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COMMENT

A PERTURBED PRAYER POLICY: WHEN PAST PRACTICE, NOT PURPOSE, POSSESSES A PREEMINENT POSITION

Joshua N. Turner[†]

I. INTRODUCTION

Since at least 1947, the Supreme Court of the United States has become an arena for religious and nonreligious parties to battle over the scope and application of the First Amendment's Establishment Clause.¹ Prior to 1947, it was settled as a matter of constitutional law that the Establishment Clause did not speak to state action.² However, once Justice Black penned *Everson v. Board of Education*,³ determining that the Establishment Clause could be wielded to proscribe government action at all levels, an entirely new slate of cases was ushered into federal courts.⁴ Subsequently, litigation over everything, from crèche displays on public property to Ten Commandments monuments in courthouses, has found its way to the Supreme Court.⁵ Unfortunately, this dramatic shift in Establishment Clause

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1. "Congress shall make no law respecting an establishment of religion . . ." U.S. CONST. amend. I; see, e.g., *Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 15 (1947).

2. Note, *Rethinking the Incorporation of the Establishment Clause: A Federalist View*, 105 HARV. L. REV. 1700, 1701 (1992); see *Permoli v. Municipality No. 1*, 44 U.S. (3 How.) 589, 609 (1845) ("The Constitution makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions and laws: nor is there any inhibition imposed by the Constitution of the United States in this respect on the states.").

3. *Everson*, 330 U.S. at 3.

4. Compare *Lee v. Weisman*, 505 U.S. 577, 603 n.4 (1992) (finding that "[s]ince 1971, the Court has decided 31 Establishment Clause cases"), with Note, *supra* note 2, at 1701 (noting that "very few Establishment Clause cases [were] decided before World War II" and citing only two cases).

5. See, e.g., *Cnty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 579-81 (1989) (holding unconstitutional a crèche displayed on government property); *Lynch v. Donnelly*, 465 U.S. 668, 671 (1984) (upholding a crèche displayed on government property); *Van Orden v. Perry*, 545 U.S. 677, 691 (2005) (plurality opinion) (upholding a monument depicting the Ten Commandments displayed on government property); *McCreary Cnty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844,

jurisprudence has not been marked with consistency.⁶ The Supreme Court has left lower courts floundering and uncertain as to the proper standard of review to apply when Establishment Clause cases are brought before them.⁷ Currently, there is little doubt that the Supreme Court's jurisprudence in this area is not clear and coherent, but rather, the prevailing standard appears to be only an ad hoc analysis of disparate facts devoid of any unifying or anchoring principle.⁸

Although the Supreme Court has decided many Establishment Clause cases post-*Everson*, only one case has involved the tradition of legislative prayer,⁹ that is, until 2014.¹⁰ In *Marsh v. Chambers*,¹¹ the Supreme Court found that prayer invocations at legislative and other deliberative bodies were not a violation of the Establishment Clause,¹² unless "the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief."¹³ The Court in *Marsh* had seemingly carved out a special Establishment Clause test for legislative prayer analysis, one that ignored the previous Establishment Clause tests,¹⁴ but instead was history-based.¹⁵ Yet, much room was left for debate regarding the scope and applicability of the *Marsh* holding.¹⁶

881 (2005) (holding unconstitutional a monument depicting the Ten Commandments displayed on government property).

6. See *infra* Part III.A.

7. See *infra* Part III.A.

8. *Utah Highway Patrol Ass'n v. Am. Atheists, Inc.*, 132 S. Ct. 12, 21 (2011) (noting that the Supreme Court's Establishment Clause jurisprudence invites erratic, selective analysis where the outcome of constitutional cases rests on the personal preferences of judges, rather than firmer, less arbitrary grounds).

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

10. For the first time since 1983, the Supreme Court granted certiorari to the legislative prayer case of *Galloway v. Town of Greece*, 681 F.3d 20, 26 (2d Cir. 2012), *cert. granted*, 133 S. Ct. 2388 (U.S. 2013), *rev'd sub nom.*, *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014).

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

12. *Id.* at 786.

13. *Id.* at 794-95.

14. See, e.g., *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984) (noting that "[i]n two cases, the Court did not even apply the *Lemon* 'test.' We did not, for example, consider that analysis relevant in *Marsh* . . .").

15. *Galloway*, 681 F.3d at 26 (2d Cir. 2012) (finding that "the *Marsh* Court conducted a largely historical analysis, looking to the 'unique history' of legislative prayer in America before turning to the particulars of the Nebraska Legislature's chaplaincy program.").

16. See, e.g., *Wynne v. Town of Great Falls*, 376 F.3d 292, 302 (4th Cir. 2004) (concluding that the "Supreme Court's apparent intent [was] to confine its holding in *Marsh* to the specific 'circumstances' before it—a nonsectarian prayer preceding public business, directed only at the legislators themselves."). *Wynne* noted that, "in the more than twenty

The Court's Establishment Clause jurisprudence was ripe for challenging and resulted in the numerous legislative prayer cases.¹⁷ Cities across the country were held captive in the "Establishment Clause purgatory."¹⁸ Some courts interpreted *Marsh* as outright precluding sectarian prayers.¹⁹ Others were convinced that *Marsh* explicitly upheld prayers that contained sectarian references.²⁰ Still other courts understood *Marsh* as requiring a balancing test.²¹ The fractures in the circuits were leading to circuit-specific tests and standards that resulted in different outcomes based on where the legislative or deliberative body being challenged was located.²² The only outcome that could be expected was not one based on rule but one based on judicial indigestion.²³

It was only a matter of time before the Supreme Court would have to step in and lend direction to the lower courts. Circuits were all over the map in regards to whether, and what kind of, legislative prayer was permissible

years since *Marsh*, the Court has never found its analysis applicable to any other circumstances; rather, the Court has twice specifically refused to extend the *Marsh* approach to other situations." *Id.*; see also *Lee v. Weisman*, 505 U.S. 577, 596 (1992); *Cnty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 603 (1989). Similarly, some Circuit Courts have also refused to extend *Marsh*. See, e.g., *Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 381 (6th Cir. 1999); *N.C. Civil Liberties Union Legal Found. v. Constangy*, 947 F.2d 1145, 1148-49 (4th Cir. 1991).

17. See, e.g., *Rubin v. City of Lancaster*, 710 F.3d 1087, 1093 (9th Cir. 2013), *cert. denied before judgment*, 13-89, 2013 WL 3789507 (U.S. Oct. 7, 2013); *Galloway v. Town of Greece*, 681 F.3d 20, 26 (2d Cir. 2012), *cert. granted*, 133 S. Ct. 2388 (U.S. 2013), *rev'd sub nom.*, *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014); *Wynne v. Town of Great Falls*, 376 F.3d 292, 302 (4th Cir. 2004).

18. *Am. Civil Liberties Union of Ky. v. Mercer Cnty.*, 432 F.3d 624, 636 (6th Cir. 2005).

19. See, e.g., *Simpson v. Chesterfield Cnty. Bd. of Sup'rs*, 404 F.3d 276, 287 (4th Cir. 2005) (holding that sectarian invocations are forbidden).

20. See, e.g., *Rubin v. City of Lancaster*, 710 F.3d 1087, 1093 (9th Cir. 2013), *cert. denied before judgment*, 13-89, 2013 WL 3789507 (U.S. Oct. 7, 2013) (finding that the "history and tradition" anchoring of *Marsh's* holding specifically encompassed sectarian legislative prayer).

21. See, e.g., *Galloway v. Town of Greece*, 681 F.3d 20, 29 (2d Cir. 2012), *cert. granted*, 133 S. Ct. 2388 (U.S. 2013) (rejecting an inquiry that looked solely to whether the town's legislative prayer practice contained sectarian references, but rather asking "whether the town's practice, viewed in its totality by an ordinary, reasonable observer, conveyed the view that the town favored or disfavored certain religious beliefs.").

22. Compare *Galloway*, 681 F.3d at 34 (finding the prayer policy of the Town of Greece, New York unconstitutional), with *Rubin*, 710 F.3d at 1101-02 (finding the prayer policy of the City of Lancaster, California constitutional). The prayer policies in the towns of Greece and Lancaster did not differ in any significant way.

23. Alex Kozinski, *What I Ate for Breakfast and Other Mysteries of Judicial Decision Making*, 26 LOY. L.A. L. REV. 993, 993 (1993).

under the Establishment Clause.²⁴ The aimless standards the Supreme Court has utilized in Establishment Clause cases have not resulted in coherent outcomes in the lower courts. Enter *Town of Greece v. Galloway*.²⁵ Although the Court granted *Galloway* certiorari in order to address severe inconsistency in the circuits,²⁶ the decision handed down by the Court is likely to have the shelf life of *Marsh*. Instead, the standards of *Galloway* seem destined to suffer the same fate as other notable Establishment Clause standards, such as the ones set forth in *Lemon v. Kurtzman*²⁷ and *Lynch v. Donnelly*.²⁸ These standards have resulted in inconsistent interpretation and application, not just by lower courts, but by the Supreme Court as well.²⁹

The solution for these issues is not a clarification of which of the existent tests to use, or even the creation of a new test. A coherent and consistent jurisprudence in this area will only result if the Court looks back to traditional methods of constitutional interpretation.³⁰ In order to resolve the current issues attendant Establishment Clause jurisprudence, judges must consider not only the letter of the Establishment Clause, but also the spirit, or object, of the Establishment Clause. A proliferation of tests that continue to ignore the object of the Establishment Clause will only further perpetuate confusing and inconsistent judgments. Likewise, a continuation of the existing, objectless standards will not address the lack of clarity that presently marks Establishment Clause jurisprudence. Until the courts return to an examination of both the purpose and text of the Establishment Clause, there is no hope for a consistent, coherent, or even predictable

24. *Galloway*, 681 F.3d at 28.

Various circuit court decisions, drawing on the Court's language in *Allegheny*, have questioned the validity of all forms of "sectarian" prayers. In the most recent of these, Judge Wilkinson wrote for the Fourth Circuit that *Marsh* and *Allegheny*, read together, seek both to acknowledge that legislative prayer can "solemnize the weighty task of governance" and to minimize the risks of "sectarian strife" such prayer may generate by requiring that invocations "embrace a non-sectarian ideal."

Id.

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

26. See *infra* Part III.A.2.

27. *Lemon v. Kurtzman*, 404 U.S. 876 (1971).

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

29. See, e.g., Lisa M. Kahle, *Making "Lemon-Aid" from the Supreme Court's Lemon: Why Current Establishment Clause Jurisprudence Should Be Replaced by a Modified Coercion Test*, 42 SAN DIEGO L. REV. 349, 363-68 (2005) (concluding that both the *Lemon* test and the Endorsement test are inherently flawed, which prevent the tests from being practically workable or useful).

30. See *infra* Part IV.

Establishment Clause jurisprudence. Specifically, this Comment will argue that Establishment Clause jurisprudence will only find clarity once it is positioned and analyzed with reference to both the letter and spirit of the Establishment Clause.

II. BACKGROUND

A. *Where it First Went Wrong*

In *Cooley v. Board of Wardens*,³¹ constitutional interpretation began to depart from previously established standards. In *Cooley*, the Supreme Court first discarded the object analysis that Chief Justice Marshall and the Court had faithfully adhered to and replaced it with an analysis of the subject only.³² First, I will introduce the methodology Chief Justice Marshall and the Court used prior to *Cooley*. Then, I will discuss how *Cooley* undermined this methodology.

1. The Marshall Methodology

In *M'Culloch v. State*,³³ Chief Justice John Marshall provided a thorough and excellent explanation of the proper method to assess the exercise of the powers of government.³⁴ Such care was taken because the Chief Justice considered it indisputable that the powers granted to the government are limited and not to be transcended.³⁵ Dealing with the controversial and sensitive question of whether the Congress of the United States had the power to establish a national bank,³⁶ Chief Justice Marshall carefully began with broad principles, essentially the ground rules for constitutional interpretation.³⁷ Once he established general, less controversial principles of constitutional interpretation, the Chief Justice applied those principles to the far more debatable particular of a national bank.³⁸

The principle Chief Justice Marshall established can be captured in one sentence: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly

31. *Cooley v. Bd. of Wardens*, 53 U.S. (12 How.) 299 (1851).

32. See *infra* Part II.A.2

33. *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

34. *Id.* at 421.

35. *Id.* (declaring that "all must admit, that the powers of the government are limited, and that its limits are not to be transcended.")

36. *Id.* at 401.

37. *Id.* at 402-12.

38. *Id.* at 412-24.

adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”³⁹ There are two areas of analysis highlighted by the Chief Justice—the means and the ends.⁴⁰ First, the end must be legitimate and within the powers granted by the Constitution, as defined by the letter and spirit of the Constitution.⁴¹ Second, the means must be appropriate, plainly adapted to the end, and not prohibited.⁴² Unless an exercise of power meets both of these tests, the Marshall Court would hold the exercise of power in question to be unconstitutional.⁴³

Chief Justice Marshall started his analysis in *M’Culloch* by looking to the ends to determine which constitutional powers were used to justify the creation of the national bank.⁴⁴ Coming to rest on the Necessary and Proper Clause,⁴⁵ Chief Justice Marshall commenced his exposition of the *letter* and *spirit* of the power in question.⁴⁶ The Chief Justice first clarified the spirit, or object, of the Necessary and Proper Clause.⁴⁷ The State of Maryland contended that the object of the clause was actually to restrict the

39. *Id.* at 401.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 407-12.

45. *Id.*; U.S. CONST. art. I, § 8, cl. 1, 18 (“The Congress shall have Power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”). Although there was no enumerated power granted to Congress to create a national bank, the Constitution “does not profess to enumerate the means by which the powers it confers may be executed.” *M’Culloch*, 17 U.S. at 408. Chief Justice Marshall noted the enumerated powers that the national bank was a necessary and proper means of effecting when he wrote:

Throughout this vast republic, from the St. Croix to the Gulf of Mexico, from the Atlantic to the Pacific, revenue is to be collected and expended, armies are to be marched and supported. The exigencies of the nation may require, that the treasure raised in the north should be transported to the south, that raised in the east, conveyed to the west, or that this order should be reversed. Is that construction of the constitution to be preferred, which would render these operations difficult, hazardous and expensive? Can we adopt that construction (unless the words imperiously require it), which would impute to the framers of that instrument, when granting these powers for the public good, the intention of impeding their exercise, by withholding a choice of means?

Id. at 408-09.

46. *Id.* at 411-12.

47. *Id.* at 412.

legislature's general right to legislate.⁴⁸ To this, the Chief Justice asked, "But could this be the object for which it was inserted?"⁴⁹ The Chief Justice thought it could not be;⁵⁰ instead, the purpose of the clause was a "general right . . . of selecting means for executing the enumerated powers."⁵¹ In fact, Chief Justice Marshall seemed to believe the clause explicitly stated what "general reasoning" already proved.⁵²

The Chief Justice then shifted his analysis to the letter of the clause.⁵³ Maryland argued that the word "*necessary*" controlled the whole sentence, and limited the legislature's right to pass laws for the execution of the enumerated powers only to those laws that "are indispensable, and without which the power would be nugatory."⁵⁴ According to Maryland, the clause "excludes the choice of means, and leaves to [C]ongress, in each case, that only which is most direct and simple."⁵⁵ These arguments were unpersuasive to the Chief Justice.⁵⁶

Chief Justice Marshall noted that the word "*necessary*" is used in various senses, and in order to properly understand the word in its construction, "the subject, the context, the intention of the person using them, are all to be taken into view."⁵⁷ The subject of the word in its construction is the execution of the enumerated powers.⁵⁸ The intention was to insure the beneficial execution of the enumerated powers by leaving it in the power of Congress to adopt any means "which might be appropriate, and which were conducive to the end."⁵⁹ The Chief Justice thought it "would have been to change, entirely, the character of the instrument, and give it the properties of a legal code" if the word *necessary* were interpreted as Maryland

48. *Id.*

49. *Id.*

50. *Id.* at 412-13.

51. *Id.* at 412.

52. *Id.* at 411. The Chief Justice looked to the constitution as a whole in concluding that the Necessary and Proper Clause only made explicit what was already implicit. The legislature can legislate using necessary means because the people gave the legislative power to the legislature. "That a legislature, endowed with legislative powers, can legislate, is a proposition too self-evident to have been questioned." *Id.* at 413.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 415.

58. *Id.*

59. *Id.*

asserted.⁶⁰ “To have declared, that the best means shall not be used, but those alone, without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances.”⁶¹ The Chief Justice found that “the intention of the convention, as manifested in the whole clause” “most conclusively demonstrate[d] the error of the construction contended for by the counsel for the state of Maryland.”⁶² To the Chief Justice, it was too apparent for controversy that Congress “might employ those [means] which, in its judgment, would most advantageously effect the object to be accomplished. That any means adapted to the end, any means which tended directly to the execution of the constitutional powers of the government, were in themselves constitutional.”⁶³

Finally, the Chief Justice concluded his analysis by assessing the creation of a national bank as a means of carrying out the enumerated powers of Congress.⁶⁴ The means must be appropriate, plainly adapted to the end, and not prohibited by the Constitution.⁶⁵ The Chief Justice found no prohibition in the Constitution because:

If a corporation may be employed, indiscriminately with other means, to carry into execution the powers of the government, no particular reason can be assigned for excluding the use of a bank, if required for its fiscal operations. To use one, must be within the discretion of congress, if it be an appropriate mode of executing the powers of government.⁶⁶

Next, the Chief Justice held that “none can deny [the creation of the bank was] an appropriate measure.”⁶⁷ Its means were adequate to its ends.⁶⁸ At this point in his opinion, Chief Justice Marshall made it a point to distinguish between what is appropriate and what is necessary.⁶⁹ While questions regarding pretext or prohibition of chosen means are justiciable,

60. *Id.*

61. *Id.*

62. *Id.* at 419.

63. *Id.*

64. *Id.* at 421-24.

65. *Id.* at 421.

66. *Id.* at 422.

67. *Id.* at 423.

68. *Id.* at 422, 424.

69. *Id.* at 423.

questions of the degree of a chosen means' necessity are "to be discussed in another place."⁷⁰

Should congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say, that such an act was not the law of the land. But where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power.⁷¹

Refusing to tread on legislative ground, the Court unanimously decided "the act to incorporate the Bank of the United States [was] a law made in pursuance of the constitution."⁷²

Notably, Chief Justice Marshall did not start with generals and reason to particulars simply as a dialectical strategy. Rather, the Chief Justice considered the nature and structure of the Constitution to require such reasoning.⁷³ After all, judges "must never forget that it is a *constitution* [they] are expounding"⁷⁴ so that the Constitution would not "partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. . . . Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves."⁷⁵ An exercise of power by the federal government is constitutional if its ends are legitimate, and within the scope of the letter and spirit of the Constitution, and the means chosen are appropriate, plainly adapted to that end, and not prohibited by the Constitution.⁷⁶ It is the nature of the Constitution that requires the type of reasoning and

70. *Id.*

71. *Id.*

72. *Id.* at 424.

73. *Id.* at 406-07.

74. *Id.* at 407.

75. *Id.* at 406-07.

76. *Id.* at 421.

analysis used in the Marshall methodology to decide questions of constitutionality.

2. A Significant Departure

In *Cooley v. Board of Wardens*, the Supreme Court significantly departed from the Marshall methodology by failing to consider the object of a constitutional provision.⁷⁷ In March 1803, the Pennsylvania legislature passed a law regulating pilots and pilotage.⁷⁸ The purpose of the law was to ensure the safe passage of lives and property by requiring ships to take a person on board peculiarly skilled to avoid “the perils of a dangerous navigation,” or else pay a sum of sixty dollars.⁷⁹ Cooley failed to hire a local pilot or pay the resulting penalty.⁸⁰ He challenged the law as an unconstitutional regulation of interstate commerce.⁸¹ The Pennsylvania courts rejected Cooley’s claim and he appealed to the United States Supreme Court.⁸² The Supreme Court held the Pennsylvania law to be a constitutional exercise of the power to regulate interstate commerce.⁸³

The Court held that the power to regulate interstate commerce was a concurrent power that the states and federal government may both exercise.⁸⁴ Prior to the adoption of the Constitution, the several states had laws regulating pilotage in their harbors.⁸⁵ Some of those laws regulated both interstate and foreign commerce, while others regulated intrastate commerce and were designed for health and safety purposes.⁸⁶ On the 7th of August, 1789, Congress adopted the following act:

“That all pilots in the bays, inlets, rivers, harbors, and ports of the United States shall continue to be regulated in conformity with the existing laws of the states, respectively, wherein such pilots may be, or with such laws as the states may respectively hereafter

77. Jeffery C. Tuomala, *The Casebook Companion: The Power to Regulate Interstate Commerce* pt. 3, ch. 3, at 1 (Aug. 28, 2013) (unpublished manuscript) (on file with the Liberty University Law Review).

78. *Cooley v. Bd. of Wardens*, 53 U.S. (12 How.) 299, 311 (1851).

79. *Id.* at 311, 312.

80. *Id.* at 300.

81. *Id.*

82. *Id.* at 311.

83. *Id.* at 321.

84. *Id.* at 320.

85. Tuomala, *supra* note 77, at pt. 3, ch. 3, at 11.

86. *Id.*

enact for the purpose, until further legislative provision shall be made by Congress.”⁸⁷

The Court concluded that this act suggested states had the power to regulate interstate commerce.⁸⁸ It reasoned that:

If the states were divested of the power to legislate on this subject by the grant of the commercial power to Congress, it is plain this act could not confer upon them power thus to legislate. If the Constitution excluded the states from making any law regulating commerce, certainly Congress cannot re-grant, or in any manner re-convey to the states that power. And yet this act of 1789 gives its sanction only to laws enacted by the states. This necessarily implies a constitutional power [of the states] to legislate [W]e are brought directly and unavoidably to the consideration of the question whether the grant of the commercial power to Congress did *per se* deprive the states of all power to regulate pilots.⁸⁹

According to the majority, “the mere grant to Congress of the power to regulate commerce, did not deprive the states of power to regulate pilots, and that although Congress has legislated on this subject, its legislation manifests an intention . . . not to regulate this subject, but to leave its regulation to the several states.”⁹⁰

While *Cooley*’s outcome may have been correct,⁹¹ the Court’s reasoning was and is destructive. Because the *Cooley* Court accepted an argument for the existence of concurrent power that Chief Justice Marshall rejected in *Gibbons v. Ogden*,⁹² it failed to consider whether the object of the

87. *Cooley*, 53 U.S. at 317.

88. *Id.* at 318.

89. *Id.*

90. *Id.* at 320.

91. See, e.g., *id.* at 322. The stated object of the law was to promote health and safety, which would be legitimate objects for the State of Pennsylvania under its reserved police powers.

92. See Tuomala, *supra* note 77, at pt. 3, ch. 3, at 12-13.

Marshall did not view the Act of 1789 as an implicit acknowledgement that the states have the right to regulate interstate commerce in the absence of a conflicting federal law. He viewed the Act of 1789 as a statement by Congress that state laws passed pursuant to their police powers which incidentally burden interstate commerce are valid unless preempted by Congressional legislation.

Pennsylvania pilotage law comported with the object of the Commerce Clause.⁹³ The majority only considered the subject of Pennsylvania's law, but did not look to the object of the law.⁹⁴ Under the majority's rationale, it would not have mattered if the real object of the law was to regulate interstate commerce. All that mattered was that "[t]he act of 1789 contain[ed] a clear and authoritative declaration by the first Congress, that the nature of this subject is such, that until Congress should find it necessary to exert its power, it should be left to the legislation of the states."⁹⁵ It made for easy analysis to show that the subject authorized by the act of 1789 was the same subject Pennsylvania sought to regulate.

Since the majority held that both the state and the federal government have the power to regulate interstate commerce, the Court did not consider a reference to the object of the law necessary.⁹⁶ Unless there is a specific constitutional prohibition, the only limitation on a state's power to regulate interstate commerce is the discretion of Congress.⁹⁷ There is no basis to distinguish state powers from national powers if both governments hold the power concurrently.⁹⁸ The objects are either the same or irrelevant. This relegates as superfluous Chief Justice Marshall's test to determine whether the regulation is "calculated to effect objects entrusted to the government."⁹⁹ While the Court did attempt to limit states to local and not national matters

Both the state and federal governments may adopt the same means, e.g., licensing pilots, but they do so for different objects—the states for the object of exercising police powers and the federal government for the object of regulating interstate commerce. The object of the Commerce Clause is to ensure the elimination of trade barriers, promote interstate commercial harmony, and preempt the states from exercising their police powers in such a way as to unduly interfere with interstate commerce. In effect, Congress expressed that the states were free to regulate safety in the harbors pursuant to their police powers without fear of preemption by federal law. The 1789 statute also, in effect, provided a statement to the courts that Congress acknowledged that any incidental burden upon, or interference with, interstate commerce by state pilotage regulations was permitted.

Id.

93. *Cooley*, 53 U.S. at 319-20.

94. *Id.*

95. *Id.* at 319.

96. See Tuomala, *supra* note 77, at pt. 3, ch. 3, at 13 (reasoning that as long as "the power to regulate interstate commerce is concurrent, an object analysis can no longer be utilized to distinguish between a state and national power.").

97. *Id.*; *Cooley*, 53 U.S. at 320.

98. See Tuomala, *supra* note 77, at pt. 3, ch. 3, at 13.

99. *Id.*

of regulation, it provided no test to distinguish local from national matters.¹⁰⁰ This is unsurprising given that interstate commerce by its nature is not local.¹⁰¹ Although *Cooley* dealt with the Commerce Clause, unfortunately, its reasoning has infected other areas of law.

B. The Advent of Establishment Clause Jurisprudence in the Legislative Prayer Context

The Establishment Clause was first brought to bear against state and municipal governments in *Everson v. Board of Education*.¹⁰² By incorporating the Establishment Clause, *Everson* laid the groundwork for the Supreme Court to review questions of constitutionality like local legislative prayer.¹⁰³ Nearly thirty years later, the constitutionality of the centuries-old practice of legislative prayer was finally challenged in *Marsh v. Chambers*.¹⁰⁴ Although *Marsh* upheld the practice of legislative prayer,¹⁰⁵ the question would not be put to rest so easily. Since *Marsh*, every circuit has heard cases challenging the constitutionality of prayer in the governmental setting. The controversy surrounding this issue culminated in the Supreme Court granting certiorari in 2013 to *Town of Greece v. Galloway*.¹⁰⁶

1. *Everson v. Board of Education*

In *Everson*, a New Jersey township board of education authorized reimbursement to parents of money expended by them for the bus transportation of their children on regular public busses.¹⁰⁷ The board was acting pursuant to a state statute that empowered local school districts to make rules and contracts for the transportation of children to and from schools.¹⁰⁸ Some of the money reimbursed was for transportation of children in the community to Catholic parochial schools.¹⁰⁹ These Catholic schools regularly instructed their students in accordance with the religious

100. *Cooley*, 53 U.S. at 319.

101. Tuomala, *supra* note 77, at pt. 3, ch. 3, at 13.

102. *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947).

103. *Id.*

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

105. *Id.* at 784.

106. *Galloway v. Town of Greece*, 681 F.3d 20, 26 (2d Cir. 2012), *cert. granted*, 133 S. Ct. 2388 (U.S. 2013), *rev'd sub nom.*, *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014).

107. *Everson*, 330 U.S. at 3.

108. *Id.*

109. *Id.*

tenets and modes of worship of the Catholic faith.¹¹⁰ A Catholic priest was the superintendent of these schools.¹¹¹ A district taxpayer challenged the right of the Board to reimburse parents of parochial school students.¹¹² The taxpayer argued that the statute and the Board's resolution passed pursuant to it violated the state and federal constitutions.¹¹³

There were only two constitutional claims before the Supreme Court of the United States with respect to the State statute and the resolution, insofar as they authorized reimbursement to parents of children attending parochial schools.¹¹⁴ The first was that the statute and resolution "authorize[d] the State to take by taxation the private property of some and bestow it upon others, to be used for their own private purposes."¹¹⁵ The taxpayer argued this violated his rights under the Due Process Clause of the Fourteenth Amendment.¹¹⁶ The second contention was that the "statute and the resolution forced inhabitants to pay taxes to help support and maintain schools which are dedicated to, and which regularly teach, the Catholic Faith."¹¹⁷ The taxpayer alleged this "to be a use of State power to support church schools contrary to the prohibition of the First Amendment which the Fourteenth Amendment made applicable to the states."¹¹⁸

Early on, the Court set aside the taxpayer's first contention, noting that rarely are state statutes struck down because the expenditures of the tax-raised funds are for private purposes rather than public purposes.¹¹⁹ Even so, the Court held that it was "much too late to argue that legislation intended to facilitate the opportunity of children to get a secular education serves no public purpose."¹²⁰ Likewise, it was too late to argue the same against legislation intended to reimburse needy parents "for payment of the fares of their children so that they can ride in public busses to and from

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 3-4.

114. *Id.* at 5.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* 5-6.

120. *Id.* at 7.

schools.”¹²¹ The Court found that subsidies, similar to the ones challenged, “have been commonplace practices in our state and national history.”¹²²

The Court then turned its focus to the alleged violation of the First Amendment, specifically the clause commanding that Congress “shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”¹²³ It began its analysis of the First Amendment claim by citing to *Murdock v. Commonwealth of Pennsylvania*¹²⁴ as support that the Fourteenth Amendment had made the First Amendment applicable to the states.¹²⁵ Before assessing whether the New Jersey law impermissibly respected the establishment of religion, the Court thought it necessary to understand the meaning of the language of the First Amendment, especially with respect to the imposition of taxes.¹²⁶

Looking to the beginning days of this country, the Court began by assessing the object of the Establishment Clause.¹²⁷ It noted that many of the early settlers came to escape the European laws that compelled support for government-favored churches.¹²⁸ The Court attributed much of the civil strife, turmoil, and persecution that were contemporaneous with colonization of America to “established sects determined to maintain their absolute political and religious supremacy.”¹²⁹ In Europe, men and women were tortured, fined, cast in jail, and even killed as part of the efforts to force loyalty to whatever religious groups that happened to be on top and in league with the government.¹³⁰ Failure to pay taxes and tithes to support the government-established churches were amongst some of the offenses for which men and women were punished.¹³¹ Many of these practices were transplanted to the soil of the new America.¹³²

The charters granted by the English Crown also authorized the erection of religious establishments in America.¹³³ These establishments enjoyed the

121. *Id.*

122. *Id.*

123. *Id.* at 8.

124. *Murdock v. Pennsylvania*, 319 U.S. 105 (1943).

125. *Everson*, 330 U.S. at 8.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 8-9.

130. *Id.* at 9.

131. *Id.*

132. *Id.*

133. *Id.* at 9-10.

sponsorship of the civil authority.¹³⁴ Through taxation and tithes, men and women of various faiths were required to support these government-sponsored churches.¹³⁵ However, some of the "freedom-loving colonials" began to dissent against the imposition of taxes to pay ministers' salaries and build churches not their own.¹³⁶ Although no single group or colony was entirely responsible for the rights enshrined in the First Amendment, Virginia was especially influential in the movement to secure religious liberty for all.¹³⁷ According to the Court, the people of Virginia believed that individual liberty could be achieved best under a government unable to tax or support any or all religions, or to interfere with the religious beliefs of individuals or groups.¹³⁸

From 1785 to 1786, when the legislative body of Virginia was attempting to renew Virginia's tax levy for the support of the established Anglican church, Thomas Jefferson and James Madison led the opposition against the law.¹³⁹ Madison wrote his Memorial and Remonstrance challenging the legitimacy of the law.¹⁴⁰ Madison's Remonstrance had its intended affect.¹⁴¹ Not only did the law ultimately fail to pass, but Virginia also passed Jefferson's "Virginia Bill for Religious Liberty."¹⁴² The bill stated that to "compel a man to furnish contribution of money for the propagation of opinions which he disbelieves, is sinful and tyrannical."¹⁴³ In *Reynolds v. United States*,¹⁴⁴ the Court had previously held that the provisions of the First Amendment "had the same *objective* and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute."¹⁴⁵

The Court then turned its attention to the application of the Establishment Clause to the New Jersey statute in question. It began by subtly, but significantly, incorporating the Establishment Clause, finding

134. *Id.* at 10.

135. *Id.*

136. *Id.* at 11.

137. *Id.*

138. *Id.*

139. *Id.* at 11-12.

140. *Id.* at 12.

141. *Id.*

142. *Id.*

143. *Id.* at 13 (quoting An Act Establishing Religious Freedom, 12 Hening, Statutes of Virginia 84 (1823)).

144. *Reynolds v. United States*, 98 U.S. 145, 164 (1878).

145. *Everson*, 330 U.S. at 13 (emphasis added).

that “[t]here is every reason to give the same application and broad interpretation to the ‘establishment of religion’ clause” as given the other previously incorporated First Amendment clauses.¹⁴⁶ Next, the Court famously wrote that the Establishment Clause at least means:

Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect a wall of separation between Church and State.¹⁴⁷

Considering the statute in light of the object of the First Amendment, the Court held that New Jersey did not violate the Establishment Clause.¹⁴⁸ While the Court held that New Jersey could not contribute tax-raised funds to support an institution that teaches the tenets and faith of a religion,¹⁴⁹ it also cautioned the state against hampering its citizens’ free exercise of their own religion.¹⁵⁰ New Jersey could extend public welfare benefits to all of its citizens without discrimination.¹⁵¹ The Court found that the statute in question did just that.¹⁵² The Court recognized that even though the statute undoubtedly helped children get to parochial schools, the First Amendment

146. *Id.* at 15 (“The interrelation of these contemporary clauses was well summarized in a statement of the Court of Appeals of South Carolina, quoted with approval by this Court, in *Watson v. Jones*, 13 Wall. 679, 730 20 L. Ed. 666: ‘The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasions of the civil authority.’” (footnote omitted)).

147. *Id.* at 15-16 (internal quotation marks omitted).

148. *Id.* at 17.

149. *Id.* at 16.

150. *Id.*

151. *Id.*

152. *Id.* at 17.

did not prohibit New Jersey from "spending taxraised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools."¹⁵³ It was crucial that the legislation provided "a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools."¹⁵⁴

The Court found no difference between the statute in question and the fact that police officers are paid with "taxraised funds" to protect children going to and from parochial schools from the hazards of traffic.¹⁵⁵ The majority did not think the *purpose* of the First Amendment was to forbid benefits from indirectly assisting the operation of religious institutions.¹⁵⁶ Simply put, state power is not to be used to handicap religions any more than it is to favor them.¹⁵⁷ Rather, the majority thought the purpose of the First Amendment was to require the government to be "neutral in its relations with groups of religious believers and non-believers," not to be their adversary.¹⁵⁸

2. *Marsh v. Chambers*

In *Marsh*, Ernest Chambers, a member of the Nebraska Legislature and a taxpayer of Nebraska, brought suit against the Nebraska Legislature.¹⁵⁹ Chambers claimed that the Legislature's chaplaincy practice violated the Establishment Clause because prayers were given in the Judeo-Christian tradition.¹⁶⁰ The Nebraska Legislature began each of its sessions with a prayer offered by a chaplain who was chosen biennially by the legislature and paid out of public funds.¹⁶¹ Robert E. Palmer, a Presbyterian minister, served as chaplain for eighteen years at a salary of \$319.75 per month for each month the legislature was in session.¹⁶²

The Supreme Court held that the practice of opening legislative sessions with prayers by state-employed clergyman did not violate the Establishment

153. *Id.*

154. *Id.* at 18.

155. *Id.* at 17.

156. *Id.* at 18.

157. *Id.*

158. *Id.*

159. *Marsh v. Chambers*, 463 U.S. 783, 784-85 (1983).

160. *Id.* at 785.

161. *Id.*

162. *Id.*

Clause.¹⁶³ The Court came to this conclusion based on an analysis of the practices and traditions that have existed in the United States since colonial times.¹⁶⁴ Pointing to the Continental Congress in 1774, the Court noted that the Congress adopted the traditional procedure of opening its sessions with a prayer offered by a paid chaplain.¹⁶⁵ Later, under the Constitution, the First Congress adopted the very same policy.¹⁶⁶ Confidently, the Court declared: “Clearly the men who wrote the First Amendment Religion Clause did not view paid legislative chaplains and opening prayers as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress.”¹⁶⁷ The focus of the *Marsh* Court, thus, is very distinct from that of *Everson*. Instead of following *Everson*’s lead and analyzing the purpose of the Establishment Clause, the *Marsh* Court focused on the practice, history, and meaning attached to the Clause.

III. PROBLEM

A. *No Reference to the Object Allows for Judicial Freewheeling*

The primary consequence of a failure to consider the object of the First Amendment is an unfettered judicial system. Without reference to the underlying purpose of the First Amendment, courts are left with only the subject to guide them. The harms associated with a failure to consider the object of the Establishment Clause are evidenced by the present state of affairs. Judicial freewheeling is rampant, which has resulted in: i) inconsistency in the circuits,¹⁶⁸ ii) uncertainty,¹⁶⁹ and iii) the chilling of fundamental rights.¹⁷⁰

163. *Id.* at 786.

164. *Id.*

165. *Id.* at 787.

166. *Id.* at 788.

167. *Id.*

168. See *infra* Part III.A.1 (comparing *Galloway v. Town of Greece*, 681 F.3d 20, 26 (2d Cir. 2012), *cert. granted*, 133 S. Ct. 2388 (U.S. 2013), *rev’d sub nom.*, *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014) (finding that the Town’s prayer policy did constitute an unconstitutional establishment of religion) with *Rubin v. City of Lancaster*, 710 F.3d 1087, 1101-02 (9th Cir. 2013) (finding that the City’s prayer policy did not constitute an unconstitutional establishment of religion)).

169. See *infra* Part III.A.2; see also *supra* text accompanying note 8.

170. See *infra* Part III.A.3.

1. Judicial Freewheeling Results in Inconsistency

A concerning symptom of the present Establishment Clause jurisprudence has been the inconsistency that has plagued courts of all levels.¹⁷¹ Justice Thomas has noted that the Supreme Court's "jurisprudence provides no principled basis by which a lower court could discern whether *Lemon*/Endorsement, or some other test, should apply in Establishment Clause cases."¹⁷² The Supreme Court has altogether ignored the *Lemon* or *Lemon*/Endorsement formulations in some cases,¹⁷³ while, in other cases, it has found those tests useful, but not binding.¹⁷⁴ Comparing the cases of *Van Orden v. Perry*¹⁷⁵ and *McCreary County v. ACLU of Kentucky*¹⁷⁶ provides the starkest example of the inconsistency plaguing even the Supreme Court in the Establishment Clause arena. In *Van Orden*, a majority of the Supreme Court did not apply the *Lemon*/Endorsement test in upholding a Ten Commandments monument located on government property,¹⁷⁷ but in *McCreary County*, decided the very same day, the Court used the *Lemon*/Endorsement test to declare a display of the Ten Commandments on government property to be unconstitutional.¹⁷⁸ As Justice Thomas remarked, "[o]ne might be forgiven for failing to discern a workable principle that explains these wildly divergent outcomes."¹⁷⁹

171. *Utah Highway Patrol Ass'n v. Am. Atheists, Inc.*, 132 S. Ct. 12, 12 (2011) (Thomas, J., dissenting).

172. *Id.* at 14. The *Lemon* test, as originally articulated in *Lemon v. Kurtzman*, has three components. First, the test requires that a statute have a secular legislative purpose; second, the statute's principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). The Endorsement test, as originally articulated in *Lynch v. Donnelly*, further exegetes the *Lemon* test by asking whether government's actual purpose is to endorse or disapprove of religion, or whether government's practice, irrespective of its purpose, conveys a message of endorsement. *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984).

173. See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Marsh v. Chambers*, 463 U.S. 783 (1983).

174. *Lynch*, 465 U.S. at 679 (finding that despite *Lemon*'s usefulness, it was "unwillin[g] to be confined to any single test or criterion in this sensitive area."); *Hunt v. McNair*, 413 U.S. 734, 741 (1973) (concluding that *Lemon* provides "no more than helpful signposts . . .").

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

176. *McCreary Cnty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844 (2005).

177. *Van Orden*, 545 U.S. at 677.

178. *McCreary Cnty.*, 545 U.S. at 859-66.

179. *Utah Highway Patrol Ass'n v. Am. Atheists, Inc.*, 132 S. Ct. 12, 19 (2011) (Thomas, J., dissenting).

The inconsistency that has persisted in the wake of the Supreme Court's Establishment Clause jurisprudence has led to wholly contradictory opinions by courts of all levels.¹⁸⁰ "[A] cr[è]che displayed on government property violates the Establishment Clause, except when it doesn't."¹⁸¹ "Likewise, a menorah displayed on government property violates the Establishment Clause, except when it doesn't."¹⁸² "Finally, a cross displayed on government property violates the Establishment Clause, as the Tenth Circuit held here, except when it doesn't."¹⁸³ According to Justice Thomas, the rampant arbitrariness wrought by the Court's Establishment Clause jurisprudence should deeply trouble it.¹⁸⁴ Presently, the "Establishment Clause precedents remain impenetrable, and the lower courts' decisions . . .

180. Presently, the Ten Commandments displayed on government property violate the Establishment Clause, only when they do not. *Compare McCreary Cnty.*, 545 U.S. at 844 (holding unconstitutional a monument depicting the Ten Commandments displayed on government property), *and* *Am. Civil Liberties Union of Ohio Found., Inc. v. DeWeese*, 633 F.3d 424 (6th Cir. 2011) (holding unconstitutional a monument depicting the Ten Commandments and the Mayflower Compact displayed on government property), *and* *Green v. Haskell Cnty. Bd. of Comm'rs*, 568 F.3d 784 (10th Cir. 2009) (same), *with Van Orden*, 545 U.S. at 677 (plurality opinion) (upholding a monument depicting the Ten Commandments displayed on government property), *and* *Card v. Everett*, 520 F.3d 1009 (9th Cir. 2008) (same), *and* *Am. Civil Liberties Union Neb. Found. v. Plattsmouth*, 419 F.3d 772 (8th Cir. 2005) (same), *and* *Am. Civil Liberties Union of Ky. v. Mercer Cnty.*, 432 F.3d 624 (6th Cir. 2005) (same).

Similarly, a crèche displayed on government property violates the Establishment Clause, only when it does not. *Compare, e.g., Cnty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 579-81 (1989) (holding unconstitutional a crèche displayed on government property), *and* *Smith v. Albemarle*, 895 F.2d 953, 955 (4th Cir. 1990) (same), *with Lynch v. Donnelly*, 465 U.S. 668, 671 (1984) (upholding a crèche displayed on government property), *and* *Elewski v. Syracuse*, 123 F.3d 51, 52 (2d Cir. 1997) (same), *and* *Am. Civil Liberties Union of Ky. v. Wilkinson*, 895 F.2d 1098, 1099 (6th Cir. 1990) (same).

And a menorah displayed on government property also violates the Establishment Clause, only when it does not. *Compare Kaplan v. Burlington*, 891 F.2d 1024 (2d Cir. 1989) (holding unconstitutional a menorah displayed on government property), *with Allegheny*, 492 U.S. at 573 (upholding an eighteen-foot Chanukah menorah displayed on government property), *and* *Skoros v. New York*, 437 F.3d 1 (2d Cir. 2006) (upholding school policy permitting display of menorah along with the Islamic star and crescent, the Kwanzaa kinara, the Hebrew dreidel, and a Christmas tree, but prohibiting a crèche).

181. *Utah Highway Patrol*, 132 S. Ct. at 17 (Thomas, J., dissenting).

182. *Id.* at 18.

183. *Id.* at 19.

184. *Id.* at 21.

remain incapable of coherent explanation.”¹⁸⁵ As a result, Justice Thomas finds it “difficult to imagine an area of the law more in need of clarity.”¹⁸⁶

In deciding Establishment Clause cases, the Court has attempted to avoid “sweep[ing] away all government recognition and acknowledgment of the role of religion in the lives of our citizens.”¹⁸⁷ However, “that is precisely the effect of the Court’s repeated failure to apply the correct standard—or at least a clear, workable standard—for adjudicating challenges to government action under the Establishment Clause.”¹⁸⁸ “Government officials, not to mention everyday people who wish to celebrate or commemorate an occasion with a public display that contains religious elements, cannot afford to guess whether a federal court, applying our ‘jurisprudence of minutiae,’ will conclude that a given display is sufficiently secular.”¹⁸⁹ Instead, the result will be a chilling effect that “purges from the public sphere all that in any way partakes of the religious.”¹⁹⁰

2. Uncertainty Abounds

The current Establishment Clause jurisprudence has also been marked by uncertainty, rooted in murkiness, and decried as arbitrary.¹⁹¹ The Supreme Court has set forth such conflicting and capricious standards that circuit courts have no touchstone to guide them. The erratic Establishment Clause decisions handed down by the Supreme Court have caused circuits a great deal of anxiety.¹⁹²

185. *Id.* at 21-22.

186. *Id.* at 22.

187. *Cnty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 623 (1989) (O’Connor, J., concurring in part and concurring in judgment).

188. *Utah Highway Patrol*, 132 S. Ct. at 22 (Thomas, J., dissenting).

189. *Id.* (quoting *Allegheny*, 492 U.S. at 674 (Kennedy, J., concurring in judgment in part and dissenting in part)).

190. *Van Orden v. Perry*, 545 U.S. 677, 699 (Breyer, J., concurring in judgment); *see also infra* Part III.B.3.

191. *Utah Highway Patrol*, 132 S. Ct. at 19. Justice Thomas labeled the “wildly divergent outcomes” of Establishment Clause cases as arbitrary, concluding that “[s]uch arbitrariness is the product of an Establishment Clause jurisprudence that does nothing to constrain judicial discretion.” *Id.*

192. *See, e.g., Am. Civil Liberties Union of Ky. v. Mercer Cnty.*, 432 F.3d 624, 636 (6th Cir. 2005) (expressing frustration and confusion after *McCreary* and *Van Orden*, stating, “we remain in Establishment Clause purgatory.”); *Green v. Haskell Cnty. Bd. of Comm’rs*, 574 F.3d 1235, 1235 n.1 (10th Cir. 2009) (Kelly, J., dissenting from denial of rehearing en banc) (noting that “[w]hether *Lemon* . . . and its progeny actually create discernable ‘tests,’ rather than a mere ad hoc patchwork, is debatable” and describing the “judicial morass resulting from the Supreme Court’s opinions.”); *Card v. Everett*, 520 F.3d 1009, 1016 (9th Cir. 2008) (pointing to the confusion resulting from the ten individual opinions in *McCreary* and *Van*

Apart from the problems lower courts are left with, in discerning the appropriate test or standard to use when it comes to Establishment Clause cases, a predicament persists on another front. Even were lower courts to have no issue creating their own standards, it would be unfair to subject residents of different geographies to varying standards. Two circuit court cases decided in 2013 serve well to highlight the problems attendant with the lack of a consistent Establishment Clause jurisprudence.

In *Town of Greece v. Galloway*,¹⁹³ the Second Circuit held that the Town of Greece's prayer policy violated the Establishment Clause.¹⁹⁴ In 1999, the town of roughly 94,000 residents began inviting local clergy to the Town Board meetings to offer an opening invocation.¹⁹⁵ The clergy giving the prayer "often asked members of the audience to participate by bowing their heads, standing, or joining in the prayer."¹⁹⁶ The town did not adopt any formal policy regarding "(a) the process for inviting prayer-givers, (b) the permissible content of prayers, or (c) any other aspect of its prayer practice, it developed a standard procedure."¹⁹⁷ Employees of the town were responsible for inviting clergy to deliver prayers.¹⁹⁸ Initially, the town employee "solicited clergy by telephoning, at various times, all the religious organizations listed in the town's Community Guide, a publication of the Greece Chamber of Commerce."¹⁹⁹ The employee then compiled a "Town Board Chaplain" list containing the names of the clergy who had accepted the town's invitations to give prayers.²⁰⁰ When inviting an individual to offer the invocation at the Town Board meeting, the town employees would work their way down the list, calling clergy about a week before each

Orden noting that courts have described the current Establishment Clause jurisprudence as both "Establishment Clause purgatory" and "Limbo."); *id.* at 1023–24 (Fernandez, J., concurring) (describing the majority's opinion as a "heroic attempt to create a new world of useful principle out of the Supreme Court's dark materials" in light of the "still stalking *Lemon* test and the other tests and factors, which have floated to the top of this chaotic ocean from time to time" as "so indefinite and unhelpful that Establishment Clause jurisprudence has not become more fathomable.").

193. *Town of Greece v. Galloway*, 681 F.3d 20, 26 (2d Cir. 2012), *cert. granted*, 133 S. Ct. 2388 (U.S. 2013), *rev'd sub nom.*, *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014).

194. *Id.* at 33.

195. *Id.* at 23.

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.* at 23–24.

meeting until someone accepted.²⁰¹ The employees also periodically updated the list “based on requests from community members and on new listings in the Community Guide and a local newspaper, the *Greece Post*.”²⁰²

The Town of Greece argued that anyone could request to give an invocation, whether adherents of any religion, atheists, or the nonreligious, and that no request was ever rejected.²⁰³ Guided by the decision in *Marsh*, the Town of Greece ensured that the invocations would not be “exploited to proselytize or advance any one, or to disparage any other, faith or belief.”²⁰⁴ The town did not censor invocations, refusing to review the content of prayers before they were delivered.²⁰⁵ The town acknowledged that it did not publicize “that anyone may volunteer to deliver prayers or that any type of invocation would be permissible.”²⁰⁶ Even though the town had an all-comers policy, “[i]n practice, Christian clergy members have delivered nearly all of the prayers.”²⁰⁷ However, a Wiccan priestess, the chairman of the local Baha’i congregation, and a lay Jewish man all delivered prayers at the Town Board meetings.²⁰⁸

Many of the invocations contained explicitly Christian references. “Roughly two-thirds contained references to ‘Jesus Christ,’ ‘Jesus,’ ‘Your Son,’ or the ‘Holy Spirit.’”²⁰⁹ Sometimes, “prayer-givers elaborated further, describing Christ as ‘our Savior,’ ‘God’s only son,’ ‘the Lord,’ or part of the Holy Trinity.”²¹⁰ Once a prayer was given “in the name of the Lord and Savior Jesus Christ, who lives with you and the Holy Spirit, one God for ever and ever.”²¹¹ Other prayers given by Christian clergy were in more general theistic language, referring to “God of all creation,” “Heavenly Father,” and God’s “kingdom of Heaven.”²¹² Likewise, the Wiccan priestess, Jewish prayer-giver, and Baha’i prayer-giver all referenced their gods.²¹³ The invocations typically gave thanks and requested assistance with the town

201. *Id.* at 24.

202. *Id.*

203. *Id.* at 23.

204. *Marsh v. Chambers*, 463 U.S. 783, 794-95 (1983).

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

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.* at 24.

210. *Id.*

211. *Id.*

212. *Id.* at 24-25.

213. *Id.* 25.

governance.²¹⁴ Prayer-givers usually opened with some variant of “let us pray,” and then spoke ostensibly on behalf of the audience or the town more broadly.²¹⁵ “Members of the audience and the Board have bowed their heads, stood, and participated in the prayers by saying ‘Amen.’”²¹⁶

However, in *Rubin v. City of Lancaster*,²¹⁷ the Ninth Circuit held that the City of Lancaster’s prayer policy, a policy very similar to the policy of the Town of Greece, did not violate the Establishment Clause.²¹⁸ Prior to August 25, 2009, the City had an informal prayer policy.²¹⁹ Due to a “cease-and-desist letter from the American Civil Liberties Union, the City decided to commit to paper an official invocation policy.”²²⁰ The official policy sets forth a two-step procedure for soliciting volunteers to offer invocations.²²¹ “First, the city clerk compile[d] and maintain[ed] a database of the religious congregations with an established presence in Lancaster.”²²² The clerk used Lancaster’s *Yellow Pages* to gather names of local congregations to create the master list, looking for “churches,” “congregations,” and “other religious assemblies.”²²³ The clerk also searched the internet for any local “church,” “synagogue,” “temple,” “chapel,” or “mosque” and consulted the regional chamber of commerce and the local newspaper.²²⁴ No congregations in Lancaster are discriminated against, nor does the clerk “probe the faith, denomination, or other religious belief of a congregation before adding its name to the database.”²²⁵

Second, the clerk mailed an invitation to give an invocation before the city-council meeting to all of the gathered religious groups.²²⁶ The invitation read:

This opportunity is voluntary, and you are free to offer the invocation according to the dictates of your own conscience. To maintain a spirit of respect and ecumenism, the City Council

214. *Id.*

215. *Id.*

216. *Id.*

217. *Rubin v. City of Lancaster*, 710 F.3d 1087 (9th Cir. 2013).

218. *Id.* at 1101-02.

219. *Id.* at 1089.

220. *Id.*

221. *Id.*

222. *Id.* (internal quotation marks omitted).

223. *Id.*

224. *Id.*

225. *Id.* (internal quotation marks omitted).

226. *Id.*

requests that the prayer opportunity not be exploited as an effort to convert others . . . nor to disparage any faith or belief different [from] that of the invocational speaker.²²⁷

The policy made clear that it “[was] not intended, and shall not be implemented or construed in any way, to affiliate the City Council with, nor express the City Council’s preference for, any faith or religious denomination.”²²⁸ Rather, the policy “[was] intended to acknowledge and express the City Council’s respect for the diversity of religious denominations and faiths represented and practiced among the citizens of Lancaster.”²²⁹ To further those goals, each congregation was allowed only three nonconsecutive invocations a year.²³⁰

While the majority of city-council invocations had been Christian,²³¹ “[n]o person who ha[d] volunteered to pray ha[d] been turned down, and no government official ha[d] ever attempted to influence the clerk’s selection or scheduling of volunteers.”²³² No one attending a city-council meeting was required to participate in any invocation.²³³ No volunteer was paid to pray.²³⁴ The city government did not “engage in any prior inquiry, review of, or involvement in, the content of any prayer to be offered.”²³⁵ Finally, “the clerk [had] never removed a congregation’s name from the list of invitees or refused to include one.”²³⁶

Although the two prayer policies were substantially and materially similar, only one was found to be constitutional. Both policies allowed any clergy volunteer an opportunity to pray. Neither Greece nor Lancaster had ever turned anyone away. Both policies utilized a government employee in creating a master list of volunteers. No one attending meetings was ever required to participate in the prayers. Further, the content of prayers was strictly off-limits to government censorship. The invocations of volunteers for both localities were wholly within their discretion. Both Greece and Lancaster had long used only informal prayer policies. The policies of each locality had separately resulted in a majority of the prayer-givers being

227. *Id.* (alteration in original).

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.* at 1095.

232. *Id.* at 1089.

233. *Id.* at 1097.

234. *Id.*

235. *Id.*

236. *Id.*

Christian clergy. Yet, one town was permitted by law to continue its practice, while another was ordered to cease its practice.

The disparate outcomes of seemingly identical cases have caused citizens in Greece to be treated differently than citizens in Lancaster. Both citizens live and claim protection under the same United States Constitution. Nonetheless, the prayer policy in Greece was deemed unconstitutional, while the one in Lancaster was deemed constitutional. This is exactly the type of situation Justice Thomas derided in his dissent from the refusal to grant certiorari in *Utah Highway Patrol Ass'n v. Am. Atheists, Inc.*²³⁷ Constitutional protections should not be applied in such a fickle manner.

3. The Expression of Pre-existing Rights Will be Chilled

A third, and equally dangerous consequence of the current Establishment Clause jurisprudence is the chilling of fundamental rights.²³⁸ Religious expression, a fundamental right enshrined in the Constitution,²³⁹ will most certainly be chilled when “subjected to the cold machinery of contemporary establishment jurisprudence.”²⁴⁰ The Supreme Court has long recognized the grave danger of chilling protected rights, especially First Amendment rights.²⁴¹ First Amendment freedoms are not only “delicate and vulnerable,” but also “supremely precious in our society.”²⁴² As Justice Brennan recognized in *Bantam Books, Inc. v. Sullivan*, “[i]t is characteristic of the freedoms of expression in general that they are vulnerable to gravely damaging yet barely visible encroachments.”²⁴³ The uncertain and vague Establishment Clause jurisprudence of the Court should cause the same concern and consternation the “vague” standards caused Justice Brennan in *Paris Adult Theatre I*.²⁴⁴ Justice Brennan reminded the Court that

237. *Utah Highway Patrol Ass'n v. Am. Atheists, Inc.*, 132 S. Ct. 12 (2011).

238. See, e.g., Monte Kuligowski, *The Supreme Court's Dilemma Respecting Establishment Clause Jurisprudence*, 38 CUMB. L. REV. 245, 276 (2008).

239. U.S. CONST. amend. I.

240. Kuligowski, *supra* note 238, at 276.

241. See, e.g., *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 91 (1973) (Brennan, J., dissenting); *Blount v. Rizzi*, 400 U.S. 410, 416 (1971); *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 367-75 (1971); *Lee Art Theatre, Inc. v. Virginia*, 392 U.S. 636 (1968); *Freedman v. Maryland*, 380 U.S. 51, 58-60 (1965); *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205 (1964) (plurality opinion).

242. *Paris Adult Theatre I*, 413 U.S. at 93 (Brennan, J., dissenting).

243. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963).

244. *Paris Adult Theatre I*, 413 U.S. at 91 (Brennan, J., dissenting).

“[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.”²⁴⁵

If First Amendment rights are to be saved from government officials and everyday citizens resorting to the safer alternative of purging all religious expression from the public sphere, the Court must adopt a more consistent and workable jurisprudence in this area. When lower court judges are applauding “heroic attempt[s] to create a new world of useful principle out of the Supreme Court’s dark materials,”²⁴⁶ the reality of the present predicament ought to shine brightly. “The outcome of constitutional cases ought to rest on firmer grounds than the personal preferences of judges.”²⁴⁷

B. Galloway Continued the Problem

In the summer of 2014, the Supreme Court had the opportunity to take a small step in righting the wayward Establishment-Clause ship. Unfortunately, its opinion in *Town of Greece v. Galloway* only further entrenched the existing precedential course. Justice Kennedy, writing for a 5-4 majority, relied heavily upon the reasoning in *Marsh v. Chambers* to uphold the constitutionality of the Town of Greece’s prayer policy.²⁴⁸

The facts of the case, as used by the Supreme Court, were found by the District Court for the Western District of New York and used by the Court of Appeals for the Second Circuit, and are set forth above.²⁴⁹ Justice Kennedy began the opinion by noting that the *purpose* of the prayer opportunity was to solemnize the event and invoke divine guidance by following a tradition practiced by Congress and many state legislatures.²⁵⁰ After recounting the relevant facts, Justice Kennedy noted that the respondents²⁵¹ did not seek an end to the prayer practice, but rather sought an injunction that would require prayers to be “inclusive and ecumenical” and refer only to a “generic God.”²⁵²

245. *Id.* at 90-91.

246. Yet, even the redoubtable colleague of Judge Fernandez could not accomplish such a feat. *Card v. City of Everett*, 520 F.3d 1009, 1023 (9th Cir. 2008) (Fernandez, J., concurring) (footnote omitted).

247. *Van Orden v. Perry*, 545 U.S. 677, 697 (2005).

248. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1815 (2014).

249. *See supra* Part III.A.2.

250. *Galloway*, 134 S. Ct. at 1816.

251. Respondents, Susan Galloway and Linda Stephens, became offended by the prayer practice after attending town board meetings to speak about issues of local concern. *Id.* at 1817.

252. *Id.* (citations omitted).

On summary judgment, the district court upheld the prayer practice, finding no impermissible preference for Christianity even though Christians gave the vast majority of the prayers.²⁵³ The district court did not think the First Amendment required Greece to invite clergy from congregations beyond its borders to ensure a minimum level of religious diversity.²⁵⁴ Likewise, the district court rejected respondent's argument that legislative prayer must be nonsectarian.²⁵⁵ So long as the prayer opportunity was not being "exploited to proselytize or advance any one, or to disparage any other, faith or belief," the content of the prayers would not be scrutinized.²⁵⁶

The Court of Appeals for the Second Circuit reversed.²⁵⁷ The Second Circuit adopted a reasonable observer test, finding that some aspects of the prayer conveyed the message that Greece was endorsing Christianity.²⁵⁸ Specific aspects of the prayer policy, such as Greece not advertising the opportunity to the public or inviting clergy from congregations outside the town limits, all but ensured a distinctively Christian viewpoint.²⁵⁹ Even though sectarian references were not *per se* unconstitutional in legislative prayers, the Second Circuit found the "steady drumbeat" of Christian prayer problematic.²⁶⁰ Without other faith traditions to diversify the "drumbeat," Greece had impermissibly affiliated itself with Christianity.²⁶¹ Lastly, the Second Circuit also considered it relevant that clergy would sometimes speak on behalf of all present, request all to stand or bow their heads, and that board members would participate in the prayer by bowing their heads or making the sign of the cross.²⁶²

The Supreme Court granted certiorari and reversed the judgment of the Court of Appeals.²⁶³ The Court looked to the holding and reasoning in *Marsh v. Chambers* to assess the constitutionality of Greece's prayer practice.²⁶⁴ The Court noted that in *Marsh*, legislative prayer, while religious

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.* (citation omitted).

257. *Id.* at 1818.

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.*

264. See generally *id.* at 1818-28.

in nature, had long been understood as compatible with the First Amendment.²⁶⁵ Again, the Court emphasized that the purpose of legislative prayer is to solemnize the event and invoke divine guidance in the pursuit of “a just and peaceful society.”²⁶⁶ *Marsh* treated the prayers as “tolerable acknowledgement[s]” of widely held beliefs, and not a dangerous step towards establishing a religion.²⁶⁷

The Court also pointed out that the *Marsh* opinion carved out an exception to the Court’s Establishment Clause jurisprudence because the holding did not rely on any of the formal Establishment Clause tests.²⁶⁸ Instead, *Marsh* relied on history and tradition to support the conclusion that legislative prayers are compatible with the Establishment Clause.²⁶⁹ Yet, Justice Kennedy tried to distance himself from the idea that history and tradition can cloak unconstitutional practices with legitimacy.²⁷⁰ The “history and tradition” test of *Marsh* allows courts to reference historical practices and understandings when ascertaining a practice’s constitutionality.²⁷¹ Here, an immediate question arises in this distinction. How can a court know that history should not be referenced for a historical practice? If the constitutionality of the practice is in question, and history and tradition are insufficient to make an otherwise unconstitutional practice constitutional, then a reference to history and tradition should not be relevant. To the extent that it has any relevance, the relevance must be limited since history is purportedly not enough to make a practice constitutional. Justice Kennedy cited to his concurrence in *County of Allegheny* to attempt to clarify that courts merely *reference* history and tradition in order to properly interpret the Constitution.²⁷² The difference between referencing history and tradition to properly interpret a practice and allowing history alone to interpret the practice is ambiguous. When a historical practice exists, what else could serve to illegitimize the practice? Searching the framers’ intent might be a possible retort. However, history is typically used to determine the framers’ intent. It seems there isn’t a discernable difference.

265. *Id.* at 1818.

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.* at 1819.

271. *Id.*

272. *Id.*

This analysis that relies on only history and tradition becomes problematic when history or tradition reveals nothing. In justifying the Town of Greece's prayer program, Justice Kennedy noted that history supports the practice of local legislative bodies having such a prayer program.²⁷³ Despite the fact that no information had been cited by the respondent or petitioner regarding the historical foundation for legislative prayer at the local level, Justice Kennedy found the necessary historical foundation.²⁷⁴ This was important for Justice Kennedy to do because *Marsh*, the majority's only touchstone, was justified based on an "unbroken history of more than 200 years."²⁷⁵ Had there been no historical foundation for legislative prayer at the local level, would Greece's prayer program be less constitutional? Justice Kennedy's reasoning points in that direction.

However, Justice Kennedy's flawed use of history is merely symptomatic of the main problem that *Galloway* continued. Justice Kennedy assessed neither the object of the Establishment Clause nor the object of the purported power the government was exercising in having a prayer program. At first blush, it does appear that Justice Kennedy uses an object analysis. In various places throughout the opinion, Justice Kennedy discusses the "purposes" of the prayers given.²⁷⁶ Undoubtedly, Justice Kennedy demonstrates that the prayer program has a sufficient nexus with the "universal ends"—ends that history and tradition indicated were constitutional.²⁷⁷ Yet, determining the purpose (i.e., object) of the prayers given is a very separate analysis from determining the object of the Establishment Clause. Unlike the analysis of the majority in *Everson*,²⁷⁸ nowhere does Justice Kennedy look to the object of the governmental power in order to properly interpret the scope of that power.

IV. SOLUTION

A resurrection of the "Marshall methodology" would provide courts with the guidance so desperately needed. Once courts return to a reference to the object, a principled standard of analysis will save the courts and the people from the inconsistency, uncertainty, and chilling effect produced by the arbitrary Establishment Clause jurisprudence as it currently exists. Courts

273. *Id.*

274. *Id.*

275. *Id.*

276. *See, e.g., id.* at 1818, 1824, 1825, 1827.

277. *Id.* at 1823.

278. *See supra* Part II.B.1.

must return to the type of analysis Chief Justice Marshall considered necessary for assessing any exercise of governmental power. Because a constitution does not “partake of the prolixity of a legal code,” “only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves.”²⁷⁹ “That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language.”²⁸⁰ There is no reasonable alternative but to consider the object of the exercise of power, and then assess the means used to achieve that object.

A. Reference to the Object

In applying the “Marshall methodology” to legislative prayer cases, the first step of the analysis is to consider the actual end or object of the grant of power used to justify the exercise of power. As Chief Justice Marshall put it, “[l]et the end be legitimate, let it be within the scope of the [C]onstitution”²⁸¹ At this point, there is an important distinction that must be made so as not to confuse the analysis. The Constitution is an agreement between the people of the United States, granting power to the government of the United States.²⁸² The government of the United States is only authorized to exercise those powers granted, or delegated, to it by the people of the United States and no other.²⁸³ However, the Constitution does not purport to limit the powers granted to the states by the citizens of each state.²⁸⁴ Thus, the powers the government of the United States may legitimately exercise are not the same as the powers the individual states may legitimately exercise.²⁸⁵ Because the powers of the two governments are not the same, the object test could look different depending on whether the prayer practice is a state one or a federal one.²⁸⁶ This is because the “Marshall methodology” looks to the object of the power used to justify the exercise of

279. *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

280. *Id.*

281. *Id.* at 421.

282. U.S. CONST. pmbi.; *see also M’Culloch*, 17 U.S. at 403-05 (noting that the government proceeds directly from the people).

283. *Id.* at 405.

284. U.S. CONST. amend. X.

285. *M’Culloch*, 17 U.S. at 405.

286. *Id.* at 410 (demonstrating that the state and federal governments “are each sovereign, with respect to the objects committed to it, and neither sovereign, with respect to the objects committed to the other.”).

power. With different powers held by the two governments, it is conceivable that a state-specific power may be used to justify a prayer practice that could not be used to justify a similar prayer practice of the federal government.²⁸⁷

Yet, the issue can be simplified. Both state and federal governments have legislatures that have been granted the legislative power. While the Constitution of the United States contains the Necessary and Proper Clause, Chief Justice Marshall did not consider the inclusion of the clause absolutely necessary in order for legislatures generally to be able to “employ the necessary means, for the execution of the powers conferred on the government.”²⁸⁸ “General reasoning” already taught what the Constitution made explicit.²⁸⁹ It was all too apparent to the Chief Justice that:

The government which has a right to do an act, and has imposed on it, the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception.²⁹⁰

This means that all governments granted the legislative power, state or federal, are able to “employ the necessary means, for the execution of the powers conferred on the government.”²⁹¹ In other words, all governments with the legislative power have the benefits of a “Necessary and Proper Clause,” whether explicitly granted or not.

There is no real power granted to governments in the First Amendment; instead, certain protected rights of the people are set forth.²⁹² The First Amendment states what government power may not do.²⁹³ Thus, a prayer policy cannot be considered a means of exercising any power under the First Amendment, but rather it must serve as a means of exercising other governmental powers. Because neither the Constitution of the United States nor of any state contain a specific grant of power to open legislative bodies with an invocation, the only other option is for the power to fall under the

287. *Id.*

288. *Id.* at 411.

289. *Id.*

290. *Id.* at 409-10.

291. *Id.* at 411, 413 (finding the proposition too self-evident to have been questioned “[t]hat a legislature, endowed with legislative powers, can legislate . . .”).

292. U.S. CONST. amend. I.

293. *Id.*

inherent power to “employ the necessary means, for the execution of the powers conferred on the government.”²⁹⁴ The question is whether the particular legislative prayer practice is “necessary and proper for carrying into Execution the foregoing Powers, and all other Powers”²⁹⁵ vested in the government, whether it be by “this Constitution in the Government of the United States,”²⁹⁶ or by any other state constitution.

1. Analysis of the Ends

As Chief Justice Marshall explained in *M’Culloch*, the object of the Necessary and Proper Clause is to explicitly state the general right to “employ the necessary means, for the execution of the powers conferred on the government.”²⁹⁷ “To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable.”²⁹⁸ The means need only be adequate to its ends, “calculated to effect any of the objects intrusted to the government.”²⁹⁹ The means chosen do not need to be absolutely necessary or indispensable.³⁰⁰ Legislatures are not left with only those means that are “most direct and simple.”³⁰¹

Can legislative prayer be considered calculated to effect the objects entrusted to the government? The question may seem a strange one at first glance. It may provoke questions such as, “In what ways is legislative prayer necessary for government to execute the objects entrusted to it?” Or, “How is legislative prayer calculated to produce the ends of any government?” There are at least three answers to these questions.

First, although legislative prayer may not be absolutely necessary or indispensable for the execution of granted powers (i.e., without which the power would be nugatory), the prayer giver usually purports to invoke divine blessing and assistance in the carrying out of all powers. Certainly, means believed to assist a governmental body in its most essential functions, such as legislating and decision-making, are calculated to produce the ends of a governmental body. Because any power that exists

294. *M’Culloch*, 17 U.S. at 411, 413.

295. U.S. CONST. art. I, § 8, cl. 18.

296. *Id.*

297. *M’Culloch*, 17 U.S. at 412-13.

298. *Id.* at 413-14.

299. *Id.* at 423.

300. *Id.* at 419-20.

301. *Id.* at 413.

only exists by God's establishment,³⁰² it seems unremarkable that an institution acknowledge its establishing authority. It is all the more unremarkable when it is understood that government is a minister of God.³⁰³

John Calvin, the influential French theologian, also addressed this issue in his *Institutes of Christian Religion*.³⁰⁴ Calvin asserted that "no government can be happily established unless piety is the first concern; and that those laws are preposterous which neglect God's right and provide only for men."³⁰⁵ In fact, Calvin believed that "civil government has as its appointed end . . . to cherish and protect the outward worship of God."³⁰⁶ Calvin later noted that governing authorities are to serve faithfully as God's deputies.³⁰⁷ When governing authorities are mindful of the position they occupy, they are not only spurred to exercise their office more justly, but also greatly comforted in bearing the many and burdensome difficulties of their office.³⁰⁸ As ministers of God:

How will they have the brazenness to admit injustice to their judgment seat, which they are told is the throne of the living God? How will they have the boldness to pronounce an unjust sentence, by that mouth which they know has been appointed an instrument of divine truth? With what conscience will they sign wicked decrees by that hand which they know has been appointed to record the acts of God? To sum up, if they remember that they are vicars of God, they should watch with all care, earnestness, and diligence, to represent in themselves to men some image of divine providence, protection, goodness, benevolence, and justice.³⁰⁹

All of this stands in the shadow of God's command to rulers: "Now therefore, O kings, be wise; be warned, O rulers of the earth. Serve the Lord with fear, and rejoice with trembling. Kiss the Son, lest he be angry, and you

302. *Romans* 13:1.

303. *Romans* 13:3-4.

304. 2 JOHN CALVIN, CALVIN: INSTITUTES OF THE CHRISTIAN RELIGION 1485-1521 (John T. McNeill ed., Ford Lewis Battles, trans., Westminster John Knox Press reissued 2006) (1960).

305. *Id.* at 1495.

306. *Id.* at 1487.

307. *Id.* at 1491.

308. *Id.*

309. *Id.*

perish in the way, for his wrath is quickly kindled. Blessed are all who take refuge in him.”³¹⁰

Second, and somewhat related to the first answer, the founders seemed to believe that a flourishing society depended in large measure upon divine guidance³¹¹ and a moral citizenry.³¹² In fact, James Madison believed that “[b]efore any man can be considered as a member of Civil Society, he must be considered as a subject of the Governour of the Universe: And if a member of Civil Society, do it with a saving of his allegiance to the Universal Sovereign.”³¹³ Membership in society is conditioned on subjection to the “Governour of the Universe.”³¹⁴

Building off of the first two answers, the third answer is that acknowledgement of God is calculated to produce the ends of maintaining and upholding the rule of law. In his 1789 Thanksgiving Proclamation, President George Washington began by saying that “it is the duty of all Nations to acknowledge the providence of Almighty God . . . and humbly to

310. *Psalm 2:10-12* (English Standard Version).

311. See, e.g., BENJAMIN FRANKLIN, *Prayer Request at the Constitutional Convention—and the Response, 1787*, in *THE FOUNDING FATHERS AND THE DEBATE OVER RELIGION IN REVOLUTIONARY AMERICA* 78, 79-80 (Matthew L. Harris & Thomas S. Kidd eds., 2012). Franklin addressed the assembly, saying:

In this situation of this Assmibly, groping as it were in the dark to find political truth, and scarce able to distinguish it when presented to us, how has it happened, Sir, that we have not hitherto once thought of humbly applying to the Father of lights to illuminate our understandings? . . . I have lived, Sir, a long time, and the longer I live, the more convincing proofs I see of this truth—that God governs in the affairs of men. . . . We have been assured, Sir, in the sacred writings that “except the Lord build the House they labour in vain that build it.” I firmly believe this; and I also believe that without his concurring aid we shall succeed in this political building no better than the Builders of Babel.

Id.

312. GEORGE WASHINGTON, *Farewell Address, 1796*, in *THE FOUNDING FATHERS AND THE DEBATE OVER RELIGION IN REVOLUTIONARY AMERICA* 118, 121 (Matthew L. Harris & Thomas S. Kidd eds., 2012). In his farewell address to the people, Washington admonished the people:

Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. . . . And let us with caution indulge the supposition that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.

Id.

313. JAMES MADISON, *Memorial and Remonstrance 1785*, in *THE FOUNDING FATHERS AND THE DEBATE OVER RELIGION IN REVOLUTIONARY AMERICA* 62, 63 (Matthew L. Harris & Thomas S. Kidd eds., 2012).

314. *Id.*

implore his protection and favor.”³¹⁵ Washington did not just believe it a good idea to pray (humbly implore Almighty God for protection and favor), he considered it a duty. Further, Washington stated that it is a national duty, and not just an individual duty. Likewise, Roberto Unger pointed out that belief in a higher law, justified by a transcendent religion, was a necessary ingredient to bring about the rule of law ideal that is so fundamental in the Western Legal Tradition.³¹⁶ Acknowledgement of belief in a transcendent God who is a necessary source for the rule of law ideology is not inappropriate.

2. Is the Object Legitimate?

The next step in Marshall’s analysis is determining the legitimacy of the object that a prayer policy is calculated to effect. In *M’Culloch*, Chief Justice Marshall clearly believed the power to “employ the necessary means, for the execution of the powers conferred on the government” was legitimate.³¹⁷ Further, the ultimate objects of a prayer policy must be legitimate objects of government. Invoking divine guidance and assistance in carrying out entrusted powers, being a member of civil society by being subject to the “Governour of the Universe,” and seeking to uphold and maintain the rule of law by acknowledging God as the Lawgiver are all legitimate objects of the government. After all, is not the duty of government to use wisdom in all that it does, and to protect and maintain the foundations of our legal order? However, were the government to pray in order to conduct an ecclesiastical function rather than a governmental function, the legitimacy of the object would be cast into question. This is a crucial distinction that goes to the very heart of the Marshall methodology. A subject-only inquiry would be insufficient to differentiate between a prayer policy that has legitimate objects (e.g., one that is meant to lend gravity to a meeting and invoke divine guidance) and one that does not have legitimate objects (e.g., one that is meant to bless a communion service offered to attendees). Only inquiring into the object of the clause would expose the one as legitimate and the other as illegitimate.

315. GEORGE WASHINGTON, *Thanksgiving Proclamation, 1789*, in *THE FOUNDING FATHERS AND THE DEBATE OVER RELIGION IN REVOLUTIONARY AMERICA* 116, 117 (Matthew L. Harris & Thomas S. Kidd eds., 2012).

316. ROBERTO MANGABEIRA UNGER, *LAW IN MODERN SOCIETY* 83-84 (1976).

317. *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 411, 413 (1819).

B. *Assessing the Particular Practice Used*

Once the objects of a prayer policy are analyzed, the final step is to assess the means chosen. “[A]ll means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the [C]onstitution, are constitutional.”³¹⁸ As long as a prayer policy is appropriate, plainly adapted to the ends it purports to achieve, and not prohibited by a constitution, state or federal, the practice will be considered lawful. Such determinations are highly specific to the particular prayer policy in question. For this reason, it becomes all the more important for courts to carefully consider the objects of the particular policy in question.

1. Is the Practice of Legislative Prayer Proper or a Pretext?

Chief Justice Marshall made it abundantly clear that chosen means that serve as a pretext for achieving objects not entrusted to the government will be struck down by the court.³¹⁹ “[S]hould congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say, that such an act was not the law of the land.”³²⁰ A particular prayer policy must be “plainly adapted” and “appropriate” for the accomplishment of objects entrusted to the government. If it is not, it is the court’s duty to say that “such an act was not the law of the land.”³²¹ Again, this analysis will turn on the specific facts of each prayer policy. Some prayer policies may appear as though they are simply invoking divine guidance and acknowledging God, but, in fact, are actually attempting to impermissibly establish religion by holding an ecclesiastical service.

2. Are There Constitutional Prohibitions?

After determining whether the means chosen are plainly adapted, the court must next look to specific prohibitions in the letter or spirit of the Constitution that would bar the selection of certain means. “Should congress, in the execution of its powers, adopt measures which are prohibited by the constitution . . . it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say, that

318. *Id.*

319. *Id.* at 423.

320. *Id.*

321. *Id.*

such an act was not the law of the land.”³²² A legislature cannot choose means that are specifically foreclosed to it. For example, a legislature seeking to deter certain crimes cannot use cruel and unusual punishment as a means of deterring those crimes.³²³ “But where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground.”³²⁴

The main point to address here is whether the Establishment Clause is a constitutional prohibition of legislative prayer. Generally, the Court has already answered, “No.”³²⁵ However, *Marsh* relied only on history and tradition in looking at what the Establishment Clause does and does not prohibit. And *Galloway* reiterated and affirmed the teaching of *Marsh*.³²⁶ The meaning of the Constitution may be illumined by history and tradition, but, as nearly all recognize, history and tradition cannot justify what would otherwise be a constitutional violation.³²⁷

Instead, judges ought to at least begin where *Everson* left off. Any analysis of the Establishment Clause must consider not only the text, but also the object. While *Everson* may not have been a perfect interpretation of the Establishment Clause, it at least considered the object.³²⁸ *Everson* looked to the history and environment surrounding the drafting of the First Amendment in order to determine its purpose.³²⁹ The *Everson* Court specifically noted that the *object* of the First Amendment was largely considered the same as that of the Virginia Bill for Religious Liberty.³³⁰ Judges may disagree on the exact object of the Establishment Clause. However, the presence of disagreement does not mean that the object is unascertainable. History and tradition may be a factor used to determine whether the Clause meant to exclude legislative invocations, but history and tradition should not be used as a substitute for asking what is the object of the Clause.

322. *Id.*

323. U.S. CONST. amend. VIII.

324. *M'Culloch*, 17 U.S. at 423-24.

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

326. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1828 (2014).

327. See, e.g., *id.* at 1819.

328. *Everson v. Bd. of Educ.*, 330 U.S. 1, 8-12 (1947).

329. *Id.*

330. *Id.* at 13.

Even when *Everson's* conclusions on the object of the First Amendment are used, it is clear that legislative prayer would not be constitutionally prohibited. The freedom-loving colonists wanted to rid the newly formed union of any ability to compel financial support for government-favored churches.³³¹ The underlying creed of the First Amendment is that to "compel a man to furnish contribution of money for the propagation of opinions which he disbelieves, is sinful and tyrannical."³³² The First Amendment was intended to provide protection against governmental intrusion on religious liberty.³³³ Legislative prayer is not a means of the government financially supporting any one denomination or sect. Nor is legislative prayer forcing citizens to contribute money for the spread of ideas. Rather, legislative prayer is a means of government officials, as subjects, furnishing their duty to God as Governour, while also acknowledging their position as ministers of divine justice.

V. CONCLUSION

Courts must return to an object analysis when assessing legislative prayer claims. As Chief Justice John Marshall wrote in *M'Culloch v. Maryland*, "we must never forget that it is a *constitution* we are expounding."³³⁴ The particulars are not set forth in the Constitution, because, by its nature, a Constitution requires that "only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves."³³⁵ Not only will a reference to the object of the First Amendment in legislative prayer cases help to stifle the persistent inconsistency, uncertainty, and chilling of permissible religious expression, but it is also the only logical way to ensure a "fair and just interpretation."³³⁶ Some prayer programs may turn out to be a pretext for unconstitutional ends. Others may not be a pretext at all, but still have unconstitutional ends. It is imperative that judges consider the object of both the Establishment Clause and the prayer program. After all, an object's nature is defined by its end.

331. *Id.*

332. *Id.*

333. *Id.*

334. *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

335. *Id.*

336. *See id.*