

DISSECTING *MARSH* AND *TOWN OF GREECE*: A COMPARATIVE
ANALYSIS

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Marsh v. Chambers,² upholding the constitutionality of the regular prayers of a chaplain hired by the Nebraska legislature, may well be the most poorly reasoned decision regarding religion in modern Supreme Court jurisprudence. Applying no traditionally recognizable “test” of constitutionality, it ultimately upholds a religious ritual using public funds, affirming the continuance of the practice solely on its history.

In my view, flawed as *Marsh*³ may be, its reasoning is distinguishable from the issues raised in the controversy in *Galloway v. Town of Greece*.⁴ Our two plaintiffs, Susan Galloway and Linda Stephens, challenged monthly town council prayers—which were almost always given by Christian ministers.⁵ Ms. Galloway is Jewish; Ms. Stephens, an avowed atheist.⁶

Here is what I consider the relevant background of this case. Prior to 1999, the Greece Town Council started its business meetings with a moment of silence, a nod to dignifying the occasion of action by a legislative body.⁷ Upon the election of a new Board chair, John Auberger, however, the “opening” policy changed to one in which a prayer was offered by a local member of the clergy, invited from persons representing institutions listed on a vaguely and erratically constructed “clergy list” garnered by city employees from publicly available sources.⁸

Actual attendance at town council meetings is sparse. Residents who do attend largely fall into one of several categories: certain city employees whose jobs require attendance, newly appointed police officers sworn in on these occasions, citizens being

¹ Executive Director of Americans United for Separation of Church and State. A version of these remarks were presented on March 27, 2014 as part of the Sixth Annual Donald C. Clark, Jr. ’79, Endowed Law and Religion Lecture at Rutgers School of Law-Camden. They were prepared and delivered before the Supreme Court issued its decision in *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014).

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

³ *Id.*

⁴ *Town of Greece v. Galloway*, 134 S. Ct. 1811 (May 5, 2014).

⁵ *Id.* at 1817.

⁶ *Id.* at 1816.

⁷ *Id.*

⁸ *Id.*

awarded various city awards, high school students who are visiting the body to fulfill part of a civics graduation requirement, and residents who are seeking a change in public policy or a “benefit” that the council has the authority to provide.⁹ Our plaintiffs fell into that last category.

When our clients went to a council meeting they were confronted with a religious activity they found wholly inappropriate for such a venue: a prayer was given by the selected minister from behind a podium containing the Town of Greece seal who faces the audience, not the seated members of the council.¹⁰ In the eighteen months before the record in this case closed, eighty-five percent of those prayers specifically mentioned “Jesus”, the “Holy Spirit”, “Your son” or “Christ.”¹¹ Indeed many were clearly based on Christian doctrinal beliefs, including the Resurrection, Pentecost, or the Ascension of Christ into heaven.¹² Some asked for very concrete affirmative conduct on the part of the audience including standing, “joining”, or bowing one’s head.¹³ Others assumed that all of those present were Christian (for example, referring to “us as Christian people” or proclaiming “our Christian faith”).¹⁴ Finally, after the lawsuit was filed, a few prayers even made veiled references to the Council being “God fearing” and implying that certain other people were not, including in the view of one prayer-giver, certain unspecified “ignorant” minorities.¹⁵ Some of these prayer offerers were officially referred to as the “Chaplain of the Month”.¹⁶

Over the course of this protracted litigation, there were four exceptions to the overarching theological direction I have just noted. A Wiccan priestess offered one invocation, a Bahai leader spoke once, and—although the council apparently found it impossible to find a rabbi—a Jewish person who knew some Jewish prayers twice offered one.¹⁷ None of these figures were accorded the title of “Chaplain”. Curiously, these four “exceptional” offerings were all done in 2008, the year in which the litigation began.¹⁸ After 2008 until the record closed, the speakers were,

9 *Town of Greece*, 134 S. Ct. at 1827.

10 *Id.* at 1846-47 (Kagan, J., dissenting).

11 *Town of Greece*, 134 S. Ct. at 1848.

12 *Id.* at 1853.

13 *Id.* at 1818.

14 *Id.* at 1816.

15 *Id.* at 1824.

16 *Town of Greece*, 134 S. Ct. at 1846-47 (Kagan, J. dissenting).

17 *Town of Greece*, 134 S. Ct. at 1839 (Breyer, J. dissenting).

18 *Id.*

once again, all Christians.¹⁹ Throughout much of this litigation, the town claimed in various media appearances and in court filings that it would be willing to have anyone from the town appear.²⁰ However, this sentiment was never actually announced to the residents, much less formally adopted as policy by the Board.²¹

Our clients' claims were rejected at trial, but on appeal to the Second Circuit, the lower court was reversed in a unanimous decision.²² The central and persuasive finding in that decision was an assessment of the "totality of the circumstances" concluding that the manner of the prayer's presentation and its consistent basic content appeared "to affiliate the town with a particular creed."²³ The decision referred to the "steady drumbeat of often specifically sectarian Christian prayer . . ."²⁴ The Second Circuit did not hold that "the town may not open its public meetings with a prayer or invocation", noting that the *Marsh*²⁵ decision allows legislative prayers under some circumstances.²⁶ The town council appealed and the Supreme Court—frankly, to my surprise—granted certiorari on May 20, 2013.²⁷ The case was argued on November 6, 2013, just a few months ago.²⁸

In the judgment of the Americans United legal team, the Second Circuit reached the right decision under the facts, but did not do so with the strongest possible analysis, particularly in distinguishing the *Greece* circumstances from those in *Marsh*. Here are some of the differences we pointed out in our brief and oral argument to the Supreme Court.

First, in Nebraska, as during invocations for the United States Congress, the prayer is directed to the members of the body. The trial court in *Marsh* referred to this as "an internal act."²⁹ It should be noted that in Washington very few members are actually present to hear these prayers but some of those not present claim to watch the prayer on the television feed sent to their offices. The

19 *Id.*

20 *Id.* at 1840.

21 *Id.*

22 *Town of Greece*, 134 S. Ct. at 1818.

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

24 *Id.* at 32.

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

26 *Galloway*, 681 F.3d at 33.

27 *Galloway v. Town of Greece*, 681 F.3d 20 (2d Cir. 2012), *granting cert.*, 133 S. Ct. 2388 (2013) (mem.)

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

29 *Chambers v. Marsh*, 504 F.Supp. 585, 588 (D. Neb. 1980).

public that is in attendance are sitting in a gallery watching events; they are not asked or expected to participate. Indeed, certain efforts to embellish or critique the invocation get you ejected and sometimes arrested. A small group of Christians found themselves in just that circumstance in July 2007, when they vocally chastised the first Hindu asked to give the Senate prayer, labelling him “wicked” and “an abomination.”³⁰

This difference is also significant as a matter of law because the people in the gallery are not there to plead a case or argue a position to the legislators. (At Congressional hearings, where advocates for positions do appear, there is never any offering of a prayer or other religious activity and witnesses can even choose to “affirm” rather than “swear” to tell the truth, which to many suggests a religiously based promise).³¹

Under the state and federal seating schema, legislators are not in a position to observe the audience and, thus, notice which people are “appropriately” observing the religious event on the floor. In *Greece*, however, the Council is viewing the audience and failure to participate fully will be observed and indeed could be used as a strike against doing what that audience member pleads for a few minutes later, a detrimental start to achieving the very goal she or he is seeking. There is no lawyer or advocate for any person appearing before a legislative, judicial, or executive branch body who would not recommend that persons “go along” with any formalistic practice whether they like it or not. In its simplest form, this is what causes me to label the *Greece* practice inherently “coercive,” tending to make people operate in a manner that they would otherwise not choose to do but for the pressure to conform and the fear of reprisal for failing to do so. The Second Circuit characterized this as putting attendees in the awkward position of “either participating in prayers invoking beliefs they did not share or appearing to show disrespect for the invocation . . .”³²

There is no way to escape this pressure, other than to forfeit one’s right to attend the Board meeting. As the Supreme Court in one of its rulings prohibiting prayers at high school

30 James Joyner, *Senate Hindu Prayer Disrupted by Christian Activists*, OUTSIDE THE BELTWAY (July 13, 2007), http://www.outsidethebeltway.com/senate_hindu_prayer_disrupted_by_christian_activists/.

31 Austin Cline, *Affirming vs. Swearing Oaths in Court*, ABOUT, <http://atheism.about.com/od/ideasforatheistactivism/a/AffirmSwear.htm> (last visited (Oct. 7, 2014)).

32 *Galloway*, 681 F.3d at 32.

graduation put it: no citizen should be required to “take unilateral and private action to avoid compromising religious scruples”³³ Coercion could be “subtle and indirect” it continued, a recognition that coercion of course does not occur only through the mechanisms of gunpoint or threatening imprisonment.³⁴ The Court even labelled prayer over the public address system in a high school football stadium as having the effect for children and adults in the bleachers of the improper effect of coercing those present “to participate in an act of religious worship,” correctly identifying prayer as a participatory event.³⁵ Significant social science research, analyzed in our brief to the Supreme Court buttresses the claim of real coercion just from a sense of needing to go along with majority sentiments and practice.

We come now to the second major distinction between Greece’s practice and the activity in the Nebraska legislature. The long-serving Presbyterian chaplain there 34 years ago had, at the request of a Jewish legislator, removed references to Jesus from his prayers, making generic references to a deity but eliminating most Christian theological references.³⁶ He did not try to proselytize non-Christian members of the body.³⁷ This fact is noted repeatedly by the majority in *Marsh*.³⁸ They believed that the prayers could be accurately labelled “non -sectarian”; indeed wrote that the prayers there had not been “exploited to proselytize or advance any one” faith.³⁹ As I have noted earlier, the prayers in *Greece* are anything but that.

The construct of a “non-sectarian” prayer is admittedly an odd one for some of us, particularly those of us who actually engage in that practice. Normally, a prayer is directed to a specific entity, envisioned in a certain way—from bearded man in flowing robes to spiritual energy field—and for the purpose of thanks for a perceived “blessing” or a request for help for the future. This is not what a majority of the Supreme Court’s members seem to mean, however. A definition which seemingly does not bother most members of the current court is one I would submit would be seen as “strange” (to be polite) by virtually any religion scholar in the world. Here is a version of that definition written by Justice

33 *Lee v. Weisman*, 505 U.S. 577, 596 (1992).

34 *Id.* at 593.

35 *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 292 (2000).

36 *Marsh v. Chambers*, 463 U.S. 783, 807 n. 14 (1983).

37 *Id.* at 821.

38 *Id.*

39 *Id.* at 794.

Antonin Scalia: a sectarian prayer is one “specifying details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world are known to differ (for example, the divinity of Christ).”⁴⁰

For many, once you announce support for one God, as opposed to multiple ones or none at all, you are making a profound and profoundly sectarian statement. Adding to that such characteristics as being all-powerful, all good, the basis for creation and active in ongoing human history makes any characterization of such “god” as non-sectarian patently ridiculous.

Some of the *amici* in *Greece* did make this point, but as the attorneys for our clients, we felt a need to walk on the decrepit porch that had been erected. Even by Justice Scalia’s flawed definition, however, the *Greece* prayers are overwhelmingly sectarian, taking positions precisely on such core claims as “the divinity of Christ.”⁴¹

If *Marsh* stands for the proposition that legislative prayers must be non-sectarian, and a number of justices led by Justice Kennedy have found constitutional problems with “coercive” prayers, the prayer mechanism used by the Town Council in *Greece* fails on both counts.

The oral argument in *Greece* did not add much to the written record in the case. It was a time in which I understood why Justice Clarence Thomas never asks questions. There were, as I wrote in a *Washington Post* article, so many red herrings present that they would turn a Cerulean blue sea, purple.⁴²

The biggest school of those herrings involved a ceaseless effort to figure out how to avoid the so-called “censorship” by government of the prayers of those visiting chaplains. Somehow, chaplains asked to provide a prayer in other legislative venues do not seem to be troubled by this. Thirty-seven states have guidelines for chaplains and/or guest prayer-givers about their expected conduct and expression. Written instructions for guest preachers in the United States House of Representatives clearly remind them that the body consists of “Members of many faith traditions.” Although Senate guidelines are apparently orally given, they seem to match those of the House and one review of recent Senate prayers revealed that only 5% even mention Jesus.

40 *Lee v. Weisman*, 505 U.S. 577, 596 (1992) (Scalia, J., dissenting).

41 *Lee*, 505 U.S. at 641.

42 Barry W. Lynn, *Prayer Case at the Supreme Court: Debunking Some Myths*, ONFAITH (Nov. 11, 2013), <http://www.faithstreet.com/onfaith/2013/11/11/prayer-case-at-the-supreme-court-debunking-some-myths>.

Remember that there is no constitutional “right” for the clergy to pray at any legislative event. Legislatures are not mandated to allow spiritual sentiments to be expressed. When prayers occur it is only because of an act of delegated governmental authority by that legislature. Surely that body can therefore set parameters and expect compliance. When Chairman Auberger in his deposition was asked whether he would permit a prayer imploring “our white Lord Jesus to grant peace to the white residents of Greece but not the blacks or the Jews or homosexuals or other perverts”, he noted that he would. I would submit this “do whatever you want” is a breathtakingly preposterous position to adopt, flying in the face of standard procedures for citizen involvement in governmental matters and commonsense sensitivities.

As one example, the House of Representatives guidelines are quite specific. Prayers are limited to 150 words, must be entirely in English, and may not make “any intimations pertaining to foreign or domestic policy.”⁴³ The Obama administration, it should be noted, took the side of the Greece town council in this case, articulating the fear that to require a more stringent effort to address the lop-sided nature of Greece invocations would cast doubt on the legitimacy of the Congressional prayers. The government’s brief suggests this is important. Honestly, though, does President Obama believe that prayers in the John Boehner-controlled House help move quality legislation forward or quell the partisan vitriol spilled on a near daily basis? I might even suggest to any non-theists in attendance that if you want one more quiver in your argument that prayer is entirely ineffectual, just ask believers how much it has produced recently in that deliberative body.

Perhaps the greatest post-argument concern raised by some civil libertarians who were critiquing the performance of our chosen oral advocate, Professor Douglas Laycock of the University of Virginia Law School, was that he somehow “threw atheists under the bus” in his time before the Court.⁴⁴ He conceded that under the definition of “non-sectarian” used by the Court, polytheists and atheists would not be happy with a result that

43 See General Operating Rules of the House of Representatives, available at <http://www.house.state.pa.us/rules/2011HouRules.htm> (last visited Oct. 7, 2014).

44 *Throwing Atheists Under the Bus*, THE ECONOMIST (Nov. 8, 2013, 4:38 PM), <http://www.economist.com/blogs/democracyinamerica/2013/11/church-and-town?page=6&spc=score&spv=xm&ah=9d7f7ab945510a56fa6d37c30b6f1709>.

simply allowed a Scalia-like definition to guide future prayer policies. When Justice Samuel Alito noted: “I don’t think it’s possible to compose anything that you could call a prayer that would be acceptable to all these groups,” Laycock responded, “You can’t treat everyone equally without getting rid of prayer altogether.”⁴⁵ I have known Professor Laycock for decades and do not always agree with him. Nevertheless, I cannot imagine him being upset were the Court throw up its hands in despair, apologize for past judicial error, and overturn *Marsh* precisely to protect the consciences and concerns Justice Alito mentioned. Indeed, in a 1986 law review article he called the *Marsh* decision “wholly unprincipled and indefensible.”⁴⁶

I wish I believed that every politician in a legislature that supports prayer before the business session was doing so out of some deep personal conviction to which he or she subscribed on a 24 hour a day basis. Regrettably, I have known too many politicians to give that view any credibility. Religion, along with patriotism, has sometimes come to be the last bastion of scoundrels. The truly devout need not leave their religious views out of their hearts or minds. Justice Scalia at the oral argument made a serious mistake in dealing with that premise, however. He said: “when local government officials attend their business meetings, they do so as citizens, take their beliefs with them, and their religious practices, and that includes their habit of ‘invoking the Deity’ just as they do at home before eating meals.”⁴⁷

Surely, there must be a legally cognizable difference between a council member saying grace over his barbeque in the backyard and offering a prayer in an official business capacity. If every government employee has the unfettered right to use public time to promote religion, teachers could pray in homeroom with their third graders, football coaches could insist that players get in a circle and praise Jesus before entering the field, and IRS agents could tell someone they are auditing about how only belief in Jesus makes you a moral person just before inquiring about the claimed donation to B’nai Brith or the Church of Scientology.

45 Mark Sherman, *High Court Wrestles With Prayer In Government*, ASSOCIATED PRESS (Nov. 6, 2013, 2:50 PM), <http://bigstory.ap.org/article/supreme-court-hears-case-legislative-prayer>.

46 Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NW. U. L. REV. 1, 8 (1986).

47 Lyle Denniston, *Argument Recap: Marsh’s Demise or its Renewal?*, SCOTUSBLOG (Nov. 6, 2013, 2:32 PM), <http://www.scotusblog.com/2013/11/argument-recap-marshs-demise-or-its-renewal/>.

No, those who share a faith with others in a legislative body can meet in one of their offices and engage in specific spiritual activity of their choice before getting to the public's business of potholes, cable television rates, and green buildings. Those who are Christian may even turn in their Bibles to Matthew 6:6 and find out about a man named Jesus who recommended that the politicians of his day "go into a closet and pray privately" so as not to appear to be praying in public as hypocrites. Not a sermon; just a suggestion.⁴⁸

48 *Matthew 6:6.*