

In God we trust: Can boards of education open meetings with prayer?

By the New York State
Association of School Attorneys

A recent U.S. Supreme Court decision delivered by Justice Anthony Kennedy held that the Town of Greece's practice of opening town board meetings with a prayer does not violate the Establishment Clause of the First Amendment of the U.S. Constitution. The decision in *Town of Greece v. Galloway* appears to open the door for school boards to commence board meetings with a prayer or invocation.

Twenty-two years ago, however, the same Supreme Court Justice – Kennedy – wrote the majority opinion in *Lee v. Weisman*, which said that the Establishment Clause forbids a school district from including prayer as part of its official public school graduation ceremony. Does *Lee* render the *Town of Greece* decision inapplicable in the school context?

The answer is: probably not. Of course, the constitutionality of prayer by any public body depends on the facts and circumstances. Officials in school districts that either currently begin school board meetings with a prayer or are considering doing so should understand the court's reasoning in both decisions.

The Establishment Clause generally prohibits government from establishing or favoring a religion. In *Town of Greece*, the Supreme Court reiterated its longstanding position that an opening prayer at a legislative session does not conflict with the Establishment Clause. The court emphasized that the practice of appointing a chaplain and conducting a prayer at the beginning of a legislative meeting has been part of the history of the United States since its inception and serves a nonsecular purpose, explaining:

As practiced by Congress since the framing of the Constitution, 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. ... The court has considered this symbolic expression to be a tolerable acknowledgement of beliefs widely held, rather than a first, treacherous step towards establishment of a state church.

While the majority found that, in theory, an opening prayer at a town board meeting does not violate the Establishment Clause, a hard look at "the setting in which the prayer arises and the audience to whom it is directed" is required. While town board meetings involve more public participation than is typical at a meeting of Congress or the state legislatures because citizens attend "to accept awards, speak on matters of local importance, and petition the board for action

that may affect their economic interests, such as the granting of permits, business licenses and zoning variances," as long as the prayer is not directed at the public, these distinctions do not transform an opening prayer into an unconstitutional endeavor.

According to the court, an invocation at the opening of a meeting should not be directed at the public in attendance; it should be directed at "the lawmakers themselves, who may find that a moment of prayer or quiet reflection sets the mind to a higher purpose and thereby eases the task of governance."

The court cautioned, however, that "[t]he analysis would be different if town board members directed the public to



Supreme Court Justice Anthony Kennedy is the author of majority opinions in two cases relevant to the legality of having an opening prayer at school board meetings.

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."

Justice Kennedy also noted that the Town of Greece did not have an obligation to insist on a "nonsectarian or ecumenical prayer" and held 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."

Yet the court explained that a government must follow a nondiscriminatory practice for selecting ministers to conduct the prayer. The Town of Greece, for example, met this requirement because it represented that it would "welcome a prayer by any minister or layman who wishes to give one." *Id.* at 1824. In fact, after the Supreme Court decision was announced, atheist Dan Courtney delivered the opening invocation at the Town of Greece's July 2014 board meeting, according to news reports.

When considering whether the *Town of Greece* decision opens the door for a school district board of education to open a board meeting with prayer, we must also consider the Supreme Court's decision in *Lee v. Weisman*. In *Lee*, the court struck down a policy of opening public school commencement ceremonies with prayer. The court was concerned with the manner in which a school district official selected a minister to say the prayer be-

cause there was no evidence that the selection was made in a nondiscriminatory manner. The court also took issue with the school district's policy of attempting to ensure that the content of the prayer was sectarian in nature. The court found that any involvement in construction of the prayer is impermissible because it was an attempt to establish a civic religion. The court explained: "The suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds strikes us as a contradiction that cannot be accepted."

The other factor that doomed the school district's prayer policy was the au-

late, or make a later protest. The court explained:

Should nonbelievers choose to exit the room during a prayer they find distasteful, their absence will not stand out as disrespectful or even noteworthy. And should they remain, their quiet acquiescence will not, in light of our traditions, be interpreted as an agreement with the words or ideas expressed. Neither choice represents an unconstitutional imposition as to mature adults, who "presumably" are "not readily susceptible to religious indoctrination or peer pressure" (emphasis added).

Relying on the *Town of Greece* decision for guidance, a school district should be able to develop a nondiscriminatory policy of selecting ministers or others to offer an opening prayer at a school board meeting that does not violate the Establishment Clause. In the event of a lawsuit, whether an opening prayer at a school board meeting would pass constitutional muster will largely depend on whether the court views a school board meeting as an adult-oriented legislative event or an event where a prayer being conducted in the presence of students would be unduly coercive. In *Town of Greece* and *Lee* the Supreme Court makes a significant distinction between adults who would not easily be coerced into participating in an opening prayer and adolescents. Historically, the Supreme Court has been protective of the impressionable minds of students. As the court noted in *Lee*, "[r]esearch in psychology supports the common assumption that adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention."

Therefore, school districts are cautioned to consider whether there is a high degree of attendance or involvement from students at school board meetings prior to initiating (or continuing) a practice of prayer to begin meetings. Even if the prayer is conducted consistent with the court ruling in *Town of Greece v. Galloway*, conducting an opening prayer in front of the impressionable minds of students could transform a constitutional practice that attempts to lend gravity to public business into a coercion to participate in religion, which is impermissible under the Establishment Clause.



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