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Overcoming Human-Nature Dualism In The Texas Hill Country: Local Governments And Urban Spaces

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FIRST AMENDMENT

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Prayer at Council Meetings: Who Prays and How is that Decided?

Introduction

On my first day of work as a Deputy City Attorney, many years ago, my boss joked with me that the only surefire way to lose your job in Texas as a municipal attorney was to be asked if prayer was allowed before City Council meetings. Either way you answered, you were in great peril. You could be accused of being a religious fanatic from the *Handmaid's Tale* by some, or you might be categorized as a socialist and atheist by others.

Of course, the best advice as this paper will try and show is that it's hard to give a clear answer. However, management and public officials may not like that particular answer.

Nature and Purpose of Prayers.
The first questions involve the nature and purpose of prayers/invocations/spiritual chats, or any talk authorized by the council itself as a religious or spiritual reflection.

The usual answer given on the **nature** or character of this type of talk is that it is government speech. This is not the same type of speech that a citizen not affiliated with the city or not authorized by it to speak on its behalf might have, governed by the Free Speech clause of the First Amendment. More likely, there will be Establishment Clause issues, centered on the fear the government is imposing a state religion on its employees and citizens. Government speech is often defined as that having editorial control exercised by the government, by a member of the government or someone authorized by the government, where the ultimate responsibility lies with the government for the speech›s content. *Turner v. City Council of Fredericksburg*, 534 F.3d 352, 354 (4th Cir. 2008).

As for the **purpose** of such reflection, cases frequently state that it is assumed that the speech is for the benefit of the council or other board that arranges the prayer at its meeting, solemnizing and lending gravity to the proceedings the members will shortly undertake for the public's best interests. They can consider shared values before voting on divisive matters.

Supreme Court Cases.
The Supreme Court has used **historical analysis** to uphold the general idea of legislative prayer. This was first done in 1983 in a case involving the Nebraska Legislature's hiring of a chaplain for its daily meetings. The Court held that as Congress passed the First Amendment for ratification by the states, it would make no sense to find the Amendment's Establishment Clause would be violated by the prayers of a chaplain, as the House and Senate of that first Congress had hired such prayer-givers themselves (*Marsh v. Chambers*, 463 U.S. 783, 786 (1983)). Accordingly, the use of legislative prayer in general was supported by "unambiguous and unbroken history of more than 200 years" (463 U.S. at 792). In the different context of prayer by public employees at sporting events, such as a football coach with his team, the Court has also signaled its reliance on "original meaning and history…historical practices" (*Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 536 (2022)).

Ten years ago, the Supreme Court revisited legislative prayer, this time involving local government meetings. Surprisingly to some observers, as lower courts had mostly rejected this idea, it explicitly allowed "sectarian" prayers as passing constitutional muster on their face; that is, the invocations could invoke the Muslim, Jewish, Christian, or Hindu god or the faith values that the prayer-giver honored (*Town of Greece v. Galloway*, 572 U.S. 565, 571-72 (2014); *Freedom of Religion Foundation Inc. v. Mack*, 49 F.4th 941, 950 (5th Cir. 2022)).

The Temple Comes A-Knockin'.
With only two Supreme Court decisions to look at, there are many real-life situations that fall at the margins where no definitive answers for the legal counsel to give their officials are going to be found easily. The City of San Marcos had such a situation occur recently where its staff and officials learned a few business days before its upcoming council meeting that a representative of the Satanic Temple was signed up under the loose system of speaker rotation to give the opening invocation. As with many cities who retain a moment devoted to a religious

observance to solemnize the meeting for its councilmembers, our city did not have an elaborate procedure or vetting official for requests from members of the public to deliver this moment. It did have a bare-bones statement of policy it had adopted, arising from a back-and-forth discussion with a group devoted to the separation of church and state almost 15 years ago, at least. This policy:

–Reminds the public that the invocation is for the benefit of the council, to solemnize its conduct during the meeting, not for the direct benefit of the attending and viewing citizens.

–Concludes that the invocation is government speech, not private speech.

–Bases the invocation on a rotating basis that can include any faith tradition.

–Reminds speakers they should not disparage others, proselytize, or advance one religious tradition.

–States a moment of silence should be observed if no prayer-giver is available.

The Satanic Temple often seeks to be the group that challenges the typical notion of who gives the moment of spiritual solemnity. Its imagery and reputation conjure up wild thoughts and notions, of course. It describes itself, however, as more secular humanist than devil-worshipping, though. One representative serving as a witness in one of its many legal challenges stated she does not believe in a literal God or Satan. She testified that Satanism encompasses all the values she holds dear: justice, the pursuit of knowledge, bodily autonomy, and person sovereignty. She testified that her beliefs include seven tenets that encompass compassion, nobility of character, justice, and the pursuit of knowledge. *Satanic Temple v. City of Scottsdale*, 2020 WL 587882 (D. AZ).

Legally, either the feared image or the reality of the Temple's beliefs should not matter, nor the content of its speech before the Council. As the Supreme Court reminded, judges should normally not be concerned or involved with prayer or speech content, as with most First Amendment analysis if not falling within an exception. *See Galloway*, 572 U.S. at 581. An exception, or at least an area of heightened scrutiny, occurs when prayers denigrate or threaten damnation for those outside the prayer-giver's faith group or ask for conversion of these outsiders into that faith. *Id.* at 583.

Process of Exclusion Found Wanting. There are certainly instances where the courts have found councilors or commissioners went too far in their hostility towards potential speakers. In *Williamson v. Brevard County*, 928 F.3d 1296, 1299 (2019)), the court added factors of **identity** of the speaker and the **process** of speaker selection to the nature of the invocation. The process itself gave the court pause, as the commissioners rotated among themselves in inviting whomever they wished, "with no consistent standards or expectations of inclusiveness." *Id.* As for the speaker identity, ultimate success went to the chosen few aligned with mainstream beliefs of the elected officials. "Secular humanists are far from the only group viewed with disfavor. Thus, for example, some of the Commissioners and former Commissioners have testified unambiguously that they would not allow deists, Wiccans, Rastafarians, or, for that matter, polytheists to deliver prayers, and that they would have to think long and hard before inviting a Hindu, a Sikh, or a follower of a Native American religion." *Id.*

As with any controversy, putting unspoken thoughts into written form caused the County many problems with the Circuit Court. "The Resolution that the Commission passed in response to the plaintiffs' requests to offer invocations only confirms our understanding that Brevard County's process of selecting invocation speakers is unconstitutional. As the Resolution notes, 'individual Board members have predominantly selected clerics from monotheistic religions and denominations -- including Christian, Jewish and Muslim -- to present the invocation.' But it does not stop there. The Resolution adds that the Board 'in recognition of the traditional positive role faith-based monotheistic religions have historically played in the community,' typically offers the cleric an opportunity to share upcoming events or other information about their religious group before the invocation." *Id.* Elsewhere, the court noted the resolution barred secular speeches promoting reason, science, the environment, nature, and even ethics. *Id.* at 1312. The commissioners would allow those rejected from the invocation slot to speak at citizen comment, but this discriminatory treatment was actually a factor counted against them by the courts.

This same court, which had upheld most challenges to invocation practices, including those where almost all prayers were Christian, had once ruled for a challenger when there was direct evidence of discriminatory intent, a phone book used to choose prayer givers with a "long and continuous line" cross-

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Prayer *cont'd from page 25*

ing out several subcategories, under Churches, such as Muslim, Jewish, Latter-Day Saints, and Jehovah's Witnesses institutions (*Pelphrey v. Cobb County*, 547 F.3d 1263, 1282 (11th Cir. 2008)).

Just as this direct evidence of discrimination made it difficult to defend the boards' invocation selection practices, it is easier to see harm when tangible adverse results happen to those falling outside the "mainstream" of the commissioners' beliefs. For example, an applicant's zoning change request is denied moments after she is chastised for not standing for a prayer; or someone is denied appointment on a citizen volunteer board after they criticize the prayer selection process (*Bormuth v. County of Jackson*, 870 F.3d 494, 499 (6th Cir. 2017)); or when the security officer in the legislative chamber asks the audience to stand and remove their hats during the invocation (*Fields v. Speaker of the Pennsylvania House of Representatives*, 251 F.Supp.3d 772, 776 (M.D. Penn 2017), *aff'd*, 936 F.3d 142 (3d Cir. 2019). These acts may be seen as coercion by the government to have citizens join the "mainstream" faith or commit acts in furtherance of that established religion. (The **Coercion** test is the second type of test mentioned by many courts, after the historical test.)

Counterarguments for Requiring Religious Prayers.

Some might object that if the prayers for the governing body are considered government speech, the governing board should be able to speak or have spoken what they prefer to hear, for their own benefit. Is it really establishing a religion by arranging for a ceremonial time when most people may sleep through? Hasn't the Supreme Court allowed Ten Commandments monuments and giant Christian crosses on government property as ceremonial window dressing? These are not bad arguments. Some courts have agreed, at least to the extent where you can envision the judges barring Satanists from signing up for the prayer rotation.

The Court of Appeals for the D.C. Circuit ruled that the Chaplain of the U.S. House of Representatives was not obligated to provide a self-professed atheist the opportunity to deliver a "nonreligious prayer" because, regardless of whether he was denied the opportunity on account of being an atheist or because he was going to deliver a nonreligious prayer, "the House permissibly limits the opening prayer to religious prayer" and the atheist's prayer would not have qualified by these terms. *Barker v. Conroy*, 921 F.3d 1118, 1132 (D.C. Cir. 2019). *Fields v. Speaker of Pennsylvania House of Representatives* had a similar holding for a state legislative body limiting prayers to theistic types (936 F.3d 142 (3d Cir. 2019)). This court also found that one security guard asking a few visitors to stand did not rise to the level of government coercion, under the Establishment Clause test.

These two lines of cases do not seem either directly in conflict with each other, but the governing "spirit" of each do not seem similar. The latter cases, for example, state "modern, evolving standards are not our lodestar when evaluating a practice like this; instead past is prologue for our inquiry. And history tells us that only theistic invocations can achieve all the purposes of legislative prayer" (*Fields*, 936 F.3d at 152).

Temple Challenges.

Some of the recent cases involving the Satanic Temple illustrate the uncertainty that permeates litigation on council-directed prayer at this historic point in time.

One challenge had some intriguing findings. First, a federal district court in Arizona discussed how the Temple's secular humanist beliefs qualified as a religion despite not possessing "a system of belief and worship of a superhuman controlling power," but curiously it mentioned this in reference to Satanism being a religion protected by the Establishment Clause! (*Satanic Temple v. City of Scottsdale*, 2020 WL 587882 (D. AZ)).

Does the court mean that an outside organization can use this Clause to demand access to participation in an official religion, or a ceremonial, constitutionally allowed historical religious process? This holding appears better suited involving the Free Exercise Clause, but that should not apply to government speech. The answer may lie in the fact this holding involved the issue of plaintiff standing, always a land mine region in the federal courts.

This case also held in favor of the City of Scottsdale based upon the "outsider status" of the Temple. In other words, the city's policy of requiring a substantial connection to its City to give the opening invocation was sufficient to exclude the "Tucsonians," who also happened to be Satanists. This holding does appear to give cities a lifeline when a controversial prayer applicant has no local presence or provable ties. Adopting a policy such as ours, with the addition of that local connection requirement, is a good start to have something to rely on, should you face such a difficult situation. Another recent case has a detailed discussion of the issue of whether invocations by "outsiders" are government or private speech. Suggesting that recent decisions have made it a tougher call whether the Free Exercise clause is involved as the government regulating private speech, the court nonetheless ended

up rejecting the Temple's attempt to argue this (*Satanic Temple Inc. v. City of Chicago*, 2024 WL 1376440 (N.D. Ill.)).

The case contains an excellent analysis of a possible circuit split, being in essence the two lines mentioned above. Interestingly, it cites *Mack* as putting the Fifth Circuit in line with the Eleventh and Seventh Circuits as rejecting a "theistic" basis for excluding secularists and atheists from praying for the government officials' well-being. The Seventh Circuit case has a good discussion of a further nuance how "adherents to Buddhism, Jainism, Shinto, and some forms of Daoism" are religious even if "gods" are absent from many versions of these faiths (*Center for Inquiry, Inc. v. Marion Cir. Ct. Clerk*, 758 F.3d 869, 874 (7th Cir. 2014) (allowing secular humanists to marry persons in Indiana). The court ended up denying the city's motion to dismiss the Temple's Establishment Clause claims.

Additionally, the Temple lost a case where the ad hoc process of councilmembers choosing prayer-givers, in rotation, reduced the amount of actual evidence that discrimination against the Temple had occurred, rather than political glad-handling of spots to donors and supporters (*Satanic Temple v. City of Boston*, 2023 WL 4868944 (D. Mass)). The Court helpfully gave five general factors to consider when evaluating broad challenges to a legislative prayer practice: (1) the identity of the speaker; (2) whether the speaker is paid to give a prayer; (3) the government's review of the speaker's chosen prayer content; (4) whether the nature of the prayer proselytizes or denigrates other religions; and (5) the selection process.

Tips

The City of San Marcos prayer policy is one place to start should you decide to have the courage to discuss adding a policy with your council. One possible added feature could be the adoption of a public statement explaining the whys of the policy:

"Welcome to the meeting of the city of ____, Texas. As many of you are aware, we customarily begin these meetings with an invocation. This prayer is intended for the benefit of the council members and should be directed to them and not the audience. Those who deliver the invocation may reference their own religious faith as you might refer to yours when offering a prayer. We wish to emphasize, however, that members of all religious faiths are welcome not only in these meetings, but in our community as well. The participation of all our citizens in the process of self-government will help our fine country best serve the good people who live here. Employees and members of the audience are welcome to pray or not pray."

This message could be placed on the council website page for further dissemination.

Final Thoughts.

The circuits that have addressed the issue have split on the legality of board members saying the prayer themselves. *See Lund v. Rowan Cnty.*, 863 F.3d 268 (4th Cir. 2017) (not allowed); *Bormuth v. Cnty. Of Jackson*, 870 F.3d 494 (6th Cir. 2017) (allowed). So no Texas or Fifth circuit cases address this particular question that would truly put counsel in their bosses' crosshairs.

The trend with the Supreme Court has been to allow more and more religion in government buildings, meetings, and spaces, as long as bright red lines are not crossed. No one can deny that the question I mentioned up front remains one you may wish never to hear. But this paper is a starting point if that dreaded time indeed arrives.

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