# Colorado LegiSource

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# Legislative Prayer: An Established Tradition that Does Not Establish Religion

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by Julie Pelegrin

The Establishment Clause within the First Amendment to the United States Constitution states that "Congress shall make no law respecting an establishment of religion…" Similarly, section 4 of article II of the Colorado Constitution states in part, "…Nor shall any preference be given by law to any religious denomination or mode of worship." In many cases, the United States Supreme Court has interpreted the federal provision to require not only government neutrality as to religion, but also to require a separation between government and religion.

But, each morning during the legislative session, the Speaker of the House and the President of the Senate ask everyone in their chambers to rise for the morning prayer. Over the years, leaders of a wide variety of religions have been invited to lead the prayer, including Catholics, Lutherans, Methodists, Baptists, Mennonites, Presbyterians, Nondenominational Christians, Jews, Hindus, Southern Utes, and Ute Mountain Utes. How can it be constitutional for the legislature to say a prayer every day before it begins working?

The U.S. Supreme Court has twice considered this issue and held that legislative prayer is, indeed, constitutional. The practice of legislative prayer is so embedded in the history and practice of the country that it does not violate the separation of church and state.

In 1983, the Court first considered the issue in Marsh v. Chambers. In this case, a Senator from Nebraska challenged the constitutionality of the Nebraska legislature's practice of hiring and paying a chaplain to open each legislative day with a prayer. In a 6-3 decision, the Court reviewed the history of the practice of legislative prayer and the history

of the First Amendment and found that, since colonial times, legislative prayer has been the consistent practice of Congress, state legislatures, and other deliberative public bodies. Legislative prayer has continuously coexisted with the constitutional guarantee of freedom of religion and the prohibition against the establishment of religion. In fact, the Court recognized that Congress adopted the final language for the First Amendment only three days after it passed a resolution to appoint and pay a chaplain, so Congress apparently did not think the First Amendment prohibited legislative prayer.

Having reached this conclusion, the Court made short work of the three specific points raised by the plaintiffs. First, without proof of an improper motive, hiring the same chaplain for 16 consecutive years does not result in the establishment of a religion. Second, paying the chaplain with public moneys does not result in the establishment of a religion. Paying chaplains is a common practice among legislatures. And third, the fact that all of the chaplain's prayers were in the Judeo-Christian tradition does not result in the establishment of religion. So long as a prayer does not exploit, proselytize, or advance a specific religion or disparage other religions, the Court will not consider the content of the prayer.

Finally, the Court acknowledged the fear that legislative prayer may lead to a violation of the Establishment Clause, but concluded that this fear is unfounded. The unbroken practice for 200 years of legislative prayer has not resulted in the establishment of a religion, and it is unlikely to do so.

During the 2013-14 term, the U.S. Supreme Court again considered the practice of legislative prayer and again found it to be constitutional. In Town of Greece v. Galloway, residents of the town of Greece, New York, sued the town for inviting local clergymen to open each town

council meeting with a prayer. A town employee solicited clergy from the congregations within the town limits, the majority of which were Christian. From 1999 to 2007, all of the persons giving the prayer were from Christian denominations, although the town council stated its willingness to include persons of any faith. The town residents argued that, to be constitutional, the prayers had to be nonsectarian and that opening town council meetings with a prayer coerced attendees into participating.

In a 5-4 decision, the U.S. Supreme Court held that opening the town council meetings with a prayer does not violate the First Amendment. First, the Court reaffirmed its holding in Marsh v. Chambers, confirming that "it is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted. Any test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change." And the Court agreed that the town council's practice fits within the tradition and practice of Congress and most of the state legislatures.

The Court held that the town's practice of going through the list of congregations within Greece to find clergy who are willing to deliver the monthly prayer is entirely reasonable. Town employees do not need to look beyond the town limits to ensure a greater diversity in religions.

The Court rejected the plaintiffs' argument that the prayers must be nonsectarian. The constitutionality of legislative prayer does not turn on neutrality. If the town were to try to dictate the content of the monthly prayer, it would lead to a greater government entanglement with religion. "Government may not mandate a civic religion that stifles any but the most generic reference to the sacred any more than it

may prescribe a religious orthodoxy."

The Court also rejected the plaintiffs' argument that the intimacy of a town council meeting, as compared with a meeting of Congress or a state legislature, has a greater likelihood of coercing attendees into participating in the opening prayers. The plaintiffs argued that persons come to town meetings to personally advocate for rulings or legislative changes and may feel a subtle pressure to participate in the prayer so as not to offend the town board members. The Court held that there was insufficient evidence to demonstrate coercion or to suggest that the town council was compelling the public to participate in religion by opening its meetings with a prayer.

Based on these rulings, the Colorado General Assembly does not violate the separation between church and state with its practice of legislative prayer nor does it risk establishing a state religion.

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