



“Don’t I Have Rights Too?” School Board Members and the First Amendment

August 27, 2016
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Who is Kim Davis, Kentucky clerk jailed over same-sex marriage licenses?

By Michael Martinez, CNN
Updated 3:11 PM ET, Tue September 8, 2015



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CONSTITUTIONAL FOUNDATIONS

- ▶ The First Amendment to the Constitution states: “[Government] shall make no law [or policy or take any action] respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech...”



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Who is the "government?"

You are! School board members, school officials, administrators, and other school personnel are the government when they are acting in their official capacities.



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SPEECH



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SPEECH


- ▶ The First Amendment prohibits laws "abridging the freedom of speech," which, as a general matter means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.
- ▶ Not all speech is "protected speech."



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PRIVATE
CITIZEN



ELECTED
OFFICIAL



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Scenario- John Grump


- ▶ John Grump is new to the County School Board. He came into office on the promise to “clean up” the school district. Grump was antagonistic from the start. He has often said things that many of the Board members found offensive. He has publicly berated the otherwise well-liked superintendent. He has made public statements criticizing other Board members.
- ▶ Can the Board censure him and avoid being sued for retaliation?

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John Grump

- ▶ Elected officials are different from the average public employee.
- ▶ “Public officials must tolerate more significant actions taken in response to [their] exercise of First Amendment rights than an average citizen...” *Mattox v. City of Forest Park*, 183 F.3d 515, 522 (6th Cir. 1999).
- ▶ “[Public officials] are expected to have thicker skin than the ordinary person when it comes to attacks on their views.” *Dillaplain v. Xenia Cmty. Schs. Bd. Of Educ.*, (S.D. Ohio Oct 21, 2013).
- ▶ The other board members have a “protected interest in speaking out and voting their consciences on important school issues,” including the behavior of their colleagues. *Blair v. Bethel Sch. Dist.*, 608 F.3d 540, 543 (9th Cir. 2010).
- ▶ The censure would not prevent Grump from speaking out again.



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Your Vote is not Protected Speech?

▶ An elected official does not have a personal, First Amendment-protected right to his or her vote as a school board member.

▶ “[Voting] is not personal to the legislator but belongs to the people; the legislator has no personal right to it.”

Nevada Comm'n on Ethics v. Carrigan, 564 U.S. 117, 125-26 (2011).



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Your speech as a board member - Considerations

- ▶ Avoid inflammatory speech generally.
- ▶ Avoid speaking to the press unless you are presenting the board's authorized viewpoint.
- ▶ Avoid engaging in controversial topics on social media.
- ▶ Consider:
 - ▶ How the public will interpret what you say.
 - ▶ Will your speech cause any harm or create a controversy for the District?



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Religion



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Constitutional Foundations

- ▶ The First Amendment states: “[Government] shall make no law [or policy or take any action] respecting an establishment of religion, or prohibiting the free exercise thereof.”
- ▶ This provision sets forth a dual guarantee of religious liberty.



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Town of Greece v. Galloway

- ▶ The town of Greece, New York, had a policy inviting a local clergyman to deliver an opening invocation before each town council meeting.
- ▶ The town did not discriminate and allowed all faiths to give the invocation.
- ▶ Two citizens sued the Town alleging the practice violated the First Amendment's Establishment Clause because it allowed and favored Christian prayer.



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Town of Greece v. Galloway

- ▶ The Supreme Court cited *Marsh v. Chambers* which held there was no First Amendment violation in the Nebraska Legislature's practice of opening its sessions with a prayer delivered by a chaplain paid from state funds.
- ▶ Such legislative prayer has a long history dating back to the framing of the Constitution and “lends gravity to public business, remind[ing] lawmakers to transcend petty differences in pursuit of a higher purpose, and express[ing] a common aspiration to a just and peaceful society.”



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Town of Greece v. Galloway

- ▶ "Absent a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose, a challenge based solely on the content of the prayer will not likely establish a constitutional violation."
- ▶ "So long as the town maintains a policy of nondiscrimination, the Constitution does not require it to search beyond its borders for non-Christian prayer givers in an effort to achieve religious balancing."



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Response to Town of Greece v. Galloway

- ▶ "A court would likely conclude that the *Marsh* exception for deliberative bodies applies to a school board."
- ▶ "A school district in South Carolina possesses such powers and authority to qualify it as a 'deliberative' or 'legislative body' for purposes of *Marsh*."
- ▶ Accordingly, a school board may constitutionally employ an opening prayer or invocation if it so desires.

SC Attorney General Opinion, Sept. 3, 2014



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Response to Town of Greece v. Galloway

- ▶ "Our reading of *Town of Greece* is that the presence of children or students at a meeting where the primary function was policymaking did not prevent a legislative prayer during the ceremonial portion of the meeting prior to business being undertaken."
- ▶ "We believe the *Town of Greece* decision provides a "road map" for a local deliberative body, such as a school board, to use in order to uphold as constitutional its prayer policy."

SC Attorney General Opinion, Sept. 3, 2014



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Response to *Town of Greece v. Galloway*

- ▶ S.C. Act 198, June 3, 2016, amending Section 6-1-160 (Authority to adopt ordinance allowing invocation to open public meeting of deliberative public body)
- ▶ Deliberative public bodies includes school boards.



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Prayer before a board meeting

- ▶ A deliberative public body may adopt a policy to permit a public invocation before each meeting of the public body . . . to be offered on a voluntary basis . . . by:
- ▶ (1) one of the public officials, elected or appointed to the deliberative public body;
- ▶ (2) a chaplain elected by the public officials of the deliberative public body; or
- ▶ (3) an invocation speaker selected on an objective basis from among a wide pool of religious leaders serving established religious congregations in the local community in which the deliberative public body meets . . .



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Reverend Doright

- ▶ The County School Board adopted a policy stating that members of the board may, on a rotating basis, offer only non-sectarian and nondenominational prayers at the beginning of each meeting. Board Member Reverend Tom Doright reacted strongly against the policy, arguing that he should be able to pray according to his faith. He has threatened to sue the District, claiming that the restriction on his prayer violated the Free Exercise clause of the First Amendment rights.



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Reverend Doright

- ▶ The Opening Prayer is government speech, not Reverend Doright's personal speech.
- ▶ The government may regulate the content of what is or is not expressed when it is the speaker.
- ▶ *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 833 (1995).
- ▶ "[T]he Board may regulate the content of what is or is not expressed when it enlists private entities to convey its own message".

Turner v. City Council of City of Fredericksburg, VA, 534 F.3d 352, 356 (4th Cir. 2008)



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Lingering Questions

- ▶ The specific issue of prayer before a school board meeting has not been addressed by the Supreme Court.
- ▶ Court decisions about religion in schools have always focused on the fact that children are more susceptible to coercion than adults.
- ▶ School board meetings are often intertwined with the public school system and often include the frequent attendance or presence of students.



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Prayer before a Board meeting - Considerations

- ▶ Avoid requiring prayer participation by attendees.
- ▶ Avoid prayers that denigrate nonreligious people or minority religions.
- ▶ Prayer must be given *before or at the beginning* of the meeting.
- ▶ Prayer before a board meeting should be a brief pronouncement of shared and simple values that help to solemnize the occasion.
- ▶ Consider having community clergy rather than board members deliver the prayers to allow for religious diversity.



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