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## Section 1: Moot Court: Town of Greece v. Galloway

Institute of Bill of Rights Law at The College of William & Mary School of Law

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## I. Moot Court: *Town of Greece v. Galloway*

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*Town of Greece v. Galloway*

**12-696**

**Ruling Below:** *Galloway v. Town of Greece*, 681 F.3d 20 (2nd Cir. 2012), *cert. granted*, 2013 WL 2149803.

Residents of Town of Greece, New York Susan Galloway and Linda Stephens brought civil rights action suit against the town and Town Supervisor John Auberger in the United States District Court for the Western District of New York. The town opened every town board meeting with a prayer; specifically, almost exclusively Christian prayers. Residents asserted that aspects of the town prayer practice violated the Establishment Clause. The district court granted the defendants' motion for summary judgment, and the plaintiffs appealed.

**Questions Presented:** Whether the court of appeals erred in holding that a legislative prayer practice violates the Establishment Clause notwithstanding the absence of discrimination in the selection of prayer-givers or forbidden exploitation of the prayer opportunity.

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**Susan GALLOWAY and Linda Stephens, Plaintiffs–Appellants,**

**v.**

**TOWN OF GREECE, Defendant–Appellee**

United States Court of Appeals, Second Circuit

Decided on May 17, 2012

[Excerpt; some footnotes and citations omitted.]

**CALABRESI, Circuit Judge**

Since 1999, the Town of Greece, New York, has begun its Town Board meetings with a short prayer. In 2008, town residents Susan Galloway and Linda Stephens brought suit against the town and Town Supervisor John Auberger in the United States District Court for the Western District of New York, asserting that aspects of this prayer practice violated the Establishment Clause. The district court granted the defendants' motion for summary judgment, and the plaintiffs appeal. We hold that, on this record, the

district court erred in rejecting the plaintiffs' argument that the prayer practice impermissibly affiliated the town with a single creed, Christianity. Accordingly, we REVERSE and REMAND for further proceedings consistent with this opinion.

**I. BACKGROUND**

For the most part, the facts at issue are not disputed, [although] the parties dispute how to characterize the facts...

The Town of Greece is a municipal corporation located in Monroe County, New York, just outside the city of Rochester. As of the 2000 census, the town had roughly 94,000 residents. An elected, five-member Town Board governs the town and conducts official business at monthly public meetings. At these meetings, the Board votes on proposed ordinances, conducts public hearings, bestows citizenship awards, swears in new town employees, and the like. Residents and town employees attend Town Board meetings to monitor and participate in these aspects of town governance. At times, children are among the residents attending town meetings; members of Boy Scout troops and other student groups have led the Pledge of Allegiance, and high school students may fulfill a state-mandated civics requirement necessary for graduation by going to Board meetings.

Before 1999, Town Board meetings began with a moment of silence. That year, at Auberger's direction, the town began inviting local clergy to offer an opening prayer. Typically, Auberger has called each meeting to order, the Town Clerk has called the roll of Board members, and Auberger has then asked the audience to rise for the Pledge of Allegiance. After the audience has been seated following the Pledge, Auberger has introduced the month's prayer-giver, who has delivered the prayer over the Board's public address system. Prayer-givers have often asked members of the audience to participate by bowing their heads, standing, or joining in the prayer. After the prayer's conclusion, Auberger has typically thanked prayer-givers for being the town's "chaplain of the month," at times also

presenting them with a plaque. The town has consistently listed the prayer in each meeting's official minutes.

Between 1999 and June 2010, when the record in this litigation closed, 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. The town claims that anyone may request to give an invocation, including adherents of any religion, atheists, and the nonreligious, and that it has never rejected such a request. The town also asserts that it does not review the language of prayers before they are delivered, and that it would not censor an invocation, no matter how unusual or offensive its content. When Galloway and Stephens complained about the town's prayer practice in 2007, the town explained the above-mentioned practices. The town acknowledges, however, that it has not publicized to town residents that anyone may volunteer to deliver prayers or that any type of invocation would be permissible.

In practice, Christian clergy members have delivered nearly all of the prayers relevant to this litigation, and have done so at the town's invitation.... In 2008, after Galloway and Stephens had begun complaining to the town about its prayer practice, non-Christians delivered the prayer at four of the twelve Town Board meetings. A Wiccan priestess and the chairman of the local Baha'i congregation each delivered one of these prayers, and a lay Jewish man delivered the remaining two. The town invited the Wiccan priestess and the lay Jewish man after they inquired about delivering prayers; it appears

that the town invited the Baha'i chairman without receiving such an inquiry. However, between January 2009 and June 2010, when the record closed, all the prayer-givers were once again invited Christian clergy.

Although the town did not adopt, prior to June 2010, a formal policy concerning the selection of prayer-givers, it developed a more or less standard procedure. Three successive employees at the town's Office of Constituent Services had responsibility for inviting clergy to deliver prayers. The employee first charged with this task initially 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. Thereafter, this employee, Linda Sofia, compiled a "Town Board Chaplain" list containing the names of individuals who had accepted invitations to give prayers. Sofia and the two employees who succeeded her in this role testified that they worked their way down the list, calling clergy about a week before each Town Board meeting until they found someone willing to give the prayer. They also testified that they updated the list periodically based on requests from community members and on new listings in the Community Guide and a local newspaper, the *Greece Post*.

Until 2008, the "Town Board Chaplain" list contained only Christian organizations and clergy. Religious congregations in the town are primarily Christian. Galloway and Stephens have both lived in or near Greece for more than thirty years, and both testified that they were unaware of any non-Christian places of worship in the town. In the district

court, the plaintiffs introduced a map indicating the presence of a Buddhist temple in the town as well as several Jewish synagogues located just outside the town. There is no indication, however, that these organizations were listed in the Community Guide or the *Greece Post*....

In all, there were roughly 130 different invocations between 1999 and June 2010, of which more than 120 are contained within the record. The invocations in the record typically gave thanks for aspects of the life of the town and requested assistance with the ongoing project of town governance. After being introduced, prayer-givers tended to begin with some variant of "let us pray," and then to speak about the matters for which "we" pray, ostensibly on behalf of the audience or the town more broadly. Members of the audience and the Board have bowed their heads, stood, and participated in the prayers by saying "Amen." On a few occasions, some members of the Town Board have made the sign of the cross.

A substantial majority of the prayers in the record contained uniquely Christian language. Roughly two-thirds contained references to "Jesus Christ," "Jesus," "Your Son," or the "Holy Spirit." Within this subset, almost all concluded with a statement that the prayer had been given in Jesus Christ's name. Typically, prayer-givers stated something like, "In Jesus's name we pray," or "We ask this in Christ's name." Some prayer-givers elaborated further, describing Christ as "our Savior," "God's only son," "the Lord," or part of the Holy Trinity....

The remaining third of the prayers spoke in more generically theistic terms. Christian clergy delivered prayers referring to “God of all creation,” “Heavenly Father,” and God’s “kingdom of Heaven.” The lay Jewish prayer-giver spoke of “God,” the “Father,” and the “Lord”; he also referenced, at one point, “the songs of David, your servant.” The Baha’i prayer-giver referred generally to “God,” concluding his prayer with the Baha’i greeting, “Alláh-u-Abhá,” which loosely means “God the All Glorious.” Finally, the Wiccan priestess invoked Athena and Apollo; she stated these were fitting deities given the Town’s name.

Galloway and Stephens attended numerous Town Board meetings after the town initiated its prayer practice in 1999. In September 2007, they began complaining to town officials about the prayer practice, sometimes during public comment periods at Board meetings. In these informal complaints, the plaintiffs raised two types of objections, though they did not distinguish them as such. First, they asserted that the prayers aligned the town with Christianity. Second, they argued that the prayers were sectarian rather than secular. Town officials met with the plaintiffs and expressed the town’s position that it would accept any volunteer to deliver the prayers and that it would not police the content of prayers. The town did not make any public response to the plaintiffs’ complaints, however. Nor did it make any comment concerning the prayer delivered at an October 2007 meeting, which described objectors to the town’s prayer practice as a “minority ... ignorant of the history of our country.”

In February 2008, the plaintiffs filed suit against the town and Auberger, challenging aspects of the prayer practice under the Establishment Clause. They made two arguments before the district court: (1) that the town’s procedure for selecting prayer-givers unconstitutionally preferred Christianity over other faiths, and (2) that the prayer practice was impermissibly “sectarian.” In support of their position, the plaintiffs reiterated the same objections they had raised before the Town Board prior to filing suit. They claimed, as an initial matter, that the prayer practice aligned the town with Christianity, and that it therefore established a particular religion. They also pointed out that the prayer practice employed language unique to specific religious sects, and asserted that in so doing it established religion generally. The plaintiffs again did not distinguish between these arguments, nor have they done so on appeal.

The district court, on cross-motions for summary judgment, entered judgment for the defendants. At the outset, the district court dismissed the plaintiffs’ claims against Auberger as redundant of their claims against the town. After holding that the plaintiffs had Article III standing to sue the town, the district court turned to the merits of their two arguments. As to the plaintiffs’ challenge regarding the town’s prayer selection process, the district court held that the plaintiffs had failed to advance any credible evidence that town employees intentionally excluded representatives of particular faiths. As to the plaintiffs’ contention regarding the sectarian content of the prayers, the district court held that, under

binding Supreme Court case law, the Establishment Clause does not foreclose denominational prayers. The court concluded for these, and for a number of case-specific reasons, that the plaintiffs had failed to show that the town's prayer practice had the effect of establishing the Christian religion.

## II. DISCUSSION

This appeal presents a narrow subset of the questions raised before the district court. Galloway and Stephens do not assert that the district court erred in dismissing their claims against Auberger. They have, moreover, expressly abandoned the argument that the town intentionally discriminated against non-Christians in its selection of prayer-givers. Accordingly, the only live issue on appeal is whether the district court erred in rejecting the plaintiffs' assertion that the town's prayer practice had the effect, even if not the purpose, of establishing religion.

We review a grant of summary judgment *de novo*....

### A.

As far as we are aware, this is the first instance in which this court has had occasion to consider the validity of a legislative prayer practice under the Establishment Clause. Our analysis must begin with *Marsh v. Chambers*, the only Supreme Court decision cited to us that has ruled on the constitutionality of legislative prayer. *Marsh* held that the Nebraska legislature's practice of opening its sessions with a prayer, delivered by a state-employed clergyman, did not violate the Establishment

Clause. In so holding, *Marsh* did not employ the three-pronged test the Court had adopted, eleven years earlier, in *Lemon v. Kurtzman*, for Establishment Clause cases. Rather, 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.

The Court first held that state-funded legislative prayer does not necessarily run afoul of the Establishment Clause....

Turning to Nebraska's practice, the Court dismissed three concerns raised by the state legislator who was plaintiff in the case. First, it rejected the argument that the sixteen-year tenure of the legislative chaplain, Robert E. Palmer, had “the effect of giving preference to his religious views.” The evidence, the Court noted, suggested that Palmer was reappointed because of his performance and indicated that guest chaplains and substitutes had officiated at various times. The Court held that “[a]bsent proof that the chaplain's reappointment stemmed from an impermissible motive,” Palmer's long tenure did not “in itself” violate the Establishment Clause.

Second, the Court rejected the claim that Palmer's compensation from public funds conflicted with the Establishment Clause....

Third, the Court rejected the argument that the “Judeo-Christian” content of the prayers established religion. In describing the facts underlying this portion of the plaintiff's complaint, the Court reported that Palmer

had characterized his prayers as “ ‘nonsectarian,’ ‘Judeo Christian,’ and with ‘elements of the American civil religion.’ ” It also pointed out that “[a]lthough some of his earlier prayers were often explicitly Christian, Palmer removed all references to Christ after a 1980 complaint from a Jewish legislator.” In responding to plaintiff’s argument, the Court reasoned that “[t]he content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief.” For these reasons, the Court concluded, it was not necessary for it “to embark on a sensitive evaluation or to parse the content of a particular prayer.”

Six years later, however, in a case that did not involve a challenge to legislative prayer, the Supreme Court suggested that legislative prayers invoking particular sectarian beliefs may, on the basis of those references alone, violate the Establishment Clause. The decision, *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, rejected the argument that *Marsh’s* historical analysis validated a city’s holiday crèche display. The Court wrote: “However history may affect the constitutionality of nonsectarian references to religion by the government, history cannot legitimate practices that demonstrate the government’s allegiance to a particular sect or creed.” *Marsh*, it reasoned, recognized that history could not justify current practices “that have the effect of affiliating the government with any one specific faith or belief.”...

As read by *Allegheny*, *Marsh* has remained a fixed point within the High Court’s Establishment Clause jurisprudence. Three years later, in striking down a public school district’s practice of including prayer in its graduation ceremonies, the Court distinguished *Marsh* in light of “[i]nherent differences between the public school system and a session of a state legislature.” In doing so, it pointed specifically to the difference between “[t]he influence and force of a formal exercise in a school graduation” as against a legislative session. More recently, in noting that “Establishment Clause doctrine lacks the comfort of categorical absolutes,” the Court invoked *Marsh* as an instance in which it had “found good reason to hold governmental action legitimate even where its manifest purpose was presumably religious.”

## **B.**

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.”

To the extent that these circuit cases stand for the proposition that a given legislative prayer practice, viewed in its entirety, may



not advance a single religious sect, we cannot disagree. Under *Marsh*, legislative prayers may not be “exploited to proselytize or advance any one, or to disparage any other, faith or belief.” It is also clear, under *Allegheny*, that legislative prayers may not “have the effect of affiliating the government with any one specific faith or belief.” *Joyner*, *Hinrichs*, and *Stein* might be read simply to reiterate these standards, rather than to construe *Marsh* and *Allegheny* as precluding denominational content in any individual prayer. Construed in this fashion, the distinction between sectarian and nonsectarian prayers merely serves as a shorthand, albeit a potentially confusing one, for the prohibition on religious advancement or affiliation outlined in *Marsh* and *Allegheny*.

To the extent that these circuit cases stand instead for the proposition that the Establishment Clause precludes all legislative invocations that are denominational in nature, however, we cannot agree. The line between sectarian and nonsectarian prayers, though perhaps the least defective among various possible distinctions that can be drawn in this area, runs into two sizable doctrinal problems.

First, the Supreme Court has explicitly rejected the notion that the government “may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds.” Admittedly, *Lee*, which postdated both *Marsh* and *Allegheny*, did not involve legislative prayer. But its language was seemingly unequivocal. The *Lee* Court held that the defendant public school district

had violated the Establishment Clause when it advised a rabbi that his prayers at the school's graduation ceremony “should be nonsectarian.” A state-imposed requirement that all legislative prayers be nondenominational, the Court reasoned, begins to sound like the establishment of “an official or civic religion.” Indeed, *Lee* made express its disagreement with the Sixth Circuit's contrary language in *Stein*. The problem with such civic religious statements lies, in part, in the danger that such efforts to secure religious “neutrality” may produce “a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious.” Under the First Amendment, the government may not establish a vague theism as a state religion any more than it may establish a specific creed.

The second difficulty with the simple sectarian/nonsectarian approach seemingly adopted by some circuits is that the touchstone of our analysis must be *Marsh*, which is hard to read, even in light of *Allegheny*, as saying that denominational prayers, in and of themselves, violate the Establishment Clause. It is true that *Allegheny* pointed out that the prayers in *Marsh* did not have “the effect of affiliating the government with any one specific faith or belief .... because the particular chaplain had ‘removed all references to Christ.’ ” But this does not mean that any *single* denominational prayer has the forbidden effect of affiliating the government with any one faith. A series of denominational prayers, each delivered in the name of a different sect, could hardly be perceived as having this effect. At any rate,

the chaplain's categorization of the prayers in *Marsh* as “nonsectarian” was plainly contestable with respect to prayers delivered prior to the 1980 complaint....

Accordingly, our inquiry cannot look solely to whether the town's legislative prayer practice contained sectarian references. We must ask, instead, 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. In other words, we must ask whether the town, through its prayer practice, has established particular religious beliefs as the more acceptable ones, and others as less acceptable. This inquiry, for its part, must be made in the light of the particular prayer practice upheld in *Marsh* and addressed in *Allegheny*. As a result, it is clear, for example, that the longstanding appointment of a single Christian clergyman does not, *in itself*, convey the prohibited favoritism, and the same is apparently true of “Judeo-Christian” prayers that make no reference to Christ. Beyond that, however, any number of different legislative prayer practices could be read to yield any number of messages—acceptable or forbidden—about religion.

### C.

Within these confines, we see “no test-related substitute for the exercise of legal judgment.” In *Marsh*, as we have noted, the Supreme Court did not employ the *Lemon* test; nor did it adopt any other precise criteria to govern cases involving legislative prayer. Instead, the decision addressed a series of case-specific concerns

raised by the plaintiff. In fact-intensive cases like this one, which defy exact legal formulas, the exercise of “legal judgment” is not the same as the exercise of “personal judgment”; it must “reflect and remain faithful to the underlying purposes” of the relevant constitutional provisions, and it must “take account of context and consequences measured in light of those purposes.”...

We conclude, on the record before us, that the town's prayer practice must be viewed as an endorsement of a particular religious viewpoint. This conclusion is supported by several considerations, including the prayer-giver selection process, the content of the prayers, and the contextual actions (and inactions) of prayer-givers and town officials. We emphasize that, in reaching this conclusion, we do not rely on any single aspect of the town's prayer practice, but rather on the totality of the circumstances present in this case....

In our view, whether a town's prayer-selection process constitutes an establishment of religion depends on the extent to which the selection process results in a perspective that is substantially neutral amongst creeds. The town asserts, and there is no evidence to the contrary, that it would have accepted any and all volunteers who asked to give the prayer. But the town neither publicly solicited volunteers to deliver invocations nor informed members of the general public that volunteers would be considered or accepted, let alone welcomed, regardless of their religious beliefs or non-beliefs. Had the town publicly opened its prayer practice to volunteers in

this way, its selection process could be defended more readily as random in the relevant sense....

It is no small thing for a non-Christian (or for a Christian, for that matter) to pray “in the name of Jesus Christ.” Prayers delivered in this fashion invoke “a deity in whose divinity *only* those of the Christian faith believe,” and do so to the clear exclusion of other faiths. References to Christ as “Our Savior” and invocations of the Holy Trinity do the same thing.

The sectarian nature of the prayers, we emphasize, was not inherently a problem. The prayers in the record were not offensive in the way identified as problematic in *Marsh*: they did not preach conversion, threaten damnation to nonbelievers, downgrade other faiths, or the like. Prayers of this more offensive sort might be sufficient in themselves to give rise to an Establishment Clause violation. But we need not determine whether any single prayer at issue here suffices to give such an indication of establishment, since we find that on the totality of the circumstances presented the town's prayer practice identified the town with Christianity in violation of the Establishment Clause.

The town had an obligation to consider how its prayer practice would be perceived by those who attended Town Board meetings. And, despite the homogeneity of viewpoints reflected by the invocations, the town did not explain that it intended the prayers to solemnize Board meetings, rather than to affiliate the town with any particular creed. The town never informed prayer-givers that

invocations were not to be “exploited as an effort to convert others to the particular faith of the invocational speaker, nor to disparage any faith or belief different than that of the invocational speaker.” Absent any effort on the part of the town to explain the nature of its prayer program to attendees, the rare handful of cases, over the course of a decade, in which individuals from other faiths delivered the invocation cannot overcome the impression, created by the steady drumbeat of often specifically sectarian Christian prayers, that the town's prayer practice associated the town with the Christian religion.

We ascribe no religious animus to the town or its leaders. The town's desire to mark the solemnity of its proceedings with a prayer is understandable; Americans have done just that for more than two hundred years. But when one creed dominates others—regardless of a town's intentions—constitutional concerns come to the fore....

Finally, it is relevant, and worthy of weight, that most prayer-givers appeared to speak on behalf of the town and its residents, rather than only on behalf of themselves. Prayer-givers often requested that the audience participate, and spoke in the first-person plural: let “us” pray, “our” savior, “we” ask, and so on. Town officials, whether intentionally or not, contributed to the impression that these prayer-givers spoke on the town's behalf. After many of the prayer-givers finished their invocations, Auberger thanked them for being “our chaplain of the month.” There was testimony, as well, that members of the Town Board participated in the prayers by bowing their heads, saying

“Amen,” or making the sign of the Cross. The invitation to audience members to participate in the prayer, particularly by physical means such as standing or bowing their heads, placed audience members who are nonreligious or adherents of non-Christian religion in the awkward position of either participating in prayers invoking beliefs they did not share or appearing to show disrespect for the invocation, thus further projecting the message that the town endorsed, and expected its residents to endorse, a particular creed.

On the record before us, taking into account all of these contextual considerations in concert, we reverse the grant of summary judgment. We conclude that an objective, reasonable person would believe that the town's prayer practice had the effect of affiliating the town with Christianity. In reaching this conclusion, we underscore that we do not rely on any single aspect of the town's prayer practice, but rather the interaction of the facts present in this case. The extent to which a given act conveys the message of affiliation, or fails to do so, will depend on the various circumstances that circumscribe it. Accordingly, we do not aim to specify what the Establishment Clause allows, but restrict ourselves to noting the ways in which this town must be read to have conveyed a religious affiliation....

#### **D.**

We emphasize what we do not hold. We do not hold that the town may not open its public meetings with a prayer or invocation. Such legislative prayers, as *Marsh* holds and as we have repeatedly noted, do not violate

the Establishment Clause. Nor do we hold that any prayers offered in this context must be blandly “nonsectarian.” A requirement that town officials censor the invocations offered—beyond the limited requirement, recognized in *Marsh*, that prayer-givers be advised that they may not proselytize for, or disparage, particular religions—is not only not required by the Constitution, but risks establishing a “civic religion” of its own. Occasional prayers recognizing the divinities or beliefs of a particular creed, in a context that makes clear that the town is not endorsing or affiliating itself with that creed or, more broadly, with religion or non-religion, are not offensive to the Constitution. Nor are we adopting a test that permits prayers in theory but makes it impossible for a town in practice to avoid Establishment Clause problems. To the contrary, it seems to us that a practice such as the one to which the town here apparently aspired—one that is inclusive of multiple beliefs and makes clear, in public word and gesture, that the prayers offered are presented by a randomly chosen group of volunteers, who do not express an official town religion, and do not purport to speak on behalf of all the town's residents or to compel their assent to a particular belief—is fully compatible with the First Amendment.

What we do hold is that a legislative prayer practice that, however well-intentioned, conveys to a reasonable objective observer under the totality of the circumstances an official affiliation with a particular religion violates the clear command of the Establishment Clause. Where the overwhelming predominance of prayers offered are associated, often in an explicitly

sectarian way, with a particular creed, and where the town takes no steps to avoid the identification, but rather conveys the impression that town officials themselves identify with the sectarian prayers and that residents in attendance are expected to participate in them, a reasonable objective observer would perceive such an affiliation....

Ours is a society splintered, and joined, by a wide a constellation of religious beliefs and non-beliefs. Amidst these many viewpoints, even a single circumstance may appear to suggest an affiliation. To the extent that the state cannot make demands regarding the content of legislative prayers, moreover,

municipalities have few means to forestall the prayer-giver who cannot resist the urge to proselytize. These difficulties may well prompt municipalities to pause and think carefully before adopting legislative prayer, but they are not grounds on which to preclude its practice.

## **CONCLUSION**

For the foregoing reasons, we REVERSE the district court's grant of summary judgment and REMAND for further proceedings consistent with this opinion. We leave it to the district court, with the assistance of the parties, to craft appropriate relief.

## “Court to Rule on Government Prayer”

*SCOTUS Blog*  
May 20, 2013  
Lyle Denniston

Returning for the first time in three decades to the constitutionality of saying prayers at the opening of a government meeting, the Supreme Court on Monday took on a case involving Town Board sessions in the upstate New York community named Greece, a city of about 100,000 people. For years, it followed the practice of having local clergy — mostly leaders of Christian congregations — recite prayers to start Town Board public meetings.

The case of *Town of Greece v. Galloway* (docket 12-696) was one of five newly granted cases, all of which will be heard and decided in the Term starting next October. No current member of the Court was serving when the Court last ruled on government prayers in the case of *Marsh v. Chambers*, in 1983.

In the town of Greece, which is located in Monroe County just outside of Rochester, the opening prayer practice began in 1999 and continued at least through 2010, when lower courts ruled on its validity. As the case reached the Supreme Court in a plea by the town, the practice had been ruled unconstitutional by the Second Circuit Court.

With two local residents challenging the prayer ritual, the Circuit Court concluded that — on the specific facts of this case alone — the recitation by clergy had the effect of aligning the town government

officially with a particular faith — Christianity. The Circuit Court stressed that it was not ruling that a local government could never open its meetings with prayers or a religious invocation, nor was it adopting a specific test that would allow prayer in theory but make it impossible in reality.

What it did rule, the Circuit Court said, was that “a legislative prayer practice that, however well-intentioned, conveys to a reasonable objective observer under the totality of the circumstances an official affiliation with a particular religion, violates the clear command of the [First Amendment's] Establishment Clause.”

It emphasized that, in the situation in Greece, New York, the overall impression of the practice was that it was dominated by Christian clergy and specific expressions of Christian beliefs, and that the town officials took no steps to try to dispel that impression.

The Supreme Court’s agreement to review the decision might be interpreted as an indication that the Justices could be preparing to make a major pronouncement on religion in the public sphere, but it also might be understood as an intent to focus solely on the specific facts of the practice as it unfolded in this one community.

As the case develops, though, it almost certainly will draw wide interest from advocacy organizations and religious

entities, if for no other reason than the Court has not examined the specific question in some thirty years. Eighteen states had joined in urging the Court to grant review of the new case.

In the 1983 decision in *Marsh v. Chambers*, the Supreme Court upheld an opening prayer tradition at the Nebraska state legislature. It did so, however, by relying solely upon the tradition of legislative opening prayers that Congress had followed since the Founding era. In asking the Supreme Court to return to the issue, the town of Greece argued that the lower courts have divided deeply over the constitutional standards to be applied to judge such prayer exercises.

Since 1983, the Court has decided only two cases involving prayer as an issue in church-

state relations, and both of those cases found invalid prayers that appeared to be sponsored by public school officials — at graduation ceremonies in a 1992 decision, and at a school football game in 2000.

While the Court granted the new case from the town of Greece after its second examination of the town's petition, the Court took no action once again — after considering it a seventh time — on another case involving religion in the public sphere. At issue in the case of *Elmbrook School District v. Doe* (12-755) is the constitutionality of holding a high school graduation ceremony in a church. There has been no explanation of what the Court is doing with that case.

## “Council Prayers Get Top Court Review in Church-State Case”

*Bloomberg*  
May 20, 2013  
Greg Stohr

The U.S. Supreme Court will consider the constitutional limits on prayers during legislative sessions, accepting an appeal from a New York town that starts most council meetings with a Christian invocation.

The justices today said they will review a federal appeals court’s conclusion that the Rochester suburb of Greece was improperly affiliating itself with Christianity.

The Supreme Court ruled in 1983 that legislative bodies could open sessions with a prayer delivered by a state-employed religious leader. The latest case gives the court under Chief Justice John Roberts a chance to reinforce that ruling and insulate government bodies from legal challenges to what is now a widespread practice across the country.

“The practice of legislative prayer is firmly embedded in the history and traditions of this nation,” Thomas Hungar, the lead lawyer representing the town, said in a statement. “We hope the court will reaffirm the settled understanding that such prayers, offered without improper motive and in accordance with the conscience of the prayer-giver, are constitutional.”

The New York-based 2nd U.S. Circuit Court of Appeals said Greece’s selection process “virtually ensured a Christian viewpoint” at the vast majority of council meetings. Under the informal invitation procedures then in

place, every prayer-giver from 1999 to 2007 was a Christian clergy member, the three-judge panel said.

### **Wiccan Priestess**

After two town residents complained, non-Christians delivered the invocation at four of the 12 board meetings in 2008. The group included a Wiccan priestess, the chairman of the local Baha’i congregation and a lay Jewish man who delivered two invocations.

The appeals court also said town officials took no steps to mitigate the impression that the city endorsed Christianity.

“The town had an obligation to consider how its prayer practice would be perceived by those who attended town board meetings,” Judge Guido Calabresi wrote for the panel. “And, despite the homogeneity of viewpoints reflected by the invocations, the town did not explain that it intended the prayers to solemnize board meetings, rather than to affiliate the town with any particular creed.”

The appeals court pointed to a 1989 Supreme Court ruling, *County of Allegheny v. American Civil Liberties Union*, which barred a Pennsylvania county from erecting a Nativity scene in a courthouse.

### **‘Specific Faith’**



In that case, the majority said in passing that legislative prayers are impermissible if they “have the effect of affiliating the government with any one specific faith or belief.”

Justice Sandra Day O’Connor wrote the pivotal opinion in the 1989 case, saying the Nativity display was an impermissible governmental “endorsement” of religion.

The two residents challenging Greece’s practices, Susan Galloway and Linda Stephens, asked the Supreme Court not to hear the appeal. Even under the 1983 decision, *Marsh v. Chambers*, legislative bodies may not use prayers to “advance one faith to the exclusion of others,” the two women argued in court papers.

“A town council meeting isn’t a church service, and it shouldn’t seem like one,” said Barry W. Lynn, executive director of Americans United for Separation of Church and State, the Washington-based organization behind the lawsuit. “Government can’t serve everyone in the community when it endorses one faith over others.”

Eighteen states, led by Indiana, and 49 members of Congress joined Greece in urging the high court to get involved.

The case, which the court will hear in the nine-month term that starts in October, is *Town of Greece v. Galloway*, 12-696.

# **“The Supreme Court Takes the Case of *Town of Greece v. Galloway*, Which Raises the Question Whether – And If So, How – A Town Board May Open Its Meetings with Prayer”**

*Justia*

May 30, 2013

Marci A. Hamilton

The Supreme Court granted certiorari last week in an important Establishment Clause case, *Town of Greece v. Galloway*, which poses the questions whether—and if so, how—a local government may open its public meetings with prayer. The fact of the cert grant is interesting for doctrinal reasons, of course, but so is the question of why this Court would take such a case.

## **The Case of *Town of Greece v. Galloway***

This case is already squaring up to be a landmark battle in the ongoing culture war over control of government programs and spaces, and control of American culture generally.

Until 1999, the Town of Greece opened its Town Board meetings with a moment of silence, a practice that is unquestionably constitutional. In 1999, however, the practice changed, when the Town Supervisor, John Auberger, substituted prayer for silence. According to Auberger’s Town profile, he is a member of St. Lawrence Roman Catholic Church and the Knights of Columbus, and virtually all of the monthly “chaplains” have been Christian. The Town and Auberger have allied themselves with the most extreme proponents of government-sponsored prayer.

They have the Alliance Defense Fund representing them, and an amicus brief has

been filed on their behalf by the Foundation for Moral Law. (That foundation is led by Judge Roy Moore, who belligerently violated the Establishment Clause by bringing his own two-ton granite rendition of a version of the Ten Commandments into the lobby of the Alabama Supreme Court). Other amici include the Liberty Institute and the National Legal Foundation, which advertises itself as a “Christian public interest law firm”. It is no secret that these groups are aggressively seeking to re-introduce prayer in public schools, a movement that includes many who insist that this is a “Christian country.”

The Town of Greece has moved backward, if you measure what they did in comparison to how the constitutional doctrine has developed. Once the Supreme Court held that public schools could not sponsor prayer, the alternative substituted was a moment of silence. The former was exclusionary, but the new practice sent no message to the participants that the government expected them to follow any particular creed. With the constantly expanded galaxy of beliefs in the United States, this was a salutary development for liberty and peace.

There is no indication why Supervisor Auberger decided to displace the likely constitutional moment of silence with constitutionally suspect

prayer. Under *Wallace v. Jaffree*, a moment of silence might be constitutional, but not if it was packaged as a moment of “meditation and voluntary prayer.” In light of his own bio on the Town website, he is a believer and a Christian. We can never learn motive, but what is the purpose of displacing a moment of silence with prayer in 1999, if not to underscore a purpose of supporting, endorsing, and propagating religion? The time line in this case does not bode well for Greece.

The procedures are also suspect and fraught with the potential for the Town to impose religious content and viewpoint on its citizens. The Town of Greece solicited clergy month-by-month, by calling those religious groups (all Christian) listed in a Chamber of Commerce publication. Calls were made by a Town employee until a member of the clergy was found to open the next monthly session. Sometimes, Supervisor Auberger gave the chaplain of the month a plaque or special commendation. Again, these practices were arbitrary and unilateral.

By and large, the prayers have been delivered solely by Christian clergy, except for a blip of time that—not coincidentally—fell in the midst of the litigation where they recruited a Wiccan priestess, a Baha’i congregation leader, and a secular Jew. By the close of the record, though, they were back to a purely Christian contingent of chaplains, who frequently invoked Jesus, God, and the Holy Spirit.

This practice was challenged by Susan Galloway and Linda Stephens, who attended

the public Town Board meetings. Americans United for Separation of Church and State represents Galloway and Stephens. Their claims sound in Justice Sandra Day O’Connor’s endorsement test, for Galloway and Stephens argue that the Town appeared to have aligned itself with a single religious tradition, Christianity, and that the government’s endorsement of Christianity is a violation of the separation of church and state, as that principle has been interpreted in Establishment Clause doctrine. Under existing doctrine, they are on solid ground.

### **First Amendment Religion Doctrine Weighs Against the Town**

The facts are pretty stark here. A religious town supervisor decided that a moment of silence was not enough, and instead embroiled the town in likely litigation by recruiting chaplains to start Town Board meetings with sectarian prayers. Moreover, the vast majority of recruited chaplains over the years have shared the same faith as the supervisor. And no citizen or resident could attend the Board Meetings without being subjected to the prayers.

Under the First Amendment, it is incumbent upon the government not to endorse a single religion, and not to choose between religion and irreligion. These are well-settled principles, and they have contributed to the remarkable achievement in the United States of simultaneous expanding diversity of religious belief and a lack of religious civil wars.

The one case that might potentially cut on the side of the Town is *Marsh v. Chambers*. There, the Court held that opening prayers in a state legislature were constitutional, largely because of the long history of opening legislative sessions with prayer. The Court reasoned, as it had in *Walz v. Tax Comm'n of City of New York*, which upheld property tax exemptions for religious groups, that a practice that had been in place since the beginning of the country and had not resulted in an established church must not be a violation of the Constitution. The Court did not, however, otherwise address its Establishment Clause doctrine, which must be applied in this case, where the prayers were not initiated until 1999. In cases like *Town of Greece*, the Court will have to use its standard Establishment Clause doctrine, which is found in the factors listed in *Lemon v. Kurtzman* and later cases interpreting those factors.

On the other side, there are many Supreme Court cases addressing government support or preference for religion that spell trouble for the Town. In *Allegheny County v. ACLU*, the Court held that the county could not place a nativity, or crèche, scene on the Grand Staircase of the county courthouse, because it sent a message of endorsement of Christianity.

The school cases are also instructive. In *Engel v. Vitale*, the Court held that public schools could not deliver a prayer each day to the students. And in *Stone v. Graham*, public schools were not permitted to post the Ten Commandments in

every classroom, where there was no secular purpose to do so.

In *Lee v. Weisman*, in a decision authored by Justice Kennedy, the Supreme Court held that a public school could not include a prayer at graduation, because it endorsed a religious tradition, and left students in the audience feeling as though they were not full members of the community. The same reasoning was embraced in *Santa Fe Independent School Dist v. Doe*, where the Court invalidated a Texas public school's practice of having students present prayers over the public announcement system as part of the program immediately preceding football games.

Both of the latter cases, *Lee* and *Santa Fe*, highlighted the plight of the student, or citizen, who is caught at a public event, but who does not subscribe to the religious views being propagated by the government at that event. The cases convey an easily understandable principle: it is unacceptable, under the Constitution, for the government to deliver a message on behalf of a religious viewpoint, in part because it marginalizes those who don't share the same perspective. Underlying that principle is that national citizenship entails inclusion, regardless of belief or creed. To put it another way, religious entities have the right, under the First Amendment to create insiders and outsiders within their own faith, but the government may not do the same. We are all Americans with the same government, regardless of our faith. The drive for government-sponsored prayer is a drive for division, and, therefore, a danger.

Galloway and Stephens were receiving, loud and clear, a message from the Town Supervisor and the Board that if they wanted to exercise their rights as citizens to monitor and speak to their government, then they first had to sit through the Supervisor's decision to impose a prayer at the start of the meeting.

### **This Supreme Court and the Establishment Clause**

Under most constitutional metrics, the U.S. Court of Appeals for the Second Circuit was correct in holding that the Town of Greece's practice was likely unconstitutional. Normally, the Supreme Court does not take cases that pose settled questions of law. Therefore, the question that this certiorari grant raises is why this Court took it.

I hope the answer is not because the conservative members of the Court intend to be judicial activists intent on rolling back the principle of government neutrality toward religion. Most court watchers would assume that there may be four conservative members of the Court who are inclined to jettison the endorsement test, Chief Justice Roberts and Justices Scalia, Thomas, and Alito, and who would embrace the agendas of the Alliance Defense Fund, and others who are backing the Town in this case. I also hope that the fact they are all Catholic does not lead them, consciously or unconsciously, to be more sympathetic to the Town Supervisor in this case.

While even they have necessarily abandoned the notion that this is a "Christian country,"

they have embraced the idea it is a monotheistic country. In other words, they have had to concede that there is meaningful diversity in America, going beyond the diversity among Christians, but they have held fast, so far, to the concept that all the "major" religions are united in worshiping a single deity.

The problem for these four conservative Justices is that we are long past the moment in history when the Court could plausibly or legitimately state, let alone hold, that this is just a "monotheistic country." The diversity of religious belief in the United States is nearly boundless, with sects numbering in the tens of thousands, and new schisms and believers appearing daily. It is rank denial to insist that the millions of Buddhists and Hindus in the country are "monotheists," not to mention the growing numbers of Pagan believers, and just as important for these purposes, the growing number of spiritual believers who do not embrace organized religion. We have established a spectrum and variety of religious experience that is unrivaled in history, and we have done it without raising arms against each other. "Monotheism" mischaracterizes the American religious experience, and in fact, falsifies it.

Indeed, in an era of Islamic terrorism, which exists to impose its religious viewpoint on the world and is offended by the religious liberty and diversity of the world, it is hard to explain why anyone still thinks that government control or support of a particular religion makes sense. We need individual and personal liberty, but what we also need to do is set an example for the

world of why the totalitarianism at the heart of Islamic radicalism is so wrong.

Justice Kennedy, as usual now, likely will be a swing vote. He authored *Lee*, and labeled the constitutional violation in that case “coercion,” but his opinion read very much like the Court’s endorsement test, making it highly unlikely that he will abandon the test in substance. He took seriously in that case the reality that a captive audience attending a graduation ceremony could not be made to feel like non-citizens consistent with the First Amendment. The same principle applies to the Town resident who wants to attend the Town Board meetings to monitor governance, but not to participate in religion. There is no other venue in which to obtain the same information, and so they are trapped in a very real sense. Giving up attending the public meetings of one’s local government is too much for the government to ask of those who don’t share the religious viewpoint of the government-sponsored speaker, or any religious viewpoint at all.

I assume the four more liberal members of the Court, Justices Ginsburg, Breyer, Sotomayor, and Kagan, will be more likely

to find that the endorsement test is appropriate and violated in these circumstances, and that the Establishment Clause is essential to liberty and safety. Justice Kagan did raise eyebrows when she joined Justice Alito in *Hosanna-Tabor* when he wrote in favor of “autonomy” for religious organizations, which is an extremist position at odds with the ordered liberty imposed by the First Amendment doctrine from the beginning. But that decision and concurrence is so far removed from this case, that vote reveals little.

What is at stake in *Town of Greece* is our self-image of ourselves as a collective. Those in favor of permitting local governments to open their public meetings with predominantly Christian messages have myopia or a sort of body image disorder. They simply are not seeing what is in front of them. If the Justices accept the actual diversity of the United States and the need of government in these difficult times to eschew taking sides on faith, the holding in this case will be inevitable: the Town of Greece has violated the Establishment Clause.

## “2nd Circuit Finds NY Town Prayers Unconstitutional”

*Thomson Reuters News & Insight*

May 17, 2012

Terry Baynes

A federal appeals court on Thursday revived a challenge against the town of Greece in upstate New York over its policy of holding opening prayers at town board meetings.

The New York-based U.S. Court of Appeals for the 2nd Circuit found that the prayer policy aligned the town with Christianity in violation of the Establishment Clause, which prevents the government from favoring one religion over another.

"The town's desire to mark the solemnity of its proceedings with a prayer is understandable; Americans have done just that for more than two hundred years. But when one creed dominates others -- regardless of a town's intentions -- constitutional concerns come to the fore," Judge Guido Calabresi wrote for a unanimous three-judge panel.

Two Greece residents, Susan Galloway and Linda Stephens, complained in 2007 that the town board only invited Christian clergy to deliver the invocation. The next year, the town invited a Wiccan priestess, a chairman of a local Baha'i congregation and a lay Jewish man to give the prayer. But prayers at eight of the 12 meetings were Christian.

Galloway and Stephens sued the town and its supervisor in 2008, challenging the prayer practice under the Establishment Clause. The district court ruled in the town's

favor before a trial, finding that town employees did not intentionally exclude any particular faiths and did not restrict the content of the prayers.

But the 2nd Circuit panel reversed that decision on Thursday, finding that the town's process for selecting speakers virtually ensured a Christian viewpoint. Even though most of the congregations in Greece were Christian, the town could have invited clergy from outside its borders, the panel found.

Joel Oster of the Alliance Defense Fund, which represents Greece, said the town was prepared to appeal the case as far as the Supreme Court.

"The court wants the town to be prayer monitors, to determine how many prayers in Jesus' name are too many," he said. That outcome violates the Establishment Clause, he said. Oster pointed to a 2008 ruling by the 11th Circuit in *Pelphrey v. Cobb County*, Georgia, upholding a county commission's opening prayer policy.

But Ayesha Khan, a lawyer with Americans United for Separation of Church and State who represented the plaintiffs before the 2nd Circuit, said the prayer givers in *Cobb County* were more diverse than in Greece.

"Municipalities need to ensure that no single religion is advanced in their prayers, and

they have to take a fairly active role in ensuring constitutional compliance," she said.

In a different case in January, the U.S. Supreme Court refused to hear an appeal by

Forsyth County, leaving in place a 4th Circuit ruling that stopped sectarian prayers at county board meetings.

The 2nd Circuit case is *Galloway et al v. Town of Greece et al*, No. 10-3635.



## “What Should the Supreme Court do With Town Board Prayers in *Galloway v. Town of Greece*?”

*Verdict*

June 7, 2013

Vikram David Amar & Alan E. Brownstein

Last week the U.S. Supreme Court granted review in an important case involving the First Amendment’s Establishment Clause, *Galloway v. Town of Greece*. *Galloway* involves a decade-plus-long practice in the upstate New York Town of Greece of starting Town Board meetings with a short prayer. Before 1999, the Town (which has slightly fewer than 100,000 residents) began Board meetings with a moment of silence. But since then, it has been inviting local clergy to offer an opening prayer after the Pledge of Allegiance has been recited. Prayer-givers deliver their prayer over the Board’s public address system, and many have asked members of the audience to bow their heads, stand, or join in the prayer during its recitation. The Town asserts that anyone—followers of any religion, agnostics, and atheists alike—can request to offer an invocation, and that it has never turned down any request. But in practice, Christian clergy have given nearly all the prayers since 1999, and have been invited to do so by the Town, which often calls them “chaplain[s] of the month.”

As fellow *Verdict* columnist Marci Hamilton pointed out last week in her analysis of this case, the U.S. Court of Appeals for the Second Circuit (with esteemed Judge Guido Calabresi writing) invalidated the Town’s practice, finding that the prayers, in context, had to be understood

as a public endorsement of Christianity, which violated the First Amendment’s ban on laws respecting an establishment of religion. We agree with much of Judge Calabresi’s reasoning, but in the space below we offer additional reasons—ones we feel the Second Circuit did not adequately explore—to be skeptical about what the Town has been doing.

### **The Town of Greece’s Practice Does Implicate Religious Equality Values**

Disputes about the recitation of prayers before town board or city council meetings implicate many values underlying the Establishment Clause. The Second Circuit’s opinion, which focused on the so-called endorsement test, spoke primarily in terms of religious equality. And there are powerful equality-based grounds for challenging the town of Greece’s government-sponsored prayers. For these constitutional purposes, equality means not only equality in material benefits but also equality of status and respect. This has been clear since the Court declared in *Brown v. Board of Education* that physically comparable but separate public schools that are segregated by race violated the equal protection clause because of the message of inferior status they communicated to African-American children. When government bodies select leaders of majoritarian religions to lead sectarian

prayers to open local governmental proceedings, while ignoring the beliefs of other citizens, the message of lack of worth and disrespect for minority religions and the non-religious would be hard to avoid.

To be sure, there is nothing intrinsically disrespectful about being asked to stand while prayers of a different faith than our own are being offered. Most of us have probably been asked to do so when attending a wedding, bar mitzvah or other religious event in the house of worship of neighbors and friends. In those situations, however, we are guests in the sanctuary of a different faith community. As outsiders, we do not expect our different religious identities to be recognized. There is no pretense that the rituals being observed reflect our own religious commitments. But citizens of a town or city are not guests and outsiders at the public meetings of their government. They belong to the political community and, quite reasonably, resent being treated as strangers who are not being shown the same respect afforded to its favored members.

And the Town has been essentially discriminating against minority religious voices. By focusing on majoritarian sects—the Town drew some prayer leaders from a list of congregations printed in the Chamber of Commerce’s directory—the Town effectively excluded religious adherents who live in the Town but who lack the numbers to establish a physical congregation within the community. Oftentimes, as in the area surrounding UC Davis, where we both teach law, religious practitioners may have an insufficient number of members to establish

a congregation in their own town, and for that reason they worship in a congregation in a neighboring town. But if each town used only a directory of congregations located within that town as the source of clergy to be invited to lead prayers at Board meetings, many religions would be left out.

### **Equality Is Not the Only Establishment Clause Value at Stake Here, the Town Councils Differ from State Legislatures**

As powerful as the equality concerns in this case are, they should not cause us to overlook the important religious liberty concerns that are also raised in this dispute. Plaintiffs argued that the prayers at Board meetings were coercive, but the Second Circuit opinion, construing these arguments to be focused only on children, quickly rejected these claims in a footnote. Plaintiffs were adults, the court reasoned, and the prayers at the Town Board meeting here were no more coercive than the prayers offered at sessions of the Nebraska state legislature that the U.S. Supreme Court upheld against an Establishment Clause challenge in *Marsh v. Chambers* in 1983. We think the court was far too quick to dismiss these religious liberty concerns on the authority of the *Marsh* decision.

There are critical distinctions between city councils and state legislatures that produce very different kinds of audiences who attend the meetings of these different government bodies. Most of what a state legislature does involves the formulation and enactment of general legislation that impacts large groups and constituencies. There may be some narrow bills that address limited issues, but

the majority of the state legislature's work relates to laws of significant breadth and scope. By contrast, the work of a city council, in most of the towns and cities of the United States, regularly deals with decisions affecting small groups and individuals. Land-use decisions impact individual neighbors and neighborhoods. Funding decisions may burden particular small constituencies. Often town councils and boards act as administrative tribunals in a quasi- adjudicatory capacity, hearing personnel grievances or land use appeals. Thus, these local government meetings are much more likely to be focused on particular individuals than are the general laws that state legislatures consider at their sessions.

Moreover, and related to these differences, citizens who watch the deliberations of the state legislature from the gallery are almost always passive observers of the government's functions. They have no role to play in the legislative process. Citizens who attend city council meetings do so for very different reasons. Usually they are not passive witnesses attending the sessions to be better informed about government operations. They attend council meetings to participate in government by speaking to the Council during public comment periods. They want and expect to be seen and heard by the Council. Their goal is to influence decisionmakers, not to simply observe or monitor them. For that reason, the ability to address the Council in person is an important right of political participation.

Finally, outside of major metropolitan areas, there are stark difference between the size and format of state legislative chambers and

sessions, and those of city councils. State legislators rarely know who is sitting in their legislative galleries. The size of the chambers and the number of legislators and visitors preclude any such knowledge or sense of familiarity. Not so, in the small meeting rooms of a city council, where the physical proximity between the Council and the audience and the limited number of participants make it far easier for Council members to be aware of their audience.

Because of these differences, the decision in *Marsh* tells us very little about the coercive nature of government-sponsored prayer at city council meetings. In the setting of a city council meeting, citizens who wish to address the council are coerced when they are asked to stand or otherwise affirm the prayer that is being offered in their name. A failure to comply would risk alienating the very political decisionmakers whom they hope to influence.

The Town of Greece provides a good illustration. Citizens there who feel excluded and burdened by the Board meeting's prayers have no good alternatives. They can try to arrive at the council session after the pledge and prayer have been completed—but they may stand out in a small council meeting room for doing so. It would be even more awkward to stay and recite the pledge and affirm their loyalty to our country, leave for the prayer, and then return after the prayer is over. Or they can sacrifice their religious liberty by agreeing to have someone appointed by the government pray in their name. Visitors sitting in the gallery at the state legislature experience no such vulnerability or pressure.

## **Why the School Analogy Doesn't Undercut Galloway's Liberty Claims**

Some commentators and jurists point to the school setting and argue that it suggests that coercion-based arguments depend upon the malleability of the listener. They read the school cases for the proposition that state-sponsored prayer is unconstitutional in the context of public schools only because children, on account of their age and maturity, are uniquely susceptible to indoctrination and the pressure to conform. By contrast, adults attending city council meetings, it is suggested, should be capable of withstanding such compulsions. This argument is unpersuasive. The major problem with religious coercion is not that it may actually change people's religious beliefs and practices. It is that when religious individuals defy the state's coercive efforts, they suffer burdens and penalties for doing so. Religious coercion is as unconstitutional when it fails as it is when it succeeds.

Prayer in the public schools is distinctively problematic, but not just because it is directed at children. It is particularly dangerous because teachers and administrators have so much discretionary power over the students in their charge. Both students and their parents know that it is treacherous to alienate school personnel because retaliation is so easy to mete out and hard to prove.

Citizens attending city council meetings for the purpose of influencing the council's decision confront a similar burden that does not dissipate with age or maturity. The

decisions of a city council often involve substantial political discretion in weighing the competing concerns of relatively small constituencies. Citizens who refuse to join in prayers offered by clergy invited by the council risk overtly or subconsciously retaliatory rulings.

## **A Final, Particular Way in Which the Town of Greece's Practice Offends Liberty**

The Town of Greece's approach to public prayer at issue in this case involves a particularly egregious affront to religious liberty. There are at least two kinds of prayers that an organization may use to begin a session or meeting. In one kind of prayer, the speaker prays in his or her own name for G-d's blessing to be given for the meeting and its participants. There is a religious liberty issue implicated here, in that individuals may feel that they should not be required to be present while a prayer is expressed. The weight of that burden may be somewhat mitigated, however, by the fact that many people do not experience the fact that someone else is offering a prayer for their well-being as a burden on their liberty—even if the person who is doing the praying is of a different faith.

But a far greater affront to religious liberty occurs when the second kind of prayer is undertaken. In this kind of prayer, the speaker claims to be offering a collective prayer expressing the beliefs of the audience, a collectivity to which audience members are asked to acquiesce by standing or bowing their heads. The decision about when and how to speak to G-d, and the

words one chooses in that expression, belong to the individual. It is an extraordinary intrusion into the religious liberty of the individual for the state to usurp those decisions. The state cannot tell people that as a condition to attending and commenting during a city council meeting, they have to delegate to the state the power to appoint someone to pray to G-d in their name.

This basic commitment to personal religious autonomy is the foundation of the American understanding of religious liberty. When colonial proponents of religious liberty argued that religious freedom was an inalienable right, they were speaking literally, not figuratively. It made no sense to suggest that a person could somehow surrender his relationship with and duty to G-d to a government official, or to anyone else for that matter. Throughout the Great

Awakening and continuing on to the ratification of the Constitution, advocates of religious liberty insisted on the right of the individual to choose who would minister to his or her spiritual needs and lead him or her in worship. Established religions violated these principles of religious liberty—and thereby prompted the First Amendment—precisely because they employed the coercive power of government to influence the private judgment of the individual in matters of religion.

Coercive collective prayer at city council meetings undermines religious equality by discriminating against minority faiths. And it abridges religious liberty by insinuating the state into the individual's relationship with G-d and compelling people to engage in prayer that lacks personal authenticity. The Constitution prohibits the state from engaging in such practices.