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Cover Page Footnote
J.D., Notre Dame Law School, 2015; B.S. in Business, B.A. in Psychology, Miami University, 2012. I am grateful for Notre Dame's Program on Church, State & Society for the opportunity to learn about the Establishment Clause from a seminar co-taught by Associate Justice Clarence Thomas of the Supreme Court of the United States and Professor Richard Garnett. I am also grateful for Professor Donald L. Drakeman's comments and insights on this piece, the staff members of the Catholic University Law Review for their hard work editing this piece, and my family for their continuous love and support. All errors are my own.

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HOPEFUL CLARITY OR HOPELESS DISARRAY?: AN EXAMINATION OF *TOWN OF GREECE V. GALLOWAY* AND THE ESTABLISHMENT CLAUSE

Krista M. Pikus[+]

The Establishment Clause of the First Amendment states that "Congress shall make no law respecting an establishment of religion."[1] While this Clause may seem straightforward, history and differing interpretations have led to an unresolved debate over its meaning and application.[2] Most First Amendment scholars agree that U.S. Supreme Court caselaw interpreting the Establishment Clause is a conflicted muddle.[3] This is no new condition; Supreme Court Justice Clarence Thomas opined twenty years ago that "our Establishment Clause jurisprudence is in hopeless disarray."[4]

In the spring of 2014, the Supreme Court had the opportunity to remedy the malady of its Establishment Clause jurisprudence with *Town of Greece v.*

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1. U.S. CONST. amend. I.

2. *See* Carl H. Esbeck, *Uses and Abuses of Textualism and Originalism in Establishment Clause Interpretation*, 2011 UTAH L. REV. 489, 495–96; Frederick Mark Gedicks, *Incorporation of the Establishment Clause Against the States: A Logical, Textual, and Historical Account*, 88 IND. L.J. 669, 670–72 (2013); Vincent Phillip Munoz, *The Original Meaning of the Establishment Clause and the Impossibility of its Incorporation*, 8 U. PA. J. CONST. L. 585, 588–604 (2006); Robert G. Natelson, *The Original Meaning of the Establishment Clause*, 14 WM. & MARY BILL RTS. J. 73, 76–78 (2005); *see also* William P. Marshall, *Unprecedential Analysis and Original Intent*, 27 WM. & MARY L. REV. 925, 930–31 (1986) (noting ambiguities in the historical record regarding whether the Establishment Clause was intended to allow accommodation of religion or require strict separation).

3. *See* Patrick M. Garry, *Distorting the Establishment Clause into an Individual Dissenter's Right*, 7 CHARLESTON L. REV. 661, 661–62 (2013); Steven G. Gey, *Reconciling the Supreme Court's Four Establishment Clauses*, 8 U. PA. J. CONST. L. 725, 725 (2006) ("It is by now axiomatic that the Supreme Court's Establishment Clause jurisprudence is a mess—both hopelessly confused and deeply contradictory."); Shannon Chapla, *ND Expert: SCOTUS Ruled Correctly on Legislative Prayer*, NOTRE DAME NEWS (May 5, 2014), http://news.nd.edu/news/48143-nd-expert-scotus-ruled-correctly-on-legislative-prayer/ ("[T]he law in this area remains as muddled and difficult to apply as . . . it has been for the past 30 years.").

4. Rosenberger v. Rector, 515 U.S. 819, 861 (1995) (Thomas, J., concurring). Justice Thomas's view has not since grown more favorable. *See* Utah Highway Patrol Ass'n v. Am. Atheists, Inc., 132 S. Ct. 12, 13 (2011) (Thomas, J., dissenting) (protesting this "jurisprudence in shambles" and "this Court's nebulous Establishment Clause analyses" that "has confounded the lower courts").

Galloway.[5] There, the Court held that a New York town's practice of opening its town board meetings with a prayer offered by clergy members did not violate the Establishment Clause.[6] The Court, however, did not use any of its previously enumerated tests for assessing Establishment Clause violations.[7] Instead, the Court focused on the historical pedigree of government invocations and the nondiscriminatory procedures the town implemented in its invocation practice.[8]

Despite the Court's resolution of *Town of Greece* by an appeal to tradition,[9] the test the Court will use to assess future Establishment Clause challenges in other factual contexts remains unpredictable.[10] This Essay asks whether there is any hope for clarity in Establishment Clause jurisprudence after *Town of Greece*. Part I analyzes the confusion surrounding current Establishment Clause jurisprudence, and Parts II and III analyze what is wrong with that jurisprudence. Lastly, Part IV analyzes possible solutions for remedying the confusion and misapplication of Establishment Clause jurisprudence and proposes modest steps to achieve that goal. Specifically, it discusses practical and theoretical implications of these solutions and focuses on whether amending the level of scrutiny used in Establishment Clause cases is a viable option.

I. CONFUSION ABOUT THE TRUE ORIGINAL MEANING OF THE ESTABLISHMENT CLAUSE?

Interpretations of the original meaning of the Establishment Clause typically fall on a spectrum between strict-separationism and nonpreferentialism.[11] In one contentious context, government financial subsidies, the current debate focuses on whether the Establishment Clause permits nonpreferential aid to religion or requires strict separation forbidding any government aid to religions.[12] Another

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5. 134 S. Ct. 1811 (2014).

6. *Id.* at 1828.

7. *See infra* notes 182–90 and accompanying text.

8. *See Town of Greece*, 134 S. Ct. at 1824–28.

9. *Id.* at 1828.

10. *See* Chapla, *supra* note 3.

11. *See* Munoz, *supra* note 2, at 588–604; Natelson, *supra* note 2, at 76–78; *see also* Marshall, *supra* note 2, at 930–31 (discussing ambiguities in the historical record regarding whether the Establishment Clause was intended to allow accommodation of religion or require strict separation). Outside these boundaries are yet other approaches to the interpretation of the Establishment Clause. *See infra* Part I.B.

12. *See* Wallace v. Jaffree, 472 U.S. 38, 99–106 (1985) (Rehnquist, J., dissenting) ("The Establishment Clause did not require government neutrality between religion and irreligion nor did it prohibit the Federal Government from providing nondiscriminatory aid to religion."); Lynch v. Donnelly, 465 U.S. 668, 673 (1984) ("The concept of a 'wall' of separation is a useful figure of speech probably deriving from views of Thomas Jefferson. The metaphor has served as a reminder that the Establishment Clause forbids an established church or anything approaching it. But the metaphor itself is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state."); Marsh v. Chambers, 463 U.S. 783, 786–92 (1983) (discussing the purposes of "separation" and "neutrality" within the meaning of the Establishment Clause).

prominent dispute centers on the government's authority to evince support for religious positions.[13]

In 1878, the Supreme Court in *Reynolds v. United States*[14] first considered the relevance of the Establishment Clause to the famous metaphor Thomas Jefferson included in his letter to the Danbury Baptist Association.[15] Jefferson wrote that the Establishment Clause built a "wall of separation between church and State."[16] In 1947, the Supreme Court again invoked this "wall of separation" metaphor in *Everson v. Board of Education*,[17] holding that the Establishment Clause binds the states through the Fourteenth Amendment.[18] The function and significance of Jefferson's "wall" metaphor remains contested.[19]

While the history preceding the Establishment Clause is largely undisputed, the debate rages over which historical facts are most important, how they should be understood, and how they should control the interpretation of the Establishment Clause.[20]

A. Historical Background

One difficulty in interpreting the Establishment Clause is that the historical record appears to present support for different sides of the debate. For instance, many people cite Jefferson's letter to the Danbury Baptist Association or James

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13. *Marsh*, 463 U.S. at 803–04, 804 n.15 (Brennan, J., dissenting) ("The second purpose of separation and neutrality is to keep the state from interfering in the essential autonomy of religious life, either by taking upon itself the decision of religious issues, or by unduly involving itself in the supervision of religious institutions or officials . . . . A court, for example, will refuse to decide an essentially religious issue even if the issue is otherwise properly before the court, and even if it is asked to decide it.").

14. 98 U.S. 145 (1878).

15. *Id.* at 163–64. The Court quoted Thomas Jefferson's letter and found it authoritative in interpreting the Establishment Clause:

> Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the government reach actions only, and not opinions,—I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion or prohibiting the free exercise thereof," thus building a wall of separation between church and State.

Id. at 164.

16. *Id.*

17. 330 U.S. 1 (1947).

18. *Id.* at 15–16.

19. *See* William J. Cornelius, *Church and State—The Mandate of the Establishment Clause: Wall of Separation or Benign Neutrality?*, 16 ST. MARY'S L.J. 1, 11–13 (1984); Arlen Specter, *Defending the Wall: Maintaining Church/State Separation in America*, 18 HARV. J.L. & PUB. POL'Y 575, 577 (1995); *cf.* Lynch v. Donnelly, 465 U.S. 668, 673 (1984) ("The concept of a 'wall' of separation is a useful figure of speech probably deriving from views of Thomas Jefferson. The metaphor has served as a reminder that the Establishment Clause forbids an established church or anything approaching it.").

20. *See generally* Specter, *supra* note 19.

Madison's Memorial and Remonstrance in support of a separationist approach.[21] Others refer to those same sources as consistent with religious accommodation.[22] Adding further complexity is the apparent tensions within the views and acts of these notable Founding-Era figures.[23] When Madison was President, he sat on a committee that appointed a congressional chaplain and proclaimed national days of prayer.[24] However, when Madison was in retirement, he wrote in opposition to such practices.[25] While Thomas Jefferson wrote of a "wall of separation,"[26] he also approved federal funding for a Christian missionary performing outreach to the Native Americans.[27] These seemingly contradictory actions and words lead us to ask: wherein lies the Framers' true intent and the original meaning of the text?

One interpretive aid to understanding the true intent of the Framers is the legislative history. Resolving the proper relationship between church and state does not appear to have been on the list of priorities for the Framers of the U.S. Constitution.[28] Instead, the religion clauses were a response to the demands of several states for a Bill of Rights in the Constitution as a condition for ratification.[29]

Although few details are recorded in the debate regarding the Establishment Clause, several states did raise concerns over the prospect of the establishment of a national church.[30] Even though the history often conflicts, the primary intention of the First Congress seems to be at least clear on one point: to prevent

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21. *See* McCreary Cty. v. ACLU, 545 U.S. 844, 876 (2005); Van Orden v. Perry, 545 U.S. 677, 724–25 (2005) (Stevens, J., dissenting); Lee v. Weisman, 505 U.S. 577, 590, 608 (1992); Wallace v. Jaffree, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting); *Lynch*, 465 U.S. at 673; Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 685 (1970) (Brennan, J., concurring); Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 213 (1963); Engle v. Vitale, 370 U.S. 421, 428 (1962); *Everson*, 330 U.S. at 16; *Reynolds*, 98 U.S. at 163–64.

22. *See* Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 153–66 (1991).

23. David Barton, *The Image and the Reality: Thomas Jefferson and the First Amendment*, 17 NOTRE DAME J.L. ETHICS & PUB. POL'Y 399, 402–03 (2003) (arguing that "there are vast numbers of Jefferson quotes and actions which, should they be considered seriously by the Court, would cause at least a serious reassessment of its landmark Establishment Clause rulings and quite probably a dramatic reversal"). In addition, either the "fervent religionists" or the "ardent secularists" could cite Jefferson's quotes and actions as authority.

24. *See* Marsh v. Chambers, 463 U.S. 783, 787–88, 788 n.8 (1983).

25. *Id.* at 807, 815 (Brennan, J., dissenting).

26. *See Everson*, 330 U.S. at 16 (quoting *Reynolds*, 98 U.S. at 164).

27. *See* Barton, *supra* note 23, at 404; James A. Davids, *Putting Faith in Prison Programs, and Its Constitutionality Under Thomas Jefferson's Faith-Based Initiative*, 6 AVE MARIA L. REV. 341, 342 (2008).

28. *See* Barton, *supra* note 23, at 436–39 (illustrating that the "separation of Church and State" was never once mentioned in the Constitutional Convention debates).

29. *See* DONALD L. DRAKEMAN, CHURCH, STATE, AND ORIGINAL INTENT 213–18 (Cambridge Univ. Press 2010).

30. *Id.* at 198.

Congress from establishing a national church or religion.[31] Although the prohibition of a national church may be clear, how religion is defined from a constitutional perspective is not.[32]

B. Meaning of the Text

Evidenced by scholars' varying proposals, discerning the original meaning of the language of the Establishment Clause is challenging.[33] The Framers did not include definitions for the words in the First Amendment because the circumstances giving rise to the Bill of Rights did not require them to define such terms.[34] One scholar suggests that the meaning of "establishment" was undergoing transition and was being used in a variety of ways during the time of the nation's Founding.[35] The word "establishment" was often used inconsistently during the Founding Era.[36] Some evidence suggests that taxes to support religious purposes might be permissible, yet some Founders viewed that as an indication of an establishment.[37]

Even if there were multiple connotations for "establishment," other language in the Clause is still heavily debated.[38] Many have interpreted "respecting an establishment of religion" to be evidence of the enhanced federalism argument to ensure the federal government would not interfere with state establishments.[39] The Supreme Court in *County of Allegheny v. ACLU*[40] discussed other phrases that may have been used instead of "respecting," such as "touching,"[41] and concluded that a government display of religious symbols falls under the

31. *Id.* at 231.

32. Krista M. Pikus, Comment, *Quasi-Rights for Quasi-Religious Organizations: A New Framework Resolving Religious-Secular Dichotomy After* Burwell v. Hobby Lobby, 90 NOTRE DAME L. REV. ONLINE 16, 18–21 (2014).

33. *See* PHILLIP HAMBURGER, SEPARATION OF CHURCH AND STATE 9–10 (Harv. Univ. Press, 2004); Natelson, *supra* note 2, at 76–78; *see also* Lisa Shaw Roy, *History, Transparency, and the Establishment Clause: A Proposal for Reform*, 112 PENN ST. L. REV. 683, 715 (2008) (advocating for a procedural solution in which the Court separates its treatment of history from its analysis of law).

34. *See* DRAKEMAN, *supra* note 29, at 226; WILLIAM GERALD MCLOUGHLIN, NEW ENGLAND DISSENT, 1630–1833, at 783 (Oxford Univ. Press 1971).

35. *See* DRAKEMAN, *supra* note 29, at 216.

36. *Id.* at 230–60.

37. *Id.* at 232–33.

38. *Id.* at 180–85.

39. *See id.* at 232–44, 319; *see also* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 45 (2004) (Thomas, J., concurring) (arguing that "the Establishment Clause is a federalism provision").

40. 492 U.S. 573 (1989), *abrogated by* Town of Greece v. Galloway, 134 S. Ct. 1811 (2014).

41. *Id.* 649.

establishment prohibition.[42] An even more fundamental question is: what is "religion"?[43]

C. Difficulty in Defining Religion

One of the biggest challenges presented in cases governed by the religion clauses is determining whether an organization or practice constitutes "religion."[44] This particular challenge is marked in the case of a religion not in existence or present in the American experience when the Constitution was drafted.[45] It is argued that at a minimum, the Framers conceived religion to be theistic.[46] Regardless, courts have held that newer religions deserve full First Amendment protection.[47] While there is some evidence that one motivation for including the religion clauses was to avert political contest among sects of Christianity, they are now considered to apply to all religions.[48] Generally, though, courts have avoided defining religion because doing so, as some assert, would violate the Establishment Clause.[49] Alternatively, it may be due to the conceptual difficulty of the task.[50]

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42. *Id.* at 613–21.

43. *See, e.g.*, Dmitry N. Feofanov, *Defining Religion: An Immodest Proposal*, 23 HOFSTRA L. REV. 309, 356–91 (1994); Michael Rhea, *Denying and Defining Religion Under the First Amendment: Waldorf Education as a Lens for Advocating a Broad Definitional Approach*, 72 LA. L. REV. 1095, 1103–09 (2012); Jane M. Ritter, *The Legal Definition of Religion: From Eating Cat Food to White Supremacy*, 20 TOURO L. REV. 751, 761–86 (2004); Jeffrey Omar Usman, *Defining Religion: The Struggle To Define Religion Under the First Amendment and the Contributions and Insights of Other Disciplines of Study Including Theology, Psychology, Sociology, the Arts, and Anthropology*, 83 N.D. L. REV. 123, 144-87 (2007).

44. *See* Pikus, *supra* note 32, at 18–21 (discussing the current legal standard for classifying organizations as religious); *cf.* Susan J. Stabile, *State Attempts To Define Religion: The Ramifications of Applying Mandatory Prescription Contraceptive Coverage Statutes to Religious Employers*, 28 HARV. J.L. & PUB. POL'Y 741, 757 n.69 (2005) (discussing the paradoxical effect that sometimes occurs when courts attempt to define organizations as religious).

45. Malnak v. Yogi, 440 F. Supp. 1284, 1315 (D.N.J. 1977), *aff'd per curiam*, 592 F.2d 197 (3d Cir. 1979) (arguing that while today there are "philosophies and theories recognized as religions or religious practices" that were unknown at the time the Constitution was drafted, the meaning of religion has expanded over time and would fall under the First Amendment).

46. Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CAL. L. REV. 753, 757–58 (1984).

47. *See Malnak*, 440 F. Supp. at 1315.

48. *See* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 35 (2004) (O'Connor, J., concurring) (citing Wallace v. Jaffree, 472 U.S. 38, 52–54 (1985)).

49. *See* Usman, *supra* note 43, at 145 ("[D]efining religion would violate the Constitution by interfering with religious liberty and establishing religion.").

50. *See* Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 714 (1981) ("The determination of what is a 'religious' belief or practice is more often than not a difficult and delicate task . . ."); *see also* Usman, *supra* note 43, at 145 (discussing the difficulty the courts would face in attempting to define religion).

Despite popular resistance to defining religion, some courts and scholars have attempted to do so.[51] That effort navigates a fine line between an impermissible questioning of the validity of religious beliefs and a permissible questioning of whether a set of beliefs is a "religion" under the First Amendment.[52] Although many have attempted to define religion,[53] its definition remains a delicate question for courts deciding religious liberty claims.[54] One approach to this task identifies instances when the concept indisputably applies and then evaluates more doubtful cases by analogizing them to the indisputable instances.[55] This method has been viewed as a safeguard against arbitrary judicial classifications of religions.[56]

The modern Supreme Court has avoided defining religion,[57] though it previously gave some indication of what it considers to be a religion.[58] In 1890, the Supreme Court in *Davis v. Beason*[59] stated that "'religion' has reference to one's views of his relations to his Creator."[60] In *United States v. Macintosh*,[61] the Supreme Court noted that "[t]he essence of religion is [a] belief in a relation to God."[62] Even James Madison, who is often cited to support strict-

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51. *See* Feofanov, *supra* note 43, at 363–66, 368, 371, 374–90; Rhea, *supra* note 43, at 1103–08; Usman, *supra* note 43, at 151–54, 165–88, 193–96, 200–17.

52. *Compare* Jones v. Bradley, 590 F.2d 294, 295 (9th Cir. 1979) (declaring "no prohibition[] . . . against ruling whether or not a set of beliefs constitutes a religion"), *with* United States v. Ballard, 322 U.S. 78, 88 (1944) ("So we conclude that the District Court ruled properly when it withheld from the jury all questions concerning the truth or falsity of the religious beliefs or doctrines of respondents."); *see also* United States v. Macintosh, 283 U.S. 605, 633–34 (1931) (Hughes, C.J., dissenting) (describing religion as a "belief in a relation to God involving duties superior to those arising from any human relation"); Davis v. Beason, 133 U.S. 333, 341 (1890) (describing religion as "reference to one's views of his relations [and obligations] to his Creator").

53. *See, e.g.*, Jesse H. Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579, 587–89, 593–95; *see generally* James M. Donovan, *God Is as God Does: Law, Anthropology, and the Definition of "Religion"*, 6 SETON HALL CONST. L.J. 23 (1995). *But see* Troy L. Booher, *Finding Religion for the First Amendment*, 38 J. MARSHALL L. REV. 469, 469 (2004) (arguing that such attempts to define religion are misguided and "will not help . . . [with interpreting] the religion clauses").

54. *Thomas*, 450 U.S. at 714 ("The determination of what is a 'religious' belief or practice is more often than not a difficult and delicate task . . .").

55. *See* Greenawalt, *supra* note 46, at 763.

56. *See* Eduardo Peñalver, *The Concept of Religion*, 107 YALE L.J. 791, 794 (1997).

57. While the courts currently have no definitive test to define religion, some cases provide insight to relevant factors. *See* LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n, 503 F.3d 217, 226 (3d Cir. 2007) (highlighting some of the factors the court examined in determining whether an organization was religious, including: "(1) whether the entity operates for a profit, (2) whether it produces a secular product, (3) whether the entity's articles of incorporation or other pertinent documents state a religious purpose, [or] (4) whether it is owned, affiliated with, or financially supported by a formally religious entity such as a church or synagogue").

58. *See* Davis v. Beason, 133 U.S. 333, 342 (1890).

59. 133 U.S. 333 (1890).

60. *Id.* at 342.

61. 283 U.S. 605 (1931).

62. *Id.* at 633 (Hughes, C.J., dissenting).

separationism, speaks multiple times of a duty to the "Creator" in his *Memorial and Remonstrance Against Religious Assessments*.[63]

As there was uncertainty pertaining to the meaning of the Establishment Clause during the Founding Era, it is hard to expect a clear understanding of that language today.[64] Evidence indicates that the language can reasonably be interpreted multiple ways.[65]

II. WHICH INTERPRETATION SHOULD CONTROL?

The participants in the debate over the meaning of the Establishment Clause confidently cite history to support their position.[66] Some Justices, including Justice Hugo Black, supported the strict-separation approach,[67] while others, such as Justice William Rehnquist, advocated for the nonpreferential approach.[68] On the other hand, Justice Thomas has advocated that the Establishment Clause is an enhanced federalism provision to prevent the federal government from interfering with states' establishments.[69] Each of these approaches has its strengths and weaknesses.

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63. James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), *in* 2 THE WRITINGS OF JAMES MADISON 183, 187 (Gaillard Hunt ed., 1901); *see also* Engel v. Vitale, 370 U.S. 421, 431–32 (1962) (citing Madison, *supra*, at 187); Vincent Blasi, *School Vouchers and Religious Liberty: Seven Questions from Madison's Memorial and Remonstrance*, 87 CORNELL L. REV. 783, 798 (2002). Madison wrote in his *Memorial and Remonstrance*:

> The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right . . . It is the duty of every man to render to the Creator such homage and such only, as he believes to be acceptable to him. This duty is precedent both in order of time and in degree of obligation, to the claims of Civil Society.

Madison, *supra*, at 184–85. For a discussion regarding the validity of Madison's *Memorial and Remonstrance*, see *Letter from James Madison to William Bradford, Jr.* (Jan. 24, 1774), *in* THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 2–4 (Marvin Meyers ed., rev. ed. 1981).

64. *See supra* note 2 and accompanying text.

65. *See supra* note 11 and accompanying text.

66. *See supra* Part I.

67. *See Engel*, 370 U.S. at 425 (referring to a "wall of separation"); *see also* DAVID L. GREY, THE SUPREME COURT AND THE NEWS MEDIA 40–41 (1968); ROGER K. NEWMAN, HUGO BLACK 522–23 (2d ed. 1997).

68. *See* Russell M. Mortyn, *The Rehnquist Court and the New Establishment Clause*, 19 HASTINGS CONST. L.Q. 567, 574–75 (1992).

69. *See* Town of Greece v. Galloway, 134 S. Ct. 1811, 1835 (2014) (Thomas, J., concurring) ("I write separately to reiterate my view that the Establishment Clause is 'best understood as a federalism provision.'" (quoting Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 50 (2004) (Thomas, J., concurring))); DRAKEMAN, *supra* note 29, at 232–47 (discussing the theory and credibility of Justice Thomas's enhanced federalism interpretation of the Establishment Clause).

A. Strict-Separationism

Support for strict-separationism often relies on Jefferson's views and his "wall of separation" metaphor.[70] Numerous Supreme Court cases have cited Jefferson's "wall" metaphor as a means of maintaining this separation.[71] Evidence reveals that Jefferson harbored hostility towards religion.[72] Furthermore, this strict-separationism view lacks constitutional authority.[73] While the principle of "separation of Church and State" possesses some value, the words themselves are not found in the Constitution.[74] Some scholars recommend that the phrase and idea it conveys should be viewed with suspicion, given that it was a development from prejudice.[75]

B. Nonpreferentialism

Justice Rehnquist's dissent in *Wallace v. Jaffree*[76] provides a powerful endorsement of nonpreferentialism.[77] He maintained that the actions of the First Congress confirm the view that the government should not prefer one religious sect to another,[78] but that accommodating religious faith and practice is acceptable and was common during the Founding Era[79] (e.g., national days of prayer and Thanksgiving,[80] the Northwest Ordinance's legislative favor for religious education,[81] and land grants supporting religion[82]).

As evidence that the nonpreferential viewpoint triumphs, some scholars point to the Framers' choice of "an" establishment of religion over "the" establishment of religion.[83] Still, no persuasive evidence exists that the First Congress assigned such significance to that distinction.[84]

When examining the totality of the evidence and the actions of the Framers, the nonpreferentialism approach seems more reasonable than the strict-

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70. *See, e.g.*, *Engel*, 370 U.S. at 424–25.

71. *See* Van Orden v. Perry, 545 U.S. 677, 708 (2005) (Stevens, J., dissenting); Lee v. Weisman, 505 U.S. 577, 600–01 (1992) (Blackmun, J., concurring); Wallace v. Jaffree, 472 U.S. 38, 91–92 (1985) (Rehnquist, J., dissenting); McCollum v. Bd. of Educ., 333 U.S. 203, 211 (1948); Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947); Reynolds v. United States, 98 U.S. 145, 164 (1878).

72. *See* DRAKEMAN, *supra* note 29, at 63.

73. *See* U.S. CONST. amend. I. (The words "wall of separation" and "separation of Church and State" do not appear in the First Amendment).

74. *Id.*

75. *See* HAMBURGER, *supra* note 33, at 481–83.

76. 472 U.S. 38 (1985).

77. *Id.* at 106, 113 (Rehnquist, J., dissenting).

78. *Id.* at 100.

79. *Id.* at 101–03.

80. *See id.* at 113.

81. *Id.* at 100.

82. *Id.*

83. *See* DRAKEMAN, *supra* note 29, at 179.

84. *Id.* at 211–12.

separationist approach.[85] However, given its major religious pluralism, nonpreferentialism does not seem practicable in the current polity.[86] This is not a criticism of the nonpreferentialist interpretation but rather a practical consideration. Because today's circumstances have changed, some advocate for a more workable approach.[87] Importantly, however, changing the rule to reflect the changing times may inadvertently unsettle the enduring meaning and predictable operation of the Constitution in the long term.[88] Additionally, new proposed frameworks must beware of inviting judges to speculate on what today's culture requires, thereby extending, rather than cabining, judicial discretion.[89]

C. Enhanced Federalism

The "enhanced federalism" interpretation advocates the view that the purpose of the Establishment Clause is to prohibit the federal government from interfering with state establishments.[90] While this viewpoint has support, it is unlikely that the *sole* purpose of the Establishment Clause is to protect state establishments, as such a view contradicts historical evidence.[91] If members of the First Congress intended for this interpretation to apply, it was not recorded in the proposed language.[92] The majority of the records from the ratification conventions and debates indicate that the Establishment Clause was intended to prohibit the federal government from establishing a national religion.[93] Even James Madison, who is often cited in support of a separationist approach, proposed the language "no national religion shall be established," indicating that perhaps even he did not think this should be implemented against the states.[94]

D. Incorporation Doctrine

Even if the Establishment Clause was only intended to prohibit Congress from establishing a national religion, the Supreme Court held in *Everson* that the Establishment Clause applied to the states via the Fourteenth Amendment.[95] Justice Thomas maintains that this is a flawed interpretation because the

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85. For instance, several Founders who were later elected President proclaimed national days of prayer and thanksgiving during their respective presidencies. *See* Lee v. Weisman, 505 U.S. 577, 633–35 (1992) (Scalia, J., dissenting).

86. *Cf.* Deborah Jones Merritt & Daniel C. Merritt, *The Future of Religious Pluralism: Justice O'Connor and the Establishment Clause*, 39 ARIZ. ST. L.J. 895, 948 (2007).

87. *See id.* at 943, 945, 947.

88. *See infra* note 221 and accompanying text.

89. *See infra* notes 221–24 and accompanying text.

90. DRAKEMAN, *supra* note 29, at 211.

91. *See id.* at 229.

92. *Id.* at 235–36.

93. *Id.* at 241.

94. *Id.* at 206.

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

Establishment Clause resists incorporation by virtue of its underlying purpose.[96] Justice Thomas believes that incorporation of the Establishment Clause frustrates its original intention to allow states the freedom to make church-state decisions without federal interference.[97]

While this interpretation is plausible based on the language of the Clause, the records of the debate in the Annals of Congress do not contain specific support for it.[98] Additionally, even if this were the intent, it was neither discussed nor considered a relevant issue during the time the Fourteenth Amendment was ratified.[99] While this view is plausible, the lack of substantive historical support leaves room for doubt.

III. What's Wrong with Our Establishment Clause Jurisprudence

A. Law Office History

Contributing to the conflicted character of Establishment Clause jurisprudence is the ambiguous historical material allowing for "law office history," where each side selects historical accounts that best support its position.[100] Two of the most significant Supreme Court cases decided on this subject matter, *Everson* and *Reynolds*, have been accused of goal-oriented "law office history."[101]

The same accusation can be made on either side.[102] With both sides possessing the ability to selectively pick desirable support, having an objective, honest argument is especially difficult.[103] Interestingly, advocates on both sides of the debate believe that they are adopting the true original meaning.[104] With numerous inconsistencies and a dearth of evidence, it is difficult to decide which side is definitively correct. This creates a majority of the confusion and "hopeless disarray" in Establishment Clause jurisprudence.[105] Many Supreme Court Justices are guilty of "law office history" in applying Establishment Clause tests.[106]

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96. *See* Town of Greece v. Galloway, 134 S. Ct. 1811, 1835 (2014) (Thomas, J., concurring); Van Orden v. Perry, 545 U.S. 677, 693 (2005) (Thomas, J., concurring) (arguing that the Establishment Clause resists incorporation); Zelman v. Simmons-Harris, 536 U.S. 639, 679–80 (Thomas, J., concurring).

97. *See* sources cited *supra* note 96.

98. *See* DRAKEMAN, *supra* note 29, at 235.

99. *Id.* at 322.

100. *Id.* at 8.

101. *Id.* at 10–11.

102. *Id.* at 11.

103. *Id.*

104. *Id.* at 13–14.

105. *See* Rosenberger v. Rector, 515 U.S. 819, 861 (1995) (Thomas, J., concurring).

106. *See* DRAKEMAN, *supra* note 29, at 79–80.

B. Inconsistent Application of Tests

Courts employ several different tests to assess government action under the Establishment Clause.[107] The available tests include: the coercion test, which is used, for example, in school prayer evaluations;[108] neutrality analysis, often applied to assess government aid to religious schools;[109] the endorsement test, applied to government displays, legislation, and government communications;[110] and the *Lemon* test, as outlined in *Lemon v. Kurtzman*,[111] used in many instances (except—for now—legislative prayer, as discussed below).[112] These tests are applied inconsistently.[113] The "law office history" phenomenon has its analogue in the sphere of judicial tests.[114] These several analytical options allow a judge to pick whichever test best facilitates his or her desired outcome.

C. Prior and Current Tests

Each of the extant Establishment Clause tests possesses strengths and weaknesses.[115] The unpredictable nature in choosing and applying them is a significant problem.[116] Another issue is that the use of any of these tests may allows the most important consideration to be cast aside: the basic principles of the Establishment Clause itself.[117]

1. The Lemon *Test*

In *Lemon*,[118] the Supreme Court established a three-part test to assess whether a government action violates the Establishment Clause.[119] The *Lemon* test examines whether: (1) the statute has a secular legislative purpose;[120] (2) its

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107. *See infra* notes 108–12 and accompanying text.

108. *See* Lee v. Weisman, 505 U.S. 577, 592 (1992).

109. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 652–53 (2002).

110. *See* Lynch v. Donnelly, 465 U.S. 668, 681 (1984).

111. 403 U.S. 602 (1971).

112. *See id.* at 614–15.

113. *See generally* Emily Fitch, Note, *An Inconsistent Truth: The Various Establishment Clause Tests as Applied in the Context of Public Displays of (Allegedly) "Religious" Symbols and Their Applicability Today*, 34 N. ILL. U. L. REV. 431 (2014).

114. *See infra* Part III.C.

115. Fitch, *supra* note 113, at 434.

116. *See, e.g.*, Newdow v. U.S. Cong., 328 F.3d 466, 487 (9th Cir. 2003) (en banc), *rev'd*, Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004) (emphasis added) ("*We are free to apply any or all of the three tests*, and to invalidate any measure that fails any one of them. Because we conclude that the school district policy impermissibly coerces a religious act and accordingly hold the policy unconstitutional, we need not consider whether the policy fails the endorsement test or the *Lemon* test as well.").

117. *See, e.g.*, *infra* Part III.C.1–3.

118. 403 U.S. 602 (1971).

119. *Id.* at 612–13.

120. *Id.* at 612.

primary effect neither advances nor inhibits religion;[121] and (3) it fosters excessive government entanglement with religion.[122] If a statute fails any of these prongs, it violates the Establishment Clause.[123] In the majority opinion, Chief Justice Warren Burger wrote that the First Amendment sought to foreclose the principle evil of "political division along religious lines."[124] Chief Justice Burger believed that aid to religious schools could pose a danger of unconstitutional entanglement due to this division.[125]

The primary arguments against the *Lemon* test are that it is too restrictive, not reflective of the underlying principles, and results in unpredictable application.[126] Assessing the true "purpose" of legislation allows for unreliable speculation.[127] Although this test was popular for some time, its application has since diminished and has been strongly criticized by some current Supreme Court Justices.[128] In *Van Orden v. Perry*,[129] the Supreme Court specifically declined to use the *Lemon* test in validating a Ten Commandments monument displayed on government property.[130] Yet, in a case decided the same day as *Van Orden*, *McCreary County v. ACLU*,[131] the Court employed the *Lemon* test to strike down a display of Ten Commandments in county courthouses.[132]

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121. *Id.*

122. *Id.* at 613.

123. *Id.* at 612–13.

124. *Id.* at 622.

125. *Id.*

126. *See* Cynthia V. Ward, *Coercion and Choice Under the Establishment Clause*, 39 U.C. DAVIS L. REV. 1621, 1623 (2006) ("The Court's first formal methodology for analyzing Establishment Clause issues, the so-called *Lemon* test, proved so ad hoc and unpredictable in application that it has receded into the background as an analytical tool."); *see also* Jay Schlosser, *Establishment Clause and Justice Scalia: What the Future Holds for Church and State*, 63 NOTRE DAME L. REV. 380, 380–81 (1988) (arguing that Justice Scalia's distaste for the *Lemon* test will further divide the Court).

127. Choper, *supra* note 53, at 609.

128. *See, e.g.*, Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring). Justice Scalia criticizes the *Lemon* test, advocating for it to be dismantled once and for all:

> Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Free Union School District. . . . Over the years . . . no fewer than five of the currently sitting Justices have . . . personally driven pencils through the creature's heart . . . and a sixth has joined an opinion doing so. . . . The secret of the *Lemon* test's survival, I think, is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will.

Id. at 398–99.

129. 545 U.S. 677 (2005).

130. *Id.* at 686.

131. 545 U.S. 844 (2005).

132. *Id.* at 859–60.

In 1983, the Supreme Court in *Marsh v. Chambers*[133] did not even mention the *Lemon* test in upholding the use of a legislative chaplain to offer prayers to open sessions of the Nebraska Legislature.[134] Had the *Marsh* Court applied the *Lemon* test, Nebraska's practice would likely have been held unconstitutional.[135] Instead, the Court deemed the historical fact of the uninterrupted existence of a decidedly non-secular legislative prayer practice throughout the history of the nation to support its constitutional propriety.[136] *Marsh*, then, implies doubt that the *Lemon* test is consistent with the Framers' intent and the original meaning of the Clause.[137] In any event, the fact that the Supreme Court treats the *Lemon* test as optional facilitates analytical selectivity, paralleling the historical selectivity critiqued above.[138]

2. Endorsement Test

In her concurring opinion in *Lynch v. Donnelly*,[139] Justice Sandra Day O'Connor proposed a new Establishment Clause test that would ask whether state action "intends to convey a message of endorsement or disapproval of religion."[140] She urged this to be an improvement upon *Lemon*, as the Court would not have to speculate about the effects of state action.[141] The Court is expected to employ this test from the perspective of the reasonable observer.[142] As Justice Thomas opined in *Utah Highway Patrol Ass'n v. American Atheists, Inc.*,[143] the Court's assessment of reasonableness is arbitrary at best.[144]

3. Neutrality Test

Another test the Supreme Court has employed in Establishment Clause cases is the "neutrality" test.[145] "Neutrality" has been interpreted multiple ways.[146] Often, the neutrality test is interpreted as "evenhandedness."[147] However, neutrality has also been interpreted as a "secular purpose" test, which

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133. 463 U.S. 783 (1983).
134. *Id.* at 795.
135. *Id.* at 800–01 (Brennan, J., dissenting).
136. *Id.*
137. *See id.* at 790–91 (majority opinion).
138. *See supra* note 116 and accompanying text.
139. 465 U.S. 668 (1984).
140. *Id.* at 691 (O'Connor, J., concurring).
141. *Id.* at 688–89.
142. *Id.* at 690.
143. 132 S. Ct. 12 (2011).
144. *Id.* at 21.
145. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 640 (2002).
146. *See id.* at 670 (O'Connor, J., concurring).
147. *Id.* at 696 (Souter, J., dissenting).

controversially stipulates that a secular purpose is neutral and a religious one is non-neutral.[148]

The "evenhandedness" interpretation of neutrality presents two virtues: (1) it is more consistent with historical practices from around the Founding Era to allow at least some aid for religious missions;[149] and (2) it protects what seems to be the widely agreed upon purpose of the Clause: to prohibit a national establishment of religion.[150]

Nevertheless, this approach also has weaknesses.[151] First, "evenhandedness" is arguably not the original intent or meaning of the Establishment Clause.[152] Justice Rehnquist's dissent in *Wallace* highlights that neither Madison's intent nor the congressional debate records evince a concern with ensuring neutrality from the government.[153]

The ability of the federal government to be "evenhanded" is questionable, especially because there are significantly more religions in America today than in the Founding Era.[154] Therefore, one may argue, as Justice Hugo Black did,[155] that a strict separation between church and state should be maintained, as preferentialism could otherwise inevitably result. While this test contains flaws, governmental evenhandedness between religions, as well as between religion and irreligion, likely comes closer to achieving the intended result, relative to other tests.[156]

The secular purpose test, on the other hand, fails for a few reasons: (1) in most cases, the purpose of legislation is irrelevant in evaluating its constitutionality; (2) even if the purpose of legislation was relevant, discerning legislative intent is inherently speculative and unreliable; and (3) requiring a secular purpose for all laws would effectively establish a secularist religion by privileging a non-theistic creed or philosophy as the lone driver of public policy.[157] Moreover, this test breeds confusion, especially when government aid to religions may have a secular purpose. Nevertheless, modern political discourse encourages this approach.[158]

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148. *See* Steven D. Smith, *The Paralyzing Paradox of Religious Neutrality* 4 (Research Paper No. 11-060, 2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1911399.

149. *See* Barton, *supra* note 23, at 408; *cf.* Davids, *supra* note 27, at 377.

150. *See* DRAKEMAN, *supra* note 29, at 232, 235–36.

151. *See* Wallace v. Jaffree, 472 U.S. 38, 99–100 (1985) (Rehnquist, J., dissenting).

152. *See id.* at 98.

153. *Id.*

154. *Cf.* Smith, *supra* note 148, at 19.

155. *See* Engel v. Vitale, 370 U.S. 421, 425 (1962) (discussing the "wall of separation").

156. *See Wallace*, 472 U.S. at 99 (Rehnquist, J., dissenting) ("None of the other Members of Congress who spoke during the August 15th debate expressed the slightest indication that they thought the language before them from the Select Committee, or the evil to be aimed at, would require that the Government be absolutely neutral as between religion and irreligion.").

157. *See* Greenawalt, *supra* note 46, at 791, 793–96.

158. *See, e.g.*, JOHN RAWLS, POLITICAL LIBERALISM xxiii–xxiv, xxvi–xxvii (Colum. Univ. Press 1993).

4. *Coercion Test*

The Supreme Court has also employed the coercion test, especially in school prayer cases.[159] Although preventing coercion of religious practices is surely an intent underlying the religion clauses,[160] the use of this test by the Supreme Court, like many of the others, has tended toward broader application than envisioned by the historical concern.[161] For instance, in *Lee v. Weisman*,[162] the Court adopted a "psychological coercion" standard that forbade an invocation at a public high school graduation ceremony.[163] The Court ruled that the social expectations present in that ceremony exerted pressure on non-adherents to stand or otherwise appear approving during the prayer, which constitutes unlawful coercion.[164] Justice Antonin Scalia's dissent maintained that only governmental actions, such as forced attendance of religious services, would be a First Amendment violation and urged the return to a "legal coercion" standard.[165]

IV. *TOWN OF GREECE V. GALLOWAY*: HOPEFUL CLARITY OR HOPELESS DISARRAY?

Given the variability and inconsistent application of tests for the Establishment Clause, when *Town of Greece*[166] reached the Supreme Court, it was uncertain which test would govern. In *Town of Greece*, the Supreme Court evaluated the practice of the town of Greece, New York, to invite local clergy members to offer prayers to open its monthly board meetings.[167] Members of the public often attended the meetings.[168] These meetings served both legislative and adjudicative purposes.[169] Originally, selection for the chaplain of the month was based on a Board representative calling congregations within Greece that

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159. This test was first discussed in Justice Kennedy's dissent in *Allegheny County v. ACLU*. 492 U.S. 573, 660 (1989) (Kennedy, J., dissenting). "Under [the coercion] test the government does not violate the establishment clause unless it (1) provides direct aid to religion in a way that would tend to establish a state church, or (2) coerces people to support or participate in religion against their will." *Establishment Clause Overview*, FIRST AMENDMENT CTR. (Sept. 16, 2011), http://www.firstamendmentcenter.org/establishment-clause.

160. *See* HAMBURGER, *supra* note 33, at 62.

161. *See* Lee v. Weisman, 505 U.S. 577, 631–32 (1992) (Scalia, J., dissenting) (stating that the Court's holding expands the coercion test to prohibit a prayer ceremony that has traditionally been a part of American history).

162. 505 U.S. 577 (1992).

163. *Id.* at 631–32 (Scalia, J., dissenting).

164. *Id.* at 593 (majority opinion).

165. *Id.* at 640–41, 643 (Scalia, J., dissenting) ("[W]e have made clear our understanding that school prayer occurs within a framework in which legal coercion to attend school (*i.e.*, coercion under threat of penalty) provides the ultimate backdrop.").

166. 134 S. Ct. 1811 (2014).

167. *Id.* at 1815.

168. *Id.* at 1846 (Kagan, J., dissenting).

169. *Id.* at 1849 (majority opinion).

were listed in a local directory.[170] Later, the Board solely relied on a list of chaplains who previously volunteered.[171] Almost all of the congregations in Greece were Christian.[172] Accordingly, every participating minister between 1999 and 2007 was Christian.[173] The ministers' prayers contained both civic and Christian themes.[174]

In 2010, two local residents brought suit claiming that Greece's legislative prayer practice violated the Establishment Clause.[175] These residents alleged that Greece excluded non-Christian prayer and impermissibly permitted sectarian prayer.[176] The U.S. District Court for the Western District of New York found in favor of Greece under a neutrality theory because the town exercised "no impermissible preference for Christianity."[177] The District Court further reasoned that the governing Supreme Court precedent of *Marsh v. Chambers* did not require legislative prayer to be non-sectarian.[178] The U.S. Court of Appeals for the Second Circuit reversed the District Court,[179] applying the endorsement test and holding that the prayer practice in Greece conveyed its official affiliation with Christianity to a reasonable objective observer.[180]

On May 5, 2014, in a narrow 5-4 ruling, the Supreme Court reversed the decision of the Second Circuit.[181] The Court focused on the longstanding tradition of legislative prayer in the United States.[182] The fact that the First Congress appointed official chaplains demonstrated that this kind of legislative prayer was contemplated and accepted by the Framers.[183] A notable aspect of the Court's opinion was not the focus on tradition, which followed *Marsh*, but rather the Justices' wide variation regarding which test should be used in Establishment Clause cases.[184]

The majority opinion, authored by Justice Anthony Kennedy, did not even discuss the *Lemon* test.[185] The Court also did not discuss the endorsement test explicitly,[186] though Justice Kennedy invoked the reasonable observer when

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170. *Id.* at 1816.
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.* at 1817.
176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.* at 1818.
180. *Id.*
181. *Id.* at 1828.
182. *Id.*
183. *Id.* at 1818–19.
184. *See generally id.*
185. *See id.* at 1815–28.
186. *See generally id.*

analyzing whether Greece's practices were coercive.[187] Justice Thomas concurred,[188] emphasizing the Establishment Clause as an enhanced federalism provision that resists incorporation.[189] On the other hand, Justice Elena Kagan's dissent urged religious equality as a governing norm.[190] Overall, the bulk of the Court's decision seemingly focused on coercion.[191] Even after *Town of Greece*, Establishment Clause jurisprudence is just as uncertain as it previously was.[192]

A. Ways to Improve

The controversies over Establishment Clause interpretations seem endless. Supreme Court Justices widely differ in their interpretations.[193] Evidence suggests that even the Framers differed in their intentions and interpretations.[194] Although achieving perfect agreement in the Establishment Clause may never happen, modest improvements can be made.

1. Remedy the Doctrinal Jumble

It is long overdue for the Court to remedy its doctrinal jumble.[195] This will require, of course, overruling longstanding precedent. Maintaining bad law for a longer period of time does not improve it. The Court declaring a more definitive test or at least overruling incorrect precedent, like the *Lemon* test, would be helpful. Admittedly, making a single test absolutely controlling is risky, especially given the conflicting history.[196] A better approach might be to focus on the principles underlying the Establishment Clause and compare upcoming cases to those principles.[197] This way, courts are forced to go back to the text when interpreting it, instead of analyzing the Establishment Clause through the lens of new doctrinal language such as "endorsement" or "neutrality."[198] The Supreme Court seems to have focused on these underlying principles in *Town of Greece*, yet each Justice came to a different conclusion

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187. *Id.* at 1825.

188. *Id.* at 1835 (Thomas, J., concurring).

189. *Id.* at 1835–36.

190. *Id.* at 1841 (Kagan, J., dissenting).

191. *Id.* at 1827 (majority opinion).

192. *See First Amendment-Establishment Clause—Legislative Prayer:* Town of Greece v. Galloway, 128 HARV. L. REV. 191, 197 (2014) ("*Greece* leaves uncertain the status and relevance of the previous doctrinal tests, as well as exactly how history fits into those approaches.").

193. *Id.* at 196–97.

194. *See* Barton, *supra* note 23, at 436; Davids, *supra* note 27; Smith, *supra* note 22, at 163–64; *see also* DRAKEMAN, *supra* note 29, at 213–18.

195. *See* Simcha David Schonfeld, *A Failing Grade: The Court in* Zelman *and Its Missed Opportunity To Clarify the Confusing State of Establishment Clause Jurisprudence*, 20 T.M. COOLEY L. REV. 489, 489–90 (2003).

196. *Id.*

197. *See supra* Part I.A.

198. *See supra* Part III.C.2–3.

with tradition only winning by a slim margin.[199] Although a more definitive test would be helpful in limiting judicial policy discretion, focusing on such principles should result in more consistent long-term results. Yet, the Supreme Court appears inclined to avoid the task of clarifying Establishment Clause jurisprudence.[200]

2. Proposal for Adjusting the Level of Scrutiny

The Court will typically use the variety of tests discussed above to resolve an Establishment Clause case.[201] The use and credibility of these tests remains uncertain and ever changing.[202] There is at least one instance in which the Court refused to use one of the previously mentioned tests and instead applied a strict scrutiny test as an alternative.[203]

In *Larson v. Valente,*[204] the Court evaluated a Minnesota statute intended to protect charitable contributors by requiring tax-deductible charitable organizations to register with the state.[205] The statute exempted religious organizations from registering if more than half of their contributions were from their members.[206] Well-established churches qualified for this exemption, while newer churches did not.[207] Accordingly, the Court held that the statute differentiated among religious organizations and thus required strict scrutiny review.[208] As a result, a religiously preferential statute is invalid "unless it is

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199. *See generally* Town of Greece v. Galloway, 134 S. Ct. 1811 (2014).

200. *See generally id.*; Schonfeld, *supra* note 195, at 489–90.

201. *Cf.* McCreary Cty. v. ACLU, 545 U.S. 844, 859–62 (2005) (*Lemon* test); Van Orden v. Perry, 545 U.S. 677, 685–86, 690–92 (2005) (endorsement test); Zelman v. Simmons-Harris, 536 U.S. 639, 653 (2002) (private choice); Mitchell v. Helms, 530 U.S. 793, 807–08 (2000) (*Lemon* test); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 310–12 (2000) (coercion); Edwards v. Aguillard, 482 U.S. 578, 582–83, 585–86 (1987) (*Lemon* test); Lynch v. Donnelly, 465 U.S. 668, 679, 681–85 (1984) (*Lemon* test); Stone v. Graham, 449 U.S. 39, 40–43 (1980) (*Lemon* test); Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) (three-pronged test, now known as the *Lemon* test); Epperson v. Ark., 393 U.S. 97, 104, 106–07, 109 (1968) (neutrality); Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 222–23 (1963) (neutrality).

202. *See supra* Part III.B.

203. Larson v. Valente, 456 U.S. 228, 246 (1982).

204. 456 U.S. 228 (1982).

205. *Id.* at 230.

206. *Id.* at 231–32.

207. *Id.* at 246–47, 246 n.23.

208. *Id.* at 246. The Court explained its rationale for using the strict scrutiny test over *Lemon*:

> In short, when we are presented with a state law granting a denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its constitutionality. The fifty per cent rule of [the statute] clearly grants denominational preferences of the sort consistently and firmly deprecated in our precedents. Consequently, that rule must be invalidated unless it is justified by a compelling governmental interest. . . . Although application of the *Lemon* tests is not necessary to the disposition of the case before us, those tests do reflect the same concerns that warranted the application of strict scrutiny to [the statute's] fifty per cent rule.

Id. at 246–47, 252 (internal citations omitted).

justified by a compelling governmental interest and unless it is closely fitted to further that interest."[209]

Since *Larson*, the Court has rarely used strict scrutiny for an Establishment Clause analysis.[210] Nevertheless, any attempts to solidify a definitive test will likely be futile given all the uncertainty and differing interpretations surrounding the original intent and meaning of the Establishment Clause. A better, more consistent, solution instead would be to adjust the level of scrutiny for Establishment Clause issues and exclude other judicially made tests (such as the *Lemon* test, coercion test, or neutrality test) from the analysis.

Even if Justice Thomas's view of "resisting incorporation" is correct, the legal community is unlikely to adopt this interpretation in the short term.[211] The Bill of Rights and religious liberty are thought of as "American" rights, not just "federal" rights.[212] Much of the public takes for granted that the religion clauses will be applicable against the states, regardless of what the historical evidence presents.[213] Furthermore, since the Supreme Court long ago held that the religion clauses apply to the states,[214] it would be disruptive to depart from that settled position in favor of an uncertain, historical perspective, even if

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209. *Id.* at 247 (internal citations omitted).

210. *See* Hernandez v. Comm'r of Internal Revenue, 490 U.S. 680, 695 (1989) ("*Larson* teaches that, when it is claimed that a denominational preference exists, the initial inquiry is whether the law facially differentiates among religions."); Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 338–39 (1987) (dismissing the plaintiffs' argument that the *Larson* test should apply, stating that "*Larson* indicates that laws discriminating among religions are subject to strict scrutiny . . . [and] we see no justification for applying strict scrutiny to a statute that passes the *Lemon* test."); Lynch v. Donnelly, 465 U.S. 668, 679 (1984) (justifying the refusal to use the *Lemon* test in *Larson*); *see also* Russell W. Galloway, *Basic Establishment Clause Analysis*, 29 SANTA CLARA L. REV. 845, 853 (1989) (discussing strict scrutiny in the Establishment Clause analysis).

211. *See supra* Part II.D.

212. *See* HAMBURGER, *supra* note 33, at 434–49.

213. *Id.*

214. Everson v. Bd. of Educ., 330 U.S. 1, 8 (1947). In discussing the incorporation of the Establishment Clause to the States, the *Everson* Court elaborated:

> The First Amendment, as made applicable to the states by the Fourteenth, commands that a state "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." These words of the First Amendment reflected in the minds of early Americans a vivid mental picture of conditions and practices which they fervently wished to stamp out in order to preserve liberty for themselves and for their posterity. Doubtless their goal has not been entirely reached; but so far has the Nation moved toward it that the expression "law respecting an establishment of religion," probably does not so vividly remind present-day Americans of the evils, fears, and political problems that caused that expression to be written into our Bill of Rights.

Id. The proposition that the First Amendment, including the Establishment Clause, applies to the states by the Fourteenth Amendment remains a well-settled claim; however, Justice Thomas is one of the few opponents of this position. *See supra* Part II.D.

plausible.[215] Nevertheless, the federalism consideration otherwise can be taken into some account.

Accordingly, this Essay proposes that the appropriate standard of review for Establishment Clause cases regarding state action should be rational basis or intermediate scrutiny. Alternatively, evaluating federal action under the Establishment Clause should be subject to strict scrutiny, as an overwhelming majority of evidence points to the purpose and intent of the Establishment Clause being a prohibition of an established national religion.[216] However, all cases implicating the Free Exercise Clause, whether state or federal, should be subject to strict scrutiny.[217] Inasmuch as the Free Exercise Clause was meant to protect an individual right, it was reasonably incorporated against the states under the Fourteenth Amendment.[218]

Town of Greece did not discuss which level of scrutiny is appropriate.[219] This is unsurprising given the Court's trend of staying away from discussing standards of review since the *Larson* Court and moving towards using judicially made tests.[220] The Court, however, stated that "[a]ny test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change."[221] This suggests that this area of the law is better suited to the legislature, which can better adjust to the changes in time and politics.[222] Relatedly, the actions of the Framers surrounding the Establishment Clause may be a result of the political discourse of the time it was enacted.

This Essay's proposal to adjust the level of scrutiny is not as simple as it sounds.[223] The question of appropriate scrutiny is subject to even more debate than the Establishment Clause.[224] This Essay does not attempt to single-

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215. *See supra* Part II.C.

216. *See* DRAKEMAN, *supra* note 29, at 231; *see also* Town of Greece v. Galloway, 134 S. Ct. 1811, 1835 (2014) (Thomas, J., concurring) ("As an initial matter, the [Establishment] Clause probably prohibits Congress from establishing a national religion.").

217. *See* Wisconsin v. Yoder, 406 U.S. 205, 213–14 (1972) (applying strict scrutiny review to Free Exercise Clause analysis); Sherbert v. Verner, 374 U.S. 398, 402–03 (1963) (applying the same review).

218. *See* DRAKEMAN, *supra* note 29, at 141.

219. *See generally Town of Greece*, 134 S. Ct. 1811 (focusing primarily on historical precedent without mentioning any level of appropriate scrutiny).

220. *See* Hernandez v. Comm'r of Internal Revenue, 490 U.S. 680, 695 (1989); Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 339 (1987); Lynch v. Donnelly, 465 U.S. 668, 679 (1984).

221. *Town of Greece*, 134 S. Ct. at 1819.

222. *See id.*

223. Many church-state cases and proposals also implicate equal protection issues. A full discussion of these issues is outside the scope of this Essay, but is encouraged for future research.

224. *See* DRAKEMAN, *supra* note 29, at 337–45; Ashutosh Bhagwat, *The Test that Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783, 784; Michael J. Burstein, *Towards a New Standard for First Amendment Review of Structural Media Regulation*, 79 N.Y.U. L. REV. 1030, 1034 (2004); Clay Calvert & Justin B. Hayes, *To Defer*

handedly solve the problems of Establishment Clause jurisprudence or answer every question regarding proper levels of scrutiny in religion cases. Instead, it hopes to open the door to further discussion about this possibility and whether adjusting the level of scrutiny better reflects the Framers' intent and the original meaning of the Clause regarding deference to state government action.

V. CONCLUSION

An examination of the Establishment Clause jurisprudence of the Supreme Court makes clear that this area of the law is in hopeless disarray. When the Supreme Court recently had the opportunity to substantially clarify the law in *Town of Greece v. Galloway*, it was unwilling or unable to do so.[225] For the Establishment Clause jurisprudence to reach a point of hopeful clarity seems impossible. While the Court's ability to make the Establishment Clause doctrine consistent and sensible may be in the distant future, modest steps toward that goal can be taken sooner. This Essay aims to spark discussion regarding this area of the law and whether amending the level of scrutiny could be an improvement for Establishment Clause cases moving forward.

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or Not To Defer? Deference and its Differential Impact on First Amendment Rights in the Roberts Court, 63 CASE W. RES. L. REV. 13, 15–16 (2012); Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094, 3096–97 (2015); R. Randall Kelso, *Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The "Base Plus Six" Model and Modern Supreme Court Practice*, 4 U. PA. J. CONST. L. 225, 225–26 (2002).

225. *Town of Greece*, 134 S. Ct. at 1819.