

PRAYER IN THE GOVERNMENT FORUM: EVALUATING THE
ALABAMA PUBLIC SERVICE COMMISSION’S PRAYER
PRACTICE IN LIGHT OF *TOWN OF GREECE*

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INTRODUCTION

In July 2013, the Alabama Public Service Commission (APSC) held a public hearing on power rates in Alabama. As customary, the APSC had, prior to the meeting, invited a guest to lead a prayer at the beginning of the hearing. After the APSC officially recognized the guest at the hearing and asked the audience to stand if they so desired, the prayer giver then asked members of the audience to raise their hands if they believed in prayer. He then led a lengthy and controversial prayer that voiced his beliefs and concerns, including some concerning same-sex marriage, abortion, and prayer in public schools. Less than a year later, the Supreme Court of the United States released its latest opinion on prayer in the public forum, *Town of Greece v. Galloway*, upholding the opening of monthly town board meetings with a prayer.¹

This Note compares the Alabama Public Service Commission's prayer practice with the prayer practice upheld in *Town of Greece*. Part I provides a brief history of prayer in the public context, as well as a more thorough overview of the Supreme Court's recent decision in *Town of Greece*. Part II describes the APSC's prayer practice by discussing its recent meetings and exploring past problems encountered in its practice. Part III evaluates the APSC's practice against the backdrop of *Town of Greece*, observing which parts of the practice trigger constitutional concern and whether the practice is constitutional as a whole. To that end, this Note seeks not to disparage, encourage, or vindicate the prayer practice, the prayer givers, or the APSC;² likewise, it does not attempt to dispute or suggest a better alternative to the Supreme Court's decisions upholding legislative prayer. Rather, this Note seeks only to evaluate the constitutionality of the practice in light of the Establishment Clause and relevant precedent. Part IV discusses an alternative path forward for the APSC's prayer practice to bring it more in line with the constitutional guideposts from *Town of Greece*. This Note concludes with my opinion that, although the APSC's prayer practice has included unconstitutional aspects and could be readily reformed, the practice would, nonetheless, likely be held constitutional as a whole.

1. *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014).

2. In attempting to divert attention from the APSC commissioners and the prayer givers and, instead, emphasize the content of the prayers, their surrounding statements, and the APSC's selection of prayer givers, I have omitted the names of the prayer givers and the APSC commissioners in the text of this Note.

I. PRAYER BY PUBLIC OFFICIALS

Prayer by government officials in the legislative setting and before public bodies has a lengthy history. Although the constitutionality of legislative prayer has been challenged, the cases show that the practice has been largely upheld.³ Similarly, though the tests within the Establishment Clause jurisprudence have shifted,⁴ been questioned,⁵ and even ignored,⁶ the Supreme Court's focus on history in evaluating legislative prayer has remained consistent and influential to its decisions.⁷ This Section provides an overview of prayer in the public context, starting with prayers from the Founders' era and ending with the Supreme Court's most recent decision on the issue of legislative prayer, *Town of Greece*.

A. *A Brief History of Legislative Prayer*

In the fall of 1774, an Anglican minister, Reverend Jacob Duché, delivered “the first American legislative prayer” to the first Continental Congress.⁸ After leading several “form prayers” and reading the thirty-fifth Psalm, Reverend Duché delivered a more personal prayer touching on current events and asking for God's divine guidance and protection.⁹ Soon

3. On the contrary, prayer in public schools and at government-sponsored events attended for secular reasons has seen a more troubled history. See Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 NOTRE DAME L. REV. 1793, 1799 & n.26 (2006) (citing *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000), *Lee v. Weisman*, 505 U.S. 577 (1992), *Sch. Dist. v. Schempp*, 374 U.S. 203 (1963), and *Engel v. Vitale*, 370 U.S. 421 (1962) as examples of its storied path).

4. Compare *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (outlining the *Lemon* test and its three prongs), and *Van Orden v. Perry*, 545 U.S. 677, 686 (2005) (plurality opinion) (describing the *Lemon* test as “not useful” as applied to government displays and detailing the Court's checkered application of the test), with *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984) (discussing the Court's unwillingness to be confined to one test in its Establishment Clause jurisprudence), and *Cty. of Allegheny v. ACLU*, 492 U.S. 573, 592–97 (1989) (applying the endorsement test). See also Christopher C. Lund, *The Future of the Establishment Clause in Context: A Response to Ledewitz*, 87 CHI.-KENT L. REV. 767, 767–68 (2012) (noting, in the context of a Kentucky Court of Appeals case on the establishment of religion, the potential for that court to have applied the *Lemon* test, the endorsement test, or “several tests at once”).

5. Justice Scalia portrays the shifting application of the *Lemon* test in more colorful terms. See *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring) (“Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District.”).

6. See *Marsh v. Chambers*, 463 U.S. 783, 790–91 (1983) (upholding legislative prayer without application of the *Lemon* test).

7. See *id.*; *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1818–20 (2014).

8. See Christopher C. Lund, *The Congressional Chaplaincies*, 17 WM. & MARY BILL RTS. J. 1171, 1177 (2009). The article by Professor Lund—a well-respected scholar of, among other things, religious liberty—provides a much more thorough discussion of the congressional chaplaincies.

9. See *id.* at 1177–79.

after, Reverend Duché became an informal chaplain for the Continental Congress, not only leading prayers for the Congress but also conducting funerals for its members.¹⁰ On July 4, 1776, Reverend Duché “set off a firestorm of controversy by resolving that prayers for King George III would no longer be included in prayers for the church, and by crossing his name out of the Book of Common Prayer.”¹¹ The Continental Congress responded by later appointing Reverend Duché as its official chaplain.¹²

One year later, the Continental Congress appointed two new chaplains—one an Anglican, the other a Presbyterian.¹³ They likewise “offered prayers, delivered sermons, conducted funerals, and acted in general as the Congress’s chaplains[, and t]his arrangement was maintained throughout the Continental Congress and the Congress of the Confederation, until the Constitution was ratified and a new Congress selected.”¹⁴ During the Constitutional Convention of 1787, however, the Convention had no formal chaplains or set legislative prayer practice.¹⁵

In 1789, the First Congress returned to its prayer practice, adopting the policy of appointing chaplains to open its sessions with a prayer as one of its early items of business.¹⁶ Congress determined that both the House and the Senate would each appoint chaplains of different denominations, and that each chaplain would regularly switch back and forth between the two legislative bodies.¹⁷ On September 22, 1789, just three days before Congress reached agreement on the Bill of Rights,¹⁸ Congress passed a

10. *See id.* at 1181 (citing 3 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 303 (Wash. GPO 1904) (1774)).

11. *Id.* at 1182 (citing Rev. Edward Duffield Neill, *Rev. Jacob Duché, The First Chaplain of Congress*, in 2 PA. MAG. OF HIST. & BIOGRAPHY 58, 67 (1878)).

12. *Id.*

13. *See id.*

14. *Id.* at 1182–83 (footnote omitted).

15. *See id.* at 1183.

16. *See Town of Greece v. Galloway*, 134 S. Ct. 1811, 1818 (2014) (“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.” (citing *Marsh v. Chambers*, 463 U.S. 783, 787–89 (1983))).

17. *See Lund, supra* note 8, at 1184.

18. In light of the agreement over the Bill of Rights just three days after Congress had authorized the appointment of paid chaplains, *Marsh* states: “Clearly the men who wrote the First Amendment Religion Clauses 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.” *Marsh*, 463 U.S. at 788.

law¹⁹ setting the salaries of the chaplains.²⁰ “[B]y 1789, the chaplaincies were by law established under the new Constitution”²¹

By 1830, the Senate and the House had elected chaplains from many different denominations, including Baptist, Congregationalist, Episcopalian, Methodist, Presbyterian, and Unitarian.²² In 1832, the Senate appointed the first Catholic chaplain, and as a result, many Americans petitioned Congress to end the chaplaincies.²³ Likewise, Protestant chaplains in state legislatures protested the election of the Catholic chaplain, refusing to offer prayers.²⁴ Opposition continued to grow,²⁵ and by 1850, the existence of legislative chaplains was in serious dispute.²⁶ This opposition arose mostly out of the Protestants’ fear that Catholics would take over the chaplaincies²⁷ and Congress’s disapproval that ministers were competing for the chaplaincies.²⁸ In addition, the issue of slavery led others to question the chaplaincies, as the House and the Senate attempted to choose chaplains based on their opposition to or support of slavery.²⁹

As a result, from 1850 to 1854, Congress examined the congressional chaplaincies and produced three reports.³⁰ The reports all concluded that the congressional chaplaincies were constitutional, reasoning that the practice was not coercive, did not exclude or favor any faiths, and imposed

19. *Town of Greece* likewise describes the importance of passing the law: “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 acknowledgement of religion’s role in society.” *Town of Greece*, 134 S. Ct. at 1819.

20. Lund, *supra* note 8, at 1184.

21. *See id.* at 1187.

22. *Id.* (adding that when Congress moved from Philadelphia to Washington, D.C., the House of Representatives hosted Sunday church services in its own hall because of the limited number of churches in the area).

23. *Id.* at 1187, 1189.

24. *Id.* at 1189.

25. *See, e.g., id.* at 1196–97 n.126 (collecting petitions to Congress as an illustration of how controversial the congressional chaplaincies had become).

26. *Id.* at 1196–97.

27. One scholar further described the religious intolerance targeted at Catholics, noting that some states maintained laws forbidding Catholic churches, ordered the arrest of Catholic priests, and even attempted to pass laws denying the right to practice Catholicism. *See* Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2166–69 (2003).

28. *See* Lund, *supra* note 8, at 1198.

29. *See id.* at 1199.

30. *See id.*; *see also* *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1819 (2014) (“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; no faith was excluded by law, nor any [faith] favored; and the cost of the chaplain’s salary imposed a vanishingly small burden on taxpayers.” (internal citations omitted)).

only a minimal burden on taxpayers.³¹ Though constitutional, the House and the Senate still decided to allow local unpaid ministers to offer prayers before their proceedings instead.³² In 1860, both the House and the Senate resumed their institutional chaplaincies, and both have maintained them ever since.³³

Though little has changed with congressional chaplaincies over the past century, they have grown more diverse in terms of the denomination or religion of the chaplains.³⁴ In addition, both the House and the Senate have instituted a guest chaplaincy program, allowing visiting ministers to offer prayers before Congress.³⁵ Guest chaplains have included, to list a few, a Roman Catholic nun, a member of the Native American religion, and a Hindu priest.³⁶ In addition, the Senate elected the first African-American chaplain in 2003. Similarly, many state legislatures have provided for the opening of their meetings with prayers over the past century.³⁷ Today, congressional chaplains and legislative prayer still remain an important though divisive part of many public bodies.³⁸

B. *The Modern Approach: Town of Greece v. Galloway*

Prior to *Town of Greece*, the leading case on legislative prayer was *Marsh v. Chambers*.³⁹ Though many have questioned the Court's rendition or summation of the history of the First Amendment in its opinions⁴⁰ and in *Marsh* in particular,⁴¹ the opinion provides a useful starting point for understanding the Court's treatment of legislative prayer.⁴² In *Marsh*, a member of the Nebraska legislature challenged the legislature's practice of

31. Lund, *supra* note 8, at 1199–1200; *see also Town of Greece*, 134 S. Ct. at 1819.

32. *See* Lund, *supra* note 8, at 1200.

33. *Id.* at 1201–02.

34. *See id.* at 1202–03.

35. *Id.* at 1204.

36. *See id.* at 1204–05.

37. *See, e.g., Marsh v. Chambers*, 463 U.S. 783, 789 n.11 (1983) (listing states with formal rules requiring the legislature to open their sessions with prayer as of 1983 and noting that “most state legislatures begin their sessions with prayer”).

38. Professor Lund notes some of the recent divisiveness post-*Marsh*: “With *Marsh*’s approval, legislative prayer has grown into a fissure that now divides county boards, state legislatures, and city councils across the country. Some of these disputes have changed the course of elections; others have led to violence. Litigation has, unsurprisingly, become an omnipresent threat and a frequent reality.” Christopher C. Lund, *Legislative Prayer and the Secret Costs of Religious Endorsements*, 94 MINN. L. REV. 972, 974–75 (2010) (footnotes omitted).

39. 463 U.S. 783 (1983).

40. *See* McConnell, *supra* note 27, at 2205–06.

41. *See* Lund, *supra* note 8, at 1171; *see also* Lund, *supra* note 38, at 984.

42. For a comprehensive survey of the Establishment Clause, see McConnell, *supra* note 27, at 2107–81.

opening its session with a prayer by a chaplain paid out of public funds.⁴³ After describing the history of congressional chaplaincies, the majority stated that, though history alone cannot justify the violation of contemporary constitutional guarantees, the “unambiguous and unbroken history of more than 200 years . . . of opening legislative sessions with prayer has become part of the fabric of our society” and is not an establishment—or a step towards establishment—of religion.⁴⁴ After upholding the general practice of opening legislative sessions with a prayer, the Court then evaluated the constitutionality of three particular aspects of the prayer practice.⁴⁵ These three aspects included the appointment of a clergyman of only one denomination for sixteen years, the paying of the chaplain at public expense, and the exclusively Judeo-Christian tradition of the prayers.⁴⁶ The Court responded: “Weighed against the historical background, these factors do not serve to invalidate Nebraska’s practice.”⁴⁷

Over three decades later, in *Town of Greece*, the Supreme Court upheld the opening of monthly town board meetings with a prayer in the small town of Greece, New York.⁴⁸ After years of opening its monthly town board meetings with a moment of silence, the town returned to its former practice of opening board meetings with a prayer in 1999.⁴⁹ To select prayer givers, an employee of the town called congregations listed in a local directory until the town employee found an available minister; its policy stated that the town did not exclude any willing prayer givers on the basis of his or her religion.⁵⁰ Over time, the selection method allowed the town to create a list of “board chaplains”—volunteers who had previously accepted invitations to lead prayers and expressed a willingness to return in the future.⁵¹ However, because the town was largely comprised of Christian congregations, nearly all of the prayer givers at the monthly board meetings were Christians as well.⁵²

Just as the town did not limit its prayer practice to certain religions, the town made no attempt to guide the prayer givers on the appropriateness of the prayers’ contents or tone.⁵³ Likewise, the town did not ask to review the prayers before they were given at the board meetings.⁵⁴ As a result, many

43. *Marsh v. Chambers*, 463 U.S. 783, 784–85 (1983).

44. *Id.* at 792.

45. *Id.* at 792–93.

46. *Id.* at 793.

47. *Id.*

48. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1828 (2014).

49. *See id.* at 1816.

50. *Id.*

51. *Id.*

52. *See id.*

53. *Id.*

54. *See id.*

of the invocations “often sounded both civic and religious themes.”⁵⁵ After attending the town board meetings, two local citizens expressed to the board that they found the prayer practice offensive.⁵⁶ Soon after, the board provided the opportunity for a Jewish layman, a chairman of the local Baha’i temple, and a Wiccan priestess to give the invocation.⁵⁷ The two attendees later challenged the prayer practice in federal court, alleging that the town violated the Establishment Clause by preferring Christian prayer givers and by sponsoring sectarian prayers.⁵⁸ The attendees sought an injunction limiting the town to prayers that would not align the town board with any one faith or belief.⁵⁹ Reversing the United States Court of Appeals for the Second Circuit, the Supreme Court held—in a five–four decision—that the town board’s prayer practice did not violate the First Amendment.⁶⁰

1. *The Majority Decision*

The majority opinion, authored by Justice Kennedy, first provided a brief history of legislative prayer and approved legislative prayer in general.⁶¹ It then evaluated whether the town’s prayer practice “fit[] within the tradition long followed in Congress and the state legislatures.”⁶² The majority concluded that the town did not violate the First Amendment because the prayer practice comported with our country’s tradition and did not coerce participation by nonadherents.⁶³ In reaching its conclusion, the majority relied heavily on history—much like *Marsh*—reasoning that “*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.”⁶⁴ The Court added: “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.”⁶⁵

The majority then addressed the challengers’ subsidiary arguments: that legislative prayer must be nonsectarian,⁶⁶ and that the prayer practice coerces participation in religion by nonadherents.⁶⁷ First, the majority

55. *Id.*

56. *Id.* at 1817.

57. *See id.*

58. *See id.*

59. *See id.*

60. *Id.* at 1818, 1828.

61. *Id.* at 1818–19.

62. *Id.* at 1819.

63. *Id.* at 1828.

64. *Id.* at 1819.

65. *Id.*

66. *See id.* at 1820.

67. *See id.* at 1824.

rejected the argument for nonsectarian prayer, stating that *Marsh* never suggested that the constitutionality of legislative prayer turns on the neutrality of the prayers' content.⁶⁸ The majority stated: "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."⁶⁹ The majority also dismissed the fact that prayer givers had, on a couple of occasions, disparaged other faiths: "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."⁷⁰ The majority then briefly discussed the town's selection method.⁷¹ It stated that the town made "reasonable efforts" to identify all congregations within the town and "represented" that it would not exclude any prayer giver; accordingly, the town did not violate the Establishment Clause "by inviting a predominantly Christian set of ministers to lead the prayer."⁷²

Joined only by Chief Justice Roberts and Justice Alito, Justice Kennedy then shifted to the "coercion" argument in Part II-B of the opinion.⁷³ Justice Kennedy argued that a reasonable observer of the prayer practice would not see the prayers as attempts to coerce attendees into the church but, rather, as traditional and respectful invocations aimed at lending gravity to the occasion and acknowledging "the place religion holds in the lives of many private citizens."⁷⁴ Justice Kennedy also made clear that "[o]ffense . . . does not equate to coercion" and summarily dismissed the suggestion that constituents could feel pressure to join the prayers in attempt to gain favor with the town leaders as lacking evidentiary support.⁷⁵ Finally, Justice Kennedy argued that attendees could always "leav[e] the meeting room" if they find a prayer "distasteful" and again posited that the purpose of the practice is to acknowledge religious leaders and their institutions—not to exclude or coerce nonbelievers.⁷⁶ In light of the prayers' "permissible ceremonial purpose," Justice Kennedy concluded that it "is not an unconstitutional establishment of religion."⁷⁷

68. *Id.* at 1821.

69. *Id.* at 1821–22 (quoting *Marsh v. Chambers*, 463 U.S. 783, 794–95 (1983) (internal quotation marks omitted)).

70. *Id.* at 1824.

71. *See id.*

72. *Id.*

73. Justice Scalia and Justice Thomas did not join Part II-B of the opinion. Accordingly, Justice Kennedy's opinion in Part II-B is not considered the majority decision.

74. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1825 (2014) (opinion of Kennedy, J.).

75. *See id.* at 1826.

76. *Id.* at 1827.

77. *Id.* at 1828.

Rejoined by Justice Scalia and Justice Thomas, the Court's opinion similarly concluded: "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."⁷⁸

2. *The Principal Dissent*

Because *Town of Greece* was a five–four decision, it is also important to understand the position of the dissenting Justices. The principal dissent by Justice Kagan⁷⁹ did not argue that legislative prayer was unconstitutional; indeed, the dissent expressed its agreement with *Marsh*⁸⁰ and stated that a government "forum need not become a religion-free zone."⁸¹ However, the dissent argued that the town of Greece's prayer practice did not fall within the constitutional boundaries for several reasons and, thus, should have been struck down.⁸² Before addressing the problems head-on, the dissent succinctly stated why the town's practice should be struck down and how it differs from the practice in *Marsh*:

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 So month in and month out for over a decade, prayers steeped in only one faith,

78. *Id.* (majority opinion).

79. Although Justice Breyer writes an additional dissent in *Town of Greece*, this Note only discusses the principal dissent as it encompasses the views of four Justices; accordingly, unless otherwise stated, any reference in this Note to "the dissent" refers to the principal dissent by Justice Kagan. While Justice Breyer's dissent, much like the concurring opinions, offers a thoughtful and interesting analysis of the issue, this Note addresses only the majority opinion and principal dissent for the sake of brevity. Though beyond the scope of this Note, each opinion in *Town of Greece* is worthy of its own exploration and discussion.

80. One scholar also summarized the agreement between the principal dissent and majority on legislative prayer:

Both agree that legislative prayer is constitutional under some circumstances; there are now nine votes for legislative prayer instead of the six in *Marsh*. Both agree that faith-specific legislative prayer is also constitutional under some circumstances. Both agree that pluralism and the protection of religious minorities are important First Amendment values. And both agree that history is a guide to the perplexed judge who confronts an Establishment Clause challenge.

Eric Rassbach, *Town of Greece v. Galloway: The Establishment Clause and the Rediscovery of History*, 2013–2014 CATO SUP. CT. REV. 71, 87–88 (2014). The disagreement in *Town of Greece* largely arose over the town's prayer practice and whether it fit within the constitutional boundaries. *See id.* at 88.

81. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1841–42 (2014) (Kagan, J., dissenting).

82. *Id.* at 1842.

addressed toward members of the public, commenced meetings to discuss local affairs and distribute government benefits.⁸³

The dissent then described its concerns with the prayer practice in further detail, stating that its problem is not with Christianity but, rather, with the government aligning itself with only one religion, *regardless* of the religion.⁸⁴ It added that, to make matters worse, the town had done so in a setting where citizens interact with officials and participate in meetings.⁸⁵ Thus, the dissent argued, the prayer practice in the town of Greece fell outside of the “protective ambit of *Marsh* and the history on which it relied” for three reasons⁸⁶: first, the significant differences in the nature and purpose of the governmental proceedings where the prayers occur;⁸⁷ second, the difference in the audiences at the proceedings;⁸⁸ and third, the difference in the content and character of the prayers.⁸⁹ Finally, the dissent argued that the sectarian content of the prayers did present a problem for the town of Greece, since such prayers are not, contrary to the majority’s view, part of the American heritage and tradition.⁹⁰ It concluded: “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.”⁹¹ Accordingly, the dissent concluded, the practice violated the First Amendment.⁹²

II. THE ALABAMA PUBLIC SERVICE COMMISSION

The Alabama Public Service Commission is a state commission responsible for, among other things, the regulation of utilities and utility rates.⁹³ Its mission is to “ensure a regulatory balance between regulated companies and consumers in order to provide consumers with safe, adequate, and reliable services at rates that are equitable and economical.”⁹⁴ The APSC is led by three commissioners—one of whom serves as

83. *Id.*

84. *See id.* at 1843–44.

85. *See id.* at 1844.

86. *Id.* at 1849.

87. *Id.* at 1847.

88. *Id.*

89. *Id.* at 1848.

90. *Id.* at 1853.

91. *Id.* at 1854.

92. *See id.* at 1842.

93. *See About the PSC: Mission and History*, ALA. PUB. SERVICE COMMISSION, <http://www.psc.state.al.us/News/ComHist.html> (last visited Nov. 12, 2015).

94. *Id.*

president of the APSC—who are elected to four year terms.⁹⁵ Though the APSC has many rules and regulations that govern its actions and authority,⁹⁶ it appears that none of them explicitly govern its prayer practice.⁹⁷ However, section 37-1-31 of the Code of Alabama requires the APSC to exercise its authority and administer its duties in a manner consistent with the Constitution of Alabama and the Constitution of the United States.⁹⁸

For the APSC's hearings, one of the commissioners is responsible for inviting a guest, typically a friend or local citizen, to lead a prayer at the beginning of the meeting.⁹⁹ After acknowledging the guest, the APSC president typically asks the audience to stand *if* they would like to join in standing for the prayer and the pledge of allegiance. Generally, the prayer giver then asks those in attendance to bow their heads, and he or she then proceeds with the prayer. After the prayer, either the prayer giver or another guest will lead the pledge of allegiance. The invited guests, commissioners, and attendees then sit, and the APSC proceeds with its business.¹⁰⁰

A. *Past Problems with the Prayer Practice*

On July 17, 2013, the APSC's hearing opened with a prayer by a friend of the APSC president.¹⁰¹ The president first recognized the prayer giver as a "role model" then presented him with a certificate before asking the audience to stand.¹⁰² After being recognized, the prayer giver began by asking those in attendance to raise their hands if they believed in prayer; he then asked attendees to raise their hands if they believed that God answers

95. ALA. CODE § 37-1-3(a) (2012).

96. See, e.g., *APSC Rules and Regulations*, ALA. PUB. SERVICE COMMISSION, http://www.psc.state.al.us/Administrative/administrative_division.htm (last visited Nov. 12, 2015); see also ALA. CODE § 37-1.

97. See *Rules of Practice of the Alabama Public Service Commission*, ALA. PUB. SERVICE COMMISSION, <http://www.psc.state.al.us/Administrative/RevRulesofPractice.pdf> (last visited Nov. 12, 2015).

98. ALA. CODE § 37-1-31.

99. One can view the APSC's most recent hearing at <http://www.psc.state.al.us/index.htm> by clicking on the drop-down menu under the "Business Information Center" heading and selecting "View [this month's] Commission Meeting."

100. These characteristics have been gleaned from reading the minutes and watching the videos of APSC monthly meetings beginning in August 2014 through May 2015, as well as observing the APSC's public proceedings on Alabama Power Company, available at http://www.psc.state.al.us/administrative/APCO_pub_proc_video.htm.

101. See *PSC APCO Videos*, ALA. PUB. SERVICE COMMISSION (July 17, 2013), <http://www.psc.state.al.us/administrative/Jul172013.htm>. Alternatively, one can also access the video of the hearing by visiting http://www.psc.state.al.us/administrative/APCO_pub_proc_video.htm and clicking the "July 17, 2013" link.

102. See *id.*

prayers; finally, the prayer giver asked them to raise their hands if they needed prayers.¹⁰³

During the prayer, which lasted a total of three minutes and thirty-four seconds, the prayer giver also voiced several statements that later aroused a significant response. To be clear, not every statement made during the prayer was inappropriate in the government forum; for example, the prayer giver asked for God's blessing on the nation's leaders and gave thanks for the state's and the APSC's leaders. However, towards the end of the prayer, the prayer giver stated that we—that is, Americans—“have taken [God] out of our schools, . . . have murdered [God's] children, [and] have said it is okay to have same sex marriage.”¹⁰⁴

Soon after the hearing, many people and organizations voiced their concerns with the statements in the prayer, as well as with the prayer practice itself. One petition from Equality Alabama, a community organization seeking to advance equality for LGBTQ Alabamians,¹⁰⁵ asked the president of the APSC to apologize to members of the LGBTQ community.¹⁰⁶ The petition emphasized its problem not with prayer in the public forum but, rather, with discrimination based on sexual orientation, particularly in a government meeting.¹⁰⁷ Likewise, one reporter argued that the prayer was more of a political speech than a prayer.¹⁰⁸

Others stressed the inappropriateness of the prayer itself in the hearing. For example, the Freedom from Religion Foundation sent a letter to the president of the APSC and the Governor of Alabama expressing its discontent with the prayer and government prayers in general.¹⁰⁹ The letter also made several suggestions to the APSC, including abandoning the prayer practice altogether, striking the prayer giver's statements from the record, and even turning to scripture for the principle that “Jesus condemns public prayer as hypocrisy.”¹¹⁰ The Montgomery Area Freethought Association also objected to the prayer practice, pointing out that not all

103. *See id.*

104. *See id.*

105. Equality Alabama, *About: Mission*, FACEBOOK, <https://www.facebook.com/equalityalabama/info> (last visited Nov. 12, 2015).

106. *See Petition: Apologize for Anti-Gay Prayer at PSC hearing*, CHANGE.ORG, <https://www.change.org/p/apologize-for-anti-gay-prayer-at-psc-hearing> (last visited Nov. 12, 2015). The petition received 2,621 supporters of the 5,000 supporters needed; it is now closed.

107. *See id.*

108. Joey Kennedy, *Prayer is not the role or purpose of the Public Service Commission (Joey Kennedy)*, AL.COM (Aug. 2, 2013), http://www.al.com/opinion/index.ssf/2013/08/prayer_is_not_the_role_of_the.html.

109. *See* Andrew L. Seidel, *Opening Alabama Public Service Commission Meetings with Divisive Prayer*, FREEDOM FROM RELIGION FOUND. (July 25, 2013), <http://ffrf.org/images/Alabama%20Public%20Service%20Commission.pdf>.

110. *See id.*

Alabamians are Christian.¹¹¹ The group argued that government prayer is inappropriate and unnecessary; it added that “asking government officials to raise their hands to show support for the prayer is coercive and exclusionary.”¹¹² The president of the APSC responded soon after the hearing, voicing support for the prayer practice.¹¹³

B. Recent Meetings

Other than the July 17, 2013 hearing, the prayers at other recent APSC meetings have been largely uncontroversial in terms of their content. Of course, many individuals and groups likely still disagree with the practice itself, while others may disagree with the fact that the prayers are consistently Christian prayers; however, in terms of content, none have included remarks comparably controversial to those from the July 17, 2013 hearing.¹¹⁴ Many of the monthly meetings have been business-oriented, civil, respectful,¹¹⁵ political,¹¹⁶ and even humorous.¹¹⁷ Similarly, many of the prayers have been relatively short, solemn, and civic-minded. All of the prayers have been led by Christian prayer givers and typically, if not always, refer to Christian themes. As noted above, one of the commissioners selects the prayer giver for the upcoming hearing. As a result, prayer givers have ranged from local church leaders, staff members, business leaders, elected state officials, to even a young grandchild of a past APSC administrative law judge.

111. Montgomery Area Freethought Ass’n, FACEBOOK (Aug. 9, 2013), <https://www.facebook.com/MontgomeryFreethinkers/posts/595514743833028>.

112. *See id.*

113. *See* Kristen Hwang, *Twinkle Cavanaugh Stands by Controversial Prayer at Public Service Commission Meeting*, AL.COM (July 31, 2013), http://blog.al.com/breaking/2013/07/twinkle_cavanaugh_addresses_pra.html; *see also* Hunter Stuart, *Alabama Government Agency Holds Prayer Against Abortion, Gay Marriage (UPDATE, VIDEO)*, HUFFINGTON POST (July 28, 2013), http://www.huffingtonpost.com/2013/07/25/alabama-prayer-gay-marriage_n_3651756.html.

114. Although some of the APSC commissioners have publicly called on citizens to pray for God’s intervention with proposed environmental regulations, those invocations do not involve the APSC’s prayer practice and, thus, are beyond the scope of this Note. *See* Stan Diel, *Pray God Blocks EPA Plan, Chief Regulator of Alabama Utilities Tells Consumers*, AL.COM (July 28, 2014), http://www.al.com/news/index.ssf/2014/07/post_14.html.

115. For example, one guest of the APSC recognized all military veterans in attendance before delivering the pledge of allegiance. Another guest read the “Alabamian Creed”—essentially, a call to civic duty—before leading a prayer.

116. During the January 2015 APSC meeting, the commissioners publicly signed an enlarged letter to President Obama signaling their frustration with Washington, D.C., as well as their strong disagreement with the EPA mandates and President Obama’s current policies aimed at crippling Alabama’s economy.

117. After the Iron Bowl—the annual college football game between the University of Alabama and Auburn University—one commissioner asked the president for a “Roll Tide.” The president, apparently an Auburn fan, did not oblige the request.

III. THE CONSTITUTIONALITY OF THE APSC PRAYER PRACTICE

Though the APSC's prayer practice has undeniably troubled many Alabamians—just as certainly as it has pleased many others—this Section explores whether the practice would survive constitutional scrutiny. Section A discusses aspects of the practice that are potentially unconstitutional, namely, the selection of prayer givers and the remarks from the July 17, 2013 hearing. Section B, by observing the practice in its entirety, discusses whether its problematic aspects are sufficient to invalidate the APSC's prayer practice as a whole.

A. *Potential Issues with the Prayer Practice*

1. *The Selection of Prayer Givers*

One component of the *Town of Greece* prayer practice that troubled the principal dissent¹¹⁸ and merited attention from the majority¹¹⁹ was the town's selection of prayer givers.¹²⁰ As mentioned above, the town's selection method eventually led to nearly all prayer givers of the Christian faith—a result that troubled local Greece citizens who did not share that faith, as well as the *Town of Greece* plaintiffs who challenged the practice on those grounds.

The APSC's prayer practice presents similar concerns. By failing to provide any written guidelines or clear protocol for the selection of prayer givers, the APSC serves as an easy target for challengers to question whether the selection method operates discriminatorily. While the town board in *Town of Greece* had an informal method for selecting prayer givers¹²¹ and occasionally updated its directory to add houses of worship,¹²² the APSC's method is more subjective. Prayer givers are selected at the whim and discretion of the commissioners. Further, the town of Greece's policy explicitly stated that it would not exclude a willing prayer giver because of his or her faith; thus, a person challenging the practice in *Town*

118. See *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1850 (2014) (Kagan, J., dissenting) (“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” “infringes the First Amendment.”).

119. See *id.* at 1824 (“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.”).

120. Additionally, the town's selection method for prayer givers also troubled the Second Circuit—the court invalidated the practice on those grounds. See *Galloway v. Town of Greece*, 681 F.3d 20, 30–31 (2d Cir. 2012).

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

122. See *id.* at 1840 (Breyer, J., dissenting).

of Greece has, at the least, a weakened argument that the selection method is discriminatory. But not so with the APSC. The APSC has no policy or guidelines to offer to rebut one questioning the discriminatory role of its selection method. Consequently, the APSC would face an uphill battle in arguing to the contrary.

Likewise, allowing the commissioners to choose the prayer givers—with *or* without clear guidelines on how they should select them—presents similar issues that prompt majoritarian concerns. As one scholar aptly states: “It is deeply unnatural to let minority believers give prayers that few people in the audience would want to hear, unnatural especially for officials whose reelection chances hinge on how that audience votes later on.”¹²³ These concerns are borne out by observing the APSC’s past meetings that have consistently afforded Christians the opportunity to lead the prayers. As a result, attendees and observers could easily think that the APSC has aligned itself with a particular faith.

Further, the possibility alone that commissioners could choose members of the community who share their faith, along with the faith of the majority of the community, to better their reelection chances prompts further concern—a concern that could be largely alleviated¹²⁴ through a nondiscriminatory selection process.¹²⁵ The APSC cannot select prayer givers solely on the basis of their religious affiliation; both *Marsh*¹²⁶ and *Town of Greece*¹²⁷ make that clear.¹²⁸ Though there is no evidence or reason to believe that the commissioners are choosing prayer givers *solely* because they are Christian, one could certainly entertain that possibility in light of the unbridled discretion of the commissioners and their consistent selection of only Christian prayer givers. As a result, the APSC’s selection of prayer givers potentially operates in a way that violates the Establishment Clause.

123. Lund, *supra* note 38, at 1040.

124. See *infra* Part IV.

125. See, e.g., Lund, *supra* note 38, at 1039–41 (describing different alternatives for selecting who should be given the right to lead the prayers).

126. See *Marsh v. Chambers*, 463 U.S. 783, 793–94 (“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 [Constitution].”).

127. See *Town of Greece*, 134 S. Ct. at 1824 (“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.”).

128. See also Christopher C. Lund, *Keeping the Government’s Religion Pure: Pleasant Grove City v. Sumnum*, 104 NW. U. L. REV. COLLOQUY 46, 56–57 (2009) (stating that the Supreme Court’s legislative prayer cases forbid legislatures from discriminating against speakers by only allowing prayer givers from a particular denomination to lead prayers).

2. *The Content of the Prayers*

The remarks made during the July 17, 2013 hearing, as well as the length of the prayer given at that meeting, also present potentially unconstitutional aspects of the prayer practice. While the statements may be appropriate—appropriate, that is, in terms of the context of the statements—in one’s private prayers, before one’s church, or in many other settings, they simply are not appropriate during a prayer given at a government hearing.

As *Town of Greece* states, “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.”¹²⁹ When, however, legislative prayers diverge from those ideals, whether through the sheer length of the prayer or the inappropriate content of the prayer, they lose their constitutional underpinnings as a result. Apart from detracting from the role of government, controversial prayers in government fora also detract from religion by dividing those who do not share the same views, as well as frustrating those who might share the same views but acknowledge the inappropriateness of the occasion for expressing them. Prayer givers are certainly entitled to their own religious—and of course, political—beliefs and opinions. However, when such controversial religious views are regularly aired with the backing of a government body, they become enmeshed with the voice of that government body—a wholly inappropriate and unconstitutional intermingling. However, as described below, *Town of Greece* also states that a couple stray remarks will not typically invalidate an otherwise valid prayer practice as a whole: “Although [the] remarks strayed from the rationale set out in *Marsh*, they do not despoil a practice that on the whole reflects and embraces our tradition.”¹³⁰

Additionally, the sectarian character of the prayers would likely trouble some of the Justices on the Court. As noted above, all of the observed prayers were strictly and undeniably Christian. Because many of the prayer givers are also church leaders, it is quite understandable that their prayers, as a result, tend to focus on religious matters rather than on solemnizing the occasion. Nonetheless, that fact simply does not make the exclusively Christian prayer practice any more appropriate. Consistently selecting Christian prayer givers rightly gives the dissent in *Town of Greece* some concern, just as it likely troubles Alabamians who are not Christian and feel excluded from leading—or even observing—the prayers.

129. *Town of Greece*, 134 S. Ct. at 1818 (citing *Lynch v. Donnelly*, 465 U.S. 668, 693 (1984) (O’Connor, J., concurring)).

130. *Id.* at 1824.

Similarly, singling out attendees who believe that God answers prayers undeniably presents coercion issues. In *Town of Greece*, the Court stated that the prayers were directed at the lawmakers—not those in attendance—and thus did not improperly coerce participants.¹³¹ The dissent argued that the prayers were directed squarely at the public and thus could coerce participants.¹³² Regardless, no one could question that the July 17, 2013 prayer was directed at the attendees, as the prayer giver affirmatively asked those in attendance to signal their belief or disbelief in prayer before beginning his prayer. In terms of the APSC's typical monthly prayers, however, there is room to question whether the prayer givers direct their prayers at the commissioners, the attendees, or—more than likely—all of those in attendance.

B. *The Prayer Practice as a Whole*

Though the APSC's prayer practice has operated in questionable ways, it is nonetheless important to consider whether those problems function so consistently as to invalidate the practice as a whole. As *Marsh* and *Town of Greece* both make clear, the history of the legislative chaplaincies and the legislative prayer practice gives particular credence to legislative prayer and its constitutionality.¹³³ In addition, *Town of Greece* added that “*Marsh* . . . requires an inquiry into the prayer opportunity as a whole, rather than into the contents of a single prayer.”¹³⁴

Comparing the APSC's prayer practice to the town of Greece's provides a useful tool in attempting to determine its constitutionality. In both settings, prayer givers are selected for each meeting rather than appointed as a chaplain or for a set term. Likewise, the prayers occur at the beginning of the hearings for both the APSC and the town board, signifying that the prayers are more likely intended to set the stage for the hearings rather than serve as the main event. Additionally, where nearly all of the prayers givers chosen by the town board in *Town of Greece* were Christian, all of the prayers givers selected by the APSC have been Christian. Finally, neither the APSC nor the town board attempt to guide the prayer givers on

131. *Id.* at 1814.

132. *Id.* at 1848 (Kagan, J., dissenting) (“Contrary to the majority’s characterization, . . . the prayers . . . 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.” (citation omitted)).

133. See also Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise and Religion*, 103 HARV. L. REV. 1409, 1413 (1990) (“Interpretations of the establishment clause . . . are replete with extensive analyses of the historical context and meaning. Indeed, it has been said that 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.” (internal quotation marks omitted)).

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

appropriate content, nor do they ask to review prayers before the prayer givers deliver them. Together, these commonalities may be sufficient to persuade members of the Court (or a court) to uphold the prayer practice.

However, while the APSC's prayer practice and the prayer practice upheld in *Town of Greece* have many similarities, they also differ in significant—and perhaps constitutionally significant—ways. Perhaps the most significant difference between the two practices involves the issue of coercion. In a typical hearing, the prayer practices seem to be somewhat equal in terms of coercing participation—those in the audience stand if they so desire, the prayer giver usually asks attendees to bow their heads, and attendees are able to leave if they feel uncomfortable. However, the fact that the prayer giver on July 17, 2013, asked attendees to signify whether they believed in prayer places that particular occasion on a different level. Not only did he separate the religious from the non-religious, he also separated Christians from persons of other religions. Even more problematically, he did so in front of a government body responsible for regulating matters that affect those in attendance. Thus, even if some attendees did not believe in prayer or that God answers prayers, they might have been coerced into signifying that they did simply to gain favor with the commissioners or the power company responsible for their basic utilities. To be sure, if such coercive actions become a pattern in the APSC's hearings, the practice would almost unquestionably be struck down.¹³⁵ Importantly, however, such coercive practices have not been repeated, and the APSC's typical hearings have resumed mirroring those from *Town of Greece*.

Likewise, of particular significance to the majority in *Town of Greece* was the town board's nondiscrimination policy. The APSC, however, has no such policy for selecting prayer givers. Thus, the fact that the APSC's selection method has led to only Christian prayer givers coupled with the fact that it has no policy prohibiting discrimination based on religion could potentially invalidate the practice. At the very least, it would likely dissuade some Justices from the *Town of Greece* majority from upholding the practice.

In the end, however, because of the similarities that the APSC's prayer practice shares with the town of Greece's prayer practice *and* the fact that the controversial statements from the July 17, 2013 prayer were more of an outlier than the norm, it is likely that the practice would survive—though perhaps only by a vote—constitutional scrutiny. Should the makeup of the

135. Again, as noted above, “[a]bsent 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.” *Town of Greece*, 134 S. Ct. at 1824.

Court change, however, the result in such a case could also certainly change, as *Town of Greece* was a close 5–4 opinion.

IV. REFORMING—NOT ABANDONING—THE PRAYER PRACTICE

While the APSC's prayer practice may withstand constitutional scrutiny, the APSC should nonetheless implement a few modifications with the goal of ensuring that future prayers do not invalidate the practice as a whole or further divide the citizens of Alabama—the citizens that the APSC represents. By allowing the commissioners unbridled discretion over the selection of prayer givers, the APSC's prayer practice stands on constitutionally feeble grounds. Not only does the practice potentially offend those excluded from leading—or rather, not invited to lead—the prayers, it also requires the APSC to subject itself to the whims of the private citizens who lead the prayers.¹³⁶ As noted above, however, this has not proved too troubling for the APSC, as some of its commissioners have stood behind the controversial speech.¹³⁷ Regardless, inappropriate prayers *should* trouble the APSC because, at the very least, the prayers have troubled the citizens it represents. And a government body should care about all of the citizens that it represents, not just those citizens who share the faith of those who lead it.

One improvement the APSC should consider is the addition of a nondiscrimination policy. Adding such a policy is neither difficult nor controversial; moreover, it has no real disadvantage unless, of course, catering to one religion *is* the intention of the APSC. And if the APSC does implement such a policy, it should strive to do more than just pay it lip service. Rather, the APSC should make it clear that it will not exclude any willing prayer giver on account of his or her religion and actually prove it by selecting members of different faiths to lead its prayers. As *Town of Greece* explicitly states, “[s]o 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.”¹³⁸ Having such a policy is not too much to ask. Furthermore, having such a policy does not require the APSC to seek out prayer givers of

136. One scholar describes the potential problems: “[S]preading around the prayer opportunity has created even more problems, for the more local governments open up the prayer opportunity, the more they have to make difficult decisions about whom to exclude and the harsher it seems to the excluded speakers.” Lund, *supra* note 38, at 1041. He adds: “Having private citizens lead prayers makes censorship both more necessary (in the sense that invited speakers often do not restrain themselves and are not easily subject to political controls) and more troubling (in the sense that their speech bears more resemblance to quintessentially private speech).” *Id.* These concerns seem particularly poignant in light of the July 17, 2013 hearing of the APSC.

137. See Hwang, *supra* note 113.

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

a different faith—though many would likely argue that it nonetheless should do so—but simply to express its willingness to accept prayer givers of different faiths. The failure to add a non-discrimination policy could open the door to litigation or, along the same lines, provide a credible basis for a litigant challenging the practice on discrimination grounds.

Another option for the APSC is to remind its prayer givers of the purpose behind legislative prayer or even provide guidelines for the prayer givers. For example, the U.S. House of Representatives now provides guest chaplains with guidelines “designed to encourage the sorts of prayer that are consistent with the purpose of an invocation for a government body in a religiously pluralistic Nation.”¹³⁹ The APSC should not be required to censor every statement of the prayer givers or attempt to provide some proper prayer formula. However, it could set reasonable limits on the amount of time for the prayers and even prohibit subjects that are off limits, such as the disparaging of another’s faith (or lack of faith) or beliefs, or the advancing of one’s own faith. Such limits should not serve as a one-size-fits-all spiritual rubric but, rather, as guideposts to help prayer givers recognize the significance of prayer in the government forum.

Our government can neither benefit nor burden citizens based on their denomination, religion, or non-religion. Though religious beliefs and practices may supersede governmental obligations for some citizens, when we come before government, we each present as equals; one’s religion—for better or for worse—simply falls out of the picture. Justice Kagan puts it better, stating 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.”¹⁴⁰ This statement should hold true to the APSC; Alabamians should not feel excluded or inferior because their religion is consistently overlooked. Likewise, attendees at the APSC’s hearings should not feel like they will be ignored if they do not participate in the exclusively Christian prayers. Rather, they should be on an equal plane with the other attendees, regardless of their religious affiliation.

The APSC could take a significant step forward and alleviate these concerns by incorporating a nondiscrimination policy, changing its method for selecting prayer givers, choosing members of other religions to lead the opening prayer, instituting guidelines governing the prayer practice, or even simply reminding prayer givers of the ceremonial purpose of legislative prayer. Though the APSC’s prayer practice may be constitutional, operating it in a way that is more inclusive of and less offensive to more Alabamians is still a worthy and attainable goal.

139. *Id.* at 1840–41 (Breyer, J., dissenting).

140. *Id.* at 1841 (Kagan, J., dissenting).

CONCLUSION

Religion and prayer play an important—if not the most important—role in the lives of many Americans. Just as true, the Alabama Public Service Commission provides a valuable service to the state of Alabama, dutifully serving its citizens for many decades. The U.S. Constitution provides for both of these realms—that is, religion and government—to cooperate in certain contexts, just as it bars their association in others. In light of the significance of religion and its ability to lend solemnity to civic occasions, government bodies have opened their sessions with a moment of prayer for over two centuries; moreover, they have done so without violating the Constitution. Accordingly, in carrying out its role, the APSC should be mindful of the generous liberty granted it by our federal Constitution, as well as of the diverse citizenship that it serves. Just as the APSC should not weaken the government by detracting from its duties, it should not degrade religion by marginalizing those who do not practice religion and dividing those who do. Proverbially put: “With great power comes great responsibility.” In light of the great powers afforded by our United States Constitution, the APSC and other government bodies must be careful not to denigrate the two spheres of government and religion in exercising those powers and privileges.

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