University of Arkansas at Little Rock Law Review

Volume 43 | Issue 2 Article 4

2020

Constitutional Law—Where Does It Fit? Solving the School Board Prayer Puzzle

Austin Reed

CONSTITUTIONAL LAW—WHERE DOES IT FIT? SOLVING THE SCHOOL BOARD PRAYER PUZZLE

I. INTRODUCTION

The Supreme Court of the United States has long recognized the constitutionality of opening legislative meetings with prayers.[1] The Court first announced the legislative prayer exception to the Establishment Clause in *Marsh v. Chambers*.[2] But do opening prayers at a school board meeting fit within the legislative prayer exception? This question sits at the intersection of school prayer practices prohibited by the Establishment Clause and legislative prayer practices allowed under the exception.[3] In 2017, the United States Court of Appeals for the Fifth Circuit upheld prayers at the beginning of school board meetings as constitutional.[4] However, just a year later, the United States Court of Appeals for the Ninth Circuit struck down school board prayer as a violation of the Establishment Clause,[5] creating a circuit split.[6] In December 2018, the Ninth Circuit denied rehearing en banc of its decision.[7] Judge Diarmuid O'Scannlain wrote a scathing opinion in protest of the Ninth Circuit's decision to deny rehearing.[8] Seven other judges joined O'Scannlain's opinion, underscoring the divergent views on this issue.[9]

This Note examines the recently created circuit split and argues that the Supreme Court of the United States should take up this important constitutional question and decide it under the legislative prayer cases. School board prayer fits within the legislative prayer exception because school boards are public deliberative bodies, school board meetings do not implicate the concerns that led to the Supreme Court's school prayer decisions, and school

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

2. *Id.*

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

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

5. Freedom From Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ. (*Chino Valley I*), 896 F.3d 1132, 1148 (9th Cir. 2018).

6. *See McCarty*, 851 F.3d at 529–30 (holding that a school district's policy of inviting students to deliver invocations before monthly board meetings is constitutional).

7. Freedom from Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ. (*Chino Valley II*), 910 F.3d 1297, 1298 (9th Cir. 2018).

8. *Id.* at 1298 (O'Scannlain, J., joined by Rawlinson, Bybee, Callahan, Bea, Ikuta, Bennett, & R. Nelson, JJ., opinion respecting the denial of rehearing en banc). Ninth Circuit judges in senior status cannot cast votes on en banc petitions, but they can take part in discussions on en banc proceedings. That is why O'Scannlain's opinion is an opinion respecting denial rather than a dissent from the denial.

9. *Id.* at 1299.

board prayers fit within the historical tradition of legislative prayers. Moreover, there are adequate constitutional limits on school board prayer practices even under the exception. School board prayer practices may not unconstitutionally denigrate unbelievers or coerce participation, prayer givers must be selected in a nondiscriminatory fashion, and prayers should be directed primarily at school board members.

Part II below provides a brief overview of the relevant Establishment Clause jurisprudence. Part III explains the legislative prayer exception to the Establishment Clause. Part IV examines the circuit split regarding whether prayers at public school board meetings fit within that exception. Part V argues that the Supreme Court should adopt the reasoning of the Fifth Circuit in *McCarty* and of Judge O'Scannlain's opinion, should the Court address the constitutionality of school board prayer. Part VI explains that there are still meaningful constitutional limits on prayers before school board meetings.

II. ESTABLISHMENT CLAUSE OVERVIEW

The First Amendment's religion clauses provide that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[10] These two clauses are known as the Establishment Clause and the Free Exercise Clause, respectively. It has been suggested that the religion clauses, together, "insure that no religion be sponsored or favored, none commanded, and none inhibited."[11]

The Establishment Clause has played a particularly salient role in cases involving religious practices in public schools. Over the last half-century, the Supreme Court has consistently struck down religious practices in the public school context.[12] For example, in 1962, the Court held that recitation of a state-composed prayer during school contravened the Establishment Clause.[13] A year later, the Court held that recitation of the Lord's Prayer or Bible readings at the beginning of the school day violated the Establishment Clause.[14] In 1992, the Court struck down prayer offered by clerical members during a high school graduation ceremony.[15] More recently, the Court held

10. U.S. CONST. amend. I.

11. Walz v. Tax Comm'n of New York, 397 U.S. 664, 669 (1970).

12. A thorough study of Establishment Clause jurisprudence is beyond the scope of this Note, but a brief summary of relevant cases is helpful to understand the difficulty of deciding whether school board prayer is constitutional.

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

14. Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203 (1963).

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

that prayer by a student prior to a high school football game violated the Establishment Clause.[16]

The Court's stance toward religion in public schools is due in large part to the "heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools."[17] Additionally, the Court has emphasized that attendance at school is mandatory, and that attendance at some school events is quasi-mandatory.[18] Because of the jurisprudential trend toward striking down religious practices in public schools, classifying a school board meeting as a school activity essentially decides the case.[19]

In fact, when the United States Courts of Appeals for the Third and Sixth Circuits decided school board prayer cases prior to the Supreme Court's *Town of Greece*[20] decision, those courts relied heavily on the Supreme Court's hard line with respect to prayer in the public school context.[21] In line with the Supreme Court school prayer cases, the courts in both of those decisions found school board prayer to be unconstitutional.[22]

Despite the Establishment Clause's significance in the public school context, it is important to note that "while the First Amendment 'reflects the philosophy that Church and State should be separated,' '[it] does not say that in every and all respects there shall be a separation of Church and State.'"[23] The government must refrain from favoring religion, but the First Amendment does not permit hostility toward religion.[24]

---

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

17. *Weisman*, 505 U.S. at 592.

18. *See, e.g.*, *id.* at 586 ("Even for those students who object to the religious exercise, their attendance and participation in the state-sponsored religious activity are in a fair and real sense obligatory, though the school district does not require attendance as a condition for receipt of the diploma.").

19. *See* Phillip Buckley, *We Call Them School Boards for a Reason: Why School Board Prayer Still Violates the Establishment Clause*, 8 OXFORD J.L. & RELIGION 71, 77 (2019) ("Given that the courts in *Indian River* and *Coles* held that the Supreme Court's school prayer precedent applied to school-board prayer, it is not surprising that the school boards lost those two cases.").

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

21. Coles *ex rel.* Coles v. Cleveland Bd. of Educ., 171 F.3d 369, 371 (6th Cir. 1999); Doe v. Indian River Sch. Dist., 653 F.3d 256, 275 (3d Cir. 2011).

22. *Coles*, 171 F.3d at 385–86; *Indian River*, 653 F.3d at 290.

23. Robert A. Sedler, *Understanding the Establishment Clause: A Revisit*, 59 WAYNE L. REV. 589, 597 (2013) (quoting Zorach v. Clauson, 343 U.S. 306, 312 (1952)) (alteration in original).

24. *See id.* (citing Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947)).

III. THE LEGISLATIVE PRAYER EXCEPTION

In 1983, the Supreme Court established an important exception to the Establishment Clause for prayers offered to open meetings of deliberative public bodies. Part A explains the case in which the exception originated. Part B points out the questions that the case left open and examines several federal appellate court decisions on school board prayer practices. Part C walks through a recent Supreme Court case that clarified the exception.

A. Where it All Began—*Marsh v. Chambers*

The Supreme Court carved out an exception to the Establishment Clause for legislative prayer in *Marsh v. Chambers*.[25] In *Marsh*, a Nebraska state legislator challenged the legislature's "practice of opening each legislative day with a prayer."[26] A chaplain, paid with public money, offered the daily prayer. A Presbyterian minister had served as chaplain for sixteen years.[27] The district court held that the prayers were permissible but paying the chaplain out of state funds violated the Establishment Clause.[28] On appeal, the United States Court of Appeals for the Eighth Circuit considered the prayer and the form of payment together and struck down the entire practice as unconstitutional.[29]

The Supreme Court granted certiorari and held that opening meetings of public legislative bodies with prayers does not violate the Establishment Clause.[30] In its decision, the Court emphasized the historical roots of opening legislative sessions with prayer.[31] According to the Court, "historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress—their actions reveal their intent."[32] Because the First Congress authorized appointing and paying legislative chaplains, and it approved the draft of the First Amendment in the same week, "[i]t can hardly be thought that . . . [members of Congress] intended the Establishment Clause of the Amendment to forbid what they had just declared acceptable."[33] The Court recognized that "[i]n light of the unambiguous and unbroken history of more than 200 years, there can be no doubt

25. Marsh v. Chambers, 463 U.S. 783, 783 (1983).
26. *Id.* at 784–85.
27. *Id.*
28. *Id.* at 785.
29. *Id.* at 785–86.
30. *Id.* at 791–92.
31. *Marsh*, 463 U.S. at 786–89.
32. *Id.* at 790.
33. *Id.*

that the practice of opening legislative sessions with prayer has become part of the fabric of our society."[34] Accordingly, the Court held that the Nebraska Legislature's prayer practice did not violate the Establishment Clause.[35]

B. Questions After *Marsh* and Federal Appellate Court Decisions on School Board Prayer Post-*Marsh*, Pre-*Town of Greece*

1. Questions Left Open by Marsh

After the *Marsh* decision, lower courts struggled to determine the scope of the decision.[36] Much of the confusion stemmed from the language in the decision that appeared to limit the legislative prayer exception.

First, in *Marsh*, the Court gave a great deal of weight to the long-standing history of Nebraska's prayer practice.[37] The history of the practice, alone, did not save it, but the Court indicated that a long-standing historical tradition should be accorded significant weight.[38] Did this mean that prayer practices without a long history were unconstitutional? How long must a practice be in place for its history to weigh in favor of constitutionality? Lower courts were left to guess.

Second, the Court noted that "the individual claiming injury by the practice is an adult, presumably not readily susceptible to 'religious indoctrination,' or peer pressure."[39] Did this mean that prayer practices at events with students present were unconstitutional?

Third, the Court opened its discussion on the history of legislative prayer with the following: "The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country."[40] After the decision, it was unclear what types of groups qualified as "other deliberative public bodies." Are city councils "other deliberative public bodies"? What about school boards? "[T]he only public bodies other than legislatures to which the [*Marsh*] Court specifically refers are the United States courts."[41] Furthermore, the *Marsh* Court pointed out that the prayers given in Nebraska "ha[d] [not] been exploited to prose-

---

34. *Id.* at 792.
35. *Id.* at 795.
36. Marie Elizabeth Wicks, *Prayer Is Prologue: The Impact of* Town of Greece *on the Constitutionality of Deliberative Public Body Prayer at the Start of School Board Meetings*, 31 J.L. & POL. 1, 13 (2015).
37. *Marsh*, 463 U.S. at 790 ("No more is Nebraska's practice of over a century, consistent with two centuries of national practice, to be cast aside.").
38. *Id.*
39. *Id.* at 792 (quoting Tilton v. Richardson, 403 U.S. 672, 686 (1971)) (other citations omitted).
40. *Id.* at 786.
41. Coles *ex rel.* Coles v. Cleveland Bd. of Educ., 171 F.3d 369, 380 (6th Cir. 1999).

lytize or advance any one, or to disparage any other, faith or belief."[42] Therefore, questions about what prayer content was acceptable were left open.

2. Third and Sixth Circuits

After *Marsh*, several federal appellate courts struck down prayers offered at school board meetings. In *Coles ex rel. Coles v. Cleveland Board of Education*, the Sixth Circuit held that school board prayer did not fit within the legislative prayer exception.[43] There, the court noted that Supreme Court school prayer precedent[44] and *Marsh* put the court "squarely between the proverbial rock and a hard place."[45] As to whether school board prayer looked more like "school prayers" prohibited by the Supreme Court's school prayer precedent or "legislative prayers" allowed by *Marsh*, the Sixth Circuit acknowledged that reasonable minds could differ.[46] Nevertheless, the court found the reasoning of *Marsh* inapposite.[47] The court's decision rested, in part, on the questions left open by *Marsh*. For example, the court relied heavily on its conclusion that *Marsh*'s reference to "other deliberative public bodies" did not necessarily include school boards.[48] The court explained that even if school boards were deliberative public bodies, the language in *Marsh* did not create a presumption of constitutionality for all prayer practices at meetings of deliberative public bodies.[49] Furthermore, the court found it important that students were involved in the school board meetings.[50]

In *Doe v. Indian River School District*, the Third Circuit followed the reasoning of the Sixth Circuit in *Coles*.[51] The court examined both the Supreme Court's school prayer precedent and its legislative prayer exception under *Marsh* before concluding that the exception did not apply.[52] Like in *Coles*, student involvement at the school board meetings was critical to the court's holding.[53] The court criticized the lower court for "ignor[ing]

42. *Marsh*, 463 U.S. at 794–95.
43. *Coles*, 171 F.3d at 380–83.
44. *Id.* at 371. The Court referred specifically to Lee v. Weisman, 505 U.S. 577 (1992).
45. *Coles*, 171 F.3d at 371.
46. *Id.*
47. *Id.* at 381.
48. *Id.* at 380–81.
49. *Id.*
50. *Id.* at 382.
51. Doe v. Indian River Sch. Dist., 653 F.3d 256, 279–80 (3d Cir. 2011) ("We agree with the Sixth Circuit's analysis.").
52. *Id.* at 269–82.
53. *Id.* at 277–81.

Marsh's suggestion that the presence of children would affect its calculus."[54] The court tossed *Marsh*'s "other deliberative public bodies" language aside, noting that regardless of whether a school board qualifies as a deliberative public body, "*Marsh* is ill-suited to this context because the entire purpose and structure of the Indian River School Board revolves around public school education."[55]

3. Fifth and Ninth Circuits

The Fifth and Ninth Circuits also struck down school board prayer but did so for different reasons than the Sixth and Third Circuits.[56] Instead of holding that the legislative exception did not apply to the prayers at issue, the courts decided the cases on one of the purported limits in *Marsh*—the proselytization language.[57] As mentioned above, the court in *Marsh* pointed out that the prayers at issue were not being used to "proselytize or advance any one . . . faith or belief."[58] In *Bacus v. Palo Verde Unified School District Board of Education*, the Ninth Circuit interpreted that language as a hard-and-fast rule that bars sectarian prayer.[59] The court stated, "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.'"[60] In other words, the court assumed that even if the *Marsh* reasoning applied to school board prayers, the sectarian nature of the prayers rendered them unconstitutional.[61]

The Fifth Circuit followed suit in *Doe v. Tangipahoa Parish School Board*.[62] Because the school board prayers at issue were overtly sectarian, the court did not have to decide whether the legislative prayer exception from *Marsh* applied in order to decide the case.[63]Although the Ninth and Fifth Circuits decided the aforementioned cases based on the one-sided nature of the school board prayers at issue, that reasoning is no longer viable in light of the Supreme Court's decision in *Town of Greece*.[64]

---

54. *Id.* at 280.
55. *Id.* at 278.
56. Bacus v. Palo Verde Unified Sch. Dist. Bd. of Educ., 52 F. App'x 355 (9th Cir. 2002) (unpublished opinion); Doe v. Tangipahoa Parish Sch. Bd., 473 F.3d 188 (5th Cir. 2006).
57. *Bacus*, 52 F. App'x at 357; *Tangipahoa*, 473 F.3d at 204.
58. Marsh v. Chambers, 463 U.S. 783, 794–95 (1983).
59. *See Bacus*, 52 F. App'x at 357.
60. *Id.* (quoting Marsh v. Chambers, 463 U.S. 783, 794–95 (1983)) (alteration in original).
61. *Id.* at 356.
62. 473 F.3d 188 (5th Cir. 2006).
63. *Id.* at 202.
64. *See* Buckley, *supra* note 19, at 80–81.

C. *Town of Greece v. Galloway*

The Supreme Court of the United States clarified, revived, and expanded the legislative prayer exception in *Town of Greece v. Galloway*.[65] The Court also rejected the argument of the Ninth and Sixth Circuits in *Bacus* and *Tangipahoa*.[66] The town of Greece, New York, opened its monthly town board meetings with a prayer from a local member of the clergy.[67] "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."[68] Prayer givers were selected through "an informal method" of calling local congregations listed in a town directory until a clergyman agreed to give that month's invocation.[69] Because the local population was predominantly Christian, all the congregations listed in the directory were Christian churches.[70] As a result, many of the prayers offered at Greece's town board meetings were given by Christian ministers and were overtly sectarian.[71] Susan Galloway and Linda Stephens, attendees of the town board meetings, brought suit in the United States District Court for the Western District of New York, alleging that the town board's prayer practice violated the Establishment Clause.[72] The district court upheld the practice as constitutional.[73] On appeal, the Second Circuit reversed.[74] The Supreme Court granted certiorari and reversed the Second Circuit's holding.[75]

The Court emphasized that legislative prayer is a longstanding practice that "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."[76] The Court explained its earlier decision in *Marsh* before addressing the petitioner's arguments that the prayer practice was unconstitutional.[77] Galloway and Stephens first argued that prayer must be nonsectarian to avoid running afoul the Establishment Clause.[78] In other words, the prayer cannot be "identifiable with any one religion," they

65. 572 U.S. 565 (2014).
66. *See id.* at 578–79.
67. *Id.* at 570.
68. *Id.*
69. *Id.* at 571.
70. *Id.* at 593 (Alito, J., concurring).
71. *Galloway*, 572 U.S. at 593 (Alito, J., concurring).
72. *Id.* at 572.
73. *Id.* at 573.
74. *Id.* at 574.
75. *Id.* at 574–75.
76. *Id.* at 575.
77. *See Galloway*, 572 U.S. at 576–77.
78. *Id.* at 577.

argued.[79] The Court rejected that argument, stating that "[a]n insistence on nonsectarian or ecumenical prayer as a single, fixed standard is not consistent with the tradition of legislative prayer outlined in the Court's cases."[80] With this pronouncement, the Court effectively overruled *Bacus* and *Tangipahoa*. Those cases had interpreted the proselytization language in *Marsh* to bar sectarian prayers.[81] However, according to the Court's reasoning here, a prayer can be sectarian without unconstitutionally advancing one faith.

Second, the respondents argued that the town's prayer practice "coerce[d] participation" by meeting attendees.[82] The Court was not persuaded.[83] Coercing participation is certainly unconstitutional,[84] but the Court did not find that the town of Greece's prayer practice coerced participation.[85] However, a plurality of the Court noted that the calculus would change "if town board members directed the public to participate in the prayers, singled out dissidents for opprobrium, or indicated that their decisions might be influenced by a person's acquiescence in the prayer opportunity."[86]

Ultimately, the *Town of Greece* decision clarified the scope of the legislative prayer exception in several ways. For one, the legislative prayer exception first announced in *Marsh* applies not only to Congress and state legislatures, but also to town councils.[87] Furthermore, "[n]owhere did the Court limit [the exception] specifically to Congress, state legislatures, or town boards."[88] In other words, the *Town of Greece* decision clarified that when the *Marsh* Court mentioned "other deliberative public bodies," it meant it. Second, *Town of Greece* made clear that a particular prayer practice's age matters little. The history relevant to the legislative prayer exception is the history of opening legislative meetings generally with prayer. In other words, the history of a prayer practice is analyzed at a fairly high level of generality. Despite the fact that Greece's prayer practice was implemented in 1999, it was still permitted. Additionally, the *Town of Greece* decision clarified that the presence of students is not the coup de grâce for prayer

79. *Id.* at 578.
80. *Id.*
81. *See* sources cited *supra* notes 57–63 and accompanying text.
82. *Galloway*, 572 U.S. at 586.
83. *Id.* at 587.
84. *Id.* at 586 (citing Cty. of Allegheny v. ACLU, 492 U.S. 573, 659 (1989)).
85. *Id.* at 587.
86. *Id.* at 588.
87. *See id.* at 591.
88. *Chino Valley II*, 910 F.3d 1297, 1300 (9th Cir. 2018) (opinion respecting the denial of rehearing en banc) (citing *Galloway*, 572 U.S. at 574–76.); *Galloway*, 572 U.S. 565.

practices. Students were often present at the town board meetings;[89] nevertheless, the Court found the prayers given there to be constitutional.[90]

Town of Greece also made clear that *Marsh* was not a one-off decision. Instead, the legislative prayer exception is broader than originally thought. To some, *Town of Greece* "muddied the waters."[91] Rather than a relatively easy decision under the Supreme Court's public school prayer cases, courts are now faced with two tracks of Supreme Court jurisprudence—one that strikes down almost all prayer practices surrounding public schools, and one that upholds prayer practices under the legislative prayer exception. *Town of Greece* answered several of the questions left open by *Marsh* and provided guidance that is necessary to decide cases involving prayers at school board meetings. The question in every school board prayer case "is whether this case is essentially more a legislative-prayer case or a school-prayer matter."[92] And the answer is clearer after *Town of Greece*.

IV. CIRCUIT SPLIT POST-*TOWN OF GREECE*

After the Supreme Court breathed new life into the legislative prayer exception in *Town of Greece*, the constitutionality of school board prayer deserved new attention. Both the Fifth and the Ninth Circuits took up school board prayer cases. Part A explains the Fifth Circuit's decision, in which it heeded the guidance of the Supreme Court in *Town of Greece*. Part B describes the Ninth Circuit's decision, in which it stuck closely to the Supreme Court's earlier school prayer cases. Part C examines Judge O'Scannlain's opinion after the Ninth Circuit refused to grant rehearing en banc of its school board prayer case.

A. *American Humanist Association v. McCarty*

The first major challenge to school board prayer post-*Town of Greece* reached the United States Court of Appeals for the Fifth Circuit in 2017.[93] Birdville Independent School District had a policy of inviting students to deliver statements of their choice before school board meetings.[94] The statements could include prayers, and often did.[95] Isaiah Smith, a Birdville alumnus who had attended school board meetings, felt offended by the

89. *Galloway*, 572 U.S. at 624 (Kagan, J., dissenting).
90. *Id.* at 591–92.
91. Buckley, *supra* note 19, at 72.
92. Am. Humanist Ass'n v. McCarty, 851 F.3d 521, 526 (5th Cir. 2017).
93. *See id.*
94. *Id.* at 523.
95. *Id.* at 524.

prayers.[96] Smith and the American Humanist Association brought suit. The district court granted summary judgment in favor of the school district, finding that the legislative prayer exception applied.[97]

On appeal, the Fifth Circuit held that the challenged school board prayer practice fit within the legislative exception and, therefore, did not violate the Constitution.[98] The court highlighted both traditional Establishment Clause tests and the legislative prayer exception before acknowledging that the key question was "whether this case is essentially more a legislative-prayer case or a school-prayer matter."[99] On the one hand, the case involved invocations to open the meetings of a deliberative public body. On the other hand, the case involved government-sanctioned invocations by students on school property.[100] The court ultimately decided that a school board is more like a legislature, and therefore, prayers to open school board meetings fit within the legislative prayer exception.[101] The court cited several reasons for its conclusion. Perhaps the most important reason was that the school board is a deliberative public body that performs primarily legislative tasks, such as "adopting budgets, collecting taxes, conducting elections, [and] issuing bonds."[102] The court also pointed out that the invocations were appropriately respectful.[103] Lastly, school board meeting attendees were free to leave at any time, and there was no discouragement from leaving or voicing protest.[104]

The plaintiffs advanced three major arguments for their position that the prayer practice violated the Establishment Clause.[105] First, they asserted that the prayers had to be directed only at lawmakers and for their benefit alone.[106] Second, they argued that the prayer practice at issue did not have a long-standing historical tradition.[107] Third, they claimed that the presence of students at the school board meetings made the case more like the cases involving school prayers than legislative prayers.[108] The court rejected all three arguments. In rejecting the argument that the prayers had to be directed only at lawmakers, the court pointed out that the plaintiffs had mis-

96. *Id.* at 523–24.
97. *Id.* at 525.
98. *McCarty*, 851 F.3d at 529–30.
99. *Id.* at 525–26.
100. *Id.* at 524.
101. *Id.* at 526.
102. *Id.*
103. *Id.*
104. *McCarty*, 851 F.3d at 526.
105. *Id.* at 526–27.
106. *Id.*
107. *Id.* at 527.
108. *Id.*

understood the *Town of Greece* decision.[109] There, the Supreme Court noted that lawmakers were the "principal audience" for the prayers, not the only audience.[110] With respect to the plaintiffs' argument that there was no historical tradition of prayers at public school board meetings, the court cited *Marsh* and *Town of Greece* for the proposition that there is "a well-established practice of opening meetings of deliberative bodies with invocations."[111] Opening school board meetings with prayer was consistent with that tradition.[112] In rejecting the plaintiffs' argument that the presence of students at the meetings distinguished this case from *Marsh* and *Town of Greece*, the court noted that the Supreme Court applied the legislative prayer exception in *Town of Greece* despite the presence of children at the town board meetings.[113]

In Part IV of the opinion, the court brushed off the decisions of the Sixth and Third Circuits in *Coles* and *Indian River* because those cases were decided before *Town of Greece* and because they were distinguishable. In *Coles*, a student sat as a member of the school board, and in *Indian River*, student government representatives were required to attend school board meetings in their official capacities.[114]

B. *Freedom From Religion Foundation v. Chino Valley Unified School District Board of Education*

After the *McCarty* decision and the *Town of Greece* decision on which it relied, whether prayers offered before school board meetings were constitutional seemed like an answered question. The Ninth Circuit thought otherwise.

In 2014, the Freedom From Religion Foundation sued the Chino Valley Unified School District Board of Education.[115] For years, the Chino Valley Board had allowed invocations to open its public meetings.[116] The board was made up of five adult members elected by voters in the school district and an appointed student member.[117] The meetings were divided into a private portion during which the board handled matters such as student discipline, and a public session during which the board handled its other general gov-

109. *Id.* at 527–28.
110. *McCarty*, 851 F.3d at 527 (citing Town of Greece v. Galloway, 572 U.S. 565, 587 (2014)).
111. *Id.*
112. *Id.*
113. *Id.* at 527–28.
114. *Id.* at 528.
115. *Chino Valley I*, 896 F.3d 1132, 1141 (9th Cir. 2018).
116. *Id.* at 1138–39.
117. *Id.*

erning duties.[118] These duties included approving fundraisers, textbooks, fieldtrips, and facility improvement projects.[119] Sometimes students or classes would make presentations, or the board would highlight student achievements.[120] The public sessions opened with a report by the board president, a presentation of the colors, and an opening prayer.[121] The meetings also included a public comment period.[122]

The opening prayers were offered pursuant to a policy that the board adopted in 2013.[123] Under the policy, the prayer was to be offered "by an eligible member of the clergy or a religious leader in the boundaries of the district."[124] Clergy were scheduled on a first-come, first-serve, or otherwise random basis, and the designee was required to "make every reasonable effort to ensure that a variety of eligible invocational speakers [were] scheduled."[125] Freedom From Religion Foundation, two parents of students in the district, and twenty Doe plaintiffs filed suit challenging the prayer policy and practice.[126] After the district court ruled against the school board, the board appealed.[127]

On appeal, the Ninth Circuit held that the board's prayer practice and policy did not fit within the legislative prayer exception and therefore violated the Establishment Clause.[128] According to the court, the school board meetings "function as extensions of the educational experience of the district's public schools."[129] Thus, the traditional Establishment Clause cases control.[130]

The court's most important reason for deciding that the practice did not fit within the exception was that the presence of large numbers of children, who are especially "vulnerable to outside influence," raises greater Establishment Clause concerns than those in *Marsh* and *Town of Greece*.[131] Because students are more susceptible to coercion and undue influence, the school board's prayer practice was particularly suspect.[132] This is the same

118. *Id.*
119. *Id.* at 1138.
120. *Id.*
121. *Chino Valley I*, 896 F.3d at 1138.
122. *Id.*
123. *Id.* at 1139.
124. *Id.* (internal quotations omitted).
125. *Id.* at 1139–40 (internal quotations omitted).
126. *Id.* at 1137.
127. *Chino Valley I*, 896 F.3d at 1141.
128. *Id.* at 1151.
129. *Id.* at 1145.
130. *See id.*
131. *Id.* at 1145–46 (citing Lee v. Weisman, 505 U.S. 577, 593–94 (1992)).
132. *Id.* at 1145.

reasoning that the Supreme Court used in earlier school prayer cases.[133] The court noted that the *Marsh* and *Town of Greece* decisions contained language emphasizing that adults are less susceptible to peer pressure than children.[134] The presence of children at the Chino Valley Board meetings apparently changed the character of the meetings such that they were not akin to the state legislative meetings in *Marsh* or the town board meetings in *Town of Greece*.[135]

The court also reasoned that school boards "exercise control and authority over the student population."[136] According to the court, the relationship between the school board and the students is substantially different than the relationship between either a state legislature and its constituents or a town council and its citizens.[137] Students' lack of autonomy creates heightened constitutional concerns.[138] And the court asserted that the students' presence at the board meetings was not voluntary in any meaningful way.[139]

The court's third major assertion was that prayer at public school board meetings was not supported by historical tradition.[140] Public education was unheard of at the time of the Constitution's framing.[141] Therefore, historical traditions did not support the school board prayer practice in the same way that they supported prayers opening state legislative sessions and town board meetings, according to the court.[142]

The Ninth Circuit also came to conclusions that focused on the nature of school board meetings. According to the court, "[t]he Board's meetings are not solely a venue for policymaking[;] they are also a site of academic and extracurricular activity and an adjudicative forum for student discipline."[143] The "nature of the Board's mandate" made it fundamentally different from legislative sessions or town board meetings.[144] For these reasons, the court concluded that the legislative prayer exception was inapplicable. Therefore, the court applied one of the traditional Establishment Clause tests.[145] Unsurprisingly, the court deemed the prayer practice unconstitutional.[146]

---

133. *See* sources cited *supra* notes 12–19 and accompanying text.
134. *Chino Valley I*, 896 F.3d at 1145–46.
135. *See id.*
136. *Id.* at 1146.
137. *Id.*
138. *Id.* at 1146–47.
139. *Id.* at 1147.
140. *Chino Valley I*, 896 F.3d at 1147–48.
141. *Id.* at 1148.
142. *Id.*
143. *Id.* at 1145.
144. *Id.* at 1146.
145. *Id.* at 1148.
146. *Chino Valley I*, 896 F.3d at 1151.

The Ninth Circuit relied heavily on the *Coles* and *Indian River* decisions.[147] The court's reliance on those decisions gave the impression that a circuit split already existed and that the Ninth Circuit was siding with the weight of authority. However, those decisions predated the Supreme Court's landmark decision in *Town of Greece v. Galloway*.[148] Prior to the Ninth Circuit's decision in *Chino Valley*, the only federal appellate court to consider the constitutionality of school board prayer after *Town of Greece* was the Fifth Circuit in *McCarty*.

C. Denial of Rehearing En Banc and Judge O'Scannlain's "Dissent"

After the panel decision, the Chino Valley School Board petitioned for the Ninth Circuit to grant rehearing en banc.[149] The court denied the request for rehearing.[150] Senior Circuit Judge Diarmuid O'Scannlain authored a lengthy opinion in protest of the court's denial.[151] Seven other judges joined O'Scannlain's opinion.[152] Judge O'Scannlain explained the Supreme Court's decision in *Marsh* and its recent reaffirmation of the legislative prayer exception in *Town of Greece*.[153] According to Judge O'Scannlain, the Ninth Circuit ignored the clear instruction of those Supreme Court cases and "disparage[d] such well-established precedent."[154]

Judge O'Scannlain addressed each of the panel's main assertions. With respect to the panel's contention about the presence of children at the board meetings, O'Scannlain retorted that the mere presence of students at the board meetings did not change the board's legislative nature.[155] Moreover, the Supreme Court had no problem with the presence of children at the town board meetings in *Town of Greece*.[156] Judge O'Scannlain carried the panel's assertion to its logical conclusion to demonstrate the argument's folly: "Does the panel mean to suggest that the legislative prayer tradition is constitutional on days when no student is present as a visitor, award recipient, or volunteer, but suddenly becomes unconstitutional on days when students are present?"[157]

---

147. *Id.* at 1144.
148. *Id.* at 1144 n.9; Town of Greece v. Galloway, 572 U.S. 565 (2014).
149. *Chino Valley II*, 910 F.3d 1297, 1298 (9th Cir. 2018).
150. *Id.*
151. *Id.*
152. *Id.* (O'Scannlain, J., opinion respecting the denial of rehearing en banc).
153. *Id.* at 1300.
154. *Id.* at 1301.
155. *Chino Valley II*, 910 F.3d at 1301.
156. *Id.* (citing Town of Greece v. Galloway, 572 U.S. 565, 590 (2014) (Alito, J., concurring)).
157. *Id.*

As to the panel's reasoning that the school district, and by extension the school board, exercised control over the students, Judge O'Scannlain quipped, "What nonsense!"[158] O'Scannlain asserted that the students enjoyed a great deal of autonomy during the meetings—they were not required to attend the meetings, nor were they discouraged from coming and going as they pleased.[159]

Judge O'Scannlain again used strong language in rejecting the panel's assertion that historical tradition did not support prayer in public school boards, calling it "absurd" to assume that because public education did not widely exist at the time of the founding, history did not support the prayers before school boards.[160] The test is, in fact, whether the prayer practice fits within the historical tradition of legislative prayer, not whether there is a long history of the specific prayer practice at issue.[161] This is supported by both the *Marsh* case and the *Town of Greece* case. As mentioned above, the prayer practice at issue in *Town of Greece* was not implemented until 1999.[162] There, despite the specific practice's youth, it fit within the legislative prayer tradition.[163]

Judge O'Scannlain responded to the panel's conclusion that the nature of school boards was different than that of legislatures or town boards by simply disagreeing. The school board is a governing body whose primary job is to legislate school district policy rather than educate students, according to O'Scannlain.[164]

V. WHERE DOES SCHOOL BOARD PRAYER FIT?

The *Town of Greece* decision made it clear that the legislative prayer exception announced in *Marsh* covers more than just the meetings of state legislatures. It is broad enough to cover public school board meetings, and many of the apparent limitations on the exception were rejected by the Court in *Town of Greece*. Accordingly, if the Supreme Court takes up a question on the constitutionality of a prayer practice to open school board meetings, the Court should apply the *Marsh* and *Town of Greece* cases. Both the Fifth Circuit and Judge O'Scannlain of the Ninth Circuit got the hint from the Supreme Court and put school board prayer under the rubric of *Marsh* and *Town of Greece*.

158. *Chino Valley II*, 910 F.3d at 1302.
159. *Id.* at 1302.
160. *Id.* at 1302–03.
161. *Id.* at 1303.
162. Town of Greece v. Galloway, 572 U.S. 565, 570 (2014).
163. *Id.* at 591–92.
164. *Chino Valley II*, 910 F.3d at 1302.

First, school board prayer fits within the legislative prayer cases because school boards are deliberative public bodies. The *Marsh* Court captured the essence of its decision in the following sentence: "The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country."[165] The Court's inclusion of "other deliberative public bodies" in that sentence is of great importance.[166] Although it was not clear to lower courts at the time, the Court's inclusion of "other deliberative public bodies" demonstrated that its decision was not limited to state legislatures. Indeed, the Supreme Court recognized in *Town of Greece* that prayers before other deliberative public bodies fit within the legislative prayer exception.[167] Therefore, the question after *Town of Greece* is whether school boards are deliberative public bodies to be included within the legislative prayer exception. In *McCarty*, the Fifth Circuit put it this way: Is "a school board . . . more like a legislature than a school classroom or event"?[168]

The most important piece of this comparison is an analysis of purpose.[169] That is, what is a school board's primary purpose? School boards "exist[] to legislate school district policy."[170] School boards are governing bodies with duties that include "overseeing the district's public schools, adopting budgets, collecting taxes, conducting elections, issuing bonds, and other tasks that are undeniably legislative."[171] School boards "conduct the business affairs" of public schools.[172] While it is true that school board meetings often take place on school property, "[n]one of the case law prohibiting prayer in public schools has focused on the titleholder to the real estate."[173] The location of a meeting does not change its purpose. Because a school board's primary purpose is legislative, it is a deliberative public body, and school board prayer practices should be evaluated under the *Marsh* and *Town of Greece* decisions.

By contrast, school classrooms and most school events serve no legislative function. That is not to say that events with hybrid purposes are necessarily deliberative public bodies to which the legislative prayer exception applies. For example, consider a meeting during school between the school

165. Marsh v. Chambers, 463 U.S. 783, 786 (1983).

166. James Mann Wherley, Jr., Casenote, *Transforming a School Board Meeting into a Student Council Meeting:* Coles v. Cleveland Board of Education, 68 U. CIN. L. REV. 1359, 1381 (2000).

167. *Galloway*, 572 U.S. at 591–92.

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

169. *Chino Valley II*, 910 F.3d at 1302.

170. *Id.*

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

172. Coles *ex rel.* Coles v. Cleveland Bd. of Educ., 171 F.3d 369, 387 (6th Cir. 1999) (Ryan, J., dissenting).

173. *Id.* at 388.

board president, the principal, some faculty members, and a few student representatives, in which they discuss the school's budget, consider ways to improve student test scores, and get student feedback about a reading program. The budget piece of the meeting is, in the words of the *McCarty* court, "undeniably legislative," but the discussion about test scores and the reading program looks much more educational in nature. Even in a murky situation like this, an examination of the *primary* purpose of the meeting yields a result with relative ease: the meeting is not one of a deliberative public body. The primary purpose of school boards, on the other hand, is clearly legislative. Moreover, the Supreme Court has never heard a case on the constitutionality of opening a meeting like the hypothetical meeting above with a prayer. Instead, the school prayer precedent that declared prayer practices unconstitutional has been limited to situations in which the event in question served almost no legislative function. School board meetings are on the opposite end of the purpose spectrum, and the fact that their primary purpose is legislative makes them deliberative public bodies to which the legislative prayer cases apply.

Judge Ryan, in his dissent in *Coles*, explained the following "syllogism derived from *Marsh*": "There is no constitutional bar to 'opening . . . sessions of legislative and other deliberative public bodies with prayer.' But the Cleveland Board of Education is a 'deliberative public bod[y].' Therefore, there is no constitutional bar to 'opening . . . sessions of [the Cleveland Board of Education] with prayer.'"[174] Any public school board could substitute its name into the syllogism. The legislative nature of school board meetings makes them fundamentally different than the school events where the Supreme Court has struck down prayer practices. Unlike graduation ceremonies or football games, school board meetings primarily serve a legislative function.

Additionally, "school board meetings . . . do not 'implicate the underlying concerns which have led the Supreme Court to apply the Establishment Clause strictly to school-related functions, i.e., the potential coercion of impressionable students and the mandatory or quasi-mandatory nature of student attendance.'"[175] The impressionability of students and their lack of choice in attendance at school and some school events have played a major role in the Supreme Court's school prayer jurisprudence.[176] But those concerns are significantly reduced in the case of school board meetings. School board meetings are aimed at and designed primarily for parents rather than

174. *Id.* at 388 (alterations in original).

175. *See* Buckley, *supra* note 19, at 84 (quoting Coles v. Cleveland Bd. of Educ., 950 F. Supp. 1337, 1346 (N.D. Ohio 1996)).

176. Wherley, *supra* note 166, at 1387–89; *see supra* notes 12–19 and accompanying text.

students. Of course, students may be present at school board meetings, but *Town of Greece* demonstrated that the presence of children is insufficient to establish unconstitutionality. In that case, "the Supreme Court . . . expressly upheld the practice of legislative prayer at town board meetings at which students are present."[177]

Further, as a practical matter, far fewer children attend school board meetings than the activities that the Supreme Court dealt with in its school prayer cases, such as graduation ceremonies. Moreover, the presence of children alone does not change a meeting's purpose or character.[178] As far as attendance goes, attendance at a school board meeting by students is far from mandatory.[179] Students are free to come and go as they please without fear of consequence. Therefore, the risk that children will be coerced into religious participation at a school board meeting is fairly low. Because the heightened concerns surrounding school activities are not implicated with school board meetings, there is little reason to treat school board prayer just like prayer practices during other school events.

Lastly, invocations to open a school board meeting fit within the historical tradition set out in *Marsh*. As explained by the Supreme Court in *Town of Greece* and by Judge O'Scannlain in his opinion, the issue isn't whether there is a longstanding historical tradition of the specific prayer practice in question. Instead, the issue is whether the specific prayer practice fits within the historical tradition of legislative prayers. Just like the Greece town council's practice of opening its meetings with prayers, opening school board meetings with prayers fits within the historical tradition of beginning meetings of deliberative public bodies with prayers. The prayers are designed to lend gravity to the upcoming task of governing the school district. It is difficult to find constitutionally significant differences between town board meetings and school board meetings.

Beyond these straightforward, logical reasons for concluding that school board prayers fit within the legislative prayer cases, the conclusion also follows from a sort of impressionistic inquiry. If one were to simply ask a friend if a school board meeting was more like a school event or a meeting of a deliberative public body, the friend's intuitive response would likely be "a deliberative public body." Put another way, if one was asked to put a school board meeting into either the school event category (e.g., classroom activity, graduation ceremony, high school football game, etc.) or the deliberative public body category (e.g., state legislature, city council, etc.), the latter category makes the most sense. Of course, these claims do not have

177. *Chino Valley II*, 910 F.3d 1297, 1301 (9th Cir. 2018) (citing Town of Greece v. Galloway, 572 U.S. 565, 590–91 (2014)).

178. *Id.* at 1301.

179. Wherley, *supra* note 166, at 1389.

empirical support, but nevertheless, this sort of impressionistic inquiry into what a school board looks like is useful. And the intuitive response to the inquiry is that a school board meeting looks more like a state legislature or town council; therefore, prayers at those meetings fit within the exception.

VI. MEANINGFUL LIMITS ON THE LEGISLATIVE PRAYER EXCEPTION

While school board prayer should be analyzed under the legislative prayer cases rather than school prayer precedent, not every school board prayer practice will survive constitutional scrutiny. There are meaningful limits on the legislative prayer exception.

To start, the prayer practice cannot "denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion."[180] This limit is not a mandate that the prayers be nonsectarian.[181] The prayers need only serve the purpose of solemnizing the occasion.[182] Prayers that are "solemn and respectful in tone"[183] and that occur at the beginning of a school board meeting would pass the test, while a "pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose" would fail.[184]

Further, prayer givers must be selected through nondiscriminatory means. In *Town of Greece*, the Supreme Court disagreed with the lower court's assertion that the town of Greece had violated the Establishment Clause by inviting predominantly Christian ministers.[185] The Supreme Court stated that "[s]o long as the town maintains a policy of nondiscrimination, the Constitution does not require it to search beyond its borders for non-Christian prayer givers in an effort to achieve religious balancing."[186] However, a prayer policy or practice of choosing prayer givers based on religious bias or favoritism is unlikely to pass constitutional muster.[187] Indeed, Justice Alito noted in his concurrence in *Town of Greece* that he would have viewed the case differently if certain congregations were left out intentionally.[188]

A third limit is that prayers to open public school board meetings must not be unconstitutionally coercive. In *Town of Greece*, the Supreme Court recognized "that government may not coerce its citizens 'to support or par-

180. *Galloway*, 572 U.S. at 583 (2014).

181. The *Town of Greece* court explicitly rejected the suggestion that prayers had to be nonsectarian to be constitutional. *Id.* at 578–85.

182. *Galloway*, 572 U.S. at 583.

183. *Id.*

184. *Id.* at 585.

185. *Id.*

186. *Id.* at 585–86.

187. *See id.* at 593 (Alito, J., concurring) ("[R]espondents do not claim that the list was attributable to religious bias or favoritism.").

188. *Galloway*, 572 U.S. at 597 (Alito, J., concurring).

ticipate in any religion or its exercise.'"[189] The Court simply was not persuaded on the facts of the case that the prayer practice at issue was sufficiently coercive to violate the Establishment Clause.[190] Implicit in this statement is an acknowledgment that there could be certain facts in a case that render a prayer practice unconstitutionally coercive.[191] A plurality of the Court agreed that "[t]he analysis would be different if town board members directed the public to participate in the prayers, singled out dissidents for opprobrium, or indicated that their decisions might be influenced by a person's acquiescence in the prayer opportunity."[192] Presumably, this kind of conduct would be unconstitutionally coercive.

There is a fourth limit on school board prayer that is related to the coercion limitation—prayers at school board meetings should be directed primarily at school board members.[193] In a portion of the *Town of Greece* opinion, Justice Kennedy highlighted the fact that "[t]he principal audience for these invocations is not . . . 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."[194] Accordingly, prayers to open school board meetings should be aimed primarily at the school board members themselves, with an eye toward helping them perform their legislative duties. Of course, that is not to suggest that the prayers must be directed only at school board members. That precise argument failed in *McCarty*.[195] Justice Kennedy also pointed out that "many members of the public find these prayers meaningful and wish to join them."[196] Public participation does not mean that the prayer necessarily violates this limit.

Because of the meaningful limits on prayer practices evaluated under *Marsh* and *Town of Greece*, putting school board prayer under the legislative prayer rubric is entirely reasonable. Although school board prayer falls under the legislative prayer exception, not every prayer practice will pass constitutional muster. A violation of the limits set out in *Marsh* and *Town of Greece* will render the practice unconstitutional.

---

189. *Id.* at 586 (quoting Cty. of Allegheny v. ACLU, 492 U.S. 573, 659 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part)).

190. *Id.* at 587.

191. There was not a majority on the coercion holding. Justices Thomas and Scalia argued that the coercion that is relevant to an Establishment Clause analysis is legal coercion. *Id.* at 610 (Thomas, J., concurring in part and concurring in the judgment).

192. *Id.* at 588 (plurality).

193. *See id.* at 587.

194. *Galloway*, 572 U.S. at 587. (This portion of the opinion garnered only a plurality.)

195. *See* sources cited *supra* notes 109–10 and accompanying text.

196. *Galloway*, 572 U.S. at 588.

VII. CONCLUSION

Without a Supreme Court decision on school board prayer, the constitutionality of prayer before public school board meetings still sits on the proverbial fence between the Court's school prayer jurisprudence and its decisions regarding the legislative prayer exception. But the Court's recent decision in *Town of Greece* pushed school board prayer practices toward the legislative prayer exception and constitutionality. Both the Fifth Circuit and Judge O'Scannlain of the Ninth Circuit got the hint from the Supreme Court.

The question of whether school board prayers fit within the legislative prayer exception should be resolved under the legislative prayer cases. School boards are public deliberative bodies, school board meetings do not implicate the concerns that led to the Supreme Court's school prayer decisions, and school board prayers align with the historical tradition of legislative prayers; therefore, prayers at school boards fit within the legislative prayer exception. Further, there are meaningful constitutional limits on school board prayer practices even under the legislative prayer exception—school board prayer practices may not unconstitutionally denigrate unbelievers or coerce participation, prayer givers must be selected in a nondiscriminatory fashion, and prayers should be directed primarily at school board members. Just like that, the school board prayer puzzle is solved.

*Austin Reed**

* J.D. University of Arkansas at Little Rock, William H. Bowen School of Law, expected May 2021. B.S., Finance, Arkansas State University. I would like to thank my wife, Madison, for her unwavering support throughout this process.