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Constitutional Myopia: The Supreme Court's Blindness to Religious Liberty and Religious Equality Values in *Town of Greece v. Galloway*

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CONSTITUTIONAL MYOPIA: THE SUPREME COURT'S BLINDNESS TO RELIGIOUS LIBERTY AND RELIGIOUS EQUALITY VALUES IN *TOWN OF GREECE V. GALLOWAY*

*Alan Brownstein**

It is difficult to analyze a Supreme Court decision that is as fundamentally misguided and unpersuasive as last term's decision in Town of Greece v. Galloway, the case upholding state-sponsored prayers before Town Board Meetings. In attempting to do so in this Article, I critically evaluate the Court's repeated failures to adequately address the serious religious equality and religious liberty issues presented in this case. With regard to religious equality concerns, for example, the Court all but completely ignores the Town's discrimination in favor of established organized churches and against minorities with too few adherents to organize a congregation in the Town, nonaffiliated spiritual residents of the community, and nonreligious residents. Even worse, the Court suggests that allowing low level functionaries to develop informal and imprecise criteria to determine who should be invited to offer prayers at board meetings without adopting a policy or providing any guidance on how these decisions should be reached somehow immunizes the Town from serious constitutional scrutiny. Instead, I argue that this lack of guidelines and policy itself should be understood to violate the First Amendment because it so obviously increases the risk of biased and discriminatory conduct.

The Court's discussion of plaintiffs' religious liberty concerns is even more untenable. Plaintiffs argued that if a government official or deliberative body has the discretionary authority to make decisions that will seriously impact the needs and interests of individuals or small groups of citizens, it is intrinsically coercive for those officials to ask these citizens to engage in a religious exercise such as a prayer before they submit their arguments or petitions to government decision-makers. In order to reject these claims, Justice Kennedy describes an

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understanding of social reality that is difficult to believe and impossible to share. Perhaps most egregiously, Kennedy's analysis treats prayer as if it is some kind of abstract ceremonial activity instead of what it is for most Americans—a personal, meaningful communication between the individual and G-D.

The Article concludes with a discussion of the possible implications of this decision for the constitutional protection of religious liberty and equality in other contexts and circumstances.

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I. INTRODUCTION

The Town of Greece is a modest, residential suburb bordering the City of Rochester, in upstate New York, with a population of roughly 94,000 residents.¹ An elected Board governs the Town.² Pursuant to its official duties, the Town Board holds monthly meetings where its members, and other Town officials, sit on a dais in front of an audience of residents.³ Attendance is modest. Typically no more than ten residents are present during Board meetings.⁴

The Town Board engages in various ceremonial, legislative and administrative (quasi adjudicatory) functions at these meetings.⁵ These monthly public sessions are designed to be participatory and residents are given numerous opportunities to address the Board and to try to influence its' decisions.⁶ In many instances, residents at meetings directly petition their government during public hearings.⁷

Traditionally, the Board's meetings opened with a moment of silence. In 1999, however, the Board changed its practice and began to open its meetings with a prayer offered by a volunteer guest "chaplain" invited to the meeting for that purpose.⁸ The process by which the Town invited individuals to offer prayers at meetings was informal and imprecise.⁹ No actual invitation policy was ever adopted.¹⁰

The Town is predominantly Christian, but not all of its residents share the same faith.¹¹ To schedule a chaplain at an upcoming Board meeting, town employees directly invited clergy from religious congregations listed in a local newspaper and a Community Guide published by the local Chamber of Commerce.¹² Eventually, employees compiled a list of clergy who had accepted the invitations

1. *Galloway v. Town of Greece*, 681 F.3d 20, 22 (2d. Cir. 2012), *rev'd*, 134 S. Ct. 1811 (2014).

2. *Id.*

3. Brief for Respondents at 2, *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014) (No. 12-696).

4. *Id.*; *Town of Greece*, 134 S. Ct. at 1846 (Kagan, J., dissenting).

5. *See id.*

6. *See id.* at 1847.

7. *See id.*

8. *Galloway*, 681 F.3d at 23.

9. *Town of Greece*, 134 S. Ct. at 1831 (Alito, J., concurring).

10. *Galloway*, 681 F.3d at 23.

11. *See Town of Greece*, 134 S. Ct. at 1839 (Breyer, J., dissenting).

12. *Galloway*, 681 F.3d at 23–24.

to offer prayers in the past and other available prayer-givers.¹³ Although a Buddhist Temple was located in the Town, and several Jewish synagogues were located nearby but outside the Town's border, the list contained only Christian-affiliated organizations within the Town's boundaries.¹⁴

From the commencement of the Town's prayer practice until plaintiffs' counsel challenged this activity, Christian clergy delivered every prayer offered at a Town Board meeting.¹⁵ Although the Town asserted that any resident could request to give the invocation, no such policy was ever written down, much less formally adopted. The Town took no steps whatsoever to publicize this opportunity to its residents.¹⁶

In response to prodding by plaintiffs' counsel, the Town invited four non-Christian individuals to offer prayers at meetings in 2008. Two prayers were delivered by a Jewish layman who happened to be a Board member's acquaintance, one was offered by a Wiccan Priestess who asked to be allowed to give the prayer, and the fourth was presented by the chairman of the local Baha'i Temple, but only after plaintiffs filed suit.¹⁷ These were the only non-Christians to offer the state-sponsored prayer at some 130 Town Board meetings between 1999 and 2010.¹⁸

During this period, approximately two-thirds of the prayers offered made some reference to "'Jesus,' 'Jesus Christ,' 'Your Son,' or the 'Holy Spirit.'"¹⁹ Many prayers included more extensive Christian references and themes.²⁰ Plaintiffs cited one prayer that stated,

We look with anticipation to the celebration of Holy Week and Easter. It is in the solemn events of next week that we find the very heart and center of our Christian faith. We acknowledge the saving sacrifice of Jesus Christ on the cross. We draw strength, vitality, and confidence from his resurrection at Easter. Jesus Christ, who took away the sins

13. *Id.*

14. *Id.* at 24.

15. *Id.* at 23.

16. *Id.*

17. *Id.*; Brief for Respondents, *supra* note 3, at 13–15.

18. *See Galloway*, 681 F.3d at 23.

19. *Id.* at 24; Brief for Respondents, *supra* note 3, at 9.

20. *See Galloway*, 681 F.3d at 24–25; Brief for Respondents, *supra* note 3, at 8–12.

of the world, destroyed our death, through his dying and in his rising, he has restored our life. Blessed are you, who has raised up the Lord Jesus, you will raise us, in our turn, and put us by His side.²¹

Another prayer “disparaged those who question[ed] the Town’s prayer practice, or who are not ‘Godfearing.’”²² Yet another prayer disparagingly characterized those who challenged the Town’s prayer practice as an “ignorant” “minority.”²³

In offering the prayer, the invited chaplain stood in front of the Board at a podium bearing the Town seal and faced the citizens in attendance.²⁴ Some chaplains asked the citizens to stand and “bow [their] heads out of respect to God.”²⁵ Board members, too, made such requests and routinely stood, bowed their heads, and made the sign of the cross.²⁶ The chaplains typically offered their prayers on behalf of the audience and the community, not on their own personal behalf.²⁷ No town official or Board member reviewed the prayers or offered chaplains any guidance as to their content.²⁸

A. The Second Circuit Opinion

Plaintiffs Susan Galloway and Linda Stephens, a Jew and an Atheist, challenged the Town’s practice, alleging that it violated the Establishment Clause by having “the effect, even if not the purpose, of establishing religion.”²⁹ The Second Circuit Court of Appeals ruled in plaintiffs’ favor. Judge Calabresi, writing for a unanimous panel, distinguished the Town’s prayer practice from the prayers offered before state legislatures, which the Supreme Court had upheld in *Marsh v. Chambers*.³⁰ The prayers in *Marsh* were non-sectarian,³¹ and the state legislature’s prayer practice, taken as a whole, did not have “the effect of affiliating the government with

21. Brief for Respondents, *supra* note 3, at 9–10.

22. *Id.* at 11.

23. *Id.*

24. *Id.* at 8–9.

25. *Id.* at 11.

26. *Id.*

27. *See* Galloway v. Town of Greece, 681 F.3d 20, 24, 32 (2012), *rev’d*, 134 S. Ct. 1811 (2014).

28. *See id.* at 23.

29. *Id.* at 26.

30. 463 U.S. 783 (1983).

31. *See* Galloway, 681 F.3d at 27 (quoting *Marsh*, 463 U.S. at 794–95).

any one specific faith or belief.”³² The prayer practices of the Town of Greece were decidedly different.

Judge Calabresi did not identify any specific aspect of the Town’s practice that violated the Establishment Clause in and of itself.³³ Instead, he evaluated multiple factors that, taken together, demonstrated that the Town had impermissibly aligned itself with the Christian faith.³⁴ The Town’s actions as well as its inactions contributed to the court’s conclusion.³⁵

The court found that “the Town’s process for selecting prayer-givers virtually ensured a Christian viewpoint” would be expressed.³⁶ The Town ignored both congregations outside its borders (even if they were attended by town residents) and nonaffiliated residents that did not choose to join an organized religion.³⁷ Further, it made no attempt to inform the community that it would allow residents from any faith or no faith who requested the opportunity to deliver an invocation.³⁸

The delivery of the prayers was also problematic. Guest chaplains “appeared to speak on behalf of the town and its residents, rather than only on behalf of themselves” by using terms like “we” or “our” rather than using singular language such as “I” pray.³⁹ It was also common for prayer-givers to encourage residents to participate in the prayer through physical movements such as standing or bowing one’s head.⁴⁰ While permitting these practices, the Board did nothing to dispel the almost unavoidable impression that the Town endorsed Christian beliefs.⁴¹ In sum although the court “ascribe[d] no religious animus” to the Board or other Town officials, the court concluded that the totality of the circumstances demonstrated the Town’s affiliation with one religion, Christianity.⁴²

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

33. *See id.* at 30.

34. *See id.* at 22, 30.

35. *See id.* at 30.

36. *Id.*

37. *See id.* at 31.

38. *See id.*

39. *Id.* at 32.

40. *See id.*

41. *See id.*

42. *Id.* at 32. Plaintiffs abandoned their claim that the Town intentionally discriminated against non-Christians in selecting guest chaplains. *See id.* at 26.

II. THE SUPREME COURT'S OPINIONS⁴³

A. Justice Kennedy's Opinion

Justice Kennedy wrote the majority opinion for the Court, except for the section responding to plaintiffs' coercion and religious liberty claims. As to those issues, Justice Thomas wrote a separate opinion with which Justice Scalia joined. Justice Alito added a concurring opinion joined by Justice Scalia. Justice Kagan wrote a dissenting opinion joined by Justices Breyer, Ginsburg, and Sotomayor, and Justice Breyer wrote a separate dissenting opinion.

Justice Kennedy's opinion collapsed the numerous problems with the Town's prayer practices identified by plaintiffs and the Second Circuit into two questions: (1) whether the Establishment Clause requires that state-sponsored prayers offered at the beginning of town board meetings must be nonsectarian in their content;⁴⁴ and (2) whether the prayer practices adopted by the Town of Greece impermissibly coerced residents into participating in a religious exercise.⁴⁵ The Court majority emphatically answered "No" to both questions.

With regard to the first question, Justice Kennedy's analysis is grounded in history and tradition. Kennedy argues that the offering of sectarian prayers before Congress and state legislative sessions was accepted by the Framers and the American people at the time of the Constitution's adoption and has "withstood the scrutiny of time and political change."⁴⁶ The Court's opinion in *Marsh* upheld the constitutionality of such prayers.⁴⁷ Any attempt to interpret *Marsh* to permit only generic or ecumenical prayers was mistaken.⁴⁸ Courts and government officials lack the ability to distinguish impermissibly sectarian from permissibly generic prayers.⁴⁹ All prayers are sectarian to some extent in that they may be challenged as conflicting

43. *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014).

44. *See id.* at 1820–23.

45. *See id.* at 1824–28.

46. *Id.* at 1819 (citing *Cnty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 670 (1989)). Justice Kennedy did acknowledge, however, that there was no information in the record indicating how prevalent it was to begin local government meetings with prayers either historically or in current times. *See id.*

47. *See id.* at 1818–20.

48. *See id.* at 1820–22.

49. *See id.* at 1822.

with some person's beliefs.⁵⁰ Further, government lacks the authority to restrict clergy to offering only non-sectarian state-sponsored prayers.⁵¹ Once an individual is invited to offer a prayer at a state function, the government is prohibited from requiring that the content of the prayer must be generic or ecumenical.⁵²

Justice Kennedy did concede that the historical tradition of legislative prayer upheld in *Marsh* had some substantive limits. The purpose of the legislative prayer was ceremonial—to solemnize the legislative deliberations and inspire legislators to work together for the common good.⁵³ Prayers that disparaged non-adherents or attempted to proselytize or preach conversion exceeded the permissible scope of these invocations.⁵⁴ Even where individual prayers ignored these constraints, however, the Constitution would not be violated. There must be a pattern of disparaging or proselytizing prayers over time to support a viable Establishment Clause claim.⁵⁵ No such pattern had been demonstrated by plaintiffs in this case.

Justice Kennedy also found no fault with the Town's "informal" process of inviting clergy from local congregations to offer prayers.⁵⁶ The Town was not required to solicit clergy from congregations outside its borders.⁵⁷ Further, any failings of this invitation process were effectively cured by the Town's contention that it would have allowed any resident to offer a prayer at the Board meeting who requested the opportunity to do so.⁵⁸ It did not seem to matter to Justice Kennedy that this unwritten policy had neither been formally adopted nor publicized.

As to the second question, plaintiffs argued their coercion claim more rigorously before the Supreme Court than they had below. Unlike citizens sitting in the gallery of Congress or a state legislature, they argued, residents attending town board meetings are not passive observers. They are active participants in government

50. *See id.* at 1822–23.

51. *See id.*

52. *See id.*

53. *See id.* at 1823–24.

54. *See id.* at 1824.

55. *See id.*

56. *See id.*

57. *See id.*

58. *See id.*

who attend meetings for the purpose of speaking to the Board and influencing its decisions.⁵⁹ As such, residents would naturally want to avoid alienating the decision-makers they would soon be petitioning.

The setting and nature of the Town's prayer practice magnified coercion concerns. The guest chaplains faced the residents in the audience, not the Board. The prayer was directed at audience members who were often asked to stand, bow their heads, or join in the prayer.⁶⁰ Commonly, the chaplain claimed to speak in the name of those who were present. Thus, the prayer was not the chaplain's prayer alone. It purported to be the prayer of everyone in the room.⁶¹ Typically, there were only a few residents in attendance at meetings. Accordingly, there was no anonymity in this setting. It was impossible to refuse to stand or to leave during the prayer without being noticed.⁶²

In these circumstances, plaintiffs argued, state-sponsored prayer is intrinsically coercive. Confronted with requests to participate in a prayer that is joined in by Board members and the majority of residents in the audience, dissenting residents would feel considerable pressure to comply. They would reasonably fear that the failure to do so would offend one or more Board members, the very decision-makers they were trying to influence.⁶³

Plaintiffs' attempts to distinguish the setting of town board meetings from Congress or state legislative sessions fell on deaf ears. Justice Kennedy concluded that their coercion claims were precluded both by historical tradition and the precedent of *Marsh*.⁶⁴ Significantly, he determined that the "principal audience" for the prayers was the Board members themselves, not residents in the audience.⁶⁵ Further, the invitations to participate were made by prayer-givers, not by Board members.⁶⁶ From Justice Kennedy's perspective, audience members should understand the American

59. See Brief for Respondents, *supra* note 3, at 21–22.

60. See *id.* at 23.

61. See *id.* at 29.

62. See *id.* at 24.

63. See *id.* at 23–30.

64. See *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1825–26 (2014).

65. See *id.* at 1826.

66. See *id.*

tradition of legislative prayer and appreciate the benign, ceremonial nature of this activity.⁶⁷

Justice Kennedy also challenged plaintiffs' arguments that there was anything intrinsically coercive about the Town of Greece's prayer practice. The Board never suggested to residents that their failure to participate in the guest chaplain's prayers would be held against them or would influence the Board's decision.⁶⁸ No evidence in the record demonstrated that the Board had rejected the petitions or arguments of dissenters in the past.⁶⁹ Also, Justice Kennedy explained, anyone who objected to a prayer was free to leave the room while it was being offered. No one would notice them doing so or consider their conduct to be disrespectful.⁷⁰ If residents did stand for a prayer they could not in good conscience join, no one would think that standing signaled any agreement with what was being said.⁷¹ Adult residents of the Town would simply be acknowledging a long-standing, religiously-neutral, American tradition.⁷²

B. Justice Alito's Concurring Opinion

Justice Alito, joined by Justice Scalia, wrote a concurring opinion for the purpose of addressing Justice Kagan's dissent. Justice Alito defended the unguided and careless process the Town employed in inviting guest chaplains, which resulted in only Christian clergy being asked to offer prayers, as a series of minor errors that did not reach the level of constitutional significance.⁷³ Not much more could be reasonably expected from small towns without imposing unacceptably heavy burdens on local governments.⁷⁴ Justice Alito also doubted that the Town of Greece's prayer practices at Board meetings were strikingly different than the practices of many other towns and cities throughout the country.⁷⁵ Those practices may well be imperfect, but their failings do not require

67. *See id.* at 1825.

68. *See id.* at 1826.

69. *See id.*

70. *See id.* at 1827.

71. *See id.*

72. *See id.* at 1827–28.

73. *See id.* at 1830–31 (Alito, J., concurring). For example, Justice Alito apparently believed the Town should have included clergy from neighboring synagogues on its invitation list, but its failure to do so was innocent error. *Id.*

74. *See id.* at 1831.

75. *See id.* at 1831–32.

judicial intervention. Certainly, the case did not justify what Justice Alito deemed to be Justice Kagan's overwrought dissent.⁷⁶

C. Justice Thomas's Concurring Opinion

Justice Thomas's concurring opinion, joined by Justice Scalia, reiterated his longstanding position that the Establishment Clause is not incorporated by the Fourteenth Amendment and does not bind state or local governments. Accordingly, it is not applicable in this case.⁷⁷ Even if the Establishment Clause did apply to state and local governments, however, Justice Thomas argued the Town of Greece's prayer practices would not violate the Constitution. The only coercion practices that warranted concern historically were those "support[ed] by force of law and threat of penalty."⁷⁸ Plaintiffs did not allege that they were subjected to any such formal sanctions.

D. Justice Breyer's Dissenting Opinion

Justice Breyer's dissent echoed the totality of the circumstances analysis employed by the Second Circuit and focused on many of the same factors identified in Judge Calabresi's opinion. In particular, he emphasized the ease with which the Town could have mitigated many of these concerns. To expand and diversify the pool of individuals invited to offer prayers at Board meetings, for example, the Town could have posted a notice of its willingness to allow any resident to offer the invocation on its website, announced this inclusive policy at the beginning of meetings, and informed congregations located just outside the Town's borders that they would be welcome to participate as well.⁷⁹ Instead, Justice Breyer noted, "the town chose to do nothing."⁸⁰

E. Justice Kagan's Dissenting Opinion

Justice Kagan authored the primary dissent. To Justice Kagan, the Town of Greece's prayer practices violated core constitutional equality principles. As a general matter, the Establishment Clause prohibits the state from "align[ing] itself with, and plac[ing] its

76. *See id.* at 1834.

77. *See id.* at 1835 (Thomas, J., concurring).

78. *Id.* at 1837–38.

79. *See id.* at 1840 (Breyer, J., dissenting).

80. *Id.*

imprimatur on, a particular religious creed.”⁸¹ Moreover, failures to abide by this requirement are magnified when individuals are interacting with and participating in “the institutions and process of government,” as was true in this case.⁸² When an individual is asked to pray by a government official or a member of the clergy invited by a government official when she is seeking benefits or services or seeking to influence government decision-makers, religious minorities must either subordinate their beliefs or publicly set themselves apart from the majority on religious grounds. The prayer becomes “an instrument for dividing her from adherents to the community’s majority religion, and for altering the very nature of her relationship with her government.”⁸³

Justice Kagan offered several hypotheticals in which she argued the above principles would clearly apply to constrain the offering of state-sponsored prayers. For example, it would violate the Establishment Clause if immediately prior to trial, the presiding judge asked a minister to come forward who then asked the attorneys and litigants to rise and join him in prayer.⁸⁴ Why should not a similar analysis and conclusion apply in the *Town of Greece* case? The answer, Justice Kagan suggests, is that the five Justice majority of the Court believes that this case should be treated differently, and the Town’s prayer practices upheld, because the tradition of legislative prayer described and upheld in *Marsh* requires that result.⁸⁵

Justice Kagan emphatically rejected this conclusion. The nature and process of prayers offered at small town board meetings are so substantively different than the prayer practice at state legislative session upheld in *Marsh*, she argued, that a different analysis applies that must lead to a different result. *Town of Greece* is distinct from *Marsh* in three critical ways.⁸⁶ First, members of the public attending state legislative sessions or sitting in the gallery of Congress are passive spectators.⁸⁷ They have no role in the proceedings.⁸⁸

81. *Id.* at 1843 (Kagan, J., dissenting).

82. *Id.* at 1844.

83. *Id.*

84. *See id.* at 1842.

85. *See id.* at 1845.

86. *See id.* at 1847–48.

87. *Id.* at 1847.

88. *Id.*

Residents attending small town board meetings are there to influence decision-makers on matters that are important to them.⁸⁹ “Each and every aspect of those sessions provides opportunities for Town residents to interact with public officials. And the most important parts enable those citizens to petition their government.”⁹⁰

Second, the prayers upheld in *Marsh* were directed exclusively at elected representatives. The prayer practice was an internal procedure.⁹¹ The prayers were delivered to and for the benefit of the legislature. They were not directed at the gallery or the public at large.⁹² In *Town of Greece*, the intended audience was the residents gathered for the Board meeting.⁹³ The chaplain stood with his back to the Town Board, faced the audience, and often asked the audience to stand, bow their heads and join him in prayer. Even the Court majority conceded that in asking the audience to “[l]et us all pray together,” the guest chaplain treated the residents attending the meeting as if they were part of his congregation.⁹⁴

Finally, Justice Kagan observed that prayers offered to the Nebraska legislature in *Marsh* and the prayers offered at Town of Greece Board meetings “differ[ed] in their content and character.”⁹⁵ After complaint from a Jewish lawmaker, the chaplain removed all references to Christian doctrine from the prayers he offered to the Nebraska legislature.⁹⁶ In contrast, Justice Kagan noted, “[N]o one can fairly read the prayers from Greece’s Town meetings as anything other than explicitly Christian—constantly and exclusively so.”⁹⁷

Because the Town of Greece’s prayer practice was not governed by the Court’s holding in *Marsh* or the historical tradition on which it is based, it must be evaluated on its merits and cannot survive basic Establishment Clause scrutiny. This does not mean that the Constitution prohibits state-sponsored prayers at small town board meetings, however. The Town Board could have taken various steps to avoid running afoul of constitutional requirements. It could have

89. *Id.*

90. *Id.*

91. *Id.*

92. *See id.* at 1847–48.

93. *See id.* at 1848.

94. *See id.*

95. *Id.*

96. *See id.*

97. *Id.*

explained to guest chaplains that the Board expected them to offer nonsectarian prayers that were respectful of religious diversity in the community. Alternatively, the Town could have invited clergy of many different faiths to serve as guest chaplains.⁹⁸ What the Town is prohibited from doing is arranging for the offering of state-sponsored prayers in a way that virtually guarantees the alignment of government with a particular faith.

III. RELIGIOUS EQUALITY AND DISCRIMINATION

The state-sponsored prayer practices the Town of Greece engaged in substantially burdened religious equality in two distinct, albeit overlapping, ways. First, the Town discriminated in favor of established religious congregations and against three groups of residents: religious minorities with too few adherents to organize a congregation in the Town; nonaffiliated, spiritual individuals who as a matter of religious choice decline to join any of the organized congregations in the community; and non-religious residents.⁹⁹ Only clergy from recognized congregations within the Town's borders were invited to serve as guest chaplains and offer prayers at the beginning of Town Board meetings.¹⁰⁰ Second, the Town discriminated in favor of Christianity and against other faiths and secular belief systems. Over more than a ten-year period, every prayer-giver at Town Board meetings was a member of the Christian clergy, except for four exceptions during one year in which complaints about the Town's practices were expressed.¹⁰¹

A. Discrimination in Favor of Established Congregations

The first discriminatory practice was blatant and undisputed. The Town invited clergy from organized congregations within its boundaries. No one else was even considered as a possible prayer-giver.¹⁰² While Justice Alito recognizes that religious minorities

98. *Id.* at 1849.

99. As Judge Calabresi explained, "The town fails to recognize that its residents may hold religious beliefs that are not represented by a place of worship within the town. Such residents may be members of congregations in nearby towns or, indeed, may not be affiliated with any congregation. The town is not a community of religious institutions, but of individual residents, and, at the least, it must serve those residents without favor or disfavor to any creed or belief." *Galloway v. Town of Greece*, 681 F.3d 20, 31 (2d Cir. 2012), *rev'd*, 134 S. Ct. 1811 (2014).

100. *Id.* at 23, 31.

101. *See id.*

102. *See Town of Greece*, 134 S. Ct. at 1816; *id.* at 1828 (Alito, J., concurring).

living in the Town of Greece may worship in houses of worship in adjoining communities,¹⁰³ he and the rest of the majority on the Court are as oblivious to the existence of non-affiliated, spiritual residents and the need to recognize them in a prayer policy as the political leaders of the Town of Greece.¹⁰⁴

Given the facially discriminatory nature of this practice, there can be only two possible doctrinal arguments to support the Town's selection process. It may be argued that the level of discrimination in this case does not warrant constitutional attention. Alternatively, it may be that the Establishment Clause does not prohibit discrimination between the classes treated differently by the Town's prayer practices. The Court appears to support the first argument. It ignores the second argument entirely.

The Court states repeatedly that the Town of Greece's practice was not discriminatory because no one who requested to be considered as a prayer giver was ever turned down.¹⁰⁵ It is also true however that the Town did absolutely nothing to publicize the fact that it would be willing to accept requests by residents unaffiliated with a local congregation to serve as guest chaplains at Town Board meetings.¹⁰⁶ The question of discrimination here is straight-forward. There are two classes in the Town. One class is comprised of clergy from organized congregations within the Town's borders. The other class is comprised of religious minorities who lack the numbers to sustain an organized congregation in the Town; nonaffiliated, spiritual residents of the community; and non-religious residents. The first class is invited to serve as prayer-givers at Town Board

103. *See id.* at 1828 (Alito, J., concurring).

104. "The number of Americans who do not identify with any religion continues to grow at a rapid pace. One-fifth of the U.S. public—and a third of adults under 30—are religiously unaffiliated today, the highest percentages ever in Pew Research Center polling." "Nones" on the Rise, PEW RESEARCH RELIGION & PUB. LIFE PROJECT (Oct. 9, 2012), <http://www.pewforum.org/2012/10.09/nones-on-the-rise/>.

105. *See Town of Greece*, 134 S. Ct. at 1816; *id.* at 1829 (Alito, J., concurring).

106. *See id.* at 1840 (Breyer, J., dissenting) ("[I]n a context where religious minorities exist and where more could easily have been done to include their participation, the town chose to do nothing. It could, for example, have posted its policy of permitting anyone to give an invocation on its website . . . which provides dates and times of upcoming town board meetings along with minutes of prior meetings. It could have announced inclusive policies at the beginning of its board meetings, just before introducing the month's prayer giver. It could have provided information to those houses of worship of all faiths that lie just outside its borders and include citizens of Greece among their members. Given that the town could easily have made these or similar efforts but chose not to, the fact that all of the prayers (aside from the 2008 outliers) were given by adherents of a single religion reflects a lack of effort to include others.").

meetings. Members of the second class are not notified that their requests to serve as prayer-givers would be considered, much less accepted. There is, however, an unwritten, unpublicized policy indicating if they should make such a request, the Town would accept their request in some fashion. Does this differing treatment count as discrimination for constitutional purposes?¹⁰⁷

I know of no cases on point, but common sense intuitions strongly suggest that the different treatment of these two classes constitutes constitutionally cognizable discrimination. Suppose, for example, the Town of Greece invited white clergy to offer prayers at town board meetings, but followed an unpublicized policy that the town would accept the requests of African-American clergy to be guest chaplains, if any such requests were communicated to it. Does anyone doubt that this policy constitutes race discrimination? If a government policy invites Christians to participate in an opportunity, but requires Jews, Moslems, and members of other minority faiths to come forward and ask to be included, without providing any notice that such requests would be honored, would not that policy constitute religious discrimination on its face? Having one process for the majority, whether it is whites or Christians, and another process for minorities surely constitutes discrimination—particularly when the process for minorities is never publicly disclosed.

Thus, the Court's repeatedly proclaiming that the Town's prayer practice was non-discriminatory seems to be clearly mistaken.¹⁰⁸ Perhaps, however, what the Court is actually arguing on this issue is not that the Town's practice is free from discrimination but rather that discrimination in favor of organized congregations and against less organized religious minorities, the non-affiliated, and non-religious residents is constitutionally permissible. The Court may

107. It is important to emphasize that the discrimination at issue here is not geographical. It is discrimination between religious groups organized into congregations and institutions and religious groups and spiritual individuals that because of their limited numbers or minority beliefs are not represented by a religious organization in the Town of Greece. No one disputes that unrepresented religious minorities and non-affiliated individuals live in the Town. The discrimination question is whether these residents can be treated less favorably than religious residents who are members of organized congregations.

108. Indeed, the Court's language seems particularly odd since it insists that the town "would welcome" religious minorities, the nonaffiliated and non-religious residents, as guest chaplains. *See id.* at 1824 (majority opinion). Who feels "welcome" to an event to which other people are invited while you are admitted only after asking to be allowed in?

think, although it does not say this explicitly, that treating these classes differently does not violate the Establishment Clause.

Here, however, we do have a case on point and it fairly explicitly holds that discrimination between these two classes does violate the Establishment Clause. In *Larson v. Valente*,¹⁰⁹ the Court held that, “[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.”¹¹⁰ The “denominational preferences” that the Court struck down in *Larson* was not a law that facially discriminated against Jews, Catholics, or some other named faith. It was a law that treated religious organizations receiving less than 50 percent of their funding from their members less favorably than religious organizations receiving more than 50 percent of their funding from their members.¹¹¹ Specifically, the Court held that the challenged law

makes explicit and deliberate distinctions between different religious organizations. We agree with the Court of Appeals’ observation that the provision effectively distinguishes between ‘well-established churches’ that have ‘achieved strong but not total financial support from their members,’ on the one hand, and ‘churches which are new and lacking in a constituency, or which, as a matter of policy, may favor public solicitation over general reliance on financial support from members,’ on the other hand.¹¹²

It is difficult to see why the Town of Greece’s policy should not be similarly construed to constitute prohibited discrimination between “well-established churches” and “churches which are new and lacking in a constituency,” or discrimination between well-established churches and minority religions with too few adherents to form a congregation within the Town’s borders.¹¹³

109. 456 U.S. 228 (1982).

110. *Id.* at 244.

111. *See id.* at 231–32.

112. *Id.* at 246 n.23 (quoting *Valente v. Larson*, 637 F.2d 562, 566 (8th Cir. 1981), *aff’d*, 456 U.S. 228 (1982)).

113. A non-discriminatory policy, consistent with constitutional guarantees, would not require equality of effect. The various non-discriminatory invitation arrangements described by Justice Breyer, *see Town of Greece*, 134 S. Ct. at 1840 (Breyer, J., dissenting), would almost certainly result in more members of majority faiths offering prayers than members of minority faiths. If too many individuals volunteered to offer prayers, the Town would have to prioritize its invitations based on neutral criteria that did not involve the number, or organizational structure, of adherents

B. Favoring Christian Denominations and Beliefs

The argument that the Town of Greece's prayer practice unconstitutionally favored Christianity raises more difficult questions. Other than four exceptions during one year, for over a decade only Christian clergy were invited to offer prayers before Town Board meetings.¹¹⁴ However, plaintiffs abandoned their argument that the failure to invite non-Christian guest chaplains involved intentional discrimination,¹¹⁵ and the lower court did not find that the Town's decisions were based on "religious animus."¹¹⁶ It seems clear that the Town of Greece is a predominantly Christian community.¹¹⁷ This does not suggest that its population is exclusively Christian. There are allusions in the record to a Buddhist temple in the Town.¹¹⁸ A leader of a "local Baha'i temple" was one of the four non-Christians invited to offer prayers on one occasion.¹¹⁹ There are Jewish residents of the Town who worship at synagogues "not far away" in the adjoining city of Rochester.¹²⁰ Plaintiffs' argument in essence, which was accepted in substantial respects by the Second Circuit Court of Appeals and Justices Breyer's and Kagan's dissent, was that the process by which the Town of Greece selected clergy and the sectarian content of many of the prayers offered during Town Board meetings demonstrated that the Town aligned itself with the Christian faith.¹²¹ Non-Christians were treated as if they did not exist or were unworthy of notice. Neither their identity nor their beliefs were taken into account by the Town's prayer practices. The fact that a town is predominantly of one faith does not justify government conduct that suggests that this is the only faith or system of beliefs that matters.

The Court's response to this argument is varied. Justice Kennedy argued that the Town need not seek guest chaplains from

in the community, but that would still in all likelihood result in a predominant number of guest chaplains from larger faiths.

114. See *supra* notes 10–18 and accompanying text.

115. See *Galloway v. Town of Greece*, 681 F.3d 20, 26 (2d Cir. 2012), *rev'd*, 134 S. Ct. 1811 (2014).

116. *Town of Greece*, 134 S. Ct. at 1829 (Alito, J., concurring); *Galloway*, 681 F.3d at 32.

117. See *Town of Greece*, 134 S. Ct. at 1839 (Breyer, J., dissenting).

118. See *Galloway*, 681 F.3d at 24.

119. See *id.* at 23; Brief for Respondents, *supra* note 3, at 13–15.

120. *Town of Greece*, 134 S. Ct. at 1828 (Alito, J., concurring).

121. See *id.* at 1838–41 (Breyer, J., dissenting), 1851 (Kagan, J., dissenting); Brief for Respondents, *supra* note 3, at 15, 21–23.

houses of worship outside its borders in order to create a more diversified pool of prayer-givers.¹²² Justice Alito disagreed. His concurrence indicates that the failure to include synagogues from neighboring communities would be unacceptable if their exclusion was a matter of deliberate policy.¹²³ The Town's failure to include the adjoining synagogues and the Buddhist temple in this case did not violate the Establishment Clause because it was a result of an informal, imprecise process involving petty functionaries who were provided insufficient guidance by the Board. This admittedly sloppy process was a far cry from invidious discrimination.¹²⁴ Both Justices seem to think that in light of the predominantly Christian population of the community, the failure to invite non-Christian clergy as guest chaplains or to include any message in the prayer program acknowledging non-Christian residents or their beliefs was basically no big deal.¹²⁵

The Court's analysis is seriously problematic for several reasons, both in terms of doctrine and the practical consequences of its decision. As a practical matter, Justice Kennedy's contention that a town can simply ignore the fact that minority residents worship at houses of worship in adjoining communities is a virtual recipe for religious discrimination. Outside of large cities it is commonplace for religious minorities who live in several small towns in an area to establish a congregation and house of worship in one town to serve the spiritual needs of the residents of several communities.¹²⁶ Under Justice Kennedy's analysis, no town in the area other than the one in which the house of worship is located has any obligation to invite religious minority residents to participate in the state-sponsored prayers offered at town meetings. I am at a loss to identify any virtue in such an approach that is so unnecessarily insensitive to the needs of religious minorities who do not live in metropolitan areas.

122. *See Town of Greece*, 134 S. Ct. at 1824.

123. *See id.* at 1830–31 (Alito, J., concurring).

124. *See id.*

125. *See id.* at 1824 (majority opinion), 1830–31 (Alito, J., concurring).

126. Alan Brownstein, *Town of Greece v. Galloway: Constitutional Challenges to State-Sponsored Prayers at Local Government Meetings*, 47 U.C. DAVIS L. REV. 1521, 1532 (2014) [hereinafter Brownstein, *State-Sponsored Prayers*].

1. The Unconstitutionality of Vesting Decisions About Religion in the Unguided Discretion of Petty Officials

From a doctrinal perspective, the Court's apparent conclusion that the lack of guidelines provided to lower level functionaries in inviting guest chaplains and the informal, imprecise nature of the selection process somehow mitigates constitutional concerns or immunizes decisions from meaningful constitutional review is nothing short of extraordinary. When other rights are at issue and decisions are being made with constitutionally-salient values at stake, the courts have emphatically demanded that government operate under carefully structured and transparent guidelines to limit the risk of biased decision-making. Leaving decisions to inadequately guided petty functionaries has always been considered a constitutional violation, not a shield for discriminatory results.

In freedom of speech cases, for example, the courts' willingness to strike down vague and overbroad laws reflects in part the concern that imprecise and indeterminate standards in regulations that may apply to speech risk and invite "discriminatory enforcement."¹²⁷ Plaintiffs need not prove that discrimination actually occurred to support a constitutional challenge in these cases.¹²⁸ It is sufficient to demonstrate that government officials were given the "unbridled discretion" to determine whether specific speech warranted sanction. Thus, in *City of Houston v. Hill*,¹²⁹ for example, the city argued unsuccessfully that its ordinance "mak[ing] it unlawful to interrupt a police officer in the performance of his or her duties"¹³⁰ did not violate the First Amendment because there was "no evidence that the city has applied the ordinance to chill particular speakers or ideas."¹³¹ Despite the lack of evidence of actual discrimination, the Court struck down the ordinance because of the unguided discretion it conferred on the police officers who enforced it.¹³²

127. See, e.g., *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 71–72 (1997) (internal quotation marks omitted) (noting that vague and overbroad laws are constitutionally problematic because they chill protected speech and create a "risk of discriminatory enforcement").

128. See, e.g., *Coates v. Cincinnati*, 402 U.S. 611, 615–16 (1971) (reversing convictions of ordinance prohibiting conduct on public sidewalks annoying to persons passing by without the Court knowing details of defendants' conduct because vague and overbroad ordinance is "an obvious invitation to discriminatory enforcement").

129. 482 U.S. 451 (1987).

130. *Id.* at 453.

131. *Id.* at 459.

132. See *id.* at 466–67.

The same concerns about the dangers of unguided discretion and the risk of bias should apply when religion rather than speech is at issue. Judge Posner in reviewing a RLUIPA case involving a statutory challenge to the denial of a church's rezoning petition noted "the vulnerability of religious institutions—especially those that are not affiliated with the mainstream Protestant sects or the Roman Catholic Church—to subtle forms of discrimination when, as in the case of the grant or denial of zoning variances, a state delegates essentially standardless discretion to nonprofessionals operating without procedural safeguards."¹³³ A similar concern should apply in *Town of Greece*. Put simply, we do not trust the government when it operates without standards in regulating speech or choosing among religious faiths.

The Court has also made it clear that the operation of any licensing or permit system imposed on expressive activities cannot be left to the discretion of a government official or functionary. Instead, the government must "establish neutral criteria to insure that the licensing decision is not based on the content or viewpoint of the speech being considered."¹³⁴ These standards are not only a critical tool for preventing discriminatory decisions because they directly limit official discretion. They are also essential to meaningful judicial review of alleged official censorship of unpopular ideas. As the Court in *City of Lakewood v. Plain Dealer Publishing Co.*¹³⁵ explained,

[T]he absence of express standards makes it difficult to distinguish, "as applied," between a licensor's legitimate denial of a permit and its illegitimate abuse of censorial power. Standards provide the guideposts that check the licensor and allow courts quickly and easily to determine whether the licensor is discriminating against disfavored speech. Without these guideposts, *post hoc* rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the

133. *Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 900 (7th Cir. 2005).

134. *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 760 (1988).

135. 486 U.S. 750 (1988).

licensor is permitting favorable, and suppressing unfavorable, expression.¹³⁶

Justices Kennedy and Alito characterize the Town of Greece's process for inviting guest chaplains as imprecise and informal. A more accurate description would note that the Town never adopted a policy for inviting clergy prior to the commencement of this litigation and left the invitation decisions to employees who, over time, "developed a more or less standard procedure."¹³⁷ There were no guidelines provided to the low level functionaries charged with inviting prayer-givers. These town employees exercised their own discretion in compiling a list of potential guest chaplains and in determining which clergy on the list to invite. The Town never adopted the kind of neutral criteria necessary to avoid biased decisions. Further, given the *ad hoc* nature of the invitation process, it is hardly surprising that plaintiffs could not prove intentional discrimination, notwithstanding the continuing invitation of exclusively Christian clergy for over a decade.¹³⁸ Juxtaposing the unguided discretion and lack of formal guidelines in this case with the standards required in free speech cases makes the Court's apparent acquiescence to the Town of Greece's invitation process hard to justify and accept.¹³⁹

136. *Id.* at 758.

137. *Galloway v. Town of Greece*, 681 F.3d 20, 23 (2d Cir. 2012), *rev'd*, 134 S. Ct. 1811 (2014).

138. *See* *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1852 n.5 (2014) (Kagan, J., dissenting) (wondering how Town Board members could fail to notice that the sectarian prayers offered included only Christian content and were delivered exclusively by Christian clergy).

139. Justice Alito expressed his concerns about small towns, such as the Town of Greece, being held to ambiguous and uncertain constitutional standards, implying that they should be given some leeway in their struggles to do the right thing when dealing with the intersection of church and state. *See id.* at 1831–32 (Alito, J., concurring). Justice Alito is certainly correct that the Establishment Clause case law in this area has hardly been a model of clarity. *See id.* at 1831; Brownstein, *State-sponsored Prayer*, *supra* note 126, at 1523–28. But, Justice Alito has demonstrated no such concern about local government officials or employees dealing with ambiguous and indeterminate standards when other constitutional guarantees are at issue. It would be hard to identify an area of constitutional law where the standards are more opaque and difficult to apply than the free speech rights of public school students. *See, e.g.,* B.H. *ex rel. Hawk v. Easton Area Sch. Dist.*, 725 F.3d 293, 302 n.7 (3d Cir. 2013) (quoting from numerous cases describing the incoherence and complexity of free speech jurisprudence as it relates to public school student expression); *Morgan v. Swanson*, 659 F.3d 359, 364 (5th Cir. 2011) (granting qualified immunity to school principal because determining when it is permissible to restrict student speech "requires recourse to a complicated body of law that seeks, often clumsily, to balance a number of competing First Amendment imperatives"); Alan Brownstein, *The NonForum as a First Amendment Category: Bringing Order Out of the Chaos of Free Speech Cases Involving School Sponsored Activities*, 42 U.C. DAVIS L. REV. 717, 719–84 (2009).

2. Explicit and Implicit Disparagement

What else does the Court offer to defend its conclusion that the Town of Greece's practices do not violate religious equality principles mandated by the Establishment Clause? In part, the Court seems to suggest that the continued offering of sectarian Christian prayers to begin Town Board meetings are consistent with religious equality values as long as the prayers do not involve a pattern or practice of prayers disparaging and denigrating religious minorities and non-religious residents.¹⁴⁰ Having to listen to a sectarian prayer offered by clergy of the majority faith shows no disrespect to religious minorities or non-religious residents. Thus, there is no constitutionally cognizable burden on religious equality in this case.¹⁴¹

Here, the Court appears to misunderstand the primary thrust of plaintiffs' equality argument. A sectarian prayer of the majority faith is not disparaging of minority faiths or non-religious residents. It is exclusionary in an important sense, however. A prayer to Jesus Christ, Our Lord and Savior, is not a prayer that reflects the beliefs, or serves the spiritual needs, of Jews, Moslems or Buddhists. What is disparaging and disrespectful is that neither the content of these prayers or the Town's selection process for inviting guest chaplains recognized the existence of non-Christians in the community in any way. There are various approaches the Town could have adopted to demonstrate some awareness of religious pluralism in its community—I will discuss these remedial alternatives later in this Article—but the key point is that the Town took no steps to demonstrate any awareness of its non-Christian residents.¹⁴² As

Because teachers and school administrative officials have to make speech discriminatory decisions every day in the regular course of performing their professional duties, the rigorous enforcement of student free speech rights places extremely heavy burdens on school authorities. Yet, Justice Alito has been insistent that the federal courts must carefully monitor teacher and administrative decisions that implicate speech. *See, e.g.,* *Morse v. Frederick*, 551 U.S. 393, 422–25 (2007) (Alito, J., concurring); *C.H. ex rel. Z.H. v. Oliva*, 195 F.3d 167 (3d Cir. 1999) (en banc) (Alito, J., dissenting). Here, unlike *Town of Greece*, Justice Alito has demonstrated little if any concern about local officials and employees beleaguered by uncertain constitutional standards.

140. *See Town of Greece*, 134 S. Ct. at 1825–26.

141. *See id.* at 1827–28.

142. *Id.* at 1840 (Breyer, J., dissenting), 1850–51 (Kagan, J., dissenting); *Galloway*, 681 F.3d at 31.

plaintiffs argued succinctly, the Town “gave the consciences of religious minorities no thought at all.”¹⁴³ That is disparaging.

Put simply, plaintiffs raised a powerful religious equality challenge to the Town of Greece’s prayer practices. The Town’s practices were facially discriminatory in inviting guest chaplains to offer prayers before Town Board meetings. The Town vested discretionary authority in petty officials and provided them inadequate guidelines for making decisions that risked being skewed by religious bias and favoritism. Whether acting deliberately or otherwise, the Town ignored the interests and needs of non-Christian residents of the community. As noted above, the Court did not provide persuasive specific responses to any of these challenges. It did offer one overriding general response, however. The Town’s practices constituted legislative prayer. Legislative prayer was a historically recognized practice from the beginning of our constitutional system, and it was explicitly upheld as constitutional at the national and state legislative level in *Marsh* in 1983.¹⁴⁴ To the Court, there was nothing about the *Town of Greece* case that distinguished it from *Marsh*. The same history and tradition that justified upholding the legislative prayer practice of the Nebraska legislature in *Marsh* required the Court to uphold the prayer practices of the Town of Greece.¹⁴⁵

3. The Relevance and Controlling Authority of *Marsh*

The Court’s reliance on the tradition of legislative prayer and the *Marsh* decision is not easily defended, however. First, there is debate as to whether the tradition supporting legislative prayer and the *Marsh* decision covers a consistent pattern of sectarian prayers.¹⁴⁶ Second, and much more importantly, there were numerous, constitutionally-salient differences that distinguished state-sponsored prayers at the state legislative level or before Congress and state sponsored prayers before local government meetings, such as a town board meeting. I will address most of these distinctions in the section

143. Brief for Respondents, *supra* note 3, at 36.

144. *Marsh v. Chambers*, 463 U.S. 783, 786 (1983).

145. See *Town of Greece*, 134 S. Ct. at 1819 (“The Court’s inquiry, then, must be to determine whether the prayer practice in the town of Greece fits within the tradition long followed in Congress and the state legislatures.”); *id.* at 1833–34 (Alito, J., concurring).

146. See, e.g., Brief for Paul Finkelman et al. as Amici Curiae Supporting Respondents, *Town of Greece*, 134 S. Ct. 1811 (No. 12-696); Brief for Respondents, *supra* note 3, at 41–47.

of this Article dealing with religious liberty and coercion. But it is important to note here that the essential identity of legislative prayer before state and national legislative sessions and legislative prayer before town board meetings is critical to the Court's analysis and holding. As Justice Kennedy concedes, there was no evidence in the record before the Court of any pervasive tradition of state sponsored prayer before local government meetings.¹⁴⁷ The historical evidence on which the Court relied applied to prayers before Congress and state legislatures.¹⁴⁸ If prayers before town board meetings raised distinctive constitutional questions that differentiated these cases from Establishment Clause challenges to state and congressional prayer practices, the Court could not rely on either history and long-standing tradition or the precedent of *Marsh* to respond to plaintiffs' powerful religious equality arguments.

As plaintiffs and the dissenting Justices argued, there are substantial and salient differences between the nature and setting of legislative prayer upheld in *Marsh* and the setting and prayer practice challenged in *Town of Greece*.¹⁴⁹ The legislative prayer upheld in *Marsh* was an internal legislative procedure directed at the legislative body itself, not at the public-at-large or audience members in the gallery. The prayers at issue in *Town of Greece* were directed at the members of the public attending the meeting.¹⁵⁰ This distinction has substantial historical relevance. Whether the tradition of legislative chaplains offering prayers before state legislatures or Congress included a pattern of sectarian prayers or not, a different tradition, limiting state-sponsored religious expression to relatively non-sectarian messages, applied to state-sponsored religious messages directed to the public. As even Justice Scalia, surely no fan of a rigorously enforced Establishment Clause, acknowledged,

[O]ur constitutional tradition, from the Declaration of Independence and the first inaugural address of Washington . . . down to the present day, has, with a few aberrations, ruled out of order government-sponsored endorsement of religion . . . where the endorsement is

147. *Town of Greece*, 134 S. Ct. at 1819.

148. *See id.* at 1823–25; *id.* at 1829–30, 1833–34 (Alito, J., concurring).

149. *Id.* at 1847–49 (Kagan, J., dissenting); Brief for Respondents, *supra* note 3, at 41–48.

150. *See Town of Greece*, 134 S. Ct. at 1847–48 (Kagan, J., dissenting); Brief for Respondents, *supra* note 3, at 43.

sectarian, in the sense of specifying details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world are known to differ (for example, the divinity of Christ).¹⁵¹

Plaintiffs relied on this tradition restricting government religious speech to the public to non-sectarian messages and emphasized Justice Scalia's recognition of this historical account in their briefs and oral argument.¹⁵²

The response to these arguments by Justices Scalia and Kennedy are as bewildering as they are disturbing. Justice Scalia simply ignores the statements in his prior opinions and says nothing to reconcile his upholding of sectarian prayers in this case with his repeated recognition of the tradition of non-sectarian state sponsored religious messages directed at citizens. Justice Kennedy argues that the "principal audience" for the prayers offered by guest chaplains at Town Board meetings in the Town of Greece is "not . . . the public but [the] lawmakers themselves."¹⁵³

To put it bluntly, this contention makes no sense. It suggests an understanding of social reality that bears little resemblance to the experience and perception of real people. Here, as will also be discussed *infra* in the section of this Article discussing religious liberty and coercion concerns, Justice Kennedy seems so determined to squeeze square facts into round doctrinal holes that he asserts factual inferences that have no support other than that they are a necessary foundation for his legal conclusions. If accepted history and Establishment Clause doctrine only permit state-sponsored sectarian prayers when such prayers are directed internally to the members of the legislature, then Justice Kennedy will construe the prayers offered at the Town of Greece Board meetings to be directed at the Town's Board Members, notwithstanding the counter-factual nature of this conclusion.

The guest chaplain at Town of Greece Board meetings stood with his back to the Board and faced the audience of town residents. Frequently, the prayer-giver asked the audience to stand, bow their

151. *Lee v. Weisman*, 505 U.S. 577, 641 (1992) (internal citation omitted).

152. See Brief for Respondents, *supra* note 3, at 33, 47–50; Transcript of Oral Argument at 32:1–7, 45:15–23, *Town of Greece*, 134 S. Ct. 1811 (No. 12-696), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-696_i4ep.pdf.

153. *Town of Greece*, 134 S. Ct. at 1825.

heads and join in the prayer. Audience members responded by doing so—demonstrating that they fully understood the guest chaplain’s prayers to be directed at them.¹⁵⁴ The chaplain commonly prayed in the name of the audience¹⁵⁵—treating residents attending the board meeting as if they were members of his own congregation.¹⁵⁶ Yet, Justice Kennedy insists that the prayers offered at Town Board meetings were directed to the Board members sitting behind the guest chaplain and not to the public audience he was so obviously addressing.

Yet another perplexing aspect of the Court’s reliance on *Marsh* to respond to plaintiffs’ religious equality arguments is the stark dissonance between the prayer-practice upheld in *Marsh* and the constitutional requirements the Court appears to require for the Town of Greece’s state-sponsored prayers. The Court repeatedly justifies its holding in *Town of Greece* on the condition that the Town’s selection of chaplains was not discriminatory and included a rotation of all the faiths in the community seeking to participate in this opportunity.¹⁵⁷ In *Marsh*, however, there was no such open invitation or rotating procedure. The same paid Protestant chaplain offered the prayers before the legislature for eighteen years, yet the Court saw no problem with such denominational exclusivity. Lower courts have read *Marsh* as permitting at least some level of denominational discrimination in choosing prayer-givers at local government meetings.¹⁵⁸ If *Marsh* is controlling precedent, why does the Court insist that town boards cannot discriminate on the basis of religious belief and affiliation in inviting guest chaplains to offer prayers before meetings? The Court’s opinion provides no answer to this question.

154. See Brief for Respondents, *supra* note 3, at 11.

155. See *Galloway v. Town of Greece*, 681 F.3d 20, 24, 32 (2012), *rev’d*, 134 S. Ct. 1811 (2014).

156. See *Town of Greece*, 134 S. Ct. at 1826.

157. See *supra* note 105.

158. See, e.g., *Simpson v. Chesterfield Cnty. Bd. of Supervisors*, 404 F.3d 276, 278 (4th Cir. 2005) (upholding selection procedure that excludes members of Wicca religion from list of clergy eligible to be invited to offer prayers at county board meetings under the authority of *Marsh*).

IV. RELIGIOUS LIBERTY AND COERCION

A. The Salient Distinctions Relating to Coercion Between Prayers at Local Board Meetings and Prayers Before Congress or a State Legislature

The issue of coercion and the protection of religious liberty played two distinct, but overlapping, roles in the *Town of Greece* dispute and decision. First, to the extent that the setting of prayer practices in the Town of Greece raised concerns about coercion that were not present when prayers are offered before state legislatures or Congress, the holding in *Marsh* and the historical tradition on which it is based would be distinguishable from the present case and would not control its analysis. Second, as even Justice Kennedy concedes, government coercion of religious exercise violates the Establishment Clause.¹⁵⁹ It is an unacceptable abridgement of religious liberty for government to coerce participation in worship services.

The *Marsh* decision did not focus on the coercion of members of the public viewing sessions of the state legislature or Congress from the gallery. There was little reason for it to do so. As noted previously, the prayers offered before the Nebraska legislative sessions upheld in *Marsh* were internal matters directed to the legislators, not the public. Of equal if not greater importance, visitors in the gallery of state legislative sessions are there as passive observers. Legislators are rarely aware of their identity or their presence. There is no interaction between the public and decision-makers.¹⁶⁰

Even in the extremely unlikely event that a member of the legislature noticed a specific visitor's conduct while a prayer was being offered, the legislator would have no basis for identifying the visitor or associating him or her with any matter being discussed by the legislature. Further, if a state legislator or member of Congress somehow did recognize a visitor who, for example, failed to stand while a prayer was offered, and somehow knew the visitor's position on some bill before the legislature, it is hardly conceivable that the legislator would allow one's person's conduct to influence a broad policy decision impacting the lives of thousands or tens of thousands

159. See *Town of Greece*, 134 S. Ct. at 1826–27.

160. See *id.* at 1847–48 (Kagan, J., dissenting).

of other persons. There is nothing intrinsically coercive of the public when prayers are offered before state legislatures or Congress.

The situation is entirely different when prayers are offered at a small town board meeting. 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.¹⁶¹

B. *What Constitutes Coercion*

Plaintiffs' coercion arguments here could hardly be more persuasive or more compelling. When government officials are empowered to exercise discretionary authority over individuals, these officials, directly or through invited clergy, cannot "request" that individuals dependent on the way that power is exercised join the officials in prayer before a decision of importance to the individual is reached. The invitation to pray in such circumstances is intrinsically coercive. To emphasize this point, Justice Kagan uses the example of a trial judge inviting a minister into the courtroom who asks the litigants to rise while he expresses a sectarian prayer.¹⁶²

161. Brownstein, *State-Sponsored Prayers*, *supra* note 126, at 1530–31.

162. See *Town of Greece*, 134 S. Ct. at 1842 (Kagan, J., dissenting). The focus of Justice Kagan's powerful dissenting opinion is religious equality, not religious liberty. Her primary concern is the alignment of the state with a particular religion, not with the coercive impact of the Town of Greece's prayer practices on residents attending town board meetings. Many of the examples and arguments she offers, however, seem to reflect concerns about coercion as much as they do concerns about religious equality. Indeed, in reading Justice Kagan's dissent one often expects an argument describing a coercive context to conclude by identifying the situation as one that abridges religious liberty by unconstitutionally coercing participation in religion exercise. At the last minute, however, Justice Kagan seems to shift gears and describes the problem in religious equality terms. Consider this paragraph in her dissent:

A person goes to court, to the polls, to a naturalization ceremony—and a government official or his hand-picked minister asks her, as the first order of official business, to stand and pray with others in a way conflicting with her own religious beliefs. Perhaps she feels sufficient pressure to go along—to rise, bow her head, and join in whatever others are saying: After all, she wants, very badly, what the judge or poll worker or immigration official has to offer. Or perhaps she is made of stronger mettle, and she

Similar coercive circumstances arise when an individual seeks a determination of his or her eligibility for benefits from a government bureaucrat or when a small town legislature deliberates on a matter of particular importance to a small group of residents. The pressure to comply with the invitation to rise and join in the offered prayer should be obvious to anyone. But it is not obvious to the Court.

Justice Kennedy acknowledges, as he must, that coercing participation in religious exercise violates the Establishment Clause.¹⁶³ He also recognizes, correctly, that an inquiry into coercion is “a fact-sensitive one that considers both the setting in which the prayer arises and the audience to whom it is directed.”¹⁶⁴ In conducting that inquiry, however, Justice Kennedy ignores important facts and circumstances. More egregiously, his description of the social reality and facts he does discuss is implausible at best. In an effort to be charitable, I can only say that it is a description of reality that neither I nor anyone I know shares or understands.

1. Prayers by Guest Chaplains Are No Less Coercive than Prayers by Board Members

As noted, the Justice Kennedy begins his attempt to refute plaintiffs’ coercion claims by arguing that the prayers offered by guest chaplains at Town Board meetings were directed at the Board members, not the town residents attending Board meetings. That distorted characterization of the prayer practices at Town of Greece Board meetings is only the first of Justice Kennedy’s, let us say, unusual understandings of the facts and circumstances of this case. Justice Kennedy also emphasizes that it is guest chaplains rather than Board members themselves who direct audience members to rise,

opts not to participate in what she does not believe—indeed, what would, for her, be something like blasphemy. She then must make known her dissent from the common religious view, and place herself apart from other citizens, as well as from the officials responsible for the invocations. And so a civic function of some kind brings religious differences to the fore: That public proceeding becomes (whether intentionally or not) an instrument for dividing her from adherents to the community’s majority religion, and for altering the very nature of her relationship with her government.

Id. at 1844. I do not doubt that these examples raise serious religious equality concerns. It seems odd, however, to discuss these hypotheticals solely in terms of how they divide people from each other on religious grounds while ignoring the burden on religious liberty they impose on minorities by pressuring them to join in the majority’s religious exercise.

163. See *supra* note 159 and accompanying text.

164. *Town of Greece*, 134 S. Ct. at 1825.

bow their heads, and join in the offered prayers.¹⁶⁵ While this is true, it is hard to understand why Justice Kennedy believes that it mitigates in any way the coercive nature of these requests.

Plaintiffs argue that if a citizen is seeking benefits or actions from a deliberative body or government official who has the discretionary authority to make decisions that will seriously impact the citizen's wellbeing, it is intrinsically coercive for the citizen to be asked to engage in a religious exercise such as a prayer before submitting his request to the government decision-maker. The government decision-maker could be a public employer evaluating job applicants, or determining promotions. It could be a teacher supervising and evaluating public school students. It could be a judge presiding over a trial. Or it could be a town board making administrative and legislative decisions involving small groups in the community or individual residents. In all of these examples, if the employer, teacher, judge, or board in their official capacity asks citizens to pray, the request is intrinsically coercive. Citizens will naturally feel pressured to comply in order to avoid alienating government decision-makers who have so much discretionary authority over the citizen's interests. In these circumstances why would anyone think that there is a distinction between the town board members asking the audience to stand and pray and the invited clergy offering the prayer directing them to do so? If a judge, employer or teacher invited clergy to offer a prayer and litigants and counsel, employees, and students were directed by the invited clergy to pray, the coercive nature of the circumstance would not be significantly reduced.

2. Coercion Exists Without Explicit Threats or Formal Penalties

Even if the Town Board itself rather than the invited clergy directed audience members to rise, bow their heads, and join in prayer, the Court seems to suggest that such requests would still not constitute unconstitutional coercion. Justices Thomas and Scalia clearly would reach this conclusion. From their perspective, religious coercion is only constitutionally problematic if it is imposed "by

165. *See supra* note 66 and accompanying text.

force of law and threat of penalty.”¹⁶⁶ Implicit coercion has no constitutional significance for these Justices. Presumably, they would have found no constitutionally problematic coercion in the various hypotheticals involving prayer requests described in Justice Kagan’s dissent.¹⁶⁷

Some of the language in Justice Kennedy’s opinion seems to echo this position. He appears to reject plaintiffs’ coercion claims because Board members never told residents that the Board’s decision “might be influenced by a person’s acquiescence in the prayer opportunity.”¹⁶⁸ Similarly, he explains, “Nothing in the record indicates that town leaders allocated benefits and burdens based on participation in the prayer, or that citizens were received differently depending on whether they joined the invocation or quietly declined.”¹⁶⁹ This suggests that Justices Kennedy, Roberts, and Alito agree with Justices Thomas and Scalia that there must be an actual threat of penalty or imposition of a penalty (or denial of benefits) for claims of religious coercion to be upheld.

Other language suggests a more fact-based understanding of Justice Kennedy’s argument. Here, Justice Kennedy does not appear to be insisting, as do Justices Thomas and Scalia, that as a matter of law, coercion must be imposed by explicit threats or penalties. He is arguing as a matter of fact and social reality that without explicit threats or a history of the sanctioning of dissidents audience members cannot reasonably claim to feel pressured by the prayer practices they challenge. Pursuant to Justice Kennedy’s understanding of human behavior, “Should nonbelievers choose to exit the room during a prayer they find distasteful, their absence will not stand out as disrespectful or even noteworthy. And should they remain, their quiet acquiescence will not, in light of our traditions, be interpreted as an agreement with the words or ideas expressed.”¹⁷⁰ Thus, Justice Kennedy suggests that implied coercion might exist in some circumstance, but not in this one.

Once again, it is hard to make sense of observations about social reality that bear so little resemblance to the world I experience.

166. *Town of Greece*, 134 S. Ct. at 1837 (Thomas, J., concurring) (internal quotation marks omitted).

167. *See id.* at 1842–43 (Kagan, J., dissenting).

168. *Id.* at 1826 (majority opinion).

169. *Id.*

170. *Id.* at 1827.

Given the small number of residents in the audience of small town meetings (typically ten or less at the Town of Greece's meetings), I would expect that anyone who stood up and walked out during a prayer would be immediately noticed. They would have every reason to worry that their conduct would be considered disrespectful and that the board would be negatively influenced by their behavior. Would anyone seriously advise a friend or colleague planning on addressing a small town board meeting on an important matter that they should have no concerns or inhibitions about standing up and leaving the room during a prayer they found objectionable because no one would notice or be upset by their behavior?

The intrinsic coercion in the Town of Greece's prayer practice is an unavoidable result of the Board's discretionary power and the obvious value it assigns to the offering of prayers to begin its meetings. In such circumstances, the normal response of an individual subject to an official's exercise of discretionary power would be to worry that a failure to comply with a "request" to pray would adversely influence the official's decisions in a way that would be detrimental to the individual's needs and interests. This is the common understanding when participation in prayer is requested by school authorities. Thus, for example, when a public high school coach asked team members to kneel, or stand and bow their heads at prayers offered during team dinners and in the locker room, it is hardly surprising that dissident students would feel pressure to participate because they "would not want to disappoint the coach" or that a student would fear "that if he did not go along with what was obviously the coach's desire, he would not get playing time."¹⁷¹

Similar concerns about coercion arise when citizens seek the discretionary assistance of public employees and are confronted with requests to join the employee in prayer. Accordingly, courts have upheld regulations prohibiting a state social worker from sharing his faith with clients and praying with them on the job. Clients go to the

171. *Borden v. Sch. Dist. of East Brunswick*, 523 F.3d 153, 182 (3rd Cir. 2008) (McKee, J., concurring) (internal quotation marks omitted). In another example, a high school teacher publicly chastised a student for refusing to recite the Pledge of Allegiance. In holding that the teacher violated the student's First Amendment rights, the court explained: "Given the gross disparity in power between a teacher and a student, such comments . . . coming from an authority figure with tremendous discretionary authority . . . cannot help but have a tremendous chilling effect on the exercise of First Amendment rights." *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1269 (11th Cir. 2004).

offices of the Department of Social Services to “seek assistance” from “an agent of the state.” If the social worker from whom they seek assistance asks them to pray, “they may well be motivated to seeks ways to ingratiate themselves” with the state’s agent.¹⁷²

Intrinsic coercion is also easily recognized in the relationship between supervisors and public employees. OPM Guidelines on Religious Exercise and Religious Expression in the Federal Workplace state:

Because supervisors have the power to hire, fire, or promote, employees may reasonably perceive their supervisors’ religious expression as coercive, even if it was not intended as such. Therefore, supervisors should be careful to ensure that their statements and actions are such that employees do not perceive any coercion of religious or non-religious behavior (or respond as if such coercion is occurring), and should, where necessary, take appropriate steps to dispel such misperceptions.¹⁷³

This common sense understanding of implicit compulsion and the reasonable fear of consequences for failing to comply is recognized in so many settings and circumstances that it is difficult to understand Justice Kennedy’s contention that it does not exist in the chambers of a town board meeting.

3. Competing Traditions as to the Meaning of Coerced Attendance at Prayers and Standing During Prayers

In refuting plaintiffs’ religious coercion claims, Justice Kennedy also seems to suggest that plaintiffs are not being required to do anything of religious or expressive significance. He contends that “in light of our traditions” involving legislative prayer, no one would think that an audience member standing up (and perhaps bowing his head) while the prayer was expressed was joining in the prayer.¹⁷⁴

On its face, this seems to be obviously wrong. A member of the clergy treats the audience as if it was the congregation at his house of worship.¹⁷⁵ He asks the audience to rise and bow their heads and

172. *Berry v. Dep’t of Soc. Services*, 447 F.3d 642, 650–51 (9th Cir. 2006).

173. Press Release, Office of the Press Secretary, The White House, Guidelines on Religious Exercise and Religious Expression in the Federal Workplace (Aug. 14, 1997), *reprinted in* CCH INC., EMPLOYMENT PRACTICES GUIDE ¶ 3814 (2014).

174. *See Town of Greece*, 134 S. Ct. at 1827.

175. *See id.* at 1826.

pray with him.¹⁷⁶ The prayer he offers is in the name of the audience.¹⁷⁷ Everyone in the room rises in response to the prayer-giver's request. Most do so for the express purpose of joining in the prayer. Why would anyone think that a particular person rising and bowing his head in such circumstances is not joining in the prayer?

Justice Kennedy's answer is that because of the tradition of legislative prayer, it is common knowledge that the expression of prayer in this circumstance serves a secular, ceremonial, solemnizing purpose.¹⁷⁸ Standing and bowing one's head is understood to reflect respect for that tradition and the function it serves. It does not involve religious exercise or signify participation in the prayer being offered. As Justice Kagan suggests, the Court acts as if by mere reference to the tradition of legislative prayer, it can transform sectarian "statements of profound belief and deep meaning" that go to "a core aspect of [a person's] identity" into mere ceremony.¹⁷⁹

Justice Kennedy reads far too much into the alleged tradition he describes. First, as a general rule, people do communicate acquiescence to a message when they stand while it is expressed. When people stand when the national anthem is played before a sporting event begins, most would explain their conduct as an expression of patriotism that is shared by the entire audience. Second, jurors and scholars seriously dispute the meaning and scope of the tradition he describes. Indeed, plaintiffs and the dissenting Justices emphatically dispute the extension of this tradition to small town board meetings.¹⁸⁰ Accordingly, it is hardly clear that laypersons in the audience are so familiar with Justice Kennedy's interpretation of this tradition that it colors their understanding of the prayer practice sponsored by the Town Board. Third, the idea that the content of the prayer is irrelevant to audience members in the context of legislative prayers because they are simply standing to show respect for tradition and the beliefs of others cannot be grounded in the facts of *Marsh*. Under Justice Kennedy's analysis, it would make little sense for Jewish legislators to tell the legislative

176. See *supra* notes 40 and 60 and accompanying text.

177. See *supra* note 39 and accompanying text.

178. See *Town of Greece*, 134 S. Ct. at 1825.

179. *Id.* at 1853 (Kagan, J., dissenting).

180. See *id.* at 1851–52; Brief for Respondents, *supra* note 3, at 21–22.

chaplain in Nebraska that his praying in Christ's name was a matter of concern to them. Yet the Court in *Marsh* understood these requests, and the Chaplain's response of making the prayers more generic, to be perfectly reasonable, whether or not the response was constitutionally required.¹⁸¹

a. American tradition rejects coerced attendance at prayers

Fourth and most importantly, Justice Kennedy completely ignores two other American traditions that compete with the tradition of legislative prayer. These alternative traditions would color the understanding of the prayer practice at town board meetings and suggest that the tradition of legislative prayer should be construed cautiously and narrowly. One tradition is historical. Americans from the colonial period onward have insisted on their right to control their decisions as to the religious congregation they will join, the services they will attend, and the clergy with whom they will worship.¹⁸² As Michael Paulsen argues in his defense of the Court's holding in *Lee v. Weisman* striking down state-sponsored prayers at public school graduations,¹⁸³ focusing on the public's historical acceptance of state-sponsored prayers to solemnize public events and activities only tells one half of the story. "[T]he evidence is also clear that compelled attendance at a religious worship service was regarded as one of the defining characteristics (and most hated features) of religious establishments."¹⁸⁴

As Paulsen explains, "government induced attendance at a prayer ceremony violates this historical principle."¹⁸⁵ Nor should the brevity of the event excuse this constitutional violation. "Surely," Paulsen concludes, "the state could not compel attendance at a ten-minute Mass or a five-minute sermon."¹⁸⁶ Yet Justice Kennedy's

181. See *Marsh v. Chambers*, 463 U.S. 783, 791–95 (1983).

182. See, e.g., Alan Brownstein, *Protecting the Religious Liberty of Religious Institutions*, 21 J. CONTEMP. LEGAL ISSUES 201, 233–36, 241–45 (2013); ELISHA WILLIAMS, THE ESSENTIAL RIGHTS AND LIBERTIES OF PROTESTANTS (1744), reprinted in AM. HERITAGE SERIES, THE GREAT AWAKENING 323, 326–29 (Alan Heimert & Perry Miller eds., 1967). The Court's opinion in *Hosanna-Tabor Evangelical Lutheran Church & School v. Equal Employment Opportunity Commission*, 132 S. Ct. 694, 702–03 (2012) reflects some recognition of how important it was to colonists and the Framers for individuals to be free to choose the clergy with whom they would choose to pray.

183. *Lee v. Weisman*, 505 U.S. 577, 598–99 (1992).

184. Michael Stokes Paulsen, *Lemon Is Dead*, 43 CASE W. RES. L. REV. 795, 828 (1993).

185. *Id.*

186. *Id.* at 829.

opinion reads as if American resistance to the use of government power to influence attendance and participation at prayer services or the selection of clergy leading worship had no place in our constitutional tradition. To the contrary, it is this tradition of challenges to government induced attendance at prayer ceremonies and government involvement in the selection of clergy that must serve as the compelling backdrop behind which the more limited tradition of legislative prayer should be understood.

b. Prayer is a personal, meaningful communication between the individual and G-d

The other tradition is cultural and religious, and it substantially predates any use of prayer to begin legislative sessions. For many if not most Americans, prayer is a personal, meaningful communication between the person expressing the prayer and G-d.¹⁸⁷ It is not an abstract or rote means of solemnizing secular activities. As Judge John Noonan explains, through religious exercise and prayer “[h]eart speaks to heart. . . . [and it expresses] the living communication between believer and God” that is the essence of religion.¹⁸⁸ In reading Justice Kennedy’s opinion, one searches in vain for any recognition of the meaning religious people assign to prayer or how foreign his description of legislative prayer is to that more basic understanding of what prayer is. Legislative prayer, it seems, involves everything except what prayer is conventionally recognized to be—a heartfelt, personal communication between men and women and G-d.¹⁸⁹ When people are asked to pray and a

187. See, e.g., Kevin L. Ladd & Daniel N. McIntosh, *Meaning, God, and Prayer: Physical and Metaphysical Aspects of Social Support*, 11 MENTAL HEALTH, RELIGION & CULTURE 23, 29 (2008) (defining prayer as the “intentional expression of one’s self in an attempt to establish or enhance connectivity with the divine, with others in a religious or spiritual framework, and with the self”).

188. JOHN T. NOONAN, JR., *THE LUSTRE OF OUR COUNTRY: THE AMERICAN EXPERIENCE OF RELIGIOUS FREEDOM* 1–2 (1998).

189. To Jews, for example, “prayer is our way of communicating with God.” REUVEN HAMMER, *ENTERING JEWISH PRAYER: A GUIDE TO PERSONAL DEVOTION AND THE WORSHIP SERVICE* 3 (1994). More specifically, “[p]rayer is the conscious expression of [our] relationship [with God], the moments and hours we devote exclusively to developing that connection: addressing ourselves to God, speaking about God, listening to the words of God.” *Id.* at 6. One Christian author describes prayer this way. “When we pray, we use words (spoken out loud or silently) and gestures to express what we believe about God and how we think about our relationship to God and to one another. In prayer, we communicate how God is active and present to us. In faith, we pray, believing that God is concerned about and responsive to human need. Prayer expresses our personal relationship to God—a relationship that God intends and initiates

member of the clergy prays in their name before a town board meeting begins, the legislative setting and allegedly neutral tradition surrounding the prayer may not easily transform the intrinsic nature of prayer for the audience asked to stand during its recital.

Indeed, Justice Kennedy not only ignores this tradition, but inexplicably he never actually addresses the obvious question of whether standing and bowing one's head while a prayer is expressed in his or her name constitutes the exercise of religion for the participant. Justice Kennedy's primary focus is on how the audience member's conduct appears to others.¹⁹⁰ He does not consider the experience of standing and bowing one's head from the audience member's perspective.

Justice Kennedy also ignores the role that physical movement plays in religious exercise and prayer. To Justice Kennedy, standing silently is a secular expression of respect. Certainly, there are occasions when this is the only way to understand this physical movement, such as when the audience is called on to rise when a judge enters the courtroom. There is no common tradition for standing during local board meetings, however, on which to build this secular interpretation of standing during an opening prayer. More importantly, again, there is a powerful tradition recognizing the act of standing during the expression of a prayer as an essential part of a religious exercise. As Justice Douglas noted, "The act of praying often involves body posture and movement as well as utterances."¹⁹¹

The meaningful role of posture and movements in prayer cannot seriously be disputed. Often, worship involves acts as well as words.¹⁹² Formal postures and gestures accompany spoken prayer

and that we accept through the intercession of the Holy Spirit. . . . In the end, prayer is about a relationship in which we see God face to face as God loves us, with unflinching mercy, and gives God's self as a gift to each and every one of us. We give ourselves to God in return." PATRICIA D. BROWN, *PATHS TO PRAYER* 15 (2003).

190. See *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1827 (2014) (contending that a dissenter's standing quietly while a state-sponsored prayer is expressed "will not . . . be interpreted as an agreement with the words or ideas expressed"); *supra* notes 169–76 and accompanying text.

191. *Brandenburg v. Ohio*, 395 U.S. 444, 455 (1969) (Douglas, J., concurring). See *supra* notes 169–76 and accompanying text.

192. See, e.g., ROY A. RAPPAPORT, *ECOLOGY, MEANING, AND RELIGION* 199 (1st ed. 1979) (emphasizing that, "Liturgy's acts may . . . speak more clearly than words").

and play an important communicative role in the act of worship.¹⁹³ Different postures are associated with different faith traditions, but the importance of physical movement to prayer is common to many faiths.¹⁹⁴ For example, the physical movements accompanying Islamic prayer are structured and complex. Because daily “[p]rayer for a Muslim involves uniting mind, soul, and body in worship . . . a Muslim carrying out these prayers will perform a whole series of set movements that go with the words of the prayer.”¹⁹⁵ Standing, bowing one’s head and kneeling are important aspects of Christian worship for many denominations.¹⁹⁶

Standing is a particularly meaningful posture for prayer in many faith traditions. Jews do not always stand when they recite prayers, but standing while praying has special significance. Indeed, “standing is perhaps the most essential physical position of Jewish prayer.”¹⁹⁷ The most central prayer in the Jewish service, the Amidah (the standing prayer), is recited while standing.¹⁹⁸ Standing is required for reciting the Amidah, while it is not required for other prayers, because the Amidah “is a prayer addressed directly to God.”¹⁹⁹

Standing and kneeling are important communicative features of Catholic worship as well. As one author explained, “The postures

193. *Id.* at 199–200; Frederick Mathewson Denny, *Postures and Gestures*, in LINDSAY JONES ET AL., *ENCYCLOPEDIA OF RELIGION* 7341 (2d ed. 2005); Heather M. Erb, *Prayer Postures: What They Mean & Why They Matter*, 79 *NEW OXFORD REV.* 37 (Apr. 2012).

194. *See, e.g.*, Denny, *supra* note 193, at 7341–42; Ladd & McIntosh, *supra* note 187, at 32; Vasile Vlad, *The Bodily Forms of the Prayer in Eastern Christian Spirituality*, 5 *SCI. J. HUMANISTIC STUD.* 166 (2013).

195. *Salat: Daily Prayers*, BBC (Sept. 8, 2009), <http://www.bbc.co.uk/religion/religions/islam/practices/salat.shtml>.

196. *See, e.g.*, *Frequently Asked Questions About Customs in the Episcopal Church*, ALL SAINTS’ EPISCOPAL CHURCH, CLINTON, S.C., <http://allsaintsclinton.org/faqcustoms.html> (last visited Aug. 29, 2014) (explaining that Episcopalians bow their heads at the name of Jesus in the creeds and stand for the reading of the Gospel “out of respect for our Lord and the good news he brought us . . .”); TERESA A. BLYTHE, *50 WAYS TO PRAY* 85–97 (2006).

197. Joshua Rabin, *Physical Movement in Jewish Prayer: Speaking to God Through the Body*, MY JEWISH LEARNING, http://www.myjewishlearning.com/practices/Ritual/Prayer/Prayer_Music_and_Liturgy/Physical_Movement.shtml (last visited Aug. 22, 2014).

198. *See* YITZCHOK KIRZNER, *THE ART OF JEWISH PRAYER* 29–30 (1991).

199. *See* HAMMER, *supra* note 189, at 156. Uri Ehrlich explains the obligation for Jews to stand while praying in somewhat similar terms. “What is of consequence is the worshiper’s perception of prayer as an interpersonal relationship, similar to a student-master relationship; hence the obligation to stand. If prayer is conceptualized as building a close experiential encounter with the divine presence, in such a situation, as in the case of close proximity to a sage, a standing posture is manifestly the appropriate one.” URI EHRLICH, *THE NONVERBAL LANGUAGE OF PRAYER: A NEW APPROACH TO JEWISH LITURGY* 16 (Dena Ordan trans., 2004).

that we [Catholics] take during the liturgy are not empty rituals, but they each have a meaning and a certain power of their own, greatly influencing our experience. A common posture is a sign of the unity of the Christian community gathered for the sacred liturgy. . . .”²⁰⁰ More specifically, “Standing is the primary posture that we take at Mass since it best embodies the active stance of the participants. . . . We stand to make a commitment.”²⁰¹ Standing during other rituals serve “as a sign of our active participation” in the worship service.²⁰²

Once again, it is this background understanding of the role that physical movements such as standing and bowing one’s head play in prayer that renders Justice Kennedy’s conclusions about the prayer practices of the Town of Greece so myopic. Standing while prayers are recited is the embodiment of religious exercise for some faiths. It may be a distortion of the physical requirements of prayer for others.²⁰³ The religious significance of physical movement in the act of prayer cannot be cavalierly subsumed by repeated references to the tradition of legislative prayer.

4. Coercion and the Timing of Prayers

Another argument related to the coercion of audience members is the suggestion that the timing of the prayer might have some relevance to its constitutionality. Justice Kennedy emphasized that the prayer is offered “during the ceremonial portion of the town’s meeting” when the board members “are not engaged in policymaking.”²⁰⁴ It is possible to imply from this language that prayers offered while the Board was engaged in its policymaking functions would raise more serious concerns. Arguably, the ceremonial activities occurring immediately after the prayer is offered contribute to the understanding that the prayer serves a

200. Judith H. Bullock, *Posture at Mass: Standing*, ARCHDIOCESE OF LOUISVILLE, <http://www.archlou.org/wp-content/uploads/2011/07/PostureatMassStanding.pdf> (last visited Oct. 1, 2014).

201. *Id.*

202. *Id.*

203. State-sponsored prayer practices create conflicts for religious minorities not only with regard to the words of the prayer, but also because of the physical movements accompanying the verbal expression of the prayer. For example, a Jewish parent objecting to the Regents Prayer that was ultimately struck down in *Engel v. Vitale*, 370 U.S. 421 (1962), argued “the children have been taught to clasp their hands when they pray. We are Jewish and do not clasp our hands when we pray.” See also BRUCE J. DIERENFIELD, *THE BATTLE OVER SCHOOL PRAYER: HOW ENGEL V. VITALE CHANGED AMERICA* 83 (Univ. Press of Kan. ed., 2007).

204. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1827 (2014).

purely ceremonial function, and the time during which the presentation of awards and other ceremonial activities take place serves as a temporal buffer between the offering of the prayer and the public comment period during which residents may address and petition the Board.

It is doubtful that Justice Kennedy assigned much weight to the temporal buffer argument, however. As plaintiffs argued, over 40 percent of the time, there were no ceremonial activities at Town of Greece Board meetings and public comment immediately followed the offering of the prayer.²⁰⁵ If the Court actually believed that close proximity of the prayer to public comment and policy-making deliberations was significant, it is hard to understand why Justice Kennedy did not even mention how often that proximity occurred.

Justice Alito appeared to recognize the possibility that prayer practices like those in the Town of Greece may pressure and coerce residents in the audience to participate in the prayer. He pointedly noted that the prayers at issue in this case took place before the legislative part of the board meeting. More importantly, Justice Alito insisted that this case did not involve (and therefore one would assume does not determine) the constitutionality of prayers offered prior to adjudicatory proceedings.²⁰⁶ Justice Alito conceded that the matters decided during the legislative portion of the meeting may “involve very specific questions,” but he argued that this reality “does not transform the nature of this part of the meeting.”²⁰⁷

This section of Justice Alito’s concurring opinion is significant for several reasons. Arguably, it limits the scope of the Court’s holding to only upholding prayers before local government meetings involving formally legislative proceedings.²⁰⁸ It certainly suggests greater consideration and concern for the coercive consequences of state-sponsored prayer than Justice Kennedy’s opinion. If implicit coercion is never constitutionally significant, it is hard to know why Justice Alito would distinguish prayers before adjudicatory

205. See Brief for Respondents, *supra* note 3, at 28.

206. See *Town of Greece*, 134 S. Ct. at 1829 (Alito, J., concurring).

207. *Id.*

208. There is considerable debate as to whether the concurring opinion of a Justice who joins the majority opinion should bind or even influence lower court interpretations of the Court’s holding and reasoning. See, e.g., Vikram David Amar, *A Potential Guide to the Meaning of Hobby Lobby: Why Justice Kennedy’s Concurring Opinion May be Key, Part I*, JUSTIA VERDICT (July 18, 2014), <http://verdict.justia.com/2014/07/18/potential-guide-meaning-hobby-lobby>.

proceedings and suggest that they required additional constitutional attention. The implication here is that the petitioner in an adjudicatory hearing is sufficiently vulnerable to the implicitly coercive impact of prayer requests to warrant judicial intervention, but a person expressing views during public comment at a legislative meeting does not merit the Court's concern.

Justice Alito's position is not entirely without merit. As a formal matter, the process of decision-making, including the possibility of meaningful appeals, varies between legislative and adjudicatory proceedings.²⁰⁹ Further some legislative decisions, even at a small town board meeting, will involve such broad policy matters that affect so many people that a board member's distaste for a few residents that refuse to join the state-sponsored prayer is unlikely to control his or her ultimate decision on the merits.

It is also true, however, that the identification of specific board actions as either legislative or adjudicatory is often indeterminate. The process of decision-making may be formally different, but the categorization of matters into one class or another is arbitrary in many cases.²¹⁰

209. Unlike quasi-judicial proceedings, legislative decisions typically do not require formal hearings or clear explanations justifying their enactment. *See, e.g.*, *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 466–69 (7th Cir. 1988) (finding that a local zoning commission's "decision to approve or disapprove a site plan is a legislative rather than adjudicative decision," the court stated that the commission is not required to conduct "adjudicative-type procedures, to give reasons for their enactments, or to act 'reasonably' in the sense in which courts are required to do"). They are also often subject to extremely deferential standards of review. *See, e.g.*, *Petersen v. Riverton City*, 243 P. 3d 1261, 1265 (Utah 2010) (having determined that city's land use decision was legislative rather than quasi-judicial, court applies "the highly deferential reasonably debatable standard" to review the city's action rather than the more rigorous substantial evidence standard of review).

210. As land use expert Daniel Mandelker explains, in land-use regulation cases "[s]ome courts hold a legislature acts legislatively even when it exercises administrative functions and do not require standards for the exercise of those functions. . . . [Other courts, to the contrary, hold] the character of the function the legislative body exercises is determinative and requires standards for the exercise of administrative functions." DANIEL R. MANKELKER, *LAND USE LAW* § 6.02 (5th ed. 2003). Rezoning cases are a classic example of the confusion courts encounter in trying to determine whether a particular municipal decision is legislative or quasi-judicial in nature. Jurisdictions are split as to how to characterize rezoning decisions with some states holding that they are legislative in nature while others treat them as quasi-judicial actions. *Id.* at § 6.26. Rezoning is hardly the only area of confusion, however. For example, after noting that "[l]egal observers concede that the distinction between adjudicative and legislative decisions are not often clear," the Governor's Office of Planning and Research of the State of California went on to describe the convoluted case history of courts reversing themselves in attempting to determine whether street abandonments were legislative or adjudicative acts. *See* GOVERNOR'S OFFICE OF PLANNING AND RESEARCH, STATE OF CAL., *BRIDGING THE GAP: USING FINDINGS IN LOCAL*

More importantly, as Justice Alito appears to recognize, many formally legislative matters decided by a small town board will involve issues that are of particular importance to only a very small group of residents.²¹¹ In those situations, for the purpose of protecting religious minorities and non-religious residents from coercion, the individual addressing the board when it acts in its legislative capacity is essentially in the same position as an individual appearing before the board in an adjudicatory proceeding. Indeed, the individual may be in an even worse situation because a local board acting in its legislative capacity may often be influenced by selfish parochial concerns, special interests, or bias and is rarely required to justify its actions under any kind of meaningful scrutiny.²¹² If the resident asking the board to reach a narrow legislative decision does not stand and bow his head as requested by the prayer-giver, he risks alienating the decision-makers he is trying to influence and increases the likelihood of an adverse outcome. As a formal matter a legislative proceeding is not an adjudicatory proceeding. In small town meetings, however, the coercion inherent in the prayer practices of the Town of Greece will be as problematic in the former context as the latter.

5. Distinguishing Graduation Prayer from Legislative Prayer

Justice Kennedy's final argument for rejecting plaintiffs' coercion argument involves his attempt to distinguish *Lee v.*

LAND USE DECISIONS (2nd ed. 1989), available at http://ceres.ca.gov/planning/Bridging_Gap/Gap_3.html#judicial_standards.

211. See *Town of Greece*, 134 S. Ct. at 1829 (Alito, J., concurring) (“[T]he matters considered by the board during this initial part of the meeting might involve very specific questions, such as the installation of a traffic light or stop sign at a particular intersection . . .”). Generic legislative decisions will often have distinctively severe consequences for specific individuals in the context of small town decision-making. For example, if the local police department has seven officers and the town board is deciding whether or not to cut the department's budget so that it will only be able to retain six officers, this conventionally “legislative” budget decision will have special meaning for the one or two officers who have most recently joined the department.

212. See, e.g., *Coniston Corp.*, 844 F.2d at 466–69 (finding that it is not uncommon that the decisions of local officials are often motivated by parochial views which contravene state law). Congress recognized that the operation of the land use regulatory process by local governments created an unacceptable risk of religious discrimination when it enacted the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000 cc (2000). Because local government actions regarding religious land uses were often highly individualized and subject to the almost limitless discretion of local boards and officials, decision-making in these circumstances was “particularly susceptible to religious discrimination.” Ashira Pelman Ostrow, *Judicial Review of Local Land Use Decisions: Lessons from RLUIPA*, 31 HARV. J.L. & PUB. POL'Y 717, 740–42 (2008).

Weisman,²¹³ the case striking down state-sponsored prayer at public high school graduations, from *Town of Greece*.²¹⁴ Justice Kennedy argues that *Town of Greece* is not governed by the analysis and holding of *Lee* for two reasons. First, he seems to suggest that it is far easier for an audience member to leave the room during the prayer offered at a town board meeting unnoticed and without disturbing the decorum of the event than it is for a graduating student to leave the auditorium unnoticed and without creating a disturbance during the invocation at her graduation ceremony.²¹⁵

There is probably some difference here, but the important question is whether it is a difference that matters. As I have argued previously, leaving the room during the prayer at a small town board meeting is more than noticeable enough to implicate coercion concerns. The greater attention that might be directed at a departing graduating student may strengthen her Establishment Clause challenge, but it does not undermine the arguments of plaintiffs in *Town of Greece*. Moreover, *Lee* is not the only relevant precedent here. The Court also struck down state-sponsored prayers at public high school football games in *Santa Fe Independent School District v. Doe*.²¹⁶ Yet it would be hard to argue that a student leaving the stands during the prayer offered at a high school football game would be more noticeable to school authorities and potentially disruptive of the event than an audience member leaving the board meeting room during a state-sponsored prayer.

Justice Kennedy's second argument is even more problematic. The plaintiff in *Lee* was a minor, and as such was particularly susceptible to peer pressure and religious indoctrination.²¹⁷ The protection against coercion that the Establishment Clause provides to minors, Justice Kennedy explains, cannot be extended to "mature adults [such as the plaintiffs in *Town of Greece*] who 'presumably' are 'not readily susceptible to religious indoctrination or peer pressure.'"²¹⁸

213. 505 U.S. 577 (1992).

214. *Id.*

215. *See Town of Greece*, 134 S. Ct. at 1827.

216. 530 U.S. 290 (2000).

217. *See Lee*, 505 U.S. at 578.

218. *Town of Greece*, 134 S. Ct. at 1827 (quoting *Marsh v. Chambers*, 463 U.S. 783, 792 (1983)).

There are serious difficulties with this analysis. If we focus on the context and setting of the two cases and not on the minority or majority status of the plaintiffs, plaintiffs in *Town of Greece* would seem to have a far stronger coercion claim than the plaintiff in *Lee*. Plaintiffs in both cases could argue they were coerced by peer pressure. But plaintiffs in *Town of Greece* have a separate and more powerful argument. They are worried that the Town Board will decide issues that are important to their lives and property adversely to their interests if they do not comply with requests to participate in state-sponsored prayers. These are material, not psychological consequences, inflicted by the government itself, not by private peers.

The plaintiff in *Lee* had no such argument. She has just graduated from her school. During the school year, because school authorities, principal, and teachers have considerable discretionary authority over students' grades and future opportunities, students may be justifiably wary of offending them by not participating in a school sponsored prayer.²¹⁹ Indeed, this is one of the reasons courts are particularly concerned about the promotion of religion in the public schools.²²⁰ In this sense, residents attending small town board meetings share common concerns with public school students who are requested to participate in state-sponsored prayers. Both groups must be wary of alienating authorities who have so much discretionary power over matters that are important to them. The school authorities have no such power over students after they graduate, however. Students who refuse to pray at graduation need

219. Fear of reprisals from teachers and school authorities has always been a concern of dissenting students and their parents. One of the children involved in the *Engel v. Vitale* lawsuit, for example, describes experiencing "antagonism from the teachers, no question about that." JOAN DELFATTORE, *THE FOURTH R: CONFLICTS OVER RELIGION IN AMERICA'S PUBLIC SCHOOLS* 72 (2004); see also DIERENFIELD, *supra* note 203, at 108 (discussing specific examples of students being singled out for their personal or familial religious beliefs). Ellory Schempp, one of the Schempp children whose opposition to being forced to recite the Lord's Prayer and listen to Bible verses read over the public address system was vindicated in *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963), was subjected to furious scolding from his school principal when he refused to participate in mandatory devotions. DIERENFIELD, *supra* note 203, at 165. Not content with browbeating the high school student, the principal wrote to the colleges that Ellory had applied to for admission and urged them to reject his application. Learning that Tufts University had accepted the Schempp boy into its entering class, the principal tried to convince the university to rescind his admission. *Id.* at 168.

220. See *supra* note 171 and accompanying text.

no longer fear how their teachers or principal will evaluate their work or reach other decisions of personal importance to them.

The other problem with Justice Kennedy's argument has its roots in earlier Establishment Clause cases. The Court has suggested that we protect minor students in public schools from state-sponsored religious activities because they are young and impressionable and are "highly susceptible to religious indoctrination."²²¹ Adults, on the other hand, are presumed to have greater knowledge, experience, and will power and accordingly, will be able to resist such indoctrination. In essence, children in school will believe what their teachers and the principal tell them about religion as a matter of course. Adults will not be so easily persuaded.

While there is some truth to this analysis, part of it is grounded on an erroneous understanding of what is problematic about religious coercion for constitutional purposes. The premise on which this conclusion is grounded appears to be that we are primarily concerned about state coercion of religious belief and practice because it will work. The coerced individual will sacrifice his beliefs and conscience to avoid state sanctions. If that result is less likely because adults will have the moral fortitude to withstand more intense forms of state coercion than children, then there is less reason to be concerned about state attempts to influence the religious belief and behavior of adults.

That premise must be wrong, however. Religious coercion is constitutionally impermissible whether it is likely to be effective or not. It violates our commitment to human dignity and personal autonomy to allow the state to pressure religious individuals to violate their beliefs and conscience. The ability or willingness of certain groups to maintain their religious integrity in the face of direct or indirect compulsion should not undermine our conclusion that such coercion is constitutionally impermissible. What is unacceptable is that individuals are forced to choose between fidelity to their faith and conscience or the risk of state sanction. How particular individuals respond to that choice is irrelevant to the

221. *Lemon v. Kurtzman*, 403 U.S. 602, 616 (1971); *see also, e.g.*, *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987) ("Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable and their attendance is involuntary.").

constitutionality of the state's actions. The fact that audience members before a town board may decide to risk adverse decisions from the board rather than violate their conscience by standing for a prayer in their name that misrepresents their beliefs does not justify confronting them with these unacceptable alternatives.

6. Protecting the Religious Autonomy of the Government Selected Prayer-Giver

While Justice Kennedy's opinion demonstrates almost total disregard for the religious liberty and conscience of residents who attend town board meetings, he offers surprisingly strong protection to the conscience of potential prayer-givers who might be invited to offer prayers before the same meetings. The juxtaposition of the Court's conclusions here is striking. On the one hand, the Court does not require the Town to do much of anything to mitigate the coercion of residents who are directed to stand and bow their heads while sectarian prayers are offered in their name. On the other hand, the Court contends that towns may not take any steps to influence the prayer-givers decisions as to the sectarian content they will express in their prayers. Justice Kennedy insists, "Once it invites prayer into the public sphere, government must permit a prayer giver to address his or her own God or gods as conscience dictates, unfettered by what an administrator or judge considers to be nonsectarian."²²²

As might be expected in an opinion that gets so many other things wrong, Justice Kennedy's analysis here comes pretty close to being just plain backwards. Because government involvement with religion so commonly threatens religious liberty and religious equality, often the safest way to guarantee constitutional values is for the state to keep its distance from religion. That, of course, could be easily accomplished in the context of this case by a town electing not to begin its board meetings with a prayer at all. The Constitution may not require the town to make this decision, however. There may be constitutionally permissible ways to begin board meetings with a prayer.²²³ The overriding principle, however, must be this. Once the

222. *Town of Greece*, 134 S. Ct. at 1822–23.

223. Complex questions may arise in some cases as to whether free speech doctrine or religion clause doctrine should govern state action involving religious expressive activities. See generally Alan Brownstein, *Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality*, 18 J. L. & POL. 119 (2002). It is possible, for example, that the government can open up a limited public forum in which both private secular and religious

state decides to involve itself with religion and “invites prayer into the public sphere,” it is constitutionally required to take appropriate steps to protect religious liberty and equality when it does so.²²⁴ The idea that when the government involves itself with religion, the Constitution somehow prevents it from mitigating the resulting burdens on religious liberty and equality that result from that involvement simply turns church-state doctrine on its head.

Certainly, there is nothing in the *Marsh* opinion that supports the idea that the legislature lacks the authority to assert any control over the prayers offered to begin its sessions. Indeed, the reasoning and holding of *Marsh* is to the contrary. The Court noted in *Marsh* that the chaplain offering prayers before the Nebraska legislature changed the content of his prayers and made them more ecumenical when he was requested to do so by a Jewish legislator.²²⁵ There is no suggestion whatsoever that the Constitution prevented the legislature as a whole, or a committee supervising the chaplain’s duties, from expressing a similar request.

Indeed, it seems odd at best to suggest that a state legislature cannot decline to renew the contract of a chaplain they had hired to offer prayers before legislative sessions because they believed the prayers offered were unsuitable for a religiously diverse institutional body and failed to achieve the goals the legislature sought to accomplish with its prayer program. Yet, the logic of Justice Kennedy’s analysis in *Town of Greece* would suggest that such supervisory oversight of a chaplaincy is unconstitutional. Similarly, if Justice Kennedy is correct that the prayers offered at the Town of Greece Board meetings were directed at the Board members, not the audience, it is hard to understand why the Constitution prohibits the Board from telling prayer-givers that they hope to hear prayers that

speech is expressed. *See, e.g.*, *Capital Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753 (1995). No such argument is available in *Town of Greece*, however. The Town invites specific individuals to offer prayers as guest chaplains during a government meeting. It chooses the speakers based on their religious affiliation and status. Such arrangements make it clear that the prayer practice here constitutes state-sponsored speech, not private speech in a limited public forum. *See, e.g.*, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000). Moreover, even under free speech forum analysis, the Town’s practices would be unconstitutional. Religion is a viewpoint of speech. *See, e.g.*, *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001). In favoring religious speech, the Town engages in viewpoint discrimination which is unconstitutional under long accepted free speech doctrine. *See id.*

224. Brownstein, *State-Sponsored Prayers*, *supra* note 126, at 1534–35.

225. *See Marsh*, 463 U.S. at 791–95.

will emphasize the common religious and ethical beliefs that the Board members share rather than prayers that emphasize denominational differences that may fail to achieve the Board's purpose in requesting that a prayer be offered in the first place.

7. The Link Between Non-Sectarian Prayer and Coercion

An issue which received little attention from the majority, concurring, or dissenting opinions in *Town of Greece* is whether plaintiffs' argument about the sectarian nature of the prayers and the Town's perceived alignment with Christianity relates in any substantive way to plaintiffs' argument about coercion. The concern about the sectarian nature of the prayer and the Town's affiliation with Christianity seems to be primarily grounded in religious equality. The claim that residents are coerced into standing and participating in the prayer, on the other hand, is more easily characterized as a religious liberty issue.

It is not obvious, for example, how changing the content of the prayer or inviting guest chaplains from a broader range of faiths mitigates the coercive nature of a town's prayer practice. While some residents may feel more comfortable if a more generic prayer is offered, it may be argued that a resident who believes that a generic prayer does not reflect his or her beliefs will still feel pressured when he or she is asked to stand and join the prayer. Similarly, if a Muslim resident of a town attends a board meeting when a sectarian Protestant prayer is offered, how does the fact that on one occasion every two or three years a Muslim cleric will offer the prayer reduce the coercion the Muslim resident experiences to participate in the prayer being offered on the day he attends the board meeting?

While these arguments have considerable force, there is a way that a shift from sectarian to generic prayers and to a broader range of potential prayer-givers may mitigate the coercion intrinsic to state-sponsored prayers at small town board meetings—although it will not eliminate such coercion entirely. When all the prayer-givers and all the prayers are aligned with a particular religion, it will be clear to everyone attending a board meeting that the prayer being offered reflects the religious beliefs of all, or at least a substantial majority, of the members of the board. Accordingly, if a resident leaves the room when the prayer is offered, they have every reason to fear that their conduct will be construed to be disrespectful to the board

members' own religion. That perception is particularly likely to antagonize the very decision-makers that the dissenting resident will be trying to influence a short time later.

Generic prayers, however, are less likely to reflect the faith of particular board members. Just as a generic prayer may be less objectionable to a broader constituency, the generic prayer is also less likely to reflect the denominationally-distinct beliefs or religious identity of any member of the board. Thus, a dissenting audience member who refuses to participate in the offered prayer is less likely to fear that by doing so he will be deemed to be acting disrespectfully to the religion adhered to by the board members themselves.

A similar, but somewhat less persuasive, argument applies to prayers offered by a more diverse group of guest chaplains. Here, the contention would be that the increased diversity of prayer-givers distances the individual board members from the substantive content of the prayer practice at board meetings. The more that the prayers offered are understood to reflect the beliefs of different faith traditions, the less likely it is that board members will identify with the prayer practice the same way that they would if all the prayers reflected the board members' own beliefs. Increasing the distance between the prayer practice in general and the religious identity of the board members may ameliorate worries that a failure to participate in the prayer would be construed to be a challenge to the board members' faith.²²⁶

V. REMEDIAL QUESTIONS RAISED BY EQUALITY AND LIBERTY BASED CHALLENGES TO STATE-SPONSORED PRAYER AT TOWN BOARD MEETINGS

One of the underlying themes addressed during the oral argument in *Town of Greece*²²⁷ and in Justice Alito's challenge to

226. While these arguments suggest that a shift from sectarian to more generic prayers may mitigate coercion to some extent, I consider such a shift to be of secondary utility in reducing religious coercion in the context of a small town board meeting. More effective ways to reduce coercion would be to use "I" prayers instead of "We" prayers, to have the guest chaplain face the board, rather, than the audience if the prayer is to be primarily directed at the board, to offer a disclaimer and explanation to make it clear that the board is not aligning itself with particular religious beliefs or practices, and to avoid having the chaplain invite audience member to stand, bow, their heads, and join in the prayer.

227. See Transcript of Oral Argument, *supra* note 152, at 31:17–35:17, 38:23–40:17, 42:2–47:5.

Justice Kagan's dissent²²⁸ involves the remedy plaintiffs are seeking for the constitutional violations they allege. Are plaintiffs insisting that any and all prayers before town board meetings are unconstitutional? If not, what are the feasible, constitutionally permissible constraints they would impose on town board prayer-practices to eliminate, or at least mitigate, the burdens on religious liberty and equality on which they base their claims?

Justice Kennedy's opinion focuses on plaintiffs' argument that the Establishment Clause prohibits state-sponsored sectarian prayers at town board meetings.²²⁹ Justice Kennedy defends such prayers as a substantive matter because he contends they are consistent with our historical traditions²³⁰ and the government has no business telling clergy what is acceptable content of the prayers they may express—even when the prayers are offered at the government's request at government functions.²³¹ But the Court also expressed concerns about the feasibility of a requirement prohibiting sectarian prayer. How is a town board or a reviewing judge to determine whether the terminology of a prayer is sufficiently generic to satisfy constitutional standards? Whatever words are expressed in a prayer, it is likely that some individuals or groups may claim, with some justification, that the prayer is not sufficiently inclusive to reflect their beliefs.²³²

Plaintiffs had a forceful response to this argument. While it is easy to conjure up hypothetical problems with the requirement of inclusive, non-sectarian prayers, in fact such standards are commonly applied, without any obvious difficulty, throughout the United States.²³³ The House of Representatives, many state legislatures, and all the cities, counties, and state legislatures within the Fourth Circuit operate under such a system.²³⁴ In the real world, the problems the Court envisions simply have not occurred.

228. *See Town of Greece*, 134 S. Ct. at 1829–30 (Alito, J., concurring).

229. *See id.* at 1820–24 (majority opinion).

230. *See id.* at 1824 (“The prayers delivered in the town of Greece do not fall outside the tradition this Court has recognized.”).

231. *See id.* at 1822–23.

232. *See id.* at 1822.

233. *See* Brief for Respondents, *supra* note 3, at 50–52; Transcript of Oral Argument, *supra* note 152, at 34:10–35:1, 46:19–46:25, 50:16–50:23.

234. *See Town of Greece*, 134 S. Ct. at 1845–46 (Kagan, J., dissenting); Brief for Respondents, *supra* note 3, at 50–52.

Notwithstanding this rejoinder, the Court's concerns here cannot be totally discounted. Indeed, the broader and more inclusive prayers may be, in response to a town's request, the more painful the experience may be for those few individuals or groups who continue to feel excluded from its coverage.²³⁵ A court committed to protecting religious liberty and equality might still balk at a constitutional requirement prohibiting the offering of sectarian prayers at town board meetings.

Short of prohibiting non-sectarian prayers, are there other remedial constraints the Court could have imposed on the offering of state-sponsored prayers to protect the religious liberty and equality rights of residents attending town board meetings? The answer to this question is obviously an affirmative one, notwithstanding the fact that the Court ignored many of these possibilities and summarily rejected the others. If one examines the opinions of the dissenting Justices, Judge Calabresi's opinion for the Second Circuit, and the plaintiffs' arguments in their brief and oral argument, it is clear that numerous aspects of the Town's prayer practice were identified as problematic and that changes to those practices would make the prayer practice more consistent with constitutional values.

As discussed previously, the Town's imprecise and limited process by which guest chaplains were invited to offer prayers at meetings was criticized as discriminatory in effect and contributing to the religious homogeneity of both the clergy invited to Board meetings and the content of the prayers they offered.²³⁶ The solution to these defects could be easily accomplished. A town deciding to sponsor prayers at board meetings should be required to adopt a selection policy that is written down and supervised. Neither *ad hoc* decisions by unsupervised petty functionaries nor unwritten invitation policies never communicated to the public are acceptable.

Residents who are members of minority faiths with too few adherents to create a local congregation and who attend houses of worship outside of the town's borders must be treated as if they exist and deserve the same respect as residents who are members of in-town congregations. The same principle applies to residents who

235. See Alan Brownstein, *Continuing the Constitutional Dialogue: A Discussion of Justice Stevens's Establishment Clause and Free Exercise Jurisprudence*, 106 NW. U. L. REV. 605, 648–51 (2012).

236. See *supra* notes 122–26 and accompanying text.

are spiritual but are not affiliated with any organized religion and residents who are not religious.²³⁷ The policy must require serious efforts to assure that all congregations and all residents located in the community are recognized.

Justice Kennedy never explains why a broader, more rule-governed, and more transparent selection process for inviting prayer-givers is not required. Justice Alito's suggestion that a policy more protective of religious equality is beyond the ability of small towns²³⁸ is hard to take seriously. As Justice Breyer explained in his dissent, in addition to engaging in a greater effort to communicate with houses of worship in neighboring communities, and announcing the open opportunity to serve as guest chaplain at the beginning of Board meetings, the Town easily could "have posted its policy of permitting anyone to give an invocation on its website . . . which provides dates and times of upcoming town board meetings."²³⁹

Instead, the Town did nothing to achieve even the semblance of religious equality in its selection procedures.²⁴⁰ For the majority of the Court, *nothing* was good enough.

Equality concerns could also be mitigated if a town provided guidance to the prayer-givers as to the purpose of the prayer and the kinds of prayers that are inconsistent with that purpose and would raise constitutional concerns. While the Court sees no constitutional problem with highly sectarian prayers, it explains that legislative prayers that fall within our constitutional tradition are designed to elevate the proceedings and invite lawmakers to "reflect upon shared ideals and common ends."²⁴¹ Prayers that "denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion," serve other purposes and are constitutionally suspect.²⁴² Yet the Court does not require town boards to inform the clergy they invite of these constitutional parameters. Instead, it holds that plaintiffs can only challenge a course or practice of inappropriate prayers. This is

237. See *Galloway*, 681 F.3d at 31 (explaining that with regard to the Town's failure to invite individuals who are not affiliated with religious institutions to offer prayers, "[t]he town is not a community of religious institutions, but of individual residents, and, at the least, it must serve those residents without favor or disfavor to any creed or belief").

238. See *Town of Greece*, 134 S. Ct. at 1830–31 (Alito, J., concurring).

239. *Id.* at 1840 (Breyer, J., dissenting).

240. See *id.*

241. *Id.* at 1823 (majority opinion).

242. *Id.*

not only an extraordinarily difficult burden to meet, but in the ordinary course of events it will do nothing to protect minorities from disparaging or proselytizing prayers.

A brief statement by a board to the audience before a prayer is expressed could also mitigate equality concerns. The board could explain the solemnizing function of the state-sponsored prayers, clarify that the board understands and respects the diversity of beliefs in the community, and assure everyone that the choice of guest chaplain and the content of the offered prayer does not reflect the board's endorsement of a particular faith or belief.²⁴³ The Court required no such explanation or disclaimer.

The guest chaplain should also be advised that the prayer should be offered in his name, not in the name of the audience in attendance.²⁴⁴ Government has no vested authority to speak to G-d in the name of its citizens.²⁴⁵ Moreover, concerns about the sectarian terminology of prayers are sharply reduced when it is clear the prayer reflects the beliefs of the chaplain offering the prayer and not the beliefs of people of other faiths or no faith in the audience. This admonition to prospective guest chaplains would not require the parsing of prayers or an evaluation of the inclusivity or exclusivity of specific language. In most cases, it would simply require the chaplain to offer an "I" prayer as opposed to a "we" prayer.²⁴⁶

Further, the board could explain before the prayer is offered that it understands that in a religious diverse community, there is no one size fits all prayer and the audience cannot and should not be expected to stand and participate in prayers of other faiths. It should be emphasized that no such conduct is expected or required of the audience.²⁴⁷ If the prayer is actually to be directed at the board and not the audience, as Justice Kennedy insists it is,²⁴⁸ the board should make that clear to the audience as well. The guest chaplain should face the board members if they are the intended beneficiaries of the prayer.

243. *See id.* at 1840 (Breyer, J., dissenting), 1850–51 (Kagan, J., dissenting); *Galloway*, 681 F.3d at 32–33.

244. *See Town of Greece*, 134 S. Ct. at 1840 (Breyer, J., dissenting); *id.* at 1848 (Kagan, J., dissenting); *Galloway*, 681 F.3d at 32.

245. Brownstein, *State-Sponsored Prayers*, *supra* note 126, at 1529.

246. *Id.* at 1536.

247. *Id.*

248. *Town of Greece*, 134 S. Ct. at 1825–26.

All of these steps are easily accomplished. None seriously interfere with the guest chaplain's ability to pray in a way that is meaningful to him or her. Taken together, they substantially reduce the religious liberty and equality costs of offering a state-sponsored prayer at the beginning of a town board meeting. The Court did not require town boards to take any of these steps.

VI. THE DOCTRINAL AND PRACTICAL IMPLICATIONS OF *TOWN OF GREECE*

A. *The Parameters of Prayer Practices at Town Board Meetings*

1. Who Must be Invited to Offer Prayers?

What *Town of Greece* means for future Establishment Clause cases is not easy to decipher. The first and somewhat less difficult question is what this decision says about the constitutionality of prayers offered at town board or city council meetings. These prayers are now presumptively constitutional to the extent that they model the practices upheld in *Town of Greece*. Serious questions remain, however, as to exactly what that model entails and when a prayer practice unconstitutionally departs from it.

An initial question is what constitutes a constitutionally acceptable invitation policy to individuals asked to offer prayers? Although it runs counter to every constitutional intuition in any other area of constitutional law in which salient values and concerns about bias and discrimination are recognized, it would seem that a town can escape serious Establishment Clause scrutiny by assigning the job of inviting individuals to offer prayers to some petty functionary and provide him little guidance as to how to proceed in arranging prayers to be offered each month. A clerk could invite all organized congregations reflecting majoritarian beliefs, "inadvertently" ignore the one or two religious minority congregations in the community for at least ten years, and pay no attention whatsoever to nonaffiliated residents, nonreligious individuals, or adherents of minority faiths who worship in congregations outside of town. That is the model the Court upheld in *Town of Greece*. It is in my view an entirely unjustified and unsympathetic model, but it is what the Court has upheld. What happens, however, if a town deviates from this model?

If a town adopts a formal policy for inviting individuals to offer prayers, it might be more constrained in its options. While the Court

clearly accepts discrimination in favor of organized religious congregations and against less established faiths in compiling the invitation list, discrimination among organized congregations is more problematic. Justice Alito's concurring opinion suggests that an intentional decision to exclude the few minority religious congregations within the town's borders would be unconstitutional. Indeed, Justice Alito states that a deliberate decision to exclude synagogues in neighboring communities—at which Jewish town residents worshipped—from the list of potential guest chaplains would create a very different case than the one before him.²⁴⁹

Justice Kennedy's opinion would not go that far. He explicitly rejects the idea that the town is required "to search beyond its borders" for prayer-givers of minority faiths.²⁵⁰ Moreover, it is not even clear that Justice Kennedy would strike down a policy that deliberately excluded local minority congregations from the list of potential guest chaplains as long as adherents of these minority faiths would be considered as potential prayer-givers on a non-discriminatory basis if they asked for the opportunity to offer a prayer. Much of the language of Justice Kennedy's opinion implies that a willingness to allow anyone who is not on the list of eligible prayer-givers to offer a prayer if they request the chance to do so cures any lack of inclusivity in the list of invited guest chaplains.²⁵¹

Two additional problems remain unresolved. First, what if the town did not invite clergy from all or almost all of its congregations to serve as prayer-givers, but instead only invited a minister from one house of worship or clergy from two or three denominations? Would that be unconstitutional? As noted earlier, the *Marsh* decision, on which *Town of Greece* purports to be based, involved a legislative chaplain from one Protestant denomination who had served in that post for eighteen years. Yet the Court in *Marsh* saw no constitutional vulnerability in that policy. Thus, the Court's call for a policy of non-discrimination in *Town of Greece* seems inconsistent with *Marsh*. This leaves open the question of whether *Town of Greece* modifies the holding in *Marsh* to require legislative prayer-givers to

249. *Id.* at 1830–31 (Alito, J., concurring).

250. *Id.* at 1824 (majority opinion).

251. *See, e.g., id.* at 1816 ("The town at no point excluded or denied an opportunity to a would-be prayer giver. Its leaders maintained that a minister or layperson of any persuasion, including an atheist, could give the invocation.").

be selected on an inclusive, non-discriminatory basis or whether there are now two constitutional models for legislative prayer—either of which would satisfy constitutional requirements. A town could invite a range of prayer-givers from various denominations, in which case it must abide by a policy of non-discrimination among faiths, or it can select one or a small number of “chaplains” to offer prayers, in which case it can favor one or a select few faiths.²⁵²

Second, what must a town do to respond to requests by uninvited clergy and lay persons to be included on the list of potential guest chaplains? The town can discriminate initially in favor of clergy from organized congregations in creating the list of prayer-givers. Can it also assign some priority to organized congregations or clergy from such institutions in deciding which guest chaplains to invite first? Are persons who request the opportunity to be a prayer-giver placed at the bottom of the list behind the names of clergy from local congregations the town has already identified as possible guest chaplains? The *Town of Greece* opinion gives little guidance on these issues.

These concerns may become increasingly important depending on the possible political consequences of *Town of Greece*. The Court’s approval of legislative prayer may encourage some communities where prayers have not been offered in the past, to institute this practice. Also, dissenters from these prayer practices who object to the alignment of their government with religion or a particular faith may now believe that litigation to challenge the prayers is futile. Accordingly, the only way to provide some recognition of the diversity of belief within a community will be for adherents of minority faiths and non-religious individuals to request the opportunity to offer invocations at board meetings. It remains to be seen how those individuals will be treated in light of the reasoning and holding of *Town of Greece*.

252. Lupu and Tuttle suggest that other alternatives may be available. It is not clear for example that it would be unconstitutional if the board members chose to “rotate the prayer opportunity among themselves.” IRA C. LUPU & ROBERT W. TUTTLE, SECULAR GOVERNMENT, RELIGIOUS PEOPLE 265 (2014).

2. What Constitutional Constraints Apply to the Structure and Content of Legislative Prayer?

Notwithstanding the Court's general affirmation of the constitutionality of legislative prayers before town board meetings, the scope and nature of legislative prayer is not unlimited. It is at least arguable that the Court may recognize certain time constraints as to when prayers may be offered. As noted, Justice Kennedy did point out that the prayers in the Town of Greece Board meetings were offered during the "ceremonial portion of the town's meeting" at a time when board members were "not engaged in policy making."²⁵³ Justice Alito is even more specific in explaining the case does not "involve the constitutionality of a prayer prior to what may be characterized as an adjudicatory proceeding," and only evaluates prayer before the legislative part of the Board meeting.²⁵⁴ Thus, there remains an open question as to whether government-sponsored prayers can be offered immediately before a town board engages in non-legislative, administrative or adjudicatory actions.

Justice Kennedy also notes that an invocation involving a "lengthy disquisition on religious dogma" may exceed the parameters of the tradition of legislative prayer approved of in *Marsh*.²⁵⁵ Apparently at some point the legislative prayer may go on for such a long time that it constitutes a state-sponsored religious service. As such, it would arguably unconstitutionally promote religion and burden dissenters. How long is too long, of course, is anybody's guess. But there is some implicit sense in Justice Kennedy's opinion that what the Court is upholding must be cognizable as a ceremonial prayer and not some other kind of religious exercise or form of worship.

There may be some manner constraints on prayers as well. The Court affirms that prayer-givers may ask the audience to stand and bow their heads and join in the offered prayer. It is unclear whether there are any limits to such requests. May a prayer-giver ask the audience to kneel while the prayer is offered? Alternatively, may he

253. *Town of Greece*, 134 S. Ct. at 1815, 1827.

254. *Id.* at 1829 (Alito, J., concurring).

255. *Id.* at 1826–27.

or she ask the audience to raise their hands if they believe in the efficacy of prayer or the divinity of Jesus Christ?²⁵⁶

The Court says much more about the content of permissible prayers. After *Town of Greece*, it is abundantly clear that legislative prayer may be sectarian. It may express its message to G-d in explicitly denominational terms that reflect the beliefs and doctrine of particular faiths. Indeed, according to the Court, it would violate the Constitution for the town board to attempt to require the prayer-giver to express his message in more ecumenical terms.²⁵⁷

Some constraints on the content of prayers are recognized, however. The limits fall into two categories. On the one hand, there is a constraint on the extent to which the prayer can disparage others. Justice Kennedy says repeatedly that to be constitutionally acceptable and serve their ceremonial function, legislative prayers may not “denigrate nonbelievers or religious minorities” or “threaten [them with] damnation.”²⁵⁸ Such prayers may not denigrate others or betray an impermissible government purpose.²⁵⁹ They cannot “disparage any other, faith or belief”²⁶⁰ or “chastise dissenters.”²⁶¹

On the other hand, there is also a limit on the extent to which legislative prayers may promote religion or a particular faith. Legislative prayers may not “preach conversion.”²⁶² They may not “proselytize or advance any one . . . faith or belief.”²⁶³

The Court also emphasizes, however, that a single instance of proselytizing or disparaging messages is of no constitutional significance. There must be a “course and practice [of transgressions] over time.”²⁶⁴ Only evidence of “the pattern of prayers over time” can support an Establishment Clause claim.²⁶⁵ The focus must be on

256. During oral argument, plaintiffs’ attorney, Professor Laycock, argued that just such a prayer would be permissible if the Court held that the government could not control the content and nature of prayers offered by invited clergy. See Brownstein, *State-Sponsored Prayers*, *supra* note 126, at 1535–36. Justice Scalia responded repeatedly to this example by insisting: “That’s not a prayer.” *Id.*

257. See *Town of Greece*, 134 S. Ct. at 1822–23.

258. *Id.* at 1823.

259. See *id.* at 1824.

260. *Id.* at 1823 (quoting *Marsh v. Chambers*, 463 U.S. 783, 794–95 (1983)).

261. *Id.* at 1826.

262. *Id.* at 1823.

263. *Id.* (quoting *Marsh*, 463 U.S. at 794–95).

264. *Id.*

265. See *id.* at 1826–27.

“the prayer opportunity as a whole, rather than [on] the contents of a single prayer.”²⁶⁶

A meaningful prohibition against proselytizing or the disparaging of other faiths or nonreligious individuals would raise serious questions about how these impermissible prayers could be identified. There is little reason to think that the Court is interested in a nuanced analysis of these concerns, however. Many of the prayers at issue in *Town of Greece* proclaimed the truth and extolled the virtue of Christian beliefs. There is no indication that the plurality and concurring justices viewed any of these prayers as proselytizing. It appears that to constitute proselytizing a prayer must explicitly urge conversion in no uncertain terms. The line may be tighter regarding disparaging messages. But here, of course, the Court rejects the central thrust of plaintiffs’ arguments in this case. What is disparaging about the prayer practice of the Town of Greece is that for a decade the selection of prayer-givers and the prayers they expressed treated adherents of minority faiths, the spiritually unaffiliated, and non-religious residents as if they did not exist or did not deserve recognition for their beliefs. That message of disparagement is constitutionally acceptable to the current Court.²⁶⁷

While there may not be much to these substantive constraints, one may certainly imagine a community far more sensitive to religious liberty and equality concerns than the Town of Greece (or the Court) that tries to take them seriously. What exactly may such a community do to enforce these standards? One would presume that it could inform individuals selected to offer prayers that they cannot proselytize or disparage nonbelievers. A harder question is whether they can criticize a prayer-giver who violates these standards and refuse to invite him back unless he conforms his prayer to constitutional requirements. There may be legal vulnerability here if the town believes the “chaplain” has engaged in proselytizing or disparaging prayer and a reviewing court disagrees with that assessment. *Town of Greece* suggests that once the town invites an individual to offer a prayer before a town board meeting, the Constitution protects the right of that individual to offer any prayer he chooses without regard to its sectarian nature. The line between

266. *Id.* at 1824.

267. *See supra* notes 141–45 and accompanying text.

the impermissible proselytizing of one faith (or the disparagement of another) and permissible sectarian prayer may be extremely thin and depend on the eye of the beholder.

Alternatively, some communities may see little harm in proselytizing prayers or prayers that disparage nonbelievers. If an individual invited to offer a prayer engages in proselytizing or denigrates religious minorities, does the town have any obligation to respond to his remarks or to deny him an opportunity to offer prayers at the town board meeting in the future? As long as most “guest chaplains” offer prayers consistent with the constitutional standards governing legislative prayer, it is uncertain whether a town’s tolerance of a “chaplain” who repeatedly violates these standards constitutes the kind of pattern that violates the Establishment Clause.

*B. The Application of Town of Greece to the Adjudication
of Establishment Clause Claims Against State-Sponsored
Religious Messages in Other Settings*

Supporters of a meaningful constitutional commitment to religious liberty and religious equality can only hope that the reasoning and holding of *Town of Greece* is limited to legislative prayer. There is some language that supports a narrow reading of the case in Justice Kennedy’s opinion,²⁶⁸ but other language suggests that the opinion is not limited to the context of legislative prayer.²⁶⁹ Justice Alito’s concurring opinion is more explicit. As noted, he argues that the *Town of Greece* decision extends only to legislative meetings and not adjudicatory proceedings. More emphatically, at the conclusion of his concurrence he challenges the hypotheticals Justice Kagan presented in her dissent and their implication that

268. Part of Justice Kennedy’s opinion emphasizes the historical tradition supporting legislative prayer and that this tradition “has withstood the critical scrutiny of time and political change.” *Town of Greece*, 134 S. Ct. at 1819. This at least suggests that his opinion is limited to government-sponsored prayers or religious displays with a strong pedigree that has continued to the current time.

269. Other language in Justice Kennedy’s opinion seems far more expansive. His contention that government is disabled from controlling the content of state-sponsored prayer “once it invites prayer into the public sphere” could apply outside of the context of legislative prayer. *See, e.g., Town of Greece*, 134 S. Ct. at 1822–23. More problematically, Justice Kennedy’s dismissal of plaintiffs’ coercion claims because plaintiffs did not allege specific threats of sanctions and because no one would notice or care if plaintiffs walked out when a state-sponsored prayer was offered seems based on an understanding of social reality that extends beyond the legislature’s chambers. *See id.* at 1826–27.

citizens could be asked by government officials to join in prayer in a variety of settings. “Nothing could be further from the truth,” Justice Alito insists.²⁷⁰ “All that the Court does today is to allow a town to follow a practice that we have previously held is permissible for Congress and state legislatures.”²⁷¹

If the reasoning and holding of *Town of Greece* is determined to be broadly applicable, the liberty and equality interests of religious minorities and non-religious people would be substantially diminished. Consider first the implications of *Town of Greece* for religious equality. First, previous doctrinal constraints on religious displays and state-sponsored prayers no longer apply. The endorsement test, championed by Justice O’Connor, has no place in the Court’s opinion.²⁷² Nor is the Court constrained by Justice Scalia’s repeated suggestion that government cannot sponsor messages on which monotheistic believers in a personal G-d would disagree.²⁷³

Second, with regard to government invitations to private individuals and organizations to express state-sponsored religious messages on public property, government would be permitted to discriminate in favor of organized congregations and entirely ignore religious minorities with too few adherents in the community to support a congregation. It could ignore the beliefs and messages of nonaffiliated residents and nonreligious individuals as well. The only limit to this discrimination is that the government must include (to some undetermined extent) the messages of religious minorities and nonreligious residents who ask to participate in its expressive program. Under this analysis, for example, it would seem that the government could invite all the religious congregations in the community to display religious murals on the walls of government buildings and place religious icons in the lobby of every government office building. As long as the government would accept requests from minorities and nonreligious residents to participate in the program, again to some indeterminate extent, the Establishment Clause would not be violated.

270. *Id.* at 1834 (Alito, J., concurring).

271. *Id.*

272. See LUPU & TUTTLE, *supra* note 252, at 263.

273. See *supra* notes 150–55 and accompanying text.

The cumulative effect of the religious messages of majority faiths pervading public property in the community would be irrelevant to the constitutional analysis, just as the cumulative effect of a decade of sectarian Christian prayers before town board meetings was irrelevant to the Court's analysis in *Town of Greece*. Taken to its logical conclusion, presumably the town board in a predominately Christian community could invite all the local churches to erect a large billboard at the entrance to the town, proclaiming that this is a Christian community, quoting a sectarian prayer, and listing the Christian congregations in the town—as long as there was a note at the bottom of the sign indicating that some non-Christians and non-religious people live here too.

Third, state-sponsored prayers and religious displays could explicitly extoll the beliefs and commitments of majoritarian faiths. The prayers and displays could not involve a pattern and practice of preaching conversion or disparaging minorities and nonbelievers. However, individual instances of state-sponsored proselytizing or the denigration of minorities would have no constitutional significance.

A commitment to religious equality requires government to treat people of all faiths and those who are not religious as if they are of equal worth and deserving of equal respect. Under *Town of Greece*, government may treat religious minorities as if they barely exist and certainly do not count as respected members of the community. If *Town of Greece* is interpreted expansively, religious equality would mean as little in the public life of largely, religiously homogeneous communities throughout the United States as it does in the town board chambers of the Town of Greece.

The implications of an expansive reading of *Town of Greece* for religious liberty are equally if not more disastrous. As noted previously, the line between Justices Thomas's and Scalia's contention that the only coercion that counts for Establishment Clause purposes is that which is imposed "by force of law and threat of penalty" and Justice Kennedy's position is perilously thin.²⁷⁴ Justice Kennedy's insistence that to demonstrate coercion plaintiffs must prove that decision-makers took plaintiffs refusal to participate in prayers into account in denying them benefits (or otherwise ruling against their interests) or indicated in some way that they intended to

274. See *supra* notes 166–71 and accompanying text.

do so in essence requires a “threat of penalty” before coercion would be recognized. Without such concrete evidence of sanctions, Justice Kennedy rejects the idea that coercion is implicit in a setting in which petitioners are asked to pray by clergy invited to offer prayers by the very decision-makers the petitioners are attempting to influence and on whose discretionary judgments they are dependent.²⁷⁵

Under the accepted premises and reasoning of *Town of Greece*, a government official, bureaucrat, or legislative, administrative, or adjudicatory body charged with exercising discretionary authority to decide issues of great importance to applicants or petitioners can invite clergy to offer a prayer at the beginning of a scheduled appointment or proceeding. Applicants or petitioners can be asked to stand, bow their heads, and join in the sectarian prayer offered by the guest chaplain who prays in their name. The applicant or petitioner should understand that their refusal to stand or participate in the prayer will not be noticed by decision-makers or taken into account in their deliberations. Also, they should recognize that by standing and bowing their heads, their conduct will not be understood as acquiescing in the prayer nor can it be reasonably experienced as participating in a religious exercise. Thus, no unconstitutional coercion of religious exercise exists in such situations.

In the real world, of course, such situations can only reasonably be understood as intrinsically coercive. To refuse to recognize their coercive nature demonstrates either an extraordinary misunderstanding of social reality or an extraordinary lack of concern for religious liberty. Religious liberty receives no support in either case.

Justice Alito appears to recognize that these kinds of state sponsored prayer practices are constitutionally unacceptable. At least that seems to be why he so emphatically rejects the implications of Justice Kagan’s dissent that “this is where today’s decision leads”—to the upholding of intrinsically coercive, divisive prayer practices in a range of governmental settings.²⁷⁶ But Justice Alito never explains why he believes the burdens on religious liberty and equality which he ostensibly deems to be constitutionally unacceptable in Justice

275. *See id.*

276. *Town of Greece*, 134 S. Ct. at 1834 (Alito, J., concurring).

Kagan's hypotheticals are not equally present in the context of state-sponsored prayers at town board meetings. Justice Alito, after all, joined Justice Kennedy's opinion for the Court and that opinion rejects the idea that the Town of Greece's prayer practices burden religious liberty or equality in any constitutionally meaningful way. Without some coherent explanation as to why his concern about coercion and religious inequality in Justice Kagan's hypotheticals does not carry over to the adjudication of challenges to town board prayer practices, Justice Alito's protests that this is not where the Court or the country is going provides little solace or assurance to those of us who care about religious liberty and equality as constitutional values.