

Invoking Guidance on Legislative Prayers

Invocation Policies following
Town of Greece v. Galloway

Allison E. Burns
Stradling Yocca Carlson & Rauth
Presented to Texas City Attorneys Association
June 18, 2014

How We Got Here

- *Marsh v. Chambers*, 463 U.S. 783 (1983) is the governing Supreme Court decision
 - Upheld Nebraska legislature's 16-year practice of hiring a single paid chaplain for legislative invocations
- Muddled by *Allegheny v. ACLU*, 492 U.S. 573 (1989)
 - Creche display case
 - Focused on a single footnote in *Marsh*
- Made complicated by *Lee v. Weisman*, 505 U.S. 577 (1992)
 - Directing Rabbi regarding the content of a prayer at a high school graduation was an unconstitutional establishment of religion AND a violation of the Rabbi's First Amendment rights
- Taken up again by the USSC in *Greece v. Galloway*

Marsh v. Chambers - Facts

- The prayers held to be constitutional by the United States Supreme Court were expressly and overtly Christian

A Little History –
Marsh v. Chambers - Facts

- Nebraska Legislature appoints and pays same Presbyterian minister for 16 years
- Prayers “in the Judeo-Christian tradition” and explicitly Christian for 15 of 16 years
- Expressly and overtly Christian
- Footnote 14: Minister removed references to Christ after complaint by a legislator
 - Heavily relied on by challengers to invocation policies
 - Referenced in *Allegheny* as the reason the *Marsh* invocations passed constitutional muster

Marsh v. Chambers - Holding

- The Court relied on the history and tradition of legislative prayer dating to the founding of the country (and before) to disregard the *Lemon* test and fashion a new standard:
 - Legislative prayer is constitutionally permissible and does not violate the Establishment Clause, where the **prayer opportunity** provided by the government is not exploited to proselytize on behalf of any one or disparage any other faith or belief.

Pelphrey v. Cobb County (11th Cir 2008)

- County commissions have longstanding tradition of opening meetings with clergy invited on a rotating basis
 - List compiled from multiple sources (yellow pages and internet)
 - Randomly selected, but majority Christian (68-70%)
- Policy upheld by 11th Circuit, finding that “Nonsectarian” prayers are not required because such a rule would be contrary to *Marsh’s* directive that “courts are not to evaluate the content of prayers absent evidence of exploitation”

Joyner (4th Circuit 2011)

- Created and imposed a frequency test
- Bad facts make bad law: Not a single non-Christian prayer in the record
- Court nonetheless refused to impose a per se requirement that invocations be “nonsectarian.”

Rubin v. Lancaster (9th Cir., 2013)

- City took every feasible precaution to ensure evenhandedness:
 - No one is required to participate
 - No one paid to pray
 - No city personnel or staff may review, inquire or be involved in the content of any prayer
 - The Clerk has never removed anyone from the invocation list or refused to include anyone

Rubin v. Lancaster - Decision

- City’s proactive measures towards inclusivity:
 - Clerk directed to “make every reasonable effort to ensure that a variety of eligible invocation speakers are scheduled”
 - No speaker permitted at consecutive meetings or more than three meetings in a year
 - Invite every local religious group to be found
 - Scheduled on a first-come, first-served basis
 - No city official has attempted to influence the clerk

Greece v. Galloway (2nd Circuit decision below)

- Held town's informal policy unconstitutional:
 - Anyone may request to give an invocation
 - No request has ever been rejected
 - Officials do not review the content of the prayer before it is given
 - Staff compiled "Town Board Chaplain" list from Chamber of Commerce "Community Guide", local newspaper and requests from community members
 - No publicity regarding all-comers policy
 - Only Christian prayers until plaintiffs began complaining

- *Galloway v. Greece (2nd Circuit decision below)*
 - Court took issue with town's failure to explain the policy to the public
 - 2nd Circuit held the practice unconstitutional but limited the scope of the holding – did not prohibit prayers or require non-sectarian

Greece v. Galloway
Majority Decision

- Authored by Kennedy, joined by Roberts, Alito, Scalia and Thomas
- Relied almost exclusively on *Marsh* & historical analysis in that decision
- Focused on whether Town's prayer practice fit within the historical tradition upheld in *Marsh*
- Found mandate of nonsectarian prayer to be inconsistent with *Marsh* and U.S. history
- Stated *Allegheny* dictum re Footnote 14 was disputed when written and later repudiated

Majority Decision

- *Marsh* “nowhere suggested that the constitutionality of legislative prayer turns on the neutrality of its content.”
- A nonsectarian requirement would force legislatures and courts to become “supervisors and censors of religious speech.”
- Questioned whether could ever be consensus on what is “nonsectarian”
 - > God
 - > Father
 - > Lord of lords
 - > King of kings

Majority Decision

- Once invited, government must allow prayer giver to address god or gods according to his/her conscience
- Elements of a constitutional prayer:
 - > Opening of sessions
 - > Lend gravity to the occasion
 - > Reflect values of Nation
 - > Solemn and respectful tone
 - > Invite lawmakers to reflect on shared ideals and common ends
 - > Nondiscrimination

Majority Decision

- What will render a policy unconstitutional:
 - > Pattern of:
 - ❖ Denigration/disparagement
 - ❖ Threatened damnation
 - ❖ Preaching conversion
 - ❖ Proselytizing or advancing any faith or belief
- *Marsh* mandates inquiry into the prayer opportunity as a whole, rather than the content of a single prayer

Plurality Opinion

Kennedy, Roberts & Alito

- Plaintiff's coercion argument fails
 - > Reasonable observer understands purpose is to lend gravity to public proceedings and acknowledge role of religion in society...not to proselytize
 - > Audience for invocations is lawmakers
 - > Offense does not equate to coercion
 - > Any member of the public is welcome to offer invocation

Plurality Opinion

- What not to do:
 - > Direct the public to participate
 - > Single out dissidents for opprobrium
 - > Indicate decisions might be influenced by acquiescence in prayer opportunity
 - > Classify citizens based on religious views
 - > Chastise dissenters
 - > Attempt "lengthy disquisition on religious dogma"
 - > Refuse any request to offer a prayer
 - > Schedule prayer in proximity to administrative or quasi-judicial activities

Alito Concurrence

- Takes Kagan dissent to task for resting dissent on town staff doing a "bad job" of compiling clergy list

Thomas Concurrence

- Argues establishment clause is inapplicable to the states
- Finds that the coercion alleged by Plaintiffs is not the coercion envisioned by the framers:
 - ❖ Mandatory church attendance
 - ❖ Support for churches by mandatory taxation
- Peer pressure is not coercion

Breyer Dissent

- Concurred with 2nd Circuit:
 - ❖ Not sufficiently inclusive
 - ❖ No significant effort to inform non-Christian houses of worship of prayer opportunity
 - ❖ Should use the House of Representatives guidelines

Kagan Dissent

- With Ginsberg, Breyer and Sotomayor
 - Facts here are distinguishable from *Marsh*
 - ❖ Participants all ordinary citizens
 - ❖ Invocations predominantly sectarian
 - ❖ Board did nothing to recognize religious diversity or reach out to non-Christians
 - ❖ Prayer giver addressed public, not legislative body
 - ❖ Board has quasi-judicial role and petition of government
 - ❖ Constantly and exclusively Christian prayers

Kagan Dissent

- Would require:
 - ❖ Prayers that “Seek to include rather than divide”
 - ❖ Invite clergy of all faiths
 - ❖ Require non-sectarian prayers
 - ❖ Publicize inclusiveness
 - ❖ Offer role to non-Christians

What’s Next?

- Further challenges based on “coercion” theory
- Challenges directly to *Marsh*
- Challenges to cities’ prohibitions on sectarian prayers and/or references to specific deities in prayers
- Challenges as to what constitutes “a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose”

Critical Elements of Policies that Pass Constitutional Muster

- “All comers” neutral program available to all faiths (and non-faiths)
- Explain program to the public
- Admonition not to proselytize or disparage
- No involvement in the content of the invocations other than the admonition
- Explain purpose to solemnize meetings
- Direct prayer to legislators, not public
- Legislators do not direct audience to stand

Additional Policy Suggestions

- Statement on agenda regarding policy
 - Voluntary, unpaid invocation givers
 - Neither reviewed nor approved by City
 - Requested to neither proselytize nor disparage
 - All are welcome
 - If you/your congregation would like to give an invocation, please contact the city clerk
 - Participation (or not) will not affect right to participate in meeting
- Include option for moment of silence within policy text
- Temporally separate from quasi-judicial functions

Questions ?
