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Constitutional Law - Confusing Game Plan: The Court Has to Use Every Play in the Book to Keep Prayer out of High School Football - Santa Fe Independent School District v. Jane Doe, 120 S. Ct. 2266

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CONSTITUTIONAL LAW—Confusing Game Plan: The Court Has to Use Every Play in the Book to Keep Prayer out of High School Football. *Santa Fe Independent School District v. Jane Doe*, 120 S. Ct. 2266 (2000).

INTRODUCTION

Since the founding of this country, debate has raged in society, in political arenas, and in the courts over the proper relationship between the government and religion. The United States Supreme Court is often involved in this conflict and has attempted, on numerous occasions, to define the proper relationship between church and state. The definition, however, remains unclear. In *Santa Fe Independent School District v. Jane Doe*, the Court made its latest attempt to articulate a test for determining whether a government action is proper, and in the process held that the School District's policy permitting student-initiated, student-led prayer before football games violated the Establishment Clause.[1]

The Santa Fe Independent School District (School District) is a political subdivision of the State of Texas and is responsible for the education of more than four thousand students.[2] Respondents (Does) are two sets of current or former students and their mothers; one family is Catholic and the other is Mormon.[3] To protect the respondents from harassment and intimidation by School District officials the Does were allowed to litigate anonymously.[4] The Does commenced their action in the United States District Court for the Southern District of Texas in April 1995, alleging that the School District engaged in several proselytizing practices.[5] The challenged practices included promoting attendance at a Baptist revival meeting, distributing Gideon bibles on school property, chastising children who held minority religious beliefs, allowing students to give overtly Christian invocations and benedictions from the stage during graduation ceremonies, and allowing students to deliver

1. Santa Fe Indep. Sch. Dist. v. Jane Doe, Individually and as Next Friend for Her Minor Children, Jane and John Doe, 120 S. Ct. 2266 (2000).

2. *Id.* at 2271.

3. *Id.*

4. *Id.*

5. *Id.* "Proselytize" is defined as to convert from one religion to another. WEBSTER'S 3D NEW INTERNATIONAL DICTIONARY, 1821 (3d ed. 1993).

overtly Christian prayers over the public address system at home football games.[6]

On May 10, 1995, the district court entered an order providing that non-denominational and non-proselytizing prayer consisting of "an invocation and/or benediction" could be presented by a senior student or students selected by the members of the graduating class.[7] The invocation could be delivered provided that the class determined the text of the invocation, and the School District did not scrutinize or pre-approve the content of the message.[8] In response to the order, the School District adopted a series of policies over the next several months concerning prayer at school functions.[9]

The school developed two pre-game prayer policies, the August policy and the October policy. The August policy, entitled "Prayer at Football Games," authorized two student elections, the first to determine whether a student should deliver an invocation, and the second to select the student to deliver the invocation.[10] The policy contained two parts: an initial statement that omitted any requirement that the content of the invocation be "non-sectarian and non-proselytizing" and a fallback provision that automatically added this limiting language in case the preferred policy be challenged in court and enjoined.[11] On August 31, 1995, the student body elected to allow student prayer at varsity football games, and a week later in a separate election the student body chose a student to deliver the prayer.[12] In October, the School District enacted the final version of the policy.[13] The only difference between the Octo-

6. *Santa Fe Indep. Sch. Dist. v. Jane Doe*, 120 S. Ct. at 2271.
7. *Id.* at 2271-72.
8. *Id.* at 2272.
9. *Id.*
10. *Id.*
11. *Id.* "Sectarian" is defined as being an adherent of a particular religious sect. WEBSTER'S 3D NEW INTERNATIONAL DICTIONARY, 2052 (3d ed. 1993).
12. Santa Fe Indep. Sch. Dist. v. Jane Doe, 120 S. Ct. 2266, 2273 (2000).
13. *Id.* The October Policy provides:

Pre-Game Ceremonies at Football Games:

> 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 message or invocation will be part of the pre-game ceremonies and if so, shall elect a student, from a list of student volunteers, to deliver

ber policy and the August policy was that the October policy eliminated the word prayer from the title and referred to messages as well as invocations.[14]

The district court concluded that the open-ended portion of the policy, which allowed sectarian or proselytizing prayer, was impermissible, because it coerced non-adherent participation in a religious practice.[15] Therefore, the district court entered an order precluding the enforcement of the open-ended portion of the policy.[16] The district court then held that the policy contained a fall-back provision consistent with an earlier Fifth Circuit decision, *Jones v. Clear Creek Independent School District*, which allowed student-led, student-initiated prayer at high school graduation ceremonies, provided that the prayers were non-sectarian and non-proselytizing.[17] Since this provision would take effect automatically if the district court found the open-ended provision unconstitutional, the district court simply ordered the School District to im-

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> the statement or invocation. The student volunteer who is selected by his or her classmates may decide what statement or invocation to deliver, consistent with the goals and purposes of this policy.
>
> If the District is enjoined by a court order from the enforcement of this policy, then and only then will the following policy become the applicable policy of the school board.
>
> 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 message or invocation will be part of the pre-game ceremonies and if so, shall elect a student, from a list of student volunteers, to deliver the statement or invocation. The student volunteer who is selected by his or her classmates may decide what statement or invocation to deliver, consistent with the goals and purposes of this policy. Any message an/or invocation delivered by a student must be non-sectarian and non-proselytizing.

Id.

14. *Id.* at 2273 (2000).
15. Jane Doe v. Santa Fe Indep. Sch. Dist., 168 F.3d 806, 813 (5th Cir. 1999).
16. *Id.*
17. *Id.* (citing Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963, 971-972 (5th Cir. 1992)).

plement the second provision of the policy.[18] The district court then denied the Doe's request for injunctive relief of any kind.[19]

The School District and the Does appealed, with the School District claiming that the enjoined portion of the October policy was permissible and the Does claiming that both portions of the policy were unconstitutional.[20] The United States Court of Appeals for the Fifth Circuit ruled in favor of the Does and reversed the district court decision.[21] The court of appeals stated that the *Jones* decision applied only to graduations and not to school-related sporting events.[22] The court of appeals explained, "our decision in *Clear Creek II* hinged on the 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 the District's alternative Clear Creek Prayer Policy can be extended to football games. . . ."[23]

The United States Supreme Court granted *certiorari*, to decide whether the School District policy permitting student-initiated, student-led prayer at football games violated the Establishment Clause of the United States Constitution.[24] The Court held that the policy was unconstitutional.[25]

This case note discusses the development of Establishment Clause jurisprudence and the various tests used by the Court to decide Establishment Clause cases. The note goes on to discuss why the Court's decision in *Santa Fe* was correct, yet could have done more to clarify this confusing area of law. The note shows that Justice Stevens had to apply all three current Establishment Clause tests in order to get a majority of the justices to join his opinion for the Court. While getting the desired result of one opinion speaking for the Court is more preferable

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18. *Id.* There was never another election to determine if a prayer would be given or an election held to determine a student speaker after the enactment of the October policy, which contained the non-sectarian, non-proselytizing language. *Id.* at 2273. The only election was under the enjoined August policy, which did not contain the limiting non-sectarian non-proselytizing language. Santa Fe Indep. Sch. Dist. v. Jane Doe, 120 S. Ct. 2266, 2273 n.5 (2000).
19. *Id.*
20. Santa Fe Indep. Sch. Dist. v. Jane Doe, 120 S. Ct. 2266, 2274 (2000).
21. *Id.*
22. *Id.*
23. Jane Doe v. Santa Fe Indep. Sch. Dist., 168 F.3d 806, 823 (1999).
24. *Santa Fe Indep. Sch. Dist.*, 120 S. Ct. at 2275. The Supreme Court did not address the issue of whether the messages delivered by students at the graduation ceremonies violated the Establishment Clause.
25. *Id.*

than several concurring opinions applying different tests, this note shows that using all three tests does little to guide school district policy making. As a result, school districts will continue to implement programs that circumvent or defy the ruling, absent a test that provides clear guidelines for school districts to follow.

BACKGROUND

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion. . . ."[26] Since the mid-twentieth century, the United States Supreme Court has struggled to decide when a government action constitutes an establishment of religion.[27] Its struggle has been even greater when the government entity is a primary or secondary school.[28] In deciding these cases, the Court has used several different tests to answer the difficult question of whether or not a school district policy that allows prayer is unconstitutional.[29]

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26. U.S. CONST. amend. I. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to assemble, and to petition the Government for a redress of grievances." *Id.* Although the Free Exercise Clause and the Free Speech Clause are both important aspects of *Santa Fe Independent School Dist v. Jane Doe*, they are beyond the scope of this case note.

27. *See* Everson v. Bd. of Educ., 330 U.S. 1 (1947); Bd. of Educ. v. Allen, 392 U.S. 236 (1968); Walz v. Tax Comm'n, 397 U.S. 664 (1970); Lemon v. Kurtzman, 403 U.S. 602 (1971); Comm. for Pub. Instruction and Religious Liberty v. Nyquist, 413 U.S. 756 (1973); Meek v. Pittenger, 421 U.S. 349 (1975); Mueller v. Allen, 436 U.S. 388 (1983); Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373 (1985); Aguilar v. Felton, 105 U.S. 3232 (1985); Bd. of Educ. of Kiryas Joel v. Grumet, 114 S. Ct. 2481 (1994); Agostini v. Felton, 114 U.S 2481 (1997). The above cases deal with the Establishment Clause as it pertains to religious schools. *See also* McCollum v. Bd. of Educ., 333 U.S. 203 (1948); Zorach v. Clausen, 343 U.S. 306 (1952); Engel v. Vitale, 370 U.S. 421 (1962); Abington Township v. Schempp, 374 U.S. 203 (1963); Epperson v. Arkansas, 393 U.S. 97 (1968); Stone v. Graham, 449 U.S. 39 (1980); Wallace v. Jaffree, 472 U.S. 38 (1985); Edwards v. Aguillard, 482 U.S. 578 (1987); West Side Community Sch. v. Mergens, 496 U.S. 226 (1990); Lee v. Weisman, 505 U.S. 577 (1992); Zobrest v. Catalina, 113 U.S. 2462 (1993). The above cases deal with the Establishment Clause as it applies to public schools.

28. *See supra* note 27.

29. *See* Abington Township v. Shempp, 374 U.S. 203, 222 (1963) (holding that if the policy has no secular purpose and the effect of the policy is to advance or inhibit religion, there is an Establishment Clause violation). *See also* Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970) (holding that if there is excessive entanglement between the government entity and religion there is a constitutional violation). *See also* Lemon v. Kurtzman, 403 U.S. 602 (1971) (holding that a policy must have a secular legislative purpose, must not have the primary effect of advancing or inhibiting religion, and the government must not be excessively entangled with religion to pass constitutional muster). *See also* Lynch v. Donnelly, 465 U.S. 668, 688-89 (1984) (O'Connor, J., concur-

Separating Church and State: Precursors to the Current Tests

Two documents the justices frequently rely upon when deciding Establishment Clause questions are James Madison's letter to the General Assembly of the Commonwealth of Virginia and Thomas Jefferson's Bill for Establishing Religious Freedom.[30] A major theme running through both documents is the fear of government coercion.[31] The fear that the government will establish a religion and that those who do not adhere to the system will be punished or ostracized guided the Court's early Establishment Clause decisions.[32]

In 1962, the Court first addressed the issue of school prayer in the landmark case of *Engel v. Vitale.*[33] The five-member majority held that using the public school system to encourage recitation of prayer was wholly inconsistent with the Establishment Clause. The majority reasoned that the First Amendment guarantees that a person's religion is not subject to government control and that the government is without power to implement any form of government religion or prayer.[34] Justice Black used a coercion analysis and concluded that the Establishment Clause prohibited the daily recitation of a non-denominational prayer, even absent a showing of direct coercion.[35] In his view, indirect coercion is plain when the power and prestige of the government is placed behind reli-

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ring) (holding that the proper test is to see if there is an endorsement of religion by the government). *See also* Lee v. Weisman, 505 U.S. 577, 587 (1992) (holding that the proper test is to see if there is coercion on the part of the government to force non-adherents to attend a religious function).

30. ROBERT S. ALLEY, THE CONSTITUTION & RELIGION: LEADING SUPREME COURT CASES ON CHURCH AND STATE 29-35 (1999). Madison writes:

> [B]ecause if religion be exempt from the authority of the Society at large, still less can it be subject to that of the Legislative Body. The rulers who are guilty of such an encroachment, [taking away the liberties of the people] exceed the commission from which they derive their authority, and are Tyrants. The people who submit to it are governed by laws made neither by themselves, nor by an authority derived by them, and are slaves.

Id. at 30. Jefferson writes, "[n]o man shall be compelled to frequent or support any religious worship . . . nor shall suffer on account of his religious opinions or beliefs. . . ." *Id.* at 35.

31. ALLEY, *supra* note 30, at 29-35.

32. *See* Everson v. Bd. of Educ., 330 U.S. 1 (1947); McCollum v. Bd. of Educ., 333 U.S. 203 (1948); Zorach v. Clausen, 343 U.S. 306 (1952); Engel v. Vitale, 370 U.S. 421 (1962).

33. 370 U.S. 421, 424 (1962) (holding the policy enacted by the school district that directed the recitation of a prayer by each class at the beginning of each school day unconstitutional).

34. *Id.* at 430.

35. *Id.*

gious beliefs.[36] Justice Black, describing the Establishment Clause, continued:

> Its first and most immediate purpose rested on the beliefs that a union of government and religion tends to destroy government and degrade religion. Another purpose of the Establishment Clause rested on the awareness of the historical fact that governmentally established religion and religious persecution go hand in hand.[37]

The view that the government cannot force a religion on the people became the basis of many decisions to follow.[38]

A year later, the Court again confronted an alleged violation of the Establishment Clause in *School District of Abington Township v. Schempp*.[39] The *Schempp* Court, however, used a different test to address the issue.[40] The Court concluded that if the policy had no secular legislative purpose and the primary effect of the statute or policy was to advance or inhibit religion, the policy was unconstitutional.[41] The Court reasoned that to pass constitutional muster, the government must remain neutral, thereby insuring that there is no fusion of government and religious sects.[42] According to the Court, by ensuring that the policy in question has a secular purpose and neither advances nor inhibits a particular religious belief or practice, the government achieves the neutrality that the Court seeks.[43]

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36. *Id.* at 431.
37. *Id.* at 431-32.
38. *See* Sch. Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963); Lemon v. Kurtzman, 403 U.S. 602 (1971); Stone v. Graham, 449 U.S. 39 (1980); Lynch v. Donnelly, 465 U.S. 668 (1984); Wallace v. Jaffree, 472 U.S. 38 (1985); Edwards v. Aguillard, 482 U.S. 578 (1987); Lee v. Weisman, 505 U.S. 577 (1992).
39. 374 U.S. 203 (1963) (holding that the State's requirement that selections of the Holy Bible be read and the required recitation of the Lord's Prayer at the opening of the school day violated the Establishment Clause).
40. *Id.* at 222. Writing for the majority, Justice Clark stated:

> The test may be stated as follows: what are the purpose and the primary effect of the enactment: If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed in the Constitution . . . there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.

Id.

41. *Id.*
42. *Id.*
43. *Id.*

In 1970, the Court approached the question differently in *Walz v. Tax Commission.*[44] The Court held that tax exemptions for religious entities and other non-profit beneficial and stabilizing entities in community life did not violate the Establishment Clause.[45] The Court, however, looked not only to the legislative purpose of the tax exemptions, but also to the extent of the administrative and fiscal involvement between the state and a religious body.[46] The Court determined that even if the policy or statute contained a secular legislative purpose, if "excessive entanglement" existed between the state and the religious institution, the financial support was invalid.[47]

Current Tests: Lemon, Endorsement, and Coercion

In 1971 the Court decided *Lemon v. Kurtzman*, reiterating the tests applied by the Court in the aforementioned cases.[48] Following *Lemon*, the Court has used three partially overlapping tests to determine if the relationship between the government and religion violates the Establishment Clause.[49]

(a) The Lemon Test

In *Lemon*, the Court combined the tests it used to decide earlier Establishment Clause cases and created one three-pronged test.[50] Using this strict approach, the Court concluded that government reimbursement to non-public religious schools for the costs of teacher salaries, textbooks and other instrumental materials, and its payment to teachers in non-public religious schools, resulted in excessive administrative entan-

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44. 397 U.S. 664 (1970).

45. *Id.* at 679-80.

46. *Id.* at 674.

47. *Id.* at 675.

48. 403 U.S. 602, 606 (1971). The court used a three-prong test and held that a Pennsylvania statute and Rhode Island statute, each providing state aid to church-related institutions, were unconstitutional. *Id.*

49. *Lemon*, 403 U.S. 602 (1971). The Court combined Establishment Clause tests into a three-prong test [Lemon Test] to decide whether the challenged policy or act violates the Establishment Clause. *Id. See also* Lynch v. Donnelly, 465 U.S. 668 (1984) (O'Connor, J., concurring). Justice O'Connor advanced the endorsement test and asked whether the challenged practice or policy impermissibly endorsed a particular religion. *Id. See also* Lee v. Weisman, 505 U.S. 577 (1992). The majority used the coercion test, in which the Court determined whether the challenged practice or policy impermissibly coerces others to participate unwillingly in a religious exercise. *Id.*

50. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

glement.[51] The policy violated one prong of the test and, therefore, was constitutionally deficient.[52]

Writing for the majority, Chief Justice Burger explained the three-prong test, "[f]irst, the statute must have a secular legislative purpose; second, its principle or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion."[53] The secular purpose prong is intended to make sure that the government remains neutral in its actions and does not favor any particular religion.[54] Under the primary effects prong, to avoid violating the Establishment Clause, the main effect of a statute or policy must be secular, and if the policy has a religious effect "it must be indirect, incidental, and remote."[55] When dealing with the entanglement prong of the *Lemon* test, the Court reasoned that there could never be total separation between church and state in an absolute sense, and that some relationships between the government and religious organizations are inevitable and appropriate.[56] To determine if there is excessive entanglement, one must examine the purposes and character of the governmental institution and the resulting relationship

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51. *Id.* at 613-14.

52. *Id.* The majority found that although the statute may contain a secular purpose and the statute did not have the primary effect of advancing religion, it was still constitutionally deficient because the relationship which arose under the statute involved an excessive entanglement of the government and religion. *Id.*

53. *Id.* at 612-13.

54. Wallace v. Jaffree, 472 U.S. 38, 75-76 (1985). In applying Lemon, the majority stated that the secular purpose requirement:

> [S]erves an important function. It reminds the government that when it acts it should do so without endorsing a particular religious belief or practice that all citizens do not share. In this sense the secular purpose requirement is squarely based in the text of the Establishment Clause it helps to enforce.

Id. See also ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 986 (1997). "A law is unconstitutional if it fails any prong of the *Lemon* test." *Id.*

55. Penny J. Meyers, *Lemon is Alive and Kicking: Using the Lemon Test to Determine the Constitutionality of Prayer at High School Graduation Ceremonies*, 34 VAL. U.L. REV. 231, 244-45 (1999) (quoting Comm. for Pub. Educ. & Religious Liberty v. Nyguist, 413 U.S. 756, 783-84 n.39 (1973)).

56. Lemon v. Kurtzman, 403 U.S. 602, 614 (1971). Justice Burger stated:

> Fire inspections, building and zoning regulations, and state requirements under school-attendance laws are examples of necessary and permissible contacts. . . . Judicial caveats against entanglement must recognize that the line of separation far from being a wall, is a blurred, indistinct, and variable barrier depending on the circumstances of a particular relationship.

Id.

between the government and the religious authority.[57] The relationship or practice violates the Establishment Clause if it requires "comprehensive, discriminating, and continuing state surveillance."[58] Although the Court developed the *Lemon* test when deciding a religious school funding case, it has also used the *Lemon* standard to decide the appropriateness of policies that allow religious practices in school settings.[59]

(b) The Endorsement Test

Although the Supreme Court and lower courts frequently applied the *Lemon* test, the test was often criticized.[60] In response to this criticism, the Court established other tests for resolving Establishment Clause issues. For example, the endorsement test advanced by Justice O'Connor in *Lynch v. Donnelly* is a refinement of the *Lemon* test.[61] Con-

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57. *Id.* at 615.

58. *Id.* at 619.

59. Stone v. Graham, 449 U.S. 39, 41 (1980) (holding that a law requiring the posting of the ten commandments on public school class rooms had no secular purpose and violated the Establishment Clause); Wallace v. Jaffree, 472 U.S. 38, 56 (1985) (invalidating a statute authorizing public school teachers to hold a one minute period of silence for meditation or voluntary prayer since the statute had no secular purpose); Edwards v. Aguillard, 482 U.S. 578, 594 (1987). The court held that the law requiring public schools to teach creation science if it also teaches evolution unconstitutional, because creation science is a religious theory explaining the origin of human life. *Id.* Therefore the primary purpose of the law is to endorse a particular religious doctrine. *Id.*

60. Wallace v. Jaffree, 472 U.S. 38, 110 (1985) (Rehnquist, C.J., dissenting). Chief Justice Rehnquist stated:

> [T]he *Lemon* test has no more grounding in the history of the First Amendment than does the wall theory upon which it rests. The three-part test represents a determined effort to craft a workable rule from a historically faulty doctrine; but the rule can only be as sound as the doctrine it attempts to service. The three part test has simply not provided adequate standards for deciding Establishment Clause cases. . . .

Id.
See also Hunt v. McNair, 413 U.S. 734, 741 (1972); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 398-400 (1993).

61. 465 U.S. 668 at 687-88 (1978) (O'Connor, J., concurring). Justice O'Connor stated that the government can violate the Establishment Clause in two ways, excessive entanglement with a religious institution and government endorsement or disapproval of religion. *Id.* Justice O'Connor also explained that the endorsement test is useful because of the analytic content it gives to the *Lemon* inquiry into purpose and effect. *Id.* at 688-89. *See also* Wallace v. Jaffree, 472 U.S. 38, 69 (1984) (O'Connor, J., concurring). Justice O'Connor believes that the real evil is government endorsement or disapproval of religion, and the government cannot communicate a message of endorsement or disapproval, since this gives those persons who hold the endorsed beliefs a certain amount of power over those who do not. *Id.* Any time this happens there is the threat of erosion of the Establishment Clause, therefore when there is alleged government endorsement or disapproval of a particular religion, the government action must be carefully scrutinized. *Id.*

curring, Justice O'Connor reasoned that a focus on the government endorsement or disapproval of a religious practice or belief made the *Lemon* test a more useful device.[62] According to Justice O'Connor, if there was no endorsement or disapproval of a religious belief or practice intended by the government, then the policy had a legitimate secular purpose and passed this prong of the *Lemon* test.[63] Justice O'Connor also used the endorsement analysis to determine if the policy had the primary effect of advancing or inhibiting religion. If the government practice had the primary effect of communicating a message of government endorsement or disapproval of religion, either intentionally or unintentionally, the practice violated the Establishment Clause.[64]

The four dissenting justices agreed with Justice O'Connor that the real issue in *Lynch* was whether the government violated the Establishment Clause by endorsing a particular religious belief or practice.[65] Thus, even though the dissenters in *Lynch* disagreed with the majority's answer to the Establishment Clause question, a majority of the Court agreed that if the government endorsed a particular religious belief or practice the challenged policy was unconstitutional.

(c) The Coercion Test

Like the *Lemon* test, the endorsement test was often criticized.[66] This criticism led the Court to rely on the coercion test when deciding the most recent school prayer cases.[67] Reliance on a coercion analysis is

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62. *Lynch*, 465 U.S. at 689 (O'Connor, J., concurring).
63. *Id.* at 691 (O'Connor, J., concurring).
64. *Id.* at 692 (O'Connor, J., concurring).
65. *Id.* at 697 n.3 (1984) (Brennan, J., dissenting). The dissent explained, "[a]s Justice O'Connor's concurring opinion rightly observes, this test provides a helpful analytical tool in considering the central question in this case—whether Pawtucket [the city] has run afoul of the Establishment Clause by endorsing religion through its display of the crèche." *Id.* (Brennan, J., dissenting).
66. Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573, 674 (1989) (Kennedy, J., dissenting). Justice Kennedy, dissenting, reasoned:

> Either the endorsement test must invalidate scores of traditional practices recognizing the place religion holds in our culture, or it must be twisted and stretched to avoid inconsistency with practices we know to have been permitted in the past, while condemning similar practices with no greater endorsement effect simply by reason of their lack of historical antecedent. Neither result is acceptable.

Id. (Kennedy, J., dissenting). *See also* Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 400-01 (1993). *See also* Capitol Square Review and Advisory Bd. v. Pinette, 115 S.Ct. 2440, 2449 (1995). Justice Scalia, writing for the plurality, rejected the symbolic endorsement approach because the approach "exiles private religious speech to a realm of less-protected expression. . . ." *Id.*
67. *See* Lee v. Weisman, 505 U.S. 577 (1992); Santa Fe Indep. Sch. Dist. v. Jane

a return to a principle referred to in the very early Establishment Clause decisions.[68] The Supreme Court clarified the coercion test in *Lee v. Weisman*.[69] Justice Kennedy, writing for the Court, made it clear that the coercion test was sensitive to public pressure as well as peer pressure on students, which could be as coercive as any form of overt compulsion.[70]

In *Lee*, the Court decided not to revisit *Lemon*, but instead focused on the belief that the State should accommodate the religious be-

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Doe, 120 U.S. 2266 (2000).

68. Zorach v. Clausen, 343 U.S. 306, 311 (1952). The Court found no coercion on the part of the school to get public school students into religious classrooms. However, the Court reasoned that if coercion were used, if one or more teachers used their office to persuade or force students to take religious instruction, it would be a different matter. *Id.* Everson v. Bd. of Educ. of Township of Ewing, 330 U.S. 1, 15-16 (1947). Justice Black stated:

> The Establishment Clause means at least this . . . Neither state nor Federal Government . . . can force nor influence a person to go or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing beliefs or disbeliefs, for church attendance or non-attendance.

Id. McCollum v. Bd. of Educ. of Sch. Dist. No. 71, Champaign County, Illinois, 333 U.S. 203, 209-10 (1947). Justice Black stated, "[p]upils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes. . . . This . . . falls squarely under the ban of the First Amendment. . . ." *Id.* Engel ev. Vitale, 370 U.S. 421, 430 (1962). Justice Black wrote, "[t]he Establishment Clause . . . does not depend upon any showing of direct government compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobservers or not." *Id.*

69. 505 U.S. 577, 586 (1992). The Court found that including school district's practice of including invocations and benedictions at a public school graduation violated the establishment clause, because there was coercion of non-adherent participation. *Id.* The majority held that the government cannot coerce, directly or indirectly, a student to attend and participate in a religious practice. *Id.* If there is overt or indirect coercion, the policy will not pass constitutional muster. *Id.* at 599. The Court stated, "[n]o holding by this Court suggest that a school can persuade or compel a student to participate in a religious exercise. That is being done here, and it forbidden by the Establishment Clause of the First Amendment." *Id.*

70. *Id.* at 593-94. Justice Kennedy stated:

> Research in psychology supports the common assumption that adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention. Britain, *Adolescent Choices and Parent-Peer Cross Pressures*, 28 AM. SOCIOLOGICAL REV. 385 (June, 1963); Clasen & Brown, *The Multidimensionality of Peer Pressure in Adolescence*, 14 J. OF YOUTH AND ADOLESCENCE 451 (Dec. 1985); Brown, Clasen, & Eicher, *Perceptions of Peer Pressure, Peer Conformity Dispositions, and Self-Reported Behavior Among Adolescents*, 22 DEVELOPMENTAL PSYCHOLOGY 521 (July 1986).

Id.

liefs and practices of its citizens, yet never coerce non-adherent partici-pation in a religious practice.[71] Instead of applying the past tests, Justice Kennedy stated:

> The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause. 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.'[72]

At the present time, the Court applies the *Lemon* test, the endorsement test, and the coercion test separately or together when it decides Establishment Clause cases, and none of these tests have been invalidated.[73]

PRINCIPAL CASE

In *Santa Fe Independent School District v. Jane Doe*, the Court decided that student-led, student-initiated prayer prior to football games did in fact violate the Establishment Clause.[74] The majority relied on four principles to reach its holding. It first discussed and concluded that since the student speech at issue is not private speech, using the coercion test from *Lee* is proper.[75] Second, the majority explained that the government endorsed the message, even though a student would ultimately decide the content of the message.[76] Third, the Court, relying primarily on *Lee*, stated that although an election process was in place and attendance at the football games was voluntary, there was impermissible coercion on the part of the School District.[77] Finally, the majority, using the *Lemon* test, invalidated the policy on its face for lack of a secular purpose.[78]

The Majority

First, the Court stated that the limitations of the Establishment

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71. *Id.* at 587.

72. *Id.* (citing Lynch v. Donnelly, 465 U.S. 662, 678 (1984)).

73. *See* Santa Fe Indep. Sch. Dist. v. Jane Doe, 120 S. Ct. 2266 (2000). Although the majority relied primarily on the coercion test developed in *Lee*, the Court also used the *Lemon* test and the endorsement test to find the policy constitutionally deficient. *Id.*

74. 120 S. Ct. 2266, 2275 (2000) (6-3 decision).

75. *Id.* at 2275.

76. *Id.* at 2277.

77. *Id.* at 2279-80.

78. *Id.* at 2282.

Clause and the principles of *Lee* applied in this case, because the messages authorized by the October policy were not private student speech, and therefore not outside the bounds of the Establishment Clause.[79] Justice Stevens stated that "[w]e are not persuaded that the pregame invocations should be regarded as private 'speech.' These invocations are authorized by a government policy and take place on government property at government sponsored school-related events."[80] The Court also relied on the fact that the forum was not open to anyone who wanted to deliver a message, noting that the school policy allowed only one student to deliver the pre-game invocations for the entire year.[81] The majority stated that the election mechanism used by the school actually limited the types of messages that could be communicated by the students.[82] Justice Stevens explained, "Santa Fe's student election system ensures that only those messages deemed appropriate under the District's policy may be delivered. That is, the majoritarian process implemented by the District guarantees, by definition, that minority candidates will never prevail and that their views will be effectively silenced."[83]

Second, the Court found that the School District policy endorsed religion, even though "[t]he District has attempted to disentangle itself from the religious messages by developing the two-step election process."[84] To make this determination, the majority looked to the language of the policy, which provided that the election takes place only because the School District permits students to give an invocation or message.[85] According to the Court, the government endorsed religion, because:

> [T]he policy, by its terms, invites and encourages religious messages. The policy itself states that the purpose of the message is 'to solemnize the event.' A religious message is the most obvious method of solemnizing an event. The only type of message that is expressly endorsed in the text is an 'invocation.'[86]

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79. *Id.* at 2275.

80. *Id.*

81. *Id.* at 2276. The majority reasoned, "[t]he 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." (citing Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 270 (1988).

82. *Id.* at 2276.

83. *Id.*

84. *Id.* at 2277.

85. *Id.* at 2273; *see also supra* note 13.

86. Santa Fe Indep. Sch. Dist. v. Jane Doe, 120 S. Ct. 2266, 2277-78 (2000). Justice Stevens went further and explained that an invocation is:

> [A] term that primarily describes an appeal for divine assistance. In fact, as used in the

The majority also looked to the circumstances and context in which the speeches would be given to show how the School District endorsed religion.[87] According to the Court, since the student would give the speech at a school-sponsored program where the school remained in control of every aspect of the program, there would be an appearance of school sponsorship of the prayer.[88] Justice Stevens explained, "[r]egardless of the listener's support for, or objection to, the message, an objective Santa Fe High School student would unquestionably perceive the inevitable pregame prayer as stamped with her school's seal of approval."[89] The majority also stressed that:

> [H]istory indicates that the District intended to preserve the practice of prayer before football games. The conclusion that the District viewed the October policy simply as a continuation of the previous policies is dramatically illustrated by the fact that the school did not conduct a new election, pursuant to the new policy, to replace the results of the previous election, which occurred under the former policy. [90]

According to the Court, it is reasonable to infer from the school's history of sponsoring pre-game prayer that the purpose of the policy was to endorse a religion.[91]

Third, the Court found that the policy impermissibly coerced participation in a religious exercise, since attendance at a football game is not as voluntary as the School District would have the Court believe.[92] The majority again stated that the election process failed to insulate the School District from responsibility, since it "[r]eflects a device put in place that determines whether religious messages will be delivered at home games."[93] The Court added:

> past at Santa Fe High School, an "invocation" has always entailed a focused religious message. Thus, the expressed purposes of the policy encourage the selection of a religious message, and that is precisely how the students understand the policy.

Id.

87. *Id.* at 2278.
88. *Id.*
89. *Id.*
90. *Id.* at 2279. The court pointed out that the evolution of the current policy from the long sanctioned office of Student Chaplain to the Prayer at Football Games regulation, combined with the fact no new election was held after the implementation of the final policy leads to the conclusion that the School District intends to continue the use of a government endorsed religious practice. *Id.*
91. *Id.* at 2279.
92. *Id.* at 2280.
93. *Id.*

> The mechanism encourages divisiveness along religious lines in a public school setting, a result at odds with the Establishment Clause. Although it is true that the ultimate choice of student speaker is 'attributable to the students,' the District's decision to hold the constitutionally problematic election is 'a choice attributable to the State.'[94]

The Court then stated that attendance at a football game is not voluntary for cheerleaders, players, and members of the band.[95] The majority also relied heavily on the fact that, for many students, social pressure to attend these games is just as significant as official pressure applied by the School District.[96]

Finally, the Court applied the *Lemon* test and found the policy itself facially deficient, because it had no legitimate secular purpose.[97] Although there had been no prayer delivered under the policy, the Court stated that the policy's text, standing alone, showed an unconstitutional purpose.[98] According to Justice Stevens:

> The text of the October policy alone reveals that it has an unconstitutional purpose. The plain language of the policy clearly spells out the extent of school involvement in both the election of the speaker and the content of the message. Additionally, the text of the October policy specifies only one, clearly preferred message—that of Santa Fe's traditionally religious invocation.[99]

To show the lack of a secular purpose, the Court looked to the history of the policy and the circumstances surrounding the litigation.[100] The ma-

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94. *Id.* (citing Lee v. Weisman, 505 U.S. 577, 587 (1992)).
95. *Santa Fe Indep. Sch. Dist.*, 120 S. Ct. at 2280.
96. *Id.* The majority stated:

> High School football games are traditional gatherings of the school community; they bring together students and faculty as well as friends and family from years present to past to root for a common cause. . .. The choice between whether to attend these games or to risk facing a personally offensive religious ritual is in no practical sense and easy one. The Constitution, moreover, demands that the school may not force this difficult choice upon these students for 'it is a tenant of the first amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state sponsored religious practice.' (citing Lee v. Weisman, 505 U.S. 577, 596 (2000)).

Id.

97. *Santa Fe Indep. Sch. Dist.*, 120 S. Ct. at 2281.
98. *Id.* at 2282.
99. *Id.*
100. *Id.* Justice Stevens stated that an invocation is not even needed to solemnize a

jority stated that "the simple enactment of this policy, with the purpose and perception of school endorsement of student prayer, was a constitutional violation. We need not wait for the inevitable to confirm and magnify the constitutional injury."[101] The Court again stated that the election process used by the School District was a constitutional violation, since the electoral process turned a school into a forum for a religious debate.[102]

The Dissent

Chief Justice Rehnquist, joined by Justices Scalia and Thomas, found that the majority not only neglected precedent, but distorted the true meaning of the Establishment Clause.[103] First, the dissent criticized the use of the *Lemon* test to invalidate the policy before a student delivered a message pursuant to the policy.[104] Second, Chief Justice Rehnquist reasoned that even under the *Lemon* test the policy would survive, because the elections deciding what speech to give and who will deliver the messages were not about prayer at all.[105] Finally, the dissent stated that there was no precedent supporting the majority's seeming demand that, to avoid being considered an endorsement of religion, a policy must be completely neutral.[106]

The dissent reasoned that in Establishment Clause cases the question that must be answered is not whether the policy *might* be applied in violation of the Establishment Clause, but whether the policy

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football game and the selection of a single student to give messages for the entire year is not essential to protect free speech. *Id.* Looking at the context of the policy and the school removes any doubt that the policy was enacted to endorse school prayer. *Id.*

101. *Id.*

102. *Id.* at 2283. The majority reasoned that "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." *Id.*

103. *Id.* at 2283-84 (Rehnquist, C.J., dissenting). Rehnquist stated:

> The Court distorts existing precedent to conclude that the school district's student-message program is invalid on its face under the Establishment Clause. . . . Even more disturbing than its holding is the tone of the Court's opinion; it bristles with hostility to all things religious in public life. Neither the holding nor the tone of the opinion is faithful to the meaning of the Establishment Clause.

Id. (Rehnquist, C.J., dissenting).

104. *Id.* at 2284 (Rehnquist, C.J., dissenting).

105. *Id.* at 2285 (Rehnquist, C.J., dissenting).

106. *Id.* at 2287 (Rehnquist, C.J., dissenting).

will inevitably be applied in an unconstitutional manner.[107] The dissent stated that the majority used the "most rigid version of the oft criticized *Lemon* test" to invalidate the statute; therefore the majority did not properly use the test since the *Lemon* test is supposed to be a guide, not a bright-line test.[108]

The dissent then stated that even under the *Lemon* standard the policy was not invalid on its face.[109] Chief Justice Rehnquist reasoned that the election was not about prayer and religion; it was about who the speaker would be. The dissent observed that it was possible that no prayer would ever be given under the policy, and that the students could have chosen a speaker on wholly secular grounds.[110] Chief Justice Rehnquist wrote, "it is possible that the students might not vote to have a pregame speaker, in which case there would be no threat of a constitutional violation. It is also possible that the election would not focus on prayer, but on public speaking ability or social popularity."[111] Moreover, the dissent stated that the instant case is distinguishable from *Lee*, because the issue in *Lee* was government speech; in this case the students chose the speaker and the speaker chose the content of the speech, therefore the speech was private.[112]

The dissent went on to state that the policy itself had a plausible secular purpose, solemnizing a sporting event and promoting good sportsmanship.[113] Chief Justice Rehnquist reasoned that, "[w]here a government body 'expresses a plausible secular purpose' for an enactment, 'courts should generally defer to that stated intent.'"[114] According to the dissent, "[t]he Court grants no deference to—and appears openly hostile toward—the policy's stated purposes, and wastes no time in concluding that they are a sham."[115] The dissent also pointed out that the School District went further than necessary to keep from endorsing prayer.[116]

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107. *Id.* at 2284 (Rehnquist, C.J., dissenting).

108. *Id.* at 2284 n.1 (Rehnquist, C.J., dissenting). Chief Justice Rehnquist reasoned that while the majority rightly pointed out that in facial challenges in the Establishment Clause context the Court looked to *Lemon* as a guide, the majority applied the test so stringently and struck down the policy on its face in anticipation of an unconstitutional application of the policy, which earlier case law warned against doing. *Id.* (Rehnquist, C.J., dissenting).

109. *Id.* at 2285 (Rehnquist, C.J., dissenting).

110. *Id.* (Rehnquist, C.J., dissenting).

111. *Id.* (Rehnquist, C.J., dissenting).

112. *Id.* at 2287 (Rehnquist, C.J., dissenting).

113. *Id.* at 2286 (Rehnquist, C.J., dissenting).

114. *Id.* (Rehnquist, C.J., dissenting) (citing Wallace v. Jaffree, 472 U.S. 38 (1985)).

115. *Id.* (Rehnquist, C.J., dissenting).

116. *Id.* (Rehnquist, C.J., dissenting).

The School District allowed a message or invocation when all the district court ordered was that it include the limiting "non-sectarian, non-proselytizing language."[117]

Finally, the dissent pointed out that the majority seemed to demand that a government policy be content neutral, and that this has never been a requirement under the Court's endorsement test or any other test.[118] The dissent reasoned that only in free speech cases is strict scrutiny applied to content-based restrictions.[119]

ANALYSIS

The Court decided correctly that the School District's policy allowing pre-game prayer violated the Establishment Clause. However, the Court's division on issues concerning the relationship between the government and religion forced Justice Stevens to apply all three tests in order to get the six-member majority.[120] Unfortunately the Court's reluctance to adopt and consistently use one test makes it difficult for school districts to develop policies in conformance with Supreme Court decisions concerning school prayer.

Overlap of Tests to Get the Desired Result

(a) Accommodation but not Coercion

One approach the Court takes when interpreting the Establishment Clause is the accommodation approach. "Under this view, the Court should interpret the establishment clause to recognize the importance of religion in society and accommodate its presence in government."[121] Conversely, the government violates the Establishment Clause only if it literally establishes a church or coerces participation.[122] According to adherents of this approach, "[t]he purpose of a religious accommodation is to relieve the believer—where it is possible to do so without sacrificing significant civil or social interests—from the conflicting claims of religion and society."[123]

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117. *Id.* (Rehnquist, C.J., dissenting).
118. *Id.* at 2287 (Rehnquist, C.J., dissenting).
119. *Id.* at 2288 (Rehnquist, C.J., dissenting).
120. *See* Santa Fe Independent School Dist. v. Jane Doe, 120 S. Ct. 2266 (2000). Justice Stevens relied on the coercion test, the endorsement test, and the *Lemon* test. *Id.*
121. CHEMERINSKY, *supra* note 54, at 981.
122. *Id.*
123. Michael W. McConnell, *Accommodation of Religion*, 85 SUP. CT. REV. 1, 26 (1985).

The accommodation approach is the most amicable to religion. Nonetheless, there is a limit to what actions are allowed. The purpose of accommodation is to enable a person to practice her faith, not to coerce or induce a person to adopt a religious practice she would not freely choose.[124] In *Lee v. Weisman,* Justice Kennedy espoused the view that while religion should be accommodated, a policy coercing non-adherent participation would fail.[125] Prayer exercises are coercive, and therefore improper, when the state compels attendance and participation in a religious exercise at an event of importance to students, and objecting students have no choice but to attend.[126] Since the School District compelled some student participation in a religious event, Justice Kennedy agreed with Justice Stevens that the School District coerced student participation in a religious event, and therefore the policy could not pass constitutional muster.[127]

The School District argued that coercion was lacking because attendance at a high school football game is voluntary.[128] In arguing that students can easily choose not to attend a game if they find the pre-game prayer objectionable, the School District asked the Court to ignore the importance and influence of Texas high school football to students, parents, and the community.[129] Justice Kennedy reasoned in *Lee* that social pressure to attend a school-sponsored event, during which a religious

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124. *Id.* at 35.

125. 505 U.S. 577, 592 (1992). *See also* Ira C. Lupu, *The Lingering Death of Separatism*, 62 GEO. WASH. L. REV. 230, 255 n.197 (1994) and accompanying text.

126. *Id.* at 598. *See also infra* note 129.

127. Brief for Respondent at 32, Santa Fe Indep. Sch. Dist. v. Jane Doe, 120 S. Ct. 2266 (2000) (No. 99-62) [hereinafter Brief for Respondent]. A significant number of students are compelled to attend by the School District's policy. *Id.* The parties stipulated that cheerleaders and band members are required to attend the pre-game ceremonies, including the prayer. *Id.* Band is a course that some students receive academic credit for attending. *Id.*

128. Santa Fe Indep. Sch. Dist. v. Jane Doe, 120 S. Ct. 2266, 2279 (2000).

129. *Three Cheers for High School Football*, TEXAS MONTHLY MAGAZINE, 111 (1999), *available at* www.texasmonthly.com/mag/1999/oct/footballintro.html (last visited Nov. 12, 2000).

> It's a game, an extracurricular activity, a community bond, the state religion, the biggest show in town every Friday night in the fall, a character builder, a revered symbol, an inspirational rallying point that offers a rare moment. . . . Texas high school football remains one of the few institutions that distinguishes us from the rest of the universe. We have more coaches, band members, cheerleaders, and pep squads than anyone else. Our fans are more fanatical. Our boosters are more loyal. Our parents are more passionate.

Id. See also H.G. BISSINGER, FRIDAY NIGHT LIGHTS: A TOWN, A TEAM, AND A DREAM (1990) (explaining the importance of high school football in many Texas communities).

message is given, is just as impermissible as direct pressure from a government entity.[130]

Like the students in *Lee*, non-adherent Santa Fe students who do not agree are pressured, not only by the school, but the public and their peers, to comply with the policy and take part in the pre-game ceremonies.[131] According to *Lee*, this type of indirect coercion is as impermissible as direct government coercion.[132] The social pressure in the present case is even more coercive than the social pressure in *Lee*, because the School District allowed the majority to force its views on the minority through the use of a school sponsored election.[133] The election permitted the majority to convey its religious views while leaving those with minority religious opinions without a forum to espouse their views.[134] While a person's religious belief should be accommodated, instituting a mechanism that accommodates only one religious practice while forcing those who disagree to conform is coercive and improper.[135]

Pressure to attend the ceremonies and participate in the religious exercises was especially strong in this case, because non-adherence to the religious exercises lead to harassment from peers and school officials.[136] Due to these coercive pressures exacted on the students, it is clear that Justice Kennedy agreed with Justice Stevens that the policy was coercive in nature, and therefore unconstitutional.

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130. *Lee*, 505 U.S. at 593. *See also supra* note 70, and accompanying text.

131. *See infra* note 136.

132. *Lee*, 505 U.S. at 592.

133. Santa Fe Indep. Sch. Dist. v. Jane Doe, 120 S. Ct. 2266, 2273 (2000). *See supra* note 13.

134. Bd. of Regents of Univ. of Wisconsin Sys. v. Southworth, 120 U.S. 1346, 1357 (2000). The Court in explaining the problematic nature of elections that determine which activities receive school support noted:

> 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 . . . does not depend on majoritarian consent. That principle is controlling here.

Id.

135. *Lee*, 505 U.S. at 592-93.

136. Brief for Respondent, *supra* note 127, at 2. "There was uncontradicted evidence of verbal harassment of students who declined to accept Bibles or objected to prayers and religious observances in school." *Id.* "One witness—not a plaintiff—began home-schooling her youngest daughter to avoid persistent verbal harassment, with pushing and shoving, over issues of religion in the public school." *Id.*

(b) Policy Lacks Neutrality and Endorses Religion

The second Establishment Clause approach seeks neutrality towards religion; "that is, the government cannot favor religion over secularism or one religion over others."[137] Justice O'Connor is the key proponent of the no-endorsement approach, which is meant to keep the government from favoring any particular religion or religious practice.[138] Under this approach, the School District's policy could not survive. Prior to 1995, an elected student, the student council chaplain, delivered prayers over the public address system before each home varsity football game. It was only after this practice was challenged in court that the School District made any attempt to develop a less-religiously oriented policy.[139] Thus, it appears that at the very least, the School District policies favored religion over secularism, and by definition violate Justice O'Connor's endorsement approach, which seeks to prevent this type of favoritism.[140]

Until there is clear evidence of a new purpose, the historic purpose of endorsing prayer is presumed to continue.[141] The School District claimed that its purpose was to promote free speech and that invalidating the policy would force the school to censor student speech.[142] The policy language does not support the School District's claimed purpose, because the policy only allows one student to speak for the entire season. In addition, the only expressly authorized message is an invocation.[143] Not only is an invocation generally regarded as a religious type of message, the School District's history indicates that invocation means religious message.[144] The School District's history of encouraging prayer,

137. CHEMERINSKY, *supra* note 54, at 978.
138. *See* Lynch v. Donnelly, 465 U.S. 668 (1984) (O'Connor, J., concurring).
139. Santa Fe Indep. Sch. Dist. v. Jane Doe, 120 S. Ct. 2266, 2272 (2000).
140. *Lynch*, 465 U.S. at 687-94 (O'Connor, J., concurring).
141. Friends of the Earth, Inc. v. Laidlaw Environmental Servs. (TOC), Inc., 120 S. Ct. 693, 708-709 (2000). This common-sense proposition is implicit in the Court's cases holding that where a defendant has abandoned unlawful conduct in the face of litigation, that defendant bears a "heavy burden" of showing that defendant will not resume the illegal conduct. *Id.* at 708. The presumption that a defendant might resume the illegal conduct necessarily entails a presumption of continuing purpose to do so, and that a continuing purpose to do so may of course be manifested in slightly altered and allegedly lawful conduct. *Id.* at 709.
142. Brief for Appellant at 44-45, Santa Fe Indep. Sch. Dist. v. Jane Doe, 120 S. Ct. 2266 (2000) (No. 99-62) [hereinafter Brief for Appellant]. "Santa Fe 'has chosen to permit' student-initiated, student-delivered speech during pre-game ceremonies of home varsity football games. . . . To strike that policy down would be to interpret the Establishment Clause as imposing an affirmative obligation on the states to *censor* religious speech where other speech is allowed." *Id.*
143. *See supra* note 13.
144. WEBSTER'S 3D NEW INTERNATIONAL DICTIONARY, 1190 (3d ed. 1993). "Invoca-

combined with the fact that the School District retained the most religion friendly policy for as long as possible, is evidence that the true purpose of the policy was to continue sponsorship of religious activities at school.[145]

According to Justice O'Connor, the endorsement test focuses on the perception of the reasonable observer.[146] A reasonable observer at a school sponsored football game, knowing the importance of prayer to the School District, would view the prayer given as sponsored by the School District. According to one amicus curia brief:

> After sitting in the high school football stadium, hearing the announcer call the crowd to order and introduce the student offering the prayer, watching the crowd stand together in an attitude of reverence, and listening to the prayer over the school's loud speaker system, any reasonable observer would inescapably conclude that the Santa Fe Independent School District endorses the religious act of prayer.[147]

Justice O'Connor could not validate the prayer under her no-endorsement analysis because a reasonable observer would perceive the prayer as delivered with the permission of, and on behalf of, the school

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tion" is defined as "a prayer of entreaty that is usually a call for the divine presence and is offered at the beginning of a meeting or service of worship." *Id. See also* Santa Fe Indep. Sch. Dist. v. Jane Doe, 120 S. Ct. 2266, 2272 n.4 (2000).

> The student giving the invocation thanked the Lord for keeping the class safe through 12 years of school and for gracing their lives with two special people and closed: 'Lord, we ask that You keep Your hand upon us during this ceremony and to help us keep You in our hearts through the rest of our lives. In God's name we pray. Amen.' (citing *App.* 54).

Id.

145. Brief for Respondent, *supra* note 127, at 36. "The Court of Appeals concluded that the claimed secular purpose is a sham." *Id. See also Santa Fe Indep. Sch. Dist.*, 120 S. Ct. at 2279. The Court stated, "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 was to preserve a popular 'state-sponsored religious practice.' " (quoting *Lee v. Weisman*, 505 U.S. 577, 596 (1992)). *Id.*

146. Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 773 (1995) (O'Connor, J., concurring). Justice O'Connor stated that the endorsement test focuses upon the perception of a reasonable, informed observer; moreover this observer "must be deemed aware of the history and context of the community and forum in which the religious display appears." *Id.* at 780.

147. Brief Amicus Curai for the Baptist Joint Committee on Public Affairs, et al. at 7, Santa Fe Indep. Sch. Dist. v. Jane Doe, 120 S. Ct. 2266 (2000) (No. 99-62).

officials.[148] Therefore, she joined Justice Steven's opinion, which relied heavily on the endorsement test.

(c) Separationists hold onto the *Lemon* Test

The strict separation approach is the final major approach used by the Supreme Court when determining Establishment Clause questions. Justices who favor the strict separation approach, including Justice Stevens, also favor using the *Lemon* test.[149] Justice Stevens easily found the policy violated the first prong of the test, which requires that a policy allowing prayer have a legitimate secular purpose.[150] Because the policy, on its face, specifically allowed only an invocation, and since invocation meant prayer to everyone involved, the policy had no secular purpose and was unconstitutional.[151]

Although a separationist, Justice Stevens could not rely solely on the *Lemon* test and to get one majority opinion speaking for the Court.[152] Justice Stevens was careful to rely heavily on both the endorsement test and the coercion test to get the important swing votes of Justices O'Connor and Kennedy.[153] Although the case law on school prayer does

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148. Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 773 (1995) (O'Connor, J. concurring).

149. CHEMERINSKY, *supra* note 54, at 986; *see also* Lupu, *supra* note 125, at 255 n.197 (1994) and accompanying text (reasoning that Justice Stevens is still rather "staunchly separationist").

150. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

151. Wallace v. Jaffree, 472 U.S. 38, 66 (1985) (O'Connor, J., concurring). If the law was enacted for the purpose of endorsing religion, the secular purpose prong is not met, and "no consideration of the second or third criteria is necessary." *Id.*

152. *See* Lee v. Weisman, 505 U.S. 577 (1990). Kennedy chose not to use the *Lemon* analysis and instead chose to use a coercion analysis to evaluate school prayer cases. *See also* Lynch v. Donnelly, 465 U.S. 668, 689 (1984) (O'Connor, J., concurring) (explaining why the endorsement test provides a more helpful analysis than the strict *Lemon* test).

153. *Lee*, 505 U.S. 577. This opinion shows Justice Kennedy follows the accommodation approach and favors the coercion test. Had Justice Stevens relied sole on *Lemon* Justice Kennedy, if agreeing with the result, likely would have not joined the Stevens's opinion, but concurred and used the coercion analysis. Moreover, if Justice Stevens relied solely on the endorsement test, it is also unlikely that Justice Kennedy would have joined the opinion. *See* Lynch v. Donnelly, 492 U.S. 668, 668-78 (Justice Kennedy concurring in the judgment in part and dissenting in part). In his concurring opinion, Justice Kennedy levels criticism at Justice O'Connor's endorsement test and shows his preference to the coercion analysis. *See* Lee v. Weisman, 505 U.S. 577, 604 (1992) (Blackmun, J., concurring). Justice O'Connor agreed with Justice Blackmun's concurring opinion which stated, "[p]roof of government coercion is not necessary to prove an Establishment Clause violation. The court has repeatedly recognized that a violation of the Establishment Clause is not predicated on coercion." *Id.* Since Justice O'Connor

not show the specific approaches that Justices Souter, Ginsburg, and Breyer favor, it does seem that one thing is clear: each of their views fall somewhere between strict separation and accommodation, and none of them are as deferential to policies that allow prayer as Justices Scalia, Rehnquist, and Thomas.[154] As a result, Justice Stevens used a conglomerate of all three tests such that each of the six majority Justices could find a part of the opinion that conformed to his or her view on school prayer.

Endorsing the Endorsement Test

Although the Court decided *Santa Fe* correctly, the decision does little to create a coherent standard for school districts to follow. Due to the fact that all of the tests are presently valid, and because the Court seems to apply whichever test will get the desired result in a particular setting, many scholars have written to explain, praise, and criticize the tests themselves and the confusing application of these tests.[155]

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seems to agree with the proposition that coercion is not needed to show a violation, it is unlikely that even if she agree with the ultimate result that the policy was unconstitutional she would have agreed with using only the coercion analysis.

154. *Lee*, 505 U.S. 577 (Souter, J., concurring). In his concurring opinion, Justice Souter expressed the view that government sponsorship of prayer at a graduation ceremony is best understood of endorsement of religion, and coercion is not necessary to a successful Establishment Clause claim. *See also* Lupu, *supra* note 125, at 255 n.197. The center will be controlled by Souter and Ginsburg, whose views on permissive accommodation remain unknown. *Id.*

155. *See* Jeremy T. Bunnow, Note, *Reinventing the Lemon: Agostini v. Felton and the Changing Nature of Establishment Clause Jurisprudence*, 1998 WIS. L. REV. 1133 (1998); Harriet Grant, Note, *Lynch v. Donnelly: The Disappearing Wall*, 63 N.C. L. REV. 782 (1985); Paula Savage Cohen, *Psycho-Coercion, A New Establishment Clause Test: Lee v. Weisman and its Initial Effect*, 73 BOSTON UNIVERSITY L. REV. 501 (1993); Penny J. Meyers, *Lemon is Alive and Kicking: Using the Lemon Test to Determine the Constitutionality of Prayer at High School Graduation Ceremonies*, 34 VAL. U. L. REV. 231 (1999); Kristin J. Graham, Comment, *The Supreme Court Comes Full Circle: Coercion as the Touchstone of an Establishment Clause Violation*, 42 BUFF. L. REV. 147 (1994); Carole F. Kagan, *Squeezing the Juice from a Lemon: Toward a Consistent Test for the Establishment Clause*, 22 N. KY. L. REV. 621 (1995); Ronald C. Khan, *Religion and the Public Schools After Lee v. Weisman: God Save Us From the Coercion Test: Constitutive Decision Making, Polity Principles, and Religious Freedom*, 43 CASE W. R. L. REV. 983 (1993); Gary J. Simson, *The Establishment Clause in the Supreme Court: Rethinking the Courts Approach*, 72 CORNELL L. REV. 905 (1987); Harlan A. Loeb, *Suffering in Silence: Camouflaging the Redefinition of the Establishment Clause*, 77 O. L. REV. 1305 (1998); Richard J. Ansson Jr., *Drawing Lines in the Shifting Sand: Where Should the Establishment Wall Stand? Recent Developments in Establishment Clause Theory: Accommodation, State Action, the Public Forum, and Private Religious Speech*, 8 TEMP. POL. & CIV. RTS. L. REV. 1 (1998); Daniel O. Conkle, Symposium, *Religion and the Public Schools After Lee v. Weisman: Lemon Lives*, 43 CASE W. RES. L. REV. 865, (1993); Jessica Smith, *Student-Initiated Prayer: Assessing the Newest Initiatives to*

This confusion spills over into the rest of the court system and leads to various applications of the tests and differing decisions among courts throughout the different circuits.[156] Since the courts do not apply the tests consistently, school boards have no clear boundaries for drafting policies dealing with prayer.[157] Had the Court in *Santa Fe* taken the opportunity to use one test instead of all three to decide this case, school districts would have more definite guidelines to follow when drafting policies, and courts would have a consistent test to use if these policies are challenged.

Although criticized, the endorsement test is the most preferable approach. The endorsement test is broad enough and flexible enough to encompass the Court's understandable concerns about subtle and overt coercive pressures that violate an individual's freedom to believe or not to believe the religious precepts advanced by a challenged government action. If a government action endorses or disapproves of a particular religion, then the policy, by definition, does not have a secular purpose and therefore violates the Establishment Clause.[158] As a result, when a school district drafts a policy concerning prayer, the school district must be sure that the policy in no way advances or supports a particular religious belief or practice by words or by actions.

Unfortunately, reality shows that when the Supreme Court delivers a school prayer decision, school districts interpret the decision in a way that allows them to continue to implement prayer policies, many of which could be viewed as impermissible.[159] Continued backlash from the

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Return Prayer to the Public Schools, 18 CAMPBELL L. REV. 303 (1996).

156. Applying each of the tests has become common in cases dealing with prayer in public schools. *See* Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963, (5th Cir. 1992) (applying the *Lemon* test, the endorsement test, and the coercion test to hold that non-sectarian, non-proselytizing prayer at graduation ceremonies constitutional); ACLU v. Black Horse Pike Reg'l Bd. of Educ., 84 F.3d 1471 (3d Cir. 1996) (discussing each prong of the *Lemon* test, the endorsement test, and the coercion test); Ingebretsen v. Jackson Public Sch. Dist., 88 F.3d 274 (5th Cir. 1996) (discussing each prong of the *Lemon* test, the endorsement test, and the coercion test); Doe v. Duncanville Indep. Sch. Dist., 994 F.2d 160, 166 n.7 (5th Cir. 1993) (explaining its rejection of the *Lemon* test, and using a "case-bound, fact sensitive approach based on analogy to Supreme Court decisions); Gearon v. Loudoun County Sch. Bd., 844 F. Supp. 1097 (1993) (applying the *Lemon* test to strike down a statute for lack of secular purpose.); Alder v. Duval County Sch. Bd., 851 F. Supp. 446 (M.D. Fla. 1994), *aff'd* 112 F.3d 1475 (11th Cir. 1997) (applying the *Lemon* test and the coercion test to determine the policy in question had a secular purpose and did not coerce non-adherents).

157. *See supra* note 156; *see also infra* notes 160-61.

158. *Lynch v. Donnelly*, 465 U.S. 642, 690 (1984).

159. Brief For Respondent, *supra* note 127 at 28-29. "After *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963, and following a student vote to authorize the practice,

Santa Fe decision shows that many people do not agree with the Court's ruling, and issues concerning school prayer are still hotly contested.[160] Around the country, school districts are defying or circumventing the *Santa Fe* decision by using various methods to continue the practice of pregame prayer.[161] The situation is analogous to the attempts made by school districts to circumvent earlier school prayer decisions by attempting to delegate responsibility to the students.[162] A strict standard is

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Wingfield High School in Jackson, Mississippi began opening each day with prayer 'over the school intercom system to all students who, during which, were required to remain at their desks.' " (quoting Ingebretsen v. Jackson Pub. Sch. Dist., 864 F. Supp. 1473, 1478 (S.D. Miss. 1994), *aff'd* 88 F.3d 274 (5th Cir. 1996)). *Id.* at 28.

> The Mississippi legislature responded to the ensuing controversy with its School Prayer Statute, authorizing non-sectarian student-initiated voluntary prayer at all school-related events, whether compulsory or not. The School Prayer Statute assumed that if student-initiation works to privatize prayer at one official school event, it should work at any other school event.

Id. at 29.

160. Alicia Gooden, *Residents: Court fumbled prayer decision*, GALVESTON COUNTY: THE DAILY NEWS, (June, 2000), *available at* www.galvnews.com/NF/omf/freedail...08. (last visited Nov. 12, 2000). Following the Supreme Court decision, citizens on both sides of the debate voiced their opinion: Stephanie Vega, a student at Santa Fe: "was counting on the nation's high court to look out for the interests of the entire student body. 'I totally agree with the opinion' said the sixteen-year-old senior. 'You cannot impose your prayers on everybody.' " *Id.* Vega said the decision did not preclude students from praying by themselves. What it prohibited was praying before a captive audience using a taxpayer-funded public address system. " 'You can't shove prayer down people's throats,' she said." *Id.* Mary Key, did not agree, " 'I am very disappointed,' she said. 'Prayer should be allowed anywhere at any time.' To Key, the assertions of religious discrimination from the Mormon and Catholic families who originally filed the suit were unfounded. 'No one was shoving prayer down their throats. . . . They had the option to go or not to go to the football games. They did not have to listen to it.' " *Id.*

161. Timothy Roche, *Too Much Like A Prayer? Flouting a Supreme Court ban on the practice, football fans appeal to the Lord on game day.*, TIME, (Sept. 11, 2000), *available at* www.cnn.com/ALLPOLITICS/time/2000/09/18/prayer.html (last visited Nov. 12, 2000).

> As Friday-night lights begin to burn on another high school football season, a not-so-quiet revolution is emerging in Southern states. . . . In nearly two dozen season openers earlier this month, students and religious groups came up with ingenious ways to protest—and in some instances, defy—the court's decision.

Id. An example of this was seen in Yellville-Summit High School in Arkansas where fans "emptied from the bleachers two weekends ago and rushed to the fifty-yard line, kneeling and praying with the cheerleaders, who had traded their pom-poms for banners bearing biblical passages. The local school board, which had voted to test the limits of the court decision, helped organize the students." *Id.*

162. *See* Martha McCarthy, *Religion and Education: Whither the Establishment Clause*, 75 IND. L.J., Winter (2000); Colin Delaney, *The Graduation Prayer Cases: Coercion By Any Other Name*, 52 VAND. L. REV. 1783, (1999); Jessica Smith, "*Student-*

needed to keep future school boards from attempting to insulate themselves from review by delegating the decision about prayer to students through mechanisms such as elections. By authorizing an election regarding whether prayer will be part of a school-sponsored activity, a school board lets the majority decide what a person's fundamental rights are. This is impermissible since, as the Court has previously noted, "fundamental rights may not be submitted to vote; they depend on the outcome of no elections."[163] A policy that uses the machinery of the state to advance religion could not possibly satisfy the endorsement test, since school sanctioned voting over religious issues allows impermissible involvement with the process and impermissible endorsement of the religious message given by the student.[164] Therefore, the endorsement test is strict enough to prevent governmental bodies from insulating themselves from review through the use of various mechanisms such as elections, while at the same time allowing school districts to create prayer policies so long as the school district does not itself adopt the religious speech given as their own.

When analyzing a policy dealing with prayer, not only must a court determine whether the school district is trying to delegate their responsibility, it must also closely examine the stated secular purpose of the policy. When the secular purpose is questionable, a strict standard is needed to make sure a legitimate secular purpose exists.

Justice O'Connor believes that sometimes policy makers will produce a sham secular purpose for a policy, but she also believes that the Court is capable of determining a sham secular purpose from a legitimate one.[165] When it appears that the purpose is a sham, using the endorsement analysis is arguably the best way to analyze the issue, since the test redefines the secular purpose prong of the *Lemon* test.[166] Simply

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Initiated" Prayer: Assessing the Newest Initiatives to Return Prayer to the Public Schools, 18 CAMPBELL L. REV. 303, Summer (1996) (above articles discuss how school districts try to return prayer to public school settings by using various mechanisms such as elections to insulate themselves from judicial review).

163. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 628 (1943).

164. Brief for Respondent, *supra* note 127, at 24. "[A] government decision made by the voters is just as much a government decision as one made by their elected representatives." (relying on *Hunter v. Erickson*, 393 U.S. 385, 392 (1969)). *Id. See also* Lucas v. Forty-Fourth General Assembly, 377 U.S. 713, 336-37 (1964). "A citizen's constitutional rights can hardly be infringed because a majority of the people choose that it be." *Id. See also* Nixon v. Shrink, 120 S. Ct. 897, 908 (2000). "[M]ajority votes do not, as such, defeat First Amendment protections." *Id.*

165. Wallace v. Jaffree, 472 U.S. 65, 75 (2000) (O'Connor, J., concurring).

166. *Id.* at 75-76 (O'Connor, J., concurring).

put, if there is government endorsement the policy lacks a secular purpose.[167] If someone brings a suit to stop a religious activity, then obviously at least that person finds the practice offensive and a violation of his fundamental rights.[168] If the policy allowing the offensive practice is based on a sham secular purpose, then the policy cannot survive, since school endorsement of a particular religious practice "puts school age children who object in an untenable position."[169]

Using Justice O'Connor's endorsement approach to review prayer policies would hopefully discourage school boards from using delegation mechanisms and purporting sham secular purposes to endorse prayer. According to James Madison, "[i]t is proper to take alarm at the first experiment with our liberties."[170] The endorsement test is strict enough to prevent school districts from implementing programs that promote prayer. As a result applying this standard would go a long way toward insuring that a policy does not infringe on the rights of students who do not adhere to the religious beliefs or practices of the majority.

CONCLUSION

In *Santa Fe* the Court correctly found the School District's policy unconstitutional. Unfortunately, the Court analyzed the issue under all three Establishment Clause tests. As a result, the decision does not create a clear standard for lower courts or school districts to follow. As the law stands now, all three tests are valid and inconsistent decisions will therefore inevitably continue to make their way to the Supreme

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> [T]he *Lemon* inquiry into the effect of an enactment would help decide those close cases where the validity of the expressed secular purpose is in doubt. While the secular purpose requirement alone may rarely be determinative in striking down a statute, it nevertheless serves and important function. It reminds government that when it acts it should do so without endorsing a particular religious belief or practice that all citizens do not share. In this sense the secular purpose requirement is squarely based in the text of the Establishment Clause it helps to enforce.

Id.

167. *Id.*

168. *See* Engel v. Vitale, 370 U.S. 421, 423 (1962). Ten pupils brought suit alleging the use of official prayer in public schools was contrary to their religious beliefs. *Id.* *See also* Sch. Dist. of Abington Township v. Schempp, 374 U.S. 203, 205 (1963). The Schempp family, of Unitarian faith, brought suit to enjoin enforcement of a state statute requiring ten verses of the Holy Bible be read at the opening of every public school day. *Id.* *See also* Lee v. Weisman, 505 U.S. 577, 581-584 (1992). Deborah Weisman, age fourteen, brought suit through her next of friend, Daniel Weisman, to enjoin a school district policy allowing members of the clergy to deliver an invocation during graduation ceremonies. *Id.*

169. *Id.* at 590.

170. ALLEY, *supra* note 30, at 30.

Court. Had the Court taken the opportunity to use only the endorsement analysis, that uniform standard would have, at the very least, created less confusing Establishment Clause jurisprudence and given school districts one standard to abide by when drafting policies dealing with prayer in the school setting.

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