LAW & RELIGION

CHAPTER IV: SCHOOL PRAYER AND LEGISLATIVE PRAYER

A. School Prayer

1. ENGEL v. VITALE
370 U.S. 421 (1962)

JUSTICE BLACK delivered the opinion of the Court.

The respondent Board of Education of Union Free School District No. 9, New Hyde Park, New York directed the School District's principal to cause the following prayer to be said aloud by each class in the presence of a teacher at the beginning of each school day:

> "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country."

This daily procedure was adopted on the recommendation of the State Board of Regents, a governmental agency granted broad powers over the State's public school system. These state officials composed the prayer which they recommended and published as a part of their "Statement on Moral and Spiritual Training in the Schools."

Shortly after the practice of reciting the Regents' prayer was adopted by the School District, the parents of ten pupils brought this action in a New York State Court. The New York Court of Appeals sustained an order of the lower courts which had upheld the power of New York to use the Regents' prayer so long as the schools did not compel any pupil to join in the prayer over his or his parents' objection. We review this important decision.

We think that by using its public school system to encourage recitation of the Regents' prayer, the State of New York has adopted a practice wholly inconsistent with the Establishment Clause. There can be no doubt that New York's program of daily classroom invocation of God's blessings as prescribed in the Regents' prayer is a religious activity. It is a solemn avowal of divine faith and supplication for the blessings of the Almighty.

The petitioners contend that the state laws requiring or permitting use of the Regents' prayer must be struck down as a violation of the Establishment Clause because that prayer was composed by governmental officials as a part of a governmental program to further religious beliefs. For this reason, petitioners argue, the State's use of the Regents' prayer in its public school system breaches the constitutional wall of separation between Church and State. We agree with that contention since we think that the constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to

recite as a part of a religious program carried on by government.

It is a matter of history that this very practice of establishing governmentally composed prayers for religious services was one of the reasons which caused many of our early colonists to leave England and seek religious freedom in America. The Book of Common Prayer, which was created under governmental direction and approved by Acts of Parliament in 1548 and 1549, set out in minute detail the accepted form and content of prayer and other religious ceremonies to be used in the established, tax-supported Church of England. The controversies over the Book and what should be its content repeatedly threatened to disrupt the peace of that country. Powerful groups representing some of the varying religious views of the people struggled among themselves to impress their particular views upon the Government and obtain amendments of the Book in order that the official religious establishment would advance their particular religious beliefs. Other groups, lacking the political power to influence the Government, decided to leave England and seek freedom in America.

It is an unfortunate fact of history that when some of the very groups which had most strenuously opposed the Church of England found themselves sufficiently in control of colonial governments in this country to write their own prayers into law, they passed laws making their own religion the official religion of their respective colonies. Indeed, as late as the time of the Revolutionary War, there were established churches in at least eight of the thirteen former colonies and established religions in at least four of the other five.[1] But the successful Revolution against English domination was shortly followed by intense opposition to the practice of establishing religion by law. This opposition crystallized into an effective political force in Virginia where the minority religious groups such as Presbyterians, Lutherans, Quakers and Baptists had gained such strength that the adherents to the established Episcopal Church were a minority. In 1785-1786, those opposed to the established Church, led by Madison and Jefferson, obtained the enactment of the "Virginia Bill for Religious Liberty" by which all religious groups were placed on an equal footing so far as the State was concerned. Similar though less far-reaching legislation was passed in other States.

By the time of the adoption of the Constitution, there was a widespread awareness among many Americans of the dangers of a union of Church and State. These people knew, some of them from bitter personal experience, that one of the greatest dangers to the freedom of the individual to worship in his own way lay in the Government's placing its official stamp of

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[1] The Church of England was the established church of at least five colonies: Maryland, Virginia, North Carolina, South Carolina and Georgia. There seems to be some controversy as to whether that church was officially established in New York and New Jersey but there is no doubt that it received substantial support from those States. In Massachusetts, New Hampshire and Connecticut, the Congregationalist Church was officially established. In Pennsylvania and Delaware, all Christian sects were treated equally in most situations but Catholics were discriminated against in some respects. In Rhode Island all Protestants enjoyed equal privileges but it is not clear whether Catholics were allowed to vote.

approval upon one particular kind of prayer or one particular form of religious services. They knew the anguish, hardship and bitter strife that could come when zealous religious groups struggled with one another to obtain the Government's stamp of approval. The Constitution was intended to avert a part of this danger by leaving the government in the hands of the people rather than in the hands of any monarch. But this safeguard was not enough. The First Amendment was added to the Constitution to stand as a guarantee that neither the power nor the prestige of the Federal Government would be used to control, support or influence the kinds of prayer the American people can say. Under that Amendment's prohibition against governmental establishment of religion, as reinforced by the Fourteenth Amendment, government in this country, be it state or federal, is without power to prescribe by law any particular form of prayer which is to be used as an official prayer in carrying on any program of governmentally sponsored religious activity.

There can be no doubt that New York's state prayer program officially establishes the religious beliefs embodied in the Regents' prayer. The respondents' argument to the contrary, which is largely based upon the contention that the Regents' prayer is "non-denominational" and the fact that the program does not require all pupils to recite the prayer but permits those who wish to do so to remain silent or be excused from the room, ignores the essential nature of the program's constitutional defects. Neither the fact that the prayer may be denominationally neutral nor the fact that its observance is voluntary can serve to free it from the limitations of the Establishment Clause, as it might from the Free Exercise Clause. Although these two clauses may in certain instances overlap, they forbid two quite different kinds of governmental encroachment upon religious freedom. The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not. This is not to say, of course, that laws officially prescribing a particular form of religious worship do not involve coercion of such individuals. When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain. But the purposes underlying the Establishment Clause go much further than that. Its first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion. The history of governmentally established religion, both in England and in this country, showed that whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs. That same history showed that many people had lost their respect for any religion that had relied upon the support of government to spread its faith. The Establishment Clause thus stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its "unhallowed perversion" by a civil magistrate. Another purpose of the Establishment Clause rested upon an awareness of the historical fact that governmentally established religions and religious persecutions go hand in hand. The Founders knew that only a few years after the Book of Common Prayer became the only accepted form of religious services in the established Church of England, an Act of Uniformity was passed to compel all Englishmen to attend those services and to make it a criminal offense to conduct or

attend religious gatherings of any other kind. And they knew that similar persecutions had received the sanction of law in several of the colonies soon after the establishment of official religions in those colonies. It was in large part to get away from this sort of systematic religious persecution that the Founders brought into being our Nation, our Constitution, and our Bill of Rights with its prohibition against governmental establishment of religion.

It has been argued that to apply the Constitution in such a way as to prohibit state laws respecting an establishment of religious services in public schools is to indicate a hostility toward religion or toward prayer. Nothing, of course, could be more wrong. The history of man is inseparable from the history of religion. Since the beginning of that history many people have devoutly believed that "More things are wrought by prayer than this world dreams of." It was doubtless largely due to men who believed this that there grew up a sentiment that caused men to leave the cross-currents of officially established state religions and religious persecution in Europe and come to this country filled with the hope that they could find a place in which they could pray when they pleased to the God of their faith in the language they chose. And there were men of this same faith in the power of prayer who led the fight for adoption of our Constitution and our Bill of Rights. These men knew that the First Amendment, which tried to put an end to governmental control of religion and of prayer, was not written to destroy either. They knew rather that it was written to quiet well-justified fears arising out of an awareness that governments of the past had shackled men's tongues to make them speak only the religious thoughts that government wanted them to speak and to pray only to the God that government wanted them to pray to. 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 themselves and to those the people choose to look to for religious guidance.[2]

It is true that New York's establishment of its Regents' prayer does not amount to a total establishment of one particular religious sect -- that, indeed, the governmental endorsement of that prayer seems relatively insignificant when compared to the governmental encroachments upon religion which were commonplace 200 years ago. To those who subscribe to the view that because the Regents' prayer is so brief and general there can be no danger to religious freedom, however, it may be appropriate to say in the words of James Madison, the author of the First Amendment:

> "It is proper to take alarm at the first experiment on our liberties. . . . Who does not see that the same authority which can establish Christianity, in exclusion of all

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[2] There is nothing in the decision reached here that is inconsistent with the fact that school children are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God. Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise that the State of New York has sponsored in this instance.

other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?"

JUSTICE DOUGLAS, concurring.

The point for decision is whether the Government can constitutionally finance a religious exercise. Our system is presently honeycombed with such financing.[1] Nevertheless, I think it is an unconstitutional undertaking whatever form it takes.

First, a word as to what this case does not involve. Plainly, our Bill of Rights would not permit a State or the Federal Government to adopt an official prayer and penalize anyone who would not utter it. This, however, is not that case, for there is no element of compulsion or coercion in New York's regulation. The prayer is said upon the commencement of the school day, immediately following the pledge of allegiance to the flag. The prayer is said aloud in the presence of a teacher, who either leads the recitation or selects a student to do so. No student, however, is compelled to take part. The respondents have adopted a regulation which provides that "Neither teachers nor any school authority shall comment on participation or non-participation . . . nor suggest or request that any posture or language be used or dress be worn or be not used or not worn." Provision is also made for excusing children, upon written request of a parent or guardian, from the saying of the prayer or from the room in which the prayer is said. In short, the only one who need utter the prayer is the teacher; and no teacher is complaining of it.

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[1] "There are many 'aids' to religion in this country at all levels of government. To mention but a few at the federal level, one might begin by observing that the very First Congress which wrote the First Amendment provided for chaplains in both Houses and in the armed services. There is compulsory chapel at the service academies, and religious services are held in federal hospitals and prisons. The President issues religious proclamations. The Bible is used for the administration of oaths. WPA funds were available to parochial schools during the depression. Veterans receiving money under the G. I. Bill of 1944 could attend denominational schools, to which payments were made directly by the government. During World War II, federal money was contributed to denominational schools for the training of nurses. The benefits of the National School Lunch Act are available to students in private as well as public schools. The Hospital Survey and Construction Act of 1946 specifically made money available to non-public hospitals. The slogan 'In God We Trust' is used by the Treasury Department, and Congress recently added God to the pledge of allegiance. There is Bible-reading in the schools of the District of Columbia, and religious instruction is given in the District's National Training School for Boys. Religious organizations are exempt from the federal income tax and are granted postal privileges. Up to defined limits contributions to religious organizations are deductible for federal income tax purposes. There are no limits to the deductibility of gifts and bequests to religious institutions made under the federal gift and estate tax laws. This list of federal 'aids' could easily be expanded, and of course there is a long list in each state." Fellman, The Limits of Freedom (1959), pp. 40-41.

The question presented by this case is therefore an extremely narrow one. It is whether New York oversteps the bounds when it finances a religious exercise. What New York does on the opening of its public schools is what we do when we open court. Our Crier has from the beginning announced the convening of the Court and then added "God save the United States and this Honorable Court." That utterance is a supplication, a prayer in which we, the judges, are free to join, but which we need not recite any more than the students need recite the New York prayer. What New York does on the opening of its public schools is what each House of Congress does at the opening of each day's business.

The Pledge of Allegiance, like the prayer, recognizes the existence of a Supreme Being. Since 1954 it has contained the words "one Nation *under God*, indivisible, with liberty and justice for all." The House Report recommending the addition of the words "under God" stated that those words in no way run contrary to the First Amendment but recognize "only the guidance of God in our national affairs."

The Act of March 3, 1865 authorized the phrase "In God We Trust" to be placed on coins. The use of the motto on all currency and coins was directed by the Act of July 11, 1955. Moreover, by the Joint Resolution of July 30, 1956, our national motto was declared to be "In God We Trust."

In New York the teacher who leads in prayer is on the public payroll; and the time she takes seems minuscule as compared with the salaries appropriated for chaplains to conduct prayers in the legislative halls. Only a fraction of the teacher's time is given to reciting this 22-word prayer. Yet for me the principle is the same, no matter how briefly the prayer is said, for in each of the instances given the person praying is a public official on the public payroll, performing a religious exercise in a governmental institution. It is said that the element of coercion is inherent in the giving of this prayer. If that is true here, it is also true of the prayer with which this Court is convened, and of those that open the Congress. Few adults, let alone children, would leave our courtroom or the Senate or the House while those prayers are being given. Every such audience is in a sense a "captive" audience.

At the same time I cannot say that to authorize this prayer is to establish a religion in the strictly historic meaning of those words. Yet once government finances a religious exercise it inserts a divisive influence into our communities. The New York Court said that the prayer given does not conform to all of the tenets of the Jewish, Unitarian, and Ethical Culture groups. One of the petitioners is an agnostic.

Under our Bill of Rights free play is given for making religion an active force in our lives. But "if a religious leaven is to be worked into the affairs of our people, it is to be done by individuals and groups, not by the Government." By reason of the First Amendment government is commanded "to have no interest in theology or ritual," for on those matters "government must be neutral." The First Amendment leaves the Government in a position not of hostility to religion but of neutrality. The philosophy is that the atheist or agnostic -- the nonbeliever -- is entitled to go his own way. The philosophy is that if government interferes in matters spiritual, it will be a divisive force. The First Amendment teaches that a government neutral in the field of religion better serves all religious interests.

My problem today would be uncomplicated but for *Everson v. Board of Education*. The *Everson* case seems in retrospect to be out of line with the First Amendment. Its result is appealing, as it allows aid to be given to needy children. Mr. Justice Rutledge stated in dissent what I think is durable First Amendment philosophy:

Public money devoted to payment of religious costs brings the quest for more. It brings too the struggle of sect against sect for the larger share or for any. That is precisely the history of societies which have had an established religion and dissident groups. It is the very thing Jefferson and Madison sought to guard against. The end of such strife cannot be other than to destroy the cherished liberty. I therefore join the Court in reversing the judgment below.

JUSTICE STEWART, dissenting.

The Court says that in permitting school children to say this simple prayer, the New York authorities have established "an official religion." I cannot see how an "official religion" is established by letting those who want to say a prayer say it. On the contrary, I think that to deny the wish of these school children to join in reciting this prayer is to deny them the opportunity of sharing in the spiritual heritage of our Nation.

The Court's historical review of the quarrels over the Book of Common Prayer in England throws no light for me on the issue before us. Equally unenlightening, is the history of the early establishment and later rejection of an official church in our own States. Moreover, I think that the Court's task is not aided by the uncritical invocation of metaphors like the "wall of separation." What is relevant to the issue here is the history of the religious traditions of our people, reflected in countless practices of the institutions and officials of our government.

At the opening of each day's Session of this Court we stand, while one of our officials invokes the protection of God. Since the days of John Marshall our Crier has said, "God save the United States and this Honorable Court." Both the Senate and the House of Representatives open their daily Sessions with prayer. Each of our Presidents has upon assuming his Office asked the protection and help of God.

In 1954 Congress added a phrase to the Pledge of Allegiance to the Flag so that it now contains the words "one Nation *under God*." In 1952 Congress enacted legislation calling upon the President each year to proclaim a National Day of Prayer. Since 1865 the words "IN GOD WE TRUST" have been impressed on our coins.

Countless similar examples could be listed, but there is no need to belabor the obvious. It was all summed up just ten years ago in a single sentence: "We are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*.

I do not believe that this Court, or the Congress, or the President has by the actions and practices I have mentioned established an "official religion" in violation of the Constitution. And I do not believe the State of New York has done so in this case. What each has done has been to follow the deeply entrenched and highly cherished spiritual traditions of our Nation.

Justice FRANKFURTER and Justice WHITE took no part in the decision of this case.

2. SCHOOL DISTRICT OF ABINGTON TOWNSHIP v. SCHEMPP
374 U.S. 203 (1963)

JUSTICE CLARK delivered the opinion of the Court.

Once again we are called upon to consider the scope of the provision of the First Amendment which declares that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." These companion cases present the issues in the context of state action requiring that schools begin each day with readings from the Bible. We hold that the practices at issue and the laws requiring them are unconstitutional under the Establishment Clause, as applied to the States through the Fourteenth Amendment.

The Facts in Each Case: No. 142. The Commonwealth of Pennsylvania by law requires that "At least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day. Any child shall be excused from such Bible reading upon the written request of his parent or guardian." The Schempp family brought suit to enjoin enforcement of the statute. The appellees Edward Lewis Schempp, his wife Sidney, and their children, Roger and Donna, are members of the Unitarian Church in Germantown, Philadelphia, Pennsylvania, where they regularly attend religious services. The children attend the Abington Senior High School, a public school operated by appellant district.

On each school day at the Abington Senior High School between 8:15 and 8:30 a.m., while the pupils are attending their home rooms or advisory sections, opening exercises are conducted pursuant to the statute. The exercises are broadcast into each room in the school building through an intercommunications system and are conducted under the supervision of a teacher by students attending the school's radio and television workshop. Selected students from this course gather each morning in the school's workshop studio for the exercises, which include readings by one of the students of 10 verses of the Holy Bible, broadcast to each room in the building. This is followed by the recitation of the Lord's Prayer, likewise over the intercommunications system, but also by the students in the various classrooms, who are asked to stand and join in repeating the prayer in unison. The exercises are closed with the flag salute and such pertinent announcements as are of interest to the students. Participation in the opening exercises, as directed by the statute, is voluntary. The student reading the verses from the Bible may select the passages and read from any version he chooses, although the only copies furnished by the school are the King James version, copies of which were circulated to each teacher by the school district. During the period in which the exercises have been conducted the King James, the Douay and the Revised Standard versions of the Bible have been used, as well as the Jewish Holy Scriptures. There are no prefatory statements, no questions asked or solicited, no comments or explanations made and no interpretations given at or during the exercises. The students and parents are advised that the student may absent himself from the classroom or, should he elect to remain, not participate in the exercises.

It appears from the record that in schools not having an intercommunications system the Bible reading and the recitation of the Lord's Prayer were conducted by the home-room teacher, who chose the text of the verses and read them herself or had students read them in rotation or by volunteers. This was followed by a standing recitation of the Lord's Prayer, together with the

Pledge of Allegiance to the Flag by the class in unison and a closing announcement of routine school items.

At the first trial Edward Schempp and the children testified as to specific religious doctrines purveyed by a literal reading of the Bible "which were contrary to the religious beliefs which they held and to their familial teaching." The children testified that all of the doctrines to which they referred were read to them at various times as part of the exercises. Edward Schempp testified at the second trial that he had considered having Roger and Donna excused from the exercises but decided against it for several reasons, including his belief that the children's relationships with their teachers and classmates would be adversely affected.[1]

The Expert testimony was introduced by both appellants and appellees at the first trial, which testimony was summarized by the trial court as follows:

"Dr. Solomon Grayzel testified that there were marked differences between the Jewish Holy Scriptures and the Christian Holy Bible. Dr. Grayzel testified that portions of the New Testament were offensive to Jewish tradition and that, from the standpoint of Jewish faith, the concept of Jesus Christ as the Son of God was 'practically blasphemous.' He cited instances in the New Testament which tended to bring the Jews into ridicule or scorn. Dr. Grayzel gave as his expert opinion that if portions of the New Testament were read without explanation, they could be, and in his specific experience with children Dr. Grayzel observed, had been, psychologically harmful to the child and had caused a divisive force within the social media of the school.

"Dr. Luther A. Weigle, an expert witness for the defense, stated that the Bible was non-sectarian. He later stated that the phrase 'non-sectarian' meant to him non-sectarian within the Christian faiths. Dr. Weigle stated that his definition of the Holy Bible would include the Jewish Holy Scriptures, but that the 'Holy Bible' would not be complete without the New Testament. He stated that the New Testament 'conveyed the message of Christians.' In his opinion, reading of the Holy Scriptures to the exclusion of the New Testament would be a sectarian practice. Dr. Weigle stated that the Bible was of great moral, historical and literary value. This is conceded by all the parties and is also the view of the court."

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[1] The trial court summarized his testimony as follows:

"Edward Schempp, the children's father, testified that after careful consideration he had decided that he should not have Roger or Donna excused from attendance at these morning ceremonies. Among his reasons were the following. He said that he thought his children would be 'labeled as "odd balls"' before their teachers and classmates; that children were liable 'to lump all particular religious objections [together] as "atheism"' and that today the word 'atheism' is often connected with 'atheistic communism,' and has 'very bad' connotations, such as 'un-American.' Mr. Schempp pointed out that due to the events of the morning exercises following in rapid succession, the Bible reading, the Lord's Prayer, the Flag Salute, and the announcements, excusing his children from the Bible reading would mean that probably they would miss hearing the announcements so important to children. He testified also that if Roger and Donna were excused from Bible reading they would have to stand in the hall outside their 'homeroom' and that this carried with it the imputation of punishment."

The trial court, in striking down the practices, made specific findings of fact that the children's attendance at Abington Senior High School is compulsory and that the practice of reading 10 verses from the Bible is also compelled by law. It also found that:

"The reading of the verses, even without comment, constitutes a religious observance. The devotional and religious nature of the morning exercises is made more apparent by the fact that the Bible reading is followed immediately by a recital in unison of the Lord's Prayer. That pupils might be excused from attendance at the exercises does not mitigate the obligatory nature of the ceremony. Since the statute requires the reading of the 'Holy Bible,' a Christian document, the practice . . . prefers the Christian religion. The record demonstrates that it was the intention of . . . the Commonwealth . . . to introduce a religious ceremony into the public schools."

No. 119. In 1905 the Board of School Commissioners of Baltimore City adopted a rule pursuant to Art. 77, § 202 of the Annotated Code of Maryland. The rule provided for the holding of opening exercises in the schools of the city, consisting primarily of the "reading, without comment, of a chapter in the Holy Bible and/or the use of the Lord's Prayer." The petitioners, Mrs. Madalyn Murray and her son, William J. Murray III, are both professed atheists. Following unsuccessful attempts to have the school board rescind the rule, this suit was filed to compel its rescission. It was alleged that William was a student in a public school of the city and his mother was a taxpayer therein; that it was the practice under the rule to have a reading on each school morning from the King James version of the Bible; that, at petitioners' insistence, the rule was amended to permit children to be excused from the exercise on request of the parent, and that William had been excused pursuant thereto; that nevertheless the rule as amended was in violation of "the principle of separation between church and state."

The "neutrality" of which this Court's cases speak stems from the teachings of history that powerful sects might bring about a fusion of governmental and religious functions or dependency of one upon the other to the end that support of the Government would be placed behind the tenets of one or of all orthodoxies. This the Establishment Clause prohibits. And a further reason for neutrality is found in the Free Exercise Clause, which recognizes the value of religious training, teaching and observance and, more particularly, the right of every person to freely choose his own course with reference thereto, free of any compulsion from the state. This the Free Exercise Clause guarantees. Thus, the two clauses may overlap. The Establishment Clause test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. To withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. *Everson v. Bd. of Educ.* The Free Exercise Clause withdraws from legislative power the exertion of any restraint on the free exercise of religion. Its purpose is to secure religious liberty in the individual. Hence it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion. The distinction between the two clauses is apparent -- a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended.

Applying Establishment Clause principles to the cases at bar we find that the States are

requiring the selection and reading at the opening of the school day of verses from the Holy Bible and the recitation of the Lord's Prayer by the students in unison. These exercises are prescribed as part of the curricular activities of students who are required by law to attend school. They are held in the school buildings under the supervision and with the participation of teachers employed in those schools. The trial court in No. 142 has found that such an opening exercise is a religious ceremony and was intended by the State to be so. We agree with the trial court's finding as to the religious character of the exercises. Given that finding, the exercises and the law requiring them are in violation of the Establishment Clause.

There is no such specific finding as to the religious character of the exercises in No. 119, and the State contends (as does the State in No. 142) that the program is an effort to extend its benefits to all public school children without regard to their religious belief. Included within its secular purposes, it says, are the promotion of moral values, the contradiction to the materialistic trends of our times, the perpetuation of our institutions and the teaching of literature. But even if its purpose is not strictly religious, it is sought to be accomplished through readings from the Bible. Surely the place of the Bible as an instrument of religion cannot be gainsaid, and the State's recognition of the pervading religious character of the ceremony is evident from the rule's specific permission of the alternative use of the Catholic Douay version as well as the recent amendment permitting nonattendance. None of these factors is consistent with the contention that the Bible is here used either as an instrument for nonreligious moral inspiration or as a reference for the teaching of secular subjects.

The conclusion follows that in both cases the laws require religious exercises conducted in direct violation of the rights of the appellees and petitioners. Nor are these required exercises mitigated by the fact that individual students may absent themselves upon parental request, for that fact furnishes no defense to a claim of unconstitutionality under the Establishment Clause. Further, it is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment. The breach of neutrality that is today a trickling stream may all too soon become a raging torrent and, in the words of Madison, "it is proper to take alarm at the first experiment on our liberties."

It is insisted that unless these religious exercises are permitted a "religion of secularism" is established in the schools. We agree that the State may not establish a "religion of secularism" in the sense of affirmatively opposing or showing hostility to religion, thus "preferring those who believe in no religion over those who do believe." We do not agree, however, that this decision has that effect. In addition, it might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment. But the exercises here do not fall into those categories.

Finally, we cannot accept that the concept of neutrality, which does not permit a State to require a religious exercise even with the consent of the majority of those affected, collides with the majority's right to free exercise of religion. The Free Exercise Clause has never meant that a majority could use the machinery of the State to practice its beliefs.

The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of government to invade that citadel, whether its purpose or effect be to aid or oppose, to advance or retard. In the relationship between man and religion, the State is firmly committed to a position of neutrality.

JUSTICE DOUGLAS, concurring.

I join the opinion of the Court and add a few words in explanation. These regimes violate the Establishment Clause in two different ways. In each case the State is conducting a religious exercise; and, as the Court holds, that cannot be done without violating the "neutrality" required of the State by the balance of power between individual, church and state that has been struck by the First Amendment. But the Establishment Clause is not limited to precluding the State itself from conducting religious exercises. It also forbids the State to employ its facilities or funds in a way that gives any church, or all churches, greater strength in our society than it would have by relying on its members alone. Thus, the present regimes must fall under that clause for the additional reason that public funds, though small in amount, are being used to promote a religious exercise. Such contributions may not be made by the State even in a minor degree without violating the Establishment Clause.

JUSTICE BRENNAN, concurring.

The line which separates the secular from the sectarian in American life is elusive. The difficulty of defining the boundary with precision inheres in a paradox central to our scheme of liberty. While our institutions reflect a firm conviction that we are a religious people, those institutions by solemn constitutional injunction may not officially involve religion in such a way as to prefer, discriminate against, or oppress, a particular sect or religion. Equally the Constitution enjoins those involvements of religious with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends where secular means would suffice. The constitutional mandate declares as a basic postulate of the relation between the citizen and his government that "the rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of governmental hand . . . ."

I join fully in the opinion and the judgment of the Court. I see no escape from the conclusion that the exercises in these two cases violate the constitutional mandate. The reasons we gave only last Term in *Engel* v. *Vitale* compel the same judgment of the practices at bar. The involvement of the secular with the religious is no less intimate here; and it is constitutionally irrelevant that the State has not composed the material for the inspirational exercises presently involved. The importance of the issue and the deep conviction with which views on both sides are held justify detailing at some length my reasons for joining the Court's judgment and opinion.

I.

The First Amendment forbids both the abridgment of the free exercise of religion and the enactment of laws "respecting an establishment of religion." The two clauses, although distinct in

their objectives and their applicability, emerged together from a common panorama of history. The inclusion of both restraints upon the power of Congress to legislate concerning religious matters shows unmistakably that the Framers of the First Amendment were not content to rest the protection of religious liberty exclusively upon either clause. "In assuring the free exercise of religion," Mr. Justice Frankfurter has said, "the Framers of the First Amendment were sensitive to the then recent history of those persecutions and impositions of civil disability with which sectarian majorities in virtually all of the Colonies had visited deviation in the matter of conscience. This protection of unpopular creeds, however, was not to be the full extent of the Amendment's guarantee of freedom from governmental intrusion in matters of faith. The battle in Virginia, hardly four years won, where James Madison had led the forces of disestablishment in successful opposition to Patrick Henry's proposed Assessment Bill levying a general tax for the support of Christian teachers, was a vital and compelling memory in 1789."

It is true that the Framers' immediate concern was to prevent the setting up of an official federal church of the kind which England and some of the Colonies had long supported. But nothing in the text of the Establishment Clause supports the view that the prevention of the setting up of an official church was meant to be the full extent of the prohibitions against official involvements in religion.

Plainly, the Establishment Clause, in the contemplation of the Framers, "did not limit the constitutional proscription to any particular, dated form of state-supported theological venture." "What Virginia had long practiced, and what Madison, Jefferson and others fought to end, was the extension of civil government's support to religion in a manner which made the two interdependent, and thus threatened the freedom of each. The purpose of the Establishment Clause was to assure that the national legislature would not exert its power in the service of any purely religious end; that it would not, as virtually all of the Colonies had done, make of religion, as religion, an object of legislation. The Establishment Clause withdrew from the sphere of legitimate legislative concern a comprehensive area of human conduct: man's belief or disbelief in the verity of some transcendental idea and man's expression in action of that belief or disbelief." *McGowan* v. *Maryland*, 366 U.S. 420, 465-466 (opinion of Frankfurter, J.).

In sum, the history of the Establishment Clause permits little doubt that its prohibition was designed comprehensively to prevent those official involvements of religion which would tend to foster or discourage religious worship or belief.

But an awareness of history and an appreciation of the aims of the Founding Fathers do not always resolve concrete problems. The specific question before us has aroused vigorous dispute whether the architects of the First Amendment understood the prohibition against any "law respecting an establishment of religion" to reach devotional exercises in the public schools. It may be that Jefferson and Madison would have held such exercises to be permissible. But I doubt that their view, even if perfectly clear one way or the other, would supply a dispositive answer to the question presented by these cases. A more fruitful inquiry is whether the practices here challenged threaten those consequences which the Framers deeply feared; whether they tend to promote that type of interdependence between religion and state which the First Amendment was designed to prevent. Our task is to translate "the majestic generalities of the Bill of Rights into concrete restraints on officials dealing with the problems of the twentieth century . . . ."

A too literal quest for the advice of the Founding Fathers upon the issues of these cases seems to me futile and misdirected for several reasons: First, on our precise problem the historical record is at best ambiguous. While it is clear to me that the Framers meant the Establishment Clause to prohibit more than the creation of an established federal church such as existed in England, I have no doubt that, in their preoccupation with the imminent question of established churches, they gave no distinct consideration to the particular question whether the clause also forbade devotional exercises in public institutions.

Second, the structure of American education has greatly changed since the First Amendment was adopted. In the context of our modern emphasis upon public education available to all citizens, any views of the eighteenth century as to whether the exercises at bar are an "establishment" offer little aid to decision.

Third, our religious composition makes us a vastly more diverse people than were our forefathers. They knew differences chiefly among Protestant sects. Today the Nation is far more heterogeneous religiously. In the face of such profound changes, practices which may have been objectionable to no one in the time of Jefferson and Madison may today be highly offensive to many persons, the deeply devout and the nonbelievers alike.

Whatever Jefferson or Madison would have thought of Bible reading or the recital of the Lord's Prayer in what few public schools existed in their day, our use of the history of their time must limit itself to broad purposes, not specific practices. By such a standard, I am persuaded, as is the Court, that the devotional exercises carried on in the Baltimore and Abington schools offend the First Amendment. It is "*a constitution* we are expounding," and our interpretation of the First Amendment must necessarily be responsive to the much more highly charged nature of religious questions in contemporary society.

Fourth, the American experiment in free public education available to all children has been guided in large measure by the dramatic evolution of the religious diversity among the population which our public schools serve. It is implicit in the history and character of American public education that the public schools serve a uniquely *public* function: the training of American citizens in an atmosphere free of parochial, divisive, or separatist influences of any sort -- an atmosphere in which children may assimilate a heritage common to all American groups and religions. This is a heritage neither theistic nor atheistic, but simply civic and patriotic.

Attendance at the public schools has never been compulsory; parents remain morally and constitutionally free to choose the academic environment in which they wish their children to be educated. The choice which is thus preserved is between a public secular education with its uniquely democratic values, and some form of private or sectarian education, which offers values of its own. In my judgment the First Amendment forbids the State to inhibit that freedom of choice by diminishing the attractiveness of either alternative -- either by restricting the liberty of the private schools to inculcate whatever values they wish, or by jeopardizing the freedom of the public schools from private or sectarian pressures. The choice between these very different forms of education is one which our Constitution leaves to the individual parent. The lesson of history -- drawn more from the experiences of other countries than from our own -- is that a system of free public education forfeits its unique contribution to the growth of democratic citizenship

when that choice ceases to be freely available to each parent.

II.

. . . .

III.

No one questions that the Framers of the First Amendment intended to restrict exclusively the powers of the Federal Government. Whatever limitations that Amendment now imposes upon the States derive from the Fourteenth Amendment. The process of absorption of the religious guarantees of the First Amendment as protections against the States under the Fourteenth Amendment began with the Free Exercise Clause. In 1923 the Court held that the protections of the Fourteenth included at least a person's freedom "to worship God according to the dictates of his own conscience . . . ." *Meyer* v. *Nebraska*, 262 U.S. 390, 399.

The absorption of the Establishment Clause has, however, come later and by a route less easily charted. It has been suggested, with some support in history, that absorption of the First Amendment's ban against congressional legislation "respecting an establishment of religion" is conceptually impossible because the Framers meant the Establishment Clause also to foreclose any attempt by Congress to disestablish the existing official state churches. Whether or not such was the understanding of the Framers and whether such a purpose would have inhibited the absorption of the Establishment Clause at the threshold of the Nineteenth Century are questions not dispositive of our present inquiry. For it is clear on the record of history that the last of the formal state establishments was dissolved more than three decades before the Fourteenth Amendment was ratified, and thus the problem of protecting official state churches from federal encroachments could hardly have been any concern of those who framed the post-Civil War Amendments. Any such objective of the First Amendment, having become historical anachronism by 1868, cannot be thought to have deterred the absorption of the Establishment Clause. That no organ of the Federal Government possessed in 1791 any power to restrain the interference of the States in religious matters is indisputable. It is equally plain that the Fourteenth Amendment created a panoply of new federal rights for the protection of citizens of the various States. And among those rights was freedom from such state governmental involvement in the affairs of religion as the Establishment Clause had originally foreclosed on the part of Congress.

It has also been suggested that the "liberty" guaranteed by the Fourteenth Amendment logically cannot absorb the Establishment Clause because that clause is not one of the provisions of the Bill of Rights which in terms protects a "freedom" of the individual. The fallacy in this contention is that it underestimates the role of the Establishment Clause as a coguarantor, with the Free Exercise Clause, of religious liberty. The Framers did not entrust the liberty of religious beliefs to either clause alone.

IV.

I turn now to the cases before us. The religious nature of the exercises here challenged seems plain. Unless *Engel* v. *Vitale* is to be overruled, or we are to engage in wholly disingenuous distinction, we cannot sustain these practices. Daily recital of the Lord's Prayer and the reading of passages of Scripture are quite as clearly breaches of the command of the Establishment Clause

as was the daily use of the Regents' Prayer in the New York public schools. Indeed, if anything, the Lord's Prayer and the Holy Bible are more clearly sectarian, and the present violations of the First Amendment consequently more serious.

A.

The secular purposes which devotional exercises are said to serve fall into two categories -- those which depend upon an immediately religious experience shared by the participating children; and those which appear sufficiently divorced from the religious content of the devotional material that they can be served equally by nonreligious materials. With respect to the first objective, much has been written about the moral and spiritual values of infusing some religious influence or instruction into the public school classroom. To the extent that only *religious* materials will serve this purpose, it seems to me that the purpose as well as the means is so plainly religious that the exercise is necessarily forbidden by the Establishment Clause. The fact that purely secular benefits may eventually result does not seem to me to justify the exercises, for similar indirect nonreligious benefits could have been claimed for the released time program invalidated in *McCollum*.

The second justification assumes that religious exercises at the start of the school day may directly serve solely secular ends -- for example, by fostering harmony and tolerance among the pupils, enhancing the authority of the teacher, and inspiring better discipline. To the extent that such benefits result not from the content of the readings and recitation, but simply from the holding of such a solemn exercise at the opening assembly or the first class of the day, it would seem that less sensitive materials might equally well serve the same purpose. Such substitutes would be inadequate only to the extent that the present activities do in fact serve religious goals.

B.

Second, it is argued that the particular practices involved in the two cases before us are unobjectionable because they prefer no particular sect or sects at the expense of others. Both the Baltimore and Abington procedures permit the reading of any of several versions of the Bible, and this flexibility is said to ensure neutrality sufficiently to avoid the constitutional prohibition. One answer, which might be dispositive, is that any version of the Bible is inherently sectarian, else there would be no need to offer a system of rotation of versions in the first place. The sectarian character of the Holy Bible has been at the core of the controversy over religious practices in the public schools. To vary the version may well be less offensive than to read from the King James version every day. But the result even of this relatively benign procedure is that majority sects are preferred in approximate proportion to their representation in the community and in the student body, while the smaller sects suffer commensurate discrimination. So long as the subject matter of the exercise is sectarian in character, these consequences cannot be avoided.

It has been suggested that a tentative solution to these problems may lie in the fashioning of a "common core" of theology tolerable to all creeds but preferential to none. But "history is not encouraging to" those who hope to fashion a "common denominator of religion detached from its manifestation in any organized church." Thus, the notion of a "common core" litany or supplication offends many deeply devout worshippers who do not find clearly sectarian practices objectionable. *Engel* is surely authority that nonsectarian religious practices, equally with sectarian exercises, violate the Establishment Clause.

C.

A third element which is said to absolve the practices involved in these cases is the provision to excuse or exempt students who wish not to participate. The short answer is that the availability of excusal simply has no relevance to the establishment question, if it is once found that these practices are essentially religious exercises designed at least in part to achieve religious aims through the use of public school facilities during the school day.

To summarize my views concerning the merits of these two cases: The history, the purpose and the operation of the daily prayer recital and Bible reading leave no doubt that these practices constitute an impermissible breach of the Establishment Clause. Such devotional exercises may well serve legitimate nonreligious purposes. To the extent, however, that such purposes are really without religious significance, it has never been demonstrated that secular means would not suffice. Under such circumstances, the States may not employ religious means to reach a secular goal unless secular means are wholly unavailing. I therefore agree with the Court.

V.

These considerations bring me to a final contention of the school officials in these cases: that the invalidation of the exercises at bar permits this Court no alternative but to declare unconstitutional every vestige, however slight, of cooperation or accommodation between religion and government. I cannot accept that contention. While it is not, of course, appropriate for this Court to decide questions not presently before it, I venture to suggest that religious exercises in the public schools present a unique problem. For not every involvement of religion in public life violates the Establishment Clause. Our decision in these cases does not clearly forecast anything about the constitutionality of other types of interdependence between religious and other public institutions.

Specifically, I believe that the line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers. What the Framers meant to foreclose, and what our decisions under the Establishment Clause have forbidden, are those involvements of religious with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends, where secular means would suffice. When the secular and religious institutions become involved in such a manner, there inhere in the relationship precisely those dangers -- as much to church as to state -- which the Framers feared would subvert religious liberty and the strength of a system of secular government. On the other hand, there may be myriad forms of involvements of government with religion which do not import such dangers and therefore should not be deemed to violate the Establishment Clause.

The line between permissible and impermissible forms of involvement between government and religion has already been considered by the lower federal and state courts. I think a brief survey of certain of these forms of accommodation will reveal that the First Amendment commands not official hostility toward religion, but only a strict neutrality in matters of religion. Moreover, it may serve to suggest that the scope of our holding today is to be measured by the particular dangers to church and state which religious exercises in the public schools present. It

may be helpful for purposes of analysis to group these other practices and forms of accommodation into several rough categories.

A. *The Conflict Between Establishment and Free Exercise.* -- There are certain practices, conceivably violative of the Establishment Clause, the striking down of which might seriously interfere with certain religious liberties also protected by the First Amendment. Provisions for churches and chaplains at military establishments for those in the armed services may afford one such example. The like provision for chaplains in penal institutions may afford another example. It is argued that such provisions may be sustained as necessary to secure those rights guaranteed under the Free Exercise Clause. Since government has deprived such persons of the opportunity to practice their faith at places of their choice, the government may provide substitutes where it requires such persons to be. Such a principle might support, for example, the constitutionality of the excusal of children from school on religious holidays; and the allowance by government of temporary use of public buildings by religious organizations when their own churches have become unavailable because of a disaster or emergency.

Such activities and practices seem distinguishable from the sponsorship of daily Bible reading and prayer recital. Of special significance to this distinction is the fact that we are dealing with adults, not with impressionable children. Moreover, the school exercises are not designed to provide the pupils with general opportunities for worship denied them by the legal obligation to attend school. The student's compelled presence in school for five days a week in no way renders the regular religious facilities of the community less accessible to him than they are to others. The situation of the school child is therefore plainly unlike that of the soldier or the prisoner.

B. *Establishment and Exercises in Legislative Bodies.* -- The saying of invocational prayers in legislative chambers, state or federal, and the appointment of legislative chaplains, might well represent no involvements of the kind prohibited by the Establishment Clause. Legislators are mature adults who may presumably absent themselves from such public and ceremonial exercises without incurring any penalty, direct or indirect.

C. *Non-Devotional Use of the Bible in the Public Schools.* -- The holding of the Court today plainly does not foreclose teaching *about* the Holy Scriptures or about the differences between religious sects in classes in literature or history. To what extent religious materials should be cited are matters which the courts ought to entrust very largely to the experienced officials who superintend our Nation's public schools. They are experts in such matters, and we are not. We do not, however, in my view usurp the jurisdiction of school administrators by holding that morning devotional exercises are invalid. But there is no occasion now to go further and anticipate problems we cannot judge with the material now before us.

D. *Uniform Tax Exemptions Incidentally Available to Religious Institutions.* -- Nothing we hold today questions the propriety of certain tax deductions or exemptions which incidentally benefit churches and religious institutions.

E. *Religious Considerations in Public Welfare Programs.* -- The Framers were not concerned with the effects of certain incidental aids to individual worshippers which come about as by-products of general and nondiscriminatory welfare programs. If such benefits serve to make easier or less expensive the practice of a particular creed, or of all religions, it can hardly be said

that the purpose of the program is in any way religious, or that the consequence of its nondiscriminatory application is to create the forbidden degree of interdependence between secular and sectarian institutions.

F. *Activities Which, Though Religious in Origin, Have Ceased to Have Religious Meaning.* -- "[T]he 'Establishment' Clause does not ban regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions." This rationale suggests that the use of the motto "In God We Trust" may not offend the clause. It is not that the use of those four words can be dismissed as "de minimis." The truth is that we have simply interwoven the motto so deeply into the fabric of our civil polity that its present use may well not present that type of involvement which the First Amendment prohibits.

This general principle might also serve to insulate the various patriotic exercises and activities used in the public schools and elsewhere which, whatever may have been their origins, no longer have a religious purpose or meaning. The reference to divinity in the revised pledge of allegiance, for example, may merely recognize the historical fact that our Nation was believed to have been founded "under God." Thus reciting the pledge may be no more of a religious exercise than the reading aloud of Lincoln's Gettysburg Address.

The principles which we reaffirm and apply today are as old as the Republic itself, and have always been as integral a part of the First Amendment as the very words of that charter of religious liberty.

JUSTICE GOLDBERG, with whom JUSTICE HARLAN joins, concurring.

Neither government nor this Court should ignore the fact that a vast portion of our people believe in and worship God and that many of our legal, political and personal values derive historically from religious teachings. Government must inevitably take cognizance of the existence of religion and, indeed, under certain circumstances the First Amendment may require that it do so. Both the required and the permissible accommodations between state and church frame the relation as one free of hostility or favor and productive of religious and political harmony, but without undue involvement of one in the concerns or practices of the other. The judgment in each case is a delicate one, but it must be made if we are to do loyal service to the ultimate First Amendment objective of religious liberty.

The practices here involved do not fall within any sensible or acceptable concept of compelled or permitted accommodation and involve the state so significantly and directly in the realm of the sectarian as to give rise to those very divisive influences and inhibitions of freedom which both religion clauses of the First Amendment preclude. The state has ordained and has utilized its facilities to engage in unmistakably religious exercises in a manner having substantial and significant import and impact. The pervasive religiosity and direct governmental involvement inhering in the prescription of prayer and Bible reading in the public schools, during and as part of the curricular day, involving young impressionable children whose school attendance is statutorily compelled, and utilizing the prestige, power, and influence of school administration, staff, and authority, cannot realistically be termed simply accommodation, and must fall within the interdiction of the First Amendment.

JUSTICE STEWART, dissenting.

As a matter of history, the First Amendment was adopted solely as a limitation upon the newly created National Government. The Establishment Clause was primarily an attempt to insure that Congress not only would be powerless to establish a national church, but would also be unable to interfere with existing state establishments. Each State was left free to go its own way and pursue its own policy with respect to religion.

So matters stood until this Court's decision in *Cantwell* v. *Connecticut*. In that case the Court said: "The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws."

I accept without question that the liberty guaranteed by the Fourteenth Amendment against impairment by the States embraces in full the right of free exercise of religion protected by the First Amendment. I accept too the proposition that the Fourteenth Amendment has somehow absorbed the Establishment Clause, although it is not without irony that a constitutional provision designed to leave the States free to go their own way should now have become a restriction upon their autonomy. But I cannot agree with the insensitive definition of the Establishment Clause contained in the Court's opinion.

The central value embodied in the First Amendment is the safeguarding of an individual's right to free exercise of his religion. It is this concept of constitutional protection which makes the cases before us such difficult ones for me. For there is involved in these cases a substantial free exercise claim on the part of those who affirmatively desire to have their children's school day open with the reading of passages from the Bible.

It might also be argued that parents who want their children exposed to religious influences can adequately fulfill that wish off school property and outside school time. This argument misconceives the constitutional justification for permitting the exercises at issue in these cases. For a compulsory state educational system so structures a child's life that if religious exercises are held to be an impermissible activity in schools, religion is placed at an artificial and state-created disadvantage. Viewed in this light, permission of such exercises for those who want them is necessary if the schools are truly to be neutral in the matter of religion. And a refusal to permit religious exercises thus is seen, not as state neutrality, but rather as the establishment of a religion of secularism, or at the least, as government support of the beliefs of those who think that religious exercises should be conducted only in private.

It may well be that even the supposed benefits to be derived from noncoercive religious exercises in public schools are incommensurate with the administrative problems which they would create. The choice involved, however, is one for each local community and its school board, and not for this Court. Religious exercises become constitutionally invalid only if their administration places the sanction of secular authority behind one or more particular religious or irreligious beliefs.

To be specific, it seems to me clear that certain types of exercises would present situations in which no possibility of coercion on the part of secular officials could be claimed to exist. Thus, if

such exercises were held either before or after the official school day, or if the school schedule were such that participation were merely one among a number of desirable alternatives, it could hardly be contended that the exercises did anything more than to provide an opportunity for the voluntary expression of religious belief. On the other hand, a law which provided for religious exercises during the school day and which contained no excusal provision would obviously be unconstitutionally coercive upon those who did not wish to participate. And even under a law containing an excusal provision, if the exercises were held during the school day, and no equally desirable alternative were provided by the school, the likelihood that children might be under at least some psychological compulsion to participate would be great. In a case such as the latter, however, I think we would err if we *assumed* such coercion in the absence of any evidence.

Viewed in this light, it seems to me clear that the records in both of the cases before us are wholly inadequate to support an informed decision. I would remand both cases for further hearings.

3. LEE v. WEISMAN
505 U.S. 577 (1992)

JUSTICE KENNEDY delivered the opinion of the Court, in which JUSTICES BLACKMAN, STEVENS, O'CONNOR, and SOUTER joined.

School principals in the public school system of the city of Providence, Rhode Island, are permitted to invite members of the clergy to offer invocation and benediction prayers as part of the formal graduation ceremonies for middle schools and for high schools. The question before us is whether including clerical members who offer prayers as part of the official school graduation ceremony is consistent with the Religion Clauses of the First Amendment.

I.

Deborah Weisman graduated from Nathan Bishop Middle School, a public school in Providence, at a ceremony in June 1989. She was 14 years old. For many years it has been the policy of the Providence School Committee and the Superintendent of Schools to permit principals to invite members of the clergy to give invocations and benedictions at middle school and high school graduations. Many of the principals elected to include prayers. Acting for himself and his daughter, Deborah's father, Daniel Weisman, objected to any prayers at Deborah's middle school graduation, but to no avail. The school principal, petitioner Robert E. Lee, invited a rabbi to deliver prayers at the graduation exercises for Deborah's class. Rabbi Leslie Gutterman, of the Temple Beth El in Providence, accepted.

It has been the custom of school officials to provide invited clergy with a pamphlet entitled "Guidelines for Civic Occasions," prepared by the National Conference of Christians and Jews. The Guidelines recommend that public prayers at nonsectarian civic ceremonies be composed with "inclusiveness and sensitivity." The principal gave Rabbi Gutterman the pamphlet and advised him the invocation and benediction should be nonsectarian.

Rabbi Gutterman's prayers were as follows:

"INVOCATION

"God of the Free, Hope of the Brave:

"For the legacy of America where diversity is celebrated and the rights of minorities are protected, we thank You. May these young men and women grow up to enrich it.

"For the liberty of America, we thank You. May these new graduates grow up to guard it.

"For the political process of America in which all its citizens may participate, for its court system where all may seek justice we thank You. May those we honor this morning always turn to it in trust.

"For the destiny of America we thank You. May the graduates of Nathan Bishop Middle School so live that they might help to share it.

"May our aspirations for our country and for these young people, who are our hope for the future, be richly fulfilled.

AMEN"

"BENEDICTION

"O God, we are grateful to You for having endowed us with the capacity for learning which we have celebrated on this joyous commencement.

"Happy families give thanks for seeing their children achieve an important milestone. Send Your blessings upon the teachers and administrators who helped prepare them.

"The graduates now need strength and guidance for the future, help them to understand that we are not complete with academic knowledge alone. We must each strive to fulfill what You require of us all: To do justly, to love mercy, to walk humbly.

"We give thanks to You, Lord, for keeping us alive, sustaining us and allowing us to reach this special, happy occasion.

AMEN"

The record in this case is sparse in many respects, and we are unfamiliar with any fixed custom at middle school graduations. High school graduations are such an integral part of American life that we can with confidence describe their customary features, confirmed by the record. In the Providence school system, most high school graduation ceremonies are conducted away from the school, while most middle school ceremonies are held on school premises. The parties stipulate that attendance at graduation is voluntary. The graduating students enter in a processional, subject to the direction of teachers and school officials, and sit together, apart from their families. We assume the clergy's participation in any high school graduation would be about what it was at Deborah's middle school ceremony. There the students stood for the Pledge of Allegiance and remained standing during the rabbi's prayers. The rabbi's two presentations must not have extended much beyond a minute each.

The school board argued that these short prayers and others like them at graduation exercises are of profound meaning to many students and parents. We assume this to be so in addressing the difficult case before us.

II.

These dominant facts mark and control the confines of our decision: State officials direct the performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools. Even for those students who object to the religious exercise, their attendance and participation in the state-sponsored religious activity are in a fair and real sense obligatory, though the school district does not require attendance as a condition for receipt of the diploma.

The controlling precedents as they relate to prayer and religious exercise in primary and secondary public schools compel the holding here that the policy of the city of Providence is an unconstitutional one. We can decide the case without reconsidering the general constitutional framework by which public schools' efforts to accommodate religion are measured. Thus we do not accept the invitation to reconsider our decision in *Lemon v. Kurtzman*. The government involvement with religious activity in this case is pervasive, to the point of creating a state-sponsored and state-directed religious exercise in a public school.

It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which "establishes a [state] religion or religious faith, or tends to do so." The State's involvement in the school prayers challenged today violates these central principles. A school official, the principal, decided that an invocation and a benediction should be given; this is a choice attributable to the State. The principal chose the religious participant, here a rabbi, and that choice is also attributable to the State. The potential for divisiveness over the choice of a particular member of the clergy is apparent. The potential for divisiveness is of particular relevance here because it centers around an overt religious exercise in a secondary school environment where, as we discuss below, subtle coercive pressures exist and where the student had no alternative which would have allowed her to avoid the fact or appearance of participation.

The State's role did not end with the decision to include a prayer and with the choice of a clergyman. Principal Lee provided Rabbi Gutterman with a copy of the "Guidelines for Civic Occasions," and advised him that his prayers should be nonsectarian. Through these means the principal directed and controlled the content of the prayers. It is a cornerstone principle of our Establishment Clause jurisprudence that "it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government," *Engel v. Vitale*, and that is what the school officials attempted to do.

Petitioners argue that the directions for the content of the prayers were a good-faith attempt by the school to ensure that the sectarianism which is so often the flashpoint for religious animosity be removed from the graduation ceremony. The concern is understandable. The school's explanation, however, does not resolve the dilemma caused by its participation. The question is the legitimacy of its undertaking when the object is to produce a prayer to be used in a formal religious exercise which students, for all practical purposes, are obliged to attend.

We are asked to recognize the existence of a practice of nonsectarian prayer, prayer within the embrace of what is known as the Judeo-Christian tradition, prayer which is more acceptable than one which, for example, makes explicit references to the God of Israel, or to Jesus Christ, or to a patron saint. Though the efforts of the school officials in this case to find common ground appear to have been a good-faith attempt to recognize the common aspects of religions, our precedents do not permit school officials to assist in composing prayers as an incident to a formal exercise for their students. *Engel v. Vitale*. The suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds cannot be accepted. The degree of school involvement here made it clear that the graduation prayers bore the imprint of the State and thus put school-age children who objected in an untenable position. We turn our attention now to consider the position of the students.

By the time they are seniors, high school students no doubt have been required to attend classes and assemblies and to complete assignments exposing them to ideas they find distasteful or immoral or absurd or all of these. Against this background, students may consider it an odd measure of justice to be denied a brief, formal prayer ceremony. This argument overlooks a fundamental dynamic of the Constitution.

The First Amendment protects speech and religion by quite different mechanisms. Speech is protected by ensuring its full expression even when the government participates, for the very object of some of our most important speech is to persuade the government to adopt an idea as its own. The method for protecting freedom of worship and freedom of conscience in religious matters is quite the reverse. In religious debate or expression the government is not a prime participant, for the Framers deemed religious establishment antithetical to the freedom of all. The Free Exercise Clause embraces a freedom of conscience and worship that has close parallels in the speech provisions of the First Amendment, but the Establishment Clause is a specific prohibition on forms of state intervention in religious affairs with no precise counterpart in the speech provisions. The explanation lies in the lesson of history that in the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce. A state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed.

As we have observed before, there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools. Our decisions in *Engel v. Vitale* and *School Dist. of Abington v. Schempp* recognize that prayer exercises in public schools carry a particular risk of indirect coercion. What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy.

We need not look beyond the circumstances of this case to see the phenomenon at work. The undeniable fact is that the school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction. This pressure, though subtle and indirect, can be as real as any overt compulsion. Of course, in our

culture standing or remaining silent can signify adherence to a view or simple respect for the views of others. And no doubt some persons who have no desire to join a prayer have little objection to standing as a sign of respect for those who do. But for the dissenter of high school age, who has a reasonable perception that she is being forced by the State to pray in a manner her conscience will not allow, the injury is no less real. There can be no doubt that for many, if not most, of the students at the graduation, the act of standing or remaining silent was an expression of participation in the rabbi's prayer. That was the very point of the religious exercise. It is of little comfort to a dissenter, then, to be told that for her the act of standing or remaining in silence signifies mere respect, rather than participation. What matters is that, given our social conventions, a reasonable dissenter in this milieu could believe that the group exercise signified her own participation or approval of it.

Finding no violation under these circumstances would place objectors in the dilemma of participating or protesting. We do not address whether that choice is acceptable if the affected citizens are mature adults, but we think the State may not place primary and secondary school children in this position. Research in psychology supports the assumption that adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention. To recognize that the choice imposed by the State constitutes an unacceptable constraint only acknowledges that the government may no more use social pressure to enforce orthodoxy than it may use more direct means.

The injury caused by the government's action, and the reason why Daniel and Deborah Weisman object to it, is that the State, in a school setting, in effect required participation in a religious exercise. It is, we concede, a brief exercise during which the individual can concentrate on joining its message, meditate on her own religion, or let her mind wander. But the embarrassment and the intrusion of the religious exercise cannot be refuted by arguing that these prayers are of a *de minimis* character. To do so would be an affront to the rabbi who offered them and to all those for whom the prayers were an essential and profound recognition of divine authority. And for the same reason, we think that the intrusion is greater than the two minutes of time consumed for prayers like these. Assuming, as we must, that the prayers were offensive to the student and the parent who now object, the intrusion was both real and, in the context of a secondary school, a violation of the objectors' rights. That the intrusion was in the course of promulgating religion that sought to be civic or nonsectarian rather than pertaining to one sect does not lessen the offense or isolation to the objectors. At best it narrows their number, at worst increases their sense of isolation and affront.

There was a stipulation in the District Court that attendance at graduation and promotional ceremonies is voluntary. Petitioners and the United States, as *amicus*, made this a center point of the case, arguing that the option of not attending the graduation excuses any coercion in the ceremony itself. The argument lacks all persuasion. Law reaches past formalism. And to say a teenage student has a real choice not to attend her high school graduation is formalistic in the extreme. Everyone knows that in our culture high school graduation is one of life's significant occasions. A rule which excuses attendance is beside the point. Attendance may not be required by official decree, yet it is apparent that a student is not free to absent herself from the graduation in any real sense of the term "voluntary," for absence would require forfeiture of intangible

benefits which have motivated the student through youth and all her high school years. Graduation is a time for family and those closest to the student to celebrate success and express mutual wishes of gratitude and respect.

The importance of the event is the point the school district and the United States rely upon to argue that a formal prayer ought to be permitted, but it becomes one of the principal reasons why their argument must fail. Their contention is that the prayers are an essential part of these ceremonies because for many persons an occasion of this significance lacks meaning if there is no recognition, however brief, that human achievements cannot be understood apart from their spiritual essence. The Government's position fails to acknowledge that what for many of Deborah's classmates and their parents was a spiritual imperative was for Daniel and Deborah Weisman religious conformance compelled by the State. While in some societies the wishes of the majority might prevail, the Establishment Clause rejects the balance urged upon us. The Constitution forbids the State to exact religious conformity from a student as the price of attending her own high school graduation. This is the calculus the Constitution commands.

The Government's argument gives insufficient recognition to the real conflict of conscience faced by the young student. The essence of the Government's position is that with regard to a civic, social occasion of this importance it is the objector, not the majority, who must take unilateral and private action to avoid compromising religious scruples, hereby electing to miss the graduation exercise. This turns conventional First Amendment analysis on its head. It is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice. Just as in *Engel v. Vitale*, and *School Dist. of Abington v. Schempp* where we found that provisions permitting a student to be voluntarily excused from attendance or participation in the daily prayers did not shield those practices from invalidation, the fact that attendance at the graduation ceremonies is voluntary in a legal sense does not save the religious exercise.

Inherent differences between the public school system and a session of a state legislature distinguish this case from *Marsh v. Chambers*, 463 U.S. 783 (1983). At a high school graduation, teachers and principals retain a high degree of control over the contents of the program, the speeches, the timing, the dress, and the decorum of the students. In this atmosphere the state-imposed character of an invocation and benediction by clergy selected by the school combine to make the prayer a state-sanctioned religious exercise in which the student was left with no alternative but to submit. This is different from *Marsh*.

We do not hold that every state action implicating religion is invalid if one or a few citizens find it offensive. But the prayer exercises in this case are especially improper because the State has in every practical sense compelled attendance and participation in an explicit religious exercise at an event of singular importance to every student, one the student had no real alternative to avoid. No holding by this Court suggests that a school can persuade or compel a student to participate in a religious exercise. That is forbidden by the Establishment Clause.

JUSTICE SOUTER, with whom JUSTICES STEVENS and O'CONNOR join, concurring.

I join the Court's opinion, and fully agree that prayers at public school graduation ceremonies

indirectly coerce religious observance. I write separately on two issues of Establishment Clause analysis that underlie my independent resolution of this case: whether the Clause applies to governmental practices that do not favor one religion over others, and whether state coercion of religious conformity is a necessary element of an Establishment Clause violation.

I.

Forty-five years ago, this Court announced a basic principle of constitutional law from which it has not strayed: the Establishment Clause forbids not only state practices that "aid one religion or prefer one religion over another," but also those that "aid all religions." *Everson v. Bd. of Ed.* Today we reaffirm that principle, holding that the Establishment Clause forbids state-sponsored prayers in public school settings no matter how nondenominational the prayers may be.

Some have challenged this precedent by reading the Establishment Clause to permit "nonpreferential" state promotion of religion. While a case has been made for this position, history neither contradicts nor warrants reconsideration of the settled principle that the Establishment Clause forbids support for religion in general no less than support for one religion or some.

II.

Petitioners rest most of their argument on a theory that the Establishment Clause does not forbid the state to sponsor affirmations of religious belief that coerce neither support for religion nor participation in religious observance. But we could not adopt that reading without abandoning our settled law, a course that, in my view, the text of the Clause would not readily permit. Nor does the extratextual evidence of original meaning stand so unequivocally at odds with the textual premise inherent in existing precedent that we should reconsider our course.

This Court has declared the invalidity of many noncoercive state laws conveying a message of religious endorsement. For example, in *Wallace v. Jaffree*, we struck down a law requiring a moment of silence in public classrooms not because the statute coerced students to participate in prayer (for it did not), but because the manner of its enactment "conveyed a message of state approval of prayer in the public schools." Our precedents simply cannot support the position that a showing of coercion is necessary to a successful Establishment Clause claim.

III.

While the Establishment Clause's concept of neutrality is not self-revealing, our recent cases have invested it with specific content: the State may not favor or endorse either religion generally over nonreligion or one religion over others. This principle against favoritism and endorsement has become the foundation of Establishment Clause jurisprudence.

That government must remain neutral in matters of religion does not foreclose it from ever taking religion into account. The State may "accommodate" the exercise of religion by relieving people from generally applicable rules that interfere with their religious callings. Whatever else may define accommodation permissible under the Clause, one requirement is clear: accommodation must lift a discernible burden on the free exercise of religion. By these lights one sees that, in sponsoring the graduation prayers at issue, the State has crossed the line from permissible accommodation to unconstitutional establishment.

Religious students cannot complain that omitting prayers from their graduation would, in any realistic sense, "burden" their spiritual callings. To be sure, many of them invest this rite of passage with spiritual significance, but they may express their religious feelings before and after the ceremony. They may even organize a privately sponsored baccalaureate if they desire the company of like-minded students. Because they have no need for the machinery of the State to affirm their beliefs, the government's sponsorship of prayer at the graduation is most reasonably understood as an official endorsement of religion and, in this instance, of theistic religion.[1]

Petitioners would deflect this conclusion by arguing that graduation prayers are no different from Presidential religious proclamations and similar official "acknowledgments" of religion in public life. But religious invocations in Thanksgiving Day addresses and the like, rarely noticed, ignored without effort, conveyed over an impersonal medium, and directed at no one in particular, inhabit a pallid zone worlds apart from official prayers delivered to a captive audience of public school students and their families. When public school officials, armed with the State's authority, convey an endorsement of religion to their students, they strike near the core of the Establishment Clause. However "ceremonial" their messages, they are flatly unconstitutional.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE THOMAS join, dissenting.

In holding the Establishment Clause prohibits invocations and benedictions at public school graduation ceremonies, the Court lays waste a tradition that is as old as public school graduation ceremonies themselves. As its instrument of destruction, the Court invents a boundlessly manipulable test of psychological coercion. Today's opinion shows forcefully why our Nation's protection, our Constitution, cannot rest upon the changeable philosophical predilections of the Justices of this Court, but must have deep foundations in the historic practices of our people.

I.

The history and tradition of our Nation are replete with public ceremonies featuring prayers of thanksgiving and petition. The Declaration of Independence avowed "a firm reliance on the protection of divine Providence." In his first inaugural address, George Washington made a prayer a part of his first official act as President. Such supplications have been a feature of inaugural addresses ever since. Our national celebration of Thanksgiving likewise dates back to Washington. This tradition of Thanksgiving Proclamations -- with their religious theme of gratitude to God -- has been adhered to by almost every President. The other two branches of the Federal Government also have a long-established practice of prayer at public events.

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[1] If the State had chosen its graduation speakers according to wholly secular criteria, and if one of those speakers (not a state actor) had individually chosen to deliver a religious message, it would have been harder to attribute an endorsement of religion to the State. But that is not our case. Nor is this a case where the State has, without singling out religious groups or individuals, extended benefits to them as members of a broad class of beneficiaries defined by secular criteria. Finally, this is not a case in which government officials invoke spiritual inspiration for their own benefit without directing any religious message at the citizens they lead.

In addition to this general tradition of prayer at public ceremonies, there exists a more specific tradition of invocations and benedictions at public school graduation exercises. By one account, the first public high school graduation ceremony took place in Connecticut in July 1868 when "15 seniors from the Norwich Free Academy marched into a church hall and waited through majestic music and long prayers." As the Court obliquely acknowledges, the invocation and benediction have long been recognized to be "traditional parts of the graduation program."

II.

The Court presumably would separate graduation invocations and benedictions from other instances of public "preservation and transmission of religious beliefs" on the ground that they involve "psychological coercion." A few citations of "research in psychology" cannot disguise the fact that the Court has gone beyond the realm where judges know what they are doing. The Court's argument that state officials have "coerced" students to take part in the invocation and benediction at graduation ceremonies is, not to put too fine a point on it, incoherent. The Court identifies two "dominant facts" that it says dictate its ruling that invocations and benedictions violate the Establishment Clause. Neither of them is in any relevant sense true.

The Court declares that students' "attendance and participation in the [invocation and benediction] are in a fair and real sense obligatory." According to the Court, students who want "to avoid the fact or appearance of participation" in the invocation and benediction are *psychologically* obligated by "public pressure, as well as peer pressure to stand as a group or, at least, maintain respectful silence." This assertion -- *the linchpin of the Court's opinion* -- is almost as intriguing for what it does not say. It does not say that students are psychologically coerced to bow their heads, place their hands in a prayer position, pay attention to the prayers, utter "Amen," or in fact pray. It claims only that students are psychologically coerced "to stand *or*, at least, maintain respectful silence." Both halves of this disjunctive merit attention.

To begin with the latter: The Court's notion that a student who *sits* in "respectful silence" during the invocation and benediction would be perceived as having joined in the prayers is ludicrous. Surely "our social conventions" have not coarsened to the point that anyone who does not shout obscenities can be deemed to have assented to everything said in his presence. Since students at graduation retain the free will to sit, there is no basis for the Court's decision.

But let us assume the worst, that the nonparticipating graduate is "subtly coerced" to stand! Even that half of the disjunctive does not establish a "participation" (or an "appearance of participation") in a religious exercise. The Court acknowledges that "in our culture standing can signify adherence to a view or respect for the views of others." But if it is a permissible inference that one who is standing is doing so out of respect for the prayers of others, then how can it possibly be said that a "reasonable dissenter could believe that the group exercise signified her own participation or approval"? Quite obviously, it cannot. The opinion manifests that the Court itself has not given careful consideration to its test of psychological coercion.

The other "dominant fact" identified by the Court is that "state officials direct the performance of a formal religious exercise" at graduation ceremonies. "Directing the performance of a formal religious exercise" has a sound of liturgy to it. But all the record shows is that principals have invited clergy to deliver invocations and benedictions at graduations; and

that Principal Lee invited Rabbi Gutterman, provided him a two-page pamphlet, prepared by the National Conference of Christians and Jews, giving general advice on inclusive prayer for civic occasions, and advised him that his prayers should be nonsectarian. How these facts can fairly be transformed into charges that Principal Lee "directed and controlled the content of [Rabbi Gutterman's] prayer," is difficult to fathom.

III.

The deeper flaw in the Court's opinion does not lie in its wrong answer to the question whether there was state-induced "peer-pressure" coercion; it lies, rather, in the Court's making violation of the Establishment Clause hinge on such a precious question. The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*. Typically, attendance at the state church was required; and dissenters, if tolerated, faced an array of civil disabilities.

The Establishment Clause was adopted to prohibit such an establishment of religion at the federal level (and to protect state establishments from federal interference). I will acknowledge for the sake of argument that by 1790 the term "establishment" had acquired an additional meaning -- "financial support of religion generally, by taxation" -- that reflected the development of "general or multiple" establishments, not limited to a single church. But that would still be an establishment coerced *by force of law*. I will further concede that our constitutional tradition has ruled out government-sponsored endorsement of religion -- even when no legal coercion is present, and even when no ersatz, "peer-pressure" psycho-coercion is present -- where the endorsement is sectarian. But there is no support for the proposition that the nondenominational invocation and benediction read by Rabbi Gutterman violated the Constitution.

Thus, while I have no quarrel with the Court's general proposition that the Establishment Clause "guarantees that government may not coerce anyone to support or participate in religion or its exercise," I see no warrant for expanding the concept of coercion beyond acts backed by threat of penalty. There is nothing in the record to indicate that failure of attending students to take part in the invocation or benediction was subject to any penalty or discipline. To characterize the "subtle coercive pressures" allegedly present here as the "practical" equivalent of legal sanctions is . . . well, let me just say it is not a "delicate and fact-sensitive" analysis.

The Court relies on our "school prayer" cases. But those cases do not support the Court's psycho-journey. First, *Engel* and *Schempp* do not constitute an exception to the rule that public ceremonies may include prayer; rather, they do not fall within the rule (school instruction is not a public ceremony). Second, school prayer occurs within a framework in which legal coercion to attend school provides the backdrop. Finally, our school prayer cases turn in part on the fact that the classroom is an instructional setting, and daily prayer there -- where parents are not present to counter "the students' emulation of teachers as role models and the susceptibility to peer pressure"-- might raise special concerns regarding state interference with the liberty of parents to direct the religious upbringing of their children. Voluntary prayer at graduation -- a one-time ceremony at which parents and relatives are present -- can hardly raise the same concerns.

IV.

Our Religion Clause jurisprudence has become bedeviled (so to speak) by reliance on

formulaic abstractions that conflict with our constitutional traditions. Foremost among these has been the so-called *Lemon* test. The Court today demonstrates the irrelevance of *Lemon* by essentially ignoring it, and the interment of that case may be the one happy byproduct of the Court's otherwise lamentable decision. Unfortunately, the Court has replaced *Lemon* with its psycho-coercion test, which suffers the double disability of having no roots in our people's historic practice, and being as infinitely expandable as the reasons for psychotherapy itself.

Another happy aspect of the case is that it is only a jurisprudential disaster and not a practical one. Given the odd basis for the decision, invocations and benedictions will be able to be given at graduations next June. All that is seemingly needed is an announcement to the effect that, while all are asked to rise for the invocation and benediction, none is compelled to join in them, nor will be assumed, by rising, to have done so. That obvious fact recited, the graduates and their parents may proceed to thank God for the blessings He has generously bestowed.

I add one final observation: The Founders of our Republic knew the potential of sectarian religious belief to generate civil strife. And they also knew that nothing is so inclined to foster among religious believers of various faiths a toleration for one another than voluntarily joining in prayer together, to the God whom they all worship. To deprive our society of that important unifying mechanism, in order to spare the nonbeliever the minimal inconvenience of standing or sitting in respectful nonparticipation, is as senseless in policy as it is unsupported in law.

4. Santa Fe Independent School District v. Doe
530 U.S. 290 (2000)

Justice STEVENS delivered the opinion of the Court, in which JUSTICES O'CONNOR, KENNEDY, SOUTER, GINSBURG and BREYER join.

Prior to 1995, the Santa Fe High School student who occupied the elective office of student council chaplain delivered a prayer over the public address system before each varsity football game. This practice, along with others, was challenged as a violation of the Establishment Clause. While these proceedings were pending, the school district adopted a different policy that permits, but does not require, prayer led by a student at all home games. The District Court entered an order modifying that policy to permit only nonsectarian, nonproselytizing prayer. The Court of Appeals held that, even as modified, the football prayer policy was invalid.

I.

The Santa Fe Independent School District (District) is responsible for the education of more than 4,000 students. Respondents are two sets of current or former students and their respective mothers. One family is Mormon and the other is Catholic. The District Court permitted respondents (Does) to litigate anonymously to protect them from intimidation or harassment.

Respondents commenced this action in April 1995 and moved for a temporary restraining order to prevent the District from violating the Establishment Clause at the imminent graduation exercises. The Does alleged that the District had engaged in several proselytizing practices, such as encouraging membership in religious clubs, chastising children who held minority religious beliefs, and distributing Gideon Bibles. They also alleged that the District allowed students to

read Christian invocations and benedictions at graduation ceremonies, and to deliver overtly Christian prayers over the public address system at home football games.

On May 10, 1995, the District Court entered an interim order. With respect to the impending graduation, the order provided that "non-denominational prayer" could be presented by a senior selected by the graduating class. The text of the prayer was to be determined by the students, without scrutiny or preapproval by school officials. References to particular religious figures would be permitted "as long as the general thrust of the prayer is non-proselytizing."

In response to the order, the District adopted a series of policies dealing with prayer at school functions. The policies enacted in May and July for graduation ceremonies provided the format for the August and October policies for football games. The May policy provided:

The board has chosen to permit the graduating senior class, with the advice and counsel of the senior class principal, to elect by secret ballot to choose whether an invocation and benediction shall be part of the graduation exercise. If so chosen the class shall elect by secret ballot, from a list of student volunteers, students to deliver nonsectarian, nonproselytizing invocations and benedictions for the purpose of solemnizing their graduation ceremonies.

The parties stipulated that after this policy was adopted, "the senior class held an election to determine whether to have an invocation and benediction at the commencement [and that the] class voted, by secret ballot, to include prayer at the high school graduation." In a second vote the class elected two seniors to deliver the invocation and benediction.

In July, the District enacted another policy eliminating the requirement that invocations and benedictions be "nonsectarian and nonproselytising," but also providing that if the District were to be enjoined from enforcing that policy, the May policy would automatically become effective.

The August policy, which was titled "Prayer at Football Games," was similar to the July policy for graduations. It also authorized two student elections, the first to determine whether "invocations" should be delivered, and the second to select the spokesperson to deliver them. Like the July policy, it contained two parts, an initial statement that omitted any requirement that the invocation be "nonsectarian and nonproselytising," and a fallback provision that added that limitation if the preferred policy should be enjoined. On August 31, 1995, "the district's high school students voted to determine whether a student would deliver prayer at varsity football games. The students chose to allow a student to say a prayer." A week later, in a separate election, they selected a student "to deliver the prayer."

The final policy (October policy) is essentially the same as the August policy, though it omits the word "prayer" from its title, and refers to "messages" and "statements" as well as "invocations."[1] It is the validity of that policy that is before us.[2]

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[1] Despite these changes, the school did not conduct another election, under the October policy, to supersede the results of the August policy election.

[2] It provides:
"STUDENT ACTIVITIES: PRE-GAME CEREMONIES AT FOOTBALL GAMES

The District Court did enter an order precluding enforcement of the first, open-ended policy. Both parties appealed. The Court of Appeals agreed with the Does. The decision of the Court of Appeals followed Fifth Circuit precedent that had announced two rules. In *Jones v. Clear Creek Independent School Dist.*, 977 F.2d 963 (5th Cir. 1992), that court held that student-led prayer that was approved by a vote of the students and was nonsectarian and nonproselytizing was permissible at high school graduation ceremonies. On the other hand, in later cases the Fifth Circuit made it clear that the *Clear Creek* rule applied only to high school graduations and that school-encouraged prayer was constitutionally impermissible at school-related sporting events. Thus, in *Doe v. Duncanville Independent School Dist.*, 70 F.3d 402 (5th Cir. 1995), it had described a high school graduation as "a significant, once in-a-lifetime event" to be contrasted with athletic events in "a setting that is far less solemn and extraordinary."

We granted the District's petition for certiorari, limited to the following question: "Whether petitioner's policy permitting student-led, student- initiated prayer at football games violates the Establishment Clause." We conclude that it does.

II.

In *Lee v. Weisman*, 505 U.S. 577 (1992), we held that a prayer delivered by a rabbi at a middle school graduation ceremony violated that Clause. Although this case involves student

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"The board has chosen to permit students to deliver a brief invocation and/or message to be delivered during the pre-game ceremonies of home varsity football games to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition.

"Upon advice and direction of the high school principal, each spring, the high school student council shall conduct an election, by the high school student body, by secret ballot, to determine whether such a statement or invocation will be a part of the pre-game ceremonies and if so, shall elect a student, from a list of student volunteers, to deliver the statement or invocation. The student volunteer who is selected may decide what message and/or invocation to deliver, consistent with the goals and purposes of this policy.

"If the District is enjoined by court order from enforcement of this policy, then and only then will the following policy automatically become the applicable policy of the school district.

"The board has chosen to permit students to deliver a brief invocation and/or message to be delivered during the pre-game ceremonies of home varsity football games to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition.

"Upon advice and direction of the high school principal, each spring, the high school student council shall conduct an election, by the high school student body, by secret ballot, to determine whether such a message or invocation will be a part of the pre-game ceremonies and if so, shall elect a student, from a list of student volunteers, to deliver the statement or invocation. The student volunteer who is selected may decide what statement or invocation to deliver, consistent with the goals and purposes of this policy. Any message and/or invocation delivered by a student must be nonsectarian and nonproselytizing."

prayer at a different type of school function, our analysis is properly guided by *Lee*.

In this case the District first argues that this principle is inapplicable to its October policy because the messages are private student speech, not public speech. It reminds us that "there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." We certainly agree with that distinction, but we are not persuaded that the pregame invocations should be regarded as "private speech."

These invocations are authorized by government policy and take place on government property at government-sponsored school-related events. Not every message delivered under such circumstances is the government's own. We have held, for example, that an individual's contribution to a government-created forum was not government speech. It is clear that the pregame ceremony is not the type of forum discussed in those cases. The Santa Fe school officials simply do not "evince any intent to open the [pregame ceremony] to 'indiscriminate use,' by the student body." Rather, the school allows only one student, the same student for the entire season, to give the invocation. The statement or invocation, moreover, is subject to regulations that confine the content and topic of the student's message.

Granting only one student access to the stage at a time does not necessarily preclude a finding that a school has created a limited public forum. Here, however, Santa Fe's student election system ensures that only messages deemed "appropriate" under the District's policy may be delivered. That is, the majoritarian process implemented by the District guarantees that minority candidates will never prevail and that their views will be effectively silenced.

This student election does nothing to protect minority views but rather places the students who hold such views at the mercy of the majority.[3] Because "fundamental rights may not be submitted to vote; they depend on the outcome of no elections," the District's elections are insufficient safeguards of diverse student speech.

Moreover, the District has failed to divorce itself from the religious content in the invocations. Contrary to the District's repeated assertions that it has adopted a "hands-off" approach to the pregame invocation, the realities of the situation plainly reveal that its policy involves both perceived and actual endorsement of religion. In this case, as we found in *Lee*, the "degree of school involvement" makes it clear that the pregame prayers bear "the imprint of the State and thus put school-age children who objected in an untenable position."

The District has attempted to disentangle itself from the religious messages by developing the

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[3] If instead of a choice between an invocation and no pregame message, the first election determined whether a political speech should be made, and the second determined whether the speaker should be a Democrat or a Republican, it would be rather clear that the public address system was being used to deliver a partisan message reflecting the viewpoint of the majority. The fact that the District's policy provides for the election of the speaker only after the majority has voted on her message identifies an obvious distinction between this case and the typical election of a "student body president, or even a newly elected prom king or queen."

two-step student election process. The text of the October policy, however, exposes the extent of the school's entanglement. The elections take place only because the school "board has chosen to permit students to deliver a brief invocation and/or message." The elections thus "shall" be conducted "by the high school student council" and "[u]pon advice and direction of the high school principal." The decision whether to deliver a message is first made by majority vote of the student body, followed by a choice of the speaker in a separate, similar majority election. Even though the particular words used by the speaker are not determined by those votes, the policy mandates that the "statement or invocation" be "consistent with the goals and purposes of this policy," which are "to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition."

In addition to involving the school in the selection of the speaker, the policy invites and encourages religious messages. The policy itself states that the purpose of the message is "to solemnize the event." A religious message is the most obvious method of solemnizing an event. Moreover, the requirements that the message "promote good citizenship" and "establish the appropriate environment for competition" further narrow the types of message deemed appropriate. Indeed, the only type of message that is expressly endorsed in the text is an "invocation"--a term that primarily describes an appeal for divine assistance. In fact, as used in the past at Santa Fe High School, an "invocation" has always entailed a religious message. Thus, the expressed purposes of the policy encourage the selection of a religious message. The results of the elections make it clear that the students understood that the question before them was whether prayer should be a part of the pregame ceremony. We recognize the sincere desire to include public prayer as a part of various occasions to mark those occasions' significance. But such religious activity in public schools must comport with the First Amendment.

The actual or perceived endorsement of the message, moreover, is established by factors beyond just the text of the policy. Once the student speaker is selected, the invocation is then delivered to a large audience assembled as part of a regularly scheduled, school-sponsored function conducted on school property. The message is broadcast over the school's public address system, subject to the control of school officials. It is fair to assume that the pregame ceremony is clothed in the traditional indicia of school sporting events, which generally include the team, cheerleaders and band members dressed in uniforms sporting the school name and mascot. The school's name is likely written across the field and on banners and flags. The crowd will include many who display the school colors and insignia on their T-shirts, jackets, or hats and who may also be waving signs displaying the school name. It is in a setting such as this that "[t]he board has chosen to permit" the elected student to give the "statement or invocation."

In this context the members of the listening audience must perceive the pregame message as a public expression of the views of the majority of the student body delivered with the approval of the school administration. In cases involving state participation in a religious activity, one of the relevant questions is "whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools." An objective Santa Fe High School student will unquestionably perceive the pregame prayer as stamped with her school's seal of approval.

The text and history of this policy reinforce our objective student's perception that prayer is

encouraged by the school. When a governmental entity professes a secular purpose for an arguably religious policy, the government's characterization is entitled to some deference. But it is the duty of the courts to "distinguis[h] a sham secular purpose from a sincere one."

According to the District, the secular purposes of the policy are to "foste[r] free expression of private persons as well [as to] solemniz[e] sporting events, promot[e] good sportsmanship and student safety, and establis[h] an appropriate environment for competition." We note, however, that the District's approval of one specific kind of message, an "invocation," is not necessary to further these purposes. Additionally, the fact that only one student is permitted to give a content-limited message suggests that this policy does little to "foste[r] free expression." Furthermore, regardless of whether one considers a sporting event an occasion for solemnity, the use of an invocation to foster solemnity is impermissible when it constitutes prayer sponsored by the school. It is unclear what type of message would be both "solemnizing" and yet non-religious.

Most striking to us is the evolution of the current policy from the long-sanctioned office of "Student Chaplain" to the candidly titled "Prayer at Football Games" regulation. This history indicates that the District intended to preserve the practice of prayer before football games. The conclusion that the District viewed the October policy as a continuation of the previous policies is dramatically illustrated by the fact that the school did not conduct a new election, pursuant to the current policy, to replace the results of the election under the former policy. Given these observations, and in light of the history of student-led prayer at athletic events, it is reasonable to infer that the purpose of the policy was to preserve a popular state-sponsored religious practice.

School sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are nonadherents "that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." The delivery of such a message--over the school's public address system, by a speaker representing the student body, under the supervision of school faculty, and pursuant to a school policy that explicitly and implicitly encourages public prayer--is not properly characterized as "private" speech.

III.

The District next argues that its football policy is distinguishable from the graduation prayer in *Lee* because it does not coerce students to participate in religious observances. Its argument has two parts: first, that there is no government coercion because the pregame messages are the product of student choices; and second, that there is really no coercion at all because attendance at an extracurricular event, unlike a graduation ceremony, is voluntary.

The reasons just discussed explaining why the alleged "circuit-breaker" mechanism of the dual elections and student speaker do not turn public speech into private speech also demonstrate why these mechanisms do not insulate the school from the coercive element of the final message. In fact, this aspect of the District's argument exposes anew the concerns that are created by the majoritarian election system.

One of the purposes served by the Establishment Clause is to remove debate over this kind of issue from governmental supervision or control. The two student elections, coupled with the debates that presumably must precede each, impermissibly invade that private sphere. The

election mechanism, when considered in light of the history in which the policy evolved, reflects a device the District put in place that determines whether religious messages will be delivered at home football games. The mechanism encourages divisiveness along religious lines in a public school setting, a result at odds with the Establishment Clause. Although the ultimate choice of student speaker is "attributable to the students," the District's decision to hold the constitutionally problematic election is clearly "a choice attributable to the State," *Lee*, 505 U.S. at 587.

The District further argues that attendance at the commencement ceremonies in *Lee* "differs dramatically" from attendance at high school football games, which it contends "are of no more than passing interest to many students" and are "decidedly extracurricular." Attendance at a high school football game, unlike showing up for class, is certainly not required to receive a diploma. Moreover, we assume that the District is correct in arguing that the informal pressure to attend an athletic event is not as strong as a senior's desire to attend her own graduation ceremony.

There are some students, however, such as cheerleaders, members of the band, and, of course, the team members themselves, for whom seasonal commitments mandate their attendance, sometimes for class credit. The District also minimizes the importance to many students of participating in extracurricular activities. To assert that high school students do not feel immense social pressure, or have a genuine desire, to be involved in the event that is American high school football is "formalistic in the extreme." We stressed in *Lee* the observation that "adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention." High school home football games are traditional gatherings of a school community. Undoubtedly, the games are not important to some students. For many others, however, the choice between whether to attend these games or to risk facing a personally offensive religious ritual is in no sense an easy one. The Constitution, moreover, demands that the school may not force this difficult choice upon these students.

Even if we regard every high school student's decision to attend a home football game as purely voluntary, we are nevertheless persuaded that a pregame prayer has the improper effect of coercing those present to participate in an act of religious worship. The constitutional command will not permit the District "to exact religious conformity from a student as the price" of joining her classmates at a varsity football game.

IV.

Under the *Lemon* standard, a court must invalidate a statute if it lacks "a secular legislative purpose." It is therefore proper, as part of this facial challenge, for us to examine the purpose of the October policy. The text alone reveals that it has an unconstitutional purpose. The plain language of the policy clearly spells out the extent of school involvement in both the election of the speaker and the content of the message. Additionally, the text of the October policy specifies only one, clearly preferred message-- that of Santa Fe's traditional religious "invocation." Our examination, however, need not stop at an analysis of the text of the policy.

This case comes to us as the latest step in litigation brought as a challenge to institutional practices that unquestionably violated the Establishment Clause. One of those practices was the District's tradition of sanctioning student-led prayer at varsity football games. The narrow question before us is whether implementation of the October policy insulates the continuation of

such prayers from constitutional scrutiny. It does not. Our inquiry into this question must include an examination of the circumstances surrounding its enactment. Our discussion demonstrates that the District's direct involvement with school prayer exceeds constitutional limits.

The District, nevertheless, asks us to pretend that we do not recognize what every Santa Fe High School student understands--that this policy is about prayer. The District further asks us to accept what is obviously untrue: that these messages are necessary to "solemnize" a football game. We refuse to turn a blind eye to the context in which this policy arose, and that context quells any doubt that this policy was implemented with the purpose of endorsing school prayer. Therefore, the simple enactment of this policy, with the purpose and perception of school endorsement of student prayer, was a constitutional violation.

This policy likewise does not survive a facial challenge because it impermissibly imposes upon the student body a majoritarian election on the issue of prayer. Through its election scheme, the District has established a governmental electoral mechanism that turns the school into a forum for religious debate. It further empowers the student body majority with the authority to subject students of minority views to constitutionally improper messages. The award of that power alone is not acceptable. Such a system encourages divisiveness along religious lines and threatens the imposition of coercion upon those students not desiring to participate in a religious exercise. The policy is invalid on its face because it establishes an improper majoritarian election on religion, and has the purpose and creates the perception of encouraging the delivery of prayer at a series of important school events.

CHIEF JUSTICE REHNQUIST, with whom JUSTICES SCALIA and THOMAS join, dissenting.

The Court distorts existing precedent to conclude that the school district's student-message program is invalid on its face. Even if it were appropriate to apply the *Lemon* test here, the district's student-message policy should not be invalidated on its face. First, the Court misconstrues the nature of the "majoritarian election" permitted by the policy as being an election on "prayer" and "religion." To the contrary, the election permitted by the policy is a two-fold process whereby students vote first on whether to have a student speaker before football games at all, and second, if the students vote to have such a speaker, on who that speaker will be. It is conceivable that the election could become one in which student candidates campaign on platforms that focus on whether or not they will pray if elected. It is also conceivable that the election could lead to a Christian prayer before football games. If, upon implementation, the policy operated in this fashion, we would have a record to review whether the policy, as applied, violated the Establishment Clause. But it is possible that the students might vote not to have a pregame speaker. It is also possible that the election would not focus on prayer, but on public speaking ability or social popularity.

But the Court ignores these possibilities by holding that merely granting the student body the power to elect a speaker that may choose to pray, "regardless of the students' ultimate use of it, is not acceptable." The Court so holds despite the fact that any speech that may occur as a result of the election process here would be private speech. The elected student, not the government, would choose what to say. Support for the Court's holding cannot be found in any of our cases.

Second, with respect to the policy's purpose, the Court holds that "the simple enactment of this policy, with the purpose and perception of school endorsement of student prayer, was a constitutional violation." But the policy itself has plausible secular purposes: "[T]o solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition." Where a governmental body "expresses a plausible secular purpose," "courts should generally defer to that stated intent." The Court grants no deference to the policy's stated purposes, and wastes no time in concluding that they are a sham.

For example, the Court dismisses the secular purpose of solemnization by claiming that it "invites and encourages religious messages." But it is easy to think of solemn messages that are not religious in nature, for example urging that a game be fought fairly. The Court bases its conclusion that the purpose of the policy is to endorse student prayer on its view of the school district's history of Establishment Clause violations and the context in which the policy was written. But the context--attempted compliance with a District Court order--demonstrates that the school district was acting diligently to come within the governing constitutional law. The school district went further than required by the District Court order and eventually settled on a policy that gave the student speaker a choice to deliver either an invocation or a message. In so doing, the school district exhibited a willingness to comply with, and exceed, Establishment Clause restrictions. Thus, the policy cannot be viewed as having a sectarian purpose.

The Court relies on *Lee v. Weisman*. In *Lee*, we concluded that the speech at issue was "directed and controlled" by a school official. At issue was government speech. Here, by contrast, the speech would be a message or invocation selected by a student. It would be private speech.

Had the policy been put into practice, the students may have chosen a speaker according to wholly secular criteria--like good public speaking skills or social popularity--and the student speaker may have chosen, on her own accord, to deliver a religious message. Such an application of the policy would likely pass constitutional muster.

Finally, the Court seems to demand that a government policy be completely neutral as to content or be considered one that endorses religion. This is undoubtedly a new requirement, as our Establishment Clause jurisprudence simply does not mandate "content neutrality." The policy at issue may be applied in an unconstitutional manner, but it will be time enough to invalidate it if that is found to be the case.

5. KENNEDY v. BREMERTON SCHOOL DIST.
U.S. Sup. Ct., June 27, 2022

GORSUCH, J., delivered the opinion of the Court, in which ROBERTS, C. J., and THOMAS, ALITO, and BARRETT, JJ., joined, and in which KAVANAUGH, J., joined, except as to Part III–B.

Joseph Kennedy lost his job as a high school football coach because he knelt at midfield after games to offer a quiet prayer of thanks. Mr. Kennedy prayed during a period when school employees were free to speak with a friend, call for a reservation at a restaurant, check email, or attend to other personal matters. He offered his prayers quietly while his students were otherwise

occupied. Still, the Bremerton School District disciplined him anyway. It did so because it thought anything less could lead a reasonable observer to conclude (mistakenly) that it endorsed Mr. Kennedy's religious beliefs. That reasoning was misguided. Both the Free Exercise and Free Speech Clauses of the First Amendment protect expressions like Mr. Kennedy's. Nor does a proper understanding of the Amendment's Establishment Clause require the government to single out private religious speech for special disfavor. The Constitution and the best of our traditions counsel mutual respect and tolerance, not censorship and suppression, for religious and nonreligious views alike.

I.

Joseph Kennedy began working as a football coach at Bremerton High School in 2008. Like many other football players and coaches across the country, Mr. Kennedy made it a practice to give "thanks through prayer on the playing field" at the conclusion of each game. In his prayers, Mr. Kennedy sought to express gratitude for "what the players had accomplished and for the opportunity to be part of their lives through the game of football." Mr. Kennedy offered his prayers after the players and coaches had shaken hands, by taking a knee at the 50-yard line and praying "quiet[ly]" for "approximately 30 seconds."

Initially, Mr. Kennedy prayed on his own. But over time, some players asked whether they could pray alongside him. Mr. Kennedy responded by saying, " 'This is a free country. You can do what you want.' " The number of players who joined Mr. Kennedy eventually grew to include most of the team, at least after some games. Sometimes team members invited opposing players to join. Other times Mr. Kennedy still prayed alone. Eventually, Mr. Kennedy began incorporating short motivational speeches with his prayer when others were present. Separately, the team at times engaged in pregame or postgame prayers in the locker room. It seems this practice was a "school tradition" that predated Mr. Kennedy's tenure. Mr. Kennedy explained that he "never told any student that it was important they participate in any religious activity." In particular, he "never pressured or encouraged any student to join" his postgame midfield prayers.

For over seven years, no one complained to the Bremerton School District about these practices. It seems the District's superintendent first learned of them only in September 2015, after an employee from another school commented positively on the practices to Bremerton's principal. At that point, the District reacted quickly. On September 17, the superintendent sent Mr. Kennedy a letter. In it, the superintendent identified "two problematic practices" in which Mr. Kennedy had engaged. First, Mr. Kennedy had provided "inspirational talk[s]" that included "overtly religious references" likely constituting "prayer" with the students "at midfield following the completion of . . . game[s]." Second, he had led "students and coaching staff in a prayer" in the locker-room tradition that "predated [his] involvement with the program."

The District explained that it sought to establish "clear parameters" "going forward." It instructed Mr. Kennedy to avoid any motivational "talks with students" that "include[d] religious expression, including prayer," and to avoid "suggest[ing], encourag[ing] (or discourag[ing]), or supervis[ing]" any prayers of students, which students remained free to "engage in." The District also explained that any religious activity on Mr. Kennedy's part must be "nondemonstrative (i.e., not outwardly discernible as religious activity)" if "students are also engaged in religious conduct" in order to "avoid the perception of endorsement." In offering these directives, the

District appealed to what it called a "direct tension between" the "Establishment Clause" and "a school employee's [right to] free[ly] exercise" his religion. To resolve that "tension," the District explained, an employee's free exercise rights "must yield so far as necessary to avoid school endorsement of religious activities."

After receiving the District's September 17 letter, Mr. Kennedy ended the tradition, predating him, of offering locker-room prayers. He also ended his practice of incorporating religious references or prayer into his postgame motivational talks to his team on the field. Mr. Kennedy further felt pressured to abandon his practice of saying his own quiet, on-field postgame prayer. Driving home after a game, however, Mr. Kennedy felt upset that he had "broken [his] commitment to God" by not offering his own prayer. On October 14, through counsel, Mr. Kennedy sent a letter to school officials informing them that, because of his "sincerely-held religious beliefs," he felt "compelled" to offer a "post-game personal prayer" of thanks at midfield. He asked the District to allow him to continue that "private religious expression" alone. Consistent with the District's policy, Mr. Kennedy explained that he "neither requests, encourages, nor discourages students from participating in" these prayers. Mr. Kennedy emphasized that he sought only the opportunity to "wai[t] until the game is over and the players have left the field and then wal[k] to mid-field to say a short, private, personal prayer." He "told everybody" that it would be acceptable to him to pray "when the kids went away from [him]." He later clarified that this meant he was even willing to say his "prayer while the players were walking to the locker room" or "bus," and then catch up with his team. However, Mr. Kennedy objected to the logical implication of the District's September 17 letter, which he understood as banning him "from bowing his head" in the vicinity of students, and as requiring him to "flee the scene if students voluntarily [came] to the same area" where he was praying. After all, District policy prohibited him from "discourag[ing]" independent student decisions to pray.

On October 16, shortly before the game that day, the District responded with another letter. The District acknowledged that Mr. Kennedy "ha[d] complied" with the "directives" in its September 17 letter. Yet instead of accommodating Mr. Kennedy's request to offer a brief prayer on the field while students were busy with other activities—whether heading to the locker room, boarding the bus, or perhaps singing the school fight song—the District issued an ultimatum. It forbade Mr. Kennedy from engaging in "any overt actions" that could "appea[r] to a reasonable observer to endorse . . . prayer . . . while he is on duty as a District-paid coach. The District did so because it judged that anything less would lead it to violate the Establishment Clause.

After receiving this letter, Mr. Kennedy offered a brief prayer following the October 16 game. When he bowed his head at midfield after the game, "most [Bremerton] players were . . . engaged in the traditional singing of the school fight song to the audience." Though Mr. Kennedy was alone when he began to pray, players from the other team and members of the community joined him before he finished his prayer. This event spurred media coverage of Mr. Kennedy's dilemma and a public response from the District. The District placed robocalls to parents to inform them that public access to the field is forbidden; it posted signs and made announcements at games saying the same thing; and it had the Bremerton Police secure the field in future games. Subsequently, the District superintendent explained in an October 20 email to the leader of a state association of school administrators that "the coach moved on from leading prayer with

kids, to taking a silent prayer at the 50 yard line." The official with whom the superintendent corresponded acknowledged that the "use of a silent prayer changes the equation a bit." On October 21, the superintendent further observed to a state official that "[t]he issue is quickly changing as it has shifted from leading prayer with student athletes, to a coaches [sic] right to conduct" his own prayer "on the 50 yard line."

On October 23, shortly before that evening's game, the District wrote Mr. Kennedy again. It expressed "appreciation" for his "efforts to comply" with the District's directives, including avoiding "on-the-job prayer with players in the . . . football program, both in the locker room prior to games as well as on the field immediately following games." The letter also admitted that, during Mr. Kennedy's recent October 16 postgame prayer, his students were otherwise engaged and not praying with him, and that his prayer was "fleeting." Still, the District explained that a "reasonable observer" could think government endorsement of religion had occurred when a "District employee, on the field only by virtue of his employment with the District, still on duty" engaged in "overtly religious conduct." The District thus made clear that the only option it would offer Mr. Kennedy was to allow him to pray after a game in a "private location" behind closed doors and "not observable to students or the public."

After the October 23 game ended, Mr. Kennedy knelt at the 50-yard line, where "no one joined him," and bowed his head for a "brief, quiet prayer." The superintendent informed the District's board that this prayer "moved closer to what we want," but nevertheless remained "unconstitutional." After the final relevant football game on October 26, Mr. Kennedy again knelt alone to offer a brief prayer as the players engaged in postgame traditions. While he was praying, other adults gathered around him on the field. Later, Mr. Kennedy rejoined his players for a postgame talk, after they had finished singing the school fight song.

Shortly after the October 26 game, the District placed Mr. Kennedy on paid administrative leave and prohibited him from "participat[ing], in any capacity, in football program activities." In a letter explaining the reasons for this disciplinary action, the superintendent criticized Mr. Kennedy for engaging in "public and demonstrative religious conduct while still on duty as an assistant coach" by offering a prayer following the games on October 16, 23, and 26. The letter did not allege that Mr. Kennedy performed these prayers with students, and it acknowledged that his prayers took place while students were engaged in unrelated postgame activities. Additionally, the letter faulted Mr. Kennedy for not being willing to pray behind closed doors.

In an October 28 Q&A document provided to the public, the District admitted that it possessed "no evidence that students have been directly coerced to pray with Kennedy." The Q&A also acknowledged that Mr. Kennedy "ha[d] complied" with the District's instruction to refrain from his "prior practices of leading players in a pre-game prayer in the locker room or leading players in a post-game prayer immediately following games." But the Q&A asserted that the District could not allow Mr. Kennedy to "engage in a public religious display." Otherwise, the District would "violat[e] the . . . Establishment Clause" because "reasonable . . . students and attendees" might perceive the "district [as] endors[ing] . . . religion."

While Mr. Kennedy received "uniformly positive evaluations" every other year of his coaching career, after the 2015 season ended in November, the District gave him a poor

performance evaluation. The evaluation advised against rehiring Mr. Kennedy on the grounds that he " 'failed to follow district policy' " regarding religious expression and " 'failed to supervise student-athletes after games.' " Mr. Kennedy did not return for the next season.

II.

After these events, Mr. Kennedy sued in federal court, alleging that the District's actions violated the First Amendment's Free Speech and Free Exercise Clauses. . . .

III.

Now before us, Mr. Kennedy renews his argument that the District's conduct violated both the Free Exercise and Free Speech Clauses. These Clauses work in tandem. Where the Free Exercise Clause protects religious exercises, whether communicative or not, the Free Speech Clause provides overlapping protection for expressive religious activities. That the First Amendment doubly protects religious speech is no accident. It is a natural outgrowth of the framers' distrust of government attempts to regulate religion and suppress dissent.

Under this Court's precedents, a plaintiff bears certain burdens to demonstrate an infringement of his rights under the Free Exercise and Free Speech Clauses. If the plaintiff carries these burdens, the focus then shifts to the defendant to show that its actions were nonetheless justified and tailored consistent with the demands of our case law. We begin by examining whether Mr. Kennedy has discharged his burdens, first under the Free Exercise Clause, then under the Free Speech Clause.

A.

Under this Court's precedents, a plaintiff may carry the burden of proving a free exercise violation in various ways, including by showing that a government entity has burdened his sincere religious practice pursuant to a policy that is not "neutral" or "generally applicable." Should a plaintiff make a showing like that, this Court will find a First Amendment violation unless the government can satisfy "strict scrutiny" by demonstrating its course was justified by a compelling state interest and was narrowly tailored in pursuit of that interest.

That Mr. Kennedy has discharged his burdens is effectively undisputed. No one questions that he seeks to engage in a sincerely motivated religious exercise. The exercise in question involves, as Mr. Kennedy has put it, giving "thanks through prayer" briefly and by himself "on the playing field" at the conclusion of each game he coaches. . . . Nor does anyone question that, in forbidding Mr. Kennedy's brief prayer, the District failed to act pursuant to a neutral and generally applicable rule. A government policy will not qualify as neutral if it is "specifically directed at . . . religious practice" or if it provides "a mechanism for individualized exemptions." Failing either the neutrality or general applicability test is sufficient to trigger strict scrutiny.

In this case, the District's challenged policies were neither neutral nor generally applicable. By its own admission, the District sought to restrict Mr. Kennedy's actions at least in part because of their religious character. Prohibiting a religious practice was thus the District's unquestioned "object." The District candidly acknowledged as much below, conceding that its policies were "not neutral" toward religion.

The District's challenged policies also fail the general applicability test. The District's

performance evaluation after the 2015 football season advised against rehiring Mr. Kennedy on the ground that he "failed to supervise student-athletes after games." But, in fact, this was a bespoke requirement specifically addressed to Mr. Kennedy's religious exercise. The District permitted other members of the coaching staff to forgo supervising students briefly after the game to do things like visit with friends or take personal phone calls. Thus, any sort of postgame supervisory requirement was not applied in an evenhanded, across-the-board way.

B.

When it comes to Mr. Kennedy's free speech claim, our precedents remind us that the First Amendment's protections extend to "teachers and students," neither of whom "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." Of course, none of this means the speech rights of public school employees are so boundless that they may deliver any message to anyone anytime they wish. In addition to being private citizens, teachers and coaches are also government employees paid in part to speak on the government's behalf and convey its intended messages.

To account for the complexity associated with the interplay between free speech rights and government employment, this Court's decisions in *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U. S. 563 (1968) and related cases suggest proceeding in two steps. The first step involves a threshold inquiry into the nature of the speech at issue. If a public employee speaks "pursuant to [his or her] official duties," *Garcetti v. Ceballos*, 547 U. S. 410, 421 (2006), this Court has said the Free Speech Clause generally will not shield the individual from an employer's control and discipline because that kind of speech is—for constitutional purposes at least—the government's own speech.

At the same time and at the other end of the spectrum, when an employee "speaks as a citizen addressing a matter of public concern," our cases indicate that the First Amendment may be implicated and courts should proceed to a second step. At this second step, our cases suggest that courts should attempt to engage in "a delicate balancing of the competing interests surrounding the speech and its consequences." *Id.* at 423.

Both sides ask us to employ at least certain aspects of this *Pickering–Garcetti* framework to resolve Mr. Kennedy's free speech claim. They share additional common ground too. They agree that Mr. Kennedy's speech implicates a matter of public concern. They also appear to accept, at least for argument's sake, that Mr. Kennedy's speech does not raise questions of academic freedom that may or may not involve "additional" First Amendment "interests." At the first step of the *Pickering–Garcetti* inquiry, the parties' disagreement thus turns out to center on one question alone: Did Mr. Kennedy offer his prayers in his capacity as a private citizen, or did they amount to government speech attributable to the District?

Our cases offer some helpful guidance for resolving this question. In *Garcetti*, the Court concluded that a prosecutor's internal memorandum to a supervisor was made "pursuant to [his] official duties" because it was speech the government "itself ha[d] commissioned or created" and speech the employee was expected to deliver in the course of carrying out his job.

By contrast, in *Lane v. Franks*, 573 U. S. 228, 231 (2014), a public employer sought to terminate an employee after he testified at a criminal trial about matters involving his

government employment. The Court held that the employee's speech was protected by the First Amendment. In doing so, the Court held that the fact the speech touched on matters related to public employment was not enough to render it government speech. Instead, the Court explained, the "critical question . . . is whether the speech at issue is itself ordinarily within the scope of an employee's duties." It is an inquiry this Court has said should be undertaken "practical[ly]," rather than with a blinkered focus on the terms of some formal and capacious written job description. To proceed otherwise would be to allow public employers to use "excessively broad job descriptions" to subvert the Constitution's protections.

Applying these lessons here, it seems clear to us that Mr. Kennedy has demonstrated that his speech was private speech, not government speech. When Mr. Kennedy uttered the three prayers that resulted in his suspension, he was not engaged in speech "ordinarily within the scope" of his duties as a coach. He did not speak pursuant to government policy. He was not seeking to convey a government-created message. He was not instructing players, discussing strategy, encouraging better on-field performance, or engaged in any other speech the District paid him to produce as a coach. Simply put: Mr. Kennedy's prayers did not "ow[e their] existence" to Mr. Kennedy's responsibilities as a public employee.

The timing and circumstances of Mr. Kennedy's prayers confirm the point. During the postgame period when these prayers occurred, coaches were free to attend briefly to personal matters. We find it unlikely that Mr. Kennedy was fulfilling a responsibility imposed by his employment by praying during a period in which its coaching staff was free to engage in all manner of private speech. That Mr. Kennedy offered his prayers when students were engaged in other activities like singing the school fight song further suggests that those prayers were not delivered as an address to the team, but instead in his capacity as a private citizen. Nor is it dispositive that Mr. Kennedy's prayers took place "within the office" environment—here, on the field of play. Instead, what matters is whether Mr. Kennedy offered his prayers while acting within the scope of his duties as a coach. And taken together, both the substance of Mr. Kennedy's speech and the circumstances surrounding it point to the conclusion that he did not.

Of course, acknowledging that Mr. Kennedy's prayers represented his own private speech does not end the matter. So far, we have recognized only that Mr. Kennedy has carried his threshold burden. Under the *Pickering–Garcetti* framework, a second step remains where the government may seek to prove that its interests as employer outweigh even an employee's private speech on a matter of public concern.

IV.

Whether one views the case through the lens of the Free Exercise or Free Speech Clause, at this point the burden shifts to the District. Under the Free Exercise Clause, a government entity normally must satisfy at least "strict scrutiny," showing that its restrictions on the plaintiff 's protected rights serve a compelling interest and are narrowly tailored to that end. A similar standard generally obtains under the Free Speech Clause. The District, however, asks us to apply to Mr. Kennedy's claims the more lenient second-step *Pickering–Garcetti* test, or alternatively intermediate scrutiny. Ultimately, however, it does not matter which standard we apply. The District cannot sustain its burden under any of them.

As we have seen, the District argues that its suspension of Mr. Kennedy was essential to avoid a violation of the Establishment Clause. On its account, Mr. Kennedy's prayers might have been protected by the Free Exercise and Free Speech Clauses. But his rights were in "direct tension" with the competing demands of the Establishment Clause. To resolve that clash, the District reasoned, Mr. Kennedy's rights had to "yield.

But how could that be? It is true that this Court and others often refer to the "Establishment Clause," the "Free Exercise Clause," and the "Free Speech Clause" as separate units. But the three Clauses appear in the same sentence of the same Amendment. A natural reading of that sentence would seem to suggest the Clauses have "complementary" purposes, not warring ones where one Clause is always sure to prevail over the others.

The District arrived at a different understanding this way. It began with the premise that the Establishment Clause is offended whenever a "reasonable observer" could conclude that the government has "endorse[d]" religion. The District then took the view that a "reasonable observer" could think it "endorsed Kennedy's religious activity by not stopping the practice." On the District's account, it did not matter whether the Free Exercise Clause protected Mr. Kennedy's prayer. It did not matter if his expression was private speech protected by the Free Speech Clause. It did not matter that the District never actually endorsed Mr. Kennedy's prayer, no one complained that it had, and a strong public reaction only followed after the District sought to ban Mr. Kennedy's prayer. Because a reasonable observer could (mistakenly) infer that by allowing the prayer the District endorsed Mr. Kennedy's message, the District felt it had to act, even if that meant suppressing otherwise protected First Amendment activities. In this way, the District effectively created its own "vise between the Establishment Clause on one side and the Free Speech and Free Exercise Clauses on the other," placed itself in the middle, and then chose its preferred way out of its self-imposed trap.

To defend its approach, the District relied on *Lemon* and its progeny. In upholding the District's actions, the Ninth Circuit followed the same course. And, to be sure, in *Lemon* this Court attempted a "grand unified theory" for assessing Establishment Clause claims. That approach called for an examination of a law's purposes, effects, and potential for entanglement with religion. In time, the approach also came to involve estimations about whether a "reasonable observer" would consider the government's challenged action an "endorsement" of religion.

What the District and the Ninth Circuit overlooked, however, is that the "shortcomings" associated with this "ambitiou[s]," abstract, and ahistorical approach to the Establishment Clause became so "apparent" that this Court long ago abandoned *Lemon* and its endorsement test offshoot. *American Legion v. American Humanist* Assn., 588 U. S. ___, ___ (2019) (plurality opinion); see also *Town of Greece v. Galloway*, 572 U. S. 565, 575–577 (2014). The Court has explained that these tests "invited chaos" in lower courts, led to "differing results" in materially identical cases, and created a "minefield" for legislators. This Court has since made plain, too, that the Establishment Clause does not include anything like a "modified heckler's veto, in which . . . religious activity can be proscribed" based on " 'perceptions' " or " 'discomfort.' " An Establishment Clause violation does not automatically follow whenever a public school or other government entity "fail[s] to censor" private religious speech. Nor does the Clause "compel the

government to purge from the public sphere" anything an objective observer could reasonably infer endorses or "partakes of the religious."

In place of *Lemon* and the endorsement test, this Court has instructed that the Establishment Clause must be interpreted by " 'reference to historical practices and understandings.' " *Town of Greece*, 572 U. S. at 576; see also *American Legion*, 588 U. S. at ___. An analysis focused on original meaning and history, this Court has stressed, has long represented the rule rather than some " 'exception' " within the "Court's Establishment Clause jurisprudence."

B.

Perhaps sensing that the primary theory it pursued below rests on a mistaken understanding of the Establishment Clause, the District offers a backup argument in this Court. It still contends that its Establishment Clause concerns trump Mr. Kennedy's free exercise and free speech rights. But the District now seeks to supply different reasoning for that result. Now, it says, it was justified in suppressing Mr. Kennedy's religious activity because otherwise it would have been guilty of coercing students to pray. And, the District says, coercing worship amounts to an Establishment Clause violation on anyone's account of the Clause's original meaning.

As it turns out, however, there is a pretty obvious reason why the Ninth Circuit did not adopt this theory in proceedings below: The evidence cannot sustain it. To be sure, this Court has long held that government may not, consistent with a historically sensitive understanding of the Establishment Clause, "make a religious observance compulsory." Government "may not coerce anyone to attend church," nor may it force citizens to engage in "a formal religious exercise." No doubt, too, coercion along these lines was among the foremost hallmarks of religious establishments the framers sought to prohibit when they adopted the First Amendment. Members of this Court have sometimes disagreed on what exactly qualifies as impermissible coercion in light of the original meaning of the Establishment Clause. But in this case Mr. Kennedy's private religious exercise did not come close to crossing any line one might imagine separating protected private expression from impermissible government coercion.

Begin with the District's own contemporaneous description of the facts. In its correspondence with Mr. Kennedy, the District never raised coercion concerns. To the contrary, the District conceded in a public 2015 document that there was "no evidence that students [were] directly coerced to pray with Kennedy." This is consistent with Mr. Kennedy's account too. He has repeatedly stated that he "never coerced, required, or asked any student to pray," and that he never "told any student that it was important that they participate in any religious activity."

Consider, too, the actual requests Mr. Kennedy made. The District did not discipline Mr. Kennedy for engaging in prayer while presenting locker-room speeches to students. That tradition predated Mr. Kennedy at the school. And he willingly ended it, as the District has acknowledged. He also willingly ended his practice of postgame religious talks with his team. The only prayer Mr. Kennedy sought to continue was the kind he had "started out doing" at the beginning of his tenure—the prayer he gave alone. He made clear that he could pray "while the kids were doing the fight song" and "take a knee by [him]self and give thanks and continue on." Mr. Kennedy even considered it "acceptable" to say his "prayer while the players were walking to the locker room" or "bus," and then catch up with his team. In short, Mr. Kennedy did not seek

to direct any prayers to students or require anyone else to participate. His plan was to wait to pray until athletes were occupied, and he "told everybody" that's what he wished "to do." It was for three prayers of this sort alone in October 2015 that the District suspended him.

Naturally, Mr. Kennedy's proposal to pray quietly by himself on the field would have meant some people would have seen his religious exercise. Those close at hand might have heard him too. But learning how to tolerate speech or prayer of all kinds is "part of learning how to live in a pluralistic society," a trait of character essential to "a tolerant citizenry." This Court has long recognized as well that "secondary school students are mature enough . . . to understand that a school does not endorse," let alone coerce them to participate in, "speech that it merely permits on a nondiscriminatory basis." Of course, some will take offense to certain forms of speech or prayer they are sure to encounter in a society where those activities enjoy such robust constitutional protection. But "[o]ffense . . . does not equate to coercion."

The District responds that, as a coach, Mr. Kennedy "wielded enormous authority and influence over the students," and students might have felt compelled to pray alongside him. To support this argument, the District submits that, after Mr. Kennedy's suspension, a few parents told District employees that their sons had "participated in the team prayers only because they did not wish to separate themselves from the team."

This reply fails too. There is no indication in the record that anyone expressed any coercion concerns to the District about the quiet, postgame prayers that Mr. Kennedy asked to continue and that led to his suspension. Nor is there any record evidence that students felt pressured to participate in these prayers. To the contrary, not a single Bremerton student joined Mr. Kennedy's quiet prayers following the three October 2015 games for which he was disciplined. On October 16, those students who joined Mr. Kennedy were " 'from the opposing team,' " and thus could not have "reasonably fear[ed]" that he would decrease their "playing time" or destroy their "opportunities" if they did not "participate," As for the other two games, "no one joined" Mr. Kennedy on October 23. And only a few members of the public participated on October 26.

The absence of evidence of coercion in this record leaves the District to its final redoubt. Here, the District suggests that any visible religious conduct by a teacher or coach should be deemed—without more and as a matter of law—impermissibly coercive on students. In essence, the District asks us to adopt the view that the only acceptable government role models for students are those who eschew any visible religious expression.

Such a rule would be a sure sign that our Establishment Clause jurisprudence had gone off the rails. In the name of protecting religious liberty, the District would have us suppress it. Rather than respect the First Amendment's double protection for religious expression, it would have us preference secular activity. Not only could schools fire teachers for praying quietly over their lunch, for wearing a yarmulke to school, or for offering a midday prayer during a break before practice. Under the District's rule, a school would be required to do so. It is a rule that would defy this Court's traditional understanding that permitting private speech is not the same thing as coercing others to participate in it. It is a rule, too, that would undermine a long constitutional tradition under which learning how to tolerate diverse expressive activities has always been "part of learning how to live in a pluralistic society." *Lee*, 505 U. S. at 590. We are aware of no

historically sound understanding of the Establishment Clause that begins to "mak[e] it necessary for government to be hostile to religion" in this way.

Our judgments on all these scores find support in this Court's prior cases too. In *Zorach*, for example, challengers argued that a public school program permitting students to spend time in private religious instruction off campus was impermissibly coercive. The Court rejected that challenge because students were not required to attend religious instruction and there was no evidence that any employee had "us[ed] their office to persuade or force students" to participate in religious activity. What was clear there is even more obvious here—where there is no evidence anyone sought to persuade or force students to participate, and there is no formal school program accommodating the religious activity at issue.

Meanwhile, this case looks very different from those in which this Court has found prayer involving public school students to be problematically coercive. In *Lee*, this Court held that school officials violated the Establishment Clause by "including [a] clerical membe[r]" who publicly recited prayers "as part of [an] official school graduation ceremony" because the school had "in every practical sense compelled attendance and participation in" a "religious exercise." In Santa Fe Independent School Dist. v. Doe, the Court held that a school district violated the Establishment Clause by broadcasting a prayer "over the public address system" before each football game. The Court observed that, while students generally were not required to attend games, attendance was required for "cheerleaders, members of the band, and, of course, the team members themselves." None of that is true here. The prayers for which Mr. Kennedy was disciplined were not publicly broadcast or recited to a captive audience. Students were not required or expected to participate. And, in fact, none of Mr. Kennedy's students did participate in any of the three October 2015 prayers that resulted in Mr. Kennedy's discipline.

C.

In the end, the District's case hinges on the need to generate conflict between an individual's rights under the Free Exercise and Free Speech Clauses and its own Establishment Clause duties—and then develop some explanation why one of these Clauses in the First Amendment should " 'trum[p]' " the other two. But the project falters badly. Not only does the District fail to offer a sound reason to prefer one constitutional guarantee over another. It cannot even show that they are at odds. In truth, there is no conflict between the constitutional commands before us. There is only the "mere shadow" of a conflict, a false choice premised on a misconstruction of the Establishment Clause. And in no world may a government entity's concerns about phantom constitutional violations justify actual violations of an individual's First Amendment rights.

V.

Respect for religious expressions is indispensable to life in a free and diverse Republic—whether those expressions take place in a sanctuary or on a field, and whether they manifest through the spoken word or a bowed head. Here, a government entity sought to punish an individual for engaging in a brief, quiet, personal religious observance doubly protected by the Free Exercise and Free Speech Clauses. And the only meaningful justification the government offered for its reprisal rested on a mistaken view that it had a duty to ferret out and suppress religious observances even as it allows comparable secular speech. The Constitution neither mandates nor tolerates that kind of discrimination.

JUSTICE SOTOMAYOR, with whom JUSTICES BREYER and KAGAN join, dissenting.

This case is about whether a public school must permit a school official to kneel, bow his head, and say a prayer at the center of a school event. The Constitution does not authorize, let alone require, public schools to embrace this conduct. Since *Engel v. Vitale*, 370 U. S. 421 (1962), this Court consistently has recognized that school officials leading prayer is constitutionally impermissible. Official-led prayer strikes at the core of our constitutional protections for the religious liberty of students and their parents, as embodied in both the Establishment Clause and the Free Exercise Clause of the First Amendment.

The Court now charts a different path, yet again paying almost exclusive attention to the Free Exercise Clause's protection for individual religious exercise while giving short shrift to the Establishment Clause's prohibition on state establishment of religion. To the degree the Court portrays petitioner Joseph Kennedy's prayers as private and quiet, it misconstrues the facts. The record reveals that Kennedy had a longstanding practice of conducting demonstrative prayers on the 50-yard line of the football field. Kennedy consistently invited others to join his prayers and for years led student athletes in prayer at the same time and location. The Court ignores this history. The Court also ignores the severe disruption to school events caused by Kennedy's conduct, viewing it as irrelevant because the Bremerton School District (District) stated that it was suspending Kennedy to avoid it being viewed as endorsing religion. Under the Court's analysis, presumably this would be a different case if the District had cited Kennedy's repeated disruptions of school programming and violations of school policy regarding public access to the field as grounds for suspending him. As the District did not articulate those grounds, the Court assesses only the District's Establishment Clause concerns. It errs by assessing them divorced from the context and history of Kennedy's prayer practice.

Today's decision goes beyond merely misreading the record. The Court overrules *Lemon v. Kurtzman* (1971), and calls into question decades of subsequent precedents that it deems "offshoot[s]" of that decision. In the process, the Court rejects longstanding concerns surrounding government endorsement of religion and replaces the standard for reviewing such questions with a new "history and tradition" test. In addition, while the Court reaffirms that the Establishment Clause prohibits the government from coercing participation in religious exercise, it applies a nearly toothless version of the coercion analysis, failing to acknowledge the unique pressures faced by students when participating in school-sponsored activities. This decision does a disservice to schools and the young citizens they serve, as well as to our Nation's longstanding commitment to the separation of church and state. I respectfully dissent. . . .

Despite the overwhelming precedents establishing that school officials leading prayer violates the Establishment Clause, the Court today holds that Kennedy's midfield prayer practice did not violate the Establishment Clause. This decision rests on an erroneous understanding of the Religion Clauses. It also disregards the balance this Court's cases strike among the rights conferred by the Clauses. The Court relies on an assortment of pluralities, concurrences, and dissents by Members of the current majority to effect fundamental changes in this Court's Religion Clauses jurisprudence, all the while proclaiming that nothing has changed at all. . . .

In focusing almost exclusively on Kennedy's free exercise claim, however, and declining to

recognize the conflicting rights at issue, the Court substitutes one supposed blanket rule for another. The proper response where tension arises between the two Clauses is not to ignore it, which effectively silently elevates one party's right above others. The proper response is to identify the tension and balance the interests based on a careful analysis of "whether [the] particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so."

For decades, the Court has recognized that, in determining whether a school has violated the Establishment Clause, "one of the relevant questions is whether an objective observer, acquainted with the text, legislative history, and implementation of the [practice], would perceive it as a state endorsement of prayer in public schools." The Court now says for the first time that endorsement simply does not matter, and completely repudiates the test established in *Lemon*. Both of these moves are erroneous and, despite the Court's assurances, novel. . . .

The Court now goes much further, overruling *Lemon* entirely and in all contexts. It is wrong to do so. *Lemon* summarized "the cumulative criteria developed by the Court over many years" of experience "draw[ing] lines" as to when government engagement with religion violated the Establishment Clause. *Lemon* properly concluded that precedent generally directed consideration of whether the government action had a "secular legislative purpose," whether its "principal or primary effect must be one that neither advances nor inhibits religion," and whether in practice it "foster[s] 'an excessive government entanglement with religion.' " It is true "that rigid application of the *Lemon* test does not solve every Establishment Clause problem," but that does not mean that the test has no value.

To put it plainly, the purposes and effects of a government action matter in evaluating whether that action violates the Establishment Clause, as numerous precedents beyond *Lemon* instruct in the particular context of public schools. Neither the critiques of *Lemon* as setting out a dispositive test for all seasons nor the fact that the Court has not referred to *Lemon* in all situations support this Court's decision to dismiss that precedent entirely, particularly in the school context.

Upon overruling one "grand unified theory," the Court introduces another: It holds that courts must interpret whether an Establishment Clause violation has occurred mainly "by 'reference to historical practices and understandings.' " Here again, the Court professes that nothing has changed. In fact, while the Court has long referred to historical practice as one element of the analysis in specific Establishment Clause cases, the Court has never announced this as a general test or exclusive focus.

The Court reserves any meaningful explanation of its history-and-tradition test for another day, content for now to disguise it as established law and move on. It should not escape notice, however, that the effects of the majority's new rule could be profound. The problems with elevating history and tradition over purpose and precedent are well documented.

For now, it suffices to say that the Court's history-and-tradition test offers essentially no guidance for school administrators. If even judges and Justices, with full adversarial briefing and argument tailored to precise legal issues, regularly disagree (and err) in their amateur efforts at history, how are school administrators, faculty, and staff supposed to adapt? How will school

administrators exercise their responsibilities to manage school curriculum and events when the Court appears to elevate individuals' rights to religious exercise above all else? Today's opinion provides little in the way of answers; the Court simply sets the stage for future legal changes that will inevitably follow the Court's choice today to upset longstanding rules.

Finally, the Court acknowledges that the Establishment Clause prohibits the government from coercing people to engage in religion practice, but its analysis of coercion misconstrues both the record and this Court's precedents. The Court claims that the District "never raised coercion concerns" simply because the District conceded that there was " 'no evidence that students [were] directly coerced to pray with Kennedy.' " The Court's suggestion that coercion must be "direc[t]" to be cognizable under the Establishment Clause is contrary to long-established precedent. The Court repeatedly has recognized that indirect coercion may raise serious establishment concerns, and that "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools."

Today's Court quotes the *Lee* Court's remark that enduring others' speech is " 'part of learning how to live in a pluralistic society.' The *Lee* Court, however, expressly concluded, in the very same paragraph, that "[t]his argument cannot prevail" in the school-prayer context because the notion that being subject to a "brief " prayer in school is acceptable "overlooks a fundamental dynamic of the Constitution": its "specific prohibition on state intervention in religious affairs."

The Court also distinguishes *Santa Fe* because Kennedy's prayers "were not publicly broadcast or recited to a captive audience." This misses the point. In *Santa Fe*, a student council chaplain delivered a prayer over the public-address system before each varsity football game of the season. Students were not required as a general matter to attend the games, but "cheerleaders, members of the band, and, of course, the team members themselves" were, and the Court would have found an "improper effect of coercing those present" even if it "regard[ed] every high school student's decision to attend . . . as purely voluntary." Kennedy's prayers raise precisely the same concerns. His prayers did not need to be broadcast. His actions spoke louder than his words. His prayers were intentionally, visually demonstrative to an audience aware of their history and no less captive than the audience in *Santa Fe*, with spectators watching and some players perhaps engaged in a song, but all waiting to rejoin their coach for a postgame talk. Moreover, Kennedy's prayers had a greater coercive potential because they were delivered not by a student, but by their coach, who was still on active duty for postgame events.

In addition, despite the direct record evidence that students felt coerced to participate in Kennedy's prayers, the Court nonetheless concludes that coercion was not present in any event because "Kennedy did not seek to direct any prayers to students or require anyone else to participate." But nowhere does the Court engage with the unique coercive power of a coach's actions on his adolescent players.

In any event, the Court makes this assertion only by drawing a bright line between Kennedy's years long practice of leading student prayers, which the Court does not defend, and Kennedy's final three prayers, which BHS students did not join. As discussed above, this mode of analysis contravenes precedent by "turn[ing] a blind eye to the context in which [Kennedy's practice] arose." This Court's precedents require a more nuanced inquiry into the realities of coercion in

the specific school context concerned than the majority recognizes. The question before the Court is not whether a coach taking a knee to pray on the field would constitute an Establishment Clause violation in all circumstances. It is whether permitting Kennedy to continue a prayer practice at the center of the football field after years of inappropriately leading students in prayer in the same spot, at that same time, and in the same manner, which led students to feel compelled to join him, violates the Establishment Clause. It does.

Having disregarded this context, the Court finds Kennedy's three-game practice distinguishable from precedent because the prayers were "quie[t]" and the students were otherwise "occupied." The record contradicts this narrative. Even on the Court's myopic framing of the facts, at two of the three games on which the Court focuses, players witnessed student peers from the other team and other authority figures surrounding Kennedy and joining him in prayer. The coercive pressures inherent in such a situation are obvious. Moreover, Kennedy's actual demand to the District was that he give "verbal" prayers specifically at the midfield position where he traditionally led team prayers, and that students be allowed to join him "voluntarily" and pray. Notably, the Court today does not embrace this demand, but it nonetheless rejects the District's right to ensure that students were not pressured to pray.

To reiterate, the District did not argue, and neither court below held, that "any visible religious conduct by a teacher or coach should be deemed . . . impermissibly coercive on students." Nor has anyone contended that a coach may never visibly pray on the field. The courts below simply recognized that Kennedy continued to initiate prayers visible to students, while still on duty during school events, under the exact same circumstances as his past practice of leading student prayer. It is unprecedented for the Court to hold that this conduct, taken as a whole, did not raise cognizable coercion concerns. Importantly, nothing in the Court's opinion should be read as calling into question that Kennedy's conduct may have raised other concerns regarding disruption of school events or misuse of school facilities that would have separately justified employment action against Kennedy.

* * *

The Free Exercise Clause and Establishment Clause are equally integral in protecting religious freedom in our society. The first serves as "a promise from our government," while the second erects a "backstop that disables our government from breaking it" and "start[ing] us down the path to the past, when [the right to free exercise] was routinely abridged."

Today, the Court once again weakens the backstop. It elevates one individual's interest in personal religious exercise, in the exact time and place of that individual's choosing, over society's interest in protecting the separation between church and state, eroding the protections for religious liberty for all. Today's decision is particularly misguided because it elevates the religious rights of a school official, who voluntarily accepted public employment and the limits that public employment entails, over those of his students, who are required to attend school and who this Court has long recognized are particularly vulnerable and deserving of protection. In doing so, the Court sets us further down a perilous path in forcing States to entangle themselves with religion, with all of our rights hanging in the balance. As much as the Court protests otherwise, today's decision is no victory for religious liberty. I respectfully dissent.

B. Legislative Prayer

1. MARSH v. CHAMBERS
463 U.S. 783 (1983)

CHIEF JUSTICE BURGER delivered the opinion of the Court.

The question presented is whether the Nebraska Legislature's practice of opening each legislative day with a prayer by a chaplain paid by the State violates the Establishment Clause of the First Amendment.

I.

The Nebraska Legislature begins each of its sessions with a prayer offered by a chaplain who is chosen biennially by the Executive Board of the Legislative Council and paid out of public funds. Robert E. Palmer, a Presbyterian minister, has served as chaplain since 1965 at a salary of $ 319.75 per month for each month the legislature is in session.

Ernest Chambers is a member of the Nebraska Legislature and a taxpayer. Claiming that the Nebraska Legislature's chaplaincy practice violates the Establishment Clause, he brought this action seeking to enjoin enforcement of the practice. The District Court held that the Establishment Clause was not breached by the prayers, but was violated by paying the chaplain from public funds. It therefore enjoined the legislature from using public funds to pay the chaplain; it declined to enjoin the policy of beginning sessions with prayers.

II.

The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country. From colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom. In the very courtrooms in which Judges heard and decided this case, the proceedings opened with an announcement that concluded, "God save the United States and this Honorable Court." The same invocation occurs at all sessions of this Court.

The tradition in many of the Colonies was, of course, linked to an established church, but the Continental Congress, beginning in 1774, adopted the traditional procedure of opening its sessions with a prayer offered by a paid chaplain. Although prayers were not offered during the Constitutional Convention, the First Congress, as one of its early items of business, adopted the policy of selecting a chaplain to open each session with prayer. On April 25, 1789, the Senate elected its first chaplain, the House followed suit on May 1, 1789. A statute providing for the payment of these chaplains was enacted into law on September 22, 1789.

On September 25, 1789, three days after Congress authorized the appointment of paid chaplains, final agreement was reached on the language of the Bill of Rights. Clearly the men who wrote the First Amendment Religion Clauses did not view paid legislative chaplains and opening prayers as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress. It has also been followed consistently in most of the states, including Nebraska, where the institution of

opening legislative sessions with prayer was adopted even before the State attained statehood.

Standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees, but there is far more here than simply historical patterns. In this context, historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress -- their actions reveal their intent. An Act "passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, is contemporaneous and weighty evidence of its true meaning."

In *Walz* v. *Tax Comm'n*, 397 U.S. 664, 678 (1970), we considered the weight to be accorded to history: "No one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it. Yet an unbroken practice is not something to be lightly cast aside." No more is Nebraska's practice of over a century, consistent with two centuries of national practice, to be cast aside. It can hardly be thought that in the same week the First Congress voted to appoint and to pay a chaplain for each House and also voted to approve the draft of the First Amendment, they intended the Establishment Clause to forbid what they had just declared acceptable. In applying the First Amendment to the states, it would be incongruous to interpret that Clause as imposing more stringent limits on the states than the draftsmen imposed on the Federal Government.

This unique history leads us to accept the interpretation of the First Amendment draftsmen who saw no real threat to the Establishment Clause arising from a practice of prayer similar to that now challenged. We conclude that legislative prayer presents no more potential for establishment than the provision of school transportation, beneficial grants for higher education, or tax exemptions for religious organizations.

Respondent argues that we should not rely heavily on "the advice of the Founding Fathers" because the messages of history often tend to be ambiguous and not relevant to a society far more heterogeneous than that of the Framers. Respondent also points out that John Jay and John Rutledge opposed the motion to begin the first session of the Continental Congress with prayer.

We do not agree that evidence of opposition to a measure weakens the force of the historical argument; indeed it infuses it with power by demonstrating that the subject was considered carefully and the action not taken thoughtlessly, by force of long tradition and without regard to the problems posed by a pluralistic society. Jay and Rutledge specifically grounded their objection on the fact that the delegates to the Congress "were so divided in religious sentiments . . . that [they] could not join in the same act of worship." Their objection was met by Samuel Adams, who stated that "he was no bigot, and could hear a prayer from a gentleman of piety and virtue, who was at the same time a friend to his country."

This interchange emphasizes that the delegates did not consider opening prayers as a proselytizing activity or as symbolically placing the government's "official seal of approval on one religious view." Rather, the Founding Fathers looked at invocations as "conduct whose effect [harmonized] with the tenets of some or all religions." The Establishment Clause does not always bar a state from regulating conduct simply because it "harmonizes with religious canons." The individual claiming injury is an adult, presumably not readily susceptible to "religious

indoctrination" or peer pressure.

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. 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.

III.

We turn then to the question of whether any features of the Nebraska practice violate the Establishment Clause. Beyond the bare fact that a prayer is offered, three points have been made: first, that a clergyman of only one denomination -- Presbyterian -- has been selected for 16 years; second, that the chaplain is paid at public expense; and third, that the prayers are in the Judeo-Christian tradition.[1] Weighed against the historical background, these factors do not serve to invalidate Nebraska's practice.

The Court of Appeals was concerned that Palmer's long tenure has the effect of giving preference to his religious views. To the contrary, the evidence indicates that Palmer was reappointed because his performance and personal qualities were acceptable to the body appointing him. Absent proof that the chaplain's reappointment stemmed from an impermissible motive, we conclude that his long tenure does not in itself conflict with the Establishment Clause.[2] Nor is the compensation of the chaplain from public funds a reason to invalidate the Nebraska Legislature's chaplaincy; remuneration is grounded in historic practice initiated by the same Congress that drafted the Establishment Clause. Currently, many state legislatures and the United States Congress provide compensation for their chaplains.[3] Nebraska has paid its chaplain for well over a century. The content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief. That being so, it is not for us to parse the content of a particular prayer.

We do not doubt the sincerity of those who believe that to have prayer in this context risks the beginning of the establishment the Founding Fathers feared. But this concern is not well founded. The practice for two centuries in Congress and for more than a century in Nebraska and

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[1] Palmer characterizes his prayers as "nonsectarian," "Judeo Christian," and with "elements of the American civil religion." Although his earlier prayers were often explicitly Christian, Palmer removed references to Christ after a 1980 complaint from a Jewish legislator.

[2] We note that Dr. Edward L. R. Elson served as Chaplain of the Senate of the United States from January 1969 to February 1981, a period of 12 years; Dr. Frederick Brown Harris served from February 1949 to January 1969, a period of 20 years.

[3] The states' practices differ widely. Like Nebraska, several states choose a chaplain who serves for the entire legislative session. In other states, the prayer is offered by a different clergyman each day. Under either system, some states pay their chaplains and others do not.

in many other states gives assurance that there is no real threat "while this Court sits."

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

The Court today has written a narrow and, on the whole, careful opinion. The Court's limited rationale should pose little threat to the overall fate of the Establishment Clause. Moreover, disagreement with the Court requires that I confront the fact that 20 years ago, I came very close to endorsing essentially the result reached by the Court today.[1] Nevertheless, after much reflection, I have come to the conclusion that I was wrong then and that the Court is wrong today. I now believe that the practice of official invocational prayer, as it exists in Nebraska and most other state legislatures, is unconstitutional. It is contrary to the doctrine as well the underlying purposes of the Establishment Clause, and it is not saved either by its history or by any of the other considerations suggested in the Court's opinion.

I.

The Court makes no pretense of subjecting Nebraska's practice of legislative prayer to any of the formal "tests" that have structured our inquiry under the Establishment Clause. That it fails to do so is, in a sense, a good thing, for it simply confirms that the Court is carving out an exception to the Establishment Clause rather than reshaping Establishment Clause doctrine. For my purposes, however, I must begin by demonstrating what should be obvious: that, if the Court were to judge legislative prayer through the unsentimental eye of our settled doctrine, it would have to strike it down as a clear violation of the Establishment Clause.

That the "purpose" of legislative prayer is pre-eminently religious rather than secular seems to me to be self-evident. "To invoke Divine guidance on a public body entrusted with making the laws" is nothing but a religious act. Moreover, whatever secular functions legislative prayer might play -- formally opening the legislative session, getting the members of the body to quiet down, and imbuing them with a sense of seriousness and high purpose -- could so plainly be performed in a purely nonreligious fashion that to claim a secular purpose is an insult to the perfectly honorable individuals who instituted and continue the practice.

The "primary effect" of legislative prayer is also clearly religious. Invocations in Nebraska's legislative halls explicitly link religious belief and observance to the power and prestige of the State. "[The] mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some."

Finally, the practice of legislative prayer leads to excessive "entanglement" between the State and religion. *Lemon* pointed out that "entanglement" can take two forms: First, a state statute or program might involve the state impermissibly in monitoring religious affairs. In the case of legislative prayer, the process of choosing a "suitable" chaplain, and insuring that the chaplain limits himself or herself to "suitable" prayers, involves precisely the sort of supervision that government should if at all possible avoid.

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[1] *Abington School Dist*. v. *Schempp*, 374 U.S. 203, 299-300 (1963) (BRENNAN, J., concurring).

Second, excessive "entanglement" might arise out of "the divisive political potential" of a state statute or program. In this case, this second aspect of entanglement is also clear. The controversy between Senator Chambers and his colleagues, which had reached the stage of difficulty and rancor long before this lawsuit was brought, has split the Nebraska Legislature precisely on issues of religion and religious conformity. The record also reports instances, involving legislators other than Senator Chambers, in which invocations by Reverend Palmer led to controversy along religious lines. And in general, the history of legislative prayer has been far more divisive than a hasty reading of the Court's opinion might indicate.[2]

In sum, I have no doubt that, if any group of law students were asked to apply the principles of *Lemon* to legislative prayer, they would find the practice to be unconstitutional.

II.

The path of formal doctrine, however, can only imperfectly capture the nature and importance of the issues at stake in this case. A more adequate analysis must therefore take into account the underlying function of the Establishment Clause.

The principles of "separation" and "neutrality" implicit in the Establishment Clause serve many purposes. Four of these are particularly relevant here. The first is to guarantee the individual right to conscience. The right to conscience, in the religious sphere, is implicated when the government requires individuals to support the practices of a faith with which they do not agree. The second purpose of separation and neutrality is to keep the state from interfering in the essential autonomy of religious life. The third purpose of separation and neutrality is to prevent the trivialization and degradation of religion by too close an attachment to government. Finally, the principles of separation and neutrality help assure that essentially religious issues not become the occasion for battle in the political arena.

Legislative prayer clearly violates the principles of neutrality and separation that are embedded within the Establishment Clause. It is contrary to the fundamental message of *Engel* and *Schempp*. It intrudes on the right to conscience by forcing some legislators either to participate in a "prayer opportunity" with which they are in basic disagreement, or to make their disagreement a matter of public comment by declining to participate. It forces all residents of the State to support a religious exercise that may be contrary to their own beliefs. It has the potential for degrading religion by allowing a religious call to worship to be intermeshed with a secular call to order. And it injects religion into the political sphere by creating the potential that each and every selection of a chaplain, or consideration of a particular prayer, or even reconsideration of the practice itself, will provoke a political battle along religious lines and ultimately alienate

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[2] As the Court points out, the practice of legislative prayers in Congress gave rise to controversy at points in the 19th century. In recent years, particular prayers and chaplains in state legislatures have periodically led to political divisiveness along religious lines. See, *e. g.*, The Oregonian, Apr. 1, 1983, p. C8 ("Despite protests from at least one representative, a follower of an Indian guru was allowed to give the prayer at the start of Thursday's House session. Shortly before Ma Anand Sheela began the invocation, about a half-dozen representatives walked off the House floor in protest").

some religiously identified group of citizens.

III.

The Court says almost nothing contrary to the above analysis. Instead, it holds that "the practice of opening legislative sessions with prayer has become part of the fabric of our society," and chooses not to interfere. I sympathize with the Court's reluctance to strike down a practice so prevalent and so ingrained. I am, however, unconvinced by the Court's arguments, and cannot shake my conviction that legislative prayer violates both the letter and the spirit of the Establishment Clause.

The Constitution is not a static document whose meaning on every detail is fixed for all time by the life experience of the Framers. To be truly faithful to the Framers, "our use of the history of their time must limit itself to broad purposes, not specific practices." Our primary task must be to translate "the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century."

The inherent adaptability of the Constitution and its amendments is particularly important with respect to the Establishment Clause. "[Our] religious composition makes us a vastly more diverse people than were our forefathers. . . . In the face of such profound changes, practices which may have been objectionable to no one in the time of Jefferson and Madison may today be highly offensive to many persons, the deeply devout and the nonbelievers alike." Members of the First Congress should be treated, not as sacred figures whose every action must be emulated, but as the authors of a document meant to last for the ages. Indeed, a proper respect for the Framers themselves forbids us to give so static and lifeless a meaning to their work. To my mind, the Court's focus here on a narrow piece of history is, in a fundamental sense, a betrayal of the lessons of history.

Of course, the Court does not rely entirely on the practice of the First Congress in order to validate legislative prayer. There is another theme which, although implicit, also pervades the Court's opinion. It is exemplified by the Court's comparison of legislative prayer with the formulaic recitation of "God save the United States and this Honorable Court." Simply put, the Court seems to regard legislative prayer as at most a *de minimis* violation. I frankly do not know what should be the proper disposition of features of our public life such as "God save the United States and this Honorable Court," "In God We Trust," "One Nation Under God," and the like. I might well adhere to the view expressed in *Schempp* that such mottos have lost any true religious significance. Legislative invocations, however, are very different.

First of all, legislative prayer, unlike mottos with fixed wordings, can easily turn narrowly sectarian. I agree that the judiciary should not sit as a board of censors on individual prayers, but the better way of avoiding that task is by striking down all official legislative invocations.

More fundamentally, however, *any* practice of legislative prayer, even if it might look "nonsectarian," will inevitably involve the State in one or another religious debate. In this case, we are faced with potential religious objections to an activity at the very center of religious life, and it is simply beyond the competence of government, and inconsistent with our conceptions of liberty, for the State to take upon itself the role of ecclesiastical arbiter.

JUSTICE STEVENS, dissenting.

In a democratically elected legislature, the religious beliefs of the chaplain tend to reflect the faith of the majority of the lawmakers' constituents. I would not expect to find a Jehovah's Witness or a disciple of the Reverend Moon serving as the official chaplain in any state legislature. Regardless of the motivation of the majority that exercises the power to appoint the chaplain, it seems plain to me that the designation of a member of one religious faith to serve as the sole official chaplain of a state legislature for a period of 16 years constitutes the preference of one faith over another in violation of the Establishment Clause.

The Court declines to "parse the content of a particular prayer." Perhaps it does so because it would be unable to explain away the sectarian content of some prayers given by Nebraska's chaplain. Or perhaps the Court is unwilling to acknowledge that the tenure of the chaplain must inevitably be conditioned on the acceptability of that content to the majority.

2. TOWN OF GREECE v. GALLOWAY
572 U.S. 565 (2014)

Justice KENNEDY delivered the opinion of the Court, except as to Part II-B. THE CHIEF JUSTICE and Justice ALITO join this opinion in full. Justice SCALIA and Justice THOMAS join this opinion except as to Part II-B.

The Court must decide whether the town of Greece, New York, imposes an impermissible establishment of religion by opening its monthly board meetings with a prayer. It must be concluded, consistent with the Court's opinion in *Marsh v. Chambers*, 463 U.S. 783 (1983), that no violation of the Constitution has been shown.

Greece, a town with a population of 94,000, is in upstate New York. For some years, it began its monthly town board meetings with a moment of silence. In 1999, the newly elected town supervisor, John Auberger, decided to replicate the prayer practice he had found meaningful while serving in the county legislature. Following the roll call and recitation of the Pledge of Allegiance, Auberger would invite a local clergyman to the front of the room to deliver an invocation. After the prayer, Auberger would thank the minister for serving as the board's "chaplain for the month" and present him with a commemorative plaque. The prayer was intended to place board members in a solemn and deliberative frame of mind, invoke divine guidance in town affairs, and follow a tradition practiced by Congress and state legislatures.

The town followed an informal method for selecting prayer givers, all of whom were unpaid volunteers. A town employee would call the congregations listed in a local directory until she found a minister available for that month's meeting. The town eventually compiled a list of willing "board chaplains" who had accepted invitations and agreed to return in the future. The town at no point excluded or denied an opportunity to a would-be prayer giver. Its leaders maintained that a minister or layperson of any persuasion, including an atheist, could give the invocation. But nearly all of the congregations in town were Christian; and from 1999 to 2007, all of the participating ministers were too.

Greece neither reviewed the prayers in advance of the meetings nor provided guidance as to their tone or content. The town instead left the guest clergy free to compose their own devotions. The resulting prayers often sounded both civic and religious themes. Typical were invocations that asked the divinity to abide at the meeting and bestow blessings on the community:

"Lord we ask you to send your spirit of servanthood upon all of us gathered here this evening to do your work for the benefit of all in our community. We ask you to bless our elected and appointed officials so they may deliberate with wisdom and act with courage. Bless the members of our community who come here to speak before the board so they may state their cause with honesty and humility. Lord we ask you to bless us all, that everything we do here tonight will move you to welcome us one day into your kingdom as good and faithful servants. We ask this in the name of our brother Jesus. Amen."

Some of the ministers spoke in a distinctly Christian idiom; and a minority invoked religious holidays, scripture, or doctrine, as in the following prayer:

"Lord, God of all creation, we give you thanks and praise for your presence and action in the world. We look with anticipation to the celebration of Holy Week and Easter. It is in the solemn events of next week that we find the very heart and center of our Christian faith. We acknowledge the saving sacrifice of Jesus Christ on the cross. We draw strength, vitality, and confidence from his resurrection at Easter.... Praise and glory be yours, O Lord, now and forever more. Amen."

Respondents Susan Galloway and Linda Stephens attended town board meetings to speak about issues of local concern, and they objected that the prayers violated their religious or philosophical views. After respondents complained that Christian themes pervaded the prayers, the town invited a Jewish layman and the chairman of the local Baha'i temple to deliver prayers. A Wiccan priestess who had read about the prayer controversy requested, and was granted, an opportunity to give the invocation.

Galloway and Stephens brought suit in the United States District Court for the Western District of New York. They alleged that the town violated the First Amendment's Establishment Clause by preferring Christians over other prayer givers and by sponsoring sectarian prayers, such as those given "in Jesus' name." The District Court upheld the prayer practice. The Court of Appeals for the Second Circuit reversed. The Court now reverses the Court of Appeals.

II.

In *Marsh v. Chambers*, the Court found no First Amendment violation in the Nebraska Legislature's practice of opening its sessions with a prayer delivered by a chaplain paid from state funds. The decision concluded that legislative prayer, while religious in nature, has long been understood as compatible with the Establishment Clause. As practiced by Congress since the framing of the Constitution, legislative prayer lends gravity to public business, reminds lawmakers to transcend petty differences in pursuit of a higher purpose, and expresses a common aspiration to a just and peaceful society. The Court has considered this symbolic expression to be a "tolerable acknowledgement of beliefs widely held," rather than a first, treacherous step towards establishment of a state church.

Marsh is sometimes described as "carving out an exception" to the Court's Establishment Clause jurisprudence, because it sustained legislative prayer without subjecting the practice to "any of the formal 'tests' that have traditionally structured" this inquiry. The Court in *Marsh* found those tests unnecessary because history supported the conclusion that legislative invocations are compatible with the Establishment Clause. When *Marsh* was decided, in 1983, legislative prayer had persisted in the Nebraska Legislature for more than a century, and the majority of the other States also had the same, consistent practice. Although no information has been cited by the parties to indicate how many local legislative bodies open their meetings with prayer, this practice too has historical precedent. 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 a prayer has become part of the fabric of our society."

Yet *Marsh* must not be understood as permitting a practice that would amount to a constitutional violation if not for its historical foundation. The case teaches instead that the Establishment Clause must be interpreted "by reference to historical practices and understandings." *County of Allegheny v. ACLU*, 492 U.S. 573, 670 (1989) (KENNEDY, J., concurring in judgment in part and dissenting in part). That the First Congress provided for the appointment of chaplains only days after approving language for the First Amendment demonstrates that the Framers considered legislative prayer a benign acknowledgment of religion's role in society. In the 1850's, the judiciary committees in both the House and Senate reevaluated the practice of official chaplaincies after receiving petitions to abolish the office. The committees concluded that the office posed no threat of an establishment because lawmakers were not compelled to attend the daily prayer, no faith was excluded by law, nor any favored, and the cost of the chaplain's salary imposed a vanishingly small burden on taxpayers. *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. Any test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change. A test that would sweep away what has so long been settled would create new controversy and begin anew the very divisions along religious lines that the Establishment Clause seeks to prevent.

The Court's inquiry, then, must be to determine whether the prayer practice in the town of Greece fits within the tradition long followed in Congress and the state legislatures. Respondents assert that the town's prayer exercise falls outside that tradition and transgresses the Establishment Clause for two independent but mutually reinforcing reasons. First, they argue that *Marsh* did not approve prayers containing sectarian language or themes, such as the prayers offered in Greece. Second, they argue that the setting and conduct of the town board meetings create social pressures that force nonadherents to remain in the room or even feign participation in order to avoid offending the representatives who sponsor the prayer and will vote on matters citizens bring before the board. The sectarian content of the prayers compounds the subtle coercive pressures, they argue, because the nonbeliever who might tolerate ecumenical prayer is forced to do the same for prayer that might be inimical to his or her beliefs.

A.

Respondents maintain that prayer must be nonsectarian, or not identifiable with any one

religion; and they fault the town for permitting guest chaplains to deliver prayers that "use overtly Christian terms" or "invoke specifics of Christian theology." An insistence on nonsectarian or ecumenical prayer as a single, fixed standard is not consistent with the tradition of legislative prayer outlined in the Court's cases. The Court found the prayers in *Marsh* consistent with the First Amendment not because they espoused only a generic theism but because our history and tradition have shown that prayer in this limited context could "coexis[t] with the principles of disestablishment and religious freedom." The Congress that drafted the First Amendment would have been accustomed to invocations containing explicitly religious themes of the sort respondents find objectionable. One of the Senate's first chaplains, the Rev. William White, gave prayers in a series that included the Lord's Prayer, the Collect for Ash Wednesday, prayers for peace and grace, a general thanksgiving, St. Chrysostom's Prayer, and a prayer seeking "the grace of our Lord Jesus Christ, &c." The decidedly Christian nature of these prayers must not be dismissed as the relic of a time when our Nation was less pluralistic than it is today. Congress continues to permit its appointed and visiting chaplains to express themselves in a religious idiom. It acknowledges our growing diversity not by proscribing sectarian content but by welcoming ministers of many creeds.

The contention that legislative prayer must be generic or nonsectarian is irreconcilable with the facts of *Marsh* and with its holding and reasoning. *Marsh* nowhere suggested that the constitutionality of legislative prayer turns on the neutrality of its content. The opinion noted that Nebraska's chaplain, the Rev. Robert E. Palmer, modulated the "explicitly Christian" nature of his prayer and "removed all references to Christ" after a Jewish lawmaker complained. 463 U.S. at 793, n.14. With this footnote, the Court did no more than observe the practical demands placed on a minister who holds a permanent, appointed position in a legislature and chooses to write his or her prayers to appeal to more members, or at least to give less offense to those who object. *Marsh* did not suggest that Nebraska's prayer practice would have failed had the chaplain not acceded to the legislator's request. Nor did the Court imply the rule that prayer violates the Establishment Clause any time it is given in the name of a figure deified by only one faith or creed. To the contrary, the Court instructed that the "content of the prayer is not of concern to judges," provided "there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief."

To hold that invocations must be nonsectarian would force the legislatures that sponsor prayers and the courts that are asked to decide these cases to act as supervisors and censors of religious speech, a rule that would involve government in religious matters to a far greater degree than is the case under the town's current practice of neither editing or approving prayers in advance nor criticizing their content after the fact. Our Government is prohibited from prescribing prayers to be recited in our public institutions in order to promote a preferred system of belief or code of moral behavior. *Engel v. Vitale*, 370 U.S. 421 (1962). It would be but a few steps removed from that prohibition for legislatures to require chaplains to redact the religious content from their message in order to make it acceptable for the public sphere. Government may not mandate a civic religion that stifles any but the most generic reference to the sacred any more than it may prescribe a religious orthodoxy.

Respondents argue, in effect, that legislative prayer may be addressed only to a generic God.

The law and the Court could not draw this line for each specific prayer or seek to require ministers to set aside their nuanced and deeply personal beliefs for vague and artificial ones. There is doubt, in any event, that consensus might be reached as to what qualifies as generic or nonsectarian. Honorifics like "Lord of Lords" or "King of Kings" might strike a Christian audience as ecumenical, yet these titles may have no place in the vocabulary of other faith traditions. Because it is unlikely that prayer will be inclusive beyond dispute, it would be unwise to adopt what respondents think is the next-best option: permitting those religious words, and only those words, that are acceptable to the majority, even if they will exclude some. The First Amendment is not a majority rule, and government may not seek to define permissible categories of religious speech. Once it invites prayer into the public sphere, government must permit a 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.

In rejecting the suggestion that legislative prayer must be nonsectarian, the Court does not imply that no constraints remain on its content. The relevant constraint derives from its place at the opening of legislative sessions, where it is meant to lend gravity to the occasion and reflect values long part of the Nation's heritage. 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 that legitimate function. If the course and practice over time shows that the invocations denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion, many present may consider the prayer to fall short of the desire to elevate the purpose of the occasion and to unite lawmakers in their common effort. That circumstance would present a different case than the one presently before the Court.

The tradition reflected in *Marsh* permits chaplains to ask their own God for blessings of peace, justice, and freedom that find appreciation among people of all faiths. That a prayer is given in the name of Jesus, Allah, or Jehovah, or that it makes passing reference to religious doctrines, does not remove it from that tradition. These religious themes provide particular means to universal ends. Prayer that reflects beliefs specific to only some creeds can still serve to solemnize the occasion, so long as the practice over time is not "exploited to proselytize or advance any one, or to disparage any other, faith or belief."

From the earliest days of the Nation, invocations have been addressed to assemblies comprising many different creeds. These ceremonial prayers strive for the idea that people of many faiths may be united in a community of tolerance and devotion. Even those who disagree as to religious doctrine may find common ground in the desire to show respect for the divine in all aspects of their lives and being. Our tradition assumes that adult citizens, firm in their own beliefs, can tolerate and perhaps appreciate a ceremonial prayer delivered by a person of a different faith.

The prayers delivered in the town of Greece do not fall outside the tradition this Court has recognized. A number of the prayers did invoke the name of Jesus, the Heavenly Father, or the Holy Spirit, but they also invoked universal themes, as by celebrating the changing of the seasons or calling for a "spirit of cooperation" among town leaders.

Respondents point to other invocations that disparaged those who did not accept the town's

prayer practice. One guest minister characterized objectors as a "minority" who are "ignorant of the history of our country," while another lamented that other towns did not have "God-fearing" leaders. Although these two remarks strayed from the rationale set out in *Marsh*, they do not despoil a practice that on the whole reflects and embraces our tradition. Absent a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose, a challenge based solely on the content of a prayer will not likely establish a constitutional violation. *Marsh*, indeed, requires an inquiry into the prayer opportunity as a whole, rather than into the contents of a single prayer.

Finally, the Court disagrees with the view taken by the Court of Appeals that the town of Greece contravened the Establishment Clause by inviting a predominantly Christian set of ministers to lead the prayer. The town made reasonable efforts to identify all of the congregations located within its borders and represented that it would welcome a prayer by any minister or layman who wished to give one. That nearly all of the congregations in town turned out to be Christian does not reflect an aversion or bias on the part of town leaders against minority faiths. So long as the town maintains a policy of nondiscrimination, the Constitution does not require it to search beyond its borders for non-Christian prayer givers in an effort to achieve religious balancing. The quest to promote "a `diversity' of religious views" would require the town "to make wholly inappropriate judgments about the number of religions [it] should sponsor and the relative frequency with which it should sponsor each," a form of government entanglement with religion that is far more troublesome than the current approach.

B. [This section of Justice Kennedy's opinion was joined only by Chief Justice Roberts and Justice Alito.]

Respondents further seek to distinguish the town's prayer practice from the tradition upheld in *Marsh* on the ground that it coerces participation by nonadherents. They and some amici contend that prayer conducted in the intimate setting of a town board meeting differs in fundamental ways from the invocations delivered in Congress and state legislatures, where the public remains segregated from legislative activity and may not address the body except by occasional invitation. Citizens attend town meetings, on the other hand, to accept awards; speak on matters of local importance; and petition the board for action that may affect their economic interests, such as the granting of permits, business licenses, and zoning variances. Respondents argue that the public may feel subtle pressure to participate in prayers that violate their beliefs in order to please the board members from whom they are about to seek a favorable ruling.

It is an elemental First Amendment principle that government may not coerce its citizens "to support or participate in any religion or its exercise." On the record in this case the Court is not persuaded that the town of Greece, through the act of offering a brief, solemn, and respectful prayer to open its monthly meetings, compelled its citizens to engage in a religious observance. The inquiry remains a fact-sensitive one that considers both the setting in which the prayer arises and the audience to whom it is directed.

The prayer opportunity in this case must be evaluated against the backdrop of historical practice. As a practice that has long endured, legislative prayer has become part of our heritage and tradition, part of our expressive idiom, similar to the Pledge of Allegiance, inaugural prayer, or the recitation of "God save the United States and this honorable Court" at the opening of this

Court's sessions. It is presumed that the reasonable observer is acquainted with this tradition and understands that its purposes are to lend gravity to public proceedings and to acknowledge the place religion holds in the lives of many private citizens, not to afford government an opportunity to proselytize or force truant constituents into the pews. That many appreciate these acknowledgments of the divine in our public institutions does not suggest that those who disagree are compelled to join the expression or approve its content.

The principal audience for these invocations is not the public but lawmakers themselves, who may find that a moment of prayer or quiet reflection sets the mind to a higher purpose and thereby eases the task of governing. To be sure, many members of the public find these prayers meaningful. But their purpose is largely to accommodate the spiritual needs of lawmakers and connect them to a tradition dating to the time of the Framers. For members of town boards and commissions, who often serve part-time and as volunteers, ceremonial prayer may also reflect the values they hold as private citizens. The prayer is an opportunity for them to show who and what they are without denying the right to dissent by those who disagree.

The analysis would be different if town board members directed the public to participate in the prayers, singled out dissidents for opprobrium, or indicated that their decisions might be influenced by a person's acquiescence in the prayer opportunity. No such thing occurred in the town of Greece. Respondents point to several occasions where audience members were asked to rise for the prayer. These requests, however, came not from town leaders but from the guest ministers, who presumably are accustomed to directing their congregations in this way and might have done so thinking the action was inclusive. Respondents suggest that constituents might feel pressure to join the prayers to avoid irritating the officials who would be ruling on their petitions, but this argument has no evidentiary support. Nothing in the record indicates that town leaders allocated benefits and burdens based on participation in the prayer, or that citizens were received differently depending on whether they joined the invocation or quietly declined. In no instance did town leaders signal disfavor toward nonparticipants. A practice that classified citizens based on their religious views would violate the Constitution, but that is not the case before this Court.

In their declarations in the trial court, respondents stated that the prayers gave them offense and made them feel excluded and disrespected. Offense, however, does not equate to coercion. Adults often encounter speech they find disagreeable; and an Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views in a legislative forum, especially where, as here, any member of the public is welcome in turn to offer an invocation reflecting his or her own convictions. If circumstances arise in which the pattern and practice of ceremonial, legislative prayer is alleged to be a means to coerce or intimidate others, the objection can be addressed in the regular course. But the showing has not been made here. Courts remain free to review the pattern of prayers over time to determine whether they comport with the tradition of solemn, respectful prayer approved in *Marsh*, or whether coercion is a real and substantial likelihood. But in the general course legislative bodies do not engage in impermissible coercion merely by exposing constituents to prayer they would rather not hear and in which they need not participate.

This case can be distinguished from the conclusions and holding of *Lee v. Weisman*. There the Court found that a religious invocation was coercive as to an objecting student. The

circumstances the Court confronted there are not present in this case and do not control its outcome. Nothing in the record suggests that members of the public are dissuaded from leaving the meeting room during the prayer, arriving late, or even, as happened here, making a later protest. Should nonbelievers choose to exit the room during a prayer they find distasteful, their absence will not stand out as disrespectful. And should they remain, their quiet acquiescence will not, in light of our traditions, be interpreted as an agreement with the words or ideas expressed. Neither choice represents an unconstitutional imposition as to mature adults, who "presumably" are "not readily susceptible to religious indoctrination or peer pressure."

In the town of Greece, the prayer is delivered during the ceremonial portion of the town's meeting. Board members are not engaged in policymaking at this time, but in more general functions, such as swearing in new police officers, inducting high school athletes into the town hall of fame, and presenting proclamations to volunteers, civic groups, and senior citizens. It is a moment for town leaders to recognize the achievements of their constituents and the aspects of community life that are worth celebrating. By inviting ministers to serve as chaplain for the month, and welcoming them to the front of the room alongside civic leaders, the town is acknowledging the central place that religion, and religious institutions, hold in the lives of those present. The inclusion of a brief, ceremonial prayer as part of a larger exercise in civic recognition suggests that its purpose and effect are to acknowledge religious leaders and the institutions they represent rather than to exclude or coerce nonbelievers. The prayer in this case has a permissible ceremonial purpose. It is not an unconstitutional establishment of religion.

Justice ALITO, with whom Justice SCALIA joins, concurring.

I write separately to respond to the principal dissent. According to the principal dissent, the town could have avoided any constitutional problem in either of two ways. First, the principal dissent writes, "[i]f the Town Board had let its chaplains know that they should speak in nonsectarian terms, common to diverse religious groups, then no one would have valid grounds for complaint."

Both Houses of Congress now advise guest chaplains that they should keep in mind that they are addressing members from a variety of faith traditions, and as a matter of policy, this advice has much to recommend it. But any argument that nonsectarian prayer is constitutionally required runs headlong into a long history of contrary congressional practice. From the beginning, as the Court notes, many Christian prayers were offered in the House and Senate, and when rabbis and other non-Christian clergy have served as guest chaplains, their prayers have often been couched in terms particular to their faith traditions.

Not only is there no historical support for the proposition that only generic prayer is allowed, but as our country has become more diverse, composing a prayer that is acceptable to all members of the community who hold religious beliefs has become harder and harder. It was one thing to compose a prayer that is acceptable to both Christians and Jews; it is much harder to compose a prayer that is also acceptable to followers of Eastern religions that are now well represented in this country. Many local clergy may find the project daunting, if not impossible, and some may feel that they cannot in good faith deliver such a vague prayer.

In addition, if a town attempts to go beyond simply recommending that a guest chaplain deliver a prayer that is broadly acceptable to all members of a particular community (and the groups represented in different communities will vary), the town will inevitably encounter sensitive problems. Must a town screen and, if necessary, edit prayers before they are given? If prescreening is not required, must the town review prayers after they are delivered in order to determine if they were sufficiently generic? And if a guest chaplain crosses the line, what must the town do? Must the chaplain be corrected on the spot? Must the town strike this chaplain (and perhaps his or her house of worship) from the approved list?

If a town wants to avoid the problems associated with this first option, the principal dissent argues, it has another choice: It may "invit[e] clergy of many faiths." "When one month a clergy member refers to Jesus, and the next to Allah or Jehovah," the principal dissent explains, "the government does not identify itself with one religion or align itself with that faith's citizens, and the effect of even sectarian prayer is transformed."

If, as the principal dissent appears to concede, such a rotating system would obviate any constitutional problems, then despite all its high rhetoric, the principal dissent's quarrel with the town of Greece really boils down to this: The town's clerical employees did a bad job in compiling the list of potential guest chaplains. The Greece clerical employee drew up her list using the town directory. If the task of putting together the list had been handled in a more sophisticated way, the employee would have realized that the town's Jewish residents attended synagogues on the Rochester side of the border and would have added one or more synagogues to the list. But the mistake was not done with a discriminatory intent. (I would view this case very differently if the omission of these synagogues were intentional.)

The informal, imprecise way in which the town lined up guest chaplains is typical of the way in which many things are done in small and medium-sized units of local government. In such places, the members of the governing body almost always have day jobs that occupy much of their time. The town almost never has a legal office and instead relies for legal advice on a local attorney whose practice is likely to center on such things as land-use regulation, contracts, and torts. When a municipality seeks in good faith to emulate the congressional practice on which our holding in *Marsh v. Chambers* was largely based, that municipality should not be held to have violated the Constitution simply because its procedure for lining up guest chaplains does not comply in all respects with what might be termed a "best practices" standard.

III.

While the principal dissent, in the end, would demand no more than a small modification in the procedure that the town of Greece initially followed, much of the rhetoric in that opinion sweeps more broadly. Indeed, the logical thrust of many of its arguments is that prayer is never permissible prior to meetings of local government legislative bodies. At Greece Town Board meetings, the principal dissent pointedly notes, ordinary citizens (and even children!) are often present. The guest chaplains stand in front of the room facing the public. "[T]he setting is intimate," and ordinary citizens are permitted to speak and to ask the board to address problems that have a direct effect on their lives. The meetings are "occasions for ordinary citizens to engage with and petition their government, often on highly individualized matters." Before a

session of this sort, the principal dissent argues, any prayer that is not acceptable to all in attendance is out of bounds.

The features of Greece meetings that the principal dissent highlights are by no means unusual. It is common for residents to attend such meetings, either to speak on matters on the agenda or to request that the town address other issues that are important to them. Nor is there anything unusual about the occasional attendance of students, and when a prayer is given at the beginning of such a meeting, I expect that the chaplain generally stands at the front of the room and faces the public. To do otherwise would probably be seen by many as rude. Finally, the fact that guest chaplains often began with the words "Let us pray" is also commonplace. In short, I see nothing out of the ordinary about any of the features that the principal dissent notes. Therefore, if prayer is not allowed at meetings with those characteristics, local government legislative bodies, unlike their national and state counterparts, cannot begin their meetings with a prayer. I see no sound basis for drawing such a distinction.

IV.

The principal dissent claims to accept the Court's decision in *Marsh*, but the acceptance of *Marsh* appears to be predicated on the view that the prayer in that case was little more than a formality to which the legislators paid scant attention. It is questionable whether the principal dissent accurately describes the Nebraska practice at issue in *Marsh*, but what is important is not so much what happened in Nebraska in the years prior to *Marsh*, but what happened before congressional sessions during the period leading up to the adoption of the First Amendment.

The first congressional prayer was emphatically Christian, and it was neither an empty formality nor strictly nondenominational. But one of its purposes, and presumably one of its effects, was not to divide, but to unite. The practice of beginning congressional sessions with a prayer was continued after the Revolution ended and the new Constitution was adopted. One of the first actions taken by the new Congress when it convened in 1789 was to appoint chaplains for both Houses.

This Court has often noted that actions taken by the First Congress are presumptively consistent with the Bill of Rights, and this principle has special force when it comes to the interpretation of the Establishment Clause. This Court has always purported to base its Establishment Clause decisions on the original meaning of that provision. Thus, in *Marsh*, we relied heavily on the history of prayer before sessions of Congress and held that a state legislature may follow a similar practice. There can be little doubt that the decision in *Marsh* reflected the original understanding of the First Amendment.

V.

This brings me to my final point. I am troubled by the message that some readers may take from the principal dissent's rhetoric and its highly imaginative hypotheticals. For example, the principal dissent conjures up the image of a litigant awaiting trial who is asked by the presiding judge to rise for a Christian prayer, of an official at a polling place who conveys the expectation that citizens wishing to vote make the sign of the cross before casting their ballots, and of an immigrant seeking naturalization who is asked to bow her head and recite a Christian prayer. Although I do not suggest that the implication is intentional, I am concerned that at least some

readers will take these hypotheticals as a warning that this is where today's decision leads — to a country in which religious minorities are denied the equal benefits of citizenship.

Nothing could be further from the truth. All that the Court does today is to allow a town to follow a practice that we have previously held is permissible for Congress and state legislatures. In seeming to suggest otherwise, the principal dissent goes far astray.

Justice THOMAS, with whom Justice SCALIA joins as to Part II, concurring in part and concurring in the judgment.

Except for Part II-B, I join the opinion of the Court, which faithfully applies *Marsh v. Chambers*. I write separately to reiterate my view that the Establishment Clause is "best understood as a federalism provision," and to state my understanding of the proper "coercion" analysis.

As I have explained before, the text and history of the Clause "resis[t] incorporation" against the States. If the Establishment Clause is not incorporated, then it has no application here, where only municipal action is at issue.

As an initial matter, the Clause probably prohibits Congress from establishing a national religion. The text of the Clause also suggests that Congress "could not interfere with state establishments." Construing the Establishment Clause as a federalism provision accords with the variety of church-state arrangements that existed at the Founding. At least six States had established churches in 1789.

The relationship between church and state in the fledgling Republic poses a special barrier to its mechanical incorporation against the States through the Fourteenth Amendment. Unlike the Free Exercise Clause, which "plainly protects individuals against congressional interference with the right to exercise their religion," the Establishment Clause "does not purport to protect individual rights." Instead, the States are the particular beneficiaries of the Clause. Incorporation therefore gives rise to a paradoxical result: Applying the Clause against the States eliminates their right to establish a religion free from federal interference, thereby "prohibit[ing] exactly what the Establishment Clause protected."

The most cogent argument in favor of incorporation may be that, by the time of Reconstruction, the framers of the Fourteenth Amendment had come to reinterpret the Establishment Clause as expressing an individual right. On this question, historical evidence from the 1860's is mixed. Given the textual and logical difficulties posed by incorporation, however, there is no warrant for transforming the meaning of the Establishment Clause without a firm historical foundation.

Even if the Establishment Clause were properly incorporated against the States, the municipal prayers at issue in this case bear no resemblance to the coercive state establishments that existed at the founding. In a typical case, attendance at the established church was mandatory, and taxes were levied to generate church revenue. Dissenting ministers were barred from preaching, and political participation was limited to members of the established church. This is not to say that the state establishments in existence when the Bill of Rights was ratified were uniform.

Notwithstanding these variations, both state and local forms of establishment involved "actual legal coercion."

None of these founding-era state establishments remained at the time of Reconstruction. But even assuming that the framers of the Fourteenth Amendment reconceived the nature of the Establishment Clause as a constraint on the States, nothing in the history of the intervening period suggests a fundamental transformation in their understanding of what constituted an establishment. There is no support for the proposition that the framers of the Fourteenth Amendment embraced modern notions that the Establishment Clause is violated whenever the "reasonable observer" feels "subtle pressure," or perceives governmental "endors[ement]."

Thus, to the extent coercion is relevant to the Establishment Clause analysis, it is actual legal coercion that counts — not the "subtle coercive pressures" allegedly felt by respondents.

Justice BREYER, dissenting.

The Court of Appeals did not hold that "the town may not open its public meetings with a prayer," or that "any prayers offered in this context must be blandly `nonsectarian.'" In essence, the Court of Appeals merely held that the town must do more than it had previously done to try to make its prayer practices inclusive of other faiths. And it did not prescribe a single constitutionally required method for doing so.

In my view, the Court of Appeals' conclusion and its reasoning are convincing. Justice KAGAN's dissent is consistent with that view, and I join it. I also here emphasize several factors that I believe underlie the conclusion that, on the particular facts of this case, the town's prayer practice violated the Establishment Clause.

First, Greece is a predominantly Christian town, but it is not exclusively so. Yet during the more than 120 monthly meetings at which prayers were delivered during the record period (from 1999 to 2010), only four prayers were delivered by non-Christians. And all of these occurred in 2008, shortly after the plaintiffs began complaining about the town's Christian prayer practice.

To be precise: During 2008, two prayers were delivered by a Jewish layman, one by the chairman of a Baha'i congregation, and one by a Wiccan priestess. The Jewish and Wiccan prayer givers were invited only after they reached out to the town to inquire about giving an invocation. The town apparently invited the Baha'i chairman on its own initiative. The inclusivity of the 2008 meetings, which contrasts starkly with the single-denomination prayers every year before and after, is commendable. But the Court of Appeals reasonably decided not to give controlling weight to that inclusivity, for it arose only in response to the complaints that presaged this litigation, and it did not continue into the following years.

Second, the town made no significant effort to inform the area's non-Christian houses of worship about the possibility of delivering an opening prayer. The evident reasons why the town consistently chose Christian prayer givers are that the Buddhist and Jewish temples were not listed in the Community Guide or the Greece Post and that the town limited its list of clergy almost exclusively to representatives of houses of worship situated within Greece's town limits.

Third, in this context, the fact that nearly all of the prayers given reflected a single

denomination takes on significance. The significance is that, in a context where religious minorities exist and where more could easily have been done to include their participation, the town chose to do nothing. Given that the town could easily have made efforts but chose not to, the fact that all of the prayers (aside from the 2008 outliers) were given by adherents of a single religion reflects a lack of effort to include others. And that is what I take to be a major point of Justice KAGAN's related discussion.

Fourth, the fact that the board meeting audience included citizens with business to conduct also contributes to the importance of making more of an effort to include members of other denominations. It does not, however, automatically change the nature of the meeting from one where an opening prayer is permissible under the Establishment Clause to one where it is not.

Fifth, it is not normally government's place to rewrite, to parse, or to critique the language of particular prayers. And it is always possible that members of one religious group will find that prayers of other groups are not compatible with their faith. Despite this risk, the Constitution does not forbid opening prayers. But neither does the Constitution forbid efforts to explain to those who give the prayers the nature of the occasion and the audience.

The U.S. House of Representatives, for example, provides its guest chaplains with guidelines, which are designed to encourage the sorts of prayer that are consistent with the purpose of an invocation for a government body in a religiously pluralistic Nation. The town made no effort to promote a similarly inclusive prayer practice here.

As both the Court and Justice KAGAN point out, we are a Nation of many religions. And the Constitution's Religion Clauses seek to "protec[t] the Nation's social fabric from religious conflict." The question in this case is whether the prayer practice of the town of Greece, by doing too little to reflect the religious diversity of its citizens, did too much, even if unintentionally, to promote the "political division along religious lines" that "was one of the principal evils against which the First Amendment was intended to protect."

In seeking an answer to that fact-sensitive question, "I see no test-related substitute for the exercise of legal judgment." Having applied my legal judgment to the relevant facts, I conclude, like Justice KAGAN, that the town of Greece failed to make reasonable efforts to include prayer givers of minority faiths, with the result that, although it is a community of several faiths, its prayer givers were almost exclusively persons of a single faith. Under these circumstances, Greece's prayer practice violated the Establishment Clause.

Justice KAGAN, with whom Justice GINSBURG, Justice BREYER, and Justice SOTOMAYOR join, dissenting.

I respectfully dissent from the Court's opinion because I think the Town of Greece's prayer practices violate that norm of religious equality — the breathtakingly generous constitutional idea that our public institutions belong no less to the Buddhist or Hindu than to the Methodist or Episcopalian. I do not contend that principle translates here into a bright separationist line. To the contrary, I agree with the Court's decision in *Marsh v. Chambers*. And I believe that a town hall need not become a religion-free zone. But still, the Town of Greece should lose this case. The practice at issue here differs from the one sustained in *Marsh* because Greece's town meetings

involve participation by ordinary citizens, and the invocations given — directly to those citizens — were predominantly sectarian in content. Still more, Greece's Board did nothing to recognize religious diversity: In arranging for clergy members to open each meeting, the Town never sought (except briefly when this suit was filed) to involve or in any way reach out to adherents of non-Christian religions. For over a decade, prayers steeped in only one faith, addressed toward members of the public, commenced meetings to discuss local affairs and distribute government benefits. In my view, that practice does not square with the First Amendment's promise that every citizen, irrespective of her religion, owns an equal share in government.

I.

To begin to see what has gone wrong in the Town of Greece, consider several hypothetical scenarios in which sectarian prayer — taken from this case's record — infuses governmental activities. None involves, as this case does, a proceeding that could be characterized as a legislative session, but they are useful to elaborate some general principles. In each instance, assume (as was true in Greece) that the invocation is given pursuant to government policy and is representative of the prayers generally offered in the setting:

• You are a party in a case going to trial; let's say you have filed suit against the government for violating one of your legal rights. The judge bangs his gavel to call the court to order, asks a minister to come to the front of the room, and instructs the individuals present to rise for an opening prayer. The clergyman faces those in attendance and says: "Lord, God of all creation,.... We acknowledge the saving sacrifice of Jesus Christ on the cross. We draw strength ... from his resurrection at Easter. Jesus Christ, who took away the sins of the world, through his dying and in his rising, he has restored our life. Amen." The judge then asks your lawyer to begin the trial.

• It's election day, and you head over to your local polling place to vote. As you and others wait to give your names and receive your ballots, an election official asks everyone there to join him in prayer. He says: "We pray this [day] for the guidance of the Holy Spirit as [we vote].... Let's just say the Our Father together. `Our Father, who art in Heaven, hallowed be thy name; thy Kingdom come, thy will be done, on earth as it is in Heaven....'" And after he concludes, he makes the sign of the cross, and appears to wait expectantly for prospective voters to do so too.

• You are an immigrant attending a naturalization ceremony to finally become a citizen. The presiding official tells you and your fellow applicants that before administering the oath of allegiance, he would like a minister to pray with you. The pastor steps to the front of the room, asks everyone to bow their heads, and recites: "[F]ather, son, and Holy Spirit — it is with a due sense of reverence and awe that we come before you seeking your blessing. You are a wise God, oh Lord, ... as evidenced in the plan of redemption that is fulfilled in Jesus Christ. We ask that you would give freely and abundantly wisdom to one and to all... in the name of the Lord and Savior Jesus Christ, who lives with you and the Holy Spirit, one God for ever and ever. Amen."

I would hold that the government officials responsible for the above practices — that is, for prayer repeatedly invoking a single religion's beliefs in these settings — crossed a constitutional line. I have every confidence the Court would agree. And even Greece's attorney conceded that something like the first hypothetical would violate the First Amendment. Why?

One glaring problem is that the government in all these hypotheticals has aligned itself with, and placed its imprimatur on, a particular religious creed. "The clearest command of the

Establishment Clause," this Court has held, "is that one religious denomination cannot be officially preferred over another." Justices have often differed about a further issue: whether and how the Clause applies to governmental policies favoring religion (of all kinds) over non-religion. But no one has disagreed with this much:

"[O]ur constitutional tradition, from the Declaration of Independence and the first inaugural address to the present day, has ruled out of order government-sponsored endorsement of religion ... where the endorsement is sectarian, specifying details upon which men and women who believe in a benevolent, omnipotent Creator are known to differ (for example, the divinity of Christ)." *Lee v. Weisman*, 505 U.S. 577, 641 (1992) (SCALIA, J., dissenting).

By authorizing prayers associated with a single religion — to the exclusion of all others — the government officials in my hypothetical cases have violated that foundational principle. They have embarked on a course of religious favoritism anathema to the First Amendment.

And making matters still worse: They have done so in a place where individuals come to participate in the institutions and processes of their government. A person goes to court, to the polls, to a naturalization ceremony — and a government official or his hand-picked minister asks her, as the first order of business, to stand and pray with others in a way conflicting with her own religious beliefs. Perhaps she feels sufficient pressure to go along — to rise, bow her head, and join in whatever others are saying: After all, she wants, very badly, what the judge or poll worker or immigration official has to offer. Or perhaps she is made of stronger mettle, and she opts not to participate in what she does not believe. She then must make known her dissent from the common religious view, and place herself apart from other citizens, as well as from the officials responsible for the invocations. And so a civic function brings religious differences to the fore: That proceeding becomes an instrument for dividing her from adherents to the community's majority religion, and for altering the very nature of her relationship with her government.

That is not the country we are, because that is not what our Constitution permits. Here, when a citizen stands before her government, whether to perform a service or request a benefit, her religious beliefs do not enter into the picture. The government she faces favors no particular religion, either by word or deed. And that government imposes no religious tests on its citizens, sorts none of them by faith, and permits no exclusion based on belief. When a person goes to court, a polling place, or an immigration proceeding — I could go on: to a zoning agency, a parole board hearing, or the DMV — government officials do not engage in sectarian worship, nor do they ask her to do likewise. They all participate in the business of government not as Christians, Jews, Muslims (and more), but only as Americans. Why not at a town meeting?

II.

In both Greece's and the majority's view, everything I have discussed is irrelevant here because this case involves "the tradition of legislative prayer outlined" in *Marsh v. Chambers*. They are right that, under *Marsh*, legislative prayer has a distinctive constitutional warrant by virtue of tradition. Relying on that "unbroken" national tradition, *Marsh* upheld (I think correctly) the Nebraska Legislature's practice of opening each day with a chaplain's prayer. And so I agree with the majority that the issue here is "whether the prayer practice in the Town of Greece fits within the tradition long followed in Congress and the state legislatures."

Where I depart from the majority is in my reply to that question. The town hall here is a kind of hybrid. Greece's Board indeed has legislative functions — and that means some opening prayers are allowed there. But much as in my hypotheticals, the Board's meetings are also occasions for ordinary citizens to engage with and petition their government, often on highly individualized matters. That feature calls for Board members to exercise special care to ensure that the prayers offered are inclusive. But the Board, and the clergy members it selected, made no such effort. Instead, the prayers given in Greece, addressed directly to the Town's citizenry, were more sectarian than anything this Court sustained in *Marsh*. For those reasons, the prayer in Greece departs from the legislative tradition that the majority takes as its benchmark.

First, the governmental proceedings at which the prayers occur differ significantly in nature and purpose. The Nebraska Legislature's floor sessions are of, by, and for elected lawmakers. Members of the public take no part in those proceedings; any few who attend are spectators only, watching from a high-up visitors' gallery. (In that respect, note that neither the Nebraska Legislature nor the Congress calls for prayer when citizens themselves participate in a hearing — say, by giving testimony relevant to a bill or nomination.) Greece's town meetings, by contrast, revolve around ordinary members of the community. Each and every aspect of those sessions provides opportunities for Town residents to interact with public officials. And the most important parts enable those citizens to petition their government. In the Public Forum, they urge (or oppose) changes in the Board's policies and priorities; and then, in what are essentially adjudicatory hearings, they request the Board to grant (or deny) applications for various permits, licenses, and zoning variances. So the meetings allow citizens to actively participate in the Town's governance — both shaping the community's policies and seeking their benefits.

Second (and following from what I just said), the prayers in these two settings have different audiences. In the Nebraska Legislature, the chaplain spoke to, and only to, the elected representatives. The same is true in the U.S. Congress and, I suspect, in every state legislature.

The very opposite is true in Greece: Contrary to the majority's characterization, the prayers there are directed squarely at the citizens. The chaplain of the month stands with his back to the Town Board; his real audience is the group he is facing — the members of the public. He begins with some version of "Let us all pray together." Often, he calls on everyone to stand and bow their heads, and he may ask them to recite a common prayer with him. In essence, the chaplain leads a highly intimate (albeit brief) prayer service, with the public serving as his congregation.

And third, the prayers themselves differ in their content and character. *Marsh* characterized the prayers as "in the Judeo-Christian tradition," and stated that the chaplain had removed all explicitly Christian references at a senator's request. And as the majority acknowledges, *Marsh* hinged on the view that "that the prayer opportunity ha[d] [not] been exploited to proselytize or advance any one faith"; had it been otherwise, the Court would have reached a different decision.

But no one can fairly read the prayers from Greece's Town meetings as anything other than explicitly Christian — constantly and exclusively so. From the time Greece established its prayer practice in 1999 until litigation loomed nine years later, all of its monthly chaplains were Christian clergy. And after a brief spell surrounding the filing of this suit, the Town resumed its practice of inviting only clergy from neighboring Protestant and Catholic churches. About

two-thirds of the prayers given over this decade or so invoked "Jesus," "Christ," "Your Son," or "the Holy Spirit"; in the 18 months before the record closed, 85% included those references. Many prayers contained elaborations of Christian doctrine or recitations of scripture.

Still more, the prayers betray no understanding that the American community is today, as it long has been, a rich mosaic of religious faiths. The monthly chaplains appear almost always to assume that everyone in the room is Christian. The Town itself has never urged its chaplains to reach out to members of other faiths, or even to recall that they might be present. And accordingly, few chaplains have made any effort to be inclusive; none has thought even to assure attending members of the public that they need not participate in the prayer session.

Those three differences, taken together, remove this case from the protective ambit of *Marsh*. That legislative prayer practice is not Greece's. None of the history *Marsh* cited supports calling on citizens to pray, in a manner consonant with only a single religion's beliefs, at a participatory public proceeding, having both legislative and adjudicative components. And so, contra the majority, Greece's prayers cannot simply ride on the constitutional coattails of *Marsh*. The Board's practice must, in its own particulars, meet constitutional requirements.

And the guideposts for addressing that inquiry include the principles of religious neutrality I discussed earlier. The government may not favor, or align itself with, any particular creed. And that is nowhere more true than when officials and citizens come face to face in their shared institutions of governance.

To decide how Greece fares on that score, think again about how its prayer practice works, meeting after meeting. The case, I think, has a fair bit in common with my earlier hypotheticals. Let's say that a Muslim citizen of Greece goes before the Board to share her views on policy or request some permit. But just before she gets to say her piece, a minister deputized by the Town asks her to pray "in the name of God's only son Jesus Christ." She must think that Christian worship has become entwined with local governance. And now she faces a choice — to pray alongside the majority or somehow to register her deeply felt difference. She is a strong person, but that is no easy call — especially given that the room is small and her every action will be noticed. She does not wish to be rude to her neighbors, nor does she wish to aggravate the Board members whom she will soon be trying to persuade. And yet she does not want to acknowledge Christ's divinity. So assume she declines to participate in the first act of the meeting — or even, as the majority proposes, that she leaves the room altogether. At the least, she becomes a different kind of citizen, one who will not join in the religious practice that the Town Board has chosen as reflecting its own and the community's most cherished beliefs. And she thus stands at a remove, based solely on religion, from her fellow citizens and her elected representatives.

Everything about that situation infringes the First Amendment. (And of course, it would do so no less if the Town's clergy always used the liturgy of some other religion.) That the Town Board selects, month after month and year after year, prayergivers who will speak in the voice of Christianity, and so places itself behind a single creed. That in offering those sectarian prayers, the Board's chosen clergy members repeatedly call on individuals, prior to participating in local governance, to join in worship that may be at odds with their beliefs. That the clergy thus put some residents to the unenviable choice of either pretending to pray like the majority or declining

to join its communal activity, at the very moment of petitioning their elected leaders. That the practice thus divides the citizenry, creating one class that shares the Board's religious beliefs and another (far smaller) that does not. And that the practice alters a dissenting citizen's relationship with her government, making her religious difference salient when she seeks to engage her elected representatives as would any other citizen.

None of this means that Greece's town hall must be prayer-free. "[W]e are a religious people," *Marsh* observed, and prayer draws some warrant from tradition in a town hall, as well as in Congress or a state legislature. What the circumstances here demand is the recognition that we are a pluralistic people too. When citizens of all faiths come to speak to their elected representatives in a legislative session, the government must take care to ensure that the prayers they hear will seek to include, rather than serve to divide. No more is required — but that much is crucial — to treat every citizen as an equal participant in her government.

And contrary to the majority's (and Justice ALITO's) view, that is not difficult to do. If the Town Board had let its chaplains know that they should speak in nonsectarian terms, then no one would have valid grounds for complaint. Priests and ministers, rabbis and imams give such invocations all the time. Or the Board might have invited clergy of many faiths to serve as chaplains, as Congress does. When one month a clergy member refers to Jesus, and the next to Allah or Jehovah — as the majority counterfactually suggests happened here, the government does not identify itself with one religion and the effect of even sectarian prayer is transformed. So Greece had multiple ways of incorporating prayer into its town meetings.

But Greece could not do what it did: infuse a participatory government body with one faith, so that citizens appearing before it become partly defined by their creed. In this country, when citizens go before the government, they go not as Christians or Muslims or Jews (or what have you), but just as Americans (or here, as Grecians). That is what it means to be an equal citizen, irrespective of religion. And that is what the Town of Greece precluded by identifying itself with a single faith.

III.

How, then, does the majority go so far astray, allowing the Town of Greece to turn its assemblies for citizens into a forum for Christian prayer? The error reflects two kinds of blindness. First, the majority misapprehends the facts of this case, as distinct from traditional legislative prayer. And second, the majority misjudges the essential meaning of the religious worship in Greece's town hall, along with its capacity to exclude and divide.

The facts here matter to the constitutional issue; indeed, the majority acknowledges that the inquiry — a "fact-sensitive" one — turns on "the setting in which the prayer arises and the audience to whom it is directed." But then the majority glides over those considerations as they relate to the Town of Greece. When the majority analyzes the "setting" and "audience" for prayer, it focuses almost exclusively on Congress and the Nebraska Legislature; it does not stop to analyze how far those factors differ in Greece's meetings. The majority thus gives short shrift to the gap between a legislative floor session involving only elected officials and a town hall revolving around ordinary citizens. And similarly the majority neglects to consider how the prayers in Greece are mostly addressed to members of the public, rather than to the lawmakers.

The chaplain faces the Town's residents and calls on them to pray together.

And of course — as the majority sidesteps as well — to pray in the name of Jesus Christ. In addressing the sectarian content of these prayers, the majority again changes the subject, preferring to explain what happens in other government bodies. The majority notes, for example, that Congress "welcom[es] ministers of many creeds," who commonly speak of "values that count as universal." But that case is not this one because in Greece only Christian clergy members speak, and then mostly in the voice of their own religion. So all the majority can point to is that the Board "represent[s] that it would welcome a prayer by any minister or layman who wishe[s] to give one." But that representation has never been publicized; nor has the Board ever provided its chaplains with guidance about reaching out to members of other faiths, as most state legislatures and Congress do. The majority thus errs in assimilating the Board's prayer practice to that of Congress or the Nebraska Legislature. Unlike those models, the Board is relentlessly noninclusive.

The not-so-implicit message of the majority's opinion — "What's the big deal, anyway?" — is mistaken. The content of Greece's prayers is a big deal, to Christians and non-Christians alike. Contrary to the majority's apparent view, such sectarian prayers are not "part of our expressive idiom" or "part of our heritage and tradition," assuming the word "our" refers to all Americans. They express beliefs that are fundamental to some, foreign to others — and because that is so they carry the ever-present potential to both exclude and divide. The majority, I think, assesses too lightly the significance of these religious differences, and so fears too little the "religiously based divisiveness that the Establishment Clause seeks to avoid." I would treat more seriously the multiplicity of Americans' religious commitments, along with the challenge they can pose to the project — the distinctively American project — of creating one from the many, and governing all as united.

IV.

When the citizens of this country approach their government, they do so only as Americans, not as members of one faith or another. And that means that even in a partly legislative body, they should not confront government-sponsored worship that divides them along religious lines. I believe, for all the reasons I have given, that the Town of Greece betrayed that promise. I therefore respectfully dissent from the Court's decision.