Do Prayer and Religious Activity Have a Place in Public Schools? An American Perspective

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Introduction

Throughout its history, beginning with its first case more than fifty years ago,[1] the United States Supreme Court has consistently ruled that there can be no school-sponsored prayer or religious activities in American public schools. In its most recent foray into the dispute, *Santa Fe Independent School District v Doe (Santa Fe)*,[2] the Court held that a board policy permitting student led prayers prior to the start of high school football games violated the Establishment Clause of the First Amendment to the United States Constitution.[3]

Santa Fe merits consideration not only because of its impact on education but also for its wider meaning with regard to the Court's wider First Amendment jurisprudence. As such, the remainder of this article is divided into three sections. The first part sets the stage by briefly reviewing

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1 *Everson v Board of Educ.*, 330 US 1 (1947).

2 530 US 290 (2000).

3 In its relevant section, the First Amendment reads that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . . " U.S. Constit. amend. I. Although the Australian Constitution includes similar language, Australian courts have not seen the volume of litigation that has emerged in their American counterparts:
The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth. Aust. Constit. Sec. 116.

key Supreme Court cases on prayer in public schools. The next section reviews the opinions in *Santa Fe*. The final section of the article examines the meaning of *Santa Fe* and the future of prayer and religious activity in American public schools.

The Supreme Court and Prayer in Schools

The history of the Court's Establishment Clause jurisprudence has not followed a logical progression. Although the Establishment Clause[4] was enacted in 1791 as part of the Bill of Rights, the Court did not address its first case on the merits of claim until its 1947 ruling in *Everson v Board of Education*.[5] In *Everson* the Court upheld a state statute that permitted the reimbursement of parents for the cost of transporting their children to the religiously affiliated non-public schools that they attended.[6] In so doing, the Court enunciated the so-called Child Benefit test that it has used to permit aid to students who attend religiously affiliated non-public schools.

The Court did not consider its first case on prayer in schools until 1961. In *Engel v Vitale*,[7] shortly after the New York State Board of Regents proposed a prayer for recitation at the start of the day in public schools, parents challenged the practice as contrary to their religious beliefs and those of their children. The Court found that the Board violated the First Amendment even though students could have been excused from participation since the involvement of state authorities in creating the prayer was dangerously close to the official establishment of religion.[8]

A year later, in *School District of Abington Township v Schempp* and *Murray v. Curlett*,[9] the Court addressed the constitutionality of a Pennsylvania

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4 Prior to *Everson*, the Court addressed four cases involving non-public schools but resolved them under the Due Process Clause of the Fourteenth Amendment rather than the Establishment Clause. *Meyer v Nebraska*, 262 US 390 (1923) (striking down a state statute prohibiting the teaching of foreign language to students who had not completed eighth grade); *Pierce v Society of Sisters*, 268 US 510 (1925) (striking down a compulsory attendance statute from Oregon that have required parents of students in non-public schools to send them to public schools); *Farrington v Tokushige*, 273 US 284 (1927) (striking down a state law that would have prevented non-public schools from teaching languages other than English); *Cochran v State Bd. of Educ.*, 281 US 370 (1930) (upholding a Louisiana statute that provided textbooks for students regardless of whether they attended public or non-public schools).

5 330 US 1 (1947).

6 In the only other case involving transportation to reach it, *Wolman v Walter*, 433 US 229 (1977), the Court struck down a statute that would have permitted the use of public school buses to take children from religiously affiliated non-public schools on field trips on the basis that this would have created excessive entanglement between the religious schools and the state.

7. 370 US 421 (1962).

8. For a more recent case involving prayer with a similar result, see *Doe v School Bd. of Ouachita Parish*, 274 F3d 289 (5th Cir, 2001) (striking down a state statute providing for verbal prayers in schools as violating of the *Establishment Act*).

9 374 US 203 (1963).

statute and a Maryland rule that required Bible reading and/or the use of the Lord's Prayer at the start of the day in public schools. *Schempp* involved a disagreement over a state law that required a student to read at least ten verses from the Bible over the school intercom, without comment, followed by the recitation of the Lord's prayer at the opening of each public school day. *Murray* challenged a rule, adopted pursuant to state law, that called for the daily reading of a chapter from the Bible without comment and recitation of the Lord's Prayer.

In *Schempp* the Court enunciated a two-part test to invalidate both practices and, in so doing, struck down both practices even though neither state was directly involved in the composition of the prayers, students participated voluntarily and could have been excused on the written request of their parents, and no one religion was favored. According to the Court:

> "[t]he test may be stated as follows: what are the purpose and the primary effect of the [legislative] enactment? . . . To withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."[10]

After this initial flurry of activity on prayer in schools, it would be more than twenty years before the Court returned to the question as it focused its attention on litigation involving governmental aid to religiously affiliated non-public schools.

The Court was soon faced with yet another dispute involving the Establishment Clause albeit not in the area of prayer.[11] In *Lemon v Kurtzman*,[12] the Court considered the constitutionality of programs from Rhode Island and Pennsylvania that aided religiously affiliated non-public schools. The case from Rhode Island centred on a state law that paid salary supplements to certified teachers in non-public schools who taught only subjects that were offered in the public schools. The action from Pennsylvania involved a statute that provided reimbursements for teachers' salaries, textbooks, and instructional materials for courses as long as they did not contain "any subject matter expressing religious teaching, or the morals or forms of worship of any sect."[13]

In striking down both programs, the Court added a third element, from *Walz v Tax Commission of New York City*,[14] to the two part test that it created in *Abington*, to create the tripartite test that it has since relied

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10 Ibid at 222.

11 In the interim, the Court applied the purpose and effects test in *Board of Educ. v Allen*, 392 US 236 (1968) (upholding a law requiring school boards to loan textbooks for secular subjects to all students regardless of whether they attended public or non-public schools).

12. 403 US 602 (1971).

13 Ibid at 610.

14. 397 US 664 (1970) (upholding state property tax exemptions for church property that is used in worship services).

upon in virtually all cases involving the Establishment Clause. The Court explained that:

> "Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster `an excessive government entanglement with religion.'"[15]

Even though the first two parts of the seemingly ubiquitous and increasingly unworkable *Lemon* test were developed in the context of a dispute over prayer and Bible reading in *Abington*, it continues to be applied just as widely, and unworkably, in disagreements involving aid to non-public schools.

As state legislatures sought to circumvent the Court's ban on school-sponsored prayer and religious activity,[16] laws mandating or permitting moments of silence emerged. *Wallace v Jaffree*,[17] was the only such case to make its way to the Supreme Court on the merits.[18] Here an Alabama statute providing for a moment of silent meditation was amended to include voluntary prayer. The Court determined that it was unnecessary to proceed beyond *Lemon's* first prong in deciding that the law violated the Establishment Clause because the legislature[19] was motivated solely by the

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[15] Ibid at 612-613 (internal citations omitted).
When addressing entanglement and state aid to institutions that are religiously affiliated, the Court took three additional factors into consideration: "we must examine the character and purposes of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority." Ibid at 615.

[16] The courts have held firm against prayer in the schools but not other arenas. See *Marsh v Chambers*, 463 US 783 (1983) (upholding the Nebraska legislature's practice of hiring a religious chaplain to open each legislative day with a prayer). But see *Coles ex rel. Coles v Cleveland Bd. of Educ.*,171 F3d 369 (6th Cir. 1999), *petition for rehearing en banc denied*, 183 F.3d 538 (6th Cir. 1999) (striking down a prayer initiated by the board president as violating the Establishment Clause). But see *Bacus v Palo Verde Unified Sch. Dist. Bd. of Educ.*, 11 F Supp2d 1192 (C.D. Cal. 1998) (holding that since prayer at the start of a board meeting was not at a school related function, it was constitutional). For a discussion of *Coles*, see C J Russo, "Between A Rock and A Hard Place: The Emerging Question of Prayer at School Board Meetings," (1999) 137 *Educ. L. Rep.* 423.

[17] 472 US 38 (1985).

[18] See also *Karcher v May*, 484 US 72 (1987). In the only other case involving a moment of silence to reach the Supreme Court, the Justices avoided reaching a judgment on the merits by ruling that the appellants, former leaders in the New Jersey legislature who lost their leadership positions, lacked standing to appeal a statute's having been struck down as unconstitutional.

[19] As the bill was making its way through the state legislature, State Senator Donald G. Holmes, prime sponsor of the bill testified that the law "was an 'effort to return voluntary prayer to our public schools . . . it is a beginning and a step in the right direction.' Apart from the purpose to return voluntary prayer to public school, [he] unequivocally testified that he had 'no other purpose in mind'" when he introduced the bill. Ibid at 43.

religious purpose of returning organized prayer to the public schools.[20]

The Court finally accepted a case on the merits of graduation prayer[21] in *Lee v Wiesman*.[22] Based on the school system's policy of inviting religious leaders to pray at graduation ceremonies, administrators in Providence, Rhode Island, asked a rabbi to deliver non-sectarian prayers based on guidelines prepared by the National Conference of Christians and Jews. After a student and her father failed to prevent the rabbi from praying at her graduation, a federal trial court enjoined the board from permitting prayer at graduation ceremonies on the basis that doing so violated *Lemon's* effect prong by creating a symbolic union between religion and the state.[23] The First Circuit affirmed but thought it unnecessary to expand on the trial court's analysis.[24]

A closely divided Supreme Court, in a five-to-four opinion written by Justice Kennedy, affirmed, but surprised most observers by virtually ignoring *Lemon*. Kennedy J's opinion, which focused first on the relationship between the Free Exercise and Establishment Clauses, maintained that "the principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause."[25] As such, he noted that there were three key factors in this regard: coerciveness, potential for divisiveness, and the place of civic religion.

In a related concern, Kennedy J contended that school officials violated the concept of neutrality because "the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise".[26] First, he pointed to the pervasive role that school officials had in electing to have prayer, inviting religious leaders to pray, and offering guidelines under which the prayer was composed. Second, Kennedy J feared that coerciveness was present insofar as students were truly not

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[20] For more recent cases involving moments of silence, see *Bown v Gwinnett County Sch. Dist.*, 112 F3d 1464 (11th Cir. 1997) (holding that a state statute which required a period for quiet reflection in public schools did not violate the Establishment Clause since it passed the tripartite *Lemon* test); *Brown v Gilmore*, 258 F3d 265 (4th Cir. 2001), *cert. denied*, 122 S Ct 465 (2001) (upholding a state statute mandating a "minute of silence" in public schools that included the word "pray" in an unlimited range of mental activities on the basis that it did not violate the Establishment Clause because even though it had two purposes, one clearly secular and the other an accommodation of religion, it did not run afoul of the *Lemon* test's requirement of only a secular purpose).

[21] For fuller discussions of prayer at public school graduation ceremonies, see R D Mawdsley, "Prayer at High School Graduation: Is the Supreme Court Signaling An End to the Practice," (2001) 151 *Educ. L. Rep.* 725; C J Russo, "Prayer at Public School Graduation Ceremonies: Exercise in Futility or A Teachable Moment?" (Winter 1999) B.Y.U. Educ. & L. J. 1 at 1-23 (portions of this article rely on arguments raised in this earlier manuscript); R D Mawdsley & C J Russo, "*Lee v. Weisman*: The Supreme Court Pronounces the Benediction on Public School Graduation Prayers," (1992) 77 *Educ. L. Rep.* 1071.

[22] 505 US 577 (1992).

[23] *Weisman v Lee*, 728 FSupp. 68 (D.R.I. 1990).

[24] *Weisman v Lee*, 908 F2d 1090 (1st Cir. 1990).

[25] *Lee*, above n 22 at 577.

[26] Ibid.

free to absent themselves from their graduations.

After voicing his concern over the potential divisiveness of prayer, Kennedy J addressed the role of civic religion. He initially seemed to suggest the need for a civic religion was founded in a "common ground . . . expressing the shared conviction that there is an ethic and a morality which transcends human invention, the sense of community and purpose sought by all decent societies." [27] Yet, he conceded that "the suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with a more specific creed strikes us as a contradiction that cannot be accepted." [28]

Turning to the link between the Free Speech and Establishment Clauses, Kennedy J observed that the government, in the form of a local school board, is not supposed to be a prime participant when, as at a graduation ceremony, religious expression is present. He examined the key factors that had to be taken into consideration in placing different emphases between the Free Speech and Establishment Clauses, namely, psychology and peer pressure of social conformity, the *de minimis* character of graduation prayers, and the potential forfeiture of the benefit of attending graduation that students would suffer if they chose not to attend the ceremony, in concluding that school sponsored graduation prayer is unconstitutional.

Justice Scalia's scathing dissent declared that the Court went "beyond the realm where judges know what they are doing. The Court's argument that state officials have 'coerced' students to take part in the invocation and benediction ceremonies is, not to put too fine a point on it, incoherent." [29] He added "that anyone who does not stand on his chair and shout obscenities can [not] reasonably be deemed to have assented to everything said in his presence." [30]

In the meantime, lower federal courts have been split over the constitutionality of prayer at graduation ceremonies. [31] Yet, when presented with

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[27] Ibid at 589.

[28] Ibid at 590.

[29] Ibid at 636 (Scalia J dissenting).

[30] Ibid at 637.

[31] See *Jones v Clear Creek Independent Sch. Dist.*, 930 F2d 416 (5th Cir. 1991), *cert. granted, vacated, and remanded*, 505 US 1215 (1992); *on remand*, 977 F2d 963 (5th Cir. 1992) (upholding student sponsored prayer at a public high school graduation ceremony), *reh'g denied*, 983 F2d 234 (5th Cir. 1992), *cert. denied* 508 US 967 (1993); *Harris v Joint Sch. Dist. No. 241*, 821 F Supp. 638 (D. Idaho 1993), *aff'd in part, rev'd in part*, 41 F3d 447 (9th Cir. 1994), *cert. granted and judgment vacated with directions to dismiss as moot*, 515 US 1154 (1995) (initially holding that since school officials ultimately controlled the ceremony, they could not permit students to decide whether to have public prayer at graduation); *American Civil Liberties Union of N. J. v Black Horse Pike Reg'l Bd. of Educ.*, 84 F3d 1471 (3rd Cir. 1996) (affirming that student-led prayer at a public high school graduation ceremony violated the Establishment Clause since the board retained significant authority over the ceremony); *Doe v Madison Sch. Dist. No. 321*, 7 FSupp.2d 1110 (D. Idaho 1997), *aff'd* 147 F3d 832 (9th Cir. 1998), *rehearing granted, opinion withdrawn*, 165 F3d 1265 (9th Cir. 1999), *vacated*, 177 F3d 789 (9th Cir. 1999) (initially upholding a policy permitting students, chosen on the basis

the opportunity to clarify the status of prayer at graduation ceremonies in *Santa Fe Independent School District v. Doe*,[32] the Court avoided the question[33] and chose to address prayer only in the narrow confines of a high school football game.[34]

Santa Fe Independent School District v. Doe

Background

After *Lee v Weisman*[35] and *Jones v Clear Creek Independent School*

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of neutral secular criteria, to offer uncensored presentations, including prayers, during high school graduation programs since it had a secular purpose, a primary effect that neither advanced nor inhibited religion, and avoided excessive government entanglement with religion); *Adler v Duval County Sch. Bd.*, 250 F3d 1330 (11th Cir. 2001), *cert. denied*, 122 S Ct 664 (2001) (holding that a policy of permitting a graduating student, elected by her class, to deliver an unrestricted message of her choice at the beginning and/or closing of a graduation ceremony did not facially violate the Establishment Clause).

[32] Earlier, the Eleventh Circuit banned prayer prior to the start of public school football games, *Jager v Douglas County Sch. Dist.*, 862 F2d 824 (11th Cir. 1989), *cert. denied* 490 US 1090 (1989). See also *Steele v Van Buren Pub. Sch. Dist.*, 845 F2d 1492 (8th Cir. 1988) (prohibiting a high school band teacher from leading the band in prayer at mandatory rehearsals and performances); *Doe v Aldine Indep. Sch. Dist.*, 563 F. Sup. 883 (S.D. Tex. 1982) (holding that a school employee's reciting a Christian prayer at athletic contests and pep rallies violated the Establishment Clause).

[33] For more recent cases, see, e.g., *Chandler v Siegelman*, 230 F3d 1313 (11th Cir. 2000), *reh'g denied*, 248 F3d 1032 (11th Cir. 2001), *cert. denied*, 533 US 916 (2001) (ruling both that an order permanently enjoining the enforcement of a statute which permitting non-sectarian, non-proselytizing student-initiated prayer at school events was over broad to the extent that it equated all student speech in a public context at school with state speech and that a board may neither prohibit genuinely student-initiated speech nor place restrictions on speech which exceeds the limits placed on their secular speech); *Lassonde v Pleasanton Unified Sch. Dist.*, 167 F Supp.2d 1108 (N.D. Cal. 2001) (granting a school board's motion for summary judgment where a student claimed that school officials who denied his request to include religious proselytizing comments in his salutatorian commencement violated his rights to freedom of religion and speech).

[34] Lower federal courts have examined the propriety of student-initiated prayer at a variety of school activities other than graduations. See, e.g., *Ingbretsen v Jackson Pub. Sch. Dist.*, 88 F3d 274 (5th Cir. 1996), *cert. denied sub nom. Moore v Ingebretsen*, 519 US 965 (1996) (invalidating a law allowing students to initiate nonsectarian, nonproselytizing prayer at various compulsory and noncompulsory school events); *Doe v Duncanville Indep. Sch. Dist.*, 70 F3d 402 (5th Cir. 1993) (prohibiting school employees from initiating and leading students in prayer before and after athletic practices and competitions); *Chandler v James*, 958 F Supp. 1550 (M.D. Ala 1997), *aff'd in part, rev'd in part, and remanded*, 180 F3d 1254 (11th Cir. 1999), *request for en banc rehearing denied*, 198 F3d 265 (11th Cir. 1999) (holding that a school board's allowing student initiated, nonsectarian, nonproselytizing voluntary prayer as school-related events did not violate the Establishment Clause since it was required under the Free Speech and Expression Clause of the First Amendment); *Herdahl v. Pontotoc County Sch. Dist.*, 933 F Supp. 582 (N.D. Miss. 1996) (prohibiting a religious club from making announcements, including prayers and Bible readings, over a school wide intercom system; however, the court did permit student-initiated prayer before school to continue); *Committee for Voluntary Prayer v Wimberly*, 704 A2d 1199 (D.C. 1997) (holding that a proposed initiative on non-sectarian, non-proselytizing, student initiated prayer at school related activities was not a proper subject within the meaning of voter initiated measures).

[35] Above n 22.

District,[36] a case from Texas involving student led prayer at a school graduation, the Board of Trustees of the Santa Fe Independent School District, near Galveston, Texas, adopted policies permitting student volunteers to deliver prayers at graduations and football games. In April, 1995, students and their parents challenged the policies seeking injunctive relief and money damages on the basis that they violated the Establishment Clause.

A federal trial court upheld both policies as long as the prayers were non-sectarian and non-proselytizing. Moreover, since the board had fall-back policies in place, adopted in the event that they were struck down, requiring the prayers to be non-sectarian and non-proselytizing, the court refused to grant prospective injunctive relief, damages, or attorney fees.[37] Both parties appealed, the plaintiffs because the policies had not been struck down for violating the Establishment Clause and the defendants since the board had to rely on its fall-back policies. The Fifth Circuit affirmed that prayer at graduation had to be non-sectarian and non-proselytizing, reversed and struck down the policy permitting prayers at football games, affirmed the denial of injunctive relief and damages, and reversed the denial of attorney's fees.[38]

Majority Opinion

Rather than review the broader question of prayer at graduation ceremonies and resolve the split between the Circuits, the Supreme Court granted *certiorari* on the limited question of "[w]hether [the school district's] policy permitting student-led, student-initiated prayer at football games violates the Establishment Clause."[39] A typically fractured Court, in a six-to-three vote, in *Santa Fe Independent School District v Doe*[40] affirmed that the policy was unconstitutional.

Writing for the majority, Justice Stevens found that just as in *Lee*, prayer at a school sponsored event, whether a football game or a graduation ceremony, violated the Establishment Clause. Yet, in *Santa Fe*, Stevens J reviewed the status of prayer from the perspective of whether its use at football games was an impermissible governmental approval or endorsement rather than as a form of psychological coercion which subjected fans to values and/ or beliefs other than their own. In striking down the

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[36] On remand following *Lee*, the Fifth Circuit, in *Jones v Clear Creek Indep. Sch. Dist.* above, n 31, essentially followed Justice Scalia's dissent in *Lee* and upheld student-initiated graduation prayer.

[37] *Doe v Santa Fe Indep. Sch. Dist.*, 933 F Supp. 647 (S.D. Tex. 1996).

[38] 168 F3d 806 (5th Cir. 1999), *rehearing en banc denied*, 171 F3d 1013 (5th Cir. 1999).

[39] 528 US Ct 1002 (1999).

[40] Justice Stevens' majority opinion was joined by Justices O'Connor, Kennedy, Souter, Ginsberg, and Breyer.

policy, Stevens J rejected the board's three main arguments.

First, Justice Stevens disagreed with the board's position that the policy furthered the free speech rights of students. He argued that the policy did not create a limited public forum since the board policy in *Santa Fe* limited speech to one single student for an entire season. Stevens J was also unconvinced that the prayer was government, rather than student, speech, since the school board chose the process by which a student would be selected, the purpose of the message, and when the message would be delivered, namely at a regularly scheduled, school-sponsored function, on school property using a public address system that was under the control of school officials. Stevens argued that a majoritarian process cannot be used to shut out the views of a minority insofar as the selection process assured that minority candidates would never have the opportunity to deliver a message and that their views would be effectively silenced.

Stevens J rejected the board's second argument, facial neutrality, despite its claim that the policy had secular goals and purposes of solemnizing the event, promoting good sportsmanship and student safety, and establishing the appropriate environment for the competition. Stevens J responded that in relying on the perceptions of an objective student, the alleged secular goals were a sham since based on the board's history of permitting prayer at school events, it was, in effect, school sponsored prayer. He also rejected the board's reliance on two separate student elections as a sham as well as its claims that prayer at football games was less coercive than at graduations because even if most students could choose to skip the pre-game prayer, a number of participants, such as band members, cheerleaders, and players had to be there, indicating that prayer had the improper effect of coercing those present to participate in an act of religious worship. Stevens J posited that the policy, which encouraged the selection of a religious message and furthered only one specific kind of message, an invocation, did not further a secular purpose.

Turning to the board's third defence, Stevens J almost dismissed out of hand its position that claims for relief were premature since there was no certainty that any of the statements or invocations would be religious until a student actually delivered a solemnizing message. He divined that the policy's unconstitutional purpose was reflected by the board's involvement in the election of the speaker and content of the message coupled with language identifying what he considered the clearly preferred message of a traditional religious invocation. Stevens J concluded that even if no student ever offered a religious message, the policy was unconstitutional because of the board's attempt to encourage prayer.

Dissenting Opinion

Chief Justice Rehnquist's dissent opened with the assertion that Justice Stevens' opinion "bristles with hostility to all things religious in public

life." [41] What Rehnquist CJ apparently considered most disturbing was Justice Stevens' refusal to defer to the board's purposes as other than religious and dismissing them as a sham when the policy was never implemented.

Rehnquist CJ viewed the issue in *Santa Fe* as student, not government, speech where, unlike *Lee's* having a prayer delivered by a rabbi under the direction of a school official, the policy allowed prayer to be selected or created by a pupil. As Rehnquist CJ noted, if the student had been selected on wholly secular criteria such as public speaking skills or social popularity, he or she could have delivered a religious message that would likely have passed constitutional muster.

Discussion

Santa Fe essentially follows forty years of Supreme Court precedent prohibiting prayer and religious activity in public schools that began with *Engel v Vitale.*[42] In light of the potential impact of *Santa Fe,* and the earlier judgment in *Lee,* the remainder of this article reflects on the place of religion in the educational market place of ideas.

As a precursor to this discussion, it is worth noting that the Justices fall into three distinct judicial camps.[43] Based on their track records of supporting prayer and/or governmental aid to religiously affiliated non-public schools, the Accommodationist/Conservative end of the bench is comprised of Chief Justice Rehnquist[44] and Justices

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[41] *Santa Fe,* above n 2 at 2283 (Rehnquist, C.J., dissenting). Chief Justice Rehnquist's dissent was joined by Justices Scalia and Thomas.

[42] Above n 7.

[43] During Justice Thomas' first five years on the High Court, he and Justice Scalia voted together 80% of the time. Further, Justice Breyer voted with Justice Souter 84% of the time while Justice Ginsberg voted with Justice Souter 80% of the time. D E Troy, "The Court's Mr. Right," *National Rev.,* Aug. 9, 1999 at 39-41.

[44] In addition to his dissent in *Santa Fe,* above n 2, Chief Justice Rehnquist agreed to permit prayer in *Lee,* above n 22. He also agreed to grant access in *Mergens v Westside Community Schs.,* 496 US 226 (1990) (upholding the Equal Access Act), *Lamb's Chapel v Center Moriches Union Free Sch. Dist.,* 508 US 384 (1993) (upholding a religious group's right to show a film on family values and child-rearing on the basis that the school district's refusal to grant them access to facilities was impermissible viewpoint discrimination against religion), and *Good News Club v Milford Cent. Sch.,* 533 US 98 (2001) (holding that prohibiting a religious club from meeting after hours in a school was unconstitutional viewpoint discrimination that was not required to avoid violating the Establishment Clause). Further, since authoring the opinion in *Zobrest v Catalina Foothills Sch. Dist.,* 509 US 1 (1993) (holding that the Establishment Clause did not bar a public school board from providing the on-site delivery of the services of a sign language interpreter for a student who attended a Roman Catholic high school), he has supported aid in the other two Establishment Clause cases involving K-12 schools, *Agostini v Felton,* 521 US 203 (1997) (permitting the on site deliver of Title I services in religiously affiliated non-public schools) and *Mitchell v Helms,* 527 US 1002 (2000), *on remand,* 229 F3d 467 (5n th Cir. 2000) (upholding Title II, a far-reaching federal statute which permits the loan of state-owned instructional materials such as computers, slide projectors, television sets, tape recorders, maps, and globes to non-public schools).

Scalia[45] and Thomas.[46] At the other end, the Separationist/Liberal Justices, Stevens,[47] Souter,[48] and Ginsberg,[49] are just as certain to continue their past opposition to prayer (and aid). Justice Breyer, who has typically cast his vote with the Separationists, is a wildcard on prayer and aid in light of his having joined Justice O'Connor's concurrence with supporting aid in *Mitchell v Helms*[50] and in *Good News Club v Milford Central School*.[51] Previously, Justice Breyer was identified as a Separationist based on his having joined the dissent in *Agostini v Felton*.[52] As such, he may fit into the moderate/swing vote category with Justices O'Connor[53] and Kennedy[54] both of whom typically tip the balance the Court one way or the other depending on which of the two judicial camps they join.

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[45] Justice Scalia would not only have upheld prayer in *Lee*, above n 22, but supported aid in *Zobrest*, ibid, *Agostini*, ibid, and *Helms*, ibid, while supporting access in *Mergens*, ibid, *Lamb's Chapel*, ibid, and *Milford*, ibid.

[46] Justice Thomas would not only have upheld prayer in *Lee*, above n 22, but also supported aid in *Zobrest*, above n 44, *Agostini*, above n 44 and *Helms*, above n 44 while supporting access in *Lamb's Chapel*, above n 44, and *Milford*, above n 44.

[47] Justice Stevens has voted against prayer and religious activity on the merits in virtually every case other than the Court's unanimous ruling in *Lamb's Chapel*, above n 44. He has voted against religious interest in *Wallace v Jaffree*, above n 17, *Mergens*, above n 44, and *Lee* above n 22. He has also voted against aid in all of the Establishment Clause cases involving K-12 schools: *Wolman v Walter*, 433 US 229 (1977) (opposing various forms of government aid to religious schools), *PEARL v Reagan*, 444 US 646 (1980) (opposing reimbursements to non-public schools for maintaining educational records); *Mueller v Allen*, 463 US 388 (1983) (dissenting in the Court's upholding a state income tax deduction for tuition, uniforms, and books, for parents regardless of whether their children attended public or non-public schools); *School Dist. of the City of Grand Rapids v Ball*, 473 US 373 (1985) (opposing a shared-time program); *Aguilar v Felton*, 473 US 402 (1985) (opposing the on-site delivery of Title I services in religious schools); he also dissented in *Zobrest*, above n 44, and *Agostini*, above n 44, and *Helms*, above n 44.

[48] During his time on the High Court, Justice Souter voted against prayer and/or access in all of the cases before the Court, *Lee*, above n 22, *Santa Fe*, above n 2, and *Milford*, above n 44. He also opposed state aid in all of the Court's aid cases, *Zobrest*, above n 44, *Agostini*, above n 44, and *Helms*, above n 44.

[49] During her time on the High Court, Justice Ginsberg also opposed prayer in *Santa Fe*, above n 2, and access in *Milford*, above n 44. She also opposed aid in both cases in which she was involved, *Agostini*, above n 44, and *Helms*, above n 44.

[50] Above n 44

[51] Above n 45.

[52] Above n 44.

[53] Justice O'Connor is difficult to understand fully insofar as she is generally willing to accommodate aid and access but not prayer. For example, she joined the majority opinions in both *Lee*, above n 22, and *Santa Fe*, above n 2, opposing prayer. Yet, she wrote the opinion of the Court in *Mergens*, above n 44, joined the majority in *Lamb's Chapel*, above n 44 and concurred in *Milford*, above n 44, all cases permitting access. In aid cases, she dissented in *Zobrest* (thereby opposing aid), above n 44, *Ball* (partially dissenting in voting to uphold a shared time program and partially concurring in striking down a community education program), above n 47, and *Aguilar* (thereby favoring aid) above n 47, but wrote the opinion of the Court in essentially over-turning it in *Agostini* (thereby favoring aid), above n 44, before concurring in *Helms* (thereby favoring aid), above n 44.

[54] Justice Kennedy is also difficult to understand fully insofar as he is generally willing to accommodate aid and access but not prayer. For example, he wrote the majority opinion in *Lee*, above n 22, and joined the majority in *Santa Fe*, above n 2, in opposing prayer but joined the majorities in *Lamb's Chapel*, above n 44, and *Milford*, above n 44, while concurring in *Mergens*, above n 44. However, as to aid, he joined the majorities in *Zobrest*, above n 44, *Agostini*, above n 44, and *Helms*, above n 44.

Hostility to Religion

Chief Justice Rehnquist's assertions that Justice Stevens' majority opinion in *Santa Fe* "bristles with hostility to all things religious in public life,"[55] and that it was "openly hostile,"[56] is not without some merit given Justice Stevens' almost summary rejection of the board's stated purpose regarding the pre-game invocation/message, "to solemnize the event [football game]"[57] as "a sham."[58] If a stated purpose "to solemnize [an] event" by having an invocation or benediction at a graduation is unacceptable under the Establishment Clause, it should not be too surprising that the same result would apply to a similar pronouncement before a football game. Giving Stevens J the benefit of the doubt, one can ask whether the Court's refusal to permit student-initiated and led graduation invocations/benedictions where no secular counterpart was present was hostile to religion or whether it was maintaining the separation of Church and State.

During the same term that the Court struck down prayer in *Santa Fe*, it upheld an expansion of the Child Benefit Test in *Mitchell v Helms*.[59] Justice Thomas's opinion in *Helms* also highlighted a latent hostility to religion, or at least Roman Catholicism, in his discussion of the Blaine Amendment.[60] The Blaine Amendment of 1875 was a proposed Constitutional amendment barring aid to sectarian institutions, using the term "religious sect," an open code word for Catholic, at a time of widespread hostility to the Catholic Church and Catholics.[61] It was not until almost a century later, in *Hunt v McNair*,[62] a case involving federal aid in higher

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[55] Santa Fe, above n 2 at 318.

[56] Ibid at 322.

[57] Ibid at 298, n 6.

[58] Ibid at 308.

[59] For a comparative assessment of Mitchell and Helms, see C J Russo & R D Mawdsley, "The Supreme Court and the Establishment Clause at the Dawn of the New Millennium: 'Bristl[ing] with Hostility to All Things Religious' or Necessary Separation of Church and State?", (2001) *B.Y.U. Educ. & L. J* 231-269 (portions of this article rely on arguments raised in this earlier manuscript).

[60] See *Helms*, above n 44 at 828-829.

[61] The Blaine Amendment, introduced by Representative James G. Blaine of Maine, which passed the House by an overwhelming majority of 180 in favor to 7 opposed, failed to receive the necessary two-thirds vote in the Senate, as 28 Senators favored it while 16 were opposed to it, read:
No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no money raised by taxation in any State, for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect, nor shall any money so raised, or lands so devoted be divided between religious sects or denominations.
Available on line, http:www.baylor.edu/~Church-State/Blaine_Amendment.html
For additional background, see M C Klinkhamer, "The Blaine Amendment of 1875: Private Motives for Political Action,", (1956) 42 *Catholic Historical Rev.* 15.

[62] 413 US 734 (1973) (upholding a statute that aided colleges and universities, including ones that were religiously affiliated, by permitting them to issue revenue bonds for projects, excluding facilities for sectarian study or religious worship, if they conveyed the projects to the state authority which would lease them back and reconvey them on payment of the bonds with limitations on their use before and after reconveyance).

education, that the Court eliminated this confusion by coining the term "pervasively sectarian" in referring to all religious schools.

Concerns voiced by Chief Justice Rehnquist and Justice Thomas aside, the Court has never clearly endorsed hostility to religion. For example, in *Board of Education of Westside Community Schools v Mergens*,[63] Justice O'Connor applied the effects prong of *Lemon* in construing the *Equal Access Act*[64] as having a message "of neutrality rather than endorsement; if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion."[65] The notion that the Establishment Clause requires neutrality when the government deals with religion has gained acceptance with the present Supreme Court under both the Free Speech[66] and Free Exercise[67] Clauses.

The meaning of neutrality can vary depending on the applicable criteria. Only once, in *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v Amos*,[68] has the Court upheld a governmental accommodation of religion that did not also benefit secular entities. In *Amos* the Court permitted an expanded exemption for religious organizations under

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[63] Above n 44. For a discussion of Mergens, see C J Russo & D L Gregory, "The Return of School Prayer: Reflections on the Libertarian-Conservative Dilemma", (1991) 20 *J.L. and Educ.* 164. For an update on the status of the Equal Access Act, see R D Mawdsley, "Noncurriculum Related Student Groups Under the Equal Access Act", (1999) 137 Educ. L. Rep. 865. For extensions of the rationale of *Mergens*, see *Lamb's Chapel*, above n 44 and *Milford*, above n 44.

[64] *The Equal Access Act*, in the relevant section, provides that:
It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings. 20 USC § 4071(a).

[65] *Mergens*, above n 44 at 248.

[66] See *Rosenberger v Rector and Visitors of Univ. of Va.*, 515 US 819, 846 (1995) (holding that the University's policy of funding the publications of student organizations could not be used to deny funding for a publication with a religious perspective as this was viewpoint discrimination in violation of the Free Speech Clause) where the Court was of the opinion that "requir[ing] public officials to scan and interpret student publications to discern their underlying philosophic assumptions respecting religious theory and belief ... [would be] a denial of the right of free speech and would risk fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires."

[67] See *Church of Lukumi Babalu Aye v Hialeh*, 508 US 520 (1993) (in striking down city ordinances that had sole effect of prohibiting animal sacrifice by a religious group, the Court commented that "[o]fficial action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked, as well as overt.")

[68] 483 US 327, 337-38 (1987) (upholding an amendment for religious organizations from the prohibition against discrimination in employment under Title VII on the basis of religion):
A law is not unconstitutional simply because it allows churches to advance religion, which is their very purpose. For a law 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 .... Where, as here, government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption come packaged with benefits to secular entities.

title VII and eliminated judicial need to determine whether the activities of employees were related to their employer's religious mission. In any event, in *Amos* the Court did not claim that Congressional refusal to expand the title VII exemption would have evidenced hostility towards religion.

The question has become whether a court is hostile to religion if it looks beyond the expressed purposes for government action as did Justice Stevens in *Santa Fe* and searches past practices for the real intent of officials. That is, has Chief Justice Rehnquist's dissent in *Santa Fe* accurately described the attitude of the majority as hostility toward religion by refusing to accept facially the school officials' stated purpose for the pre-game invocation/message? Alternatively, does the search for intent by looking at past practice run the risk of looking to, and/or impugning, the motives of school officials who are responsible for creating and enforcing school policies? The Court has frequently expressed concern that the constitutionality of government action should not depend entirely on the motives of public officials,[69] observing that "the [*Equal Access*] Act on its face grants equal access to both secular and religious speech,"[70] a comparison that is difficult to make with a graduation "invocation/benediction" policy that allows only for prayer.[71]

Ultimately, the question may be whether past practice or intent of school officials is relevant in *Santa Fe* in terms of whether the Court is hostile toward religion. Perhaps it is just as important to consider whether the process that school officials proposed in *Santa Fe* to permit students to use two separate secret votes on whether to have an invocation/benediction was a subterfuge to mask its own goal of endorsing prayer. The problem in *Santa Fe* arose in large part because even though there were two elections, they were set up in such a way that there were no safeguards in place to ensure that other religious points of view could have been heard. In fact, had school officials permitted more than one point of view to be presented, and more than one speaker, perhaps the Court would not have vitiated the policy. Further, if a policy permitting either an invocation or message before a football game violates the Establishment Clause where a non-religious message is possible, then one permitting only an invocation and/or benediction would seem to be even more in jeopardy.

It is important to consider whether refusal to permit students to elect to have a prayer at graduation represents hostility toward religion. Justice Stevens' attitude toward prayer at football games seems to suggest that graduation prayers would be unconstitutional if they were based on a past practice of prayer. When students are not provided even with the

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[69] For example, in *Mergens*, above n 44 at 249, the Court observed that:
[e]ven 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 possible religious motives of the legislators who enacted the law.

[70] Ibid.

[71] See also *Jaffree*, *supra* note 17.

opportunity to cast a secret ballot, which, in effect, determines whether they wish to continue a past practice, one wonders whether such an action, on its face, evidences opposition to religion. The question becomes how one defines neutrality if one eradicates a secret ballot process simply because it allows for the possibility of a religious message. Moreover, it is unclear which may be more threatening to the interpretation of the Establishment Clause, the intent of school officials, community members, and a majority of students to make a minimal religious statement, or the intent of a majority of the Court to eliminate an event simply because it might be religious. While acknowledging that constitutional rights are not, and should not be, subject to a majority vote, the Court needs to address the clear tension that has arisen between the will of the American people and activist judges who interpret the Constitution based on their own judicial philosophies.

In the event that *Santa Fe* is interpreted as representing hostility, even though school officials and voters in a school district wish to include invocations or benedictions at graduation, then the result may represent the hostility of equality. To permit prayers at graduation where no secular counterpart is available seems, arguably, to be changing the rules.[72] Having been forced onto a playing field where neutrality is defined by the presence of a secular counterpart, school boards will continue to find use of graduation invocations/benedictions difficult to defend. Even if the separationists lack overt hostility to religion, then given the role that it has played, and continues to occupy, in shaping American life, perhaps the Court needs to perhaps move beyond mere neutrality and find a way to afford religion a greater voice in the market place of ideas.[73]

Wither Prayer?

When considering the circumstances under which prayer may be permissible at public school activities, it is worth acknowledging that gatherings

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[72] Arguably, a school board's selecting students based on academic performance to speak at graduation with the possibility that some, or all, might incorporate religious messages should not run afoul of the Establishment Clause as long as students are free to select their own content. See *Doe v Madison Sch. Dist. No. 321*, above n 31.

[73] For two interesting, but conflicting, cases, see *Fleming v Jefferson County Sch. Dist. No. R-1*, 170 F. Supp 2d 1094 (D. Colo. 2001) (holding that school officials at Columbine, home to a school shooting massacre, could not prohibit parents and friends of victims from installing tiles on a school wall commemorating the dead because they had religious content). But see *Anderson v Mexico Academy & Cent. Sch.*, 186 F. Supp 2d (N.D.N.Y. 2002) (denying plaintiffs the opportunity to include bricks with Christian messages and/or which refer to Jesus in a walkway in front of a public school). See also, e.g., *American Civil Liberties Union v McCreary County*, 145 F. Supp 2d 845 (E.D. Ky. 2001) (striking down a display that included the Ten Commandments, the Magna Carta, the Bill of Rights, and the Mayflower Compact on the basis that the Ten Commandments had a religious rather than a secular purpose and that the history of the display indicated that its purpose was to endorse religion).

of public prayer, as happened throughout the United States in the wake of the terrorist attacks on September 11, 2001, may be transformed from potentially contentious exercises to experiences that can unite communities.[74] How the Court clarifies the place of prayer and religious activities, if any, at school activities is likely have a major impact on the American way of life since the way in which this debate is resolved will reveal whether the nation still cherishes the underlying values of freedom of religion and speech that contributed so greatly to its foundation.

An interesting paradox emerges over how a democratic society founded on religious principles but which continues to preserve the Jeffersonian metaphor of maintaining "a wall of separation"[75] between church and state can respect the rights of both the majority and minority. Put another way, even though a majority of Americans appear to favour prayer at graduations,[76] it is important to safeguard the rights of the minority.[77] At the same time, in protecting the rights of the minority by banning prayer, it remains to be seen how the courts can avoid the tyranny of the minority. Thus, finding an acceptable middle ground is crucial, especially since such a basic constitutional right as freedom of religion is not, and cannot be, subject to a vote of the majority.

In *Lee*, Justice Kennedy expressed a concern over "mutuality of

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[74] See, e.g., "Local Governments, Schools Turn to Prayer After Attacks," *Lethbridge Herald*, Oct. 13, 2001 (no page number provided), available at 2001 WL 26344489 (documenting examples of public gatherings for prayer); W Raspberry, "Good-Faith Argument for School Prayer", (2001) *Wash. Post*, Nov. 26, at A 25 (detailing instances of public prayer, including a memorial at Yankee Stadium for the victims of the terrorist attacks).

[75] The metaphor of the "wall of separation" comes from Thomas Jefferson's letter of January 1, 1802 to Nehemiah Dodge, Ephraim Robbins, and Stephen S. Nelson, A Committee of the Danbury Baptist Association. 16 *Writings of Thomas Jefferson* 281 (Andrew A. Lipscomb, ed., 1903). Jefferson wrote:
Believing with you that religion is a matter which lies solely between man and his God . . . I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between church and state.The Supreme Court first employed the term in *Reynolds v United States*, 98 US 145, 164 (1879) (rejecting a Free Exercise Clause challenge to a federal polygamy statute).

[76] No such prohibition against prayer applies in higher education, in part, since students are not subject to compulsory attendance. For cases upholding prayer at university graduations, *see Tanford v Brand*, 104 F.3d 982 (7th Cir. 1997), *cert. denied*, 522 US 814 (1997); *Chaudhuri v State of Tenn.*, 130 F 3d 232 (6th Cir. 1997), *cert. denied, Chaudhuri v Tennessee*, 523 US 1024 (1998).

[77] The most recent version of the Phi Delta Kappa/Gallup Poll on attitudes toward public schools reveals that the majority of respondents favored prayer. In response to the question: "An amendment to the U.S. Constitution has been proposed that would permit prayers to be spoken in public schools. Do you favor or oppose this amendment?" 67% of respondents answered yes; 28% answered no; 5% answered don't know. Further, 73% of parents with children in public schools supported the amendment; 22% opposed the amendment; and 5% answered don't know. Lowell C. Rose & Alec M. Gallup, The 30th Annual Phi Delta Kappa/ Gallup Poll Of the Public's Attitudes Toward the Public Schools, 80 *Phi Delta Kappan* 41, 50 (1998).

obligation"[78] to safeguard the rights of all involved in a graduation. Yet, if this concern is to have any real significance, then public schools need to find a way to accommodate the viewpoints of all, rather than stifle the religious expression of believers. As such, Justice Scalia's response "that maintaining respect for the religious observances of others is a fundamental civic virtue that government (including the public schools) can and should cultivate"[79] is critical. In fact, his point that silence is not assent should lead one to wonder how educators can expect to foster an appreciation of diversity in all of its forms if Americans cannot tolerate expressions of religious or other beliefs that may not be shared by all members of an audience or community.

It is ironic that in a nation that protects freedom of speech and claims to value freedom of religion, the courts have been unable to reach a consensus on the appropriateness of prayer as form of expression at public school activities such as graduations and athletic contests. Equally as ironic is the realization that protection for student diversity of expression in public schools finds no comparable counterpart for religious expression which is typically subject to a "heckler's veto"[80] which allows a small group to drown out the wishes of the majority. Even in acknowledging that constitutional rights are not subject to majority votes, judicial inability to formulate a measure that respects the rights of diverse groups is frustrating where educators have, as in *Lee*, included well-reasoned safeguards such as selecting a religious leader from a different faith each year and providing broad-based guidelines under which prayers may be offered. The *Lee* Court's failure to respond adequately to Justice Scalia's salient observation that silence does not necessarily mean assent has further exacerbated the situation. By silently listening to and reflecting upon whatever prayer is being offered, members of an audience can develop a deeper respect for perspectives other than their own. If the United States is to continue to grow, it is dangerous to limit the parameters of civil discourse on controversial issues such as prayer.

At the same time, it is essential that the Court provide guidance for the remainder of the federal judiciary to avoid the appearance of inhibiting religion, especially in the aftermath of litigation that has been less than favorable to expressions of religious belief.[81] Mere talk over the importance

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[78] *Lee*, above n 22 at 591.

[79] Ibid at 638.

[80] In *Milford*, above n 44 at 118, Justice Thomas made just this point in warning that the Court is unwilling " . . . to employ Establishment Clause jurisprudence using a modified heckler's veto, in which a group's religious activity can be proscribed on the basis of what . . . members of the audience might misperceive."

[81] See e.g., *Roberts v Madigan*, 921 F 2d 1047 (10th Cir. 1990), *cert. denied*, 505 US 1218 (1992) (preventing a teacher from reading the Bible during class time and removing *The Bible in Pictures* and *The Story of Jesus* from his classroom library while books on Greek gods and goddesses and American Indian religions remain on the shelves); *Washegesic v Bloomingdale Pub. Schs.*, 33 F 3d 679 (6th Cir. 1994), *cert. denied* 514 US 1095 (1995) (upholding the removal of a portrait of Christ, painted by a graduate of the school, that had been posed on the wall of a public high school for thirty years).

of respect for differences of opinion aside, educators must allow schools to practise what they preach and do more than talk about inculcating different values. One can only wonder what message school children receive when the courts have ensured that their education is essentially sanitized of references to religion[82] other than "appropriate" discussions in history and/or English classes, let alone the wider school community,[83] especially since dicta in *Engel v Vitale*[84] tacitly endorsed such an approach. By continuing to exclude religious expression at school-sponsored events, the judiciary sends out the unfortunate message to children that freedom of religion is little more than an unfulfilled promise.

Conclusion

As controversy lingers on, a prodigious line of Supreme Court precedent from *Engel v Vitale* to *Santa Fe Independent School District v Doe* prohibits officials in American public schools from sponsoring or permitting prayer or other religious activities at school-sponsored events. The sad part is that by erecting a seemingly unbreachable brick wall of separation that fails to acknowledge the legitimate place of prayer at graduation ceremonies and other activities in public schools, the Separationist members of the Court have abnegated their responsibility to assume a leadership role in fostering a climate wherein diversity of opinions and beliefs are not only appreciated but are also celebrated by all. In light of Justice Scalia's aptly worded, if highly acerbic, dissent in *Lee* about silence not necessarily being assent, one can only wonder how students can ever develop into open-minded adults who can tolerate, if not appreciate and respect, different points of view if they cannot learn to do so in a controlled school environment. If students fail to learn the valuable lesson of accepting others with different points of view, whether religious or political, then the world as we know it may not have a prayer of a chance.

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[82] See e.g., *C.H. ex rel. Z.H. v Oliva*, 226 F 3d 198 (3rd Cir. 2000), *cert. denied sub nom., Hood v Medford Township Bd. of Educ.*, 533 US 915 (2001) (affirming that school officials did not violate the rights of a child when he was in kindergarten and first grade by temporarily removing a poster of Jesus that he drew from a class display and not allowing him to read a story with religious content to classmates).

[83] For an interesting case, see *Sechler v State College Area Sch. Dist.*, 121 F Supp 2d 439 (M.D. Pa. 2000) (deciding that a winter holiday display in an elementary school that included references to Chanukah and Kwanza, but not Christmas, did not violate the Establishment Clause because it, and an accompanying program, did not favor one religion over others or favor religion over non-religion.

[84] See *Engel v Vitale*, above n 9 at 435, n. 21 (1962) where the Court wrote:
"[t]here is, of course, nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God."