



THE COMMONWEALTH EDUCATIONAL POLICY INSTITUTE

CENTER FOR PUBLIC POLICY - L. DOUGLAS WILDER SCHOOL OF GOVERNMENT AND PUBLIC AFFAIRS

CEPI Education Law Newsletter

Dr. Richard S. Vacca, Editor; Senior Fellow, CEPI

OCTOBER 2013: Vol. 12-2

PRAYER AND LOCAL GOVERNMENT: POLICY IMPLICATIONS FOR SCHOOL BOARDS**Overview**

Last year I devoted a commentary to a discussion of the practice of beginning an official meeting of a local school board with a prayer. (Vacca, 2012) In that piece I reviewed Indian River School District v. Doe (3rd Cir. 2012) where the appellate court found the prayer policy and practice in violation of the Establishment Clause, reversed the trial court, and granted summary judgment to the plaintiff parents. Subsequently, the United States Supreme Court denied certiorari. (132 S.Ct. 1097 [2012])

Once again the subject of prayer at official meetings of public governmental bodies has been reported in the news. Here in Virginia, for example, a local board of supervisors finds itself embroiled in such a controversy. At the same time a case involving prayer and a town board of supervisors is on the docket to be heard by the United States Supreme Court during this term. Galloway v. Town of Greece (2nd Cir. 2012) Suffice it to say, the Court's decision will have an impact on all local governmental bodies including local school boards. Thus, it is time to up-date last year's commentary.

Historical Background: The Search for Neutrality

Often justified as seeking "divine guidance" in deliberations, the practice of having prayer at the beginning of a public meeting has deep roots in our nation's history stretching back to when communities were small in size and homogeneous in population. However, as communities began to grow and populations were more heterogeneous such practices became potentially litigious. (Vacca, 2012)

The First Amendment. The First Amendment to the United States Constitution states, in part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...." As my colleague Professor Boshier and I have observed, the *Establishment Clause* of the First Amendment requires that government be *neutral* in matters of religion. It does not favor or promote one religion over another, or compel participation in any religious activity. The *Free Exercise Clause* also mandates that government be *neutral* in matters of religion so that governmental actions will not interfere with the free exercise of a person's belief. While balancing *non-establishment* with *free exercise*

is the common goal, the task has not been issue free—resulting in a long series of inconsistent court decisions. (Vacca and Bosher, 2012)

The Establishment Clause Dominates. As education law entered the 1970s, the United States Supreme Court's decision in Lemon v. Kurtzman (1971) set the dominant standard for judicial review. In an opinion written by Chief Justice Burger the Court established the following three-pronged standard to apply when searching for *Establishment Clause* violations: (1) Does the act have a *secular* legislative purpose? (2) Does the *primary effect* of the act either advance or inhibit religion? (3) Does the act *excessively entangle* government and religion? In the late 1970s and early 1980s the courts demonstrated a total lock-step reliance on the Lemon standard.

Endorsement Test and Free Exercise. The United States Supreme Court opened a different path of judicial reasoning when in Marsh v. Chambers (1983) the Court held, by a 6-to-3 vote, that the traditional practice of opening each session of the Nebraska legislature with an official chaplain-led prayer (*i.e.*, invocation to invoke divine guidance on the deliberations) did not violate the Establishment Clause. The Court's rationale focused on the long history and tradition of the "legislative prayer" practice and how it had become over time a part of the "fabric of our society." In essence the Court had created a "legislative exemption."

One year later, in a concurring opinion in Lynch v. Donnelly (1984), Justice O'Connor combined Lemon's second prong (*primary effect*) and third prong (*excessive entanglement*) and posed the following question: When examining the governmental practice under review, does it "convey a message of endorsement or disapproval of religion?" Stated another way, was the practice under review either motivated wholly by religious considerations or does it give the impression (to an ordinary reasonable observer), or have the effect that the practice is government sanctioned (*i.e.*, bears the government's *imprimatur*)?

In writing the Court's majority opinion in Agostini v. Felton (1997), Justice O'Connor narrowed the scope of her "endorsement test" when she cautioned that the Supreme Court has repeatedly recognized that "government inculcation of religious beliefs has the impermissible effect of advancing religion." Justice O'Connor's *endorsement test* was further strengthened when in Lee v. Weisman (1992) the Court added that government cannot "*coerce* an individual to participate in exercises that intrude on his/her faith." A decade later, Justice Thomas added that "a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion." Good News Club v. Milford Central School (2002) Thus, in my view, while the Lemon (1971) test remains as a viable standard of analysis, the *endorsement test* (and its focus on "the effect" of a government exercise or program, *i.e.*, conveys the "impression") tips the balance more toward the *Free Exercise Clause*.

Galloway v. Town of Greece (2nd Cir. 2012)

Facts: Briefly summarized the facts are these. The Town of Greece is located in Monroe County, New York. An elected, five member Town Board (hereafter referred to as the Board) governs the Town and conducts official business at monthly public meetings.

Before 1999, official meetings of the Board began with a moment of silence. That year the Board began inviting local clergy to offer an "opening prayer" which followed the recitation of the Pledge of Allegiance. Following the Pledge the audience was asked to be seated, a "monthly prayer-giver" was introduced, and

that person delivered a prayer over the Board's public address system. The prayer-giver often asked the audience to bow their heads, stand, or join the prayer. The prayer-giver was then thanked for being the "chaplain of the month." Sometimes the prayer-giver was presented a plaque. The prayer exercise was often listed in the Board's official minutes.

The record shows that before 1999 and June 2010, when the record of the litigation closed, the town did not adopt any formal policy regarding (a) the process of inviting prayer-givers, (b) the permissible contents of the prayers, or (c) any other aspect of the prayer practice. The town claimed that anyone may request to give an invocation, "including adherents to any religion, atheists, and the nonreligious, and that it has never rejected such a request." The town also asserted that "it does not review the language of prayers before they are delivered, and that it would not censor an invocation, no matter how unusual or offensive its content." The town acknowledged, however, that it "has not publicized to town residents that anyone may volunteer to deliver prayers or that any type of invocation would be permissible." Subsequently, when plaintiffs complained about the prayer practice in 2007, the town explained it. Thus, while no formal policy existed regarding the selection process it became a standard procedure.

The record shows that while some Board meeting prayers were led by adherents of a variety of belief systems, in practice Christian clergy members delivered all the prayers relevant to the litigation. From 1999 through 2007, every prayer-giver met the description of being Christian clergy. Until 2008, a "Town Board Chaplain list" contained only "Christian organizations and clergy" and religious congregations in town are "primarily Christian." In all there were approximately 130 different invocations between 1999 and June 2010, of which more than 120 are contained in the record. The record showed that "a substantial majority of the prayers contained Christian references—*e.g.*, "Jesus Christ," "Your Son," "Christ as 'our Savior'," and others. The remaining third of the prayers included "generically theistic" terms—*e.g.*, "God of all creation, Heavenly Father;" a lay Jewish prayer-giver spoke of "God," the "Father;" a Baha'i prayer-giver referred to "God the All Glorious;" and a Wiccan priestess invoked "Athena," and "Apollo." Between January 2009 and June 2010, all prayer-givers were invited Christian clergy.

Plaintiffs attended numerous Board meetings after the prayer practice began in 1999. In 2007 they began complaining about the practice—sometimes during public comment periods. In their complaints plaintiffs asserted that the prayers (1) aligned the town with Christianity, and (2) were sectarian rather than secular. Town officials met with plaintiffs and expressed the town's position that it would "accept any volunteer" to give the prayer and that it would "not police the content of prayers." The town did not give a public response to the complaints nor did it comment regarding a comment which described objectors to the prayer practice as a "minority...ignorant of our history."

Federal District Court Action: In February 2008, Plaintiffs filed suit in federal district court claiming that aspects of the town's prayer practice violated the Establishment Clause of the First Amendment. Plaintiffs argued that (1) the procedure for selecting prayer-givers unconstitutionally preferred Christianity over other faiths, and (2) the prayer practice was impermissibly "sectarian." They pointed out, among other things, that the prayer practice "employed language unique to specific religious sects, and asserted that in doing so it established religion generally.

The district court held that because under Supreme Court case law, "the Establishment Clause does not foreclose denominational prayers"... "plaintiffs had failed to show that the town's prayer practice had in effect, even if it had the purpose, of establishing religion." The court entered judgment for the defendants.

Galloway v. Town of Greece (W.D.N.Y. 2010) Plaintiffs appealed to the United States Court of Appeals for the Second Circuit.

Appellate Court Opinion and Decision:

At the outset the Second Circuit Court narrowed the scope of the appeal. Because the appellants “abandoned the argument that the town intentionally discriminated against non-Christians in the selection of prayer-givers...” said the Court, “the only live issue on appeal is whether the district court erred in rejecting the plaintiffs’ assertion that the town’s prayer practice had in effect, even if not the purpose, of establishing religion.”

The Second Circuit initially focused on Marsh v. Chambers (1983) and the Supreme Court’s creation of a legislative exemption (*i.e.*, state-funded legislative prayer does not necessarily run afoul of the Establishment Clause) and commented as to how the Supreme Court in *Marsh* did not employ the three-pronged standard of analysis created in Lemon v. Kurtzman (1971). However, said the Second Circuit, six years later in County of Allegheny v. ACLU Greater Pittsburgh Chapter (1989) the Supreme Court suggested that legislative prayers invoking particular sectarian beliefs may, on the basis of those references alone, violate the Establishment Clause. The Second Circuit Court then reminds the reader that in Marsh the chaplain had removed all “references to Christ.”

Citing Joyner v. Forsyth County, N.C. (4th Cir. 2011) and decisions from other circuit courts, for example, McCreary County v. ACLU of Kentucky (2005), where the Marsh exemption was applied, the Second Circuit opined that “[t]o the extent that these circuit court cases stand that a given legislative practice, viewed in its entirety, may not advance a single religious set, we cannot disagree.” However, said the Second Circuit, “[t]o the extent that these circuit cases stand instead for the proposition that the Establishment Clause precludes all legislative invocations that are denominational in nature we cannot agree. The line between sectarian and nonsectarian prayers, though perhaps the least defective among various possible distinctions that can be drawn in this area, runs into sizable doctrinal problems.”

In its analysis the Second Circuit Court next cited, among others, Lee v. Weisman (1992) and School District of Abington Township v. Schempp (1963) and opined that “[u]nder the First Amendment, the government may not establish a vague theism as a state religion any more that it may establish a specific creed.” However, “this does not mean that any *single* denominational prayer has the forbidden effect of affiliating the government with any one faith. A series of denominational prayers, each delivered in the name of a different sect, could hardly be perceived as having this effect.” Thus, said the Second Circuit Court, “[w]e must ask, instead, whether the town’s practice, viewed in its totality by an ordinary, reasonable observer, conveyed the view that the town favored or disfavored certain religious beliefs. In other words, we must ask whether the town, through its prayer practice, has established particular religious beliefs as more acceptable ones, and others as less acceptable.”

The Court then made the following summative statement: “We conclude, on the record before us, that the town’s prayer practice must be viewed as an endorsement of a particular religious viewpoint. This conclusion is supported by several considerations, including the prayer-giver selection process, the content of the prayers, and the contextual actions (and inactions) of prayer-givers and town officials. We emphasize that, in reaching this conclusion, we do not rely on any single aspect of the town’s prayer practice, but rather on the totality of the circumstances present in this case.” More specifically, said the

Court, the process of selecting prayer-givers virtually ensured a Christian viewpoint; and the town neither publicly solicited volunteers to deliver the invocations nor informed members of the general public that volunteers would be considered or accepted, let alone welcomed, regardless of their religious beliefs or non-beliefs. Had such publication happened the “selection process could be defended more readily as random in the relevant sense.” Regarding the sectarian nature of the prayers said at supervisor’s meetings, the Court emphasized that this was not “inherently the problem.” Relying on Marsh (1983) the Second Circuit concluded that the prayers “did not preach conversion; threaten damnation to nonbelievers; downgrade other faiths; or the like.”

The Second Circuit added that the town had a obligation to (1) consider how its prayer practice would be perceived by those who attended Town Board meetings, and (2) explain the nature of the practice and prayers to attendees. Moreover, the prayer-givers appeared to speak for the town and not for themselves and the prayer-givers often requested that the audience participate. Plus the town officials by their actions (intentionally or not) gave the impression that the prayer-giver spoke on behalf of the town.

Decision: Based on record before it and taking into account “the contextual considerations in concert,” the decision of the district court grant of summary judgment is reversed and the case is remanded. In reaching this conclusion, said the appellate court, “[w]e conclude that an objective, reasonable person would believe that the town’s prayer practice had the effect of affiliating the town with Christianity.”

The Second Circuit then cautions that a *contextual analysis* like the one used in this case gives “only limited guidance” to municipalities that wish to maintain a legislative prayer practice and still comply with the mandates of the Establishment Clause. “A municipality cannot—in our judgment—ensure that its prayer practice complies with the Establishment Clause simply by stating expressly that it does not mean to affiliate itself with a particular faith.” The Court then adds that compliance cannot be ensured simply “by adopting a lottery to select prayer-givers, or by actively pursuing prayer-givers of minority faiths whose members reside within the town.” And, “there is no substantive mixture of prayer language that will, on its own, necessarily avert the appearance of affiliation.”

The Second Circuit Court then clarifies that it does not hold that the town may not open its public meetings with a prayer or invocation. What it does hold is that “a legislative prayer practice that, however well intentioned, conveys to a reasonable observer under the totality of the circumstances an official affiliation with a particular religion violates the clear command of the Establishment Clause.”

Policy Implications

The intent of this commentary is not to predict what the United States Supreme Court will say in Galloway v. Town of Greece (2nd Cir. 2012); rather, it is to present the case and to discuss the rationale used by the second Circuit in reaching its decision. In my view the appellate court’s reliance on the *endorsement test* (*i.e.*, gives the impression to a reasonable observer that the practice is government sanctioned) rather than on a strict application of Lemon’s three-pronged standard is significant. Will a majority of the Supreme Court Justices follow a similar line of thinking—*i.e.*, adopt an *endorsement test* analysis? While the policy implications for local school boards are significant, it would be premature to create a list prior to the Supreme Court handing down its decision. The policy implications will become clearer only after the Galloway decision is analyzed by legal experts.

As we wait for the Supreme Court to speak on the issue of prayer at local government meetings, the following piece of advice offered by the Second Circuit is worth repeating: While difficulties are not “grounds to preclude its practice, [they] may well prompt municipalities to pause and think carefully before adopting legislative prayer....”

Resources Cited

Agostini v. Felton, 521 U.S. 203 (1997)

County of Allegheny v. ACLU Greater Pittsburgh, 492 U.S. 573 (1989)

Galloway v. Town of Greece, 732 F.Supp.2d 195 (W.D. 2010)

Galloway v. Town of Greece, 681 F.3d 20 (2nd Cir. 2012), cert. granted, by

Greece v. Galloway, 2013 U.S. LEXIS 3962 (2013)

Good News Club v. Milford Central School, 533 U.S. 98 (2002)

Indian River School District v. Doe, 653 F.3d 256 (3rd Cir. 2011), cert. denied 132 S.Ct. 1097 (2012)

Joyner v. Forsyth County, NC, 653 F.3d 341 (4th Cir. 2011), cert. denied 132 S.Ct. 1097 (2012)

Lee v. Weisman, 505 U.S. 577 (1992)

Lemon v. Kurtzman, 403 U.S. 602 (1971)

Lynch v. Donnelly, 465 U.S. 668 (1984)

Marsh v. Chambers, 463 U.S. 783 (1983)

McCreary County v. ACLU of Kentucky, 545 U.S. 844 (2005)

School District of Abington Township v. Schempp, 374 U.S. 203 (1963)

Vacca, Richard S., “Religion and Public Education: School Board Prayer,”

CEPI Ed. Law Newsletter (Feb. 2012)

Vacca, Richard S. and Bosher, William C., Jr., LAW AND EDUCATION: CONTEMPORARY ISSUES AND COURT DECISIONS, Eighth Edition (LexisNexis 2012)

Richard S. Vacca
Senior Fellow CEPI

Note: The views expressed in this commentary are those of the author.