St. Mary's Law Journal

Volume 32 | Number 4 Article 3

1-1-2001

Religion in Public Schools: Let Us Pray - Or Not.

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Recommended Citation

Carolyn Hanahan & David M. Feldman, *Religion in Public Schools: Let Us Pray - Or Not.*, 32 ST. MARY'S L.J. (2001).

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ESSAY

RELIGION IN PUBLIC SCHOOLS: "LET US PRAY"—OR NOT

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I. Introduction 882
II. The Creation and Evolution of the Law Governing Prayer in Public Schools 883

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A. In the Beginning 886
B. And Then Came a Three-Part Test 887
C. The Moment of Silence 891
D. A New Test Emerges 892
E. A Hallowed Tradition Confronts All the Tests 893
III. Variations on the Theme—Prayer at Activities 897
A. A Recent Attempt to Return Prayer to School 898
B. *Santa Fe Independent School District v. Doe*: Prayer at Sporting Events 900
C. Still Some Rivers to Cross 905
1. *Chandler v. James* 905
2. *Adler v. Duval County School Board* 907
3. *Cole v. Oroville Union High School District* 907
D. Prayer at Board Meetings . . . the Answer Is Unclear 909
IV. Conclusion 910

I. Introduction

Of the many heated debates in America, the role of religion in public schools is perhaps the most divisive. Legal scholars and lay people alike have firm opinions about religion and schools, and there may be as many opinions as there are individuals. The debate will likely continue unabated, for religion represents not only a personal and emotional issue, but also a legal one. The result required by the law does not always correspond to what some think the result should be. The sources of the debate, the First Amendment's Free Exercise and Establishment Clauses, require a delicate balance.[1] On the one hand, the Free Exercise Clause expressly protects the free exercise of personal religious beliefs.[2] On the other, the Establishment Clause prohibits the state from propagating any one religion as the official belief.[3]

This Essay addresses judicial interpretation and application of the religious protections of students in public schools. Part II ad-

1. *See* T.C. Mattocks, Ph.D., *Reflections on* Santa Fe v. Doe*: Is Student Prayer at Graduation Still an Option?*, EDUC. L. REP., Mar. 15, 2001, at 333 (recognizing the delicate balance between the Establishment and Free Exercise clauses), WL 150 WELR 333.

2. U.S. CONST. amend. I (stating that, "Congress shall make no law . . . prohibiting the free exercise [of religion]").

3. *Id.* (expressing that, "Congress shall make no law respecting an establishment of religion").

dresses the evolution of law governing prayer in public schools, including the creation of judicial tests utilized in determining whether a school district has impeded the rights of students in the area of religion. Part III examines the application of these tests to various activities, including a discussion of the disparity in judicial interpretation with respect to the permissibility of prayer at public school functions. This Essay concludes with discussion analyzing the effect of the recent Supreme Court decision, *Santa Fe Independent School District v. Doe.*[4] In a post-*Santa Fe* world, students may pray privately[5] or as long as such prayer does not disrupt the pedagogical goals of the school,[6] but students may not pray if others would interpret the religious speech as sanctioned by the school.[7]

This Essay contends that recent Supreme Court precedents represent the Court's attempt to maintain a precarious balance between the Establishment and Free Exercise Clauses, and not an attempt to impose any political agenda. Through an objective observation of judicial holdings, this Essay comes to the conclusion that both the courts and the United States Constitution demand religious neutrality on the part of government actors. Despite the beliefs of some, however, religious neutrality does not mean antireligion. Religious neutrality means respecting the religious rights of all students, not just the rights of those religious students who wish to publicly pray.

II. THE CREATION AND EVOLUTION OF THE LAW GOVERNING PRAYER IN PUBLIC SCHOOLS

The First Amendment to the United States Constitution contains several important protections, two of which focus on religious liberty. One such clause prohibits the establishment of a state relig-

4. 530 U.S. 290 (2000).

5. *See* Santa Fe Ind. Sch. Dist. v. Doe, 530 U.S. 290, 313 (2000) (warning that "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").

6. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) (finding that schools can regulate student speech "so long as their actions are reasonably related to legitimate pedagogical concerns").

7. *See* Lee v. Weisman, 505 U.S. 577, 590 (1992) (finding against the use of a rabbi in a middle school graduation because his language had "the imprint of the State and thus put school-age children who objected in an untenable position").

St. Mary's Law Journal, Vol. 32 [2000], No. 4, Art. 3

ion, and another protects individuals' free exercise of religion.[8] These principles date back to the dawn of our country, yet judicial interpretation regarding the boundaries of these protections grew primarily during the 20th century.

Judicial constructions of the First Amendment have ebbed and flowed over the years, often in sync with trends in the popular culture and changes in the political personalities on the bench. Compiling the teachings of these various decisions offers guidance on a variety of matters, but unanswered questions still remain regarding religious activities in the public sector. The courts undoubtedly will continue to face new questions, especially regarding religious activities in public schools. Furthermore, recent popular opinion seems to support a return to prayer in public schools in an effort to revert back the "good old days," when morals are perceived as higher.

In June 2000, the United States Supreme Court handed down its latest word on prayer in schools with *Santa Fe Independent School District v. Doe*. In *Santa Fe* the Court reaffirmed a principle established more than thirty years before in *Engel v. Vitale*.[9] In *Engel* the Court found the Establishment Clause prohibits a local school district from taking affirmative steps to create a vehicle for prayer at a school function.[10] The *Santa Fe* decision reminded public schools that the Court keenly applies the First Amendment in the school setting. It is important to note, however, that as public schools struggle to assess their limits, so do the courts. This problem has existed for many years and no doubt will continue into the future.

The First Amendment presents a distinct challenge to schools and courts alike. The related and yet often contradictory forces inherent in the First Amendment create a tension that requires courts in many instances to consider two factors. Under the Estab-

8. *See* U.S. CONST. amend. I (stating that, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech"); *see also* Regina F. Speagle, Comment, *Waging War in America's Classrooms: Recognizing the Religious Rights of Children*, 31 CUMB. L. REV. 123, 125 (2000) (recognizing "no less than three constitutional protections" in the First Amendment which are embodied in the Free Exercise Clause, Free Speech Clause and the Establishment Clause).

9. 370 U.S. 421 (1962).

10. Engel v. Vitale, 370 U.S. 421, 424 (1962); *see also* Chandler v. Siegelman (Chandler II), 230 F.3d 1313 (11th Cir. 2000), *cert. denied*, 69 U.S.L.W. 3702 (U.S. June 18, 2001) (No. 00-1606) (discussing the court's application of the *Engel* principle and *Santa Fe*).

Hanahan and Feldman: Religion in Public Schools: Let Us Pray - Or Not.

lishment Clause, a court must consider whether the government has taken action that would tend to promote, advance, or sponsor a particular religion.[11] Under the Free Exercise Clause, the court must ensure that the government does not unduly burden an individual's right to exercise the religion of his or her choice.[12] When these two clauses clash, controversy often follows.[13]

The Supreme Court first considered the interrelationship of the Establishment Clause and the Free Exercise Clause in *Cantwell v. Connecticut*.[14] *Cantwell* established that the First Amendment applies equally to the federal government and the individual states, and that neither level of government can enact laws establishing a religion or prohibiting the free exercise thereof.[15] In so holding, the Court recognized the fundamental intent behind the First Amendment:

> In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.
>
> The essential characteristic of these liberties is, that under their shield many types of life, character, opinion and belief can develop unmolested and unobstructed. Nowhere is this shield more necessary than in our own country for a people composed of many races and of many creeds.[16]

11. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000).

12. *See* Sch. Dist. of Abington v. Schempp, 374 U.S. 203, 216-17 (1963) (declaring that the First Amendment distinctly separates religious activity from civil authority); *see also* David S. Stolle, Comment, *A Holy Mess: School Prayer, the Religious Freedom Restoration Act of Texas, and the First Amendment*, 32 St. Mary's L.J. 153, 157-63 (2000) (providing a historical overview of the jurisprudence governing both the Establishment and Free Exercise clauses).

13. *See Santa Fe*, 530 U.S. at 290.

14. 310 U.S. 296 (1940).

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

16. *Id.* at 310.

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St. Mary's Law Journal, Vol. 32 [2000], No. 4, Art. 3

Later, the Court confirmed that the Establishment Clause does more than forbid governmental preference of one religion over another. The Court interpreted the goal of the Establishment Clause as to completely separate religious activity from civil authority in an effort to obtain, or maintain, absolute neutrality on the part of the government.[17]

A. *In the Beginning*

The grandfather of school prayer decisions, *Engel v. Vitale*,[18] arose after a school district in New York adopted an official prayer.[19] The State Board of Regents promulgated the prayer to apply in all public schools.[20] At the beginning of each school day, schools required students to recite the following: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country."[21] In an attempt to accommodate all students, the school permitted students not wishing to recite the prayer either to remain silent or leave the classroom. Several parents, who claimed that the prayer was contrary to the religious beliefs of their children, brought suit against the district challenging the constitutionality of the practice.[22]

The Supreme Court agreed with the parents in stating that "[w]e think that by using its public school system to encourage recitation of the Regents' prayer, the State of New York has adopted a practice wholly inconsistent with the Establishment Clause."[23] The Court found the prayer constituted a religious activity, identifying the prayer as "a solemn avowal of divine faith and supplication for the blessings of the Almighty."[24] Although the prayer was admittedly non-denominational and voluntary, the Court concluded the district violated the Establishment Clause by composing and

17. Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 212 (1948) (upholding a state statute that reimbursed parents of parochial school children for bus transportation).

18. 370 U.S. 421 (1962).

19. Engel v. Vitale, 370 U.S. 421, 422 (1962).

20. *Id.* at 422-23.

21. *Id.*

22. *Id.* at 423.

23. *Id.* at 424.

24. 370 U.S. at 424.

promulgating a prayer to further specific religious beliefs.[25] The Court added that "[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."[26] The Court thus established government neutrality towards religion as the law of the land.

Another challenge followed closely on the heels of *Engel.* In *School District of Abington v. Schempp*,[27] Pennsylvania law required students to read at least ten verses from the *Bible* at the beginning of each school day. In *Abington*, schools read the verses over the loudspeaker followed by a recitation of the Lord's Prayer.[28] The Court found this practice unequivocally violated the Establishment Clause.[29] Furthermore, the Court held that prohibiting such activity would not violate the Free Exercise Clause.[30] The Court explained that "[w]hile the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to *anyone*, it has never meant that a majority could use the machinery of the State to practice its beliefs."[31] These cases demonstrate the initial balance struck between the Free Exercise and Establishment Clauses in school prayer cases. Within ten years, the Supreme Court established a test that continues to this day.[32]

B. *And Then Came a Three-Part Test*

In 1971, the Supreme Court handed down what would prove one of the most significant decisions regarding religion in public schools. While *Lemon v. Kurtzman*[33] is not a prayer case, courts adopted and repeatedly used the *Lemon* Test to evaluate the constitutionality of prayer policies. *Lemon* involved challenges to

25. *See id.* at 422-23, 430 (mentioning that the Court found unconstitutional the State Board of Regents' prayer, which was created for the "Statement on Moral and Spiritual Training in the Schools").

26. *Id.* at 431.

27. 374 U.S. 203 (1963).

28. Sch. Dist. of Abington v. Schempp, 374 U.S. 203, 204-05 (1963).

29. *Id.* at 223.

30. *Id.* at 225-26.

31. *Id.* at 226.

32. *See generally* Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (establishing what would become known as the *Lemon* Test).

33. 403 U.S. 602 (1971).

St. Mary's Law Journal, Vol. 32 [2000], No. 4, Art. 3

Rhode Island's use of public funding to increase the salaries of teachers who taught secular subjects in private, mostly religious, schools and to Pennsylvania's plan to reimburse private schools for expenses incurred in teaching secular subjects.[34] The Court maintained that the founders intended the Establishment Clause to protect against "three main evils"—the "sponsorship, financial support, and active involvement of the sovereign in religious activity."[35] The Court concluded by developing a three-part test to apply in determining whether an activity violates the Establishment Clause.[36] The Court drew the three elements of the test from "the cumulative criteria developed by the Court over many years."[37] The three elements ask:

1. Does the activity (whether policy, practice, or law) have a secular or nonreligious purpose?
2. Does the primary effect "neither advance[ ] nor inhibit[ ] religion?"
3. Does the activity "foster 'an excessive government entanglement with religion?'"[38]

In addressing the first and second parts of the test, the Court looked to the legislative history of the funding statutes in question.[39] The Court determined that under the first two prongs, the two states' plans sought "to enhance the quality of the secular education in all schools."[40] As to the third part, the Court explained that one must examine the "character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority."[41] By examining these characteristics the Court determined that, due to the overtly religious nature and purposes of the institutions benefiting from the funding, the statutes themselves created an excessive governmental entanglement with religion and were, therefore, unconstitutional.[42]

34. *Lemon*, 403 U.S. at 607-08.
35. *Id.* at 612 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970)).
36. *Id.* at 612-13.
37. *Id.* at 612.
38. *Id.* at 612-13.
39. *Lemon*, 403 U.S. at 613.
40. *Id.*
41. *Id.* at 615.
42. *Id.* at 615-16.

After *Lemon*, courts throughout the country began to diligently apply the three part test. Although beyond the scope of this Essay to examine all of the cases interpreting and/or following *Lemon*, a few cases exemplifying Lemon's application prove useful. For example, *Doe v. Aldine Independent School District*[43] provides a good example of the interaction between the Free Exercise and Establishment Clauses in a school prayer context. *Aldine* involved a challenge to a denominational prayer recited or sung at extracurricular activities.[44] The court addressed the dispute by responding to two interrelated questions: (1) whether the activities violated the Establishment Clause; and (2) whether restricting those activities violated the Free Exercise Clause.[45]

To determine whether the district violated the Establishment Clause, the court used the three-part *Lemon* test.[46] The secular purpose of the activity, the district argued, was to instill pride and advance school spirit.[47] The court concluded, however, that "[a] school district or other governmental body cannot seek to advance nonreligious goals and values, no matter how laudatory, through religious means," especially when nonreligious means are available.[48] As to the second part of the *Lemon* test, the court found that the primary effect of the activity advanced religion.[49] This conclusion rendered immaterial the degree of involvement by state employees and the entirely voluntary nature of the activity.[50]

Nevertheless, the court determined that the third element of *Lemon* also could not be satisfied.[51] The school district maintained that no excessive entanglement with religion arose because students did not recite the prayer during class time and the schools did not require attendance at the events in question.[52] Despite these

43. 563 F. Supp. 883 (S.D. Tex. 1982).

44. Doe v. Aldine Indep. Sch. Dist., 563 F. Supp. 883, 884 (S.D. Tex. 1982) (reciting the following prayer "Dear God, please bless our school and all it stands for. Help keep us free from sin, honest and true, courage and faith to make our school the victor. In Jesus' [sic] name we pray, Amen").

45. *Id.* at 885.

46. *Id.* at 885-86.

47. *Id.* at 886.

48. *Id.* (citing Sch. Dist. of Abington v. Schempp, 374 U.S. 203 (1963)).

49. *Aldine*, 563 U.S. at 887.

50. *Id.* at 886-87.

51. *Id.* at 888.

52. *Id.* at 887.

arguments, however, the court framed the relevant inquiry as whether the state must continue to supervise the religious activity.[53] Finding continuous supervision, the court determined that the activity also failed *Lemon*'s third element.[54]

In addition to arguing that the prayer did not violate the Establishment Clause under *Lemon*, Aldine also offered a Free Exercise Clause argument. Specifically, Aldine argued that to deny students the right to recite the prayer violates the students' right to exercise religion free from government interference.[55] The court answered the free exercise question by concluding the religious speech in question did not constitute the private type of speech protected by the Free Exercise Clause.[56] The court instead found the prayer a form of unprotected state-sponsored religious speech.[57]

Foreshadowing the events of *Santa Fe* the Eleventh Circuit, in *Jager v. Douglas County School District*,[58] reviewed a challenge to the longstanding tradition of invocations at high school football games.[59] In *Jager*, the Douglas County School District asked a Protestant minister to deliver an invocation at football games.[60] After the plaintiff complained, however, the school district developed an "equal access" plan that allowed any school staff member, parent, or student to volunteer to deliver the invocation.[61] The student government then randomly selected a speaker from the volunteers.[62] In an attempt to avoid *Lemon*'s excessive entanglement element, the school would not monitor the invocation's content.[63]

Applying the *Lemon* test to examine the validity of the invocation policy, the court rejected the school district's argument that the standard utilized by the Supreme Court in *Marsh v. Cham-*

53. *Id.* at 888.
54. *Aldine*, 563 U.S. at 887-88.
55. *Id.* at 888.
56. *Id.*
57. *Id.*
58. 862 F.2d 824 (11th Cir.), *cert. denied*, 490 U.S. 1090 (1989).
59. Jager v. Douglas County Sch. Dist., 862 F.2d 824, 826 & n.2 (11th Cir. 1989), *cert. denied*, 490 U.S. 1090 (1989).
60. *Id.* at 826 n.2.
61. *Id.* at 827.
62. *Id.*
63. *Id.*

Hanahan and Feldman: Religion in Public Schools: Let Us Pray - Or Not.

bers,[64] dealing with legislative prayer as opposed to school prayer, would be more appropriate.[65] In *Marsh*, the Supreme Court relied on the "unique history" of legislative prayer to determine such activity constitutional.[66] The Eleventh Circuit found no similar unique history for invocations prior to high school football games.[67] Applying *Lemon*, the court found the invocation policy had no secular purpose, as the school could achieve the stated goals for delivering an invocation (promoting sportsmanship, safety, etc.) through an entirely secular message.[68] Indeed, the school district had expressly rejected the option of utilizing secular inspirational speeches to accomplish the same stated goals, thereby leading the court to conclude that the purpose of the invocations must be religious.[69] As such, the policy failed the first part of the *Lemon* test. The court also concluded that the policy failed the second part of *Lemon* because the delivery of an invocation at a school event, in a school facility, via a sound system controlled by the school principal, effectuated the endorsement of religion.[70]

C. *The Moment of Silence*

As school districts and state legislatures realized the court's unwavering position banned all forms of school-sponsored prayers, creative attempts to circumvent traditional notions of prayer rose to the Supreme Court. In *Wallace v. Jaffree*,[71] the Court heard a challenge to an Alabama statute authorizing a one-minute period of silence in public schools "for meditation or voluntary prayer."[72] The Supreme Court found the statute unconstitutional for lack of a clearly secular purpose and because the statute's primary effect was to advance religion.[73] In reaching this conclusion, the Court

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64. 463 U.S. 783 (1983).

65. *See Jager*, 862 F.2d at 828 (mentioning that the *Marsh* Court found that legislative invocations posed no threat).

66. Marsh v. Chambers, 463 U.S. 783, 791 (1983). In *Marsh*, the Court addressed whether prayers offered at the beginning of legislative sessions violated the Establishment Clause.

67. *Jager*, 862 F.2d at 829.

68. *Id.* at 829.

69. *Id.* at 830.

70. *Id.* at 831.

71. 472 U.S. 38 (1985).

72. Wallace v. Jaffree, 472 U.S. 38, 40 (1985).

73. *Id.* at 55-56.

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St. Mary's Law Journal, Vol. 32 [2000], No. 4, Art. 3

relied heavily on the statute's legislative history.[74] According to the statute's sponsor, the sole purpose of the law was "an 'effort to return voluntary prayer' to the public schools."[75] Equally telling was the addition of the words "or voluntary prayer" in the text of the statute.[76] The Court found that adding this phrase elevated prayer to a favored practice and that "[s]uch an endorsement is not consistent with the established principle that the government must pursue a course of complete neutrality toward religion."[77] Because the statute failed for lack of a secular purpose, the Court did not reach the issue of whether a moment of silence for meditation would be permissible in the public schools.[78]

D. *A New Test Emerges*

Although not involving school prayer, courts have applied the test created by *County of Allegheny v. ACLU*[79] in prayer cases. This case involved a challenge to religious symbols placed outside a county courthouse and other city and county buildings during the winter holiday season.[80] To analyze the issue, the Supreme Court developed an "endorsement test."[81] This test finds an Establishment Clause violation when the governmental practice has the effect of endorsing religious beliefs.[82] The Court concluded that a crèche displayed in this case had the effect of endorsing Christianity because, as presented, the object represented a purely religious symbol.[83] Alternatively, the Court found a menorah placed beside a Christmas tree constitutionally sound because, as displayed, the

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74. *Id.* at 64-66.

75. *Id.* at 56-57.

76. *Id.* at 59.

77. *Wallace*, 472 U.S. at 60.

78. *Id.* at 62 n.1 (Powell, J., concurring). The Texas Legislature apparently believes that a moment of silence statute that does not suffer from the procedural defects of *Wallace* is permissible. Texas recently enacted a law allowing school districts to "provide for a period of silence at the beginning of the first class of each school day during which a student may reflect or meditate." TEX. EDUC. CODE § 25.082(b) (Vernon 1996). During the 1995 legislative session, the legislature was very careful to avoid any mention of prayer or a religious purpose. To date, this law has not been challenged.

79. 492 U.S. 573 (1989).

80. County of Allegheny v. ACLU, 492 U.S. 573, 578 (1989).

81. *Id.* at 593-94.

82. *Id.*

83. *Id.* at 601-02.

Hanahan and Feldman: Religion in Public Schools: Let Us Pray - Or Not.

menorah did not constitute an exclusively religious symbol but one with both secular and religious dimensions.[84]

E. *A Hallowed Tradition Confronts All the Tests*

Prayer at graduation has, by now, become a familiar legal topic. Most of the jurisprudence regarding graduation prayer has arisen only in recent years. One of the first cases arose in Clear Creek, Texas. Two students and their parents brought suit seeking injunctive relief against the Clear Creek Independent School District based on the content of an invocation and benediction delivered by students at a previous high school graduation ceremony.[85] Confronted with inconsistent past use and content of invocations/benedictions at high school graduation ceremonies, the school board passed a resolution guided by the principles established in *Stein v. Plainwell Community Schools.*[86] The resolution stated:

1. The use of an invocation and/or benediction at high school graduation exercise shall rest within the discretion of the graduating senior class, with the advice and counsel of the senior class principal;
2. The invocation and benediction, if used, shall be given by a student volunteer; and
3. Consistent with the principle of equal liberty of conscience, the invocation and benediction shall be nonsectarian and nonproselytizing in nature.[87]

The Fifth Circuit Court of Appeals affirmed the constitutionality of the policy based on an application of *Lemon.*[88] The policy satisfied the first prong of *Lemon* because the invocation and benediction had the secular purpose of "solemnizing" the graduation ceremony.[89] There was no evidence that religious motivation played a role in the construction of the policy, nor was there any evidence of an alternative, secular method of accomplishing its purpose.[90] The court also concluded that the primary effect of the

84. *Id.* at 613-14.
85. Jones v. Clear Creek Indep. Sch. Dist. (Clear Creek I), 930 F.2d 416, 417 (5th Cir. 1991), *vacated by* 505 U.S. 1215 (1992).
86. 822 F.2d 1406 (6th Cir. 1987).
87. *Clear Creek I*, 930 F.2d at 417.
88. *Id.* at 419-20.
89. *Id.* at 420.
90. *Id.*

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St. Mary's Law Journal, Vol. 32 [2000], No. 4, Art. 3

policy was neither to advance nor endorse religion.[91] Furthermore, the court found it significant that graduating seniors were not impressionable young children but adults on the verge of entering a world that exposes people to a variety of different cultures and experiences.[92] In addition, the court noted that the policy exposed students only to a brief, nonproselytizing invocation occurring once in four years, and in an atmosphere where, unlike in a classroom, the chance of peer pressure would be lessened by the presence of parents and loved ones.[93] Finally, the court dismissed the question of excessive entanglement, stating that the district's policy merely facilitated the ability of the students in deciding to have an invocation at graduation but took no part in the planning or delivery of any graduation invocation.[94] Within the contours of the policy, the students made all decisions including the content of the speech itself.[95] In conclusion, the court found the Clear Creek policy, and the resulting invocations and benedictions, distinguishable from the objectionable practices in prior cases.[96] Shortly after the Fifth Circuit handed down *Clear Creek*, however, another similar case heard before the United States Supreme Court again altered the approach courts take in regard to school prayer.[97]

Lee v. Weisman[98] centered on a middle school graduation ceremony at which a rabbi, upon invitation from the principal, delivered a nonsectarian prayer.[99] The rabbi delivered the prayer in accordance with a school policy providing that every year the school would invite a member of the clergy to give a prayer at graduation.[100] Finding *Lemon* again too restrictive, the Court chose to apply what has become known as the "coercion test."[101] In defining the coercion test, the Court noted "the Constitution guarantees that government may not coerce anyone to support or

91. *Id.* at 421.
92. *Clear Creek I*, 930 F.2d at 421.
93. *Id.* at 422.
94. *Id.* at 422-23.
95. *Id.* at 422.
96. *Id.*
97. Lee v. Weisman, 505 U.S. 577, 581 (1992).
98. 505 U.S. 577 (1992).
99. *Lee*, 505 U.S. at 586.
100. *Id.* at 581.
101. *Id.* at 577.

Hanahan and Feldman: Religion in Public Schools: Let Us Pray - Or Not.

participate in religion or its exercise."[102] Under this test, a school policy violates the Establishment Clause if the policy has the effect of coercing students or others to take part in a religious activity.[103]

The Supreme Court found that the principal's policy constituted an impermissible establishment of religion.[104] The Court found "[t]he government involvement with religious activity in this case pervasive, to the point of creating a state-sponsored and state-directed religious exercise in a public school."[105] The Court found troublesome the fact that the school principal, functioning in his role as a state actor, had authority to decide whether to include a prayer in the graduation ceremony and then to designate which type of clergyman would deliver such prayer.[106] The Court was unimpressed by the nonsectarian guidelines that the principal issued to the clergyman, finding instead that the guidelines simply evidenced further state direction and control.[107] The Court was also unpersuaded by the argument that attendance at graduation was voluntary.[108] The Court reasoned that graduations, as significant and important parts of life, should not require young students to choose between attending or compromising their religious beliefs.[109] This decision significantly affected school district graduation prayer policies.

In light of *Lee*, the Supreme Court vacated and remanded *Clear Creek I* for reconsideration.[110] In reaffirming its prior decision, the Fifth Circuit Court of Appeals once again relied on *Lemon*, emphasizing that a high school graduation represents a significant and special event in a person's life and that the "solemnization" of such an event constitutes a sufficiently secular purpose under that test.[111] Similarly, the court also found that the primary effect of the policy was to solemnize the occasion, not to advance religion.[112]

102. *Id.* at 587.
103. *Id.* at 592-93.
104. *Lee*, 505 U.S. at 588.
105. *Id.* at 587.
106. *Id.*
107. *Id.* at 588.
108. *Id.* at 595.
109. *Lee*, 505 U.S. at 595.
110. Jones v. Clear Creek Indep. Sch. Dist., 505 U.S. 1215 (1992).
111. Jones v. Clear Creek Indep. Sch. Dist. (Clear Creek II), 977 F.2d 963, 966 (5th Cir. 1992), *cert. denied*, 508 U.S. 967 (1993).
112. *Id.*

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The possibility that the practice could advance religion was significantly curtailed by the voluntary use of invocations and the nonsectarian, nonproselytizing limitation.[113]

In addition to reaffirming its *Lemon* analysis, the Fifth Circuit also conducted a coercion test analysis in light of *Lee*.[114] The court determined that the Clear Creek policy contained none of the three indicia of "coercion" present in *Lee*.[115] In *Lee*, the principal initially decided whether to include an invocation, whereas in *Jones* the senior class made that decision.[116] Additionally, the principal in *Lee* chose a clergyman to deliver the invocation, while in *Jones* a student volunteered to give the invocation.[117] Finally, in *Lee*, the principal provided the clergyman with "Guidelines for Civic Occasions" to follow in delivering the invocation, while in *Jones* the school provided no invocation requirements, other than that the prayer be nonsectarian and nonproselytizing.[118]

Other circuit courts have considered prayer at graduation and have offered differing conclusions. The Third Circuit Court of Appeals, for example, struck down a school board policy under which the senior class would vote on whether to include a prayer at graduation.[119] The Ninth Circuit held that school district officials did not violate students' free speech rights by refusing to allow one student to give a sectarian, proselytizing valedictorian speech and another to give a sectarian invocation.[120] Just two years previous, however, a panel from the same circuit upheld a policy that allowed students selected on the basis of academic standing to present "an address, poem, reading, song, musical presentation prayer, or any other pronouncement."[121]

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113. *Id.*

114. *Id.* at 970-71.

115. *Id.* at 966. To satisfy the Establishment Clause, using the three-part test, "a governmental practice must (1) reflect a clearly secular purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) avoid excessive government entanglement with religion." Lee v. Weisman, 505 U.S. 577, 584-85 (1992).

116. *Clear Creek II*, 977 F.2d at 970-71.

117. *Id.* at 971.

118. *Id.* at 963.

119. ACLU v. Black Horse Pike Reg'l Bd. of Educ., 84 F.3d 1471, 1474 (3d Cir. 1996) (en banc).

120. Cole v. Oroville Union High Sch. Dist., 228 F.3d 1092, 1095, 1101 (9th Cir. 2000), *cert. denied*, 121 S. Ct. 1228 (2001).

121. Doe v. Madison Sch. Dist. No. 321, 147 F.3d 832, 834 (9th Cir. 1998), *vacated on other grounds* 177 F.3d 789 (9th Cir. 1999) (en banc). Subsequently, however, the en banc

At least one circuit has decided that a school does not violate the Constitution by failing to stop a religious exercise. The Seventh Circuit upheld an injunction prohibiting a school district's employees from "authorizing, conducting, sponsoring or *intentionally allowing or permitting* religious prayer to be conducted at school commencement proceedings."[122] In so holding, the court indicated that school officials could not "sit back and do nothing as students turned graduation into a revival meeting; inaction under such circumstances would almost certainly imply school officials' approval."[123] The court emphasized, however, that a school cannot prevent an individual student from engaging in unobtrusive private prayer at graduation.[124] On one hand, "[a]ppropriately restraining an individual from temporarily converting graduation into a prayer meeting" is constitutionally permissible, but on the other hand, "wilfully obstructing an individual from personally recognizing the religious implications of a momentous event in her life is impermissible interference."[125]

III. VARIATIONS ON THE THEME—PRAYER AT ACTIVITIES

Graduation represents only one context in which prayers in public schools have been conducted and challenged. Prayer at athletic activities—as evidenced by the fact that the United States Supreme Court agreed to consider the issue in *Santa Fe*—is a common practice. In 1995, the Fifth Circuit Court of Appeals heard a challenge brought by a member of a girls' basketball team, which had the tradition of praying before and after games.[126]

In finding that the prayers violated the Establishment Clause, the court noted the differences between prayer at graduation and prayer at sporting events. The court observed:

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court determined that the parents did not have standing to challenge the school district's policy after the student had graduated. Doe v. Madison Sch. Dist. No. 321, 177 F.3d 789, 791 (9th Cir. 1999) (en banc). In 1994, however, a panel of the same court held that a policy allowing students to vote on whether to have an invocation or benediction, and if so, which minister would deliver it, was invalid. Harris v. Joint Sch. Dist. No. 241, 41 F.3d 447, 458-59 (9th Cir. 1994), *vacating as moot* 515 U.S. 1154 (1995). The *Madison* court did not acknowledge *Harris* in any way.

122. Goluba v. Sch. Dist. of Ripon, 45 F.3d 1035, 1036 (7th Cir. 1995).

123. *Id.* at 1040.

124. *Id.*

125. *Id.*

126. Doe v. Duncanville Indep. Sch. Dist., 70 F.3d 402, 404 (5th Cir. 1995).

St. Mary's Law Journal, Vol. 32 [2000], No. 4, Art. 3

> [H]igh 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 . . .[127]

The court found these differences significant and thus struck down the prayers as unconstitutional.[128] At the same time, the court upheld the school district's use of "The Lord Bless You and Keep You" as the choir's theme song.[129] Given that sixty to seventy-five percent of serious choral music includes religious themes, the court would not accept the argument that using religious music in the choir program constituted an endorsement of religion.[130] Forbidding the district from using religious music would force the district to disqualify most choral music and "[w]ithin the world of choral music, such a restriction would require hostility, not neutrality, toward religion."[131] The line between church and state is by no means a clear one.

A. *A Recent Attempt to Return Prayer to School*

Mississippi enacted a school prayer statute which allowed "invocations, benedictions or nonsectarian, nonproselytizing student-initiated voluntary prayer" at compulsory and noncompulsory school events.[132] The law was passed "[o]n a wave of public sentiment and indignation over" how a principal, who had allowed students to begin each day with a prayer over the intercom, had been treated.[133]

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127. *Id.* at 406-07 (citation omitted).

128. *Id.*

129. *Id.* at 407-08.

130. *Id.* at 407.

131. *Duncanville*, 70 F.3d at 407-08. The court contrasted the decision in *Aldine*, noting in that case the challenged song was a school-composed prayer set to music. *Id.* at 407 n.7. It likened the *Aldine* song as "more akin to pre-game prayers" that it prohibited in this opinion than to the music the choir would sing. *Id.*

132. Ingebretsen v. Jackson Pub. Sch. Dist., 88 F.3d 274, 277 (5th Cir. 1996) (quoting 1994 Miss. Laws ch. 609 § 1(2)).

133. *Id.* A majority of the student body had requested that the student body president be allowed to deliver a prayer over the school intercom system on November 9, 1993. Ingebretsen v. Jackson Pub. Sch. Dist., 864 F. Supp. 1473, 1478 (S.D. Miss. 1994), *aff'd*, 88 F.3d 274 (5th Cir. 1996). The student body had voted 490 to 96 to permit such a prayer. *Id.* Despite the advice of the school district's attorney—that the practice would violate the

Hanahan and Feldman: Religion in Public Schools: Let Us Pray - Or Not.

In the statute's preamble, the legislature explained the statute's purpose as an attempt "to accommodate the free exercise of religious rights of . . . student citizens in the public schools."[134]

The Fifth Circuit Court of Appeals found this policy a violation of the Establishment Clause. Initially, the court found the language was intended to inform students, teachers, and administrators that prayer was permissible at any school event, so long as a student initiated the prayer.[135] When viewed in this context, the court could not escape the conclusion that the effect of the law was to advance religion in direct violation of *Lemon*'s second prong.[136] The court noted that the statute gave "a preferential, exceptional benefit to religion that it [did] not extend to anything else."[137] The law violated the third prong of *Lemon* as well. The court found that the law would require school officials to determine who gets to say a prayer at each event, thus creating an excessive entanglement.[138]

In addition to failing all three prongs of *Lemon*, the statute also failed the coercion test of *Lee*—because students would be a "captive audience" at compulsory events.[139] The statute also failed the endorsement test of *Allegheny* by creating the appearance of allowing school officials to lead students in prayer at special times set aside for prayer and nothing else.[140] The court of appeals therefore affirmed orders enjoining enforcement of the statute "except as to nonsectarian, nonproselytizing student initiated voluntary prayer at high school commencement as condoned by *Jones II*."[141]

Constitution—the principal allowed the prayer on November 9, 1993 and over the next three days. *Id.* During the time the prayer was read, students were required to remain at their desks. *Id.* On November 24, 1993, the superintendent terminated the principal's employment. *Id.* The school board, however, voted to suspend the principal, rather than terminate his employment. *Ingebretsen*, 864 F. Supp. at 1478. His suspension sparked protests, and rallies were held in his support. *Id.* at 1479. The public support eventually reached the state legislature. *Id.*

134. *Ingebretsen*, 88 F.3d at 279 (quoting 1994 Miss. Laws ch. 609 § 1(1)).

135. *Id.*

136. *Id.*

137. *Id.* (citing to Herdahl v. Pontotoc County Sch. Dist., 887 F. Supp. 902, 908-09 (N.D. Miss. 1995)).

138. *Id.* at 279.

139. *Ingebretsen*, 88 F.3d at 279.

140. *Id.* at 280.

141. *Id.* at 281.

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B. Santa Fe Independent School District v. Doe*: Prayer at Sporting Events*

The issue of prayer in schools returned to the Supreme Court with *Santa Fe Independent School District v. Doe.* Two students and their families, one Mormon and one Catholic, brought the action.[142] The complaint centered on a variety of religious activities, including the use of prayer at graduation ceremonies and before home football games.[143]

Prior to the 1994-95 school year, Santa Fe ISD allowed students to give overtly Christian invocations and benedictions at high school graduation ceremonies.[144] The school district also allowed students to deliver such prayers over the public address system prior to home football games.[145] From June 1994 to October 1994 the district developed a graduation prayer policy that eventually resembled the *Clear Creek* policy.[146]

In response to the students' initial suit in 1995, the school district revised the graduation prayer policy.[147] Simultaneously, the district developed a prayer policy for football games.[148] Both the graduation and football game policies included two components.[149] The primary policy permitted student-led, student-initiated prayer without content limitation.[150] The second component constituted a "fall-back" policy that included a "nonsectarian, nonproselytizing" limitation.[151] The school district utilized the "fall-back" policy only in the event a court enjoined the basic policy.[152] Both policies also included a two-tiered election process whereby students would first vote to determine whether an invocation would be given.[153] If stu-

142. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 294 (2000).

143. *Id.* at 295.

144. *Id.*

145. *Id.*

146. *Compare id.* at 296-97 (approving a policy allowing nonsectarian student initiated invocations which solemnize graduation ceremonies), *with* Jones v. Clear Creek Indep. Sch. Dist. (Clear Creek I), 930 F.2d 416, 423 (5th Cir. 1991), *vacated by* 505 U.S. 1215 (1992) (describing the school's policy allowing student led invocations at graduation so long as they had a nonsectarian and solemnizing purpose).

147. *Santa Fe*, 530 U.S. at 295-96.

148. *Id.* at 297.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Santa* Fe, 530 U.S. at 298 n.6.

153. *Id.*

Hanahan and Feldman: Religion in Public Schools: Let Us Pray - Or Not.

dents voted affirmatively in step one, the students would then elect a student to deliver the invocation.[154] In ruling on these policies, the district court determined that the nonproselytizing, nonsectarian limitation was required and ordered the district to implement the fall-back version containing that limitation.[155]

The Fifth Circuit Court of Appeals upheld the rulings on the graduation prayer policy but struck down the football prayer policy.[156] The court concluded that without a "nonsectarian, nonproselytizing" content limitation, the school district's graduation prayer policy failed, at a minimum, the first two parts of the *Lemon* test, as well as the endorsement test.[157] The court rejected the school district's argument that such a limitation constituted viewpoint discrimination in violation of the Free Speech Clause.[158] The court found that in the absence of a limited public forum, no free speech issue existed.[159] Finally, as to the football policy, the Court held that *Doe v. Duncanville*[160] was dispositive and that "[o]utside [the] nurturing context [of a graduation ceremony], a Clear Creek Prayer Policy cannot survive."[161]

The Supreme Court agreed to consider only one issue: whether Santa Fe's policy of having a "student-led, student-initiated prayer at football games violate[d] the Establishment Clause."[162] The Court stated that, although it did not consider graduation prayer, its analysis would be guided by the principles set forth in *Lee*.[163] The Court began by addressing the school district's argument that the speech in question was private student speech that did not implicate the Establishment Clause.[164] The Court greeted this argument with skepticism, noting that the school authorized the speech,

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154. *Id.* at 299 n.6.

155. *Id.* at 299.

156. *Id.* at 300.

157. Doe v. Santa Fe Indep. Sch. Dist., 168 F.3d 806, 816-18 (5th Cir. 1999), *aff'd*, 530 U.S. 290 (2000).

158. *Id.* at 822.

159. *Id.* at 819-22.

160. 70 F.3d 402 (5th Cir. 1995).

161. *Id.* at 823.

162. *Santa Fe*, 530 U.S. at 301.

163. *Id.* at 301-02.

164. *Id.* at 302.

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St. Mary's Law Journal, Vol. 32 [2000], No. 4, Art. 3

and the speech occurred on school property at a school-sponsored event.[165]

The Court then focused on the district's election system, noting that such a system did not necessarily create a limited public forum deserving of free speech protection.[166] Of particular concern to the Court was the fact that the election system operated in such a way as to completely silence the views of the minority.[167] The Court noted that such an election might ensure that the majority's views are represented but only serve to further alienate those with minority religious views.[168]

Central to this conclusion was the fact that the policy approved one kind of message: an invocation.[169] The school district did not, therefore, maintain neutrality toward religion.[170] By allowing a majority of the students to vote on whether to have an invocation and the student who would deliver that invocation, the school district substituted "the views of the majority for the government neutrality required by the Establishment Clause."[171] Thus, it violated "the very raison d'etre of the Establishment Clause—protection against the tyranny of a religious majority."[172] The Court did point out, however, that not all religious speech at a school event is inherently coercive.[173] The Court limited the holding by stating that only state-sponsored, coercive prayer is unconstitutional.[174] *Santa Fe* left unanswered, however, the question of under what circumstances courts may consider religious speech in schools *private* and therefore constitutional."[175]

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165. *Id.*

166. *Id.* at 304.

167. *Santa Fe*, 530 U.S. at 304.

168. *Id.* at 304-05. "[F]undamental rights may not be submitted to vote; they depend on the outcome of no elections." *Id.* (quoting W. Vir. Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943)).

169. *Id.* at 306.

170. *Id.* The "fatal flaw," as the Eleventh Circuit Court of Appeals called it, in the Santa Fe policy was the election system. Chandler v. Siegelman (Chandler II), 230 F.3d 1313, 1315 (11th Cir. 2000), *cert. denied*, 69 U.S.L.W. 3702 (U.S. June 18, 2001) (No. 00-1606).

171. *Chandler II*, 230 F.3d at 1315.

172. *Id.*

173. *See Santa Fe*, 530 U.S. at 313 (establishing that the Constitution does not prohibit voluntary student prayer during the schoolday).

174. *Id.*

175. *Chandler II*, 230 F.3d at 1316.

The Court also determined that the school district endorsed religion, despite claims that the election system separated religion from the content of the speech.[176] The school board had, after all, decided to allow a student to deliver an invocation, developed the policy for the selection of the student, and specified that the purpose of the speech as to "solemnize the event."[177] Solemnization, the Court noted, is most often accomplished by some kind of religious message.[178]

Additionally, the only type of speech expressly described in the policy was "an 'invocation'—a term that primarily describes an appeal for divine assistance."[179] The Court explained that one of the most important questions one must ask when presented with a situation like this is "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."[180] In this case, according to the majority, an objective observer would see the pregame message as being endorsed by the district.[181]

The school district claimed that the policy had a secular purpose: to "foste[r] free expression of private persons . . . as well [as to] solemniz[e] sporting events, promot[e] good sportsmanship and student safety, and establis[h] an appropriate environment for competition."[182] The Court disagreed. In the Court's view, permitting one student to give a content-limited message—specifically an invocation—would do little to foster free expression.[183] Furthermore, the Court thought it obvious from the history of the message—the fact that students always gave a prayer and that such prayers were delivered by the student council chaplain—that the district intended the policy to facilitate the continuation of prayer before the games.[184] Based on these findings, the Court concluded that "[t]he delivery of such a message—over the school's public

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176. *See Santa Fe*, 530 U.S. at 306 (asserting that the school board chose to allow a student invocation and the election is conducted under the principal's direction).

177. *Id.*

178. *Id.*

179. *Id.* at 306-07.

180. *Id.* at 308 (quoting Wallace v. Jaffree, 472 U.S. 38, 73, 76 (1985)).

181. *Santa Fe*, 530 U.S. at 308.

182. *Id.* at 309 (quoting Brief for Petitioner 14) (alteration in original).

183. *Id.*

184. *Id.*

St. Mary's Law Journal, Vol. 32 [2000], No. 4, Art. 3

address system, by a speaker representing the student body, under the supervision of school faculty, and pursuant to a school policy that explicitly and implicitly encourages public prayer—is not properly characterized as 'private' speech."[185]

The Court proceeded to the district's next argument that the speech did not coerce students to participate in religious exercises because the prayer represented the product of student choice and, unlike graduation ceremonies, attendance at football games is voluntary.[186] This argument merely reminded the Court of its disdain for the election process.[187] The Court reiterated the view that the election alienated minority viewpoints and then noted that the school requires "some students, . . . such as cheerleaders, members of the band, and of course the team members themselves" to attend the games in order to receive class credit.[188] Moreover, the games constitute a valuable part of the high school experience, and schools should not force students to choose between not attending or being subjected to offensive religious practices.[189]

The district also argued that the challenge to the policy was premature due to the fact that no message had yet been delivered under the policy.[190] The Court noted, however, that other Establishment Clause cases have been decided on a facial challenge and that, under *Lemon*, the policy would still fail without a secular legislative purpose.[191] The Court looked to the plain language of the policy and to the circumstances surrounding the policy's enactment and determined that the purpose was to continue the religious practice of prayer before football games.[192] Additionally, the policy failed a facial challenge because the policy "impermissibly impose[d] upon the student body a majoritarian election on the issue

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185. *Id.* at 310.

186. *Santa Fe*, 530 U.S. at 310.

187. *See id.* (demonstrating the Court's distrust of political influence in the field of public prayer).

188. *Id.* at 311.

189. *Id.* The Court indicated that even if it regarded football games as purely voluntary events, it would have reached the same conclusion. Citing its holding in *Lee*, the Court stated that "the government may no more use social pressure to enforce orthodoxy than it may use more direct means." *Id.* at 312 (citing Lee v. Weisman, 505 U.S. 577, 594 (1992)).

190. *Santa Fe*, 530 U.S. at 313.

191. *Id.* at 314.

192. *Id.* at 314-15.

Hanahan and Feldman: Religion in Public Schools: Let Us Pray - Or Not.

of prayer."[193] In the eyes of the Court, "the District has established a governmental electoral mechanism that turns the school into a forum for religious debate."[194] The Court thus concluded that the district's policy was unconstitutional.

C. *Still Some Rivers to Cross*

1. *Chandler v. James*

The Supreme Court's decision in *Santa Fe* implicated for several similar challenges. In *Chandler v. James*,[195] for example, a vice-principal and his son challenged the facial constitutionality of an Alabama statute permitting "non-sectarian, non-proselytizing student-initiated voluntary prayer, invocations and/or benedictions . . . during compulsory or non-compulsory school-related student assemblies, school-related sporting events, school-related graduation or commencement ceremonies, and other school-related events."[196] The district court issued an injunction preventing the school from, *inter alia*, permitting any prayer or devotional speech at school.[197]

The Eleventh Circuit held that because students are not state actors, schools cannot restrict genuine, private religious speech without violating both the Free Exercise and the Free Speech Clauses of the First Amendment.[198] The court reasoned that suppression of such speech did not constitute neutrality toward religion.[199] To the contrary, such limitation constituted an unconstitutional disapproval of religion.[200] The court did, however, issue two caveats: (1) student-initiated speech may become state action if the state participates in supervising the speech, and (2) a school can place the same reasonable restrictions on the time, place, and manner of religious speech as it does on secular speech.[201]

193. *Id.* at 316.

194. *Id.*

195. 180 F.3d 1254 (11th Cir. 1999).

196. Chandler v. James (Chandler I), 180 F.3d 1254, 1256 (11th Cir. 1999), *vacated sub nom.* Chandler v. Siegelman, 530 U.S. 1256, *opinion reinstated*, 230 F.3d 1313 (11th Cir. 2000), *and cert. denied*, 69 U.S.L.W. 3702 (U.S. June 18, 2001) (No. 00-1606).

197. *Id.* at 1257.

198. *See id.* at 1261 (indicating that genuinely student-initiated religious speech is private speech protected by the Free Exercise and Free Speech Clauses).

199. *Id.*

200. *Id.*

201. *Chandler I*, 180 F.3d at 1264-65.

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St. Mary's Law Journal, Vol. 32 [2000], No. 4, Art. 3

The Supreme Court vacated and remanded *Chandler v. James* (*"Chandler I"*) for further consideration in light of *Santa Fe Independent School District v. Doe*.[202] On reconsideration, a panel of the Eleventh Circuit Court of Appeals concluded that the decision in *Chandler I* did not conflict with the Supreme Court's decision in *Santa Fe* and reinstated the original opinion.[203] The Eleventh Circuit explained that "*Santa Fe* condemns school *sponsorship* of student prayer. *Chandler* condemns school *censorship* of student prayer."[204] In *Santa Fe*, the school policy was hopelessly entangled in the religious messages because the district allowed only the delivery of "appropriate" messages.[205] The prayers, therefore, bore the imprint of the state and could not constitute "private" speech.[206] By contrast, the Eleventh Circuit Court explained that *Chandler I* involved an injunction that assumed any speech in schools was attributable to the state.[207] The *Chandler II* court stated:

> The Establishment Clause does not require the elimination of private speech endorsing religion in public places. The Free Exercise Clause does not permit the State to confine religious speech to whispers or banish it to broom closets. If it did, the exercise of one's religion would not be free at all.[208]

The Eleventh Circuit concluded that private speech endorsing religion is permissible in the public schools but school-sponsored prayer is not constitutionally allowed.[209] Student-initiated speech, including religious speech, cannot be prohibited, nor can there be restrictions on the time, place, and manner of student-initiated religious speech that exceed the restrictions placed on students' secular speech.[210]

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202. Chandler v. Siegelman, 530 U.S. 1256, 1256 (2000) (mem.).

203. Chandler v. Siegelman (Chandler II), 230 F.3d 1313, 1314 (11th Cir. 2000), *cert. denied*, 69 U.S.L.W. 3702 (U.S. June 18, 2001) (No. 00-1606).

204. *Id.* at 1315.

205. *Id.*

206. *Id.*

207. *Id.* at 1316.

208. *Chandler II*, 230 F.3d at 1316.

209. *Id.* at 1316-17.

210. *Id.* at 1317.

2. *Adler v. Duval County School Board*

Another Eleventh Circuit case was subject to review in light of *Santa Fe*.[211] In *Adler v. Duval County School Board*,[212] the school district's policy permitted unrestricted student-led messages at the beginning or close of high school graduation ceremonies.[213] The Eleventh Circuit found the policy facially constitutional due to the total lack of state involvement in deciding whether to include a message, who would deliver such message, and what that person would say.[214]

The court distinguished the policy from the policy in *Lee* by noting that the process was completely student-controlled and allowed the graduating class to select a student speaker to give remarks with total autonomy.[215] The court dismissed the contention that, by providing the platform and opportunity for religious speech, the state converted private student speech into public, state-supported speech, and that the majoritarian election the district used gave the speech the imprint of state action.[216] The Supreme Court granted *certiorari*, vacated the judgment below, and remanded the case for further consideration in light of the Supreme Court's decision in *Santa Fe*.[217] As of this writing, the Eleventh Circuit Court of Appeals has not issued an opinion regarding the remand.

3. *Cole v. Oroville Union High School District*

Cole v. Oroville Union High School District,[218] a Ninth Circuit case, has followed the same path as *Adler*. In *Cole*, the district allowed a student to deliver a nondenominational, spiritual invocation, which the high school administration would review prior to the ceremony.[219] In June 1998, one of the co-valedictorians proposed to give a valedictory speech that made repeated reference to

211. Adler v. Duval County Sch. Bd., 206 F.3d 1070 (11th Cir.), *vacated by* 121 S. Ct. 31 (2000).
212. 206 F.3d 1070 (11th Cir. 2000).
213. *Adler*, 206 F.3d at 1071.
214. *Id.*
215. *Id.* at 1080.
216. *Id.* at 1080-81.
217. Adler v. Duval County Sch. Bd., 121 S. Ct. 31 (2000).
218. 228 F.3d 1092 (9th Cir. 2000), *cert. denied*, 121 S. Ct. 1228 (2001).
219. Cole v. Oroville Union High Sch. Dist., 228 F.3d 1092, 1096 (9th Cir. 2000), *cert. denied*, 121 S. Ct. 1228 (2001).

St. Mary's Law Journal, Vol. 32 [2000], No. 4, Art. 3

Jesus and God.[220] The student chosen to deliver the invocation likewise proposed a sectarian presentation.[221]

When the administration rejected their proposed speeches, the students sought a temporary restraining order.[222] The district court denied the student's claim for relief due to a lack of time to consider the issues.[223] The students attended the graduation ceremony, and the principal prevented them from delivering their sectarian speeches.[224]

In early 1999, the students filed an amended complaint, including as parties the valedictorian's brother, who was valedictorian of the 1999 graduating class and would be giving a sectarian speech, as well as other students to secure standing.[225] The district court determined that only the 1999 valedictorian had standing to bring a claim for injunctive relief, denied the motion for a preliminary injunction, and granted summary judgment in favor of the school district.[226] The court of appeals affirmed, concluding that the school district officials did not infringe the students' freedom of speech by refusing to allow a sectarian speech.[227] This refusal, the court found, was necessary to avoid violating the Establishment Clause under the principles set forth in *Santa Fe* and in *Lee v. Weisman*.[228] The invocation would not have been private speech, the court added, because the district authorized delivery at a district-sponsored event held on district property.[229] Allowing a student to give a sectarian speech would constitute governmental endorsement of religion similar to the policies found unconstitutional in *Santa Fe*.[230] Furthermore, an objective observer would have perceived that the district endorsed the speech.[231] The Supreme Court declined to review the decision.[232]

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220. *Id.*
221. *Id.*
222. *Id.* at 1096-97.
223. *Id.* at 1097.
224. *Cole*, 228 F.3d at 1097.
225. *Id.*
226. *Id.*
227. *Id.* at 1101.
228. *Id.* at 1101-02.
229. *Cole*, 228 F.3d at 1102.
230. *Id.* at 1103.
231. *Id.*
232. Niemeyer v. Oroville Union High Sch. Dist., 121 S. Ct. 1228 (2001).

D. *Prayer at Board Meetings . . . the Answer Is Unclear*

For many years, school boards have offered prayers before board meetings under the authority of *Marsh v. Chambers*.[233] Although not directly on point, the facts of *Marsh* are analogous to school board meetings. In *Marsh*, the Supreme Court upheld a state legislature's practice of opening each session with a prayer delivered by a state-paid chaplain.[234] The Court found the practice of opening legislative and other deliberative bodies embedded in the history and tradition of this country.[235] Because adults attend the sessions and may leave at any time, the Court did not consider the practice a threat to the Establishment Clause.[236]

Applying this rationale to school board meetings may not, however, be as reasonable as once thought after *Coles v. Cleveland Board of Education*.[237] In *Coles*, the Sixth Circuit Court of Appeals struck down a school board's practice of praying before meetings.[238] Significant to this conclusion was the fact that students often attended these meetings to make public comments or voice grievances.[239] Additionally, a student representative sat on the board, and the district often invited students to the meetings to receive awards.[240] The court determined that the prayers violated all three prongs of the *Lemon* test, and therefore, the prayers violated the Establishment Clause.[241] Since many students attend school board meetings, the holding in *Cole* might be reason enough to reconsider the practice of praying before these meetings.

As for student meetings, the Ninth Circuit Court of Appeals has held that a public school cannot permit a student council to open assemblies with a prayer.[242] In *Collins v. Chandler Unified School*

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233. 463 U.S. 783 (1983).

234. *See* Marsh v. Chambers, 463 U.S. 783, 784-86 (1983) (finding the Nebraska legislature's practice of beginning each day with prayer constitutional under the Establishment Clause).

235. *Id.* at 792.

236. *Id.* at 795.

237. 171 F.3d 369 (6th Cir. 1999).

238. Coles v. Cleveland Bd. of Educ., 171 F.3d 369, 371 (6th Cir. 1999).

239. *Id.* at 372.

240. *Id.*

241. *Id.* at 384-85.

242. Collins v. Chandler Unified Sch. Dist., 644 F.2d 759, 762 (9th Cir. 1981) (holding that opening assemblies with prayer violates the *Lemon* test).

St. Mary's Law Journal, Vol. 32 [2000], No. 4, Art. 3

District,[243] the court rejected the school's argument that it was merely accommodating students' religious desires.[244] The court held that permission to conduct these prayers constituted an impermissible state sponsorship of religious activity.[245]

IV. Conclusion

Santa Fe, and its recent progeny, supports the argument that acceptable student prayer in school is limited to private expressions that are not disruptive.[246] These decisions, namely *Santa Fe*, *Cole*, and *Chandler II*, demonstrate the delicate balance between the Establishment and the Free Exercise Clauses. On the one hand, *Cole* clearly exemplifies the idea that student religious speech can be reasonably attributed to state advocacy and can be limited in adhering to the Establishment Clause.[247] On the other hand, *Chandler II* recognizes the importance of the Free Exercise Clause when the speech is genuinely student-led and not disruptive.[248] The theory that seems to emanate from *Santa Fe* and its progeny is that "[s]o long as the prayer is *genuinely student-initiated*, and not the product of any school policy which actively or surreptitiously encourages it, the speech is private and . . . protected."[249]

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243. 644 F.2d 759 (9th Cir. 1981).

244. *Collins*, 644 F.2d at 761-63.

245. *Id.* at 762-63.

246. *See* Santa Fe Indep. Sch. Dep't v. Doe, 530 U.S. 290, 308 (2000) (noting the distinctions between public and private speech and indicating that the student-led effort was construed as state speech); Cole v. Oroville Union High Sch. Dist., 228 F.3d 1092, 1101 (9th Cir. 2000), *cert. denied*, 121 S. Ct. 1228 (2001) (holding that because of the potential to violate the Establishment Clause the school district's refusal to allow a student to deliver a sectarian speech at graduation was not a violation of Free Speech). *But see* Chandler v. Siegelman (Chandler II), 230 F.3d 1313, 1316 (11th Cir. 2000), *cert. denied*, 69 U.S.L.W. 3702 (U.S. June 18, 2001) (No. 00-1606) (stating "*Santa Fe* leaves unanswered . . . what circumstances religious speech in schools can be considered *private*, and, therefore, protected").

247. *See Cole*, 228 F.3d at 1101 (noting that compliance with the Establishment Clause presents a compelling state interest sufficient to abrogate or limit free speech).

248. *Chandler II*, 230 F.3d at 1316-17 (interpreting *Santa Fe* to say that "[p]rivate speech endorsing religion is constitutionally protected—even in school"). This court found that an injunction issued by the lower district court was unconstitutional because the school district cannot forbid "genuinely student-initiated religious speech, nor apply restrictions on the time, place, and manner of that speech which exceed those placed on students' secular speech." *Id.* at 1317.

249. *Id.*

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Hanahan and Feldman: Religion in Public Schools: Let Us Pray - Or Not.

The effect of *Santa Fe* and its progeny is very broad in scope. Students cannot pray in instances where their speech will be attributable to the State by a reasonable observer. The issue of state speech versus public speech is the determining factor. Even *Chandler II*, which provides the most support for religious speech, concludes that as long as the speech is private student speech then it is protected by both the Free Exercise and Free Speech Clauses. Because of the breadth of the *Santa Fe* decision students are not likely to be able to pray very often during school.

There are few scenarios in which religious student speech is permitted at school. First, a student may pray silently to himself or herself. Second, students may pray aloud during non-instructional time, so long as they do not disrupt the legitimate pedagogical interest of the school.[250] Finally, a student may pray individually, or in a student-initiated group, during, prior to, or after lunch. Outside of the above scenarios, there is a compelling state interest in regulating the religious speech of children in schools.

Some argue that the Establishment Clause overwhelms or minimizes rights set forth in the Free Exercise Clause. The Supreme Court has not acted in such a way that diminishes the protection afforded the Free Exercise and Free Speech clauses. The Court has struck a balance between the Establishment and Free Exercise Clauses and, thus, has ensured the protection of both believers and non-believers. Without this balance, the rights of both groups are jeopardized.

It is clear that interpreting the First Amendment's application to activities in public schools will continue to challenge the federal courts. Just as zealously as those in favor of prayer in schools attempt to secure its return, others will defend their rights to be free from governmental imposition of religious exercises. Such seems the price, however, of living in a free society.

250. Hazlewood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988).

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St. Mary's Law Journal, Vol. 32 [2000], No. 4, Art. 3

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