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Stein v. Plainwell Community Schools—The American Civil Religion and the Establishment Clause

Introduction

The First Amendment guarantees in part that "Congress shall make no law respecting an establishment of religion."[1] This restriction is extended to the states by the Fourteenth Amendment.[2] Responding to the potential for establishment clause violations in public schools, the United States Supreme Court has gradually developed standards for evaluating establishment clause challenges in this area.[3]

In *Stein v. Plainwell Community Schools*,[4] the United States Court of Appeals for the Sixth Circuit recently held that invocations and benedictions[5] at high school graduation ceremonies were not per se unconstitutional.[6] Under the Sixth Circuit's ruling, such benedictions and invocations are valid if they "preserve the principle of equal liberty of conscience"[7] and do not "go beyond 'the American civil religion.' "[8] This holding presents an ominous interpretation of the current Supreme Court mandate on establishment clause questions.

This Comment examines *Stein v. Plainwell Community Schools* as a new step in the continuing evolution of establishment clause jurisprudence. Part I presents both the traditional approach of *Lemon v. Kurtz-*

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1. U.S. CONST. amend. I.

2. Everson v. Board of Educ., 330 U.S. 1, 15 (1947).

3. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38 (1985) (striking down an Alabama statute authorizing a moment of silence in all public schools); Stone v. Graham, 449 U.S. 39 (1980) (striking down a state statute requiring the posting of the Ten Commandments in each public classroom in the state); Abington School Dist. v. Schempp, 374 U.S. 203 (1963) (holding unconstitutional a requirement that the Bible be read or the Lord's prayer be recited in a state's public schools); Engel v. Vitale, 370 U.S. 421 (1962) (invalidating the requirement that an official state prayer be recited in the public schools of the state).

4. 822 F.2d 1406 (6th Cir. 1987), *rev'g* 610 F. Supp. 43 (W.D. Mich. 1985).

5. An "invocation" is "a form of prayer invoking God's presence, said [especially] at the beginning of a public ceremony." THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 749 (1966). A "benediction" is defined as "the form of blessing pronounced by an officiating minister, as at the close of divine service." *Id.* at 138.

6. *Stein*, 822 F.2d at 1409.

7. Equal liberty of conscience is limited by interests of the public in order and security. *See infra* text accompanying notes 57-61.

8. *Stein*, 822 F.2d at 1409.

man[9] and the singular "historical practice" approach of *Marsh v. Chambers*.[10] Part II discusses the application of these two approaches in the decisions of the district and appellate courts in *Stein*. Part III explores the use of the "American civil religion" concept[11] and the relationship between that concept and the historical practice test. Finally, Part IV of this Comment considers the difficulties that arise in adopting the American civil religion as an exception to the Establishment Clause.

This Comment contends that the Sixth Circuit articulated a rule in *Stein* that the Supreme Court had followed but never clarified: in cases involving ceremonial invocations and benedictions, courts should regard the American civil religion concept as constitutionally valid and use the *Marsh* historical practice test[12] rather than the *Lemon* test.

Two secondary conclusions follow. First, it seems likely that the Supreme Court has avoided addressing the American civil religion idea to forestall constitutional objections to "establishment" of a state religion by that name. Second, while the Sixth Circuit accurately perceived the implied support of civil religion by the Supreme Court, judicial use of the "civil religion" concept to distinguish valid from invalid state-supported religious expression would seriously weaken establishment clause protection of persons who do not share the beliefs underlying American civil religion.

I. The Two Supreme Court Approaches to the Establishment Clause

A. *Lemon v. Kurtzman*[13]

At issue in *Lemon* were two state statutes providing financial aid to nonpublic schools. The Court found both statutes unconstitutional because they involved excessive entanglement between government and religion.[14] Integrating criteria it had developed in earlier cases,[15] the Court in *Lemon* laid down a three-part test for evaluating government action under the Establishment Clause: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be

9. 403 U.S. 602 (1971).

10. 463 U.S. 783 (1983).

11. "American civil religion" refers to an underlying set of non-creedal beliefs and values held by the members of our society. *See infra* notes 83-99 and accompanying text. Sociologist Robert Bellah introduced the term into contemporary discussion. Note, *Civil Religion and the Establishment Clause*, 95 YALE L. J. 1237, 1247-48 (1986).

12. This is the term used hereinafter to refer to the test enunciated in *Marsh*. This test is also referred to as the "acknowledgment exception." *See* Note, *supra* note 11, at 1245.

13. 403 U.S. 602 (1971).

14. *Id.* at 625.

15. For a concise summary of the development of the *Lemon* test, see Note, *Constitutional Law—Legislative Prayer and the Establishment Clause: An Exception to the Traditional Analysis*—Marsh v. Chambers, 17 CREIGHTON L. REV. 157 (1983).

one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion . . . ."[16] In the period between 1971 and 1983, the *Lemon* test became the standard in establishment clause cases.[17]

B. *Marsh v. Chambers*[18]

In *Marsh v. Chambers*, a state congressman challenged the Nebraska legislature's practice of opening each legislative day with prayer by a state-paid chaplain.[19] By a six to three vote in *Marsh*[20] the Supreme Court departed from its previous reliance on the *Lemon* test in establishment clause cases.[21] The Court instead applied a historical test based on the alleged original intent of the Framers of the Bill of Rights.[22]

The district court had held that while the prayers themselves did not violate the Establishment Clause, paying the chaplain with public funds did.[23] However, the Eighth Circuit, applying the *Lemon* test,[24] held that Nebraska's practice violated all three parts of the test: the purpose and primary effect of the practice was to promote a particular religious expression, and use of state money to compensate the chaplain and publish the prayers led to impermissible entanglement.[25]

The Supreme Court, through Chief Justice Burger, began its discussion of *Marsh* with a review of the American tradition of opening legislative sessions with prayer.[26] As an example, the Court pointed out that Congress authorized the appointment of a paid chaplain only three days

16. 403 U.S. at 612-13 (quoting Waltz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).

17. Examples of cases in which the Supreme Court utilized the *Lemon* test include Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982); Widmar v. Vincent, 454 U.S. 263 (1981); Stone v. Graham, 449 U.S. 39 (1980); Wolman v. Walter, 433 U.S. 229 (1977); Committee for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973).

18. 463 U.S. 783 (1983).

19. *Id.* at 786.

20. Chief Justice Burger wrote the majority opinion in which Justices White, Blackmun, Powell, Rehnquist, and O'Connor joined. Justice Brennan dissented, joined by Justice Marshall. *Id.* at 1030 (Brennan, J., dissenting). Justice Stevens also dissented. *Id.* at 1047 (Stevens, J., dissenting).

21. This departure has evoked sharp criticism. See Note, *supra* note 15, at 176-85, for the proposition that by developing an alternative to the *Lemon* test, the Court in *Marsh* created an unwarranted exception to the Establishment Clause.

22. *Marsh*, 463 U.S. at 788-91.

23. Chambers v. Marsh, 504 F. Supp. 585, 592 (D.C. Neb. 1980).

24. The district court did not mention the *Lemon* test. It defined the restriction placed on the states by the First Amendment as follows: "[T]he clause forbids a legislature from making any law that tends to firm up or support religion or to prefer one branch of religion or one religious belief over another." *Id.* at 588.

25. Chambers v. Marsh, 675 F.2d 228, 234-35 (8th Cir. 1982).

26. *Marsh*, 463 U.S. at 786. Chief Justice Burger traced this development from colonial times. He gave as an example Virginia's policy of opening legislative sessions with prayer, both during and after the existence of its state religion. *Id.* at 787 n.5.

before final agreement on the language of the Bill of Rights was reached.[27] Discussing the weight that should be given to this history, the Court stated:

> Standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees, but there is far more here than simply historical patterns. In this context, historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice [of appointing paid chaplains] authorized by the First Congress— their actions reveal their intent.[28]

Chief Justice Burger related this early congressional practice to that of the Nebraska legislature, stating that it would be "incongruous" to interpret the Establishment Clause as imposing greater restrictions on the states than its drafters imposed on the federal government.[29] The Court's view of prayer under the circumstances in question was an indulgent one: for a legislative body to invoke divine guidance is not an establishment of religion, "it is simply a tolerable acknowledgment of beliefs widely held among the people of this country."[30] The Court concluded that the challenged practices did not violate the Establishment Clause.[31]

II. *Stein v. Plainwell Community Schools:* Application of the Two Methods of Analysis

A. The Factual Background

The plaintiffs in *Stein* were parents of students who were about to graduate from the two schools in question. The parents sought a preliminary injunction to prevent the school districts from permitting invocations and benedictions at commencement ceremonies in their districts.[32]

The facts in *Stein* were not in dispute. Plainwell High School and Portage Central High School, two public schools in western Michigan, regularly included benedictions and invocations in their commencement ceremonies.[33] These ceremonies were held outdoors during the evening,

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27. *Id.* at 788.

28. *Id.* at 790. *See generally* Chesler, *Imagery of Community, Ideology of Authority: The Moral Reasoning of Chief Justice Burger*, 18 HARV. C.R.-C.L. L. REV. 457 (1983) (discussion of a recurring tendency of former Chief Justice Burger to allow moral reasoning to decide constitutional issues).

29. *Marsh*, 463 U.S. at 790-91.

30. *Id.* at 792.

31. *Id.* at 795. The Court upheld the state's practice despite noting that (1) for 16 years the legislature had selected a clergyman of only one denomination; (2) the legislature paid the chaplain with public funds; and (3) the prayers were in the Judeo-Christian tradition. *Id.* at 793.

32. Stein v. Plainwell Community Schools, 610 F. Supp. 43, 44 (W.D. Mich. 1985).

33. Stein v. Plainwell Community Schools, 822 F.2d 1406, 1407 (6th Cir. 1987). Benedictions and invocations are the actual terms used by the court. *See supra* note 5.

and conferral of a diploma was not contingent on a student's attendance.[34] The invocations and benedictions at Plainwell High were delivered by two student volunteers, who also determined their content.[35] At Portage Central High, the graduating seniors had traditionally organized the commencement ceremonies. For at least fifteen years, students had selected local Christian clergymen to deliver an invocation and benediction.[36]

B. The District Court's Analysis

The district court applied the *Lemon* test in *Stein*,[37] first determining whether the school districts were motivated by a secular purpose in including the invocations and benedictions.[38] In the court's view, even if the graduation speaker had a purely religious purpose, the practice was constitutional as long as the school administration had a primarily secular purpose.[39] It found that the defendant school districts had two such possible purposes: first, to follow an established tradition; and second, to allow students to be involved in either planning or participating in the graduation exercises.[40] Furthermore, the court found no evidence of a secret religious purpose.[41]

The district court next determined that the proposed benedictions and invocations would not have the primary effect of advancing religion.[42] The court based its conclusion on six factors: (1) the ceremony was not a mandatory part of the curriculum;[43] (2) speakers other than school employees delivered the prayers, whose content was not subject to school control;[44] (3) the one-time ceremony raised no danger of daily

34. *Stein*, 822 F.2d at 1407.

35. *Id.* The Plainwell High invocation given in June 1985 made reference to "Heavenly Father", "God", and "Divine Master." *Id.* at 1407 n.1.

36. *Id.* at 1407. The May 1985 invocation at Portage Central High, delivered by a Lutheran minister, included a reference to "Christ our Lord." *Id.* at 1407 n.2.

37. 610 F. Supp. at 47-50.

38. *Id.* at 47.

39. *Id.* The court cited the Supreme Court's holding in Widmar v. Vincent, 454 U.S. 263, 271-73 (1981), that a student group's religious purpose did not negate a university's secular purpose in providing that group with equal access to meeting room facilities.

40. *Stein*, 610 F. Supp. at 48. At Plainwell High School, where the students themselves delivered the invocation and benediction, the school administration required them to practice before the speech instructor but did not monitor the content. *Id.* at 45.

41. *Id.* at 48. See Wallace v. Jaffree, 472 U.S. 38, 57-61 (1985), for an example of religous purpose.

42. 610 F. Supp. at 48-49.

43. *Id. See also* Wood v. Mt. Lebanon Township School Dist., 342 F. Supp. 1293, 1294 (W.D. Pa. 1972) (voluntariness of participation in graduation ceremony is an important factor in evaluating propriety of state action).

44. 610 F. Supp. at 48-49. *Contra* Graham v. Central Community School Dist., 608 F. Supp. 531, 532-33 (D.C. Iowa 1985) (school board's inclusion of invocation and benediction

indoctrination;[45] (4) the audience was composed mainly of adults rather than impressionable children;[46] (5) the graduation ceremonies were not part of the educational programs of the schools;[47] and (6) there was no evidence that the speakers intended to use the opportunity to proselytize.[48]

Finally, the court determined that the benedictions and invocations would not foster excessive entanglement of government with religion.[49] The decisive factors here were the infrequent nature of the graduation ceremonies and the fact that only minimal contacts existed between school officials and local clergy.[50] Thus, the district court's holding that the school districts' practices were acceptable under the Establishment Clause was based on an intensely fact-specific analysis.[51]

C. The Sixth Circuit's Analysis

On appeal, the Sixth Circuit subjected the case to a rather different analysis. The court phrased the issue on appeal: "what kind of invocations and benedictions, if any, does the Establishment Clause of the First Amendment permit the public schools to conduct at their annual commencement exercises?"[52] In answering this question, the Sixth Circuit declined to apply the *Lemon* test.[53] It explained that the commencement ceremonies in question were "analogous to the legislative and judicial sessions referred to in *Marsh* and should be governed by the same principles."[54] The court interpreted *Marsh* as standing for the proposition that

violated the Establishment Clause even though the speaker was not a school employee and the board had no control over content).

45. 610 F. Supp. at 49. *See* Stone v. Graham, 449 U.S. 39, 42 (1980) (posting of Ten Commandments in classroom served purpose of "inducing the schoolchildren to read, meditate upon, perhaps to venerate and obey the Commandments").

46. 610 F. Supp. at 48-49. *Cf.* Americans United for Separation of Church and State v. Grand Rapids School Dist., 718 F.2d 1389, 1407 (6th Cir. 1983), *aff'd sub. nom* Grand Rapids School Dist. v. Ball, 465 U.S. 1064 (1985) (noting a special concern because the challenged program primarily affected children).

47. 610 F. Supp. at 49-50. *See* Grossberg v. Deusebio, 380 F. Supp. 285, 289 (E.D. Va. 1974) (noting the common practice of using invocations in legislatures and at celebrations of public holidays).

48. 610 F. Supp. at 50. *Cf.* Marsh v. Chambers, 463 U.S. 783, 794-95 (1983) (content of prayer unimportant in legislative setting since there was no attempt to proselytize).

49. 610 F. Supp. at 50.

50. *Id.* At Portage High School, where a member of the clergy delivered the invocation and benediction, neither the school administration nor the senior class representatives previewed the content of the presentations. *Id.* at 45.

51. *Id.* at 50. It therefore denied the motion for a preliminary injunction and later dismissed the plaintiffs' claim on the merits. *See* Stein v. Plainwell Community Schools, 822 F.2d 1406, 1408 (6th Cir. 1987), *rev'g* 610 F. Supp. 43 (W.D. Mich. 1985).

52. *Stein*, 822 F.2d at 1407. See *infra* text accompanying note 78 for a discussion of the dissent's disagreement with this framing of the issue.

53. *Stein*, 822 F.2d at 1408-09.

54. *Id.* at 1409.

ceremonial invocations and benedictions are acceptable under the Establishment Clause if they do not "go beyond 'the American civil religion' "[55] and provided that they preserve "the substance of the principle of equal liberty of conscience."[56]

The court discerned in the Establishment and Free Exercise Clauses the "guiding principle" of "equal liberty of conscience."[57] The court viewed this principle as a means of accommodating the vast spectrum of religions in American society:

> In our national and community life, we can never be sure whether our particular religious, sectarian and moral convictions will be in the majority or the minority. So as a diverse people we have rejected the notion of a confessional state that supports religion in favor of a neutral state designed to foster the most extensive liberty of conscience compatible with a similar or equal liberty for others.[58]

Equal liberty of conscience, though described by the court as the "guiding principle"[59] in the court's analysis, is limited "by the common interest in public order and security."[60] The court noted that the Supreme Court had concluded in *Marsh* that individuals may be required to make some accommodation with our national history and tradition.[61] The Supreme Court's deference to the tradition of ceremonial prayer in legislative, judicial, and other public circumstances suggests that the facts of *Stein* lay on the "boundary between liberty of conscience and public order and tradition."[62] Although the court failed to draw the boundary, it seemed to conclude that the *Stein* plaintiffs did not enjoy an absolute right to be free from the school districts' implicit endorsement of the beliefs conveyed in the challenged invocations and benedictions. If the ceremonies merely reflected American civil religion, the plaintiffs' liberty of conscience would give way to the state's interest in "public order and tradition" that such civil religion represented.[63] Thus, the *Marsh* limitations on the principle of equal liberty of conscience would require the court to permit the tradition of invocations at graduations to continue if the content of the prayers did not "go beyond the 'American civil

55. *Id. See infra* notes 83-95 and accompanying text, describing the concept of "American civil religion."

56. 822 F.2d at 1409.

57. *Id.* at 1408.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id. Marsh* referred to the tradition of opening legislatures and other public deliberative bodies with prayer. Marsh v. Chambers, 463 U.S. 783, 786 (1983).

62. *Stein*, 822 F.2d at 1408-09. The Sixth Circuit observed that it is the job of the federal courts to draw such boundaries. *Id.* at 1409.

63. *Id.* at 1409.

religion.' "[64]

The Sixth Circuit's reliance on the Supreme Court's deference to the historical basis of allowing prayer at public ceremonies suggests that the ceremonial nature of graduation was the key to the court's decision to rely on the historical practice test of *Marsh*.[65] Had the court viewed *Stein* as a traditional school prayer case, it probably would have felt obligated to use the *Lemon* test.[66]

Furthermore, the Sixth Circuit emphasized the decreased opportunity for impermissible religious indoctrination in ceremonial situations as compared with classroom prayer.[67] According to the court, several char-

64. *Id.*

65. The Sixth Circuit did not necessarily have to find that the facts of *Stein* paralleled those of *Marsh*. In a similiar case decided two years earlier, a district court within the Sixth Circuit had held that inclusion of an invocation and benediction in a public high school graduation ceremony violated the Establishment Clause. Graham v. Central Community School Dist., 608 F. Supp. 531 (D.C. Iowa 1985). The district court considered and rejected the *Marsh* test, stating:

> The *Marsh* decision is a singular Establishment Clause decision that rests on the "unique history" of legislative prayer, and the holding of that case is clearly limited to the legislative setting. Any doubts about the limited application of *Marsh* and the continued viability of the *Lemon* three-part test were laid to rest by the Court's post-Marsh application of the *Lemon* three-part test in *Lynch*. This court is abundantly satisfied that it must measure the facts of this case by the *Lemon* three-part test.

Id. at 535.

During the same month in which the Sixth Circuit announced its decision in *Stein*, a California court of appeal considering the constitutionality of including invocations at high school graduation ceremonies arrived at the same result reached in *Graham*. In Bennett v. Livermore Unified School Dist., 193 Cal. App. 3d 1012, 238 Cal. Rptr. 819 (1987), the California Court of Appeal held the practice unconstitutional under both the United States and California Constitutions. *Id.* at 1016. The court discussed the unique history of legislative prayer and distinguished *Marsh* as being limited to its facts. *Id.* at 1022, 238 Cal. Rptr. at 825. *Bennett* interpreted the *Marsh* Court's holding as an acknowledgment that legislative invocations are not intended "to inject religion into a state function, but to honor those persons who founded this country by continuing a practice specifically established by them." *Id.* The California court held that graduation invocations are clearly distinguishable in that, because public schools did not yet exist in this country, the Founding Fathers made no provision for them. *Id.* at 1023.

66. In a case decided only a few weeks before *Stein*, the United States Supreme Court held unconstitutional a statute requiring the teaching of "creation-science." Edwards v. Aguillard, 107 S. Ct. 2573 (1987). Affirming the applicability of the *Lemon* test, the Court stated:

> The *Lemon* test has been applied to all cases since its adoption in 1971, except in *Marsh v. Chambers* . . . where the Court held that the Nebraska legislature's practice of opening a session with a prayer by a chaplain paid by the State did not violate the Establishment Clause. The Court based its conclusion in that case on the historical acceptance of the practice. Such a historical approach is not useful in determining the proper roles of church and state in public schools, since free public education was virtually nonexistent at the time the Constitution was adopted.

Id. at 2577 n.4 (citations omitted). For an illustration of the continuing importance of the *Lemon* test, compare the separate opinions in Wallace v. Jaffree 472 U.S. 38 (1985): Justice Powell's concurrence, *id.* at 62; Justice O'Connor's concurrence, *id.* at 67; and Justice Rehnquist's dissent, *id.* at 91.

67. *Stein*, 822 F.2d at 1409.

acteristics of the graduation ceremonies made the invocations and benedictions noncoercive: the public nature of the ceremonies, the presence of parents and other adults, and the absence of a potentially intimidating student-teacher classroom setting.[68]

Notwithstanding its conclusion that the *Marsh* historical practice test applied,[69] the Sixth Circuit held that the school invocations and benedictions violated the Establishment Clause.[70] The court viewed the actual language in the invocations and benedictions as symbolic governmental endorsement of the Christian religion, since they employed "the language of Christian theology and prayer."[71] Going "beyond the American civil religion," these practices did not constitute the type of nondenominational or "civil" prayers approved in *Marsh*.[72]

D. The Concurring and Dissenting Opinions

Although Judge Milburn concurred with the result in *Stein*, he analyzed the case differently.[73] He stated briefly that ceremonial school commencement prayer should satisfy both the *Marsh* and *Lemon* standards.[74] In his view, "most, if not all, of the challenged prayers" did not meet the *Lemon* test.[75]

Judge Wellford dissented from the conclusion reached by the majority and the concurrence while acquiescing in much of their analysis.[76] He felt that the majority had erred in framing the issue in terms which emphasized the content of the prayers.[77] According to Wellford, the issue presented in *Stein* was "whether any invocation or benediction at a public high school commencement in the form of a prayer, or reference to the Deity, the content of which prayer is not officially prescribed, is constitutionally permissible."[78]

Wellford reviewed several Supreme Court cases involving religion in the public schools[79] and noted that the Court had consistently concerned itself with "(1) regularly scheduled or persistent religious expressions, (2)

68. *Id.*

69. *Id.* at 1409-10.

70. *Id.* at 1410.

71. The court focused on the ceremony's employment "of Christian theology" by invoking "the name of Jesus as the Savior." *Id. See also supra* notes 35-36 and accompanying text.

72. *Id.* See also Note, *supra* note 11, at 1256, for suggestions of acceptable civil prayers.

73. 822 F.2d at 1410 (Milburn, J., concurring).

74. *Id.*

75. *Id.*

76. 822 F.2d at 1410 (Wellford, J., dissenting).

77. *Id.* at 1411-12 (Wellford, J., dissenting).

78. *Id.* at 1412 (Wellford, J., dissenting).

79. *Id.* at 1412-15 (Wellford, J., dissenting). Judge Wellford cited Grand Rapids School Dist. v. Ball, 473 U.S. 373 (1985); Wallace v. Jaffree, 472 U.S. 38 (1985); Stone v. Graham, 449 U.S. 39 (1980); Engel v. Vitale, 370 U.S. 421 (1962); Zorach v. Clauson, 343 U.S. 306 (1952); and McCollum v. Board of Educ., 333 U.S. 203 (1948).

in a classroom setting, (3) officially sponsored or sanctioned content initiated by school authorities, which are (4) directed to students, primarily those of formative years."[80] Judge Wellford contended that the Supreme Court had consistently found a first amendment violation when a majority of these factors was present.[81] Since none of these factors was present in *Stein*,[82] Judge Wellford concluded that the invocations and benedictions were constitutional.

III. The "American Civil Religion" Concept

In its establishment clause analysis, the Sixth Circuit mentioned the sociological concept of "American civil religion." This concept, in the court's view, circumscribed the proper limits of ceremonial invocations and benedictions.[83] As examples of American civil religion the court spoke of secularized invocations used to open formal sessions of various public bodies across this country.[84] The court did not, however, define this term. Instead, the court referred generally to a commentator's discussion of civil religion.[85] The commentator summarized two scholarly views of "civil religion."[86]

One view, expressed in very broad terms, perceives civil religion as a set of beliefs and attitudes held generally by the people of any given political society. These beliefs, expressed in public rituals, myths, and symbols, explain the meaning and purpose of that society in terms of its relationship to a transcendent, spiritual reality.[87]

According to the commentator, three salient elements characterize all civil religions. First, civil religion is a modern phenomenon, existing as part of society's response to the modern world.[88] Second, the focus of civil religion is political, *i.e.*, the transcendent features of its rituals, myths, and symbols are all tied to the political life of the society.[89] "A civil religion gathers and expresses the most deeply felt, abiding ideals and attitudes of a society's political life. By drawing on the form and language of sacral religion it achieves a special resonance and power."[90]

80. *Stein*, 822 F.2d at 1414 (Wellford, J., dissenting).

81. *Id.* at 1414-15 (Wellford, J., dissenting).

82. *Id.* at 1415 (Wellford, J., dissenting). Judge Wellford described the invocations and benedictions in *Stein* as a brief acknowledgment of religion in a yearly ceremony outside the classroom, involving children beyond the formative years. *Id.*

83. *Stein*, 822 F.2d at 1409.

84. *Id.* These public bodies included legislatures, city councils, and courts.

85. Instead, the court cited Note, *supra* note 11, as "an excellent discussion of civil religion as a concept." 822 F.2d at 1409 n.5.

86. Note, *supra* note 11, at 1247-49.

87. *Id.* at 1249.

88. *Id.* at 1249-50. The author uses the term "modernity" to refer to the post-Reformation, industrialized Western world. *Id.* at 1249.

89. *Id.* at 1250-51.

90. *Id.*

Third, as an underlying set of beliefs binding together persons of different creeds, civil religion does not represent any particular sect or group of tenets or doctrines.[91]

The other scholarly view focuses on American civil religion in particular and perceives it as "a sort of millenarian Protestantism that had been secularized and assimilated into American culture, eventually taking the form of a comprehensive set of values, symbols, rituals and metaphysical assumptions, all centered around and rooted in the interpretation of the American historical experience."[92]

American civil religion, in the view of the commentator cited by the Sixth Circuit, has evolved to fill the gap left by the constitutional ban on official state religions.[93] Historically rooted in the religious beliefs of the early American colonists, American civil religion follows the forms and structures of Judeo-Christianity, and particularly of Protestantism.[94]

Five themes characterize American civil religion in particular:

> [First,] a sense that there is some sort of transcendent principle of morality to which this polity is, or ought to be, reponsible; [second,] a faith in democracy as a way of life for all people and a concommitant belief in an American mission to spread it the world over; [third,] a sense of civic piety, that exercising the responsibilities of citizenship is somehow a good end in itself; [fourth,] a reverence for American religious folkways; and [fifth,] a belief that Destiny has great things in store for the American people.[95]

In *Stein* the Sixth Circuit drew upon this view of American civil religion to give a specific name to what the Supreme Court had alluded to in *Marsh*. The Supreme Court tacitly acknowledged the concept of an "American civil religion" when it described the use of prayer in opening sessions of various public bodies as "deeply embedded in the history and tradition of this country"[96] and as having "coexisted with the principles of disestablishment and religious freedom" since colonial times.[97]

Furthermore, the Court's refusal to use the *Lemon* test in circumstances involving such historical traditions may reflect the fact that the *Lemon* test simply does not work in the civil religion context.[98] A test for secular "purpose" and "effect" is unmanageable so long as the courts lack a precise and practical definition of "civil religion" which relates it

91. *Id.* at 1250.

92. *Id.* at 1248. This description was drawn from the theories of sociologist Robert N. Bellah.

93. *Id.* at 1251.

94. *Id.* See also *id.* at 1254 n.84, for a discussion of the existence of Judeo-Christianity.

95. *Id.* at 1252 (footnotes omitted).

96. Marsh v. Chambers, 463 U.S. 783, 786 (1983).

97. *Id.*

98. *See* Note, *supra* note 11, at 1243-44.

to the *Lemon* concept of secularity.[99] Under the conventional analysis of *Lemon*, unless American civil religion is "secular", promotion of this religion would be a religious purpose and would result in the advancement of a particular religion.[100] Yet the Court in *Marsh* implicitly approved this type of quasi-political religious expression when it bypassed the *Lemon* test in favor of a "historical practice" framework.[101]

A. *Lynch v. Donnelly:* Can *Lemon* and *Marsh* Be Reconciled?

The Court's reasoning in *Lynch v. Donnelly*[102] further supports the possibility that a historical practice test may replace the *Lemon* test for establishment clause cases implicating an unofficial American civil religion. *Lynch* involved a municipally owned Christmas display in a park in Pawtucket, Rhode Island. The display included several traditional, secular Christmas images[103] as well as a Nativity scene. Plaintiffs challenged Pawtucket's sponsorship of the creche as a violation of the Establishment Clause.[104]

The district court applied the *Lemon* test and found that the inclusion of the creche in the Christmas display was unconstitutional.[105] A divided panel of the First Circuit Court of Appeals affirmed.[106] The Supreme Court reversed,[107] and stated at the outset that total separation of church and state was impossible to achieve, and in any case not constitutionally mandated.[108] The Court concluded that "the Constitution . . . affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any."[109]

The Court also traced the history of official recognition of religion in America, citing as examples the approval by the first Congress of the employment of a paid chaplain, use of the motto "In God We Trust" on American currency, and inclusion of the language "One nation under God" in the Pledge of Allegiance.[110] This history furnished the rationale for the Court's consistent refusal "to take a rigid, absolutist view of the Establishment Clause. We have refused 'to construe the Religion

99. *See id.* at 1252.

100. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

101. *Marsh*, 463 U.S. at 1028.

102. 465 U.S. 668 (1984).

103. *Id.* at 671. These images included a Santa Claus house, reindeer pulling Santa's sleigh, a Christmas tree, and a large banner reading "SEASONS GREETINGS." *Id.*

104. *Id.*

105. Donnelly v. Lynch, 525 F. Supp 1150, 1178 (D.R.I. 1981).

106. Donnelly v. Lynch, 691 F.2d 1029 (1st Cir. 1982). Unable to find a secular purpose for the inclusion of the creche, the Court did not reach the other two prongs of the *Lemon* test. *Id.* at 1035.

107. *Lynch*, 465 U.S. at 672.

108. *Id.* at 672.

109. *Id.* at 673.

110. *Id.* at 674-76.

Clauses with a literalness that would undermine the ultimate constitutional objective as illuminated by history.' "[111]

In *Lynch*, the Court observed that every judicial inquiry in an establishment clause case calls for line-drawing; no fixed rule can be applied.[112] Although the *Lemon* test was described as a useful tool in the line-drawing process,[113] the Court explicitly disavowed strict allegiance to that test.[114] Nonetheless, the *Lynch* Court proceeded to utilize *Lemon* in its analysis. Both *Lynch* and *Marsh* thus seem to acknowledge tacitly the existence of an American civil religion and endorse the concept that state promotion of this religion is valid under the Establishment Clause. *Lynch* clearly stressed that the historical test was a proper alternative to *Lemon* under some circumstances. However, the Court's failure to define the historical test precisely, and its ultimate use of *Lemon* to decide the issue before it, left open the key question of what factors trigger application of a historical practice test instead of *Lemon*.

IV. Problems With The Historical Practice Test, as Interpreted by *Stein*

In *Stein*, the Sixth Circuit cited equal liberty of conscience and American civil religion as standards for determining whether ceremonial invocations and benedictions are constitutional under *Marsh*.[115] Use of the concept of American civil religion as a test for constitutionality, however, poses serious problems, not the least of which is the vagueness of the term itself. If, as has been suggested,[116] courts look to scholarly writings on the subject, they will have to decide among different scholars' perceptions of a historical and cultural phenomenon that is by definition subject to constant change and reinterpretation.[117] This approach would lead to judicial legislation at its worst. Consistency in this area of great constitutional importance demands a more precise analytical standard than can be provided by the concept of American civil religion.

A more fundamental problem arises when American civil religion is exempted from the establishment clause bar on government support of religion. This exemption violates the Establishment Clause insofar as the civil religion includes specific religious elements imposed by the majority on dissenting minorities. Proponents of this exemption argue that Amer-

111. *Id.* at 678 (quoting Waltz v. Tax Comm'n, 397 U.S. 664, 671 (1970)).

112. *Id.* at 678.

113. *Id.* at 679.

114. *Id.* The Court stated: "[W]e have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area." *Id.* See also *id.* at 687 (O'Connor, J., concurring) and *id.* at 694 (Brennan, J., dissenting, joined by Marshall, J., Blackmun, J., and Stevens, J.), for further discussion of the *Lemon* test.

115. Stein v. Plainwell Community Schools, 822 F.2d 1406, 1409 (6th Cir. 1987).

116. Note, *supra* note 11, at 1255.

117. *See supra* text accompanying notes 84-99.

ican civil religion is something accepted by all members of our society.[118] However, while the beliefs of American civil religion may not be directly derived from particular creeds, they clearly bear the marks of religious tenets—particularly those of Protestant Christianity.[119] These tenets are offensive to an increasing number of religious minorities. As America's religious and cultural diversity continues to expand, many Americans who do not subscribe to civil religion or to the narrow political assumptions it represents, may perceive the link between the divine and specific policy choices as impermissable governmental or majoritarian indoctrination. Examples of such policy choices range from requiring public school children to recite the Pledge of Allegiance to justifications for foreign military intervention. Government protection of American civil religion amounts to the establishment of a religion these citizens do not share.

Finally, the Court stated in *Lemon* that "political division along religious lines was one of the principal evils against which the First Amendment was intended to protect."[120] Recognition of American civil religion as an exception to the establishment clause ban on government-endorsed religion would create the very kind of political division the Court feared.

Conclusion

The Supreme Court in *Marsh* developed a historical practice test without explicitly recognizing American civil religion, apparently to avoid the appearance of establishing a "state" religion. The historical practice test escapes the establishment clause problem by emphasizing historical views of constitutionally acceptable state conduct.

Stein's importance lies in its astute interpretation of the Supreme Court's historical practice test. The Sixth Circuit perceived the Supreme Court's decision in *Marsh* as based on "American civil religion," and articulated a rule that the Supreme Court had only implied: in cases involving certain public ceremonies and rituals, including prayers and references to particular religious beliefs or assumptions, courts should regard American civil religion as an essentially secular phenomenon, and use the more deferential *Marsh* historical practice test rather than the *Lemon* test.

The decision in *Stein* is, of course, controlling only in the Sixth Circuit. Should other circuits accept its interpretation of *Marsh*, more plaintiffs will find it difficult to halt government involvement in religious activities when those activities are judicially acknowledged as expressions of American civil religion. This may mean, in turn, that a significant

118. Note, *supra* note 11, at 1254-55.
119. *Id.* at 1251.
120. Lemon v. Kurtzman, 403 U.S. 602, 622 (1971).

segment of the American population will be subjected to state religious activities it finds personally offensive. The current emphasis on the historical practice thus threatens to de-emphasize the significance of the views of religious minorities in this country.

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