CONSTITUTIONAL LAW—ESTABLISHMENT CLAUSE—PRAYERS BEFORE TOWN BOARD MEETINGS HELD CONSTITUTIONAL.

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

TAYLOR PHILLIPS

In *Town of Greece v. Galloway*, the United States Supreme Court determined the constitutionality of the Town of Greece, New York's practice of opening its monthly board meetings with a prayer.[1] In 1999, John Auberger ("Auberger") was elected town supervisor and sought to replicate the prayer practice in which he had participated while serving in the county legislature.[2] Subsequently, Greece began opening its monthly board meetings with prayers delivered by a local clergyman.[3] A town employee would call various congregations found in a local directory until the employee found a clergyman to give the prayer.[4] Most of the congregations located within Greece were Christian, and, for the period lasting from 1999 to 2007, all of the participating clergymen were as well.[5] The town leaders of Greece maintained that anyone could give the invocation, including those without a religious persuasion.[6] Respondents, Susan Galloway and Linda Stephens, attended the board meetings and spoke against the practice of opening the meeting with a prayer.[7] After Galloway and Stephens complained about the lack of representatives from other faiths, the Town invited the chairman of the local Baha'i temple and a Jewish layman to say the prayer.[8]

Respondents Galloway and Stephens brought suit in the United States District Court for the Western District of New

---

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

[2] *See id.* at 1816.

[3] *See id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Galloway IV*, 134 S. Ct. at 1817.

[8] *Id.* at 1817.

York.[9] Respondents brought a Section 1983 claim,[10] alleging that the Town's practice of opening board meetings with prayer violated the Establishment Clause of the First Amendment.[11] The district court granted the Town's motion for summary judgment, holding that the prayers did not violate the Establishment Clause of the First Amendment.[12] Respondents appealed, and the Second Circuit Court of Appeals reversed the ruling of the district court.[13] The Second Circuit held that the practice of opening town board meetings with a prayer, when considered under the totality of the circumstances, would give a reasonable observer the impression that the town was endorsing Christianity.[14]

Following the Second Circuit's reversal, the Town of Greece filed a petition for certiorari, and the United States Supreme Court granted the petition[15] on the issue of "whether the town of Greece, New York, impose[d] an impermissible establishment of religion by opening its monthly board meetings with a prayer."[16] The Court ultimately reversed the Second Circuit, and held that the Town of Greece's practice of opening board meetings with a prayer did not violate the Establishment Clause.[17] Additionally, the Court rejected the arguments that prayer must be non-sectarian.[18] The Court analyzed the issue under the holding from the Court's earlier decision in *Marsh v. Chambers*,[19] which held that opening legislative sessions with prayer would generally be found constitutionally permissible.[20]

---

[9] Galloway v. Town of Greece (*Galloway I*), 732 F. Supp. 2d 195 (W.D.N.Y. 2010), *rev'd*, 681 F.3d 20 (2d Cir. 2012).

[10] *See* 42 U.S.C. § 1983 (2012) ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . . .").

[11] U.S. CONST. amend. I; *see Galloway I*, 732 F. Supp. 2d at 209.

[12] *Galloway I*, 732 F. Supp. 2d at 243.

[13] *See* Galloway v. Town of Greece (*Galloway II*), 681 F.3d 20, 34 (2d Cir. 2012), *rev'd*, 134 S. Ct. 1811 (2014).

[14] *See id.* at 33–34.

[15] Town of Greece v. Galloway (*Galloway III*), 133 S. Ct. 2388 (2013) (mem.), *certifying questions to* 681 F.3d 20 (2d Cir. 2012).

[16] *Galloway IV*, 134 S. Ct. at 1815.

[17] *See id.* at 1828.

[18] *Id.* at 1820–24.

[19] Marsh v. Chambers (*Marsh IV*), 463 U.S. 783 (1983).

[20] *Galloway IV*, 134 S. Ct. at 1818–19.

The Court reached its decision by focusing its inquiry on whether the prayer practice followed in the Town of Greece comported with the "tradition long followed in Congress and the state legislatures."[21] The Court noted the symbolic importance of the tradition, acknowledging that "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."[22] The Court held that the prayers at issue in this case fell within the tradition recognized by the Court.[23] Additionally, the Court found that the Town of Greece made reasonable efforts to discover the congregations within its city limits and maintained a policy of inclusiveness in regards to who could deliver prayers.[24] The Court also recognized that lawmakers, and not the general public, were the target audience of the opening prayers.[25] The Court concluded by noting that the practice of opening the town board sessions with a prayer was an acknowledgement of the religious institutions that are interwoven with the rest of society, and thus, had a legitimate ceremonial purpose.[26]

In previous cases, the Supreme Court of the United States has recognized the importance of considering the historical traditions of legislative prayer and other religious practices when interpreting the Establishment Clause.[27] While legislative prayer is certainly a practice with roots tracing back to the founding of the country, the Supreme Court did not decide the constitutionality of legislative prayer until 1983 in *Marsh v. Chambers*.[28] Prior

---

[21] *Id.* at 1819. Justice Kennedy argues the Court's establishment clause analysis "must acknowledge" what involvement between religious and secular institutions was acceptable to the Framers of the First Amendment—and has since withstood the test of time. *Id.* (citing Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 294 (1963) (Brennan, J., concurring) ("[T]he line we must draw between the permissible and the impermissible is one *which accords with history and faithfully reflects the understanding of the Founding Fathers*." (emphasis added))).

[22] *Id.* at 1818.

[23] *Id.* at 1824.

[24] *Id.*

[25] *Galloway IV*, 134 S. Ct. at 1825.

[26] *See id.* at 1827.

[27] *See, e.g.*, Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203 (1963).

[28] *See Marsh IV*, 463 U.S. 783, 786.

to *Marsh*, the Supreme Court's Establishment Clause jurisprudence dealt with subjects such as school prayer;[29] a law prohibited the teaching of human evolution;[30] and a law that reimbursed religious schools for textbooks and salaries of teachers.[31]

In *Marsh v. Chambers*, Nebraska state senator, Ernest Chambers, filed suit challenging the practice of opening each legislative session with a prayer.[32] Senator Chambers also challenged the practice of having a chaplain who was paid with public funds leading the prayer.[33] The Nebraska legislature had chosen Robert E. Palmer, a Presbyterian minister, to occupy the position of chaplain since 1965.[34] The chaplain's salary was taken from the general funds of the State of Nebraska.[35] In 1975, 1978, and 1979, prayer books were prepared and distributed amongst the legislature at the State's expense.[36] Nebraska had employed a chaplain to open its daily legislative sessions since 1855.[37]

The initial suit was filed in the United States District Court for the District of Nebraska.[38] The district court held that the practice of opening each legislative session with a prayer did not violate the Establishment Clause.[39] Judge Urbom reached this decision through interpreting the text of the Establishment Clause, which mandates that legislatures shall "make no law respecting the establishment of religion."[40] Judge Urbom noted that the simple act of allowing a prayer to be given prior to the sessions did not constitute making a law.[41] However, the district

---

[29] Engel v. Vitale, 370 U.S. 421, 424 (1962) (holding practice of daily mandatory recitation of government written prayers unconstitutional).

[30] Epperson v. Arkansas, 393 U.S. 97, 103 (1968) (holding an Arkansas law prohibiting the teaching of evolution unconstitutional).

[31] Lemon v. Kurtzman, 403 U.S. 602, 606–07 (1971) (holding Pennsylvania law that reimbursed religious schools for textbooks and teachers' salaries unconstitutional).

[32] *See* Chambers v. Marsh (*Marsh I*), 504 F. Supp. 585, 586 (D. Neb. 1980), *aff'd in part, rev'd in part*, 675 F.2d 228 (8th Cir. 1982).

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.* at 587.

[38] *Marsh I*, 504 F. Supp. at 585.

[39] *See id.* at 588.

[40] U.S. CONST. amend. I; *see Marsh I*, 504 F. Supp. at 586, 588.

[41] *Marsh I*, 504 F. Supp. at 588.

court held that paying for the chaplain's salary and for the distribution of prayer books violated the Establishment Clause.[42] The district court stated that mandating payment for the chaplain out of public funds and the use of tax dollars for printing prayer books involved "the power, prestige and financial support of government," and therefore violated the Establishment Clause.[43]

The parties then appealed to the Eighth Circuit Court of Appeals.[44] The Eighth Circuit affirmed the district court's decision on the issue of the use of public money for both the chaplain's salary and the printing of prayer books.[45] The Eighth Circuit held that "Nebraska's legislative prayer practice, taken as a whole, is unconstitutional as a violation of the Establishment Clause of the First Amendment."[46] The Eighth Circuit used a three-pronged test to determine whether the prayer practice violated the Establishment Clause.[47] In order for a state action to be permissible under the Establishment Clause, the action must: "(1) serve a clearly secular purpose, (2) have a primary effect which neither advances nor inhibits religion, and (3) avoid excessive government entanglement with religion."[48] In order to decide whether a particular practice offends the Establishment Clause, the court stated that the practice must be examined in its entirety, with the determination "'depending on all the circumstances of a particular relationship.'"[49] The court determined that the Nebraska legislature's practice of opening each session with a prayer from a publicly-funded chaplain and publishing the chaplain's prayers violated all three prongs of the aforementioned test.[50]

The defendants in the original action petitioned for a grant of certiorari, and the United States Supreme Court granted the petition to determine whether Nebraska's legislative prayer

---

[42] *Id.* at 592.

[43] *Id.*

[44] Chambers v. Marsh (*Marsh II*), 675 F.2d 228 (8th Cir. 1982), *rev'd*, 463 U.S. 783 (1983).

[45] *Id.* at 235.

[46] *Id.*

[47] *See id.* at 233.

[48] *Id.* at 233. *See generally* Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) (establishing the three-pronged *Lemon* test based on criteria developed by the Court over the years).

[49] *Marsh II*, 675 F.2d at 233–34 (quoting *Lemon*, 403 U.S. at 614).

[50] *Id.* at 234.

practice constituted an impermissible endorsement of religion.[51] The Court reversed the judgment of the Eighth Circuit Court of Appeals, and held that both the practice of opening legislative sessions with a prayer and compensating the chaplain from public funds was constitutional.[52]

The Court looked to the historical existence of legislative prayer in the United States, noting that the First Congress began opening sessions with prayer pursuant to one of its earliest acts.[53] The Court described the practice as one that "is deeply embedded in the history and tradition of this country."[54] In examining the history of legislative prayer, the Court sought to determine the meaning of the Establishment Clause and the draftsmen's intended application of the Establishment Clause with regard to the constitutionality of legislative prayer.[55] The Court's determination that the relevant actions were constitutional turned on the fact that both legislative prayer and public funding for chaplains had occurred throughout the history of the United States; in particular, the Court noted that the First Congress voted to appoint a publicly funded chaplain within days of finalizing the language of the Bill of Rights.[56] The Court next described the legislative prayer practice as "simply a tolerable acknowledgment of beliefs widely held among the people of this country."[57] Accordingly, the Court held that the practice of legislative prayer to be constitutional, and noted that the content of the prayer is not to be examined by judges, absent any indication that the "prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief."[58]

The Supreme Court continued to attempt to identify the types of practices prohibited by the Establishment Clause in *County of Allegheny v. ACLU*.[59] In 1981, the county of Allegheny

---

[51] *See Marsh IV*, 463 U.S. 783, 786 (1983); Marsh v. Chambers (*Marsh III*), 459 U.S. 966 (1982) (mem.), *certifying a question to Marsh II*, 675 F.2d 228.

[52] *Marsh IV*, 463 U.S. at 790, 793, 795.

[53] *See id.* at 786–88.

[54] *Id.* at 786.

[55] *See id.* at 790.

[56] *See id.* at 790–91.

[57] *Id.* at 792.

[58] *Marsh IV*, 463 U.S. at 794–95.

[59] *See* Cnty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter (*Allegheny III*), 492 U.S. 573 (1989). While *Allegheny III* primarily concerned crèche displays, the Justices also engaged in a lengthy discussion of other practices with respect to the Establishment Clause, including legislative prayer. *See generally id.* at 602–13; *id.* at 660–74 (Kennedy, J., concurring in part, dissenting in part).

began allowing a Roman Catholic group, the Holy Name Society, to display a crèche in the county courthouse during the Christmas season.[60] The crèche had an angel located at its highest point bearing a banner with the phrase "Gloria in Excelsis Deo!"[61] During the 1986–87 holiday season, the crèche displayed a plaque naming the Holy Name Society as the donors.[62] The City of Pittsburgh had annually placed a large Christmas tree at the Grant Street entrance to the City-County Building.[63] Since 1982, the City had also placed a menorah at the display.[64] In the Christmas season of 1986, the City's display featured a Christmas tree, a menorah, and a sign containing the mayor's name and with the title "Salute to Liberty."[65]

The plaintiffs in the original action filed suit against the City and the County in December of 1986, alleging that the display of the crèche and the menorah violated the Establishment Clause and seeking a permanent injunction.[66] The district court denied the request for a permanent injunction, holding that the displays were constitutional.[67] On appeal, the Third Circuit Court of Appeals reversed the district court's ruling, holding that the displays were an endorsement of Christianity and Judaism.[68] The Supreme Court granted the petition for certiorari by Chabad,[69] the City, and the County.[70] The issue presented was whether the displays, taking into account their physical setting, had the effect of endorsement or disapproval of religious beliefs.[71] The Court affirmed the court of appeal's judgment regarding the constitutionality of the crèche, but reversed the

---

[60] *Id.* at 579 (majority opinion).

[61] *Id.* at 580.

[62] *Id.*

[63] *Allegheny III*, 492 U.S. at 581–82.

[64] *Id.* at 582–83.

[65] *See id.* at 582.

[66] *Id.* at 587–88.

[67] *See id.* at 588.

[68] *Id.* at 588–89; *see* Am. Civil Liberties Union Greater Pittsburgh Chapter v. Cnty. of Allegheny (*Allegheny I*), 842 F.2d 655, 662–63 (3d Cir. 1988), *aff'd in part, rev'd in part*, 492 U.S. 573 (1989).

[69] *Allegheny III*, 492 U.S. at 588 (Chabad owned the menorah at issue and was permitted to intervene in the case).

[70] *Id.* at 589; *see* Cnty. of Allegheny v. Am. Civil Liberties Union (*Allegheny II*), 488 U.S. 816 (1988) (mem.), *certifying questions to Allegheny I*, 842 F.2d 655.

[71] *Allegheny III*, 492 U.S. at 597 (Blackmun, J.).

judgment holding the display of the menorah to be unconstitutional.[72]

The Supreme Court described the key principle of the Establishment Clause as one which "prohibits government from appearing to take a position on questions of religious belief."[73] In its analysis, the Court relied upon an earlier case *Lynch v. Donnelly*, in which it examined a display's physical setting to determine whether the display impermissibly endorsed a religion.[74] Under *Lynch*, the Court stated that a reasonable observer would interpret the display of the crèche as an endorsement of religion and held accordingly that the display was an impermissible under the Establishment Clause.[75] In analyzing the display of the menorah, the Court examined the setting surrounding the display, which featured a Christmas tree and the "Salute to Liberty" sign.[76] The Court held that the display would not likely be interpreted as an endorsement of religion.[77] In conclusion, the Court stated that the overall display "must be understood as conveying the city's secular recognition of different traditions for celebrating the winter-holiday season."[78]

Roughly three years after the Supreme Court decided *Allegheny*.[79] Petitioner Robert E. Lee, a middle school principal, invited a rabbi to deliver the prayer at graduation.[80] Lee gave the rabbi a pamphlet entitled "Guidelines for Civic Occasions," and recommended that the rabbi deliver a non-sectarian invocation and benediction.[81] Respondent, Daniel Weisman (Daniel), attended the middle school graduation for his daughter, Deborah Weisman (Deborah), objected to prayers being given at the graduation, but received no response.[82] After failing to hear from the school, Daniel filed suit in the District Court of Rhode Island and requested a temporary restraining order to prevent either

---

[72] *Id.* at 620–21.

[73] *Id.* at 593–94 (majority opinion).

[74] *Id.*; *see also* Lynch v. Donnelly, 465 U.S. 668, 687–94 (1984) (O'Connor, J., concurring) (rejecting "political divisiveness" in favor of endorsement or disapproval of religion as the appropriate analytical framework for applying the *Lemon* test).

[75] *See Allegheny III*, 492 U.S. at 599–600.

[76] *Id.* at 614 (Blackmun, J.).

[77] *See id.* at 619.

[78] *Id.* at 620.

[79] Lee v. Weisman (*Lee IV*), 505 U.S. 577 (1992).

[80] *Id.*

[81] *Id.*

[82] *Id.* at 581.

an invocation or benediction from being given at the graduation.[83]

The district court denied Daniel's initial motion, and Daniel filed an amended complaint seeking a permanent injunction.[84] After Daniel filed the amended complaint, the district court held that the prayers at issue violated the Establishment Clause.[85] The district court reached its decision by using the three-pronged test from *Lemon v. Kurtzman*, and noted that the school officials violated the second prong: the "principal or primary effect must be one that neither advances nor inhibits religion."[86] On appeal, the First Circuit Court of Appeals affirmed the ruling of the district court, and held that prayer given by clergy at a graduation ceremony violates the Establishment Clause.[87] The defendants in the original action petitioned for certiorari, and the Supreme Court granted the petition.[88] The issue before the Court was to determine whether inviting members of the clergy to offer prayers at a public school graduation ceremony violated the Establishment Clause.[89]

The Supreme Court affirmed the decision of the appellate court, and held that the state's involvement in school prayer violated the Establishment Clause.[90] The Court summarized the minimum guarantee of the Establishment Clause as being that "government may not coerce anyone to support or participate in religion or its exercise."[91] The environment in which the school prayer was to take place was very relevant to the Court; in particular, the Court considered the level of control that the school officials exercised over the student body.[92] In the Court's view, the prayer given at graduation amounted to forced participation

---

[83] Weisman v. Lee (*Lee I*), 728 F. Supp. 68, 69 (D.R.I. 1990), *aff'd*, 908 F.2d 1090 (1990).

[84] *See id.* at 69–70.

[85] *Id.* at 74–75.

[86] *Id.* at 71 (quoting Lemon v. Kurtzman, 403 U.S. 602, 612 (1971)).

[87] Weisman v. Lee (*Lee II*), 908 F.2d 1090 (1st Cir. 1990) (affirming the ruling of the district court), *aff'd*, 505 U.S. 577 (1992).

[88] Lee v. Weisman (*Lee III*), 499 U.S. 918 (1991), *certifying questions to Lee II*, 908 F.2d 1090.

[89] *Lee IV*, 505 U.S. at 580.

[90] *Id.* at 588, 599.

[91] *Id.* at 587.

[92] *See id.* at 586.

in a religious exercise.[93] The Court carefully noted that the jurisprudence involving the Establishment Clause would still be very fact-sensitive.[94] The facts in *Lee* involved what amounted to compelled attendance and participation in a religious exercise; therefore, the Court reasoned that the students had no true opportunity to avoid participation.[95] Accordingly, the Court held that the school officials violated the Establishment Clause.[96]

In summary, in *Town of Greece v. Galloway*[97] the Supreme Court upheld the Town of Greece's practice of opening town board meetings with a prayer.[98] In concluding that the practice did not violate the Establishment Clause of the First Amendment, the Court focused on the inquiry in *Marsh v. Chambers*.[99] *Marsh* reviewed the historical foundation of legislative prayer, with the Court noting its existence dating back to the founding of the country.[100] *Marsh* established the constitutionality of legislative prayer, with the Court deeming the practice as "part of the fabric of our society."[101] In determining whether the prayers at issue in *Galloway* satisfied the historical inquiry, the Court had to determine "whether the prayer practice in the town of Greece fits within the tradition long followed in Congress and the state legislatures."[102] *Marsh* was the key case underlying the opinion in *Galloway*, as the tradition described by the Court is very broadly defined.[103] The Court characterized the tradition as allowing chaplains of any faith to pray to their God for blessings that "find appreciation among people of all faiths."[104] By holding that prayer containing sectarian language was constitutionally permissible, the Court reconciled its holdings in *Marsh* and *Allegheny*.[105]

In *Allegheny*, the Supreme Court applied the three-pronged

---

[93] *Id.* at 594.
[94] *Id.* at 597.
[95] *Lee IV*, 505 U.S. at 598.
[96] *Id.* at 597–99.
[97] *Galloway IV*, 134 S. Ct. 1811.
[98] *Id.* at 1816, 1818.
[99] *See id.* at 1818–20 (citing *Marsh IV*, 463 U.S. 783 (1983)).
[100] *Marsh IV*, 463 U.S. at 786–92.
[101] *Id.* at 792.
[102] *Galloway IV*, 134 S. Ct. at 1819.
[103] *See id.* at 1824 (noting the presence of universal themes in most of the prayers, such as celebrating the seasons changing or praying for a spirit of cooperation).
[104] *Id.* at 1823.
[105] *See id.* at 1828.

test from *Lemon v. Kurtzman* to determine the constitutionality of displays with religious themes.[106] *Allegheny* further refined the test as one which prohibits the state from engaging in behavior which would appear to constitute taking a position on religious beliefs.[107] *Allegheny* also affirmed the rule that the effect of a display depends upon its setting.[108]

In *Lee v. Weisman*, the Supreme Court determined the constitutionality of a public school system's practice of instituting prayer during the graduation ceremony.[109] The Court distinguished *Galloway* from the earlier ruling in *Lee* on the basis that the target audience in *Galloway* consisted mainly of adults who were free to leave at any time,[110] while *Lee* involved children who practically had no option to avoid the religious exercise.[111]

Only time will reveal the eventual outcome of the Court's ruling in *Galloway*. The ruling only underscores the divisiveness of the Court's Establishment Clause jurisprudence. There are reports of people threatening to abuse the ruling by excluding other religions from offering prayer,[112] however the Town of Greece invited an atheist to deliver the invocation prior to a board meeting sometime in 2014.[113] While it is impossible to know exactly what the long-term implications of the decision are, Establishment Clause jurisprudence will undoubtedly remain a contentious issue.

---

[106] *See Allegheny III*, 492 U.S. 573, 620–21 (1989) (Blackmun, J.); Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).

[107] *Allegheny III*, 492 U.S. at 593–94 (majority opinion).

[108] *Id.* at 598.

[109] *Lee IV*, 505 U.S. 577, 580 (1992).

[110] *Galloway IV*, 134 S. Ct. at 1827.

[111] *Lee IV*, 505 U.S. at 592–94.

[112] Dahlia Lithwick, *Majority Rules*, SLATE (May 6, 2014, 5:11 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/05/town_of_g reece_v_galloway_roanoke_virginia_already_seeing_the_effects_of.html.

[113] Evan Dawson, *Connections: How Greece Is Handling the* Greece v. Galloway *Decision*, WXXI NEWS (July 15, 2014, 4:23 PM), http://wxxinews.org/post/connections-how-greece-handling-greece-v-galloway-decision.