

**STATE & LOCAL LEGAL CENTER WEBINAR**

**“GOVERNMENT PRAYER AFTER TOWN OF GREECE”**

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*1. Interplay Between Establishment Clause and Governmental Action: A Case History*

**A. Lemon v. Kurtzman, 403 US 602 (1971)**

In this case, the Supreme Court established a test under which governmental action involving religion would be found to violate the Establishment Clause unless: (1) it had a secular purpose, (2) its primary effect neither advanced nor inhibited religion, and (3) it did not excessively entangle government with religion.

In 1989, this three-pronged Lemon Test (purpose, effect, entanglement) morphed into a one-prong, three-factor Endorsement Test.

**B. Allegheny v. ACLU, 492 US 573 (1989)**

In this case, the Supreme Court combined the three Lemon Test prongs into one overall inquiry into whether a governmental action “endorsed” religion. Under this test, an action would be found to violate the Establishment Clause if:

1. The governmental action lacked a “secular purpose”, and therefore gave the appearance of endorsing religion, or
2. The governmental action made a “reasonable observer” think that the government was endorsing religion, or
3. The governmental action “excessively entangled” the government with religion, thereby giving the appearance that it was endorsing religion.

Significantly, the four-justice minority in Allegheny, led by Justice Kennedy, proposed the adoption of a Coercion Test instead of the Endorsement Test favored by the Court majority for determining whether governmental action involving religion violated the Establishment Clause. Under this alternative test, a governmental action would violate the Establishment Clause only if it “coerced” someone to support or participate in a religion or established a

national religion. This test was revisited in **Town of Greece**, with Justice Kennedy now writing for the majority.

C. **Van Orden v. Perry**, 545 US 677 (2005)

In this plurality decision, Justice Breyer, in his concurrence, established an *ad hoc*, wholly subjective Legal Judgment Test to be used by courts in “borderline” cases wherein the results of the Endorsement Test are inconclusive.

Subsequent to **Van Orden**, the federal Circuits issued numerous conflicting Establishment Clause case decisions. This case law chaos was resolved in **Town of Greece**.

1. Legal Judgment Test

**ACLU V. Plattsmouth**, 419 F.3d 772 (8th Cir., 2005)(*en banc*)

**Meyers v. Loudon County**, 418 F. 3d 395 (4<sup>th</sup> Cir., 2005)

2. Endorsement Test

**ACLU V. Mercer County**, 432 F.3d 624 (6<sup>th</sup> Cir., 2005)

**Green v. Haskell County**, 568 F.3d 784 (10<sup>th</sup> Cir., 2009)

**Weinbaum v. Las Cruces**, 541 F.3d 1017 (10<sup>th</sup> Cir., 2009)

**Simpson v. Chesterfield County**, 404 F.3d 276 (4<sup>th</sup> Cir., 2005)

**Joyner v. Forsyth County**, 653 F.3d 341 (4<sup>th</sup> Cir., 2011)

3. Both Tests Applied

**Trunk v. San Diego**, 629 F.3d 1099 (9<sup>th</sup> Cir., 2011)

4. Endorsement Test Not Applied to Legislative Prayer

**Rubin v. City of Lancaster**, 710 F.3d 1087 (9<sup>th</sup> Cir., 2013)

**Pelphrey v. Cobb County**, 547 F.3d 1263 (11<sup>th</sup> Cir., 2008)

5. “Totality of Circumstances” Application of Endorsement Test Created

**Galloway v. Town of Greece**, 681 F.3d 20 (2<sup>nd</sup> Cir., 2012)

## 2. Practical Impact of Town of Greece on Local Governments

The practical impact of **Town of Greece** on a local governmental unit can be huge or small depending upon whether it currently begins its public meetings with prayer, how it currently chooses its prayer-givers, and whether it has local prayer guidelines in place.

However, as a general rule, **Town of Greece** should make the lives of local government officials much easier, both by providing some certainty, and by injecting some common sense, into the analysis of public meeting prayers that are the subject of an Establishment Clause challenge. In this regard, the Court majority in **Town of Greece** *rejected*:

- A. The need to have absolute religious balance in a local government's selection of prayer-givers.
  
- B. Embracing "demographic ignorance", choosing instead to acknowledge the fact that the demographic make-up of a community - - something over which a local government has no control - - will affect its prayer-giver selection pool.

- C. An approach that would have required local authorities to either look beyond their corporate boundaries for prayer-givers or artificially give greater weight in its prayer-giver selection process to religious views not commonly held by members of its community.
  
- D. An approach that would have required local authorities to somehow determine the religious beliefs of its constituents in order to ensure that all religious viewpoints were represented in its public prayers - - to somehow be “equally inclusive beyond dispute” in its treatment of religious viewpoints.
  
- E. An approach that would have forced local officials to somehow, without engaging in unlawful censorship, make a theological determination of what constitutes a sectarian prayer and/or to write prayer “guidelines” that would generate only non-sectarian prayers.
  
- F. An Establishment Clause test so subjective and vague that it would have effectively forced local officials to forgo public prayers altogether out of fear that a single sectarian prayer reference would embroil them in years of expensive litigation.

G. An approach that would have spawned immediate Establishment Clause challenges to local war memorials, oaths of office, cemetery monuments, public art and inscriptions, national day of prayer proclamations, pledges of allegiance, and all other common public expressions that touch upon religion.

3. What is now OK/ Not OK/ Unclear as Regards Public Meeting Prayers?

A. It is OK For Local Governments to:

1. Engage in the historical practice of opening their meetings with a prayer.
2. Allow sectarian prayers to be given in the language of the prayer-giver's own religion.
3. Allow a prayer regimen that, over time, does not equally express or consider all religious viewpoints, when this unequal emphasis is a result of community demographics.
4. Allow prayers that may "offend" meeting attendees when their "offense" stems from the facts that the prayers express religious viewpoints contrary to those held by the "offended" attendees.

B. It is NOT OK for Local Governments to:

1. Coerce public meeting attendees to engage in prayer.



2. Constantly allow prayer-givers to proselytize or disparage opposing religious viewpoints or the holders of such viewpoints.
3. Discriminate against or for any religion in seeking its prayer-givers.
4. Imply that its official actions will be affected in any way by a person's participation or non-participation in a public meeting prayer.

### C. It is Still Unclear to Local Governments

Even after **Town of Greece**, it remains unclear as to the extent of governmental “coercion” that is needed in order to violate the Establishment Clause -- is unlawful conduct limited to taxation and legal sanctions -- or is “psychological” coercion enough? What *is* clear is that the **Town of Greece** majority has no tolerance for Establishment Clause claims brought by adults alleging that they are unable to resist the “coercive” effects of a public meeting prayer when the facts show that they could have remained seated or silent during the prayer, come into the meeting after the prayer was given, or left the meeting room during the prayer.

4. *Best Practices for Local Governments Regarding Public Meeting Prayers*
- A. Have the prayer given at the start of your public meeting -- during its “ceremonial” (call to order, pledge of allegiance, etc.) portion -- and before the start of its “legislative” portion.
  - B. Have prayer-givers face your legislators when giving their prayer.
  - C. Do not require the public to participate in a prayer and do not single out or admonish non-participants.
  - D. Do not require the public to stand during a public meeting prayer – although the prayer-giver is free to himself/herself ask that “all rise” for the prayer.
  - E. Provide time for persons who wish to leave the room during a prayer to do so, and equal time for them to return to the room before other business is addressed.
  - F. Ask each prayer-giver how he/she would like to be introduced, so as not to unintentionally offend the prayer-giver or any adherents to the prayer-giver’s faith who are in the audience or listening from a remote location.

- G. Present each prayer-giver with the same certificate of appreciation or plaque, if one is given.
- H. Allow members of the public to lodge post-meeting complaints about public meeting prayers and/or prayer-givers just as you allow them to complain about any other matter.
- I. Publicize on your government website, bulletin boards and in other media the fact that all citizens, regardless of their personal religious beliefs, are invited to volunteer to give a prayer at a public meeting.
- J. Do periodically send prayer invitations to all of the known religious institutions within your corporate limits - - the same “go-to” prayer-givers should not be constantly asked to give prayers at your public meetings.
- K. Do not edit prayers or require their pre-approval by a government official.
- L. Do not encourage after-the-fact comments or criticisms by your government officials of the content of public meeting prayers.
- M. Do not encourage long renditions of religious dogmas or detailed statements of support or opposition to pending political or legislative issues.

- N. Limit prayers to five minutes in length.
- O. Establish a written policy stating that your local governmental unit provides all of its citizens, regardless of their religious beliefs, the free and equal benefits of citizenship, invites all citizens to volunteer to give a public meeting prayer, does not discriminate against anyone on the basis of their participation or non-participation in a public meeting prayer, encourages all prayer-givers to be respectful of those who may hold different religious beliefs, and prohibits prayers that intentionally proselytize or disparage any person, religion, or religious sect.
- P. Keep a record of all of your attempts to solicit prayer-givers, and especially of your efforts to be inclusive of religions that do not have strong demographic representation in your community.

**[END]**