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“The Court distorts existing precedent to conclude that the school district's student-message program is invalid on its face under the Establishment Clause. But even more disturbing than its holding is the tone of the Court’s opinion; it bristles with hostility to all things religious in public life.”

—Chief Justice William Rehnquist

INTRODUCTION

A. Confusion in the Courts of Appeals

The first “right” bestowed upon the American people by the First Amendment provides: “Congress shall make no law respecting an establishment of religion . . . .” Although this phrase is plainly worded, it has beleaguered courts since coming into the limelight in 1947 when the Supreme Court upheld a
Board of Education resolution that provided transportation to both public and parochial school students. It was not until a decade and a half later that the Supreme Court handed down its first decision striking down prayer in public school.

Since then, the Court has used a variety of theories to "cleanse" public schools of worship. In consequence, localities have attempted to overcome Establishment Clause challenges by crafting various types of schemes that would allow for prayer in public school. Upon judicial review in the federal courts,

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4 See Everson v. Board of Educ. of Ewing Township, 330 U.S. 1, 16 (1947) (representing the first landmark case to interpret the meaning of the Establishment Clause). In Everson, the Court enumerated several types of actions that are prohibited by the Establishment Clause:

Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.

Id. at 15–16.


7 See Adler v. Duval County Sch. Bd., 206 F.3d 1070, 1071–72 (11th Cir. 2000) (en banc) (relating to a policy that required a student vote to decide upon the occurrence of an unrestricted student speech at graduation), vacated, 121 S. Ct. 31 (2000); see also Chandler v. James, 180 F.3d 1254, 1256 (11th Cir. 1999) (concerning a policy that permitted "non-sectarian, non-proselytizing student-initiated voluntary prayer, invocations and/or benedictions during compulsory or non-compulsory school related student assemblies, sporting events, school-related graduation or commencement ceremonies and other school-related student events"), vacated sub nom. Chandler v. Siegelman, 120 S. Ct. 2714 (2000); Doe v. Madison Sch. Dist. No 321, 147 F.3d 832, 834 (9th Cir. 1998) (ruling on a policy that permitted the administration to choose students to deliver an address, poem, reading, song, musical presentation, prayer or any other pronouncement of their choosing at commencement exercises), vacated for procedural reasons, 177 F.3d 789 (9th Cir. 1999); ACLU v. Black Horse Pike Reg'l Bd. of Educ., 84 F.3d 1471, 1474–75 (3d Cir. 1996) (pertaining to a policy that provided for a student vote to determine whether or not to have prayer at graduation); Harris v. Joint Sch. Dist. No. 241, 41 F.3d 447, 453 (9th Cir. 1994) (relating to a scheme whereby students voted to choose religious prayer at their graduation), vacated as moot, 515 U.S. 1154 (1995); Jones
differing policies caused a split in opinion in the circuit courts, thereby creating the need for a definitive answer from the Supreme Court.\footnote{Recently, in \textit{Santa Fe Independent School District v. Doe},\footnote{530 U.S. 290 (2000).} the Supreme Court attempted to provide an answer when it invalidated a school district’s policy for pre-football game ceremonies.}\footnote{See id. at 316–17.}

\section*{B. The Decision in \textit{Santa Fe Independent School District}}

The parties in \textit{Santa Fe Indep. Sch. Dist.} endured a lengthy, turbulent relationship\footnote{See Santa Fe Indep. Sch. Dist. v. Doe, 168 F.3d 806, 809–11 (5th Cir. 1999), aff’d, 530 U.S. 290 (2000). Conflict between the Santa Fe Independent School District (School District) and its critics commenced in April of 1993 when a seventh grade history teacher admonished one of his students for adhering to the Mormon faith. See id. at 809. Shortly thereafter at the commencement exercises of 1993, the School District permitted its graduates to deliver prayers. See id. at 810–811. This practice was extended to its high school football games and continued into the 1993–94 academic year. See id.} that came to a head in 1994 when the Santa Fe Independent School District (School District) began enacting a series of policies that permitted the recitation of invocations and benedictions at school events.\footnote{See id. at 811. On the heels of \textit{Lee v. Weisman}, 505 U.S. 577 (1992), the School District enacted its first written policy in 1994 which prohibited clergymen and school officials from presenting “invocations or benedictions at promotional and graduation ceremonies for secondary schools.” \textit{Santa Fe Indep. Sch. Dist.}, 168 F.3d at 811. Then, in response to the fifth circuit’s decision in \textit{Jones v. Clear Creek Ind. Sch. Dist.}, 977 F.2d 963 (5th Cir. 1992), the School district amended the policy to allow graduating seniors “to elect to choose student volunteers to deliver nonsectarian, nonproselytizing invocations and benedictions for the purpose of solemnizing their graduation ceremonies.” \textit{Santa Fe Indep. Sch. Dist.}, 168 F.3d at 811.} Not more than a year later, the plaintiffs, a group of current and former school

\footnote{\textit{Compared Jones}, 977 F.3d at 967–68 (5th Cir. 1992) (upholding a challenge to a school prayer policy because the primary effect was secular, was not an excessive entanglement between government and religion, and did not endorse a religion or coerce participation) \textit{and Doe v. Madison Sch. Dist. No. 321}, 147 F.3d 832 (9th Cir. 1998) (upholding school prayer policy using the \textit{Lemon test}) \textit{and Adler v. Duval Cty. School Bd.}, 206 F.3d 1070 (11th Cir. 2000) (upholding school prayer policy) \textit{with ACLU v. Black Horse Pike Reg’l Bd. of Educ.}, 84 F.3d 1471, 1482 (1996) (holding that school prayer policy violated the Establishment Clause) \textit{and Freiler v. Tangipahoa Parish Bd. of Educ.}, 185 F.3d 337 (5th Cir. 1999) (striking down a school prayer policy as an endorsement of religion).}
attendees and their parents, initiated an action in the Federal District Court for the Southern District of Texas alleging that a variety of practices performed by the School District violated the Establishment Clause. The focus of their attack, however, was the School District’s practice of allowing its students to recite religious messages at graduation ceremonies and high school football games. To ease the tension that surrounded the upcoming commencement exercises, the district court entered an interim order which provided that a “non-denominational prayer” consisting of ‘an invocation and/or benediction’ could be presented by a senior student or students selected by members of the graduating class.”

To comply with that order, the School District modified its existing policy for graduation exercises in May and July of 1995. In August, the School District created a policy entitled “Prayer at Football Games.” This policy provided that the students would hold two elections. The first election would permit the students to decide whether an “invocation” would be delivered, while the second election would enable them to choose their “spokesperson” who would decide upon the message to be delivered. The policy did not limit the students to invocations of a non-sectarian and non-proselytizing nature. It did, however, contain a fallback provision that provided for such constraints if the policy were to be enjoined. Shortly after the School District implemented the policy, the high school

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13 See Santa Fe Indep. Sch. Dist., 530 U.S. at 294–95. The Does claimed that the School District was responsible for “promoting attendance at a Baptist revival meeting, encouraging membership in religious clubs, chastising children who held minority religious beliefs, and distributing Gideon Bibles on school premises.” Id. at 295. They sought to enjoin the School district as well as obtain monetary relief under 42 U.S.C. § 1983. See Santa Fe Indep. Sch. Dist., 168 F.3d at 811.
14 See Santa Fe Indep. Sch. Dist., 530 U.S. at 295.
15 Id. at 295–96. The district court further provided that the prayer could refer to prominent religious individuals such as Jesus or Buddha “as long as the general thrust of the prayer [was] non-proselytizing.” Id. at 296. In relation to the other claims of the plaintiffs, the district court implored the School District to devise new policies and amend existing ones. Id. at 295 n.3.
16 See id. at 296–97. For a complete reproduction of the May and July policies, see Santa Fe Indep. Sch. Dist., 168 F.3d at 811–12.
17 See Santa Fe Indep. Sch. Dist., 168 F.3d at 811–12.
18 See id.
19 Id.
20 See id.
21 See id.
students voted or a pre-game prayer and elected a student speaker for the presentation.22

In October of that year, the School District amended the August policy.23 More specifically, it changed the title of the policy to "Pre Game Ceremonies at Football Games."24 Additionally, it utilized neutral terms such as "messages," "statements," and "invocations" as opposed to religious terms like "prayer."25 Unlike the August policy, the students never held any elections under this policy.26 An order of the district court struck down the part of the policy that did not limit the students to the recitation of messages that were non-sectarian and non-proselytizing, but upheld the fallback provision that added such limitation upon the imposition of an injunction.27 Upon review of the district court decision, the United States Court of Appeals for the Fifth Circuit found that the entire policy violated the Establishment Clause.28 The School District appealed,29 and the United States Supreme Court granted certiorari.30 For the reasons set forth below, the Court

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22 See id; see also Nancy E. Drane, Comment, 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, 497 (2000) (illustrating the harrowing experience of Marian Ward, the speaker selected by the student body for the pre-game invocation); Christopher J. Heinze, Illegal Procedure: Student Delivered Prayer at Public High School Football Games—An Examination of the Encroachment on Religious Freedom in Doe v. Santa Fe Independent School District, 23 HAMLIN L. REV. 427, 428 (likening Ward to a "rock star"); David G. Savage, The Praying Fields of Texas, A.B.A. J., March 2000, at 34 ("I was glad to have the opportunity to stand up and protect the rights of Christian students . . . . As far as I am concerned, religious speech shouldn't have to take second place to secular speech.") (statement of Marian Ward).

23 See Santa Fe Indep. Sch. Dist., 530 U.S. at 298.

24 Id. at 298 n.6.

25 Id.

26 See id. at 298 n.5.

27 See id. at 299. The district court found that the section of the policy that did not restrict the students to non-sectarian prayer failed because it violated the constitutional principle that a "school's 'action must not coerce anyone to support or participate in a religious exercise.'" Id. (quoting Lee v. Weisman, 505 U.S. 577, 587 (1992)).

28 See Santa Fe Indep. Sch. Dist., at 299–300. Strictly construing Fifth Circuit precedent that permitted prayer at graduations, the court found that the atmosphere associated with a football game was not analogous to the commencement exercise setting. See Santa Fe Indep. Sch. Dist., 168 F.3d at 823 ("The prayers are to be delivered at football games—hardly the sober type of annual event that can be appropriately solemnized with prayer.").

29 See Santa Fe Indep. Sch. Dist., 530 U.S. at 301.

held that the policy violated the Establishment Clause.\textsuperscript{31} First, the Court considered whether the student messages were private or public speech.\textsuperscript{32} According to the School District, if the students' messages were deemed private speech, then the Establishment Clause would not apply.\textsuperscript{33} While agreeing that the Establishment Clause did not apply to private speech, the Court rejected the idea that the speech in this case was private.\textsuperscript{34} Instead, it found that "these invocations [were] authorized by government policy and [took] place on government property at government-sponsored school-related events."\textsuperscript{35} Although not all such speech can be attributed to the government, the Court found that the speech in this case was governmental in nature since "the District [had] failed to divorce itself from the religious content in the invocations."\textsuperscript{36} Finally, the Court held that although the policy claimed to have a secular purpose,\textsuperscript{37} the school's history with prayer policies and practices indicates its intention of furthering state-sponsored religion.\textsuperscript{38}

Second, the Court examined the School District's argument that its policy did not coerce students into participating in a

\begin{itemize}
\item \textsuperscript{31} See Santa Fe Indep. Sch. Dist., 530 U.S. at 317 ("The policy is invalid on its face because it establishes an improper majoritarian election on religion, and unquestionably has the purpose and creates the perception of encouraging the delivery of prayer at a series of important school events.").
\item \textsuperscript{32} See id. at 301–10.
\item \textsuperscript{33} See id. at 302.
\item \textsuperscript{34} See id.
\item \textsuperscript{35} Id.
\item \textsuperscript{36} Id. at 305 ("In this case, as we found in Lee, the 'degree of school involvement' makes it clear that the pregame prayers bear 'the imprint of the State and thus put school-age children who objected in an untenable position.' " (quoting Lee v. Weisman, 505 U.S. 577, 590 (1992)). More specifically, the Court believed that the School District was overly involved because it chose to have the elections, advised the students, and required that the message set forth by the student be consistent with the School District's policy. See Santa Fe Indep. Sch. Dist., 530 U.S. 305–06. Furthermore, the presentation of the policy before a student audience over the School District's public address system indicated such involvement. See id. at 307. As a result, the Court held that "an objective observer... would perceive it as a state endorsement of prayer in public schools." Id. at 308 (quoting Wallace v. Jaffree, 472 U.S. 38, 73 (1985) (O'Connor, J. concurring)).
\item \textsuperscript{37} See Santa Fe Indep. Sch. Dist., 530 U.S. at 309. The policy stated that its purpose was "to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition." Id. at 298 n.6.
\item \textsuperscript{38} See id. at 309.
\end{itemize}
religious ceremony. In striking down this argument, the Court believed that although the election process may be perceived as providing students with a choice in the matter, it ultimately "[would encourage] divisiveness" among religious beliefs which, in turn, could not be tolerated in a public school setting. Also, the Court concluded that even though attendance at the football game would be voluntary for some, there were others, such as the players themselves and cheerleaders, who were required to attend the games. Moreover, students not required to attend the games were forced unfairly to weigh their religious beliefs against the genuine social pressure of attending a traditional gathering of the school community.

The final issue considered by the Court was whether the challenge by the plaintiffs was premature. To address this matter, the Court applied the test created in Lemon v. Kurtzman. Under that test, the Lemon Court found that the policy operated for an "unconstitutional purpose." More specifically, it ruled that such a conclusion could be found in the plain text of the policy because the language employed was not...

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39 See id. at 310. There were two arguments advanced by the School District. See id. First, it claimed that the students chose whether or not to have such a pregame ceremony. See id. Secondly, it argued that the football game was extracurricular unlike the graduation ceremony in Lee v. Weisman, 505 U.S. 577 (1992). See Santa Fe Indep. Sch. Dist., 530 U.S. at 310.

40 See id. at 311.

41 See id.

42 See id. at 312 ("For many others, however, the choice between whether to attend these games or to risk a personally offensive religious ritual is in no practical sense an easy one."). The Court reasoned that the "constitutional command will not permit the District 'to exact' religious conformity from a student as 'a price' of joining her classmates at a varsity football game." Id. (quoting Lee, 505 U.S. at 595-96). As illustrated by his words in this case and other cases, it is evident that Justice Stevens champions the view that there must be "adequate consideration for the religious beliefs of minorities in society." Lisa Langendorfer, Comment, Establishing a Pattern: An Analysis of the Supreme Court's Establishment Clause Jurisprudence, 33 U. Rich. L. Rev. 705, 715 (1999) (discussing Justice Stevens' method for resolving Establishment Clause controversies).

43 See Santa Fe Indep. Sch. Dist., 530 U.S. at 313-16. The School District argued that it is speculative that a student would deliver a religious prayer since no invocations were ever presented under the new October policy. See id. at 313.

44 403 U.S. 602 (1971). There are three factors in this test. See id. at 612. "First, 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 entanglement with religion.' " Id. at 612-13 (citations omitted).

45 Santa Fe Indep. Sch. Dist., 530 U.S. at 314.
"content neutral." Additionally, upon consideration of the context in which this case arose, the Court determined that there was no "doubt that this policy was implemented with the purpose of endorsing school prayer." It concluded its response to the School District's argument that it "need not wait for the inevitable to confirm and magnify the constitutional injury."

The dissent criticized the Court's analysis of the last issue. First, it questioned the majority's use of the Lemon test. Then, the dissent argued that the Court reached the wrong result upon application of the test and emphasized that there had never been an election under the policy. Furthermore, according to the dissent, the Court did not consider the possibility that the students could vote not to have an election, or that if an election occurred, it would focus on popularity instead of religion. Additionally, the dissent believed that the policy had a viable secular purpose for its foundation. Finally, it concluded its attack on the majority with the argument that "our Establishment Clause jurisprudence simply does not mandate 'content neutrality.'"

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46 Id. at 315. Here, the Court was concerned with the extent of school involvement, the use of the word "invocation," and "the extremely selective access of the policy." Id.

47 Id. Not even the implementation of an elective process could sway the court to believe otherwise. See id. at 316–17 ("[The election] further empowers the student body majority with the authority to subject students of minority views to constitutionally improper messages.").

48 Id. at 417 ("The policy is invalid on its face because it establishes an improper majoritarian election on religion, and unquestionably has the purpose and creates the perception of encouraging the delivery of prayer at a series of important school events.").

49 See id. at 318–20 (Rehnquist C.J., dissenting).

50 See id. at 319 (describing it as "the oft criticized test").

51 See id. at 320 ("Even if it were appropriate to apply the Lemon test here, the district's student message policy should not be invalidated on its face.").

52 See id. at 320 n.2 (contending that the October policy would allow a student to present "a message as opposed to an invocation").

53 See id. at 320–21 ("It is conceivable that the election could become one in which student candidates campaign on platforms that focus on whether or not they will pray if elected."). The new policy would allow for such possibilities. See id. Furthermore, it is "[t]he elected student, not the government, [who] would choose what to say." Id. at 321.

54 See id. at 322 (stating that the policy had "plausible secular purposes" in aiming to solemnize a sporting event). Moreover, the court found that in amending its policy, "the school district was acting diligently to come within the governing constitutional law." Id. at 323.

55 Id. at 325 (declaring, "This is undoubtedly a new requirement.").
C. Ambitions of this Comment

This Comment will argue that the Court's decision in this case neither conformed to the historical framework set up by the framers of the Constitution nor to past school prayer case precedent. Rather, it appears the Court will never allow the states to consider for themselves whether or not there should be prayer in public schools. As a result, it appears that the Court is on the road to closing up all Establishment Clause loopholes that might permit public school prayer, albeit in a limited fashion.

Part I of this Comment will delve into the history surrounding the Establishment Clause. This Part will examine the context in which the clause came to fruition and argue that states were to be given unlimited discretion in defining church-state relations within their boundaries. Part II will analyze prior Supreme Court cases relating to prayer in public settings and will utilize those cases to show that the Court prematurely concluded that the policy was unconstitutional.

I. THE HISTORY OF THE ESTABLISHMENT CLAUSE

A. The Framers' Intent as to the Application of the Establishment Clause to the States

Originalism is one of the competing theories that prescribe a method for judicial interpretation of the U.S. Constitution. According to a prominent proponent of this doctrine, “a judge is to apply the Constitution according to the principles intended by those who ratified the document.” Therefore, it is a theory that can provide judges with a greater understanding of the meaning

56 See WILLIAM GANGI, SAVING THE CONSTITUTION FROM THE COURTS 126 (1995) (dividing the differing approaches into two schools: “interpretivists” and “noninterpretivists”). Interpretivists believe that judges should have a “limited role” when reading the Constitution, e.g., that they should adhere to the meanings attached to its words by the framers. Id. Noninterpretivists, on the other hand, take the position that “judges should not be confined by what the ratifiers of the Constitution or any of its subsequent amendments understood their provisions to mean.” Id.

57 ROBERT BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 143 (1990); see also JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION xiii (1996) (“The advocates of originalism argue that the meaning of the Constitution, or of its individual clauses, was fixed at the moment of its adoption, and that the task of interpretation is accordingly to ascertain that meaning and apply it to the issue at hand.”).
of the troublesome words embodied within the Establishment Clause. Relating originalism to the Establishment Clause in the school prayer situation is difficult since the new country lacked a nationwide public school system. Upon evaluating the Framers' general impressions of the Bill of Rights and religion, however, it certainly seems as if the Framers would have let the states and localities govern church-state relations with respect to school prayer.

B. The Framers' Reluctance to Adopt the Bill of Rights

The Federalist is a major source for discerning Framers' intent with regard to the words of the Constitution. In one of these papers, the author argued that a bill of rights to the Constitution was highly unnecessary for four reasons: (1) many state constitutions at the time did not even set forth a bill of rights; (2) the Constitution contained a number of implicit rights; (3) the Constitution would not create a monarchy where

58 See Wallace v. Jaffree, 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting) ("The true meaning of the Establishment Clause can only be seen in its history. As drafters of our Bill of Rights, the Framers inscribed the principles that control today. Any deviation from their intentions frustrates the permanence of that Charter . . . ") (citations omitted); LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT xxii (2d ed., rev. 1994) ("With little guidance from the constitutional text, we may better understand the American experience with establishments of religion at the time of the ratification of the Bill of Rights in 1791.").

59 See School Dist. of Abington Township v. Schempp, 374 U.S. 203, 238 n.7 (1963) (Brennan, J., concurring) (providing a history of the movement for public education in the United States which did not produce positive results until the 1820's); Martha McCarthy, Religion and Education: Whither the Establishment Clause?, 75 IND. L.J. 123, 123 (2000) (calling the application of the Establishment Clause to school prayer cases a "mystery, because universal public education was not yet prevalent when the Bill of Rights was adopted").

60 See WILMOORE KENDALL & GEORGE W. CAREY, THE BASIC SYMBOLS OF THE AMERICAN POLITICAL TRADITION 97-98 (1995) (contending that "The Federalist . . . provides us with answers to some of our more perplexing questions"). The authors of this work argue that this set of papers should be accorded significant weight for three reasons: (1) the creation of The Federalist and the Constitution were close in time to one another; (2) the papers were "an attempt to justify the Constitution in the strongest possible terms in order to meet the objections of its critics and obtain the support necessary for ratification in New York State;" and (3) The Federalist provides clues as to how the Constitution should operate. See id. at 96.


62 See id. at 510 (expressing that New York, where most of the objection to a lack of a bill of rights arose, was a state without such a bill).

63 See id. at 510-12 (naming the rights that the Constitution granted to its
such a bill would be essential; and (4) a bill of rights was believed to be “dangerous” since it “would afford a colorable pretext to claim more than was granted.” This sentiment was further reflected at the Philadelphia convention of 1787 when the states unanimously rejected the inclusion of a Bill of Rights.

As part of the First Amendment, the addition of the Establishment Clause to the Constitution made it clear that the rights applied to individuals in conflict with the federal government, not the states. Therefore, it seems as if the

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64 See id. at 512–513 (contending that a bill of rights is pivotal where there is a relationship between a monarch and his or her subjects).

65 Id. at 513. “Why, for instance, should it be said that the liberty of press shall not be restrained, when no power is given by which restrictions may be imposed?” Id. at 513–14.

66 See CHRISTOPHER COLLIER & JAMES L. COLLIER, DECISION IN PHILADELPHIA: THE CONSTITUTIONAL CONVENTION OF 1787 249–50 (1986) (discussing the defeat of a bill of rights proposal at the Philadelphia convention); KENDALL & CAREY, supra note 60, at 120 (asserting that the omission of the Bill of Rights from the Constitution was not an "oversight").

67 See U.S. CONST. amend. I (providing that “Congress shall make no law”); AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 33 (1998) (“[A]s with the rest of the First Amendment, the establishment clause limited only Congress and not the states; that point is obvious on the face of the amendment and is confirmed by its legislative history.”).

In 1833, the Supreme Court reiterated this understanding when it held that the Bill of Rights did not apply to the states. See Barron v. Mayor & City Council of Baltimore, 32 U.S. (7. Pet.) 243, 250–51 (1833) (holding that “the provision in the fifth amendment to the constitution . . . is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the states”). To reach this result, the Supreme Court reasoned that “[h]ad congress engaged in the extraordinary occupation of improving the constitutions of the several states by affording the people additional protection from the exercise of power by their own governments in matters which concerned themselves alone, they would have declared this purpose in plain and intelligible language.” Id. at 250. This understanding, of course, was overturned almost one hundred years later by the Supreme Court when the incorporation doctrine was utilized to make the religion clauses of the First Amendment applicable to the states. See Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (“The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws.”). The application of the Establishment Clause to the states has been criticized by both justices and commentators. See, e.g., School Dist of Abington Township v. Schempp, 374 U.S. 203, 310 (1963) (Stewart, J., dissenting) (“[I]t is not
Framers crafted the First Amendment in such a way as “to allow the States, unimpeded, to deal with religious establishments and aid to religious institutions as they saw fit.” With this in mind, the fact that the Framers did not intend to apply the Establishment Clause to the states indicated that they supported the existing relationships between churches and the states. Moreover, it might even have been intended to serve as “an assurance to those nervous about the federal government that it was not going to reverse any of the guarantees for religious liberty won by the revolutionary states.”

without irony that a constitutional provision evidently designed to leave the States free to go their own way should now have become a restriction upon their autonomy.); AMAR, supra, at 33–34 (arguing that “the nature of the states’ establishment-clause right against federal disestablishment makes it quite awkward to mechanically ‘incorporate’ the clause against the states” since it would “eliminate [a state’s] right to choose whether to establish a religion—a right clearly confirmed by the establishment clause itself”); Robert P. George, Protecting Religious Liberty in the Next Millennium: Should We Amend the Religion Clauses of the Constitution?, 32 LOY. L.A. L. REV. 27, 44 (1998) (“It is logically impossible to incorporate and apply against a state a provision whose purpose is to preserve the state’s prerogative.”).

68 ROBERT L. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION 15 (1982); see also AMAR, supra note 67, at 32 (“[The Establishment Clause’s] mandate that Congress shall make no law ‘respecting an establishment of religion’... prohibited the national legislature from interfering with, or trying to dis-establish, churches established by state and local governments.”); MICHAEL J. MALBIN, RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT 16 (1978) (contending that the Establishment Clause “prohibited Congress from tampering with the state religious establishments”).

69 See MICHAEL CORBETT & JULIA MITCHELL CORBETT, POLITICS AND RELIGION IN THE UNITED STATES 81 (1999) (providing that “it was still possible for a state to establish a church; further, several states still had religious tests for public office and did not give full citizenship rights to people who were not Protestants”).

70 THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 216 (1986); see also AMAR, supra note 67, at 33 (“[W]hen all the dust had settled, the final version of the clause returned to its states’-rights roots. In the words of Joseph Story’s celebrated Commentaries on the Constitution, ‘the whole power over the subject of religion is left exclusively to the state governments.’”); CORBETT & CORBETT, supra note 69, at 82 (asserting that Congress desired to secure the necessary amount of state votes for ratification of the amendment).
C. Religious Establishment in the New Nation

Establishment of churches in the states was commonplace in the eighteenth and early nineteenth centuries. In the era leading up to the birth of the new nation, there were establishments of religion in most of the colonies. Following the Revolutionary War, some of the establishments existing before the war were implanted within the new state constitutions. When the Constitutional Convention convened in 1787, five states still had established churches. At the time of the framing of the Bill of Rights, half of the states instituted religious establishments. Finally, over forty years after the ratification of the Establishment Clause, the last church was disestablished in Massachusetts.

71 Since there is a substantial amount of history to report upon the religious practices of the states under the new Constitution, this Comment will not provide an extensive, detailed analysis. Instead, this Comment will attempt to gather from that history specific acts and practices tending to establish that the states were free to define their own church-state relationships.

72 See CORBETT & CORBETT, supra note 69, at 29 ("[R]eligion and politics were very much intertwined in colonial times, but there were substantial variations from one colony to another. The southern colonies of Virginia, Maryland, North Carolina, South Carolina, and Georgia established the Church of England as their official church, while the New England colonies enacted laws that favored the Congregationalist religion. See LEVY, supra note 58, at 1, 5. Only the colonies of Rhode Island, Pennsylvania, Delaware and New Jersey, did not have an establishment of religion. See id. at 11. New York was unique in that it "developed an establishment of religion—or at least of Protestantism in general—without preference to one church over others." Id.

73 See CORBETT & CORBETT, supra note 69, at 70–73 ("Some of [the state] constitutions carried over the basic church-state arrangements that had existed before independence, but changes occurred—sooner for some and later for others—in almost all the arrangements.").

74 See CORD, supra note 68, at 4 (stating that Connecticut, Georgia, Massachusetts, New Hampshire, and South Carolina still had such arrangements).

75 See LEVY, supra note 58, at xxii (stating that although "seven of the fourteen states that comprised the Union in 1791 authorized establishments of religion by law[, n]ot one state maintained a single or preferential establishment of religion"); Charles J. Russo, Prayer at Public School Graduation Ceremonies: An Exercise in Futility or a Teachable Moment?, 1999 BYU EDUC. & L.J. 1, 2 ("[C]lose ties between religion and government continued in several states even after the adoption of the Bill of Rights."). Even the nonestablished states implemented religious requirements for public office candidates. See AMAR, supra note 67, at 33 (expressing that "eleven of the thirteen states had religious qualifications for officeholding").

76 See CORD, supra note 68, at 4 ("The elimination of the established churches in the several states continued after the ratification of the Federal Constitution in 1788 and culminated in the disestablishment of the Congregational Church in Connecticut in 1818, in New Hampshire in 1819, and in Massachusetts in 1833.").
As stated above, discerning the Framers’ intent with regard to school prayer is an arduous task because the nation did not have an extensive public education system at the creation of the Establishment Clause.\textsuperscript{77} In addition to the facts that the Bill of Rights was not intended to apply to the states, and that the states had established religions well after the ratification of the Constitution, other bits of history indicate that the Framers would have approved of such a practice.\textsuperscript{78} First, some state constitutions intertwined education with religion.\textsuperscript{79} Second, the language of the Northwest Ordinance of 1787 spoke of religion and education in the same context.\textsuperscript{80} The ordinance also set aside federal land in those territories to be used for church-sponsored schools.\textsuperscript{81} Finally, the states may not have ratified the First Amendment had they known that there would be national control over their schools.\textsuperscript{82}

Earlier Supreme Court cases declared that the Framers intended the Establishment Clause to construct a “wall of

\textsuperscript{77} See supra note 59 and accompanying text.

\textsuperscript{78} Cf. Russo, supra note 75, at 4 (“The notion of public education divorced from denominational control was foreign to the colonial mind.”).

\textsuperscript{79} The Pennsylvania Constitution of 1776 had consecutive provisions dealing with public schooling and religious societies, which were considered to be “entities designed for the ‘encouragement of virtue’ and ‘for the advancement of religion or learning.’” AMAR, supra note 67, at 44 (quoting PA. CONST. OF 1776 §§ 44-45) (emphasis added). Similarly, in the sections of the Massachusetts Constitution of 1780 concerning church establishment, there was mentioning of “‘public instructions’” and “‘public teachers’” as well as a declaration that “‘the happiness of a people, and the good order of society ‘depend upon piety, religion, and morality.’” Id. (quoting MASS CONST. of 1780 pt. I, art. III). Additionally, there was a statement evidencing the “religious roots” of Harvard College. Id. (quoting MASS CONST. of 1780 pt. II, ch. V, § 1, art. I.).

\textsuperscript{80} An Act to Provide for the Government of the Territory Northwest of the River Ohio, 1 Stat. 50, 52 (1789) (stating that “[r]eligion, morality, knowledge, being necessary to good government and the happiness of mankind, schools and the means of learning shall forever be encouraged”).

\textsuperscript{81} See id.; see also John S. Baker, Jr., The Establishment Clause as Intended: No Preference Among Sects and Pluralism in a Large Commercial Republic, in THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING 41, 49 (Eugene W. Hickok Jr. ed., 1991) (“It would seem difficult to argue that the First Congress, which proposed the religion clauses of the First Amendment and which by reenacting the Northwest Ordinance extended religious freedom to the territories, acted unconstitutionally by promoting religion, morality, and knowledge in public education and setting aside land ‘for the purposes of religion.’”).

\textsuperscript{82} See AMAR, supra note 67, at 45 (“The possibility of national control over a powerful intermediate association self-consciously trying to influence citizens’ worldviews, shape their behavior, and cultivate their habits obviously struck fear in the hearts of Anti-Federalists.”).
separation between church and state. This often quoted phrase can be attributed to the words of Thomas Jefferson in a letter commenting upon the Establishment Clause. When Jefferson spoke of this wall, it appears that he was referring to a wall between the church and the federal government, not between the church and the states, as evidenced by his second inaugural address. Furthermore, this letter cannot be afforded too much weight since it was written a significant amount of time after the ratification of the First Amendment. In the words of Chief Justice Rehnquist, "unfortunately the Establishment Clause has been expressly freighted with Jefferson's misleading metaphor. . . ."

D. Santa Fe Independent School District’s Disregard of Establishment Clause History

Unfortunately, Santa Fe Indep. Sch. Dist. did not address the events leading to the creation of the Establishment Clause, which exhibited an understanding that the Establishment

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83 Everson v. Bd. of Educ. of Ewing Township, 330 U.S. 1, 16 (1947) (“In the words of Jefferson, the clause against establishment of religion by law was intended to erect ‘a wall of separation between Church and State.’” (quoting Reynolds v. United States, 98 U.S. 145, 164 (1878)).


In matters of religion I have considered that its free exercise is placed by the Constitution independent of the powers of the General Government. I have therefore undertaken on no occasion to prescribe the religious exercises suited to it, but have left them, as the Constitution found them, under the direction and discipline of the church or state authorities acknowledged by the several religious societies.

Id.

86 See Letter from Thomas Jefferson, supra note 84, at 518 (indicating that the letter was written in 1802). The doctrine of originalism implores that the wording in question be given the meaning it had up until the time of ratification. See RAKOVE, supra note 57, at xiii (stating that the "meaning" of the phrases within the Constitution were "fixed at the moment of [their] adoption").

Clause applied only to the actions of Congress. The majority, perhaps, was just adhering to the precedent set by prior courts including the incorporation doctrine, which applied the First Amendment to conflicts between individuals and the states. How did the Court stray away from this historical framework?

The next part of this Comment endeavors to shed some light on this matter and show that the Court’s decision in Santa Fe Indep. Sch. Dist. moves the Establishment Clause analysis further away from both the historical understanding of the Establishment Clause and existing precedent.

II. THE INCONGRUENCE BETWEEN PUBLIC SETTING PRAYER PRECEDENT AND SANTA FE INDEPENDENT SCHOOL DISTRICT

A. Past Controversies Involving Prayer in Public Settings

The Supreme Court has failed to articulate one clear test for general Establishment Clause analysis, let alone a viable mode of analysis for prayer in public setting cases. As a result, Establishment clause jurisprudence has been described as "chaotic," 'doctrinal gridlock,' a 'legal quagmire,' contradictory and unprincipled, 'ad hoc,' 'intuitive,' and a 'maze.' Therefore, it seems as if the best approach is to analyze the Santa Fe Indep. Sch. Dist. decision in light of other cases involving prayer in public settings.

In 1962, Engel v. Vitale represented the first application of the Establishment Clause to a case involving prayer in a public setting. In this case, the New York Board of Regents composed a prayer that was recited at the start of each school day by the

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88 See discussion supra Part I.A-B.
89 See supra note 67 (setting forth the original understanding of the Bill of Rights as applied to the states, which was overturned by the incorporation doctrine).
90 See Langendorfer, supra note 42, at 705 ("The Establishment Clause has been greatly litigated, with more than seventy cases decided by the United States Supreme Court since the 1940s, yet the Court has been unable to agree for any amount of time on a standard method for determining if the Establishment Clause has been violated."); Robert C. Stelle, Comment, Religious Freedom in the Twenty-First Century: Life Without Lemon, 23 S. Ill. U. L.J. 657, 658 (1999) ("The Supreme Court has failed in recent years to clearly articulate just exactly what the proper legal test is . . . to be applied to alleged violations of the Establishment Clause.").
91 McCarthy, supra note 59, at 124.
teacher and his or her class. The Supreme Court held that such a practice violated the Establishment Clause even though the prayer was "nondenominational" and "noncoercive." In reaching this decision, the Court found that

> [the] constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government.

Disregarding the states' right to govern church-state relations that was provided by the Framers, the Court, to support its holding, recited irrelevant history regarding the colonists' plight to free themselves from the religious constraints imposed by the Church of England.

One year later, the Supreme Court decided *School District of Abington Township v. Schempp*. This case involved the consolidation of two suits. In the first suit, a Pennsylvania statute mandated that a minimum of ten verses from the Bible were to be read to students at the beginning of each school day followed by a recitation of the Lord's Prayer. The other suit, taking place in Baltimore, Maryland, similarly involved reading a chapter of the Bible to the students. To resolve this matter, the Court created a test that asks what is the purpose and the

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93 *See id.* at 422.

94 *See id.* at 424 (“[T]he State of New York has adopted a practice wholly inconsistent with the Establishment Clause.”).

95 *See id.* at 430 (“The Establishment Clause . . . does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not.”). The Court would renege on this view thirty years later in *Lee v. Weisman*, 505 U.S. 577 (1992).

96 *Engel*, 370 U.S. at 425. The Court later went on to note that “one of the greatest dangers to the freedom of the individual to worship in his own way lay in the Government's placing its official stamp of approval upon one particular kind of prayer or one particular form of religious services.” *Id.* at 429.

97 *See id.* at 425–28 (discussing the practices utilized by the Church of England). The Church of England established "governmental composed prayers for religious services" that set out in detail the acceptable content and form of prayers and religious ceremonies. *Id.* In addition, the Church allowed powerful groups to lobby for amendments to the Book of Common Prayers. *See id.*


99 *See id.* at 205.

100 *See id.* at 206–07. This practice allowed a student to be excused upon providing a written note from his or her parents or guardians. *See id.* at 205.

101 *See id.* at 211–12.
primary effect of the enactment?\textsuperscript{102} In this case, it found that the practices at issue violated this two-prong analysis.\textsuperscript{103} The Court, however, indicated that it might have decided differently in the Baltimore suit if there were "factors" tending to show that "the Bible [was] used either as an instrument for nonreligious moral inspiration or as a reference for the teaching of secular subjects."\textsuperscript{104}

Beginning in 1981, the Supreme Court reviewed a trilogy of cases involving student-prayer groups.\textsuperscript{105} In the first case, the Supreme Court applied the Lemon test,\textsuperscript{106} and found a state university's refusal to allow a student-religious group to use its facilities in order to adhere to the tenets of the Establishment Clause unwarranted.\textsuperscript{107} Nine years later, a plurality found that the Equal Access Act, which granted a right to student high school groups to meet at public schools during non-instructional time in a limited public forum setting, did not violate the Establishment Clause.\textsuperscript{108} The last of these cases held that the funding of a student religious group's activities by a state university would not violate the Establishment Clause because

\textsuperscript{102} Id. at 222. "[T]here must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion." Id. As in Engel, the Court again stated that a violation of the Establishment Clause does not require coercion. See id. at 223. Eight years later, this two prong test would be incorporated into the mode of analysis created by Lemon v. Kurtzman, 403 U.S. 602 (1971).


\textsuperscript{104} Id. at 224 ("[T]he State's recognition of the pervading religious character of the ceremony is evident from the rule's specific permission of the alternative use of the Catholic Douay version as well as the recent amendment permitting nonattendance at the exercises.").


\textsuperscript{106} See infra notes 136-38 and accompanying text (providing an explanation of the Lemon test).

\textsuperscript{107} See Widmar, 454 U.S. at 271-75 (finding that religion would not be advanced by the "incidental benefits" received by the religious group).

\textsuperscript{108} See Mergens, 496 U.S. at 253 ("[W]e hold that the Equal Access Act does not on its face contravene the Establishment Clause."). Using the Lemon test, the plurality found that the Act had a secular purpose of promoting speech. See id. at 248-49. It also found the Act did not advance religion, because "secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis." Id. at 250. Furthermore, mere custodial oversight did not create excessive entanglement. See id. at 252-53.
in *Widmar v. Vincent*\(^{109}\) and *Board of Education of the Westside Community Schools v. Mergens*,\(^ {110}\) the universities spent money to provide those groups with a meeting place.\(^ {111}\) Although the facts in this line of cases are not completely analogous to those involving prayer in a public setting, these cases are important in addressing the problem of excessive entanglement.\(^ {112}\)

In *Marsh v. Chambers*,\(^ {113}\) decided in 1983, the Supreme Court encountered prayer in a different public setting, the Nebraska legislature.\(^ {114}\) In this case, a Nebraska taxpayer challenged, as an Establishment Clause violation, the legislature's practice of opening each session with a prayer delivered by a chaplain.\(^ {115}\) The Supreme Court held that this practice did not violate the Clause because "[t]he opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country."\(^ {116}\) Upon this statement, the following query must be raised: What is the difference between the tradition of prayer in governmental bodies and the tradition of letting the states govern their own church-state relationships? Moreover, it must be noted that the chaplain in this case, a Presbyterian, delivered the invocation for sixteen years.\(^ {117}\) Furthermore, the majority distinguished this situation from the school prayer cases in that the claimant, being an adult, was not likely to succumb to religious indoctrination or pressure from his peers.\(^ {118}\)


\(^ {111}\) See *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 843 (1995) ("The government usually acts by spending money. Even the provision of a meeting room, as in *Mergens* and *Widmar*, involved governmental expenditure, if only in the form of electricity and heating or cooling costs.").

\(^ {112}\) See infra notes 166–69 and accompanying text.

\(^ {113}\) 463 U.S. 783 (1983).

\(^ {114}\) See id. at 784.

\(^ {115}\) See id. at 784–86. The Executive Board of the Legislative Council chose the chaplain, and the chaplain was compensated with public funds. See id. at 784–85.

\(^ {116}\) Id. at 786. The Court then supported its holding with an examination of the tradition associated with prayer in governmental bodies. See id. at 786–90.

\(^ {117}\) See id. at 793. The Court downplayed this fact by noting that "the evidence indicates that [the chaplain] was reappointed because his performance and personal qualities were acceptable to the body appointing him." Id. It also stated that there were guest chaplains during the chaplain's absences. See id.

\(^ {118}\) See id. at 792. In relation to the *Santa Fe Indep. Sch. Dist.* decision, the statement made here broaches the question: Is a high school student mature enough to be considered "an adult . . . not readily susceptible to 'religious indoctrination,' . . . or peer pressure?" Id. A plurality in *Board of Education of Westside Community Schools*
Two years later, in *Wallace v. Jaffree*, the Court considered an Establishment Clause challenge to an Alabama statute allowing for a moment of silent prayer before the beginning of the school day's first class. After reviewing the legislative history behind the statute, the Court found that the statute violated the Establishment Clause. More specifically, the Court utilized the *Lemon* test to find that the statute failed the first prong of the test requiring a secular purpose.

In 1992, the Supreme Court decided the case of *Lee v. Weisman*. In *Lee*, a middle school principal invited a rabbi to deliver an invocation at the school's commencement exercises. At the ceremony, the rabbi delivered a non-denominational prayer that made several references to God. Instead of applying the *Lemon* test, the Court applied a coercion analysis and held that the practice violated the Establishment Clause. More specifically, it found that the state officials had a great deal of control over the invocation and benediction. Additionally,
although attendance was not obligatory, it was still coercive since the experience of graduating high school is a significant occasion in one’s life.\textsuperscript{129} Furthermore, the majority believed that this case was not akin to the Marsh situation, in which prayer was permitted to open a legislative session,\textsuperscript{130} because “[t]he atmosphere at the opening of a session of a state legislature where adults are free to enter and leave with little comment . . . cannot compare with the constraining potential of the one school event most important for the student to attend.”\textsuperscript{131} With this decision, the Court seemed to indicate that the Lemon test was no longer useful in these types of analyses, especially since all of the opinions ignored the test.\textsuperscript{132} This “trend,” however, was short-lived with the Santa Fe Indep. Sch. Dist. decision.

B. An Analysis of Santa Fe Independent School District in Light of Public Setting Prayer Precedent

As explained above,\textsuperscript{133} the Court in Santa Fe Indep. Sch. Dist. employed a multifaceted attack to reach its decision.\textsuperscript{134} To invalidate the policy on its face, however, the Court resorted to the Lemon test.\textsuperscript{135} An evaluation of the Court’s invalidation will ensue in light of the public setting prayer precedent outlined above. As will be shown, this policy was prematurely struck down and not given the opportunity to operate constitutionally or unconstitutionally. Within that analysis, it will be contended that the application of the coercion and endorsement tests should not have been reached since no speech was ever delivered under the School District’s new October policy.

\textsuperscript{129} See id. at 595 (“A school rule which excuses attendance is beside the point.”).
\textsuperscript{130} See supra notes 111–15 and accompanying text.
\textsuperscript{131} Lee, 505 U.S. at 597.
\textsuperscript{132} See supra note 126 (setting forth the majority’s coercion approach); Lee, 505 U.S. at 599–609 (Blackman, J., concurring) (“Government may neither promote nor affiliate itself with any religious doctrine or organization, nor may it obtrude itself in the internal affairs of any religious institution.”); id. at 609–631 (Souter, J., concurring) (arguing that the coercion test alone is not enough for this type of situation); id. at 631–646 (Scalia, J., dissenting) (“[T]he meaning of the Clause is to be determined with reference to historical practices and understandings.”) (citations omitted).
\textsuperscript{133} See supra notes 32–55 and accompanying text.
\textsuperscript{135} See id. at 314 (setting forth the three factors articulated in Lemon v. Kurtzman) (citations omitted)).
C. The Lemon that Will Not Rot

In *Lemon v. Kurtzman*, the Supreme Court held that Pennsylvania and Rhode Island statutes providing particular types of state aid to parochial schools were invalid under the Establishment Clause. This holding, however, was merely a footnote to the three part test that was articulated by the Court: “First, 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.’”

This test has endured a rocky history, but has been reinvigorated with the *Santa Fe Indep. Sch. Dist.* decision.

Up until the *Santa Fe Indep. Sch. Dist.* decision, it seemed as if the Court no longer held the *Lemon* test in high esteem. Recently, the Court has employed the *Lemon* test sparingly. Most significantly, this test was not applied in the latest of the public setting prayer cases. Similarly, it was also not resorted to when the Court decided the constitutionality of prayer in the legislature. Analogously, the mere existence of other tests lends support to the Court’s dissatisfaction.

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137 See id. at 625.
138 Id. at 612–13 (citations omitted).
139 See Stelle, *supra* note 90, at 658 (“Between 1971, the year the court decided *Lemon*, and 1992, the Court used this test in thirty of thirty-one cases in which the Establishment Clause was invoked. Since then, however, this test has effectively been abandoned with no clear replacement announced.”).
140 See Lee v. Weisman, 505 U.S. 577, 587 (1992) (applying the coercion test). The coercion test is the principle emanating from the Constitution that “government may not coerce anyone to support or participate in religion or its exercise . . ..” Id. The Court stated that a religious exercise at a school graduation ceremony created “subtle coercive pressures,” leaving the student no alternative to the appearance of participation in the exercise. Id. at 585, 593–94.
142 See, e.g., Lee, 505 U.S. at 587 (applying the coercion test); see also County of Allegheny v. ACLU, 492 U.S. 573, 592–94 (1989) (applying the endorsement test). The Court noted the need to closely watch whether a governmental practice has the purpose or effect of “endorsing” religion. Id. at 592. It then went on to elaborate the term “endorsement” to cover situations where the government favors, prefers, or promotes religion, religious beliefs or religious theory. Id at 593–94 (noting that the government may not take a position on religious beliefs nor make adherence to a particular religious belief relevant to a person’s standing in the political community); see also Brian J. Serr, *A Not-So-Neutral “Neutrality”: An Essay on the State of the Religion Clauses on the Brink of the Third Millennium*, 51 BAYLOR L. REV. 319, 332–35 (1999) (summarizing the various Establishment Clause tests).
Furthermore, a substantial amount of dissents have expressed dismay towards this mode of analysis. Likewise, commentators have questioned the test's viability. In light of these considerations, it is astonishing that the Court applied the Lemon analysis in this context. Nonetheless, the results of this application must be examined.

D. The School District's October Policy Was Not Facially Invalid

The first prong of the Lemon test requires that the School District's policy operate under a "secular legislative purpose." Looking back to the Engel and Schempp decisions, those policies clearly operated with religious purposes. In Schempp, however, the Court indicated that "factors" tending to show that "the Bible [was] used . . . as an instrument for nonreligious moral inspiration" might have led it to uphold the public school's reading of the bible to its students. In Santa Fe Indep. Sch. Dist., there was a question as to whether the policy was implemented for "nonreligious moral inspiration." The School District inserted into its policy a statement that the purpose of the pre-game ceremony was "to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for competition." Thus, it appears as these words connote a sense of "nonreligious moral inspiration."

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143 See, e.g., Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 318–20 (2000) (Rehnquist, C.J., dissenting) (describing Lemon's "checkered career in the decisional law of this Court"); Bd. of Educ. of Kiryas Joel Sch. Dist. v. Grumet, 512 U.S. 687, 751–52 (1994) (Scalia, J., dissenting) ("The problem with (and the allure of) Lemon has not been that it is 'rigid,' but rather that in many applications it has been utterly meaningless, validating whatever result the Court would desire."); Wallace v. Jaffree, 472 U.S. 38, 112 (1985) (Rehnquist, J., dissenting) (describing the test as a "constitutional theory [that] has no basis in the history of the amendment it seeks to interpret, is difficult to apply and yields unprincipled results . . . ").

144 E.g., Christian W. Johnston, Agostini v. Felton: Redefining the Establishment of Religion through a Modification of the Lemon Test, 26 PEPP. L. REV. 407, 430 (1999) ("Lemon is still good law, although it may not be the best law."); Stelle, supra note 90, at 658 (expressing concern about the test's "disuse").


146 See supra notes 92–97 and accompanying text (explaining the Engel decision).

147 See supra notes 98–104 and accompanying text (summarizing the Schempp decision).


Upon examining the policy’s purposes, the majority in *Santa Fe Indep. Sch. Dist.* declared that the policy’s words were not neutral due to the extent of the school’s involvement in the policy and the use of words like “invocation.” This policy, however, was not as sectarian as the statutes in *Engel* and *Schempp*, which specified the actual prayers and readings to be delivered. Instead, the School District’s policy merely provided that the message, which could have been either religious or nonreligious, was to be chosen by the elected student. Unlike *Engel* and *Schempp*, the School District played no role in composing an official prayer.

Moreover, the policy was certainly more content neutral than the statute that was upheld in *Marsh*, which allowed for prayer in the legislature. In fact, the policy was very similar to the *Marsh* statute since the student body, like the legislature, was to decide upon the speaker. Additionally, both the policy statement and statute implicitly adhered to the historical principles that permitted states to govern church-state relationships within their borders.

In *Santa Fe Indep. Sch. Dist.*, the Court implored that the context surrounding the creation of the policy statement must be considered in determining the policy’s purpose. Upon examining the context, the Court found that the “policy was implemented with the purpose of endorsing school prayer.” This context did reveal that the policy was originally geared toward delivery of prayer. The School District officials, however, did not act blatantly like the governor and senator in the *Wallace* decision by explicitly declaring that the policy was for purposes of religion. Furthermore, as the dissent noted, the context of the *Santa Fe Indep. Sch. Dist.* policy should be

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150 See id. at 314–15.
151 See supra notes 92–104.
152 See *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 298 n.6.
154 See supra notes 111–16 and accompanying text.
155 *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 317.
156 Id. at 315.
157 See supra notes 13–26 and accompanying text (providing a summary of the policy’s creation).
disregarded since it was conceivable that "the school districk was acting diligently to come within the governing constitutional law."\textsuperscript{159}

The second prong of the \textit{Lemon} test provides that the policy's "principal or primary effect must be one that neither advances nor inhibits religion."\textsuperscript{160} This prong, however, can not even be addressed since no speech was ever delivered under the new October policy.\textsuperscript{161} With its decision, the Court "venture[d] into the realm of prophesy."\textsuperscript{162} It appears as if the majority was merely speculating when it determined that there would be an unconstitutional religious message under the new policy. Although such a message was delivered under previous policies,\textsuperscript{163} those policies allowed for religious messages. It would not be proper, however, to claim that the same type of message would be delivered under the new policy. Most significantly, unlike the public setting prayer precedent presented above, the \textit{Santa Fe Indep. Sch. Dist.} court did not provide the district with the opportunity to operate constitutionally or unconstitutionally.

Likewise, since a religious speech never occurred, the Court could not have known if the government "coerce[d] anyone to support or participate in religion or its exercise" under a coercion analysis.\textsuperscript{164} Analogously, an endorsement test could not be administered here since the court could not have fathomed whether "the members of the listening audience [could] 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."\textsuperscript{165} Furthermore, in its speculative analysis, the Court turned a blind eye to a past statement in which it declared that "secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis."\textsuperscript{166}

\textsuperscript{159} \textit{Santa Fe Indep. Sch. Dist.}, 530 U.S. at 323 (Rehnquist, C.J., dissenting).
\textsuperscript{160} \textit{Lemon}, 403 U.S. at 612.
\textsuperscript{161} \textit{See Santa Fe Indep. Sch. Dist.}, 530 U.S. at 298 n.5.
\textsuperscript{162} \textit{Id.} at 319 (Rehnquist, C.J., dissenting).
\textsuperscript{163} \textit{See supra} notes 14–22 and accompanying text.
\textsuperscript{165} \textit{Santa Fe Indep. Sch. Dist.}, 530 U.S. at 308.
The third prong of the Lemon test stipulates that "the statute must not foster 'an excessive government entanglement with religion.'" To address this consideration, the student prayer group cases can provide some insight. Like those cases, the School District in Santa Fe Indep. Sch. Dist. merely enacted a policy that created the potential for religious student speech on public school grounds. Additionally, both the student speaker in Santa Fe Indep. Sch. Dist. and the student-prayer groups in those cases would be merely supplied with "incidental benefits." While the student prayer groups would be provided with a place to meet, the student speaker in Santa Fe Indep. Sch. Dist. would be provided with access to the football field's public address system.

CONCLUSION

In a past case, the Supreme Court declared that "[w]e are a religious people . . . ." With its holding in Santa Fe Indep. Sch. Dist., however, the Court may have totally eliminated any opportunity for states to experiment with speech policies that would allow for constitutionally valid prayer in a public setting. In consequence, time-honored traditions like pre-football game prayer will probably have to yield to the Court's confused Establishment Clause jurisprudence. As illustrated by the Santa Fe Indep. Sch. Dist. decision, clarification is needed to bring order to this important area of constitutional law.

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167 Lemon v. Kurtzman, 403 U.S. 602, 613 (citations omitted).
168 See supra notes 105–09 and accompanying text (synthesizing Supreme Court cases involving student prayer groups on public school grounds).