

## Prayer is Serious Business: Reflections on Town of Greece

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PRAYER IS SERIOUS BUSINESS: REFLECTIONS ON  
*TOWN OF GREECE*

*Perry Dane*<sup>1</sup>

**Abstract:**

In his dissent in *Marsh v. Chambers*, which upheld the practice of chaplains delivering public prayers in state legislative chambers, Justice William J. Brennan, Jr., observed that “prayer is serious business – serious theological business.” This two-part essay returns to that simple, but important insight in discussing the Supreme Court’s recent return to the question of legislative prayer in *Town of Greece v. Galloway*.

The first part is based on remarks I delivered as part of a panel discussion held several months before the Supreme Court handed down its ruling in *Town of Greece*. I proposed that the Court should overrule *Marsh*, or at least not extend its reach beyond Congress and state legislatures to local governmental bodies. But I also argued that, if the Court was unwilling to draw such bright lines, it should resist the temptation to parse individual prayer practices to make sure that they remained inoffensively “non-sectarian.”

The second part of the essay was written after *Town of Greece* came down. It contends that both the majority opinion and Justice Kagan’s principal dissent failed spectacularly to appreciate that “prayer is serious business.” The majority listed a litany of purposes for public prayer, but neglected to include the most obvious – to pray. The dissent repeatedly discussed the audience for various public prayers, but ignored the most obvious intended audience – God. The two opinions are actually remarkably alike in reducing civic prayer to political declarations of identity. For Justice Kennedy, the prayers recited in the Town of Greece reflected a patriotic and inclusive national identity that transcends specific religious expressions. For Justice Kagan, the prayers were sectarian and exclusionary. But, at the end of the day, that is mere quibbling.

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*This article consists of two distinct parts, which I have, with malice aforethought, titled “Prologue” and “Epilogue.”*

*Part I, the “Prologue,” is based on remarks I delivered on March 27, 2014 as part of a panel discussion during the Sixth Annual Donald C. Clark, Jr., ’79, Endowed Law and Religion Lecture on “The Town of Greece and its Impact on the Establishment Clause,” organized by the Rutgers Journal of Law and Religion. I join the Journal and the Rutgers Law School in thanking Don Clark for not only endowing the wonderful series of lectures and panel discussions that have comprised the annual Clark Lectures, but also pouring his own heart and soul into them.*

*I have slightly edited those original remarks, and have added footnotes, but have not tried to change their conversational tone, which was intended for a general audience. I have also not updated the original text to take into account how the Court ultimately resolved Town of Greece several months after our panel discussion.<sup>2</sup>*

*Part II of the article, the “Epilogue,” is new. It offers some extended observations about the Court’s majority and principal dissenting opinion in the case in light of the discussion in Part I.*

## I. PROLOGUE

I’m going to play two roles here tonight. First, I’ve been asked to begin with a very short overview of the legislative prayer controversy, including *Marsh v. Chambers*,<sup>3</sup> the 1983 Supreme case that upheld in a general way the practice of legislative prayer, and this year’s *Town of Greece v. Galloway* case, which promises to add or maybe subtract some wrinkles from *Marsh* and its application since 1983. Second, I’m going to suggest some views of my own that, I think, will differ from those expressed by either of our other two speakers. A connecting thread between these two roles, and my one claim to fame here, though it really has less to do with fame than with opportunity, is that I clerked

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<sup>2</sup> *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014). I should mention that I am a member of the Church-State Policy Center of the Jewish Social Policy Action Network (JSPAN), which filed an amicus brief in *Town of Greece*. See Brief for Jewish Social Policy Action Network as Amicus Curiae Supporting Respondents, *Town of Greece v. Galloway*, 134 S.Ct. 1811 (2014), available at, [http://sblog.s3.amazonaws.com/wp-content/uploads/2013/11/249571\\_Brief1.pdf](http://sblog.s3.amazonaws.com/wp-content/uploads/2013/11/249571_Brief1.pdf) [hereinafter JSPSAN Brief]. For what it is worth, the brief generally reflects my views, though not in every detail.

<sup>3</sup> *Marsh v. Chambers*, 463 U.S. 783 (1983).

for Justice Brennan the year that *Marsh v. Chambers* was handed down and worked on his dissent in *Marsh*.

A.

In the early 1960's, the Supreme Court struck down the practice of official prayer<sup>4</sup> and devotional readings<sup>5</sup> in public school classrooms. *Marsh* raised the question whether the Establishment Clause in the First Amendment also forbade the common practice of beginning sessions of the houses of Congress and state legislatures with official prayers by either appointed paid chaplains or a rotating cast of guest chaplains. The case involved a challenge to the practice of the Nebraska unicameral legislature.

The majority upheld legislative prayer on essentially historic grounds.<sup>6</sup> The first Congress, which wrote the Establishment Clause, also began its sessions with prayer.<sup>7</sup> And Congress and state legislatures had continued the practice.<sup>8</sup> The Court also held that no extra threat was posed by the Nebraska practice of relying on one paid chaplain, who had served in that position for a long time, to deliver most of the prayers.<sup>9</sup> And it wrote, a bit ambiguously, that:

The content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief. That being so, it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer.<sup>10</sup>

There were two dissenting opinions in *Marsh*. Justice Brennan wrote one for himself and Justice Thurgood Marshall.<sup>11</sup>

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<sup>4</sup> *Engel v. Vitale*, 370 U.S. 421 (1962).

<sup>5</sup> *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203 (1963).

<sup>6</sup> *Marsh*, 463 U.S. at 786-91.

<sup>7</sup> *Id.* at 787-88. *See id.* at 790 ("It can hardly be thought that in the same week Members of the First Congress voted to appoint and to pay a chaplain for each House and also voted to approve the draft of the First Amendment for submission to the states, they intended the Establishment Clause of the Amendment to forbid what they had just declared acceptable.").

<sup>8</sup> *Id.* at 786, 790, 792.

<sup>9</sup> *Id.* at 793-94.

<sup>10</sup> *Id.* at 794-95.

<sup>11</sup> *Marsh*, 463 U.S. at 795-822 (Brennan, J., dissenting).

Justice Stevens wrote a second, much shorter, dissent for himself alone.<sup>12</sup>

Since *Marsh*, lower courts have occasionally struggled with its precise implications. One question is whether and how *Marsh* applies to other legislative bodies – city councils, school boards, and so on.<sup>13</sup> Another is whether *Marsh* leaves some room for striking down practices of legislative prayer that are too “sectarian.”<sup>14</sup> *Town of Greece* is one of those cases. The Second Circuit, in an opinion by Judge Guido Calabresi, held that the town government had crossed the line by a practice of invocations that overwhelmingly featured Christian clergy, who very often delivered explicitly Christian prayers that were often phrased in

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<sup>12</sup> *Marsh*, 463 U.S. at 822-24 (Stevens, J., dissenting).

<sup>13</sup> With respect to school boards, compare, for example, *Doe v. Indian River Sch. Dist.*, 653 F.3d 256 (3d Cir. 2011) (striking down practice of prayer before school board meetings; holding that *Marsh*'s narrow historical justification did not apply to school boards, particularly given the attendance of students at meetings and the role of the board in administering the district's schools) and *Coles by Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369 (6th Cir. 1999) (holding that school board prayers should be analyzed under school prayer case law rather than *Marsh*) with *Doe v. Tangipahoa Parish Sch. Bd.*, 631 F. Supp. 2d 823 (E.D. La. 2009) (denying summary judgment in challenge to prayer practices at local school board, holding that board was a “deliberative public body” under Louisiana law, but ordering a trial to resolve whether board's specific practices had been impermissibly exploited to advance Christianity). With respect to other local government bodies, compare *Pelphrey v. Cobb County*, 547 F.3d 1263 (11th Cir. 2008) (holding that *Marsh* applied to local legislative bodies, though finding that some of the specific practices being challenged were unconstitutional) with *Pelphrey*, 547 F.3d at 1286 (Middlebrooks, J., dissenting) (urging that *Marsh* exception not apply beyond Congress and state legislatures, arguing that prayer at County Commissions “do not have the ‘unambiguous and unbroken history of more than 220 years’ of prayer central to the holding in *Marsh*.”). Cf. JSPAN Brief, *supra* note 2 (arguing that *Marsh* should be overruled or that its reach should at least be limited to Congress and state legislatures).

<sup>14</sup> See, e.g., *Atheists of Fla., Inc. v. City of Lakeland*, 713 F.3d 577 (11th Cir. 2013) (City Commission's selection procedure for inviting speakers to deliver invocations did not violate Establishment Clause even though the overwhelming majority of speakers were Christian and many included “the name of Jesus Christ and other Christian references” in their prayers); *Joyner v. Forsyth County*, 653 F.3d 341, 349 (4th Cir. 2011) (holding that legislative prayers “in a particular venue that repeatedly suggest the government has put its weight behind a particular faith . . . transgress the boundaries of the Establishment Clause.”); *Pelphrey v. Cobb County*, 547 F.3d 1263 (11th Cir. 2008) (refusing the parse the context of specific prayers, but striking down prayer practice that categorically excluded certain faiths); *Wynne v. Town of Great Falls*, 376 F.3d 292, 302 (4th Cir. 2004) (upholding District Court order enjoining Town Council in its prayers “from invoking the name of a specific deity associated with any one specific faith or belief in prayers given at Town Council meetings.”).

the first-person plural.<sup>15</sup> The opinion tried to be very careful;<sup>16</sup> Judge Calabresi specifically wrote that prayers didn't have to be bland or devoid of specific content.<sup>17</sup>

Still, the Second Circuit held that it could and should look at the town's practice as a whole, holistically.<sup>18</sup> It held that, even if the town showed no direct hostility to minority faiths:<sup>19</sup>

Where the overwhelming predominance of prayers offered are associated, often in an explicitly sectarian way, with a particular creed, and where the town takes no steps to avoid the identification, but rather conveys the impression that town officials themselves identify with the sectarian prayers and that residents in attendance are expected to participate in them, a reasonable objective observer would perceive such an affiliation.<sup>20</sup>

The Supreme Court's challenge is to decide whether this rule, or this sort of rule, makes sense.

*B.*

My own view here is, not surprisingly, taken from Justice Brennan's dissent in *Marsh*. If I had my druthers, I would probably hold that all official legislative invocations are unconstitutional. If that is unrealistic, I would support drawing a line between Congress and state legislatures on the one hand, and local bodies on the other.<sup>21</sup> I also think that a practice of selecting chaplains that explicitly rules out certain faiths could be struck

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<sup>15</sup> *Galloway v. Town of Greece*, 681 F.3d 20, 30-33 (2d Cir. 2012), *rev'd* *Town of Greece v. Galloway*, 134 S.Ct. 1811 (2014).

<sup>16</sup> *Town of Greece*, 681 F.3d at 33 (“[W]e do not aim to specify what the Establishment Clause allows, but restrict ourselves to noting the ways in which this town must be read to have conveyed a religious affiliation.”); *id.* at 33-34 (“We emphasize what we do not hold.”).

<sup>17</sup> *Id.* at 33 (“Nor do we hold that any prayers offered in this context must be blandly ‘nonsectarian.’”).

<sup>18</sup> *Id.* (“[W]e underscore that we do not rely on any single aspect of the town's prayer practice, but rather the interaction of the facts present in this case. The extent to which a given act conveys the message of affiliation, or fails to do so, will depend on the various circumstances that circumscribe it.”).

<sup>19</sup> *Id.* at 32 (“We ascribe no religious animus to the town or its leaders.”).

<sup>20</sup> *Id.* at 34.

<sup>21</sup> *See* JSPAN Brief, *supra* note 2.

down if the evidence were strong enough.<sup>22</sup> But, short of enforcing such bright-line rules, I would be very reluctant to have courts delve into the particulars of specific prayers, prayer practices, or patterns of prayer.

So what about the notion, at the heart of Judge Calabresi's opinion, that a pattern of prayer could just be too sectarian to be constitutional? Justice Stevens' dissent in *Marsh* might support that sort of test.<sup>23</sup> But not Justice Brennan's. Here is what we wrote:

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<sup>22</sup> As I argued in a blog post in December 2013:

I wouldn't rule out all constitutional limits on the particulars of legislative prayer. Since legislative prayers are, for better or worse, said in a civic context, the Constitution might at least demand that they be civil, in the sense of not disparaging other faiths. More to the point, maybe, the Establishment Clause might bar processes for selecting chaplains, guest chaplains, or the like that by their terms manifestly exclude certain faiths, or for that matter even all faiths other than the preferred one.

To be sure, the distinction between exclusion and inclusion is shaky, and applying it in particular cases even more so. But it might be the closest we can get to a fair rule while still treating prayer as serious business.

Perry Dane, *Prayer is Serious Business*, CENTER FOR LAW AND RELIGION FORUM (Dec. 2, 2013), <http://clrforum.org/2013/12/02/prayer-is-serious-business/> [hereinafter "Prayer 2013"]. Cf. *Pelphrey v. Cobb County*, 547 F.3d 1263, 1282 (11th Cir. 2008) ("The record supports the finding that Richardson [the deputy clerk of the Planning Commission] 'categorically excluded' certain faiths from the list of potential invocational speakers for meetings of the Planning Commission. The phone book used by Richardson to compile the list of potential speakers for 2003-2004 had a long and continuous line through certain categories of faiths, including 'Churches-Islamic,' 'Churches-Jehovah's Witnesses,' 'Churches-Jewish,' and 'Churches-Latter Day Saints.' The line that crossed through these religious categories was similar to the line drawn through other categories, such as 'Chiropractors' and 'Circuit Board Assembly Repairs,' and there were no invocational speakers from these faiths at Planning Commission meetings in 2003 and 2004.").

<sup>23</sup> *Marsh v. Chambers*, 463 U.S. 783, 823 (Stevens, J., dissenting) (emphasizing the long tenure and "clearly sectarian content of some of the prayers given by Nebraska's chaplain."). In a deeper sense, though, Justice Stevens suggested that legislative prayer was unconstitutional not merely by virtue of being sectarian but because it could not realistically avoid being "sectarian." See *id.* at 822-24 ("In a democratically elected legislature, the religious beliefs of the chaplain tend to reflect the faith of the majority of the lawmakers' constituents . . . . The Court declines to 'embark on a sensitive evaluation or to parse the content of a particular prayer.' Perhaps it does so because it would be unable to explain away the clearly sectarian content of some of the prayers given by Nebraska's chaplain. Or perhaps the Court is unwilling

[A]s JUSTICE STEVENS' dissent so effectively highlights, legislative prayer, unlike mottos with fixed wordings, can easily turn narrowly and obviously sectarian. I agree with the Court that the federal judiciary should not sit as a board of censors on individual prayers, but to my mind the better way of avoiding that task is by striking down all official legislative invocations.

More fundamentally, however, any practice of legislative prayer, even if it might look “nonsectarian” to nine Justices of the Supreme Court, will inevitably and continuously involve the State in one or another religious debate. Prayer is serious business – serious theological business – and it is not a mere “acknowledgment of beliefs widely held among the people of this country” for the State to immerse itself in that business.” Some religious individuals or groups find it theologically problematic to engage in joint religious exercises predominantly influenced by faiths not their own. Some might object even to the attempt to fashion a “nonsectarian” prayer. Some would find it impossible to participate in any “prayer opportunity” . . . marked by Trinitarian references. Some would find a prayer not invoking the name of Christ to represent a flawed view of the relationship between human beings and God.” Some might find any petitionary prayer to be improper. Some might find any prayer that lacked a petitionary element to be deficient. Some might be troubled by what they consider shallow public prayer, or non-spontaneous prayer, or prayer without adequate spiritual preparation or concentration. Some might, of course, have theological objections to any prayer sponsored by an organ of government. Some might object on theological grounds to the level of political neutrality generally expected of government-sponsored invocational prayer. And some might

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to acknowledge that the tenure of the chaplain must inevitably be conditioned on the acceptability of that content to the silent majority.”) (footnote and internal citation omitted).



object on theological grounds to the Court's requirement . . . that prayer, even though religious, not be proselytizing. If these problems arose in the context of a religious objection to some otherwise decidedly secular activity, then whatever remedy there is would have to be found in the Free Exercise Clause. But, in this case, we are faced with potential religious objections to an activity at the very center of religious life, and it is simply beyond the competence of government, and inconsistent with our conceptions of liberty, for the State to take upon itself the role of ecclesiastical arbiter.<sup>24</sup>

To extrapolate (and I am not sure that Justice Brennan would have agreed with me), the cure would be worse than the disease. All prayer is “serious business.” All prayer, “narrowly sectarian” or not, reflects very specific theological assumptions. And while it might be constitutionally perilous to allow legislative bodies, or individuals selected by them, to channel official prayers through one or another theological perspective, it is even more problematic (beyond the sorts of bright lines I have suggested) to have courts claim that the Constitution itself embodies a particular (if less visibly “sectarian”) view of prayer.<sup>25</sup>

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<sup>24</sup> *Marsh*, 463 U.S. at 818-824 (Brennan, J., dissenting) (footnotes and internal citations omitted).

<sup>25</sup> In the December 2013 blog post cited above, I argued that:

[T]he principle that prayer is serious business would require us to let (most of) the chips fall where they may. For the reasons Justice Brennan stated, courts should not demand that legislative prayer be “nonsectarian.” There is, *with respect to prayer*, no such thing. Bland prayers, and prayers to an unnamed deity, are — if taken seriously as religious acts — just as “sectarian” as more apparently meaty prayers. Certainly, judges should not try to monitor or censor individual prayers to strip them of religious particularity. Nor should they even try, as the Court of Appeals for the Second Circuit panel did, to decide whether a whole pattern of prayer over several years is somehow disproportionate by being, for example, too Christian.

Prayer 2013, *supra* note 22. I stand by the gist of that view, except that I would no longer go so far as to say that there is “no such thing” as “nonsectarian” prayer. Some prayers and prayer practices *can* be less “sectarian” than others in the sense of being less clearly identified with a particular religious tradition. Moreover, it is certainly within the province of both public and private sponsors of ecumenical prayer to try to fashion a “nonsectarian” approach to the occasion.

To put it more precisely, cases such as *Town of Greece* are, at least loosely speaking, instances of the classic problem of the “second best.” The “theory of the second best” was originally a tool of economic analysis,<sup>26</sup> but it also applies, at least by analogy, to legal argument and legal doctrine.<sup>27</sup> As Adrian Vermeule has put it, when “at least some of the conditions necessary to produce a given ideal or first best constitutional order fail to hold,” then even though “it would be best to achieve full satisfaction of all those conditions, it does not follow that it is best to achieve as many of the conditions as possible, taken one by one.”<sup>28</sup> Thus, in the present context, it might be true that: (1) *Contra Marsh*, official legislative prayer should be held unconstitutional, and (2) the government in general should not sponsor sectarian religious expressions. But it does not necessarily follow that, if *Marsh* is not overruled, the “second best” response should be to make sure that official legislative prayers remain inoffensively non-sectarian.<sup>29</sup>

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See Perry Dane, *Town of Greece*, CENTER FOR LAW AND RELIGION FORUM (May 18, 2014), <http://www.religiousleftlaw.com/2014/05/town-of-greece.html> [hereinafter Dane, *Town of Greece*]. But cf. Perry Dane, *Take These Words: The Abiding Lure of the Hebrew Bible In-Itself*, in 4 HEBRAIC POLITICAL STUDIES 230, 231, 254-55 (2009) (illustrating some of the complications of trying to fashion a genuinely pluralistic university baccalaureate service) [hereinafter Perry Dane, *Abiding Lure*]. But as I discuss in further detail in *infra* Part II, “nonsectarian” prayer creates its own dilemmas and all prayer, however “nonsectarian,” is theologically freighted.

<sup>26</sup> See Richard Lipsey & Kelvin Lancaster, *The General Theory of the Second Best*, in 24 REVIEW OF ECONOMIC STUDIES 11 (1956).

<sup>27</sup> See, e.g., Peter B. McCutchen, *Mistakes, Precedent, and the Rise of the Administrative State: Toward a Constitutional Theory of the Second Best*, 80 CORNELL L. REV. 1 (1994); Adrian Vermeule, *The Supreme Court 2008 Term: Foreword: System Effects and the Constitution*, 123 HARV. L. REV. 4 (2009).

<sup>28</sup> Vermeule, *supra* note 27, at 7.

<sup>29</sup> In a blog post I wrote after the Supreme Court decided *Town of Greece*, I suggested some further, more prudential and instrumental, reasons for courts (as long as *Marsh* remains in place) to avoid censoring either prayer practices or individual prayers beyond enforcing certain bright-line rules of the sort of I have discussed:

The line between “sectarian” and “non-sectarian” practices of prayer is difficult and vague. Had the Court tried to draw that line, beyond its warning that prayers should not “denigrate” or “proselytize,” that would only have invited hard identity religious partisans (more interested in power than in prayer) to press as close to the line as possible and separationists to challenge them at every turn. In this context, at least, reasonable compromises might actually be more likely if the shadow of the law recedes a bit.

## C.

So how did we get to the situation we are in? How did Judge Calabresi reach a conclusion at odds with at least the spirit of both the majority and principal dissenting opinions in *Marsh*?

One reason is that, a few years after *Marsh*, our Establishment Clause doctrine took a decidedly psychological turn.<sup>30</sup> The currently influential endorsement test,<sup>31</sup> which had not yet been put on the table when *Marsh* was debated, asks whether a reasonable observer would find that a challenged government practice endorsed religion.<sup>32</sup> The point, in Justice O'Connor's words, was to prohibit "government from making adherence to a religion relevant in any way to a person's standing in the political community."<sup>33</sup> Members of religious minorities should not feel like outsiders in their own country.

This sort of psychological turn has taken place elsewhere in the law. And it has become part of the larger culture. We have stopped talking about justice and only worry now about offense. This psychological turn, which encourages something like Judge Calabresi's analysis, is deeply misguided for at least two reasons.

First, it is not honest to the underlying values of the Establishment Clause. The Establishment Clause is, in a paradoxical but important sense not inconsistent with what I have already said here; in large part an essentially theological statement.<sup>34</sup> It reflects the conviction that too close a relationship between church and state is bad for both. In particular, official prayers trivialize the religiously serious act of prayer. In the school prayer cases, the court made clear that prayers were not saved by being nonsectarian or inoffensive or noncoercive.<sup>35</sup> They

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Dane, *Town of Greece*, *supra* note 25.

<sup>30</sup> I discuss this and related developments in a longer article now in draft. Parts of the next few paragraphs are drawn from that article.

<sup>31</sup> For purposes of these short informal comments, I do not want to delve into the complicated and arguably declining role that the "endorsement test" plays in the Supreme Court's current constellation of Establishment Clause doctrine. Suffice it to say that the test has been enormously influential, and has shaped in particular the lower courts' analysis of specific Establishment Clause questions.

<sup>32</sup> See *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 592-94 (1989); *Cnty. of Allegheny*, 492 U.S. at 620 (Blackmun, J., concurring).

<sup>33</sup> *Cnty. of Allegheny*, 492 U.S. at 625 (O'Connor, J., concurring) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring)).

<sup>34</sup> See Perry Dane, *Separation Anxiety*, 22 J. L. & Religion 545, 546, 565-70 (2007) (review essay on NOAH FELDMAN, *DIVIDED BY GOD: AMERICA'S CHURCH-STATE PROBLEM*).

<sup>35</sup> As the Court put it in *Engel*:

might indeed have gone further and observed that bland prayers, in some respects at least, were even worse than sectarian prayers.<sup>36</sup>

Second, and related, the endorsement test does not take religion as serious business.

Third, even if the psychological view made sense in principle, the Court ignores the fact that psychological responses are to a large extent culturally determined. Our church-state dispensation is specifically American. It arises out of our distinct religious and political history. And it arises out of, among other things, Supreme Court opinions.

#### D.

Yesterday, I flew back from a conference at Cambridge University, in England. Cambridge and similar institutions powerfully embody a distinctively English church-state dispensation very different from our own. Cambridge is (in an appropriately complicated way)<sup>37</sup> a public institution, now (though obviously not in the past) open and welcoming to students and faculty of all faiths. Indeed, the conference at which I spoke was focused on Jewish philosophy and modern Jewish thought.<sup>38</sup>

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Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause . . . . The Establishment Clause . . . stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its “unhallowed perversion” by a civil magistrate . . . . It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance.

Engel v. Vitale, 370 U.S. 421, 430-35 (1962).

<sup>36</sup> I have more to say on “bland” prayers at *infra* note 75.

<sup>37</sup> See EDWARD ALBERT SHILS, *THE ORDER OF LEARNING: ESSAYS ON THE CONTEMPORARY UNIVERSITY* 142 (Philip G. Altbach ed.) Cf. Perry Dane, Allan Stein, & Robert Williams, *Saving Rutgers-Camden*, 44 RUTGERS L. J. 337, 342, 345-48, 381-89, 390-98, 404-05 (2014) (discussing the complex, hybrid, identity, of Rutgers and some other American public universities).

<sup>38</sup> See *Jewish Studies as Philosophy: Beyond Historicism and Sociology?*, UNIVERSITY OF CAMBRIDGE, <http://www.modernjewishthought.group.cam.ac.uk/conferences/jewish-studies-as-philosophy> (last visited Dec. 18, 2014).

Nevertheless, Cambridge prominently displays its ancient Christian and specifically Anglican heritage, as does Oxford. Many of the older colleges – Christ’s College, Corpus Christi College, Jesus College, Magdalene College, Trinity College, and so on – bear Christian names. And most of the great, historic, college chapels are identifiably Anglican in their mission and orientation, even as other religious traditions are fully represented on campus.

Yet it is fascinating to any American observer to see how lightly this Christian identity is worn and how generally accepted it is (most of the time) by students and faculty of other faiths. There is even a touch of self-conscious humor in the juxtapositions of the modern Cambridge identity. So I was told, with some pride, that the college in the university that has in recent years had the most observant Jewish students, and made the most accommodations to them, was (of course) Jesus College.

This is, of course, only a particularly pronounced example of a much larger pattern in contemporary English life and constitutional identity.<sup>39</sup> Consider thus that among the leading defenders of the continued privileged status of the Anglican Church in England has been the former Chief Rabbi Lord Sacks. His conception of the implications of even full-blown establishment for minority faiths’ status in the polity are simply different from ours.<sup>40</sup>

Indeed, Rabbi Sacks’s argument for “antidisestablishmentarianism” uses the same insider/outsider trope as Justice O’Connor does, but to very different effect:

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<sup>39</sup> The next few paragraphs again draw on my longer article still in draft. See *Discussion*, *supra* note 30.

<sup>40</sup> See JONATHAN SACKS, *THE PERSISTENCE OF FAITH: RELIGION, MORALITY AND SOCIETY IN A SECULAR AGE* (2005); Jonathan Sacks, *Antidisestablishmentarianism - a Great Word and a Good Ideal*, THE TIMES OF LONDON, (July 20, 2002) [hereinafter Sacks, *Antidisestablishmentarianism*]; Jonathan Sacks, *Written Evidence to the House of Lords Joint Committee on the Draft House of Lords Reform Bill*, (April 23, 2012), available at <http://www.publications.parliament.uk/pa/jt201012/jtselect/jtdraftref/284/284iii85.htm> [hereinafter Sacks, *Written Evidence*]. At least one British Muslim intellectual has made similar arguments. See Tariq Modood, *Establishment, Multiculturalism, and British Citizenship*, 65 THE POLITICAL QUARTERLY 53 (1994); Tariq Modood, *Anti-Essentialism, Multiculturalism and the ‘Recognition’ of Religious Groups*, 6 J. POL. PHIL. 378 (1998) (defending “moderate” forms of European religious establishments and moderate secularism as best mediating the inherent tension between multiculturalism and secularism).

England, for all its shortcomings, is one of the most tolerant societies on Earth. One of the reasons is that the Church helps to sustain that environment.

It is like entering a crowded room, knowing no one, and then discovering to your relief that there is a host who greets you, introduces you to others, and makes you feel at home. In a multifaith England, the Church of England is that host.<sup>41</sup>

Rabbi Sacks admits that his argument would not work in the United States.<sup>42</sup> The endorsement test cannot explain why this is the case. Only a richer account of the American relationship between church and state – an account from which the psychological turn and the endorsement test have distracted us – can, at the end of the day, explain and justify American separationism and give us the tools with which to understand it in particular cases such as *Town of Greece*.

## II. EPILOGUE

So much for hoping for “a richer account of the American relationship between church and state.” As I have noted, the Supreme Court decided *Town of Greece* several months after the event at which I delivered remarks in Part I. But, as I could have predicted, none of the Justices took the path mapped out by Justice Brennan’s dissent in *Marsh*. The majority, in an opinion by Justice Kennedy, reversed the Second Circuit and upheld the prayer practice in the Town of Greece. The dissents, rather than arguing that *Marsh* be overruled, simply lamented the overly

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<sup>41</sup> Sacks, *Antidisestablishmentarianism*, *supra* note 40.

<sup>42</sup> For example, in a more recent statement on English religious establishment, he explicitly emphasized the importance of understanding the English and American situations in their respective historic and political contexts:

Each nation charts its own route to freedom, and that becomes part of its history. The United States found it in the Jeffersonian separation of Church and State. Britain found it in successive acts of emancipation and liberalization [sic], alongside an established church charged with the burden of generosity toward others.

Sacks, *Written Evidence*, *supra* note 40.

“sectarian” cast of Greece’s practice. Indeed, Justice Kagan’s principal dissent explicitly agreed with *Marsh*.<sup>43</sup>

This is not the place for a comprehensive analysis of the Court’s various opinions in *Town of Greece*.<sup>44</sup> But I do have a couple of very partial and selective observations about the majority opinion and the principal dissent directly related to the arguments in my original remarks.

#### A.

In my original remarks, I laid much of the blame for the current impoverished state of Establishment Clause jurisprudence on the “endorsement test,” and its unitary, psychologically-inflected, concern that members of religious minorities should not be made to feel like outsiders in their own country. Judge Calabresi’s court of appeals opinion had relied heavily on an explicit “endorsement” analysis. Interestingly, though, neither the majority nor the other opinions in the Supreme Court’s *Town of Greece* decision referred much, if at all to the E-word.<sup>45</sup> Whether that was because of the exceptional status accorded to legislative prayer or because the endorsement test is, at least as a formal doctrine, on its way out; I do not want to guess.

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<sup>43</sup> *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1841-42 (2014) (Kagan, J., dissenting) (“I respectfully dissent from the Court’s opinion because I think the *Town of Greece*’s prayer practices violate that norm of religious equality . . . . I do not contend that principle translates here into a bright separationist line. To the contrary, I agree with the Court’s decision in *Marsh v. Chambers* upholding the Nebraska Legislature’s tradition of beginning each session with a chaplain’s prayer. And I believe that pluralism and inclusion in a town hall can satisfy the constitutional requirement of neutrality; such a forum need not become a religion-free zone.”) (internal citation omitted).

<sup>44</sup> I do not in this short comment address at all Justice Alito’s concurrence, Justice Thomas’s separate opinion, or Justice Breyer’s dissent. See *Town of Greece*, 134 S. Ct. at 1828 (Alito, J., concurring); *Town of Greece*, 134 S. Ct. at 1835 (Thomas, J., concurring in part and concurring in the judgment); *Town of Greece*, 134 S. Ct. at 1838 (Breyer, J., dissenting). For some of my thoughts on Justice Thomas’s argument that the Establishment Clause should never have been incorporated to apply against the States, see Perry Dane, *Justice Thomas, Town of Greece, and Rewinding the Tape*, CENTER FOR LAW AND RELIGION FORUM (June 2, 2014), <http://www.religiousleftlaw.com/2014/06/thomas-town-of-greece.html>.

<sup>45</sup> Justice Kagan’s dissent does slyly cite for support Justice Scalia’s support in an earlier case for a much-diluted version of the non-endorsement principle. See *Town of Greece*, 134 S. Ct. at 1843-44 (Kagan, J., dissenting) (quoting *Lee v. Weisman*, 505 U.S. 577, 641 (1992) (Scalia, J., dissenting)).

Still, the endorsement test cast its shadow over the various opinions. Justice Kagan's dissent emphasizes the imperative to "religious equality,"<sup>46</sup> which in the abstract is surely vital to any reasonable account of the establishment clause. But, in the context of this case, she understands that norm, in O'Connor-like terms, to forbid consistently sectarian patterns of prayer that might "both exclude and divide" the citizenry on the basis of religious belief.<sup>47</sup> Indeed, the entirety of Justice Kagan's opinion, including both her analysis of the facts in *Town of Greece* and her surrounding argument are entirely consistent with the substantive and rhetorical thrust of the endorsement test.

Particularly revealing in this respect is Justice Kagan's series of hypotheticals in which she transposes official prayer to other, less familiar, contexts:

- You are a party in a case going to trial . . . . The judge bangs his gavel to call the court to order, asks a minister to come to the front of the room, and instructs the 10 or so individuals present to rise for an opening prayer. The clergyman faces those in attendance and says . . . : "Lord, God of all creation . . . . We acknowledge the saving sacrifice of Jesus Christ on the cross." [Etc.] . . . The judge then asks your lawyer to begin the trial.
- It's election day, and you head over to your local polling place to vote. As you and others wait to give your names and receive your ballots, an election official asks everyone there to join him in [the Lord's Prayer] . . . . And after he concludes, he makes the sign of the cross, and appears to wait expectantly for you and the other prospective voters to do so too.
- You are an immigrant attending a naturalization ceremony to finally become a citizen. The presiding official tells you and your fellow applicants that before administering the oath of allegiance, he would like a minister to pray for you and with you. The pastor steps to the front of

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<sup>46</sup> *Town of Greece*, 134 S. Ct. at 1841 (Kagan, J., dissenting).

<sup>47</sup> *Id.* at 1851, 1853 (Kagan, J. dissenting).



the room, asks everyone to bow their heads, and [begins]: “[F]ather, son, and Holy Spirit . . . .”<sup>48</sup>

The use of the second person here is punchy. But it also buys into the radically incomplete notion that the primary problem with official prayer, or any official governmental religious expression, is the psychological discomfort or alienation it might create on unwilling listeners or viewers.

Notice also, closer to the opinion’s conclusion, Justice Kagan’s equally forceful protest against the majority’s apparent view that even consistently sectarian official prayer is (in her words) not a “big deal”:

The content of Greece’s prayers *is* a big deal, to Christians and non-Christians alike. A person’s response to the doctrine, language, and imagery contained in those invocations reveals a core aspect of identity—who that person is and how she faces the world. And the responses of different individuals, in Greece and across this country, of course vary. Contrary to the majority’s apparent view, such sectarian prayers are not “part of our expressive idiom” or “part of our heritage and tradition,” assuming the word “our” refers to all Americans. They express beliefs that are fundamental to some, foreign to others—and because that is so they carry the ever-present potential to both exclude and divide.<sup>49</sup>

There is a good deal of genuine wisdom here, particularly in Justice Kagan’s recognition that religious particulars matter and that religion can constitute a “core aspect of identity.” Justice Kagan is right to identify “religious equality,” the political standing of religious minorities, and “religiously based divisiveness”<sup>50</sup> as important concerns of the Establishment Clause. She is even right in urging us to look to real (even if hypothetically real) people and not just reified principles to understand constitutional doctrine.

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<sup>48</sup> *Id.* at 1842-43 (Kagan, J. dissenting) (citations to record omitted).

<sup>49</sup> *Town of Greece*, 134 S. Ct. at 1853 (internal citations omitted).

<sup>50</sup> *Id.* (quoting *Van Orden v. Perry*, 545 U.S. 677, 704 (2005) (Breyer, J., concurring in the judgment)).

Nevertheless, I wonder how Justice Kagan expects us to referee between her armchair psychology, in which sectarian prayers “exclude and divide” and Justice Kennedy’s different armchair psychology, in which members of religious minorities appreciate such prayers as historically benign parts of our common “expressive idiom.”<sup>51</sup> Nor, as I will discuss in more detail shortly, does she acknowledge the theological complexities of “sectarianism” in collective, ecumenical, prayer. Moreover, she does not even begin to appreciate the degree to which the real or hypothesized psychological reactions to the challenged prayer practices are, to some extent at least, shaped by the dynamics of our specifically American cultural, religious, and legal history.

In short, while Justice Kagan tries to move beyond the specific, controversial, rhetoric of the endorsement test. Her arguments and assumptions are just variations on the endorsement theme. And precisely for that reason, her analysis –

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<sup>51</sup> Not coincidentally, the passage in Justice Kennedy’s opinion to which Justice Kagan is responding (part of a section of his opinion only joined by Chief Justice Roberts and Justice Alito) features his only riff on a central figure in the endorsement trope – the “reasonable observer.” In trying to explain why even sectarian legislative prayer is not “coercive,” Justice Kennedy argues that the:

[P]rayer opportunity in this case must be evaluated against the backdrop of historical practice. As a practice that has long endured, legislative prayer has become part of our heritage and tradition, part of our expressive idiom, similar to the Pledge of Allegiance, inaugural prayer, or the recitation of “God save the United States and this honorable Court” at the opening of this Court’s sessions. It is presumed that the reasonable observer is acquainted with this tradition and understands that its purposes are . . . not to afford government an opportunity to proselytize or force truant constituents into the pews.

*Town of Greece*, 134 S. Ct. at 1825 (Kennedy, J., plurality opinion).

As I suggest in text, there is no easy way of knowing whether Justice Kennedy or Justice Kagan is reading the reasonable observer correctly, particularly if the question is taken to be at least significantly empirical. To Justice Kennedy’s credit, though, his clever argument recognizes, if self-servingly, that the meaning of governmental religious expression are to a large extent culturally determined. *Cf. supra* text accompanying notes 35-37 (my argument along those lines). Unfortunately, though, he does not concomitantly acknowledge the pitfalls of relying on such socially-constructed psychological responses.

Moreover, even though Justice Kennedy’s account of “coercion” was insufficiently narrow to please Justices Scalia and Thomas, that he took a detour into “coercion” at all – compounded by the mocking reference to forcing “truant constituents into the pews” – only ends up confirming that, whatever the answer, little is usually gained by asking the wrong question.

as much as the majority opinion – lacks the depth, sensitivity, and sensibility necessary to do justice to the genuine problems she is trying to address.

*B.*

All this, however, is merely the doctrinal scaffolding that both surrounds and obscures the empty space inside Justice Kennedy's majority opinion and Justice Kagan's dissent in *Town of Greece*. For neither opinion acknowledges, let alone appreciates, the complicated implications of acknowledging the deep seriousness of prayer – even in the civic context – as a religious act.

1.

Consider first the Court's majority, which upheld and purported to defend the practice of prayer in the Town of Greece. The Court's opinion in *Town of Greece* unintentionally proves this point.<sup>52</sup> According to the Court, the justifiable purposes of official legislative prayer include lending "gravity to public business,"<sup>53</sup> encouraging lawmakers to "transcend petty differences,"<sup>54</sup> and expressing a "common aspiration to a just and peaceful society."<sup>55</sup> In the part of his opinion joined only by the Chief Justice and Justice Alito, Justice Kennedy adds that official public prayer acknowledges "the place religion holds in the lives of many private citizens."<sup>56</sup>

Conspicuously missing in this list, however, is the most obvious purpose of genuine prayer – to pray. The Court, at some level, recognizes that a city hall is not a church or synagogue or mosque. We can all pray for our government, but the Court is implicitly admitting that it is not the government's job to pray for itself. But if the purpose of official prayer is not (ahem) to pray, then all the lesser purposes the Court allows, including lending "gravity to public business," are merely play-acting – using and abusing religion for secular ends. That is to say, the majority is trying to have it both ways: to allow the government to engage in

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<sup>52</sup> The rest of this paragraph and the next are mostly drawn from one of my earlier blog posts. Dane, *Town of Greece*, *supra* note 25.

<sup>53</sup> *Town of Greece*, 134 S. Ct. at 1818.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Town of Greece*, 134 S. Ct. at 1825 (Kennedy, J., plurality opinion).

overt religious expression while minimizing the actual and profound religiousness of that expression. The result, as with much contemporary accommodationist establishment clause jurisprudence, is at most a pyrrhic victory.<sup>57</sup>

2.

One might have thought that Justice Kagan's dissent would have hammered on this fatal fault line in the majority opinion. But no such luck. Justice Kagan takes an entirely different tack, and falls into the same trap as the majority.

At various points in Justice Kagan's opinion, she thinks it particularly important to get straight to whom public prayers in various contexts are addressed. Thus, she emphasizes near the start of her opinion that the invocations at the Town of Greece's council meetings were "addressed toward members of the public."<sup>58</sup> Later in the opinion, she described the prayers as "addressed directly to the Town's citizenry."<sup>59</sup> A few pages later, she repeats that the prayers are "directed squarely at the citizens,"<sup>60</sup> indeed, that the chaplain's "real audience is the group he is facing—the 10 or so members of the public [in attendance], perhaps including children."<sup>61</sup> By contrast, she points out, the chaplain delivering prayers in the Nebraska legislature, which were upheld in *Marsh v. Chambers*, "spoke to, and only to, the elected representatives."<sup>62</sup>

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<sup>57</sup> Justice Brennan emphasized exactly this point, on precisely this issue, in his dissent in *Marsh v. Chambers*:

[M]embers of the clergy who offer invocations at legislative sessions are not museum pieces put on display once a day for the edification of the legislature. Rather, they are engaged by the legislature to lead it as a body – in an act of religious worship. If upholding the practice requires denial of this fact, I suspect that many supporters of legislative prayer would feel that they had been handed a pyrrhic victory.

*Marsh v. Chambers*, 463 U.S. 783, 811 (1983) (Brennan, J., dissenting) (footnotes omitted).

<sup>58</sup> *Town of Greece*, 134 S. Ct. at 1842. See also *Marsh*, 463 U.S. at 811 (stressing that the town meetings "involve participation by ordinary citizens, and the invocations given—*directly to those citizens*—were predominantly sectarian in character.") (emphasis added).

<sup>59</sup> *Town of Greece*, 134 S. Ct. at 1845 (Kagan, J., dissenting).

<sup>60</sup> *Id.* at 1848.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 1847 (emphasis added).

That is to say, “the prayers in those two settings” – the state legislature and the town council – “have different audiences.”<sup>63</sup>

The problem here is obvious. Justice Kennedy’s majority opinion embarrassingly fails to acknowledge that one purpose of official public prayer might be (ahem) to pray. And Justice Kagan, similarly, neglects to mention that such official public prayers might be *directed*, among other *audiences* to (ahem) God. She does not even fully acknowledge that such prayers are spoken, not only *to* the people in the room, whether legislators or citizens, but on behalf of or for the sake of the people in the room.<sup>64</sup> She never takes on board the vital point at the heart of Justice Brennan’s dissent in *Marsh*, that “[p]rayer means to take hold of a word, the end, so to speak, of a line that leads to God.”<sup>65</sup>

To be fair, Justice Kagan never explicitly denies that prayers are directed at God. Her goal in these passages is to highlight the differences between prayer in Congress and state legislatures, where token members of the general public are “spectators only, watching from a highup visitors’ gallery,”<sup>66</sup> and prayer in local government bodies, whose meetings “revolve around ordinary members of the community”<sup>67</sup> who “actively participate in the Town’s governance.”<sup>68</sup> That is actually an important distinction. Indeed, as I noted in Part I, some lower court judges had refused to extend the holding in *Marsh* at all beyond Congress and state legislatures.<sup>69</sup> And some of us believed that drawing that sort of bright line could finesse the question of legislative prayer while doing the least possible damage to the principle of church-state separation.<sup>70</sup>

But none of that justifies Justice Kagan’s repeated instinct to talk about prayer reductively as nothing more than speech (albeit fraught speech) “directed” to an “audience” of “citizens.”

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<sup>63</sup> *Id.*

<sup>64</sup> Justice Kagan’s dissent does argue that, in the Town of Greece’s council’s prayer practice, “the chaplain leads, as the first part of a town meeting, a highly intimate (albeit relatively brief) prayer service, with the public serving as his congregation.” *Town of Greece*, 134 S. Ct. at 1848 (Kagan, J. dissenting). Her point here, however, was only to criticize the practice for conscripting the “audience” into a religious activity to which many of its members might object.

<sup>65</sup> *Marsh v. Chambers*, 463 U.S. 783, 811 (1983) (Brennan, J., dissenting) (quoting ABRAHAM HESCHEL, *MAN’S QUEST FOR GOD* 30 (1954)).

<sup>66</sup> *Town of Greece*, 134 S. Ct. at 1847 (Kagan, J., dissenting).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *See Doe v. Indian River Sch. Dist.*, 653 F.3d 256 (3d Cir. 2011); *see also supra* text accompanying note 13.

<sup>70</sup> *See* JSPAN Brief, *supra* note 2; *see also supra* text accompanying note 2.

More to the point, that way of imagining the meaning and discursive dynamics of the act of prayer is precisely what leads Justice Kagan into her armchair assertions about how an “audience” of members of religious minorities would react to this or that prayer “directed” at them. And that, in turn, steers Justice Kagan to what might be the most egregious misstep in her opinion.

In complaining about the overly “sectarian” character of the prayer practice in the Town of Greece council, and in emphasizing how easy it would have been for the council to have avoided constitutional difficulty, Justice Kagan asserts that “If the Town Board had let its chaplains know that they should speak in nonsectarian terms, common to diverse religious groups, then no one would have valid grounds for complaint.”<sup>71</sup> Really? If official prayer were simply a government-sponsored expression of views “directed” to an “audience” of “citizens,” then this claim might have a bit of merit. But as an analysis of the constitutional dynamics of *prayer*, it is spectacularly wrong. It ignores, of course, the message of Justice Brennan’s dissent in *Marsh*, which I discussed in more detail in my comments in Part I.<sup>72</sup> But it also ignores the Court’s own admonition in its graduation prayer case, *Lee v. Weisman*, that the “suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds strikes us as a contradiction that cannot be accepted.”<sup>73</sup> And most tellingly, it ignores the history and lessons of the first great school prayer decision, *Engel v. Vitale*.<sup>74</sup>

*Engel* involved a challenge to the official Regents’ Prayer recited in New York State classrooms: “Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country.”<sup>75</sup> This prayer was certainly “nonsectarian,” at least within a broad monotheistic framework. It spoke in a language “common to diverse religious groups.” It was actually, as several observers have put it, “bland.”<sup>76</sup> More cuttingly, the Regents’ Prayer has

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<sup>71</sup> *Town of Greece*, 134 S. Ct. at 1851 (Kagan, J., dissenting).

<sup>72</sup> *See Town of Greece*, 134 S. Ct. at 818-24 (Brennan, J. dissenting); *see also supra* text accompanying note 25.

<sup>73</sup> *Lee v. Weisman*, 505 U.S. 577, 590 (1992).

<sup>74</sup> *Engel v. Vitale*, 370 U.S. 421 (1962).

<sup>75</sup> *Id.* at 422.

<sup>76</sup> *See, e.g., Sch. Dist. of Abington v. Schempp*, 374 U.S. 203, 267 (1963) (Brennan, J., concurring); BRUCE J. DIERENFIELD, *THE BATTLE OVER SCHOOL PRAYER: HOW ENGEL V. VITALE CHANGED AMERICA* 130 (2007).

often been nicknamed the “to whom it may concern” prayer,<sup>77</sup> or as one contemporaneous commentator put it, “a pathetically vacuous assertion of piety.”<sup>78</sup> But, as I emphasized in Part I, none of that dissuaded the Court from holding the official schoolroom of the prayer to be unconstitutional.<sup>79</sup>

More than that: The New York Regents’ Prayer was challenged in the first place, not despite its vacuity but largely because of it. The lead plaintiff, parent Steven Engel, was a “devout Reform Jew” who

objected to the regents’ prayer because it undercuts what was sacred. Prayer, in Engel’s mind, was intended to be meaningful: “It’s really man’s communication with what he perceives as his god—his innermost thoughts. It’s sacred, and when you rattle these things off and they have no meaning to it at all, . . . you vitiate the value of religion.”<sup>80</sup>

And even before the legal challenge, some Protestant religious commentators argued that recitation of the Regents’ Prayer was “likely to deteriorate quickly into an empty formality with little, if any spiritual significance. Prescribed forms of this sort . . . can actually work against the inculcation of vital religion.”<sup>81</sup> To the

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<sup>77</sup> See, e.g., *State Bd. of Educ. v. Bd. of Educ. of Netcong*, 262 A.2d 21, 30 (N.J. Super. Ct. Ch. Div. 1970); SYDNEY HOOK, *RELIGION IN A FREE SOCIETY* 80 (1967); PAUL FREUND, *THE LEGAL ISSUE IN RELIGION AND THE PUBLIC SCHOOLS* 13 (1965); Keith E. Durso, *Voluntary School Prayer Debate: A Separatist Perspective*, 36 J. CHURCH & ST. 79, 80 (1994); see also DIERENFIELD, *supra* note 76, at 130.

<sup>78</sup> Louis H. Pollak, *The Supreme Court: 1962 Term: Foreword: Public Prayers in Public Schools*, 77 HARV. L. REV. 62, 63 (1963) (arguing that had the Court denied certiorari in *Engel*, its disposition to do so “might have been strengthened by a feeling that New York’s attempt to write a prayer had produced such a pathetically vacuous assertion of piety as hardly to rise to the dignity of a religious exercise.”).

<sup>79</sup> See *Engel*, 370 U.S. at 430-35.

<sup>80</sup> DIERENFIELD, *supra* note 76, at 95. Engel went on to note “that the regents’ prayer was optional, but ‘if your school board chose to use the prayer, your school had to use this one-size-fits-all prayer that doesn’t fit the religious faiths of all people.’” *Id.* That is to say, the prayer, like many that purport to be phrased “in nonsectarian terms, common to diverse religious groups,” *Town of Greece*, 134 S.Ct. at 1851, was *both* vacuous and parochial. Note, though, that Engel did not phrase even the second half of his complaint in terms of psychological or political alienation, but rather in terms of the unsuitability of the prayer itself to many religious traditions and sensibilities.

<sup>81</sup> *Prayer in Public Schools Opposed*, 69 CHRISTIAN CENTURY 35 (Jan. 9, 1952).

same effect, but with the directness of youth, Ellory Schempp, a student who figured in the second great school prayer case, said that reciting official prayers was “like peeing—you just do it, it has no meaning.”<sup>82</sup> In fact, one historian has recently argued that *Engel* was very much the product of a newly acute dilemma in American public religious life: “Mid-twentieth century America had too many religions to devise a prayer that would suit everyone—and the harder one tried, the closer one came to meaningless rote that was more trouble than it was worth.”<sup>83</sup>

### 3.

Put to one side, then, Justice Kagan’s casual assumption that if the Town of Greece council had “let its chaplains know that they should speak in nonsectarian terms, common to diverse religious groups, then no one would have valid grounds for complaint.” In fact, many good citizens might have excellent grounds for complaint.

So imagine, in the light of all this, a local government body that is trying, with both good faith and religious sensitivity, to devise a template or guidelines for its prayer practice. Such a hypothetical local body might well appreciate the spiritual and communal value of genuinely all-embracing, ecumenical, “non-sectarian” prayers. But it would also recognize that getting that sort of prayer practice “right” is a profound challenge.<sup>84</sup> One risk is the sort of vacuity I have just discussed, when prayer becomes just like peeing, and has no meaning. But there are other pitfalls too, even in more meaty interreligious efforts. The ideology of “non-sectarianism” is not neutral; it embodies specific religious commitments.<sup>85</sup> Quite apart from that standard meta-argument,

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<sup>82</sup> DIERENFIELD, *supra* note 76, at 164.

<sup>83</sup> Corinna Lain, *God, Civic Virtue, and the American Way: Reconstructing Engel* 67 STANFORD L. REV. at 15 (2015 forthcoming), available at <http://ssrn.com/abstract=2423771>. I am also indebted to Professor Lain’s article for alerting me to some of the sources cited in in my discussion of *Engel* here.

<sup>84</sup> Devising workable and acceptable ecumenical or interreligious prayer services is a difficult task even in purely private, non-governmental, contexts. See, e.g., 26 LITURGY, Issue 3 (2011), available at <http://www.tandfonline.com/toc/ultg20/26/3#.VJmzzl4B6A>; Peter Drilling, *Ecumenical and Interreligious Relations: What Can They Offer Each Other?*, 14 NEW THEOLOGY REVIEW 53 (2001); Paul Meyendorff, *Ecumenical Prayer: An Orthodox Perspective*, 54 THE ECUMENICAL REVIEW 28 (2009). See also Perry Dane, *Abiding Lure*, *supra* note 25 (discussing complex recent history of the Yale Baccalaureate service).

<sup>85</sup> At one time, at least, proponents of “non-sectarian” religion happily embraced their specific religious commitments:



though, putatively “non-sectarian” prayer practices and other religious expressions are often steeped in the spiritual grammar, standard practices, textual nuances, and rhetorical tropes of specific, unquestionably “sectarian,” faith traditions.<sup>86</sup> This sort of passive-aggressive sectarianism is much less visible than explicit prayers “in the name of Jesus” or the like. But for that very reason, it can challenge or threaten the integrity of those minority faiths in more insidious, and arguably more dangerous, ways.<sup>87</sup>

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We claim that we have freed ourselves from many superstitions and errors still taught by the Church, and planted ourselves on higher ground. We claim that we have come nearer to the truth as it is in Christ Jesus; that we have truer and nobler conceptions of God, and of Christ, and of worship, and of sin and salvation . . . . We hold that love to God and love to man is the sum of all religion, the only essential thing in Christianity, and the only rightful basis of Christian fellowship and fraternity . . . . We hold that men . . . should turn away from the religion of creed and ritual to the religion of love and service; . . . that instead of trusting in the merits of a Son of God who lived two thousand years ago, they should become sons of God themselves, and trust in their own merits for salvation.

R.C. Cave, *The Non-Sectarian Position and Outlook*, 3 THE NON-SECTARIAN 65, 67-69 (1893). I am being unfair here, of course. What Justice Kagan and others mean today by “non-sectarian” is a much thinner and more all-inclusive common creed. Yet the genealogical connection is clear.

<sup>86</sup> That was one of the issues in *Schempp*, the next great school prayer case decided soon after *Engel*. In *Schempp*, the Court struck down, among other practices, the devotional recitation of Bible verses as part of a high school’s morning opening exercises. *Sch. Dist. of Abington v. Schempp*, 374 U.S. 203, 224-25 (1963). For Jewish students, the New Testament readings created obvious problems. But the reading from what Christians call the Old Testament, which more or less comprises the Jewish scriptures, also contradicted Jewish tradition, if in more subtle and corrosive ways. Jews chant portions of the Bible in the original Hebrew as part of the synagogue service. Apart from that though, as one expert witness testified to the trial court, Jewish tradition “attaches no special significance to the reading of the Bible *per se*,” *id.* at 209, but rather habitually reads scripture for the purpose of study and discussion, and in tandem with a long and diverse tradition of commentary and exposition.

During more recent controversies over displays of the Ten Commandments, legal and religious commentators have frequently pointed out that Jews, Catholics, various denominations of Protestants, and others group number the relevant verses in Exodus and Deuteronomy in different ways, creating several quite distinct versions of the “Ten Commandments,” motivated in part by different theological assumptions and polemical agendas and conveying subtly but importantly different moral and religious messages.

<sup>87</sup> Similarly, in writing about the intractable “Christmas dilemma,” I have argued that:

The mischief here is not overt religious triumphalism, but the corrosive assumption that minority religious traditions can be painlessly assimilated into the false consensus of a putatively nonsectarian common tradition.<sup>88</sup> And even when determined efforts manage to overcome those sorts of structural biases, the result can be outright syncretism, which creates its own set of problems and challenges.

Again, I do not want to deny the possibility or the appeal of nonsectarian prayer practices, difficult and complex as they are. At their best, appeals to overarching religious vocabularies can ring deeply true. They can also be, if they are allowed to be, genuinely bracing, disruptive, and even prophetic.<sup>89</sup>

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[T]he non-propositional elements of Christmas culture are, in certain respects, more threatening to the non-Christian minority than the propositional ones. Some serious Jews, for example, are more comfortable with explicitly religious Christmas decorations whose beauty they can appreciate as outsiders than with the siren-song of Christmas glitz. And for some marginal Jews, the Christmas tree – and the rationalization that it is merely secular – is the gateway, so to speak, to more thoroughgoing assimilation.

Perry Dane, *Christmas*, SSRN, (Dec. 8, 2014) <http://ssrn.com/abstract=947613>.

<sup>88</sup> I am saying nothing new here. Commentators have long pointed out how American “non-sectarianism” tends to hide its specific commitments behind the myth of the “Judeo-Christian” tradition. See Perry Dane, *Separation Anxiety*, 22 J.L. & RELIGION 545, 548-49 n.8 (2007) (review essay on NOAH FELDMAN, *DIVIDED BY GOD: AMERICA’S CHURCH-STATE PROBLEM AND WHAT WE SHOULD DO ABOUT IT*) (citing sources). Even before Jews and others entered the conversation, American Catholics reasonably resisted the powerful tendency in public schools and elsewhere to treat nondenominational Protestantism as the equivalent of nonsectarian Christianity.

<sup>89</sup> On October 3, 2013, in the midst of the last government shutdown due to a partisan impasse, the Chaplain of the United States Senate offered this prayer:

Let us pray. Have mercy upon us, O God, and save us from the madness. We acknowledge our transgressions, our shortcomings, our smugness, our selfishness, and our pride. Create in us clean hearts, O God, and renew a right spirit within us. Deliver us from the hypocrisy of attempting to sound reasonable while being unreasonable. Remove the burdens of those who are the collateral damage of this government shutdown, transforming negatives into positives as You work for the good of those who love You. We pray in Your merciful Name. Amen.

159 CONG. REC. S7143-01 (daily ed. Oct. 3, 2013) (statement of Dr Barry C. Black).

Nevertheless, it might well be reasonable for our hypothetical local government to decide, either because of the difficulty of threading the nonsectarian needle or even as a matter of first principles, to go in a different direction. Such a hypothetical local government, still acting in good faith, might instead adopt a presumptive civic theology, broadly drawn in its own way from a broad range of more specific religious traditions that went something like this.<sup>90</sup>

God can be addressed by persons of all faiths, or little or no faith. God hears the prayers of Jews,<sup>91</sup> Christians, Muslims, Buddhists, and atheists.<sup>92</sup> More to the point, God hears not only the prayers of Jews but also Jewish prayers, not only the prayers of Christians but also Christian prayers, and so on. Indeed, there is a special and worthy power and spiritual beauty in addressing God through the particular channels of prayer of distinct religious traditions. And while some adherents of other religious traditions might feel alienated by such “sectarian” prayer, others will appreciate and welcome that spiritual beauty and power, even if the prayers uttered are not their own, and even if they cannot join in them.

That still leaves the important religious and political challenge of honoring the diversity of religious traditions within the polity. But that too is a complicated task that cannot be reduced to a mechanical formula. Prayers spoken from one tradition can bind together the entire community and speak on its

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<sup>90</sup> I should emphasize again that I am speaking hypothetically here. I do not necessarily subscribe to their every detail.

<sup>91</sup> This is an intentional riff on Rev. Bailey Smith’s (in)famous declaration that “God does not hear the prayer of a Jew.” MARK SILK & ANDREW WALSH, *ONE NATION, DIVISIBLE: HOW REGIONAL RELIGIOUS DIFFERENCES SHAPE AMERICAN POLITICS* 214 (2008).

<sup>92</sup> See ANDREW M. GREELEY, *RELIGION AS POETRY* 91 (1997):

14 percent of the atheists in Britain believe in miracles, 8 percent pray every week . . . . Almost two out of five of the British atheists support prayer in the schools . . . . Forty percent of the Irish atheists pray every week as do 20 percent of the Americans, 18 percent of the Northern Irish, 15 percent of the Italians, and 12 percent of the West Germans . . . .

*Cf.* Steve Doyle, *Atheist-led City Council Invocation in Huntsville This Week Could be a First For Alabama*, AL.COM (Sept. 23, 2014), <http://tinyurl.com/ltrj7s3> (including videos of atheist, humanist, and free-thinking invocations or prayers before the city council of Greece, New York, the regional council of Colorado Springs, Colorado, and the Arizona House of Representatives).

behalf. And prayers spoken from a rotating cast of characters can devolve into mere one-upmanship. God is in the details.

The Town of Greece council, in the years it engaged in the practices described in the recent litigation, might not have come anywhere close in either its deliberations or its behavior to this hypothetical town government acting in perfect good faith. But the point of this exercise has only been to illustrate how complications, dangers, and hard choices multiply once we take prayer seriously. And that in turn might counsel that, if our constitutional doctrine permits public civic prayer, it also needs to appreciate its conundrums and perhaps tread lightly. In fact, there is an argument that such theological good faith is best facilitated, in this limited context at least, by courts allowing legislators to exercise agency themselves rather than merely suffer judicial rebuke.<sup>93</sup>

Justice Kagan might respond, of course, that neither town governments nor courts should be engaging in the sort of theological discourse that I have been suggesting, whether in good faith or not. I agree. I absolutely agree. That is one reason that *Marsh v. Chambers* should be overruled, and legislative prayers should be taken off the table.<sup>94</sup> My hypothetical city council should have been told to direct its good faith energies elsewhere.

But it is Justice Kagan, after all, who pledged her allegiance to the majority opinion in *Marsh v. Chambers*<sup>95</sup> and rejected the notion that an official legislative proceeding needs to be “a religion-free zone.”<sup>96</sup> And all I am arguing here is that if religion is to remain in the room – specifically, if official public prayer is to remain constitutional – then attention must be paid to what prayer is.

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<sup>93</sup> Interestingly, the Town of Greece itself heard its first atheist invocation after it prevailed in the Supreme Court, see Tina Susman, *Supreme Court Ruling on Prayer at Board Meetings Still Reverberates*, L.A. TIMES (July 16, 2014), <http://www.latimes.com/nation/la-na-greece-prayer-20140717-story.html>; *Dan Courtney's Secular Invocation Before the Town Board of Greece, NY*, YOUTUBE (July 15, 2014) <https://www.youtube.com/watch?v=m01rD656kGM>, though whether that practice will continue has since been put in doubt.

<sup>94</sup> For a resonant, but theological rather than legal, argument in a related context, see Grace Y. Kao, *Mission Impossible: “Nonsectarian” Prayer in the Military Chaplaincy*, 11 POLITICAL THEOLOGY 577 (2010).

<sup>95</sup> *Town of Greece*, 134 S. Ct. at 1841-42.

<sup>96</sup> *Id.* at 1842.

## C.

Justice Kennedy's majority opinion and Justice Kagan's dissent are much more alike than either author seems to have intended. Neither opinion really treats prayer as serious business – serious theological business. Both, in fact, reduce civic prayer to essentially political declarations of identity. For Justice Kennedy, the prayers recited in the Town of Greece reflected a patriotic and inclusive national identity that transcends specific religious expressions. For Justice Kagan, the prayers were sectarian and exclusionary. But that is mere quibbling over semiotics (at best) and psychology. And the only sensible response to both opinions is . . . ahem.