
LEADING CASES

CONSTITUTIONAL LAW

First Amendment — Establishment Clause — Legislative Prayer — Town of Greece v. Galloway

Over three decades ago, in *Marsh v. Chambers*,¹ the Supreme Court upheld the constitutionality of a state legislature’s practice of opening each session with a prayer by a chaplain paid with state funds.² Rather than applying its at-the-time customary Establishment Clause test, the *Lemon* test,³ the Court based its decision on the long, unbroken history of legislative prayer dating back to the time of the drafting of the First Amendment.⁴ Since *Marsh*, the Court has taken a bewildering array of different approaches to the Establishment Clause, leaving it unclear which test should govern Establishment Clause inquiries generally, as well as how the Court might approach, specifically, another legislative prayer case.⁵ Last Term, in a 5–4 decision in *Town of Greece v. Galloway*,⁶ the Court reaffirmed *Marsh* and again relied on history in upholding a town’s practice of opening its monthly town board meetings with a prayer offered by volunteers from the local community.⁷ While the decision did little to alleviate the doctrinal muddle of the Court’s Establishment Clause jurisprudence, *Greece* highlights the deep divisions among the Justices on a central question underlying the Establishment Clause: what the government is required to do, or even permitted to do, to accommodate religious pluralism in an increasingly diverse society.

In 1999, Greece, a town in upstate New York, began a practice of inviting local members of the clergy to lead prayer sessions to open its monthly town board meetings.⁸ Employees from the town’s Office of

¹ 463 U.S. 783 (1983).

² See *id.* at 795.

³ To survive a challenge for a violation of the Establishment Clause under the *Lemon* test, a government practice (1) “must have a secular legislative purpose”; (2) must not have a “principal or primary effect” of either “advanc[ing] [or] inhibit[ing] religion”; and (3) “must not foster ‘an excessive government entanglement with religion.’” *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 674 (1970)).

⁴ *Marsh*, 463 U.S. at 792.

⁵ See generally Steven G. Gey, *Reconciling the Supreme Court’s Four Establishment Clauses*, 8 U. PA. J. CONST. L. 725 (2006) (reviewing various approaches employed by different Justices).

⁶ 134 S. Ct. 1811 (2014).

⁷ See *id.* at 1823–24, 1828.

⁸ *Id.* at 1816. The meetings had both legislative and adjudicatory functions and were attended by members of the public as well as by town board members. *Id.* at 1846 (Kagan, J., dissenting) (“[The meetings] 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

Constituent Services initially selected these volunteer “chaplains of the month” by calling congregations within town limits based on a list in a local directory; over time, town employees began to rely on a list of “Town Board Chaplains” who had previously accepted those invitations and had agreed to return in the future.⁹ Because “nearly all of the congregations in town were Christian,” all of the participating ministers between 1999 and 2007 were Christian.¹⁰ The town provided no guidelines or restrictions on the content of the prayers, and the ministers composed prayers that contained both civic and distinctly Christian themes.¹¹ While the town never denied anybody the opportunity to give prayer, neither did it publicize its all-comers policy.¹²

In 2010, two local residents brought suit alleging that the town’s prayer practice violated the Establishment Clause for two reasons: the town intentionally excluded non-Christian prayer, and the town impermissibly permitted sectarian prayer.¹³ The district court awarded summary judgment to the town on the basis that the town’s clerical employees exercised no impermissible preference for Christianity in selecting prayer-givers,¹⁴ and that *Marsh* did not require legislative prayers to be nonsectarian.¹⁵

The Second Circuit reversed.¹⁶ Writing for a unanimous panel, Judge Calabresi found that, under the totality of the circumstances as viewed by a reasonable objective observer, the town’s prayer practice conveyed an impermissible “official affiliation” with Christianity.¹⁷ The fact-specific decision relied on “the interaction of the facts present in this case” rather than “any single aspect of the town’s prayer practice.”¹⁸

The Supreme Court reversed. Writing for the Court, Justice Kennedy¹⁹ began by emphasizing the long tradition of legislative prayer in the United States. He referred to the Court’s previous case on legislative

provides an opportunity . . . for citizens to address local issues and ask for improved services or new policies . . . ; and it usually hears debate on individual applications from residents and local businesses to obtain special land-use permits, zoning variances, or other licenses.” (citation omitted).

⁹ *Galloway v. Town of Greece*, 681 F.3d 20, 23–24 (2d Cir. 2012); see also *Town of Greece*, 134 S. Ct. at 1816.

¹⁰ *Town of Greece*, 134 S. Ct. at 1816.

¹¹ *Id.*; see also *id.* at 1848 (Kagan, J., dissenting) (“About two-thirds of the prayers given over this decade or so invoked ‘Jesus,’ ‘Christ,’ ‘Your Son,’ or ‘the Holy Spirit’”).

¹² *Id.* at 1816 (majority opinion); see also *id.* at 1852 (Kagan, J., dissenting).

¹³ *Galloway v. Town of Greece*, 732 F. Supp. 2d 195, 196–97 (W.D.N.Y. 2010).

¹⁴ *Id.* at 219.

¹⁵ *Id.* at 241.

¹⁶ *Galloway v. Town of Greece*, 681 F.3d 20, 22 (2d Cir. 2012). In their appeal, the plaintiffs dropped the intentional discrimination argument. Thus, the only issue considered by the Second Circuit was whether the town’s prayer practice had the effect of establishing religion. *Id.* at 26.

¹⁷ *Id.* at 34.

¹⁸ *Id.* at 33.

¹⁹ Justice Kennedy was joined by Chief Justice Roberts and Justice Alito. Justices Scalia and Thomas joined in part.

prayer, *Marsh*, in which the Court held that, “[i]n 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.”²⁰ In particular, the appointment of official chaplains in the First Congress was evidence that legislative prayer was “accepted by the Framers.”²¹ The Court’s inquiry, then, was “whether the prayer practice in the town of Greece fits within the tradition long followed in Congress and the state legislatures.”²²

The Court then rejected the argument that legislative prayer must be nonsectarian to fit within this historical tradition and to fall within the holding of *Marsh*.²³ In fact, not only was mandating nonsectarian prayer not required, but requiring nonsectarian prayer was also itself prohibited. “Once [government] invites prayer into the public sphere, [it] must permit a prayer giver to address his or her own God or gods as conscience dictates.”²⁴ To hold otherwise and require legislatures that sponsor prayers to examine their content to ensure that they refer only to a “generic God” would result in greater government entanglement than Greece’s practice of noninvolvement did.²⁵

The Court also rejected the argument that Greece was obligated to do more to seek out non-Christian prayer-givers to avoid impermissible bias against minority faiths. While the town was obligated to follow “a policy of nondiscrimination,” the overwhelmingly Christian nature of the prayers in Greece did not violate the Constitution where that prevalence was due to the predominance of Christian congregations within the town borders rather than bias by the town leaders.²⁶ To hold otherwise and require the town to reach outside its borders to achieve “religious balancing” would result in even greater government entanglement with religion than would Greece’s approach.²⁷

Having found that Greece’s prayer policy fell within the scope of *Marsh*, Justice Kennedy²⁸ proceeded to find that the prayer practice

²⁰ *Town of Greece*, 134 S. Ct. at 1819 (quoting *Marsh v. Chambers*, 463 U.S. 783, 792 (1983)) (internal quotation marks omitted).

²¹ *Id.*

²² *Id.*

²³ *Id.* at 1821. The Court abrogated dicta in *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989), which stated that the constitutionality of the legislative prayer in *Marsh* had turned on the nonsectarian nature of the prayer. *Town of Greece*, 134 S. Ct. at 1821.

²⁴ *Town of Greece*, 134 S. Ct. at 1822.

²⁵ *Id.* While Justice Kennedy did draw a line by noting that the content of legislative prayer may violate the Establishment Clause “[i]f the course and practice over time shows that the invocations denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion,” there was no such pattern in the town’s prayers. *Id.* at 1823.

²⁶ *Id.* at 1824.

²⁷ *Id.*

²⁸ Justices Scalia and Thomas did not join this section of the opinion.

was not sufficiently coercive to raise constitutional concerns.²⁹ He reasoned that the history of legislative prayer mitigated any coercive effect because:

It is presumed that the reasonable observer is acquainted with [the] 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, not to afford government an opportunity to proselytize or force truant constituents into the pews.³⁰

While he noted that the prayer would have been impermissibly coercive “if town board members [had] 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,” there was no evidence that such impermissible coercion had taken place.³¹ Thus, Justice Kennedy found no conflict between the town’s practices and the Establishment Clause.

Justice Alito concurred,³² writing separately to suggest that Justice Kagan’s dissent would render opening prayers legal in theory but impossible in practice.³³ A requirement that prayer be nonsectarian would burden the town by requiring it to prescreen and edit prayers to ensure that they met the “daunting, if not impossible” requirement of being acceptable to members of all religions.³⁴ Similarly, demanding anything more than a good faith effort from towns to invite individuals of many faiths to give opening prayers would create too high a bar, “pressur[ing] towns to forswear altogether” legislative prayer in order to avoid constitutional challenges.³⁵

Justice Thomas concurred in part and concurred in the judgment.³⁶ Writing for himself only, Justice Thomas reiterated his position that the Establishment Clause should be understood as a federalism provision protecting state churches from the establishment of a national

²⁹ *Town of Greece*, 134 S. Ct. at 1825–27 (opinion of Kennedy, J.). Justice Kennedy had previously suggested that coercion is the proper test for Establishment Clause analysis. See *Lee v. Weisman*, 505 U.S. 577, 587 (1992) (“[G]overnment may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which ‘establishes a [state] religion or religious faith, or tends to do so.’” (second alteration in original) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984))); see also *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 659–60 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part).

³⁰ *Town of Greece*, 134 S. Ct. at 1825 (opinion of Kennedy, J.).

³¹ *Id.* at 1826. The fact that some nonparticipants might feel the need to leave the room or remain silent did not “represent[] an unconstitutional imposition as to mature adults, who ‘presumably’ are ‘not readily susceptible to religious indoctrination or peer pressure.’” *Id.* at 1827 (quoting *Marsh v. Chambers*, 463 U.S. 783, 792 (1983)). *But cf. Lee*, 505 U.S. at 592 (finding “heightened concerns” about “subtle coercive pressure” in school context).

³² Justice Alito was joined by Justice Scalia.

³³ *Town of Greece*, 134 S. Ct. at 1831 (Alito, J., concurring).

³⁴ *Id.* at 1830.

³⁵ *Id.* at 1831.

³⁶ Justice Thomas was joined in part by Justice Scalia.

religion and should not be incorporated against the states.³⁷ Then, writing for himself and Justice Scalia, he recited a narrower understanding of the coercion test that prohibits only “actual legal coercion,” not merely psychological coercion.³⁸

Justice Breyer dissented. He agreed with the Second Circuit’s view that the decision should be “fact-sensitive” and consider the “totality of the circumstances.”³⁹ Finding “no test-related substitute for the exercise of legal judgment,”⁴⁰ Justice Breyer would have “applied [his] legal judgment to the relevant facts” and found an Establishment Clause violation.⁴¹

Justice Kagan wrote the principal dissent.⁴² In her view, the town violated the “norm of religious equality” by treating minority citizens as outsiders at the very moment they sought to exercise their right to engage in participatory democracy.⁴³ While she expressed continued agreement with the Court’s decision in *Marsh*, she distinguished *Marsh* on the basis that the prayer there had opened a legislative floor session in which citizens had no direct role and often were not even present;⁴⁴ by contrast, Greece’s board meetings involved participation by ordinary citizens, who were present in order to “engage with and petition their government, often on highly individualized matters.”⁴⁵ By showing a preference for a particular religion in “a place where individuals come to interact with, and participate in, the institutions and processes of their government,”⁴⁶ the town violated “the First Amendment’s promise that every citizen, irrespective of her religion, owns an equal share in her government.”⁴⁷ This situation, Justice Kagan

³⁷ *Town of Greece*, 134 S. Ct. at 1835–37 (Thomas, J., concurring in part and concurring in the judgment). Justice Thomas has stated this position previously in, for example, *Van Orden v. Perry*, 545 U.S. 677, 692–93 (2005) (Thomas, J., concurring); and *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 50–51 (2004) (Thomas, J., concurring in the judgment).

³⁸ *Town of Greece*, 134 S. Ct. at 1838 (Thomas, J., concurring in part and concurring in the judgment).

³⁹ *Id.* at 1838–39 (Breyer, J., dissenting) (quoting *id.* at 1825 (majority opinion)) (internal quotation marks omitted).

⁴⁰ *Id.* at 1841 (quoting *Van Orden*, 545 U.S. at 700 (Breyer, J., concurring in the judgment)) (internal quotation mark omitted).

⁴¹ *Id.* Among the facts Justice Breyer found to be relevant were: the prayers being predominantly Christian despite the presence of other faith groups within the town’s borders; the town making no significant effort to invite non-Christian prayer-givers or to publicize its policy that anybody who wished to lead a prayer could do so; the nature of the town board meetings, which were not purely legislative as in *Marsh* but which also involved participation by members of the public; and the town making no effort to provide guidelines to prayer-givers, as the U.S. House of Representatives does. *See id.* at 1839–41.

⁴² Justice Kagan was joined by Justices Ginsburg, Breyer, and Sotomayor.

⁴³ *Town of Greece*, 134 S. Ct. at 1841, 1849 (Kagan, J., dissenting).

⁴⁴ *Id.* at 1842.

⁴⁵ *Id.* at 1845.

⁴⁶ *Id.* at 1844.

⁴⁷ *Id.* at 1842.

explained, was coercive and violative of the principle of religious and political equality because it forced a non-Christian citizen appearing before the town board to choose to join the prayer or to risk aggravating the board members before whom she would soon appear.⁴⁸ Instead, Justice Kagan suggested, the town could have avoided this de facto establishment of religion either by directing invitees to give nonsectarian prayer or by inviting clergy of many faiths to give prayer — ensuring that more citizens felt included in the prayer-giving process and that these citizens did not perceive their government as explicitly Christian.⁴⁹

With its holding built mostly around historical invocation and *Marsh*, *Greece* did little to elucidate the Court's muddled Establishment Clause jurisprudence or to clarify which doctrinal test should apply to Establishment Clause challenges in other factual contexts. But the opinions in *Greece* do highlight a deep divergence among the Justices on the question of what the Establishment Clause requires the government to do, or even permits it to do, to accommodate religious diversity.

In deciding *Greece*, the Justices faced a murky doctrinal landscape. A number of different Establishment Clause tests had emerged out of the Court's previous opinions,⁵⁰ and the Justices had never reached consensus on which test should govern.⁵¹ Moreover, it was unclear if *Marsh* had introduced a new, broadly applicable approach that relied on history or if legislative prayer was sui generis.⁵²

Although the Justices could have used *Greece* as an opportunity to clarify the doctrine, they did not do so. With no test garnering support from a majority of the Court, Establishment Clause jurisprudence remains as cloudy as it was before. If anything, *Greece* created further

⁴⁸ See *id.* at 1850.

⁴⁹ See *id.* at 1850–51.

⁵⁰ These tests include the *Lemon* test, *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (as described *supra* note 3); the endorsement test, *Lynch v. Donnelly*, 465 U.S. 668, 687–89 (1984) (O'Connor, J., concurring) (whether a reasonable observer would perceive religious endorsement); and the coercion test, *Lee v. Weisman*, 505 U.S. 577, 587 (1992) (whether the government is coercing citizens into participating in religious observance).

⁵¹ The formerly prevailing *Lemon* test had been largely abandoned, but never formally renounced. See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 319 (2000) (Rehnquist, C.J., dissenting) (noting *Lemon*'s “checkered career in the decisional law of this Court”); *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 655 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part) (“Persuasive criticism of *Lemon* has emerged.”). But no other test has received consensus support, either.

⁵² Courts have tended to describe *Marsh* as a historical outlier. See, e.g., *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 40 (2004) (O'Connor, J., concurring in the judgment) (suggesting that *Marsh* was a special case because of the “extremely long and unambiguous history” of legislative prayer); *Coles ex rel. Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 381 (6th Cir. 1999) (“*Marsh* is one-of-a-kind . . .”); *Cammack v. Waihee*, 932 F.2d 765, 772 (9th Cir. 1991) (expressing “reluctan[ce] to extend a ruling explicitly based upon the ‘unique history’ surrounding legislative prayer” (quoting *Marsh v. Chambers*, 463 U.S. 783, 791 (1983))).

uncertainty. For one, the Court again declined to expressly reject the *Lemon* test; in fact, the majority opinion did not even mention the test and Justice Breyer's dissent mentioned the case itself only once in passing.⁵³ While Justice Kennedy's opinion might be read as folding history into his general coercion test,⁵⁴ it also seemed to invoke the reasonable observer test as part of the coercion analysis.⁵⁵ Either way, the section of Justice Kennedy's opinion on coercion did not receive support from a majority of the Court. In her dissent, Justice Kagan agreed with *Marsh*'s reliance on the history of legislative prayer⁵⁶ but did not explicitly engage with either the reasonable observer approach or the coercion test; instead, she introduced what is debatably an entirely new participatory democracy perspective.⁵⁷ Thus, while all the Justices seem to agree that history likely plays some role in Establishment Clause interpretation, *Greece* leaves uncertain the status and relevance of the previous doctrinal tests, as well as exactly how history fits into those approaches.

Still, although *Greece* may provide no more doctrinal clarity, the opinions reveal two fundamentally distinct understandings among the Justices of what the Constitution permits or requires the government to do to accommodate religious pluralism in the public sphere. The Justices' differing views on the Constitution's treatment of diver-

⁵³ See *Town of Greece*, 134 S. Ct. at 1841 (Breyer, J., dissenting).

⁵⁴ See *id.* at 1825 (opinion of Kennedy, J.). Justice Kennedy has previously sought to characterize the historical inquiry in *Marsh* as relevant to general Establishment Clause challenges, not just to special cases like *Marsh*. *County of Allegheny*, 492 U.S. at 670 (Kennedy, J., concurring in the judgment in part and dissenting in part) ("*Marsh* stands for the proposition, not that specific practices common in 1791 are an exception to the otherwise broad sweep of the Establishment Clause, but rather that the meaning of the Clause is to be determined by reference to historical practices and understandings."). Justice Kennedy's belief in the importance of history for Establishment Clause interpretation is not new to the Court. See, e.g., *Everson v. Bd. of Educ.*, 330 U.S. 1, 33 (1947) (Rutledge, J., dissenting) ("No provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment."). However, a historical approach to Establishment Clause interpretation has not been without criticism. See generally, e.g., Steven K. Green, "*Bad History*": *The Lure of History in Establishment Clause Adjudication*, 81 NOTRE DAME L. REV. 1717 (2006) (discussing the unreliability and manipulability of history as an analytical tool in Establishment Clause analysis).

⁵⁵ See *Town of Greece*, 134 S. Ct. at 1825 (opinion of Kennedy, J.).

⁵⁶ Justice Kagan agreed with the majority opinion that *Marsh* was correct in identifying a long history of legislative prayer in this country, and that the sole question in the instant case was whether *Greece*'s prayer practice fell within that tradition. *Id.* at 1845 (Kagan, J., dissenting) (expressing agreement with the majority's historical exposition, *id.* at 1819 (majority opinion)). It is surprising that although three Justices dissented in *Marsh* in 1983, all nine Justices today agree that legislative prayer, at least in some form, can be compatible with the Establishment Clause. In particular, it is puzzling that Justice Kagan embraced *Marsh*'s reliance on history when an emphasis on history may lead to a more majority-favoring and prayer-tolerant clause. See Gerard V. Bradley, *The Supreme Court on Prayer*, WITHERSPOON INST.: PUBLIC DISCOURSE (May 29, 2014), <http://www.thepublicdiscourse.com/2014/05/13238> [<http://perma.cc/Q98W-7TKX>] (suggesting that a historical approach could "buttress[]" a number of practices that may not survive other Establishment Clause tests).

⁵⁷ See *Town of Greece*, 134 S. Ct. at 1842 (Kagan, J., dissenting).

sity lead in opposite directions: to either a minority-protective or a majority-favoring Establishment Clause.

In Justice Kagan's view, the Establishment Clause not only permits but also requires the government to protect minority believers, such as by allowing within the public sphere only those forms of religious expression that everyone — or at least most people — will find acceptable. To her, the Establishment Clause is a minority-protective device that prescribes an active governmental role in preventing exclusion of minorities. The clause's purpose is to prevent the "religiously based divisiveness" that results from marginalization of minority faiths.⁵⁸ As a result, the Establishment Clause requires that when government sponsors legislative prayer, it must accommodate minorities by ensuring either that prayers are generic and nonsectarian or that clergy of many faiths are invited.⁵⁹

But in Justice Kennedy's view, the Constitution does not require the government to take such steps to ensure inclusivity, and may even prohibit such involvement. As long as the government adheres to a "policy of nondiscrimination,"⁶⁰ it can allow people to fully express their religious beliefs in the public sphere, even if the result is that the majority faiths predominate.⁶¹ In fact, it might even be largely impermissible for government to attempt to control the content of such religious expression — in Justice Kennedy's view, the Establishment Clause is concerned less with minorities feeling marginalized and more with the backlash that might result when longstanding traditions are threatened by government efforts to promote inclusivity.⁶² While minorities are presumed to understand expressions of the majority religion as part of the prevailing culture of the society in which they live, not as an attempt to coerce their adherence to the majority faith,⁶³ government efforts to affirmatively promote a balance of religious

⁵⁸ *Id.* at 1853 (quoting *Van Orden v. Perry*, 545 U.S. 677, 704 (2005) (Breyer, J., concurring in the judgment)) (internal quotation mark omitted).

⁵⁹ *See id.* at 1851.

⁶⁰ *Id.* at 1824 (majority opinion).

⁶¹ *See* RICHARD H. FALLON, JR., *THE DYNAMIC CONSTITUTION* 99 (2d ed. 2013) (explaining how a "weak" reading of the Establishment Clause combines with the Court's "weak" Free Exercise Clause doctrine to "well serve[] the interests of those with mainstream religious beliefs").

⁶² *See Town of Greece*, 134 S. Ct. 1819 ("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."); *see also Van Orden*, 545 U.S. at 704 (Breyer, J., concurring in the judgment) ("[Striking down the display of the Ten Commandments] might well encourage disputes concerning the removal of longstanding depictions of the Ten Commandments from public buildings across the Nation. And it could thereby create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid."); NOAH FELDMAN, *DIVIDED BY GOD* 243 (2006).

⁶³ *See Town of Greece*, 134 S. Ct. at 1825 (opinion of Kennedy, J.); *see also* FELDMAN, *supra* note 62, at 239–40 (arguing that symbolic invocations of a majority religion merely reflect that religion's majority status and that, with regard to atheists or those of minority faiths, "it is largely an interpretative choice to feel excluded," *id.* at 242).

views may result in “a form of government entanglement with religion that is far more troublesome”⁶⁴ because such efforts would require government “to make wholly inappropriate judgments” about which religions to sponsor and how much to sponsor them.⁶⁵

In short, Justice Kagan sees the Establishment Clause as concerned with the experience of religious minorities while Justice Kennedy reads the clause as preventing government from curtailing expressions of the majority faith in order to ensure inclusion of those in the minority — and these opposing perspectives inform how the Justices portray the proper role of the government under the Establishment Clause.⁶⁶ Justice Kennedy views the clause as conferring a negative obligation: government merely ensures equal access to all religious faiths and can exercise minimal content restrictions beyond that.⁶⁷ In this view, Justice Kagan’s suggestion of nonsectarian prayer might itself result in impermissible government entanglement with, or censorship of, prayer — either prescreening or after-the-fact review with consequences for prayer-givers who violate the nonsectarian requirement.⁶⁸ But to Justice Kagan, the Constitution imposes a positive obligation on government to engage in this supposed entanglement to protect followers of minority faiths. In other words, each Justice understands the clause as designating a different role for the government in accommodating religious pluralism in a democratic society.⁶⁹

⁶⁴ *Town of Greece*, 134 S. Ct. at 1824.

⁶⁵ *Id.* (quoting *Lee v. Weisman*, 505 U.S. 577, 617 (1992) (Souter, J., concurring)) (internal quotation mark omitted).

⁶⁶ Professor Chad Flanders has suggested the term “thick” diversity for Justice Kennedy’s view that the Constitution requires “allowing each particular religious faith to express itself, no holds barred, provided that every other religious faith gets its turn.” Chad Flanders, *Symposium: Religious Diversity, Thick and Thin*, SCOTUSBLOG (May 6, 2014, 11:33 AM), <http://www.scotusblog.com/2014/05/symposium-religious-diversity-thick-and-thin> [<http://perma.cc/TU2N-SKUL>]. He has suggested the term “thin” diversity for Justice Kagan’s view that the Constitution requires “trying to find some common denominator between faiths, so that all faiths are placated, and no one faith is exalted over others.” *Id.*

⁶⁷ Justice Kennedy’s content restriction on prayers — that prayers are impermissible “[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 — quietly loosens the requirement from *Marsh* that prayer not “proselytize or advance any one, or . . . disparage any other, faith or belief,” 463 U.S. 783, 794–95 (1983). Not only is “denigrate,” “threaten damnation,” or “preach conversion” a higher bar than “proselytize or advance,” but the prayers must also continue those characteristics “over time” in order to be impermissible. *Town of Greece*, 134 S. Ct. at 1823.

⁶⁸ See *Town of Greece*, 134 S. Ct. at 1830 (Alito, J., concurring); see also Robert J. Delahunty, “*Varied Carols*”: *Legislative Prayer in a Pluralist Polity*, 40 CREIGHTON L. REV. 517, 522–26 (2007) (expressing concern that a nonsectarian prayer requirement leads to government involvement in religious questions).

⁶⁹ See generally Patrick M. Garry, *The Democratic Aspect of the Establishment Clause: A Refutation of the Argument that the Clause Serves to Protect Religious or Nonreligious Minorities*, 59 MERCER L. REV. 595 (2008).

This difference in the way the Justices view the government's role in accommodating religious pluralism may extend beyond the confines of the Establishment Clause to questions about how the Constitution envisions the government's role in accommodating diversity in other contexts. Justice Kennedy's views on religious diversity in *Greece* echo a common refrain in the Court's race-based affirmative action and campaign finance cases that government may not actively seek to promote diversity in those contexts by balancing voices.⁷⁰ Meanwhile, Justice Kagan's sensitivity to the minority population of Greece parallels the dissenting Justices' views in those cases: that the Constitution permits more active governmental involvement in accommodating minority members of the diverse polity.⁷¹ Perhaps, then, *Greece* fails to clarify the doctrinal muddle of the Establishment Clause because, at its core, it reflects broader divides among the Justices over how the Constitution envisions the government's role in accommodating diversity in other contexts, such as race-based affirmative action and political speech.

Although it remains unclear what specific doctrinal test the Court might use in its next Establishment Clause case, the opinions in *Greece* are illuminating in the way that they display opposing perspectives on the underlying question of what the government may or must do to accommodate religious diversity. In that respect, *Greece* may be much more helpful than its doctrinal muddle might suggest: more important than knowing which test to apply is understanding the central animating questions that inform them. *Greece* does not clarify the language the Justices will use in the future to resolve an Establishment Clause controversy — but the contours of the underlying debate have become a little clearer.

⁷⁰ Justice Kennedy's distrust in *Greece* of "religious balancing" may allude to the "racial balancing" that has been found impermissible in the school affirmative action context. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 729–30 (2007) (plurality opinion). Likewise, Justice Kennedy's suspicion of government involvement in favor of minority voices reflects some Justices' fears that the government's attempts to "level[] the playing field" in campaign financing, *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2825–26 (2011), may lead to government having the power "to silence entities whose voices the Government deems to be suspect," *Citizens United v. FEC*, 130 S. Ct. 876, 898 (2010).

⁷¹ Justice Kagan's view echoes the dissenting Justices' support for an affirmative role for race-based government action "that seek[s], not to keep the races apart, but to bring them together," *Parents Involved*, 551 U.S. at 835 (Breyer, J., dissenting), as well as the dissenting Justices' support for a campaign finance system in which the government takes an affirmative role in "promot[ing] the values underlying both the First Amendment and our entire Constitution by enhancing the 'opportunity for free political discussion to the end that government may be responsive to the will of the people,'" *Ariz. Free Enter. Club*, 131 S. Ct. at 2830 (Kagan, J., dissenting) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964)).