
OPENING PRAYER AND THE ESTABLISHMENT CLAUSE

by Pam Fellin

Most people at least know of the concept of the constitutional separation of church and state, so from time to time, we field questions from our clients regarding the use of prayer during board or council meetings. Fortunately, we now have a recent United States Supreme Court decision that offers new guidance establishing parameters for prayers that will survive a constitutional challenge.

As is true with most issues people feel strongly about, there is no shortage of opinion and commentary related to the May 5, 2014, U.S. Supreme Court opinion that upheld the practice of legislative prayer in *Town of Greece, New York v. Galloway* in a 5-4 split decision. This article is intended to provide a snapshot of the Supreme Court's opinion to help guide municipalities in understanding the impact of the Court's ruling and to create a practical framework to consider when prayers are a component of public meetings.

Simply stated, the opinion of the Court reads:

"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."

TOWN OF GREECE

In 1999, Greece, New York, established a practice of opening the monthly town board meetings with a roll call, the Pledge of Allegiance and a prayer. This practice was challenged by Susan Galloway and Linda Stephens, two local citizens who attended and actively participated in the town



board meetings. Prior to the legal challenge, Galloway complained to the board that she found the prayers "offensive," "intolerable," and an affront to a "diverse community," and both Galloway and Stephens complained that "Christian themes" were ever-present to the exclusion of those with differing religious beliefs.¹ The board heard the complaints and "the Town invited a Jewish layman and the chairman of the local Baha'i temple to deliver prayers." In addition, "a Wiccan priestess who had read press reports about the prayer controversy requested and was granted an opportunity to give the invocation."² In their legal challenge, Galloway and Stephens alleged the Town violated the First Amendment's Establishment Clause by preferring Christian prayers over others and by sponsoring sectarian prayers. As clarification, the Establishment Clause is the first pronouncement of the First Amendment to the United States Constitution which states "Congress shall make no law respecting an establishment of religion ... " *U.S. Const. Amend. I.*

Galloway and Stephens requested an injunction to limit the prayer to an "inclusive and ecumenical prayer that referred only to a generic God."³ The

district court upheld the Town's practice of prayer finding no violation of the First Amendment because the Town did not exclude any religions from participating in the prayer program. The district court acknowledged most prayers were given by Christians in the town meetings, but opined this was due to the demographics of the community and not "an official policy or practice of discriminating against

minority faiths."⁴ Furthermore, the District Court relied, at least in part, on the opinion set forth in *Marsh v. Chambers* that "permitted prayer in state legislatures by a chaplain paid from the public purse, so long as the prayer opportunity was not 'exploited to proselytize or advance any one, or to disparage any other faith or belief.'"⁵ In other words, the prayer should not attempt to convert citizens to a particular religion, and the prayer should not criticize any other faith or belief.

Galloway and Stephens appealed, and the United States Court of Appeals for the Second Circuit reversed the district court's holding based upon the premise that a "reasonable observer" may view the prayer as a validation of Christianity. The Second Circuit opined that "the Town's failure to promote the prayer opportunity to the public, or to invite ministers from congregations outside the town limits" essentially lead to a preference of the "Christian viewpoint."⁶ The Second Circuit went on to say that an invitation to pray at a town meeting may put citizens in an "awkward position"⁷ by encouraging their participation in a belief system differing from their own or having the appearance of disrespect if they chose not to participate.

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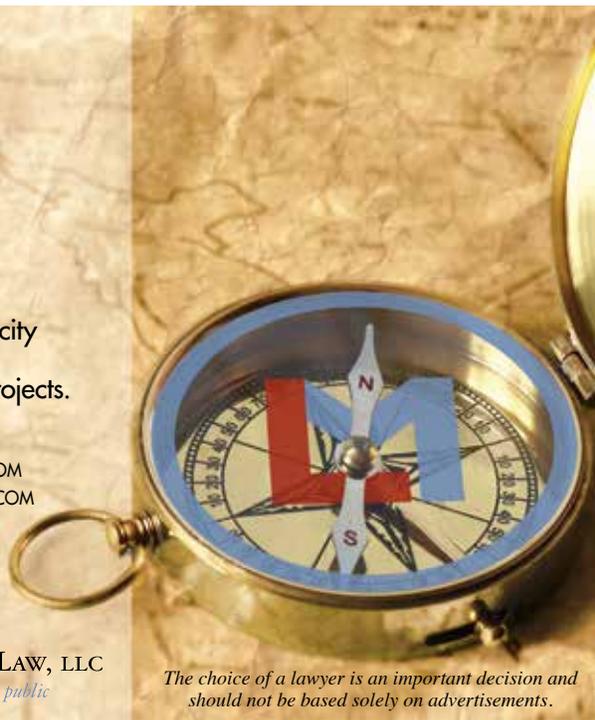
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As mentioned previously, however, the United States Supreme Court reversed the Second Circuit's decision and invalidated the Second Circuit's analysis that conceivably would have required public notice of a prayer opportunity and invitations to ministers in surrounding communities. In doing so, the Court spent a considerable amount of time laying the groundwork of its opinion discussing the *Marsh* decision. In particular, the Court explored the historical significance of the Establishment Clause, stating 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"⁸ and the Establishment Clause "must be interpreted by reference to historical practices and understandings."⁹

HISTORY AND PURPOSE OF LEGISLATIVE PRAYER

History and tradition should not be overlooked when considering a prayer program in light of the fact that the Court spent so much effort explaining the significance throughout the *Greece* opinion.

The practice of legislative prayer began with the First Congress and one of the earliest items of business was "to appoint and pay official chaplains."¹⁰ Congress has continued this practice from that point forward. This tradition

"assumes that adult citizens, firm in their own beliefs, can tolerate and perhaps appreciate a ceremonial prayer delivered by a person of a different faith"¹¹ and promotes unity of multiple faiths in furtherance of a tolerant and diverse community. The Supreme Court opinion also points to legislative prayer in setting the stage for conducting public business by creating a sense of

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solemnity, reminding the lawmakers to set aside their differences, and encouraging the lawmakers to seek "a common aspiration to a just and peaceful society."¹² The Court suggests that it is not the public, but rather the lawmakers who may benefit from taking a moment of quiet reflection before turning their attention to the sometimes difficult task

of governing. The Court also notes that legislative prayer is valuable in the sense that it creates an opportunity for the board to publicly acknowledge the presence and contributions of religion in the community. Many religious organizations offer social services to community members regardless of their beliefs or affiliation.

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THE FIRST AMENDMENT AND COERCION

So, you might be asking yourself, what does the First Amendment allow or prohibit in the context of a prayer program?

The First Amendment declares that "government may not coerce the citizens to support or participate in any religion or its exercise."¹³ Considering this, the Supreme Court was "not persuaded that the town of Greece, through the act of monthly meetings, compelled its citizens to engage in a religious observance."¹⁴ The Court notes, however, that the "the analysis would be different if the town board members 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."¹⁵ This statement supports Justice Thomas' concurring opinion, which simply states that "actual legal coercion" is the threshold that may move the municipality over the line and "peer pressure" does not constitute coercion.¹⁶

The Court also notes "the First Amendment is not a majority rule, and government may not seek to define permissible categories of religious speech. Once it invites prayer into the public sphere, government must permit a prayer giver to address his or her own God or gods as conscience dictates, unfettered by what an administrator or judge consider to be nonsectarian."¹⁷ It also is suggested that an attempt to monitor the prayers by the municipality reviewing or approving them prior to the meeting or requiring redaction of Christian-specific language moves a municipality closer to crossing the line of establishment of religion.

The lesson to be learned with the First Amendment analysis by the Court is that policymaker's should take a "hands off" approach in their prayer program to avoid blurring the line between ceremony and coercion. Even if the prayer practice is held prior to the opening of the business portion of the meeting, it may be best to follow the practice of federal and state legislatures and invite clergy, of any and all faiths, to offer the prayer.

CONSTRAINTS

The Court is careful to note that the ruling in *Greece* does not mean that the Establishment Clause has no constraints. Again emphasizing the significance of tradition and history, the Court establishes that "the relevant constraint derives from its place at the opening of legislative sessions, where it is 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."¹⁸ In other words, prayer should be initiated at the beginning or prior to the meeting to serve the purpose of putting lawmakers in the right frame of mind to conduct business on behalf of the community.

KEY FACTORS OF PRAYER PROGRAMS

So, what does this all mean? The Supreme Court opinion outlines several factors throughout the ruling that should be considered when establishing or continuing legislative prayer. Here are a few considerations to make as you take a moment to reflect on prayers in your government meeting:

- **Timing.** The Court emphasized the significance of when in the meeting the prayer takes place. In the town of Greece, the prayer took place at the beginning of the meeting in what was described as the ceremonial session when the board was not engaged in policymaking but rather in more general functions such as recognizing members of the community.
- **Conversion.** The purpose of the prayer should promote quiet reflection of the lawmakers rather than attempt to convert or gain new followers.
- **Coercion.** There should be no

action taken against those who choose not to participate in the prayer, and the lawmakers' decision on any given issue should not be influenced by whether or not a group or individual is a prayer participant.

- **Prayer Giver.** It may be wise to rethink the process of having the mayor or board members offer the prayer even if it is done prior to the policymaking session. The Supreme Court distinctly and repeatedly referred to the historical practice of employing chaplains.
- **Choice of Clergy.** Choice of clergy should represent the demographics of the community as close as possible, but there is no requirement to go outside the boundaries of the city to create a more diverse pool of prayer givers.
- **Review of Prayer.** No prior review and/or approval of the prayer should be required by the governing body.

CONCLUSION

Clearly this remains a contentious issue due to the emotional connections individuals have with their faith. Putting this guidance to use can give you peace in determining if your government meeting prayers would pass constitutional muster. □

Pam Fellin, an Associate Attorney with Lauber Municipal Law, LLC, in Lee's Summit, is the Assistant City Attorney of six Missouri cities. Pam formerly worked as the Acting Chief Deputy County Counselor of Jackson County, Missouri, and has extensive complex contract experience through former corporate positions. Pam is an active member of MML and the Missouri Municipal Attorneys Association. She can be reached at 816-525-7881 or pfellin@laubermunicipal.com.

¹ *Town of Greece v. Galloway*, __U.S.__ (2014) (S.C. #12-696)
² *Id.* at 3 (quoting Complaint in No. 08-cv-6088 (WDNY), ¶166).
³ *Id.* at 4.
⁴ *Id.*
⁵ *Id.* (quoting *Marsh v. Chambers*, 463 U.S. 783 (1983)).
⁶ *Id.* at 5.
⁷ *Id.* at 6.
⁸ *Id.* at 8 (quoting *County of Allegheny*, 492 U.S. 670).
⁹ *Id.*
¹⁰ *Id.* at 7 (quoting *Marsh*).
¹¹ *Id.* at 16.
¹² *Id.* at 6 (quoting *Lynch v. Donnelly*, 465 U.S. 668 (1984)).
¹³ *Id.* at 18 (quoting *County of Allegheny*).
¹⁴ *Id.* at 19.
¹⁵ *Id.* at 20.
¹⁶ *Id.* (opinion of *Thomas, J.*)
¹⁷ *Id.* at 14.
¹⁸ *Id.*

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