RESTORING RESPECT FOR THE LISTENER IN FIRST AMENDMENT RELIGIOUS DOCTRINE

HOPE O'LEARY

INTRODUCTION

Today, perhaps more so than ever before, the focus is on the listener. Casual conversations between coworkers in the office must be handled with care to avoid affronting one's colleague. Tweets and Instagram stories, easily made permanent through screenshots and screen recordings, also call for prudence. While some praise "political correctness" as wise and respectful, others mock the term as hypersensitive.[1] But for some of those who disregard due consideration for the listener, "cancel culture" looms large.[2] An unidentified mass online stands ready to condemn the offensive behavior, demanding that the perpetrator be relegated to some inferior status. Prominently, these retributory consequences have included disciplinary action from an employer (Amy Cooper) or boycotts of published works (JK Rowling, Woody Allen).[3]

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1. *See* Kat Chow, *'Politically Correct': The Phrase Has Gone from Wisdom to Weapon*, NPR (Dec. 14, 2016, 11:00 PM) https://www.npr.org/sections/codeswitch/2016/12/14/505324427/politically-correct-the-phrase-has-gone-from-wisdom-to-weapon [https://perma.cc/U4NX-LLQQ].

2. *See* Aja Romano, *Why We Can't Stop Fighting About Cancel Culture*, Vox (Aug. 25, 2020, 12:03 PM) https://www.vox.com/culture/2019/12/30/20879720/what-is-cancel-culture-explained-history-debate [https://perma.cc/A9CV-NZPB].

3. *See* Gwen Aviles, *J.K. Rowling Faces Backlash After Tweeting Support for 'Transphobic' Researcher*, NBC News (Dec. 19, 2019, 2:10 PM) https://www.nbcnews.com/feature/nbc-out/j-k-rowling-faces-backlash-after-tweeting-support-transphobic-researcher-n1104971 [https://perma.cc/UBR2-BHCM] (suggesting that the backlash following Rowling's tweet included a boycott of her books); Ligaya Mishan, *The Long and Tortured History of Cancel Culture*, N.Y. Times (Dec. 3, 2020) https://www.nytimes.com/2020/12/03/t-magazine/cancel-culture-history.html [https://perma.cc/96X4-23NW] (providing examples of retributory consequences); Bret Stephens, *Woody Allen Meets the Cancel Culture,* N.Y. Times (Mar. 18, 2020) https://www.nytimes.com/2020/03/18/opinion/woody-allen-memoir.html [https://perma.cc/6TXJ-JY23]; Max Zahn & Andy Serwer, *Franklin Templeton CEO: We 'Stand By' Firing of Viral Ex-Employee Amy Cooper*, Yahoo News (July 15, 2021) https://news.yahoo.com/franklin-templeton-stand-by-firing-of-viral-former-employee-amy-cooper-ceo-135142445.html [https://perma.cc/J2CC-5JVU];.

First Amendment doctrine, on the other hand, ordinarily focuses on the rights of speakers, rather than listeners.[4] The First Amendment's Free Speech Clause provides "Congress shall make no law . . . abridging the freedom of speech . . . ."[5] The Supreme Court considers the speaker to be an invaluable player in the free market of ideas in need of protection.[6] Justice Oliver Wendell Holmes constructed this metaphor, viewing the speaker as essential to the free flow of information, in turn a requirement for the effective functioning of institutions of free choice, like markets and democracies.[7]

Another potential motivation for the Court's continued championing of the speaker is Justice Brandeis' vision of the dignitary speaker with dignitary interests in self-realization.[8] In Brandeis's view, the speaker's freedom to develop her own ideas is a valuable end in itself, not just a means to the free market of ideas.[9] The speaker is entitled to engage in the process of self-determination, through participation in public discourse.[10] The Court has perpetuated this view, accepting that we tolerate offensive speech because

4. *See* Burt Neuborne, *Limiting the Right to Buy Silence: A Hearer-Centered Approach*, 90 U. COLO. L. REV. 411, 411 (2019) (citing BURT NEUBORNE, MADISON'S MUSIC 97-131 (2015)); *see also* Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 HARV. L. REV. F. 165, 170 (2015) (noting that ordinary First Amendment doctrine protects the right to participate in public discourse, but arguing instead that the "constitutional value of commercial speech lies in the rights of *listeners* to receive information so that they might make intelligent and informed decisions").

5. U.S. CONST. amend. I.

6. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (noting there exists a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials").

7. Holmes articulated this view in his dissents in *Gitlow v. New York*, 268 U.S. 652, 672-73 (1925) (Holmes, J., dissenting), and *Abrams v. United States*, 250 U.S. 616, 624-31 (1919) (Holmes, J., dissenting). *See also* Burt Neuborne, *The Status of the Hearer in Mr. Madison's Neighborhood*, 25 WM. & MARY BILL RTS. J. 897, 901-02 (2017) [hereinafter Neuborne, *Status of the Hearer*].

8. *See* Whitney v. California, 274 U.S. 357, 372-80 (1927) (Brandeis, J., concurring), *overruled by* Brandenburg v. Ohio, 395 U.S. 444 (1969) ("Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means . . . .").

9. *See id.* at 375.

10. Post & Shanor, *supra* note 4, at 171-72.

the speaker is entitled to work through her ideas as a dignitary right.[11]

A third potential motivation for the Supreme Court's continued endorsement of the rights of speakers is a fear of government. The Court may be wary that government will abuse any power it is given to censor speech, and so champion the rights of speakers as a method of resisting government censorship.[12]

Whether its motivation is the free market of ideas, the speaker's dignitary right to self-realization, or a fear of government censorship, the Court has consistently treated the speaker as a powerful figure and demonstrated hesitancy to restrict speakers' rights.[13] Consequently, the Court has consistently treated the listener as capable of handling whatever speech the speaker throws its way.[14]

Despite this focus on speakers, the three justifications for a speaker's right to speak also support the right of listeners to know.[15] In Justice Holmes' free market of ideas, the listener is just as important, if not more so, than the speaker.[16] The listener absorbs the speaker's information and through her autonomous choices, integrates the information into the free market.[17] Under the Brandeisian dignitary approach, the listener of the speaker's message also enjoys a dignitary interest in self-fulfillment.[18] Likewise, the Court may distrust the government's ability to censor speech and fear that it will prevent the hearer from accessing information necessary to the free market of ideas and to exercising her own dignitary rights.[19] As a result of one or more of these motiva-

11. *See* United States v. Alvarez, 567 U.S. 709, 727-28 (2012) (plurality opinion) (citing *Whitney*, 274 U.S. at 377).

12. Neuborne, *Status of the Hearer*, *supra* note 7, at 897, 902.

13. *See* Joel M. Gora, *Free Speech Matters: The Roberts Court and the First Amendment*, 25 J.L. & POL'Y 63, 66, 68, 75 (2016) (noting that a "core purpose" of the First Amendment is to guarantee that the people, not the government, determine what they want to say and how they want to say it, and that the Roberts Court, adopting principles from the Court's First Amendment precedents, has "steadfastly refused to declare speech that many deemed socially worthless to be beyond the pale of the First Amendment's protection").

14. *See infra* Part I.

15. The Court "tends to deploy this powerful vision of a hearer's right to know only when necessary to shore up a weak speaker." Neuborne, *Status of the Hearer*, *supra* note 7, at 909-10.

16. *See id.* at 901.

17. *See id.*

18. *See id.*

19. *See id.* at 906.

tions, the Court has expected the listener to cope with offensive, hateful, and even false speech.[20]

The Supreme Court has demonstrated a markedly different approach to claims alleging a violation of the Establishment Clause. Its analysis more closely resembles regular discourse in 2022, by illustrating a concern for the feelings of the hearer that often prevails over the right of the speaker to speak, or the hearer to know.[21] The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion[.]"[22] History, both in England and in the United States prior to the founding, illustrated that governmental support of religion produced an inevitable result: "hatred, disrespect and even contempt of those who held contrary beliefs."[23] The Establishment Clause therefore prohibited the government from preferentially treating one religion over another, or religion over nonbelief.[24] Accordingly, where the

20. *See infra* Part I.

21. *See infra* Part II.A.

22. U.S. CONST. amend. I. Scholars have noted that the Court has been inconsistent in its Establishment Clause jurisprudence in terms of results, theory, and the tests applied. *See* William P. Marshall, *"We Know It when We See It" The Supreme Court Establishment*, 59 S. CAL. L. REV. 495, 495-96 (1986). But the Court has also stated that complete separation is impossible and therefore required "neutrality." Roemer III v. Bd. of Pub. Works, 426 U.S. 736, 745-46 (1976) ("The Court has enforced a scrupulous neutrality by the State, as among religions, and also as between religious and other activities, but a hermetic separation of the two is an impossibility it has never required."); *see also* Marshall, *supra*, at 496 (citing Roemer, 426 U.S. at 745; Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970)). In other instances, the Court has found that the Constitution instead mandates "accommodation" of all religions. Lynch v. Donnelly, 465 U.S. 668, 673 (1984) ("The concept of a 'wall' of separation is a useful figure of speech probably deriving from views of Thomas Jefferson. . . . But the metaphor itself is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state."); *see also* Marshall, *supra*, at 496 (citing *Lynch*, 465 U.S. at 673; Zorach v. Clauson, 343 U.S. 306, 313-14 (1951)). Ultimately, however, the Court has recognized that the Framers believed the government's stamp of approval on one particular religious practice constituted a serious threat to religious freedom. *See* Engel v. Vitale, 370 U.S. 421, 428-29 (1962).

23. *Engel*, 370 U.S. at 431.

24. *See* Everson v. Bd. of Educ., 330 U.S. 1, 15-16 (1947) ("The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the

speaker is the government and the speech consists of a religious display or includes religious messaging, the Court ordinarily prohibits speech that may offend the listener.[25]

The Court has deviated from this customary emphasis on the listener in its Establishment Clause jurisprudence in one particular area: legislative prayer.[26] When litigants allege a violation of the Establishment Clause based on the opening of a session of legislature[27] or a town board meeting[28] with a prayer, the Court has demonstrated reasoning resembling its free speech jurisprudence, expecting the hearer to be capable of coping with the feelings generated by the speech.[29]

This divergence has resulted in a split between the Fifth and Ninth Circuits over what amount of consideration to afford the hearer in the context of school board prayer.[30] The Fifth Circuit has applied the Court's legislative prayer approach (favoring the speaker),[31] whereas the Ninth Circuit has applied ordinary Establishment Clause principles (favoring the hearer).[32]

This Note will argue, first, that under Supreme Court precedent, the Ninth Circuit correctly concluded that school board prayer should not fall within the Court's legislative prayer exemption and should violate the Establishment Clause. Second, this Note will argue that the legislative prayer exemption itself should be deemed an impermissible establishment of religion and should be overruled. In creating the legislative prayer exemption, the Court abandoned its customary sensitivity to the hearer, an approach designed to protect freedom of religion. Instead, the Court applied reasoning that resembled its treatment of the hearer in the free speech context by expecting the listener to cope with the speech. The Court was incorrect to adopt a free speech approach to the establishment claim involving legislative prayer because the Free Speech Clause and Establishment Clause operate through reverse

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Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*.").

25. *See infra* Part II.A.

26. *See infra* Part II.B.

27. *See* Marsh v. Chambers, 463 U.S. 783, 784 (1983).

28. *See* Town of Greece v. Galloway, 572 U.S. 565, 569-70 (2014).

29. *See infra* Part II.B.

30. *See* Freedom from Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ., 896 F.3d 1132, 1137 (9th Cir. 2018) (per curiam); Am. Humanist Ass'n v. McCarty, 851 F.3d 521, 523 (5th Cir. 2017).

31. *See* McCarty, 851 F.3d at 528-29.

32. *See* Chino Valley, 896 F.3d at 1142-3.

mechanisms.[33] The Free Speech Clause protects free speech by *allowing* speech, ensuring a lack of censorship. In contrast, the Establishment Clause protects freedom of religion by *prohibiting* speech, specifically speech that explicitly or implicitly endorses religion. By applying its free speech jurisprudence approach to an establishment claim against legislative prayer, the Court abandoned the very object of the Establishment Clause – to protect freedom of religion.[34]

I.
BACKGROUND

A. Treatment of the Hearer: Free Speech Claims

When litigants raise claims under the Free Speech Clause that their First Amendment rights have been infringed upon, the Court has regularly sided with the speaker and required the hearer to cope with the speech. The Court has made clear that the hearer must tolerate offensive speech when it does not target the hearer and is not a direct insult.[35] In *Cohen v. California*, the Court invalidated a conviction under a California statute based on a man wearing a jacket bearing the words "fuck the draft" in a Los Angeles courthouse, requiring the hearers present to deal with the explicit speech.[36] The Court found that the four-letter word was "clearly not directed to the person of the hearer" and that no hearer present "could reasonably have regarded the words on appellant's jacket as a direct personal insult."[37] Because precedent has "consistently stressed that we are often captives outside the sanctuary of the home and subject to objectionable speech," government cannot shut off discourse solely to protect the hearer unless substantial privacy interests have been invaded in an intolerable manner.[38] The Court was also motivated at least in part by a fear of government, commenting that a majority could easily silence dissidents and minorities based only on personal preferences.[39] Accordingly, rather than silence the speaker, the hearers present were expected to

33. *See infra* Part V.

34. *See infra* Part V.

35. *See* Cohen v. California, 403 U.S. 15, 20 (1971); *see also* Virginia v. Black, 538 U.S. 343 (2003).

36. 403 U.S. at 16-17.

37. *Id.* at 20 (citation omitted).

38. *Id.* at 21 (citation omitted).

39. Cohen, 403 U.S. at 21. The Court's wariness of government seemed to reflect not only a concern for governmental abuse of censorship, *see supra* text accompanying note 11, but also a regard for the "discrete and insular minorities"

"avoid further bombardment of their sensibilities . . . by averting their eyes."[40]

In *Virginia v. Black*, the Court went further and expected the hearer to be capable of withstanding hateful speech.[41] In *Black,* respondents were convicted of violating a Virginia statute which criminalized cross-burning "with the intent of intimidating any person or group of persons[.]"[42] One respondent had led a Ku Klux Klan rally where a cross was burned, and two respondents had attempted to burn a cross on the yard of a Black neighbor.[43] The Court found that a State cannot suppress speech purely because it was carried out "with the purpose of creating anger or resentment" in the hearer.[44] While a State may ban cross-burning carried out with the intent to intimidate, the provision in the Virginia statute treating *any* cross-burning as prima facie evidence of intent to intimidate rendered the statute unconstitutional.[45] Accordingly, the Court found that some cross-burning is protected speech,[46] despite acknowledging that "the burning of a cross is a 'symbol of hate.'"[47] The sense of anger or hatred aroused in the hearer was not sufficient to ban all cross burnings because of the need to avoid oversuppression of ideas.[48] The Court, embracing a Holmesian free market of ideas method of reasoning, quoted Gerald Gunther:[49]

> The lesson I have drawn from my childhood in Nazi Germany and my happier adult life in this country is the need to walk the sometimes difficult path of denouncing the bigot's hateful ideas with all my power, yet at the same time challenging any

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who may be silenced by a governmental majority. *See* United States v. Carolene Prods Co., 304 U.S. 144, 153 n.4 (1938).

40. Cohen, 403 U.S. at 21.

41. *See* 538 U.S. 343, 366 (2003).

42. *Id.* at 348.

43. *Id.* at 348-350.

44. *Id.* at 366.

45. *Id.* at 367-68.

46. Black, 538 U.S. 366.

47. *Id.* at 357 (citing Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 771 (Thomas J., concurring)).

48. *See* Black, 538 U.S. at 366-67.

49. Gerald Gunther was a leading constitutional law scholar and Stanford Law professor, mentored by Learned Hand. Ari L. Goldman, *Gerald Gunther, Legal Scholar, Dies at 75*, N.Y. Times (Aug. 1, 2002) https://www.nytimes.com/2002/08/01/us/gerald-gunther-legal-scholar-dies-at-75.html [https://perma.cc/V5Y6-39G5].

> community's attempt to suppress hateful ideas by force of law.[50]

The hearer is therefore asked to weather hateful, demeaning speech, with arguably no instrumental value, specifically carried out with the purpose of creating anger or resentment in the hearer, so long as it was not designed to intimidate the hearer.

The hearer is expected to cope with offensive and hateful speech because, as the Court has underscored, our system of government rests on the idea that speech should invite debate.[51] In *Texas v. Johnson,* the Court overturned a criminal conviction for burning an American flag in political protest based on a Texas statute outlawing flag desecration.[52] The Court again declined to prioritize the sentiments of the hearer, despite acknowledging that some were "seriously offended" by the protest.[53] The Court instead focused on the critical need for this type of offensive speech for our democratic government to function effectively, again advancing Holmes's free market of ideas: "a principal 'function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.'"[54] Speech that invites debate and the exchange of ideas, even if it offends the hearer, therefore serves a noble or "high" purpose.[55] Consequently, the Court declared it a "bedrock principle underlying the First Amendment" that the government "may not prohibit the expression of an idea simply because society finds the idea . . . offensive or disagreeable."[56]

The Court once again articulated this bedrock principle in *Snyder v. Phelps,* overturning a damage award against the Westboro Baptist Church for intentionally inflicting emotional distress through an anti-gay demonstration at the funeral of a soldier.[57] The impact on the hearer was striking. The father of the soldier testified that he was "unable to separate the thought of his dead son from his thoughts of Westboro's picketing," and that he often would be-

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50. Black, 538 U.S. at 366-67 (citing Gerhard Casper, *Tribute to Professor Gerald Gunther: Gerry*, 55 STAN. L. REV. 647, 649 (2002) (internal quotation marks omitted)).

51. *See* Texas v. Johnson, 491 U.S. 397, 414 (1989); *see also* 491 U.S. at 399.

52. *Id.* at 399.

53. *Id.* at 408.

54. *Id.* at 408-09 (citing Terminiello v. Chicago, 337 U.S. 1, 4 (1949)).

55. *See id.*

56. *Id.* at 414.

57. 562 U.S. 443, 460 (2011).

come "tearful, angry, and physically ill" when he thought about it.[58] Expert witnesses also testified that his emotional anguish had resulted in severe depression and had exacerbated pre-existing health conditions.[59] Despite these effects, the Court rearticulated the necessity of avoiding suppression purely based on the offensive nature of the speech.[60] On the contrary, the Court quoted an earlier opinion of the Court for the proposition that "in public debate [we] must tolerate insulting, and even outrageous, speech in order to provide adequate 'breathing space' to the freedoms protected by the First Amendment."[61]

On occasion, the Court does not even acknowledge the effect of offensive speech on the hearer in its reasoning. In *United States v. Stevens*, the Court reversed a conviction under a federal statute criminalizing the sale of depictions of animal cruelty and declared the statute facially invalid.[62] The Court did not address the effect on the hearer of the horrifying and cruel "crush videos," in which animals were tortured and killed to appeal to persons with a specific sexual fetish, but simply declared the statute overbroad.[63] Despite a clear lack of instrumental value, the Court found that banning depictions of animal cruelty "as a class" violates the First Amendment, noting that restrictions upon the content of speech have been permitted in only a few limited areas.[64]

Not only is the hearer expected to cope with offensive and hateful speech,[65] but also the hearer is required to sort out true

58. *Id.* at 450.

59. *Id.*

60. *Id.* at 458.

61. *Id.* (quoting Boos v. Barry, 485 U.S. 312, 322 (1988) (some internal quotations omitted)).

62. 559 U.S. 460, 482 (2010).

63. *Id.* at 465-66. The case itself involved an application of the statute to depictions of animal fighting, but the Court acknowledged that crush videos fell within the scope of and were the main target of the statute. *Id.*

64. *Id.* at 468.

65. Hate speech has been defined as "any form of expression through which speakers primarily intend to vilify, humiliate, or incite hatred against their targets." Kenneth D. Ward, *Free Speech and the Development of Liberal Virtues: An Examination of the Controversies Involving Flag-Burning and Hate Speech*, 52 U. MIAMI L. REV. 733, 765 (1998). Hate speech is generally protected by the Constitution, unless the speech falls within a narrow, unprotected category. Planned Parenthood v. Am. Coal. of Life Activists, 290 F.3d 1058, 1092 (9th Cir. 2002), as amended (July 10, 2002) (Reinhardt, J., dissenting) ("Speech . . . may not be punished or enjoined unless it falls into one of the narrow categories of unprotected speech recognized by the Supreme Court: true threat, incitement, conspiracy to commit criminal acts, fighting words, etc.") (citations omitted).

speech from false.[66] In *United States v. Alvarez,* the Court overturned a criminal conviction for a false claim of receipt of the Congressional Medal of Honor.[67] The Court declined to protect the hearer from such false speech, reasoning that "some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee."[68] The Court once again prioritized the speaker's contribution to the Holmesian free market of ideas over the position of the hearer, in pursuit of a more robust exchange of ideas. However, in *Alvarez,* the Court prioritized the speaker's right to speak not just over the hearer's feelings, but also over the hearer's right to know, since the speaker's contribution to the marketplace of ideas consisted of falsehoods.

II.
TREATMENT OF THE HEARER: ESTABLISHMENT CLAUSE CLAIMS

A. Ordinary Treatment

In contrast to its treatment of the hearer in claims asserting a violation of the freedom of speech, the Court has ordinarily been sympathetic to the concerns of the hearer where the litigant has asserted a violation of the Establishment Clause. In *Engel v. Vitale*, the Court did not focus directly on the hearer, but rather on the government, specifically the prohibition against the government providing support for a religious group.[69] The Court declared that public prayer in public schools violated the Establishment Clause, not because of the potential coercion on the students, but because the government had no right "to control, support or influence the kinds of prayer the American people can say."[70] The Court also acknowledged that indirect coercive pressure on religious minorities is readily apparent where the government supports one particular religious belief, but that the "purposes underlying the Establishment Clause go much further" than preventing coercion.[71] Instead,

66. *See generally* United States v. Alvarez, 567 U.S. 709 (2012) (plurality opinion).

67. *Id.* at 715.

68. *Id.* at 718 (citation omitted). The Court drew a distinction between perjury and statutes prohibiting lying to the government, speech that is not protected by the First Amendment, based on the impact on the integrity of the trial system and the government process, respectively. *See id.* at 720-21.

69. 370 U.S. 421, 430-31 (1962).

70. *Id.* at 429.

71. *Id.* at 431.

the First Amendment's "first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion."[72] The Court then recognized the detrimental effect on the hearer, acknowledging that history illustrated that government support of religion resulted in disrespect and contempt for those in the minority.[73] The Court therefore demonstrated concern for the hearer in its reasoning, but focused on the long-term consequences of government establishment on non-adhering minorities, including the hearer, rather than the hearer's immediate offense or the coercive effect of the prayer.[74] Accordingly, public prayer in public schools violated the Establishment Clause,[75] as did bible readings and readings of the Lord's Prayer.[76]

In 1971, the Court outlined the three-prong *Lemon* test to determine whether a government action violates the Establishment Clause.[77] To satisfy the test and avoid invalidation, the government action must (1) have a secular purpose, (2) have a primary effect that neither advances nor inhibits religion, and (3) avoid excessive entanglement with religion.[78] In *Lemon*, the Court invalidated two state statutes that provided state aid to church-related elementary and secondary schools because they involved excessive entanglement between government and religion.[79] In finding that the statutes involved excessive entanglement, the Court focused on various characteristics of the schools that made them a vehicle for transmitting religion to the next generation, a process enhanced by the impressionable age of the students.[80] The Court therefore demonstrated concern for the coercive effect on the hearer,[81] as opposed to the long-term consequences on non-adherent minorities as in *Engel*.[82]

Justice O'Connor signaled particular sensitivity to the hearer's immediate feelings in her concurrence in *Lynch v. Donnelly*,[83] which

72. *Id.*
73. *Id.*
74. *See* Engel, 370 U.S at 431.
75. *See id.* at 436.
76. Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 205-06 (1963).
77. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).
78. *Id.*
79. *Id.* at 613-614, 625.
80. *Id.* at 616.
81. *See id.*
82. Engel v. Vitale, *supra* note XX,at 431.
83. *See* 465 U.S. 668, 687-94 (1984) (O'Connor, J., concurring).

shortly thereafter became controlling precedent.[84] Although she agreed with the majority that the city of Pawtucket did not violate the Establishment Clause by erecting a Nativity scene in its shopping district, O'Connor's articulation of how government may potentially violate the Clause established a framework that was much more deferential to the hearer. Under Justice O'Connor's construction, government violates the Establishment Clause through its "endorsement or disapproval of religion."[85] She reasoned that endorsement sends a message to non-adherents that they are "outsiders, not full members of the political community," and also sends an "accompanying message to adherents that they are insiders, favored members of the political community," whereas disapproval sends the opposite message.[86] O'Connor's endorsement test ushered in a greater concern for the sensibilities of the hearer in the Court's jurisprudence, suggesting that a showing that a non-adherent was made to feel like an outsider may be sufficient to establish a violation of the Establishment Clause.[87]

After *Lynch,* the Court continued to demonstrate sensitivity to the immediate feelings of the hearer. Just four years later, the Court revisited the claim that a local government's display of a Nativity scene violated the Establishment Clause, and found a violation.[88] The Court justified this departure by stating that the rationale of the majority opinion in *Lynch* was "none too clear," and that neither of its lines of reasoning provided guidance in subsequent cases.[89] Instead, the Court embraced O'Connor's framework, agreeing that government endorsement sends a message to non-adherents that they are outsiders.[90] The Court also clarified that to determine whether the government has the effect of endorsing religion under O'Connor's test, the Court should consider "what

84. *See infra* text accompanying notes 88-92.

85. Lynch, 465 U.S. at 688.

86. *Id.*

87. *See id.*

88. *See* County of Allegheny v. ACLU, 492 U.S. 573, 592-603 (1989).

89. *Id.* at 594. Justice Kennedy dissented in *Allegheny*, rejecting O'Connor's endorsement test. *See id.* at 655 (Kennedy, J., dissenting). Kennedy argued that if the intent of the Establishment Clause were to "protect individuals from mere feelings of exclusion," then legislative prayer, permitted just six years earlier in *Marsh v. Chambers*, 463 U.S. 783 (1983), would be invalidated. Allegheny, 492 U.S. at 673 (Kennedy, J., dissenting). He instead suggested a "proselytization" inquiry, noting that there was "no realistic risk" that a creche display represented an effort to proselytize or was otherwise the first step down the road to an establishment of religion. *Id.* at 664 (Kennedy, J., dissenting).

90. *Id.* at 595-97 (majority opinion).

viewers may fairly understand to be the purpose of the display."[91] Here, the Court found factual differences, such as its setting in a country courthouse, that suggested the purpose of the display was to send a message that it supported and promoted a creche's Christian message.[92]

The Court has since demonstrated heightened concern for the immediate feelings of the hearer when applying other Establishment Clause tests apart from the endorsement framework. In *Lee v. Weisman*, the Court concluded that public prayer at a graduation ceremony violated the Establishment Clause, based on concerns for the sentiments of the students in the audience.[93] Applying what is now dubbed the Coercion Test,[94] the Court asked whether the prayer would have a "coercive" effect on the students in attendance.[95] The Court acknowledged that heightened concerns exist in the elementary and secondary public-school context to protect against "subtle coercive pressure," because a non-adhering student may perceive a request to respect religious practices as an "attempt to employ the machinery of the State to enforce a religious orthodoxy."[96]

In its application of the Coercion Test, the Court illustrated sensitivity to the feelings of the hearer, who may feel slighted by the state's decision to support a certain religion over the non-adherent's. Although the graduation ceremony was technically voluntary, students' attendance at their graduation ceremony and participation in the religious activity was "in a fair and real sense obligatory"[97] due to public pressure, and also peer pressure, to attend and on attending students to stand as a group or maintain respectful silence.[98] The Court considered this pressure to be as concrete and consequential as overt compulsion,[99] recognizing that adolescents

91. *Id.* at 595.

92. *Id.* at 599-600.

93. 505 U.S. 577, 588, 599 (1992).

94. *See* Phillip E. Marbury, *Audience Maturity and the Object of the Establishment Clause*, 6 LIBERTY U.L. REV. 565, 573 (2012) ("The origin of this so-called Coercion Test is found in *Lee v. Weisman*, where the Court began its analysis of an Establishment Clause issue by laying out the elements of the three-prong *Lemon* Test, but then – based on the inability of *Lemon* to appropriately address the specific issue at hand – shifted its focus and based its holding upon something different.").

95. Weisman, 505 U.S. at 592.

96. *Id.*

97. *Id.* at 586.

98. *Id.* at 593. The Court recognized that "to say a teenage student has a real choice not to attend her high school graduation is formalistic in the extreme." *Id.* at 595.

99. *Id.* at 593.

are often more susceptible to peer pressure, especially in matters of social convention.[100] The Court was ultimately concerned with the "conflict of conscience" that the young student hearer was facing,[101] and prioritized the hearer's sensibilities.

Likewise, the Court demonstrated extra attention to the feelings of the student hearer in *Santa Fe Independent School District. v. Doe*, when holding that prayer conducted via a public address system at public high school football games violated the Establishment Clause.[102] The Court applied both O'Connor's endorsement framework as well as the *Lemon* Test, calling its prongs "three factors . . . which guide[ ] 'the general nature of our inquiry in this area.'"[103] Accordingly, the Court considered school sponsorship of a religious message impermissible because it sends the ancillary message to non-adhering hearers that they are outsiders.[104] Although participation at high school home football games was not mandatory, prayer at home football games presented a similar level of impermissible peer pressure as did prayer at a graduation ceremony.[105] High school football games are traditional gatherings of a school community that bring students, faculty, friends, and family together, and therefore the choice between attending and risking a personally offensive religious ritual may be a very difficult one for a student.[106]

B. Departures from Ordinary Treatment of the Hearer

In the area of legislative prayer, however, the Court has departed from its customary protection of the feelings of the hearer confronted with governmental religious messaging. In *Marsh v. Chambers*, the Court held that the Nebraska legislature's practice of opening each legislative day with a prayer by a chaplain paid by the State was constitutionally permissible,[107] reasoning that the practice of opening sessions of legislative and other deliberative public bodies with prayer is deeply embedded in United States history and tradition.[108] The Court noted that the Framers of the First Amendment Religion Clauses had voted three days prior to pass a congressional act authorizing a chaplain for Congress.[109] Therefore, the

100. Weisman, 505 U.S. at 593.
101. *Id.* at 596.
102. *See* 530 U.S. 290, 294, 317 (2000).
103. *Id.* at 314 (citing Mueller v. Allen, 463 U.S. 388, 394 (1983)).
104. *See id.* at 309-10.
105. *See id.* at 311-12 (citing Weisman, 505 U.S. at 593).
106. *See id.*
107. Marsh v. Chambers, 463 U.S. 783, 784, 795 (1983).
108. *Id.* at 786.
109. *See id.* at 787-88.

Court concluded, the Framers did not consider legislative chaplains and opening prayers to be a violation of the Establishment Clause.[110]

Although non-adherent hearers in the legislature may ultimately feel isolated by a legislative prayer, the Court did acknowledge the sentiments of these hearers.[111] The Court noted that the target audience of legislative prayer consists of adults who are "presumably not readily susceptible to 'religious indoctrination,' . . . or peer pressure[.]"[112] The Court therefore seemed more comfortable permitting an affront to the sensibilities of the hearer faced with governmental religious content where that hearer was an adult, here an elected legislator. Likewise, the Court indicated some concern for the feelings of the hearer when noting that the Framers did not consider legislative opening prayers to be a "proselytizing activity" or to be "symbolically placing the government's 'official seal of approval on one religious view.'"[113] In *Marsh*, there was also no indication that the Nebraska legislature's prayer had been exploited to proselytize anyone or to disparage any religion, an absence that the Court used in support of finding the prayer constitutional.[114]

More recently, the Court again concluded that the non-adhering hearer must cope with the potential offense of governmental religious speech, this time in the context of town board prayer.[115] The Court held that the practice by the Greece, New York Town Board of opening its monthly meetings with a prayer from an invited clergy member did not violate the Establishment Clause.[116] Justice Kennedy, writing for the majority,[117] determined that the Court should inquire whether the Town Board prayer fits within

110. *Id.* The Court noted that historical patterns cannot alone justify contemporary violations of constitutional guarantees, but that in this context the historical evidence shed light on the Framers' intended meaning of the Establishment Clause. *See id.* at 790.

111. *See id.* at 791-92.

112. *Id.* at 792 (citations omitted).

113. *Id.* (quoting Chambers v. Marsh, 675 F.2d 228, 234 (8th Cir. 1982)).

114. *Id.* at 794-95.

115. *See* Town of Greece v. Galloway, 572 U.S. 565, 569-70 (2014).

116. *Id.*

117. The opinion was 5-4, with Justice Kennedy writing the majority opinion for Chief Justice Roberts, Justices Scalia, Thomas, and Alito, with Justices Breyer, Kagan, Ginsburg, and Sotomayor dissenting. *See generally* Town of Greece, 572 U.S. 565 (2014).

the tradition followed by Congress and the state legislatures permitted under *Marsh*.[118]

In determining whether town board prayer fit within tradition as in *Marsh*, the Court found that the purpose of opening a legislative session with prayer is to "lend gravity to the occasion and reflect values long part of the Nation's heritage."[119] Accordingly, prayer 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" serves a legitimate purpose.[120] The Court imposed only minimal restraints on the content of the prayer; legislative prayer will only violate the Establishment Clause if a "course and practice over time shows that the invocations denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion."[121] Even then the Court refused to declare a violation, but said that type of prayer "may . . . fall short" of the legitimate governmental purpose and would "present a different case[.]"[122]

In concluding that town board prayer fit within the *Marsh* legislative prayer tradition, the Court's reasoning more closely resembled the Court's treatment of the hearer in the free speech context than its treatment of the hearer in Establishment Clause precedents. The majority concluded first that the sectarian content of the Town Board's prayer did not establish that the prayer was outside the *Marsh* tradition.[123] In the process, the Court explicitly rejected the endorsement test[124] employed in *Allegheny* that considered whether the hearer felt like an outsider.[125] The Court noted that four dissenting Justices in *Allegheny* disputed that endorsement could be the proper test; in their view, an endorsement test would invalidate traditional practices that "recognize the role religion plays in our society," including legislative prayer.[126] Justice Kennedy

118. *See id.* at 577. *Marsh* is sometimes described as an exception to the Court's Establishment Clause jurisprudence, because it upheld legislative prayer without employing any of the tests that traditionally structure the inquiry. However, the Court in *Town of Greece* noted that those tests were found to be unnecessary in *Marsh* because history supported the conclusion that legislative prayer did not violate the Establishment Clause. *Id.* at 575.

119. *Id.* at 583.

120. *Id.*

121. *Id.*

122. *Id.*

123. *See id.* at 578-79.

124. *See id.* at 579-80.

125. *See supra* text accompanying notes 84-87.

126. *See* Town of Greece, 572 U.S. at 579-80.

and the majority in *Town of Greece* agreed and instead embraced an approach much less sympathetic to the feelings of the non-adhering hearer and much more tolerant of governmental religious messaging.[127] Accordingly, a sectarian prayer with "the effect of endorsing a patently Christian message" did not on its own violate the Establishment Clause.[128]

The Court's move from asking whether the religious message or display sends a message to non-adherents that they are outsiders,[129] to asking whether the message or display amounts to a pattern that "over time denigrate[s], proselytize[s], or betray[s] an impermissible government purpose"[130] represents a departure from its customary Establishment Clause jurisprudence, even beyond *Marsh*. The Court demonstrated much less concern for the sentiments of the hearer. The prayer may cause the hearer to feel completely isolated and apart from the rest of the political community, but nevertheless the prayer may be permitted because there has not yet been a pattern or practice of denigration.[131] The prayer in *Town of Greece* isolated certain listeners but withstood challenge because of this absence of pattern or practice. One guest minister offering an invocation characterized the objectors as a "minority" who were "ignorant of the history of our country," and another lamented that other towns did not have "God-fearing" leaders.[132] The Court cast aside these disparaging comments, declaring them insufficient to establish a violation of the Establishment Clause.[133]

The Court in *Town of Greece* separately rejected the argument that the town board's prayer coerced participation by non-adherents in the audience.[134] The Court's application of *Weisman*'s Coercion Test was also much less sympathetic to the feelings of the hearer of the town board prayer.[135] The Court began by essentially ignoring certain offended hearers, contending that the principal

127. *See id.* at 579-83.

128. *Id.* at 579 (quoting County of Allegheny v. ACLU, 492 U.S. 573, 601 (1989)).

129. *See* Allegheny, 492 U.S. at 595-97.

130. Town of Greece, 572 U.S. at 585.

131. The Court's decision to extend First Amendment protection for a legislative prayer so long as no pattern or practice of denigration has been shown resembles its Free Speech approach in *Virginia v. Black*, 538 U.S. 343 (2003), where speech will be protected so long as it was not designed to intimidate the hearer. *See supra* text accompanying notes 41-50.

132. Town of Greece, 572 U.S. at 585.

133. *Id.*

134. *Id.* at 587.

135. *See id.* at 586-91.

audience for the prayers was not the members of the public in the audience but the legislators 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."[136] The Court then acknowledged that members of the audience were offended and made to feel "excluded and disrespected," but the Court (closely mirroring its free speech jurisprudence) found that offense "does not equate to coercion" and that "[a]dults often encounter speech they find disagreeable[.]"[137] The majority was also careful to distinguish *Lee v. Weisman*,[138] where the Coercion Test had produced the opposite outcome and where the Court was more wary of the concerns of the hearer in the audience.[139] The Court noted that the town meeting's target audience in *Town of Greece* consisted mainly of "mature adults," who are less susceptible to religious indoctrination, and that members of the public are free to leave or arrive late to the meeting, unlike the graduation ceremony in *Weisman*.[140] Describing the inquiry as a fact-sensitive one, the Court ultimately concluded that the town board's prayer did not compel the hearer to engage in religious observance.[141]

Marsh and *Town of Greece* represent deviations from the Court's conventional approach to Establishment Clause claims. While the Court does not consistently apply a single framework for evaluating claims based on the Establishment Clause,[142] it has consistently demonstrated a special consideration for the hearer's sense of alienation by the government's religious exhibition. Beginning with *Marsh*, and then more dramatically in *Town of Greece*, the Court departed from this approach and instead insisted that the hearer deal with the religious display.

III.
CIRCUIT SPLIT

The Court's approach in *Marsh* and subsequently in *Town of Greece* has produced a split among the Circuits as to whether school board prayer violates the Establishment Clause. The Fifth and Ninth Circuits disagree over whether school board prayer falls

136. *Id.* at 587.
137. *Id.* at 589.
138. 505 U.S. 577, 592, 598 (1992).
139. *See supra* text accompanying notes 93-101.
140. *Town of Greece*, 572 U.S. at 590.
141. *Id.* at 587.
142. *See supra* note 22.

within the scope of legislative prayer,[143] and consequently what level of concern the hearer is owed.

A. Fifth Circuit

In 2017, the Fifth Circuit in *American Humanist Association v. McCarty* held that school board prayer fell within *Marsh* and did not violate the Establishment Clause,[144] expanding the Supreme Court's detached consideration of the hearer to the school board context. The Birdville Independent School District had a policy of inviting two students, usually either elementary or middle school students, to deliver statements before school-board meetings.[145] One student would lead the Pledge of Allegiance and the Texas pledge, and the other would deliver another form of statement, which according to plaintiffs usually consisted of an invocation in the form of a prayer, with speakers frequently referencing "Jesus" or "Christ."[146] The Fifth Circuit acknowledged that the central issue was whether school board prayer fit within the legislative prayer line of cases,[147] or instead within the school prayer cases[148] where the Supreme Court has applied its conventional Establishment Clause tests.[149]

Relying on *Town of Greece*, the Fifth Circuit concluded that the school board context more closely aligned with the legislative context than the public-school setting.[150] Although the court acknowledged that students themselves delivered the religious invocations, like the school prayer in *Santa Fe*,[151] the Fifth Circuit reasoned that the school board was a deliberative body established to accomplish tasks that were "undeniably legislative" such as adopting budgets, collecting taxes, and conducting elections, like the town board in *Town of Greece*.[152] Further, as in *Town of Greece*, most attendees at the

143. *See* Freedom from Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ., 896 F.3d 1132, 1137 (9th Cir. 2018) (per curiam); Am. Humanist Ass'n v. McCarty, 851 F.3d 521, 523 (5th Cir. 2017).

144. McCarty, 851 F.3d at 523, 526.

145. *Id.* at 523-24.

146. *Id.* at 524.

147. *See* Town of Greece v. Galloway, 572 U.S. 565 (2014); Marsh v. Chambers, 463 U.S. 783 (1983). .

148. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 301 (2000); Lee v. Weisman, 505 U.S. 577 (1992); County of Allegheny v. ACLU, 492 U.S. 573, 591 (1989).

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

150. *See id.* at 526-28.

151. *See id.* at 526.

152. *Id.*

meetings were mature adults, and the attendees were not prevented from leaving the meeting room during the prayer, arriving late, or making a later protest.[153] Although members of the board and other school officials would ask the audience, including students in the audience, to stand for the invocation, the court did not consider these "polite requests" to be coercive.[154]

The Fifth Circuit acknowledged that children were present at the school board meetings, and that children are especially susceptible to peer pressure and other forms of coercion.[155] However, the Fifth Circuit dismissed this fact because children were present at the town-board meetings in *Town of Greece* and the Supreme Court nevertheless considered the town board meeting to fall within *Marsh*, and also because the prayer was delivered during the ceremonial part of the meeting.[156]

B. Ninth Circuit

Taking the opposite approach to the Fifth Circuit, the Ninth Circuit declared school-board prayer a violation of the Establishment Clause.[157] In *Freedom from Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ.*, the local school board opened its meetings with a report by the board's president on the previous session, the pledge of allegiance, and then an opening prayer, usually led by a member of the clergy.[158] Occasionally, a board member or audience member would lead the prayer instead.[159] Students regularly attended the meetings, as student presentations often followed the opening prayer and at times meetings would include recognition of student academic and extracurricular accomplishments.[160] The school board itself also included a student representative who was an "active participant" at meetings.[161]

The Ninth Circuit rejected the notion that school-board prayers should be considered within the meaning of legislative prayer.[162] The court recognized that *Marsh* and *Town of Greece* to-

153. *Id.*
154. *Id.*
155. *See* McCarty, 851 F.3d at 527 (citing Lee v. Weisman, 505 U.S. 577 at 592 (1992)).
156. *See id.* at 527-28.
157. Freedom from Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ., 896 F.3d 1132, 1152 (9th Cir. 2018) (per curiam).
158. *Id.* at 1138.
159. *Id.*
160. *Id.*
161. *Id.* at 1139.
162. *See id.* at 1142.

gether identified "certain characteristics of setting and content that mark legislative prayer."[163] First, the prayer occurs at the opening of the legislative session to lend gravity to the occasion and to invite legislators to reflect upon shared ideals and common ends, "before they embark on the fractious business of governing."[164] Second, the audience consists of "mature adults" who are free to enter and leave during the prayer.[165] Further, the atmosphere where legislative prayer occurs is distinct from that of a school function, where school personnel "retain a high degree of control over the event" and supervise the students' conduct and substance of the event closely.[166]

The Ninth Circuit concluded that the school-board meeting in *Chino Valley* did not share these legislative prayer characteristics.[167] First, the setting of legislative prayers only "dimly resemble[d]" the Chino Valley Board meetings.[168] The meetings were "not solely a venue for policymaking," but were also "a site of academic and extracurricular activity," and further an "adjudicative forum for student discipline."[169] Therefore, many members of the audience, and many active participants in the meetings, were children whose "attendance was not truly voluntary."[170] The meetings instead functioned as "extensions of the educational experience,"[171] closer to a school function than a legislative session.

The Ninth Circuit also emphasized that the makeup of the audience distinguished the setting from a legislative session. Both *Marsh* and *Town of Greece* were premised on the principle that adult citizens, who are firm in their beliefs, are less susceptible to peer pressure and can tolerate prayer and speech they find disagreeable.[172] The audience in *Chino Valley*, in contrast, included large

163. Chino Valley, 896 F.3d. at 1143.
164. *Id.* (quoting Town of Greece v. Galloway, 572 U.S. 565, 583 (2014)).
165. *Id.* at 1143 (citing Town of Greece, 572 U.S. at 590).
166. *Id.* at 1143-44 (citing Lee v. Weisman, 505 U.S. 577, 597 (1992)).
167. *Id.* at 1145.
168. *Id.*
169. Chino Valley, 896 F.3d at 1145.
170. *Id.*
171. *Id.*
172. *Id.* ("Both *Marsh* and *Town of Greece* emphasize that the audience for the prayers at issue consisted of adults—"adult citizens, firm in their own beliefs," who consequently could "tolerate and perhaps appreciate" legislative prayer. . . As *Town of Greece* explained, "[a]dults often encounter"—and, our law presumes, are well-equipped to handle—"speech they find disagreeable." . . . For adults, legislative prayer does not pose an insurmountable constitutional problem, because adults "presumably are not readily susceptible to religious indoctrination or peer pressure."). As the Fifth Circuit in *McCarty* noted, children were present at the town-

numbers of children, who are "more vulnerable to outside influence."[173] In addition to differences in setting, the Ninth Circuit reasoned that the nature of the Board's mandate, and its relationship to the population it serves, was dissimilar from the function of Congress, a state legislature, or a town board.[174] School boards "exercise control and authority over the student population," for example through the power to suspend or expel students, whereas legislators and constituents hold equal status as adult members of the political community such that constituents feel free to exit the environment or voice dissent.[175]

The Ninth Circuit also found that the historical tradition of legislative prayer identified in *Marsh* and *Town of Greece* did not support prayer at school-board meetings.[176] At the time of the Founding, free public education was virtually nonexistent, and the Bill of Rights had not yet been incorporated to the states.[177] Accordingly, the court reasoned, the Framers could not have considered the Establishment Clause's legislative prayer exception to apply to local school boards' actions.[178]

Having found that the school board prayer was not within the meaning of legislative prayer, the Ninth Circuit applied the *Lemon* test[179] to determine whether the policy was an impermissible establishment of religion.[180] The court found that the policy lacked a secular purpose and therefore failed the first *Lemon* prong.[181] Although failure of the first *Lemon* prong alone establishes a violation of the Establishment Clause, the court found that the policy vio-

board meeting in *Town of Greece*. *See* Am. Humanist Ass'n v. McCarty, 851 F.3d 521, 527-28 (5th Cir. 2017). However, the Court in *Town of Greece* found that the meeting's target audience consisted mainly of mature adults and that members of the public were free to leave or arrive late. Town of Greece v. Galloway, 572 U.S. 565, 590 (2014).

173. Chino Valley, 896 F.3d at 1145 (citing Lee v. Weisman, 505 U.S. 577, 593-94 (1992)).

174. *Id.* at 1146.

175. *Id.* at 1146-47 (citation omitted).

176. *Id.* at 1147-48.

177. *Id.* at 1148 (citing Edwards v. Aguillard, 482 U.S. 578, 583 n.4 (1987)).

178. *Id.*

179. *See supra* note 79.

180. *See* Chino Valley, 896 F.3d at 1148-51.

181. *Id.* at 1149-50. The school board had offered two secular purported secular purposes: solemnization of the Board meetings, and acknowledging and expressing the Board of Education's respect for the diversity of religious faiths represented and practiced among the district. The Court found that neither purpose was secular; there is no secular reason to limit solemnization to prayers or to certain faiths, and the purpose of acknowledging religious faiths does not encompass nonreligious belief systems and their diversity. *Id.*

lated the second and third *Lemon* prongs as well.[182] The policy advanced religion, in particular Christianity, in violation of the second prong, and the policy fostered excessive government entanglement with religion, in violation of the third.[183] Accordingly, the school board's prayer was an impermissible establishment of religion.[184]

C. The Fifth and Ninth Circuits' Consideration of the Hearer

The Fifth Circuit's expansion of *Marsh* and *Town of Greece* to the school board prayer context results in less concern for the hearer's potential indignation, a particularly problematic result given the more numerous and diverse audience in attendance at a school board meeting. In *Marsh,* the hearers consisted solely of members of the legislature.[185] The Supreme Court expanded that group in *Town of Greece* to the legislators on the town board and also the audience members.[186] The group of hearers at the school-board meeting in *McCarty* included the legislators on the school-board, the audience members, including students receiving awards or giving performances, and the students who delivered the pledges and invocations.[187] However, the Fifth Circuit chose to focus on one primary hearer, the board members, ignoring the feelings of the other hearers, including young students. Moreover, in *McCarty*, the students themselves delivered the invocations,[188] which arguably exacerbates the pressure on other students in the audience to conform that the Court in *Weisman* was concerned with preventing.[189]

The Ninth Circuit's decision to decline to extend *Marsh* and *Town of Greece* to school board prayer followed from its heightened concern for the audience member hearer. The Ninth Circuit's reasoning in part depended on the makeup of the hearers, which included children more vulnerable to pressure and indoctrination.[190] While children were also hearers at the town board meeting in *Town of Greece*,[191] the school board exercised direct authority over

182. *Id.* at 1151.
183. *Id.*
184. *Id.* at 1152.
185. Marsh v. Chambers, 463 U.S. 783, 784 (1983).
186. Town of Greece v. Galloway, 572 U.S. 565, 587-88 (2014).
187. Am. Humanist Ass'n v. McCarty, 851 F.3d 521, 523-24 (5th Cir. 2017).
188. *See id.* at 524.
189. *See* Lee v. Weisman, 505 U.S. 577, 592 (1992).
190. *See id.* at 593.
191. *See* Town of Greece v. Galloway, 572 U.S. 565, 598 (Alito, J., concurring). *See also McCarty*, 851 F.3d at 527-28.

the children.[192] These students consequently would feel even less free to dissent and more coerced by the exercise of prayer. This concern for the feelings of the student hearer resembles the Court's sympathy for the non-adherent hearer in its ordinary Establishment Clause jurisprudence, in particular the school prayer line of cases.[193]

IV.
APPLYING MARSH AND TOWN OF GREECE TO SCHOOL BOARD PRAYER

Under current Supreme Court precedent, school board prayer should violate the Establishment Clause. The Fifth Circuit correctly acknowledged that school board prayer falls within a gray area between the Supreme Court's school prayer precedents and the legislative and town board meeting prayers upheld in *Marsh* and *Town of Greece*.[194] However, the Fifth Circuit incorrectly concluded that school board prayer fell within *Marsh*, while the Ninth Circuit properly found that school board prayer was outside the proper scope of legislative prayer.

As the Ninth Circuit illustrated, the historical tradition of legislative prayer also does not support prayer at school-board meetings.[195] The Framers could not have considered the Establishment Clause's legislative prayer exception to apply to local school boards' actions because at the time of the Founding, the Establishment Clause did not apply to the states.[196]

Furthermore, school board prayer does not meet the criteria required for a governmental prayer to fall within the meaning of legislative prayer, as established by the Court in *Marsh* and *Town of Greece*. First, a legislative prayer is inherently conducted during a legislative session where the purpose is to govern constituents. Justice Kennedy in *Town of Greece* illustrated this principle by declaring that a prayer is held during a legislative session to invite lawmakers to reflect upon their shared ideals before they begin to govern,[197] and that prayer eases the task of governing by setting the mind to a

192. *See* Freedom from Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ., 896 F.3d 1132, 1146-47 (9th Cir. 2018) (per curiam).

193. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000); Weisman, 505 U.S. at 577; County of Allegheny v. ACLU, 492 U.S. 573, 591 (1989).

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

195. Chino Valley, 896 F.3d at 1147-48.

196. *Id.* at 1148.

197. Town of Greece, 572 U.S. at 583.

higher purpose.[198] A school board's primary purpose is not to govern its constituents, but to ensure the education of the students in its district.[199]

In addition to serving a different purpose, the setting and content of a school board meeting diverges notably from a town board meeting. School boards are deliberative bodies and may accomplish tasks that resemble a legislature, like adopting budgets and conducting elections. However, the deliberative nature of a board cannot on its own qualify the board for legislative prayer; otherwise, a student-body president could invite a priest or rabbi to open a student council meeting with a prayer. School boards are, unlike national, state, and local legislatures, a site of academic and extracurricular activity, and an adjudicative forum for student discipline. The board members are often communicating directly to students. Faculty or administrators affiliated with the school also exercise control over the event and supervise the students. While children were present at the town board meeting in *Town of Greece*,[200] the town board members did not exercise any control over the children present. The students at a school board meeting, subject to the discipline of the faculty in attendance, would likely not feel free to dissent from the prayer.

Most notably, an instrumental difference between town board meetings and school board meetings is the hearer. In *Marsh* and *Town of Greece*, the Court considered the legislators or board members, respectively, to be the relevant hearers. The Court in *Town of Greece* acknowledged that audience members were present hearers who may be offended by the prayer, but that the audience consisted mainly of "mature adults," less susceptible to religious indoctrination, and that the audience members were free to leave or arrive late.[201] The same cannot be said for the hearers present at school board meetings. The students in attendance are clearly a relevant group for the Court to consider,[202] attending their own school's board meeting perhaps for the purpose of recognition or disci-

198. *Id.* at 587.

199. *See supra* text accompanying notes 169-171 and text accompanying notes 174-175.

200. *See* Town of Greece, 572 U.S. at 598 (Alito, J., concurring). *See also* McCarty, 851 F.3d at 527.

201. Town of Greece, 572 U.S. at 590.

202. An argument can certainly be made that the children in the audience in *Town of Greece* are relevant hearers (*see infra* text accompanying notes 200-201), but under the Supreme Court's logic they are treated as irrelevant and unfocused companions of their parents. *See id.*

pline.[203] Most significantly, the students involved are more susceptible to peer pressure and indoctrination, and may face a significant "conflict of conscience."[204] The criteria laid out by the Supreme Court that mark legislative prayer, and also the historical tradition that the Court relied on in support of legislative prayer, together make clear that school board prayer should not fall within the scope of the legislative prayer sanctioned by the Court.

V.
SCHOOL BOARD PRAYER: A VIOLATION UNDER PROPER CONSIDERATION OF THE HEARER

School board prayer should violate the Establishment Clause not only because it does not fall within the Supreme Court's understanding of legislative prayer, but also because legislative prayer itself should violate the Establishment Clause. Analysis of the Court's treatment of the hearer over the past half-century illustrates that the Court is much more sensitive to the hearer when establishment claims are raised, as compared to free speech claims.[205] However, the Court broke from this customary approach in *Marsh* and *Town of Greece,* expecting the non-adherent hearer to cope with the isolation and offense of a governmental prayer.[206] The Court's reasoning in *Marsh* and *Town of Greece* mirrored the Court's treatment of the hearer in the free speech context, rather than its establishment jurisprudence.[207]

The Supreme Court was incorrect to adopt a free speech approach to the establishment claims against legislative prayer. The Court's diverging treatment of the hearer in the areas of free speech and establishment follows from the different mechanisms by which the First Amendment protects speech (through the Free Speech Clause) versus religion (through the Establishment Clause).[208]

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203. *See supra* text accompanying note 159.

204. *See* Weisman, 505 U.S. 577, 596 (1992).

205. *See supra* Part I and Part II.A.

206. *See supra* Part II.B.

207. *See id.*

208. Weisman, 505 U.S. at 591. In *Weisman,* the school district had argued that high school students are capable of rejecting ideas with which they disagree and therefore that the non-adhering students were capable of coping with the school prayer, in effect asking the Court to afford the hearer the customary treatment in free speech claims. *See id.*

The Free Speech clause of the First Amendment protects free speech by ensuring its full expression.[209] Each possible motivation for the freedom of speech demands this full, unrestricted expression. First, the speaker's right to speak and the hearer's right to know are critical to the free flow of information, the essential ingredient in Holmes' free market of ideas.[210] Second, the speaker's right to full expression and the hearer's right to consume that full expression are critical to both actors' dignitary quest to understand themselves and achieve self-fulfillment.[211] And thirdly, unlimited speech ensures that the government will not slide down a slippery slope toward over-censorship.[212] Full expression is guaranteed to the speaker even where the government participates, since after all the object of some speech is to persuade the government to adopt an idea.[213]

In contrast, the Establishment Clause protects freedom of religious worship and freedom of conscience in religious matters through a reverse mechanism.[214] The Establishment Clause is a *prohibition* on state intervention in religious affairs, because the Framers deemed religious establishment to be antithetical to religious freedom.[215] Although the Court has fluctuated in what it considers "establishment" of religion to mean,[216] it has accepted that the Establishment Clause prohibited the government from preferentially treating one religion over another, or religion over non-disbelief.[217] The Framers knew from history that government establishment of religion could result in a policy of indoctrination and coercion, endangering religious freedom.[218] This prohibition illustrates the Framers' decision, motivated in large part by a fear of government, to prioritize religious freedom over the free market of religious ideas or the dignitary interest in speaking about one's religion or hearing about other religions.[219]

By deserting its customary sensitivity to the hearer, the Court in *Marsh* abandoned the mechanism by which the Establishment

209. *Id.*
210. *See supra* text accompanying notes 6-7 and text accompanying notes 15-17.
211. *See supra* text accompanying notes 8-11 and text accompanying note 18.
212. *See supra* text accompanying note 12 and text accompanying note 19.
213. Weisman, 505 U.S. at 591.
214. *See id.*
215. *See id.*
216. *See supra* note 22.
217. *See* Everson v. Bd. of Educ., 330 U.S. 1, 15-16 (1947).
218. *See* Weisman, 505 U.S. 577 at 591-92.
219. *See supra* note 22 and text accompanying notes 23-24.

Clause protects religious freedom: prohibiting state support for religion. Applying ordinary Establishment Clause principles, the Court would have recognized that the non-adherent legislator hearer would be made to feel like an outsider by the legislative prayer, and the hearers' ability to withstand the offense should have been irrelevant.[220]

The Court also cast aside the widely accepted neutrality principle, namely that government should remain neutral in matters of religion, including between religion and non-religion.[221] As Justice Douglas recognized, "[t]he First Amendment teaches that a government neutral in the field of religion better serves all religious interests."[222] Instead, the Court substituted history over principle by concluding that legislative prayer did not violate the Establishment Clause based on the historical practice of opening legislative sessions with prayer.[223] The Court's consideration of the hearer was limited, only deeming adults less susceptible to religious indoctrination and noting that no religion had been disparaged by the legislative prayer.[224]

The Court's extension of legislative prayer to town board prayer in *Town of Greece* only further divorced legislative prayer from Establishment Clause principles. In concluding that town board prayer fell within legislative prayer, the Court repeated the *Marsh* Court's cursory consideration of the non-adherent legislator hearer, and then chose to disregard the wide array of other hearers present at the meeting.[225] The Court expected the adults in the

220. Justice Brennan observed in dissent in *Marsh* 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." Marsh v. Chambers, 463 U.S. 783, 800-01 (1983) (Brennan, J., dissenting).

221. *See* Epperson v. Arkansas, 393 U.S. 97, 103-04 (1968) ("Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion."); Nicholas C. Roberts, *The Rising None: Marsh, Galloway, and the End of Legislative Prayer*, 90 IND. L.J. 407, 410 (2015); *see also* Phillip E. Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 CAL. L. REV. 817, 818 (1984) (suggesting that the principle of neutrality is undisputed, although there is "significant disagreement over how benevolent that neutrality should be and how rigorously it ought to be enforced").

222. Engel v. Vitale, Jr., 370 U.S. 421, 443 (Douglas, J., concurring).

223. *See* Timothy L. Hall, *Sacred Solemnity: Civic Prayer, Civil Communion, and the Establishment Clause*, 79 IOWA L. REV. 35, 46 (1993).

224. Marsh, 463 U.S. at 792, 794–95.

225. *See* Town of Greece v. Galloway, 571 U.S. 565, 588 (2014).

audience to be capable of encountering speech they find disagreeable, rather than applying ordinary Establishment Clause consideration of the hearer. Further, the Court ignored the child hearers in the audience, noting only that the audience consisted "mostly" of mature adults and that the audience members were free to come and go as they pleased.[226]

CONCLUSION

The Court's authorization of legislative and town board prayer is inconsistent with its

Establishment Clause jurisprudence. By deserting the sensitivity to the hearer that is typical of its Establishment Clause approach, the Court abandoned the Establishment Clause's purpose of protecting religious freedom. The Court's approach enables the marginalization of religious minorities, including the non-religious. The ends offered in defense of legislative prayer (lending gravity to the occasion, inviting legislators to reflect before they come together to govern) can readily be achieved by moments of silence, rather than by prayer. A moment of silence would allow religious adherents to silently pray and would avoid the isolation of and offense to non-adherents that the Framers intended the Establishment Clause to prohibit.

Likewise, ordinary Establishment Clause consideration for the hearer dictates that school board prayer should be considered an impermissible establishment of religion. A school board prayer isolates the non-adherent hearers, including legislators, members of the school community, and of course, the students who may even be obligated to attend. Religious minority students are likely to feel offended, isolated, pressured, or coerced by the governmental display of religion, and may produce hatred, disrespect, and contempt for those in the minority, the very effects the Establishment Clause seeks to preclude.[227] The Court should revisit *Marsh* and *Town of Greece*, this time giving the hearer the consideration and respect that is now customary in 2022.

226. *Id.* at 590.
227. *See* Engel, 370 U.S. at 431.