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Legal and practical implications of Town of Greece v. Galloway

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The U.S. Supreme Court's decision in *Town of Greece v. Galloway*, upholding a prayer practice in local government meetings, illustrates deep divisions in our country over how to protect religious liberty for all. Though the 5-to-4 decision upholding "legislative prayer" was not totally unexpected, the majority's lack of concern about the effects of the Town's repeated and distinctly Christian prayers in a forum for citizen participation is troubling. The decision does not signal the demise of religious freedom. It is, however, a disappointing departure, albeit in one specific context, from an important First Amendment promise. That promise, as Justice Elena Kagan said in the dissent, is "that every citizen, irrespective of her religion, owns an equal share in her government."

From a legal perspective, and as BJC Blogger Don Byrd expertly noted in an annotated post, the decision has several noteworthy aspects. I highlight three of them here.

First, while all the justices agreed that legislative prayer is constitutional, even in a local government meeting where citizens participate, limits remain. Writing for the majority, Justice Anthony Kennedy said such opening prayers are "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." He stated, however, that if the practice over time tends to denigrate religious minorities or focus on conversion, it would present a different case.

Second, the majority rejected the idea that governments must require or encourage prayer-givers to offer nonsectarian invocations. From the majority's perspective, a nonsectarian standard is too hard to define and seems inappropriate to enforce. Moreover, the tradition of legislative prayers before Congress has sometimes included prayers in distinct religious traditions. While the Court found no duty to reflect the entire religious community, nor a prohibition on prayers exclusively from one religion, it suggested there should be a policy of nondiscrimination, at least where the government relies on volunteers.

Third, the decision hinges on a view of legislative prayer as ceremonial. The Court described such prayer as simply a recognition that "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." That's what Justice Kennedy said, though it is not surprising that his definition of prayer in a governmental context is different from how many experts on religion would define prayer. As Professor (and Baptist historian) Bill Leonard wrote in an excellent Associated Baptist Press column, "At its depth, prayer is anything but ceremonial."

From a practical perspective, the impact of the Court's decision will vary according to the diversity and political climate of local jurisdictions. Based on a broad reading of *Marsh v. Chambers*, the 1983 decision upholding chaplain-led prayer before the Nebraska Legislature, the Court clarified what the Establishment Clause allows. It did not, however, recommend the Town of Greece as a model. While asserting that anyone could participate, Greece had no written policy identifying the purpose of the prayers or selection process for prayer-givers and took no steps to prevent pressuring citizens into an act of worship. Citizens faced the Town Board and were asked to rise and join in prayer — in meetings where they petitioned elected officials for action that may affect their economic and other interests.

The plaintiffs endured years of local government meetings opened by Christian clergy praying in exclusively Christian terms. They sued seeking to uphold the promise of the First Amendment that their political rights were equal to others, regardless of religion. Their quest was for a more inclusive, less coercive practice. The BJC was glad to stand with the plaintiffs and for our contribution to be noted, despite the outcome.

As is typical of our involvement in any major dispute, our filing an *amicus* brief, after consulting with the litigants, other lawyers, local government experts, clergy and scholars, is a way of advancing our mission of defending religious liberty for all in the courts and in the larger public conversation. Our efforts may not always win, but we steadfastly serve the principles that stem from the historic Baptist tradition of separation of church and state that we believe is good for both.