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In Brief: Supreme Court Revisits Legislative Prayer in *Town of Greece v. Galloway*

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The U.S. Supreme Court will revisit the issue of legislative prayer when it hears oral arguments on Nov. 6 in a case involving a challenge to a municipality's practice of beginning each town board meeting with an invocation. The last time the high court weighed in on this issue was in its 1983 decision in *Marsh v. Chambers*, when the justices ruled that the Nebraska legislature's practice of opening each legislative session with a prayer did not violate the Establishment Clause of the First Amendment of the U.S. Constitution.

In the upcoming case, *Town of Greece v. Galloway*, two local citizens argue that the specifics of their town's policy of starting board meetings with a prayer violate the Establishment Clause, in part because they promote the Christian religion. The town counters that its practice does not violate the Establishment Clause because the opportunity to offer a prayer is made available to residents of all faiths and because the town's practice fits squarely in the centuries-old tradition of legislative prayer, which the Supreme Court deemed constitutional in its landmark *Marsh* ruling.

How did this case arise, and how did it reach the Supreme Court?

Greece is a town just outside the city of Rochester in Monroe County in northwestern New York state. The town is governed by a board that, under state law, has executive, legislative and administrative authority. Since 1999, the town board has opened its monthly sessions with a prayer. In 2007, two local citizens who frequently attended board meetings, Susan Galloway and Linda Stephens, complained that the prayers "aligned the town with Christianity." As non-Christians, they said they felt both coerced to participate and isolated during the ceremony. The board responded that anyone (regardless of faith tradition or beliefs) could volunteer to recite a prayer and the town was not trying to exclude anyone.

In February 2008, Galloway and Stephens sued the town in federal court, alleging that its prayer policy violated the First Amendment's prohibition against the establishment of religion. In 2010, a district court, citing *Marsh*, ruled for the town. In *Marsh*, the Supreme Court reasoned that legislative prayer did not violate the Establishment Clause because Congress and state legislatures had engaged in the practice since the founding of the republic. However, the high court suggested that not all legislative prayers would fall within that protected tradition. In particular, the justices questioned the constitutionality of invocations that promoted or denigrated a particular faith tradition or religious group.

On appeal in 2012, however, the 2nd U.S. Circuit Court of Appeals reversed the district court's decision, ruling that the town's prayer policy violated the Establishment Clause because it effectively promoted a single religion (Christianity) and thus went beyond the practice of legislative prayer approved by the Supreme Court in *Marsh*. The town then appealed the ruling to the Supreme Court, which in May 2013 agreed to review the case.

What arguments does the Town of Greece make?

The town and its supporters argue that its practice of opening board meetings with a prayer or invocation is squarely within the tradition of legislative prayer that has existed since the founding of the United States and that the Supreme Court upheld in *Marsh*. To begin with, the town contends, the practice is open to all who are interested in participating, regardless of faith tradition. As a result, they say, opening prayers have not been confined to one denomination or religious tradition but have been offered by adherents of different faiths, including Christianity, Buddhism, Judaism, the Baha'i' faith and Wicca. The fact that most prayers have been given by Christians reflects the fact that most people in the community are themselves Christian and is not evidence of impermissible discrimination against non-Christian religions by the town or its employees, according to the Town of Greece. In addition, the town argues, these prayers do not seek to convert listeners or denigrate other faiths.

The town also argues that the practice of offering opening prayers at government functions falls well within the government's long-standing tradition of acknowledging the religious beliefs of its citizens. Indeed, the town points out, the members of the first Congress – who drafted the Bill of Rights, which contains the First Amendment's Establishment Clause – opened their own legislative sessions with a prayer, a practice that has continued in federal and state governments to this day and one that was acknowledged by the Supreme Court in *Marsh*.

Finally, the town argues that in striking down the practice of opening each board session with a prayer, the 2nd Circuit disregarded both the letter and spirit of the *Marsh* decision. The town asserts that instead of relying on *Marsh*, which directly addresses the issue of legislative prayer, the appeals court wrongly applied the "endorsement test," which was first articulated by Supreme Court Justice Sandra Day O'Connor in her concurring opinion in *Lynch v. Donnelly* (a 1984 case involving a city-sponsored religious holiday display) and which has been used in subsequent cases. The endorsement test asks whether a reasonable observer would view the challenged practice as government promotion of one faith – or of religion in general. (For more on *Lynch* and the endorsement test, see [Religious Displays and the Courts.](#))

The town contends that the endorsement test does not apply to this case for two reasons. First, the town argues that the high court in *Marsh* treated legislative prayer as a special category under the Establishment Clause, with its constitutional validity secured by historical tradition and precedent rather than one of the court's more recently adopted constitutional tests. Second, the town contends that using the endorsement test in prayer cases like this one is especially problematic because it requires courts to closely examine every prayer offered to determine which ones are too religious and which are appropriately inclusive. As a result, the town says, courts will be turned into a "national theology board," which is far beyond their expertise or legitimate role. Indeed, the town asserts, forcing courts to do such theological assessments would represent a far greater threat of inappropriate government involvement with religion than any legislative prayer considered permissible under *Marsh*.

What arguments do Galloway and Stephens make?

Galloway, Stephens and their supporters say that *Marsh* should not apply in this case because the Greece Town Board's practice of opening each meeting with a prayer differs significantly from the specifics at issue in the 1983 ruling. In the Town of Greece, citizens who have business before the board – such as those seeking zoning changes or business permits, those who wish to comment on public questions and those receiving awards or citations – must attend the meetings in person. Because the prayer is an integral part of the meeting, those in attendance are effectively required to participate in a religious ceremony, regardless of their personal beliefs, which makes the practice coercive, Galloway and Stephens argue. And, they point out, such government coercion has specifically been deemed unconstitutional by the high court in a number of rulings, most recently in *Lee v. Weisman* (1992), a case involving clergy speaking at graduation ceremonies.

In contrast with the practice in Greece, they say, the Nebraska legislature (which was a party in the *Marsh* case) did not require attendance during its opening prayer as a condition of receiving public benefits or the opportunity to seek official redress. Even state lawmakers, who had approved the prayer practice, were free to come and go as they pleased during the invocation.

As noted earlier, the Supreme Court in *Marsh* upheld legislative prayers as long as they were not used "to proselytize or advance any one, or to disparage any other, faith or belief." But according to Galloway and Stephens, the Town of Greece has used the practice of prayer to advance Christianity. In fact, Galloway and Stephens assert that until the threat of litigation became apparent in 2007, members of the board chose only Christian clergy to pray before each meeting, and the prayers they offered often were overtly Christian (invoking Jesus, for

example) and contained calls for all present to participate. Only after the threat of a lawsuit did board members begin inviting people of other faith traditions, such as Jews and Buddhists, to recite prayers at the meetings, Galloway and Stephens point out. They argue that a legislative body may choose to have a prayer, but only in a way that avoids lending the authority of government to any particular faith, which was not the case in the Town of Greece. By contrast, they say, the prayers offered in the Nebraska legislature and upheld by the Supreme Court in *Marsh*, were intentionally nonsectarian.

The Obama administration submitted a “friend-of-the-court” brief in this case, the content of which surprised some people. What did the brief say?

The Supreme Court requires the parties in a case to submit their arguments in written briefs, but it also allows outside groups and individuals to submit additional briefs laying out their views. Many outside groups, including religious groups, advocacy groups, states, counties and individuals have submitted these amicus curiae (“friend-of-the-court”) briefs, hoping to influence the high court’s decision in *Galloway*. In August 2013, the [U.S. solicitor general submitted a brief](#) that argues that the 2nd Circuit misinterpreted the *Marsh* decision when it struck down the Town of Greece’s prayer policy. Specifically, the administration contends that *Marsh* allows for legislative prayer, even with sectarian content, as long as the prayer does not proselytize or disparage another faith tradition. The prayer policy of the Greece Town Board met this test, the administration says, and thus should be upheld.

What might be the broad significance of this case?

Galloway holds direct implications for the practice of legislative prayer, which exists at every level of government in the United States, from Congress to local school boards. That being said, the high court is unlikely to overturn *Marsh* and strike down the practice entirely because the tradition of legislative prayer has a long and established history in the U.S. Instead, the case likely will hinge on how the court interprets *Marsh*.

It could read the *Marsh* decision broadly and determine that it insulates virtually all forms of legislative prayer from future judicial review. If it reaches such a conclusion, the court likely would rule in favor of the Town of Greece and hold that the 2nd Circuit, in striking down the town’s practice, overreached and exceeded the review appropriate or necessary under *Marsh*. Following such a decision, lower courts would have a basis for questioning legislative prayers only in rare circumstances – for example, if the person giving a prayer denounced other faith traditions.

Alternatively, the Supreme Court could interpret the *Marsh* ruling more narrowly and hold that legislative prayer is constitutional only in certain contexts. In *Marsh*, for example, the prayer was directed solely at legislators, who approved the policy of praying before a session opened and were not required to attend when the prayer was offered. If the high court determines that the lawmakers' voluntary choice to have and be present for a prayer was an important element in upholding the practice in *Marsh*, it could call into question the existing practice of prayer at a vast number of local elected or appointed bodies, where, as previously noted, the circumstances surrounding the practice can be quite different. Mandating closer scrutiny of legislative prayer does not mean that the court would hold unconstitutional all prayer by government bodies, but it likely would require some examination of participants' freedom to attend meetings or the religious content of any prayer, or both.

If the court rules in favor of Galloway and Stephens and upholds the 2nd Circuit's decision, the case would be returned to the trial court to design an appropriate remedy. The lower court could do any number of things – for example, requiring some separation between the prayer and other parts of the meeting agenda, instructing the town to adopt guidelines to promote nonsectarian prayer or simply banning prayer altogether at town board meetings.

This report was written by David Masci, a senior researcher at the Pew Research Center.