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The Supreme Court's Missed Opportunity: The Constitutionality of Student-Led Graduation Prayer in Light of the Crumbling Wall between Church and State

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Comment

The Supreme Court's Missed Opportunity: The Constitutionality of Student-Led Graduation Prayer in Light of the Crumbling Wall Between Church and State

I. INTRODUCTION

Marian Ward had to bar the doors of her home because she was the center of steadfast media attention and public scrutiny.[1] She worried that she might be the target of a gunman.[2] The Santa Fe High School sophomore, a member of the National Honor Society and a talented trumpet player in the school band,[3] was threatened with sanctions from her school and a local court.[4] One Friday evening, when she arrived at the traditional high school football game, Marian feared federal marshals would "carry [her] away."[5] When she entered the stadium, she passed news cameras and placards with messages such as "Prayer is Private" and "Keep the Devil Out of Santa Fe."[6] Why the commotion? Marian's peers selected her to compose and recite a traditional pre-game prayer.[7]

Across the country in Calvert County, Maryland, Nick Becker was threatened with arrest and banned from attending his high school's post-graduation boat cruise.[8] Nick's mother kept his grandparents away from the graduation ceremony because it would be too upsetting for

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1. *See* Victoria Loe Hicks, *New Football Match-up: Church v. State*, DALLAS MORNING NEWS, Nov. 7, 1999, at 1A.

2. *See id.* Marian was reacting to a previous incident in Fort Worth, Texas, where a gunman had killed those attending a Baptist youth service. *See id.*

3. *See* Paul Duggan, *Texas Holy War on the Gridiron: Prayer Ban Fuels Controversy*, WASH. POST, Oct. 10, 1999, at A3.

4. *See* Hicks, *supra* note 1, at 1A.

5. *See id.*

6. *See* Duggan, *supra* note 3, at A3.

7. *See id.* Marian Ward stated: "Dear Heavenly Father, I pray [for] your presence in this stadium tonight. [I pray for] a good, clean and fun game, [and ask that] God keep us safe. In Jesus's name, Amen." *Id.*

8. *See* Lyndsey Layton, *The Grad Who Got Religion*, WASH. POST, June 22, 1999, at C1.

them.[9] Why? Nick legally challenged the traditional recitation of prayer during the ceremony because he is an agnostic.[10] The school administration held a "moment of reflection" in place of prayer as a result of Nick's actions.[11] When members of the audience spontaneously recited the Lord's Prayer, however, Nick walked out of his own graduation ceremony in protest.[12]

Marian and Nick's experiences characterize a growing debate in the nation's courts[13] heard throughout society: local schools,[14] legislatures,[15] political campaigns,[16] media outlets,[17] and private citizen opinion polls.[18] Although public attention to the constitutionality of

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9. *See id.* at C2.

10. *See id.*

11. *See id.*

12. *See id.*

13. *See infra* Part III (discussing the disagreement among the federal circuit courts of appeals on the constitutionality of student-led prayer at public school graduation ceremonies).

14. In fact, after the Fifth Circuit decided *Jones v. Clear Creek Independent School District*, 930 F.2d 416 (5th Cir. 1992), students organized a "prayer-in" to protest. *See* Marc A. Brown, *Christmas Trees, Carols and Santa Claus: The Dichotomy of the First Amendment in Public Schools and How the Implementation of a Religion Policy Affected a Community*, 28 J.L. & EDUC. 145, 152 n.45 (1999); *infra* Part III.A.1 (discussing *Jones v. Clear Creek Independent School District*); *see also* Steve DiMeglio, *Texas Lawmakers' Bill Would Allow Prayer Before Kickoff*, Gannet News Service, Oct. 20, 1999, *available in* LEXIS, News Library, News Group File (stating that over 1000 Texas public high schools stopped prayer before games as a result of Marian Ward's case).

15. *See* Sense of Congress Supporting Prayer at Public School Sporting Events, H.R. Con. Res. 199, 106th Cong. (1999) (enacted) ("Prayers and invocations at public school sporting events are constitutional under the First Amendment to the Constitution; and the Supreme Court, accordingly, should uphold the constitutionality of such practices."); *see also* Jeremy Learning, *House Urges High Court to Support Prayer Before Public School Sporting Events*, The Freedom Forum On-Line (last modified Nov. 3, 1999) <http://www.freedomforum.org/religion/1999/11/3houseres.asp>.

16. *See Bush Asks Court to Reconsider Texas School Prayer Ruling*, AP, Mar. 28, 1999, *available in* LEXIS, News Library, AP File; *see also Bauer Says Judicial Elites at War with Religion in Public Life*, U.S. Newswire, May 18, 1999, *available in* LEXIS, News Library, Wire Service File.

17. *See, e.g.*, Jeremy Southall, *A Place for Prayer*, ATL. J. & CONST., Nov. 5, 1999, at 21A; *CNN Crossfire* (CNN television broadcast, Nov. 3, 1999) (*transcript available in* LEXIS, News Library, Transcript File); *ABC News This Morning* (ABC television broadcast, Oct. 12, 1999) (*transcript available in* LEXIS, News Library, Transcript File); *Hardball with Chris Matthews: Federal Appeals Court Rules that Alabama Students Can Pray Over a School's Public Address System Under Some Limitations* (CNBC television broadcast, July 21, 1999) (*transcript available in* LEXIS, News Library, Transcript File); *Hardball with Chris Matthews: Whether Prayer Should be Allowed in Public Schools* (CNBC television broadcast, June 1, 1999) (*transcript available in* LEXIS, News Library, Transcript File).

18. According to a recent Gallup poll, 83% of those surveyed favored allowing students to recite prayers at graduation ceremonies. *See Public Opinion Online*, Gallup Organization, CNN, U.S.A. Today Poll, July 9, 1999, *available in* LEXIS, News Library, News Group File. Seventeen percent of those surveyed opposed prayer, and less than .5% had no opinion. *See id.*

student-led prayer is now particularly strong, it is hardly a new controversy. The role of religious expression in a democratic society was a vexing problem for America's Founding Fathers.[19]

Acting under the shadow of the religious intolerance that sparked the American Revolution, our nation's early leaders created the First Amendment.[20] Two components of the First Amendment relate to religion: the Free Exercise Clause states that citizens have freedom of religious expression and belief,[21] and the Establishment Clause warns that such expression is meant to be private and cannot be endorsed or promoted by the government.[22] The First Amendment also houses the Free Speech Clause, which affords citizens the freedom of private expression on general topics.[23] Since the drafting of the First Amendment, courts have attempted to strike a balance between these clauses; the scale, however, has remained decidedly uneven.[24] Since 1940, seventy cases involving religious expression were heard before the United States Supreme Court.[25] A clear standard has yet to emerge.[26]

The Court is now at a critical juncture in its effort to find a balance between church and state, especially within the setting of public schools.[27] Before the 1999-2000 session, the Supreme Court reviewed petitions for certiorari that involved issues ranging from religious practice in public schools to taxpayer support for parochial education.[28]

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19. *See* KERN ALEXANDER, THE LAW OF SCHOOLS, STUDENTS AND TEACHERS IN A NUTSHELL 98 (1984).

20. *See id.* ("The European experience of embattled Church and State was fresh in the minds of the founding fathers in America when the First Amendment was drafted.").

21. *See* U.S. CONST. amend. I.

22. *See id.*

23. *See id.*

24. *See infra* Part II (discussing the development of First Amendment law).

25. *See* Lisa Langendorfer, Comment, *Establishing a Pattern: An Analysis of the Supreme Court's Establishment Clause Jurisprudence*, 33 U. RICH. L. REV. 705, 705 (1999) ("The Establishment Clause has been greatly litigated, with more than seventy cases decided by the United States Supreme Court since the 1940s, yet the Court has been unable to agree for any amount of time on a standard method for determining if the Establishment Clause has been violated.").

26. *See id.*

27. *See* Brown, *supra* note 14, at 182 (arguing that the cases are "conflicting"); *see also* Charles J. Russo, *Prayer at Public School Graduation Ceremonies: An Exercise in Futility or a Teachable Moment*, 1999 BYU EDUC. & L.J. 1, 3 ("Public education presents today's Court with one of its greatest challenges as it interprets the religion clauses."); *see also* Learning, *supra* note 15.

28. The Court reviewed petitions considering taxpayer-paid vouchers for parochial school tuition. *See* Strout v. Albanese, 178 F.3d 57 (1st Cir. 1999) (holding that a policy providing high school students who had no public education facilities with reimbursements for private school tuition payments did not violate the Establishment Clause), *cert. denied*, 120 S. Ct. 329 (1999);

In addition, the Supreme Court had the opportunity to resolve one of the most controversial issues in education today: the appropriateness of student-led prayer at high school graduation ceremonies and athletic events.[29] The Supreme Court will review a case in which the Fifth Circuit Court of Appeals held that students could offer non-sectarian (but not proselytizing) prayer at graduation ceremonies, but refused to extend that right to invocations at athletic contests.[30] The Supreme Court granted partial certiorari, however, and will decide only whether pre-game prayer is constitutional.[31] Consequently, the Court will leave untouched the muddled area of graduation prayer.[32] Conflicting opinions on the practice of student-led prayer at graduation ceremonies

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Bagley v. Raymond Sch. Dep't, 728 A.2d 127 (Me. 1999) (holding that a tuition funding statute excluding reimbursement for parochial schools did not violate the Free Exercise, Establishment, or Equal Protection Clauses), *cert. denied,* 120 S. Ct. 364 (1999). In addition, the Court considered cases involving tax credits for the support of private school education. *See* Kotterman v. Killian, 972 P.2d 606 (Ariz. 1999) (holding that a state program providing tax credits up to $500 for donations to school tuition funds did not violate the Establishment Clause), *cert. denied,* 120 U.S. 283 (1999), *and cert. denied sub nom.* Rhodes v. Killian, 120 S. Ct. 42 (1999). The Court also reviewed the establishment of school districts for particular religious sects. *See* Pataki v. Grumet, 720 N.E.2d 66 (N.Y. 1999) (finding a New York statute allowing a religious sect, the Kiryas Joel, to establish a separate district for their disabled children violative of the Establishment Clause), *cert. denied,* 120 S. Ct. 363 (1999). The Court also reviewed the use of federally funded computers and instructional materials for religious schools. *See* Helms v. Picard, 151 F.3d 347 (5th Cir. 1998) (holding that a program providing special education services by public school teachers to parochial school children and program providing transportation to parochial school students did not violate the Establishment Clause), *cert. granted,* Mitchell v. Helms, 119 S. Ct. 2336 (1999).

29. *See* Santa Fe Indep. Sch. Dist. v. Doe, 168 F.3d 806 (5th Cir. 1999), *cert. granted,* 120 S. Ct. 494 (1999).

30. *See id.*

31. *See* Santa Fe Indep. Sch. Dist. v. Doe, 120 S. Ct. 494, 494 (1999) ("Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit granted limited [review] of the following question: Whether petitioner's policy permitting student-led, student-initiated prayer at football games violates the Establishment Clause.").

32. *See* Linda Greenhouse, N.Y. TIMES, Nov. 16, 1999, at A24. In fact, Texas courts are unevenly applying *Santa Fe* to graduation prayer. *See House Urges High Court to Overturn Decision in Texas Prayer Case,* AP, Oct. 21, 1999, *available in* LEXIS, News Library, AP File. Although the *Santa Fe* decision was cited by Judge John McBride in a Texas district court opinion that disallowed graduation prayer, the Texas Attorney General disagreed with the district court judge's interpretation. "The [*Santa Fe*] opinion does not prohibit students from engaging in voluntary prayer and should not be construed to prevent that type of activity as long as the school and school officials are not involved." *Id.*

stand within the Fifth,[33] Ninth,[34] Eleventh,[35] and Third Circuits.[36] In denying certiorari on the graduation prayer issue, the Supreme Court denied the lower courts guidance on a genuine First Amendment controversy among federal circuits.[37]

This Comment will first address the general background of the clauses in the First Amendment, tracing Establishment Clause, Free Exercise and Free Speech jurisprudence historically and in light of the public school setting.[38] Next, this Comment will outline the current status of the law regarding student-led prayer in graduation ceremonies among federal circuit courts.[39] This Comment will also consider the application of traditional First Amendment doctrines to cases involving student-led prayer at graduation ceremonies.[40] Finally, this Comment will suggest a framework for courts to analyze student-led graduation prayer cases and for schools to consider when implementing student-initiated school prayer policies.[41]

II. BACKGROUND

When the Founding Fathers wrote in the First Amendment, "Congress shall make no law respecting an establishment of religion,"[42] ("Establishment Clause"), they sought to quell the religious persecution and intolerance that fed the fire of the American Revolution.[43] Within

33. *See Santa Fe*, 168 F.3d at 806; Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 508 U.S. 967 (1993); *see also infra* Parts III.B.2 (discussing *Santa Fe Independent School District v. Doe*), III.A.1 (discussing *Jones v. Clear Creek Independent School District*).

34. *See* Doe v. Madison Sch. Dist. No. 321, 147 F.3d 832 (9th Cir. 1998); Harris v. Joint Sch. Dist. No. 241, 41 F.3d 447 (9th Cir. 1994); *see also infra* Parts III.A.2 (discussing *Doe v. Madison School District No. 321*), III.B.1 (discussing *Harris v. Joint School District No. 241*).

35. *See* Chandler v. James, 180 F.3d 1254 (11th Cir. 1999); Adler v. Duval County Sch. Bd., 112 F.3d 1475 (11th Cir. 1997); *see also infra* Part III.A.3 (discussing *Chandler v. James*), III.B.4 (discussing *Adler v. Duval County School Board*).

36. *See* ACLU v. Black Horse Pike Reg'l Bd. of Educ., 84 F.3d 1471 (3d Cir. 1996); *see also infra* Part III.B.3 (discussing *ACLU v. Black Horse Pike Regional Board of Education*).

37. *See House Urges High Court to Overturn Decision in Texas Prayer Case*, *supra* note 32.

38. *See infra* Part II (discussing the history and judicial interpretation of the Establishment Clause).

39. *See infra* Part III (describing disparate approaches to student-led prayer in circuit courts).

40. *See infra* Part IV (contending that student-led prayer is unconstitutional under traditional Establishment Clause or Free Speech analysis).

41. *See infra* Part V (suggesting alternative analysis for determining the constitutionality of student-led prayer).

42. U.S. CONST. amend. I.

43. *See* JOSEPH E. BRYSON & SAMUEL H. HOUSTON, JR., THE SUPREME COURT AND PUBLIC FUNDS FOR RELIGIOUS SCHOOLS: THE BURGER YEARS 1969-1986 27 (1990) ("For James Madison and Thomas Jefferson, religious freedom was the crux of the struggle for freedom in general."

the same breath, however, they warned Congress that they "shall make no law . . . prohibiting the free exercise [of religion]"[44] ("Free Exercise Clause"), or "abridging the freedom of speech"[45] ("Free Speech Clause"). These clauses presented a curious dichotomy. The Framers limited the government's endorsement of religious beliefs and simultaneously protected these same beliefs when uttered under the guise of free religious speech via the Free Exercise or Free Speech Clauses.[46] However, some aspects of the First Amendment are settled. For example, it was established that, by definition, the Establishment Clause primarily limits state action,[47] and the Free Speech Clause protects private speech.[48] Additionally, the Free Exercise Clause compels exceptions to state policies that burden religious expression.[49] Although these distinctions among the Establishment Clause, the Free Exercise Clause, and the Free Speech Clause seemed clear, discussion over the meaning of the Clauses nevertheless began in earnest.[50]

Scholars looked to the Founding Fathers to settle the debate.[51] There was evidence that the Framers, especially Thomas Jefferson, aimed to

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(citing ARVAL A. MORRIS, THE CONSTITUTION AND AMERICAN EDUCATION 377 (1977))).

44. U.S. CONST. amend. I.

45. *Id.*

46. *See* 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, 1 (1998) ("Within the past sixty years, increased litigation in First Amendment jurisprudence has shown the intrinsic tension that exists between the Free Speech and Free Exercise Clauses on one hand and the Establishment Clause on the other."); *see also* JOHN H. GARVEY & FREDERICK SCHAUER, THE FIRST AMENDMENT: A READER 394 (1992) ("The [Free Exercise and Establishment] clauses should be read as stating a single precept: that government cannot utilize religion as a standard for action or inaction because these clauses, read together as they should be, prohibit classification in terms of religion either to confer a benefit or to impose a burden." (quoting Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 96 (1961))).

47. *See* U.S. CONST. amend. I (stating that "Congress," as a representative body of the state, may not establish religion).

48. *See id.* (stating that the state may not "abridge" the freedom of speech); *see also* Chad Allred, *Guarding the Treasure: Protection of Student Religious Speech in the Classroom*, 22 SEATTLE U. L. REV. 741, 764 (1999).

49. *See* U.S. CONST. amend. I (stating that the state may not make a law that prohibits the free exercise of religion).

50. *See* Ann E. Stockman, Comment and Note, *ACLU v. Black Horse Pike Regional Board of Education: The Black Sheep of Graduation Prayer Cases*, 83 MINN. L. REV. 1805, 1812 (1999) (stating that "Establishment Clause jurisprudence has eroded into a guessing game for legislatures and judges").

51. *See generally* RODNEY K. SMITH, PUBLIC PRAYER AND THE CONSTITUTION (1987) (discussing modern public prayer jurisprudence in light of the writings of the Founding Fathers and historical jurists).

build an impenetrable wall separating church and state.[52] Equally strong historical data suggested that the Clauses simply meant to prohibit the development of a national religion.[53] The dissonance of this historical background thus has given no complete answer to the original intent of the Framers[54] and has instead produced a body of law that evidences the Court's struggle to reconcile the First Amendment Clauses.[55] Thus, scholars have explored the First Amendment Clauses in light of the differing opinions that have interpreted them over the past two hundred and fifty years.[56]

A. The Establishment Clause

1. Establishment Clause Jurisprudence: Separation and Accommodation

Drafted in 1789, the Establishment Clause intended to prohibit government sponsorship of religious activities.[57] The Supreme Court,

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52. Thomas Jefferson first established the metaphor of a "wall" separating church and state:

> Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the government reach actions only, and not opinions,—I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion or prohibiting the free exercise thereof,' thus building a wall of separation between church and State.

Reynolds v. United States, 98 U.S. 145, 164 (1878) (quoting Thomas Jefferson). John Adams, however, described these clauses as dictating instead that "Congress will never meddle in religion." ALEXANDER, *supra* note 19, at 99.

53. *See* Stockman, *supra* note 50, at 1808. Commentators have noted that James Madison intended that civil rights (such as religious rights) be preserved in light of government action. *See* John E. Joiner, Note, *A Page of History or a Volume of Logic? Reassessing the Supreme Court's Establishment Clause Jurisprudence*, 73 DENV. U. L. REV. 507, 509 (1996) (quoting Madison: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed."); *see also* THERESA L. DONOVAN ET AL., VOLUNTARY SCHOOL PRAYER: JUDICIAL DILEMMA, PROPOSED SOLUTIONS 9 (1995) (stating that the Establishment Clause was intended to prevent a "National ecclesiastical establishment") (citing JOSEPH STORY III, COMMENTARIES ON THE CONSTITUTION § 1871 (1833)); *id.* (stating that "historical data does *not* support the theory that the First Amendment was adopted to ensure an absolute separation of church and state").

54. *See* SMITH, *supra* note 51, at 7.

55. *See* DANIEL A. FARBER, THE FIRST AMENDMENT 263 (1998) ("[These cases] are an impossible tangle of divergent doctrines and seemingly conflicting results."); *see also* Board of Educ. v. Mergens, 496 U.S. 226, 250 (1990) ("[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.").

56. *See* Ansson, *supra* note 46, at 1.

57. *See* BRYSON & HOUSTON, *supra* note 43, at 27 (stating that the purpose of the First Amendment was the "complete and permanent separation of the spheres of religious activity and

however, did not directly consider the Establishment Clause until 1947.[58] In *Everson v. Board of Education,*[59] the Court reviewed a New Jersey policy that reimbursed parents for their children's bus transportation to private, religious, and public schools.[60] After holding that the Establishment Clause applied to the states through the Equal Protection Clause of the Fourteenth Amendment,[61] the Court invoked Thomas Jefferson's "wall" between church and state and expressed concern about government assistance to children who attended religious schools.[62] Nonetheless, the Court decided to allow the extension of these state subsidies to religious schools.[63]

The most far-reaching impact[64] of the *Everson* decision was the endorsement of government neutrality toward religion.[65] The *Everson* Court characterized the subsidies as standard state benefits that only indirectly touched religious schools.[66] The cautious Court warned that citizens should not be denied these regular benefits because of an "overzealous" enforcement of the Establishment Clause.[67] Rather,

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civil authority").

58. *See* Everson v. Board of Educ., 330 U.S. 1, 1 (1947). While *Everson* was not the first case to explore the Establishment Clause, it was the first to do so exclusively. *See* SMITH, *supra* note 51, at 125 n.10.

59. Everson v. Board of Educ., 330 U.S. 1 (1947).

60. *See id.* at 3.

61. *See id.* at 15.

62. *See id.* at 18 (declaring that the wall "must be kept high and impregnable"). *But see id.* at 29 (Rutledge, J., dissenting) (suggesting that the majority had allowed the wall between church and state to be lowered).

63. *See id.* at 16-17.

64. *See* Stockman, *supra* note 50, at 1811 (discussing the Supreme Court's incorporation of the Establishment Clause into the Fourteenth Amendment's Due Process guarantees).

65. *See Everson*, 330 U.S. at 18 ("[The First] Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary."). A similar rationale was used in *Doe v. Santa Fe Independent School District.* Doe v. Santa Fe Indep. Sch. Dist., 168 F.3d 806, 831 (5th Cir. 1999) (Jolly, J., dissenting). The dissent suggested that the Constitution requires "an essentially neutral directive of accommodation for private religious and other speech . . . ." *Id.* (Jolly, J., dissenting); *see also generally* Alan E. Brownstein, *Interpreting the Religion Clauses in Terms of Liberty, Equality, and Free Speech Values–A Critical Analysis of "Neutrality Theory" and Charitable Choice,* 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 243 (1999) (providing an in-depth critical analysis of the neutrality theory and its implications in charitable choice).

66. *See Everson*, 330 U.S. at 18.

67. *See id.* at 16. Later Court decisions support this decision. *See* Wallace v. Jaffree, 472 U.S. 38, 60 (1985); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 792-93 (1973) ("A proper respect for both the Free Exercise and Establishment Clauses compels the state[s] to pursue a course of neutrality . . . ."); Zorach v. Clauson, 343 U.S. 306, 314 (1952) ("We find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence.").

Justice Black focused on the fact that the policy assisted in the transportation of children attending *any* accredited school and did not directly fund or support religious schools.[68] Based upon these facts, the Court held that the policy was neutral toward religion and did not violate the Establishment Clause.[69]

The Court's decision to endorse government neutrality was important because it allowed an indirect governmental benefit to children attending religious schools.[70] It did not, however, signal the start of a crumbling of Jefferson's wall. The Court re-emphasized this wall one year after *Everson* when it deemed unconstitutional a policy allowing religious classes to be held in public school buildings. In *Illinois ex rel. McCollum v. Board of Education*,[71] the Court determined that allowing clergy to use public school facilities for religious instruction moved far closer to the government support of religion than did the policy in *Everson*.[72] Justice Frankfurter said, "'the great American principle of eternal separation' . . . is one of the vital reliances of our Constitutional system. . . . It is the Court's duty to enforce this principle in its full integrity."[73] Thus, the first Establishment Clause cases evidenced the Court's stance of separation, unless a government policy was clearly neutral, as in *Everson*.[74]

The Court soon softened its separationist stance, however, and moved toward a philosophy of accommodation.[75] In *Zorach v. Clauson*,[76] the Court permitted a policy that allowed students to be released from a

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68. *See Everson*, 330 U.S. at 18.

69. *See* Stockman, *supra* note 50, at 1811-12 (discussing the shift of the *Everson* case towards invalidating government support of religion).

70. *See* Brownstein, *supra* note 65, at 245 (arguing that neutrality "maximizes religious liberty").

71. Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203, 210-11 (1948) (holding that religious classes held in public school buildings outside of class time are unconstitutional and using Thomas Jefferson's metaphor of the wall between church and state to evoke Robert Frost's phrase "good fences make good neighbors"). Justice Frankfurter also articulated the importance of keeping First Amendment law clear in public schools:

> The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools, to avoid confusing, not to say fusing, what the Constitution sought to keep strictly apart.

Id. at 231.

72. *See id.* at 209-11.

73. *Id.* at 231.

74. *See, e.g.*, Everson v. Board of Educ., 330 U.S. 1, 18 (1947) (asserting that the First Amendment requires neutrality).

75. *See* FARBER, *supra* note 55, at 269-71 (discussing the separationist versus accommodationist views).

76. Zorach v. Clauson, 343 U.S. 306 (1952).

public school building during the day in order to attend religious classes.[77] The Court referenced its prior holding in *Everson* when it announced its departure from a strict separationist view.[78] The Court went further than *Everson*, however, and accepted a state policy with an accomodationist stance towards religion.[79]

In lowering Jefferson's wall, the Court first noted that the First Amendment does not say that in "every and all respect[s] there shall be a separation of church and state."[80] Instead, it suggested that only where there was a genuine tension between religious expression and government indoctrination must the separation "be complete and unequivocal."[81] Citing a nation of religious citizens, the Court rationalized its holding and new accomodationist stance.[82] In language that suggested a special consideration for the religious needs of students, the Court remarked that United States citizens were "religious people whose institutions presuppose a Supreme Being."[83] Justice Douglas wrote that without accommodation of religious needs, the Court would "show a callous indifference to religious groups" and the historical underpinnings on which our country is based.[84] The Court found that the policy allowing student dismissals for religious education did not engender tension because the classes were held outside of the public school building and did not require administrative involvement.[85] The Court, however, did not suggest a permissible response in the event this tension would arise.[86]

Thus, the Court presented two lines of Establishment Clause cases: one compelling strict separation between religion and the state and the other supporting accommodation of religious expression and practice.[87] The Court left unclear, however, where permissible accommodation

77. *See id.* at 309-11 (holding that students must leave the public school setting in order for religious instruction to occur).

78. *See id.* at 312 (referencing the "separation of Church and State in the history of the Bill of Rights and in the decisions clustering around the First Amendment").

79. *See id.* at 313.

80. *Id.* at 312.

81. *Id.*

82. *See id.* at 313.

83. *Id.*

84. *Id.* at 314. Justice Douglas also suggested that such an interpretation would create a situation where churches would not pay property taxes, the phrase "so help me God" would not be part of courtroom oaths, etc. *See id.* at 312-13.

85. *See id.* at 315.

86. *See id.*

87. *See* FARBER, *supra* note 55, at 268 (discussing the two lines of Establishment Clause cases).

might end and separation might begin.[88] In fact, the Court's balancing of accommodation and separation continued for almost two decades, and a clear standard of analysis did not emerge until 1971.[89]

2. The *Lemon* Test Emerges

In *Lemon v. Kurtzman*,[90] the Court synthesized these lines of Establishment Clause cases[91] and produced a new test.[92] In *Lemon*, the Court declared that provisions of two state statutes providing publicly financed instructional aids and other disbursements to religious schools were unconstitutional.[93] The Court struck down the statutes because they presented government "sponsorship, financial support and active involvement" in religious activities.[94] The Court presented three requirements for a permissible government policy that involved religion.[95] First, the state must have a "secular legislative purpose" when enacting a policy.[96] Second, the policy must have a neutral effect on religion and "its principal or primary effect must be one that neither advances nor inhibits religion."[97] Third, the state must not create "an excessive government entanglement with religion" when it administers the policy.[98]

Although the three requirements themselves established a significant "test," the Court's rationale behind this test proved to be instructive to Establishment Clause jurisprudence as well.[99] In the first part of the test, the Court sought to uncover policies that contained religiously neutral language but were really conceived to promote religious activity.[100] The Court therefore looked to the legislative history of the

88. *See id.* ("In the two decades after *Everson*, the Court seemed to oscillate between these two attitudes.").

89. *See id.*; *see also* Stockman, *supra* note 50, at 1812 (noting that "[t]he relatively easy and unifying principles that had emerged from early Establishment Clause jurisprudence had eroded into a guessing game for legislatures and judges").

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

91. *See* ALEXANDER, *supra* note 19, at 101 (suggesting that *Lemon* was a hybrid of various pre-determined tests); *see also* FARBER, *supra* note 55, at 268 (stating that *Lemon* "made sense" of previous Establishment Clause cases and was a "synthesis" of such precedent).

92. *See Lemon*, 403 U.S. at 612-13.

93. *See id.* at 611, 625.

94. *Id.* at 612 (citing Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970)).

95. *See id.*

96. *See id.*

97. *Id.* at 612-13.

98. *Id.* (citing *Walz*, 397 U.S. at 674).

99. *See* Stockman, *supra* note 50, at 1812-14 (referring to the *Lemon* test as the first "comprehensive" test for the Establishment Clause).

100. *See Lemon*, 403 U.S. at 613.

state policies in order to determine their purpose.[101] The second part of the test considered the effect of implementing the policy.[102] The Court evaluated the policy's practical effects and the way they might be viewed by the public.[103] With this part of the test, the Court tried to draw a distinction between policies such as in *Zorach*, which simply accommodated religion, versus programs that would be viewed as religious promotion by the state.[104] Similarly, the Court considered the role the state and its actors might play in such a policy in the third part of the test.[105] The Court sought to avoid policies where the state entity's level of supervision and oversight was too closely related to a religious activity.[106] In order to maintain its constitutionality, a policy could not excessively "entangle" the state with a religious exercise.[107]

In effect, the Court in *Lemon* retreated from its earlier separationist stance and allowed a slight weakening of Jefferson's wall between church and state.[108] Indeed, the *Lemon* Court acknowledged that "the line of separation, far from being a 'wall,' is a blurred, indistinct and variable barrier depending on all the circumstances of a particular relationship."[109]

3. *Lemon*'s Inefficacy: Alternative Tests of Endorsement and Coercion Emerge

Lemon set a new guideline for Establishment Clause analysis and sought to resolve the Court's fluctuation between separation and accommodation.[110] As the *Lemon* Court noted, however, the test left a

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101. *See id.*

102. *See id.*

103. *See id.* Justice O'Connor later noted that such a consideration is to be made irrespective of the government's actual [or articulated] purpose. *See* Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring).

104. *See* FARBER, *supra* note 55, at 272.

105. *See Lemon*, 403 U.S. at 613-14.

106. *See id.* at 613.

107. *See id.* The Court later suggested that the second and third prongs of the *Lemon* test be combined, as they invoke similar factual analyses. *See* Agostini v. Felton, 521 U.S. 203, 232-34 (1997) (holding that publicly funded instructional materials were allowed in religious schools and rejecting the presumption that having public school employees at parochial schools advances religious effect).

108. *See generally* Ansson, *supra* note 46 (illustrating the recent shift in Establishment Clause jurisprudence).

109. *Lemon*, 403 U.S. at 614.

110. *See* Mueller v. Allen, 463 U.S. 388, 394 (1983) (suggesting that *Lemon* is only a "helpful signpos[t]" or guideline to assist the Court (quoting Hunt v. McNair, 413 U.S. 734, 741 (1973))); *see also* Lynch v. Donnelly, 465 U.S. 668, 679 (1984) (refusing to be "confined to a single test or criterion"); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 773 n.31 (1973) (referring to the established tests as guidelines).

blurred picture of the wall between church and state.[111] As a result, subsequent Establishment Clause cases defined a period of confused[112] and uneven results.[113] Thus, certain Supreme Court Justices have since suggested alternative tests because of their discomfort with *Lemon's* application.[114]

Justice O'Connor suggested an alternative for the first two parts of the *Lemon* test in her concurring opinion in *Lynch v. Donnelly*.[115] O'Connor concluded that a policy that essentially provided for government endorsement of religion was impermissible.[116] O'Connor suggested that courts consider "both the subjective and the objective components of the message communicated by [the] government['s] action."[117] This so-called "endorsement test"[118] prohibited policies that allowed "government [to make] adherence to a religion relevant in any way to a person's standing in the political community."[119] In effect, O'Connor sought to prohibit policies that gave more political rights to certain citizens simply due to their religious beliefs.[120] Because of the endorsement test's subjective nature, the Court has struggled to draw a

111. *See Lemon*, 403 U.S. at 614.

112. For example, the Court has come to disparate conclusions regarding the public funding of instructional materials for parochial schools that *Lemon* prohibited. *See Agostini*, 521 U.S. at 220-21 (holding that program providing remedial education to children in parochial schools did not violate the Establishment Clause); Aguilar v. Felton, 473 U.S. 402, 409 (1985), *overruled by Agostini*, 521 U.S. at 203. Commentators have remarked that the *Agostini* decision reflects a court "anxious" about denying public services to children, similar to *Everson*. *See* FARBER, *supra* note 55, at 269-70 (providing an analysis of these cases as exemplifying the current Establishment Clause divide).

113. *See* Bryan D. LeMoine, Note, *Changing Interpretations of the Establishment Clause: Financial Support of Religious Schools*, 64 MO. L. REV. 709, 715-24 (1999).

114. *See* Langendorfer, *supra* note 25, at 710-24 (outlining each of the Justices' views on Establishment Clause jurisprudence); *see also* Hugh Baxter, *Managing Legal Change: The Transformation of Establishment Clause Law*, 46 UCLA L. REV. 343, 385-89 (1998).

115. Lynch v. Donnelly, 465 U.S. 668, 690-91 (1984) (O'Connor, J., concurring).

116. *See id.* at 691 (O'Connor, J., concurring) (suggesting that the Establishment Clause jurisprudence required clarification in a case holding that a nativity scene in a city Christmas display was permissible). Justice O'Connor noted, "[w]hat is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion. It is only practices having that effect . . . that make religion relevant, in reality or public perception, to status in the political community." *Id.* at 692 (O'Connor, J., concurring).

117. *Id.* at 690 (O'Connor, J., concurring).

118. *See* FARBER, *supra* note 55, at 272.

119. *Lynch*, 465 U.S. at 687 (O'Connor, J., concurring). Justice O'Connor warned against policies that send "a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Id.* at 688 (O'Connor, J., concurring).

120. *See id.* (O'Connor, J., concurring).

distinction between impermissible endorsement and some sort of permissible religious accommodation.[121]

Taking Justice O'Connor's lead, Justice Kennedy suggested an alternative test in his concurring opinion to *Allegheny v. ACLU*.[122] Kennedy stated that the majority expressed a "hostility" towards religion and took the Establishment Clause too far when it used *Lemon's* three principles to reach the conclusion of forbidding a crèche in a county courthouse.[123] He proposed instead that two principles control a state policy: (1) the government cannot coerce participation in a religious exercise, and (2) it cannot tend to create a state religion through its sponsorship of religious expression.[124] Applying these principles, Kennedy concluded that the mere presence of a holiday crèche in a courthouse was not unconstitutional because employees were not forced or coerced to participate in religion but could simply walk by the display.[125] He further concluded that allowing space for a religious symbol did not rise to the level of impermissible state sponsorship of prayer.[126]

As with the *Lemon* test and Justice O'Connor's endorsement test, Justice Kennedy's test is difficult to apply.[127] In particular, Justice Kennedy's test has been criticized because of the complex process of ascertaining and considering whether the general public feels coerced to participate in religious expression.[128] Critics contend that Kennedy's requirement of consideration goes far beyond a mere analysis of what the public might view or hear.[129] Instead, it involves an analysis of

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121. The endorsement test has been utilized subsequent to *Lynch*. *See generally* Agostini v. Fenton, 521 U.S. 203, 241 (1997) (Souter, J., dissenting); Capital Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753, 773-74 (1995) (O'Connor, J., concurring); Allegheny v. ACLU, 492 U.S. 573, 592-93 (1989); Texas Monthly Inc. v. Bullock, 489 U.S. 1, 17 (1989); Wallace v. Jaffree, 472 U.S. 38, 60 (1985). The test, however, has been critized as too difficult to apply. *See* FARBER, *supra* note 55, at 273.

122. Allegheny v. ACLU, 492 U.S. 573, 599 (1999) (holding that the display of a crèche in a county courthouse violated the Establishment Clause but that the display of a Menorah on a city common did not). *But see id.* at 654 (Kennedy, J., concurring in the judgment in part, dissenting in part) (suggesting that the public placement of neither symbol violated the Establishment Clause).

123. *See id.* at 656 (Kennedy, J., concurring in the judgment in part, dissenting in part).

124. *See id.* at 659 (Kennedy, J., concurring in the judgment in part, dissenting in part).

125. *See id.* at 662 (Kennedy, J., concurring in the judgment in part, dissenting in part).

126. *See id.* at 667 (Kennedy, J., concurring in the judgment in part, dissenting in part).

127. *See* FARBER, *supra* note 55, at 274. "[I]n part because the concept of coercion is pliable, the test has not always been easy to apply. Reasonable people may differ on what is coercive, and where the majority group sees only as invitation a religious minority may see an offer it can't refuse." *Id.*

128. *See id.*

129. *See id.*

psychological and emotional coercion that is difficult to ascertain and far too vague to be judicially effective.[130]

4. Establishment Clause Analysis of School Prayer

Subsequent application of the various Establishment Clause tests proved to be as ineffective and uneven as the use of the *Lemon* test.[131] The Court's contemplation of policies implicating religion and prayer in a school setting serves as a good example of this difficulty. As early as 1925, the Court began to define the relationship between religion and public education.[132] In the first case that contemplated this relationship, the Court allowed state compulsory attendance requirements to be satisfied by religious, rather than public schools.[133] The Court failed to carefully examine the Establishment Clause, however, and instead cited the liberty interest of parents to direct the quality of their children's schooling.[134]

The Court first considered the issue of school prayer in 1962 in *Engel v. Vitale,*[135] where the Court applied the Establishment Clause to a school setting.[136] The Court held that a public school could neither compose daily invocations for students[137] nor promote a school-sponsored religious activity.[138] *Engel* was heard before *Lemon v. Kurtzman*, and thus did not apply the *Lemon* three part Establishment Clause test for constitutionality.[139] Instead, the Court articulated a traditional separationist view between church and state[140] and found that the policy in question was constitutionally impermissible.[141] The Court

130. *See id. But see Allegheny*, 492 U.S. at 661 n.1 (Kennedy, J., concurring in the judgment in part, dissenting in part) (stating that coercion in circumstances such as voluntary prayer is still accomplished in an "indirect manner"). Kennedy finds no consistency between *Marsh v. Chambers*, where prayer opening legislative sessions was found constitutional, and *Allegheny*, where a crèche in a court building was found unconstitutional. *See id.* at 665 n.4 (Kennedy, J., concurring in the judgment in part, dissenting in part).

131. *See* FARBER, *supra* note 55, at 274-82.

132. *See* Pierce v. Society of Sisters, 268 U.S. 510, 513 (1925).

133. *See id.* at 535-36 (holding that a state compulsory education statute requiring children to attend public schools was unconstitutional).

134. *See id.* at 534-35.

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

136. *See id.* at 425.

137. *See id.*

138. *See id.* at 435-36.

139. *See id.* at 421.

140. *See id.* at 430-31. The Court stated, "[The Establishment Clause's] first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and degrade religion." *Id.* at 431.

141. *See id.* at 425. The Court concluded that "it is no part of the business of government to

disregarded the voluntary nature of student participation and instead found that the very presence of a prayer written and endorsed by public school teachers would constitute state sponsorship of religious expression.[142] In addition, the Court looked beyond the facts of the case before it and voiced a concern about the direction of Establishment Clause jurisprudence.[143]

Subsequently, in other cases, the Court warned that the affirmation of a similar school policy would begin a "trickling stream" that would soon become a "raging torrent," overtaking the wall between church and state.[144] In *School District of Abington v. Schempp*,[145] the Court held that school policies that allowed Bible reading and other forms of prayer were unconstitutional.[146] Such prohibition of prayer composed or sponsored by school employees is now one of the strongest and most uniform areas of Establishment Clause law, a primary example of the Court's effort to keep the wall between church and state solid.[147]

School districts reacted to this general prohibition of prayer by instituting moments of silence in place of formal prayer.[148] Districts argued that since students would be free to reflect in any way during that time, religious or not, their policies epitomized the type of neutrality toward religion that the Court had embraced in cases like *Everson*.[149] School district reliance upon the line of cases embracing neutrality and accommodation was ill-timed, however, as the Court had

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compose official prayers for any group of the American people to recite as a part of a religious program carried on by government." *Id.*

142. *See id.*

143. *See id.* at 430 (stating that state court approval of programs endorsing non-denominational prayer "ignores the essential nature of the program's constitutional defects" even when students are not required to participate).

144. *See* FARBER, *supra* note 55, at 275 ("[This policy is a] trickling stream [that] may all too soon become a raging torrent." (quoting School Dist. of Abington v. Schempp, 374 U.S. 203 (1963))).

145. School Dist. of Abington v. Schempp, 374 U.S. 203 (1963).

146. *See id.* at 225.

147. *See* FARBER, *supra* note 55, at 275 (noting that the prohibition of directed school prayer is a "benchmark" of the Court's rulings in this area).

148. *See* David Z. Seide, *Daily Moments of Silence in Public Schools: A Constitutional Analysis*, 58 N.Y.U. L. REV. 364, 364 (1983). For lower courts' discussions dealing with the moment of silence issue, see generally May v. Cooperman, 572 F. Supp. 1561 (D.N.J. 1983); Duffy v. Las Cruces Pub. Schs., 557 F. Supp. 1013 (D.N.M. 1983); Beck v. McElrath, 548 F. Supp. 1161 (M.D. Tenn. 1982); Jaffree v. James, 544 F. Supp. 727 (S.D. Ala. 1982); Gaines v. Anderson, 421 F. Supp. 337 (D. Mass. 1976).

149. *See* Seide, *supra* note 148, at 364; *see also supra* Part II.A.1 (discussing Establishment Clause cases that showed the Court's willingness to uphold policies that either were neutral toward religion or simply accommodated religious expression).

just adopted the *Lemon* three part test.[150] In a moment of silence case, *Wallace v. Jaffree*,[151] the Court looked to the policy's purpose, effect, and potential church-state entanglement and concluded that moments of silence were unconstitutional.[152] The particular policy presented in *Wallace* failed the *Lemon* test for two reasons.[153] The Court found a clear non-secular purpose to the policy because the school district intended to create a forum for student religious thought and expression.[154] In addition, the Court posited that the effect of the policy would be to promote religious expression within the school setting.[155]

The Court, however, left the door open a crack on moments of silence. In dicta, the Court distinguished the facts of *Wallace*, noting that if a school district truly did not have a religious intent, but instead implemented a moment of silence policy simply to allow students to reflect in a general manner, it might be permissible as a policy neutral to religious expression.[156]

5. The Court Considers Graduation Prayer

Despite the opening presented in the *Wallace* decision, the prevailing standard for school prayer issues remained the separation approach of *Engel v. Vitale* and the test articulated in *Lemon*.[157] In 1992, however,

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150. *See* Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971); *see also supra* Part II.A.2 (discussing the development of the *Lemon* test).

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

152. *See id.*

153. *See id.* at 38-39.

154. *See id.* at 59.

155. *See id.*

156. *See id.* at 65-66 (Powell, J., concurring). Commentators have noted that moments of silence should be constitutionally permissible. *See* Jesse H. Choper, *Religion in the Public Schools: A Proposed Constitutional Standard*, 47 MINN. L. REV. 329, 371 (1962); Seide, *supra* note 148, at 368 (citing LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-6, at 828-29 (1978)).

157. *See* DONOVAN ET AL., *supra* note 53, at 45 (stating that not much happened after *Engel* before *Lemon*). Before the Supreme Court's 1992 decision in *Lee v. Weisman*, however, there were a number of lower court opinions that interpreted the *Lemon* standard of the role of religion in schools. *See id.* at 51-54; *see also* Stone v. Graham, 449 U.S. 39 (1980) (holding that placing the Ten Commandments on walls in public schools violates the Establishment Clause of the First Amendment); Collins v. Chandler, 644 F.2d 759 (9th Cir. 1981) (holding that a school policy allowing student prayer at voluntary school assemblies violated the Establishment Clause and rejecting Free Speech and Free Exercise grounds, stating that students could practice their religious beliefs at other times during the day); Brandon v. Board of Educ., 635 F.2d 971 (2d Cir. 1980) (holding the school board's refusal to allow student-organized communal prayer meetings on school premises did not violate Free Exercise, Free Speech, Freedom of Association, or Equal Protection Clauses). *See generally* DeSpain v. DeKalb County Community Sch. Dist., 384 F.2d 836 (7th Cir. 1967) (holding that a kindergarten class recital of a verse expressing thanks but not mentioning to whom was a prayer and was not protected under the First Amendment when re-

the Court again considered the issue in *Lee v. Weisman*.[158] The Court examined a policy allowing clergy to deliver invocations and benedictions at school graduation ceremonies provided that the principal first reviewed the content.[159] Because the clergy member was a private citizen, the school district distinguished earlier cases that prohibited prayer led by school employees. The Court disagreed, however, and concluded that the clergy member acted in a manner attributable to the state.[160] The Court reasoned that a school may not avoid the prohibition of school-sponsored prayer by having an outsider perform the prayer.[161] Thus, it concluded that the Establishment Clause was the proper form of analysis.[162]

Lee is an example of the Court's dissatisfaction with the *Lemon* test.[163] The Court did not use *Lemon* but instead used Justice Kennedy's coercion test.[164] Thus, the Court considered whether prayer at graduation ceremonies, promoted by the school policy, created a state-sponsored coercive environment.[165] Generally, the Court identified the policy as coercive because the students in attendance would be involuntarily subjected to religious speech.[166] On the other hand, the school district argued that students were not coerced to participate or hear the prayer because a student's attendance at the ceremony was officially voluntary.[167] The Court disagreed and argued that the importance of a student's graduation practically compelled his or her attendance even if it was not mandatory.[168]

In addition, the Supreme Court suggested that the principal's role in reviewing and advising the religious speaker had two impermissible

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quired in school); Stein v. Oshinsky, 348 F.2d 999 (2d Cir. 1965) (enjoining school officials from preventing student-initiated recitation of prayers and holding constitutional rights to free exercise and free speech do not require a state to permit student-initiated prayer in public schools).

158. Lee v. Weisman, 505 U.S. 577 (1992); *see also* Ralph D. Mawdsley, *Student Choice and Graduation Prayer: Division Among the Circuits*, 129 EDUC. L. REP. 553, 553 (1998).

159. *See Lee*, 505 U.S. at 577.

160. *See id.* at 587.

161. *See id.* at 586-90.

162. *See id.* at 599.

163. *See id.* at 644 (Scalia, J., dissenting). In his dissent, Justice Scalia deemed the *Lemon* test effectively interned: "The Court today demonstrates the irrelevance of *Lemon* by essentially ignoring it . . . and the interment of that case may be the one happy byproduct of the Court's otherwise lamentable decision." *Id.* (Scalia, J., dissenting).

164. *See id.* at 587; *see also supra* Part II.A.3 (discussing alternatives to *Lemon*, including the coercion test first set forth in *Allegheny v. ACLU*, 492 U.S. 573 (1989)).

165. *See Lee*, 505 U.S. at 587.

166. *See id.* at 593-94.

167. *See id.* at 594-95.

168. *See id.* at 595.

results.[169] First, the Court considered such participation to be state control of religious speech, which it deemed unconstitutional in *Engel v. Vitale*.[170] Second, the Court held that students viewed the school official's participation in reviewing prayer as "inducing a participation they might otherwise reject."[171] On both these points, Justice Kennedy discussed the susceptibility of young people to such messages of authority and stated in dicta that the same might not be true for an audience of university-aged students.[172]

Finally, the Court distinguished a line of cases relied upon by the school district that allowed invocations during legislative sessions.[173] In *Marsh v. Chambers*,[174] the Court upheld a Nebraska practice of hiring a clergy member to pray before legislative sessions.[175] The *Lee* Court distinguished *Marsh* and reasoned that the special setting of a school and the young age of the intended audience allowed a different analysis.[176] Specifically, the *Lee* Court characterized *Marsh* as an exceptional circumstance, emphasizing the historical practice of legislative prayer[177] and the mature age of the audience members.[178]

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169. *See id.* at 588.

170. *See id.*; *see also* Engel v. Vitale, 370 U.S. 421, 425 (1962).

171. *Lee*, 505 U.S. at 590; *see also* FARBER, *supra* note 55, at 277 ("[G]iven the generally authoritative nature of public schools, any official connection with religion easily is labeled as coercive.").

172. *See Lee*, 505 U.S. at 593-94 (citing psychological reviews and articles on child peer pressure).

173. *See id.* at 596-97 (distinguishing *Marsh v. Chambers* on the basis of numerous fundamental differences between the public school and state legislative environments).

174. Marsh v. Chambers, 463 U.S. 783 (1983).

175. *See id.* at 786.

176. *See Lee*, 505 U.S. at 597. In rebuffing an Establishment Clause challenge to the policy, the *Marsh* Court said that unlike school prayer, the content of the speech was not important because it was not intended to be exploitative or proselytizing. *See Marsh*, 463 U.S. at 791. In fact, the Court has refused to extend *Marsh's* rationale. *See Lee*, 505 U.S. at 597. Furthermore, a recent circuit court case prohibited an Ohio school board from beginning meetings with an invocation. *See* Coles v. Cleveland Bd. of Educ., 171 F.3d 369, 371 (6th Cir. 1999). The court held that the policy failed the three prongs of the *Lemon* test. *See id.* at 384-85; *see also Sixth Circuit Halts Ohio School Board's Prayer Practice*, SCH. L. BULL., May 1999, at 1, *available in* LEXIS, News Library, Newsletter Stories File.

177. Indeed, the Court warned that *Marsh* might not apply in situations where there is no historical tradition of prayer. *See Marsh*, 463 U.S. at 786-89. "Historical evidence sheds light upon what draftsmen intended the Establishment Clause to mean." *Id.* at 790. *But see* SMITH, *supra* note 51, at 240-41 nn.14-15 (noting that some of the Founding Fathers, such as Madison and Franklin, disagreed as to the appropriateness of legislative prayer).

178. *See Lee*, 505 U.S. at 597-98.

B. Alternative Modes of Analysis: Free Exercise and Free Speech

The analysis of school prayer issues has almost exclusively fallen under the realm of Establishment Clause jurisprudence,[179] in large part because the cases have involved state policies implemented or administrated by state employees.[180] In response, courts have concluded that policies directing teachers or students to pray in school settings are appropriately analyzed as state-sponsored activities that might contribute to the establishment of religion.[181]

Commentators and jurists or judges, including Justice O'Connor and Justice Scalia, have suggested that a Free Exercise or Free Speech analysis may also be an appropriate way to approach student-led school prayer issues,[182] and that a student's religious speech in a classroom is not state-sponsored, but rather private speech.[183] They argue that, for this reason, the Establishment Clause is an inappropriate form of analysis.[184] Indeed, Justice O'Connor declared that student-led prayer is private religious speech and may be fully protected by both the Free Exercise and Free Speech Clauses of the Constitution.[185] Additionally, Justice Scalia suggested that a private speaker's ability to conduct religious speech in a public forum is not an Establishment Clause violation.[186] He found that public religious expression does not violate the Establishment Clause if it is made by a private citizen.[187]

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179. *See supra* Part II.A.4 (discussing school prayer and the Establishment Clause).

180. *See* Russo, *supra* note 27, at 4 (discussing the consistency of Establishment Clause jurisprudence concerning school prayer).

181. *See, e.g.*, Engel v. Vitale, 370 U.S. 421 (1962) (holding state officials cannot compose an official state prayer and require its recitation at the start of each school day even if students are not required to participate).

182. *See* Rick A. Swanson, *Time for a Change: Analyzing Graduation Invocations and Benedictions Under Religiously Neutral Principles of the Public Forum*, 26 U. MEM. L. REV. 1405, 1412 (1996) (emphasizing that Free Speech and Free Exercise Clauses protect private speech that endorses religion). In addition, Justice Kennedy has remarked that the Free Exercise Clause is a natural counterpart to the Establishment Clause, in saying "[t]he Free Exercise [C]lause embraces a freedom of conscience and worship that has close parallels in the speech provisions of the First Amendment, but the Establishment Clause is a specific prohibition on forms of state intervention in religious affairs with no precise counterpart in the speech provisions." *Lee*, 505 U.S. at 591 (citing Buckley v. Valeo, 424 U.S. 1, 92-93 n.127 (1976)).

183. *See* Chandler v. James, 180 F.3d 1254, 1261 (11th Cir. 1999).

184. *See id.*

185. *See id.* (citing Board of Educ. v. Mergens, 496 U.S. 226, 250 (1992) (majority opinion written by Justice O' Connor)).

186. *See* Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753, 770 (1995).

187. *See id.*

1. Free Exercise

The Free Exercise Clause reads: "Congress shall make no law . . . prohibiting the free exercise [of religion]."[188] Thus, government policy may not unreasonably restrict "religious proselytizing, or even acts of worship."[189] Traditionally, the Free Exercise Clause has been invoked to provide exemptions to government policies that substantially burden religion.[190] In order for a particular policy to be found permissible, the state must demonstrate a compelling interest for its enactment and must narrowly tailor its policy to meet that stated interest.[191]

The Supreme Court first found that a government policy unreasonably restricted the free exercise of religious belief in *Sherbert v. Verner*.[192] In that case, the Court found that the State wrongly denied a Seventh-day Adventist unemployment benefits because she had refused to accept jobs that required work on Saturday based upon her religious beliefs.[193] The Court posited that such a situation forced the employee to choose between economic stability and her religious beliefs and that the State did not demonstrate a compelling interest.[194]

Soon after, Free Exercise jurisprudence extended to the issue of religion in schools. In *Wisconsin v. Yoder*,[195] the Court determined that Amish children could be exempted from laws compelling compulsory education in public schools after eighth grade.[196] The Court allowed this because the Amish were educating their children outside of the public schools in ways more pertinent to the Amish society.[197] In its opinion, the Court balanced the compelling interest of the State in providing education with Amish religious beliefs.[198] It found that a public school policy compelling Amish children to attend "worldly" public schools in stark contrast to the Amish way of life overburdened Amish religious beliefs.[199] The Court determined that although the

188. U.S. CONST. amend. I.

189. *Capitol Square*, 515 U.S. at 760 (citation omitted).

190. *See* FARBER, *supra* note 55, at 243 (stating Free Exercise considers "the extent to which religious practices are entitled to exemption from general legal requirements").

191. *See id.* at 249.

192. Sherbert v. Verner, 374 U.S. 398 (1963).

193. *See id.* at 410.

194. *See id.* at 406-07.

195. Wisconsin v. Yoder, 406 U.S. 205 (1972).

196. *See id.* at 234.

197. *See id.* at 235-36. The Court held that the Amish provide an "'ideal' vocational education for their children" in this alternative setting. *Id.* at 224.

198. *See id.* at 234.

199. *See id.* at 217-18; *see also id.* at 231-32 (balancing the interest of Amish parents to direct their child's education with the interest of the state to compel education for all children).

State did have a compelling interest in educating children, a policy of forcing Amish children to attend the last few years of school was not "narrowly tailored" to meet that particular interest.[200]

This opinion, however, has been criticized because it granted an exception to one particular religious denomination that it probably would not grant to other secular or religious groups.[201] Critics argue that *Yoder* endorsed a policy that was not neutral because it failed to benefit all children or religions equally.[202] Instead, the policy (and the Court) "preferred" certain religions over others.[203] As a result of this lack of neutrality in state policy and the Court's deference to the Amish religion, some suggest the decision may have been a violation of the Establishment Clause.[204]

The Court used the compelling state interest test from *Sherbert* and *Yoder* for twenty-seven years, but abandoned it in 1990.[205] While some argue this shift occurred because the compelling state interest test rarely resulted in religious exemptions,[206] the only area where the Court made such allowances was unemployment compensation.[207] In *Employment Division v. Smith*,[208] Justice Scalia rejected the compelling state interest test and wrote that a valid state policy could not be invalidated simply because of an employee's religious beliefs. Specifically, Native Americans could be fired from their jobs at a drug rehabilitation organization for using a hallucinogen in the context of a religious ceremony.[209] Scalia declared that the state need not articulate a compelling interest to justify generally applicable religion-neutral laws that have the effect of burdening religious practice.[210] Scalia argued

200. *See id.* at 234.

201. *See id.* at 250-51.

202. *See id.*; *see also* City of Boerne v. Flores, 521 U.S. 507, 537 (1997) (Scalia, J., concurring) (discussing United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring) (stating generally the need for a valid and neutral law)).

203. *See* FARBER, *supra* note 55, at 250-51 (suggesting that the Court would not make such exceptions for either another religious group or a non-religious person with equally "heartfelt" beliefs about holding her child out of school). Justice Stevens reiterated this point, stating in *City of Boerne v. Flores*, "[a] governmental preference for religion, as opposed to irreligion" is in conflict with the Establishment Clause. *Boerne*, 521 U.S. at 537 (Stevens, J., concurring) (agreeing that the Religious Freedom Restoration Act was violative of the First Amendment) (citing Wallace v. Jaffree, 472 U.S. 38, 52-55 (1985)).

204. *See, e.g.*, FARBER, *supra* note 55, at 251.

205. Employment Div. v. Smith, 494 U.S. 872, 884-85 (1990).

206. *See* FARBER, *supra* note 55, at 252.

207. *See id.*

208. Employment Div. v. Smith, 494 U.S. 872 (1990).

209. *See id.* at 890.

210. *See id.* at 884.

that the compelling state interest test provided exemptions for religious beliefs that would be impermissible if analyzed under the Establishment Clause because these types of policies constituted a state preference to those with particular religious beliefs.[211] Notably, however, Scalia distinguished *Yoder* by creating an exception for situations where Free Exercise rights were accompanied by a second constitutional right.[212] Negative reaction to the *Smith* opinion was swift.[213] Congress reacted by passing the Religious Freedom Restoration Act,[214] but the Court later ruled that it was unconstitutional.[215]

Although the restrictive nature of the *Smith* decision severely reduced claims of Free Exercise, the decision's breadth was not as dramatic as one might expect.[216] In fact, the line of cases prohibiting state policies that specifically discriminate against religious groups has remained strong.[217] Attempts to apply the Free Exercise Clause to issues traditionally considered under the Establishment Clause have been largely unsuccessful.[218] In large part, this is because the state rarely bars an individual's freedom of religious speech in its entirety. In fact, none of the circuit court cases considering student-led graduation prayer directly invoked the Free Exercise line of cases.[219]

2. Introduction to Free Speech Bases

Unlike Free Exercise jurisprudence, the Free Speech doctrine has been applied to school prayer issues.[220] This doctrine allows the government to reasonably regulate the time, manner, and place of speech.[221] The content of such speech, however, may only be restricted

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211. *See id.* at 885.

212. *See id.* at 881 (noting that *Yoder* involved the fundamental, impliedly constitutional right for parents to make decisions about their child's education).

213. *See* FARBER, *supra* note 55, at 254.

214. *See* Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. § 2000bb (1994) (declared unconstitutional in *City of Boerne v. Flores*, 521 U.S. 507 (1997)).

215. *See* City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (holding RFRA unconstitutional and stating that Congress cannot use disagreement with judiciary as a basis for new legislation).

216. *See* FARBER, *supra* note 55, at 257 (noting that although *Smith* is clearly the law, "reports of the death of the Free Exercise Clause have been somewhat exaggerated").

217. *See id.* at 257-59; *see also* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 524 (1993) (invalidating an ordinance restricting the use of animals in sacrificial ceremonies).

218. *See* FARBER, *supra* note 55, at 257-58.

219. *See infra* Part III (outlining the current status of the law regarding student-led graduation prayer).

220. *See* Allred, *supra* note 48, at 746-50.

221. *See* FARBER, *supra* note 55, at 15; *see also* Brody v. Spang, 957 F.2d 1108, 1117 (3d Cir. 1992) (considering whether religious speech at a public high school graduation ceremony is a

under particular circumstances, based on either the nature of the government's involvement with the location of the speech or the identity of the speaker.[222]

a. Speech on Public Property: Public Forum Doctrine

The Court has outlined special limitations on speech that is delivered on public property.[223] Not all properties, however, are treated equally; instead, the allowance of a government restriction is based upon the type of public property (called a forum) that is implicated.[224] The Court has recognized three types of fora: a traditional public forum, a designated public forum and a non-public forum.[225] A traditional public forum is a place that has traditionally hosted public assembly and discourse.[226] Traditional public fora include areas such as sidewalks and streets.[227] The government may only restrict the content of speech in a traditional public forum if it can articulate a compelling state interest to do so.[228] In addition, the government restriction must be narrowly tailored to meet that state interest.[229]

Designated fora are places that are not traditionally considered areas for public debate and include university meeting facilities, school board meetings, and municipal theaters.[230] These places are treated as designated fora, however, because the government has specifically opened the place to entertain limited public communication.[231] Speech in a designated fora is afforded constitutional protections similar to speech in traditional fora.[232] Like traditional fora, content-based restrictions on speech are only allowed if restrictions are narrowly tailored to serve a compelling state interest.[233] The third type of forum,

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violation of Free Speech and Establishment Clauses, and using public forum analysis to make this determination).

222. *See* FARBER, *supra* note 55, at 15.

223. *See id.* at 167.

224. *See* Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 797 (1985).

225. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983) (holding that a school's mail system was a non-public forum whose access could not be restricted to one particular employee union over another).

226. *See id.* at 45.

227. *See id.*

228. *See id.*

229. *See id.* (citing United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 132 (1981)).

230. *See id.* at 46.

231. *See id.*; *see also* Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 800 (1985).

232. *See Perry*, 460 U.S. at 45-47.

233. *See id.* at 66 (Brennan, J., dissenting) (citing Consolidated Edison Co. v. Public Serv.

the non-public forum, includes government properties that are not considered traditional or designated public fora.[234] Unlike traditional or designated public fora, the government has "broad" control over speech in a non-public forum.[235] The government may regulate speech without a compelling interest.[236] The only limitation is that the regulation of speech must be reasonable in light of the forum's intended purpose.[237] Still, expression cannot be suppressed merely because public officials oppose the speaker's view.[238]

Thus, once a forum has been opened by the state for public debate or discourse, an attempt by the government to curtail particular forms of speech may constitute impermissible viewpoint discrimination[239] unless the government can demonstrate a compelling state interest.[240] If the speech occurred in a non-public forum, the government may reasonably regulate an individual's private speech as long as public officials do not curtail expression simply because they oppose the speaker's particular viewpoint.[241]

Traditionally, the Court has analyzed actions within schools and universities under the designated public forum or non-public forum standard.[242] For example, a line of public forum cases considered the access of religious student groups to school facilities.[243] In *Widmar v. Vincent*,[244] the Supreme Court held that a university that opened its facilities for after-hours use by student groups created a designated public forum.[245] Therefore, the Court concluded that the university deliberately opened the facilities for use beyond their normal instructional purpose.[246] The Court prohibited the university from

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Comm'n, 447 U.S. 530, 540 (1980)).

234. *See id.* at 46.

235. *See* FARBER, *supra* note 55, at 173.

236. *See Perry*, 460 U.S. at 70 n.11 (Brennan, J., dissenting).

237. *See* Swanson, *supra* note 182, at 1423 (citing *Perry*, 460 U.S. at 45).

238. *See* Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 392-93 (1993) (stating that neutral accommodation must be exercised within non-public fora); Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 806 (1985); *Perry*, 460 U.S. at 46.

239. *See* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 888 (1995) (Souter, J., dissenting).

240. *See Perry*, 460 U.S. at 45 (citing Carey v. Brown, 447 U.S. 455, 461 (1980)).

241. *See id.* at 46-49.

242. *See* Allred, *supra* note 48, at 746-50 (discussing forum analysis in schools).

243. *See* FARBER, *supra* note 55, at 172. These cases applied First Amendment limitations to the states through the Equal Protection Clause of the Fourteenth Amendment. *See id.* at 172-73.

244. Widmar v. Vincent, 454 U.S. 263 (1981).

245. *See id.* at 269; *see also* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 842 (1995).

246. *See Widmar*, 454 U.S. at 267 (citing the "neutral" purpose of the policy).

barring religious student groups from using the facilities because the university did not convincingly articulate a compelling reason to do so.[247] Although the university invoked the Establishment Clause itself as a compelling reason to limit use by students, the Court reasoned the clause would not be violated.[248] It concluded that the mere use of public space by a religious group did not mean that there was an impermissible "imprimatur of state approval" to the religious activity.[249] Rather, a policy allowing any student group to use university facilities was neutral on its face and treated all student groups equally.[250]

The Court, however, made a distinction between university and secondary school students when it found no violation of the Establishment Clause in *Widmar*.[251] The Court stated that university students are "less impressionable" than younger students and should be able to appreciate that the university's policy is one of "neutrality toward religion."[252] The majority opinion also implied that the Establishment Clause might serve as a compelling enough reason to regulate a public forum if violated in a secondary school.[253] If younger students would glean state-sponsorship from a policy's allowance of religious presence in a secondary school, such a violation might be found.[254]

In *Rosenberger v. Rector & Visitors of the University of Virginia*,[255] the Court considered a university funding policy for student publications.[256] The university wished to restrict funding to a religious student publication entitled *Wide Awake*.[257] The Court concluded that

247. *See id.* at 277. Some have commented, however, that *Widmar* is a narrow decision. *See* SMITH, *supra* note 51, at 223 (discussing *Widmar* and stating that "this might imply an increasing willingness on the part of the Court to permit religious exercise in the public sector"). *But see Widmar*, 454 U.S. at 282 (White, J., dissenting) ("I believe states to be a good deal freer to formulate policies that affect religion in divergent ways than does the majority.").

248. *See Widmar*, 454 U.S. at 267.

249. *Id.* at 274 ("[A]n open forum in a public university does not confer any imprimatur of state approval on religious sects or practices.").

250. *See id.*

251. *See id.*

252. *See id.* at 274 n.14; *see also* SMITH, *supra* note 51, at 227 (stating that this distinction will limit speech rights of secondary students).

253. *See Widmar*, 454 U.S. at 275. Specifically, the Court held "[a]t least in the absence of empirical evidence that religious groups will dominate UMKC's [University of Missouri at Kansas City] open forum, we agree with the Court of Appeals that the advancement of religion would not be the forum's 'primary effect.'" *Id.*

254. *See id.* at 274 n.14.

255. Rosenberger v. Rectors & Visitors of the Univ. of Va., 515 U.S. 819 (1995).

256. *See id.* at 823.

257. *See id.* at 826-28.

the university could not regulate speech based on its content unless that regulation facilitated the forum's intended purpose.[258] Otherwise, the regulation constituted impermissible viewpoint discrimination.[259] Because the intended purpose of the policy in *Rosenberger* was to fund student publications, the Supreme Court determined that a denial of such funding based solely on the basis of religious belief did not further the intended purpose.[260] Similarly, in *Board of Education of the Westside Community Schools v. Mergens*,[261] the Court held that a secondary school could not deny a student Christian club access to school facilities.[262] In *Mergens*, the Court extended the standard articulated in *Widmar* and created no distinction between university and secondary school settings.[263]

b. Regulation of Speech Based on a Speaker's Identity: Student Speech

The government may also regulate speech based upon the speaker's identity.[264] This is especially true in the case of custodial institutions such as schools, prisons and military institutions.[265] The Supreme Court has concluded that the government may restrict individual activity, including speech, because the scope of state authority in these organizations is substantial.[266]

The Supreme Court first considered the Free Speech rights of public school secondary students in *Tinker v. Des Moines Independent Community School District*.[267] In *Tinker*, a school policy specifically prohibited students from wearing black armbands to protest the Vietnam War.[268] Justice Fortas declared that "[students do not] shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[269] Even still, the Court acknowledged that it should consider Free Speech rights of students in light of the special characteristics of the school environment.[270] Thus, it established a

258. *See id.* at 829-30 (reviewing the general rules of regulated speech in a specific forum).
259. *See id.*
260. *See id.* at 832-33.
261. Board of Educ. v. Mergens, 496 U.S. 226 (1990).
262. *See id.* at 253.
263. *See id.* at 250.
264. *See* FARBER, *supra* note 55, at 187.
265. *See id.*
266. *See id.*
267. Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969).
268. *See id.* at 504.
269. *Id.* at 506.
270. *See id.*

special standard for private student expression in public secondary schools.[271] The Court held that if the expression by students did not materially disrupt classwork or cause substantial chaos, it was constitutionally permissible.[272] The Court found that the Des Moines School District's policy was impermissible because the school administration's action was an attempt to "avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[273]

Despite this holding, the Court subsequently limited students' rights of expression in *Bethel School District No. 403 v. Fraser*[274] and *Hazelwood School District v. Kuhlmeier*.[275] The Court distinguished the student speech in both cases from the facts of *Tinker* and, thus, established different standards. In *Fraser*, the Court considered student speech at a school assembly.[276] The speech was considered quasi-curricular because of the level of teacher supervision and control.[277] As a result, the Court provided broad discretion to the school district to censor sexually explicit student speech at the assembly that was "inconsistent with the 'fundamental values' of public school education."[278] The Court noted that although similar speech might be allowed in another setting, the value-based nature of a school setting compelled a special discretion to school administration.[279] Thus, it noted that the "First Amendment rights of students . . . are not automatically coextensive with the rights of adults in other settings."[280]

The Court expanded the breadth of that discretion in *Kuhlmeier*.[281] The *Kuhlmeier* Court allowed a school principal to censor stories about teen pregnancy and parents' divorces from a student newspaper.[282] The Court distinguished *Tinker* based upon the nature of the speech involved.[283] It remarked that *Tinker* compelled a school to simply tolerate private student expression.[284] In contrast to *Tinker*, the Court

271. *See id.* at 509.
272. *See id.*
273. *Id.*
274. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986).
275. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).
276. *See Fraser*, 478 U.S. at 685.
277. *See id.* at 683.
278. *Id.* at 685-86.
279. *See id.* at 685.
280. *Id.* at 682.
281. *See generally* FARBER, *supra* note 55, at 189 (discussing the allowance of broad discretion over quasi-curricular activities in *Kuhlmeier*).
282. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 274 (1988).
283. *See id.* at 270-71.
284. *See id.*

characterized the speech at issue in *Kuhlmeier* as quasi-curricular because it was supervised by teachers and could be perceived as bearing the "imprimatur of the school."[285] The Court concluded that the school district could reasonably limit such speech if it articulated "legitimate pedagogical concerns" in prohibiting it.[286] In addition, the Court refused to characterize the student newspaper as a public forum that deserved more freedom of expression.[287] The Court noted that the intended purpose of the newspaper was curricular in nature and not public expression because it involved journalism instruction.[288]

III. DISCUSSION

Supreme Court decisions involving First Amendment issues in a school setting fluctuate in their focus between the Establishment and Free Speech Clauses.[289] Lower court cases involving student-led prayers at graduation ceremonies are no exception.[290] Although the Supreme Court settled the constitutionality of graduation prayer sponsored by school officials and delivered by clergy in *Lee v. Weisman*,[291] federal circuit courts vacillate on the issue of *student-initiated* school prayer.[292] Without direction from the Supreme Court, circuit courts are left with a choice of criteria in evaluating student-led school prayer.[293] These courts have reached strikingly different conclusions, even when using similar modes of analysis.[294]

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285. *Id.* at 271.

286. *See id.* at 273 (holding such a standard applied to "editorial control over the style and content of student speech in school-sponsored expressive activities"). Interestingly, *Kuhlmeier* stands for a large degree of discretion to educators, which seems counter to the limitations on educators' decisions in the school-prayer graduation line of cases. *See id.* at 273 n.7 ("[E]ducators decisions with regard to the content of . . . expressive activities are entitled to substantial deference."). *But see id.* at 286 n.2 (Brennan, J., dissenting) ("[This discretion] was referring only to the appropriateness of the *manner* in which the message is conveyed, not of the message's *content*." (citing Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986))).

287. *See id.* at 270.

288. *See id.*

289. *See supra* Part II.

290. *See infra* Parts III.A-B (discussing various circuit court holdings concerning First Amendment issues in school settings).

291. *See* Lee v. Weisman, 505 U.S. 577 (1992) (holding that clergy may not conduct a prayer at a graduation ceremony).

292. *See infra* Parts III.A-B (discussing the differences in holdings on the issue of student-led school prayer).

293. *See infra* Parts III.A-B (describing the various constitutional standards employed by lower courts).

294. *See infra* Parts III.A-B (discussing each case addressing student-led school prayer and its holding).

Four circuit courts have considered the issue of student-led graduation prayer.[295] Of those four, three circuits have conflicting decisions within the circuit.[296] All told, on three occasions courts have found school policies allowing student-initiated prayer at graduation to be permissible,[297] while in four instances, courts have held such policies impermissible.[298] These cases vacillate between an Establishment Clause and Free Speech form of analysis.[299] In addition, even through they are faced with similar facts, they reach disparate conclusions.[300]

A. Courts Holding that Student-Led Prayer at Graduation Ceremonies Is Constitutionally Permissible

1. *Jones v. Clear Creek Independent School District* (Fifth Circuit) (November, 1992)

The Fifth Circuit was one of the first courts to consider the constitutionality of student-led graduation speech.[301] In *Jones v. Clear Creek Independent School District*,[302] the Clear Creek Independent School District allowed students to deliver an invocation or benediction in a non-sectarian and non-proselytizing manner.[303] The school's principal advised and counseled the students on permissible content.[304]

Before it engaged in a traditional Establishment Clause analysis, the court remarked upon the role of religion and character development in

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295. The Third, Fifth, Ninth and Eleventh Circuits have considered the issue. *See infra* Parts III.A-B (discussing the holdings of each federal circuit court of appeals that has considered this issue).

296. The Fifth, Ninth and Eleventh Circuits have conflicting decisions. *See infra* Parts III.A-B (discussing the split in the circuits).

297. *See infra* Part III.A (discussing the circuits that have found student-led prayer constitutional).

298. *See infra* Part III.B (discussing the circuits that have found student-led prayer unconstitutional).

299. *See infra* Part III (discussing the various forms of analysis for student-led graduation prayer); *see generally* Stockman, *supra* note 50 (discussing the "varying approaches" to the issue).

300. *See infra* Parts III.A-B, IV (discussing these cases and their conclusions).

301. *See* Jones v. Clear Creek Indep. Sch. Dist., 930 F.2d 416 (5th Cir. 1992), *cert. granted*, 505 U.S. 1215 (1992) (former judgment vacated and remanded for further review in light of *Lee v. Weisman*), *reh'g en banc* 977 F.2d 963 (5th Cir. 1992), *and cert. denied*, 508 U.S. 967 (1993). The Fifth Circuit distinguished this case in February 1999. *See* Santa Fe Indep. Sch. Dist. v. Doe, 168 F.3d 806, 821-23 (5th Cir. 1999), *cert. granted*, 120 S. Ct. 494 (1999); *see also infra* Part III.B.2 (discussing *Santa Fe* and distinguishing factors from *Clear Creek*).

302. Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963, 963 (5th Cir. 1992).

303. *See id.* at 967. *Santa Fe* distinguished itself from *Clear Creek* on this point. *See Santa Fe*, 168 F.3d at 818.

304. *See Clear Creek*, 977 F.2d at 965.

modern education.[305] Specifically, the court emphasized the importance of religious dialogue in light of "parental failure" to properly develop moral character in their children.[306] In addition, the court was concerned that a vigilant attempt to limit religious exchange in school settings might lead children to adopt a hostile attitude toward religion.[307]

In this light, the court held that Clear Creek's school policy withstood the three part *Lemon* test.[308] The court found that the policy did not manifest a religious intent but rather a secular purpose to solemnize the graduation ceremony.[309] It further determined that the policy would not have an effect of religious promotion or endorsement because the student speech could only be non-sectarian and non-proselytizing.[310] The court declined to address the third prong of the *Lemon* test, excessive entanglement with religion, and relied instead on the first two prongs of the test.[311]

The court also considered the Supreme Court's other Establishment Clause tests.[312] Under Justice O'Connor's endorsement test, originally set forth in *Lynch v. Donnelly*, the court found the policy permissible.[313] The court held that the policy did not rise to the level of religious endorsement because it did not specifically require prayer; rather, it simply accommodated such expression.[314] In addition, the court analyzed the case in light of Justice Kennedy's coercion test.[315] The court concluded that the policy would not result in a coercive atmosphere because any potentially religious speech would only be delivered by a peer student,[316] and, thus, the court distinguished the facts of *Lee v. Weisman*.[317] In *Lee*, the Supreme Court used Kennedy's coercion test to conclude that a policy that allowed clergy members to

305. *See id.*

306. *See id.*

307. *See id.* at 965-66 (citing Board of Educ. v. Mergens, 496 U.S. 226, 248 (1990)).

308. *See id.* at 967.

309. *See id.* at 966-67.

310. *See id.* at 971.

311. *See id.* at 967-68 (holding that the non-sectarian nature of the school policy keeps the case "free of all involvement with religious institutions").

312. *See id.* at 968-72.

313. *See id.* at 968 (discussing Justice O'Connor's concurring opinion in *Lynch v. Donnelly*, 465 U.S. 668, 688-89 (1984)).

314. *See id.*

315. *See id.* at 969.

316. *See id.* at 970-71.

317. *See id.*; *see also* Lee v. Weisman, 505 U.S. 577, 598-99 (1992).

deliver an invocation was constitutionally impermissible.[318] The Fifth Circuit in *Clear Creek* concluded that the effect of a peer speaker was inherently less coercive than speech delivered by an authority figure, such as a member of the clergy.[319] In addition, it concluded that high school students are able to understand the difference between independent student speech and state-endorsed religion.[320]

2. *Doe v. Madison School District No. 321* (Ninth Circuit) (May, 1998)

The Ninth Circuit also considered graduation school-prayer under the traditional Establishment Clause analysis. In *Doe v. Madison School District No. 321*,[321] the court considered a school policy that allowed administrators to choose four students, based upon their academic standing, to deliver an "address, poem, reading, song, musical presentation, prayer or any other pronouncement of their choosing."[322] The court found this policy constitutional.[323]

The court analyzed the policy using the three part test articulated in *Lemon v. Kurtzman,* which focuses on a policy's purpose, effect, and entanglement with religious activity.[324] In terms of the first prong, the court found that the policy had a secular purpose for two reasons.[325] First, the school used "neutral and secular criterion" in choosing the student speaker.[326] In addition, the court noted that the policy contemplated a number of genres of student speech, rather than referring exclusively to religious speech.[327] In other words, the policy

318. *See Lee*, 505 U.S. at 581-85.

319. *See Clear Creek*, 977 F.2d at 972.

320. *See id.* at 971-72.

321. Doe v. Madison Sch. Dist. No. 321, 147 F.3d 832 (9th Cir. 1998) (granting summary judgment for the school district, reasoning that the Establishment Clause was not violated), *vacated on procedural grounds*, 177 F.3d 789 (9th Cir. 1999) (*reh'g en banc*). Although this decision was vacated *en banc* on procedural grounds in May, 1999, the opinion is still instructive as to the treatment of the issue within the Ninth Circuit. *See Madison*, 177 F.3d at 799 (holding that parents did not have standing and further that the challenge did not present a live controversy because the plaintiffs had since graduated).

322. *Madison*, 147 F.3d at 834.

323. *See id.* at 838.

324. *See id.* at 836-38; Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971); *see also supra* Part II.A.2 (discussing the *Lemon* test).

325. *See Madison*, 147 F.3d at 837.

326. *Id.* at 835. The court invoked Justice Souter's reliance upon that criterion in his concurring opinion in *Lee* to support its rationale: "If the State had chosen its graduation day speakers according to wholly secular criteria, and if one of those speakers (not a state actor) had individually chosen to deliver religious message, it would have been harder to attribute an endorsement of religion to the state." *Id.* (quoting Lee v. Weisman, 505 U.S. 577, 630 n.8 (1992) (Souter, J., concurring) (internal quotation marks omitted)).

327. *See id.* at 836-37.

was simply neutral toward religion.[328] Under the second prong of the *Lemon* test, the court found that the policy had no primary religious effect because religious speech was only one of a number of topics from which a student could independently choose.[329] Even if a student chose to deliver religious speech, the school included a disclaimer in the graduation program that clarified the independence of the student's choice.[330] The court found that this disclaimer erased any perception of state endorsement of religion.[331] Thus, the policy had no religious effect.[332] The court only briefly considered the third prong of the *Lemon* test, dismissing the possibility that the policy would create excessive entanglement with religion because the policy was "neutral" to both religious and non-religious speech.[333]

The court also considered the coercion test utilized in *Lee v. Weisman* and relied upon the same factual rationale used to interpret *Lemon*.[334] The court noted that the policy in *Madison* included the element of student "autonomy" that the *Lee* court suggested would characterize a constitutionally appropriate policy.[335]

3. *Chandler v. James* (Eleventh Circuit) (July, 1999)

In July, 1999, a panel of judges from the Eleventh Circuit in *Chandler v. James*[336] held that a school policy permitting student-led prayer was constitutionally permissible.[337] The policy allowed "non-sectarian, non-proselytizing student-initiated voluntary prayer, invocations and/or benedictions during compulsory or non-compulsory

328. *See id.* at 837.

329. *See id.*

330. *See id.* at 836-37.

331. The disclaimer read, "any presentation by participants of graduation exercises is the private expression of the individual participants and does not reflect any official position of Madison School District #321 . . . ." *Id.* at 837 n.5.

332. *See id.* at 838.

333. *See id.*

334. *See id.* at 835-36 (referring to *Lee v. Weisman*, 505 U.S. 577, 587-90 (1992)).

335. *See id.* at 835. In reaching this conclusion, the *Madison* Court cited the *Lee* opinion, where three of the five majority Justices commented: "If the State had chosen its Graduation day speakers according to wholly secular criteria, and if one of those speakers (not a state actor) had individually chosen to deliver a religious message, it would have been harder to attribute an endorsement of religion to the State." *Lee*, 505 U.S. at 630 n.8 (Souter, J., concurring).

336. Chandler v. James, 180 F.3d 1254 (11th Cir. 1999), *petition for cert. filed*, 68 U.S.L.W. 3391 (U.S. Dec. 2, 1999) (No. 99-935).

337. *See id.* The panel was comprised of Judges Tjoflat, Godbold, and Hill. Note that this panel differs from the one in *Adler v. Duval County School Board*, 174 F.3d 1236 (11th Cir. 1999). The panel in *Alder* included Judges Hatchett, Marcus, and Kravitch. *See id.*; *infra* Part III.B.4 (discussing *Adler* and its holding).

school-related student assemblies, sporting events, school-related graduation or commencement ceremonies and other school-related student events."[338]

The court concluded that the case did not implicate the Establishment Clause because student speech could not constitute state or government endorsement of religion.[339] Instead, the court considered student speech to be private religious expression.[340] The court rejected the idea that students speaking at a formal public school ceremony were acting on behalf of the school simply because they were present on school grounds.[341] The Eleventh Circuit panel distinguished the controlling Supreme Court case on graduation school prayer, *Lee v. Weisman,* on those grounds.[342] *Lee* used traditional Establishment Clause analysis to conclude that graduation prayer by clergy constituted state endorsement of religion.[343]

The *Chandler* court instead based its decision on Free Speech grounds.[344] The court first recognized the graduation ceremony as a non-public forum.[345] Thus, limitations on student religious speech could only reach the time, place, and manner restrictions that would govern secular speech.[346] The court also concluded that the school could not restrict the content of student speech at graduation ceremonies, including religious speech. The court did note that a Free Speech analysis would not always be appropriate and found two situations where the more traditional Establishment Clause analysis should be invoked.[347] The court suggested that private student speech would be transformed into a state-endorsed action if a school policy

338. ALA. CODE § 16-1-20.3(b) (1995).

339. *See Chandler*, 180 F.3d at 1261-62.

340. *See id.* at 1261.

341. *See id.* at 1261-62.

342. *See id.* at 1258.

343. *See* Lee v. Weisman, 505 U.S. 577, 597-99 (1992).

344. *See Chandler*, 180 F.3d at 1260–63. The court said, "student-initiated religious speech is private speech endorsing religion, it is fully protected by both the Free Exercise and the Free Speech Clauses of the Constitution." *Id.* at 1261 (citing Board of Educ. v. Mergens, 496 U.S. 226, 250 (1990)); *see also* Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 506 (1969) ("[S]tudents [do not] . . . shed their constitutional rights . . . at the schoolhouse gate."); Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963, 964-65 (5th Cir. 1992) (*rehearing en banc*) (holding a school policy of permitting public high school student volunteers to deliver nonsectarian, nonproselytizing invocations at graduation ceremonies constitutional).

345. *See Chandler*, 180 F.3d at 1264-65.

346. *See id.* "This includes restrictions on announcements permitted in the schools' commencement programs and the distribution of religious literature." *Id.* at 1266 n.20.

347. *See id.* at 1264.

required administrative oversight of that speech.[348] Because such a policy might constitute state endorsement of religion, the Establishment Clause would be implicated.[349] The court further warned that overly proselytizing student speech might create a coercive atmosphere.[350] Accordingly, the coercion test endorsed by Justice Kennedy for Establishment Clause analysis might be violated.[351] Besides these two examples, the court offered no other guidelines concerning graduation prayer.[352]

B. Courts Holding That Student-Led Prayer at Graduation Ceremonies Is Constitutionally Impermissible

1. *Harris v. Joint School District No. 241* (Ninth Circuit) (November, 1994)

The Ninth Circuit held in *Harris v. Joint School District No. 241*[353] that a student-selected prayer was unconstitutional.[354] Although the opinion was vacated as moot by the Supreme Court in June of 1995 on procedural grounds,[355] other circuits have since relied upon it as persuasive.[356] Additionally, in *Doe v. Madison School District No. 321,* the Ninth Circuit distinguished *Harris* and came to a different holding.[357]

Harris involved a school policy allowing a majority vote by students to select religious prayer at their graduation ceremonies. Student

348. *See id.* The court stated that active endorsement, encouragement or participation constitutes prohibited "active supervision." *See id.* at 1264-65 n.19. Supervision does not mean mere presence. *See id.*

349. *See id.* at 1265.

350. *See id.*

351. *See id.* (citing Lee v. Weisman, 505 U.S. 577, 587 (1992)).

352. *See id.*

353. Harris v. Joint Sch. Dist. No. 241, 41 F.3d 447 (9th Cir. 1994), *vacated as moot,* 515 U.S. 1154 (1995). It is notable that a subsequent court discussing the Ninth Circuit's decision in *Harris* stated that the case's mootness was a result of the graduation of the student-plaintiffs. *See* Doe v. Madison Sch. Dist. No. 321, 7 F. Supp. 2d 1110, 1117 (D. Idaho 1997).

354. *See Harris,* 41 F.3d at 458. The Ninth Circuit had earlier found that prayer was unconstitutional under the auspices of a school assembly. *See* Collins v. Chandler Unified Sch. Dist., 644 F.2d 759, 760 (9th Cir. 1981).

355. *See* Harris v. Joint Sch. Dist. No. 241, 515 U.S. 1154, 1154 (1995), *vacating as moot* 41 F.3d 447 (9th Cir. 1994).

356. *See, e.g.,* ACLU v. Black Horse Pike Reg'l Bd. of Educ., 84 F.3d 1471, 1483 (3d Cir. 1996) (citing *Harris* for its categorization of a graduation ceremony as a public forum).

357. *See* Doe v. Madison Sch. Dist. No. 321, 147 F.3d 832 (9th Cir. 1998) (holding that graduation prayer was permissible), *vacated on procedural grounds,* 177 F.3d 789 (9th Cir. 1999).

speakers were selected based upon academic achievement.[358] The school published a disclaimer in its graduation program, disavowing any sponsorship or association with the content of student speech.[359] The *Harris* court used Justice Kennedy's coercion test to prohibit this student speech.[360] The court found that the atmosphere was coercive because the school inherently controlled in many ways (including financially[361]) such a formal event.[362] The court declared that the school district could not disclaim responsibility for a decision so important to students.[363] The court found that the potential for coercion was natural because students were "obligated" to participate in all portions of the ceremony, including any prayer.[364]

The court also briefly moved beyond the coercion test in its analysis.[365] First, the court considered *Lemon* and stated that there was no secular purpose for allowing such speech.[366] It further declared that, even if such a purpose could be shown, the primary effect of such speech would be to endorse religion, thereby failing the second prong of *Lemon*.[367] Second, the court flatly rejected the school's Free Speech argument and declared that the graduation ceremony was not a public forum.[368]

2. *Santa Fe Independent School District v. Doe* (Fifth Circuit) (February, 1999)

In February, 1999, the Fifth Circuit distinguished its decision in *Jones v. Clear Creek Independent School District* when finding graduation prayer to be impermissible in *Doe v. Santa Fe Independent School District*.[369] In *Santa Fe*, students and parents filed suit against the school district over school policies that governed speech at graduation ceremonies and sporting events.[370] Under the first policy,

358. *See Harris*, 41 F.3d at 453.

359. *See id.*

360. *See id.* at 457.

361. *See id.* at 454.

362. *See id.*

363. *See id.* at 454-55.

364. *See id.* at 457.

365. *See id.*

366. *See id.* at 457-58 (citing Collins v. Chandler Unified Sch. Dist., 644 F.2d 759, 762 (9th Cir. 1981)).

367. *See id.* at 458.

368. *See id.*

369. Doe v. Santa Fe Indep. Sch. Dist., 168 F.3d 806 (5th Cir. 1999), *cert. granted*, 120 S. Ct. 494 (1999).

370. *See id.* at 811. Such speech was quite traditional. *See* Duggan, *supra* note 3, at A3 (dis-

the school selected students to deliver an invocation or benediction at the graduation ceremony.[371] School administrators screened the language of the speeches and censored prayers that were too proselytizing.[372] The policy prohibited religious speech by clergy and school officials in response to *Lee v. Weisman*, which held such practices unconstitutional.[373]

Unlike the graduation context, the Santa Fe Independent School District did not have an explicit policy for religious student speech at athletic games until the litigation commenced.[374] Once developed, the football policy allowed student prayer before games.[375] In part, the school district's policy followed the rationale of the leading Fifth Circuit case on the issue at the time, *Clear Creek*.[376] Similar to the court's analysis in *Clear Creek*, the school district justified pre-game prayer because it "solemnize[d] the event, . . . promote[d] good sportsmanship and student safety, and . . . establish[ed] the appropriate environment for the competition."[377] Although the school district argued that it would strike any proselytizing speech from graduation or athletic events, neither policy required that prayers be non-proselytizing and non-sectarian.[378] Instead, the school district deferred that decision until such time as they were ordered by the court to do so.[379]

In approaching the constitutionality of the school district's policy, the court first distinguished two points of its earlier holding in *Clear Creek*.[380] First, the court reasoned that the Santa Fe Independent School District had allowed prayers to be proselytizing and sectarian and, thus, overstepped the protections of the *Clear Creek* decision.[381] Secondly,

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cussing the history of football in Texas and its role in the community); *see also* Catalina Camia, *Congress Should Join Push for Pre-Game Prayer*, DALLAS MORNING NEWS, Oct. 24, 1999, at 12A (quoting Texas Congressman Joe Barton, "The pre-game prayer is as much an institution as Texas football itself.").

371. *See Santa Fe*, 168 F.3d at 812.

372. *See id.* at 810.

373. *See id.* at 811.

374. *See id.* at 810.

375. *See id.* at 812.

376. *See id.* (stating that the football game prayer policy was essentially the same as the final graduation prayer policy which had been held constitutional in *Jones v. Clear Creek Independent School District*, 977 F.2d 963 (5th Cir. 1992)); *see also supra* Part III.A.1 (discussing the holding in *Clear Creek*, which allowed students to deliver invocation or benediction in a non-sectarian and non-proselytizing manner).

377. *Santa Fe*, 168 F.3d at 812.

378. *See id.*

379. *See id.*

380. *See id.* at 814-15.

381. *See id.* at 816.

the court refused to extend the *Clear Creek* prayer policy to include football games because there was no need for solemnization in that setting.[382]

Following *Clear Creek's* lead, the court analyzed both policies according to the three part *Lemon* test.[383] The court held that the secular purpose of solemnization relied upon in *Clear Creek* to allow student-led prayer was not present in *Santa Fe*.[384] The court found that the school district had a clear religious purpose and pointed to the district's reluctance to prohibit sectarian or proselytizing prayer unless mandated by court order.[385] The court noted that any type of proselytizing student speech "transform[ed] the character of the ceremony."[386] The court concluded that the policy also violated the second part of the *Lemon* test.[387] The court found that the primary effect of a policy that requested students to lead an invocation or benediction would be to advance religion and would, therefore, constitute religious endorsement by the state.[388] The court put little emphasis on the fact that the prayer was student-initiated and student-led.[389] Instead, the court relied upon its reasoning with respect to the first two prongs of the test to conclude that the prayer also violated the third prong. As a result, the court ruled that the policy excessively entangled government with religion.[390]

The court also considered Justice Kennedy's coercion test as outlined in *Lee v. Weisman*.[391] Ultimately, however, the court rested upon the fact that the policy failed to meet the proscriptions in the *Lemon* test, thereby declining to engage in the *Lee* analysis.[392] In addition, the court acknowledged Justice O'Connor's endorsement test[393] and stated that, by permitting religious speech at a graduation ceremony or athletic

382. *See id.* at 823; *see also* Doe v. Duncanville Indep. Sch. Dist., 994 F.2d 160, 168 (5th Cir. 1993) (holding that an injunction prohibiting prayer at basketball games and/or practices was likely to succeed on its merits).

383. *See Santa Fe*, 168 F.3d at 814.

384. *See id.* at 816.

385. *See id.* (referring to the decision to change the speech policy only if mandated by court order); *see also supra* Part III.A.1 (discussing *Jones v. Clear Creek Independent School District*).

386. *Santa Fe*, 168 F.3d at 816.

387. *See id.* at 817.

388. *See id.* at 817-18.

389. *See id.*

390. *See id.*

391. Lee v. Weisman, 505 U.S. 577 (1992).

392. *See Santa Fe*, 168 F.3d at 818 (citing *Lee*, 505 U.S. at 588-90).

393. *See* Allegheny v. ACLU, 492 U.S. 573 (1989) (involving governmental endorsement of religion by means of challenged action).

event, the school implied the district's sponsorship and endorsement of religion.[394]

Unlike other circuit courts, the dissenting opinion acknowledged the Santa Fe School District's argument that student-led graduation prayer should be analyzed under Free Exercise and Free Speech doctrines.[395] Specifically, the school district argued that a graduation ceremony was a designated public forum.[396] For that reason, it contended that any limitation on speech would "constitute impermissible viewpoint discrimination."[397] Although the majority in *Santa Fe* declared that religious speech at the graduation ceremony did not warrant Free Speech analysis, the dissenting judge disagreed and remarked that the majority should have exercised a more thorough Free Speech analysis.[398] The dissent suggested that a graduation ceremony could be classified as a public forum because it met the definition of a government sponsored event where private views were expressed.[399] The dissent concluded that if the government prohibited proselytizing religious speech in a public forum, but tolerated ecumenical religious speech, the government had engaged in illegitimate, viewpoint discrimination.[400]

3. *ACLU v. Black Horse Pike Regional Board of Education* (Third Circuit) (May, 1996)

Unlike the Fifth and Eleventh Circuits, the Third Circuit has heard only one case on the issue of student-led graduation prayer. The case, *ACLU v. Black Horse Pike Regional Board of Education,*[401] involved a Board of Education policy that allowed students to vote on whether to allow prayer at graduation ceremonies.[402] Prior to this policy, the Board implemented a policy that allowed clergy members to perform benedictions and invocations at graduation ceremonies.[403] In an effort to conform to the requirements of *Lee v. Weisman*, however, the Board developed a new policy that clearly prohibited any endorsement,

394. *See Santa Fe*, 168 F.3d at 818.
395. *See id.* at 825 (Jolly, J., dissenting).
396. *See id.* at 814.
397. *Id.*
398. *See id.* at 825 (Jolly, J., dissenting).
399. *See id.* (Jolly, J., dissenting).
400. *See id.* (Jolly, J., dissenting).
401. ACLU v. Black Horse Pike Reg'l Bd. of Educ., 84 F.3d 1471 (3d Cir. 1996).
402. *See id.* at 1474-75.
403. *See id.* at 1475.

organization or promotion of religious speech by school personnel.[404] Further, the Board hoped that the presence of a student vote would be in line with the permissible parameters set forth in the Fifth Circuit's decision of *Jones v. Clear Creek Independent School District.*[405]

The Third Circuit disagreed with the Fifth Circuit's decision to allow such prayer in *Clear Creek* and accordingly deemed Black Horse's policy invalid.[406] The court relied on the *Lemon* and *Lee* tests to invalidate the policy.[407] Under the first prong of the *Lemon* test, the school argued that its purpose was secular because it sought to promote free speech.[408] The court rejected this argument, reasoning that a graduation ceremony was not a public forum and, thus, did not require free speech protections.[409] In addition, the court rejected the school district's argument that prayer assisted in the solemnization of the ceremony.[410] The court determined that a graduation ceremony would be a solemn occasion with or without prayer.[411] The court concluded that the school district endorsed religious speech when it created the revised policy.[412]

Under the second prong of *Lemon*, the court found that the allowance of prayer at graduation ceremonies would naturally have the effect of promoting or endorsing religious activity. Therefore, the policy failed the second part of the *Lemon* test.[413] The court rejected the school's argument that the freedom afforded to student speakers would prevent the promotion of a specific religious message from year to year.[414] Rather, the court held that any religious message would have a religious effect.[415] The court further discounted the fact that the school inserted a disclaimer on programs to separate itself from the speech and held that no matter what distance the school might intimate, the policy would

404. *See id.* at 1474 (citing Lee v. Weisman, 505 U.S. 577 (1992)).

405. *See id.* at 1474-75.

406. *See id.* at 1482.

407. *See id.* at 1482-88.

408. *See id.* at 1484.

409. *See id.*

410. *See id.* at 1485.

411. *See id. But see* Marsh v. Chambers, 463 U.S. 783 (1983) (holding that prayer before legislative sessions has a solemnizing effect). The *Black Horse* court distinguished *Marsh* because of the differing contexts in which prayer would be taking place. *See Black Horse*, 84 F.3d at 1485.

412. *See Black Horse*, 84 F.3d at 1485.

413. *See id.* at 1487.

414. *See id.*

415. *See id.*

imply state endorsement of religion.[416] The court failed to address the entanglement prong of the *Lemon* test, relying solely upon the first two prongs.[417]

The court also considered other Establishment Clause tests.[418] For example, it contemplated the coercion test set forth in *Lee v. Weisman*.[419] The court held that a democratic vote by students on the graduation speech was not enough to avoid the risk of a coercive atmosphere.[420] It held that "an impermissible practice cannot be transformed into a constitutionally acceptable one by putting a democratic process to an improper use."[421] In so holding, the court noted that the inherent control of the school graduation ceremonies would put great pressure on students to participate,[422] as the students who voted not to have prayer at the graduation ceremony would be forced to hear it anyway.[423]

The school district made a Free Speech argument similar to that made by the Santa Fe district, but the court likewise rejected it.[424] The court concluded that graduation ceremonies were not public forums and, therefore, were not entitled to Free Speech protection.[425] The court's dissent, however, gave more credence to the school district's Free Speech argument.[426] The dissent concluded that the speech was student-directed, was free of excessive school involvement, and had a purpose more in tune with solemnization.[427] In addition, the court's dissent found that the policy was not violative of the *Lemon* test because the student polling was secular in nature[428] and a school disclaimer avoided the potential image of state power or coercion.[429]

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416. *See id.*

417. *See id.* at 1488.

418. *See id.* at 1478.

419. *See id.* at 1478-83.

420. *See id.* at 1479.

421. *Id.* at 1477.

422. *See id.* at 1479-80.

423. *See id.* at 1480. The vote was 128 for prayer, 120 for a moment of silence, and 20 for neither. *See id.* at 1475.

424. *See id.* at 1478.

425. *See id.*

426. *See id.* at 1490 (Mansmann, J., dissenting).

427. *See id.* at 1490-91 (Mansmann, J., dissenting).

428. *See id.* at 1495 (Mansmann, J., dissenting).

429. *See id.* at 1496 (Mansmann, J., dissenting).

4. *Adler v. Duval County School Board* (Eleventh Circuit) (May, 1999)

In May, 1999, the Eleventh Circuit reviewed in *Adler v. Duval County School Board*[430] a school district policy that allowed a student majority vote to determine whether there would be unrestricted student-led speech at the beginning or closing of graduation ceremonies.[431] The school district had traditionally included a clergy-led prayer in graduation ceremonies.[432] When the Supreme Court prohibited that practice in *Lee v. Weisman*, however, the school district was forced to adjust its policy.[433] In response, the school district only allowed the possibility of student-directed speech.[434] Yet the court, in *Adler* determined that the school district did not make a bona fide attempt to comport to newly established constitutional standards even though the district looked to the Fifth Circuit's decision in *Jones v. Clear Creek Independent School District* for guidance when modifying its policy.[435]

The court used the rationale of both the *Lemon* and *Lee* tests to conclude that student-led graduation prayer was impermissible.[436] The policy first failed the *Lemon* test.[437] The court held that the policy had a clear religious purpose because the school district's intent was to formulate a new policy that would maintain the religious speech that had been a traditional part of the district's graduation ceremonies.[438] Additionally, the court held that the policy violated the second part of the *Lemon* test because its primary effect was to permit prayer at graduation.[439] The court failed to address the third prong of the *Lemon* test, excessive entanglement with religion, because the policy clearly violated the first two prongs.[440]

The court also analyzed the policy in light of Justice Kennedy's coercion test, which was cited in *Lee v. Weisman*.[441] It cited several reasons why the policy created a coercive atmosphere.[442] First, the

430. Adler v. Duval County Sch. Bd., 174 F.3d 1236 (11th Cir. 1999) (Hatchett, Marcus and Kravitch, J.J.), *vacated, reh'g en banc granted*, Jun. 3, 1999.

431. *See id.*

432. *See id.* at 1238.

433. *See id.* (citing generally Lee v. Weisman, 505 U.S. 577 (1992)).

434. *See id.* at 1239-40.

435. *See id.* at 1239 (citing generally Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963 (5th Cir. 1992)).

436. *See id.* at 1251.

437. *See id.*

438. *See id.* at 1249.

439. *See id.* at 1251.

440. *See id.*

441. *See id.* at 1243.

442. *See id.* at 1244.

court rejected the idea that the school administration could separate itself from religious speech because the speech was delivered by a student.[443] Instead, it concluded that the inherent control school administrators held over the graduation ceremony rendered them responsible for all of its content.[444] In fact, the court noted that the mere opportunity for student speech in a graduation ceremony was ultimately the prerogative of the school district.[445] When students spoke at the public school graduation ceremony, they in effect became actors of the state.[446]

The court found that, although students voted on the presence of religious speech in their ceremony, this did not "erase the imprint of the state from graduation prayer."[447] The court posited that a majority vote of one's peers endorsing religious speech would create a far more coercive and dominating atmosphere than if the choice was left to school administrators.[448] The court noted that students would feel coerced to listen and respond to the religious speech because their attendance at their graduation ceremonies was so important to them.[449] Students who disagreed with the vote to include religious prayer would have no choice but to participate in the ceremony.[450] As a result, the court found that reasonable students would not be able to distinguish "student-elected sectarian and proselytizing prayerful messages" from state sponsorship and "will feel coerced to participate in them."[451]

IV. ANALYSIS

As shown, courts and commentators disagree on the appropriate standard of analysis to apply to student-led graduation prayer.[452]

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443. *See id.*

444. *See id.*

445. *See id.* (citing ACLU v. Black Horse Pike Reg'l Bd. of Educ., 84 F.3d 1471, 1479 (3d Cir. 1996) (en banc)).

446. *See id.* at 1246 (stating that "[w]hen the senior class is given plenary power over a state sponsored, state controlled event such as a high school graduation, it is just as constrained by the Constitution as the state would be." (quoting Harris v. Joint Sch. Dist. No. 241, 41 F.3d 447, 455 (9th Cir. 1994))).

447. *Id.* at 1244.

448. *See id.* at 1247 (making a determination in direct opposition to *Clear Creek*). In effect, it seems as if the court will not acknowledge any independent decision-making ability of the students, instead attributing the decisions of the students to the state. *See id.*

449. *See id.* at 1248.

450. *See id.*

451. *Id.* at 1247.

452. *See supra* Part III (discussing the disagreement among courts regarding whether student-led prayer at graduation ceremonies is constitutionally protected).

Traditionally, these types of school prayer cases were subject to an Establishment Clause analysis.[453] The thrust of the Establishment Clause is the prohibition of government policies that endorse or support religious practice.[454] Thus, under the Establishment Clause, courts evaluate school prayer policies to determine whether they produce such a result.[455] Accordingly, the Establishment Clause analysis focuses primarily on schools and their motivations for implementing policies.[456] As a result, the rights of students to express their religious beliefs are often disregarded.[457] A growing number of cases and commentators, including Justices O'Connor and Scalia, have suggested that a Free Speech form of analysis should be considered in addition to an Establishment Clause analysis.[458] This approach considers two additional issues: the special Free Speech standards for student speakers[459] and the regulation of speech on public property.[460] Because the issue incorporates both the prohibition of government entanglement with school prayer and the protection of student expression of religious beliefs, the optimal approach is one that looks at graduation prayer under the dual lenses of the Establishment and Free Speech Clauses. Graduation prayer, however, is unconstitutional under both analyses.

A. Establishment Clause Analysis Is Appropriate

The Establishment Clause restricts government policies that support or endorse religious expression.[461] Thus, it seems appropriate to

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453. *See supra* Part II (discussing the progression of the Court's application of the Establishment Clause).

454. *See generally* Allred, *supra* note 48, at 762-78 (discussing the Establishment Clause and student religious speech in classrooms).

455. *See, e.g.*, Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963, 964-65 (5th Cir. 1992) (stating that the Establishment Clause analysis must consider whether the effect of the school board policy is to "advance or endorse religion").

456. *See id.*

457. *See id.* at 965-66.

458. Justice O'Connor declared that student-initiated speech is "private speech endorsing religion, and is fully protected by both the Free Exercise and Free Speech Clauses." Board of Educ. v. Mergens, 496 U.S. 226, 250 (1990). Justice Scalia suggested that a private speaker's ability to conduct religious speech in a public forum is not considered an Establishment Clause violation. *See* Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753, 769 (1995). He found that religious expression does not violate the Establishment Clause if it is not made by an employee of the state and occurs in a traditional or designated public forum. *See id.* at 770; *see also* Allred, *supra* note 48 (discussing student religious speech).

459. *See supra* Part II.B.2.b (discussing the Court's establishment of special standards for student expression in public schools).

460. *See supra* Part II.B.2.a (explaining the Court's outline of special limitations on speech that is delivered on public property).

461. *See* FARBER, *supra* note 55, at 281.

evaluate policies involving religion that are promulgated by a public school system according to the provisions of the Establishment Clause.[462] Policies that regulate public high school graduation ceremonies, in effect, govern a state-sponsored event.[463] Graduation ceremonies are financially and organizationally supported by a school's administration.[464] The Supreme Court has consistently held that religious speech within a public school setting invokes an Establishment Clause analysis,[465] and the majority of circuit courts considering student-led graduation prayer have agreed.[466] These courts have disagreed, however, on how the Establishment Clause is implicated by these policies.[467] Courts can choose from three Establishment Clause analyses: adopt pre-*Lemon* standards of analysis,[468] utilize the *Lemon* test,[469] or consider post-*Lemon* analyses.[470]

1. Pre-*Lemon*: Graduation Policies Are Neither Separate Nor Accommodating of Religion

The earliest Establishment Clause cases attempted to balance two central philosophies: separation and accommodation.[471] Cases such as *Engel v. Vitale*, which prohibited prayer in public schools, adopted the stance that the Establishment Clause invalidated any policy that allowed

462. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38 (1985) (holding that an Alabama statute that authorizes a period of silence for "meditation or voluntary prayer" violates the Establishment Clause); Widmar v. Vincent, 454 U.S. 263, 276 (1981) (stating that the Establishment Clause does not require a university to close its facilities to registered religious groups where the facilities are generally available for activities of registered student groups); Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963, 972 (5th Cir. 1992) (holding that a school district resolution allowing student volunteers, with the permission of the senior class, to present nonsectarian, non proselytizing graduation prayers does not violate the Establishment Clause).

463. *See, e.g.*, *Clear Creek*, 977 F.2d at 965-66 (noting that the school district resolution at issue was subject to Establishment Clause analysis because the State was providing space in a closed forum for a government sponsored event).

464. *See* Harris v. Joint Sch. Dist. No. 241, 41 F.3d 447, 454 (9th Cir. 1994), *vacated as moot*, 62 F.3d 1233 (9th Cir. 1995).

465. *See supra* Part II.A (outlining the history of the Establishment Clause and the Court's application of the Clause to issues that involve religious speech).

466. *See supra* Part III (discussing conflicting decisions among circuit courts on the issue of student-led prayer at graduation ceremonies).

467. *See supra* Part III (discussing the various holdings on the issue of student-led graduation prayer).

468. *See infra* Part IV.A.1 (discussing the judicial approach in the earliest Establishment Clause cases).

469. *See infra* Part IV.A.2 (discussing the three parts of the *Lemon* test and its application to graduation school prayer cases).

470. *See infra* Part IV.A.3 (applying post-*Lemon* approaches to graduation prayer).

471. *See supra* Part II.A.1 (discussing Establishment Clause jurisprudence in light of religious expression in schools).

religious speech in a public school.[472] For the most part, the Court has sustained that idea.[473] There have only been two types of exceptions to this strict separationist view.[474] In *Everson v. Board of Education*, the Court upheld a bus transportation policy because it did not explicitly support religion but remained neutral to all students.[475] In addition, in *Zorach v. Clauson*, the Court held that a policy that allowed students to leave public school for religious instruction was simply an accommodation of religious expression, not supportive of it.[476]

Neither *Everson* nor *Zorach* involved student-led graduation prayer. If student-led graduation prayer policies were analyzed in a strict separationist vein, they would most likely be unconstitutional. Policies either allowing students to vote for religious speech or directing school administration to review such student speech create a knowing and intentional religious presence in a public school.[477] Only two factual situations would seem to lessen this knowing presence. The first involves policies that permit speech on a subject of a student's choosing. These policies may receive protection because of their neutrality.[478] Like the bus policy in *Everson*, such a policy treats all of its recipients equally, but the constitutionality of such a policy would most likely be marred if a school administrator ever reviewed the student speech.[479] This review would ensure an awareness of religious speech on the part of the school administration.[480] The knowing

472. *See* Engel v. Vitale, 370 U.S. 421 (1962) (holding that the practice of the recitation of a prayer in each class at the start of the school day was in violation of the Establishment Clause).

473. *See* FARBER, *supra* note 55, at 275 (noting that the prohibition of directed school prayer is a "benchmark" of the Court's rulings in this area).

474. *See, e.g.*, Zorach v. Clauson, 343 U.S. 306, 308-9 (1952) (stating that so long as there is "neither religious instruction in the public school classrooms nor the expenditure of public funds," public schools are permitted to accommodate outside religious groups); Everson v. Board of Educ., 330 U.S. 1, 18 (1947) (stating that the First Amendment "requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary").

475. *See Everson*, 330 U.S. at 17 (holding that a state's bus transportation policy could support families with children attending religious schools).

476. *See Zorach*, 343 U.S. at 315.

477. *See* Chandler v. James, 180 F.3d 1254, 1264 (11th Cir. 1999). *But see* Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963, 969-70 (5th Cir. 1992).

478. *See Everson*, 330 U.S. at 18; *see also* Doe v. Madison Sch. Dist. No. 321, 147 F.3d 832, 836-37 (9th Cir. 1998), *vacated on procedural grounds*, 177 F.3d 789 (9th Cir. 1999); *Clear Creek*, 977 F.2d at 969. *But see* ACLU v. Black Horse Pike Reg'l Bd. of Educ., 84 F.3d 1471, 1487 (3d Cir. 1996).

479. *See Black Horse*, 84 F.3d at 1484.

480. *See id.*

permission of such speech may be seen as endorsement or support of religious speech.[481]

Another opportunity for permissible prayer might occur through the accommodation line of cases.[482] Under the accommodation cases, an activity such as a moment of silence at a graduation ceremony might be permitted.[483] With a moment of silence instead of student-led religious speech, the school would only be accommodating religious expression, but not endorsing or supporting it publicly.[484] Although moments of silence have not received universal support from the Court,[485] Justice Stevens in *Wallace v. Jaffree* suggested that a moment of silence policy that was neutral in motivation might be constitutionally permissible as an accommodation of personal expression.[486]

Outside of the above exceptions, the presence of religious speech within a public school graduation ceremony would be a violation of the Establishment Clause under a separationist analysis. Permutations of school policies that would render them permissible under this view would undoubtedly require concessions that would destroy the intent of students and/or school administrators to allow purely religious speech in graduation ceremonies.

2. Graduation Prayer Violates the *Lemon* Test

If a court moved away from the separationist versus accommodation framework and adopted the *Lemon* test, the results would remain the same. Although the *Lemon* test has been utilized in the majority of graduation-prayer cases,[487] its vagueness has resulted in uneven application.[488] The first part of the *Lemon* test requires an analysis of

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481. *See id.*

482. *See supra* Part II.B.1 (discussing the Free Exercise Clause, which prohibits government policies restricting religious expression).

483. This was the type of compromise used by Nick Becker's school. *See* Layton, *supra* note 8, at C1.

484. *See* Zorach v. Clauson, 343 U.S. 306, 314 (1952) (exemplifying an accomodationist policy).

485. *See* Wallace v. Jaffree, 472 U.S. 38, 56 (1985).

486. *See id.*

487. *See* Adler v. Duval County Sch. Bd., 174 F.3d 1236, 1242 (11th Cir. 1999) (citing Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971)); Doe v. Santa Fe Indep. Sch. Dist., 168 F.3d 806 (5th Cir. 1999), *cert. granted*, 120 S. Ct. 494 (1999); Doe v. Madison Sch. Dist. No. 321, 147 F.3d 832, 836 (9th Cir. 1998), *vacated on procedural grounds*, 177 F.3d 789 (9th Cir. 1999); ACLU v. Black Horse Pike Reg'l Bd. of Educ. Sch. Dist, 84 F.3d 1471, 1483 (3d Cir. 1996); Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963, 966 (5th Cir. 1992); *see also supra* Part III (discussing the preceding cases in light of *Lemon*).

488. *See supra* Part II.A.2 (discussing the development and implementation of *Lemon*).

the purpose of a graduation speech policy.[489] Policies that explicitly endorse or request student-led prayer fail this part of the test because their purpose is non-secular.[490] This includes policies that either allow a student vote or tacitly request prayer.[491]

Some school districts and courts, however, have articulated different purposes.[492] For example, the Fifth Circuit in *Jones v. Clear Creek Independent School District* found the solemnization of a graduation ceremony a secular purpose for student-initiated school prayer.[493] Other districts have held the purpose of such policies to be secular because students were chosen by a secular criteria, such as academic standing.[494] This reasoning seems to be a pretext and is the type of disingenuous action that the *Lemon* Court sought to avoid.[495] The criteria for choosing a student speaker would not supercede an intentional non-secular purpose.[496] The only policy that could potentially survive the first part of the *Lemon* test is one that genuinely invited general student speech but did not specifically mention or exclusively contemplate religious expression.[497] Ultimately, however, it is the subjective intent of the drafters of such policies that would guide this analysis on a case-by-case basis.[498]

The second part of the *Lemon* test contemplates the effect of a student-led graduation policy.[499] Specifically, a policy is impermissible if it has an effect of advancing or inhibiting religion.[500] Some commentators have argued that a graduation prayer policy should pass

489. *See Lemon*, 403 U.S. at 615.

490. *See id.*

491. *See Santa Fe*, 168 F.3d at 823 (noting that a football game is not a solemn event and, thus, prayer is prohibited); *Black Horse*, 84 F.3d at 1488 (holding that a school policy allowing students to vote to include prayer at graduation violated the Establishment Clause of the First Amendment).

492. *See Madison*, 147 F.3d at 837 (citing the secular criterion used to choose student speakers); *Clear Creek*, 977 F.2d at 966-67 (citing a purpose to solemnize the ceremony). *But see Santa Fe*, 168 F.3d at 823 (rejecting the solemnization argument for football games); *Black Horse*, 84 F.3d at 1485 (rejecting the solemnization argument).

493. *See Clear Creek*, 977 F.2d at 971.

494. *See Madison*, 147 F.3d at 835.

495. *See Santa Fe*, 168 F.3d at 816. The court held that prayer would rather "transform" the event. *See id.*; *see also Black Horse*, 84 F.3d at 1484-85 (noting that a student vote to include prayer at graduation, even if serving a secular purpose, is still unconstitutional).

496. *See* Adler v. Duval County Sch. Bd., 174 F.3d 1236, 1249 (11th Cir. 1999).

497. *See id.*

498. *See* Lemon v. Kurtzman, 403 U.S. 602, 613 (1971).

499. *See id.* at 612.

500. *See id.*

this part of the test.[501] In particular, they contend that, although a regular practice of school prayer would have such an effect because of its recurring nature,[502] speech at a graduation ceremony is a fairly isolated occurrence that might seem more like a mere accommodation than an endorsement of religious expression. Courts, however, have rejected this argument.[503]

Another circumstance that may pass muster under the second part of *Lemon* is a policy that prohibits proselytizing or overly sectarian speech that would curb any effect of advancing religion.[504] Two circuits have found that a school policy has no religious effect under these restrictions.[505] In addition, school policies where students were given a wide range of acceptable speech to choose from would have little religious effect.[506] Such a neutral policy could not be characterized as advancing religion per se.[507] A simple disclaimer on a graduation program has enabled some courts to minimize a policy's religious effect.[508] Other courts, however, have simply disregarded such a statement.[509]

The third part of the *Lemon* test[510] was largely ignored by most courts. Instead, courts either combined this excessive entanglement prong of the test into the second prong or declined to consider it.[511] A prayer policy requiring extensive supervision or review of a graduation prayer policy by school administration would fail this portion of the *Lemon* test because it would involve the "entanglement" that the *Lemon*

501. *See generally* Stockman, *supra* note 50, at 1820-22 (theorizing that graduation prayer included at the sole choice of students may be constitutional under *Lee v. Weisman*, 505 U.S. 577 (1992)).

502. *See* Engel v. Vitale, 370 U.S. 421, 436 (1962) (holding that school sponsored prayer is unconstitutional).

503. *See* ACLU v. Black Horse Pike Reg'l Bd. of Educ., 84 F.3d 1471, 1488 (3d Cir. 1996).

504. *See* Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963, 967 (5th Cir. 1992).

505. *See id.* at 967; Doe v. Madison Sch. Dist. No. 321, 147 F.3d 832, 837 (9th Cir. 1998), *vacated on procedural grounds*, 177 F.3d 789 (9th Cir. 1999).

506. *See Madison*, 147 F.3d at 837.

507. *See* Everson v. Board of Educ., 330 U.S. 1, 18 (1947) (exemplifying a neutral policy).

508. *See Madison*, 147 F.3d at 835 n.5.

509. *See* ACLU v. Black Horse Pike Reg'l Bd. of Educ., 84 F.3d 1471, 1487 (3d Cir. 1996).

510. *See* Lemon v. Kurtzman, 403 U.S. 602, 613 (1971).

511. *See* Adler v. Duval County Sch. Bd., 174 F.3d 1236, 1251 (11th Cir. 1999) (declining to consider entanglement because the policy failed the first two prongs); Doe v. Santa Fe Indep. Sch. Dist., 168 F.3d 806, 818 (5th Cir. 1999) (analyzing government control as part of the effect test), *cert. granted*, 120 S. Ct. 494 (1999); *Black Horse*, 84 F.3d at 1488 (declining to consider entanglement because the policy failed the first two prongs).

Court sought to avoid.[512] A policy ensuring complete autonomy to a student speaker, however, would satisfy the test.[513]

3. Post-*Lemon*: Graduation Prayer Policies Create Coercion and Endorsement of Religious Speech

The alternative Establishment Clause tests suggested by members of the Supreme Court would also deem impermissible a graduation prayer policy. A policy that requires school administrators to be aware of religious speech before its delivery would likely violate Justice O'Connor's endorsement test.[514] Any pre-approval by school administration of speech can reasonably be seen as an endorsement of its content.[515] Although *Clear Creek* held that permitting prayer is not endorsement,[516] the *Santa Fe* court disagreed, declaring that permitting prayer is endorsement by mere implication.[517]

Justice Kennedy's coercion test is more difficult to apply.[518] The Court in *Lee v. Weisman* held that prayer delivered by an authority figure such as a member of the clergy would be naturally coercive.[519] In addition, the Court cited the school's selection of the speaker as bearing the imprimatur of the state.[520] Likewise, students who assume the podium at a school-sponsored and controlled graduation ceremony should be considered state actors whose speech is subject to constitutional restrictions under the Establishment Clause.[521] Students are subject to state control when a school's administration chooses one of them to speak, allocates time for their speeches and provides advice and guidance.[522] Further, to an adolescent, peer speech may be more persuasive and coercive than to adults.[523] For example, a democratic

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512. *See* Chandler v. James, 180 F.3d 1254, 1264 (11th Cir. 1999).

513. *See Madison*, 147 F.3d at 838 (the neutrality of the policy's accepted speech eschewed any entanglement).

514. *See* Allred, *supra* note 48, at 774.

515. *See Chandler*, 180 F.3d at 1264.

516. *See* Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963, 969 (5th Cir. 1992).

517. *See* Doe v. Santa Fe Indep. Sch. Dist., 168 F.3d 806, 818 (5th Cir. 1999), *cert. granted*, 120 S. Ct. 494 (1999).

518. *See supra* Part II.A.3 (discussing alternatives to the *Lemon* test, including Justice Kennedy's coercion test).

519. *See* Lee v. Weisman, 405 U.S. 577, 593 (1992).

520. *See id.*

521. *But see* Chandler v. James, 180 F.3d 1254, 1259 (11th Cir. 1999) (holding that students are not state actors).

522. *See* Adler v. Duval County Sch. Bd., 174 F.3d 1236, 1242 (11th Cir. 1999); ACLU v. Black Horse Pike Reg'l Bd. of Educ., 84 F.3d 1471, 1477 (3d Cir. 1996); Harris v. Joint Sch. Dist. No. 241, 41 F.3d 447, 454 (9th Cir. 1994), *vacated as moot*, 515 U.S. 1154 (1995).

523. *See Adler*, 174 F.3d at 1248. *But see* Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d

vote by students on whether to include prayer in ceremonies might demonstrate to an agnostic student that the majority of his peers feel that he should embrace religious speech.[524] Such a student vote does not "erase the imprint" of state control.[525] The freedom of students to choose their own type of speech does not change the fact that once religious speech is presented to students, it might have a coercive effect.[526] Non-prayer policies that survived Justice Kennedy's coercion test involved religious expression that could easily be physically avoided. Although a state employee might be able to walk by a crèche[527] or a cross,[528] a student cannot simply tune out religious speech that is thrust upon him at a graduation ceremony he feels compelled to attend.

B. Graduation Prayer Policies Are Not Protected by the Free Speech Clause

Student-led graduation school prayer would also be unconstitutional under a Free Speech analysis. Despite the Free Speech rights of individuals, these rights may be curtailed based upon the location of the speech[529] or identity of the speaker.[530] Case law involving these limitations would most likely render a school policy unconstitutional. Even if a graduation ceremony were considered a designated public forum,[531] the state could readily articulate a compelling interest to curb religious speech.[532] In addition, the Court has greatly restricted student

963, 972 (5th Cir. 1992) (holding that peer speech is not coercive when all students participate in choosing to hear that type of speech).

524. *See Adler*, 174 F.3d at 1248.

525. *See id.* at 1244; *see also Black Horse*, 84 F.3d at 1477.

526. *But see* Doe v. Madison Sch. Dist. No. 321, 147 F.3d 832, 835 (9th Cir. 1998), *vacated on procedural grounds*, 177 F.3d 789 (9th Cir. 1999); *Clear Creek*, 977 F.2d at 968.

527. *See* Lynch v. Donnelly, 465 U.S. 668, 687 (1984).

528. *See* Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753, 770 (1995).

529. *See supra* Part II.B.2.a (discussing the relevance of location and identity to application of the Free Speech analysis).

530. *See supra* Part II.B.2.b (discussing the importance of the speaker's identity under the Free Speech analysis).

531. *See* Ansson, *supra* note 46, at 3-6 (discussing public forum analysis in Free Speech doctrine).

532. *See supra* Part II.A.2 (discussing the emergence and development of the *Lemon* test).

speech.[533] Thus, normal Free Speech protections would not protect state curtailment of speech.[534]

1. Can a Graduation Ceremony Really Be a Public Forum?

A Free Speech analysis is invoked if speech is delivered within a public forum.[535] Although schools and universities are not traditional public forums such as a street or park, courts have considered them designated or non-public fora.[536] In a case involving the access of religious groups to a public school building, Justice O'Connor warned that in its attempt to be sensitive to the clearly religious motivations for such school policies, the Court must not ignore the fact that an authentic open policy fails to endorse religious speech of any kind but instead honors the free speech rights of student speakers.[537] Likewise, some have argued that commencement exercises at a public high school could reasonably qualify as a public forum.[538] In allowing students to speak at graduation ceremonies, schools invite the public exchange that is contemplated under Free Speech jurisprudence and express an intent to create the fora required.[539] One need only skim the papers to see that controversial speakers often grace the podiums of such ceremonies.[540] The *Santa Fe* court, however, strongly disagreed[541] and remarked that

533. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 276 (1988) (holding that a school principal did not violate a student's First Amendment rights by censoring unapproved articles); Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 514 (1969) (holding that passive, nondisruptive political speech by a student was protected by the First Amendment).

534. *See supra* Part II.B.2 (discussing the limitations on the Free Speech doctrine).

535. *See* Allred, *supra* note 48, at 746.

536. *See* Ansson, *supra* note 46, at 25.

537. *See* Allred, *supra* note 48, at 773 (citing Board of Educ. v. Mergens, 496 U.S. 226 (1990)). This might be done through a disclaimer, but to censor the speech would infringe upon Free Speech protections within the First Amendment. *See id.* at 775.

538. *See* Ansson, *supra* note 46, at 32 (noting the possibility of a broad group of student speakers and the lack of interference of those speeches but noting that the traditional use of the property does not compel public forum analysis). *But see* Rosenberger v. Rector & Visitors of the Univ. of Va., 18 F.3d 269 (4th Cir. 1994) (determining that a high school is not a public forum), *rev'd*, 515 U.S. 819 (1995). Even though universities have been labeled public fora in certain circumstances, courts have distinguished secondary school classrooms on the basis of the students' age and impressionability. *See* Brandon v. Board of Educ., 635 F.2d 971, 978 (2d Cir. 1985) (finding that students in secondary schools are more susceptible to the mere appearance of religious endorsement).

539. *See* Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 802 (1985) (determining that a school newspaper was not a public forum and emphasizing that there must be "clear intent to create a public forum").

540. *See infra* Part II.B.2.b (discussing the regulation of speech based on a speaker's identity).

541. *See* Doe v. Santa Fe Indep. Sch. Dist., 168 F.3d 821, 822 (5th Cir. 1999), *cert. granted*, 120 S. Ct. 494 (1999).

graduation ceremonies do not elicit the sort of debate typical of public fora.[542] The Court stated:

> [They] created no forum at all and therefore could not, and did not, trigger the First Amendment's prohibition of viewpoint discrimination. The limited number of speakers, the monolithically non-controversial nature of graduation ceremonies, and the tightly restricted and highly controlled form of "speech" involved, all militate against labeling such ceremonies as public fora of any type. Absent feathers, webbed feet, and bill, and a quack, this bird just ain't a duck![543]

Even if a graduation ceremony were considered a designated public forum, any restrictions on speech would be permissible if motivated by a compelling state interest and, thus, would not be considered viewpoint discrimination.[544] Some courts have argued that the compelling state interest could be the Establishment Clause itself.[545] The Court in *Widmar v. Vincent* indicated that while a school's interest in complying with the Establishment Clause might not overcome a Free Speech claim in a university setting, the same might not hold true in a secondary school.[546] It thus implied that the susceptibility of younger students to the impressions of state speech might compel a stricter standard.[547]

If a graduation ceremony were only considered a non-public forum and not a designated forum, a school district still might be able to curtail religious speech. A non-public forum may be restricted if a regulation is reasonably related to the intended purpose of the forum.[548] In *Rosenberger v. Rector & Visitors of the University of Virginia*, the Court found that a neutral policy regarding student publications could not restrict access based on religious content because the restriction was not based upon the publication purpose of the policy.[549] Similarly, a school might not be able to restrict religious speech based upon a purpose dissimilar from the purpose of a graduation ceremony.[550] Two factors, however, might overcome this parallel to *Rosenberger*. First of all, secondary schools are generally afforded a greater ability to restrict

542. *See generally* Swanson, *supra* note 182.

543. *Santa Fe*, 168 F.3d at 822.

544. *See id.*

545. *See* Widmar v. Vincent, 454 U.S. 263, 276 (1981).

546. *See id.* at 274 n.14. *But see* Board of Educ. v. Mergens, 496 U.S. 226, 250 (1990) (drawing no distinction between university and secondary schools).

547. *See Widmar*, 454 U.S. at 274.

548. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 49 (1983).

549. *See* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 840 (1995).

550. *See id.*

speech.[551] Additionally, a school might be able to articulate a policy that could maintain consistency with the ceremony itself and the curtailment of religious speech.[552]

2. The Limits of Secondary Student Speech

Likewise, the line of cases looking at the speech rights of an individual would compel a school policy unconstitutional. The opinions in *Tinker v. Des Moines Independent Community School District* and *Hazelwood School District v. Kuhlmeier* stand for the proposition that school administrators have an interest in and broad discretion to control student speech, which may be protected outside the walls of a school.[553] This discretion, however, may be exercised only if a threat of disruption or inconsistency to the school's "pedagogical" purpose exists.[554]

The *Tinker* and *Kuhlmeier* standards are distinguishable because of the type of speech in question.[555] Graduation prayer would follow under the *Kuhlmeier* standard, which considered the curricular speech of student journalists.[556] Unlike the purely private expression considered in *Tinker*, speech at a graduation ceremony may "bear the imprimatur of the school."[557] Additionally, a graduation ceremony is similar to other school events such as assemblies, which have been considered quasi-curricular.[558] Thus, all one would need to do to restrict religious speech is to articulate a legitimate pedagogical interest. Great deference has been given to school districts when this standard has been applied.[559] Thus, a school district could claim separation of church and state, maintenance of the integrity of the graduation ceremony, or any other such reason to curtail speech.

Even if *Tinker* were to apply, a graduation prayer policy would most likely fail. One need look no further than the experience of Nick Becker[560] to see that religious speech has the potential to cause the "material" and "substantial" disruption considered impermissible in

551. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988); Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 507 (1969).

552. *See* Brody v. Spang, 957 F.2d 1108, 1120 (3d Cir. 1992).

553. *See Kuhlmeier*, 484 U.S. at 266; *Tinker*, 393 U.S. at 509.

554. *See Kuhlmeier*, 484 U.S. at 289 (Brennan, J., dissenting).

555. *See id.* at 270-71.

556. *See id.* at 271.

557. *Id.*

558. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986).

559. *See Kuhlmeier*, 484 U.S. at 273 (requiring only a "legitimate" interest).

560. *See supra* Part I (discussing how Nick Becker's objection to religious speech at his graduation ceremony sparked spontaneous audience prayer and led to his leaving in protest).

Tinker.[561] Such speech may spark school and even community-wide disruption.[562]

V. PROPOSAL

Despite the existing case law, the forms of analysis of student-led prayer are unclear. As a result, in Stephensville, Texas, two students defiantly snuck an amateur public address system into their school's stadium in order to lead the fans in a pre-game prayer.[563] In Justin, Texas, a student wishing to deliver a pre-game prayer "commandeered" the press box public address system.[564] As the result of a temporary injunction, Marian Ward is still allowed to deliver pre-game prayer in Santa Fe, Texas,[565] but Nick Becker's parents sent him to visit relatives in another state in order to avoid the pressure of media scrutiny.[566]

Without a clear directive from the United States Supreme Court, such desperate practices will continue. Some have said that the public school is the "most pervasive means of promoting our common destiny."[567] Without consistent school approaches toward religious speech, this purpose of public education disappears.[568] The resolution of this issue with sound judicial rationale will resolve a muddled area of First Amendment jurisprudence and will spark a further judicial dialogue into matters of church and state.[569]

Unfortunately, the Supreme Court will not prescribe a new analysis during this term.[570] By only granting partial certiorari on the pre-game prayer issue, the Court missed an important opportunity to contemplate

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561. *See* Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 509 (1969).

562. *See id.*

563. *See* Robert Bryce, *To Pray-or Not to Pray*, U.S. NEWS & WORLD REP., Sept. 13, 1999, at 26.

564. *See* Hicks, *supra* note 1, at 1A.

565. *See id.*

566. *See* Layton, *supra* note 8, at C2.

567. Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203, 231 (1948). Indeed, the Court stated:

> The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools, to avoid confusing, not to say fusing, what the Constitution sought to keep strictly apart. The great American principle of eternal separation . . . is one of the vital reliances of our Constitutional system for assuring unities among our people stronger than our diversities. It is the Court's duty to enforce this principle in its full integrity.

Id.

568. *See id.*

569. *See* Stockman, *supra* note 50, at 1836-37 (arguing for the resolution of the issue).

570. *See* Santa Fe Indep. Sch. Dist. v. Doe, 120 S. Ct. 494 (1999).

graduation prayer as well.[571] Although the Court has concluded that school or clergy-led prayer at such traditional ceremonies is not constitutionally valid, it has yet to rule on the role of student-led speech, which is a common nation-wide practice. To defer on the issue of pre-game prayer, the Supreme Court may only have the opportunity to rule on a less common practice that will leave unaffected the scores of high schools around the country that embrace student-led prayer at graduation.

A. A Better Mode of Analysis

With the tension between the First Amendment Clauses in mind, a comprehensive analysis of student-led graduation prayer issues must include an exploration of Establishment Clause and Free Speech principles.[572] This task is difficult because "the content-neutral thrust of the Free Speech clause . . . coexists uneasily with the special status of religion under the Free Exercise and Establishment Clauses."[573] The particular nature of student-led graduation school prayer compels such a complex analysis despite this tension.[574]

The application of the Free Speech Clause to the religious expression of students requires an additional analysis because that expression occurs under the guise of a state sponsored public school.[575] Thus, an additional Establishment Clause analysis is required.[576] Yet, Free Speech and Establishment Clause considerations must be balanced. Such a two-step analysis will balance the duty of school districts to restrict activity, which is tantamount to state support of religious activity while also acknowledging the rights of expression held by students.[577]

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571. *See id.* ("Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit granted limited to the following question: Whether petitioner's policy permitting student-led, student-initiated prayer at football games violates the Establishment Clause.").

572. *See* Ansson, *supra* note 46; *see also* Doe v. Santa Fe. Indep. Sch. Dist., 168 F.3d 806, 814 (5th Cir. 1999), *cert. granted,* 120 S. Ct. 494 (1999).

573. Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 118 (1992) (stating that First Amendment prohibition is content-based discrimination).

574. *See* Ansson, *supra* note 46.

575. *See* U.S. CONST. amend. I (prohibiting state action under the Establishment Clause).

576. *See* Chandler v. James, 180 F.3d 1254, 1256 (11th Cir. 1999) (discussing the state sponsorship of speech on school grounds).

577. Some schools have met this duty by including disclaimers in their graduation programs. *Compare* ACLU v. Black Horse Pike Reg'l Bd. of Educ., 84 F.3d 1471, 1487 (3d Cir. 1996) (holding that a disclaimer does not neutralize the implication of the Board's favoring the inclusion of such a prayer), *with* Harris v. Joint Sch. Dist. No. 241, 41 F.3d 447, 453 (9th Cir. 1994) (noting that the district court found very little state involvement in a process that allowed prayer by relying on a disclaimer in a commencement program).

As stated, a solid analysis must recognize the Free Speech rights of students while being cognizant of the potential for state entanglement with that speech.[578] Simply put, the analysis should be concerned with the potential for a reasonable audience member to look upon student-led prayer as a government indoctrination rather than a private expression of religious conviction.[579] Some have suggested that this sort of "perception" based analysis[580] encompasses the different clauses of the First Amendment and addresses the concerns of the Founding Fathers while following the balancing act modern jurists have tried to achieve.[581] This analysis recognizes the separation that guided early Establishment Clause analysis while also furrowing a place for the accommodation of religiously neutral policies.[582]

In order to balance the Free Speech rights of students while still limiting governmental entanglement with religion, a sound analysis should involve a consideration of two main factors: the nature of the graduation ceremony forum[583] and the involvement of the school administration in chosen speech.[584] Thus, a two-pronged analysis of graduation prayer policies follows. The first prong requires a determination of whether the graduation ceremony was a public forum.[585] If a general graduation policy elicited speech from a wide range of student speakers and outside guests, then arguably some could argue that it could qualify as a designated public forum.[586] Moreover, this type of graduation ceremony might be considered such a forum because the school allowed a limited discourse on various topics to take place on the school setting.[587] Even still, in such a forum the state is allowed to restrict speech only if it articulates a compelling state interest to do so.[588]

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578. *See* Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (discussing excessive entanglement).

579. *See* Lee v. Weisman, 505 U.S. 577, 593-94 (1992) (discussing the coercive nature of speech).

580. *See* Seide, *supra* note 148, at 386 (discussing the consideration of perception).

581. *See* FARBER, *supra* note 55, at 244-45 (discussing the intentions of the Framers regarding the clauses of the First Amendment).

582. *See generally* Engel v. Vitale, 370 U.S. 421 (1962) (showing separation); Zorach v. Clauson, 343 U.S. 306 (1952) (showing accommodation).

583. *See* Allred, *supra* note 48, at 751.

584. *See Lee*, 505 U.S. at 586-87.

585. *See, e.g.*, Chandler v. James, 180 F.3d 1254, 1257 (11th Cir. 1999) (discussing forum analysis in light of graduation school prayer).

586. *See id.*

587. *See* Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S 788, 802-804 (1985) (discussing the formation of a limited public forum).

588. *See id.* at 800.

Thus, the second part of the analysis requires a consideration of that interest. Some have argued that the Establishment Clause may qualify as that compelling interest.[589] Under the resultant Establishment Clause inquiry, then, the court should consider the potential sponsorship of religious speech by the state. In order to determine such endorsement, two additional factors need to be considered: the role of school administration in reviewing student speech and the manner in which the student speaker was chosen.[590] Through the first factor, school administration cannot be permitted to prescribe or edit particular forms of student speech.[591] Districts that did so violated the Establishment Clause because the school districts were too involved in the development and formation of religious speech.[592] School districts could avoid this by including a disclaimer in their graduation program in anticipation of religious speech to separate student speech from school-endorsement. Courts, however, are divided on whether such a disclaimer would erase the imprimatur of the state.[593]

In addition, the decision to include student prayer could not come solely from a school administrator, otherwise it will be viewed as state endorsement of religious expression.[594] Rather, students would have to be involved by a democratic vote on the potential content of a particular speech.[595] Similarly, a school administrator could not select a student speaker based upon religious beliefs or ask explicitly for a religious speaker. Instead, a permissible policy would be defined by clear student autonomy, from the selection of the speaker to the selection of the content.[596]

B. What Should Schools Do Now?

Although the above suggested test may provide a proper balance of the involved interests, until there is a directive from the Supreme Court or legislative guidance, school districts are left to independently

589. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-47 (1983).

590. This test is similar to *Lee v. Weisman*, 505 U.S. 577 (1992), but does not define itself with the ambiguity of themes like psychological and emotional coercion. *See id.* at 597-98 (setting forth a two-prong test: state sponsorship and coercion).

591. *See* Chandler v. James, 180 F.3d 1254, 1264-65 (11th Cir. 1999).

592. *See id.* at 1265; *see also* Engel v. Vitale, 370 U.S. 421, 433 (1962).

593. *See* ACLU v. Black Horse Pike Reg'l Bd. of Educ., 84 F.3d 1471, 1487 (3d Cir. 1996); Harris v. Joint Sch. Dist. No. 241, 41 F.3d 447, 453 (9th Cir. 1994).

594. *See Chandler*, 180 F.3d at 1264 (discrediting school administration involvement).

595. *See id.*

596. *See* Doe v. Madison Sch. Dist. No. 321, 147 F.3d 832, 836-37 (9th Cir. 1998), *vacated*, 177 F.3d 789 (9th Cir. 1999); Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963, 968 (5th Cir. 1992). *But see Black Horse*, 84 F.3d at 1487.

evaluate the constitutionality of their student-led prayer graduation policies.[597] The opinions discussed within this Comment suggest some characteristics of a permissible school graduation policy.[598] For example, the autonomy of student speakers has been an important consideration of courts.[599] A school that chooses to draft or otherwise advise on the content of student speech is likely to commit Establishment Clause violations.[600] Undoubtedly, to pass constitutional muster, students should have the freedom to deliver whatever sort of speech they desire.[601] This autonomy both embraces ideas of Free Speech, but also avoids the risk of state establishment of religion.[602] Additionally, such a policy avoids the entanglement problems that Justice O'Connor suggested were inevitable where there is invasive monitoring to prevent religious speech.[603]

Other smaller details will ensure a permissible policy. Although the decisions were not unanimous on this point, some courts recognized a disclaimer in a graduation program as an official state separation from religious speech.[604] Another factor is the subjective intent of a school policy. School districts should be careful when they articulate the purpose or intent of a graduation prayer policy.[605] A number of courts

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597. Some organizations have already set out guidelines for school districts:

> School officials may not mandate or organize prayer at Graduation, nor may they organize a religious baccalaureate ceremony. If the school generally rents out its facilities to private groups, it must rent them out on the same terms, and on a first-come, first-served basis to organizers of privately sponsored religious baccalaureate services, provided that the school does not extend preferential treatment to the baccalaureate ceremony and the school disclaims official endorsement of the program. The courts have come to conflicting conclusions under the federal Constitution on student-initiated prayer at Graduation. Until the issue is authoritatively resolved, schools should ask their lawyers what rules apply in their area.

Religion in the Public Schools: A Joint Statement of Current Law (visited Feb. 1, 2000) <http://www.members.tripod.com/~candst/jnt-sta.htm>; *see also ACLU Guidelines on School Prayer*, SCRIPPS HOWARD NEWS SERV., Sept. 26, 1999, at 13 ("The *Lemon* test states that in order to be constitutional, a [school graduation] policy must have a non-religious purpose; not end up promoting or favoring any set of religious beliefs; and not overly involve the government with religion.").

598. *See supra* Part II (discussing the Supreme Court's fluctuating focus on the Establishment and Free Exercise Clauses).

599. *See Madison*, 147 F.3d at 836-37; *Clear Creek*, 977 F.2d at 968.

600. *See* Chandler v. James, 180 F.3d 1254, 1265 (11th Cir. 1999).

601. *See Madison*, 147 F.3d at 836-37; *Clear Creek*, 977 F.2d at 968.

602. *See Chandler*, 180 F.3d at 1264; *see, e.g.*, Engel v. Vitale, 370 U.S. 421, 425 (1962) (noting impermissible state involvement).

603. *See* Board of Educ. v. Mergens, 496 U.S. 226, 253 (1990).

604. *See id.* at 263 (Marshall, J., concurring).

605. *See* Doe v. Santa Fe Indep. Sch. Dist., 168 F.3d 806, 816 (5th Cir. 1999), *cert. granted*, 120 S. Ct. 494 (1999); ACLU v. Black Horse Pike Reg'l Bd. of Educ., 84 F.3d 1471, 1478 (3d

seemed to base their opinions almost solely upon the fact that a school district was trying to fool others into believing that a religiously motivated policy had a secular purpose.[606] A school must genuinely invite neutral student speech in order to withstand an Establishment Clause analysis.[607] Finally, a school policy must reflect a tone of simple "toleration" of religious speech rather than explicit endorsement in order to be found constitutional.[608]

VI. CONCLUSION

Such recommendations are certainly not a guarantee of constitutionality because of the enormous inconsistencies among lower courts. The Supreme Court missed an opportunity to resolve these inconsistencies and give lower courts and school districts the means to formulate constitutionally appropriate graduation prayer policies. *Doe v. Santa Fe Independent School District* provided the Court with the tools to craft a coherent directive on the issue of religious speech in schools. In addition, the case presented a more global question for the Court: whether student religious speech is more properly analyzed under the Establishment Clause or the Free Speech doctrine. In side-stepping the question, however, the Court has left the Third, Fifth, Ninth, and Eleventh Circuits in disagreement, both within and among themselves. In turn, other circuit courts and lower courts are left to wonder which circuit's reasoning best captures the constitutional questions presented by the issue.

When the Court denied certiorari on the question of student-led graduation prayer presented in *Santa Fe*, it left stagnant a body of law and courts struggling to do justice to the original intent of the Framers of the Constitution while following modern Supreme Court precedent. The right of religious speech, although vexing, is one of the core values of our society. Unfortunately, however, the Court has left the boundaries of that right muddled, and has created more confusion than clarity. Thus, students like Marian Ward and Nick Becker will continue to test those boundaries in order to maintain the religious integrity that the Constitution aimed to protect.

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Cir. 1996).

606. *See Santa Fe*, 168 F.3d at 816-17.

607. *See* Doe v. Madison Sch. Dist. No. 321, 147 F.3d 832, 838 (9th Cir. 1998), *vacated*, 177 F.3d 789 (9th Cir. 1999).

608. *See* Jones v. Clear Creek Indep. Sch. Dist. No. 321, 977 F.2d 963, 968 (5th Cir. 1992) (emphasizing the invitation for speech on general topics), *vacated*, 177 F.3d 789 (9th Cir. 1999).