

THE CURIOUS CASE OF LEGISLATIVE PRAYER: *TOWN OF GREECE V. GALLOWAY*

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INTRODUCTION

In Greece, New York, as in many other places around the country, the town board begins its monthly meetings with a prayer.¹ While the audience members—including town residents and employees with matters pending before the board—bow their heads or join in, a chosen “chaplain of the month” delivers an invocation before the governing body’s business begins.² The Town has had no formal policy for selecting this chaplain, but by regular practice, a municipal employee solicits volunteers from among those religious groups listed in the community guide and local newspaper. Until 2008, the list included only Christian organizations.³ And, although no town official reviews the content of the prayers before they are delivered, a “substantial majority” of those given have “contained uniquely Christian language.”⁴ Two town residents objected to the practice in 2007, and they filed suit when their complaints went largely unheeded.⁵ Eventually, the Second Circuit concluded that the prayers “impermissibly affiliated the town with a single creed, Christianity,”⁶ and in the spring of 2012 the Supreme Court granted certiorari. Then, in a development few saw coming, the United States filed an amicus brief in the summer of 2013—in support of the Town.⁷

All of this gives rise to at least two interesting questions. First, why did the Court choose to reconsider the question now, when it approved (for the most part) of legislative prayer just thirty years ago in *Marsh v. Chambers*?⁸ Second, why would the Solicitor General enter into this dispute in support of a practice that pushes the boundaries of what the Court found acceptable in *Marsh*? In this Essay, I speculate that the answers to these two questions

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¹ *Galloway v. Town of Greece*, 681 F.3d 20, 22 (2d Cir. 2012).

² *Id.* at 23.

³ *Id.* at 24.

⁴ *Id.*

⁵ *Id.* at 25.

⁶ *Id.* at 22.

⁷ Eyder Peralta, *Obama Administration, GOP Agree on Opening Prayers Case*, NPR: THE TWO-WAY (Aug. 9, 2013, 11:58 AM), <http://www.npr.org/blogs/thetwo-way/2013/08/09/210498961/obama-administration-gop-agree-on-opening-prayers-case>.

⁸ 463 U.S. 783 (1983).

are interrelated. The Court has taken the case, in all likelihood, because some Justices see an opportunity to reconsider the so-called endorsement test that now governs many Establishment Clause questions, and the Solicitor has entered the fray to preserve that same test, even if it means that some sectarian legislative prayers are constitutional.

I. WHY REVISIT LEGISLATIVE PRAYER?

To begin thinking about why the Court would revisit the question of legislative prayer, it is necessary to locate *Marsh* within the body of Establishment Clause doctrine. In 1980, Nebraska State Senator Ernie Chambers challenged the state's tradition of having a chaplain open legislative sessions with a prayer.⁹ A divided Court upheld the practice for largely historical reasons, with the caveat that the prayers must be nonsectarian, that they not "proselytize or advance any one, or . . . disparage any other, faith or belief."¹⁰ In light of an "unambiguous and unbroken history of more than 200 years"¹¹ of legislative prayer, Chief Justice Warren Burger created an exception to the general Establishment Clause test that he had fashioned just a decade earlier in *Lemon v. Kurtzman*.¹² As a result, *Marsh* seems to suggest, a bit uncomfortably, that legislative prayer is something of a constitutional anomaly. To borrow Justice Anthony Kennedy's phrase from oral argument in *Town of Greece v. Galloway*, perhaps legislative prayer is a "historical aberration"¹³—born of an unprincipled practice that seemed relatively harmless when the national population was overwhelmingly Protestant.¹⁴ Indeed, James Madison, the First Amendment's primary author, labeled legislative prayer an unconstitutional irregularity that he hoped would not distort our future understanding of the Establishment Clause.¹⁵ Nonetheless, the anomaly has persisted.

Despite this, and the dissenters' hope that *Marsh* had "carv[ed] out an exception to the Establishment Clause" rather than reshaped the law, the

⁹ *Id.* at 785.

¹⁰ *Id.* at 794–95.

¹¹ *Id.* at 792.

¹² 403 U.S. 602 (1971). The three-part *Lemon* test asks whether state action (1) has a "secular legislative purpose," (2) "advances" or "inhibits" religion, or (3) excessively entangles government and religion. *Id.* at 612–13.

¹³ Transcript of Oral Argument at 8, *Town of Greece v. Galloway*, No. 12-696 (U.S. argued Nov. 6, 2013) [hereinafter *Galloway Oral Argument*], available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-696_5425.pdf.

¹⁴ For an excellent account of the history of legislative chaplaincies and prayer, see Christopher C. Lund, *The Congressional Chaplaincies*, 17 WM. & MARY BILL RTS. J. 1171 (2009).

¹⁵ JAMES MADISON, *Detached Memoranda*, in JAMES MADISON: WRITINGS 745, 762–63 (Jack N. Rakove ed., 1999). Madison called the establishment of congressional chaplaincies "a palpable violation of equal rights, as well as of Constitutional principles," and he hoped their "daily devotions" would not come to be seen as a "legitimate precedent." *Id.* at 763.

decision could not remain entirely independent of the general Establishment Clause doctrine.¹⁶ Since the Clause's incorporation against the states in *Everson v. Board of Education*,¹⁷ the doctrine has developed along several axes, the most germane of which has been an ongoing debate over the meaning of state "neutrality" in religious matters. I have argued elsewhere that this debate has largely involved two competing visions of neutrality: an "exclusive" vision, which would banish all religion from the public square, and an "inclusive" vision, which would attempt to accommodate all religious viewpoints equally.¹⁸ The Court announced the exclusive paradigm in *Everson* itself—"[n]either [a state nor the federal government] can pass laws which aid one religion, aid all religions, or prefer one religion over another"¹⁹—and this approach would later undergird the *Lemon* test.²⁰ Perhaps the best expression of the inclusive approach came just a few years later in *Zorach v. Clauson*:

We are a religious people whose institutions presuppose a Supreme Being. . . . [The state should] respect[] the religious nature of our people and accommodate[] the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.²¹

The theoretical divide is thus quite straightforward: exclusivists believe that the only feasible way for the state to remain neutral is to carefully avoid all religious speech or activity, while inclusivists contend that such an approach actually establishes an irreligious or secular viewpoint at the expense of all others.²²

Everson, *Lemon*, and *Zorach* all addressed the relationship between religion and public schooling, however, and the exclusive–inclusive debate has played out somewhat differently in the context of state involvement with religious displays.²³ There the doctrine has evolved to ask whether a display would cause a reasonable observer to view the government as endorsing a particular religion.²⁴ This so-called endorsement test—which

¹⁶ *Marsh*, 463 U.S. at 796 (Brennan, J., dissenting).

¹⁷ 330 U.S. 1, 8 (1947).

¹⁸ For a more thorough account of this debate, see Ian Bartrum, *Of Historiography and Constitutional Principle: Jefferson's Reply to the Danbury Baptists*, 51 J. CHURCH & ST. 102 (2009).

¹⁹ 330 U.S. at 15.

²⁰ See *supra* note 12 and accompanying text.

²¹ 343 U.S. 306, 313–14 (1952).

²² See Bartrum, *supra* note 18, at 110–13.

²³ Ira Lupu has argued that the Court tends to distinguish between cases involving state religious *speech* and those involving state *money*. See Ira C. Lupu, *Government Messages and Government Money: Santa Fe, Mitchell v. Helms, and the Arc of the Establishment Clause*, 42 WM. & MARY L. REV. 771 (2001).

²⁴ *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 596–98 (1989) (addressing holiday display that included a crèche).

has emerged out of *Lemon*'s second prong—is rooted in an exclusivist vision of state neutrality, and it has thus long troubled the Court's more inclusivist Justices.²⁵ Some, like Justice Antonin Scalia, would like to see it replaced with a "coercion test," which would ask only whether a government practice actually coerces citizens into a specific religious activity "by force of law and threat of penalty."²⁶ Justice Anthony Kennedy would also look to coercion rather than endorsement, but would find that coercion manifests itself in more subtle kinds of psychological pressures.²⁷ Justice Clarence Thomas, for his part, has repeatedly suggested that the Establishment Clause might not apply against the state governments at all.²⁸

These objections notwithstanding, the endorsement approach has had majority support for nearly twenty-five years,²⁹ and so inclusivists have focused instead on making the test sympathetic to some kinds of religious speech or symbolism. The general thrust of this effort has been to suggest that certain symbols or speech actually endorse a historical or secular message rather than (or in addition to) a particularized religious viewpoint.³⁰ Legislative prayer has drifted, rather uneasily, into the lee of these inclusivist exceptions. Perhaps it has become a secularized act of "civic religion";³¹ or perhaps striking such prayers down at this point in our history is just too controversial.³² But the composition of the Court has shifted in the years since the last relevant case—possibly in favor of those who would do away with these tenuous rationales in favor of a straight-out coercion test.³³ Justice Sandra Day O'Connor, who forged and championed the

²⁵ For a discussion of the endorsement test in these terms, see Ian Bartrum, *Salazar v. Buono: Sacred Symbolism and the Secular State*, 105 NW. U. L. REV. COLLOQUY 31 (2010), *reprinted in* 104 NW. U. L. REV. 1653, 1655–56 (2010).

²⁶ *Lee v. Weisman*, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting).

²⁷ *Id.* at 592–93 (majority opinion); *see also Allegheny*, 492 U.S. at 660–62 (Kennedy, J., concurring in the judgment in part and dissenting in part) (considering forces like peer or social pressures potentially coercive).

²⁸ *See Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 45–46 (2004) (Thomas, J., concurring in the judgment); *see also Cutter v. Wilkinson*, 544 U.S. 709, 727 (2005) (Thomas, J., concurring).

²⁹ The notable exception is *Lee v. Weisman*, in which the Court applied Kennedy's psychological coercion test to strike down a prayer before a middle school graduation. 505 U.S. at 592–93.

³⁰ *See, e.g., Salazar v. Buono*, 130 S. Ct. 1803, 1820 (2010) (finding Latin cross had taken on secular meanings as a war memorial); *Van Orden v. Perry*, 545 U.S. 677, 687–89 (2005) (approving of state's recognition of "the role of God in our Nation's heritage").

³¹ The concept of civic religion is that the prayer is no longer offered for its religious content, but for its historical and traditional significance. *See generally* Bartrum, *supra* note 25.

³² *See Lee*, 505 U.S. at 589 (It may be "that there has emerged in this country a civic religion, one which is tolerated when sectarian exercises are not."); *see also Van Orden*, 545 U.S. at 699 (Breyer, J., concurring in the judgment) (striking down a monument of the Decalogue would "tend to promote the kind of social conflict the Establishment Clause seeks to avoid").

³³ It is certainly worth noting here that even the most demanding versions of the coercion test would not seem to permit the legislative prayers at issue in *Marsh* itself, which are given by chaplains paid out of the state coffers. *Marsh v. Chambers*, 463 U.S. 783, 784–85 (1983). In such cases, of course, the tax code coerces all citizens into supporting the prayers.

endorsement test, has retired. Her replacement, Justice Samuel Alito, has expressed some skepticism about the approach.³⁴ And so it is within this uncertain doctrinal context that the Court has chosen to revisit the problematic question of legislative prayer.

There seem to be at least two potential reasons why the Court has decided to intervene now. The first is that *Marsh* has proven too difficult to apply in practice, and thus some Justices may be ready to put the problematic constitutional anomaly to rest once and for all. The second, and more likely, possibility is that the Court's inclusivists believe they finally have the votes to do away with the endorsement test.

Although it seems unlikely that the Court would overturn *Marsh* now, there are very real concerns that lend credence to the argument for striking down legislative prayer. Nobody has done more to chronicle these difficulties than Chris Lund, and his insights are instructive here.³⁵ First, Lund has observed that the nonsectarian requirement is, in itself, difficult to define and apply in the context of legislative prayer.³⁶ This stems in part from the fact that prayers can never truly be nonsectarian. There will always be someone who disagrees with the message conveyed—at the very least atheists may take offense, as responding counsel Douglas Laycock conceded during oral argument in *Galloway*³⁷—and so the question then becomes one of degree. The hope is for as little sectarianism as possible; but in practice, *Marsh*'s blurriness inevitably opens the door to political pressures, which predictably tend to favor majoritarian religious viewpoints.³⁸ It has also caused judicial uncertainty, with some courts adopting a fairly strict nonsectarian rule while others permit prayers unless they run afoul of *Marsh*'s ban on “proselytizing.”³⁹ The long-term result of this uncertainty is that the appropriate content of legislative prayers remains among the most controverted church–state questions in our national life.⁴⁰

Moreover, even if courts are able to delineate the precise contours of a nonsectarian prayer, there might still be serious constitutional obstacles to imposing such a requirement on prayer givers. In *Lee v. Weisman*, the Court struck down an invocation at a middle school graduation ceremony in part because, by distributing “Guidelines for Civic Occasions” and advising celebrants to keep their message nonsectarian, the school principal had “directed and controlled the content of the prayers.”⁴¹ The school had

³⁴ See discussion *infra* notes 54–55.

³⁵ Christopher C. Lund, *Legislative Prayer and the Secret Costs of Religious Endorsements*, 94 MINN. L. REV. 972 (2010).

³⁶ See *id.* at 994–1013.

³⁷ Galloway Oral Argument, *supra* note 13, at 31–32.

³⁸ Lund, *supra* note 35, at 1039–42.

³⁹ See *id.* at 1011–12 (discussing *Pelphrey v. Cobb Cnty.*, 547 F.3d 1263 (11th Cir. 2008)).

⁴⁰ See *id.* at 975–76.

⁴¹ 505 U.S. 577, 588 (1992).

violated a “cornerstone principle”⁴² of the Establishment Clause by attempting to “compose official prayers” for use at a public function.⁴³ Lund has called this strain of doctrine the “[c]ensorship [o]bjection,”⁴⁴ and these concerns no doubt informed the Town of Greece’s decision not to formally review or oversee the content of their opening prayers. Indeed, at oral argument several Justices expressed some concern that any detailed prescription the Court could hand down in these circumstances might present the same difficulties.⁴⁵ All of this leaves *Marsh*’s requirement that legislative prayers be nonsectarian, or at least nonproselytizing, in a very precarious position: even where there is agreement on some basic premises about the standard, courts and administrators cannot constitutionally enforce those terms upon prayer givers. Little wonder, then, that some have suggested that *Marsh* is unworkable in practice and that the Court would be better off doing away with the anomaly of legislative prayer once and for all.⁴⁶

In truth, however, it seems very unlikely that the Court has taken this case in order to eliminate legislative prayer. Legislative prayer is ensconced very deeply among our national traditions, and, as Justice Elena Kagan noted at oral argument, any effort to displace it now would open the Court to the familiar charge of being “hostile to religion.”⁴⁷ Much more likely is the possibility that some members of the Court see the case as an opportunity to do away with the endorsement test.

For these Justices, *Marsh*’s practical failings are really just the failings of the endorsement approach writ large—it is impossible to identify what should count as an “endorsement” of religion generally, and any effort to decide inevitably involves the state in questions that it is incompetent to answer. And the extreme exclusivist solution—ending the practice altogether—would abandon neutrality in favor of an irreligious or secular viewpoint. Thus, rather than eliminate all legislative prayers, the inclusivist resolution is to permit virtually all prayers, so long as they are not actively coercive. This debate is really one of constitutional first principles, and it is worth taking a quick look at the competing ideas.⁴⁸

Justice O’Connor’s endorsement test—formulated in concurrence in *Lynch v. Donnelly* and adopted by the Court in *Allegheny v. ACLU*—is rooted in the belief that the Establishment Clause promises Americans

⁴² *Id.*

⁴³ *Id.* (quoting *Engel v. Vitale*, 370 U.S. 421, 425 (1962)).

⁴⁴ Lund, *supra* note 35, at 1013.

⁴⁵ See Galloway Oral Argument, *supra* note 13, at 33–35.

⁴⁶ Brief of Law Professors as Amici Curiae in Support of Respondents at 26, *Town of Greece v. Galloway*, No. 12-696 (U.S. Sept. 20, 2013).

⁴⁷ Galloway Oral Argument, *supra* note 13, at 52.

⁴⁸ See Bartrum, *supra* note 25, 105 NW. U. L. REV. COLLOQUY at 35–36, *reprinted in* 104 NW. U. L. REV. at 1657–58.

something like a secular state.⁴⁹ Perhaps akin to the French notion of *laïcité*, the “secular state” view of disestablishment asserts that government should set aside all religion in favor of secular rationales and policies.⁵⁰ By contrast, the coercion test—in either Justice Scalia’s or Justice Kennedy’s formulation—seems to view the Establishment Clause as simply supplementing the Free Exercise Clause in protecting individual conceptions of religious duty against state intrusion.⁵¹ Under the “religious duty” view, an Establishment violation arises only when the state forces us to choose between our civic obligations and our duties to God.⁵² From these divergent views emerge many of the seemingly intractable difficulties with which the Justices wrestled in oral argument: a religious duty conception sees efforts to police or eliminate legislative prayers as hostile towards religion, while a secular state conception worries that the state’s imprimatur on particular religious practices makes nonadherents feel excluded.⁵³ It is, in all likelihood, the contest between these basic conceptions of disestablishment that underlies the Court’s decision to revisit legislative prayer.

The salient question is whether a majority of the Court is, in fact, ready to replace the endorsement test with a coercion analysis. Given previous opinions, it is probably safe to count Justices Scalia, Thomas, and Kennedy among those who would welcome such a change. And in *Salazar v. Buono*, decided in 2010, Justice Alito made some skeptical noises about the propriety of the endorsement test—although that case’s odd procedural posture did not permit the Court to actually decide that question.⁵⁴ It is certainly possible that Justice Alito would do away with the endorsement test if given the chance, and at oral argument he seemed dubious about the practicality of imposing any nonendorsement or nonsectarian kind of

⁴⁹ *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 592–96 (1989); *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O’Connor, J., concurring).

⁵⁰ Bartrum, *supra* note 25, 105 NW. U. L. REV. COLLOQUY at 35, *reprinted in* 104 NW. U. L. REV. at 1657–58. The reasoning here is something like that given in John Rawls’s account of public reasoning. JOHN RAWLS, *POLITICAL LIBERALISM* 217 (expanded ed. 2005). *Laïcité* is the French term for keeping government matters among the lay people and out of the hands of the clergy. In practice, the principle promises that the government will be secular in some sense, as opposed to the American idea that there simply will be no official state church. See T. Jeremy Gunn, *Religious Freedom and Laïcité: A Comparison of the United States and France*, 2004 BYU L. REV. 419, 419–25.

⁵¹ See Bartrum, *supra* note 25, 105 NW. U. L. REV. COLLOQUY at 35, *reprinted in* 104 NW. U. L. REV. at 1657.

⁵² *Id.*

⁵³ See, in particular, the comments of Justice Scalia, Galloway Oral Argument, *supra* note 13, at 40–41, Justice Kagan, *id.* at 52, and Justice Sotomayor, *id.* at 20–22.

⁵⁴ 130 S. Ct. 1803, 1824 (2010) (Alito, J., concurring) (“Assuming that it is appropriate to apply the so-called ‘endorsement test,’ this test would not be violated [given these facts].”). The Court in *Salazar* was asked only whether the government’s decision to sell the land on which a Latin cross stood was an impermissible effort to evade an earlier injunction. *Id.* at 1815–16. Thus, the endorsement test was already the law of the case. *Id.* at 1816.

standard on legislative prayer givers.⁵⁵ If Justice Alito does side with the coercionists, it would require only one more vote to accomplish the change; and, if we can read anything meaningful into the oral argument, that vote might come from either Justice Kagan or Justice Roberts. Justice Kagan is a particularly interesting possibility. In addition to voicing her worries about appearing “hostile to religion,”⁵⁶ she opened the questioning by reading one of the more sectarian prayers given in Greece and asking counsel to hypothesize whether he would have felt coerced to participate had the Chief Justice asked the room to stand while it was read before arguments began.⁵⁷ Taking her comments together, it could be that Justice Kagan is willing to sign on to the coercion test, but would conclude that the Town’s practice in Greece violates even that more deferential standard.

There are a number of observers who believe, or perhaps hope, that the Court has taken this case for just this reason.⁵⁸ Ken Klukowski forthrightly suggested as much on the influential *SCOTUSblog*:

The Court should take the rule it implicitly used in *Marsh*—looking to history and coercion—and hold that this is not some carve-out from the Establishment Clause: instead, it is the correct understanding of the Establishment Clause. *Lemon* and *Allegheny* should be overruled, and the coercion test restored as the test the Constitution requires.⁵⁹

Nevertheless, even the coercion test’s proponents acknowledge that it presents its own share of problems. Justice Scalia, for example, expressly acknowledged one of the test’s principal shortcomings during oral argument:

[I]f coercion is the test . . . of the Establishment Clause, why do we need the Establishment Clause? If there’s coercion, I assume it would violate the Free Exercise Clause, wouldn’t it?

. . . .

So it seems to me very unlikely that the test for the Establishment Clause is identical to the test for the Free Exercise Clause.⁶⁰

From a textualist perspective, the coercion test threatens to make one of the two religion clauses redundant, a significant objection to those who

⁵⁵ See Galloway Oral Argument, *supra* note 13, at 30–33.

⁵⁶ *Id.* at 52.

⁵⁷ *Id.* at 3–5.

⁵⁸ See, e.g., Steven Smith, *Town of Greece v. Galloway Symposium: The End of “No Endorsement”?*, SCOTUSBLOG (Oct. 2, 2013, 10:37 AM), <http://www.scotusblog.com/2013/10/town-of-galloway-v-greece-symposium-the-end-of-no-endorsement>.

⁵⁹ Ken Klukowski, *Symposium: Time to Restore Longstanding Meaning—and Sanity—to the Establishment Clause in Town of Greece v. Galloway*, SCOTUSBLOG (Oct. 3, 2013, 3:39 PM), <http://www.scotusblog.com/2013/10/symposium-time-to-restore-longstanding-meaning-and-sanity-to-the-establishment-clause-in-town-of-greece-v-galloway>.

⁶⁰ Galloway Oral Argument, *supra* note 13, at 35–36.

consider themselves strict constructionists of constitutional meaning. With that said, however, it is the possibility of exactly this sort of Establishment Clause sea change—a move from the endorsement to the coercion analysis—that best explains the Court’s decision to revisit *Marsh* and legislative prayer.

II. WHY DID THE SOLICITOR GENERAL SUPPORT THE TOWN?

The Solicitor General’s decision to file an amicus brief in support of the Town caught many observers off guard.⁶¹ Why, they wondered, would the Solicitor’s office argue that the prayers at issue in Greece—most of which adopt an identifiably Christian tone—are nonsectarian in the sense that *Marsh* requires? In truth, exactly what *Marsh* requires is a matter of some dispute, and it would be perfectly understandable if the Obama Administration wanted to stay above that politicized fray. So it has to count as somewhat of a surprise that the Solicitor would go on the record contending that the Second Circuit erred in applying *Marsh* too stringently. Indeed, it suggests that the Solicitor, too, recognizes the potential threat to the endorsement test and has entered the case in order to give the Court another option—preserve the endorsement test, but conclude that most sectarian legislative prayers are permissible as a historically entrenched exception.

The arguments advanced in the Solicitor’s brief tend to support this theory of his involvement in the case. He is at pains to emphasize the unique place that legislative prayer occupies in Establishment Clause doctrine; indeed, the brief repeatedly suggests that *Marsh* announced a special test that applies only to this particular, historically justified practice.⁶² In this way, the Solicitor is able to argue that neither the endorsement test *nor* the coercion test should apply in *Galloway*. Rather, *Marsh* “established that the practice of providing an opportunity for a prayer at the beginning of a legislative body’s day or session, when not exploited to proselytize, advance, or disparage any faith or belief does not violate the Establishment Clause.”⁶³ If this is true, the Court would seem to have no occasion to revisit the endorsement test, as the question simply is not presented. Further, the Solicitor’s brief attempts to allay fears about

⁶¹ See, e.g., Christopher C. Lund, *Legislative Prayer Goes Back to the Supreme Court: And This Time the Obama Administration Is on the Side of Prayer*, SLATE (Aug. 15, 2013, 3:06 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2013/08/the_supreme_court_will_have_another_chance_to_decide_when_government_can.html; Nelson Tebbe & Micah Schwartzman, *Symposium: The Puzzle of Town of Greece v. Galloway*, SCOTUSBLOG (Sept. 24, 2013, 10:20 AM), <http://www.scotusblog.com/2013/09/symposium-the-puzzle-of-town-of-greece-v-galloway>.

⁶² Brief for the United States as Amicus Curiae Supporting Petitioner at 9–16, *Town of Greece v. Galloway*, No. 12-696 (U.S. Aug. 2, 2013) (repeatedly characterizing *Marsh* as establishing an exception to Establishment jurisprudence).

⁶³ *Id.* at 9.

state censorship of prayer givers by suggesting that *Marsh* does not “[p]ermit[] [a] [c]ourt [t]o [p]arse [t]he [s]ectarian [c]ontent [o]f [legislative] [p]rayers.”⁶⁴ While such parsing would be necessary if courts had to apply the endorsement test, the special *Marsh* standard requires much less official oversight. Thus, if the Court is willing to leave the endorsement test alone, the Solicitor is willing to concede the constitutionality of sectarian legislative prayers.

Ian Gershengorn’s oral argument on behalf of the United States also evidences the intent to insulate the endorsement test by placing legislative prayer in a doctrinal category of its own. The clearest indication of this tactic came in a short exchange with Justice Scalia, who seemed eager to test the Solicitor’s principles and motives. Justice Sotomayor had pressed Gershengorn to explain why Greece’s practice was not coercive, and, after he distinguished between prayer in legislative and quasi-judicial contexts, Justice Scalia jumped at his opportunity:

JUSTICE SCALIA: You agree that coercion is the test, however?

MR. GERSHENGORN: We don’t agree that coercion is the test, Your Honor.

JUSTICE SCALIA: If it is the test—

MR. GERSHENGORN: . . . [W]e think there are three pillars in *Marsh*: First of all, that the history is what the Court looks to first. . . . Second, that the Court should be very wary of parsing prayer to make sectarian judgments. And third, what *Marsh* said is that adults are less susceptible [than children] to religious doctrine—indoctrination and peer pressure.⁶⁵

Gershengorn’s *Marsh* interpretation asks very different questions than does the endorsement test, but—probably more importantly—the coercion test is equally inappropriate in this context. Again, it seems the Solicitor is willing to turn a deferential eye to the historical aberration of sectarian (but nonproselytizing) legislative prayer if, in so doing, he can preserve the endorsement test’s place within some larger universe of Establishment cases.

All of this, however, leaves one glaring question largely unanswered, and it is one Justice Sotomayor put to Gershengorn at oral argument: “And what was the purpose of *Marsh* saying that proselytizing or damning another religion would be a constitutional violation? . . . [U]nless you parse the prayers, you can’t determine whether there’s proselytizing or damnation.”⁶⁶ That is to say, despite the government’s determined effort to advance *Marsh* as an alternative approach—one that avoids the problem of state censorship—even the more deferential proselytizing standard requires

⁶⁴ *Id.* at 10.

⁶⁵ Galloway Oral Argument, *supra* note 13, at 23–24.

⁶⁶ *Id.* at 20.

some judicial oversight. Of course, the same problem would persist under the coercion test, except the parsing would be for coercive language or practices. Indeed, it would seem that the only way to truly avoid the censorship problem is to end the practice of legislative prayer altogether. But the Solicitor undoubtedly recognizes that, for the reasons I have offered above, this is a very unlikely result. Better, then, to cabin the problematic constitutional anomaly as closely as possible so that it does not undermine the larger body of disestablishment principle.

CONCLUSION

Despite the Supreme Court's qualified approval in 1983, legislative prayers such as those at issue in *Town of Greece v. Galloway* still give rise to some of the most difficult church–state questions alive today. In part, this is because the tradition of opening legislative sessions with a prayer predates the Constitutional Convention, and so—despite obvious Establishment problems—the Court has essentially grandfathered the practice into its constitutional doctrine. Nonetheless, there are always those that would see the exception made into the rule, and it seems likely that at least some members of the Court hope to use *Galloway* as an opportunity to revisit the larger contours of the Establishment Clause. In particular, they would like to replace Justice O'Connor's endorsement test with a more permissive and deferential coercion test. Aware of this potential threat, the United States entered the case in order to reinforce legislative prayer's unique status as a constitutional aberration—one that should not guide our general efforts to craft a coherent body of disestablishment doctrine. In this sense, the Solicitor simply reminds us of a warning James Madison offered nearly two centuries ago: we would do well to treat legislative prayer not as a “legitimate precedent,” but rather, in the words of Horace, as a “few blots carelessly spilt, or that human frailty could not avert.”⁶⁷

⁶⁷ This is a rough translation of Horace's Latin, from which Madison excerpted: “maculis quas aut incuria fudit, aut humana parum cavit natura.” MADISON, *supra* note 15, at 763; see HORACE, *De Arte Poetica*, in HORACE: SATIRES, EPISTLES, AND ARS POETICA 450, 478–79 (H. Rushton Fairclough trans., Harvard Univ. Press 1942 prtg.).