

AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
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Supplementary Material

Chapter 11: The Contemporary Era – Individual Rights/Religion/Establishment

Santa Fe Independent School Dist. v. Doe, 530 U.S. 290 (2000)

The Santa Fe Independent School District in Santa Fe, Texas, had a longstanding policy of student prayers before football games. When a lawsuit was filed against that policy by several families who asked to remain anonymous for fear of harassment, the school district modified the offending practice. The new policy required students to hold two elections by secret ballot. The first determined whether invocations would be said before football games. If the students favored an invocation, the second election determined which member of the student body would be the speaker. This modification did not satisfy the federal district court, which ordered the school board to ensure that only non-sectarian prayers were said. That decision, in turn, was reversed by the Court of Appeals for the Fifth Circuit, which found that no prayers could be said. The Santa Fe Independent School District appealed to the Supreme Court of the United States. Many religious organizations submitted amicus briefs urging the Supreme Court to declare the Santa Fe policy unconstitutional. The brief for the Baptist Joint Committee on Public Affairs was

deeply concerned about the mixed message Santa Fe ISD sends to its students about religion. On the one hand, its policy stands as an endorsement of prayer – a quintessential religious act. But on the other hand, the school district’s policy denigrates and trivializes the act of prayer by portraying an act of religious devotion as a quasi-secular ceremonial practice. Even more dangerous, the policy invades the sacred realm of private religious expression by telling students that their prayers must be nonsectarian and nonproselytizing, which equates to state monitoring and censorship of religion.

Other religious organizations, elected officials, states, and school districts submitted amicus briefs urging the Supreme Court to sustain the Santa Fe policy. The brief for the Christian Legal Society stated,

Nothing in the policy encourages students to elect speakers on the basis of non-neutral criteria; there has been no showing that Petitioner (the “District”) reviews student messages for religious content; and insofar as the students retain control over their statements, they are free to make either secular or religious remarks. Without more, this does not violate the Establishment Clause.

The Supreme Court by a 6-3 vote ruled that the Santa Fe policy on invocations at football games violated the Establishment Clause. Justice Stevens’s majority opinion claimed that public school officials were encouraging and sponsoring a religious event. The majority and dissenting opinions offered very different interpretations of what local officials were attempting to do when they implemented the electoral process for determining messages at athletic events. Justice Stevens interpreted Santa Fe’s action as masking efforts not to comply with past decisions declaring school prayer unconstitutional. Chief Justice Rehnquist interpreted the same actions as a good faith effort to adopt a constitutional policy. How do you interpret the actions of the Santa Fe School Board? To what extent do you believe the different interpretations of the facts explicitly influenced the opinions in Santa Fe?

JUSTICE STEVENS delivered the opinion of the Court.

...

These invocations are authorized by a government policy and take place on government property at government-sponsored school-related events. Of course, not every message delivered under such circumstances is the government's own. We have held, for example, that an individual's contribution to a government-created forum was not government speech. See *Rosenberger v. Rector and Visitors of Univ. of Va.* . . . (1995). Although the District relies heavily on *Rosenberger* . . . , the pregame ceremony is not the type of forum discussed in th[at] case[.]. The Santa Fe school officials simply do not "evince either 'by policy or by practice,' any intent to open the [pregame ceremony] to 'indiscriminate use,' . . . by the student body generally." . . . Rather, the school allows only one student, the same student for the entire season, to give the invocation. . . .

Granting only one student access to the stage at a time does not, of course, necessarily preclude a finding that a school has created a limited public forum. Here, however, Santa Fe's student election system ensures that only those messages deemed "appropriate" under the District's policy may be delivered. That is, the majoritarian process implemented by the District guarantees, by definition, that minority candidates will never prevail and that their views will be effectively silenced.

. . .
. . . Contrary to the District's repeated assertions that it has adopted a "hands-off" approach to the pregame invocation, the realities of the situation plainly reveal that its policy involves both perceived and actual endorsement of religion. In this case, as we found in *Lee*, the "degree of school involvement" makes it clear that the pregame prayers bear "the imprint of the State and thus put school-age children who objected in an untenable position." . . .

. . . In addition to involving the school in the selection of the speaker, the policy, by its terms, invites and encourages religious messages. The policy itself states that the purpose of the message is "to solemnize the event." A religious message is the most obvious method of solemnizing an event. Moreover, the requirements that the message "promote good sportsmanship" and "establish the appropriate environment for competition" further narrow the types of message deemed appropriate, suggesting that a solemn, yet nonreligious, message, such as commentary on United States foreign policy, would be prohibited. Indeed, the only type of message that is expressly endorsed in the text is an "invocation" — a term that primarily describes an appeal for divine assistance. In fact, as used in the past at Santa Fe High School, an "invocation" has always entailed a focused religious message.

. . .
The actual or perceived endorsement of the message, moreover, is established by factors beyond just the text of the policy. Once the student speaker is selected and the message composed, the invocation is then delivered to a large audience assembled as part of a regularly scheduled, school-sponsored function conducted on school property. The message is broadcast over the school's public address system, which remains subject to the control of school officials. It is fair to assume that the pregame ceremony is clothed in the traditional indicia of school sporting events, which generally include not just the team, but also cheerleaders and band members dressed in uniforms sporting the school name and mascot. The school's name is likely written in large print across the field and on banners and flags. The crowd will certainly include many who display the school colors and insignia on their school T-shirts, jackets, or hats and who may also be waving signs displaying the school name. It is in a setting such as this that "[t]he board has chosen to permit" the elected student to rise and give the "statement or invocation."

In this context the members of the listening audience must perceive the pregame message as a public expression of the views of the majority of the student body delivered with the approval of the school administration. In cases involving state participation in a religious activity, one of the relevant questions is "whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools." . . . Regardless of the listener's support for, or objection to, the message, an objective Santa Fe High School student will unquestionably perceive the inevitable pregame prayer as stamped with her school's seal of approval.

. . .

According to the District, the secular purposes of the policy are to “foste[r] free expression of private persons . . . as well [as to] solemniz[e] sporting events, promot[e] good sportsmanship and student safety, and establis[h] an appropriate environment for competition.” . . . We note, however, that the District’s approval of only one specific kind of message, an “invocation,” is not necessary to further any of these purposes. Additionally, the fact that only one student is permitted to give a content-limited message suggests that this policy does little to “foste [r] free expression.” . . .

School sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are nonadherents “that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.” . . . The delivery of such a message – over the school’s public address system, by a speaker representing the student body, under the supervision of school faculty, and pursuant to a school policy that explicitly and implicitly encourages public prayer – is not properly characterized as “private” speech.

The District next argues that its football policy is distinguishable from the graduation prayer in *Lee* because it does not coerce students to participate in religious observances. Its argument has two parts: first, that there is no impermissible government coercion because the pregame messages are the product of student choices; and second, that there is really no coercion at all because attendance at an extracurricular event, unlike a graduation ceremony, is voluntary.

One of the purposes served by the Establishment Clause is to remove debate over this kind of issue from governmental supervision or control. . . . The two student elections authorized by the policy, coupled with the debates that presumably must precede each, impermissibly invade that private sphere. The election mechanism, when considered in light of the history in which the policy in question evolved, reflects a device the District put in place that determines whether religious messages will be delivered at home football games. The mechanism encourages divisiveness along religious lines in a public school setting, a result at odds with the Establishment Clause. . . .

There are some students, . . . such as cheerleaders, members of the band, and, of course, the team members themselves, for whom seasonal commitments mandate their attendance, sometimes for class credit. The District also minimizes the importance to many students of attending and participating in extracurricular activities as part of a complete educational experience. . . . To assert that high school students do not feel immense social pressure, or have a truly genuine desire, to be involved in the extracurricular event that is American high school football is “formalistic in the extreme.” . . .

Even if we regard every high school student’s decision to attend a home football game as purely voluntary, we are nevertheless persuaded that the delivery of a pregame prayer has the improper effect of coercing those present to participate in an act of religious worship. . . . The constitutional command will not permit the District “to exact religious conformity from a student as the price” of joining her classmates at a varsity football game.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE SCALIA and JUSTICE THOMAS join, dissenting.

The Court distorts existing precedent to conclude that the school district’s student-message program is invalid on its face under the Establishment Clause. But even more disturbing than its holding is the tone of the Court’s opinion; it bristles with hostility to all things religious in public life. Neither the holding nor the tone of the opinion is faithful to the meaning of the Establishment Clause, when it is recalled that George Washington himself, at the request of the very Congress which passed the Bill of Rights, proclaimed a day of “public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favors of Almighty God.” . . .

First, the Court misconstrues the nature of the “majoritarian election” permitted by the policy as being an election on “prayer” and “religion.” . . . It is conceivable that the election could become one in which student candidates campaign on platforms that focus on whether or not they will pray if elected. It is also conceivable that the election could lead to a Christian prayer before 90 percent of the football

games. If, upon implementation, the policy operated in this fashion, we would have a record before us to review whether the policy, as applied, violated the Establishment Clause or unduly suppressed minority viewpoints. But it is possible that the students might vote not to have a pregame speaker, in which case there would be no threat of a constitutional violation. It is also possible that the election would not focus on prayer, but on public speaking ability or social popularity. And if student campaigning did begin to focus on prayer, the school might decide to implement reasonable campaign restrictions.

. . . Support for the Court's holding cannot be found in any of our cases. And it essentially invalidates all student elections. A newly elected student body president, or even a newly elected prom king or queen, could use opportunities for public speaking to say prayers. Under the Court's view, the mere grant of power to the students to vote for such offices, in light of the fear that those elected might publicly pray, violates the Establishment Clause.

. . . [T]he policy . . . has plausible secular purposes: "[T]o solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition." Where a governmental body "expresses a plausible secular purpose" for an enactment, "courts should generally defer to that stated intent." . . .

. . . [I]t is easy to think of solemn messages that are not religious in nature, for example urging that a game be fought fairly. And sporting events often begin with a solemn rendition of our national anthem, with its concluding verse "And this be our motto: 'In God is our trust.'" Under the Court's logic, a public school that sponsors the singing of the national anthem before football games violates the Establishment Clause. . . .

The Court bases its conclusion that the true purpose of the policy is to endorse student prayer on its view of the school district's history of Establishment Clause violations and the context in which the policy was written, that is, as "the latest step in developing litigation brought as a challenge to institutional practices that unquestionably violated the Establishment Clause." But the context—attempted compliance with a District Court order—actually demonstrates that the school district was acting diligently to come within the governing constitutional law. The District Court ordered the school district to formulate a policy consistent with Fifth Circuit precedent, which permitted a school district to have a prayer-only policy. . . . But the school district went further than required by the District Court order and eventually settled on a policy that gave the student speaker a choice to deliver either an invocation or a message. In so doing, the school district exhibited a willingness to comply with, and exceed, Establishment Clause restrictions. Thus, the policy cannot be viewed as having a sectarian purpose.

. . . .
[A]t issue in *Lee v. Weisman* (1992) was government speech. Here, by contrast, the potential speech at issue, if the policy had been allowed to proceed, would be a message or invocation selected or created by a student. That is, if there were speech at issue here, it would be private speech. . . .

Had the policy been put into practice, the students may have chosen a speaker according to wholly secular criteria—like good public speaking skills or social popularity—and the student speaker may have chosen, on her own accord, to deliver a religious message. Such an application of the policy would likely pass constitutional muster. . . .

. . . Schools do not violate the First Amendment every time they restrict student speech to certain categories. But under the Court's view, a school policy under which the student body president is to solemnize the graduation ceremony by giving a favorable introduction to the guest speaker would be facially unconstitutional. Solemnization "invites and encourages" prayer and the policy's content limitations prohibit the student body president from giving a solemn, yet nonreligious, message like "commentary on United States foreign policy."

The policy at issue here may be applied in an unconstitutional manner, but it will be time enough to invalidate it if that is found to be the case. . . .