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COMMENTS

CEREMONIAL INVOCATIONS AT PUBLIC HIGH SCHOOL EVENTS AND THE ESTABLISHMENT CLAUSE

JAMES J. DEAN

WHILE it is clear that conducting vocal prayers in public school classrooms violates the establishment clause, the Supreme Court has not addressed the use of ceremonial invocations to open extracurricular public school events. The Court has, however, upheld the practice of opening state legislative sessions with an invocation. Against this background, the Sixth and Eleventh Circuit Courts of Appeals recently addressed the constitutionality of using ceremonial invocations in the public school context and reached contrary conclusions concerning the analytical standard that should be applied. Judge Merritt, writing for a divided three-judge panel of the Sixth Circuit in Stein v. Plainwell Community Schools, concluded that the standards articulated by the Supreme Court in Marsh v. Chambers for examining legislative invocations should determine the constitutionality of using ceremonial invocations to open public high school graduation exercises. To the contrary, the Eleventh Circuit in Jager v. Douglas County School District held that the three-prong test articulated by the Court in Lemon v. Kurtzman governed the issue of using invoca-

2. Although the term "invocation" could be used to refer to a short speech not said in the form of a prayer, in this Comment the term is defined to mean "the act of invoking or calling upon a deity, spirit, etc., for aid, protection, inspiration, or the like; supplication," or "a form of prayer invoking God's presence, said [especially] at the beginning of a public ceremony." RANDOM HOUSE COLLEGE DICTIONARY 703 (rev'd ed. 1979). For purposes of this Comment, therefore, the term does not include mere inspirational opening comments which are not said in the form of a prayer.
4. 822 F.2d 1406 (6th Cir. 1987). Judge Merritt's conclusion that Marsh "governed" the issue in Stein has been characterized as a holding of the Sixth Circuit, see Jager v. Douglas County School Dist., 862 F.2d 824, 829 n.9 (11th Cir. 1989); Comment, Stein v. Plainwell Community Schools—The American Civil Religion and the Establishment Clause, 15 HASTINGS CONST. L.Q. 533, 538 (1988). However, this characterization is inaccurate. See infra note 33.
6. 862 F.2d 824 (11th Cir. 1989).
tions to open high school football games, and concluded that Marsh had no application. Although both courts found violations of the establishment clause, Judge Merritt's application of Marsh left open the possibility that a properly worded invocation would be constitutional, whereas the Eleventh Circuit's approach under Lemon apparently would invalidate all invocation practices regardless of the content of the particular prayers involved.

This Comment examines the Sixth and Eleventh Circuits' approaches to determine which of these analytical frameworks should be employed when evaluating the constitutionality of using ceremonial invocations in the public schools. The Comment then applies this analysis to determine whether the practice of having invocations to open public school events itself is unconstitutional, or whether a properly worded ceremonial invocation may be constitutional.

I. ALTERNATIVE ESTABLISHMENT CLAUSE APPROACHES: LEMON AND MARSH

The test traditionally applied in establishment clause cases, and the one applied by the vast majority of courts addressing the ceremonial invocation issue in the public school context, is the three-prong test articulated by the Supreme Court in Lemon v. Kurtzman. Lemon involved an establishment clause challenge to Pennsylvania and Rhode Island statutes which provided financial assistance to church-related elementary and secondary schools. In addressing the constitutionality of these statutes, the Court articulated the inquiry which would become the Lemon three-prong test: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"

8. U.S. Const. amend. I. The clause provides that "Congress shall make no law respecting an establishment of religion."


11. Id. at 606.

12. Id. at 612-13 (citations omitted). Although both statutes contained provisions to ensure that aid would not be used to further the religious aims of the schools, the Court ultimately
During the years following the Supreme Court's decision in \textit{Lemon}, the three-prong \textit{Lemon} test achieved widespread acceptance as the appropriate analysis to apply in establishment clause cases. Since its formulation, the Court has departed from the \textit{Lemon} test only once.\textsuperscript{13} This departure occurred in \textit{Marsh v. Chambers},\textsuperscript{14} where the Court considered an establishment clause challenge to Nebraska's practice of opening its state legislative sessions with an invocation by a paid clergyman. The majority in \textit{Marsh} relied on the original intent of the framers, and never mentioned the \textit{Lemon} test. The Court reasoned that since the framers of the first amendment also authorized paid legislative chaplains to open their sessions with prayers, the framers must not have considered this practice an establishment of religion.\textsuperscript{15} The Court then concluded that since the establishment clause could not be more restrictive on the states than on the federal government, the same practice before state legislative sessions must also be constitutional.\textsuperscript{16} Finally, the Court weighed the specific attributes of the Nebraska practice\textsuperscript{17} against the historical background and concluded that these factors did not serve to invalidate the Nebraska practice.\textsuperscript{18}

\textbf{II. THE SIXTH AND ELEVENTH CIRCUIT APPROACHES}

The Supreme Court's decisions in \textit{Lemon} and \textit{Marsh} represent two different approaches to establishment clause cases. Thus, a threshold question concerning the ceremonial invocation issue is which of these conflicting approaches should govern the inquiry.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{13} See Edwards v. Aguillard, 107 S. Ct. 2573, 2577 n.4 (1987). Notwithstanding the Court's statement in \textit{Edwards}, commentators have read the Court's decision in \textit{Lynch v. Donnelly}, 465 U.S. 668 (1984), to have established a separate test from the traditional \textit{Lemon} analysis even though the Court in \textit{Lynch} purported to apply \textit{Lemon}. See Van Alstyne, \textit{Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall—A Comment on \textit{Lynch} v. Donnelly}, 1984 DUKE L.J. 770, 782-83 (characterizing \textit{Lynch} as establishing a new "any more than" test); Note, \textit{Civil Religion and the Establishment Clause}, 95 YALE L.J. 1237, 1245 (1986) (\textit{Lynch} relies on \textit{Marsh} to create an "acknowledgement exception" to \textit{Lemon}) [hereinafter \textit{Civil Religion}].
\item \textsuperscript{14} 463 U.S. 783 (1983).
\item \textsuperscript{15} \textit{Id.} at 790.
\item \textsuperscript{16} \textit{Id.} at 790-91.
\item \textsuperscript{17} The Nebraska practice was challenged on the specific grounds that a clergyman of one denomination had been selected for 16 years, that he was being paid at public expense, and that he offered prayers in the Judeo-Christian tradition. \textit{Id.} at 792-93.
\item \textsuperscript{18} \textit{Id.}
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A. The Sixth Circuit's Approach

*Stein v. Plainwell Community Schools*\(^{19}\) involved graduation exercises at the Plainwell and Portage Central high schools in Western Michigan near Kalamazoo. Invocations and benedictions had been included regularly as a part of the Plainwell High School commencements since 1980,\(^{20}\) and as a part of the Portage Central High School commencements for fifteen years before *Stein* was litigated.\(^{21}\) Attendance at both commencements was voluntary, and receipt of a diploma was not conditioned upon attendance.\(^{22}\) At the Plainwell commencement, students were to be chosen from a group of volunteers to deliver the prayers. The students would be advised to keep the prayers brief, but would not be given any instructions regarding the content of the prayers.\(^{23}\) At Portage Central High School, the graduating seniors were permitted to organize and develop the content of their commencement exercises, and had regularly elected to include an invocation and benediction as a part of their graduation ceremony.\(^{24}\) Senior class representatives traditionally had chosen local ministers to deliver the prayers.\(^{25}\) The minister generally was instructed to keep the prayer nondenominational and short, but the content of the prayer would not be previewed by either the school administration or the senior class representatives.\(^{26}\)

The district court in *Stein* noted that the graduation invocation issue "[fell] into a grey area of establishment clause doctrine" between the unconstitutional practice of daily classroom prayer on the one hand, and the constitutional practice of invocations before state legislatures on the other.\(^{27}\) However, the district court showed no hesitation in deciding which analytical framework should be applied.\(^{28}\) The district court reasoned that the *Lemon* analysis was appropriate,\(^{29}\) noting however, that the Supreme Court recently had stated its unwillingness to be strictly bound by the *Lemon* test.\(^{30}\) The district court then applied *Lemon* and concluded that the practice of opening high school

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19. 822 F.2d 1406 (6th Cir. 1987).
20. *Id.* at 1411 (Wellford, J., dissenting).
21. *Id.* at 1407.
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
27. *Id.* at 46.
28. *Id.*
29. *Id.*
graduation ceremonies with an invocation passed all three prongs of the *Lemon* test.  

The plaintiffs in *Stein* appealed the district court's decision. Although the Sixth Circuit reversed the district court and held the invocation at issue unconstitutional, the three-judge panel in *Stein* was divided on the appropriate analytical framework to apply to the issue. However, Judge Merritt's majority opinion concluded that the invocations and benedictions at issue were governed by the standards articulated by the Supreme Court in *Marsh*. Judge Merritt reasoned that since the graduation ceremonies were analogous to the legislative and judicial sessions referred to in *Marsh*, and the invocations served the same solemnizing function as did the prayers in *Marsh*, the *Marsh* analysis should apply. Although he did not expressly address the question of whether the *Lemon* test should be applied to the issue, Judge Merritt did address the question implicitly by distinguishing graduation ceremonies from the classroom setting. Judge Merritt reasoned that the public nature of the graduation ceremony and the presence of parents minimized the potential for coercion, and that the special teacher-student relationship, which places the teacher in a position of authority, was absent in the graduation ceremony context. Thus, he concluded that the *Marsh* analysis should be applied "notwithstanding the fact that a school function was involved."

In fashioning the standard to be applied, Judge Merritt observed that the Supreme Court in *Marsh* upheld nonsectarian, nonproselytizing legislative invocations that "do not 'symbolically place the government's seal of approval on one religious view.'" He then stated that under *Marsh*, invocations used to open public functions, such as the graduation ceremonies in *Stein*, would withstand constitutional scrutiny provided they did not "go beyond the 'American civil religion.'"

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31. *Id.* at 50.
33. Judge Millburn concurred with Judge Merritt's opinion that the invocations would have to pass the *Marsh* standards, but added that the invocations should also have to pass the *Lemon* test. *Id.* Judge Wellford in dissent first measured the graduation invocation practices against a four-factor test he developed from the Supreme Court's case law on religious practices in the public schools and then applied the *Lemon* test. He concluded that the practice passed both analyses. *Id.* at 1410-17 (Wellford, J., dissenting).
34. *Id.* at 1409.
35. *Id.*
36. *Id.*
37. *Id.* at 1409-10.
38. *Id.* at 1409 (citation omitted).
39. *Id.* (footnote omitted).
Judge Merritt then examined the language of the invocations and concluded that they were not the "civil or secularized" invocations described in *Marsh*, and thus did not pass the *Marsh* test. Since the prayers employed the language of Christian theology and some "expressly invoked the name of Jesus as the Savior," he concluded that the prayers "symbolically placed the government's seal of approval on one religious view," the Christian view. Thus, Judge Merritt concluded that the prayers at issue violated the establishment clause. Significantly, however, Judge Merritt's decision preserved the possibility that a properly worded invocation could withstand establishment clause scrutiny.

**B. The Eleventh Circuit's Approach**

*Jager v. Douglas County School District* involved invocations before home football games at Douglas County High School in Douglas County, Georgia. The practice had been followed at the high school since as early as 1947. From the early 1970's through 1986, a Presbyterian clergyman recruited ministers to deliver the invocations through the Douglas County Ministerial Association, whose membership consisted exclusively of Protestant Christian ministers. The invocation speakers often began with the words, "let us bow our heads" or "let us pray" and often closed with the words, "in Jesus' name we pray."

Doug Jager, a member of the high school marching band, objected to the practice of opening the football games with an invocation. Some time later, representatives of the school district and the Douglas County Ministerial Association met with the Jagers to discuss two alternative proposals to the traditional invocation practice. One alternative was a wholly secular inspirational speech. The other was an "equal access plan" under which any student, parent, or school staff member could submit his or her name as a potential pregame speaker. The student government would randomly select from the list a person to deliver a pregame address or an invocation, the content of which would not be monitored by the school.

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40. Id. at 1410.
41. Id.
42. Id.
43. 862 F.2d 824 (11th Cir. 1989).
44. Id. at 826 n.2.
45. Id. at 826.
46. Id.
47. Id. at 826-27. Thus, on its face the equal access plan apparently permitted both secular speeches and invocations.
The Jagers initially rejected the equal access plan, stating that the wholly secular speech was the only acceptable alternative.\textsuperscript{48} Although the Jagers subsequently notified the school district that they would reconsider the equal access plan if the traditional invocation practice ceased during the interim, the school district superintendent directed the high school principals to proceed with the pregame invocations pursuant to the equal access plan.\textsuperscript{49} The Jagers then filed for a temporary restraining order to enjoin the school district from conducting or permitting religious invocations prior to any athletic events at the high school. The district court held that the pregame invocation system as practiced prior to the implementation of the equal access plan was unconstitutional. Additionally, the court held the equal access plan constitutional on its face, although it declined to address the constitutionality of the plan as applied.\textsuperscript{50}

On appeal the Eleventh Circuit affirmed the district court’s finding that the traditional invocation practice was unconstitutional, but reversed the district court’s determination that the equal access plan was facially valid.\textsuperscript{51} The Eleventh Circuit first addressed the applicability of \textit{Marsh} to the pregame invocation issue. In contrast to Judge Merritt’s conclusion in \textit{Stein} that \textit{Marsh} should govern the ceremonial invocation issue, the Eleventh Circuit in \textit{Jager}, with one judge dissenting,\textsuperscript{52} held \textit{Marsh} inapplicable.\textsuperscript{53} The court noted that the Supreme Court had recently stated that the \textit{Marsh} historical approach was inapplicable to practices in the public schools since free public education was virtually nonexistent at the time the Constitution was adopted.\textsuperscript{54} Thus, the court concluded that the \textit{Lemon} test was the appropriate standard.

The court first addressed the constitutionality of the equal access plan. The court noted that the question in applying the secular purpose analysis of the \textit{Lemon} test was whether the government’s actual
purpose was to endorse or disapprove of religion. The district court concluded that the pregame invocations served both secular and religious purposes. However, the Eleventh Circuit concluded that since the school district superintendent rejected the Jagers' offer to accept a wholly secular inspirational speech that could have fulfilled all of the secular purposes given for the challenged practice, the school district must have been most interested in the invocation's religious purpose. Thus, although the school district asserted a number of secular purposes for the equal access plan, the court held that since "the preeminent purpose behind having the invocations was to endorse Protestant Christianity," the equal access plan failed the secular purpose prong of the Lemon test.

The court in Jager also concluded that the equal access plan violated the effect prong of the Lemon test. The court stated that "'[t]he effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval of religion.'" The court concluded that "'[w]hen a religious invocation is given via a sound system controlled by school principals and the religious invocation occurs at a school-sponsored event at a school-owned facility, the conclusion is inescapable that the religious invocation conveys a message that the school endorses the religious invocation.'"  

55. Id. (citing Wallace v. Jaffree, 472 U.S. 38, 56 (1985)).
56. Id. The pregame invocation served four purposes:
(1) to continue a longstanding custom and tradition, (2) to add a solemn and dignified tone to the proceedings, (3) to remind the spectators and players of the importance of sportsmanship and fair play, and (4) "to satisfy the genuine, good faith wishes on the part of a majority of the citizens of Douglas County to publicly express support for Protestant Christianity.'"

57. Id. at 830.
58. Id.
60. Id. (citation omitted). The court apparently presumed that the pregame addresses would be religious despite the fact that the equal access plan—which apparently permitted both secular and religious openings—was examined on its face, rather than as applied. Theoretically, some of the speakers could choose to open the football games with a secular speech, while others could decide to offer an invocation. The court apparently recognized this theoretical possibility for it noted that since the majority religious preference in Douglas County was Protestant Christianity, the plan would most likely result in the continuation of Protestant Christian invocations. Id.

It is unclear whether it was proper for the Eleventh Circuit to rely on this inference when conducting its effect prong analysis to determine the facial validity of the equal access plan. In Bowen v. Kendrick, 108 S. Ct. 2562, 2571-77 (1988), the Court addressed the validity of the Adolescent Family Act, Pub. L. No. 97-35, 95 Stat. 578 (1981), both on its face and as applied. Although the majority in Bowen noted that the Court had seldom explicitly distinguished between facial and as applied challenges in establishment clause cases, 108 S. Ct. at 2569, the
Although the court held that the equal access plan violated the first two prongs of the *Lemon* test and was therefore unconstitutional, it went on to address the entanglement prong of the *Lemon* test as well. The court concluded that since the school district would not monitor the content of the invocations, and the Douglas County Ministerial Association would not select the invocation speakers or deliver any of the invocations, the plan did not excessively entangle government with religion.61

The court then addressed the traditional invocation practice which had been followed prior to the implementation of the equal access plan. The court held that the practice violated *Lemon's* intent prong for the same reasons that the equal access plan did.62 The court also concluded that the practice violated the effect prong based on the district court's finding that "one of the effects of the prior practices . . . was to create the appearance or impression that the school system endorsed Protestant Christianity."63 Finally, since the school system delegated to the Douglas County Ministerial Association the authority to select invocation speakers and to deliver the invocations, the court held that the practice also violated the entanglement prong.64

III. WHICH STANDARD SHOULD APPLY?

Since the Sixth and Eleventh Circuit Courts of Appeals reached contrary conclusions concerning the analytical framework which should be applied when determining the constitutionality of ceremonial invocations in the public schools, and because the Supreme Court has not addressed this issue, it is unclear whether a properly worded invocation would be constitutional. To determine whether the inclusion of some invocations at high school events may be constitutional,
the first question which must be addressed is what standard should be applied. Three possible approaches emerge from the Sixth and Eleventh Circuits' decisions in *Stein* and *Jager*: the *Marsh* analysis, an American civil religion standard purportedly based on *Marsh*, and the *Lemon* test.

A. Marsh Analysis

Although it is not entirely clear what standard Judge Merritt actually applied to the graduation invocation at issue in *Stein v. Plainwell Community Schools*, he did conclude that the Supreme Court's decision in *Marsh* should govern the issue. Although, as Judge Merritt noted, invocations at graduation ceremonies share some similarities to invocations given before state legislative sessions, an examination of the analysis in *Marsh* suggests that such an analysis should not be applied to ceremonial invocations in the public high school context.

The Court in *Marsh* applied essentially a two-step analysis to determine whether the Nebraska practice of opening its legislative sessions with an invocation was constitutional. The Court first addressed whether the use of legislative invocations generally violated the establishment clause, and then proceeded to examine whether the attributes of the specific invocation system at issue passed constitutional muster. In conducting the first part of its analysis concerning the use of legislative invocations, the Court relied exclusively on an historical analysis. The Court reasoned that since the same members of the First Congress who voted to approve the draft of the first amendment for submission to the states also voted to appoint and pay a chaplain to deliver legislative invocations for each house, the framers must not have viewed this practice as an establishment of religion. The Court then concluded that since the amendment could not be more restrictive on the states than on the federal government, the same practice before state legislatures must also be constitutional.

65. 822 F.2d 1406 (6th Cir. 1987). Judge Merritt did not actually apply the *Marsh* analysis. See infra notes 88-97 and accompanying text. Interestingly, Judge Merritt actually seemed to apply a version of Justice O'Connor's endorsement test, see infra notes 138-41 and accompanying text, for he stated that the prayers should not be phrased in language which conveys to parents and students a message that their religious beliefs are disfavored. *Stein*, 822 F.2d at 1410.

66. *Id.* at 1409.

67. *Id.*


70. *Id.* at 790-91.
Having determined that the practice of opening legislative sessions with an invocation was permissible generally, the Court next addressed the specific circumstances of the Nebraska practice, namely, that a clergyman of one denomination had been selected for sixteen years, that he was being paid at public expense, and that he offered prayers in the Judeo-Christian tradition. Weighing these factors against the historical background, the Court concluded that they did not serve to invalidate the Nebraska practice.

1. The Eleventh Circuit’s Criticism of the Sixth Circuit’s Approach

The Eleventh Circuit in Jager criticized the Sixth Circuit for applying Marsh to the constitutionality of using ceremonial invocations in the public school context. The Eleventh Circuit noted that the Supreme Court had recently stated in Edwards v. Aguillard, "a historical approach [like that applied in Marsh] 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." The Eleventh Circuit then stated that the Sixth Circuit failed to consider the limitations placed on the Marsh historical approach by the Supreme Court in Edwards.

It is not clear from the Supreme Court’s statement in Edwards whether the Court was simply observing that Marsh’s original intent analysis could not be applied to practices in the public schools "since free public education was virtually nonexistent when the Constitution was adopted," or whether the Court also meant to foreclose the second part of the Marsh analysis by which the Court examined the specific attributes of the Nebraska practice. Notwithstanding this uncertainty, Jager’s majority opinion suggests that the Eleventh Circuit based its criticism of the Sixth Circuit on the former construction of the Edwards limitation. The Eleventh Circuit concluded in Jager

71. Id. at 792-93.
72. Id.
73. Jager, 862 F.2d at 829 n.9.
74. Id. at 828-29.
76. Jager, 862 F.2d at 829 (quoting Edwards v. Aguillard, 107 S. Ct. 2573, 2577 (1987)). But see DuPuy, Religion, Graduation, and the First Amendment: A Threat or a Shadow?, 35 Drake L. Rev. 323, 359 (1985-86) (“The recognition that, contemporaneous with the adoption of the first amendment, public schools existed in which religious practices were common actually lends special credence to the application of Marsh’s historical exception to [graduation invocations].”).
77. Jager, 862 F.2d at 829 n.9.
that since "invocations at school-sponsored football games were non-existent when the Constitution was adopted," the practice "does not lend itself to Marsh's historical approach."78 In other words, Marsh cannot be applied to the use of invocations before public high school football games because, unlike state legislative invocations, the framers could not have considered the constitutionality of this practice since it did not exist when the Constitution was adopted.

Assuming this is the basis for the Eleventh Circuit's criticism of the Sixth Circuit's approach in Stein, the criticism is not well-founded. Judge Merritt did not purport to employ the Marsh historical approach in Stein to determine the attitudes of the framers toward the practice of opening public high school graduation ceremonies with an invocation.79 Rather, he concluded that since graduation invocations were analogous to legislative invocations, the standards utilized in Marsh to judge the specific attributes of the practice of opening legislative sessions with an invocation should apply by analogy to the practice of opening high school graduation ceremonies with an invocation.80

2. Problems With Applying Marsh By Analogy

Although Judge Merritt's conclusion that Marsh should govern the public school ceremonial invocation issue by analogy did not necessarily exceed the Edwards limitations, applying Marsh by analogy to the use of ceremonial invocations in the public schools still raises three primary difficulties which suggest that Marsh should not be applied to this issue. The first difficulty with applying Marsh by analogy is that relying on original intent in constitutional analysis presents a number of concerns when applied to practices actually in existence at the time, let alone when this type of analysis is applied to other practices by analogy. Justice Brennan pointed out three such concerns in his dissent in Marsh. First, it cannot always be presumed that "[l]egislators, influenced by the passions and exigencies of the moment, the pressure of constituents and colleagues, and the press of business" will always carefully consider the constitutionality of every piece of legislation.

78. Id. at 829.
79. Judge Merritt never discussed the history of the public schools.
80. Stein, 822 F.2d at 1409. In other words, since as the Supreme Court found in Marsh, the framers did not consider the practice of having ceremonial invocations before legislative sessions to be unconstitutional, it is likely they also would not consider the use of ceremonial invocations in other contexts to be per se unconstitutional. Thus, the reasoning goes, courts should scrutinize the specific attributes of ceremonial invocation practices in the public schools in the same manner that the Supreme Court analyzed the specific attributes of the Nebraska legislature's invocation practice in Marsh.
they enact.81 Second, since enactment of the first amendment also required ratification by the states, the intent of the states is equally relevant as that of the members of the First Congress.82 Finally, the meaning of the Constitution has not been limited by the intent of the framers as evidenced by their specific practices, but rather, has been discerned from the broad purposes which the document sought to achieve.83 This third consideration is particularly pertinent in light of the profound changes which have occurred in the religious composition of our nation since its founding.84 Given that these concerns exist with respect to an historical analysis of a specific practice actually authorized by the framers, they are of even greater significance concerning an historical analysis which can be applied to a practice only by analogy.

A second difficulty with applying the Marsh analysis of legislative prayer to the use of ceremonial invocations in the public schools is that the traditional deference shown by the courts to a legislature's internal ordering of its own affairs is not implicated by a school board's decision to have ceremonial invocations at extracurricular events. Although Judge Merritt stated that the Court in Marsh "emphasized that . . . invocations are used across the country to open legislative, judicial, and administrative sessions of state legislatures, city councils, courts and other public bodies, as well as by private institutions of all kinds,"85 the Court in Marsh actually only referred to invocations before legislative and judicial sessions. Although the Court in Marsh did not expressly state that its decision derived from its deference to the legislature's ordering of its own internal affairs, at least one court has read Marsh to be based in part on this principle.86 Since a school district's decision to open school events with an invocation does not implicate the deference traditionally accorded another branch of government in the internal ordering of its own affairs, the Marsh standards for legislative invocations should not be applied by analogy to ceremonial invocations in the public school context.

A third difficulty with applying Marsh by analogy to ceremonial invocations in the public schools arises from the recognition that the

82. Id. at 815.
83. Id. at 817.
84. Id.
86. See Van Zandt v. Thompson, 839 F.2d 1215, 1219 (7th Cir. 1988) ("We read Marsh to derive partly from . . . a degree of deference to the internal spiritual practices of another branch of government or of a branch of the government of another sovereign.").
public elementary and secondary school system presents a "special context" in which the Supreme Court "has been particularly vigilant in monitoring compliance with the Establishment Clause." The legislature's prayers in *Marsh* were challenged, in part, on the basis that they were being offered in the Judeo-Christian tradition. Having already concluded that the mere offering of a legislative invocation without more was not constitutionally prohibited, the Court stated the standards to be applied to the specific practice at issue: "The content of 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." The Court continued, "That being so, it is not for us . . . to parse the content of a particular prayer." Thus, under *Marsh* a court must first determine whether the prayer opportunity has been used to proselytize or to demean any particular faith or belief. If a court finds that the prayer opportunity has been so exploited, the court may then, but only then, examine the language of the particular prayer at issue. This relaxed analysis does not seem commensurate with the particular vigilance the Court has indicated is appropriate when addressing establishment clause questions in the public school context.

Perhaps Judge Merritt recognized the inadequacy of the *Marsh* analysis in the public school context, because his opinion in *Stein* established a much stricter analysis for high school graduation invocations than the Court set forth in *Marsh* for legislative invocations. For instance, Judge Merritt's application of the *Marsh* test to the specific practices at issue in *Stein* did not even address the question of whether the prayer opportunity was being exploited to proselytize or advance a

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87. Edwards v. Aguillard, 107 S. Ct. 2573, 2577 (1987). The Court derived this approach from a number of its prior cases addressing activities in elementary and secondary school classrooms, observing that "[t]he state exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure." *Id.* (footnote omitted). That the ceremonial invocations at issue in *Stein* and *Jager* did not take place in the classroom does not minimize the concerns expressed by the Court in *Edwards*. Although students may not be compelled by the state to attend graduation ceremonies and football games, many students will naturally consider these and other school events to be an important part of their educational experience in which they may want very much to participate. Furthermore, although some extracurricular events such as graduation ceremonies are not held frequently and the presence of parents may minimize the potential for coercion, other events such as football games, pep rallies, club meetings, and sports and academic awards ceremonies more closely resemble the classroom setting. The use of ceremonial invocations at some extracurricular events, therefore, also will implicate the concerns expressed by the Court in *Edwards*.

89. *Id.* at 794-95.
90. *Id.* at 795.
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single faith or belief. Rather, the analysis was framed to focus directly on the content of the prayers at issue.91 Thus, Judge Merritt’s opinion in Stein departed from the approach taken by the Supreme Court in Marsh.92

Not only does the approach set forth by Judge Merritt in Stein bypass the threshold question of whether the prayer opportunity was being used to proselytize; the standards set forth to judge the content of the prayer appear to be much more strict than those which would be applied to legislative prayer under Marsh. For instance, although the Supreme Court acknowledged in Lynch v. Donnelly,93 decided subsequent to Marsh, that the invocations delivered to the Congress retain their “sacredness,”94 Judge Merritt’s opinion emphasized that to pass the Marsh test, the invocations must be civil or secularized, and must not go beyond the “American civil religion.”95 Furthermore, the Supreme Court also has noted that the invocations upheld in Marsh constitute practices which are identified with one religious faith at least as much as a nativity scene in the context of a Christmas display.96 Yet Judge Merritt indicated that any invocations, such as those in Stein, which “employ the language of Christian theology and prayer,” would violate the Marsh test.97 That Judge Merritt established a much more strict standard for addressing the use of ceremonial invocations in the public schools than the Supreme Court set forth in Marsh indicates the inadequacy of applying Marsh in the public school context.

91. Judge Merritt stated: “So long as the invocation or benediction... does not go beyond the ‘American civil religion,’ so long as it preserves the substance of the principle of equal liberty of conscience, no violation of the Establishment Clause occurs under the reasoning of Marsh.” Stein, 822 F.2d at 1409. Judge Merritt stated further that the prayers “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.” Id. at 1410.
92. For an example of a more faithful application of the Marsh analysis, see Jager v. Douglas County School Dist., 862 F.2d 824, 835 (11th Cir. 1989) (Roney, C.J., dissenting). After determining that Marsh should govern the constitutionality of the equal access plan at issue in Jager, id. at 835-37, Chief Judge Roney applied the second part of the Marsh analysis. He reasoned that although the specific practice at issue could include the offering of prayers, “the short duration of the invocations and the context in which they are delivered seem to alleviate any risk that the invocations will be used to proselytize or convert.” Id. at 837. He then concluded that since the invocations served the purpose of providing a solemn opening to a public event, and did not create the potential for indoctrination, the practice passed establishment clause scrutiny under Marsh. Id. at 838.
94. Id. at 685.
95. Stein, 822 F.2d at 1409.
96. The Court stated, “the creche is identified with one religious faith but no more so than the examples we have set out from prior cases,” and then cited Marsh as one of these examples. Lynch, 465 U.S. at 685.
97. Stein, 822 F.2d at 1410.
The Sixth Circuit in *Stein* seemed troubled by the apparent inconsistency of establishing an absolute ban on invocations at high school graduation ceremonies while allowing ceremonial invocations before other public bodies.98 To resolve this tension, Judge Merritt stated that prayers at graduation ceremonies would be permissible provided they did not go beyond the American civil religion.99

The concept of American civil religion was introduced into contemporary discussion by Robert N. Bellah in 1967.100 According to Bellah, "there actually exists alongside of and rather clearly differentiated from the churches an elaborate and well-institutionalized civil religion in America."101 The tenets of American civil religion are not simply those of Christianity, although Christianity does provide the source of much of the civil religion's content.102 Rather, the civil religion embodies a set of more general beliefs which relate the American political experience to a "universal and transcendent religious reality."103 It expresses the notion that our founding fathers were motivated by a desire to carry out God's will on earth.104 It does not speak of Christ, but of a "unitarian" God, yet a God "actively interested and involved in history, with a special concern for America."105 According to Bellah, the beliefs, symbols, and rituals through which the American civil religion has been expressed "have played a crucial role in the development of American institutions and still provide a religious dimension for the whole fabric of American life, including the political sphere."106 The expression of civil religion in our public life is said to

98. This concern is evident in Judge Merritt's statement that "[t]o prohibit entirely the tradition of invocations at graduation exercises while sanctioning the tradition of invocations for judges, legislators and other public officials does not appear to be a consistent application of the principle of equal liberty of conscience." *Id.*
99. *Id.*
102. *Id.* at 7.
103. *Id.* at 12.
104. *Id.* at 5.
105. *Id.* at 7.
106. *Id.* at 3-4. Bellah suggested that the American civil religion is expressed in the references to God in the Declaration of Independence, in Washington's first inaugural address, in Kennedy's inaugural address, and in Lincoln's second inaugural address and Gettysburg Address. See *id.* at 3-7. Other possible expressions of civil religion include the adoption of the phrase, "'In God We Trust' as the national motto, the reference to God in the Pledge of Allegiance, and the phrase, "'God Save the United States and this Honorable Court'" used to open the Supreme Court's sessions. See Note, *Developments—Religion and the State*, 100 HARV. L. REV. 1606, 1652 (1987) [hereinafter *Developments—Religion and the State*].
fulfill a need for a sense of transcendent unity among the American people and to legitimate the political order.\textsuperscript{107}

Judge Merritt's opinion in \textit{Stein} cites no case precedent for the suggestion that an American civil religion standard should be applied.\textsuperscript{108} Significantly, although the Supreme Court in \textit{Marsh} noted that the Nebraska chaplain characterized his prayers as containing elements of American civil religion,\textsuperscript{109} nowhere in its \textit{Marsh} opinion did the Court indicate that American civil religion was the appropriate standard to apply to ceremonial invocations.\textsuperscript{110} Furthermore, although a number of Supreme Court justices have discussed in dicta some of the numerous references to God which occur in our public life, none of these justices has expressly invoked the concept of American civil religion as a basis for determining the constitutionality of these practices. For instance, Justice O'Connor has explained that the references to God found in the national motto, the invocation used to open the Supreme Court's sessions, and the Pledge of Allegiance, are simply acknowledgments of religion which serve the secular purpose of solemnizing

\textsuperscript{107} See \textit{Civil Religion}, supra note 13, at 1250-53.

\textsuperscript{108} Although Judge Merritt cited to a recent Note proposing that the courts consider the existence of American civil religion, and its differences from sacral religion, when deciding establishment clause cases, the Note did not propose that the American civil religion concept be used as a standard of constitutionality. See \textit{Civil Religion}, supra note 13, at 1255-57. The Note suggests that courts should consider the different nature of exercises of civil religion and sacral religion, but acknowledges, at least implicitly, that some practices of civil religion may need to be modified in order to pass the establishment clause.

\textsuperscript{109} \textit{Marsh}, 463 U.S. at 793 n.14.

\textsuperscript{110} One commentator states that Justice Burger alluded to the American civil religion concept in \textit{Marsh} "when [he] described the use of prayer in opening sessions of various public bodies as 'deeply embedded in the history and tradition of this country' and as having 'coexisted with the principles of disestablishment and religious freedom' since colonial times." Comment, \textit{Stein v. Plainwell Community Schools—The American Civil Religion and the Establishment Clause}, 15 Hastings Const. L.Q. 533, 543 (1988) (quoting \textit{Marsh}, 463 U.S. at 786). The commentator suggests that the Court in \textit{Marsh} applied a historical practice test to uphold an exercise of the American civil religion. Whether the Court in \textit{Marsh} considered legislative prayer to be an exercise of civil religion is unclear. However, considering the language of some of the prayers at issue in \textit{Marsh}, it is unlikely that Justice Burger would have had the American civil religion concept in mind as a standard of adjudication. For instance, one of the prayers challenged in \textit{Marsh} included the following language:

\begin{quote}
Father in heaven, the suffering and death of your son brought life to the whole world moving our hearts to praise your glory. The power of the cross reveals your concern for the world and the wonder of Christ crucified.

The days of his life-giving death and glorious resurrection are approaching. This is the hour when he triumphed over Satan's pride; the time when we celebrate the great event of our redemption.
\end{quote}

\textit{Marsh}, 463 U.S. at 823 n.2 (Stevens, J., dissenting).

Although the practice of ceremonially invoking God before a legislative session might be within the civil religion, the sectarian prayer quoted above most likely would not. See \textit{Stein v. Plainwell Community Schools}, 822 F.2d 1406, 1416 n.9 (Wellford, J., dissenting) (observing that the Senate chaplain's prayers often have contained language of Christian theology).
public occasions.\textsuperscript{111} Former Chief Justice Burger has characterized these practices as acknowledgments of the religious heritage of the American people.\textsuperscript{112} While Justice Brennan has indicated that he remains uncertain with respect to the constitutionality of these practices, he has suggested that they may be permissible on the basis that their use is necessary to serve the secular function of inspiring commitment and solemnizing public events coupled with their having lost any significant religious content through rote repetition over the years.\textsuperscript{113} Furthermore, Justice Black has emphasized the patriotic nature of these types of practices.\textsuperscript{114}

Additionally, none of the lower federal courts that have addressed the constitutionality of these practices has expressly employed the American civil religion concept. These courts have rejected establishment clause challenges to references to God in the national motto,\textsuperscript{115} the national anthem,\textsuperscript{116} and the Pledge of Allegiance,\textsuperscript{117} finding that the purpose and character of these practices is predominantly patriotic and ceremonial, rather than religious. Such emphasis on the patriotic nature and purpose of these practices raises the possibility that a type of civil religion standard is being applied, implicitly if not expressly. Thus, the potential usefulness of this concept as a standard for determining the constitutionality of using ceremonial invocations in the public schools should be examined.

Two major difficulties emerge regarding the introduction of an American civil religion standard into establishment clause jurisprudence. The first difficulty is that the concept is very complex,\textsuperscript{118} thus,

\begin{itemize}
\item \textsuperscript{112} Lynch, 465 U.S. at 676.
\item \textsuperscript{113} Id. at 716-17 (Brennan, J., dissenting).
\item \textsuperscript{114} After concluding that state-sponsored daily classroom prayer was unconstitutional, Justice Black stated:
\begin{quote}
There is of course nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God. Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise that the State of New York has sponsored in this instance.
\end{quote}
\item \textsuperscript{115} O'Hair v. Blumenthal, 588 F.2d 1144 (5th Cir. 1979), aff'd 462 F. Supp. 19 (W.D. Tex. 1978); Aronow v. United States, 432 F.2d 242 (9th Cir. 1970).
\item \textsuperscript{116} Sheldon v. Fannin, 221 F. Supp. 766 (D. Ariz. 1963).
\item \textsuperscript{117} Smith v. Denny, 280 F. Supp. 651 (E.D. Cal. 1968).
\end{itemize}
very difficult to define.\textsuperscript{119} Russell Richey and Donald Jones have identified five different yet somewhat overlapping definitions.\textsuperscript{120} Other commentators have noted that "one of the limitations of Bellah's transcendant universal model . . . is the absence of a precise definition which distinguishes American civil religion from other religious forms and from civil society,"\textsuperscript{121} and that the concept of civil religion is often confused with public theology and nationalism.\textsuperscript{122} Indeed, Bellah himself appears to have changed his civil religion thesis from that which he originally expressed in 1967,\textsuperscript{123} subsequently discerning two types of civil religion: "general" and "special."\textsuperscript{124} Other scholars have found it difficult to accept Bellah's claim that an institutionalized, well-developed, and differentiated civil religion actually exists in America.\textsuperscript{125} Considering the differences of opinion among scholars regarding a precise definition of the American civil religion concept, it is doubtful that the concept would be useful as a standard by which to adjudicate establishment clause cases.\textsuperscript{126}

The second difficulty is that, even if the American civil religion concept were clearly defined, it is still not clear that the concept would be an appropriate standard to apply in establishment clause cases. The Supreme Court has made clear that the establishment clause protects the right not only to select one religion over another, but also the right to select nonreligion over religion.\textsuperscript{127} At a minimum, American civil

\textsuperscript{119} Professor West stated in 1980 that "the term today has no one, clear definition." West, \textit{A Proposed Neutral Definition of Civil Religion}, 22 J. CHURCH \& ST. 23, 23 (1980).

\textsuperscript{120} Jones \& Richey, \textit{The Civil Religion Debate}, in \textit{AMERICAN CIVIL RELIGION} 14-18 (R. Richey \& D. Jones eds. 1974). These five kinds of civil religion include religion as folk religion, as the transcendental universal religion of the nation, as religious nationalism, as democratic faith, and as Protestant civic piety. \textit{Id}.


\textsuperscript{122} Stahl, \textit{supra} note 118, at 73.

\textsuperscript{123} Handy, \textit{A Decisive Turn in the Civil Religion Debate}, 37 THEOLOGY TODAY 342, 343 (1980).

\textsuperscript{124} \textit{Id}.


\textsuperscript{126} \textit{See} Comment, \textit{supra} note 110, at 545 (absence of a precise definition of the American civil religion concept would lead to inconsistency in establishment clause adjudication).

\textsuperscript{127} Wallace v. Jaffree, 472 U.S. 38, 52-53 (1985). Justice Stevens, writing for the majority, observed:

At one time it was thought that this right [to choose one's own creed] merely proscribed the preference of one Christian sect over another, but would not require equal respect for the conscience of the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism. But when the underlying principle has been examined in the crucible of litigation, the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to
religion is an expression of political ideas in religious terms that presupposes the existence and involvement of God in our national life.\textsuperscript{128} As a result, governmental practices expressive of civil religion may violate the establishment clause by endorsing religion and disapproving of nonreligion.\textsuperscript{129} Thus, even if courts could agree that a specific ceremonial invocation did not go beyond the American civil religion, this would not necessarily resolve the establishment clause issue.

C. \textit{The Lemon Test}

Since neither the \textit{Marsh} analysis nor an American civil religion standard should be applied to the use of ceremonial invocations in the public schools, the vitality of the \textit{Lemon} test will now be examined. To pass the \textit{Lemon} test, the government practice at issue must have a secular legislative purpose, its principal or primary effect must be one that neither advances nor inhibits religion, and it must not foster an excessive government entanglement with religion.\textsuperscript{130} The \textit{Lemon} test has been applied in every establishment clause case since its formulation with the single exception of \textit{Marsh}.\textsuperscript{131} Although the three-prong \textit{Lemon} analysis "is the only coherent test a majority of the Court has ever adopted,"\textsuperscript{132} the test has still been the subject of criticism by both

\begin{itemize}
  \item select any religious faith or none at all.
  \item \textit{Id.} (footnotes omitted). \textit{But see id.} at 113 (Rehnquist, J., dissenting) ("nothing in the Establishment Clause requires government to be strictly neutral between religion and irreligion").
  \item \textsuperscript{128} \textit{See} Bellah, \textit{supra} note 101, at 15 ("'God' has clearly been a central symbol in the civil religion from the beginning and remains so today."); Gehrig, \textit{supra} note 121, at 53 ("Central to the American civil belief system are beliefs in the existence of God, in the American nation's being subject to God's laws, and in the divine guidance and protection of the nation.") (footnote omitted); West, \textit{supra} note 119, at 38 ("[A] civil religion can be said to exist whenever the people of any given nation believe in a transcendent, spiritual reality, believe that reality to be the source of meaning and order for their nation, and express that belief and meaning in certain public rituals, myths, and symbols."). Thus, expressions of American civil religion may go beyond merely acknowledging that religion was a motivating force in the lives of private individuals who shaped our history by actually presupposing the fact that God exists.
  \item \textsuperscript{129} This is not to say that any governmental practice which expresses civil religion violates the establishment clause, but rather that since some practices of civil religion may endorse religion or a particular religious belief, the concept should not be employed as a standard for the adjudication of establishment clause cases. \textit{See Developments—Religion and the State}, \textit{supra} note 106, at 1653 n.61 (1987) (observing that since governmental expressions of civil religion may have religious as well as patriotic meaning, they may violate the establishment clause); Comment, \textit{supra} note 110, at 545-46 (since American civil religion bears the marks of Protestantism, it may offend religious minorities).
  \item \textsuperscript{130} \textit{Lemon} v. \textit{Kurtzman}, 403 U.S. 602, 612-13 (1971).
  \item \textsuperscript{131} \textit{See supra} note 13 and accompanying text.
  \item \textsuperscript{132} \textit{Wallace} v. \textit{Jaffree}, 472 U.S. 38, 63 (1985) (Powell, J., concurring).
CEREMONIAL INVOCATIONS

Commentators\textsuperscript{133} and members of the Court. Specifically, then-Associate Justice Rehnquist, dissenting in \textit{Wallace v. Jaffree},\textsuperscript{134} reviewed the history of the framing of the first amendment and concluded that the \textit{Lemon} test and the "wall of separation" theory on which it was based, have no grounding in the history of the establishment clause.\textsuperscript{135} Thus, Chief Justice Rehnquist would abandon the \textit{Lemon} analysis altogether. Both Justice White\textsuperscript{136} and Justice Scalia\textsuperscript{137} have also expressed their dissatisfaction with the \textit{Lemon} test and their willingness to reassess its validity.

Justice O'Connor also has expressed some misgivings with \textit{Lemon},\textsuperscript{138} but instead of totally abandoning the analysis, she has suggested a reformulation of the test.\textsuperscript{139} According to Justice O'Connor, "the religious liberty protected by the Establishment Clause is infringed when the government makes adherence to religion relevant to a person's standing in the political community."\textsuperscript{140} The government can make adherence to religion relevant to a person's standing in the political community in two principal ways. First, if the government becomes excessively entangled with religious institutions, this could either interfere with the independence of the institutions or give the institutions access to the political process not fully shared by nonadherents of the religion. Second, by either endorsing or disapproving of religion, the government can send a message to citizens

\begin{itemize}
\item \textsuperscript{134} 472 U.S. 38, 91-106 (1985) (Rehnquist, J., dissenting).
\item \textsuperscript{135} \textit{Id.} at 110.
\item \textsuperscript{136} Justice White stated:
Against [Justice Rehnquist's explication of the history of the religion clauses], it would be quite understandable if we undertook to reassess our cases dealing with these Clauses, particularly those dealing with the Establishment Clause. Of course, I have been out of step with many of the Court's decisions dealing with this subject matter, and it is thus not surprising that I would support a basic reconsideration of our predecesors.
\item \textsuperscript{137} \textit{Id.} at 91 (White, J., dissenting).
\item \textsuperscript{138} Justice Scalia endorsed Justice Rehnquist's historical analysis with respect to the purpose prong of \textit{Lemon}. Edwards v. Aguillard, 107 S. Ct. 2573, 2605 (Scalia, J., dissenting).
\item \textsuperscript{139} In Lynch v. Donnelly, 465 U.S. 668 (1984), Justice O'Connor stated that "[i]t has never been entirely clear . . . how the three parts of the [Lemon] test relate to the principles enshrined in the Establishment Clause." \textit{Id.} at 688-89 (O'Connor, J., concurring). In Wallace v. Jaffree, 472 U.S. 38 (1985), Justice O'Connor noted that "[d]espite its initial promise, the Lemon test has proved problematic." \textit{Id.} at 68 (O'Connor, J., concurring).
\item \textsuperscript{139} \textit{See Lynch}, 465 U.S. at 687-94 (O'Connor, J., concurring); \textit{Wallace}, 472 U.S. at 68 (O'Connor, J., concurring) ("Perhaps because I am new to the struggle, I am not ready to abandon all aspects of the Lemon test.").
\item \textsuperscript{140} \textit{Wallace}, 472 U.S. at 69 (O'Connor, J., concurring).
\end{itemize}
that their adherence or nonadherence to religion will make a difference as to whether they are favored or disfavored members of the political community. Thus, under Justice O'Connor's reformulation, "Lemon's inquiry as to the purpose and effect of a [government action] requires courts to examine whether government's purpose is to endorse religion and whether the [action] actually conveys a message of endorsement."

The Eleventh Circuit in Jager concluded that the Lemon test governed the use of ceremonial invocations in the public schools, and applied Justice O'Connor's endorsement test to the question. The Supreme Court has not expressly adopted Justice O'Connor's reformulation of Lemon in place of the traditional Lemon test. However, the Court has employed Justice O'Connor's "endorsement/disapproval" language when applying the Lemon purpose and effect prongs in a number of recent establishment clause cases. Thus, the Lemon analysis—as reformulated by Justice O'Connor—is the appropriate standard to apply to the ceremonial invocation issue.

IV. APPLICATION OF JUSTICE O'CONNOR'S REFORMULATION OF THE LEMON TEST

According to Justice O'Connor, the "purpose prong of the Lemon test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval." The entanglement prong of Lemon requires that the government not become excessively entangled with institutional religion.

141. Id. In addressing the effect of the government practice, "'[t]he relevant issue is whether an objective observer, acquainted with the [circumstances surrounding the government's action] would perceive it as a state endorsement of [religion or a particular religious belief].'" Id. at 76.

142. See Jager, 862 F.2d 824, 828-31 (11th Cir. 1989).


146. Id. at 689. Justice O'Connor later expressed doubts about the validity of the entanglement prong of the Lemon test. In Aguilar v. Felton, 473 U.S. 402 (1985), which followed Lynch, she suggested that "'[i]f 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.'" Id. at 430
A. The Purpose Prong

Under the traditional *Lemon* analysis, the purpose prong is violated only where no secular purpose exists for the governmental action.\(^{147}\) Thus, governmental activity motivated in part by a secular purpose and in part by a religious purpose could pass the purpose prong of *Lemon*.\(^{148}\) It is unclear whether the Supreme Court has retained this principle in its application of Justice O'Connor's endorsement test. In both *Wallace* and *Edwards*, the Court concluded both that no legitimate secular purpose existed for the government action and that the purpose was to endorse religion.\(^{149}\) In *Jager v. Douglas County School District*,\(^{150}\) however, the district court concluded that the school district had three secular purposes for the invocation practice, but that the school district also intended to endorse Protestant Christianity. Thus, the question arises whether the existence of a legitimate secular purpose satisfies the purpose prong even though an intent to endorse religion also exists. Neither Justice O'Connor nor any other member of the Court has qualified the endorsement test by, for instance, stating that where a government action is motivated by a legitimate secu-

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(O'Connor, J., dissenting).

Justice O'Connor's views about the entanglement prong may be analyzed in terms of cases that deal with subsidies to religious organizations, and those that do not. For example, in *Lynch*, which upheld the erection of a creche, Justice O'Connor accepted the entanglement prong but limited the doctrine to "institutional" entanglement. Yet in *Aguilar*, which dealt with financial aid to parochial schools, she "question[ed] the utility of entanglement as a separate Establishment Clause standard in most cases." *Aguilar*, 473 U.S. at 422 (emphasis added). Although Justice O'Connor may have intended to leave open the door to using the entanglement prong as an independent constitutional test in cases that do not involve financial subsidies, it is unclear whether she would apply an institutional entanglement test to the ceremonial invocations issue.

147. *Edwards*, 107 S. Ct. at 2577 (to pass *Lemon* the legislature must have acted "with a secular purpose") (emphasis added).

148. *Wallace*, 472 U.S. at 56 ("statute that is motivated in part by a religious purpose may satisfy [the purpose prong]"). But see *Stone v. Graham*, 449 U.S. 39, 41-43 (1980) (although state asserted secular purposes for posting copies of Ten Commandments in classrooms, Court held that because the preeminent purpose was plainly religious, this practice violated *Lemon*'s purpose prong).

149. In *Edwards*, Justice Brennan concluded that "because the primary purpose of the [governmental action was] to endorse a particular religious doctrine, [it] further[ed] religion in violation of the Establishment Clause." 107 S. Ct. at 2583. Yet he also emphasized that the petitioner had "identified no clear secular purpose" for the government action. *Id.* at 2578. In *Wallace*, Justice Stevens stated:

In applying the purpose test, it is appropriate to ask "whether government's actual purpose is to endorse or disapprove of religion." In this case the answer to that question is dispositive. For the record not only provides us with an unambiguous affirmative answer, but it also reveals that the enactment of the [challenged statute] was not motivated by any clearly secular purpose—indeed, the statute had no secular purpose. 472 U.S. at 56 (footnote omitted) (emphasis in original).

150. 862 F.2d 824, 829 (11th Cir. 1989).
lar purpose as well as a purpose to endorse religion the purpose prong is still satisfied. Since the purpose prong of the endorsement test has been consistently stated in unqualified terms, a finding that one of the purposes of the government was to endorse religion should constitute a violation of the purpose prong.  

Applying this understanding of the purpose prong to the practices at issue in *Jager v. Douglas County School District*  
152 and *Stein v. Plainwell Community Schools*  
153 will illustrate how the purpose prong works. The district court in *Jager* found that the actual purposes for opening the football games with an invocation included three secular purposes, but also included an intent to endorse Protestant Christianity.  
154 Assuming the district court's findings were not clearly erroneous, the Eleventh Circuit properly held that the practice violated the purpose prong of *Lemon*.  
155

The district court in *Stein* noted that the record contained no clear articulation of the purpose of the school districts for including the invocations in the graduation ceremonies.  
156 However, the court gleaned from the stipulation of facts that the school districts had two secular purposes for including the invocations. First, the schools were following a long tradition of using the invocation to provide a solemn opening for the ceremonies. Second, the schools were permitting the students to plan or participate in their own commencement exercises.  
157 The district court also stated its view that it was the school district’s purpose for including the practice in the graduation, rather than the purpose of the person actually delivering the invocation, which was relevant to the purpose prong analysis.  
158 Thus, the court reasoned that since ceremonial invocations have a dual nature in that they are both religious and ceremonial, the purpose of the government was not necessarily religious simply by virtue of the fact that the prac-

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151. *See Comment, Lemon Reconstituted: Justice O'Connor's Proposed Modification of the Lemon Test for Establishment Clause Violations, 1986 B.Y.U. L. Rev. 465, 471* (preferring Justice O'Connor’s version of the intent prong over the traditional intent prong because Justice O’Connor’s version invalidates any practice motivated by an intent to endorse religion even though a secular intent also exists, whereas the traditional intent prong is satisfied as long as the practice is not wholly motivated by religious purposes).
152. 862 F.2d 824 (11th Cir. 1989).
153. 822 F.2d 1406 (6th Cir. 1987).
154. 862 F.2d at 829.
155. *Id.* at 830. The Eleventh Circuit based its conclusion on its determination that the school district was most interested in the religious purpose for the practice. *Id.* However, since one of the purposes for the practice was to endorse religion, this finding should have been sufficient in and of itself to violate the purpose prong.
157. *Id.* at 48.
158. *Id.* at 47.
tice contemplated the offering of a prayer. Having found two secular purposes for the practice and no evidence of an intent to endorse religion by the school districts, the district court held the practices did not violate the purpose prong.

The district court's reasoning in Stein differs from language in the Eleventh Circuit's decision in Jager. The Eleventh Circuit indicated that the purpose for an invocation practice which permits prayer would have to be religious since prayer is inherently religious. Thus, the Eleventh Circuit suggests that an invocation practice would violate the purpose prong of Lemon regardless of whether any evidence of an intent to endorse religion exists.

The district court's analysis in Stein is the proper approach. As Justice O'Connor has explained, the intent of government is examined because some people may discern this actual intent, even though the message actually conveyed is different. Thus, the first prong focuses on the government's actual subjective intent in authorizing a certain activity, which may not be obvious simply from the religious nature of the activity. This is especially true with regard to ceremonial invocations which also have a ceremonial nature and purpose that is distinct from a prayer's religious function. Thus, when conducting this first inquiry, the courts should scrutinize the subjective intent of the governmental entity which sanctioned the prayer to determine whether a purpose to endorse religion exists. If no such purpose is found, and the government expresses a bona fide and plausible secular purpose for the practice, the practice should not be struck down based on the first prong of Lemon.

B. The Effect Prong

When addressing the moment of silence statute at issue in Wallace v. Jaffree, Justice O'Connor stated that the inquiry under the effect

159. See id.
160. Id. at 50.
161. Jager, 862 F.2d at 830 ("an intrinsically religious practice cannot meet the secular purpose prong of the Lemon test").
164. Justice O'Connor has stated that the courts should defer to a government entity's expression of a plausible secular purpose. Wallace v. Jaffree, 472 U.S. 38, 74 (1985) (O'Connor, J., concurring). However, she has also explained that the courts should distinguish "a sham secular purpose from a sincere one," and that in a close case, the inquiry into the effect prong of Lemon might help the court decide on the purpose question. Id. at 75.
prong of *Lemon* was "whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools."166 Since the decision to include an invocation at a school event generally is not statutory, Justice O'Connor's statement would presumably require a court to examine the records of discussions concerning the decision to establish or continue the practice, any written statements or guidelines concerning the practice, and the manner in which the decision was implemented when determining whether an objective observer would perceive the practice as an endorsement of religion.

To address this formulation of the effect prong, two of its elements must be clarified. First, it must be determined whether a court should take the perspective of an adherent or a nonadherent of the religious beliefs implicated by the practice at issue since the endorsement question could easily turn on which of these perspectives is taken.167 Because the purpose of Justice O'Connor's test is to ensure that the government does not convey to nonadherents the message that their beliefs are disfavored,168 the courts should assume the nonadherent's perspective when examining the message conveyed by a government practice.169

Second, it is unclear precisely how the legislative history and other factors surrounding the decision to have an invocation should influence the effect prong analysis. Although Justice O'Connor has stated that the objective observer should be imputed with knowledge of the "legislative history" and text of a challenged government policy, as well as the manner in which the policy was implemented, taking this approach drains the effect prong of any independent function. An objective observer acquainted with this information will reach the same conclusion as to whether the government is conveying a message of endorsement or disapproval of religion that the court will reach when

166. *Id.* at 76.
167. *See Developments—Religion and the State, supra* note 106, at 1647-48 ("The objective observer approach . . . may allow a finding for or against a government action, depending on whether the action is viewed from the perspective of the accommodated majority or from the perspective of the outsider who does not share the accommodated beliefs.").

This principle may be illustrated to some extent by comparing Justice Brennan's dissenting opinion in *Lynch* with Justice O'Connor's concurring opinion. Justice Brennan appears to have examined the creche from the perspective of a nonadherent. "The effect on minority religious groups, as well as on those who may reject all religion, is to convey the message that their views are not similarly worthy of public recognition nor entitled to public support." *Lynch*, 465 U.S. at 701 (Brennan, J., dissenting) (emphasis added). Justice O'Connor seems not to have employed this distinction in her analysis as she phrased the inquiry as what "viewers may fairly understand to be the purpose of the display." *Id.* at 692 (O'Connor, J., concurring) (emphasis added).

conducting the intent prong analysis. The need to examine the purpose and effect prongs separately derives from the recognition that when government speaks the message actually received by some members of the audience may—and often does—differ from the intended message. Since this is the underlying purpose for conducting the intent analysis separately from the effect analysis, it seems that the observer of the practice should not be imputed with detailed knowledge of the specific circumstances surrounding the school district's decision to have an invocation practice.

Thus, when examining the message conveyed by a school's practice of opening events with an invocation, courts should take the perspective of an objective observer in the audience who does not adhere to the religious beliefs implicated by the practice, and who is not imputed with detailed knowledge of the legislative history of the school district's decision to have the invocation. Taking this perspective, it will be difficult to conclude that the sanctioning of invocations at public school events, regardless of the content of the invocations, is permissible. Unlike other public references to God, such as the national motto or the Pledge of Allegiance, which by rote repetition over the years have likely lost much of their religious content, invocations are inherently religious exercises, the content of which changes with each new speaker. It is difficult to conceive of the offering of an invocation which would not be perceived by nonadherents as a message of endorsement of religion. Accordingly, as the Eleventh Cir-

172. See id. at 716 (Brennan, J., dissenting):
I would suggest that such practices as the designation of "In God We Trust" as our national motto, or the references to God contained in the Pledge of Allegiance to the flag can best be understood...as a form of "ceremonial deism," protected from Establishment Clause scrutiny chiefly because they have lost through rote repetition any significant religious content. Id. (citation omitted) (emphasis added).
173. See Wallace v. Jaffree, 472 U.S. 38, 73 (O'Connor, J., concurring) (distinguishing sponsored vocal prayer from moment of silence in that moment of silence is not inherently religious); Marsh v. Chambers, 463 U.S. 783, 811 (1983) (Brennan, J., dissenting) ("Prayer is religion in act. Praying means to take hold of a word, the end, so to speak, of a line that leads to God.") (footnotes omitted) (emphasis in original); Engel v. Vitale, 370 U.S. 421, 424-25 (1962) (denominationally neutral prayer composed by New York, "a solemn avowal of divine faith and supplication for the blessings of the Almighty," is obviously religious in nature).

Although an invocation as defined earlier, supra note 2, is inherently religious because it is a prayer to a divine being, the use of an inspirational speech to open public high school events would not be inherently religious.
174. Professor Loewy's application of Justice O'Connor's endorsement test to the Supreme Court's invocation of "God Save the United States and this Honorable Court" illustrates how a
cuit indicated in Jager v. Douglas County School District, the practice of having invocations at public high school events should be held unconstitutional based on the effect prong of Lemon, regardless of the content of a particular invocation.

C. The Entanglement Prong

The third prong of the Lemon test requires that government not become excessively entangled with religion. The entanglement prong "reflect[s] the Madisonian concern that secular and religious authorities must not interfere with each other's respective spheres of choice and influence." The prong has two general strands: administrative entanglement and political divisiveness. Since the Court has indicated that the political divisiveness inquiry applies only to cases involving direct financial subsidies to religious institutions, only the administrative entanglement strand is implicated by the ceremonial invocation issue when the speaker is not monetarily compensated.

The administrative entanglement prong has most often been addressed in cases involving government aid to religious institutions.

nonadherent is likely to perceive such an invocation:


175. 862 F.2d 824 (11th Cir. 1989).

176. This result also avoids the problems created by an analysis which requires the courts to examine the language of particular invocations to determine their validity. See Comment, Stein v. Plainwell Community Schools: The Constitutionality of Prayer in Public High School Commencement Exercises, 22 GA. L. REV. 469, 496-97 n.96 (1988).


178. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-11, at 1226 (2d ed. 1988); see also Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring) (entanglement with religious institutions "may interfere with the independence of the institutions, give the institutions access to government or governmental powers not fully shared by nonadherents of the religion, and foster the creation of political constituencies defined along religious lines") (citation omitted).


The Court's concern in these cases has been that the government surveillance necessary to ensure that the aid does not have the effect of advancing or endorsing religion could lead the government to trespass into the spiritual realm.\textsuperscript{182} Chief Justice Rehnquist,\textsuperscript{183} Justice O'Connor,\textsuperscript{184} and Justice White\textsuperscript{185} have criticized the entanglement prong on the ground that the very state supervision of religious organizations required to ensure compliance with the \textit{Lemon} effect prong renders a program unconstitutional based on the entanglement prong. Since the Court has continued to apply the entanglement prong in recent cases,\textsuperscript{186} however, the entanglement inquiry must still be addressed.

A ceremonial invocation practice could raise both the concern that the state may intrude into the spiritual realm, and that the church may intrude into the governmental realm. In \textit{Marsh v. Chambers},\textsuperscript{187} Justice Brennan raised the former concern in relation to the Nebraska legislature's practice of opening its legislative sessions with an invocation. He concluded that the process of choosing a suitable chaplain, and ensuring that the chaplain said suitable prayers when opening the legislative sessions, involved the very kind of government supervision of church officials that the entanglement prong was intended to avoid.\textsuperscript{188} Similarly, where a school board monitors the selection of invocation speakers or the content of the invocations, the board has trespassed into the spiritual realm, thereby violating the entanglement prong.

A ceremonial invocation practice could also raise the second entanglement prong concern that religious institutions not trespass into the governmental sphere. In \textit{Lynch v. Donnelly},\textsuperscript{189} the Court suggested

\begin{itemize}
\item \textsuperscript{182} See, e.g., \textit{Lemon}, 403 U.S. at 620 (monitoring required by the Rhode Island program created a "relationship pregnant with dangers of excessive government direction of church schools and hence of churches").
\item \textsuperscript{184} See \textit{Aguilar}, 473 U.S. at 429-30 (1985) (O'Connor, J., dissenting) (entanglement prong has led to "anomalous results" and should not be an independent test of constitutionality, but should remain relevant to the effect prong analysis).
\item \textsuperscript{185} See \textit{Roemer v. Board of Pub. Works}, 426 U.S. 736, 767-70 (1976) (White, J., concurring) (entanglement prong is "insolubly paradoxical" and should be eliminated from \textit{Lemon} test); \textit{Lemon}, 403 U.S. at 664-71 (White, J., concurring in part and dissenting in part).
\item \textsuperscript{186} See Bowen v. Kendrick, 108 S. Ct. 2562, 2577-78 (1988); Corporation of Presiding Bishop v. Amos, 107 S. Ct. 2862, 2870 (1987); \textit{Aguilar}, 473 U.S. at 409-14. Cf. Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 489-90 & n.5 (1986) (declining to address entanglement prong as a prudential matter because the question was not addressed by the Washington Supreme Court below, but noting that the state court may choose to consider the question on remand).
\item \textsuperscript{187} 463 U.S. 783 (1983).
\item \textsuperscript{188} \textit{Marsh}, 463 U.S. at 798-99 & n.8 (Brennan, J., dissenting).
\item \textsuperscript{189} 465 U.S. 668, 684 (1984).
\end{itemize}
that the degree of control exercised by church authorities over the content or design of a city's nativity scene in its Christmas display might reach a level that violates the entanglement prong. Lynch suggests that a ceremonial invocation practice could violate the entanglement prong where a school board involves church authorities in the selection of speakers or in the monitoring of the content of the invocations.

Neither the equal access plan in \textit{Jager v. Douglas County School District},\footnote{862 F.2d 824, 827 (11th Cir. 1989).} nor the Plainwell graduation ceremony practice in \textit{Stein v. Plainwell Community Schools},\footnote{822 F.2d 1406, 1407 (6th Cir. 1987).} directed the school boards to monitor the content of the invocations or involved church authorities in selecting invocation speakers. Thus, the Eleventh Circuit in \textit{Jager}\footnote{See \textit{Jager}, 862 F.2d at 831.} and the district court in \textit{Stein}\footnote{See \textit{Stein}, 610 F. Supp. 43, 50 (W.D. Mich. 1985), rev'd, 822 F.2d 1406 (6th Cir. 1987).} properly held that these practices did not violate the entanglement prong. However, under the traditional invocation practice in \textit{Jager}, the school board delegated the task of selecting invocation speakers to the Douglas County Ministerial Association.\footnote{\textit{Jager}, 862 F.2d at 834.} Since this practice raises both entanglement prong concerns, the Eleventh Circuit in \textit{Jager} properly concluded that the traditional invocation practice violated the entanglement prong.\footnote{\textit{Id.} Since ceremonial invocation practices in public high schools should not pass the effect prong of Justice O'Connor's reformulated \textit{Lemon} test, see supra notes 165-76, courts should not have to address the entanglement prong on this issue.}

An invocation practice may or may not violate the entanglement prong, depending on the attributes of the specific practice at issue. However, courts may choose not to fully engage in an entanglement prong analysis because the effect prong of the \textit{Lemon} test should be dispositive.

\section*{V. Conclusion}

The inclusion of an invocation at public high school events seems to be a widespread practice. Thus, the question of whether this practice violates the establishment clause is an important one for public school districts throughout the country. The difference in the approaches taken by the Sixth Circuit in \textit{Stein} and by the Eleventh Circuit in \textit{Jager} has created some uncertainty concerning the proper analytical framework which should be applied to this issue, and whether a properly worded prayer would pass constitutional muster.
Of the three approaches which have been suggested, Justice O'Connor's reformulation of *Lemon* appears to be the standard the Court is most likely to apply to the ceremonial invocation issue. Yet settling on this standard does not resolve the question. The resolution of this issue under O'Connor's endorsement test also depends on whether a court views the practice from the perspective of an adherent or a non-adherent of the religious beliefs implicated by the practice. Since the purpose of the endorsement test is to ensure that the government not convey to nonadherents the message that their beliefs are disfavored, the courts should examine the practice of having ceremonial invocations from the perspective of nonadherents. Taking this approach should lead the courts to hold unconstitutional the practice of including invocations at public high school events.