MISREADING THE RECIPE: HOW THE COURT IN *SANTA FE INDEPENDENT SCHOOL DISTRICT v. DOE* FAILED TO APPRECIATE THE "INGREDIENTS" OF EQUAL ACCESS AND STUDENT CHOICE IN A POLICY PROVIDING FOR AFTER-SCHOOL RELIGIOUS SPEECH

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"[R]ecipes are about their ingredients . . . ."[1]

INTRODUCTION

For millennia, the proper interaction between religion and government has been a topic of debate in nations around the world.[2] In America, the debate rages perhaps strongest in the

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This Article is dedicated to my parents, Michael F. and Anne M. Forte, who are responsible for both beginning and encouraging my interest in this topic. In addition, this Article could not have been published without the guidance of Professor Thomas C. Marks, Jr., the comments of editor Jessica Paz Mahoney, and, most importantly, the incredible support of my wife, Christy A. Forte.

1. Rozanne Gold, *Recipes 1-2-3: Fabulous Food Using Only Three Ingredients* 11 (Viking 1996).

2. *See e.g. Koran* 10:84-85 (implying that Moses, by following Allah, encouraged Egyptian youths to subvert Pharoah's authority); *Daniel* 3:13–18 (New King James) (relating, in both the Jewish Tanakh and the Christian Bible, a conversation in which three Hebrew men challenged the authority of a Babylonian king to order the worship of a golden statue). In fact, Jesus Christ Himself commented on the subject. *Matthew* 22:15–22 (New King James). When the pharisees asked Him whether He paid taxes to Caesar, Jesus responded, "Render therefore to Caesar the things that are Caesar's, and to God the things that are God's.' When they had heard these words, they marveled, and left Him and went their way." *Id.* Unfortunately, modern societies continue to marvel about how to draw appropriate boundaries between "the things that are Caesar's" and "the things that are God's." *See e.g. Lynch v. Donnelly*, 465 U.S. 668, 672 (1984) (suggesting that this confusion persists in part because of the "tension between the objective of preventing unnecessary intrusion of either the church or the state upon the other, and the reality that . . . total separation of the two is not possible").

public-school context.[3] Noting that the State compels children to attend school and that students are especially susceptible to religious indoctrination,[4] the United States Supreme Court has been leery of permitting religious speech within public-school classrooms during school hours.[5] However, the Court has been more willing to uphold policies providing for religious speech on school campuses after school hours, so long as such policies contain two "special ingredients."[6] First, the policy must provide for both religious and non-religious speech on equal terms.[7] Second, the policy's provisions must ensure that any resulting religious speech would be attributable to the private choices of individuals and not to the government.[8]

In *Santa Fe Independent School District v. Doe*,[9] the Court considered whether such a policy contained these two ingredients.[10] The policy permitted a student speaker to deliver an "invocation and/or message" over a public-address system

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3. *Infra* n. 5.

4. *E.g. Lee v. Weisman*, 505 U.S. 577, 592 (1992) (citing *Bd. of Educ. of Westside Community Schs. v. Mergens*, 496 U.S. 226, 261–262 (1990) (Kennedy, J., concurring); *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987); *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203, 307 (1963) (Goldberg, J., concurring)).

5. *E.g. Stone v. Graham*, 449 U.S. 39 (1980) (invalidating a statute requiring the posting of the Ten Commandments on public-school-classroom walls); *Schempp*, 374 U.S. 203 (prohibiting *Bible* reading in public-school classrooms during school hours); *Engel v. Vitale*, 370 U.S. 421 (1962) (prohibiting the reading of a government-written prayer in public-school classrooms during school hours).

6. *Infra* nn. 7–8.

7. *E.g. Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395 (1993) (upholding a public-school policy of allowing religious groups to show religious films in school classrooms after school hours in part because the school allowed non-religious groups to do the same); *Mergens*, 496 U.S. at 248 (upholding the Equal Access Act, which allowed student groups to participate in religious discussions in public-school classrooms after school hours in part because the Act also permitted groups to use the classrooms for non-religious discussions); *Widmar v. Vincent*, 454 U.S. 263, 271–272 n. 10 (1981) (upholding a public university's policy of allowing student clubs to worship in classrooms when classes were not in session in part because the university also allowed student clubs to engage in non-religious discussions within the classrooms).

8. *E.g. Lee*, 505 U.S. at 587 (enjoining a public-school principal's practice of selecting a member of the clergy to deliver a prayer at the school's graduation ceremony because the selection was attributable to the principal, a government actor); *Mergens*, 496 U.S. at 248 (citing *Widmar* in upholding the Equal Access Act in part because any religious speech resulting from the Act's indiscriminate allowance of both religious and non-religious speech would not have been attributable to the government).

9. 530 U.S. 290 (2000).

10. *Id.*

before the start of public high-school football games.[11] At first glance, one can easily detect within the policy the two "special ingredients."[12] By granting both religious and non-religious speakers access to the same public-address system, the policy provided for religious and non-religious speech on equal terms.[13] In addition, by allowing student speakers to decide whether the pre-game speech would be religious, the policy ensured that any religious content in the speeches would be attributable to the student speakers and not to the government.[14]

The *Santa Fe* majority, however, misread the "recipe": it misapplied and selectively ignored controlling precedent to rule that the policy promoted religious speech attributable to the State.[15] In so doing, the majority limited the free-speech[16] and free-exercise rights[17] of students who would have liked to deliver a religious speech.[18] This observation is particularly troublesome when one considers that other courts in future cases may use

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11. *Id.* at 298 n. 6. The exact language of the policy is as follows:

> The board has chosen to permit students to deliver a brief invocation and/or message to be delivered during the pre-game ceremonies of home varsity football games to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition.
>
> Upon advice and direction of the high school principal, each spring, the high school student council shall conduct an election, by the high school student body, by secret ballot, to determine whether such a message or invocation will be a part of the pre-game ceremonies and if so, shall elect a student, from a list of student volunteers, to deliver the statement or invocation. The student volunteer who is selected by his or her classmates may decide what statement or invocation to deliver, consistent with the goals and purposes of this policy. Any message and/or invocation delivered by a student must be nonsectarian and nonproselytizing.

Id.

12. *Id.*

13. *Id.*; *supra* n. 7.

14. *Supra* nn. 8, 11.

15. 530 U.S. at 301–317.

16. "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. Const. amend I.

17. "Congress shall make no law . . . prohibiting the free exercise [of religion] . . . ." U.S. Const. amend I.

18. *See Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969) (explaining that "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students"). Of course, there are circumstances in which courts, legislatures, and schools are justified in limiting these First Amendment rights. *E.g. Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270–273 (1988) (noting that schools have greater leeway in limiting student speech when one may reasonably perceive the school as endorsing that speech). However, as this Article explains, the facts of *Santa Fe* did not present such a circumstance.

Santa Fe as precedent to limit improperly the rights of other students. Obviously, such an improper curtailment of constitutional freedoms should not go uncriticized.[19]

This Article articulates such criticism and then proposes solutions for courts and policy drafters. Part I relates the evolution of the law leading up to *Santa Fe*. Part II explains *Santa Fe*'s procedural history. Part III uses a "cause and effect" analytical framework to analyze the policy at issue in *Santa Fe*. Part IV suggests ways in which courts can more accurately and efficiently analyze policies providing for religious speech in public schools. Part IV also suggests ways in which legislative bodies can draft policies providing for religious speech and still satisfy the preferences of a sometimes-fickle Court.

I. A BRIEF HISTORY OF ESTABLISHMENT CLAUSE JURISPRUDENCE

"[B]oth religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere."[20] This is, of course, the sentiment behind the Establishment Clause of the First Amendment, providing that "Congress shall make no law respecting an establishment of religion."[21] Although the Clause takes only seconds to read, the Court, in more than 200 years, has yet to settle upon the best way to implement the Clause.[22] A main source of controversy surrounding the Clause's implementation stems from the fact that its drafters intended "to state an objective, not to write a statute."[23] Ascertaining that objective has fueled extensive debate

19. As President James Madison explained, "[I]t is proper to take alarm at the first experiment on our liberties." *Everson v. Bd. of Educ.*, 330 U.S. 1, 65 (1947) (Rutledge, J., dissenting) (quoting James Madison, *Memorial and Remonstrance against Religious Assessments* (1785)).

20. *McCollum v. Bd. of Educ.*, 333 U.S. 203, 212 (1948).

21. U.S. Const. amend I.

22. John E. Nowak & Ronald D. Rotunda, *Constitutional Law* § 17.3, 1223–1224 n. 1 (5th ed., West 1995) (noting the Justices' different opinions concerning which of the Court's various tests are appropriate for Establishment Clause inquiries).

23. Laurence H. Tribe, *American Constitutional Law* § 14-2, 1155 (2d ed., Found. Press 1988) (quoting *Walz v. Tax Commn.*, 397 U.S. 664, 668 (1970)). Adding to the controversy is the obvious fact that the drafters are no longer available to offer the Court guidance. As Rousseau observed, "He who makes the law knows better than any man how it should be administered and interpreted." Jean-Jacques Rousseau, *The Social Contract*, in *Social Contract: Essays by Locke, Hume, and Rousseau* 167, 231 (Oxford U. Press 1962).

among members of the Court.[24]

Compounding the problem of implementation is the fact that the Establishment Clause often conflicts with the Free Exercise Clause, forcing the Court to draw lines between the two.[25] For example, under the Free Exercise Clause, students have the right to speak on religious topics, even if that speech takes place at a public school.[26] Nevertheless, the Establishment Clause may require the censoring of that speech if the speech would cause or result in the government's promotion,[27] endorsement,[28] or coercion of religion.[29]

Until the early 1970s, the Court lacked a uniform system with which to implement the Establishment Clause and draw lines between the Religion Clauses. Finally, in 1971, the Court in *Lemon v. Kurtzman*[30] articulated a test to guide courts in Establishment Clause inquiries.[31] Under the *Lemon* test, a government policy[32] passes Establishment Clause muster if it satisfies a three-pronged inquiry.[33]

First, courts consider whether the policy has a "secular legislative purpose."[34] That is, the government must design the policy to accomplish non-religious objectives,[35] such as promoting highway safety or discouraging under-age drinking. A policy fails the *Lemon* test's purpose prong when the government designs the policy to accomplish a religious objective,[36] such as increasing church membership.

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24. *See generally* Robert T. Miller & Ronald B. Flowers, *Toward Benevolent Neutrality: Church, State, and the Supreme Court* 7–16 (5th ed., Baylor U. Press 1996) (discussing various Justices' opinions about the Clause's meaning).

25. Darien A. McWhirter, *The Separation of Church and State: Exploring the Constitution Series* 4–5 (Oryx Press 1994) (explaining the need for line-drawing and noting the difficulty the Court encounters in drawing such lines). This Article refers to the Establishment Clause and the Free Exercise Clause collectively as the "Religion Clauses."

26. *Supra* n. 18.

27. *Lemon v. Kurtzman*, 403 U.S. 602, 612–613 (1971).

28. *Wallace v. Jaffree*, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring).

29. *Lee*, 505 U.S. at 587.

30. 403 U.S. 602 (1971).

31. *Id.* at 612–613.

32. Throughout this Article, the discussion of government policies is also applicable to other forms of written government action, such as statutes and rules.

33. *Lemon*, 403 U.S. at 612–613.

34. *Id.* at 612. This Article refers to the first element of the *Lemon* test as *Lemon*'s "purpose prong."

35. *Id.*

36. *Id.*

Second, courts consider whether the policy has a principal or primary effect that "neither advances nor inhibits religion."[37] An example of a policy that does not have such an effect is one that provides tuition assistance to students in both religious and public colleges.[38] Such a policy would principally or primarily advance or inhibit religion only if it provided tuition assistance exclusively to students in religious or public colleges, respectively.[39]

Third, courts consider whether the policy fosters "excessive government entanglement with religion."[40] One way in which a policy may foster entanglement is by regulating religious practices on a basis different from that used to regulate non-religious practices.[41] For example, a government policy fosters entanglement when it allows individuals to deliver only non-religious speeches in a government-created forum.[42] Such a policy entangles government officials in the process of defining "religious" speech, as well as in the process of preventing the communication of religious ideas.[43]

In 1984, Justice Sandra Day O'Connor, in *Lynch v. Donnelly*,[44] advocated a revision of the *Lemon* test.[45] She proposed that the Court revise the *Lemon* test's purpose prong to ask "whether [the] government's actual purpose is to endorse or disapprove of religion."[46] Additionally, she suggested that the

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37. *Id.* This Article refers to the second element of the *Lemon* test as *Lemon*'s "effects prong."

38. *Witters v. Wash. Dept. of Servs. for the Blind*, 474 U.S. 481, 487–488 (1986) (ruling that a government policy offering tuition assistance to all blind students in both public and private universities does not have a principal or primary effect of advancing religion).

39. *Id.* at 488.

40. *Lemon*, 403 U.S. at 612–613. This Article refers to the third element of the *Lemon* test as *Lemon*'s "entanglement prong."

41. *Infra* n. 42.

42. *E.g. Rosenberger v. Rector & Visitors of U. of Va.*, 515 U.S. 819, 844–845 (1995) (banning religious speech from government-sponsored student newspapers "would tend inevitably to entangle the State with religion in a manner forbidden by our cases" (quoting *Widmar*, 454 U.S. at 269–270 n. 6)).

43. Jay Alan Sekulow, James Henderson & John Tuskey, *Proposed Guidelines for Student Religious Speech and Observance in Public Schools*, 46 Mercer L. Rev. 1017, 1062 n. 268 (1995) ("[D]enial of equal access [to religious speech] might well create greater entanglement problems in the form of invasive monitoring to prevent religious speech at meetings [at] which such speech might occur." (quoting *Mergens*, 496 U.S. at 253)).

44. 465 U.S. 668 (1984).

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

46. Steven G. Gey, *Religious Coercion and the Establishment Clause*, 1994 U. Ill. L. Rev. 463, 477 (quoting *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring)).

Court modify the *Lemon* test's effects prong to ask "whether, irrespective of [the] government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval" of religion.[47] These proposed modifications became the foundation of the endorsement test.[48] One year after *Lynch*, Justice O'Connor clarified the nature of the endorsement test by explaining that "the relevant issue is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of [religion]."[49]

Often, a government policy satisfies or fails the endorsement test for many of the same reasons it satisfies or fails the *Lemon* test.[50] This fact is true because the two tests are very similar.[51] For example, the purpose prongs of both tests are essentially the converse of each other. While the *Lemon* test requires a government policy to have a secular purpose,[52] the endorsement test precludes a policy from having a religious purpose of endorsing or disapproving of religion.[53] The effects prongs of both tests are also similar. For example, one way in which the government can advance or inhibit religion (a *Lemon*-test violation) is to endorse or disapprove of religion (an endorsement-test violation).[54]

A third test the Court has applied in Establishment Clause inquiries is the coercion test.[55] Under the coercion test, courts consider whether a government policy "coerce[s] anyone to

47. *Id.*

48. *Id.* at 476. This Article refers to the endorsement test's purpose element as the test's "purpose prong." Likewise, this Article refers to the endorsement test's effects element as the test's "effects prong."

49. *Id.* at 477 (quoting *Wallace*, 472 U.S. at 76 (O'Connor, J., concurring)).

50. In fact, modern courts tend to claim they are applying the *Lemon* test when they are actually applying the endorsement test. *E.g. County of Allegheny v. Am. Civ. Liberties Union*, 492 U.S. 573, 593–594 (1989) (explaining that although the *Lemon* and endorsement tests are distinct, modern courts tend to apply the *Lemon* test's effects prong by asking whether the government action in question endorses religion); *Edwards*, 482 U.S. at 585 (defining the *Lemon* test's purpose prong as one which asks "whether [the] government's actual purpose is to endorse or disapprove of religion" (quoting *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring))). However, for the sake of clarity, this Article applies the *Lemon* and endorsement tests separately.

51. *County of Allegheny*, 492 U.S. at 593.

52. *Supra* nn. 33–36 and accompanying text.

53. Gey, *supra* n. 46, at 477.

54. *E.g. County of Allegheny*, 492 U.S. at 592 (citing *Engel*, 370 U.S. at 436).

55. *Lee*, 505 U.S. at 587.

support or participate in religion or its exercise."[56] Importantly, this test does not guard against all forms of coercion; rather, it prohibits only that coercion that is attributable to the government.[57] For example, the coercion test does not prohibit a mother from forcing her minor child to participate in religious worship.[58] Because the mother is a private actor,[59] the mother's coercion is not attributable to the government.[60]

The coercion test guards against two forms of governmental coercion: direct coercion and social coercion.[61] The government uses direct coercion when it orders an individual to participate in religion or its exercise.[62] The government uses social coercion when it equips a private actor to pressure another individual into participating in religion or its exercise.[63]

II. SANTA FE INDEPENDENT SCHOOL DISTRICT v. DOE

A. The District Court[64]

Santa Fe Independent School District (the School District) traditionally permitted the student chaplain of Santa Fe High School to deliver a prayer over the school's public-address system before varsity home football games.[65] In 1995, current and former

56. *Id.* The *Lee* Court based its formulation of the coercion test on the "central principles" of two cases. First, in *Lynch*, the court found that because religion and government can never operate truly independent of one another, Establishment Clause inquiries require the Court to define permissible interaction between the two based upon the facts of each case. 467 U.S. at 672, 678. Second, in *County of Allegheny*, the Court explained that the Establishment Clause means at least that the government cannot engage in the following activities: establishing churches, passing laws which benefit only religious entities, controlling church attendance, levying taxes based upon religious considerations, and participating in the affairs of religious organizations. 492 U.S. at 591 (quoting *Everson*, 330 U.S. at 15–16).

57. *Lee*, 505 U.S. at 587.

58. *See id.* (prohibiting only that coercion which is attributable to the government).

59. This illustration assumes that the mother conjoles the child into religious worship in her private capacity as a parent, and not in a governmental capacity such as the child's public-school teacher.

60. *See Lee*, 505 U.S. at 587 (implying that a public-school principal's coercion of religion was attributable to the government in part because the principal was a government employee).

61. *Id.* at 587, 593.

62. *Id.* at 587.

63. *Id.* at 593.

64. Because the relevant portions of the district court's opinion were unreported, this section was developed using facts derived from other specified sources.

65. *Santa Fe*, 530 U.S. at 294.

students sued the School District in federal district court to enjoin this practice.[66] Following precedent from the United States Court of Appeals for the Fifth Circuit, the district court required that any religious speech delivered at future pre-game ceremonies be non-sectarian and non-proselytizing.[67]

In response to the district court's order, the School District drafted several pre-game policies before settling upon two.[68] The first policy was to take effect immediately.[69] This policy permitted the student body to vote on whether the pre-game ceremony would include a speech by a student speaker.[70] If the student body voted in favor of a pre-game speech, the policy permitted the students then to elect a student speaker to "deliver a brief invocation and/or message."[71] The School District's second policy was identical to the first, except that the second policy required all pre-game speeches to be non-sectarian and non-proselytizing.[72] This second policy was to take effect only if a court enjoined the first policy.[73]

The district court eventually enjoined the School District's first policy because the policy deviated from Fifth Circuit precedent requiring such policies to contain provisions requiring speeches to be non-sectarian and non-proselytizing.[74] The court then ordered the School District to implement its second policy, which did include such restrictions.[75] Unsatisfied with these mixed results, both parties appealed.[76]

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66. *Id.* at 295. Interestingly, the petitioners belonged to Christian sects. *Id.* at 294. One set of petitioners was Mormon and the other was Catholic. *Id.*

67. Br. of Pet. at 7–8, *Santa Fe Independent School District v. Doe*, 530 U.S. 312 (2000). In concluding that a pre-game policy with such restrictions would be permissible, the district court relied on *Jones v. Clear Creek Independent School District*, 977 F.2d 963 (5th Cir. 1992). Br. of Pet. However, the implied overruling of *Jones* has since been recognized in *Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806 (5th Cir. 1999).

68. *Santa Fe*, 530 U.S. at 296.

69. *Id.* at 297–298.

70. *Id.*

71. *Id.* at 298 n. 6.

72. *Id.* at 299 n. 6; *supra* n. 11. This second policy was the subject of the litigation before the Court in *Santa Fe*. 530 U.S. at 298.

73. *Id.* at 298 n. 6.

74. *Doe*, 168 F.3d at 813.

75. *Id.*

76. *Id.*

B. The Court of Appeals

The appellate court affirmed the district court's ruling regarding the first policy, and it reversed the district court's ruling regarding the second policy.[77] The court concluded that the School District's first policy violated the Establishment Clause under the *Lemon* test[78] because the policy permitted sectarian and proselytizing religious speech.[79] Santa Fe High School had a long history of permitting only prayer at pre-game ceremonies.[80] This history suggested that the policy's articulated secular purposes were insincere[81] and that the policy's genuine purpose was to continue the tradition of permitting only sectarian and proselytizing religious speech.[82] The court went on to note that the School District's policy endorsed religious speech because it advanced religion.[83] Because Santa Fe High School "retain[ed] a high degree of control over" all aspects of the pre-game ceremony, one can reasonably assume that the school approved of any speech delivered during the ceremony.[84]

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77. *Id.* at 824. Thus, the appellate court invalidated both of the School District's policies. *Id.*

78. The court seemed to apply the original version of the *Lemon* test's purpose prong. *Id.* at 816–817. However, the court defined the *Lemon* test's primary effects prong as one that asks "whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval [of religion]." *Id.* at 817 (citing *Lynch*, 465 U.S. at 690).

79. *Id.* at 815–817. The court indicated that a main reason it previously had upheld policies providing for religious speech at public-high-school-graduation ceremonies was that those policies required the speech to be non-sectarian and non-proselytizing. *Id.* at 815 (quoting *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 406 (5th Cir. 1995) (ruling that the restrictions enable a policy to satisfy the *Lemon* test's primary effect prong); *Jones*, 977 F.2d at 971 (ruling that the restrictions enable a policy to satisfy the effects prongs of both the *Lemon* and endorsement tests)).

80. *Id.* at 816–817. Additionally, the court noted that the School District enacted graduation policies that also seemed to encourage religious speech. *Id.* at 816.

81. *Id.* ("[T]he government's statement of a secular purpose cannot be a mere 'sham.'" (citing *Edwards*, 482 at 586–587)). "Our cynicism about the school board's proffered secular purpose is galvanized by SFISD's inclusion of the fall-back alternative [i.e., the second pre-game policy] that would re-insert the twin restrictions *ipso facto* should the district court invalidate the basic provision of the [first] [p]olicy." *Id.* at 817.

82. *Id.* at 816.

83. *Id.* at 817.

84. *Id.* (quoting *Lee*, 505 U.S. at 597). Specifically, the court implied that the School District controlled the pre-game speeches in three ways. *Id.* First, school officials controlled the content of the pre-game speeches. *Id.* (quoting *Lee*, 505 U.S. at 597). Second, because the ceremony was a non-public forum, school officials had inherent power to regulate any speech within that forum. *Id.* (quoting *Jones*, 930 F.2d at 416); *infra* n. 86

The court ruled that the School District's first policy failed the endorsement test "[f]or the very same reasons" the policy failed the *Lemon* test: Santa Fe High School's control over the pre-game ceremony suggests that school officials had pre-approved any speech delivered during the ceremony.[85]

In addition to ruling that the Establishment Clause requires the pre-game speech to be non-sectarian and non-proselytizing, the court concluded that such restrictions do not present free speech concerns.[86] The restrictions are permissible under the government's broad power to regulate speech in non-public fora like the pre-game ceremony.[87]

The court invalidated the School District's second policy because one of the policy's articulated purposes was to "solemnize the event."[88] The court suggested that a policy designed for such a purpose would be constitutional only at formal gatherings, such as graduation ceremonies.[89]

The School District appealed the order of the appellate

(explaining the characteristics of a non-public forum). Third, school officials had the administrative power to control the speeches because the speeches took place over the school's sound system, on school property, at a school-sponsored event. *Id.* (quoting *Jager v. Douglas County Sch. Dist.*, 862 F.2d 824, 831 (11th Cir. 1989)).

85. *Id.* at 818; *supra* nn. 79–85 and accompanying text.

86. 862 F.2d at 822.

87. *Id.* at 819–822. As the court explained, there are three types of fora. *Id.* at 819 (citing *Cornelius v. NAACP Leg. Defense & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985)). First, traditional public fora are areas traditionally devoted to assembly and debate, such as parks and sidewalks. *Id.* Second, designated public fora are non-traditional areas which the government has specifically set aside for assembly and debate. *Id.* Third, non-public fora are areas in which the First Amendment does not guarantee the right to assemble or speak freely. *Id.* The *Doe* court concluded the pre-game ceremony was a non-public forum for two reasons. *Id.* at 819, 820. First, the School District did not evince an intent to transform the pre-game ceremony into a public forum. *Id.* (citing *Cornelius*, 473 U.S. at 802). Second, the School District permitted only "limited discourse" and did not provide for "indiscriminate use" of the public address system during the pre-game ceremony. *Id.* (citing *Cornelius*, 473 U.S. at 802; *Perry Educ. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45, 46–47 (1983)).

88. *Id.* at 823. Because both policies articulated this purpose, one may infer that the Court's discussion of this purpose in the context of the second policy applies also to the first policy.

89. *Id.* at 822–823.

> In concluding that... [non-sectarian, non-proselytizing religious speech at graduation ceremonies] did not violate the Establishment Clause, we emphasized that high school graduation is a significant, once-in-a-lifetime event that could appropriately be marked with a prayer... Here, we are dealing with a setting [football and basketball games] far less solemn and extraordinary.

Id. (quoting *Duncanville*, 70 F.3d at 406).

court,[90] contending that the School District's second policy is permissible because the policy did not violate the Establishment Clause.[91]

C. The Supreme Court

1. The Majority

The Supreme Court affirmed the appellate court's holding.[92] First, Justice John Paul Stevens, writing for the majority, generally discussed the School District's second policy.[93] The majority concluded that the pre-game ceremony was a non-public forum because the School District did not evince an intent to open the ceremony to "indiscriminate use" by student speakers.[94] Additionally, any speech delivered under the policy would have been government-sponsored because the speech would have taken place on government property at a government-sponsored event.[95]

Second, the majority ruled that the policy violated the Establishment Clause.[96] The policy failed the *Lemon* test's purpose prong.[97] Dismissing the policy's articulated secular purposes as insincere,[98] the majority concluded that the policy's text and circumstances surrounding its enactment demonstrate that the policy's genuine purpose was to promote religion by endorsing religious speech.[99] The policy's text provided for only one specific type of speech — the generally religious "invocation" — thereby encouraging students to deliver religious speeches.[100]

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

91. *Id.*

92. *Id.* at 317.

93. *Id.* at 301–305.

94. *Id.* at 302–303. Relying on *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 270 (1988), for this proposition, the majority reasoned that the School District did not evince such an intent because its policy permitted only one student to speak at each home football game, and the policy "confine[d] the content and topic of the student's message." *Id.* at 303.

95. *Id.* at 302–303.

96. *Id.* at 316.

97. *Id.* at 314–316.

98. *Id.* at 306–308.

99. *Id.* at 314–315.

100. *Id.* at 316 (noting that petitioners' suit was not premature because the mere enactment of a policy in which the government encourages religious speech violates the Establishment Clause, even if the policy never goes into effect). According to the majority, the policy's text was also problematic because it imposed a majoritarian election on prayer. *Id.* at 304, 316–317. "To the extent the referendum substitutes majority determinations for view-point neutrality it would undermine the constitutional protection the program

In addition, the majority noted that the policy is best interpreted in the context of its previous incarnations, all of which suggest that the School District enacted the policy for the unconstitutional purpose of continuing to promote prayer.[101]

The majority concluded that the policy failed the endorsement test for many of the same reasons that the policy failed the *Lemon* test.[102] After noting again that the only specific type of speech for which the policy provided was the generally religious "invocation," the majority concluded that the policy's genuine purpose was to endorse religion.[103] Additionally, the policy's history and potential implementation indicated that the policy would have had the actual or perceived effect of endorsing religion.[104] Being aware of the School District's previous policies that did not include restrictions requiring the speech to be non-sectarian and non-proselytizing, an objective observer would perceive the enactment of the School District's policy as another attempt to endorse religious speech at school functions.[105] Also, the suggestion of State endorsement of religion is enhanced by the policy permitting students to deliver religious speeches in a ceremony littered with the indicia of school sponsorship, such as school uniforms and banners bearing the school's name.[106]

The majority concluded that the policy also failed the coercion test by permitting student speakers to use social coercion

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requires." *Id.* (quoting *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000)).

101. *Id.* at 315 (characterizing the case "as the latest step in developing litigation brought as a challenge to institutional practices that unquestionably violated the Establishment Clause").

102. *Id.* at 305–308 (citing *Wallace*, 472 U.S. at 73, 75, for the proposition that the policy's articulated secular purposes were insincere in the contexts of both the *Lemon* and endorsement tests).

103. *Id.* (stating that, not only did the policy endorse religion, but that the students at Santa Fe High School also understood the School District enacted the policy for that purpose).

104. *Id.* at 307–308.

105. *Id.* at 308–309 (citing *Wallace*, 472 U.S. at 73, 76 (O'Connor, J., concurring); *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 777 (1995) (O'Connor, J., concurring)). Specifically, the majority was referring to the School District's first policy which the district court enjoined. *Id.* The School District held an election for the pre-game speaker under the first policy, but did not conduct a new election when the second policy went into effect. *Id.* The majority reasoned that this suggests the School District viewed its second policy merely as a continuation of the first. *Id.*

106. *Id.* at 307–308 (mentioning also that the school's name probably would appear on its mascot and in large letters across the football field).

in soliciting religious participation from the crowd.[107] If a student speaker were to request that the crowd participate in an exercise acknowledging the speaker's religion, participants would exert, consciously or not, social pressure[108] on non-religious attendees to participate.[109]

2. The Dissent

Chief Justice William H. Rehnquist, writing for the dissent, concluded that the majority erred in entertaining the petitioners' facial challenge to the School District's policy.[110] The challenge was premature because students had yet to deliver speeches under the policy.[111] The dissent went on to state that, even if the claim was ripe, the majority still erred by misapplying the *Lemon*, endorsement, and coercion tests to rule that the policy violated the Establishment Clause.[112]

The dissent asserted that the majority misapplied *Lemon*'s purpose prong by misconstruing the nature of the majoritarian election for which the School District's policy provided.[113] According to the dissent, the election was constitutional because the students could have voted against having a pre-game speaker altogether.[114] Even if the students did decide to have a pre-game speaker, the election might not have focused on religion, but rather on popularity or speaking ability.[115]

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107. *Id.* at 310–312 (relying exclusively on *Lee*, 505 U.S. at 587).

108. *Id.* at 312 ("[T]he government may no more use social pressure to enforce orthodoxy than it may use more direct means." (quoting *Lee*, 505 U.S. at 594)).

109. *Id.* ("[W]hat to most believers may seem nothing more than a reasonable request that the non-believer respect their religious practices, in a school context may appear to the non-believer or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy." (quoting *Lee*, 505 U.S. at 592)).

110. *Id.* at 318–319 (Rehnquist, C.J., Scalia & Thomas, JJ., dissenting).

111. *Id.* ("[T]he fact that a policy might 'operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid.'" (quoting *U.S. v. Salerno*, 481 U.S. 739, 745 (1987)).

112. *Id.* at 319–325.

113. *Id.* at 320–322 (distinguishing *Southworth*, 529 U.S. 217, by noting that, unlike *Santa Fe*, *Southworth* primarily examined issues of free speech and the government's financing of a public forum).

114. *Id.* at 321.

115. *Id.* at 321–322 (stating that the majority's treatment of the majoritarian election essentially invalidates all public-high-school-student elections). For example, the dissent reasoned that were a court to apply the majority's reasoning to elections for prom queen, such elections would violate the Establishment Clause because the newly elected prom queen might refer to religion in her acceptance speech. *Id.*

Additionally, the dissent indicated that the policy should have satisfied both the *Lemon* and endorsement tests because the policy articulated genuine secular purposes.[116] These secular purposes were entitled to deference because they were sincere in light of the policy's text and circumstances surrounding the policy's enactment.[117] The policy's text did not have a religious purpose because the policy provided for non-religious speech in addition to religious speech.[118] Also, by drafting its second policy in accordance with the district court's order, the School District demonstrated an attempt to comply with the Establishment Clause.[119]

The dissent also criticized the majority's reliance on *Lee v. Weisman*.[120] While *Lee* involved a graduation prayer directed by a high-school principal, *Santa Fe* involved religious speech composed by student speakers.[121] Thus, the majority improperly extended the Court's reasoning in *Lee* to the facts of *Santa Fe*.[122]

Moreover, the dissent reasoned that, contrary to the majority's suggestion, a government policy need not be content-neutral to avoid endorsing religion.[123] Content neutrality is a component of free speech, not Establishment Clause, inquiries.[124]

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116. *Id.* at 322–324.

117. *Id.* (citing *Wallace*, 472 U.S. at 74–75 (O'Connor, J., concurring); *Mueller v. Allen*, 463 U.S. 388, 394–395 (1983)).

118. *Id.* The dissent concluded that, by offering this choice to student speakers, any resulting religious endorsement would have been attributable to the student speakers, not to the School District. *Id.* ("[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." (quoting *Mergens*, 496 U.S. at 250) (emphasis in original)).

119. *Id.* at 323–324 (noting that the School District's second policy went further than the district court's order required. While the district court required only that the pre-game speech be non-sectarian and non-proselytizing, it did not preclude the School District from permitting only religious pre-game speeches. The School District, however, provided for both religious and non-religious speech.).

120. *Santa Fe*, 530 U.S. at 324–325; 505 U.S. 577 (1992).

121. *Santa Fe*, 530 U.S. at 324.

122. *Id.* at 324–325 (Rehnquist, C.J., Scalia & Thomas, JJ., dissenting).

123. *Id.* at 325–326.

124. *Id.* at 325 (citing *Ward v. Rock Against Racism*, 491 U.S. 781 (1989)). The dissent went on to point out that even in free speech inquires, policies providing for student speech need not always be content neutral. *Id.* (citing *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986)).

III. CRITICAL ANALYSIS: THE CAUSE AND EFFECT ANALYTICAL FRAMEWORK

To facilitate an organized application of the Establishment Clause tests, this Article employs a "cause and effect" analytical framework.[125] The framework divides the elements of each test into a "cause group" of elements and an "effects group" of elements.[126] This organization enables the Author to discuss the similar elements of each test in the same general area of the Article, preventing redundancy and facilitating reader comprehension.

The framework uses the term "cause" loosely. The term encompasses both the reasons for a policy's existence and the source of the policy. The "cause group" of elements includes the purpose prongs of the *Lemon* and endorsement tests, as well as the coercion test's caveat that only governmental coercion of participation in religion constitutes an Establishment Clause violation. The framework uses the term "effects" in a narrow sense. The term refers to the result of a policy's implementation. The "effects group" of elements includes the *Lemon* test's effects and entanglement prongs, the endorsement test's effects prong, and the coercion test's varieties of direct and social governmental coercion.

Before using the cause and effect analytical framework to analyze the constitutionality of the School District's policy, the Author acknowledges that each of the three Establishment Clause tests have been subjects of thorough criticism.[127] Although

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125. This framework is not intended as a new Establishment Clause test. Rather, it is merely a device with which one may more easily compare similar elements within each of the existing tests. Comparing all three tests in a single article is a bit like watching *Star Trek* for the first time. "Do you remember when you first watched *Star Trek*?" begins the introduction to *Star Trek Chronology*. "Even though it was a lot of fun, it was probably a little confusing at first." Michael Okuda & Denise Okuda, *Star Trek Chronology: The History of the Future* v (Pocket Bks. 1996).

126. Because the framework divides the elements of each test into two separate groups, one must read the discussion of each test under both of the framework's groups to glean a complete analysis.

127. *E.g.* Gey, *supra* n. 46, at 463 (explaining why the coercion test is an inadequate protection of religious liberty); Thomas C. Marks, Jr. & Michael Bertolini, *Lemon Is a Lemon: Toward a Rational Interpretation of the Establishment Clause*, 12 BYU J. Pub. L. 1 (1997) (noting the inadequacies of the *Lemon* test and proposing two alternative Establishment Clause tests); Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 Mich. L. Rev. 266, 276 (1987) (identifying analytical defects in the endorsement test).

the Author agrees with much of this criticism, such a critique is not the purpose of this Article. Rather, this Article uses an analysis of *Santa Fe* to demonstrate a proper application of these admittedly problematic tests.

A. The Analytical Framework's "Cause Group" of Elements

1. The Lemon Test's Purpose Prong: Secular Legislative Purpose

A government policy satisfies the *Lemon* test's purpose prong so long as the policy has a secular legislative purpose.[128] Because purpose inquiries under both the *Lemon* and endorsement tests consist of several complicated steps, this Article uses Appendix 1 to facilitate a purpose analysis. The reader will be referred to Appendix 1 as needed.

To ascertain a policy's purpose, the Court first examines the face of the policy.[129] If the text articulates plausible secular purposes for the policy's existence, the Court normally defers to those purposes.[130]

In *Santa Fe*, one may discern in the policy's text secular purposes that were entitled to deference.[131] The policy states that its purposes are "to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition."[132] Such purposes are decidedly secular. One can easily imagine how a policy can promote sportsmanship, safety, and competition without establishing religion. Additionally, as the School District noted in its brief to the Court, solemnizing an event can indeed be a secular purpose.[133]

However, courts are charged with the duty of "distinguish[ing] a sham secular purpose from a sincere one."[134]

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128. *Supra* nn. 34–36 and accompanying text.

129. *E.g. Edwards*, 482 U.S. at 594–595 (ascertaining a statute's purpose by examining its text before examining its context and legislative history).

130. *E.g. Mergens*, 496 U.S. at 248–249 (The Court "is normally deferential to [legislative] articulation of a secular purpose." (quoting *Edwards*, 482 U.S. at 586)); *Mueller*, 463 U.S. at 394–395 (The Court "is reluctant to attribute unconstitutional motives to the states, particularly when a plausible secular purpose may be discerned from the face of the statute); app. 1.

131. *Supra* n. 11 (providing the exact language of the policy).

132. *Id.*

133. Br. of Pet., *supra* n. 67, at 24 (quoting *Lynch*, 465 U.S. at 693 (O'Connor, J., concurring) (listing solemnizing public occasions as a secular purpose)).

134. *Santa Fe*, 530 U.S. at 308 (quoting *Wallace*, 472 U.S. at 75 (O'Connor, J.,

To test the sincerity of a policy's articulated secular purposes, the Court delves deeper into the policy's text for evidence of hidden, unconstitutional purposes.[135] One example of a hidden, unconstitutional purpose that the Court might be able to discern from a policy's text is the promotion or endorsement of religious speech.[136]

In *Santa Fe*, the majority claimed to detect evidence of such a purpose in the text of the School District's policy.[137] To arrive at this conclusion, the majority applied a "balancing standard."[138] The balancing standard provides that a government policy has a hidden purpose of promoting or endorsing religion when the policy uses more specificity to provide for religious speech than it uses to provide for non-religious speech.[139] For example, a policy providing for "religious hymns and/or non-religious music" would not satisfy the balancing standard because the religious term "hymns" is a more specific noun than the non-religious term "music."[140] Thus, under the balancing standard, a court would infer that such a policy has the hidden, unconstitutional purpose of promoting or endorsing religious speech.

The *Santa Fe* majority used the balancing standard to evaluate the policy's phrase "invocation and/or message."[141] The presumably religious term "invocation" was placed on one side of a conceptual scale, while the non-religious term "message" was

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concurring)); *see e.g. Stone*, 449 U.S. at 41–42 (implying that courts should be aware of the possibility that the government may articulate within its policies insincere secular purposes in an attempt to avoid constitutional scrutiny).

135. *See e.g. Santa Fe*, 530 U.S. at 306–309, 314–315 (re-examining the policy's text to uncover unconstitutional purposes); app. 1.

136. *Id.*

137. *Id.*

138. App. 1. The label and express articulation of the balancing standard originated with the Author.

139. *Id.*

140. That is, "hymns" are a specific type of song falling within the broader category of "music."

141. *Santa Fe*, 530 U.S. at 306–309, 314–315. The fact that the majority applied the balancing standard to evaluate this phrase is subtly reflected throughout its opinion. *Id.* For instance, referring to the phrase "invocation and/or message," the majority stated that "[i]ndeed, the only type of message that is expressly endorsed in the text is an 'invocation.'" *Id.* at 306. This suggests that the majority considered "messages" to be a generic type of speech, while it considered "invocations" to be a specific type of message. *Id.* Other passages also support this inference. For example, the majority noted the School "District's approval of only one specific kind of message, an 'invocation.'" *Id.* at 309. The majority also stated that "the text of the [final pre-game] policy specifies only one, clearly preferred message — that of Santa Fe's traditional religious 'invocation.'" *Id.* at 315.

placed on the other side.[142] This conceptual scale then tilted toward the invocation side because "invocation" is a more specific type of speech than the more general term "message."[143] Because invocations are generally religious, the majority concluded that the policy favored religious speech.[144] This conclusion, in turn, implied that the policy's articulated purposes were insincere and that the policy's real purpose was to promote religion by encouraging religious speech over non-religious speech.[145] After all, the policy's inclusion of the specific term "invocation" made it easier, at least for the unimaginative, to deliver a religious invocation as opposed to a non-religious message.[146]

Santa Fe is the first case in which the Court used the balancing standard to test the sincerity of a policy's articulated secular purpose. Although existing precedent did not preclude the *Santa Fe* majority from applying this standard, public policy nonetheless discourages its application for three main reasons.

First, the balancing standard may result in a lack of needed legislation. Government policies are often the result of committee review and revision, and usually include language without which a committee would not have approved the policy.[147] In anticipating a court's use of the balancing standard, a legislature would avail itself of fewer words when drafting policies. Certain religious words for which the English language has no non-religious counterparts with the same level of specificity would be simply "off limits." Having fewer available words reduces the potential for legislative compromise and, consequently, reduces the potential for political support of proposed legislation.[148]

Second, the balancing standard may encourage the implementation of vague legislation by fostering a legislative

142. *Id.* at 306–309, 314–315.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* That is, if a student speaker did not know what kind of speech to deliver, he or she may be prompted to deliver an invocation because, according to the majority, that was the only specific type of speech listed in the policy. *Id.*

147. *See e.g.* Staff of H.R. Comm. on Educ. & the Workforce, 107th Cong., *Status of Bills and Resolutions Considered by the Committee on Education and the Workforce* <http://edworkforce.house.gov/legislation/status107.htm> (last updated May 15, 2001) (demonstrating that congressional committees and subcommittees review and revise resolutions before enacting them into law).

148. *See id.* The Author draws this conclusion based on the information from the Web site noted in *supra* note 147.

search for the lowest common denominator. For example, the government may desire to enact a policy providing for a specific type of religious speech, as well as for a specific non-religious counterpart.[149] However, if a legislature anticipates the use of the balancing standard, the legislature would provide for specific types of religious speech only to the extent that the English language contains a non-religious counterpart with the same specificity. Upon implementation, such vague policies may cause confusion, a result that courts should seek to discourage.

Third, the balancing standard improperly shifts the focus of an Establishment Clause inquiry from one of substance to one of form. For example, the government obviously violates the Establishment Clause when one of its policies allows public-school students to play only Christian music over the school's intercom system during school hours. This result would not change if the policy permitted only Christian songs, a specific type of Christian music. Nor would the result change if the policy permitted only Christian hymns, a specific type of Christian song. The point is that courts should not focus on the level of specificity inherent in a religious term. Instead, courts should focus on guarding against *any* kind of governmental promotion of religion, regardless of the specificity of the religious practice the government promotes.

Because the *Santa Fe* majority did not explicitly rule that the balancing standard is the only legitimate method of testing the sincerity of a policy's articulated purposes, courts are free to apply other standards in future Establishment Clause inquiries. To avoid the problems associated with the balancing standard, courts should instead employ a "detection standard"[150] in future cases. The detection standard provides that a government policy permitting religious speech does not have a hidden purpose of promoting or endorsing religion so long as a reasonable reader could detect within the policy a provision for non-religious speech.[151] For example, a policy providing for "religious hymns and/or non-religious music" would satisfy the detection standard because the policy, although providing for religious speech, also provides for non-religious speech. Thus, the School District's

149. As the School District pointed out in its brief to the Court, such a purpose can be constitutional. Br. of Pet., *supra* n. 67, at 23 (citing *Widmar*, 454 U.S. at 271).

150. App. 1. The label and concept of the detection standard originated with the Author.

151. *Id.*

policy would have satisfied the detection standard because a reasonable reader would recognize the term "message" as a provision for non-religious speech.

The detection standard avoids the problems that plague the balancing standard. If legislatures were to anticipate the courts' use of the detection standard, they could more easily implement needed legislation. Legislatures would feel comfortable choosing from a wide variety of terms, which may in turn foster political compromise and efficiency.[152] Additionally, legislatures would feel unhampered in their quest for specificity and clarity in drafting policies. Lastly, the detection standard would absolve courts of the extra duty of weighing the specificity of nouns. Instead, courts would have more time to focus on the more important issue of whether a policy impermissibly favors religion over non-religion, however slightly.

One potential weakness of the detection standard stems from its incorporation of a reasonable person test: reasonable judges and Justices may disagree on which terms are "religious" and which terms are "non-religious." However, legislative entities can easily alleviate such a problem by explicitly providing for non-religious speech in their policies. For example, the School District's policy in *Santa Fe* would have fared even better under the detection standard if the policy had explicitly provided for "religious invocations and/or non-religious messages." The more explicit the policy's terms, the less chance a court has of misconstruing the religious or non-religious nature of those terms.

In *Santa Fe*, the majority claimed to detect evidence of hidden, unconstitutional purposes not only in the policy's text, but also in the circumstances surrounding the policy's enactment.[153] These circumstances suggested that continuing the tradition of permitting only prayer at pre-game ceremonies was one of the School District's main motivations in enacting the policy.[154] Only upon the district court's order did the School District enact its first policy requiring the pre-game speech to be student-led and student-initiated.[155] Additionally, only the School District's second policy required the pre-game speech to be non-sectarian and non-proselytizing.[156]

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152. *Supra* n. 147 and accompanying text.
153. *Santa Fe*, 530 U.S. at 308–309, 315, 317.
154. *Id.* at 295, 297–298.
155. *Id.* at 295–296.
156. *Id.* at 297–299.

The School District's treatment of prayer in other contexts strengthens this inference.[157] For example, at about the same time that the School District enacted its pre-game policies, it also enacted a policy for its graduation ceremonies.[158] The graduation policy permitted the senior class to vote on whether the ceremony would include an "invocation and benediction."[159] Although this policy required the invocation and benediction to be non-sectarian and non-proselytizing, the School District enacted a second graduation policy that eliminated those restrictions.[160]

Considering the School District's treatment of prayer in the contexts of both pre-game and graduation ceremonies, one would be hard-pressed to argue convincingly that continuing the tradition of pre-game prayer was not one of the School District's motivations in enacting its final pre-game policy.[161] However, the possibility of the School District harboring an unconstitutional motivation while enacting its policy does not necessarily translate into an unconstitutional purpose.[162] For example, in *Board of Education of Westside Community Schools v. Mergens*,[163] the Court examined the constitutionality of the Equal Access Act, which prohibited public high schools from discriminating against student clubs on the basis of "religious, political, philosophical, or other" speech.[164] The petitioners claimed that the Act's inclusion of "religious" speech violated the Establishment Clause.[165] In analyzing the Act's purpose under the *Lemon* test, the Court stated that,

> Even if some legislators were motivated by a conviction that religious speech in particular was valuable and worthy of protection, that alone would not invalidate the Act, because what is relevant is the legislative *purpose* of the statute, not the possibly religious *motives* of the legislators who enacted the law.[166]

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157. *Id.* at 295–296.
158. *Id.* at 296–297.
159. *Id.*
160. *Id.* at 297.
161. *Id.* at 305–309.
162. *Mergens*, 496 U.S. at 249.
163. 496 U.S. 226 (1990).
164. *Id.* at 235.
165. *Id.* at 247.
166. *Id.* at 249 (emphasis in original). Of course, *Santa Fe* presents stronger evidence of the government's unconstitutional motivation than did *Mergens*. *Santa Fe*, 530 U.S. at

In *Santa Fe*, the majority improperly equated the School District's motivation with the School District's purpose.[167] As indicated above, the Court was correct in stating that circumstances surrounding the policy's enactment "indicate[ ] that the [School] District intended to preserve the practice of prayer before football games."[168] However, the Court attached too much significance to the School District's motivation.[169] The Court erred in not ascertaining the degree to which the School District's motivation reflected the purpose of the policy.[170]

A policy fails *Lemon*'s purpose prong only if the policy is "motivated wholly by an impermissible purpose."[171] In *Bowen v. Kendrick*,[172] for example, the Court considered whether the Adolescent Family Life Act had the impermissible purpose of promoting religion.[173] The Act established grants for organizations that maintained programs discouraging teenage premarital sexual relations.[174] The Act stated that such programs should emphasize the provision of support of "family members, religious and charitable organizations, voluntary associations, and other groups."[175] The Act also required organizations receiving the grants to describe how they planned to involve religious organizations in their programs.[176]

The Court ruled that the Act satisfied the *Lemon* test's purpose prong for two reasons.[177] First, the Act had the secular purpose of reducing the social and economic problems associated

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309, 315; *Mergens*, 496 US. at 239. While the policy in *Santa Fe* evolved from unconstitutional incarnations, the Act in *Mergens* was not the result of such an evolution. *Santa Fe*, 530 U.S. at 309, 315; *Mergens*, 496 U.S. at 239. Rather, the Act received sweeping support from both conservative and liberal Congresspersons. *Mergens*, 496 U.S. at 239. Nevertheless, the fact remains that the government's motivation in enacting its polices is not dispositive in a purpose analysis. *Id.* at 249.

167. *Santa Fe*, 530 U.S. at 309.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Bowen v. Kendrick*, 487 U.S. 589, 602 (1988) (emphasis added). The *Bowen* Court extrapolated this rule from *Lynch*, 465 U.S. at 680 (stating that a purpose is unconstitutional when it is "motivated wholly by religious considerations"), and *Stone*, 449 U.S. at 41 (suggesting that a purpose is unconstitutional when its "pre-eminent purpose . . . is plainly religious in nature").

172. 487 U.S. 589 (1988).

173. *Id.* at 593.

174. *Id.*

175. *Id.* at 595.

176. *Id.* at 603.

177. *Id.* at 602–603.

with teenage sexual activity.[178] Second, even if the Act was partially motivated by legislators' religious beliefs, the Act was also motivated by secular concerns, such as "increasing broad-based community involvement" in discouraging teenage sexual activity.[179]

Like the Act in *Bowen*, the School District's policy satisfies the *Lemon* test's purpose prong despite the possibly unconstitutional motives of the school-board members who helped to enact the policy.[180] As explained above, the policy had secular purposes.[181] Additionally, although having prayer at pre-game ceremonies may have been one of the School District's motivations in enacting the policy, this was not the School District's sole motivation.[182] The School District apparently was motivated also by a desire to solemnize the event and promote sportsmanship, student safety, and competition.[183] As the School District pointed out in its brief to the Court, a pre-game speaker could have accomplished the policy's articulated purposes without using any form of religious speech.[184] In fact, by offering students the choice of delivering either presumably religious invocations or non-religious messages, the policy made it possible for pre-game ceremonies never again to include any religious speech whatsoever.[185] If the School District's sole motivation in enacting the policy was to ensure the continuance of pre-game prayer, the School District probably would not have created such an obvious

178. *Id.* at 602. The Court determined the Act had a secular purpose for two reasons. *Id.* First, "on the whole, religious concerns were not the sole motivation behind the Act." *Id.* at 602–603 (citing *Lynch*, 465 U.S. at 680). Second, the Act's avowed secular purpose was legitimate. *Id.* at 603 (citing *Edwards*, 482 U.S. at 585).

179. *Id.* at 603. The Court went on to note that a statute does not "serve[ ] an impermissible religious purpose simply because some of the goals of the statute coincide with the beliefs of certain religious organizations." *Id.* at 604 n. 8.

180. *Mergens*, 496 U.S. at 249; *Bowen*, 487 U.S. at 602–603.

181. *Supra* nn. 11, 131–133 and accompanying text.

182. *Infra* n. 184.

183. *Santa Fe*, 530 U.S. at 298 n. 6.

184. Br. of Pet., *supra* n. 67, at 25. Although the Court suggested that only a religious speech could accomplish the policy's purpose of solemnizing the event, this conclusion runs contrary to the positions of both the School District and the petitioners. *Santa Fe*, 530 U.S. at 306; Br. of Pet., *supra* n. 67, at 25 (explaining on behalf of the School District that even "[i]f every student message is secular, the policy can still achieve its stated goals"); Br. of Respt. at 10, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (explaining on behalf of the respondents that "[t]he policy is not needed to solemnize the event; the National Anthem and other readily available secular means could do that").

185. *Supra* n. 11.

"loophole" that provided for the potentially permanent elimination of religious pre-game speech.

In summary, the School District's policy satisfies the *Lemon* test's purpose prong for two main reasons. First, the policy articulated plausible secular purposes that were entitled to deference. Second, the policy's articulated purposes are genuine because no evidence of hidden, unconstitutional purposes exists in the policy's text or in circumstances surrounding the policy's enactment.

2. The Endorsement Test's Purpose Prong: Purpose That Does Not Endorse or Disapprove of Religion

A government policy satisfies the endorsement test's purpose prong so long as the government's purpose in enacting the policy is neither to endorse nor disapprove of religion.[186] Because the endorsement test's purpose prong is so similar to the *Lemon* test's purpose prong,[187] the School District's policy satisfies both prongs for the same reasons.[188] As explained above, the policy has articulated secular purposes: solemnization of the pre-game ceremony and the promotion of sportsmanship, student safety, and competition.[189] These purposes were entitled to deference because no evidence of hidden, unconstitutional purposes existed in the policy's text or in the circumstances surrounding the policy's enactment. Analyzing the policy's text under the appropriate detection standard reveals that, contrary to the majority's conclusion, the policy did not have the hidden, unconstitutional purpose of promoting or endorsing (or disapproving of) religious speech. Additionally, the School District's possibly unconstitutional motives in enacting the policy did not render the policy unconstitutional, because secular concerns also motivated the policy's enactment.

3. The Coercion Test's Caveat: Only Governmental Coercion of Participation in Religion Violates the Establishment Clause

Under the coercion test, coerced participation in religion or its exercise violates the Establishment Clause only when the

186. *Supra* n. 46.
187. *Supra* nn. 50–54.
188. *Supra* nn. 125–185 and accompanying text; app. 1.
189. *Supra* nn. 11, 183 and accompanying text.

government is the source of the coercion.[190] In *Santa Fe*, the School District's policy obviously constituted government action, because the School District is a government entity.[191] Thus, if the policy would have coerced students to participate in religion or its exercise, the policy clearly would have violated the Establishment Clause.[192] However, as discussed in Part III(B)(3) of this Article, the policy would not have resulted in such coercion.

B. The Analytical Framework's "Effects Group" of Elements

1. The Lemon Test's Effects and Entanglement Prongs[193]

a. The *Lemon* Test's Effects Prong: The Principle or Primary Effect of Advancing or Inhibiting Religion

A government policy satisfies the *Lemon* test's effects prong so long as the policy does not have the principle or primary effect of advancing or inhibiting religion.[194] The School District's policy satisfies this prong for two main reasons. First, the policy would not have fostered a governmental advancement of religion. Second, even if the policy would have fostered a governmental advancement of religion, that advancement would have been a secondary — as opposed to a principal or primary — effect of the policy.

"For a [policy] to have forbidden 'effects' under *Lemon*, it must be fair to say that the government itself has advanced religion through its own activities and influence."[195] Thus, the first question in this area of inquiry is not whether a policy advances religion, but whether any potential religious advancement would be attributable to the government.[196] When a government policy provides for both religious and non-religious speech, religious advancement is not attributable to the govern-

190. *Supra* nn. 56–60 and accompanying text.

191. 530 U.S. at 294.

192. *Supra* nn. 56–60 and accompanying text.

193. In *Santa Fe*, the Court ended its *Lemon* test analysis after concluding that the School District's policy failed *Lemon*'s purpose prong. 530 U.S. at 317. However, for the sake of completeness, this Article analyzes the School District's policy under all three elements of the *Lemon* test. 403 U.S. at 612–613.

194. *Supra* nn. 37–39 and accompanying text.

195. *Mitchell v. Helms*, 530 U.S. 793, 809 (2000) (quoting *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 337 (1987) (emphasis deleted)).

196. *Id.*

ment so long as the government "disclaims" the resulting speech.[197] One way for a school to make this disclaimer is to create a limited public forum.[198] By creating a limited public forum, a school relinquishes control over whether the speech delivered in that forum will be religious or non-religious.[199] Thus, any resulting religious speech would clearly be attributable to the choices of private speakers.[200]

The *Santa Fe* majority correctly acknowledged that a school's creation of a limited public forum can serve as the government's disclaimer of any religious speech delivered within that forum.[201] However, the majority erred in reasoning that because the School District's policy did not create such a forum, the religious speech for which the policy provided was attributable to the government.[202] Although the pre-game ceremony was a non-public forum, the School District nonetheless relinquished control over whether students delivered a religious or non-religious speech.[203] As in the limited-public-forum cases, any resulting speech would have been attributable to the private choices of individual speakers, and not to the government. Thus, the School District's policy did not foster governmental advancement of religion. Rather, the policy constitutionally gave private individuals the option to advance religion by delivering religious speeches.

However, one could argue that any advancement of religion resulting from the policy would nonetheless be attributable to the government. After all, very few people attending the pre-game ceremony would have actually seen the policy's text and the School District's "disclaimer" of religious speech. Even if one were to assume the validity of this argument, the School District's policy still did not violate the *Lemon* test's effects prong. This

197. Although the Court has never used the term "disclaimer" in this context, it has routinely upheld the constitutionality of policies providing for after-school religious speech when the government has somehow disassociated itself from the speech. *E.g. Rosenberger*, 515 U.S. at 841–842; *Pinette*, 515 U.S. at 763–764; *Lamb's Chapel*, 508 U.S. at 395; *Mergens*, 496 U.S. at 248–249; *Widmar*, 454 U.S. at 271–272.

198. *Mergens*, 496 U.S. at 235; *supra* n. 86. Usually, such fora are limited in the sense that the school opens them for free speech and assembly only during specified hours. *Supra* n. 197.

199. *Id.*

200. *Id.*

201. *Santa Fe*, 530 U.S. at 302 (citing *Rosenberger*, 515 U.S. at 819).

202. *See id.* at 302–303 n. 12 (distinguishing limited public forum cases from the facts of *Santa Fe*).

203. *Supra* n. 11.

conclusion is based on the fact that the *Lemon* test's effects prong does not completely prohibit the government from advancing religion through one of its policies.[204] The prong merely prohibits the advancement of religion from being a principal or primary effect of the policy.[205]

As the School District pointed out in its brief to the Court, a government policy that aids religious entities does not have a principal or primary effect of advancing religion so long as two conditions are met.[206] First, the government offers the aid to both religious and non-religious entities.[207] Second, the religious entities receive the aid as a result of the independent decisions of private actors.[208] For example, in *Zobrest v. Catalina Foothills School District*,[209] a school district refused to comply with a federal act requiring the school district to provide government-paid interpreters to deaf students in religious schools.[210] The school district claimed that such government aid would impermissibly advance religion because the interpreters would be serving as conduits for the school's religious messages.[211] The Court ruled that the government program did not have a principal or primary effect of advancing religion for two reasons.[212]

First, the program provided interpreters for all qualifying deaf students, regardless of whether the students attended a religious or public school.[213] By aiding deaf students in religious and public schools equally, the act had a primary effect of advancing education for deaf students and not of advancing

204. *Supra* nn. 37–39 and accompanying text.

205. *Id.*

206. *Infra* n. 208.

207. *Id.*

208. Br. of Pet., *supra* n. 67, at 28–31. The School District relied on several cases for this proposition, three of the most relevant being the following: *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 13 (1993); *Witters*, 474 U.S. at 487–488 (ruling that a government policy offering tuition assistance to all blind students in both public and private universities does not have a principle or primary effect of advancing religion); *Mueller*, 463 U.S. at 398–399 (ruling that a government policy providing a tax deduction for educational expenses for all private- and public-school students did not have a principle or primary effect of advancing religion).

209. 509 U.S. 1 (1993).

210. *Id.* at 3–4.

211. *Id.* at 4.

212. *Id.* at 10.

213. *Id.* at 9–10 (citing *Witters*, 474 U.S. at 487–489; *Mueller*, 463 U.S. at 398, 399, 401, 405).

religion.[214] Second, any benefit to religion was attributable to the independent choices of private actors, not to government decision-making.[215] The act required school districts to place interpreters in religious schools only when deaf students chose to attend those schools.[216]

Like the act in *Zobrest* that provided aid to religious-school students, the policy in *Santa Fe* would have provided aid to religious speakers. This aid would have included property on which to speak, the use of a public-address system, and a pre-assembled crowd to whom to speak.[217] But also like the government aid in *Zobrest*, the aid to religious speakers in *Santa Fe* would not have had a principal or primary effect of advancing religion.[218] First, the School District's policy would have provided the same benefits to all student speakers, regardless of whether the speaker delivered a religious or non-religious speech.[219] By aiding religious and non-religious speech equally, the policy would have had a primary effect of advancing the policy's secular purposes and not of advancing religion.[220] Second, any benefit to religion would have been attributable to the independent choices of the student speakers, not to the School District.[221] The policy would have benefitted religious speakers only when the speakers chose to deliver a religious speech.[222]

To summarize, the School District's policy satisfies the

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214. *Id.* at 10, 13–14.

215. *Id.*

216. *Id.* The Court noted that the act specifically gave the parents of deaf students the option to place their children in either a religious or public school and still be eligible for the services of a government-paid interpreter. *Id.* The Court reasoned that because the act "creates no financial incentive for parents to choose a sectarian [i.e., religious] school, an interpreter's presence there cannot be attributed to state decisionmaking." *Id.* at 10.

217. *Supra* n. 11.

218. *Zobrest*, 509 U.S. at 10 (citing *Witters*, 474 U.S. at 488); *supra* n. 11.

219. *Supra* n. 11. The act in *Zobrest* provided students with interpreters based upon whether they were deaf, not whether they attended a religious or public school. *Zobrest*, 509 U.S. at 10. Similarly, the School District's policy in *Santa Fe* provided students with certain benefits based upon whether they were elected to speak at the pre-game ceremony, not whether they decided to deliver a religious or non-religious speech. *Supra* n. 11.

220. *Zobrest*, 509 U.S. at 10.

221. *Supra* n. 11.

222. *Id.* The act in *Zobrest* specifically gave parents of deaf students the option to place their children in either a religious or public school and still be eligible for the services of a government-paid interpreter. 509 U.S. at 10. Similarly, the School District's policy in *Santa Fe* specifically gave student speakers the option to deliver a religious or non-religious speech and still be eligible for the benefits for which the policy provided. *Supra* n. 11.

Lemon test's effects prong for two main reasons. First, the policy would not have fostered a governmental advancement of religion. Second, even if the policy would have fostered a governmental advancement of religion, that advancement would have been a secondary — as opposed to a principal or primary — effect of the policy.

b. The *Lemon* Test's Entanglement Prong: Excessive Government Entanglement with Religion

A government policy satisfies the *Lemon* test's entanglement prong so long as the policy avoids excessively entangling the government with religion.[223] The School District's policy easily satisfies this prong because the policy provided for both religious and non-religious speech.[224] Had the policy permitted only non-religious speech at pre-game ceremonies, the policy would have created excessive government entanglement with religion by imposing upon school officials the duty to define and prevent the communication of religious ideas.[225]

2. The Endorsement Test's Effects Prong: The Government's Actual or Perceived Endorsement or Disapproval of Religion

A government policy satisfies the endorsement test's effects prong so long as the policy does not communicate the government's actual or perceived endorsement or disapproval of religion.[226] The School District's policy did not communicate the government's actual or perceived disapproval of religion because of the obvious fact that the policy permitted religious speech.[227]

Further, the policy did not communicate the government's actual endorsement of religion. This Article concedes, as it must, that the School District's policy in *Santa Fe* could have fostered religious endorsement.[228] For example, the policy did not preclude a student speaker from taking the microphone and explaining the benefits of religion to the crowd.[229] However, any such

223. *Supra* nn. 40–43 and accompanying text.
224. *Id.*; *supra* n. 11.
225. *Supra* nn. 11, 40–43.
226. *Supra* n. 47.
227. *Supra* n. 11.
228. *Id.*
229. *Id.* This assumes, of course, that the speaker does not go so far as to deliver a

endorsement of religion would have been attributable to the student speaker and not to the School District.[230] As the Court recently noted in *Mitchell v. Helms*,[231]

> [i]n distinguishing between indoctrination that is attributable to the State and indoctrination that is not, we have consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion. . . .
>
> As a way of assuring neutrality, we have repeatedly considered whether any government aid that goes to a religious institution [or entity] does so "only as a result of the genuinely independent and private choices of individuals."[232]

Thus, the policy satisfies the endorsement test's effects prong for the same reasons it satisfies the *Lemon* test's effects prong. The policy would have provided benefits — property on which to speak, the use of a public-address system, and a pre-assembled crowd to whom to speak — to all student speakers, regardless of whether the speaker chose to deliver a religious or non-religious speech.[233] By aiding religious and non-religious speakers equally, any endorsement of religious indoctrination would not have been attributable to the School District.[234] Rather, such endorsement would have been attributable to the private choices of the student speakers.[235]

We now examine whether the policy would have communicated the government's perceived endorsement of religion. In this area of inquiry, "[t]he relevant issue is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute [or policy], would perceive it as a state endorsement of [religion]."[236]

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proselytizing speech.

230. *Infra* nn. 232–235 and accompanying text.

231. 530 U.S. 793 (2000).

232. *Id.* at 809–810 (quoting *Agostini v. Felton*, 521 U.S. 203, 226 (1997)).

233. *Supra* n. 11.

234. *Mitchell*, 530 U.S. at 809–810.

235. *Id.* Additionally, as the School District pointed out in its brief to the Court, "there is little if any risk of official state endorsement . . . where no formal classroom activities are involved and no school officials actively participate." Br. of Pet., *supra* n. 67, at 34 (quoting *Mergens*, 496 U.S. at 251). Thus, the fact that a student speaker would have delivered the pre-game speech on a football field after school hours would have served to further reduce or eliminate any potential for the School District's actual endorsement of religion. *Id.*

236. Gey, *supra* n. 46, at 477 (quoting *Wallace*, 472 U.S. at 76 (O'Connor, J.,

An objective observer acquainted with the text of the School District's policy would not have perceived the policy as a State endorsement of religion. The observer would know that the policy enabled student speakers, not the School District, to decide whether the pre-game speeches would refer to religion. Thus, an observer would view any religious pre-game speech as the student speaker's personal endorsement of religion.[237]

The same objective observer, being acquainted with the policy's history,[238] would not have perceived the policy as a State endorsement of religion. Unlike the policy's previous incarnations, the policy at issue in *Santa Fe* required that all pre-game speech be non-sectarian and non-proselytizing.[239] This provision for "minimally" religious speech is properly viewed, not as the School District's endorsement of religion, but rather as the School District's attempt to enact a constitutional policy.[240] After all, banning religious speech from the pre-game ceremony would communicate the School District's perceived disapproval of religion, a result against which the endorsement test guards.[241]

Lastly, the same objective observer acquainted with the implementation of the School District's policy would not have perceived the policy as a State endorsement of religion.[242] As the Court noted in *Mergens*, the government does not endorse the religious content of speech simply because the government fails to censor that speech.[243]

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concurring)). The objective observer standard is obviously problematic: reasonable people can observe the same events in different ways because of differences in knowledge and background. *Id.* However, as the School District pointed out in its brief to the Court, "A program does not become unconstitutional because someone ignorant of its actual operation perceives an endorsement. 'Private religious speech cannot be subject to veto by those who see favoritism where there is none.'" Br. of Pet., *supra* n. 67, at 38 (quoting *Pinette*, 515 U.S. at 766).

237. *Supra* n. 11.

238. This Article uses the phrase "policy's history" in lieu of "legislative history" because the School Board, which enacted the policy, is not a legislature. This deviation from the endorsement test's literal language is merely one of convenience and is not intended to detract from the endorsement test's meaning.

239. *Santa Fe*, 530 U.S. at 294–298.

240. *Id.*

241. *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring).

242. *Santa Fe*, 530 U.S. at 294–298.

243. 496 U.S. at 250. Although the *Mergens* Court made this statement in reference to a limited designated public forum, nothing suggests that the Court did not intend for this rule to apply also to non-public fora like the pre-game ceremony. *Id.* at 246–247. Even in non-public fora, the government must be sure not to communicate a message of disapproval of religion or risk violating the endorsement test. *Lynch*, 465 U.S. at 690

In summary, the School District's policy satisfies the endorsement test's effects prong for three main reasons. First, the policy would not have communicated the government's actual or perceived disapproval of religion because the policy provided for religious speech. Second, any actual endorsement of religion would have been attributable to student speakers and not to the School District, because the policy would have provided benefits without reference to religion and permitted student speakers to decide upon religious content. Third, the policy would not have communicated the government's perceived endorsement of religion because an objective observer acquainted with the policy's text, history, and implementation would not have perceived the policy as a government endorsement of religion.

3. The Coercion Test: Prohibiting Direct and Social Governmental Coercion

A government policy satisfies the coercion test so long as the policy does not enable the government to employ direct or social coercion.[244] The School District's policy, by requiring that the pre-game speech be non-sectarian and non-proselytizing, would have prevented student speakers from employing direct coercion to effect religious participation from the crowd.[245] For example, the policy clearly would bar a speaker from requesting the pre-game attendees to lift their hands in worship.[246] Such a religious act is characteristic of certain Christian sects[247] and therefore would violate the policy's requirement that the speech be non-sectarian.[248] Similarly, the policy would bar the speaker from requesting the crowd's involvement in the recitation of a prayer.[249] Such a religious act would violate the policy's requirement that any religious speech be non-proselytizing.[250]

(O'Connor, J., concurring). Such a message would be communicated if the government specifically banned only religious speeches in a non-public forum. *Id.*

244. *Supra* nn. 61–63 and accompanying text.

245. *Supra* n. 11.

246. *Supra* n. 242 and accompanying text.

247. *See generally* Ocala Word of Faith Church, *About Us, Style of Worship* <http://www.owfc.org/about_us/index.htm> (accessed Feb. 11, 2002) (citing *Psalm* 63:4 and *I Timothy* 2:8 from the Christian Bible in explaining why certain Christian sects lift their hands during worship).

248. *Id.*; *supra* n. 11.

249. *Supra* n. 11.

250. *Id. Webster's Dictionary* defines "proselytize" as "to convert or attempt to convert

However, one could argue that the policy's restrictions that the pre-game speech be non-sectarian and non-proselytizing would not have guarded against social coercion. For example, even if a pre-game speaker did not request crowd involvement while he or she delivered a religious speech, members of the crowd may, of their own accord, close their eyes, bow their heads, or fold their hands in a position of prayer during the speech. Such actions could exert social pressure on those not desiring to participate to nevertheless take part in those actions. One could argue that this social pressure would be attributable indirectly to the government because, without the School District's policy, no pre-game speech would have taken place at all.[251]

In *Santa Fe*, the majority relied exclusively on *Lee* to conclude that the pre-game ceremony lent itself to the facilitation of social coercion.[252] In *Lee*, a public-high-school principal asked a rabbi to deliver a prayer during the school's graduation ceremony.[253] A student who attended the ceremony sued the school district to enjoin this practice.[254] The Court ruled the graduation prayer violated the newly articulated coercion test.[255] The Court reasoned that the school district's supervision and control of the ceremony created an environment in which students would feel peer pressure to comply with the rabbi's suggestions to stand or remain silent during the prayer.[256] According to the Court, standing or remaining silent in such a

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as a proselyte; recruit." *Webster's Unabridged Dictionary* 1552 (Sol Steinmetz ed., 2d ed., Random House 1998). Because Christians "convert" non-Christians by leading them in a prayer, a student speaker leading the crowd in prayer would probably be viewed as violating the policy's non-proselytizing requirement. *See e.g.* Christian Broad. Network, *Prayer and Counseling, Salvation for Myself* <http://www.cbn.com/cc/article/1,1183, PTID2546/CHID101298/CIID203164,00.html> (accessed Feb. 11, 2002) (offering to convert individuals to Christianity by leading them in a prayer).

251. *Supra* n. 11 (noting that "The board *has chosen* to permit" students to deliver an invocation or message (emphasis added). This phrase suggests that students would not have delivered a pre-game speech but for the school board's consent).

252. 530 U.S. at 310–312.

253. 505 U.S. at 581. Although the principal requested that the prayer be non-sectarian, the record does not indicate whether the principal requested the prayer to be non-proselytizing. *Id.*

254. *Id.* at 584.

255. *Id.* at 587 (noting that the principal's actions violated the "central principles" in *Lynch*, 465 U.S. at 678, and *County of Allegheny*, 492 U.S. at 591).

256. *Id.* at 593. Noting that high-school students are especially susceptible to peer pressure, the Court concluded that social coercion "can be as real as any overt compulsion." *Id.*

context constituted participation in the prayer.[257]

However, in *Santa Fe* the majority's reliance on *Lee* was misplaced. As the School District explained in its brief to the Court, the potentially coercive environment of graduation ceremonies is distinguishable from the environment of a pre-game ceremony. For example, students participating in graduation ceremonies usually sit together in a monolith. Such a seating arrangement magnifies peer pressure, increasing the discomfort of those desiring to refrain from religious participation. In *Santa Fe*, however, students attending the pre-game ceremony probably did not sit in one homogenous group. A typical crowd probably consisted of a random mix of students, parents, and other community members. Such a seating arrangement reduces the pressure attendees may feel to conform to those around them, allowing dissenters more comfortably to resist social pressure to participate in religion. Additionally, at graduation ceremonies, students generally must arrive on time, stay in their seats the entire time, and not leave early. Conversely, football game attendees generally may arrive late, move about during the game, and leave early if they so desire. This lack of formality at pre-game ceremonies serves further to reduce the potential for social coercion by giving the attendees a sense of personal mobility and freedom.[258]

IV. CONCLUSION

This Article has demonstrated how the *Santa Fe* majority failed to appreciate the "ingredients" of equal access and student choice in the School District's policy by misapplying the *Lemon*, endorsement, and coercion tests. Yet, one major question remains: "Where do we go from here?" The answers are different for courts and policy drafters.

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257. *Id.* However, the *Lee* Court seemed to warn against extending its reasoning to cases outside the specific context of graduation ceremonies in which school officials, as opposed to students, actively promote religious speech:

> These dominant facts mark and control the confines of our decision: State officials direct the performance of a formal religious exercise at *promotional and graduation ceremonies for secondary schools*. Even for those students who object to the religious exercise, their attendance and participation in the state-sponsored religious activity are in a fair and real sense obligatory, though the school district does not require attendance as a condition for receipt of the diploma.

Id. at 586 (emphasis added).

258. Br. of Pet., *supra* n. 67, at 42.

Courts should employ three techniques to evaluate more accurately the constitutionality of public-school policies providing for religious speech. First, courts should apply the detection standard when examining a policy's text for evidence of hidden, unconstitutional purposes. The detection standard avoids the problems that plague the balancing standard. Additionally, policy drafters can easily avoid any problems stemming from the detection standard's incorporation of a "reasonable person" test by explicitly providing for both religious and non-religious speech in their policies.

Second, courts should ascertain the degree to which an improper motivation constitutes the reason for a policy's existence. Probably few public-school policies providing for religious speech are motivated entirely by secular concerns. Courts should remember that a policy violates the Establishment Clause only if it is motivated wholly by an unconstitutional purpose.

Third, courts should be sensitive to the various ways in which a school or school district may "disclaim" religious speech. Although creating a limited designated public forum is one way to make this disclaimer, creating such a forum is not always appropriate or practical.[259] Providing for both religious and non-religious speech on a non-discriminatory basis also should be considered adequate to prevent the attribution of religious speech to the government.

Similarly, policy drafters should employ three techniques to ensure that their policies providing for religious speech pass Establishment Clause muster. First, until courts begin applying the detection standard, policy drafters should use the same degree of specificity in providing for religious and non-religious speech. By using the same degree of specificity, a school district's policies will be sure to satisfy the balancing standard.

Second, once courts begin applying the detection standard, policy drafters should be sure to explicitly provide for both religious and non-religious speech in their policies. This would avoid any potential confusion caused by the detection standard's incorporation of a "reasonable person" test.

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259. For example, in *Santa Fe*, converting the pre-game ceremony into a limited designated public forum would have seemed awkward. The crowd at the pre-game ceremony likely would not have appreciated student after student delivering speeches on whatever topics the speakers desired. Most people probably attended the game to watch football, not to listen to multiple student speeches.

Third, policy drafters should explicitly disclaim all speech for which their policies provide. In addition to incorporating disclaimers into a policy's text, school officials would do well to make these disclaimers verbally before the delivery of any student speech.

APPENDIX 1

Steps in a Purpose Inquiry under the *Lemon* and Endorsement Tests