

Prayer Is Prologue: The Impact of *Town of Greece* on the  
Constitutionality of Deliberative Public Body Prayer at the  
Start of School Board Meetings

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## INTRODUCTION

The Supreme Court decision in *Town of Greece v. Galloway*<sup>1</sup> fell on attentive ears in Pickens County, South Carolina. Just over a year prior to the *Town of Greece* ruling, the Pickens County School Board restructured its tradition of inviting students to lead the invocation prior to each monthly meeting for fear that such a prayer practice would raise Establishment Clause concerns.<sup>2</sup> The school district shifted to a routine shuffling of trustee members, each of whom was instructed to deliver only non-sectarian prayers.<sup>3</sup> When news reached the South Carolina town that the Supreme Court had upheld a town council’s prayer practice, the school board did not hesitate to reconsider its policy.<sup>4</sup> In fact, the Pickens County School Board chairman met with attorneys to fashion a new prayer policy—one that reflected the structure of Greece’s policy and was least likely to raise

<sup>1</sup> 134 S. Ct. 1811 (2014).

<sup>2</sup> Liz Lohuis, *School Board Pushes for Prayer After High Court Ruling: Pickens County Schools Could Revise Prayer Policy*, WYFF4 (June 20, 2014, 6:06 AM), <http://www.wyff4.com/news/school-board-revisits-prayer-policy/26580162>. This change followed the board’s receipt of a letter from the Freedom from Religion Foundation, which accused the school board of committing “a serious constitutional violation” by allowing students to deliver the invocation. Ron Barnett, *Pickens County School Board Tables Policy that Would Allow Sectarian Prayers*, GREENVILLE ONLINE (Oct. 28, 2014, 11:52 AM), <http://www.greenvilleonline.com/story/news/local/pickens-county/2014/10/27/pickens-county-school-board-tables-policy-allow-sectarian-prayers/18036685/>.

<sup>3</sup> Barnett, *supra* note 2. Non-sectarian prayer is not affiliated with any particular religious sect. See *non-sectarian*, OXFORD ENGLISH DICTIONARY PAGE (Oxford Univ. Press, 3d ed. 2002).

<sup>4</sup> See Lohuis, *supra* note 2.

constitutional complaints.<sup>5</sup> After tabling the vote in late October of 2014,<sup>6</sup> the six-member board revisited the issue four months later.<sup>7</sup> At a meeting charged by lengthy debate among citizens and board members, a 3-3 vote of the members fell short of the majority support needed to change the current prayer policy to the one proposed.<sup>8</sup>

The struggle facing the school board of Pickens County is not unique to this particular school district. Many courts have placed school boards at the juncture between the two camps of Establishment Clause jurisprudence—the “prayer in school” prohibition and the “legislative prayer” exception—rather than fully inside either camp.<sup>9</sup> The Supreme Court first recognized the constitutionality of legislative prayer by upholding the Nebraska legislature’s prayer policy in *Marsh v. Chambers*.<sup>10</sup> Since then, the circuit courts have disagreed as to whether to apply *Marsh*’s “legislative and other deliberative public bodies” exception<sup>11</sup> to school board situations, and if *Marsh* does apply, how to interpret it.<sup>12</sup> The school boards’ dilemma

<sup>5</sup> *Id.* The Pickens County School Board planned to institute a system of random selection of clergymen to deliver the prayers. *Id.*

<sup>6</sup> Liz Lohuis, *Prayer Policy Vote Tabled by Upstate School Board*, WYFF4 (Oct. 28, 2014, 7:08 AM), <http://www.wyff4.com/news/prayer-policy-vote-tabled/29375398> (“After months of research, [Board Chairman Alex Saitta] drafted a policy that would randomly select a different clergy person in the county to lead a prayer before each meeting.”). The proposed policy called for the district administration to compile a list of religious institutions in Pickens County, updated annually. Barnett, *supra* note 2. Each listed congregation would receive an invitation to deliver the invocation at one of the school board’s ten monthly meetings. *Id.* Much to the dismay of Saitta and local pastors who had agreed to participate, the school board decided to revisit the issue at a later date. *Id.*

<sup>7</sup> Barnett, *supra* note 2.

<sup>8</sup> *Id.* See also Heather Carpenter, *Pickens Co. School Board Won’t Change Prayer Policy*, WISTV.COM (Mar. 23, 2015, 10:51 PM), <http://www.wistv.com/story/28596036/pickens-co-school-board-to-decide-on-pre-meeting-prayers>.

<sup>9</sup> Paul Imperatore, Note, *Solemn School Boards: Limiting Marsh v. Chambers to Make School Board Prayer Unconstitutional*, 101 GEO. L.J. 839, 841 (2013).

<sup>10</sup> 463 U.S. 783, 792 (1983).

<sup>11</sup> See *id.* at 786 (“The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country.”).

<sup>12</sup> Imperatore, *supra* note 9, at 847. While the application of *Marsh* is crucial to the vitality of a school board’s prayer practice, it does not guarantee that courts will uphold every disputed practice as constitutional. Both the Third and Sixth Circuits have chosen not to apply *Marsh* to school board prayer cases. Rather, these circuits have applied the tests from *Lemon v. Kurtzman* and *Lee v. Weisman* to strike down school board prayer as unconstitutional. See *Doe v. Indian River Sch. Dist.*, 653 F.3d 256, 289-90 (3d Cir. 2011); *Coles ex rel. Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 371 (6th Cir. 1999). An equal number of circuits, however, have chosen to analyze the prayer practices of school board meetings under the *Marsh* line of cases. See, e.g., *Doe v. Tangipahoa Parish Sch. Bd.*, 473 F.3d 188, 202 (5th Cir. 2006) (assuming without deciding that the school board prayer practice did fall within the *Marsh* standard and striking the prayer practice as unconstitutional due to its sectarian nature); *Bacus v. Palo Verde Unified Sch. Dist. Bd. of Educ.*, 52 F. App’x 355, 356 (9th Cir. 2002) (holding that prayers given at school board meeting violated the Establishment Clause because they contained sectarian references and included “in the name of Jesus”). Even so, these circuits have regularly struck down any prayer practices

has even caught the attention of members of Congress.<sup>13</sup> Moreover, a handful of articles have addressed school boards' attempts to argue that they fall within the "other deliberative public bodies" language of *Marsh*'s prayer protection—arguments that have had little chance of success.<sup>14</sup> That is, until now. Enter *Town of Greece*, a decision that anchors the constitutionality of prayer before local deliberative public bodies and introduces a more expansive deliberative body doctrine of voluntary prayer.

This Article argues that the principles established by *Town of Greece* logically extend to voluntary prayer practices by school boards as deliberative public bodies. Justice Kennedy's opinion for the Court includes language that allows for a logical expansion of the *Town of Greece* holding beyond the narrow dimensions of town council meetings.<sup>15</sup> Like town boards, school boards are composed of elected adult members who determine policy in a forum in which citizens are welcome.<sup>16</sup> Unlike the student-centered venues of football games and graduation ceremonies,<sup>17</sup> school board meetings are incidental to a student's educational experience.

Part I examines the development of the deliberative public body doctrine beginning with the Supreme Court's decision in *Marsh*, its

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by school boards that were deemed sectarian. See *Tangipahoa Parish Sch. Bd.*, 473 F.3d at 202–03; see also *Bacus*, 52 F. App'x at 356.

<sup>13</sup> See H.R. Res. 250, 113th Cong. (2013); see also S. Res. 11, 113th Cong. (2013). Though non-binding, these proposed House and Senate resolutions express congressional support of prayer at school board meetings.

<sup>14</sup> See, e.g., Imperatore, *supra* note 9; Robert Luther III & David B. Caddell, *Breaking Away from the "Prayer Police": Why the First Amendment Permits Sectarian Legislative Prayer and Demands a "Practice Focused" Analysis*, 48 SANTA CLARA L. REV. 569 (2008); Anne Abrell, Note, *Just a Little Talk with Jesus: Reaching the Limits of the Legislative Prayer Exception*, 42 VAL. U. L. REV. 145 (2007); Charles J. Russo, *Between a Rock and a Hard Place: The Emerging Question of Prayer at School Board Meetings*, 137 EDUC. L. REP. 423 (Oct. 1999).

<sup>15</sup> For instance, the Court indicated that "[o]ur tradition assumes that adult citizens . . . can tolerate and perhaps appreciate a ceremonial prayer delivered by a person of a different faith." *Town of Greece*, v. Galloway, 134 S. Ct. 1811, 1823 (2014).

<sup>16</sup> See, e.g., *Tangipahoa Parish Sch. Bd.*, 473 F.3d at 192 (stating that the Tangipahoa Parish School Board meetings were open to the public).

<sup>17</sup> See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (holding that student-initiated invocations at football games amounted to impermissible coercion because they carried the perception of school endorsement of student prayer); see also *Lee v. Weisman*, 505 U.S. 577 (1992) (holding that a clergyman selected by a school could not deliver non-sectarian invocation and benediction at the school's graduation ceremony because even though the ceremony was voluntary, students should not have to miss an important event to avoid being exposed to unwanted prayer). The Supreme Court recently denied certiorari to another graduation ceremony case. See *Elmbrook Sch. Dist. v. Doe*, 134 S. Ct. 2283 (2014), *denying cert. to* 687 F.3d 840 (7th Cir. 2012) (en banc). In Justice Scalia's dissent to the denial of certiorari in *Elmbrook*, he outlined the impact of *Town of Greece* on Establishment Clause analyses, including its emphasis on historic practice as contributing to the Clause's interpretation. *Id.* at 2284–85 (Scalia, J., dissenting from denial of certiorari). For discussion on how the historic practice of legislative prayer also encompasses school boards as deliberative bodies, see *infra* notes 176–90 and accompanying text.

clarification of *Marsh*'s principles in *Town of Greece*, and the pre-*Town of Greece* treatment of school boards by circuit courts. Part I then examines school boards' reactions to the *Town of Greece* ruling and ways that they are restructuring their prayer policies to fit this road map for a local deliberative public body.

Part II argues that a school board is nearly identical in nature to the *Greece* town board, which in turn resembles a legislature. For all of these deliberative public bodies, the opening invocation acts as a communal handshake that brushes away the lawmakers' petty differences to ease the subsequent process of deliberation.

Part III explains that any structural distinctions between school boards and the *Greece* town board are not constitutionally relevant for the purposes of opening prayers. Part III also addresses the historical tradition that formed the basis of the deliberative public body prayer doctrine—first established in *Marsh*, and then solidified in *Town of Greece*—and it argues that school boards also have a longstanding tradition of pre-deliberative prayer.

Part IV contemplates the school board decisions of the circuit courts through the lens of *Town of Greece*. When read as a whole, *Town of Greece* focuses the principles of *Marsh* onto a small town board. This decision erodes the reasoning of circuit courts that have declared school board prayers unconstitutional—either because they chose not to apply *Marsh* to the school board situation, or because they assumed that *Marsh* applied before declaring the sectarian nature of the prayer to be unconstitutional.

Part V examines the special case of student representatives versus student members of school boards. Such a distinction is relevant in determining whether the particular structure of the school board more closely resembles a town board or a student-centered venue. Under *Town of Greece*, the opening invocations were directed towards the town board members to promote a spirit of unity. Students who are included as *members of* school boards are thus included in the opening prayers. Student *representatives to* the school board, however, are not considered members of the school board and thus would not be among the individuals to whom the opening prayer is directed.

Part VI examines ways in which school districts may minimize potential Establishment Clause issues in their school board prayer practices. School boards may invite clergymen from a variety of different faiths to deliver the prayers, thereby closely mimicking the *Greece* town board's practice, rather than circulating prayer opportunities internally among the members. Only adults should be invited to deliver the prayers; to allow

students to deliver the prayers would transform the deliberative body setting into a student-centered school setting. School boards should also refrain from dictating the content of the prayers. As the Court held in *Town of Greece*, such active involvement by a deliberative body in the prayer would result in an impermissible establishment of religion.

## I. THE DELIBERATIVE PUBLIC BODY PRAYER DOCTRINE

### A. *The Supreme Court*

The deliberative public body prayer doctrine emerged from the Supreme Court's holding in *Marsh v. Chambers*, which preserved “[t]he opening of sessions of legislative and other deliberative public bodies with prayer” as a practice that is “deeply embedded in the history and tradition of this country.”<sup>18</sup> In *Lee v. Weisman*,<sup>19</sup> the Court distinguished this legislative prayer exception from prayer delivered in the student-centered setting of a graduation. In *Town of Greece*, the Court further clarified that permissible legislative prayer practices do not “over time denigrate, proselytize, or betray an impermissible government purpose[.]”<sup>20</sup> This section will examine the foundations of the deliberative public body prayer doctrine as articulated by the Supreme Court.

#### 1. *Marsh v. Chambers: Permitted Prayer Before “Other Deliberative Public Bodies”*

The legislative day had begun.<sup>21</sup> Before the Nebraska unicameral legislature stood the figure of Robert E. Palmer, his head bowed in prayer.<sup>22</sup> A Presbyterian minister, Palmer had been serving as paid chaplain of the legislature for almost two decades when Ernie Chambers challenged the constitutionality of his role.<sup>23</sup> Chambers, a member of the Nebraska legislature, claimed that the state’s chaplaincy practice violated the Establishment Clause of the First Amendment.<sup>24</sup> He brought suit under 42 U.S.C. § 1983 against the State Treasurer Frank Marsh, Chaplain Palmer,

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<sup>18</sup> *Marsh v. Chambers*, 463 U.S. 783, 786 (1983).

<sup>19</sup> 505 U.S. at 587.

<sup>20</sup> *Town of Greece*, 134 S. Ct. at 1824.

<sup>21</sup> *Marsh*, 463 U.S. at 784.

<sup>22</sup> *Id.* at 785.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

and the members of the Executive Board of the Nebraska legislature in their official capacities.<sup>25</sup>

Justice Burger<sup>26</sup> delivered the opinion for the Supreme Court, which held that “[t]he opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country.”<sup>27</sup> To support this reasoning, Justice Burger recalled the fledgling years of our nation and claimed that since the time of the Framers, the tradition of opening legislative sessions with prayer by a paid chaplain had “coexisted with the principle of disestablishment.”<sup>28</sup> Justice Burger concluded, “This unique history leads us to accept the interpretation of the First Amendment draftsmen who saw no real threat to the Establishment Clause arising from a practice of prayer similar to that now challenged.”<sup>29</sup>

These early congressional prayer practices did not sidestep dispute.<sup>30</sup> Both John Jay and John Rutledge assailed the idea of beginning the first

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<sup>25</sup> *Id.* at 785 n.2. The district court had denied a motion to dismiss on the grounds of legislative immunity and held that while the Nebraska practice of paying the chaplain using state funds was a violation of the Establishment Clause, the offering of the prayer at the start of each legislative session was not. *Id.* at 785. The Eighth Circuit refused to separate the issue of prayer before the legislative session from that of the chaplain’s publicly funded salary. *Id.* Instead, the Eighth Circuit applied the Establishment Clause test from *Lemon v. Kurtzman*, which involved a three-part inquiry into the purpose and effect of a state-sponsored religious practice. *Id.* at 786. The circuit court found that Nebraska’s practice of maintaining the same chaplain for sixteen years and publishing his prayers in a volume—both paid for by state funds—facilitated a purpose and effect of promoting impermissible religious expression and resulted in an excessive government entanglement with religion. *Id.* See also *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (“First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion.”) (citations omitted) (internal quotation marks omitted). *Marsh* reached the Supreme Court on the limited issue of whether the practice of opening legislative sessions with prayers by a state-employed clergyman constituted an unconstitutional establishment of religion. *Marsh*, 463 U.S. at 786.

<sup>26</sup> It is worth noting that twelve years prior to the *Marsh* decision, Justice Burger drafted the Court’s opinion in *Lemon*. 403 U.S. at 602. The *Marsh* Court’s decision not to apply the *Lemon* test left Justice Brennan nonplussed. He reasoned that *Marsh* simply carved out an exception to the typical Establishment Clause jurisprudence. *Marsh*, 463 U.S. at 796 (Brennan, J., dissenting). Justice Brennan then quipped, “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.” *Id.* at 800–01.

<sup>27</sup> 463 U.S. at 786 (majority opinion).

<sup>28</sup> *Id.* Justice Burger explained that although the members did not engage in deliberative body prayer at the Constitutional Convention, the First Congress adopted a policy of selecting a chaplain to open each session with prayer as one of its first orders of business. *Id.* at 787–88. Three days after Congress approved the hiring of paid chaplains, the Bill of Rights was enacted. *Id.* at 788. “Clearly the men who wrote the First Amendment Religion Clause did not view paid legislative chaplains and opening prayers as a violation of that Amendment,” Justice Burger wrote, “for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress.” *Id.*

<sup>29</sup> *Id.* at 791.

<sup>30</sup> *Id.*

session of the Continental Congress with prayer.<sup>31</sup> They claimed that the delegates were so diverse in their religious beliefs “that [they] could not join in the same act of worship.”<sup>32</sup> Samuel Adams stifled Jay and Rutledge’s contentions with a brisk retort, that “he was no bigot, and could hear a prayer from a gentleman of piety and virtue, who was at the same time a friend to his country.”<sup>33</sup> Likewise, the *Marsh* Court viewed the Nebraska legislature’s prayer practice not as an act of proselytization, but of harmonization. Justice Burger rejected the notion that the Establishment Clause forbade governmental conduct that happened to align with religious canons.<sup>34</sup> As long as the prayers did not seek “to proselytize or advance any one, or to disparage any other, faith or belief,” such prayers were not parsed according to their content.<sup>35</sup>

Justice Burger viewed the maturity of the audience as significant, noting that “[h]ere, the individual claiming injury by the practice is an adult, presumably not readily susceptible to ‘religious indoctrination.’”<sup>36</sup> Because the purpose of the opening prayer was to “invoke Divine guidance on a public body entrusted with making the laws” as part of an uninterrupted history of over 200 years, the Court insisted that lawmakers should have the opportunity to acknowledge the beliefs “widely held among the people of this country.”<sup>37</sup>

## 2. Lee v. Weisman: *Prohibited Prayer at a Student-Centered Venue*

Almost a decade after *Marsh*, the Supreme Court ruled that invocations and benedictions at high school graduations are impermissibly coercive and a violation of the Establishment Clause.<sup>38</sup> Fourteen-year-old Deborah Weisman graduated from Nathan Bishop Middle School during “promotional exercises” at which a local rabbi delivered an invocation and a benediction.<sup>39</sup> Rabbi Leslie Guterman was invited by the middle school principal to participate in the graduation, as was the school district’s

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.* (citation omitted).

<sup>33</sup> *Id.* at 792 (quoting CHARLES FRANCIS ADAMS, FAMILIAR LETTERS OF JOHN ADAMS AND HIS WIFE, ABIGAIL ADAMS, DURING THE REVOLUTION 37–38, reprinted in ANSON PHELPS STOKES, CHURCH AND STATE IN THE UNITED STATES 449 (1950)).

<sup>34</sup> *Marsh*, 463 U.S. at 792.

<sup>35</sup> *Id.* at 794–95. To proselytize is to seek conversion. An act of proselytization contains a greater degree of intent to convert than that of advancement of religion. See *proselytize*, OXFORD ENGLISH DICTIONARY PAGE (Oxford Univ. Press, 3d ed. 2002).

<sup>36</sup> *Marsh*, 463 U.S. at 792 (1983) (quoting *Tilton v. Richardson*, 403 U.S. 672, 686 (1971)).

<sup>37</sup> *Id.*

<sup>38</sup> *Lee v. Weisman*, 505 U.S. 577, 592–93 (1992).

<sup>39</sup> *Id.* at 581, 583.

policy.<sup>40</sup> Daniel Weisman, Deborah's father, objected to the prayers on behalf of himself and his daughter.<sup>41</sup> He filed suit against various officials of the Providence public schools, seeking an injunction barring continuation of the prayer practice.<sup>42</sup> Before long, *Lee v. Weisman* had inched its way to the Supreme Court.<sup>43</sup>

In an opinion written by Justice Kennedy, the Supreme Court held that the graduation ceremony prayers coerced students to stand and remain silent, a gesture that constituted an impermissible establishment of religion.<sup>44</sup> Though graduations are not technically mandatory, they are special occasions that define a student's educational experience.<sup>45</sup> Further, the Court reasoned that the ceremonious atmosphere present during the graduation ceremony caused the invocations at issue to exert an "influence and force" nonexistent in less formal situations.<sup>46</sup>

### 3. Town of Greece: *The Game Changer*

*Town of Greece* redefined *Marsh*'s "unique history" of legislative prayer by upholding the prayer practice of a small town board in Greece, New York.<sup>47</sup> The *Town of Greece* ruling indicates that the twenty-year-old *Marsh* rule has retained its tenacity, even when the members of the relevant legislative body shrink in number from forty-nine to four.<sup>48</sup> In a 5-4 decision,<sup>49</sup> the *Town of Greece* Court looked to the historical tradition as well as the limited purpose of the prayer practice as two reasons to apply

<sup>40</sup> *Id.* at 581.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 584.

<sup>43</sup> The district court applied the three-part test set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971), to hold that the invocations and benedictions delivered at the graduations violated the Establishment Clause. See *Weisman v. Lee*, 728 F. Supp. 68, 71 (D.R.I. 1990). On appeal, the First Circuit affirmed the district court's decision. See *Weisman v. Lee*, 908 F.2d 1090, 1090 (1st Cir. 1990).

<sup>44</sup> *Lee*, 505 U.S. at 590 ("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.").

<sup>45</sup> *Id.* at 595 ("Attendance may not be required by official decree, yet it is apparent that a student is not free to absent herself from the graduation exercise in any real sense of the term 'voluntary,' for absence would require forfeiture of those intangible benefits which have motivated the student through youth and all her high school years.").

<sup>46</sup> *Id.* at 597; see also *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1827 (2014) (comparing the formal setting of a high school graduation to the more informal atmosphere of a town board meeting).

<sup>47</sup> *Town of Greece*, 134 S. Ct. at 1815–16.

<sup>48</sup> See *id.* at 1846 (Kagan, J., dissenting) (describing the Greece town board as consisting of "[t]he Town Supervisor, Town Clerk, Chief of Police, and four Board members . . ."); see also *Senators' Web Pages*, NEB. LEG., [http://nebraskalegislature.gov/senators/senator\\_list.php](http://nebraskalegislature.gov/senators/senator_list.php) (listing the forty-nine senators of the Nebraska unicameral legislature).

<sup>49</sup> *Town of Greece*, 134 S. Ct. at 1815.

*Marsh* to the meetings of a small town council.<sup>50</sup> The intimate setting of the town meetings distinguished the *Town of Greece* situation from that in *Marsh*. In *Town of Greece*, citizens regularly attended meetings and participated in discussions; students occasionally appeared to accept awards and fulfill school civic requirements.<sup>51</sup> And for nearly fifteen years, the meetings began with a prayer.<sup>52</sup>

Justice Kennedy, in his opinion for the Court,<sup>53</sup> described the prayer practice in great detail.<sup>54</sup> In 1999, Greece adopted its practice of inviting a local clergyman to deliver an invocation at the start of each meeting, following the roll call and recitation of the Pledge of Allegiance.<sup>55</sup> The lawmakers intended the prayers to place them in a solemn and deliberative frame of mind.<sup>56</sup> Enter the clergymen—all invited, unpaid volunteers chosen from a compiled list of “willing ‘board chaplains’ who had accepted invitations and agreed to return in the future.”<sup>57</sup> Despite the town’s efforts to invite clergymen of varied faiths and because most of the congregations in town were Christian, the resultant prayers resonated with a Christian timbre.<sup>58</sup> The board members never examined, dictated, or pre-approved the content of the prayers, preferring instead to avoid any encroachment onto the free exercise and speech rights of the ministers that such a gesture would entail.<sup>59</sup>

When Susan Galloway and Linda Stephens objected to the sectarian content of the prayers, the town invited a Jewish layman and the chairman of the local Baha’i temple to deliver prayers.<sup>60</sup> A Wiccan priestess also asked to be allowed to lead a session in prayer, a request that the town board welcomed.<sup>61</sup> Undeterred by these efforts to diversify the pool of invited

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<sup>50</sup> *Id.* at 1823–24.

<sup>51</sup> See *id.* at 1825; see also *id.* at 1832 (Alito, J., concurring); *id.* at 1846 (Kagan, J., dissenting).

<sup>52</sup> *Id.* at 1816 (majority opinion).

<sup>53</sup> Chief Justice Roberts and Justice Alito joined Justice Kennedy in the opinion of the Court. Justices Thomas and Scalia joined the opinion in part. Justice Thomas filed an opinion concurring in part, which Justice Scalia joined. *Id.* at 1815. Justices Kagan, Breyer, Ginsburg, and Sotomayor dissented, and both Justice Breyer and Justice Kagan filed separate dissenting opinions. *Id.*

<sup>54</sup> See *id.* at 1816.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* (“The prayer was intended to place town board members in a solemn and deliberative frame of mind, invoke divine guidance in town affairs, and follow a tradition practiced by Congress and dozens of state legislatures.”).

<sup>57</sup> *Id.*

<sup>58</sup> See *id.* at 1816–17.

<sup>59</sup> *Id.* at 1816.

<sup>60</sup> *Id.* at 1817.

<sup>61</sup> *Id.*

clergymen, Galloway and Stephens brought suit against the town board.<sup>62</sup> They alleged that the prayer practice violated the Establishment Clause by preferring Christians over other prayer givers and allowing sectarian references within the content of the prayers.<sup>63</sup> Appealing to the *Marsh* protection of prayer before “legislative and other deliberative public bodies,” the district court dismissed this argument and upheld the prayer practice as constitutional.<sup>64</sup> The Second Circuit reversed the district court’s ruling.<sup>65</sup> It found that because the town council’s practice pulsed with the “steady drumbeat” of Christian prayer, it affiliated Greece with endorsing Christianity.<sup>66</sup>

Upon granting certiorari, the Supreme Court placed the town council’s prayer practice squarely within the scope of *Marsh*’s legislative prayer protection.<sup>67</sup> The decision that Justice Brennan once described as “carving out an exception to the Establishment Clause”<sup>68</sup> matured through *Town of Greece* into a principle in itself. In *Town of Greece*, the Court opined, “*Marsh* stands for the proposition that it is not necessary to define the precise

<sup>62</sup> *Galloway v. Town of Greece*, 732 F. Supp. 2d 195, 196 (W.D.N.Y. 2010).

<sup>63</sup> *Town of Greece*, 134 S. Ct. at 1813.

<sup>64</sup> *Id.; see also Marsh v. Chambers*, 463 U.S. 783, 786 (1983). Rather than identify the predominance of Christian prayer givers as indicative of an official policy of establishment, the district court instead attributed this outcome to the large number of Christian congregations in the community. *Town of Greece*, 134 S. Ct. at 1817. The court likewise found little merit in the argument that the sectarian references included in the prayers propelled them toward a violation of the Establishment Clause. *Id.* The court held that the prayers did not proselytize, and further rejected the notion that *Marsh* required that prayers be non-sectarian. *Id.* The district court noted the Supreme Court’s opinion in *Co. of Allegheny v. ACLU*, in which the Court described the prayers in *Marsh* as constitutionally permissible “because the particular chaplain had ‘removed all references to Christ.’” *Id.* (quoting *Co. of Allegheny*, 492 U.S. 573, 603 (1989)). In describing the district court’s decision, Justice Kennedy writing for the Court explained that this language in *Marsh* did not convince the district court that *Marsh* mandated legislative prayer to be nonsectarian, “at least in circumstances where the town permitted clergy from a variety of faiths to give invocations.” *Town of Greece*, 134 S. Ct. at 1817.

<sup>65</sup> *Galloway v. Town of Greece*, 681 F.3d 20, 34 (2d Cir. 2012).

<sup>66</sup> *Town of Greece*, 134 S. Ct. at 1818. The circuit court further found fault with the behavior of the clergymen during the prayers. *See id.* Visiting prayer givers often inserted inclusive language, such as “let us pray,” into their prayers, faced the audience when praying, and asked audience members to stand or bow their heads. *Id.* (emphasis added). Justice Kagan’s dissent in *Town of Greece* highlighted the significance of the prayer giver’s position during the prayer. *See id.* at 1845 (Kagan, J., dissenting). She noted that despite the Court’s insistence that the prayers were meant for the benefit of the lawmakers, they were nevertheless “addressed directly to the Town’s citizenry,” because the visiting clergymen faced the audience—and not the board members—while praying. *Id.* Also, during the prayer board members openly bowed their heads, and some made the sign of the cross. *Id.* at 1818 (majority opinion). The circuit court stepped back, examined “the interaction of the facts present” in the case, concluded that the prayer practice conveyed a message that the town endorsed Christianity, and declared the practice unconstitutional. *Id.*

<sup>67</sup> *Id.* at 1824 (“*Marsh*, indeed, requires an inquiry into the prayer opportunity as a whole, rather than into the contents of a single prayer.”) (citing *Marsh*, 463 U.S. at 794–95) (citation omitted).

<sup>68</sup> *See Marsh*, 463 U.S. at 796 (Brennan, J., dissenting).

boundary of the Establishment Clause where history shows that the specific practice is permitted.”<sup>69</sup> In one decision, *Marsh*’s “unique history” suddenly became a much larger umbrella under which to find protection; not only did the Court determine that the town board’s prayer practice fit within *Marsh*’s description of legislative prayer, but it also concluded that the sectarian nature of many of the prayers did not render them impermissible under the principles of *Marsh*.<sup>70</sup>

#### *B. The Circuit Court School Board Cases Pre-Town of Greece*

After *Marsh*, courts struggled with determining whether to apply the decision’s holding to local analogs of a state legislature, such as town councils and school boards. The circuits have split in their application of *Marsh*: some assumed a school board to be a “deliberative public body” within the meaning of *Marsh*—but then struck down the school board prayer practice for being too sectarian, and others chose not to apply *Marsh* at all in favor of the *Lemon* and coercion tests.

##### *1. Third and Sixth Circuits: Marsh Does Not Apply*

Both the Third and Sixth Circuits have chosen not to apply the *Marsh* rule to prayers before school board meetings as *Marsh*’s “other deliberative public bodies.”

###### *a. Coles ex rel. Coles v. Cleveland Board of Education—Sixth Circuit*

The Sixth Circuit found fault with the comparison between a school board and a state legislature in *Coles ex rel. Coles v. Cleveland Board of Education*.<sup>71</sup> This decision similarly applied the *Lemon* test and the coercion test from *Lee v. Weisman* to overturn the practice by the Cleveland Board of Education of opening its meetings with a prayer.<sup>72</sup>

In writing the opinion for the court, an exasperated Circuit Judge Gilman confessed that the issue regarding the Cleveland Board of Education’s prayer practice placed the court “squarely between the proverbial rock and a hard place.”<sup>73</sup> The circuit court inched away from the hard place and planted its feet on the rock by applying the *Lemon* test and

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<sup>69</sup> *Town of Greece*, 134 S. Ct. at 1819.

<sup>70</sup> *Id.* at 1820–21.

<sup>71</sup> *Coles ex rel. Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 371, 382 (6th Cir. 1999).

<sup>72</sup> See *id.* at 379–85. See also *supra* notes 38–46 and accompanying text.

<sup>73</sup> 171 F.3d at 371 (“The rock is *Lee v. Weisman*, holding that opening prayers at high school graduation ceremonies violate the Establishment Clause of the First Amendment. The hard place is *Marsh v. Chambers*, ruling that opening prayers are constitutionally permissible at sessions of a state legislature.”) (citations omitted).

the coercion test from *Lee v. Weisman*.<sup>74</sup> The Sixth Circuit based its decision on the unique “constituency” of school boards—“namely, students.”<sup>75</sup> Because students cannot vote, their only means of protecting their individual interests is to appear at school board meetings and voice their opinions.<sup>76</sup> To support its decision, the court pointed toward the fact that a permanent student representative served on the Board of Education.<sup>77</sup> This student’s specific role was to deliver a report at each meeting and provide the students’ perspective in board discussions.<sup>78</sup> Because of the student’s active participation as a member of the board, and because the court determined that school board meetings fell within “the public schools context,”<sup>79</sup> the court overturned the district court’s favorable ruling on the prayer practice.<sup>80</sup>

*b. Doe v. Indian River School District—Third Circuit*

The Third Circuit, in *Doe v. Indian River School District*,<sup>81</sup> relied on the Sixth Circuit’s reasoning in *Coles* and held that *Marsh* did not apply. Due to the school board’s close connection with public schools, the circuit court determined that prayer could be coercive, even though attendance at the board meetings was “not technically mandatory.”<sup>82</sup>

The Indian River School Board members rotated among themselves to deliver the prayer at each meeting.<sup>83</sup> While student attendance was not mandatory, students and their families regularly attended school board meetings to be honored for the students’ accomplishments.<sup>84</sup> In this way, the

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<sup>74</sup> See *id.* at 379–85.

<sup>75</sup> *Id.* at 381.

<sup>76</sup> See *id.*

<sup>77</sup> *Id.* at 383.

<sup>78</sup> *Id.* at 372 (“Beyond the normal dialogue that occurs between board members and students during these public meetings, a student representative regularly sits on the school board itself.”).

<sup>79</sup> *Id.* at 379.

<sup>80</sup> *Id.* at 371. The Sixth Circuit further commented on the unique ruling in *Marsh*: “*Marsh* is one-of-a-kind, and whether its extension to the Cleveland School Board would conflict with *Lee* and the other school prayer cases is the very issue that makes this case a difficult one.” *Id.* at 381.

<sup>81</sup> 653 F.3d 256 (3d Cir. 2011) (holding that River School Board meetings were closer in kind to a school setting than that of a legislative body due to regular student involvement in the meetings).

<sup>82</sup> *Id.* at 275–76. The school board situation can be contrasted with that of a graduation ceremony, at which the Supreme Court has also held that student attendance is not technically mandatory. Nevertheless, attendance by students at graduations is effectively obligatory, because the event is “the one school event the most important for the student to attend.” *Lee v. Weisman*, 505 U.S. 577, 578–79 (1992). See also *Doe ex rel. Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 854 (7th Cir. 2012).

<sup>83</sup> *Indian River Sch. Dist.*, 653 F.3d at 269 (3d Cir. 2011).

<sup>84</sup> *Id.* at 276.

Indian River School Board “deliberately made its meetings meaningful to students in the district.”<sup>85</sup>

In refusing to apply *Marsh*, the Third Circuit classified the *Marsh* ruling as encompassing a “unique history” that did not necessarily extend to deliberative bodies outside of Congress and state legislatures.<sup>86</sup> The circuit court concluded that the “very purpose” of the school board distinguished it from “other deliberative bodies.”<sup>87</sup>

## *2. Fifth and Ninth Circuits: Marsh Applies, but Sectarian School Board Prayers Are Unconstitutional*

Among the circuit courts that have chosen to apply *Marsh*, most found issue nevertheless with the sectarian nature of the school board prayer practices and struck them down. Because in *Marsh* Chaplain Palmer of the Nebraska state legislature attempted to remove from his invocations any overtly sectarian references, the circuit courts interpreted the *Marsh* Court’s holding to limit the deliberative body prayer protection to only non-sectarian prayers. The contested school board prayers in the Fifth and Ninth Circuits were deemed to be too sectarian; thus, the circuit courts did not inquire further into whether *Marsh* should be applied to school boards as deliberative public bodies. They assumed *Marsh* applied simply because either way, the sectarian flavor of the prayers violated the Establishment Clause.

### *a. Doe v. Tangipahoa Parish School Board—Fifth Circuit*

The Fifth Circuit, in *Doe v. Tangipahoa Parish School Board*, decided to apply *Marsh* before determining that the prayers were too sectarian and thus unconstitutional.<sup>88</sup> In *Tangipahoa Parish*, the Fifth Circuit examined four prayers at issue.<sup>89</sup> The plaintiffs claimed these prayers to be “Christian in tenor,” because they contained sectarian references.<sup>90</sup> The circuit court believed that the sectarian nature of the prayers pushed them into realm of Establishment Clause violation; it therefore sidestepped the inquiry into whether school boards could be considered “other deliberative public

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<sup>85</sup> *Id.* at 277.

<sup>86</sup> *Id.* at 280 n.10.

<sup>87</sup> *Id.* at 280.

<sup>88</sup> *Doe v. Tangipahoa Parish Sch. Bd.*, 473 F.3d 188, 202–03 (5th Cir. 2006).

<sup>89</sup> *Id.* at 192 (“The stipulations contained four of the prayers given; each contained a reference to ‘Jesus Christ’ or ‘God’ and ‘Lord.’”).

<sup>90</sup> *Id.* at 193.

bodies” as articulated by *Marsh*.<sup>91</sup> Rather, the court presumed that *Marsh* applied, because the prayers would have been unconstitutional regardless.<sup>92</sup>

The circuit court struggled with the decision of whether to apply the *Marsh* line of cases or the *Lemon* test, which is typically applied to the public school situation.<sup>93</sup> The opinion for the court is accompanied by two additional opinions, and each of the three applies a different analysis and/or reaches a different outcome.<sup>94</sup> Judge Barksdale, writing for the court, first assumed that *Marsh* applied to the school board as a deliberative public body.<sup>95</sup> Under *Marsh*, he held that the four prayers at issue were unconstitutional.<sup>96</sup> Judge Clement wrote that she would apply *Marsh* as well; however, she believed that the prayers *did* fit within *Marsh*’s umbrella of protection because they did not exploit “prayer opportunities to advance one religion over another.”<sup>97</sup> In his separate opinion, Judge Stewart wrote that he would apply the *Lemon* test rather than the *Marsh* rule to reach the conclusion that the prayers were unconstitutional.<sup>98</sup>

#### *b. Bacus v. Palo Verde Unified School District—Ninth Circuit*

The Ninth Circuit, in *Bacus v. Palo Verde Unified School District*,<sup>99</sup> declared the school board’s prayer practice to be unconstitutional, but in doing so implied that a prayer practice that was not as blatantly sectarian as that of the Palo Verde Unified School District may pass constitutional muster.<sup>100</sup> Because the same individual delivered the prayers before each meeting, and because the prayers all invoked the name of Jesus, the circuit court held that such a series of prayers violated the Establishment Clause.<sup>101</sup>

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<sup>91</sup> *Id.* at 202–03.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 196–97.

<sup>94</sup> *Id.* at 205 (Stewart J., concurring in part and dissenting in part); *id.* at 211 (Clement, J., concurring in part and dissenting in part).

<sup>95</sup> *Id.* at 202 (majority opinion) (“[W]e assume *arguendo* the Board is a *Marsh* ‘legislative’ or ‘other deliberative public body.’”).

<sup>96</sup> *Id.* at 205.

<sup>97</sup> *Id.* at 211 (Clement, J., concurring in part and dissenting in part) (“I would hold that *Marsh*, rather than *Lemon*, applies to this deliberative body.”) (internal citations omitted).

<sup>98</sup> *Id.* at 211 (Stewart, J., concurring in part and dissenting in part) (“The *Lemon* test should apply to the practice of the Tangipahoa Parish School Board because the Supreme Court has announced no applicable exception to its normal Establishment Clause jurisprudence that would allow this court to deviate from *Lemon*.”).

<sup>99</sup> 52 F. App’x 355 (9th Cir. 2002).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

In *Bacus*, as in *Tangipahoa Parish*, the circuit court “assum[ed] without deciding” that *Marsh* applied to the school board situation.<sup>102</sup> The Ninth Circuit borrowed language from the *Marsh* holding, stating that while the school board’s prayers did not “proselytize,” they nevertheless operated to “advance[] one faith, Christianity, . . .”<sup>103</sup> Because in this way the individual prayers encroached upon establishment, the Ninth Circuit struck them down.

### C. School Board Reactions to Town of Greece: Reinstituting Prayer Practices at the Start of Meetings

School boards faced with the difficult decision of risking a constitutional violation by holding prayers before meetings or discarding prayer practices altogether met the *Town of Greece* ruling with open arms. These school districts are examining the legal implications of instituting opening invocations in the same manner as the town board in *Town of Greece*. Simultaneously, school boards are also facing litigation for their current prayer practices from organizations such as the Freedom From Religion Foundation.

#### 1. Pickens County School Board, South Carolina

In Pickens County, members of the school board that had restructured its prayer policy only a year earlier<sup>104</sup> quickly proposed an institution of a pre-deliberative prayer practice analogous to that of Greece, in which a variety of clergymen are invited to deliver the invocation. These members worked closely with the board’s attorney and even sought an opinion from the Attorney General of South Carolina to define a prayer practice for Pickens County that would be constitutionally acceptable in light of *Town of Greece*.<sup>105</sup>

The chairman of the school board labored for months to develop a prayer policy that would randomly invite clergymen of different faiths from the community to deliver the prayers, similar to the practice in *Town of*

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<sup>102</sup> *Id.* at 356.

<sup>103</sup> *Id.* at 357 (“The school board argues, and we agree, that the prayers did not disparage other religious faiths, and did not proselytize. But that is not enough. Even assuming that the school board can be treated like a state legislature, which we do not decide, its invocations must not ‘advance any one . . . faith or belief.’”) (quoting *Marsh v. Chambers*, 463 U.S. 783, 794 (1983)).

<sup>104</sup> Since April 2013, the Pickens County School Board had been opening its meetings with a non-sectarian invocation delivered by board members on a rotating basis. See Barnett, *supra* note 2. The school board shifted to this practice after the Freedom From Religion Foundation criticized its earlier practice of allowing voluntary student-led invocations. *Id.*

<sup>105</sup> See Letter from Robert D. Cook, Solicitor Gen., to William F. Halligan, Op. S.C. Att’y Gen., 2014 WL 4659412 (S.C.A.G. Sept. 3, 2014).

*Greece* that the Court upheld. Following months of discussion, the Pickens County School Board decided in late October 2014 to table the question of whether and how to implement a new prayer policy until a later date.<sup>106</sup> The vote surfaced again in March 2015 before a packed audience, when fourteen members of the audience spoke out in support of the new policy, but a tie vote among the six members prevented it from taking effect.<sup>107</sup> For the time being, the Pickens County School Board will continue its practice of allowing the board members to deliver non-sectarian opening prayers on a rotating basis.<sup>108</sup>

### *2. Mesa Public School System, Arizona*

School districts in Arizona are drawing publicity for entering into public discussions regarding their school board prayer practices. The Mesa Public School system was faced with contention by a national organization threatening a lawsuit if the school district did not cease its prayer practice before school board meetings.<sup>109</sup> The school board shifted to a moment of silence before receiving feedback from the majority of community members in favor of the invocations.<sup>110</sup>

### *3. Williamson County School Board, Tennessee*

Williamson County is situated in the Sixth Circuit, where in 1999, the circuit court in *Coles* refused to apply *Marsh* to a school board prayer situation. Since *Town of Greece*, however, members of the Williamson County School Board have been rethinking their long-standing policy of holding a moment of silence prior to meetings and instead have been entertaining discussions regarding the implementation of a prayer policy similar to that of the Greece town council.<sup>111</sup> While they wish to avoid the possibility of overwhelming legal fees, the board members value the opportunity to solemnize the beginning of school board meetings in this

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<sup>106</sup> See *supra* note 6 and accompanying text.

<sup>107</sup> Carpenter, *supra* note 8.

<sup>108</sup> Barnett, *supra* note 2.

<sup>109</sup> Jill Adair, *Mesa School Board Reinstates Prayer Before Meetings*, DESERET NEWS (June 2, 2014, 5:00 AM), <http://www.deseretnews.com/article/865604238/Mesa-school-board-reinstates-prayer-before-meetings.html?pg=all>.

<sup>110</sup> *Id.*

<sup>111</sup> Kevin Walters, *Williamson School Board May Pursue Prayer at Meetings*, THE TENNESSEAN (Oct. 6, 2014, 9:16 PM), <http://www.tennessean.com/story/news/local/williamson/schools/2014/10/06/williamson-school-board-may-pursue-prayers-meetings/16839063/>.

manner and have been exploring the potential repercussions of opening their meetings with prayer.<sup>112</sup>

#### 4. Chino Valley Unified School District Board of Education, California

In November 2014, the Freedom From Religion Foundation (“FFRF”) filed a lawsuit against the Chino Valley School Board, accusing it of proselytizing through its prayer practice.<sup>113</sup> Since at least 2010, the school board has invited religious figures from the community to deliver the invocation before each meeting.<sup>114</sup> In its complaint, the FFRF alleged that the board meetings featured active participation by students and therefore should be considered as integral to the public school system.<sup>115</sup> Therefore, FFRF has demanded that the district court declare the board’s practice unconstitutional and “permanently enjoin the board from any further school-sponsored religious exercises.”<sup>116</sup>

## II. WHY THE PRINCIPLES OF *TOWN OF GREECE* EXTEND TO SCHOOL BOARDS

*Town of Greece* demonstrated that a unit of local government may hold a prayer prior to each meeting for reasons central to the historical and civic traditions of our nation.<sup>117</sup> The Court reinforced the principle of *Marsh* that prayers before meetings of “legislative and other deliberative public bodies”<sup>118</sup> do not violate the Establishment Clause.<sup>119</sup> Because school boards are deliberative public bodies and are nearly identical in structure to town boards like that in *Town of Greece*, school boards also should be allowed to solemnize the start of meetings with a brief prayer.

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<sup>112</sup> *Id.*

<sup>113</sup> Complaint for Equitable Relief and Damages, Freedom From Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ., No. 5:14-CV-2336 (C.D. Cal. Nov. 13, 2014). See also FFRF Sues Praying School Board in Chino Valley, Calif., FREEDOM FROM RELIGION FOUND. (Nov. 14, 2014), <http://ffrf.org/news/news-releases/item/21768-ffrf-sues-praying-school-board-in-chino-valley-calif>.

<sup>114</sup> Complaint for Equitable Relief and Damages, *supra* note 113, at \*49.

<sup>115</sup> *Id.*

<sup>116</sup> FREEDOM FROM RELIGION FOUND., *supra* note 113. See also Grace Wong, *Chino Valley School Board Denies Violating Church-and-State Separation*, INLAND VALLEY DAILY BULLETIN (Jan. 15, 2015, 11:24 PM), <http://www.dailybulletin.com/social-affairs/20150115/chino-valley-school-board-denies-violating-church-and-state-separation>.

<sup>117</sup> See *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1819–20 (2014).

<sup>118</sup> *Marsh v. Chambers*, 463 U.S. 783, 786 (1983).

<sup>119</sup> *Town of Greece*, 134 S. Ct. at 1818–19.

*A. As Deliberative Public Bodies, School Boards Are Nearly Identical to Town Boards*

School boards and town boards exhibit extensive similarities in their structure and deliberative powers. Both share approximately the same number of members and the fact that members are elected adults and often volunteers.<sup>120</sup> Both serve a primarily deliberative function, and both experience the occasional presence of students.

*I. Nearly Identical in Size*

A school board is congruent to a town board in size. Both types of boards are small, and meetings involve a great deal of interaction with the community citizens. In her dissent in *Town of Greece*, Justice Kagan provided a snapshot of a typical town meeting in Greece, including the number of members:

The Town Supervisor, Town Clerk, Chief of Police, and four Board Members sit at the front of the meeting room on a raised dais. But the setting is intimate: There are likely to be only 10 citizens or so in attendance. A few may be children or teenagers, present to receive an award or fulfill a high school civics requirement.<sup>121</sup>

Justice Kennedy addressed the more intimate setting of a town board meeting in comparison to the grander form of the state legislative session. “Citizens attend town meetings,” Justice Kennedy observed, “to accept awards; speak on matters of local importance; and petition the board for action that may affect their economic interests, such as the granting of permits, business licenses, and zoning variances.”<sup>122</sup> Ultimately, the Court determined that the size of the town board did not affect the constitutional relevance of an opening prayer before it as a deliberative public body.<sup>123</sup>

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<sup>120</sup> While many school boards consist of adult members only, some states allow school boards to include the participation of a student representative. See *infra* notes 213–19 and 251–53, as well as the accompanying text, for a discussion of special situations involving student members of school boards.

<sup>121</sup> *Town of Greece*, 134 S. Ct. at 1846 (Kagan, J., dissenting).

<sup>122</sup> *Id.* at 1825 (majority opinion).

<sup>123</sup> Justice Kennedy remarked on the significance of this brief acknowledgment of the role of religion in the lives of the members, explaining “[f]or members of town boards and commissions, who often serve part-time and as volunteers, ceremonial prayer may also reflect the values they hold as private citizens.” *Id.* at 1826.

Like the town board described in *Town of Greece*, many school boards differ negligibly in the number of members. For example, the school board before the Sixth Circuit in *Coles* consisted of seven members.<sup>124</sup> The school board from *Tangipahoa Parish*, where the Fifth Circuit weighed in on whether *Marsh* applied to the board as a deliberative public body, currently consists of ten members, including a president, vice president, and superintendent.<sup>125</sup> The Indian River School District likewise has ten members in its school board.<sup>126</sup> Hovering at around six,<sup>127</sup> a typical school board's members might be numerous enough to match the number of players on a football team.<sup>128</sup>

## 2. Nearly Identical in Membership

Not only are school boards and town boards analogous in terms of their number of members, but they also are nearly identical in membership.<sup>129</sup> Like town boards, most school boards are composed of elected adult members. For instance, the governor of Louisiana filed an amicus brief in support of the school board in *Doe v. Tangipahoa Parish School Board*, in which he described the school board meetings as “business meetings of adults charged with policymaking duties.”<sup>130</sup> Adults are not “impressionable students.”<sup>131</sup> They are therefore able to tolerate and even appreciate a brief prayer spoken by a visiting person of faith at the start of the school board meeting.<sup>132</sup> In addition, board members and attending citizens are often free to enter and leave the meeting room at will, and therefore are not compelled

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<sup>124</sup> Russo, *supra* note 14, at 424.

<sup>125</sup> About the TPSS Board, TANGIPAHOA PARISH SCH. SYS., <http://www.tangischools.org/domain/51> (last visited Feb. 1, 2015).

<sup>126</sup> Board Members, INDIAN RIVER SCH. DIST., [http://www.irsd.net/pages/Indian\\_River\\_School\\_District/Discover\\_IRSD/7189720675311210626/Members](http://www.irsd.net/pages/Indian_River_School_District/Discover_IRSD/7189720675311210626/Members) (last visited Feb. 1, 2015). See *Indian River Sch. Dist.*, 653 F.3d at 263 (stating that the school board consists of ten members who serve three-year terms).

<sup>127</sup> FREDERICK M. HESS & OLIVIA MEEKS, SCHOOL BOARDS CIRCA 2010: GOVERNANCE IN THE ACCOUNTABILITY ERA 27 (2010), available at <http://files.eric.ed.gov/fulltext/ED515849.pdf>.

<sup>128</sup> In American football, each team has eleven players on the field at any one moment during the game.

<sup>129</sup> An exception to this parallel structure involves school boards that include a student as an actual member of the board, rather than a representative to the board. See *infra* notes 205–11 and 243–47, and accompanying text.

<sup>130</sup> Amended Brief of Amici Curiae the State of Louisiana—and the Governor of Louisiana in Support of Appellants at \*1, *Doe v. Tangipahoa Parish Sch. Bd.*, 473 F.3d 188 (5th Cir. 2006) (No. 05–30294), 2005 WL 5774136, at \*1.

<sup>131</sup> See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 116 (2001) (relating mandatory attendance requirements to state advancement of religion when enforced upon “impressionable students”).

<sup>132</sup> See *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1823 (2014).

to remain in their seats.<sup>133</sup> The Court in *Town of Greece* recognized this same trait in town board meetings: “In this case, as in *Marsh*, board members and constituents are ‘free to enter and leave with little comment and for any number of reasons.’”<sup>134</sup>

### *3. Nearly Identical in Deliberative Function*

Both school boards and town boards perform a combination of deliberative and administrative functions.<sup>135</sup> Justice Kagan correctly identified the Greece town board as a “kind of hybrid,”<sup>136</sup> possessing both legislative and administrative functions. In Justice Alito’s concurrence in *Town of Greece*, he pointed out that the prayer preceded the “essentially legislative” portion of the town board meeting.<sup>137</sup> He did so in response to allegations by the respondents that the prayers preceded a portion of the meeting that was similar in nature to an adjudicatory proceeding.<sup>138</sup> The legislative nature of the town board meeting did not change when specific requests from citizens—such as a request for the installation of a stop light at a particular intersection—arose during this portion of the meeting.<sup>139</sup>

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<sup>133</sup> See *id.* at 1827.

<sup>134</sup> *Id.* at 1827 (quoting *Lee v. Weisman*, 505 U.S. 577, 597 (1992)). Justice Kennedy referred to the section of the Court’s opinion in *Lee* that compared this aspect of legislative sessions with the more formal atmosphere at a graduation. *Id.* Justices Scalia and Thomas did not join this part of the opinion. *Id.*

<sup>135</sup> During the *Town of Greece* oral arguments before the Supreme Court, an issue that arose was the fact that the town board performed both administrative and legislative functions. Transcript of Oral Argument at 31, *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014) (No. 12–696). The Court did not find this dual nature of the town board to affect the overall purpose and effect of the opening prayer. *Town of Greece*, 134 S. Ct. at 1824–25.

<sup>136</sup> *Town of Greece*, 134 S. Ct. at 1845 (Kagan, J., dissenting) (“The town hall here is a kind of hybrid. Greece’s Board indeed has legislative functions, . . . and that means some opening prayers are allowed there. But . . . the Board’s meetings are also occasions for ordinary citizens to engage with and petition their government, often on highly individualized matters. That feature calls for Board members to exercise special care to ensure that the prayers offered are inclusive—that they respect each and every member of the community as an equal citizen.”). Justice Kagan further noted that this “citizen-centered venue” distinguished the *Town of Greece* situation from that in *Marsh*: “I do not remotely contend that ‘prayer is not allowed’ at participatory meetings of ‘local government legislative bodies’; . . . Rather, what I say . . . is that in this citizen-centered venue, government officials must take steps to ensure—as none of Greece’s Board members ever did—that opening prayers are inclusive of different faiths, rather than always identified with a single religion.” *Id.* at 1845, n.2 (internal citations omitted).

<sup>137</sup> *Id.* at 1829 (Alito, J., concurring).

<sup>138</sup> *Id.* (“The prayer took place at the beginning of the meetings. . . . No prayer occurred before this second part of the proceedings, and therefore I do not understand this case to involve the constitutionality of a prayer prior to what may be characterized as an adjudicatory proceeding. The prayer preceded only the portion of the town board meeting that I view as essentially legislative.”).

<sup>139</sup> *Id.*

Similar to a town board, a school board deliberates, debates, and votes on policies affecting the school system where it is located. The Louisiana Amicus Brief in *Tangipahoa Parish* described school boards as executing “quasi-legislative and policymaking functions.”<sup>140</sup> Likewise, the Fifth Circuit’s opinion in *Tangipahoa Parish* characterized the school board as a “deliberative body that acts in the public interest.”<sup>141</sup> In doing so, the circuit court referenced the Louisiana constitution, which defines “political subdivision” as consisting of local entities, including school boards, “authorized by law to perform governmental functions.”<sup>142</sup> Overall, these policymaking functions, coupled with the parallel structure of both a school board and a town board, support the logical extension of the principles of *Town of Greece* to school boards as deliberative public bodies.<sup>143</sup>

#### 4. *Nearly Identical in that Both Experience the Occasional Presence of Students*

Although school boards are deliberative bodies of elected adults, they do experience the occasional attendance of students.<sup>144</sup> However, this fact does not alter the opening prayer’s singular purpose of solemnizing the occasion for the board members.<sup>145</sup> Both *Marsh* and *Town of Greece* highlighted the significance of a predominantly adult audience when the

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<sup>140</sup> Amended Brief of Amici Curiae the State of Louisiana—and the Governor of Louisiana in Support of Appellants, *supra* note 130, at \*2.

<sup>141</sup> Doe v. Tangipahoa Parish Sch. Bd., 473 F.3d 188, 192 (5th Cir. 2006).

<sup>142</sup> *Id.* at 191; LA. CONST. art. VI, § 44(2).

<sup>143</sup> Over a decade before *Town of Greece* authorized the constitutionality of prayer before local deliberative public bodies, Judge Ryan’s dissenting opinion in *Coles* advocated similar treatment of both school boards and other legislative bodies. *See Coles ex rel. Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 387 (6th Cir. 1999) (Ryan, J., dissenting) (“The Cleveland Board of Education is a statutory body of citizens elected by the people of Cleveland for the purpose of administering the Cleveland public school system. It is an administrative/legislative unit of government that has the power of taxation and eminent domain, and it is mandated by statute to conduct the business affairs of the Cleveland Public Schools. These affairs include buying and selling real estate, constructing buildings, establishing educational policy, hiring and firing administrators and teachers, negotiating with labor unions, and occasionally conducting ceremonies honoring student achievement. Even if there were no *Marsh* decision . . . my colleagues’ attempt to make the meetings of the Cleveland Board of Education equate with the regular educational environment of a primary or secondary public school classroom would be totally unconvincing.”). In light of *Town of Greece*, Judge Ryan’s description further links the characteristics of many school boards to those of town boards as deliberative public bodies.

<sup>144</sup> Justice Alito observed this characteristic of the Greece town council meetings. *See Town of Greece v. Galloway*, 134 S. Ct. 1811, 1832 (2014) (Alito, J., concurring) (“Nor is there anything unusual about the occasional attendance of students . . . .”). In addition to allowing the voluntary attendance of students as spectators at school board meetings, a number of states allow students to serve on school boards. *See Students Serving on Local School Boards*, NAT’L SCH. BDS. ASS’N, (Feb. 2009), available at <https://www.nsba.org/sites/default/files/reports/Students-on-school-boards.pdf>.

<sup>145</sup> A special case that will be discussed in a separate section involves student members of school boards. *See infra* notes 213–19 and accompanying text.

prayer giver delivered the invocation. In *Town of Greece*, the Court mentioned, “Our tradition assumes that adult citizens, firm in their own beliefs, can tolerate and perhaps appreciate a ceremonial prayer delivered by a person of a different faith.”<sup>146</sup>

Before the Court’s ruling in *Town of Greece*, the circuit courts struggled with the potential coercion that may occur when students are present at a school board meeting. In *Coles*, the Sixth Circuit found issue with the fact that students often attended school board meetings to accept awards and receive honors.<sup>147</sup> However, in *Town of Greece*, Justice Kennedy noted that high school football players were honored during the ceremonial portion of the Greece town council’s meeting.<sup>148</sup> While students may attend school board meetings for various reasons, such meetings are not student-centered activities similar in kind to those at which the Court has previously declared invocations to violate the Establishment Clause.<sup>149</sup>

#### *B. As Deliberative Public Bodies, School Boards Should Be Allowed to Open Sessions with a Brief Prayer*

Because school boards are nearly identical to town boards, a school board should be able to do what a town board does for the purposes of deliberative public body prayer. In both the school board and the *Town of Greece* scenarios, the opening prayer is limited by its placement during the ceremonial portion at the start of meetings, where it is meant to solemnize the occasion and promote a spirit of cooperation among board members.<sup>150</sup> The ears to which the prayer is directed are those of the board members, not the citizens in attendance.<sup>151</sup> Both of these factors contribute to the invocation’s overall purpose to promote a sense of “wisdom, courage,

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<sup>146</sup> *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1823 (2014).

<sup>147</sup> *Coles*, 171 F.3d at 372 (noting that students not only attended school board meetings, but actively participated in the meeting’s agenda).

<sup>148</sup> *Town of Greece*, 134 S. Ct. at 1827.

<sup>149</sup> See *Santa Fe Ind. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (discussing student initiated prayer at high school football game); see also *Lee v. Weisman*, 505 U.S. 577 (1992) (discussing prayer at high school graduation).

<sup>150</sup> See *Town of Greece*, 134 S. Ct. at 1823 (“The relevant constraint derives from its place at the opening of legislative sessions, where it is meant to lend gravity to the occasion and reflect values long part of the Nation’s heritage.”). See also, e.g., *Regular School Board Meeting Minutes, Lake Ridge Schools, Lake County, Indiana* (July 28, 2014), available at <http://www.lakeridge.k12.in.us/cms/lib7/IN01000416/Centricity/Domain/6/Minutes%207.28.14.pdf> (listing the names of the board members who delivered the invocation and officially called the meeting to order).

<sup>151</sup> *Town of Greece*, 134 S. Ct. at 1825. Justice Kennedy drew from the district court’s language in *Marsh* to identify the prayer practice as an “internal act.” *Id.* (quoting *Chambers v. Marsh*, 504 F. Supp. 585, 588 (D. Neb. 1980)).

discernment, and a single-minded desire to serve the common good” among the board members prior to making deliberative decisions.<sup>152</sup>

*1. The Opening Invocation Has a Universal Purpose To Solemnize the Occasion and Encourage a Sense of Unity Prior to Deliberation*

In *Marsh*, Justice Burger noted that “[t]o invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an ‘establishment’ of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country.”<sup>153</sup> This unifying exercise is not new. The Court noted in *Town of Greece* that the *Marsh* Court found the Nebraska legislature’s prayers constitutional “not because they espoused only a generic theism but because our history and tradition have shown that prayer in this limited context could ‘coexist[ ] with the principles of disestablishment and religious freedom.’”<sup>154</sup>

School board members who wish to begin their meetings with this unifying exercise may turn to the language of *Town of Greece* for a description of the meaning of the opening prayer. The Court described the prayer practice of the town council in Greece, New York as “intended to place town board members in a solemn and deliberative frame of mind.”<sup>155</sup> Writing for the Court, Justice Kennedy noted, “As practiced by Congress since the framing of the Constitution, legislative prayer lends gravity to public business, reminds lawmakers to transcend petty differences in pursuit of a higher purpose, and expresses a common aspiration to a just and peaceful society.”<sup>156</sup> Justice Kennedy’s remarks broaden the application of a prayer practice to serve all types of deliberative public bodies, including school boards.<sup>157</sup>

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<sup>152</sup> *Town of Greece*, 134 S. Ct. at 1824 (quoting App. 98a–99a). These words are part of the invocation that Rev. Richard Barbour delivered before the September 2006 Greece town board meeting. *Id.*

<sup>153</sup> *Marsh v. Chambers*, 463 U.S. 783, 792 (1983).

<sup>154</sup> *Town of Greece*, 134 S. Ct. at 1820 (quoting *Marsh*, 463 U.S. at 786).

<sup>155</sup> *Id.* at 1816.

<sup>156</sup> *Id.* at 1818.

<sup>157</sup> Justice Kennedy’s connection between the opening prayer of a small town council meeting and that of the First Congress represents a significant leap from what lower courts post-*Marsh* have interpreted as the meaning of legislative prayer. The *Town of Greece* concurring and dissenting justices mounted a painting metaphor to illustrate their arguments. Justice Kagan in her dissent drew a picture of a typical morning in the Nebraska legislature to highlight the distinctions between this legislative body and the Greece town council. *Id.* at 1846 (Kagan, J., dissenting). In Justice Alito’s concurring opinion, he removed the dissent’s “morning in Nebraska circa 1983” painting from the wall and instead mounted an image of “‘morning in Philadelphia,’ September 1774.” *Id.* at 1832 (Alito, J., concurring). He did so to underscore the Founders’ purpose behind the opening prayer to the First Continental Congress, to overcome entrenched divisions and ease the process of uniting the colonies as one nation. *Id.* at 1833.

### *2. The Opening Invocation Is Delivered for the Board Members*

The invocation at the start of a school board meeting is not intended to gratify spectators in attendance, but rather to promote cooperation among the board members as they prepare to represent their respective interests in deliberation. As Justice Kennedy explained in *Town of Greece*, “The principal audience for these invocations is not, indeed, the public, but the lawmakers themselves, who may find that a moment of quiet reflection sets the mind to a higher purpose and thereby eases the task of governing.”<sup>158</sup> Justice Kennedy’s words echo those of Justice Burger in *Marsh*, that “[t]o invoke Divine guidance on a public body *entrusted with making the laws*”<sup>159</sup> does not violate the Establishment Clause. The purpose of the prayer, the “Divine guidance” invoked, is not directed toward all in attendance, but specifically toward lawmakers to ease the deliberative process.

### *3. The Opening Invocation Need Not Be Non-Sectarian*

For a school board to adhere closely to the prayer practice that was upheld in *Town of Greece*, it need not dictate the content of each prayer. The *Town of Greece* Court did not view *Marsh* as requiring only non-sectarian prayer.<sup>160</sup> In *Town of Greece*, the Court held that as long as the prayer practice did not “over time denigrate, proselytize, or betray an impermissible government purpose,”<sup>161</sup> any sectarian quality present in the prayers themselves did not have to be diluted. To attempt to do so would “mandate a civic religion” that overrides “any but the most generic reference to the sacred.”<sup>162</sup>

### *4. The Opening Invocation Is Limited by Its Placement at the Start of the Meeting, Before Actual Deliberation Occurs*

In *Town of Greece*, the Court noted that the prayer’s placement at the start of each session signified that it was “meant to lend gravity to the occasion and reflect values long part of the Nation’s heritage.”<sup>163</sup> This

<sup>158</sup> *Id.* at 1825 (majority opinion). Justices Thomas and Scalia did not join this part of the opinion.

<sup>159</sup> *Marsh*, 463 U.S. at 792 (emphasis added).

<sup>160</sup> See *Town of Greece*, 134 S. Ct. at 1821 (“*Marsh* nowhere suggested that the constitutionality of legislative prayer turns on the neutrality of its content.”). On the contrary, the *Town of Greece* Court referenced clear language in the *Marsh* opinion that indicated otherwise: “[T]he Court instructed that the ‘content of the prayer is not of concern to judges,’ provided ‘there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief.’” *Id.* at 1821–22 (quoting *Marsh*, 463 U.S. at 794–95).

<sup>161</sup> *Id.* at 1824.

<sup>162</sup> *Id.* at 1822.

<sup>163</sup> *Id.* at 1823.

“legitimate function” is achieved through “[p]rayer that is solemn and respectful in tone, that invites lawmakers to reflect upon shared ideals and common ends before they embark on the fractious business of governing.”<sup>164</sup> Local school board members echo the Court’s observation: “[U]ltimately the business of what we are trying to do outweighs the first minute and a half of a board meeting . . . . [I]t’s not something that ultimately affects the students.”<sup>165</sup> Justice Blackmun’s concurring opinion in *Lee v. Weisman* likewise supports an argument for prayer delivered before a deliberative body in a limited context: “Neither a State nor the Federal Government can *pass laws* which aid one religion, aid all religions, or prefer one religion over another.”<sup>166</sup> An opening prayer is delivered during the ceremonial portion of the meeting and does not involve the passage of laws at all.

### III. THE DISTINCTIONS BETWEEN SCHOOL BOARDS AND TOWN BOARDS ARE NOT CONSTITUTIONALLY RELEVANT FOR THE PURPOSES OF DELIBERATIVE PUBLIC BODY PRAYER

Any structural distinctions that exist between school boards and town boards are not constitutionally relevant for the limited purpose of an opening invocation at meetings of deliberative public bodies. Though school boards determine policies that directly affect public schools, in many cases their meetings are not student-centered activities. Unlike graduations and football games, at which invocations are accompanied by coercion concerns, student attendance at school board meetings is not a central aspect of the educational experience. In addition, unlike the formal atmosphere of a graduation ceremony, school board meetings are open and informal. Board members and citizens in attendance may come and go as they please.

Prayer before school board meetings is also not outside the tradition of deliberative public body prayer. The Court in *Town of Greece* articulated a broad tradition of deliberative body prayer that was not limited to the specific historical tradition of the Greece town board’s prayer practice.<sup>167</sup> Not only may school boards draw from this broad tradition of deliberative

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<sup>164</sup> *Id.*

<sup>165</sup> These words were spoken by a member of the Williamson County School Board in Tennessee, which is currently contemplating a reinstatement of its prayer practice. Walters, *supra* note 111.

<sup>166</sup> *Lee v. Weisman*, 505 U.S. 577, 600 (1992) (Blackmun, J., concurring) (referring to *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1 (1947)) (emphasis added).

<sup>167</sup> *Town of Greece*, 134 S. Ct. at 1824 (“The prayers delivered in the Town of Greece do not fall outside the tradition this Court has recognized.”).

body prayer, but they may also reference specific historical accounts of invocations delivered at school board meetings.

#### *A. Unlike Most School-Affiliated Events, School Board Meetings Are Not Student-Centered Venues*

The district court opinion in *Doe v. Indian River School District*, when paired with the principles articulated in *Town of Greece*, highlights the difference between school boards and the public schools they represent: “[B]oard meetings are not analogous to school extracurricular activities, because the former are ‘part of a complete educational experience’ and ‘important to many students.’ . . . Attending a board meeting, on the other hand, is ‘at best incidental to a student’s public school experience.’”<sup>168</sup> In other words, school board meetings of elected adult citizens do not implicate the same concerns of coercive religious pressure that would accompany prayer practices during student-centered activities.

The opening invocation at a school board meeting does not activate the same level of concern for the possibility of coercion as would a prayer delivered to students in a classroom. The school board’s association with the administrative activities of the school does not affect the limited context of the prayer or cause it to threaten an establishment of religion. As one scholar recently noted, “Naturally, school boards look after the well-being of students, but that is no different from other legislative bodies concerned with education, including the Nebraska state legislature.”<sup>169</sup> Even in *Marsh*, the Court recognized that association with public schools does not *per se* result in establishment: “We conclude that legislative prayer presents no more potential for establishment than the provision of school transportation, [or] beneficial grants for higher education.”<sup>170</sup> The greater concern behind the Court’s strict approach to student prayer is the fact that the prayer is directed toward students.<sup>171</sup> In *Lee v. Weisman*, the Court rejected the acceptability

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<sup>168</sup> Doe v. Indian River Sch. Dist., 653 F.3d 256, 267 (3d Cir. 2011) (quoting Doe v. Indian River Sch. Dist., 685 F. Supp. 2d 524, 539 (D. Del. 2010)).

<sup>169</sup> Imperatore, *supra* note 9, at 849; *see also* Marsh v. Chambers, 463 U.S. 783 (1983).

<sup>170</sup> *Marsh*, 463 U.S. at 791 (citations omitted). *See generally* Everson, 330 U.S. at 67 (holding that the First Amendment did not prohibit the use of taxpayer funds to pay the bus fares of school buses of parochial schools).

<sup>171</sup> *See, e.g.*, Santa Fe Ind. Sch. Dist. v. Doe, 530 U.S. 290, 312–13 (2000) (observing that high school home football games are gatherings of the entire school community and that the delivery of a prayer prior to the game impermissibly coerces students in attendance).

of ever “persuad[ing] or compel[ling] a student to participate in a religious exercise.”<sup>172</sup>

The atmosphere of a school board meeting further distinguishes it from the school setting. In *Lee v. Weisman*, the Court found that a school’s facilitating an invocation during a graduation had a coercive effect on the students in attendance.<sup>173</sup> In contrast to the formal setting of a high school graduation in *Lee*, the casual atmosphere of the Greece town board meetings permitted “enter[ing] and leav[ing] with little comment and for any number of reasons.”<sup>174</sup> Due to the similarly informal atmosphere of a school board meeting, citizens who enter and exit during the opening prayer are not viewed as dissenters. Likewise, quiet acceptance of a visiting prayer giver’s opening invocation is not interpreted as conforming to the particular ideology expressed.<sup>175</sup>

#### *B. Prayer Before School Boards Is Not Outside of the Tradition of Deliberative Public Body Prayer that the Supreme Court Has Recognized*

The tradition of prayer at the start of sessions of deliberative public bodies is not limited to the specific tradition of a particular town council’s prayer, but rather encompasses a tradition that is as diverse as our Nation.<sup>176</sup> Following the Court’s decision in *Marsh*, many lower courts interpreted the history to which *Marsh* appealed as a narrow one, bolstered both by the state legislature’s 100-year-old prayer practice and that of Congress, which has lasted for over 200 years. In *Town of Greece*, the Court determined that town councils too fell under this umbrella of history. Justice Kennedy, writing for the Court, described the town council’s prayer practice as following “a

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<sup>172</sup> *Lee*, 505 U.S. at 599. Justice Blackmun’s concurrence in *Lee* highlights the Court’s finding that the graduation prayer was unconstitutional “because the State ‘in effect required participation in a religious exercise.’” *Id.* at 604 (Blackmun, J., concurring) (quoting *id.* (majority opinion) at 594). Justice Blackmun further argued that “[g]overnment pressure to participate in a religious activity is an obvious indication that the government is endorsing or promoting religion.” *Id.* (Blackmun, J., concurring). See *supra* notes 38–46 and accompanying text.

<sup>173</sup> *Id.*

<sup>174</sup> *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1827 (2014) (quoting *Lee*, 505 U.S. at 597). This language from the *Lee* Court was drawn from a description of the opening of the state legislature in *Marsh*, which the *Lee* Court determined “cannot compare with the constraining potential of the one school event most important for the student to attend.” *Lee*, 505 U.S. at 597. In *Town of Greece*, Justice Kennedy elaborated on this notion: “Should nonbelievers choose to exit the room during a prayer they find distasteful, their absence will not stand out as disrespectful or even noteworthy.” *Town of Greece*, 134 S. Ct. at 1827. Justices Scalia and Thomas did not join this part of the opinion.

<sup>175</sup> *Town of Greece*, 134 S. Ct. at 1827.

<sup>176</sup> In *Town of Greece*, the Court highlights the evolution of Congress’ pre-deliberative prayer practice as representative of our nation’s growing religious diversity, in that it does not “proscrib[e] sectarian content but . . . welcom[es] ministers of many creeds.” *Id.* at 1820–21.

tradition practiced by Congress and dozens of state legislatures.”<sup>177</sup> The Court compared the “consistent practice” of prayer by the Nebraska state legislature in *Marsh* to that of the Greece town council.<sup>178</sup> “Although no information has been cited by the parties to indicate how many local legislative bodies open their meetings with prayer, this practice too has historical precedent.”<sup>179</sup> Even though the Greece town council had been opening its sessions with a prayer for a little over a decade,<sup>180</sup> the Court held that its prayers reverberated with a longstanding tradition of prayer before deliberative public bodies.

In comparison, many of the school boards whose prayer practices have been at issue have been conducting opening invocations for a much longer period of time than the Greece town board. In *Doe v. Tangipahoa Parish School Board*, the Fifth Circuit noted that the school board’s prayer practice “ha[d] been followed since at least 1973.”<sup>181</sup> Likewise, in *Doe v. Indian River School District*, prayers had been recited at the opening of the school board’s meetings since its inception in 1969.<sup>182</sup> Even the more recent institution of a prayer practice in *Coles ex rel. Coles v. Cleveland Board of Education* still took place seven years before the town of Greece began opening its board sessions with prayer.<sup>183</sup> Not only are school boards able to claim the broader history of prayer before deliberative public bodies, but many also may assert their own individual history of opening sessions with prayer.

In addition to the broader history of legislative prayer, school boards have enjoyed a more specific historical tradition of invocations at the start of meetings.<sup>184</sup> At least eight states demonstrate historical records of prayers that were recited during school board meetings, dating back to the early 19th century. These states include Pennsylvania, Massachusetts, Iowa, Missouri, North Carolina, Wisconsin, Michigan, and New York.<sup>185</sup> In Pennsylvania,

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<sup>177</sup> *Id.* at 1816.

<sup>178</sup> *Id.* at 1819.

<sup>179</sup> *Id.* (citing CITY COUNCIL OF BOSTON, REPORTS OF PROCEEDINGS OF THE CITY COUNCIL OF BOSTON FOR THE YEAR COMMENCING JAN. 1, 1909, AND ENDING FEB. 5, 1910, 1–2 (1910)).

<sup>180</sup> *Id.* at 1816 (stating that the town council began its opening invocation in 1999).

<sup>181</sup> *Doe v. Tangipahoa Parish Sch. Bd.*, 473 F.3d 188, 192 (5th Cir. 2006).

<sup>182</sup> *Doe v. Indian River Sch. Dist.*, 653 F.3d 256, 261 (3d Cir. 2011).

<sup>183</sup> *Coles ex rel. Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 372–73 (6th Cir. 1999) (stating that the board president believed the opening invocation assuaged the “strife and acrimony” that plagued board meetings and in turn promoted a “more businesslike and professional decorum”).

<sup>184</sup> Brief of Amici Curiae Family Research Council and Louisiana Family Forum – Attorneys Resource Council in support of Defendants-Appellants’ Supplemental Brief for Rehearing En Banc, *Doe v. Tangipahoa Parish Sch. Bd.*, 494 F.3d 494 (5th Cir. 2007) (No. 05-30294), 2007 WL 2735330, at \*3.

<sup>185</sup> *Id.* at \*3–11.

minutes of public school board meetings from 1820 contain the texts of the invocations delivered.<sup>186</sup> In Massachusetts, the *Common School Journal* for the year 1842 explained that public school boards in Massachusetts could have clergymen as members.<sup>187</sup> The *Journal of the Board of Education of the State of Iowa* contains several references to invocations delivered during school board sessions in the year 1859, as well as the names of the pastors who delivered them.<sup>188</sup> In *A History of Public Schools in North Carolina*, the author notes that each year delegates were chosen from each school board to attend the statewide delegation in 1859, and a large portion of the delegates were “ministers of the gospel.”<sup>189</sup> In Wisconsin, minutes from board meetings dating back to 1857 denote opening prayers, as well as the names of the reverends that delivered them, including some members of the board themselves.<sup>190</sup> To the extent that an argument for school board prayer can be made based upon its historical tradition, these records show that school boards have long been solemnizing the beginning of their meetings with a brief invocation.

#### IV. TOWN OF GREECE ERODES SCHOOL BOARD CIRCUIT COURT PRECEDENT

School board circuit court precedent followed two lines of analysis before *Town of Greece*. The Third and Sixth Circuits declined to apply the principles of *Marsh* to the school board setting.<sup>191</sup> The Fifth and Ninth Circuits assumed that *Marsh* did apply to school boards as deliberative bodies, but then struck down the prayers at issue as unconstitutional because

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<sup>186</sup> *Id.* at \*4 (“Desirous, notwithstanding, of being ever mindful that human exertions for advancing the welfare of mankind, can only prove availing through the interposition, and blessing, of the beneficent Ruler of all things, it is incumbent upon us to commend these humble efforts, and purposes, to the favour of Heaven.” (quoting SECOND ANNUAL REPORT OF THE CONTROLLERS OF THE PUBLIC SCHOOLS OF THE FIRST SCHOOL DISTRICT OF THE STATE OF PENNSYLVANIA 7 (1820))).

<sup>187</sup> *Id.* at \*6 (citing *Fifth Annual Report of the Secretary of the Board of Education*, 4 COMMON SCH. J. 321, 323 (1845) (stating that the State Normal School at Bridgewater dedication ceremony began after a reverend delivered an introductory prayer)).

<sup>188</sup> Brief of Amici Curiae, *supra* note 184, at \*8 (“Resolved. That the several clergymen of this city be invited to open our sessions by prayer, in such order as the President of the Board may think proper.” (quoting JOURNAL OF THE BOARD OF EDUCATION OF THE STATE OF IOWA, AT ITS SECOND SESSION, DECEMBER, A.D. 1859, 5 (1860))).

<sup>189</sup> *Id.* at \*9–10 (quoting M.C.S. NOBLE, A HISTORY OF THE PUBLIC SCHOOLS OF NORTH CAROLINA 175 (1930)) (“Sixty-five of the delegates were women and seventeen were ministers of the gospel – a matter of statistics which shows that . . . a large proportion of the teachers were preachers.”).

<sup>190</sup> *Id.* (citing PROCEEDINGS OF THE BOARD OF REGENTS OF NORMAL SCHOOLS AND THE REGULATIONS ADOPTED AT THEIR FIRST MEETING HELD AT MADISON, JULY 15, 1857, 6 (1857)).

<sup>191</sup> See *Doe v. Indian River Sch. Dist.*, 653 F.3d 256, 259 (3d Cir. 2011); see also *Coles ex rel. Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 371 (6th Cir. 1999).

they were not non-sectarian.<sup>192</sup> By applying *Marsh* to the opening prayers of a local town board and ruling that the prayers need not be non-sectarian, the *Town of Greece* Court has uprooted the standard *Marsh* analysis. This more tolerant approach has caused a doctrinal erosion of the circuit court precedent concerning school board prayer practices.

#### *A. Third and Sixth Circuits: Prior Reasons for Not Applying Marsh Are Now Eroded by Town of Greece*

Before *Town of Greece*, the Third and Sixth Circuits both halted their analyses at the inquiry of whether *Marsh* applied, holding that *Marsh* did not apply to the school board situation. The Third Circuit in *Indian River* held that the school board's prayer practice should be subject to a *Lee* and *Lemon* analysis due to its close connection to public schools.<sup>193</sup> The court cited the Supreme Court's ruling in *Edwards v. Aguillard* that Louisiana's "Creationism Act"<sup>194</sup> was a violation of the Establishment Clause.<sup>195</sup> The *Edwards* Court chose to apply the *Lemon* test instead of *Marsh*, because *Marsh* was "not useful in determining the proper roles of church and state in public schools, since free public education was virtually nonexistent at the time the Constitution was adopted."<sup>196</sup> In *Town of Greece*, the Court's application of the principles of *Marsh* to a town board was not based on the town board's existence since the time the Constitution was adopted.<sup>197</sup> Rather, the Court held that *Marsh* established a broader history of "legislative invocations" that were "compatible with the Establishment Clause."<sup>198</sup>

The Sixth Circuit in *Coles* held that a *Marsh* analysis did not apply to school boards because school boards differ from state legislatures and due to the extensive presence of students.<sup>199</sup> *Town of Greece* eroded this

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<sup>192</sup> See *Doe v. Tangipahoa Parish Sch. Bd.*, 473 F.3d 188, 191 (5th Cir. 2006); see also *Bacus v. Palo Verde Unified Sch. Dist. Bd. of Educ.*, 52 F. App'x 355, 356 (9th Cir. 2002).

<sup>193</sup> See *Indian River*, 653 F.3d at 275, 283 (3d Cir. 2011); see also *supra* notes 81–87 and accompanying text.

<sup>194</sup> The "Creationism Act" of Louisiana forbade public elementary and secondary school teachers from instructing students on the theory of evolution without also teaching them the principles of "creation science." See *Edwards v. Aguillard*, 482 U.S. 578, 581 (1987).

<sup>195</sup> *Indian River*, 653 F.3d at 281.

<sup>196</sup> *Id.* (quoting *Edwards*, 482 U.S. at 581–82) (internal quotation marks omitted).

<sup>197</sup> *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1818–19 (2014).

<sup>198</sup> *Id.* at 1818.

<sup>199</sup> *Coles ex rel. Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 381 (commenting that the "unique history" of *Marsh* did not encompass school board prayer situations). While the foundation of the Sixth Circuit's reasoning in *Coles* has eroded due to *Town of Greece*'s application of the *Marsh* legislative

reasoning by redefining *Marsh*'s "unique history" to encompass deliberative public bodies at a local level.<sup>200</sup> The Sixth Circuit's basis for not applying *Marsh* no longer holds water; while school boards differ from state legislatures in that students actively participate in school board meetings, school boards relate to town boards for that very reason.<sup>201</sup> In her *Town of Greece* dissent, Justice Kagan underscored the extensive participation by local citizens in the proceedings of the town board meetings: "Each and every aspect" of the Greece town meetings "provides opportunities for Town residents to interact with public officials . . . . So the meetings, both by design and in operation, allow citizens to actively participate in the Town's governance."<sup>202</sup> Justice Kennedy responded that the active participation of citizens did not alter the purpose or scope of the "brief, solemn, and respectful prayer" that clergy offered at the start of each meeting.<sup>203</sup>

#### *B. Fifth and Ninth Circuits: Principles of Marsh Interpreted as Requiring Non-Sectarian Prayers Are Now Eroded by Town of Greece*

The Fifth and Ninth Circuits both applied *Marsh*, but ultimately held the school board prayer practices to be unconstitutional due to the presence of sectarian references in the particular prayers at issue. The Fifth Circuit in *Doe v. Tangipahoa Parish School Board* assumed without deciding that *Marsh* did apply to the Tangipahoa Parish School Board as a deliberative public body.<sup>204</sup> Nevertheless, it concluded that four specific prayers delivered by the school board were excessively sectarian and violated the Establishment Clause.<sup>205</sup> The Ninth Circuit in *Bacus v. Palo Verde Unified School District Board of Education* also assumed that *Marsh* applied before holding that the prayers at issue were too sectarian and in violation of the

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prayer exception to a small town board, the ultimate outcome of the case was correct as a permanent student representative served on the board. *See infra* notes 213–19, 251–53 and accompanying text.

<sup>200</sup> *Town of Greece*, 134 S. Ct. at 1813 ("There is historical precedent for the practice of opening local legislative meetings with prayer as well."). This statement by the Court in *Town of Greece* upsets the Sixth Circuit's observation in *Coles* that "as far as *Marsh* is concerned, there are no subsequent Supreme Court cases. *Marsh* is one-of-a-kind, and whether its extension to [a] . . . school board would conflict with *Lee* and the other school prayer cases is the very issue that makes this case a difficult one." *Coles*, 171 F.3d at 381. *Town of Greece* clarified what was in *Marsh* a one-of-a-kind legislative prayer practice and expanded it into a one-size-fits-all doctrine of deliberative body prayer.

<sup>201</sup> *See Town of Greece*, 134 S. Ct. at 1845–46 (Kagan, J., dissenting) ("[T]he Board's meetings are also occasions for ordinary citizens to engage with and petition their government, often on highly individualized matters. That feature calls for Board members to exercise special care to ensure that the prayers offered are inclusive – that they respect each and every member of the community as an equal citizen.").

<sup>202</sup> *Id.* at 1847 (Kagan, J., dissenting).

<sup>203</sup> *Id.* at 1825 (majority opinion).

<sup>204</sup> *Doe v. Tangipahoa Parish Sch. Bd.*, 473 F.3d 188, 191 (5th Cir. 2006).

<sup>205</sup> *Id.*

Establishment Clause.<sup>206</sup> However, it left open the notion that nonsectarian prayers at school board meetings may pass constitutional muster.<sup>207</sup>

The *Bacus* Court focused on the language of *Marsh*, stating that even though the prayers did not “proselytize” the Christian faith, they nonetheless “advanced one faith.”<sup>208</sup> Justice Kennedy in *Town of Greece*, however, used “advance” only within his quotation of the *Marsh* holding and placed almost all of his emphasis on “proselytize” as the measuring stick of a permissible pattern of prayer.<sup>209</sup> This subtle relaxation of the *Marsh* standard provides deliberative public bodies with the opportunity to continue their prayer practices despite the occasional sectarian references. When this focus on “proselytize” is coupled with the scope of the analysis as prescribed in *Town of Greece*, one that regards the prayer practice as a whole rather than the content of individual prayers, school boards have an even stronger argument in favor of maintaining their prayer practices.

Both the Fifth and Ninth Circuit Courts decided to apply the *Marsh* standard without inquiring into whether school boards actually could be characterized as deliberative public bodies for the purposes of opening prayers. Instead, they chose to address the simpler question of whether the prayers were too sectarian.<sup>210</sup> In *Town of Greece*, however, the Court held *Marsh* in an exacting light, noting, “*Marsh* nowhere suggested that the constitutionality of legislative prayer turns on the neutrality of its content.”<sup>211</sup> This interpretation of *Marsh* stems from the Court’s opinion in *Van Orden v. Perry*. The *Van Orden* Court offered that the “‘content of the prayer is not of concern to judges,’ provided ‘there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief.’”<sup>212</sup>

Now that *Town of Greece* has established that a prayer practice containing sectarian prayers may still pass constitutional muster, lower courts will be forced to address this underlying question. Moreover, *Town of Greece* has simplified what was once a difficult question: whether *Marsh* applied to school boards as deliberative bodies, or whether they fell instead

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<sup>206</sup> *Bacus v. Palo Verde Unified Sch. Dist. Bd. of Educ.*, 52 F. App’x 355, 356 (9th Cir. 2002).

<sup>207</sup> *Id.* at 356–57.

<sup>208</sup> *Id.* at 357.

<sup>209</sup> See, e.g., *Town of Greece*, 134 S. Ct. at 1817 (describing the district court’s finding that the town board’s prayer practice “did not amount to impermissible proselytizing”).

<sup>210</sup> See *Tangipahoa Parish*, 473 F.3d at 202 (stating that “constitutional issues should be decided on the most narrow, limited basis” (quoting *United States v. Roberts*, 274 F.3d 1007, 1012 (5th Cir. 2001))).

<sup>211</sup> *Town of Greece*, 134 S. Ct. at 1821.

<sup>212</sup> *Id.* at 1821–22 (quoting *Marsh*, 463 U.S. at 794–95).

within the context of public schools. Justice Kennedy's application of *Marsh* to the intimate setting of a town council, whose prayer practice did not affect the substance of its deliberations and was not affected by the occasional presence of students, supports the extension of the *Marsh* analysis to school board prayer.

#### V. SPECIAL CASE: STUDENT REPRESENTATIVES VS. STUDENT MEMBERS

A deviation in the traditional structure of an all-adult school board occurs when a student sits as a member of the board. The extent to which students are actively involved in the school board deliberation, and whether a student member sits on the board, affect the constitutional analysis of the school board's prayer practice. Students' involvement in their local school boards is by no means uniform across school districts.<sup>213</sup> While many school boards retain the traditional structure of adult-elected board members,<sup>214</sup> a significant number are considering allowing a student member to represent the interests of the student body.<sup>215</sup> In 2009, the National School Boards Association conducted a nationwide survey of student membership in school boards.<sup>216</sup> Thirty-nine states responded, and of those, twenty-five indicated that they permit school boards to include students as members.<sup>217</sup>

To properly align with the prayer practice upheld in *Town of Greece*, opening invocations that are directed toward school board members must also comport with Justice Kennedy's statement that "mature adults" are less inclined to yield to peer pressure.<sup>218</sup> Thus, school boards should distinguish

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<sup>213</sup> See *infra* note 216-17.

<sup>214</sup> For example, the Pickens County School Board, for which the prayer practice vote has been debated and ultimately tabled, is composed of only adult elected members. See *supra* text accompanying notes 1-8, 104-08. See also, e.g., *Meet Our Board Members*, PICKENS COUNTY SCHOOL DISTRICT, <https://pickensk12-public.sharepoint.com/Pages/Board%20of%20Trustees/Meet-Our-Board-Members.aspx> (listing the six-member board of Pickens County School District). See also *Invocation at Regular School Board Meetings, Draft School Board Policy*, PICKENS COUNTY SCHOOL DISTRICT, [https://pickensk12-public.sharepoint.com/Documents/Side%20Nav/Board%20of%20Trustees/Meetings/Agendas/2014/BEAA%20Invocation%20at%20School%20Board%20Meetings\\_clean%209-22-14.pdf#search=invocation](https://pickensk12-public.sharepoint.com/Documents/Side%20Nav/Board%20of%20Trustees/Meetings/Agendas/2014/BEAA%20Invocation%20at%20School%20Board%20Meetings_clean%209-22-14.pdf#search=invocation) (describing the proposed school board's prayer policy).

<sup>215</sup> See, e.g., Jacoba Urist, *Should Students Sit on School Boards?*, THE ATLANTIC (Apr. 23, 2014, 4:06 PM) <http://m.theatlantic.com/education/archive/2014/04/do-school-boards-need-student-members/361127>.

<sup>216</sup> *Students Serving on Local School Boards*, NAT'L SCH. BDS. ASS'N, (Feb. 2009), available at <https://www.nsba.org/sites/default/files/reports/Students-on-school-boards.pdf>.

<sup>217</sup> *Id.*

<sup>218</sup> *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1827 (2014) ("Should nonbelievers choose to exit the room during a prayer they find distasteful, their absence will not stand out as disrespectful or even noteworthy. And should they remain, their quiet acquiescence will not, in light of our traditions, be

student representatives, who are not considered members of the school board, from student school board members, whose characterization would push the constitutional situation away from the protective ambit of *Town of Greece* and toward the more scrutinizing *Lee* analysis.<sup>219</sup>

#### A. Student Members on the School Board

Part of the Sixth Circuit's analysis of the Cleveland Board of Education's prayer practice in *Coles* was influenced by the fact that a permanent student member sat on the board itself.<sup>220</sup> By classifying the student as a member of the school board, the school board is including the student as a member of the deliberative body. Therefore, an opening invocation that is directed toward the board members would then include a student, which would transform the nature of the meeting into a setting that more closely resembles that of a school.<sup>221</sup>

Consider the following hypothetical situation. Ana, a high school senior, has just been elected president of her class. Incidental to her main role as a class officer, Ana also serves as an *ex officio* student member of the school board for her district.<sup>222</sup> She diligently attends school board meetings, delivering reports on upcoming events at her school and voicing concerns from a student's perspective.<sup>223</sup> During the meetings, Ana sits alongside the

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interpreted as an agreement with the words or ideas expressed. Neither choice represents an unconstitutional imposition as to mature adults, who 'presumably' are 'not readily susceptible to religious indoctrination or peer pressure.'") (citation omitted) (quoting *Marsh v. Chambers*, 463 U.S. 783, 792 (1983)).

<sup>219</sup> The active involvement of student school board members in the deliberative proceedings of the school board places them in a similar situation as that of the students at the graduation ceremony in *Lee v. Weisman*, 505 U.S. 577 (1992).

<sup>220</sup> See *Coles ex rel. Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 372 (6th Cir. 1999). In *Tangipahoa Parish*, the Fifth Circuit acknowledged the school board's argument that *Coles* was distinguishable from the Tangipahoa Parish School Board in that *Coles* dealt with a board that had a student member. The Fifth Circuit called this a "distinction without a difference." *Doe v. Tangipahoa Parish*, 473 F.3d 188, 203 (5th Cir. 2006).

<sup>221</sup> The extent to which this scenario would trigger a *Lee* analysis stretches beyond the scope of this Article. Suffice it to say that this situation resembles more closely a case in which *Lee* would likely apply. See *Lee*, 505 U.S. at 590.

<sup>222</sup> This scenario is likely to occur in states such as New York, where a state statute allows for the choosing of an *ex officio* student member of a school board. N.Y. EDUC. LAW § 1702 (McKinney 1947) ("[T]he *ex officio* student member of the board may be any of the following: the student that has been duly elected as student president of the high school; a student duly elected by the student body; a student selected by the high school student government; a student selected by the high school principal; a student selected by the superintendent of schools; a student selected by majority vote of the school board.").

<sup>223</sup> See, e.g., *Coles*, 171 F.3d at 372 ("Student representatives are responsible for delivering a report to those in attendance that provides a student's perspective on activities taking place at school. In these reports, student representatives typically recap recent proceedings of the student council, inform the school board of student concerns and achievements, and describe upcoming student-sponsored events.").

school board members at the head of the boardroom. At the beginning of each meeting, a visiting pastor from a nearby church stands before the school board members to deliver an invocation. Ana notices all of the board members bow their heads in reverence. Should she decide not to take part, Ana could not easily refrain. While audience members freely enter and exit throughout the meeting and the prayer, Ana cannot leave her position at the front of the boardroom without drawing attention to herself. The pastor delivers the invocation, asking the Lord to “bless our elected and appointed officials.”<sup>224</sup>

Ana did not choose to run for a position on the school board like her adult counterparts. Rather, her position as an *ex officio* student member of the school board accompanies her main role as class president. Just as the students’ attendance at the graduation ceremony in *Lee* was effectively mandatory due to the importance of one’s high school graduation,<sup>225</sup> Ana’s attendance at school board meetings is effectively mandatory due to her position as a student member of the board. Thus, a *Lee* analysis would likely apply, and the school board may have to choose an alternate means of solemnizing the beginning of its meetings.<sup>226</sup>

#### B. Student Representatives to the School Board

In *Indian River*, the Third Circuit noted that the school board routinely welcomed student representatives from the local high schools to “attend the meetings and speak on a wide variety of issues relating to the student experience in the Indian River School District.”<sup>227</sup> The Third Circuit viewed the representatives’ role as an extracurricular responsibility that was as important as that of the “‘cheerleaders, members of the band, and, of course, the team members themselves, for whom seasonal commitments mandate their attendance’ at football games.”<sup>228</sup>

A student who serves as a representative to the school board fulfills a role that is removed from membership on the deliberative body. This distinction becomes relevant in the consideration of the school board’s

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<sup>224</sup> These same words composed an invocation in *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1816 (2014).

<sup>225</sup> See *supra* notes 38–46 and accompanying text.

<sup>226</sup> Of the New York school boards that have included an *ex officio* student member of the board, many opt for a Moment of Silence at the start of their meetings. See *Frontier Cent. Sch. Dist. Meeting Minutes* (Oct. 2, 2012), <http://www.frontier.wnyric.org/cms/lib/NY19000265/centricity/domain/9/Oct0212.pdf>; see also Port Jervis City Sch. Dist. Meeting Minutes (Aug. 19, 2012), <http://www.pjschools.org/Board/Meetings/2014.15/Minutes14.15/BOEMinutes2014.08.19.pdf>.

<sup>227</sup> *Doe v. Indian River Sch. Dist.*, 653 F.3d 256, 277 (3d Cir. 2011).

<sup>228</sup> *Id.* at 278 (quoting *Santa Fe Ind. Sch. Dist. v. Doe*, 530 U.S. 290, 311 (2000)).

opening prayer practice. The more enunciated the difference between the positions of the student as a representative and the adults as school board members, the more likely the prayer practice will fall under the protective ambit of *Town of Greece*.<sup>229</sup>

The following hypothetical illustrates this distinction. Taylor, a high school junior, wishes to become more involved in extracurricular activities at school. She applies to become a student representative to the school board.<sup>230</sup> At the first school board meeting to welcome the new student representative, Taylor marches in and takes her seat in the audience. She does not sit at the head of the room among the adult school board members.<sup>231</sup> A visiting rabbi delivers an invocation at the start of the meeting, followed by the Pledge of Allegiance. The regular business of the meeting commences after the ceremonial portion ends. Only then is Taylor invited to stand and deliver her report on the recent school-wide fundraiser and upcoming prom. Her designation as a spectator who acts as a liaison between the school board and the student body distinguishes Taylor from the board members. This characterization ensures that the school board itself remains a deliberative body composed entirely of adult members.

## VI. A FACT-SENSITIVE INQUIRY: WAYS SCHOOL BOARDS CAN MINIMIZE POTENTIAL ESTABLISHMENT CLAUSE ISSUES

Perhaps the safest route that school boards can take in developing a policy of opening invocations is to echo Shakespeare and assert, “It’s all *Greece* to me.”<sup>232</sup> The Pickens County School Board received a recommendation from the Solicitor General of South Carolina to follow closely the prayer policy of the Greece town council to ensure that no establishment violations occur: “[W]e believe the *Town of Greece* decision

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<sup>229</sup> See *infra* notes 251–55 and accompanying text.

<sup>230</sup> Many school districts conduct an application process to choose the student representative to the school board. See, e.g., Pine Grove Area Sch. Dist., *Local Bd. Procedures: Student Representative to the School Board* (Dec. 7, 2000), <http://www.pgasd.com/pdf/0000%20Local%20Board%20Procedures/004.1%20Student%20Representative%20To%20The%20School%20Board.pdf> (“Junior students who desire to serve as a Student School Board Representative during their senior year shall secure an election packet . . .”). See also, e.g., Quaker Valley Sch. Dist. Policies, *Student Representative to the Board*, (Mar. 21, 2000), available at <http://www.qvsd.org/page.cfm?p=3722> (“In the spring of the year, any sophomore who is eligible may apply to become the alternate student representative to the school board.”).

<sup>231</sup> Contrast Taylor’s position in the audience with Ana’s position at the head of the boardroom as a designated member of the school board. See *supra* notes 220–26 and accompanying text.

<sup>232</sup> See WILLIAM SHAKESPEARE, THE TRAGEDY OF JULIUS CAESAR act 1, sc. 2 (“[F]or mine own part, it was Greek to me.”).

provides a ‘road map’ for a local deliberative body, such as a school board, to use in order to uphold as constitutional its prayer policy.”<sup>233</sup> School boards can take extra precautions to ensure that their opening invocations closely adhere to the policy that was preserved in *Town of Greece*.

A perusal of the *Town of Greece* pattern of prayers reveals characteristics that are readily transferable onto the school board situation. These include inviting clergy from diverse faiths within the community to deliver the invocation, limiting the prayer opportunity to adults, refraining from dictating the content of the prayers, and distinguishing student representatives from adult school board members.

#### *A. Inviting Clergy from Diverse Faiths To Deliver the Invocation*

A major factor in the constitutionality of the town board’s prayer practice in *Town of Greece* involved the open invitation of clergymen from diverse faiths within the community of Greece.<sup>234</sup> In Justice Kennedy’s review of the district court’s ruling, he noted, “Although most of the prayer givers were Christian, this fact reflected only the predominantly Christian identity of the town’s congregations, rather than an official policy or practice of discriminating against minority faiths.”<sup>235</sup> A similar disproportionality would result for any religion that constituted a large portion of a community, be it Jewish, Muslim, or Christian. The diversity of the stream of prayer givers is only as extensive as the population that they represent. The Court in *Town of Greece* called for a “policy of nondiscrimination,” which did not require the board to reach beyond the town borders to ensure “religious balancing.”<sup>236</sup>

The dissenting justices in *Town of Greece* expressed dissatisfaction with this method of limiting prayer invitations to places of worship within the city limits.<sup>237</sup> While Greece contained predominantly Christian places of worship, the town also housed a Buddhist temple and was close in proximity to several Jewish synagogues (though these were not within the town borders).<sup>238</sup> The dissenting justices did not see a significant effort on the part of the town board to include prayer givers whose houses of worship were in close proximity to, yet just beyond, town limits.<sup>239</sup> Due to school boards’

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<sup>233</sup> Op. S.C. Att’y Gen., *supra* note 105.

<sup>234</sup> *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1816 (2014).

<sup>235</sup> *Id.* at 1817.

<sup>236</sup> *Id.* at 1824.

<sup>237</sup> See *id.* at 1839 (Breyer, J., dissenting).

<sup>238</sup> *Id.* (referring to the Buddhist temple and “several Jewish synagogues just outside its borders, in the adjacent city of Rochester, New York”).

<sup>239</sup> *Id.* at 1840.

primary focus on matters pertaining to public schools,<sup>240</sup> they should make a “significant effort” to invite clergy of diverse faiths—even if it means reaching out to houses of worship in neighboring towns. As many school boards currently allow the members to deliver the invocation on a rotating basis, a structured prayer practice that involves wide participation from outside clergymen would be a beneficial change.<sup>241</sup> In addition, school boards that include a student representative should strive to include the participation of prayer givers of diverse faiths. This would neutralize the prayer practice as a whole.<sup>242</sup>

#### *B. Ensuring that Only Adults Deliver the Invocation*

School boards must not overlook their close relationship to the activities of public schools and the heightened potential for coercion that stems from it. However, many school boards are composed entirely of elected adults, whom the Framers believed to have the capacity to share in an invocation without feeling undue religious pressure. In these situations, board members may safely engage in a prayer practice that is closely modeled after the prayer practice upheld in *Town of Greece*. Important to this practice is the participation of adult prayer givers only. To have children or young high school students deliver the prayer would cause them to actively participate in a policy that is reserved for the benefit of the board members and would likely thrust the prayer practice towards the prohibitive ambit of *Lee* and the coercion test.<sup>243</sup>

In 2013, the Deputy Attorney General of South Carolina provided advice to the Pickens County School Board regarding its practice of allowing

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<sup>240</sup> Prayer in public schools has historically been struck down as an Establishment Clause violation due to the potential danger of subjecting formative students to coercive pressure. *See Lee v. Weisman*, 505 U.S. 577 (1992). *See also Bacus v. Palo Verde Unified Sch. Dist. Bd. of Educ.*, 11 F. Supp. 2d 1192, 1196 (C.D. Cal. 1998).

<sup>241</sup> In *Town of Greece*, Justice Kennedy tempered the respondents’ arguments that citizens who attended the meetings were coerced to participate in the prayer: “[Requests for audience members to rise for the prayer] came not from the town leaders but from the guest ministers, who presumably are accustomed to directing their congregations in this way and might have done so thinking the action was inclusive, not coercive.” *Town of Greece*, 134 S. Ct. at 1826.

<sup>242</sup> The dissenting justices in *Town of Greece* actually offer some suggestions for ways in which local deliberative bodies may be more proactive in ensuring a religiously diverse prayer practice. Justice Breyer pointed out that the U.S. House of Representatives provides guest chaplains with guidelines to ensure that they deliver prayers that are consistent with our identity as a “religiously pluralistic Nation” without specifically dictating the content of the prayers. *Id.* at 1841 (Breyer, J., dissenting). These include a limitation on the length of the prayer to 150 words or fewer and a recommendation that the prayer giver consider the diversity of faith traditions that compose the House of Representatives. *Id.*

<sup>243</sup> *See Lee*, 505 U.S. at 577.

students to volunteer to deliver the prayers at school board meetings.<sup>244</sup> He warned against the continuance of this practice, stating that the “use of students to give the invocation, no matter how well intentioned such practice may be, runs the risk of transforming what otherwise may be a deliberative body into a body more akin to the school for the purposes of the Establishment Clause.”<sup>245</sup> To remove the scripted participation of students in school board invocations is to avoid such classification of the school board meeting as a classroom setting.<sup>246</sup>

### C. Refraining from Dictating the Content of the Prayers

Should they wish to include prayers at the start of their meetings, school boards should refrain from exercising any control over the content of the prayers delivered by the guest prayer givers. “The composition of [a] prayer is ‘a hallmark of state involvement.’”<sup>247</sup> Supreme Court jurisprudence bolsters this statement by the Third Circuit. In the landmark case *Engel v. Vitale*, the Court proscribed a prayer drafted by New York state officials, finding it determinative that the “prayer was composed by government officials as part of a governmental program to further religious beliefs.”<sup>248</sup> In *Lee v. Weisman*, the Court again found issue with the extent of the school officials’ involvement in the content of the prayer.<sup>249</sup> One of the reasons the *Town of Greece* Court upheld the deliberative body prayer practice was the fact that the town board refused to offer guidance or control over the content of the opening prayers.<sup>250</sup> Because the constitutionality of an invocation before a deliberative public body does not depend on the content of the prayer, school boards may strive for impartiality through inviting prayer givers of diverse faiths rather than through any neutrality of content.

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<sup>244</sup> Op. S.C. Att'y Gen., 2013 WL 482679 (S.C.A.G. Jan. 28, 2013).

<sup>245</sup> *Id.*

<sup>246</sup> *Id.* (“Rather than being cast as occasional observers of School Board meetings, students giving the invocation could be deemed by a court to be active participants in the Board meeting itself.”).

<sup>247</sup> *Doe v. Indian River Sch. Dist.*, 653 F.3d 256, 288 (3d Cir. 2011) (quoting *Adler v. Duval Cnty. Sch. Bd.*, 250 F.3d 1330, 1337 (11th Cir. 2001)).

<sup>248</sup> *Id.* (quoting *Engel v. Vitale*, 370 U.S. 421, 425 (1962)).

<sup>249</sup> *Id.* at 289 (quoting *Lee v. Weisman*, 505 U.S. 577, 588 (1992)) (“The State’s role did not end with the decision to include a prayer and with the choice of clergyman. [The principal] provided [the rabbi] with a copy of the ‘Guidelines for Civic Occasions,’ and advised him that his prayers should be nonsectarian. Through these means the principal directed and controlled the content of the prayers.”).

<sup>250</sup> See *Town of Greece v. Galloway*, 134 S. Ct. 1818, 1822 (2014) (“To hold that invocations must be nonsectarian would force the legislatures that sponsor prayers and the courts that are asked to decide these cases to act as supervisors and censors of religious speech, a rule that would involve government in religious matters to a far greater degree than is the case under the town’s current practice of neither editing or approving prayers in advance nor criticizing their content after the fact.”).

#### *D. Distinguishing Student Representatives from Adult School Board Members*

School boards that do welcome a student representative in a “non-voting, advisory capacity”<sup>251</sup> should refrain from classifying these students as *members* of the school board.<sup>252</sup> Otherwise, an opening prayer that is directed toward the board members would necessarily include students. Such a practice would then likely implicate the *Lee* standard, as opposed to that of *Town of Greece*.<sup>253</sup>

To accomplish such a distinction, school boards that wish to hold an opening invocation should do so while the student representative is sitting among the spectators in the audience. In this way, the student representative to the school board is not among the members to whom the prayer is directed. Only after the opening prayer is completed should the student representative be invited to take part in the meeting. This small detail in the procedure of the meeting can help ensure that the opening invocation is only given for the benefit of adult board members.<sup>254</sup> If the potential for coercion is too great due to mandatory attendance of the student representative, school boards may limit the opening invocation to five minutes before the official start of the meeting.<sup>255</sup>

#### CONCLUSION

When the Supreme Court upheld a town council’s prayer practice in *Town of Greece*, school boards across the country lent the decision a willing

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<sup>251</sup> VA. CODE ANN. § 22.1–86.1 (2011) (“Student representatives shall not be construed to be members of local school boards for any purpose, including, but not limited to, establishing a quorum or making any official decision.”).

<sup>252</sup> See *Coles ex rel. Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369 (6th Cir. 1999) (finding issue with the fact that a student member sat on the school board). See *supra* text accompanying notes 220–21.

<sup>253</sup> See, e.g., *Town of Greece*, 134 S. Ct. at 1825 (“The principal audience for these invocations is not, indeed, the public but lawmakers themselves, who may find that a moment of prayer or quiet reflection sets the mind to a higher purpose and thereby eases the task of governing.”).

<sup>254</sup> See *id.* Because the student is not a member of the school board, but rather a spectator in the audience, the student is not among the members to whom the prayer is directed. In *Town of Greece*, Justice Kennedy cites the district court opinion in *Marsh*, which described the opening invocation as an “internal act” that was intended to be for the benefit of the Nebraska Legislature’s “own members.” *Id.* (quoting *Chambers v. Marsh*, 504 F. Supp. 585, 588 (D. Neb. 1980)).

<sup>255</sup> See, e.g., Steven Elliott, *Prayer Approved for Mercer County School Board Meetings*, QUAD-CITIES ONLINE (Feb. 10, 2010), [http://www.qconline.com/news/regional/prayer-approved-for-mercercounty-school-board-meetings/article\\_127b4b03-3f07-516d-a583-b2e739468446.html?mode=jqm](http://www.qconline.com/news/regional/prayer-approved-for-mercercounty-school-board-meetings/article_127b4b03-3f07-516d-a583-b2e739468446.html?mode=jqm) (describing an Illinois school board’s practice of conducting an invocation and reciting the Pledge of Allegiance five minutes prior to the start of each meeting).

ear. The striking similarities between school boards and the Greece town board support the logical extension of the *Town of Greece* principles to school boards' prayer practices. In both situations, an opening invocation acts to solemnize the occasion and is directed toward the board members. Further, the distinguishing characteristics between school boards and town boards are not constitutionally relevant for the purposes of an opening invocation. The school board circuit court precedent, in light of *Town of Greece*, exhibits widespread doctrinal erosion regarding the application of *Marsh* to the school board setting. School boards in numerous states are welcoming student representatives to school board meetings to speak on behalf of the student body. The regular presence of such students gives rise to specific concerns that school boards must consider when structuring a prayer practice that will not violate the Establishment Clause.

To minimize potential Establishment Clause violations in the development of their prayer policies, school boards should strive for diversity in inviting prayer givers from their community, allow only adults to deliver the prayers, refrain from dictating the content of the prayers, and distinguish student representatives from adult members. Just as the prologue to a literary work sets the tone without determining the story, an invocation at the start of a school board meeting solemnizes the occasion without affecting the substance of the deliberation. In this limited context, prayer—like the past—is prologue.