GREECE IS THE WORD: RESOLVING THE SCHOOL BOARD PRAYER CIRCUIT SPLIT WITH AN APPROACH BASED ON *TOWN OF GREECE V. GALLOWAY*

ABSTRACT

State-directed prayer in a public school setting has long been considered to conflict with the Establishment Clause of the United States Constitution. Nonetheless, recent Supreme Court jurisprudence recognizes that ceremonial prayer given before a legislative body can be constitutional. School board prayer—the practice of holding a ceremonial prayer during a school board meeting—raises the question of how courts should resolve an Establishment Clause challenge to a prayer practice which is arguably being given in both a public school setting and before a legislative body.

After the Supreme Court upheld a prayer before a town board meeting in Town of Greece v. Galloway, *both the Fifth Circuit and the Ninth Circuit decided Establishment Clause challenges to school board prayer practices. These two circuits applied different reasoning and reached different results as to the constitutionality of the school board prayer practices at issue—arguably creating a circuit split.*

This Note addresses the flaws of these approaches and formulates a two-part approach to analyze Establishment Clause challenges to school board prayer practices based on Justice Anthony Kennedy's opinion in Town of Greece v. Galloway. *If the Supreme Court were to hear an Establishment Clause challenge to school board prayer, it could resolve the circuit split over the constitutionality of school board prayer by applying the two-part approach advocated by this Note.*

TABLE OF CONTENTS

I. INTRODUCTION

School board prayer is a metaphorical fault line at the convergence of two independent trends in Establishment Clause jurisprudence.[1] The first is the trend against allowing state-sponsored prayer in the public school

1. *See* Coles *ex rel.* Coles v. Cleveland Bd. of Educ., 171 F.3d 369, 371 (6th Cir. 1999).

setting.[2] The second is the trend toward acknowledging the validity of ceremonial prayer grounded in the history and tradition of the United States.[3] The tectonic tension between these two trends has created an arguable rift among the federal circuit courts, putting them, in the words of the Sixth Circuit, "squarely between the proverbial rock and a hard place."[4]

School board prayer presents a legal dilemma as it shares characteristics with school settings, where state-sponsored prayer is generally struck down,[5] and deliberative public bodies, where ceremonial prayer is likely to be upheld as long as it does not proselytize or coerce participation.[6] Federal circuit courts have attempted to choose whether to view school board prayer as *either* state-sponsored prayer in a school setting *or* as ceremonial prayer before a deliberative public body.[7] This Note recognizes most school board prayer practices may very well be *both* state-sponsored prayer in a school setting *and* ceremonial prayer before a deliberative public body.[8] Embracing this recognition, this Note suggests an approach that reconciles the precedent and policy behind both the trend toward striking down state-sponsored prayer in the public school setting and the trend toward upholding ceremonial prayer before deliberative public bodies.[9]

The result of this reconciliation leads to the fundamental thesis of this Note: even though school board prayer should be considered to be state-sponsored prayer in a public school setting, because most school board prayer practices also fit within the tradition of legislative prayer recognized by the Supreme Court, an Establishment Clause analysis of school board

2. *See generally* Lee v. Weisman, 505 U.S. 577 (1992) (holding opening prayers at high school graduation ceremonies violate the Equal Protection Clause); Engel v. Vitale, 370 U.S. 421 (1962) (holding the requirement that students recite a daily prayer in the classroom violates the Equal Protection Clause).

3. *See generally* Town of Greece v. Galloway, 572 U.S. 565 (2014) (holding opening town board meetings with prayer did not violate the Equal Protection Clause); Marsh v. Chambers, 463 U.S. 783 (1983) (holding the practice of the Nebraska legislature to open session with prayer did not violate the Equal Protection Clause).

4. *Coles*, 171 F.3d at 371.

5. *See* Coles v. Cleveland Bd. of Educ., 950 F. Supp. 1337, 1345 (N.D. Ohio 1996), *rev'd sub nom.* Coles *ex rel.* Coles v. Cleveland Bd. of Educ., 171 F.3d 369 (6th Cir. 1999).

6. *See* Am. Humanist Ass'n v. McCarty, 851 F.3d 521, 526 (5th Cir. 2017).

7. *Id.*

8. *See id.*; Freedom from Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ., 896 F.3d 1132, 1143–44 (9th Cir. 2018).

9. *See infra* Part IV.A.

prayer should be governed by the approach taken by Justice Anthony Kennedy in *Town of Greece v. Galloway*.[10] Under this approach, most school board prayer practices would be held constitutional if they do not proselytize or coerce participation.[11]

This Note further argues that the Supreme Court, if it hears an Establishment Clause challenge to school board prayer, should analyze the prayer practice under the "indirect coercion" standard applied by Justice Kennedy in his plurality opinion in *Greece* rather than the "actual legal coercion" standard advocated for by Justice Clarence Thomas in his concurrence in *Greece*.[12] The outcome under this analysis would likely vary, with some school board prayer practices being upheld and others struck down.[13]

If the Supreme Court hears an Establishment Clause challenge to a school board prayer practice and adopts the two-part history and coercion approach advocated by this Note to determine the constitutionality of the prayer practice, then the circuit courts will have a consistent, principled approach to analyzing school board prayer cases that will resolve the current circuit split.[14]

II. SCHOOL PRAYER AND LEGISLATIVE PRAYER

There are two lines of cases that both seem to apply to prayer given before a school board meeting: the school prayer line of cases and the legislative prayer line of cases.[15]

A. *School Prayer Line of Cases*

The first Supreme Court decision to rule on prayer in a school setting was *Engel v. Vitale*.[16] The case, decided in 1962, involved a daily practice of New York public school prayer promulgated by the state Board of Regents.[17] In striking down the prayer practice, the Supreme Court noted, "Neither the fact that the prayer may be denominationally neutral nor the fact that its

10. *See infra* Part IV.
11. *See infra* Part V.
12. *See infra* Part IV.B.2.
13. *See infra* Part V.
14. *See infra* Part V.
15. *See supra* Part I.
16. *See generally* Engel v. Vitale, 370 U.S. 421 (1962).
17. *Id.* at 422.

observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause, as it might from the Free Exercise Clause, of the First Amendment . . . ."[18]

The Court in *Engel* stated that the purposes of the Establishment Clause go beyond simply requiring neutrality and voluntariness, and elaborated on two other purposes behind the Establishment Clause: (1) to prevent "a union of government and religion [which] tends to destroy government and to degrade religion" and (2) to prevent the "religious persecutions" that "go hand in hand" with "governmentally established religions."[19] The Court found the New York public school prayer practice to be inconsistent with the historical context and purposes behind the creation of the Establishment Clause.[20] The Court's holding in *Engel* reflects a strict separationist understanding on Establishment Clause jurisprudence.[21]

In 1971, the Court continued to embrace a mainly strict separationist approach in deciding *Lemon v. Kurtzman*, holding that Rhode Island and Pennsylvania statutes providing state aid to non-public schools were unconstitutional.[22] In *Lemon*, the Court attempted to synthesize existing Establishment Clause jurisprudence into a three-pronged test.[23] The resulting "*Lemon* test" requires that government action, in order to be constitutional, "must have a secular legislative purpose," have a "principal or primary effect . . . that neither advances nor inhibits religion," and "must not foster 'an excessive government entanglement with religion.'"[24] After *Lemon*, the Court began to apply the *Lemon* test to cases involving prayer

18. *Id.* at 430.

19. *Id.* at 431, 432.

20. *Id.* 431–32.

21. *See id.* at 435–36; Scott W. Brady, Comment, *Once More Unto the Breach!—The Judicial Assault on Student-Initiated Prayer at Graduation Ceremonies*, 105 DICK. L. REV. 93, 109–10 (2000).

22. Lemon v. Kurtzman, 403 U.S. 602, 625–26 (1971).

23. *Id.* at 612–13.

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

in a school setting.[25] Supreme Court Justices have heavily criticized the *Lemon* test[26] yet have never formally overruled it in all contexts.[27]

In *Lee v. Weisman*, instead of applying the *Lemon* test, the Court used a coercion test to hold a prayer before a public high school graduation ceremony as unconstitutional.[28] However, the Court did not overrule *Lemon.*[29] Instead, the Court noted the presence of coercion made the practice unconstitutional and therefore a further analysis under *Lemon* was unnecessary.[30] In *Santa Fe Independent School District v. Doe*, the Court confirmed its holding in *Lee* when it struck down a school policy whereby a student would give a prayer before a football game.[31] The Court first held that such a prayer, if it were to be given, would be unconstitutionally coercive under *Lee*.[32] In rebuking an alternative theory of the school district, the Court turned to the *Lemon* test and held the prayer policy was facially unconstitutional.[33]

Thus, the Court's modern approach to cases involving religion in schools is to first analyze the circumstances under a coercion test.[34] Even if no coercion is found, the Court may still apply the *Lemon* test.[35]

25. Edwards v. Aguillard, 482 U.S. 578, 582–83 (1987); Wallace v. Jaffree, 472 U.S. 38, 55–56 (1985).

26. Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring) (collecting opinions criticizing *Lemon*). As to the Court's invocation of the *Lemon* test: Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District. *Id.*

27. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2097–98 (2019) (Thomas, J., concurring) (lamenting that the plurality opinion failed to overrule *Lemon* in all contexts).

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

29. *Id.* at 586–87.

30. *Id.*

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

32. *Id.* at 311–13.

33. *Id.* at 314–16.

34. *See id.* at 311–16.

35. *See id.*

B. *Legislative Prayer Line of Cases*

The first Supreme Court decision to address an Establishment Clause challenge to legislative prayer was *Marsh v. Chambers*.[36] In *Marsh*, decided in 1983, the Court upheld the Nebraska legislature's practice of beginning its sessions with a prayer.[37] In upholding this prayer practice, the Court relied on "the unambiguous and unbroken history . . . of opening legislative sessions with prayer,"[38] particularly noting the First Congress approved a policy of paying chaplains to pray before its sessions just three days before agreeing on the language of the Bill of Rights.[39] Based on this history, the Court reasoned that the drafters of the Bill of Rights did not intend the Establishment Clause to prohibit legislative prayer.[40]

Although the *Marsh* opinion states, "The opening of sessions of legislative *and other deliberative public bodies* with prayer is deeply embedded in the history and tradition of this country,"[41] courts have nonetheless disputed how extensively *Marsh* should be interpreted to uphold prayer before other deliberative public bodies.[42] This dispute was at least partially resolved in *Town of Greece v. Galloway*, where the Court upheld a town board prayer practice.[43] The Court in *Greece* concluded by noting the town board fit within the same tradition of legislative prayer upheld in *Marsh*.[44]

In *Greece*, the Court elaborated on *Marsh*, stating the case did not stand for an exception to the traditional tests governing Establishment Clause cases.[45] Instead, the Court said it was an acknowledgement of the constitutionality of "a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change."[46] The Court, in

36. *See generally* Marsh v. Chambers, 463 U.S. 783 (1983).

37. *See id.* at 784–85.

38. *Id.* at 792.

39. *Id.* at 787–88.

40. *See id.* at 788.

41. *Id.* at 786 (emphasis added).

42. *See, e.g.*, Coles *ex rel.* Coles v. Cleveland Bd. of Educ., 171 F.3d 369, 380–81 (6th Cir. 1999) ("[I]t does not appear to us that Marsh created a presumption of validity for government-sponsored prayer at all deliberative public bodies.").

43. *See generally* Town of Greece v. Galloway, 572 U.S. 565 (2014).

44. *Id.* at 584 ("The prayers delivered in the town of Greece do not fall outside the tradition this Court has recognized.").

45. *Id.* at 566.

46. *Id.*

both *Marsh* and *Greece,* declined to apply the *Lemon* test and instead upheld practices that would be struck down under the *Lemon* test.[47] *Marsh* and *Greece*, therefore, stand for the proposition that the *Lemon* test is not an all-encompassing doctrine applicable to all Establishment Clause controversies.[48]

This proposition is reinforced by the recent Supreme Court decision in *American Legion v. American Humanist Association* where the Court determined a town could maintain a cross memorializing soldiers from the town who died in World War I.[49] *American Legion* is about a monument and not a practice, but the plurality and concurring opinions in the case discuss the *Marsh* historical doctrine—extrapolating from *Marsh* and *Greece* to analyze the historical validity of monuments rather than prayer.[50] Importantly, a majority of Justices in *American Legion* supported not applying the *Lemon* test in cases involving "religious symbols on government property and religious speech at government events."[51]

III. MODERN CIRCUIT COURT APPROACHES TO ANALYZING SCHOOL BOARD PRAYER CASES

Establishment Clause challenges to school board prayer present the question of how to reconcile the line of cases involving state-sponsored prayer in school settings—where prayer practices are generally struck down—with the line of cases involving legislative prayer—where ceremonial prayer before a deliberative public body is likely to be upheld as long as it does not proselytize or coerce the participation of nonadherents.[52] With no

47. Marsh v. Chambers, 463 U.S. 783, 800–01 (1983) (Brennan, J., dissenting) ("I have no doubt that, if any group of law students were asked to apply the principles of *Lemon* to the question of legislative prayer, they would nearly unanimously find the practice to be unconstitutional."); *see Galloway*, 572 U.S. at 575–77.

48. *See Galloway*, 572 U.S. at 575–77.

49. *See generally* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067 (2019).

50. *Id.* at 2087–89; *id.* at 2092–94 (Kavanaugh, J., concurring).

51. *Id.* at 2092 ("As this case again demonstrates, this Court no longer applies the old test articulated in *Lemon v. Kurtzman*."); *id.* at 2081–82 (plurality opinion) ("Together, these considerations counsel against efforts to evaluate such cases under *Lemon* and toward application of a presumption of constitutionality for longstanding monuments, symbols, and practices."); *id.* at 2098 (Thomas, J., concurring) ("The obvious explanation is that *Lemon* does not provide a sound basis for judging Establishment Clause claims.").

52. *See* Coles *ex rel.* Coles v. Cleveland Bd. of Educ., 171 F.3d 369, 371 (6th Cir. 1999).

direct guidance from the Supreme Court on how this question should be resolved, circuit courts have attempted to resolve this question on their own.[53]

Before the Supreme Court's decision in *Greece*, multiple circuit courts heard Establishment Clause challenges to school board prayer practices.[54] However, these cases generally found school board prayer practices unconstitutional based on either a narrow reading of *Marsh* or the sectarian content of the prayer.[55] Nonetheless, the Court in *Greece* clarified that *Marsh* should not be narrowly interpreted to its facts[56] and that legislative prayer does not need to be nonsectarian.[57] Therefore, the circuit court cases before *Greece* are not in accord with modern Establishment Clause jurisprudence.[58] Conspicuously, the two circuits to hear Establishment Clause challenges to school board prayer after the Supreme Court's decision in *Greece*—the Fifth and the Ninth Circuits—applied different approaches and reached different results as to the constitutionality of the school board prayer practices at issue.[59] This arguably created a circuit split.

A. *The Fifth Circuit's Approach to Analyzing School Board Prayer Cases*

Since *Greece*, two circuit courts have attempted to reconcile the U.S. Supreme Court's school prayer and legislative prayer cases.[60] The first was the Fifth Circuit in *American Humanist Association v. McCarty*.[61] *McCarty* involved a challenge by the American Humanist Association (AHA) to the

53. *See generally* Freedom from Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ., 896 F.3d 1132 (9th Cir. 2018); Am. Humanist Ass'n v. McCarty, 851 F.3d 521 (5th Cir. 2017).

54. *See generally* Doe v. Indian River Sch. Dist., 653 F.3d 256 (3d Cir. 2011); *Coles*, 171 F.3d at 369.

55. *Indian River Sch. Dist.*, 653 F.3d at 281. ("The Court has consistently emphasized the narrow, historical underpinnings of *Marsh* and has proven reluctant to extend *Marsh* outside of its narrow historical context."); *Coles*, 171 F.3d at 385 ("In contrast, the prayers in this case were clearly sectarian . . . .").

56. *See* Town of Greece v. Galloway, 572 U.S. 565, 576 (2014).

57. *Id.* at 581.

58. *See* generally Indian River Sch. Dist., 653 F.3d 256; *Coles*, 171 F.3d 369.

59. *See generally* Freedom from Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ., 896 F.3d 1132 (9th Cir. 2018); Am. Humanist Ass'n v. McCarty, 851 F.3d 521 (5th Cir. 2017).

60. *See McCarty*, 851 F.3d at 521; *Freedom from Religion Found., Inc.*, 896 F.3d at 1132.

61. *See generally McCarty*, 851 F.3d at 521.

policy of the Birdville Independent School District and the seven members of its school board (BISD) of inviting students to deliver statements—usually prayers—before school board meetings.[62]

Initially, elementary and middle school students were typically selected based on merit to deliver these statements.[63] However, apparently in response to AHA's concerns, the selection process of students to deliver the statements—now referred to as "student expressions"—was changed to randomly select students from a list of volunteers.[64] Aside from the students selected to deliver the statement before the school board meeting, some students were frequently present "to receive awards or for other reasons, such as brief performances by school bands and choirs."[65] Furthermore, at the time of the case "[n]o students s[at] on the BISD board, BISD board members d[id] not deliver the invocations, and the student representatives [were] not expected to attend board meetings."[66]

In its holding, the Fifth Circuit approached the issue by inquiring whether the circumstances were more like a school prayer case or more like a legislative prayer case.[67] The court then compared the practice at issue with the practice upheld in *Greece* and concluded, "[T]he BISD board is 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."[68] Thus, the BISD school board is no less of a deliberative public body than the town board in *Greece*.[69] Continuing to compare the BISD prayer practice with the town board prayer practice upheld in *Greece*, the court noted, "The invocations are appropriately 'solemn and respectful in tone.' Most attendees at school-board meetings . . . are 'mature adults,' and the invocations are 'delivered during the ceremonial portion of the [school board's] meeting."[70]

62. *Id.* at 523.
63. *Id.* at 523–24.
64. *Id.*
65. *Id.* at 524.
66. *Id.* at 528.
67. *Id.* at 526.
68. *Id.*
69. *Id.*
70. *Id.* (quoting Town of Greece v. Galloway, 572 U.S. 565, 591 (2014)).

The court also addressed concerns that the presence of children heightens the potential for coercion.[71] The court noted there were children present during the town board prayer practice upheld in *Greece*, and that the presence of children alone was not enough to "transform this into a school-prayer case."[72] Finally, the court compared the lack of coercion present in both the BISD prayer practice and the prayer practice in *Greece*.[73] Based on this analysis, the practice was within the legislative prayer tradition recognized in *Marsh* and, therefore, constitutional.[74]

B. *The Ninth Circuit's Approach to Analyzing School Board Prayer Cases*

The other circuit court to hear a case challenging the constitutionality of school board prayer was *Freedom from Religion Foundation, Inc. v. Chino Valley Unified School District Board of Education*.[75] The Chino Valley Unified School District Board of Education (Chino Valley School Board) meetings began with "roll call and opportunity for public comment on closed-session items."[76] Next, the meetings moved into the closed-session where the "five adult, non-student members" of the school board would "make decisions on student discipline, including suspension and expulsion, student readmission, negotiations with the employee labor union, and hiring, firing, and discipline of district personnel."[77] After this, the meetings were opened to the public with a report on the preceding closed-session followed by a recitation of the Pledge of Allegiance and presentation of colors by the Junior Reserve Officers' Training Corps.[78] Then, an opening prayer was given by a member of the clergy, or occasionally a board member or member of the audience.[79]

The Chino Valley School Board meetings included "presentations by classes or student groups from the district" and the board would set aside

71. *Id.* at 526–28.

72. *Id.* at 527–28.

73. *Id.* at 526 ("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.").

74. *See id.* at 529–30.

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

76. *Id.* at 1138.

77. *Id.*

78. *Id.*

79. *Id.*

time "to highlight the academic and extracurricular accomplishments of students in the district."[80] A student representative, who "sits on the Board to represent student interests" and "votes with the Board in the open session," were given time to comment.[81] During the meetings, board members sometimes expressed religious beliefs in the form of further prayer, Bible readings, and endorsing prayers given by Christian pastors.[82]

The court held that the prayer practice at issue did not fit "within the tradition long followed in Congress and the state legislatures."[83] This holding was based primarily on "[t]he presence of large numbers of children and adolescents, in a setting under the control of public-school authorities"[84] and the limited history of school board prayer.[85] The court compared the *Chino Valley* prayer practice with the prayer practice upheld in *Greece* and found it only "dimly resemble[d]" legislative prayers that occurred "'at the opening of legislative sessions,' where the audience members are 'mature adults' who are 'free to enter and leave with little comment and for any number of reasons.'"[86]

A large part of the Ninth Circuit's analysis took the form of attempting to differentiate the *Chino Valley* prayer practice from those upheld in *Marsh* and *Greece* based on the conditions under which children are present.[87] Relying on *Lee*'s conclusion "that minors' beliefs and actions are often more vulnerable to outside influence," the court found that the presence of many of the children and adolescents at the school board meetings was "not truly voluntary."[88]

Furthermore, the Ninth Circuit based its holding on the presence of children by differentiating the relationship of students to school board members from the relationship of adult constituents to legislators.[89] This differentiation was based on the students' inability to remove and replace

80. *Id.*
81. *Id.* at 1139.
82. *Id.* at 1140–41.
83. *Id.* at 1144 (quoting Town of Greece v. Galloway, 572 U.S. 565, 566 (2014)).
84. *Id.* at 1145.
85. *Id.* at 1147–48.
86. *Id.* at 1145 (quoting *Galloway*, 572 U.S. at 583, 590 (plurality opinion)).
87. *Id.* at 1145–46.
88. *Id.* at 1145.
89. *Id.* at 1146–47.

the school board members through the electoral process.[90] On this basis, the court viewed the relationship of students to school board members as lacking "the democratic hallmarks present in legislative sessions and in constituents' relationship with the legislature."[91]

Therefore, the Ninth Circuit held that the Chino Valley school board prayer practice fell outside the tradition recognized in *Marsh* due to its less extensive history of school board prayer compared to other types of legislative prayer, the heightened concern over subjecting children to coercion, and the difference in the relationship of children to school board members from constituents to legislators.[92] After reaching this conclusion, the Ninth Circuit applied the *Lemon* test to analyze the prayer practice—ultimately striking the practice down under this test.[93]

C. *Shortcomings of Circuit Court Approaches to Analyzing School Board Prayer Cases*

The approaches used by the Fifth and Ninth Circuits to analyze Establishment Clause challenges to school board prayer practices fail to accurately apply the holding in *Greece*.[94]

1. *Shortcomings of the Fifth Circuit's Approach to Analyzing School Board Prayer Cases*

The primary shortcoming of the Fifth Circuit's approach is that it assumes school prayer and legislative prayer are mutually exclusive.[95] This approach, therefore, attempts to discern whether the prayer practice at issue is school prayer or legislative prayer.[96] Although this may be an easier approach in some ways—as a determination of either school prayer or legislative prayer allows the court to ignore the precedent and policy behind the other—it fails to recognize the reality that school board prayer often is both a state-sponsored prayer in a school setting *and* a ceremonial prayer before a deliberative public body.[97] The Fifth Circuit's approach is therefore

90. *Id.*
91. *Id.* at 1147.
92. *See id.* at 1132–41.
93. *Id.* at 1148–51.
94. *See infra* Part III.C.1–2.
95. *See* Am. Humanist Ass'n v. McCarty, 851 F.3d 521, 526 (5th Cir. 2017).
96. *See id.*
97. *See id.*

problematic as it dismisses the policy interests underlying the Supreme Court's precedent regarding either prayer in schools or prayer before public deliberative bodies.[98]

School board prayer should be understood as state-sponsored prayer in a school setting because the prayer is given under the direction of the school board—a state actor—often in a building owned by the school district.[99] Moreover, school board prayer implicates the policies usually considered by the Supreme Court in addressing matters of state-sponsored prayer in a school setting—namely the Court's "heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools."[100]

It should be acknowledged that most common forms of school board prayer share many of the same characteristics as the Town of Greece board meeting upheld by the Supreme Court.[101] Therefore, school board prayer also implicates the policies pursued by the Supreme Court in addressing legislative prayer—specifically the recognition and preservation of acceptable historical practices.[102]

The Fifth Circuit's approach attempts to choose whether a school board prayer practice is either school prayer or legislative prayer, dismissing the policies the Supreme Court has held to be important in either school prayer or legislative prayer cases.[103] This approach may be viewed as necessary, even if not representative of reality, if a court views the school prayer line of cases and legislative prayer doctrine to be irreconcilable.[104] This Note nonetheless argues the analytical framework used by Justice Kennedy in *Greece* adequately addresses the policy concerns behind both school prayer and legislative prayer in accordance with modern Establishment Clause jurisprudence and, therefore, it is unnecessary to make the forced distinction between school prayer and legislative prayer as the Fifth Circuit attempts to do in its approach.[105]

98. *See id.*

99. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 311–12 (2000).

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

101. *See* Am. Humanist Ass'n v. McCarty, 851 F.3d 521, 526 (5th Cir. 2017).

102. *See* Town of Greece v. Galloway, 572 U.S. 565, 577 (2014) ("Any test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change.").

103. *See McCarty*, 851 F.3d at 526.

104. *See id.*

105. *See infra* Part IV.B.1.

2. *Shortcomings of the Ninth Circuit's Approach to Analyzing School Board Prayer Cases*

The primary shortcoming of the Ninth Circuit's approach in *Chino Valley* is that instead of striking down the prayer practice on the basis of the Supreme Court's heightened concern for the coercion of children, the Ninth Circuit used facts relevant to a coercion analysis to distinguish the school board prayer practice from the *Marsh* tradition and then struck down the practice under the *Lemon* test.[106] This approach is problematic because *Greece* indicates the inquiries into whether a prayer practice fits within the *Marsh* tradition and whether that practice is unconstitutionally coercive should be conducted separately.[107] The Ninth Circuit's approach combines these inquiries into one analysis and incorrectly determines the prayer practice falls outside of *Marsh* based—among other arguments—on the concern over potential coercion of children that could result from the prayer practice.[108]

Under the approach taken by Justice Kennedy in *Greece*, the presence of coercion makes a prayer practice unconstitutional—however, coercion alone does not remove a prayer practice from the *Marsh* tradition.[109] This approach makes sense because, even if a prayer practice in general is recognized as fitting within the *Marsh* tradition, specific instances of such prayer may become unconstitutional if deemed coercive.[110]

A counterargument to this view is that the purpose of legislative prayer as understood by the Framers was to bring legislators together and lend gravity to the deliberations, and that a purpose to "force truant constituents into the pews" is not consonant with that tradition.[111] This is a strong argument, however, whichever view is ultimately taken, the result will be the same because a finding of coercion is independently enough to render a prayer practice unconstitutional. Therefore, in cases where coercion is present, it is not necessary to strike down the practice under *Lemon* through a finding that the prayer practice is outside the *Marsh* tradition.[112]

106. Freedom from Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ., 896 F.3d 1132, 1148–51 (9th Cir. 2018).

107. *See Galloway*, 572 U.S. at 591–92.

108. *See Freedom from Religion Found.*, Inc., 896 F.3d at 1145–46.

109. *See Galloway*, 572 U.S. at 590–92.

110. *See* Am. Humanist Ass'n v. McCarty, 851 F.3d 521, 529–30 (5th Cir. 2017).

111. *Galloway*, 572 U.S. at 587.

112. *See* Lee v. Weisman, 505 U.S. 577, 587 (1992).

The plurality and concurring opinions in *American Legion* also strongly support the conclusion that whether a prayer practice fits within the tradition of legislative prayer recognized in *Marsh* and whether that prayer practice is unconstitutionally coercive should be analyzed separately.[113] Thus, in cases involving "religious speech at government events,"[114] the *Lemon* test should not be applied.[115] Therefore, the Ninth Circuit's approach needlessly varies from the internal logic of *Greece* and, particularly in light of *American Legion*, erroneously strikes down the prayer practice under *Lemon* on the basis of factors indicating coercion rather than conducting a coercion analysis if coercion is present, strikes down the practice under a coercion test.[116]

IV. TWO-PART APPROACH TO ANALYZING SCHOOL BOARD PRAYER CASES

This Note advocates for a two-part approach, based on Justice Kennedy's opinion in *Greece*, to determine the constitutionality of school board prayer practices that separately analyzes: (1) whether the prayer practice fits within the tradition of legislative prayer recognized in *Marsh* and (2) whether the prayer practice is unconstitutionally coercive.[117] This approach begins with an analysis of whether the school board prayer practice fits within the legislative prayer tradition identified in *Marsh* and ends with an analysis of whether the prayer practice is unconstitutionally coercive.[118] Both of these steps are in accordance with the indirect coercion standard.[119] This approach has the benefits of being supported by Supreme Court precedent and being consistent with the underlying policy interests behind

113. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2092 (2019) (Kavanaugh, J., concurring).

114. *Id.*

115. *Id.* at 2081–82 (plurality opinion) ("Together, these considerations counsel against efforts to evaluate such cases under *Lemon* and toward application of a presumption of constitutionality for longstanding monuments, symbols, and practices."); *id.* at 2092 (Kavanaugh, J., concurring) ("As this case again demonstrates, this Court no longer applies the old test articulated in *Lemon v. Kurtzman*."); *id.* at 2098 (Thomas, J., concurring) ("The obvious explanation is that *Lemon* does not provide a sound basis for judging Establishment Clause claims.").

116. *See* Freedom from Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ., 896 F.3d 1132, 1148–51 (9th Cir. 2018).

117. *See generally* Town of Greece v. Galloway, 572 U.S. 565, 589–92 (2014).

118. *See infra* Part IV.A.1–2.

119. *See infra* Part IV.A.1–2.

both the Supreme Court's school prayer and legislative prayer lines of cases.[120]

A. *Explanation of Two-Part Approach to Analyzing School Board Prayer Cases*

1. *History*

The first part of the approach advocated by this Note requires an analysis of whether the school board prayer practice at issue fits within the tradition of legislative prayer identified in *Marsh*.[121] For the purposes of this part, whether a prayer practice fits within the *Marsh* legislative prayer tradition depends on: (1) whether the prayer is delivered before a deliberative public body,[122] (2) the circumstances of its delivery,[123] and (3) its purpose.[124]

a. *Prayer Delivered Before a Deliberative Public Body.* To be considered within the legislative prayer tradition identified in *Marsh*, a prayer practice must involve prayer given before a deliberative public body.[125] In determining whether the Nebraska Legislature's prayer practice was constitutional, the Court in *Marsh* detailed the history and tradition of ceremonial prayer given before deliberative public bodies.[126] Through this analysis the Court found that such prayers are consistent with the Establishment Clause.[127] Thus, for a prayer practice to fit within the legislative prayer tradition identified in *Marsh*, it must involve prayer given before a deliberative public body.[128]

b. *Prayer Delivered at the Opening of the Legislative Session.* Furthermore, to be considered within the legislative prayer tradition identified in *Marsh*, the prayer should be delivered at the opening of the

120. *See infra* Part IV.B.1–2.
121. *See* Marsh v. Chambers, 463 U.S. 783, 786 (1983).
122. *See id.*
123. *See* Town of Greece v. Galloway, 572 U.S. 565, 591 (2014) (plurality opinion).
124. *See id.* at 582–83 (majority opinion).
125. *See Marsh*, 463 U.S. at 786.
126. *Id.* at 786–90.
127. *Id*. at 791–92.
128. *See id.* at 786.

legislative session.[129] The Court in *Greece* held a restraint on legislative prayer must be given at the opening of legislative sessions because the purpose of such prayer is to "invite lawmakers to reflect upon shared ideals and common ends before they embark on the fractious business of governing."[130]

c. *Proper Purpose of Prayer.* Finally, as the purpose of legislative prayer is to "lend gravity to the occasion" and invite "lawmakers to reflect upon shared ideals and common ends before they embark on the fractious business of governing," a prayer practice must serve this purpose.[131] The Court in *Greece* stated a prayer practice would fall short of this purpose "[i]f the course and practice over time shows that the invocations denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion."[132] Similarly, the Court in *Marsh* stated that a legislative prayer practice should not be "exploited to proselytize or advance any one, or to disparage any other, faith or belief."[133] Therefore, in order to be considered within the tradition of legislative prayer recognized in *Marsh*, a legislative prayer practice must be conducted to "solemnize the occasion" and not in order to "denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion."[134]

2. *The Second Part of Approach: Coercion*

The second part of the approach advocated for by this Note requires an analysis of whether the prayer practice at issue is unconstitutionally coercive. Although a majority of Justices in *Greece* agreed that a school board prayer practice should be struck down if it is coercive, a majority of Justices did not agree as to what coercion standard to apply.[135] The plurality opinion, written by Justice Kennedy and supported by Chief Justice John Roberts and Justice Samuel Alito, applied an indirect coercion standard.[136] Justice Clarence Thomas, with the support of Justice Antonin Scalia, argued

129. *See Galloway*, 572 U.S. at 591 (plurality opinion).
130. *Id.* at 583 (majority opinion).
131. *See id.* 582–83.
132. *Id.* at 583.
133. *Marsh,* 463 U.S. at 794–95.
134. *See Galloway*, 572 U.S. at 583.
135. *See generally id.* at 565.
136. *Id.* at 586–92 (plurality opinion).

in his concurrence that an actual legal coercion standard should be applied.[137] This Note argues that, in a future Establishment Clause challenge to a school board prayer practice, the Supreme Court should apply the indirect coercion standard.

The fundamental principle behind any coercion standard can be easily stated: "[The] government may not coerce its citizens 'to support or participate in any religion or its exercise.'"[138] However, as applied, the indirect coercion inquiry is "a fact-sensitive one that considers both the setting in which the prayer arises and the audience to whom it is directed."[139] Considering the Supreme Court's use of the indirect coercion standard in *Greece*, *Lee*, and *Santa Fe*, the predominant factors relevant to an indirect coercive inquiry are: (1) the degree of state involvement[140] and (2) the voluntary nature of the event where the prayer is given—which is more likely to result in a finding of coercion when children are involved in the event.[141]

a. *Degree of State Involvement.* The first factor relevant to an indirect coercion inquiry is the degree of state involvement. In *Lee*, the Court stated that a "dominant fact" of the case was that "State officials direct the performance of a formal religious exercise."[142] Specifically, the Court noted that the school principal decided a prayer should be given, selected who would give the prayer, and "directed and controlled the content of the prayers."[143] Given these facts, the Court held, "The degree of school involvement here made it clear that the graduation prayers bore the imprint of the State and thus put school-age children who objected in an untenable position."[144]

The Court in *Greece* acknowledged that the degree of state involvement is an important factor, but distinguished the high school graduation prayer struck down in *Lee*—where school authorities maintained close supervision over the conduct of the students and the substance of the

137. *Id.* at 608–10 (Thomas, J., concurring).

138. *Id.* at 586 (plurality opinion) (quoting Cnty. of Allegheny v. ACLU, 492 U.S. 573, 659 (1989) (Kennedy, J., concurring)).

139. *Id.* at 587 (plurality opinion).

140. Lee v. Weisman, 505 U.S. 577, 590 (1992).

141. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 312 (2000); *see also Galloway*, 572 U.S. at 590 (plurality opinion).

142. *Lee*, 505 U.S. at 590.

143. *Id.* at 588.

144. *Id.* at 590.

ceremony—from the town board prayer upheld in *Greece*—where "board members and constituents are 'free to enter and leave with little comment and for any number of reasons.'"[145] Therefore, in conducting a coercion inquiry, the Supreme Court considers the degree of state involvement and is more likely to uphold a prayer practice with lower levels of state involvement—particularly where people may come and go without any negative repercussions.[146]

b. *The Voluntary Nature of the Event Where the Prayer is Given*

Another factor relevant to an indirect coercion inquiry is the voluntary nature of the event where the prayer is given.[147] Certainly, if a school board required people to either attend its meetings or face legal consequences, this would be unconstitutionally coercive.[148] However, the Supreme Court has found, when children are involved, the attendance of some events is not truly voluntary—even if not legally mandated—and that forcing a child to choose between attending such an event or avoiding "personally offensive religious ritual" is unconstitutionally coercive.[149]

The Supreme Court first found this factor to be relevant in striking down the high school graduation prayer practice in *Lee*.[150] The Court stated that, although a student's attendance at their high school graduation was technically not mandatory, because "high school graduation is one of life's most significant occasions," it would be "formalistic in the extreme" "to say a teenage student has a real choice not to attend her high school graduation."[151] Thus, in *Lee*, the Court found that events of great importance to students are likely to be considered mandatory and, therefore, prayer given before school events is more likely unconstitutional the more important the event—even if attendance is not technically mandatory.[152]

145. *Galloway*, 572 U.S. at 590 (plurality opinion) (quoting *Lee*, 505 U.S. at 597).
146. *See Galloway*, 572 U.S. at 590 (plurality opinion); *Lee*, 505 U.S. at 587–88.
147. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 312 (2000).
148. *See Galloway*, 572 U.S. at 586–87 (plurality opinion).
149. *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 292, 312.
150. *See Lee*, 505 U.S. at 595.
151. *Id.*
152. *See id.*

The Court revisited this factor in *Santa Fe* in holding that prayer before a high school football game was unconstitutionally coercive.[153] In comparing the football game prayer with the graduation prayer in *Lee*, the Court acknowledged that the coercive pressures for students to attend a football game were "not as strong as a senior's desire to attend her own graduation ceremony."[154] However, the Court still found that students "feel immense social pressure, or have a truly genuine desire, to be involved in the extracurricular event that is American high school football."[155] Based on the finding that attending football games is of high importance to students, the Court held that it is unconstitutional for schools to force students to make the difficult "choice between attending these games and avoiding personally offensive religious rituals."[156]

In contrast, Justice Kennedy's plurality opinion in *Greece* suggests that this dilemma would not be "an unconstitutional imposition as to mature adults" because they "are 'not readily susceptible to religious indoctrination or peer pressure.'"[157] The mere presence of children does not automatically make a prayer practice unconstitutional—however, the more a prayer practice involves children, the more likely it is to be unconstitutionally coercive.[158] Therefore, in applying the indirect coercion test to a prayer, the Court is more likely to hold that a prayer practice is not truly voluntary and unconstitutionally coercive if it involves children rather than adults.[159]

Therefore, the Court is likely to find a prayer practice unconstitutional if students are mandated to attend it as a part of an extracurricular activity.[160] However, even if an extracurricular activity is not technically mandatory, the Supreme Court will still find that a prayer practice involving children at that activity is unconstitutionally coercive if the activity—such as a football game—is important enough that students are forced to make the difficult

153. *See Santa Fe Indep. Sch. Dist.*, 530 U.S. at 312.

154. *Id.* at 311.

155. *Id.*

156. *See id.* at 312.

157. Town of Greece v. Galloway, 572 U.S. 565, 590 (2014) (plurality opinion) (quoting Marsh v. Chambers, 463 U.S. 783, 792 (1983)).

158. *Compare Galloway*, 572 U.S. at 590 (plurality opinion), *with Santa Fe Indep. Sch. Dist.*, 530 U.S. at 312.

159. *See Galloway*, 572 U.S. at 590 (plurality opinion).

160. *See Santa Fe Indep. Sch. Dist.*, 530 U.S. at 312.

choice "between attending these games and avoiding personally offensive religious rituals."[161]

B. *Justification of Two-Part Approach to Analyzing School Board Prayer*

If the Supreme Court decides to hear a case involving an Establishment Clause challenge to a school board prayer practice, it should analyze the case according to the two-part approach advocated for in this Note because this approach is consistent with Supreme Court precedent[162] and preserves the important policy interests behind cases involving both school and legislative prayer.[163]

1. *Two-Part Approach is Consistent with Supreme Court Precedent*

The two-part approach advocated by this Note should be applied by the Supreme Court if it hears an Establishment Clause challenge to a school board prayer practice because it is consistent with Supreme Court precedent.[164] The key feature of this approach is that, based on Justice Kennedy's opinion in *Greece*, it determines: (1) whether a prayer practice fits within the tradition recognized in *Marsh* and (2) whether the prayer practice is unconstitutionally coercive.[165] This approach is supported by Justice Kennedy's opinion in *Greece*, which states in its final paragraph that, "The town of Greece does not violate the First Amendment by opening its meetings with prayer that comports with our tradition *and* does not coerce participation by nonadherents."[166]

This statement lends support to an independent analysis of whether the prayer fits within the *Marsh* tradition and whether the prayer is coercive because the word "and" implies that both "comport[ing] with our tradition" and "not coerc[ing] participation" are independent requirements for a prayer practice to be constitutional.[167] In other words, the Court's statement implies that a prayer practice could comport with tradition but be unconstitutionally coercive or, conversely, fail to comport with tradition

161. *See id.*

162. *See Galloway*, 572 U.S. at 591–92 (plurality opinion).

163. *See id.* at 577 (majority opinion); Lee v. Weisman, 505 U.S. 577, 592 (1992).

164. *See* Town of Greece v. Galloway, 572 U.S. 565, 591–92 (2014) (plurality opinion).

165. *See id.*

166. *Id.* (emphasis added).

167. *Id.*

while still being free of coercion.[168] Therefore, based on the understanding that comporting with tradition and not coercing participation are independent requirements of constitutionality, this Note advocates these two requirements be analyzed separately.[169]

Although this understanding is supported by the final paragraph of the *Greece* decision, critics of this approach may point to other parts of Justice Kennedy's plurality opinion in *Greece* that imply the presence of coercion is just another factor to consider in determining whether to remove a prayer practice from the *Marsh* tradition of legislative prayer.[170] For example, the section of the *Greece* decision addressing coercion begins by stating, "Respondents further seek to distinguish the town's prayer practice from the tradition upheld in *Marsh* on the ground that it coerces participation by nonadherents."[171] This indicates that the presence of coercion should remove a prayer practice from the *Marsh* tradition generally.[172]

However, a close reading, focusing on the word "upheld," suggests that the intended meaning was that the presence of coercion in *Greece* would distinguish the town board prayer practice at issue from the *particular* tradition of prayer before the Nebraska legislature that was *upheld* in *Marsh*, rather than the general tradition of legislative prayer that that was *recognized* and *identified* in *Marsh*.[173] This reading indicates that the intended meaning of the sentence was simply that in *Marsh* there was no coercion, so if coercion is found in the Town of Greece's prayer practice, it would make the cases factually differentiable.[174]

These passages from *Greece* support the conclusion that the issues of (1) whether a prayer practice comports with the tradition of legislative prayer recognized in *Marsh* and (2) whether a prayer practice is unconstitutionally coercive, are independent requirements of the Establishment Clause.[175] Therefore, an Establishment Clause analysis of

168. *See id.*
169. *See id.*
170. *See id.* at 586.
171. *Id.*
172. *See id.*
173. *See id.*
174. *See id.*
175. *See id.* at 586, 591–92.

school board prayer should independently consider whether these requirements are met.[176]

2. *Two-Part Approach Preserves the Policies Behind Both School Prayer and Legislative Prayer Cases*

Furthermore, the two-part approach advocated by this Note should be applied by the Supreme Court if it hears an Establishment Clause challenge to a school board prayer practice because it preserves the policies behind both school prayer and legislative prayer cases.[177] By applying this approach to an Establishment Clause challenge to a school board prayer practice, the Supreme Court could continue to protect the interests it has identified as important throughout both its school prayer and legislative prayer cases.[178]

a. *Two-Part Approach Preserves the Policy Behind School Prayer Cases.* The two-part approach advocated by this Note preserves the policy behind the Supreme Court's cases involving prayer in public schools.[179] The primary policy behind school prayer cases has been "protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools" because "prayer exercises in public schools carry a particular risk of indirect coercion."[180] The two-part approach advocated by this Note will continue to protect children from indirect coercion that could be present in an instance of school board prayer because it uses the indirect coercion standard applied in Justice Kennedy's plurality opinion in *Greece* rather than the actual legal coercion standard advocated by Justice Thomas in his *Greece* concurrence.[181]

The actual legal coercion standard advocated for by Justice Thomas requires "coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*."[182] If the actual legal coercion standard were applied to determine the constitutionality of a school board prayer practice

176. *See id.*

177. *See id.* at 577 (majority opinion); Lee v. Weisman, 505 U.S. 577, 592 (1992).

178. *See Galloway*, 572 U.S. at 577; *Lee*, 505 U.S. at 592.

179. *See Lee*, 505 U.S. at 592.

180. *See id.*

181. *Compare Galloway*, 572 U.S. at 586–92 (plurality opinion), *with Galloway*, 572 U.S. at 608–10 (Thomas, J., concurring).

182. *Id.* at 608 (Thomas, J., concurring) (quoting *Lee*, 505 U.S. at 640 (Scalia, J., dissenting)).

then every typical form of school board prayer would be upheld because most school board prayer practices do not require participation in the prayer by "force of law or threat of penalty."[183] Therefore, the application of the actual legal coercion standard to school board prayer practices could allow children to be subjected to coercive pressures in a school board setting that would be unconstitutional under *Lee*.[184]

Furthermore, the indirect coercion standard advocated by this Note would provide children with the same protection against coercive pressures they are provided with in a school setting.[185] This is because the indirect coercion standard is the standard that the Court has applied in analyzing whether school board prayer practices are unconstitutionally coercive in *Lee* and *Santa Fe*.[186]

However, a criticism of the two-part approach advocated in this Note may be that it does not do enough to protect children from factors beyond coercion because, as long as the prayer practice is within the *Marsh* tradition, this approach will not apply the *Lemon* test—only striking down a prayer practice if it is coercive.[187] This criticism is founded in the Court's holding in *Engel* that the purposes of the Establishment Clause go beyond requiring neutrality and forbidding coercion, and that courts should consider the historical concerns of the Framers when determining if a practice is constitutional.[188] The two-part approach advocated by this Note takes these historical concerns into account because, in order for the *Lemon* test not to be applied, there must be a finding that the prayer practice at issue is within the *Marsh* tradition and, therefore, is in accordance with the Framers' purpose of writing the Establishment Clause.[189] Therefore, by applying the indirect coercion standard and only refraining to apply *Lemon* in instances where a prayer practice demonstrates its congruence with the Framers' conception of the Establishment Clause by fitting within the *Marsh* tradition,

183. *Lee*, 505 U.S. at 640 (Scalia, J., dissenting); *see generally* Freedom from Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ., 896 F.3d 1132 (9th Cir. 2018).

184. *See Lee*, 505 U.S. at 592.

185. *See id.*

186. *See id.* at 577; Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 311–12 (2000).

187. *See Santa Fe Indep. Sch. Dist.*, 530 U.S. at 314–16 (2000).

188. *See* Engel v. Vitale, 370 U.S. 421, 429–33 (1962).

189. *See* Town of Greece v. Galloway, 572 U.S. 565, 577 (2014).

190. *See id.*

the two-part approach advocated by this Note preserves the policy interests behind the Supreme Court's school prayer decisions.[190]

b. *Two-Part Approach Preserves the Policy Behind Legislative Prayer Cases.* The two-part approach advocated by this Note also preserves the policy interests behind the Supreme Court's decisions involving legislative prayer. The primary policy interest behind *Marsh* and *Greece* is to not invalidate practices that were "accepted by the Framers" and that have "withstood the critical scrutiny of time and political change."[191] The Court provided a justification for this policy by stating in *Greece*, "A test that would sweep away what has so long been settled would create new controversy and begin anew the very divisions along religious lines that the Establishment Clause seeks to prevent."[192]

The two-part approach advocated by this Note recognizes that school board prayer, even if admitted to take place in a school setting, may also be a deliberative public body, and, therefore, school board prayer has the potential to fit within the *Marsh* tradition. Under this approach, if school board prayer does fit within the *Marsh* tradition, it should be constitutional as long as it is not coercive. Therefore, this approach furthers the interest of validating practices that were "accepted by the Framers" and have "withstood the critical scrutiny of time and political change" because it does not apply the *Lemon* test to practices that fit within the *Marsh* tradition, with the result that they will be upheld as long as they are not unconstitutionally coercive.[193]

A criticism of this approach is that, by applying the indirect coercion standard in its coercion analysis, it is too strict and will result in school board prayer practices being struck down if they place students under coercive pressure similar to the football game prayer in *Santa Fe*.[194] However, this argument places too much emphasis on upholding practices that were accepted by the Framers and gives too little consideration to analyzing whether these practices have "withstood the critical scrutiny of time and political change."[195] While ceremonial prayer given before deliberative

191. *Id.* at 566.
192. *Id.* at 577.
193. *See id.* at 591–92 (plurality opinion).
194. *See* Santa Fe Indep. Sch. Dist., v. Doe, 530 U.S. 290, 312 (2000).
195. *See Galloway*, 572 U.S. at 577.

public bodies is, in general, a practice accepted by the Framers that has "withstood the critical scrutiny of time and political change," exposing children to subtle coercive pressures, while possibly a practice accepted by the Framers, has not withstood the critical scrutiny of time and political change."[196] Therefore, preserving practices that expose children to coercive pressure does not further the logic behind the Supreme Court's decisions in *Marsh* and *Greece*.[197]

In recent decades, the Supreme Court has recognized that the Constitution should be interpreted differently when applied to children rather than adults.[198] This recognition is based on the Court's finding that there are real psychological differences between children and adults that raise constitutional concerns with treating these groups the same in certain instances.[199] The Supreme Court has also given "heightened concern" to the rights of children in analyzing whether they are subject to coercion under an Establishment Clause analysis.[200] In *Lee*, the Court found the public high school graduation prayer to be unconstitutionally coercive based partly on the finding that psychological research "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."[201] In contrast, the Court stated in *Greece* that "mature adults" "'presumably' are 'not readily susceptible to religious indoctrination or peer pressure.'"[202]

Thus, the Supreme Court has, in recent decades, consistently recognized that there are real psychological differences between children and adults, and particularly recognized that children are more susceptible to coercive pressures than adults.[203] Based on this recognition, the Supreme Court has held prayer practices unconstitutional where they exert coercive pressures on children, and that these coercive pressures would not make the

196. *See id.*; *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 312.

197. *See Galloway*, 572 U.S. at 577.

198. *See* Lee v. Weisman, 505 U.S. 577, 592 (1992); *see also* Roper v. Simmons, 543 U.S. 551, 569–70 (2005).

199. *See Lee*, 505 U.S. at 593–94; *see also Roper*, 543 U.S. at 569–70.

200. *Lee*, 505 U.S. at 592.

201. *Id.* at 593–94.

202. *Galloway*, 572 U.S. at 590 (plurality opinion) (quoting Marsh v. Chambers, 463 U.S. 783, 792 (1983)).

203. *Compare Galloway*, 572 U.S. at 590 (plurality opinion), *with Lee*, 505 U.S. at 592.

practice unconstitutional if only "mature adults" were involved.[204] Subjecting children to coercive pressure should not be considered to have "withstood the critical scrutiny of time and political change" and, therefore, preserving practices that subject children to coercive pressure does not further the policy underlying the Supreme Court's legislative prayer cases.[205]

Because the two-part approach advocated by this Note will uphold historical practices that have both been "accepted by the Framers" and "withstood the critical scrutiny of time and political change,"[206] this approach preserves the important policy interests behind the Supreme Court's cases involving legislative prayer.[207]

V. CONCLUSION

School board prayer appears to present a legal dilemma as it shares characteristics with both school settings, where state-sponsored prayer is generally struck down, and deliberative public bodies, where ceremonial prayer is likely to be upheld as long as it does not proselytize or coerce participation.[208] Federal circuit courts have attempted to choose whether to approach school board prayer as *either* state-sponsored prayer in a school setting *or* as ceremonial prayer before a deliberative public body.[209] This Note recognizes that school board prayer practices may very well be *both* state-sponsored prayer in a school setting *and* ceremonial prayer before a deliberative public body.[210] Embracing this recognition, this Note suggests a two-part approach that reconciles the precedent and policy behind both the trend toward striking down state-sponsored prayer in the public school setting and the trend toward upholding ceremonial prayer given before deliberative public bodies.[211]

The result of this reconciliation leads to the fundamental thesis of this Note: even though school board prayer should be considered to be state-sponsored prayer in a public school setting, because most school board

204. *Compare Galloway*, 572 U.S. at 590 (plurality opinion), *with Lee*. 505 U.S. at 592.

205. *See Galloway*, 572 U.S. at 577.

206. *Id.*

207. *See Marsh*, 463 U.S. at 792.

208. *See* Coles *ex rel.* Coles v. Cleveland Bd. of Educ., 171 F.3d 369, 371 (6th Cir. 1999).

209. Am. Humanist Ass'n v. McCarty, 851 F.3d 521, 526 (5th Cir. 2017).

210. *See supra* Part IV.A.

211. *See supra* Part IV.A.

prayer practices also fit within the tradition of legislative prayer recognized by the Supreme Court, an Establishment Clause analysis of school board prayer should be governed by the approach taken by the Supreme Court in *Greece*.[212] Under this approach most school board prayer practices should be held constitutional as long as they do not proselytize or coerce participation.[213]

This Note further argues that the Supreme Court, if it hears an Establishment Clause challenge to school board prayer, should analyze the prayer practice under the indirect coercion standard applied by Justice Kennedy in his plurality opinion in *Greece* rather than the actual legal coercion standard advocated for by Justice Thomas in his *Greece* concurrence.[214] This approach is superior to the current approaches to analyzing school board prayer cases used by the circuit courts because it is in accordance with Supreme Court precedent and because it preserves the policy interests underlying both the Supreme Court's school prayer and legislative prayer cases.[215]

**Frederic Hayer*

212. *See* Town of Greece v. Galloway, 572 U.S. 565, 591–92 (2014) (plurality opinion).

213. *See supra* Part IV.A.

214. *See supra* Part IV.B.

215. *See supra* Part IV.B.1–2.

* Drake University Law School, J.D. Candidate, Drake Law Review, *Research Editor* 2020-2021; University of Iowa, B.B.A. Finance.