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Claire Lee[†]

I. INTRODUCTION

Prayer in the public sphere has been part of American daily life since the founding.[1] Historically, both legislative sessions and school days began with Bible readings or prayers to solemnize the day.[2] The constitutionality, or lack thereof, of these prayers lies in the First Amendment's provision that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . . or abridging the freedom of speech."[3] The First Amendment protects individual speech, but it also ensures that the government does not use speech to favor one religion over another. While the Supreme Court in *Engel v. Vitale*[4] found official school prayer in schools violated the First Amendment's Establishment Clause, in *Marsh v. Chambers*,[5] it conversely recognized the constitutionality of legislative prayer, observing that opening legislative bodies with prayer was a practice "deeply embedded in the history and tradition of this country."[6] Lying at the juncture of this conflicting First Amendment jurisprudence are school boards—effectively legislative bodies in the educational setting—that begin meetings with prayer.

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[1] *See, e.g.*, Marsh v. Chambers, 463 U.S. 783, 786 (1983); SANFORD H. COBB, THE RISE OF RELIGIOUS LIBERTY IN AMERICA 491–97 (1902).

[2] *See, e.g.*, *id.*; Sch. Dist. of Abington v. Schempp, 374 U.S. 203, 207–12 (1963).

[3] U.S. CONST. amend. I.

[4] 370 U.S. 421 (1962).

[5] 463 U.S. 783 (1983).

[6] *See id.* at 786; *see also Engel*, 370 U.S. at 424.

While school boards have legislative functions such as setting school district policies and curricula, they are unlike traditional legislatures because they are student focused.[7] Not only do they make decisions that impact students, but frequently students are also in attendance at meetings.[8] Students may be required to attend meetings as student board or student council representatives, or they may attend sporadically when they are recognized by the board, disciplined, or attending to make their voices heard.[9] School boards' hybrid function make them difficult to classify within existing jurisprudence.

While the Third, Sixth, and Ninth Circuits treat school board meetings as extensions of the school setting, making prayer unconstitutional, the Fifth Circuit treats school board prayer as protected under the First Amendment.[10] Further complicating the circuit split, each of the circuits employs a jumble of Establishment Clause tests, leaving no clear authority on which test should be used.[11] While the "historical practices test" dominates legislative prayer jurisprudence,[12] school prayer cases frequently use a combination of tests.[13] School board prayer cases have used the *Lemon*, historical practices, coercion, and endorsement tests to different degrees.[14]

This Comment will explain the prominent Establishment Clause tests utilized by the Supreme Court in Part II and discuss the conflicting jurisprudence of school and legislative prayer in Part III. Part IV will analyze the approaches taken by the various circuits regarding school board prayer. For the purpose of resolving this circuit split, Part V of this Comment will argue in favor of a fact-specific coercion test that gives flexibility and clarity while also protecting students. Additionally, this Part will discuss the shortcomings of using the historical practices, endorsement, and *Lemon* tests in the school board prayer context. All

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[7] *See, e.g.*, Freedom From Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ., 896 F.3d 1132, 1138–39 (9th Cir. 2018).

[8] *See, e.g.*, *id.*

[9] *See, e.g.*, *id.* at 1138–39 (explaining instances in which students attend school board meetings as part of a disciplinary proceeding, "student showcase," "student recognition," or as a Board student representative).

[10] *Compare* Doe v. Indian River Sch. Dist., 653 F.3d 256, 282 (3d Cir. 2011), Coles v. Cleveland Bd. of Educ., 171 F.3d 369, 383–85 (6th Cir. 1999), *and Chino*, 896 F.3d at 1145 *with* Am. Humanist Ass'n v. McCarty, 851 F.3d 521, 529–30 (5th Cir. 2017).

[11] *See, e.g.*, *Indian River*, 653 F.3d at 283–90 (applying the *Lemon* and endorsement tests and using language from the coercion test); *Coles*, 171 F.3d at 383 (applying the *Lemon* test); *Chino*, 896 F.3d at 1148 (applying the *Lemon* test); *McCarty*, 851 F.3d at 529 (applying the legislative prayer historical practices test).

[12] *See, e.g.*, Marsh v. Chambers, 463 U.S. 783, 786–790 (1983); Town of Greece v. Galloway, 572 U.S. 565, 590 (2014).

[13] *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 595 (1992).

[14] *See, e.g.*, *Indian River*, 653 F.3d at 283–90; *Coles*, 171 F.3d at 383; *Chino*, 896 F.3d at 1148; *McCarty*, 851 F.3d at 529.

three overlook important factors present in school board meetings including setting, audience, and history.

II. ESTABLISHMENT CLAUSE TESTS

The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion."[15] Through the Fourteenth Amendment, the Establishment Clause applies not only to federal authorities, but also to state and local authorities such as school boards.[16] While this rule appears simple, courts have historically been far from clear on what counts as establishment.[17] As a result, modern courts apply an assortment of different tests at different times, sometimes even applying multiple tests to decide a single case.[18] The most applicable tests in legislative and school prayer jurisprudence are the *Lemon*, endorsement, coercion, and historical practices tests. These four tests have been used both alone and jointly by the Supreme Court to explain its Establishment Clause school and legislative prayer cases.[19]

A. *Lemon* Test

In 1971, the Court first handed down the three-part *Lemon* test in *Lemon v. Kurtzman*,[20] where it considered the constitutionality of state statutes that provided state funding to secular and religious private schools.[21] Relying on many years of "cumulative criteria," the Court found that a statute passes constitutional muster if (1) it "ha[s] a secular legislative purpose," (2) "its principal or primary effect [is] one that neither advances nor inhibits religion," and (3) "the statute [does] not foster 'an excessive government entanglement with religion.'"[22] The third prong of the *Lemon* test has been interpreted to prohibit a law that has "divisive political potential" or may lead the state to overseeing and meddling in religious affairs.[23]

The "divisive political potential" aspect broadens the *Lemon* test such that policies that are facially neutral toward religion may still be

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[15] U.S. CONST. amend. I.

[16] *See, e.g.*, Everson v. Bd. of Educ. of Ewing Tp., 330 U.S. 1, 8 (1947).

[17] *See* Steven G. Gey, *Reconciling the Supreme Court's Four Establishment Clauses*, 8 U. PA. J. CONST. L. 725, 728 (2006).

[18] *See id.* (noting at least ten Establishment Clause standards).

[19] *See, e.g.*, Marsh v. Chambers, 463 U.S. 783, 786–790 (1983); Town of Greece v. Galloway, 572 U.S. 565, 590 (2014); Lee v. Weisman, 505 U.S. 577, 595 (1992); *Indian River*, 653 F.3d at 283–90; *Coles*, 171 F.3d at 383; *Chino*, 896 F.3d at 1148; *McCarty*, 851 F.3d at 529.

[20] 403 U.S. 602 (1971).

[21] *Id.* at 606.

[22] *Id.* at 612–13 (internal citations omitted).

[23] *Id.* at 614–15, 622.

found unconstitutional.[24] In *Santa Fe Independent School District v. Doe*,[25] the Court found unconstitutional a policy of allowing students to vote on who would give invocations at high school football games.[26] The Court emphasized that the voting mechanism would encourage religious divisiveness in a public school setting, which would be at odds with the First Amendment.[27]

Almost as soon as the *Lemon* test was announced, justices on the Court began to erode the doctrine, in part, because of its lack of clarity and malleable nature.[28] As a result, in many of the cases following *Lemon*, the Court either expressly declined to apply the test or ignored it.[29] Recently, a plurality in *American Legion v. American Humanist Association*[30] found that the *Lemon* test should not be used in at least some Establishment Clause cases because it fails to consider that, for historical practices, it may be difficult to determine an original purpose, and purposes may multiply or evolve over time.[31] While the *Lemon* test, if enforced broadly, may remove religion from government spaces, it may do so at the cost of limiting historically supported religious practices.

B. Endorsement Test

Unsatisfied with the shortcomings of the *Lemon* test, Justice O'Connor proposed the endorsement test in *Lynch v. Donnelly*,[32] where the Court considered the legality of a nativity scene on town property.[33]

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[24] *See, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 312 (2000).

[25] 530 U.S. 290.

[26] *Id.* at 305–07.

[27] *Id.* at 317.

[28] *See, e.g.*, Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2081–82 (2019) (finding that there are considerations counseling against the usefulness of *Lemon* in deciding the constitutionality of longstanding monuments, symbols, and practices); McCreary Cty. v. ACLU, 545 U.S. 844, 890 (2005) (Scalia, J., dissenting) (highlighting that a majority of the justices had "repudiated the brain-spun '*Lemon* test'"); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398–99 (1993) (Scalia, J., concurring in judgment) ("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.").

[29] *See Am. Legion*, 139 S. Ct. at 2080 (citing Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993)); Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687 (1994); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995); Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995); Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001); Zelman v. Simmons-Harris, 536 U.S. 639 (2002); Cutter v. Wilkinson, 544 U.S. 709 (2005); Van Orden v. Perry, 545 U.S. 677 (2005); Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC, 565 U.S. 171 (2012); Town of Greece v. Galloway, 572 U.S. 565 (2014); Trump v. Hawaii, 138 S. Ct. 2392 (2018)).

[30] 139 S. Ct. 2067.

[31] *Id.* at 2082–85.

[32] 465 U.S. 668 (1984).

[33] *See id.* at 670–71, 690 (O'Connor, J., concurring).

Justice O'Connor sought to clarify the *Lemon* test by using endorsement as the focus of analysis. Under this analysis, the first two *Lemon* factors turn on "whether [the] government's actual purpose is to endorse or disapprove of religion . . . [and] whether, irrespective of [the] government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval."[34] Justice O'Connor's endorsement test is based on the idea that government endorsement sends a message that is linked to political inclusion.[35] As a result, religious endorsement may make non-adherents of that religion feel like outsiders. The test narrows *Lemon*'s scope while also ensuring that the government does not send a message of inclusion or exclusion based on religion.[36] Given the overlap between the *Lemon* and endorsement tests, courts have used the endorsement test both as a stand-alone analysis and as a "legitimate part of *Lemon*'s second prong."[37]

Like the *Lemon* test, the endorsement test is extremely manipulatable because it assesses endorsement through the eyes of a "reasonable observer."[38] While a "reasonable observer" may appear to be objective, Justice O'Connor notes that this hypothetical person should be "deemed aware of the history and context of the community and forum in which the religious display appears."[39] As such, the results of this analysis will depend on the background and cultural assumptions that a judge gives the "reasonable observer,"[40] thus giving excessive power to the court by way of discretion. Additionally, as a narrowed version of the *Lemon* test, the endorsement test may protect more religious speech instead of staunchly upholding the Establishment Clause.

C. Coercion Test

With the misgivings of the *Lemon* and endorsement tests in mind, courts in school prayer cases have recently turned to the coercion test, which focuses on compelled religious practices' potential effects on

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[34] *Id.*

[35] *See id.* at 688 (O'Connor, J., concurring).

[36] *See* Gey, *supra* note 17, at 738.

[37] Doe v. Elmbrook Sch. Dist., 687 F.3d 840, 850 (7th Cir. 2012) (viewing the endorsement test as a "legitimate part of *Lemon*'s second prong"); *see also* Zelman v. Simmons-Harris, 536 U.S. 639, 652 (2002) (using the endorsement test to find a school-voucher program constitutional).

[38] *See* County of Allegheny v. ACLU, 492 U.S. 573, 630 (1989) (O'Connor, J., concurring in part and concurring in the judgement), *abrogated by* Town of Greece v. Galloway, 572 U.S. 565 (2014).

[39] Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring in part and concurring in the judgement).

[40] *See* Gey, *supra* note 17, at 739.

growing young minds.[41] In *Lee v. Weisman*,[42] the Court found that the government cannot "coerce anyone to support or participate in religion or its exercise."[43] Unlike the *Lemon* test, the coercion test lacks formal criteria. Instead, it looks to the extent of supervision and social pressures on students to participate in the prayer or religious activity.[44] This means that courts will analyze state action to determine if it directly or indirectly coerces individuals to participate in religious activity.[45] While some, most notably Justice Scalia,[46] have argued that only direct coercion should be considered, precedent currently dictates that even indirect coercion—laws that do not directly coerce religious behavior—may violate the First Amendment.[47]

The coercion test has flexibility of a different kind, providing in the analysis a consideration of time and place not present in the *Lemon* or endorsement analyses. Furthermore, by taking a totality-of-the-circumstances approach, the coercion test provides space to consider that some religiously rooted practices in public spaces may not be coercive. Steven Gey argues that the coercion test, looking at both direct and indirect coercion, is incoherent and unpredictable as every government action is potentially coercive.[48] If the coercion test were instead modified to only consider direct coercion, the resulting predictability would come at the cost of rendering the Establishment Clause redundant.[49] Considering only direct coercion—in Justice Scalia's view, the most egregious and overt actions—it is likely that any government actions violating the Establishment Clause would also run afoul of the Free Exercise or Free Speech Clauses.[50]

D. Historical Practices Exception

Within Establishment Clause jurisprudence, there is an exception to the application of the jumble of tests. The historical practices exception first evolved as the basis for the legislative prayer exception.[51] In *Marsh*, the Court implied that when a practice has a long historical

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[41] *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 592 (1992).

[42] 505 U.S. 577.

[43] *Id.* at 587.

[44] *See id.* at 593.

[45] *See id.* at 588.

[46] *See, e.g.*, *id.* at 640 (Scalia, J. dissenting) (arguing that, historically, coercion only referred to direct "coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*").

[47] *See, e.g.*, Engel v. Vitale, 370 U.S. 421, 430 (1962).

[48] *See* Gey, *supra* note 17, at 740–42.

[49] *See id.* at 744.

[50] *See id.*

[51] *See, e.g.*, Marsh v. Chambers, 463 U.S. 783, 786 (1983).

pedigree, other Establishment Clause tests are either wholly or partially inapplicable.[52] Relying on legislative prayer in the First Congress, the Court stated that historical patterns alone do not justify constitutional violations but do shed light on what the Framers thought comprised unconstitutional conduct.[53]

This exception is still largely undefined as to what practices qualify and how long of a history a practice must have to qualify.[54] While it is uncertain how longstanding a practice must be, Michael McConnell has suggested some characteristics of what the Framers thought were constitutional violations.[55] These characteristics include: government control over the doctrine and personnel of the established church, mandatory attendance in the established church, government financial support of an established church, restrictions on worship in dissenting churches, restrictions on political participation by dissenters, or use of the church to carry out civil functions.[56] Under the historical practices framework looking at practices extending to the founding, practices that do not fit within these characteristics would be constitutional, as the founders would not have considered them violations.

The historical practices exception allows the Court to preserve long-held traditions that may seem to violate the First Amendment but have been ingrained in the American tradition. This may act as a tradeoff between Establishment Clause protections and upholding longstanding religious speech. Such a tradeoff may come at a cost to predictability and constitutionality. Similar to the criticism of other Establishment Clause tests, the exception can also be unpredictable. The jurisprudence does not define how long-standing a practice must be to qualify for the exception, leaving its application to practices outside of legislative prayer uncertain.[57] Additionally, the exception fails to consider that a historical practice may have a long pedigree but nonetheless be considered unconstitutional by modern standards.

III. LEGISLATIVE AND SCHOOL PRAYER

The various Establishment Clause tests and historical practices exception have been applied in different degrees and combinations in school and legislative prayer cases.[58] These two lines of jurisprudence

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[52] *See id.* at 788–92.

[53] *Id.* at 790.

[54] *See, e.g.*, Town of Greece v. Galloway, 572 U.S. 565, 590 (2014).

[55] Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2131–76 (2003).

[56] *See id.*

[57] *See, e.g.*, *Town of Greece*, 572 U.S. at 590.

[58] *See, e.g.*, *Marsh*, 463 U.S. at 783; *Town of Greece*, 572 U.S. at 590; Lee v. Weisman, 505 U.S.

lead to a divergence in outcomes with school prayer being held largely unconstitutional and legislative prayer being held largely constitutional.[59] To understand the application of these tests to school board prayer—a hybrid of school and legislative prayer—the two lines of jurisprudence must be examined.

A. Religion and Public Schools

Unlike other areas of Establishment Clause jurisprudence, the Supreme Court has been largely consistent in striking down religious expression or involvement in the area of public schools.[60] School prayer jurisprudence began with *Engel v. Vitale* and *School District of Abington v. Schempp*,[61] in which the Court found school-sponsored prayer and Bible readings unconstitutional.[62] The statute in question in *Engel* required students to begin each school day by saying aloud a prayer, while in *Schempp* the challenged statutes required schools to begin each day with readings from the Bible. Both *Engel* and *Schempp* were decided prior to the *Lemon* test, and the Court undertook an analysis focused largely on the concern of mixing religious activity with a government institution by considering coercion, endorsement, and the neutrality of the statute in question.[63] Following the advent of the *Lemon* test, the Supreme Court in *Wallace v. Jaffree*[64] reconsidered required school prayer in the form of a moment of silence for "meditation or voluntary prayer."[65] Relying on *Lemon* and the endorsement tests, the *Wallace* court emphasized that the implicated state statute did not have a secular purpose and thus was unconstitutional.[66]

More recently, the Court has moved away from applying the *Lemon* or endorsement tests in favor of the coercion test in school prayer

577, 595 (1992); Doe v. Indian River Sch. Dist., 653 F.3d 256, 283–90 (3d Cir. 2011); Coles v. Cleveland Bd. of Educ., 171 F.3d 369, 383 (6th Cir. 1999); Freedom From Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ., 896 F.3d 1132, 1148 (9th Cir. 2018); Am. Humanist Ass'n v. McCarty, 851 F.3d 521, 529 (5th Cir. 2017).

[59] *See, e.g.*, *Marsh*, 463 U.S. at 786; Engel v. Vitale, 370 U.S. 421, 424 (1962).

[60] *See, e.g.*, Bruce P. Merenstein, *Last Bastion of School Sponsored Prayer? Invocations at Public School Board Meetings*, 145 U. PA. L. REV. 1035, 1042 (1997); Illinois ex rel. McCollum v. Bd. of Educ. of Sch. Dist. No. 71, 333 U.S. 203 (1948); Zorach v. Clauson, 343 U.S. 306 (1952); *Engel*, 370 U.S. 421; Sch. Dist. of Abington v. Schempp, 374 U.S. 203 (1963); Wallace v. Jaffree, 472 U.S. 38 (1985); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000).

[61] 374 U.S. 203.

[62] *See id.* at 211; *Engel*, 370 U.S. at 430.

[63] *See, e.g.*, *Engel*, 370 U.S. at 431, 436; *Schempp*, 374 U.S. at 221–26.

[64] 472 U.S. 38 (1985).

[65] *Id.* at 40.

[66] *See id.* at 56.

cases.[67] This became evident in *Lee v. Weisman*,[68] decided in 1992, where the Court employed the coercion test and found prayer at a nonmandatory, public school graduation unconstitutional.[69] The Court emphasized that the school's control of the event placed pressure on students to participate and that the pressure, while indirect, could be as real as overt compulsion.[70]

The Court in *Santa Fe Independent School District v. Doe*[71] similarly found prayer before football games unconstitutional.[72] There, the Court relied on *Lee*'s coercion test while also employing the *Lemon* and endorsement tests to find the practice similar to the unconstitutional prayer in *Lee*.[73] Extending *Lee*, the *Santa Fe* Court contended that prayers in a school setting could be coercive even if attendance was "purely voluntary."[74] The Court utilized all three tests to emphasize that, regardless of which Establishment Clause test was used, the practice was unconstitutional. This analytical choice demonstrates that, while the coercion test is most frequently used in modern analysis, the *Lemon* and endorsement tests are still relevant in school prayer cases. The continued relevance of the *Lemon* and endorsement tests, both inherently hostile toward integrating church and state, may weaken attempts to argue that school prayer is constitutional.[75]

B. Legislative Prayer

Prayer in legislative bodies, on the other hand, is constitutional under the historical practices exception.[76] In *Marsh*, the Supreme Court ruled that legislative prayer could coexist with the First Amendment.[77] There, a state legislator challenged the constitutionality of a practice by the Nebraska legislature of opening each session with prayer by a chaplain paid with public funds.[78] In the Court's ruling, it noted that adults and elected legislators are presumably not vulnerable to religious pressure.[79] *Marsh* relied on the long history of legislative prayer

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[67] *See, e.g.*, Lee v. Weisman, 505 U.S. 577 (1992).

[68] 505 U.S. 577.

[69] *See id.* at 592.

[70] *See id.* at 593.

[71] 530 U.S. 290 (2000).

[72] *See id.* at 317.

[73] *See id.* at 301–02.

[74] *Id.* at 312.

[75] *See, e.g.*, Gey, *supra* note 17, at 733.

[76] *See, e.g.*, Marsh v. Chambers, 463 U.S. 783, 786 (1983).

[77] *Id.*

[78] *Id.* at 784–85.

[79] *Id.* at 792.

in America to justify its constitutionality.[80] The Court commented that there was an "unambiguous and unbroken history of more than 200 years" leaving "no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society."[81] Relying on the historical practices test, the Court declared that this was not an establishment of religion, but rather a "tolerable acknowledgement of beliefs widely held among the people."[82]

Recently, the Supreme Court revisited this issue in *Town of Greece v. Galloway*,[83] ruling that an opening prayer at a town meeting was constitutional.[84] The opening prayer at issue in *Town of Greece* was given by clergy—unpaid volunteers—selected from congregations listed in a local directory.[85] Relying on its decision in *Marsh*, the Court stated that the historical practices exception applied if the prayer practice "fits within the tradition long followed in Congress and state legislatures."[86] In finding that the prayer in *Town of Greece* fell within the historical practices exception, the Court further noted that the prayer was not coercive because the target audience of the prayer was mature adults not "readily susceptible to religious indoctrination or peer pressure."[87] Justice Kennedy, writing for the fractured court, distinguished *Town of Greece* from *Lee*, finding that mature adults at legislative sessions are free to leave, arrive late, or make protests without being disrespectful.[88] Furthermore, the Court noted that within the context of legislative sessions, it may not even be noticed if someone in attendance wanted to exit the room during a prayer they found distasteful.[89]

Additionally, the Court noted that the prayer took place during the opening, not the policymaking portion of the meeting.[90] The Court found that the prayer delivered during the ceremonial portion of the meeting acknowledged religious leaders and the institutions they represented, without endorsing a religion as a policy of the community.[91]

While the legislative prayer jurisprudence makes clear that prayer at the opening of legislative sessions is constitutional, the Court left

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[80] *See id.* at 783.

[81] *Id.* at 792.

[82] *Id.*

[83] 572 U.S. 565 (2014).

[84] *See id.* at 566.

[85] *Id.* at 570–71.

[86] *Id.* at 577.

[87] *Id.* at 590 (quoting *Marsh*, 463 U.S. at 792).

[88] *See id.*

[89] *Id.*

[90] *See* Town of Greece v. Galloway, 572 U.S. 565, 591 (2014).

[91] *Id.*

open how this might apply to circumstances outside of an elected state legislature.

IV. THE CIRCUIT SPLIT

In light of uncertain Supreme Court precedent, lower courts both before and after *Town of Greece* have considered whether prayers preceding school board meetings are more like school prayer or legislative prayer.[92] Since school and legislative prayer jurisprudence utilize different Establishment Clause tests and lead to diverging outcomes, the determination of whether school board prayer is more like prayer in a classroom or in the legislature is critical to the analysis.

Prior to *Town of Greece*, the Third and Sixth Circuits held that the coercive nature of school board prayer resembled school prayer, finding school board prayer unconstitutional under the *Lemon* test.[93] After *Town of Greece*, the Ninth Circuit held the same.[94] The Fifth Circuit is the only circuit to disagree.[95]

The Third and Sixth Circuits' pre-*Town of Greece* rulings both used the coercion and the *Lemon* tests in their analyses.[96] In *Coles v. Cleveland Board of Education*,[97] the Sixth Circuit rejected the comparison between school boards and legislative sessions.[98] Challenged in *Coles* was a 1992 prayer policy that resulted in each school board meeting opening with either a prayer offered by a local religious leader chosen by the school board president, a moment of silent prayer, or a prayer led by the school board president.[99] These school board meetings were held on school property and provided opportunities for voluntary and required student attendance.[100] The public-comment portion of the meeting allowed students and parents to voice their concerns over school polices and, under certain circumstances, served as a forum for addressing student disciplinary grievances.[101]

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[92] *See, e.g.*, Doe v. Indian River Sch. Dist., 653 F.3d 256 (3d Cir. 2011); Coles v. Cleveland Bd. of Educ., 171 F.3d 369 (6th Cir. 1999); 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).

[93] *See Indian River*, 653 F.3d at 282, 290; *Coles*, 171 F.3d at 380–85.

[94] *See Chino*, 896 F.3d at 1150.

[95] *See McCarty*, 851 F.3d at 526.

[96] *See, e.g.*, *Indian River*, 653 F.3d at 282, 290; *Coles*, 171 F.3d at 380–85.

[97] 171 F.3d 369 (6th Cir. 1999).

[98] *Id.* at 381.

[99] *Id.* at 372–74 (noting that prior to 1992, Cleveland school board "meetings were devoid of opening prayer).

[100] *Id.* at 372.

[101] *Id.*

Additionally, student representatives sat on the Cleveland Board of Education to summarize the students' perspective on school activities.[102] The school board also regularly invited students to attend its meetings to acknowledge their academic, athletic, or community service achievements.[103] Considering the presence of the students, the Sixth Circuit reasoned that school board meetings, unlike legislative sessions, risk coercion.[104] Because school board meetings concern students, students have an incentive to attend and, in some cases, are required to attend—local townsfolk have no such compulsion.[105] Further, in contrast to legislators, school board members "are directly communicating, at least in part, to students."[106] While in *Engel* and *Lee* the risk of coercion was enough to make prayer unconstitutional, here, coercion was only enough to trigger the *Lemon* test.[107] Under the *Lemon* test analysis, the prayers were unconstitutional.[108]

The Third Circuit, in *Doe v. Indian River School District*,[109] followed the Sixth Circuit's reasoning.[110] In *Indian River*, the school board had a long-standing policy of praying at regularly scheduled meetings.[111] This policy allowed, on a rotating basis, an adult Board member to offer a prayer or request a moment of silence explicitly stipulating that such prayers were voluntary and no employees, students, or community members in attendance were required to participate.[112] The court noted that school board meetings, whether or not they are mandatory, invite student participation, and, consequently, "bear several markings of . . . implied coercion."[113] Thus, the court held, prayer before school board meetings resembles other in-school prayer and cannot survive the *Lemon* test.[114] Therefore, the

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[102] *Id.*

[103] Coles v. Cleveland Bd. of Educ., 171 F.3d 369, 372 (6th Cir. 1999).

[104] *See id.* at 382.

[105] *Id.* at 383.

[106] *Id.* at 382.

[107] *See id.* at 383.

[108] *Id.* at 385.

[109] 653 F.3d 256 (3d Cir. 2011).

[110] *See id.* at 282.

[111] *Id.* at 261 (highlighting that the school district has recited prayers at meetings since the creation of the district in 1969, but the policy was not formalized until 2004).

[112] *Id.* at 261–62 (noting that the school board went so far as to read a disclaimer prior to the prayer to "ensure that any members of the public in attendance understand the purpose of the prayer policy").

[113] *Id.* at 276–78 (finding recognition of student achievements, attendance at board meetings as a requirement of extracurricular activities, the location of meetings on school property, and the board's complete control over the meeting as markings of implied coercion).

[114] *Id.* at 282–90.

prayers before Indian River School District board meetings were deemed unconstitutional.[115]

The Ninth Circuit's post- *Town of Greece* ruling is the most recent and relevant opinion to the side of the circuit split that finds school board prayer unconstitutional.[116] In *Freedom From Religion Foundation, Inc. v. Chino Valley Unified School District Board of Education*,[117] the court found that school board prayer failed the *Lemon* test because it lacked a secular purpose.[118] The Chino Valley Unified School District Board's challenged 2013 policy "provide[d] for prayer delivery [opening school board meetings] 'by an eligible member of the clergy or a religious leader in the boundaries of' the district."[119] This prayer usually followed the recitation of the Pledge of Allegiance by a member of the school community and presentation of the colors by the Junior Reserve Officers' Training Corps to begin each meeting.[120] In addition to providing the forum for making decisions on student discipline and district administration, Chino Valley school board meetings featured "student showcase[s]" and "student recognition" involving "students of all ages—from elementary school to high school—who are in attendance."[121] The Board's student representative additionally served as an active contributor at meetings, voting with the Board in open sessions and discussing student issues during the period for comment.[122]

In finding that the prayer policy failed the *Lemon* test, the Ninth Circuit analogized the case to *Santa Fe*, stating that messages other than prayers could serve the stated purpose of having the prayer.[123] This analysis differed slightly from the Third and Sixth Circuit's

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[115] *Id.* at 290.

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

[117] 896 F.3d 1132 (9th Cir. 2018).

[118] *See id.* at 1150 (finding that policy's purported secular purposes were contradicted by public statement of board member that board's goal in enacting prayer policy was furtherance of Christianity); *see also* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 306–09 (2000) (dismissing solemnizing an event as a valid secular purpose as it "invites and encourages religious messages"); *cf.* Lynch v. Donnelly, 465 U.S. 668, 693 (1984) (O'Connor, J., concurring) (discussing the "legitimate secular purposes of solemnizing public occasions").

[119] *Chino*, 896 F.3d at 1139.

[120] *Id.* at 1138.

[121] *Id.* at 1138–39 (explaining that "student showcase[s]" encompassed presentations by classes or student groups including second-graders singing folk songs or elementary advanced band students, while "student recognition[s]" highlighted academic and extracurricular accomplishments of students in the district including recognition of science fair winners, recipients of college scholarships, and the high school student with the highest GPA).

[122] *Id.* While the student representative did vote with the Board, their voting was recorded separately, and they did not take part in closed-session disciplinary decisions. *Id.* at 1138.

[123] *Id.* at 1150–51.

approaches by minimizing discussion of coercion in the application of the *Lemon* test.[124] The Ninth Circuit found *Chino* to be dissimilar from *Town of Greece* because it determined that the setting of a board meeting, where schoolchildren are often in attendance and under the control of the board, was unlike a legislative meeting where members have equal status.[125] As a result of these factors, the court found that the large numbers of children and adolescents present made the situation inconsistent with the legislative prayer tradition.[126] The Ninth Circuit's ruling limited the ability of school board members to begin meetings in prayer, but also limited the government from indoctrinating children in attendance with the Christian religion.

In contrast, the Fifth Circuit classified school board meetings as legislative, and consequently held that pre-meeting invocations, often consisting of prayer, were constitutional.[127] In *American Humanist Association v. McCarty*,[128] the Birdville Independent School District opened their public monthly meetings with two students reciting the Pledge of Allegiance, the Texas pledge, and delivering a statement—which sometimes consisted of an invocation.[129] While the school district did not mandate that the invocation include a prayer, frequently students elected to open with a prayer.[130] Like other school boards, students frequently attended meetings to receive awards or for brief performances.[131] In this context, the Fifth Circuit specifically found that a "school board is more like a legislature than a school classroom or event."[132] Even though children are in attendance, the Fifth Circuit stated that that fact was not enough to change a school board meeting prayer case into a school prayer case.[133] Thus, instead of finding school boards to be within school prayer jurisprudence, the Fifth Circuit followed *Town of Greece* and the historical practices exception, finding prayer at school board meetings constitutional.[134] This decision allows school board members to share their religious convictions through

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[124] *See id.* at 1148–51.

[125] *See id.* at 1142.

[126] *See id.* at 1145.

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

[128] 851 F.3d 521 (5th Cir. 2017).

[129] *Id.* at 524.

[130] *Id.* at 524 ("From 1997 through February 2015, the student-led presentations were called 'invocations' and were delivered by students selected on merit. In March 2015 . . . [the school district] began referring to them as 'student expressions' and providing disclaimers that the students' statements do not reflect BISD's views. BISD began randomly selecting, from a list of volunteers, the students who would deliver the expressions.").

[131] *Id.*

[132] *Id.* at 526.

[133] *See id.* at 527–28.

[134] *See id.* at 529–30.

prayer, despite the risk that the prayers may persuade the children in attendance.

V. THE COERCION TEST AS A FRAMEWORK FOR ANALYZING SCHOOL BOARD PRAYER CASES

A. The Ninth and Fifth Circuits' Establishment Clause Analyses Are Ill-Suited for School Board Prayer Cases

While the Ninth and Fifth Circuits used two predominant Establishment Clause analyses, both the *Lemon* test and historical practices exception are ill-suited for school board prayer cases.[135] Both have a myriad of issues in development and application in addition to overlooking important considerations.

1. The *Lemon* test is unsatisfactory due to doctrinal shortcomings and waning support

The *Lemon* test has been eroded and avoided by the Court since its inception due to its doctrinal difficulties and extreme malleability.[136] The doctrinal implications of *Lemon* stem from how broadly or narrowly it is interpreted. If interpreted broadly, the *Lemon* test makes it difficult to reconcile the Establishment Clause with the Free Exercise Clause.[137] Taken literally, *Lemon*'s requirement that a statute have a "secular purpose" would foreclose all government actions that account for religious interests.[138] However, past decisions concerning the Religion Clauses make it clear that it is constitutional to, say, excuse Amish schoolchildren from compulsory education laws and religious conscientious objectors from military service.[139] Narrow interpretations, on the other hand, may overprotect religious interests. This flexibility in interpretation gives the Court desirable latitude, but, as the Court itself has conceded, does so at the cost of clarity and predictability.[140] As a result, decisions under the *Lemon* test are difficult to reconcile as a whole.[141]

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[135] *See, e.g.*, Freedom From Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ., 896 F.3d 1132 (9th Cir. 2018); *McCarty*, 851 F.3d 521 (5th Cir. 2017).

[136] *See, e.g.*, Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2081–82 (2019); McCreary Cty. v. ACLU, 545 U.S. 844, 890 (2005) (Scalia, J., dissenting); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398–99 (1993) (Scalia, J., concurring in judgment).

[137] *See, e.g.*, Jesse H. Choper, *The Endorsement Test: Its Status and Desirability*, 18 J.L. & POL. 499, 501 (2002).

[138] *See id.*

[139] *See, e.g.*, *id.*; Wisconsin v. Yoder, 406 U.S. 205 (1972); Selective Draft Law Cases, 245 U.S. 366, 389–90 (1918).

[140] *See, e.g.*, Comm. for Pub. Educ. v. Regan, 444 U.S. 646, 662 (1980).

[141] *See, e.g.*, Choper, *supra* note 137, at 503 n.25 ("*Compare* Comm. for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973) (holding that government tax benefits to parents whose children attended

This flexibility means that a particular court can mold the *Lemon* test to its desired outcome, leaving school boards without clear guidance on which policies are acceptable and which policies are unconstitutional.

Recently, the Court highlighted the shortcomings of the *Lemon* test in *American Legion*.[142] There, Justice Alito, writing for a majority, explained that in some Establishment Clause cases the *Lemon* analysis is incredibly difficult to undertake.[143] In the case of long-established practices or symbols, he noted, it may be difficult to identify the original purpose.[144] Furthermore, with the passage of time, the original purpose may change or be replaced with multiple purposes.[145] Finally, ending any historical practice will often not appear neutral, making it seem as if the government is hostile toward religion.[146] For these reasons, the Court found the *Lemon* test unsuitable for at least some categories of Establishment Clause cases.[147] Justice Kavanaugh, concurring, argued that the *Lemon* test is not applicable in any Establishment Clause cases due to its shortcomings.[148] Beyond the difficulty in conducting a *Lemon* test analysis, Justice Kavanaugh argued that in modern jurisprudence the *Lemon* test is not good law as the Court does not actually use *Lemon* in its decision-making.[149]

Due to the doctrinal issues, the Court's inconsistent use of the test, and recent hostility toward it, the *Lemon* test is unsuitable for school board prayer cases. As explained in *American Legion*, it fails to consider the historical significance of some practices, a factor relevant in both legislative prayer and school board prayer cases.[150] Furthermore, as a notoriously malleable test, it could be used, as it has been in other Establishment Clause cases, to create inconsistent results that could either over or under protect religious interests depending on the

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nonpublic and predominantly parochial schools violated the Establishment Clause because the effect was to advance religion in the schools . . .), *with* Mueller v. Allen, 463 U.S. 388 (1983) (upholding the constitutionality of a state income tax deduction to all taxpayers for expenses of tuition, transportation, textbooks, instructional materials, and other school supplies in public and nonpublic schools since the purpose and primary effect of the facially neutral law was secular, despite the fact that the great bulk of deductions could be taken *only* by parents of children in parochial schools).").

[142] Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2082–85 (2019).

[143] *See id.* at 2082.

[144] *Id.*

[145] *Id.* at 2082–84.

[146] *Id.* at 2084–85.

[147] *Id.* at 2085.

[148] *Id.* at 2092 (Kavanaugh, J., concurring).

[149] *Id.* (arguing that instead of the *Lemon* test each category of Establishment Clause cases has its own principles based on history, tradition, and precedent).

[150] *See, e.g.*, Am. Humanist Ass'n v. McCarty, 851 F.3d 521 (5th Cir. 2017); Town of Greece v. Galloway, 572 U.S. 565 (2014).

interpretation of the test.[151] The *Lemon* test undercuts First Amendment protections by not providing clear and coherent guidance on Establishment Clause violations.

In sum, the *Lemon* test fails because of doctrinal shortcomings stemming from its inherent malleability and difficult application. These shortcomings lead to decisions that are difficult to reconcile as a whole. With the *Lemon* test waning in support, as Justice Kavanaugh pointed out, it is not a suitable candidate for reconciling this circuit split.[152]

2. The historical practices exception is unsatisfactory because it fails to consider the context of the practice and changing understandings of what constitutes an Establishment Clause violation

Likewise, the historical practices exception has shortcomings that make it an unsuitable candidate for these cases. The historical practices exception purportedly relies on unbroken history to uphold practices that might otherwise be found to violate the Establishment Clause. However, it assumes that the founders' understanding of constitutional practices holds true today.[153] This fails to consider how the nation and the understanding of the constitution over time has developed. What may have once been considered a religious yet constitutional practice, may today serve as a sign of government-established religion.[154] Furthermore, the requirement of an unbroken history that the exception relies on has been undermined through subsequent decisions. While the practice in *Marsh* was continued for over two hundred years, practices with much shorter histories have also been granted the exception.[155] *American Legion* used historical practices to justify preserving a memorial cross that had been on public land for less than a century.[156] *Town of Greece* used historical practices to justify the decade-old practice of opening town council meetings with prayer.[157] Without an actual

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[151] *See, e.g.*, Choper, *supra* note 137, at 503 n.25 (comparing jurisprudence such as *Comm. for Pub. Educ. v. Nyquist*, 413 U.S. 756 (1973) with *Mueller v. Allen*, 463 U.S. 388 (1983) where the *Lemon* test resulted in unreconcilable outcomes).

[152] *See Am. Legion*, 139 S. Ct. at 2092 (Kavanaugh, J., concurring).

[153] *See, e.g.*, Eric J. Segall, *Mired in the Marsh: Legislative Prayers, Moments of Silence, and the Establishment Clause*, 63 U. MIAMI L. REV. 713, 723 (2009).

[154] *See, e.g.*, Michael McConnell, *On Reading the Constitution*, 73 CORNELL L. REV. 359, 363 n.4 (1988) (explaining that the conceivable explanations for why the First Congress might not have considered the legislative chaplaincy as a "law respecting the establishment of religion" are either not historically convincing or are inapplicable in modern times).

[155] *See, e.g.*, *Town of Greece*, 572 U.S. 565; *Am. Legion*, 139 S. Ct. 2067.

[156] *See Am. Legion*, 139 S. Ct. at 2074.

[157] *See Town of Greece*, 572 U.S. at 570.

history to rely on, the historical practices exception has no other doctrinal support.[158]

Further, while some school boards can trace their opening prayers back to the nineteenth century, even the oldest traditions of school board prayer do not date back to the founding.[159] The tradition of school boards can be traced back to the seventeenth century, when the Massachusetts Bay Colony passed a law requiring towns to establish and maintain schools, administering these schools through town meetings.[160] It was not until the early nineteenth century that school boards developed as independent bodies from the government.[161] This may be a long enough history of school board prayer, as evidenced by the Court's decisions in *American Legion* and *Town of Greece*, to qualify for the historical practices exception. However, since school boards as independent bodies did not exist at the founding, it is incredibly difficult to surmise what the founders did or did not think of the constitutionality of school board prayer.

Finally, the historical practices exception is unsatisfactory in school board prayer cases because it fails to consider the extraneous circumstances, such as setting and audience, at play in school boards. The prayers in *Engel* and the Bible readings in *Schempp* were historically accepted practices, yet the Court in both cases refused to look at history alone as history could not outweigh the impact on students.[162] Similarly, the setting and audience of a school board present a different picture from both a classroom and a legislature. With the potential for requiring student attendance as representatives and audience members, school boards host more than just developed adult minds. In looking only to history, the historical practices exception misses how a particular practice may lead to a different effect depending on the environment. As a result, the exception fails to fully protect the rights afforded to individuals in the Establishment Clause.

The *Lemon* test and historical practices exception have limitations in their own right. When these limitations are considered in light of the hybrid setting of school boards, it becomes apparent that neither line of analysis provides for the comprehensive consideration of all the factors

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[158] *See, e.g.*, Segall, *supra* note 153, at 723–24.

[159] *See, e.g.*, Marie Elizabeth Wicks, *Prayer is Prologue: The Impact of* Town of Greece *on the Constitutionality of Deliberative Public Body Prayer at the Start of School Board Meetings*, 31 J.L. & POL. 1, 30–31 (2015) (noting the historical records in eight states trace school board prayer to the nineteenth century); Doe v. Tangipahoa Parish Sch. Bd., 473 F.3d 188, 192 (5th Cir. 2006) (tracing school board prayer to "at least 1973").

[160] *Public Education FAQ*, NAT'L SCH. BD. ASS'N, https://www.nsba.org/About/Public-Education-FAQ [https://perma.cc/2AFJ-Y4SJ] (last visited Sept. 27, 2020).

[161] *Id.*

[162] *See* Engel v. Vitale, 370 U.S. 421 (1962); Sch. Dist. of Abington v. Schempp, 374 U.S. 203 (1963).

present in school board prayer cases. With the analyses of the Ninth and Fifth Circuits both unsatisfactory, only the endorsement or coercion tests stand as possible options for reconciling school board prayer cases.

B. The Endorsement Test Is Too Unpredictable

As a narrower version of the *Lemon* test, the endorsement test appears at first to provide the clarity that *Lemon* lacks, and also considers the setting overlooked in the historical practices exception. Nonetheless, the endorsement test is also ill-suited for school board prayer cases because of its unique unpredictability and waning support by the Court.

Narrowing the focus of *Lemon* to endorsement provides some clarity as to what practices qualify as a secular purpose, solving some of the doctrinal flexibility inherent in *Lemon*.[163] Furthermore, the endorsement test overcomes one of the historical practices exception's shortcomings by considering both the history and context of the government action.[164] The endorsement test introduces new unpredictability, however, that leaves it as malleable as the *Lemon* test.

Justice O'Connor calls for endorsement to be assessed through the eyes of a reasonable observer "deemed aware of the history and context of the community and forum in which the religious display appears."[165] This creates an analysis that is fact-specific and lacks clarity.[166] The outcome will necessarily depend on what background knowledge and community awareness a particular judge assumes a reasonable observer to have.[167] This leads to malleability that can be exploited. For a school board prayer case, this unpredictability is even more apparent as outcomes would likely differ depending on whether the reasonable observer is a student or an adult, and whether the meetings had required student attendance or almost no students in attendance. As a result, an endorsement analysis would make it difficult for school districts to make decisions concerning the allowance of religious activities given different environments. Additionally, similar to the *Lemon* test, in some cases an endorsement analysis may be difficult to make if the government's original purpose is difficult to identify or has changed.[168]

Finally, modern incorporation of the endorsement test into the *Lemon* test has resulted in hostility toward the endorsement test.[169] The

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[163] *See* Gey, *supra* note 17, at 737.

[164] *See, e.g.*, Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring).

[165] *Id.*

[166] *See* Gey, *supra* note 17, at 739.

[167] *See id.*

[168] *See, e.g.*, Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2082–85 (2019).

[169] *See, e.g.*, *id.* at 2080.

Court in *American Legion* mentioned endorsement as a way of evaluating the first and second prongs of *Lemon*, before concluding that the *Lemon* test is unsuitable in some Establishment Clause cases.[170] While not explicitly hostile to the endorsement test as a stand-alone test, the overlap with the *Lemon* test and the unique malleability of the endorsement test does not make it a better candidate for school board prayer cases.

C. The Coercion Test Provides the Best Framework

The coercion test, which considers both direct and indirect coercion, provides the best framework for considering hybrid school board prayer cases. It considers all of the external factors present in school boards, takes into account the intent of the Establishment Clause, and also protects those that are most vulnerable. In doing so, the coercion test takes relevant considerations from the *Lemon* test, endorsement test, and historical practices exception and puts them in context of the environment.

While the *Lemon* test, endorsement test, or historical practices exception might be appropriate for other categories of Establishment Clause cases, they all fail to provide full consideration of the unique school board situation.[171] The coercion test, on the other hand, is able to account both for historical significance and for the impact on a particular audience.[172] As a totality-of-the-circumstances test looking at direct and indirect coercion, the coercion test focuses on whether the state action, school board prayer, is coercing anyone to support or participate in religion.[173] As such, a court can consider the relevance of factors such as the history of the school board's prayer practice, the presence of students at the board meetings as school board members or as student government representatives, and the agency of those present to leave or participate when determining whether coercion is present. A totality-of-the-circumstances approach allows a court to recognize that religion is an important part of society but balances that consideration against the potential harms to society of coercing religious observance. Furthermore, this approach allows flexibility given the environment, while still giving direction to school boards. A court can decide if the historical tradition of legislative prayer is outweighed by the coercive pressures on students present at board meetings.

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[170] *See id.* at 2080, 2085.

[171] *See, e.g.*, Am. Humanist Ass'n v. McCarty, 851 F.3d 521, 525 (5th Cir. 2017) (recognizing that the *Lemon* test, considering endorsement, fails to account for the historical significance of a particular practice); Wicks, *supra* note 159, at 30–31 (noting that school board prayer cannot be traced to the founding, weakening the application of the historical practices exception).

[172] *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 593 (1992).

[173] *See id.* at 587, 593.

Additionally, the coercion test recognizes the Framers' intent that it is not only unconstitutional to establish a national religion, but that freedom of conscience should be closely guarded.[174] Unlike other Establishment Clause tests, the coercion test is directly focused on how a particular practice or tradition affects an audience. The coercion test recognizes that some practices, such as the passive acknowledgement of religion, may not be a violation of the Establishment Clause, even though they are religious. Additionally, by focusing on the specific actor, action, and result, this test recognizes that freedom of conscience can be affected to different degrees in different populations. This is useful in school board settings where both young minds, as seen in school prayer cases, and developed minds, as traditionally thought of in legislative prayer cases, are present.[175]

The coercion test is uniquely situated to address cases involving school board meetings, where both young and developed minds are affected.[176] Traditionally, school boards are comprised of elected adult officials making legislative decisions.[177] However, they are also inherently student focused, existing to set policies and procedures for education in a particular community.[178] Not only do school board decisions affect the lives and education of students and parents, some students may regularly serve on school boards, be required to attend meetings as student representatives, or voluntarily attend meetings to voice their concerns.[179] The record of *Chino* demonstrates that at every meeting, students were in attendance to recite the Pledge of Allegiance, to participate in the "student showcase," to be recognized during "student recognition," and to serve as student representatives.[180] In *McCarty*, students frequently attended meetings to receive awards or share brief band or choir performances.[181] As a result, the unique presence of students at school board meetings makes the coercion test uniquely suited to consider how the environment and context of prayer may or may not affect young minds.

Some critics may argue that the coercion test is unnecessary, and that school boards are just legislatures where the historical practices

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[174] *See, e.g.*, Lisa M. Kahle, *Making "*Lemon*-Aid" from the Supreme Court's* Lemon*: Why Current Establishment Clause Jurisprudence Should be Replaced by a Modified Coercion Test*, 42 SAN DIEGO L. REV. 349, 391 (2005).

[175] *See, e.g.*, *Lee*, 505 U.S. at 592; Town of Greece v. Galloway, 572 U.S. 565, 590 (2014).

[176] *See, e.g.*, *Lee*, 505 U.S. at 592; *Town of Greece*, 572 U.S. at 590.

[177] *See, e.g.*, Freedom From Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ., 896 F.3d 1132, 1138 (9th Cir. 2018).

[178] *See, e.g.*, *id.* at 1138–40.

[179] *See, e.g.*, *id.*; Am. Humanist Ass'n v. McCarty, 851 F.3d 521, 524 (5th Cir. 2017).

[180] *See Chino*, 896 F.3d at 1138–40.

[181] *See McCarty*, 851 F.3d at 524.

exception applies.[182] A critic might argue that having students present at school board meetings is no different than having minors present at legislative sessions. The argument is that the mere presence of students should not transform a historical legislative practice into a school prayer.[183] This criticism fails to recognize that while in a legislature the legislative members will always be consenting adults, this is not the case with school boards.[184] Many school boards have student representatives, and even those that do not have a high likelihood that students will be present at school board meetings.[185] This is similar to the cheerleaders and football players in *Santa Fe*, who, due to their extracurricular commitments, were required to be at the games.[186] Furthermore, the Court has found that even at purely voluntary events, such as attending football games as a spectator, coercion can still be present.[187] There must be consideration for the choice with which students are presented between attending school board meetings they find important and avoiding personally offensive or uncomfortable religious rituals.[188] Even in instances where few students are present, these concerns prevail, as students in attendance might be even more vulnerable to pressure to conform to the religious norms of their adult counterparts.

Additionally, critics may claim that school boards are more like legislatures because there is a diminished educational function in school boards. This argument fails to consider that graduations and football games, both only tangentially educational in nature, are considered within the school prayer domain.[189] Just as football games may be part of an extracurricular activity for some students, so too may school board meetings.[190]

Finally, by implementing a totality-of-the-circumstances test, courts are afforded necessary flexibility without too much unpredictability. A totality-of-the circumstances approach does not force courts to apply a rigid rule, which is useful in the school board setting where a particular environment may greatly affect the coercive influence. Critics may argue that this flexibility leads to the same lack of clarity as the other Establishment Clause tests because a totality-of-the-

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[182] *See, e.g.*, Wicks, *supra* note 159.

[183] *See, e.g.*, *id.* at 527–28.

[184] *See, e.g.*, Town of Greece v. Galloway, 572 U.S. 565, 590 (2014).

[185] *See, e.g.*, *Chino*, 830 F.3d at 1138–40; *McCarty*, 851 F.3d at 524.

[186] *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 312 (2000).

[187] *See id.*

[188] *See id.*

[189] *See, e.g.*, Lee v. Weisman, 505 U.S. 577 (1992); *Santa Fe*, 530 U.S. 290.

[190] *See Santa Fe*, 530 U.S. at 312.

circumstances approach does not make clear what audience members are considered in the coercion analysis nor the bounds of indirect coercion.

When determining which audience members to consider for coercion, the flexibility of the coercion test can be distorted by a court to produce its desired outcome.[191] This could lead to inconsistent results. One court may find school board prayer without student board members but with students present constitutional, while another may find school board prayer with regular student board representatives present unconstitutional. Courts could be drawing incredibly fine lines to distinguish between nearly identical situations. On one hand, this nuance may be preferred, as an invocation's level of coercion on a student board representative and a student audience member may be different. However, such nuance may lead to gameplaying, with some districts making student representative attendance voluntary to allow for constitutional prayers. This could be dealt with by defining the coercion test to only look at the coercive impact on those required, or practically required, to be in attendance. Focusing the coercion test on these individuals ensures that those most likely to be directly or indirectly coerced are considered. A focus on those required to be in attendance also would be congruent with the outcome in legislative prayer. Since legislators are necessarily adults, the coercive power of prayer is diminished.[192]

Furthermore, looking at those required or *practically required* to be in attendance ensures that coercion is not viewed in a rigid, formalistic sense. This idea is further supported by school prayer cases such as *Lee* and *Santa Fe* where students were not required to be at graduation or football games, but, due to social peer and administrative pressures, were practically required to be in attendance as a part of their overall educational experience.[193] This factor allows consideration for students who are in attendance as recognized students, disciplined students, or those who are there as student representatives. For example, a member of the state champion softball team might be practically required to attend the school board meeting as a member of the team being recognized for their accomplishment. By not attending the student may be forfeiting intangible benefits and an opportunity to celebrate their accomplishment.[194] This particular safeguard still gives flexibility for nuance without leading to unpredictability. A school board would then be given notice as to which students are taken into account in the coercion

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[191] *See, e.g.*, Choper, *supra* note 137, at 503.

[192] *See Town of Greece*, 572 U.S. at 590.

[193] *See, e.g.*, *Lee*, 505 U.S. at 593; *Santa Fe*, 530 U.S. at 312.

[194] *See, e.g.*, Doe v. Indian River Sch. Dist., 653 F.3d 256, 276 (3d Cir. 2011) (citing *Lee*, 505 U.S. at 595).

analysis while also preserving flexibility given the different factors in different school boards.

The flexibility of the scope of indirect coercion can be mitigated by using a "reasonable student" to determine if coercion is present given the totality-of-the-circumstances. For those who are incredibly sensitive, virtually any government favoritism toward religion is coercive because it benefits those who choose the favored faith.[195] Such an extreme would make the coercion test just as unpredictable as other Establishment Clause tests. This fault can be reconciled by analyzing coercion through the perspective of a reasonable student in that particular totality-of-the-circumstances, giving some objectivity to the test. Unlike Justice O'Connor's suggestion to give the reasonable student community knowledge and context, the reasonable student under the proposed coercion test will remain objective. Extra community knowledge is unnecessary, not only because it introduces malleable subjectivity, but also because the totality of the environment is already being considered. Under the coercion test, the totality-of-the-circumstances provides useful information on the historical practices of the prayer without turning the coercion test into a subjective test. Furthermore, while some students may be more prone to coercion than others, the test can still remain objective. The school prayer jurisprudence makes clear that the Court is not as concerned with how any particular student feels about religion in schools, but how religious expressions in a school environment result in pressures to conform as perceived by a reasonable student.[196] The Court's decisions around school prayer are not based on how actual students responded to the prayer, but rather the effects that the prayers could have.[197]

The coercion test is the most suitable framework for school board prayer cases. By considering the totality-of-the-circumstances from the point of view of a reasonable student, the test ensures that both the historical significance and the potential coercion of school board prayer are taken into account. Considering more factors gives a more robust view as to the effect school board prayer may have on those in the audience. This test provides flexibility while also ensuring safeguards to give school boards predictability. Since school boards fall at the juncture of school prayer and legislative prayer, incorporating important considerations from both bodies of jurisprudence ensures that the unique environment of a school board is not unnecessarily forced into Establishment Clause tests designed for schools or legislatures.

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[195] *See* Gey, *supra* note 17, at 742.

[196] *See, e.g.*, *Lee*, 505 U.S. at 597–98; *Santa Fe*, 530 U.S. at 312.

[197] *See, e.g.*, *Lee*, 505 U.S. at 597–98; *Santa Fe*, 530 U.S. at 312.

D. Under the Coercion Test, School Board Prayer Is Likely Unconstitutional

Once it is clear that the coercion test is best suited for school board prayer cases, an application will likely lead to a finding that prayers in these cases are unconstitutional. As defined by Justice Kennedy, the coercion test is a totality-of-the-circumstances test looking to the extent of supervision and social pressures to participate to determine if the state "coerce[s] anyone to support or participate in religion or its exercise."[198] School boards—like classrooms, graduation ceremonies, and football games—are controlled and supervised by state actors. The school board, as the government actor, determines its policies and procedures. This is unlike an impromptu decision by students to pray around the flagpole or other student-instigated action. Legislative prayer and school prayer collide in the "social pressure to participate" consideration. In making that determination, a court needs to decide if the historical significance of school board prayer is such that it does not make it coercive. For example, like legislative prayer, if a religious invocation has been used by a school board for centuries, perhaps the practice has become less about religion and more about tradition. On the other side are the pressures that student board members and representatives, unlike adults, may face. Unlike school prayer at graduations, the audience at school boards is likely primarily adults. However, while students may be fewer in number, they may be required to attend the meetings either in an official capacity or to receive recognition.[199] This may place an even higher social pressure on them to conform in an audience primarily comprised of their elders. Furthermore, even if students are not required to attend meetings, this fact may not be dispositive. The Court in *Santa Fe* explained that even purely voluntary events may produce unconstitutionally coercive pressures.[200]

Given all of these considerations, school boards present an opportunity where students in attendance may feel the coercive pressure by those in the audience to pray. As a student in an environment likely filled with adults, this coercion seems unacceptable. In some cases, a historical practice of prayer may reduce the coercive factor. This may occur where the historical practice lends itself to tradition, reducing the level of coercion. However, a historical practice should not easily outweigh coercive concerns. After all, schools had a history of beginning the day with prayer or a Bible verse, and yet the Court found these

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[198] *Lee*, 505 U.S. at 587.

[199] *See, e.g.*, Freedom From Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ., 896 F.3d 1132, 1145 (9th Cir. 2018).

[200] *See Santa Fe*, 530 U.S. at 312.

practices too coercive to be constitutional.[201] Since school boards are uniquely positioned to impact the student population and frequently have students in attendance, both in required and voluntary capacities, the unique concerns of coercion of minors indicate that official school board prayer should be found unconstitutional under the coercion test.

Importantly, such an analysis will not prohibit school board members in their individual capacity from joining together privately before a meeting and praying.[202] Such an act of personal choice is not only constitutionally protected, but also does not have the same coercive power as a school board authorized prayer. Instead of acting in their role as government actors, individual school board members can engage in private prayer beforehand, which allows them to practice their own personal beliefs.

VI. CONCLUSION

School board prayer lies at the juncture of diverging school prayer and legislative prayer jurisprudence and does not fit either category. While school boards are legislative bodies making decisions for a community, they are also student centric.[203] Unlike a legislature made up of adult representatives, school boards frequently have student members and representatives.[204] Even those without student representation may have students attend to be recognized or to voice their opinions.[205] This makes a school board outside the confines of both a legislature and a classroom and in need of a suitable Establishment Clause test for this hybrid case.

The circuit split with respect to school board prayer developed as the Ninth and Fifth Circuits attempted to use Establishment Clause tests that failed to consider the entirety of the circumstances. The Ninth Circuit's approach using the *Lemon* test is ill-suited for school board prayer due to its extreme malleability and recent Court hostility toward it.[206] The historical practices exception used by the Fifth Circuit is likewise unsatisfactory because it overlooks the effect of a historical practice in a particular time and place. Additionally, the historical practices exception was developed based on an unbroken history extending back

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[201] *See, e.g.*, Engel v. Vitale, 370 U.S. 421 (1962); Sch. Dist. of Abington v. Schempp, 374 U.S. 203 (1963).

[202] *See, e.g.*, *Santa Fe*, 530 U.S. at 302 (explaining that private religious speech is protected by the First Amendment).

[203] *See, e.g.*, *Chino*, 896 F.3d at 1138–40.

[204] *Id.*

[205] *See* Am. Humanist Ass'n v. McCarty, 851 F.3d 521, 528 (5th Cir. 2017).

[206] *See, e.g.*, *id.*

to the founding, something that school board prayer cannot claim.[207] Turning to other prominent Establishment Clause tests, the endorsement test likewise is ill-suited for school board prayer cases. While it narrows the scope of *Lemon*, it introduces unnecessary subjectivity through the use of a standard of a reasonable observer aware of the history and context of the community and forum.[208]

Ultimately, the coercion test provides the best framework to consider school board prayer cases. It provides for a full consideration of all the relevant factors not fully considered in either the *Lemon* test, endorsement test, or historical practices exception. As a totality-of-the-circumstances approach, it can look at all of the relevant factors from the view of a reasonable student in the audience to determine if coercion is present. Furthermore, both school and legislative prayer decisions consider coercion as at least a relevant factor.[209] Since *Town of Greece*, legislative prayer has looked at both historical practices and coercion. Furthermore, the coercion test was developed in *Lee* for a school prayer case.[210] It is this common factor of coercion that can unite the diverging jurisprudence and can be used to evaluate the constitutionality of school board prayer.

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[207] *See, e.g.*, Marsh v. Chambers, 463 U.S. 783, 784–85 (1983).

[208] *See* Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring).

[209] *See, e.g.*, Town of Greece v. Galloway, 134 U.S. 565, 590 (2014); Lee v. Weisman, 505 U.S. 577, 592 (1992).

[210] *See Lee*, 505 U.S. at 592.