2022 YMCA NATIONAL JUDICIAL COMPETITION
APPELLATE CASE MATERIALS

GILDA FLICKER and JAY GREEN,
Plaintiffs-Petitioners,

v.

MURRELET COUNTY,
Defendant-Respondent

This problem focuses on the constitutionality of Murrelet County's policy of opening the meetings of its Board of Commissioners with prayer led by the commissioners, all of whom are members of the Druid faith. Gilda Flicker and Jay Green, non-Druid residents of Murrelet County, filed an action in federal district court asserting that the County's legislative-prayer practice violated the Establishment Clause of the First Amendment to the United States Constitution. The district court granted judgment as a matter of law to Flicker and Green, concluding that the prayer policy was not consistent with the tradition of legislative prayer in this country and that the prayer impermissibly coerced those attending Board meetings to participate in a religious activity. On appeal, the United States Court of Appeal for the Twenty-Eighth Circuit reversed the district court's decision and held that Murrelet County's prayer practice did not violate the Establishment Clause. Flicker and Green thereafter filed a petition for writ of certiorari to the Supreme Court of the United States, seeking review of the decision of the Twenty-Eighth Circuit.

You will be representing Flicker and Green (the Petitioners) or Murrelet County (the Respondent) before the Supreme Court of the United States. The issues on appeal are: (1) whether the County's prayer policy is consistent with this country's tradition of legislative prayer; and (2) whether the prayers coerce participation in religion.

The materials for this problem consist of (1) the Statement of the Case, which includes an exhibit prepared by Murrelet County; (2) the opinion of the United States Court of Appeals for the Twenty-Eighth Circuit; (3) excerpts of the written briefs filed in the Supreme Court on behalf of the Petitioners and the Respondent; and (4) selected relevant case precedent. The facts of the case are set out in the Statement of the Case. The legal principles governing this problem are those set out in the opinion of the Twenty-Eighth Circuit and the case precedent provided to you. No other materials may be used, and no outside research is permitted.

The Supreme Court briefs contain discussions of the relevant cases, and they provide a roadmap for structuring your argument before the Court. Do not memorize the arguments in the briefs or read the briefs to the Justices during argument. You should read and understand the arguments made in the briefs and use them to help you develop and present to the Court your own views on the issue. You are not required to follow the approaches set out in the briefs, and you are free to formulate your own arguments about the issues. Unless you are prepared to offer sound reasons for the Court to overrule a prior decision, however, you should be prepared to explain how your position is consistent with the existing case law, as provided in the briefs and court opinion

STATEMENT OF THE CASE

I. Facts & Procedural Background

Murrelet County is a small, sparsely populated county in the southwest corner of Oregon. The western part of the county is heavily forested, with numerous stands of old-growth sequoias. Some parts of the county have been cleared for subsistence and small-scale farms, and there are several small placer gold mining operations in the eastern part of the county.

The only real town in Murrelet County is Marble, which is located in the western part of the county. Most of the county's population is concentrated in and around the town. Marble's economy is now largely tourist-driven. It is home to many artists and artisans like wood-turners, soap makers, and jewelry designers. Marble also has several eco-tourism ventures (like zip-lining), as well as one small inn, a few bed-and-breakfasts, and two always-full campgrounds.

In 1927, a British tourist named Wilson Snipe was exploring the area around a rocky stream near Marble. He came across an apparently natural arrangement of rocks and stones that looked like a scale model of the Avebury henge monument in Wiltshire County, England. The find was particularly interesting to Snipe, who was an adherent of Druidry, a neopagan religion with roots in 18th-century England. The Avebury henge was a sacred site for the ancient Druids, and it had been adopted as a sacred site by many modern Druids as well.

Snipe decided to relocate to Marble, and he shared news of his find with his fellow Druids. Marble ultimately became a tourist hot-spot in the Druid world, and many of the visitors made the same decision Snipe did and decided to move. In addition to the miniature henge monument, they were drawn by the forests in western Murrelet County, which are filled with the kind of groves and glades where the ancient druids conducted their ceremonies. Marble proved to be such a draw that Druidry eventually became the largest religious denomination in the county. In 2016, 82% of the people living in the area surrounding Marble were Druids.

Modern Druidry takes many forms, as there is no fixed dogma or required ceremonies or practices. Although there are areas of individual disagreement, the Druids in Murrelet County generally agree on many core principles. The Murrelet Druids are polytheists who

believe that divinity is present all parts of the natural world and can manifest itself in a multiplicity of gods and goddesses. They recognize that there is evil in the world, but they have no single figure serving as the embodiment of ultimate evil, nor any concept of Hell or damnation.

The Druids in Murrelet County believe that the soul is successively reincarnated in human and animal form. After death, the soul travels to the Otherworld, where it awaits reincarnation. The Druids believe that the Otherworld is real, but exists in a realm beyond the reach of the physical senses. The Druids accept the "Gaia theory," which posits that the Earth and its biosphere is a single living system of which everything in the natural world, including humans, are component parts or "cells." They view Nature itself as divine and believe that they have a sacred obligation to protect the natural world.

Murrelet County is governed by an elected, five-member Board of Commissioners. The Board has been controlled by a Druid majority since the 1990s. After the 2000 election, all five commissioners were Druid, and no non-Druid has been elected to the Board since then.

Board meetings are held twice a month in the auditorium of Marble High School. For at least the last 25 years, the Board has permitted each commissioner, on a rotating basis, to offer an invocation before the start of the Board's legislative agenda. The Chairperson generally calls each meeting to order and invites the Board and audience to stand for the invocation and the Pledge of Allegiance. The commissioners stand facing each other in a loose circle, and the designated commissioner delivers a prayer of his or her choosing. After the recital of the Pledge, the commissioners take their seats behind the table on the stage, and the meeting begins.

The designated commissioner usually begins the invocation with a phrase of invitation such as, "Let us pray," or "Please join me in a celebration of our natural world." The prayers offered by the commissioners typically take the form of statements of gratitude or requests for guidance directed to the gods and goddesses. One of the prayers most frequently mostly offered by the commissioners is The Druid's Prayer:

> Grant O, Gods and Goddesses, thy protection
> and in protection, strength
> and in strength, understanding
> and in understanding, knowledge
> and in knowledge, the knowledge of justice
> and in the knowledge of justice, the love of it
> and in the love of it, the love of all existences
> and in the love of all existences, the love of all Gods and Goddesses and all Goodness

Another frequently offered prayer is The Druid's Peace Prayer:

> Deep within the center of my being, may I find peace
> Silently within the quiet of the grove, may I share peace
> Gently and powerfully within the greater circle of humanity, may I radiate peace

When Board meetings coincide with the solstices or other important festivals, the opening invocation is more elaborate. Rather than staying on stage, the commissioners stand in the open area in front of the auditorium seating. After reciting the Pledge, the Chairperson invites any "willing souls" to join them in forming a circle. The designated commissioner stands in the center and addresses prayers to the four quarters of the circle: Facing east, the commissioner says, "I stand in the east, in the place of first light, and I call upon the powers of air and clarity to bless this circle with their presence." The commissioner then faces south and says, "I stand in the south, in the place of the Sun's greatest light, and I call upon the powers of fire and inspiration to bless this circle with their presence." Facing west, the commissioner says, "I stand in the west, in the place of the setting sun, and I call upon the powers of water and intuition to bless this circle with their presence." The commissioner then turns to face north and says, "I stand in the north, in the place of greatest darkness, and I call upon the powers of earth and steadfastness to bless this circle with their presence." The designated commissioner then asks the spirit of the circle to bless the meeting. The commissioners then return to their seats on stage and the meeting begins. As a general rule, most (but not all) of the Druids in the audience join the circle for these special prayers. Non-Druids sometimes join the circle, but many choose to remain at their seats. The same holds true at the regular Board meetings – there are always some Druids and non-Druids who remain seated during the invocations.

Tundra Swanson has been the Chairperson of the Board since 2005. Under her leadership, the Board in recent years has passed a series of ordinances aimed at protecting Murrelet County's natural resources. The centerpiece of the regulatory scheme is a comprehensive water-quality ordinance. Among other things, the ordinance places strict controls on the use of pesticides, fertilizers, and other chemicals in proximity to water sources. It also requires the placer mining operations to recycle the water used in separating out the gold and to follow certain guidelines when disposing of the "tailings" that remain after the gold has been removed.

Many of Murrelet County's farmers and miners opposed the water-quality ordinance, and they were unhappy when the ordinance passed with the overwhelming support of Druids and others who lived around Marble. Unhappy farmers and miners began regularly attending Board meetings to express their unhappiness and to request that the Board revise the ordinance. Among those who began regularly attending Board meetings were Gilda Flicker, a gold miner, and Jay Green, a goat farmer. Flicker and Green are Christians; Flicker is a Roman Catholic, and Green is a Southern Baptist.

At the first three Board meetings attended by Flicker and Green, the meetings were opened with the regular process – the Board remained on stage, Chairperson Swanson directed the audience to stand for the invocation and the Pledge, and a designated commissioner gave the invocation. At each meeting, Flicker and Green participated in the Pledge but stood silently during the invocation. There were a few audience members at each meeting who remained seated during the invocation and the Pledge.

The fourth Board meeting that Flicker and Green attended fell on the Festival of Beltane, and the Board followed the more elaborate circle-of-prayer process described above. Approximately two-thirds of the audience joined the Board in the circle; most of the remaining third stood at their seats. Flicker and Green stood for the Pledge, but they did not join the circle and took their seats during the invocation. Once the meeting began,

Green informed the Board that he objected to their exclusively Druid prayers, which he believed excluded those of different religious views. Chairperson Swanson thanked Green for his perspective, but declined to change the Board's prayer policy. She explained that the prayers helped to "center" the commissioners and put them in the right frame of mind for doing the County's important work.

Flicker and Green subsequently filed an action against Murrelet County in federal district court. They alleged that the County violated the First Amendment's Establishment Clause by affiliating the Board with Druidry and making those of other faiths feel like outsiders.

Tensions ran fairly high in the community after Flicker and Green filed their lawsuit. In an interview with a local newspaper, Commissioner Phoebe Black expressed her disapproval of certain farming and mining practices, saying that those who engage in such practices "fail to respect the deity of the streams they defile." The prayers given at the Board meetings became more pointed than usual. For example, Commissioner Black in one prayer asked the goddesses to impart "wisdom on those who poison the waters of Mother Gaia." On two occasions when giving the invocation, Commissioner Chip Sparrow expressed hope that "the blind will open their hearts and minds and recognize the pain they are inflicting on that which we are obliged to protect."

Shortly after Flicker and Green filed their complaint, the United States Supreme Court issued its opinion in *Town of Greece v. Galloway*, a case that challenged the constitutionality of the Town's practice of opening Town Board meetings with invocations given by invited clergy. The Court upheld the practice, concluding that it was consistent with the historical tradition of legislative prayer in this country and had not been used over time to proselytize or denigrate non-believers.

After the issuance of the Court's opinion in *Town of Greece*, Flicker and Green filed a motion for summary judgment, arguing that the undisputed facts show that they were entitled to judgment in their favor as a matter of law. The district court agreed and issued an order directing the County to discontinue its practice of opening Board meetings with prayer. In the district court's view, there was an important difference prayers led by county officials and the clergy-led prayers in *Town of Greece*. The district court also concluded that the circumstances surrounding the prayer was unduly coercive, as citizens about to make requests of the Board would feel compelled to participate in the invocation so as not to displease the commissioners who will be considering their requests.

The Board appealed the district court's decision to the United States Court of Appeals for the Twenty-Eighth Circuit. In a 2-1 decision, the Court of Appeals reversed the district court and concluded that Murrelet County's prayer practice was constitutional under the standards set out by the Supreme Court in *Town of Greece*. Flicker and Green sought review of the Court of Appeals' decision by filing a petition for writ of *certiorari* with the Supreme Court. The Supreme Court granted the writ and agreed to hear Flicker and Green's appeal.

II. Defendant's Exhibit A:
Legislative Prayer Practices in the U.S.

When opposing Flicker and Green's motion for summary judgment, Murrelet County submitted a document detailing the history and current practice of legislative prayer in the United States. Below is a summary of the information submitted to the district court.

Federal Government:

- Congress has opened its sessions with prayer since 1789. The House and Senate each employ a chaplain, which is a paid position.
- The House and the Senate both permit legislators to give opening invocations.

State Government:

- With the exception of the Hawaii Senate and the Massachusetts Senate, every State legislative chamber opens legislative sessions with an invocation.
- 29 states use a visiting member of clergy to deliver the opening prayer. 19 states designate a specific chaplain to serve the body. 2 states rely exclusively on lawmaker-led prayer.
- 27 states permit a legislator to give an opening invocation.

Local Government:

- Of the 276 counties within the jurisdiction of the Twenty-Eighth Circuit, the governing body of the county opened its meetings with prayer in 126.
- Of the 126 counties that open meetings with prayer, 79 rely exclusively on lawmaker-led prayer.

United States Court of Appeals,
Twenty-Eighth Circuit

Gilda Flicker and Jay Green, Plaintiff-Respondents,

v.

Murrelet County, Oregon, Defendant-Appellant.

Opinion

PARTRIDGE, Circuit Judge:

The Board of Commissioners of Murrelet County, Oregon ("the Board") opens its public meetings with an invocation delivered by a member of the Board. The district court determined that the practice violates the Establishment Clause of the First Amendment. Under the Supreme Court's most recent decision explaining legislative prayer, *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014), we find the Board's legislative prayer practice constitutional and reverse the judgment of the district court.

I.

A.

Following *Town of Greece*, the parties correctly acknowledge that sectarian legislative prayer, as a general matter, is compatible with the Establishment Clause. What remains in dispute is whether the Board's practice of the elected commissioners delivering such prayers makes a substantive constitutional difference. The district court found this feature largely dispositive. In its view, the prayer-giver's status as a member of the legislative body is a crucial and determinative difference. The district court's decision has the practical effect of imposing a bright-line prohibition on lawmaker-led prayer. That was error.

While *Town of Greece* involved a rotating group of local clergy, and *Marsh* concerned a paid chaplain, the Supreme Court in neither case attached any significance to the speakers' identities and simply confined its discussion to the facts surrounding the prayer practices before it. Nowhere did the Court say anything that could reasonably be construed as a requirement that outside or retained clergy are the only constitutionally permissible givers of legislative prayer. Quite the opposite, *Town of Greece* specifically directs our focus to what has been done in "Congress and the state legislatures," without any limitation regarding the officiant.

More importantly, the very "history and tradition" anchoring the Supreme Court's holding in *Town of Greece* underscores a long-standing practice not only of legislative prayer generally but of lawmaker-led prayer specifically. Opening invocations offered by elected legislators have long been accepted as a permissible form of religious observance. *See* S. Rep. No. 32-376, at 4 (1853) (commenting that the authors of the Establishment Clause "did not intend to prohibit a just expression of religious devotion by the legislators of the nation, even in their public character as legislators"). As just one example, the South

Carolina Provincial Congress—South Carolina's first independent legislature—welcomed an elected member to deliver its opening invocations. *See* South Carolina Provincial Congress, Thanks to the Continental Congress (Jan. 11, 1775). "The recognition of religion in these early public pronouncements is important, unless we are to presume the founders of the United States were unable to understand their own handiwork." *Myers v. Loudoun Cty. Sch. Bd.*, 418 F.3d 395, 404 (4th Cir. 2005).

This tradition of legislative prayer has continued to the present. A majority of state assemblies honor requests from individual legislators to give an opening invocation. Indeed, several states have enacted legislation recognizing the historical practice of legislative prayer. For example, a Virginia statute protects legislators who deliver a sectarian prayer during deliberative sessions. *See* Va. Code § 15.2-1416.1. And South Carolina expressly authorizes its elected officials to open meetings with prayer. *See* S.C. Code § 6-1-160(B)(1); *see also* Mich. H.R. Rule 16 (requiring the clerk of the Michigan House of Representatives to arrange "for a Member to offer an invocation" at the beginning of each session). Moreover, both houses of Congress allow members to deliver an opening invocation, and the Congressional Record is replete with examples. *See, e.g.*, 159 Cong. Rec. S3915 (daily ed. June 4, 2013) (prayer by Sen. William M. Cowan); 155 Cong. Rec. S13401-01 (daily ed. Dec. 18, 2009) (prayer by Sen. John Barrasso); 119 Cong. Rec. 17,441 (1973) (statement of Rep. William H. Hudnut III).

In view of this long and varied tradition of lawmaker-led prayer, we decline to accept the district court's view that legislative prayer forfeits its constitutionally protected status because a legislator delivers the invocation. A legal framework that would result in striking down legislative prayer practices that have long been accepted as "part of the fabric of our society" cannot be correct. We therefore reject the district court's determination that the fact of the prayer being led by a legislator is a significant constitutional distinction.

B.

The *Town of Greece* Court held that sectarian prayer was consistent with our historical tradition, but the Court recognized that there could be certain circumstances where sectarian references cause a legislative prayer practice to fall outside constitutional protection. "If the course and practice over time shows that the invocations denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion," a constitutional line can be crossed. In that circumstance, the Court observed, "many present may consider the prayer to fall short of the desire to elevate the purpose of the occasion and to unite lawmakers in their common effort." *Town of Greece*.

The record in this case reflects that the Board's prayer practice did not stray across this constitutional line of proselytization or disparagement. The content of the commissioners' prayers largely encompassed universal themes, such as giving thanks and requesting divine guidance in deliberations. References to exclusively Druid concepts typically consisted of a mention or gods and goddesses in the opening or closing lines, as well as occasional references to Gaia. There is no prayer in the record asking those who may hear it to convert to the prayer-giver's faith or belittling those who believe differently. And even if there were, it is the practice as a whole—not a few isolated incidents—which controls. *Town of Greece,* 134 S. Ct. 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.”).

Plaintiffs call our attention to a few examples that contain more forceful references to Druidry out of the hundreds of legislative prayers delivered before Board meetings. Plaintiffs' hypersensitive focus is misguided. *Town of Greece* “requires an inquiry into the prayer opportunity as a whole, rather than into the contents of a single prayer.” Given the respectful tone of nearly all the invocations delivered here, which largely mirror those identified in *Town of Greece*, the Board's practice crossed no constitutional line. *See id.* at 1824 (holding that a few stray remarks are insufficient to “despoil a practice that on the whole reflects and embraces our tradition”).

II.

We now turn to Plaintiffs' claims that the Board's legislative prayer practice is impermissibly coercive.

“It is an elemental First Amendment principle that government may not coerce its citizens to support or participate in any religion or its exercise.” *Town of Greece*, 134 S. Ct. at 1825. When deciding whether the prayer is coercive, we must conduct a fact-sensitive inquiry “consider[ing] both the setting in which the prayer arises and the audience to whom it is directed.” As the Court explained, coercion may exist “if town board members directed the public to participate in the prayers, singled out dissidents for opprobrium, or indicated that their decisions might be influenced by a person's acquiescence in the prayer opportunity.” *Id.* The Court also identified as problematic “practice[s] that classified citizens based on their religious views” or resulted in a pattern of prayers used to “intimidate” or “chastise dissenters.”

Although this part of the Court’s opinion was joined by only three justices, we will assume without deciding that the Court’s coercion analysis is binding on this court. We nevertheless conclude that the district court erred in finding the Board's prayer practice coercive under this framework.

Generally speaking, the commissioners’ prayers “neither chastised dissenters nor attempted lengthy disquisition on religious dogma.” *Town of Greece,* 134 S. Ct. at 1826. Moreover, the record shows that both attendance and participation in the invocations were voluntary. The Board has represented without contradiction that members of the public were free to remain seated or otherwise disregard the invocation in a manner that was not disruptive. Thus, citizens attending a Board meeting who found the prayer unwanted had several options available—they could arrive after the invocation, leave for the duration of the prayer, or remain for the prayer without participating: just like the audiences in *Marsh* and *Town of Greece*. And to the extent individuals like the Plaintiffs elected to stay, “their quiet acquiescence [would] not, in light of our traditions, be interpreted as an agreement with the words or ideas expressed.” *Town of Greece*, 134 S. Ct. at 1827. The record is similarly devoid of evidence that anyone who chose not to participate during the prayer suffered adverse consequences, that their absence was perceived as disrespectful, or was recognized by the Board in any way. Thus, it is implausible on this record to suggest that Plaintiffs were in a fair and real sense coerced to participate in the Board’s exercise of legislative prayer.

Plaintiffs' allegations that the prayer practice made them feel subjectively excluded at meetings does nothing to change the outcome. *Town of Greece* explicitly rejected the claim that a citizen's perceived "subtle pressure to participate in prayers that violate their beliefs in order to please the board members from whom they are about to seek a favorable ruling" constitutes coercion. This is true even where the legislative body may "know many of their constituents by name," making anonymity less likely for those citizens who decline to rise or otherwise participate in the invocation. Likewise, merely exposing constituents to prayer they find offensive is not enough. "[I]n the general course, 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." *Town of Greece*, 134 S. Ct. at 1827.

Plaintiffs next argue that the commissioners unacceptably directed public participation in the prayers. To reiterate, the Board's opening ceremony usually began with the Chairperson asking everyone to stand "for the Invocation and Pledge of Allegiance." The designated commissioner would then offer an invocation that typically started with "let us pray" or "please join me in celebration . . . ." Plaintiffs maintain that these statements amount to unconstitutional coercion. We disagree. Similar invitations have been routinely offered for over two centuries in the U.S. Congress, the state legislatures, and countless local boards and councils. No case has ever held such a routine courtesy opening a legislative session amounts to coercion of the gallery audience, and we decline to be the first.

As the Court explained in *Town of Greece*, "It is presumed that the reasonable observer is acquainted with [our historical tradition of legislative prayer] and understands that its purposes are to lend gravity to public proceedings and to acknowledge the place religion holds in the lives of many private citizens." 134 S. Ct. at 1825. Viewed through this lens, no reasonable person would interpret the commissioners' commonplace invitations as government directives commanding participation in the prayer. The phrase "let us pray" is a familiar and almost reflexive call to open an invocation that hardly compels in the rational mind thoughts of submission. The same goes for the Board's request for audience members to stand. We may safely assume that mature adults, like Plaintiffs, can follow such contextual cues without the risk of religious indoctrination.

Lastly, Plaintiffs claim they and others who do not share the Board's environmental zealotry were singled out for opprobrium by Board members signaling their disfavor of those who did not fall in line. Although the Plaintiffs point to a statement to a local newspaper by Commissioner Phoebe Black, as well as a few politically focused post-litigation prayers, these isolated incidents do not establish, as *Town of Greece* requires, "a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose." A few stray remarks are simply insufficient to "despoil a practice that on the whole reflects and embraces our tradition." *Town of Greece*, 134 S. Ct. at 1824.

III.

The legislative-prayer practice of Murrelet County falls within our recognized tradition and does not coerce participation by non-adherents. It is therefore constitutional. The district court erred in concluding to the contrary. Accordingly, the district court's grant of summary judgment is hereby reversed, and the case is remanded to the district court for further proceedings consistent with this opinion.

* * * * *

KITE, Circuit Judge, dissenting:

Murrelet County's prayer practice featured Druid invocations week after week, month after month, year after year, with the same sectarian references. To be sure, *Town of Greece* ruled that sectarian prayer is not by itself unconstitutional. But the issue before us turns on more than just prayer content, the primary concern in *Town of Greece*. Whereas guest ministers led prayers in that case, it was public officials who exclusively delivered the invocations in Murrelet County. Those prayers served to open a meeting of our most basic unit of government, a local board of commissioners that passes laws affecting citizens in the most daily aspects of their lives. This combination of legislators as the sole prayer-givers, official invitation for audience participation, consistently sectarian prayers referencing but a single faith, and the intimacy of a local governmental setting exceeds even a broad reading of *Town of Greece*.

I.

Though the majority treats this case as all but resolved by *Town of Greece*, that decision did not touch upon the combination of factors presented here, particularly the question of legislator-led prayer. Indeed, prayers by public officials form a distinct minority within Establishment Clause case law. The great majority of legislative prayer cases have not involved legislators at all, but invocations by guest ministers or local religious leaders. *E.g., Marsh v. Chambers*, 463 U.S. 783, 784–85 (1983) (invocation by a chaplain paid by the state at the opening of state legislative sessions); *Joyner v. Forsyth Cnty*., 653 F.3d 341, 343 (4th Cir. 2011) (prayers by leaders of local congregations at county commission meetings). The invocations in *Town of Greece* were likewise delivered solely by ministers from local congregations.

By contrast, the only eligible prayer-givers at Murrelet County board meetings were the five board commissioners, each of whom took up the responsibility in turn. Not only did they lead the prayers, but they also composed all the invocations according to their personal faiths, which was Druid for all of them. Of course, the prayer practice was not infirm simply because it was led by the commissioners. As the majority notes, there exists a robust tradition of prayers delivered by legislators. All but two state legislative bodies engage in legislative prayer or a moment of silence. Lawmakers lead at least some legislative prayers in just over half of those states. Many county governments also call upon elected officials to give prayer.

However, we cannot discern from the evidence which prayers were primarily for the benefit of legislators or commissioners, as in *Town of Greece*, and which focused, as the prayers did here, on requesting the citizens at the meeting to pray. Nor do we know what percentage of prayers given by elected officials generally contain sectarian references or proselytizing exhortations, or which are non-denominational or delivered by legislators of diverse faiths. We should focus then not on any general statistics but on the interaction among elements specific to this case: legislative prayer-givers exclusively of one faith, legislative invitation to the citizens before them to participate, and exclusively sectarian prayers referencing a single faith in every regular meeting of a local governing body over a

period of many years. At a certain point, the interaction of these elements rises to the level of coercion that *Town of Greece* condemned.

II.

A.

I begin with the fact that the commissioners themselves delivered the invocations. Legislator-led prayer, when combined with the other elements, poses a danger not present when ministers lead prayers. The Murrelet County commissioners, when assembled in their regular public meetings, are the very embodiment of the state. Since the 2000 election, all of the County's Board meetings have begun with Druid prayers.

The five commissioners, all Druid, maintained exclusive and complete control over the content of the prayers. When the state's representatives so emphatically evoke a single religion in nearly every prayer over a period of many years, that faith comes to be perceived as the one true faith, not merely of individual prayer-givers, but of government itself. The Board's rules and regulations bind residents of all faiths. And yet those laws that govern members of every faith are passed in meetings where government overtly embraces only one. That singular embrace runs up against "[t]he clearest command of the Establishment Clause," that "one religious denomination cannot be officially preferred over another." *Larson v. Valente,* 456 U.S. 228, 244 (1982).

An equally clear command is that "each separate government in this country should stay out of the business of writing or sanctioning official prayers." *Engel v. Vitale*, 370 U.S. 421, 435 (1962). *Town of Greece* echoed that principle even as it upheld legislative prayer: "Our Government is prohibited from prescribing prayers to be recited in our public institutions in order to promote a preferred system of belief or code of moral behavior." By instituting its elected officials as the sole proclaimers of the sole faith, Murrelet County is elbow-deep in the activities banned by the Establishment Clause—selecting and prescribing sectarian prayers.

Further, the prayer-giver's identity affects the range of religions represented in legislative prayer. Because only commissioners may give the invocation, potential prayer-givers in Murrelet County came from a closed universe dependent solely on electoral outcomes. While a small group of legislators can diversify their appointment of prayer-givers at will, it may be more difficult to expect voters to elect representatives of minority religious faiths. For instance, after residents in the town of Greece complained about the pervasive Christian prayers, local officials granted a Jewish layman, a Baha'i practitioner, and a Wiccan priestess the opportunity to lead prayers. The Court took comfort in the fact that "any member of the public is welcome in turn to offer an invocation reflecting his or her own convictions." But no guest ministers or clergy and no member of the public delivered an invocation here, that being reserved for the commissioners belonging to the faith that dominates the electorate.

B.

Town of Greece requires us to consider the effect of legislative prayer on the audience, not merely the actions of the prayer-givers. Here the effect is apparent. The attendees at Murrelet County board meetings, upon hearing the invocations uttered by the

state's representatives day in and day out, must have grasped the obvious: the Murrelet County Board of Commissioners favors one faith and one faith only.

Moreover, this message was amplified by frequent exhortations to participate. Commissioners spoke directly to the attendees during prayer, asking them to stand and leading with phrases like "Let us pray" or "Please join me in celebration." The record reflects that the great majority of attendees did in fact join the Board in standing, and the plaintiffs themselves alleged in their complaint that "as a result of the Board Chairperson's instructions, they sometimes felt compelled to stand so that they would not stand out. When reviewing phrases like "Let us pray," *Town of Greece* underscored that the requests "came not from town leaders but from the guest ministers." 134 S. Ct. at 1826. The Court noted that its "analysis would be different if town board members directed the public to participate in the prayers." Here they did.

A request to an audience to stand or pray carries special weight when conveyed in an official capacity by an elected commissioner. County board decisions affect both property and livelihood, including zoning laws and variances, school funding, police protection, fire prevention and sanitation budgets, and the location of parks and other areas of recreation. While I do not at all suggest that commissioners would base their decisions on who prays and who doesn't, the close proximity of participatory sectarian exercises to citizen petitions for the many benefits that local boards can withhold or dispense presents, to say the least, the opportunity for abuse.

C.

The Supreme Court made clear in *Town of Greece* that legislative prayer cannot be "exploited to proselytize or advance any one . . . faith or belief." 134 S. Ct. at 1823. Plaintiffs, all non-Druids, believe that many of the prayers offered by the commissioners were proselytizing and that the prayers advanced Druidry by denigrating non-believers.

In support of this argument, the Plaintiffs point primarily to the post-litigation prayer by Commissioner Black in which she asked the goddesses to impart "wisdom on those who poison the waters of Mother Gaia," and the prayers by Commissioner Sparrow expressing hope that "the blind will open their hearts and minds and recognize the pain they are inflicting on that which we are obliged to protect." The Plaintiffs also point to the frequently-delivered Druid's Prayer, which exalts "the love of all Gods and Goddesses and all Goodness." As the Plaintiffs argue, the post-litigation prayers amount to proselytizing. While there was no explicit statement that non-believers should convert to Druidry, the judgmental prayers make it clear that the commissioners think that the beliefs of non-Druids are wrong. And while the Druid Prayer is perhaps less overtly judgmental, its explicit association of polytheism with "all goodness" again suggests condemnation of monotheist faiths like Christianity.

These invocations thus sound like an invitation to take up the tenets of Druidry. And an invitation can take on tones of exhortation when issued from the lips of county leaders. As the majority notes, those attending the board meeting could have arrived after the invocation, left for the duration of the prayer, or remained for the prayer without participating. Those options, however, served only to marginalize.

Indeed, to speak of options masks important differences. People often go to church or join groups and organizations out of a sense of choice. It is the faith they have chosen or it is a group to which they wish to belong. But people often go to local government meetings in their capacity as citizens in order to assert their views or defend their rights vis-à -vis an entity with legal and coercive powers. These are two very different forms of attendance. In board meetings, it fell to non-Druid attendees, facing their elected representatives and surrounded by bowed heads, to choose between staying seated and unobservant, or acquiescing to the prayer practice. This no trivial choice, as it involves the pressures of civic life and the intimate precincts of the spirit.

The Murrelet County Board of Commissioners can solemnize its meetings without creating such tensions. The desire of this fine county for prayer at the opening of its public sessions can be realized in many ways, such as non-denominational prayers or diverse prayer-givers. Indeed, the availability of so many inclusive alternatives throws into relief the unfortunate confluence of factors in the county's practice. For the county to insist on uniformly sectarian prayer led by legislators of one faith in a closed and purely governmental space carries us far from the central premise of the Establishment Clause.

IV.

By pairing the Free Exercise Clause with the Establishment Clause in the First Amendment, the Framers struck a careful balance. Americans are encouraged to practice and celebrate their faith but not to establish it through the state. This seems an inapt moment to upset that ancient balance. The violent sectarian tensions in the Middle East are only the most visible religious divisions now roiling the globe. Are such levels of hostility likely here? Probably not, but it behooves us not to take our relative religious peace for granted and to recognize that the balance struck by our two great religion clauses just may have played a part in it. In venues large and small, a message of religious welcome becomes our nation's great weapon, never to be sheathed in this or any other global struggle. Believing that legislative prayer in Murrelet County can further both religious exercise and religious tolerance, I respectfully dissent.

In the Supreme Court of the United States

Gilda Flicker and Jay Green,
Petitioners,

v.

Murrelet County, Oregon,
Respondent.

BRIEF OF PETITIONERS

ISSUES PRESENTED

I. WHETHER MURRELET COUNTY'S POLICY OF OPENING MEETINGS OF THE BOARD OF COMMISSIONERS WITH PRAYER DELIVERED EXCLUSIVELY BY THE ALL-DRUID COMMISSIONERS IS CONSISTENT WITH THIS COUNTRY'S TRADITION OF LEGISLATIVE PRAYER

II. WHETHER THE COUNTY'S PRAYER POLICY IMPERMISSIBLY COERCES PARTICIPATION IN RELIGION

ARGUMENT

I. Murrelet County's Exclusive Reliance on Lawmakers to Deliver the Opening Invocation is Not Consistent with This Country's Tradition of Legislative Prayer

A. Exclusive Reliance on Lawmaker-led Prayer is Not Consistent with the Tradition of Legislative Prayer

The Supreme Court in *Town of Greece* held that a legislative-prayer policy is consistent with the Establishment Clause as long as the policy "fits within the tradition long followed in Congress and the state legislatures." 134 S. Ct. at 1818. Exclusive reliance on lawmaker-led prayer is not consistent with that tradition.

The *overwhelming* majority of legislative chambers use permanent chaplains or invited clergy members to deliver the opening invocation. More specifically, both houses of Congress and 48 states use chaplains or visiting clergy; only two states rely exclusively on lawmaker-led prayer. It is therefore clear that the tradition of legislative prayer in this country is a tradition of *clergy-led* prayer, not lawmaker-led prayer.

While Congress and 27 states *permit* lawmakers to give the invocation from time to time, there is a significant difference between lawmakers occasionally giving a prayer and lawmakers *always* giving *every* prayer. When lawmakers give every prayer, the prayer is more closely associated with the government than when prayer is delivered by clergy, even if the clergy member is in fact a government employee like a chaplain. And as will be discussed in more detail later, prayer delivered by lawmakers is more likely to feel coercive

to audience members, particularly where, as here, the lawmakers not only deliver the prayer but also direct the audience to participate in that prayer. Accordingly, given the fundamentally different way that exclusive lawmaker-led prayer is perceived by the audience, the prayer practice of Murrelet County must be understood to be outside this country's tradition of legislative prayer.

B. The Murrelet County Prayers Proselytize and Denigrate Other Faiths and Do Not Serve the Legitimate Function of Legislative Prayer

Even if exclusive lawmaker-led prayer were consistent with the tradition of legislative prayer, the Court held in *Town of Greece* held that a legislative-prayer policy can still violate the Constitution if it is inconsistent with the *purpose* of legislative prayer:

> The relevant constraint [on legislative prayer] derives from its place at the opening of legislative sessions, where it is meant to lend gravity to the occasion and reflect values long part of the Nation's heritage. Prayer that is solemn and respectful in tone, that invites lawmakers to reflect upon shared ideals and common ends before they embark on the fractious business of governing, serves that legitimate function. *If the course and practice over time shows that the invocations denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion, many present may consider the prayer to fall short of the desire to elevate the purpose of the occasion and to unite lawmakers in their common effort.* That circumstance would present a different case than the one presently before the Court.

Town of Greece, 134 S. Ct. at 1823 (emphasis added).

The prayers in Murrelet County do not serve the "legitimate function" identified in *Town of Greece*. The prayers here are not directed internally, towards focusing the commissioners on the task before them, but instead externally, towards the audience, who are directed by the commissioners to stand for the invocation and instructed to join in the prayer. The language used here when directing audience participation – *e.g.*, "Let us pray" – is similar to that found to be unproblematic in the *Town of Greece*. In that case, however, the "directions" were given by *invited clergy*, not the lawmakers themselves, which is a critical distinction. In *Town of Greece*, invited clergy directed prayers to an audience of the Board commissioners and meeting attendees. In this case, the commissioners direct prayers to the audience of meeting attendees. Thus, instead of providing the spiritual guidance to government officials that the Supreme Court approved in *Town of Greece*, the prayers in Murrelet County were exploited in order to press Druidry on citizens who attend Board meetings.

In addition to pressing their Druid beliefs on the citizens of Murrelet County, the commissioners denigrated non-Druids who did not ascribe to their Nature-revering beliefs. Commissioner Black accused non-Druid farmers and miners of "defil[ing]" streams and ignoring the "deity" of those streams, and she prayed that the "goddesses" would impart "wisdom on those who poison the waters of Mother Gaia." Commissioner Sparrow twice asked the gods to open the "hearts and minds" of the "blind" who disagreed with him on environmental issues. These statements and prayers clearly denigrate non-Druids. The prayers may not explicitly threaten damnation or preach conversion, but the intent and

effect is clear: The commissioners believe that their religion is the only correct one and that non-Druids are blind and foolish.

Because the prayers as delivered in Murrelet County are not directed to the commissioners themselves and are not "solemn and respectful in tone," the prayers do not "serve [the] legitimate function" that makes legislative prayer constitutional. *Town of Greece*, 134 S. Ct. at 1823. The Court of Appeals erred in concluding otherwise.

II. Murrelet County's Prayer Policy Impermissibly Coerces Citizens to Participate in Religion

A. The Coercion Analysis Set Out in *Town of Greece* is Binding as it Reflects the Views of Seven Justices

Justice Kennedy addressed the coercion question in part II-B of his opinion in *Town of Greece*; that section of the opinion was joined in only by Chief Justice Roberts and Justice Alito. An examination of the majority and dissenting opinions, however, shows that the dissenting justices agreed with the Kennedy plurality as to the factors that could make a prayer practice impermissibly coercive; the only disagreement was whether the facts of that case rose to the level of coercion.

Accordingly, because seven justices agreed on the circumstances that would support a finding of coercion, Justice Kennedy's coercion analysis should be viewed as binding precedent. But even if the coercion analysis is not technically binding, it is a compelling and persuasive analysis that should be explicitly adopted by this Court in its opinion in this case.

B. The County's Prayer Policy Impermissibly Coerces the Public to Participate in Religion

"It is an elemental First Amendment principle that government may not coerce its citizens to support or participate in any religion or its exercise." *Town of Greece*, 134 S. Ct. at 1825. Although the Court found no coercion under the facts of *Town of Greece*, the Court stated that the "analysis would be different if town board members directed the public to participate in the prayers, singled out dissidents for opprobrium, or indicated that their decisions might be influenced by a person's acquiescence in the prayer opportunity." *Id.* Determining whether a legislative-practice is coercive is "a fact-sensitive one that considers both the setting in which the prayer arises and the audience to whom it is directed." *Id.* Consideration of those factors in this case compels the conclusion that the County's prayer practice is impermissibly coercive.

1. The Murrelet County Prayers Arise in an Inherently Coercive Setting

The prayers at issue in this case are delivered at the public meeting of the Murrelet County Board of Commissioners. When citizens visit Congress and state legislatures, they are typically just that – visitors. They observe the proceedings, but do not participate and do not make individual requests of the legislators. Meetings of local governmental bodies are entirely different, however. The Board has direct authority over many matters that have a direct effect on the lives of the County's citizens – zoning ordinances and variances, school funding, fire prevention, etc. Citizens attend Board meetings to petition their government and obtain assistance from the commissioners. Because they are there to ask for a favorable response from someone in power, citizens who attend local government

meetings could very reasonably fear that refusing to participate in the prayers – prayers that are delivered by the very officials who will hear and decide their plea -- will jeopardize their chances of obtaining a favorable decision.

2. The Commissioners Direct the Audience to Participate in the Prayers

The coerciveness of the setting is amplified by the fact that the commissioners themselves direct the audience to participate in the prayers, a fact the Supreme Court stated would change the coercion analysis. *See Town of Greece*, 134 S. Ct. at 1826 (explaining that the coercion analysis "would be different *if town board members directed the public to participate in the prayers*" (emphasis added)).

The reason the Supreme Court flagged this fact as indicative of coercion is clear. As noted, citizens attend Board meetings in order to ask the Board to act in their favor. Minutes before they will make their requests directly to the commissioners, the commissioners direct the attendees to participate in a prayer. Attendees may understandably fear that refusing to participate in a prayer delivered by the commissioners would make it harder to obtain favorable decisions or to influence the policy decisions about to be made by the commissioners. Under these circumstances, citizens with business before the commissioners have little practical choice but to participate in the commissioners' prayers.

Moreover, the fact that the commissioners direct the audience to participate distinguishes this case from *Town of Greece* and shows that the "principal audience" for the prayers is not the Commissioners themselves, but the members of the public attending the meetings. *Town of Greece*, 134 S. Ct at 1825. The purpose of the prayers is not "to accommodate the spiritual needs of lawmakers," *id.*, but to press the views of the commissioners on the public. Accordingly, because the commissioners direct the audience participate in the prayers that the Commissioners will be delivering, Murrelet County's prayer policy coerces those attending the Board meetings to participate in prayer.

3. The Exclusive Druid Focus of the Prayers Contributes to the Coercive Setting

In *Town of Greece*, the Supreme Court held that legislative prayer does not violate the Establishment Clause simply because the prayer is sectarian. Nevertheless, the Court held that the coercion inquiry is a "fact-sensitive one." In this case, the unrelenting drumbeat of Druid doctrine is a factor that contributes to the coerciveness of the prayers.

The prayers given in Murrelet County included repeated references to "gods," "goddesses;" and "Gaia," concepts that are in no sense universal, but are instead specific to Druid doctrine. The commissioners may not have explicitly sought conversion through their prayers, but the constant and exclusive reference to Druid doctrine makes it clear that the commissioners think the beliefs of non-Druids are wrong. Moreover, the Druid Prayer effectively condemns monotheistic faiths like Christianity by associating polytheism with "all goodness."

If the prayer practice in this case had been like that in *Town of Greece*, where different invited clergy delivered the invocations, it would be easier for those attending the meetings to view the diverse prayers as merely "lend[ing] gravity to public proceedings and acknowledg[ing] the place religion holds in the lives of many private citizens." *Town of Greece*, 134 S. Ct. at 1825. As the dissenting judge in the Court of Appeals explained,

however, "[w]hen the state's representatives so emphatically evoke a single religion in nearly every prayer over a period of many years, that faith comes to be perceived as the one true faith, not merely of individual prayer-givers, but of government itself." When the message from the Board of Commissioners is that Druidry is the one true faith of Murrelet County, those attending the Board meetings would reasonably feel compelled to participate in the prayers as directed by the government officials who wield direct power over them.

4. Commissioners Used the Invocation to Single Out Dissidents for Opprobrium

The Court explained in *Town of Greece* that a practice of legislative prayer can be unconstitutionally coercive if the prayer was used to "single[] out dissidents for opprobrium." *Town of Greece*, 134 S. Ct. at 1825. The Commissioners here did just that.

After controversy erupted over Chairperson Tundra Swanson's environmental agenda and the water-quality ordinance, the commissioners began using the opening prayer to criticize the non-Druids who were complaining about the ordinance. Commissioner Black implored the goddesses to impart "wisdom on those who poison the waters of Mother Gaia," while Commissioner Sparrow hoped that "the blind will open their hearts and minds and recognize the pain they are inflicting on that which we are obliged to protect." Although the commissioners did not identify anyone by name, the prayers were clearly used to single out non-Druids for opprobrium. Given the Board's willingness to use the opening prayer to publicly shame those who disagree with the Board, anyone with business before the Board would surely feel compelled to participate in the commissioners' prayer rituals so as to avoid the wrath of displeased commissioners.

CONCLUSION

The Twenty-Eighth Circuit Court of Appeals erred by upholding the prayer policy of the Board of Commissioners of Murrelet County. The policy is not consistent with the tradition of legislative prayer in this country, as the prayers are delivered exclusively by the commissioners and are focused outward, on the audience, rather than inward, on the commissioners themselves. Moreover, the Board's practice of delivering opening invocations coerces the citizens attending the meetings to participate in the commissioners' Druid faith. Petitioners Gilda Flicker and Jay Green therefore respectfully request that this Court reverse the decision of the Court of Appeals and hold that the Murrelet County's legislative-prayer policy violates the Establishment Clause of the United States Constitution.

In the Supreme Court of the United States

Gilda Flicker and Jay Green,
Petitioners,

v.

Murrelet County, Oregon,
Respondent.

BRIEF OF RESPONDENT

ISSUES PRESENTED

I. WHETHER MURRELET COUNTY'S POLICY OF OPENING MEETINGS OF THE BOARD OF COMMISSIONERS WITH PRAYER DELIVERED EXCLUSIVELY BY THE COMMISSIONERS IS CONSISTENT WITH THE HISTORY AND TRADITION OF LEGISLATIVE PRAYER

II. WHETHER THE COUNTY'S PRAYER POLICY IMPERMISSIBLY COERCES PARTICIPATION IN RELIGION

ARGUMENT

The Board of Commissioners of Murrelet County opens each of its public meetings with an invocation given by the commissioners on a rotating basis. The County's policy is consistent with this Country's long-standing tradition of legislative prayer and does not coerce audience members to participate in religious activity. The Court of Appeals therefore properly rejected the Petitioners' claim that the prayers violated the First Amendment.

I. THE BOARD'S PRAYER POLICY IS CONSISTENT WITH THE TRADITION OF LEGISLATIVE PRAYER

As the Supreme Court explained in *Town of Greece*, "legislative prayer, while religious in nature, has long been understood as compatible with the Establishment Clause. As practiced by Congress since the framing of the Constitution, 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." *Town of Greece*, 134 S. Ct. at 1818. Accordingly, where the constitutionality of legislative prayer is at issue, the inquiry "must be to determine whether the prayer practice . . . fits within the tradition long followed in Congress and the state legislatures." *Id.*

A. The County's Use of Lawmaker-led Prayer Is Consistent With Tradition

Town of Greece requires courts to evaluate legislative-prayer practices in light of "historical practices and understandings." As the Court explained in *Town of Greece*, the practice of legislative prayer is as old as our country. Both house of Congress open their daily sessions with prayer, and have done so since the First Congress. At the state level, all but two legislative chambers open their sessions with prayer. Murrelet County's general

practice of opening its Board meetings with prayers is thus consistent with that of almost every other legislative body in the country. That the County relies exclusively on the commissioners to deliver the invocations does not take the County's prayer policy outside the historical tradition.

As recognized by the majority opinion from the Court of Appeals in this case, lawmaker-led prayer is not at all unusual in this country. Although the House and Senate both employ chaplains, members of Congress have frequently delivered the opening prayer. Lawmaker-led prayer is also common at the state and local level. More than half of the States permit lawmakers to deliver the prayer, and two states rely exclusively on lawmaker-led prayer. And of the 276 counties within the jurisdiction of the appeals court, the governing bodies in 126 of those counties open their meetings with prayers. Among the counties that use legislative prayer, 79 exclusively use lawmakers to lead the prayers.

There is, of course, a difference between lawmakers *occasionally* giving the invocation and lawmakers *always* giving the invocation, but it is not a constitutionally significant difference. As noted above, almost two-thirds of the county boards that open with prayer exclusively use lawmaker-led prayer, and more than half of the states are receptive to lawmaker-led prayer on at least some occasions. Murrelet County's prayer practice is thus entirely consistent with the practice of a strong majority of its neighboring counties and is in no way inconsistent with the practices at the state and federal level. The Supreme Court, which was fully aware of the diverse prayer practices of the state legislative chambers, requires only that a legislative-prayer policy "fit[] within the tradition" of legislative prayer. *Town of Greece*, 134 S. Ct. at 1818. Murrelet County's prayer policy easily meets that standard.

B. The Pattern of Prayers Given in Murrelet County Do No Denigrate Nonbelievers or Religious Minorities, Threaten Damnation, or Preach Conversion

The Supreme Court upheld the prayer policy at issue in *Town of Greece*, but the Court noted that the result might be different "[i]f the course and practice over time shows that the invocations denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion." *Town of Greece*, 134 S. Ct. at 1823. Under those circumstances, the prayer practice would not serve the "legitimate function" of "invit[ing] lawmakers to reflect upon shared ideals and common ends before they embark on the fractious business of governing." *Id.* Contrary to the Petitioners' argument, Murrelet County's prayer practice serves the legitimate function of legislative prayer, and the prayers of the commissioners do not denigrate nonbelievers or otherwise stray from the purpose pf legislative prayer.

First, the prayers are directed to and for the benefit of the commissioners themselves. As Chairperson Tundra Swanson explained to Petitioner Green, the purpose of the prayers is to "center the commissioners and put them in the right frame of mind for doing the County's important work." The manner in which the prayers are delivered also confirms the inward focus of the prayers. The prayers are delivered while the commissioners stand in a circle facing each other, not the audience. When the designated commissioner says "Let us pray," or "Join me in celebration," he or she is thus speaking most directly to the other commissioners, not the audience. The prayer practice on the occasional festival days may be more elaborate than the usual prayer, but it is not fundamentally different. The festival prayer remains inwardly focused, as the commissioners stand in a circle facing each

other, and the designated commissioner stands inside the circle and directs the prayers to those inside the circle.

Second, the pattern of prayers given in Murrelet County were and continue to be "solemn and respectful in tone." *Town of Greece*, 134 S. Ct. at 182. The prayers "invoked universal themes," *id.* at 1824, by seeking strength, understanding, and love in the Druid's Prayer or seeking to radiate peace in the Druid's Peace Prayer. The festival prayer again is more elaborate, but still it invokes universal themes of clarity, inspiration, intuition, and steadfastness. The prayers do not seek converts, nor threaten damnation. Indeed, the concepts of Hell and damnation are foreign to Druids.

To be sure, the record contains a few prayers that were arguably more topical and political than universal. While Murrelet County disagrees with Petitioners' assertion that those prayers denigrated non-believers, the relevant point is that those prayers are aberrations. Of the hundreds of prayers that have been given in the County, the Petitioners can point only to three prayers that arguably "strayed from the rationale" supporting legislative prayer, *Town of Greece*, 134 S. Ct. at 1824. Those few prayers "do not despoil a practice that *on the whole* reflects and embraces our tradition. 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." *Id.* (emphasis added).

II. Murrelet County's Prayer Policy is Materially Indistinguishable from the Policy in *Town of Greece* and Does Not Coerce Participation in Religion

A. Justice Kennedy's Coercion Analysis is Not Binding Precedent

As the Petitioners acknowledge, the coercion standard articulated by Justice Kennedy in *Town of Greece* and joined by only two other justices. When a majority of the justices do not agree on a single rationale for deciding a case, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193 (1977). The Petitioners patch together the votes of the justices in the plurality, who voted to *uphold* the prayer policy, with the votes of the dissenting justices, who voted to *strike down* the prayer policy. Under the *Marks* rule, however, we must try to find the common ground in the views of the justices "who concurred in the judgment" upholding the prayer practice. Justices Thomas and Scalia argued that only actual legal coercion is constitutionally relevant, while Justice Kennedy, Roberts, and Alito believe coercion can encompass more than actual legal coercion. Thus, the only point of agreement between the five concurring justices is the unremarkable and irrelevant (to this case) proposition that the Establishment Clause would be violated by "coercion of religious orthodoxy and of financial support by force of law and threat of penalty." *Town of Greece*, 134 S. Ct. at 1837 (Thomas, J., concurring).

Justice Kennedy's discussion of coercion is therefore not binding precedent, and this Court is free to conclude that the kind of "subtle pressures" alleged in this case do not give rise to a violation of the Establishment Clause.

B. Assuming the Coercion Analysis is Relevant, the Prayer Policy in Murrelet County Does Not Coerce Participation in Religion

In *Town of Greece*, the Court found no coercion under the facts presented in that case, but it indicated that the "analysis would be different if town board members directed the public to participate in the prayers, singled out dissidents for opprobrium, or indicated that their decisions might be influenced by a person's acquiescence in the prayer opportunity." *Town of Greece*, 134 S. Ct. at 1825. The facts of this case are largely similar to those in *Town of Greece*, and any differences are not constitutionally significant.

Contrary to the Petitioners' argument, the setting of the prayers – a public meeting of County's governing body – is not inherently coercive. In *Town of Greece*, the Supreme Court expressly considered the intimate nature of town meetings, *see id.* at 1824-25, but still found no coercion. The setting here is identical to that in *Town of Greece*, and it is no more coercive here than it was in that case.

As the Petitioners note, the Court suggested that a prayer policy might be impermissibly coercive if "board members directed the public to participate in the prayers." *Town of Greece,* 134 S. Ct. at 1826. While the commissioner delivering the prayer generally begins with a statement like "Let us pray" or "Join me in celebration," that statement, as discussed above, is really directed to the commissioners standing in the prayer circle, not to the public attending the meeting. As the facts presented to the district court established, at every Board meeting there are attendees who do not stand or otherwise participate in the prayer, which shows that the audience understands participation to be completely optional. Moreover, citizens who would prefer not to hear the prayer are free to avoid it entirely, either by leaving the auditorium during the prayer or arriving after the prayer concludes. The practice in Murrelet County therefore does not involve the commissioners directing participation in the manner with which the Supreme Court was concerned in *Town of Greece*.

As to the claim that those attending the meeting would feel compelled to participate in the prayers in order to stay on the commissioners' good side, the theoretical possibility of such a fear is not enough to violate the Establishment Clause. As the Court made clear in *Town of Greece*, proof of *actual* retaliation by commissioners is required to show coercion. *See id.* at 1826 ("Respondents suggest that constituents might feel pressure to join the prayers to avoid irritating the officials who would be ruling on their petitions, *but this argument has no evidentiary support.* Nothing in the record indicates that town leaders allocated benefits and burdens based on participation in the prayer, or that citizens were received differently depending on whether they joined the invocation or quietly declined." (emphasis added)). Because the record in this case is devoid of any evidence of retaliation by the commissioners against non-Druids, this argument should be rejected.

The Petitioners also contend that the prayers were coercive because of the "unrelenting drumbeat of Druid doctrine," which the Petitioners claim showed that the commissioners believed non-Druids are wrong. The County strongly disagrees.

Although the prayers included concepts specific to Druidry, the prayers in *Town of Greece* likewise included concepts specific to Christianity. Stating a belief in "gods and goddesses" does not amount to a condemnation of monotheism any more than the Christian prayers in *Town of Greece* amounted to condemnations of polytheism. As the Court explained in *Town of Greece*,

> The tradition reflected in *Marsh* permits chaplains to ask their own God for blessings of peace, justice, and freedom that find appreciation among people of all faiths. That a prayer is given in the name of Jesus, Allah, or Jehovah, or that it makes passing reference to religious doctrines, does not remove it from that tradition. These religious themes provide particular means to universal ends. Prayer that reflects beliefs specific to only some creeds can still serve to solemnize the occasion, *so long as the practice over time is not exploited to proselytize or advance any one, or to disparage any other, faith or belief*.

Id. at 1823 (emphasis added).

The prayers as delivered in Murrelet County do not cross the line drawn in *Town of Greece*. The principal audience for the prayers is the commissioners, as indicated by Chairperson Swanson in response to Petitioner Green's objection, and by the manner in which the prayers are delivered, as discussed above. Even if a few post-litigation prayers could be viewed as singling out non-Druids for opprobrium, the overall pattern of prayers delivered by the commissioners is respectful and solemn. Petitioners Flicker and Green contend that the Druid prayers made them feel like outsiders at the meeting. While that fact is unfortunate and not at all what the commissioners intended, it is not a constitutionally significant fact. "Offense . . . does not equate to coercion. Adults often encounter speech they find disagreeable; and an Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views in a legislative forum . . . ." *Town of Greece*, 134 S. Ct at 1826.

CONCLUSION

The practice of legislative prayer followed by Murrelet County is completely consistent with this Nation's tradition of legislative prayer. The prayers express largely universal themes and are directed to the commissioners themselves, to help them focus their minds "before they embark on the fractious business of governing." *Town of Greece*, 134 S. Ct. at 1823. Murrelet County therefore respectfully requests that this Court affirm the decision of the Court of Appeals upholding the County's legislative-prayer policy.

SUPREME COURT OF THE UNITED STATES
Frank MARSH, State Treasurer, et al., Petitioners
v.
Ernest CHAMBERS, Respondent.
Decided July 5, 1983.
Chief Justice BURGER delivered the opinion of the Court.

The question presented is whether the Nebraska Legislature's practice of opening each legislative day with a prayer by a chaplain paid by the State violates the Establishment Clause of the First Amendment.

I

The Nebraska Legislature begins each of its sessions with a prayer offered by a chaplain who is chosen biennially by the Executive Board of the Legislative Council and paid out of public funds. Robert E. Palmer, a Presbyterian minister, has served as chaplain since 1965 at a salary of $319.75 per month for each month the legislature is in session.

Ernest Chambers is a member of the Nebraska Legislature and a taxpayer of Nebraska. Claiming that the Nebraska Legislature's chaplaincy practice violates the Establishment Clause of the First Amendment, he brought this action under 42 U.S.C. § 1983, seeking to enjoin enforcement of the practice. After denying a motion to dismiss on the ground of legislative immunity, the District Court, held that the Establishment Clause was not breached by the prayers, but was violated by paying the chaplain from public funds. It therefore enjoined the Legislature from using public funds to pay the chaplain; it declined to enjoin the policy of beginning sessions with prayers.

The Court of Appeals for the Eighth Circuit applied the three-part test of *Lemon v. Kurtzman,* 403 U.S. 602, 612–613 (1971), the court held that the chaplaincy practice violated all three elements of the test: the purpose and primary effect of selecting the same minister for 16 years and publishing his prayers was to promote a particular religious expression; use of state money for compensation and publication led to entanglement. Accordingly, the Court of Appeals modified the District Court's injunction and prohibited the State from engaging in any aspect of its established chaplaincy practice.

We granted certiorari limited to the challenge to the practice of opening sessions with prayers by a State-employed clergyman, 459 U.S. 966, 103 S.Ct. 292, 74 L.Ed.2d 276 (1982), and we reverse.

II

The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country. From colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom. In the very courtrooms in which the United States District Judge and later three Circuit Judges heard and decided this case, the proceedings opened with an announcement that concluded, "God save the United States and this Honorable Court." The same invocation occurs at all sessions of this Court.

The tradition in many of the colonies was, of course, linked to an established church,[5] but the Continental Congress, beginning in 1774, adopted the traditional procedure of

opening its sessions with a prayer offered by a paid chaplain. Although prayers were not offered during the Constitutional Convention, the First Congress, as one of its early items of business, adopted the policy of selecting a chaplain to open each session with prayer. Thus, on April 7, 1789, the Senate appointed a committee "to take under consideration the manner of electing Chaplains." J. of the Sen. 10. On April 9, 1789, a similar committee was appointed by the House of Representatives. On April 25, 1789, the Senate elected its first chaplain, J. of the Sen. 16; the House followed suit on May 1, 1789, J. of the H.R. 26. A statute providing for the payment of these chaplains was enacted into law on Sept. 22, 1789.

On Sept. 25, 1789, three days after Congress authorized the appointment of paid chaplains, final agreement was reached on the language of the Bill of Rights, J. of the Sen. 88; J. of the H.R. 121.[9] Clearly the men who wrote the First Amendment Religion Clause 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. It has also been followed consistently in most of the states, including Nebraska, where the institution of opening legislative sessions with prayer was adopted even before the State attained statehood. Nebraska Journal of the Council at the First Regular Session of the General Assembly 16 (Jan. 22, 1855).

[9] Interestingly, Sept. 25, 1789 was also the day that the House resolved to request the President to set aside a Thanksgiving Day to acknowledge "the many signal favors of Almighty God," J. of the H.R. 123. See also J. of the Sen. 88.

Standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees, but there is far more here than simply historical patterns. In this context, historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress—their actions reveal their intent. An act "passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, ... is contemporaneous and weighty evidence of its true meaning." *Wisconsin v. Pelican Ins. Co.,* 127 U.S. 265, 297 (1888).

In *Walz v. Tax Comm'n,* 397 U.S. 664, 678, 90 S.Ct. 1409, 1416, 25 L.Ed.2d 697 (1970), we considered the weight to be accorded to history:

> "It is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it. Yet an unbroken practice ... is not something to be lightly cast aside."

No more is Nebraska's practice of over a century, consistent with two centuries of national practice, to be cast aside. 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 States, they intended the Establishment Clause of the Amendment to forbid what they had just declared acceptable. In applying the First Amendment to the states through the Fourteenth Amendment, *Cantwell v. Connecticut,* 310 U.S. 296 (1940), it would be incongruous to interpret that

clause as imposing more stringent First Amendment limits on the States than the draftsmen imposed on the Federal Government.

This unique history leads us to accept the interpretation of the First Amendment draftsmen who saw no real threat to the Establishment Clause arising from a practice of prayer similar to that now challenged. We conclude that legislative prayer presents no more potential for establishment than the provision of school transportation,, beneficial grants for higher education, or tax exemptions for religious organizations*.*

Respondent cites Justice BRENNAN's concurring opinion in *Abington School Dist. v. Schempp,* 374 U.S. 203, 237,(1963), and argues that we should not rely too heavily on "the advice of the Founding Fathers" because the messages of history often tend to be ambiguous and not relevant to a society far more heterogeneous than that of the Framers, *id.,* at 240. Respondent also points out that John Jay and John Rutledge opposed the motion to begin the first session of the Continental Congress with prayer.

We do 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, by force of long tradition and without regard to the problems posed by a pluralistic society. Jay and Rutledge specifically grounded their objection on the fact that the delegates to the Congress "were so divided in religious sentiments ... that [they] could not join in the same act of worship." Their objection was met by Samuel Adams, who stated that "he was no bigot, and could hear a prayer from a gentleman of piety and virtue, who was at the same time a friend to his country." C. Adams, Familiar Letters of John Adams and his Wife, Abigail Adams, during the Revolution 37–38, reprinted in Stokes, at 449.

This interchange emphasizes that the delegates did not consider opening prayers as a proselytizing activity or as symbolically placing the government's "official seal of approval on one religious view" cf. 675 F.2d, at 234. Rather, the Founding Fathers looked at invocations as "conduct whose ... effect ... harmonize[d] with the tenets of some or all religions." *McGowan v. Maryland,* 366 U.S. 420, 442 (1961). The Establishment Clause does not always bar a state from regulating conduct simply because it "harmonizes with religious canons." *Id.,* at 462 (Frankfurter, J., concurring). Here, the individual claiming injury by the practice is an adult, presumably not readily susceptible to religious indoctrination, or peer pressure

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. To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an "establishment" of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country. As Justice Douglas observed, "[w]e are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson,* 343 U.S. 306, 313 (1952).

III

We turn then to the question of whether any features of the Nebraska practice violate the Establishment Clause. Beyond the bare fact that a prayer is offered, three points have been made: first, that a clergyman of only one denomination—Presbyterian—has been selected for 16 years;[13] second, that the chaplain is paid at public expense; and third, that

the prayers are in the Judeo-Christian tradition.[14] Weighed against the historical background, these factors do not serve to invalidate Nebraska's practice.

[13] In comparison, the First Congress provided for the appointment of two chaplains of different denominations who would alternate between the two chambers on a weekly basis, J. of the Sen. 12; J. of the H.R. 16.

[14] 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.

The Court of Appeals was concerned that Palmer's long tenure has the effect of giving preference to his religious views. We, no more than Members of the Congresses of this century, can perceive any suggestion that choosing a clergyman of one denomination advances the beliefs of a particular church. To the contrary, the evidence indicates that Palmer was reappointed because his performance and personal qualities were acceptable to the body appointing him. Palmer was not the only clergyman heard by the Legislature; guest chaplains have officiated at the request of various legislators and as substitutes during Palmer's absences. 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.

Nor is the compensation of the chaplain from public funds a reason to invalidate the Nebraska Legislature's chaplaincy; remuneration is grounded in historic practice initiated, as we noted earlier, by the same Congress that adopted the Establishment Clause of the First Amendment. The Continental Congress paid its chaplain, see *e.g.,* 6 J. of the Continental Cong. 887 (1776), as did some of the states, see *e.g.,* Debates and other Proceedings of the Convention of Va. 470 (June 26, 1788). Currently, many state legislatures and the United States Congress provide compensation for their chaplains, Brief for Nat'l Conference of State Legislatures as *Amicus Curiae* 3; 2 U.S.C. §§ 61d and 84–2; H.R.Res. 7, 96th Cong., 1st Sess. (1979). Nebraska has paid its chaplain for well over a century, see 1867 Neb.Laws §§ 2–4 (June 21, 1867), reprinted in, Neb.Gen'l Stat. 459 (1873). 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.

We do not doubt the sincerity of those, who like respondent, believe that to have prayer in this context risks the beginning of the establishment the Founding Fathers feared. But this concern is not well founded, for as Justice Goldberg, aptly observed in his concurring opinion in *Abington,* 374 U.S., at 308, 83 S.Ct., at 1616:

> "It is of course true that great consequences can grow from small beginnings, but the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow."

The unbroken practice for two centuries in the National Congress, for more than a century in Nebraska and in many other states, gives abundant assurance that there is no real threat "while this Court sits," *Panhandle Oil Co. v. Mississippi ex rel. Knox,* 277 U.S.

218, 223 (1928) (Holmes, J., dissenting).

The judgment of the Court of Appeals is

Reversed.
Justice BRENNAN, with whom Justice MARSHALL joins, dissenting.

The Court today has written a narrow and, on the whole, careful opinion. In effect, the Court holds that officially sponsored legislative prayer, primarily on account of its "unique history," is generally exempted from the First Amendment's prohibition against "the establishment of religion." The Court's opinion is consistent with dictum in at least one of our prior decisions, and its limited rationale should pose little threat to the overall fate of the Establishment Clause. I believe that the practice of official invocational prayer, as it exists in Nebraska and most other State Legislatures, is unconstitutional. It is contrary to the doctrine as well the underlying purposes of the Establishment Clause, and it is not saved either by its history or by any of the other considerations suggested in the Court's opinion. I respectfully dissent.

I

The Court makes no pretense of subjecting Nebraska's practice of legislative prayer to any of the formal "tests" that have traditionally structured our inquiry under the Establishment Clause. That it fails to do so is, in a sense, a good thing, for it simply confirms that the Court is carving out an exception to the Establishment Clause rather than reshaping Establishment Clause doctrine to accommodate legislative prayer. For my purposes, however, I must begin by demonstrating what should be obvious: that, if the Court were to judge legislative prayer through the unsentimental eye of our settled doctrine, it would have to strike it down as a clear violation of the Establishment Clause.

The most commonly cited formulation of prevailing Establishment Clause doctrine is found in *Lemon v. Kurtzman,* 403 U.S. 602 (1971):

> "Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute [at issue] 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.' " *Id.,* at 612–613.

That the "purpose" of legislative prayer is preeminently religious rather than secular seems to me to be self-evident. "To invoke Divine guidance on a public body entrusted with making the laws," *ante,* at 3336, is nothing but a religious act. Moreover, whatever secular functions legislative prayer might play—formally opening the legislative session, getting the members of the body to quiet down, and imbuing them with a sense of seriousness and high purpose—could so plainly be performed in a purely nonreligious fashion that to claim a secular purpose for the prayer is an insult to the perfectly ***798** honorable individuals who instituted and continue the practice.

The "primary effect" of legislative prayer is also clearly religious. As we said in the

context of officially sponsored prayers in the public schools, "prescribing a particular form of religious worship," even if the individuals involved have the choice not to participate, places "indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion" *Engel v. Vitale,* 370 U.S. 421, 431, (1962). More importantly, invocations in Nebraska's legislative halls explicitly link religious belief and observance to the power and prestige of the State. "[T]he mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred." *Larkin v. Grendel's Den.*

Finally, there can be no doubt that the practice of legislative prayer leads to excessive "entanglement" between the State and religion. *Lemon* pointed out that "entanglement" can take two forms: First, a state statute or program might involve the state impermissibly in monitoring and overseeing religious affairs. 403 U.S., at 614–622. In the case of legislative prayer, the process of choosing a "suitable" chaplain, whether on a permanent or rotating basis, and insuring that the chaplain limits himself or herself to "suitable" prayers, involves precisely the sort of supervision that agencies of government should if at all possible avoid

Second, excessive "entanglement" might arise out of "the divisive political potential" of a state statute or program. 403 U.S., at 622. "Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect. The potential divisiveness of such conflict is a threat to the normal political process." *Ibid.* (citations omitted).

In this case, this second aspect of entanglement is also clear. The controversy between Senator Chambers and his colleagues, which had reached the stage of difficulty and rancor long before this lawsuit was brought, has split the Nebraska Legislature precisely on issues of religion and religious conformity. App. 21–24. The record in this case also reports a series of instances, involving legislators other than Senator Chambers, in which invocations by Reverend Palmer and others led to controversy along religious lines. And in general, the history of legislative prayer has been far more eventful—and divisive—than a hasty reading of the Court's opinion might indicate.

In sum, 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.

II

The path of formal doctrine, however, can only imperfectly capture the nature and importance of the issues at stake in this case. A more adequate analysis must therefore take into account the underlying function of the Establishment Clause, and the forces that have shaped its doctrine.

A

Most of the provisions of the Bill of Rights, even if they are not generally enforceable in the absence of state action, nevertheless arise out of moral intuitions applicable to individuals as well as governments. The Establishment Clause, however, is quite different. It is, to its core, nothing less and nothing more than a statement about the proper role of

government in the society that we have shaped for ourselves in this land.

The Establishment Clause embodies a judgment, born of a long and turbulent history, that, in our society, religion "must be a private matter for the individual, the family, and the institutions of private choice...." *Lemon v. Kurtzman,* 403 U.S., at 625, 91 S.Ct., at 2117.

> "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 nonreligion." *Epperson v. Arkansas,* 393 U.S. 97, 103–104, 89 S.Ct. 266, 269–270, 21 L.Ed.2d 228 (1968) (footnote omitted).

"In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and state.' " *Everson v. Board of Education,* 330 U.S. 1, 16, 67 S.Ct. 504, 511, 91 L.Ed. 711 (1947).

The principles of "separation" and "neutrality" implicit in the Establishment Clause serve many purposes. Four of these are particularly relevant here.

The first, which is most closely related to the more general conceptions of liberty found in the remainder of the First Amendment, is to guarantee the individual right to conscience. The right to conscience, in the religious sphere, is not only implicated when the government engages in direct or indirect coercion. It is also implicated when the government requires individuals to support the practices of a faith with which they do not agree.

> "[T]o compel a man to furnish contributions of money for the propagation of [religious] opinions which he disbelieves, is sinful and tyrannical; ... even ... forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor, whose morals he would make his pattern ...." *Everson v. Board of Education,* 330 U.S., at 13, 67 S.Ct., at 510, quoting Virginia Bill for Religious Liberty, 12 Hening, Statutes of Virginia 84 (1823).

The second purpose of separation and neutrality is to keep the state from interfering in the essential autonomy of religious life, either by taking upon itself the decision of religious issues, or by unduly involving itself in the supervision of religious institutions or officials.

The third purpose of separation and neutrality is to prevent the trivialization and degradation of religion by too close an attachment to the organs of government. The Establishment Clause "stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy to permit its 'unhallowed perversion' by a civil magistrate." *Engel v. Vitale,* 370 U.S., at 432, 82 S.Ct., at 1267.

Finally, the principles of separation and neutrality help assure that essentially religious issues, precisely because of their importance and sensitivity, not become the occasion for battle in the political arena. With regard to most issues, the Government may

be influenced by partisan argument and may act as a partisan itself. In each case, there will be winners and losers in the political battle, and the losers' most common recourse is the right to dissent and the right to fight the battle again another day. With regard to matters that are essentially religious, however, the Establishment Clause seeks that there should be no political battles, and that no American should at any point feel alienated from his government because that government has declared or acted upon some "official" or "authorized" point of view on a matter of religion.

B

The imperatives of separation and neutrality are not limited to the relationship of government to religious institutions or denominations, but extend as well to the relationship of government to religious beliefs and practices. In *Torcaso v. Watkins,* 367 U.S. 488, 81 S.Ct. 1680, 6 L.Ed.2d 982 (1961), for example, we struck down a state provision requiring a religious oath as a qualification to hold office, not only because it violated principles of free exercise of religion, but also because it violated the principles of non-establishment of religion. And, of course, in the pair of cases that hang over this one like a reproachful set of parents, we held that official prayer and prescribed Bible reading in the public schools represent a serious encroachment on the Establishment Clause. *Schempp, supra; Engel, supra.* As we said in *Engel,* "[i]t is neither sacrilegious nor anti-religious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance." 370 U.S., at 435, 82 S.Ct., at 1269 (footnote omitted).

Nor should it be thought that this view of the Establishment Clause is a recent concoction of an overreaching judiciary. Even before the First Amendment was written, the Framers of the Constitution broke with the practice of the Articles of Confederation and many state constitutions, and did not invoke the name of God in the document. Moreover, Thomas Jefferson and Andrew Jackson, during their respective terms as President, both refused on Establishment Clause grounds to declare national days of thanksgiving or fasting. And James Madison, writing subsequent to his own Presidency on essentially the very issue we face today, stated:

> "Is the appointment of Chaplains to the two Houses of Congress consistent with the Constitution, and with the pure principle of religious freedom? In strictness, the answer on both points must be in the negative. The Constitution of the U.S. forbids everything like an establishment of a national religion. The law appointing Chaplains establishes a religious worship for the national representatives, to be performed by Ministers of religion, elected by a majority of them; and these are to be paid out of the national taxes. Does not this involve the principle of a national establishment, applicable to a provision for a religious worship for the Constituent as well as of the representative Body, approved by the majority, and conducted by Ministers of religion paid by the entire nation." Fleet, Madison's "Detached Memoranda," 3 Wm. & Mary Quarterly 534, 558 (1946).

C

Legislative prayer clearly violates the principles of neutrality and separation that are embedded within the Establishment Clause. It is contrary to the fundamental message of *Engel* and *Schempp.* It intrudes on the right to conscience by forcing some legislators either to participate in a "prayer opportunity," *ante,* at 3337, with which they are in basic disagreement, or to make their disagreement a matter of public comment by declining to

participate. It forces all residents of the State to support a religious exercise that may be contrary to their own beliefs. It requires the State to commit itself on fundamental theological issues. It has the potential for degrading religion by allowing a religious call to worship to be intermeshed with a secular call to order. And it injects religion into the political sphere by creating the potential that each and every selection of a chaplain, or consideration of a particular prayer, or even reconsideration of the practice itself, will provoke a political battle along religious lines and ultimately alienate some religiously identified group of citizens.

D

One response to the foregoing account, of course, is that "neutrality" and "separation" do not exhaust the full meaning of the Establishment Clause as it has developed in our cases. It is indeed true that there are certain tensions inherent in the First Amendment itself, or inherent in the role of religion and religious belief in any free society, that have shaped the doctrine of the Establishment Clause, and required us to deviate from an absolute adherence to separation and neutrality. Nevertheless, these considerations, although very important, are also quite specific, and where none of them is present, the Establishment Clause gives us no warrant simply to look the other way and treat an unconstitutional practice as if it were constitutional. Because the Court occasionally suggests that some of these considerations might apply here, it becomes important that I briefly identify the most prominent of them and explain why they do not in fact have any relevance to legislative prayer.

* * *

(3)

We have also recognized that Government cannot, without adopting a decidedly *anti* -religious point of view, be forbidden to recognize the religious beliefs and practices of the American people as an aspect of our history and culture. Certainly, bona fide classes in comparative religion can be offered in the public schools. And certainly, the text of Abraham Lincoln's Second Inaugrual Address which is inscribed on a wall of the Lincoln Memorial need not be purged of its profound theological content. The practice of offering invocations at legislative sessions cannot, however, simply be dismissed as "a tolerable *acknowledgment of beliefs* widely held among the people of this country." "Prayer is religion *in act.*" "Praying means to take hold of a word, the end, so to speak, of a line that leads to God." Reverend Palmer and other members of the clergy who offer invocations at legislative sessions are not museum pieces, put on display once a day for the edification of the legislature. Rather, they are engaged by the legislature to lead it—as a body—in an act of religious worship. If upholding the practice requires denial of this fact, I suspect that many supporters of legislative prayer would feel that they had been handed a pyrrhic victory.

* * *

(5)

Finally, our cases recognize that, in one important respect, the Constitution is *not* neutral on the subject of religion: Under the Free Exercise Clause, religiously motivated claims of conscience may give rise to constitutional rights that other strongly-held beliefs

do not. Moreover, even when the government is not compelled to do so by the Free Exercise Clause, it may to some extent act to facilitate the opportunities of individuals to practice their religion. This is not, however, a case in which a State is accommodating individual religious interests. We are not faced here with the right of the legislature to allow its members to offer prayers during the course of general legislative debate. We are certainly not faced with the right of legislators to form voluntary groups for prayer or worship. We are not even faced with the right of the state to employ members of the clergy to minister to the private religious needs of individual legislators. Rather, we are faced here with the regularized practice of conducting official prayers, on behalf of the entire legislature, as part of the order of business constituting the formal opening of every single session of the legislative term. If this is Free Exercise, the Establishment Clause has no meaning whatsoever.

III

With the exception of the few lapses I have already noted, each of which is commendably qualified so as to be limited to the facts of this case, the Court says almost nothing contrary to the above analysis. Instead, it holds that "the practice of opening legislative sessions with prayer has become part of the fabric of our society," *ante,* at 3336, and chooses not to interfere. I sympathize with the Court's reluctance to strike down a practice so prevalent and so ingrained as legislative prayer. I am, however, unconvinced by the Court's arguments, and cannot shake my conviction that legislative prayer violates both the letter and the spirit of the Establishment Clause.

A

The Court's main argument for carving out an exception sustaining legislative prayer is historical. The Court cannot—and does not—purport to find a pattern of "undeviating acceptance," *Walz,* 397 U.S., at 681, 90 S.Ct., at 1417 (BRENNAN, J., concurring), of legislative prayer. It also disclaims exclusive reliance on the mere longevity of legislative prayer. The Court does, however, point out that, only three days before the First Congress reached agreement on the final wording of the Bill of Rights, it authorized the appointment of paid chaplains for its own proceedings, and the Court argues that in light of this "unique history," the actions of Congress reveal its intent as to the meaning of the Establishment Clause. I agree that historical practice is of considerable import in the interpretation of abstract constitutional language. This is a case, however, in which—absent the Court's invocation of history—there would be no question that the practice at issue was unconstitutional. And despite the surface appeal of the Court's argument, there are at least three reasons why specific historical practice should not in this case override that clear constitutional imperative.

First, it is significant that the Court's historical argument does not rely on the legislative history of the Establishment Clause itself. Indeed, that formal history is profoundly unilluminating on this and most other subjects. Rather, the Court assumes that the Framers of the Establishment Clause would not have themselves authorized a practice that they thought violated the guarantees contained in the clause. This assumption, however, is questionable. Legislators, influenced by the passions and exigencies of the moment, the pressure of constituents and colleagues, and the press of business, do not always pass sober constitutional judgment on every piece of legislation they enact, and this

must be assumed to be as true of the members of the First Congress as any other. Indeed, the fact that James Madison, who voted for the bill authorizing the payment of the first congressional chaplains, *ante,* at 3333, n. 8, later expressed the view that the practice was unconstitutional, see *supra,* at 3343–3344, is instructive on precisely this point. Madison's later views may not have represented so much a change of *mind* as a change of *role,* from a member of Congress engaged in the hurley-burley of legislative activity to a detached observer engaged in unpressured reflection. Since the latter role is precisely the one with which this Court is charged, I am not at all sure that Madison's later writings should be any less influential in our deliberations than his earlier vote.

Second, the Court's analysis treats the First Amendment simply as an Act of Congress, as to whose meaning the intent of Congress is the single touchstone. Both the Constitution and its amendments, however, became supreme law only by virtue of their ratification by the States, and the understanding of the States should be as relevant to our analysis as the understanding of Congress. This observation is especially compelling in considering the meaning of the Bill of Rights. The first 10 Amendments were not enacted because the members of the First Congress came up with a bright idea one morning; rather, their enactment was forced upon Congress by a number of the States as a condition for their ratification of the original Constitution. To treat any practice authorized by the First Congress as presumptively consistent with the Bill of Rights is therefore somewhat akin to treating any action of a party to a contract as presumptively consistent with the terms of the contract. The latter proposition, if it were accepted, would of course resolve many of the heretofore perplexing issues in contract law.

Finally, and most importantly, the argument tendered by the Court is misguided because the Constitution is not a static document whose meaning on every detail is fixed for all time by the life experience of the Framers. We have recognized in a wide variety of constitutional contexts that the practices that were in place at the time any particular guarantee was enacted into the Constitution do not necessarily fix forever the meaning of that guarantee. To be truly faithful to the Framers, "our use of the history of their time must limit itself to broad purposes, not specific practices." *Abington School Dist. v. Schempp,* 374 U.S., at 241, 83 S.Ct., at 1581 (BRENNAN, J., concurring). Our primary task must be to translate "the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century." *West Virginia State Bd. of Education v. Barnette,* 319 U.S. 624, 639 (1943).

The inherent adaptability of the Constitution and its amendments is particularly important with respect to the Establishment Clause. "[O]ur religious composition makes us a vastly more diverse people than were our forefathers.... In the face of such profound changes, practices which may have been objectionable to no one in the time of Jefferson and Madison may today be highly offensive to many persons, the deeply devout and the nonbelievers alike." *Schempp,* 374 U.S., at 240–241 (BRENNAN, J., concurring). President John Adams issued during his Presidency a number of official proclamations calling on all Americans to engage in Christian prayer. Justice Story, in his treatise on the Constitution, contended that the "real object" of the First Amendment "was, not to countenance, much less to advance Mahometanism, Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects." Whatever deference Adams' actions and Story's views might once have deserved in this Court, the Establishment Clause must now be read

in a very different light. Similarly, the members of the First Congress should be treated, not as sacred figures whose every action must be emulated, but as the authors of a document meant to last for the ages. Indeed, a proper respect for the Framers themselves forbids us to give so static and lifeless a meaning to their work. To my mind, the Court's focus here on a narrow piece of history is, in a fundamental sense, a betrayal of the lessons of history.

B

Of course, the Court does not rely entirely on the practice of the First Congress in order to validate legislative prayer. There is another theme which, although implicit, also pervades the Court's opinion. It is exemplified by the Court's comparison of legislative prayer with the formulaic recitation of "God save the United States and this Honorable Court." It is also exemplified by the Court's apparent conclusion that legislative prayer is, at worst, a "mere shadow" on the Establishment Clause rather than a "real threat" to it. Simply put, the Court seems to regard legislative prayer as at most a *de minimis* violation, somehow unworthy of our attention. I frankly do not know what should be the proper disposition of features of our public life such as "God save the United States and this Honorable Court," "In God We Trust," "One Nation Under God," and the like. I might well adhere to the view expressed in *Schempp* that such mottos are consistent with the Establishment Clause, not because their import is *de minimis,* but because they have lost any true religious significance. Legislative invocations, however, are very different.

First of all, legislative prayer, unlike mottos with fixed wordings, can easily turn narrowly and obviously sectarian. I agree with the Court that the federal judiciary should not sit as a board of censors on individual prayers, but to my mind the better way of avoiding that task is by striking down all official legislative invocations.

More fundamentally, however, *any* practice of legislative prayer, even if it might look "non-sectarian" to nine Justices of the Supreme Court, will inevitably and continuously involve the state in one or another religious debate. Prayer is serious business—serious theological business—and it is not a mere "acknowledgment of beliefs widely held among the people of this country" for the State to immerse itself in that business. Some religious individuals or groups find it theologically problematic to engage in joint religious exercises predominantly influenced by faiths not their own. Some might object even to the attempt to fashion a "non-sectarian" prayer. Some would find it impossible to participate in any "prayer opportunity" marked by Trinitarian references. Some would find a prayer *not* invoking the name of Christ to represent a flawed view of the relationship between human beings and God. Some might find any petitionary prayer to be improper. Some might find any prayer that lacked a petitionary element to be deficient. Some might be troubled by what they consider shallow public prayer, or non-spontaneous prayer, or prayer without adequate spiritual preparation or concentration. Some might, of course, have *theological* objections to any prayer sponsored by an organ of government. Some might object on theological grounds to the level of political neutrality generally expected of government-sponsored invocational prayer. And some might object on theological grounds to the Court's requirement, that prayer, even though religious, not be proselytizing. If these problems arose in the context of a religious objection to some otherwise decidedly secular activity, then whatever remedy there is would have to be found in the Free Exercise Clause. But, in this case, we are faced with potential religious objections to an activity at the very center of religious life, and it is simply beyond the competence of government, and inconsistent

with our conceptions of liberty, for the state to take upon itself the role of ecclesiastical arbiter.

IV

The argument is made occasionally that a strict separation of religion and state robs the nation of its spiritual identity. I believe quite the contrary. It may be true that individuals cannot be "neutral" on the question of religion. But the judgment of the Establishment Clause is that neutrality by the organs of *government* on questions of religion is both possible and imperative. . . . I respectfully dissent.

Supreme Court of the United States
TOWN OF GREECE, NEW YORK, Petitioner,
v.
Susan GALLOWAY et al., Respondents.
Decided May 5, 2014

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Justice KENNEDY delivered the opinion of the Court, except as to Part II–B. THE CHIEF JUSTICE and Justice ALITO join this opinion in full. Justice SCALIA and Justice THOMAS join this opinion except as to Part II–B.

KENNEDY, J.: The Court must decide whether the town of Greece, New York, imposes an impermissible establishment of religion by opening its monthly board meetings with a prayer. It must be concluded, consistent with the Court's opinion in *Marsh v. Chambers,* 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983), that no violation of the Constitution has been shown.

I

Greece, a town with a population of 94,000, is in upstate New York. For some years, it began its monthly town board meetings with a moment of silence. In 1999, the newly elected town supervisor, John Auberger, decided to replicate the prayer practice he had found meaningful while serving in the county legislature. Following the roll call and recitation of the Pledge of Allegiance, Auberger would invite a local clergyman to the front of the room to deliver an invocation. After the prayer, Auberger would thank the minister for serving as the board's "chaplain for the month" and present him with a commemorative plaque. The prayer was 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.

The town followed an informal method for selecting prayer givers, all of whom were unpaid volunteers. A town employee would call the congregations listed in a local directory until she found a minister available for that month's meeting. The town eventually compiled a list of willing "board chaplains" who had accepted invitations and agreed to return in the future. The town at no point excluded or denied an opportunity to a would-be prayer giver. Its leaders maintained that a minister or layperson of any persuasion, including an atheist, could give the invocation. But nearly all of the congregations in town were Christian; and from 1999 to 2007, all of the participating ministers were too.

Greece neither reviewed the prayers in advance of the meetings nor provided guidance as to their tone or content, in the belief that exercising any degree of control over the prayers would infringe both the free exercise and speech rights of the ministers. *Id.,* at 22a. The town instead left the guest clergy free to compose their own devotions. The resulting prayers often sounded both civic and religious themes. Typical were invocations that asked the divinity to abide at the meeting and bestow blessings on the community:

> "Lord we ask you to send your spirit of servanthood upon all of us gathered here this evening to do your work for the benefit of all in our community. We ask you to bless our elected and appointed officials so they may deliberate

> with wisdom and act with courage. Bless the members of our community who come here to speak before the board so they may state their cause with honesty and humility.... Lord we ask you to bless us all, that everything we do here tonight will move you to welcome us one day into your kingdom as good and faithful servants. We ask this in the name of our brother Jesus. Amen." *Id.,* at 45a.

Some of the ministers spoke in a distinctly Christian idiom; and a minority invoked religious holidays, scripture, or doctrine, as in the following prayer:

> "Lord, God of all creation, we give you thanks and praise for your presence and action in the world. We look with anticipation to the celebration of Holy Week and Easter. It is in the solemn events of next week that we find the very heart and center of our Christian faith. We acknowledge the saving sacrifice of Jesus Christ on the cross. We draw strength, vitality, and confidence from his resurrection at Easter.... We pray for peace in the world, an end to terrorism, violence, conflict, and war. We pray for stability, democracy, and good government in those countries in which our armed forces are now serving, especially in Iraq and Afghanistan.... Praise and glory be yours, O Lord, now and forever more. Amen." *Id.,* at 88a–89a.

Respondents Susan Galloway and Linda Stephens attended town board meetings to speak about issues of local concern, and they objected that the prayers violated their religious or philosophical views. At one meeting, Galloway admonished board members that she found the prayers "offensive," "intolerable," and an affront to a "diverse community." Complaint in No. 08–cv–6088 (WDNY), ¶ 66. After respondents complained that Christian themes pervaded the prayers, to the exclusion of citizens who did not share those beliefs, the town invited a Jewish layman and the chairman of the local Baha'i temple to deliver prayers. A Wiccan priestess who had read press reports about the prayer controversy requested, and was granted, an opportunity to give the invocation.

Galloway and Stephens brought suit in the United States District Court for the Western District of New York. They alleged that the town violated the First Amendment's Establishment Clause by preferring Christians over other prayer givers and by sponsoring sectarian prayers, such as those given "in Jesus' name." They did not seek an end to the prayer practice, but rather requested an injunction that would limit the town to "inclusive and ecumenical" prayers that referred only to a "generic God" and would not associate the government with any one faith or belief.

The District Court upheld the prayer practice as consistent with the First Amendment. It found no impermissible preference for Christianity, noting that the town had opened the prayer program to all creeds and excluded none. Although most of the prayer givers were Christian, this fact reflected only the predominantly Christian identity of the town's congregations, rather than an official policy or practice of discriminating against minority faiths. The District Court found no authority for the proposition that the First Amendment required Greece to invite clergy from congregations beyond its borders in order to achieve a minimum level of religious diversity.

The District Court also rejected the theory that legislative prayer must be nonsectarian. The court began its inquiry with the opinion in *Marsh v. Chambers,* which permitted prayer in state legislatures by a chaplain paid from the public purse, so long as the prayer opportunity was not "exploited to proselytize or advance any one, or to disparage any other, faith or belief." With respect to the prayer in Greece, the District Court concluded that references to Jesus, and the occasional request that the audience stand for the prayer, did not amount to impermissible proselytizing. It located in *Marsh* no additional requirement that the prayers be purged of sectarian content. In this regard the court quoted recent invocations offered in the U.S. House of Representatives "in the name of our Lord Jesus Christ," *e.g.,* 156 Cong Rec. H5205 (June 30, 2010), and situated prayer in this context as part a long tradition. Finally, the trial court noted this Court's statement in *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter,* 492 U.S. 573, 603, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989), that the prayers in *Marsh* did not offend the Establishment Clause "because the particular chaplain had 'removed all references to Christ.'" But the District Court did not read that statement to mandate that legislative prayer be nonsectarian, at least in circumstances where the town permitted clergy from a variety of faiths to give invocations. By welcoming many viewpoints, the District Court concluded, the town would be unlikely to give the impression that it was affiliating itself with any one religion.

The Court of Appeals for the Second Circuit reversed. It held that some aspects of the prayer program, viewed in their totality by a reasonable observer, conveyed the message that Greece was endorsing Christianity. The town's failure to promote the prayer opportunity to the public, or to invite ministers from congregations outside the town limits, all but "ensured a Christian viewpoint." Although the court found no inherent problem in the sectarian content of the prayers, it concluded that the "steady drumbeat" of Christian prayer, unbroken by invocations from other faith traditions, tended to affiliate the town with Christianity. Finally, the court found it relevant that guest clergy sometimes spoke on behalf of all present at the meeting, as by saying "let us pray," or by asking audience members to stand and bow their heads: "The invitation ... to participate in the prayer ... placed audience members who are nonreligious or adherents of non-Christian religion in the awkward position of either participating in prayers invoking beliefs they did not share or appearing to show disrespect for the invocation." That board members bowed their heads or made the sign of the cross further conveyed the message that the town endorsed Christianity. The Court of Appeals emphasized that it was the "interaction of the facts present in this case," rather than any single element, that rendered the prayer unconstitutional.

Having granted certiorari to decide whether the town's prayer practice violates the Establishment Clause, the Court now reverses the judgment of the Court of Appeals.

II

In *Marsh v. Chambers,* 463 U.S. 783, the Court found no First Amendment violation in the Nebraska Legislature's practice of opening its sessions with a prayer delivered by a chaplain paid from state funds. The decision concluded that legislative

prayer, while religious in nature, has long been understood as compatible with the Establishment Clause. As practiced by Congress since the framing of the Constitution, 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. The Court has considered this symbolic expression to be a "tolerable acknowledgement of beliefs widely held," *Marsh,* 463 U.S., at 792, 103 S.Ct. 3330, rather than a first, treacherous step towards establishment of a state church.

Marsh is sometimes described as "carving out an exception" to the Court's Establishment Clause jurisprudence, because it sustained legislative prayer without subjecting the practice to "any of the formal 'tests' that have traditionally structured" this inquiry. *Id.,* at 796, 813, 103 S.Ct. 3330 (Brennan, J., dissenting). The Court in *Marsh* found those tests unnecessary because history supported the conclusion that legislative invocations are compatible with the Establishment Clause. The First Congress made it an early item of business to appoint and pay official chaplains, and both the House and Senate have maintained the office virtually uninterrupted since that time. When *Marsh* was decided, in 1983, legislative prayer had persisted in the Nebraska Legislature for more than a century, and the majority of the other States also had the same, consistent practice. Although no information has been cited by the parties to indicate how many local legislative bodies open their meetings with prayer, this practice too has historical precedent. *See* Reports of Proceedings of the City Council of Boston for the Year Commencing Jan. 1, 1909, and Ending Feb. 5, 1910, pp. 1–2 (1910) (Rev. Arthur Little) ("And now we desire to invoke Thy presence, Thy blessing, and Thy guidance upon those who are gathered here this morning ..."). "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 a prayer has become part of the fabric of our society." *Marsh, supra,* at 792, 103 S.Ct. 3330.

Yet *Marsh* must not be understood as permitting a practice that would amount to a constitutional violation if not for its historical foundation. The case teaches instead that the Establishment Clause must be interpreted "by reference to historical practices and understandings." *County of Allegheny,* 492 U.S., at 670, 109 S.Ct. 3086 (KENNEDY, J., concurring in judgment in part and dissenting in part). That the First Congress provided for the appointment of chaplains only days after approving language for the First Amendment demonstrates that the Framers considered legislative prayer a benign acknowledgment of religion's role in society. D. Currie, The Constitution in Congress: The Federalist Period 1789–1801, pp. 12–13 (1997). In the 1850's, the judiciary committees in both the House and Senate reevaluated the practice of official chaplaincies after receiving petitions to abolish the office. The committees concluded that the office posed no threat of an establishment because lawmakers were not compelled to attend the daily prayer, S.Rep. No. 376, 32d Cong., 2d Sess., 2 (1853); no faith was excluded by law, nor any favored, *id.,* at 3; and the cost of the chaplain's salary imposed a vanishingly small burden on taxpayers, H. Rep. No. 124, 33d Cong., 1st Sess., 6 (1854). *Marsh* stands for the proposition that it is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted. Any test the Court adopts must

acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change. A test that would sweep away what has so long been settled would create new controversy and begin anew the very divisions along religious lines that the Establishment Clause seeks to prevent.

The Court's inquiry, then, must be to determine whether the prayer practice in the town of Greece fits within the tradition long followed in Congress and the state legislatures. Respondents assert that the town's prayer exercise falls outside that tradition and transgresses the Establishment Clause for two independent but mutually reinforcing reasons. First, they argue that *Marsh* did not approve prayers containing sectarian language or themes, such as the prayers offered in Greece that referred to the "death, resurrection, and ascension of the Savior Jesus Christ," App. 129a, and the "saving sacrifice of Jesus Christ on the cross," *id.,* at 88a. Second, they argue that the setting and conduct of the town board meetings create social pressures that force nonadherents to remain in the room or even feign participation in order to avoid offending the representatives who sponsor the prayer and will vote on matters citizens bring before the board. The sectarian content of the prayers compounds the subtle coercive pressures, they argue, because the nonbeliever who might tolerate ecumenical prayer is forced to do the same for prayer that might be inimical to his or her beliefs.

A

Respondents maintain that prayer must be nonsectarian, or not identifiable with any one religion; and they fault the town for permitting guest chaplains to deliver prayers that use overtly Christian terms or invoke specifics of Christian theology. A prayer is fitting for the public sphere, in their view, only if it contains the "'most general, nonsectarian reference to God,'" Brief for Respondents, at 33, and eschews mention of doctrines associated with any one faith. They argue that prayer which contemplates "the workings of the Holy Spirit, the events of Pentecost, and the belief that God 'has raised up the Lord Jesus' and 'will raise us, in our turn, and put us by His side' " would be impermissible, as would any prayer that reflects dogma particular to a single faith tradition.

An insistence on nonsectarian or ecumenical prayer as a single, fixed standard is not consistent with the tradition of legislative prayer outlined in the Court's cases. The Court found the prayers in *Marsh* consistent with the First Amendment not because they espoused only a generic theism but because our history and tradition have shown that prayer in this limited context could "coexis[t] with the principles of disestablishment and religious freedom." 463 U.S., at 786, 103 S.Ct. 3330. The Congress that drafted the First Amendment would have been accustomed to invocations containing explicitly religious themes of the sort respondents find objectionable. One of the Senate's first chaplains, the Rev. William White, gave prayers in a series that included the Lord's Prayer, the Collect for Ash Wednesday, prayers for peace and grace, a general thanksgiving, St. Chrysostom's Prayer, and a prayer seeking "the grace of our Lord Jesus Christ, &c." Letter from W. White to H. Jones (Dec. 29, 1830), in B. Wilson, Memoir of the Life of the Right Reverend William White, D. D., Bishop of the Protestant Episcopal Church in the State of Pennsylvania

322 (1839); see also New Hampshire Patriot & State Gazette, Dec. 15, 1823, p. 1 (describing a Senate prayer addressing the "Throne of Grace"); Cong. Globe, 37th Cong., 1st Sess., 2 (1861) (reciting the Lord's Prayer). The decidedly Christian nature of these prayers must not be dismissed as the relic of a time when our Nation was less pluralistic than it is today. Congress continues to permit its appointed and visiting chaplains to express themselves in a religious idiom. It acknowledges our growing diversity not by proscribing sectarian content but by welcoming ***1821** ministers of many creeds. See, *e.g.,* 160 Cong. Rec. S1329 (Mar. 6, 2014) (Dalai Lama) ("I am a Buddhist monk—a simple Buddhist monk—so we pray to Buddha and all other Gods"); 159 Cong. Rec. H7006 (Nov. 13, 2013) (Rabbi Joshua Gruenberg) ("Our God and God of our ancestors, Everlasting Spirit of the Universe ..."); 159 Cong. Rec. H3024 (June 4, 2013) (Satguru Bodhinatha Veylanswami) ("Hindu scripture declares, without equivocation, that the highest of high ideals is to never knowingly harm anyone"); 158 Cong. Rec. H5633 (Aug. 2, 2012) (Imam Nayyar Imam) ("The final prophet of God, Muhammad, peace be upon him, stated: 'The leaders of a people are a representation of their deeds' ").

The contention that legislative prayer must be generic or nonsectarian derives from dictum in *County of Allegheny,* 492 U.S. 573, 109 S.Ct. 3086, that was disputed when written and has been repudiated by later cases. There the Court held that a crèche placed on the steps of a county courthouse to celebrate the Christmas season violated the Establishment Clause because it had "the effect of endorsing a patently Christian message." *Id.,* at 601, 109 S.Ct. 3086. Four dissenting Justices disputed that endorsement could be the proper test, as it likely would condemn a host of traditional practices that recognize the role religion plays in our society, among them legislative prayer and the "forthrightly religious" Thanksgiving proclamations issued by nearly every President since Washington. *Id.,* at 670–671. The Court sought to counter this criticism by recasting *Marsh* to permit only prayer that contained no overtly Christian references:

> "However history may affect the constitutionality of nonsectarian references to religion by the government, history cannot legitimate practices that demonstrate the government's allegiance to a particular sect or creed.... The legislative prayers involved in *Marsh* did not violate this principle because the particular chaplain had 'removed all references to Christ.' " *Id.,* at 603 [109 S.Ct. 3086] (quoting *Marsh, supra,* at 793, n. 14 [103 S.Ct. 3330]; footnote omitted).

This proposition is irreconcilable with the facts of *Marsh* and with its holding and reasoning. *Marsh* nowhere suggested that the constitutionality of legislative prayer turns on the neutrality of its content. The opinion noted that Nebraska's chaplain, the Rev. Robert E. Palmer, modulated the "explicitly Christian" nature of his prayer and "removed all references to Christ" after a Jewish lawmaker complained. 463 U.S., at 793, n. 14. With this footnote, the Court did no more than observe the practical demands placed on a minister who holds a permanent, appointed position in a legislature and chooses to write his or her prayers to appeal to more members, or at least to give less offense to those who object. *Marsh* did not suggest that Nebraska's prayer practice would have failed had the chaplain not

acceded to the legislator's request. Nor did the Court imply the rule that prayer violates the Establishment Clause any time it is given in the name of a figure deified by only one faith or creed. To the contrary, the Court instructed that the "content of the prayer is not of concern to judges," provided "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." 463 U.S., at 794–795, 103 S.Ct. 3330.

To hold that invocations must be nonsectarian would force the legislatures that sponsor prayers and the courts that are asked to decide these cases to act as supervisors and censors of religious speech, a rule that would involve government in religious matters to a far greater degree than is the case under the town's current practice of neither editing or approving prayers in advance nor criticizing their content after the fact. Our Government is prohibited from prescribing prayers to be recited in our public institutions in order to promote a preferred system of belief or code of moral behavior. It would be but a few steps removed from that prohibition for legislatures to require chaplains to redact the religious content from their message in order to make it acceptable for the public sphere. Government may not mandate a civic religion that stifles any but the most generic reference to the sacred any more than it may prescribe a religious orthodoxy. See *Lee v. Weisman,* 505 U.S. 577, 590, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992) ("The suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds strikes us as a contradiction that cannot be accepted")

Respondents argue, in effect, that legislative prayer may be addressed only to a generic God. The law and the Court could not draw this line for each specific prayer or seek to require ministers to set aside their nuanced and deeply personal beliefs for vague and artificial ones. There is doubt, in any event, that consensus might be reached as to what qualifies as generic or nonsectarian. Honorifics like "Lord of Lords" or "King of Kings" might strike a Christian audience as ecumenical, yet these titles may have no place in the vocabulary of other faith traditions. The difficulty, indeed the futility, of sifting sectarian from nonsectarian speech is illustrated by a letter that a lawyer for the respondents sent the town in the early stages of this litigation. The letter opined that references to "Father, God, Lord God, and the Almighty" would be acceptable in public prayer, but that references to "Jesus Christ, the Holy Spirit, and the Holy Trinity" would not. App. 21a. Perhaps the writer believed the former grouping would be acceptable to monotheists. Yet even seemingly general references to God or the Father might alienate nonbelievers or polytheists. Because it is unlikely that prayer will be inclusive beyond dispute, it would be unwise to adopt what respondents think is the next-best option: permitting those religious words, and only those words, that are acceptable to the majority, even if they will exclude some. The First Amendment is not a majority rule, and government may not seek to define permissible categories of religious speech. Once it invites prayer into the public sphere, government must permit a prayer giver to address his or her own God or gods as conscience dictates, unfettered by what an administrator or judge considers to be nonsectarian.

In rejecting the suggestion that legislative prayer must be nonsectarian, the

Court does not imply that no constraints remain on its content. The relevant constraint derives from its place at the opening of legislative sessions, where it is meant to lend gravity to the occasion and reflect values long part of the Nation's heritage. Prayer that is solemn and respectful in tone, that invites lawmakers to reflect upon shared ideals and common ends before they embark on the fractious business of governing, serves that legitimate function. If the course and practice over time shows that the invocations denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion, many present may consider the prayer to fall short of the desire to elevate the purpose of the occasion and to unite lawmakers in their common effort. That circumstance would present a different case than the one presently before the Court.

The tradition reflected in *Marsh* permits chaplains to ask their own God for blessings of peace, justice, and freedom that find appreciation among people of all faiths. That a prayer is given in the name of Jesus, Allah, or Jehovah, or that it makes passing reference to religious doctrines, does not remove it from that tradition. These religious themes provide particular means to universal ends. Prayer that reflects beliefs specific to only some creeds can still serve to solemnize the occasion, so long as the practice over time is not "exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Marsh,* 463 U.S., at 794–795, 103 S.Ct. 3330.

It is thus possible to discern in the prayers offered to Congress a commonality of theme and tone. While these prayers vary in their degree of religiosity, they often seek peace for the Nation, wisdom for its lawmakers, and justice for its people, values that count as universal and that are embodied not only in religious traditions, but in our founding documents and laws. The first prayer delivered to the Continental Congress by the Rev. Jacob Duché on Sept. 7, 1774, provides an example:

> Be Thou present O God of Wisdom and direct the counsel of this Honorable Assembly; enable them to settle all things on the best and surest foundations; that the scene of blood may be speedily closed; that Order, Harmony, and Peace be effectually restored, and the Truth and Justice, Religion and Piety, prevail and flourish among the people.
>
> Preserve the health of their bodies, and the vigor of their minds, shower down on them, and the millions they here represent, such temporal Blessings as Thou seest expedient for them in this world, and crown them with everlasting Glory in the world to come. All this we ask in the name and through the merits of Jesus Christ, Thy Son and our Saviour, Amen." W. Federer, America's God and Country 137 (2000).

From the earliest days of the Nation, these invocations have been addressed to assemblies comprising many different creeds. These ceremonial prayers strive for the idea that people of many faiths may be united in a community of tolerance and devotion. Even those who disagree as to religious doctrine may find common ground in the desire to show respect for the divine in all aspects of their lives and being. Our tradition assumes that adult citizens, firm in their own beliefs, can tolerate and perhaps appreciate a ceremonial prayer delivered by a person of a different faith.

The prayers delivered in the town of Greece do not fall outside the tradition this Court has recognized. A number of the prayers did invoke the name of Jesus, the Heavenly Father, or the Holy Spirit, but they also invoked universal themes, as by celebrating the changing of the seasons or calling for a "spirit of cooperation" among town leaders. Among numerous examples of such prayer in the record is the invocation given by the Rev. Richard Barbour at the September 2006 board meeting:

> "Gracious God, you have richly blessed our nation and this community. Help us to remember your generosity and give thanks for your goodness. Bless the elected leaders of the Greece Town Board as they conduct the business of our town this evening. Give them wisdom, courage, discernment and a single-minded desire to serve the common good. We ask your blessing on all public servants, and especially on our police force, firefighters, and emergency medical personnel.... Respectful of every religious tradition, I offer this prayer in the name of God's only son Jesus Christ, the Lord, Amen."

Respondents point to other invocations that disparaged those who did not accept the town's prayer practice. One guest minister characterized objectors as a "minority" who are "ignorant of the history of our country," while another lamented that other towns did not have "God-fearing" leaders. Although these two remarks strayed from the rationale set out in *Marsh,* they do not despoil a practice that on the whole reflects and embraces our tradition. 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.

Finally, the Court disagrees with the view taken by the Court of Appeals that the town of Greece contravened the Establishment Clause by inviting a predominantly Christian set of ministers to lead the prayer. The town made reasonable efforts to identify all of the congregations located within its borders and represented that it would welcome a prayer by any minister or layman who wished to give one. That nearly all of the congregations in town turned out to be Christian does not reflect an aversion or bias on the part of town leaders against minority faiths. So long as the town maintains a policy of nondiscrimination, the Constitution does not require it to search beyond its borders for non-Christian prayer givers in an effort to achieve religious balancing. The quest to promote "a 'diversity' of religious views" would require the town "to make wholly inappropriate judgments about the number of religions [it] should sponsor and the relative frequency with which it should sponsor each," *Lee,* 505 U.S., at 617, 112 S.Ct. 2649 (Souter, J., concurring), a form of government entanglement with religion that is far more troublesome than the current approach.

B

Respondents further seek to distinguish the town's prayer practice from the tradition upheld in *Marsh* on the ground that it coerces participation by nonadherents. They contend that prayer conducted in the intimate setting of a town board meeting

differs in fundamental ways from the invocations delivered in Congress and state legislatures, where the public remains segregated from legislative activity and may not address the body except by occasional invitation. Citizens attend town meetings, on the other hand, to accept awards; speak on matters of local importance; and petition the board for action that may affect their economic interests, such as the granting of permits, business licenses, and zoning variances. Respondents argue that the public may feel subtle pressure to participate in prayers that violate their beliefs in order to please the board members from whom they are about to seek a favorable ruling. In their view the fact that board members in small towns know many of their constituents by name only increases the pressure to conform.

It is an elemental First Amendment principle that government may not coerce its citizens "to support or participate in any religion or its exercise." *County of Allegheny,* 492 U.S., at 659, 109 S.Ct. 3086 (KENNEDY, J., concurring in judgment in part and dissenting in part); see also *Van Orden,* 545 U.S., at 683, 125 S.Ct. 2854 (plurality opinion) (recognizing that our "institutions must not press religious observances upon their citizens"). On the record in this case the Court is not persuaded that the town of Greece, through the act of offering a brief, solemn, and respectful prayer to open its monthly meetings, compelled its citizens to engage in a religious observance. The inquiry remains a fact-sensitive one that considers both the setting in which the prayer arises and the audience to whom it is directed.

The prayer opportunity in this case must be evaluated against the backdrop of historical practice. As a practice that has long endured, legislative prayer has become part of our heritage and tradition, part of our expressive idiom, similar to the Pledge of Allegiance, inaugural prayer, or the recitation of "God save the United States and this honorable Court" at the opening of this Court's sessions. See *Lynch,* 465 U.S., at 693, 104 S.Ct. 1355 (O'Connor, J., concurring). It is presumed that the reasonable observer is acquainted with this tradition and understands that its purposes are to lend gravity to public proceedings and to acknowledge the place religion holds in the lives of many private citizens, not to afford government an opportunity to proselytize or force truant constituents into the pews. That many appreciate these acknowledgments of the divine in our public institutions does not suggest that those who disagree are compelled to join the expression or approve its content.

The principal audience for these invocations is not, indeed, the public but lawmakers themselves, who may find that a moment of prayer or quiet reflection sets the mind to a higher purpose and thereby eases the task of governing. The District Court in *Marsh* described the prayer exercise as "an internal act" directed at the Nebraska Legislature's "own members," *Chambers v. Marsh,* 504 F.Supp. 585, 588 (D.Neb.1980), rather than an effort to promote religious observance among the public. To be sure, many members of the public find these prayers meaningful and wish to join them. But their purpose is largely to accommodate the spiritual needs of lawmakers and connect them to a tradition dating to the time of the Framers. For members of town boards and commissions, who often serve part-time and as volunteers, ceremonial prayer may also reflect the values they hold as private citizens. The prayer is an opportunity for them to show who and what they are without denying the right to dissent by those who disagree.

The analysis would be different if town board members directed the public to participate in the prayers, singled out dissidents for opprobrium, or indicated that their decisions might be influenced by a person's acquiescence in the prayer opportunity. No such thing occurred in the town of Greece. Although board members themselves stood, bowed their heads, or made the sign of the cross during the prayer, they at no point solicited similar gestures by the public. Respondents point to several occasions where audience members were asked to rise for the prayer. These requests, however, came not from town leaders but from the guest ministers, who presumably are accustomed to directing their congregations in this way and might have done so thinking the action was inclusive, not coercive. See App. 69a ("Would you bow your heads with me as we invite the Lord's presence here tonight?"); *id.,* at 93a ("Let us join our hearts and minds together in prayer"); *id.,* at 102a ("Would you join me in a moment of prayer?"); *id.,* at 110a ("Those who are willing may join me now in prayer"). Respondents suggest that constituents might feel pressure to join the prayers to avoid irritating the officials who would be ruling on their petitions, but this argument has no evidentiary support. Nothing in the record indicates that town leaders allocated benefits and burdens based on participation in the prayer, or that citizens were received differently depending on whether they joined the invocation or quietly declined. In no instance did town leaders signal disfavor toward nonparticipants or suggest that their stature in the community was in any way diminished. A practice that classified citizens based on their religious views would violate the Constitution, but that is not the case before this Court.

In their declarations in the trial court, respondents stated that the prayers gave them offense and made them feel excluded and disrespected. Offense, however, does not equate to coercion. Adults often encounter speech they find disagreeable; and an Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views in a legislative forum, especially where, as here, any member of the public is welcome in turn to offer an invocation reflecting his or her own convictions. If circumstances arise in which the pattern and practice of ceremonial, legislative prayer is alleged to be a means to coerce or intimidate others, the objection can be addressed in the regular course. But the showing has not been made here, where the prayers neither chastised dissenters nor attempted lengthy disquisition on religious dogma. Courts remain free to review the pattern of prayers over time to determine whether they comport with the tradition of solemn, respectful prayer approved in *Marsh,* or whether coercion is a real and substantial likelihood. But in the general course 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.

This case can be distinguished from the conclusions and holding of *Lee v. Weisman,* 505 U.S. 577. There the Court found that, in the context of a graduation where school authorities maintained close supervision over the conduct of the students and the substance of the ceremony, a religious invocation was coercive as to an objecting student. Four Justices dissented in *Lee,* but the circumstances the Court confronted there are not present in this case and do not control its outcome. Nothing in the record suggests that members of the public are dissuaded from leaving

the meeting room during the prayer, arriving late, or even, as happened here, making a later protest. In this case, as in *Marsh,* board members and constituents are free to enter and leave with little comment and for any number of reasons. Should nonbelievers choose to exit the room during a prayer they find distasteful, their absence will not stand out as disrespectful or even noteworthy. And should they remain, their quiet acquiescence will not, in light of our traditions, be interpreted as an agreement with the words or ideas expressed. Neither choice represents an unconstitutional imposition as to mature adults, who "presumably" are "not readily susceptible to religious indoctrination or peer pressure." *Marsh,* 463 U.S., at 792, 103 S.Ct. 3330 (internal quotation marks and citations omitted).

In the town of Greece, the prayer is delivered during the ceremonial portion of the town's meeting. Board members are not engaged in policymaking at this time, but in more general functions, such as swearing in new police officers, inducting high school athletes into the town hall of fame, and presenting proclamations to volunteers, civic groups, and senior citizens. It is a moment for town leaders to recognize the achievements of their constituents and the aspects of community life that are worth celebrating. By inviting ministers to serve as chaplain for the month, and welcoming them to the front of the room alongside civic leaders, the town is acknowledging the central place that religion, and religious institutions, hold in the lives of those present. Indeed, some congregations are not simply spiritual homes for town residents but also the provider of social services for citizens regardless of their beliefs. See App. 31a (thanking a pastor for his "community involvement"); *id.,* at 44a (thanking a deacon "for the job that you have done on behalf of our community"). The inclusion of a brief, ceremonial prayer as part of a larger exercise in civic recognition suggests that its purpose and effect are to acknowledge religious leaders and the institutions they represent rather than to exclude or coerce nonbelievers.

Ceremonial prayer is but a recognition that, since this Nation was founded and until the present day, many Americans deem that their own existence must be understood by precepts far beyond the authority of government to alter or define and that willing participation in civic affairs can be consistent with a brief acknowledgment of their belief in a higher power, always with due respect for those who adhere to other beliefs. The prayer in this case has a permissible ceremonial purpose. It is not an unconstitutional establishment of religion.

* * *

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. The judgment of the U.S. Court of Appeals for the Second Circuit is reversed.

It is so ordered.

Justice THOMAS, joined by Justice SCALIA, concurring in the judgment as to Part II:

While I agree with Justice Kennedy that coercive religious pratices by state and local governmental bodies could violate the Establishment Clause of the Constitution, I do not agree with the broad formulation of what constitutes coercion set out by Jstice Kennedy in part II-B of his opinion.

In my view, the Establishment Clause is not violated by the kind of subtle pressures respondents allegedly suffered, but is violated *only* by conduct that amounts to *actual, legal* coercion: "coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*." *Lee v. Weisman*, 505 U.S. 577, 640 (1992) (SCALIA, J., dissenting). The municipal prayers in this case bear no resemblance to the coercive state establishments that existed at the founding, which exercised government power in order to exact financial support of the church, compel religious observance, or control religious doctrine.

Accordingly, I concur in the judgment as to Part II of the Justice Kennedy's opinion.

* * *

Justice KAGAN, with whom Justice GINSBURG, Justice BREYER, and Justice SOTOMAYOR join, dissenting.

For centuries now, people have come to this country from every corner of the world to share in the blessing of religious freedom. Our Constitution promises that they may worship in their own way, without fear of penalty or danger, and that in itself is a momentous offering. Yet our Constitution makes a commitment still more remarkable—that however those individuals worship, they will count as full and equal American citizens. A Christian, a Jew, a Muslim (and so forth)—each stands in the same relationship with her country, with her state and local communities, and with every level and body of government. So that when each person performs the duties or seeks the benefits of citizenship, she does so not as an adherent to one or another religion, but simply as an American.

I respectfully dissent from the Court's opinion because I think the Town of Greece's prayer practices violate that norm of religious equality—the breathtakingly generous constitutional idea that our public institutions belong no less to the Buddhist or Hindu than to the Methodist or Episcopalian. I do not contend that principle translates here into a bright separationist line. To the contrary, I agree with the Court's decision in *Marsh v. Chambers,* 463 U.S. 783 (1983), upholding the Nebraska Legislature's tradition of beginning each session with a chaplain's prayer. And I believe that pluralism and inclusion in a town hall can satisfy the constitutional requirement of neutrality; such a forum need not become a religion-free zone. But still, the Town of Greece should lose this case. The practice at issue here differs from the one sustained in *Marsh* because Greece's town meetings involve participation by ordinary citizens, and the invocations given—directly to those citizens—were predominantly sectarian in content. Still more, Greece's Board did nothing to recognize religious diversity: In arranging for clergy members to open each meeting, the Town never sought (except briefly when this suit was filed) to involve, accommodate, or in any way reach out to adherents of non-Christian religions. So month in and month out for over a decade, prayers steeped in only one faith,

addressed toward members of the public, commenced meetings to discuss local affairs and distribute government benefits. In my view, that practice does not square with the First Amendment's promise that every citizen, irrespective of her religion, owns an equal share in her government.

I

To begin to see what has gone wrong in the Town of Greece, consider several hypothetical scenarios in which sectarian prayer—taken straight from this case's record—infuses governmental activities. None involves, as this case does, a proceeding that could be characterized as a legislative session, but they are useful to elaborate some general principles. In each instance, assume (as was true in Greece) that the invocation is given pursuant to government policy and is representative of the prayers generally offered in the designated setting:

- You are a party in a case going to trial; let's say you have filed suit against the government for violating one of your legal rights. The judge bangs his gavel to call the court to order, asks a minister to come to the front of the room, and instructs the 10 or so individuals present to rise for an opening prayer. The clergyman faces those in attendance and says: "Lord, God of all creation,.... We acknowledge the saving sacrifice of Jesus Christ on the cross. We draw strength ... from his resurrection at Easter. Jesus Christ, who took away the sins of the world, destroyed our death, through his dying and in his rising, he has restored our life. Blessed are you, who has raised up the Lord Jesus, you who will raise us, in our turn, and put us by His side.... Amen." The judge then asks your lawyer to begin the trial.
- It's election day, and you head over to your local polling place to vote. As you and others wait to give your names and receive your ballots, an election official asks everyone there to join him in prayer. He says: "We pray this day for the guidance of the Holy Spirit as we vote.... Let's just say the Our Father together. Our Father, who art in Heaven, hallowed be thy name; thy Kingdom come, thy will be done, on earth as it is in Heaven...." And after he concludes, he makes the sign of the cross, and appears to wait expectantly for you and the other prospective voters to do so too.
- You are an immigrant attending a naturalization ceremony to finally become a citizen. The presiding official tells you and your fellow applicants that before administering the oath of allegiance, he would like a minister to pray for you and with you. The pastor steps to the front of the room, asks everyone to bow their heads, and recites: "Father, son, and Holy Spirit—it is with a due sense of reverence and awe that we come before you today seeking your blessing.... You are ... a wise God, oh Lord, ... as evidenced even in the plan of redemption that is fulfilled in Jesus Christ. We ask that you would give freely and abundantly wisdom to one and to all ... in the name of the Lord and Savior Jesus Christ, who lives with you and the Holy Spirit, one God for ever and ever. Amen."

I would hold that the government officials responsible for the above practices—that is, for prayer repeatedly invoking a single religion's beliefs in these settings—crossed a constitutional line. Why? The reason, of course, has nothing to do with Christianity as such. This opinion is full of Christian prayers, because those were the

only invocations offered in the Town of Greece. But if my hypotheticals involved the prayer of some other religion, the outcome would be exactly the same. Suppose, for example, that government officials in a predominantly Jewish community asked a rabbi to begin all public functions with a chanting of the Sh'ma and V'ahavta. ("Hear O Israel! The Lord our God, the Lord is One.... Bind [these words] as a sign upon your hand; let them be a symbol before your eyes; inscribe them on the doorposts of your house, and on your gates.") Or assume officials in a mostly Muslim town requested a muezzin to commence such functions, over and over again, with a recitation of the Adhan. ("God is greatest, God is greatest. I bear witness that there is no deity but God. I bear witness that Muhammed is the Messenger of God.") In any instance, the question would be why such government-sponsored prayer of a single religion goes beyond the constitutional pale.

One glaring problem is that the government in all these hypotheticals has aligned itself with, and placed its imprimatur on, a particular religious creed. "The clearest command of the Establishment Clause," this Court has held, "is that one religious denomination cannot be officially preferred over another." *Larson v. Valente,* 456 U.S. 228, 244 (1982). Justices have often differed about a further issue: whether and how the Clause applies to governmental policies favoring religion (of all kinds) over non-religion. But no one has disagreed with this much:

> "[O]ur constitutional tradition, from the Declaration of Independence and the first inaugural address of Washington . . . down to the present day, has ruled out of order government-sponsored endorsement of religion where the endorsement is sectarian, in the sense of specifying details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world are known to differ (for example, the divinity of Christ)." *Lee v. Weisman,* 505 U.S. 577, 641 (1992) (SCALIA, J., dissenting).

See also *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter,* 492 U.S. 573, 605, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989) ("Whatever else the Establishment Clause may mean[,] ... [it] means at the very least that government may not demonstrate a preference for one particular sect or creed (including a preference for Christianity over other religions)"). By authorizing and overseeing prayers associated with a single religion—to the exclusion of all others—the government officials in my hypothetical cases (whether federal, state, or local does not matter) have violated that foundational principle. They have embarked on a course of religious favoritism anathema to the First Amendment.

And making matters still worse: They have done so in a place where individuals come to interact with, and participate in, the institutions and processes of their government. A person goes to court, to the polls, to a naturalization ceremony—and a government official or his hand-picked minister asks her, as the first order of official business, to stand and pray with others in a way conflicting with her own religious beliefs. Perhaps she feels sufficient pressure to go along—to rise, bow her head, and join in whatever others are saying: After all, she wants, very badly, what the judge or poll worker or immigration official has to offer. Or perhaps she is made of stronger mettle, and she opts not to participate in what she does not believe—indeed, what would, for her, be something like blasphemy. She then must make known her dissent

from the common religious view, and place herself apart from other citizens, as well as from the officials responsible for the invocations. And so a civic function of some kind brings religious differences to the fore: That public proceeding becomes (whether intentionally or not) an instrument for dividing her from adherents to the community's majority religion, and for altering the very nature of her relationship with her government.

That is not the country we are, because that is not what our Constitution permits. Here, when a citizen stands before her government, whether to perform a service or request a benefit, her religious beliefs do not enter into the picture. The government she faces favors no particular religion, either by word or by deed. And that government, in its various processes and proceedings, imposes no religious tests on its citizens, sorts none of them by faith, and permits no exclusion based on belief. When a person goes to court, a polling place, or an immigration proceeding—I could go on: to a zoning agency, a parole board hearing, or the DMV—government officials do not engage in sectarian worship, nor do they ask her to do likewise. They all participate in the business of government not as Christians, Jews, Muslims (and more), but only as Americans—none of them different from any other for that civic purpose. Why not, then, at a town meeting?

II

In both Greece's and the majority's view, everything I have discussed is irrelevant here because this case involves "the tradition of legislative prayer outlined" in *Marsh v. Chambers*. And before I dispute the Town and Court, I want to give them their due: They are right that, under *Marsh,* legislative prayer has a distinctive constitutional warrant by virtue of tradition. As the Court today describes, a long history, stretching back to the first session of Congress (when chaplains began to give prayers in both Chambers), "ha[s] shown that prayer in this limited context could 'coexis[t] with the principles of disestablishment and religious freedom.'" Relying on that "unbroken" national tradition, *Marsh* upheld (I think correctly) the Nebraska Legislature's practice of opening each day with a chaplain's prayer as "a tolerable acknowledgment of beliefs widely held among the people of this country." And so I agree with the majority that the issue here is "whether the prayer practice in the Town of Greece fits within the tradition long followed in Congress and the state legislatures.".

Where I depart from the majority is in my reply to that question. The town hall here is a kind of hybrid. Greece's Board indeed has legislative functions, as Congress and state assemblies do—and that means some opening prayers are allowed there. But much as in my hypotheticals, the Board's meetings are also occasions for ordinary citizens to engage with and petition their government, often on highly individualized matters. That feature calls for Board members to exercise special care to ensure that the prayers offered are inclusive—that they respect each and every member of the community as an equal citizen. But the Board, and the clergy members it selected, made no such effort. Instead, the prayers given in Greece, addressed directly to the Town's citizenry, were *more* sectarian, and *less* inclusive, than anything this Court sustained in *Marsh*. For those reasons, the prayer in Greece departs from the

legislative tradition that the majority takes as its benchmark.

A

Start by comparing two pictures, drawn precisely from reality. The first is of Nebraska's (unicameral) Legislature, as this Court and the state senators themselves described it. The second is of town council meetings in Greece, as revealed in this case's record.

It is morning in Nebraska, and senators are beginning to gather in the State's legislative chamber: It is the beginning of the official workday, although senators may not yet need to be on the floor. The chaplain rises to give the daily invocation. That prayer, as the senators emphasized when their case came to this Court, is directed only at the legislative membership, not at the public at large. Any members of the public who happen to be in attendance—not very many at this early hour—watch only from the upstairs visitors' gallery.

The longtime chaplain says something like the following (the excerpt is from his own *amicus* brief supporting Greece in this case): "*O God,* who has given all persons talents and varying capacities, Thou dost only require of us that we utilize Thy gifts to a maximum. In this Legislature to which Thou has entrusted special abilities and opportunities, may each recognize his stewardship for the people of the State." The chaplain is a Presbyterian minister, and "some of his earlier prayers" explicitly invoked Christian beliefs, but he "removed all references to Christ" after a single legislator complained. *Marsh,* 463 U.S., at 793, n. 14. The chaplain also previously invited other clergy members to give the invocation, including local rabbis.

Now change the channel: It is evening in Greece, New York, and the Supervisor of the Town Board calls its monthly public meeting to order. Those meetings (so says the Board itself) are "the most important part of Town government." See Town of Greece, Town Board, online at http://greeceny. gov/planning/townboard (as visited May 2, 2014 and available in Clerk of Court's case file). They serve assorted functions, almost all actively involving members of the public. The Board may swear in new Town employees and hand out awards for civic accomplishments; it always provides an opportunity (called a Public Forum) for citizens to address local issues and ask for improved services or new policies (for example, better accommodations for the disabled or actions to ameliorate traffic congestion, and it usually hears debate on individual applications from residents and local businesses to obtain special land-use permits, zoning variances, or other licenses.

The Town Supervisor, Town Clerk, Chief of Police, and four Board members sit at the front of the meeting room on a raised dais. But the setting is intimate: There are likely to be only 10 or so citizens in attendance. A few may be children or teenagers, present to receive an award or fulfill a high school civics requirement.

As the first order of business, the Town Supervisor introduces a local Christian clergy member—denominated the chaplain of the month—to lead the assembled persons in prayer. The pastor steps up to a lectern (emblazoned with the Town's seal)

at the front of the dais, and with his back to the Town officials, he faces the citizens present. He asks them all to stand and to "pray as we begin this evening's town meeting." (He does not suggest that anyone should feel free not to participate.) And he says:

> "The beauties of spring are an expressive symbol of the new life of the risen Christ. The Holy Spirit was sent to the apostles at Pentecost so that they would be courageous witnesses of the Good News to different regions of the Mediterranean world and beyond. The Holy Spirit continues to be the inspiration and the source of strength and virtue, which we all need in the world of today. And so we pray this evening for the guidance of the Holy Spirit as the Greece Town Board meets."

After the pastor concludes, Town officials behind him make the sign of the cross, as do some members of the audience, and everyone says "Amen." The Supervisor then announces the start of the Public Forum, and a citizen stands up to complain about the Town's contract with a cable company.

B

Let's count the ways in which these pictures diverge. First, the governmental proceedings at which the prayers occur differ significantly in nature and purpose. The Nebraska Legislature's floor sessions—like those of the U.S. Congress and other state assemblies—are of, by, and for elected lawmakers. Members of the public take no part in those proceedings; any few who attend are spectators only, watching from a high-up visitors' gallery. (In that respect, note that neither the Nebraska Legislature nor the Congress calls for prayer when citizens themselves participate in a hearing—say, by giving testimony relevant to a bill or nomination.) Greece's town meetings, by contrast, revolve around ordinary members of the community. Each and every aspect of those sessions provides opportunities for Town residents to interact with public officials. And the most important parts enable those citizens to petition their government. In the Public Forum, they urge (or oppose) changes in the Board's policies and priorities; and then, in what are essentially adjudicatory hearings, they request the Board to grant (or deny) applications for various permits, licenses, and zoning variances. So the meetings, both by design and in operation, allow citizens to actively participate in the Town's governance—sharing concerns, airing grievances, and both shaping the community's policies and seeking their benefits.

Second (and following from what I just said), the prayers in these two settings have different audiences. In the Nebraska Legislature, the chaplain spoke to, and only to, the elected representatives. Nebraska's senators were adamant on that point in briefing *Marsh,* and the facts fully supported them: As the senators stated, "[t]he activity is a matter of internal daily procedure directed only at the legislative membership, not at [members of] the public." Brief for Petitioners in *Marsh* 30; see Reply Brief for Petitioners in *Marsh* 8 ("The [prayer] practice involves no function or power of government vis-à-vis the Nebraska citizenry, but merely concerns an internal decision of the Nebraska Legislature as to the daily procedure by which it conducts its own affairs"). The same is true in the U.S. Congress and, I suspect, in every other state legislature. See Brief for Members of Congress as *Amici Curiae* 6 ("Consistent with the fact that attending citizens are mere passive observers, prayers

in the House are delivered for the Representatives themselves, not those citizens"). As several Justices later noted, *Marsh* involved "government officials invok[ing] spiritual inspiration entirely for their own benefit without directing any religious message at the citizens they lead." *Lee,* 505 U.S., at 630, n. 8, 112 S.Ct. 2649 (Souter, J., concurring).

The very opposite is true in Greece: Contrary to the majority's characterization, the prayers there are directed squarely at the citizens. Remember that the chaplain of the month stands with his back to the Town Board; his real audience is the group he is facing—the 10 or so members of the public, perhaps including children. And he typically addresses those people, as even the majority observes, as though he is "directing [his] congregation." He almost always begins with some version of "Let us all pray together." Often, he calls on everyone to stand and bow their heads, and he may ask them to recite a common prayer with him. He refers, constantly, to a collective "we"—to "our" savior, for example, to the presence of the Holy Spirit in "our" lives, or to "our brother the Lord Jesus Christ." In essence, 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.

And third, the prayers themselves differ in their content and character. *Marsh* characterized the prayers in the Nebraska Legislature as "in the Judeo–Christian tradition," and stated, as a relevant (even if not dispositive) part of its analysis, that the chaplain had removed all explicitly Christian references at a senator's request. 463 U.S., at 793, n. 14. And as the majority acknowledges, *Marsh* hinged on the view that "that the prayer opportunity ha[d] [not] been exploited to proselytize or advance any one ... faith or belief"; had it been otherwise, the Court would have reached a different decision.

But no one can fairly read the prayers from Greece's Town meetings as anything other than explicitly Christian—constantly and exclusively so. From the time Greece established its prayer practice in 1999 until litigation loomed nine years later, all of its monthly chaplains were Christian clergy. And after a brief spell surrounding the filing of this suit (when a Jewish layman, a Wiccan priestess, and a Baha'i minister appeared at meetings), the Town resumed its practice of inviting only clergy from neighboring Protestant and Catholic churches. About two-thirds of the prayers given over this decade or so invoked "Jesus," "Christ," "Your Son," or "the Holy Spirit"; in the 18 months before the record closed, 85% included those references. Many prayers contained elaborations of Christian doctrine or recitations of scripture. See, *e.g., id.,* at 129a ("And in the life and death, resurrection and ascension of the Savior Jesus Christ, the full extent of your kindness shown to the unworthy is forever demonstrated"); *id.,* at 94a ("For unto us a child is born; unto us a son is given. And the government shall be upon his shoulder ..."). And the prayers usually close with phrases like "in the name of Jesus Christ" or "in the name of Your son." See, *e.g., id.,* at 55a, 65a, 73a, 85a.

Still more, the prayers betray no understanding that the American community is today, as it long has been, a rich mosaic of religious faiths. See *Braunfeld v. Brown,* 366 U.S. 599, 606 (1961) (plurality opinion) (recognizing even half a century ago

that "we are a cosmopolitan nation made up of people of almost every conceivable religious preference"). The monthly chaplains appear almost always to assume that everyone in the room is Christian (and of a kind who has no objection to government-sponsored worship). The Town itself has never urged its chaplains to reach out to members of other faiths, or even to recall that they might be present. And accordingly, few chaplains have made any effort to be inclusive; none has thought even to assure attending members of the public that they need not participate in the prayer session. Indeed, as the majority forthrightly recognizes, when the plaintiffs here began to voice concern over prayers that excluded some Town residents, one pastor pointedly thanked the Board "[o]n behalf of all God-fearing people" for holding fast, and another declared the objectors "in the minority and . . . ignorant of the history of our country."

C

Those three differences, taken together, remove this case from the protective ambit of *Marsh* and the history on which it relied. To recap: *Marsh* upheld prayer addressed to legislators alone, in a proceeding in which citizens had no role—and even then, only when it did not "proselytize or advance" any single religion. It was that legislative prayer practice (not every prayer in a body exercising any legislative function) that the Court found constitutional given its "unambiguous and unbroken history." But that approved practice, as I have shown, is not Greece's. None of the history *Marsh* cited—and none the majority details today—supports calling on citizens to pray, in a manner consonant with only a single religion's beliefs, at a participatory public proceeding, having both legislative and adjudicative components. Or to use the majority's phrase, no "history shows that th[is] specific practice is permitted." And so, contra the majority, Greece's prayers cannot simply ride on the constitutional coattails of the legislative tradition *Marsh* described. The Board's practice must, in its own particulars, meet constitutional requirements.

And the guideposts for addressing that inquiry include the principles of religious neutrality I discussed earlier. The government (whether federal, state, or local) may not favor, or align itself with, any particular creed. And that is nowhere more true than when officials and citizens come face to face in their shared institutions of governance. In performing civic functions and seeking civic benefits, each person of this nation must experience a government that belongs to one and all, irrespective of belief. And for its part, each government must ensure that its participatory processes will not classify those citizens by faith, or make relevant their religious differences.

To decide how Greece fares on that score, think again about how its prayer practice works, meeting after meeting. The case, I think, has a fair bit in common with my earlier hypotheticals. Let's say that a Muslim citizen of Greece goes before the Board to share her views on policy or request some permit. Maybe she wants the Board to put up a traffic light at a dangerous intersection; or maybe she needs a zoning variance to build an addition on her home. But just before she gets to say her piece, a minister deputized by the Town asks her to pray "in the name of God's only son Jesus Christ." She must think—it is hardly paranoia, but only the truth—that

Christian worship has become entwined with local governance. And now she faces a choice—to pray alongside the majority as one of that group or somehow to register her deeply felt difference. She is a strong person, but that is no easy call—especially given that the room is small and her every action (or inaction) will be noticed. She does not wish to be rude to her neighbors, nor does she wish to aggravate the Board members whom she will soon be trying to persuade. And yet she does not want to acknowledge Christ's divinity, any more than many of her neighbors would want to deny that tenet. So assume she declines to participate with the others in the first act of the meeting—or even, as the majority proposes, that she stands up and leaves the room altogether. At the least, she becomes a different kind of citizen, one who will not join in the religious practice that the Town Board has chosen as reflecting its own and the community's most cherished beliefs. And she thus stands at a remove, based solely on religion, from her fellow citizens and her elected representatives.

Everything about that situation, I think, infringes the First Amendment. (And of course, as I noted earlier, it would do so no less if the Town's clergy always used the liturgy of some other religion.) That the Town Board selects, month after month and year after year, prayergivers who will reliably speak in the voice of Christianity, and so places itself behind a single creed. That in offering those sectarian prayers, the Board's chosen clergy members repeatedly call on individuals, prior to participating in local governance, to join in a form of worship that may be at odds with their own beliefs. That the clergy thus put some residents to the unenviable choice of either pretending to pray like the majority or declining to join its communal activity, at the very moment of petitioning their elected leaders. That the practice thus divides the citizenry, creating one class that shares the Board's own evident religious beliefs and another (far smaller) class that does not. And that the practice also alters a dissenting citizen's relationship with her government, making her religious difference salient when she seeks only to engage her elected representatives as would any other citizen.

None of this means that Greece's town hall must be religion- or prayer-free. "[W]e are a religious people," *Marsh* observed, 463 U.S., at 792, and prayer draws some warrant from tradition in a town hall, as well as in Congress or a state legislature. What the circumstances here demand is the recognition that we are a pluralistic people too. When citizens of all faiths come to speak to each other and their elected representatives in a legislative session, the government must take especial care to ensure that the prayers they hear will seek to include, rather than serve to divide. No more is required—but that much is crucial—to treat every citizen, of whatever religion, as an equal participant in her government.

And contrary to the majority's view, that is not difficult to do. If the Town Board had let its chaplains know that they should speak in nonsectarian terms, common to diverse religious groups, then no one would have valid grounds for complaint. See *Joyner v. Forsyth County,* 653 F.3d 341, 347 (C.A.4 2011) (Wilkinson, J.) (Such prayers show that "those of different creeds are in the end kindred spirits, united by a respect paid higher providence and by a belief in the importance of religious faith"). Priests and ministers, rabbis and imams give such invocations all the time; there is no great mystery to the project. (And providing that guidance would hardly have caused the Board to run afoul of the idea that "[t]he First Amendment is

not a majority rule," as the Court (headspinningly) suggests, what does that is the Board's *refusal* to reach out to members of minority religious groups.) Or if the Board preferred, it might have invited clergy of many faiths to serve as chaplains, as the majority notes that Congress does. When one month a clergy member refers to Jesus, and the next to Allah or Jehovah—as the majority hopefully though counterfactually suggests happened here, the government does not identify itself with one religion or align itself with that faith's citizens, and the effect of even sectarian prayer is transformed. So Greece had multiple ways of incorporating prayer into its town meetings—reflecting all the ways that prayer (as most of us know from daily life) can forge common bonds, rather than divide.

But Greece could not do what it did: infuse a participatory government body with one (and only one) faith, so that month in and month out, the citizens appearing before it become partly defined by their creed—as those who share, and those who do not, the community's majority religious belief. In this country, when citizens go before the government, they go not as Christians or Muslims or Jews (or what have you), but just as Americans (or here, as Grecians). That is what it means to be an equal citizen, irrespective of religion. And that is what the Town of Greece precluded by so identifying itself with a single faith.

III

How, then, does the majority go so far astray, allowing the Town of Greece to turn its assemblies for citizens into a forum for Christian prayer? The answer does not lie in first principles: I have no doubt that every member of this Court believes as firmly as I that our institutions of government belong equally to all, regardless of faith. Rather, the error reflects two kinds of blindness. First, the majority misapprehends the facts of this case, as distinct from those characterizing traditional legislative prayer. And second, the majority misjudges the essential meaning of the religious worship in Greece's town hall, along with its capacity to exclude and divide.

The facts here matter to the constitutional issue; indeed, the majority itself acknowledges that the requisite inquiry—a "fact-sensitive" one—turns on "the setting in which the prayer arises and the audience to whom it is directed." But then the majority glides right over those considerations—at least as they relate to the Town of Greece. When the majority analyzes the "setting" and "audience" for prayer, it focuses almost exclusively on Congress and the Nebraska Legislature, it does not stop to analyze how far those factors differ in Greece's meetings. The majority thus gives short shrift to the gap—more like, the chasm—between a legislative floor session involving only elected officials and a town hall revolving around ordinary citizens. And similarly the majority neglects to consider how the prayers in Greece are mostly addressed to members of the public, rather than (as in the forums it discusses) to the lawmakers. "The District Court in *Marsh,*" the majority expounds, "described the prayer exercise as 'an internal act' directed at the Nebraska Legislature's 'own members.' " *Ante,* at 1825 (quoting *Chambers v. Marsh,* 504 F.Supp., at 588); see *ante,* at 1825 (similarly noting that Nebraska senators "invoke[d] spiritual inspiration entirely for their own benefit" and that prayer in Congress is "religious worship for national representatives" only). Well, yes, so it is

in Lincoln, and on Capitol Hill. But not in Greece, where as I have described, the chaplain faces the Town's residents—with the Board watching from on high—and calls on them to pray together. See *supra,* at 1846, 1847.

And of course—as the majority sidesteps as well—to pray in the name of Jesus Christ. In addressing the sectarian content of these prayers, the majority again changes the subject, preferring to explain what happens in *other* government bodies. The majority notes, for example, that Congress "welcom[es] ministers of many creeds," who commonly speak of "values that count as universal," and in that context, the majority opines, the fact "[t]hat a prayer is given in the name of Jesus, Allah, or Jehovah ... does not remove it from" *Marsh* 's protection. But that case is not this one, as I have shown, because in Greece only Christian clergy members speak, and then mostly in the voice of their own religion; no Allah or Jehovah ever is mentioned. So all the majority can point to in the Town's practice is that the Board "maintains a policy of nondiscrimination," and "represent[s] that it would welcome a prayer by any minister or layman who wishe[s] to give one." But that representation has never been publicized; nor has the Board (except for a few months surrounding this suit's filing) offered the chaplain's role to any non-Christian clergy or layman, in either Greece or its environs; nor has the Board ever provided its chaplains with guidance about reaching out to members of other faiths, as most state legislatures and Congress do. The majority thus errs in assimilating the Board's prayer practice to that of Congress or the Nebraska Legislature. Unlike those models, the Board is determinedly—and relentlessly—noninclusive.

And the month in, month out sectarianism the Board chose for its meetings belies the majority's refrain that the prayers in Greece were "ceremonial" in nature. *Ante,* at 1823 – 1824, 1825, 1826, 1827 – 1828. Ceremonial references to the divine surely abound: The majority is right that "the Pledge of Allegiance, inaugural prayer, or the recitation of 'God save the United States and this honorable Court' " each fits the bill. But prayers evoking "the saving sacrifice of Jesus Christ on the cross," "the plan of redemption that is fulfilled in Jesus Christ," "the life and death, resurrection and ascension of the Savior Jesus Christ," the workings of the Holy Spirit, the events of Pentecost, and the belief that God "has raised up the Lord Jesus" and "will raise us, in our turn, and put us by His side"? No. These are statements of profound belief and deep meaning, subscribed to by many, denied by some. They "speak of the depths of [one's] life, of the source of [one's] being, of [one's] ultimate concern, of what [one] take[s] seriously without any reservation." P. Tillich, The Shaking of the Foundations 57 (1948). If they (and the central tenets of other religions) ever become mere ceremony, this country will be a fundamentally different—and, I think, poorer—place to live.

But just for that reason, the not-so-implicit message of the majority's opinion—"What's the big deal, anyway?"—is mistaken. The content of Greece's prayers *is* a big deal, to Christians and non-Christians alike. A person's response to the doctrine, language, and imagery contained in those invocations reveals a core aspect of identity—who that person is and how she faces the world. And the responses of different individuals, in Greece and across this country, of course vary. Contrary to the majority's apparent view, such sectarian prayers are not "part of our expressive

idiom" or "part of our heritage and tradition," assuming the word "our" refers to all Americans. They 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. The majority, I think, assesses too lightly the significance of these religious differences, and so fears too little the "religiously based divisiveness that the Establishment Clause seeks to avoid." *Van Orden v. Perry,* 545 U.S. 677, 704, 125 S.Ct. 2854, 162 L.Ed.2d 607 (2005) (BREYER, J., concurring in judgment). I would treat more seriously the multiplicity of Americans' religious commitments, along with the challenge they can pose to the project—the distinctively American project—of creating one from the many, and governing all as united.

IV

In 1790, George Washington traveled to Newport, Rhode Island, a longtime bastion of religious liberty and the home of the first community of American Jews. Among the citizens he met there was Moses Seixas, one of that congregation's lay officials. The ensuing exchange between the two conveys, as well as anything I know, the promise this country makes to members of every religion.

Seixas wrote first, welcoming Washington to Newport. He spoke of "a deep sense of gratitude" for the new American Government—"a Government, which to bigotry gives no sanction, to persecution no assistance—but generously affording to All liberty of conscience, and immunities of Citizenship: deeming every one, of whatever Nation, tongue, or language, equal parts of the great governmental Machine." Address from Newport Hebrew Congregation (Aug. 17, 1790), in 6 PGW 286, n. 1 (M. Mastromarino ed. 1996). The first phrase there is the more poetic: a government that to "bigotry gives no sanction, to persecution no assistance." But the second is actually the more startling and transformative: a government that, beyond not aiding persecution, grants "immunities of citizenship" to the Christian and the Jew alike, and makes them "equal parts" of the whole country.

Washington responded the very next day. Like any successful politician, he appreciated a great line when he saw one—and knew to borrow it too. And so he repeated, word for word, Seixas's phrase about neither sanctioning bigotry nor assisting persecution. But he no less embraced the point Seixas had made about equality of citizenship. "It is now no more," Washington said, "that toleration is spoken of, as if it was by the indulgence of one class of people" to another, lesser one. For "[a]ll possess alike ... immunities of citizenship." Letter to Newport Hebrew Congregation (Aug. 18, 1790), in 6 PGW 285. That is America's promise in the First Amendment: full and equal membership in the polity for members of every religious group, assuming only that they, like anyone "who live[s] under [the Government's] protection[,] should demean themselves as good citizens." *Ibid.*

For me, that remarkable guarantee means at least this much: When the citizens of this country approach their government, they do so only as Americans, not as members of one faith or another. And that means that even in a partly legislative body, they should not confront government-sponsored worship that divides them along religious lines. I believe, for all the reasons I have given, that the Town of Greece betrayed that promise. I therefore respectfully dissent from the Court's decision.