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PRELIMINARY MEMORANDUM

March 15, 1991 Conference
List 3, Sheet 2, (Page 12)

No. 90-1014-CFX

Lee, et al.

Cert to CA1 (Tortuella;
Bownes [concurr]; &
Campbell [diss])

v.

Weisman (challenged
invocation and benediction
at school graduation
ceremony)

Federal/Civil

Timely

1. Summary: Petrs challenge CA1's decision applying Lemon v. Kurtzman, 403 U.S. 602 (1971), in determining whether invocations and benedictions at public schools violate the 1A. While this Court's cases do not make clear under what circumstances Lemon should be applied, I do not agree with petrs' contention that

there is a circuit split on the issue. Further, the fragmented opinion below may not make the case the best vehicle for addressing the issue. I recommend denial.

2. *Facts and Decisions Below:* Each year, the Providence School Committee and Superintendent of Schools for the City of Providence sponsor graduation ceremonies in the city's public middle and high schools. Resp's daughter was to graduate from Nathan Bishop Middle School, a public junior high, in June of 1989. Part of the program included an invocation and benediction by Rabbi Leslie Gutterman. Four days before the ceremony was to take place, resp filed a motion for a TRO seeking to prevent the inclusion of prayer to a deity in the form of an invocation and benediction in the Providence public schools' graduation ceremonies. The day before the ceremony, the dct (Boyle, C.J.) denied the motion for lack of adequate time to consider the matter. The full texts of Rabbi Gutterman's invocation and benediction, respectively, follow:

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.

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 fore^e these young people, who are our hope fore the future, be richly fulfilled.

AMEN

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 fore^e 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

In July 1989, resp sought a permanent injunction against invocations and benedictions in future graduation ceremonies of the Providence public junior high and high schools.

The dct ruled in favor of resp and granted the requested relief: The SCT has consistently applied the three-pronged test of Lemon v. Kurtzman, 403 U.S. 602 (1971), to determine whether a particular state action violates the Establishment Clause of the Constitution. The Lemon test reviews governmental actions for conformity with the Establishment Clause using three prongs: First, the practice must have a secular purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; third, the practice must not foster an excessive entanglement with religion. Because we find that the Providence School

Committee's practice permitting public school invocations and benedictions delivered by clergy in graduation ceremonies violates the second prong of the Lemon test, we do not discuss the other prongs of the test.

One method of determining whether a state action advances or inhibits religion is to determine whether the action creates an identification of the state with a religion, or with religion in general. In this case, the benediction and invocation advance religion by creating an identification of school with a deity, and therefore religion. The invocation and benediction present a "symbolic union" of the state and schools with religion and religious practices. While the fact that graduation is a special occasion distinguishes this school day from all others, the uniqueness of the day could highlight the particular effect that the benediction and invocation may have on the students. The symbolic union of government and religion in one sectarian enterprise is an impermissible effect under the Establishment Clause.

Closely related to the identification analysis is examination which determines whether the effect of the governmental action is to endorse one religion over another, or to endorse religion in general. The response is a foregone conclusion; that is, the reference to a deity necessarily implicates religion. The Providence School Committee has in effect endorsed religion in

general by authorizing an appeal to a deity in public school graduation ceremonies. The invocations and benedictions convey a tacit preference for some religions, or for religion in general over no religion at all. Petr argues that this ct should follow the reasoning of CA6 in Stein v. Plainwell Community Schools, 822 F.2d 1406 (CA6 1987), in which the ct extended Marsh v. Chambers, 463 U.S. 783 (1983) (upholding Nebraska state legislature's opening of each session with a prayer led by a chaplain who was paid by the State), to include benediction and invocations at public school commencement ceremonies. In Stein, CA6 held that high school graduation exercises were analogous to the legislative and judicial sessions in Marsh. CA6 did, however, find that the particular benediction and invocation challenged in Stein were unacceptable under the Marsh holding because they contained language that was based on Christian theology and thus were not nonsectarian. Stein's extension of Marsh is not persuasive. The Marsh holding was narrowly limited to the unique situation of legislative prayer.

CA1 affd for the reasons stated by the dct. Judge Bownes concurred separately, concluding that the invocation and benediction violated all three prongs of the Lemon test. Judge Campbell dissented, believing that invocations and benedictions on public ceremonial

occasions are constitutionally acceptable so long as school authorities take care to invite speakers representing a wide range of religious beliefs and nonreligious ethical philosophies.

3. *Contentions:* Graduation invocations and benedictions cannot sensibly be perceived as a real threat to the fundamental values protected by the 1A. These traditional ceremonial practices pose no greater threat to the Establishment Clause values than do legislative invocations, upheld in Marsh, supra. CA1 dismissed Marsh as a narrow exception to Lemon, supra, extending only to official religious practices, such as legislative prayer, that were well known and broadly accepted when the 1A was framed in 1791--an exception inapplicable here because the origins of public schooling in this country can be traced back only a century and a half. CA1 thus adopted an understanding of Marsh directly at odds with that of CA6 in Stein, supra, which viewed nondenominational invocations at public school graduation ceremonies as analogous to the legislative prayers upheld in Marsh.

Resp: CA1's decision presents no unsettled question. Further, petrs make too much of the differences between the decision in this case and that of CA6 in Stein. CA6 adopted a Marsh rather than a Lemon analysis, but nevertheless held that the prayers before

it were constitutionally impermissible because they placed the state's imprimatur on one set of religious beliefs--Christianity. Thus, at most, the purported conflict with Stein is one of reasoning, not result.

A number of Amici have raised substantially the same contentions as those of petrs in briefs in support of petrs. The Amici who have filed briefs in the case (all in support of petrs) are: (1) The United States, (2) The States of Utah, Idaho, North Dakota, Pennsylvania, and Wyoming, (3) The National Association of State Boards of Education, (4) The National School Boards Association.

4. *Discussion*: First, it is not so clear under the Supreme Court's cases when the Lemon test must be applied and when it need not. Lemon involved two state statutes providing aid to church-related elementary and secondary schools. The Court noted that a given law might not establish a state religion but nevertheless be one "respecting an establishment of religion" under the 1A in the sense of being a step that could lead to such establishment and hence offend the 1A. Lemon, 403 U.S., at 612. The Court then stated, "we must draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Id.*, at 612 (quoting Walz v. Tax Commission, 397 U.S. 664, 668

(1970)). "Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. 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." *Id.*, at 612-613 (internal quotations omitted). In *Marsh v. Chambers*, 463 U.S. 783 (1983), however, where the Court considered the Nebraska Legislature's practice of beginning each of its sessions with a prayer by a chaplain paid out of public funds, the Court did not apply *Lemon*. But neither did it make clear when it was appropriate to apply *Lemon* and when not. The message was instead conflicting: On the one hand, the framers' actions revealed their intent--the same week members of the First Congress voted to appoint and to pay a chaplain for each House, they voted to approve the draft of the 1A for submission to the states, *Marsh*, at 790; on the other hand, the Court seemed to speak more broadly--"We conclude that legislative prayer presents no more potential for establishment than the provision of school transportation, beneficial grants for higher education, or tax exemptions for religious organizations. *Id.*, at 791 (citations omitted). *Lynch v. Donnelly*, 465 U.S. 668

(1984), did not help when it stated that the Court does not always consider the Lemon analysis relevant in the Establishment Clause area and pointed out that this was so in Marsh. *Id.*, at 679. Thus, it may be worthwhile to take this case in order to clarify the scope of Marsh.

I cannot agree with *petrs*, however, that there is a circuit split on the question whether Marsh or Lemon applies in assessing the 1A validity of invocations and benedictions at graduation ceremonies. Stein v. Plainwell Community Schools, 822 F.2d 1406 (CA6 1987), involved three separate opinions. Two of those applied Lemon. All other CA's to have considered the question have also applied Lemon.

I note that the fragmented opinion below in this case may not make it the best vehicle for consideration of the issue presented. Judge Torruella, in his lead opinion, merely stated the Court's agreement with the opinion of the *dct*. The *dct* pointed out that plaintiff (*resp*) was contesting only an invocation or benediction which invokes a deity or praise of a God. In the *dct*'s view, "nothing in this decision prevents a cleric of any denomination or anyone else from giving a secular inspirational message at the opening and closing of the graduation ceremonies." App. to Pet. for Cert. 28a. But in Judge Bownes' view, the Constitution "prohibits prayer in public schools and not merely references to a deity.

An invocation (literally invoking the name of God over the proceedings) and a benediction (blessing the proceedings) are by their very terms prayers and religious. A benediction or invocation offends the First Amendment even if the words of the invocation or benediction are somehow manipulated so that a deity is not mentioned." Id., at 13a.

5. Recommendation: Deny

There is a response.

March 6, 1991 Anabtawi Op. in petn; dct op. at
728 F. Supp. 68 (D.R.I. 1990).

I think this is a hard case. But I hope the Court denies cert b/c I fear for what some Justices would do if the case were granted. Iman is correct that the CAS have not split on these questions. The tension between Marsh and Lemon is reflected in opinions such as CAB's Stein but the tension is neither deep nor intolerable.

X AA 3.8.91