Brooklyn Law Review

Volume 67
Issue 4
SYMPOSIUM:
Cognitive Legal Studies: Categorization and Imagination in the Mind of Law. A Conference in Celebration of the Publication of Steven L. Winter's Book, *A Clearing in the Forest: Law, Life, and Mind*

Article 14

3-1-2002

COMMENT: An Attempt to Pick Up the Fallen Bricks of the Wall Separating Church and State After *Santa Fe v. Doe*

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Recommended Citation
Ross Schmierer, *COMMENT: An Attempt to Pick Up the Fallen Bricks of the Wall Separating Church and State After Santa Fe v. Doe*, 67 Brook. L. Rev. 1291 (2002).
Available at: https://brooklynworks.brooklaw.edu/blr/vol67/iss4/14

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AN ATTEMPT TO PICK UP THE FALLEN BRICKS OF THE WALL SEPARATING CHURCH AND STATE AFTER *SANTA FE v. DOE*[*]

> Of all the issues the ACLU takes on—reproductive rights, discrimination, jail and prison conditions, abuse of kids in the public schools, police brutality, to name a few—by far the most volatile issue is that of school prayer. Aside from our efforts to abolish the death penalty, it is the only issue that elicits death threats.[1]

INTRODUCTION

Since its enactment, the First Amendment to the United States Constitution[2] has firmly stood to protect an individual's freedom of religion. Although the cruelty witnessed by the framers against those holding minority religious beliefs would be unthinkable in America today, one cannot question the importance of this freedom.[3] Unfortunately, the dual guarantees of the religion clauses of the First Amendment cause a perplexing problem when there is religious speech in

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[1] Lee v. Weisman, 505 U.S. 577, 606 n.10 (1992) (quoting Michelle A. Parish, *Graduation Prayer Violates the Bill of Rights*, 4 UTAH BAR. J. 19 (1991)).

[2] *See* U.S. CONST. amend 1 ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . .").

[3] *See* Everson v. Bd. of Educ. of Ewing, 330 U.S. 1, 8 (1947) (describing how:

> A large proportion of the early settlers of this country came from Europe to escape the bondage of laws which compelled them to support and attend government favored churches. The centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy . . . . In efforts to force loyalty to whatever religious group happened to be on top and in league with the government of a particular time and place, men and women had been fined, cast in jail, cruelly tortured and killed.)

Id.

the context of a public forum. On the one hand, the Free Speech Clause,[4] intended to protect private religious expression, forbids content-based restrictions on private expression in the public forum. Yet, on the other hand, the Establishment Clause[5] requires that the government not favor one religion over another. As a result, an inherent conflict exists between these doctrines because when the government allows private religious speech in a public forum it appears to be sponsoring religion.

When these doctrines collide in the public school context, it is imperative that lower courts and school districts have intelligible guidelines. In the early school prayer cases, the Supreme Court clearly embraced the doctrine of church-state separation.[6] Commentators have argued that the separationist ethos has survived best in the context of religious exercises in public schools.[7] Because of the changes in the makeup of the Supreme Court, school prayer issues have been scrutinized using several different tests and rationales, further exacerbating the situation.[8] Recently, the American Bar Association declared that "[f]or the past decade, the legal status of student-led prayer has become the most contentious of First Amendment questions, dividing school officials, lawyers and judges."[9] Sadly, the current Supreme Court in its *Santa Fe Independent School District v. Doe*[10] decision took a step backwards in this important and volatile area of

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[4] *See* U.S. CONST. amend. 1 ("Congress shall make no law . . . abridging the freedom of speech . . .").

[5] *See* U.S. CONST. amend. 1 ("Congress shall make no law respecting an establishment of religion . . .").

[6] *See* Sch. Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962) (Discussed *infra* Part I.A.).

[7] JOHN H. GARVEY & FREDERICK SCHAUR, THE FIRST AMENDMENT: A READER 450 (1996).

> This setting combines many of separationism's core concerns, including the privatization of religion, the dangers of a divisive local politics of religion, the role of common schools as unifying carriers of shared aspirations and culture, and the threat to individual religious liberty created by the compulsory character of education of the young.

Id.

[8] These tests are described *infra* Part I.

[9] David G. Savage, *OK to Pray in Public School?*, A.B.A. J., Feb. 2002, at 31.

[10] 530 U.S. 290 (2000).

jurisprudence by not providing clear guidance to lower courts and school districts.

In *Santa Fe,* two families objected to the persistent imposition of sectarian religious practices in the public schools of Santa Fe, Texas. As a result, they sought injunctive relief against the Santa Fe Independent School District to prevent it from sponsoring or condoning religious acts at imminent graduation exercises.[11] They also alleged, *inter alia*, that the district allowed students to deliver overtly Christian prayers over the public address system at home football games.[12] Although the Supreme Court correctly held the school district's policy was unconstitutional, the Court utilized language and principles from several different Establishment Clause tests. Among the ramifications of the Court's analysis in *Santa Fe*, is its failure to offer a cogent standard for analyzing the constitutionality of school policies that allegedly violate the Establishment Clause. In addition, the Court employed the public forum doctrine which was created to govern the First Amendment guarantees of individuals using publicly owned property for free speech purposes. As Chief Justice Renhquist acknowledged, "we [the Court] have repeatedly emphasized our unwillingness to be confined to any single test or criterion in the [Establishment Clause] area."[13] Admittedly, the Court cannot use the same test to evaluate every situation challenged under the Establishment Clause. However, the *Santa Fe* approach in this particular school prayer context left too many unanswered questions including: (1) which Establishment Clause test and/or principle, if any, was dispositive; (2) the significance of a facial challenge on Establishment Clause grounds; and (3) when speech endorsing religion is truly private and constitutionally protected.

Unfortunately, these concerns materialized in two Eleventh Circuit decisions, *Chandler v. James*[14] and *Adler v. Duval County School Board.*[15] After the Supreme Court granted

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[11] *See* Respondent's Brief at 43, Santa Fe v. Doe, 530 U.S. 290 (2000) (No. 99-62), *available at* 2000 WL 140928.

[12] *See Santa Fe*, 530 U.S. at 295.

[13] *Id.* at 319 (Rehnquist, C.J., dissenting).

[14] 180 F.3d 1254 (11th Cir. 1999) [hereinafter *Chandler I*].

[15] 250 F.3d 1330 (11th Cir. 2001) [hereinafter *Adler I*].

certiorari[16] and remanded *Chandler* to be decided in light of the principles announced in *Santa Fe*, the Eleventh Circuit maintained that "Santa Fe leaves unanswered, however, under what circumstances religious speech in schools can be considered private, and therefore, protected."[17] On remand, the Eleventh Circuit upheld the challenged Alabama statute permitting student-initiated prayer by pronouncing the speech protected under the guise of private speech.[18] Similarly, the Court vacated the *Adler* decision and remanded it for further consideration in light of *Santa Fe*.[19] Like *Chandler*, the Eleventh Circuit reinstated its judgment and upheld a policy permitting high school seniors to vote whether a student could deliver a message of that student's choosing as part of graduation ceremonies.[20] Unfortunately, the Court refused to review the *Adler* ruling, thus causing greater confusion in this area of law. Frustrated by the lack of clarity on this issue, the lawyer challenging the Adler policy declared, "[t]here's one rule for the 11th Circuit, one rule for the 5th Circuit and, in my opinion, no rule on this issue for the rest of the country."[21]

Because school districts and lower courts do not have clear guidance on school prayer issues, Establishment Clause jurisprudence may be inconsistently applied in such cases. Moreover, school districts that disagree with the Supreme Court's view of disallowing prayer at these school events may subvert the Court's stance on this issue through devious techniques. Therefore, it is imperative that the Court clarifies the law and provides uniformity throughout the federal circuits and the country. Part I of this Comment details the first school prayer cases and the three different tests used in the Establishment Clause area. Part II details the development of the public forum doctrine because school districts argue that this doctrine shields their policies under the guise of the Free Speech Clause. Part III discusses the *Santa Fe* decision. Lastly, Part IV examines the Supreme Court's analysis and the fundamental problems in the Court's approach in *Santa Fe*,

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[16] Chandler v. Seigelman, 530 U.S. 1256 (2000).
[17] 230 F.3d 1313 (11th Cir. 2000) [hereinafter *Chandler II*].
[18] *Id.*
[19] Adler v. Duval County Sch. Bd., 531 U.S. 801 (2001).
[20] 250 F.3d 1330 (11th Cir. 2001) [hereinafter *Adler II*].
[21] Savage, *supra* note 9, at 31.

Chandler, and *Adler* and proposes a two-step analysis for this particular context. First, courts should apply forum analysis and its categorical approach. Second, courts should conduct an Establishment Clause inquiry using an "any reasonable observer endorsement test" version of the endorsement test.

I. SUPREME COURT JURISPRUDENCE INVOLVING RELIGION AND PRAYER IN SCHOOL

A. *The School Prayer Cases*

An examination of the freedom of religion guaranteed by the First Amendment necessarily begins in 1947 with *Everson v. Board of Education of Ewing*.[22] In that case, the Supreme Court upheld the constitutionality of a New Jersey statute and a school board resolution passed pursuant to it which allowed parents of parochial students to be reimbursed for the transportation of their children on buses operated by the public transportation system.[23] Despite the approval of the statute and resolution, the decision was filled with strong language extolling the virtues of the First Amendment. Specifically, Justice Jackson declared in two sentences that proved enormously influential as well as controversial, "the First Amendment has erected a wall between church and state" and "[t]hat wall must be kept high and impregnable."[24]

Almost fifteen years later, parents of public school students looked to the strength of this "wall" to challenge the constitutionality of a state law authorizing a school district to direct the use of prayer in public schools and of a school district's regulation ordering the recitation of a prayer.[25] In *Engel v. Vitale*,[26] the Court made clear that these prayers were

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[22] 330 U.S. 1 (1947).

[23] *See id.* at 17.

[24] *Id.* at 16.

[25] *See* Engel v. Vitale, 370 U.S. 421, 422 (1962). The Board of Education directed the following prayer to be said aloud by each class in the presence of the teacher at the beginning of each school day: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." *Id.* at 426.

[26] 370 U.S. 421 (1962).

in violation of the Establishment Clause because they were composed by "governmental officials as part of a governmental program to further religious beliefs."[27] As a result, the Court found that the constitutional prohibition against laws respecting an establishment of religion must mean that "in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as part of a religious program carried on by government."[28] The Court articulated that the Constitution was adopted to avert the dangers of a union of church and state. The Court further stated, "one of the greatest dangers to the freedom of the individual to worship in his own way lay in the Government's placing its official stamp of approval upon one particular kind of prayer or one particular form of religious services."[29] It did not matter to the Court whether the prayer was denominationally neutral or that its observance was voluntary, for the Establishment Clause "rested on the belief that a union of government and religion tended to destroy . . . and to degrade religion."[30] The Court also noted that the Establishment Clause rested upon an awareness of the historical fact that governmentally established religions and religious persecution were closely related.[31] The Court noted that the Establishment Clause stood as an "expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate."[32] The Court maintained that even though the Regent's prayer did not compare "to the governmental encroachments upon religion that occurred 200 years ago," it was significant enough to violate the Establishment Clause.[33]

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[27] *Id.* at 425.

[28] *Id.*

[29] *Id.* at 429.

[30] *See id.* at 431. The court noted that the history of England and America "showed that whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect, and even contempt of those who held contrary beliefs." *Engel*, 370 U.S. at 431.

[31] *See id.* at 433.

[32] *Id.* at 432.

[33] *See id.* at 436. The Court quoted James Madison to emphasize this point:

> It is proper to take alarm at the first experiment on our liberties. . . . Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the

Following *Engel*, the Court reinforced the "wall" when it examined state action requiring schools to begin each day with readings from the Bible in two companion cases. In *School District of Abington v. Schempp*,[34] one set of plaintiffs, the Schempp family, sued to enjoin the enforcement of a Pennsylvania statute requiring "[a]t least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day."[35] The Schempps claimed that the religious doctrines of the Bible were contrary to their religious beliefs and to their familial teaching.[36] Although the Pennsylvania statute did allow children to be excused from this reading upon written request from their parent or guardian, the plaintiffs believed that this would adversely affect the children's relationships with their teachers and classmates.[37] In the other case, plaintiffs Madalyn Murray and her son William J. Murray III challenged a Baltimore City rule providing for opening exercises in city schools that consisted primarily of reading, without comment, a chapter in the Holy Bible and/or the use of the Lord's Prayer.[38] The Murrays, both professed atheists, claimed that the rule violated their rights in religious freedom by placing a premium on belief over nonbelief and by subjecting their freedom of consent to the majority rule.[39] Utilizing the principles and language of several cases beginning with *Everson*, the Court reaffirmed that the Establishment Clause does more than forbid governmental preference of one religion over another.[40] The Court re-emphasized that "the first and most immediate purpose of the Establishment Clause rested on the belief that a union of government and religion tends to destroy government and to

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> same ease any particular sect of Christians, in exclusion of all Sects? That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?

Id. at 436.

[34] 374 U.S. 203 (1963).

[35] *Id.* at 205.

[36] *See id.* at 208.

[37] *See id.*

[38] *Id.* at 211.

[39] *Schempp*, 374 U.S. at 212.

[40] *See id.* at 216.

degrade religion."[41] Like New York's program and policy in *Engel*, the opening exercises were religious exercises imposed by the State in violation of the First Amendment command that the government remain strictly neutral without aiding or opposing religion.

B. *The Three Tests Used by the Court to Examine Establishment Clause Violations*

Following *Everson* and the school prayer cases, the Supreme Court utilized different tests and rationales to decide Establishment Clause conflicts. A study of Court decisions reveals that three tests are used in modern Establishment Clause jurisprudence.

1. The *Lemon* Test

In *Lemon v. Kurtzman*,[42] the Court established a three-prong test for determining whether a statute violates the Establishment Clause. In this case, the Court addressed two appeals challenging Pennsylvania and Rhode Island statutes that provided state aid to church-related elementary and secondary schools. Pennsylvania had a statutory program that reimbursed private schools for the cost of teachers' salaries, textbooks, and instructional materials in specified secular subjects.[43] Rhode Island's statute directly paid teachers in private elementary schools a supplement of fifteen percent of their annual salary.[44] Acknowledging the absence of precisely stated constitutional prohibitions in this area, the Court set out to unify the tests developed by it over several years. The Court found that the Establishment Clause was created to protect against the evils of sponsorship, financial support, and active involvement of the sovereign in religious activity.[45] Thus, the Court created a tri-partite framework to determine whether a statute violates the Establishment Clause. First, the

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[41] *Id.* at 221.
[42] 403 U.S. 602 (1971).
[43] *Id.* at 607.
[44] *Id.*
[45] *Id.* at 612.

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."[46]

When applying the test, the Court relied primarily on the third prong to find the statutes unconstitutional. It found that both statutes involved several areas of excessive entanglement between government and religion. Under the Rhode Island statute, the state had to inspect and evaluate the religious content of a religious organization.[47] Likewise, the Pennsylvania statute gave rise to entanglements between church and state with the same restrictions and surveillance necessary to ensure that teachers played a strictly non-ideological role.[48] In addition, the Court was concerned with the entanglement presented by the divisive political potential of these state programs. Lastly, the Court concluded that "the Constitution decrees that religion must be a private matter for the individual, the family and the institutions of private choice, and that while some involvement and entanglement are inevitable, lines must be drawn."[49]

Although the Supreme Court has not formally repudiated the *Lemon* test, many justices have criticized it.[50] Because the test is disjunctive, courts are free to choose which prong to apply when analyzing Establishment Clause challenges.

2. The Endorsement Test

In an influential concurring opinion in *Lynch v. Donnelly*,[51] Justice O'Connor created the "endorsement test" to serve as a guide for Establishment Clause challenges. In

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[46] *Id.* at 612-13.

[47] *Lemon*, 403 U.S. at 619.

[48] *See id.* at 620.

[49] *Id.* at 625.

[50] One memorable example was Justice Scalia's concurring opinion in *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993). He graphically stated, "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 . . . ." *Id.* at 398 (Scalia, J., concurring).

[51] 465 U.S. 668 (1984).

Lynch, the Court held that the city's inclusion of a nativity scene in its Christmas display was constitutional under the Establishment Clause. Writing separately, Justice O'Connor suggested an approach to clarify the Court's Establishment Clause doctrine. Justice O'Connor urged that "the proper inquiry under the purpose prong of *Lemon* . . . is whether the government intends to convey a message of endorsement or disapproval of religion."[52] Under the effect prong of the *Lemon* test, she found that "what is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion."[53]

In *County of Allegheny v. American Civil Liberties Union*,[54] the Court applied Justice O'Connor's endorsement test when it evaluated the constitutionality of two recurring holiday displays located on public property in downtown Pittsburgh. Justice Blackmun's majority opinion found that Justice O'Connor's concurrence in *Lynch* provided a sound analytical framework for Establishment Clause cases.[55] Adopting this framework, Justice Blackmun pointed out the test's guiding principles. First, any endorsement of religion is invalid because it "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."[56] Second, "the effect of the display depends upon the message that the government's practice communicates" and "what viewers may fairly understand to be the purpose of the display."[57] In this regard, "every government practice must be judged in its unique circumstances to determine whether it endorses religion."[58] Therefore, under this framework, the Court must ascertain whether "the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious

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[52] *Id.* at 691.
[53] *Id.* at 692.
[54] 492 U.S. 573 (1989).
[55] *See id.* at 595.
[56] *Id.*
[57] *Id.*
[58] *Id.*

choices."[59] To determine this, the Court found that the constitutionality of the display's effect "must [ ] be judged according to the standard of a 'reasonable observer'."[60] Using these considerations, the Court held that it "is not 'sufficiently likely' that residents of Pittsburgh will perceive the combined display . . . as an 'endorsement' or 'disapproval' . . . of their individual religious choices."[61] Therefore, the Court held that "the city's overall display must be understood as conveying the city's secular recognition of different traditions for celebrating the winter-holiday season."[62]

3. The Coercion Test

Lastly, in *Lee v. Weisman*,[63] the Court enunciated the "coercion test" for analyzing Establishment Clause challenges. It held that (1) the principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause; and (2) 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.[64]

Because the facts and questions addressed in *Lee* are closely analogous to *Santa Fe*, an in-depth look at this case is helpful. In *Lee*, the Court addressed whether including clerical members who offer prayers as part of an official school graduation ceremony was consistent with the Religion Clauses of the First Amendment.[65] The public school system of Providence, Rhode Island had a policy that permitted principals to invite members of the clergy to give invocations and benedictions at middle school and high school graduations.[66] It was customary for Providence school officials

[59] *Allegheny*, 492 U.S. at 597.
[60] *Id.* at 620.
[61] *Id.* at 619.
[62] *Id.* at 620.
[63] 505 U.S. 577 (1992).
[64] *See Santa Fe*, 530 U.S. at 302.
[65] *Lee*, 505 U.S. at 580.
[66] *See id.* at 581.

to provide invited clergy with a pamphlet entitled "Guidelines for Civic Occasions."[67] A middle school principal, Robert E. Lee, invited Rabbi Leslie Gutterman to deliver prayers at the graduation exercises.[68] Lee gave Gutterman the pamphlet before the graduation and advised him that the invocation and benediction should be nonsectarian.[69] Attendance by graduating students at all Providence middle schools and high schools was voluntary.[70]

The Court began its analysis by indicating that it was not required to reconsider its decision in *Lemon*, because the government involvement with religious activity in this case was so pervasive that it created a "state-sponsored and state-directed religious exercise in a public school."[71] The Court noted that although the government may accommodate the free

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[67] *Id.* at 581. The National Conference of Christians and Jews prepared the pamphlet. The Guidelines recommended that public prayers at nonsectarian civic ceremonies be composed with "inclusiveness and sensitivity" though they acknowledge that "prayer of any kind may be inappropriate on some civic occasions." *Id.*

[68] Rabbi Gutterman belonged to the Temple Beth El in Providence. *See Lee*, 505 U.S. at 581.

[69] Rabbi Gutterman's prayers were as follows:

Invocation:

> God of the Free, Hope of the Brave: For the legacy of America where diversity is celebrated and the rights of minorities are protected, we thank You. May these young men and women grow up to enrich it. For the liberty of America, we thank You. May these new graduates grow up to guard it. For the political process of America in which all its citizens may participate, for its court system where all may seek justice we thank You. May those we honor this morning always turn to it in trust. For the destiny of America we thank You. May the graduates of Nathan Bishop Middle School so live that they might help to share it. May our aspirations for our country and for these young people, who are our hope for the future, be richly fulfilled.

Benediction:

> O God, we are grateful to You for having endowed us with the capacity for learning which we have celebrated on this joyous commencement. Happy families give thanks for seeing their children achieve an important milestone. Send Your blessings upon the teachers and administrators who helped prepare them. The graduates now need strength and guidance for the future, help them to understand that we are not complete with academic knowledge alone. We must each strive to fulfill what You require of us all: To do justly, to love mercy, to walk humbly. We give thanks to You, Lord, for keeping us alive, sustaining us and allowing us to reach this special, happy occasion. Amen."

Id.

[70] *See id.* at 583.

[71] *See id.* at 587.

exercise of religion, it must abide by the limitations of the Establishment Clause.[72] The Court found that Lee's decisions to have an invocation and benediction; choose the religious participant; and provide a Rabbi with guidelines and advice were troubling and attributable to the State.[73] The Court maintained that these decisions violated the principle of Establishment Clause jurisprudence because "it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government."[74]

In addition, the Court maintained that the Religion Clauses stand for the principle that religious beliefs and expression are too precious to be either "proscribed or prescribed by the State."[75] Instead, "the preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere . . ."[76] In addition, the Court maintained that while the efforts of the school officials to find common ground were a good-faith attempt to recognize common aspects of religion, prior case law prohibited school officials from participating in this act.[77] The Court then determined that "the degree of school involvement here made it clear that the graduation prayers bore the imprint of the State and thus put school-age children who objected in an untenable position."[78]

The Court then concentrated on the ceremonies' effect on students. Here, the Supreme Court rejected as formalistic the argument that the graduation was voluntary.[79] The Court recognized that graduation is an important and valuable experience for students and their families.[80] Moreover, the

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[72] *See Lee*, 505 U.S. at 587. The Court maintained that "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." *Id.* (quoting Lynch v. Donnelly, 465 U.S. 668, 678 (1984)).

[73] *See id.* at 587-88.

[74] *Id.* at 588. (quoting *Engel*, 370 U.S. at 425).

[75] *Id.* at 589.

[76] *Lee*, 505 U.S. at 589.

[77] *See id.* at 590.

[78] *Id.*

[79] *See id.* at 591. The Court declared, "to say teenage student has a real choice not to attend her high school graduation is formalistic in the extreme." *Id.* at 591.

[80] *See Lee*, 505 U.S. at 591.

Court maintained that while these religious prayers would be important to some students, these same prayers would amount to religious conformity with other students.[81]

Further, the Court rejected arguments comparing the public school system to sessions of a state legislature.[82] The Court noted that at graduation teachers and principals must and do retain "a high degree of control over the precise contents of the program, the speeches, the timing, the movements, the dress, and the decorum of the students."[83] The Court then found that "[i]n this atmosphere the state-imposed character of an invocation and benediction by clergy selected by the school combine to make the prayer a state-sanctioned religious exercise in which the student was left with no alternative but to submit."[84]

Lastly, the Court acknowledged that it is not constitutional to exclude religion from every aspect of public life.[85] Further, the Court recognized that there are instances where religious values, practices, and purposes will interact with public schools and their students.[86] However, the Court maintained that these were different issues. The Court found that here it faced the sole question of "whether a religious exercise may be conducted at a graduation ceremony in circumstances where . . . young graduates who object are induced to conform."[87] Thus, the Court held that the invocation and benediction given by the Rabbi at the commencement ceremony were forbidden by the Establishment Clause.[88]

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[81] *Id.* at 595-96. The Court further elaborated, "[t]he Constitution forbids the State to exact religious conformity from a student as the price of attending her own high school graduation." *Id.* at 596.

[82] *See id.* at 596-97. Here, the Court distinguished its decision in *Marsh v. Chambers*, 463 U.S. 783 (1983), where it decided that clergy-delivered prayer before a session of a state legislature was constitutional. The court explained that "[t]he atmosphere at the opening of a session of a state legislature where adults are free to enter and leave with little comment and for any number of reasons cannot compare with the constraining potential of the one school event most important for the student to attend." *Lee*, 505 U.S. at 596-97.

[83] *Id.* at 597.

[84] *Id.*

[85] *See id.* at 598.

[86] *See id.* at 599.

[87] *Lee*, 505 U.S. at 599.

[88] *See id.*

4. Analysis of Tests

Because of the changing make-up of the Supreme Court, different tests and rationales have been applied to Establishment Clause challenges. Throughout the 1970s, the Court utilized the *Lemon* framework and its separationist vision.[89] The Supreme Court has not formally renounced the *Lemon* test, but no majority has relied on it to invalidate any practice since 1985.[90] In *Santa Fe*, Chief Justice Rehnquist pointed out that "we have even gone so far as to state that it has never been binding on us."[91] Also, the Chief Justice declared that in *Lee* the Court "mentioned, but did not feel compelled to apply the *Lemon* test."[92]

In 1989, a five-Justice majority accepted a version of the endorsement test.[93] However, the replacement of Justices Brennan, Marshall, and White with Justices Souter, Thomas and Ginsburg creates doubt whether the endorsement test can still command a majority.[94] In *Lee*, a narrow majority of the Court enunciated the coercion test to strike down the graduation policy. Writing for the Court, Justice Kennedy expressed his view that coercion is a necessary element of an Establishment Clause violation.[95]

Although the *Santa Fe* Court claimed to rely on the principles of *Lee*, the language of the endorsement test appeared throughout the *Santa Fe* opinion.[96] In addition, the Court employed two of *Lemon*'s prongs to analyze the issue.[97] Thus, the Court utilized different principles and different tests to analyze this specific Establishment Clause area. Such an

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[89] *See* Ira C. Lupu, *The Lingering Death of Separationism*, 62 GEO. WASH. L. REV. 230, 236 (1993).

[90] *See* GARVEY & SCHAUR, *supra* note 7, at 525.

[91] *Santa Fe*, 530 U.S. at 319 (Rehnquist, C.J., dissenting).

[92] *Id.* at 320.

[93] *See* Allegheny v. A.C.L.U., 492 U.S. 573 (1989).

[94] *See* Lupu, *supra* note 89, at 240.

[95] *See Lee*, 505 U.S. at 587 (finding "[i]t 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. . . .").

[96] *See supra* Part IV.B. (discussing the mixing and matching of different Establishment Clause tests).

[97] The Court discussed the secular legislative purpose prong and the entanglement prong.

approach fails to provide a coherent analysis for circuits confronting this issue. The Court's analysis of the Establishment Clause challenges should provide clearer guidance to lower courts.

II. THE PUBLIC FORUM DOCTRINE

When the Santa Fe School District defended the constitutionality of its pre-game football policy, it argued that its policy permitted private student speech, not government speech.[98] In making this argument, the school district relied on the Free Speech Clause cases that protected religious speech under the public forum doctrine.[99] As a result, the Court examined these cases and found that "an individual's contribution to government-created forums was not government speech."[100] The Court found these cases distinguishable, but stated "a conclusion that the District had created a public forum would shed light on whether the resulting speech is public or private . . ."[101] Therefore, it is likely that school districts in the future will argue their policies create public forums and only authorize protected private speech.[102] Thus, it is necessary to examine the development of the public forum doctrine analysis and its effects on student led prayer in this particularized area.

A. *The Development of the Public Forum Doctrine Analysis*

Because the First Amendment cannot guarantee the individual an absolute right to use publicly owned property for expressive purposes, the Court developed the public forum

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[98] *See Santa Fe*, 530 U.S. at 203.

[99] *See* Petitioner's Brief at 45-46, Santa Fe v. Doe, 530 U.S. 290 (2000) (No. 99-62), *available at* 1999 WL 1269325. The petitioners argued that the Free Speech Clause precludes discrimination against religious speech and relied on *Pinette*, *Lamb's Chapel*, and *Rosenberger*. These cases are discussed, *infra*, in this section.

[100] *See Santa Fe*, 530 U.S. at 302.

[101] *See id.* at 303 n.13 (2001).

[102] In fact, the Eleventh Circuit reinstated its en banc opinion that found a school district policy very similar to that in *Santa Fe* "can be analogized to a line of open forum cases" including *Mergens*, *Pinette* and *Lamb's Chapel*. *See Adler v. Duval County School Board*, 206 F.3d 1070 (11th Cir. 2001), discussed, *infra* Part IV D.

analysis. This analysis has evolved along two interrelated tracks. One line of analysis governs streets and parks and the other analysis governs all other publicly-owned property.

In *United States v. Grace*,[103] the Court held that the government's ability to restrict expression on public sidewalks is very limited. The Court found that the government may enforce reasonable time, place, and manner restrictions only if the restrictions are content-neutral, narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.[104] Lastly, the Court stated it may absolutely prohibit "a particular type of expression" only if the prohibition is "narrowly drawn to accomplish a compelling governmental interest."[105]

Under modern public forum doctrine, the Supreme Court takes a categorical approach. As a result, the critical issue is whether the public place to which access is being sought is a public forum. In *Perry Education Ass'n v. Perry Local Educators' Ass'n*,[106] the Court identified in great detail the three different types of forums. These principles were reaffirmed fifteen years later in *Arkansas Educational Television Commission v. Forbes*.[107]

In *Perry*, the Court noted that the existence of a right of access to public property and the standards to evaluate limitations depended on the character of the property at issue.[108] The first type of forum is the "quintessential public forum" where the government may not prohibit all communicative activity.[109] The Court noted that when the state wanted to enforce a content-based exclusion it must show that its regulation was necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.[110]

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[103] 461 U.S. 171 (1983).

[104] *See id.* at 177 (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)).

[105] *Id.*

[106] 460 U.S. 37 (1983).

[107] 523 U.S. 666 (1998).

[108] *See Perry*, 460 U.S. at 45.

[109] *Id.* These places are by long tradition or by government fiat devoted to assembly and debate such as streets and parks which "have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."

[110] *Id.* at 45.

The second type of forum is the "designated" or "limited public forum," which is public property that the state opened for use by the public as a place for expressive activity.[111] This type of forum is "created by purposeful governmental action."[112] In determining whether the state has transformed its property into a designated public forum, the court looks at two factors. First, the court looks to governmental intent. Here, "the government does not create a [designated] public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional public forum for public discourse."[113] Therefore, "the court has looked to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum."[114] Other indicia of intent[115] include the nature of the state property and its compatibility with expressive activity. Second, the court examines the extent of the use granted. In order to create the designated forum, the "government must allow 'general access' to or 'indiscriminate use' of the forum in question by the general public, or by particular speakers, or for the discussion of designated topics."[116]

Although the state is not required to indefinitely retain the open character of the forum, as long as it does so, however, it is bound by the same standards as apply in a traditional public forum.[117] As a result, "[r]easonable time, place and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest."[118]

The third type of forum is the "non-public forum." This is "public property which is not by tradition or designation a forum for public communication."[119] Here, "[i]n addition to time, place, and manner regulations, the state may reserve the

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[111] *See id.*

[112] *Forbes*, 523 U.S. at 677.

[113] *Id.* at 677.

[114] *Id.*

[115] *See id.* at 673.

[116] Doe v. Santa Fe Indep. Sch. Dist., 168 F.3d 806, 820 (5th Cir. 1999) (quoting *Perry*, 460 U.S. at 47).

[117] *See Perry*, 460 U.S. at 45.

[118] *Id.* at 46.

[119] *See id.* at 46.

forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."[120]

B. *The Interaction between the Public Forum Doctrine and the Establishment Clause*

In some situations, a state entity may exclude a religious group or speaker from a public forum based on the content of the group's intended speech. The state entity will claim a compelling state interest in maintaining separation of church and state in compliance with the Establishment Clause. This inevitably creates a tension between the public forum doctrine and the Establishment Clause. The Supreme Court faced this situation in 1981 in the case of *Widmar v. Vincent*.[121]

Here, the Court considered whether a state university, which made its facilities generally available for the activities of registered student groups, could close its facilities to a registered student group for religious worship and religious discussion.[122] The University of Missouri at Kansas City encouraged the activities of student organizations, officially recognized over one hundred student groups, and provided facilities for the meetings of registered organizations.[123] For four years, a registered religious group named Cornerstone regularly conducted meetings in university facilities.[124] In 1977, the university informed the students that they were no longer allowed to meet in university buildings because of a regulation prohibiting the use of university buildings or grounds "for purposes of religious worship or religious teaching."[125] As a result, eleven student-members of Cornerstone brought suit

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[120] *See id.; Forbes*, 523 U.S. at 678.

[121] 454 U.S. 263 (1981).

[122] *Id.* at 264.

[123] *See id.* at 265. The students paid an activity fee per semester to help defray the costs.

[124] *See id.* The group was an organization of evangelical Christian students from various denominational backgrounds. The meetings attracted up to 125 students and included prayer, hymns, Bible commentary, and discussion of religious views. *See id.*

[125] *Widmar*, 454 U.S. at 265.

alleging that the university's discrimination against religious activity and discussion violated their rights to free exercise of religion, equal protection, and freedom of speech under the First and Fourteenth Amendments.[126]

First, the Court examined the university's policy under the public forum doctrine. It found that the university had created a limited public forum generally open for use by student groups which created an obligation to justify its discriminations and exclusions under applicable constitutional norms.[127] The Court opined that the university discriminated against this group based on the group's desire to use a generally open forum to engage in religious worship and discussion.[128] Therefore, the Court stated that in order to justify this content-based exclusion, the university must show that its regulation "is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."[129] In this case, the university claimed that the compelling state interest was maintaining strict separation of church and state under the federal and Missouri constitutions.[130] The Court agreed that the university had a compelling interest in complying with its constitutional obligations.[131] But, the Court refused to find that an "equal access" policy would always be incompatible with its Establishment Clause cases. Instead, the Court held that "a policy will not offend the Establishment Clause if it can pass" the three-pronged *Lemon* test.[132]

Applying the *Lemon* test, the Court quickly concluded that the first secular purpose prong and the third entanglement prong were "clearly met."[133] As to the second

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[126] *See id.* at 266.

[127] *See id.* at 268. In a footnote, the Court recognized that prior cases have recognized two important principles applied in the classroom setting. First, the Court noted students enjoy First Amendment rights of speech and association on the campus, and that the denial to particular groups of use of campus facilities for meetings and other appropriate purposes must be subjected to the level of scrutiny appropriate to any form of prior restraint. Second, the Court noted that First Amendment rights must be analyzed in light of the special characteristics of the school environment. *See id.*

[128] *See id.*

[129] *Widmar*, 454 U.S. at 270.

[130] *See id.*

[131] *See id.* at 271.

[132] *Id.*

[133] *Id.* at 271. The Court noted that the District Court and the Court of Appeals both held that an open-forum policy, including nondiscrimination against

prong, however, the Court explained in more detail how the limited public forum would not have the primary effect of advancing religion. The Court maintained that because the university opened its facilities for use by student groups, the focus was whether it could now exclude groups because of the content of their speech.[134] The Court explained that although religious organizations may benefit from the forum, these "incidental" benefits did not violate the prohibition against the "primary advancement" of religion.[135] In making this determination, the Court found two factors especially relevant. First, the open forum in a public university did not confer any "imprimatur of state approval on religious sects or practices."[136] Second, the forum was available to a broad class of nonreligious as well as religious speakers.[137] Thus, the Court held that the advancement of religion would not be the forum's "primary effect" and struck down the university's policy as unconstitutional under the First Amendment.[138]

Several years later, in *Board of Education of Westside Community v. Mergens*,[139] the Court considered whether the federal Equal Access Act violated the Establishment Clause.[140] In Westside public High School, the school board encouraged the creation of student-run clubs and other organizations as a vital part of the education program.[141] Students trying to form clubs presented their request to a school official who determined whether the club's goals and objectives were consistent with school board policies.[142] In 1985, a student

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religious speech, would have a secular purpose and would avoid entanglement with religion. *See id.*

[134] *See Widmar*, 454 U.S. at 273. In a footnote, the Court explained that this case is different from cases in which religious groups claim that the denial of facilities not available to other groups deprives them of their rights under the Free Exercise Clause. Here, the University's forum is already available to other groups, and the claim to use that forum does not rest solely on rights claimed under the Free Exercise Clause. Instead, the claim implicates First Amendment rights of speech and association. *See id.*

[135] *Id.* at 274.

[136] *Id.*

[137] *See id.* at 275.

[138] *Widmar*, 454 U.S. at 275.

[139] 496 U.S. 226 (1990).

[140] *See id.* at 231-47.

[141] *See id.* at 231.

[142] *See id.* at 232.

requested permission to form a Christian club at the school. The proposed club would have the same privileges, terms, and conditions as other Westside student groups, except that the club would not have a faculty sponsor.[143] The request was denied because the policy required clubs to have a faculty sponsor and the club would violate the Establishment Clause.[144] As a result, the students sought injunctive relief alleging that the refusal to permit the proposed club to meet at the school violated the federal Equal Access Act[145] and the First Amendment. In response, the defendants argued that the Equal Access Act did not apply to the school and that, if it did apply, it violated the Establishment Clause.[146] The United States intervened to defend the constitutionality of the Equal Access Act.[147]

The Court held that the denial of the request to form the Christian club violated the Equal Access Act.[148] The Court rested its conclusion on statutory grounds and did not decide whether the First Amendment required the same result.[149] The Court found that the logic of its decision in *Widmar* applied to the Equal Access Act and secondary school students.[150] The Court opined that the Act's prohibition against discrimination on the basis of "political, philosophical or other speech as well as religious speech is a sufficient basis for meeting the secular purpose prong of the Lemon test."[151] The Court also found that because the Act on its face granted equal access to both secular

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[143] *See id.* According to the student, the club's purpose would have been to permit the students to read and discuss the Bible, to have fellowship, and to pray together. Also, membership would be "voluntary and open to all students." *Mergens*, 496 U.S. at 232.

[144] *See id.* at 233.

[145] *See id.* The Equal Access Act, 20 U.S.C. §§ 4071 *et. seq.* (1994), prohibits "public secondary schools that receive federal financial assistance and that maintain a 'limited open forum' from denying 'equal access' to students who wish to meet within the forum on the basis of the content of the speech at such meetings." *Mergens*, 496 U.S. at 233.

[146] *Id.*

[147] *Id.*

[148] *See id.* at 247. This statute, passed in 1984, extended the reasoning of *Widmar* to public secondary schools. *See id.* at 235.

[149] *See Mergens*, 496 U.S. at 247.

[150] *See id.* at 247 (finding that a similar equal access policy at the university level was constitutional under the *Lemon* test).

[151] *Id.* at 248.

and religious speech the "Act's purpose was not to endorse or disapprove of religion."[152]

Petitioners argued that the Act had the primary effect of advancing religion.[153] The Court disagreed. First, the Court noted 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 Exercise Clauses protect."[154] Further, the Court opined that secondary school students were mature enough to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis.[155] Second, the Court found that the Act expressly limited participation by school officials at meetings of student religious groups and that any such meetings were to be held during noninstructional time.[156] Lastly, the Court found that "the broad spectrum of officially recognized student clubs at Westside, and the fact that Westside students were free to initiate and organize additional student clubs counteracted any message or official endorsement of or preference for religion."[157]

Finally, petitioners claimed that by complying with the Act's requirements, the school risked excessive entanglement between government and religion.[158] The Court rejected this argument because the Act mandated that faculty monitors could not participate in any religious meetings and school officials could not promote, lead, or participate in any such meeting.[159] The Court held that a denial of equal access to religious speech might create "greater entanglement problems in the form of invasive monitoring to prevent religious speech at meetings at which such speech may occur."[160] Thus, the Court held that the Equal Access Act did not violate the Establishment Clause.

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[152] *Id.*

[153] *See id.* at 249.

[154] *Mergens*, 496 U.S. at 250.

[155] *See id.* To back up this proposition, the Court noted that Congress specifically rejected the argument that high school students are likely to confuse an equal access policy with state sponsorship of religion. *See id.*

[156] *See id.* at 251.

[157] *Id.*

[158] *See Mergens*, 496 U.S. at 252.

[159] *See id.* at 253.

[160] *Id.*

In *Lamb's Chapel v. Center Moriches Union Free District*,[161] the Court invalidated a school district rule that permitted after-school social, civic, and recreational uses of school property, but prohibited the use of such property for religious purposes.[162] In *Lamb's Chapel*,[163] an evangelical church group was twice denied permission to use school facilities by the school district.[164] The church brought suit challenging the denial as a violation of the Free Speech and Assembly Clauses, the Free Exercise Clause of the First Amendment, as well as the Equal Protection Clause.[165]

Both the district court and court of appeals rejected the church's argument that the district had opened its property for a wide variety of communicative purposes creating a designated public forum. Finding that it did not have to rule on whether the courts below were correct on the forum issue, the Court analyzed the case as a nonpublic forum.[166] Next, the Court focused on the court of appeals' conclusion that Rule 7's total ban on using district property for religious purposes was reasonable and viewpoint neutral. Here, the Court found that the critical question regarding Rule 7 was whether it discriminated on the basis of viewpoint to permit school property to be used for the presentation of all views about family issues except those dealing with the subject matter from a religious standpoint.[167] In this regard, the Court found that the district impermissibly denied the application because the

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[161] 508 U.S. 384 (1993).

[162] *See id.* at 387. The Board of Center Moriches Union Free School District was empowered under New York Education Law § 414 to adopt reasonable regulations for the use of school property for ten specified purposes when the property was not in use for school purposes. The Board issued rules and regulations which allowed for only two of the purposes listed in § 414. Rule 7 provided that the school premises shall not be used by any group for religious purposes. *See id.*

[163] 508 U.S. 384.

[164] *See id.* at 385. The District denied the first application saying that "this film does appear to be church related." The second application was denied using identical language. *Id.* at 388.

[165] *See id.* at 387.

[166] *See id.* at 392. The Court cited *Perry* for the principle that "control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Lamb's Chapel*, 508 U.S. at 393 (citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 49 (1983)).

[167] *See Lamb's Chapel*, 508 U.S. at 393.

presentation would have been from a religious perspective.[168] The district argued that to permit its property to be used for religious purposes would be an establishment of religion forbidden by the First Amendment.[169] The Court rejected this argument by utilizing the *Widmar* decision.[170] The Court found that the fear of violating the Establishment Clause was unfounded because the showing of the film series: (1) would not have been during school hours, (2) would not have been sponsored by the school, and (3) would have been open to the public, not just to church members.[171] Therefore, the Court held, there would be no danger that the community would think that the district was endorsing religion and any benefit to religion would be incidental.[172] Lastly, the Court quickly and summarily stated that there would not have been an establishment of religion under the *Lemon* test.[173]

In the cases above, the Court allowed religious speech to occur in public schools. However, these school districts took affirmative steps to open its facilities to several different types of speakers and speech. Once these facilities were open for general access, the Court applied strict scrutiny to the districts' content-based exclusion of religious speech. Although the schools claimed a compelling governmental interest in separating church and state, the Court upheld these policies under the Establishment Clause. Therefore, one can see that the Court is not engaged in balancing free speech interests against the Establishment Clause. Instead, the Court is

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[168] *See id.* at 394. The Court found inconsistent with prior precedent that "although a speaker may be excluded from a non-public forum if he wishes to address a topic not encompassed within the purpose of the forum . . . or if he is not a member of the class of speakers for whose benefit the forum was created . . . the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject." *Id.*

[169] *See id.* at 394.

[170] *See Lamb's Chapel*, 508 U.S. at 394. The Court recognized that the Court held that permitting use of university property for religious purposes under the open access policy involved there would not be incompatible with the Court's Establishment Clause cases. *See id.*

[171] *See id.* at 395.

[172] *See id.*

[173] *See id.* The Court simply stated that "the challenged governmental action has a secular purpose, does not have the principal or primary effect of advancing or inhibiting religion, and does not foster an excessive entanglement with religion." *Lamb's Chapel*, 508 U.S. at 395.

demonstrating its contempt for content-based exclusions in a particular forum opened for expressive activities. Furthermore, because the public forum doctrine implicates strict scrutiny, one can point to Professor Gerald Gunther's characterization of this standard of review as "'strict' in theory and fatal in fact."[174]

As a result, school districts have an incentive to claim their pre-game policies are protected under these cases. But, before granting this protection, lower courts must remember why creating a limited public forum avoids many of the evils of uniting church and state. First, the schools' policies discussed above allowed for equal access to the facilities for a broad range of speech. Second, the type of religious speech was not subjected to a vote. Therefore, students did not decide whether the facilities would be used for Buddhist, Christian, or other religious expressive activity. Third, the religious groups utilized these facilities *privately* for their own expressive activity. As a result, the school facilities were not filled with unwilling students subjected to different religious views. These students were not faced with the inevitable fate of attending a school function and being subjected to religious viewpoints by the organs of the state. Instead, the students uninterested in these views did not have to attend the meetings. Therefore, it is evident that pre-game ceremonies do not possess these important safeguards and characteristics. It is imperative that lower courts understand when a public forum doctrine is created and its implications. Thus, lower courts must not bestow protection on unworthy forums ill suited for the expressive activity of several different speakers.

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[174] Gerald Gunther, *The Supreme Court 1971 Term—Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

III. *SANTA FE V. DOE*

A. *Facts*

The Santa Fe Independent School District ("SFISD") is a political subdivision of Texas,[175] responsible for the education of more than 4,000 students in a small community in the southern part of the state.[176] The respondents, the Does, were two sets of current or former students and their mothers.[177] One family is Mormon and the other is Catholic.[178]

In April 1995, the Does moved for a temporary restraining order to prevent the SFISD from violating the Establishment Clause at the upcoming graduation exercises.[179] In their complaint, the Does alleged that the SFISD engaged in many proselytizing practices including: (1) promoting attendance at a Baptist revival meeting; (2) encouraging membership in religious clubs; (3) chastising children who held minority religious beliefs; and (4) distributing Gideon Bibles on school premises.[180] In addition, the Does alleged that the SFISD permitted students to read Christian invocations and benedictions from the stage at graduation ceremonies and to deliver overtly Christian prayers over the public address system at home football games.[181]

In May 1995, the district court entered an interim order.[182] First, the order provided that for the impending graduation a "non-denominational prayer" consisting of "an invocation and/or benediction" could be presented by a senior student or students selected by members of the graduating class.[183] Second, the text of the prayer was to be determined by

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[175] *See Santa Fe*, 530 U.S. at 295.

[176] *See id. at* 295. This includes the Santa Fe High School, two primary schools, an intermediate school, and the junior high school.

[177] *See id.* In order to protect the respondents from intimidation and harassment, the district court allowed them to litigate anonymously (as "Doe").

[178] *See id.*

[179] *Id.* at 295.

[180] *See Santa Fe*, 530 U.S. at 295.

[181] *See id.*

[182] *See id.*

[183] *See id*

the students, without scrutiny or preapproval by school officials.[184] Finally, references to particular religious figures, such as Mohammed, Jesus, or Buddha, would be permitted, "as long as the general thrust of the prayer is nonproselytizing."[185]

In response to the order, the SFISD adopted policies for the graduation ceremonies ("July policy" or "graduation policy") and the football games ("August policy" or "football game policy").[186] Both policies authorized two student elections. The first election determined whether "invocations" should be delivered and the second selected the spokesperson to deliver them.[187] Similar to the graduation policy, the football game policy contained two parts. First, an initial statement omitted any requirement that the content of the invocation be "nonsectarian and nonproseltyising."[188] Second, the football game policy contained a fallback provision that automatically added that limitation if the preferred policy was enjoined.[189]

On August 31, 1995, the district's high school students voted and chose to allow a student to say a prayer at varsity football games.[190] Then, in a separate election, they selected a student to deliver the prayer.[191] Following these events, the SFISD enacted an October policy, similar to the August policy.[192] One change was that it omitted the word "prayer" from its title. Although changes were made to the August policy, the school did not conduct another election to supersede the results of the August policy.[193]

In an order, the district court precluded enforcement of the October policy without the portion requiring "any message and/or invocation delivered by a student must be nonsectarian and nonproselytizing."[194] Applying the coercion test, the court held that the graduation prayers "appealed 'to distinctly Christian beliefs,' and that delivering a prayer 'over the

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[184] *Id.* at 294.
[185] *Santa Fe*, 530 U.S. at 294.
[186] *See id.* at 296.
[187] *Id.*
[188] *Id.*
[189] *See id.* at 296.
[190] *Santa Fe*, 530 U.S. at 296.
[191] *Id.*
[192] *See id.* at 298.
[193] *Id.*
[194] *Id.* at 299.

school's public address system prior to each football and baseball games coerces student participation in religious events.'"[195] Subsequently, both parties appealed. SFISD argued that the enjoined portion of the October policy was permissible.[196] Whereas, the Does argued that both alternatives violated the Establishment Clause.[197]

B. *The Fifth Circuit Opinion*

When *Santa Fe* reached the Fifth Circuit Court of Appeals, it was not a case of first impression. In *Jones v. Clear Creek Independent School District*,[198] the Fifth Circuit established a rule that student-led prayer is permitted as part of a school's program at graduation if it is approved by vote of the students and if it is nonsectarian and nonproselytizing. After this decision, Mississippi attempted to codify the *Clear Creek* prayer policy and apply it throughout the public schools. Its statute authorized "nonsectarian, nonproselytizing student-initiated voluntary prayer at *all* school related events, whether compulsory or noncompulsory."[199] However, a federal district court entered an injunction against implementation of the statute in all its applications except graduation.[200] After an appeal, the Fifth Circuit affirmed and declined to reconsider the *Clear Creek* decision.[201]

Although the Fifth Circuit endorsed its *Clear Creek* policy at graduations, it distinguished athletic events. In *Doe v. Duncanville Independent School District*,[202] the Fifth Circuit affirmed a preliminary injunction against school-encouraged prayer "during curricular or extra-curricular activities, including before, during, or after school-related sporting events."[203] In a later appeal, the Duncanville school district

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[195] *See Santa Fe*, 530 U.S. at 299.

[196] *See id.*

[197] *See id.*

[198] 977 F.2d. 963 (5th Cir. 1992).

[199] MISS. CODE ANN. § 37-B-4.1(2) (1986).

[200] *See* Ingebretsen v. Jackson Pub. Sch. Dist., 864 F. Supp. 1473 (S.D. Miss. 1994), *aff'd* 88 F.3d 274 (5th Cir. 1996).

[201] *See Ingebretsen*, 88 F.3d at 280.

[202] 994 F.2d 160 (5th Cir. 1993).

[203] *Id.* at 163.

relied on *Clear Creek* to attack the provision of the injunction forbidding school employees from supervising or participating in prayer initiated by students.[204] In affirming the injunction, the Fifth Circuit held "that high school graduation is a significant, once-in-a-lifetime event," and that the athletic events were "a setting that is far less solemn and extraordinary."[205]

Under this precedent, the Fifth Circuit analyzed SFISD's July policy and discussed: (1) whether the July policy was designed to solemnize its graduation ceremony and thus satisfy the *Lemon* test's secular purpose requirement;[206](2) whether without the nonsectarian, nonproselytizing restrictions SFISD's modified *Clear Creek* prayer policy fail *Lemon*'s primary effect prong;[207] (3) whether SFISD's prayer policy violate the endorsement test because the government has appeared to take a position on questions of religious belief or has conveyed a message that religion is favored, preferred, or promoted over other beliefs;[208] (4) whether the SFISD policy violate the coercion test;[209] (5) whether the SFISD through its July policy created a limited public forum;[210] and (6) whether the *Clear Creek* prayer policy's "nonsectarian" and nonproselytizing" requirement can be extended to football games through the SFISD's October policy.[211]

In its secular purpose analysis under *Lemon*, the court began by noting that deference must be paid to a government's articulation of a secular purpose. However, the court cautioned that a government's statement of secular purpose cannot be a mere "sham."[212] With this in mind, the court examined the July policy and its effects on the graduation ceremony. First, the court stated that the prayers would alter the tone of the

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[204] Doe v. Duncanville Indep. Sch. Dist., 70 F.3d 402 (5th Cir. 1995).

[205] *Id.* at 406-07.

[206] *See* Doe v. Santa Fe, 168 F.3d 806, 815 (5th Cir. 1999) [hereinafter *Doe*].

[207] *See id.* at 816. The court labeled SFISD's policy a modified *Clear Creek* prayer policy because the policy did not limit speakers to nonsectarian, nonproselytizing invocations and benedictions. Most of the opinion was dedicated to SFISD's attack on the *Clear Creek* requirements.

[208] *Id.* at 817.

[209] *Id.*

[210] *Id.* at 819.

[211] *Doe*, 168 F.3d at 822.

[212] *Id.* at 816.

graduation ceremony and shift the focus away from the students and the secular purpose of the graduation to the religious content of the speaker's prayers.[213] Second, the court determined that permitting the recitation of prayers would polarize and politicize the event.[214] Finally, the court stated that sectarian and proselytizing prayers would alter the character of the event and possibly disrupt it.[215] As a result, the court rejected the possibility that permitting students to deliver sectarian and proselytizing prayer would further a solemnizing effect.

Under *Lemon*'s second prong, the court opined that without the nonsectarian, nonproselytizing restrictions, SFISD's modified *Clear Creek* policy failed *Lemon*'s primary effect prong. First, the court noted that in the context of public school children, it is important to ensure that a practice does not convey a message of religious endorsement or disapproval.[216] Second, the court dismissed the importance of the student vote because the students could conceivably designate a formal religious representative to deliver a "full-fledged, fire-and-brimstone, Bible or Koran-quoting, sectarian sermonette (in the dress for a prolonged invocation or benediction) at graduation."[217]

Because the *Lemon* test is disjunctive, the court did not address *Lemon*'s third prong. However, the court continued its analysis of SFISD's policy. It rejected the notion that, because the ultimate choice was the students', "the sermonette would not facially bear the government's imprimatur."[218] The court was not persuaded because the prayers would be: (1) delivered to a government-organized audience; (2) by government-owned appliance and equipment; (3) on government controlled property; and (4) at a government-sponsored event.[219] Finally, the court concluded that a message was conveyed that government endorsed religion, including a particular form of religion, because the school permitted sectarian and

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[213] *See id.*
[214] *See id.*
[215] *See id.*
[216] *See Doe*, 168 F.3d at 816.
[217] *Id.* at 817.
[218] *Id.*
[219] *Id.*

proselytizing prayers.[220] Here, it seems the court utilized principles of the endorsement test as well as dictum from *Lee* when it discussed the "government's imprimatur." Thus, the court mixed and matched Establishment Clause jurisprudence to strike down the policy.

Next, the court moved to a troublesome rendition of the endorsement test analysis. The court summarily asserted that due to these same reasons, the SFISD's policy "obviously" violated the endorsement test.[221] Here, it seems the court opined that in its discussion of the two *Lemon* prongs and allusions to *Lee* dictum that the policy clearly violated the endorsement test. Then, the court sadly asserted

> [H]aving concluded that student-selected, student-given, sectarian, proselytizing invocations and benedictions at high school graduations violate both the *Lemon* test and the endorsement test, we are *not required* to determine that such public school prayer policies also run afoul of the Coercion test to hold them antithetical to the Establishment Clause.[222]

The court did not "[address] . . . whether SFISD's policy violates the Coercion Test."[223] These statements are upsetting because they prove that lower courts can utilize any Establishment Clause test they desire to justify their results. Moreover, this clearly shows a lack of uniformity and clear guidelines. Although the *Santa Fe* Court clearly supported the coercion test, the Fifth Circuit ignored the test and its principles. Instead, the court rested its decision on the policies' failure to prohibit "sectarian and proselytizing" prayers. Because it lacked these elements, the court utilized *Lemon* by stating that SFISD's July policy lacked a secular purpose and had the primary effect of advancing and unconstitutionally endorsing religion.[224]

In its public forum analysis, the court considered whether SFISD's July policy survives constitutional scrutiny because it created a limited public forum.[225] First, the court

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[220] *See id.*
[221] *Doe*, 168 F.3d at 818.
[222] *Id.* (emphasis added).
[223] *Id.*
[224] *See id.*
[225] *See id.* at 819-21.

quickly declared that the graduation ceremony is "quite obviously not a traditional public forum." Therefore, the court addressed whether the SFISD's commencement program constituted a government designated public forum. In concluding that the state did not transform its property into designated public forum, the court examined (1) governmental intent and (2) the extent of the use granted.[226]

The court first found that SFISD's policy clearly did not meet the test of government intent. First, the policy's character and history did not make the ceremony, in general, nor the invocation and benediction portions, in particular, appropriate fora for such public discourse.[227] Second, graduation ceremonies are not the place for presentations on topics of public concern.[228] Lastly, the court reasoned that a graduation ceremony comprised one activity which is singular in purpose, unlike a debate or other venue for the exchange of competing viewpoints.[229]

When examining the extent of free speech use, the court asserted that SFISD did not grant general access to a class of speakers at its graduation ceremony because only a limited number of speakers were chosen to deliver prayers.[230] Also, the court noted that the speakers would not be given free reign to address issues, or even a particular issue of political and social significance.[231] Therefore, the court concluded that no one was granted "indiscriminate use" of SFISD's government-controlled channel of communication.[232]

Because the state cannot discriminate against religious speech in a limited public forum, the court took great pains to distinguish limited public forum cases. The court stated that public forum analysis did not play a role in its *Clear Creek* decision and the words public forum were not even mentioned in the opinion.[233] As a result, the court held that public forum doctrine could not apply to the July policy and did not

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[226] *See Doe*, 168 F.3d at 819-20.
[227] *See id.* at 820.
[228] *See id.*
[229] *See id.*
[230] *See id.*
[231] *See Doe*, 168 F.3d at 820.
[232] *Id.*
[233] *See id.* at 821.

implicate Free Speech Clause protection as a limited public forum.[234] Thus, using the Establishment Clause, the court rejected SFISD's policy because it was missing the nonsectarian and nonproselytizing restrictions.[235]

Lastly, the court addressed whether a prayer policy including the nonsectarian and nonproselytizing requirements could be extended to football games. In rejecting the extension to football games, the court was convinced that the issue was identical to the *Duncanville* case discussed earlier.[236] In an attempt to distinguish the cases, SFISD argued that the students did not initiate prayers spontaneously.[237] Instead, the students had a voting system. The court quickly rejected this distinction as unimportant.[238] It stated that the controlling and relevant principle enunciated in *Clear Creek* was the singular context and serious nature of a graduation ceremony.[239] Thus, the court held that SFISD's policy including the nonsectarian, nonproselytizing restrictions could not be extended to football games.[240]

C. *The Supreme Court Opinion*

On appeal, the Supreme Court limited its inquiry to the question of "[w]hether petitioner's policy permitting student-led, student-initiated prayer at football games violates the Establishment Clause."[241] In the first part of its analysis, the Supreme Court utilized the coercion test in *Lee* to determine if the October policy violated the Establishment Clause. Applying the coercion test, the Court discussed: (1) whether the October policy messages are private student speech, not public speech;[242] and (2) whether SFISD's football policy is distinguishable from the graduation prayer in *Lee* because it

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[234] *See id.*

[235] *See id.*

[236] *See Doe*, 168 F.3d at 822. *Duncanville* is discussed *supra* notes 201-204 and accompanying text.

[237] *Id.*

[238] *Id.*

[239] *Id.*

[240] *Id.*

[241] *See Santa Fe*, 530 U.S. at 301.

[242] *See id.* at 302.

did not coerce students to participate in religious observances.[243] Lastly, the Supreme Court applied the *Lemon* test to decide whether the Does made a premature facial challenge to the October policy.[244]

First, the Court announced that *Lee's* coercion test was applicable to this case even though *Lee* involved student prayer at a different type of school function.[245] By announcing that "our analysis is properly guided by the principles that we endorsed in *Lee*,"[246] it seemed that Justice Stevens would utilize the coercion test to judge the constitutionality of the October policy. However, the opinion is filled with dictum and analysis from several different Establishment Clause tests.

Before the Court discussed the Establishment Clause, it addressed the public forum issue and the Free Speech Clause. The Court recognized that there is a crucial difference between government speech endorsing religion and private speech endorsing religion. However, the Court rejected SFISD's argument that the pre-game invocations should be regarded as private speech because the school officials did not show, either by policy or by practice, any intent to open the pre-game ceremony to indiscriminate use by the student body generally.[247] Instead, the Court opined that the school allowed only the same student for the entire season to give the invocation.[248] Therefore, the Court concluded that "selective access does not transform government property into a public forum."[249]

Second, the Court found that *Santa Fe's* student election system ensured that only those messages deemed "appropriate" under the SFISD's policy would be delivered.[250] Here, the Court opined that "the majoritarian process implemented by SFISD guarantees, by definition, that minority candidates will never prevail and that their views will be effectively silenced."[251] The Court determined that Santa

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[243] *See id.* at 311.
[244] *See id.* at 314.
[245] *See id.* at 303.
[246] *Santa Fe*, 530 U.S. at 301.
[247] *See id.*
[248] *See id.*
[249] *Id.* at 303.
[250] *Id.*
[251] *Santa Fe*, 530 U.S. at 303.

Fe's student election did nothing to protect minority views.[252] The Court found that the SFISD's elections were "insufficient safeguards of diverse student speech" because fundamental rights may not be submitted to a vote and do not depend on the outcome of elections.[253]

Third, the Court rejected the argument that the SFISD adopted a hands-off approach to the pre-game invocation. Instead, the court found that the realities of the situation revealed that SFISD's policy involved both perceived and actual endorsement of religion. The Court found that the "degree of school involvement" made it clear that the pre-game prayer bore "the imprint of the State and thus put school-age children who objected in an untenable position."[254]

Fourth, the Court found that the two-step student election process did not disentangle the district from the religious messages because the text of the October policy "exposes the extent of the school's entanglement" and the policy "by its terms invites and encourages religious messages."[255] Beyond the text of the policy, the Court noted that other factors established the endorsement of the religious message. Some of these factors included: (1) the invocation was delivered to a large audience assembled as part of a regularly scheduled, school-sponsored function conducted on school property; and (2) the message was broadcast over the school's public address system which remains subject to the control of school officials.[256] The Court also decided that regardless of a listener's "support for, or objection to, the message, an objective Santa Fe High School student will unquestionably perceive the pre-game prayer as 'stamped' with her school's seal of approval."[257]

Lastly, the Court rejected SFISD's argument that the purposes of the policy were secular: to "foster free expression of private persons as well as to solemnize sporting events, promote good sportsmanship and student safety, and establish

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[252] *See id.*
[253] *Id.*
[254] *Id.*
[255] *Id.* at 306.
[256] *See Santa Fe*, 530 U.S. at 306.
[257] *Id.*

an appropriate environment for competition."[258] The Court found that SFISD's approval of only one specific kind of message, an invocation, was not necessary to further any of its stated purposes[259] and that permitting only one student to give a content-limited message suggested that the policy did little to foster free expression.[260] The Court concluded that "regardless of whether one considers a sporting event an appropriate occasion for solemnity, the use of an invocation to foster such solemnity is impermissible when, in actuality, it constitutes prayer sponsored by the school."[261]

In the second part of the analysis, the Court addressed whether the SFISD's football policy was distinguishable from the graduation prayer in *Lee*. Here, the SFISD argued that the there was no impermissible government coercion because the pre-game messages are the product of student choices.[262] The Court rejected this argument because the issue in the first election was whether a student would deliver prayer at varsity football games. Before this election, the students would debate a religious issue. Furthermore, this case demonstrated that the "views of the students are not unanimous on [this] issue."[263] This was troubling to the Court. It declared that the "Establishment Clause purports to remove debate over [whether to have prayer] from governmental supervision or control."[264] The Court explained that the two student elections authorized by the policy, coupled with the debates that follow each, impermissibly invade the private sphere that must be preserved for religious beliefs and worship.[265] In addition, the Court clarified that the policy violated the Establishment Clause because it encouraged "divisiveness along religious lines in a pubic school setting."[266]

The SFISD further asserted that there was no coercion because attendance at an extracurricular event, unlike a

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[258] *Id.*
[259] *See id.*
[260] *See id.*
[261] *Santa Fe*, 530 U.S. at 306.
[262] *See id.*
[263] *Id.* at 310.
[264] *Id.*
[265] *See id.*
[266] *See Santa Fe*, 530 U.S. at 310.

graduation ceremony, is voluntary.[267] The Court rejected this formalistic argument because some students such as cheerleaders, band members, and team members have seasonal commitments that mandate their attendance.[268] In fact, Respondent Doe's daughter was a cheerleader at the school.[269] Also, the court opined that the choice between whether to attend the events or to risk facing a "personally offensive religious ritual is in no practical sense an easy one."[270] Finally, the Court reasoned that the constitutional command "will not permit the District to exact religious conformity from a student as the price of joining her classmates at a varsity football game."[271]

In the third part of the analysis, the Court addressed whether the Does made a premature facial challenge to the October policy.[272] Looking to *Lemon* to assess the constitutionality of the policy, the Court examined whether the policy lacked a "secular legislative purpose."[273] The Court opined that the October policy had an unconstitutional purpose. First, the Court noted that the plain language of the policy demonstrated the school's involvement in the election of the speaker and the content of the message.[274] Second, the text of the policy specified a preferred traditional religious invocation.[275] Third, the Court stated that the selective access of the policy and the other content restrictions revealed that it was not a content-neutral regulation that created a limited public forum for the expression of student speech.[276] Thus, the Court concluded that the policy was invalid on its face because "it establishes an improper majoritarian election on religion, and unquestionably has the purpose and creates the perception of encouraging the delivery of prayer at a series of important school events."[277]

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[267] *See id.*
[268] *Id.* at 311.
[269] *See* Respondent's Brief at 46.
[270] *Santa Fe*, 530 U.S. at 312.
[271] *Id.* at 313.
[272] *See id.*
[273] *Id.* at 314.
[274] *See id.*
[275] *See Santa Fe*, 530 U.S. at 314.
[276] *See id.*
[277] *Id.*

In a rigorous dissent, Chief Justice Rehnquist pointed out flaws in the majority opinion. He emphasized that this was a facial challenge to the October policy. Therefore, in facial challenges in the Establishment Clause context, "[the Court has] looked to *Lemon*'s three factors to guide the general nature of our inquiry."[278] Yet, Chief Justice Rehnquist emphasized that the Court is unwilling to be confined to any single test in this sensitive area. Like the majority opinion, this assertion allowed the dissent to employ several different tests, principles, and dictum to achieve its end. Thus, the dissent suffered from the same vice as the majority opinion.

IV. THE AFTERMATH OF SANTA FE

While the Supreme Court properly held that SFISD's policy was unconstitutional, its decision left unanswered questions. Unfortunately, the issue in this case was difficult because it implicated both the public forum doctrine and the conflict between the religion clauses. As a result, the Court had to confront the competing principles associated with these different components of First Amendment jurisprudence. The Court has found that religious beliefs and expression are forms of speech and are protected by the Free Speech Clause of the First Amendment.[279] In addition, some early free speech decisions involving religious expression relied on the Free Exercise Clause as well.[280] Moreover, statutes and policies that attempt to accommodate the concerns of adherents of religion lie at the borderline of the Free Exercise and Establishment Clauses. As a result, the problem of student religious speech creates intricate problems. In fact, some commentators question whether the two religion clauses are compatible in a pluralist nation.[281]

Because of the role religion plays in many parts of the country, it is not unreasonable to assume that other school

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[278] *Id.* at 315 n.1.

[279] *See* GEOFFREY R. STONE ET AL., THE FIRST AMENDMENT 573 (1999).

[280] *See id.* at 573.

[281] *See id.* at 611. The authors note that the Establishment Clause requires (some sort of) neutrality, while the Free Exercise Clause requires (some sort of) preference to religion and may permit other preferences. *See id.*

districts will attempt to create policies similar to SFISD. Furthermore, it is foreseeable that school districts will attempt to seek refuge in the public forum doctrine and claim viewpoint discrimination against religion. As a result, the Court needs to draw a brighter line in these cases between government speech and private speech. More importantly, the Court needs to use only one test to govern the issues in this area of Establishment Clause jurisprudence. The Court can no longer use malleable doctrines and dictum from different Establishment Clause cases and tests to justify its findings. Instead, the Court needs to provide a uniform Establishment Clause test that gives lower courts and school districts guidance in this troublesome area.

This final section of the Note will first examine the *Santa Fe* Court's private speech analysis. Then, it will explore the Court's utilization of different Establishment Clause tests throughout the opinion. Next, this Note will briefly examine the *Chandler* and *Adler* decisions. Lastly, this Note will posit that one solution is to: (1) apply forum analysis and its categorical approach; and (2) conduct an Establishment Clause inquiry using an "any reasonable observer endorsement test" version of the endorsement test instead of *Lee*'s coercion test.

A. *The Private Speech Analysis in* Santa Fe

When confronted with SFISD's argument that the messages are private student speech, the Court immediately cited dictum from *Board of Education of Westside Community v. Mergens*[282] 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."[283] Although the Court agreed with the distinction, it was not persuaded that the pre-game invocations should be regarded as private speech. Yet, the Court did not adequately explain the reasons why these invocations are not private speech. Because this dictum from *Mergens* has been cited in many cases, it is useful to examine the original context. After

[282] 496 U.S. 226 (1990).
[283] *Id.* at 250.

stating this proposition, the *Mergens* Court stated, "we think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis."[284] The Court further stated that the proposition that schools do not endorse everything they fail to censor is not complicated.[285] Lastly, the Court supported the proposition that "students below the college level are capable of distinguishing between State-initiated, school-sponsored, or teacher-led religious speech on the one hand and student-initiated, student-led religious speech on the other."[286]

It is questionable whether the Court should be relying on this case at all. First, the *Mergens* Court was interpreting a federal statute that allowed religious speech in a situation entirely different from pre-football game ceremonies. Second, it is clear by its language that the *Mergens* Court was applying the endorsement test, not the coercion test. In fact, the coercion test was formulated after the *Mergens* case. Therefore, the *Mergens* Court was not using the principles established in *Lee* to guide its analysis as the *Santa Fe* Court claimed.

The *Santa Fe* Court also stated that although the SFISD relied on cases involving public forum analysis, it is "clear" that the pre-game ceremony is not the type of forum discussed in those cases. Subsequently, the Court importantly stated that "a conclusion that the District had created a public forum would help shed light on whether the resulting speech is public or private."[287] Here, the Court cited to Justice O'Connor's concurrence in *Capitol Square Review and Advisory Board v. Pinnette*. In that case, the plurality opinion formulated a per se approach holding that religious expression does not violate the Establishment Clause where it is purely private and occurs in a traditional or designated public forum. Justice O'Connor disagreed with the plurality's per se approach to speech in public forums and would not "carve out an exception to the endorsement test for the public forum context."[288] Although this Note posits that Justice O'Connor's approach was the better

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[284] *Id.*
[285] *See id.*
[286] *Id.*
[287] *Santa Fe*, 530 U.S. at 303 n.13.
[288] *Id.*

approach, citing this statement was troubling for several reasons. First, the Court used the ambiguous term "public forum." However, as *Perry* and its progeny explained, there is a separate analysis regarding each distinct forum. The Court failed to establish whether it would rule one way or another due to the creation of a traditional public forum, a limited public forum, or a nonpublic forum. Second, the concurrence in *Pinette* is clearly using the endorsement test. Citing *Allegheny*, Justice O'Connor stated that "in my view, the endorsement test asks the right question about governmental practice challenged on Establishment Clause grounds."[289] By invoking *Allegheny*'s endorsement test, the Court mixed a different Establishment Clause test with the principles announced in *Lee*. Thus, the Court left courts and school districts guessing which test or which principles properly guide the analysis in this sensitive area of law.

B. *The Mixing and Matching of Different Establishment Clause Tests*

Throughout the *Santa Fe* opinion, the Court utilized dictum and principles from different Establishment Clause tests and cases. As a result, the Court has given lower courts an opportunity to justify its decision using principles and tests created by different Supreme Court justices. Because of the change in the make-up of the Supreme Court, it is foreseeable that decisions will be based on principles espoused by justices no longer on the Supreme Court. Therefore, the Supreme Court should clarify the law in this particular context by using one Establishment Clause test.

In *Santa Fe*, the majority opinion is filled with principles and dictum from all of the Establishment Clause tests. First, the Court began the opinion by stating that "our analysis is properly guided by the principles that we endorsed in *Lee*."[290] Then, the Court opined that "the realities of the situation plainly reveal that its policy involves both perceived and actual *endorsement* of religion."[291] In the following

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[289] *See* Capitol Square Rev. & Advisory Bd. v. Pinette 515 U.S. 753, 772 (1995).
[290] See *Santa Fe*, 530 U.S. at 301.
[291] *See id.* at 305.

paragraph, the Court stated "the District has attempted to *disentangle* itself from the religious messages by developing the two-step student election process."[292] Then, the Court claimed that the "actual or perceived *endorsement* of the message, moreover, is established by factors beyond just the text of the policy."[293] Later in the opinion, the Court returned to discussing the "*coercive* element of the . . . message." However, as the dissent points out, the Court acknowledged that this case is a *facial challenge* to the policy late in the opinion. More importantly, the Court stated that "as in previous cases involving facial challenges on Establishment Clause grounds . . . we assess the constitutionality of an enactment by reference to the three factors first articulated in *Lemon v. Kurtzman.*" One wonders whether the other two-thirds of the opinion were necessary. Then, after announcing the *Lemon* test, the Court strays from its test. The Court discusses "endorsement" as well as coercion throughout the rest of the opinion.

Mixing and matching principles from different Establishment Clause tests is troubling and irresponsible in this particularized context. The Court needs to set a single standard and test to provide uniformity for school districts and lower courts throughout the country.

C. *Chandler v. Siegelman*

The concerns expressed above occurred in a recent Eleventh Circuit decision. In *Chandler*, the Eleventh Circuit addressed an action challenging the facial constitutionality of Alabama's statute permitting non-sectarian, non-proselytizing student-initiated prayer, invocations, and benedictions during compulsory or non-compulsory school-related assemblies, sporting events, graduation ceremonies, and other school-related events.[294] After the lower court instituted a permanent injunction, the school district appealed.[295]

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[292] *See id.* at 305-06.

[293] *See id.* at 307.

[294] *See Chandler*, 230 F.3d at 1314.

[295] *See id.* The court of appeals vacated the permanent injunction holding that the injunction may neither prohibit genuinely student-initiated religious speech, nor

In its opinion,[296] the Eleventh Circuit, on remand from the Supreme Court, held that the "the prayer condemned there (in *Santa Fe*) was coercive precisely because it was not private."[297] Then, the Eleventh Circuit summarily asserted: "the Court's holding in *Santa Fe* is *only* that State-sponsored, coercive prayer is forbidden by the Constitution."[298] As a result, many concerns are raised by *Chandler* such as whether: (1) this was the only holding of *Santa Fe*, (2) it necessarily follows that the *Santa Fe* Court was only concerned with coercion and not endorsement, and (3) whether lower courts should ignore forum analysis. Moreover, the next paragraph of the Eleventh Circuit opinion called the soundness of *Santa Fe* into question. The Eleventh Circuit stated that *Santa Fe* explicitly reaffirms the basic principle espoused in *Mergens*, 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."[299] Then, the Eleventh Circuit significantly asserted that "*Santa Fe* leaves *unanswered*, however, under what circumstances religious speech in schools can be considered private and, therefore, protected."[300] Therefore, the Eleventh Circuit in *Chandler* highlighted the fact that *Santa Fe*'s incomplete analysis has created uncertainty in this area. As a result, lower courts were left to decide which Establishment Clause test to follow and apply when confronted with similar issues.

D. Adler v. Duval County School Board

In addition to the mixed signals sent by the *Chandler* decision, the Supreme Court this term has added even more

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apply restrictions on the time, place, and manner of that speech which exceed those placed on student's secular speech.

[296] On June 26, 2000 the Supreme Court granted certiorari in *Chandler*, vacated the judgment and remanded the case for further consideration in light of *Santa Fe*. On remand the Eleventh Circuit reinstated its opinion and judgment. Chandler v. Siegelman, 530 U.S. 1256 (2000).

[297] *Chandler*, 230 F.3d at 1315.

[298] *Id.* at 1315 (emphasis added).

[299] *Id.* at 1317.

[300] *Id.* at 1315 (emphasis added).

uncertainty to the law governing student-led prayer in public schools. On December 10, 2001, the Supreme Court refused to review the Eleventh Circuit decision upholding a Florida school district's policy permitted graduating students to vote on whether to have unrestricted student-led messages at the beginning and closing of graduation ceremonies.[301] Unfortunately, the Duval policy represents the same Establishment Clause dangers found in the unconstitutional *Santa Fe* policy.

In *Adler*, the Eleventh Circuit found that the Duval policy was distinguishable from *Santa Fe* because it did not allow school officials to review the content of the student message.[302] Because the Duval students chose their own message for the ceremony, the Eleventh Circuit found the student speech not state-sponsored.[303] However, the *Santa Fe* Court rejected the same "circuit-breaker" argument. Jay Sekulow, arguing on behalf of the *Santa Fe* petitioners, urged that the policy created the ultimate circuit-breaker because the independent, individual student determined the content of the message.[304] In rejecting this argument, the Court found that "contrary to the District's repeated assertions that it has adopted a 'hands-off' approach . . . the realities of the situation plainly reveal that its policy involves both perceived and actual endorsement of religion."[305] Thus, this same hands-off approach cannot render the Duval policy constitutional.

Moreover, Justice Souter's question during the *Santa Fe* oral argument demonstrates the Establishment Clause dangers clearly present in the Duval policy. He asked

> if the student who is chosen exercises that student's choice to pray, we are still faced with a system in which it is the school or the school district that provides the forum in which this is going to appear,

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[301] *See* Adler v. Duval County Sch. Bd., 122 S. Ct. 664 (2001). Two years ago, the Supreme Court vacated and remanded the initial Eleventh Circuit decision to be considered in light of *Santa Fe*. *See Adler*, 531 U.S. 801 (2000). After reviewing *Santa Fe*, the Eleventh Circuit reinstated its en banc decision in favor of the school district. *See Adler* 250 F.3d 1330 (11th Cir. 2001).

[302] *See Adler*, 250 F. 3d. at 1336.

[303] *See Adler*, 250 F. 3d at 1337-38.

[304] *See* Transcript of Oral Argument, Santa Fe v. Doe, 530 U.S. 290 (2000), *available at* 2000 WL 374300 at *17.

[305] *See Santa Fe*, 530 U.S. at 305.

> requires the attendance of a certain number of students to be there and, therefore, requires those students to sit there while a prayer is going on. What more do we need to decide the Establishment Clause case?[306]

Clearly, Justice Souter succinctly illuminates Establishment Clause concerns that the Eleventh Circuit disregarded in *Adler*. Undoubtedly, this exact question could be posed to the Duval school district lawyer. Therefore, despite its minor variations, the Duval policy still offends the Establishment Clause.[307] Although the Supreme Court should have granted certiorari in this case, it will certainly face future challenges to similar policies. Thus, the Court must give clearer guidance to lower courts, clarify its approach to this issue, and pay proper respect to the Establishment Clause.

E. *One Possible Remedy*

As noted above, the Court over time has applied several different tests and principles to the issue of school prayer.[308] However, the Court has been unwilling to confine itself to a single test in the entire area of Establishment Clause jurisprudence. Still, lower courts need clearer guidance to determine the constitutionality of school policies allowing student-led, student initiated prayers at extra-curricular events and pre-game ceremonies. As the Eleventh Circuit decisions highlight, the Court should no longer announce that it is guided in a certain area by the principles of one test and rest its decision on principles and language from other tests. One possible remedy is to pursue a two-step analysis in this context. First, courts should apply forum analysis with its categorical approach. Second, the courts should use a particularized form of the endorsement test that asks whether the challenged policy has the purpose or effect of endorsing religion by focusing on the perception of any reasonable observer. This Note will elaborate on the two steps of the

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[306] *See* Tr. of Oral Argument at *17.

[307] One difference was that the Duval policy did not contain the word "invocation."

[308] For an overview of developments, see Ira C. Lupu, *The Lingering Death of Separationism*, 62 GEO. WASH. L. REV. 230 (1994).

analysis, address some counterarguments, and apply the analysis to a hypothetical situation.

1. Step One: Conducting a Public Forum Analysis

In *Santa Fe*, the Court held that the SFISD policy did not create a public forum. However, the Court did state that "a conclusion that the District had created a public forum would shed light on whether the resulting speech is public or private."[309] As a result, school districts may seek refuge in the public forum doctrine and argue that the messages given under their policy are protected private speech. Thus, lower courts must still engage in public forum analysis to address this argument. As a result, the first prong of the proposed analysis is to determine in which category the forum belongs and engage in the analysis enunciated in *Perry*.

Under this analysis, the pre-game ceremony context clearly does not lend itself to the classic, or quintessential, traditional public forum, such as a park or a sidewalk. However, when the forum is not a historic type of public forum, but has nonetheless been opened to the public's first amendment activities, a designated public forum may have been created. In this forum, following *Widmar*, *Mergens,* and *Lamb's Chapel*, lower courts will apply strict scrutiny when schools exclude speakers based on their religious speech. Finally, if lower courts determine that the school district created a nonpublic forum, the government will be free to exclude speech or speakers based upon the subject of the message, except in cases of viewpoint discrimination. For example, the lower court could allow a regulation such as "no religious speech in this forum." However, it could not allow viewpoint discrimination in a regulation such as "no Buddhist speech in this forum."

When analyzing religious speech in traditional or designated public forums, some commentators argue that the Court should apply the per se rule from *Pinette*.[310] In that case, the plurality held that "religious expression cannot violate the

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[309] *Santa Fe*, 530 U.S. at 305.

[310] Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995).

Establishment Clause where it is (1) purely private and (2) occurs in a traditional or designated public forum."[311] The court found that an expression is private simply when someone other than a state actor engages in the speech. However, I agree with Justice O'Connor's concurrence and Stevens dissent in *Pinette* that this approach is flawed and pays little respect to the Establishment Clause. It is unwise to allow the public forum doctrine to convey an absolute constitutional right to engage in religious speech. Despite the forum, students may still be unwillingly exposed to others' religious views. Worse, the views may be espoused in a setting surrounded by indicia of the school. As a result, the students may be subjected to evils the Establishment Clause forbids. Therefore, lower courts should not find the type of forum dispositive and should conduct an Establishment Clause inquiry.

2. Step Two: Applying the Modified Endorsement Test

After the forum has been established, courts should employ an Establishment Clause inquiry using the "any reasonable observer endorsement" version of the endorsement test. This step is derived from Justice Stevens' *Pinette* dissent in which he advocated that a religious display would violate the Establishment Clause when *some* reasonable observer would attribute a religious message to the State.[312]

In order to correctly apply this standard, lower courts need to focus on an objectively reasonable person. In *Pinette*, Justice O'Connor in her concurrence and Justice Stevens in his dissent disagreed about the reasonable observer's state of mind when observing a religious display in a limited public forum. Justice O'Connor gave the reasonable person knowledge of the forum's history and past uses.[313] In contrast, Stevens argued against assuming the observer knew the existence of a public forum.[314] Justice Stevens pointed out that "Justice O'Connor apparently would not extend Establishment Clause protection

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[311] *Id.* at 770.
[312] *Id.* at 800 n.5.
[313] *Id.* at 808 n.14.
[314] *Id.* at 807.

to passers-by who are unaware of Capitol Square's history."[315] Extending this logic to the *Santa Fe* context, some students will be unaware of the school property's history and uses. Therefore, the same objectively reasonable standard should be utilized in this particular school speech context.[316] This focus will better prevent students from feeling like outsiders in matters of religion and believing that their sovereign supports a faith to which they do not subscribe.

In employing this second prong, lower courts should not utilize language or dictum from other Establishment Clause inquiries. Therefore, in the *Santa Fe* context, the Court should abandon the *Lee* test because it is a malleable doctrine and too subjective in nature. While courts may look at a situation and attempt to figure out if a state is endorsing or favoring religion, a judgment that a "nonadherent" feels coercion is too personal in nature. In addition, the coercion test gives courts an opportunity to use formalistic arguments to reach their intended result. Moreover, because different towns have different cultural makeups, a student in Maine may feel coerced whereas a student in Alabama in a similar situation may not. In sum, this prong is a more workable analytical tool and better protects Establishment Clause values.

3. Step 3. Applying the Two-Part Test

By applying the above analysis to a hypothetical case, I hope to clarify the analysis and show the intricacies involved in this problem. Suppose a school in town X conducts a "pep-rally" assembly every afternoon before its football games. The high school students would sit in the bleachers and the football coach would announce the players. Next, assume that the school has a policy allowing a student to approach the podium and give a two-minute "message" to the student body. Traditionally, the team captain, the head cheerleader, and the student council president address the student body using the microphone on the podium. Here, the school did not evince any

[315] *See Pinette*, 515 U.S. at 808 n.15.

[316] In *Pinette*, Justice Stevens argued that "a person who views an exotic cow at the zoo as a symbol of the government's approval of the Hindu religion" would be not be objectively reasonable. *Id.*

intent to open this forum to the public. Additionally, historically and traditionally the school property is not open for free speech debate and activity. Under *Perry*, it seems the school is not allowing "indiscriminate use" by the general public and the property would be a nonpublic forum. However, arguably the school's policy opens the school property to a certain class of speakers. Also, this practice may be a tradition practiced every year. Therefore, it is foreseeable that the school district X would argue that the three students would be engaging in private speech that the Free Speech Clause protects. As a result, the school will claim that it does not want to engage in viewpoint discrimination against religious speech.

Furthermore, assume that two students are in the audience who recently moved to town X. These students are devout followers of religion Y. At the conclusion of the football captain's speech, he recites a Christian prayer to the entire school. After the football captain, the other students recite the same prayer. Is it possible that the two religion Y students in the audience will attribute the football captain's comments to the school? What if these students completely disagree with Christianity and are utterly offended? Many issues need to be considered. First, the school district could argue that the football captain's expression would be his own private student speech because the school did not direct the captain or control his choice of message in any way. Second, the pep-rally has many of the earmarks of the school. The pep-rally was a regularly-scheduled, school-sponsored function conducted on school property. Third, the school had a policy that allowed these messages to be given to the rest of the student body. Lastly, the three students used a microphone and stood on a school podium covered with the indicia of the school. As a result, the public forum analysis cannot end the inquiry.

Under the coercion test, it is possible that the religion Y students may feel that the school is "coercing" them to support or participate in the Christian religion. On the other hand, these students may not feel any coercion and believe the prayers are innocuous. A court may rule either way in this case. This type of guessing and probing into the subjective mind is one of the vices of *Lee*'s coercion test.

Under the second prong of the proposed analysis, the courts should utilize the "any reasonable observer endorsement" test. In this example, the court would then look to whether the school was endorsing, favoring, promoting or preferring the religious belief espoused by the students focusing on any reasonable observer. Furthermore, the courts should look to whether reasonable observers would attribute a religious message to the state. When applying the reasonable observer standard, courts should not look to an ideal observer with knowledge of the history and values of the community. The religion Y students may not know the history or the policy surrounding this activity. Also, the students do not understand the intricacies of the First Amendment and do not know the difference between a public forum, a limited public forum, and a nonpublic forum. It is problematic to attribute to some observers knowledge that would save the policy from an Establishment Clause violation. Instead, the courts should determine whether an objectively reasonable student listener of the religious speech would be likely to perceive government endorsement.

Applying this standard to the students of religion Y, the court must remember that they are students in the school who are equally entitled to be free from government endorsement of the Christian religion. Under this version of the endorsement test, the courts should test the situation using objective criteria. Here, the school had a policy of allowing these messages to be given to the entire student body. Many of the indicia of the school are present. Also, the students are assembled as part of a regularly-scheduled, school-sponsored function on the school's athletic field and stadium. Regardless of whether the students of religion Y feel coerced by the school to participate or approve of the Christian prayer, it seems objectively reasonable that the school is endorsing the Christian prayer. Although the other students may wish to pray privately, they should not be able to utilize the school's microphone and podium to espouse their religious views.

In conclusion, *Lee*'s coercion test gives lower courts and school districts more room to defy Supreme Court principles. Instead of concentrating on objective determinations, the coercion test focuses on the subjective views of the students. It is evident that these views may differ dramatically with each

student and that some students may be more sensitive than others. Therefore, the "any reasonable observer" version of the endorsement test is a better analytical tool. Instead of mixing and matching old principles of Supreme Court jurisprudence, the Court should employ a single straightforward test for this troublesome area of the Establishment Clause.

CONCLUSION

In *Santa Fe*, the Supreme Court exacerbated the controversial area of school prayer. The Court utilized several different tests and rationales to find the policy unconstitutional. Unfortunately, the Court carelessly used dictum that left many questions and concerns unresolved. The decision leaves lower courts without clear guidance on which test to employ and results in inconsistent decisions. As the *Chandler* decision highlights, lower courts may deviate from the central holding of *Santa Fe* by citing to unanswered questions concerning private speech. One possible solution is for courts to utilize the single test proposed above in this particularized context: First conduct a public forum analysis, and second, apply the "any reasonable observer" version of the endorsement test. Until the Supreme Court employs a straightforward, clear analysis, lower courts will wander and fend for themselves in the depths of this confusing and intricate area of jurisprudence.

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