Holy Football! Transgressing the Establishment Clause Through Student-Initiated Prayer

I. Introduction

On September 3, 1999, Marian Ward scored a proverbial touchdown for the advocates of student-initiated prayer. On that day, the District Court for the Southern District of Texas issued a temporary order requiring the Santa Fe Independent School District allow Ward to deliver a "courteous, reverent, solemnizing 'prayer, blessing, invocation, or reference to a deity' as her choice of message" before the school's football games.[1] Ward's victory is at the center of the current prayer debate pending before the U.S. Supreme Court.[2] It is the opinion of this author that student-initiated prayer policies are unconstitutional and represent an attempt to circumvent the Establishment Clause and return prayer to the public schools.

II. Background

Religion is a much-debated subject in America.[3] Since the Supreme Court banned voluntary prayer in public school in 1962, opinion polls have consistently indicated that more than 60% of Americans favor returning prayer to the schools.[4] High-profile politicians have participated in the debate. For instance, George W. Bush has filed an amicus brief with the Supreme Court supporting student-initiated prayer.[5]

The First Amendment mandates that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[6] A "dual guarantee" of religious liberty is thus created;[7] one that prevents the government from endorsing a religion and from burdening the free exercise of religious practices.[8] At the heart of the debate are two constitutional interpretations. Proponents of student-initiated prayer rely on the Free Exercise Clause and a recent Fifth Circuit opinion to support their position. That decision[9] was the first to hold student-initiated prayer constitutional

and immediately spawned copycat prayer policies by other school districts and state legislatures.[10]

On the other hand, opponents prove student-initiated prayer unconstitutional based on the Establishment Clause and Supreme Court interpretations thereof. Since 1962, the Supreme Court has read the Establishment Clause to render unconstitutional state practices which have ranged from classroom invocations[11] and silent meditations[12] to clergy-led, nonsectarian, non-proselytizing prayers at school graduations.[13] The most recent of these, Lee v. Weisman,[14] established what is known as the Coercion Test. It held that when schools reserve time at a graduation ceremony for prayers, they violate the Constitution by putting the power, prestige and endorsement of the state behind whatever prayer is offered.[15] Cases arising since then have returned mixed results in the federal courts.[16]

III. Student-Initiated Prayer Violates The Establishment Clause

A proper analysis of student-initiated prayers begins with the Establishment Clause. In Lee, the Court stated "[t]he principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause."[17] By analogy then, the Establishment Clause operates as a gatekeeper to the Free Exercise Clause. Thus, the "wall of separation"[18] between Church and State may be penetrable, at least in theory. The question is then whether student-initiated prayer statutes can properly get past the gatekeeper.

A. Purpose of Student-Initiated Prayers is to Promote School Prayer

Alabama § 16-1-20.3(a) explicitly states that the "intent and purpose" of the student-initiated voluntary prayer statute is to "protect the freedom of speech guaranteed by the First Amendment."[19] Despite this "saving" language,[20] student-initiated prayer remains invalid because its clear purpose is to promote prayer in school.

The statute's purpose is clear because it does nothing to advance free speech generally. Instead it is limited to mandating that only student-initiated prayer "shall be permitted."[21] Furthermore, as the Court of Appeals for the District of Columbia observed, an identical statute was facially unconstitutional because its "principle and primary effect is to advance the religious views of those students who lead school prayers."[22] Validating the policy, the court noted would place teachers and principals in the position of "endorsing legislation which has the purpose of fostering prayer."[23]

The historical record in Alabama also indicates that the purpose of the statute is to return prayer to school. Only seven years before Alabama adopted its current statute, the Supreme Court struck down the state's teacher-led voluntary prayer statute as an effort by the State to "encourage a religious activity."[24] It appears far from coincidental that within a year of the Fifth Circuit's controversial decision in Jones v. Clear Creek Indep. Sch. Dist.,[25] Alabama adopted § 16-1-20.3.

B. Student-Initiated Prayer Improperly Delegates to Students What the State is Prohibited From Doing

Student-initiated prayer policies function by placing broad power in the hands of students. For example, in Santa Fe, Texas, the school board enacted a prayer policy that permitted the students to vote on holding prayers before their football games and to select a person to deliver those prayers. As Jessica Smith explains, both of these decisions would constitute endorsement of religion and thus violate the Establishment Clause if they had been made by the school board.[26]

Furthermore, this problem is exacerbated because there is nothing to prevent the students from choosing a member of the clergy or even a teacher to deliver the prayer.[27] Alabama § 16-1-20.3(b) leaves the doors open to the formal religious exercises banned in Lee by referring only to "student-

initiated voluntary prayer." [28] There is no limitation that the prayer be "student-led."

C. Student-Initiated Prayers Fail Lee's *Coercion Test*

If student-initiated prayers can survive the above infirmities, they must also pass Lee's Coercion Test. In Lee, the Court emphasized its "heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary schools."[29] The court also observed that "prayer exercises in public schools carry particular risk of indirect coercion."[30] The success or failure of student-initiated prayers will depend on the significance of two distinguishing facts. First, in Lee, a member of the clergy as opposed to a student gave the prayer in question. Second, the school-related activity was a graduation ceremony, not a football game.

Upon examination, the Supreme Court should hold both of these facts irrelevant for purposes of Lee. When a student, such as Ward, is handed the microphone by the school and delivers a prayer over the school's loudspeaker, she does so at a school-sponsored event, using school-owned property and during time specifically set aside by the school for that prayer. Although the Fifth Circuit held student-initiated prayer at football games unconstitutional on other grounds,[31] it noted that merely permitting student-initiated prayer raises "substantial" Establishment Clause concerns because "government imprimatur is not so easily masked." [32] Under these circumstances, when Ward speaks she does so with the power and prestige of the school behind her. That Ward is only a student does not preclude her from exerting the kind of "subtle" and "indirect" coercion prohibited by Lee.[33] Therefore, the student-initiated prayer statutes would remain unconstitutional even if they specified that the prayer must be "student-led."

Finally, although students are not compelled to attend football games, the Court should consider the problem of the football player who is a

nonbeliever. If the player is to remain on the team, they are certainly compelled to attend the games. Lee emphasized that failure of an alternative to avoid the coercive speech was especially important.[34]

Proponents of student-initiated prayer both ignore and misread Lee on this point. For example, in Chandler v. James,[35] the court which upheld Alabama's statute said "the fact that student religious speech may fall on deaf ears does not make it unconstitutionally coercive."[36] Other proponents express a take-it-or-leave-it attitude toward nonbelievers. Nonbelievers in Santa Fe, one wrote, "will just have to 'tolerate' the majority rule…If those (including the football players) do not like it – than [sic] maybe they are at the wrong school!"[37] This is neither practical nor constitutional after Lee.

IV. The Fallacy of Free Exercise and Student-Initiated Prayer

In order to circumvent the Establishment Clause's fundamental limitations, proponents of student-initiated prayer have developed arguments based on the First Amendment's guarantee of Free Exercise and Free Speech. In making these arguments, the coercive nature of the prayers and the role of the state in fostering and sanctioning prayer are glossed over. Instead, proponents emphasize that the student-initiated prayer is private speech guaranteed protection by the First Amendment.[38] It is also asserted that rejecting student-initiated prayer is the equivalent to "cleansing" public schools of religious expression that will "inevitably" result in the establishment of atheism as the State's religion.[39] This is unconstitutional, proponents argue, because the Constitution requires state neutrality and the government cannot "prefer disbelief over religion."[40] These arguments ring hollow.

Chandler is the only opinion besides Jones, which has upheld the constitutionality of a student-initiated prayer statute. As noted by Daniel Washburn, the Chandler court "diverged from the traditional analysis" and provided "a new avenue" by which to analyze student-initiated prayer.[41]

Washburn also notes that "much of the court's opinion hinged on the issue whether or not student-initiated speech was the same as private speech."[42]

According to Chandler, "privately-initiated speech" is defined as that which is "not *commanded* by a school board or state law."[43] In order for student-initiated prayer to fall under this definition, the court must first accept the Alabama's professed secular intent. After doing that the court must also overlook the government's imprimatur left on any religious speech. Once this is done, the court may then hold up and easily defeat the most basic interpretation of the Establishment Clause: "the Establishment Clause prohibits the government from commanding prayer and prescribing its form."[44] According to the logic in Chandler, anything other than an affirmative *command* by the state satisfies the Establishment Clause. Relying on the authority of Jones, Chandler observes: "student-initiated religious speech…even if it incidentally advances religion, does not violate the Establishment Clause because it is private speech endorsing religion which the First Amendment protects."[45]

In stark terms, Chandler suggests that if student-initiated prayer is not permitted, the government will engage in the "prohibition of all religious speech."[46] This argument fails for the very simple reason that private religious speech is permitted and will not be denied by rejecting student-initiated prayer. Secretary of Education, Richard Riley, clearly states, "students may pray in a nondisruptive manner during the school day when they are not engaged in school activities and instruction."[47] Thus, denying students the right to pray over the loudspeaker at school-related activities does not amount to a prohibition of *all* private prayer. Rather it merely denies a "special platform" for prayer.[48]

Finally, in order to support a free speech argument, proponents of student-initiated prayer must show that graduation and football comprise the type of public forum where free speech is permitted. In Doe v. Santa Fe Indep.

Sch. Dist.,[49] the majority notes that "religious expression cannot violate the Establishment Clause where it (1) is purely private and (2) occurs in a traditional or designated public forum, publicly announced and *open to all on equal terms*."[50] Student-initiated prayers fail this test because graduation ceremonies comprise events that are the "diametric opposite" of venues open for debate.[51] Furthermore, as the court observes, student-initiated prayer statutes "so restrict the pool of potential speakers and topics" that the activity cannot possibly be characterized as a public forum.[52] Thus, it is clear that Santa Fe's football policy did not create a public forum. It permitted the students to elect by majority vote only one representative to deliver only a prayer to solemnize the football games.

V. Conclusion

Despite the relative popularity of returning prayer to our schools, student-initiated prayers do not pass constitutional muster. It is especially interesting to note that the court that set the current debate in motion through Jones has recently revealed obvious discomfort with that earlier decision. In Santa Fe, the court wrote: "whether or not we agree with the [Jones] conclusion that student-led graduation prayers do not transgress the Establishment Clause…we are bound by its judgement."[53] This is hardly an endorsement.

Finally, in 1943, Justice Jackson observed that the "very purpose" of the Bill of Rights was to remove certain subjects from political controversy and "place them beyond the reach of majorities and officials."[54] These fundamental rights, including the right to freedom of worship "may not be submitted to vote; they depend on the outcome of no elections."[55] Student-initiated prayer statutes clearly violate this principle by subjecting the freedom of worship to a majority vote.

[1] See Ward v. Santa Fe Indep. Sch. Dist., No. G-99-556 (S.D. Tex. Sept. 3, 1999) (order granting temporary restraining order), reprinted in (visited Apr. 15, 2000) <http://www.aclj.org/ussc/add_info/tx-tro.html>.

[2] Josie Karp, Collision Course, **CNN/SI**, ¶ 11 (Sept. 20, 1999) <http://www.cnnsi.com/thenetwork/news/1999/09/14/pageone_texasprayer/>.

[3] See generally Martin E. Marty, America Is a Religious Society, in **Religion in America** 17, 18-24 (David L. Bender et al. eds., 1989); See also Michael Harrington, America Is Not a Religious Society, in **Religion in America** 25, 26-32 (David L. Bender et al. eds., 1989).

[4] See Viewpoints, Religious Freedom Amendment, (visited Apr. 25, 2000) <http://www.religiousfreedom.house.gov/natlpolls.htm> (citing various national opinion polls indicating support for prayer in public schools).

[5] See Karp, supra note 2, ¶ 22.

[6] **U.S. Const.** amend. I.

[7] See <author>, The Establishment Clause And Public Schools, An ACLU Legal Bulletin (visited Apr. 15, 2000) <http://www.aclu.org/issues/religion/pr3.html>.

[8] See Daniel Washburn, Comment, Student-Initiated Religious Speech in Public Schools 39 **Washburn L.J.** 273, 276 (2000).

[9] See Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963 (5th Cir. 1992), cert. denied, 113 S.Ct. 2950 (1993).

[10] See Jessica Smith, "Student-Initiated" Prayer: Assessing the Newest Initiative to Return Prayer to the Public Schools, 18 **Campbell L. Rev.** 303, 308 (1996).

[11] See The Establishment Clause And Public Schools, supra note 7 (citing Engel v. Vitale, 370 U.S. 421 (1962)).

[12] See id. (citing Wallace v. Jaffree, 472 U.S. 38 (1985)).

[13] See id. (citing Lee v. Weisman, 112 S.Ct. 2649 (1992)).

[14] 112 S.Ct. 2649 (1992).

[15] See The Establishment Clause And Public Schools, supra note 7.

[16] See Comm. for Voluntary Prayer v. Wimberly, 704 A.2d 1199 (D.C. 1977) (holding student-initiated prayer statute unconstitutional); But see Chandler v. James, 180 F.3d 1254 (11th Cir. 1999) (holding student-initiated prayer constitutional).

[17] Wimberly, 704 A.2d at 1202 (quoting Lee, 112 S.Ct. at 2655).

[18] See The Establishment Clause And Public Schools, supra note 7 (citing Everson v. Board of Educ. of Ewing, 330 U.S. 1, 15-16 (1947) quoting Thomas Jefferson).

[19] **Ala. Code** § 16-1-20.3 (1995).

[20] See, e.g., Wimberly, 704 A.2d at 1202.

[21] **Ala. Code** § 16-1-20.3 (1995).

[22] Wimberly, 704 A.2d at 1203.

[23] Id.

[24] Wimberly, 704 A.2d at 1203 (quoting Jaffree, 472 U.S. at 41).

[25] See infra note 9.

[26] See Smith, supra note 10, at 315.

[27] See Doe v. Santa Fe Indep. Sch. Dist., 168 F.3d 806, 817 (5th Cir. 1999); See also Smith, supra note 10, at 310 n.36.

[28] **Ala. Code** § 16-1-20.3 (1995).

[29] Wimberly, 704 A.2d at 1202 (quoting Lee, 112 S.Ct. at 2658).

[30] Id.

[31] Santa Fe Indep. Sch. Dist., 168 F.3d 806, 822-823 (holding football policy unconstitutional because football is “hardly the sober type of annual event that can be appropriately solemnized with prayer”).

[32] Id. at 817.

[33] See infra note 30.

[34] See The Establishment Clause And Public Schools, supra note 7.

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

[36] Id. at 1263.

[37] Comments of J.R. Riccio, (Nov. 16, 1999) Christian Coalition of America BB: Presidential Elections 2000: Football Game Prayer, (visited Apr. 15, 2000) <http://cc.org/discus/messages/1/13.html>.

[38] See Chandler, 180 F.3d at 1261.

[39] See id.

[40] See id.

[41] See Washburn, supra note 8, at 274.

[42] Id. at 283.

[43] See Chandler, 180 F.3d at 1260(emphasis added).

[44] Id.

[45] Id. at 1263.

[46] Id. at 1261.

[47] Richard W. Riley, Secretary's Statement on Religious Expression (last modified Jan. 26, 2000) <http://www.ed.gov/Speeches/08-1995/religion.html>.

[48] See Smith, supra note 10, at 310.

[49] 168 F.3d 806 (1999).

[50] See id. at 821 (quoting Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 770 (1995)(emphasis added in Santa Fe).

[51] Id. at 820.

[52] Id. at 821.

[53] Id. at 822 n.12.

[54] See The Establishment Clause and Public Schools, supra note 7 (quoting West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943)).

[55] Id.