A LEAP OF FAITH: QUESTIONING THE CONSTITUTIONALITY OF TEXAS'S LEGISLATIVE PRAYER PRACTICE

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I. PLEASE RISE FOR THE INVOCATION

> Today, Father, we . . . thank you for the gifted men and women that you have called to serve in this body . . . We also ask, Father, that these legislators and all who assist them would be ever mindful of the fact that they are first and foremost your servants . . . And finally, Father, help us all, as citizens and governors alike, to recognize the futility and the foolishness

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> of governing without you . . . We ask all of these things, Father, in the name of your precious Son, Jesus Christ. Amen.[1]

For decades, both chambers of the Texas Legislature have begun most session days with an invocation similar to the above-quoted one.[2] A visiting religious leader offers the prayer, which is often Christian.[3] This prayer practice has been a tradition in the United States Congress and many state legislatures since the United States became a country.[4] In each of the fifty states, at least one legislative chamber begins its session days with a prayer.[5] The person who delivers the prayer might include a permanent chaplain, a visiting chaplain, a legislator, a legislative staff person, or a guest of a legislator.[6] In both chambers of the Texas Legislature, which convenes every other year, the House and Senate leaders begin session days by asking the legislators on the floor, and the citizens in the gallery, to rise for the prayer after the floor session is called to order and opening roll call is taken.[7]

Ostensible purposes of legislative prayer include reminding legislators "of their noble task and to encourage them to think about what is right, not just political gain and loss" and "set[ting] the mind to a higher purpose and thereby eas[ing] the task of governing."[8] Another goal of legislative prayer is to create unity in the chambers, "remind[ing] lawmakers to transcend petty

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1. *84th Legislative Session - Part 1 of 2*, TEX. HOUSE REPRESENTATIVES (Jan. 15, 2015), http://tlchouse.granicus.com/MediaPlayer.php?view_id=38&clip_id=9606 [hereinafter *84th Legislative Session*].

2. *Inside the Legislative Process*, NAT'L CONF. ST. LEGISLATURES, Jan. 2010, at tbls.02-5.50, 02-5.51, http://www.ncsl.org/documents/legismgt/ILP/02Tab5Pt7.pdf.

3. *See, e.g.*, *84th Legislative Session*, *supra* note 1; *see also* Jan Jarboe Russell, *Bless This House*, TEX. MONTHLY (May 2003), https://www.texasmonthly.com/politics/bless-this-house/ (discussing the balance between a suitable morning prayer and the supplicant's interest in including moral views).

4. Marsh v. Chambers, 463 U.S. 783, 792 (1983); *Inside the Legislative Process*, *supra* note 2, at 5-145.

5. *See* N.Y. Senate, *New York State Senate Session - 04/05/16*, YOUTUBE (Apr. 5, 2016), https://www.youtube.com/watch?v=qkTgWF5kJAY; N.Y.SenateUncut, *New York State Senate Session - 06/03/13*, YOUTUBE (June 3, 2013), https://www.youtube.com/watch?t29=&v=0IoYNQSZAYc; N.Y.SenateUncut, *NYS Senate Session - May 19, 2009 - Part 1 of 2*, YOUTUBE (May 19, 2009), https://www.youtube.com/watch?v=s7fQmzdFJpY; *3-6 Session*, N.Y. ST. ASSEMBLY (Mar. 6, 2017), http://nystateassembly.granicus.com/GeneratedAgendaViewer.php?view_id=6&clip_id=4135; *5-23 Session*, N.Y. ST. ASSEMBLY (May 23, 2017), http://nystateassembly.granicus.com/GeneratedAgendaViewer.php?view_id=6&clip_id=4267; *Inside the Legislative Process*, *supra* note 2, at 5-148, 5-171; *Tuesday, June 16, 2015 12:00 pm House of Representatives — House of Representatives*, S.C. LEGISLATURE (June 16, 2015), http://www.scstatehouse.gov/video/archives.php; *Tuesday, June 16, 2015 12:00 pm Senate — Senate - Part 1*, S.C. LEGISLATURE (June 16, 2015), http://www.scstatehouse.gov/video/archives.php.

6. *Inside the Legislative Process*, *supra* note 2, at 5-145, 5-151; *see infra* Section III.A (discussing the relevance of the supplicant's identity).

7. TEX. GOV'T CODE ANN. § 301.001 (West 2017); *Inside the Legislative Process*, *supra* note 2, at 5-150; *see, e.g.*, *84th Legislative Session*, *supra* note 1; *Senate Session*, TEX. SENATE (Feb. 5, 2003), http://tlcsenate.granicus.com/MediaPlayer.php?view_id=20&clip_id=5186.

8. Town of Greece v. Galloway, 134 S. Ct. 1811, 1825 (2014); Russell, *supra* note 3.

differences in pursuit of a higher purpose, and express[ing] a common aspiration to a just and peaceful society."[9]

People have challenged the prayer practice's constitutionality many times over the years, most recently in 2017 with three circuit courts addressing the issue of whether the practice violates the United States Constitution's Establishment Clause.[10] The Establishment Clause prohibits both the federal and state governments from establishing an official religion.[11] A 2017 circuit split between the Fourth and Sixth Circuits indicates a gap in Establishment Clause case law that the United States Supreme Court could fill.[12]

While most of the Founding Fathers were religious, in 1776 only 17% of United States citizens had a religious affiliation.[13] Therefore, the historical tradition of legislative prayer may reflect the personal beliefs of the men who created our government but probably not the beliefs of the general public.[14] However, the United States became a country almost 250 years ago, and in that time, the religious makeup of the country has changed significantly.[15] Citizens became much more religious after the 1700s, but a decades-long trend shows that the number of citizens who identify with religion is declining.[16] In the 1950s, more than 95% of Americans identified as Christian.[17] In 2008, this number fell to 80%, and then dropped to 75% in 2015.[18] This trend suggests that legislative prayer may become less popular in the near future.[19]

In Texas, which is tied as the eleventh most religious state in the United States, 18% of adults do not affiliate with a religion.[20] This means both

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9. *Town of Greece*, 134 S. Ct. at 1818.

10. U.S. CONST. amend. I; Everson v. Bd. of Educ., 330 U.S. 1, 13 (1947); Bormuth v. County of Jackson, 870 F.3d 494, 497 (6th Cir. 2017); Lund v. Rowan County, 863 F.3d 268, 272 (4th Cir. 2017); Am. Humanist Ass'n v. McCarty, 851 F.3d 521, 523–25 (5th Cir. 2017).

11. U.S. CONST. amend. I; *Everson*, 330 U.S. at 13; Michael A. Rosenhouse, Annotation, *Construction and Application of Establishment Clause of First Amendment—U.S. Supreme Court Cases*, 15 A.L.R. Fed. 2d 573, § 2 (2006).

12. *See infra* Section III.A (describing the circuit split between the Fourth and Sixth Circuits regarding legislative prayer).

13. ROGER FINKE & RODNEY STARK, THE CHURCHING OF AMERICA, 1776–2005: WINNERS AND LOSERS IN OUR RELIGIOUS ECONOMY 22 (2d ed. 2005); David L. Holmes, *The Founding Fathers, Deism, and Christianity*, ENCYCLOPÆDIA BRITANNICA (Dec. 21, 2006), https://www.britannica.com/topic/The-Founding-Fathers-Deism-and-Christianity-1272214.

14. FINKE & STARK, *supra* note 13; Holmes, *supra* note 13.

15. *The Declaration of Independence, 1776*, OFF. HISTORIAN, https://history.state.gov/milestones/1776-1783/declaration (last visited Dec. 30, 2018).

16. Frank Newport, *Percentage of Christians in U.S. Drifting Down, but Still High*, GALLUP NEWS (Dec. 24, 2015), http://news.gallup.com/poll/187955/percentage-christians-drifting-down-high.aspx.

17. *Id.*

18. *See id.*

19. *See id.*

20. Michael Lipka & Benjamin Wormald, *How Religious Is Your State?*, PEW RES. CTR. (Feb. 29, 2016), http://www.pewresearch.org/fact-tank/2016/02/29/how-religious-is-your-state/?state=texas; *see Religious Tradition Among Adults in New Hampshire*, PEW RES. CTR., http://www.pewforum.org/

legislators and members of the public sitting in the gallery may not necessarily agree with Texas's legislative prayer practice and the religious beliefs it encompasses.[21] For example, a non-religious Austin reporter who covered the Texas Legislature said the prayer practice made her feel uncomfortable.[22] Additionally, according to a 2016 survey, 62% of atheists and agnostics feel uncomfortable when Christians invite them to pray.[23] This means non-religious legislators and members of the public may feel out of place during the prayers.[24] This discomfort could marginalize non-religious people who might want to run for office but worry about the implications of their lack of religious beliefs.[25]

This Comment discusses the constitutionality of Texas's legislative prayer practice and how it relates to the United States Constitution's Establishment Clause. Part II sets out the events surrounding the formation of the Establishment Clause, the tests the courts use to determine whether a particular practice violates the Establishment Clause, and the existing case law that developed over the decades regarding legislative prayer.[26] Part III analyzes a circuit split over legislative prayer and evaluates whether the Texas Legislature's prayer practice would withstand a court's Establishment Clause tests.[27] Part IV of this Comment recommends inclusive alternatives to legislative prayer that would fall more in line with the Constitution.[28] Finally, Part V concludes by emphasizing the importance of a constitutional alternative to Texas's legislative prayer practice.[29]

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religious-landscape-study/state/new-hampshire/religious-tradition/ (last visited Dec. 30, 2018); *Religious Tradition Among Adults in Texas*, PEW RES. CTR., http://www.pewforum.org/religious-landscape-study/state/texas/religious-tradition/ (last visited Dec. 30, 2018). In New Hampshire and Massachusetts, which tied for the least religious state, 36%—more than one-third—of adults do not affiliate with a religion. Lipka & Wormald, *supra*. In contrast, the most religious states in the United States are Alabama and Mississippi, in which 77% of adults are highly religious. *Id.*

21. *See, e.g.*, Marsh v. Chambers, 463 U.S. 783 (1983) (involving a Nebraska state legislator who brought an action challenging the constitutionality of a similar practice in his state); Lund v. Rowan County, 863 F.3d 268, 274 (4th Cir. 2017) ("[T]he prayers . . . caused the plaintiffs to feel 'excluded from the community and the local political process.'").

22. The reporter, who has covered the Texas Legislature for three years, asked to remain anonymous.

23. Leah Libresco, *When Does Praying in Public Make Others Uncomfortable?*, FIVETHIRTYEIGHT (Sept. 16, 2016, 11:03 AM), https://fivethirtyeight.com/features/when-does-praying-in-public-make-others-uncomfortable/.

24. *See id.*

25. *See, e.g.*, *Lund*, 863 F.3d at 274 (describing council people who filed suit against a county and sanctioned sectarian prayer practices because of reasonable discomfort).

26. *See infra* Part II (explaining the Establishment Clause and its court-created constitutional tests).

27. *See infra* Part III (analyzing the constitutionality of Texas's legislative prayer practice).

28. *See infra* Part IV (recommending alternatives to Texas's legislative prayer practice).

29. *See infra* Part V (concluding and articulating the importance of using constitutional alternatives to Texas's legislative prayer practice).

II. PRAYER, PRAYER, EVERYWHERE: THE BACKGROUND OF LEGISLATIVE PRAYER

A. Pass the Offering Plate

The First Amendment to the United States Constitution reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[30] The Establishment Clause, which prohibits the federal government from establishing a religion and is based on the principle of separation of church and state, introduces the Amendment.[31] Scholars have proposed a wide variety of purposes for the Establishment Clause, but one of the more commonly proposed purposes is to guarantee liberty of conscience.[32]

The idea of conscience has Christian roots.[33] Most scholars define the conscience as an act of judgment that determines whether an action is a sin.[34]

> [The conscience is] an act of judgment, or practical reason, performed by the rational part of the soul to determine whether an action was good or bad . . . . Because acting against conscience meant acting against one's apprehension of the right thing to do, it followed that to act against conscience was necessarily to sin.[35]

The Framers intended to protect liberty of conscience—and by extension, people's right to refrain from sin—by drafting the First Amendment.[36] A Northeastern University political science professor postulated that the Framers intended the First Amendment to accomplish three objectives: (1) preventing the government from establishing a national religion or

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30. U.S. CONST. amend. I. State delegates signed the United States Constitution on September 17, 1787. *The Constitution: How Was It Made?*, NAT'L ARCHIVES, https://www.archives.gov/founding-docs/constitution/how-was-it-made (last reviewed Sept. 25, 2018). The First Amendment, however, did not become part of the Constitution until December 15, 1791, after three-fourths of the states ratified the Bill of Rights. *The Bill of Rights: How Did It Happen?*, NAT'L ARCHIVES, https://www.archives.gov/founding-docs/bill-of-rights/how-did-it-happen (last reviewed Dec. 14, 2018); *Bill of Rights Is Finally Ratified*, HIST., http://www.history.com/this-day-in-history/bill-of-rights-is-finally-ratified (last updated Aug. 21, 2018).

31. Rosenhouse, *supra* note 11.

32. ROBERT L. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION 15 (1982); *see, e.g.*, LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 112–15 (2d ed. 1994); Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 350 (2002) (explaining that both rationalists and evangelicals alike valued a guarantee of that liberty).

33. Feldman, *supra* note 32, at 355.

34. *Id.* at 356–57.

35. *Id.*

36. CORD, *supra* note 32.

preferring any religious denomination; (2) safeguarding the people's right to freedom of conscience; and (3) allowing the states to address religious establishments however they saw fit.[37] In 1802, Thomas Jefferson wrote approvingly of the Establishment Clause's "building a wall of separation between [c]hurch [and] [s]tate."[38]

Many early settlers migrated from Europe to escape the laws that forced them to support and attend churches the government favored, including laws that imposed taxes that were then used to fund government-sponsored churches.[39] "In efforts to force loyalty to whatever religious group happened to be on top and in league with the government of a particular time and place, men and women had been fined, cast in jail, cruelly tortured, and killed."[40] Even with this history as a backdrop, many colonies kept with the English tradition of establishing government-sponsored churches, compelling citizens to pay taxes to fund these churches, and punishing citizens who failed to acquiesce to supporting the established churches.[41]

Eventually, "[t]hese practices became so commonplace as to shock the freedom-loving colonials into a feeling of abhorrence," and Virginia helped lead the movement against government-established churches.[42] The state enacted a statute that said, "[N]o man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened, in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief . . . ."[43] The provisions of the First Amendment have the same objective as this statute.[44] A preeminent scholar who broadly interprets the Establishment Clause wrote that the Establishment Clause means that the government may not levy any tax to support a religious activity or institution.[45]

The First Amendment originally left the question of establishment of religion up to the states, and although most states provided to their people rights similar to those ensured by the First Amendment, a few states spent about fifty years restraining the free exercise of religion and discriminating against particular religious groups.[46]

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37. *Id.*

38. *Jefferson's Letter to the Danbury Baptists*, LIBR. CONGRESS, https://www.loc.gov/loc/lcib/9806/danpre.html (last visited Dec. 30, 2018) [hereinafter *Jefferson's Letter*].

39. Everson v. Bd. of Educ., 330 U.S. 1, 8 (1947).

40. *Id.* at 9.

41. *Id.* at 8–12; *see* Engel v. Vitale, 370 U.S. 421, 433 (1962).

42. *Everson*, 330 U.S. at 11.

43. *Id.* at 13.

44. *Id.* (citing Davis v. Beason, 133 U.S. 333, 342 (1890), *abrogated by* Romer v. Evans, 517 U.S. 620 (1996); Reynolds v. United States, 98 U.S. 145, 164 (1878); Watson v. Jones, 80 U.S. 679 (1871)).

45. CORD, *supra* note 32, at 18 (citing LEO PFEFFER, CHURCH, STATE, AND FREEDOM 149–50 (rev. ed. 1967)).

46. U.S. CONST. amend. I; *Everson*, 330 U.S. at 13; CORD, *supra* note 32, at 14; *see* LEVY, *supra* note 32, at 27–29.

For centuries, "establishment[] of religion" meant "a single church or religion enjoying formal, legal, official, monopolistic privilege through a union with the government of the state."[47] Colonies used tax money to support multiple types of religion and even allowed each person to specify which church their tax money would go to, but this practice still meant the governments were preferring religion over non-religion.[48] In the 1700s and 1800s, establishment of religion meant exclusivity or preference to the generation that wrote the First Amendment, but it also came to mean "the financial support of religion generally, by public taxation."[49] The Framers did not believe Congress had "any authority over the subject of religion."[50] "Congress was powerless, *even in the absence of the First Amendment*, to enact laws that benefited one religion or church in particular or all of them equally and impartially."[51] The courts later began ruling on the constitutionality of laws that people saw as violating the Establishment Clause.[52]

B. Testing the Establishment Clause

Legislative prayer cases usually involve Establishment Clause issues, and when addressing these issues courts usually apply at least one of three tests: (1) the *Lemon* test; (2) the endorsement test; or (3) the coercion test.[53] The Supreme Court established the *Lemon* test in 1971, and the Fifth Circuit established the endorsement and coercion tests in 1996 and 1999, respectively.[54]

The *Lemon* test originated in the 1971 case *Lemon v. Kurtzman* and sets out three requirements a law must meet in order to avoid violating the Establishment Clause: (1) "the statute must have a secular legislative purpose"; (2) "[the statute's] principal or primary effect must be one that neither advances nor inhibits religion"; and (3) "the statute must not foster 'an excessive government entanglement with religion.'"[55]

Lemon v. Kurtzman consisted of a combined appeal challenging the constitutionality of two different states' statutes that provided state aid to

47. *See* LEVY, *supra* note 32, at 7 (capitalization altered from original).

48. *See id.* at 10.

49. *Id.*

50. *Id.* at 83.

51. *Id.*

52. *See infra* Section II.C (discussing court cases in which legislative prayer and the Establishment Clause are the main issues).

53. *See* Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971); Doe v. Beaumont Indep. Sch. Dist., 173 F.3d 274, 285 (5th Cir. 1999); Ingebretsen v. Jackson Pub. Sch. Dist., 88 F.3d 274, 280 (5th Cir. 1996).

54. *See generally Lemon*, 403 U.S. 602 (noting the year of the decision); *Doe*, 173 F.3d 274 (referring to the year of the decision); *Ingebretsen*, 88 F.3d 274 (referencing the year of the decision).

55. *Lemon*, 403 U.S. at 612–13 (citing Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970); Bd. of Educ. v. Allen, 392 U.S. 236, 243 (1968)); *see, e.g.*, Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 708 (1985).

church-related schools.[56] Rhode Island passed a statute in 1969 that gave a 15% salary supplement to teachers in "nonpublic school[s] at which the average per-pupil expenditure on secular education [was] less than the average in . . . public schools . . . ."[57] The statute required those teachers to teach only courses offered in public schools, use only materials used in public schools, and refrain from teaching courses in religion.[58]

Pennsylvania passed a similar statute in 1968 authorizing a state superintendent "to 'purchase' specified 'secular educational services' from nonpublic schools . . . directly reimburs[ing] nonpublic schools solely for . . . teachers' salaries, textbooks, and instructional materials."[59] The statute restricted reimbursement to courses in specific secular subjects, required that the superintendent approve the textbooks and materials, and prohibited payment "for any course that contain[ed] 'any subject matter expressing religious teaching, or the morals or forms of worship of any sect.'"[60]

The United States Supreme Court held that both statutes were unconstitutional.[61] Both statutes "fostered 'excessive entanglement' between government and religion," and the Pennsylvania statute failed three tests from previous cases that the Court later combined to form the *Lemon* test.[62] The *Lemon* test is the formal test the Court uses to address Establishment Clause issues, but Justices have disagreed on when to apply it.[63] About twenty years after the *Lemon* test was established, two Fifth Circuit cases set forth alternative methods of addressing the issue.[64]

The endorsement test, which the Fifth Circuit introduced in 1996, states that the government violates the endorsement test when it takes a stance "on questions of religious belief, or makes adherence to a religion relevant in any way to a person's standing in the political community . . . . The government creates this appearance when it conveys a message that religion is favored, preferred, or promoted over other beliefs."[65]

The third test, the coercion test from the 1999 case of *Doe v. Beaumont Independent School District*, states that "unconstitutional coercion [occurs]

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56. *Lemon*, 403 U.S. at 606.

57. *Id.* at 607.

58. *Id.* at 608.

59. *Id.* at 609.

60. *Id.* at 610.

61. *Id.* at 607.

62. *See generally id.* at 609, 614, 620–22. *See also* Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 708 (1985) (explaining the modern *Lemon* test).

63. *See* Recent Case, *Fourth Circuit Holds that County Commissioners' Practice of Offering Sectarian Prayers at Public Meetings Is Unconstitutional*—Lund v. Rowan County, 131 HARV. L. REV. 626, 632, 633 n.86 (2017).

64. *See* Doe v. Beaumont Indep. Sch. Dist., 173 F.3d 274, 285 (5th Cir. 1999); Ingebretsen v. Jackson Pub. Sch. Dist., 88 F.3d 274, 280 (5th Cir. 1996).

65. *Ingebretsen*, 88 F.3d at 280 (quoting County of Allegheny v. ACLU, 492 U.S. 573, 593, 594 (1989)) (internal quotations omitted).

when: (1) the government directs (2) a formal religious exercise (3) in such a way as to oblige the participation of objectors."[66] The Court has used this test to analyze school-sponsored religious activity.[67]

Courts have applied these tests inconsistently, and sometimes not at all, so gleaning precedent that will address the many nuances of legislative prayer is near impossible.[68] However, even without clear precedent, Texas's legislative prayer practice would almost certainly not survive the scrutiny of either the *Lemon* test or the endorsement test (the coercion test would not apply because it only applies to school-sponsored religious activity).[69]

C. Making the Case Against Legislative Prayer: A History of Establishment Clause Case Law

Because legislative prayer issues usually involve the Establishment Clause, case law—instead of statutory law—often governs the issue.[70] The Establishment Clause is part of the Bill of Rights.[71] Thus, the Establishment Clause has applied to the federal government since 1791, but it did not apply to the states until 1947.[72]

1. Incorporating the Establishment Clause

In the 1947 case *Everson v. Board of Education of Ewing*, the Supreme Court applied the Establishment Clause analysis in a New Jersey case.[73] In this case, a New Jersey statute allowed boards of education to reimburse parents the money they spent on their schoolchildren's bus transportation, including money spent to transport children to Catholic schools.[74] A taxpayer sued the board, contending that the statute violated parts of both the state constitution and federal Constitution, including the Establishment Clause.[75]

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66. *Doe*, 173 F.3d at 285 (alteration removed); Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963, 970 (5th Cir. 1992).

67. *See Ingebretsen*, 88 F.3d at 279–80 (citing Lee v. Weisman, 505 U.S. 577, 577 (1992)).

68. *See, e.g.*, Marsh v. Chambers, 463 U.S. 783, 796 (1983).

69. *See Ingebretsen*, 88 F.3d at 280 (citing *Lee*, 505 U.S. at 594); *infra* Section III.C (applying the *Lemon* test and the endorsement test to Texas's legislative prayer practice).

70. *See infra* Section II.C.1 (discussing the involvement of the Establishment Clause in legislative prayer issues and the court-created tests used to determine the constitutionality of the legislative prayer practices).

71. *See generally* Everson v. Bd. of Educ., 330 U.S. 1 (1947) (applying the Establishment Clause to the states); *The Bill of Rights: How Did It Happen?*, *supra* note 30; *Bill of Rights Is Finally Ratified*, *supra* note 30.

72. *See generally Everson*, 330 U.S. at 15 (applying the Establishment Clause to the states for the first time). *See also The Bill of Rights: How Did It Happen?*, *supra* note 30; *Bill of Rights Is Finally Ratified*, *supra* note 30.

73. *Everson*, 330 U.S. at 15.

74. *Id.* at 3.

75. *Id.* at 3–4, 8.

The Court considered both the Establishment Clause and the Free Exercise Clause in its analysis, concluding that, although New Jersey would violate the Establishment Clause by contributing tax money to support a Catholic school, disallowing the school board from helping parents pay for their schoolchildren's transportation to Catholic schools would violate the Free Exercise Clause.[76] The Court held that New Jersey's statute did not violate the Establishment Clause: The "legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools."[77] About fifteen years later, the issues of prayer and education overlapped again in *Engel v. Vitale*.[78]

2. Legislative Prayer v. School Prayer

In 1962, the United States Supreme Court applied *Everson*'s incorporation of the First Amendment to the states and struck down a New York school district's practice of public school prayer, ruling that the practice violated the Establishment Clause, even if the school did not require students to participate.[79] In *Engel*, a New York school district began each school day with the following prayer: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country."[80] Ten parents of students at the school sued the school district, challenging the constitutionality of the prayer practice, and the Court agreed with them.[81] The Court wrote, "It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people . . . ."[82]

Two main differences exist between public school prayer and legislative prayer.[83] First, legislative prayer is a historically sanctioned tradition, shown by the fact that the Framers wrote the Establishment Clause a few days after hiring legislative chaplains.[84] Second, the *Lee v. Weisman* majority opinion, which reaffirmed *Engel* in 1992, differentiated school prayer from legislative prayer by pointing out that the atmosphere of a school is more coercive than

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76. *Id.* at 16. The Free Exercise Clause states: "Congress shall make no law . . . prohibiting the free exercise [of religion.]" U.S. CONST. amend. I.

77. *Everson*, 330 U.S. at 18.

78. *See* Engel v. Vitale, 370 U.S. 421, 424, 430 (1962).

79. *See id.*; *see also Everson*, 330 U.S. at 15 (discussing the application of the First Amendment to the states).

80. *Engel*, 370 U.S. at 422.

81. *See id.* at 423–24.

82. *Id.* at 435.

83. *See* Lee v. Weisman, 505 U.S. 577, 597 (1992); DAVID M. ACKERMAN, CONG. RESEARCH SERV. REPORTS, 94–821 A, LEGISLATIVE PRAYER AND SCHOOL PRAYER: THE CONSTITUTIONAL DIFFERENCE 4 (1994).

84. ACKERMAN, *supra* note 83, at 3.

the atmosphere of a state legislative session.[85] The *Lee* Court referenced the 1983 case of *Marsh v. Chambers*, pointing out that teachers and principals at schools retain a high level of control over young students' actions, while in legislative chambers, adult legislators and members of the public come and go as they please.[86] About ten years before *Lee*, the Supreme Court ruled on *Marsh*.[87]

3. Let Us Pray: The First Legislative Prayer Case

A major landmark case on the issue of legislative prayer came about forty years after the Court applied the Establishment Clause to the states.[88] *Marsh v. Chambers* carved out an exception to the Establishment Clause, holding that because of legislative prayer's unique history, hiring chaplains to give a prayer at the start of legislative sessions does not violate the Establishment Clause.[89] In *Marsh*, Nebraska Senator Ernest Chambers, backed by the Nebraska chapter of the American Civil Liberties Union, brought a § 1983 action challenging Nebraska's practice of opening each legislative session day with a prayer led by a chaplain.[90] The Executive Board of the Legislative Council chose the chaplain biennially and paid him with public money, and the Board chose the same Presbyterian chaplain for sixteen years.[91]

The Supreme Court reasoned that the strong history and tradition of legislative prayer, including the fact that the Founding Fathers elected and paid a chaplain at the First Congress, justified its holding.[92] Chief Justice Burger wrote, "In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society."[93] The Court also pointed out that many people in the United States agree with Christian beliefs: "To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an 'establishment' of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country."[94]

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85. *See Lee*, 505 U.S. at 597.

86. *Id.*

87. *See id.* at 596–97. *See generally* Marsh v. Chambers, 463 U.S. 783 (1983).

88. *See Marsh*, 463 U.S. at 790.

89. *See id.* at 791; *see also id.* at 796 (Brennan, J., dissenting) (discussing why he believes the majority came to the wrong conclusion).

90. *Marsh*, 463 U.S. at 784–85; Marsh v. Chambers, DUKE L., https://law.duke.edu/voices/marsh/ (last visited Dec. 30, 2018).

91. *Marsh*, 463 U.S. at 784–85, 793.

92. *See id.* at 786–90.

93. *Id.* at 792.

94. *Id.*

However, the Court somewhat limited legislative prayer by stating that it may not be "exploited to proselytize or advance any one, or to disparage any other, faith or belief."[95] The National Conference of Community and Justice set out guidelines for people giving public prayers, and those guidelines also discourage proselytizing and advancing or disparaging other beliefs.[96] *The New Oxford American Dictionary* defines "proselytize" as to "convert or attempt to convert (someone) from one religion, belief, or opinion to another" and "advocate or promote (a belief or course of action)."[97]

The Court upheld the constitutionality of the prayer practice without employing any of the commonly used tests to determine whether an action violates the Establishment Clause, seemingly because legislative prayer "is deeply embedded in the history and tradition of this country."[98] The majority acknowledged some concerns that legislative prayer will be the first step down a road to "the establishment the Founding Fathers feared," but the Court wrote that, because the prayer practice existed in the United States for centuries without leading to an establishment of religion, the concerns are unfounded.[99]

Justice Brennan's persuasive dissent offers more logical and satisfying arguments than the majority's opinion.[100] Justice Brennan said if the majority had applied the *Lemon* test, it would have found legislative prayer unconstitutional.[101] He wrote that legislative prayer runs contrary to the purposes of the Establishment Clause: ensuring citizens' individual rights to conscience and preventing the government from interfering with the essential autonomy of religious life.[102] He said the Establishment Clause also intends to prevent religion from being trivialized and degraded because of a close attachment to government.[103] He wrote: "[R]eligion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate."[104]

Justice Brennan also combatted the majority's argument that history and tradition support legislative prayer.[105] He offered history establishing that the

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95. *Id.* at 794–95.

96. *See Guidelines for Civic Occasions*, NAT'L CONF. FOR COMMUNITY & JUST., https://www.nccj.org/sites/default/files/uploaded_documents/updated_prayer_guidelines_brochure.pdf (last visited Dec. 30, 2018).

97. *Proselytize*, THE NEW OXFORD AMERICAN DICTIONARY (2d ed. 2005).

98. *Marsh*, 463 U.S. at 786; *see supra* Section II.B (describing the commonly used tests for Establishment Clause issues); *see also* Am. Humanist Ass'n v. McCarty, 851 F.3d 521, 525–26 (5th Cir. 2017).

99. *Marsh*, 463 U.S. at 794–95.

100. *See id.* at 795–822 (Brennan, J., dissenting) (arguing that legislative prayer does violate the Establishment Clause).

101. *Id.* at 796.

102. *Id.* at 803, 808.

103. *Id.* at 804.

104. *Id.*

105. *Id.* at 813–14.

Framers did not refer to God in many state constitutions.[106] Two Presidents—Thomas Jefferson and Andrew Jackson—used the Establishment Clause to justify their refusals to declare national days of thanksgiving or fasting.[107] James Madison wrote that the practice of hiring chaplains to give prayers violated the Establishment Clause.[108] Soon after the Court decided *Marsh*, the D.C. Circuit Court of Appeals dismissed a similar case that challenged the constitutionality of paying a chaplain to give prayers in Congress, stating that the *Marsh* decision was dispositive of the issue.[109]

Like the *Marsh* Court, courts often use history and tradition to analyze constitutional issues.[110] However, the 2015 case of *Obergefell v. Hodges* suggests that this practice might become less common.[111] The *Obergefell* Court upheld same-sex marriage, rejecting the argument that because marriage between two people of opposite sexes has always been the norm in the United States it should continue to stay that way.[112] The Court discussed the ways marriage has changed over time, pointing out that arranged marriages are no longer common in the United States and that the law of coverture is gone.[113] The *Obergefell* opinion explains that history and traditions change, so the law should keep pace with these changes.[114] The 2015 *Obergefell* case could be the very beginning of a trend that focuses more on the changes in history, and how the law can reflect these changes, rather than using history to restrict analysis of constitutional issues.[115] About one year before *Obergefell*, the Supreme Court released *Town of Greece v. Galloway*, which was essentially an updated version of *Marsh*, and focused on the same history and tradition arguments that *Marsh* did, even though *Town of Greece* came down thirty years later.[116]

4. The Prayer Must Go On: Expanding the Case Law

The Supreme Court reaffirmed *Marsh* in *Town of Greece v. Galloway*, the Court's first and only legislative prayer case since *Marsh* in 1983.[117] The

106. *Id.* at 807.
107. *Id.*
108. *Id.*
109. *See generally id.* (showing that the United States Supreme Court decided *Marsh v. Chambers* right before the D.C. Circuit Court of Appeals decided *Murray v. Buchanan*); Murray v. Buchanan, 720 F.2d 689 (D.C. Cir. 1983); ACKERMAN, *supra* note 83.
110. *See, e.g.*, *Marsh*, 463 U.S. at 786–95 (showing that the United States Supreme Court discussed American history and tradition throughout its opinion in *Marsh v. Chambers*).
111. *See generally* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).
112. *See id.* at 2595.
113. *Id.*
114. *See id.*
115. *See generally id.* at 2584.
116. *See generally* Town of Greece v. Galloway, 134 S. Ct. 1811 (2014); Marsh v. Chambers, 463 U.S. 783 (1983).
117. *Town of Greece*, 134 S. Ct. at 1819 (referencing *Marsh*, 463 U.S. 783).

Town of Greece Court wrote, "*Marsh* stands for the proposition that it is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted."[118]

Town of Greece involved a town in New York that opened its monthly board meetings with a prayer given by an unpaid, local minister.[119] Almost all of the town's congregations were Christian, and although the town leaders said any minister or layperson could give an invocation, all of the participating ministers from 1999, the year the prayer practice began, to 2007 were Christian and often recited Christian prayers.[120]

The district court held that the practice did not violate the Establishment Clause and need not be nonsectarian, but the Court of Appeals for the Second Circuit reversed, stating "that the town's prayer practice must be viewed as an endorsement of a particular religious viewpoint . . . . [and] in reaching this conclusion, we do not rely on any single aspect of the town's prayer practice, but rather on the totality of the circumstances present in this case."[121]

The United States Supreme Court agreed with the district court, stating that Greece did not violate the Establishment Clause by "opening its meetings with prayer that comports with our tradition and does not coerce participation by nonadherents."[122] The Supreme Court pointed out that the main audience for the prayers is not the public but the lawmakers, and it broadened *Marsh*'s rule against proselytizing by adding that a prayer's content will likely only violate the Establishment Clause if it makes up "a *pattern of prayers* that over time denigrate, proselytize, or betray an impermissible government purpose . . . ."[123] The majority also pointed out that its "analysis would be different if town board members directed the public to participate in the prayers . . . ."[124]

Justice Kagan dissented, pointing out the difference between a legislative floor full of elected officials and a town hall full of ordinary citizens.[125] Justice Kagan's dissent illustrates the difference between the town hall setting of *Town of Greece* and the legislative floor setting of *Marsh*, pointing out why *Marsh* should not control in *Town of Greece*.[126] However, *Town of Greece*'s conclusion that tradition makes legislative prayer permissible as long as the pattern of prayers does not "denigrate, proselytize,

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118. *Id.*

119. *Id.* at 1816.

120. *Id.*

121. *Id.* at 1817; Galloway v. Town of Greece, 681 F.3d 20, 30 (2d Cir. 2012), *rev'd*, 134 S. Ct. 1811 (2014).

122. *Town of Greece*, 134 S. Ct. at 1828.

123. *Id.* at 1824–25 (emphasis added).

124. *Id.* at 1826.

125. *Id.* at 1842 (Kagan, J., dissenting).

126. *Compare id.* at 1811(majority opinion) (explaining that the setting is a smaller, town hall setting), *with* Marsh v. Chambers, 463 U.S. 783, 792 (1983) (explaining that the setting is a larger, state-wide setting).

or betray an impermissible government purpose," remains the most recent United States Supreme Court holding on this issue.[127]

D. 2017 Legislative Prayer Cases

In 2017, three circuit courts addressed the legislative prayer issue: the Fifth Circuit in *American Humanist Association v. McCarty*, the Fourth Circuit in *Lund v. Rowan County*, and the Sixth Circuit in *Bormuth v. County of Jackson*.[128] The Fifth and Sixth Circuits agreed that two similar legislative prayer practices did not violate the Constitution, while the Fourth Circuit disagreed and held that legislative prayer violates the Establishment Clause.[129]

1. American Humanist Association v. McCarty

The earliest case of 2017 was *American Humanist Association v. McCarty*, a case in which a graduate of Birdville High School, near Fort Worth, Texas, sued the school district, claiming the student-led prayers that introduced the school board meetings violated the Establishment Clause.[130] The court analyzed the issue as a legislative prayer issue rather than a school prayer issue because "a school board is more like a legislature than a school classroom or event."[131] It held that the prayer in this situation did not violate the Establishment Clause, reasoning that it fell within the legislative-prayer exception established in *Marsh*.[132] The United States Supreme Court declined to hear the humanist organization's appeal of the Fifth Circuit's decision, so, for now, *McCarty* is the law in Texas, Mississippi, and Louisiana.[133]

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127. *Town of Greece*, 134 S. Ct. at 1824.

128. *See generally* Bormuth v. County of Jackson, 870 F.3d 494 (6th Cir. 2017), *cert. denied*, 138 S. Ct. 2708 (2018); Lund v. Rowan County, 863 F.3d 268 (4th Cir. 2017), *cert. denied*, 138 S. Ct. 2564 (2018); Am. Humanist Ass'n v. McCarty, 851 F.3d 521 (5th Cir.), *cert. denied*, 138 S. Ct. 470 (2017).

129. *See generally Bormuth*, 870 F.3d 494; *Lund*, 863 F.3d 268; *McCarty*, 851 F.3d 521.

130. *McCarty*, 851 F.3d at 523–25.

131. *Id.* at 526.

132. *Id.* at 525–26; Marsh v. Chambers, 463 U.S. 783, 788 (1983).

133. American Humanist Association v. Birdville Independent School District, SCOTUSBLOG, http://www.scotusblog.com/case-files/cases/american-humanist-association-v-birdville-independent-school-district/ (last visited Dec. 30, 2018); *Geographic Boundaries of United States Courts of Appeals and United States District Courts*, U.S. CTS., http://www.uscourts.gov/sites/default/files/u.s._federal_courts_circuit_map_1.pdf (last visited Dec. 30, 2018).

2. Lund v. Rowan County

In July 2017, the Fourth Circuit Court of Appeals came to a conclusion opposite from *McCarty*.[134] In *Lund v. Rowan County*, the Fourth Circuit held that commissioners delivering Christian prayers before each Rowan County Board of Commissioners meeting violated the United States Constitution.[135] The court wrote, "The principle at stake here may be a profound one, but it is also simple. The Establishment Clause does not permit a seat of government to wrap itself in a single faith."[136] In this case, three long-time Rowan County residents sued the county's board of commissioners because of its commissioner-led prayer practice, which the residents said "'sent [the] message that . . . the Board favor[ed] Christians' and caused the plaintiffs to feel 'excluded from the community and the local political process.'"[137]

The lower court said legislative prayer led by a religious leader is part of a long-standing tradition in the United States, but prayer led by a legislator is not.[138] Many legislative bodies have historically begun each session day with a prayer, but usually a chaplain—rather than a member—delivers the prayer.[139] The Fourth Circuit wrote that the prayer-giver's identity is relevant to the prayer practice's constitutionality, and lawmaker-led prayer "identifies the government with religion more strongly than ordinary invocations and heightens the constitutional risks posed by requests to participate and by sectarian prayers."[140] Recently, the Supreme Court denied petition for certiorari in *Lund*.[141]

3. Bormuth v. County of Jackson

A few months after the Fourth Circuit decided *Lund*, the Sixth Circuit came to the opposite conclusion on the same issue.[142] In *Bormuth v. County of Jackson*, a non-Christian member of the Jackson County Board of Commissioners complained that the commissioners' leading Christian prayers at the start of each meeting violated the Establishment Clause.[143] In *Lund*, the court ruled that commissioners offering prayers was

134. *Compare McCarty*, 851 F.3d 521 (holding that student prayer practice did not violate the Establishment Clause because it fit the exception stated in *Marsh v. Chambers*), *with Lund*, 863 F.3d 268 (holding that the commissioner prayer practice violated the Constitution).

135. *Lund*, 863 F.3d at 272.

136. *Id.* at 290.

137. *Id.* at 273–74.

138. Lund v. Rowan County, 103 F. Supp. 3d 712, 723 (M.D.N.C. 2015).

139. *Lund*, 863 F.3d at 277.

140. *Id.* at 278, 280.

141. Rowan County v. Lund, 138 S. Ct. 2564 (2018).

142. *Compare Lund*, 863 F.3d 268 (holding that the commissioner's prayer practice violated the Constitution), *with* Bormuth v. County of Jackson, 870 F.3d 494, 498 (6th Cir. 2017) (holding that the commissioner's prayer practice did not violate the Constitution despite the prayer-giver's identity).

143. *Bormuth*, 870 F.3d at 498.

unconstitutional, but here, the court held that this practice is constitutional and the identity of the prayer-giver does not matter.[144]

The *Bormuth* court used much of the same reasoning as the *Marsh* Court, discussing the history and tradition of legislator-led prayer.[145] It pointed to various examples of legislator-led prayer and wrote, "In our view and consistent with our Nation's historical tradition, prayers by agents (like in *Marsh* and *Town of Greece*) are not constitutionally different from prayers offered by principals."[146]

The court also agreed with *Marsh* that the content of a prayer does not necessarily make a prayer practice unconstitutional, citing to *Town of Greece*'s interpretation of *Marsh*.[147] However, the *Bormuth* court pointed out that in *Town of Greece*, some of the prayers strayed from the "universal themes" the courts have praised as helping bring a spirit of cooperation and solemnity to a legislative or town board meeting.[148]

Bormuth quotes *Town of Greece*, writing that legislative prayer is consistent with the country's tradition even when the prayer-giver gives the prayer "in the name of Jesus, Allah, or Jehovah, or . . . makes passing reference to religious doctrines . . . ."[149] The court wrote that once the government has brought up prayer in a public setting, it must allow the prayer-giver "to address his or her own God or gods as conscience dictates, unfettered by what an administrator or judge considers to be nonsectarian."[150] The court also defended the Christian nature of most legislative prayers in this case and said that the Founders viewed legislative prayers as "[a] particular means to universal ends."[151] *Bormuth* was on the United States Supreme Court's docket, but the Court has determined it will not hear the appeal.[152]

III. LIVIN' ON A PRAYER: AN ANALYSIS OF TEXAS'S LEGISLATIVE PRAYER PRACTICE

Texas's legislative prayer practice, which usually involves a legislator introducing a religious leader from that legislator's district to give an

144. *Bormuth*, 870 F.3d at 498, 512; *Lund*, 863 F.3d at 275.

145. Marsh v. Chambers, 463 U.S. 783, 786–90 (1983); *Bormuth*, 870 F.3d at 503–09, 512.

146. *Bormuth*, 870 F.3d at 512.

147. Town of Greece v. Galloway, 134 S. Ct. 1811, 1824 (2014) (reaffirming *Marsh*'s ruling that legislative prayer does not violate the Constitution). "*Marsh* revolved not on espousement of 'generic theism,' but rather on the 'history and tradition' showing prayer—even one that is explicitly Christian in tone—'in this limited context could coexist with the principles of disestablishment and religious freedom.'" *Bormuth*, 870 F.3d at 506 (citing *Town of Greece*, 134 S. Ct. at 1820).

148. *Bormuth*, 870 F.3d at 506 (citing *Town of Greece*, 134 S. Ct. at 1824); *see Town of Greece*, 134 S. Ct. at 1818.

149. *Bormuth*, 870 F.3d at 505 (quoting *Town of Greece*, 134 S. Ct. at 1823).

150. *Id.* at 506 (quoting *Town of Greece*, 134 S. Ct. at 1822–23).

151. *Id.* at 512.

152. *Id.* at 506, *cert. denied*, 138 S. Ct. 2708 (2018).

invocation, is similar to prayer practices in other parts of the country that are currently under scrutiny.[153] These practices include prayers at the start of boards of commissioners' meetings and school board meetings.[154]

A. Splitting Hairs and Splitting Prayers: Implications of the 2017 Circuit Split

The circuit split between *Bormuth* and *Lund*, which both involve boards of county commissioners, turns on the identity of the prayer-giver and whether a lawmaker can constitutionally present a prayer at a governmental meeting.[155] Because of this split, some scholars expect the Supreme Court to hear a case during the next session about who the Constitution allows to give legislative prayers.[156] The Court might even rule again on the constitutionality of legislative prayer in general.[157]

The *Bormuth* court disagreed with *Lund*'s conclusion that legislator-led prayer is a phenomenon and an exception to the general rule against lawmakers leading prayer.[158] *Bormuth* also distinguished its facts from the facts of *Lund* by pointing out that, while in both cases lawmakers led Christian prayers at the start of every meeting, the prayers themselves were different in *Bormuth* compared to *Lund*.[159] The *Lund* prayers implicitly signaled that Christianity was superior to other religions, looked down upon non-Christians, and urged attendees to convert to Christianity.[160] In contrast, the *Bormuth* prayers were more general and did not encourage Christianity as overtly as the *Lund* prayers did.[161] This distinction between the content of the prayers in *Lund* and *Bormuth* is definitely important, and it is relevant to the *Bormuth* case, but it is not consistent with *Marsh*'s statement that judges should not parse the content of legislative prayers.[162]

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153. *See supra* Section II.D (discussing non-Texas legislative prayer cases).

154. *Bormuth*, 870 F.3d at 498; Am. Humanist Ass'n v. McCarty, 851 F.3d 521, 523–24 (5th Cir. 2017).

155. *See supra* Section II.D (introducing the circuit split between *Bormuth v. County of Jackson* and *Lund v. Rowan County*).

156. David L. Hudson Jr., *Circuit Split on Constitutionality of Legislator-Led Prayer May Lead to SCOTUS Review*, A.B.A. J., (Feb. 2018), www.abajournal.com/magazine/article/circuit_split_on_legislator_led_prayer; Don Byrd, *Religious Liberty Stories to Watch in 2018*, BAPTIST JOINT COMMITTEE FOR RELIGIOUS LIBERTY (Jan. 2, 2018), http://bjconline.org/religious-liberty-stories-to-watch-in-2018-010218/.

157. *See supra* Part II (discussing the background of legislative prayer and the possibility of the United States Supreme Court overturning *Marsh v. Chambers*).

158. *See Bormuth*, 870 F.3d at 510; Lund v. Rowan County, 863 F.3d 268, 279 (4th Cir. 2017).

159. *See Bormuth*, 870 F.3d at 513; *Lund*, 863 F.3d at 284–85.

160. *Lund*, 863 F.3d at 283–84.

161. *See generally Bormuth*, 870 F.3d 494.

162. *See infra* notes 169–73 and accompanying text (discussing the logical inconsistencies in *Marsh v. Chambers* compared to *Lund v. Rowan County* and *Bormuth v. County of Jackson*).

B. Marsh v. Chambers*: Whether History Is Enough*

Marsh prohibits judges from questioning the content of a prayer as long as the prayer opportunity does not "proselytize or advance any one, or . . . disparage any other, faith or belief," and *Town of Greece* affirmed this rule in 2014.[163] Both decisions, decades apart, forbade proselytizing, but the courts have not elaborated much on how exactly to apply that rule.[164] Almost all Texas legislative prayers, which pastors and other religious leaders lead, pray to the Christian God on behalf of everyone present.[165] Even if legislative prayer does not proselytize or promote one religion over another, the government still promotes the idea of religion over the idea of nonreligion by allowing legislative prayer.[166] Although case law does not allow proselytizing, people who lead religious services are used to speaking to God on behalf of congregations, and asking them not to do that might veer into the forbidden territory of the government's prohibiting the free exercise of religion.[167] This supports the argument that the United States Supreme Court should overturn *Marsh* in order to avoid the uncertainty and risk of evaluating the content of a prayer.[168]

The *Marsh* majority pointed out that if a governmental body tried to resolve the controversy over legislative prayer by requiring the prayer to be nonsectarian that would delve into the territory of violating the Free Exercise Clause.[169] The Court wrote: "[I]t is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer."[170] However, the previous sentence of that opinion set forth the rule that legislative prayer cannot proselytize.[171] This is a quandary because a person cannot evaluate whether a prayer is proselytizing without evaluating the content of that particular prayer. This point weakens the *Marsh* decision and supports the argument that the United States Supreme Court should adopt Justice Brennan's *Marsh* dissent.[172] Ensuring that legislative prayer practices are constitutional is such a subjective analysis that it would be fairer to abolish the practice, not because of any animosity toward religion, but because abiding by the United States Constitution—the foundation of our country—should be the United States legal system's first and foremost goal.

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163. Town of Greece v. Galloway, 134 S. Ct. 1811, 1824 (2014); Marsh v. Chambers, 463 U.S. 783, 794–95 (1983).

164. *See, e.g.*, *Town of Greece*, 134 S. Ct. 1811; *Marsh*, 463 U.S. 783.

165. *See Bormuth*, 870 F.3d at 498–99; *see, e.g.*, *84th Legislative Session*, *supra* note 1.

166. *See* LEVY, *supra* note 32, at 10.

167. U.S. CONST. amend. I; *see Marsh*, 463 U.S. at 794–95; *Bormuth*, 870 F.3d at 508.

168. *See generally Marsh*, 463 U.S. 783.

169. *See id.* at 794–95.

170. *Id.* at 795.

171. *See id.* at 794–95.

172. *See id.*

When a governmental body, such as the Texas Legislature, allows a minister or other religious leader to present a prayer each day, it seems like the government is in fact evaluating the content, even if only indirectly, because it chooses who it allows to lead the invocation.[173] The Texas Legislature's prayer practice is fairly casual, at least in the House of Representatives; usually, the legislator who wants to invite a religious leader to lead the invocation asks the Speaker of the House if a specific date is available, and the speaker puts that legislator and religious leader on the calendar.[174] Religious leaders give non-Christian prayers sometimes, but the prayers are usually Christian.[175] This is not to say that the Texas Legislature intentionally tries to promote Christian prayers over other types of prayers, but *Marsh* still prohibits the Texas Legislature from using the prayer opportunity to advance any one faith.[176]

The Texas Legislature is probably not purposely using the prayer practice to advance Christianity, but the practice still has this effect because most legislators are Christian and bring Christian religious leaders.[177] The chart below shows that in the 85th Texas Legislature, which ran from January 10 through May 29, 2017, with a special session from July 18 through August 15, 2017, 172 legislators identified as Christian (either nondenominational or a Christian denomination, including Catholicism), while only three legislators identified as Jewish and six had an unknown religious affiliation.[178] The Texas Legislature has offered prayers from leaders of other faiths, including Islam and Unitarianism, but Christian prayers are still by far the most common in the Texas Legislature.[179] The Texas government is preferring religion over non-religion, and the endorsement test—set forth in the Fifth Circuit, which encompasses Texas—forbids this.[180]

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173. *See* Interview with William R. Keffer, Assoc. Professor of Energy Law, Tex. Tech Univ. Sch. of Law, in Lubbock, Tex. (Jan. 8, 2018) (discussing the fact that different Texas legislators bring religious leaders from their districts to give an invocation each session day). Keffer served as a member of the Texas House of Representatives during the 2003 and 2005 legislative sessions. *Id.*

174. *See id.*

175. *See, e.g.*, *84th Legislative Session*, *supra* note 1; *Senate Session (Part I)*, TEX. SENATE (Aug. 7, 2017), http://tlcsenate.granicus.com/MediaPlayer.php?view_id=42&clip_id=12869.

176. *See Marsh*, 463 U.S. at 794–95.

177. *See* Alexa Ura & Jolie McCullough, *Once Again, the Texas Legislature Is Mostly White, Male, Middle-Aged*, TEX. TRIB. (Jan. 9, 2017, 12:00 AM), https://www.texastribune.org/2017/01/09/texas-legislature-mostly-white-male-middle-aged/.

178. *Id.*

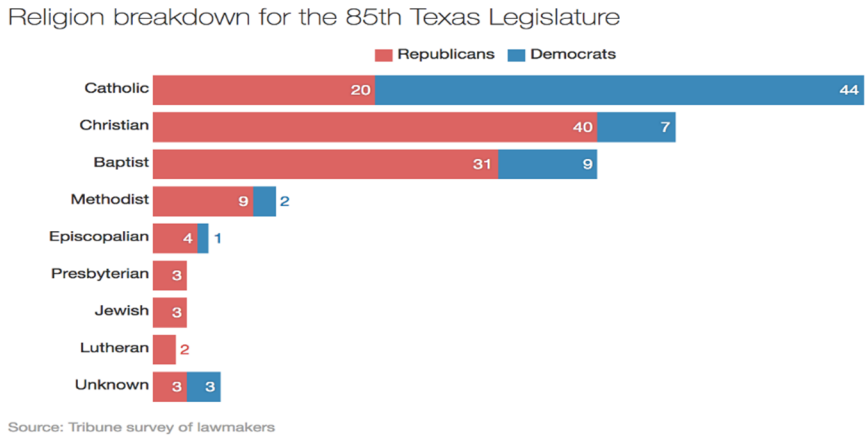
179. *See* Interview with William R. Keffer, *supra* note 173; *Senate Session (Part I), supra* note 175 (giving examples of Christian legislative prayers).

180. *See* Ingebretsen v. Jackson Pub. Sch. Dist., 88 F.3d 274, 280 (5th Cir. 1996).

> Government unconstitutionally endorses religion whenever it appears to "take a position on questions of religious belief," or makes "adherence to a religion relevant in any way to a person's standing in the political community" . . . . The government creates this appearance when it conveys a message that religion is "favored," "preferred," or "promoted" over other beliefs.

Id. (citation omitted).

This Comment will not analyze the Texas Legislature's prayer practice under the coercion test



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Obergefell v. Hodges, the 2015 same-sex marriage case, gives rise to an argument that if the Court did hear a legislative prayer case in the near future, it may diverge from its emphasis on using history and tradition to keep the status quo and overturn *Marsh*.[182] The *Obergefell* Court supports an argument that examining changes in history and tradition, and using those changes to inform constitutional interpretation, may become a more common practice.[183] If the Court were to decide to deemphasize history and tradition, it would have to rely more on the Establishment Clause tests: the *Lemon* test, the endorsement test, and the coercion test.[184]

C. Applying the Establishment Clause Tests to the Texas Legislature

If a court were to apply the *Lemon* test to Texas's practice of allowing a visiting religious leader to lead a prayer at the start of each legislative session day, the practice would likely fail.[185] The *Lemon* test sets out three requirements: (1) "the statute must have a secular legislative purpose"; (2) "[the statute's] principal or primary effect must be one that neither

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because the coercion test only applies to school prayer. *See supra* Section II.B (explaining the coercion test).

181. Ura & McCullough, *supra* note 177.

182. Obergefell v. Hodges, 135 S. Ct. 2584 (2015); *see, e.g.*, Town of Greece v. Galloway, 134 S. Ct. 1811, 1819 (2014); Marsh v. Chambers, 463 U.S. 783, 790–91 (1983); *supra* Section II.C.3 (discussing the facts of *Obergefell v. Hodges*).

183. *See supra* Section II.C.3 (describing the *Obergefell* Court's references to the way marriage has changed throughout history to support its holding).

184. *See* Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971); Doe v. Beaumont Indep. Sch. Dist., 173 F.3d 274, 285 (5th Cir. 1999); *Ingebretsen*, 88 F.3d at 280.

185. *Marsh*, 463 U.S. at 795 (Brennan, J., dissenting) ("I have no doubt that, if any group of law students were asked to apply the principles of *Lemon* to the question of legislative prayer, they would nearly unanimously find the practice to be unconstitutional."); *Lemon*, 403 U.S. at 612–13.

advances nor inhibits religion"; and (3) "the statute must not foster 'an excessive government entanglement with religion.'"[186] The practice would fail the first requirement because the foremost purpose of prayer is religious.[187] It would fail the second requirement because the primary effect seems to be to advance religion, and it would also fail the third requirement.[188] The practice definitely appears to foster an excessive government entanglement with religion because it involves prayer during a government body's meeting.[189] Also, a main tenet of Christianity is to spread the word of God to everyone and to encourage people to convert to Christianity.[190] Therefore, it seems like Christian prayers inherently proselytize, even if they do not explicitly ask people to become Christian, simply by praying to the Christian God.[191]

If a court were to apply the endorsement test to Texas's legislative prayer practice, the court would probably hold that the practice violates the First Amendment.[192] The government violates the endorsement test when it takes a stance "'on questions of religious belief,' or makes 'adherence to a religion relevant in any way to a person's standing in the political community' . . . . The government creates this appearance when it conveys a message that religion is 'favored,' 'preferred,' or 'promoted' over other beliefs."[193] Prayer in itself is a religious act, so the Texas government's practice of praying before each legislative session definitely conveys the message that religion is favored and preferred in Texas, which causes the practice to fail the endorsement test.[194]

IV. LET US HAVE SILENCE

Texas's legislative prayer practice likely fails the Establishment Clause tests, and although a court might uphold the practice under *Marsh*, there is no guarantee that the United States Supreme Court will not overturn that case.[195] Therefore, in order for Texas to avoid violating the Constitution, the legislature should adopt an alternative to the practice.[196] Texas, as well as the

186. *Lemon*, 403 U.S. at 612.

187. *Marsh*, 463 U.S. at 797 (Brennan, J., dissenting); *Prayer*, THE NEW OXFORD AMERICAN DICTIONARY (2d ed. 2005).

188. *See Lemon*, 403 U.S. at 612.

189. *See id.*

190. *Matthew* 28:18–20.

191. *See id.*

192. *See* Ingebretsen v. Jackson Pub. Sch. Dist., 88 F.3d 274, 280 (5th Cir. 1996).

193. *Id.* (citations omitted) (citing County of Allegheny v. ACLU, 492 U.S. 573, 594 (1989) (quoting Lynch v. Donnelly, 465 U.S. 668, 687 (1984))).

194. *See id.*

195. *See* Marsh v. Chambers, 463 U.S. 783 (1983); *supra* Part III (outlining the reasons Texas's legislative prayer practice violates the United States Constitution).

196. *See supra* Part III (outlining the reasons Texas's legislative prayer practice violates the United States Constitution).

Supreme Court, should also adopt Justice Brennan's dissenting opinion in *Marsh*.[197] This would uphold the purposes of the Establishment Clause and help ensure that case law is consistent with the Establishment Clause.[198]

No single, definitive purpose of legislative prayer practices exists, but scholars have suggested many purposes.[199] Courts have written about the solemn mood that the prayer practice creates in the legislative chambers before the legislators get down to business.[200] Former-Representative Keffer agreed that one purpose of the prayer could be to create this type of setting.[201]

> You would like to hope that maybe [a prayer] would set the stage for everybody, kind of reminding themselves how they ought to act with each other. And of course, it never works out that way, but you have this hope that maybe, "Okay, let's not throw furniture at each other and call you a name," and all that kind of stuff, and maybe it's a little harder to do that after you just said a prayer.[202]

Several alternatives could accomplish the goal of legislative prayer without the adverse constitutional implications and stay ahead of the curve in case the Supreme Court overturns *Marsh*.[203] These alternatives could include a moment of silence at the start of meetings or a legislator reading inspirational words to the chambers. The fact that religion in the United States is declining means adopting one of these alternatives is a preventative measure, a way to decrease the likelihood of someone suing the Texas Legislature and accusing it of violating the Establishment Clause.[204]

One feasible alternative would be to allow a moment of silence at the start of legislative and other government meetings. A couple minutes of silence would create the same solemnity that legislative prayer purports to create and may achieve this goal more inclusively than prayer does.[205] Many legislators would likely pray because they affiliate with religion, but others may simply reflect on their goals for the day, meditate, or use those moments of peace however they feel would best benefit them.[206] Public schools in

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197. *See generally Marsh*, 463 U.S. 783. *See supra* Section II.C.3 (discussing Brennan's *Marsh v. Chambers* dissent).

198. *See supra* Section II.A (discussing the purposes of the Establishment Clause).

199. *See supra* notes 8–9 and accompanying text (discussing the ostensible purposes of legislative prayer).

200. *See* Bormuth v. County of Jackson, 870 F.3d 494, 506 (6th Cir. 2017) (citing Town of Greece v. Galloway, 134 S. Ct. 1811, 1823 (2014)).

201. Interview with William R. Keffer, *supra* note 173.

202. *Id.* (available at 21:30).

203. *See* U.S. CONST. amend. I. *See generally* Marsh v. Chambers, 463 U.S. 783 (1983).

204. *See* U.S. CONST. amend. I; *supra* notes 16–19 and accompanying text (describing the decline in religion among Americans).

205. *See Bormuth*, 870 F.3d at 507 (citing *Town of Greece*, 134 S. Ct. at 1825); Interview with William R. Keffer, *supra* note 173.

206. *See, e.g.*, *Rep. Alvarado, Carol District 145*, TEX. HOUSE REPRESENTATIVES, https://house.texas.gov/members/member-page/?district=145 (last visited Dec. 30, 2018); *Rep. Anchia, Rafael District*

Texas allow one minute of silence at the start of each day, and many students use that time for prayer.[207] Both public schools and the legislature have government employees and private citizens on the premises, so it makes sense to treat the two institutions similarly.[208]

A moment of silence would pass both the *Lemon* and endorsement tests.[209] It would pass the *Lemon* test because a moment of silence is secular, and the effect is neutral toward religion and does not foster excessive government entanglement with religion.[210] This alternative would pass the endorsement test because a moment of silence does not mean the government is taking a position on questions of religious belief or conveying any message that religion is favored over other beliefs.[211] If the Supreme Court were to overturn *Marsh*—which could happen based on *Obergefell*'s use of changes in history to justify its holding—and instead adopt Justice Brennan's dissent, then courts would probably use the *Lemon* test more consistently because they would not have the history and tradition arguments of *Marsh* to fall back on.[212]

Another goal of legislative prayer is to create unity in the chambers, "remind[ing] lawmakers to transcend petty differences in pursuit of a higher purpose, and express[ing] a common aspiration to a just and peaceful society."[213] Individual prayer may not necessarily achieve the goal of creating unity, but the Texas Legislature also begins each day with pledges of allegiance to both the United States and Texas.[214] Reciting a pledge in a large group likely creates a sense of unity, meaning that legislative prayer is not necessary to achieve this goal.[215] Many Texas legislators go into politics

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103, TEX. HOUSE REPRESENTATIVES, https://house.texas.gov/members/member-page/?district=103 (last visited Dec. 30, 2018); *Rep. Burkett, Cindy District 113*, TEX. HOUSE REPRESENTATIVES, https://house.texas.gov/members/member-page/?district=113 (last visited Dec. 30, 2018); *Rep. Elkins, Gary District 135*, TEX. HOUSE REPRESENTATIVES, https://house.texas.gov/members/member-page/?district=135 (last visited Dec. 30, 2018) (showing various legislators' religious affiliations on the Texas House of Representatives website).

207. *See* TEX. EDUC. CODE ANN. § 25.082 (West 2017); Lane Luckie & Holley Nees, *Texas' Moment of Silence is Being Challenged*, KTRE, http://www.ktre.com/story/9791578/texas-moment-of-silence-is-being-challenged (last updated July 2, 2009, 11:50 AM).

208. *See House of Representatives*, BULLOCK MUSEUM, https://www.thestoryoftexas.com/discover/texas-state-capitol/house-of-representatives (last visited Dec. 30, 2018); Tamar Wilner, *Texas Senate Cites 'Decorum' to Increase Distance Between Legislators, Reporters*, COLUM. JOURNALISM REV. (Jan. 27, 2017), https://www.cjr.org/united_states_project/texas_senate_decorum.php.

209. *See* Lemon v. Kurtzman, 403 U.S. 602, 612 (1971); Ingebretsen v. Jackson Pub. Sch. Dist., 88 F.3d 274, 280 (5th Cir. 1996).

210. *See Lemon*, 403 U.S. at 612–13.

211. *See Ingebretsen*, 88 F.3d at 280; *supra* note 65 and accompanying text (setting forth the endorsement test).

212. *See* Obergefell v. Hodges, 135 S. Ct. 2584 (2015); Marsh v. Chambers, 463 U.S. 783 (1983); *Lemon*, 403 U.S. at 612.

213. Town of Greece v. Galloway, 134 S. Ct. 1811, 1818 (2014).

214. Interview with William R. Keffer, *supra* note 173; *see, e.g.*, *84th Legislative Session*, *supra* note 1.

215. *See, e.g.*, *84th Legislative Session*, *supra* note 1.

because they love their state and country and want to advance the welfare of their communities.[216] Ensuring that the Texas Legislature is an inclusive place helps ensure that the governed feel comfortable and free to express themselves.[217]

One might argue that the pledges are the same each day, which could lead to the legislators just reciting the words without thinking about the meaning of them and without feeling like they were fully expressing their aspiration to maintain a just and peaceful society.[218] Therefore, another alternative is to allow a different legislator to read some inspirational words to the chambers each day. The words could be from a historical figure, a governmental leader, or even the Bible or another religious book. The Texas Legislature should, of course, allow religious words—if it did not, the legislature would be infringing on Texans' freedom of speech and religion—but something like a Bible verse or words from the Pope would be more appropriate than a prayer.[219] This is because statements like these are not asking the members of the legislature and the public to stand, bow their heads, and join in prayer. Rather, they allow people to reflect on the words and determine what the words mean to them. This practice could also create a sense of unity as people reflect on the meaning of their legislative work. Some examples of potential inspirational words could include words from former or current Supreme Court Justices, historians, former or current presidents, attorneys, and other people who have positively affected society.

Many Texas legislators tend to be more conservative, which often equates with more traditional views, and Texas legislators generally do not publicly oppose the prayer practice.[220] "It never was one of those things that was a lightning rod for anybody that people got excited about."[221] However, if a legislator were to file a lawsuit in the future, like in *Marsh*, that might lead the Texas Legislature to consider changing its practice or even eliminating the prayer practice altogether.[222] Part of the reason no one has said anything might be because none of the prayers have contained inflammatory content that offended anyone enough to cause them to strongly object to the practice.[223] However, the issue of whether a government action

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216. *See, e.g.*, *About Joe*, JOE STRAUS, http://www.joestraus.org/about (last visited Dec. 30, 2018).

217. *See supra* note 25 and accompanying text (explaining that people interested in serving on the Texas Legislature may not pursue that goal because they feel their success would be hindered by their lack of religious beliefs).

218. 4 U.S.C.A. § 4 (2013); TEX. GOV'T CODE § 3100.101 (West 2017).

219. U.S. CONST. amend. I.

220. *See, e.g.*, *Issues*, JOE STRAUS, http://www.joestraus.org/issues (last visited Dec. 30, 2018); *Senator Charles Schwertner: District 5*, TEX. SENATE, http://www.senate.texas.gov/member.php?d=5 (last visited Dec. 30, 2018). Texas lawmakers seem unbothered by expressly adding religious values to state-sponsored activities. GOV'T § 3100.101. In 2007, only about ten years ago, Texas lawmakers added the words "under God" to the Texas pledge. *Id.*

221. Interview with William R. Keffer, *supra* note 173 (available at 12:00).

222. Marsh v. Chambers, 463 U.S. 783, 794–95 (1983).

223. Interview with William R. Keffer, *supra* note 173.

violates the Constitution does not turn on whether the action offends anyone.[224] Instead, it turns on whether the action runs contrary to the Constitution and the federal court opinions on the matter.[225] Based on both of these sources, Texas's legislative prayer practice does not seem to be legal.[226]

Lawmakers purportedly intend for legislative prayer to bring the legislative body together, but inclusion is not always the result because prayers often tend to assume that everyone in the room agrees with the content of the prayer.[227] In dissent, Justice Kagan wrote in *Town of Greece* about the importance of legislative prayer bringing people together.[228] "When citizens of all faiths come to speak to each other and their elected representatives in a legislative session, the government must take especial care to ensure that the prayers they hear will seek to include, rather than serve to divide."[229] Many Americans, especially Texans, agree with the prayers' content, but the Establishment Clause prohibits the government from promoting people's religious beliefs, even if very few people disagree with those beliefs.[230] In a majority-Christian state such as Texas, banning legislative prayer could equate to putting the minority's desires above the majority's desires, and many people do not want to do this.[231]

However, even though Texas legislators have seemed to view legislative prayer as a practice that does not present egregious problems, one of the Constitution's purposes is to prevent the "tyranny of the majority" that James Madison discussed in *Federalist Paper No. 51 (1788)*.[232] Madison pointed out that the purpose of the Constitution—specifically the Bill of Rights—is to protect every citizen's freedom, not just the freedom of the citizens who agree with the majority's viewpoints.[233] This idea applies to legislative prayer in Texas because, although the majority of Texans and Texas legislators affiliate with religion, in order to prevent the tyranny of the majority, religious Texans' views should not override the Constitution's First Amendment guarantee of separation of church and state.[234]

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224. *See supra* Section II.B (discussing courts' interpretations of the Establishment Clause).

225. *See supra* Section II.B (discussing courts' interpretations of the Establishment Clause).

226. *See supra* Section II.B (discussing courts' interpretations of the Establishment Clause).

227. *See, e.g.*, *84th Legislative Session*, *supra* note 1.

228. Town of Greece v. Galloway, 134 S. Ct. 1811, 1850 (2014) (Kagan, J., dissenting).

229. *Id.*

230. *See supra* notes 20, 170 and accompanying text (explaining that most Texans associate with a religion and discussing how the Establishment Clause does not consider the content of the prayers).

231. *See* Interview with William R. Keffer, *supra* note 173; *supra* notes 20, 170 and accompanying text (explaining that most Texans associate with a religion and discussing how the Establishment Clause does not consider the content of the prayers).

232. *Federalist No. 51 (1788)*, BILL RTS. INST., https://www.billofrightsinstitute.org/founding-documents/primary-source-documents/the-federalist-papers/federalist-papers-no-51/ (last visited Dec. 30, 2018); Interview with William R. Keffer, *supra* note 173 (stating that Keffer does not remember any legislators getting upset about the prayer practice during his two sessions as a representative).

233. *Federalist No. 51 (1788)*, *supra* note 232.

234. *See Jefferson's Letter*, *supra* note 38. In 1802, Thomas Jefferson spoke approvingly of the "wall of separation between Church [and] State" that the First Amendment creates. *Id.*; *see* Interview with

V. AMEN

If a court were to hear a challenge to the Texas Legislature's prayer practice, it would likely rule that the practice withstands neither the *Lemon* test nor the endorsement test, which courts so often use to evaluate legislative prayer cases.[235] In order to prevent a cumbersome lawsuit, to be consistent with the decrease in religion in the United States, and to prepare for the possible reversal of *Marsh*, Texas should adopt an alternative to its prayer practice.[236] Replacing Texas's prayer practice with a different practice, such as a moment of silence or a reading of inspiring words, would create a more inclusive, open, and welcoming legislature that is in line with the United States Constitution.[237]

William R. Keffer, *supra* note 173.

235. *See supra* Section III.C (discussing how under the Establishment Clause and its accompanying court-created tests, the Texas legislative prayer practice would likely be ruled void).

236. *See supra* Part IV (explaining how terminating Texas's legislative prayer practice altogether would be the best way to ensure that the practice does not create litigation); *supra* Section III.B (discussing why *Marsh* should be overturned); *supra* notes 16–20 and accompanying text (describing the downtick in the number of Americans who affiliate with religion).

237. *See generally supra* Part IV (explaining how Texas's legislative prayer practice raises several issues addressed in United States Supreme Court cases and discussing the likelihood that the practices would fail under the tests created by such cases, leading to constitutional litigation).