

# The Rising None: *Marsh, Galloway*, and the End of Legislative Prayer

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## INTRODUCTION

You know that every session of Congress begins with a prayer by a paid pastor or paid minister whose salary has been paid by the taxpayer since 1777. So lest we forget, this is not a new idea, and despite the objections of some, they are in the minority and they are ignorant of the history of our country. So humbly, I'd like to thank you for letting me pray and if out of respect to God you're open to bowing, I would love to pray.

So again, just govern this entire meeting, help it to be pleasing and effective, and we ask all this in Jesus Christ's name. Amen.<sup>1</sup>

In *Town of Greece v. Galloway*,<sup>2</sup> which concerned a New York town's practice of opening its public board meetings with brief prayers, the Supreme Court upheld the constitutionality of the preceding prayer and others like it.<sup>3</sup> The decision made it clear that very few, if any, legislative prayer practices will be held unconstitutional<sup>4</sup> under the Establishment Clause.<sup>5</sup> What remains unclear is how that ruling can possibly coexist with earlier Supreme Court pronouncements that the government must remain neutral in religious matters,<sup>6</sup> and that the government cannot favor religion over nonreligion.<sup>7</sup>

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1. Complaint at ¶ 67, *Galloway v. Town of Greece*, 732 F. Supp. 2d 195 (W.D.N.Y. 2010) (No. 6:08CV06088), 2008 WL 7318228 (quoting the opening prayer delivered by Pastor Vince de Paola at the October 16, 2007, meeting of the town board of Greece, New York), *rev'd*, 681 F.3d 20 (2d Cir. 2012), *rev'd*, 134 S. Ct. 1811 (2014).

2. 134 S. Ct. 1811 (2014).

3. *Id.* at 1828 (“The town of Greece does not violate the First Amendment by opening its meetings with prayer that comports with our tradition and does not coerce participation by nonadherents.”).

4. *Id.* at 1824 (“Absent a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose, a challenge based solely on the content of a prayer will not likely establish a constitutional violation.”).

5. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion . . .”).

6. *Epperson v. Arkansas*, 393 U.S. 97, 103–04 (1968).

7. *Id.* at 104 (“The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.”).

Before *Galloway*, the Supreme Court directly addressed the topic of legislative prayer only once. In the landmark case of *Marsh v. Chambers*,<sup>8</sup> the Court rejected a challenge to the Nebraska state legislature's practice of beginning its sessions with prayers delivered by a chaplain—a Presbyterian minister employed by the State and paid out of public funds.<sup>9</sup> The Court held that where the chaplain's appointment did not “stem[] from an impermissible motive”<sup>10</sup> and there was “no indication that the prayer opportunity ha[d] been exploited to proselytize or advance any one, or to disparage any other, faith or belief,” there was no Establishment Clause violation.<sup>11</sup> The Court based its decision primarily on the long history of legislative prayer in the United States.<sup>12</sup>

The Supreme Court did not revisit the issue of legislative prayer for thirty years following *Marsh*. In the intervening years, lower courts struggled to apply its holding, with inconsistent results.<sup>13</sup> Unresolved questions included whether *Marsh* required legislative prayers to be nonsectarian and what constituted an impermissible motive in selecting a prayer giver. *Galloway* answered some of *Marsh*'s questions, but raised others about the future of legislative prayer and about the Court's interpretation of the Establishment Clause in general.<sup>14</sup>

This Note contends that the Supreme Court wrongly decided both *Marsh* and *Galloway*. The Justices in the Court's conservative majority likely voted for the outcome they desired in *Galloway*, but even if the Justices had preferred a different result, external pressures on the Court ensured that they would not overrule *Marsh*.<sup>15</sup> Although legislative prayer is safe for now, it will almost certainly be ruled unconstitutional eventually. *Marsh* and its progeny depend on the exclusion and marginalization of certain religious minorities, including polytheists and atheists.<sup>16</sup> Any legislative prayer offered to a monotheistic God can neither respect nor accommodate the beliefs of such groups. Legislative prayer has survived this long because the American people have been willing to accept the practice.<sup>17</sup> However, the public's acquiescence will not last forever, especially considering that the number of people who do not affiliate themselves with any particular religion

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8. 463 U.S. 783 (1983).

9. *Id.* at 784–85.

10. *Id.* at 793.

11. *Id.* at 794–95.

12. *Id.* at 792 (“In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society.”).

13. *See infra* Part II.

14. *See infra* Part III.

15. *See infra* Part IV.

16. *See* *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 893 (2005) (Scalia, J., dissenting) (“With respect to public acknowledgment of religious belief, it is entirely clear from our Nation's historical practices that the Establishment Clause permits this disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists.”).

17. *See* *Voters Say We Can Pray in Public Meetings*, FAIRLEIGH DICKINSON UNIVERSITY (Apr. 21, 2014), <http://publicmind.fdu.edu/2014/letuspray/final.pdf> (finding that 73% of voters approved of legislative prayer).

(“the Nones”)<sup>18</sup> is growing.<sup>19</sup>

Before discussing the future of legislative prayer, it will be useful to review its past. Part I of this Note discusses *Marsh*, including its reasoning, its meaning, and its effects. Part II reviews the implementation and modification of *Marsh* by the circuit courts. Part III turns to *Galloway*, analyzing the decision and evaluating its future implications. Finally, Part IV applies the strategic model<sup>20</sup> of judicial decision making to help explain legislative prayer’s past and future, explores the impact of the Nones, and proposes a few alternatives to legislative prayer, including nonreligious opening statements, moments of silence, and public forums.

A survey of the cases from *Marsh* through *Galloway* demonstrates that legislative prayer’s continued existence threatens the religious liberty protected by the First Amendment.<sup>21</sup> In the context of town board meetings such as those in *Galloway*, the danger is especially great. Unlike the meetings of Congress or state legislatures, town board meetings involve direct democracy. The government cannot subject its citizens to a state-sponsored religious practice as the cost of participation in government.<sup>22</sup>

#### I. UNDERSTANDING *MARSH* AND ITS MEANING

*Marsh v. Chambers* is a curious decision. After all, if the Establishment Clause and the separation of church and state<sup>23</sup> mean anything, it seems (if only as a matter

18. The term “Nones” was coined by Professor Barry A. Kosmin of Trinity College. Wendy Thomas Russell, *An Interview with the Guy Who Named the “Nones”* (Jan. 10, 2013), <http://wendythomasrussell.com/nones/>. The term is “a label for a diverse group of people who do not identify with any of the myriad of religious options in the American religious marketplace—the irreligious, the unreligious, the anti-religious, and the anti-clerical. Some believe in God; some do not. Some may participate occasionally in religious rituals; others never will.” BARRY A. KOSMIN & ARIELA KEYSAR WITH RYAN CRAGUN & JUHEM NAVARRO-RIVERA, *AMERICAN NONES: THE PROFILE OF THE NO RELIGION POPULATION i* (2009), available at [http://commons.trincoll.edu/aris/files/2011/08/NONES\\_08.pdf](http://commons.trincoll.edu/aris/files/2011/08/NONES_08.pdf).

19. See, e.g., Yasmin Anwar, *Americans and Religion Increasingly Parting Ways, New Survey Shows*, UC BERKELEY NEWS CENTER (Mar. 12, 2013), <http://newscenter.berkeley.edu/2013/03/12/non-believers/>.

20. See generally Frank B. Cross & Blake J. Nelson, *Strategic Institutional Effects on Supreme Court Decisionmaking*, 95 NW. U. L. REV. 1437 (2001).

21. See, e.g., *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 313 (2000) (“But the religious liberty protected by the Constitution is abridged when the State affirmatively sponsors the particular religious practice of prayer.”); *Cnty. of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 590 (1989) (finding that the Establishment Clause “guarantee[s] religious liberty and equality to ‘the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism’” (quoting *Wallace v. Jaffree*, 472 U.S. 38, 52 (1985))), *abrogated on other grounds by Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014).

22. *Lee v. Weisman*, 505 U.S. 577, 596 (1992) (“It is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice.”).

23. See *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1, 16 (1947) (“In the words of [Thomas] Jefferson, the clause against establishment of religion by law was intended to erect ‘a wall of separation between church and State.’” (quoting *Reynolds v. United States*, 98

of common sense) that a legislature should not pray to God and seek divine guidance in the performance of its legislative duties.

By grounding its decision in a predominantly historical analysis, the Supreme Court ignored and rejected its own Establishment Clause jurisprudence, including the test established in *Lemon v. Kurtzman*<sup>24</sup> just a dozen years earlier. To pass constitutional muster under the *Lemon* test, the challenged statute or policy must have a secular legislative purpose, its primary effect must neither advance nor inhibit religion, and it “must not foster an excessive government entanglement with religion.”<sup>25</sup> In order to uphold Nebraska’s practice as constitutional, the *Marsh* Court needed to ignore *Lemon*. As Justice Brennan observed in dissent, “[I]f any group of law students were asked to apply the principles of *Lemon* to the question of legislative prayer, they would nearly unanimously find the practice to be unconstitutional.”<sup>26</sup>

Nor was there any other test the Court could have applied from its previous Establishment Clause cases to uphold Nebraska’s legislative prayer policy. Even before *Lemon*, the Court had declared a rule that the government must remain neutral in religious matters. This “neutrality principle” was most clearly articulated in *Epperson v. Arkansas*:

Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.<sup>27</sup>

The *Marsh* Court disregarded the neutrality principle by upholding the plainly religious practice of legislative prayer,<sup>28</sup> but it did so without overruling *Epperson*, *Lemon*, or any of its other Establishment Clause cases. The Court thus created an exception to the Establishment Clause, “rather than reshaping Establishment Clause doctrine to accommodate legislative prayer.”<sup>29</sup> The obvious question is: Why? One possibility is that the Court responded strategically to external institutional pressures.<sup>30</sup> In a post-*Marsh* case involving the constitutionality of a Ten Commandments display, Justice Scalia provided an explanation for the Court’s inconsistent approach to religious neutrality:

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U.S. 145, 164 (1878))).

24. 403 U.S. 602 (1971).

25. *Id.* at 612–13 (citation omitted) (internal quotation marks omitted).

26. *Marsh v. Chambers*, 463 U.S. 783, 800–01 (Brennan, J., dissenting).

27. 393 U.S. 97, 103–04 (1968).

28. *See Marsh*, 463 U.S. at 797 (Brennan, J., dissenting) (“That the ‘purpose’ of legislative prayer is pre-eminently religious rather than secular seems to me to be self-evident. ‘To invoke Divine guidance on a public body entrusted with making the laws[]’ is nothing but a religious act.” (footnote omitted) (citation omitted) (quoting the opinion of the Court at 792)).

29. *Id.* at 796.

30. For a more detailed discussion of how external pressures influence judicial decision making, see *infra* Part IV.

What, then, could be the genuine “good reason” for occasionally ignoring the neutrality principle? I suggest it is the instinct for self-preservation, and the recognition that the Court, which “has no influence over either the sword or the purse,” cannot go too far down the road of an enforced neutrality that contradicts both historical fact and current practice without losing all that sustains it: the willingness of the people to accept its interpretation of the Constitution as definitive, in preference to the contrary interpretation of the democratically elected branches.<sup>31</sup>

In its attempt to preserve itself, the *Marsh* Court disregarded the neutrality principle and its own jurisprudence, relying on a version of history that was incomplete at best and distorted at worst.<sup>32</sup> The resulting decision created more questions than it answered and offered little help to courts in future legislative prayer cases.<sup>33</sup>

#### A. Oversimplified History

The *Marsh* Court’s unusual reliance on historical tradition rather than judicial precedent has been criticized for two separate reasons. First, scholars such as Professor Michael W. McConnell have argued that the Court’s history-focused approach does not help us interpret the meaning of the Constitution.<sup>34</sup> Second, there is evidence that the Court’s account of history was not entirely accurate.<sup>35</sup>

Turning to the first objection, the Court’s use of historical analysis is troubling because the majority uses history to avoid engaging in a meaningful discussion of Establishment Clause principles. “In light of the unambiguous and unbroken history of more than 200 years,” Chief Justice Burger wrote, “there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society.”<sup>36</sup> By glossing over any arguments to the contrary, the Court produced an opinion that is “simply insufficient.”<sup>37</sup> While the Court paid lip service to the idea that “historical patterns cannot justify contemporary violations of constitutional guarantees,”<sup>38</sup> it failed to provide any convincing reason that *would*

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31. *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 892–93 (2005) (Scalia, J., dissenting) (citation omitted).

32. *See infra* Part I.A.

33. *See infra* Parts I.B and II.

34. Michael W. McConnell, *On Reading the Constitution*, 73 CORNELL L. REV. 359, 362–63 (1988) (“So far as one can tell from the Court’s opinion, there is simply an exception from the establishment clause for legislative chaplains . . . . The decision casts no light on the meaning of the constitutional provision. Indeed, it can be said that *Marsh v. Chambers* does not interpret the Constitution at all.”).

35. Justice Brennan made this point in his dissenting opinion: “[I]n general, the history of legislative prayer has been far more eventful—and divisive—than a hasty reading of the Court’s opinion might indicate.” *Marsh v. Chambers*, 463 U.S. 783, 800 (1983) (Brennan, J., dissenting).

36. *Id.* at 792.

37. Michael Stokes Paulsen, *Lemon is Dead*, 43 CASE W. RES. L. REV. 795, 841 (1993).

38. *Marsh*, 463 U.S. at 790.

justify violating the principle of religious neutrality. The Court's conclusory assertions failed to satisfy scholars such as McConnell, who argued that:

*Marsh v. Chambers* represents original intent subverting the principle of the rule of law. Unless we can articulate some *principle* that explains *why* legislative chaplains might not violate the establishment clause, and demonstrate that that principle continues to be applicable today, we cannot uphold a practice that so clearly violates fundamental principles we recognize under the clause.<sup>39</sup>

The Court compounded its failure to provide a principled basis for its decision by oversimplifying the historical narrative it relied upon. The majority opinion noted that the First Congress in 1789 adopted a policy of hiring chaplains to open sessions of both the U.S. House of Representatives and the Senate.<sup>40</sup> Congress approved the Bill of Rights just three days after authorizing the appointment of paid chaplains, and the Court accepted this as proof that “the men who wrote the First Amendment Religion Clauses did not view paid legislative chaplains and opening prayers as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress.”<sup>41</sup>

Professor Christopher C. Lund reviewed the history of the congressional chaplaincies and concluded that this history was both more contentious and more complicated than the *Marsh* opinion would suggest.<sup>42</sup> Consider Lund's response to the Court's assertion that legislative prayer “is simply a tolerable acknowledgment of beliefs widely held among the people of this country”<sup>43</sup>:

This is simply wrong, and almost risibly so. It perpetuates the very false illusion that the chaplaincies were altogether innocuous and universally supported; it ignores all of the ways in which the chaplaincies were sometimes controversial and divisive. In the end, the Court's desire to portray the chaplaincies as benign ends up distorting its historical analysis. *Marsh* wanted the chaplaincies to seem sterile, but this required disinfecting parts of the relevant history.<sup>44</sup>

One of the parts that “required disinfecting” was the widespread prejudice against American Catholics in the nineteenth century.<sup>45</sup> The 1832 election of Charles Constantine Pise, the first Catholic Senate chaplain,<sup>46</sup> led to calls for the abolition of the chaplaincies.<sup>47</sup> Pise left office after less than a year,<sup>48</sup> and neither the House

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39. McConnell, *supra* note 34, at 362 (emphasis in original).

40. *Marsh*, 463 U.S. at 787–88.

41. *Id.* at 788.

42. See generally Christopher C. Lund, *The Congressional Chaplaincies*, 17 WM. & MARY BILL RTS. J. 1171 (2009).

43. *Marsh*, 463 U.S. at 792.

44. Lund, *supra* note 42, at 1213.

45. See *id.* at 1187–93.

46. *Id.* at 1187.

47. *Id.* at 1189.

48. *Id.* at 1190.

nor the Senate elected another Catholic chaplain until the year 2000.<sup>49</sup> According to Lund, the fierce opposition to Catholic chaplains contradicts the *Marsh* Court's assertion that legislative prayer does not place the government's seal of approval on the prayer giver's religious viewpoint<sup>50</sup>—"that was precisely why it became so important to prevent Catholic priests from becoming congressional chaplains."<sup>51</sup>

The *Marsh* Court also downplayed the opposition to legislative prayer by some of the Founding Fathers. Although the Court acknowledged that John Jay and John Rutledge opposed the practice,<sup>52</sup> it did not "agree that evidence of opposition to a measure weakens the force of the historical argument; indeed it infuses it with power by demonstrating that the subject was considered carefully and the action not taken thoughtlessly."<sup>53</sup> It is difficult to take this argument seriously. Essentially, the Court asserted that a practice or policy deserves *greater* deference when it was *less* popular at the time of its adoption.

The majority also failed to mention that both James Madison and Thomas Jefferson opposed governmental prayer. Although Madison, while in Congress, voted in favor of the appropriations bill that authorized the payment of congressional chaplains, he "consistently opposed the chaplaincies throughout his political life."<sup>54</sup> As President, Jefferson "refused to issue Thanksgiving prayers because he understood them to violate the Establishment Clause's prohibition against governmental 'recommendation' of religion."<sup>55</sup> The positions of Madison and Jefferson cast serious doubt over the *Marsh* Court's hasty conclusion that the drafters of the First Amendment "saw no real threat to the Establishment Clause arising from a practice of [legislative] prayer."<sup>56</sup>

### B. Unresolved Questions

Why would the Court rest its decision on such a weak historical foundation? Justice Scalia's theory of self-preservation<sup>57</sup> may have been a factor. Justice Brennan alluded to this possibility at the end of his dissent: "If the Court had struck down legislative prayer today, it would likely have stimulated a furious reaction."<sup>58</sup> The majority opinion observed that the practice of legislative prayer had continued uninterrupted in

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49. *Id.* at 1191–92.

50. *Marsh v. Chambers*, 463 U.S. 783, 792 (1983).

51. Lund, *supra* note 42, at 1213.

52. *Marsh*, 463 U.S. at 791.

53. *Id.*

54. Lund, *supra* note 42, at 1185–86 (citing Andy G. Olree, *James Madison and Legislative Chaplains*, 102 NW. U. L. REV. 145, 221 (2008)); see also *Marsh*, 463 U.S. at 807–08 (Brennan, J., dissenting) (noting that after Madison left the Presidency, he wrote that congressional chaplains were inconsistent with the Constitution and with religious freedom).

55. Thomas B. Colby, *A Constitutional Hierarchy of Religions? Justice Scalia, the Ten Commandments, and the Future of the Establishment Clause*, 100 NW. U. L. REV. 1097, 1128 (2006).

56. *Marsh*, 463 U.S. at 791.

57. See *supra* note 31 and accompanying text.

58. *Marsh*, 463 U.S. at 822 (Brennan, J., dissenting).

Congress since it first began,<sup>59</sup> and it had been “followed consistently in most of the states.”<sup>60</sup> Justice Brennan was surely correct that striking down such a widely accepted practice would provoke a strong, and likely furious, reaction.

Given the widespread political and popular support for legislative prayer, the Court had little choice in the matter. Lund compared *Marsh* to the controversy the Court faced regarding the inclusion of the words “under God” in the Pledge of Allegiance.<sup>61</sup> In both cases, “while precedent clearly led to the conclusion that the government’s action was unconstitutional, political realities cut strongly the other way.”<sup>62</sup>

Whatever the reasons for the Court’s decision in *Marsh*, the lower courts were stuck with it. Unfortunately, the decision proved difficult to interpret and implement. The language of the majority opinion left open several questions that must be answered when deciding a legislative prayer case, and various courts provided inconsistent answers.<sup>63</sup>

First, it was unclear whether *Marsh* required legislative prayers to be nonsectarian. In determining that the prayers delivered by the Nebraska legislature’s chaplain, Robert Palmer, did not violate the Establishment Clause, the Court noted that his prayers were “in the Judeo-Christian tradition.”<sup>64</sup> In a footnote, the Court then added, “Palmer characterizes his prayers as ‘nonsectarian,’ ‘Judeo Christian,’ and with ‘elements of the American civil religion.’ Although some of his earlier prayers were often explicitly Christian, Palmer removed all references to Christ after a 1980 complaint from a Jewish legislator.”<sup>65</sup> Did this footnote mean that *only* nonsectarian prayers pass constitutional muster under *Marsh*? In *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*,<sup>66</sup> the Supreme Court said yes: “The legislative prayers involved in *Marsh* did not violate this principle *because* the particular chaplain had removed all references to Christ.”<sup>67</sup>

Despite this pronouncement from the *Allegheny* Court, the question remained unsettled until *Galloway*. There, the Court ruled that sectarian prayers are permissible, as long as the prayer practice does not reflect an attempt “to proselytize or advance any one, or to disparage any other, faith or belief.”<sup>68</sup>

Another key holding from *Marsh* that required clarification was the proscription on impermissible motives. When evaluating whether Palmer’s sixteen-year tenure as chaplain violated the Establishment Clause, the Court determined that “Palmer was reappointed because his performance and personal qualities were acceptable to the body appointing him.”<sup>69</sup> The Court held that, “[a]bsent proof that the chaplain’s

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59. *Id.* at 788.

60. *Id.* at 788–89.

61. Lund, *supra* note 42, at 1209 (referring to *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004)).

62. Lund, *supra* note 42, at 1209.

63. *See infra* Part II.

64. *Marsh*, 463 U.S. at 793.

65. *Id.* at 793 n.14 (citations omitted).

66. 492 U.S. 573 (1989), *abrogated by* *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014).

67. *Id.* at 603 (emphasis added) (internal quotation marks omitted).

68. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1823 (2014) (quoting *Marsh*, 463 U.S. at 794–95).

69. *Marsh*, 463 U.S. at 793.



reappointment stemmed from an impermissible motive, . . . his long tenure does not in itself conflict with the Establishment Clause.”<sup>70</sup> The Court failed to define exactly what would constitute an impermissible motive, but it implied that choosing a prayer giver for the purpose of advancing a particular religion would be impermissible.<sup>71</sup> Unfortunately, this language will likely continue to cause problems for lower courts because *Galloway* also referred to “an impermissible government purpose”<sup>72</sup> without defining the term.

Additionally, it was unclear when (if ever) a court should review the contents of particular prayers. The *Marsh* Court explained:

The content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief. That being so, it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer.<sup>73</sup>

This suggests that the content of a prayer should only be evaluated when there is evidence that “the prayer opportunity has been exploited.”<sup>74</sup> But this is problematic because the best evidence of exploitation will often be the contents of the prayers themselves. In such a case, would a court be permitted to review the prayers, or is extrinsic evidence of exploitation required?

Perhaps most importantly, if we assume that *Marsh*’s historical inquiry is not the proper framework for analyzing a legislative prayer case, should the *Lemon* test or some other test be applied? The *Galloway* majority, like the *Marsh* Court, relied on the history of legislative prayer, but Justice Kennedy’s plurality opinion reflected a preference for the so-called coercion test over other Establishment Clause tests.<sup>75</sup>

## II. LEGISLATIVE PRAYER IN THE CIRCUIT COURTS

A review of recent legislative prayer cases in the circuit courts will shed further light on *Marsh*’s shortcomings. An examination of how *Galloway* clarified—or failed to clarify—the questions raised by *Marsh* reveals that a lower court will still be in a difficult position when faced with a legislative prayer case. These difficulties lead to the conclusion that legislative prayer and the Establishment Clause are simply incompatible.<sup>76</sup> Although the *Galloway* Court abrogated *Allegheny* and approved sectarian prayers,<sup>77</sup> this Part begins by reviewing the ways

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70. *Id.* at 793–94.

71. *See id.* at 793 (“We cannot, any more than Members of the Congresses of this century, perceive any suggestion that choosing a clergyman of one denomination advances the beliefs of a particular church.”).

72. *Galloway*, 134 S. Ct. at 1824.

73. *Marsh*, 463 U.S. at 794–95.

74. *Id.* at 794.

75. *See infra* Part III.C.

76. *See* Christopher C. Lund, *Legislative Prayer and the Secret Costs of Religious Endorsements*, 94 MINN. L. REV. 972, 1023 (2010) (“Religious liberty for all cannot really be served in any legislative prayer scheme.” (emphasis in original)).

77. *Galloway*, 134 S. Ct. at 1823 (“In rejecting the suggestion that legislative prayer

that the circuit courts addressed this question before *Galloway*, and by asking whether *Galloway* answered that question correctly.

*A. Should Legislative Prayers Be Nonsectarian?*

As a matter of interpretation, the *Galloway* Court's conclusion that *Marsh* did not require nonsectarian prayers seems correct. The word "nonsectarian" appeared just once in *Marsh*'s majority opinion—and only in a footnote, at that.<sup>78</sup> Lund noted that *Allegheny*'s interpretation of *Marsh* was "a revisionary sort of summary."<sup>79</sup> The Court transformed the chaplain's removal of the references to Christ from a mere "background fact" into "a central holding of the case."<sup>80</sup> Even assuming *Galloway* correctly interpreted *Marsh*, should there be a nonsectarian requirement?

In a 2008 article,<sup>81</sup> Kenneth A. Klukowski made a compelling argument that perhaps nonsectarian prayers should *not* be required. If naming a particular deity—such as Christ—renders a prayer impermissibly sectarian, then all members of religions whose faiths require them to pray in the name of a specific deity are categorically excluded from delivering a prayer.<sup>82</sup> Justice Brennan expressed the same concern in *Marsh*.<sup>83</sup> The Fourth Circuit confronted this problem in *Turner v. City Council of Fredericksburg*,<sup>84</sup> a pre-*Galloway* case in which a city council member challenged the city's nondenominational prayer policy because his religion required him to pray in the name of Jesus Christ.<sup>85</sup> In *Turner*, the court stopped short of saying that nonsectarian prayers were constitutionally required, but held that the nonsectarian policy fit "squarely within the range of conduct permitted by *Marsh*."<sup>86</sup> Turner's unwillingness to pray in accordance with the city's policy did not amount to a violation of his First Amendment rights because he "remain[ed] free to pray on his own behalf, in nongovernmental endeavors, in the manner dictated by his conscience."<sup>87</sup>

The Fourth Circuit's decision in *Turner* was perfectly reasonable—after all, no one has a First Amendment right to deliver a legislative prayer. Yet there does seem to be something unfair about it. Unless Turner violated his own religious

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must be nonsectarian, the Court does not imply that no constraints remain on its content.").

78. *Marsh*, 463 U.S. at 793 n.14.

79. Lund, *supra* note 76, at 995.

80. *Id.*

81. Kenneth A. Klukowski, *In Whose Name We Pray: Fixing the Establishment Clause Train Wreck Involving Legislative Prayer*, 6 GEO. J.L. & PUB. POL'Y 219 (2008).

82. *Id.* at 255.

83. *Marsh*, 463 U.S. at 820 (Brennan, J., dissenting) ("Some would find a prayer *not* invoking the name of Christ to represent a flawed view of the relationship between human beings and God." (emphasis in original)); see also Eric J. Segall, *Mired in the Marsh: Legislative Prayers, Moments of Silence, and the Establishment Clause*, 63 U. MIAMI L. REV. 713, 730 (2009) ("Some spiritual leaders, when given the choice between offering a nondenominational, nonsectarian prayer or no prayer at all, will certainly choose the latter. This choice therefore discriminates against those clergy who want to offer sectarian prayers and those legislators who want to hear them.").

84. 534 F.3d 352 (4th Cir. 2008).

85. *Id.* at 353–54.

86. *Id.* at 356.

87. *Id.*

beliefs, he could not participate in the city's supposedly nondenominational prayer practice. If the Establishment Clause truly commands "that one religious denomination cannot be officially preferred over another,"<sup>88</sup> then a policy that prefers religions that do not require adherents to pray to specific deities is difficult to justify. On the other hand, the court could have relied on *Marsh*'s prohibition of "impermissible motives"<sup>89</sup> and ruled against the city because Turner had been excluded on the basis of his religious beliefs. This result would have been just as defensible as the one the Fourth Circuit actually reached. This sort of problem, where there seemingly is no right answer, is typical of legislative prayer cases in the post-*Marsh* era.

Three years after *Turner*, the Fourth Circuit ruled on another legislative prayer practice in *Joyner v. Forsyth County*.<sup>90</sup> The case involved a challenge to the Forsyth County Board of Commissioners' prayer practice, which involved prayers delivered by volunteers from religious congregations in the community.<sup>91</sup> The court struck down the policy because, based on its interpretation of *Marsh* and *Allegheny*,<sup>92</sup> the prayers were impermissibly sectarian; "[a]lmost four-fifths of the prayers delivered after the adoption of the policy referenced Jesus Christ. None of the prayers mentioned any other deity."<sup>93</sup> In doing so, the Fourth Circuit gave a ringing endorsement to the nonsectarian standard: "Sectarian prayers must not serve as the gateway to citizen participation in the affairs of local government. To have them do so runs afoul of the promise of public neutrality among faiths that resides at the heart of the First Amendment's religion clauses."<sup>94</sup>

Justice Kagan made a similar argument in her *Galloway* dissent. She objected to Justice Kennedy's claim that sectarian prayers could be "part of our heritage and tradition, part of our expressive idiom,"<sup>95</sup> and argued that such prayers "express beliefs that are fundamental to some, foreign to others—and because that is so they carry the ever-present potential to both exclude and divide."<sup>96</sup>

Both sides of this debate present strong arguments. On one hand, requiring nonsectarian prayers would unintentionally exclude people whose religions require them to pray to certain deities. And, as the *Galloway* majority argued, such a requirement would force legislatures and courts "to act as supervisors and censors of religious speech,"<sup>97</sup> further entangling the government with religion. On the other hand, allowing sectarian prayers would cause feelings of exclusion and division for members of other faiths, particularly religious minorities. The unavoidability of this conflict demonstrates that any legislative prayer practice likely violates the neutrality principle and therefore the Establishment Clause.

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88. *Larson v. Valente*, 456 U.S. 228, 244 (1982).

89. *Marsh v. Chambers*, 463 U.S. 783, 793–94 (1983).

90. 653 F.3d 341 (4th Cir. 2011).

91. *Id.* at 342–43.

92. *See id.* at 352 (noting that "*Allegheny* read *Marsh* as precluding sectarian prayer" (internal quotation marks omitted)).

93. *Id.* at 353.

94. *Id.* at 342–43.

95. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1825 (2014) (plurality opinion).

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

97. *Id.* at 1822.

*B. Impermissible Motives and Religious Discrimination*

Both *Marsh* and *Galloway* included references to “impermissible” motives or purposes.<sup>98</sup> Although neither case defined the term, it would presumably be impermissible for a government entity to exclude someone from its prayer practice solely because of her religious beliefs.<sup>99</sup> That was one of the issues faced by the Fourth Circuit in *Simpson v. Chesterfield County Board of Supervisors*.<sup>100</sup>

This case concerned a challenge to the county’s prayer practice by Cynthia Simpson, a member of the Reclaiming Tradition of Wicca who had identified herself as a witch when she asked to be added to the list of potential prayer givers.<sup>101</sup> The County Attorney refused her request because the “non-sectarian invocations [were] traditionally made to a divinity that [was] consistent with the Judeo-Christian tradition.”<sup>102</sup> Simpson contended that this amounted to an impermissible advancement of Judeo-Christian religions.<sup>103</sup> The court never seriously considered the possibility that the county had relied on an impermissible motive in rejecting Simpson’s request,<sup>104</sup> instead upholding the prayer practice because the policy “aspired to non-sectarianism,”<sup>105</sup> had “achieved diversity,”<sup>106</sup> and was “wide enough . . . to include Islam.”<sup>107</sup> These are all admirable qualities, but they have no bearing on the central issue in the case—that Simpson’s request to be included among the county’s prayer givers was denied *expressly because of her religious beliefs*. As Lund noted, the case “seems to vitiate the impermissible motive requirement altogether; it is hard to imagine a clearer case of denominational discrimination than what happened to Cynthia Simpson.”<sup>108</sup>

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98. *Id.* at 1824 (“Absent a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose, a challenge based solely on the content of a prayer will not likely establish a constitutional violation.”); *Marsh v. Chambers*, 463 U.S. 783, 793–94 (1983) (“Absent proof that the chaplain’s reappointment stemmed from an impermissible motive, we conclude that his long tenure does not in itself conflict with the Establishment Clause.”).

99. In fact, the Eleventh Circuit has explicitly held that the impermissible motive standard “prohibits purposeful discrimination.” *Pelphrey v. Cobb Cnty.*, 547 F.3d 1263, 1281 (11th Cir. 2008).

100. 404 F.3d 276 (4th Cir. 2005).

101. *Id.* at 278–80.

102. *Id.* at 280.

103. *Id.*

104. The court’s application of the impermissible motive requirement amounted to a single sentence: “*Marsh*’s caution against ‘impermissible motives’ does not fasten on local governments a *limitation* to a prayer-giver from one religious view.” *Id.* at 287 (emphasis in original). While this statement is undoubtedly true, it is difficult to see how it is at all relevant to the facts of the case.

105. *Id.* at 284.

106. *Id.* at 285.

107. *Id.* at 286.

108. Lund, *supra* note 76, at 1027–28; accord *Fourth Circuit Holds That Local Government May Restrict the Leading of Its Invocations to Representatives of Judeo-Christian Religion: Simpson v. Chesterfield County Board of Supervisors*, 119 HARV. L. REV. 1223, 1229 (2006) [hereinafter *Fourth Circuit Holds*] (“From the viewpoint of

Interestingly, *Simpson* would have been wrongly decided even under *Galloway*'s more permissive standard. One of *Galloway*'s few requirements is that the government entity maintain "a policy of nondiscrimination."<sup>109</sup> By excluding *Simpson* because of her religious beliefs, Chesterfield County failed that test. Unfortunately, the *Galloway* Court did not specify which government purposes are impermissible or discriminatory, and therefore produced a standard as vague and malleable as *Marsh* itself. Consequently, some future plaintiffs may suffer the same fate as *Simpson*.

### C. When May Courts Review the Content of Prayers?

In *Pelphrey v. Cobb County*,<sup>110</sup> the Eleventh Circuit considered a challenge to a county commission's prayer practice. A rotating group of volunteers delivered the prayers.<sup>111</sup> The plaintiffs, relying on *Allegheny*'s interpretation of *Marsh*, argued that the prayers were impermissibly sectarian.<sup>112</sup> The court held that the county's "diversity of speakers . . . support[ed] the finding that the County did not exploit the prayers to advance any one religion,"<sup>113</sup> even though 96.6% of the prayer givers were Christian and 70% of the prayers included Christian references.<sup>114</sup> Further, the court avoided any examination of the prayers' language by citing *Marsh* for the proposition that a court should not evaluate or parse a prayer's content unless there is evidence that the prayer opportunity has been exploited.<sup>115</sup>

In *Joyner*, the Fourth Circuit took the opposite approach and provided a persuasive answer to the question of when—and why—courts may review the contents of specific prayers under *Marsh*. The dissent objected to the majority's examination of the references to Christ in the prayers.<sup>116</sup> The majority responded by explaining that *Marsh* only prevents a court from examining the prayers if there is no evidence that the prayer opportunity has been exploited.<sup>117</sup> The court expanded on this concept:

[T]he dissent gives the impression that virtually any review by the majority of the invocations under challenge would constitute impermissible "parsing." Quite simply, this stark approach leaves the

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religions outside the Judeo-Christian tradition, however, the Board's policy is more exclusive than inclusive. . . . [L]imiting eligibility to Judeo-Christianity excludes in terms of religious diversity far more than it includes."

109. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1824 (2014).

110. 547 F.3d 1263 (11th Cir. 2008).

111. *Id.* at 1266.

112. *See id.* ("The taxpayers argue that the Establishment Clause permits only nonsectarian prayers . . .").

113. *Id.* at 1277.

114. *Id.* at 1267.

115. *Id.* at 1272 (citing *Marsh v. Chambers*, 463 U.S. 783, 795 (1983)).

116. *Joyner v. Forsyth Cnty.*, 653 F.3d 341, 361 (4th Cir. 2011) (Niemeyer, J., dissenting) ("This focus by the majority on the December 17 prayer, simply because of its description of Jesus' role in Christianity, is precisely the content-inquiry that *Marsh* intended to foreclose. With such an inquiry, must we now determine how many times the name Jesus is spoken or what description of him is given?").

117. *Id.* at 351–52.

court without the ability to decide the case, by barring any substantive consideration of the very practice under challenge. It is to say the least an odd view of the judicial function that denies courts the right to review the practice at issue. For to exercise no review at all—to shut our eyes to patterns of sectarian prayer in public forums—is to surrender the essence of the Establishment Clause and allow government to throw its weight behind a particular faith. *Marsh* did not countenance any such idea.<sup>118</sup>

This is a reasonable understanding of the language in *Marsh*. *Marsh*'s prohibition on parsing prayers should only be applied when the content of the prayers is not an issue (where, for example, a plaintiff challenges the constitutionality of a prayer practice in general but makes no allegations regarding specific prayers). But when a plaintiff claims that the nature and language of the prayers *made* the prayer practice impermissible, the prayers' content will obviously be essential to the court's evaluation. The *Galloway* Court provided a slightly different interpretation:

Absent a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose, a challenge based solely on the content of a prayer will not likely establish a constitutional violation. *Marsh*, indeed, requires an inquiry into the prayer opportunity as a whole, rather than into the contents of a single prayer.<sup>119</sup>

While this approach initially seems fair and reasonable, it leads to unacceptable results. The *Galloway* Court acknowledged that one of the town's prayer givers referred to the plaintiffs as a "minority . . . ignorant of the history of our country,"<sup>120</sup> and that this attack "strayed from the rationale set out in *Marsh*,"<sup>121</sup> but nonetheless "[did] not despoil a practice that on the whole reflects and embraces our tradition."<sup>122</sup> The Supreme Court essentially said, in other words, "It's OK if the government's prayers disparage the religious beliefs of others, so long as they don't do it too often." Any American who respects the First Amendment and religious liberty should be appalled.

As the cases discussed in this Part demonstrate, *Galloway* did not resolve many of the issues the circuit courts struggled with in the years following *Marsh*. The Court did clarify (for better or worse) that legislative prayers may be sectarian. But *Galloway* brought us no closer to a workable definition of an "impermissible" motive or purpose, and the Court expanded *Marsh* with its rationale that the prayers' content may only be examined when a plaintiff challenges an entire pattern of prayers. A single prayer, no matter how offensive, is effectively unreviewable.

The inconsistent results in the circuit courts prove that *Marsh* (and therefore *Galloway*) is too malleable, too easily manipulated. The frequent presence of compelling arguments on both sides suggests that it may be impossible to craft a legislative prayer policy that does not violate *someone's* constitutional rights. The

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118. *Id.* at 351.

119. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1824 (2014).

120. *See supra* note 1 and accompanying text.

121. *Galloway*, 134 S. Ct. at 1824.

122. *Id.*

following Part addresses the *Galloway* case in greater detail and evaluates the impact this landmark decision will have on future Establishment Clause cases.

### III. TOWN OF GREECE V. GALLOWAY

#### A. The Town's Prayer Practice

In *Galloway*, the Supreme Court addressed the constitutionality of the legislative prayer practice in the town of Greece, New York, a Rochester suburb with a population of about 94,000.<sup>123</sup> Plaintiffs Susan Galloway and Linda Stephens claimed that the town board violated the Establishment Clause by starting its monthly board meetings with prayers.<sup>124</sup> The board implemented its prayer practice in 1999 (meetings previously began with moments of silence).<sup>125</sup> The prayer givers appeared by invitation; a town employee solicited local clergy by calling religious organizations that were listed in the town's Community Guide.<sup>126</sup> All of the prayer givers from 1999 through 2007 were Christian.<sup>127</sup> Galloway and Stephens first complained about the prayer practice in 2008.<sup>128</sup> That year, four non-Christians delivered prayers; in 2009 and 2010, "all the prayer-givers were once again invited Christian clergy."<sup>129</sup> About two-thirds of the prayers "contained uniquely Christian language."<sup>130</sup> When delivering a prayer, the speaker faced the citizens attending the meeting, with his or her back to the members of the board.<sup>131</sup> The prayer givers "often asked members of the audience to participate by bowing their heads, standing, or joining in the prayer."<sup>132</sup>

When Galloway and Stephens filed suit, they claimed that the town's selection procedure preferred Christianity over other faiths, and that the prayer practice was impermissibly sectarian.<sup>133</sup> They later abandoned their claim of intentional discrimination against non-Christians, eliminating the impermissible motive issue.<sup>134</sup> The town claimed that anyone who volunteered could give a prayer, including atheists, and that it had never rejected such a request.<sup>135</sup> The town admitted, however, that it had never publicized this opportunity to the town's residents.<sup>136</sup> The town did not review the prayers in advance, and it asserted that "it

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123. *Id.* at 1816.

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

125. *Id.* at 23.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 24.

131. Brief for Respondents at 8–9, *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014) (No. 12-696), 2013 WL 5230742, at \*8–9.

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

133. *Id.* at 25.

134. *Id.* at 26.

135. *Id.* at 23.

136. *Id.*

would not censor an invocation, no matter how unusual or offensive its content.”<sup>137</sup> Indeed, the town took no action even after the prayer that described opponents of the town’s practice as a “minority . . . ignorant of the history of our country.”<sup>138</sup>

### B. The Second Circuit Opinion

The Second Circuit ruled that the town’s prayer practice violated the Establishment Clause,<sup>139</sup> but did not read *Allegheny* as a requirement that all legislative prayers be nonsectarian.<sup>140</sup> Instead of applying a strict nonsectarian requirement, the court resolved the Establishment Clause question by asking

whether the town’s practice, viewed in its totality by an ordinary, reasonable observer, conveyed the view that the town favored or disfavored certain religious beliefs. In other words, we must ask whether the town, through its prayer practice, has established particular religious beliefs as the more acceptable ones, and others as less acceptable.<sup>141</sup>

While this fact-specific inquiry might appear to be a rejection of *Marsh*, the court justified its deviation on the grounds that *Marsh* itself “addressed a series of case-specific concerns raised by the plaintiff.”<sup>142</sup> The court ostensibly declined to apply the *Lemon* test<sup>143</sup> or any other Establishment Clause test because *Marsh* did not follow that approach,<sup>144</sup> and the court believed that *Marsh* should be the “touchstone” of its analysis.<sup>145</sup>

Despite these statements to the contrary, the Second Circuit’s analysis had a distinctly *Lemon* flavor.<sup>146</sup> Specifically, the opinion calls to mind Justice O’Connor’s “endorsement test,” which was an interpretation of the effect prong of the *Lemon* test.<sup>147</sup> Although the Second Circuit never used the phrase “endorsement test,” it struck down Greece’s prayer practice because it amounted to an endorsement of

137. *Id.*

138. *Id.* at 25; *see also supra* note 1 and accompanying text.

139. *Galloway*, 681 F.3d at 32 (“[W]e find that on the totality of the circumstances presented the town’s prayer practice identified the town with Christianity in violation of the Establishment Clause.”).

140. *Id.* at 28.

141. *Id.* at 29–30 (footnote omitted).

142. *Id.* at 30.

143. *See supra* text accompanying notes 24–25.

144. *Galloway*, 681 F.3d at 30.

145. *Id.* at 29.

146. That was my only lemon pun. I hope you enjoyed it.

147. *See Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O’Connor, J., concurring) (“The effect prong asks whether, irrespective of government’s actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid.”).



religion<sup>148</sup> and “convey[ed] to a reasonable objective observer under the totality of the circumstances an official affiliation with a particular religion.”<sup>149</sup>

By implicitly relying on the endorsement test, the Second Circuit stumbled (perhaps unwittingly) into a debate about what should be the prevailing analytical framework in Establishment Clause cases. The most important legacy of the Supreme Court’s decision in *Galloway* may be its impact on that larger Establishment Clause debate, rather than its effects on legislative prayer itself.

### C. The Supreme Court Decision and Its Future Effects

#### 1. The Coercion Argument

Although the Second Circuit relied on an endorsement analysis, *Galloway* and *Stephens* did not urge the Supreme Court to adopt that reasoning on appeal. Instead, they once again argued that the prayer practice was impermissibly sectarian, and that the prayers were a form of governmental coercion.<sup>150</sup> As noted above, Justice Kennedy’s majority opinion (joined by Chief Justice Roberts and Justices Alito, Scalia, and Thomas) abrogated *Allegheny* by holding that *Marsh* does not require nonsectarian prayers.<sup>151</sup> The coercion argument—and the Court’s response to it—requires a more detailed explanation.

Before the Second Circuit, *Galloway* and *Stephens* argued that the presence of children at the meetings created a threat of religious coercion.<sup>152</sup> Children sometimes led the Pledge of Allegiance and high school students could fulfill a civics requirement by attending the meetings.<sup>153</sup> The board also invited children to the meetings to receive awards.<sup>154</sup>

*Galloway* and *Stephens* likely referred to children when objecting to the coercive potential of the prayer policy because the Supreme Court’s Establishment Clause coercion doctrine was developed in two school prayer cases, *Lee v. Weisman*<sup>155</sup> and *Santa Fe Independent School District v. Doe*.<sup>156</sup> In *Lee*, the Court (with Justice Kennedy writing for the majority) ruled that a school had violated the Establishment Clause by having a rabbi deliver a nonsectarian prayer at a graduation ceremony.<sup>157</sup> The Court found that “prayer exercises in public schools

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148. *Galloway*, 681 F.3d at 30.

149. *Id.* at 34.

150. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1820 (2014).

151. *See supra* notes 64–68 and accompanying text.

152. *Galloway*, 681 F.3d at 33 n.8.

153. *Id.* at 23.

154. Brief for Respondents at 27, *supra* note 131, at \*27.

155. 505 U.S. 577, 587 (1992) (“It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise . . .”).

156. 530 U.S. 290, 312 (2000) (“Even if we regard every high school student’s decision to attend a home football game as purely voluntary, we are nevertheless persuaded that the delivery of a pregame prayer has the improper effect of coercing those present to participate in an act of religious worship.”).

157. *See Lee*, 505 U.S. at 594–96.

carry a particular risk of indirect coercion,”<sup>158</sup> and that the school had placed “public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction.”<sup>159</sup> In *Santa Fe*, the Supreme Court struck down a school’s practice of beginning high school football games with student-led prayers partly because it would be coercive to force the students to choose “between attending [the football] games and avoiding personally offensive religious rituals.”<sup>160</sup>

However, Galloway and Stephens could not simply rely on *Lee* and *Santa Fe* because the Court’s approach to legislative prayer has been much more deferential than its approach to school prayer. In 1962, *Engel v. Vitale*<sup>161</sup> held that New York could not use its public school system to encourage the recitation of prayers.<sup>162</sup> After *Engel*, federal courts have consistently enforced the separation of prayer and public education.<sup>163</sup> *Marsh* required no such separation in the legislative prayer context.<sup>164</sup> Perhaps for this reason, Galloway and Stephens did not limit their coercion argument to the prayers’ effects on children. They asserted that they had personally felt coerced by requests to participate in the prayers, and that they “felt isolated, embarrassed, and humiliated when they [had] declined to participate while those around them stared.”<sup>165</sup>

Furthermore, Galloway and Stephens argued, a citizen who attends a meeting to request a permit or to seek some other action from the board would feel coerced to participate in the prayer or risk having her request denied.<sup>166</sup> During oral arguments, Justice Kagan expressed similar concerns:

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158. *Id.* at 592.

159. *Id.* at 593.

160. *Santa Fe*, 530 U.S. at 312.

161. 370 U.S. 421 (1962).

162. *Id.* at 424.

163. *See, e.g., Santa Fe*, 530 U.S. at 312 (striking down prayers before high school football games); *Lee*, 505 U.S. at 593 (striking down prayers at high school graduation ceremony); *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985) (striking down Alabama statute requiring a moment of silence in public schools for reflection or voluntary prayer); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 223 (1963) (striking down state laws requiring the recitation of the Lord’s Prayer and Bible verses in public schools); *Doe v. Indian River Sch. Dist.*, 653 F.3d 256, 282 (3d Cir. 2011) (applying *Marsh* and holding that prayers at school board meetings violated Establishment Clause); *Doe v. Tangipahoa Parish Sch. Bd.*, 473 F.3d 188, 204–05 (5th Cir. 2006) (holding that sectarian prayers at school board meetings violated Establishment Clause), *rev’d on standing grounds*, 494 F.3d 494 (5th Cir. 2007); *Mellen v. Bunting*, 327 F.3d 355, 376 (4th Cir. 2003) (applying *Lemon* and holding that supper prayers at state-sponsored military college violated Establishment Clause); *Coles ex rel. Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 385–86 (6th Cir. 1999) (applying *Lemon* and holding that prayers before school board meetings violated Establishment Clause).

164. *See generally supra* Part I.

165. Brief for Respondents, *supra* note 131, at 15.

166. *Id.* at 24 (“[A]pplicants cannot afford to offend anyone. *Perhaps* no Board member would think less of a citizen who refused to participate in the prayer. But the citizen has no way to know.” (emphasis in original)).

[W]hat troubles me about this case is that here a citizen is going to a local community board, supposed to be the closest, the most responsive institution of government that exists, and is immediately being asked, being forced to identify whether she believes in the things that most of the people in the room believe in, whether she belongs to the same religious idiom as most of the people in the room do.

And it strikes me that that might be inconsistent with this understanding that when we relate to our government, we all do so as Americans, and not as Jews and not as Christians and not as nonbelievers.<sup>167</sup>

This is one of the most important factual differences between *Galloway* and *Marsh*. As Galloway and Stephens argued in their brief, “In both Congress and state legislatures, ordinary citizens are excluded from the legislative floor and confined to a gallery. They are mere spectators, not permitted to address the legislative body and with no business to conduct before it.”<sup>168</sup> The direct interaction between citizens and government officials in the town meeting context creates a greater risk of infringing on individuals’ First Amendment rights and a greater risk of conveying the impression that the government prefers certain religious views over others.

The Town of Greece responded to the claims of coercion by arguing that because the town never “compelled anyone to pray or to agree with the viewpoints of the prayer-givers, or . . . conditioned any governmental benefits on participation, the mere fact that attendees at meetings might disagree with a prayer [was] insufficient to constitute an Establishment Clause violation.”<sup>169</sup> But even if *participation* in the prayers was not compelled, being required to *attend* a religious ceremony or exercise still violates the Establishment Clause.<sup>170</sup> Participation in democracy is one of the most fundamental rights of American citizenship.<sup>171</sup> It is a violation of the Establishment Clause to require citizens to attend a religious ceremony they may not agree with—especially when it contains sectarian references to a God they may not believe in—before they are allowed to participate in the democratic process.<sup>172</sup> If the school district in *Santa Fe* could not force its

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167. Transcript of Oral Argument at 24, *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014) (No. 12-696), 2013 WL 5939896, at \*24.

168. Brief for Respondents, *supra* note 131, at 42.

169. Brief for Petitioner at 40, *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014) (No. 12-696), 2013 WL 3935899, at \*40.

170. See Paulsen, *supra* note 37, at 843 n.171 (“[I]f government requires a Christian to attend a Jewish worship service in a way that does not require the Christian to violate any of her religious obligations as a Christian, there is no *Free Exercise Clause* violation. But required attendance at the Jewish worship service would still be an *Establishment Clause* violation.” (emphasis in original)); accord Brief for Respondents, *supra* note 131, at 31 (“No one would claim that government may require citizens to attend religious services as long as they are free to disbelieve what is preached there.”).

171. Brief for Respondents, *supra* note 131, at 22.

172. See *Lee v. Weisman*, 505 U.S. 577, 596 (1992) (“It is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice.”); *Joyner v. Forsyth Cnty.*, 653 F.3d 341, 342–43 (4th Cir. 2011) (“Sectarian prayers must not serve as

students to choose between attending football games and hearing unwanted prayers,<sup>173</sup> then surely the Town of Greece could not force its citizens to choose between *participating in democracy* and hearing unwanted prayers, right?

Wrong, said Justice Kennedy.

In his plurality opinion, joined by Chief Justice Roberts and Justice Alito, Justice Kennedy declared that “legislative bodies do not engage in impermissible coercion merely by exposing constituents to prayer they would rather not hear and in which they need not participate.”<sup>174</sup> He stated that no coercion exists “where the prayers neither chastised dissenters nor attempted lengthy disquisition on religious dogma,”<sup>175</sup> and where the citizens “are free to enter and leave with little comment and for any number of reasons.”<sup>176</sup> Of course, at least one prayer *did* chastise dissenters,<sup>177</sup> and the prayers *did* include statements of religious dogma,<sup>178</sup> and people attending a graduation ceremony or a football game may *also* enter and leave for any number of reasons. Justice Kennedy nonetheless determined (somehow) that the prayers in *Galloway* were less coercive than those in *Lee* or *Santa Fe*.

Before analyzing the likely effects of the Court’s decision, it may be helpful to consider why Galloway and Stephens based their argument on coercion rather than endorsement. After all, the Second Circuit ruled in their favor by applying a version of the endorsement test,<sup>179</sup> and the coercion test is generally more permissive of governmental religious practices. The endorsement test prohibits government actions that “convey a message of endorsement or disapproval” of religion.<sup>180</sup> The coercion test, meanwhile, states that “government may not coerce anyone to support or participate in any religion or its exercise.”<sup>181</sup> Consequently, Professor Kyle Langvardt has noted that “[o]ne would expect that all government religious speech would survive under a coercion approach.”<sup>182</sup> The plaintiffs’ decision to rely on a coercion argument therefore seems curious.

Perhaps Galloway and Stephens simply (and reasonably) believed they possessed a stronger argument for government coercion than the arguments that had prevailed in *Lee* and *Santa Fe*.<sup>183</sup> However, Becket Fund advocate Eric Rassbach argued that the plaintiffs were trying to rescue “the ailing endorsement

the gateway to citizen participation in the affairs of local government. To have them do so runs afoul of the promise of public neutrality among faiths that resides at the heart of the First Amendment’s religion clauses.”).

173. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 312 (2000).

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

175. *Id.* at 1826.

176. *Id.* at 1827 (quoting *Lee*, 505 U.S. at 597) (internal quotation marks omitted).

177. *See supra* note 1 and accompanying text.

178. *See Galloway*, 134 S. Ct. at 1853 (Kagan, J., dissenting) (listing numerous references to Christian dogma in the town’s prayers).

179. *See supra* notes 147–49 and accompanying text.

180. *Lynch v. Donnelly*, 465 U.S. 668, 691 (1984) (O’Connor, J., concurring).

181. *Cnty. of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 659 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part), *abrogated on other grounds by Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014).

182. Kyle Langvardt, *The Lawless Rule of the Norm in the Government Religious Speech Cases*, 20 WASH. & LEE CIVIL RTS. & SOC. JUST. 405, 443 (2014).

183. *See supra* text accompanying notes 157–60.

test.”<sup>184</sup> According to this theory, the plaintiffs avoided making an endorsement argument before the Supreme Court so that the Court would not have an opportunity to overrule the endorsement test.<sup>185</sup> If that was their intention, they succeeded.<sup>186</sup>

Although Rassbach acknowledged that “the courts of appeals almost uniformly [rely] on *Lemon*/endorsement as the main way to decide Establishment Clause cases,”<sup>187</sup> he contended that endorsement has fallen out of favor with the Supreme Court.<sup>188</sup> Professor Ian Bartrum offered a similar interpretation, speculating that the Court agreed to hear the case because “some Justices [saw] an opportunity to reconsider the so-called endorsement test that now governs many Establishment Clause questions.”<sup>189</sup> Additionally, scholars have argued for several years that the coercion test is gaining traction as an analytical framework in Establishment Clause cases.<sup>190</sup> *Galloway*’s ultimate legacy may be its role in the struggle between the endorsement and coercion tests.

## 2. *Galloway*’s Impact

While it would be premature to make any sweeping statements about the long-term effects of the *Galloway* decision, there are a few safe conclusions. First, the Supreme Court will likely not revisit the issue of legislative prayer for a number of years, if ever. More than thirty years passed between the Court’s decisions in *Marsh* and *Galloway*. And the Court stated that, “[a]bsent a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose, a challenge based solely on the content of a prayer will not likely establish a constitutional violation,”<sup>191</sup> which suggests the Court is getting out of the legislative prayer adjudication business.

Second, the Justices who favor the coercion test will attempt to extend *Galloway* to Establishment Clause cases that do not involve legislative prayer. Less than two months after the *Galloway* decision, the Court denied certiorari in a case where the Seventh Circuit had applied the endorsement test and declared that a school’s decision to hold its graduation ceremony in a Christian church violated the Establishment

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184. Eric Rassbach, *Symposium: Lemon Wins a Reprieve, but the End Is Near*, SCOTUSBLOG (May 6, 2014, 10:55 AM), <http://www.scotusblog.com/2014/05/symposium-lemon-wins-a-reprieve-but-the-end-is-near/>.

185. *See id.*

186. *See id.* (“The attorneys for the plaintiffs are thus to be congratulated for clever lawyering.”).

187. *Id.*

188. *See id.*

189. Ian Bartrum, *The Curious Case of Legislative Prayer: Town of Greece v. Galloway*, 108 NW. U. L. REV. ONLINE 218, 219 (2014).

190. *See, e.g.*, Antony Barone Kolenc, “*Mr. Scalia’s Neighborhood*”: *A Home for Minority Religions?*, 81 ST. JOHN’S L. REV. 819, 833 (2007) (“Conventional wisdom assumes that the most likely *Lemon* replacement under the new majority will be the ‘coercion’ test, which sees the purpose of the Establishment Clause as the protection of an individual’s religious liberty by preventing religious coercion.” (internal quotation marks omitted)); accord Paulsen, *supra* note 37, at 826 n.115 (“[T]he historical evidence overwhelmingly supports the coercion test.”).

191. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1824 (2014).

Clause.<sup>192</sup> Justice Scalia dissented from the denial of certiorari and argued that “*Town of Greece* abandoned the antiquated ‘endorsement test,’ which formed the basis for the decision below.”<sup>193</sup> Although *Galloway* did not apply the endorsement test—possibly because Galloway and Stephens’s argument did not rely on it<sup>194</sup>—it would be a rather large stretch to suggest that it abandoned the endorsement test for all time, in all circumstances. If the Justices in the *Galloway* majority make a concerted effort to expand and distort the decision beyond its true holding, Professor Erwin Chemerinsky’s fear that “the Roberts Court is eroding the notion of a wall separating church and state and allowing much more religious involvement in government and government support for religion”<sup>195</sup> may prove to be well-founded.

Third, the circuit courts will not immediately change their approach to all Establishment Clause cases because of the *Galloway* decision. Although the Supreme Court overruled the Second Circuit in *Galloway*, the Second Circuit has not changed its approach to Establishment Clause cases that do not involve legislative prayer. In *Newdow v. Peterson*,<sup>196</sup> a post-*Galloway* case that involved an Establishment Clause challenge to the use of the phrase “In God We Trust” on currency,<sup>197</sup> the Second Circuit applied the *Lemon* test and noted that “*Lemon* remains the prevailing test in this Circuit, absent its abrogation.”<sup>198</sup> And in *American Atheists, Inc. v. Port Authority of New York and New Jersey*,<sup>199</sup> another post-*Galloway* case, the Second Circuit applied the *Lemon* and endorsement tests<sup>200</sup> to an Establishment Clause challenge regarding the display at the National September 11 Memorial and Museum of a steel cross recovered from the World Trade Center.<sup>201</sup> Thus it appears that, at least in the Second Circuit, *Galloway* is viewed as a decision on legislative prayer alone, not on the Establishment Clause as a whole.

#### D. A Question of Purpose

When evaluating these questions—whether *Marsh* and *Galloway* were correctly decided and whether endorsement or coercion is the proper Establishment Clause test—it helps to think about purpose. What is the purpose of legislative prayer and, more broadly, what is the purpose of the Establishment Clause?

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192. *Elmbrook Sch. Dist. v. Doe*, 134 S. Ct. 2283, 2284 (2014) (Scalia, J., dissenting from denial of certiorari).

193. *Id.*

194. *See supra* Part III.C.1.

195. Erwin Chemerinsky, *Symposium: Dismantling the Wall That Should Separate Church and State*, SCOTUSBLOG (May 6, 2014, 4:00 PM), <http://www.scotusblog.com/2014/05/symposium-dismantling-the-wall-that-should-separate-church-and-state/>.

196. 753 F.3d 105 (2d Cir. 2014).

197. *Id.* at 106.

198. *Id.* at 107.

199. 760 F.3d 227 (2d Cir. 2014).

200. *Id.* at 242 (“The second prong of the *Lemon* test requires that the principal or primary effect of the challenged government action neither advance nor inhibit religion. This mandate is often cast in terms of endorsement . . . .” (citation omitted) (internal quotation marks omitted)).

201. *Id.* at 233.

Courts and commentators alike have struggled to pin down the purpose of legislative prayer. Justice O'Connor famously wrote that governmental acknowledgments of religion such as legislative prayer “serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society.”<sup>202</sup> Professor Lund argued that the purpose “is to foster an inclusive legislative atmosphere.”<sup>203</sup>

Justice Kennedy himself proposed several different (sometimes contradictory) theories about the purposes of legislative prayer in his *Galloway* opinion. First, he asserted that the prayers were “intended to place town board members in a solemn and deliberative frame of mind, invoke divine guidance in town affairs, and follow a tradition practiced by Congress and dozens of state legislatures.”<sup>204</sup> He also claimed that legislative prayer “lends gravity to public business, reminds lawmakers to transcend petty differences in pursuit of a higher purpose, and expresses a common aspiration to a just and peaceful society,”<sup>205</sup> and that it “reflect[s] values long part of the Nation’s heritage.”<sup>206</sup> He argued that the lawmakers themselves were the principal audience for the prayers,<sup>207</sup> and that the purpose was to “accommodate the spiritual needs of lawmakers and connect them to a tradition dating to the time of the Framers.”<sup>208</sup> Yet he also claimed that the purpose was to “acknowledge the place religion holds in the lives of many private citizens,”<sup>209</sup> and to acknowledge “the central place that religion, and religious institutions, hold in the lives of those present.”<sup>210</sup> Justice Kagan put it more bluntly, noting that the prayers were “directed squarely at the citizens,”<sup>211</sup> and that “the chaplain leads, as the first part of a town meeting, a highly intimate (albeit relatively brief) prayer service, with the public serving as his congregation.”<sup>212</sup>

All of the secular purposes listed above—solemnizing the occasion, fostering an inclusive atmosphere, putting legislators in a deliberative frame of mind, etc.—could be accomplished easily by something other than prayer.<sup>213</sup> Justice O'Connor’s claim that legislative prayer is one of “the only ways reasonably possible in our culture”<sup>214</sup> to accomplish these objectives is plainly wrong. Whether

202. *Lynch v. Donnelly*, 465 U.S. 668, 693 (1984) (O’Connor, J., concurring); *accord Simpson v. Chesterfield Cnty. Bd. of Supervisors*, 404 F.3d 276, 288 (4th Cir. 2005) (“The avowed purpose of the invocation is simply that of a brief pronouncement of simple values presumably intended to solemnize the occasion. The invocation is not intended for the exchange of views or other public discourse. Nor is it intended for the exercise of one’s religion.” (citation omitted)).

203. Lund, *supra* note 76, at 1018.

204. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1816 (2014).

205. *Id.* at 1818.

206. *Id.* at 1823.

207. *Id.* at 1825 (plurality opinion).

208. *Id.* at 1826.

209. *Id.* at 1825.

210. *Id.* at 1827.

211. *Id.* at 1848 (Kagan, J., dissenting).

212. *Id.*

213. *See infra* Part IV.D.

214. *Lynch v. Donnelly*, 465 U.S. 668, 693 (1984) (O’Connor, J., concurring).

the government may constitutionally engage in the more *religious* purposes listed above, such as accommodating the spiritual needs of legislators, depends on one's interpretation of the purpose of the Establishment Clause.

This question ultimately lies at the heart of legislative prayer cases and the debate between the endorsement and coercion tests. The endorsement test, which prohibits the government from endorsing or disapproving of religion,<sup>215</sup> is grounded in the neutrality principle. As Justice Douglas once wrote, "The First Amendment teaches that a government neutral in the field of religion better serves all religious interests."<sup>216</sup> The coercion test, meanwhile, is more compatible with Justice Scalia's philosophy that "there is nothing unconstitutional in a State's favoring religion generally, honoring God through public prayer and acknowledgment, or, in a nonproselytizing manner, venerating the Ten Commandments."<sup>217</sup> Under the most literal interpretation of the test, the Establishment Clause would prohibit only coercion "by force of law and threat of penalty."<sup>218</sup>

The problem with Justice Scalia's view, and with the coercion test in general, is that it would not even prohibit an official establishment of a state religion. As Justice Stevens put it, "A Clause so interpreted would not prohibit explicit state endorsements of religious orthodoxies of particular sects, actions that lie at the heart of what the Clause was meant to regulate. The government could, for example, take out television advertisements lauding Catholicism as the only pure religion."<sup>219</sup>

Therefore, the coercion test cannot be the correct analytical framework for Establishment Clause cases. The endorsement test, which is faithful to the longstanding neutrality principle<sup>220</sup> and the purposes of the First Amendment, is the far superior option. Because all legislative prayers endorse religion over nonreligion, the practice is unconstitutional. The Supreme Court wrongly decided both *Marsh* and *Galloway*, and these decisions should be overruled.

#### IV. THE RISING NONE AND THE FALL OF LEGISLATIVE PRAYER

JUSTICE SCALIA: You want to pick the groups we're going to exclude?  
 MR. [DOUGLAS] LAYCOCK: I think you picked them, Your Honor.  
 JUSTICE SCALIA: The Baha'i, who else? These—these groups are too small to—  
 CHIEF JUSTICE ROBERTS: We've already excluded the atheists, right?  
 JUSTICE SCALIA: Yeah, the atheists are out already.<sup>221</sup>

Two separate but related causes help explain the Supreme Court's deviation from the neutrality principle in legislative prayer cases. First, the strategic model of

215. *See id.* at 690.

216. *Engel v. Vitale*, 370 U.S. 421, 443 (1962) (Douglas, J., concurring).

217. *Van Orden v. Perry*, 545 U.S. 677, 692 (2005) (Scalia, J., concurring).

218. *Lee v. Weisman*, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting) (emphasis omitted).

219. *Van Orden*, 545 U.S. at 733 n.35 (Stevens, J., dissenting).

220. *See Epperson v. Arkansas*, 393 U.S. 97, 103–04 (1968).

221. Transcript of Oral Argument, *supra* note 167, at 45–46 (questioning Douglas Laycock, attorney for Respondents Galloway and Stephens, about which groups would be excluded from even a supposedly nonsectarian legislative prayer practice).



judicial decision making demonstrates that institutional pressures on the Court influence its decisions. Because legislative prayer receives such strong support from other governmental institutions and the general public, there is a great amount of pressure on the Court to uphold the practice, even though the Establishment Clause “mandates governmental neutrality between religion and religion, and between religion and nonreligion.”<sup>222</sup> Second, these cases evince a longstanding governmental disregard for religious minorities, such as polytheists and atheists, who believe in anything other than a monotheistic God. This final Part will examine both of these causes in turn, and will explain how shifting religious attitudes in America and the increasing number of Nones—those who do not identify with any particular religion—will ultimately lead to the elimination of legislative prayer. Finally, a few alternatives that could replace legislative prayer will be proposed.

#### A. Institutional Pressures

As previously noted, Justice Scalia has suggested that the Court’s interest in self-preservation leads it to occasionally ignore the neutrality principle.<sup>223</sup> The strategic model explains why the Court would be concerned with self-preservation in the first place. In a nutshell, this model supposes that judges understand that “they are constrained in their powers by the operation of outsiders, which may include the Congress, the President, the general public, state governments, private interest groups, attorneys, litigants, or other entities,” and suggests that “judges amend their decisions to account for the preferences of these other actors.”<sup>224</sup> In applying this model, Professors Frank B. Cross and Blake J. Nelson addressed “first stage institutionalism” (the possibility that the Court’s decisions could be overruled by congressional legislation) and “second stage institutionalism” (a variety of other institutional constraints on the Court).<sup>225</sup> Cross and Nelson concluded that the second stage institutional concerns have a greater impact on the courts.<sup>226</sup> This is especially true for constitutional decisions, which are much more difficult for Congress to override.<sup>227</sup>

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222. *Epperson*, 393 U.S. at 104.

223. *See supra* note 31 and accompanying text.

224. Cross & Nelson, *supra* note 20, at 1446.

225. *Id.* at 1450.

226. *See id.* at 1459–60 (“While statutory reversal is closely targeted to the congressional concern, the other tools have potentially much more power, as they may strike at the very independence of the judiciary itself and the powers and resources that judges require or strongly desire.”).

227. *See id.* at 1459 (“The override model is limited to statutory decisions, as the difficulty of constitutional amendment largely precludes an override to constitutional interpretations of the Court.”); William N. Eskridge, Jr., *The Judicial Review Game*, 88 NW. U. L. REV. 382, 386 (1993) (“When the Court strikes down a federal statute as unconstitutional, an override is very difficult, because it must be accomplished by a constitutional amendment requiring supermajorities in both chambers of Congress and ratification by three-quarters of the state legislatures.”).

Some of the second stage institutional constraints wielded by Congress include “threatened impeachment, jurisdiction restrictions, other legislation limiting court powers and reducing the courts’ resources.”<sup>228</sup> Although Congress lacks the power to reduce judicial salaries, the legislature can withhold salary increases and resources such as funding for support staff and courthouses.<sup>229</sup> Thus, “Congress may achieve indirectly through appropriations what it cannot do directly.”<sup>230</sup>

Additionally, local governments and the people themselves wield some authority over the courts. If these entities refuse to implement a judicial decision, “there is little courts can do.”<sup>231</sup> In *Brown v. Board of Education*,<sup>232</sup> for example, the Supreme Court’s decision had little effect in desegregating the South until President Johnson and Congress took action.<sup>233</sup>

Finally, the President also has influence over the Court.<sup>234</sup> Due to the President’s role in the legislative process, there is a strong incentive for the Court to agree with his or her position; “[i]f the President supports the Court over Congress, the legislature must muster a two-thirds majority to act against the Court.”<sup>235</sup>

Clearly, these institutional concerns affect legislative prayer cases, and did so particularly in *Galloway*. Congress has a vested interest in the Court’s decisions; it has employed chaplains since 1789,<sup>236</sup> and many of its members would like to continue that practice.<sup>237</sup> Due to the widespread acceptance and popularity of legislative prayer, it is questionable whether the people and local governments would accept a decision abolishing the practice—at least one chamber in every state legislature begins its sessions with a prayer.<sup>238</sup> And in *Galloway*, the Obama Administration urged the Court to uphold the town’s legislative prayer practice.<sup>239</sup> This position was somewhat surprising, considering President Obama’s history with religious issues. While running for President in 2008, he famously criticized rural Pennsylvanians for “clinging to religion.”<sup>240</sup> Perhaps the President succumbed

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228. Cross & Nelson, *supra* note 20, at 1460.

229. *Id.* at 1465–66.

230. *Id.* at 1469.

231. *Id.* at 1470 (quoting GERALD N. ROSENBERG, *THE HOLLOW HOPE* 19 (1991)) (internal quotation marks omitted).

232. 347 U.S. 483 (1954).

233. Cross & Nelson, *supra* note 20, at 1471.

234. *Id.* at 1472.

235. *Id.*

236. *Marsh v. Chambers*, 463 U.S. 783, 788 (1983).

237. *See generally* Brief for Members of Congress as Amici Curiae in Support of Petitioner, *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014) (No. 12-696), 2013 WL 4011043 (arguing on behalf of eighty-five members of Congress that the Supreme Court should rule in favor of the Town of Greece).

238. Brief for Petitioner, *supra* note 169, at 54.

239. *See generally* Brief for the United States as Amicus Curiae Supporting Petitioner, *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014) (No. 12-696), 2013 WL 3990880.

240. Mayhill Fowler, *Obama: No Surprise That Hard-Pressed Pennsylvanians Turn Bitter*, HUFFINGTON POST (Nov. 17, 2008, 10:07 PM), [http://www.huffingtonpost.com/mayhill-fowler/obama-no-surprise-that-ha\\_b\\_96188.html](http://www.huffingtonpost.com/mayhill-fowler/obama-no-surprise-that-ha_b_96188.html).

to institutional pressures of his own and sought to take a position that would help his image among religious constituents and members of Congress.<sup>241</sup>

Furthermore, the Justices themselves have provided evidence that they respond to these institutional pressures when deciding Establishment Clause cases. In *Marsh*, Justice Brennan speculated that striking down Nebraska's prayer practice would have "stimulated a furious reaction."<sup>242</sup> During oral arguments in *Galloway*, Justice Kagan expressed concern that invalidating the town's prayer practice would "make the problem worse rather than better."<sup>243</sup> And in *Van Orden v. Perry*,<sup>244</sup> a case concerning a Ten Commandments monument, Justice Breyer worried that finding the display of the monument unconstitutional would encourage further challenges to similar monuments and "thereby create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid."<sup>245</sup> This possibility led him to join Chief Justice Rehnquist's plurality opinion upholding the constitutionality of the monument even though he did not agree with its reasoning.<sup>246</sup>

These institutional concerns clearly played a role in *Galloway*. In addition to Justice Kagan's comments during oral argument,<sup>247</sup> the majority claimed that abolishing legislative prayer "would create new controversy and begin anew the very divisions along religious lines that the Establishment Clause seeks to prevent."<sup>248</sup> Indeed, as a practical matter, it may have been impossible to reach any other result. Like *Marsh* before it, *Galloway* was "politically impossible to affirm and legally impossible to reverse."<sup>249</sup> Yet if the purpose underlying these decisions was not only to preserve the Court's political standing but also to avoid religiously based divisiveness, then *Marsh* was a failure. Professor Lund argued that "[a]s long as legislative prayer is constitutionally permissible—as long as *Marsh* lives—these fights over legislative prayer will continue, as will the distress that gives rise to them."<sup>250</sup> The same can be said for *Galloway*.

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241. It is also possible that the Obama Administration took this position because it feared the Supreme Court would overrule the endorsement test. See Bartrum, *supra* note 189, at 226 (arguing that the Solicitor General "entered the case in order to give the Court another option—preserve the endorsement test, but conclude that most sectarian legislative prayers are permissible as a historically entrenched exception"); cf. Rassbach, *supra* note 184 (arguing that *Galloway* and *Stephens* made a similar effort to preserve the endorsement test by relying on the coercion test instead).

242. *Marsh v. Chambers*, 463 U.S. 783, 822 (1983) (Brennan, J., dissenting).

243. Transcript of Oral Argument, *supra* note 167, at 52.

244. 545 U.S. 677 (2005).

245. *Id.* at 704 (Breyer, J., concurring in the judgment).

246. William Van Alstyne, *Ten Commandments, Nine Judges, and Five Versions of One Amendment—The First*. ("Now What?"), 14 WM. & MARY BILL RTS. J. 17, 25 (2005).

247. See *supra* text accompanying note 243.

248. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1819 (2014).

249. See Lund, *supra* note 76, at 984 (quoting Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 115, 224 (2004)) (referring to *Marsh*).

250. Lund, *supra* note 76, at 979.

*B. The Supreme Court's Preference for Monotheism*

The widespread support for legislative prayer, and therefore the institutional pressures that drive the outcomes of legislative prayer cases, can be partially explained by the government's longstanding attitude toward religious minorities. In Establishment Clause cases, the government has traditionally shown little concern for them. As Justice Scalia argued in *McCreary County v. American Civil Liberties Union of Ky.*<sup>251</sup>:

One cannot say the word "God," or "the Almighty," one cannot offer public supplication or thanksgiving, without contradicting the beliefs of some people that there are many gods, or that God or the gods pay no attention to human affairs. With respect to public acknowledgment of religious belief, it is entirely clear from our Nation's historical practices that the Establishment Clause permits this disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists.<sup>252</sup>

This helps explain why the *Marsh* Court found nothing objectionable about prayers delivered exclusively in "the Judeo-Christian tradition,"<sup>253</sup> even though that tradition does not include the members of many other religious groups. It also explains the result in *Simpson*, where the Fourth Circuit held that Chesterfield County's prayer practice was sufficiently inclusive because it was "wide enough . . . to include Islam,"<sup>254</sup> despite the plaintiff's exclusion from the prayer practice *solely because of her unconventional religious beliefs.*<sup>255</sup>

Justice Scalia's disregard of religious minorities was on full display in the portion of the oral arguments in *Galloway* excerpted at the beginning of this Part, in which he and Chief Justice Roberts cavalierly bantered about which religious groups would be excluded from a hypothetical nonsectarian prayer policy.<sup>256</sup> It seems that atheists and the Baha'i are among the only religious minority groups that government officials may still comfortably and openly discriminate against. Such discrimination occurs because the public accepts it. Indeed, some writers have agreed with Justice Scalia's reading of the Establishment Clause.<sup>257</sup> Attorney Antony Barone Kolenc supported this interpretation because "historically, public acknowledgments of religion by all three branches of both state and federal government have been in the monotheistic context."<sup>258</sup> In other words, history and the majority rule.

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251. 545 U.S. 844 (2005).

252. *Id.* at 893 (Scalia, J., dissenting).

253. *Marsh v. Chambers*, 463 U.S. 783, 793 (1983).

254. *Simpson v. Chesterfield Cnty. Bd. of Supervisors*, 404 F.3d 276, 286 (4th Cir. 2005).

255. *See id.* at 280 ("Chesterfield's non-sectarian invocations are traditionally made to a divinity that is consistent with the Judeo-Christian tradition, a divinity that would not be invoked by practitioners of witchcraft." (internal quotation marks omitted)).

256. *See supra* note 221 and accompanying text.

257. *See, e.g.*, Kolenc, *supra* note 190.

258. *Id.* at 877.

Others have rejected this “majority rules” vision of religious liberty. Professor Thomas B. Colby sharply criticized Justice Scalia’s *McCreary* dissent, asserting that Scalia believes

the Establishment Clause permits the government to favor religion over nonreligion (but not vice versa), and, in the context of governmental religious expression, to favor Judeo-Christian monotheism over all other religions (but not vice versa). In other words, in Justice Scalia’s opinion, biblical monotheism is now, has always been, and always will be, the favored religion of the United States Constitution.<sup>259</sup>

This position contradicts “the view that the government cannot ‘constitutionally pass laws or impose requirements which aid all religions as against nonbelievers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.’”<sup>260</sup> Lund also expressed concerns about bowing to the will of the majority on religious matters: “Legislative prayer is often framed as pitting nonbelievers against believers, but that is an oversimplification. Having legislative prayer means committing religious decisions to a majoritarian governmental process, which has deep ramifications for all religious minorities.”<sup>261</sup>

Colby’s and Lund’s views are more in line with the Supreme Court’s decisions holding that the Religion Clauses guarantee “religious liberty and equality to the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism”,<sup>262</sup> that the government must be neutral between religion and nonreligion,<sup>263</sup> that “one religious denomination cannot be officially preferred over another”,<sup>264</sup> and that the First Amendment “erected a wall between church and state.”<sup>265</sup> These holdings have led scholars to the conclusion that “[t]he government simply shouldn’t be in the business of endorsing the belief that there is a God, even a generic one,”<sup>266</sup> and that the government’s proper approach to religious belief is agnosticism: “Agnostics have no opinion for epistemological reasons; the government must have no opinion for constitutional reasons. The government must have no opinion because it is not the government’s role to have an opinion.”<sup>267</sup> Ultimately, shifting religious beliefs in America and the increasing importance of the Nones dictate that this latter view will prevail.

259. Colby, *supra* note 55, at 1098.

260. *Id.* at 1113 (quoting *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961)).

261. Lund, *supra* note 42, at 1176.

262. *Cnty. of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 590 (1989) (quoting *Wallace v. Jaffree*, 472 U.S. 38, 52 (1985)) (internal quotation marks omitted), *abrogated on other grounds by Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014).

263. *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

264. *Larson v. Valente*, 456 U.S. 228, 244 (1982).

265. *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 18 (1947).

266. Segall, *supra* note 83, at 730.

267. Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 356 (1996).

*C. The Rising None*

An abundance of recent data indicates that the number of Americans who have no religious affiliation is growing. In a 2013 survey, 20% of respondents indicated that they had no religious preference.<sup>268</sup> Only 8% reported no religious preference in 1990.<sup>269</sup> The American Religious Identification Survey found that the percentage of Nones had increased from 8.2% in 1990 to 15% in 2008,<sup>270</sup> and the Nones had the largest percentage share of population growth during that time period.<sup>271</sup> Similarly, the 2008 U.S. Religious Landscape Survey found that 16.1% of American adults were unaffiliated with any particular faith,<sup>272</sup> and this group was “the biggest gainer in this religious competition.”<sup>273</sup> People moving into the category outnumbered those moving out of it by a margin of more than three-to-one.<sup>274</sup> Note that the Nones are more than just atheists and agnostics; the category also typically includes those who are unaffiliated with a particular religion, whether they describe themselves as religious or secular.<sup>275</sup>

In fact, the percentage of atheists in America has only increased slightly over recent decades. In 2012, just 3% of Americans identified themselves as atheists.<sup>276</sup> This represented an increase from 1% in 1965 and 2% in 1991.<sup>277</sup> This modest increase in the percentage of atheists led the Institute for the Study of Societal Issues to conclude that religious belief is not declining.<sup>278</sup> However, the Institute’s own data seem to undermine this conclusion. The percentages of atheists, agnostics, and those who do not believe in a personal God but believe in a “Higher Power” all increased from 1991 through 2012; meanwhile, the percentages of those who believe in God some of the time, who believe in God but have doubts, and who believe in God without a doubt all *decreased* over the same time period.<sup>279</sup> In any case, these sources agree that the percentage of Nones has increased dramatically since the early 1990s, indicating that the American population is becoming more secular and less attached to particular religious affiliations.

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268. Anwar, *supra* note 19.

269. *Id.*

270. BARRY A. KOSMIN & ARIELA KEYSAR, AMERICAN RELIGIOUS IDENTIFICATION SURVEY SUMMARY REPORT 3 (2009), available at [http://commons.trincoll.edu/aris/files/2011/08/ARIS\\_Report\\_2008.pdf](http://commons.trincoll.edu/aris/files/2011/08/ARIS_Report_2008.pdf).

271. *Id.* at 4.

272. PEW FORUM ON RELIGION & PUBLIC LIFE, U.S. RELIGIOUS LANDSCAPE SURVEY 5 (2008), available at <http://religions.pewforum.org/pdf/report-religious-landscape-study-full.pdf>.

273. *Id.* at 7.

274. *Id.*

275. *See id.* at 6.

276. MICHAEL HOUT, CLAUDE S. FISCHER & MARK A. CHAVES, UNIV. OF CAL., BERKELEY, INST. FOR THE STUDY OF SOCIETAL ISSUES, MORE AMERICANS HAVE NO RELIGIOUS PREFERENCE: KEY FINDING FROM THE 2012 GENERAL SOCIAL SURVEY 4 (2013), available at [http://issi.berkeley.edu/sites/default/files/shared/docs/Hout%20et%20al\\_No%20Relig%20Pref%202012\\_Release%20Mar%202013.pdf](http://issi.berkeley.edu/sites/default/files/shared/docs/Hout%20et%20al_No%20Relig%20Pref%202012_Release%20Mar%202013.pdf).

277. *Id.* at 6.

278. *Id.* at 4.

279. *See id.* at 12.

One final statistical observation deserves mention: the ascendance of the Nones is primarily a youth movement. Gallup Daily tracking information for the year 2012 found that 27% of Americans between the ages of 18 and 29 had no religious affiliation, compared to 19% for ages 30–49, 14% for ages 50–64, and 10% for ages 65 and older.<sup>280</sup> Although these numbers could be explained by a theory that people become more religious as they grow older, the Institute for the Study of Societal Issues rejected that hypothesis: “We suspect that these age differences will not diminish as the people in them age. Instead we see them as persisting generational differences that are likely to characterize these collections of people throughout their life course . . . .”<sup>281</sup>

#### D. The Fall of Legislative Prayer

What does this all mean for legislative prayer? These religious trends will likely continue in the future. Considering the generational data quoted in Part IV.C, it appears likely that each succeeding generation of new Americans will be less religious than the one before it.<sup>282</sup> Additionally, while the nation was more than 98% Christian at the time of the founding,<sup>283</sup> it was only 78.4% Christian in 2008.<sup>284</sup> Even if America is still a “Christian nation de facto,”<sup>285</sup> it is less Christian than it was two centuries ago—and it will likely be even less Christian in the future.

For legislative prayer to be abolished, it is not necessary that the Nones eventually become the majority (or that Christians become a minority). Minorities have achieved civil rights victories before the Supreme Court without ever becoming a majority of the population.<sup>286</sup> What matters is that a significant portion of the public—and, therefore, the people’s elected representatives—become sympathetic to the cause.

As time passes and Americans become more secular and less attached to religion, they will likely also grow less tolerant of the Court’s preference for monotheistic religions—and Christianity in particular—over all others. Such a shift would remove the institutional pressures that have forced the Court to uphold legislative prayer until now. The will of the people would trickle down to Congress and the Presidency, removing the pressures imposed by the legislative and executive branches. At that time, the Court would be free to strike down legislative prayer and bring this area of Establishment Clause jurisprudence into line with the Constitution’s promise of religious neutrality for all.

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280. Lydia Saad, *In U.S., Rise in Religious “Nones” Slows in 2012*, GALLUP (Jan. 10, 2013), <http://www.gallup.com/poll/159785/rise-religious-nones-slows-2012.aspx%231#1>.

281. HOUT ET AL., *supra* note 276, at 3.

282. See KOSMIN ET AL., *supra* note 18, at 22 (“In the future we can expect more American Nones given that 22% of the youngest cohort of adults self-identify as Nones and they will become tomorrow’s parents.”).

283. Transcript of Oral Argument, *supra* note 167, at 44.

284. PEW FORUM ON RELIGION & PUBLIC LIFE, *supra* note 272, at 5.

285. *Fourth Circuit Holds*, *supra* note 108, at 1230.

286. See, e.g., *United States v. Windsor*, 133 S. Ct. 2675, 2695 (2013) (ruling that the Defense of Marriage Act’s definition of marriage as only between a man and a woman violated the Fifth Amendment rights of same-sex couples).

This sea change did not arrive in time to benefit Galloway and Stephens, but the cracks in legislative prayer's armor have already begun to show. The Hawaii Senate recently became the first state legislative body to ban legislative prayer.<sup>287</sup> According to Brett Harvey and Joel Oster, "seventeen federal lawsuits have challenged the validity of various legislative prayer practices" between 2004 and 2013.<sup>288</sup> Clearly, a significant number of people are not satisfied with the legislative prayer status quo, and the rise of the Nones suggests that number is growing.

After the inevitable fall of legislative prayer, what standard will rise to take its place? It would be unnecessary for the Court to craft a new rule. It could simply overrule *Marsh* and *Galloway* and revive the *Lemon*/endorsement test as the prevailing standard in legislative prayer cases. As Justice Brennan noted in *Marsh*, any legislative prayer policy must flunk the *Lemon* test.<sup>289</sup> Legislative prayer does not have a primarily secular purpose, its primary effect is to advance and endorse religion, and it fosters an excessive entanglement with religion.<sup>290</sup>

If government entities are determined to begin legislative sessions with a ceremony that serves "the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society,"<sup>291</sup> there are several ways they may do so without using prayer. As Justice Kennedy rightly noted in *Allegheny*, "appeals to patriotism, moments of silence, and any number of other approaches would be as effective."<sup>292</sup>

Appeals to patriotism may be the closest substitute for legislative prayer. A legislative body could read from the writings of the Founding Fathers, the Declaration of Independence, or any number of presidential speeches throughout history. In fact, two months after the *Galloway* decision, a man named Dan Courtney delivered the first atheist invocation before a Greece town board meeting.<sup>293</sup> Mr. Courtney "quoted the Declaration of Independence and called upon common principals [sic] that unite all Americans."<sup>294</sup> Such invocations, if delivered at every meeting, would provide all the secular and civic benefits of legislative prayer with none of the controversy or religiously based divisiveness.

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287. Kerry Picket, *Hawaii Senate Becomes First Legislative Body To End Daily Prayer*, WASH. TIMES (Jan. 21, 2011, 4:44 PM), <http://www.washingtontimes.com/blog/watercooler/2011/jan/21/hawaii-senate-becomes-first-legislative-body-end-d/>.

288. Brett Harvey & Joel Oster, *Who Said That? A Simple Question That May Change the Way Courts View Legislative Prayer*, 14 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS 69, 69 (2013); see also Lund, *supra* note 42, at 1174 n.11 (listing a number of legislative prayer disputes that occurred in 2008 alone).

289. *Marsh v. Chambers*, 463 U.S. 783, 800–01 (1983) (Brennan, J., dissenting).

290. See *id.* at 797–800.

291. *Lynch v. Donnelly*, 465 U.S. 668, 693 (1984) (O'Connor, J., concurring).

292. *Cnty. of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 673 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part), *abrogated on other grounds by Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014).

293. Meaghan McDermott, *Atheist Gives 'Historic' Invocation in Greece*, DEMOCRAT & CHRONICLE (July 15, 2014, 7:34 PM), <http://www.democratandchronicle.com/story/news/2014/07/14/town-greece-dan-courtney-prayer-athiest/12650143/>.

294. *Id.* (emphasis omitted).



Alternatively, Professor Eric J. Segall has advocated using moments of silence.<sup>295</sup> This would provide an opportunity for prayer, but those who do not wish to take part would not be “compelled to listen to the prayers or thoughts of others.”<sup>296</sup> Moments of silence would certainly eliminate the problems associated with spoken legislative prayers, but they would not provide the same civic benefits as appeals to patriotism.

Finally, a government entity could establish a public forum in which citizens would be completely free to express their religious views, as the town claimed that it did in *Galloway*.<sup>297</sup> However, this would require the government to “give up virtually all control over the resulting speech. . . . It will have to allow entirely secular invocations. It will have to allow speeches that question the appropriateness of legislative prayer, and speeches that reject prayer altogether.”<sup>298</sup> Thus, a legislative body would more likely choose patriotic ceremonies or moments of silence.

Other secular, constitutional alternatives could undoubtedly be imagined. As the preceding discussion demonstrates, the secular purposes served by legislative prayer never required an actual prayer. The practice was never justified by necessity or any legitimate constitutional principle; its only justification was the questionable historical tradition relied upon by the Supreme Court in *Marsh* and *Galloway*.

#### CONCLUSION

Legislative prayer was unconstitutional when the First Congress implemented the practice, when *Marsh* affirmed it in 1983, and when *Galloway* reaffirmed it in 2014. Its continued existence has provided no public benefit that could not have been obtained through secular means, and it has created religious strife, divisiveness, and controversy, leading to litigation in *Galloway* and many other cases. The institutional pressures on the Court dictated that legislative prayer could not be struck down in *Galloway* or in the immediate future. But eventually, assuming the Nones continue to grow and America continues its slow shift from the religious to the secular, legislative prayer will likely be abolished. Until that day arrives, we can expect only additional controversy and further litigation in this area of the law.

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295. Segall, *supra* note 83, at 736; see also Eric Segall, *Silence Is Golden: Moments of Silence, Legislative Prayers, and the Establishment Clause*, 108 NW U. L. REV. ONLINE 229, 230 (2014) (“The only possible objection a person could make to this moment of silence solution is that it deprives people of speaker-led, overtly religious, organized prayers at governmental hearings.”).

296. *Wallace v. Jaffree*, 472 U.S. 38, 72 (1985) (O’Connor, J., concurring in the judgment).

297. See Brief for Petitioner, *supra* note 169, at 44.

298. Lund, *supra* note 76, at 1035.

