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5-5-2014

May 5, 2014: A Brain Dead Decision

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Title: A Brain Dead Decision

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5/5/2014—Having worked very hard to justify a form of legislative prayer in a law review article—Toward a Meaning-Full Establishment Clause Neutrality, 87 Chi-Kent L. Rev. 725 (2012)—I really resent the brain dead decision written by Justice Kennedy in the Town of Greece case today, upholding legislative prayer. Specifically, the majority opinion upheld legislative prayer on grounds of history. We have always had it. But this is no argument at all. We had school segregation as long as we had Equal Protection, yet overturned the practice. We always punished flag desecration until it was held unconstitutional. And so forth. It is no argument that a practice has always existed. The point is how a long standing practice helps us understand the meaning of the constitutional provision at issue. We can be sure that history is not really decisive. The real point is that something about legislative prayer makes it not unconstitutional. When the majority can explain what that is, we will all understand the Establishment Clause. Unlike today.