
THE UNEXPLORED IMPLICATIONS OF *TOWN OF GREECE V. GALLOWAY*

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ABSTRACT

The Establishment Clause doctrine that awaits the next Associate Justice of the United States has the potential to look considerably different than that of the last fifty years. The Court's recent Establishment Clause decision upholding legislative prayer, *Town of Greece v. Galloway*, does not herald a sharp doctrinal turn or overruling of precedent. Instead, the *Town of Greece* opinion reorients the focus of the Establishment Clause, shifting the ground underneath the endorsement test and the other doctrinal approaches that have typified past Establishment Clause decisions. The opinion reads like a rhetorical clearing of the field—an attempt to neutralize the separationist arguments of the past. With only four of the original five Justices in the *Town of Greece* majority on the Court, *Town of Greece* may represent little more than a step toward an unfinished project. In coming years, *Town of Greece* could go the way of its antecedent, *Marsh v. Chambers*, as a doctrinal island amid the Court's Establishment Clause doctrine. Given the elevation of a conservative fifth justice to replace the late Justice Scalia, however, this is unlikely. And the decision itself projects more broadly. *Town of Greece* declares *Marsh* to be more than an exception to the Court's existing Establishment Clause jurisprudence. Taken seriously, *Town of Greece* has much to say about what has gone before and the development of doctrine going forward. This article summarizes some of that rhetoric and its significance as a potential seedbed of new doctrine. As an example

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of the application of *Town of Greece* outside the context of legislative prayer, the last part of this article considers how a coercion test might be applied in a case involving a religious symbol.

I. THE *TOWN OF GREECE* DECISION

A. Town of Greece: *The Holding*

In *Town of Greece v. Galloway*,¹ the Supreme Court reaffirmed its 1983 decision, *Marsh v. Chambers*,² which held that legislative prayer does not violate the Establishment Clause.³ Given statements in *Marsh* itself and dictum in a later case about religious symbols, *County of Allegheny v. ACLU*,⁴ lower courts had divided over the application of *Marsh* beyond state legislatures, and whether the prayers must be non-sectarian.⁵ *Town of Greece* resolved those issues in favor of the rotating volunteer chaplaincy in that case.⁶ In an opinion by Justice Kennedy, a 5-4 majority of the Court reversed a Second Circuit decision against the town board meeting prayer practice.⁷ The Court held that the prayer offered need not be non-sectarian, and the fact that the town did not widely publicize the prayer opportunity to religious minorities, either in houses of worship outside of the town, or to individuals within the town borders, did not invalidate the policy.⁸ Nor did it matter that town officials often joined in the prayers.⁹ *Town of Greece* tightened the opening for future challenges to legislative prayer, substituting the operative dictum of *Marsh*¹⁰ for language forbidding only a practice of “denigrat[ing] nonbelievers or religious minorities, threaten[ing] damnation, or preach[ing] conversion”¹¹ The *Town of Greece* majority was split between an opinion for the Court upholding legislative prayer and a plurality of three Justices who

¹ *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014).

² *Marsh v. Chambers*, 463 U.S. 783 (1983).

³ See *Galloway*, 134 S. Ct. at 1821, 1828; *Marsh*, 463 U.S. at 784, 792–93.

⁴ *Cty. of Allegheny v. ACLU*, 492 U.S. 573 (1989).

⁵ See *id.* at 601; *Marsh*, 463 U.S. at 791–93; see also Marie Elizabeth Wicks, *Prayer is Prologue: The Impact of Town of Greece on the Constitutionality of Deliberative Public Body Prayer at the Start of School Board Meetings*, 31 J. L. & POL. 1, 4 (2015) (noting a circuit split on the application of *Marsh* in the school board context).

⁶ *Galloway*, 134 S. Ct. at 1816, 1824.

⁷ *Id.* at 1828, 1841.

⁸ See *id.* at 1820, 1824.

⁹ See *id.* at 1826.

¹⁰ See *Marsh*, 463 U.S. at 794–95 (“[T]here is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief.”).

¹¹ *Galloway*, 134 S. Ct. at 1823.

applied a coercion test.¹² Justice Kagan wrote the primary dissent.¹³ The dissent accepted the legitimacy of *Marsh*, but found the town's prayers too sectarian in light of the participatory nature of the town's board meetings.¹⁴

The commentary on the scope of *Town of Greece* has been mixed. Professor Paul Horwitz has concluded that the decision in *Town of Greece* does not extend much beyond legislative prayer and perhaps the adjunct category of ceremonial deism.¹⁵ This observation is supported by the fact that in *Town of Greece*, the Court did not overrule the endorsement or *Lemon*¹⁶ tests, or make other explicit changes to the Establishment Clause doctrine.¹⁷ Professor Christopher Lund finds in *Town of Greece* evidence of the end of a strict separationist approach to the Establishment Clause, but not an overhaul of current doctrine.¹⁸ Eric Rassbach, on the other hand, sees a turn to history as a source of decision for lower courts in

¹² See *id.* at 1825, 1828. Justice Kennedy was joined in the majority by Chief Justice Roberts and Justices Alito, Scalia, and Thomas. *Id.* at 1815. He wrote for the majority except for the portion of his opinion applying a coercion test. *Id.* at 1815, 1825 (citation omitted). Justice Alito wrote a concurrence joined by Justice Scalia. *Id.* at 1828 (Alito, J., concurring). Justice Thomas wrote a concurrence joined in part by Justice Scalia, in which he argued that the Establishment Clause should be governed by a test that requires the "actual legal coercion" that characterized historical state establishments. See *id.* at 1835, 1837–38 (Thomas, J., concurring) (citation omitted).

¹³ See *id.* at 1841 (Kagan, J., dissenting). Justice Kagan wrote for herself and Justices Ginsburg, Breyer, and Sotomayor. *Id.* Justice Breyer authored an individual dissent which highlighted the paucity of prayers and prayer-givers representing minority faiths. See *id.* at 1838 (Breyer, J., dissenting).

¹⁴ See *id.* at 1849, 1850 (Kagan, J., dissenting). The dissent contains some powerful rhetoric as well. See, e.g., *id.* at 1841 ("A Christian, a Jew, a Muslim (and so forth)—each stands in the same relationship with her country, with her state and local communities, and with every level and body of government."); see also *id.* at 1849 ("[T]he American community is today, as it long has been, a rich mosaic of religious faiths." (citation omitted)).

¹⁵ See, e.g., Paul Horwitz, *The Religious Geography of Town of Greece v. Galloway*, 2014 SUP. CT. REV. 243, 252 ("This is the probable significance of the 'historical-categorical' approach announced in *Galloway*. It provides a blueprint for rejecting at least some challenges to civil religion practices."); see also *id.* at 251 ("It is unlikely that the Court will abandon its standard repertoire of Religion Clause tests.").

¹⁶ *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

¹⁷ See Eric Rassbach, *Town of Greece v. Galloway: The Establishment Clause and the Rediscovery of History*, in CATO SUPREME COURT REVIEW: 2013–2014, at 71, 84 (Ilya Shapiro ed., 2014); see also Christopher C. Lund, *Leaving Disestablishment to the Political Process*, 10 DUKE J. CONST. L. & PUB. POL'Y 45, 45–46 (2014) ("Despite repeated invitations and concrete opportunities, the Court has refused to make sweeping changes to the Establishment Clause.").

¹⁸ See Lund, *supra* note 17, at 55–57 (observing some of the rhetoric mentioned in this article but predicting that it will not be applied outside the context of legislative prayer); but see Alan Brownstein, *Constitutional Myopia: The Supreme Court's Blindness to Religious Liberty and Religious Equality Values in Town of Greece v. Galloway*, 48 LOY. L.A. L. REV. 371, 434–36 (2014) (warning that language in *Town of Greece* could have a broader application).

Establishment Clause cases.¹⁹ In practice thus far, only a few judges have extended *Town of Greece* beyond legislative prayer.²⁰

The Court in *Town of Greece* did not declare an abrupt end to Establishment Clause challenges in particular cases.²¹ *Town of Greece* affirms the holding of *Marsh*, applies it to town boards, and makes it more difficult for future Establishment Clause challenges to the practice to succeed.²² But the dicta in *Town of Greece* casts beyond legislative prayer with broad statements about practices with a historical pedigree.²³ The majority and plurality opinions also state general propositions about how best to interpret the Establishment Clause, as well as the proper role of ceremonial religious practices in modern society.²⁴ It is these such statements that are the focus of this article.

B. Town of Greece: *The Dicta*

1. *Marsh* Expanded

Perhaps most striking is the *Town of Greece* majority's statement that *Marsh* was more than just an exception in the Court's Establishment Clause jurisprudence.²⁵ This part of the opinion speaks directly to the dissent in *Marsh*²⁶ and to the widely-held

¹⁹ See Rassbach, *supra* note 17, at 88, 91. Rassbach is Deputy General Counsel for the Becket Fund for Religious Liberty. *Id.* at 71.

²⁰ See, e.g., *Lund v. Rowan Cty.*, No. 15-1591, 2016 U.S. App. LEXIS 17064, at *57 (4th Cir. Sept. 19, 2016) (applying *Town of Greece* in determining whether the County Board of Commissioners' practice of legislative prayer violated the Establishment Clause of the First Amendment); see also *Felix v. City of Bloomfield*, 841 F.3d 848 (10th Cir. 2016) (denial of rehearing en banc) (Kelly, J., dissenting) (arguing that neither *Town of Greece* nor *Marsh* analyses are limited to legislative prayer); but see, e.g., *Smith v. Jefferson Cty. Bd. of Sch. Comm'rs*, 788 F.3d 580, 595, 602 (6th Cir. 2015) (Batchelder, J., concurring) ("When the Supreme Court signals a sea change in constitutional law, I do not believe that we can lightly set it aside in a case implicating the same constitutional provision. Therefore, while we must still apply the *Lemon*/endorsement test, *Town of Greece* should inform our analysis here.").

²¹ See *Lund*, *supra* note 17, at 45–46; see also Horwitz, *supra* note 15, at 246 ("From a doctrinal perspective, *Galloway* was interesting in two respects. First, it was interesting for what it did *not* do. It did not do away with any of the Establishment Clause tests governing the use of religious speech or symbols by government. In particular, it did not, as has long been anticipated, deliver the coup de grace to the endorsement test for Establishment Clause violations.").

²² See *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1815, 1828 (2014) (citing *Marsh v. Chambers*, 463 U.S. 783, 792 (1983)); *Lund*, *supra* note 17, at 51–52.

²³ See *Galloway*, 134 S. Ct. at 1825 (citation omitted).

²⁴ See, e.g., *id.* at 1826, 1827–28 (citations omitted).

²⁵ See *id.* at 1818–19; Rassbach, *supra* note 17, at 84.

²⁶ *Galloway*, 134 S. Ct. at 1818–19 (citing *Marsh*, 463 U.S. at 796 (Brennan, J., dissenting)). The *Town of Greece* majority quoted Justice Brennan's *Marsh* dissent, though that language had been ignored by Chief Justice Burger's majority opinion in that case. See

view of *Marsh*'s place within the Court's Establishment Clause doctrine.²⁷ *Town of Greece* also reflects a certain skepticism about the development and deployment of tests in Establishment Clause cases.²⁸ An indirect reference to the *Lemon* and endorsement tests illustrates the point:

Marsh stands for the proposition that it is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted. Any test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change.²⁹

The Court's language sounds ambivalent about whether to mention the extant test(s), but the citation to Justice Kennedy's dissent in *County of Allegheny*, a case striking down the display of a crèche, makes the point that the majority disapproves of the endorsement test.³⁰ So, too, does the Court's description of the *County of Allegheny* dissent in a later portion of the opinion.³¹ The use of the present verb tense "adopts" describes a process that is still open and subject to negotiation.³² Because the Court did not

Galloway, 134 S. Ct. at 1818–19 (citing *Marsh*, 463 U.S. at 796 (Brennan, J., dissenting)).

²⁷ See *Marsh*, 463 U.S. at 796 (Brennan, J., dissenting); Scott W. Gaylord, *When the Exception Becomes the Rule: Marsh and Sectarian Legislative Prayer Post-Summum*, 79 U. CIN. L. REV. 1017, 1029, 1031 (2011); Christopher C. Lund, *Legislative Prayer and the Secret Costs of Religious Endorsements*, 94 MINN. L. REV. 972, 985–86, 987, 989 (2010).

²⁸ See *Galloway*, 134 S. Ct. at 1819 (citations omitted).

²⁹ *Id.* (citing *Cty. of Allegheny v. ACLU*, 492 U.S. 573, 670 (1989) (Kennedy, J., dissenting)).

³⁰ See *Galloway*, 134 S. Ct. at 1819 (citing *Allegheny*, 492 U.S. at 670 (Kennedy, J., dissenting)). Justice Alito says this more forthrightly in his concurrence:

In the case before us, the Court of Appeals appeared to base its decision on one of the Establishment Clause "tests" set out in the opinions of this Court, . . . but if there is any inconsistency between any of those tests and the historic practice of legislative prayer, the inconsistency calls into question the validity of the test, not the historic practice.

Galloway, 134 S. Ct. at 1834 (Alito, J., concurring) (internal citation omitted).

³¹ See *Galloway*, 134 S. Ct. at 1821 ("Four dissenting Justices disputed that endorsement could be the proper test, as it likely would condemn a host of traditional practices that recognize the role religion plays in our society . . ." (citing *Allegheny*, 492 U.S. at 670–71 (Kennedy, J., dissenting in part and concurring in part))).

³² See Rassbach, *supra* note 17, at 84. There is another way to interpret this language. Rassbach believes that it controls the lower courts. See, e.g., *id.* ("Any test a lower court applies must be accompanied by (or probably preceded by) a historical analysis, and that analysis trumps the other considerations."). And "adopts" could be read to mean "applies," in which case it would apply to the Supreme Court and to lower courts. See, e.g., *Lund v. Rowan Cty.*, No. 15-1591, 2016 U.S. App. LEXIS 17064, at *26–27 (4th Cir. Sept. 19, 2016) ("Heeding this advice, we decline to accept the district court's view that legislative prayer forfeits its constitutionally protected status because a legislator delivers the invocation. A legal framework that would result in striking down legislative prayer practices that have long been accepted as 'part of the fabric of our society' cannot be correct." (citing *Galloway*, 134 S. Ct. at 1819)); see also *Smith v. Jefferson Cty. Bd. of Sch. Comm'rs*, 788 F.3d 580, 596–98 (6th Cir.

purport to adopt a test in *Town of Greece*, this dictum would seem more suited to explain the Court's past cases and the majority's view of the appropriate development of doctrine.³³ In the process, the majority questioned the legitimacy of the *Allegheny* Court's adoption of the endorsement test without overruling that case or disposing of the test.³⁴

If all this is true, however, it is an indirect way of repudiating the endorsement test, and certainly not a lurch in the opposite direction.³⁵ The majority could have been more explicit in its criticism of the test, and it could have said more about what should replace it. The distance between the three-Justice plurality and the concurring Justices over what constitutes "coercion" may explain the majority's apparent reluctance to discard *Lemon* or the endorsement test in favor of something else.³⁶ It remains to be seen whether and how these differences will begin to be resolved.³⁷

2015) (Batchelder, J., concurring) (discussing the Establishment Clause).

³³ See Rassbach, *supra* note 17, at 90.

³⁴ See *id.* ("That neither the majority nor the dissent applied the *Lemon*/endorsement framework to decide an important Establishment Clause case that the lower courts decided using precisely that framework is an indication that the test is lacking viability. Given the proper set of facts, the Court is likely to discard the test."). In a dissent to the denial of certiorari, Justice Scalia stated that "*Town of Greece* abandoned the antiquated 'endorsement test' . . ." *Elmbrook Sch. Dist. v. Doe*, 134 S. Ct. 2283, 2284 (2014) (Scalia, J., dissenting); see also Gary J. Simson, *Religious Arguments by Citizens to Influence Public Policy: The Lessons of the Establishment Clause*, 66 MERCER L. REV. 273, 285–86 (2015) (arguing that Justice Scalia's enthusiasm to abandon the test colored his view in *Town of Greece*). Lower courts have drawn their own conclusions about the status of the *Lemon* and endorsement tests. Compare, e.g., *Smith*, 788 F.3d at 589 ("Likewise, *Town of Greece* gives no indication that the Court intended to completely displace the endorsement test. The opinion does not address the general validity of the endorsement test at all; it simply explains why a historical view was more appropriate in the case at hand."), *with Freedom from Religion Found., Inc. v. Connellsville Area Sch. Dist.*, 127 F. Supp. 3d 283, 310 (W.D. Pa. 2015) (citations omitted) (declining to apply the endorsement test to a Ten Commandments monument on public school property, and instead applying *Lemon* as modified by the endorsement test).

³⁵ One thing can be said: it clearly affirms *Marsh*. See Marc O. DeGirolami, *Constitutional Contraction: Religion and the Roberts Court*, 26 STAN. L. & POL'Y REV. 385, 406–07 (2015) ("[B]efore *Town of Greece*, there had been no decision on the issue since 1983, and while *Marsh* was still good law, the simple fact of the passage of thirty years without any word from the Supreme Court made *Marsh's* continuing vitality less certain. Yet now, after its reaffirmation and re-entrenchment in *Town of Greece*, *Marsh* has new strength and force, even as its scope may be limited to legislative prayer.").

³⁶ The opinions reveal differences between Justices Kennedy, Roberts, and Alito on the one hand, and Justices Scalia and Thomas, on the other, over what constitutes coercion prohibited by the Establishment Clause. See DeGirolami, *supra* note 35, at 395.

³⁷ As a judge on the Tenth Circuit, Justice Gorsuch has been critical of the endorsement test, but it is not clear whether he would require "actual legal coercion" or whether he would apply the more context-dependent version applied in the *Town of Greece* plurality opinion. See James Y. Xi, *Judge Gorsuch and the Establishment Clause*, 69 STAN. L. REV. ONLINE 125 (2017); see, e.g., *Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095, 1109 (10th Cir. 2010) (denial of rehearing en banc) (Gorsuch, J., dissenting) (raising questions about the continuing validity of the endorsement test); see also *Green v. Haskell Cty. Bd. of Comm'rs*, 574 F.3d

2. Concerns about Divisiveness Revisited

At the end of the passage on *Marsh*, the *Town of Greece* majority supported its reading with concerns about divisiveness: “A test that would sweep away what has so long been settled would create new controversy and begin anew the very divisions along religious lines that the Establishment Clause seeks to prevent.”³⁸

The Court cited Justice Breyer for this proposition, and while the doctrinal roots of the argument can be traced back to *Lemon*, Justice Breyer’s concurrence in *Van Orden*³⁹ did raise divisiveness as a reason to uphold the Ten Commandments monument in that case.⁴⁰ Breyer’s concurrence expressed concern about perceived hostility stemming from the Court’s decision in a particular dispute.⁴¹ With his vote, the Court’s Ten Commandments decisions struck a compromise and provided ostensible criteria for the resolution of future Ten Commandments cases.⁴² By contrast, the *Town of Greece* majority’s use of divisiveness is directed to an entire approach and not simply a particular dispute. Note the substitution of the word “test” for more limited words like “conclusion” or “holding”⁴³: “A *test* that would sweep away what has so long been

1235, 1245-48 (10th Cir. 2009) (denial of rehearing en banc) (Gorsuch, J., dissenting) (criticizing panel’s application of the endorsement test).

³⁸ *Galloway*, 134 S. Ct. at 1819 (citation omitted). The potential for divisiveness was a recurring theme in the dissents. See *id.* at 1841 (Breyer, J., dissenting); *id.* at 1854 (Kagan, J., dissenting).

³⁹ *Van Orden v. Perry*, 545 U.S. 677 (2005).

⁴⁰ See *id.* at 704 (Breyer, J., concurring); see also Richard W. Garnett, *Religion, Division, and the First Amendment*, 94 GEO. L.J. 1667, 1684–91 (2006) (tracing the history of the Court’s inquiry into potential for divisiveness).

⁴¹ See *Van Orden*, 545 U.S. at 704 (Breyer, J., concurring).

⁴² See *id.* at 700–03 (applying factors such as context, physical setting, and age).

⁴³ See *Galloway*, 134 S. Ct. at 1819. Compare Justice Breyer’s language, after suggesting that the Texas display might satisfy the requirements of the Establishment Clause under the Court’s more formal tests:

At the same time, to reach a contrary *conclusion* here, based primarily on the religious nature of the tablets’ text would, I fear, lead the law to exhibit a hostility toward religion that has no place in our Establishment Clause traditions. *Such a holding* might well encourage disputes concerning the removal of longstanding depictions of the Ten Commandments from public buildings across the Nation. *And it could thereby create* the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid.

Van Orden, 545 U.S. at 704 (Breyer, J., concurring) (emphasis added) (citing *Zelman v. Simmons-Harris*, 536 U.S. 639, 718–19, 722–23 (2002) (Breyer, J., dissenting)). To be sure, Justice Breyer rejected the use of any particular test in his concurrence, but the sentence about divisiveness does not read as a rejection of the endorsement test. See *Van Orden*, 536 U.S. at 700 (“I see no test-related substitute for the exercise of legal judgment.” (citation omitted)). Rather, he rejected the logical result of a strict application of that test in the case, i.e., a holding that the Texas monument violates the Establishment Clause. See *id.* at 703–04 (“[I]n reaching the conclusion that the Texas display falls on the permissible side of the constitutional line, I rely less upon a literal application of any particular test than upon

settled”⁴⁴ This particular phrasing questions the legitimacy of any test—past, present, or future—and not just a particular decision. This is not the first time that the conservative Justices have cited Justice Breyer’s *Van Orden* concurrence,⁴⁵ and the revival of divisiveness here is consistent with a focus on history and tradition, though not necessarily originalism.⁴⁶ The divisiveness observation grounds the appeal to age, and it bears a certain kinship to the endorsement test.⁴⁷ The use of divisiveness by the *Town of Greece* majority makes sense as a transitional argument, bridging endorsement to coercion or history.⁴⁸ It has potential application in a case involving a religious symbol, given past usage.⁴⁹ One could also imagine its use in a funding case, as a justification to strike down (or uphold) an exclusion of religious groups from an evenhanded funding program.⁵⁰

3. The Inclusion of Christianity within Notions of Pluralism

Post-*Marsh*, courts struggled with the extent to which legislative prayers must be ecumenical. In *Town of Greece*, the Court approved

consideration of the basic purposes of the First Amendment’s Religion Clauses themselves.”).

⁴⁴ *Galloway*, 134 S. Ct. at 1819 (emphasis added) (citing *Van Orden*, 545 U.S. at 702–04 (Breyer, J., concurring)).

⁴⁵ See, e.g., *Salazar v. Buono*, 559 U.S. 700, 716–17 (2010) (citing *Van Orden*, 545 U.S. at 702–03 (Breyer, J., concurring)) (suggesting that Congress deemed a land transfer necessary to avoid the potential divisiveness that could be caused by the dismantling of a veterans’ memorial cross).

⁴⁶ There is no claim here about what the Establishment Clause was intended to do, or even of its purpose, but merely what it does. On the whole, *Town of Greece* reaffirms *Marsh* but the Court doesn’t base its decision solely on original meaning or intent. See *Galloway*, 134 S. Ct. at 1826–27 (citing *Marsh v. Chambers*, 463 U.S. 783, 792 (1983)). The concurring opinions of Justices Alito and Thomas, however, place more emphasis on originalism. See *Galloway*, 134 S. Ct. at 1832–34 (Alito, J., concurring); *id.* at 1835 (Thomas, J., concurring). Compare, e.g., Michael W. McConnell, *On Reading the Constitution*, 73 CORNELL L. REV. 359, 361–62 (1988) (“[*Marsh* analysis is an example of] those who interpret the Constitution as if it froze into place the conclusions reached at the time of the framing about the application of constitutional principles to concrete situations.”).

⁴⁷ See *Lynch v. Donnelly*, 465 U.S. 668, 688 (O’Connor, J., concurring) (“Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.”).

⁴⁸ See *Galloway*, 134 S. Ct. at 1820, 1826–27.

⁴⁹ See, e.g., *Lynch*, 465 U.S. at 683–84 (showing that the Court discussed divisiveness but declined to apply it to the display of a crèche in a park).

⁵⁰ See, e.g., *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, 788 F.3d 779, 781–82 (8th Cir. 2015), *cert. granted*, 136 S. Ct. 891 (2016) (upholding a state’s denial of funding for playground resurfacing for church day care); see also *Zelman v. Simmons-Harris*, 536 U.S. 639, 722–23 (2002) (Breyer, J., dissenting) (using divisiveness as a reason to exclude religious groups from an educational voucher program).

of sectarian legislative prayer, citing the school prayer cases.⁵¹ This was a turn of both *Engel v. Vitale* and *Lee v. Weisman*,⁵² which invalidated the prayers in those cases, though it is at least formally consistent with their rejection of government efforts to compose or edit prayers.⁵³ Going beyond *Marsh*, however, the majority embraced pluralism as consistent with legislative prayer.⁵⁴ The majority cited Justice Brennan's *Schempp* concurrence, which explained and defended *Engel* largely on the basis of pluralism.⁵⁵ This move was made explicit by the majority's peculiar admonition about the prayers in *Town of Greece*: "The decidedly Christian nature of these prayers must not be dismissed as the relic of a time when our Nation was less pluralistic than it is today."⁵⁶

The majority's view of pluralism counters a narrative that points to the direction of the country as the trajectory for the Religion Clauses.⁵⁷ There is a concern that Christian prayers, monuments, and themes, in particular, stifle pluralism. This is reflected in the rule that in general the government may not favor or disregard a particular religion—that it must act with denominational neutrality—but it is more than that.⁵⁸ Explicit references to

⁵¹ The preceding section of the opinion contains citations to Justice Brennan's concurrence in *Schempp*, a tacit reference to the school prayer decisions. See *Galloway*, 134 S. Ct. at 1819 (quoting *School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 294 (1963) (Brennan, J., concurring) ("[T]he line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers.")).

⁵² *Lee v. Weisman*, 505 U.S. 577 (1992).

⁵³ See *id.* at 588, 598 (quoting *Engel v. Vitale*, 370 U.S. 421, 425 (1962)); *Engel*, 370 U.S. at 424, 435. The Court's reliance on the school prayer decisions is one reason to conclude that *Town of Greece* is not likely to be applied to school prayer. Another is Justice Kennedy's authorship of the majority opinion in *Lee*, and the fact that the plurality distinguished *Lee* from legislative prayer. See *Galloway*, 134 S. Ct. at 1827.

⁵⁴ See *Galloway*, 134 S. Ct. at 1820.

⁵⁵ See *id.* at 1822 (citing *Schempp*, 374 U.S. at 306 (Goldberg, J., concurring)).

⁵⁶ *Galloway*, 134 S. Ct. at 1820. This sounds like a direct response to Justice Brennan's *Schempp* concurrence as well as many of the Court's past cases, and much contemporary scholarship. See, e.g., Paul W. Kahn, *The Jurisprudence of Religion in a Secular Age: From Ornamentalism to Hobby Lobby*, 10 LAW & ETHICS HUM. RTS. 1, 6–7 (2016) ("Ornamentalism can express romanticism and nostalgia. It can attach to objects or practices that we keep before us as expressions of a longing that we have no intention of fulfilling. Ornamentalism can produce the 'quaint.' We are not serious about these objects or groups on their own terms. Rather, the quaint is juxtaposed to our ordinary life as a way of responding to anxieties about the limits of that life. Holding on to an ornamental presence can relieve us of the burden of confronting just how much we have changed."). Professor Kahn is concerned here with secularism, not pluralism, but his description lines up a sharp contrast with the majority's assertion. See discussion *infra* Part I(B)(4).

⁵⁷ See *Emp't Div. v. Smith*, 494 U.S. 872, 918–19 (1990) (discussing the Free Exercise Clause).

⁵⁸ See *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 696 (1994); *Larson v. Valente*, 456 U.S. 228, 246 (1982).

Christianity may have passed without notice when there were fewer members of other religions and fewer nonbelievers, the argument goes, but increased religious pluralism means that Christian symbols and language can no longer be taken for granted as simply a “part of culture.”⁵⁹ The *Town of Greece* majority’s position that explicit recognition of Christianity fits within a contemporary, pluralist frame goes against that logic, rebutting some long-standing judicial and elite intuitions.⁶⁰

What ostensible purpose this language serves is not entirely clear, particularly since the dissent doesn’t claim to adopt a contrary view.⁶¹ Unlike Justice Brennan’s concurrence in *Schempp*, this language would not seem necessary to explain a controversial break with tradition or precedent. But it can be understood to rebut the position that *Marsh*’s reliance on history to sustain legislative prayer is at odds with pluralism.⁶² This, too, is a statement about the proper interpretation of the Establishment Clause beyond the prayers at issue in the case.⁶³

Like the point about divisiveness, the *Town of Greece* dictum about pluralism could be given application in other areas of Establishment Clause doctrine—to a symbol, for example—without much difficulty.⁶⁴ And the Court’s discussion follows the logic of the holiday display cases.⁶⁵ As an example of pluralism, the majority referred to the practice of Congress in inviting “ministers of many creeds” to offer prayers.⁶⁶

⁵⁹ See *Van Orden v. Perry*, 545 U.S. 677, 690 (2005) (citations omitted).

⁶⁰ See Corinna Barrett Lain, *God, Civic Virtue, and the American Way: Reconstructing Engel*, 67 STAN. L. REV. 479, 548 (2015) (“Even the most seemingly innocuous prayer would never please everyone, the Court wrote. The pressures of religious pluralism were propelling the nation toward constitutional change, and the ecumenical movement was fueling that momentum with the strong sense that there was no other way.”).

⁶¹ See *Galloway*, 134 S. Ct. at 1841–42 (Kagan, J., dissenting) (citing *Marsh v. Chambers*, 463 U.S. 783 (1983)). Justice Kagan’s dissent pressed the nondenominational rule, although the thrust of the dissent certainly can be read as a rebuke of the majority’s position.

⁶² See *Galloway*, 134 S. Ct. at 1849.

⁶³ See *id.* The dissent contains rhetoric that serves a similar purpose, and already has been cited in cases involving religion claims. See, e.g., *Burwell v. Hobby Lobby Stores*, 134 S. Ct. 2751, 2786 (2014) (Kennedy, J., concurring) (“[T]he American community is today, as it long has been, a rich mosaic of religious faiths.” (quoting *Galloway*, 134 S. Ct. at 1849 (Kagan, J., dissenting))); see also *Barber v. Bryant*, No. 3:16-CV-442(CWR)(LRA), 2016 U.S. Dist. LEXIS 86120, at *69 (S.D. Miss. June 30, 2016) (“America as a whole is ‘a rich mosaic of religious faiths.’” (quoting *Galloway*, 134 S. Ct. at 1849 (Kagan, J., dissenting))).

⁶⁴ See *Galloway*, 134 S. Ct. at 1850.

⁶⁵ See *supra* notes 57–60 and accompanying text.

⁶⁶ *Galloway*, 134 S. Ct. at 1820–21. The “many creeds” formulation sounds like the Court’s treatment of religious symbols after *Lynch* and *County of Allegheny*, but the focus appears to be the extent to which multiple participants reflect the religious pluralism of the community. Cf. *Salazar v. Buono*, 559 U.S. 700, 726 (2010) (Alito, J., concurring) (“One possible solution

4. “Ceremonial Prayer” as Something More than Hollowed-Out Religion

In rejecting a requirement that legislative prayer be non-sectarian, the Court also tacitly rejected the argument that ceremonial deism and other public piety degrade religion.⁶⁷ According to the majority, only a form of prayer mandated by the state would represent inauthentic religion.⁶⁸ The majority therefore refused to substitute its own notions of appropriate prayers which would be “vague and artificial” for the “nuanced and deeply personal” prayers in *Town of Greece*.⁶⁹ The majority and plurality described “ceremonial prayer” as perfunctory and yet meaningful.⁷⁰ The opinion has a strain of Justice Kennedy’s dignity jurisprudence as well, discussing a legislator’s ability to show “who and what they are,” for example.⁷¹

The objection that civil religion degrades sincere devotion is an argument that could have been ignored without losing the historical point about the constitutionality of legislative prayer. Rather, this particular argument has provided a reason for some to support the Court’s more separationist decisions.⁷² The joining of this argument by the majority and plurality opinions, then, fits within the context of a larger debate about the role of religion in public life.

would have been to supplement the monument on Sunrise Rock so that it appropriately recognized the religious diversity of the American soldiers who gave their lives in the First World War.”). I have supported this position in the past as a desirable vision of pluralism. See, e.g., Lisa Shaw Roy, *Can the Accommodationist Achieve Pluralism?*, 32 SEATTLE U. L. REV. 361, 364–65 (2009).

⁶⁷ See *Galloway*, 134 S. Ct. at 1823–24.

⁶⁸ *Id.* at 1822 (“Government may not mandate a civic religion that stifles any but the most generic reference to the sacred any more than it may prescribe a religious orthodoxy.” (citing *Lee v. Weisman*, 505 U.S. 577, 590 (1992))).

⁶⁹ *Galloway*, 134 S. Ct. at 1822.

⁷⁰ *Id.* at 1823 (“Our tradition assumes that adult citizens, firm in their own beliefs, can tolerate and perhaps appreciate a ceremonial prayer delivered by a person of a different faith.”).

⁷¹ *Id.* at 1826; see also *Burwell v. Hobby Lobby Stores*, 134 S. Ct. 2751, 2785 (2014) (Kennedy, J., concurring) (“In our constitutional tradition, freedom means that all persons have the right to believe or strive to believe in a divine creator and a divine law. For those who choose this course, free exercise is essential in preserving their own dignity and in striving for a self-definition shaped by their religious precepts.”); *Galloway*, 134 S. Ct. at 1823 (“These ceremonial prayers strive for the idea that people of many faiths may be united in a community of tolerance and devotion.”).

⁷² See, e.g., Perry Dane, *Prayer is Serious Business: Reflections on Town of Greece*, 15 RUTGERS J. L. & RELIGION 611, 623 (2014) (providing a nuanced version of this argument in the context of *Town of Greece*).

II. BEYOND LEGISLATIVE PRAYER: THE COERCION TEST AND SYMBOLS

Whether *Town of Greece* may have any application to future Establishment Clause cases that do not involve legislative prayer remains to be seen. The Court's reliance on history in *Town of Greece* may extend to other practices, and I have mentioned other possible applications of dicta earlier in this article. In *Town of Greece*, the three-Justice plurality applied a coercion test.⁷³ It was the same test advanced by Justice Kennedy in his dissent in *County of Allegheny*, in which he read *Marsh* broadly to state a general proposition about the Establishment Clause.⁷⁴ Justice Kennedy applied *Marsh* to the symbols cases; if the legislative prayer practice in *Marsh* did not offend the Establishment Clause, then neither does a holiday symbol.⁷⁵ If *Town of Greece* has future application outside the context of legislative prayer, then religious symbols may be a logical category.

How easily could a coercion test be applied in a case involving a religious symbol? One conclusion might be that symbols are inherently non-coercive. In the words of Justice Kennedy's *County of Allegheny* dissent, they are passive.⁷⁶ Observers are free to avoid the symbol and therefore cannot be coerced.⁷⁷ The *Town of Greece*

⁷³ See *Galloway*, 134 S. Ct. at 1825.

⁷⁴ See *Cty. of Allegheny v. ACLU*, 492 U.S. 573, 662–63 (1989) (Kennedy, J., dissenting).

⁷⁵ See *id.* at 664–65; see also *McCreary Cty. v. ACLU*, 545 U.S. 844, 908–09 (2005) (Scalia, J., dissenting) (asserting that a passive display of the Ten Commandments does not coerce anyone). The operative limit announced in *Marsh* and reiterated in *Town of Greece* was cited in dissent in *McCreary*. See *ACLU*, 545 U.S. at 908–09 (Scalia, J., dissenting) (“[The Ten Commandments display does not] proselytize or advance any one, or . . . disparage any other, faith or belief.” (second alteration in original) (quoting *Marsh v. Chambers*, 463 U.S. 783, 794–95 (1983))).

⁷⁶ But see Claudia E. Haupt, *Active Symbols*, 55 B.C. L. REV. 821, 834 (2014).

⁷⁷ See *Allegheny*, 492 U.S. at 664 (Kennedy, J., concurring in part and dissenting in part). This may be an overstatement of Justice Kennedy's position, at least as a categorical rule. The fact that Justice Kennedy used a symbol as an example of coercion in his *County of Allegheny* dissent, and gave the same example as recently as his opinion for a plurality in *Salazar v. Buono*, suggests that he may believe that a symbol can violate the Establishment Clause. See *Salazar v. Buono*, 559 U.S. 700, 715 (2010); *Allegheny*, 492 U.S. at 662 (Kennedy, J., concurring in part and dissenting in part). Justice Kennedy's hypothetical example of a coercive symbolic establishment was a cross atop a city hall. See *Allegheny*, 492 U.S. at 661 (Kennedy, J., concurring in part and dissenting in part). Although critical of the context-driven analysis of the majority invalidating the crèche in *County of Allegheny*, Kennedy's conclusion about a city hall cross appears to have been based on the combination of certain facts: the use of a Latin cross rather than some other symbol, a year-round display rather than a seasonal one, and the symbolic placement of the cross on a city hall rather than in some other location. See *id.* (“[A city hall cross would violate the Establishment Clause] because such an obtrusive year-round religious display would place the government's weight behind an obvious effort to proselytize on behalf of a particular religion.”). A colleague in the

plurality opinion likewise appears to undermine a more subtle interpretation of coercion.⁷⁸ One might argue that coercion is present if a citizen who observes a religious symbol in a public setting fears unfavorable treatment by government or otherwise feels compelled to hide his or her minority religious status or convictions.⁷⁹ The plurality rejected just this type of argument in the context of prayer.⁸⁰ Justice Kennedy's opinion for the plurality concluded that mature adults can resist pressure to participate.⁸¹ According to the plurality, historical practices such as legislative prayer are treated as part of the cultural backdrop that informs the reasonable observer's sensibilities.⁸² Under the plurality's analysis, coercion is a possibility but only in the more extreme case when prayer is used to chastise or intimidate.⁸³ Because the *Town of Greece* plurality rejected this argument as it related to the legislative prayers in that case,⁸⁴ it is doubtful whether those Justices would apply it to a religious symbol. Rather, coercion of this sort requires an impermissible government intent or action beyond the placement of the symbol.⁸⁵

field suggested another possibility: perhaps there is a conceptual problem with thinking about a symbol as an establishment, when at most a symbol may be evidence of an establishment.

⁷⁸ See *Galloway*, 134 S. Ct. at 1827 (citing *Allegheny*, 492 U.S. at 670 (Kennedy, J., concurring in part and dissenting in part)).

⁷⁹ See *Galloway*, 134 S. Ct. at 1825.

⁸⁰ See *id.* (citations omitted).

⁸¹ See *id.* (citations omitted).

⁸² See, e.g., *id.* ("It is presumed that the reasonable observer is acquainted with this tradition and understands that its purposes are to lend gravity to public proceedings and to acknowledge the place religion holds in the lives of many private citizens, not to afford government an opportunity to proselytize or force truant constituents into the pews." (citing *Salazar*, 559 U.S. at 720–21)). This refers to the endorsement test's reasonable observer, who comes to something just short of a chain novel demise in this statement.

⁸³ See *Galloway*, 134 S. Ct. at 1823 ("If the course and practice over time shows that the invocations denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion . . . [t]hat circumstance would present a different case than the one presently before the Court.").

⁸⁴ See *id.*

⁸⁵ See *id.* at 1826 ("The analysis would be different if town board members directed the public to participate in the prayers, singled out dissidents for opprobrium, or indicated that their decisions might be influenced by a person's acquiescence in the prayer opportunity."); see also *McCreary Cty. v. ACLU*, 545 U.S. 844, 908–09 (2005) (Scalia, J., dissenting) ("[Display of the Ten Commandments does not] proselytize or advance any one, or . . . disparage any other, faith or belief." (second alteration in original) (quoting *Marsh v. Chambers*, 463 U.S. 783, 794–95 (1983))); see also Caroline Mala Corbin, *Intentional Discrimination in Establishment Clause Jurisprudence*, 67 ALA. L. REV. 299, 306–07 (2015) ("According to the Court, state-sponsored prayers only cross the line if they are too extreme and slip into denigration of non-Christian religions or proselytization of the Christian one. Their overwhelming Christianity is not itself a reason to invalidate them. Instead, the Supreme Court held that without an illegitimate intent the practice stands . . .").

Another question is the extent to which a coercion test takes into account the age of symbols. The heavy reliance on history in *Town of Greece* is consistent with a focus on the age of a monument and whether it has been in existence for a sufficient amount of time to represent part of the cultural fabric.⁸⁶ Yet the age issue would not seem to be entirely dispositive in some cases. Take, for example, newly-installed traditional monuments, or new additions to old ones.⁸⁷ Such new-old traditions, like the legislative prayers in *Town of Greece*, may be sufficiently historically associated to be constitutional under a coercion test.⁸⁸ One wonders also whether the issue of how long a monument has stood “without challenge” makes a difference now.⁸⁹ As some have noted, the absence of litigation does not necessarily show the absence of controversy or offense.⁹⁰ Surely, years of litigation show divisiveness, but if that litigation ultimately results in the dismantling of a monument, perhaps even more citizens will be offended and the situation will worsen.⁹¹

The symbols cases represent only one potential application of *Town of Greece*. It remains to be seen whether it will have a life beyond legislative prayer. If it does, the opinions in the case contain dicta that could move the Establishment Clause further in the direction of accommodation.

⁸⁶ See *Salazar*, 559 U.S. at 716 (“Time also has played its role. The cross had stood on Sunrise Rock for nearly seven decades before the statute was enacted. By then, the cross and the cause it commemorated had become entwined in the public consciousness.”).

⁸⁷ See, e.g., S. Res. 1044, 113th Cong. (2014) (enacted) (proposing to add FDR’s D-Day prayer on a plaque alongside the existing monument).

⁸⁸ See *Galloway*, 134 S. Ct. at 1825.

⁸⁹ Compare *Van Orden v. Perry*, 545 U.S. 677, 702 (2005) (Breyer, J., concurring) (stating that the Ten Commandments monument existed for forty years without challenge), with *Trunk v. City of San Diego*, No. 06cv1597-LAB(WMc), 2013 WL 6528884, at *1 (S.D. Cal. Dec. 12, 2013) (describing how a fifty-nine-year-old monument has been the subject of litigation for years). Note the majority’s reference to the passage of time. See *supra* text accompanying notes 86–88; see also *Galloway*, 134 S. Ct. at 1819 (“Any test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change.” (emphasis added)). Politics may not be indifferent to litigation, but they are not the same thing.

⁹⁰ See, e.g., Douglas Laycock, *Government-Sponsored Religious Displays: Transparent Rationalizations and Expedient Post-Modernism*, 61 CASE W. RES. L. REV. 1211, 1224–27 (2011).

⁹¹ See, e.g., *Salazar*, 559 U.S. at 726 (Alito, J., concurring) (“The demolition of [the cross at issue in the case would] . . . have been interpreted by some as an arresting symbol of a Government that is not neutral but hostile on matters of religion and is bent on eliminating from all public places and symbols any trace of our country’s religious heritage.”).

CONCLUSION

Town of Greece v. Galloway signaled a turn in the Court's Establishment Clause jurisprudence. Although the Court didn't bury or replace the endorsement test, the outcome in the case—affirming *Marsh* and upholding legislative prayer—and, importantly, the Court's reasoning and rhetoric, outline a more modest Establishment Clause doctrine.