

Prayer at City Council Meetings

Is an invocation allowed at a city council meeting?

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. However, a recent decision by the Fifth Circuit Court of Appeals may cast some doubt over the practice. The following 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.

What is “legislative prayer?”

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, 612-13 (1971). However, in the case of legislative prayer, the Supreme Court did not use the *Lemon* test, but rather studied the place of legislative prayer in U.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. 463 U.S. 783 (1983).

Why is legislative prayer different?

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, *id.* at 791 (citing *Everson v. Bd. of Educ.*, 330 U.S. 1 (1946)), (2) beneficial grants for higher education, *id.* (citing *Tilton v. Richardson*, 403 U.S. 672 (1971)), or (3) tax exemptions for religious organizations, *id.* (citing *Walz v. Tax Comm’n*, 397 U.S. 664 (1970)). The Court also 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. *Marsh*, 463 U.S. at 794-795. The court specifically mentioned that the Nebraska chaplain’s prayers were non-sectarian. *Id.* at 793 n.14. This part of the opinion may be considered to be dicta, and therefore, is not necessarily binding on lower courts.

Should a city make an instruction booklet for religious leaders to use when saying a prayer at a meeting?

No. When a governmental entity tells religious leaders how to pray, even in a helpful way, it violates the Establishment Clause. The Supreme Court has 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 (1992). 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.* (quoting *Engel v. Vitale*, 370 U.S. 421, 425 (1962)). Even asking a religious leader to provide a neutral, non-sectarian prayer must be avoided. *Id.*

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

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 community to feel represented and included. Two county commissions used such a rotation practice, which was upheld by the Eleventh Circuit Court of Appeals in *Pelphrey v. Cobb County, Georgia*. 547 F.3d 1263 (11th Cir. 2008). The Eleventh Circuit referred to the Supreme Court’s recognition that “legislative prayers that have the effect of affiliating the government with any one specific faith or belief” violate the Establishment Clause. *Id.* at 1270 (quoting *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 603 (1989)). Although the majority of the volunteer religious leaders who offered invocations before the county commission were Christian, prayers were also offered by members of the Jewish, Unitarian, and Muslim faiths. *Id.* at 1277. This diversity of speakers, in contrast with the chaplain of one denomination allowed in *Marsh*, supported the finding that the County did not exploit the prayers to advance any one religion. *Id.*

How is legislative prayer different from school prayer?

If legislative prayer is acceptable, then 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, any adult may step out quietly for any reason without calling too much attention to himself or herself, thus choosing not to participate. *Id.* That option is not often open to a child attending the school graduation or assembly.

What is the law on legislative prayer in Texas?

Currently, there is no clear guidance on legislative prayer in Texas. The recent case of *Doe v. Tangipahoa Parish School Board* called into question some aspects of prayer at meetings, but was ultimately vacated due to lack of standing. 473 F.3d 188 (5th Cir. 2006), *vacated en banc*, 494 F.3d 494 (5th Cir. 2007). Originally, the Fifth Circuit (in a 2-1 vote) upheld a permanent injunction against sectarian prayers at the Tangipahoa Parish school board meetings. However, the three judges on the panel all reached his or her conclusion for a different legal reason at that time.

Judge Barksdale held that as the seminal case on legislative prayer (prayers used to “solemnize” meetings of legislative bodies), *Marsh* applies to the school board because it is a “legislative” or “other deliberative” body as discussed in that case. *Id.* at 202. His opinion interprets *Marsh* as rendering all non-sectarian legislative prayers acceptable as an exception to the Establishment Clause. *Id.* at 204-5. The prayers in question were, in his opinion, decidedly sectarian in that they “advanced” religion, and were therefore unconstitutional. *Id.* The opinion clearly stated,

however, that its ruling extended only to the *sectarian prayers in this case*, not *all sectarian prayers*. *Id.* at 205 n.6.

On the other hand, Judge Stewart held that the *Marsh* test did not apply because the school board was not a “legislative body” as defined in *Marsh*. *Id.* at 206-211. Therefore, the *Lemon* test, which the school board stipulated that its actions could not pass, must be used. *Id.* at 211. Because he specifically pointed to school boards as examples of legislative bodies, his opinion arguably does not affect the application of *Marsh* to legislative prayers at city council meetings.

The dissenting opinion from Judge Clement held that *Marsh* applies to this case, and that the prayers in question passed the *Marsh* test. *Id.* at 211-212. Her opinion held that Judge Barksdale misinterpreted the *Marsh* test, and that the test is not content-based, but rather intent-based. *Id.* at 212-14. Therefore, since the plaintiff offered no evidence that the prayers were being offered for an “impermissible purpose” under *Marsh* (to “proselytize or to advance any one, or to disparage any other, faith or belief”), the content of the prayer should not even be examined. *Id.* at 215-16.

However, while these opinions by judges on the Fifth Circuit Court of Appeals may be useful to councilmembers and attorneys addressing this issue, the original panel opinion is no longer binding in any way since it was overruled for lack of standing by the entire Fifth Circuit.

Most recently, the U.S. District Court of the Northern Division of Texas found Texas Education Code section 25.082(d) to be constitutional. *Croft v. Governor*, 530 F.Supp.2d 825 (N.D.Tex. 2008). The provision, which requires schools to provide one minute of silence for meditation, satisfied the *Lemon* test: it had a secular legislative purpose, its primary effect was not to advance or inhibit religion, and it does not promote an excessive entanglement between government and religion. *Id.* at 848.

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

It can't. The law in this area changes often, and 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 (which 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*, 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. The decision of whether to open a city council meeting with a prayer ultimately falls on the city council, and should be based on the advice of local legal counsel.

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