

2013

Is Prayer Constitutional at Municipal Council Meetings?

Thomas A. Schweitzer

Touro Law Center, tschweitzer@tourolaw.edu

Follow this and additional works at: <http://digitalcommons.tourolaw.edu/scholarlyworks>

 Part of the [Constitutional Law Commons](#), and the [First Amendment Commons](#)

Recommended Citation

27 *Mun. Law.* 26 (2013)

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Commons @ Touro Law Center. It has been accepted for inclusion in Scholarly Works by an authorized administrator of Digital Commons @ Touro Law Center. For more information, please contact ASchwartz@tourolaw.edu.

Is Prayer Constitutional at Municipal Council Meetings?

By Thomas A. Schweitzer

The Supreme Court may be about to make a major decision involving the First Amendment Establishment Clause¹ and local governments in this year's United States Supreme Court Term. On May 20, 2013, the Court granted the petition for certiorari of the Town of Greece, New York in a case challenging official prayers at town council meetings.² It is hard to imagine a greater facial violation of "the wall of separation between church and state"³ than prayer at a session of an American law-making body.⁴ Nevertheless, the constitutionality of legislative prayer has been generally upheld since the Supreme Court decided *Marsh v. Chambers* in 1983.⁵



This article will discuss *Galloway v. Town of Greece*, the case currently pending at the Supreme Court. It will begin with a brief discussion of *Lemon v. Kurtzman*⁶ and *Marsh* to provide the background necessary for understanding the issues raised by *Galloway*. The article then will examine the district and circuit court decisions in *Galloway* and the Establishment Clause issues posed by the case. Next, it will note issues raised by other lower court decisions involving legislative prayer after *Marsh*.

Moving from description of the rather muddled state of precedent in this area to the Supreme Court's duty, in deciding *Galloway*, to clarify and decide the constitutional issues, the article will recommend that the Court not only affirm the Second Circuit's decision in *Galloway* but also either overturn or sharply limit the *Marsh* precedent. As this recommendation seems unlikely to be followed, the article ends with a plea that the Court decide *Galloway* in a way that provides lower courts with greater guidance when addressing the wide variety of fact patterns and legal issues raised by municipal prayer cases after *Marsh*.

Background: The *Lemon* Test and the *Marsh* Case

In 1971, the Supreme Court announced in *Lemon v. Kurtzman* what became the leading test for evaluating the constitutionality of a law or practice under the Establishment Clause: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"⁷

The *Lemon* test, as it is known, represented the Court's attempt to accommodate competing if not contradictory goals of the Establishment Clause: On the one hand, the Clause "severs the link between Church and State"; on the other hand, it "does not disassociate religion from government."⁸ The *Lemon* test has been widely criticized by commentators and at least seven Supreme Court justices,⁹ and it has been significantly watered down in more recent cases.¹⁰ Nevertheless, it never has been officially repudiated by the Court and is frequently applied by the Court in Establishment Clause cases.¹¹

Despite the fact that *Lemon* was the Court's leading Establishment Clause case, the Court declined to apply the *Lemon* test twelve years later in *Marsh v. Chambers*.¹² Instead, the Court invoked the early history of the Republic in rejecting an Establishment Clause challenge in a case involving legislative prayer.

The facts in *Marsh* were as follows: The Nebraska Legislature¹³ began each session with a prayer offered by a chaplain who was chosen every two years by the Legislative Council and paid with public funds. Ernest Chambers, a state legislator who thought that this violated the Establishment Clause, sued to enjoin the practice. The defendants included State Treasurer Frank Marsh and Robert Palmer, a Presbyterian minister who had held the chaplaincy position for sixteen years.

The federal district court applied the *Lemon* test separately to the challenged practices of prayer and funding for the chaplain. It upheld the constitutionality of offering daily prayers but concluded that use of state funds to pay Reverend Palmer's salary of \$320 per month and to publish books of his prayers was unconstitutional.¹⁴

On appeal, the United States Court of Appeals for the Eighth Circuit held that actions of the Nebraska Legislature had to be viewed as a whole because "[t]he funding is inextricably bound up with the prayers themselves."¹⁵ It concluded that the chaplaincy practice violated all three elements of the *Lemon* test and enjoined the entire practice.¹⁶

The Supreme Court granted certiorari and then reversed the Eighth Circuit in an Opinion by Chief Justice Warren Burger. The Court upheld the Nebraska chaplaincy practice in its entirety.¹⁷ The lynchpin of the Court's decision was that the First Congress both ratified the Bill of Rights, including the First Amendment, and enacted a statute to pay chaplains. Indeed, a final agreement was reached on the language of the Bill of Rights on September 25, 1789, only three days after Con-

gress passed the statute.¹⁸ The Court concluded that those who drafted the First Amendment could not have believed that paid chaplains violated the Establishment Clause.

The Court declared that “the practice of opening legislative sessions with prayer has become part of the fabric of our society” and the practice of invoking divine guidance on lawmakers “is simply a tolerable acknowledgment of beliefs widely held among the people of this country.”¹⁹ Nor was paying the chaplain of a particular denomination with public funds a violation of the Establishment Clause, the Court explained, because the first Continental Congress had also compensated its chaplain.²⁰ Furthermore, the Court held that “absent proof that the chaplain’s reappointment stemmed from an impermissible motive... his long tenure does not in itself conflict with the Establishment Clause.”²¹

In addition, the Court suggested that it was not incumbent on courts to scrutinize legislative prayers in order to eliminate sectarian messages. It stated: “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.”²²

The only elaborations by the Supreme Court of its holding in *Marsh* were provided in two subsequent cases: *County of Allegheny v. American Civil Liberties Union*²³ and *Lee v. Weisman*.²⁴ The *Allegheny* Court emphasized that even the *Marsh* Court had recognized that not all practices that were 200 years old were necessarily automatically constitutional and that legislative prayers that affiliate the government with any one specific faith or belief were unconstitutional. It further stated: “The legislative prayers involved in *Marsh* did not violate this principle because the particular chaplain had ‘removed all references to Christ.’”²⁵

Public school commencements are functions of state government and thus are subject to Establishment Clause strictures. As in *Marsh*, the challenged event in *Lee v. Weisman* was a prayer preceding the program.²⁶ Because the Court in *Lee* squarely distinguished the *Marsh* precedent,²⁷ however, it has scant relevance to legislative prayer.

Galloway in the District Court

Greece is a town of about 94,000 residents, located just outside Rochester. Since 1999, the Greece Town Council had arranged for religious invocations to be delivered by clergy and other individuals at the beginning of its monthly meetings. Christian clergymen delivered the vast majority of the prayers.²⁸ Beginning in September 2007, Susan Galloway and Linda Stephens,

neither of whom is a Christian, complained without success to the town about its prayer practice.²⁹ On February 28, 2008, Galloway and Stephens, arguing that the town’s prayer practices violated the Establishment Clause, sued the town and Supervisor John Auberger for a declaratory judgment and injunctive relief.

Although Galloway felt that prayer was inappropriate at government meetings, she only asked the Town Board to make the prayers “nonsectarian.” Stephens regarded all legislative prayer as inappropriate and believed that “sectarian prayers” were “more offensive than nonsectarian ones.”³⁰ Plaintiffs contended that *Marsh* and *Allegheny* forbade all sectarian prayer; however, they did not oppose “inclusive and ecumenical” prayer.³¹ They also claimed that the town’s procedure for selecting clergy was unconstitutional because it favored Christians over other faiths.³²

The parties conducted extensive discovery, described in detail in the decision of United States District Court Judge Charles J. Siragusa. The district court found that Supervisor John Auberger had instituted the Town of Greece’s informal policy of inviting local clergy to offer prayers at the beginning of Town Board meetings in 1999 after he observed this practice at meetings of the Monroe County Legislature. From that time through 2010, responsibility for inviting clergy to deliver prayers at Town Board meetings was delegated to employees of the Town’s Office of Constituent Services. They consulted a “Community Guide” published by the Town Chamber of Commerce for a list of religious organizations within the town’s borders. Before each meeting, a clerk would make telephone calls to such groups until she found a clergyman willing to offer the prayer. In the course of time, groups who did not wish to participate were removed and others were added.

Almost all places of worship in the Town of Greece were Christian, as were most of the prayer givers.³³ Some of the prayers were Christian in nature and contained explicit references to Jesus Christ.³⁴ The district court found no evidence that the town clerks who selected the prayer givers were biased;³⁵ they did not attend the Board meetings themselves, and there was no indication of their religious affiliation, if any. After plaintiffs sued the Town, moreover, the clerk in charge added a “Wiccan Priestess”³⁶ and a Jewish layman to the list of approved prayer givers. A representative of the Baha’i Assembly of Greece had also been added to the list and delivered an invocation at a Town Board meeting during this period.³⁷

Because there was little disagreement between the parties on the underlying facts, Judge Siragusa decided that a trial was unnecessary and the parties submitted cross-motions for summary judgment. On August 5, 2010, he granted the Town’s motion and entered judgment in its favor and against the plaintiffs.

The district court concluded that the Town of Greece's legislative prayer practices were consistent with *Marsh*. It found that there was no indication in the record that the town's prayer policy had been established for an improper purpose such as "to proselytize or advance any one, or to disparage any other, faith or belief."³⁸ Instead, its policy was to invite all the denominations in the town and to even welcome volunteers, like atheists and members of non-Judeo-Christian religions, to give invocations.³⁹

The court added that "[t]he mere fact that prayers may contain a reference to Jesus or another deity does not make them proselytizing. Instead, limited references such as, 'in Jesus's name,' are, under the facts of this case, 'tolerable acknowledgment[s] of beliefs widely held among the people of this country.'"⁴⁰

The court also rejected the argument that only nonsectarian prayer should be tolerated.⁴¹ In support of this conclusion, it noted that legislative prayer in Congress over the years had often been "overtly sectarian"⁴² and took "judicial notice" of two recent sectarian invocations that ministers had delivered in recent months in the House of Representatives.⁴³

Finally, the district court rejected plaintiffs' contention that the town should instruct potential prayer givers that their prayers should be "inclusive and ecumenical."⁴⁴ It found that "[p]laintiffs' proposed nonsectarian policy, which would require town officials to differentiate between sectarian prayers and nonsectarian prayers, is vague and unworkable, as *Pelphrey* demonstrates."⁴⁵ Accordingly, the court found as a matter of law that the town had not violated the Establishment Clause, and it granted the town's motion for summary judgment.

Galloway in the Second Circuit

In a unanimous decision, the Second Circuit reversed the district court's grant of summary judgment to the Town of Greece and remanded the case for further proceedings and appropriate relief. The author of the decision, Judge Guido Calabresi, initially noted that the scope of the issues had narrowed on appeal, as the plaintiffs had abandoned their argument that the town intentionally discriminated against non-Christians in its selection of prayer givers.⁴⁶

The only remaining issue on appeal was whether the district court had erred in rejecting plaintiffs' claim that the town's prayer practice had the effect, even if not the purpose, of establishing religion in violation of the Establishment Clause. The Second Circuit concluded that, based on the totality of the circumstances, the plaintiffs had demonstrated that the town's prayer practice impermissibly affiliated the town with a single creed, Christianity.⁴⁷

After discussing the applicable law, the Second Circuit noted that there was no precise criterion or formula for determining whether there was an Establishment Clause violation in connection with legislative prayer. Instead, as Judge Calabresi wrote, "we see 'no test-related substitute for the exercise of legal judgment.'"⁴⁸ After reviewing the entire record, the court concluded that the town's prayer practice had to be viewed as an endorsement of the Christian faith.

The Court found a number of facts that supported this conclusion. It noted that "[i]n the town's view, the preponderance of Christian clergy was the result of a random selection process."⁴⁹ However, the town had invited clergy almost exclusively from places of worship within the town's borders, which were overwhelmingly Christian, while some town residents might be members of congregations outside the town or of no congregation at all. In addition, the town had neither informed members of the public that they could volunteer to offer prayers, nor had it publicly solicited prayer volunteers. As a result, the town's selection process could not result in "a perspective that is substantially neutral amongst creeds."⁵⁰ Instead, the process virtually ensured that a Christian viewpoint overwhelmingly predominated.

Furthermore, the Court noted, prayer givers often appeared to speak on behalf of all present and even the town itself. Prayer givers often asked the audience to participate and to signify their assent by standing or bowing their heads. "It is no small thing for a non-Christian (or for a Christian, for that matter) to pray 'in the name of Jesus Christ,'" the Court wrote.⁵¹ This "placed audience members who were nonreligious or adherents of non-Christian religions in the awkward position of either participating in prayers invoking beliefs they did not share or appearing to show disrespect for the invocation[.]"⁵² Thus, even though the prayers refrained from proselytization, the unending succession of "often specifically sectarian Christian prayers"⁵³ would create the impression in an objective, reasonable person that "the town's prayer practice associated the town with the Christian religion."⁵⁴

The Court emphasized that it was not stating that legislative prayers to open town meetings violated the Establishment Clause, even if they occasionally were sectarian in nature.⁵⁵ The Constitution required, however, that the prayers offered "do not express an official town religion, and do not purport to speak on behalf of all the town's residents or to compel their assent to a particular belief."⁵⁶ In summary, "a legislative prayer practice that, however well-intentioned, conveys to a reasonable objective observer under the totality of the circumstances an official affiliation with a particular religion violates the clear command of the Establishment Clause."⁵⁷

The Larger Context

Galloway is one of a number of cases decided by lower courts involving challenges to legislative prayer at the municipal level. (Interestingly, the absence of reported cases involving challenges to chaplains in state legislatures suggests that most of the states have accepted *Marsh* and have not encountered difficulty in applying its holding to their proceedings.)⁵⁸ In fact, the cases involving prayers at town and city council meetings reveal a distressing degree of divisiveness between the dominant Christian prayer givers and adherents of minority and non-Western religions, as well as among the different Christian groups.⁵⁹ It is regrettable that prayers which no doubt are intended to bring community members together and to unite them in the important enterprise of self-government should engender such disharmony.

This welter of cases may be due to the fact-and-history-specific nature of the Court's decision in *Marsh*. (*Galloway* shares this fact-specific approach to deciding the case.) In essence, federal courts called upon to adjudicate disputes about legislative prayer are engaged in building a body of constitutional common law. Applying a strict version of the traditional rules for adjudicating only cases and controversies, one could argue that the Supreme Court should not go beyond the specific facts and legal issues present in *Galloway* when it decides the case.

Nevertheless, my view is that such a fact-specific decision would be unfortunate. For three decades, lower courts have struggled to understand and apply *Marsh* to the legislative prayer controversies they were called upon to adjudicate. These cases, of course, were never heard by the Supreme Court. However, their diverse fact patterns raise a number of issues that the Court could—and should—address.

The major split among the approximately dozen progeny of *Marsh* involves the issue of whether only “nonsectarian” prayer is constitutional. Six courts have answered this question in the affirmative,⁶⁰ but at least two have held that sectarian prayers, at least within limits, can be constitutional.⁶¹ The reason for this seems obvious: the ambiguous, even cryptic, language from *Marsh* noted above.⁶²

The Court observed that while Chaplain Robert E. Palmer had earlier given explicitly Christian prayers before the Nebraska Legislature, he had removed all references to Christ after a 1980 complaint from a Jewish legislator.⁶³ Thus, in context, one could understand the Court's statement to mean that Palmer's prayers were only constitutional because they were nonsectarian, and some courts have held thus.⁶⁴

One could also understand the Court to mean that so long as the speaker refrained from proselytizing or

disparaging other religions, there would be no constitutional problem, and that other forms of sectarian prayer were permissible. Some courts have so held.⁶⁵

Determining whether or not a prayer is “sectarian” is not necessarily a straightforward matter. As noted above, the court of appeals in *Pelphrey* observed that counsel for plaintiff in that case deemed “Heavenly Father” and “Lord” nonsectarian, even though his clients testified to the contrary.⁶⁶ Judge Middlebrooks, dissenting in *Joyner*, claimed that “there is no clear definition of what constitutes a ‘sectarian’ prayer.”⁶⁷

The Author's Recommendation

Thirty years of its misbegotten progeny have exposed the deep flaws in *Marsh*, which arguably was wrongly decided and inarguably failed to provide adequate guidelines for deciding the controversies that were certain to arise around the vexing issue of municipal legislative prayer. In deciding the constitutionality of a hired, paid long-term chaplain, the Court gave no guidance to town and city councils about how they could administer a program of legislative prayer by volunteers without violating the Establishment Clause.

By relying on Eighteenth Century history as the basis for its decision and simply brushing aside the dominant test, which it had fashioned over the years to govern Establishment Clause cases,⁶⁸ the Supreme Court took the easy way out. It avoided a decision which would no doubt have provoked a firestorm of protest⁶⁹ and it emerged relatively unscathed. But the expediency of this approach came at the cost of engendering doctrinal confusion that has plagued lower courts ever since. This time, at long last, the Court should strive for a broad, comprehensive disposition which seeks to resolve the many issues engendered by *Marsh* and left unresolved for so long.

As part of its task in *Galloway*, the Court should face forthrightly a regrettable consequence of applying the *Marsh* holding to municipal legislative prayer: divisiveness and conflict among people of different faiths.⁷⁰ Such conflict arguably takes its greatest toll when waged by members of the same local community. The Supreme Court has highlighted divisiveness as part of the entanglement “prong” of the *Lemon* test,⁷¹ and a noted authority asserted that “political division on religious lines is one of the principal evils that [the] First Amendment sought to forestall.”⁷²

As Judge Calabresi noted in *Galloway*, “People with the best of intentions may be tempted, in the course of giving a legislative prayer, to convey their views of religious truth, and thereby run the risk of making others feel like outsiders.”⁷³

In my view, the progeny of *Marsh* at the municipal level sadly mirror what Justice Felix Frankfurter called

“the strife of sects.”⁷⁴ The divisiveness is not theoretical; it is an unfortunate reality. Even without acting with such an intention, many Christian prayer givers in various parts of the country have delivered prayers at city council meetings that appeared to be official. Their effect was to affiliate the local government with Christianity and to make nonbelievers and adherents of nonwestern religions or no religion feel uncomfortable and feel like outsiders. Thirty years of divisiveness and judicial division are enough; *Marsh* should be overruled.

And yet I am aware that such a decision could be regarded as a radical one that could set off a furor on the religious right. If total overruling is not possible, a coherent half measure would be to preserve *Marsh*'s holding for state legislatures and Congress, but to overrule it at the municipal level. While such a course might seem inconsistent, a persuasive case for it is made in the dissent of Judge Donald M. Middlebrooks in *Pelphrey*.⁷⁵ He views *Marsh* as an “outlier in Establishment Clause jurisprudence,”⁷⁶ and argues that the rationale for the Court’s decision based on 1789 history should not apply to local governments at a time when Massachusetts and other states had established churches.⁷⁷ The Court could do worse than reach the same conclusion.

Endnotes

1. U.S. CONST. amend. 1 (“Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof...”).
2. *Galloway v. Town of Greece*, 732 F.Supp.2d 195 (W.D.N.Y. 2010), *rev'd*, 681 F.3d 20 (2d Cir. 2012), *cert. granted*, Docket 12-696, May 20, 2013. The oral argument before the Supreme Court is scheduled for November 6, 2013.
3. See *Everson v. Board of Education*, 330 U.S. 1, 16 (1947). The expression “a wall of separation between church and state” comes from an 1802 letter from President Jefferson to the Danbury, Connecticut Baptists.
4. *Marsh v. Chambers*, 463 U.S. 783, 800-01 (1983) (Brennan, J., dissenting) (“[I] have no doubt that, if 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”).
5. *Id.* at 783.
6. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).
7. *Id.* at 612.
8. See Carl H. Esbeck, *The Lemon Test: Should It Be Retained, Reformulated, or Rejected?*, 4 NOTRE DAME J. L. ETHICS & PUB. POL’Y 513, 513 (1990). The conceptual disarray in the Supreme Court’s Establishment Clause jurisprudence is largely due to sharp and irreconcilable differences among the justices on the substantive law. Broadly speaking, the Court is divided between strict “separationists,” who are suspicious of even indirect government aid to religion, and “accommodationists” who are more sympathetic to such aid. The justices rarely change sides in these matters, but changes occur when they retire and are replaced by nominees with different views.
9. *McCreary County v. ACLU*, 545 U.S. 844, 890 (2005) (Scalia, J. dissenting) (“[A] majority of the Justices on the current Court

(including at least one Member of today’s majority) have, in separate opinions, repudiated the brain-spun ‘*Lemon Test*’ that embodies the supposed principle of neutrality between religion and irreligion.”) See also *Lamb’s Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 398-399 (1993) (Scalia, J. concurring in judgment) (collecting criticism of *Lemon*); *Van Orden v. Perry*, 545 U.S. 677, 692, 693 (2005) (Thomas, J. concurring); Board of Ed. of Kiryas Joel Village School Dist. v. Grumet, 512 U.S. 687, 720 (1994) (O’Connor, J. concurring in part and concurring in judgment); *County of Allegheny v. ACLU*, 492 U.S. 573, 655-656, 672-673 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part); *Wallace v. Jaffree*, 472 U.S. 38, 112 (1985) (Rehnquist, J., dissenting); see also Committee for Public Ed. and Religious Liberty v. Regan, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting) (disparaging “the Sisyphean task of trying to patch together the ‘blurred, indistinct, and variable barrier’ described in *Lemon*”); *Roemer v. Board of Pub. Works*, 426 U.S. 736, 768 (1976) (White, J., concurring in judgment) (“I am no more reconciled now to *Lemon* I than I was when it was decided.... The threefold test of *Lemon* I imposes unnecessary, and...superfluous tests for establishing [a First Amendment violation].”)

10. See *Agostini v. Felton*, 521 U.S. 203, 222-223 (1997) (quoting *Mitchell v. Helms* 530 U.S. 793, 794 (2000)). The Supreme Court recast the “entanglement” prong of the *Lemon* test “as simply one criterion relevant to determining a statute’s effect.” Thus, the Court in effect conflated the effects and entanglement prongs, turning the three-part *Lemon* test into a two-part test. The Supreme Court has introduced and applied several additional Establishment Clause tests in recent decades. Justice O’Connor proposed a modified endorsement test in her concurrence in *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984). Justice Kennedy introduced a “coercion test” in *Lee v. Weisman*, 505 U.S. 577, 592 (1992). The Court applied a neutrality test in *Rosenberger v. Rector of Univ. of Virginia*, 515 U.S. 819, 839 (1995); see *Wynne v. Town of Great Falls, South Carolina*, 376 F.3d 292, 302, n.8 (4th Cir. 2004). Yet another test, the “totality of the circumstances” test influenced by Justice O’Connor’s approach, was applied by the Second Circuit in *Galloway*, as discussed *infra*.
11. According to the author’s calculation, the Supreme Court applied the *Lemon* test in thirty Establishment Clause cases in the twenty years after *Lemon v. Kurtzman*.
12. See *Marsh v. Chambers*, 463 U.S. 783, 796 (Brennan, J., dissenting).
13. NEBRASKA LEGISLATURE: A HISTORY OF THE UNICAMERAL. http://nebraskalegislature.gov/about/history_unicameral.php (Nebraska is the only state with a unicameral legislature).
14. *Chambers v. Marsh*, 504 F.Supp. 585, 592 (D.Neb. 1980).
15. *Chambers v. Marsh*, 675 F.2d 228, 233 (8th Cir. 1982).
16. *Id.* at 235.
17. *Marsh v. Chambers*, 463 U.S. 783 (1982).
18. *Id.* at 788. (“It can hardly be thought that in the same week Members of the First Congress voted to appoint and to pay a chaplain for each House and also voted to approve the draft of the First Amendment for submission to the state, they intended the Establishment Clause of the Amendment to forbid what they had just declared acceptable”).
19. *Id.*
20. *Id.* at 794.
21. See *id.* at 793. The Court suggested that Chaplain Palmer was reappointed because the Legislature was satisfied with his services and not because of any “preference” given to his religious views.
22. *Id.* As discussed *infra*, the question of whether the content of legislative prayers should be evaluated by courts has been difficult to resolve.

23. County of Allegheny v. ACLU, 492 U.S. 573 (1989).
24. Lee v. Weisman, 505 U.S. 577 (1992). See *id.* at 588. The First Amendment principles that apply to prayers delivered to a public school graduation that are different from those which apply to legislative prayer. See also Thomas A. Schweitzer, “Lee v. Weisman and the Establishment Clause: Are Invocations and Benedictions at Public School Graduations Constitutionally Unspeakable?,” 69 U. DET. MERCY L. REV. 113, 119, n. 23 (1992).
25. *Id.* at 793 n. 14. *Allegheny*, of course, did not involve legislative prayers, and this led one federal judge to discount this statement as mere dicta. See Joyner v. Forsyth County, North Carolina, 653 F.3d 341, 360 (4th Cir. 2011) (Niemeyer, J., dissenting) (“*Allegheny’s* dicta, however, do not govern legislative prayer cases, and...[n]othing in *Allegheny* suggests that it supplants *Marsh* in the area of legislative prayer” (quoting Simpson v. Chesterfield County Board of Supervisors, 404 F.3d 276, 281, n. 3 (4th Cir. 2005)). Even if they are technically “dicta,” however, declarations in a decision by the Supreme Court arguably should not be so easily brushed aside. Judge Calabresi in *Galloway* treated the above statement from *Allegheny* as an important gloss on *Marsh*, and this seems clearly correct.
26. See Lee v. Weisman, 505 U.S. at 588. The school principal invited a rabbi to offer an invocation and benediction at a public middle school graduation and provided him with a pamphlet entitled “Guidelines for Civic Occasions” prepared by the National Conference of Christians and Jews. The Court commented that this was an improper attempt by the principal to direct and control the content of the prayers. *Id.*
27. *Id.* at 596. (“[I]nherent differences between the public school system and a session of a state legislature distinguish this case from *Marsh v. Chambers*...”).
28. See *Galloway v. Town of Greece*, 681 F.3d 20, 24 (2d Cir. 2012) (describing some prayers as explicitly Christian, containing language such as “In Jesus’s name we pray.”)
29. See *Galloway v. Town of Greece*, 732 F.Supp.2d 195, 196 (W.D.N.Y. 2010) (*Galloway* is Jewish, and Stephens is an atheist).
30. *Id.* at 204.
31. *Id.* at 210. (“Plaintiffs contend that prayers may only refer to a ‘generic God,’ and must not refer to any particular deity or to any religious belief, such as the Holy Trinity that is specific to a particular religion or group of religions”). *Id.* at 241.
32. *Id.*
33. See *Galloway v. Town of Greece*, 681 F.3d 20, 31 (2d Cir. 2012).
34. *Id.* at 206. Judge Siragusa quoted completely ten of the prayers which plaintiffs found objectionable. One typical example included the following: “Heavenly Father, you guide and govern everything with order and love. Look upon this assembly of our town leaders and fill them with the spirit of their wisdom. May they always act in accordance with your will.” *Id.*
35. *Galloway v. Town of Greece*, 732 F.Supp.2d 195, 217 (W.D.N.Y. 2010) (“Based on the entire record in this case, there is no evidence that Sofia, Wagoner, or Fiannaca [the Town’s clerks who compiled the list of local religious bodies to invite to offer prayers] intentionally excluded non-Christians from giving prayers at Town Board meetings.”) See also *id.* at 219. (“[T]here is no evidence that policymaking Town officials were aware that non-Christian groups were allegedly being excluded.”).
36. *Id.* at 202.
37. *Id.*
38. *Id.* at 239.
39. *Id.* The district court explicitly rejected plaintiffs’ claim that a Jehovah’s Witness congregation, a Vietnamese Buddhist congregation and a Jewish synagogue located outside town were excluded by the Town for religious reasons.
40. *Galloway v. Town of Greece*, 732 F.Supp.2d 195, 241 (W.D.N.Y. 2010) (quoting *Marsh v. Chambers*, 463 U.S. 783, 792 (1982)).
41. *Galloway v. Town of Greece*, 732 F.Supp.2d at 241.
42. *Id.* at 241-42.
43. On April 15, 2010, Rev. Clyde Mighells, of Lighthouse Reformed Church, ended his opening prayer with the words, “It is in the blessed name of our Lord, Jesus Christ, that we lay these requests at Your feet. Amen.” *Id.* at 242. On June 30, 2010, Rev. Robert Henderson of First Baptist Church in Lincoln, Illinois, ended his opening prayer with the words, “These things we pray in the name of our Lord Jesus Christ. Amen.” *Id.*
44. *Id.* at 243.
45. *Id.* See *Pelphrey v. Cobb County, Georgia*, 547 F.3d 1263, 1266 (11th Cir. 2008). The Eleventh Circuit in *Pelphrey* squarely rejected the claim of plaintiffs in that case that under *Marsh*, only nonsectarian legislative prayers could satisfy Establishment Clause requirements. See also *id.* at 1272. (“[W]e would not know where to begin to demarcate the boundary between sectarian and nonsectarian expressions.”). It also noted that plaintiff taxpayers disagreed with their counsel as to whether “Heavenly Father” and “Lord” were nonsectarian.” *Id.*
46. *Galloway v. Town of Greece*, 681 F.3d 20, 26 (2d Cir. 2012).
47. *Id.* at 34.
48. *Id.* at 30.
49. *Id.* at 31.
50. *Id.*
51. *Id.* See also Joyner v. Forsyth County, North Carolina, 653 F.3d 341, 354 (4th Cir. 2011) (“‘To...Jewish, Muslim, Baha’I, Hindu, or Buddhist citizens[,] a request to recognize the supremacy of Jesus Christ and to participate in a civic function sanctified in his name is a wrenching burden.’ See Amicus Br. of American Jewish Congress et al. 8. Such burdens run counter to the Establishment Clause...”).
52. See *Galloway*, 681 F.3d at 32 (stressing the problem of persons feeling obliged to show deference to prayers they did not believe in, if only by standing and bowing their heads, lest they be deemed disrespectful or irreverent).
53. *Id.*
54. *Id.*
55. See *id.* at 34. The Second Circuit noted that a number of cases had interpreted *Allegheny’s* gloss on *Marsh* to preclude sectarian prayer. The court denied, however, that the Establishment Clause precludes all legislative invocations that are “denominational in nature” (which evidently means “sectarian”), as these cases seem to suggest. The court gave two reasons for this conclusion. First, in disapproving of the school district’s action in *Lee* instructing the rabbi to make his prayers nondenominational, the Supreme Court had not favored establishment of “a civic religion” any more than the original form of Establishment. See also *id.* at 29. Second, even after *Allegheny*, it was difficult to read *Marsh* as holding that every denominational prayer affiliated the government with a religion and thereby violated the Establishment Clause.
56. *Id.* at 34.
57. *Id.*
58. The only exception is *Hinrichs v. Bosma*, 400 F.Supp.2d 1103 (S.D.Indiana 2005), *stay denied*, 440 F.3d 393 (7th Cir. 2006), *rev’d and remanded for lack of standing*, 506 F.3d 584 (7th Cir. 2007). The district court had found that the legislative prayer practices of the Indiana House of Representatives in the 2005 session “when viewed as a whole, are well outside the boundaries established

by the Supreme Court in *Marsh v. Chambers*.” 400 F.Supp.2d at 1125-26.

59. E.g., *Wynne*, *supra* (finding that Town Council’s prayers referring to Jesus Christ “promoted one religion over all others, dividing the Town’s citizens along denominational lines”), 376 F.3d 298-99; *Simpson*, *supra* (members of Board of Supervisors disparaged and disrespected Wiccan plaintiff), 404 F.3d 285, n. 4; *Turner v. City Council of Fredericksburg*, 534 F.3d 352, 354 (4th Cir. 2008) (Baptist pastor and city council member sued, claiming violation of his Free Exercise and Free Speech rights, when he was forbidden to deliver prayer which would violate the council’s policy since he intended to close the prayer in the name of Jesus Christ); *Joyner*, *supra* (“To plant sectarian prayers at the heart of local government is a prescription for religious discord”), 653 F.3d at 355.
60. *Wynne v. Town of Great Falls*, 376 F.3d 292 (4th Cir. 2004); *Simpson v. Chesterfield County Bd. of Supervisors*, 404 F.3d 276 (4th Cir. 2005); *Hinrichs v. Bosma*, 400 F.Supp.2d 1103 (S.D.Indiana, 2005); *Turner v. City Council of Fredericksburg*, 534 F.3d 352 (4th Cir. 2008); *Joyner v. Forsyth County*, 653 F.3d 341 (4th Cir. 2011).
61. *Pelphrey v. Cobb County*, 547 F.3d 1263 (11th Cir. 2008); *Galloway v. Town of Greece*, 732 F.Supp.2d 195 (W.D.N.Y. 2010).
62. *Marsh v. Chambers*, 463 U.S. 795, 794-95 (1983). (“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.”)
63. *Id.* at 793.
64. Town Council meetings in Great Falls, South Carolina opened with prayers which often invoked Jesus Christ as “Savior,” and a Wiccan sued to challenge this practice. *Wynne v. Town of Great Falls*, 376 F.3d 292, 301-02 (4th Cir. 2004). The Fourth Circuit affirmed the district court’s order permanently enjoining such prayers as unconstitutional. Concluding that the Supreme Court apparently intended to limit its holding upholding prayer in *Marsh* to nonsectarian prayers, it concluded, “The invocations at issue here, which specifically call upon Jesus Christ, are simply not constitutionally acceptable legislative prayer like that approved in *Marsh*. Rather, they embody the precise kind of ‘advance[ment]’ of one particular religion that *Marsh* cautioned against.” *Accord*, *Joyner v. Forsyth County*, 653 F.3d 341, 342 (4th Cir. 2011) (“...Supreme Court precedent and our own [cases] establish that in order to survive constitutional scrutiny, invocations must consist of the type of nonsectarian prayers that solemnize the legislative task and seek to unite rather than divide.”).
65. As noted above, the Court in *Marsh*, after finding that Chaplain Palmer’s prayers contained neither efforts to proselytize nor disparagement of other faiths or beliefs, stated: “That being so, it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer.” 463 U.S. at 794-95. The Eleventh Circuit in *Pelphrey v. Cobb County*, 547 F.3d 1263 (2008) took this to mean that *Marsh* did not prohibit sectarian prayer, so long as it contained no proselytizing or disparagement of other religious faiths or beliefs. The majority of those offering prayers at the Cobb County Commission’s meetings were Christian, and their prayer often ended with the words “in Jesus’ name we pray.” *Id.* at 1267. The court rejected plaintiffs’ argument that *Marsh* permitted only “nonsectarian” prayers at commission meetings: “[T]he Court never held that the prayers in *Marsh* were constitutional because they were ‘nonsectarian’...To read *Marsh* as allowing only non-sectarian prayers is at odds with the clear directive by the Court that the content of a legislative prayer ‘is not of concern to judges where...there is no indication that the prayer opportunity has been exploited to proselytize or advance any one...faith or belief.” *Id.* at 1271. *Accord*, *Galloway*, 681 F.3d 29 (*Marsh* “is hard to read, even in light of *Allegheny*, as saying that denominational prayers, in and of themselves, violate the Establishment Clause.”)
66. *Id.* at 1272. (“We would not know where to begin to demarcate the boundary between sectarian and nonsectarian expressions, and the taxpayers have been opaque in explaining that standard.”).
67. 653 F.3d at 364. In addition, other cases subsequent to *Marsh* raise a series of issues that seem to be beyond the scope of *Galloway* but should nevertheless be resolved by the Court. Among these are the following: Since most of the municipal councils involved turned the podium for prayers over to outside volunteers, both clerical and lay, should that make a difference regarding the applicable rule? If a town or county is overwhelmingly dominated by people of one faith, does the town council bear the same burden of trying to locate and invite minority religion prayer givers? What is the constitutionally preferred method of compiling a list of prayer givers, and should prayer givers be chosen from the list at random? If the list of prayer givers turns out to be overwhelmingly Christian, for instance, are the efforts of the city council staff to find minority religion prayer givers irrelevant? Can and should the Court use this case to attempt to formulate a single test for constitutionality under the Establishment Clause? Because of the conflicting interpretations by lower courts of *Marsh*’s holding, the Supreme Court should endeavor to provide a clear and comprehensive set of guidelines to address these issues if it decides to uphold legislative prayer in general.
68. The three-part test set out in *Lemon v. Kurtzman*, 403 U.S. 602, 622 (1971) was the culmination of decades of case law.
69. The Supreme Court cases outlawing prayer in public schools, *Engel v. Vitale*, 370 U.S. 421 (1962) and *Abington School District v. Schempp*, 374 U.S. 203 (1963) created furious reactions all over the country, which led to numerous proposed Constitutional amendments to overrule their holdings. See generally Frederick Mark Gedicks and Roger Hendrix, *Uncivil Religion: Judeo-Christianity and the Ten Commandments*, 110 W.Va.L.R. 275, 283-84 (2007).
70. *Joyner v. Forsyth County*, 653 F.3d 341, 347 (2011) (“More broadly, while legislative prayer has the capacity to solemnize the weighty task of governance and encourage ecumenism among its participants, it also has the potential to generate sectarian strife. Such conflict rends communities and does violence to the pluralistic and inclusive values that are a defining feature of American public life”).
71. *Lemon*, 403 U.S. at 622.
72. Paul Freund, “*Public Aid to Parochial Schools*,” 82 HARV.L.REV. 1680, 1692 (1969). *Accord*, *Zelman v. Simmons-Harris*, 536 U.S. 639, 717 (2002) (Breyer, J., dissenting).
73. *Galloway v. Town of Greece*, 681 F.3d 20, 34 (2d Cir. 2012).
74. *Illinois ex rel. McCollum v. Board of Ed.*, 333 U.S. 203, 217 (1948).
75. *Pelphrey v. Cobb County*, 547 F.3d 1263, 1282-91 (Middlebrooks, J., dissenting).
76. *Id.* at 1286.
77. *Id.* at 1288 (“[T]he Massachusetts Constitution at the time, largely written by John and Samuel Adams, established a state religion financed by tax payers, authorized mandatory church attendance and the imposition of criminal sanctions for blasphemy, and discriminated against Catholics”).

Thomas A. Schweitzer is a Professor of Law at Touro Law Center, where he teaches Law and Religion and a number of other courses.

Like what you’re reading? To regularly receive issues of the *Municipal Lawyer*, join NYSBA’s Municipal Law Section (attorneys only).