

SILENCE IS GOLDEN: MOMENTS OF SILENCE, LEGISLATIVE PRAYERS, AND THE ESTABLISHMENT CLAUSE

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I'm wondering what you would think of the following: Suppose that as we began this session of the Court, the Chief Justice had called a minister up to the front of the courtroom, facing the lawyers, maybe the parties, maybe the spectators. And the minister had asked everyone to stand and to bow their heads in prayer and the minister said the following: He said, we acknowledge the saving sacrifice of Jesus Christ on the cross. We draw strength from His resurrection. Blessed are you who has raised up the Lord Jesus. You who will raise us in our turn and put us by His side.

The members of the Court who had stood responded amen, made the sign of the cross, and the Chief Justice then called your case.

Would that be permissible?

—Justice Elena Kagan[‡]

INTRODUCTION

In *Town of Greece v. Galloway*, the Supreme Court is considering what may become a landmark decision on the constitutionality of prayers at town council meetings. At oral argument, Justice Kagan began by asking the question quoted above raising the hypothetical of whether an obviously Christian prayer (similar to the ones actually at issue in the case) would be allowed at the start of a Supreme Court session. The lawyer for the town fumbled the question (the answer is probably no), and for the next sixty minutes it seemed like the Justices would have preferred to be doing almost anything other than deciding this case. In fact, towards the end of the argument, Justice Kagan uttered the following sobering and depressing comments: “Part of what we are trying to do here is to maintain a multi-religious society in a peaceful and harmonious way. And every time the Court gets involved in things like this, it seems to make the problem worse rather than better.”¹

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‡ Transcript of Oral Argument at 3–4, *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.

¹ *Id.* at 52.

In between Justice Kagan's opening question and her final comments, the Justices wrestled with numerous difficult and divisive issues raised by this controversial Establishment Clause case, such as whether courts should be involved at all in defining the content of legislative prayers, setting forth guidelines for who will give the prayers, and making sure the prayers are inclusive enough to satisfy what will inevitably be vague and hard-to-enforce constitutional standards.

None of these questions have easy answers. Circuit courts all over the country have been struggling with these issues, and have reached divergent answers.² Moreover, it is highly unlikely that five Supreme Court Justices will agree to one set of guidelines to govern legislative prayers in different factual settings, and if they do not, we can expect more time-consuming, divisive, and expensive litigation.

Yet, unlike most constitutional questions before the Supreme Court, the issue of legislative prayer actually has an easy answer, and one that has worked before. The Court should hold that the dignity of governmental hearings can be fully solemnized by a moment of silence where everyone in attendance can choose to silently pray or not pray, worship a god, several gods, or no god. With this solution, all of the difficult questions courts have grappled with would be answered once and for all and easily. There would be no more contentious litigation over the appropriate content of the prayers, no more community uprisings over the choice of prayer-givers, and mercifully no more hymns sung by legislators at official government sessions.³

The only possible objection a person could make to this moment of silence solution is that it deprives people of speaker-led, overtly religious, organized prayers at governmental hearings. The possible incremental community solidarity benefits of having dedicated religious prayers over moments of silence, however, does not justify the acrimony, strife, and offense to nonbelievers caused by allowing the prayers. In a better world, the members of the Greece Town Council and legislators across the land would reach this conclusion on their own without judicial coercion. But, in the world we live in, where the Court seems to be involved in most of the controversial social and political issues of our day, the Court must decide this controversial issue. Judicial invalidation of legislative prayers and explicit judicial approval of moments of silence in lieu of such prayers is the most persuasive reading of the instruction that the government "shall make no law respecting an establishment of religion"⁴

² See, e.g., *Pelphrey v. Cobb Cnty.*, 547 F.3d 1263 (11th Cir. 2008); *Hinrichs v. Speaker of the House of Representatives of the Ind. Gen. Assembly*, 506 F.3d 584 (7th Cir. 2007); *Wynne v. Town of Great Falls*, 376 F.3d 292 (4th Cir. 2004).

³ See *Hinrichs v. Bosma*, 440 F.3d 393, 395 (7th Cir. 2006).

⁴ U.S. CONST. amend. I.

I. THE TOWN

For many years, the Town of Greece, New York, began its council hearings with moments of silence. No one was offended and there were no lawsuits. Then in 1999, at the behest of a new town supervisor, the council decided to have a “chaplain of the month.”⁵ It is unclear exactly how these chaplains were selected, but for the next eight years 100% of the prayer-givers were Christian and approximately two-thirds of the prayers referred specifically to Christian images or deities.⁶ Often, the prayer-giver would ask members of the audience to participate “by bowing their heads, standing, or joining in the prayer.”⁷

Two town residents objected to the town council’s beginning its business with official Christian prayers. After the two residents filed a lawsuit, several non-Christians began offering the prayers but that practice quickly waned after the town won the lawsuit in the trial court.⁸ On appeal, however, a unanimous three-judge panel ruled for the residents.⁹ Given the totality of the circumstances, the court found that the town had affiliated itself with Christianity in a way that violated the Establishment Clause. Judge Calabresi, who wrote the opinion, painted the picture vividly:

[M]ost 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 [the head of the town council] thanked them for being “our chaplain of the month.” . . . 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.¹⁰

II. COURTS’ PREVIOUS STRUGGLES WITH LEGISLATIVE PRAYERS

A. *The Supreme Court’s Historical Stance*—*Marsh v. Chambers*

For sixteen years, Presbyterian minister Robert E. Palmer opened official sessions of the Nebraska state legislature with a prayer. In his

⁵ *Galloway v. Town of Greece*, 681 F.3d 20, 23 (2d Cir. 2012).

⁶ *Id.* at 23–24.

⁷ *Id.* at 23.

⁸ *Id.* at 23.

⁹ *Id.* at 22.

¹⁰ *Id.* at 32–33.

absence, other clergy of other denominations sometimes delivered the prayer. A member of the Nebraska legislature objected and filed a lawsuit in federal court, but the Supreme Court upheld the practice of legislative prayers in *Marsh v. Chambers*.¹¹

To determine the constitutionality of the prayers, the Court looked almost exclusively to historical practice. The Court observed that the very first U.S. Congress began each session with prayer and both houses have been doing so ever since.¹² Because the Establishment Clause was drafted at a time when both houses of Congress used legislative prayers, the Court held the practice today could not be unconstitutional. The practice of prayer in the Nebraska legislature, the Court said, was “simply a tolerable acknowledgment of beliefs widely held among the people of this country,”¹³ and “it would be incongruous to interpret [the Establishment] Clause as imposing more stringent First Amendment limits on the states than the draftsmen imposed on the Federal Government.”¹⁴

Determining that the Constitution did not forbid legislative prayers generally, the Court also examined the specific prayer practice in Nebraska. First, it considered Nebraska’s practice of having a permanent chaplain of one faith paid by taxpayer dollars. The Court held that the mere fact that a clergyman of only one denomination delivered the prayers did not suggest that religious beliefs were unlawfully advanced. After all, clergy of other religions often delivered the prayer in Palmer’s absence, and there was no proof that Palmer’s extended employment resulted from an “impermissible motive.”¹⁵ Based on this rationale, the Court found that Nebraska’s practice of opening up each legislative session with prayer by a publicly funded clergyman of only one denomination did not violate the Establishment Clause.

Second, the Court considered the content of the prayers and found that they also did not violate the Establishment Clause. The majority found that there was no evidence that the prayers were used to further Christianity or disparage any other religion or belief.¹⁶ The Court was influenced by the chaplain’s promise, before the case was argued, to remove all references to Jesus from the prayers. In a subsequent Establishment Clause case, the Court strongly suggested that the prayers in *Marsh* were upheld mostly because they did not refer to any specific religious symbols or deities.¹⁷ The Court declined to credit the plaintiffs’ fears that the establishment of prayer

¹¹ 463 U.S. 783 (1983).

¹² *Id.* at 786–88.

¹³ *Id.* at 792.

¹⁴ *Id.* at 790–91.

¹⁵ *Id.* at 793.

¹⁶ *Id.* at 794–95.

¹⁷ *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 603 (1989) (citation omitted) (the chaplain in *Marsh* “had ‘removed all references to Christ,’” and this was why the prayers were upheld).

in these proceedings was just the beginning of the kind of establishment of religion that the Founders feared.

B. Varying Applications of *Marsh*

Since *Marsh*, lower courts have struggled with virtually every kind of legislative prayer issue imaginable and have applied different and conflicting tests. Some courts require the prayers to be nondenominational, some refuse to parse the prayers for content absent overt and obvious proselytizing conduct, and some courts have pleaded for more guidance from the Supreme Court.¹⁸ The battles over legislative prayers have been constant, bitter, and expensive.¹⁹

Only a few examples are needed to show how problematic *Marsh* became in the years succeeding the case. In Cobb County, Georgia, a local government commission began its meetings with prayers offered by clergy who allegedly were invited on a rotating basis from diverse faiths. The plaintiffs alleged, and the Eleventh Circuit did not deny, that from 1998–2005, almost 97% of the prayer-givers were Christian and almost 70% of the prayers contained explicitly Christian references.²⁰ Despite this pattern, the Eleventh Circuit refused to even examine the nature of the prayers or the diversity of the prayer-givers saying that “[t]he federal judiciary has no business in ‘compos[ing] official prayers for any group of the American people to recite as a part of a religious program carried on by government’”²¹ The court also held that the county did not unconstitutionally advance Christianity by “using predominantly Christian speakers,”²² because “[n]othing in the record suggest[ed] any improper motive on the part of the commissioners”²³ It is hard to imagine what evidence, other than an open confession by a commission member professing the desire to further Christianity and Christianity only, would have satisfied the Eleventh Circuit’s test that legislative prayers are unconstitutional only when they are used to affiliate the government with a specific religion or disparage particular religious beliefs.²⁴

In the Seventh Circuit, on April 5, 2005, the Indiana House Legislature began its proceedings with a religious prayer “Just a Little Talk with Jesus,”

¹⁸ See Christopher C. Lund, *Legislative Prayer and the Secret Costs of Religious Endorsements*, 94 MINN. L. REV. 972, 996 nn. 111–13 (2010) (collecting cases).

¹⁹ See Eric J. Segall, *Mired in the Marsh: Legislative Prayers, Moments of Silence, and the Establishment Clause*, 63 U. MIAMI L. REV. 713, 713–15 (2009).

²⁰ See *Pelphrey v. Cobb Cnty.*, 547 F.3d 1263, 1267 (11th Cir. 2008).

²¹ *Id.* at 1278 (alteration in original) (quoting *Lee v. Weisman*, 505 U.S. 577, 588 (1992)).

²² *Id.* at 1277.

²³ *Id.* at 1278.

²⁴ See Segall, *supra* note 19, at 718–19.

delivered by a Christian minister.²⁵ The chaplain led a rousing sing-along of the prayer, causing some members to walk out of the session while others joined in the song.²⁶ Looking at the entire 2005 session, Christian clergy delivered forty-one out of fifty-three prayers and at least twenty-nine prayers were identifiably Christian.²⁷ The overtly Christian nature of the prayers led to long and expensive litigation, where the plaintiffs first prevailed, but then lost (on their second trip to the court of appeals) on standing grounds.²⁸

Perhaps there is no better indication of the chaos and confusion brought on by *Marsh* than the cases coming out of the Fourth Circuit. In two cases, the Fourth Circuit invalidated legislative prayers that were overtly Christian on the grounds that *Marsh* requires prayers to be nondenominational.²⁹ In between these two decisions, a third case upheld the deliberate exclusion of a member of the Reclaiming Tradition of Wicca on the grounds that her religion did not fall within the Judeo-Christian tradition.³⁰

In the most recent Fourth Circuit case, Judge Wilkinson, a conservative judge who is a strong proponent of judicial deference,³¹ found that bringing sectarian prayers into a public forum, such as the local government, “is a prescription for religious discord”³²:

As our nation becomes more diverse, so also will our faiths. . . . But in their public pursuits, Americans respect the manifold beliefs of fellow citizens by abjuring sectarianism and embracing more inclusive themes. That the Board and religious leaders in Forsyth County hold steadfast to their faith is certainly no cause for condemnation. But where prayer in public fora is concerned, the deep beliefs of the speaker afford only more reason to respect the profound convictions of the listener. Free religious exercise posits broad religious tolerance.³³

Judge Wilkinson’s opinion in *Joyner* is a thoughtful, comprehensive, and persuasive explanation of why legislative prayers that contain sectarian language, such as many of the prayers given at the Greece Town Council, violate the core values of the Establishment Clause.

²⁵ *Hinrichs v. Bosma*, 400 F. Supp. 2d 1103, 1107 (S.D. Ind. 2005), *rev’d sub nom.* *Hinrichs v. Speaker of the House of Representatives of the Ind. Gen. Assembly*, 506 F.3d 584 (7th Cir. 2007).

²⁶ *Hinrichs v. Bosma*, 440 F.3d 393, 395 (7th Cir. 2006).

²⁷ *Id.*

²⁸ *Hinrichs v. Speaker of the House of Representatives of the Ind. Gen. Assembly*, 506 F.3d at 585.

²⁹ *Joyner v. Forsyth Cnty.*, 653 F.3d 341 (4th Cir. 2011); *Wynne v. Town of Great Falls*, 376 F.3d 292 (4th Cir. 2004).

³⁰ *Simpson v. Chesterfield Cnty. Bd. of Supervisors*, 404 F.3d 276 (4th Cir. 2005).

³¹ See J. HARVIE WILKINSON, III, *COSMIC CONSTITUTIONAL THEORY: WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHT TO SELF-GOVERNANCE* (2012).

³² *Joyner*, 653 F.3d at 355.

³³ *Id.*

C. Varying Tests for Establishment Clause Cases

There is currently no consensus among the Justices or scholars over the appropriate test for Establishment Clause cases. Some of the Justices prefer the much-criticized *Lemon* test,³⁴ some have adopted Justice O'Connor's "no-endorsement" approach, and a few want to apply some form of "coercion" standard.³⁵ The *Marsh* Court refused to apply any test and instead based its decision that the nondenominational prayers in that case were constitutional solely on the basis of the historical pedigree of legislative prayer.

The mere fact that a governmental practice has existed for centuries, standing alone, should not justify constitutionally problematic behavior. Segregation, discrimination against women, and campaign finance laws limiting corporate spending on behalf of candidates are all examples of government activities with long historical pedigrees that were eventually held unconstitutional by the Supreme Court. As Michael McConnell has observed:

The interesting thing about the opinion [in *Marsh*] is that it is based squarely and exclusively on the historical fact that the framers of the first amendment did not believe legislative chaplains to violate the establishment clause.

....

... If James Madison and the boys thought legislative chaplains were okay, who are we to disagree?

I dissent. I believe that *Marsh v. Chambers* represents original intent subverting the principle of the rule of law. Unless we can articulate some *principle* that explains *why* legislative chaplains might not violate the establishment clause, and demonstrate that that principle continues to be applicable today, we cannot uphold a practice that so clearly violates fundamental principles we recognize under the clause.³⁶

Professor McConnell is right that historical practice should not be allowed to subvert constitutional principle. Moreover, we need not struggle over which general Establishment Clause principle should control to develop a persuasive answer to the validity of legislative prayers. Whether

³⁴ The *Lemon* test asks whether state (1) has a "secular legislative purpose," (2) "inhibits" or "advances" religion, or (3) excessively entangles religion and government. *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

³⁵ While there is some disagreement as to how a "coercion" test would be applied, the basic framework of the test would require a court to strike down a government action only where the government coerces citizens into religious activity by law or by threatened penalty. *See Lee v. Weisman*, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting).

³⁶ Michael W. McConnell, *On Reading the Constitution*, 73 CORNELL L. REV. 359, 362 (1988) (emphasis in original).

we ask if such prayers unconstitutionally advance religion, endorse religion, or even coerce religion, the answers are all the same.

III. SOLVING THE LEGISLATIVE PRAYER QUESTION WITH A NEW SOLUTION

When you pray, go into your room, close the door and pray to your Father, who is unseen. Then your Father, who sees what is done in secret, will reward you.^{††}

Those who have no choice but to attend a governmental meeting, or even those who have that choice, should not have their civic participation marred by religious prayers they do not believe. While the purpose of such prayers may be to instill some solemnity to legislative sessions, the actual effect is to link the government with some people's, but inevitably not other people's, religious values. Yet, the Establishment Clause is meant to prohibit governmental approval of some religions but not others.³⁷

The Free Exercise Clause of the Constitution prohibits governmental conduct that penalizes, punishes, or directly coerces religious beliefs.³⁸ That Clause prevents the government from singling out certain religions, or nonreligion, for unfavorable treatment under the law. The Establishment Clause must mean something different; otherwise it would be redundant. That something different is the idea that the government may not engage in behavior that puts its stamp of approval on certain religious beliefs or values. Even Justice Scalia seemed to recognize this point during the *Galloway* oral arguments.

JUSTICE SCALIA: If there's coercion . . . why do we need the Establishment Clause? If there's coercion, I assume it would violate the Free Exercise Clause, wouldn't it?

MR. LAYCOCK: Well, I think that's right. And that's why—

JUSTICE SCALIA: So it seems to me very unlikely that the test for the Establishment Clause is identical to the test for the Free Exercise Clause.³⁹

In other cases involving the separation of church and state, such as governmental aid to parochial schools or passive religious symbols on governmental property, it might be necessary to articulate what test, short of coercion, is appropriate for the Establishment Clause. And it may well be

^{††} Steve Sebelius, *Praying for a Moment of Silence Instead*, LAS VEGAS REVIEW-JOURNAL (Aug. 21, 2012, 2:34 AM) (citing *Matthew* 6:6), <http://www.reviewjournal.com/steve-sebelius/praying-moment-silence-instead>.

³⁷ *Larson v. Valente*, 456 U.S. 228, 244 (1982).

³⁸ “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .” U.S. CONST. amend. I (emphasis added).

³⁹ *Galloway* Oral Argument, *supra* note ¶**Error! Bookmark not defined.**, at 35–36 (Justice Scalia questioned why we need the Establishment Clause and stated that the test for the Establishment Clause is not identical to the Free Exercise Clause).

that different tests would be better suited to different Establishment Clause problems. The Court need not define those parameters precisely, however, to resolve the issue of legislative prayers. All of the complexity and acrimony over this issue could simply evaporate with an obvious alternative that has worked well in the context of public elementary and secondary schools.

If people want to pray at governmental meetings, or wish to begin the meeting with a solemn pause, a moment of silence would allow them to do so. People of a like mind could even join hands or bow their heads in unison (if done spontaneously). Other people could choose to reflect on anything or nothing at all. A uniform moment of silence would mark the event with seriousness and let everyone in attendance pause to consider the importance of the business about to be conducted.⁴⁰

At major sporting and theatrical events taking place after a national or even local tragedy, moments of silence are powerful tools of public awareness, shared understandings, and civic responsibility. There is no reason why, if moments of silence work in a 50,000-person football or baseball stadium, they would not adequately mark the importance of legislative or other governmental meetings.

Some may argue, however, that a more appropriate judicial response to the problem of legislative prayers is to allow nondenominational prayers. This argument notes that it is undeniable that religion plays a major role in our society and the fabric of our culture, and thus generic references to God simply recognize the importance of religion to many Americans. Judge Wilkinson made this argument in the *Joyner* case when he stated that legislative prayers should strive to be nondenominational so that they “send a signal of welcome rather than exclusion. [They] should not reject the tenets of other faiths in favor of just one.”⁴¹ Judge Wilkinson believes that truly nondenominational prayers can mark the importance of governmental meetings without unduly endorsing or advancing certain religions over others, and religion over nonreligion.

The problems with limiting legislative prayers to nondenominational references to a generic God, however, are many. First, the choice of prayer-givers may still be controversial. A legislature that chooses only Christians to lead years of nondenominational prayers still sends a message to non-Christians that their leaders do not merit an official governmental spotlight. Second, someone has to draft standards describing and defining what is or is not denominational. That places legislatures in the problematic role of dictating, and courts in the role of reviewing, the content of official prayers. Third and most importantly, even nondenominational prayers quite clearly

⁴⁰ See Segall, *supra* note 19, at 737–39.

⁴¹ *Joyner v. Forsyth Cnty.*, 653 F.3d 341, 349 (4th Cir. 2011).

favor religion over nonreligion and the belief in one God over the belief in many gods.

If there were no way to recognize our religious heritage at governmental meetings without these prayers, maybe the issue would be different. But there is and the solution is obvious. A moment of silence where every person in attendance can pray to the God of their choice, or reflect on whatever beliefs they may hold, allows people to pray without government favoritism. Moments of silence have proven emotionally salient in thousands of public schools across our country (and at other public events). There is no reason that a moment of silence cannot adequately solemnize the important business conducted in the official halls of our legislatures, our courts, and our executive sessions.

CONCLUSION

Thirty years after *Marsh v. Chambers* was decided, we know that the battles over legislative prayers are frequent, politically divisive, and expensive. The fights over legislative prayers have put state and local governments in the business of picking and choosing which religious groups are entitled to have their prayers uttered at official meetings and which religions receive official government approval. These prayers tell people who are nonbelievers in any God, or who believe in many gods, that those views are not entitled to equal respect by their government. There is no way to avoid that conclusion in places like Greece, New York, where every prayer for eight years was given by a Christian “chaplain of the month,” or in Cobb County, Georgia, where the vast majority of prayers were given by Christians and contained Christian references, or in the halls of the Indiana legislature, where singing a hymn to Jesus seemed an acceptable thing to do.

Like Judge Wilkinson, who struck down legislative prayers in the Fourth Circuit, I am a strong and passionate advocate of judicial deference to elected political officials,⁴² and like Justice Kagan, I think the Court’s exercise of judicial review often causes more harm than good.⁴³ But there are rare times when judges must enforce our Constitution and reverse decisions of other political officials. Over fifty years ago, the Court stepped in and prohibited official prayers in public school classrooms and more recently at high school football games and graduation ceremonies. Although these decisions were controversial, there has not been a harmful backlash. Like many old and traditional practices that discriminate against traditionally disadvantaged groups (such as segregation and gender

⁴² See ERIC J. SEGALL, SUPREME MYTHS: WHY THE SUPREME COURT IS NOT A COURT AND ITS JUSTICES ARE NOT JUDGES (2012).

⁴³ See Eric J. Segall, *Beware a Gay Rights Backlash*, L.A. TIMES (May 15, 2012), <http://articles.latimes.com/2012/may/15/opinion/la-oe-segall-gay-marriage-backlash-20120515>.

discrimination), legislative prayers should not be upheld solely because they have been around for a long time.

The only possible justification for judicial approval of an official moment of prayer over an official moment of silence is to mark the occasion with a religious component that many will find offensive and coercive. When the government's sole motivation for a decision is a religious one, where there is no plausible secular benefit, where there is real harm, and where there is a satisfactory alternative to the enmeshing of church and state, the Establishment Clause blocks that choice. The members of the Greece Town Council, and those who attend legislative sessions there and all over this country, may pray to whomever they want, as often as they want, wherever they want. But our Constitution should prohibit them from making those prayers part of official governmental business.