LET US PRAY?: THE CONSTITUTIONALITY OF STUDENT-LED GRADUATION PRAYER AFTER *SANTA FE V. DOE*

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The proper role of prayer in public schools is a divisive issue that continually challenges our courts to rethink the meaning of the First Amendment. The Supreme Court has offered some guidance to school officials and lower courts, but many open questions still remain. This note analyzes whether student-led, student-initiated prayer at public school graduation ceremonies is constitutional. Drawing on the Supreme Court's various Establishment Clause Tests and Santa Fe Independent School District v. Doe*, the recent Supreme Court decision evaluating student-led prayer at a public school football game, the author concludes that two representative school policies addressing student-led, student-initiated prayer at graduation are unconstitutional. The author makes two suggestions to schools and students about how a student may deliver a religious message at a graduation ceremony without offending the Constitution.*

I. INTRODUCTION

"We need God in our schools, in every aspect of our schools," proclaimed pastor David Newsome.[1] "Whenever you take God out of anything, gradually it's going to go downhill . . . . Our young people need all the prayer they can get."[2] But, can "our young people" get prayer at their public high school graduation ceremonies? Given that students can "get prayer" at graduation in the Eleventh Circuit[3] but not in the Third Circuit or the Eastern District of Virginia,[4] and given that the Fifth and Ninth Circuits are split on the issue of the constitutionality of graduation

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1. Judith Graham, *Texans Make a Goal-Line Stand for Prayer; Football*, CHI. TRIB., Sept. 1, 2000, at 1.

2. *Id.*

3. *See* Adler v. Duval County Sch. Bd., 206 F.3d 1070 (11th Cir. 2000) (en banc), *vacated by* 531 U.S. 801 (2000) (mem.), *and reinstated*, 250 F.3d 1330 (11th Cir. 2001) (en banc), *cert. denied*, No. 01-287, 2001 WL 984867 (U.S. Dec. 10, 2001); Chandler v. James, 180 F.3d 1254 (11th Cir. 1999), *vacated sub nom.* Chandler v. Siegelman, 530 U.S. 1256 (2000) (mem.), *and reinstated*, 230 F.3d 1313 (11th Cir. 2000).

4. *See* ACLU v. Black Horse Pike Reg'l Bd. of Educ., 84 F.3d 1471 (3d Cir. 1996) (in banc); Gearon v. Loudoun County Sch. Bd., 844 F. Supp. 1097 (E.D. Va. 1993).

prayer,[5] school administrators, students, parents, and education law specialists are seeking divine intervention.

The Supreme Court delivered its decision on the issue in *Santa Fe Independent School District v. Doe (Santa Fe)*,[6] holding that student-initiated, student-led prayer at public high school football games violates the Establishment Clause.[7] Commentators continue to debate the breadth of the Court's ruling.[8] These critics disagree quite sharply as to the implications of *Santa Fe* on student-initiated, student-led graduation prayer.[9]

This note argues that the *Santa Fe* decision prohibits student-initiated, student-led, public school graduation prayer,[10] and that this conclusion is most consistent with the prescriptions of the First Amendment. Part II explores the controversial history of this divisive subject and discusses the various Establishment Clause tests the Court has developed.[11] Part II also analyzes the only Supreme Court decision dealing directly with graduation prayer, *Lee v. Weisman*.[12] In addition, Part II discusses post-*Lee* lower court decisions and explores the split among the circuits.[13] Also in Part II, this note analyzes the *Santa Fe* case and its subsequent fallout.[14] Part III then applies the Establishment Clause tests and the *Santa Fe* ruling to two common student-led graduation prayer policies.[15] I argue that under the Court's Establishment Clause tests and the *Santa Fe* holding, student-initiated, student-led graduation prayer violates the Establishment Clause. Consequently, Part IV recommends that public schools should eliminate formal, student-selected, student-led invocations and benedictions from their graduation ceremonies and, if desired, solemnize the ceremonies in other, constitutional, manners. Fi-

5. *See* Doe v. Santa Fe Indep. Sch. Dist., 168 F.3d 806 (5th Cir. 1999), *aff'd on other grounds*, 530 U.S. 290 (2000); Doe v. Madison Sch. Dist. No. 321, 147 F.3d 832 (9th Cir. 1998), *vacated for lack of standing*, 177 F.3d 789 (9th Cir. 1999) (en banc); Ingebretsen v. Jackson Pub. Sch. Dist., 88 F.3d 274 (5th Cir. 1996) (holding that student-initiated, student-given, nonproselytizing, nonsectarian prayer at graduation ceremonies, but not other school events, is constitutional); Harris v. Joint Sch. Dist. No. 241, 41 F.3d 447 (9th Cir. 1994), *vacated as moot*, 515 U.S. 1154 (1995); Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963 (5th Cir. 1992).

6. 530 U.S. 290 (2000).

7. *See id.* at 301.

8. *See, e.g.*, Jan Crawford Greenburg, *Court Bans Prayer at School Games*, CHI. TRIB., June 20, 2000, at 1 ("[S]tudent-led prayers at graduation may now be illegal as well . . . .").

9. *Compare* Joan Biskupic, *Prayer Ruling Is Blow to Tradition: Supporters Look for Other Ways to Show Their Faith*, USA TODAY, June 20, 2000, at 3A ("There's not much room left for prayer at any school-sanctioned activity . . . . Prayer at graduation will sink."), *with Again a School-Prayer Scheme Leapfrogs the Constitution*, USA TODAY, June 20, 2000, at 14A ("Student-led prayer at graduation exercises remains a legally gray area . . . .").

10. This note deals almost exclusively with the issue of student-initiated, student-led prayer delivered during public school graduation invocations and benedictions. Prayer given during student speeches, such as valedictorian addresses, is discussed briefly at *infra* Part IV.A.

11. *See infra* text accompanying notes 17–52.

12. 505 U.S. 577 (1992); *see infra* text accompanying notes 53–67.

13. *See infra* text accompanying notes 68–122.

14. *See infra* text accompanying notes 123–49.

15. *See infra* text accompanying notes 150–238.

nally, Part IV suggests two possible ways a student constitutionally may deliver a religious message at a graduation ceremony.[16]

II. BACKGROUND: THE ESTABLISHMENT CLAUSE, SUPREME COURT DECISIONS, AND THE CIRCUIT SPLIT

To fully understand the divide between and among the circuits as to the constitutionality of student-led graduation prayer, this Part explores the historical, analytical, and precedential underpinnings of this issue. This Part discusses the relevant clauses of the First Amendment, the Court's tests under such amendment, the Court's only decision dealing exclusively with graduation prayer, and the split among the circuits. Finally, this Part concludes by analyzing the Court's recent *Santa Fe* decision.

A. The Establishment Clause: Governmental Neutrality

The First Amendment to the U.S. Constitution contains three clauses that are relevant in the student graduation prayer context: the Establishment Clause,[17] the Free Exercise Clause,[18] and the Free Speech Clause.[19] The Establishment Clause requires strict government neutrality by "prohibit[ing] the government from participating or giving preference to any religion."[20] It "requires the government to stay out of religion."[21] "[U]nder the Free Exercise Clause . . . [,] the government is restricted from making any law prohibiting the exercise of religion."[22] Finally, the Free Speech Clause prohibits the government from abridging a person's freedom of speech.[23]

The Supreme Court, in *Board of Education v. Mergens*,[24] succinctly underscored the distinct functions of each clause. Justice O'Connor wrote: "[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."[25] Historically, courts have analyzed prayer cases under the Establishment Clause only;[26] however, at least one circuit has exam-

16. *See infra* text accompanying notes 239–52.

17. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . . .").

18. *Id.* ("Congress shall make no law . . . prohibiting the free exercise [of religion] . . . .").

19. *Id.* ("Congress shall make no law . . . abridging the freedom of speech . . . .").

20. Daniel Washburn, *Student-Initiated Religious Speech in Public Schools [Chandler v. James, 180 F.3d 1254 (11th Cir. 1999)]*, 39 WASHBURN L.J. 273, 275 (2000).

21. *Id.* at 276.

22. *Id.* at 277.

23. *See id.* at 278.

24. 496 U.S. 226 (1990).

25. *Id.* at 250 (emphasis omitted).

26. *See, e.g.*, Engel v. Vitale, 370 U.S. 421 (1962).

ined student prayer cases under all three clauses.[27] Courts, however, primarily view prayer cases through the Establishment Clause prism.

The Establishment Clause is made applicable to the states through the Fourteenth Amendment.[28] "[A]t the core of Establishment Clause jurisprudence is the notion that the state may not favor, endorse, or oppose the propagation of religious doctrine by its citizens."[29] Thus, states must remain neutral with respect to religion. Early on, the Court interpreted the Clause to require "a wall of separation between church and State."[30] One of the early cases applying the Establishment Clause to prayer in schools was *Engel v. Vitale*,[31] in which the Court held that a school district's policy, which the State Board of Regents prescribed, requiring each class, in the presence of a teacher, to begin each day by reciting a twenty-two word prayer[32] violated the Establishment Clause.[33] In *School District of Abington Township v. Schempp*,[34] the Court held that a state statute requiring that schools begin each day with readings from the Bible violated the Establishment Clause.[35] Finally, in *Wallace v. Jaffree*,[36] the Court held unconstitutional, as a violation of the Establishment Clause, a state statute that allowed for a daily period of silent meditation or voluntary prayer in public schools.[37] During these two decades, the Court began to move away from the strict "wall of separation" approach of *Reynolds* to one requiring neutrality as to religion.[38]

27. *See* Chandler v. James, 180 F.3d 1254 (11th Cir. 1999), *vacated sub nom.* Chandler v. Siegelman, 530 U.S. 1256 (2000) (mem.), *and reinstated*, 230 F.3d 1313 (11th Cir. 2000).

28. *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) ("The fundamental concept of liberty embodied in [the Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment.").

29. Adler v. Duval County Sch. Bd., 206 F.3d 1070, 1075 (11th Cir. 2000) (en banc), *vacated by* 531 U.S. 801 (2000) (mem.), *and reinstated*, 250 F.3d 1330 (11th Cir. 2001) (en banc), *cert. denied*, No. 01-287, 2001 WL 984867 (U.S. Dec. 10, 2001).

30. Reynolds v. United States, 98 U.S. 145, 164 (1878) (tracing Madison's and Jefferson's drafting of the Establishment Clause).

31. 370 U.S. 421 (1962).

32. "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." *Id.* at 422.

33. *See id.* at 424.

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

35. *See id.* at 223.

36. 472 U.S. 38 (1985).

37. *See id.* at 61.

38. *See* Nancy E. Drane, *The Supreme Court's Missed Opportunity: The Constitutionality of Student-Led Graduation Prayer in Light of the Crumbling Wall Between Church and State*, 31 LOY. U. CHI. L.J. 497, 502–07 (2000). The Court has developed a "test" for analyzing neutrality with respect to religion, which is discussed at *infra* Part II.B. The public has continued to support prayer in public schools, making student-initiated, student-led graduation prayer a practical and potentially divisive issue for school administrators. *See* Richard Carelli, *Court Reaffirms School Prayer Stance*, PEORIA JOURNAL-STAR, June 20, 2000, at A1 ("[I]n March [2000], an ABC News poll said two-thirds of Americans thought students should be permitted to lead [pre-football game] prayers.").

B. The Court's Establishment Clause "Tests": Clarity or Confusion?

Over the years, the Court has developed three separate tests to determine whether a statute or policy violates the Establishment Clause. First, the Court announced the seminal test in *Lemon v. Kurtzman*.[39] The so-called *Lemon* test has three prongs. In order to pass constitutional scrutiny, "[f]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . [;] finally, the statute must not foster 'an excessive government entanglement with religion.'"[40] Since *Lemon*, the Court has used the three-prong framework to analyze Establishment Clause issues. In recent decisions, however, the Court has either refused to apply the test or to place much stock in its results, leading some to wonder whether it is still a viable Establishment Clause test.[41] In fact, in *Agostini v. Felton*,[42] the Court explicitly analyzed the issue under only the first and second prongs of the test, incorporating the "entanglement" analysis as part of the "effect" analysis.[43] However, in *Mitchell v. Helms*,[44] Justice Thomas, writing for the plurality, submitted that "in *Agostini* we modified *Lemon for purposes of evaluating aid to schools* and examined only the first and second factors."[45] Thus, it appears that as to issues of prayer, the proper *Lemon* analysis is under the traditional three-prong test.

Subsequent to *Lemon*, the Court has utilized two other tests in the context of the Establishment Clause. In *Lee v. Weisman*,[46] the Court developed the "coercion test."[47] This test "identifies unconstitutional coercion when (1) the government directs (2) a formal religious exercise (3)

39. 403 U.S. 602 (1971).

40. *Id.* at 612–13 (citation omitted).

41. *See* Norman Redlich, *Is the Wall Crumbling? (Spreme* [sic] *Court on Separation of Church and State)*, THE NATION, Oct. 9, 2000, at 25, 2000 WL 17718976; *see also* Freiler v. Tangipahoa Parish Bd. of Educ., 530 U.S. 1251, 1253 (2000) (mem.) (Scalia, J., dissenting) ("Like a majority of the Members of this Court, I have previously expressed my disapproval of the *Lemon* test. I would grant certiorari in this case if only to take the opportunity to inter the *Lemon* test once and for all." (citations omitted)); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 319 (2000) (Rehnquist, C.J., dissenting) ("*Lemon* has had a checkered career in the decisional law of this Court."); Freiler v. Tangipahoa Parish Bd. of Educ., 185 F.3d 337, 344 (5th Cir. 1999), *cert. denied*, 530 U.S. 1251 (2000) (mem.) ("Although widely criticized and occasionally ignored, the *Lemon* test continues to govern Establishment Clause cases."); *infra* Part II.C (discussing that the Court did not consider the *Lemon* test in *Lee v. Weisman*, 505 U.S. 577 (1992)).

42. 521 U.S. 203 (1997).

43. *See id.* at 232–33. However, although the Court recast the test as a two-factor analysis, it still examined the amount of government entanglement in determining whether the statute or policy had the effect of advancing or inhibiting religion. Therefore, the consolidation did not practically change the test.

44. 530 U.S. 793 (2000).

45. *Id.* at 807 (citations omitted) (emphasis added).

46. 505 U.S. 577 (1992). For a more complete analysis of *Lee*, see *infra* Part II.C.

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

in such a way as to oblige the participation of objectors."[48] Finally, the Court, in *Lynch v. Donnelly*,[49] introduced the "endorsement test."[50] Under this test, a "government . . . unconstitutionally endorse[s] religion when a reasonable person would view the challenged government action as a disapproval of her contrary religious choices."[51]

Therefore, a full and complete disposition of an Establishment Clause issue probably includes an analysis under each of these tests. However, the Court has inconsistently applied the tests in most every Establishment Clause case. In addition, it has not made clear when a particular test should be used, whether one test carries more weight and is therefore more persuasive, or whether a statute or policy must pass constitutional muster under all three tests. This lack of direction has placed the lower courts in the precarious position of trying to determine under what circumstances to apply the individual tests and whether they must apply all three.[52]

C. Lee v. Weisman*: The Court's Only Look at Graduation Prayer*

Prior to 1992, school districts customarily had benedictions and invocations as part of their graduation ceremonies.[53] In fact, many schools invited local priests, ministers, or rabbis to deliver such invocations and benedictions.[54] However, a student's parent at Providence's Nathan Bishop Middle School claimed that such an invitation to a rabbi to deliver the invocation and benediction at the school's graduation ceremony violated the Establishment Clause.[55] In a five to four decision, the Court held that a school's inclusion of a nonsectarian prayer offered by a member of the clergy at an official public school graduation ceremony violates the Establishment Clause.[56]

Most troublesome to the Court were two "dominant facts:"

> State officials direct the performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools. Even for those students who object to the religious exercise, their

48. Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963, 970 (5th Cir. 1992) (*Clear Creek II*) ("'The inquiry with respect to coercion must be whether the government imposes pressure upon a student to participate in a religious activity.'" (quoting Bd. of Educ. v. Mergens, 496 U.S. 226, 261 (1990) (Kennedy, J., concurring))). The coercion test is discussed further at *infra* Part II.C.

49. 465 U.S. 668 (1984).

50. *See id.* at 688–89 (O'Connor, J., concurring).

51. *Clear Creek Indep. Sch. Dist.*, 977 F.2d at 968.

52. As the reader will see *infra*, there is tremendous variation among the lower courts as to which Establishment Clause test to apply and when. In addition, lower courts are not in agreement as to whether all three tests are mandatory in all circumstances.

53. *See, e.g.*, ACLU v. Black Horse Pike Reg'l Bd. of Educ., 84 F.3d 1471, 1474 (3d Cir. 1996) (in banc) ("The . . . Board of Education . . . has had a longstanding tradition of including a nonsectarian invocation and benediction in high school graduation ceremonies.").

54. *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 580 (1992).

55. *See id.* at 581–84.

56. *See id.* at 579, 581, 599.

> attendance and participation in the state-sponsored religious activity are in a fair and real sense obligatory, though the school district does not require attendance as a condition for receipt of the diploma.[57]

In other words, the Court found an Establishment Clause violation because (1) the state controlled the ceremony, and (2) attendance at the ceremony was, in a practical sense, involuntary.

As to the first concern, the Court determined that the school district chose the religious participant, the rabbi, and provided the rabbi with guidelines, including that the prayers should be nonsectarian.[58] The Court held that "[t]hrough these means the principal directed and controlled the content of the prayers."[59] Thus, "The degree of school involvement . . . made it clear that the graduation prayers bore the imprint of the State."[60]

The Court then considered the position of the students who attended the graduation ceremony, "both those who desired the prayer and [those] who did not."[61] The majority did not analyze the district's action under its traditional *Lemon* Establishment Clause test;[62] instead, it adopted the so-called coercion test.[63] Most important to the Court was that the Establishment Clause prevents the state from directly or indirectly indoctrinating persons with its own religious viewpoints.[64] The state cannot place objectors of a religious message in the untenable position of "participating [in the message], with all that implies, or protesting."[65] The Court found that state prayer at graduation ceremonies places students in such a position:

> The undeniable fact is that the school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction. This pressure, though subtle and indirect, can be as real as any overt compulsion. Of course, in our culture standing or remaining silent can signify adherence to a view or simple respect for the

57. *Id.* at 586.
58. *See id.* at 587–88.
59. *Id.* at 588.
60. *Id.* at 590.
61. *Id.*
62. *See* Lemon v. Kurtzman, 403 U.S. 602 (1971). The *Lemon* test is discussed more fully at *supra* Part II.B.
63. *See Lee*, 505 U.S. at 587. The Court stated:

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

Id. (alteration in original) (citations omitted). The coercion test is discussed more fully at *supra* Part II.B.
64. *See id.* at 590–93.
65. *Id.* at 593.

> views of others. And no doubt some persons who have no desire to join a prayer have little objection to standing as a sign of respect for those who do. But for the dissenter of high school age, who has a reasonable perception that she is being forced by the State to pray in a manner her conscience will not allow, the injury is no less real. There can be no doubt that for many, if not most, of the students at the graduation, the act of standing or remaining silent was an expression of participation in the rabbi's prayer.[66]

Therefore, because the rabbi's prayer coerced students to participate in a formal religious exercise, it violated the Establishment Clause. The Court proclaimed that "[t]he Constitution forbids the State to exact religious conformity from a student as the price of attending her own high school graduation. This is the calculus the Constitution commands."[67]

*D. Post-*Lee: *A Split Among the Circuits*

To circumvent the holding of *Lee*, many schools started allowing student-initiated, student-led graduation prayer.[68] Schools' rationale for such a policy was based in large part on Justice Souter's concurrence in *Lee*. Justice Souter proclaimed in footnote eight that "[i]f the State had chosen its graduation day speakers according to wholly secular criteria, and if one of those speakers (not a state actor) had individually chosen to deliver a religious message, it would have been harder to attribute an endorsement of religion to the State."[69] Many school districts, and some circuits, interpreted this statement, along with the rest of *Lee*, to allow students to lead the graduation prayer.

1. Graduation Prayer Held Constitutional

a. *Jones v. Clear Creek Independent School District* (*Clear Creek II*) (5th Cir.)

Prior to *Lee*, the Fifth Circuit Court of Appeals held that student-led nonsectarian, nonproselytizing invocations at public high school graduation ceremonies do not violate the Establishment Clause.[70] On remand, the Fifth Circuit affirmed its judgment in *Clear Creek I* and held

66. *Id.*

67. *Id.* at 596.

68. *See, e.g.*, ACLU v. Black Horse Pike Reg'l Bd. of Educ., 84 F.3d 1471, 1474 (3d Cir. 1996) (in banc) ("In May of 1993, the School Board decided to reconsider [its policy of inviting local clergy to deliver prayer at graduation ceremonies] because of the Supreme Court's decision in *Lee v. Weisman* . . . ."). Thereafter, the school board adopted a policy that allowed a student volunteer to lead a prayer at graduation. *See id.* at 1475.

69. *Lee*, 505 U.S. at 630 n.8.

70. *See* Jones v. Clear Creek Indep. Sch. Dist., 930 F.2d 416 (5th Cir. 1991) (*Clear Creek I*). After its decision in *Lee*, the Supreme Court granted certiorari in *Clear Creek I*, vacated the judgment, and remanded the case for reconsideration in light of *Lee*. Jones v. Clear Creek Indep. Sch. Dist., 505 U.S. 1215 (1992).

that *Lee* did not render the student-led policy unconstitutional.[71] The court analyzed the district's policy[72] under each of the three Establishment Clause tests.

First, under the first prong of the *Lemon* test (secular purpose), the court found that the district's policy had the secular purpose of solemnization.[73] Under the second prong (primary effect), the court held that the policy's primary effect was to solemnize the graduation ceremony, not to advance religion.[74] The court believed there was little chance of advancing religion because of the policy's "requirement that any invocation be nonsectarian and nonproselytizing."[75] Under the third prong of *Lemon* (excessive entanglement), the court determined that because the policy merely allowed prayer upon student choice, it "keeps [the district] free of all involvement with religious institutions."[76] Therefore, because the district's policy satisfied each of the *Lemon* factors, it did not violate the Establishment Clause under this test.

Second, the court applied the endorsement test to the policy. The court held that the school did not unconstitutionally endorse religion.[77] The court distinguished Clear Creek's policy from the school's action in *Lee*. Clear Creek's policy "does not mandate a prayer. [It] does not even mandate an invocation; it merely permits one if the seniors so choose . . . . The [policy] is passive . . . ."[78] The court made it clear that there was no government endorsement because "a graduating high school senior *who participates in the decision as to whether her graduation will include an invocation by a fellow student volunteer* will understand that any religious references are the result of student, not government, choice."[79] Therefore, this "private speech" would be protected under the Free Speech and Free Exercise Clauses.[80]

Finally, the court analyzed the policy under the newly established *Lee* coercion test. The court found that the policy did not "impose[] pressure upon a student to participate in a religious activity."[81] Most persuasive to the court was: (1) that the school did not make the

71. *See* Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963, 965 (5th Cir. 1992).

72. The school's policy provided:

1. The use of an invocation and/or benediction at high school graduation exercise shall rest within the discretion of the graduating senior class, with the advice and counsel of the senior class principal;

2. The invocation and benediction, if used, shall be given by a student volunteer; and

3. Consistent with the principle of equal liberty of conscience, the invocation and benediction shall be nonsectarian and nonproselytizing in nature.

Id. at 964 n.1.

73. *See id.* at 966.

74. *Id.* at 967.

75. *Id.*

76. *Id.* at 968.

77. *Id.* at 969.

78. *Id.* at 968.

79. *Id.* at 969.

80. *See id.*; *supra* Part II.A.

81. *Clear Creek II*, 977 F.2d at 970.

decision whether to have a religious speaker, therefore detaching the government from the decision about the speaker and content; (2) that the policy required any prayer to be nonsectarian and nonproselytizing; and (3) that volunteer student speakers are less coercive than members of the clergy.[82] "The practical result of [the court's] decision, viewed in light of *Lee*, is that a majority of students can do what the State acting on its own cannot do to incorporate prayer in public high school graduation ceremonies."[83]

In 1996, a group of students, parents, and civil liberties organizations asked the Fifth Circuit to reconsider its holding in *Clear Creek II*. The court held that a state statute permitting students to lead nonsectarian, nonproselytizing prayer at compulsory and noncompulsory school-related events violates the Establishment Clause except as to commencement ceremonies.[84] The court found that *Clear Creek II* "allows students to choose to solemnize their graduation ceremonies with a student-initiated, non-proselytizing and nonsectarian prayer given by a student."[85] The court continued, "To the extent the [statute] allows students to choose to pray at high school graduation to solemnize that *once-in-a-lifetime event*, we find it constitutionally sound under [*Clear Creek II*]."[86]

b. *Adler v. Duval County School Board* (11th Cir.)

After *Lee*, the Duval County, Florida school board implemented a policy whereby graduating seniors elect a student to deliver a "message," which the school cannot in any way censor or monitor, at their graduation ceremony.[87] The court found this "message" to be private speech protected by the Free Speech and Free Exercise Clauses.[88] It wrote:

82. *See id.* at 970–71. The court wrote:

> We think that the graduation prayers permitted by the [policy] place less psychological pressure on students than the prayers at issue in *Lee* because all students, *after having participated in the decision of whether prayers will be given*, are aware that any prayers represent the will of their peers, who are less able to coerce participation than an authority figure from the state or clergy.

Id. at 971.

83. *Id.* at 972.

84. *See* Ingebretsen v. Jackson Pub. Sch. Dist., 88 F.3d 274, 280 (5th Cir. 1996).

85. *Id.*

86. *Id.* (emphasis added); *see also* Doe v. Duncanville Indep. Sch. Dist., 70 F.3d 402, 406–07 (5th Cir. 1995) (holding that an athletic competition is not a "once-in-a-lifetime event [like graduation] that could be appropriately marked with a prayer"). For another case with similar results, see Doe v. Madison Sch. Dist. No. 321, 147 F.3d 832 (9th Cir. 1998), *vacated as moot*, 177 F.3d 789 (9th Cir. 1999) (en banc) (vacating for mootness because the student had graduated). The court, applying the *Lemon* test, found that the policy: (1) had the secular purpose of "grant[ing] top students the autonomy to deliver an uncensored speech," *id.* at 837; (2) did not advance religion because the policy permitted student speech on any subject, and due to the disclaimer, the audience would know any proselytizing was the sole product of the student, *see id.* at 837–38; and (3) because the policy allowed any type of student speech, the district was not excessively entangled with religion; rather, it was "neutral with respect to religion," *id.* at 838.

87. *See* Adler v. Duval County Sch. Bd., 206 F.3d 1070, 1072 (11th Cir. 2000) (en banc), *judgment vacated by* 531 U.S. 801 (2000) (mem.), *and reinstated*, 250 F.3d 1330 (11th Cir. 2001) (en banc), *cert. denied*, No. 01-287, 2001 WL 984867 (U.S. Dec. 10, 2001). The full policy reads:

> The total absence of state involvement in deciding whether there will be a graduation message, who will speak, or what the speaker may say combined with the student speaker's complete autonomy over the content of the message convinces us that the message delivered, be it secular or sectarian or both, is not state-sponsored.[89]

The court continued, "[T]he selection of a graduation student speaker by a secular criterion (not controlled by the state) to deliver a message (not restricted in content by the state) does not violate the Establishment Clause . . . ."[90] The court distinguished *Lee* in that under the Duval policy, the district, as the state actor, "[has] no control over who will draft the message (if there be any message at all) or what its contents may be."[91] Finally, under a free speech and free exercise analysis, the court disagreed with the *Clear Creek II* court's requirement that any prayer must be nonsectarian and nonproselytizing. According to the court, the Duval policy "permits sectarian and proselytizing prayers because it places *no* limitations, either secular or sectarian, on the content of a graduation message."[92]

As to the Establishment Clause, the court found the policy to pass the *Lemon* test. First, the court believed there to be three secular purposes: "affording graduating students an opportunity to direct their own graduation ceremony," solemnizing the ceremony, and "permitting student freedom of expression."[93] Second, because the student, as a private actor, can deliver a message on any topic, the court found that the message is attributable to the student and not the state; therefore, the state did not unconstitutionally advance religion.[94] Finally, because the school cannot in any way review the student message, the policy does not excessively entangle the state with religion.[95] Therefore, the court held the policy to be neutral with regard to religion.[96]

> 1. The use of a brief opening and/or closing message, not to exceed two minutes, at high school graduation exercises shall rest within the discretion of the graduating senior class;
> 2. The opening and/or closing message shall be given by a student volunteer, in the graduating senior class, chosen by the graduating senior class as a whole;
> 3. If the graduating senior class chooses to use an opening and/or closing message, the content of that message shall be prepared by the student volunteer and shall not be monitored or otherwise reviewed by Duval County School Board [sic], its officers or employees;
> The purpose of these guidelines is to allow students to direct their own graduation message without monitoring or review by school officials.

Id.

88. *See id.* at 1071.
89. *Id.*
90. *Id.* at 1074.
91. *Id.* at 1076.
92. *Id.* at 1079 n.7.
93. *Id.* at 1085.
94. *See id.* at 1089.
95. *See id.* at 1090.
96. *See id.* at 1077. On remand after *Santa Fe*, the Eleventh Circuit reinstated its opinion and judgment. *See* Adler v. Duval County Sch. Bd., 250 F.3d 1330 (11th Cir. 2001). The court determined that Duval's policy was factually distinguishable from the policy at issue in *Santa Fe*. *Id.* at 1336. According to the court, the following two facts allowed it to uphold the Duval policy: (1) the speech was

In upholding student-initiated, student-led graduation prayer, courts have employed a variety of rationales, including that the prayer be nonsectarian and nonproselytizing, that the student speaker be chosen according to a wholly secular criterion like academic standing, that the school not, in any way, be involved with the prayer, and that the school simply permit private student prayer. The following section looks at the rationales used by courts finding similar policies unconstitutional.

2. Graduation Prayer Held Unconstitutional

a. *Doe v. Santa Fe Independent School District* (5th Cir.)

Relying on the Fifth Circuit's decision in *Clear Creek II*,[97] the Santa Fe Independent School District instituted a policy that allowed its graduating class to choose whether to have an invocation and benediction as part of its graduation ceremony and to elect a student to deliver the prayers.[98] However, unlike the policy in *Clear Creek II*, Santa Fe's policy did not require the prayer to be nonsectarian and nonproselytizing.[99] In addition, the district permitted its students to give such prayers, with the prerequisite that they must be nonsectarian and nonproselytizing, prior to high school football games.[100] Applying the *Lemon* and endorsement tests, the court held that "a knock-off of a Clear Creek Prayer Policy that does not limit speakers to nonsectarian, nonproselytizing invocations and benedictions violates the dictates of the Establishment Clause."[101]

The district argued that the purpose of the policy was to solemnize its graduation ceremonies.[102] The court found this purported purpose a "sham."[103] Furthermore, the court concluded that the policy's effect, by

not "subject to particular regulations that confine the content and topic of the student's message"; on the contrary, "the student elected to give [the] message is totally free and autonomous to say whatever he or she desires, without review or censorship by agents of the state or, for that matter, the student body," and (2) the policy did not "*by its terms*, invite[] and encourage[] religious messages"; rather, "the policy is entirely neutral regarding whether a message is to be given, and if a message is to be given, the content of that message." *Id.* at 1336–37. As will be discussed at *infra* Part III.B.2, the court erred in reinstating its judgment. For another case applying a similar analysis, see Chandler v. James, 180 F.3d 1254 (11th Cir. 1999), *vacated sub nom.* Chandler v. Siegelman, 530 U.S. 1256 (2000) (mem.), *and reinstated*, 230 F.3d 1313, 1317 (11th Cir. 2000) (holding that "[s]o long as the prayer is *genuinely student-initiated*, and not the product of any school policy which actively or surreptitiously encourages it, the speech is private and it is protected.").

97. *See Clear Creek II*, 97 F.2d at 965; *see also supra* Part II.D.1.a.

98. *See* Doe v. Santa Fe Indep. Sch. Dist., 168 F.3d 806, 812 (5th Cir. 1999), *aff'd on other grounds*, 530 U.S. 290 (2000). The policy in question had a "fall-back" provision: if a court enjoined the unrestricted policy, the student invocations and benedictions must be nonsectarian and nonproselytizing. *See id.* For a more complete discussion of the Santa Fe policy, see *infra* Part II.E. For a general discussion and analysis of the case and potential ramifications of the decision, see Ralph D. Mawdsley & Charles J. Russo, *Student Prayers at Public School Sporting Events:* Doe v. Santa Fe Independent School District, 143 WEST'S EDUC. L. REP. 415 (2000).

99. *See Doe*, 168 F.3d at 812.

100. *Id.* The football policy is discussed more fully at *infra* Part II.E.

101. *Id.* at 816.

102. *See id.*

103. *Id.* The court found:

permitting sectarian and proselytizing prayer, was to advance religion.[104] As to the football game prayer, the court determined that football is "hardly the sober type of annual event that can be appropriately solemnized with prayer" and thus such prayer violated the Establishment Clause.[105] The Supreme Court granted certiorari on this limited issue of prayer prior to football games.[106]

b. *ACLU of New Jersey v. Black Horse Pike Regional Board of Education* (3d Cir.)

After the Supreme Court's decision in *Lee*, the Black Horse Pike Regional Board of Education modified its longstanding policy of including clergy-led invocations and benedictions at its high school graduation ceremonies.[107] The new policy allowed the senior class officers to poll the graduating class to ascertain if the students wanted a "prayer, a moment of reflection, or nothing at all."[108] After conducting the poll in June 1993, the class voted to have a prayer as part of its graduation ceremony and selected a student volunteer to deliver the prayer.[109] A student and the ACLU challenged the constitutionality of this policy. The school argued that the student-control aspect of the policy made its practice constitutional under the Free Speech Clause.[110] However, the court concluded that the Establishment Clause prohibits a majority from imposing its will on the minority.[111]

> [Sectarian and proselytizing] prayers would alter dramatically the tenor of the ceremony, shifting its focus—at least temporarily—away from the students and the secular purpose of the graduation ceremony to the religious content of the speaker's prayers. Indeed, an almost inevitable consequence of permitting the uttering of such prayers would be the polarizing and politicizing of an event intended to recognize and celebrate the graduating students' academic achievements and the commonality of their presence and the path on which they are about to embark. In short, rather than solemnize a graduation, sectarian and proselytizing prayers would transform the character of the ceremony and conceivably even disrupt it.

Id.

104. *See id.* at 817.

105. *See id.* at 823.

106. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (1999). For two other cases finding student-initiated, student-led graduation prayer unconstitutional, see *Harris v. Joint School District No. 241*, 41 F.3d 447, 458 (9th Cir. 1994), *vacated as moot*, 515 U.S. 1154–55 (1995) (holding that the policy's primary purpose was to advance religion—in violation of the first prong of *Lemon*), and *Gearon v. Loudoun County School Board*, 844 F. Supp. 1097, 1100 (E.D. Va. 1993) (holding that the policy was inherently coercive).

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

108. *Id.* at 1475.

109. *See id.* Interestingly, 128 students voted for the prayer, 120 voted for a reflection or moment of silence, and twenty voted to have neither. Therefore, more students voted against having a prayer than voted for the prayer (140 to 128).

110. *See id.* at 1477.

111. *See id.* ("'[T]he individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority.'" (quoting Wallace v. Jeffree, 472 U.S. 38, 52 (1985))).

Finally, the court analyzed the policy under the factors emphasized in *Lee*: (1) the amount of state control and (2) the students' coerced participation in the ceremony. First, the court found that "the student referendum [did] not erase the state's imprint from [the] graduation prayer."[112] In fact, the court pointed out, the school maintained control by, among other things, determining the sequence of the program and holding the event on school property.[113] In addition, "[s]tudents decided the question of prayer at graduation only because school officials agreed to let them decide that question."[114] Thus, the court found that the state controlled the event. Second, the court concluded that the policy was coercive. Relying on *Lee* for the proposition that high school graduation, even if officially voluntary, is not voluntary in a real sense, the court found that the 140 students who voted against prayer at their ceremony were compelled to attend a religious ceremony against their will.[115] Contrary to the Fifth Circuit, the court concluded that because graduation is a "once-in-a-lifetime event," it is *more* coercive.[116] The court stated, "It [is] precisely because graduation [is] a 'once-in-a-lifetime' event that students [are] denied the option of foregoing the ceremony to avoid compromising their religious scruples."[117] Finally, as to the constitutionality of leaving the decision whether to have a prayer to the students, the court embraced the Ninth Circuit's determination, stating, "We cannot allow the school district's delegate to make decisions that the school district cannot make."[118] Therefore, because the state controlled the event and student participation was coerced, the Black Horse Pike policy violated the Establishment Clause.

In striking down student-initiated graduation prayer policies, courts have focused primarily on three Constitutional sticking points. First, the school controls the graduation ceremony and most, if not all, aspects related to it. Second, high school graduation is an inherently coercive event. Finally, schools cannot delegate prayer decisions to a majority of their students.

3. Confusion Among the Authorities

Lee and the subsequent lower court decisions discussed above created great confusion among legal scholars, school administrators, students, and advocacy groups as to the constitutionality of graduation

112. *Id.* at 1479.
113. *See id.*
114. *Id.*
115. *See id.* at 1480.
116. *See id.* at 1482.
117. *Id.*
118. *Id.* at 1483 (quoting Harris v. Joint Sch. Dist. No. 241, 41 F.3d 447, 455 (9th Cir. 1994), *vacated as moot*, 515 U.S. 1154 (1995)).

prayer.[119] For example, a diverse committee of religious and civil liberties organizations, chaired by the American Jewish Congress, published a joint statement on public school law and religion.[120] Regarding graduation prayer, the committee concluded: "The courts have reached 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."[121] In addition, the National Congress of Parents and Teachers states in an informational brochure: "Lower courts are divided about whether a student may offer prayers at graduation exercises. Parents should seek legal counsel about what rules apply in their state."[122] Clearly, everyone involved with this issue, including school administrators, students, and parents, needs some affirmative guidance. The U.S. Supreme Court had the perfect opportunity to render such guidance in *Santa Fe Independent School District v. Doe*. The Court furnished some direction but did not provide a definitive statement.

E. Santa Fe Independent School District v. Doe*: A Narrow or Broad Holding?*

After the Fifth Circuit's opinion in *Doe v. Santa Fe*,[123] the Santa Fe school district petitioned the Supreme Court for writ of certiorari. The Court granted certiorari; however, it limited the issue before it to "[w]hether [the school district's] policy permitting student-led, student-initiated prayer at football games violates the Establishment Clause."[124] Therefore, even though the appellate court decision dealt with graduation prayer, the Court declined to address this issue.

After numerous revisions of its policy, the Santa Fe Independent School District adopted a policy permitting its students, by secret ballot, to determine if they want "a brief invocation and/or message to be delivered during the pre-game ceremonies of home varsity football games."[125] If the students so choose, they then elect a student volunteer to give the "message and/or invocation."[126] The principal policy did not prescribe any requirements as to the invocation's content. However, the primary policy had a backup provision, effective only if a court enjoined the pri-

119. *See, e.g.*, THE NAT'L CONGRESS OF PARENTS & TEACHERS, PUB. NO. 95-F06, A PARENT'S GUIDE TO RELIGION IN THE PUBLIC SCHOOLS (Aug. 1999), *available at* http://www.fac.org [hereinafter PARENT'S GUIDE]; AM. JEWISH CONGRESS ET AL., RELIGION IN THE PUBLIC SCHOOLS: A JOINT STATEMENT OF CURRENT LAW (1995) [hereinafter JOINT STATEMENT]; U.S. DEP'T OF EDUC., RELIGIOUS EXPRESSION IN PUBLIC SCHOOLS (1998), *available at* http://www.ed.gov.

120. *See* JOINT STATEMENT, *supra* note 119.

121. *Id.* at 2.

122. PARENT'S GUIDE, *supra* note 119.

123. *See supra* Part II.D.2.a.

124. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 301 (2000) (quoting Santa Fe Indep. School Dist. v. Doe, 528 U.S. 1002 (1999)).

125. *Id.* at 298 n.6 (citation omitted).

126. *Id.*

mary one, that required the student invocation "be nonsectarian and nonproselytizing."[127]

The Court found this policy facially invalid. Writing for a six-to-three majority, Justice Stevens held that student-initiated, student-led prayer at football games violates the Establishment Clause.[128] The majority did not engage in a thorough analysis under the three Establishment Clause tests discussed above; rather, it focused its analysis primarily on the endorsement and coercion tests. First, the Court was concerned with the student election process and its impact on viewpoint neutrality, which requires the government to treat majority and minority views equally.[129] Because of its structure, the student election "guarantees, by definition, that minority candidates will never prevail and that their views will be effectively silenced."[130] The Court stated, "[T]his student election does nothing to protect minority views but rather places the students who hold such views at the mercy of the majority."[131] In addition, the Court emphasized that the election process violated the Establishment Clause by creating divisiveness along religious lines.[132]

Second, due to the degree of school involvement, the Court held that the district unconstitutionally endorsed religion.[133] The text of the policy and the setting of the event are evidence of unlawful endorsement.[134] The Court found that the policy's text indicated that the students' opportunity to deliver the invocation was possible only because the school gave them the ability to do so. In addition, the word "invocation" is "a term that primarily describes an appeal for divine assistance."[135] The context, a regularly scheduled school event where the invocation is broadcast over the school's public address system with the "indicia of school sporting events" prevalent, ensures that "members of the listening audience must perceive the pregame message as a public expression of the views of the majority of the student body delivered with the approval of the school administration."[136] The Court continued, "Regardless of the listener's support for, or objection to, the message, an objective Santa Fe High School student will unquestionably perceive the inevitable pregame prayer as stamped with her school's seal of approval."[137] Moreover, the Court made it clear that the school cannot dis-

127. *Id.* at 299 n.6 (citation omitted).
128. *See id.* at 313–17.
129. *See id.* at 304–05.
130. *Id.* at 304.
131. *Id.*
132. *See id.* at 311 ("The [election] mechanism encourages divisiveness along religious lines in a public school setting, a result at odds with the Establishment Clause.").
133. *See id.* at 305 ("[Santa Fe's] policy involves both perceived and actual endorsement of religion.").
134. *See id.* at 305–10.
135. *Id.* at 306–07.
136. *Id.* at 308.
137. *Id.*

entangle itself by simply delegating the invocation decision to its students.[138] The Court also explained that in determining improper endorsement "one of the relevant questions is 'whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools.'"[139]

Third, under the coercion test, the majority found that because of the inherent social pressures of high school football games, these events are similar in their coercive effect to the graduation ceremonies described by the Court in *Lee*.[140] Finally, the Court held that the facial challenge to the policy was not premature.[141] The Court found a facial violation because (1) the policy was enacted with a religious purpose, and (2) the majoritarian election process creates divisiveness along religious lines in violation of the Establishment Clause.[142] Although no student may ever choose to deliver a religious message, "[g]overnment efforts to endorse religion cannot evade constitutional reproach based solely on the remote possibility that those attempts may fail."[143]

In a strongly worded dissent authored by Chief Justice Rehnquist, the dissenters proclaimed that the majority's opinion "bristles with hostility to all things religious in public life."[144] The dissent argued that the facial challenge was premature, and that the policy has plausible secular purposes: "[t]o solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition."[145] Finally, the dissent argued that the district was simply tolerating religion, not unconstitutionally endorsing it.[146] This deeply divided decision produced wide-ranging commentary on the extent of its holding.[147] In addition, several Southern towns decided to circumvent the Court's decision and hold "spontaneous prayers"

138. *See id.* at 305–06.

139. *Id.* at 308 (quoting Wallace v. Jaffree, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring in judgment)).

140. *See id.* at 311–12.

141. *See id.* at 313–17.

142. *See id.*

143. *Id.* at 316.

144. *Id.* at 318.

145. *Id.* at 322 (citation omitted).

146. *See id.* at 323 n.4.

147. *See, e.g.*, Jendi Reiter, *Let 'Em Pray, Then Let 'Em Play*, NAT'L L.J., Aug. 7, 2000, at A19. "([T]he opinion raises more questions than it answers. . . . [T]here is no clear legal rule that schools can follow to determine in advance which events meet the [coercion] standard, or how much peer pressure is required to create an establishment clause violation, because the court's analysis is so dependent on the particular facts of the case."). Contributing to this uncertainty is that the Court's opinion may be relatively fact-specific. The Court noted that the school had a "long-established tradition of sanctioning student-led prayer at varsity football games." *Santa Fe*, 530 U.S. at 315. Therefore, a history of school-endorsed religious practices may be important to the Court's holding.

in the bleachers prior to the start of high school football games.[148] After the decision, "legal scholars said the next—and bigger—fight would involve student-led prayer at graduation ceremonies."[149] To better analyze this issue, the following Part sets forth two hypothetical graduation prayer situations. Then, this note will argue, applying the Court's Establishment Clause tests based on the lower courts' rationale and the Supreme Court's opinion in *Santa Fe*, that both policies are unconstitutional. Finally, this note will argue that although the *Santa Fe* decision is a broad one, prayer nevertheless may be introduced during a graduation ceremony in two very limited circumstances.

III. ANALYSIS: SCHOOL POLICIES—APPLICATIONS OF *SANTA FE*

Because the Supreme Court has not provided definitive direction as to the circumstances under which each of the Establishment Clause tests[150] should be applied, a complete and thorough analysis of the issue should include a discussion of each test. Until the Court gives lower courts more guidance as to what tests to use for particular issues, courts should apply all three tests, without considering one test dispositive of the issue. Consequently, Part III employs each test to examine both school prayer policies, applying the Court's rationale in *Santa Fe*. Ultimately, this Part concludes that, following *Santa Fe*, both policies violate the Establishment Clause.

A. Hypothetical Graduation Prayer Policies

To better illustrate the breadth of the *Santa Fe* holding and the persuasiveness of the appellate court decisions finding graduation prayer unconstitutional, this note will analyze the constitutionality of two common, representative hypothetical graduation prayer policies.

1. Hypothetical Policy #1[151]

Under this policy, students of the graduating class conduct a secret ballot election to determine if they want a fellow graduating student to deliver a benediction and invocation at their graduation ceremony. If so desired, the students then elect, via secret ballot, the student to deliver the prayer. The invocation and benediction must be nonsectarian and nonproselytizing. Finally, the school places a disclaimer in the gradua-

148. *See Advocates Try to Circumvent Supreme Court's Ban on School Prayer*, CHI. TRIB., Aug. 24, 2000, § 1, at 4; Dave Shiflett, *Houses of Worship: The Prayer Scrimmage*, WALL ST. J., Sept. 22, 2000, 2000 WL-WSJ 26610579.

149. Jan Crawford Greenburg, *Top Court Refuses to Hear Exxon Spill, Prayer Cases*, CHI. TRIB., Oct. 3, 2000, at 4.

150. For a discussion of the *Lemon*, coercion, and endorsement tests, see *supra* Part II.B.

151. Hypothetical Policy #1 is based roughly on the facts of *Jones v. Clear Creek Independent School District*, 977 F.2d 963 (5th Cir. 1992). *See supra* Part II.D.1.a.

tion program indicating that the invocation and benediction are solely the opinion of the student, not the school.

2. *Hypothetical Policy #2*[152]

Under this policy, the graduating class votes by secret ballot whether or not it wants a "message" to be given at its graduation ceremony. If yes, the students elect a fellow graduating student to deliver the "message." The school does not, in any way, review the content of the elected student's message prior to the ceremony. Finally, the school publishes a disclaimer in the graduation program indicating that the "message" is solely the opinion of the student, not the district.

B. Hypothetical Policies: Violations of the Establishment Clause

As will be discussed below, both policies violate the Establishment Clause. First, Hypothetical Policy #1 fails all three of the Court's Establishment Clause tests. This conclusion is at odds with, and this Part argues is more persuasive than, the Fifth Circuit's rationale in *Clear Creek II*.[153] Second, Hypothetical Policy #2 presents a more difficult case. Because the policy permits a "message," which could include a secular speech or proselytizing prayer, and the school does not place any content restrictions on, or review, the message, the *Adler* court found that the Free Speech Clause protects a similar policy as private speech.[154] However, this note argues below that the student speech is state sponsored and not protected by the Free Speech Clause. Moreover, it will be argued that even though the policy passes the *Lemon* and endorsement tests, it violates the coercion test, and therefore the Establishment Clause, because the majoritarian election mechanism to determine if students want a message is unconstitutional.

1. *The* Lemon *Test: Primary Effect and Entanglement Distinguishing*

First, as with the *Lemon* test generally, the secular purpose prong is highly fact dependent. Because Hypothetical Policy #1 does not include any background information about the circumstances of its passage, it is possible to speculate what some of these purposes may have been. One

152. Hypothetical Policy #2 is based roughly on the facts of *Adler v. Duval County School Board*, 206 F.3d 1070 (11th Cir. 2000) (en banc), *vacated by* 531 U.S. 801 (2000) (mem.), *and reinstated*, 250 F.3d 1330 (11th Cir. 2001) (en banc), *cert. denied*, No. 01-287, 2001 WL 984867 (U.S. Dec. 10, 2001). *See supra* Part II.D.1.b.

153. 977 F.2d 963 (5th Cir. 1992). For a discussion of *Clear Creek II*, see *supra* Part II.D.1.a.

154. Adler v. Duval County Sch. Bd., 206 F.3d 1070 (11th Cir. 2000) (en banc), *vacated by* 531 U.S. 801 (2000) (mem.), *and reinstated*, 250 F.3d 1330 (11th Cir. 2001) (en banc), *cert. denied*, No. 01-287, 2001 WL 984867 (U.S. Dec. 10, 2001).

conceivable secular purpose is to solemnize the graduation ceremony.[155] Another secular purpose is to give students the opportunity to deliver a speech at their graduation.[156] Similarly, a school's purpose in passing a policy is secular if it is to allow the students to direct their own graduation ceremony.[157] Although these secular purposes, depending on the particular circumstances of the case, may pass muster under the first prong, the court must determine if the alleged secular purpose is a "sham." According to the Court in *Santa Fe*, "When a governmental entity professes a secular purpose for an arguably religious policy, the government's characterization is, of course, entitled to some deference. But it is nonetheless the duty of the court to 'distinguis[h] a sham secular purpose from a sincere one.'"[158] Therefore, again depending on the facts of the case, a court may find a seemingly facially valid secular purpose a sham actually intended to promote religion. Consequently, without knowing more about the context of the policy's passage, it is impossible to know if Hypothetical Policy #1 has a secular purpose under the first prong of the *Lemon* test.

Under the second prong, a policy's primary effect must be neutral towards religion. The *Clear Creek II* court found that a policy similar to Hypothetical Policy #1 does not advance religion; rather, the court determined, its primary effect is to solemnize the occasion.[159] In addition, the nonsectarian and nonproselytizing requirements ensure that there will be no proselytizing, which minimizes any advancement of religion. Important to the Fifth Circuit is that graduation is a "once-in-a-lifetime event." To the court, graduation is an annual, sober event where solemnization is appropriate, important, and tradition. These characteristics allow students, if they so choose on their own initiative, to solemnize the occasion.[160] However, implicit in endorsing the primary effect of solemnization is allowing the most obvious and popular method for doing so—prayer. Therefore, even though the nonsectarian, nonproselytizing requirements reduce the possibility of advancing religion, "even if no . . .

155. *See, e.g.*, *Clear Creek I*, 977 F.2d at 966 ("A meaningful graduation ceremony can provide encouragement to finish school and the inspiration and self-assurance necessary to achieve after graduation, which are secular objectives.").

156. *See, e.g.*, Doe v. Madison Sch. Dist. No. 321, 147 F.3d 832, 837 (9th Cir. 1998), *judgment vacated for lack of standing*, 177 F.3d 789 (9th Cir. 1999) (en banc).

157. *See, e.g.*, *Adler*, 206 F.3d at 1085 ("By choosing whether to have a graduation message, and if so, the student speaker, the graduating class shares, at least in part, in the civic responsibility of planning their graduation ceremony.").

158. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308 (2000) (quoting Wallace v. Jaffree, 472 U.S. 38, 75 (1985) (modification in original)). For example, in *Santa Fe*, the Court found that the school had a "long-established tradition of sanctioning student-led prayer at varsity football games." *Id.* at 315.

159. *See* Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963, 967 (5th Cir. 1992) ("[The policy's] requirement that any invocation be nonsectarian and nonproselytizing minimizes any such advancement of religion.").

160. *See* Ingebretsen v. Jackson Pub. Sch. Dist., 88 F.3d 274, 280 (5th Cir. 1996); Doe v. Duncanville Indep. Sch. Dist., 70 F.3d 402, 406–07 (5th Cir. 1995); *supra* text accompanying notes 84–86.

student were ever to offer a religious message, the . . . policy fails a facial challenge because the attempt by the District to encourage prayer is also at issue."[161] Furthermore, the policy fails to consider other nonreligious ways to solemnize the event, such as the playing of the Star Spangled Banner by the high school band or the recitation of a poem by a student. The policy exclusively permits benedictions and invocations, which indicate that the district is attempting to advance religion, not remain neutral with respect to it.

Third, the government must not be excessively entangled with religion.[162] Proponents of Hypothetical Policy #1 may assert that the student election serves as a "circuit breaker" to disentangle the district with religion. They may argue that the policy is consistent with Justice Souter's concurrence in *Lee*.[163] Thus, they may advance that because the students decide whether to have an invocation or benediction, the government is not entangled with the prayer. However, this position fails to take into account a number of factors. First, the school district wrote and approved the policy. The students are allowed to choose a student speaker to deliver the invocation and benediction solely because the district allows them to. The district controls the program and all facets of the event. Therefore, even if the district does not choose the speaker to give the prayer or compose the prayer itself, it is still excessively entangled with religion because it passed a policy allowing students to deliver the prayer. Second, Justice Souter's concurrence in *Lee* supposes a graduation speaker chosen "according to wholly secular criteria."[164] A student election over whether to have an invocation or benediction and, if so, the student to deliver such prayers is not a secular criterion. Presumably, the students will lobby in support or opposition of inclusion of a religious message and will choose a speaker they believe will deliver a quality benediction and/or invocation. Therefore, the students will decide their votes on religiously grounded campaigning and elect their speaker based on their independent knowledge of the speaker's religious beliefs or the potential student speaker's speeches/campaigning on how he or she is qualified to deliver the invocation and/or benediction.[165] Third, the dis-

161. *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 316. In other words, because the district is well aware that solemnization in the name of an invocation or benediction almost always includes a prayer, *see id.* at 306 (defining an invocation as "a term that primarily describes an appeal for divine assistance"), despite the limitations on the type of prayer, the policy's primary effect is to advance religion in violation of the second prong of *Lemon*.

162. Although the court may collapse the traditional three-prong *Lemon* test into a two-prong test, *see supra* note 42 and accompanying text, for purposes of completeness, this note will examine the policy under the third prong as well.

163. *See supra* note 69 and accompanying text.

164. Lee v. Weisman, 505 U.S. 577, 630 n.8 (1992).

165. *See* U.S. Supreme Court Official Transcript at *8–9, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) (No. 99-62), 2000 WL 374300. Justice Kennedy, in a question during oral argument to the attorney for the Santa Fe Independent School District, stated:

> I assume that the election is offered to us as a saving feature of the program, yet an election doesn't mean anything without a campaign, and if we had a campaign it seems to me that the stu-

trict places content restrictions on the invocations and benedictions, i.e., that they must be nonsectarian and nonproselytizing. Thus, the district must presumably review the prayers, and therefore become entangled, prior to graduation to ensure their compliance with the policy. Finally, the district cannot delegate to its students decisions it cannot make on its own.[166] As the Supreme Court held in *Lee*, the district cannot ask a member of the clergy to deliver an invocation or benediction and then compel student attendance.[167] Therefore, the district cannot delegate to its students the ability to choose a student to deliver a similar invocation or benediction.

Based on the foregoing, Hypothetical Policy #1 fails the second and third prongs of the *Lemon* test. The policy's primary effect is one that advances religion, and the school is excessively entangled with religion. In addition, depending on the factual background, it may not satisfy *Lemon's* first prong.

Unlike Hypothetical #1, however, Hypothetical Policy #2 does not violate *Lemon*. First, as discussed above, because the policy's historical context is not clear, it is difficult to determine if the policy has a secular purpose. In *Adler*, the court advanced three possible secular purposes: allowing the graduating class to direct its own graduation ceremony, permitting the students to solemnize their graduation ceremony, and affording students the freedom of expression.[168] However, a court must determine if such alleged secular purposes are legitimate or merely a disguise to promote religion.[169] For example, under a similar policy at Madison School District No. 321,[170] over the course of several years, fifteen students delivered a "message" at graduation. Of these fifteen "messages," fourteen were exclusively prayers or included a prayer as part of the speech.[171] Therefore, to ascertain whether there is a secular purpose, a court must analyze the purposes advanced by the parties, the

> dents might say, I will be a very good speaker, representative of the school, because I am well-trained and well-motivated to give inspirational prayers. Another student has a poster saying, no prayers in school, and they have a school election, based on the issue of whether or not there should be prayer.
>
> Now, that is the kind of thing, I think, that our Establishment Clause wants to keep out of the schools. We have a school electoral mechanism, a governmental mechanism for selecting a speaker, and one of the criteria is, I should think, whether or not prayers are going to be given.

Id.

166. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 306 (2000); ACLU v. Black Horse Pike Reg'l Bd. of Educ., 84 F.3d 1471, 1483 (3d Cir. 1996) (in banc).

167. *See* Lee v. Weisman, 505 U.S. 577, 599 (1992).

168. *See* Adler v. Duval County Sch. Bd., 206 F.3d 1070, 1085 (11th Cir. 2000) (en banc), *vacated by* 531 U.S. 801 (2000) (mem.), *and reinstated*, 250 F.3d 1330 (11th Cir. 2001) (en banc), *cert. denied*, No. 01-287, 2001 WL 984867 (U.S. Dec. 10, 2001).

169. *See supra* text accompanying note 158.

170. *See* Doe v. Madison Sch. Dist. No. 321, 147 F.3d 832, 834 (9th Cir. 1998), *vacated for lack of standing*, 177 F.3d 789 (9th Cir. 1999) (en banc).

171. Interview with Dr. Paul Thurston, Professor, Education & Organizational Leadership, University of Illinois College of Education, in Urbana, Ill. (Jan. 29, 2001).

historical context of the policy's enactment, and the practical effect of the policy.

Second, as opposed to Hypothetical Policy #1, this policy does not advance religion. The distinguishing feature is that Hypothetical Policy #2 provides for an uncensored "message," not an invocation or benediction. As argued above, invocations and benedictions are religious in nature.[172] On the other hand, a policy permitting a "message" on a topic chosen and written exclusively by a student does not advance religion. The policy does not, by its terms, implicate a religious message. The student speaker is free to address any topic. To be sure, the speaker could deliver a prayer or other religious message; however, such a message, because it is not mandated by the policy, merely advances students' free expression, not government-sponsored religion.[173]

Third, under Hypothetical Policy #2, the government is not excessively entangled with religion. Although similar to Hypothetical Policy #1 in that this is also a school policy and a school-sponsored event, the district has effectively disentangled itself by not reviewing in any way or placing any content restrictions on the message.[174] "Undoubtedly, [a school] would find itself far more entangled with religion if it attempted to eradicate all religious content from student messages than if it maintained a meaningful policy of studied neutrality."[175] Because the only school involvement is allowing the student to speak pursuant to a school policy, and in all other relevant respects, the school stays out, the district is not "excessively" entangled with religion.

Based on the foregoing, Hypothetical Policy #2 passes each prong of the *Lemon* test. Because the policy provides for an uncensored "message" in which the district is not involved in any way, it passes muster. However, because no one Establishment Clause test is dispositive, the policies must be analyzed under the coercion and endorsement tests as well.

172. *See supra* text accompanying note 135; *supra* note 161.

173. As the Eleventh Circuit stated in *Adler*:

> While it is undoubtably true than an autonomous student speaker could read a prayer at graduation under the policy, it is equally true that the same speaker may opt for a wholly secular message instead. It would require a strain of the term "primary" to suggest that a content-neutral forum policy, which accommodates private sectarian and secular speech on an equal basis, has the "primary" or "principal" effect of advancing religion.

Adler v. Duval County Sch. Bd., 206 F.3d 1070, 1089 (11th Cir. 2000) (en banc), *vacated by* 531 U.S. 801 (2000) (mem.), *and reinstated*, 250 F.3d 1330 (11th Cir. 2001) (en banc), *cert. denied*, No. 01-287, 2001 WL 984867 (U.S. Dec. 10, 2001).

174. *Cf.* Hypothetical Policy #1, *supra* Part III.A.1 (requiring that the invocation and benediction must be nonsectarian and nonproselytizing).

175. *Adler*, 206 F.3d at 1090; *see also Doe*, 147 F.3d at 838 (finding, under a similar policy, that "although school officials participate in the event by way of funding it and appearing on stage with the student speakers, the fact remains that on its face the policy is neutral with respect to religion").

2. Coercion Test: Minority Viewpoints

In *Lee*, the Court reiterated that the government cannot coerce its citizens into supporting or participating in a religious exercise.[176] Under this proposition, a court will find coercion when the government pressures a student to participate in a religious activity.[177] Because both policies mandate a majoritarian election over a religious speech or a "message," they coerce students into such participation.

Under Hypothetical Policy #1, even if students' participation is not required for them to receive their diplomas, attendance is nonvoluntary in a real sense. Students should not be required to choose between attending their own graduation ceremony where they are exposed to a religious message or boycotting the event. As the Court explained in *Lee*, students, including objecting students, are under immense public pressure to at least stand in respectful silence during the invocation and benediction.[178] Therefore, because objecting students are coerced into participating in a religious exercise[179] organized by the state, the policy violates the coercion test.

However, the student election may serve as a "circuit breaker," making the policy less coercive. The students themselves, rather than the school, choose whether to include an invocation and benediction at their graduation ceremony; therefore, the "messages are the product of student choices."[180] However, this argument fails because "[a]lthough it is true that the ultimate choice of student speaker is attributable to the students, the District's decision to hold the constitutionally problematic election is clearly a choice attributable to the State."[181] Consequently, because the district allows its students to choose, through an election, whether to have an invocation and benediction, its policy is coercing some students, in violation of the Establishment Clause, to participate in a religious exercise to which they object.

Even if the student vote successfully serves as a "circuit breaker," Hypothetical Policy #1 still violates the Establishment Clause. This premise was the central tenant of the Court's decision in *Santa Fe*. The Santa Fe policy is similar to Hypothetical Policy #1 in that the students choose whether to have a "statement or invocation" as part of a school-sponsored event and the student to give such statement or invocation.[182] The policy "empowers the student body majority with the authority to

176. Lee v. Weisman, 505 U.S. 577, 587 (1992).

177. *See id.*

178. *See id.* at 593.

179. As the Court stated, invocations and benedictions, by their very terms, are religious in nature. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 306–07 (2000); *see supra* text accompanying notes 135, 161 and 172.

180. *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 310.

181. *Id.* at 311 (citations omitted).

182. In contrast to Hypothetical #1, along with invocations, the Santa Fe policy allowed "statements" and "messages," which inherently are not religious.

subject students of minority views to constitutionally improper messages."[183] Relying on its opinion in *Board of Regents of University of Wisconsin System v. Southworth*,[184] the Court held: "Simply by establishing this school-related procedure, which entrusts the inherently nongovernmental subject of religion to a majoritarian vote, a constitutional violation has occurred."[185] The Court continued, "[T]he District's decision to allow the student majority to control whether students of minority views are subjected to a school-sponsored prayer violates the Establishment Clause."[186] Therefore, because Hypothetical Policy #1 subjects the minority to the religious will of the majority through the majoritarian election, it violates the Establishment Clause.[187] In fact, any policy allowing a student-body-wide, majoritarian election *regarding religion* violates the Establishment Clause.

Finally, contrary to the Fifth Circuit's view, because graduation is a "once-in-a-lifetime" event, it is *more* coercive. The important nature of the event ensures that students will attend the ceremony, even if it is nonmandatory. Therefore, because of the important and unique nature of the occasion, students will attend and participate in a ceremony to which they might object in violation of the Establishment Clause.[188]

In summary, Hypothetical Policy #1 violates the coercion test. The nonvoluntary nature of the event ensures that student participation will be unconstitutionally coerced. Most important, based on *Santa Fe*, any policy permitting a majoritarian election regarding religion violates the coercion test.

Similarly, because of Hypothetical Policy #2's majoritarian election mechanism, it "forces objectors to participate in a religious exercise" and thus runs afoul of the coercion test. Proponents of this policy may argue that the coercion test is inapplicable in this case because the student message is private, not state, speech.[189] Therefore, they may assert, there is no *government* coercion. However, this note argues, consistent with *Santa Fe*, that the student message is state-sponsored speech, and, furthermore, that this speech violates the coercion test.

183. *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 316.

184. 529 U.S. 217 (2000) (holding, inter alia, that funding student organizations through a student referendum is not a viewpoint neutral selection process).

185. *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 317.

186. *Id.* at 316 n.23.

187. As Judge Kravitch pointed out in his dissent in *Adler II*, a "'majoritarian election might ensure that *most* of the students are represented, [but] does nothing to protect the minority.'" Adler v. Duval County Sch. Bd., 250 F.3d 1330, 1344 (11th Cir. 2001) (en banc) (Kravitch, J., dissenting) (quoting *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 305).

188. *See* ACLU v. Black Horse Pike Reg'l Bd. of Educ., 84 F.3d 1471, 1482 (3d Cir. 1996) (in banc).

189. *See supra* text accompanying notes 87–96.

a. Free Speech: Still State Sponsored

According to the *Adler* court, Hypothetical Policy #2 is protected by the Free Speech Clause of the First Amendment.[190] Likewise, the school district in *Santa Fe* argued that "it's important to emphasize that the individual student selected, if, in fact, there is a decision to have a student give a message, that that student is the *circuit-breaker*. That student determines the message. There is no way to know what that student's going to say."[191] Because the school stays out altogether, proponents argue, the message is protected free speech.

Santa Fe counsels that the student message is not private speech. In addressing this issue in the context of the Santa Fe policy, which allowed for a student-initiated, student-led "invocation and/or message,"[192] the Court held that the student's invocation and/or message was not private speech.[193] Problematic to the Court was that "[the] invocations are authorized by a government policy and take place on government property at government-sponsored school-related events."[194] However, as the Court points out, if the district has opened the forum to "indiscriminate use by the student body generally," even if the message is given pursuant to a government policy at a government-sponsored event, the individual speech is protected.[195] Under Hypothetical Policy #2, as in *Santa Fe*, because the district only permits one student on stage to speak at a time, it has not opened the forum to "indiscriminate use by the student body generally." However, according to the Court, this limited access is not dispositive of the issue of whether the district has created a limited public forum in which private free speech rights are protected.[196] Instead, the limited access coupled with "the majoritarian process [to determine if there will be a message and the speaker] implemented by the District[, which] guarantees, by definition, that minority candidates will never prevail and that their views will be effectively silenced," evinces that the district has not created a limited public forum.[197] The forum is open *only if* the majority votes to have a message and then *only to* the student that the majority elects, not to indiscriminate use. Therefore, because of Hypothetical Policy #2's majoritarian election and that the message is given

190. *See id.*

191. U.S. Supreme Court Official Transcript at *7–8, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) (No. 99-62), 2000 WL 374300 (emphasis added).

192. *See supra* note 125 and accompanying text.

193. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 310 (2000) ("The delivery of such a message—over the school's public address system, by a speaker representing the student body, under the supervision of school faculty, and pursuant to a school policy that explicitly and implicitly encourages public prayer—is not properly characterized as 'private' speech.").

194. *Id.* at 302.

195. *Id.* at 303 (citations omitted); *see also* Rosenberger v. Rectors & Visitors of Univ. of Va., 515 U.S. 819 (1995) (holding that an individual's contribution to a government-created forum was not government speech).

196. *See Santa Fe Indep. Sch. Dist.*, 530 U.S. at 303.

197. *Id.*

pursuant to a school policy at a government-sponsored event, the speech is not private, but rather state sponsored and therefore subject to a coercion test analysis.

In addition, three other characteristics of the policy suggest that the student's speech is state sponsored. First, the district has defined the electoral body—the graduating class. When the students vote whether to have a message and, if so, who the speaker will be, they are not doing so individually, but rather as a collective body defined by the state. Therefore, votes cast by the school-designated electorate are state sponsored, with the elected speaker delivering a message on behalf of the school-designated electorate.[198] Second, "the election of a student to deliver the opening or closing 'message' is state action."[199] Not only does the state define the electorate, but it develops the election policy, rules, and regulations; presumably oversees the election; and certifies the results. Thus, the district facilitates the student's message. Furthermore, because of the election mechanism, as argued above, the state's action does not create a limited open forum. Finally, "when government delegates authority over a portion of a public operation to an ostensibly private actor, but retains ultimate control over the larger operation, the exercise of the delegated authority is attributable to the state."[200] Undoubtedly, the district retains control over all other aspects of the graduation ceremony. Unless evidence could be introduced to prove that the school has delegated other facets of the ceremony, simply because it allows its students to vote whether to have a message, the policy does not make the student's speech private.

b. The Coerciveness of a Majoritarian Election

According to the Supreme Court, graduating students' attendance at their own graduation ceremony is not voluntary.[201] In fact, even if a diploma is not predicated on attendance, because graduation is a "once-in-a-lifetime" event, students will feel more social/informal pressure to attend the event.[202] Furthermore, this characteristic makes graduation less voluntary than a football game, which the Court determined, due to extracurricular commitments and intense social pressure, was not voluntary.[203] Therefore, the district cannot force its objecting students to choose between attending their own graduation, where they might be

198. *See* U.S. Supreme Court Official Transcript at *15, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) (No. 99-62), 2000 WL 374300.

199. Adler v. Duval County Sch. Bd., 206 F.3d 1070, 1092 (11th Cir. 2000) (en banc) (Kravitch, J., dissenting), *vacated by* 531 U.S. 801 (2000) (mem.), *and reinstated*, 230 F.3d 1313 (11th Cir. 2001) (en banc), *cert. denied*, No. 01-287, 2001 WL 984867 (U.S. Dec. 10, 2001).

200. *Id.* at 1094.

201. *See supra* text accompanying notes 57, 61–66.

202. *See supra* text accompanying note 188.

203. *See Santa Fe Indep. Sch. Dist.*, 530 U.S. at 311–12.

subjected to a state-sponsored prayer, or forfeiting this "once-in-a-lifetime" event.[204]

Most importantly, however, the majoritarian election violates the coercion test. "[S]tudent elections that determine, by majority vote, which expressive activities shall receive or not receive school benefits are constitutionally problematic."[205] Under the concept of viewpoint neutrality, when determining state-sponsored benefits, all views must be treated equally.[206] "To the extent the referendum substitutes majority determinations for viewpoint neutrality it would undermine the constitutional protection the program requires."[207] Therefore, because the student speaker receives school (i.e., state-sponsored) benefits ("the school gives her substantial assistance [and exclusive speaking privileges] in delivering her message to a state-assembled audience"),[208] the method of choosing the speaker must be viewpoint neutral. A student election over a "message" is not viewpoint neutral.[209] In fact, a "student election does nothing to protect minority views but rather places the students who hold such views at the mercy of the majority."[210] The problem is that the students select the view, i.e., message, first *and then* the speaker.[211] Thus, Hypothetical Policy #2 is not viewpoint neutral.

204. *See id.*

205. *Id.* at 304.

206. *See* Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 235 (2000). The Court recently addressed the issue of viewpoint neutrality in *Good News Club v. Milford Central School*, 121 S. Ct. 2093 (2001). In this case, a divided Court held that a school's exclusion of the Good News Club constituted unconstitutional viewpoint discrimination. *Id.* at 2101. Pursuant to the school's policy, which allowed outside groups to use the school's facilities after hours for "instruction in any branch of education, learning or the arts" or "social, civic, recreational meetings and entertainment events," the Good News Club petitioned to hold after-school meetings in the school at which participants would read Bible verses, memorize scripture, sing songs, and pray. *Id.* at 2098 (citation omitted). The school, claiming that the Club's use was "for the purpose of conducting religious instruction and Bible study" in violation of the school's policy, denied the Club's application. *Id.* at 2098 (citation omitted). The Court found this to be unconstitutional viewpoint discrimination. According to the Court, "the Club [sought] to address a subject otherwise permitted under the rule, the teaching of morals and character, from a religious standpoint." *Id.* at 2101. Thus, the government cannot exclude or prefer one type of viewpoint over another. In this case, it could not allow one group to teach morals and character from a nonreligious perspective and deny the Good News Club from doing so from a religious viewpoint. It must remain neutral with respect to all such viewpoints.

207. *Southworth*, 529 U.S. at 235.

208. Respondent's Supplemental Brief at 1, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) 2000 WL 340266. The respondent also stated: "[T]he student speaker who delivers the prayers is given exclusive speaking privileges by the school, and a private speaker who gets these exclusive privileges must be selected in a viewpoint-neutral process." *Id.* at 2.

209. *See Santa Fe Indep. Sch. Dist.*, 530 U.S. at 304; *Southworth*, 529 U.S. at 235.

210. *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 304.

211. *See id.* at 304 n.15. The Court stated:

> If instead of a choice between an invocation and no pregame message, the first election determined whether a political speech should be made, and the second election determined whether the speaker should be a Democrat or a Republican, it would be rather clear that the public address system was being used to deliver a partisan message reflecting the viewpoint of the majority rather than a random statement by a private individual.
>
> The fact that the District's policy provides for the election of the speaker only after the majority has voted on her message identifies an obvious distinction between this case and the typical election of a "student body president, or even a newly elected prom king or queen."

Furthermore, the Santa Fe policy did not survive a facial challenge "because it impermissibly imposes upon the student body a majoritarian election on the issue of prayer."[212] The election process "turns the school into a forum for religious debate."[213] Continued the Court, "[The election] further empowers the student body majority with the authority to subject students of minority views to constitutionally improper messages. The award of that power alone, *regardless of the students' ultimate use of it*, is not acceptable."[214] Finally, the Court held that "the District's decision to allow the student majority to control whether students of minority views are subjected to a school-sponsored prayer violates the Establishment Clause."[215]

Therefore, because the election mechanism of Hypothetical #2 is analogous to the Santa Fe policy, it too violates the Establishment Clause. The speaker's ability to give an uncensored message is irrelevant and does not distinguish the two policies. The Court is concerned with the election itself, not the message. Furthermore, because students will elect their speaker based on the speaker's views made known during a campaign, the school may be turned into "a forum for religious debate." Although this policy allows for a "message," which may not be religious in nature, the potential for religious debate, "regardless of the students' ultimate use of it," violates the Establishment Clause.[216] Moreover, this debate over the students' messages, potentially *over religious ideals*, is not secular in nature, as advanced by Justice Souter in *Lee*.[217]

Because a student election determines who receives school benefits, it must be viewpoint neutral. Because a majoritarian election over whether to have a message at graduation suppresses minority views in favor of a majority vote, this type of election is not viewpoint neutral and is thus coercive because it obliges an objecting student to *attend a non-voluntary religious exercise*. Therefore, because Hypothetical #2 employs

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Id. (quoting *id.* at 321 (Rehnquist, J., dissenting).

Judge Carnes makes a similar point in dissent in *Adler II*:

> The majority of the senior class selects and endorses the message because the majority selects the messenger. All the majority has to do to ensure that a religious message is delivered at graduation is select as its messenger one whom it can rely upon to give such a message. There is no reason at all to believe that will be difficult to do.

Adler v. Duval County Sch. Bd., 250 F.3d 1330, 1349 (11th Cir. 2001) (en banc) (Carnes, J., dissenting).

212. *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 316.

213. *Id.* As Judge Carnes succinctly states:

> Once the majority will is expressed in favor of a student-delivered message, all the majority has to do to ensure that message includes prayer is select someone who can be counted upon to deliver a prayer. If there is any doubt about who will do so, that doubt can be resolved in the usual way that candidates' positions are identified in a democracy—through campaigning and debate.

Adler, 250 F.3d at 1349 (Carnes, J., dissenting).

214. *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 316 (emphasis added).

215. *Id.* at 317 n.23.

216. *See supra* text accompanying note 214.

217. *See supra* text accompanying note 69. A student election may be secular; however, a majoritarian election to determine whether to have a religious speaker is not secular.

the type of majoritarian election decried in *Southworth* and *Santa Fe*, it too violates the coercion test.

3. Endorsement Test: The Objective Observer

Under the endorsement test, a policy is unconstitutional if an objective observer would consider the government action as a disapproval of his or her contrary religious beliefs.[218] Clearly, graduation is a school-sponsored event. The issue under the two policies, therefore, is whether a reasonable person would view a student invocation or benediction—given by a speaker, elected by his or her peers, who delivers a nonsectarian and nonproselytizing speech to which the observer finds offensive—or an unrestricted student "message"—which the school does not review—as government action or private speech.

Following *Santa Fe*, an objective observer would find Hypothetical #1 to be government action in violation of the endorsement test. The *Clear Creek II* court found that a similar policy did not violate this test because the policy did not mandate a prayer; rather the policy, similar to Hypothetical Policy #1, allowed the students to choose whether they wanted a prayer at their graduation.[219] Furthermore, the court stated, "[A] graduating high school senior *who participates in the decision as to whether her graduation will include an invocation by a fellow student volunteer* will understand that any religious references are the result of student, not government, choice."[220] Moreover, the program contains a disclaimer announcing that the invocations and benedictions are the product of the student, not the school.

In spite of these compelling arguments, Hypothetical Policy #1 does not pass the endorsement test. First, the school controls the event.[221] In fact, the student, albeit one elected by his or her peers, only is allowed to speak at graduation because the school has such a policy. Therefore, because of the indicia of school sponsorship prevalent at a graduation ceremony—including that the ceremony is typically held on school grounds, financed by the school, over the school's public address system, with school colors displayed, school awards given, and the school band and choir performing—an objective observer fully would be aware that the student is speaking pursuant to a school policy. Similarly, student participants also would know that the student invocation and benediction was given pursuant to school policy. Even though students are allowed to choose, they do so only because the district permits such choice. In

218. *See Santa Fe Indep. Sch. Dist.*, 530 U.S. at 308; Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963, 968 (5th Cir. 1992).

219. *See Jones*, 977 F.2d at 968–69.

220. *Id.* at 969.

221. *See* Lee v. Weisman, 505 U.S. 577, 597 (1992) ("At a high school graduation, teachers and principals must and do retain a high degree of control over the precise contents of the program, the speeches, the timing, the movements, the dress, and the decorum of the students.").

Santa Fe, the Court found that a "statement or invocation," which may not even include a prayer, given pursuant to a similar school policy violated the endorsement test because, due to the district policy and other indicia of a school-sponsored event,[222] "an objective Santa Fe High School student will unquestionably perceive the inevitable pregame prayer stamped with her school's seal of approval."[223]

Furthermore, the disclaimer does not save the policy. A school "cannot sanction coerced participation in a religious observance merely by disclaiming responsibility for the content of the ceremony."[224] Even though the district publishes the disclaimer, students know that the school has simply *delegated* the ability to include a prayer as part of the ceremony to its students.[225] Therefore, an objecting reasonable observer, in spite of the disclaimer, would perceive a student invocation or benediction as government action contrary to his or her religious views.

Finally, the school's delegation to its students regarding prayer is problematic. "[S]chool officials cannot divest themselves of constitutional responsibility by allowing the students to make crucial decisions . . . ."[226] In fact, if schools were allowed to do so, they could "'effectively overrule or evade every one of [the] Court's school prayer cases.'"[227] Following this premise, schools could allow their students to vote to authorize the holding of daily prayers in their classrooms[228] or the posting of the Ten Commandments.[229] Quite clearly, such a policy would create serious constitutional problems and is contrary to the Establishment Clause.[230] Therefore, because the government cannot delegate the

222. According to the Court, such indicia of a school sponsored event included:

> a large audience assembled as part of a regularly scheduled, school-sponsored function conducted on school property. The message is broadcast over the school's public address system, which remains subject to the control of school officials. . . . [T]he pregame ceremony is clothed in the traditional indicia of school sporting events, [including] not just the team, but also cheerleaders and band members dressed in uniforms sporting the school name and mascot. The school's name is likely written in large print across the field and on banners and flags.

Santa Fe Indep. Sch. Dist., 530 U.S. at 307–08.

223. *Id.* at 308.

224. ACLU v. Black Horse Pike Reg'l Bd. of Educ., 84 F.3d 1471, 1482 (3d Cir. 1996) (en banc).

225. *See* Harris v. Joint Sch. Dist. No. 241, 41 F.3d 447, 455–56 (9th Cir. 1994), *vacated as moot*, 515 U.S. 1154 (1995). The court stated:

> The student in the religious minority is well aware that the school has delegated authority over the prayers to the majority of her classmates while retaining ultimate control over the school-sponsored meeting. The student is also aware that the effect of the delegation is that her religious views are subordinated to the majority's.

Id.

226. *Id.* at 455.

227. Douglas W. Kmiec, *Free Speech, Religion, and the Gridiron: The Supreme Court Tackles School Prayer*, PREVIEW OF U.S. SUP. CT. CAS., Mar. 8, 2000, WL 1999–2000 Preview 324 (quoting Brief for Respondent at 27, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) (No. 99-62)).

228. Engle v. Vitale, 370 U.S. 421 (1962) (holding authorization by student vote to hold daily prayers in classrooms unconstitutional).

229. *See Harris*, 41 F.3d at 455, *vacated as moot*, 515 U.S. 1154 (1995). The Court barred public schools from posting the Ten Commandments in *Stone v. Graham*, 449 U.S. 39 (1980).

230. *See Harris*, 41 F.3d at 455.

authority to take action it cannot itself take, Hypothetical Policy #1 violates the endorsement test.

However, because an objective observer would not find Hypothetical Policy #2 to be government action in violation of the Establishment Clause, it passes the endorsement test. Recall that endorsement is determined by analyzing the text of the policy and the setting of the event.[231] Hypothetical Policy #2 overcomes the constitutional weaknesses of Hypothetical Policy #1.[232] To be sure, an objective observer would recognize graduation as a government-sponsored event (setting of the event). In addition, the students know who wrote the policy allowing a message (the district) and who wrote the disclaimer in the program (also the district). These facts alone, as in Hypothetical Policy #1, might evidence an unconstitutional government endorsement of religion. However, these are not the only facts relevant to Hypothetical Policy #2.

First, the district is not involved, in any way, in a student speaker's preparation of his or her message. In fact, by its very terms, the policy prohibits any school involvement. Moreover, the school does not place any restrictions on the type of speech or content of the message; the student is free to choose his or her own topic and write the speech without district censorship or prior restraint. Most importantly, just as the students know the selected speaker is permitted to speak only because the district allows him or her, the students also are fully aware that the school does not place restrictions on or become involved with the speech in any way. As the *Adler* court stated, "Duval County seniors will [not] interpret the school's failure to censor a private student message for religious content as an endorsement of that message—particularly where the students are expressly informed as part of the election process that they may select a speaker who alone will craft any message."[233] Thus, the students, the objective observers, know the district is not, through its policy, endorsing religion. Furthermore, when the school publicizes in its program that any religious message is the private view of the student speaker, because the students know the district is not involved, they are fully aware that the disclaimer is accurate.

Second, in contrast with Hypothetical Policy #1, the district has not delegated to its students something it constitutionally cannot do itself. In *Santa Fe*, the Court found that the district could not delegate to its students the ability to choose to give an *invocation*, an inherently religious message.[234] Under Hypothetical Policy #2, the district is not delegating to its students the opportunity to give a state-sponsored prayer at gradua-

231. *See supra* text accompanying note 134.

232. *See supra* text accompanying notes 219–30.

233. Adler v. Duval County Sch. Bd., 206 F.3d 1070, 1083 (11th Cir. 2000) (en banc), *vacated by* 531 U.S. 801 (2000) (mem.), *and reinstated*, 250 F.3d 1330 (11th Cir. 2001) (en banc), *cert. denied*, No. 01-287, 2001 WL 984867 (U.S. Dec. 10, 2001).

234. *See supra* text accompanying note 135.

tion, which is prohibited by *Lee*;[235] rather, it is allowing the student speaker to give a "message," religious or not, of his or her choice. Obviously, schools have the authority to allow students to speak at graduation. Under this policy, the district is not trying to circumvent the Establishment Clause by allowing its students to elect to give a prayer. Instead, it is permitting its students to speak on an open topic, just as it allows its valedictorian to do.[236]

Hypothetical Policy #2 cures many of the defects of Hypothetical Policy #1 and thus passes the endorsement test. Because the school is not involved and does not delegate something it cannot do itself, an objective observer, "'acquainted with the text, legislative history, and implementation'"[237] of the policy, would understand that the school does not endorse religion.

C. Summary: Violations for Different Reasons

Based on the above discussion, Hypothetical Policy #1 violates the Establishment Clause. Because it advances religion and the government is excessively entangled with religion, the policy violates the second and third prongs of the *Lemon* test. In addition, a majoritarian election unconstitutionally coerces objecting students in violation of the coercion test. Finally, because of the setting of the event and the district's delegation to its students, an objective observer would view the invocation and benediction as the product of the school, not the student, in violation of the endorsement test.

Although no single Establishment Clause test is dispositive, Hypothetical Policy #2 violates a clearly established constitutional principal: viewpoint neutrality. Under *Southworth* and *Santa Fe*, the policy fails the coercion test. In addition, the *Lemon* test's standing is quite dubious.[238] Thus, although the policy meets the endorsement test, *Santa Fe* counsels that the majoritarian election renders the policy unconstitutional as violative of the Establishment Clause.

IV. RESOLUTION: THE LIMITED EXCEPTIONS—WHEN PRAYER AT GRADUATION IS PERMISSIBLE

Santa Fe has left public school districts in a disconcerting position with respect to their graduation policies. The opinion is certainly subject to varied interpretations as to its applicability to graduation ceremo-

235. *See supra* text accompanying notes 53–67.

236. *See* Cole v. Oroville Union High Sch. Dist., 228 F.3d 1092, 1096 (9th Cir. 2000) (discussing a school policy that permitted the valedictorian and salutatorian to deliver an address at graduation). This case is discussed further at *infra* Part IV.A.

237. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308 (2000) (quoting Wallace v. Jaffree, 472 U.S. 38, 76 (1985)).

238. *See supra* text accompanying notes 41–45.

nies.[239] However, using *Santa Fe* as a basis for the Establishment Clause tests, this note argues that *Santa Fe* effectively prohibits all formal graduation prayer policies, including invocations and benedictions, as violations of the Establishment Clause.[240] Furthermore, the decision proscribes any policy employing a majoritarian election as the means to determine if students want an invocation, benediction, or "message" at their graduation. Because the election creates a mechanism whereby minority views are subjugated, it violates the requirement of viewpoint neutrality.[241] Therefore, school districts should eliminate all formal prayer/invocation/benediction policies and cease using a majoritarian election as the method for ascertaining whether their students desire a prayer or "message."[242] If desired, schools have means other than formal, student-initiated, student-led prayers to solemnize their graduates' "once-in-a-lifetime" occasion that do not impinge the Establishment Clause. For example, the band could perform the Star Spangled Banner or the choir could sing an appropriate song. Prayer is not the only option available to solemnize a graduation ceremony. However, even if a school follows *Santa Fe*'s holding and eliminates formal graduation prayer policies, a student may deliver a prayer in two limited circumstances.

A. Valedictorian Speeches: The Next Supreme Court Battle[243]

"[T]he next case likely to get to the high court will be something about valedictorian addresses. For example, a school administrator learns in advance that the valedictorian is planning to give a sermonette, tells the valedictorian that it is inappropriate, and the valedictorian sues."[244] This was just the case in *Cole v. Oroville Union High School District*.[245] In *Cole*, the class valedictorian challenged the school's refusal to allow him to deliver a sectarian, proselytizing valedictory speech alleging that such a refusal violated his free speech rights. The school had a policy whereby "all student speeches and invocations for graduation are reviewed by the principal, who has the final say regarding their content."[246] Therefore, finding that the district's review of valedictorian addresses, inter alia, makes the valedictorian's speech state sponsored, the

239. *See supra* text accompanying notes 8–9.

240. I use the term "formal graduation prayer policies" to refer to a policy similar to Hypothetical Policy #1 that permits student-led "benedictions," "invocations," "prayers," or similar "religious messages."

241. *See supra* text accompanying notes 205–15.

242. *See supra* text accompanying notes 182–87, 205–15.

243. A full analysis of valedictory speech under the Free Speech, Free Exercise, and Establishment Clauses is beyond the scope of this note. However, this note briefly discusses the major issues involved and contends that such speech is protected as private under certain circumstances.

244. Marcia Coyle, *Justices Struggle with a 'Lemon:' Landmark Church-State Ruling Needs Updating—But How?*, NAT'L L.J., July 3, 2000, at A1 (citation omitted).

245. 228 F.3d 1092 (9th Cir. 2000).

246. *Id.* at 1096.

Ninth Circuit held that "the District's refusal to allow the students to deliver a sectarian speech or prayer as part of the graduation was necessary to avoid violating the Establishment Clause."[247] Thus, there seems to be authority suggesting that a district can censor student graduation speeches to avoid violating the Establishment Clause. However, if the school's policy prohibited any district review or censorship and did not employ a majoritarian election mechanism for selecting the speaker, a court employing a free speech analysis would be hard pressed to attribute the speech to the state. Therefore, the valedictorian's speech would be protected by the Free Speech and Free Exercise Clauses.

B. A Policy That Satisfies Santa Fe*,* Southworth*, and* Lee

Following the premise that a valedictorian's speech is private when a school does not review his or her speech and that a majoritarian election is an unconstitutional means of determining students' demands for a graduation prayer or "message," a school could draft a policy whereby a student delivers an uncensored message at graduation. Recalling Justice Souter's concurrence in *Lee*,[248] such a school policy must employ secular criteria to select the student, and the individual student must freely choose to deliver the religious message. A policy drafted pursuant to these guidelines will protect the student speaker's speech as private under the Free Speech and Free Exercise Clauses. "[W]hen a state uses a secular criterion for selecting graduation speakers and then permits the speaker to decide for herself what to say, the speech does not bear the imprimatur of the State."[249] Moreover, "student religious speech must be without oversight, without supervision, subject only to the same reasonable time, place, and manner restrictions as all other student speech in school."[250] Therefore, following *Santa Fe*, the following school policy does not violate the Establishment Clause: one that permits a student selected pursuant to a *secular criterion* (e.g., the student with the third highest grade-point-average in the class[251]) to deliver an *uncensored* mes-

247. *Id.* at 1101. However, the court states: "In the wake of *Santa Fe*, it may be that the District's invocation policy itself violates the Establishment Clause. We do not reach this issue, however, because it was not raised." *Id.* at 1102 n.8 (citation omitted). I would argue that the policy does violate *Santa Fe*.

248. *See supra* text accompanying note 69.

249. Doe v. Madison Sch. Dist. No. 321, 147 F.3d 832, 836 (9th Cir. 1998), *vacated as moot and for lack of standing*, 177 F.3d 789 (9th Cir. 1999) (en banc).

250. Chandler v. James, 180 F.3d 1254, 1264–65 (11th Cir. 1999) (footnote omitted), *vacated sub nom.* Chandler v. Siegelman, 530 U.S. 1256 (2000) (mem.), *and reinstated*, 230 F.3d 1313 (11th Cir. 2000).

251. It also would be permissible to use a majoritarian election where the student is elected *first* and then delivers an uncensored message. Such an election would be similar to a vote for prom king or queen. This election is secular—unlike Hypothetical Policy #2, where the students vote first whether to have a message at all and then the student speaker. Therefore, a majoritarian election to select the student speaker, and not whether to have a message, and allow him or her to deliver an uncensored message is also a valid secular criterion.

sage on a topic of the student's choice.[252] Speech under this policy would be protected by the Free Speech and Free Exercise Clauses. However, such a policy is not without its risks. By allowing the student to choose his or her topic and not censoring the message in any way, the district must tolerate *all* messages, including those it finds morally, ethically, or socially offensive. Therefore, schools must take great care and carefully consider the ramifications of affording a student the opportunity to speak at graduation.

Although schools cannot, after *Santa Fe*, maintain formal graduation prayer policies, they can craft a policy allowing students to address the graduation assembly. The student must be selected pursuant to a secular criterion and permitted to speak on a topic of his or her choice. The school may not censor this message in any way. Moreover, the school must be aware that such student speech is private and may include, inter alia, proselytizing and sectarian religious messages.

V. CONCLUSION

Santa Fe Independent School District v. Doe prohibits formal graduation prayer policies. However, religious messages are constitutionally permissible under certain circumstances, namely when the school uses a secular criterion to choose the speaker and allows him or her to deliver an uncensored message on a topic of his or her choice. Based on *Santa Fe*, the holdings of some of the courts of appeals are no longer "good law," while others of these decisions help reinforce the central tenets of the Court's opinion.

Therefore, in answering the question posed at the beginning of this note, "our young people" *can* "get prayer" at their graduation ceremonies. However, to do so, the district must implement the constitutionally permissible policy described above and not one that allows formal prayer. Although some believe that "[t]he Supreme Court ruled against us," and that "they've [sic] been taking our religious freedom from us one piece at a time,"[253] this note concludes that the Court has properly balanced the competing interests of the Establishment, Free Exercise, and Free Speech Clauses in prohibiting state-sponsored, majoritarian graduation prayer while permitting, under certain circumstances, private religious messages delivered at graduation.

252. Therefore, such a policy parallels Hypothetical Policy #2 except that it replaces the majoritarian election to determine if the graduating class wants a "message" with a secular criterion. Thus, for the complete analysis and rationale for the constitutionally permissible policy, see *supra* text accompanying notes 168–75, 189–217, 231–37.

253. Graham, *supra* note 1, at 12.