RELIGIOUS LIBERTY IN PUBLIC SCHOOLS: DO STUDENTS SHED THEIR CONSTITUTIONAL RIGHTS AT THE SCHOOLHOUSE GATE?†

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . ."[1]

I. INTRODUCTION

The guarantees of religious liberty secured by the First Amendment embody a very simple proposition that was "first in the Bill of Rights because it was first in the forefathers' minds; it was set forth in absolute terms, and its strength is its rigidity."[2] Forty years ago, Justice Jackson proclaimed,

> The First Amendment was added to the Constitution to stand as a guarantee that neither the power nor the prestige of the Federal Government would be used to control, support or influence the kinds of prayer the American people can say . . . . Under that Amendment's prohibition . . . government in this country, be it state or federal, is without power to prescribe by law any particular form of prayer which is to be used as an official prayer in carrying on any program of governmentally sponsored religious activity.[3]

The "absolute terms" and "rigidity" of which Justice Jackson spoke would certainly seem crystallized in the above passage. Chief Justice Burger more accurately expressed potential confusion in the practical application of these provisions in an opinion twenty-five years later:

> The language of the Religion Clauses . . . is at best opaque, particularly when compared with other portions of the Amendment. Its authors did not simply prohibit the establishment of a state church or a state religion . . . . Instead they commanded that there should be 'no law respecting an establishment of religion.' A law 'respecting' the proscribed result . . . is *not always easily identifiable as one violative of the Clause.* A given law might not establish a state religion but nevertheless be one 'respecting' that end in the sense of being a step that could *lead to* such establishment and hence offend the First Amendment.[4]

The Establishment Clause and Free Exercise Clause encompass fundamental rights guaranteed to citizens. They also circumscribe an

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† Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969) (addressing whether students "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate").

1 U.S. CONST. amend. I.

2 Everson v. Bd. of Educ., 330 U.S. 1, 26 (1947) (Jackson, J., dissenting).

3 Engel v. Vitale, 370 U.S. 421, 429-30 (1962).

4 Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (emphasis added).

area into which public laws, ordinances, rules, and guidelines shall not normally intrude. With regard to religion and religious freedom "the Amendment embraces two concepts, – freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be."[5] It "requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary."[6] "State power is no more to be used so as to handicap religions than it is to favor them."[7] To a far greater extent than is the case with free speech, the enforcement mechanisms and permissive limits of state involvement concerning the Establishment and Free Exercise Clauses are problematic in their definition and execution.

Traditional battlegrounds for testing the constitutional limits imposed by the First Amendment regarding free speech and religious liberty are public school classrooms and associated venues. Particular care is exercised in reviewing the effects of legislation and the potential diminution of rights in these forums, as demonstrated by the words of Justice Brennan:

> The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.[8]

In this regard and germane to all of the discussion that follows, it will be important to consider the heightened sensitivity that the Court routinely applies to decisions which impact students, teachers and administrators in public schools. This article, in Part II, explores the roots of a dichotomy in legislative and judicial treatment of the religion and speech clauses of the First Amendment and the fertile nature of the public school classroom as the catalyst for the debate of these issues. Part III provides a jurisprudential history of the discourse, attempting to ground the source of the modern confusion. Finally, Part IV scrutinizes the current state of play in the very narrow field of limits of religious expression as applied in public schools.

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[5] Sch. Dist. v. Schempp, 374 U.S. 203, 218 (1963) (quoting Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940)).

[6] *Everson*, 330 U.S. at 18.

[7] *Id.* Justice Rutledge, in his dissent, agreed that "the sphere of religious activity, as distinguished from the secular intellectual liberties, has been given the twofold protection and, as the state cannot forbid, neither can it perform or aid in performing the religious function." *Id.* at 52.

[8] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 512 (1969) (quoting Keyshian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (citation omitted)).

II. BACKGROUND

A. Contrasting "Freedoms"

The Framers chose subtly disparate language in defining the first two rights ensured by the First Amendment. Justice Kennedy contrasted the difference in the treatment of religious and speech protections in a Supreme Court decision regarding prayer at high school graduations ten years ago:

> Speech is protected by ensuring its full expression even when the government participates, for the very object of some of our most important speech is to persuade the government to adopt an idea as its own. The method for protecting freedom of worship and freedom of conscience in religious matters is quite the reverse. In religious debate or expression the government is not a prime participant . . . . The Free Exercise Clause embraces a freedom of conscience and worship that has close parallels in the speech provisions . . . but the Establishment Clause is a specific prohibition on forms of state intervention in religious affairs with no precise counterpart in the speech provisions.[9]

Difficulty arises in the attempt to equate governmental treatment of the two rights. With regard to the Religion Clauses, the intricacies prove particularly acute. When government officials undertake actions to promulgate any form of enactment from legislative statute to local policy, potential conflict with the tenets of these clauses may not be readily apparent. These actions, which by the language of the Amendment fall outside the purview of legislative review, are put to the test in practice and are judicially reviewed on constitutional grounds. The Supreme Court, then, as the ultimate arbiter "to say what the law is,"[10] is called upon to make sense of cases in which these legislative pronouncements impermissibly intrude into the territory secured by these clauses. Case-by-case review is required, says the Court, because its holdings

> do not call for total separation between church and state; total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable. . . . [T]he line of separation, far from being a "wall," is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.[11]

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[9] Lee v. Weisman, 505 U.S. 577, 591 (1992) (citations omitted).

[10] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

[11] Lemon v. Kurtzman, 403 U.S. 602, 614 (1971). The reference to a "wall" comes from the oft-quoted letter of Thomas Jefferson to the Danbury Baptist Association. In apparent reference to the scope and effect of the First Amendment, Jefferson penned his now-famous lines that the Establishment Clause built "a wall of separation between church and State." *Lee*, 505 U.S. at 601 n.1 (1992); *see* Martha McCarthy, *Religion and Education: Whither the Establishment Clause?*, 75 IND. L.J. 123, 127 (2000) (reviewing

B. Public Schools as Ground Zero

The heightened sensitivity that the Court routinely applies to decisions that impact students, teachers, and administrators in public schools stems from the understanding that

> [f]amilies entrust public schools with the education of their children . . . . Students in such institutions are impressionable and their attendance is involuntary . . . . The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure.[12]

This sensitivity, however, must be carefully balanced by recognizing that "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[13] In finding invalid a school district's punishment of students for a "silent, passive expression of opinion, unaccompanied by any disorder or disturbance,"[14] the Court held that "the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible."[15] Students are

> 'persons' under our Constitution . . . possessed of fundamental rights which the State must respect . . . [not] confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.[16]

"considerable evidence that adherence to an absolute separation of church and state never has been universal in our nation").

[12] Edwards v. Aguillard, 482 U.S. 578, 584 (1987) (citations omitted). "The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools . . . ." Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 231 (1948). *See* McCarthy, *supra* note 11, at 127-28 (enumerating examples where "[t]raditionally, separationist doctrine [has] received the most support in education cases, given the captive, impressionable audience").

[13] *Tinker*, 393 U.S. at 506.

[14] *Id.* at 508. Wearing black armbands to school to protest the Vietnam war, specifically proscribed by the school district, "was entirely divorced from actually or potentially disruptive conduct by those participating in it" and as such "akin to 'pure speech'" that the Supreme Court has "repeatedly held, is entitled to comprehensive protection under the First Amendment." *Id.* at 505-06.

[15] *Id.* at 511. Other considerations include impact on "rights of other students to be secure and to be let alone." *Id.* at 508.

[16] *Id.* at 511. A student may "express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without 'materially and substantially interfer[ing]

This absolutism in upholding students' rights begins to evaporate under challenge of the Religion Clauses. Constitutionally valid reasons to regulate speech and expression are precisely the issues with which the Court wrestles. This observation is illustrated by Justice Rehnquist's dissent in a 1981 case that invalidated a Kentucky statute requiring posting of copies of the Ten Commandments "on the wall of each public classroom in the State."[17] In criticizing the majority's wholesale denial of any potential secular purpose as such a "valid reason," Justice Rehnquist maintained that

> the elected representatives of Kentucky determined, that the Ten Commandments have had a significant impact on the development of secular legal codes of the Western World . . . . Certainly the State was permitted to conclude that a document with such secular significance should be placed before its students, with an appropriate statement of the document's secular import.[18]

The Court has set about, when called upon, to dissect the language of the Religion Clauses and to define the factors that affect the balance of rights in public schools. In so doing, the opinions provide a yardstick against which the limits of establishment and free exercise shall be measured. In 1947, the Court found that reimbursing parents for fares that they paid for the public transportation of their children attending public *and Catholic* schools was permitted.[19] Then, at the other end of the spectrum, some fifteen years later, the Court found that a state-adopted program of daily brief, denominationally-neutral, voluntary prayer in the classroom intruded into the realm of the Establishment Clause.[20] Two years ago, the Justices likely thought that they had

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with the requirements of appropriate discipline in the operation of the school' and without colliding with the rights of others." *Id.* at 513.

[17] Stone v. Graham, 449 U.S. 39, 39 (1981). The Court held that posting copies of the Ten Commandments will "induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments. However desirable this might be as a matter of private devotion, it is not a permissible state objective under the Establishment Clause." *Id.* at 42.

[18] *Id.* at 45. Justice Rehnquist went on to quote Justice Jackson's concurrence from *McCollum v. Bd. of Educ.*:

> Perhaps subjects such as mathematics, physics or chemistry are, or can be, completely secularized. But it would not seem practical to teach either practice or appreciation of the arts if we are to forbid exposure of youth to any religious influences. Music without sacred music, architecture minus the cathedral, or painting without the scriptural themes would be eccentric and incomplete, even from a secular point of view . . . . I should suppose it is a proper, if not an indispensable, part of preparation for a worldly life to know the roles that religion and religions have played in the tragic story of mankind.

Id. (quoting McCollum v. Bd. of Educ., 333 U.S. 203, 235-36 (1948) (Jackson, J., concurring)).

[19] Everson v. Bd. of Educ., 330 U.S. 1, 8-18 (1947).

[20] Engel v. Vitale, 370 U.S. 421, 425 (1962).

rounded out the discussions with clarity and finality when they determined that a Texas school district's policy of "permitting" student-led, student-initiated prayer at football games violated the Establishment Clause.[21] The sweeping nature of this pronouncement was evident in the action that it precipitated regarding pending cases on other issues of religious liberty in schools. In each case, writs of certiorari were granted, the judgments were vacated and the cases remanded "for further consideration in light of *Santa Fe*."[22]

III. SEPARATION OF CHURCH AND STATE IN THE PUBLIC SCHOOL FORUM: FROM *ENGEL* TO *LEE*

The Supreme Court has had the opportunity to address the application of the religious liberties clauses in numerous cases that help to define, and refine, the "blurred line."[23] Some of these decisions have proven incredibly simple for the Court, and some have proven very difficult. Yet in all cases, the decisions spark controversy. Among the simplest was *Engel v. Vitale*, involving a district school board in New York that directed its principals to cause a prayer, composed by state officials, "to be said aloud by each class in the presence of a teacher at the beginning of each school day."[24] Parents challenged the policy as "contrary to [their] beliefs, religions, or religious practices" in violation of the First Amendment.[25] The Court pronounced, "[I]t is no part of the business of government to compose official prayers for any group . . . to recite as a part of a religious program carried on by government."[26] The opinion was as straightforward as the holding in providing a brief review of the history of religious persecution that led the Framers to add the First Amendment to the Constitution.[27] The amendment's "first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion."[28]

Just a year later, in *School District v. Schempp*, the Court reviewed companion cases, commonly adjudicated on appeal, which questioned the validity of state action requiring schools to begin each day with readings

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[21] Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 320 (2000) (holding that the policy was "invalid on its face because it establishes an improper majoritarian election on religion, and unquestionably has the purpose and creates the perception of encouraging the delivery of prayer at a series of important school events").

[22] Adler v. Duval County Sch. Bd., 531 U.S. 801, 801 (2000); Chandler v. Siegelman, 530 U.S. 1256 (2000). *See infra* Part IV (comparing and contrasting *Adler*, *Chandler*, and *Santa Fe*).

[23] *See supra* text accompanying note 10.

[24] *Engel*, 370 U.S. at 422.

[25] *Id.* at 423.

[26] *Id.* at 425.

[27] *Id.* at 431.

[28] *Id.*

from the Bible.[29] The two cases, one in Pennsylvania and one in Maryland, were decided differently in the lower courts, which is surprising in the aftermath of *Engel*. The Court deferentially admitted that in an earlier holding "we gave specific recognition to the proposition that '[w]e are a religious people whose institutions presuppose a Supreme Being.'"[30] The opinion further fortified that assertion by cataloging a list of traditional governmental practices that provided contemporary evidence of such recognition.[31] Borrowing words from Justice Jackson's dissent in *Everson v. Board of Education* that "secular education can be isolated from all religious teaching so that the school can inculcate all needed temporal knowledge and also maintain a strict and lofty *neutrality* as to religion,"[32] the Court articulated the first "test" for neutrality. In order for any enactment to pass constitutional muster, the question must be posed "what are the purpose and the primary effect of the enactment?"[33] The Court provided amplifying language regarding accepted "neutral" practices, including use of the Bible as a book "worthy of study for its literary and historic qualities."[34] Finding that neither statute met the standard of neutrality with respect to secular purpose or primary effect, the Court struck both as inconsistent with the First Amendment.[35]

Lemon v. Kurtzman was the next significant foray into the area of religious liberty. The case involved challenges "to Pennsylvania and Rhode Island statutes providing state aid to church-related elementary

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[29] *Schempp*, 374 U.S. 203, 205 (1963).

[30] *Id.* at 213 (quoting Zorach v. Clauson, 343 U.S. 306, 313 (1952)).

[31] *See id.* These practices of government include:

> continuance in our oaths of office from the Presidency to the Alderman of the final supplication, "So help me God." Likewise each House of the Congress provides through its Chaplain an opening prayer, and the sessions of this Court are declared open by the crier in a short ceremony, the final phrase of which invokes the grace of God.

Id.

[32] Everson v. Bd. of Educ., 330 U.S. 1, 24 (1947) (emphasis added) (assuming that "after the individual has been instructed in worldly wisdom he will be better fitted to choose his religion"); *cf.* Stone v. Graham, 449 U.S. 39, 45 (1981) (quoting Justice Jackson's concurring opinion published just one year after *Everson*).

[33] *Schempp*, 374 U.S. at 222. If the answer to either question imputes "the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. . . . [T]o withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion." *Id.*

[34] *Id.* at 225. "[S]uch study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment." *Id.*

[35] *Id.* at 226-27.

and secondary schools."[36] The Court expanded the test expressed in *Schempp* and provided the jurisprudential standard for religious neutrality that is still applied today, the *Lemon* Test.[37] The test requires review of the governmental enactment in question under three prongs: "[f]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; [and] finally, the statute must not foster 'an excessive government entanglement with religion.'"[38] The Court in *Lemon* quickly dispensed with its review of the challenged statutes under the first and second prongs determining that there was "no basis for a conclusion that the legislative intent was to advance religion."[39] The Court then conducted extensive review of the complex statutory schemes of oversight and verification that were attendant to the proposed allocations of resources in both state enactments. The Court concluded that both enactments "foster[ed] an impermissible degree of entanglement."[40] As such, the statutes were deemed adverse to the Establishment Clause under the third prong of the Court's newly announced standard.[41]

A year later, the United States Circuit Court of Appeals for the D.C. Circuit heard a class action suit, *Anderson v. Laird*, that reflected the tumult of the time and the changes in societal attitudes that were taking place.[42] Appellants sought "reversal of the District Court's decision that the requirement of mandatory chapel attendance for cadets and midshipmen at three federal military academies [did] not violate the

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[36] Lemon v. Kurtzman, 403 U.S. 602, 606 (1971). The Pennsylvania statute provided for "financial support to nonpublic elementary and secondary schools . . . [for] teachers' salaries, textbooks, and instructional materials in specified secular subjects." *Id.* The Rhode Island statute allowed the state to pay "directly to teachers in nonpublic elementary schools a supplement of 15% of their annual salary." *Id.* at 606-07.

[37] *Id.* at 612.

[38] *Id.* at 612-13 (construing language from Bd. of Educ. v. Allen, 392 U.S. 236, 243 (1968) and Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)); *see* Charles J. Russo & Ralph Mawdsley, *The Supreme Court and the Establishment Clause at the Dawn of the New Millennium: "Bristling with Hostility to All Things Religious" or Necessary Separation of Church and State?*, 2001 BYU EDUC. & L.J. 231, 234, 237-38 (providing an expanded discussion regarding "the seemingly ubiquitous tripartite test, employed in virtually all subsequent cases involving religion").

[39] *Lemon*, 403 U.S. at 613.

[40] *See id.* at 615-22. In addition to the "facial" entanglement incumbent in the statutes, the Court concerned itself also with "[a] broader base of entanglement of yet a different character . . . presented by the divisive political potential of these state programs. . . . The potential for political divisiveness related to religious belief and practice is aggravated in these two statutory programs . . . ." *Id.* at 622-23.

[41] *Id.* at 625.

[42] Anderson v. Laird, 466 F.2d 283, 284 (D.C. Cir. 1972).

Freedom of Religion Clauses."[43] The District Court in *Anderson* had applied the neutrality test from *Schempp* and "reasoned that there [was] a crucial distinction between 'attendance' at religious services and 'worship' at those services."[44] The court found merit to the government's argument that "the military academies require *only attendance* at Sunday services for the secular purpose of providing an 'overall training program designed to create effective officers and leaders by preparing them to meet all the exigencies of command.'"[45] The Court of Appeals was unpersuaded by these arguments, holding that the statutes failed under the second prong of the *Lemon* test. The court concluded that "[a]ttendance at religious exercises is an activity which under the Establishment Clause a government may never compel."[46] This court also felt it important to completely foreclose the government's "secular purpose" argument by stating, "An individual's voluntary assumption of an employment or an educational relationship with the government is not a waiver of First Amendment rights."[47] "[W]hile an individual's freedoms may of necessity be abridged upon his entrance into military life, there is no authority for the point that his right to freedom of religion is abolished."[48]

All remained fairly quiet as to court challenges involving application of the Religion Clauses until the early eighties when a question was raised regarding the validity of three Alabama statutory provisions dealing with a "1-minute period of silence in all public schools 'for meditation.'"[49] The United States District Court for the Southern District of Alabama, in a startling decision, held that "Alabama has the power to establish a state religion if it chooses to do so."[50] Not

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[43] *Id.*

[44] *Id.* at 285. The government asserted that

> the primary effect of compulsory attendance is also secular "in that it enables those who will one day hold command positions to gain an awareness and respect for the force religion has on the lives of men so as to react for the benefit of all in combat crises including the giving of spiritual counseling and guidance to those who turn to religion in such situations."

Id.

[45] *Id.* (emphasis added).

[46] *Id.* "The Government's contention that there is a difference between compelling attendance at church and compelling worship or belief is completely without merit." *Id.* at 291.

[47] *Id.* at 293.

[48] *Id.* at 294.

[49] Wallace v. Jaffree, 472 U.S. 38, 40 (1985).

[50] *Id.* at 41. In arriving at its intriguing conclusion,

> the District Court reviewed a number of opinions of [the Supreme Court] . . . and then embarked on a fresh examination of the question whether the First Amendment imposes any barrier to the establishment of an official religion by the State of Alabama. After reviewing at length what it

surprisingly, the Court of Appeals for the Eleventh Circuit summarily reversed. The Supreme Court granted certiorari on the narrow question of whether a statute "which authorizes a period of silence for 'meditation or voluntary prayer,' is a law respecting the establishment of religion within the meaning of the First Amendment."[51] The Supreme Court affirmed the Court of Appeals' dismissal of the District Court's "remarkable conclusion."[52] The Court felt compelled to reaffirm its view of the relevant societal and jurisprudential history surrounding the Religion Clauses before ultimately holding that the statute in question failed for lack of a "secular purpose" under the first prong of *Lemon*.[53] Justice Powell, in a concurring opinion, wrote separately to respond specifically to criticism of the *Lemon* test and to give further definition to the first prong of that test. He stated that while the "secular purpose must be 'sincere' [and not] merely a 'sham,'"[54] the Court has "not interpreted the first prong of *Lemon* . . . as requiring that a statute have 'exclusively secular' objectives."[55] He explained, "If such a requirement existed, much conduct and legislation approved by this Court in the past would have been invalidated."[56]

In 1987, the Court heard the question of whether "Louisiana's 'Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction' Act (Creationism Act) [was] facially invalid as violative of the Establishment Clause . . . ."[57] The Creationism Act forbade "the teaching of the theory of evolution in public schools unless accompanied by instruction in 'creation science.'"[58] Applying *Lemon*, the Court scrutinized "the Act's stated purpose . . . to protect academic freedom"[59] and concluded that "[t]he goal of providing a more

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perceived to be newly discovered historical evidence, the District Court arrived at their conclusion.

Id. at 44-45.

[51] *Id.* at 41-42.

[52] *Id.* at 56-57.

[53] *Id.*

[T]he Alabama Legislature intended to change existing law . . . for the sole purpose of expressing the State's endorsement of prayer activities for one minute at the beginning of each schoolday. . . . Such an endorsement is not consistent with the established principle that the government must pursue a course of complete neutrality toward religion.

Id. at 59-60.

[54] *Id.* at 64.

[55] *Id.*

[56] *Id.*

[57] Edwards v. Aguillard, 482 U.S. 578, 580-81 (1987).

[58] *Id.* at 581.

[59] *Id.* at 586 (construing LA. REV. STAT. ANN. § 17:286.2 (West 1982)). "[R]equiring schools to teach creation science with evolution does not advance academic freedom. The Act does not grant teachers a flexibility that they did not already possess to supplant the

comprehensive science curriculum [was] not furthered either by outlawing the teaching of evolution or by requiring the teaching of creation science."[60] The Court put its exclamation point on the discussion by suggesting that "teaching a variety of scientific theories about the origins of humankind to schoolchildren might be validly done with the clear secular intent of enhancing the effectiveness of science instruction. But because the primary purpose of the Creationism Act [was] to endorse a particular religious doctrine, the Act further[ed] religion."[61]

The first significant extension of the application of the Religion Clauses in a public school setting involving students outside the classroom came in *Lee v. Weisman* in 1992.[62] According to policy, "[s]chool principals in the public school system . . . [were] permitted to invite members of the clergy to offer invocation and benediction prayers as part of the formal graduation ceremonies for middle schools and for high schools."[63] The middle school principal "invited a rabbi to deliver prayers at the graduation exercises."[64] The principal gave the rabbi a pamphlet containing certain guidelines and "advised him the invocation and benediction should be nonsectarian."[65] On challenge, the school board asserted that "these short prayers . . . are of profound meaning to many . . . and acknowledgment for divine guidance and for the deepest spiritual aspirations of our people ought to be expressed at an event as important in life as a graduation."[66]

The District Court had applied the *Lemon* test and determined under the second prong that "the practice of including invocations and benedictions, even so-called nonsectarian ones, in public school graduations create[d] an identification of governmental power with religious practice, endorse[d] religion, and violate[d] the Establishment Clause."[67] The court rejected the state's argument that this case

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present science curriculum with the presentation of theories, besides evolution, about the origin of life." *Id.* at 587.

[60] *Id.* at 586. "The preeminent purpose of the Louisiana Legislature was clearly to advance the religious viewpoint that a supernatural being created humankind. The term 'creation science' was defined as embracing this particular religious doctrine by those responsible for the passage of the Creationism Act." *Id.* at 591.

[61] *Id.* at 594.

[62] Lee v. Weisman, 505 U.S. 577 (1992).

[63] *Id.* at 580.

[64] *Id.* at 581.

[65] *Id.* The pamphlet was entitled GUIDELINES FOR CIVIC OCCASIONS, prepared by the National Conference of Christians and Jews, and "recommend[ed] that public prayers at nonsectarian civic ceremonies be composed with 'inclusiveness and sensitivity,' though they acknowledge[d] that 'prayer of any kind may be inappropriate on some civic occasions.'" *Id.*

[66] *Id.* at 583-84.

[67] *Id.* at 585.

warranted application of a "legislative prayer" exception by narrowly construing the Supreme Court's decision on that issue.[68] In turn, the Supreme Court affirmed the decision of the lower courts, holding that "[t]he government involvement with religious activity in this case is pervasive, to the point of creating a state-sponsored and state-directed religious exercise in a public school."[69] The opinion made clear that the overriding concerns surrounded the fact that it was the principal who decided that an invocation and a benediction should be given, chose the religious participant, provided that chosen participant with printed guidelines, and advised the religious participant that the prayers should be nonsectarian.[70] The Court concluded that these actions amounted to "control[ling] the content of the prayers."[71]

In the middle of its opinion, the Court took the opportunity to segue into a discussion of another principal aspect of the case that was absent in its jurisprudence to that time. In classroom situations, students are understood to be in a non-voluntary environment. Thus, any interjection of prayer into the classroom setting contains elements of state coercion. The State, in *Lee*, argued that graduation ceremonies were wholly voluntary and thus lacked the element of coercion necessary to implicate the Establishment Clause.[72] The Court was unconvinced by this argument and felt compelled to address the issue as follows:

> It is argued that our constitutional vision of a free society requires confidence in our own ability to accept or reject ideas of which we do not approve, and that prayer at a high school graduation does nothing more than offer a choice. By the time they are seniors, high school students no doubt have been required to attend classes and assemblies and to complete assignments exposing them to ideas they find distasteful or immoral or absurd . . . . [S]tudents may consider it an odd measure of justice to be subjected during the course of their educations to ideas deemed offensive and irreligious, but to be denied a brief, formal prayer ceremony that the school offers in return. This argument cannot prevail . . . .[73]

The Court determined that "subtle coercive pressures exist[ed] and . . . the student had no real alternative which would have allowed her to avoid the fact or appearance of participation."[74] "[T]here are heightened concerns with protecting freedom of conscience from subtle coercive

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[68] *Id.*; *see also* Marsh v. Chambers, 463 U.S. 783, 794-95 (1983) (upholding constitutionality of the Nebraska State Legislature's practice of opening each of its sessions with a prayer offered by a chaplain paid out of public funds).

[69] *Lee*, 505 U.S. at 587.

[70] *Id.* at 587-88.

[71] *Id.* at 588.

[72] *See id.* at 592-97.

[73] *Id.* at 591.

[74] *Id.* at 588.

pressure in the elementary and secondary public schools,"[75] and "prayer exercises in public schools carry a particular risk of indirect coercion."[76] Though the opinion states that "in our culture standing or remaining silent can signify adherence to a view *or* simple respect for the views of others,"[77] the Court nonetheless concludes that "for the dissenter of high school age, who has a reasonable perception that she is being *forced by the State to pray* in a manner her conscience will not allow" real injury results.[78] The Court dismissed the stipulation that such ceremonies are "voluntary" as overly formalistic because "high school graduation is one of life's most significant occasions."[79]

Interestingly, the opinion mentions the rite of passage that the ceremony is meant to represent. The Court acknowledges the participation of family and friends celebrating and wishing the graduating student ongoing success, "all to the end of impressing upon the young person the role that it is his or her right and duty to assume in the community and *all of its diverse parts*."[80] This statement, however, is clearly anachronistic in the context of an opinion that serves to ensure that the student is shielded from potential injurious effects of standing quietly out of respect for others while "prayers . . . of a de minimis character"[81] are spoken during which the student is free to "concentrate on joining [the] message, meditate on her own religion, or let her mind wander."[82] The Court concluded that "[t]he Constitution forbids the State to exact religious conformity from a student as the price of attending her own high school graduation."[83] "The prayer exercises in this case [were] especially improper because the State ha[d] in every practical sense compelled attendance and participation in an explicit religious exercise

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[75] *Id.* at 592.

[76] *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.*

[77] *Id.* at 593 (emphasis added).

[78] *Id.* (emphasis added).

[79] *Id.* at 595.

> Attendance may not be required by official decree, yet it is apparent that a student is not free to absent herself from the graduation exercise in any real sense of the term "voluntary," for absence would require forfeiture of those intangible benefits which have motivated the student through youth and all her high school years.

Id.

[80] *Id.* (emphasis added).

[81] *Id.* at 594.

[82] *Id.*

[83] *Id.* at 596.

at an event of singular importance to every student, one the objecting student had no real alternative to avoid."[84]

IV. THE CURRENT SCHEME IN THREE CONTRASTED VIEWS

The Supreme Court has attempted to make clear the "absolute terms" and "rigidity"[85] of the Religion Clauses out of the "blurred, indistinct, and variable barrier"[86] the clauses circumscribe about state action. While the above cases, all of which are generally cited in some form when any court renders an opinion on the application of the clauses, provide a reasoned approach in analysis of the issues, their precedential value is limited in application to the intricate nuances presented in each case. As will be shown below in review of the three most recent strings of cases that have addressed the issues, the lower courts continue to wrestle with the tension between the clauses and the Supreme Court's guidance regarding their application. Courts have decided cases in ways that seem to conflict with the above precedents or, at a minimum, very narrowly construe the holdings in the circumstances of the individual case. The following review will focus on the particularly striking outcome where courts have been forced to readdress some of the same issues to arrive at compatible or, at times, adverse results.

The Supreme Court began the summer of 2000 by issuing what appeared to be the definitive word on religious expression outside the classroom environment in the nation's public schools in *Santa Fe Independent School District v. Doe*.[87] So broad was the sweep of this single opinion in the eyes of the Court that it was seen to encompass all of the necessary elements to define the current view on the subject of freedom of religious expression in a public school setting. As such, the decision in *Santa Fe* led the Court to grant petitions for writs of certiorari in two other cases pending on appeal. In each case, the judgment was vacated and the case remanded "for further consideration in light of *Santa Fe*."[88] The views of the Supreme Court were thus

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[84] *Id.* at 599.

> The sole question presented is whether a religious exercise may be conducted at a graduation ceremony in circumstances where, as we have found, young graduates who object are induced to conform. No holding by this Court suggests that a school can persuade or compel a student to participate in a religious exercise. That is being done here, and it is forbidden by the Establishment Clause of the First Amendment.

Id.

[85] Everson v. Bd. of Educ., 330 U.S. 1, 26 (1947) (Jackson, J., dissenting).

[86] Lemon v. Kurtzman, 403 U.S. 602, 614 (1971).

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

[88] Adler v. Duval County Sch. Bd., 531 U.S. 801, 801 (2000); Chandler v. Siegelman, 530 U.S. 1256 (2000). Note in the latter citation that Don Siegelman is now the named defendant as Governor of Alabama and President of the State Board of Education,

subjected to interpretation on remand, and that interpretation of the essential holdings of *Santa Fe* by the Eleventh Circuit Court of Appeals in both remanded cases proves as enlightening as the language of the Supreme Court opinion itself.

A. Santa Fe Independent School District v. Doe

Prior to 1995, at the one high school in the small Santa Fe Independent School District in Texas, a student was annually elected to the office of "student council chaplain [whose duties included] deliver[ing] a prayer over the public address system before each varsity football game for the entire season."[89] This practice was challenged as a violation of the Establishment Clause, and while proceedings were pending, "the school district adopted a different policy that permit[ted], but [did] not require, prayer initiated and led by a student at all home games."[90] The District Court then entered an order modifying the school board's policy to permit only "non-sectarian, non-proselytizing prayer."[91] The Supreme Court, affirming the Court of Appeals reversal of the District Court's order, determined the policy was invalid on its face because it "establish[ed] an improper majoritarian election on religion, and unquestionably [had] the purpose and create[d] the perception of encouraging the delivery of prayer at a series of important school events."[92]

Consolidating divergent recent holdings in the lower courts from across the country, the opinion categorically extended the coercion test from *Lee* to the facts presented, stating that "[a]lthough this case involves student prayer at a different type of school function, our analysis is properly guided by the principles that we endorsed in *Lee*."[93]

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positions held by Fob James at the commencement of the original action in Federal District Court; references to *Chandler v. James* refer to earlier proceedings in the same line of cases.

89 *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 294.

90 *Id.*

91 *Id.* The policy, "Prayer at Football Games," authorized student elections, first to determine *whether* invocations should be delivered, and then to select the spokesperson to deliver them. The students chose to allow a student to say a prayer at football games and selected that student. *Id* at 297-98.

92 *Id.* at 320.

93 *Id.* at 302.

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

Id. at 301 (quoting Lee v. Weisman, 505 U.S. 577, 587 (1992)).

The school district argued that "there [was] no impermissible government coercion because the pregame messages [were] the product of student choices [and] because attendance at an extracurricular event, unlike a graduation ceremony, is voluntary."[94] The Court disposed of the former argument by attacking the majoritarian process that, it felt, would result in the suppression of minority views; it then moved on to dissect the latter argument.[95] The Court imposed a nearly incomprehensible limiting construction to the term "voluntary" as applied to high school students' attendance at extra curricular activities concluding that "the importance to many students of attending and participating in extracurricular activities as part of a complete educational experience" is apparently immeasurable.[96] The Court states with emphasis that

> [h]igh school home football games are traditional gatherings of a school community; . . . not important to some students, and they voluntarily choose not to attend. [For others, though,] the choice between whether to attend or . . . risk facing a personally offensive religious ritual . . . [is a choice that] the Constitution . . . demands that the school may not force . . . upon these students.[97]

The Court dispenses with the assertion that the messages are private student speech, determining rather that they are public prayer because "[t]hese invocations are authorized by a government policy and take place on government property at government-sponsored, school-related events."[98] Based on the overbreadth of this statement, finding any related scenario that would satisfy the claim asserted in the very next line of the opinion that "not every message delivered under such circumstances is the government's own"[99] would indeed prove problematic. The Court not only falls short of attempting to define what "such circumstances" may be, but seems to contradict itself later in the opinion by stating that

> regardless of whether one considers a sporting event an appropriate occasion for solemnity, the use of an invocation to foster such solemnity is impermissible when, in actuality, it constitutes prayer sponsored by the school. *And it is unclear what type of message would*

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

95 *Id.* at 316-17.

96 *Id.* at 311.

> Attendance at a high school football game, unlike showing up for class, is certainly not required in order to receive a diploma. Moreover, we may assume that the District is correct in arguing that the informal pressure to attend an athletic event is not as strong as a senior's desire to attend her own graduation ceremony.

Id.

97 *Id.* at 312.

98 *Id.* at 302.

99 *Id.*

be both appropriately 'solemnizing' under the District's policy and yet nonreligious.[100]

The opinion is very clear and exceptionally comprehensive in its criticism of the defective election scheme,[101] the failed attempt at government disentanglement,[102] the total lack of neutrality to the policy,[103] the purported secular purpose to "foster free expression,"[104] and the incriminating history of the policy.[105] All of these factors, in the final analysis, appear amassed in an attempt to overshadow the "stretch" that the opinion makes in finding "coercion" among high school students on Friday afternoons in the stands of a high school football field in south Texas.[106]

B. Chandler v. James

Chandler v. James involves the Alabama legislature's fourth attempt to pass legislation aimed at facilitating "student prayer" in public school classrooms and at school events.[107] With a history dating back to *Jaffree*,[108] the latest legislation read, "On public school . . . property, non-sectarian, non-proselytizing student-initiated voluntary prayer, invocation and/or benedictions, shall be permitted during compulsory or non-compulsory school-related student assemblies, . . .

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[100] *Id.* at 309 (emphasis added).

[101] *Id.* at 304. The election scheme was implemented to remove government actors from involvement, and yet the Court offers the critique that the "election system *ensures* that only those messages deemed 'appropriate' . . . may be delivered. . . . [T]he majoritarian process . . . guarantees, by definition, that minority candidates will never prevail and that their views will be effectively silenced." *Id.* (emphasis added).

[102] *Id.* at 305. "Contrary to the District's repeated assertions that it has adopted a "hands-off" approach . . . the 'degree of school involvement' makes it clear that the pregame prayers bear 'the imprint of the State . . . ' thus put[ting] school-age children who objected in an untenable position." *Id.*

[103] *Id.* at 306. "[T]he policy mandates that the 'statement or invocation' be 'consistent with the goals and purposes of this policy,' which are 'to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition.'" *Id.*

[104] *Id.* at 309. "[T]he fact that only one student is permitted to give a content-limited message suggests that this policy does little to 'foster free expression.'" *Id.*

[105] *Id.* at 315. "Most striking to us is the evolution of the current policy from the long-sanctioned office of 'Student Chaplain' to the candidly titled 'Prayer at Football Games' regulation. This history indicates that the District intended to preserve the [challenged] practice of prayer before football games." *Id.*

[106] For a review of *Santa Fe* and its potential impacts, see Jeremy Speich, Note, Santa Fe Independent School District v. Doe: *Mapping the Future of Student-Led, Student-Initiated Prayer in Public Schools*, 65 ALB. L. REV. 271 (2001).

[107] Chandler v. Siegelman, 248 F.3d 1032, 1033 (11th Cir. 2001) (Barkett, J., dissenting) (denying rehearing en banc), *cert. denied*, No. 00-1606, 2001 U.S. LEXIS 4546 (June 18, 2001).

[108] *See supra* text accompanying notes 49-56.

sporting events, . . . graduation or commencement ceremonies, and other . . . events."[109] The District Court found the statute facially unconstitutional.[110] Then, the District Court went much further and separately issued a sweeping permanent injunction[111] that specifically prohibited the school board from "'permitting' vocal prayer or other devotional speech in its schools."[112] The Eleventh Circuit affirmed the judgment of the District Court as to the unconstitutionality of the statute.[113] However, the Eleventh Circuit vacated the injunction, indicating that through its actions the court "may neither prohibit genuinely student-initiated religious speech, nor apply restrictions on the time, place, and manner of that speech which exceed those placed on students' secular speech."[114] The statement was simple and unequivocal. The District Court had overstepped its bounds in issuing an overbroad injunction and the appellate court was remanding the case for that court to recraft the injunction much more narrowly.

The appeal to the Supreme Court was pending when *Santa Fe* was decided. On remand, the Eleventh Circuit reinstated its opinion and judgment, but felt it necessary to "explain how *Chandler I* fits within the Supreme Court's analysis in *Santa Fe* so that the district court may have this guidance when it revisits its injunction."[115] The opinion states that "*Santa Fe* condemns school *sponsorship* of student prayer. *Chandler* [*I*] condemns school censorship of student prayer. In their view of the proper relationship between school and prayer, the cases are complementary rather than inconsistent."[116] The court reviewed the neutrality and entanglement concerns of the *Santa Fe* opinion and pointed out that "*Santa Fe* [left] unanswered under what circumstances religious speech in schools can be considered *private*, and, therefore, protected. This is the answer *Chandler I* sought to supply."[117] The analysis calls for a focus not on "the public context that makes some speech the State's" but rather the degree of "entanglement with the

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[109] Chandler v. James, 180 F.3d 1254, 1256 (11th Cir. 1999), *reh'g denied*, 198 F.3d 265, *cert. granted, vacated*, 530 U.S. 1256 (2000) (referred to alternately as *Chandler I*).

[110] *Id.* at 1256.

[111] *See* Chandler v. James, 985 F. Supp. 1094 (M.D. Ala. 1997).

[112] *Chandler*, 180 F.3d at 1257 ("[T]he prohibition applies to bar not only school personnel from leading or participating in such public or vocal prayer or other devotional speech or Bible reading, but also requires school officials to forbid students . . . from doing so while in school or at school-related events.").

[113] *Id.* at 1266.

[114] *Id.*

[115] Chandler v. Siegelman, 230 F.3d 1313, 1314 (11th Cir. 2000), *reh'g en banc denied*, 248 F.3d 1032 (2001), *cert. denied*, No. 00-1606, 2001 U.S. LEXIS 4546 (June 18, 2001).

[116] *Id.* at 1315.

[117] *Id.* at 1316.

State."[118] This led the Eleventh Circuit to conclude, "So long as the prayer is *genuinely student-initiated*, and not the product of any school policy which actively or surreptitiously encourages it, the speech is private and it is protected."[119] This explanation provides some clarity in attempting to answer the question left unresolved in *Santa Fe* regarding the types of messages and circumstances of delivery that will not implicate the state and by extension the Establishment Clause.[120] The Supreme Court is apparently satisfied with the finality of the case because on June 18, 2001, the writ of certiorari was denied. The attempt to find congruity between the two opinions still lacks a certain fidelity regarding which "specific" actions may and may not be deemed appropriate.[121]

C. Adler v. Duval County School Board

In March 2000, the Eleventh Circuit handed down yet another decision in a religious liberty case from Florida. It "ruled that Duval County's facially-neutral policy permitting high school seniors to vote upon the delivery by a student of a message entirely of that student's choosing as part of graduation ceremonies did not violate the Establishment Clause."[122] The plaintiffs filed a petition for a writ of certiorari, which the Supreme Court took up in October 2000 and remanded with the language regarding further consideration.[123] The Eleventh Circuit reheard the case en banc and returned its decision on

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[118] *Id.*

[119] *Id.* at 1317 ("Private speech endorsing religion is constitutionally protected – even in school. Such speech is not the school's speech even though it may occur in the school. Such speech is not unconstitutionally coercive even though it may occur before non-believer students.").

[120] *See supra* text accompanying notes 98-100.

[121] For a comprehensive review of *Chandler v. James*, see Sarah Beth Mabery, Case Note, Chandler v. James: *Welcome Student Prayer Back in the Schoolhouse Gate*, 51 MERCER L. REV. 1309 (2000).

[122] Adler v. Duval County Sch. Bd., 250 F.3d 1330, 1331 (11th Cir. 2001), *cert. denied*, 122 S.Ct. 664 (2001).

The Duval County policy provides in relevant part:

> 1. The use of a brief opening and/or closing message, not to exceed two minutes, at high school graduation exercises shall rest within the discretion of the graduating senior class;
>
> 2. The opening and/or closing message shall be given by a student volunteer, in the graduating senior class, chosen by the graduating senior class as a whole;
>
> 3. If the graduating senior class chooses to use an opening and/or closing message, the content of that message shall be prepared by the student volunteer and shall not be monitored or otherwise reviewed by Duval County School Board, its officers or employees . . . .

Id. at 1332.

[123] Adler v. Duval County Sch. Bd., 531 U.S. 801 (2000).

May 11, 2001. Finding the differences between this case and *Santa Fe* to be "substantial and material,"[124] the court determined that

> [t]he Court in *Santa Fe* had every opportunity to declare that all religious expression permitted at a public school graduation ceremony violates the Establishment Clause; it did not do so. We could not invalidate Duval County's policy, *on its face*, without taking the very step the Court declined to take . . . . Accordingly, we reinstate our original en banc decision and judgment in favor of the County.[125]

The impact of this decision is as striking in its conclusion as it is in its clarity of analysis. The review begins with the assertion that "it is impossible to say that the Duval County policy *on its face* violates the Establishment Clause without effectively banning *all* religious speech at school graduations . . . . *Santa Fe* does not go that far, and we are not prepared to take such a step."[126] As such, the *Adler* court has, at least temporarily, derailed a fast moving train of jurisprudential decision-making. The court reissued a challenge, not to the express language, but rather to the intent of the Supreme Court that seemed destined to impose a total ban.

The Eleventh Circuit had previously evaluated the school board's policy under the standards set forth in *Lee* and found that it satisfied all three prongs of the *Lemon* test and that no coercion existed.[127] The opinion emphasized that "school officials ha[d] no power to direct that a message (let alone a religious message) be delivered at graduation ceremonies, or control in any way the content."[128] The court rejects the arguments "that the state's role in providing a vehicle for a graduation message by itself transformed the student's private speech into state-sponsored speech"[129] and "that Duval County's policy would have the impermissible effect of coercing unwilling listeners to participate in a

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[124] *Adler*, 250 F.3d at 1340.

[125] *Id.* at 1342.

[126] *Id.* at 1332.

[127] *Id.* at 1333-34.

[128] *Id.* at 1332-33. "[O]n the face of the policy itself, the students unambiguously understand that any student message is utterly divorced from any state sponsorship." Adler v. Duval County Sch. Bd., 206 F.3d 1070, 1076 (11th Cir. 2000) (also referred to as *Adler I*), *cert. granted, vacated*, 531 U.S. 801 (2000).

[129] *Adler*, 250 F.3d at 1333.

state-sponsored religious exercise."[130] This last conclusion is in marked contrast with the Supreme Court's previous statements in *Lee*.[131]

Subtle, nearly imperceptible differences in the linguistic construction of the policy in *Adler* produce results opposite to those found in *Santa Fe*, a notion not unprecedented but certainly worthy of evaluation. The *Santa Fe* Court itself asserted "just how case-specific Establishment Clause analysis must be."[132] The Eleventh Circuit takes the framework provided by the *Santa Fe* opinion and effectively re-scrutinizes the school board's policy. The court finds to its satisfaction that the policy completely "disentangles" school officials from selection of the speaker, as well as from exercise of any editorial license over the content of the message.[133] The policy does not "'by its terms, invite and encourage religious messages' . . . [rather it] is entirely neutral regarding whether a message is to be given, and if a message is to be given, the content of that message."[134] The court focuses its analysis of the "coercive" element on the election scheme in *Santa Fe* which "subjected the issue of prayer to a majoritarian vote,"[135] and refers to that scheme as the "linchpin of the [*Santa Fe*] Court's analysis" on the coercion issue.[136] Though the mechanism in *Adler* appears identical to that invalidated in *Santa Fe* – "students vote on two questions . . . : (1) whether to permit a student 'message' during the ceremony, and (2) if so, which student is to deliver the message"[137] – the Eleventh Circuit concludes that the word "message," contrasted with "invocation," could not plausibly be given so narrow a meaning as to connote prayer.[138] Reaffirming its own earlier language, the court states "whatever majoritarian pressures are attendant to a student-led prayer pursuant to

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[130] *Id.*

> We cannot assume . . . seniors will interpret the school's failure to censor a private student message for religious content as an endorsement of that message – particularly where the students are expressly informed as part of the election process that they may select a speaker who alone will craft any message. . . . No religious result is preordained.

Alder v. Duval County Sch. Bd., 206 F.3d 1070, 1083-84 (11th Cir. 2000).

[131] *See supra* text accompanying notes 69-79.

[132] *Adler*, 250 F.3d at 1336.

[133] *Id.* "[S]chool officials are affirmatively *forbidden* from reviewing the content of the message, and are expressly denied the opportunity to censor any non-religious or otherwise disfavored views." *Id.* at 1336-37.

[134] *Id.* at 1337 (quoting Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 317 (2000)). "[T]he Supreme Court did not limit its analysis to the text of the Santa Fe policy, [but] it placed heavy emphasis on the text's express and unambiguous preference for the delivery of religious messages." *Id.*

[135] *Id.* at 1338 (quoting Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 317 (2000)).

[136] *Id.*

[137] *Id.*

[138] *Id.* at 1338-39.

a direct student plebiscite on prayer are not facially presented by the Duval County policy."[139]

V. CONCLUSION: IS THERE A "RIGHT" ANSWER?

"What turns private speech into state speech . . . is, above all, the additional element of state control over the content of the message," which the court found lacking in the policy in *Adler*.[140] The assertion is that when school officials exercise any span of control over the student-speaker or the content of the message, that student becomes a surrogate for the state, a "state-actor." A school board cannot write and require the reading of a prayer.[141] Nor can it permit another to do so in its stead.[142] There can be no policy wherein any government official or body "permits" private parties to speak, but then limits their speech in any manner "tending" toward a religious theme.[143] "It is not the 'permitting' of religious speech which dooms these policies, but rather the *requirement* that the speech be religious, i.e., invocations, benedictions, or prayers."[144] It is theorized then that, contrary to the zealous assertions of the ever-present opponents,[145] as long as no state official puts any imprint on the speech or actions of the students, they, through their own speech and

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[139] *Id.* at 1339 (quoting Adler v. Duval County Sch. Bd., 206 F.3d 1070, 1083 (11th Cir. 2000)). "[I]n seven of the 17 instances reflected in the record, students voted for no message at all or for a student speaker who subsequently delivered an entirely secular message." *Id.* This is the potential outcome to which Chief Justice Rehnquist spoke in his dissent in *Santa Fe*:

> [T]he Court misconstrues the nature of the "majoritarian election" permitted by the policy as being an election on "prayer" and "religion". . . . [I]t is possible that the students might vote not to have a pregame speaker, in which case there would be no threat of a constitutional violation. It is also possible that the election would not focus on prayer, but on public speaking ability or social popularity. And if student campaigning did begin to focus on prayer, the school might decide to implement reasonable campaign restrictions.

Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 320-21 (Rehnquist, C.J., dissenting).

[140] *Adler*, 250 F.3d at 1341.

[141] *See supra* text accompanying notes 24-28.

[142] *See supra* text accompanying notes 57-79.

[143] *Santa Fe*, 530 U.S. at 290.

[144] Chandler v. James, 180 F.3d 1254, 1259 (11th Cir. 1999).

[145] *See, e.g., id.* at 1260. The court characterizes the Chandlers' argument as follows:

> [W]hen the State permits students to speak religiously in situations that are not purely private, the State lends its imprimatur to the speech, thereby endorsing and advancing religion in violation of the "obligation of the public schools to provide a religiously neutral environment. . . ." [A]ll public religious speech in schools is unconstitutionally coercive of some students because of "peer pressure." Consequently, schools must forbid all public religious speech in school, including genuinely student-initiated religious speech.

Id. (citation omitted).

actions, do not become "state-actors."[146] Or, in the words of the Supreme Court in *Santa Fe*, "[N]othing in the Constitution . . . 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."[147]

The debates, and the ongoing requirements for definition, continue unabated. The courts staunchly protect free speech, in spoken, and other more radically demonstrative forms, even when characterized as seditious,[148] obscene,[149] or defamatory.[150] Speech described as "religious" or "sectarian," even tangentially, and particularly when emanating from the lips of a young child in a public school, is seemingly subject to control by its very utterance. There is no clear yardstick with which to measure the reach of the Religion Clauses, much as the courts have tried to provide one. Consider the contrasting views of speech encapsulated in the following statement: "Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect."[151] This simple statement describes the ongoing tension between the different clauses of the First Amendment.

Strictly applied, the Court's decision in *Santa Fe*, despite the assertion to the contrary, appeared to foreclose the right to Free Exercise in public schools through the application of the Establishment Clause.

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[146] *See* Lee v. Weisman, 505 U.S. 577, 630 n.8 (1992) (Souter, J., concurring) ("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.").

[147] *Santa Fe*, 530 U.S. at 313.

[148] *See, e.g.*, United States v. Rahman, 189 F.3d 88, 115 (2d Cir. 1999) (holding that "the expression of views – even including the view that the violent overthrow of the government is desirable" may not be criminalized by the state).

[149] *See, e.g.*, LSO, Ltd. v. Stroh, 205 F.3d 1146, 1158 (9th Cir. 2000) (holding that "content-based regulation of expression by the Government, even of indecent expression, is prohibited unless necessary to meet a compelling government interest"); Free Speech Coalition v. Reno, 198 F.3d 1083, 1092 (9th Cir. 1999) (finding the Child Pornography Prevention Act of 1996 invalid because by "criminalizing all visual depictions that 'appear to be' or 'convey the impression' of child pornography . . . [the Act] outlaws a type of depiction protected by the Supreme Court interpretation of the First Amendment").

[150] *See, e.g.*, Cochran v. NYP Holdings Inc., 210 F.3d 1036, 1036 (9th Cir. 2000) (affirming Cochran v. NYP Holdings, Inc., 58 F.Supp.2d 1113, 1120 (C.D. Cal. 1998), which held that a newspaper article describing attorney as "legal scoundrel" who was willing to "say or do just about anything to win, typically at the expense of the truth" amounted to "pure opinion" and was thus subject to protection under the First Amendment).

[151] Lemon v. Kurtzman, 403 U.S. 602, 622 (1971) (quoting Freund, Comment, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680, 1692 (1969)).

This interpretation of the holding is obviously not the final answer, nor a completely accurate one. The key points regarding "entanglement" and "coercion" are postulated not to exist in *Adler*. It is that case then that needs to be heralded as the most current word on the subject in its thoughtful review and specific application of the strictures of *Santa Fe*. These issues will continue to be debated in a likely overbroad interpretation of the Establishment Clause. The guidance will continue to be redefined as the Court is diligent in its efforts to protect the fundamental rights, rights that some perceive to be in conflict.[152]

What is clear is that they will not be soon silenced who espouse the view that "when the State permits students to speak religiously in situations that are not purely private, the State lends its imprimatur to the speech" and "[c]onsequently, schools must forbid all public religious speech in school, including genuinely student-initiated religious speech."[153] On the other hand, neither will the following constitutional assertions be silenced:

> The Establishment Clause does not require the elimination of private speech endorsing religion in public places. The Free Exercise Clause does not permit the State to confine religious speech to whispers or banish it to broom closets. If it did, the exercise of one's religion would not be free at all.[154]

It is a safe bet, though, that the Framers never intended that the protection of religious liberty, so paramount in their thinking as to come first among the Amendments, should turn on carefully nuanced semantics rather than true case-by-case analysis based on the relevant circumstances. Lastly, the words ring as true today as they did when the Supreme Court first uttered them: Students most assuredly *do not* "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[155]

Daniel A. Tanner III

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[152] For a view on how the Court's decisions to date may be applied in a public school setting, see Graham B. Forrester, Note, *A Practical Guide to the Establishment Clause for Teachers, Principals, and Consumers*, 6 NEXUS 257 (2001) (discussing religious freedom as it relates to public schools and proffering "a guide for public schools on how to act within *Santa Fe* and other case law").

[153] Chandler v. James, 180 F.3d 1254, 1260 (11th Cir. 1999).

[154] Chandler v. Siegelman, 230 F.3d 1313, 1316 (11th Cir. 2000).

[155] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).