Prayer at Local Government Meetings After *Town of Greece*

The U.S. Supreme Court ruled on May 5 in *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014), that the Town of Greece had not violated the First Amendment’s establishment clause by opening town meetings with prayers that had almost exclusively Christian content. Afterward, there was much speculation about whether Christian prayers would become commonplace before local government meetings. It is too early to tell.

On the one hand, the Christian group that defended the town, Alliance Defending Freedom, has offered a model prayer policy for local governments to use, and public understanding of the decision seems to view it as upholding a right to pray. On the other hand, it is difficult to find evidence that there is a rush of localities adopting Christian prayer policies or any prayer policies at all. It is also interesting that the new policy the Town of Greece adopted after the Court’s decision looks far more innocuous than what had happened in the town to trigger the case:

It is the intent of the Town Board to allow a private citizen to solemnize the proceedings of the town board. It is the policy of the Town Board to allow for an invocation, which may include a short prayer, a reflective moment of silence, or a short solemnizing message, to be offered before its meetings for the benefit of the

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Town Board to accommodate the spiritual needs of the public officials.

But let’s take a step back and review what the decision said before venturing any predictions about its implications for public prayer.

*Town of Greece* is the first time the Supreme Court has dealt with prayer before legislative sessions in 30 years. The immediately preceding case was *Marsh v. Chambers*, 463 U.S. 783 (1983), in which the Court upheld the constitutionality of prayers delivered by a Christian minister before sessions of the Nebraska legislature. The Court found that these prayers did not violate the establishment clause because they were consistent with the historical practice, maintained since the country was founded, of saying legislative prayers before sessions of Congress and because the prayers were ecumenical and had deleted all references to Christ.

The facts in *Town of Greece* differed from *Marsh*. A suburb of Rochester, New York, the Town of Greece did not have a long history of prayer before board proceedings. Until 1999, the town board opened its meetings instead with a moment of silence to provide gravity to the proceedings. But the board changed its practice and began inviting local clergy to open meetings with a prayer. Because the town had mostly Christian places of worship, from 1999 to 2007, all invitations went exclusively to Christian clergy, many of whom used prayers with explicit Christian content.

Although the board responded to complaints lodged in 2007 about the exclusively Christian prayers by inviting clergy from other religions for a short period, it reverted to exclusively Christian invitees for the next 18 months. Two town members who had regular business before the board, Susan Galloway and Linda Stephens, brought suit, objecting to the prayers as a violation of the establishment clause. They lost at trial, but the Second Circuit reversed, citing the facts that the board had invited exclusively Christian clergy for most of an 11-year period, the regular references to Christ and Christian theology in the prayers, and the regular requests by the ministers that the audience join in the prayers as bases for finding that the town had violated the establishment clause.

That the Supreme Court granted the town’s petition for certiorari was somewhat surprising, because the Court had passed on the opportunity three years earlier to hear a case out of Forsyth County, North Carolina, in

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which the Fourth Circuit had found an establishment clause
violation based on public prayers at county board meetings
that were laden with Christian references. Joyner v. Forsyth
County, N.C., 653 F.3d 341 (4th Cir. 2011), cert. denied,
132 S. Ct. 1097 (2012). But it could hardly be surprising,
when certiorari was granted, that the Court’s Town of Greece
decision overturned the Second Circuit’s.

In a 5–4 decision, with all of the Court’s Democratic
appointees dissenting, Justice Kennedy wrote the plurality
opinion, joined by Chief Justice Roberts and Justice Alito.
Justice Kennedy concluded that Marsh did not require that
prayers before legislative sessions be nonsectarian. Rather,
he wrote, the prayers in Nebraska were constitutional be-
cause prayers in such a limited context can coexist with the
principles of disestablishment and religious freedom. Justice
Kennedy dealt dismissively with the plaintiffs’ argument that
to them the prayers were not simply a benign acknowledg-
ment of religion’s role in society but instead an affront to
a diverse community, especially when the plaintiffs had
no choice but to attend board meetings to conduct such
business as obtaining waivers of zoning ordinances. Adults
sometimes have to live with speech they find disagreeable,
Justice Kennedy responded.

In his concurrence, Justice Thomas was joined by Justice
Scalia in stating that to violate the establishment clause
the town would have to engage in actual legal coercion,
that is, force people to participate in the prayers or face
legal penalties. Justice Thomas was alone in asserting that
the establishment clause does not apply to state or local
governments through incorporation under the Fourteenth
Amendment.

Justice Kagan wrote the dissent, arguing that the Town of
Greece had violated the establishment clause’s requirement
that no one should be made an outsider before her own
government. Justice Kagan pointed out the obvious distinc-
tions between this case and Marsh noted above.

What does this decision foretell? Justice Kennedy left
open the possibility that prayer before legislative sessions
could violate the establishment clause if there is a pattern
that either denigrates other religions or attempts to convert
people in attendance through proselytizing. It is difficult,
however, to see how that standard could be met, if 11 years
of only Christian prayers, for all practical purposes, that
included the audience’s being asked to bow their heads and
join in the Lord’s Prayer was not enough in Town of Greece.

Given Town of Greece’s consistency with the Roberts
Court’s two other opinions rejecting establishment clause
challenges, Salazar v. Buono, 559 U.S. 700 (2010), involv-
ing a cross on federal property, and Arizona School Tuition
v. Winn, 131 S. Ct. 1436 (2011), rejecting standing in a
challenge to sectarian school funding, it seems unlikely the
Court will find prayer before legislative sessions unconstitu-
tional any time soon. This means that the challenge will
occur at the local government level.

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