BYU Law Review

Volume 1989 | Issue 1 Article 9

3-1-1989

# Making Prior Restraint an Enforcement Tool of the Establishment Clause: Stein v. Plainwell Community Schools

Ken Jorgensen

Follow this and additional works at: https://digitalcommons.law.byu.edu/lawreview

 Part of the Constitutional Law Commons, and the Religion Law Commons

Recommended Citation

Ken Jorgensen, *Making Prior Restraint an Enforcement Tool of the Establishment Clause: Stein v. Plainwell Community Schools*, 1989 BYU L. Rev. 305 (1989).
Available at: https://digitalcommons.law.byu.edu/lawreview/vol1989/iss1/9

This Casenote is brought to you for free and open access by the Brigham Young University Law Review at BYU Law Digital Commons. It has been accepted for inclusion in BYU Law Review by an authorized editor of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

# Making Prior Restraint an Enforcement Tool of the Establishment Clause: *Stein v. Plainwell Community Schools*

## I. Introduction

May the courts strike down a prayer because of its content to protect citizens from endorsement of religion under our Constitution? In *Stein v. Plainwell Community Schools*[1] a three-member appellate panel in the Court of Appeals for the Sixth Circuit did just that, allowing invocations and benedictions at high school graduation ceremonies but deciding that the prayers would be an unconstitutional establishment of religion[2] if framed in constitutionally unacceptable language.

The court in *Stein* did not reach this decision by means of the usual three-pronged *Lemon* test.[3] Instead, citing *Marsh v. Chambers*[4] as the controlling precedent, it announced a prohibition on language that endorses any particular religious view in the challenged prayers.

This note looks at the *Stein* case in relation to the tests normally used in Establishment Clause cases. It concludes that any approach involving governmental scrutiny of the content of prayers is not only inconsistent with precedent, but is a more serious threat to constitutional freedoms than the threat of establishment of religion by prayer at commencement exercises.

## II. The Facts and the Holding in *Stein*

### A. *The Facts*

Both the Plainwell Community School District and the Portage Public School District had for many years begun commencement exercises with an invocation and had ended with a

---

1. 822 F.2d 1406 (6th Cir. 1987).

2. U.S. Const. amend. I ("Congress shall make no law respecting the establishment of religion . . . .").

3. So called because the test was first announced in Lemon v. Kurtzman, 403 U.S. 602 (1971). *See infra* note 9 and accompanying text.

4. 463 U.S. 783 (1983) (allowing legislative prayers as not violative of the prohibition on establishment).

benediction.[5] In the Plainwell exercises the invocation and benediction were given by graduating seniors who were chosen from a group of honor students. The two students selected chose the content of their prayers and were not monitored by the school. In the Portage commencement the graduating seniors organized the exercises and, as they had for fifteen years, selected a member of the local clergy to give an invocation and benediction.

Parents of graduating seniors in the respective districts brought action to enjoin the invocations and benedictions, but the district court denied the injunction.[6] About two weeks after this denial the commencement exercises were held, with the prayers. In the prayers were references to "the Lord" and "Christ." The case was appealed, reversed, and remanded for "further proceedings and the granting of equitable relief."[7]

### *B. The Holding of the Court of Appeals*

The cases surrounding the Establishment Clause indicate that the *Stein* court had at least three different standards it could have applied in determining the constitutionality of prayers at the commencement exercises: the three-pronged *Lemon* test announced in *Lemon v. Kurtzman*;[8] the endorsement test espoused by Justice O'Connor; or an historical approach.

The test generally applied to determine constitutionality of a governmental action under the Establishment Clause is the *Lemon* test, which was developed to preserve governmental neutrality toward religion. To survive an Establishment Clause challenge, a governmental act must meet these three tests: first, it must neither advance nor inhibit religion; second, it must have a valid secular purpose; and third, it must not cause excessive entanglement of government with religion.[9]

---

5. The facts are taken from the district court and the appellate decisions, Stein v. Plainwell Community Schools, 610 F. Supp. 43, 44-45 (D.C. Mich. 1985), *rev'd.*, 822 F.2d 1406, 1410-11 (6th Cir. 1987).

6. *Stein*, 610 F. Supp. at 47.

7. Stein v. Plainwell Community Schools, 822 F.2d 1406, 1410 (6th Cir. 1987). Because an injunction was first sought, an injunction would be the most likely form of equitable relief to be ordered on remand.

8. 403 U.S. 602, 612-13 (1971).

9. *Id.* This three-pronged test has been criticized by members of the Court. Wallace v. Jaffree, 472 U.S. 38, 68 (1985) (O'Connor, J., concurring) ("Despite its initial promise, the *Lemon* test has proved problematic."); *see also* Aguilar v. Felton, 473 U.S. 402, 420-21 (1985) (Rehnquist, J., dissenting) (The entanglement prong is a " 'Catch-22' paradox

The Supreme Court has declared the *Lemon* test especially applicable in the educational setting.[10] When the case involves youth in an educational setting, *Lemon* is to be applied "with particular care when many of the citizens perceiving the governmental message are children in their formative years,"[11] because "[t]he government's activities in this area can have a magnified impact on impressionable young minds . . . ."[12] When school-age children are involved, governmental activity will fail the *Lemon* test merely because it is located in parochial school facilities.[13] This standard of "particular care" is still the *Lemon* test,

---

. . . whereby aid must be supervised to ensure no entanglement but the supervision itself is held to cause an entanglement."); *Jaffree*, 472 U.S. at 108-10 (Rehnquist, J., dissenting); *Lemon*, 403 U.S. at 668 (White, J., concurring in the result) (calling the test an "insoluble paradox"). It has also been criticized by constitutional scholars. *See, e.g.*, Levinson, *Separation of Church and State: And the Wall Came Tumbling Down*, 18 VAL. U.L. REV. 707, 724, 731-32 (1984) (describing the *Lemon* test as "logically unsound, unworkable and in fact sometimes ignored by the Court itself when it desires," and arguing for a "strict scrutiny" test); Dorsen & Sims, *The Nativity Scene Case: An Error of Judgment*, 1985 U. ILL. L. REV. 837; Smith, *Some Observations on the Establishment Clause*, 11 PEPPERDINE L. REV. 457, 465-69 (1984); Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 CAL. L. REV. 817, 825-31 (1984); Note, Wallace v. Jaffree: *The* Lemon *Test Sweetened*, 22 HOUS. L. REV. 1273, 1285 (1985) [hereinafter Lemon *Sweetened*] ("The *Lemon* test is based on the government neutrality concept, and inherited many of the neutrality concept's difficulties.").

In spite of the difficulties, however, the test has not been rejected, and several Justices have re-affirmed its applicability. "[The *Lemon* test] is the only coherent test a majority of the Court has ever adopted. Only once since our decision in *Lemon* have we addressed an Establishment Clause issue without resort to its three-pronged test. [*Marsh*]. *Lemon* has not been overruled or its test modified." Wallace v. Jaffree, 472 U.S. 38, 63 (1985) (Powell, J., concurring); *see also Marsh*, 463 U.S. at 796 (Brennan, J., dissenting) (calling *Lemon* the "formulation of prevailing Establishment Clause doctrine").

The *Lemon* test's viability is beyond the scope of this note. What is important is that, despite the problems, the Supreme Court still finds *Lemon* to be the test generally applicable.

10. "We have particularly relied on *Lemon* in every case involving the sensitive relationship between government and religion in the education of our children." Grand Rapids School Dist. v. Ball, 473 U.S. 373, 383 (1985); *see also*, Edwards v. Aguillard, 107 S.Ct. 2573, 2577-78 (1987).

11. *Ball*, 473 U.S. at 390. "The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools." *Edwards*, 107 S.Ct. at 2577.

12. *Ball*, 473 U.S. at 383. *Compare* Wallace v. Jaffree, 472 U.S. 38 (1985) (moment of silence in schools disallowed because it promoted prayer) *with* Marsh v. Chambers, 463 U.S. 783 (1983) (allowing prayer to open legislative sessions); *see infra* note 24. In *Lemon* itself the Court says that age and impressionability are two of the "circumstances of a particular relationship" between church and state to be looked at in applying the test. Lemon v. Kurtzman, 403 U.S. 602, 614, 616-617 (1971).

13. *Ball*, 473 U.S. at 391.

but it is applied more stringently when the case involves "children in their formative years."

The second standard is an alternative to the *Lemon* test suggested by Justice O'Connor in concurring opinions in *Lynch v. Donnelly*[14] and *Wallace v. Jaffree*.[15] This standard is the endorsement test, and would modify or replace the secular purpose and effects prongs of *Lemon*, while leaving the entanglement prong intact.[16] A governmental activity will be disallowed under the Establishment Clause if "the government intends to convey a message of endorsement or disapproval of religion."[17]

The third approach, which was used by the *Stein* court, is an historical approach which was used by the Supreme Court in

---

14. 465 U.S. 668, 688-91 (1984) (O'Connor, J., concurring).

15. 472 U.S. at 69 (O'Connor, J., concurring).

16. For the secular purpose prong, Justice O'Connor suggests that "[t]he proper inquiry . . . is whether the government intends to convey a message of endorsement or disapproval of religion." *Lynch*, 465 U.S. at 691. This test would be broad enough to include within constitutional limits traditional "governmental acknowledgements of religion," such as legislative prayers, our national motto and anthem, and Thanksgiving and Christmas as official holidays. *Id.* at 693. These traditional acknowledgements of religion, according to Justice O'Connor, serve "the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society. For that reason, and because of their history and ubiquity, those practices are not understood as conveying government approval of particular religious beliefs." *Id.*

The endorsement test inquiry under the effects prong would replace the inquiry of whether the challenged action has the effect of advancing or inhibiting religion with the question of whether the governmental action "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Id.* at 688. This part of the test has been recognized by the Court, which stated that "an important concern of the effects test is whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as disapproval, of their individual religious choices." *Ball*, 473 U.S. at 390. (It is interesting to note, however, that Justice O'Connor disagrees with the Court's reasoning in *Ball*, 473 U.S. at 391, that location is a sufficient symbolic endorsement. *Aguilar v. Felton*, 473 U.S. 402, 423-26 (1985)).

Although this is at least a limited approval of endorsement as a test by the Supreme Court, it is yet unclear how the Court relates the endorsement test to the *Lemon* test. One particularly ecstatic observer proclaimed that "it appears that the Supreme Court has adopted Justice O'Connor's endorsement approach in all but name." Lemon *Sweetened, supra* note 9 at 1281. Such a conclusion is premature. It is probably only safe to say that, as the language indicates, endorsement is merely "an important concern" of the effects prong, not a new test. *See* Loewy, *Rethinking Government Neutrality Towards Religion Under the Establishment Clause: The Untapped Potential of Justice O'Connor's Insight*, 64 N.C.L. REV. 1049 (1986) (arguing that the endorsement test best gets to the heart of Establishment Clause worries).

17. *Lynch*, 465 U.S. at 691.

*Marsh v. Chambers*.[18] In *Marsh* the Supreme Court confronted a challenge to the practice of opening Nebraska state legislative sessions with prayers. Reversing the Court of Appeals, the Supreme Court applied an historical analysis instead of the *Lemon* test. The Court held that history showed that legislative prayer was no threat to Establishment Clause freedoms.[19]

In deciding which of these approaches to take, the Sixth Circuit panel recognized, then rejected, appellants' argument that *Stein* was a school prayer case.[20] Prayer in public schools is an area where the Establishment Clause doctrine is well established,[21] but the court found a once-a-year commencement much more analogous to the legislative session in *Marsh* than to the classroom of *Engel*.[22]

Deciding that the *Stein* case is not a school prayer case was necessary for the application of the historical approach. *Lemon* is applicable both in and out of the school setting.[23] *Marsh*, on the other hand, is not applicable to school prayer cases.[24] The *Stein* opinion did not explore *Marsh*'s place in the Establish-

---

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

19. The Court maintained that "[t]he opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country." *Id.* at 786. One example is the opening of Federal courts with the phrase "God save the United States and this Honorable Court." *Id.* The Court pointed out that the Continental and First Congress opened with prayers by paid chaplains. *Id.* at 787-88. The opinion by Chief Justice Burger then cautioned that "[s]tanding alone, historical patterns cannot justify contemporary violations of constitutional guarantees," *id.* at 790, but they can illuminate the Framer's intent as to both meaning and practice. "The unbroken practice for two centuries . . . gives abundant assurance that there is no real threat [to religious freedoms]." *Id.* at 795.

20. 822 F.2d at 1408 & n.3.

21. It is clear that prayer is *per se* unallowable in public schools. *E.g.*, Engel v. Vitale, 370 U.S. 421 (1962) (prayer not allowed in public school even if denominationally neutral and voluntary). The frontier issues in this area have moved beyond prayer and into the so-called "moment of silence." *See* Wallace v. Jaffree, 472 U.S. 38 (1985).

22. 370 U.S. 421 (1962). *Stein*, 822 F.2d at 1409-10 ("[T]he prayer in question here should be analyzed under the *Marsh* standards for ceremonial prayer notwithstanding the fact that a school function is involved.").

23. *See supra* notes 10-13 and accompanying text.

24. While *Marsh*'s applicability under most circumstances is unclear, it is inapplicable in educational settings.

> [T]his Court has held that prayers conducted at the commencement of legislative sessions do not violate the Establishment Clause, in part because of long historical usage and lack of particular sectarian content. [*Marsh*]. But we have never indulged a similar assumption with respect to prayers conducted at the opening of the school day.

*Ball*, 473 U.S. at 390 n.9; *Edwards v. Aguillard*, 107 S.Ct 2573, 2577 n.4 (1987) (*Marsh*'s historical approach "is not useful in determining the proper roles of church and state in public schools . . . .").

ment Clause doctrine in relation to *Lemon*. Instead, the *Stein* court[25] found great similarity between the commencement prayers and the legislative ones in *Marsh*, and therefore *Marsh*, rather than the long line of precedents using the *Lemon* test, was deemed to control.[26] If the court had found *Stein* to be a school prayer case, that would have been enough to distinguish it from *Marsh*, and would have required the application of the *Lemon* test.

In applying *Marsh*, the majority in this case determined that two results were required. First, the practice of prayers at commencement exercises is sufficiently analogous to invocations by legislative and judicial bodies as to require the same tolerance.[27] Second, to be allowed the prayers could not be "framed in language that is unacceptable under *Marsh*, language that says to some parents and students: we do not recognize your religious beliefs, our beliefs are superior to yours."[28] The decision therefore allows the practice of prayer, but defines what language would be offensive to the Establishment Clause.[29]

---

25. Two of the three-judge panel agreed with the *Marsh* analysis, but one of these, in a concurring opinion, stated that the prayers should also pass muster under the *Lemon* test, which he decided they failed to do. 822 F.2d at 1410.

26. The court noted that the invocation and benediction had a "solemnizing" function, 822 F.2d at 1409 (quoting Lynch v. Donnelly, 465 U.S. 668, 692-93 (1984)), that the commencement exercise was more like legislative prayer, or opening court sessions with invocations, than a classroom activity, *Id.* at 1409-10, and that the chances for coercion were reduced because parents were present and the setting was not the classroom, *Id.* at 1409.

This reasoning, however, was rejected recently by the Eleventh Circuit, which applied the *Lemon* test to disallow prayers at high school sporting events. Jager v. Douglas County School Dist., 862 F.2d 824 (11th Cir. 1989). The court there specifically rejected the application of *Marsh* in the *Stein* opinion. *Id.* at 829 n.9.

27. 822 F.2d at 1409 ("[P]rohibit[ing] entirely the tradition of invocations at graduation exercises while sanctioning the tradition of invocations for judges, legislators and public officials [would not] be a consistent application of the principle of equal liberty of conscience.").

28. *Id.* at 1410. This language seems to come from the endorsement test, *supra* notes 14-17 and accompanying text, rather than from *Marsh*. *Infra* note 34 and accompanying text.

29. There was a dissenting opinion that, though not questioning the applicability of *Marsh*, pointed out that the complaint said nothing about the content of the invocation and benediction, *id.* at 1411, and argued that under *Marsh* the proper inquiry is not into content, but instead whether "the prayer opportunity has been exploited to proselytize or advance any one, or disparage any other, faith or belief. That being so it is not [proper] to embark on a sensitive evaluation or to parse the content of a particular prayer." *Id.* at 1412 (quoting Marsh v. Chambers, 463 U.S. 783, 794-95 (1983)). Finding no such exploitation, the dissent would allow both the individual prayers and the invocation practice under the *Marsh* analysis. *Id.* at 1412.

Though the dissent pointed out the problem of using the *Marsh* analysis to look into

## III. ANALYSIS

The *Stein* opinion stated that the "boundary between liberty of conscience and public order and tradition [is where] we find ourselves in this case."[30] In trying to strike a balance between these two interests the court departs from the usual judicial doctrine applicable to the Establishment Clause. The court cites *Marsh* to first allow the practice of prayer at commencement exercises, to protect "public order and tradition," and second to cause the content of the prayers to be scrutinized, to protect "liberty of conscience."

The approach of allowing most invocations or benedictions at commencement exercises, but disallowing prayers that contain sectarian language that could be interpreted as an official approval of a particular religious view, is a novelty in Establishment Clause adjudication.[31] That *Marsh* lends itself to allowing ceremonial invocations and benedictions is easy to see, but it is a misreading and misapplication of *Marsh* to cite it as authority to disallow prayers based on their content.[32]

The *Stein* court, however, finds justification for examining

---

the content of the prayers, its main focus was on the three-pronged test. The dissent argued that the *Lemon* test was met in the *Stein* case because none of the traditional factors involved in school prayer cases were involved here. *Id.* at 1412-15.

> An examination of these Supreme Court cases involving prayer, meditation, or posting of religious expression in the public schoolrooms indicates that the Court has been concerned throughout, as in *McCollum* [*v. Board of Educ.*, 333 U.S. 203 (1948)], with (1) regularly scheduled or persistent religious expressions, (2) 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. When a majority of these factors have [sic] been present, the Supreme Court has found the practice or statute to be violative of the first amendment. None of the above factors are [sic] present in this case.

*Id.* at 1414-15.

30. *Id.* at 1408-09.

31. "[N]othing in the Establishment Clause requires the State to suppress a person's speech merely because the *content* of the speech is religious in character." Bender v. Williamsport Area School Dist., 475 U.S. 534, 552 (1986) (Burger, C.J., dissenting, reaching the merits after the majority vacated for lack of standing) (emphasis in original).

32. The Supreme Court mentioned in a footnote in *Marsh* that the prayers approved are "in the Judeo Christian tradition" and characterizes them as "nonsectarian," Marsh v. Chambers, 463 U.S. 783, 793 n.14 (1983); *supra* note 31, but adds that "[t]he content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Marsh*, 463 U.S. at 794-95. The concern of the Supreme Court, then, is impermissible establishment activity, such as proselyting, rather than forbidden words or phrases in the prayers, as the *Stein* court finds.

the content of the prayers in the symbolic union of church and state that may result from the use of Christian words of worship in what is at least a nominally government-approved prayer.[33] The language used for this purpose is that of Justice O'Connor's endorsement test.[34]

The test thus ultimately applied is neither endorsement nor an historical analysis. Because the endorsement test was suggested as an alteration of the *Lemon* test, the *Stein* plurality has taken it out of context by applying it to the *Marsh* rationale. The result of mixing these two precedents is a new test which turns on the language of the prayers, rather than the mere practice of praying; a result far different from, and not justified by, either precedent. The decision resulting from this misapplication of the *Marsh* and endorsement standards is in conflict with the doctrine and precedent surrounding the Establishment Clause in two ways. The regulation of the content of prayers is first, inconsistent with the principle of neutrality that has characterized the law governing the relation of church and state, and second, an impermissible prior restraint.

### *A. Neutrality*

The Supreme Court announced the principle of neutrality in its first major Establishment Clause decision, *Everson v. Board of Education*.[35] That case first announced the principle that whenever a government act involves a religious body or function, the government must be "neutral in its relations."[36] This neutrality was to be a "wall" of separation between church and state.[37] The decision in *Stein*, which uses content as a

---

33. 822 F.2d at 1409.

34. In fact, Justice O'Connor's language is quoted. *Id.* (quoting Lynch v. Donnelly, 465 U.S. 668 (1984) (O'Connor, J., concurring)).

The applicability of the endorsement test in the *Marsh* analysis is at best unclear, especially because Justice O'Connor was referring her remarks specifically to the *Lemon* test. *See supra* note 16. There is language from the endorsement standard in *Marsh*, 463 U.S. at 792 (cited at *Stein*, 822 F.2d at 1409), but the language is that of the Eighth Circuit, which found legislative prayers to be a governmental endorsement of religion. The Supreme Court specifically reversed this holding as incompatible with the history of legislative prayer. Thus, the *Stein* court used the language as did the Eighth Circuit, to disallow the prayers, even though the Eighth Circuit's holding and endorsement analysis were specifically reversed by the Supreme Court. 822 F.2d at 1409.

35. 330 U.S. 1 (1947).

36. *Id.* at 18.

37. *Id.*; Board of Educ. v. Allen, 392 U.S. 236, 243 (1968). This neutrality standard was initially that government could neither advance nor inhibit religion. *Everson*, 330

method of determining whether a prayer is an improper establishment of religion, is inconsistent with the idea of neutrality in two ways. First, it causes entanglement of the state with religious views, and second, it would for the first time allow a religious practice to stand merely because it was nondenominational.

### 1. *Entanglement*

The *Lemon* test grew out of and incorporates the principle of neutrality. The last prong of the test announced by the Court is that a governmental action cannot foster "an excessive entanglement with religion" if it is to be valid under the Establishment Clause.[38] One of the ways a government can entangle itself improperly with religion is by monitoring the *content* of religious expression.[39] It is just this sort of impermissible monitoring that the decision in *Stein* seems to require. Instead of neutrality toward religious beliefs, *Stein* requires the school district and the federal district court to screen the prayers to be offered to insure that they are not "framed in language that is unacceptable" under the Constitution.[40] While striking down or upholding the practice of prayer would be consistent with neutrality, governmental inspection of those same prayers for forbidden "language of Christian theology"[41] causes excessive entanglement and thus is not consistent with the principle of governmental neutrality toward religion.

---

U.S. at 18. It later developed a second prong, that any government action must have a valid secular purpose. This two-pronged standard, later became the three-pronged *Lemon* test. *See supra* note 9 and accompanying text.

38. Walz v. Tax Comm'r, 397 U.S. 664, 674 (1970). This entanglement test was applied as a separate test in *Walz* but was soon incorporated into the two-pronged approach to form the three-pronged *Lemon* test. *See supra* note 37.

39. Lanner v. Wimmer, 662 F.2d 1349, 1361 (10th Cir. 1981) (Granting school credit for some release time religious instruction classes based on a test of the content of that class is unallowable as "it requires the public school officials to entangle themselves excessively in church-sponsored institutions by examining and monitoring the *content* of courses offered there to insure that they are not 'mainly denominational.'" (Emphasis in original.)); Bender v. Williamsport Area School Dist., 741 F.2d 538, 554 n.22 (3d Cir. 1984) ("[I]f the courts were to establish the degree of sectarianism as a part of the Establishment Clause tests, then they would themselves be engaging in impermissible entanglement by the very act of applying those tests . . . ."), *vacated for lack of standing*, 475 U.S. 534 (1986). *See also* Aguilar v. Felton, 473 U.S. 402 (1985) (state monitoring of instruction by religious schools receiving state funding disallowed under "entanglement" prong of *Lemon*); Meek v. Pittenger, 421 U.S. 349, 370 (1975).

40. Stein v. Plainwell Community Schools, 822 F.2d 1406, 1410 (6th Cir. 1987).

41. *Id.*

*2. Content neutrality*

The second manner that the *Stein* court's decision is inconsistent with the principle of governmental neutrality toward religion is by requiring content neutrality. At first blush, requiring content neutrality for ceremonial prayers seems consistent with the principle of governmental neutrality toward religion. This, however, is not the case. The Supreme Court has never made the content of prayers a factor in deciding their constitutionality, and has in fact indicated that content neutrality is *not* to be considered in making such a decision. In the landmark case of *Engel v. Vitale*[42] the Court stated that "the fact that the prayer may be denominationally neutral . . . [cannot] serve to free it from the limitations of the Establishment Clause."[43] It is thus ironic that a defense of the practice of prayer in schools that is specifically rejected by the Supreme Court in *Engel* is found to be a requirement in *Stein.*

The *Stein* court distinguishes *Engel* on the basis that *Engel* was a school prayer case, and the commencement prayers in question are not in a school setting.[44] This may distinguish the case, but does not distinguish the principle that mere content neutrality will not validate an otherwise invalid activity.[45]

The *Stein* court cites a footnote of *Marsh v. Chambers*[46] as justification for requiring content neutrality. This is a misreading of *Marsh.*[47] The Supreme Court specifically rejects in *Marsh* the contention that legislative prayers establish religion even if in the Judeo-Christian tradition.[48] Instead the Court looks at the

---

42. 370 U.S. 421 (1962).

43. *Id.* at 430; *see also* Karen B. v. Treen, 653 F.2d 897, 901 (5th Cir. 1981) (content neutrality will not cure a constitutional defect), *aff'd mem.*, 455 U.S. 913 (1982); Mangold v. Albert Gallatin Area School Dist., 438 F.2d 1194, 1195 (3d Cir. 1971) (Denominational neutrality not of "constitutional moment when the establishment clause is involved.").

44. *See supra* notes 20-22 and accompanying text.

45. The court in *Stein* thus creates for itself a paradox. If the practice is invalid, content neutrality will not validate it. *See supra* note 42-43 and accompanying text. But if the practice is valid, as the court finds, Stein v. Plainwell Community Schools, 822 F.2d 1406, 1409 (1987), then the court is mandating governmental regulation of the content of a valid religious expression. *See infra* notes 51-59 and accompanying text.

46. 463 U.S. 783, 793 n.14 (1983). *See supra* notes 32 and accompanying text.

47. *See supra* note 32. The Court in *Marsh* stated that "[t]he content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or disparage any other, faith of belief." *Marsh*, 463 U.S. at 794-95.

48. *Marsh*, 463 U.S. at 793. There the Court stated:

Beyond the bare fact that a prayer is offered, three points have been made:

context of the prayers, concluding that the historical background of legislative prayer is what justifies it under the Constitution.[49] Thus, while the *context* of the prayer may be considered,[50] the Supreme Court has never considered the *content*. In fact, if government is to remain neutral in religious matters, courts should not decide what is religious and what is not based on the wording of a prayer.

### *B. Prior Restraint*

The second major defect in the *Stein* rationale is that it guards against establishment by placing a prior restraint on speech. One of the stated goals of the court in *Stein* is the protection of liberty of conscience. The method used to protect this liberty is disallowing prayers based upon their content. Despite lofty goals, the use of governmental censorship[51] of prayer to protect the "liberty of conscience" is, at best, ironic.

The Supreme Court has been very explicit that content is not a constitutionally justified method of regulating speech.[52] It

---

> first, that a clergyman of only one denomination — Presbyterian — has been selected for sixteen years; second, that the chaplain is paid at public expense; and third, *that the prayers are in the Judeo-Christian tradition.* Weighed against the historical background, these factors do not serve to invalidate Nebraska's practice [of legislative prayer].

*Id.* (emphasis added, footnotes omitted). The court in *Stein* cites a footnote from the above quote which notes that the clergyman "characterizes his prayers as 'nonsectarian,'Judeo Christian,' and with 'elements of the American civil religion.' Although some of his earlier prayers were often explicitly Christian, [he] removed all references to Christ after a 1980 complaint from a Jewish legislator." *Id.* at 793 n.14. The language of this footnote is read by the *Stein* court to require that prayers at public functions not be allowed to "employ the language of Christian theology and prayer." *Stein*, 822 F.2d at 1410. Even if this reading were correct, the resulting test is at best confusing as it would allow Judeo-Christian language, but not Christian language. Does the *Stein* court merely forbid references to Jesus Christ?

49. *See supra* notes 18 & 19 and accompanying text.

50. *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668 (1984) (totality of Christmas decorations and holiday considered); Marsh v. Chambers, 463 U.S. 783 (1983) (history and nature of practice of legislative prayer given great weight).

51. "To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control." Police Dep't. v. Mosley, 408 U.S. 92, 95-96 (1972).

52. "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Id.* This theme is prevalent in free-speech cases. "Our cases have required the most exacting scrutiny in cases in which a State undertakes to regulate speech on the basis of content." Widmar v. Vincent, 454 U.S. 263, 276 (1981). While both of these cases dealt with traditional or limited public forums, the Court has not upheld any content-related restriction

has been just as explicit that prior restraints are to be allowed in only the most extreme exigencies.[53] A court-ordered restriction on the content of prayer or other speech is a prior restraint,[54] and a court ordered restraint is as invalid as any governmental restraint.[55]

The holding of this case thus seems to run afoul of the Constitutional mandate against prior restraint. Where it goes wrong is in deciding what the Establishment Clause should forbid. Establishment of religion is best looked at as a forbidden governmental activity,[56] and it is the act of prayer that should be found as either establishment or non-establishment, regardless of the content; for when content is the issue, the court is addressing speech, not establishment. The form of the speech is inconsequential. The courts can clearly forbid governmental proselyting or other religious activity, but to forbid prayers because of content, whether at a government function or not, is an impermissible prior restraint.

Protecting against establishment of religion is not a state interest "sufficiently 'compelling' to justify content-based discrimination against . . . religious speech."[57] To place an injunction[58] on the use of particular phrases or words in the prayers is

---

of protected speech. *See also* Kev, Inc. v. Kitsap County, 793 F.2d 1053, 1058 (9th Cir. 1986) ("[R]egulations that restrain speech on the basis of content presumptively violate the first amendment . . . ."); Adamian v. Jacobsen, 523 F.2d 929, 933 (9th Cir. 1975) ("The state cannot regulate any protected speech on the basis of content."), *cert. denied*, 446 U.S. 938 (1980); *In re* Nat'l. Serv. Corp., 742 F.2d 859, 862 (5th Cir. 1984) ("When the content of pure speech is restricted and prohibited, the restraint bears a heavy presumption against its validity and mandates the closest scrutiny.").

53. "[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." Nebraska Press Ass'n. v. Stuart, 427 U.S. 539, 559 (1976). *See also* Rosen v. Port of Portland, 641 F.2d 1243, 1249 (9th Cir. 1981).

54. The "classic mold of prior restraint" is a "prior injunction against publication." Smith v. Daily Mail Pub. Inc., 443 U.S. 97, 101 (1979). Here the injunction is against words that connote religious belief, a form of protected speech. "An outright prohibition [of a certain kind of speech, in this case profanity] can be sustained only if it proscribes unprotected speech [i.e. obscenity or fighting words]." Beckerman v. City of Tupelo, 664 F.2d 502, 513 (5th Cir. 1981).

55. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976).

56. *See supra* note 32.

57. Widmar v. Vincent, 454 U.S. 263, 276 (1981). In *Widmar* the Supreme Court ruled that a university that made certain facilities available for public speech could not prohibit prayer and worship in those facilities under the Free Speech Clause, U.S. CONST. art I. *Id.* The Court rejected the university's contention that the Establishment Clause created a compelling state interest in restricting freedom of speech.

58. The exact remedy was not given by the court, which remanded for that purpose. However, an injunction or other sort of court-imposed guidelines to the school district

a prior restraint on speech, and is a more serious threat to Constitutional freedoms than the threat of establishment which it was meant to abate.[59]

## IV. Conclusion

In *Stein v. Plainwell Community Schools* a three-member panel for the Sixth Circuit Court of Appeals found prayers in high school commencement exercises unacceptable under the Establishment Clause because of their content. It concluded that such prayers cannot constitutionally be framed in language that endorses a Christian viewpoint. This conclusion does violence to the doctrine surrounding the Establishment Clause.

The foundation of Establishment Clause doctrine is the principle of neutrality toward religion. By analyzing the content of prayers to find words of worship, the court has both entangled itself with religion and, contrary to precedent, allowed a religious activity to stand merely because it is nondenominational.

The injunction the court places on the use of certain language, the words of Christian theology, is also a prior restraint. Religious speech is protected by the freedom of speech, and therefore the injunction is in violation of the first amendment.

The court errs in finding establishment of religion in the use of Christian words of worship in prayers rather than in the act of praying itself. Establishment is an activity. If the prayer is a disallowed establishment activity, controlling its content should not validate it. On the other hand, if the activity of prayer is valid, the court is then censoring a valid form of speech. Whether or not the prayers can be allowed under the Establishment Clause, their content should not be subject to control by the courts.

*Ken Jorgensen*

---

seems to be required. *See supra* note 7 and accompanying text.

59. *See supra* note 54 and accompanying text.