The Constitutionality of Saying a Prayer at a City Council Meeting: May America Bless God?

CASE AT A GLANCE

The Town of Greece, New York, has an elected five-member Town Board. The Board invites local clergy to offer an opening prayer at its regular monthly meetings. The two plaintiffs are residents of the Town who disapproved of this practice enough to make a federal case out of it. The District Court rejected their challenge, but the Second Circuit sided with the plaintiffs and ruled that the Town was violating the Establishment Clause in the way it was arranging for the official prayers. Now the Supreme Court will have to sort out its prior precedents on public prayer and the newer justices will have to declare their views of the practice. The decision will determine the proper constitutional etiquette for these occasions of ceremonial deism, i.e., religious rituals by the government.

Town of Greece, New York v. Galloway
Docket No. 12-696

Argument Date: November 6, 2013
From: The Second Circuit

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ISSUE

Is the Establishment Clause violated when a town board invites local clergy to offer an opening prayer at its regular meetings?

FACTS

The Town of Greece, New York (the Town), is a suburb of Rochester with a population of 96,000. Its curious name was chosen in 1822 out of sympathy for the Greeks who were then fighting for their independence from Turkish rule. The Town is governed by a five-member Town Board that conducts official business at monthly meetings. The Supervisor of the Town is the presiding member. Previously, after reciting the Pledge of Allegiance, the Board would open meetings with a moment of silence. In 1999, the Town Supervisor began a practice of inviting a member of the local clergy to offer an oral prayer at the start of each meeting. The prayer and the name of the prayer-giver are noted in the official minutes and the prayer-giver is acknowledged as the "chaplain of the month" and officially thanked. By the time this lawsuit was filed, the practice had developed that a designated town employee invited local clergy to deliver the prayer, at first relying on a list of churches in the town in a community guide published by the chamber of commerce. That employee maintained an unofficial list of "Town Board Chaplains," who had appeared to lead the prayer. The employee would telephone individuals on the list a week before each monthly meeting on a rotating basis until someone agreed to deliver the next prayer. Until 2008, the list included only Christian congregations. In fact, between 1999 and 2007, every person who delivered a prayer was Christian.

Most of the prayers overtly referenced "Jesus" or "Jesus Christ" or similar invocations. Frequently, the prayer-giver invoked a majoritarian religious perspective with first person plural pronouns such as "we" and "our" and "us" to assume everyone in attendance was joining in the prayers. More recently, during the contemplation of the lawsuit, there were occasional non-Christian prayer-givers including the chair of the local Baha'i congregation, a lay Jewish man, and a Wiccan priestess; consequently, the prayers included references to "God," "Father," "Allah-u-Abha" ("God the All Glorious"), and—appropriately enough, given the name of the town—"Athena and Apollo."

These practices developed over time, without any formal, written policy ever having been officially adopted. Town officials neither set any formal guidelines for the content of the prayers nor did they review the prayers in advance. Town officials further insisted that anyone who would have come forward to volunteer to offer an invocation would have been accommodated, without regard to whether they were religious, a-religious, or irreligious. No one was ever refused the opportunity, although the Town never publicized its willingness to accommodate all comers, believers and nonbelievers alike. It is beyond peradventure, however, that Christian prayers empirically predominated the prayers offered at the meetings of the Town Board, because Christian clergy dominated the invitation list, and they were left to their own theological devices.

Plaintiff-respondent Linda Stephens is an atheist who objects to all legislative prayer. Plaintiff-respondent Susan Galloway would prefer that there be no legislative prayers but believes that any government prayers should at least be nonsectarian and inclusive (whatever

that means). They raised their objections before the Town Board unsuccessfully and then brought suit in 2008. They are represented by the Americans United for Separation of Church and State. The defendant-petitioner Town of Greece is represented by the Alliance Defending Freedom. So there are institutional litigators on both sides.

The U.S. District Court for the Western District of New York granted summary judgment for the defendants, the Town of Greece and the Town Supervisor. Judge Siragusa concluded that the Town Board's legislative prayer practices did not violate the U.S. Constitution, considering the facts in the light most favorable to the plaintiffs. 732 F. Supp. 2d 195 (W.D.N.Y. 2010) (the District Court's opinion has a detailed account of all the prayers delivered over the years).

A three-judge panel of the U.S. Court of Appeals for the Second Circuit reversed. The focus of the Second Circuit was whether the Town Board's prayer practices had the effect, if not the purpose, of establishing a religion. Judge Calabresi's opinion summarized the precedents from the Supreme Court and the various other courts of appeals that had taken up the issue of legislative prayer. He carefully parsed the record on appeal and concluded that a reasonable objective observer (presumably, he and his two colleagues) would view the legislative prayer practices of the Town Board to endorse Christianity. Thus, according to Judge Calabresi, the practice violates the First Amendment prohibition on establishments of religion. The constitutional irony was that the Second Circuit approved the professed goal of the Town but disapproved its actual practices over the years:

> We emphasize what we do not hold. We do not hold that the town may not open its public meetings with a prayer or invocation. … Nor do we hold that any prayers offered in this context must be blandly "nonsectarian." … Occasional prayers recognizing the divinities or beliefs of a particular creed, in a context that makes clear that the town is not endorsing or affiliating itself with that creed or, more broadly, with religion or non-religion, are not offensive to the Constitution. …
>
> What we do hold is that a legislative prayer practice that, however well-intentioned, conveys to a reasonable objective observer under the totality of the circumstances an official affiliation with a particular religion violates the clear command of the Establishment Clause.

This holding thus was based on the totality of the facts and was applicable only to the facts of this case. After sitting on the petition for certiorari for several weeks, the Supreme Court eventually granted review on May 20, 2013. 133 S. Ct. 2388 (2013).

CASE ANALYSIS

This case focuses directly on the Establishment Clause or "anti-establishment clause" or "nonestablishment clause" or "disestablishment clause." That clause is simply stated in the First Amendment: "Congress shall make no law respecting an establishment of religion." By virtue of the Fourteenth Amendment, the Clause now applies not only to the federal government, but to the states. There has been much disagreement—on and off the Supreme Court—about the Establishment Clause's meaning and application. There is no dispute that certain obvious types of governmental activity are prohibited, for example: the establishment of an official national or a state church; laws requiring individuals to go to or remain away from church against their will; and laws forcing individuals to profess a belief or disbelief in any religion. The difficulty is that few, if any, Establishment Clause cases are obvious. Instead, the Supreme Court has examined whether certain lesser acts—for example, prayer in public schools, financial aid to religious organizations, and religious displays in public places—constitute a law "respecting an establishment of religion." Because these "lesser" acts are not-so-obvious violations of the First Amendment, the justices have struggled to give consent to the prohibition on a case-by-case basis.

The doctrinal baseline of the Establishment Clause is the three-part *Lemon* test, an abstract ratiocination from the case of that same name, which requires that a statute or a government program: (1) have a secular legislative purpose; (2) have a principal or primary effect neither to advance nor to inhibit religion; and (3) not foster an excessive government entanglement with religion. *Lemon v. Kurtzman,* 403 U.S. 602 (1971). The test was tweaked in a later case to downplay the entanglement inquiry and fold that concern back into the purpose and effect prong of the test. *Agostini v. Felton,* 521 U.S. 203 (1997).

The *Lemon* test has been an intellectual soap opera, a serial precedent replete with multiple story lines and multiple characters and multiple twists and turns. It has never won an Emmy and has been threatened with cancellation repeatedly. Commentators have ridiculed it. For starters, there is no internal logic to the test. A government action may not advance or inhibit religion. But does not every government action toward religion necessarily do one or the other? Not surprisingly, the doctrine has been characterized by inconsistency and discontent. Multiple justices have called for its overruling, but at no time has there been a critical mass of five justices behind a substitute for the *Lemon* test. One does not have to be a legal realist to think that there are nine *Lemon* tests, however, in effect one version for each of the nine justices. That may even be a low estimate. In an article that surveys the conflicting majority opinions along with the separate concurring and dissenting opinions of individual justices, a leading scholar charged that "Establishment Clause jurisprudence is a mess—both hopelessly confused and deeply contradictory." Over the previous ten years, he counted no fewer than ten different standards offered by the justices—Justice O'Connor alone signed on to six different standards over that same period. Steven G. Gey, *Reconciling the Supreme Court's Four Establishment Clauses,* 8 U. Pa. J. Const. L. 725 (2006). Thus, the *Lemon* test has endured the harshest criticism on and off the Supreme Court, but nonetheless it has endured.

The justices and legal scholars have concocted a menu of alternative tests. See generally Amy J. Alexander, Note, *When Life Gives You the Lemon Test: An Overview of the Lemon Test and Its Application,* 3 Phoenix L. Rev. 641 (2010). Justice O'Connor used the endorsement test to determine whether the government's purpose is to endorse religion in general or one religion in particular from the perspective of the ordinary reasonable observer who is made to feel like an outsider. E.g., *Lynch v. Donnelly,* 465 U.S. 668 (1984) (O'Connor, J., concurring). Justice Kennedy has used the coercion test to determine if the government is compelling individuals to participate in a religious practice. E.g., *Lee v. Weisman,* 505 U.S. 577 (1992)

(holding prayer at high school graduation unconstitutional).Various justices have used the neutrality test to determine if the government policy improperly favors one religion over other religions or favors religious persons over nonreligious persons. E.g., *Rosenberger v. Rector,* 515 U.S. 819 (1995). In this case, various amici advocate that the Supreme Court adopt one or the other of these alternative tests. For example, the American Civil Rights Union prefers the coercion test and sides with petitioner Town of Greece.

One of the most exasperating aspects of the *Lemon* test is that the Supreme Court applies it in some cases and ignores it in other cases, seemingly with neither rhyme nor reason. Justice Scalia, who scored in the 99th percentile of the SAT test for sarcasm, once observed:

> As to the Court's invocation of the *Lemon* test: Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again. … Its most recent burial, only last Term, was, to be sure, not fully six feet under: Our decision … conspicuously avoided using the supposed "test" but also declined the invitation to repudiate it. Over the years, however, no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart, and a sixth has joined an opinion doing so. The secret of the *Lemon* test's survival, I think, is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will. When we wish to strike down a practice it forbids, we invoke it; when we wish to uphold a practice it forbids, we ignore it entirely. Sometimes, we take a middle course, calling its three prongs "no more than helpful signposts." Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him.

Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) (Scalia, J., dissenting) (citations omitted).

One example of the Supreme Court ignoring the *Lemon* test is the leading case that obliged the Second Circuit to recognize, as quoted above, that a legislature may constitutionally begin its sessions with a prayer: *Marsh v. Chambers,* 463 U.S. 783 (1983). The briefs in this case are peppered with citations to *Marsh,* and you can expect the justices to question the attorneys about it. A 6-3 majority upheld the constitutionality of the Nebraska state legislature employing a Presbyterian minister for 18 years to begin official sessions with a prayer. The majority opinion duly noted that the lower court had matter-of-factly concluded that practice obviously violated all three prongs of the *Lemon* test. But the majority opinion—written by Chief Justice Burger who authored the opinion in *Lemon*—did not otherwise invoke or discuss the three-part test, much to the chagrin of the dissenters who likewise were ignored. Instead, the majority opinion emphasized "the unambiguous and unbroken history of more than two hundred years" of legislatures officially designating chaplains—that included both the Senate of the United States and the United States House of Representatives beginning with the first Congress (which drafted the First Amendment) down to the present day. History and tradition thus rendered the *Lemon* test implicitly irrelevant to the *Marsh* Court. Thus, it is not surprising that 85 members of the House of Representatives and 34 Senators filed bipartisan amicus briefs in support of the petitioner Town of Greece, as did the former chaplain for the Nebraska legislature who was one of the defendants in *Marsh*.

Petitioners argue that the constitutional analysis should begin and end with the Supreme Court's holding in *Marsh* and, therefore, the district court was right and the Second Circuit was wrong. According to petitioners, the Second Circuit had no constitutional business parsing the particular history of the Town Board's invitation procedures, the list of clergy, or the content of the prayers. The Second Circuit arguably was mistaken to review the facts from the point of view of the objective reasonable observer. It lifted that perspective from Supreme Court *dictum* in the later decision in *County of Allegheny v. ACLU,* 492 U.S. 573 (1989), which involved Christmas and Hanukkah displays on public property. If the justices disregard precedents, if all they can see is *Marsh,* if they follow the approach in *Marsh* and ignore the three-part *Lemon* test, then petitioners are more likely to prevail in the present case. If the justices zero in on the *dictum* in *County of Allegheny* that seemingly disapproves of explicitly sectarian prayers and practices, then respondents are more likely to prevail in the present case. However, the precedential authority from those two decisions resembles the grin of the Cheshire Cat: no member of the *Marsh* Court remains and only Justices Scalia and Kennedy are left from the natural Court that decided *County of Allegheny* in 1989. Putting further distance between themselves and the majority's *dictum,* Justice Kennedy wrote a separate concurring opinion, joined by Justice Scalia, to approve both of the displays in *County of Allegheny.*

Respondents reframe the issue to argue what is at stake here for the individual plaintiff is the "right of citizens to participate in local government without being required to participate in sectarian prayers." They seek to distinguish *Marsh* by characterizing that case as involving the "ability of legislatures to acknowledge God or seek divine guidance." Their constitutional objections are that the prayers here are being directed at those in attendance, townspeople including impressionable school-aged children, who are obliged to attend Board meetings for various reasons, e.g., to seek zoning changes, to obtain business permits, to petition for redress of grievances, to receive public recognition and awards, etc. Worse, according to respondents, the prayers actually prayed are not inclusive because most of them were explicitly Christian and therefore sectarian as a result of the Town's haphazard and passive procedures to select prayer-givers. The expressed concern is for the rights of religious minorities who are being presented with a coercive dilemma of conscience with equally unconstitutional consequences, namely they can sit still for the prayers and betray their own individual beliefs or they can actively dissent from the majority's sectarian religious expressions and risk community calumny.

Respondents make two more clever moves. First, they read *Marsh* as a smaller precedent that involved a state legislature, so the question of congressional chaplains was not decided there and is not in play here in a case involving a local city council. Respondents seek to make the case that the Town of Greece Board meetings were local and participatory on the part of the citizenry. Second, respondents invoke the Establishment Clause *grundnorm* that the government

may not direct explicitly sectarian and proselytizing prayers at its citizenry. Respondents would have the Supreme Court understand the prayers at the Town Board's meetings to be the government's own prayers that are being unwillingly forced upon some of those in attendance. For the Supreme Court to license this practice, the respondents insist, would be contrary to long-standing principles of Establishment Clause jurisprudence going back decades and reaffirmed in dozens of Supreme Court cases. Respondents march a solemn procession of establishment horribles past the bench: if the Town of Greece prevails in this case, there would be nothing to prevent another city from always opening city council meetings with Imams reciting prayers from the Koran or some other city from always having a Catholic Mass to begin its meetings. If petitioner Town of Greece should prevail, according to respondents, then theologically, and constitutionally, "anything goes." The respondents set out many such examples taken from lower court cases along these lines to suggest the kinds or religious mischiefs local religious majorities can commit if they are not restrained by the First Amendment and the "wall of separation" built up over the years by the Supreme Court. Douglas Laycock, who is one of the leading scholars on the Religion Clauses and who has argued other important religion cases before the Supreme Court, is one of the authors of the respondents' brief. It is a *tour de force* presentation that favorably explains the case and better justifies the Second Circuit decision than does the Second Circuit opinion. It is certain to influence the thinking of the justices because it sets out a smaller claim on the Constitution and the justices than the petitioner Town of Greece makes on them.

SIGNIFICANCE

It is possible that a majority of the current justices will vote to formally abandon the *Lemon* test and, if so, that would be "Headline News." Justices Scalia, Kennedy, and Thomas are on record wanting to overrule it. Justices Ginsburg and Breyer are two votes to support it—the former is enthusiastic and the latter is somewhat tepid. If Chief Justice Roberts and Justice Alito join the first threesome out of some kind of judicial solidarity, there will be a majority of five votes. The two newbie justices, Justices Sotomayor and Kagan, are unknowns in the nine-variable equation. But sophisticated court watchers understand that for *Lemon* to be overturned, there have to be five votes to discard the *Lemon* test *and* five votes in favor of some new, improved test. Just what that new, improved test would be is anyone's guess. The point should not be lost that a majority of the justices could make the same move that Chief Justice Burger once made; he authored *Lemon* but he ignored it in *Marsh*. That is probably more likely.

The Supreme Court seems to be stuck because the individual justices usually sort out into three groups, which have a tendency to cancel out each other. The *Lemon* test is favored by justices who take a strict separationist approach to church and state issues, i.e., those justices who insist that government and religion should be separated to the greatest extent possible. It is also relied upon selectively by justices who insist upon governmental neutrality towards religion, i.e., those justices who believe that government should not favor one religion over other religions or believers over nonbelievers. The accommodationist justices, who would prefer a weaker Establishment Clause and a stronger Free Exercise Clause, dislike the *Lemon* test and would overrule it because they believe religion is important and valuable in our society and the government should respect it. See generally Erwin Chemerinsky, *Constitutional Law—Principles and Policies* 1236–43 (4th ed. 2011).

One of the likely reasons there were at least four votes to grant certiorari is that the lower courts have been going around in circles over the issue of legislative prayers. The justices may consider it a good day's work to affirm or reverse the Second Circuit in a definitive opinion that would provide a "MapQuest" set of directions on how to proceed for the benefit of the lower federal courts and state courts. See, e.g., *Rubin v. City of Lancaster,* 710 F.3d 1087 (9th Cir. 2013) (holding that neither an invocation specifically naming Jesus nor the City's prayer policy constituted an unconstitutional establishment of religion); *Newdow v. Roberts,* 603 F.3d 1002 (D.C. Cir. 2010) (holding that the issue of whether Chief Justice Roberts violated the Establishment Clause with his prayer at the 2009 inaugural ceremony was moot and plaintiffs did not have standing to bring their claims pertaining to future inaugurations); *Pelphrey v. Cobb Cnty., Ga.,* 547 F.3d 1263 (11th Cir. 2008) (holding that the prayers of the County Commission were constitutional because the selection process was not based on an impermissible motive, and the identity of the speakers and the nature of the prayers did not advance a single religion; however, the prayers of the Planning Commission were unconstitutional because the selection procedures demonstrated an "impermissible motive"); *Turner v. City Council of Fredericksburg, Va.,* 534 F.3d 352 (4th Cir. 2008) (holding that the city was entitled to allow only nonsectarian legislative prayers and an individual's First Amendment rights were not violated by being prohibited from delivering sectarian messages); *Simpson v. Chesterfield Cnty. Bd. of Supervisors,* 404 F.3d 276 (4th Cir. 2005) (holding that a county could invite clergy from diverse faiths to offer "a wide variety of prayers" at meetings of its governing body); *Wynne v. Town of Great Falls, S. Carolina,* 376 F.3d 292 (4th Cir. 2004) (holding that the legislative prayers violated the Establishment Clause because of frequent invocations of the name of a specific deity associated with a specific religion and therefore advanced one religion over others); *Joyner v. Forsyth Cnty., N.C.,* 653 F.3d 341 (4th Cir. 2011) cert. denied, 132 S. Ct. 1097 (U.S. 2012) (holding that although the county was not involved in choosing the message, the prayers were sectarian and unconstitutional because they impermissibly advanced one religion over others by frequently naming Jesus). Law professors have debated the validity and wisdom of legislative prayers, as well, without reaching anything resembling a consensus. See, e.g., Scott W. Gaylord, *When the Exception Becomes the Rule: Marsh and Sectarian Legislative Prayers Post-Summum,* 79 U. Cinn. L. Rev. 1017 (2011) (pro); Christopher C. Lund, *Legislative Prayer and the Secret Costs of Religious Endorsements,* 94 Minn. L. Rev. 972 (2010) (con); Marc Rohr, *Can the City Council Praise the Lord? Some Ruminations About Prayers at Local Government Meetings,* 36 Nova L. Rev. 481 (2012) (pro); Eric J. Segall, *Mired in the Marsh: Legislative Prayers, Moments of Silence, and the Establishment Clause,* 63 U. Miami L. Rev. 713 (2009) (con).

This case involves the concept of "ceremonial deism." See generally Caroline Mala Corbin, *Ceremonial Deism and the Reasonable Religious Outsider,* 57 UCLA L. Rev. 1545 (2010); Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism,* 96 Colum. L. Rev. 2083 (1996). The term was coined to describe religious references and practices which have become public rituals that have lost their religious meaning and consequently are constitutionally

tolerated. Examples include the reference to "God" that was added to the Pledge of Allegiance and the adoption of our national motto, "In God We Trust." Another example of ceremonial deism will be on display at the oral argument in this case, when the Marshal intones "Oyez! Oyez! Oyez! All persons having business before the Honorable, the Supreme Court of the United States, are admonished to draw near and give their attention, for the Court is now sitting. *God save the United States and this Honorable Court* (emphasis added)." Justice O'Connor, who is no longer on the Court, in *County of Allegheny* equated that ritual judicial "prayer" with the kind of legislative "prayer" at issue in this case and offered a rationale to approve them both:

> Practices such as legislative prayers or opening Court sessions with "God save the United States and this honorable Court" serve the secular purposes of "solemnizing public occasions" and "expressing confidence in the future." These examples of ceremonial deism do not survive Establishment Clause scrutiny simply by virtue of their historical longevity alone. … On the contrary, the "history and ubiquity" of a practice is relevant because it provides part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion. It is the combination of the longstanding existence of [such practices], as well as their nonsectarian nature that leads me to the conclusion that those particular practices, despite their religious roots, do not convey a message of endorsement of particular religious beliefs. …

For Justice O'Connor and other like-minded justices, these practices are not de minimis violations of the Constitution that they are willing to overlook. Rather, given their history, character, and context these practices have ceased being religious qua religion. *Elk Grove Unified Sch. Dist. v. Newdow,* 542 U.S. 1 (2004) (O'Connor, J., concurring).

The usual rationalization for tolerating ceremonial deism ought to generate considerable cognitive dissonance for devout religionists, however. If these public ceremonial references to God, religious faith, and ultimate beliefs are permissible because they are empty prayers before cold altars, then these practices actually serve to demean religion. For example, according to this understanding the phrase "under God" in the Pledge does not mean anything important or anything authentically religious. It is not a prayer dedicating the nation to God. It is more like saying "hip-hip-hooray." Sectarians and secularists alike often complain that these public observances amount to turning the sacred into the profane, which a thoughtful true believer ought to find religiously unsettling. Steven G. Gey, *"Under God," the Pledge of Allegiance, and Other Constitutional Trivia,* 81 N.C. L. Rev. 1865 (2003) (exploring the ceremonial deism or "trivial defense" of the word "God" in the Pledge of Allegiance).

The United States, as amicus curiae, sides with the petitioners. Its view is certain to figure prominently in the justices' consideration of the case sub judice, because arguably there is no logical or constitutional way for the Supreme Court to tell the Town Board it cannot have prayers without telling the U.S. Congress the same thing. Indeed, the government explicitly identifies that interest as its justification for filing its brief. It is important to note that this argument is directly opposed to the approach taken by the respondents, and the justices will be obliged to pick between these two approaches. The United States hunkers down with the *Marsh* precedent and insists that the Second Circuit misunderstood and misapplied that case. Quoting chapter and verse from *Marsh,* the solicitor general, argues that legislative prayers are constitutionally permissible so long as "there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief." The United States argues that it was inappropriate for the Second Circuit to parse the content of the prayers to disapprove of the prevalence of Christian sectarian references and to find fault in the otherwise neutral methods for selecting the prayer-givers. Indeed, the solicitor general points out the same theological quality characterized the prayers offered by the Nebraska state legislature's Presbyterian chaplain in *Marsh*. While the chaplain characterized his prayers as "nonsectarian" and "Judeo-Christian," they were more accurately described as nondenominational Christian, much like the prayers offered at the Town Board's meetings in this case. The solicitor general also cleverly reports in detail that the content of the prayers that currently are offered daily in the House of Representatives and the Senate are identifiably and predominately Christian prayers.

The analytical point of departure in the government's argument, however, is the long-standing history and still ongoing practice of legislative prayer that was the emphasis of Chief Justice Burger's opinion in *Marsh*. That such a strong endorsement comes from the Obama administration's Department of Justice is a little surprising because the government could have ducked the issue and not taken sides. But again, the government seems self-consciously to be determined—come heck or high water—to defend the two-century-old tradition of congressional prayers. See Christopher C. Lund, *The Congressional Chaplaincies,* 17 Wm. & Mary Bill Rts. J. 1171 (2009) (history); Jeremy G. Mallory, *"Well, But That System Has Failed Entirely": Using Theological and Philosophical Methods to Resolve the Jurisprudential Confusion Over Legislative Prayer,* 33 Whittier L. Rev. 377 (2012) (theology).

Interesting fact the justices may consider: 78.4 percent of adults in the United States identify themselves as Christian, but the numbers of non-Christian believers and nonbelievers are growing to make it theologically impossible to offer a nonsectarian, nondenominational prayer. See *U.S. Religious Landscape Survey,* Pew Forum on Religion & Public Life (Feb. 2008), http://religions.pewforum.org/reports. Think about it: some of the major world religions do not have a God and some have many gods—even the capitalization in this sentence reflects a particular theology on the part of this writer. Once you get past a moment of silence, even a lowest common denominator kind of prayer, such as "To Whom It May Concern: Amen," is not totally inclusive of all belief systems and logically excludes the a-religious and the irreligious who would consider it a fatuous invocation of an imaginary friend.

For the sake of completeness, it should be noted that military chaplains serve a different function and arguably have a different constitutional rationale than legislative chaplains. The traditional explanation is that when the government appoints and pays a military chaplain to minister to troops, on a base or in a foreign deployment, the government is not so much violating the Establishment Clause as it is accommodating the Free Exercise Clause rights of

sailors and soldiers. *McCreary County, Ky. v. American Civil Liberties Union,* 545 U.S. 844 (2005) (noting that "if the government cannot pay for military chaplains a good many soldiers and sailors would be kept from the opportunity to exercise their chosen religions"). This traditional explanation has held up, although it has been noted that James Madison believed that paid military chaplains did violate the Establishment Clause. See *Lee v. Weisman* (Souter, J., concurring).

Finally, it has become de rigueur in cases involving the Religion Clauses for reporters to note for the record that a new religious order exists on the current High Court. There are six justices who are Catholic (Chief Justice Roberts, and Justices Scalia, Kennedy, Thomas, Alito, and Sotomayor) and three justices who are Jewish (Justices Ginsburg, Breyer, and Kagan). Beginning with the October 2011 term, after the retirement of Justice Stevens and the appointment of Justice Kagan, there are no Protestant justices on the Supreme Court for the first time in its history. This is a noteworthy historic development. Of the first 112 justices, all but 20 have been of a Protestant background. Philosophically and constitutionally speaking, what are the supposed implications from what the newspapers once upon a time labeled the "Catholic seat" or the "Jewish seat" on the Supreme Court of the United States? Is there any proper role that a judge's individual personal religious beliefs should play in his or her judicial decision making? Religion and the religious views of nominees have been the subject of partisan debates during confirmation proceedings for the Supreme Court, particularly regarding the question of abortion. See generally Thomas C. Berg & William G. Ross, *Some Religiously Devout Justices: Historical Notes and Comments,* 81 Marq. L. Rev. 383 (1998); Michael J. Gerhardt, *Why the Catholic Majority on the Supreme Court May Be Unconstitutional,* 4 U. St. Thomas L.J. 173 (2006); Paul Horwitz, *Religious Tests in the Mirror: The Constitutional Law and Constitutional Etiquette of Religion in Judicial Nominations,* 15 Wm. & Mary Bill Rts. J. 75 (2006); Sanford Levinson, *The Confrontation of Religious Faith and Civil Religion: Catholics Becoming Justices,* 39 DePaul L. Rev. 1047 (1990); Scott C. Idleman, *Note, The Role of Religious Values in Judicial Decision Making,* 68 Ind. L.J. 433 (1993).

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Seven Prayer-Givers (Barry A. Bostrom, 317.203.5599)

Southeastern Legal Foundation (Shannon Lee Goessling, 770.977.2131)

Southern Baptist Convention Ethics & Religious Liberty Commission (Michael K. Whitehead, 816.876.2600)

State of South Carolina (Robert D. Cook, 803.734.3970)

United States (Donald B. Verrilli Jr., 202.514.2217)

United States Senators Marco Rubio, Lamar Alexander, et al. (Steffen N. Johnson, 202.282.5000)

Virginia Christian Alliance et al. (Rita M. Dunaway, 540.830.1229)

Wallbuilders, Inc. (Steven W. Fitschen, 757.463.6133)

In Support of Respondent Susan Galloway

Foundation for Moral Law (John A. Eidsmoe, 334.262.1245)

In Support of Neither Party

League of California Cities (Allison E. Burns, 949.725.4000)