2001

Prayer in Public Schools After Santa Fe Independent School District

Mark W. Cordes
Northern Illinois University

Follow this and additional works at: https://uknowledge.uky.edu/klj
Part of the Constitutional Law Commons, and the Religion Law Commons
Click here to let us know how access to this document benefits you.

Recommended Citation
Available at: https://uknowledge.uky.edu/klj/vol90/iss1/2

This Article is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.
Religion in public schools has long been a subject of intense controversy in our country and from all appearances will remain so for a long time to come. Among the various ways that religion might interject itself in schools, there is none more volatile than the issue of school prayer. Ever since the Supreme Court held in the early 1960s that recitation of state-composed prayer in public schools was unconstitutional, the issue of school prayer has been a cultural flashpoint. This has included not only various efforts by states and local school boards to finesse the parameters of what is constitutionally permissible, but also periodic attempts to amend the Constitution to allow school prayer.

* Professor of Law, Northern Illinois University College of Law. B.S. 1975, Portland State University; J.D. 1980, Willamette University; J.S.M. 1983, Stanford University. The author would like to thank Peter Ames for his research assistance in the preparation of this Article.


2 Constitutional amendments for school prayer have frequently been proposed over the years. A recent joint resolution in the House proposed the following Constitutional amendment:
The Supreme Court itself has addressed the issue of school prayer six times, including four times in the last fifteen years. Whereas the earlier cases concerned the more straightforward issue of school children reciting state-led prayers on a daily basis, recent decisions have addressed more refined issues of prayer in school. In a series of three decisions from the mid-80s to early-90s, the Court struck down a moment of silence statute clearly designed to promote school prayer, upheld the right of high school students themselves to form a religious club that would involve voluntary prayer on campus, and struck down a state-initiated and directed prayer at graduation. In deciding these cases, the Court extended the earlier prohibition on recitation of state-composed prayer to any significant attempt by the state to promote or sponsor prayer in public schools. On the other hand, it clearly affirmed the right of students to initiate and lead prayer in a voluntary setting at school.

The Court's most recent school prayer case came in 2000 with Santa Fe Independent School District v. Doe, where it held that a school district policy allowing students to vote on whether to have a prayer at home football games violated the Establishment Clause. The school district's policy was an apparent effort to avoid the Court's concerns about state-directed prayer emphasized in Lee v. Weisman by shifting the decision whether to pray, and who was to pray, over to the students. Nevertheless, the Court found that the voting scheme suffered from the same two defects identified in Lee. First, despite letting students vote on whether to pray, the Court said the policy, when seen as a whole, was clearly designed to promote school prayer and had the state's imprint upon it. Second, the

Nothing in this Constitution shall be construed to prohibit individual or group prayer in public schools or other public institutions. No person shall be required by the United States or by any State to participate in prayer. Neither the United States nor any State shall prescribe the context of any such prayer.


4 See Wallace, 472 U.S. at 38.

5 See Mergens, 496 U.S. at 226.

6 See Lee, 505 U.S. at 577.

7 Santa Fe, 530 U.S. at 290.

8 See id. at 304-07.
state-promoted prayer resulted in coercion of those attending football games and was therefore unconstitutional.\textsuperscript{9}

In the \textit{Santa Fe} decision, the Court reiterated its continuing resolve to prohibit state-promoted prayer in public schools, even in arguably less intrusive settings.\textsuperscript{10} This is in contrast to the Court's substantial dismantling in recent years of prior prohibitions on aid to religious schools, which is the other major Establishment Clause arena.\textsuperscript{11} The \textit{Santa Fe} decision thus

\textsuperscript{9} See id. at 310-13.

\textsuperscript{10} See id. at 317.

\textsuperscript{11} The largest number of Supreme Court Establishment Clause cases have concerned aid to religious institutions and schools. In a series of decisions in the 1970s and 1980s, the Court scrutinized aid programs quite closely, invalidating a number of programs where a religious institution might directly benefit from aid or where provision of aid might be interpreted as placing the state's imprimatur on religion. This included aid that might supplant a current expense and thereby free up money for religion, provision of instructional materials to religious schools themselves instead of to parents or to students, and the presence of state employees on school grounds where an impression of endorsement might be created. See, e.g., Aguillar v. Felton, 473 U.S. 402 (1985) (invalidating program providing publicly employed Title I teachers to teach remedial secular classes at religious schools); Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373 (1985) (invalidating program in which public school employees provided secular services on religious school grounds); Meek v. Pittenger, 421 U.S. 349 (1975) (invalidating provision of instructional materials directly to religious schools); Levitt v. Comm. for Pub. Educ. & Religious Liberty, 413 U.S. 472 (1973) (invalidating aid for tests designed by religious teachers on secular subjects).

In recent years, however, the Court has substantially lessened its scrutiny in this area, permitting a number of aid programs that might have been suspect in earlier years. See Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993) (upholding provision of a sign interpreter to deaf student at a religious school); Witters v. Wash. Dep't of Serv. for the Blind, 474 U.S. 481 (1986) (holding that provision of aid to blind student enrolled in religious school does not violate the Establishment Clause). Most significantly, in its two most recent decisions the Court has overruled prior decisions in upholding aid programs. In \textit{Agostini v. Felton}, 521 U.S. 203 (1997), the Court upheld a program providing publicly employed Title I teachers to teach remedial classes at religious schools and, in doing so, specifically overruled its previous decisions in \textit{Aguillar} and \textit{Ball}, which had invalidated such programs. Moreover, in \textit{Mitchell v. Helms}, 530 U.S. 793 (2000), a divided Court upheld a state program which loaned educational materials and equipment, including library, media, and computer materials, to religious schools. In doing so, the plurality specifically stated that the effect of the decision was to overrule the Court's prior decisions in \textit{Meek} and \textit{Levitt} which prohibited essentially the same sorts of programs. Id. at 808.
reflects the Court’s own recognition of the highly sensitive concerns presented by government-promoted prayer in public elementary and secondary schools, most particularly the coercion of nonadherents that easily occurs when the state involves itself in the prayer business.

At the same time, Santa Fe repeatedly affirmed the right of students themselves to engage voluntarily in prayer activities in school.\(^\text{12}\) Indeed, the Court in several places suggested that there was a critical constitutional distinction between voluntary student prayer on the one hand, and state-sponsored prayer on the other.\(^\text{13}\) This same distinction had been recognized in earlier cases\(^\text{14}\) and is certainly consistent with the outcome of the school prayer cases.

It is the thesis of this Article that the distinction between voluntary student prayer on the one hand, and state-sponsored prayer on the other, has arguably become, and indeed should be, the central consideration in analyzing school prayer cases. Not only was this distinction emphasized by the Court in Santa Fe and prior cases, but it perhaps best explains the Court’s results in the cases. More importantly, the distinction is one which best balances the competing constitutional concerns that are potentially present in school prayer cases. In particular, it guards against the primary Establishment Clause concerns presented by some school prayer—government-created orthodoxy and compelled religious activity—while preserving the important free speech rights of students.

The distinction is also one which overlaps substantially, though not precisely, with concerns about state coercion and endorsement of religion, both of which have played roles in the Court’s school prayer cases. For obvious reasons, both coercion and endorsement are predicated on the state’s involvement with the challenged religious practice. Indeed, the coercion analysis used in Santa Fe and Lee consists of two parts, the first of which is showing a substantial state involvement with the challenged

\(^{12}\) See Santa Fe, 530 U.S. at 313 (“Thus, nothing in the Constitution ... prohibits any public school student from voluntarily praying at any time before, during, or after the schoolday. But the religious liberty protected by the Constitution is abridged when the State affirmatively sponsors the particular religious practice of prayer.”).

\(^{13}\) See id. at 302, 313.

\(^{14}\) See Bd. of Educ. of Westside Cnty. Sch. v. Mergens, 496 U.S. 226, 250 (1990) (O’Connor, J., plurality opinion) (“[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.”); see also Lee v. Weisman, 505 U.S. 577, 586-88 (1992) (emphasizing high degree of state involvement with challenged prayer).
prayer. Conversely, where students initiate prayer, the state is not coercing anyone and problems of endorsement are minimized. Yet a focus on the distinction between voluntary student prayer and state-promoted prayer would not require a showing of coercion and therefore prohibits more state activity than a pure coercion test. And while significant endorsement concerns would almost always be predicated on state promotion, to the extent that mere accommodation of student prayer on school property might raise endorsement concerns, focusing on the distinction between voluntary student prayer and state-sponsored prayer is somewhat less restrictive than a pure endorsement standard.

Part I of this Article will first examine the five school cases prior to Santa Fe. Part II of the Article will then examine the Santa Fe decision more in-depth. Part III will discuss the dual concerns of accommodating both Establishment and free speech concerns in resolving school prayer issues. Finally, Part IV will examine remaining prayer scenarios in public schools, focusing on three particular areas: student religious clubs, moment of silence statutes, and graduation prayers with student speakers.

I. BACKGROUND: THE SCHOOL PRAYER CASES

Among the various church-state issues that have come before the Supreme Court in modern times, there is none more sensitive than that of religion in public schools. Indeed, the Court itself has frequently noted that public schools are a highly sensitive Establishment Clause arena and for that reason it "has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools." It is not surprising, therefore, that the Court has closely monitored such activity and, in all but one case, struck down religious activities in public schools, including the posting of the Ten Commandments, teaching of creationism, Bible reading, and prayer.

---

15 See Santa Fe, 530 U.S. at 302-06; Lee, 505 U.S. at 586-90.
16 See infra notes 20-124 and accompanying text.
17 See infra notes 125-83 and accompanying text.
18 See infra notes 184-261 and accompanying text.
19 See infra notes 262-345 and accompanying text.
At the same time, the Court has recognized that we are religious people and that religion is an important part of American life.\(^{25}\) It has made clear that this does not justify state-sponsored religious practice, but it does permit some accommodations of religious activity. Thus, although the Court has been quick to strike down state-promoted religious practices, it has frequently emphasized that students themselves are free to express their religion in school.\(^{26}\) Moreover, the Court in *Lee v. Weisman* stated that "throughout the course of the educational process, there will be instances when religious values, religious practices, and religious persons will have some interaction with the public schools and their students."\(^{27}\)

Therefore, though closely monitoring religion in public schools, the Court has indicated that complete separation is neither possible nor desirable. Although the Court has addressed this balance in several distinct public school contexts, none is more central and problematic than that of school prayer, which had come before the Court five times prior to *Santa Fe*. This subsection will review those five decisions and the stage they set for the *Santa Fe* case.

### A. Engel v. Vitale and Abington School District v. Schempp

The Supreme Court first struck down school prayer as unconstitutional in two landmark decisions in the early 1960s, *Engel v. Vitale*\(^{28}\) and *Abington School District v. Schempp*.\(^{29}\) In the first case, *Engel*, the Court reviewed a school board policy requiring that the following prayer be said aloud by each class at the start of the school day: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country."\(^{30}\) The school district itself had adopted this practice upon the recommendation of the New York State Board of Regents, which included it as part of their "Statement on Moral and Spiritual Training in the Schools."\(^{31}\) The required prayer recitation was challenged as unconstitutional by the parents of ten district students, who

\(^{25}\) See Zorach v. Clausen, 343 U.S. 306, 313 (1952) ("We are a religious people whose institutions presuppose a Supreme Being.").

\(^{26}\) See Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 313 (2000) ("[N]othing in the Constitution as interpreted by this Court prohibits any public school student from voluntarily praying at any time before, during, or after the schoolday.").

\(^{27}\) *Lee*, 505 U.S. at 598-99.

\(^{28}\) *Engel*, 370 U.S. at 421.


\(^{30}\) *Engel*, 370 U.S. at 422.

\(^{31}\) *Id.* at 423.
alleged that use of the official prayer was contrary to the religious beliefs of both themselves and their children.\textsuperscript{32}

In finding that this practice violated the Establishment Clause, the Court began by focusing on the fact that students were required to recite a government-composed prayer. The Court noted that, at a minimum, the Establishment Clause means that "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."\textsuperscript{33} In finding this contrary to principles of religious freedom found in the Constitution, the Court discussed in-depth how the "practice of establishing governmentally composed prayers for religious services was one of the reasons" early colonists left England and was an ongoing concern in the early colonial experience.\textsuperscript{34} Thus, according to the Court, the First Amendment was in part designed to prohibit government from using its power "to control, support or influence the kinds of prayer the American people can say."\textsuperscript{35}

Significantly, the Court did not premise its holding on any possible coercion of students. It acknowledged that even when students were asked to be excused there might be a significant indirect coercion to conform to the officially approved religion,\textsuperscript{36} but it emphasized that the Establishment Clause went much further than prohibiting coercive activities. Unlike the Free Exercise Clause, which the Court suggested requires a showing of government coercion, the Establishment Clause is violated by establishing

\textsuperscript{32} Id.
\textsuperscript{33} Id. at 425.
\textsuperscript{34} Id. The Court noted that the Book of Common Prayer, which was created by the English government, set out in detail the form and content of prayer to be used in the Church of England. This resulted in numerous controversies in which various religious groups attempted to influence the book to advance their own religious views. Other groups left England to avoid conformance with the required practices. \textit{Id.} at 425-27. The Court further noted that it was "an unfortunate fact of history" that some of the religious groups which fled the established English church, once here, themselves created state-established churches and at times sought to impose their beliefs on others. \textit{Id.} at 427. These earlier colonial experiences of the problems of established churches and official religious practices were apparent at the time the First Amendment was adopted. See \textit{id.} at 427-30.
\textsuperscript{35} Id. at 429.
\textsuperscript{36} Id. at 431 ("When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.").
an official religion, whether or not it coerces nonobserving individuals.\textsuperscript{37} Thus, even though the Court acknowledged that indirect coercion might have existed in \textit{Engel}, it rested its decision on the official establishment of religion through prescribed prayer.

Finally, the Court addressed the argument that prohibiting school prayer indicated a hostility toward religion. The Court responded that the contrary was true, stating that it was precisely because prayer and religion were so important that the religion clauses were created, ensuring that people “could pray when they pleased to the God of their faith in the language they chose.”\textsuperscript{38} The First Amendment was therefore not designed to destroy or to hamper religion, but to end governmental control of it, leaving people free to pursue religion as they chose.

One year later, in \textit{Abington School District v. Schempp},\textsuperscript{39} the Court again examined the issue of religious practices in public schools. There the Court reviewed two consolidated cases, both involving opening exercises in public schools that included daily readings from the Bible and recitation of the Lord’s Prayer. The Bible reading was done over a school intercom system by selected students, who chose what passage to read, while the Lord’s Prayer was said over both the intercom and in unison by the students in their classrooms. Participation in these exercises was voluntary, with students being given the option to remove themselves from the classroom or to remain but not participate in the exercises.\textsuperscript{40}

As in \textit{Engel}, the Court held that these religious practices violated the Establishment Clause. It began its analysis by stating that the First Amendment requires that government be neutral toward religion and then proceeded to review at length how prior Establishment Clause cases reflected such a neutrality requirement.\textsuperscript{41} Based on those cases, the Court then articulated a two-fold test for withstanding an Establishment Clause challenge: first, “there must be a secular legislative purpose;” and second, the government act must have “a primary effect that neither advances nor inhibits religion.”\textsuperscript{42} These requirements, of course, are the first two prongs of the now famous \textit{Lemon} tripartite test for resolving Establishment Clause issues. Indeed, \textit{Lemon} itself largely relied upon \textit{Schempp} and one subsequent case in articulating the test.\textsuperscript{43}

\begin{itemize}
  \item \textsuperscript{37} See \textit{id.} at 430-31.
  \item \textsuperscript{38} \textit{Id.} at 434.
  \item \textsuperscript{39} \textit{Abington Sch. Dist. v. Schempp}, 374 U.S. 203 (1963).
  \item \textsuperscript{40} See \textit{id.} at 205-08.
  \item \textsuperscript{41} See \textit{id.} at 215-22.
  \item \textsuperscript{42} \textit{Id.} at 222.
  \item \textsuperscript{43} In \textit{Lemon v. Kurtzman}, 403 U.S. 602, 612-13 (1971), the Court stated the following three-prong test for evaluating the validity of a statute under the Estab-
The Court then proceeded to hold that the religious exercises in question violated this standard, although it was not precise in stating how or in what manner the violation was found. As a practical matter, once the religious character of the activity was established, the Court rather summarily concluded that for the state to sponsor and direct the exercises clearly violated the Establishment Clause. Despite the lack of analysis, this was clearly the correct result, especially in light of Engel. Whatever secular purpose might be articulated for the practices, and certainly some are conceivable, there is little doubt that the state sponsorship of such activities clearly advanced religion. Moreover, the exercises violated the neutrality principle emphasized by the Court throughout the opinion since the state was actively involved in promoting religion.

Taken together, Engel and Schempp established that state-sponsored prayer in public school violates the Establishment Clause. Although the Court was sensitive in both decisions to the problem of coercion, neither one was predicated on that basis. Rather, it was government involvement in promulgating official prayers and therefore religious views, whether coercive or not, that violated the Establishment Clause. At the heart of both decisions was the concern that government itself had no business composing or sanctioning official prayers, and that the First Amendment was designed to end government control of religion. Thus, whatever else the Establishment Clause might mean, it clearly prohibited the state trying to influence how children prayed.

Although far-reaching in some respects, the precise facts of Engel and Schempp concerned state-sponsored and prescribed religious practices in school itself on a daily basis. It was unclear, therefore, how the Court would deal with other issues where the prayer was not prescribed, where the students rather than the school sponsored the religious exercise, or where prayer occurred only on special occasions outside the classroom.

Establishment Clause: “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.’” (citations omitted). In stating the first two prongs, the Court cited its decision in Board of Education v. Allen, 392 U.S. 236, 243 (1968), which itself had relied on Schempp. The excessive entanglement prong came from the Court’s decision in Walz v. Tax Commissioner of New York, 397 U.S. 664, 674 (1970). See Schempp, 374 U.S. at 223 (“We agree with the trial court’s finding as to the religious character of the exercises. Given that finding, the exercises and the law requiring them are in violation of the Establishment Clause.”).

The Court made clear in Schempp, as it had in Engel, that a violation of the Free Exercise Clause requires a showing of coercion, while the Establishment Clause does not necessarily require that coercion be shown. Id.
Those issues were partially addressed in a series of relatively recent decisions beginning with *Wallace v. Jaffree*.

**B. Wallace v. Jaffree**

The Court's next school prayer case came almost a quarter-century after *Engel* and *Schempp*, in *Wallace v. Jaffree*. There the Court reviewed an Alabama statute that required a minute of silence in public elementary and secondary schools for the purpose of "meditation or voluntary prayer." The statute in question was actually the second of three Alabama statutes relating to school prayer noted by the Court. An earlier statute was similar to that being challenged, but only referred to "meditation" and did not mention prayer, whereas a third statute provided for a teacher-led prayer, the unconstitutionality of which the Supreme Court had already affirmed. It was only the statute providing for "meditation and voluntary prayer" during a minute of silence that was before the Court.

In many respects, the statute in *Wallace* avoided some of the most serious concerns identified in *Engel* and *Schempp*. Most notably, no prayer or reading was prescribed, and thus any prayer that might occur was completely of a student's own choosing. This avoided the problem of prescribed prayer very much at the heart of *Engel* and *Schempp*. Moreover, since no content was provided, there was no endorsement of an official religious view, a significant concern in *Schempp*. Finally, although coercion was not the focus of either of the earlier decisions, to the extent it might be a consideration, it seemed to be nonexistent in *Wallace* since no one would know how any particular student used the minute of silence.

Despite all of these distinctions, the Court held that the statute violated the Establishment Clause. It began its analysis by reference to the tripartite test announced in *Lemon v. Kurtzman*, which states that to be valid a statute

---

47 *Id.* at 40. The challenged statute stated:

> At the commencement of the first class of each day in all grades in all public schools, the teacher in charge of the room in which each such class is held may announce that a period of silence not to exceed one minute in duration shall be observed for meditation or voluntary prayer, and during any such period no other activities shall be engaged in.

*AL. CODE § 16-1-20.1 (1984).*
48 *See AL. CODE § 16-1-20.*
49 *See id. § 16-1-20.2 (1989).*
51 *See Wallace*, 472 U.S. at 41-42.
must (1) have a secular purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) not foster an excessive entanglement with religion.\textsuperscript{52} Using this formulation, the Court in \textit{Wallace} held that the "prayer and meditation" statute failed to have a secular purpose and therefore declared it unconstitutional without examining the second and third prongs of the test.\textsuperscript{53}

In finding that the statute failed to have a secular purpose, the Court noted that a statute might be partially motivated by religion and still satisfy the purpose test, but it is invalid if it is entirely motivated by a religious purpose.\textsuperscript{54} The Court then proceeded to give two reasons why the record indicated that the statute was entirely motivated by a purpose to advance religion. First, the legislative record itself clearly indicated that the sole purpose of the statute was to put prayer back in the schools. Indeed, the bill's sponsor inserted into the legislative record a statement that the bill was an "effort to return voluntary prayer' to the public schools."\textsuperscript{55} He confirmed this before the District Court, where he stated that he had no purpose in mind other than returning prayer to the schools. The rest of the legislative record showed no other purported purpose.\textsuperscript{56}

Second, the Supreme Court also considered the purpose of the statute in relation to the prior statute requiring a minute of meditation. The Court noted that the only significant difference between the challenged statute and the prior one was the addition of the words "or voluntary prayer." Moreover, the Court stated that the prior statute already protected a student's right to engage in prayer during the moment of silence at the start of the school day.\textsuperscript{57} The Court concluded that adding the phrase "or voluntary prayer" in the challenged statute served no purpose other than "to convey a message of state approval of prayer activities"\textsuperscript{58} and was thus unconstitutional.

\textit{Wallace}, therefore, made clear that the state could not promote school prayer in any manner, even where it left the content entirely up to the individual student. Although the statute in question was in some respects far removed from many of the central concerns identified in \textit{Engel} and \textit{Schempp}, it nevertheless conveyed a message of endorsement and was, in

\textsuperscript{52} Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).
\textsuperscript{53} See \textit{Wallace}, 472 U.S. at 56.
\textsuperscript{54} See id.
\textsuperscript{55} Id. at 57 (citation omitted).
\textsuperscript{56} See id. at 56-57.
\textsuperscript{57} See id. at 59.
\textsuperscript{58} See id. at 61.
essence, used to promote prayer. Moreover, as noted by the Court, the
statute clearly violated the Court's longstanding requirement of neutrality
toward religion since, by its very terms, it was promoting prayer.59

It is important to emphasize, however, that Wallace did not declare all
moment of silence statutes or practices to be unconstitutional, but only
those that were clearly designed for no other purpose than to promote
prayer and thereby advance religion. Indeed, the Court seemed to suggest
that the earlier Alabama statute, which required a daily moment of silence
for meditation, was constitutional even though students might use the time
for prayer. In distinguishing the first statute from the one it struck down,
the Court stated that an "intent to return prayer to the public schools is, of
course, quite different from . . . voluntary prayer during an appropriate
moment of silence," a right which it said the prior statute protected. The
general validity of moment of silence statutes was more expressly stated in
concurring opinions by Justices Powell and O'Connor, both of whom
explicitly stated that moment of silence statutes can be constitutional, even
if individual students use them for the purpose of prayer.61

Therefore, although the earlier Alabama statute providing only for a
moment of silence was not before the Court, the Court in Wallace appeared
to support the validity of moment of silence provisions as long as their
primary intent was not to promote prayer, even if as a consequence some
students choose to pray during that time.62 Such a position makes sense
since the statute is not promoting prayer as such but a moment of silence,

59 See id. at 60 ("Such an endorsement is not consistent with the established
principle that the government must pursue a course of complete neutrality toward
religion.").

60 Id. at 59.

61 Most significant was Justice O'Connor's concurring opinion, which dis-
cussed at length moment of silence statutes, stating that they should be constitutional
as long as they were not used to promote or endorse prayer. In discussing
their general validity, she noted that, unlike prayer, a moment of silence provision
is not inherently religious, and that students are completely free to participate in
any manner they choose. Id. at 67-73 (O'Connor, J., concurring). Justice Powell's
concurrence, which focused on other concerns, briefly stated at the beginning that
he agreed with O'Connor's "assertion that some moment-of-silence statutes may
be constitutional," a position which he interpreted the majority opinion as
suggesting. Id. at 62 (Powell, J., concurring).

62 The majority was clearly not bothered by the fact that students might choose
to pray during a required moment of silence, as indicated by the statement that the
earlier meditation statute "protect[ed] every student's right to engage in voluntary
prayer during an appropriate moment of silence during the schoolday." Id. at 59.
which might serve several secular purposes, and such a provision could not reasonably be interpreted as endorsing prayer. Moreover, the choice to pray as well as the content of the prayer would belong solely to the student.

C. Board of Education of Westside Community Schools v. Mergens

The Court's next examination of the school prayer issue came in Board of Education of Westside Community Schools v. Mergens, a 1990 case. There the Court examined whether the Equal Access Act, passed by Congress several years earlier, was violated when a high school prohibited a student religious group from meeting on campus and if the Act, so construed, violated the Establishment Clause. As such, the case presented the distinct, yet critical, issue of whether student-initiated, rather than state-initiated, prayer and religious activity poses an Establishment Clause problem.

The basic constitutional issue presented in Mergens was whether permitting a student religious group to meet on campus on terms equal to those of other student groups violated the Establishment Clause. The high school in question had a policy of permitting a variety of student groups to meet on campus after school on a voluntary basis. Altogether, about thirty such groups were recognized, including a chess club, a scuba diving club, a photography club, and several service clubs. The respondent, Bridget Mergens, sought permission to form a Christian club at the school for the stated purpose of reading and discussing the Bible, having fellowship, and praying together. The school denied the request, stating that permitting such a club at the school would violate the Establishment Clause.

The first issue before the Supreme Court was whether the school's refusal to recognize the religious club violated the Equal Access Act, passed in 1984. The Act required that once a school created a forum for student clubs to meet, access could not be denied to a group because of its content, including religious content. In Widmar v.

---

65 Mergens, 496 U.S. at 231.
66 See id.
67 See id. at 232.
68 See id. at 233.
69 The Act provides:
   It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who
the Supreme Court had recognized this as a constitutional principle when applied to student religious groups on university campuses. The Equal Access Act, in essence, applied the same standard to high schools. Construing the Act in a broad fashion as clearly intended by Congress, the Court in Mergens found that the school’s refusal to allow the religious group to meet violated the Equal Access Act.

The second issue before the Court was whether the Equal Access Act, construed to require that student religious groups have the same access to school facilities as other groups, violated the Establishment Clause. The school argued that because the recognized clubs were an integral part of its educational mission, official recognition of a religious club would amount to school endorsement of the club and “provide the club with an official platform to proselytize other students.” In particular, the school argued that since the club would meet under school aegis, “an objective observer
in the position of a secondary student" would perceive official support for and endorsement of the meetings.  

The Supreme Court disagreed, holding 8-1 that the Act did not violate the Establishment Clause, but with no opinion gaining a majority of the Court. Justice O'Connor's plurality opinion, for four members of the Court, said that the logic of the Court's earlier decision in *Widmar v. Vincent*, involving university students, applied with equal force in the secondary school setting.  

In *Widmar*, the Court held that permitting a religious group to meet on a university campus on the same basis as other student groups did not violate the Establishment Clause under the tripartite *Lemon* test. The Court stated that providing equal access to religious groups served the secular purpose of promoting free speech and avoided entanglements with religion that would occur if the university tried to police the content of meetings. Moreover, granting religious groups equal access to facilities did not communicate endorsement but, rather, neutrality and therefore did not have a primary effect of advancing religion. The Court in *Widmar* also noted that the broad spectrum of approved groups helped dissipate endorsement concerns.

Justice O'Connor said that the above analysis was equally applicable to high school groups under the Equal Access Act. She noted that the avowed purpose of the Act, to prevent discrimination against religious and other groups, was clearly secular. Most importantly, the plurality said that there was no problem of advancing religion through endorsement, stating "there 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." Moreover, secondary school students, like university students, are mature enough to recognize "that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis."

---

74 *Id.* at 249 (O'Connor, J., plurality opinion).
75 *Id.* at 248 (O'Connor, J., plurality opinion).
76 *Widmar*, 454 U.S. at 271.
77 *Id.* at 272.
78 *Id.* at 273-74.
79 *Id.* at 274.
80 See *Mergens*, 496 U.S. at 248 (O'Connor, J., plurality opinion) ("We think the logic of *Widmar* applies with equal force to the Equal Access Act.").
81 *Id.* at 248-49 (O'Connor, J., plurality opinion).
82 *Id.* at 250 (O'Connor, J., plurality opinion).
83 *Id.* (O'Connor, J., plurality opinion).
plurality also noted that the broad spectrum of student groups represented dissipated any possible problems of endorsement that might exist.\textsuperscript{84}

Justice Kennedy, joined by Justice Scalia, concurred in the judgment that there was no Establishment Clause violation, but on somewhat different grounds than the plurality. Whereas O'Connor's plurality opinion primarily focused on why there was no endorsement of religion under the facts, Kennedy focused on a coercion standard, expressly rejecting O'Connor's endorsement test as inappropriate for Establishment Clause analysis.\textsuperscript{85} Instead, Kennedy stated that the relevant Establishment Clause test is "whether the government imposes pressure upon a student to participate in a religious activity."\textsuperscript{86} Under that standard, there was nothing in the facts to suggest any coercion whatsoever since participation in the club was completely voluntary and outside normal school hours.\textsuperscript{87}

Finally, Justice Marshall wrote a concurring opinion, joined by Justice Brennan. He stated that the Equal Access Act simply codified what was already constitutionally required under the Free Speech Clause—prohibiting discrimination against religious clubs on the basis of content.\textsuperscript{88} He also indicated that the Establishment Clause was not violated by allowing a religious group to meet, but that concerns were raised in the secondary school context distinct from universities that called for precautionary measures by schools.\textsuperscript{89} In particular, he believed that because the problem of perceived endorsement was greater in the more structured environment of a high school, schools needed to take special steps to disassociate themselves from religious groups through explicit disclaimers.\textsuperscript{90} Thus,

\textsuperscript{84} See id. at 252 (O'Connor, J., plurality opinion).
\textsuperscript{85} See id. at 260-61 (Kennedy, J., concurring).
\textsuperscript{86} Id. at 261 (Kennedy, J., concurring).
\textsuperscript{87} Id. (Kennedy, J., concurring).
\textsuperscript{88} See id. at 262 (Marshall, J., concurring).
\textsuperscript{89} See id. at 262-63 (Marshall, J., concurring). Justice Marshall believed that the "wide-open and independent character of the student forum" in \textit{Widmar}, which involved a variety of controversial groups that were in no way encouraged by the university, was quite distinct from the forum in \textit{Mergens}. Id. at 265. In the latter instance, the school made no effort to disassociate itself from the groups and even encouraged the formation of extracurricular student groups as part of its overall mission. Id. at 266-67. The danger of perceived endorsement was quite real and required special effort by the school to disassociate itself with religious groups. Id. at 267.
\textsuperscript{90} See id. at 269-70 (Marshall, J., concurring). Justice Marshall stated that the school could either stop encouraging student participation in clubs generally and communicate that the clubs do not relate to the school's mission or, if it continued
according to Marshall, the Establishment Clause did not act as a barrier to the group meeting, but instead imposed an affirmative obligation on the school to clearly disassociate itself from the group.91

Mergens, therefore, clearly established that student-initiated religious activity in a noncurricular setting does not pose Establishment Clause problems, at least where it is part of a larger student forum of activities and groups. Although the justices differed somewhat on the precise rationale, the basic message of the different opinions was the same: when students, rather than the state, initiate the prayer and other religious exercises, the Establishment Clause is not violated. Moreover, the Court strongly suggested that not only was the Establishment Clause not violated under such circumstances, but also that denying the students the right to meet might well violate their rights of free speech. The plurality opinion made this point well, stating, "there 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."92

D. Lee v. Weisman

The final school prayer case to come before the Court prior to Santa Fe was Lee v. Weisman,93 a 1992 decision. There the Court reviewed a school district policy which permitted school principals to invite clergy to offer invocation and benediction prayers at middle school and high school ceremonies. The specific incident giving rise to the case involved the principal of a middle school who invited a rabbi to pray at the graduation ceremony. The principal gave the rabbi a pamphlet containing guidelines for the prayers and also told the rabbi that the prayers should be non-sectarian. The parent of a graduating student challenged inclusion of the prayers as violating the Establishment Clause.94

The Supreme Court agreed, voting 5-4 that inclusion of state-controlled prayers at middle or high school graduations violated the Establishment Clause.95 In doing so, however, members of the Court divided over the

---

91 Id. (Marshall, J., concurring).
92 Id. at 250 (O'Connor, J., plurality opinion).
94 See id. at 581-84.
95 See id. at 586-87. For an excellent series of articles discussing Lee v. Weisman and its impact on religion in public schools, see Symposium, Religion and the Public Schools After Lee v. Weisman, 43 CASE W. RES. L. REV. 699-1020.
scope of Establishment Clause prohibitions on prayer in school, leaving some doubt as to the scope of the Court's decision and the appropriate standard to apply in future cases. Justice Kennedy's majority opinion struck down the challenged prayer under a coercion standard, stating that in the context of a graduation ceremony a state-controlled prayer constituted an indirect, but substantial, coercion of religious exercise. Although four other justices joined his opinion, agreeing that the coercion involved in the challenged practice violated the Establishment Clause, they were careful to emphasize in two concurring opinions that although a showing of coercion was sufficient to violate the Establishment Clause, it was not necessary, and that a violation can also occur under an endorsement test. The four dissenting justices found the practice constitutional, apparently conceding that coercion would violate the Establishment Clause, but finding none present in this case.

In analyzing the challenged practice under a coercion test, Kennedy's majority opinion engaged in a two-part analysis. First, he discussed at some length the pervasive and substantial state involvement with the prayer in the case. The principal, an agent of the state, decided that prayer should be offered. The principal also chose who would offer the prayer. Finally, by providing the pamphlet on prayer guidelines and telling the rabbi the prayer should be nonsectarian, the state attempted to control the content of the prayer. This was particularly troubling to Kennedy, who stressed that it was a "cornerstone principle of our Establishment Clause jurisprudence" that government had no business composing prayer. Thus, although the prayer was delivered by a private citizen, Kennedy's majority opinion concluded that the state was pervasively involved in it at several levels.

Kennedy then turned his attention to the effect that this state-controlled prayer had on student participants. After discussing the Establishment Clause's historical role in guarding against the infringement of conscience
and belief by state-created orthodoxy, Kennedy emphasized the heightened concerns that subtle coercive pressure presents in public elementary and secondary schools. He then stated that the government’s extensive involvement and control of the ceremony put substantial pressure on students to engage in actions that they themselves might understand as participation. Although this pressure was indirect since no one was required to stand or otherwise be involved, it was nonetheless real and substantial. Moreover, the fact that graduation ceremonies were not compulsory did little to address the problem of coercion since high school graduations play a uniquely significant role in our society and could hardly be considered voluntary in the normal sense of the word. Thus, Kennedy concluded that the graduation prayers in this case constituted substantial, albeit indirect, coercion of dissenting students that violated the basic principles of the Establishment Clause.

As noted above, although four other justices joined Kennedy’s opinion, agreeing that the coercive effect of the graduation prayers violated the Establishment Clause, in their concurring opinions, Justices Blackmun and Souter emphasized that coercion was a sufficient, but not a necessary, condition for a violation. Souter’s opinion, joined by Stevens and O’Connor, in particular stressed that the mere endorsement of religion, even without coercion, is enough to violate the Establishment Clause.

103 See id. at 591-92. The Court noted that, unlike speech in general, the Constitution contemplated that government was not to be a participant in religious discussion or debate since religious establishments threatened the religious liberty of all. “A state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed.” Id. at 592.

104 Id. The Court noted that the problem of indirect coercion is not necessarily limited to public schools, “but it is most pronounced there.” Id. "What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy.” Id.

105 Id. at 593.

106 Id. at 594-95.

107 See id. at 604 (Blackmun, J., concurring) (“Although our precedents make clear that proof of government coercion is not necessary to prove an Establishment Clause violation, it is sufficient.”); id. at 619 (Souter, J., concurring) (stating that the Court’s precedents “simply cannot . . . support the position that a showing of coercion is necessary to a successful Establishment Clause claim”).

108 Justice Souter’s concurrence examined two issues in-depth: (1) whether the Establishment Clause only prohibited preferences among religions but permitted aid to religion in general; and (2) whether a showing of coercion is necessary to
This was essentially a continuation of the same debate two years earlier in *Mergens*, where O’Connor’s plurality opinion in essence applied an endorsement test, while Kennedy’s concurrence argued that endorsement alone was not enough and that coercion was necessary. Although Kennedy was not that explicit in *Lee*, presumably to get the other justices to join his opinion, there appeared to be little doubt that Kennedy was still championing a coercion test while the other justices in the majority would include an endorsement standard as well.

prove an Establishment Clause violation. *Id.* at 609. Examining both Court precedent and the history surrounding the Establishment Clause, Souter persuasively argued that the Establishment Clause prohibits general, as well as preferential, advancement of religion. *See id.* at 609-18.

Regarding the coercion issue, Souter conceded the force of some of the arguments for the “coercion” analysis but again believed that both precedent and history supported a position that a showing of coercion was sufficient but not necessary. In doing so he noted that since the Free Exercise Clause already protected against state coercion of religious practice, “a literal application of the coercion test would render the Establishment Clause a virtual nullity.” *Id.* at 621. He also relied heavily on the fact that both Jefferson and Madison strongly disfavored various noncoercive state actions that nonetheless supported religion. *See id.* at 622-25.

The final section of Souter’s concurrence emphasized the principle of neutrality, which requires that “the State may not favor or endorse either religion generally over nonreligion or one religion over others.” *Id.* at 627.

Despite Kennedy’s emphasis on coercion, some commentators have read the majority opinion as not solely resting on coercion, but as suggesting that the prayer was also invalid because of the state’s involvement. In particular, they have read the parts of the opinion emphasizing the degree of state involvement with the prayer as establishing an independent basis for invalidation, rather than being part of the overall coercion analysis. *See* Daniel O. Conkle, *Lemon Lives*, 43 CASE W. RES. L. REV. 865, 875-79 (1993); Ronald C. Kahn, *God Save Us From the Coercion Test: Constitutive Decisionmaking, Polity Principles, and Religious Freedom*, 43 CASE W. RES. L. REV. 983, 998-1000 (1993). Admittedly, Justice Kennedy was less than clear on how the state’s extensive involvement with the challenged prayer related to his discussion of coercion. However, he began his analysis by stating that “[t]hese dominant facts mark and control the confines of our decision,” and then identified that state officials directed the prayer and that it was coercive. *Lee*, 505 U.S. at 586. This strongly suggests that it was a combination of the two that was the basis for the decision, which would appear to be affirmed by the general tone of Kennedy’s opinion as well as the apparent need for the concurring opinions to distance themselves from the coercion test.
Importantly, however, even those justices advocating inclusion of an endorsement standard emphasized the state’s role in such a test. Thus, both Justice Blackmun’s and Justice Souter’s concurring opinions spoke in terms of the problems of official state prayers constituting an unconstitutional endorsement of religion. In this respect, Souter’s opinion stressed endorsement as a dimension of the broader requirement of neutrality toward religion, which, according to Souter, is clearly violated when government itself endorses a particular view. Indeed, Souter suggested in a footnote that endorsement would not occur if a student speaker privately chose a religious message to deliver at graduation, stating: “If the State had chosen its graduation day speakers according to wholly secular criteria, and if one of those speakers (not a state actor) had individually chosen to deliver a religious message, it would have been harder to attribute an endorsement of religion to the State.”

The four dissenting justices, in an opinion by Justice Scalia, disagreed with each of the majority’s primary grounds for finding coercion, arguing that the state did not direct and control the prayer in question and disputing at length the majority’s conclusion that students were coerced to partici-

This, of course, does not mean that Lee established that both prongs of Kennedy’s analysis must be there to show an Establishment Clause violation. What it means, however, is that the invalidation of the prayer in Lee was based upon a combination of both substantial state involvement in the prayer and its coercive effect.

In discussing endorsement concerns that occur with school prayer, Justice Blackmun consistently used language suggesting the state’s own active participation in the prayer. See, e.g., Lee, 505 U.S. at 604 (Blackmun, J., concurring) (“But it is not enough that the government restrain from compelling religious practices: It must not engage in them either.”). Justice Souter also emphasized the state’s active involvement when discussing endorsement concerns. See, e.g., id. at 629-30 (Souter, J., concurring) (“[T]he government’s sponsorship of prayer at the graduation ceremony is most reasonably understood as an official endorsement of religion . . . .”)

While the Establishment Clause’s concept of neutrality is not self-revealing, our recent cases have invested it with specific content: the State may not favor or endorse either religion generally over nonreligion or one religion over others. This principle against favoritism and endorsement has become the foundation of Establishment Clause jurisprudence, ensuring that religious belief is irrelevant to every citizen’s standing in the political community.

Id. at 627 (Souter, J., concurring) (citations omitted).

Id. at 630 n.8 (Souter, J., concurring).
More fundamentally, however, the dissent said that historically the type of coercion necessary to violate the Establishment Clause was "coercion of religious orthodoxy and of financial support by force of law and threat of penalty," which was completely missing in this case. Scalia also distinguished the graduation prayers from the earlier Engel decision where students were compelled to attend school by law, the prayers took place in an instructional setting, and parents were absent, all of which presented concerns about state interference with the right of parents to direct their children's religious upbringing, a concern not at all present in Lee.

Although invalidating graduation prayers of the type involved in that case, the divisions within the Court in Lee created some uncertainty about the proper test for resolving Establishment Clause issues in the public schools. The only clear point of a majority agreement was that five members of the Court said that the type of coercion present in Lee, in which the state controlled a religious exercise which put indirect, but substantial, pressure on students to participate, violated the Establishment Clause. In essence, this is the coercion test previously championed by Justice Kennedy. Although prior decisions indicated that coercion was sufficient but not necessary for proving an Establishment Clause violation, only four members of the Court articulated such a position in Lee, arguing that endorsement continued to be a separate and viable Establishment Clause test. For that reason, some commentators suggested that the Kennedy coercion test had, in effect, become the appropriate Establishment Clause standard since it was the only one to garner a clear majority of the Court.

Lee also left uncertain whether religious exercises, such as prayer, might be permissible when involving less state control. Kennedy's majority
opinion discussed at length the various ways that the state was involved in the challenged prayer, suggesting that such state involvement was a necessary prerequisite for a finding of coercion.121 The concurring opinions also discussed state involvement as a significant factor under the endorsement test.122 This is in contrast to Mergens, where student-initiated religious activity, characterized by the plurality as private versus government speech, did not raise Establishment Clause concerns.123 Thus, Lee appeared to leave open the possibility of prayer at graduation and other school-related events if coming from students themselves rather than government.124 That set the stage for the Santa Fe decision.

II. SANTA FE INDEPENDENT SCHOOL DISTRICT V. DOE

A. Facts and Procedural History

The litigation in Santa Fe Independent School District v. Doe125 began in 1995 when the parents of two students sought a restraining order prohibiting prayer in violation of the Establishment Clause at upcoming graduation exercises. The complaint alleged that the school district permitted a number of unconstitutional religious activities in the schools,

121 See Lee, 505 U.S. at 586 (stating that the decision was confined by two dominant facts: the state’s involvement with the prayer and its coercive effect on students).
122 See id. at 604-09 (Blackmun, J., concurring); id. at 619-27 (Souter, J., concurring).
124 In his dissent, Justice Scalia said that, “[g]iven the odd basis for the Court’s decision,” all that would need to be done to make graduation prayers constitutional would be an announcement or written insertion stating “while all are asked to rise for the invocation and benediction, none is compelled to join in them, nor will be assumed, by rising, to have done so.” Lee, 505 U.S. at 644-45 (Scalia, J., dissenting). Scalia’s interpretation of the majority opinion is quite questionable and likely wrong. Not only would such an announcement completely fail to address the endorsement concerns of the concurring justices, but it also would not likely address the indirect coercion concerns of Kennedy’s majority opinion. Given his discussion of the psychological effects on participating students, it seems unlikely that a statement telling people they need not join would be sufficient.

As noted in the text, however, a substantial question remained after Lee regarding the validity of prayers lacking the substantial state involvement that existed in Lee.

including prayer at graduation ceremonies and at home football games. In response, the district court entered an interim order, which, among other things, permitted "non-denominational" prayer at graduation by students selected by the graduating class. In response to the district court order, the school district enacted a policy for graduation ceremonies which established a bifurcated student election on prayer. First, students would vote, by secret ballot, on whether to have an invocation and benediction as part of the graduation ceremony. Second, if the class chose to have a prayer, then it would elect by secret ballot, from a list of student volunteers, students to deliver the prayers.

Several months later, the school district adopted another policy, entitled "Prayer at Football Games," which was essentially the same procedure to govern prayer at home football games. As with graduation ceremonies, it first provided for a student election on whether to have prayer at home football games, and if the student body so chose, a second election to decide which student would deliver the prayer. Like the policy on graduation prayer, the football game policy did not contain a provision requiring that the prayer be nonsectarian, but it had a fallback provision requiring that the prayer be nonsectarian if the initial policy were enjoined on that basis.

Pursuant to this policy, the student body elected to have prayer at football games and chose a student to deliver the prayer. A short time later, the school district revised the policy slightly, deleting the word "prayer" from the title and referring to "messages" and "statements" as well as "invocations" in the text. Otherwise it remained the same, and it was this policy in its final form that eventually came before the Supreme Court.

The district court enjoined enforcement of the first policy on the grounds that it permitted sectarian prayers that would coerce other students

---

126 Id. at 295. The complaint alleged that, in addition to allowing students to give sectarian Christian prayers at graduation ceremonies and football games, the school district permitted several incidents where teachers promoted religion or chastised students for holding minority religious beliefs. In particular, a teacher had promoted in class attendance at a Baptist revival and had ridiculed a student for holding a minority religious belief. The teacher was subsequently reprimanded by the school district, however. See Doe v. Santa Fe Indep. Sch. Dist., 168 F.3d 806, 810 (5th Cir. 1999).
127 See Santa Fe, 530 U.S. at 296.
128 See id. at 296-98.
129 See id. at 297.
130 See id.
131 See id. at 298.
contrary to the Supreme Court's decision in Lee. It permitted the fallback policy, however, which contained the provision that all prayers must be nonsectarian, reasoning that a nonsectarian prayer would not coerce anyone to support a particular religious perspective.  

The Court of Appeals for the Fifth Circuit found both versions of the policy unconstitutional, with and without the limitation to nonsectarian prayers. In doing so, it relied on Fifth Circuit precedent, which drew a distinction between student-initiated prayer at graduation ceremonies, which was permissible, and prayer at sporting events, which was not. In Jones v. Clear Creek Independent School District, the Fifth Circuit had upheld a policy which provided for student-led prayer at graduation ceremonies if nonsectarian and adopted by a vote of the students, essentially the same policy adopted by the Santa Fe School District for graduation ceremonies. But in a subsequent decision, the Fifth Circuit had limited that policy to graduation ceremonies only because of the unique and solemn nature of such events and did not apply it to sports events, which the court considered neither unique nor solemn. On that basis, the court of appeals in Santa Fe struck down the prayer policy for football games. The Supreme Court granted the petition for certiorari, limiting its review only to the school district policy for football games.

B. Holding and Analysis

The Supreme Court, in a 6-3 decision, affirmed, holding that the policy permitting student-led prayer at football games violated the Establishment Clause. In finding the policy unconstitutional, the Court emphasized two distinct, but related, tests. The first and dominant part of the Court's analysis applied the coercion analysis developed in Lee, first examining at

---

132 See id. at 299.
133 See Doe v. Santa Fe Indep. Sch. Dist., 168 F.3d 806 (5th Cir. 1999).
134 See id. at 823.
136 See id. at 972.
138 Doe, 168 F.3d at 823.
139 The Supreme Court in Santa Fe specifically stated that its decision was limited to the policy for pregame prayer at sporting events. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 301 (2000).
140 Id.
length why the prayer was government, and not private, speech, and then discussing why it was an indirect, but substantial, coercion of those attending football games. Second, the Court also said the policy was facially invalid for two additional reasons: because by promoting prayer it lacked a secular purpose under Lemon and because “it impermissibly impose[d] upon the student body a majoritarian election on the issue of prayer.”

The Court began by establishing that the school prayer policy was unconstitutionally coercive under the principles established in Lee. The discussion began with an extended analysis of why the prayers in question were not merely private speech but were the result of significant state involvement, as in Lee. In doing so, the Court rejected what appeared to be the school district’s primary argument, that the prayers in question were private, not government, speech, and thus were governed by Mergens rather than Lee. In particular, the school district argued that permitting the students to decide whether to have prayer acted as a “circuit-breaker,” in effect cutting off any state involvement in the decision and turning it over to the students. This arguably made the process distinct from that in Lee, where the Court emphasized that the school principal decided whether to pray and who was to pray and gave advice on how to pray. According to the school district, the circuit-breaker mechanism avoided all those concerns by turning each of the decisions over to the students.

The Supreme Court rejected that argument, characterizing the prayer as public speech. Although the Court agreed with the Mergens’s plurality that “there 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

141 See id. at 301-10.
142 See id. at 310-13.
143 See id. at 314-15.
144 Id. at 316.
145 Id. at 302. The Court began its analysis by stating that “our analysis is properly guided by the principles that we endorsed in Lee.” Id. The next two sections of its analysis then closely tracked the two-part coercion test established in Lee. See id. at 302-10.
146 See id. at 301-10.
147 See id. at 305.
148 See id. at 305-06.
149 Id. at 309-10.
protect," the Court rejected the private label in this case for several reasons. First, the prayer could not be justified under the Court's public forum doctrine, although in several previous cases the Court had permitted religious speech on school property when part of a broader forum.\textsuperscript{151} The pregame ceremony was quite different than the fora giving rise to protected student speech in other cases, such as \textit{Mergens, Widmar v. Vincent,}\textsuperscript{152} and \textit{Rosenberger v. Rector of the University of Virginia,}\textsuperscript{153} each of which involved clearly religious activity within a broader forum of student groups.\textsuperscript{154} Although the Court acknowledged that even a single speaker might qualify as a limited public forum if a free range of opinions could be expressed, that was not the case here.\textsuperscript{155} Rather, by submitting the decision to a student vote, the school district assured that only majoritarian views would be expressed and that minority views would be silenced.\textsuperscript{156}

\begin{footnotesize}
\textsuperscript{150} Id. at 302 (quoting Bd. of Educ. of Westside Cmty. Sch. v. Mergens, 496 U.S. 226, 250 (1990) (O'Connor, J., plurality opinion)).

\textsuperscript{151} See id. at 302-04. According to the Court, those previous cases established that a student's contribution to a government created forum is not government speech, even if it is "authorized by a government policy and take[s] place on government property at government-sponsored school-related events." \textit{Id.} at 302.

\textsuperscript{152} Widmar v. Vincent, 454 U.S. 263, 273-75 (1981) (indicating that a public university cannot prohibit a religious group from using campus facilities when such use of facilities are extended to non-religious groups).

\textsuperscript{153} Rosenberger v. Rector of the Univ. of Va., 515 U.S. 819 (1995). The Court in \textit{Rosenberger} held that to deny funding to a religious student publication while giving funding to non-religious student publications constituted content discrimination and violated the free speech rights of the religious group. \textit{Id.} at 837. Moreover, to provide funding to the religious publication did not violate the Establishment Clause since the state would not be favoring religion but would be treating it neutrally. \textit{Id.} at 845.

\textsuperscript{154} The Court in \textit{Santa Fe} distinguished \textit{Rosenberger} and other public forum cases by noting that there was no intention "to open the [pregame ceremony] to 'indiscriminate use,' ... by the student body generally." \textit{Santa Fe}, 530 U.S. at 303 (quoting Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 270 (1988)). Rather, the school district policy allowed only one student to give the invocation the entire season, subject to restrictions on the content and topic of what was said. \textit{See id.}

\textsuperscript{155} Id. at 304 ("Granting only one student access to the stage at a time does not, of course, necessarily preclude a finding that a school has created a limited public forum.")

\textsuperscript{156} See id. at 304-05. The Court stressed how it had long stated that "fundamental rights may not be submitted to vote; they depend on the outcome of no elections." \textit{Id.} (quoting W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943)). In particular, it had noted earlier in the same term, in \textit{Board of Regents of
The Court then proceeded to analyze the actual degree of state involvement with the pregame prayer, focusing on two basic concerns. First, and most significant, the Court emphasized several ways in which the school district encouraged and promoted the prayer in question. Although the students voted on whether to have a prayer, the decision to have a vote at all was made by the school district,\(^5\) thus initiating a process that was in all likelihood going to result in a decision to pray. Moreover, by stating that the purpose of the pregame ceremony was to “solemnize the event,” the policy appeared to invite religious messages.\(^5\) Further, the only type of message specifically mentioned in the text of the policy was an “invocation,” commonly understood as a prayer.\(^5\) Thus, there was no doubt that the students were being asked whether they wanted prayer, with the very question itself being a form of endorsement of the practice.\(^6\)

Second, the Court noted that endorsement of the pregame ceremony was also fostered by the setting in which it was delivered. The prayer involved “a large audience assembled as part of a regularly scheduled, school-sponsored function conducted on school property.”\(^6\) The Court recognized several other ways that the school might be perceived as involved, including use of the school’s public address system; the team, band, and cheerleaders dressed in uniforms bearing the school name; and the likelihood of signs, banners, and even articles of clothing reflecting the school colors and name.\(^6\) Relying on the “objective observer” standard associated with the endorsement test, the Court concluded that “an objective Santa Fe High School student will unquestionably perceive the inevitable pregame prayer as stamped with her school’s seal of approval.”\(^6\)

---

\(^1\) See University of Wisconsin System v. Southworth, 529 U.S. 217, 235 (2000), the problematic nature of student elections determining free speech rights. See Santa Fe, 530 U.S. at 304.

\(^5\) See Santa Fe, 530 U.S. at 306-07.

\(^6\) Id. at 306 (citation omitted).

\(^7\) See id. at 307.

\(^8\) Id.

\(^9\) See id. at 307.

\(^10\) Id. at 307-08.

\(^11\) Id. at 308. In reaching this conclusion it was unclear whether the Court considered this second group of factors enough, by themselves, to create a perception of endorsement, or whether they merely lent further support to the Court’s earlier discussion of the school district’s actual involvement in the prayer. The Court was also less than precise in how it was using the endorsement analysis at this point. In rejecting the school district’s argument that the pregame ceremony involved only private speech, the Court emphasized in several places that the effect of the
After establishing that the pregame ceremony was government-promoted, rather than private, speech, the Court rather quickly explained why it was coercive and therefore unconstitutional under *Lee*. First, the Court rejected the school district's argument that there was no coercion because the prayers were the result of student choice. The analysis used to show why the "circuit-breaker" argument failed to make the speech private also demonstrates why the school is not insulated "from the coercive element of the final message." Second, the Court rejected the argument that there was no coercion because attendance at football games was voluntary and lacked the informal pressure to attend that a graduation would have. The Court pointed out that, in fact, a number of students typically are required to attend games, such as players, bandmembers, and cheerleaders. However, even if attendance were completely voluntary, the Court noted the important role such extracurricular activities play in high school, which creates both a strong desire to participate and even social pressure to be involved. The Court stated that the state cannot take advantage of this pressure to coerce those present to participate in a religious exercise.

government's involvement was to create a perception of endorsement, even using the "objective observer" test at one point. See id. at 308. However, nowhere did the Court clearly indicate that this endorsement alone lead to an Establishment Clause violation. Rather, the Court indicated that endorsement helped to establish the state's involvement in the prayer, a necessary prerequisite to the coercion discussion that followed, although the Court did state near the end of this first part of its analysis that "[s]chool sponsorship of a religious message is impermissible because it sends the ancillary message" to nonadherents that they are outsiders. Id. at 309. More broadly, the Court did not appear to use the endorsement standard as an independent ground for striking down the pregame prayer. See id.

Several reasons support reading the endorsement discussion in *Santa Fe* as simply further evidence of state involvement under the coercion test, rather than being an independent basis for invalidating the pregame prayer. First is the absence of any clear statement by the Court that it was an independent basis. Second, the Court proceeded to discuss the problem of indirect coercion, which would have been unnecessary if endorsement itself was a basis for invalidation. At a minimum, the Court should have clarified that the coercion problems were an *additional* ground for finding the practice unconstitutional, but it instead treated it as central to its holding. Finally, it is hard to believe Justice Kennedy would have joined the majority opinion given his previous explicit statements that endorsement is not enough to show an Establishment Clause violation. See Bd. of Educ. of Westside Cmty. Sch. v. Mergens, 496 U.S. 226, 260-61 (1990) (Kennedy, J., concurring).

---

164 *Santa Fe*, 530 U.S. at 309-10.
165 Id. at 310.
166 See id. at 311-12.
Finally, in the last section of the opinion, the Court gave two reasons why the policy was facially invalid, responding to a school district argument that any challenge was premature because there was no certainty under the latest version of the policy that any of the statements would be religious. First, the Court indicated that the clear purpose of the policy was to promote prayer and thus failed the first prong of the *Lemon* tripartite test, which requires that government acts have a secular purpose. The Court emphasized concerns previously discussed under the first part of its coercion analysis, in particular noting that by specifying invocations, the policy was asking for a vote on prayer and not establishing a content-neutral limited forum. Moreover, the Court said that it could not ignore the history leading up to the policy and the context in which it was adopted, which left no doubt that it "was implemented with the purpose of endorsing school prayer."  

Second, the Court also found the policy facially invalid because the election process permitted a majoritarian view to be imposed on religious minorities. According to the Court, this turned the school into a forum for religious debate and undermined essential protection of minority viewpoints. The Court noted that it had already held unconstitutional a student referendum policy that placed minority viewpoints at the mercy of the majority, and that the election scheme in *Santa Fe* posed essentially the same problem. Thus, the mere establishment of a voting scheme "which entrusts the inherently nongovernmental subject of religion to a majoritarian vote" violated the Constitution.

C. Summary

Although somewhat disjointed in its approach, the Court’s decision in *Santa Fe* established three distinct grounds for finding the school’s election

---

167 See id. at 313-16. As noted earlier, subsequent to the election of a student speaker to deliver a prayer, the school district revised its policy to omit the word prayer and instead refer to "messages," "statements," and "invocations." Id. at 298.

168 See id. at 314-16.

169 See id. at 315-17.

170 Id. at 315.

171 Id. at 304.


173 *Santa Fe*, 530 U.S. at 304-05.

174 Id. at 317.
on prayer at football games unconstitutional. First, the majority's decision focused on the coercive and therefore unconstitutional nature of any prayer that might be offered. The Court essentially applied the two-step coercion analysis established in *Lee*, examining in-depth the type and degree of state involvement with the prayer in question and then discussing its coercive effect upon attending students. Second, the Court found that the prayer policy itself was facially unconstitutional because it was clearly designed to promote prayer and thus lacked a secular purpose. Third, the Court held that structuring a vote that permitted majoritarian religious views to be imposed on religious minorities violated minority rights.

Though largely fitting within prior Establishment Clause analysis, *Santa Fe* clarified the parameters of analysis in several important respects. First, it made clear that simply turning over to students the final decision on whether to pray or who was to pray did not negate broader state involvement. Although, on the surface, the Santa Fe School District's policy seemed to address some of the central concerns about state involvement expressed in *Lee*, the Court was correct in examining the broader school policy. Similarly, the Court clarified that coercion concerns were not limited to mandatory or de facto mandatory activities, but also applied to activities of an admittedly more voluntary nature that can be viewed as part of ordinary student life. This made sense since such students are still put in the untenable position of having to choose between activities commonly associated with high school life and being subjected to state-sponsored religious activities.

That being said, the real and most fundamental message of *Santa Fe* is simply this: The state has no business promoting prayer in schools and any attempt to do so will be unconstitutional. That message is not new, of course, but the Court said it with particular force and made clear the extent to which it is willing to apply the principle. Thus, not only does this prohibit the state itself from deciding whether to pray, but it prohibits giving that decision to students in a way that promotes prayer. Moreover, the Court reiterated what had been made clear in *Wallace*—any state attempt to promote prayer would be unconstitutional.

In sending this message, however, the Court made it clear that state involvement in prayer made the prayer in *Santa Fe* unconstitutional—not

---

175 See id. at 301-13.
176 See id. at 314-15.
177 See id. at 316-17.
178 See id. at 311-13.
prayer per se. At each stage of its analysis, the Court emphasized that it was the state's own involvement with, and promotion of, prayer that was problematic. Thus, in finding that any offered prayers would be unconstitutionally coercive, the Court discussed at length the state's role in the prayers.\footnote{See id. at 301-10.} Similarly, the policy was facially unconstitutional because it involved state encouragement of prayer.\footnote{See id. at 316.} The Court even noted that its finding that the majoritarian scheme was unconstitutional was predicated on its earlier analysis that "the resulting religious message under this policy would be attributable to the school" and not to students.\footnote{Id. at 316 n.23.}

Conversely, while suggesting that the state's own promotion of prayer was inevitably unconstitutional, the Court stressed throughout the opinion that a student's own choice to pray within appropriate fora was permissible. It began its analysis by agreeing with the Mergens plurality statement that "there 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."\footnote{Id. at 302 (quoting Bd. of Educ. of Westside Cmty. Sch. v. Mergens, 496 U.S. 226, 250 (1990) (O'Connor, J., plurality opinion)).} At the end of its coercion analysis, the Court again stressed this fundamental distinction, stating: "Thus, nothing in the Constitution as interpreted by this Court prohibits any public school student from voluntarily praying at any time before, during, or after the school-day. But the religious liberty protected by the Constitution is abridged when the State affirmatively sponsors the particular religious practice of prayer."\footnote{Id. at 313.}

Indeed, the Court in Santa Fe strongly affirmed the basic distinction between truly student-initiated prayer on the one hand, and government-sponsored prayer on the other. This distinction goes to the heart of monitoring religious activity in public schools and has arguably become the most significant factor in distinguishing between what is permissible and impermissible. Therefore, although Santa Fe left no doubt that the state itself has no business promoting prayer, even in the subtlest of ways, the Court continued to affirm that students themselves can choose to pray when truly the result of voluntary choice. The next section of this Article will examine the dual establishment and free speech rationales supporting this central distinction.

\footnote{See id. at 301-10.} \footnote{See id. at 316.} \footnote{Id. at 316 n.23.} \footnote{Id. at 302 (quoting Bd. of Educ. of Westside Cmty. Sch. v. Mergens, 496 U.S. 226, 250 (1990) (O'Connor, J., plurality opinion)).} \footnote{Id. at 313.}
III. ACCOMMODATING ESTABLISHMENT AND FREE
SPEECH CONCERNS: DISTINGUISHING BETWEEN STATE-SPONSORED
AND STUDENT-INITIATED PRAYER

In analyzing the prayer in public school cases, the Supreme Court has
resorted to a variety of legal standards, including neutrality, coercion, and endorsement. The
cocircion and endorsement standards have been particularly significant in
recent years, with the Court explicitly applying a coercion standard in Lee and Santa Fe accompanied by a strong endorsement undercurrent. Indeed,
two recent decisions, Mergens and Lee, involved a significant debate within
the Court over whether a coercion or endorsement standard should be
applied in resolving school prayer cases.

Throughout these recent cases, however, the Court has frequently
alluded to another, perhaps more central, distinction between state-
sponsored and student-initiated prayer. This distinction formed the basis for
permitting the student religious club in Mergens. Moreover, the Court in
both Lee and Santa Fe affirmed this basic distinction between prohibited
government prayer and permissible student prayer. Indeed, the Court in
Santa Fe both began and concluded its analysis with reference to this basic
distinction, emphasizing the central distinction between prohibited
government prayer and permitted student-initiated prayer.

184 See Wallace v. Jaffree, 472 U.S. 38, 60 (1985); Abington Sch. Dist. v.
185 See Wallace, 472 U.S. at 55-56.
186 See Santa Fe, 530 U.S. at 309-13; Lee v. Weisman, 505 U.S. 577, 592-94
187 See Lee, 505 U.S. at 618-26 (Souter, J., concurring); Bd. of Educ. of
Westside Cmty. Sch. v. Mergens, 496 U.S. 226, 248-52 (1990) (O’Connor, J.,
plurality opinion); see also Santa Fe, 530 U.S. at 307-08 (discussing endorsement
concerns).
188 See supra notes 63-124 and accompanying text.
189 The Court began its discussion by quoting the Mergens plurality that “there
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.” Santa Fe, 530 U.S. at 302
(quoting Mergens, 496 U.S. at 250 (O’Connor, J., plurality opinion)). The Court
concluded its discussion by stating: “Thus, nothing in the Constitution as
interpreted by this Court prohibits any public school student from voluntarily
praying at any time before, during, or after the schoolday. But the religious liberty
protected by the Constitution is abridged when the State affirmatively sponsors the
particular religious practice of prayer.” Id. at 313.
Taken together, the six prayer in public school cases essentially establish a central distinction between prohibited government prayer and permitted voluntary student prayer. The clear message of Santa Fe, Lee, Wallace, Schempp, and Engel is that the state has no business sponsoring, promoting, or even encouraging prayer in public schools. This is true whether the state itself tells students how to pray, as in the earlier cases, or simply promotes prayer for students to say on their own. In either situation, the Court has said that the state should not be in the business of prayer, especially as it relates to schools. At the same time, Mergens clearly affirmed that students themselves have a right to initiate private, voluntary prayer in public schools. Not only does this not violate the Establishment Clause, but denying student access to prayer when other groups are permitted likely violates their free speech rights.

Thus, apart from discussions of coercion and endorsement, the school prayer cases can be read as establishing a central distinction between affirmatively sponsored school prayer, which the Establishment Clause prohibits, and student-initiated prayer, which the Free Speech Clause protects. This distinction is not necessarily at odds with the coercion or endorsement tests since both coercion and endorsement concerns are largely predicated on state involvement and are minimized or absent altogether for student-initiated activities. But the distinction between state-sponsored and student-initiated prayer focuses the relevant constitutional inquiry and directly highlights the accompanying constitutional values.

In particular, use of the state-sponsored/student-initiated distinction as the primary starting point for analyzing school prayer cases makes sense for three reasons. First, the primary concerns that animate the school prayer debate are ones that arise from the state’s own involvement in prayer, not from that of students. The most central concern is that the Establishment Clause clearly forbids the state itself from promoting a particular religious perspective, which state-sponsored prayer clearly does. The early prayer cases, as well as Lee, strongly emphasized that the fear of any state-created orthodoxy lays at the heart of concerns about school prayer. Thus, the

---

190 The Court’s prayer decisions have long stressed the paramount concern that government cannot require people to pray in a particular manner. See, e.g., Engel v. Vitale, 370 U.S. 421, 425 (1962) (“[I]t 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.”).

191 See Lee, 505 U.S. at 592 (“A state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed.”); Engel, 370 U.S. at 429 (explaining that the First Amendment was designed to prevent government from using its power “to control, support
most central dangers posed by school prayer are those triggered by government’s own active promotion of a religious perspective.

Second, the state-sponsored/student-initiated distinction best balances the dual concerns of avoiding establishment problems while preserving student autonomy and speech rights. Whereas the coercion and endorsement analyses primarily focus on the Establishment Clause, the prohibited state prayer versus student prayer distinction more clearly brings in the dual concerns of establishment and speech. As a practical matter, these constitutional mandates are not in competition with regard to school prayer; rather, they complement each other. Yet any attempt at establishing the boundary between permissible and impermissible school prayer must necessarily be informed by both Establishment Clause and free speech interests, which the state-sponsored/student-initiated distinction does best.

Third, the distinction between voluntary student prayer and state-sponsored prayer is also one that comports with the central First Amendment principle of neutrality, a principle that bridges both Establishment Clause and free speech jurisprudence. As noted earlier, government neutrality toward religion is one of the oldest and most consistently applied Establishment Clause principles, and in recent years it has arguably become the Court’s primary benchmark in analyzing Establishment Clause issues. Similarly, neutrality has long been the Court’s principal focus of

or influence the kinds of prayer the American people can say”).


free speech jurisprudence, with content-neutrality being the Court’s primary analytical tool. In this respect, neutrality is a central analytical bridge between Establishment and free speech concerns, both of which are at play with regard to school prayer.

For all of these reasons, a focus on distinguishing between state-sponsored and student-initiated prayer—a distinction the Court itself has emphasized—is an eminently sensible starting point for setting the boundaries between permissible and impermissible prayer. As established by the Court itself, this distinction prohibits any state promotion of prayer, no matter how minor. This is necessarily a more expansive prohibition than that imposed by a coercion standard, which would additionally require a showing of coercion. Although it has been lenient in finding coercion when this standard is applied, the Court nevertheless only prohibits state-promoted prayer that is coercive.

On the other hand, the distinction permits student-initiated prayer in a voluntary setting. This does not mean that students can pray whenever they want, no more than they can speak on any of a number of topics whenever they want. Rather, a student’s right to speak, or pray for that matter, is necessarily contingent on several variables, most notably an appropriate forum for the speech.


196 Although the Supreme Court held in Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969), that the right to free speech extends to high school students at school, it made clear that such speech is subject to the school’s educational function. Thus, speech that would disrupt school
understood as involving a forum where prayer is one of several possible responses left entirely to the initiative and choice of the students. Examples might include prayer at the lunch table with friends or the creation of a religious club as in Mergens.\footnote{See supra notes 63-92 and accompanying text.}

To date, each of the Court’s school prayer cases clearly falls into one of these two categories, with five cases involving impermissible state efforts to promote prayer (Engel, Schempp, Wallace, Lee, and Santa Fe) and one case involving permissible voluntary student prayer (Mergens). A third possible category, falling somewhere between these two, would be truly student-initiated prayer involving a captive audience. This raises sensitive concerns on both sides of the issue and is the “blurred” boundary in this area. Although the Court in dictum has suggested that such prayer might be permissible in very limited situations, it has not clearly addressed the issue.\footnote{See infra notes 254-61 and accompanying text.}

The rest of this section will discuss each of the three categories of school prayer suggested above. Subsection A will discuss why the Court has correctly held that any state-sponsored prayer, even when relatively minor, should be unconstitutional.\footnote{See infra notes 202-22 and accompanying text.} Subsection B will discuss why truly voluntary and student-initiated prayer in public schools poses no threat to the Establishment Clause and, indeed, should be protected under the Free Speech Clause.\footnote{See infra notes 223-53 and accompanying text.} Subsection C will then look at some of the general concerns in resolving the issue of student-initiated prayer with a captive audience.\footnote{See infra notes 254-61 and accompanying text.}

A. Why State-promoted School Prayer is Unconstitutional

Prayer, by most accounts, is a good thing, and voluntary student prayer in public schools is a constitutional activity. Why, then, has the Court drawn what appears to be a rather rigid line prohibiting the state’s own efforts to encourage and promote school prayer, no matter how minor those efforts might appear? This has included not only the more obvious cases, where the state itself was telling students how to pray in admittedly coercive environments, but also more recent attempts and arguably less
threatening situations where the state promoted prayer by students themselves.

On one level, of course, the answer is simply that even relatively minor efforts to promote prayer violate broader Establishment Clause tests for governing the proper relationship between church and state. In Wallace v. Jaffree, for example, the Court struck down the Alabama statute providing for a "moment of meditation and prayer" because it was clear from the record that it completely failed to have a secular purpose under the first prong of the Lemon test. Similarly, government efforts to promote school prayer, no matter how minor, obviously violate the central Establishment Clause principle of neutrality since, in promoting prayer, the state has taken the side of religion.

Thus, the prohibition on state-promoted prayer in public school cases can, in part, be understood as simply one component of a broader judicial attitude toward the proper relationship between church and state. The Court has clearly indicated, however, that school prayer raises specific concerns unique to its setting that reflect principles at the heart of the Establishment Clause. At this level, school prayer arguably reflects the intersection of two highly compelling concerns: the avoidance of state-created orthodoxy and the particularly impressionable status of elementary and, to a lesser extent, secondary school students. These two concerns, the dangers of state-created orthodoxy and the impressionable status of school children, best explain the particularly problematic nature of state-sponsored school prayer and the Court's rigid enforcement against any state-initiated prayer.

The first of the two intersecting concerns is that the state has no business promoting prayer because of the threat it poses to religious freedom, a proposition that is both historically sound and eminently sensible. Although the history leading up to and surrounding adoption of the Religion Clauses is subject to significant disagreement on numerous issues, it seems clear that one purpose was to preserve freedom of worship and to avoid state-approved orthodoxy. Indeed, as emphasized in Engel,
the Establishment Clause was, in part, designed to avoid the problems experienced due to the established churches in Europe from which the early colonists fled.206 Central to this were concerns over state-mandated beliefs and compelled worship.207 Although our own colonial history itself reflected some of those same concerns, by the time of the Bill of Rights there was certainly a consensus that people should be free to worship as their conscience dictated, without being told by government what to do or not to do. In particular, this precluded government from directing religious worship and exercises and from creating any orthodoxy itself.

The threat to this freedom of worship by government-promoted prayer should be apparent. To tell people how to pray, or even whether to pray, creates a form of government orthodoxy in an area central to religious expression. There is perhaps no more personal aspect of religion than prayer, and to many it is closely related to the act of worship itself.208
Government involvement with prayer is therefore government involvement with a core religious practice, one integrally involved with worship. For similar reasons, for government to involve itself with prayer is in some respect akin to establishing a state-approved orthodoxy since it touches upon a central religious tenet.

This is true even when such prayer and worship are not compelled, but only promoted by the state in a voluntary setting. Putting aside for the moment the indirect coercion often experienced in voluntary contexts, the government is still trying to direct and influence core religious practices. This in itself is a form of state orthodoxy—the state is putting its stamp of approval on a particular belief or variety of beliefs as correct and is trying to influence its citizens in that regard. This path is constitutionally and historically a very dangerous one to follow since, as innocuous as the start may seem, it might well lead to substantial infringement of religious freedom at some point. This concern was at the heart of the Court’s analysis in both *Engel* and *Schempp* and was strongly affirmed again in *Lee*.

There are, of course, different degrees of state involvement with prayer, with some types of involvement presenting more serious concerns than others. There is little doubt that the state involvement in *Engel* and *Schempp*, where the state composed or selected a particular prayer for children themselves to recite daily, was more egregious than the involvement in *Wallace*, where time was given to students to pray on their own, or in *Lee*, where those at a graduation ceremony had to listen to someone else pray. The state’s approval of orthodoxy is less obvious in the latter two cases and the intrusion into personal beliefs less severe. Yet even when the state merely advocates prayer in such ways, it is involving itself in a sensitive and core arena of religious practice.

Moreover, as much as a state might want to, it is extremely difficult for the state to avoid endorsing a particular orthodoxy. Beyond the obvious fact that prayer itself represents a particular religious viewpoint, attempts by the state to create nonoffensive and innocuous prayer themselves plunge the state into the act of shaping prayer content in a way that is highly problematic.

---

209 The concern that what might appear to be harmless prayers might eventually lead to substantial infringement of religious freedom was particularly stressed in *Engel*. There the Court acknowledged that the prayer in question might seem insignificant compared to the types of religious establishments commonplace 200 years ago but quoted from James Madison’s warning that “[i]t is proper to take alarm at the first experiment on our liberties.” *Engel*, 370 U.S. at 436.
PRAYER IN PUBLIC SCHOOLS

atic. This was most apparent in *Lee*, where the Court properly chastised the school district for advising the rabbi that the prayer should be nonsectarian and for giving guidelines on how to pray at public occasions. As well-intentioned as such efforts are, they involve the state not only in promoting prayer but in shaping its content. In doing so, the state has simply replaced one orthodoxy with another one of its own making. As noted in *Lee*, the fact that fewer people are offended does not make the situation any better, especially since the sense of alienation for nonadherents will be even greater. More fundamentally, for the state itself to tell people how to pray properly is a dangerous thought and one that strikes at the heart of the Establishment Clause. Yet, caught in a dilemma between wanting to promote prayer but not wanting to offend others, such state efforts to direct the content of the prayers it is promoting will likely be a common occurrence.

For all of these reasons, state involvement in prayer is a bad idea and certainly raises concerns at the heart of the Establishment Clause. Yet what makes school prayer especially problematic is its intersection with children, who are particularly susceptible to the impacts of such state involvement. The Court has permitted state-promoted prayer in other limited contexts, most notably in *Marsh v. Chambers* where it upheld against an Establishment Clause challenge the practice of opening legislative sessions with prayer, emphasizing the long historical record of such practices. Where state-sponsored prayer involves school children, however, the Court has emphasized the impressionable and vulnerable nature of such children and therefore has guarded more carefully against concerns presented by state prayer. Indeed, the Court has frequently characterized elementary and secondary schools as being constitutionally sensitive in this regard, calling for greater judicial scrutiny.

---

201 See *Lee*, 505 U.S. at 588-89; see also *Engel*, 370 U.S. at 425 ("It is no part of the business of government to compose official prayers for any group of American people to recite as a part of a religious program carried on by government.").

211 See *Lee*, 505 U.S. at 594.


213 *Id.* at 795.


215 See *Edwards v. Aguillar*, 482 U.S. 578, 583-84 (1987) ("The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools.").
The impressionable and vulnerable status of children is made apparent in relation to the two themes of coercion and endorsement frequently emphasized in the school prayer cases. As noted in *Lee*, the problem of coercion might not be limited to public elementary and secondary schools, "but it is most pronounced there." School children are susceptible to both public and peer pressure to conform and will often not want to be thought of as different from their peers. Thus, even where students are told they can choose not to participate, there is an indirect, yet substantial, pressure to conform. Students are therefore presented with a dilemma of participating or protesting. The Court in *Lee* reserved judgment with regard to mature adults, but made clear that it was invalid with students.

For similar reasons, endorsement concerns are most pronounced in a school setting. Although it is unclear whether an independent endorsement test is to be applied, endorsement concerns have been a consistent theme in the decisions, most recently in *Santa Fe*. The essence of endorsement analysis is that the state cannot endorse a particular religious perspective, in part because it sends a clear message to those who might not share the endorsed beliefs that they are "outsiders." These concerns are certainly most pronounced with regard to school children. The less mature and more impressionable nature of children increases the likelihood that they will interpret state involvement as an endorsement of a religious view. This is particularly true with younger children, though, depending upon the nature of the state involvement, it might also occur at the secondary level. Perhaps more significant, however, is that the effects of such endorsement—the perception of being an outsider—are much greater for students.

The Court’s heightened sensitivity about religion in schools is, therefore, in part based on the impressionable nature of school children and

---

216 *Lee*, 505 U.S. at 592.
218 See supra notes 103-06 and accompanying text.
220 The Court’s primary proponent of the endorsement test, Justice O’Connor, has often stated that the problem with state endorsement of religion is that it “sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.” *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring); *Wallace v. Jaffree*, 472 U.S. 38, 69 (1985) (O’Connor, J., concurring) (quoting *Lynch*). Other justices have expressed similar concerns. See, e.g., *Lee*, 505 U.S. at 606-07 (Blackmun, J., concurring). Also, the majority in *Santa Fe* acknowledged this concern. See *Santa Fe*, 530 U.S. at 309-10.
the concomitant coercion and endorsement concerns presented. Perhaps even more fundamental, however, is the simple fact that the religious upbringing of children is such an important and personal responsibility of parents and family that the state should avoid any interference with it. Justice Brennan alluded to such a concern in his concurring opinion in Schempp, where he emphasized that the choices involved in sending a student to a religious or secular school should be left up to the individual parents, a policy that is frustrated when public schools interject prayer.22 This reflects the fundamental principle that, because of its extreme importance and integral role in development of self, religious instruction should be left in the hands of parents, free from state interference. When the state promotes religious beliefs, however, it does exactly that, interjecting itself into the role of religious educator, a role historically and properly reserved for parents.222

Perhaps more than anything else, this concern best explains the Court’s sensitivity to interjecting religion in public schools. As threatening as state-created orthodoxy is, it is even worse when the state attempts to inculcate religious values into children. State-sponsored school prayer, in any form, does exactly that. In effect, the state is sending a message that one should pray and, almost inevitably, how one should pray. To prohibit the state from entering such an arena does not minimize religious values but simply acknowledges that their formation is properly left to the family.

B. Free Speech and Student-initiated Prayer

In contrast to state-promoted prayer, students themselves might initiate prayer in a voluntary setting. As noted above, the Court has clearly indicated that such prayer is not only permissible, but is often protected speech.223

222 The Court has recognized that our society places a high value on reserving religious education to parents, free from state interference. See Wisconsin v. Yoder, 406 U.S. 205, 213-14 (1972) ("[T]he values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society."); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925) (finding that the liberty interest of parents to direct the upbringing and education of children includes the right to private religious education).
The right of students to initiate prayer within a broader forum of speech opportunities is informed by both establishment and free speech jurisprudence. On the one hand, where students themselves choose prayer among various speech options, the concerns animating Establishment Clause jurisprudence are not present. Not only is the state itself not promoting prayer, coercion and endorsement concerns are minimal or absent altogether. The coercion analysis used in both *Lee* and *Santa Fe* was predicated on the state's own active involvement in the prayer, which is not present when students initiate the prayer. Similarly, unlike state-promoted prayer, which potentially carries a message of state endorsement, student-initiated prayer carries no such message. If anything, the state is merely endorsing students' free speech rights.

More fundamentally, the state is acting neutrally when it permits students to pray within a broader forum context. As noted earlier, neutrality is one of the oldest and most important Establishment Clause principles, playing a central role in the early school prayer cases, and has arguably become the central Establishment Clause principle in recent years. By allowing students themselves to choose prayer among various options, such as in the formation of student clubs, the state is steering a completely neutral course. Indeed, to prohibit prayer while allowing other activities reflects "not neutrality but hostility to religion." On the other hand, student free speech concerns are strongly implicated when students themselves choose prayer within a broader forum of options. Students, of course, do not have a right to speak at any or all times in a school. Speech rights are necessarily contextual, and this applies with particular force in public elementary and secondary schools. In the same

---

224 See *Santa Fe*, 530 U.S. at 302-10; *Lee*, 505 U.S. at 586-88.
227 *Mergens*, 496 U.S. at 248 (O'Connor, J., plurality opinion).
228 The Supreme Court has frequently stated that speech can be subject to reasonable time, place, and manner restrictions. See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781 (1989); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288 (1984). The Court has indicated that this is particularly true with regard to public schools, whose primary purpose is education, and speech interests must
way that speech can be regulated in a content-neutral manner to serve important societal interests, so too can it be regulated to avoid interference with educational objectives. Thus, students can be prohibited from disrupting class and can be required to conform to curricular assignments.\textsuperscript{229}

Yet student speech interests are clearly triggered when the school provides a forum for broader speech activities. In such situations, the Court has indicated that, once a forum is created, the state cannot discriminate on the basis of speech content.\textsuperscript{230} This is true even if the state was not required to establish a forum to permit speech in the first instance.\textsuperscript{231} Known as the "designated forum" doctrine, the Court has consistently required in various settings that, once a public forum is created for speech purposes, the state cannot discriminate on the basis of speech content.\textsuperscript{232} Indeed, the requirement of content-neutrality has emerged as the most central concept in free speech jurisprudence.\textsuperscript{233} Importantly, the Court has applied this requirement to a variety of religious forms of speech, such as proselytizing, the sale of religious literature, preaching, and worship,\textsuperscript{234} making clear that prayer and worship are forms of speech for free speech purposes.

As noted in Part I, the Court in \textit{Mergens} did not expressly base its decision on the Free Speech Clause, finding instead that the students' rights yield to that broader objective. Thus, even though students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," \textit{Tinker} v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969), speech cannot interfere with the school's educational objectives. \textit{Id.} at 509. Moreover, the Court has also indicated that schools have substantial latitude in restricting vulgar speech at school, see \textit{Bethel Sch. Dist. No. 403 v. Fraser}, 478 U.S. 675 (1986), and in regulating speech in response to curricular or quasi-curricular activities. See \textit{Hazelwood Sch. Dist. v. Kuhlmeier}, 484 U.S. 260, 273 (1988).

\textsuperscript{229} See \textit{Tinker}, 393 U.S. at 509 (schools can restrict speech that would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school"); \textit{Hazelwood}, 484 U.S. at 273 (schools can control student speech as it relates to curriculum).


\textsuperscript{232} See \textit{SMOLLA}, supra note 194, §§ 8.5-8.7.

\textsuperscript{233} For discussion of the central role that the requirement of content-neutrality has in free speech jurisprudence, see \textit{id.} § 3.1; \textit{Williams}, supra note 194, at 616-17.

were guaranteed by a federal statute and that permitting them to meet for prayer and other religious speech within the context of a broader forum did not violate the Establishment Clause. The various opinions in Mergens strongly suggested, however, that free speech rights were clearly implicated. For example, Justice O’Connor’s plurality opinion, though technically grounding the students’ speech rights in the Equal Access Act, nevertheless stressed the distinction between “government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.” Justice Marshall’s concurrence was even more explicit, stating that the statute merely codified what was already constitutionally required—that schools not discriminate between student-initiated groups based on content.

Just as significantly, in several other recent cases the Court has addressed instances in which religious speech rights were restricted within a broader forum because of Establishment Clause concerns. In each case, the Court held that not only was the Establishment Clause not violated in such situations, but that restricting the religious speech violated the First Amendment. Decided under the rubric of the Court’s public forum doctrine, the Court held in each of these cases that religious speech was to have equal access to public fora. In doing so, the Court continued to affirm its longstanding recognition that religious expression and practices constitute speech for First Amendment analysis and thus must be treated neutrally. Just as importantly, the Court made clear that treating religious speech neutrally within a public forum does not pose Establishment Clause concerns, even if clearly religious activities such as prayer and worship occurred on public property.

The first of these cases, Widmar v. Vincent, was the impetus for the Mergens decision and was certainly influential in the Mergens analysis. In Widmar, the Court held that a public university could not prohibit a religious group from using campus facilities when use of such facilities was extended to non-religious groups. In so holding, the Court both recognized religious activities as coming within the protection of the Free Speech Clause and emphasized that the First Amendment prohibited discrimination

235 See supra notes 69-90 and accompanying text.
237 ‏Id. at 262 (Marshall, J., concurring).
238 Widmar, 454 U.S. at 263.
on the basis of speech content. It also specifically rejected the argument that the Establishment Clause prohibited student use of campus facilities, noting that permitting equal access to religious groups did not confer the state’s imprimatur. Thus, as long as the forum had a secular purpose, providing equal access to religious speech not only did not violate the Establishment Clause, but was compelled by the Free Speech Clause.

In several cases after Mergens, the Court has continued to affirm that religious speech must be treated neutrally and accorded equal access to public property, including schools, and that doing so does not violate the Establishment Clause. For example, in *Lamb’s Chapel v. Center Moriches Union Free School District*, the Court held that a church could not be denied use of a public school building for a film series on child-rearing when the school was open to other groups. As in Widmar, the Court said that free speech rights required that religious speech have the same access to the forum as other speech, and that permitting the group to meet did not violate the Establishment Clause. In particular, the Court found that the requirements of Lemon were met, there was no danger of endorsement, and any benefits to religion were incidental.

Even more significant was the Court’s decision in *Rosenberger v. Rector of the University of Virginia*, where the Court applied a neutrality analysis even when it involved direct government funding of religious activity. In that case, a student group at the University of Virginia sought funding for a newspaper that was clearly Christian in its message. The University declined to provide the funding, saying that such direct financial support violated the Establishment Clause. The Court, however, held that, under the facts of the case, the Free Speech Clause required that the university provide equal funding to the Christian group and that doing so

---

239 Id. at 269-70.
240 Id. at 274-75.
241 The Court succinctly summarized its decision in the following statement: “Having created a forum generally open to student groups, the University seeks to enforce a content-based exclusion of religious speech. Its exclusionary policy violates the fundamental principle that a state regulation of speech should be content-neutral, and the University is unable to justify this violation under applicable constitutional standards.” Id. at 277.
243 See id. at 392-94.
244 See id. at 394-95.
246 See id. at 827.
did not violate the Establishment Clause. In so holding, it viewed the refusal to fund the religious newspaper as viewpoint discrimination\textsuperscript{247} and once again employed a neutrality analysis in finding no Establishment Clause violation.\textsuperscript{248} In particular, the Court stressed that the manner of funding made perceptions of endorsement unlikely but was careful to limit its holding to the facts of the case.\textsuperscript{249}

\textit{Widmar}, Lamb's Chapel, and Rosenberger all affirm the strong free speech interest underlying the \textit{Mergens} decision.\textsuperscript{250} Taken together, these cases indicate that free speech principles require that religious speech be afforded equal treatment relative to other permitted speech. Thus, even though student speech can be appropriately regulated in schools to avoid interference with educational objectives, once a forum is created for student speech opportunities, religious speech, which includes prayer, cannot be excluded. Moreover, the Court has consistently rejected Establishment Clause justifications for prohibiting religious speech, noting that the very neutrality concerns which require protection of religious speech in schools also dissipate establishment concerns.\textsuperscript{251}

Indeed, what is apparent from this analysis is that the existence of a broader forum both dissipates Establishment Clause concerns and strengthens free speech concerns. The very range of options that triggers equal treatment for religious speech also works to minimize the endorse-

\textsuperscript{247}See id. at 830-32.

\textsuperscript{248}See id. at 838-44.

\textsuperscript{249}The majority emphasized the program's neutrality, in which the Christian paper was given funding on the same basis as any other student group, which made it very different from the types of church funding issues at the time the First Amendment was ratified. It also noted that the money was paid directly to the printer and that the University had disassociated itself from the speech in question. \textit{Id.} at 841-44. In a concurrence, Justice O'Connor was even more careful in limiting the holding, noting three important limitations. First, the student group was clearly independent of the university. Second, the payments went directly to a third-party vendor and did not go directly to the group. Third, the large number and wide variety of groups that received funding made it illogical to perceive that the university endorsed any particular view. \textit{Id.} at 849-50 (O'Connor, J., concurring).

\textsuperscript{250}See also Capital Square Review & Advisory Bd. v. Pinnette, 515 U.S. 753 (1995) (plurality and concurring opinions said private display of cross in public square, which was traditionally open to displays of other kinds, did not violate Establishment Clause and was protected by Free Speech Clause).

ment concerns often discussed by the Court. Where students themselves choose religious content from a range of options, the state is not promoting religion but, instead, is only treating it neutrally relative to other speech contents. Indeed, not to allow religious speech in such circumstances arguably reflects hostility, rather than neutrality, toward religion.

It is important to note that the definition of a broader forum is necessarily a loose one here, essentially meaning any context in which students are given a range of speech options outside of a curricular setting. The forum might be of a more formal nature, as in Mergens, or of a more informal nature. For example, although schools rarely create official fora governing lunch conversations, as a practical matter students sitting at lunch tables with their friends are free to choose any topic of conversation. For that reason, students should be free to pray together at lunch as one choice among many that the students might make. The same would be true for a number of other informal gatherings that might occur on school property before, during, or after school hours, such as in a locker room, parking lots, or between classes. As long as the prayer is not done in a disruptive manner—essentially the same standard to apply to any other speech content—\(^2\) it should be viewed as a permissible student choice within a broader range of speech options.

Significant speech interests might exist even when a single speaker is involved, as long as he or she is free to choose from a range of speech contents. This was recognized by the Court in Santa Fe, which stated that granting a single speaker the stage does not necessarily preclude a limited public forum, as long as the messages communicated are not limited by the state.\(^3\) In such a situation, the core free speech principle of content-neutrality strongly supports the student’s autonomous choice of speech content, even if religious in nature. And, as noted above, the range of speech options that trigger equal treatment of religious speech minimizes Establishment Clause concerns that might otherwise exist. Thus, regardless of whether the Court’s “limited public forum” doctrine would be triggered by a single speaker, the relative balance of speech and establishment concerns suggests permitting a religious message in such an instance.

The analysis is quite different, however, where the speech in question is student-initiated but not within the range of options prescribed by a forum. The school might permit such speech, of course, but the process of

\(^{252}\) See Tinker v. Des Moines Sch. Dist., 393 U.S. 503, 509 (1969) (implying that schools can restrict speech that would “materially and substantially interfere with the requirements of appropriate discipline in the operation of the school”).

doing so runs the danger of the state’s own promotion. For example, a student with no prompting from school officials might ask a teacher if he or she can say a prayer in front of the class. This certainly qualifies as student-initiated speech but does not trigger free speech rights. No student has the right to speak to the class outside of a broader forum, whether the content be prayer, advocacy of Marxism, or anything else. Moreover, permitting the prayer runs the danger of the state’s own promotion in ways quite different than when a broader forum is involved. Not only are perceptions of endorsement much stronger than when a student makes a choice from a range of options, but the school’s decision to permit the prayer might well involve the school’s own promotion.

There might be other ambiguous student prayer scenarios, but the above example illustrates the general premise. Where students initiate prayer as a response within a broader framework of speech options, then permitting the prayer is not only consistent with the Establishment Clause, but required under the neutrality requirements of free speech. But where the student initiates speech outside such a forum, the symmetry reverses. Not only are free speech interests more minimal in such situations, but Establishment Clause concerns are more pronounced.

The two general models so far examined in this section concern state promotion of prayer, which is prohibited, and students’ initiation of prayer in response to a broader forum of speech options, which is permitted. The typical examples in this latter situation, however, all involve voluntary audiences, such as other participants in a religious club or around the lunchroom table. A third possible model, somewhat falling between the other two, is where students initiate prayer within a range of speech options but do so with a captive audience. This is a less likely scenario, but it is still possible and will be briefly examined in the next subsection.

C. Student Prayer and Captive Audiences

The analysis above suggests that strong grounds exist for granting student-initiated prayer equal access to created fora within a public school setting. As noted, however, this typically occurs in situations involving voluntary audiences, such as religious clubs. Indeed, the Supreme Court itself has not yet addressed a case involving purely student prayer with captive audiences. The five cases in which the Court has held prayer activities unconstitutional (Engel, Schempp, Wallace, Lee, and Santa Fe) all involved the state itself promoting the prayer, while the one case in which it upheld prayer activities (Mergens) involved student prayer in a non-captive audience setting.
There is no doubt that Establishment Clause sensitivities become
greater when a captive, as opposed to a voluntary, audience is the recipient
of the prayer. Although even the existence of voluntary religious activities
might appear intrusive to some, the ability to avoid exposure to any actual
content minimizes such concerns. In contrast, when a student is captive to
speakers because of the nature of the activity, such as with graduation
prayers, the student is forced to listen to the content against his or her
wishes. This is true whether the prayer in question is the result of state
promotion or of the truly autonomous choice of a student speaker.

On this basis, it might reasonably be argued that the combination of
prayer with the nonvoluntary or official status of a school function creates
a coercive environment so as to violate the Establishment Clause. Although the state does not itself promote the prayer, the state’s creation
of the setting in which the prayer might happen, together with the
requirement that nonadherents be present, is a sufficient state connection
to pose establishment concerns. Under this analysis, any prayer, whether
initiated by the state or by an autonomous student, would be impermissible
if delivered in a captive and quasi-official setting, such as graduation.

While there is certainly some force to this position, it is problematic for
several reasons. First, drawing the line in this way would appear to be
inconsistent with the Court’s own jurisprudence in this area. Although the
Court has certainly been sympathetic to the captive audience situation with
unwilling members, it has never said that such situations are enough in
and of themselves to violate the Establishment Clause. Rather, the Court’s
analysis has always presupposed the need to show state promotion of the
prayer in addition to any coercive effect. Specifically, the Court’s analysis
in both Lee and Santa Fe applied what amounted to a two-part coercion
test, the first step examining the degree of state involvement with the
prayer, and the second showing the coercive effect of the prayer. If the
captive audience by itself was sufficient to violate the Establishment
Clause, the Court’s extended discussion in both cases of state involvement
was both unnecessary and even nonsensical. Indeed, lower court decisions

Other Name, 52 VAND. L. REV. 1783, 1819-27 (1999) (arguing that even student
prayers should be seen as unconstitutional coercion).
255 See Santa Fe, 530 U.S. at 310-13; Lee v. Weisman, 505 U.S. 577, 592-95
(1992); see also Engel v. Vitale, 370 U.S. 421, 430-31 (1962) (noting the
potentially coercive effect of school prayer on young children even when children
could have asked to be excused).
256 See Santa Fe, 530 U.S. at 310-13; Lee, 505 U.S. at 586-88.
subsequent to Lee either explicitly or implicitly assumed the necessity of state promotion of the prayer in order for it to be viewed as unconstitutionally coercive.\textsuperscript{257}

That a captive audience does not by itself create an Establishment Clause violation when religious messages are involved finds further support in Justice Souter’s concurrence in Lee. Joined by Justices Stevens and O’Connor, Souter emphasized that, although coercion was a sufficient basis for finding an Establishment Clause violation, it was not a necessary one, and an endorsement standard could be used. In doing so, however, he strongly suggested that a religious message delivered by a student at graduation, devoid of state influence, might well be constitutional.\textsuperscript{258} This makes little sense if the captive audience nature of graduation was itself sufficient to create a violation. Thus, even those justices who desired a broader Establishment Clause inquiry in Lee still recognized that a truly student-initiated religious message would be constitutional even in a captive audience setting.

The Court’s own jurisprudence therefore presupposes the need for some state involvement beyond mere creation of a captive audience situation. This makes sense for several reasons. First, to the extent that the distinction between state-sponsored and student-initiated speech best

\textsuperscript{257} As will be discussed in Part IV.C, infra, there have been several federal circuit court decisions involving graduation prayer subsequent to Lee, all of which attempted to apply the Lee coercion test to the prayer policies in question. Although courts split on the constitutionality of the various schemes, each decision devoted substantial attention to whether the prayer in question could be attributed to the state or not. Those decisions finding the prayers constitutional did so because of a lack of the type of state involvement found in Lee. See Adler v. Duval County Sch. Bd., 206 F.3d 1070 (11th Cir.), vacated and remanded, 531 U.S. 801 (2000); Doe v. Madison Sch. Dist. No. 321, 147 F.3d 832 (1998), opinion withdrawn, reh’g granted, 1999 U.S. App. LEXIS 5051 (9th Cir. 1999); Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963 (5th Cir. 1992). Similarly, those finding the prayer schemes unconstitutional found significant state involvement in addition to a coercive environment. See ACLU of N.J. v. Black Horse Pike Reg’l Bd. of Educ., 84 F. 3d 1471 (3d Cir. 1996); Harris v. Joint Sch. Dist. No. 241, 41 F.3d 447 (9th Cir. 1994), vacated and remanded, 515 U.S. 1154 (1995). Common to all cases, however, was a close examination of the degree of state involvement in the prayer, in essence tracking the two-step coercion analysis established in Lee and assuming the need for state involvement in the prayer beyond creating the captive audience.

\textsuperscript{258} See Lee, 505 U.S. at 630 n.8 (Souter, J., concurring) (suggesting that if a student speaker, chosen by secular criteria, had chosen to deliver a religious message, it would be harder to show the state’s endorsement).
balances the respective establishment and free speech values at stake, that principle applies equally to the captive audience situation. In particular, the need for content-neutrality with respect to speech would apply with equal force to the captive and noncaptive audience situation. Similarly, the central Establishment Clause value of neutrality is in no way compromised in a captive audience context as long as religious speech is treated the same as other speech. Indeed, to prohibit religious speech simply because of the existence of a captive audience would undercut the neutrality very much at the core of Establishment Clause jurisprudence.

Second, to the extent endorsement concerns inform Establishment Clause thinking, they are not automatically triggered by the presence of a captive audience. Rather, those Justices advocating endorsement concerns have stressed examining the totality of circumstances to see if there is an implied endorsement of religion. Although the existence of a captive audience might require greater vigilance in examining endorsement concerns, the focus is not the voluntary or involuntary nature of the audience but the perceptions those in the audience might reasonably have. As often noted, the neutral treatment of religion dissipates endorsement concerns. More specifically, whatever the status of the audience, it is hard to assume government endorsement when the speech is the result of autonomous student choice.

Third, the Court has made clear that the coercion necessary for establishment violations is government coercion, which it has equated with government promotion at some level. Although a captive audience might feel pressure to participate in a prayer due to peer pressure, this pressure is certainly far less substantial than when the government itself is promoting the practice. Moreover, even peer pressure is substantially lessened when the prayer is the result of autonomous student choice rather than government or majoritarian student vote. Though sensitivity to the problem of coercion must certainly be heightened in a captive audience setting, it does not itself constitute the type of coercion necessary to violate the Establishment Clause.

261 See Lee, 505 U.S. at 630 n.8 (Souter, J., concurring).
For all of these reasons, the existence of a captive audience should not be viewed as negating the fundamental distinction between prohibited state-sponsored prayer and permitted student-initiated prayer. Both free speech values and Establishment Clause values support the distinction even with regard to captive audiences, and the Supreme Court's own jurisprudence indicates that captive audience concerns are not by themselves enough to trigger an Establishment Clause violation. The existence of a captive audience should certainly heighten sensitivities, however, and it calls for increased vigilance in monitoring the correct boundary between prohibited and non-prohibited prayer. Yet the focus should continue to be whether the prayer is state-promoted, and therefore prohibited, or the result of autonomous student choice within an acceptable range of options, and therefore permitted.

IV. WHAT CAN AND CANNOT BE DONE:
REMAINING PRAYER SCENARIOS IN PUBLIC SCHOOLS

The previous section suggested that the distinction between state-sponsored prayer and student-sponsored prayer should be the primary starting point for analyzing school prayer cases. Thus, if the state itself is promoting prayer, no matter how minimally, the activity should be viewed as violating the Establishment Clause. Conversely, if the prayer in question is the result of autonomous student choice within a broader forum of options, the prayer should be permissible. This section will examine what this theory permits in terms of prayer scenarios in public schools, focusing on three continuing areas of controversy: (1) student religious clubs; (2) moment of silence statutes; and (3) student prayers at graduation.

A. The Student Club: Mergens and Equal Access

As discussed in Part I.C, the Supreme Court in Board of Education of Westside Community Schools v. Mergens held that student religious groups have a right to meet for prayer and other activities on terms equal to other student groups. Not only does such neutral treatment of religious speech not violate the Establishment Clause, but the Court strongly suggested that it was required by free speech principles. Thus, the right of student groups to meet as part of a broader forum of student groups seems quite secure.

262 See supra text accompanying notes 63-92.
There are, however, two general questions remaining about the scope of Mergens and student religious groups. The first question is whether avoidance of an Establishment Clause violation is predicated upon a relatively broad forum of student groups and, if so, at what point a more limited array would trigger Establishment Clause concerns. As noted in Part I, the Court in Mergens was divided over the Establishment Clause issue, with no opinion receiving a majority. Although Justice Kennedy's concurring opinion, joined by Justice Scalia, emphasized the lack of state coercion, the plurality opinion by Justice O'Connor focused on endorsement. In doing so, she gave three reasons why an "objective observer" would not interpret recognition of the religious club as state endorsement: first, secondary students are mature enough to understand that permitting speech on a nondiscriminatory basis is not endorsement; second, school officials did not participate in the meeting; and third, the broad spectrum of officially recognized clubs counteracted any possible perception of endorsement. This third factor, in which possible Establishment Clause concerns are negated by reference to the breadth and variety of the forum in which the religious club meets, has been noted by the Court in several other cases, including Widmar and Rosenberger.

It might be argued, therefore, that the Mergens-type religious club is constitutionally permissible only when it is part of a relatively broad and diverse set of clubs, and that endorsement concerns might preclude a group meeting when it is one of only a few clubs. Although the breadth of the forum was noted in these cases, there are several reasons to believe that student religious clubs should be permitted even when the number of clubs is quite limited. First, the breadth of the forum as a factor is only relevant under some versions of the endorsement test, and it is unclear what role that test should currently play in Establishment Clause analysis. As noted earlier, although endorsement concerns are frequently voiced, it is uncertain whether endorsement has been clearly established as an independent test. Moreover, as argued above, endorsement concerns should be most relevant when the state affirmatively promotes religious activity, rather than when it merely accommodates it in a nondiscriminatory fashion.

Second, and more importantly, even under an endorsement standard, forum breadth is only a factor, and not the crucial one at that. The critical

263 See Mergens, 496 U.S. at 260-61 (Kennedy, J., concurring).
264 See id. at 250-52 (O'Connor, J., plurality opinion).
267 See supra notes 118-20, 163 and accompanying text.
concern is whether students will perceive club recognition as endorsement. Indeed, the first point emphasized by the Mergens plurality is that "[w]e think 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{268} This correctly suggests that if club recognition is truly done in a nondiscriminatory manner, and so communicated, then endorsement should not be a concern, no matter how broad or narrow the resulting set of clubs. Although there might be a greater need for explicit disclaimers when the range of clubs is narrow, recognizing clubs on a nondiscriminatory basis is more important than the number of student groups that respond.

The second general issue remaining under Mergens is whether the same analysis should apply to voluntary student religious clubs in elementary, as opposed to secondary, schools.\textsuperscript{269} In one sense, of course, the primary analysis should be the same at the elementary level as at the secondary level: Is the club the result of student initiation within a policy permitting extracurricular student groups on a nondiscriminatory basis? There are, however, several significant differences between secondary and elementary school students. First, elementary students are less mature and more impressionable than secondary students and therefore are more likely to misinterpret school recognition of clubs.\textsuperscript{270} Second, clubs themselves are more likely to need greater adult participation to function and will rarely be initiated by students themselves.\textsuperscript{271}

Moreover, it is not insignificant that the Equal Access Act, the federal statute applied in Mergens which prohibited discrimination among student

\textsuperscript{268} Mergens, 496 U.S. at 250 (O'Connor, J., plurality opinion).
\textsuperscript{269} See generally James E.M. Craig, Comment, "In God We Trust" Unless We Are a Public Elementary School: Making a Case for Extending Equal Access to Elementary Education, 36 IDAHO L. REV. 529 (2000) (discussing types of clubs that might form in the elementary schools and the level of protection appropriate in that context).
\textsuperscript{271} Most of the reported case law concerning religious clubs at elementary schools have involved adult leadership of the clubs. See, e.g., Good News Club v. Milford Cent. Sch., 202 F.3d 502 (2d Cir. 2000), rev'd and remanded, 121 S. Ct. 2093 (2001) (adult leadership of group); Good News/Good Sports Club v. Sch. Dist., 28 F.3d 1501, 1502 (8th Cir. 1994) (parent volunteers ran club meetings); Quappe, 772 F. Supp. at 1006 (adult leadership of group).
groups on the basis of content, applies only to secondary schools.\textsuperscript{272} This does not necessarily mean that permitting student-initiated groups in elementary schools violates the Establishment Clause, but it does indicate Congress’s own judgment that the need was greatest at the secondary level. Indeed, several of the Act’s findings in terms of the maturity of students were specifically tied to the maturity of secondary students.\textsuperscript{273}

For obvious reasons, therefore, creation of any student religious group in elementary schools, even in the context of a limited forum of other such groups, must be closely scrutinized. In particular, courts must ensure that the impetus for the groups does not come from school officials, or that such officials do not actively participate in the group. Even a truly student-initiated group in the context of a limited forum of student clubs raises concerns about perceived state sponsorship of the club under Justice O'Connor's endorsement test. The more impressionable nature of such younger students increases the possibility that they would misinterpret a school permitting a club to meet on a nondiscriminatory basis as endorsement.\textsuperscript{274}

Notwithstanding these concerns, such clubs should be able to meet even at the elementary school level if truly student-initiated, in response to a forum of extracurricular clubs, and without significant school official involvement. Although the likelihood of all of these conditions being met at the elementary level is not great, if the conditions are met the club would appear to qualify as a voluntary student choice, rather than a government-sponsored, organization. The problems of perceived sponsorship that might exist are best addressed through explicit disclaimers.\textsuperscript{275}

\textsuperscript{273} See Mergens, 496 U.S. at 250-51 (O'Connor, J., plurality opinion) (discussing legislative findings).
\textsuperscript{274} See Quappe, 772 F. Supp. at 1010-11.
\textsuperscript{275} A distinct, but related, issue is the permissibility of adult-led religious clubs in public elementary schools after school. Indeed, all of the reported cases for elementary schools have involved such adult-led clubs, in contrast to the high school area in which the clubs have all been student-led. The several reported cases have involved situations where adult volunteers want to use school facilities for a religious club, similar to other community groups that might use the facilities, such as the Boy Scouts, Girl Scouts, or nonschool athletic clubs. See Milford Cent. Sch., 202 F.3d at 504-05; Good News/Good Sports Club, 28 F.3d at 1502; Quappe, 772 F. Supp. at 1004; Ford v. Manuel, 629 F. Supp. 771, 772 (N.D. Ohio 1985). Although one of these cases involved a complete prohibition on the group meeting (Milford Central School), the other cases involved requirements that the group meet at a later time than other permitted groups to avoid appearances of endorse-
B. The Moment of Silence: Remnants of Wallace

A second potential type of school prayer is when students voluntarily use a moment of silence for the purposes of prayer. As noted in Part I, although the Supreme Court held in Wallace v. Jaffree that, under the facts of the case, a statute which provided for a moment of meditation and prayer violated the Establishment Clause, it did not address the validity of a provision for just a moment of silence or meditation. A close reading of the case, however, together with the concurring opinions, strongly suggests that the practice of having a moment of silence or meditation should generally be constitutional. This is true even if it is likely that some students would use that time for silent prayer.

The statute struck down in Wallace was actually one of three related statutes. The first statute authorized a one-minute period for silent meditation in public school classrooms. The second statute, reviewed in Wallace, provided for a minute period for meditation or prayer. The third statute authorized teachers to lead willing students in a vocal prayer. Although all three statutes were initially challenged as unconstitutional, the petitioners, on appeal, abandoned their challenge to the first statute. Moreover, the unconstitutionality of the third statute had been earlier affirmed by the Supreme Court, leaving only the validity of the second statute before the Court.  

Lower courts addressing the issue have typically analyzed the restrictions under the Court's limited public forum doctrine and have split on whether differential treatment of religious clubs is constitutional. In Good News/Good Sports Club, for example, the Eighth Circuit held that the different treatment of religious speech was unconstitutional, stating that it constituted viewpoint discrimination. See Good News/Good Sports Club, 28 F.3d at 1505-07. Conversely, the Second Circuit recently held in Milford Central School that a complete prohibition on adult-led religious clubs from meeting after hours at public elementary schools was constitutional. It said that the content of the speech was outside the limited genre of the created forum and that the school was reasonable in its purpose of not wanting to suggest endorsement of any particular religion. See Milford Cent. Sch., 202 F.3d at 509-11. However, the Supreme Court reversed the Second Circuit's holding in Milford Central School on the grounds that the complete ban was unconstitutional viewpoint discrimination. Good News Club v. Milford Cent. Sch., 121 S. Ct. 2093 (2001). The response of the lower courts remains to be seen, but perhaps the Court's ruling in Milford Central School will settle this issue.  


277 See id. at 40-42.
Thus, the Court was not called upon to address the validity of a pure moment of silence provision, but in the course of its discussion the majority opinion appeared supportive of its validity. This particularly was seen when the Court used the existence of the earlier statute as additional evidence that the second statute was designed solely to promote prayer. The Court stated:

The legislative intent to return prayer to the public schools is, of course, quite different from merely protecting every student’s right to engage in voluntary prayer during an appropriate moment of silence during the schoolday. The 1978 statute already protected that right, containing nothing that prevented any student from engaging in voluntary prayer during a silent minute of meditation.\[278\]

This language does not explicitly affirm the constitutionality of that prior moment of silence provision, but it certainly is supportive of it. Moreover, the Court saw prayer as an activity that might naturally occur during a moment of silence, even acknowledging how a moment of silence provision could be used to protect “every student’s right to engage in voluntary prayer.”\[279\]

More importantly, two concurring opinions in Wallace expressly stated that a moment of silence provision could be constitutional. These opinions, taken together with the dissenting justices, clearly create a majority of the Court. Most significant was a concurring opinion by Justice O’Connor which discussed, at length, moment of silence statutes, stating that they should be constitutional if done correctly. In suggesting their general validity, O’Connor emphasized that moment of silence statutes are distinct from the school prayer struck down in earlier decisions in two important ways. First, a moment of silence, unlike prayer, is not inherently religious. Second, during a moment of silence students are free to participate in any way they like and are not forced to listen to others.\[280\] O’Connor said that a moment of silence provision would violate the Establishment Clause, however, if it were used to endorse or promote prayer, such as an explicit statement on the face of the statute or an exhortation by a teacher to use the time to pray.\[281\]

Justice Powell’s concurrence, though written for a different purpose, expressly stated that he agreed with Justice O’Connor “that some moment-

---

\[278\] Id. at 59.  
\[279\] Id.  
\[280\] See id. at 72-73 (O’Connor, J., concurring).  
\[281\] See id. at 73-74 (O’Connor, J., concurring).
of-silence statutes may be constitutional," and he even interpreted the majority opinion as saying the same.\textsuperscript{282} Since the three dissenting justices would have found the statute in question constitutional, even though it seemed to promote prayer, it seems certain that they would find a pure moment of silence provision constitutional.\textsuperscript{283} Thus, a clear majority of the Court in \textit{Wallace} were on record supporting the general constitutionality of moment of silence provisions, with the remaining justices also apparently supportive of such provisions. Taken as a whole, therefore, \textit{Wallace} strongly supports the validity of moment of silence provisions.

Such a position makes substantial sense. As noted by Justice O'Connor, moment of silence statutes do not pose the problems found with regard to vocal prayers.\textsuperscript{284} The state's only involvement is in providing the moment of silence itself, which is not an inherently religious activity. To the extent prayer occurs, whether to pray and the content of such prayer is the choice of the students involved. Moreover, coercion is nonexistent since no one will know how a student uses the time, making endorsement concerns minimal. Thus, any prayer that might occur would fall on the side of student-initiated, rather than state-sponsored, activity.

Moment of silence or meditation statutes should therefore be generally constitutional. Establishment Clause problems arise, however, where the state uses such provisions to actively encourage or promote prayer, such as through official school encouragement to use the time to pray. Although in such a situation coercion concerns would still be minimal, since students could use the time as they choose, the prayer becomes state-initiated rather than student-initiated. Justice O'Connor is correct, therefore, that, in evaluating the validity of moment of silence provisions, "[t]he crucial question is whether the State has conveyed or attempted to convey the message that children should use the moment of silence for prayer."\textsuperscript{285}

At the time \textit{Wallace} was decided, about half of the states had moment of silence provisions,\textsuperscript{286} a number of which had been challenged in lower courts. Although some were upheld as constitutional,\textsuperscript{287} a majority of the decisions prior to \textit{Wallace} held those provisions to be unconstitutional,

\begin{itemize}
\item \textsuperscript{282} See id. at 62 (Powell, J., concurring).
\item \textsuperscript{283} See id. at 84-90 (Burger, C.J., dissenting); id. at 90-91 (White, J., dissenting); id. at 91-114 (Rehnquist, J., dissenting).
\item \textsuperscript{284} See id. at 72-73 (O'Connor, J., concurring).
\item \textsuperscript{285} Id. at 73 (O'Connor, J., concurring).
\item \textsuperscript{286} See id. at 70-71 (O'Connor, J., concurring) (stating that twenty-five states had statutes providing for a moment of silence in classrooms).
\end{itemize}
relying primarily on the *Engel* and *Schempp* decisions. As shown above, that reasoning would appear to be incorrect, and, after *Wallace*, such provisions should be valid if properly drawn.

Today, at least twenty states continue to have statutes providing for a moment of silence during the school day. These statutes fall into two basic types. First, about half of the statutes provide for a moment of silence for meditation or other purposes, without any explicit identification of prayer as a possible use of the time. The other half of the statutes mention prayer as one of several possible uses of the time, typically stating that the time can be used for "silent prayer or meditation" or "meditation, prayer or reflection."

It would appear that those statutes providing for a moment of silence without reference to prayer are clearly constitutional under *Wallace*, even if students choose to use the time for prayer. As noted above, a moment of silence is not inherently religious and would neither coerce nor endorse religion.

---


290 See, e.g., DEL. CODE ANN. tit. 14, § 4101A (1999) (brief period, not to exceed two minutes, to be used according to dictates of individual student’s conscience); GA. CODE ANN. § 20-2-1050 (2001) (brief period of reflection); MICH. COMP. LAWS ANN. § 380.1565 (West 2001) (opportunity for silent meditation); R.I. GEN. LAWS § 16-1-12-3.1 (1996) (minute of silence for meditation).


292 See NEV. REV. STAT. 388.075 (2001); see also W. VA. CONST. art. III, § 15A.
Indeed, the only post-

Wallace case to address a moment of silence statute, Bown v. Gwinnett County School District,293 held it to be constitutional. There the Eleventh Circuit reviewed a Georgia statute which allowed teachers to “conduct a brief period of quiet reflection for not more than 60 seconds” at the start of the school day.294 In finding the statute valid, the court applied the Lemon test, finding that the statute had a secular purpose, did not advance religion, and did not involve an excessive entanglement with religion.295 It distinguished Wallace by noting that the record in the case indicated that the statute served a secular purpose, whereas in Wallace the statute was singularly designed to promote prayer.296 The court also noted that there was no coercion of any kind, as in Lee, and that the moment of quiet reflection could be used in any manner a student chose, whether it be to pray or not to pray.297

It is less clear whether those statutes which expressly mention prayer as one possible use of the moment of silence are constitutional. It might be argued that the reference to prayer is designed to promote its use, which would run afoul of the Establishment Clause. Moreover, the statute struck down by the Court in Wallace was of this type, providing a minute of silence in public elementary and secondary schools for the purpose of “meditation or voluntary prayer.”298 Similarly, in upholding the moment of silence statute in Bown, the Eleventh Circuit noted that the term “period of quiet reflection” had been substituted for earlier statutory language that stated “prayer or meditation,” which the court stated strengthened the statute’s secular purpose.299

Nonetheless, inclusion of prayer as one of several possible uses of the time is not necessarily invalid under Wallace. Despite the similarity in language, the Supreme Court struck down the statute in Wallace because of what it considered the clear statutory purpose to promote prayer, which it felt was reflected in two respects. First, the legislative history in Wallace indicated that the sole purpose of the moment of silence statute in that case was to promote prayer, a motive the bill’s sponsor unashamedly and clearly acknowledged.300 Second, since a previous statute already provided for a

293 Bown v. Gwinnett County Sch. Dist., 112 F.3d 1464 (11th Cir. 1997).
295 See Bown, 112 F.3d at 1468-74.
296 See id. at 1471-72.
297 See id. at 1473.
299 Bown, 112 F.3d at 1469 n.3.
300 See Wallace, 472 U.S. at 56-57.
moment of silent meditation, the challenged statute served no purpose but to add prayer as a suggested activity.\textsuperscript{301} In this context, the Court held that it failed the secular purpose prong of the \textit{Lemon} test.\textsuperscript{302}

It is therefore uncertain whether a statute which provides a period of silence “for mediation or prayer,” but which lacks the clear legislative history of \textit{Wallace} and which does not have a separate statute for meditation would be invalid. Although the reference to prayer might still be somewhat troubling, the reference could be defended as simply recognizing that prayer was one of several permissible uses of the period of silence. This point was explicitly made by Justice O’Connor in her \textit{Wallace} concurrence, where she stated “[e]ven if a statute specifies that a student may choose to pray silently during a quiet moment, the State has not thereby encouraged prayer over other specified alternatives.”\textsuperscript{303} It would thus appear that statutory references to prayer do not necessarily make a statute invalid.

What is more important than how a statute reads is what is actually said to students in the classroom. As noted above, “[t]he crucial question is whether the State has conveyed or attempted to convey the message that children should use the moment of silence for prayer.”\textsuperscript{304} Thus, as stated by Justice O’Connor, “if [a] teacher exhorts children to use the designated time to pray,” this would involve active promotion of prayer and would be unconstitutional.\textsuperscript{305} Even a mild suggestion that children pray would be invalid since it would still involve promotion of prayer. On the other hand, including prayer as one of several possible uses of the time, with no suggestion that children should pray, would appear to be constitutional. The best course of action, of course, would be simply to tell the students there will be a moment of silence, and the students are free to use the time in any way they choose.

\subsection*{C. Graduation Prayers and Student Speakers}

The Supreme Court’s decision in \textit{Lee v. Weisman}\textsuperscript{306} greatly limited inclusion of prayers in public school graduation ceremonies. As a practical matter, it shut the door on the state itself sponsoring or directing the prayer.

\begin{footnotes}
\item[301]\textit{See id.} at 59-61.
\item[302] \textit{Id.} at 56.
\item[303] \textit{Id.} at 73 (O’Connor, J., concurring).
\item[304] \textit{Id.} (O’Connor, J., concurring).
\item[305] \textit{Id.} (O’Connor, J., concurring).
\end{footnotes}
even if delivered by someone other than a school official.\textsuperscript{307} The decision did not, however, necessarily prohibit all graduation prayers.\textsuperscript{308} As noted earlier, the decision was based on two dominant concerns, the first being the state's own pervasive involvement in the prayer.\textsuperscript{309} This strongly suggested that truly student-initiated, rather than state-initiated, prayers might be constitutional, a position consistent with the general voluntary student versus state-sponsored approach to resolving school prayer issues.

The Court's decision in \textit{Santa Fe} did not necessarily upset the basic distinction drawn in \textit{Lee}, but it clarified its meaning by being more specific. As noted earlier, the voting scheme reviewed in \textit{Santa Fe}—which allowed a majoritarian vote by the students to decide whether to pray and who was to pray—was essentially a response to the Court's emphasis on the pervasive state involvement with the prayer in \textit{Lee}. Although putting those issues to a student vote arguably lessened to some degree the state's involvement, the Court in \textit{Santa Fe} correctly stated that the voting scheme nevertheless still constituted state promotion of prayer. In particular, the Court suggested that by even presenting the question, the state was promoting prayer.\textsuperscript{310} Furthermore, the Court noted that deciding the issue by majority vote presented special difficulties to religious minorities.\textsuperscript{311} Thus, \textit{Santa Fe}, though preserving the general distinction between student-initiated and state-sponsored prayer, indicated that even more subtle forms of state promotion of prayer would be unconstitutional.

An initial question presented by \textit{Santa Fe} is whether a similar voting scheme for prayer at graduation exercises would also be unconstitutional.\textsuperscript{312}

\textsuperscript{307} See id. at 587-88.
\textsuperscript{308} For recent articles discussing graduation prayers after \textit{Lee}, see Charles J. Russo, \textit{Prayer at Public School Graduation Ceremonies: An Exercise in Futility or a Teachable Moment?}, 1999 BYU EDUC. & L.J. 1; Delaney, \textit{supra} note 254, at 1783; Ann E. Stockman, Comment, ACLU v. Black Horse Pike Regional Board of Education: \textit{The Black Sheep of Graduation Prayer Cases}, 83 MINN. L. REV. 1805 (1999).
\textsuperscript{309} See \textit{Lee}, 505 U.S. at 586-88.
\textsuperscript{311} See id. at 305-06.
\textsuperscript{312} Prior to \textit{Santa Fe}, four federal circuits had reviewed voting schemes for graduation prayer, with the Fifth and Eleventh Circuits holding such schemes constitutional and the Third and Ninth Circuits holding such schemes unconstitutional. The Fifth Circuit held that the scheme was constitutional because, by putting the decision whether to pray and who was to pray into the hands of students, the district policy avoided the substantial state involvement emphasized in \textit{Lee}. See Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963, 970-71 (5th Cir. 1992). Similarly, the Eleventh Circuit held constitutional a school policy which had
Even though the school district policy in that case involved essentially similar voting arrangements for both prayer at graduation and prayer at sporting events, in accepting the case for review the Court expressly limited the question to that of the constitutionality of student-led prayer at football games. In doing so, the Court arguably left open the possible validity of a similar scheme for graduation. Indeed, the Fifth Circuit itself, from where the case arose, had essentially drawn that very distinction. In *Jones v. Clear Creek Independent School District*, the Fifth Circuit upheld such a voting arrangement for prayer at graduation, but it struck down identical voting schemes for student prayer at sporting events in two subsequent cases. In doing so, the Fifth Circuit emphasized the distinction between graduation ceremonies, where the unique and solemn nature of the occasion might make a student-initiated and student-led prayer appropriate, and sporting events, where prayer should play no role.

Despite the limited nature of the question reviewed in the Supreme Court’s *Santa Fe* decision and the distinction drawn in the Fifth Circuit, it is hard to see how the Supreme Court’s analysis in *Santa Fe* is not equally applicable to prayer at graduation ceremonies. Although graduation is typically a more unique and solemn occasion than football games, this

students vote on whether to have brief opening and closing messages and who should deliver them, emphasizing the lack of state involvement. *See* Adler v. Duval County Sch. Bd., 206 F.3d 1070, 1073-74 (11th Cir.), *vacated and remanded* by 531 U.S. 801 (2000).

In contrast, the Third Circuit rejected the previous Fifth Circuit position and found the voting scheme unconstitutional. *See* ACLU of N.J. v. Black Horse Pike Reg’l Bd. of Educ., 84 F.3d 1471 (3d Cir. 1996). It acknowledged that the state involvement was certainly less than in *Lee* but said that the prayer still had the imprint of the state in a number of ways, including the fact that it was a school-sponsored event on school property over which school officials retained tight control. *See id.* at 1479. Moreover, students would decide the prayer issue only because the school let them decide it, further indicating the state’s involvement. *Id.* Similarly, the Ninth Circuit also rejected *Jones*, stating that delegating to students the decision whether to pray was still unconstitutional. *See* Harris v. Joint Sch. Dist. No. 241, 41 F.3d 447, 454-55 (9th Cir. 1994).

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

* Jones, 977 F.2d at 963.


* See Santa Fe, 168 F.3d at 823 (“The controlling feature here is the same as in *Duncanville*: The prayers are to be delivered *at football games*—hardly the sober type of annual event that can be appropriately solemnized with prayer.”).
consideration is not particularly relevant to the central distinction drawn in both *Lee* and *Santa Fe* between state-sponsored prayer and voluntary student prayer. For the same reasons that the voting scheme concerning football games contained substantial state involvement, despite the supposed “circuit-breaker” of a student vote, so, too, would a similar arrangement for student-led prayer at graduation contain substantial state involvement. In particular, the very fact that the school district is isolating the issue of prayer for a vote itself suggests promotion of the idea. Moreover, the vote will assure a majoritarian perspective and thus lack the range of options that a truly voluntary scheme would include.

That its analysis in *Santa Fe* should also apply to graduation prayer was strongly suggested by the Supreme Court itself when it recently summarily vacated the Eleventh Circuit decision in *Adler v. Duval County School Board* and remanded the case for reconsideration in light of *Santa Fe*. In *Adler*, the Eleventh Circuit had held that a school board policy which permitted students to vote on whether to have a “brief opening and/or closing message, not to exceed two minutes,” at graduation and, if so, which student was to deliver it, was constitutional. In finding the policy constitutional, the Eleventh Circuit stressed that not only was the decision to deliver a message made by students rather than the state, but that the content of the message was decided neither by the state nor by student plebiscite, but by an autonomous student speaker. As such, it avoided the primary concerns found in *Lee*.

The Supreme Court’s summary vacation of this decision and remand in light of *Santa Fe* does not necessarily mean that the policy in *Adler* is unconstitutional since several significant differences exist between that policy and the one struck down in *Santa Fe*. In particular, the *Adler* policy did not involve a vote on prayer, as such, but only whether to have a message. At a minimum, however, the Supreme Court’s action strongly suggests that the analysis developed in *Santa Fe* regarding student votes on prayer is applicable to the graduation context. Thus, where a school policy provides for a student vote on prayer at graduation, that policy should be

---

317 *Santa Fe*, 530 U.S. at 305.
320 See id. at 1074-76.
322 But see infra notes 340-45 and accompanying text.
unconstitutional for essentially the same reasons as articulated in *Santa Fe*.

Indeed, it is fair to say after *Santa Fe* and *Lee* that any affirmative state action to promote graduation prayers, whether by student vote or otherwise, would be unconstitutional. The most obvious example would be where a school district policy provides for an invocation or other form of prayer at graduation, even if delivered by a student. As recently suggested by the Ninth Circuit in *Cole v. Oroville Union High School District*, any school policy specifically providing for prayer of any type would be unconstitutional under *Santa Fe*.

Thus, to the extent that graduation prayers remain permissible after *Lee* and *Santa Fe*, they should be truly student-initiated. Although this significantly, and appropriately, limits the possibility of prayer, such prayer might occur under a narrow policy in which prayer is one of several options for a student. For example, in *Doe v. Madison School District*, decided shortly before *Santa Fe*, the Ninth Circuit reviewed a school district policy that permitted a minimum of four students, selected on the basis of academic class standing, to speak at graduation. Students themselves decided the content of what to say, which the policy stated may be "an address, poem, reading, song, musical presentation, prayer, or any other pronouncement." School officials were prohibited from censoring the content of the presentation; they were permitted to advise students on "the appropriate language for the audience and occasion," but the students were free to reject the advice.

The Ninth Circuit held the policy to be constitutional, rejecting the argument that *Lee* established a per se rule against prayer at graduation. The court noted that *Lee* emphasized that it was confined by two facts: the substantial state involvement in the prayer and its coercive effect upon students. Although pressure to attend graduation might exist, the school

---

323 See Douglas Laycock, *The Supreme Court and Religious Liberty*, 40 CATH. LAW. 25, 56-57 (2000) (arguing that *Santa Fe* appears to prohibit election of student prayer leaders at graduations and other activities).
324 *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092 (9th Cir. 2000).
325 See id. at 1102 ("[A]s the Court noted in *Santa Fe*, an invocation policy by its very terms appears to reflect an impermissible state purpose to encourage a religious message.").
326 *Doe v. Madison Sch. Dist. No. 321*, 147 F.3d 832 (9th Cir. 1998), vacated and remanded en banc, 177 F.3d 789 (9th Cir. 1999).
327 *Id.* at 834.
328 See *id.*
district policy lacked the substantial state involvement present in Lee. In particular, the court noted that students themselves delivered the presentations, selection of the speakers was on a neutral basis, and—most importantly—the content of the presentation was the autonomous choice of the student speaker, with prayer being just one of many possibilities. As such, control was vested in students and was not in any meaningful way directed by the state.

The decision in Doe was subsequently vacated on grounds that the parties challenging the policy lacked standing. Although the earlier decision is thereby deprived of its precedential value, the court's reasoning in that decision would still appear to be correct and the type of policy reviewed there constitutional even after Santa Fe. It might be argued, however, that even where the state itself is in no significant way involved with the prayer, it is still unconstitutional under an endorsement test if it is done in a state-controlled, nonvoluntary ceremony. Although the Court in Santa Fe primarily emphasized the state's involvement in promoting the prayer, it also noted the contextual dimensions of the pregame prayer: it was on school property, it was over the school public address system, and it was said in an environment surrounded by banners and uniforms bearing the school's name. Similar contextual factors likely also would exist even for graduation prayers of the type that might occur under the policy approved in Doe. Arguably, the totality of the contextual factors, in which attendees might understand the prayer to be promoted by the state, together with its potentially coercive impact on some students, suggest that even such truly voluntary student prayer should be invalid. Indeed, several lower courts have noted such contextual concerns in finding graduation prayers unconstitutional, both before and after Santa Fe, though none rest on that basis alone.

---

329 See id. at 834-35.
330 See id. at 835.
331 See Doe v. Madison Sch. Dist. No. 321, 177 F.3d 789 (9th Cir. 1999) (en banc).
333 For such an argument, made prior to the Santa Fe decision, see Delaney, supra note 254, at 1825-28. But see Stockman, supra note 308, at 1829-37 (rejecting such an argument).
334 See Cole v. Oroville Union High Sch. Dist., 228 F.3d 1092 (9th Cir. 2000); ACLU of N.J. v. Black Horse Pike Reg'l Bd. of Educ., 84 F.3d 1471, 1479 (3d Cir. 1996). Neither Cole nor Black Horse found a constitutional violation on these factors alone but noted them along with other concerns more directly relating to the
Such an argument, in effect, amounts to a rejection of any prayer at graduations and should be rejected for several reasons. First, although an endorsement standard might well be used in such a manner, it hardly need be, nor does Santa Fe as a whole suggest that it should be. The primary focus in Santa Fe was the state's affirmative promotion of prayer, and the contextual concerns were given in that context. Indeed, both Lee and Santa Fe made substantial government involvement a primary focus of their holdings.\textsuperscript{335}

Further support for permitting limited prayer of the type approved in Doe is found in Lee and Santa Fe themselves. Justice Kennedy's majority opinion in Lee completely ignored an endorsement analysis, the rejection of which he more explicitly presented in his Mergens concurrence.\textsuperscript{336} Although the remaining members of the Lee majority voiced their continued support of endorsement through concurring opinions, three of those justices, in a concurring opinion by Justice Souter, seemed to approve the type of voluntary student prayer in Doe, stating 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."\textsuperscript{337}

Support for the Doe type of prayer can also be found in the Santa Fe majority's analysis of the public forum issue. There the Court noted that it had previously permitted religious speech on school property and even through a school structure where it was part of a limited public forum created by the state. The pregame prayer decided by a student vote failed to qualify as such a public forum, however, because it was limited to only one view, voted on by the majority, rather than the full range of opinion typically permitted by a public forum.\textsuperscript{338} Importantly, however, the Court noted that even a single speaker might qualify as a public forum, thereby dissipating Establishment Clause concerns, if the messages that might be communicated are not limited by the state.\textsuperscript{339} Thus, the Court suggested that it was the range of options, rather than the number of participants, that was

\textsuperscript{335} See Santa Fe, 530 U.S. at 305-06; Lee v. Weisman, 505 U.S. 577, 586-88 (1992).


\textsuperscript{337} Lee, 505 U.S. at 630 n.8 (Souter, J., concurring).

\textsuperscript{338} See Santa Fe, 530 U.S. at 303.

\textsuperscript{339} See id. at 304.
critical, and the problem in *Santa Fe* was that only a majoritarian message would be voiced. In contrast, the type of policy approved in *Doe* permits a speaker to say virtually anything and is clearly not tied to a majoritarian position.

Finally, the policy that was upheld by the Eleventh Circuit in *Adler v. Duval County School Board*[^340] (and subsequently summarily vacated and remanded by the Supreme Court for consideration in light of *Santa Fe*) is somewhat more problematic. That policy provided that the graduating class could vote on whether to have a brief (not to exceed two minutes) opening and/or closing message at high school graduations and, if so, could vote on the student speaker. The policy also provided that the content of the message would be prepared by the selected student and could not be monitored or even reviewed by school officials.[^341] On that basis, the Eleventh Circuit upheld the policy, particularly emphasizing that the content of the message was decided by neither the school nor student plebiscite but by the individual student chosen to speak.[^342]

On the one hand, this policy avoids several of the more problematic aspects of *Santa Fe*. First, by making the vote on whether to have opening and/or closing messages, rather than on prayer, the school was not singling out prayer for special treatment. This is arguably in contrast to *Santa Fe*, where the Court emphasized that the very act of putting the prayer issue to a vote was a form of endorsement.[^343] Second, as emphasized by the Eleventh Circuit, the decision to deliver a religious message is one made by an individual student among a range of options, rather than by the state as in *Lee* or by a student vote as in *Santa Fe*. In this sense, it is arguably similar to the type of religious message approved in Justice Souter's concurring opinion in *Lee*.

Despite this analysis, the policy in *Adler* still poses several significant Establishment Clause problems and should probably be found unconstitutional. First, despite structuring the vote to be on opening and closing messages rather than prayer, the policy might be seen simply as a subtle way of seeking a plebiscite on prayer. Indeed, by voting on short messages at the beginning or the end of the ceremony, the policy seems to suggest invocations and benedictions, which are short prayers to open and close

[^341]: See id. at 1072.
[^342]: See id. at 1076.
[^343]: See *Santa Fe*, 530 U.S. at 306.
events. To the extent that a policy such as this can be shown to be a deliberate attempt to encourage prayer, rather than an honest effort to permit an individual student to select an opening or closing message from a range of options, the policy is invalid.\textsuperscript{344}

Second, the voting scheme itself might fail to meet the selection by secular criteria requirement suggested by Justice Souter. Unlike Doe, where the student speaker was selected by class rank, here the speaker is selected by student vote. On its face this is secular since the vote itself is not about prayer or the content of the message but only who will speak. As a practical matter, however, the vote on a student to deliver the message might well be based on the perceived content of that person's message, either because the student advertised in advance what he or she would say or because of the general reputation of the student. More specifically, the possibility exists that a student might be selected because he or she made clear in advance that a prayer would be said or because students perceived that the person would use the time to pray. In this sense, the scheme begins to look quite similar to that struck down in Santa Fe, posing the same concerns about imposition of majoritarian religious views.\textsuperscript{345}

For this reason in particular, the policy in Adler, though somewhat removed from the problems presented in Santa Fe, should still be unconstitutional. A slightly modified policy in which student speakers are selected on some criteria other than a vote, such as class rank, should probably be valid. In such an instance, any decision to pray or otherwise include a religious theme would be the autonomous decision of the student, within a completely wide-open range of options, devoid of control or supervision by the state. As such, it represents the type of student-initiated speech arguably anticipated by both Lee and Santa Fe. More fundamentally, it avoids state promotion of prayer, which is clearly prohibited, and represents the type of student speech protected under the Free Speech Clause.

In sum, most efforts at graduation prayers should be unconstitutional under the standards in Lee and Santa Fe. In particular, any attempt by schools themselves to promote prayer at graduation exercises, even if students deliver the prayers, should be unconstitutional. Most obvious would be where school policy includes prayer in the graduation exercises.

\textsuperscript{344} The Court in Santa Fe made clear in several different places that it would not “turn a blind eye to the context in which [a] policy arose.” Rather, it would examine the circumstances in which a policy is enacted. \textit{Id.} at 315.

\textsuperscript{345} See \textit{id.} at 303-05 (discussing constitutional problems with imposing majoritarian religious views by student election).
Even an attempt to shift the decision to students by permitting them to vote on prayer is unconstitutional since it still involves affirmative state promotion of prayer and presents the further danger of majoritarian decisions. Prayer should be allowed, however, in the very limited situation where a student, selected by secular criteria, chooses prayer within an acceptable range of options, without encouragement or control by the state. Not only are Establishment Clause concerns minimized in such a situation, but free speech concerns strongly suggest protecting the student’s autonomous choice in such a situation.

CONCLUSION

Government-sponsored prayer is a bad idea, and government-promoted prayer involving elementary and secondary students is particularly disturbing. It is not surprising, therefore, that the Supreme Court has consistently held any government attempt to sponsor prayer to be unconstitutional, even when minimal in nature. In doing so, however, the Court has been careful to affirm and even protect students’ own rights to engage in voluntary prayer at school. This basic distinction was affirmed in the Court’s most recent prayer case, Santa Fe Independent School District v. Doe, in which the Court held unconstitutional a school policy permitting students to vote on prayer at football games.\(^{346}\) Though clearly reflecting the Court’s continuing resolve to ensure that the state does not promote prayer in school, even in more subtle and attenuated forms, the Court repeatedly affirmed students’ own right to engage in voluntary prayer at school.

This basic distinction between government-sponsored prayer and voluntary student prayer best reflects the competing constitutional values potentially at stake when examining prayer in public schools. When students truly initiate prayer themselves as one of several speech options, Establishment Clause concerns, which focus on government’s role in promoting religion, are minimized, while free speech concerns are heightened. In particular, the same focus on neutrality which suggests student prayer should be permitted under free speech principles, also addresses and dissipates Establishment Clause concerns. Conversely, when government promotes the prayer, Establishment Clause concerns are heightened while free speech concerns are generally not present.

As a practical matter, this distinction between government and student prayer permits rather limited prayer scenarios in public schools after Santa Fe. Most notable are the continuing viability of student religious clubs

\(^{346}\) Id. at 317.
affirmed in *Mergens* and moment of silence statutes. Both of these involve truly voluntary, and essentially private, prayer by students that remain viable options. On the other hand, the permissibility of prayer in more structured settings, such as graduations, is much more limited. However, even in a graduation, prayer might be permitted where it is the result of truly autonomous student choice within an appropriate range of options and without government promotion. But government efforts to promote prayer in such settings, even by student voting, should be held unconstitutional.