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Of Football,"˜Footnote One, and the Counter-Jurisdictional Establishment Clause: The Story of Santa Fe Independent School District v. Doe

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Of Football, "Footnote One," and the Counter-Jurisdictional Establishment Clause: The Story of *Santa Fe Independent School District v. Doe*

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ABSTRACT

This article is a chapter in the forthcoming collection *First Amendment Stories*. It tells the story of *Santa Fe Independent School District v. Doe*, a case in which the United States Supreme Court struck down a school policy establishing an election mechanism that enabled student-led prayers before football games. It offers both a doctrinal and a human perspective on the case.

In particular, this article focuses on two issues. First, it argues that the first footnote in the Supreme Court's opinion in *Santa Fe*, recounting the strenuous efforts that both school officials and private citizens undertook to "ferret out" the identity of the anonymous plaintiffs in the case, is worthy of greater attention. "Footnote One" speaks volumes about why the election mechanism the school district tried to employ as a "circuit-breaker" between government speech and private speech failed, and more broadly about the meaning of the Establishment Clause in overwhelmingly religiously homogeneous jurisdictions.

Second, it argues that for similar reasons, there are good grounds for thinking about the Establishment Clause in a "counter-jurisdictional" fashion: that is, despite its own language, the Establishment Clause should, if anything, be more strictly maintained at the state and local level than at the national level. This suggestion, which follows from the lumpy rather than even nature of religious diversity in the United States, runs counter to an increasing trend on the Court and in legal scholarship in favor of a "jurisdictional" reading of the Establishment Clause which would apply it more loosely at the state and local level than at the national level.

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Can you not have a message before the game, or possibly a prayer, because one or two students don't want it? I mean, you're kind of inflicting the minority's will over the majority.

John Couch[1]

It's like I told the school board, and I told kids, and press people, everybody at one time or another is a minority, whether you're a woman, or it's your color, your religion, where you live, what you own – at one time or another, you're a minority. And until you're the minority, you don't know how it feels. But when you become the minority, oh, you know how it feels. And then you look at things a lot differently.

Debbie Mason[2]

INTRODUCTION

The saying goes: Don't Mess With Texas. So how do you mess with a Texan? You could start by messing with two things a Texan holds dear: God and football.

That is why the case that forms the subject of this chapter has its name: *Santa Fe Independent School District v. Doe*.[3] This is a tale that hangs on an anonymous plaintiff, a Jane Doe – on *why* that plaintiff was anonymous, and the meaning of that anonymity for the modern Establishment Clause.

In a sense, our story begins in 1962, with the Supreme Court's decision striking down official school prayer in *Engel v. Vitale*.[4] Public reaction to that decision was swift and negative.[5] In his memoirs, Chief Justice Earl Warren recalled a newspaper headline

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1 Peter Irons, *God on Trial: Landmark Cases From America's Religious Battlefields* 179 (2007). Couch chaired the board of the Santa Fe Independent School District during the *Santa Fe* litigation.

2 *Id.* at 170. Mason was a parent of children in the Santa Fe Independent School District and was active in protesting the football prayer policy and other actions of the school board. She was not a plaintiff in the *Santa Fe* litigation.

3 530 U.S. 290 (2000).

4 370 U.S. 421 (1962).

5 *See, e.g.*, Michal R. Belknap, *God and the Warren Court: The Quest for "A Wholesome Neutrality,"* 9 Seton Hall Const. L.J. 401, 430-31 (1999).

reading "Court outlaws God."[6]

Still, *Engel* was issued in an era in which the "political environment [was] increasingly tolerant of secularization,"[7] and it was supported by a broad coalition of religious and secular groups.[8] The furor thus died down quickly.[9] But the Court's school prayer decisions were never truly popular,[10] and they lit a long fuse. These decisions have been cited as one of the reasons for the resurgence of the "Christian Right" movement,[11] and the Court's rulings were defied by many school districts,[12] especially

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6 Earl Warren, *The Memoirs of Earl Warren* 316 (1977).

7 John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 Mich. L. Rev. 279, 319 (2001); *see also* Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 Va. L. Rev. 1, 15 ("The court barred prayer and Bible reading from public schools only *after* the dramatic disestablishment of Protestantism as America's unofficial religion in the middle decades of the twentieth century"), 46-62 (discussing this phenomenon). *Cf.* Paul Horwitz, *Religion and American Politics: Three Views of the Cathedral*, 39 U. Memphis L. Rev. 973, 978 (2009) (describing the religious spirit of the age as "one of religious piety, but of a decidedly thin brand").

8 *See, e.g.,* Jeffries & Ryan, *supra* note __, at 318-25.

9 *See, e.g.,* Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 Yale L.J. 153, 203-04 (2002).

10 *See, e.g.,* Belknap, *supra* note __, at 431 (citing opinion polls at the time of *Engel*); Klarman, *supra* note __, at 15 (same); Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 Va. L. Rev. 747, 775 (1991) (discussing more recent opinion polls); Barry Friedman, *Dialogue and Judicial Review*, 91 Mich. L. Rev. 577, 608 (1993) (same).

11 *See, e.g.,* Joel A. Nichols, *Evangelicals and Human Rights: The Continuing Ambivalence of Evangelical Christians' Support for Human Rights*, 24 J.L. & Religion 629, 638 (2008-2009); Theodore Y. Blumoff, *The New Religionists' Social Gospel: On the Rhetoric and Reality of Religions' 'Marginalization' in Public Life*, 51 U. Miami L. Rev. 1, 51 (1996).

12 *See, e.g.,* Michael J. Klarman, *Rethinking the History of American Freedom*, 42 Wm. & Mary L. Rev. 265, 282 (2000) (noting that the Court's decisions on school prayer were "widely defied in practice") (citing Frank J. Sorauf, *The Wall of Separation: The Constitutional Politics of Church*

in the South. The issue resurfaced in the early 1990s, when the Supreme Court decided *Lee v. Weisman*,[13] which invalidated a practice of giving a religious invocation at a school graduation ceremony. *Lee* turned the attention of many school districts and private religious and political groups back to the question of whether they could find some mechanism by which prayers could remain a part of at least some central school events, like graduations.[14]

Although this background is helpful to an understanding of the story we tell here, the focus in this chapter will be somewhat different. It will be on the mechanism itself, the means by which some schools sought to escape the strictures of those earlier cases. That mechanism was "student-initiated" prayer, especially at central school events and especially by means of majoritarian student voting processes. This was the method employed by Santa Fe, when its longstanding and overt encouragement of prayer at graduation ceremonies and football games came under attack. Instead, the school board instituted a policy under which the students themselves would vote on whether to include a student speaker to give an "invocation" or "statement" at football games. This was the policy struck down by the Supreme Court in *Santa Fe*.

The Court's decision in *Santa Fe* raises three important questions. First, can majoritarian processes of selecting student speakers who give religious addresses preserve those messages from an Establishment Clause challenge? To put it differently, given that the Supreme Court has drawn a firm line between "*government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect,"[15] when does a majoritarian mechanism for selecting a student speaker who then offers a prayer constitute impermissible *government* speech, and

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and State 296-300 (1976); H. Frank Way, Jr., *Survey Research on Judicial Decisions: The Prayer and Bible Reading Cases*, 21 W. Pol. Q. 189 (1968)).

13 505 U.S. 577 (1992).

14 *See, e.g.,* Jessica Smith, *"Student-Initiated" Prayer: Assessing the Newest Initiatives to Return Prayer to the Public Schools*, 18 Campbell L. Rev. 303, 305-14 (1996).

15 *Bd. of Educ. of Westside Cmty. Sch. (Dist. 66) v. Mergens*, 496 U.S. 226, 250 (1990) (emphasis in original).

when is it acceptable *private* speech?[16]

Second, how should the law deal with the difficult questions of majority and minority status that are wrapped up in these processes? Does the Establishment Clause give religious minorities a veto over public expressions of religion, and if so does it make the religious majority in those communities outsiders in their own way? And at what *level* do these rules operate? Is the solution to this problem to give greater autonomy to individual communities to engage in religious expression while maintaining a strong disestablishment principle at the national level, as some have maintained?[17] Or is the modern Establishment Clause, in an important sense, "counter-jurisdictional?" That is, should its protection of religious minorities apply more stringently at the *state* and *local* level rather than the *federal* level?[18]

Finally, what is the story of *Santa Fe* on the ground? What was the experience of the individuals, on both sides of the divide, who confronted the "football prayer" question at first hand? And what has been the experience, in Santa Fe and elsewhere, since the Court's ruling in this case? Ira Lupu wrote shortly after that decision that "school districts' best hope [for the continuation of prayers at football games and other ceremonies] is that the U.S. Courts of Appeals will stubbornly resist the teachings of *Santa Fe*."[19] Is that what has happened, on the courts and elsewhere?

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16 *See, e.g.*, Caroline Maia Corbin, *Mixed Speech: When Speech is Both Private and Governmental*, 83 N.Y.U. L. Rev. 605 (2008); Kathleen A. Brady, *The Push to Private Religious Expression: Are We Missing Something?*, 70 Fordham L. Rev. 1147 (2002).

17 *See, e.g., Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 49-50 (2004) (Thomas, J., concurring in the judgment); Steven D. Smith, *The Jurisdictional Establishment Clause: A Reappraisal*, 81 Notre Dame L. Rev. 1843 (2006); Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 Harv. L. Rev. 1810 (2004).

18 For an initial treatment of these questions, see Paul Horwitz, *Demographics and Distrust: The Eleventh Circuit on Graduation Prayer in* Adler v. Duval County, 63 U. Miami L. Rev. 835 (2009).

19 Ira C. Lupu, *Government Messages and Government Money:* Santa Fe, Mitchell v. Helms, *and the Arc of the Establishment Clause*, 42 Wm. & Mary L. Rev. 771, 810 (2001).

Looming above these questions is the stark fact that we do not know who "Jane Doe," the successful plaintiff in the *Santa Fe* case, *is*. This was neither accidental nor inevitable. Doe, her co-plaintiff, and their parents sued under pseudonyms for a reason. That reason becomes clearer when one reads footnote one of the Supreme Court's opinion in *Santa Fe*. That footnote recounts that the district court in the case found it necessary to issue an order preventing any "further" efforts on the part of the District, school officials and employees, and others "to ferret out the identities of Plaintiffs in this cause, by means of bogus petitions, questionnaires, individual interrogation, or downright 'snooping.'"[20]

It is easy to overlook this footnote, dramatic as it is. For lawyers and judges, Supreme Court opinions are primarily about rules of law, not personalities. By the time the opinions reach the casebooks, details like these are the first to go. Very few footnotes in Supreme Court decisions go down in history. There are exceptions: Footnote Four to the *Carolene Products* decision[21] and Footnote Eleven in *Brown v. Board of Education*[22] have both become famous enough in constitutional law circles to warrant capitalization.[23] So far, however, *Santa Fe*'s first footnote seems destined for lower-case status. Most casebooks that discuss *Santa Fe* omit it entirely.

One purpose of this chapter is to raise Footnote One to its deserved canonical status for students of law and religion. The fact that Jane Doe is a cipher, a nameless name, and the fact that officials and citizens in Santa Fe went to such lengths to "ferret out" her identity, matters. It tells us a great deal about the past, present, and future of the school prayer issue, about the legitimacy

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20 *Santa Fe*, 530 U.S. at 294 n.1.

21 *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938).

22 347 U.S. 483, 494-95 n.11 (1954).

23 *See, e.g.*, Michael Heise, Brown v. Board of Education, *Footnote 11, and Multidisciplinarity*, 90 Cornell L. Rev. 279 (2005); Felix Gilman, *The Famous Footnote Four: A History of the* Carolene Products *Footnote*, 46 S. Tex. L. Rev. 163, 165 (2004) (calling Footnote Four "the most famous footnote in constitutional law"); Sanjay Mody, Note, *Brown Footnote Eleven in Historical Context: Social Science and the Supreme Court's Quest for Legitimacy*, 54 Stan. L. Rev. 793 (2002); J.M. Balkin, *The Footnote*, 83 Nw. U. L. Rev. 275 (1989) (discussing Footnote Four)

or illegitimacy of majoritarian processes of selecting student religious speakers as a form of "circuit-breaker" between government and religious speech,[24] and about the arguments for a "counter-jurisdictional" understanding of the modern Establishment Clause.

I. SANTA FE AND *SANTA FE*

Although Santa Fe means "holy faith" in Spanish, the name of Santa Fe, Texas, has more mundane origins. It is named after the old Atchison, Topeka and Santa Fe railroad around which the community formed. Santa Fe is a small town lying some 20 miles northwest of Galveston and 30 miles south of Houston.[25] Data from the 2000 federal census puts its population at 9,548 people, of whom about 87.5 percent were white and non-Hispanic, another 10.8 percent were Hispanic, and 37.6 percent lived in family households with children under 18 years of age.[26] Like many such communities, it both depends on its larger neighbors for employers, like the oil industries that dot the landscape of Galveston, and fears being swallowed up by them. The Santa Fe Independent School District itself is a political subdivision that represents about 4,000 students, in Santa Fe itself and a number of surrounding towns. who attend five schools, including Santa Fe High School.[27]

Santa Fe is a deeply religious community. Although survey data for the town itself are hard to come by, Galveston County, in which Santa Fe sits, reports large numbers of Evangelical and mainline Protestants and a substantial Catholic population, which may be lower in Santa Fe itself.[28] Certainly Santa Fe views itself

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24 *Santa Fe*, 530 U.S. at 305 (quoting Tr. of Oral Arg. 7).

25 *See, e.g.*, Irons, *supra* note __, at 137.

26 *See* http://factfinder.census.gov/servlet/QTTable?_bm=y&-geo_id=16000US4865726&-qr_name=DEC_2000_SF1_U_DP1&-ds_name=D&-_lang=en (last visited Nov. 12, 2009).

27 *Santa Fe*, 530 U.S. at 294; *Doe v. Santa Fe. Indep. Sch. Dist.*, 168 F.3d 806, 809 (5th Cir. 1999), *rev'd sub nom. Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).

28 *See* Association of Religion Data Archives, County Membership

as a Christian community. A resident in one news account said, "'We're all Christians here,' . . . overlooking Santa Fe's only Jewish family."[29]

To say football is important in this Texas town is almost redundant. Norman Maclean wrote, in the first line of his classic book *A River Runs Through It*, "In our family, there was no clear line between religion and fly fishing."[30] Of course, the poor fellow grew up in Montana. Change the sport and put the whole statement in capital letters, and the same is emphatically true of football in Texas – especially high school football. "Football," writes Bobby Hawthorne, "is Texas's unofficial religion."[31] Another writer goes a step further: "[I]n Texas, high school football is the official and established religion of the state. Nothing is more solemn and sacred."[32] The glow of the "Friday night lights" of a Texas high school football game have been immortalized in print and on film and television.[33] Of course, religious Texans would be the first to point out that in Texas, *religion*, first and foremost, is a religion. But there is surely room in their Father's mansion for a tackling dummy or two. Santa Fe's team is the Indians, and it is beloved, if not blessed with much success.[34]

God has been a part of the Santa Fe public school tradition for a long time. In a seventh-grade Texas history class in 1993, the

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Report, Galveston County, Texas, http://www.TheArda.com/mapsReports/reports/counties/48167_2000.asp (last visited Nov. 12, 2009).

29 Irons, *supra* note __, at 136.

30 Norman Maclean, *A River Runs Through It and Other Stories* 1 (1976).

31 Bobby Hawthorne, *Longhorn Football: An Illustrated History* __ (2007).

32 Barry Hankins, *Prayer, Football, and Civic Religion in Texas*, Liberty, Nov./Dec. 2000, *available at* http://www.libertymagazine.org/index.php?id=458.

33 *See* H.G. Bissinger, *Friday Night Lights: A Town, A Team, and a Dream* (1990). The book was adapted for both a movie and a television series.

34 For an entertaining account of a trip to Santa Fe to watch the Santa Fe team fall to a powerhouse rival by a score of 44-2, see Jay Wexler, *Holy Hullabaloos: A Road Trip to the Battlegrounds of the Church/State Wars* 188-96 (2009).

teacher handed out fliers promoting a Baptist revival meeting. When a student revealed that she was a Mormon, her teacher lectured the whole class about the "non-Christian, cult-like nature of Mormonism[ ] and its general evils." The teacher was subsequently reprimanded and instructed to apologize to the student, her family, and the class.[35] Another student, at the same time as the *Santa Fe* case was reaching its apogee, complained that the school had failed to stop students from harassing him with anti-Semitic language along the lines of "Hitler missed one." That student subsequently settled a suit against the school, and the family moved elsewhere.[36] The school permitted the distribution of Gideon Bibles at the school, leading to the harassment of students who declined to accept them; this practice also was halted after complaints.[37] Parents complained that in addition to these incidents, school-sponsored religion was pervasive in Santa Fe, with teachers leading prayers in class and during lunch.[38]

Prayer, at both graduation ceremonies and football games, was also part of the mix. Before 1995, Santa Fe High School had the practice of electing a student council chaplain, who was responsible for "deliver[ing] a prayer over the public address system before each varsity football game for the entire season."[39]

The road to *Santa Fe* began in earnest in 1994, when Debbie Mason, the mother of three girls who had gone through the school system, contacted Debbie Perkey, director of the Houston office of the American Civil Liberties Union. Perkey told the school board that its prayer practices violated the Establishment Clause and had to stop. One member of the board, John Couch, made clear that "he would willingly face a lawsuit and even go to jail to keep prayer in the schools."[40] Perkey referred Mason and other parents to Anthony Griffin, an ACLU lawyer in Galveston who had acquired some notoriety for his defense of the Ku Klux Klan when

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35 Irons, *supra* note __, at 139.

36 *Id.* at 138.

37 *See* Brief for Respondents at 2, *Santa Fe*, 530 U.S. 290 (No. 99-62) (citing Transcript of Hearing at 98-99, 197, 208-09 (July 25, 1996)).

38 Irons, *supra* note __, at 140.

39 *Id.* at 294; *see also Santa Fe*, 168 F.3d at 810 & n.4.

40 Irons, *supra* note __, at 140.

the state sought its membership records, a representation that resulted in his removal from the position of counsel for the National Association for the Advancement of Colored People.[41] Griffin agreed to represent the families (not including Mason, who decided her high profile would hurt the litigation), and, fearing retaliation against them and their children, filed suit anonymously in *Doe v. Santa Fe Independent School District* in federal district court in Galveston in April 1995.[42]

Feelings ran high on all sides. One of Debbie Mason's daughters recalled attending her Baptist church shortly after the suit was filed and watching a school board member, Mike Lopez, climb the pulpit to denounce the complaining parents "as 'dim-witted' and 'bored' housewives with a 'void' in their lives."[43] Mason's husband found it difficult to obtain work in Santa Fe, and the family received threatening phone calls.[44] Couch described the litigation as being spearheaded by a few "disgruntled parents" who "were always complaining about something in the schools," although he acknowledged that some of the complaints were legitimate and pointed out that the school took immediate action in response to those incidents.[45] Elsewhere, he said that "[w]e as parents have allowed the expungement of Judeo-Christian teachings from our schools, allowing moral decay."[46] One Santa Fe resident, at a school board meeting during the debate over Bible distribution at school, said, "Satan is taking over our schools. . . . We have to put a stop to it. We serve a living God."[47] A local group, the Santa Fe Ministerial Alliance, played a prominent role in support of the school district's prayer policies throughout the

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41 *See id.* at 140-41.

42 *See id.* at 141.

43 *Id.* at 142.

44 *See id.*

45 *Id.* at 173; *see also* Maggie Sieger, *Suit challenges Santa Fe district on school prayer*, Galveston County Daily News, April 5, 1995, at 1-A (quoting school district superintendent Richard Ownby as saying that "when things have been brought to our attention, we have tried to deal with it").

46 Robert Lucey, *School trustees accept petition backing prayer*, Galveston County Daily News, April 19, 1995, at 1-A, 14-A.

47 Janice Simon. *Policy on religious materials reviewed*, Galveston County Daily News, May 10, 1994, at 1-A.

controversy.[48]

Over the course of the litigation, the school district adopted a series of new policies addressing student prayer at school events. The first set of policies dealt with graduation prayers. It provided, in its first iteration, that the senior class could "elect by secret ballot to choose whether an invocation and benediction shall be part of the graduation exercise."[49] The policy provided that a yes vote on a benediction or invocation would be followed by a student election to select a student "to deliver nonsectarian, nonproselytizing invocations and benedictions for the purpose of solemnizing their graduation ceremonies."[50] A subsequent version of the policy eliminated the language requiring the prayers to be nonsectarian and nonproselytizing, but provided that the earlier policy would be effective in the event that the district was enjoined from enforcing the later policy.[51]

The second set of policies dealt with prayer at football games. It, too, came in two iterations. The first, titled "Prayer at Football Games," also provided for two elections: one to determine whether to give an invocation at football games, and the second to determine who would deliver it.[52] It also provided that, if but only if a court required it, the invocation should be nonsectarian and nonproselytizing.[53] The second version of the policy omitted the word "prayer" from its title and talked about "messages" and "statements" as well as invocations.[54]

II. THE LEGAL BACKGROUND – AND THE HUMAN BACKGROUND

The legal case that confronted the federal district court judge, Samuel B. Kent,[55] was, in the words of the movie *Miller's*

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48 *See, e.g.,* Robert Lucey, *Christians pray for school district*, Galveston County Daily News, April 18, 1995, at 1-A.

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

50 *Id.* at 296-97.

51 *Id.* at 297.

52 *Id.*

53 *Id.*

54 *Id.* at 298; the policy is set out in full at 298-99 n.6.

55 Kent has earned a chapter of his own in American legal history,

Crossing, clear as mud.[56] The reason for the lack of clarity lay partly with the Supreme Court, and substantially with the United States Court of Appeals for the Fifth Circuit.

At the Supreme Court level, the problem stemmed from both the lack of real guidance provided by its prior decisions and the novelty of the factual situation. The Court's recent decision in *Lee v. Weisman* was clearly relevant, but incomplete. There, the Court invalidated a policy under which public schools in Providence, Rhode Island, invited rabbis and other ministers to give a "non-sectarian" invocation and benediction at graduation ceremonies. The Court held that the state's hosting and supervision of the ceremony, and its involvement in the content of the prayer, made it clear that "the graduation prayers bore the imprint of the State."[57] It held that the prayer was, in context, impermissibly coercive of the religious beliefs and practices of its audience, although the coercion consisted only of a pressure on those who attended the ceremony to "stand as a group or, at least, maintain respectful silence during the invocation and benediction."[58] Although Justice Scalia complained that the Court's decision rested on an "incoherent[t]" and "ersatz[ ] 'peer-pressure'" theory of "psycho-coercion,"[59] and the majority fractured on the question of whether coercion or some other theory, such as government endorsement of religion, should be the proper test, the majority concluded that the policy impermissibly "persuade[d] or compel[led] a student to participate in a religious exercise" in violation of the Establishment Clause.[60] But the Court did not address the question of what would happen if a prayer took place at some other exercise, such as a football game, where the pressure on students and others to attend might not be as great. Nor did it say whether the case might come out differently if the prayer in

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albeit a sordid and tragic one. Kent was ultimately sentenced to prison and impeached by the United States House of Representatives for sexual misconduct involving judicial employees, and resigned under threat of conviction and removal by the United States Senate. *See, e.g.*, Suzanne Gamboa, *Senate Officially Ends Kent Impeachment*, Houston Chron., July 23, 2009, at B5.

56 *See Miller's Crossing* (Twentieth Century Fox Film Corp. 1990).

57 Lee, 505 U.S. at 590.

58 *Id.* at 593.

59 *Id.* at 636, 641 (Scalia, J., dissenting).

60 *Id.* at 599.

question was arrived at through some mechanism under which the students themselves decided whether and how to pray.

The other complication left by the Supreme Court's jurisprudence had to do with how to determine whether the speech in question was government or private speech. On the private speech side of the line, the Court made clear that different rules applied. Thus, in its decision in *Board of Education v. Mergens*, the Court had drawn a distinction between "*government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."[61] The trend on the Court was increasingly one of treating private religious speech, including speech within the public school environment, as covered by the broad protections of the Speech Clause of the First Amendment. This line of cases left those who wanted some place for prayer at graduations and other school ceremonies eager to find some way to treat those prayers as "student-initiated" private speech rather than as government-sponsored prayer.

Before *Santa Fe* came along, the Fifth Circuit had muddied the waters still further. In *Jones v. Clear Creek Independent School District*, [62] the Fifth Circuit upheld a school policy under which graduating classes were given the discretion to have a student volunteer give a non-sectarian and non-proselytizing invocation and benediction at high school graduation.[63] The panel held that the prayer policy had the permissible secular purpose of

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61 *Bd. of Educ. of Westside Cmty. Sch. (Dist. 66) v. Mergens*, 496 U.S. 226, 250 (1990) (emphasis in original).

62 977 F.2d 963 (5th Cir. 1992). The opinion arose after an earlier panel decision was vacated and remanded by the Supreme Court in light of *Lee v. Weisman*. *See* 505 U.S. 1215 (1992). The Fifth Circuit's decision on remand was, to say the least, grudging and exasperated in accepting the Supreme Court's directions on the Establishment Clause. *See, e.g., Clear Creek*, 977 F.2d at 965 (beginning a section of the opinion with the words "THE SUPREME COURT TELLS THIS COURT WHAT THE ESTABLISHMENT CLAUSE MEANS").

63 The court noted that the record in that case was unclear on precisely how the students would decide whether an invocation should be given or how the student speaker would be chosen. *See id.* at 969.

solemnizing the graduation event, and that the non-sectarian and non-proselytizing nature of the prayer minimized any chance that the prayers would advance religion.[64] It found that the policy resembled "private speech" cases like *Mergens* more than it did "government speech" cases like *Lee*, because "a graduating high school senior who participates in the decision as to whether her graduation will include an invocation by a fellow student volunteer will understand that any religious references are the result of student, not government, choice."[65] Because of this disjunction between government and private speech, any religious invocation that resulted from a *student* vote would be inherently less coercive than the prayers in *Lee*.[66]

But there was conflicting precedent in the Fifth Circuit. In *Doe v. Duncanville Independent School District*, another panel upheld a lower court injunction barring the employees of a school district from "leading, encouraging, promoting, or participating in prayers with or among students during curricular or extracurricular activities" including "school-related sporting events." It did so in part on the grounds that the setting in which these prayers occurred was "far less solemn and extraordinary" than graduation ceremonies.[67]

This was the state of affairs when Judge Kent received the *Santa Fe* case. On a motion for injunctive relief, the court held that the individual instances of school conduct identified by the Doe plaintiffs, such as harassing the Mormon student, were clearly unlawful. With respect to the graduation and football prayers, the court held that those policies were "essentially identical to the policies upheld by [the Fifth Circuit] in *Clear Creek*," except that the district's fall-back policy requiring any prayers to be non-sectarian and non-proselytizing must be implemented.[68]

Both sides appealed the district court's judgment on this and other matters. The school district argued that the requirement that student prayers at these events be non-sectarian and non-proselytizing was unconstitutional. The plaintiffs argued, among other things, that *Clear Creek*'s validation of student prayers at

64 *See id.* at 966-68.

65 *Id.* at 969 (emphasis omitted).

66 *See id.* at 969-71.

67 70 F.3d 402, 405, 407 (5th Cir. 1995).

68 *Santa Fe*, 186 F.3d at 813.

graduation should not be extended to football games.[69]

On appeal, a divided Fifth Circuit panel rejected the school district's arguments. It dealt separately with the graduation and football policies. On the question whether the graduation prayer policy served a secular purpose, it said, "[W]e simply cannot fathom how permitting students to deliver sectarian and proselytizing prayers can possibly be interpreted as furthering [the] solemnizing effect" found by the *Clear Creek* panel.[70] It also pointed to the "evolutionary history in which [the school district] developed its series of prayer policies" as confirmation of its underlying religious purpose.[71] Moreover, "the mere fact that prayers are student-led or student-initiated" did not "automatically ensure" that the school's policy would not advance religion; otherwise, a school could resort to a student election to secure exactly the same prayer, by the same religious representative, that the Supreme Court in *Lee* had held was unconstitutional.[72] "Government imprimatur" was "not so easily masked," especially where the ceremony still involved a message being "delivered to a government-organized audience, by means of government-owned appliances and equipment, on government-controlled property, at a government-sponsored event."[73] Finally, the panel rejected the school district's effort to move the ground of contention to the more advantageous terrain of free speech, holding that the graduation ceremony did not constitute a public forum in which all viewpoints were equally available for expression.[74]

The panel made shorter work of the football policy. With *Duncanville*, it concluded that football games were "hardly the sober type of annual event," like graduations, "that can be appropriately solemnized with prayer."[75] "Our decision in *Clear Creek*[ ] hinged on the singular context and singularly serious nature of a graduation ceremony," the panel wrote. "Outside that

69 *See id.* at 813-14.

70 *Id.* at 816.

71 *Id.*

72 *Id.* at 817.

73 *Id.*

74 *See id.* at 818-22.

75 *Id.* at 823.

nurturing context, a Clear Creek Prayer Policy cannot survive."[76]

The panel decision sparked angry dissents, both from that decision and from the full Fifth Circuit's subsequent rejection of rehearing en banc.[77] In particular, Judge Jolly's dissent from the panel decision raised issues that would be aired by the Supreme Court in *Santa Fe*. He argued that the school's policy constituted a "neutral accommodation of non-coerced, private, religious speech, which allows students, selected by students, to express their personal viewpoints. The state is not involved."[78] From this perspective, once it had been established that the school district had established a neutral public forum in which to accommodate religious or other speech, it was irrelevant whether that speech occurred at a graduation or a football game.[79]

Those are the bare-bones facts that brought *Santa Fe* to the Supreme Court. They are the kinds of facts that make it into the dry procedural histories that preface judicial opinions.[80] But they tend to neglect the human drama, the play of passions and interests on both sides of the dispute. They do not tell us, for instance, what the eventual student vote to have prayers at football games was like – how many students voted, how clearly they understood the stakes, whether they campaigned on this issue or against it, and what discussions occurred in the halls or at home. They do not tell us what price was paid by the young people on both sides of the issue.

Some of that deeper context can be found in the tales of three Santa Fe students who found themselves in the spotlight generated by the first pregame prayer given under the new policy, in the fall of 1999. One student who stood outside the stadium was 17-year-old Amanda Bruce, an opponent of the prayer policy who was one of only two students to join a small group of protesters outside the stadium.[81] Bruce recalled that many onlookers "shouted at them or made insulting remarks."[82] When the protesters informed school

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76 *Id.*

77 *See Doe v. Santa Fe Indep. Sch. Dist.*, 171 F.3d 1013 (5th Cir. 1999).

78 *Santa Fe*, 168 F.3d at 836 (E. Grady Jolly, J., dissenting).

79 *See id.* at 834.

80 *See, e.g., Santa Fe*, 530 U.S. at 296-301 (setting out the background of the case).

81 *See* Scott E. Williams, *Teen protester looks for freedom from prayer*, Galveston County Daily News, Oct. 11, 1999, at A1.

82 *Id.*

superintendent Richard Ownby of their intentions, he told them he would check with local ministers to "get a feel" for the potential reaction of the community, and warned, "I cannot guarantee that they won't take your signs and burn them."[83] Another student at the protest reported that "[p]eople who walked into the stadium . . . cursed at [us], told us we were going to hell." When the protesters were pushed, she said, the police "told them to 'push them back.' They were no help at all."[84]

According to a news account, fewer than 100 students, or 10 percent of the student body, voted in the prayer policy election. Bruce said that the vote was preceded by no announcements or notices, and said, "That election was a sham. . . . No one even asked if we wanted an inspirational message."[85]

But powerful stories can be found on the other side as well, and that story is best told through two other students, Stephanie Vega and Marian Ward. Vega, a Catholic, was the 16-year-old student first selected to deliver the pregame invocation. In the summer leading up to the first game under the new policy, school superintendent Richard Ownby reluctantly issued a strong statement suggesting that any student who violated the stricture against sectarian and proselytizing prayer "would be disciplined just as if they had cursed."[86] Vega quickly surrendered her position, telling reporters, "I do not want to be expelled from school for using the word 'God' in a reverent manner. . . . When a student is told by the government that she may say anything except a prayer, and if she does pray, she will be disciplined as if she had cursed, it is just too much pressure."[87]

Vega's successor was Marian Ward, the daughter of a local Southern Baptist minister. Just before the first game, Ward and an attorney successfully sought an injunction from a different federal district court against the ban on sectarian and proselytizing prayer; the court wrote that such a ban "clearly prefer[s] atheism over any

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83 Irons, *supra* note __, at 150.

84 *Id.*

85 *See* Williams, *supra* note __.

86 Irons, *supra* note __, at 148.

87 *Id.* at 148-49.

religious faith."[88] When Ward finally took the microphone at the game, it was before a capacity crowd and forests of media microphones and cameras. Her voice "cracking," Ward told the crowd: "Since a very good judge that was using a lot of wisdom this afternoon ruled that I have freedom of speech tonight, I'm going to take it."[89] She then offered a simple prayer, asking God to bless the players and the audience and expressing thanks "for all the prayers that were lifted up this week for me." She closed: "In Jesus' name I pray. Amen."[90] She was greeted with "thunderous applause."[91]

None of these stories found their way into the Supreme Court's opinion in *Santa Fe*. But they are an inescapable part of the background to the case; the opinion makes much less sense without them, and without a broader sense of the debate that took place in Santa Fe. And to that context, one final story must be added: the story of Footnote One. According to the plaintiffs, school officials engaged in strenuous efforts to uncover their identity. This led Judge Kent to issue an order stating that "any further attempt on the part of District or school administration, officials, counsellors, teachers, employees or servants of the School District, parents, students or anyone else, covertly to ferret out the identities of the Plaintiffs in this cause, by means of bogus petitions, questionnaires, individual interrogation, or downright 'snooping,'" would meet with "THE HARSHEST POSSIBLE CONTEMPT SANCTIONS FROM THIS COURT."[92]

In Peter Irons' book *God on Trial*, Debbie Mason recounts that because Judge Kent had made clear that he would not tolerate any effort by school officials to uncover the identity of the Doe plaintiffs, "what ended up happening is, instead of the adults doing it, the kids did it."[93] Mason adds:

> [My daughter] Jennifer called me [from school] crying one day, Come and get me. . . . And when I walked in, they had a petition going around from the churches, with things to fill out: what your religion was, are you a

88 *Id.* at 149.

89 *Id.*

90 *Id.* at 149-50.

91 *Id.* at 150.

92 *Santa Fe*, 530 U.S. at 294 n.1.

93 Irons, *supra* note __, at 166.

> Christian? And if they thought you might be involved in the case, or one of the Does, they'd push you up against lockers, kick you, hit you.[94]

These facts, too, are a crucial part of the background to *Santa Fe* and its meaning for the Establishment Clause.

III. *SANTA FE* IN THE SUPREME COURT

In November 1999, the Supreme Court granted a writ of *certiorari* in *Santa Fe*. It dispensed with the graduation prayer issue, however, limiting the grant to the single question "[w]hether student-led, student-initiated prayer at football games violates the Establishment Clause."[95]

Writing for a 6-3 Court, Justice John Paul Stevens held that it did. In many respects, that answer was foreordained from the moment the Court resolved the first issue that it dealt with: whether *Santa Fe* presented a case of government speech, or whether instead, as the school district argued, the case was one of free speech by private citizens – namely, students – in a public forum. Both parties agreed that the starting point was the recognition in *Mergens* that "there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."[96] Thus, the question that would drive the rest of the opinion was which side of this line the *Santa Fe* case fell on.

The Court answered this question clearly, rejecting the argument that the student-led prayer was genuinely private speech that took place in a public forum. It pointed out that the "invocations are authorized by a government policy and take place on government property at government-sponsored school-related events."[97] While the same might be said of private speech in government-owned

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94 *Id.*

95 528 U.S. 1002 (1999).

96 *Santa Fe*, 530 U.S. at 302 (quoting *Mergens*, 496 U.S. at 250) (emphasis in original).

97 *Id.*

public fora, the Court concluded that the fact that only one student was entitled to give the invocation over the whole year rendered the policy far too selective and limited to constitute a public forum.[98]

The Court then came to one of the distinctive features of the Santa Fe policy: its use of a student vote to decide whether to have graduation speakers and to elect those speakers. Drawing on its recent opinion in *Board of Regents of University of Wisconsin System v. Southworth*,[99] the Court suggested that "the majoritarian process implemented by the District" was "problematic," because it did "nothing to protect minority views but rather places the students who hold such views at the mercy of the majority."[100] It suggested that the fact that students effectively voted on the content of the message – an invocation – before voting on the identity of the speaker distinguished it from an election process in which the speech is not so constrained, such as the election of a prom king or queen.[101] It held that the fact that a majority of students approved of the message did "nothing to protect the minority; indeed, it likely serves to intensify their offense."[102] It concluded with a flourish by quoting Justice Jackson's statement in *West Virginia Board of Education v. Barnette*: "[F]undamental rights may not be submitted to vote; they depend on the outcome of no elections."[103]

The Court also found that the election process did not sufficiently insulate the school district from the religious content of the student invocations, rejecting the district's argument that the election served as a "circuit-breaker" separating the district from the speech.[104] To the contrary, the Court believed that the district was intimately involved in the speech, from the fact that the district had established the policy in the first place to the fact that it mandated a particular form of speech – an invocation, which common usage and local practice suggested was intended to be

98 *Id.* at 302-03.

99 529 U.S. 217 (2000).

100 *Santa Fe*, 530 U.S. at 304.

101 *Id.* at 304-05 n.15.

102 *Id.* at 305.

103 *Id.* at 304-05 (quoting *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943)).

104 *Id.* at 305 (quotation and citation omitted).

religious in nature.[105] Beyond this, a host of details tied the government to the speech: the speech would be delivered at a regularly scheduled school event, the government retained control over the public address system, and the pregame ceremony would be "clothed in the traditional indicia of school sporting events."[106] All of these factors led to the conclusion that a reasonable objective observer would "unquestionably perceive the inevitable pregame prayer as stamped with her school's seal of approval."[107]

The Court also held that its view of whether an endorsement had occurred in this case should be influenced by the "text and history of [the] policy" at issue.[108] As Justice Stevens wrote, "We refuse to turn a blind eye to the context in which this policy arose, and that context quells any doubt that this policy was implemented with the purpose of endorsing school prayer."[109] That context included the "evolution of the current policy," under which the district had begun with an official office of student chaplain and moved to a regulation "candidly titled 'Prayer at Football Games.'"[110] And it included the surrounding background of the case, in which the district had been accused of a wide range of practices endorsing the beliefs of the local religious majority and scorning religious minorities.[111]

The Court's decision also turned on coercion. Its earlier decision in *Lee* had rejected a graduation prayer policy in part on the grounds that by expecting students to stand respectfully and silently during the invocation, the policy effectively coerced religious practice. The school district urged the Court to distinguish its policy from the policy in *Lee* because both the majoritarian selection process and the voluntary nature of attendance at football games rendered any prayer in this case non-coercive. The Court rejected both arguments. As to the first argument, it held that the very fact that the election process created

105 *See id.* at 305-07.
106 *Id.* at 308.
107 *Id.*
108 *Id.*
109 *Id.* at 315.
110 *Id.* at 309.
111 *See id.* at 315.

religious winners and losers within the district "encourages divisiveness along religious lines in a public school setting" and puts at issue a debate that the Establishment Clause intended to "remove . . . from governmental supervision or control."[112] On the second argument, it pointed out that some students – players, band members, and others – are in fact required to attend school football games, and in any event bowed to the reality (in Texas, if not elsewhere) that high school football is of immense importance to students and community members, and argued that students and others ought not be put to the choice of attending and hearing a religious speech or not attending at all.[113]

Finally, the Court responded to the objection that a ruling striking down the policy would be premature at the facial challenge stage. It noted that some injuries had already occurred, regardless of the outcome of the vote, including the passage of the policy itself and the implementation of an election process that "subjects the issue of prayer to a majoritarian vote."[114] It held that as long as the policy itself had an unconstitutional religious purpose, the "simple enactment of [the] policy" would be unconstitutional.[115] It held that there was manifestly such a purpose: "every Santa Fe High School student understands clearly [ ] that this policy is about prayer."[116]

Chief Justice Rehnquist filed an angry dissent on behalf of himself and Justices Scalia and Thomas, charging that the Court's opinion "bristles with hostility to all things religious in public life."[117] Its central line of attack was that the Court's ruling was premature. Given that the case presented a facial challenge, the question before the Court should have been whether the district's policy "inevitably will be" applied "in violation of the Establishment Clause."[118]

The Court's conclusions on this point were purely speculative, Chief Justice Rehnquist argued. The election process itself left open the possibility that students might vote not to have an invocation, or not to give an expressly religious invocation. He

112 *Id.* at 310-11.
113 *See id.* at 311-12.
114 *Id.* at 314.
115 *Id.* at 316.
116 *Id.* at 315.
117 *Id.* at 318 (Rehnquist, C.J., dissenting).
118 *Id.*

added, however, that a clearer record would be presented if the election process led "to a Christian prayer before 90 percent of the football games."[119] Moreover, the policy ensured, in the dissent's view, that any viewpoints expressed belonged to the student speaker and not the government, and thus fell on the private side of the public-private divide.[120] And the Chief argued that taken on its face, the policy had a plausible secular purpose – the solemnization of a school event – and thus could not be inherently injurious.[121] The dissent also rejected the Court's willingness to hold the district's history against it, arguing instead that the district's efforts to modify its policies suggested that the district "was acting diligently to come within the governing constitutional law."[122]

The dissent concluded that if the students had selected speakers "according to wholly secular criteria," the policy would be constitutional even if the private speech that resulted was religious.[123] If, on the other hand, the policy was "applied in an unconstitutional manner," there would be time enough to act; but that time was not now.[124]

IV. ANALYSIS

A. Majoritarian Processes in Overwhelmingly Religiously Homogeneous Political Districts: What "Footnote One" Tells Us

The *Santa Fe* case raises a number of important points for students of law and religion and the First Amendment more generally.[125] Some of those issues, concerning school prayer or

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119 *Id.* at 321.

120 *See id.*

121 *See id.* at 321-22.

122 *Id.* at 323.

123 *Id.* at 324.

124 *Id.* at 326.

125 One issue that receives short shrift in this chapter is a significant one: whether the fact that the case came before the Court as a facial challenge to the policy rather than an as-applied challenge should have changed the outcome of the case. For the reasons offered by Justice

the Establishment Clause more generally, are dealt with elsewhere in this book. Let us focus instead on a couple of aspects of *Santa Fe* that are relatively novel – that distinguish it from the other school prayer cases and deal with important new variations on that old debate.

As we have seen, one of the central questions in *Santa Fe* was whether the Court would slot the prayers resulting from the policy into the category of permissible private speech or impermissible government establishment. The key distinction was between "*government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."[126] What had changed since the earliest school prayer decisions by the Court, and was still in the process of changing as late as *Lee v. Weisman*, was the Court's increasing emphasis on the Speech Clause, as opposed to the Establishment Clause alone, in cases involving religion. This doctrinal shift was behind the explosive growth of "student-initiated" prayer policies in the public schools after *Lee*. It was not an accident, but a deliberate effort by groups that favored some form of prayer in school – including the American Center for Law and Justice, whose general counsel Jay Sekulow argued the school district's case in the Supreme Court in *Santa Fe* – to shift the ground of debate to the friendlier territory of the Speech Clause.[127] They hoped that the student-initiated nature of the speech would, in Sekulow's words, act as a "circuit-breaker" separating free private speech from any attribution to the government.[128]

This was the doctrinal question. But it raises a broader question, one that is brought out by the statement from Santa Fe's board chairman, John Couch, which opens this chapter.[129] If *students*

Stevens in his opinion, I think the Court was right on this issue. *See Santa Fe*, 530 U.S. at 313-17. For important criticisms on this point, however, see Michael W. McConnell, *State Action and the Supreme Court's Emerging Consensus on the Line Between Establishment and Private Religious Expression*, 28 Pepp. L. Rev. 681, 710-18 (2001).

126 *Santa Fe*, 530 U.S. at 302 (quoting *Mergens*, 496 U.S. at 250) (emphasis in original).

127 *See, e.g.*, Smith, *supra* note __, at 306-09.

128 Transcript of Oral Argument, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000), available at 2000 WL 374300, at *17.

129 *See supra* note 1 and accompanying text.

themselves want to have particular forms of speech at a school event, and agree by a fair majority vote to do so, why should we not honor their wishes? Why should we allow a minority to derail the good-faith desires of these students, by treating these decisions as coming from the government itself?

The courts have an eloquent answer to this question: that, in the words of the Supreme Court, "fundamental rights may not be submitted to vote; they depend on the outcome of no elections."[130] Or, as another judge has written: "The notion that a person's constitutional rights may be subject to a majority vote" is "anathema."[131] These are strong words, and intuitively attractive ones; isn't the very point of the Bill of Rights to protect the minority against majority rule?[132]

But these words do not do enough work. Especially where the Establishment Clause is concerned, they do not tell us how listening to a thirty-second invocation that fleetingly mentions Jesus really puts the minority's "fundamental rights" to a vote. Furthermore, as advocates of the "circuit-breaker" theory have pointed out, the majoritarian policies at issue purport not to leave prayer as the only possible outcome of a vote. Recall that the final version of the Santa Fe football game policy spoke in terms of "messages" and "statements" as well as "invocations." From this perspective, students were simply voting on whether to have a "message" or none at all, and that message would be whatever the student wanted it to be: a prayer, a purely secular sentiment, or something else altogether. In a religiously and ideologically diverse society such as ours, one might say, surely such a policy will result in a healthy profusion of different messages.

One might respond that the problem with such a policy is that it

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130 *Barnette*, 319 U.S. at 624.

131 *Gearon v. Loudoun County Sch. Bd.*, 844 F. Supp. 1097, 1100 (E.D. Va. 1993); *see also ACLU of N.J. v. Black Horse Pike Reg'l Bd. of Educ.*, 84 F.3d 1471, 1478 (3d Cir. 1996); *Harris v. Joint Sch. Dist. No. 241*, 41 F.3d 447, 455 (9th Cir. 1994).

132 *But see* Patrick Garry, *The Democratic Aspect of the Establishment Clause: A Refutation of the Argument That the Clause Serves to Protect Religious or Nonreligious Minorities*, 59 Mercer L. Rev. 595 (2008) (arguing against this interpretation of the Establishment Clause).

might result in prayer, and that this fact alone "encourages divisiveness along religious lines in a public school setting."[133] But if the reaction of the townsfolk of Santa Fe is any guide, *thwarting* the desire of the vast majority of students and parents to solemnize football games with a brief prayer can be just as divisive.[134] What, then, is really wrong with majoritarian processes, like the election process in *Santa Fe*, that allow students to decide for themselves whether student speech, religious or otherwise, will be permitted at graduations and football games?

Here as elsewhere in constitutional law, an important part of the answer is that context matters. Even in a facial challenge, one should not "turn a blind eye to the context" in which policies like Santa Fe's arise.[135] The story of *Santa Fe* hardly began with the school district's revised football prayer policy. It began long before that, when the district maintained a consistent and defiant practice, decades after cases like *Engel*, of having an official student chaplain position. It included every impermissible practice, every slight, every instance of official and peer harassment launched at students of minority faiths – not because the district should be held forever accountable for every aberrant act of vicious behavior, many of which it remedied, but because when viewed cumulatively these acts were *not* aberrations. And it included the revised policy itself, whose original title announced its purpose: "'Prayer at Football Games.'"[136] Taken as a whole, surely the Court was right to observe that "every Santa Fe High School student underst[ood] clearly [ ] that this policy [was] about prayer."[137] The school district understood this as well. It was not interested in creating a forum for any speech that individual students might wish to make; it wanted to find a mechanism to ensure that the majority religious views of its students would prevail.

We might say that, as long as the process itself allowed a free and fair election, the religious minority could *conceivably* win; a majority *could* be persuaded to vote to have no invocation at all at

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133 *Santa Fe*, 530 U.S. at 311.

134 For a sustained and critical examination of the "divisiveness" argument, see Richard W. Garnett, *Religion, Division, and the Constitution*, 94 Geo. L.J. 1666 (2006).

135 *Santa Fe,* 530 U.S. at 315.

136 *Id.* at 309.

137 *Id.* at 315.

football games, or select a student who would give a non-religious invocation. As we have seen, however, while the school district may have left football prayer up to the result of an ostensibly neutral *process*, it hardly left it up to chance.

Furthermore, this argument does not acknowledge the one-shot nature of rigged systems when considered from the perspective of the loser, and the fairness concerns raised by such systems. Speaking slots at football games and graduations are a finite resource. Santa Fe's football policy provided for only two votes for any given year: one to decide whether to have an invocation, and another to decide the single speaker who would give an invocation all year. As the Court noted, these were not genuine public fora, in which both winners and losers could speak in turn.[138] Having lost the election, the member of the losing minority had no recourse but to like it or lump it.[139] She could not simply raise her own voice. Where such a system has been designed to take systematic advantage of the majority status of a particular belief system, the outcome for the minority is close to a foregone conclusion, and there is no recourse for the minority. That the minority's views are subordinated to the views of the majority is problematic enough, particularly where fundamental rights are concerned. That the system is designed to achieve precisely this result adds insult to injury. Hence the Court's conclusion that Santa Fe's policy "might ensure that *most* of the students [were] represented," but "it [did] nothing to protect the minority; indeed, it likely serve[d] to intensify their offense."[140]

All of these conclusions, to be sure, depend on the notion that the school district knew what it was doing – on the Court's refusal to "turn a blind eye to the context" of *Santa Fe*.[141] This is where

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[138] *See id.* at 303 ("[T]he school allows only one student, the same student for the entire season, to give the invocation.").

[139] *See, e.g., Black Horse Pike*, 84 F.3d at 1487 ("Although it is true that [the policy] does not require the view that prevails in any given year to prevail in subsequent years, it is nonetheless true that the effect of the particular prayer that is offered in any given year will be to advance religion and coerce dissenting students.").

[140] *Id.* at 305; *see also Lee*, 505 U.S. at 594.

[141] *Santa Fe,* 530 U.S. at 315.

both demographics and Footnote One enter in. Americans are fond of rhapsodizing over the incredible religious diversity of our nation, and they have a point. Viewed at the local level, however, demographically speaking the United States is less like a religious melting pot and more like a bowl of oatmeal: it's lumpy. In some pockets, such as major urban centers, the diversity of religious views is such that any single faction is less likely to prevail at the local level. In those areas, perhaps counter-intuitively, the very fact of potential religious strife is more likely to lead to broad accommodations between and among all the players. In many other areas, however, a single religious group is far more likely to predominate overwhelmingly over any religious minorities.[142] Although the dominant faith in these places may vary, in each of these locales the condition that prevails is one of overwhelming religious homogeneity. Majorities are massive; minorities are tiny.

These conditions make *both* of the epigraphs to this chapter all the more potent. John Couch's complaint about "one or two students" being able to derail the football prayer policy makes all the more sense when one considers the overwhelming religious homogeneity of Santa Fe. But so does Debbie Mason's plaintive point: "Until you're the minority, you don't know how it feels. But when you become the minority, oh, you know how it feels."[143]

One may hope that local majorities will respect the feelings of minorities, and often enough they do. But the Bill of Rights is premised on the knowledge that these hopes can be unavailing. This concern is exemplified by "Footnote One" of *Santa Fe* and what it represents: the interlocking efforts of an overwhelmingly religiously homogeneous community, employing both public and private channels and hard and soft methods, to "ferret out" and intimidate the minority holdouts.[144] *Santa Fe* without Footnote One is like the libretto of an opera without the music; it may make some kind of sense, but it doesn't really *sing*. It is no accident that the *Santa Fe* majority quotes Judge Kent's order in its first

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142 For debates on these issues, see, *e.g.,* Kevin D. Breault, *New Evidence on Religious Pluralism, Urbanism, and Religious Participation*, 54 Am. Sociological Rev. 1048 (1989); Roger Finke & Rodney Starke, *Religious Economies and Sacred Canopies: Religious Mobilization in American Cities, 1906*, 53 Am. Sociological Rev. 41 (1988).

143 Irons, *supra* note __, at 170.

144 *Santa Fe*, 530 U.S. at 294 n.1.

footnote, or that some dissenting Justices were unable to see the anonymous status of the plaintiffs as anything other than a mere procedural curiosity.[145] That the plaintiffs thought it necessary to sue the school district as Does, and that their fears proved justified, is of signal importance in understanding why majoritarian processes like those employed in *Santa Fe* are problematic in overwhelmingly religiously homogenous communities. It is a crucial fact in support of the Court's ultimate ruling – one of those facts to which the Court rightly refused to "turn a blind eye."[146]

B. The Counter-Jurisdictional Establishment Clause

Both *Santa Fe* and Footnote One help shed light on another Establishment Clause issue. This has to do with the *size* and *scope* of the Establishment Clause. It is well-settled law that the Establishment Clause, whose text speaks only to congressional establishments of religion, is now incorporated against state and local governments through the Fourteenth Amendment.[147] Post-incorporation, the Establishment Clause is assumed to apply in the same way and with the same force to all levels of government. We have, in Mark Rosen's words, a "categorical 'One-Size-Fits-All' approach" to constitutional interpretation.[148]

This approach has always occasioned some disagreement, and of late the dissenting voices have grown louder. They have argued that the Establishment Clause is not primarily about individual rights. Rather, it serves a fundamentally jurisdictional role, one that bars religious establishments at the federal level while leaving state and local governments free to establish religion. On the Supreme Court, Justice Clarence Thomas is the lone vocal

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145 *See* Tr. of Oral Argument, *supra* note __, at *30-31 (questions by Justice Scalia).

146 *Santa Fe*, 530 U.S. at 315.

147 The first case clearly applying the Establishment Clause against state or local governments is *Everson v. Board of Education*, 330 U.S. 1 (1947).

148 Mark D. Rosen, *The Surprisingly Strong Case for Tailoring Constitutional Principles*, 153 U. Pa. L. Rev. 1513, 1516 (2005).

supporter of this view.[149] In the legal academy, it has a few prominent advocates.[150]

From a slightly different perspective, some constitutional scholars have recently argued for the need to reassess "the role of the local in the doctrine and discourse of religious liberty."[151] On this view, because the "chief threat to religious liberty" is "the exercise of centralized power," the Establishment Clause should be interpreted in a manner that is "more skeptical of federal and state regulations that touch on religion than of similar local regulations."[152] This approach is less explicitly sweeping than the "jurisdictional Establishment Clause" approach, but it would still potentially have an effect on cases like *Santa Fe* by giving "local communities . . . [greater] room to permit the public expression of religiously grounded values."[153]

Santa Fe does not answer the question whether the Establishment Clause was originally understood as a jurisdictional provision aimed at barring state establishments while protecting states' rights to establish (or disestablish) religion. But it may shed some light on whether we should *still* read it this way.[154] In particular, it raises questions about the arguments made by some scholars that the Establishment Clause today ought to be interpreted in a way that is more skeptical about national laws concerning religion than local laws. To see this, we have to accept a premise that a few people, including Justice Thomas, might find questionable: that the Establishment Clause *is* a fundamental constitutional right, one that, whatever mechanism it employs, is

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149 *See Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 49-50 (2004) (Thomas, J., concurring in the judgment).

150 *See* Smith, *supra* note __, at 1844 (listing supporters and placing himself somewhat diffidently on the side of the jurisdictional argument).

151 *See* Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 Harv. L. Rev. 1810 (2004); *see also* Mark. D. Rosen, *Establishment, Expressivism, and Federalism*, 78 Chi.-Kent L. Rev. 669 (2003); Ira C. Lupu & Robert W. Tuttle, *Federalism and Faith*, 56 Emory L.J. 19 (2006).

152 Schragger, *supra* note __, at 1815.

153 *Id.* at 1820.

154 *See* Smith, *supra* note __, at 1891 ("To say that the Framers didn't intend to put [ ] substantive rights and principles into the [Establishment Clause] is not to say, of course, that we should not put them into our constitutional law.").

ultimately closely linked to the religious and political rights of *individuals*. In practice, however, this assumption is widely shared and unlikely to change any time soon. It is, moreover, an assumption shared by those "localists" who argue that *as* an individual rights provision, the Establishment Clause should be applied more rigidly against national establishments than local establishments. Even if we share this premise, then, it still remains to be seen whether the Establishment Clause as an individual rights provision should be applied differently according to the level of government involved.

What *Santa Fe* and Footnote One suggest is that, contrary to these arguments, and in some ways contrary to the bare text of the Establishment Clause itself,[155] that provision might best be read, in light of widespread assumptions about its rights-protecting purpose, in what we might call a *counter*-jurisdictional fashion. That is, it might best be read as requiring courts to be *more* skeptical of state or local laws touching on religion than federal laws.

The reason for this again has to do with the real-life nature of religious diversity in the United States, which is lumpy rather than evenly distributed. When Americans meet in the national political forum, they do so under conditions of *genuine* diversity. They negotiate in what Madison called an "extended republic" in which no single faction, religious or otherwise, can call the shots.[156] The result is more likely to be one of compromise, one in which minority interests are protected and not subtly or openly coerced.[157] The same thing will often be true in cities: the diversity of religious and political interests in these locales places a premium on compromise and the genuine consideration of minority interests. The relative infrequency of directly or

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155 This seeming contradiction is less alarming than it might seem, because the Establishment Clause is *not* a "bare" or stand-alone text; it must now also be read in light of the Fourteenth Amendment.

156 *See The Federalist*, No. 51 (James Madison).

157 *See, e.g.*, Steven G. Calabresi & Nicholas P. Stabile, *On Section 5 of the Fourteenth Amendment*, 11 U. Pa. J. Const. L. 1431, 1434 (2009) ("A legislature in an extended republic is inherently more likely to protect minority factions and civil rights than are state legislatures.").

indirectly government-sponsored prayers in public schools in large cities may thus have less to do with stereotypical views of the city as a breeding ground for secularism, and more to do with the flourishing religious diversity of these places.

Smaller locales like Santa Fe, on the other hand, are not as diverse. They are overwhelmingly religiously homogeneous communities. The majority may not even be aware of the minority in its midst – recall the Santa Fe resident who said "We're all Christians here," overlooking the presence of a Jewish family[158] – let alone feeling compelled to negotiate with it or take its concerns into account in forming policies on school prayer and other issues.

These are conditions under which the interests of "one or two students" are especially vulnerable.[159] Given the homogeneity of the community, public and private actions are more likely to overlap to the detriment of this minority. Thus we get Footnote One, with its evidence of public and private collaboration to uncover the identities of the Doe plaintiffs. And thus, too, we get all the other public and private actions – the lack of perception that student "chaplains" might pose a problem, the teacher lecturing a Mormon student about her religion's "cult-like" status, the invocation of Hitler against a Jewish student by his peers – that surrounded the *Santa Fe* litigation. Nor is Santa Fe an outlier in this sense. The record is replete with many other instances of serious private and public harassment of religious minorities in overwhelmingly religiously homogeneous communities, ranging from mild insults to arson and death threats.[160] Of course everyone deplores these actions, and it would be unfair to attribute them to everyone in the community. But their relative frequency suggests that they may be inevitable when overwhelmingly religiously homogeneous communities are faced with the objections of small local religious minorities to state-sponsored religious practices.[161]

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158 *See* Irons, *supra* note __, at 136.

159 *Id.* at 179 (quoting school district chair John Couch).

160 *See* Horwitz, *supra* note __, at 887-88 (collecting examples).

161 Of course, some of the objecting minorities will share the faith of the majority; one of the *Santa Fe* plaintiffs, for instance, was one of many Catholics in Santa Fe, as was Stephanie Vega, the first person selected by her fellow students to deliver invocations at football games. But those common ties may obscure intra- and inter-faith differences about *how* and when religion should be practiced in those communities. Those differences can be every bit as controversial as actual differences in faith

All of these factors and incidents, taken together, suggest that the modern Establishment Clause might best be understood in a counter-jurisdictional fashion. Rather than conclude that minorities need not be concerned about local government-sponsored religious exercises because they can always look to a national community in which their interests are acknowledged,[162] we might conclude instead that the Establishment Clause's strictures are *more* necessary at the state or local level, where those exercises easily take on coercive features and are more likely to be accompanied by public and private harassment, than at the national level, where the extended republic is likely to result in meaningful and inclusive compromises on religion.[163] Whatever the Establishment Clause might originally have been understood to mean, *Santa Fe* and Footnote One suggest that it should be read today as being more concerned about *local* establishments than federal ones.

V. THE AFTERMATH: *SANTA FE* ON THE GROUND

Shortly after *Santa Fe* came out, Ira Lupu wrote that the decision had put to rest the uncertainty in the wake of *Lee v. Weisman* about the permissibility of "school-enacted policies which are designed to promote student-spoken prayer at

affiliation.

162 *See, e.g.,* Steven D. Smith, *Our Agnostic Constitution*, 83 N.Y.U. L. Rev. 120, 154 (2008).

163 One might respond that minorities can at least *move* from overwhelmingly religiously homogeneous communities, but will find it more difficult to leave the country altogether. But that argument understates the degree of local harassment to which minorities will be subjected before they are able to move, the many practical difficulties involved in exercising the "exit" option from local communities, and the fact that the religious diversity of our extended republic tends to reduce the likelihood of coercive religious establishments at the local level, and thus the need for minorities to exit the country. *See* Horwitz, *supra* note __, at 890-91; *see also* Douglas Laycock, *Voting With Your Feet is No Substitute for Constitutional Rights*, 32 Harv. J.L. & Pub. Pol'y 29 (2009).

commencement or other school-sponsored events."[164] After *Santa Fe*, Lupu wrote, "any system of student election, in which school policy promotes invocation as a message or solemnization as a purpose," and any "system of official selection of student speakers" whose context "reveals an official desire to have or maintain prayer" at school events, would be "doomed."[165] Lupu might have been right as a legal matter. As the history of defiance of the Court's original school prayer cases would have predicted, however, *Santa Fe* hardly ended the controversy over either majoritarian student prayer mechanisms or the role of religion at football games and other school events, especially in overwhelmingly religiously homogeneous communities.

The resistance to *Santa Fe* took two different forms. The first, one that was relatively limited in scope, was outright defiance by schools, courts, and legislatures. After *Santa Fe*, for instance, a school in Batesburg-Leesville, South Carolina, had its student body president deliver a pregame prayer over the public address system.[166] This may have been an isolated instance – although, as *Santa Fe* itself suggests, the precarious status of religious minorities in some communities may tend to discourage protest or litigation, and local pockets of defiance may persist without drawing public dissent. More strikingly, just as Lupu predicted, a few federal courts "stubbornly resist[ed] the teachings of *Santa Fe*."[167] Most prominently, in *Adler v. Duval County School Board*, the United States Court of Appeals for the Eleventh Circuit upheld a school graduation prayer policy that could not be fairly upheld under *Santa Fe* – *after* the Supreme Court had vacated and remanded the full court's earlier decision on the case in light of *Santa Fe*.[168]

State legislatures also responded to *Santa Fe*. Texas's

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164 Lupu, *supra* note __, at 810.

165 *Id.*

166 *See* David Firestone, *South's Football Fans Still Stand Up and Pray*, N.Y. Times, Aug. 27, 2000, available at http://www.nytimes.com/2000/08/27/us/south-s-football-fans-still-stand-up-and-pray.html.

167 Lupu, *supra* note __, at 810.

168 *See Adler v. Duval County Sch. Bd.*, 250 F.3d 1330 (11th Cir. 2001). For an argument that *Adler* is so inconsistent with *Santa Fe* as to suggest a willful disregard for the Supreme Court's decision, see Horwitz, *supra* note __.

legislature, unsurprisingly, was one of them. In 2007, it enacted the Religious Viewpoints Antidiscrimination Act, which provided in part that every school in the state should establish "a limited public forum for student speakers at all student events at which a student is to publicly speak."[169] Whether, say, a high school football game is a public forum at all would seem to be as much a question of factual context as of legislative fiat, and the provision raises serious questions about whether it is a successful end-run around *Santa Fe* or an incomplete pass.[170]

The second form of defiance of *Santa Fe* was quite different. Although it raises some of the same concerns about the nature of overwhelmingly religiously homogeneous communities, on the whole it is a response that advocates of religion in the schools and civil libertarians and separationists alike should welcome. Motivated by the *Santa Fe* ruling, a number of groups and individuals launched a movement aimed at encouraging crowds at high school football games to pray spontaneously and without any school involvement during the pregame ceremonies, or for students and others to meet before the game and at other times around the school flagpole for prayer.[171] This approach was employed in Santa Fe at the first football game following the *Santa Fe* ruling, among other places.[172] More recently, after a Georgia high school ended a post-9/11 practice of having its football players "charge[ ] through" paper banners bearing messages like "Commit to the Lord" as they entered the field, its fans began carrying religious signs and banners in the stands, leading to even "more displays of religious belief at the games,"

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169 Tex. Educ. Code § 25.152(a) (Vernon 2008).

170 For discussion of this provision, see Melissa Rogers, *The Texas Religious Viewpoints Antidiscrimination Act and the Establishment Clause*, 42 U.C. Davis L. Rev. 939 (2009); Argyrios Saccopoulos, Note, *Analysis: The Religious Viewpoints Antidiscrimination Act*, 14 Tex. J. on C.R. & C.R. 127 (2008).

171 *See, e.g.,* Firestone, *supra* note __; Steve Benen, *Righteous Revolution or Constitutional Quagmire*, Church & State Mag., Oct. 2000, available at http://www.au.org/media/church-and-state/archives/2000/10/righteous-revolu.html.

172 *See id.*

albeit now without school sponsorship.[173]

Private movements like this may raise some of the deeper questions about the fate of minorities in religiously homogeneous communities that *Santa Fe* presents. In such communities, it may matter little as a practical matter to the member of the minority whether intimidation, or even just a sense of *being* a minority, stems from public or private action. These movements also raise separate questions about whether these actions are the result of genuine piety or just a means of using prayer as a cudgel, or as a defiant response to a larger society that seems to value secularism more than religion.[174] One might applaud these movements but urge their participants, who after all generally constitute the majority in their communities, to view them as a real outpouring of religious belief, not a mere salvo in the culture wars.

Surely it is unfair, however, to expect religious speakers to speak with purer motives than anyone else. And it is just as unfair to expect a majority to suppress its *own* speech in order to satisfy a minority, even assuming that the minority would want it to. Whether or not Chief Justice Rehnquist was right that the tone of Justice Stevens's majority opinion in *Santa Fe* "bristles with hostility to all things religious in public life,"[175] the *rule* in *Santa Fe* does not. By refusing to turn a blind eye to the context in which majoritarian speaker selection policies arise, *Santa Fe* protects the minority in overwhelmingly religiously homogeneous communities from having to participate in "democratic" processes that are anything but, and which enlist the state in ways that infringe their fundamental rights. But it does *not* bar "*private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."[176] To the contrary, as the profusion of private religious speech following *Santa Fe*, in the stands and

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173 Robbie Brown, *Barred From Field, Religious Signs Move to Stands*, N.Y. Times, Oct. 26, 2009, available at http://www.nytimes.com/2009/10/27/us/27cheerleader.html?_r=1&scp=1&sq=georgia%20football%20prayer&st=cse. As the story notes, the "objector" in this case was herself a religious Christian, who said that she was simply trying to raise concerns about potential litigation.

174 *See* Benen, *supra* note __. One of the signs displayed by a fan in the Georgia school discussed by Brown, *supra* note __, read: "You Can't Silence Us."

175 *Santa* Fe, 530 U.S. at 318 (Rehnquist, C.J., dissenting).

176 *Id.* at 302 (quoting *Mergens*, 496 U.S. at 250) (emphasis in original).

outside the stadium suggests, *Santa Fe* preserves – and may even encourage – a vigorous and vocal place for religion in the public square.

What of Santa Fe itself? Some of the major players in the controversy remain there, of course. John Couch is no longer on the school board but is still a resident of Santa Fe, as is Debbie Mason. One of Mason's daughters, Jenni, wrote years later that the threats and harassment she and her family experienced led her to move from the area as soon as she could.[177]

Recently, law professor Jay Wexler visited Santa Fe High School to watch a game under the Friday night lights. Before the game, the announcer asked everyone to rise for the Pledge of Allegiance and a "minute of silence."[178] When the Pledge was finished, the announcer didn't miss a beat before beginning to announce the cheerleading squad. "More like a second of silence," a fan in the stands said.[179] As the rain poured down, the Indians lost, 44-2.

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177 *See* http://www.nysun.com/comments/25867 (online comment of Jenni Simonis, dated June 5, 2007).

178 Wexler, *supra* note __, at 194.

179 *Id.* at 195.