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# Constitutional Law: Endorsing a New Test for Establishment Clause Cases

Elenore Cotter Klingler

# CONSTITUTIONAL LAW: ENDORSING A NEW TEST FOR ESTABLISHMENT CLAUSE CASES

## *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000)

*Elenore Cotter Klingler**

Petitioner adopted a policy that permitted student-led prayer over the loudspeaker at school football games.[1] Respondents sued to prevent Petitioner from enacting the policy.[2] The District Court for the Southern District of Texas upheld the policy, but required that the prayer be nonsectarian and nonproselytizing.[3] The Court of Appeals for the Fifth Circuit held that even such restricted prayer was unconstitutional and invalid because the policy had been initiated by school officials.[4] The United States Supreme Court granted review,[5] and in affirming the court of appeals, HELD, that the policy violated the Establishment Clause[6] by encouraging prayer at government-sponsored events.[7]

The principle of the Establishment Clause has been difficult to force into an easy-to-apply test.[8] The United States Supreme Court has made several attempts to more narrowly define the Establishment Clause, but no test has completely satisfied all needs.[9] The seminal effort to construct a test was made in 1971.[10]

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* My deepest love and gratitude goes to Rob Klingler, my husband, who encourages me in everything I do.

1. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 294 (2000). Petitioner adopted a succession of policies on this subject; the one at issue in the instant case was adopted in October 1995. *Id.* at 296.

2. *Id.* at 295.

3. *Id.* at 294.

4. *Id.* at 299. The court of appeals applied three separate tests to the Petitioner's policy: the three-pronged *Lemon* test, the "coercion" test, and the "endorsement" test. The policy was invalid under all three. Doe v. Santa Fe Indep. Sch. Dist., 168 F.3d 806, 814-15, 816-18 (5th Cir. 1999), *aff'd*, 530 U.S. 290 (2000).

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

6. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .").

7. *Santa Fe*, 530 U.S. at 317.

8. *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) ("The language of the Religion Clauses of the First Amendment is at best opaque. . . .").

9. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 68 (1985) (O'Connor, J., concurring). Justice O'Connor stated, "[I]t is far easier to agree on the purpose that underlies the First Amendment's Establishment and Free Exercise Clauses than to obtain agreement on the standards that should govern their application." *Id.* (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 694 (1970) (Harlan, J., concurring)).

10. *See Lemon*, 403 U.S. at 602.

In *Lemon v. Kurtzman*,[11] the Court created a very specific test to determine the constitutionality of government action toward religion.[12] The issue in *Lemon* was whether two statutes, one from Rhode Island,[13] and one from Pennsylvania,[14] violated the Establishment and Free Exercise Clauses of the Constitution.[15] The Rhode Island statute provided a salary supplement of fifteen percent to private school teachers of secular subjects.[16] The Pennsylvania statute reimbursed private schools for some secular expenditures, such as teacher salaries and books.[17] Both statutes required the schools to segregate religious expenditures from secular, and also required the state to maintain surveillance over the separation.[18]

Using a new three-pronged test, the Court held that both statutes were unconstitutional.[19] Any statute that had an effect on religion had to satisfy all three requirements of the test in order to be constitutional.[20] The three requirements were: first, that the statute must have a secular purpose; second, that the statute must neither have the effect of advancing nor inhibiting religion; and finally, that the statute must not "excessively entangle" the government with religion.[21]

Applying the test to the two statutes, the Court found that although both had a secular purpose, they failed the third part of the test.[22] The governmental oversight required by the statute fostered too great a connection between the government and the religious aspects of the schools.[23] For this reason, the statutes were unconstitutional.[24]

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11. *Id.*

12. *Id.* at 612-13. The Court pulled together holdings from *Bd. of Educ. v. Allen*, 392 U.S. 236 (1968) and *Walz v. Tax Comm'n*, 397 U.S. 664 (1970) to develop the three prongs of the *Lemon* test. *Lemon*, 403 U.S. at 602.

13. *Lemon*, 403 U.S. at 607 n.1 (citing the Rhode Island Salary Supplement Act, R.I. GEN LAWS ANN. § 16-51-1 *et seq.* (1970)).

14. *Id.* at 609 n.3 (citing the Pensylvania Nonpublic Elementary and Secondary Education Act, PA. STAT. ANN., tit. 24 §§ 5601-5609 (1971)).

15. *Lemon*, 403 U.S. at 606.

16. *Id.* at 607. The salaries of the recipient teachers could not exceed the maximum paid to public school teachers. *Id.*

17. *Id.* at 609.

18. *Id.* at 619, 620.

19. *Id.* at 625.

20. *Id.* at 612. The Court made the point that the Establishment Clause covered more ground than simply "establishing a religion." A law that "respected" religion could still violate the Constitution, even if it did not "establish" a church. *Id.*

21. *Id.* at 612-13.

22. *Id.* at 613-14.

23. *Id.* at 619-21.

24. *Id.* at 625.

The Court used the *Lemon* test to decide nearly every Establishment Clause case for fifteen years after its creation.[25] However, despite its use by the majority, the *Lemon* test was criticized for its lack of specificity.[26] In *Wallace v. Jaffree*,[27] Justice O'Connor proposed an alternative criterion, the "endorsement" test.[28]

The issue in *Wallace* was the constitutionality of an Alabama statute that authorized a moment of silence for "meditation or prayer."[29] After applying the first prong of the *Lemon* test, the Court held that the statute was unconstitutional because it did not have any secular purpose.[30] Applying the other two prongs of the test was unnecessary.

In a strong concurrence, Justice O'Connor suggested an alternative to the often ambiguous *Lemon* test.[31] She outlined what she called the "endorsement" test, which was premised upon the idea that government-sponsored religion sends a message of exclusivity to nonparticipants.[32] Under the endorsement test, direct government action is invalid if it endorses religion or a religious sect.[33] When using this test, it is necessary to consider the purpose of the government message by examining the history, language, and context of the message.[34] Though the Court should not accept a "sham secular purpose,"[35] deference should be granted to the stated intent of the government when determining the purpose of the message.[36] Using the endorsement test, Justice O'Connor argued, would allow a clear and consistent analysis of Establishment Clause cases.[37]

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25. *See* Wallace v. Jaffree, 472 U.S. 38, 63 (1985) (Powell, J., concurring) ("It is the only coherent test a majority of the Court has ever adopted. Only once since our decision in *Lemon*... have we addressed an Establishment Clause issue without resort to its three-pronged test.").

26. *See, e.g., id.* at 68 (O'Connor, J., concurring) ("Despite its initial promise, the *Lemon* test has proved problematic."); *id.* at 110 (Rehnquist, J., dissenting) ("The three-part test represents a determined effort to craft a workable rule from a historically faulty doctrine; but the rule can only be as sound as the doctrine it attempts to service.").

27. 472 U.S. 38 (1985).

28. *See infra* notes 32-37 and accompanying text.

29. *Wallace*, 472 U.S. at 41-42. The district court in this case held that the purpose of the statute was to encourage prayer; however, it ruled that the Constitution did not forbid Alabama from establishing a state religion. *Id.* at 41.

30. *Id.* at 59.

31. *See id.* at 68-70 (O'Connor, J., concurring).

32. *Id.* at 69. Justice O'Connor stated, "it 'sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.'" *Id.* (quoting *Lynch v. Donnelly*, 465 U.S. 668 at 688 (1984) (O'Connor, J., concurring)).

33. *Id.* (O'Connor, J., concurring).

34. *Id.* at 73-74 (O'Connor, J., concurring).

35. *Id.* at 75 (O'Connor, J., concurring).

36. *Id.* at 74-75 (O'Connor, J., concurring).

37. *Id.* at 69 (O'Connor, J., concurring).

The Court did not adopt the endorsement test, but in *Lee v. Weisman*,[38] the Court did seem to adopt the reasoning behind it. In reaching its decision, the Court focused on the exclusionary, coercive pressure government-sponsored religion creates. The issue in *Lee* was whether the practice of inviting members of clergy to give benedictions at the official public school graduation violated the Establishment Clause.[39] The Court declined to use or address the *Lemon* test in its decision.[40] Instead, the Court focused on the coercive pressure that the presence of prayer in school has on students.[41]

The school in *Lee* invited a rabbi from the community to give the invocation at the graduation ceremony.[42] The rabbi was instructed to be nondenominational and to focus on "inclusiveness."[43] Attendance at the graduation ceremony was optional, in that nonattending students would still receive diplomas.[44]

The Court found the practice to be an unacceptable coercive pressure on the students. It held that prayer in schools conveyed a powerful social pressure to conform that children may feel compelled to follow.[45] Prayer at a graduation ceremony was especially coercive because a student did not have a true choice to avoid attendance.[46] Accordingly, and without reliance upon either *Lemon* or an explicit adoption of the endorsement test, the Court held school-sponsored prayer at graduations to be unconstitutional.[47]

The instant Court inherited this variety of precedential tests. In deciding the instant case,[48] the instant Court appears to have adopted Justice O'Connor's endorsement test.[49] Very little mention was made of *Lemon* or of the coercion reasoning from *Lee*.

The traditional practice of Petitioner was to permit an elected student chaplain to deliver a prayer over the loudspeaker before each home football

38. 505 U.S. 577 (1992).

39. *Id.* at 580.

40. *Id.* at 587. Both the district court and court of appeals, however, did use the *Lemon* test. They both determined that the graduation benediction policy violated the test. *Id.* at 584-86.

41. *Id.* at 588. The court of appeals in the instant case considered this stance to be a separate test, apart from either the *Lemon* test or the endorsement test. Doe v. Santa Fe Indep. Sch. Dist., 168 F.3d 806, 814-15, 816-18 (5th Cir. 1999), *aff'd*, 530 U.S. 290 (2000).

42. *Lee*, 505 U.S. at 581.

43. *Id.* The invocation and benediction given by the rabbi in this case each mentioned a specific religious figure (God) once. They both were of a general religious nature. *See id.* at 581-82.

44. *Id.* at 583.

45. *Id.* at 593.

46. *Id.* at 595.

47. *Id.* at 599.

48. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000).

49. *See supra* notes 31-37 and accompanying text.

game.[50] Respondents[51] sued to prevent this and other similar practices.[52] Following the district court's decision to permit nonsectarian, nonproseltyzing prayer,[53] Petitioner adopted a succession of policies on the matter.[54] The policy concerning the instant case was adopted in October, but the election conducted under the August policy stood.[55] The October policy authorized a vote among students as to whether an invocation[56] should be allowed at football games. If the students voted to have an invocation, it authorized a second vote to select a student speaker to deliver it.[57] The policy did not require the invocation to be nonsecular or nonproseltyzing, unless so directed by a court.[58] The court of appeals rejected the invocation policy entirely as a violation of the Establishment Clause.[59]

The instant Court affirmed the decision of the court of appeals and held that the policy was facially[60] unconstitutional.[61] The instant court found that there was direct government involvement in the policy.[62] It reasoned that Petitioner was too closely tied to the religious nature of the message, because the policy permitted one student to speak an approved message at a school-sponsored event.[63] The instant Court also noted that the elections themselves were initiated by Petitioner and thus constituted state action.[64] The instant Court determined that, despite Petitioner's protests to the

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

51. Respondents were two students and their mothers. One was Mormon, the other Catholic. Their identities were kept secret to avoid harassment. *Id.*; *see also id.* at 294 n.1 (quoting the district court's order threatening to hold Petitioner in contempt for its attempts to determine the identity of Respondents).

52. Respondents alleged that Petitioner conducted a variety of proselytizing practices, including encouraging attendance at Baptist events, scolding children for having other religious beliefs, and permitting religious invocations at graduations. *Id.* at 295.

53. *Id.* at 296.

54. *Id.* Petitioner adopted policies on the issue in May, July, August, and October. The May and July policies regarded prayer at graduation, and the August and October policies regarded prayer at football games. *Id.* at 296-98.

55. *Id.* at 298 n.5.

56. The word "invocation" was a change from the August policy, which used the word "prayer." *Id.*

57. *Id.* at 297.

58. *Id.*

59. *Id.* at 299.

60. *Id.* at 316. The instant Court answered the dissent's argument that the majority had acted before any speech was made. It pointed out that the enactment alone of the policy violated the Establishment Clause. *Id.*

61. *Id.* at 317.

62. *Id.* at 302-03.

63. *Id.* The instant Court rejected Petitioner's argument that the invocation was an individual's message at a limited public forum, and thus, private speech. *Id.*

64. *Id.* at 306.

contrary,[65] the policy was enacted with the purpose of endorsing a particular religious viewpoint.[66] An examination of the circumstances surrounding the enactment of the policy made that clear to the instant Court.[67] The instant Court found that the purpose of the policy was to encourage prayer,[68] and also that the policy was enacted in a way that excluded the minority.[69] For those reasons, the instant Court held that the policy violated the Establishment Clause and was thus unconstitutional.[70]

In an emphatic dissent,[71] Chief Justice Rehnquist argued that the majority was acting in a fashion hostile to religion in general.[72] He pointed out that the policy had not yet been enacted, and contended that the majority had acted too quickly to decide the case.[73] Finally, he argued that the majority had used the strictest test available[74] and had not given proper deference to the stated intent of Petitioner.[75]

In its decision in the instant case, the United States Supreme Court has retreated further from the *Lemon* test, and moved toward Justice O'Connor's endorsement test. Chief Justice Rehnquist and other analysts have suggested that the Court reaffirmed its commitment to *Lemon* in this decision.[76] However, in its opinion, the Court briefly mentions the test only once,[77] and instead relies heavily on the reasoning and wording of the

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65. The instant court was very skeptical of Petitioner's explanations. It stated, "The District, nevertheless, asks us to pretend that we do not recognize what every Santa Fe High School student understands clearly–that this policy is about prayer. The District further asks us to accept what is obviously untrue: that these messages are necessary to 'solemnize' a football game. . . ." *Id.* at 315.

66. *Id.*

67. *Id.* at 314-15.

68. *Id.* at 315.

69. *Id.* at 317.

70. *Id.*

71. Chief Justice Rehnquist, Justice Scalia, and Justice Thomas dissented from the majority. *Id.* at 318.

72. *Id.* at 318, 322 (Rehnquist, C.J., dissenting).

73. *Id.* at 321 (Rehnquist, C.J., dissenting) ("It is also conceivable that the election could lead to a Christian prayer before 90 percent of the football games . . . [b]ut it is possible that the students might vote not to have a pregame speaker, in which case there would be no threat of a constitutional violation."). *But cf. id.* at 295 n.2 (quoting the graduation invocation given at Petitioner's school, "Lord, bless this ceremony and give us all a safe journey home. In Jesus' name we pray.").

74. *Id.* at 318 (Rehnquist, C.J., dissenting). Chief Justice Rehnquist contended that the majority used the *Lemon* test to decide the instant case. *Id.*

75. *Id.* at 322 (Rehnquist, C.J., dissenting).

76. *Id.* at 318 (Rehnquist, C.J., dissenting); *see also Firm and Necessary Line*, L.A. TIMES, June 20, 2000, at B8 ("closely watched cases, underscored by nearly 40 years of precedent"); Tony Mauro, *Court Tackles Prayer at Football Games*, LEGAL TIMES, June 26, 2000, at 8. ("The ruling suggests a recommitment by the Court to the strict 'Lemon Test' for evaluating church-state cases . . . .").

77. *Santa Fe*, 530 U.S. at 314 (referring to the *Lemon* test).

endorsement test.[78] This, combined with the steady criticism of *Lemon*,[79] suggests that the Court has all but officially dispensed with the *Lemon* test.

The Court begins its analysis of the instant case with an examination of the degree of state involvement in the policy and the context of the policy's adoption.[80] The directness of the state involvement is the first part of the endorsement test.[81] After determining that Petitioner initiated and approved of the policy,[82] the Court considers the context of the policy and its adoption.[83] In discussing the context, the Court uses language similar to Justice O'Connor's in *Wallace*.[84] The Court quotes her directly three times.[85]

Throughout its decision, the Court is concerned with the exclusive nature of the policy.[86] The fact that the policy was decided by election is especially troubling to the Court.[87] A majoritarian process like an election guarantees that minority voices will not be heard and may further exclude them from the community.[88] This sense of exclusivity caused by government endorsement of religion is the very basis of Justice O'Connor's endorsement test.[89]

Despite the Court's cursory mention of *Lemon*, it does not seem to rely upon it to any great extent. In fact, in the one instance in which the Court cites to *Lemon*, it is in support of the need to examine the context of the policy.[90] An examination of context as a means to determine the purpose of an action is a central tenet of the endorsement test.[91]

The final portion of the endorsement test is the need to be deferential to the stated purpose of the governmental action.[92] Chief Justice Rehnquist

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78. *See, e.g., id.* at 307-10, 315-17.

79. *See supra* note 26 and accompanying text.

80. *Santa Fe*, 530 U.S. at 306-07.

81. *See supra* note 33 and accompanying text.

82. *Santa Fe*, 530 U.S. at 305 ("Contrary to the District's repeated assertions that it has adopted a 'hands-off' approach to the pregame invocation, the realities of the situation plainly reveal that its policy involves both perceived and actual endorsement of religion.").

83. *Id.* at 307-08.

84. *See id.* at 307. "The actual or perceived endorsement of the message, moreover, is established by factors beyond just the text of the policy." *Id.*

85. *See id.* at 308, 309-10.

86. *See id.* at 309-10 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984), to support the point that such religious policies emphasize the "outsider" nature of nonadherents).

87. *Id.* at 304-05.

88. *Id.* at 304 ("[T]he majoritarian process implemented by the District guarantees, by definition, that minority candidates will never prevail and that their views will be effectively silenced.").

89. *See supra* note 32 and accompanying text.

90. *See Santa Fe*, 530 U.S. at 314.

91. *See supra* note 34 and accompanying text.

92. *See supra* note 36 and accompanying text.

is especially critical that the majority did not give enough weight to the stated purpose of Petitioner's policy.[93] To him, this indicates an undue haste to decide the case against Petitioner and a hostility to religion in general.[94] Though Justice O'Connor specifically suggests that there is no need to accept a "sham secular purpose,"[95] the Court does quickly disregard Petitioner's stated purpose.[96] The evidence from the district court of bad-faith actions[97] by Petitioner and the multiple policies[98] themselves do strongly suggest that Petitioner's espoused secular intent was not in good faith. However, the extreme nature of Petitioner's actions may have led the Court to act hastily[99] in deciding the instant case, possibly damaging its precedential value.

It is difficult, from this case alone, to determine if the Court has abandoned *Lemon*, because the policy would probably fail under either the *Lemon* test or the endorsement test.[100] However, it does appear that the Court has at least relied heavily upon the reasoning of the endorsement

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93. *See supra* note 75 and accompanying text.

94. *Santa Fe*, 530 U.S. at 318. "But even more disturbing than its holding is the tone of the Court's opinion; it bristles with hostility to all things religious in public life." *Id.* (Rehnquist, C.J., dissenting); *see also supra* note 72 and accompanying text.

95. *See supra* note 35 and accompanying text.

96. *See, e.g.*, *Santa Fe*, 530 U.S. at 308 ("The text and history of this policy, moreover, reinforce our objective student's perception that the prayer is, in actuality, encouraged by the school.").

97. As noted in *supra* note 51, the district court had to issue a very strongly worded order to stop Petitioner's attempts to discover the identities of Respondents. *See also* Colbert I. King, *How They Prayed in Texas*, WASH. POST, June 24, 2000, at A23, describing repeated harassment of a Jewish teenager who attended a school in the Santa Fe Independent School District. The parents of the boy reported that the administration had been repeatedly unresponsive to her complaints.

98. *Santa Fe*, 530 U.S. at 296. After the district court's order that prayer be nondenominational, Petitioner created a policy to address prayer at football games. It specifically mentioned the word "prayer," and student elections were held to determine whether a prayer would be said at games. In October, Petitioner created a new policy that used the words "messages" and "statements" instead of the word "prayer." However, no new elections took place under this new policy. *Id.* at 298 n.5. The Court took this as evidence that the stated secular purpose of the policy was not in good faith, and the true purpose was to support religion. *Id.* at 309.

99. *See id.* at 319, 320-21 (Rehnquist, C.J., dissenting) (questioning why the majority decided the case before the policy had been enacted).

100. The three prongs of *Lemon* are that the statute must have a secular legislative purpose, its primary affect must not inhibit nor advance religion, and it must not excessively entangle the government with religion. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). Petitioner's policy has a purported secular purpose, but the level of deference required under the *Lemon* test is unclear. Related to the first issue is whether the policy's primary effect would be good sportsmanship, as suggested by Petitioner in *Santa Fe* (Santa Fe Indep. Sch. Dist., 530 U.S. at 309), or whether its primary effect would be to promote religion. In either case, it is likely that the election process arranged by Petitioner would be considered "excessive entanglement." For that reason, the policy would probably not pass the *Lemon* test.

test. This suggests that the Court may intend to rely on the endorsement test in future decisions regarding the Establishment Clause.

Some analysts have suggested that the endorsement test is more accommodating to religion than the *Lemon* test.[101] This is most clear when the issue concerns government funding of religious programs.[102] Using the *Lemon* test, it is very difficult for a government to fund a religious group, because the oversight needed to avoid an Establishment Clause problem itself causes such a problem.[103] In contrast, the endorsement test would often permit a government to fund a religious organization. The government would simply have to be certain that its expressed purpose was a secular one that did not endorse the religion directly.[104] The endorsement test's deference to the government's stated purpose would likely permit many purposes that would be considered "excessive entanglement" under the *Lemon* test.

However, outside of funding, it is not entirely clear that the endorsement test would be more lenient than the *Lemon* test. One issue that highlights the similarities between the results of the endorsement test and the *Lemon* test is that of student-led prayer at graduations. Though the Court ruled on school-initiated prayer in *Lee*,[105] it did not reach a decision as to whether voluntary student prayer would be acceptable. Various interest groups have already made predictions about the Court's future position on this issue.[106]

The application of the *Lemon* test would probably result in the finding that the presence of prayer at a school function is excessive entanglement and thus unconstitutional.[107] The result under the endorsement test is similar. If the school sponsored an election for a student speaker, as in the instant case, the policy would probably be unconstitutional. The school's

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101. *See, e.g.*, Mauro, *supra* note 76, at 8.

102. *See* Wallace v. Jaffree, 472 U.S. 38, 109 (1985) (Rehnquist, C.J., dissenting) ("[I]t creates an 'insoluble paradox' in school aid cases: we have required aid to parochial schools to be closely watched lest it be put to sectarian use, yet this close supervision itself will create an entanglement.").

103. This was the very problem in *Lemon* itself. The two school-funding programs were declared unconstitutional because the oversight needed to control them was itself entangling. *Lemon*, 403 U.S. at 619-21.

104. *See supra* notes 32-37 and accompanying text.

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

106. *See* Mauro, *supra* note 76, at 8 (quoting Steven Shapiro of the American Civil Liberties Union and Jan LaRue of the Family Research Council).

107. A policy permitting prayer at graduation would also have difficulty arriving at a secular purpose, the first prong of *Lemon*. *See Lemon*, 403 U.S. at 612. The only possibility of developing a secular purpose would be that of "solemnizing" the occasion, which was one of the purposes advanced by Petitioner in the instant case. The instant court seemed skeptical of the practice. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 309 (2000) ("[T]he use of an invocation to foster such solemnity is impermissible when, in actuality, it constitutes prayer sponsored by the school.").

participation in a religious interlude at a school function would likely be too great an endorsement of religion, even if the prayer were spoken by a student.[108] Even if the students themselves decided to vote on the issue, the majoritarian process of an election might trigger the exclusivity concern of the endorsement test.[109] The only options left to those wishing to pray at graduation would be either a private invocation outside of the graduation, or a general "moment of silence," such as in *Wallace*.[110] Neither of these options would exclude those who did not wish to participate, and neither is particularly accommodating to religion. In this context, it seems the endorsement test is not more lenient than the *Lemon* test.

Future decisions from the Supreme Court may clarify this and other issues. However, until that time, lower courts face some confusion in precedent.[111] The Court has upheld in the instant case its long history of keeping separate the realms of church and state. At the same time, though, it has left the determination of an appropriate test in doubt. The Court has backed away from the *Lemon* test without officially adopting a replacement, such as the endorsement test. With such a precedent in place, lower courts may find themselves reaching the right decision in Establishment Clause cases for the wrong reason.

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108. It may be more difficult for this policy to pass the endorsement test than the *Lemon* test. The government would have to demonstrate that, by allowing an election, it was not endorsing a particular religion or religion in general. Even with the deference shown to the government under the endorsement test, it may be difficult for the government to prove a true, and not a "sham" secular purpose.

109. A voluntary movement by the students to have prayer at their graduation would avoid direct government involvement in the election. However, merely allowing an election to decide whether to have prayer at a school function may be problematic. The underlying purpose of the endorsement test is to avoid the message of exclusivity that government-sponsored religion creates. *See supra* note 32 and accompanying text. An election in which the minority voice is not heard goes to the heart of this problem, and was a major factor in the instant court's decision. *Santa Fe*, 530 U.S. at 316-17.

110. Wallace v. Jaffree, 472 U.S. 38 (1985).

111. *See supra* note 4 (referring to the court of appeals' use of all three tests in deciding *Santa Fe*).