

Prayer in City Council Meetings

Q. Is an invocation allowed at a city council meeting?

A. Many Texas cities and other governmental entities open their meetings with a brief prayer. Is this a violation of the doctrine of the separation of church and state? Not usually. Below is a brief summary of the law relating to prayer at meetings of governmental bodies. Of course, each city should consult with local legal counsel regarding whether to open meetings with a prayer.

Q. What is “legislative prayer”?

A. A prayer used to open the session of a governing body is known as “legislative prayer.” Legislative prayer is treated as a special issue under the United States Constitution’s “Establishment Clause.” The Establishment Clause is the part of the First Amendment that reads: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” Usually, the U.S. Supreme Court uses a three-part test, known as the *Lemon* test, to determine whether a governmental action is a violation of the Establishment Clause [*Lemon v. Kurtzman*, 403 U.S. 602 (1971)]. However, in the case of legislative prayer, the Supreme Court did not use the *Lemon* test, but rather studied the role of legislative prayer in our country’s history. In *Marsh v. Chambers*, the Supreme Court upheld the State of Nebraska’s practice of opening each day during the legislative session with a prayer [*Marsh v. Chambers*, 463 U.S. 783 (1983)].

Q. Why is legislative prayer different?

A. The Supreme Court based its reasoning in *Marsh* on the perceived intent of the writers of the Establishment Clause (*Marsh*, 463 U.S. at 790-792). According to the Court, the first Congress passed the First Amendment, including the Establishment Clause, in the same week that a chaplain was hired for the Congress (*Id.* at 790). In the eyes of the Court, this action stated very clearly that legislative prayer was to be excepted from the Establishment Clause (*Id.*). The Court held that legislative prayer created no more government entanglement with religion than: (1) bus transportation to parochial schools (citing *Everson v. Board of Education*, 330 U.S. 1); (2) beneficial grants for higher education (citing *Hilton v. Richardson*, 403 U.S. 672); or (3) tax exemptions for religious organizations (citing *Walz v. Tax Comm’n*, 397 U.S. 664) (*Marsh*, 463 U.S. at 792). The Court noted that the content of the prayer itself should be of no concern to the court, unless it is proselytizing or is disparaging to other faiths (*Id.* at 794-795). The court specifically mentioned that the Nebraska chaplain’s prayers were non-sectarian (*Id.* at 793, footnote); therefore, this part of the opinion may be considered to be dicta, and is not necessarily binding on lower courts.

Q. Should a city make an instruction booklet for religious leaders?

A. No. When a governmental entity such as a city council tells religious leaders how to pray, even in a helpful way, it violates the Establishment Clause. The Supreme Court held that a booklet given to religious leaders outlining what was and was not appropriate for a prayer at a

school graduation was effectively a composition of the prayer by the government (*Lee v. Weisman*, 505 U.S. 577, 588). In the words of the court, “it is no part of the business of government to compose official prayers of any group of the American people to recite as part of a religious program carried on by government.” (*Id.*, citing *Engel v. Vitale*, 370 U.S. 421, 425).

Q. What can a city council do to avoid a legal challenge?

A. While nothing can guarantee the avoidance of a lawsuit, some cities invite religious leaders of different denominations and faiths to give the legislative prayer at city council meetings on a rotating schedule. In theory, this practice enables people of all faiths in the city to feel represented and included.

Q. How is legislative prayer different from school prayer?

A. If legislative prayer is acceptable, why is prayer at school graduations or assemblies so often successfully challenged? First, those involved in city council meetings are usually adults. Therefore, courts consider them to be less impressionable and susceptible to religious indoctrination than children (*Marsh*, 463 U.S. at 795). Second, schools expect children to attend and participate in all aspects of school graduations or assemblies, and stepping out discreetly is difficult, if not impossible (*Weisman*, 505 U.S. at 597). However, at a city council meeting, adults may step out quietly for any reason without calling too much attention to themselves, thus choosing not to participate (*Id.*). This option is not often open to the child attending the school graduation or assembly.

Q. How can a city be sure that its legislative prayer is appropriate?

A. It can't. The law in this area changes often, not always in a way that one would expect. For example, the Fourth Circuit federal courts on the East Coast have taken a footnote from the *Marsh* decision that mentioned the non-sectarian nature of the Nebraska chaplain's prayers, and created a new test based on whether a prayer is overly sectarian in nature [*Wynne v. Town of Great Falls, SC*, 376 F.3d 292 (2004)]. While this decision is not binding in Texas, it indicates the many different interpretations of the U.S. Supreme Court's legislative prayer decision in *Marsh*. The similarity among all the legislative prayer cases, however, is the call for cities to be inclusive and to avoid the appearance of favoring one denomination or religion.