JURISPRUDENTIAL JUXTAPOSITIONS:
RESOLVING ESTABLISHMENT CLAUSE ISSUES AFTER
TOWN OF GREECE, N.Y. V. GALLOWAY

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I. INTRODUCTION

In *Town of Greece, New York v. Galloway*, the Supreme Court attempted to apply a First Amendment jurisprudential standard considered fractured, incoherent, and in need of a great deal of clarification.¹ This modern application of disarrayed First Amendment jurisprudence now allows for dangerously wide latitude in determining what violates the Establishment Clause.² The origins of these divisive standards of application developed from the first Establishment Clause test conceived by the Supreme Court.³

In *Lemon v. Kurtzman*,⁴ the United States Supreme Court established what is “arguably considered the operative test”⁵ through which to examine issues regarding violations of the Establishment Clause. However, over time the Court adopted several other tests to examine Establishment Clause cases.⁶ The most notable alternative tests adopted by the Court examined whether the government endorsed a religion or coerced others to support or participate in religion or its exercise thereof.⁷ Additionally, in *Marsh v. Chambers*,⁸ the Court

¹. 134 S. Ct. 1811 (2014). See, e.g., Van Orden v. Perry, 545 U.S. 677, 694 (2005) (Thomas, J., concurring) (“[W]hen the Court’s cases recognize that such symbols have religious meaning, they adopt an unhappy compromise . . . [that] provides no principled way to choose . . . worse, the incoherence of the Court’s decisions in this area renders the Establishment Clause impenetrable and incapable of consistent application.”); see also Utah Highway Patrol Ass’n v. Am. Atheists, Inc., 132 S. Ct. 21, 22-22 (2011) (Thomas, J., dissenting) (“And yet, six years after Van Orden, our Establishment Clause precedents remain impenetrable . . . [and] incapable of coherent explanation. It is difficult to imagine an area of the law in need of more clarity.”).

². See discussion infra Part III.


⁴. Id. at 612 (holding that statutes allowing state aid to parochial schools caused excessive entanglement between government and religion, thereby violating the Establishment Clause of the First Amendment).


⁶. See discussion infra Part II.

created the “historical practice” test, under which the Court may likely allow potentially violating practices if they existed at the time of the drafting of the First Amendment. In the recent case of Town of Greece, New York v. Galloway, the Court both diverged from the use of the Lemon test and expanded the Marsh exception to cover legislative prayer involving the public body.

In Galloway, plaintiffs filed an injunction alleging that the town of Greece’s practice of prayer before town board meetings violated the First Amendment’s Establishment Clause. In 1999, the then-elected town supervisor instituted a prayer practice similar to the one “he found meaningful while serving in the county legislature.” The town used unpaid volunteers who selected the prayer giver through an informal method, calling congregations in the local directory until they found an available minister. The town board in Greece did not “review the prayers in advance of the meetings,” or make any recommendations “as to their tone or content.” Many times, the given prayer at the town board meetings underscored civic and religious themes. Only after plaintiffs Susan Galloway and Linda Stephens

10. See Marsh, 463 U.S. at 790 (“[H]istorical 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.”); see also Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 297 (1888) (“[A]n act passed by the first Congress assembled under the Constitution . . . is contemporaneous and weighty evidence of its true meaning.”).
11. 134 S. Ct. 1811, 1825 (2014) (using the coercion test in deciding that the Town of Greece did not compel its citizens to engage in religious observance in violation of the Establishment Clause).
12. Id. at 1817.
13. Id. at 1816.
14. Id.
15. Id.
16. Id.
objected, stating the prayers violated their religious beliefs, did the town board invite speakers of other faiths to deliver an invocation.  

Upon review of the claim that the town board’s legislative prayer violated the Establishment Clause, the District Court granted summary judgment in favor of Greece, determining such practice was consistent within the First Amendment. The Second Circuit Court of Appeals reversed, holding “the totality of the circumstances presented the town’s prayer practice [and] identified the town with Christianity in violation of the Establishment Clause.” The Supreme Court granted certiorari to “decide whether the town’s prayer practice violated the Establishment Clause.”

In a split five-four decision, Justice Kennedy delivered the majority opinion, holding the town board’s act of opening meetings with legislative prayer did not violate the First Amendment’s Establishment Clause. The majority also held that the town did not compel its citizens to engage in religious observance, and that the prayer did not have to be nonsectarian to comply with the Establishment Clause. The majority further held that, similar to Marsh, if “interpreted ‘by reference to historical practices and understandings,'” the practice of opening legislative meetings with prayer did not violate the First Amendment. This comment suggests the Galloway majority erred in both the test used to determine the violation of the Establishment Clause and in applying the historical evidence exception laid out in Marsh. In doing so, this comment

17. See id. at 1852 (Kagan, J., dissenting) (recognizing that the town of Greece never “offered the chaplaincy to any non-Christian clergy or layman” until a few months before the filing of the suit.).
18. See id. at 1817 (observing that the District Court found no impermissible preference for Christianity; there was no authority for the proposition requiring Greece to invite clergy from congregations beyond its borders to obtain a minimum diversity; and rejected the theory that legislative prayer must be nonsectarian).
21. Id. at 1828.
22. Id. at 1827.
23. See Marsh v. Chambers, 463 U.S. 783, 795 (1983) (upholding the Nebraska State practice of legislative prayer as constitutionally permitted since such practice existed at the inception of the First Amendment).
25. Id. at 1828.
26. See discussion infra Part III.
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outlines the convoluted history of the First Amendment’s Establishment Clause, and explores the multitude of tests the Court typically uses to examine such cases. Second, this comment explains how the Galloway decision applied a poor test to determine Establishment Clause violations and misapplied precedent regarding the Marsh test, setting a dangerously broad precedent to examine future cases. Finally, this comment suggests the use of a test that homogenizes several different ideas of First Amendment jurisprudential thought and strictly limits the historical practice test derived from Marsh.

II. HISTORICAL BACKGROUND

The existence of the First Amendment originates from the Framers’ intent to avoid the “creation of a national church or financial and legal preference for one [religious] institution over other churches,” similar to the Church of England. The main purpose of the First Amendment is to keep “church and state . . . separate so that the legislative powers of the government reach actions only and not opinions.” The First Amendment provides, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” Through the Fourteenth Amendment, the First Amendment is “applicable to the States,” ensuring that the States shall not enact laws in violation of the First Amendment.

The Supreme Court decided the first Establishment Clause case over sixty years ago in Everson v. Board of Education. In the Everson Court’s majority

27. Wendell R. Bird, Freedom From Establishment and Unneutrality in Public School Instruction and Religious School Regulation, 2 HARV. J.L. & PUB. POL’Y 125, 127 (1979) (“By establishment of religion is meant the setting up or recognition of a state church, or at least the conferring upon one church of special favors and advantages which are denied to others.”) (citing T. Cooley, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW 224 (3rd ed. 1898)).

28. See Lee v. Weisman, 505 U.S. 577, 641 (1992) (Scalia, J., dissenting) (“Thus for example, in the Colony of Virginia, where the Church of England had been established, ministers were required by law to conform to the doctrine and rights of the Church of England; and all person were required to attend church and observe the Sabbath.”).

29. 16A AM. JUR. 2D Constitutional Law § 436 (2014).

30. U.S. CONST. amend. I.

31. See U.S. CONST. amend. XIV; see also Murdock v. Com. of Pennsylvania, 319 U.S. 105, 108 (1943) (“The First Amendment, which the Fourteenth makes applicable to the states.”); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (“The Fourteenth Amendment has rendered the legislatures of the States as incompetent as Congress to enact such laws.”).

32. 330 U.S. 1, 18 (1947) (holding that tax-raised funding for public transportation of children to parochial schools and general government services as any other school would benefit from did not violate the First Amendment).
opinion, Justice Hugo Black quoted Thomas Jefferson, stating, “[t]he clause against establishment of religion by law was intended to erect ‘a wall of separation between Church and State.’” 33 Additionally, the Court surmised that such a wall must “[b]e kept high and impregnable.” 34 In over sixty years since Everson, the Court established a multitude of standards with which to review possible violations of the Establishment Clause. 35 As a result, both modern legal scholars and Supreme Court Justices alike recognize that the “Constitutional standard for evaluating state action under the Clause” 36 is currently in disarray.

A. Creating the Three-Pronged Establishment Clause Test in Lemon v. Kurtzman

In Lemon, the Court established the first standardized, three-factor test to examine cases brought under the Establishment Clause. 37 In order for a government action to be valid under this test, it must “[f]irst . . . have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, 38 and; third, [it] must not foster ‘an excessive government entanglement with religion.’” 39 This test underscores the

34. Everson, 330 U.S. at 18 (“The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach.”); see also Alex Geisinger & Ivan E. Bodensteiner, An Expressive Jurisprudence of the Establishment Clause, 112 PENN ST. L. REV. 77, 81 (2007).
35. See Rupal M. Doshi, Nonincorporation of the Establishment Clause: Satisfying the Demands of Equality, Pluralism, and Originalism, 98 GEO. L.J. 459, 460 (2010) (noting the four main tests used to evaluate Establishment Clause cases, as well as many other applied tests and standards that appeared over time).
36. See Cynthia V. Ward, Coercion and Choice Under the Establishment Clause, 39 U.C. DAVIS L. REV. 1621, 1623 (2006) (“Over the half century that the Court has been deciding cases under the [Establishment] Clause, its muddled and inconsistent decisions have confounded scholars, lower courts, and at times, even members of the Court itself.”); see also Van Orden v. Perry, 545 U.S. 677, 692 (2005) (Scalia, J., concurring) (“I join the Chief Justice because I think [the holding] accurately reflects our current Establishment Clause jurisprudence – or at least the Establishment Clause jurisprudence we currently apply some of the time.”).
37. See Ward, supra, note 36, at 1623 (“The Court’s first formal methodology for analyzing Establishment Clause issues [is] the so-called Lemon Test.”).
39. Id. at 613 (quoting Walz v. Tax Comm’r, 397 U.S. 664, 674 (1970)).
idea of “strict separation” between Church and State as originally conceived of by Thomas Jefferson. Strict separation refers to the concept that Church and State shall not intermix with one another to the greatest extent possible. In *Lemon*, the Court recognized that the goal of the Establishment Clause was “to prevent, as far as possible, the intrusion of either [Church or State] into the precincts of each other.” Conversely, the Court noted, “[t]otal separation is not possible in an absolute sense. Some relationship between government and [religion] is inevitable.”

The *Lemon* Court held that the adoption of statutes providing financial support for secular material in nonpublic elementary schools and the supplementation of teachers’ salaries violated all three prongs of the newly derived test. However, the Court did not create a firm rule regarding application of the *Lemon* test, leaving it open to highly subjective interpretation in future cases. Adding to the confusion is the Court’s adoption of other tests to analyze violations of the Establishment Clause. Over the years, the *Lemon* test remains the authoritative standard, “as it has never been categorically overruled.”

Unfortunately, the *Lemon* test failed to establish a united

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41. See id. at 79. See also Douglas G. Smith, *Jefferson’s Retrospective on the Establishment Clause*, 26 Harv. J.L. & Pub. Pol’y 369, 372 (2003) (“The Court has assumed not only that Jefferson’s views have some relevance to the proper interpretation of the First Amendment, but also that Jefferson’s statements regarding ‘separation’ of Church and State [in his Danbury letter] connoted a rigid barrier between government and religion.”).


44. Id.

45. Id. at 614-24 (holding that although it is likely the statutes violate all three prongs, there is no need to examine them closely, for there is clearly excessive entanglement between government and religion).

46. Wallace v. Jaffree, 472 U.S. 38, 112 (1985) (Rehnquist, J., dissenting) (“[The *Lemon* Test] is a constitutional theory [with] no basis in the history of the amendment it seeks to interpret, is difficult to apply and yields unprincipled results.”).

47. See discussion infra Part II.B-D.

48. Jennifer L. Bryant, *Talking “Religious, Superstitious Nonsense” in the Classroom: When do Teachers’ Disparaging Comments About Religion Run Afoul of the Establishment Clause?*, 86 S. Cal. L. Rev. 1343, 1358 (2013) (“Despite this less-than-full embrace of *Lemon*, its three-part test has not been categorically overruled or replaced with any definitive alternative approach.”).
jurisprudential standard, and, as such, alongside the development of other potential methods of evaluation, created a great deal of contention amongst Justices.

As it currently stands, the modern Lemon test varies slightly from its original version. The Supreme Court, in Agostini v. Felton, combined the effect and entanglement prongs of the Lemon test so that only the purpose and effect prongs remained. The Agostini Court addressed the issue of whether the Establishment Clause prohibited New York City’s Board of Education from sending public school teachers to parochial schools to provide education. In delivering the opinion of the Court, Justice O’Connor opined that the practice, failing to meet the purpose or effect standard, did not violate the First Amendment. However, even with modification, the primary purpose of the test – to strictly separate Church and State – remains, and, to the chagrin of some Justices, the Supreme Court still applies it on occasion.
B. The Introduction and Adoption of the Endorsement Test in Lynch and Allegheny County

Thirteen years after the Court conceived the Lemon test, in Lynch v. Donnelly Justice O’Connor suggested a new “analytical framework” by which to review First Amendment cases. In her concurring opinion, O’Connor proposed the Court examine whether the government action in question was intending “to endorse or had the effect of endorsing [religion].” In that case, the Court analyzed whether or not a city-sponsored Christmas display featuring a nativity scene violated the Establishment Clause. The Court held in favor of the city, believing that no secular purpose existed in the nativity scene, nor did the display have any effect to advance or inhibit religion, given the circumstance of the Christmas holidays. O’Connor’s proposal mirrors the effect and purpose aspects of the Lemon test; however, the endorsement test interprets a government practice “in its unique circumstances” allowing for the possibility of a wide variety of results from one standardized test. Further, O’Connor believed the endorsement test interprets the contextual circumstance of the practice through the eyes of the “reasonable observer.”

The Court did not implement the endorsement test until almost five years after Lynch, in the case of County of Allegheny v. ACLU. In Allegheny, the Court decided if two holiday displays—a crèche outside the county courthouse,

58. Id. at 694.
59. Id. at 670.
60. Id. at 669-70.
61. See Hill, supra, note 56, at 497 (“[As] Justice O’Connor explained, courts should examine both what the government ‘intended to communicate’ and ‘what message the . . . display actually conveyed’; these subjective and objective components of the message correspond to the purpose and effect prongs of the Lemon test.”).
63. See Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 34 (2004); see also Capital Square Review and Advisory Bd. v. Pinette, 515 U.S. 753 (1995) (O’Connor, J., concurring in part) (“On the facts of this case, the reasonable observer would not fairly interpret the State’s tolerance of the Klan’s religious display as an endorsement of religion.”). Justice O’Connor, both in Elk Grove and Capital Square, clearly indicates the use of the “reasonable person” standard.
64. 492 U.S. 573 (1989).
and a Chanukah menorah next to a Christmas tree outside the city county building – violated the Establishment Clause. The Court, applying the endorsement test, held that the crèche, but not the menorah, violated First Amendment principles. The Court determined the Government could not use religious symbolism if: (1) it has the effect of endorsing religious beliefs; (2) historical context indicates endorsement of a belief; or (3) the government conveys or attempts to convey preference of a religious belief.

The endorsement test, as proposed by Justice O’Connor, added to the repertoire of jurisprudential standards an “approach to the Establishment Cause . . . that evaluates the neutrality of the government’s action.” However, the test is subject to criticism – primarily that the Court cannot reconcile what would be permissible under the test with traditional jurisprudential practices. In addition, it is difficult to establish the standard of the reasonable person when it comes to using O’Connor’s endorsement test. As such, even amidst the adoption of O’Connor’s endorsement test from Lynch, the Court could still not find a common standard of First Amendment jurisprudence. Instead, the

65. Id. at 578.

66. See id. at 574-75 (plurality opinion) (holding that it was not sufficiently likely that residents would perceive the Christmas tree, menorah, and a sign containing text declaring the city’s “salute to liberty” as endorsing a religion, but a crèche display historically demonstrates a secular allegiance).

67. 25 CAUSES OF ACTION 2d 221 Endorsement Test § 7 (2004) (“The government’s use of religious symbolism is unconstitutional if it has the effect of endorsing religious beliefs, that the effect of the government’s use of religious symbolism depends upon its context, and that the prohibition against governmental endorsement of religion precludes government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred.”).

68. See Geisinger & Bodensteiner, supra, note 34, at 81 (quoting CHEMERINSKY, supra note 40, at 1194).

69. Steven B. Epstein, Rethinking the Constitutionality of Ceremonial Deism, 96 COLUM. L. REV. 2083, 2174 (1996) (quoting County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 493 U.S. 573, 674 (1989) (Kennedy, J., concurring in part and dissenting in part) (“[e]ither the endorsement test must invalidate scores of traditional practices . . . or it must be twisted and stretched to avoid inconsistency with practices we know to have been permitted in the past.”).

70. See Joel S. Jacobs, Endorsement as “Adoptive Action:” A Suggested Definition of, And an Argument for, Justice O’Connor’s Establishment Clause Test, 22 HASTINGS CONS. L.Q. 29, 42 (1994) (discussing the main issue of the endorsement test as dealing with the objective observer standard).

71. See Geisinger & Bodensteiner, supra, note 34, at 86 (“Different versions of the symbolic endorsement approach can be found in Capitol Square Review and Advisory Board v. Pinette, [515 U.S. 753 (1995)], in which the Court held that it was a violation of the Free Speech Clause of the First Amendment to preclude the Ku Klux Klan from erecting a large
Court found yet more standards by which to measure the separation of Church and State.  

C. Lee v. Weisman: The Promulgation of the Coercion Test and Yet Another Jurisprudential Standard

Three years after the Court’s ruling in Allegheny, the Court adopted yet another potential standard to analyze cases under the Establishment Clause. In Lee v. Weisman, the Court introduced the coercion test, establishing that “at a minimum . . . government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way that establishes a state religion or religious faith, or tends to do so.” Justice Kennedy noted in his majority opinion that under the coercion test, government must not, whether directly or indirectly, “indoctrinate and coerce others” to support a religious view.

In the matter of Lee, the Court held that the Establishment Clause forbade a clerical member from offering prayers as part of an official public school graduation ceremony. The Court found that public and peer pressure to “stand . . . or maintain respectful silence,” coupled with a school district’s control over a graduation ceremony, created a “subtle and indirect, [pressure] as real as any overt compulsion.” In this way, the Lee Court recognized the possibility of both a narrow and broad interpretation of the coercion test application; however, the Court did not delve into the subtleties of either

Latin cross in the park across from the Ohio statehouse, and that allowing the display would not violate the Establishment Clause.

72. See discussion infra Part II.C-D.
74. Id. at 587.
75. Id. at 578; see also County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 659 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part) (advocating the use of the coercion test as a proper observation of what the Founding Fathers intended to restrict).
76. Weisman, 505 U.S. at 577.
77. Id. at 578.
78. Id. at 593.
80. Id. at 270; see also Weisman, 505 U.S. at 578 (holding the broad view that the State “may no more use [indirect means] to enforce orthodoxy than it may use direct means.”). Justice Scalia would later posit in his dissent that the coercion test should maintain a narrow view and only consist of forcible coercion, not the “psycho-coercion test” the Court seemingly adopts. Id. at 644 (Scalia, J., dissenting).
interpretation of the test. In decisions after Lee, the Supreme Court attempted to interpret the coercion test, seemingly upon their own predilections on the scope of the Establishment Clause. Even so, the lower courts still consistently apply a broad scope of the coercion test encompassing both direct and indirect coercion.

The jurisprudential approach in Lee is one of “accommodation,” arguing that “religion should be incorporated into government . . . government support for religion should be tolerated so long as the government does not discriminate [against different] religions.” Moreover, it must be noted that Lee did not suggest the coercion test as an independent test, but that the act of coercion could sufficiently establish a violation of Constitutional rights.

D. Marsh v. Chambers: The Arrival of the Historical Practice Test – Exception to the Scope of First Amendment Jurisprudence

If the number of First Amendment jurisprudential standards were not already complex enough, in Marsh v. Chambers the Supreme Court, “carved out an exception” as to when the jurisprudential standards apply. In Marsh,

81. See Peterson, supra, note 79, at 270. (“Scholars have argued that the coercion standard remains too imprecise and subject to case-by-case interpretation, making it even less predictable than the maligned Lemon test.”) (citing Steven G. Gey, When is Religious Speech Not “Free Speech”? 2000 U. ILL. L. REV. 379 (2000)).

82. Compare County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 659-60 (1989) (Kennedy, J., dissenting) (believing that direct coercion should be the deciding factor of the coercion test), with Weisman, 505 U.S. at 578 (“[T]he State may no more use social pressure to enforce orthodoxy than it may use direct means.”).


84. See, e.g., Newdow v. Rio Linda Union Sch. Dist, 597 F.3d 1007 (9th Cir. 2010).

85. See Geisinger & Bodensteiner, supra, note 34, at 87 (citing CHEMERINSKY, supra note 40, at 1196).


87. See Lee v. Weisman, 505 U.S. 577, 587 (1992) (noting that Lee could be decided without addressing the general constitutional framework in which the Lemon test was conceived).

88. See Gaylord, supra note 9, at 1029.

89. See Marsh v. Chambers, 463 U.S. 783, 795 (1983) (holding that “the unbroken practice” of funding a state chaplain for the invocation of the Nebraska State legislature was constitutional). The Court evaded any application of the Establishment Clause, believing the
the Court upheld the Nebraska State Legislature’s practice of opening state legislative sessions with prayer. In doing so, the Court created an additional test, in which a practice might violate any of the previously established tests.

In the majority opinion in *Marsh*, Chief Justice Burger rationalized the historical practice test in the context of tradition with the existence of the previously established Establishment Clause tests. Justice Burger did not overturn the tests, but noted that traditional practices are “simply a tolerable acknowledgement of beliefs widely held among the people of this country.” The majority further posited that the content of prayer should not be of concern when not “exploited to proselytize or advance any . . . faith or belief.” Determinably, the *Marsh* test is one of “impermissible intent . . . [assuming] legislative invocations are constitutional provided that the government neither intends to promote one faith . . . nor improperly uses the prayer opportunity to advance or disparage a [belief].”

The Court would later revisit the historical practice test in *County of Allegheny v. ACLU*, where Justice Blackmun, concerned about the far-reaching implications of Justice Kennedy’s dissenting proposal, felt the standard warranted address. The Court did not apply the historical practice test, but expounded on its limitations; Justice Blackmun stated that applying only the historical test, as Kennedy suggests, would render the Establishment Clause worthless.

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90. *Marsh*, 463 U.S. at 792.
91. *Id.* at 800-01 (Brennan, J., dissenting) (“I have no doubt that, if any group of law students were asked to apply the principles of *Lemon* to the question of legislative prayer [in *Marsh*], they would nearly unanimously find the practice to be unconstitutional.”).
92. *Id.* at 796 (Brennan, J., dissenting) (“The Court makes no pretense of subjecting Nebraska’s practice of legislative prayer to any of the formal “tests” that have traditionally 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 to accommodate legislative prayer.”).
93. *Id.* at 793.
94. *Id.* at 794-95.
95. See Gaylord, supra note 9, at 1028.
97. *Id.* at 602.
98. *Id.* at 604 (plurality opinion) (“Justice Kennedy’s reading of *Marsh* would gut the core of Establishment Clause . . . .”).
III. ANALYSIS

Prior to Galloway, the Court established that a Constitutional violation might occur if a government practice: (1) was secular and caused excessive entanglement with religion;\textsuperscript{99} (2) to the eyes of the reasonable observer, had the purpose or effect of endorsing religion;\textsuperscript{100} or (3) coerced others to support or acknowledge a religion or belief;\textsuperscript{101} unless (4) it comports with traditions of the country’s history.\textsuperscript{102} With this background, the Court in Galloway then turned to the question of whether opening a town board meeting with legislative prayer violated the First Amendment’s Establishment Clause.\textsuperscript{103}

After review of the facts, the Court concluded that the town of Greece did not violate the First Amendment, believing that opening a town board meeting with prayer was akin to the legislative prayer set aside in Marsh.\textsuperscript{104} Further, the Court opined that such prayer did not coerce its citizens to engage in religious observance.\textsuperscript{105} Even further, the Court held that the prayer did not have to be nonsectarian to comport with the Establishment Clause.\textsuperscript{106} Because of these findings, the Supreme Court reversed the judgment of the Second Circuit Court of Appeals, which had held that the prayer practice violated the First Amendment.\textsuperscript{107}

A. The Majority Opinion — Wrongly Applying Marsh: A Soggy Excuse of a Decision

The Galloway Court suggests that the rightful precedent to apply to this case is the historical practice test set forth in Marsh v. Chambers.\textsuperscript{108} However, in applying such precedent, the Court advocates an expansion of the definition

\textsuperscript{99} \textit{See generally} Lemon v. Kurtzman, 403 U.S. 602 (1971) (establishing the \textit{Lemon} test and setting up the initial three prong test). \textit{See also} Agostini v. Felton, 521 U.S. 203, 218 (1997) (folding the \textit{Lemon} test into the cause and effect prong and creating the modern version of the \textit{Lemon} test).

\textsuperscript{100} \textit{See} Allegheny, 492 U.S. at 630.


\textsuperscript{102} \textit{See} Marsh v. Chambers, 463 U.S. 783 (1983).

\textsuperscript{103} \textit{See} Town of Greece, N.Y. v. Galloway, 134 S. Ct. 1811, 1818 (2014).

\textsuperscript{104} \textit{Id.} at 1828.

\textsuperscript{105} \textit{Id.}

\textsuperscript{106} \textit{Id.} at 1820.

\textsuperscript{107} \textit{Id.} at 1828.

of “legislative body,” creating a new precedent that includes not only lawmakers but also the public. Further, Justice Kennedy’s opinion in Galloway wrongly supposes that the Marsh test is an independent test, the supposition of which the Court never acknowledges in either Marsh or in County of Allegheny v. ACLU. The dissent correctly recognizes that by applying the historical practice test, Justice Kennedy draws a poor analogy between the distinctly different cases of Marsh and Galloway. As addressed in the Respondents’ brief to the Court, “[a] state legislature [as in Marsh] enacts general legislation that impacts a large number of people. A town board, in contrast, addresses individual disputes and concerns involving land use and local spending priorities False.” In Marsh, the general public was not involved in the case – and although Justice Kennedy attempts to make that transition in Galloway, he makes no cognizable argument in support of his theory. Additionally, the prayer practice as it stands in Greece derived from when the county supervisor instituted the practice from his time serving in the county legislature. The Court fails to examine the test’s compatibility in a more public forum, in which the crux of the issue rests. Future applications of Justice

109. See generally id. (addressing the issue of legislative prayer with regards to a legislative body that represents its constituents, not one that incorporates the everyday public into its decision-making).

110. See County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 603 (1989) (“However history may affect the constitutionality of nonsectarian references to religion by the government, history cannot legitimate practices that demonstrate the government’s allegiance to a particular sect or creed.”); see also id. at 605 (“Justice Kennedy’s misreading of Marsh is predicated on a failure to recognize the bedrock Establishment Clause principle that, regardless of history, government may not demonstrate a preference for a particular faith, even he is forced to acknowledge that some instances of such favoritism are constitutionally intolerable.”); Marsh, 463 U.S. at 794-95 (holding that even in light of history, a practice must not be “exploited to proselytize and advance any one, or disparage any other, faith or belief”).

111. Galloway, 134 S. Ct. at 1842 (Kagan, J., dissenting) (“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.”).


113. See Galloway, 134 S. Ct. at 1819-20 (applying the Marsh historical practice test without once acknowledging the difference between the legislative body as defined in that case and the town board, which functions differently and involves members of the general public).

114. Id. at 1816.
Kennedy’s historical practice test, used alongside the coercion test he so often promotes,\textsuperscript{115} create a dangerously limited Establishment Clause jurisprudence.\textsuperscript{116} Justice Alito, in his concurring opinion, makes a poor attempt to dismiss this issue, writing, “[a]ll 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.”\textsuperscript{117} Hidden amongst Alito’s protest in the dissent, however, is the fact that he does not adequately address the difference between the legislative body in \textit{Marsh} and the legislative body composed of everyday citizens in \textit{Galloway}.\textsuperscript{118}

Furthermore, \textit{Galloway}’s majority opinion both misappliies and misinterprets the historical practice test defined in \textit{Marsh}.\textsuperscript{119} In \textit{Marsh}, the Court allowed for prayer practices “grounded in historic practice . . . [unless] the content of the prayer proselytize[s] or advance[s] any . . . faith or belief.”\textsuperscript{120} However, such a phrase is precisely what the \textit{Lemon} test, endorsement test, and to an extent, the coercion test, examine: whether a prayer practice proselytizes, advances, or demeans a religion. If these standards are violated, then it is unthinkable that the historical practice test, which is the “exception, not the rule”\textsuperscript{121} to Establishment Clause cases, applies. Similar to \textit{Marsh}, the case in

\begin{itemize}
\item \textit{Allegheeny}, 492 U.S. at 659-60 (Kennedy, J., dissenting) (believing that direct coercion should be the deciding factor of the coercion test).
\item \textit{Galloway}, 134 S. Ct. at 1834 (Alito, J., concurring).
\item \textit{generally id. at 1828-34 (Alito, J., concurring).}
\item \textit{Erwin Chemerinsky, The Jurisprudence of Justice Scalia: A Critical Appraisal}, 22 U. Haw. L. Rev. 385 (2000) (“Justice Scalia uses [his jurisprudence of ‘original meaning’] selectively when it leads to the conservative results he wants, but ignores when it does not generate the outcomes he desires.”). Scalia’s joining of Alito’s concurrence in \textit{Galloway} is in lockstep with his Conservative ideals, and “little under his approach will anything ever violate the Establishment Clause.” \textit{id.} at 389.
\item \textit{Galloway}, 134 S. Ct. 1811 (using the historical practice test as a primary rule and ignoring any in-depth analysis of proselytization), \textit{with Marsh v. Chambers}, 463 U.S. 783 (1983) (using the historical practice test as an exception to Establishment Clauses tests, unless the analysis of proselytization demonstrated exploitation of the practice).
\item \textit{Marsh}, 463 U.S. at 794-95.
\item \textit{County of Allegheny v. ACLU, Greater Pittsburgh Chapter}, 492 U.S. 573, 606 (1989) (“Indeed, not even under Justice Kennedy’s preferred approach can the Establishment Clause be transformed into an exception to this rule.”). In Justice Blackmun’s opinion, he reiterates that Justice Kennedy’s accusations of religious hostility “offensive” and “absurd,” and that “[p]erhaps it is Justice Kennedy himself who has slipped into a form of Orwellian newspeak when he equates the constitutional command of secular government with a prescribed orthodoxy.” \textit{id.} at 610-11.
\end{itemize}
Galloway violates all main tests previously developed by the Supreme Court to examine Establishment Clause cases.\footnote{122}

B. Prayer Does Not Have to Be Nonsectarian?

\textit{Sounds Like a Nonsequitur}

In the majority opinion of Greece \textit{v.} Galloway, Justice Kennedy clarified that “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.”\footnote{123} However, such a statement is not consistent with Supreme Court precedent – rather, it misinterprets a comment made in County \textit{v.} ACLU\footnote{124} and takes it to an extreme. If Justice Kennedy’s analysis were true in how he applied it in Galloway, the wall of separation between Church and State would be very low indeed.

Additionally, the Galloway majority states that the Allegheny Court “re-casted\footnote{125} Marsh to “permit only prayer that contained no overtly Christian references . . . which is irreconcilable with the facts of Marsh.”\footnote{126} Further, the Court holds that to insist on nonsectarian or ecumenical prayer “would force the legislatures . . . to act as supervisors and censors of religious speech.”\footnote{127} Justice Kennedy delves deeper, explaining that the Court in Marsh recognized that the “content of prayer is not of concern to judges, provided that there is no [indication] of exploitation to proselytize, advance, or disparage any other belief.”\footnote{128}
The majority’s dismissal of the dicta in Allegheny as “disputed when written and repudiated by later cases”\(^{129}\) is disconcerting, as there is no overt refutation that prayer should be nonsectarian. In fact, the circuit courts are split on the issue of sectarian prayer constitutionality.\(^{130}\) Some lower courts hold sectarian references as unconstitutional\(^{131}\) – that these prayers “involve government directly endorsing specific religions and belief.”\(^{132}\) In addition, Justice Sotomayor asserts during oral argument a point that demonstrates the inherently flawed, circular approach undermining Kennedy’s application of Marsh. “Unless you parse the prayers you can’t determine whether there’s proselytizing or damnation.”\(^{133}\) In trying to apply this test, and protect “the role religion plays in our society,”\(^{134}\) Justice Kennedy’s majority opinion continues to “gut” the very foundation of the Establishment Clause.\(^{135}\) The historical practice test, as it stands in Galloway, requires that the Court not “concern themselves with parsing prayer”\(^{136}\) unless there is indication of the prayer’s exploitation to advance or demean a religion. Since the latter cannot be determined without the former, it stands to reason that the only necessary analysis is to ask if the practice is mired in tradition – and the test of tradition is not a proper standard by which to analyze the First Amendment.

C. Direct and Indirect Coercion – A Compelling Argument for the “Compelling” Standard

Amongst a myriad of things the Court gets wrong is a misinterpretation of the coercion test. The Galloway majority admits, “It is an elemental First Amendment principle that government may not coerce its citizens ‘to support or participate in any religion or its exercise.’”\(^{137}\) However, the Court holds “on the record in this case that the town of Greece . . . compelled its citizens to

\(^{129}\) Id.


\(^{131}\) Id. at 30

\(^{132}\) Id.


\(^{134}\) Galloway, 134 S. Ct. at 1821.

\(^{135}\) County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 604 (1989) (plurality opinion) (Justice Kennedy’s reading of Marsh would gut the core of Establishment Clause . . . ”).

\(^{136}\) Galloway, 134 S. Ct. at 1821.

\(^{137}\) Id. at 1825.
engage in a religious observance.” In doing so, the Court appropriates the reasonable person standard used in Justice O’Connor’s endorsement test and applies it to the coercion test. Such application makes the coercion test, as limited as it is, even more difficult to apply. It raises more questions than it answers – such as how would the reasonable person determine what is subtly coercive? Would the reasonable person be judged under one standard or by age, as suggested in Lee v. Weisman? However, even judging Galloway by the standard of the reasonable person, it seems highly probable that, given the facts, the reasonable person might assume that always opening a meeting with a Christian prayer is advancing a religious belief.

Additionally, should First Amendment jurisprudence continue along this path, Justice Thomas’s concurring opinion raises one of the biggest concerns of all. Justice Thomas, a proponent of the coercion test only recognizing “actual, legal coercion,” also believes that the town of Greece did not compel its citizens to support or profess a belief for any particular faith. Although the court previously recognized the dangers of both indirect and direct coercion, Justices Scalia and Kennedy also favor the same definition of coercion that only acknowledges it in the strictest sense.

In concert with the Marsh test, adopting a coercion standard that only recognizes an overt attempt at coercion would further “gut the Establishment

138. Id.
140. See Lee v. Weisman, 505 U.S. 577, 578 (1992) (“A reasonable dissenter of high school age could believe that standing or remaining silent signified her own participation in, or approval of, the group exercise, rather than her respect for it.”).
141. See Galloway, 134 S. Ct. at 1841 (Kagan, J., dissenting) (noting that there were many things the town of Greece could have done, such as: (1) letting the chaplains know to speak in nonsectarian terms; (2) reach out to members of minority religious groups, as Congress does; or (3) actually invite members of different faiths before the complaints were brought).
142. Id. at 1838 (Thomas, J., concurring in part) (“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 in this case . . .”).
143. See Weisman, 505 U.S. at 578 (holding the broad view that the State “may no more use [indirect means] to enforce orthodoxy than it may use direct means.”).
144. See id. at 644 (Scalia, J., dissenting) (arguing that the coercion test should maintain a narrow view and only consist of forcible coercion, not the “psycho-coercion test” the Court adopts); see also County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 659-60 (1989) (Kennedy, J., dissenting) (believing that direct coercion should be the deciding factor of the coercion test).
Clause to the point where it would be nothing more than mere decorum in the United States Constitution. Under these conjoined tests, a government practice would only violate the Establishment Clause if the government forcibly coerced an individual into supporting or believing in a religion. The current idea raised by the majority, if the Court’s jurisprudence remains constant, would raze the wall of separation between Church and State to the ground.

IV. SOLUTION

A common theme among Justices and legal scholars is the recognition of the chaotic and confusing nature of tests surrounding the Establishment Clause. It is the confusing nature of these tests, coupled with the many standards advocated by different Justices, that results in the serious misapplication and misunderstandings seen in Galloway. In order to resolve the current state of confusion over First Amendment jurisprudence, the Court must apply a unified standard by which to examine such cases. And in order to resolve the current trouble with the Establishment Clause, the Court must adopt a test that is universally applicable, and does not require a new test for every alien situation it encounters.

To mend the currently fractured state of analysis under the Establishment Clause, this comment suggests implementing and improving upon a previously proposed two-factor test. In this test developed by Cynthia Ward, the Court should: (1) first apply the direct and indirect coercion test – if there is coercion under either standard, the act is a violation; (2) second, if no coercion exists, the Court should then apply the endorsement test – asking if a reasonable person would construe the government action as endorsing or construing a preference for a religious belief. This comment also suggests an additional third prong to satiate the members of the Court concerned about the historical practices of the nation: (3) if no coercion exists and the act is one so traditionally embedded in the nation’s history that no reasonable person would consider them an endorsement, the Court should then apply a “national tradition” exception. However, this test must be strictly applied, only relevant

146. See Ward, supra, note 36, at 1665 (explaining a test enjoining both the historical practice and endorsement tests).
147. Id.
148. Id.
149. Id.
to practices proved to have a history of tradition, and not analogized from traditional practices to newly created practices such as it was in Galloway.

By establishing this three-prong test, the Court can ensure that the separation between Church and State remains intact without envisioning a new standard of application for every new case encountered. In addition, Justices Kennedy, Thomas, and Scalia can rest easy, knowing that “In God We Trust” will remain on the nation’s currency, and that the traditional opening of Supreme Court sessions is not in jeopardy.150

V. CONCLUSION

The case of Greece v. Galloway is itself a compelling argument for the need to restructure the deciding tests of the Establishment Clause. It is commendable that the Court attempts to strike a balance between too much and too little separation between Church and State. However, despite doing so, the current state of First Amendment jurisprudence remains in shambles. It is possible that by merging the various theories of the Lemon, endorsement, and coercion tests, the Court can now adopt a unified test that allows for traditional, historic practices while maintaining a standard that effectively creates a wall of separation between Church and State. A test that examines both coercion and endorsement of religion does not cause an overt negativity or latent hostility towards religion, but merely respects the primary goals of the Establishment Clause.151

As James Madison once warned,

[T]here remains in [American states] a strong bias towards the old error, that without some sort of alliance or coalition between Gov[ernment] & religion neither can be duly supported. Such indeed is the tendency to such a coalition, and such is the corrupting influence on both parties, that the danger cannot be too carefullyguarded ag[ain]st.152

150. Allegheny, 492 U.S. at 602 (plurality opinion) (“Justice [Kennedy] asserts, such practices such as our national motto (‘In God We Trust’) and our Pledge of Allegiance (with the phrase ‘under God,’ added in) are in danger of validity.”).

151. See Doshi, supra, note 35, at 466 (“[Either Hamilton or Madison] believed the security of the minority depended on the diversity of society. Every sect would be free to believe and practice according to its religious tenets because the society would not have a dominating majority. This would, of course, be impossible if Congress established a national religion or even preferred one religion to another.”).
