

that the practice was well-rooted historically in the Nebraska legislature and in most other state legislatures, and that the First Amendment had been drafted in the First Congress with an awareness of the chaplaincy practice. The Court did not address the lower court's findings,²²⁰ amplified in Justice Brennan's dissent, that each aspect of the *Lemon v. Kurtzman* tripartite test had been violated by these prayers. Instead of constituting an application of the tests, therefore, *Marsh* can be read as representing an exception to their application.²²¹

The Court has also shown itself to be reluctant to evaluate the content of these prayers. In *Town of Greece v. Galloway*,²²² the Court considered whether such legislative prayers needed to be "ecumenical" (inclusive of all religions) or at least reflective of a diversity of faiths. The challenge arose when the upstate New York town of Greece recruited local clergy, who were almost exclusively Christian, to deliver prayers at monthly town board meetings. While some of these prayers invoked civic themes, others were distinctly Christian in nature.²²³ The Court noted, however, that both historical and modern practice in Congress included the delivery of distinctly sectarian prayers.²²⁴ As to the lack of religious diversity, the Court found that there was no overt discrimination against non-Christian religions, and that the town had made reasonable efforts to identify the clergy of all congregations within its borders. A plurality also went on to hold that the setting where the prayer occurred, in which participants could arrive late or leave the room, resulted in no diminishment of the opportunity to seek allocation of governmental

²²⁰ *Chambers v. Marsh*, 675 F.2d 228 (8th Cir.1982).

²²¹ School prayer cases were distinguished on the basis that legislators, as adults, are presumably less susceptible than are schoolchildren to religious indoctrination and peer pressure, 463 U.S. at 792, but there was no discussion of the tests themselves.

²²² 572 U.S. ___, No. 12-696, slip op. (2014). The opinion was written by Justice Kennedy.

²²³ See, e.g., 572 U.S. ___, No. 12-696, slip op. at 3 ("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 . . .").

²²⁴ Although Christian prayers were initially the norm for prayers delivered before Congress, such prayers in recent times have included a diversity of religious beliefs, including Buddhism, Judaism, and Hinduism. 572 U.S. ___, No. 12-696, slip op. at 10-11. The Court did suggest that a pattern of prayers that over time "denigrate, proselytize, or betray an impermissible government purpose" could establish a constitutional violation. *Id.* at 17.