Evangelical Chaplains, Ceremonial Deism, and the Establishment Clause

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Introduction

Several instances exist in which political and military leaders encouraged the reading of Scripture in order to spur members of the armed forces to be both morally upright individuals and better warriors. The wedding of Scripture with service to country is a theme found throughout America's history, and has led some cultural critics to charge that America has always had a sort of politicized religion, where honor to God is important, so long as it supports the agenda and ethos of the State.

Former Navy Chaplain (Lieutenant) Gordon Klingenschmitt, well known for supposedly being court-martialed for praying in Jesus' name, has argued that Unitarian Universalism is actually the official religion of the U. S. government.[2] Elsewhere, I have questioned Klingenschmitt's claims with regard to the specifics [Unitarian Universalism is not the government-endorsed religion of the U.S.], but I also think we should not be too quick to dismiss the general claim that there is a government-sponsored religion.[3]

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[2]In support of his claim, he points to training in pluralism conducted at the military service schools for chaplains, official guidance on public prayers disseminated by the Naval Chief of Chaplains Office, and the perceived endorsement of Harvard University Divinity School's "Pluralism Project" by naval chaplaincy leadership.

[3]See my *In Jesus' Name* (2010). Even though I questioned his claims about Universalism, I have sustained his claim that there does seem to be a preference in military chaplaincy (in my examination, specifically Army chaplaincy) for theological liberalism and at a minimum, an ambivalence toward evangelicalism (and perhaps in the Navy, outright hostility, though probably more localized and sporadic than he wishes to admit), but have also argued

Many candidates for the government-sponsored religion have been proposed in addition to Klingenschmitt's claim of Unitarian Universalism. For example, Noonan argues that the United States government, through its Establishment Clause jurisprudence, has actually made military service, paying taxes, and the judiciary sacred,[4] though other, more viable candidates exist. Perhaps the most serious and plausible is *ceremonial deism*, since it actually serves as the legal basis for the constitutionality of instances where religion and government mix. That is, religious speech at government-sponsored events, religious symbols on government-owned property, or religious practices led by government employees functioning in their official capacity, are deemed constitutional because they are thought to be cases of ceremonial deism. Of course, the applicability to the question of allowing sectarian prayers (e.g., "In Jesus' Name") by military chaplains at official events and ceremonies should be obvious. Such prayers are typically justified by an appeal to *ceremonial deism*.

"Ceremonial Deism" is the legal term used to describe activity (primarily speech) that, "though religious in nature has a secular purpose and hence is constitutional."[5] The term originates with Eugene Rostow, then Dean of the Yale Law School, who explained in his 1962 Meiklejohn Lecture at Brown University that certain types of speech were "so conventional and uncontroversial as to be constitutional."[6] Since Rostow introduced the term, it has been used by several Supreme Court Justices in Establishment cases, sometimes by explicit reference, and sometimes by allusion. It was specifically mentioned by Justice William Brennan in his

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that this should not be surprising, given perceived constitutional constraints coupled with the pluralistic composition of the military.

[4]See John T. Noonan, *The Lustre of Our Country: The American Experience of Religious Freedom* (Berkeley: University of California Press, 1998), 216-231.

[5]Davison M. Douglas, "Ceremonial Deism" in *Encyclopedia of American Civil Liberties*, ed. Paul Findleman (New York: Routledge, 2006) 1:258.

[6]Eugene Rostow, Meiklejohn Lectures on Law (unpublished), Brown University, 1962.

dissenting opinion in *Lynch v. Donnelly* (1984) to argue that some phrases, through rote repetition, have lost their significant religious content, and by Justice Sandra Day O'Connor in her opinion in *County of Allegheny v. ACLU* (1989), a case involving religious symbols in holiday displays, and in *Elk Grove Unified School District v. Newdow* (2004), a case which questioned the constitutionality of the phrase, "under God" in the Pledge of Allegiance.[7] In the latter two cases, O'Connor claimed that a secular purpose, along with a history of institutional use, can allow religious speech or symbols to pass constitutional muster.

The basic reason for accepting ceremonial deism has to do with the function some religious references and symbols have played in the historical and cultural development of the United States; they have, through continued use, become part of the American identity and consciousness. Yet, even among its adherents/proponents, there is little agreement over what constitutes legitimate cases. For example, Frank Ravitch argues that ceremonial deism should be limited to items of a generic religious nature associated with public property or government-sponsored events, such as patriotic songs with references to the divine, "In God We Trust" on U.S. currency, and even Christmas trees on public property, but it should not include items with theological content such as nativity scenes, Ten Commandment displays, or legislative prayers because they are too specific, and to so identify them is to detract from their religious meaning.[8] Others, though, have even viewed at least some prayers (e.g., invocations at the opening of legislature, invocations and benedictions at military and other governmental ceremonies, etc.) as instances of ceremonial deism. In order to gain an appreciation for the complexities associated

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[7]Justice Harry Blakckmun, in *County of Allegheny v Greater Pittsburgh ACLU*, argued that all people realize that the government is not promulgating particular religious beliefs by simply allowing religious symbols in a holiday display.

[8]Frank S. Ravitch, *Masters of Illusion: The Supreme Court and the Religion Clauses* (New York: NYU Press, 2007), 101.

with the concept of ceremonial deism and to see how it has been used in Establishment Clause jurisprudence, it may be helpful to examine, in some detail, the rulings in the three cases in which it was mentioned. We will then be in a position to evaluate it as a concept and to determine how to proceed in responding to the issue of sectarian prayers at public events in a way that is workable as well as theologically sound.

Lynch v Donnelly (1984)

Two separate cases involving religious displays set up and maintained by local governments have included references and/or allusions to ceremonial deism. The first case, *Lynch v Donnelly*, arose when the city of Pawtucket, RI, erected a nativity scene as part of a larger Christmas holiday display. The display included many secular items such as a banner which read, "Season's Greetings," a Santa Clause house, and a Christmas tree, and was erected on the grounds of a park owned by a nonprofit organization in the heart of the city's downtown shopping district. It had been an annual display for forty years before the local chapter of the American Civil Liberties Union brought suit, claiming the crèche violated the First Amendment.

The city claimed that the crèche served a purely secular purpose as part of the larger holiday display designed to attract people to the downtown shopping district in order to boost retail sales. It also stated that it hoped to engender the spirit of goodwill and neighborliness which is a common result of the Christmas season. The Court ruled in favor of the city, arguing that the display of the crèche is not a violation of Establishment because it serves a secular purpose and does not advance religion.

In the majority opinion, Chief Justice Warren Burger noted that it is the *purpose* of any given governmental activity which determines its constitutionality: if it has a religious purpose, then it is unconstitutional: "Focus exclusively on the religious component of any activity would

inevitably lead to its invalidation under the Establishment Clause."[9] Justice Burger points out, just because a given action or item is religious in nature, does not necessarily mean that it is a violation of Establishment. In fact, he argues that Ten Commandments displays or required Bible reading in public schools could be constitutional if they served a secular purpose.[10] The religious content is not the primary concern; rather, the *purpose* and as will be noted later, the *effect* are most important is Establishment Clause questions.

It is interesting to note that Burger admits that, even though the crèche serves a secular purpose for the city (namely, to celebrate a national holiday and point to its historic origins), it may still indirectly advance a particular religion (i.e., Christianity). This indirect aid, though, does not in itself make the display a violation of the Constitution: "Here, whatever benefit there is to one faith or religion or to all religions, is indirect, remote, and incidental; display of the crèche is no more an advancement or endorsement of religion than the Congressional and Executive recognition of the origins of the Holiday itself as 'Christ's Mass' . . ."[11] So advancement of religion, at least under Burger's analysis, may be constitutional, so long as it is incidental to a larger secular purpose and can be fairly judged minor in scope or effect.

Justice Sandra Day O'Connor, in her concurring opinion, notes that Establishment questions cannot be decided by a single test, but that the endorsement test is particularly helpful nonetheless. The endorsement test disallows situations in which an individual's inclusion in the political community or process is contingent upon some form of religious belief, confession, or practice. However, the evaluation of contingency must be based upon what a reasonable

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[9] *Lynch v Donnelly*, 465 US 668 (1984) at 60.

[10] 465 US 668 at 679.

[11] 465 US 668 at 683.

observer would be expected to think about the relationship between inclusion in the political community and the activity, and the religious nature of the activity.[12] The upshot of this requirement is a denial of an absolute separation of all references to religion in public life. In this case, O'Connor makes a distinction between the intent of city leaders in displaying the crèche, and what they actually communicated in the display. Thus, for the Court, the hermeneutical issue includes both authorial intent and the meaning of the words/actions themselves. Even if the intent is secular, there could still be a violation of Establishment (if the outcome is that a particular religion is promoted, or religion is promoted over non-religion, or vice versa).[13]

In the case of Pawtucket's Christmas display, the fact that it was included alongside non-religious holiday images supported the city's claim that the nativity display was not meant to promote religion, but instead to celebrate the holiday. O'Connor concluded that this case was no more a violation of Establishment than other government acknowledgements of religions such as the recognition of Thanksgiving, "In God We Trust" on coinage, or opening courts with the declaration, "God save the United States and this honorable court." According to O'Connor, these sorts of government acknowledgement of religion solemnize pubic occasions, express

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[12]O'Connor notes elsewhere that the endorsement test must assume the viewpoint of a reasonable observer because there could always be unreasonable objections to any supposedly religious event or requirement. She writes, "Given the dizzying religious heterogeneity of our Nation, adopting a subjective approach would reduce the test to an absurdity. Nearly any government action could be overturned as a violation of the Establishment Clause if a 'heckler's veto' sufficed to show that its message was one of endorsement. . . . Second, because the 'reasonable observer' must embody a community ideal of social judgment, as well as rational judgment, the test does not evaluate a practice in isolation from its origins and context. Instead, the reasonable observer must be deemed aware of the history of the conduct in question, and must understand its place in our Nation's cultural landscape." *Elk Grove Unified School District et al v Newdow et al,* 542 US 1 at 85.

[13]O'Conor writes, "If the audience is large, as it always is when government 'speaks' by word or deed, some portion of the audience will inevitably receive a message determined by the 'objective' content of the statement, and some portion will inevitably receive the intended message. [Note: She neglect to mention that some, no doubt, will fail to properly discern either, but perhaps this is irrelevant to her point.]. Examination of both the subjective and objective components of the message communicated by a government action is therefore necessary to determine whether the action carries a forbidden meaning." *Lynch v Donnelly,* 465 US 668 (1984) at 690.

confidence in the future, and encourage the recognition of what is worthy of appreciation in society. She concludes, "For that reason, and because of their history and ubiquity, those practices are not understood as conveying governmental approval of particular religious beliefs. The display of the crèche likewise serves a secular purpose—celebration of a public holiday with traditional symbols."[14]

The dissenting opinion was written by Justice William Brennan, who was joined by Justices Marshall, Blackmun, and Stevens. Their principle objection was due to the sectarian nature of the crèche. It is simply hard to believe, they noted, that the city leaders' motives for including a nativity scene in the holiday display was purely secular, but that notwithstanding, it is even more difficult to claim that it does not have the primary *effect* of advancing religion. This fact leads to excessive entanglement, and there does not seem to be a compelling state interest in retaining the crèche. As Justice Brennan notes, the secular goals can be met without the nativity scene: "Plainly, the city's interest in celebrating the holiday and in promoting both retail sales and goodwill are fully served by the elaborate display of Santa Claus, reindeer, and wishing wells that are already a part of Pawtucket's annual Christmas display. More importantly, the nativity scene, unlike every other element of the Hodgson Park display, reflects a sectarian exclusivity that the avowed purposes of celebrating the holiday season and promoting retail commerce simply do not encompass."[15]

Justice Blackmun wrote an additional dissenting opinion in which he was joined by Justice Stevens. In it, he suggests that, in addition to an improper application of the Lemon Test (another commonly used Establishment Clause test), the Court's ruling here does an injustice to

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[14]465 US 668 at 693.

[15]465 US 668 at 699-700.

the religious value and meaning of the nativity scene. That is, to see the nativity scene as just one more item in a secular display designed to make money for community merchants is to detract from its true significance:

> While certain persons, including the Mayor of Pawtucket, understood a crusade to 'keep 'Christ' in Christmas,' App. 161, the Court today has declared that the presence virtually irrelevant. The majority urges that the display, 'with or without a crèche,' 'recalls[s] the religious nature of the Holiday,' and 'engenders a friendly community spirit of goodwill in keeping with the season.' Ante, at 685. Before the District Court, an expert witness for the city made a similar, though perhaps more candid, point, stating that Pawtucket's display invites people 'to participate in the Christmas spirit, brotherhood, peace, and let loose with their money.' See 525 F. Supp. 1150, 1161 (RI 1981). The crèche has been relegated to the role of a neutral harbinger of the holiday season, useful for commercial purposes, but devoid of any inherent meaning and incapable of enhancing the religious tenor of a display of which it is an integral part. The city has its victory—but it is a Pyrrhic one indeed.[16]

This complaint of Blackmun and Stevens, I suspect, will resonate with many evangelicals regarding a capitulation to ceremonial deist requirements for pluralistic, or at least nonsectarian, prayers.

Allegheny County v Greater Pittsburgh ACLU (1989)

The second case, *Allegheny County v Greater Pittsburgh ACLU* (1989) arose when the American Civil Liberties Union sued the county of Allegheny, claiming that two holiday displays on county-owned land violate the Establishment Clause. The first, a nativity scene, was placed on the Grand Staircase of the Allegheny County Courthouse, a place described as the "main," "most beautiful," and "most public" section of the courthouse. The second, an 18-foot menorah, was erected outside the City-County Building next to the city's 45-foot decorated

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[16]465 US 668 at 726-727. My concern is that a victory in the opposite view—to declare that an activity is religious may win the battle—it is Unconstitutional to require generic prayers since to do so would violate the person's (giving the prayer) free exercise rights—but lose the war. The result may be that, since all prayers are religious expressions of the individual leading the prayer, prayers at all government events will be prohibited. This would be a Pyrrhic victory, but even more so.

Christmas tree and a sign with comments by the city mayor which connect the display to the city's "Salute to Liberty." The crèche was donated by the Holy Name Society, a Roman Catholic group, and the menorah is owned by Chabad, a Jewish group, though it is maintained, stored, and erected by the city.

The Court found (5-4) that the nativity scene violates the Establishment Clause, but that the menorah (6-3) does not. While it may be tempting to interpret these findings as just another example of anti-Christian attitudes in the culture, such an interpretation seems flawed. The reason for rejecting the crèche while accepting the menorah has to do with the setting of each display and what it communicates about the government's endorsement of a particular religion (or religion in general). The crèche was seen as endorsing Christianity because it was alone with no secular message and included a "patently Christian message": a sign which read, "Glory to God for the birth of Jesus Christ."[17] As Justice Blackmun notes in his summary of the judgment, "Although the government may acknowledge Christmas as a cultural phenomenon, it may not observe it as a Christian holy day by suggesting that people praise God for the birth of Jesus."[18] The menorah's position next to the secular symbol of the Christmas tree, along with the largely secular interpretation of the symbols on the city's accompanying sign, detracted from its purely religious significance and communicated a sense of pluralism that makes its display pass constitutional muster.

In her concurring opinion, Justice O'Connor responded to some criticisms of her position in *Lynch v Donnelley.* She points out that an appeal to historical use of religious language, practices, or symbols does not, in itself, allow their continued use to survive Establishment

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[17] *Allegheny County v Greater Pittsburgh ACLU*, 492 US 573 (1989) at 574.

[18] 492 US 573 at 574.

questioning, but it does contribute to an overall evaluation of the meaning of that language or those practices/symbols. Commenting on such examples as legislative prayers and opening court sessions with "God save the United States and this honorable Court," she reaffirms her earlier contention that they solemnize the occasion and express confidence in the future, but then added, "These examples of *ceremonial deism* do not survive Establishment Clause scrutiny simply by virtue of their historical longevity alone."[19]

For O'Connor, longevity of use combined with a nonsectarian nature allow for the use of religious language, practices and symbols by government because they are then viewed as a recognition of the nation's history and therefore, serve a secular function: "It is the combination of the longstanding existence of practices such as opening legislative sessions with legislative prayers or opening Court sessions with 'God save the United States and this honorable Court,' as well as their nonsectarian nature, that leads me to the conclusion that those particular practices, despite their religious roots, do not convey a message of endorsement of particular religious beliefs."[20]

For O'Connor, then, the importance of the menorah's being stationed next to the, in her word, "secular" symbol of the Christmas tree, is found in the message of pluralism that it sends to the reasonable observer. The menorah does not need to be viewed as a secular symbol and Chanukah need not be seen as a secular holiday for the display to serve a secular purpose and/or to convey a secular message, and thereby avoid the appearance of a government endorsement of

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[19]Emphasis Mine. This should be obvious. In fact, Justice O'Connor goes on to point out the clear counter-example to such a claim in discrimination: "Historical acceptance does not in itself validate that practice under the Establishment Clause if the practice violates the values protected by that Clause, just as historical acceptance of racial or gender based discrimination does not immunize such practices from scrutiny under the Fourteenth Amendment." *Allegheny County v Greater Pittsburgh ACLU,* 492 US 573 at 630.

[20]492 US at 630-631.

religion (in this case, Judaism), contrary to Justice Blackmun's contention, in *Lynch v Donnelly* that the majority had relegated the menorah to the status of a secular holiday symbol. However, she does contend that the menorah does need to be in a setting which clearly conveys a message of pluralism and freedom of choice with respect to religion.[21] Thus, she notes that, for example, a menorah standing alone at city hall would violate the First Amendment, just as the crèche at the Allegheny Courthouse did. In this case, it is the combination of the secular symbol of the Christmas tree and the sign saluting liberty alongside the menorah which communicates the government's intent to commemorate the religious liberty and diversity enjoyed in this country. She writes,

> By accompanying its display of a Christmas tree—a secular symbol of the Christmas holiday season—with a salute to liberty, and by adding a religious symbol from a Jewish holiday also celebrated at roughly the same time of year, I conclude that the city did not endorse Judaism or religion in general, but rather conveyed a message of pluralism and freedom of belief during the holiday season.[22]

Justice O'Connor also argues that the display does not endorse religion over nonreligion by virtue of the inclusion of secular symbols alongside the distinctively religious. She continues:

> Here, by displaying a secular symbol of the Christmas holiday season rather than a religious one, the city acknowledged a public holiday celebrated by both religious and nonreligous citizens alike, and it did so without endorsing Christian beliefs. A reasonable observer would, in my view, appreciate that the combined display is an effort to acknowledge the cultural diversity of our country and to convey tolerance of different choices in matters of religious belief or nonbelief by recognizing that the winter holiday season is celebrated in diverse ways by our citizens.[23]

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[21] 492 US at 633-634.

[22] 492 US at 635.

[23] 492 US at 635-636.

In his dissenting opinion, Justice Brennan (joined by Justices Marshall and Stevens) argued that the Christmas tree is, indeed, a religious symbol and therefore, violates Establishment because the combined display seemingly endorses Christianity and Judaism. He bases his argument on three points: first, it is unquestionably symbolic of, and has historically been associated with the celebration of, Christmas, a Christian holiday; second, Justice O'Connor's argument that the menorah combined with the Christmas tree communicates pluralism requires the tree be a religious symbol; and third, the context within which the tree sits (i.e., next to the menorah) makes it a religious symbol; that is, the religious nature of the menorah at least suggests a religious dimension to the tree (the only other holiday symbol present, unlike in *Lynch v Donnelly*).[24] On the third point, Brennan notes, one cannot claim to know with certainty what a "reasonable observer" would conclude about the symbolic significance of the tree (or the display):

> I would not, however, presume to say that my interpretation of the tree's significance is the 'correct' one, or the one shared by most visitors to the City County Building. I do not know how we can decide whether it was the tree that stripped the religious connotations from the menorah, or the menorah that laid bare the religious origins of the tree. Both are reasonable interpretations of the scene the city presented.[25]

He continues, noting the subjective aspect of the majority opinion: "I shudder to think that the only 'reasonable observer' is one who shares the particular view on perspective, spacing, and

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[24]Brennan writes, "Positioned as it was, the Christmas tree's religious significance was bound to come to the fore. Situated next to the menorah . . . the Christmas tree's religious dimension could not be overlooked by observers of the display. . . . Consider a poster featuring a star of David, a statue of Buddha, a Christmas tree, a mosque, and a drawing of Krishna. There can be no doubt that, when found in such company, the tree serves as an unabashedly religious symbol." 492 US at 641.

[25]492 US at 642.

accent expressed in Justice Blackmun's opinion, thus making analysis under the Establishment Clause look more like an exam in Art 101 than an inquiry into constitutional law."[26]

Brennan also concludes that a message of pluralism can still favor religion over nonreligion and thus, violate the Constitution. In fact, he suggests that the only pluralism O'Connor has in mind is religious pluralism. This is problematic, he argues, because the display suggests a government preference for religious homogeneity or cooperation which seems to go afoul of Free Exercise:

> The uncritical acceptance of a message of religious pluralism also ignores the extent to which even that message may offend. Many religious faiths are hostile to each other, and indeed, refuse even to participate in ecumenical services designed to demonstrate the very pluralism Justices Blackmun and O'Connor extol. To lump the ritual objects and holidays of religions together without regard to their attitudes toward such inclusiveness, or to decide which religions should be excluded because of the possibility of offense, is not a benign or beneficent celebration of pluralism: it is instead an interference in religious matters precluded by the Establishment Clause.[27]

This, I suspect, is the greatest concern of evangelicals in these discussions.

Elk Grove Unified School District v Newdow (2004)

Another case involving the issue of ceremonial deism has to do with the constitutionality of the inclusion of the phrase, "under God" in the Pledge of Allegiance. In *Elk Grove Unified School District v Newdow*, Michael Newdow, an atheist living in California, sued the school district in which his daughter attended school because children in the schools were forced to recite the Pledge of Allegiance daily, and he believed the phrase, "under God" violated both her First Amendment rights and his rights as a parent to direct the religious education of his daughter. At the time, California law required public schools to begin the day with some form of

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[26] 492 US at 643.

[27] 492 US at 645.

patriotic act, and the recitation of the Pledge was seen to fulfill that requirement. It should be noted that students were permitted to opt out for religious reasons without fear of reprisal. Ultimately, Newdow's complaint was not allowed to go forward in argument because the Supreme Court found that he did not have standing since he did not have any form of custody of his daughter and therefore, could not sue as a *next friend* for her, and that it is not the place of the federal court to decide matters of paternity, custody, or parental rights.[28]

In her concurring opinion, Justice O'Connor, nevertheless, sought to address the issues at stake in the suit and appealed to ceremonial deism as her basis for upholding the constitutionality of the phrase, "under God" in the Pledge. She begins by reasserting her claim that the reasonable observer is the standard for evaluating the perception of coercion by the government or of one's inclusion in or exclusion from the political community because of religion. She also reiterates the fact that the Court has allowed religious references in the public square because they serve the secular purpose of commemorating the role of religion in our Nation's history. Taking this a step further, though, O'Connor argues that even invocations of divine assistance can serve such a secular function and therefore, are not viewed as a government preference for religion. She writes,

> For centuries, we have marked important occasions or pronouncements with references to God and invocations of divine assistance. Such references can serve to solemnize an occasion instead of to invoke divine provenance. The reasonable observer discussed above, fully aware of our national history and the origins of such practices, would not perceive these acknowledgments as signifying a government endorsement of any specific religion, or even of religion over nonreligion.[29]

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[28]The mother's child, to whom Newdow was never married and who had sole legal custody of the child, enjoined the court to remove the child from the complaint. She did so for three reasons: first, their daughter was a Christian; second, she did not object to the practice, and third, there was concern that her remaining on the complaint could cause problems for her at school with teachers as well as other students.

[29]542 US at 36.

O'Connor's claim here seems to represent something of a departure from earlier claims that the religious aspect of instances of ceremonial deism may still be constitutional so long as they are incidental to the secular purpose. Here, though, O'Connor seems to suggest that the prayer itself not only serves a secular purpose, but is itself a secular act! Such an interpretation of prayer may be disturbing to some, and certainly, if a correct understanding of her words, is theologically suspect.

In perhaps the most developed discussion of ceremonial deism by a Supreme Court Justice, O'Connor outlined four factors deserving consideration: 1) History and ubiquity, 2) Absence of worship or prayer, 3) Absence of reference to particular religion, and 4) Minimal religious content. Other justices did not join her in this assessment, even though she found that the phrase meets the criteria and hence, passes constitutional muster.

First, O'Connor maintains that one way to evaluate the viewpoint of the reasonable observer is to examine the historical response of Americans to religious speech, acts, or symbols that have broad appeal and have been in use for some time. She writes, "The constitutional value of ceremonial deism turns on a shared understanding of its legitimate nonreligious purposes. That sort of understanding can exist only when a given practice has been in place for a significant portion of the Nation's history, and when it is observed by enough persons that it can fairly be called ubiquitous."[30] In the case of the Pledge, there has been virtually no challenges to its constitutionality since the words, "under God" were added approximately 50 years ago.

Second, O'Connor cites the findings in another case to make the point that ceremonial deism almost never includes prayer or worship because such activities seem to detract from the

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[30] 542 US at 37.

secular purpose.[31] The one exception was in *Marsh v Chambers*, where prayers to open the legislature by a chaplain were deemed instances of ceremonial deism, and this due largely to its historical longevity.[32] [Incidentally, this is the case that serves to justify chaplain-led prayers at mandatory military events.] But generally speaking, prayers and other forms of religious speech associated with worship cannot count as ceremonial deism: "Any statement that has as its purpose placing the speaker or listener in a penitent state of mind, or that is intended to create a spiritual communion or invoke divine aid, strays from the legitimate secular purposes of solemnizing an event and recognizing a shared religious history."[33]

Third, O'Connor notes that the Establishment Clause does not allow for one denomination to be officially preferred over another.[34] Thus, practices cannot be deemed ceremonial deism if they explicitly favor "one particular religious belief system over another."[35] In most cases, ceremonial deism must keep its theological claims general. The reference to God in the Pledge meets this criterion. However, this has serious implications for the desire to offer sectarian prayers at public events.

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[31]She cites *Engel v Vitale*, 370 US 421 (1962) at 429: "[O]ne of the greatest dangers to the freedom of the individual to worship in his own way [lies] in the Government's placing its official stamp of approval upon one particular kind of prayer or one particular form of religious service."

[32]*Marsh v Chambers*, 463 US 783 (1983).

[33]542 US 1 (2004) at 40. O'Connor bolsters her opinion here by quoting from *Santa Fe Independent School District v Doe*, 530 US 290 (2000), a school-prayer case, which concluded that invocations cannot be used to solemnize occasions if they were, in actuality, prayers. This, of course, is confusing, to say the least, as it is hard to see how a reasonable observer would not view an invocation to open a legislative session as an actual prayer. What O'Connor almost seems to suggest is that the reasonable observer knows enough to not take prayer seriously if offered at a government event by a chaplain.

[34]*Larson v Valente*, 456 US 228 (1982).

[35]542 US 1 (2004) at 42.

Fourth, O'Connor suggests that ceremonial deism includes minimal reference to God. This seems to be largely a test for exclusion than inclusion: a case which has too many references to God or religion will not be deemed ceremonial deism. As O'Connor puts it,

> ... the brevity of a reference to religion or to God in a ceremonial exercise can be important for several reasons. First, it tends to confirm that the reference is being used to acknowledge religion or to solemnize an event rather than endorse religion in any way. Second, it makes it easier for those participants who wish to 'opt out' of language they find offensive to do so without having to reject the ceremony entirely. And third, it tends to limit the ability of government to express a preference for one religious sect over another.[36]

In her summary statement, she concludes,

> Certain ceremonial references to God and religion in our Nation are the inevitable consequence of the religious history that gave birth to our founding principles of liberty. It would be ironic indeed if this Court were to wield our Constitutional commitment to religious freedom so as to sever our ties to the traditions developed to honor it.[37]

Analysis of Ceremonial Deism

Beyond the Supreme Court cases, a complete analysis of ceremonial deism requires examination of three categories: legal, theological, and practical issues. Space constraints prevent examination of the legal aspects, so primary attention will be given to theological analysis, with a few closing comments on the practical issues.

Theological (Irreligious)

T heologically speaking, what may be of greatest concern is not the thought that, in the government use of ceremonial deism, Deism—the seventeenth century English movement—has become the unofficial official religion of the United States, but rather that ceremonial deism is patently irreligious! That is, the way ceremonial deism is described makes a mockery of

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[36] 542 US 1 (2004) at 43.

[37] *Elk Grove Unified School District et al. v Newdow et al* 542 US 1 at 44-45.

legitimate religious belief. Recall Justice Blackmun's dissenting opinion in *Lynch v Donnelly*. There, he noted that if the ceremonial deism argument holds, the crèche seems to have devolved to the status of a secular symbol for a secular holiday. This, of course, is an offense to the meaning of the nativity scene. Similarly, Justice O'Connor's own words defending ceremonial deism betray its questionable (at best) theological assessment of prayers offered at government-sponsored events: they are neither invoking the aid or blessing of God nor instilling a sense of penitence, worship, or piety in the gathered crowd and are, in effect, not *real* prayers! While O'Connor seems to think that the reasonable (and informed) observer would view such invocations and benedictions as mere solemnizations of the occasions at which they are given, this is hard to believe. Nevertheless, ceremonial deism currently stands as the reasoning behind many religious functions in the public arena, including chaplain-led prayers at official military events.

Practical (Evangelical Responses)

The implications of this fact for evangelical chaplains and more broadly, for Christianity in the public square are many. First, it means that the legal basis for public prayers is that they are viewed as having a secular purpose. It also means that some may claim that the prayers are meaningless as far as religious value goes, and that their real value lies in their ability to add solemnity to an event or to commemorate the religious heritage of our nation. While we may bristle at this suggestion, we should remember it is a *legal*, not theological, analysis. We should take care to avoid confusion between the legal basis for certain actions and the theological content of those actions. That is, just because ceremonial deism serves as the basis for declaring something constitutional, it does not follow that the action *really is* devoid of theological meaning.

Consider a contemporary example: "God bless you"—Here we have an example of God-talk that, to many in our society, is meaningless with respect to theological content. When most say it, even Christians, they do not mean to convey a special blessing upon the recipient. Nevertheless, it would be wrong to conclude, then, that the statement *must* be meaningless, for the sincere believer may, indeed, mean to convey something more than mere polite response to a sneeze, and in so doing, may indeed invoke the blessing of God upon the other. Similarly, a prayer offered for an outgoing commander at a change of command ceremony may be allowed legally because it adds solemnity to the occasion, but may also actually function to intercede for that individual such that, he is blessed by God in a way that he would not have been had the prayer not been offered. Perhaps the greater part of wisdom here is silence. If the courts wish to preserve a function like public prayer because it has historical roots, this is not to say that historical commemoration is all the prayer means for the one praying or for those in attendance.

Second, it could mean that chaplains and others asked to give prayers at government-sponsored events may be asked to give nonsectarian prayers. That is, it may be the case that we will be asked to offer prayers that do not end with "in Jesus' name" (though it has not been demanded, contrary to what some have reported). If that occurs, the evangelical (and other Christian) chaplain will be faced with three choices: refrain from offering prayers at secular events, fight for the right to pray faith-specific prayers, or offer prayers that do not end "in Jesus' name." A brief examination of the practical considerations of each follows.

If the chaplain decides that he would rather avoid controversy altogether by simply not praying, he should realize that he may be missing out on valuable opportunities for ministry. First, as noted above, prayer actually accomplishes something; it is an activity that is revealed in Scripture as making a difference. For the chaplain to refrain from praying is to reduce his sphere

of influence. Second, sometimes prayers at secular events gives the chaplain exposure to all the employees of the organization (or soldiers/sailors/airmen in the unit). To refuse to offer prayers at these events is to miss an opportunity for visibility. Last, it may be the case that the individual in charge of the event will ask someone else to offer a prayer, and if this occurs, members of the unit/organization may wonder why the chaplain refuses to lead in prayer. This could send the wrong impression about the chaplain's love and commitment to the persons in the unit.

If one's first inclination is to fight for the right to pray sectarian prayers, he should at least ask himself why he wishes to fight. For some, the basic reason for fighting may be sin. It may be that his own pride, or desire to be right, or need to be on top is driving him to resist. It may be that he is just contrary in personality. If any of these reasons serve as the basis for such resistance, then to fight is sin. Others may view the structure of prayers as a non-negotiable; they may believe that prayers must be offered with the formulaic expression, "in Jesus' name" in order to be a legitimate. It seems to me that this position is based on a rather wooden reading of Jesus' exhortation to ask in his name, and it borders on sacramental theology. The phrase, "in Jesus' name" almost functions like an incantation, rather than an expression of a relationship. [While in Iraq recently, I had a modalist who came to Protestant chapel services and thought, for example, baptism did not *count* (and the person subsequently still in his sins if "in Jesus' name" was not stated in the baptismal formula; "in the name of the Father, Son, and Holy Spirit was no good]. Others will be inclined to fight because ceremonial deism *really is* a competitor (and thus false) religion to Christianity. It seems that this position has at least some merit.

Ceremonial Deism as a Competitor Religion to Christianity

As the concept of ceremonial deism takes root in the popular culture with its antipathy toward religion and its embracement of spirituality, there is cause for concern. Already

ceremonial deist websites are being operated which claim the following monikers for ceremonial deism: "the only religion blessed by the Supreme Court" and "The official religion of the United States."[38] The seriousness with which the groups who operate the sites seem to vary, but at their heart, they point to the undermining of sacred faith that takes place with the acceptance of ceremonial deism as a valid concept. Consider the following:

> We suspect that most ceremonial deists are atheists but atheism is not required. There will probably be a lot of agnostics too, as well as people who just go along with the rituals of the religion of their childhood because they find it comforting. We accept anyone—including people of faith—who enjoys a bit of tradition as long as they don't take it too seriously. You can think of us as the Unitarians of atheism.[39]

The problem this raises for theists generally and evangelical Christians specifically is that it suggests that the constitutionally-allowable prayers and religious-sounding mottos encapsulated by ceremonials deism are really devoid of theological content. Thus, followers of ceremonial deism can proclaim as the center of their belief system, "We believe in God. Ritually, not literally," and claim that religious traditions (presumably in the United States, Judeo-Christian traditions) provide structure to life and society, even though they are based in belief systems characterized as "silly."[40] Similarly, others have identified the deity of ceremonial deism as "Providence" *in contradistinction to* the deity of Christianity, Judaism, Islam, or other so-called *great religions*.[41] Our concern is not so much that prayers at civic events, statements made at the beginning of the court, national and state mottos, etc., are void of theological content and are not

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[38] www.ceremonialdeists.com and www.ceremonialdeism.com, accessed March 4, 2009.

[39] www.ceremonialdeists.com/content/view/13/34, accessed March 4, 2009.

[40] www.ceremonialdesits.com/content/view/17/34, accessed March 4, 2009.

[41] www.ceremonialdeism.com, accessed March 4, 2009. The website claims, "Christianity? Bah! Judaism? Bah! And forget Islam and Hinduism and Buddhism and the cult of Cthulhu. Our deity is Providence. The Capital City of Rhode Island is even named for our national God."

directed at or heard by the One True God by virtue of the declaration made by proponents of ceremonial deism, but rather that our acceptance of ceremonial deism and its secular revisioning of religious statements and acts may communicate something about our faith that we do not wish to communicate; namely, that it is not important. That is, by accepting the legal reasoning of ceremonial deism, evangelicals may be hurting our witness to the culture by detracting from the seriousness of our faith. Ultimately, of course, we should be concerned with how ceremonial deism may detract from the glory of God.

If one does choose to fight against ceremonial deism, he ought to consider how that fight may result. It seems to me that two possibilities exist. First, it may move the Court to do away with public prayers and acknowledgements of religion altogether. That is, in challenging the constitutionality of forced pluralistic prayers (for example), evangelicals are in actuality undercutting the legal basis for those very same public prayers. Since, as we have seen, that basis is to be found in the view that the prayers have no theological content, when we argue that they do, in fact, have theological content, we undermine the legal basis. We are, in effect, asking the Court to recognize the religious nature of our prayers when the nonreligious nature of those prayers (in the eyes of the Court) is the only reason they are allowed in the first place.

Some evangelicals may contend that prayer should be removed from the public sphere if that prayer is mandated as nonsectarian. This may be a valid point, and at least theologically, it has much to commend it. After all, the prophets seem to constantly chastise the leadership of ancient Israel and Judah (as well as the people) for compromising the faith. Nevertheless, it is important that we at least acknowledge that this approach would be a shift in evangelical thought and political activism, as it has been something of a standard in fundamentalist and evangelical preaching/teaching to blame many of the country's ills on the removal of prayer from public

schools in 1962.[42] We should also note that many evangelicals have lobbied for generic *moments of silence* in public schools as a replacement for those former prayers. But this is hardly distinguishable from the generic prayers being seen as liberal compromise here.

Second, the choice to fight could result in an overturning of the constitutionality of ceremonial deism. This would allow for public prayers, not on the basis of ceremonial deism, but rather on the basis of pluralism. According to Delahunty, the only other constitutional option is that of what he calls "Pluralist Polity."[43] By this, he means an approach which permits prayers of any kind, but also requires that, over time, the prayers reflect a sufficient variety of religious voices and perspectives to dispel any appearance that the legislature is favoring any particular form of religious belief. Put plainly, it may mean that Buddhist priests, Muslim Imams, Jewish rabbis, Hindu priests, etc. must all be given an opportunity to lead in prayer in whatever setting is considered. This, though, also seems to be a failed suggestion for evangelicals, if reactions to Rajan Zed's prayer to the Hindu gods at the opening of the U.S. Senate is any indication.

Of course, there is one other alternative not yet mentioned: one could argue against separation of Church and State. One could make the case that, while American Civil Religion was not to be seen as a competitor to Christianity, it has since so become and we have all, in one sense or another, bowed the knee to the god of religious liberty. On such an argument, one could suggest that faithfulness to the One True God requires that we abandon the American experiment (at least in its current form) and acknowledge the Lordship of God over our nation with an

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[42]See, for example, Gary Bergel "Banning Prayer in Public Schools Has Led to America's Demise" http://www.forerunner.com/forerunner/X0098_Ban_on_school_prayer.html, accessed March 25, 2009.

[43]Robert J. Delahunty, "'Varied Carols': Legislative Prayer in a Pluralist Polity" *Creighton Law Review* 40:3 (April 2007): 517-568.

established religion.[44] However, it seems to me that we have good political, historical, and theological reasons for rejecting this move, and all involve a fear that the religion established by the government would not be friendly to our theological position(s).

So it seems that it may be best to not fight and be willing, if asked, to offer a nonsectarian prayer at government-sponsored events. I must confess that it is easy for me to make this suggestion since I, even in the confines of my own home, offer prayers "in Your name" already. However, as already noted, there is good reason to think that the offering of prayers by a Christian chaplain at mandatory events can have a positive effect, even if the prayer does not end with the formulaic expression, "in Jesus' name." Still, there may be concern over *compromising* in this way. In fact, some may have concern that we are betraying the heritage of religious purity handed us by the early Christians. Some may fear that we are denigrating the sacrifice of the brave men and women of old, who died as martyrs because they refused to burn incense to the genius of the emperor. Some may see in my suggesting to capitulate on "events' prayers" as analogous to burning incense to the genius of the emperor. But there are some important differences. The early Christians refused to burn incense to the genius of the emperor because they recognized the act as a commitment of religious devotion to a competitor to the One True God. If ceremonial deism required a rejection of the biblical revelation or a rejection of the Lord, or if it required religious devotion to the State, then the analogy would stand, but it does not. So capitulating here is not selling out to a false god. It is allowing the legal recourses in place to justify some religious activity in the public arena.

Conclusion

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[44]In fact, many evangelical seem to think that not only *should* Christianity be the established religion, but that it *was* the established religion, and so attempt to use historical citation to argue for a return to that establishment. It would be more correct to argue that each state had its own ideas regarding state-sponsored religion.

Ultimately, the answer to the question of praying in Jesus' name and to the question of whether Christians should accept the *ceremonial deism* interpretation of Establishment Clause jurisprudence is a matter between the chaplain and God. In my mind, there is some cost to pay in accepting it, but the risks associated with fighting it are too great. I would rather have the opportunity to be visible, to conduct a public ministry, and most importantly, to pray in order to make a difference, than to fight an almost guaranteed losing battle. In the current context, non-sectarian prayers are still a suggestion, and I have no problem praying to "God" and do not feel I am *denying Christ before men* if I fail to say, "in Jesus' name" to close. However, if the time comes when I am told I cannot pray with the name of Jesus as a closing, I will deem a fight necessary and unavoidable.