



Prayer at School Board Meetings

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Many school boards begin their meetings with a comment or remark to signify the solemnity of the occasion. Often, school board trustees conclude that a prayer is a fittingly solemn opening for a meeting. Prayer at school board meetings, however, is a controversial issue that brings a risk of litigation and dissent among members of the community.

According to the First Amendment of the U.S. Constitution, the government is prohibited from establishing a religion. This means that the government must maintain strict neutrality, neither aiding nor opposing religion. The U.S. Supreme Court has exercised special vigilance over compliance with the Establishment Clause in elementary and secondary schools because “[f]amilies entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family.” *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987). This ban on the government establishing a religion is precisely why opening a school board meeting with a prayer is so controversial.

Legal Analysis

When courts analyze whether a school board may pray before a meeting, they can either choose to use the analysis in *Marsh v. Chambers*, a Supreme Court case concerning prayer by a legislature, or they can apply the analysis articulated in several other Supreme Court cases that involve establishment of a religion by a school district.

Marsh v. Chambers

Some courts have held that opening certain meetings of governmental bodies with a prayer is constitutional. In 1983, the U.S. Supreme Court upheld the practice of state legislatures opening each session with a prayer, even approving prayer led by a chaplain paid by the state. *Marsh v. Chambers*, 463 U.S. 783 (1983). As support for its decision, the Court noted that the practice of opening sessions by legislative and other deliberative bodies with a prayer “is deeply embedded in the history and tradition of this country” and has “coexisted with the principles of disestablishment and religious freedom” from colonial times. *Marsh v. Chambers*, 463 U.S. 783, 786 (1983). The Court also concluded that the members of the First Congress did not view legislative prayers as a violation of the Establishment Clause because the Bill of Rights, including the First Amendment, was adopted a mere three days after the First Congress authorized the appointment of paid chaplains. The Court therefore concluded that legislative prayers did not violate the Establishment Clause.

Town of Greece

In 2014, the U.S. Supreme Court issued an opinion that applied the *Marsh* analysis to prayers delivered before town board meetings. In *Town of Greece v. Galloway*, the Court considered a situation in which the town board of Greece, New York, invited local clergy to deliver an invocation at the start of each board meeting. The Court followed the *Marsh* line of reasoning and held that the town's prayer practice was constitutional as part of the practice of legislative bodies opening their meetings with a prayer.

In its opinion, the Court acknowledged that whether a governmental body has compelled its citizens to engage in a religious observance is a fact-sensitive question that requires consideration of both the setting in which the prayer arises and the audience to whom it is directed. The Court concluded that the principal audience for the invocations before the town board was not the public but the lawmakers themselves. The Court also held that legislative prayer did not have to be generic or nonsectarian, as *Marsh* nowhere suggested that the constitutionality of legislative prayer turned on the neutrality of its content. In response to claims that the prayers were offensive and thus coercive, the Court stated that any offense caused by the prayers did not rise to the level of coercion. The citizens were free to leave the room during the invocation—a choice, the Court said, that did not represent an unconstitutional imposition on *mature adults*.

Supreme Court Justice Elena Kagan authored a dissent in which she agreed with the majority that the case involved a fact-sensitive question that required consideration of both the setting in which the prayer arose and the audience to whom it was directed—but Kagan disagreed with the majority that the setting and audience were similar to that approved in *Marsh*. Kagan noted that the town board's meetings involved participation by ordinary citizens, with the clergy who gave the invocations facing the citizens, not the board, and inviting the citizens to join him or her in prayer. Kagan also pointedly noted that the group of citizens that the clergy faced could include children.

Other Supreme Court Cases

In the past, the U.S. Supreme Court considered Establishment Clause issues using an analysis referred to as the *Lemon* test. Under *Lemon*, to avoid a violation of the Establishment Clause, governmental action (1) must have a secular purpose, (2) must have a primary effect that neither advances nor inhibits religion, and (3) must not foster an excessive government entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602 (1971). In subsequent cases, the Court expanded on the *Lemon* test, holding that a school district must not persuade or compel a student to participate in a religious exercise or endorse religion in the public schools. *Lee v. Weisman*, 505 U.S. 577 (1992); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).

In more recent cases, however, including *Town of Greece*, the Court declined to follow *Lemon*, replacing the endorsement test with other factors such as history and longstanding practices. *See American Legion v. American Humanist Assoc.*, 139 S. Ct. 2067 (2019) (holding 32-foot-tall Christian cross on public land did not violate Establishment Clause due to longstanding history and significance); *also see Town of Greece, N.Y. v. Galloway*, 134 S. Ct. 1811 (2014) (holding prayer by local clergy before city council meetings did not violate Establishment Clause because the practice comported with American tradition and did not coerce participation). In 2022, the Court decisively overturned *Lemon* in *Kennedy v. Bremerton School District*, a case involving an assistant high school football coach in Washington who successfully asserted a constitutional right to kneel and pray on the 50-yard line after football games. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (June 27, 2022)

Although *Kennedy* involved prayer by an employee after a football game, not prayer at the opening of a school board meeting, the Court's rejection of the endorsement test alters the legal landscape with respect to prayer in school. School officials still must avoid coercing students to participate in religious expression. But after *Kennedy*, courts are less likely to ask whether prayer in the school context would be seen as an endorsement.

Fifth Circuit Guidance

Not long after the Supreme Court's decision in *Town of Greece*, a case involving a Texas school district provided an opportunity for the Fifth Circuit Court of Appeals to consider the constitutionality of opening school board meetings with prayer.

The Birdville Independent School District board of trustees had a practice of choosing students at random from a list of volunteers to give a statement before each school board meeting. The district did not tell the students what to say, other than that they should not make obscene or otherwise inappropriate comments, and the district provided a disclaimer to clarify that the students' statements were their own. Former student Isaiah Smith and the American Humanist Association, of which Smith was a member, sued the district, arguing that the district's practice violated the Establishment Clause. Texas school officials and attorneys watched the litigation closely, as previous cases before the Fifth Circuit had left questions about how the court viewed prayer at school board meetings. *See Doe v. Tangipahoa Parish Sch. Bd.*, 473 F.3d 188 (5th Cir. 2006), *dismissed on other grounds*, 494 F.3d 494 (5th Cir. 2007) (finding school board's practice of opening meetings with Christian prayer unconstitutional).

The Fifth Circuit analyzed the prayers as legislative prayers, under *Marsh*, rather than prayers in a school setting. Citing *Town of Greece*, the court noted that most attendees at the board's meeting were "mature adults," that the prayers were held during the "ceremonial" part of the board meeting, and that attendees were free to leave the room, arrive late, or protest the prayer if they wished. The court also did not find the board's occasional requests for audience members to stand during the prayer coercive. The fact that students occasionally attended the meetings did not change the court's opinion, as no students sat on the Birdville ISD school

board, and student representatives were not expected to attend board meetings. Based on *Town of Greece*, the court also did not find the sectarian nature of some of the invocations to be problematic. The court thus upheld the district's practice, noting that its decision was based on the specific facts of the case. *American Humanist Assoc. v. Birdville Indep. Sch. Dist.*, 851 F.3d 521 (5th Cir. 2017), *cert. denied*, 138 S. Ct. 470 (2017).

The Fifth Circuit's decision in *American Humanist Association v. Birdville Independent School District* created a split among the federal courts of appeal regarding prayer at school board meetings. The Third, Sixth, and Ninth Circuit Courts of Appeal have all determined that the practice violated the Establishment Clause. *See Doe v. Indian River Sch. Dist.*, 653 F.3d 256 (3d Cir. 2011) (finding school board prayer policy did not pass endorsement test because its primary effect was to communicate a "government endorsement or disapproval of religion"); *Freedom From Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ.*, 896 F.3d 1132 (9th Cir. 2018) (reaffirming prohibition of prayers before board meetings); *Coles ex rel. Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369 (6th Cir. 1999) (finding school board prayer policy violated Establishment Clause). The U.S. Supreme Court frequently accepts appeals to resolve splits among the federal circuit courts. However, in this case the Court denied the American Humanist Association's petition for certiorari. The Court's decision not to review the case has the effect of allowing the Fifth Circuit's decision upholding the invocation practice to stand.

Conclusion

Given the confusing history of the legality of prayer before school board meetings, what is a school board to do? Essentially, a board considering whether to hold prayers or invocations before meetings needs to consult very carefully with the school district's attorney and weigh all of the pros and cons. The legal risks associated with the practice are obvious. While the Fifth Circuit has upheld one Texas district's practice, challenges are likely to continue, and courts around the country are not consistent in their analysis. Choosing not to pray at school board meetings allows a school district to avoid the time and expense of confronting a legal challenge. School boards that wish to begin board meetings with a solemn opening may consider opting for a moment of silence, modeled after the minute of silence that begins each school day in Texas schools. A moment of silence, during which attendees may pause for meditation, prayer, reflection, or any other silent activity has been upheld as constitutional in the public school setting. *Croft v. Governor of Tex.*, 562 F.3d 735 (5th Cir. 2009).

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