Exploring the History and Future of Legislative Prayer in light of *Town of Greece v. Galloway*

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INVOCATIONS: The Starting Point

March v. Chambers, 463 U.S. 783 (1983)

Ernest Chambers, a member of Nebraska's unicameral legislature, brought suit to enjoin his state legislature from commencing each session with a prayer as had been the state's practice since entering the union in 1867.

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Marsh v. Chambers, SCOTUS

- In the 16 years prior to Chambers' lawsuit, the prayer had been offered by the same Presbyterian minister who was paid out of public funds.
- The District Court found the prayers constitutional, but deemed it unconstitutional to pay the minister out of public funds.
- Then the Eighth Circuit found both the prayers and the payments unconstitutional.

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Marsh v. Chambers, SCOTUS

- In a 6-3 opinion authored by Chief Justice Warren Burger, the Supreme Court held the legislature's practice did not violate the Establishment Clause given "the unbroken practice for two centuries in the National Congress and for more than a century in Nebraska and in many other states."

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Marsh v. Chambers, SCOTUS

- Absent impermissible motives or attempts to proselytize or advance any one, or disparage any other, faith or belief, the Court appeared unwilling to examine the content of the invocations.
- The majority chose to ignore the "most commonly cited formulation of prevailing Establishment Clause doctrine" developed in *Lemon* in favor of a history-based analysis.

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Circuit Split After *Marsh*

- *Marsh* did not settle issues around legislative prayer
- Persistent division among Circuit Courts

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Post *Marsh* Decision: 9th Circuit

Rubin v. City of Lancaster, 710 F.3d 1087 (9th Cir. 2012)

Rubin claimed the Council's invocation practice was unconstitutional because a substantial majority of the prayers were Christian in nature employing overtly sectarian references to "Jesus."

Rubin v. Lancaster

- The city clerk maintained a database of religious congregations with an established presence in the City of Lancaster compiled from the Yellow Pages, internet, chamber of commerce and newspaper.
- Each organization was invited to participate and informed that the City in no way affiliates itself with a particular religion.
- Each congregation was limited to three appearances per year.

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Rubin v. Lancaster

- Ninth Circuit found that Lancaster's policies provided adequate safeguards to ensure the City was being evenhanded by:
  - (1) not requiring anyone attending council meetings to participate;
  - (2) ensuring that a variety of invocational speakers are scheduled; and
  - (3) not reviewing the content of the prayer beforehand.

Post *Marsh* Decision: 2nd Circuit

- *Galloway v. Town of Greece,* 681 F.3d 20 (2nd Circuit 2012), rev'd.
- Town of Greece, New York
- Second Circuit held that the Town's prayer practice was too closely affiliated with Christianity to survive an Establishment Clause challenge.

Galloway v. Town of Greece (2nd Cir.)

- Greece had been inviting local clergy to offer an opening prayer at Town Board meetings since 1999.
- The Town contacted the religious organizations published by the Chamber of Commerce and created a list of chaplains.
- Until 2008, without exception, all were of the Christian faith.

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Prayer at Town of Greece Board Meeting

- March of 2008 Town Board Meeting https://www.youtube.com/watch?v=p0-dj8LcBPc



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Galloway v. Town of Greece (2nd Cir.)

- After receiving complaints, however, several clergy from non-Christian denominations were added in 2008 including:
  (1) a Wiccan priestess,
  (2) Baha'i chairman, and
  (3) a lay Jewish man.

- Only Christian clergy performed invocations in 2009 and 2010.

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Galloway v. Town of Greece (2nd Cir.)

- Second Circuit found the Board's policy was not based on religious animus, but that the totality of the circumstances reflected an endorsement of a particular religious viewpoint.
- The Court noted the overtly-Christian content of the prayers, the failure of the Town to advise prayer-givers to conform to an ecumenical message, and affirmative requests for participation, such as asking audience members to stand or bow their heads, as supportive of its decision.

Supreme Court Decision: *Town of Greece v. Galloway*

- SCOTUS issued its opinion on May 5, 2014.
- Court reversed Second Circuit and upheld the Town's prayer practice holding that the practice fit within the tradition of legislative prayer.
- Court found:
  - Sectarian references did not denigrate, proselytize or betray an impermissible government motive
  - Majority of prayer-givers being from one faith was not a constitutional violation where Town opened the opportunity to all
  - Timing and nature of prayers were not coercive

*Town of Greece v. Galloway (*SCOTUS)

- Court stated that government should not review content of prayers; doing so would force legislatures and courts to act as "supervisors and censors of religious speech."

- Court found that prayers were not coercive because they took place during ceremonial portion of meeting, prayers were targeted at lawmakers, and citizens were free to exit during the prayers.

- Offense does not equal coercion.

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Take Aways

- Practical Considerations:
  - Do not require meeting attendees to participate in prayer;
  - Government employees or officials should not ask about or review the content of any prayer;
  - Government employees or officials should not ask or encourage the audience to take any overt act in connection with prayers (bow head, stand up, etc.);

Take Aways

- Prayers should be held at the beginning of meetings, not during policymaking portions of meetings;
- Jurisdictions should adopt a written policy acknowledging that prayers are not intended to advance, proselytize, or disparage any faith over others

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