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TOPIC:

PRAYER AT PUBLIC COLLEGE AND UNIVERSITY EVENTS: PARSING THE FREE SPEECH, FREE EXERCISE AND ESTABLISHMENT CLAUSE ISSUES

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INTRODUCTION:

As long as there are final exams, there will always be prayer in schools
-Author unknown

As in many aspects of First Amendment jurisprudence, the precise rules regarding prayer at public colleges can be elusive, [1] and constitutional applications require a case-by-case analysis of the precise facts at hand. While public entities, including public colleges and universities, may not take steps to establish religion or a specific religion, neither may they take steps to infringe upon an individual's free exercise of his or her religious beliefs. The Supreme Court wrote that, "there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." [2] This NACUANOTE examines the Establishment, Free Exercise, and Speech Clause issues raised by prayer at public colleges and universities. [3]

DISCUSSION:

I. The First Amendment's Establishment Clause: Three Tests, Similar Results

The Establishment Clause of the First Amendment to the United States Constitution, [4] which applies equally to the states, [5] prohibits the government from taking actions which tend to favor a single religion over others or the idea of religion over no religion. [6] Three separate tests appear in Supreme Court Establishment Clause jurisprudence, but for the questions analyzed here, the results will likely be consistent.

Questions of establishment are ostensibly analyzed under the test laid out in *Lemon v. Kurtzman*. "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.'" [7] In other words, if the government (including a state university) takes any action to support or benefit religion, it must take care to have a secular purpose for its actions, not harm or help religion in general or a specific religion, and prevent a sense that its actions entangle it with a religious cause. Although the *Lemon* test has never been overturned, as the Court has changed over time, use and application of the *Lemon* test have shifted considerably along with the membership. [8]

The Court has also used a modified *Lemon* test it has called the "endorsement" test. The endorsement test considers (1) whether the government has a secular purpose for the action, and (2) whether the primary effect of the action endorses religion. The second prong of the test considers whether a "reasonable observer," informed by history and context, would consider the governmental action to endorse religion. [9] The Endorsement Test was a favorite of its author, Justice O'Connor, but has not been widely embraced following her retirement.

Some justices review the constitutionality of governmental decisions on religion through the prism of the "coercion" test. Authored by Justice Kennedy and discussed most prominently for these purposes in *Lee v. Weisman*, a middle school graduation prayer case, the Court wrote that:

The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause. It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.' [10]

The Three Establishment Clause Tests

The Lemon Test	The "Coercion" Test	The "Endorsement" Test
To pass constitutional muster, a governmental action must: 1. Have a secular legislative purpose; 2. Have its principal or primary effect be one that neither advances nor inhibits religion; and 3. Not foster an excessive entanglement with religion.	Government may not pass a statute or implement a practice that uses the machinery of the state to coerce believers, as well as nonbelievers and dissenters to enforce a religious ideal or orthodoxy.	Government may take action or pass a statute if: 1. The government has a secular purpose for the action; and 2. In the eyes of a reasonable observer, familiar with history and context, the primary effect of the action does not endorse religion.

II. Prayers at College and University Events: Establishment Clause Issues

Although the Supreme Court has not yet ruled on a case directly dealing with prayer at a public university function, case law from the circuit courts seems to indicate that a nonsectarian prayer in this context, barring any unusual circumstances, would be constitutionally permissible. It is important to remember, however, that the *Lemon* test remains the standard, and therefore the university must ensure that its practices comply with the three prongs of the test.

Most of the jurisprudence in the area of public school prayer concerns elementary and secondary students. However, there are obvious differences between K-12 and higher education students in terms of age and presumed maturity. Courts generally consider elementary and secondary students to be more vulnerable to coercion and unable to resist participating when prayers are recited. [11] While there is no Supreme Court case declaring that college and university students are or are not so coerced by prayers read in their presence, the Court in *Tilton v. Richardson* analyzed Establishment Clause questions in government capital funding at religious institutions and found "there is substance to the conclusion that college students are less impressionable and less susceptible to religious indoctrination." [12] Further, "[t]he skepticism of the college student is not an inconsiderable barrier to [religious indoctrination and a] degree of academic freedom [can] evoke free and critical responses from students." [13] Furthermore, the lower court decisions discussed below suggest that college students are, for the most part, less vulnerable, except in cases where their presence is demanded by culture or the rules of the institution. That said, no court has drawn a bright line declaring when an adolescent is no longer subject to coercion.

Circuit court decisions make clear that a public college or university may include a nonsectarian invocation and/or benediction as part of a large institutional event such as commencement or an athletic contest, as long as the coercion test and/or the three prongs of the *Lemon* test are not violated. For example, in *Chaudhuri v. Tennessee*, the Sixth Circuit upheld Tennessee State University's custom of delivering generic, nonsectarian prayers at various university functions, including graduations. [14] The university did not contribute to the content of the prayer, only requesting of the local religious leaders invited to deliver the prayers that the messages remain nonsectarian. In its discussion, the court performed a *Lemon* analysis, and first found that the prayer had a secular purpose—namely, to "solemniz[e] public occasions, express[] confidence in the future, and encourag[e] the recognition of what is worthy of appreciation in society." [15] Under the second prong, the court found that the primary effect of the prayer was not to advance religion, because a reasonable observer would conclude that the graduation prayers were meant for solemnization and reflection, not for endorsing a religion. [16] The court made an effort here to distinguish prayer in the higher education context from prayer at a secondary school graduation, by reasoning that an audience of adults is not likely to be influenced by prayer at this type of function, while an audience of children is more likely to be so influenced. [17] Finally, there was no "excessive entanglement" of church and state, satisfying the third prong of *Lemon*. [18] University officials simply invited a religious leader to deliver the prayer, and requested that it be nonsectarian in nature; therefore, the university's (and consequently, the state's) involvement was merely *de minimis*. [19]

In another example, the Seventh Circuit upheld the practice of prayer at Indiana University's graduation event. [20] Since 1840, Indiana University had included an opening invocation and a closing benediction as part of its commencement ceremony. Each year, the university invited a different clergy member from the local religious community to deliver the nonsectarian prayers to the attendees of the ceremony. When this practice was challenged in 1995, the court upheld the practice as consistent with the Establishment Clause. [21] The court's analysis closely followed that used by the Sixth Circuit in *Chaudhuri*. The court here again emphasized the "mature" nature of the audience at a college graduation and posited that the attendees of a commencement ceremony would not be especially prone to coercion. [22] Because of that, the court held that the "special concerns" present when younger graduates are involved, such as at a middle school or high school graduation, are not present at a college graduation. [23] Furthermore, the university did not require anyone to participate in the prayer or even to attend the commencement exercises; in fact, the record in this case indicated that only about two-thirds of the Indiana University graduating class even attended the ceremony, while members of the audience remained free to come and go as they pleased. [24] Therefore, the court found that prayer at a college commencement ceremony does not violate the Constitution. [25]

When special circumstances are involved, however, college students *can* be subject to coercion. In *Mellen v. Bunting*, an influential case on point, the Fourth Circuit held that a pre-dinner prayer at the Virginia Military Institute (VMI) violated the Constitution. [26] The court emphasized the unique characteristics of a military institution, striking down VMI's practice of the pre-dinner prayer because

VMI cadets, despite being “mature adults,” were “uniquely susceptible to coercion.” [27] They are subject to a strict code of conduct and a history of rituals that have been part of the school’s training method and educational philosophy for decades. Additionally, the cadets were not free to choose whether or not to attend the dinner at which the prayers were delivered. Unlike the commencement ceremonies in the cases discussed above, where attendance was entirely voluntary, the VMI cadets were required to attend dinner in the dining hall and therefore be exposed to the daily prayer. [28] As a result, the court found that a “coercive atmosphere” had been established, placing the school-sponsored daily prayer in violation of the Establishment Clause. [29] The court also applied the *Lemon* test and found: first, that the prayer had the primary effect of promoting religion because the authoring and delivering of the prayer by school officials would lead a reasonable observer to interpret the practice as state sponsorship of religion; and second, that because the school “composed, mandated, and monitored a daily prayer for its cadets,” there was an excessive entanglement between the state and religion. [30]

Another example of potentially coercive situations involves prayers in athletic team locker rooms, as student athletes may feel that leaving the room during the course of the prayer will lead to less playing time, less respect from the coach and other players, and other difficulties within the team. In such a case, a court could apply the *Mellen* factors to find a similarly “coercive atmosphere” and therefore strike down such a prayer as unconstitutional.

Although few cases have dealt specifically with prayer in this context, many commentators believe locker room prayers to be a potential violation of the Establishment Clause. For example, in 2005 a federal district court in Georgia upheld the University of Georgia’s termination of a cheerleading coach who had not complied with the university’s request that she refrain from leading her team in prayer. [31]

Characteristics typical of locker room prayer and which courts are likely to find troubling include the coach’s initiation of or participation in the prayer; [32] the small locker room space often involved, making it difficult for an objector to avoid exposure to the prayer; mandatory involvement or social pressure to participate; and consequences for non-participation (“no pray, no play” arrangements). Under these circumstances, courts are more likely to find that a “coercive atmosphere” exists, removing the case from the line of cases permitting college commencement prayer and placing it under the higher scrutiny followed in *Mellen*.

In summary, the larger and less formal a gathering, the more likely a prayer at the event is to pass Establishment Clause analysis. The smaller a gathering, the more formal and compelled its attendance, and the more pressure—whether from faculty and staff or fellow students—to remain for a prayer, the more likely it is to violate the Establishment Clause. Whether analyzed under the Coercion, Endorsement, or *Lemon* tests, the specific facts of the case will determine the constitutionality. For ease of reference, we have included the chart below to assist in determining the constitutionality of prayer included in public college and university events. No one factor is likely controlling, but the factors can be read together to help determine where on the spectrum of Constitutionality lie a specific set of facts.

Establishment Clause Violations Chart

Less Likely to Violate	More Likely to Violate
Generic invocations to higher power to solemnize an occasion	Specific prayers read
Large audience occasions	Small groups
Attendance is voluntary	Attendance is mandatory

Complete freedom to come and go	Requirement or social pressure not to leave
Students choose speaker	Institution chooses speaker
Student speaker chooses prayer	Institution chooses prayer

III. Prayers at College and University Events: Free Exercise and Free Speech Clause Issues

While public colleges and universities pay significant attention to the Establishment Clause issues in allowing or endorsing prayer at school events, they must not lose sight of the Free Exercise and Free Speech rights of students, rights that include the right to religious speech and prayer. The Free Exercise Clause, [33] which applies equally to the states, [34] limits the ability of government to prevent individuals from exercising their religious beliefs or, when analyzed with the Speech Clause, [35] from speaking out about religious issues.

In *Widmar v. Vincent*, the Court ruled that although colleges and universities have power to impose reasonable restrictions on speech, to the extent that an institution maintains a limited public forum wherein students may engage in free speech on secular issues, it must provide the same rights to students to engage in free speech regarding religious concerns. [36] Simply allowing such religious speech by students is not itself an endorsement, as college students are keenly able to differentiate between speech by students and speech with the institution's seal of approval. [37]

While institutions must exercise caution in allowing college-endorsed prayers at certain events, they must also allow student speakers to engage in speech that may be religious or infused with prayer. This can mean allowing student speakers to include a prayer in a student commencement speech or athletic event (through cheers or statements) when the administration is not involved in the content or selection of the prayer. Additionally, students and student-athletes are free to pray, individually or in groups, during or surrounding institution-related events.

Section II of this Note discussed the notion that prayer initiated or led by coaches or other college employees may violate the Establishment Clause. Nonetheless, an institution must allow the same prayer if intiated or led by students themselves unless it is apparent that students have been enabled or asked to assume a coercive role in lieu of a coach. Thus, the difficult part of this delicate balance would arise when student leaders initiate or lead the prayers (with the tacit approval or participation of coaches or administrators) and some students feel compelled to participate lest they lose respect or the ability to play. Colleges should respond to such situations by ensuring that coaches or administrators clearly state that participation in prayer is irrelevant to participation in sports and that students are free to participate or decline. It should go without saying that students should not, tacitly or actively, enforce prayer requirements on behalf of coaches or other administrators. Using students as a vehicle in this way would raise serious Establishment Clause concerns.

CONCLUSION:

In parsing the Establishment, Speech and Free Exercise Clause questions in regard to prayers at institutional events, context is key. Factors such as the ability of the listeners to freely come and go, the size of the audience, the culture and its demands to remain or not, the nature of the message

and the status of the speaker as student or employee can help institutions determine whether allowing prayer at an institutional event violates the First Amendment.

ENDNOTES:

1. The Supreme Court once remarked that in constitutional analysis of the religion clauses in college settings, "candor compels the acknowledgment that we can only dimly perceive the boundaries of permissible government activity in this sensitive area of constitutional adjudication." Tilton v. Richardson, 403 U.S. 672, 678 (1971).

2. Board of Educ. of Westside Community Schools v. Mergens, 496 U.S. 226, 250 (1990) (emphases in original).

3. A deeper analysis of the legal issues posed by the establishment and free exercise clauses of the First Amendment on college campuses is available in Joseph Storch and Brendan Venter, *Holiday and Religious Displays on Campus: Threading the First Amendment Needle*, NACUANOTE, NATIONAL ASSOCIATION OF COLLEGE AND UNIVERSITY ATTORNEYS, Vol. 11, No. 1 (Nov. 15, 2012).

4. "Congress shall make no law respecting an establishment of religion . . . " U.S. Const., Amend. I.

5. See Wallace v. Jaffree, 472 U.S. 38, 48–49 (1985); Everson v. Bd. of Educ. of Ewing TP, 330 U.S. 1, 15–16 (1947).

6. See Wallace, 472 U.S. at 48–49; U.S. Const., Amend. I.

7. Lemon v. Kurtzman, 403 U.S. 602, 612-613 (1971) (citations omitted); see also Skoros v. City of New York, 437 F.3d 1,17 (2d Cir. 2006), *cert. denied*, 549 U.S. 1205 (2007).

8. In their most recent holding on the issue (handed down prior to Chief Justice Roberts and Justice Alito ascending to the bench), the Court, in a confusing amalgamation of opinions, did make the point that while the government may not explicitly endorse a specific religion, "the Establishment Clause does not compel the government to purge from the public sphere all that in any way partakes of the religious." Van Orden v. Perry, 545 U.S. 677, 699 (2005) (Breyer, J., concurring). The majority opinion called the Lemon test a helpful signpost, though not binding. See id. at 685. In fact, in two cases handed down on the same day in 2005, the Court went in opposite directions with respect to the Lemon test. In McCreary County v. A.C.L.U., the Court applied the Lemon test to the posting of the Ten Commandments in county courthouses, and found it to be a violation of the Establishment Clause. McCreary Cnty. v. A.C.L.U., 545 U.S. 844, 881 (2005). Yet, in Van Orden v. Perry, the Court declined to apply the Lemon test, and upheld a display of the Ten Commandments at the Texas state capitol building. 545 U.S. at 691–92. Each of these cases resulted in a 5-4 decision, with Justice Breyer serving as the swing vote in each. Exemplifying the admonition that individual facts matter, Justice Breyer attributed his differing conclusions to seemingly minute differences between the two situations. In McCreary, he saw the courthouse display as unconstitutional, yet he voted with the plurality in Van Orden in holding that the state capitol display was constitutionally permissible. This was, according to Justice Breyer, primarily because the display in Van Orden had a dual secular and religious nature, as it was donated by a secular organization, was not in an overtly religious setting, and was included amongst other more secular monuments. Id. at 701–703. While not explicitly overturning Lemon, the Court in Van Orden revealed its dissatisfaction with the test, and simply chose not to apply it, "instead [looking to] . . . the nature of the monument." Id. at 686. The divergence of the analyses in these two similar cases demonstrates how difficult it can be for campus counsel to navigate Establishment Clause jurisprudence.

9. See County of Alleghany v. A.C.L.U., 492 U.S. 573, 593–94 (1989). Justice Antonin Scalia particularly dislikes the Lemon Test, writing in a biting concurrence in a Free Speech and Free Exercise Clause case discussed below that:
As to the Court's invocation of the Lemon test: Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, Lemon stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District. Its most recent burial, only last Term, was, to be sure, not fully six feet under: Our decision in Lee v. Weisman . . . conspicuously avoided using the supposed 'test' but also declined the invitation to repudiate it. Over the years, however, no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart (the author of today's opinion repeatedly), and a sixth has joined an opinion doing so.
Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring).

10. Lee v. Weisman, 505 U.S. 577, 587 (1992), *citing* Lynch v. Donnelly, 465 U.S. 668, 676 (1984).

11. See, e.g., Weisman, 505 U.S. 577, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000), Engel v. Vitale, 370 U.S. 421 (1962), Borden v. Sch. Dist. of Twp. of East Brunswick, 523 F.3d 153 (3d Cir. 2008), *cert. denied*, 555 U.S. 1212 (2009), Jager v. Douglas Cnty. Sch. Dist., 862 F.2d 824 (11th Cir. 1989), *cert. denied*, 490 U.S. 1090 (1989), Doe v. Aldine Indep. Sch. Dist., 563 F.Supp. 883 (S.D. Tex. 1982), Stein v. Plainwell Cmty. Schs., 822 F.2d 1406 (6th Cir. 1987), Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963 (5th Cir. 1992), cert. denied, 508 U.S. 967 (1993), Cole v. Oroville Union High Sch. Dist., 228 F.3d 1092 (9th Cir. 2000), cert. denied, 532 U.S. 905 (2001), Deveney v. Bd. of Educ. of Cnty. of Kanawha, 231 F.Supp.2d 483 (S.D. W. Va. 2002), Gearon v. Loudoun Cnty. Sch. Bd., 844 F.Supp. 1097 (E.D.Va. 1993), Steele v. Van Buren Pub. Sch. Dist., 845 F.2d 1492 (8th Cir. 1988), Collins v. Chandler Unified Sch. Dist., 644 F.2d 759 (9th Cir. 1981), *cert. denied*, 454 U.S. 863 (1981), Kent v. Comm'r of Ed., 402 N.E.2d 1340, 380 Mass. 235 (1980), Workman v. Greenwood Cmty. Sch. Corp., 2010 WL 1780043 (S.D. Ind. 2010); Adler v. Duval Cnty. Sch. Bd., 250 F.3d 1330 (11th Cir. 2001); see also Good News Club v. Milford Cent. Sch., 533 U.S. 98, 142–43 (2001), *cert. denied*, 534 U.S. 1065 (2001) (stating that "Establishment Clause cases have consistently recognized the particular impressionability of school children, and the special protection required for those in the elementary grades in the school forum," and noting "the difference between college students and grade school pupils to be a 'distinction [that] warrants a difference in constitutional results.") (quoting Edwards v. Aguillard, 482 U.S. 578, 583–84 (1987)) (citing Cnty. of Allegheny v. Am. Civil Liberties Union, 492 U.S. 573, 620, n. 69 (1989)). For additional analysis of some of these cases, see Bridget Asplund, "Student-Led, Student-Initiated Prayer at Football Games Violates the Establishment Clause—Santa Fe Independent School District v. Doe, 530 U.S. 290 (2000)," 13 Seton Hall J. Sport L. 97 (2000). The United States Department of Education has prepared guidance on this matter for elementary and secondary schools. See "Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools," United States Department of Education, (Feb. 7, 2003).

12. Tilton, 403 U.S.at 686; see also Roemer v. Board of Public Works of Maryland, 426 U.S. 736 (1976).

13. Tilton, 403 U.S. at 686; see also Widmar v. Vincent, 454 U.S. 263, 274, n. 14 (1981) ("University students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion"); Bd. of Educ. of Westside Community Schools v. Mergens, 496 U.S. 226, 234–235 (1990).

14. Chaudhuri v. Tennessee, 130 F.3d 232 (6th Cir. 1997), *cert. denied*, 523 U.S. 1024 (1998).

15. Id. at 236.

16. Id. at 237; see also Americans United for Separation of Church and State v. City of Grand Rapids, 980 F.2d 1538, 1543–44 (6th Cir. 1992), County of Alleghany v. A.C.L.U., supra at 597.

17. Chaudhuri. 130 F.3d at 237.

18. Id. at 238.

19. Id.

20. Tanford v. Brand, 104 F.3d 982 (7th Cir. 1997), *cert. denied*, 522 U.S. 814 (1997).

21. Id. at 986.

22. Id. at 985–86; see also Weisman, 505 U.S. at 586–87.

23. Tanford v. Brand, supra at 986.

24. Id. at 983.

25. Id. at 986.

26. Mellen v. Bunting, 327 F.3d 355 (4th Cir. 2003), *cert. denied*, 541 U.S. 1019 (2004).

27. Id. at 371.

28. Id.

29. Id. at 371–72.

30. Id. at 374–75.

31. Braswell v. Bd. of Regents of Univ. Sys. Of Ga., 369 F. Supp. 2d 1362 (N.D. Ga. 2005). For more information, see Kris Bryant, Take a Knee: Applying the First Amendment to Locker Room Prayers and Religion in College Sports, 36 J.C. & U.L. 329 (2009). Cases of prayers in a locker room and similar situations also implicate the speaker's Free Speech and Free Exercise rights, requiring a balancing of such rights against Establishment Clause concerns. See Pt. III, infra. See Borden v. Sch. Dist. of Twp. of New Brunswick, 523 F.3d 153, 178 (3d Cir. 2009), *cert. denied*, 555 U.S. 1212 (2009) (holding that a high school football coach could not take a knee with his team in the locker room before a game, nor could he even bow his head while a pre-meal prayer was given at a team dinner, because "a reasonable observer would conclude that [the coach] is showing not merely respect when he bows his head and takes a knee with his teams and is instead endorsing religion.").

32. See Holloman v. Harland, 370 F.3d 1252, 1289 (11th Cir. 2004) (stating a bright-line rule that it is "unconstitutional for a teacher or administrator (or someone acting at their behest) to lead students aloud in voluntary prayer."). Note that a different analysis would apply to prayer initiated or led by students, see Section III, infra.

33. "Congress shall make no law…prohibiting the free exercise [of religion]." U.S. Const. amend. I, cl. 2.

34. See Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

35. "Congress shall make no law…abridging the freedom of speech." U.S. Const.amend. I, cl. 3.

36. 454 U.S. 263 (1981); see also Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) (denying religious organizations access to school facilities for speech purposes equal to that of secular organizations violates the Free Speech clause; allowing such access is not in and of itself a violation of the Establishment Clause). For questions of funding of religious speech and speech alleged to infringe on religion at college campuses, see generally Rosenberger v. Rectors and Visitors of University of Virginia, 515 U.S. 819 (1995); Bd. of Regents of the Univ. of Wisc. Sys. v. Southworth, 529 U.S. 217 (2000); Christian Legal Society Chapter of the Univ. of Cal., Hastings College of the Law v. Martinez, 561 U.S. ____, 130 S.Ct. 2971 (2010).

37. See Widmar, 454 U.S. at 274; Mergens, 496 U.S. at 248-50.