Establishment Clause

Bormuth v. County of Jackson

By

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If you're looking for evidence that Establishment Clause jurisprudence is a mess, look no further than the Sixth Circuit's decision in *Bormuth v. County of Jackson* (decided September 6, 2017) and the Fourth Circuit's decision in *Lund v. Rowan County* (decided July 14, 2017). Both cases involve the constitutionality of governmental officials engaging in prayer before a public meeting. Both were decided by *en banc* circuit courts. And when all the votes in both cases are counted, there were 15 votes striking down legislative prayer, 14 votes upholding the same practice, and one neutral vote that would have remanded for further proceedings. This scenario begs for Supreme Court review. But if that happens, what next?

The nine-member Jackson County Board of Commissions opens its monthly board meetings with Commissioner-led prayers. These typically begin with the Board Chairman asking the public to stand and assume a "reverent position," followed by a Commissioner offering a prayer, the Pledge of Allegiance, and county business. The prayer practice is facially neutral regarding religions. Commissioners take turns each month, on a rotating basis, to offer a short invocation based on the dictates of his or her own conscience, without regard to the Commissioner's religion or lack thereof. The invocations are not pre-approved, and there is no evidence that the Board adopted the practice with discriminatory intent. The prayers are generally "Christian in tone," but not always. Mr. Bormuth, a "self-professed Pagan and Animist" objects. He says the Commissioners' prayers make him feel like he is "being forced to worship Jesus Christ in order to participate in the business of County Government," though he admits that he neither stands nor participates in the pre-meeting invocation.

The Supreme Court's recent decision in *Town of Greece v. Galloway* would appear to be controlling in these circumstances. But in what was essentially a 9-5-1 ruling, the Sixth Circuit fractured along the same fault lines as the majority and dissenting coalitions in *Lund* and in *Town of Greece* itself. The majority felt that the Commission's practice fell within the historical tradition of legislative prayer; the dissenters saw the practice as excluding non-Christians and denying them an opportunity to fully participate in government.

So what is the Supreme Court to do? As the Becket Fund for Religious Liberty advocates in its *Bormuth* amicus brief, the Court could start by confirming that *Lemon v. Kurtman*'s purpose/endorsement/entanglement analysis is unworkable and should be abandoned. The Court could then confirm the basic approach that the majority implicitly adopted in *Town of Greece*: that the Establishment Clause should be interpreted based on the common understanding at the time of its ratification, just like other constitutional provisions. And history teaches that the ratifiers of the First Amendment did not view legislative prayer as "establishing" religion at all. (For the historical view, *see generally* Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of a Religion*, 44 Wm. & Mary L. Rev. 2015 (2003)). Such an approach could still lead to disagreements over specific facts. But it would provide an easy-to-understand test that aligns Establishment Clause jurisprudence with the rest of the Constitution. Stay tuned.

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