
LECTURE

Town of Greece v. Galloway: Constitutional Challenges to State-Sponsored Prayers at Local Government Meetings

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This term, the Supreme Court is hearing a case, *Town of Greece v. Galloway*, involving state-sponsored prayers before town board meetings. Oral argument took place just a couple of weeks ago on November 6, 2013. I consider this case to be a strategically important battleground for the soul of the religion clauses of the First Amendment. As I am going to explain, a lot is at stake in the adjudication of this dispute.

Let me note two things I am *not* going to talk about today. First, I'm not going to say very much about the oral argument or try to predict how this case is going to be decided. Second, I'm not going to discuss the historical practices prevalent in the United States when the First Amendment was adopted. There are many reasons why I think the history of the United States in 1791 isn't terribly helpful in interpreting the religion clauses — but that's another talk for another time.¹

For the most part, the facts of this case are undisputed.² Prior to 1999, town board meetings in the town of Greece began with a moment of silence. From that time onward, the meetings began with

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¹ For a detailed discussion of these arguments, see generally Alan Brownstein, *The Reasons Why Originalism Provides a Weak Foundation for Interpreting Constitutional Provisions Relating to Religion*, 2009 CARDOZO L. REV. DE NOVO 196.

² The facts are taken from the Court of Appeals decision, *Galloway v. Town of Greece*, 681 F.3d 20, 22-26 (2d Cir. 2012).

invited local clergy offering an opening prayer. Typically, these were collective rather than personal prayers. They were offered on behalf of the audience and the town. Often the person offering the prayer asked audience members to stand, bow their heads, or otherwise join in the prayer. Supervisors referred to the prayer-givers as “chaplain of the month.” Between 1999 and 2010, roughly two thirds of the prayers employed uniquely Christian language and references; one third expressed more generic theistic terminology.

The town invited individuals to offer prayers at board meetings by compiling a “town board chaplain” list from local religious congregations listed in a chamber of commerce directory or the local newspaper. Between 1999 and 2010, with only four exceptions, every prayer offered at a town meeting was delivered by Christian clergy. The town claims that anyone may volunteer to offer prayers at town meetings, but it acknowledged that it has done nothing to publicize that policy to residents. Plaintiffs filed suit, and the Court of Appeals for the Second Circuit agreed that the town’s actions violated the Establishment Clause.³

Evaluating the issues in this case requires some understanding of the doctrinal lay of the land on which this battle is being waged. Over the last sixty years, there has been continuous debate about the meaning of the Free Exercise Clause and the Establishment Clause of the First Amendment. One axis of this debate has focused on the scope and rigor of these constitutional mandates. Here I think it is fair to say that, with an occasional exception,⁴ the current Court is interpreting both religion clauses to mean as little as possible.⁵ That is, the Court believes that the great majority of church-state disputes in

³ *Id.* (describing the facts and procedural history of the case).

⁴ See, e.g., *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 132 S. Ct. 694 (2012) (recognizing that a “ministerial exception” protects religious organizations against employment discrimination suits brought by clergy); *McCreary Cnty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844 (2005) (holding that a display of the Decalogue in front of a courthouse lacked a secular purpose and violated the Establishment Clause).

⁵ See, e.g., *Hein v. Freedom from Religion Found.*, 551 U.S. 586 (2007) (limiting the ability of claimants to challenge Establishment Clause violations by restricting standing to bring taxpayer suits); *Van Orden v. Perry*, 545 U.S. 677 (2005) (upholding placement of Ten Commandments monument on State Capitol grounds); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (limiting the Establishment Clause prohibition against state aid to religious institutions by upholding subsidy programs using vouchers that provide financial support to religious schools); *Emp’t Div. v. Smith*, 494 U.S. 872 (1990) (reducing the scope of the Free Exercise Clause by holding that individuals cannot assert Free Exercise claims against neutral laws of general applicability).

our society should be resolved through political deliberation rather than constitutional adjudication. I believe this approach is wrong headed, but it is coherent.

The Court is far less clear with regard to the second axis of debate. What are the foundational principles and values underlying the religion clauses of the First Amendment? The problem here is that religion is a complex social phenomenon which implicates multiple constitutional interests.⁶ For example, a religious person defines her identity by accepting transcendent truths and relationships through which she orders her life and her place in the world. Thus, one may argue that religious liberty protects personal autonomy and human dignity by allowing individuals to make these self-defining decisions without state interference.⁷

Consider another example. For many people, religion is more than a personal commitment. It also reflects their membership in a group or class defined by shared beliefs and practices. Accordingly, one may argue that religious equality principles limit the government's ability to favor certain religious groups over others.⁸ Equality for religion clause purposes tracks equal protection analysis in recognizing that we cannot always trust the political process with regard to the equal treatment of religious groups. Importantly, a central constitutional focus here is on religious hierarchy and status. Government must

⁶ See, e.g., Alan E. Brownstein, *Evaluating School Voucher Programs Through a Liberty, Equality, and Free Speech Matrix*, 31 CONN. L. REV. 871, 886-88 (1999) [hereinafter *School Voucher Programs*] (describing the various constitutional values implicated in religion clause disputes); Alan E. Brownstein, *Harmonizing the Heavenly and Earthly Spheres: The Fragmentation and Synthesis of Religion, Equality, and Speech in the Constitution*, 51 OHIO ST. L.J. 89 (1990) [hereinafter *Harmonizing the Heavenly*] (attributing part of the difficulty courts experience in adjudicating religion clause issues to the multidimensional nature of religion); Alan E. Brownstein, *Interpreting the Religion Clauses in Terms of Liberty, Equality, and Free Speech Values — A Critical Analysis of "Neutrality Theory" and Charitable Choice*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 243, 256-57 (1999) [hereinafter *Interpreting the Religion Clauses*] (explaining that religion crosses constitutional boundary lines and implicates personal liberty, group equality, and freedom of speech).

⁷ See, e.g., Brownstein, *Harmonizing the Heavenly*, *supra* note 6, at 95-102; Alan E. Brownstein, *The Right Not to Be John Garvey*, 83 CORNELL L. REV. 767, 807-08 (1998).

⁸ See, e.g., Brownstein, *School Voucher Programs*, *supra* note 6, at 902-27; Brownstein, *Harmonizing the Heavenly*, *supra* note 6, at 103-12, 125-54 (explaining how equality values underlying equal protection principles justify protecting the equality interests of religious minorities); Brownstein, *Interpreting the Religion Clauses*, *supra* note 6, at 256-68 (comparing race and religion for the purpose of explaining why the Establishment Clause should be interpreted to prohibit religious favoritism just as the Equal Protection Clause prohibits racial hierarchy).

recognize that people of different faiths, or no faith, are of equal worth and deserving of equal respect.⁹

Religion implicates other constitutional values, in addition to liberty and equality.¹⁰ But for the purpose of this talk, we can limit our discussion to these two constitutional interests.

The Court has decided several cases involving state-sponsored prayers or religious displays. The case holdings do not fit neatly into clear patterns. With regard to state-sponsored prayer, on the one hand, we know that school directed prayer in public schools violates the Establishment Clause — and this prohibition extends not only to the classroom¹¹ but to middle school and high school graduations¹² and to sporting events like high school football games.¹³ On the other hand, we also know that in *Marsh v. Chambers*¹⁴ in 1983, the Court held that prayers offered by government chaplains before federal or state legislative sessions are constitutional.¹⁵ The language of the *Marsh* opinion and dicta in subsequent cases arguably suggest that there are some constraints on the content of these prayers: the prayers should not proselytize one faith or disparage another,¹⁶ or, alternatively, they should be non-sectarian.¹⁷ The Court's message has not been clear here.

The holdings of religious display cases seem even more incoherent. A government maintained nativity scene surrounded by Santa's sleigh and reindeer and other seasonal icons in a commercial mall is constitutional.¹⁸ A stand-alone nativity scene in the foyer of a government office building is unconstitutional.¹⁹ A Menorah and Christmas tree side-by-side outside a government office building is constitutional.²⁰ A Ten Commandments display in school classrooms²¹

⁹ See sources cited *supra* note 8.

¹⁰ Freedom of speech, for example, is another constitutional value implicated by constitutional requirements relating to religion. See, e.g., Alan Brownstein, *Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality*, 18 J.L. & POL. 119 (2002).

¹¹ See *Engel v. Vitale*, 370 U.S. 421, 424 (1962).

¹² See *Lee v. Weisman*, 505 U.S. 577, 599 (1992).

¹³ See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 301 (2000).

¹⁴ 463 U.S. 783 (1983).

¹⁵ See *id.* at 791.

¹⁶ See *id.* at 794-95.

¹⁷ See *Cnty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 603 (1989).

¹⁸ See *Lynch v. Donnelly*, 465 U.S. 668, 668 (1984).

¹⁹ See *Cnty. of Allegheny*, 492 U.S. at 578-79.

²⁰ See *id.* at 620-21.

or on a court house wall²² is unconstitutional. A Ten Commandments display on the state house grounds, standing among other non-religious displays, is constitutional.²³ A stand-alone Latin cross designated to be a war memorial is probably constitutional, although that is not the holding of the case.²⁴

The doctrinal dissonance on the Court in this area can be captured to a considerable extent by looking at two different tests that the Court has employed in adjudicating these cases. One standard is the endorsement test, developed by Justice O'Connor and often applied to cases during her tenure on the court.²⁵ State action fails the endorsement test and violates the Establishment Clause when it “sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.”²⁶

The endorsement test is grounded in a constitutional commitment to religious equality. When the government endorses a religious belief or group, it does not punish the beliefs or practices of other faiths. But it does promote the status of certain faiths and undermines that of faiths holding conflicting beliefs.

Religious equality has a long constitutional pedigree that precedes the endorsement test. In *Larson v. Valente*²⁷ in 1982, for example, the Court stated that “[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.”²⁸ The *Larson* case dealt with a religious accommodation that “distinguished between well-established churches” and “churches which are new and lacking in a constituency.”²⁹ But the endorsement test has been employed repeatedly since it was coined in 1984, particularly in cases involving state-sponsored prayer and religious displays.

²¹ *Stone v. Graham*, 449 U.S. 39, 42-43 (1980).

²² See *McCreary Cnty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 881 (2005).

²³ See *Van Orden v. Perry*, 545 U.S. 677, 691-92 (2005).

²⁴ See *Salazar v. Buono*, 559 U.S. 700, 713-14 (2010).

²⁵ See Alan E. Brownstein, *A Decent Respect for Religious Liberty and Religious Equality: Justice O'Connor's Interpretation of the Religion Clauses of the First Amendment*, 32 MCGEORGE L. REV. 837, 843-66 (2001).

²⁶ *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

²⁷ 456 U.S. 228 (1982).

²⁸ *Id.* at 244.

²⁹ *Id.* at 246 n.23.

The endorsement test is often criticized because of its subjectivity and indeterminacy and because, taken to its extreme, it could justify purging government of any and all religious expression in the public life of our society. No one on the Court would accept that result, of course. Some state-sponsored religious messages are constitutional. But, determining whether a particular prayer or religious display impermissibly endorsed religion often seemed to be in the eye of the beholder.

An alternative approach to evaluating both state-sponsored prayers and religious displays is a coercion test championed by Justice Kennedy in several opinions.³⁰ This test is rooted in religious liberty, not religious equality. As its name implies, this test prohibits government from “coerc[ing] anyone to support or participate in religion or its exercise.”³¹ Advocates of the coercion test argue that it is more objective and provides better guidance to government officials and courts than the endorsement test.

That contention is debatable. In applying the coercion test, the Court has struggled to distinguish between coercive and non-coercive state action. For example, in *Lee v. Weisman*, the decision striking down the offering of state-sponsored prayers at high school graduations, Justice Kennedy wrote of public and peer pressure that, “though subtle and indirect, can be as real as any overt compulsion.”³² The four dissenting justices in that case, however, saw no unconstitutional coercion, subtle or otherwise.³³ Here, coercion seemed to be as subjective and elusive a concept as endorsement.

Part of the problem is that Supreme Court Justices do not only disagree about the appropriate standard to use. They also disagree about the social reality underlying the dispute to which the standard is applied. Let me give just one example. If a religious display is challenged as endorsing a religion, the Court must determine what the display communicates in its social context.

During oral argument in the *Salazar v. Buono*³⁴ case involving the use of a Latin cross as a war memorial, Justice Scalia opined that the Latin cross was, of course, a common and universally accepted symbol

³⁰ See, e.g., *Lee v. Weisman*, 505 U.S. 577 (1992) (employing the coercion test); *Cnty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 659-60 (1989) (Kennedy, J., concurring in part and dissenting in part) (same).

³¹ *Lee*, 505 U.S. at 587.

³² *Id.* at 593.

³³ See *id.* at 637-39 (Scalia, J., dissenting).

³⁴ *Salazar v. Buono*, 559 U.S. 700 (2010).

for memorializing all of the war dead.³⁵ To Scalia, the cross in the context of a war memorial was a religiously neutral symbol that could not be challenged as endorsing Christianity. Plaintiffs' counsel attempted to refute this understanding of social reality. However, when he explained that he had been to many Jewish cemeteries and crosses simply are not used to memorialize Jews who have died,³⁶ Scalia responded angrily that this was an outrageous statement for the attorney to make.³⁷ Yet the Department of Veterans Affairs lists over fifty-five emblems of belief that can be placed on the headstones of servicemen and servicewomen buried in national cemeteries.³⁸ The Department does not appear to perceive a social reality where one symbol, a Latin cross, would be universally appropriate for everyone.

Putting social reality aside, in some ways, the coercion test and the endorsement test suffer from the same problems. While the endorsement test, taken to the extreme, unreasonably purges religious references from public life, a coercion test, taken to the extreme, unreasonably permits government to promote favored religious beliefs. If the government proselytizes adherence to a particular religion or declares religious truth in its proclamations, it may not be directly coercing participation in religious activities. But, most of us would assume that these actions violate the Establishment Clause.

Because of the intrinsic limits of a direct coercion test, the Court has recognized that indirect coercion may also violate the establishment clause. Famously, in *Engel v. Vitale*,³⁹ the case striking down state directed prayer in the public schools, the Court stated, "when the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."⁴⁰

More recently, in a dissenting opinion challenging the use of the endorsement test to strike down a stand-alone Christmas crèche in a government office building, Justice Kennedy argued that a coercion test should be used in its place.⁴¹ Kennedy conceded, however, that

³⁵ Transcript of Oral Argument at 38-39, *Buono*, 559 U.S. 700 (No. 08-427).

³⁶ *See id.* at 39.

³⁷ *See id.*

³⁸ *Available Emblems of Belief for Placement on Government Headstones and Markers*, NAT'L CEMETERY ADMIN., U.S. DEP'T OF VETERANS AFFAIRS, <http://www.cem.va.gov/hmm/emblems.asp> (last visited on Jan. 14, 2014).

³⁹ 370 U.S. 421 (1962).

⁴⁰ *Id.* at 431.

⁴¹ *See Cnty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*,

the Establishment Clause prohibits more than just direct coercion. Symbolic recognition or accommodation of religion would also violate the Constitution if it went too far. Erecting a permanent large Latin cross on city hall, for example, would impermissibly place the government's weight behind an obvious effort to proselytize a particular religion.⁴²

When we move from direct coercion to so-called indirect coercion, however, we seem to be moving away from core religious liberty interests toward some recognition of the importance of religious equality. At some point indirect coercion and endorsement seem to merge into each other and to overlap.

That completes my thumbnail sketch of religion clause doctrine in this area. Now, you might think: Well, this certainly appears to be a confused and complicated area of constitutional law, but why should anyone think that the current prayer case reflects a battle for the heart and soul of the religion clauses of the First Amendment? Put simply, if the Court upholds the town of Greece's policy, it will have to reject any reasonable understanding of both the coercion test and the endorsement test. In doing so, it will dramatically undermine the protection provided by the Establishment Clause to religious minorities and to non-religious individuals.

Further, if the Court strikes down the town of Greece's policy on direct coercion grounds, but abandons the endorsement test in doing so, it will signal an unwillingness to recognize a constitutional commitment to religious equality. These are serious consequences that extend far beyond the offering of state-sponsored prayers at town board meetings.

At last, we reach the core question. Are state-sponsored prayers before a town board meeting per se violations of the Establishment Clause? No, at least not necessarily.

True, the most easily administrated and constitutionally acceptable solution would be for the government not to sponsor the prayers at all. This is a basic separation of church and state approach to the problem. From my perspective, however, a separationist position does not require prohibiting all government-sponsored prayer at all public events. The separation of church and state operates as a prophylactic rule. If we keep government and religion separate, we do not have to resolve complicated questions about how the government can involve itself with religion while still respecting our constitutional commitments to religious liberty and equality.

492 U.S. 573, 659-61 (1989) (Kennedy, J., dissenting).

⁴² *Id.* at 661.

Thus, in my view, the town has a choice. It can decide not to offer prayers at town board meetings. That's a constitutionally permissible, and perhaps the constitutionally preferred, approach. Or the town can choose to involve itself with religion by inviting citizens to offer prayers to lead off the board's agenda. If it adopts this alternative, however, then it is has to carefully structure its involvement with religion to adequately protect religious liberty and equality interests. What the state cannot do is to involve itself with religion and ignore the constitutional values protected by the First Amendment.

Let's begin by examining the religious liberty interests burdened by state-sponsored prayer. My initial analysis of this issue is fairly idiosyncratic. That doesn't mean it's wrong. But it does mean that there aren't a lot of other church-state scholars expressing a similar perspective. I suggest that there are two kinds of prayers that can be used to begin a meeting. I call these "I" prayers and "We" prayers. In offering an "I" prayer, the speaker prays in his or her own name for G-d's blessing to be given to the meeting's participants, the audience, and perhaps the greater community. In contrast, in offering a "We" prayer, the speaker asserts that he is praying in the name of the meeting's participants, the audience, and the community. He is offering a collective prayer intended to express the audience or community's message to G-d.

I think state-sponsored "We" prayers, collective prayers, are presumptively unconstitutional. From a religious liberty perspective, decisions about whether to pray to G-d and what to say in prayers belong to the individual. The state cannot usurp the individual's inalienable right to speak to G-d in his or her own words by claiming to pray in the name of its citizens.

In my view, one of the foundational principles underlying the religion clauses is that we do not vest religious power in the government. As a matter of first principles, "We the people" do not vest government with the power to speak to G-d in our names. Government does not have the authority to express collective prayers that purport to speak for everyone in the audience or the community. There are constitutional constraints on "I" prayers before town board meetings as well, as we shall see. But as a matter of first principle, state-sponsored collective prayers are inconsistent with any serious commitment to religious liberty.

My second analysis of the religious liberty issues in this case is more conventional. It is an unconstitutional abridgement of religious liberty for the government to coerce individuals into joining in prayers. Everyone agrees with that principle. The critical and more debated question is what constitutes coercion for establishment clause

purposes. Obviously, it is unconstitutional coercion if the state threatens to penalize or deny benefits to a person who refuses to pray as directed. However, what if the state asks a person to pray in a context in which the individual would reasonably worry that he would incur burdens or lose benefits if he declined to do so.

Suppose you are a litigant or lawyer in a civil suit and immediately before the proceeding begins the judge asks you to stand, bow your head, and join him in prayer. Wouldn't you feel considerable pressure to comply? Of course, in an ideal world, a judge should not hold your unwillingness to join in his prayers against you in making decisions in your case. But constitutions are not written for ideal worlds. In the real world, the coercion intrinsic to this situation is obvious. The risk of alienating the very official empowered to make discretionary decisions in your case is all too real.

I think it is unconstitutionally coercive for a judge to ask attorneys and parties to join him in prayer before a trial begins. Beginning town board meetings with prayers led by clergy who ask the audience to stand and bow their heads and join him in prayer is also an unconstitutionally coercive practice under a similar analysis.

This is why the Supreme Court's decision in *Marsh v. Chambers* upholding the opening of a state legislature's session with prayers is largely irrelevant to the religious liberty concerns that are at issue in the *Town of Greece* case.

Most of what Congress or a state legislature does involves the formulation and enactment of general laws that impact large groups and constituencies. By contrast, town boards regularly deal with issues affecting small groups and individuals. Land use decisions impact individual parcel owners and specific neighborhoods. Budget decisions may burden particular small constituencies. Sometimes town boards act as administrative tribunals in a quasi-adjudicatory capacity, hearing personnel grievances or zoning appeals. Thus, these local government meetings are much more likely to be focused on the needs and interests of individuals than are a state legislature's sessions. The distinction between legislative, administrative, and executive action often has little utility and meaning at town board meetings.

More importantly, citizens who watch the deliberations of Congress or a state legislature from the gallery are passive observers. They have no role to play in the legislative process. They are no more involved in the government's decisions than viewers who watch the legislature's sessions at home on CSPAN.

Citizens who attend town board meetings are not passive witnesses of government operations. They attend board meetings to participate in government by speaking to the board during public comment

periods. They expect to be seen and heard by the board. Their goal is to influence decision-makers. Their ability to address the board in person, to tell the board their side of the story, is an important right of political participation.

Finally, outside of major metropolitan areas, there are substantial differences between the size and format of state and national legislative chambers and town board meeting rooms. State legislators and members of Congress rarely know who is sitting in the gallery. The size of the chambers and the number of legislators and visitors preclude any such knowledge or sense of familiarity. The small meeting rooms of town board sessions are different. Here, the physical proximity between the board and the audience, and the limited number of participants, make it far easier for board members to be aware of their audience.

Because of these differences, the decision in *Marsh* tells us very little about the coercive nature of government-sponsored prayer at town board meetings. In the setting of a town board meeting, citizens are coerced when they are asked to stand or otherwise affirm the prayer that is being offered in their name. A failure to comply would risk alienating the very political decision-makers whom they hope to influence.

Town residents speaking at meetings know that the board's decisions will often involve substantial political discretion in weighing the competing concerns of relatively small constituencies. Residents will justly fear that if they refuse to join in prayers offered by clergy invited by the board, the board will respond less favorably to their needs and concerns than it will to other speakers in the audience who do join in the offered prayers.

In a setting designed to allow and encourage citizens to petition their government, the state is prohibited from asking citizens to participate in religious ceremonies. If we are seriously committed to religious liberty, addressing decision-makers at public meetings can't be pre-conditioned on citizens standing, bowing their heads, or reciting a prayer — or on citizens identifying themselves as unwilling to do so.

Now let's shift to religious equality concerns. The *Town of Greece* case raises two religious equality issues. First, the town invited individuals to offer the prayer from the religious congregations in the community identified in a local directory. I think restricting invitations to identified local congregations violates the Establishment Clause.

The town's invitation policy discriminates between larger, organized faiths and religious minorities in the community with insufficient numbers to create a congregation, develop a house of worship, or hire

clergy. This is the kind of discrimination the Court condemned in *Larson v. Valente*, a case I mentioned earlier. It is discrimination in favor of “well-established churches” and against “churches which are new and lacking in a constituency.”⁴³

Outside of large urban and suburban centers, it is common for religious minorities in an area to form a congregation and construct a house of worship in one town — with the understanding that this congregation will serve the religious needs of adherents who live in neighboring communities as well. The board cannot treat religious minorities who live in the town, but join a congregation and worship in an adjoining community, as if they do not even exist — as if they are not residents of the town at all. Government does not treat religious faiths with equal respect when it ignores the existence of religious minorities.

The City of Davis and Yolo County, where I live, provide a good illustration of this point. The only synagogue in Yolo County is in Davis. But Jews also live in Woodland, another town in the County, about a fifteen minute drive from Davis. The Seventh-day Adventist church is in Woodland. But Adventists also live in Davis. If the invitation policy of the town of Greece is constitutional, Woodland’s city council could never invite Jews to offer prayers at its meetings, and the Davis city council could never invite Adventists to offer prayers at its meetings. If religious equality is an important constitutional value, then these kinds of exclusionary policies have to violate the Establishment Clause.

The town of Greece’s policy also discriminates between members of traditional organized religions and people who are spiritual, but do not affiliate with any organized faith. Recent surveys suggest that millions of Americans describe themselves as spiritual, but religiously unaffiliated.⁴⁴ These town residents are also entirely ignored by an invitation policy restricted to congregations.

Certainly, there are other easily administered, more egalitarian ways to invite residents to offer prayers at board meetings. There is simply no excuse for limiting invitations to congregations listed in local directories when doing so effectively denies minorities and the unaffiliated the opportunity to offer prayers at meetings.

The second equality issue raises the question of religious endorsement. It would clearly violate the endorsement test if the town deliberately invited only Christian clergy to offer Christian prayers

⁴³ *Larson v. Valente*, 456 U.S. 228, 246 n.23 (1982).

⁴⁴ See “Nones” on the Rise, PEW RESEARCH (Oct. 9, 2012), <http://www.pewforum.org/2012/10/09/nones-on-the-rise/>.

before board meetings. And the Second Circuit found that this was a fairly close approximation of what the town of Greece did in this case.⁴⁵ Such deliberate favoritism could also be characterized as impermissible indirect coercion. If it is unconstitutionally coercive to place a Latin cross on top of city hall, it should be equally unconstitutional to place a Latin cross in front of the room where board meetings take place. Starting every board meeting with an exclusively sectarian prayer would seem to be at least as indirectly coercive as placing a cross before the dais at board meetings.

A more difficult religious equality issue arises if a town adopts an open, neutral invitation policy, but because the community is relatively homogeneous, virtually all of the prayers offered at town board meetings are explicitly Christian in their content. Under the endorsement test, as Justice O'Connor conceived it, if prayers of one religion dominated public events or property, the prayers would constitute an unconstitutional endorsement of religion.⁴⁶

This conclusion can be challenged on several grounds. An open call to volunteers at least allows for the possibility that adherents of minority faiths would be permitted to offer prayers. It can also be argued that the resulting homogeneity of the prayers offered is not a government endorsement of specific religions. It is simply a neutral reflection of the religious demographics of the community. These arguments cannot be dismissed out of hand. Yet they are unsettling in their consequences. For example, if all town residents are invited to suggest a religious symbol to be placed on top of city hall and one suggestion per week is chosen at random, in relatively homogenous communities, the symbol reflecting the majority's beliefs will be selected almost all of the time. Justice Kennedy's Latin cross on top of city hall might be placed there fifty weeks per year or more. Whether we use the language of endorsement or indirect coercion, the question remains whether such a long-term, symbolic connection between government and particular religious beliefs is constitutional.

If the offering of explicitly and almost exclusively Christian prayers by residents selected from an open pool of volunteers violates the Establishment Clause, two approaches for mitigating the resulting endorsement or indirect coercion have been suggested. Under one approach, the town could deliberately invite residents of minority faiths to serve as a prayer-giver in order to achieve some balance in the prayers that are offered. The problems with this suggestion, however,

⁴⁵ *Galloway v. Town of Greece*, 681 F.3d 20, 31-34 (2d. Cir. 2012).

⁴⁶ See *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 777 (1995) (O'Connor, J., concurring in part and concurring in judgment).

are obvious. There are hard questions as to what would be considered acceptable balance and diversity in the prayers offered, and equally difficult questions as to who would be invited to speak for the various faiths receiving special invitations.

Alternatively, the town could monitor the content of the prayers. Invited individuals would be told to offer generic prayers and avoid sectarian references that divide religions from each other. Although the practice of issuing such instructions is not uncommon, if disputes arose, it would be difficult to distinguish between acceptably nonsectarian prayers or unacceptably sectarian prayers. Also, having the government dictate to residents the content of the prayers they can offer at board meetings seems problematic. Indeed, one might argue that a rule requiring state-sponsored prayers to be non-sectarian suggests that religions reflecting more ecumenical beliefs are favored insiders, while faiths committed to more denominationally exclusive creeds are disfavored outsiders.

And this is the rub, the constitutional catch-22 — once you go down the road of involving government with religion, the government will have to entangle itself with religion in ways we would ordinarily consider inappropriate.

This problem pervades religion clause issues. For example, legislatures often accommodate religious individuals by exempting them from general laws that would require them to violate the dictates of their faith. Native American religions that use peyote in ceremonies are often exempt from laws prohibiting the possession and use of this hallucinogen.⁴⁷ Religious pacifists were provided conscientious objector exemptions from conscription, back when we had conscription.⁴⁸

By adopting these exemptions, however, government often finds itself forced to engage in inquiries that would otherwise be rejected as impermissible. Ordinarily, we do not think it is any of the government's business to evaluate the sincerity of our professed religious beliefs. However, government can and will test the sincerity of individuals who claim religious exemptions.⁴⁹ The adoption of

⁴⁷ See *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 433-34 (2006).

⁴⁸ See, e.g., *Welsh v. United States*, 398 U.S. 333, 359, 365-66 (1970) (discussing exemptions of conscientious objectors on religious grounds); *United States v. Seeger*, 380 U.S. 163, 170 (1965) (same).

⁴⁹ See MICHAEL W. MCCONNELL, JOHN H. GARVEY & THOMAS C. BERG, *RELIGION AND THE CONSTITUTION* 229-31 (3d ed. 2011).

accommodations carries with it the need to determine if religious exemption claims are genuine.

Also, when an exemption is granted for the practice of one faith, courts must determine whether the accommodation reflects impermissible favoritism. If Native Americans are permitted to use peyote for religious purposes, must similar exemptions be granted to members of other faiths who use different prohibited substances in their religious rituals?⁵⁰ Trying to guarantee equal treatment in the provision of religious exemptions is a formidable judicial undertaking.⁵¹

This, then, is the problem we are left with. The offering of state-sponsored prayers before town board meetings raises serious religious liberty and equality concerns. Inevitably, however, attempts to structure this practice to mitigate those concerns create new problems.

Even if in the *Town of Greece* case the Court allows prayers to be offered at town board meetings and rejects any Establishment Clause responsibility to determine whether such prayers are impermissibly sectarian, this holding would still require judicial scrutiny to determine whether religious activities at town board meetings involve something different and more constitutionally problematic than the offering of a prayer. And it is not at all clear how courts should decide what constitutes a prayer.

During oral argument in the *Town of Greece* case, for example, the following exchange took place between Professor Laycock, the attorney for the plaintiffs, and Justice Scalia:

MR. LAYCOCK: “If you really believe government can’t draw lines here [with regard to the nature and content of state-sponsored prayers at town board meetings], then your alternatives are either prohibit the prayer entirely or permit absolutely anything, including the prayer at the end of the brief where they ask for a show of hands, how many of you believe in prayer? How many of you feel personally in need of prayer? If there are no limits, you can’t draw lines.”

JUSTICE SCALIA: “That’s not a prayer. That’s not a prayer.”

MR. LAYCOCK: “Well, it was how — ”

⁵⁰ See Alan E. Brownstein, *Continuing the Constitutional Dialogue: A Discussion of Justice Stevens’s Establishment Clause and Free Exercise Jurisprudence*, 106 *Nw. U. L. Rev.* 605, 644-46 (2012).

⁵¹ *Id.*

JUSTICE SCALIA: “How many of you have been saved?
That’s not a prayer.”

MR. LAYCOCK: “It was how he introduced his prayer, and if
you can’t draw lines I don’t know why he can’t say that.”⁵²

Justice Scalia’s apparent confidence that he knows a prayer when he sees one, however, may reflect his personal religious perspective far more than it provides useful and accepted constitutional criteria for distinguishing a prayer from other religious activities.

Accordingly, one might reasonably conclude that the cures are worse than the disease in this case, and that the best rule would prohibit all state-sponsored prayer at local government meetings. That, after all, was the judgment the Court reached in *Lee v. Weisman*, when it held that government-sponsored prayers at public school graduations violated the Establishment Clause.⁵³

Yet there are ways to mitigate the costs to religious liberty and equality that result from state-sponsored prayers being offered at town board meetings without prohibiting the prayers in their entirety. These mitigation constraints are not without risk. Government-sponsored prayers are inherently problematic. But they do limit the religious liberty and equality costs to a considerable extent. The prayers should be “I” prayers rather than “We” prayers. The person offering the prayer should do so in his or her own name, not as the voice of the audience or the community. Even an “I” prayer can operate coercively, however, if the audience is asked to participate in a religious activity. Accordingly, the person offering the prayer should be told not to ask people to stand, bow their heads, or join in reciting the prayer. These instructions are less intrusive and far easier to administer than screening prayers for sectarian references. And they would diminish the coercive effect of offering prayers before board meetings, at least to some extent.

The town should also employ a truly open and egalitarian invitational system. Further, before the prayer is offered, a town spokesperson should explain that the prayer offered is the personal expression of the speaker, not the government. The town recognizes the diversity of belief among its residents, and appreciates that community members of all faiths and no faith are of equal worth and are entitled to equal respect. These expressive requirements, imposed on the town rather than the person offering the prayer, would

⁵² Transcript of Oral Argument at 51, *Town of Greece v. Galloway*, 134 S. Ct. 467 (2013) (No. 12-696).

⁵³ *Lee v. Weisman*, 505 U.S. 577, 598-99 (1992).

diminish the endorsement effect of the practice of starting meetings with state-sponsored prayers.

Thoughtful people committed to religious liberty and equality values might reject these proposals. They might argue that these mitigation requirements do not adequately limit the coercion and endorsement effect of state-sponsored prayers. Alternatively, they might consider these restrictions to be such an unacceptably intrusive entanglement of government and religion that we would be better off if the prayers were prohibited altogether. Both of these arguments have substantial persuasive force. Upholding the town of Greece's practice, as is, however, is unacceptable. Doing so would be fundamentally inconsistent with principles of religious liberty and equality.

Let me conclude my remarks with a few general observations. Religion clause cases can be difficult to resolve because so many constitutional values are implicated in church-state disputes. But they are also difficult because religious beliefs can be the subject of intense passions. In his famous challenge to Virginia's establishment of religion in 1785, James Madison wrote of the "[t]orrents of blood" that had been spilled over religious differences.⁵⁴ Looking at the world today, Madison's admonition continues to ring true.

While no one expects the results of the *Town of Greece* case to lead to violence, during oral argument Justice Kagan expressed her concern that the purpose of the religion clauses is to enable people in a multi-religious society to live together in a peaceful and harmonious way. But if the Court enforces the Establishment Clause to prohibit practices like state-sponsored prayers, Justice Kagan worried that people would get unhappy and angry and agitated and would accuse the Court of being hostile to religion.⁵⁵

I understand Justice Kagan's concerns, but there are powerful responses to them. Protecting minority liberty and equality rights often risks an angry reaction from the majority. And protecting minority rights is frequently challenged as disturbing the harmony of the community. But harmony that exists on a foundation of hierarchy and coercion is not true harmony. Minority silence in the face of discrimination and burdens on liberty should not be misconstrued as acquiescence to these conditions.

Moreover, the way for the Court to avoid being misunderstood as hostile to religion should not be to undercut the anti-coercion, pro-equality values of the Establishment Clause, but rather to more

⁵⁴ James Madison, *Memorial and Remonstrance Against Religious Assessments*, in *THE FOUNDERS' CONSTITUTION* 82, 83 (Philip B. Kurland & Ralph Lerner eds., 1987).

⁵⁵ Transcript of Oral Argument at 52, *Town of Greece*, 134 S. Ct. 467 (No. 12-696).

rigorously protect Free Exercise rights (the other religion clause). If Free Exercise rights were taken seriously (as they are not today),⁵⁶ it would be more difficult for the Court to be criticized as anti-religious because of its Establishment Clause holdings.

Lastly, if the Court ignores the liberty and equality interests of religious minorities in the name of achieving harmony, it sends this unmistakable message to religious minorities and nonreligious people: you cannot rely on the Constitution. The only way to protect yourself against discrimination and coercion is to live in communities where there are a sufficiently large number of people who adhere to your beliefs so that you can protect yourselves politically. Such a message would create the “harmony” of a religiously fragmented and balkanized society where people of different faiths do not live together in religiously integrated communities. By contrast, I suggest that what enables people of different faiths and no faith to all live together in meaningful harmony is the knowledge that the Constitution requires government to recognize that everyone, regardless of their beliefs, is of equal worth and must be treated with equal respect.

⁵⁶ See, e.g., Alan Brownstein, *Taking Free Exercise Rights Seriously*, 57 CASE W. RES. L. REV. 55, 60 (2006).