BYU Law Review

Volume 1991 | Issue 2 Article 3

5-1-1991

Establishment Clause Jurisprudence and Its Effect on Prayer at Commencement Exercises: A Look at Weisman v. Lee

Brian A. Hatch

Establishment Clause Jurisprudence and Its Effect on Prayer at Commencement Exercises: A Look at *Weisman v. Lee*

I. INTRODUCTION

Government funded education has been a feature of the United States since the first half of the nineteenth century. Before that time, education was almost purely a sectarian exercise.[1] The religious roots of our educational system may, in part, explain the tradition of opening and closing public school commencement exercises with prayer.

The Supreme Court cases dealing with prayer in the public schools have held that classroom prayer violates the establishment clause of the first amendment.[2] The Court has not yet addressed the constitutionality of a prayer given at a public school graduation exercise, although the issue has been discussed in several federal court of appeals and district court opinions.[3] This note examines the First Circuit's decision in *Weisman v. Lee*,[4] which held that public school graduation invocations and benedictions violate the establishment clause of the first amendment. The opinion of the court consists of only two paragraphs and contains no analysis. This note therefore discusses the concurring opinion of Judge Bownes and its analysis.

Part II of the note discusses the historical development of establishment clause jurisprudence and the application of the

---

1. *See* Abington School Dist. v. Schempp, 374 U.S. 203, 238 n.7 (1963) (Brennan, J., concurring). Indeed, the footnote suggests that American education was religiously dominated well into the latter half of the 19th century. *Id.* (citing 2 J. BRYCE, THE AMERICAN COMMONWEALTH 734-35 (1933)).

2. Wallace v. Jaffree, 472 U.S. 38 (1985); *Schempp*, 374 U.S. at 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962). *See also infra* note 76.

The establishment clause states: "Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST. amend. I.

3. *See, e.g.*, Weisman v. Lee, 728 F. Supp. 68 (D.R.I.), *aff'd*, 908 F.2d 1090 (1st Cir. 1990), *cert. granted sub nom*, 111 S. Ct 1305 (1991); Stein v. Plainwell Community Schools, 822 F.2d 1406 (6th Cir. 1987); Graham v. Central Community School Dist., 608 F. Supp. 531 (S.D. Iowa 1985). *See also* Jager v. Douglas County School Dist., 862 F.2d 824 (11th Cir.), *cert. denied*, 490 U.S. 1090 (1989) (invocations prior to high school football games held violative of the first amendment).

4. 908 F.2d 1090 (1st Cir. 1990).

test developed in *Lemon v. Kurtzman*.[5] Parts III and IV treat, respectively, the facts and the reasoning of *Weisman v. Lee*. Part V analyzes the *Weisman* Concurrence and discusses its probable affect on future establishment clause inquiry and on the use of prayer at graduation exercises. Finally, the note concludes in part VI that graduation prayers will not pass establishment clause scrutiny under any of the tests currently embraced by the Supreme Court.

II. Historical Development

The various tests the Court has developed to deal with establishment clause cases derive from the broad language of the first amendment. The amendment reads in pertinent part, "Congress shall make no law respecting an establishment of religion . . . ."[6] This prohibition against the establishment of religion has been applied to the states through the fourteenth amendment.[7] The exact meaning of the establishment clause, however, is the subject of much disagreement. An illustrative statement by Justice Black is found in *Everson v. Board of Education*:[8]

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. . . . Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect a "wall of separation between church and State."[9]

Since Justice Black's day, the height of Jefferson's "wall of separation" has varied. Indeed, in *Everson* the wall was not as high as Justice Black's statement suggests. There, the Court found that a New Jersey program to reimburse parents for their chil-

---

5. 403 U.S. 602 (1971). The *Lemon* test states: "First, the [practice] must have a secular purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, [it] must not foster 'an excessive government entanglement with religion.' " *Id.* at 612-13 (citations omitted). For a discussion of the *Lemon* test, see *infra* notes 17-32 and accompanying text.

6. U.S. Const. amend. I.

7. Cantwell v. Connecticut, 310 U.S. 296 (1940).

8. 330 U.S. 1 (1947).

9. *Id.* at 15-16 (citation omitted; emphasis added) (quoting Reynolds v. United States, 98 U.S. 145, 168 (1878)).

dren's public transportation costs did not offend the establishment clause, even though many of those children attended parochial schools.[10]

The Court has been particularly strict, however, in its review of establishment clause challenges involving the public schools.[11] In the early school prayer cases, for example, the Court erected a high wall of separation. In *Engel v. Vitale*[12] and *Abington School District v. Schempp*,[13] the Court found that daily classroom prayer and Bible recitation violated the first amendment. Justice Frankfurter earlier expressed this same concern for establishment clause issues arising in the public schools:

> The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools, to avoid confusing, not to say fusing, what the Constitution sought to keep strictly apart.[14]

The Court has apparently found the wall of separation an unworkable basis on which to establish a constitutional inquiry. The Court acknowledged that "[s]ome relationship between government and religious organizations is inevitable."[15] Perhaps because of this fact, the Court has concluded that "the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."[16]

A. The Lemon *Test*

Because the establishment clause and its attendant metaphors are lacking in precise meaning, the Court in *Lemon* articulated a three-part inquiry. "First, the [practice] must have a secular purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, [it] must not foster 'an excessive government entanglement with religion.' "[17]

---

10. *Id.* at 18.

11. Edwards v. Aguillard, 482 U.S. 578, 583-84 (1987).

12. 370 U.S. 421 (1962).

13. 374 U.S. 203 (1963).

14. McCollum v. Board of Educ., 333 U.S. 203, 231 (1948) (Frankfurter, J., concurring).

15. Lemon v. Kurtzman, 403 U.S. 602, 614 (1971).

16. *Id.*

17. *Id.* at 612-13 (citations omitted).

The Court considered the *Lemon* test a synthesis of the cumulative establishment clause inquiries up to that point.[18] A statute or practice is unconstitutional if it fails any one of the three parts of the test.[19]

The first element, the "purpose" element, looks to the intent of the statute or practice. The Court considers "whether government's actual purpose is to endorse or disapprove of religion."[20] Because a single purpose is rare, the Court looks to the actual predominant purpose of the act or practice;[21] the religious motives of state actors are not dispositive of the question.[22] Thus, it appears that an act or practice having mixed secular and religious purposes will not violate the first element of the test if no particular religious purpose predominates.[23]

The second part of the *Lemon* test is the "effect" element. The Court determines whether the "primary or principal effect of the [practice or act] is to advance or inhibit religion."[24] The effect also must be something more than remote or incidental.[25] Therefore, if the Court finds that the effect is "direct and substantial," religion has been advanced or inhibited.[26] This part of the *Lemon* test has been substantially modified in more recent decisions of the Supreme Court.[27]

The third and final inquiry of the *Lemon* test is the "entanglement" element. The Court has articulated two distinct types of entanglement. The first is that which tends to cause political divisiveness.[28] The Court has held, however, that political divi-

---

18. *Id.* at 612. The Court later reaffirmed this conclusion stating, "the now well-defined three-part test that has emerged from our decisions is a product of considerations derived from the full sweep of the Establishment Clause cases." Committee for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 772 (1973).

19. *See* County of Allegheny v. ACLU, 109 S. Ct. 3086, 3098 (1989); Edwards v. Aguillard, 482 U.S. 578, 583 (1987).

20. Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring).

21. Wallace v. Jaffree, 472 U.S. 38, 56 (1985).

22. Board of Educ. v. Mergens, 110 S. Ct. 2356, 2371 (1990).

23. Abington School Dist. v. Schempp, 374 U.S. 203, 296-303 (1963) (Brennan, J., concurring).

24. School Dist. v. Ball, 473 U.S. 373, 383 (1985).

25. *Id.* at 393.

26. *Id.* Though the second part of the *Lemon* test purportedly examines whether religion has been advanced or inhibited, the establishment clause would probably not be implicated if religion was inhibited. The more likely challenge to an act or practice that had the effect of inhibiting religion would be under the free exercise clause.

27. For the discussion on the "endorsement" modifications to the test, see *infra* notes 43-55 and accompanying text.

28. Political divisiveness concerns the public turmoil associated with a particular practice. The Court has held that a plaintiff cannot prove such divisiveness merely by

siveness by itself is not enough to find entanglement.[29] In fact, the Court will only consider political divisiveness if the challenged action involves a direct government subsidy to a religious institution.[30]

The second type of entanglement involves problems of administrative and supervisory entanglement. This entanglement inquiry is designed to protect religion from intrusion by the government. The Court looks for ongoing interaction with and "continuing state surveillance" of religious institutions or practices.[31] "The picture of state inspectors prowling the halls of parochial schools and auditing classroom instruction surely raises more than an imagined specter of governmental 'secularization of a creed.' "[32]

B. Lemon *Criticized*

The Court has tended to apply the *Lemon* test with something less than evenhanded vigor. In fact, establishment clause jurisprudence under the *Lemon* standard has been widely criticized; "people who disagree about nearly everything else in the law agree that establishment doctrine is seriously, perhaps distinctively, defective."[33] In *Lynch v. Donnelly*,[34] the Court applied the three steps of the *Lemon* test to a city's display of a nativity scene. The *Lynch* Court approached the facts of the case with considerable deference to the status quo and found that the city's predominant purpose was to celebrate and depict the origins of Christmas; the primary effect of the display was only to indirectly or remotely advance religion; and the possibility of any entanglement was unlikely.[35]

Little more than a year later, the Court rendered the decision in *Aguilar v. Felton*.[36] In *Aguilar*, the City of New York was

---

bringing the lawsuit itself. Lynch v. Donnelly, 465 U.S. 668 (1984).

29. *Id.* at 684.

30. *Id.* (citing Mueller v. Allen, 463 U.S. 388, 403-04 n.11 (1983)).

31. *Lemon*, 403 U.S. at 619.

32. Edwards v. Aguillard, 482 U.S. 578, 650 (Brennan, J., concurring).

33. Smith, *Separation and the "Secular": Reconstructing the Disestablishment Decision*, 67 TEX. L. REV. 955, 956 (1989). *See also* Lee, *The Religion Clauses: Problems and Prospects*, 1986 B.Y.U. L. REV. 337; McConnell, *The Religion Clauses of the First Amendment: Where Is the Supreme Court Heading?*, 32 CATH. LAW. 187 (1988); *Edwards*, 482 U.S. at 610-40 (Scalia, J., dissenting).

34. 465 U.S. 668 (1984).

35. *Id.* at 681-84.

36. 473 U.S. 402 (1985).

paying public school teachers who conducted remedial education classes for low-income students. Some thirteen-percent of those students attended religious schools. The state teachers held their classes in rooms that the religious schools had set aside for those classes. The Court conceded that the program did not have the purpose or effect of advancing religion.[37] However, the Court did find that the program risked excessive entanglement and therefore violated the establishment clause. The Court based its finding on the occasional presence of state personnel to monitor their teachers and the frequent contacts required between the state employed teachers and the church employed teachers.[38] The Court rigidly applied the entanglement element of the test even though the facts indicated that the program had "done so much good and little, if any, detectable harm."[39] It is probable that had the Court taken the less rigid *Lynch* approach to these facts, no excessive entanglement would have been found.

In addition to the varying degrees of vigor with which the Court has applied the *Lemon* test, there is arguably an internal inconsistency between the effect element and the entanglement element. The interplay between these two prongs of the test "creates an 'insoluable [sic] paradox' in school aid cases: we have required aid to parochial schools to be closely watched lest it be put to sectarian use, yet this close supervision itself will create an entanglement."[40] Several justices have suggested that because of this paradox within the *Lemon* test, the entanglement inquiry or perhaps the entire test should be rejected.[41] For those who count votes, however, a majority of the Court has not yet embraced such rejection.[42]

C. Lemon *Clarified*

The first two elements of the *Lemon* test have undergone

---

37. *Id.* at 409.

38. *Id.* at 413.

39. *Id.* at 415 (Powell, J., concurring) (quoting Felton v. United States Dept. of Educ., 739 F.2d 48, 72 (2d Cir. 1984)). *Felton* was the same case below and the quoted language is taken from the opinion of Judge Friendly.

40. Wallace v. Jaffree, 472 U.S. 38, 109 (1985) (Rehnquist, J., dissenting) (citation omitted).

41. *See, e.g., Id.* at 91 (White, J., dissenting); *Id.* at 112-13 (Rehnquist, J., dissenting); *Aguilar*, 473 U.S. at 422 (O'Connor, J., dissenting).

42. *See* Board of Educ. v. Mergens, 110 S. Ct. 2356 (1990); County of Allegheny v. ACLU, 109 S. Ct. 3086 (1989).

some modification in recent decisions through the application of the "endorsement test." This shift in establishment clause analysis is probably best viewed as a clarification of the *Lemon* test rather than a new test itself.[43] The endorsement standard was first articulated by Justice O'Connor in her dissent in *Lynch*.[44] Since then, the Court has adopted the language and, more recently, the analysis of the endorsement test.[45]

Under the endorsement test, the purpose element of *Lemon* has been refined to question the actual subjective intent of the government. If the government intends to send a message that it endorses religion, then the act or practice violates the establishment clause.[46] The Court is generally willing to accept the government's stated secular purpose, but has invalidated a state statute based on the intent to endorse religion articulated in the legislative history.[47]

The second element of the *Lemon* test has been modified so that the Court asks whether the effect of the act or practice is to objectively convey a message endorsing religion. The government endorses religion when it conveys the message that a particular creed or religion in general is favored.[48] In *County of Allegheny v. ACLU*,[49] the Court found that the government's display of a nativity scene in the city-county building had violated the establishment clause. The creche in question contained a banner which stated, "Gloria in excelsis Deo!" The Court, considering the prominent location of the display and the message of the banner, held that the particular physical setting communicated an endorsement of Christian doctrine.[50] The Court reasoned that

> [t]he effect of the display depends upon the message that the government's practice communicates: the question is "what viewers may fairly understand to be the purpose of the dis-

---

43. *See, e.g.*, Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW. U.L. REV. 1113, 1147 (1988).

44. 465 U.S. 668, 687 (1984).

45. A majority of the Court in *Wallace* adopted Justice O'Connor's endorsement language. 472 U.S. at 38. In *County of Allegheny* the Court based its opinion on the endorsement test applied to the governmental display of a nativity scene. 109 S. Ct. at 3086.

46. *Lynch*, 465 U.S. at 691 (O'Connor, J., concurring).

47. *Wallace*, 472 U.S. at 38.

48. *Id.* at 70.

49. 109 S. Ct. 3086 (1989).

50. *Id.* at 3105.

> play." That inquiry, of necessity, turns upon the context in which the contested object appears: "a typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content." The concurrence thus emphasizes that the constitutionality of the creche in that case depended upon its "particular physical setting," and further observes: "Every government practice must be judged in its unique circumstances to determine whether it [endorses] religion."[51]

1. *Entanglement under the endorsement analysis*

It is unclear whether the entanglement element of the *Lemon* test survives the endorsement modifications as a separate inquiry or merely as one of many factors to be considered. The recent opinion in *Board of Education v. Mergens*[52] suggests that excessive entanglement is still part of the Court's establishment clause inquiry. In *Mergens*, Justice O'Connor, writing for a plurality of the Court, applied the entanglement analysis and held that custodial oversight of student-initiated religious groups did not impermissibly entangle the school authorities in religion.[53]

That Justice O'Connor applied the entanglement inquiry is somewhat at odds with her opinion in *Aguilar v. Felton*.[54] There Justice O'Connor expressed doubt about the continued use of the entanglement inquiry in establishment clause cases.

> My reservations about the entanglement test . . . have come to encompass its institutional aspects. . . . [M]any of the inconsistencies in our Establishment Clause decisions can be ascribed to our insistence that parochial aid programs with a valid purpose and effect may still be invalid by virtue of undue entanglement. . . . To a great extent, the anomalous results . . . are "attributable to [the] 'entanglement' prong." Pervasive institutional involvement of church and state may remain relevant in deciding the *effect* of a statute which is alleged to violate the Establishment Clause, but state efforts to ensure that public resources are used only for nonsectarian ends should not

---

51. *Id.* at 3102 (citations omitted). For a similar discussion also involving a nativity scene, see Lynch v. Donnelly, 465 U.S. 668 (1984). In *Lynch*, however, the Court considered the setting and found the display constitutionally permissible.

52. 110 S. Ct. 2356 (1990).

53. *Id.* at 2373.

54. 473 U.S. 402, 421 (1985).

> in themselves serve to invalidate an otherwise valid statute. . . . If a statute lacks a purpose or effect of advancing or endorsing religion, I would not invalidate it merely because it requires some ongoing cooperation between church and state or some state supervision to ensure that state funds do not advance religion.[55]

2. *The* Marsh *exception*

The only alternative establishment clause test is found in *Marsh v. Chambers*.[56] There the Court addressed whether opening state legislative sessions with prayer by a state-employed clergyman violated the establishment clause. Though the circuit court below employed the *Lemon* test and found the prayers unconstitutional, the Supreme Court reversed without any attempt to apply the *Lemon* test. The Court found the legislative prayer to be a "tolerable acknowledgement" of religious belief and not a "step towards establishment" of religion.[57] The Court seemed to be guided by the "unique history" of legislative prayer. Such history evinced the intent of the First Congress with regard to the scope of the establishment clause.

> It can hardly be thought that in the same week Members of the First Congress voted to appoint and pay a chaplain for each House and also voted to approve the draft of the First Amendment for submission to the states, they intended the Establishment Clause of the Amendment to forbid what they had just declared acceptable.[58]

The Court went on to examine the particular facts of the dispute. The sixteen-year tenure of a clergyman representing a single religion caused no establishment conflict. Neither did the clergyman's salary from public funds constitute establishment. The Court characterized the content of the prayers as non-sectarian and found that the prayers had not been used "to proselytize or advance only one, or to disparage any other, faith or belief."[59] In such a circumstance, "it is not for us to . . . parse the

---

55. *Id.* at 429-30 (O'Connor, J., dissenting) (citations omitted) (emphasis in original).

56. 463 U.S. 783 (1983). Alternative in this sense means that the test has been adopted by a majority of the Court.

57. *Id.* at 792.

58. *Id.* at 790.

59. *Id.* at 794-95.

content of a particular prayer."[60] Thus, the content of the prayer caused no constitutional concern.

The logical extension of the content inquiry is, however, that the Court *will* "parse the content" of the prayer if it proselytizes or advances a belief. While the Court offered no example of a prayer that was so used, it appears that a prayer making specific reference to Christ would be in violation.[61] Whether *Marsh* is useful precedent seems doubtful since the Court has never extended its reasoning to any other establishment clause case.[62]

D. The Current State of Establishment Clause Inquiry

The *Lemon* test seems to be fairly well ingrained in establishment clause jurisprudence. The Court recently invoked the *Lemon* test in *Board of Education v. Mergens*.[63] In *County of Allegheny v. ACLU*[64] both the Court's opinion and the dissenting opinion applied *Lemon* in their respective decisions.[65] The difference between the Court's opinion and the dissenting opinion in *County of Allegheny* is probably the endorsement test versus a proselytization test. The endorsement version of the *Lemon* test was the basis for the opinion of the Court. The dissent, however, articulated a proselytization version of the same *Lemon* test.[66]

The proselytization approach looked to whether a realistic risk of establishment existed. If the government's action constituted only a passive or symbolic recognition of religion then there is no realistic risk of establishment.[67] This approach is more accommodating toward religion than the endorsement test. A greater degree of state involvement or coercion would be re-

---

60. *Id.* at 795.

61. *Id.* at 793 & n.14. The particular prayers at issue had made no references to Christ since 1980. Before that time they were "often explicitly Christian." *Id.*

62. In addition, *Marsh* has been criticized in its own right as an establishment clause inquiry. *See* Note, *Legislative Prayer and the Establishment Clause: An Exception to Traditional Analysis*, 17 CREIGHTON L. REV. 157 (1984); Note, *The* Lemon *Test Soured: The Supreme Court's New Establishment Clause Analysis*, 37 VAND. L. REV. 1175 (1984); Drakeman, *Antidisestablishmentarianism: The Latest (and Longest) Word from the Supreme Court in* Marsh v. Chambers, 5 CARDOZO L. REV. 153 (1984).

63. 110 S. Ct. 2356 (1990).

64. 109 S. Ct. 3086 (1989).

65. *Id.*

66. *Id.* at 3134.

67. *Id.* at 3138-39.

quired than simply "making adherence to a religion relevant in any way to a person's standing in the political community."[68]

The difficult question is which of the two versions of the *Lemon* test will the Court adopt. Any answer to this question would be, at best, speculative. There is no clear majority for either of the two propositions. Indeed, two of the justices voting for the proselytization approach in *County of Allegheny* voted for the endorsement approach in *Mergens*.[69] It seems rather obvious that the Court is more concerned about the result in any particular case than it is about applying "tidy formulas by rote. . . ."[70] Nevertheless, courts require some kind of analytical framework to adjudicate disputes that arise. The *Lemon* test, in some form or another, is that framework.

III. Facts of *Weisman v. Lee*[71]

The Providence, Rhode Island, School Committee oversees the city's public school graduation ceremonies and permits the schools to open and close the ceremony with prayer. School principals have at their disposal a pamphlet describing the type of prayer to be given at the ceremony. The pamphlet is titled "Guidelines for Civic Occasions" and is published by the National Conference of Christians and Jews.[72] Mr. Lee, as school principal, provided a copy of the pamphlet to Rabbi Gutterman who was to give the prayers at the Bishop Middle School graduation. Mr. Lee also advised Rabbi Gutterman that the prayers should be non-sectarian. Mr. Weisman, whose daughter was graduating, filed a motion for a temporary restraining order to halt prayer "to a deity" as part of the graduation ceremony.[73] The motion was denied and Rabbi Gutterman opened and closed the graduation exercises with prayer as scheduled.[74] After

---

68. Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring).

69. Both Justice White and Chief Justice Rehnquist voted with Justice Kennedy's proselytization argument in *County of Allegheny*, 109 S. Ct. at 3134, and less than a year later voted with Justice O'Connor's endorsement argument in *Mergens*, 110 S. Ct. at 2356.

70. Wallace v. Jaffree, 472 U.S. 38, 89 (1985) (Burger, C.J., dissenting).

71. 908 F.2d 1090 (1st Cir. 1990).

72. *See Weisman v. Lee*, 728 F. Supp. 68, 69 (D.R.I.), *aff'd*, 908 F.2d 1090 (1st Cir. 1990).

73. *Id.* at 69.

74. The invocation was presented as follows:

> God of the Free, Hope of the Brave: For the legacy of America where diversity is celebrated and the rights of minorities are protected, we thank You. May these young men and women grow up to enrich it.

hearing all the evidence, the United States District Court for the District of Rhode Island granted Weisman's request for a permanent injunction. The injunction prevented the use of invocations and benedictions in the form of a prayer to deity at the graduation ceremonies of public schools.[75] Applying the *Lemon* test, the district court found that such prayer violated the establishment clause. The First Circuit upheld the district court's decision and adopted wholesale the district court's opinion.[76]

IV. REASONING

The First Circuit majority opinion based its holding exclusively on the district court's finding that the prayer failed the *Lemon* test. The concurrence set out the three elements of the *Lemon* test and attempted to show how the prayer issue failed each one of those elements. In the course of his concurrence, Judge Bownes detailed and analogized the Supreme Court holdings in the school prayer cases.[77]

> For the liberty of America, We thank You. May these new graduates grow up to guard it. For the political process of America in which all its citizens may participate, for its court system where all can seek justice we thank You. May those we honor this morning always turn to it in trust.
>
> For the destiny of America we thank You. May the graduates of Nathan Bishop Middle School so live that they might help to share it. May our aspirations for our country and for these young people, who are our hope for the future, be richly fulfilled.
>
> AMEN.

Id. at 69 n.2.

The benediction was presented as follows:

> O God, we are grateful to You for having endowed us with the capacity for learning which we have celebrated on this joyous commencement.
>
> Happy families give thanks for seeing their children achieve an important milestone. Send Your blessings upon the teachers and administrators who helped prepare them.
>
> The graduates now need strength and guidance for the future. Help them to understand that we are not complete with academic knowledge alone. We must each strive to fulfill what You require of us all: To do justly, to love mercy, to walk humbly.
>
> We give thanks to You, Lord, for keeping us alive, sustaining us and allowing us to reach this special, happy occasion.
>
> AMEN

Id. at 70 n.3.

75. *Id.* at 68.

76. Weisman v. Lee, 908 F.2d 1090 (1st Cir. 1990).

77. The school prayer cases are not strictly limited to those dealing with daily classroom prayer. *See, e.g.*, Engel v. Vitale, 370 U.S. 421 (1962) (daily classroom prayer); Abington School Dist. v. Schempp, 347 U.S. 208 (1963) (recitation of the Lord's Prayer and other biblical passages); Stone v. Graham, 449 U.S. 39 (1980) (the ten command-

The concurrence dismissed the argument that graduation prayers might be better analyzed under the *Lemon* test exception found in *Marsh v. Chambers*.[78] In *Marsh*, the Supreme Court held that the practice of opening a state legislative session with prayer did not violate the establishment clause.[79] The *Weisman* concurrence specifically held that graduation prayer is more closely analogous to school prayer than to ceremonial legislative prayer.[80]

The concurrence also rejected *Stein v. Plainwell Community Schools*[81] as precedent for applying *Marsh* in graduation prayer cases. In *Stein*, a divided panel of the Sixth Circuit found that prayer at graduation exercises would not violate the establishment clause under the *Marsh* standard if the prayer was non-denominational.[82] The *Weisman* concurrence cited the split in the panel, and the fact that it ultimately held the prayers unconstitutional, to reject *Stein* as persuasive authority.

In addition, the concurrence discussed the problems that would arise if the logic of *Stein* or that of the district court in *Weisman* were followed.[83] Both of those opinions suggested that a prayer given at a public school graduation would overcome the establishment clause hurdle if the prayer were sufficiently sanitized.[84] The *Weisman* concurrence recognized that "[j]udges should not be passing on the acceptability of specific passages in prayers."[85] Judge Bownes determined that the endorsement version of the *Lemon* test should be the basis for establishment

---

ments displayed in classrooms); Wallace v. Jaffree, 472 U.S. 38 (1985) (moment of silence).

78. 463 U.S. 783 (1983). The Court did not specifically state that it was creating an exception to the *Lemon* test. The conclusion that *Marsh* creates an exception is articulated in the dissent. *Id.* at 795 (Brennan, J., dissenting).

79. *See supra* notes 56-62 and accompanying text.

80. *Weisman*, 908 F.2d at 1094 (Bownes, J., concurring).

81. 822 F.2d 1406 (6th Cir. 1987).

82. *Id.* The concurrence in *Stein* pointed out that constitutional prayers must be not only non-denominational, but also must be non-sectarian or "similarly secular to those invocations and benedictions given at public governmental-sponsored occasions as in state legislatures, in the courts, and in Congress . . . ." *Id.* at 1410 (Milburn, J., concurring). The prayers in *Stein* did not meet the standard of the court or the concurrence, and were held unconstitutional.

83. For a discussion of problems surrounding judicial scrutiny of prayers, see *infra* notes 106-112 and accompanying text.

84. *Stein*, 822 F.2d at 1406; Weisman v. Lee, 728 F. Supp. 68 (D.R.I. 1990).

85. *Weisman*, 908 F.2d at 1097 (Bownes J., concurring).

clause analysis and found the prayers unconstitutional under that standard.[86]

V. ANALYSIS

A. *Rejection of Original Intent*

The concurrence correctly points out that the language of the establishment clause requires close scrutiny of those acts that threaten a step toward establishment.[87] "A given law might not *establish* a state religion but nevertheless be one 'respecting' that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment."[88] The establishment clause is directed against establishment of religion and not simply against an established state church.[89] The plain language of the amendment, while providing a general direction for inquiry, is of little help in deciding individual cases.[90]

Similarly, any guidance from the perceived intent of the Framers is of little use in individual cases. Indeed, in addition to recognizing the well-known debate surrounding original intent, the *Weisman* concurrence noted that there is scholarly debate surrounding the original intent of the Framers with respect to the role that their intent would play in later constitutional interpretation.[91] The concurrence therefore rejected any sort of original intent theory stating, "[t]he ground has been trodden so much that it is barren of meaning and persuasive power."[92] It appears that Judge Bownes presented this historical analysis to justify the use of the more definitive *Lemon* test.

B. *The* Lemon *Analysis*

The *Lemon* test provides the sort of concrete basis for inquiry that the establishment clause itself lacks.[93] This kind of inquiry is especially important when public schools are involved because "[t]he Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary

---

86. *Id.*

87. *Id.* at 1091-92.

88. *Lemon*, 403 U.S. at 612 (emphasis in original).

89. Everson v. Board of Educ., 330 U.S. 1, 31 (1947) (Rutledge, J., dissenting).

90. *Weisman*, 908 F.2d at 1092 (Bownes, J., concurring).

91. *Id.* at 1093 (citing Powell, *The Original Understanding of Original Intention*, 98 HARV. L. REV. 885 (1985)).

92. *Id.* at 1093.

93. For a concise statement of the *Lemon* test, see *supra* note 5.

and secondary schools."[94] An examination of the establishment clause cases involving the public schools certainly supports this observation.[95] Following existing precedent, the *Weisman* concurrence correctly applied the *Lemon* test to the facts of the case.

1. *The purpose of prayer*

Prayer is by definition a reverent petition to deity. Therefore, the purpose of a prayer is to petition God. The Court has noted, however, that some references to God, such as the invocation that opens Supreme Court sessions,[96] may 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."[97] Such references are acceptable under the establishment clause not because they are the only available means for solemnizing public occasions, but because they have lost any real religious significance. Therefore, they are not religious petitions to deity. They fall into the same category as the secular reference to God in the Pledge of Allegiance or on a quarter.

The *Weisman* concurrence specifically rejected the notion that an invocation or benediction serves the secular purpose of solemnizing the occasion. The opinion relies on the actual predominant purpose inquiry articulated in *Wallace v. Jaffree*,[98] and finds that prayer serves a predominantly religious purpose.[99]

The same result would follow even if the inquiry focused on the actual subjective intent of the state actors. The school au-

---

94. Edwards v. Aguillard, 482 U.S. 578, 583-84 (1987).

95. *See, e.g.*, Board of Educ. v. Mergens, 110 S. Ct. 2356 (1990) (student Christian club allowed); *Edwards*, 482 U.S. at 578 (an act requiring the teaching of creationism along with evolution not allowed); Aguilar v. Felton, 473 U.S. 402 (1985) (publicly funded remedial education program in private schools not allowed); School Dist. v. Ball, 473 U.S. 373 (1985) (shared time educational program not allowed); Wallace v. Jaffree, 472 U.S. 38 (1985) (statute granting moment of silence for meditation or voluntary prayer not allowed); Lemon v. Kurtzman, 403 U.S. 602 (1971) (state aid statutes for reimbursement to nonpublic teachers not allowed); Abington School Dist. v. Schempp, 374 U.S. 203 (1963) (daily Bible reading not allowed); Engel v. Vitale, 370 U.S. 421 (1962) (daily prayer not allowed).

96. The Court's sessions open with "God save the United States and this honorable Court." *See* Lynch v. Donnelly, 465 U.S. 668, 693 (1984) (O'Connor, J., concurring).

97. *County of Allegheny v. ACLU*, 109 S. Ct. 3086, 3102 n.4 (1989) (quoting *Lynch*, 465 U.S. at 693 (O'Connor, J., concurring)).

98. 472 U.S. 38 (1985).

99. Weisman v. Lee, 908 F.2d 1090, 1095 (1st Cir. 1990) (Bownes, J., concurring).

thorities selected a local religious leader to offer the invocation and benediction for the graduation service. It would be anomalous indeed for those who support such prayer to embrace "an argument that explicitly relegates the value of religion [or prayer] in our society to the merely ceremonial."[100] The purpose of a commencement prayer that is something more than a ceremonial reference to God will violate the first part of the *Lemon* test.

2. The effect of prayer

Though the *Weisman* decision stated that this element of the *Lemon* test was dispositive of the case, there is but one paragraph in the concurrence that discusses it, and no discussion in the opinion of the court.[101] The concurrence correctly applied precedent, and analyzed the prayer at issue under the endorsement version of this second *Lemon* element.[102] What then will viewers of the graduation ceremony understand to be the purpose of the prayer? In this context, those attending could easily understand that the government favors a religious message to open and close the ceremony. The school district argued, however, that the setting of the prayer, which must be considered,[103] served to negate the message of endorsement. The ceremony was not held on campus, attendance was voluntary and it was held but once a year.[104]

While these factors serve to distance graduation prayer from classroom prayer, they may also serve to strengthen the message of government endorsement. The practice must be viewed from the perspective of those attending the ceremony.[105] Those students attending the ceremony will hear a religious message in a special non-classroom setting the one time they graduate. For the others who attend, the ceremony may be the only contact with the school district. Those present will not be able to observe, over the years, the school district's evenhanded treatment (if it exists) of all parts of the religious spectrum. The particular physical setting, therefore, may communicate endorsement of that year's particular message. It should be ac-

100. *Id.* at 1095 n.13.
101. *Id.* at 1095.
102. *See supra* notes 48-51 and accompanying text.
103. County of Allegheny v. ACLU, 109 S. Ct. 3086, 3102 (1989).
104. *Weisman*, 908 F.2d at 1093 (Bownes, J., concurring).
105. *County of Allegheny*, 109 S. Ct. at 3102.

knowledged, however, that this argument presents a catch-22. On the one hand, school authorities have limited prayer to a single occasion in a student's career to avoid pervasive religious instruction; on the other hand, the very fact that the prayer occurs but once may lend government endorsement to the religious message.

3. Excessive entanglement

Since the political divisiveness strain of entanglement is only implicated in state aid cases, the *Weisman* concurrence addressed the problem of administrative entanglement.[106] The concurrence was concerned with state action that might interfere with the independence of religious institutions.[107] The facts of the *Weisman* case easily suggest an excessive entanglement problem. School teachers chose the person who was to offer the prayers. The school district attempted to monitor the content of the prayers given. The school principal provided advice and a pamphlet to direct the mood and words of the prayer in a nondenominational direction. Such state involvement in a religious practice surely constitutes excessive entanglement under Supreme Court precedent.[108]

The facts of *Stein v. Plainwell Community Schools*,[109] however, raise a more difficult question. In *Stein* the senior class determined the content of the graduation ceremony and selected the speakers who offered the invocations and benedictions. The school authorities did not attempt to monitor the choice of speakers nor the content of any prayer.[110] It is unclear whether such a system by delegation of authority would be able to avoid entanglement. The potential for entanglement is weak, but the Court has still found entanglement on such a showing.[111] It is possible, however, that an arrangement similar to the *Stein* facts could overcome the entanglement hurdle because the actions of the school authorities amounted only to "custodial oversight"

106. *Weisman*, 908 F.2d at 1095 (Bownes, J., concurring).

107. *Id.* (citing *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring)).

108. *See, e.g.*, Aguilar v. Felton, 473 U.S. 402 (1985); Lemon v. Kurtzman, 403 U.S. 602 (1971).

109. 822 F.2d 1406 (6th Cir. 1987).

110. *Id.*

111. *See Aguilar*, 473 U.S. at 402.

similar to that found permissible in *Board of Education v. Mergens*.[112]

C. The Marsh *Analogy*

In *Weisman*, the school district argued that the decision of the Supreme Court in *Marsh v. Chambers*[113] should control the graduation prayer issue.[114] *Marsh* specifically held that the legislative prayer did not have the effect of advancing or disparaging any particular religious belief.[115] This holding led the Sixth Circuit in *Stein* to find a commencement prayer unconstitutional because it had expressly invoked the name of Jesus as the savior:

> [I]nvocations and benedictions delivered at these occasions should 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. The invocations and benedictions delivered here do not pass the *Marsh* test.[116]

The same argument was treated by the district court in *Weisman v. Lee*. The district court suggested that if the prayer omitted reference to deity, then the establishment clause would not be implicated.[117] The concurring and dissenting opinions of the First Circuit in *Weisman* argued at some length over the validity of the district court's suggestion. What the district court essentially decided, and what the dissent argued, was that a graduation prayer which avoids addressing God is the only kind of prayer acceptable under the establishment clause. Such a prayer is clearly no prayer at all. This discussion may, however, be just one part of the larger and much more important inquiry as to whether a court or other government entity may designate the contents of a public prayer.[118]

Equally pertinent is the question of whether *Marsh* was the

---

112. 110 S. Ct. 2356, 2373 (1990).

113. 463 U.S. 783 (1983).

114. *Weisman*, 908 F.2d at 1097 (Bownes, J., concurring).

115. *Marsh*, 463 U.S. at 793.

116. *Stein*, 822 F.2d at 1410. It is worth noting that the Sixth Circuit panel in *Stein* decided that *Marsh*, not *Lemon*, was the standard to be used in evaluating commencement prayer.

117. Weisman v. Lee, 728 F. Supp. 68, 74 (D.R.I. 1990).

118. For a discussion of the entanglement element of the *Lemon* test, see *supra* notes 28-32 and accompanying text.

correct standard to apply. The Supreme Court in *Edwards v. Aguillard*[119] indicated that *Marsh* is probably not the appropriate standard. "Such a historical [*Marsh*] 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."[120] Given the restricted coverage of the historical argument, the *Marsh* approach is probably limited to its facts.

The concurrence in *Weisman* adopted the *Edwards* argument and found *Marsh* inapplicable to the graduation prayer issue. But the first portion of the concurrence dedicated itself to showing the futility of reliance on the Framer's intent in solving constitutional disputes. By the same reasoning, an appeal to the historical roots of public education seems misplaced. A careful reading of *Marsh*, however, compels the historical analysis and the result that the concurrence reached.

D. Another Rationale for Commencement Prayer

The *Marsh* opinion does raise some important constitutional considerations. A tradition can be part of society and have useful ceremonial and cultural value even if it did not come into common practice until the early nineteenth century. Invocations and benedictions at a public school graduation ceremony have some parallels to the legislative prayer upheld in *Marsh*. In the understanding of most Americans, graduation prayer may occupy a cultural position closer to legislative prayer than to classroom prayer. While *Marsh* is inapplicable to graduation prayer issues, the historical and cultural position of such prayer may be sufficiently strong to merit another exception to strict *Lemon* analysis. Perhaps the establishment clause does not mandate the total eradication of ceremonial religious prayers, even in public school settings.

Emphasizing the difference between graduation prayer and classroom prayer, the dissent in *Stein v. Plainwell Community Schools*[121] argued that the Court is most concerned with religious expression in the public schools exhibiting "(1) regularly scheduled or persistent religious expressions, (2) in a classroom setting, (3) [with] officially sponsored or sanctioned content ini-

119. 482 U.S. 578 (1987).
120. *Id.* at 583 n.4.
121. 822 F.2d 1406 (6th Cir. 1987).

tiated by school authorities, which [is] (4) directed to students, primarily those of formative years."[122] If the *Stein* dissent has correctly identified the Court's areas of concern with respect to establishment problems in the public schools, then, in the absence of any of the four factors above, the Court may be unwilling to find an establishment clause violation. In *Weisman*, for example, the ceremony took place only a single time in the student's career, occurred outside the classroom setting, and, though school sponsored, was directed toward the community, parents, friends and not strictly to the students.[123]

There is some question whether the content of the prayer in *Weisman* was officially sanctioned or initiated. Since the Providence School Committee provided an outline of a "proper" prayer, and the principal advised a non-demoninational prayer, the prayer could probably be characterized as officially sanctioned or initiated. A school district could avoid this result if it simply chose the speaker—or allowed the students to do so—and refrained from giving any guidance as to the prayer's content.[124]

Because current establishment clause jurisprudence under the *Lemon* standard is questionable,[125] the Court should reject *Lemon* in favor of a more closely tailored standard. Such a standard should directly address the Court's concerns in any particular factual setting. If the Court were to use the four factors in the *Stein* dissent as an establishment clause test, for example, then it would probably find that graduation prayer generally does not violate the first amendment. Recognizing judicial reluctance to deviate from well-established precedent, however, the Court could simply modify the *Lemon* test to explicitly reflect these four concerns in public school settings. It is worth noting that a generalized version of the four factors in *Stein* could be converted to an all-purpose establishment clause test. Such a test could provide a compromise inquiry between the current en-

---

122. *Id.* at 1414 (Wellford, J., dissenting).

123. *See Weisman*, 908 F.2d at 1094 (Bownes, J., concurring).

124. Of course, this leaves the door open for extremely sectarian prayers that could easily offend others attending the graduation ceremony. Freedom from exposure to other beliefs, however, is neither a constitutional right nor a goal of the public school system. This scenario would also clearly raise a problem under an endorsement analysis. The "officially sanctioned or initiated" question parallels some concerns in the endorsement test. To overcome this kind of hurdle, the school might be required to give some sort of disclaimer.

125. *See supra* note 33 and accompanying text.

dorsement version and the proposed proselytization version of the *Lemon* test. The four generalized factors, (1) the pervasiveness of the religious act or practice, (2) the setting in which it occurs, (3) the extent to which the state initiates, sanctions or directs the content of the religious act or practice, and (4) the audience at which it is directed, address all of the various establishment concerns that the Court has decided since *Everson v. Board of Education*.[126] The Court could implement such a test either as a modification of the *Lemon* test or as a distinct inquiry and not diminish its responsibility to say what the establishment clause means.

VI. Conclusion

By itself, the establishment clause of the first amendment provides little useful guidance for a court in deciding individual cases. The Supreme Court developed the *Lemon* test to aid in deciding such cases. The First Circuit in *Weisman v. Lee* faithfully applied the *Lemon* test and correctly held that the graduation prayer at issue violated the establishment clause. The concurrence went on to detail the *Lemon* test and to analyze the facts under this standard. The concurrence correctly distinguished the concerns addressed in *Marsh v. Chambers* from those arising in a commencement exercise invocation or benediction. The *Marsh* decision, while providing an important discussion of various establishment clause concerns, is not controlling precedent in graduation prayer cases.

Though a faithful application of the *Lemon* test results in finding graduation prayer unconstitutional, the Court is not bound to a rigid application of any test. Indeed, a rigid application of the effect and entanglement parts of the *Lemon* test together will usually result in finding unconstitutional what would otherwise be a valid act or practice. The Court may choose to simply modify further or even reject the *Lemon* test. The Court should not, however, adopt any test or inquiry that would subject the content of any prayer to governmental scrutiny. If constitutional graduation prayer means prayer that has been sani-

126. 330 U.S. 1 (1947). This is not to suggest that such a test would be any easier to apply, or would be less susceptible to inconsistency when applied to individual cases. The Court is not, and ought not to be, concerned with easy tests or assembly line results. The proposed test may constitute, however, a middle ground position that directly addresses concerns on which a majority of the Court could agree.

tized and approved by the government, then graduation prayer ought to be unconstitutional.

Brian A. Hatch