

WILL THE LEGISLATURE PLEASE BOW THEIR HEADS?  
HOW “TOWN OF GREECE V. GALLOWAY” CAN RESET  
LEGISLATIVE PRAYER JURISPRUDENCE...AND WHY  
IT IS NECESSARY

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To debate whether the crimes of the British Crown were atrocious enough to justify a move toward independence, the First Continental Congress convened in 1774.<sup>1</sup> Before their deliberations that would decide the future of what would become the United States, they bowed their heads and following the words of a paid chaplain, they prayed.<sup>2</sup> Fifteen years later, after winning independence from the British Empire, one of the first orders of business for the First Congress of the newly formed United States of America was to adopt a policy of hiring a chaplain to open each session with a prayer.<sup>3</sup> The tradition adopted by those early American legislative bodies would continue at the federal and state level over the next two centuries, the constitutionality of the prayer practices going largely unquestioned.<sup>4</sup>

That changed in 1983. A challenge to a state legislature’s practice of employing a paid chaplain to open each legislative workday with a prayer reached the Supreme Court.<sup>5</sup> In the landmark case, *Marsh v. Chambers*, the Court found that the unique history of

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1. *Marsh v. Chambers*, 463 U.S. 783, 787 (1983).

2. *Id.* at 787-88.

3. *Id.* at 788. The Court noted that both Houses of Congress in their initial session adopted an official policy of prayer and established a committee to select chaplains. Shortly thereafter, a statute, 1 Stat. 70-71, was passed to provide payment for the chaplains.

4. *Id.* at 788-89, n. 10. A footnote in the *Marsh* opinion does cite to an instance in the 1850s where there was “sundry petitions praying Congress abolish the office of chaplain.” *Id.* at 788 n.10. The request was considered by the Senate Committee on the Judiciary and ultimately decided that the practice did not violate the Establishment Clause because “a rule permitting Congress to elect chaplains is not a law establishing a national church.” *Id.* More noteworthy, the Senate Committee apparently reasoned that the Founding Fathers “could not have intended the First Amendment to forbid legislative prayer or viewed prayer as a step toward an established church,” reasoning that would be key to their conclusion. *Id.*

5. *Id.* at 783.

“legislative prayer,” which extended back to the founding of the country, including the framing of the First Amendment, was outside the scope of the Amendment’s Establishment Clause protections.<sup>6</sup> The Court concluded that because the Framers had employed the practice of paying chaplains and opening their day with a prayer, such challenged practices should be exempted from traditional First Amendment analysis.<sup>7</sup>

As many scholars have noted, the *Marsh* decision is unique in its creation of an exception to traditional Establishment Clause analysis.<sup>8</sup> Since the ruling, legislative prayer has seemingly become a settled issue in constitutional law, as no challenge to a legislature’s praying practice has made it to the Supreme Court since. In a time of continuing concern over the separation of church and state,<sup>9</sup> the Supreme Court should assert a standard for evaluating this controversial practice, such as the Endorsement Test, instead of the current state of a carved-out exception. The Court can fix this broken area of First Amendment law this term.<sup>10</sup> For the first time in thirty years, the issue of legislative prayer will return to the Court in *Town of Greece v. Galloway*.<sup>11</sup>

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6. *Marsh*, 463 U.S.at 792.

7. *Id.* at 786-92 (the Court was satisfied that the Framers’ actions revealed their intent).

8. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1225-26 (3d ed. 2006).

9. A poll conducted in April 2013 by the organization “YouGov” demonstrates the continued conflict over the proper role that religion should play in government. In response to the question: “Which comes closest to your view about religion and government in the United States?” Many (37%) think the government has “gone too far” in separating church and state, while slightly less (29%) think that the mixing of government and religion has gone too far. Few (17%) think the issue is settled, responding that the government strikes “a good balance” in terms of separation of church and state with about the same amount responding that they were unsure (16%). In response to other questions, a strong majority opposed establishment of any specific religion and also believed that the Constitution barred states from doing so on their own. Omnibus Poll, YOUGOV (Apr. 3-4, 2013), [http://big.assets.huffingtonpost.com/toplines\\_churchstate\\_0403042013.pdf](http://big.assets.huffingtonpost.com/toplines_churchstate_0403042013.pdf).

10. Lyle Denniston, *Court to Rule on Government Prayer*, SCOTUSBLOG (May 20, 2013, 12:05 PM), <http://www.scotusblog.com/2013/05/court-to-rule-on-government-prayer/>.

11. Adam Liptak, *Justices Take Case on Prayer at Town Board Meetings, and a Patent Dispute*, N.Y. TIMES, May 20, 2013, <http://www.nytimes.com/2013/05/21/us/politics/justices-take-case-on-prayer-at-town-board-meetings.html>.

This Article argues that the exception carved out for legislative prayer in *Marsh v. Chambers* is inconsistent with Establishment Clause jurisprudence and should be replaced by an actual legal test. First, this Article discusses the holding of *Marsh* and how the unique grounds in which the Court decided the case have in effect carved out an exception for legislative prayer from normal Establishment Clause analysis. Next, it discusses why legal consistency demands that the Supreme Court assert a test for evaluating legislative prayer. This article will then argue that the case before the Supreme Court during its 2013-2014 term, *Town of Greece v. Galloway*, gives the Court the opportunity to fix this exception to its Establishment Clause jurisprudence. The Court can fix the exception by asserting a legal test and bringing the practice of legislative prayer into a place of legal certainty. The test that the Court should assert for this case and all future legislative prayer cases should be the “Endorsement Test,” as it has become the chosen test for the Court in evaluating abstract questions of whether governmental action has the effect of religious establishment.<sup>12</sup> It will further argue that despite being subjective, the Endorsement Test would effectively bring order to an ignored area of law. Finally, this Article concludes that by employing the Endorsement Test and looking at the totality of circumstances in a given case, the Town of Greece’s legislative prayer practice should be struck down and the Second Circuit’s decision affirmed, bringing certainty into this unenforced area of law.

I. THE ESTABLISHMENT CLAUSE’S LEGISLATIVE PRAYER LOOPHOLE:  
 “DEEPLY EMBEDDED IN THE HISTORY AND TRADITION OF THIS  
 COUNTRY”

During those first days of the United States of America, Congress finalized the language of the Bill of Rights—the ten proposed Amendments that would guarantee and protect what the Founders considered fundamental rights of the people from the federal government.<sup>13</sup> As they debated the language of those historic amendments, Congress would often begin their day with a prayer led by a

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12. In a recent notable Establishment Clause case, *Van Orden v. Perry*, the Court discussed in-depth the ascension of the Endorsement Test as an alternative to the old Lemon Test, employing it to conclude that a passive display of the Ten Commandments on the grounds of the Texas State Capitol did not violate the First Amendment. 545 U.S. 677, 687-88 (2005).

13. *Marsh v. Chambers*, 463 U.S. 783, 788 (1983).

paid chaplain.<sup>14</sup> In fact, five months before the Bill of Rights debate began, both Houses of Congress adopted an official prayer practice, and just three days before the debate, Congress passed a statute authorizing the payment of chaplains.<sup>15</sup> This inspired a tradition that has since been copied at the federal and state level for the past two centuries of legislators asking for divine help and guidance as they undertake their important work in governing.<sup>16</sup>

In the early 1980s, the Nebraska legislature was seemingly no different than any of its state-level counterparts across the country. It would begin each session with a prayer offered by a chaplain, selected and hired by an executive board of the legislators, and paid through public funds.<sup>17</sup> A member of the legislature, Ernest Chambers, filed suit seeking to enjoin enforcement of the practice because it violated the Establishment Clause of the First Amendment.<sup>18</sup> In a 6-3 decision, the Court upheld the practice of both the legislature's employment of a paid chaplain and the actual practice of the chaplain leading the state legislature in prayer.<sup>19</sup>

The crux of the decision was the Court finding that the practice of legislators collectively praying as a body was so deeply rooted in the nation's history that it could not have been understood by the Framers to be prohibited by the Establishment Clause.<sup>20</sup> By tracing the roots of the legislative prayer from the days before independence, up through the writing of the Bill of Rights, and continuing to the modern day at the state and federal levels, the Court found that the prevalence and history of the practice justi-

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14. *Id.*

15. *Id.*

16. Jeremy W. Peters, *Give Us This Day, Our Daily Senate Scolding*, N.Y. TIMES, Oct. 6, 2013, <http://www.nytimes.com/2013/10/07/us/politics/senate-chaplain-shows-his-disapproval-during-morning-prayer.html> (During the government shutdown of Fall 2013, the Senate chaplain, Barry C. Black, gained notoriety for chastising the legislature's inability to come together. Using phrases such as: "stop the madness," and "deliver us from the hypocrisy of attempting to sound reasonable while being unreasonable," Mr. Black's daily sermons quickly gained a following as encapsulating the outrage, disgust, and frustration of the American people with their government that shut itself down over budget negotiations).

17. *Marsh*, 463 U.S. at 784-85.

18. *Id.* at 785.

19. *Id.* at 793.

20. *Id.* at 788-89 ("clearly the men who wrote the First Amendment did not view paid legislative chaplains and opening prayers as a violation of that Amendment").

fied the conclusion that the prayer did not violate the Establishment Clause.<sup>21</sup>

Although the *Marsh* opinion acknowledged that a long and embedded history of a practice, such as legislative prayer, does not automatically shelter it from being a constitutional violation, the six-member majority refused to go much further in its legal analysis. The majority refused to assert or claim that the practice of legislative prayer passed any existing legal test.<sup>22</sup> The Court felt it was enough that the Framers had engaged in the practice of employing a chaplain to lead a prayer before the start of the legislative work day for the finding that there was no “establishment” of state religion or legal issue worthy of a test.<sup>23</sup> Going further, the Court did not feel the need to analyze any of the content of the prayer unless there was an “indication that the prayer opportunity ha[d] been exploited to proselytize or advance any one, or to disparage any other, faith or belief.”<sup>24</sup>

The consequences of the Court’s dismissal of the challenge based mainly on an “exception” because a practice had its roots in historical tradition were not lost on the dissent.<sup>25</sup> The dissenting justices observed that the majority made no pretense of subjecting Nebraska’s practice of legislative prayer to any of the formal “tests” of the Establishment Clause, and instead, simply carved out an exception to the constitutional prohibition against government entanglement with religion.<sup>26</sup> The dissent argues for application of the most prevalent Establishment Clause analysis, the *Lemon* test, and predictably concludes that legislative prayer fails the test, falling short of constitutional muster.<sup>27</sup> Legal historians and scholars have noted the peculiarity of the Court’s reliance on history to escape applying existing legal doctrine.<sup>28</sup>

21. *Id.*

22. *Marsh*, 463 U.S.at 790.

23. *Id.* at 794-95.

24. *Id.* at 794-95. The Court even went on to say that the “unbroken practice for two centuries in the National Congress and for more than a century in Nebraska and in many other states gives abundant assurance that there is no real threat ‘while this Court sits.’” *Id.* at 795.

25. *Marsh*, 463 U.S. at 796-97 (Brennan, J., dissenting).

26. *Id.*

27. *Id.*

28. CHEMERINSKY, *supra* note 8, at 1226 (recognizing that “it is notable that the Court did not apply the *Lemon* test,” and that by “focusing exclusively on history,” the Court avoided the Establishment Clause issues that legislative prayer would seem to implicate).

## II. THE RISE OF THE ENDORSEMENT TEST IN ESTABLISHMENT CLAUSE JURISPRUDENCE

The question as to what point government entanglement with religion violates the First Amendment has been a struggle the Court has grappled with since the nation's inception.<sup>29</sup> In 1971, the Court handed down the landmark decision of *Lemon v. Kurtzman*, a case in which the Court established a three-pronged approach to evaluating legislation concerning government and religion.<sup>30</sup> The *Lemon* test would become the dominant analytical framework used by the Court Establishment Clause jurisprudence for more than a decade.<sup>31</sup>

### A. *The O'Connor Concurrence*

In 1984, however, the Court ruled on *Lynch v. Donnelly*, a case concerning the legality of a municipality's nativity scene display.<sup>32</sup> The Court ruled in favor of the town, finding that the crèche display<sup>33</sup> did not violate the Establishment Clause because it had a secular purpose, and was at most, a passive representation of religion.<sup>34</sup> Significantly, the decision's lasting legacy has not been the conclusion of the majority, but the reasoning of the concurring Justice Sandra Day O'Connor.

Justice O'Connor penned an influential concurrence as she foresaw the increasing complexity of trying to evaluate govern-

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29. *Id.* at 1192 (discussing the three major competing approaches to the Establishment Clause, illustrating the difficulty the Court has had with settling on how to deal with holding the line between government and religion).

30. *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971). The Court in this case established the famous and often-used (for a time) *Lemon* test, which was a three-pronged approach that evaluated legislation by asking three questions. *Id.* at 612. First, whether the government's action has a secular legislative purpose. *Id.* Second, whether the government's action must not have the primary effect of either advancing or inhibiting religion. *Id.* And finally, whether the government's action results in an "excessive government entanglement" with religion. *Id.* at 613.

31. CHEMERINSKY, *supra* note 8, at 1205-06 (discussing the Court's application of the *Lemon* test over time).

32. *Lynch v. Donnelly*, 465 U.S. 668 (1984).

33. A crèche is a set of statues usually displayed during the Christmas season that represents the birth of Jesus Christ. *Crèche—Definition and More*, MERRIAM-WEBSTER DICTIONARY (2013), available at <http://www.merriam-webster.com/dictionary/creche>.

34. *Lynch*, 465 U.S. at 686.

ment entanglement with religion.<sup>35</sup> She recognized the need for an altered *Lemon* test, which focused on the final two prongs that analyzed whether the government “endorsed” or “disproved” religion, instead of a test that was designed to focus on evaluating statutory entanglement.<sup>36</sup> Further, the *Lemon* test had become increasingly frustrating to apply, as a recent Court decision had said that it “provides no more than a helpful signpost in dealing with Establishment Clause challenges.”<sup>37</sup> Realizing the increasing complexity of the relationship between government actions and religious support, she argued that the Endorsement Test would ask whether a reasonable person would think that his government is either approving or disapproving of a certain religion.<sup>38</sup>

### *B. The Endorsement Approach Rises*

In the years following the *Lynch* decision, the Endorsement Test approach slowly became influential in the Court’s Establishment Clause cases. In *Wallace v. Jaffree*, the Court struck down an Alabama statute that set aside a minute for silent prayer at the beginning of each school day. The Court reasoned that such a practice indicated that the State favored the practice of prayer, and “such an endorsement is not consistent with the established principle that government must pursue a course of complete neutrality toward religion.”<sup>39</sup> Likewise, in *Grand Rapids v. Ball*, an educational program that advanced religious education was struck down, because it had the principle effect of conveying a “powerful symbol of state endorsement and encouragement of the religious beliefs.”<sup>40</sup> Finally, in *Texas Monthly, Inc. v. Bullock*, the Court con-

35. *Id.* at 687-88 (O’Connor, J., concurring).

36. *Id.*

37. *Id.* at 689 n.1 (quoting *Mueller v. Allen*, 463 U.S. 388, 394 (1983)).

38. *See* *County of Allegheny v. ACLU*, 492 U.S. 573, 592-594 (1989) (detailing the numerous cases in the years in between *Lynch* and *County of Allegheny* in which the Court had used the Endorsement Test advocated by Justice O’Connor’s concurrence).

39. *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985). Although the Court referred to the test it employed as the “Secular Purpose Test,” it is clear from the language used by the decision that the O’Connor approach advocated in *Lynch* was gaining steam as part of the evaluation as to whether the statute had a secular purpose.

40. *Sch. Dist. of City of Grand Rapids v. Ball*, 473 U.S. 373, 392 (1985) *overruled by* *Agostini v. Felton*, 521 U.S. 203 (1997). This case was overruled by the *Agostini* decision because the Court said that the understanding of what constitutes an impermissible advancement of religion had changed. *Id.* The Court no longer held the position that a “Shared Time” program, such as the one in *Ball*,

sidered a Texas tax provision that granted religious periodicals an exemption from state sales taxes.<sup>41</sup> In striking down the sales tax as violating the Establishment Clause, the Court once again noted the “blatant endorsement” of religion in evaluating the legislation’s secularity.<sup>42</sup>

### C. *The Endorsement Approach Triumphs*

The Court’s most extensive discussion of the legacy of *Marsh* and the use of the Endorsement Test occurred in *County of Allegheny v. American Civil Liberties Union*.<sup>43</sup> The case involved a challenge to a crèche prominently displayed outside Pittsburgh’s Grand Staircase located at the Allegheny County Courthouse and a challenge to a menorah placed outside Pittsburgh’s City-County Building.<sup>44</sup> After several years of putting up the displays during the holiday season, the ACLU brought suit against the county claiming that both the crèche and menorah displays violated the Establishment Clause.<sup>45</sup>

Instead of carving out a *Marsh*-like Establishment Clause exception for traditional religious celebrations such as the dissent would argue,<sup>46</sup> the majority applied the Endorsement Test.<sup>47</sup> Applying the test to the two displays, a majority of the court found that the nativity scene, but not the menorah, was in violation of the Establishment Clause.<sup>48</sup>

Justice O’Connor’s endorsement approach finally prevailed as the controlling opinion. It embraced the idea that the government could not undertake an activity that has the effect of “endorsing”

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that provided federally funded remedial instruction to disadvantaged students that included religious instruction, was not an Establishment Clause violation so long as there were “sufficient safeguards” in place. *Id.*

41. *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989).

42. *Id.* at 20.

43. *County of Allegheny v. ACLU*, 492 U.S. 573 (1989).

44. *Id.* at 578.

45. *Id.* at 587-88.

46. *Id.* at 669-70 (Kennedy, J., dissenting) (stating that the holiday displays analysis should have been the same kind of historical practice analysis that exempted legislative prayer from Establishment Clause analysis in *Marsh*).

47. *Id.* at 592 (“Our subsequent decisions have refined the definition of governmental action that unconstitutionally advances religion.”).

48. *Allegheny*, 492 U.S. at 620-621. The term “a majority” is used loosely here as *Allegheny* is a famously splintered opinion with the menorah display being found constitutional by a 6-3 vote and the nativity scene being found to be in violation by a 5-4 margin.

or “disapproving” a religion. In defining “endorsement,” the Court conceded that it could not be defined in any one particular way but derives meaning from other words that the Court has found useful over the years in interpreting the Establishment Clause, such as “favoritism” or “promotion.”<sup>49</sup>

The Court’s definition of “endorsement” can be separated into two distinct interpretations. First, endorsement means the Establishment Clause “precludes government from conveying or attempting to convey a message that a religion or a particular religious belief is favored or preferred.”<sup>50</sup> Second, endorsement can be found when government “promote[s] one religion or religious theory against another.”<sup>51</sup> In determining whether a government action effectively endorses religion, the Court asks whether the government sends a signal to a reasonable observer who would view that action as conveying a message that the government favors or disfavors religion or a particular sect over others.<sup>52</sup> The reasonable observer is someone who is aware of the history and context surrounding the specific government action.

### III. *TOWN OF GREECE V. GALLOWAY*

The story of the highest challenge to *Marsh* starts in a seemingly innocent town west of Rochester, New York. As of the 2010 census, the Town of Greece had a population of about 96,000<sup>53</sup> and was governed by an elected five-member Town Board.<sup>54</sup> The Town Board has the responsibility of governing the town and conducting all official business on behalf of the municipality, including voting on proposed ordinances, conducting public hearings, and swearing in new town employees.<sup>55</sup> All of the Board’s business is conducted

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49. *Id.* at 593.

50. *Id.*

51. *Id.*

52. *Id.* at 595. As Justice O’Connor notes in her concurrence, the “history and ubiquity” of a practice is relevant to the Endorsement analysis because it provides the context to which a reasonable observer evaluates whether a government practice conveys a message of endorsement. *Id.* at 625.

53. *All About Greece*, TOWN OF GREECE, <http://greeceny.gov/aboutgreece> (last visited Dec. 27, 2013) (under “Demographic Characteristics”).

54. *All About Greece*, TOWN OF GREECE, <http://greeceny.gov/government/board> (last visited Dec. 27, 2013) (under “Form of Town Government”).

55. *Galloway v. Town of Greece*, 681 F.3d 20, 22-23 (2d Cir. 2012).

at a monthly meeting at the Town's city hall, which is open to the public and attended by residents and town employees.<sup>56</sup>

Historically, the Board would start the meetings with a moment of silence.<sup>57</sup> That changed in 1999 when the Town Supervisor, John Auberger,<sup>58</sup> began inviting local clergy to the Board meetings to offer an opening prayer.<sup>59</sup> The Board meetings would open with the traditional roll call of Board members by the Town Clerk, and then Mr. Auberger would lead the audience and Board in a recitation of the Pledge of Allegiance.<sup>60</sup> Following the Pledge, the audience would sit down, and Auberger would introduce that meeting's chosen prayer-giver, who would then deliver the prayer over the Board's public address system.<sup>61</sup> After being introduced, typically the chaplains would begin with "let us pray" or some variant thereof.<sup>62</sup> The prayer-givers would often ask members of the audience to participate in the prayer by bowing their heads, standing, or following along verbally.<sup>63</sup> The prayer would conclude with the chaplain, board members, and audience saying "Amen," and on a few occasions, making the sign of the cross.<sup>64</sup> Auberger would typically thank the prayer-givers as the town's "chaplain of the month," and sometimes present them with a plaque.<sup>65</sup>

There was no formal policy adopted by the Town Board for the choosing of chaplains, the content of the prayers, or any aspect of its prayer practice.<sup>66</sup> The town claimed in the litigation that anyone could have requested to give an invocation, including adherents of any religion, and it never rejected a request or altered the content of a proposed prayer on those grounds.<sup>67</sup> However, the town never publicized the process for which potential prayer-

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56. *Id.*

57. *Id.* at 23.

58. *Galloway v. Town of Greece*, 732 F. Supp.2d 195, 197. (W.D.N.Y. 2010) (the Town Supervisor, John Auberger, is a named defendant in this case and was sued in his official capacity).

59. *Id.* (indicating that Auberger witnessed the practice be used by the local Monroe County Legislature and decided soon thereafter to use the practice for Town Board meetings).

60. *Galloway v. Town of Greece*, 681 F.3d 20, 23 (2d Cir. 2012).

61. *Id.*

62. *Id.* at 24-25.

63. *Id.* at 23.

64. *Id.* at 24.

65. *Galloway*, 681 F.3d. at 23.

66. *Id.*

67. *Id.*

givers could apply to give a prayer.<sup>68</sup> The record also reflects that from 1999 through 2007, when the future Plaintiffs first complained, every prayer-giver was an invited member of the Christian clergy.<sup>69</sup> In 2008, after receiving the first complaints, the Town Board began inviting non-Christians to give the prayers.<sup>70</sup> However, between January 2009 and June 2010, when the record closed on the litigation, every prayer-giver was once again an invited member from the Christian clergy.<sup>71</sup>

Despite attempts to broaden the religious variety, a substantial majority of the prayers given in the litigation record contained uniquely Christian language.<sup>72</sup> About two-thirds of the prayers on the record contained references to such Christian religious symbols and names such as “Jesus Christ,” “Jesus,” “Your Son,” or the “Holy Spirit.”<sup>73</sup> Included with those terms, almost all the prayers began and concluded with a statement that the prayer had been given in “Jesus Christ’s name.”<sup>74</sup> Some prayers elaborated further, invoking Christ “as our savior,” “God’s only son,” and “in the name of our Lord Jesus Christ, who lives with you and the Holy Spirit, one God for ever and ever.”<sup>75</sup> Others began the prayer with “In Jesus’s name we pray.”<sup>76</sup> The remaining third of the prayers spoke in more general terms about “God,” “Heavenly Father,” and “God’s Kingdom.”<sup>77</sup>

After complaining for a year to the Town Board about the prayer practices, Susan Galloway and Linda Stephen filed suit in federal district court, alleging that the practice of opening town board meetings with prayers violated the Establishment Clause of the First Amendment.<sup>78</sup> After examining the complicated history of

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68. *Id.*

69. *Id.*

70. *Galloway*, 681 F.3d at 23.

71. *Id.*

72. *Id.* at 24.

73. *Id.*

74. *Id.*

75. *Galloway*, 681 F.3d at 24.

76. *Id.*

77. *Id.* at 24-25. The Second Circuit’s opinion goes into more detail about the more general prayers content and the prayer content of the four non-Christians who delivered prayers in 2008.

78. *Galloway v. Town of Greece*, 732 F. Supp. 2d 195, 196-97 (W.D.N.Y. 2010). The District Court also addressed the “official capacity” complaint that the Plaintiffs filed against John Auberger. That complaint was dismissed because it was “redundant” when coupled with the claim against the Town. The claim

legislative prayer jurisprudence, both the Supreme Court's decision in *Marsh* and subsequent approaches taken by the circuits, the district court held that Greece's prayer practice did not violate the Establishment Clause.<sup>79</sup> Noting that Establishment Clause cases are "extremely fact-specific,"<sup>80</sup> the court found that there was "no indication" that the Town was using its prayer policies to "proselytize or advance" any faith or belief.<sup>81</sup>

Drawing off of *Marsh* and *Allegheny*, the district court found that there was no requirement that legislative prayers be non-sectarian.<sup>82</sup> The court held that not only did the *Marsh* decision carve out an exception for legislative prayer, but did so with full knowledge of the overtly sectarian nature of legislative prayers, namely that of Congress.<sup>83</sup> The court was also unmoved by the *Allegheny* decision, finding that despite the sharp rhetoric against any possibility of religious advancement, nothing in the decision indicated that legislative prayers must be non-sectarian.<sup>84</sup> The court found that any argument for the Town advancing a religion through sectarian prayers was defeated by the fact that the Town had rotated chaplains of several denominations and therefore there was "less likelihood that the government could be viewed as advancing a particular religion," and thus "less concern over sectarian nature" of prayers.<sup>85</sup>

On review of the district court's opinion, the Second Circuit reversed.<sup>86</sup> Noting that the Supreme Court's Establishment Clause

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against Auberger had no bearing on the rest of the court's decision and is therefore not addressed in this Article.

79. *Id.* at 238-39.

80. *Id.* at 238 ("It is clear that outcomes in Establishment Clause cases are extremely fact-specific. *See, e.g. Van Orden v. Perry*, 545 U.S. 677 (2005) ('[N]o exact formula can dictate a resolution to such fact-intensive cases.') (Breyer, J. concurring). Here, the Court has considered the particular facts of this case in light of all the binding and non-binding authority discussed above, and finds that the Town's prayer policy does not violate the Establishment Clause.").

81. *Id.* at 238-39 (finding that there was no "improper purpose" on the part of the Town Board in both the formulation and carrying out of their prayer practice).

82. *Id.* at 241.

83. *Galloway*, 732 F. Supp. 2d at 241-42. The decision also notes that the U.S. Congress had very recently (at the date of the decision) paid chaplains to give overtly sectarian prayers, some with similar invocations that were being challenged in the present case.

84. *Id.* at 242.

85. *Id.*

86. *Galloway v. Town of Greece*, 681 F.3d 20 (2d Cir. 2012).

analysis has shifted since *Marsh*, the court of appeals rejected the legislative prayer historical exception analysis in favor of a more modern framework reflected by recent decisions, most notably *County of Allegheny v. ACLU*.<sup>87</sup> The Second Circuit found the language in *Allegheny* reflected an evolving understanding of the Establishment Clause and legislative prayer, as the Supreme Court noted in *Allegheny* that the prayers led by the *Marsh* chaplain had removed all “Christ” references and thus would not have had the same effect of affiliation if he had not.<sup>88</sup> The Second Circuit interpreted the Supreme Court’s language as hinting that prayer practices may be Establishment Clause violations if they contain content or are part of a larger practice that has the effect of religious affiliation.<sup>89</sup>

The Second Circuit also rejected *Marsh* on the grounds that it only signaled legislative prayers would trigger an Establishment Clause question if they “proselytize” or “disparage” religion, which is far less scrutiny than government actions under *Allegheny* which stated in dictum that legislative prayers may not “have the effect of affiliating the government with any one specific faith or belief.”<sup>90</sup> Because of those two reasons, the court set on a course to analyze the Town of Greece’s prayer practice.

The court of appeals first recognized the limits of analyzing the content of the prayers.<sup>91</sup> The sectarian/non-sectarian distinction, despite being facially the most telling indication of a government favoring a religion, has doctrinal limitations that keep it from being dispositive of government endorsement.<sup>92</sup> The Supreme Court, even in the more protective decision in *Allegheny*, has never embraced the approach that denominational prayers alone violate the Establishment Clause.<sup>93</sup> However, denominational content can be a helpful indication of potential Establishment Clause issues.

Instead of inquiring strictly into the town’s legislative prayer content, the Second Circuit adopted a wider analysis that asked “whether the town’s practice, viewed in its totality by an ordinary reasonable observer, conveyed the view that the town favored or

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87. *Id.* at 27.

88. *Id.* at 27-28.

89. *Id.* at 26.

90. *Id.* at 28.

91. *Galloway*, 681 F.3d at 28-29.

92. *Id.* at 28.

93. *Id.* at 29.

disfavored certain religious beliefs.”<sup>94</sup> The court of appeals asserted that this was an inquiry that combined elements of *Marsh*, as the seminal case dealing with legislative prayer, with *Allegheny*, the Supreme Court’s most expansive discussion on government affiliation and endorsement.<sup>95</sup>

The Second Circuit concluded, that based on the facts in the record, the Town of Greece’s prayer practice had the unconstitutional effect of advancing an endorsement of religion.<sup>96</sup> The Second Circuit cited a few key elements that supported its conclusion, including the prayer-giver selection process, the content of the prayers, and the contextual actions (and inactions) of the prayer-givers and town officials.<sup>97</sup> This Article asserts that the framework articulated by the court in *Galloway v. Town of Greece* should be the analysis adopted by the Supreme Court in the appeal heard in November 2013.

#### IV. WHY THE ENDORSEMENT TEST?

*Town of Greece* represents the most significant challenge to a legislative prayer practice since *Marsh*. However, if going solely based on *Marsh* precedent, there is little chance that a challenge to the Town of Greece’s practice, much less any other legislative prayer practice across the country, will be successful on an appeal to the Supreme Court. This is because the rule of law emanating from *Marsh* — that legislative prayer is separate from the First Amendment because of its unique history — makes any legal challenge to a practice almost impossible. This makes legislative prayer a government practice unique to constitutional law, as the Court’s sole guidance on the issue has been that it has roots in the practice of the Framers of the First Amendment, with no applicable or comprehensible test.<sup>98</sup>

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94. *Id.* For clarification, the court repeated “in other words, we must ask whether the town, through its prayer practice, has established particular religious beliefs as the more acceptable ones, and others as less acceptable.” *Id.* at 29-30.

95. *Id.* at 31.

96. *Galloway*, 681 F.3d at 30.

97. *Id.*

98. CHEMERINSKY, *supra* note 8, at 1226 (noting this is an anomaly in constitutional law as the Court sidestepped traditional, forward-looking legal analysis in favor of the simple, almost unchallengeable analysis that the practice’s basis in the founding legislature were grounds to put it outside the reach of Establishment Clause analysis).

In the years since *Marsh*, the Court has made it clear that the government cannot take any action that gives official preference for religion, non-religion, or any particular religion.<sup>99</sup> The government cannot approve, disapprove, or affiliate in a way that gives a reasonable observer the impression that it favors one practice or another.<sup>100</sup> The exception for legislative prayer demonstrates that the wall between church and state is not truly high or impenetrable.<sup>101</sup> Something has to give in *Town of Greece v. Galloway*.

To ensure consistency with the tradition of the Establishment Clause and recent Supreme Court precedent, the Court should use the *Town of Greece v. Galloway* case to establish the Endorsement Test as the analytical framework for all courts to employ when examining legislative prayer practices. The Endorsement Test is a subjective test, with the analysis based on the facts specific to a case.<sup>102</sup> However, it has still been widely employed by the Court in analyzing and evaluating government activity that may advance one religion over another.<sup>103</sup> Government advancing religion is not as simple as analyzing a statute or spending measure and asking the three *Lemon* questions.<sup>104</sup> The Endorsement Test “asks the right questions”<sup>105</sup> in government and religion controversies, looking at the facts and asking if a reasonable person would find that the government is advancing or disapproving a religion, and capable of consistent application.<sup>106</sup>

99. *County of Allegheny v. ACLU*, 492 U.S. 573, 605 (1989) (“Whatever else the Establishment Clause may mean . . . it certainly means at the very least that government may not demonstrate a preference for one particular sect or creed”).

100. *Id.*

101. *Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 18 (1947). This is a reference to Justice Black’s famous quote speaking for the majority of the Court in *Everson v. Bd. Of Ed. of Ewing Twp.* in which he concluded his opinion with the words: “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. New Jersey has not breached it here.”

102. *Galloway*, 681 F.3d at 30.

103. *Id.* at 28.

104. *See Van Orden v. Perry*, 545 U.S. 677, 685-86 (2005) (“Just two years after *Lemon* was decided, we noted that the factors identified in *Lemon* serve as “no more than helpful signposts.” *Hunt v. McNair*, 413 U.S. 734, 741 (1973). Many of our recent cases simply have not applied the *Lemon* test. *See, e.g., Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Good News Club v. Milford Central School*, 533 U.S. 98 (2001). Others have applied it only after concluding that the challenged practice was invalid under a different Establishment Clause test.”).

105. *County of Allegheny v. ACLU*, 492 U.S. 573, 628 (1989) (O’Connor, J. concurring).

106. *Id.* at 629 (O’Connor, J. concurring).

*A. Issues with the Endorsement Test*

The main criticism of the Endorsement Test is that it is subjective and fact-specific, and thus it does little to resolve areas of legal uncertainty. However, for an area such as legislative prayer, fact-specific inquiries would be necessary in order to evaluate whether a specific practice would be governmental advancing or disapproving of a religion. As the *Allegheny* majority noted, the Endorsement Test offers “a sound analytical framework.”<sup>107</sup> Asserting this test would end the blank check handed to legislatures in *Marsh* for formulating their prayer practices. For analyzing legislative prayer practices, *Marsh* gave the litigating community nothing. The practice is so engrained in our history that traditional legal tests best not touch it. The Court can undo the mess left by *Marsh* this term.

Given the limited nature of the question presented to the Court, it should be noted that this Article does not suggest, nor do many legal scholars contend, that legislative prayer practices in general violate the Establishment Clause. The practice is engrained in the nation’s history and has become a part of most deliberating bodies’ practices, including the U.S. Senate and House. Non-sectarian prayers are at most “ceremonial deism,”<sup>108</sup> a category of religious practices that have been held to be acceptable un-

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107. *Id.* at 595.

108. There is a long litany of cases that discuss in depth “ceremonial deism.” In the most recent and famous case discussing ceremonial deism, *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 37 (2004), three justices of the Court (the other five justices settled the case by saying the Plaintiff lacked standing), wrote concurrences about the question of whether the “Pledge of Allegiance” phrase “Under God” constituted an endorsement of religion. In her concurrence, Justice O’Connor writes:

There are no *de minimis* violations of the Constitution—no constitutional harms so slight that the courts are obliged to ignore them. Given the values that the Establishment Clause was meant to serve, however, I believe that government can, in a discrete category of cases, acknowledge or refer to the divine without offending the Constitution. This category of “ceremonial deism” most clearly encompasses such things as the national motto (“In God We Trust”), religious references in traditional patriotic songs such as The Star–Spangled Banner, and the words with which the Marshal of this Court opens each of its sessions (“God save the United States and this honorable Court”).

As will be further discussed, a practice of legislative prayer, on its own, is analogous, if not included in what is generally thought of as being ceremonial deism. It is the additional facts that bring about Establishment Clause issues.

der the First Amendment because through repetition and practice have lost “any significant religious content.”<sup>109</sup>

What is untenable is the current state of this area of First Amendment law, that exempts such practices from being checked by the First Amendment’s mandate that government must be neutral when it comes to religion. The language of *Allegheny* and the history of the area of law make it clear the Court will not tolerate any endorsement of religion, but every government practice will be judged in its unique circumstances.<sup>110</sup> That is why the Endorsement Test fits perfectly as a sound “analytical framework” for legislative prayer practices.<sup>111</sup> Under this approach, courts would have clear instructions as to what specific facts to look for in making their ultimate conclusion as to whether the legislative prayer procedure and content had the effect of advancing or disapproving religion.

In summary, the Second Circuit’s decision in *Galloway v. Town of Greece*, by employing the Endorsement analysis and taking into account all the relevant facts in a given case, is the soundest and correct analytical approach to legislative prayer issues. The *Marsh* decision cautioned courts not to analyze the content of prayers, and to only be concerned with them if they proselytize or disparage a religion. However, as the Second Circuit noted, it is also clear that government prayers cannot “have the effect of affiliating the government with any one specific faith or belief.”<sup>112</sup>

#### V. THE WAY FORWARD: *TOWN OF GREECE V. GALLOWAY* AND BEYOND

The Second Circuit analyzed the Town of Greece’s legislative prayer by asking whether the legislature’s practice, “viewed in its totality by an ordinary, reasonable observer, conveyed the view that the town favored or disfavored certain religious beliefs.”<sup>113</sup> Channeling the words of Justice O’Connor, the court stated that the inquiry centered on the question of whether through its prayer practice, the government of the town had “established particular religious beliefs as the more acceptable ones, and others as less

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109. *Lynch v. Donnelly*, 465 U.S. 668, 716 (1984) (Brennan, J. dissenting).

110. *Allegheny*, 492 U.S. at 624 (O’Connor, J. concurring).

111. *Id.* at 595.

112. *Id.* at 603.

113. *Galloway v. Town of Greece*, 519 F.3d 20, 29-30 (2d Cir. 2012).

acceptable.”<sup>114</sup> In more familiar terms, viewing the facts of the case and interpreting them under a totality of circumstances analysis, does a legislature’s prayer practice advance or disapprove a religion? Thus, the Second Circuit’s analysis of whether the Town of Greece’s practice endorsed a particular religious viewpoint is a blueprint for the Supreme Court and future courts.

#### *A. The Legislature’s Selection of Prayer-Givers*

Courts should first look to how the legislature goes about picking its chaplain. As *Galloway* demonstrates, the selection process can demonstrate much about how a reasonable person may perceive a government approving or endorsing one religion over another.<sup>115</sup> Does the legislature’s procedure “virtually ensure” a specific viewpoint and whether there is any variety in the denomination of the prayer-giver.<sup>116</sup> Does the legislature recognize that its constituency may hold beliefs that are not recognized by places of worship within the boundaries of the legislature’s jurisdiction?<sup>117</sup> Further, does the legislature publicly open its prayer practice to volunteers, and in doing so, make it known to representatives of all faiths that they can deliver invocations at a legislature’s meeting?<sup>118</sup> If the selection process is open and publicly known, it may be more indicative of a truly random, non-endorsing process.

For example, the Town of Greece only selected prayer-givers from places of worship within the town’s borders, which were all Christian.<sup>119</sup> As the court noted, a town is “not a community of religious institutions, but of individual residents,” and the Town Board’s prayer-giver selection process only favored those with places of worship within their limits, failing to recognize that resi-

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114. *Id.*. In articulating this analysis, the court noted that certain practices, such as employing a single Christian chaplain such as the case in *Marsh*, does not “in itself” convey favoritism.

115. *Id.* at 30-31.

116. *Id.*

117. *Id.* The Town of Greece had argued in part that their selection of prayer-givers that were overwhelmingly of the Christian faith was more of a reflection of what they could perceive were the resident’s religious denominations as being overwhelmingly Christian. The Second Circuit said that the Town could not hide behind the fact that its religious institutions were predominantly Christian and look at the Town’s population as “not a community of religious institutions, but of individual residents.”

118. *Galloway*, 519 F.3d at 31.

119. *Id.*

dents may hold religious beliefs that are not represented by a worship facility within the town limits.<sup>120</sup> Further, the town did not publicly solicit volunteers, nor inform members of the general public that prayer-givers of any faith could apply to give the invocation.<sup>121</sup>

*B. How the Prayer is Perceived*

The next factor courts should examine is how those who either attend the legislative session, or read the transcript, perceive the prayer practice.<sup>122</sup> Does the legislature make it clear that the prayer practice is meant to “solemnize” the proceedings, not “affiliate” the body with any particular creed?<sup>123</sup> This is particularly important if there is a substantial majority of prayer-givers from a single faith. As noted, if a legislature has a tendency of inviting prayer-givers of a single faith, absent explanation of the prayer’s purpose, it is possible that onlookers may get the wrong impression about why the legislature is praying.<sup>124</sup>

Turning to the case study of *Town of Greece*, the court of appeals found that the sectarian nature of the prayers is “not inherently a problem,” but when viewed in conjunction with the Board not explaining the role of prayers to the meetings, would create the reasonable impression that the “prayer practice associated the town with the Christian religion.”<sup>125</sup> The court was careful to note that it ascribed animus to the members of the Town Board, but the lack of explanation over the role of the prayer practice may have helped give off the impression of religious affiliation, especially given the “steady drumbeat of often specifically sectarian Christian prayers.”<sup>126</sup> Conveying respect and solemnity for a legislature’s proceedings is understandable and permissible, however, the legislature should be clear in the prayer’s purpose.

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120. *Id.*  
 121. *Id.*  
 122. *Id.* at 32.  
 123. *Galloway*, 519 F.3d at 32.  
 124. *Id.* at 31-32.  
 125. *Id.*  
 126. *Id.* at 32.

*C. Who the Prayer-giver Speaks For*

The final factor courts should examine is if the prayer-givers appear to speak “on behalf of” the legislature.<sup>127</sup> This factor focuses on facts that would lead an observer to believe that the prayer-givers are speaking for the legislature and government entity, rather than on behalf of themselves.<sup>128</sup> In the interest of maintaining government neutrality, language such as “let us pray,” “our savior,” “we ask,” and such others should be less favored by courts evaluating whether the practice has an endorsing effect as such language may reasonably give the impression that the prayer-giver is affiliating the lawmakers with a religious creed.<sup>129</sup> Further, inviting audience members to participate in the prayer through physical means, such as standing or bowing their heads, places audience members who are non-adherents in the position of having to choose to participate in a worship practice they do not believe in or awkwardly not participate.<sup>130</sup> Although seemingly harmless, inviting people to participate in a sectarian prayer can put people in the awkward position of making the choice of whether they want to be included or looked at as “outsiders.” The distinction is important when thinking about Justice O’Connor’s Endorsement Test writings in which she specifically warned against practices that may place people with the feeling of being an “outsider” to a particular practice.<sup>131</sup>

Applying these principles to the Town of Greece, the Second Circuit concluded that the chaplains’ prayers had the effect of affiliating the town with Christianity because of the sectarian content of the prayers, the encouragement for all present to join in the Christian prayers, the participation by the members of the legislature during the prayer, and the language used by the Town Supervisor in welcoming and thanking the prayer-giver.<sup>132</sup> To the court,

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127. *Id.* The Second Circuit gave this factor the most importance and I would assert that it is the factor that future courts should look to the most because it directly implicates how a reasonable observer would interpret the government’s action.

128. *Galloway*, 519 F.3d at 32-33.

129. *Id.* at 32.

130. *Id.* at 32-33.

131. *County of Allegheny v. ACLU*, 492 U.S. 573, 625 (1989) (O’Connor, J. concurring).

132. *Galloway*, 681 F.3d 20, 33 (2d Cir. 2012).

these facts combined to “project a message that the town endorsed, and expected its residents to endorse, a particular creed.”<sup>133</sup>

*D. Legislative Prayers: Constitutional, When Done Right*

Legislative Prayers are not themselves unconstitutional. As courts have noted, virtually every legislative body throughout this country’s history has adopted some form of them, and the Supreme Court has upheld them in very broad terms.<sup>134</sup> In striking down the Town of Greece’s prayer practice, the Second Circuit made explicit, that a legislature “may not open its public prayer or invocation.”<sup>135</sup> However, a check needs to be placed on the practice, and there is no easy solution.

The idea this article asserts is a fact-specific, subjective test in finding whether a legislative prayer practice constitutes an Endorsement of a religion, the kind of legal test that is least preferred by courts. However, it does work in the context of legislative prayer in that it looks at all the circumstances surrounding the practice by considering whether a religion is being advanced or disapproved by the government. As the Second Circuit opinion in *Galloway v. Town of Greece* proves, the soundest form of analyzing this complicated issue is to look at all the facts of a particular case to see if a practice “conveys to a reasonable objective observer under the totality of the circumstances,” that the government is endorsing or disproving a particular religious practice.<sup>136</sup>

## VI. CONCLUSION

So long as history is not rewritten and the Founding Fathers still prayed before their deliberations, any legislative prayer practice seems to be outside Establishment Clause analysis under *Marsh*. As of the date of this publication, there is no judicial check on the content or practice of a legislature conducting a prayer practice.

Given this untenable state of law and to ensure state and federal legislatures respect the traditions of the First Amendment’s Establishment Clause, the Court should use the highest challenge to a legislative prayer practice since *Marsh* to establish a test for

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133. *Id.* at 33-34.

134. *Id.* at 33.

135. *Id.*

136. *Id.* at 34.

legislative prayer practices. The Endorsement Test, which has been the primary engine for the Court in answering complex Establishment Clause issues, offers the best answer to the problem. Finding Endorsement is a subjective and fact-specific judicial endeavor, but as the Supreme Court and the Second Circuit have demonstrated, the fact-specific inquiry is an effective way of identifying government actions that have the effect of religious endorsement.

Legislative Prayer is an engrained practice in our state and federal government functions. As the government shutdown of Fall 2013 came to an end, Senate Majority Leader Harry Reid thanked the Senate chaplain for his daily prayers during the shutdown that were a source of “stability” and “inspiration” during a time of political crisis.<sup>137</sup> Elsewhere state and local governments may employ vastly different practices that may have the effect of endorsing or disapproving of certain religious practices with no judicial redress available. *Town of Greece v. Galloway* offers the opportunity to change that.

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137. Chris Cillizza, *Winners and Losers of the Government Shutdown*, WASH. POST., Oct. 16, 2013, <http://www.washingtonpost.com/blogs/the-fix/wp/2013/10/16/winners-and-losers-of-the-government-shutdown/> (mentioning how Mr. Black had become increasingly popular for his prayers that chastised the Senate for their inability to work together, evoking a thank you from Majority Leader Harry Reid on the Senate floor when the ordeal was over).