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I. INTRODUCTION

Friday night high school football games—the aroma of popcorn and hotdogs, the blare of the fight song coming from the marching band, the cheers emanating from the cheerleading squad down below, the crisp autumn air, and up until the Supreme Court's recent ruling in *Santa Fe Independent School District v. Doe,* at least for some communities, the traditional pre-game prayer asking for the football players' safety and a safe return home for the fans in attendance. On June 19, 2000, the United States Supreme Court ruled that student-led, student-initiated pre-game prayers were properly attributable to the state, and for that reason, violative of the Establishment Clause of the First Amendment to the United States Constitution.

Many high schools across the country, predominantly in the southern states, did not take kindly to the Supreme Court's opinion and rallied in protest as the first games of the high school football season began. At Batesburg-Leesville High School in South Carolina, for example, the student body president, despite a threat from the American Civil Liberties Union, led football fans in a pre-game prayer after taking the microphone from the stadium press box. In Hendersonville, North Carolina, a protest group called "We Still Pray" participated in a prayer offered by a local church member at a Hendersonville High School football game. In Searcy, Arkansas, members of the local school board voted to allow a non-profit interdenominational group to lead prayers around the flagpole at the high school stadium before football games. In Hattiesburg, Mississippi, also a site of protest, actor Tom Lester of the popular 1960s television show "Green Acres" delivered a pre-game prayer prior to a home football game.

On November 15, 1999, the Supreme Court granted partial certiorari in this landmark case arising out of the Fifth Circuit Court of Appeals, limiting its issue to "[w]hether petitioner's policy permitting

2. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
student-led, student-initiated prayer at football games violates the Establishment Clause.\textsuperscript{7} Although the issue was limited to the context of high school football games, the \textit{Santa Fe Independent School District v. Doe} opinion should not be discounted—it will have far-reaching effects not only on those school districts around the nation that have been deprived of a long-held tradition, but on future cases dealing with the broader, constitutionally perplexing issue of the appropriate place for student-led prayer in public schools.

This case note is divided into five principal sections. The first section, entitled “Establishment Clause Jurisprudence,” attempts to lay the foundation for Establishment Clause analysis. It presents the four primary tests the Supreme Court has announced to be controlling in this area of the law and the respective criticisms associated with each. The second section, “Split Among the Circuits,” demonstrates the difficulty federal circuit courts have had in interpreting Supreme Court Establishment Clause precedent. This section also highlights the inherent complexity in applying the four primary tests and introduces the reader to some non-Establishment Clause issues that inevitably enter the picture for courts dealing with student-led prayer. The third section, “Facts and District and Appellate History of \textit{Santa Fe Independent School District v. Doe},” attempts to summarize the long and convoluted history of the case that ultimately made its way to the Supreme Court. “Supreme Court Opinion,” the fourth section of this note, represents an effort to follow the Supreme Court’s complicated analysis which led it to its holding in \textit{Santa Fe}. The fifth and final section, “Discussion and Analysis: Long-Term Implications of \textit{Santa Fe v. Doe},” discusses what are, in the author’s opinion, the most significant issues of this case, and hints at what the Supreme Court’s ultimate answers to these issues may entail for the future.

\section*{II. Establishment Clause Jurisprudence: The Four Primary Tests}

The Establishment Clause, found in the First Amendment to the United States Constitution, reads: “Congress shall make no law respecting an establishment of religion . . .”\textsuperscript{8} Establishment Clause jurisprudence has a long and checkered history. The Supreme Court has formally announced four different tests that apply to this area of law.\textsuperscript{9} The student-led prayer cases rely principally on three of the four

\textsuperscript{8} U.S. Const. amend. I.
tests: the Lemon test, the endorsement test, and the coercion test. A brief overview of all four tests is provided to highlight the inherent complexity in resolving Establishment Clause concerns.

A. The Lemon Test

The Lemon test has the longest tenure of any Establishment Clause test. \(^{10}\) Lemon v. Kurtzman, the case in which the test was formulated, involved government aid to sectarian schools. \(^{11}\) The test consists of three principles that the Court had developed in previous Establishment Clause cases. \(^{12}\) If any one of the three prongs is violated, the challenged statute or governmental practice is held unconstitutional. \(^{13}\)

The first prong mandates that the challenged statute or government practice have a secular legislative purpose. \(^{14}\) The second prong states that the primary or principal effect of the statute or state practice must neither advance nor inhibit religion. \(^{15}\) The third and final prong requires that there be no excessive government entanglement with religion. \(^{16}\)

Although several justices have recently shown signs of abandoning the Lemon test, a majority of the Court has declined to formally renounce it; thus, it is still Supreme Court precedent. \(^{17}\) However, because of the many criticisms associated with the test, the Court has relied less and less on it in recent years. \(^{18}\) There are at least three criticisms that are of a recurring nature. First, some argue that the secular purpose requirement, taken literally, would result in holdings of unconstitutionality for every deliberate government accommodation of religion, which the free exercise clause sometimes demands. \(^{19}\) Second, many critics assert that it is all but impossible to
reconstruct legislative purpose, especially of a multi-membered body.\textsuperscript{20} Last, scholars point out that the excessive entanglement prong contradicts the previous two prongs.\textsuperscript{21} They emphasize that some government entanglement is crucial in order to ensure government aid does not excessively benefit religion.\textsuperscript{22}

B. The History and Tradition Test: Marsh v. Chambers

The history and tradition test was announced by the Supreme Court in \textit{Marsh v. Chambers},\textsuperscript{23} a case involving a challenge to the practice of the Nebraska Legislature opening each session with a prayer led by a chaplain paid from public funds.\textsuperscript{24} The Eighth Circuit found the practice violative of the Establishment Clause using the \textit{Lemon} test.\textsuperscript{25} The Supreme Court, however, ignored the \textit{Lemon} test and reversed the Eighth Circuit by carving out an exception for legislative prayer.\textsuperscript{26} The Court found the fact that the First Congress had selected a chaplain to open each session with prayer dispositive.\textsuperscript{27} The majority opinion conclusively stated: "[t]he opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country."\textsuperscript{28}

Like the \textit{Lemon} test, the history and tradition test has its critics. In an article entitled \textit{When Government Speaks Religiously}, E. Gregory Wallace states there is no evidence to answer the question of "why" the founders did not believe legislative prayer offended the Establishment Clause.\textsuperscript{29} Furthermore, this test is exclusively confined to analyzing legislative prayer.\textsuperscript{30} Outside this context, the \textit{Marsh} case offers virtually no help in answering Establishment Clause questions.\textsuperscript{31}

\begin{itemize}
  \item \textsuperscript{20} \textit{Id}.
  \item \textsuperscript{21} \textit{Id}.
  \item \textsuperscript{22} \textit{Id}.
  \item \textsuperscript{23} \textit{Marsh v. Chambers}, 463 U.S. 783 (1983).
  \item \textsuperscript{24} \textit{Id}.
  \item \textsuperscript{25} \textit{Id.} at 786.
  \item \textsuperscript{26} \textit{Id.} at 791.
  \item \textsuperscript{27} \textit{Id.} at 790.
  \item \textsuperscript{28} \textit{Id.} at 786.
  \item \textsuperscript{30} \textit{Id}.
  \item \textsuperscript{31} \textit{Id}.
\end{itemize}
C. The Endorsement Test

First proposed by Justice O'Connor in her concurrence in *Lynch v. Donnelly*, the endorsement test prohibits government from making religion a relevant factor in assessing a person's standing in the political community. The *Lynch* case involved the issue of whether a creche, or Nativity scene, included in a city's annual Christmas display violated the Establishment Clause. Although the majority of the Court used the *Lemon* test to determine that the Nativity scene did not violate the Establishment Clause, the majority suggested that it refused to be bound by one test in its Establishment Clause jurisprudence.

Justice O'Connor stated the premise of her new test: "[e]ndorsement 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. Disapproval sends the opposite message." Wallace notes several criticisms of O'Connor's endorsement test. First, he states that the term "endorsement" is extremely difficult to define: "[i]t can mean anything from acknowledgment to approval to sanction." Second, he points out that the difficulty in defining the term "endorsement" makes it subject to observer bias: "[i]f the Establishment Clause forbids official practices that create the perception that government has endorsed religion, the question is, whose perception counts? The concept depends ultimately on the eye of the beholder." Last, Wallace states that the endorsement test allows Establishment Clause claims to arise solely based on the grounds that a governmental action results in hurt feelings or stigmatization.

D. The Coercion Test

The coercion test, the most recent proposal for Establishment Clause analysis, was embraced by the majority of the Supreme Court for the first time in *Lee v. Weisman*, a case involving a school board's

33. Id.
34. Id. at 670-71.
35. Id. at 678.
36. Id. at 688.
37. Wallace, supra note 29, at 1219.
40. 505 U.S. at 577.
policy of choosing a local minister to recite a prayer during graduation exercises written to comply with school board guidelines. The test was formulated by Justice Kennedy in his concurring opinion in the case of County of Allegheny v. ACLU. He remarked:

[G]overnment may not coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact "establishes a [state] religion or religious faith, or tends to do so." In Lee, Justice Kennedy rejected the school district's argument that graduation attendance was completely voluntary on the part of the student—graduation was a once-in-a-lifetime event that students would not want to miss. Furthermore, he rejected the district's argument that no student was "required" to actually participate in the prayer. The students were "psychologically coerced", according to Kennedy, because of school supervision and peer pressure—there was no effective way a student could avoid at least an appearance of participation in the prayer. Because the school district was largely in control of including the coercive prayer in the graduation program, they were in clear violation of the Establishment Clause.

The dissent, drafted by Justice Scalia and joined by Chief Justice Rehnquist, Justice White, and Justice Thomas, was extremely critical of Kennedy's new approach to Establishment Clause concerns. First, the dissent argued that there was no way the school district's policy could be considered compulsive: the students were not required to attend a graduation ceremony as they were an official class and they were in no way required to participate in the prayer itself. Scalia did not see any reason in expanding the concept of coercion to include Kennedy's 'indirect coercion': "I see no warrant for expanding the concept of coercion beyond acts backed by threat of penalty—a brand of coercion that, happily, is readily discernible to those of us who have made a career of reading the disciples of Blackstone rather than of Freud." Second, the dissent noted that invocations and benedictions

41. Id. at 581.
42. 492 U.S. 573 (1989).
43. Id. at 659 (quoting Lynch v. Donnelly, 465 U.S. 668, 678 (1984)).
44. Lee, 505 U.S. at 593-96.
45. Id.
46. Id.
47. Id. at 598-99.
48. Id. at 631-46.
49. Id. at 637-39.
50. Id. at 642.
including prayers at public ceremonies were part of the history and tradition of this country dating back to Jefferson's inauguration.\textsuperscript{51} Third, the dissent pointed out the important unifying role that prayer has traditionally served in this nation of bringing groups composed of diverse backgrounds together, and how the \textit{Lee} decision would do grave injustice to this custom.\textsuperscript{52}

III. SPLIT AMONG THE CIRCUITS

A. Circuit Opinions Holding Student-Led Prayer Constitutional


In \textit{Doe v. Madison School District No. 321},\textsuperscript{53} prior to the withdrawal of the opinion for mootness, the Ninth Circuit held constitutionally permissible a high school graduation policy that allowed the invitation of at least four students based on academic standing to deliver an address, reading, song, prayer, musical presentation, poem, or any other pronouncement consisting of the students' choice of content. The court began by distinguishing the case at hand from \textit{Lee v. Weisman}.\textsuperscript{54} It found at least three discrete differences: first, in \textit{Madison}, individual students, not clergy, delivered the messages; second, the student speakers were chosen based on purely neutral and secular criteria (their academic performance); third, the students themselves had complete control over the content of their message—prayer was in no way mandated, but was simply one of seven choices from which the student could choose.\textsuperscript{55} The court then quoted from Justice Souter's concurrence in \textit{Lee} to demonstrate the significance of these distinguishing features embodied in the Madison School District policy: "[i]f the State had chosen its graduation day speakers according to wholly secular criteria, and if one of those speakers (not a state actor) had individually chosen to deliver a religious message, it would have been harder to attribute an endorsement of religion to the State."\textsuperscript{56}

Next, the court analyzed the policy using the \textit{Lemon} test.\textsuperscript{57} Under the first prong, the court found the school's graduation policy had the

\begin{footnotesize}
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\item \textsuperscript{51.} Id. at 633-36.
\item \textsuperscript{52.} Id. at 646.
\item \textsuperscript{53.} 147 F.3d 832 (9th Cir. 1998), \textit{vacated on procedural grounds}, 177 F.3d 789 (9th Cir. 1999) (reh'g en banc).
\item \textsuperscript{54.} Id. at 834.
\item \textsuperscript{55.} Id. at 835.
\item \textsuperscript{56.} Id. (quoting \textit{Lee}, 505 U.S. at 630 n.8).
\item \textsuperscript{57.} Id. at 836.
\end{itemize}
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secular purpose of giving top students the opportunity to present an uncensored speech. The court found the primary effect prong of Lemon satisfied as well. It stated that a school policy on its face that permits student speeches on any topic the student chooses can not have the primary effect of advancing or inhibiting religion. The court then quoted from the Supreme Court opinion Corporation of Presiding Bishop: "'[T]o have forbidden 'effects' under Lemon, it must be fair to say that the government itself has advanced religion through its own activities and influence.'" The fact the school printed disclaimers in every graduation program stating that student speeches constituted private expression and not necessarily the government's position also led the court to conclude that the primary effect of the policy was secular. Lastly, the Ninth Circuit found no excessive entanglement, and in fact found the policy to prevent excessive entanglement because censoring students' speeches by school officials for content was not permitted. Thus, because the Madison School District policy survived the Lemon test, the court held the policy constitutionally permissible under the Establishment Clause.


In Jones v. Clear Creek Independent School District (I), the Fifth Circuit affirmed a district court opinion holding that a school district policy permitting graduating seniors to elect student volunteers to deliver nonsectarian, nonproselytizing invocations at graduation exercises did not run afoul of the Establishment Clause. The court reached this conclusion by applying the Lemon test. In the court's eyes, the policy carried the secular purpose of solemnizing the graduation event, the primary effect of the policy was to reinforce the great social significance aligned with the occasion instead of advancing or endorsing religion, and the school district did not participate in excessive government entanglement, in that the school district required the invocation to be nonsectarian and nonproselytizing, and did not prescribe

58. Id. at 837.
59. Id.
60. Id.
61. Id. (quoting Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 337 (1987)) (alteration in original).
62. Id. at 837-38.
63. Id. at 838.
64. Id.
65. 930 F.2d 416 (5th Cir. 1991), vacated, 505 U.S. 1215 (1992) (Jones I).
66. Id.
any specific form of invocation. The challengers of the policy petitioned for writ of certiorari to the United States Supreme Court, which vacated and remanded the judgment for further consideration in light of Lee v. Weisman. On remand to the Fifth Circuit, the policy at issue in Jones v. Clear Creek Independent School District (II) passed constitutional scrutiny once again, despite the Lee holding.

On remand, the Fifth Circuit started by noting the difficulty in deciding Establishment Clause cases using Supreme Court precedent:

Of the six forms of argument recognized in constitutional interpretation, it is the doctrinal arguments that control Establishment Clause cases. Although the Supreme Court's doctrinally-centered manner of resolving Establishment Clause disputes may be credited with accommodating a society of remarkable religious diversity, it requires considerable micromanagement of government's relationship to religion as the Court decides each case by distilling fact-sensitive rules from its precedents.

In order to fully reconsider the policy under Lee, the court noted it must engage in reanalysis of the case under all five tests the Supreme Court had declared relevant in Establishment Clause jurisprudence. Under Lemon's secular purpose requirement, the court noted that "[n]othing in Lee abrogates our conclusion that the Resolution has a secular purpose of solemnization . . . ." In its interpretation of the second prong of Lee, the primary effect test, the court stated that the only way the policy could advance religion was by increasing religious conviction among those in attendance, either by intensifying the faith of believers or drawing new converts. The court remarked:

If the students choose a nonproselytizing, nonsectarian prayer, the effect may well marshal attendees' extant religiosity for the secular purpose of solemnization; but no one would likely expect the advancement of religion by the initiation or increase of religious faith through these prayers. The Resolution's primary effect is secular.

In dealing with the entanglement prong of Lemon, the court did not modify its prior opinion that the policy's proscription of sectarianism did not make the school district liable for excessive entanglement. The

67. Id. at 419-23.
70. Id. at 965.
71. Id. at 966.
72. Id.
73. Id. at 967.
74. Id.
court considered the fact that a rabbi wrote and delivered the prayer in *Lee* dispositive to the Supreme Court's holding in that case in which excessive entanglement was found.\(^{75}\)

In its analysis under the endorsement test, the court found the case at hand similar to the case *Board of Education of Westside Community School v. Mergens*,\(^ {76} \) in which the Supreme Court found no unconstitutional endorsement of religion. The Supreme Court stated in that case:

> [T]here 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. 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.\(^ {77} \)

The Fifth Circuit stated that because Clear Creek School District submitted the decision of whether to have an invocation to solemnize the graduation ceremony to a majority vote of the graduating class who then decided the content of the message, if any, the school district did not engage in unconstitutional endorsement of religion.\(^ {78} \)

In analyzing the case under *Lee*'s coercion test, the court identified unconstitutional coercion to occur when "(1) the government directs (2) a formal religious exercise (3) in such a way as to oblige the participation of objectors."\(^ {79} \) Because the *Clear Creek* policy did not charge the government with deciding whether to have invocations, the religious participant was not selected by or attributable to the State. Furthermore, because the school district provided no guidelines respecting content, the Fifth Circuit concluded that the school district did not "direct" prayer presentations at graduation exercises.\(^ {80} \) The court also found no "formal religious exercise", because unlike the scenario in *Lee*, where the rabbi was directed to pray, the *Clear Creek* policy allowed nonsectarian, nonproselytizing prayer, but in no way required it.\(^ {81} \) Lastly, the court held no participation by objectors was compelled by the school district policy because as stated in *Mergens*, "graduating seniors 'are less impressionable than younger students'."

\(^{75}\) *Id.* at 967-68.

\(^{76}\) *496 U.S. 226* (1990).

\(^{77}\) *Jones II*, 977 F.2d at 969 (quoting *Board of Educ. of Westside Community Sch. v. Mergens*, 496 U.S. 226, 250 (1990)).

\(^{78}\) *Id.*

\(^{79}\) *Id.* at 970.

\(^{80}\) *Id.* at 970-71.

\(^{81}\) *Id.* at 971.
especially when they understand the message represents the will of their peers, not of an authoritative figure of the clergy or state.\textsuperscript{82} Because none of the three elements of coercion as defined by \textit{Lee} existed, the court concluded there was no unconstitutional coercion, and therefore reaffirmed the district court’s holding.\textsuperscript{83}


In \textit{Chandler v. James},\textsuperscript{84} the plaintiffs challenged an Alabama statute allowing nonsectarian, nonproselytizing student-initiated prayer, invocations, and benedictions during both non-compulsory and compulsory school-related events, such as assemblies, sporting events, and graduation ceremonies. The court framed its issue:

Do school officials have “the ability (and duty) to impose content restrictions on purportedly ‘private’ speakers at school events,” in order to achieve neutrality with respect to religion as the Chandlers contend; or do the Free Exercise and Free Speech Clauses require that school officials permit student religious speech at the same time, and in the same place and manner as secular speech, as DeKalb contends? Under the Chandlers’ theory, student religious speech is attributable to the State thereby violating the constitutional requirement of neutrality. Students, therefore, cannot be permitted to speak freely in school if religion is the topic; the State has a positive duty to censor student speech if it is religious.\textsuperscript{85}

The court held that allowing students to speak religiously did not constitute state approval or disapproval; therefore, the students’ speech was not the State’s.\textsuperscript{86} The justices noted that neutrality towards religion is required by the Constitution and can only be achieved by tolerating students’ religious expression.\textsuperscript{87}

After the court found genuinely student-initiated religious speech to be fully protected private speech endorsing religion instead of gov-
ernment speech, it proceeded to analyze the case under the Free Speech Clause. Protected speech is not subject to content-based restrictions, and here the court found suppression of private religious speech to constitute “the most egregious form of content-based censorship”: viewpoint discrimination. However, the court noted that a student's right to speak religiously is not absolute—the same time, place, and manner restrictions governing secular student speech are applicable. Also, student-initiated speech is transformed into unconstitutional state endorsement when the State participates in or supervises the speech, and thereby invokes traditional Establishment Clause analysis rather than Free Speech analysis. Lastly, the court noted that “[t]he Constitution requires that schools permit religious expression, not religious proselytizing.” Thus, the Chandler court concluded that genuinely student-initiated religious speech could not be prohibited and restrictions on the time, place, and manner of that speech could not exceed those encumbering students’ non-religious speech.


On June 3, 1999, a majority of the Eleventh Circuit voted to hear the case Adler v. Duval County School Board en banc. The case, which involved a school district policy allowing the senior class to vote on whether to have unrestricted student-led messages at the start and close of graduation exercises, had been heard in May 1999 by a three-judge circuit panel that held the policy unconstitutional. The court en banc first concluded that the religious message made by students was not state-sponsored, as it was in Lee v. Weisman. They stated that to hold otherwise “would come perilously close to announcing an absolute rule that would excise all private religious expression from a public graduation ceremony, no matter how neutral the process of the selecting the speaker may be, nor how autonomous

88. Id. at 1264.
89. Id. at 1265.
90. Id.
91. Id.
92. Id.
93. Id. at 1266.
94. 174 F.3d 1236 (11th Cir. 1999), reh'g en banc granted, judgment vacated, 206 F.3d 1070 (11th Cir. 2000).
95. Id.
the speaker may be in crafting her message."97 The court next rejected the argument that the religious content of any graduation speech is attributable to the state merely because of the school’s sponsorship and control over the ceremony.98 They found that the selection of the speaker, the content of the speech, and at the most simplistic level, the decision to have a religious message in the first place, to be the most crucial elements to consider in Establishment Clause calculus.99 Consequently, not one of these elements was attributed to the state; rather, they were all assigned to private actors—the students.100

The court also found the policy not in violation of the coercion test announced in Lee because the individual student was in total control of his or her message: "Here, neither the Duval County schools nor the graduating senior classes even decide if a religious prayer or message will be delivered, let alone ‘require’ or ‘coerce’ the student audience to participate in any privately crafted message."101

Under the traditional Lemon analysis, the court found at least three clear secular purposes which were not subject to the rebuttal of the challengers: allowing graduating seniors to direct their ceremony by choosing a student of their choice to deliver a message, solemnizing the event, and permitting student freedom of expression.102 As to the policy’s primary effect, the court concluded that because the policy allowed a student message on any subject of the student’s own choosing, and may not even result in prayer at all, there was no way the primary effect was to advance religion.103 Because by its terms the policy prohibited any censorship of the student message, the court also concluded there was no excessive entanglement.104 In closing, the court announced that based on the foregoing analysis, the policy did not facially violate the Establishment Clause, and therefore withstood constitutional scrutiny.105

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97. Id.
98. Id. at 1080.
99. Id.
100. Id.
101. Id. at 1083.
102. Id. at 1084-89.
103. Id. at 1089-90.
104. Id. at 1090.
105. Id. at 1090-91.
B. Circuits Holding Student-Led Prayer Unconstitutional


In *Harris v. Joint Independent School District No. 241*, 106 the Ninth Circuit held unconstitutional a school policy permitting a majority vote by graduating seniors to decide whether or not to have religious prayer at their commencement. If the students voted for prayer, they would then vote on whether to have a minister or a student deliver the invocation and benediction.107 If a minister was chosen, the students would select the minister of their choice.108 On the other hand, if a student was chosen, the third and fourth students ranked according to grade point average were suggested to deliver the prayer.109 Although the holding was vacated as moot by the Supreme Court in June 1995,110 at least two circuit opinions, *Doe v. Madison School District No. 321*111 and *ACLU v. Black Horse Pike Regional Board of Education*,112 have cited to the *Harris* opinion.

The *Harris* court first found extensive state involvement in the school’s policy.113 The school financed the event, retained a large amount of control over the content of the program, and directed the students as to timing, movements, dress and decorum.114 Furthermore, the court stated that the State could not absolve itself of its constitutional duties by delegating its responsibilities to private parties.115 The fact that a disclaimer appeared on the graduation program made no difference to the court—a student was still aware of the school’s ultimate control over commencement.116 Also, according to the court, the school did not create an open forum with its policy because minority views were silenced by majority vote.117

The *Harris* court primarily relied upon *Lee’s* coercion test to find the policy unconstitutional.118 In fact, it found the case at hand indis-
tistinguishable from Lee: students were obligated to attend the ceremony and participate in the prayer.\textsuperscript{119}

As for the \textit{Lemon} test, the court found the district's stated purpose of solemnizing the event insufficient—solemnization through prayer was by no means secular.\textsuperscript{120} Furthermore, even if a secular purpose had been found, the court noted that the policy would fail \textit{Lemon}'s primary effect prong.\textsuperscript{121} The court found indistinguishable a prayer said at graduation and a prayer said during a church service.\textsuperscript{122} If said at church, a prayer's primary effect would most assuredly be to advance religion.\textsuperscript{123} Therefore, the Ninth Circuit concluded the school prayer violated the Establishment Clause.\textsuperscript{124}

In response to the school district's argument that denial of the students' permission to pray would place it in violation of the Free Speech Clause, the court simply concluded that the graduation ceremony did not qualify as an open or public forum.\textsuperscript{125} The Free Exercise argument made by the school district was also flatly dismissed by the court:

"[T]hese high school students are free to worship together as they please before and after the school day," . . . and outside of the graduation ceremony. Moreover, by entering the public sphere and planning a state-controlled, state-sponsored meeting, the students entered the domain of the Establishment Clause.\textsuperscript{126}


In \textit{Doe v. Duncanville},\textsuperscript{127} a female student on an extracurricular basketball team and her father challenged school district policies, one of which allowed the coach to lead the players in prayer at games and practices. On appeal, the school district argued that the district court's order enjoining district employees and agents from participating in or supervising student-initiated prayers was made in error because to do so would violate employees' rights of free exercise, free

\textsuperscript{119} Id.
\textsuperscript{120} Id. at 458.
\textsuperscript{121} Id.
\textsuperscript{122} Id.
\textsuperscript{123} Id.
\textsuperscript{124} Id.
\textsuperscript{125} Id.
\textsuperscript{126} Id. (quoting Collins v. Chandler Unified Sch. Dist., 644 F.2d 759, 763 (9th Cir. 1981), \textit{cert. denied}, 454 U.S. 863 (1981)).
\textsuperscript{127} 70 F.3d 402 (5th Cir. 1995).
speech and academic freedom, and association. The court specifically rejected this argument and concluded that government accommodation of religion does not displace the critical limitations mandated under the Establishment Clause.

The court next attempted to distinguish the case at hand from its decision in Jones (II):

[High school graduation is a significant, once-in-a-lifetime event that could be appropriately marked with a prayer, that the students involved were mature high school seniors, and that the challenged prayer was to be non-sectarian and non-proselytizing. Here, we are dealing with a setting that is far less solemn and extraordinary, a quintessentially Christian prayer, and students of twelve years of age ....]

Another issue before the court involved the religious content in the Duncanville choir's theme song "The Lord Bless You and Keep You," which was enjoined by the district court from being used. The court noted that significant secular reasons led the choir director to use the song as the theme song, one of which was to teach students to sing a cappella. Furthermore, the court concluded that having the song as the district's theme song did not advance or endorse religion. It noted that a majority of the songs available as theme songs carried religious overtones. Also, requiring the district to disqualify religious songs would result in hostility, instead of neutrality, towards religion, which the Establishment Clause requires. The Does also challenged the district's policy of permitting the Gideons to distribute Bibles; however, the court concluded the Does lacked standing to litigate this claim.

128. Id. at 406.
129. Id.
130. Id. at 406-407 (citing Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963, 966-72 (5th Cir. 1992)).
131. Id. at 407.
132. Id.
133. Id.
134. Id.
135. Id. at 407-08.
136. Id. at 408-09.

_Ingebretsen v. Jackson Public School District_ involved a challenge to a Mississippi statute that permitted nonsectarian and nonproselytizing prayer at both compulsory and noncompulsory school events. After affirming the district court's decision that the challenger Ingebretsen had standing to litigate even though the School Prayer Statute had yet to be implemented, the court analyzed the statute under the _Lemon_ test. The proposed legislative purpose in enacting the statute was "to accommodate the free exercise of religious rights of its student citizens in the public schools." The court responded: "[t]his statement of purpose cannot be characterized as 'secular' because its clear intent is to inform students, teachers, and school administrators that they can pray at any school event so long as a student 'initiates' the prayer (ostensibly by suggesting that a prayer be given)." As to _Lemon_ 's primary effect prong, the court simply concluded that the statute advanced religion over irreligion because it gave a preference to religion that it did not give to anything else. The court also found the government liable for excessive entanglement because school officials were permitted to lead students in prayer and discipline students who attempted to leave class or assemblies because they did not wish to take part in prayer. Furthermore, the court found that because school officials had to screen the prayers in order to meet compliance with the nonsectarian, nonproselytizing requirement and also helped determine who was to lead the prayer, entanglement was pervasive.

The Fifth Circuit also found the statute violative of _Lee_ 's coercion test because prayers were permitted to be led by any person, including clergy, teachers, and administrators at compulsory events, where the students had no choice but to attend. Last, the court found the statute to be an unconstitutional endorsement of religion because it sent a message that religion was "'favored,' 'preferred,' or 'promoted' over

138. _Id._ at 278.
139. _Id._ at 279.
140. _Id._ (quoting 1994 Miss. Laws ch. 609 § 1(1)).
141. _Id._
142. _Id._
143. _Id._
144. _Id._
145. _Id._ at 279-80.
other beliefs . . . . [It] sets aside special time for prayer that it does not set aside for anything else." 146 Although the court concluded that the vast majority of the statute failed constitutional scrutiny, it stated that to the extent the Mississippi statute allowed graduating seniors to initiate nonsectarian, nonproselytizing prayer at graduation ceremonies to solemnize that once-in-a-lifetime event, it was constitutional under the Fifth Circuit’s holding in Jones (II). 147


In ACLU v. Black Horse Pike Regional Board of Education, 148 the Third Circuit confronted the issue of whether a school district policy permitting a vote of the graduating class to determine if prayer would be a part of commencement exercises was constitutional. The school district in question had a long-standing tradition of permitting nonsectarian prayer, led by local ministers on a rotating basis, in an effort to allow different denominational groups the occasion to be represented. 149 In an attempt to comply with the Supreme Court’s decision in Lee v. Weisman, the board altered its policy to provide that no member of the school district could endorse, organize, or in any way promote prayer, and that it should be determined by the senior class whether to have prayer at graduation. 150 If the students were to vote to include prayer, the prayer could only be led by a student volunteer. 151

The court began by analyzing the free speech rights of students. 152 In an attempt to demonstrate that the school district’s graduation ceremony did not amount to a public forum, the court stated that school authorities did not permit a member of the ACLU to speak about “safe sex” and condom distribution at the ceremony, as requested by a member of the senior class. 153 The court noted: “the response illustrates the degree of control the administration retained over student speech at graduation. Version D was not intended to broaden the rights of students to speak at graduation, nor to convert the graduation ceremony into a public forum.” 154

146. Id. at 280.
147. Id. (citing Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963, 965 n.1 (5th Cir. 1992)).
148. 84 F.3d 1471 (3d Cir. 1996).
149. Id. at 1474.
150. Id. at 1475.
151. Id.
152. Id. at 1477-78.
153. Id. at 1478.
154. Id.
The court also concluded that Black Horse Pike's policy did not comply with Lee v. Weisman because school officials retained such a high level of control over the speech at graduation. Just because the district put the decision of whether to have prayer to student vote did not erase state involvement—the choice to allow a student referendum in the first place was made by the state. The court reasoned that the students who voted not to have a formal graduation prayer would be involuntarily coerced to participate. Furthermore, the school district's disclaimer on the graduation program led the court to conclude: "the Board cannot sanction coerced participation in a religious observance merely by disclaiming responsibility for the content of the ceremony."

Under the Lemon test, the court rejected the district's arguments that the secular purpose was to promote free speech and to solemnize the event. Because graduation exercises could not be viewed as a public forum, the court swiftly dismissed the free speech argument. It also rejected the board's asserted secular purpose of solemnizing the event because in the court's eyes, graduation is a solemn event with or without prayer. As to Lemon's primary effect prong, the Third Circuit, relying on Lynch and Allegheny, concluded that context of a challenged practice is extremely significant. The Board's "long-standing tradition" of permitting graduation prayer when coupled with the new policy leaving the choice of prayer to student vote "would certainly leave the reasonable nonadherent with the impression that his or her religious choices were disfavored." Since the court found the policy violative of Lemon's first two prongs, it found no need to address the third prong of excessive entanglement.

IV. FACTS AND DISTRICT AND APPELLATE PROCEDURAL HISTORY OF SANTA FE INDEPENDENT SCHOOL DISTRICT v. DOE

Santa Fe Independent School District is the supervisory body in charge of public education in a small community in south Texas.
The school district is composed of two elementary schools, one intermediate school, one junior high school, and one high school. These five schools have a combined enrollment of approximately 4,000 students. The respondents, the “Does,” who in light of the controversy surrounding the case were permitted by the district court to proceed anonymously, consist of four children and two parents who are currently or were formerly enrolled in the Santa Fe Independent School District.

The Fifth Circuit notes at least two “sparks” that led the Does to initiate litigation. The first involved an incident that occurred in April 1993 involving Jane Doe II. During her seventh grade history class, teacher David Wilson distributed fliers advertising a Baptist religious revival. After inquiring whether non-Baptists were invited to attend, Jane Doe II was subjected to insulting criticism regarding her Mormon faith by David Wilson. Wilson was later issued a written reprimand by the school district and was ordered to apologize to the Does and to the students in his classroom.

The second spark which the Appeals Court notes to be “of the greatest significance to this case” involved the reading of Christian prayers in the form of invocations and benedictions both on the stage of graduation exercises and over the public address system at home football games which occurred for some time prior to and culminated in the 1992-93 and 1993-94 school years. Although the graduation prayers were typically read by student officers, the Santa Fe Independent School District retained total authority over both the graduation program and school facility during the recitations. The graduation prayers were also screened for textual content by the school district. Football prayers were led by the elected student council “chaplain,” whose office was authorized in the student-drafted constitution. There was no written district policy for the football prayers prior to the

166. Id.
167. Id.
169. Doe, 168 F.3d at 810.
170. Id.
171. Id.
172. Id.
173. Id.
174. Id.
175. Id.
176. Id. at n.4.
initiation of this case. However, there was a written graduation policy (known as the "June policy") which was made available in time for the 1994 exercises, and which was drafted to comply with the recent Supreme Court decision Lee v. Weisman:

The Board shall not permit clergymen to deliver invocations or benedictions at promotional and graduation ceremonies for secondary schools; nor shall school officials direct the performance of a formal religious exercise at such ceremonies. Lee et al. v. Weisman, 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed. 2d 467 (1992) [See also EMI]
Dated June 17, 1993

Following the 1994 graduation exercises and prior to the initiation of the lawsuit by the Does, the Santa Fe Independent School District added to its June graduation policy in an effort to more closely comply with the Fifth Circuit's holding in Jones v. Clear Creek Independent School District. The new addition, when joined with the June Policy, became known as the "October Policy":

The Board may permit the graduating senior class(es), with the advice and counsel of the senior class sponsor, to elect to choose student volunteers to deliver nonsectarian, nonproselytizing invocations and benedictions for the purpose of solemnizing their graduation ceremonies. Jones v. Clear Creek ISD, 977 F.2d 963 (5th Cir. 1992), cert. denied, 508 U.S. 967, 113 S.Ct. 2950, 124 L.Ed.2d 697 (1993).
Dated October 20, 1994

The Does initiated a § 1983 action against the Santa Fe Independent School District and several members of its Board of Trustees and administrators in their private capacities in April 1995 in the Federal District Court for the Southern District of Texas. The individual board members were dismissed as defendants early in the case. The Does filed a motion for a temporary restraining order with respect to the approaching 1995 graduation exercises. Consistent with the Fifth Circuit's decision in Clear Creek (II) and the school district's "October Policy," the district court ordered that "student-selected, student-given, nonsectarian, nonproselytizing invocations and benedictions would be permitted, and that such invocations and benedictions

177. Id.
178. Id. at 810-11.
179. Id. at 811.
180. Id.
182. Doe, 168 F.3d at 811, n.5.
183. Id. at 811.
could take the form of a ‘nondenominational prayer’.”184 The district court noted further that

“generic prayers to the ‘Almighty’, or to ‘God’, or to ‘Our Heavenly Father (or Mother)’, or the like, will of course be permitted. Reference to any particular deity, by name, such as Mohammed, Jesus, Buddha, or the like, will likewise be permitted, as long as the general thrust of the prayer is non-proselytizing, as required by [Clear Creek II].”185

The court also warned the school district that they should play no part in the selection process of the student or in reviewing the content of the invocations or benedictions. In addition, the court directed the school district to be prepared “to establish or to clarify existing policies to deal with either banning all prayer, or firmly establishing reasonable guidelines to allow nonsectarian and non-proselytizing prayer at all relevant school functions” in the upcoming case.186

In immediate response to the district court’s order, the school district drafted the “May Policy”:

The Board has chosen to permit the graduating senior class, with the advice and counsel of the senior class principal or designee, to elect by secret ballot to choose whether an invocation and benediction shall be a part of the graduation exercise. If so chosen the class shall elect by secret ballot, from a list of student volunteers, students to deliver nonsectarian, nonproselytizing invocations and benedictions for the purpose of solemnizing their graduation ceremonies. Jones v. Clear Creek ISD, 977 F.2d 963 (5th Cir. 1992) cert. denied 508 U.S. 967, 113 S.Ct. 2950, 124 L.Ed. 2d 697 (1993).

Dated May 23, 1995187

The “May Policy” was superseded by the “July Policy” after the Santa Fe Independent School District had more thoughtfully reconsidered its stance on graduation invocations and benedictions:

The Board has chosen to permit the graduating senior class, with the advice and counsel of the senior class principal or designee, to elect by secret ballot to choose whether an invocation and benediction shall be a part of the graduation exercise. If so chosen, the class shall elect by secret ballot, from a list of student volunteers, students to deliver nonsectarian, nonproselytizing invocations and benedictions for the purpose of solemnizing their graduation ceremonies. If the District is enjoined by court order from the enforcement of this policy, then and only then will the following policy automatically become the applicable policy of the school district.

184. Id.
185. Id. (quoting district court order).
186. Id. (quoting district court order).
187. Id. at 811-12.
The Board has chosen to permit the graduating senior class, with the advice and counsel of the senior class principal or designee, to elect by secret ballot to choose whether an invocation and benediction shall be a part of the graduation exercise. If so chosen, the class shall elect by secret ballot, from a list of student volunteers, students to deliver nonsectarian, nonproselytizing invocations and benedictions for the purpose of solemnizing their graduation ceremonies. Dated July 24, 1995.

The Fifth Circuit noted in its opinion that the fact the school district removed the nonsectarian, nonproselytizing requirement from the July Policy formed the "deviation that ultimately forms the core of the issues before us today." The district court formally ordered the school district to have a First Amendment religion/expression policy ready for review by October 13. Both the school district and the Does were ordered to prepare and record stipulations of fact by October 13.

It was not until October 1995 that the Santa Fe Independent School District first embraced a football game policy regarding invocations. The football policy was implemented amongst the infamous Texas community-wide tradition of treating football games with the special reverence typically reserved only for graduation ceremonies. Prior to the time the lawsuit was filed, the student-elected Student Council Chaplain, whose post was authorized in the student constitution, delivered a prayer over the P.A. system before home football games.

The football policy took essentially the same format as the July Policy on graduations:

The board has chosen to permit students to deliver a brief invocation and/or message to be delivered during the pre-game ceremonies of home varsity football games to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition.

Upon advice and direction of the high school principal, each spring, the high school student council shall conduct an election, by the high school student body, by secret ballot, to determine whether such a statement or invocation will be a part of the pre-game ceremo-

188. Id. at 812.
189. Id.
190. Id.
191. Id.
193. Id. at 2.
nies and if so, shall elect a student, from a list of student volunteers, to deliver the statement or invocation. The student who is selected by his or her classmates may decide what message and/or invocation to deliver, consistent with the goals and purposes of this policy. 194

Like the July Policy for graduations, the football policy contained a fallback provision including the nonsectarian, nonproselytizing requirement that would be implemented if and only if the school district was enjoined by court order to do so. 195 Both the July Policy on graduations and the football policy were submitted to the district court for review. 196

The Does and the school district pursuant to court order submitted one hundred thirty-one joint stipulations of fact. 197 The Santa Fe Independent School District filed a motion for summary judgment in February 1996 to which the Does responded but did not file a counter motion. 198 The school district argued that no evidence existed to prove the school district currently or formerly endorsed a policy or practice in violation of the Establishment Clause. 199

In June 1996, as part of a broad preliminary ruling, the district court denied the school district's pending motion for summary judgment on the issue of former policies in violation of the Establishment Clause and instead granted summary judgment, sua sponte, in favor of the plaintiffs based on findings of impermissible coercion, endorsement, or purposeful advancement of religion by the State. 200 As for the Does' request for injunctive relief from current policies in violation of the Establishment Clause, the district court granted the school district's motion for summary judgment. 201 The court reasoned that regardless of the school district's past policies, it had abandoned any potentially violative policies except for those concerning the invocations and benedictions at graduation exercises and football games. 202 These new policies were almost identical to the policies upheld by the court of appeals in Clear Creek (II) except for the absence of the nonsectarian, nonproselytizing requirement. The district court read the Clear Creek opinion as requiring this dual limitation, and likewise found the first paragraphs of the July Policy and football policy consti-

195. Doe, 168 F.3d at 812.
196. Id.
197. Id.
198. Id.
199. Id.
200. Id. at 812-13.
201. Id. at 813.
202. Id.
tionally deficient. However, because each policy contained an automatic fallback provision that included the dual nonsectarian, nonproselytizing requirement, the district court found the Doe's request for injunctive relief inappropriate.203

The district court entered its final judgment in December 1996.204 Because it found that the Does had failed to show any actual, compensable harm as required for a § 1983 claim, it entered a take-nothing judgment against them.205 The district court also found that because the Does were unsuccessful parties as to every central issue in the litigation, they were not entitled to attorney's fees under 42 U.S.C. § 1988.206 Both the Santa Fe Independent School District and the Does timely appealed, the school district arguing that a Clear Creek Prayer Policy does not require the dual nonsectarian, nonproselytizing requirement to be constitutional, and the Does arguing that the district court erred in first, defining the dual nonsectarian, nonproselytizing requirement to allow citation to particular deities; second, permitting the school district to extend the Clear Creek Prayer Policy to football games; third, disallowing injunctive relief; and fourth, refusing to award attorney's fees.207

On February 26, 1999, the United States Court of Appeals for the Fifth Circuit issued its opinion in Doe v. Santa Fe Independent School District.208 After a brief explanation of Establishment Clause jurisprudence and the three Supreme Court tests used to analyze Establishment Clause cases (the Lemon test, the endorsement test, and the coercion test), the Fifth Circuit set out to apply the tests to the Santa Fe case.209 It first concluded that the school district did not meet the Lemon secular purpose requirement.210 After noting that "the government's statement of secular purpose cannot be a mere 'sham'," the court stated, "we simply cannot fathom how permitting students to deliver sectarian and proselytizing prayers can possibly be interpreted as furthering a solemnizing effect. Such prayers would alter dramatically the tenor of the ceremony, shifting its focus . . . to the religious content of the speaker's prayers."211 The court also gave significant attention to the history and context of the prayer policies the school

203. Id.
204. Id.
205. Id.
206. Id.
207. Id. at 813-14.
208. 168 F.3d 806 (5th Cir. 1999).
209. Id. at 814-16.
210. Id. at 816.
211. Id.
district had adopted. The fact that the school district included the fall-back alternative in the event the district court invalidated the July Policy convinced the court that the school district had "a purpose which is the antithesis of secular."

Citing to its opinion in *Clear Creek* (II), the court next determined that when the school district dropped the dual nonsectarian, nonproselytizing requirement, it violated Lemon's primary effect test. The court stated:

As our later cases of *Ingebretsen* and *Duncanville* make abundantly clear... the mere fact that prayers are student-led or student-initiated, or both, does not automatically ensure that the prayers do not transgress Lemon's second prong... Indeed, if subjecting a prayer policy to a student vote were alone sufficient to ensure the policy's constitutionality, what would keep students from selecting a formal religious representative, such as the rabbi in *Lee*, to present a graduation prayer?

Likewise, the court found Santa Fe's policies violative of the endorsement test. The fact that the prayers would be read over government-owned equipment to a government-organized audience on government-owned property at a government-controlled event led the court to conclude that Santa Fe Independent School District would be conveying "a message not only that the government endorses religion, but that it endorses a particular form of religion."

Although noting that it was not required to analyze the Santa Fe policies under the coercion test, the court proceeded to do so for the sake of wholeness. It reached the conclusion that devoid of the dual nonsectarian, nonproselytizing requirement, the school district's prayers would be considered a "formal religious exercise", and thus violative of the coercion test announced in *Lee v. Weisman*. Next, the Fifth Circuit analyzed the Santa Fe policies under the Free Speech Clause. The school district argued that the prayer policy created a "limited public forum", and therefore, the school district would not be allowed to engage in unconstitutional viewpoint discrimination by permitting nonsectarian, nonproselytizing prayer and disallowing sectarian, proselytizing student prayer. The court was quick

212. Id.
213. Id.
214. Id. at 817.
215. Id.
216. Id. at 818.
217. Id.
218. Id.
219. Id.
220. Id. at 819.
to conclude that the school district did not create a designated public forum, limited or otherwise.\textsuperscript{221} The court cited \textit{Estiverne v. Louisiana State Bar Association}, a Fifth Circuit case which stated that a designated public forum arises where "the character of the place, the pattern of usual activity, the nature of its essential purpose and the population who take advantage of the general invitation extended make it an appropriate place for communication of views on issues of political and social significance . . . ."\textsuperscript{222}

According to the court, a graduation ceremony does not constitute such a forum because it is not an event where people interchange competing viewpoints on subjects of public significance.\textsuperscript{223} The court also reasoned that the school district had not opened up the graduation ceremony to provide general access to a class of speakers.\textsuperscript{224} Only one or two students would ultimately be chosen to deliver the invocations and benedictions.\textsuperscript{225} In a restatement of their position, the court stated: "[Santa Fe Independent School District's] restrictions so shrink the pool of potential speakers and topics that the graduation ceremony cannot possibly be characterized as a public forum—limited or otherwise—at least not without fingers crossed or tongue in cheek."\textsuperscript{226} In perhaps an even more descriptive and metaphorical restatement, the court concluded: "[a]bsent feathers, webbed feet, a bill, and a quack, this bird just ain't a duck!"\textsuperscript{227}

After the appellate court found the school district's modified \textit{Clear Creek} policy unconstitutional, they set out to address the constitutionality of the pure \textit{Clear Creek} Prayer Policy (the policy containing the fall-back provision including the dual nonsectarian, nonproselytizing language) as applied to football games.\textsuperscript{228} The court compared the issue in \textit{Santa Fe} to the nearly identical issue presented in \textit{Duncanville}.\textsuperscript{229} \textit{Duncanville} was a case that dealt with student-initiated, student-led prayers during athletic events.\textsuperscript{230} In that case, the district court enjoined school district employees from supervising these prayers and the Fifth Circuit upheld the injunction noting:

\begin{enumerate}
\item 221. \textit{Id.}
\item 222. \textit{Id.} at 820 (quoting \textit{Estiverne v. Louisiana State Bar Ass'n}, 863 F.2d 371, 378-79 (5th Cir. 1989)).
\item 223. \textit{Id.}
\item 224. \textit{Id.}
\item 225. \textit{Id.}
\item 226. \textit{Id.} at 821.
\item 227. \textit{Id.} at 822.
\item 228. \textit{Id.}
\item 229. \textit{Id.}
\item 230. \textit{Id.}
\end{enumerate}
"In concluding that [the Clear Creek] resolution did not violate the Establishment Clause, we emphasized that high school graduation is a significant, once-in-a-lifetime event that could appropriately be marked with a prayer, that the students involved were mature high school seniors and the challenged prayer was to be non-sectarian and non-proselytizing. Here, we are dealing with a setting [football and basketball games] far less solemn and extraordinary, a quintessentially Christian prayer, and students twelve years of age . . . ."\textsuperscript{231}

The Santa Fe Independent School District attempted to distinguish \textit{Duncanville} by stating that their case was more closely parallel to \textit{Clear Creek} (II).\textsuperscript{232} The school district argued that in \textit{Duncanville} students spontaneously initiated the prayers.\textsuperscript{233} By contrast, in their case and in \textit{Clear Creek} (II), students voted on whether to have the prayer at all, and if so, the students then voted on which student would recite the prayer.\textsuperscript{234} The Fifth Circuit found Santa Fe's argument irrelevant on the basis that regardless of whether the prayers are spontaneously initiated or initiated by student vote at athletic events, school officials are present and carry the authority to terminate the prayers.\textsuperscript{235} The court concluded:

Thus, as we indicated in \textit{Duncanville}, our decision in \textit{Clear Creek} II hinged on the singular context and singularly serious nature of a graduation ceremony. Outside that nurturing context, a Clear Creek Prayer Policy cannot survive. We therefore reverse the district court's holding that SFISD's alternative Clear Creek Prayer Policy can be extended to football games, irrespective of the presence of the nonsectarian, nonproselytizing restrictions.\textsuperscript{236}

The Fifth Circuit, relying on the district court's greater ability to assess the evidence regarding Santa Fe's future likelihood of engaging in unconstitutional activities, rejected the Does' request to overturn the district court's denial of injunctive relief.\textsuperscript{237} The court disagreed with the district court's decision to deny the Does attorney's fees and found that having received a judgment preserving Santa Fe students' important First Amendment rights, the Does should be considered prevailing parties and should receive reasonable and realistic attorney's fees pur-

\textsuperscript{231} Id. at 822-23 (quoting Doe v. Duncanville Indep. Sch. Dist., 70 F.3d 402, 406 (5th Cir. 1995)) (alterations in original).
\textsuperscript{232} Id. at 823.
\textsuperscript{233} Id.
\textsuperscript{234} Id.
\textsuperscript{235} Id.
\textsuperscript{236} Id.
\textsuperscript{237} Id.
suant to § 1988.\textsuperscript{238} In agreement with the district court, the Fifth Circuit refused to grant Jane Doe II's plea for monetary damages regarding the David Wilson "Mormon" incident.\textsuperscript{239}

V. SUPREME COURT OPINION

The Supreme Court granted the Santa Fe Independent School District's petition for certiorari limited to the issue of "[w]hether petitioner's policy permitting student-led, student-initiated prayer at football games violates the Establishment Clause."\textsuperscript{240} The Court announced that their analysis would be guided by the principles announced in \textit{Lee} v. \textit{Weisman} even though \textit{Santa Fe} involved school prayer at a different kind of school event, namely, football games rather than graduation ceremonies.\textsuperscript{241} The Court quoted from \textit{Lee}:

The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause. It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which "establishes a [state] religion or religious faith, or tends to do so."\textsuperscript{242}

The school district's first argument was that the student prayers were private speech, not government speech, and were thereby protected by both the Free Speech Clause and the Free Exercise Clause.\textsuperscript{243} The Court rejected the district's argument that the district had created a limited public forum:

The Santa Fe school officials simply do not "evince either by 'policy or by practice,' any intent to open [the pregame ceremony] to 'indiscriminate use,' . . . by the student body generally." . . . Rather, the school allows only one student, the same student for the entire season, to give the invocation. The statement or invocation, moreover, is subject to particular regulations that confine the content and the topic of the student's message.\textsuperscript{244}

The Court noted the fact that just because only one student is selected to speak does not automatically forbid the finding of a limited

\textsuperscript{238} \textit{Id.} at 823-24.
\textsuperscript{239} \textit{Id.} at 824.
\textsuperscript{241} \textit{Id.}
\textsuperscript{242} \textit{Id.} (quoting \textit{Lee} v. \textit{Weisman}, 505 U.S. 577, 587 (1992)).
\textsuperscript{243} \textit{Id.}
\textsuperscript{244} \textit{Id.} at 2276 (quoting Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 270 (1988)).
Here, however, the Court stated that the election mechanism assures that only those speakers' messages considered "appropriate" under the school district's policy will be permitted. Citing to *Board of Regents v. Southworth*, the Court attacked Santa Fe's majoritarian election process as always guaranteeing that minority candidates will never prevail, thus placing their views at the mercy of the majority.

Next, the Court found the school district had "failed to divorce itself from the religious content in the invocations." During oral argument before the Supreme Court, an attorney for the school district argued that there was "an independent circuit breaker here" which allowed the school district to dissociate itself from the religious content of the prayers. By "circuit breaker", the attorney meant that a "student determines the message. There is no way to know what the student's [sic] going to say." In what appears to be the Court finding the school district's policy violative of the endorsement test, the Court stated in response:

Contrary to the District's repeated assertions that it has adopted a "hands-off" approach to the pregame invocation, the realities of the situation plainly reveal that its policy involves both perceived and actual endorsement of religion. In this case, as we found in *Lee*, the "degree of school involvement" makes it clear that the pregame prayers bear "the imprint of the State and thus put school-age children who objected in an untenable position."

The Court next attempted to expose the extent of the school district's entanglement with the religious messages. The Court stated that the elections only take place because of the school district's policy decreeing that elections "shall" be conducted. The Court also pointed out that even though the school district does not censor the particular words the student speaker uses, it does mandate that "the 'statement or invocation' be 'consistent with the goals and purposes of this policy,' which are 'to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environ-

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245. *Id.*
246. *Id.*
247. *Id.* (citing *Board of Regents of Univ. of Wis. Sys. v. Southworth*, 120 S. Ct. 1346 (2000)).
248. *Id.* at 2277.
250. *Id.* at 8.
252. *Id.*
ment for the competition." The Court then went on to state that not only is the school district involved in the selection of the speaker, but the policy itself endorses religious messages. The fact that the policy calls for an "invocation", the Court reasoned, "primarily describes an appeal for divine assistance" and is a term the students at Santa Fe High School had always associated with a religious message.

The Supreme Court also found unconstitutional state endorsement in the way the message was to be delivered:

The invocation is... delivered to a large audience assembled as part of a regularly scheduled, school-sponsored function conducted on school property. The message is broadcast over the school's public address system, which remains subject to the control of school officials. It... is clothed in the traditional indicia of school sporting events... The school's name is likely written in large print across the field and on banners and flags... It is in a setting such as this that "the board has chosen to permit" the elected student to rise and give the "statement or invocation."

The Court next posed the question associated with the endorsement test and posited by Justice O'Connor in Wallace v. Jaffree: "whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools." The answer according to the Court was unequivocally "yes": "[r]egardless of the listener's support for, or objection to, the message, an objective Santa Fe High School student will unquestionably perceive the inevitable pregame prayer as stamped with her school's seal of approval."

The majority of justices also found the school district's policy violative of the first prong of the Lemon test, the requirement of a secular purpose, based on the policy's text and history. The opinion notes that whenever a governmental body asserts a secular purpose for an arguably religious policy "it is... the duty of the courts to 'distinguish[h] a sham secular purpose from a sincere one." Although the school district professed the secular purpose to "foste[r] free expression of private persons... as well [as to] solemniz[e] sporting

253. Id. (quoting App. 104-05).
254. Id.
255. Id.
256. Id. at 2278.
257. Id. (quoting Wallace v. Jaffree, 472 U.S. 38, 73 (1985)).
258. Id.
259. Id. (quoting Wallace, 472 U.S. at 75).
events, promot[e] good sportsmanship and student safety, and estab-
lish[ h] an appropriate environment for competition," the court nev-

260. Id. at 2278-79 (quoting Brief for Petitioner at 14) (alterations in original). 
261. Id. at 2279. 
262. Id. (quoting Lee v. Weisman, 505 U.S. at 596). 
264. Id. 
265. Id. at 2280 (quoting Lee, 505 U.S. at 587). 
266. Id. 
267. Id. 

260. Id. at 2278-79 (quoting Brief for Petitioner at 14) (alterations in original). 
261. Id. at 2279. 
262. Id. (quoting Lee v. Weisman, 505 U.S. at 596). 
264. Id. 
265. Id. at 2280 (quoting Lee, 505 U.S. at 587). 
266. Id. 
267. Id. 

the court nevertheless found a "sham secular purpose" based on the evolution of the policy from the long established office of "Student Chaplain" to the regulations embodied in the football policy. The Court stated that because of these findings and in light of the district's history of allowing student-led prayer at athletic events, "it is reasonable to infer that the specific purpose of the policy was to preserve a popular 'state-sponsored religious practice'." Quoting from O'Connor's opinion in Lynch v. Donnelly, the Court emphasized:

School sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are 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." . . . The delivery of such a message—over the school's public address system, by a speaker representing the student body, under the supervision of school faculty, and pursuant to school policy that explicitly and implicitly encourages public prayer—is not properly characterized as "private" speech.

In an attempt to distinguish its policy from the one struck down as unconstitutionally coercive in Lee v. Weisman, the school district argued first, that the pre-game messages are the end result of student decision-making; and second, that attendance at a football game or any other extracurricular event, in contrast to a graduation ceremony, is purely voluntary. The Court rejected the district's first argument due to the electoral process: "[a]lthough it is true that the ultimate choice of student speaker is 'attributable to the students,' Brief for Petitioner 40, the District's decision to hold the constitutionally problematic election is clearly 'a choice attributable to the State'." In rejection of the district's second argument, the Court noted the fact that some students are required to attend the football games such as band members, team members, and cheerleaders. They also pointed out the high degree of peer pressure that adolescents face to conform, especially in matters of social convention. However, the
Court stated even if they were to consider the act of attending a high school football game purely voluntary, the deliverance of a pre-game prayer still amounts to unconstitutional coercion in regards to those present as they are compelled to engage in an act of religious worship.268

The last argument posed by the school district was that the Does' facial challenge to the October policy was premature, and thus unfounded because no speech had actually been delivered by a student under the October Policy yet.269 The Court stated that constitutional injury occurred the moment the district passed the policy because it "has the purpose and perception of government establishment of religion" and it is an "implementation of a governmental electoral process that subjects the issue of prayer to a majoritarian vote."270 The Court also dismissed the district's argument that the policy cannot be invalidated on the basis of a remote possibility of unconstitutional application.271 The Court stated that facial challenges to Establishment Clause concerns proceed under the Lemon test, which as the Court had discussed earlier, the district had clearly failed because the secular purpose requirement was violated due to the text and history of the policy.272 The Court also found the policy to fail a facial challenge because of the improper majoritarian election mechanism, and the fact the policy had the purpose and produced the perception of advocating the leading of prayer at a number of significant school functions.273

In speaking on the effect of its opinion in Santa Fe Independent School District v. Doe, the Court stated:

By no means do these commands impose a prohibition on all religious activity in our public schools. . . . Indeed, the common purpose of the Religion Clauses "is to secure religious liberty." . . . Thus, nothing in the Constitution as interpreted by this Court prohibits any public school student from voluntarily praying at any time before, during, or after the schoolday. But the religious liberty protected by the Constitution is abridged when the State affirmatively sponsors the particular religious practice of prayer.274

268. Id.
269. Id. at 2281.
270. Id.
271. Id.
272. Id. at 2281-82.
273. Id. at 2283.
274. Id. at 2281 (quoting Engel v. Vitale, 370 U.S. 421, 430 (1962)).
VI. DISCUSSION AND ANALYSIS: LONG-TERM IMPLICATIONS OF SANTA FE v. DOE

A. Private v. Government Speech—The Constitutionally Problematic Majoritarian Election Process

The Supreme Court brief for Respondents Jane Doe, et al., begins: "[b]oth sides agree that if Santa Fe has sponsored or encouraged prayers as part of the program at football games, it has violated the Constitution. Both sides also agree that genuinely private religious speech is constitutionally protected."275 The brief for Petitioner, Santa Fe Independent School District begins: "[t]here 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."276 Therefore, the crux of the issue facing the Supreme Court was whether the prayer permitted under the Santa Fe Independent School District policy was properly attributable to the state or to the students in their private capacities.

If the Court were to side with respondents, which the Court ultimately decided to do,277 Santa Fe would most likely go down in the history books as standing for the proposition that when a student-speaker (or any non-school official) elected by a majority vote of the student body to deliver an invocation and/or message on school property, with the aid of school equipment, to a governmentally-gathered audience, his or her message is attributable to the state; and, if the speech carries religious overtones, the state would be in constitutional violation of the Establishment Clause. On the other hand, if the Court were to side with Petitioners, the case would stand for the proposition that when a student speaker (or any non-school official) elected by a majority vote of the student body to deliver an invocation and/or message on school property, with the aid of school equipment, to any governmentally-gathered audience, his or her speech is attributable to the private individual; and, if it carries religious overtones, it is constitutionally permissible because private religious speech is constitutionally protected by both the Free Speech Clause and the Free Exercise

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277. Santa Fe, 120 S. Ct. at 2266.
Clause, and the state’s allowance of such speech does not violate the Establishment Clause.

To exemplify the possible long-term ramifications of the Court’s ultimate decision that the elected students’ messages were properly attributable to the state, and thus violative of the Establishment Clause, it is helpful to consider two examples offered by the Eleventh Circuit in Adler v. Duval County School Board:

First, consider the case of the selection of a Homecoming Queen. While she may be selected by a vote, or plebiscite of the entire senior class, the Homecoming Queen cannot be characterized as a state actor, or a representative of the state, merely because she holds a “public” position and sits atop the Homecoming float. Imagine, second, the example of replacing the traditional valedictory address with the practice of affording the students of the graduating class the opportunity to select the graduation student speaker through a vote by the entire class. In this hypothetical, the student speaker is selected, not by the School Board on the basis of grades, but by the students on the basis of student choice—be it popularity, ability to entertain, achievement in athletics, or for some other reason. Again, it strains reason and common sense to suggest that, by virtue of her selection by the majority of the senior high school class, the student speaker becomes a mouthpiece of the state. Both examples suggest that the senior class’s act of voting does not, in any way, turn the senior class vote into state action, nor turn the chosen student into a state actor.

The prayer at issue in Lee v. Weisman was clearly attributable to the state—the school principal invited a rabbi to deliver a nonsectarian prayer at the school’s commencement ceremony which was to be drafted to comply with guidelines issued by the school principal. The policy at issue in Santa Fe was not at all so clear—the school district seemingly had no control over the selection of the student speakers other than the decision to submit the question of whether to have an invocation and/or message at football games to the student electoral process. In Justice Souter’s concurring opinion in Lee, he suggests a policy involving no state action, and thus no Establishment Clause violation, that might be found constitutionally permissible by the current Court: “[i]f the State had chosen its graduation day speakers according to wholly secular criteria, and if one of those speakers (not a state actor) had individually chosen to deliver a religious message, it would have been harder to attribute an endorsement of religion to the State.”

278. 206 F.3d 1070, 1082 (11th Cir. 2000), cert. granted, judgment vacated by 121 S. Ct. 31 (2000).
279. 505 U.S. at 581.
280. Id. at 630, n.8 (emphasis added).
So, what constitutes Justice Souter’s wholly secular criteria requirement? At least according to a majority of the Court in Santa Fe, a majoritarian election by the student body on whether to have an invocation and/or message clearly does not. In order to fully understand the reasoning of the Court on this point, it is critical to go beyond the Court’s limited issue of whether the football policy violates the Establishment Clause. Regarding the majoritarian election process, the majority notes:

This policy likewise does not survive a facial challenge because it impermissibly imposes upon the student body a majoritarian election on the issue of prayer. Through its election scheme, the District has established a governmental electoral mechanism that turns the school into a forum for religious debate. It further empowers the student body majority with the authority to subject students of minority views to constitutionally improper messages. The award of that power alone, regardless of the students’ ultimate use of it, is not acceptable. Like the referendum in Board of Regents v. Southworth, the election mechanism established by the District undermines the essential protection of minority viewpoints.

The briefs for both respondent and petitioner begin with the simple premise: if the student speech is attributable to the state it is unconstitutional under the Establishment Clause; on the other hand, if it is genuinely private religious speech, it is purely constitutional. This is a basic premise: in order to have an Establishment Clause violation, there must be a state actor; individual persons in their private capacities cannot be charged with an Establishment Clause violation. This simple premise, however, does not provide the guidance an ordinary reader of the opinion (like myself) needs to understand the Court’s reasoning regarding the majoritarian election process—free speech issues ultimately guide both the majority and dissenting opinions.

In Santa Fe, the school district decided to put the issue of whether or not to have a pre-game message and/or invocation to a majority vote of the student body. Because of this, Justice Stevens viewed the majoritarian process as ultimately attributable to the school district, a

281. Santa Fe, 120 S. Ct. at 2276.
282. Id. at 2275.
283. Id. at 2283.
285. Santa Fe, 120 S. Ct. at 2272-73.
state actor. He stated: "the District's decision to hold the constitutionally problematic election is clearly 'a choice attributable to the state'." The private student speaker, elected under this state-implemented policy, would then convey the particular viewpoint of the majority of the student's peers. The reason the elected student speaker would be conveying the particular viewpoint of the majority is presumably because the student voters knew at the time they cast their ballots that the elected student would deliver a brief invocation and/or message as specifically enumerated in the school district's football policy. If the students voting wanted prayer, they would vote to elect a person they believed would choose to deliver an invocation rather than some other secular message. The majority noted: "[t]he results of the elections described in the parties' stipulation make it clear that the students understood that the central question before them was whether prayer should be a part of the pregame ceremony." If a student was chosen who decided to deliver an invocation, the student would presumably offer a religious statement (i.e., a prayer); and, religion, at least according to the majority of the Court in *Rosenberger v. Rector and Visitors of the University of Virginia*, constitutes a particular viewpoint. The *Rosenberger* court noted: "[r]eligion may be a vast area of inquiry, but it also provides, as it did here, a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered." Thus, the school district (as state actor) would be engaging in unconstitutional viewpoint discrimination under the Free Speech Clause by implementing a student electoral mechanism essentially amounting to a referendum on whether or not to have prayer, a religious statement constituting a particular viewpoint. In *Rosenberger*, Justice Kennedy, writing for the majority, explained the constitutional ramifications of viewpoint discrimination:

> When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is

286. *Id.* at 2280 (quoting *Lee*, 505 U.S. at 587).

287. *See* Board of Regents of the Univ. of Wis. Sys. v. Southworth, 120 S. Ct. 1346, 1356 (2000) ("The University must provide some protection to its students' First Amendment interests, however. The proper measure . . . is the requirement of viewpoint neutrality."). *See also id.* at 1357 ("To the extent the referendum substitutes majority determinations for viewpoint neutrality it would undermine the constitutional protection the program requires. The whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views.").

288. *Santa Fe*, 120 S. Ct. at 2278.


290. *Id.* at 831.
all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.291

A.E. Brownstein, a professor of the University of California at Davis, elaborates on the likelihood of viewpoint discrimination arising in the constitutionally problematic majoritarian election process at issue in Santa Fe:

Generally speaking, vesting this kind of discretionary authority in the individual or group who has the power to decide who will be allowed to speak on public property is anathema to the First Amendment. Unfettered discretion is always constitutionally problematic because it creates such an obvious risk that implicit viewpoint discrimination will color the state or the majority’s choice of speakers.292

Justice Stevens compares the referendum at issue in Santa Fe to the one in Board of Regents v. Southworth.293 Southworth involved a practice of the University of Wisconsin which assessed students a mandatory student activity fee to fund registered student organizations (RSO’s) engaged in political or ideological speech.294 Student challengers claimed the mandatory fee violated their First Amendment rights of free speech, free exercise, and free association.295 The RSO’s were granted funding in one of three ways, one of which involved a student referendum.296 This state-implemented policy allowed a vote of the student body to determine whether or not to approve or disapprove funding for a particular RSO.297 The Southworth Court held that the First Amendment does not bar a public university from charging a mandatory student activity fee provided the program is viewpoint neutral.298 However, the Court remanded the case on the student referendum mechanism because it believed this would allow the assessment of fees in violation of the viewpoint neutrality principle central to the Free Speech Clause.299 The Southworth Court noted:

292. A.E. Brownstein, RELIGIONLAW@listserv.ucla.edu, Feb. 9, 2000 (emphasis added).
293. Santa Fe, 120 S. Ct. at 2276, 2283.
294. Southworth, 120 S. Ct. at 1351.
295. Id. at 1352.
296. Id. at 1351.
297. Id.
298. Id. at 1356.
299. Id. at 1357.
To the extent the referendum substitutes majority determinations for viewpoint neutrality it would undermine the constitutional protection the program requires. The whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views. Access to a public forum, for instance, does not depend upon majoritarian consent.\textsuperscript{300}

In his dissent in \textit{Santa Fe}, joined by Justices Scalia and Thomas, Chief Justice Rehnquist also seems to draw upon free speech principles to analyze the majoritarian election process. In contrast to Justice Stevens, the Chief Justice does not believe the vote by the majority is attributable to the state; nor does he consider the election process the equivalent of a student vote bearing the majority's particular viewpoint.\textsuperscript{301} Therefore, when the student speaker is selected by the majoritarian process, he or she is conveying his or her own private message and viewpoint, which is most likely unknown by the student majority at the time of the election. Presumably, this would pose no free speech violation because it is purely private religious speech that can not be attributed to either the state or the student majority.\textsuperscript{302} Rehnquist noted: "the Court misconstrues the nature of the 'majoritarian election' permitted by the policy as being an election on 'prayer' and 'religion'."\textsuperscript{303} The Chief Justice pointed out that the election is actually a two-fold process whereby students first vote on whether to have an invocation and/or message at all, and second, if they vote to have the message, which student will deliver it.\textsuperscript{304} The dissent concedes that it is conceivable that election campaigns could turn on whether or not prayer would be delivered, and that elections could produce the end result of having Christian prayer before ninety percent of the football games; however, the dissenters point out it is

\textsuperscript{300} \textit{Id.}.
\textsuperscript{301} \textit{See Santa Fe}, 120 S. Ct. at 2285.

Our precedent establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression. Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed precisely at religious speech that a free-speech clause without religion would be Hamlet without the prince.


\textsuperscript{303} \textit{Santa Fe}, 120 S. Ct. at 2285.
\textsuperscript{304} \textit{Id.}
equally conceivable that students would vote not to have a pre-game message by a student speaker at all, in which case no constitutional violation would ever arise.\(^{305}\) Rehnquist also explained:

It is also possible that the election would not focus on prayer, but on public speaking ability or social popularity. And if student campaigning did begin to focus on prayer, the school might decide to implement reasonable campaign restrictions. . . . But the Court ignores these possibilities by holding that merely granting the student body the power to elect a speaker that may choose to pray, "regardless of the students' ultimate use of it, is not acceptable." The Court so holds despite that any speech that may occur as a result of the election process here would be private, not government speech. . . . Support for the Court's holding cannot be found in any of our cases. And it essentially invalidates all student elections.\(^{306}\)

So, the question ultimately becomes: if the school district cannot constitutionally assign to the student body the authority to elect a speaker that may or may not choose to pray, how can a school district choose a pre-game speaker and not run afoul of the Establishment Clause or the Free Speech Clause if the chosen speaker happens to deliver a message carrying religious overtones? This is where the often quoted passage of the *Lee v. Weisman* opinion made by Justice Souter in his concurring opinion becomes significant: "[i]f the State had chosen its graduation day speakers according to wholly secular criteria, and if one of those speakers (not a state actor) had individually chosen to deliver a religious message, it would have been harder to attribute an endorsement of religion to the State."\(^{307}\) Thus, by analogy, if the pre-game football student speakers were chosen by secular, neutral criteria (e.g., grade point average) rather than the constitutionally problematic majoritarian election process, their messages would most likely be considered wholly private speech, conveying their own personal viewpoints, and no Establishment Clause problem or Free Speech problem would arise.

Rich Friedman, a professor at the University of Michigan Law School, suggests that selection of a student by lot for each game might be held constitutionally permissible by the current Court.\(^{308}\) He reasons that state endorsement is lessened by the elimination of the majoritarian election.\(^{309}\) Furthermore, he adds that if the identity of

\(^{305}\) Id.
\(^{306}\) Id. (quoting majority opinion at 2283).
\(^{307}\) 505 U.S. 577, 630 n.8 (1992) (emphasis added).
\(^{308}\) Richard D. Friedman, RELIGIONLAW@listserv.ucla.edu, June 19, 2000.
\(^{309}\) Id.
the chosen student were kept anonymous whereby he would have the option of not delivering a message at all, the process might be further enhanced.\textsuperscript{310} Friedman adds:

[I]f Santa Fe is the type of Texas town in which a lot of people care passionately about making religious invocations before football games—and I gather from the majority opinion that it is—then presumably many of the students selected by lot would choose to make religious statements. Of course, there's a problem: If this policy is too successful, then it appears simply to be an evasion of the previous decisions preventing the school district from using more overt means generating religious invocations. This path dependence—you can't get half a loaf because you previously tried to get a full loaf and were told you couldn't—is one of the interesting aspects of the majority opinion, and in my novice's view, of this whole area of law.\textsuperscript{311}

What does the majority's critique of the majoritarian election scheme mean for the future? The majoritarian election process is in everyday use at the nation's schools for a variety of purposes—to elect student graduation speakers, to select outside graduation speakers, to nominate homecoming queens, and to elect student representatives, to name a few. Surely a school district's implementation of an electoral mechanism does not always ensure that a particular viewpoint of the majority will prevail or that the electee automatically becomes a mouthpiece of the state. What if a student election produced the end result of having Reverend Jesse Jackson speak at a high school graduation ceremony, or in the alternative, what if a devout atheist were elected to give a graduation speech? If these electees automatically become mouthpieces of the state, representing the particular viewpoint of the majority, and happen to brief the audience on their faith (or lack thereof), is the school district clearly in violation of the Establishment Clause as Santa Fe seems to imply at first glance? Probably not.

The election scheme in Santa Fe was constitutionally problematic not only because of the student majoritarian election process, but also because the students voting knew the elected student, if he chose to speak at all, would deliver a brief invocation and/or message as spelled out in the school district's football policy. So, perhaps this is the crucial difference between the Santa Fe football policy and the other policies in existence across the nation calling for a majority vote of the student body to determine homecoming queen, graduation speaker, etc. Most likely, these other policies are not restricted by the "invoca-
tion and/or message" language, and instead, leave the method of delivery largely up to the speaker himself. Although it is possible that the student election for these various speakers/representatives could turn on the probable content of their messages, the students electing them would presumably have no idea ahead of time that their speeches would take the form of an "invocation and/or message." Thus, the threat of unconstitutional viewpoint discrimination contaminating the majoritarian election process is greatly diminished.

B. The Majority's Reliance on History and Context

When the majority analyzes the Santa Fe policy under the secular purpose requirement of the Lemon test, it flatly dismisses the district's proffered secular purposes to "'foste[r] free expression of private persons . . . as well [as to] solemniz[e] sporting events, promot[e] good sportsmanship and student safety, and establish[ing] an appropriate environment for competition'" in one short paragraph. It does so despite the deference courts usually grant to a government's stated secular purpose. Justice Stevens noted that the school district's endorsement of only one specific type of message—an invocation—is not essential to advance any of the proposed purposes. Furthermore, he added that because only one student is selected to give this content-limited speech, the policy could not be said to advance free expression. The purpose to solemnize sporting events, which the majority interpreted as "code" for prayer, was likewise impermissible because school-sponsored prayer is clearly unconstitutional.

The next paragraph of the majority opinion, also addressing Lemon's secular purpose requirement, is quite profound. It begins:

Most striking to us is the evolution of the current policy from the long-sanctioned office of "Student Chaplain" to the candidly titled "Prayer at Football Games" regulation. This history indicates that the District intended to preserve the practice of prayer before football games. . . . Given these observations, and in light of the school's history of regular delivery of a student-led prayer at athletic events, it is reasonable to infer that the specific purpose of the policy was to preserve a popular "state-sponsored religious practice."

312. Santa Fe, 120 S. Ct. at 2278-79 (quoting Brief for Petitioner at 14) (alterations in original).
313. See Doe v. Santa Fe Indep. Sch. Dist., 168 F.3d 806, 816 (5th Cir. 1999).
314. Santa Fe, 120 S. Ct. at 2279.
315. Id.
316. Id.
317. Id. (quoting Lee, 505 U.S. at 596).
If the Court can find a stated secular purpose invalid based on historical practices amounting to Establishment Clause violations and the context in which the policy evolved, a school district like Santa Fe could never draft a policy that would be found constitutionally permissible. The dissent picked up on the majority's unfortunate reasoning process:

[T]he context—attempted compliance with a District Court order—actually demonstrates that the school district was acting diligently to come within the governing constitutional law. The District Court ordered the school district to formulate a policy consistent with Fifth Circuit precedent, which permitted a school district to have a prayer-only policy. . . . But the school district went further than required by the District Court order and eventually settled on a policy that gave the student speaker a choice to deliver either an invocation or a message. In so doing, the school district exhibited a willingness to comply with, and exceed, Establishment Clause restrictions. Thus, the policy cannot be viewed as having a sectarian purpose.\textsuperscript{318}

Steffen N. Johnson, of Mayer, Brown & Platt in Chicago, Illinois, who filed a brief in \textit{Santa Fe}, also points out the Court's excessive reliance on the history and context of the Santa Fe policy in order to find it violative of \textit{Lemon}'s secular purpose requirement.\textsuperscript{319} He notes first that our constitutional system is grounded on case-by-case adjudication.\textsuperscript{320} Johnson states that the evidence of record not pertaining to the football policy should not be given undue weight in the Court's analysis.\textsuperscript{321} He remarks: "[i]ndeed, it would be odd if the District's former or unrelated policies were dispositive of whether its current football policy is constitutional. If it were, no government body could ever correct an unconstitutional practice."\textsuperscript{322}

The majority's reliance on the history and outside context of the Santa Fe football policy in order to find it devoid of secular purpose produces a host of concerns. Most likely, at least half of the school districts in America have some history of permitting student-led prayer at curricular and/or extracurricular events. Although most of them have probably altered their respective policies to comply with Supreme Court Establishment Clause precedent, will a policy on review be auto-

\textsuperscript{318} Id. at 2286-87.
\textsuperscript{319} Steffen N. Johnson, RELIGIONLAW@listserv.ucla.edu, Feb. 9, 2000. See also http://www.appellate.net/about/johnsonsn.html (internet site containing the \textit{Santa Fe} brief authored by Steffen N. Johnson).
\textsuperscript{320} Id.
\textsuperscript{321} Id.
\textsuperscript{322} Id.
matically doomed based on prior error? If so, no school district would ever have a good chance of drafting a constitutional policy.

C. "Catch 22"

Although not explicitly addressed by the Supreme Court in *Santa Fe*, albeit it was briefly touched on in the Fifth Circuit opinion, an issue which found its way into the recent case of *Rosenberger v. Rector and Visitors of the University of Virginia* will be paramount in analyzing future student-led prayer cases: what happens when the Establishment Clause and the Free Speech Clause collide? Put another way, if the Establishment Clause mandates one form of action and the Free Speech Clause requires a conflicting form of action, which Clause should ultimately win out in the end? Is there a First Amendment "hierarchy"?

Although the Court has explicitly stated that "[t]here is no doubt that compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech," as of the date of the opinion *Capitol Square Review and Advisory Board v. Pinette*, Justice Scalia noted that the Court had addressed the issue on only two occasions, in *Lamb's Chapel* and *Widmar*. Both times the Court chose to strike down the restriction based on a finding of religious content. Even though the Court has never affirmatively stated that compliance with the Free Speech Clause will excuse an Establishment Clause violation, the case of *Rosenberger v. Rector and Visitors of the University of Virginia* seems to indicate that in some circumstances it may.

In *Santa Fe*, the October football policy fallback provision contained the requirement that the student message and/or invocation be nonsectarian and nonproselytizing, presumably to keep the policy in conformity with the Establishment Clause. However, this nonsectarian, nonproselytizing dual requirement does more than implicate

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323. Doe, 168 F.3d at 819.
325. This issue was explicitly raised by the Eleventh Circuit in Chandler v. James, 180 F.3d 1254, 1260 (11th Cir. 1999), but was ultimately resolved when the *Chandler* court found the student speech to be private speech, thus displacing any possible Establishment Clause violation by the state.
327. *Id.*
the Establishment Clause—it could be found by the Court to constitute unconstitutional viewpoint discrimination under the Free Speech Clause, which the Santa Fe Independent School District argued to the Fifth Circuit. In Petitioner's Brief to the Supreme Court, they state: "[i]ndeed, such discrimination [against religious speech] may well constitute viewpoint discrimination, the most egregious form of content-based censorship. . . . Thus, as a general matter, for example, if a governmental agency allows a private speaker to offer a secular message of inspiration, it must allow the speaker to take a religious perspective as well."331

In Rosenberger, the Court dealt with a policy of the University of Virginia which permitted student groups known as "Contracted Independent Organizations" (CIOs) to petition the University's student activities fund for money to pay the CIOs' third party contractors. Religious organizations were not eligible to become CIOs. Furthermore, guidelines disallowed money advancements to fund a CIO's "religious activity," defined as any activity that primarily promoted or manifested a particular belief in or about a deity or an ultimate reality." The challengers of the policy consisted of the organization, editors, and members of the CIO Wide Awake Productions (WAP), which had been denied funding for the newspaper's printing costs because it had been deemed a "religious activity" by a committee of the student council and ultimately sustained as such by the students activities fund committee. The suit charged the University of Virginia with violating the free speech and press and free exercise of religion provisions of the First Amendment.336

The Supreme Court held first that in regard to Wide Awake, the University's guidelines regarding ineligibility for payment to CIOs for religious activities constituted impermissible viewpoint discrimination in violation of the Free Speech Clause of the First Amendment. Second, the Court held that this free speech violation was not pardoned.

332. Rosenberger, 515 U.S. at 819.
333. Id.
334. Id.
335. Id.
336. Id.
337. Id. at 837.
by the need of the University to comply with the Establishment Clause. 338 In closing, the majority stated:

The viewpoint discrimination inherent in the University's regulation required public officials to scan and interpret student publications to discern their underlying philosophic assumptions respecting religious theory and belief. That course of action was a denial of the right of free speech and would risk fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires. There is no Establishment Clause violation in the University's honoring its duties under the Free Speech Clause. 339

So, what does the *Rosenberger* opinion mean for future cases involving student-led prayer like that in Santa Fe? Are school districts first to ensure compliance with the Free Speech Clause to avoid unconstitutional viewpoint discrimination and give the Establishment Clause less priority as the Supreme Court seemed to do in *Rosenberger*? The *Rosenberger* Court was cautious to limit its holding to the case at hand, 340 but future cases dealing with student-led prayer are bound to arise that present significant Free Speech and Establishment Clause conflicts. Perhaps the *Santa Fe* Court intentionally attempted to distance itself from confronting this perplexing subject by limiting its issue to whether the school district's football policy violated the Establishment Clause (although the Court did consider free speech issues when reviewing the majoritarian election process). When and if the Court does answer this complex question, school districts and other governmental entities across the nation will most likely rejoice—they will no longer find themselves in this "Catch 22" situation where they are almost forced to sacrifice one First Amendment provision for another.

**VII. CONCLUSION**

As stated at the beginning of this case note, the Supreme Court's opinion in *Santa Fe Independent School District v. Doe* was about a lot more than what the Court limited its issue to: whether the district's football policy violated the Establishment Clause. The opinion sheds light on the current majority's take on the distinction between private speech and government speech, the constitutionally problematic majoritarian election scheme, the majority's extensive reliance on history and context in determining whether a secular purpose exists for

338. Id. at 845.
339. Id. at 845-46.
340. See id at 846. ("There is no Establishment Clause violation in the University's honoring its duties under the Free Speech Clause.") (emphasis added).
the purposes of the Lemon test, and the inherent difficulty in ironing out the friction between the Establishment Clause and the Free Speech Clause. If nothing else, the opinion informs the reader of the infinite number of complex constitutional questions that public school districts across the country face when student-led prayer is at issue. It also explains why the various circuits who have encountered the problem are not at all in agreement on how student-led prayer should be treated.

Student-initiated prayer cases, and Establishment Clause cases in general, should be viewed as individual building blocks. No single block ever "finishes" the ultimate design, even though it is essential for a sturdy foundation. There is always room for one more addition, if you will, no matter how colossal the structure gets. Although the Santa Fe case is but one "block" in the great design, it should not be discounted. It will be added to, altered, or maybe even replaced, but it will always be a block—a block that shaped the ultimate design.

Jennifer Carol Irby