ONE AMENDMENT, TWO CLAUSES, NO PRECEDENT

I. INTRODUCTION

Ratified in 1791, the First Amendment to the U.S. Constitution pronounces that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech."[1] These sections of the First Amendment are referred to as the Establishment Clause and the Free Speech Clause, respectively. These liberties function to protect the religious self-determination and freedom of expression for all Americans.[2] The constitutionality of school prayer has been debated squarely within the province of the First Amendment, and has led to the cessation of state laws that provided for school-led prayer.[3] This debate continues as the controversy shifts from school-led prayer to student-initiated prayer. The confusion that has resulted for teachers and students alike has even necessitated the promulgation of specific educational guidelines for the teaching of religion.[4]

This commentary addresses the tension inherent in the First Amendment, and its possible dispositive effect on the current question of student-initiated school prayer, specifically student-elected prayer at graduation ceremonies and football games. Part II provides a brief background of landmark school prayer cases as well as current considerations. Part III discusses the constitutional tests that developed within traditional Establishment Clause scrutiny, and hypothesizes their continued effectiveness in holding student-initiated prayer unconstitutional under *either* an Establishment or Free Speech challenge. Part IV will conclude that student-initiated prayer at non-compulsory school activities is unconstitutional despite the cloak of the Free Speech Clause draped over the issue by the Religious Right.

II. BACKGROUND

In the early 1960's, two Supreme Court decisions, School District Of Abington Township v. Schempp[5] and Engel v. Vitale[6] struck down classroom prayer as an unconstitutional violation of the Establishment Clause.[7] Though far from settled, the controversial subject of school prayer is once again

before the Supreme Court, as recent Fifth and Eleventh Circuit Court of Appeals decisions have evaluated student initiated prayer during graduation ceremonies and football games, not according to precedents set forth under the Establishment Clause, but through a persuasive Free Speech Clause analysis.[8] This tension between the Establishment Clause and the Free Speech Clause threatens to destroy the separation of church and state jurisprudence that has dominated the public educational system for the last thirty-eight years.

Advocates of school prayer invariably appeal to majority religiosity and invoke fears of a disintegrating moral fabric to garner support.[9] While recent polls demonstrate overwhelming support for either prayer in public schools or a Constitutional amendment allowing such[10], this ignores a fundamental protection against tyranny that is afforded all citizens by the Constitution and the Bill of Rights.[11] In *all* of the recent cases discussed below, the preponderance of the student body desired student prayer at non-compulsory school activities. Majority rule has never been and cannot now be allowed to undermine the rights of a minority. Student-initiated prayer, whether elected by a majority of the student body or offered individually in a non-public forum, violates both the Establishment Clause and the Free Speech Clause of the First Amendment.

Current challenges to student-initiated prayer in Chandler v. James[12] and Doe v. Santa Fe Independent School District[13] require a reconsideration of the tests codified in prior First Amendment cases challenging school-led prayer. An appreciation of their strengths and weakness will confirm the breadth of their potential application when the Supreme Court hears arguments in the Santa Fe case.[14]

III. ANALYSIS

Establishment Clause jurisprudence has produced three separate, albeit closely associated Supreme Court tests, which have been frequently applied to determine the constitutionality of government conduct or policy: the Lemon test, the Coercion test and the Endorsement test.[15] Though developed under Establishment Clause challenges to school-led prayer, they are potent tools when analyzing voluntary student-initiated prayer, provided their intrinsic

weaknesses are understood and their language is broadly construed in furtherance of their purpose. Through these tests, the Supreme Court has developed a powerful doctrine that will withstand recent invocations of the Free Speech Clause by school prayer advocates.

A. Tools of the Past, Tools of the Future

The Lemon test, first enumerated in Lemon v. Kurtzman[16], defines a governmental practice unconstitutional if "(1) it lacks a secular purpose; (2) its primary effect either advances or inhibits religion; or (3) it excessively entangles government with religion."[17] A fundamental problem with this test exists in the first factor, which incentivizes the legislature to proclaim that a particular statute is secular in purpose despite its application and effect. This is evidenced in Alabama's statute concerning student initiated school prayer, which begins, "The legislative intent and purpose for this section is to protect the freedom of speech guaranteed by the First Amendment."[18] This language also serves to defeat the second prong of the Lemon test. The Alabama Legislature can point a court to this verbiage in support of the premise that the primary effect of the statute is to uphold the Free Speech Clause. Alabama added this statute only after witnessing the Supreme Court invalidate school-led prayer in Jaffree v. Wallace.[19] However, the judiciary has the power to pierce such obvious attempts to challenge the Lemon test; as the District of Columbia Court of Appeals did by striking down a proposed prayer initiative that attempted to permit student-initiated prayer at both compulsory and non-compulsory school events.[20] Refusing to isolate the Lemon test, the court announced, "We see no distinction between the teacher-led voluntary prayer struck down in Jaffree and the student-led prayer envisioned by the proposed prayer initiative."[21]

The recent decision of Lee v. Weisman[22], invalidated school-sponsored non-sectarian prayer at graduation ceremonies and announced the Coercion test. Coercion is defined where "(1) the government directs (2) a formal religious exercise (3) in such a way as to oblige the participation of objectors."[23] Though applied to school-sponsored prayer, coercion is no less present in student-initiated prayer that is conducted outside of purely private

situations. Coercion is apparent in the alienating treatment of non-participants and followers of minority religions.[24] Any contention that student-initiated prayer lacks the requisite unconstitutional coercion, need only hear the words of Santa Fe High School Senior, Jesus Trevino, "If you don't want to hear us pray then you can leave. I understand some people have different religions, but Christ is all on our side."[25] It would be difficult to find a clearer manifestation of coercion and intolerance, despite lacking the official school sanction or invitation that has dominated the Establishment Clause debate.

The third analysis, the Endorsement test was established in County of Allegheny v. ACLU[26], which determines impermissible governmental endorsement of religion when "it conveys a message that religion is 'favored,' 'preferred,' or 'promoted' over other beliefs."[27] As with the previous tests, the relevance of the Endorsement test is functionally unchanged when applied to student-initiated prayer. The U.S. Secretary of Education, Richard Riley, codified the restrictions and recommendations concerning religious expression in public schools which expressly states that "the right to engage in voluntary prayer...does not include the right to have a captive audience listen."[28] The term 'captive audience' is nowhere defined exclusively as a compulsory audience, allowing the characterization of graduation ceremonies and football games to fit within the Secretary's understanding. This religious indoctrination takes place even when a non-denominational prayer or invocation is given.[29] Further, the principles set forth permit student prayer only "in a nondisruptive manner when not engaged in school activities or instruction."[30] Student-initiated or elected prayer at football games and graduation violates both the 'nondisruptive' aspect as well as the 'activities' aspect; for regardless of their non-compulsory nature, they are social and educational rights of passage that should not be impaired by state sanctioned or permitted student prayer, even when endorsed by a majority of the student body.

The court in Doe v. Santa Fe Indep. School Dist. applies each of these tests to a Texas school policy that allowed for student-elected prayer at graduation and football games.[31] Holding that nonsectarian and

nonproselytizing restrictions were necessary constitutional additions to the policy as it pertained to graduation ceremonies, the court refused to support the feeble semantic argument that student-initiated prayer is outside of the school's control or direction.[32] However, the court stopped short of fully exploiting the Supreme Court tests, by allowing an accommodation for religious, albeit nonsectarian, prayer at graduation ceremonies.

B. A Shift in Focus: Establishment Clause to Free Speech

Recent Federal Appeals Court decisions have not only shifted focus onto the Free Speech Clause, but have applied a narrow reading of Supreme Court precedents to functionally subvert the Establishment Clause's protections beneath that of a student's right to freely speak.[33]

The Free Speech Clause does not contemplate nor declare a right that is inviolable and resistant to reasonable restrictions. Rather, any Free Speech Clause analysis must begin with the three designated fora: the public forum by tradition, the public forum by designation (limited public forum) and the nonpublic forum.[34] The crucial error made in Chandler v. James[35] is the assertion that "genuinely student-initiated religious speech must be *permitted*...Such speech is fully protected."[36] This mistakenly puts the emphasis upon the student-initiated aspect of the speech instead of *where* such speech is taking place, as defined according to traditional public fora. Holding that student-initiated religious speech may *only* be subject to the same time and manner restrictions as all other speech[37], ignores the principle that one student's freedom of speech may not impair another's freedom from the establishment of religion in public school.[38] This refusal to distinguish between purely private speech and that permitted within a traditional or designated public forum highlights the court's inattention to the practical considerations of it's ruling.

The Chandler court further demonstrated insensitivity toward non-participating students and a clear overstatement of the rights accorded students under the Free Speech Clause. By suggesting that students are free to disagree with student-initiated prayer by not participating[39], the court ignores the personal attacks and safety concerns inherent in publicly

identifying oneself as a religious minority in a zealously religious scholastic environment.[40] Non-participation labels students as outcasts within their school, inviting humiliating and frightening taunts, as was the case with a Florida Senior who was told "Stand up, you stupid bitch" as she attempted to quietly express her disagreement with student-led prayer through non-participation.[41] This is the practical effect of the Chandler court's recommendation to those students wishing to decline participation in school prayer. The Chandler court equates the prohibition of *all religious speech* with an "unconstitutional *disapproval* of religion."[42] This is overly broad, as no authority even suggests that purely private speech may be subjected to limitations by the school as an agent of the state. Rather, this belief echoes that of the Christian Coalition.[43] The Establishment Clause does not apply to purely private speech, so therefore schools are not violating the First Amendment by permitting non-disruptive and private student religious speech,[44] including the expression of religious beliefs in class assignments and homework.[45] Additionally, the Equal Access Act assures that student religious activities are permitted the identical freedoms and access of facilities that secular activities are granted.[46] The Chandler court equates the strict neutrality required by the First Amendment as hostility toward religion in general[47] in an effort to advance its proposition that student-initiated religious speech can be subjected *only* to the same restrictions as other student speech.[48] This disregards the tension that exists between the Establishment Clause and the Free Speech Clause, and appears to favor the latter at the expense of the former.

IV. CONCLUSION

Despite the history of declaring unconstitutional school-led prayer, the Supreme Court faces a different animal with student-initiated prayer. References to God exist in many state constitutions[49], and those longstanding beliefs are reflected in a continuing religious majority.[50] By holding student-initiated prayer unconstitutional, the Court would resoundingly affirm the privileges enumerated in the First Amendment without impairing the rights of students to pray in purely private fora. The tension within the First

Amendment cannot be mitigated by allowing schools to provide for an election-based violation of the Establishment Clause in the name of Free Speech. The only way to resolve this internal conflict is apply the time-honored Establishment Clause tests with the traditional designation of public and private fora. The synthesis of these doctrines will harmonize, however uneasily, the students who wish to hold private religious meetings within the protection of the Equal Access Act, with the non-participants who do not wish to ostracize themselves by leaving a room or filing a court action.

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1. **U.S. Const.** amend. I, cl. 1, cl. 2.

2. See, e.g., ACLU Legal Bulletin: The Establishment Clause and Public Schools, (visited Apr. 15, 2000) <http://www.aclu.org/issues/religion/pr3.html> [hereinafter ACLU Bulletin].

3. See, e.g., **Ala. Code §16-1-20.2 (1975).**

4. See Richard W. Riley, U.S. Secretary of Education Guidelines: Religious Expression in Public Schools (visited Apr. 25, 2000) <http://www.ed.gov/Speechs/08-1995/religion.html>; see also <author if elsewhere on site> A Teacher's Guide to Religion in the Public Schools, **First Amendment Center** 99-FO2 (1999) [hereinafter Teacher's Guide].

5. 374 U.S. 203 (1963).

6. 370 U.S. 421 (1960).

7. See ACLU Bulletin, supra note 2, at 1.

8. See generally Doe v. Santa Fe Indep. School Dist., 168 F.3d 806 (5th Cir. 1999); see also Chandler v. James, 180 F.3d 1254 (11th Cir. 1999).

9. See Norman L. Geisler, 10 Reasons for Voluntary School Prayer, (visited Apr. 24, 2000) <web site name> <http://www.softdisk.com/comp/shume/politics/pray1.html> (article originally appeared in The Shreveport Humanist Bulletin, August 1995).

10. See Viewpoints: Religious Freedom Amendment (visited Apr. 25, 2000) <http://religiousfreeom.house.gov/natpolls.htm>.

11 See, e.g., ACLU Bulletin, supra note 2, at 6.

12. 180 F.3d 1254 (11th Cir. 1999).

13. 168 F.3d 806 (5th Cir. 1999).

14. See, e.g., Steve Benen, Pigskin Piety v. The Constitution, **Church & State**, January 1, 2000, at 4.

15. See Doe v. Santa Fe Indep. School Dist., 168 F.3d 806, 814 (5th Cir. 1999).

16. 403 U.S. 602 (1971).

17. See Santa Fe, 168 F.3d at 814 (citing Lemon, 403 U.S. at 612-613).

18. **Ala. Code** §16-1-20.3 (a) (1995).

19. 472 U.S. 38 (1985).

20. See Committee for Volun. Prayer v. Wimberly, 704 A.2d 1199 (D.C. 1997).

21. Id. at 1203.

22. 505 U.S. 577 (1992).

23. Santa Fe, 168 F.3d at 814 (citing Jones v. Clear Creek Indep. School Dist., 977 F.2d 963 (5th Cir. 1992).

24. See Jessica Smith, Student-Initiated Prayer: Assessing the Newest Initiatives to Return Prayer to the Public Schools, 18 **Campbell L. Rev.** 303, 328 (1996).

25. Josie Karp, Collision Course: Prep Football, Religious Freedom at Odds in Texas, (visited Apr. 24, 2000) <http://www.cnnsi.com/thenetwork/news/1999/09/14/pageone_texasprayer/>.

26. 492 U.S. 573 (1989).

27. Santa Fe, 168 F.3d at 815 (citing County of Allegheny 492 U.S. at 593).

28. Riley, supra note 4, at 5.

29. See American Atheist: FAQ’s About Prayer in Schools (visited Apr. 25, 2000) <http://www.atheists.org/schoolhouse/faqs.prayer.html>.

30. Riley, supra note 4, at 5.

31. Santa Fe, 168 F.3d at 816.

32. Santa Fe, 168 F.3d at 817.

33. See generally Chandler v. James, 180 F.3d 1254 (11th Cir. 1999).

34. See, e.g., Smith, supra note 24, at 323.

35. 180 F.3d 1254 (11th Cir. 1999).

36. Id. at 1264 (emphasis supplied).

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37. Id. at 1264.

38. See Smith, supra note 24, at 328.

39. Chandler, 180 F.3d at 1263.

40. See Smith, supra note 24, at 328.

41. See A Loss for Religious Tolerance: A Times Editorial, **St. Petersburg Times Online** (published July 18, 1999) <http://www.sptimes.com/New…/Perspective/A_loss_for_religious_.shtml>.

42. Chandler, 180 F.3d at 1261 (emphasis supplied).

43. See Christian Coalition Stand On: Religious Freedoms (visited Apr. 15, 2000) <http://www.cc.org/issues/r-freedom.html>.

44. See Teacher's Guide, supra note 4, at 9.

45. See Riley, supra note 4, at 6.

46. See id.

47. See Chandler 180 F.3d at 1261.

48. See id. at 1264.

49. See, e.g., **Ala. Const.** preamble.

50. See Marty Martin, Religion and Republic at 19 (Julie S. Bach & Thomas Modl eds., Greenhaven Press 1989).