in the world, with more than 1,500 different religious sects.[2] This religious diversity makes individuals of different sects highly protective of their religious heritage. Thus, the issue of prayer in schools produces heated emotions.[3] According to the American Civil Liberties Union, not even intensely debated affirmative action cases can hold a candle to school prayer in terms of the amount of public response generated.[4] The First Amendment, which states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech,"[5] is the controlling constitutional provision in the prayer in school debate. The simplicity of the First Amendment language belies the complex arguments and heated debate that surround its meaning.

Recently, school district policies that allow for student-initiated, student-selected prayer at school-sponsored events have dominated the discourse on school prayer. Within four years of the Supreme Court's decision in *Lee v. Weisman*,[6] five different federal circuits decided cases involving student-selected, student-initiated graduation prayers.[7] The factual scenarios of these five graduation

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1. *See* Editorial, *God and the Gridiron: Are Football Games Covered by a School-Prayer Ban?*, PITTSBURGH POST-GAZETTE, Nov. 20, 1999, at A16 ("In Texas, the comics said, football *is* religion.").

2. *See* Jo Ann Zuniga, *"Government Sponsored Prayer" decried by ACLU/Group to go to High Court in Santa Fe Flap*, HOUSTON CHRONICLE, Jan. 29, 2000, at A31.

3. *Id.*

4. *Id.*

5. U.S. CONST. amend. I.

6. 505 U.S. 577 (1992) (holding that under the Establishment Clause of the First Amendment state officials may not direct the performance of a formal religious exercise at a secondary school's promotional and graduation ceremonies). In *Lee*, the principal invited a rabbi to give the invocation and benediction and provided the rabbi with guidelines for the prayer. *Id.* at 577. The Court held that the principal's decision that a prayer should be given and his selection of the religious participant were choices attributable to the state and that his provision of prayer guidelines meant that he effectively directed and controlled the prayer's content. *Id.* at 587. In an attempt to avoid the prohibitions created by *Lee*, many school districts adopted policies providing for student-selected, student-initiated prayer. *See infra*, note 7 (listing school districts with student-selected prayer policies subject to litigation in the years following *Lee v. Weisman*).

7. The five student-selected prayer cases are: Adler v. Duval County Sch. Bd., 206 F.3d 1070 (11th Cir. 2000) (determining that a student-selected prayer policy employing a majority vote passes constitutional muster); ACLU v. Black Horse Pike Reg'l Bd. of Educ., 84 F.3d 1471 (3d Cir. 1996) (holding that the student-selected graduation prayer policy adopted by Black Horse Pike is

prayer cases are nearly identical, yet the decisions fall on both sides of the Establishment Clause wall.[8] The appellate courts applied all three of the tests that have appeared in the Supreme Court's Establishment Clause decisions over the past ten years.[9] The Supreme Court did not depart from this trend when it dealt with the issue this year in *Santa Fe Independent School District v. Doe*.[10] The *Lemon* test, the endorsement test, and the coercion test surfaced once again. While the application of these tests may give the appearance of more stringent and objective judicial scrutiny, the specific tests employed do not seem to be the determining factors in the court decisions.[11] Rather, the courts appear to interpret the three tests in a manner that reinforces the philosophy of the particular judge applying the tests.[12] This phenomenon renders Establishment Clause jurisprudence a morass of conflicting decisions.

The Supreme Court's decision in *Santa Fe* reaffirmed that the principles endorsed in *Lee* are a proper guide for determining the constitutionality of prayer at school functions, but the Court employed an endorsement analysis to reach its decision. The Court's failure to define a particular test as controlling or to refine the

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unconstitutional); Harris v. Joint Sch. Dist. No. 241, 41 F.3d 447 (9th Cir. 1994) (holding that a student-selected prayer policy violates the Establishment Clause because school officials bore the ultimate responsibility for the decision to have a prayer); Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963 (5th Cir. 1992) (holding that student-selected graduation prayers do not violate the Establishment Clause); Gearon v. Loudoun County Sch. Bd., 844 F. Supp. 1097 (E.D. Va. 1993) (stating that a school board policy that gives a voting majority of graduating students the right to have a prayer at graduation violates the Establishment Clause).

8. *See* Richard J. Ansson, Jr., *Drawing Lines in the Shifting Sand: Where Should the Establishment Wall Stand? Recent Developments in Establishment Clause Theory: Accommodation, State Action, The Public Forum, and Private Religious Speech*, 8 TEMP. POL. & CIV. RTS. L. REV. 1, 20-23 (1998) (arguing that the Supreme Court should adopt the state action and expanded public forum doctrines and should refrain from drawing intricate distinctions in its Establishment Clause jurisprudence).

9. *See* Martha M. McCarthy, *"A Wink and a Nod" To Student-Initiated Devotionals in Public Schools*, 139 EDUC. LAW REP. 1, 10 (2000) (summarizing the legal controversy over student-initiated, student-led prayer in public education). The three tests employed by the Supreme Court in Establishment Clause cases are: the *Lemon* test, the endorsement test, and the coercion test.

10. 530 U.S. __, 120 S. Ct. 2266 (2000).

11. *See* McCarthy, *supra* note 9, at 10.

12. *See* McCarthy, *supra* note 9, at 10.

parameters of what constitutes constitutionally acceptable forms of student-initiated, student-selected speech leaves the public thirsting for more definite lines. Ambiguous definitions and inconsistent standards are frustrating to school districts attempting to craft policies that comply with Establishment Clause jurisprudence.[13] As the Fifth Circuit recently observed, "[W]hen we view the deceptively simple words of the Establishment Clause through the prism of the Supreme Court cases interpreting them, the view is not crystal clear."[14] Unless the Supreme Court establishes a more concrete standard, schools will have to continue to devote substantial amounts of time and resources to Establishment Clause controversies.

An inspection of the Justices' opinions in the public forum case of *Capitol Square Review and Advisory Board v. Pinette*[15] offers a unique opportunity to construct a clear benchmark in Establishment Clause jurisprudence that will aid school districts and other governmental entities in developing constitutionally viable policies. The approaches to private expression in public forums derived from Justice Scalia's plurality opinion and Justice O'Connor's concurrence come together through the principles of the public forum doctrine to cast a light on the Establishment Clause puzzle.[16]

In *Pinette*, the plurality suggests a per se rule that allows a governmental entity to avoid an Establishment Clause violation when religious speech is purely private and occurs in a traditional or designated public forum and it is publicly announced and open to all on equal terms.[17] In her concurrence, Justice O'Connor eschewed the per se rule and espoused the use of the endorsement test.[18] Under O'Connor's endorsement analysis, the purpose of the Establishment Clause is to prevent the appearance that government

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13. *See* McCarthy, *supra* note 9, at 15.

14. Helms v. Picard, 151 F.3d 347, 355-56 (5th Cir. 1998).

15. 515 U.S. 753 (1995).

16. The issues involved in student-selected, student-initiated prayer at school sponsored events closely parallel those found in equal access cases like *Pinette*. The district policies at issue in the prayer cases give students access to government property or government-controlled channels of communication such as a public address system. These channels of communication qualify as fora under public forum doctrine. This Note will attempt to create an identifiable baseline for acceptable practices under the Establishment Clause by using the principles of public forum doctrine as espoused by the Supreme Court in equal access cases.

17. *See Pinette*, 515 U.S. at 770 (Scalia, J., plurality).

18. *Id.* at 772 (O'Connor, J., concurring).

either endorses or disapproves of religion.[19] Support for the ideals of this endorsement test, however, should not necessitate the abandonment of the plurality's per se rule. The public forum doctrine promotes a public awareness that speech within a public forum is not that of the government. The doctrine embraces the principles of free speech by facilitating a marketplace of ideas that celebrates a diversity of "sincerely held beliefs within the community."[20] The public forum doctrine achieves its goals by removing government control over speech within the forum. The Court's decision in *Santa Fe* is ripe with references to both the endorsement test and the benefits of removing speech from government control through the utilization of public forums.[21]

The public forum doctrine's focus on the removal of government control over a private individual's speech makes it an ideal companion for the endorsement test's mission of preventing the appearance of either government endorsement or disapproval. This Note proposes the adoption of the *Pinette* plurality's per se rule as a method of avoiding Establishment Clause problems in school-prayer situations. Furthermore, in situations where a government entity falls short of creating a public forum, the Court should employ an endorsement inquiry guided by the principles of public forum doctrine. By focusing on access to the forum and the government's intent to separate itself from the private speaker, the Court can create consistency in student-initiated prayer cases.

Part I of this Note discusses the purposes and requirements of traditional and designated public forums. Part II addresses the applicability of public forum doctrine to Establishment Clause cases. The *Pinette* decision and the creation of an integrated test for dealing with Establishment Clause cases are the focus of Part III. Finally, Part IV illustrates the application of the new test to a situation where a student speaker is selected by majority vote of his classmates to give an invocation or message. The fact pattern from *Santa Fe Independent School District v. Doe* provides the basis for the

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19. *See* Lynch v. Donnelly, 465 U.S. 668, 686 (1984) (clarifying that one way to run afoul of the Establishment Clause is for the government to endorse or disapprove of religion).

20. *See* Rick A. Swanson, *Time for a Change: Analyzing Graduation Invocations and Benedictions Under Religiously Neutral Principles of the Public Forum*, 26 U. MEM. L. REV. 1405, 1437 (1996).

21. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. __, 120 S. Ct. 2266, 2275 (2000).

discussion. This final section will also offer the option of a random selection of a student speaker as a constitutionally viable alternative under the new integrated test.

II. Public Forum Doctrine

In *Cornelius v. NAACP Legal Defense and Education Fund*[22] the Supreme Court adopted the public forum doctrine to address the problems generated when the First Amendment gives an individual or group the right to engage in expressive activity on government property. The use of government property facilitated by the public forum doctrine assists in furthering the interests that freedom of speech serves for society as a whole.[23] However, the *Cornelius* majority explains that "[e]ven protected speech is not equally permissible in all places at all times."[24] The Constitution does not require the government to freely grant access to anyone who wishes to exercise his right to free speech on government property without regard to the nature of the property or to the disruption caused by the speech.[25] In making the determination of who has access to government property, it is appropriate to engage in a three-step public forum evaluation.[26]

The first step in public forum analysis is the determination of whether the prospective form of expression is speech protected by the First Amendment.[27] Protected forms of speech include written and verbal speech,[28] symbolic speech,[29] and both political and religious speech.[30] If the type of speech is not protected, the

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22. 473 U.S. 788 (1985).

23. *See id.* at 815-16 (Blackmun, J., dissenting) (identifying those interests as unfettered public debate, an informed citizenry, and sociopolitical process).

24. *Id.* at 799 (citing *Jones v. N.C. Prisoners' Labor Union, Inc.*, 433 U.S. 119, 136 (1977)).

25. *See id.* at 799-800.

26. *See id.* at 797.

27. *See* Cornelius v. NAACP Legal Def. and Educ. Fund, Inc., 473 U.S. 788, 797 (1985).

28. *See* Texas v. Jones, 491 U.S. 397, 404 (1989) (stating that both written and verbal expression are protected by the First Amendment).

29. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 510-11 (1969) (holding that wearing black armbands to protest the Vietnam Conflict is protected speech).

30. *See* Widmar v. Vincent, 454 U.S. 263, 276-77 (1981) (finding that religious speakers have a right to use public forums on equal terms with others); NAACP v. Button, 371 U.S. 415, 455 (1963) (stating that the First Amendment

analysis need go no further.[31] The government's ability to control unprotected speech in this way defeats the public forum's purpose of removing private speech from government control.

The second step in public forum analysis is the identification of the nature of the forum.[32] The doctrine does not require that the public forum be a physical location. For example, *Perry Education Association v. Perry Local Educators' Association*[33] defined the prospective forum as a school's internal mail system and the teachers' mailboxes, not withstanding the fact that an "internal mail system" lacks a physical situs.[34] When limited access is sought, the Supreme Court has narrowly defined the perimeters of what may constitute a forum within the confines of the government property.[35] In *Cornelius*, for example, respondents argued that "[t]he particular channel of communication sought by the speaker" constitutes the forum for First Amendment purposes.[36] Thus, a discrete subsection of government property, such as a public address system, would qualify as a forum.

The final step is determining how to classify the public forum in question. Public forum doctrine places all varieties of public fora into one of three categories: the traditional public forum, the public forum created by government designation, and the non-public forum.[37] Each category places different limitations on the government's ability to control speech.

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protects expression without regard to the race, creed or political or religious affiliation of the group who invokes its shield or to the truth, popularity, or social utility of the ideas or beliefs offered).

31. *See Cornelius,* 473 U.S. at 797. *See also* Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (stating that there are well-defined classes of speech that are not protected, including the lewd or obscene, the profane, the libelous, and those that incite an immediate breach of the peace).

32. *See Cornelius*, 473 U.S. at 797.

33. 460 U.S. 37 (1983).

34. *Id.* at 44.

35. *See Cornelius*, 473 U.S. at 801.

36. *Id.*

37. *See id.* at 802. Only the traditional public forum and the designated public forum are relevant to this Note's analysis. The third variety of public forum is the non-public forum. A non-public forum is that which has not, either by tradition or by designation, become a forum for public communication. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983). Control over access to a non-public forum may be based on subject matter and speaker identity as long as the distinctions drawn are reasonable in light of the purposes of the forum. *See Cornelius,* 473 U.S. at 806. "The state may reserve the forum for its intended

A. Traditional Public Forum

Traditional public fora are those places which "by long government tradition or by government fiat have been devoted to assembly or debate" or which "have immemorially been held in trust for the use of the public and . . . have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[38] This category includes public streets and parks.[39] In developing the traditional public forum, the Court reasoned that the public should have places for assembly, communication of thoughts between citizens, and discussion of public questions.[40]

The importance our society places on the free exchange of ideas led the Court to restrict the government's ability to restrain speech within a traditional public forum.[41] The government can exclude speakers from the forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is reasonable, viewpoint neutral, and narrowly tailored to achieve that interest.[42]

The Supreme Court is reluctant to find a violation of the Establishment Clause when the religious speech at issue takes place in a traditional public forum.[43] Justice Brennan explained the reason for the Court's reticence:

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purposes . . . as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry*, 460 U.S. at 46.

38. *Perry*, 460 U.S. at 45.

39. *See Cornelius*, 473 U.S. at 802.

40. *See* Edward J. Neveril, *"Objective" Approaches to the Public Forum Doctrine: The First Amendment at the Mercy of Architectural Chicanery*, 90 NW. U. L. REV. 1185, 1189-91 (1996) (discussing the intricacies of public forum doctrine).

41. *See* Terminiello v. Chicago, 337 U.S. 1, 4 (1949), which held:

> A function of free speech in our system . . . is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.

42. *See Perry,* 460 U.S. at 45.

43. *See* Ansson, *supra* note 8, at 1.

> Religionists no less than members of any other group enjoy the full measure of protection afforded speech, association, and political activity generally. The Establishment Clause, properly understood, is a shield against any attempt by government to inhibit religion. . . . It may not be used as a sword to justify repression of religion or its adherents from any aspect of public life. ... The antidote which the Constitution provides against zealots who would inject sectarianism into the political process is to subject their ideas to refutation in the marketplace of ideas and their platforms to rejection at the polls. With these safeguards, it is unlikely that they will succeed in inducing the government to act along religiously divisive lines, and, with judicial enforcement of the Establishment Clause, any measure of success that they achieve must be short-lived, at best.[44]

The traditional public forum creates the marketplace for ideas to which Justice Brennan refers. By opening a forum to a large number of people of all viewpoints, society explores ideas and provides a platform for the furtherance of society.

B. *Designated But Limited Public Forum*

The designated public forum is the second variety of forum. A government entity creates a designated forum when it intentionally opens a nontraditional forum for public discourse.[45] "A public forum may be created by government designation of a place or channel of communication for use by the public at large, for assembly and speech, [f]or use by certain groups, or for the discussion of certain subjects."[46] Once the government opens a designated public forum, however, it is not required to maintain the open character of the facility, and it may subsequently close the forum.[47]

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44. McDaniel v. Paty, 435 U.S. 618, 641-42 (1978) (Brennan, J., concurring).

45. *See* Int'l Soc'y for the Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 680 (1992).

46. *Perry*, 460 U.S. at 45-46 n.7.

47. *See id.* at 46.

A subcategory of the designated public forum is the limited public forum. A limited public forum consists primarily of government property that the government has opened for use as a place for expressive activity for a limited amount of time,[48] for a limited class of speakers,[49] or for the discussion of certain subjects.[50] Courts have found that limited public fora include state university meeting facilities, municipal theaters, and school board meetings.[51] In *Perry*, the Supreme Court stated that the public forum analysis would apply to both traditional and limited public forums.[52] Within a designated public forum or a limited public forum, speakers cannot be excluded without a compelling government interest, and such an exclusion must be narrowly tailored, reasonable, and viewpoint neutral.[53] This type of forum facilitates the exploration of a specific topic from a variety of viewpoints. Reasonable time, place, and manner regulations, however, are permissible.[54] The ability to

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48. *See* Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981) (holding that a limited public forum offers a temporary means for "exhibitors" to express their viewpoints, provided that they can do so within the time constraints proscribed by the government).

49. *See* Widmar v. Vincent, 454 U.S. 263, 276-77 (1981).

50. *See Perry,* 460 U.S. at 46 n.7.

51. *See id.* at 46.

52. *See id.*

53. *Id.*; *accord* Cornelius v. NAACP Legal Def. and Educ. Fund, Inc., 473 U.S. 788, 815 (1985).

54. *See Widmar*, 454 U.S. at 269-70. It is important that a government entity recognize the consequences of opening a limited public forum. By acquiescing in the use of the property or channel of communication, the entity gives up its ability to control the content of the speech beyond the state's justifiable ability to reserve the forum for certain groups or for the discussion of certain topics within the limited and legitimate purposes for which the state created the forum. *See* Rosenberger v. Rectors and Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995). Within a public forum, any "discrimination against speech because of its message is presumed to be unconstitutional." *Id.* at 828. Such viewpoint discrimination is an egregious form of content discrimination: "The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Id.* at 829. Even within a forum of its own creation, the state must respect the autonomy of the speaker when the speech is "reasonable in light of the purpose served by the forum." *Cornelius*, 473 U.S. at 806. The Supreme Court has stated that "[t]hese principles provide the framework forbidding the State to exercise viewpoint discrimination, even when the limited public forum is one of its own creation." *Rosenberger*, 515 U.S. at 829. Once a public forum is open, a speaker is free to approach the legitimate limited purpose of the forum from a minority or majority

impose time limits provides an incentive for a government entity to selectively open property for public debate that would otherwise remain closed because of the disruption caused by the expression. Thus, the rules with respect to time, place, and manner restrictions facilitate the expansion of free speech to new areas.

Two factors form the basis for determining whether the state created a limited public forum. The first factor is the governmental intent and the second factor concerns the extent of use granted by the state.[55]

1. Governmental Intent

Governmental intent is ascertained by an investigation of "the policy and practice of the government" and "the nature of the property and its compatibility with the expressive activity."[56] The *Cornelius* court held, "The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse."[57] Therefore, the Supreme Court looks into the policy and practice of the governmental entity "to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum."[58] The actions of the governmental entity, not the governmental entity's rhetoric, is determinative of intent.[59]

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religious perspective, or from a completely nonreligious perspective, and secular speakers have a right to use the forum on equal terms. *See id.*; *Widmar,* 454 U.S. at 272 n.12.

55. *See Perry*, 460 U.S. at 46-47.

56. *Cornelius*, 473 U.S. at 802.

57. *Id.*

58. *Id.* (citing *Perry*, 460 U.S. at 46).

59. *See* Bd. of Educ. of Westside Cmty. Sch. v. Mergens, 496 U.S. 226, 244 (1990) (arguing that when a government entity's articulated rationale behind an action is designed to circumvent a mandated act, the entity's actions will be determinative of intent, not the initial reason given). In *Widmar v. Vincent*, the Court held that a state university with a policy of opening meeting rooms to registered student groups created a public forum. 454 U.S. 263, 264 (1981). The *Widmar* policy evidenced a clear intent to create a public forum, even in light of the university's erroneous view that the Establishment Clause forbade the use of the rooms by religious groups. At least as to its students, a university campus possesses many of the attributes of a traditional public forum. 454 U.S. 263, 268 n.5.

The Court also examines "the nature of the property and its compatibility with expressive activity to discern the government's intent."[60] The Court is reluctant to hold that the government has intended to create a public forum in situations where the expressive activity disrupts the principle purpose of the property.[61] Thus, the Court has held that military bases and prisons do not constitute public fora.[62]

2. Extent of Use

While a limited public forum allows limited time, place, and manner restrictions, it does not appear that a governmental entity may limit the forum to individual speakers. The State must allow "general access to"[63] or "indiscriminate use"[64] of the forum by a class of speakers, the general public, or for the discussion of designated topics.[65] For example, in *Widmar v. Vincent*,[66] the Court identified that the availability of the public forum to a wide array of public speakers was particularly relevant in determining that the university could not exclude a registered religious group from generally available university facilities. Additionally, in *Board of Education of Westside Community Schools v. Mergens*,[67] *Rosenberger v. Rector of the University of Virginia*,[68] and *Lamb's Chapel v. Center Moriches Union Free School District*,[69] the Court held that governmental entities had created limited public fora when they generally opened up their facilities for use by an entire class of people: high school students, college students, or the general public respectively.

The clearest articulation of the access standards for a limited public forum appears in *Arkansas Educational Television v. Forbes*.[70] There, the Supreme Court held that public forum analysis

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60. *Cornelius*, 473 U.S. at 802.
61. *See id.* at 804.
62. *See id.*
63. *Id.* at 802.
64. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 47 (1983).
65. *See Cornelius*, 473 U.S. at 802.
66. 454 U.S. 263 (1981).
67. 496 U.S. 226 (1990).
68. 515 U.S. 819 (1995).
69. 508 U.S. 384 (1993).
70. 523 U.S. 666 (1998).

applied to televised candidate debates on publicly owned television stations.[71] The Court's decision reiterated the fact that the government has the option of designating property as a forum for a specified class of speakers, but made it clear that a governmental entity does not create a limited public forum by providing selective access for an individual speaker.[72]

To create a limited public forum, "the government must intend to make the property 'generally available' to a class of speakers."[73] For example, in *Widmar* the university created a limited public forum for registered student groups by adopting a policy that made its meeting facilities "generally open" to a variety of student groups.[74] In contrast, the government does not create a limited public forum when it "allows selective access for individual speakers rather than general access to a class of speakers."[75]

The Supreme Court's decisions in *Perry* and *Cornelius* further explore the selective access distinction. In *Perry*, the Court held that while selected speakers could gain access to a school's internal mail system, the system did not constitute a designated public forum.[76] Under the school board policy in *Perry*, the selected speakers gained access to the forum by requesting permission from the individual school principal.[77] When contrasted with the general access policy in *Widmar*, the Court found that the board's policy did not grant general access.[78] Furthermore, in *Cornelius,* the Court held that the Combined Federal Campaign (CFC) charity drive was not a designated public forum.[79] It was the government's consistent policy under the CFC to limit participation to "appropriate" voluntary

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71. *Id.* at 679.

72. *Id.* at 680; *accord* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. __, 120 S. Ct. 2266, 2276 (2000) (stating that selective access does not transform government property into a public forum).

73. Arkansas Educational Television v. Forbes, 523 U.S. 666, 679 (1998) (quoting *Widmar v. Vincent*, 454 U.S. 263, 264 (1981)).

74. *See Widmar*, 454 U.S. at 267.

75. *See Forbes*, 523 U.S. at 679.

76. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 47 (1983).

77. *Id.* at 40.

78. *See* Cornelius v. NAACP Legal Def. and Educ. Fund, Inc., 473 U.S. 788, 803 (1985).

79. 473 U.S. at 804.

agencies and to require those agencies that wished to participate to obtain permission from CFC officials.[80]

By viewing these three cases together, the Supreme Court's methodology becomes clear. The university in *Widmar* made its property generally available to an entire class of speakers.[81] So long as a student group qualified, the university granted access to the designated forum. In *Perry* and *Cornelius*, on the other hand, the government reserved access to a class of speakers, but then added the additional requirement that the members of the class "obtain permission" to use the forum.[82]

III. Understanding the Interplay of Public Forum Principles and Establishment Clause Jurisprudence

In a public education setting, there must be a framework that recognizes the competing interests of free speech and the Establishment Clause and allows for a balancing of the two.[83] The threshold question in any Establishment Clause case is whether there is sufficient governmental involvement with a form of expression to invoke the prohibition of speech.[84] As discussed in the previous section, the creation of a public forum serves the purpose of limiting the ability of government to control private speech. Investigating Establishment Clause concerns through the lens of public forum doctrine results in focusing decisions on the degree speech is removed from government control, thus promoting the values of free speech by protecting private speakers' access to the forum while also avoiding the specter of government endorsement.

Capital Square Review and Advisory Board v. Pinette[85] provides an excellent platform for an examination of how the Supreme Court should apply public forum principles in a case with

80. *Id.* at 804.

81. 454 U.S. at 265.

82. *See* Arkansas Educational Television v. Forbes, 523 U.S. 666, 679 (1998) (explaining how the Court differentiated between *Perry*, *Cornelius*, and *Widmar*).

83. *See generally* John W. Whitehead & Alexis I. Crow, *Beyond Establishment Clause Analysis in Public School Situations: The Need to Apply the Public Forum and Tinker Doctrines*, 28 TULSA L.J. 149 (1992) (maintaining that the Court should not base its analysis of prayer in public schools solely upon the Establishment Clause, but rather should incorporate forum analysis and free speech concerns into jurisprudential framework).

84. *See id.* at 184.

85. 515 U.S. 753 (1995).

Establishment Clause implications. The *Pinette* Court held that private religious speech is as fully protected as secular private expression under the First Amendment.[86] However, the Court expressed some limits by reiterating the dominant themes of public forum analysis. First, the right to private expression on government property is not unlimited.[87] Second, the type of speech allowed varies depending upon the particular type of forum involved.[88] Additionally, the Court stated that the state's interest in complying with the Establishment Clause constitutes a compelling state interest sufficient to warrant content-based restrictions on speech occurring within a public forum.[89]

The Court, however, cautioned against an expansive reading of the acceptability of restrictions based on compelling state interests.[90] Justice Scalia, writing for the Court, stated that in two previous cases involving private religious expression, a forum available for public use, a content-based restriction, and the state's compelling interest in complying with the Establishment Clause, the Court struck down the restrictions based on religious content.[91]

The Court had first struck down these restrictions in *Lamb's Chapel v. Center Moriches Union Free School District*.[92] There, the Supreme Court rejected a school policy that generally allowed private groups to use school facilities for a variety of purposes but excluded those groups with religious purposes.[93] The Court rejected the claim that the compelling state interest of avoiding an Establishment Clause violation required the restrictions.[94] The Court based its decision on the fact that the school property was open to a wide variety of uses and the district did not directly sponsor the activity.[95] Furthermore, the Court found that this reasoning applied even if the use of school property during off hours did not constitute a public forum because the school district violated the applicant's

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86. *Id.* at 760.
87. *See id.* at 761.
88. *See id.*
89. *See id.* at 761-62.
90. *Pinette*, 515 U.S. at 761.
91. *Id.* at 762-63.
92. 508 U.S. 384 (1993).
93. *Id.* at 392.
94. *Id.* at 395.
95. *Id.*

free speech rights by denying the use of its facilities solely based on the viewpoint of the program the applicant wished to present.[96]

In *Widmar*, the Court also addressed restrictions that discriminated against groups who wished to use a generally open forum for religious purposes.[97] Again, the Court held that because the university created a forum open to a broad spectrum of groups, any benefit to religion would be incidental and not a government endorsement of religion.[98]

The factors the Court considered determinative in its analysis of whether the Establishment Clause constituted a compelling state interest requiring a content-based restriction closely parallel the factors required for the formation of a designated public forum. First, both require that an institution intends to create a forum for the expression of a variety of viewpoints as evidenced by the policy and practice of the institution.[99] Second, both demand that the forum provide for "general access" or "indiscriminate use" of the property by a class of speakers.[100]

The *Lamb's Chapel* and *Widmar* decisions create a line of demarcation in Establishment Clause jurisprudence: if religious speech is purely private and takes place in a traditional or designated public forum, that speech cannot violate the Establishment Clause.[101] While only a plurality of the Court established this line of demarcation, the reasoning of those concurring in the Court's judgment supports granting significant deference to this line of demarcation.[102]

96. *Id.* at 390-95.

97. 454 U.S. at 269.

98. *Id.* at 274.

99. *See* Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 762-63 (1995) (discussing the Court's decision in *Widmar v. Vincent*, 454 U.S. 384 (1993)).

100. *See id.*

101. *Widmar*, 454 U.S. at 267; *Lamb's Chapel*, 508 U.S. at 395 (1993).

102. *Widmar*, 454 U.S. at 280-81. The concurring opinion focuses on whether or not evidence exists that the government entity would be perceived as sponsoring a religion. In the absence of this evidence, the Establishment Clause is not sufficient grounds for prohibiting speech in a public forum. Furthermore, sound public policy favors the adoption of the per se rule and an endorsement approach that focuses on the principles of the public forum when a district does not establish a technical public forum. The current deluge of cases involving student-selected prayer underscores the need for a clear constitutional benchmark. The adoption of the per se rule would give school districts a simple method of avoiding litigation when attempting to facilitate student speech. The district may create a

IV. *Pinette* and the Creation of an Integrated Approach to Establishment Clause Cases

In *Pinette*, the Capitol Square Advisory Board denied the Ku Klux Klan's application to erect a Latin cross in the state-owned plaza surrounding the Ohio State Capitol.[103] To use the plaza, the board required a group to fill out an official application form and meet several criteria that were neutral as to the speech and content of the proposed event. The square's history as a location for public speeches, gatherings, and both religious and secular festivals made it a traditional public forum subject to limited time, place, and manner restrictions.[104] The Advisory Board admitted that it denied the KKK's application to display the cross because of a fear of violating the Establishment Clause by appearing to endorse Christianity.

A. The Per Se Rule: Establishment of a Public Forum as a Procedural Method of Complying with the Establishment Clause

The State of Ohio in *Pinette* contended that the close proximity of a public forum to the seat of government created a possibility that one could construe a display as carrying government approval.[105] Justice Scalia's plurality opinion, however, makes it clear that content-neutral policies that provide an incidental benefit to religion cannot violate the Establishment Clause.[106] For the plurality, the existence of a properly created public forum is the determinative factor in the acceptability of religious speech.[107] Scalia simply states that "[r]eligious expression cannot violate the Establishment Clause where it (1) is purely private and (2) occurs in

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limited public forum that is publicly announced and available to all on equal terms. If the school district fails to create a public forum because it grants only selective access to the forum, the district would know that it must attempt to remove the appearance of government control over student speech. Such a separation would require allowing for a broad range of students to have an opportunity to access the forum by providing viewpoint-neutral selection criteria.

103. 515 U.S. at 758.

104. *See id.* at 761.

105. *Id.*

106. *Id.* at 764.

107. *See id.* at 765 ("Once we determined that the benefit to religious groups from the public forum was incidental and shared by other groups, we categorically rejected the State's Establishment Clause defense.").

a traditional or designated public forum, publicly announced and open to all on equal terms."[108]

Scalia supports this per se rule for the acceptability of religious speech in a public forum by relying upon a foundation of the principle of neutrality. In explaining this principle of neutrality, his plurality opinion states that if secular religious speech received preferential access to a public forum, it would violate the Establishment Clause.[109] Furthermore, in a situation where a government entity manipulates the administration of the public forum in such a manner that only certain religious groups can take advantage of it, the government entity would violate the Establishment Clause.[110] Both situations the plurality opinion discusses as constituting violations of the Establishment Clause also violate the requirements of a public forum, particularly the requirements of "general access"[111] to or the "indiscriminate use"[112] of the forum. The non-neutral nature of the method of access forecloses the opportunity for those with competing views to engage in expression.

The per se rule advocated by Scalia has the benefit of administrative feasibility. By adopting public forum analysis, the plurality strikes a necessary balance between free speech and the Establishment Clause. The per se rule develops a procedural method of creating and operating an open forum that avoids Establishment Clause concerns which, in turn, allows government entities to avoid costly litigation over private religious expression while protecting minority speakers. When a government entity creates a forum that is "publicly announced" and "open to all on equal terms," the possibility that the government conveys any imprimatur of state support for the expression is minimized because the public knows the forum is open for the free expression of private beliefs.[113] The private groups have the opportunity to express their beliefs by going through a neutral application process.

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108. *Pinette*, 515 U.S. at 769.

109. *Id.* at 766.

110. *See id.*

111. *See* Cornelius v. NAACP Legal Def. and Educ. Fund, Inc., 473 U.S. 788, 802 (1985).

112. *See* Perry Educ. Ass'n v Perry Local Educators' Ass'n, 460 U.S. 37, 47 (1983).

113. *See Pinette*, 515 U.S. at 769.

B. The Endorsement Test: A Reasonableness Based Method

Justice O'Connor's concurring opinion in *Pinette* acknowledges the importance that the Supreme Court places on maintaining the appearance of a disinterested government when dealing with religious speech in a public forum.[114] However, O'Connor eschews the per se rule for determining what constitutes an Establishment Clause violation. Instead, Justice O'Connor advocates the continued use of the endorsement test to determine if expression within a public forum constitutes a violation of the Establishment Clause.[115]

Justice O'Connor introduced the endorsement test in *Lynch v. Donnelly*[116] in the context of determining that the inclusion of a nativity scene in a city's Christmas display did not constitute a violation of the Establishment Clause.[117] The appropriate question under the endorsement test is whether the government intends to convey a message of endorsement or disapproval of religion.[118] "The reason is that government endorsement sends a message to non-adherents 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."[119] An inquiry into governmental intent takes place through the eyes of a reasonable observer endowed with knowledge of the unique circumstances of the situation.[120]

In recent years, the Court has paid close attention to whether the challenged governmental practice has either the purpose or effect of "endorsing" religion.[121] There is "a crucial difference between government speech endorsing religion, which the Establishment

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114. *Id.* at 774 (O'Connor, J., concurring).

115. *Id.*

116. 465 U.S. 668 (1984).

117. *Id.* at 673-75.

118. *See id.* at 691.

119. *Id.* at 688.

120. *See id.* at 694.

121. *See, e.g., Lynch*, 465 U.S. at 694 (citing County of Allegheny v. ACLU, 492 U.S. 573, 592 (1989)).

Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."[122]

Rather than relying upon the procedural mechanism of creating a public forum to make the distinction between public and private speech, Justice O'Connor espouses investigation into whether a reasonable observer would view the government practice as endorsing religion.[123] O'Connor's endorsement test stresses the need to view neutrality through the eyes of a reasonable observer, not from the facial neutrality of the statute. In other words, "the Establishment Clause forbids a State to hide behind the application of a formally neutral criteria and remain studiously oblivious to the effects of its actions. Governmental intent cannot control, and not all state policies are permissible under the Religion Clauses simply because they are neutral in form."[124] If a reasonable observer would view a government practice as endorsing religion, it is the role of the Court under the endorsement test to hold the practice invalid.[125] A per se rule based solely on the procedural creation of a public forum, she contends, "is out of step both with the Court's prior cases and with well-established notions of what the Constitution requires [in Establishment Clause cases]."[126]

O'Connor states that government practices must be judged according to their unique circumstances "to determine whether [they] constitute[] an endorsement or disapproval of religion."[127] In her view, even the government does not intend to encourage the view that it endorses religion.[128] If the operation of the public forum gives the impression of endorsing religion through the eyes of a reasonable observer, then the Establishment Clause is violated.[129] Additionally, O'Connor supports the addition of a disclaimer to help remove doubt about state approval of a respondent's private religious message.[130]

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122. Capital Square Advising Bd. v. Pinette, 515 U.S. 753, 774 (1995). (O'Connor, J., concurring) (citing Bd. of Educ. of Westside Cmty. Sch. v. Mergens, 496 U.S. 226, 250 (plurality opinion)).

123. *Id.* at 777 (O'Connor, J., concurring).

124. *Id.*

125. *See id.*

126. *Id.*

127. Lynch v. Donnelly, 465 U.S. 668, 694 (1984) (O'Connor, J., concurring).

128. *See id.* at 690.

129. *See id.*

130. *See* Capital Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 776 (1995) (O'Connor, J., concurring).

Contrary to her statement that a per se rule is out of step with Establishment Clause jurisprudence, Justice O'Connor's reasoning does not depart from the reasoning behind the plurality's per se rule—except for her focus on the appearance of a violation, as indicated by her additional requirement of a disclaimer when necessary. O'Connor recognizes the importance of the factors identified by the plurality as determinative in making their decision and that are equally applicable to public forum analysis. Justice O'Connor states that her decision would not differ from the plurality's if truly private speech is allowed on equal terms in a vigorous public forum that the government has administered properly.[131] The factors highlighted by Justice O'Connor parallel the requirements that a government must meet in order to designate a public forum, as expressed in *Cornelius* and clarified in *Forbes* an intent to create a forum, and the provision of general access and indiscriminate use of the forum.[132] Justice O'Connor would only add the use of a disclaimer, when necessary, to further dissociate the government from the private speech.

Furthermore, Justice O'Connor endows the reasonable observer with an awareness "of the history and context of the community and forum in which the religious display appears."[133] The reasonable observer would know the general history of the place where the expression took place and the fact that the location has served as a platform for speakers of various types.[134] "The reasonable observer would recognize the distinction between speech the government supports and speech that it merely allows in a place that has traditionally been open to a range of private speakers accompanied, if necessary, by an appropriate disclaimer."[135]

The knowledge granted the reasonable observer makes Justice O'Connor's decision to forgo the plurality's per se rule inconsistent with her reasoning. If a reasonable observer has knowledge of the history and context of the community and the forum, it follows that a reasonable observer should also be aware of

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131. *See id.* at 775 (O'Connor, J., concurring).

132. *See* Cornelius v. NAACP Legal Def. and Educ. Fund, Inc., 473 U.S. 788, 802 (1985); Arkansas Educational Television v. Forbes, 523 U.S. 666, 679 (1998).

133. *Pinette*, 515 U.S. at 780 (O'Connor, J., concurring).

134. *See id.* at 781 (O'Connor, J., concurring).

135. *Id.* at 782 (O'Connor, J., concurring).

a governmental entity opening a designated public forum that grants general access to a class of private speakers for the discussion of a topic. Such awareness would dispel any notion that the government endorsed the private speech that occurred within the forum. By properly following the public forum analysis, a governmental entity fully divests itself from sponsorship of any opinions expressed within the forum. If the governmental entity fails to achieve any of the requirements of public forum analysis, such as manipulating the forum to avoid granting general access to people seeking to engage in expressive activity, the forum would fall outside of the exemption and become subject to endorsement test analysis.

C. *Integrating the Plurality's Per Se Rule and the Endorsement Test into a Workable Analysis*

Following the implementation of the plurality's per se rule, numerous situations would still exist where government action is alleged to discriminate in favor of private religious expression because the government fails to meet all of the requirements for developing a limited public forum. Scalia's opinion in *Pinette* illustrates the usefulness of additional Establishment Clause tests by referring to the crèche display in *County of Allegheny v. American Civil Liberties Union*.[136] In *County of Allegheny*, the Court made it clear that if the staircase where the crèche was displayed had been available to all on the same terms, the presence of the crèche would not have constituted government endorsement of religion.[137] In situations such as those in *County of Allegheny*, the endorsement test—viewed in concert with the plurality's per se rule—provides a logical method for investigating Establishment Clause violations.

The particular setting of a display may negate any perceived message of endorsement without neutralizing the religious content of the display by changing what viewers see as the purpose of the display. In *County of Allegheny*, the Court adopted the endorsement test in deciding that a crèche displayed alone on the courthouse steps violated the Establishment Clause, while a menorah displayed with a Christmas tree and a sign saluting liberty in a city display did not violate the Establishment Clause.[138] The context of the display of the

136. *Id.* at 764 (citing County of Allegheny v. ACLU, 492 U.S. 573, 592 (1989)).

137. *Allegheny*, 492 U.S. at 599.

138. *Id.* at 617.

menorah supported a reading that acknowledged the cultural diversity of the United States and conveyed tolerance of different choices of religious belief or non-belief.[139] The Court reiterated that, at the very least, the Establishment Clause prohibits the government from appearing to take a position on questions of religious belief or from making adherence to a religion in any way relevant to a person's standing in the political community.[140] The principle of neutrality forms the foundation for the endorsement test. As Justice O'Connor stated:

> We live in a pluralistic society. Our citizens come from diverse religious traditions or adhere to no particular religious beliefs at all. If government is to be neutral in matters of religion, rather than showing either favoritism or disapproval toward citizens based on their personal religious choices, government cannot endorse the religious practices and beliefs of some citizens without sending a clear message to nonadherents that they are outsiders or less than full members of the political community.[141]

An application of the endorsement test is appropriate because it allows for an examination of the government intent in the context of the expression, history, and ubiquity of the government practice similar to that which public forum analysis provides. The similarities between the requirements of the endorsement test and the goals of public forum analysis provide for symmetry in attacking Establishment Clause inquiries. Even a government entity's failed efforts at creating a public forum may go a long way toward satisfying the government's requirements for separating itself from the private speech under the endorsement test. Additionally, the endorsement test allows the Court to focus not only on coercive practice of the government, but also the myriad subtle ways that a government can show favoritism to a particular belief.[142] Only when a test does this can it properly protect the religious diversity of the United States' pluralistic political community.

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139. *See id.* at 636 (O'Connor, J., concurring).

140. *Id.* at 594.

141. *Id.* at 627 (O'Connor, J., concurring).

142. *Alleghany*, 492 U.S. at 627 (O'Connor, J., concurring).

V. The *Santa Fe* Situation

The emotions and arguments surrounding the First Amendment recently erupted in the small Texas town of Santa Fe. During the 1992-93 and 1993-94 school years, Santa Fe Independent School District (SFISD) allowed high school students to read overtly Christian prayers over the public address system at home football games.[143] At each home game, an elected student council chaplain recited a pre-game prayer. In 1995, after the institution of litigation over the pre-game prayer, SFISD adopted a written policy entitled "Pre-Game Ceremonies at Football Games." The final policy read as follows:

> The Board has chosen to permit students to deliver a brief invocation and/or message to be delivered during the pre-game ceremonies of home varsity football games to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition.
>
> Upon the advice and direction of the high school principal, each spring, the high school student council shall conduct an election, by the high school student body, by secret ballot, to determine whether such a statement or invocation will be a part of the pre-game ceremonies and if so, shall elect a student from a list of student volunteers, to deliver the statement or invocation. The student volunteer who is selected by his or her classmates may decide what message and/or invocation to deliver, consistent with the goals and purposes of this policy. Any message and/or invocation delivered by a student must be nonsectarian and nonproselytizing.[144]

The school district's stated goal was to create an opportunity for a student-led prayer or message before each game that was

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143. *See* Doe v. Santa Fe Indep. Sch. Dist., 168 F.3d 806, 809 (5th Cir. 1999), *aff'd,* 530 U.S. __, 120 S. Ct. 2266 (2000).

144. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. __, 120 S. Ct. 2266, 2273 (2000).

acceptable to the courts. The opponents of the policy claimed that the football policy was an attempt to perpetuate the school district's long tradition of overtly Christian prayer at football games. Critics of the SFISD position often justified their positions by citing the primacy of the Establishment Clause over the Free Speech and Free Exercise Clauses or vice versa.[145] This controversial policy is the subject of the Supreme Court's decision.[146]

A. Application of the Integrated Endorsement Test to a Santa Fe-*Style Football Policy*

The Santa Fe-style football policy presents an ideal situation for application of the endorsement test in light of the recent *Pinette* plurality's per se rule for private speech in a designated public forum. Amicus briefs presented on the issue claim that a SFISD-style policy results in the creation of a limited public forum.[147] Additionally, the Court acknowledged the usefulness of determining if SFISD created a public forum in deciding if the resulting speech was public or private.[148] Under the integrated approach proposed by this Note, the first step in the analysis is a determination of whether the district in fact created a public forum.

1. The Per Se Rule: Consequences of the Public Forum's Extent of Use Requirement in *Santa Fe*

The SFISD football prayer policy faced a dramatic hurdle in qualifying as a limited public forum because of its method of selective access. The Supreme Court in *Forbes* stated that a governmental entity does not create a limited public forum when it "allows for selective access for individual speakers."[149] The length of pre-game activities limits the time available for a student message or invocation. Therefore, even if the district intended to create a limited public forum, the time constraints necessitate the selection of

145. *See Id.*, 120 S. Ct. at 2273.

146. *See* Brief for Petitioner at 8, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. __, 120 S. Ct. 2266 (2000) (No. 99-62).

147. *See* Brief of the Rutherford Institute as Amicus Curiae in Support of the Petitioner at 14; *see also* Brief of the Northstar Legal Center as Amicus Curiae in Support of the Petitioner at 3.

148. *See Santa Fe*, 120 S. Ct. at 2275-76.

149. Ark. Educ. Television v. Forbes, 523 U.S. 666, 679 (1998).

a limited number of students for participation in the forum. To facilitate this selective process, SFISD chose to adopt a popular election of an individual from an eligible class of speakers.[150]

The SFISD policy could have escaped the selective access problems associated with obtaining "permission" to access the forum because the school district allowed the class of students to select their representative, rather than the government.[151] However, the selection of a single voice through an election makes any claim of a "generally open"[152] or "indiscriminate"[153] forum use ring hollow. While one could argue that an election creates general access because the election involves a number of individuals, the Court has foreclosed this approach. A process that employs a popular election is a general grant of authority to the majority. As the Court stated in *Santa Fe*, "the majoritarian process implemented by the district guarantees, by definition, that minority candidates will never prevail and that their views will be effectively silenced."[154] The student election does nothing to protect those with minority views; instead, it places those who hold these views at the mercy of the majority. It is the representative of the majority, rather than an entire class of speakers, that has access to the forum. This type of selective access defeats the public forum doctrine's goal of creating a marketplace of ideas.

While granting students access to the public address system one at a time does not preclude the creation of a limited public forum, the selection of a single, popularly-elected representative does not "evince either by policy or practice" any intent to open the pre-game ceremony to indiscriminate use by the student body as a whole.[155] This constitutes selective access—not general access to a class—and does not qualify as the creation of a limited public forum.[156]

This failure by the school district to create a limited public forum makes it more difficult for the district to separate itself from the speech. However, the inability of the district to create a limited public forum should not be fatal. Therefore, the second part of the

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150. *Santa Fe*, 120 S. Ct. at 2272.

151. *See Forbes*, 523 U.S. at 697.

152. *See* Widmar v. Vincent, 454 U.S. 263, 267 (1983).

153. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 47 (1983).

154. *Id.* at 2276.

155. *Id.*

156. *See Forbes*, 523 U.S. at 679.

proposed integrated approach allows the Court to focus its endorsement inquiry on the distance created between the government, the speech, and open access.

2. The Integrated Endorsement Test

While the SFISD policy did not create a limited public forum, the policy does evince an attempt to separate the school district from the speech, making compliance with the Establishment Clause an open question. A policy violates the Establishment Clause if its actual purpose is to support or approve of a religion or if, irrespective of the actual purpose, the policy conveys a message of endorsement or disapproval.[157] Thus, an investigation must begin with a look at the neutrality of a policy.

a. Facial Neutrality

The stated purpose of the SFISD policy is to provide for the solemnization of the event, to encourage good sportsmanship and student safety, and to establish the appropriate environment for the competition.[158] Justice O'Connor's introduction of the endorsement test in *Lynch v. Donnelly* stated that government acknowledgements of religion on public occasions serve "the legitimate secular purpose of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society."[159] The SFISD policy, however, does not require the expression of a religious viewpoint for the purpose of solemnization. It allows for the student who is selected to choose to give an "invocation or message."[160]

The express provision allowing for a purely secular approach evidences neutrality in purpose. The Supreme Court is reluctant "to attribute unconstitutional motives to states, particularly when a plausible secular purpose for the state's program may be discerned from the face of the statute."[161] Furthermore, in *Board of Education*

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157. *See* Lynch v. Donnelly, 465 U.S. 668, 690 (1983) (holding that a message must be examined both objectively and subjectively to determine if it runs afoul of the Establishment Clause).

158. *See* Brief for Petitioner at 3, *Santa Fe* (No. 99-62).

159. *Lynch*, 465 U.S. at 691 (O'Connor, J., concurring).

160. *See* Brief for Petitioner at 23, *Santa Fe* (No. 99-62).

161. Mueller v. Allen, 463 U.S. 388, 394-95 (1983).

of Westside Community School v. Mergens,[162] the Court found that because an act granted equal access to both secular and religious speech on its face, it was "clear that the Act's purpose was not to endorse or disapprove of religion."[163] The *Santa Fe* Court, however, stated that its duty is to look beyond the text of a policy to "distinguish a sham secular purpose from a sincere one."[164]

b. Apparent Purpose

As the integrated approach suggests, the majority in *Santa Fe* utilized the endorsement test to inquire beyond the facial purpose of the policy, into the contextual circumstances surrounding the policy.[165] It is in the application of the endorsement test that the extent of access and the separation of the speech from government control should enter the analysis. The primary area of contention over the neutrality of the SFISD policy is the student selection process.[166] SFISD argued that the method of student selection is further evidence of the neutrality of the policy because it provides additional separation from the State.[167] SFISD proposes that student election of a student to deliver the message or invocation serves the important role of providing an independent, intervening student decision that prevents the program from having the primary effect of advancing religion.[168] *Mergens* and *Widmar* provide support for the proposition that the students can differentiate between private and state-sponsored religious speech. SFISD uses the *Mergens* and *Widmar* Courts' statements on the ability of students to differentiate between government speech and private speech as justification for its football policy. The basis of the district's argument is that students do not check their First Amendment right to free speech at the schoolhouse gate.[169] As the Court said in *Mergens*, "That the Constitution requires toleration of speech over its suppression is no

162. 496 U.S. 226 (1990).

163. *Id.* at 249.

164. Santa Fe Indep. Sch. Dist. V. Doe, 530 U.S. __, 120 S. Ct. 226, 2278 (2000).

165. *See id.* at 2281.

166. *See* Brief for Petitioner at 28, *Santa Fe* (No. 99-62).

167. *See id.*

168. *See id.*

169. *Santa Fe*, 120 S. Ct. 2266, 2275-76 (2000).

less true in our nation's schools."[170] The difficulty develops in distinguishing whether a high school student can perceive the difference between speech the school merely permits and speech it actually endorses.

The *Mergens* Court made it clear that high school students possess the cognitive ability to make the distinction between school-endorsed speech and the toleration of private speech.[171] According to the Court, "The proposition that schools do not endorse everything they fail to censor is not complicated. 'Particularly in this age of massive media information, . . . the few years difference in age between high school and college students [does not] justif[y] departing from *Widmar*.'"[172]

However, Justice Marshall, concurring in *Mergens*, recognized the conundrum faced by public school administrators: "The introduction of religious speech into the public schools reveals the tension between these two constitutional commitments [to the Establishment Clause and the Free Speech Clause], because the failure of the school to stand apart from religious speech can convey a message that the school endorses rather than merely tolerates speech."[173] Given the potential tensions that often accompany the perception of school-endorsed religion, the Court has "shown particular 'vigilan[ce] in monitoring compliance with the Establishment Clause in elementary and secondary schools.'"[174]

The development of a school policy that is neutral toward student expression formed the cornerstone of the Court's decision in *Mergens*. "[S]tudents will reasonably understand that the school's official recognition of the club evinces neutrality toward, rather than endorsement of religious speech."[175] A plurality of the Court concluded that secondary school students are mature enough to understand that a "school does not endorse or support student speech that it merely permits on a nondiscriminatory basis."[176] Hence,

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170. Bd. of Educ. of Westside Cmty. Sch. v. Mergens, 496 U.S. 226, 263 (1990) (Marshall, J., concurring).

171. *Id.* at 250 (O'Connor, J., plurality).

172. *Id.* (quoting Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 556 (1986)).

173. *Id.* at 264 (Marshall, J., concurring).

174. *Id.* (quoting Edwards v. Aquillard, 482 U.S. 578, 583-84 (1987)).

175. *Id.* at 251 (O'Connor, J., plurality).

176. *Mergens*, 496 U.S. at 250 (O'Connor, J., plurality).

SFISD argued that the football policy created the neutrality necessary to satisfy any Establishment Clause concerns.[177]

The decisions in *Mergens* and *Widmar*, however, are easily distinguishable from the situation created by the popular election of a single speaker. *Mergens* involved a situation where a variety of clubs enjoyed school recognition and the benefits associated with the recognition.[178] In *Widmar*, multiple clubs sought use of school facilities.[179] In both situations, the equal access served the core First Amendment purpose of promoting the expression of a variety of viewpoints. "The provision of benefits to so broad a spectrum of groups is an important index of secular effect."[180] The Court makes this distinction to avoid the appearance of government imprimatur of a student's speech.

1) The Method of Student Selection Does Not Comport With Public Forum Principles

The use of a popular election to advance the views of a religious majority goes against the very principles that surrounded the development of the Establishment Clause. One of the purposes of the First Amendment was to withdraw certain subjects from the uncertainty of political life and place them beyond the reach of the majority.[181] To provide access to a forum only through the funnel of a popular vote would be the equivalent of allowing the majority to perpetually close the forum to those holding minority views.[182] "Delegation of one aspect of a ceremony to a [vote] of the students does not constitute the absence of a school's control over [the school event]."[183] At the very least, the government would be placed in the position of enforcing the majority's viewpoint discrimination.[184] By setting up and enforcing a system that perpetuates the ability of the

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177. *See generally* Brief for Petitioner at 28, *Santa Fe* (No. 99-62).

178. *Mergens*, 496 U.S. at 226 (O'Connor, J., plurality).

179. Widmar v. Vincent, 454 U.S. 263, 263 (1981).

180. *Id.* at 274.

181. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.").

182. *See* Swanson, *supra* note 20, at 1432.

183. ACLU of N.J. v. Black Horse Pike Reg'l Bd. of Educ., 84 F.3d 1471, 1479 (3d Cir. 1996).

184. *See* Swanson, *supra* note 20, at 1432.

majority to exclude the minority from expressing its viewpoint in the forum, the school can be seen as endorsing the majority viewpoint.[185]

In *Adler v. Duval County School Board*[186] the Eleventh Circuit espoused a competing view that allowing the students to vote on a graduation message and to select a student speaker did not "automatically place the imprint of the state on the student speaker's . . . message."[187] The majority pointed to the fact that only ten of the seventeen messages delivered under the policy had religious content as proof that the speaker was separate from both the religious whims of the majority and manipulation by the state.[188] Reliance on results that show that more than half of the elections resulted in religious speech, however, does not negate the reality that on all seventeen occasions the religious beliefs of the student body were subjected to a referendum. However, the *Santa Fe* Court pointed out that the student election "does nothing to protect minority views, but rather places the students who hold such views at the mercy of the majority."[189] "[F]undamental rights may not be submitted to a vote; they depend upon the outcome of no election."[190] The fact that a vote came out on the side of secular expression does not change the fact that the policy submits fundamental rights to the ballot box. "The District's elections are insufficient safeguards of diverse student speech."[191]

As Justice O'Connor stated in her definition of the endorsement test, "the Establishment Clause prohibits the government from making adherence to a religion relevant in any way to a person's standing in the political community."[192] By creating and enforcing a method of access to a forum that can perpetuate the exclusion of religious minorities, "the government sends a message to nonadherents that they are outsiders, and not full members of the

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185. *See* Swanson, *supra* note 20, at 1432.

186. 206 F.3d 1070 (11th Cir. 2000).

187. *Id.* at 1081.

188. *See id.* at 1083 (refuting the appellant's argument that the school's policy was facially violative of the Establishment Clause).

189. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. __, 120 S. Ct. 2266, 2276 (2000).

190. *Id.*

191. *Id.* at 2276.

192. Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

political community."[193] Even the plurality in *Pinette* recognized the opportunity for a governmental entity to manipulate a forum:

> Of course, giving sectarian religious speech preferential access to a forum close to a seat of government (or anywhere else for that matter) would violate the Establishment Clause—as well as the Free Speech Clause, since it would involve content discrimination. And one can conceive of a case where a governmental entity manipulates its administration of a public forum close to a seat of government (or within a government building) in such

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193. *Id.* The "'history and ubiquity' of a practice is important because it provides part of the context in which a reasonable observer evaluates whether a challenged practice conveys a message of endorsement of religion." *See* County of Allegheny v. ACLU, 492 U.S. 573, 630 (1989) (O'Connor, J., concurring). SFISD's history of dealing with religion in its schools provides an important insight into how a reasonable observer would view the SFISD football policy.

Religion has long been a flash point in Santa Fe. The majority in the Fifth Circuit recounted two situations as key in understanding this history. *See* Doe v. Santa Fe Indep. Sch. Dist., 168 F.3d 806, 809-10 (5th Cir. 1999), *aff'd* 530 U.S. __, 120 S. Ct. 2266 (2000). First, in April 1993, a Santa Fe seventh-grade teacher handed out flyers advertising a Baptist religious revival. The student asked if non-Baptists were able to attend, "prompting [the teacher] to inquire about her religious affiliation." *Id.* at 810. Upon hearing that she was an adherent of the Church of Jesus Christ of Latter Day Saints, the teacher lectured her about "the non-Christian, cult-like nature of Mormonism, and its general evils." *Id.* This prompted discussion among the student's classmates that compared Mormons to the KKK. *Id.* Second, during the 1992-93 and 1993-94 school years, SFISD had a policy of allowing the student council chaplain to read overtly Christian prayers before all home football games. *Id.* It was only after the initiation of the current litigation that the school district sought to change its policy. *Santa Fe*, 168 F.3d at 810-11. Additionally, the popular media picked up on the conflicts surrounding religion in Santa Fe. A *Newsday* article referred to a situation in Santa Fe where Catholic and Baptist students who demonstrated against the football game prayers were jeered as Satanists. *See* Steve Jacobson, *Prayer Should Not Be Part of Athletics Keeping Church and State Separate Should Be the Rule*, THE NEW ORLEANS TIMES-PICAYUNE, Nov. 28, 1999, at C11. SFISD policies developed from a long-standing tradition of school-sponsored public prayer at football games, as well as a history of open support for evangelical Christianity. *See* Brief for Respondent at 13, *Santa Fe* (No. 99-62). The football policy originally allowed for "prayer," but two months into the litigation the district changed the policy to provide a choice for an invocation or message. *See id.* Even in light of this change, the policy appears to be built on the premise of providing for pre-game prayer as evidenced by the continued popular selection of a student to deliver the invocation or message.

> a manner that only certain religious speakers take advantage of it, thereby creating an impression of endorsement that is in fact accurate.[194]

Hence, allowing the government to make decisions on religion based upon a majority vote violates the very essence of the Establishment Clause.

The Court's decision in *Santa Fe* refines the Court's earlier statement in *Board of Regents v. Southworth*[195] that a popular vote is an ineffective means of producing a neutral policy.[196] There the Court concluded that an election "substitute[d] majority determinations for viewpoint neutrality. . . . The whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views."[197] In *Santa Fe*, the Court clarified this position, stating that "such a majoritarian policy does not lessen the offense or isolation of the objectors. At best it narrows their numbers, at worst it increases their sense of isolation and affront. . . . Access to a forum . . . does not depend upon majoritarian consent."[198]

Furthermore, the scarcity of opportunities to speak is not a justification for allowing a popular vote as a method of granting access to a forum. The Court in *Rosenberger* foreclosed the ability to use scarcity of opportunity as an excuse for circumventing the neutrality requirements.[199] Dealing with a similar claim of scarcity with respect to the university's refusal to allocate student-activity funds to religious organizations, the Court cited the applicability of neutrality in all circumstances:

> The government cannot justify viewpoint discrimination among private speakers on the economic fact of scarcity. Had the meeting rooms in *Lamb's Chapel* been scarce, had the demand been greater than the supply, our decision would have been no different.

194. *See* Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 766 (1995) (stating that situations involving government favoritism in regards to religious expression would be unconstitutional).

195. 529 U.S. 217 (2000).

196. *Id.*

197. *Id.*

198. 120 S. Ct. at 2280.

199. Rosenberger v. Rectors and Visitors of the Univ. of Va., 515 U.S. 819, 835 (1995).

> It would have been incumbent on the State, of course, to ration or allocate the scarce resources on some acceptable neutral principle; but nothing in the decision indicated that the scarcity would give the right to exercise viewpoint discrimination that is otherwise impermissible.[200]

2) Random Selection of Students: A Better Solution

The popular election method of selecting a student speaker outlined in the SFISD policy fails the endorsement test. However, the question of how a governmental entity provides for the selection of individuals for participation in a forum presents an opportunity to illustrate how the Court can extend the principles developed in the public forum analysis and applied in the *Pinette* per se rule to situations where an entity fails to create a forum based on the extent of access. Public forum analysis exists to provide a uniform policy to give a party an equal opportunity of access regardless of the party's viewpoint. It is possible that, even in a forum with limited access, a governmental entity could create a policy that would present an equal opportunity for access.

In *Rosenberger,* the Court stated that a government's neutrality toward religion is a significant factor in upholding governmental programs in the face of an Establishment Clause attack.[201] The Court "rejected the position that the Establishment Clause justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in abroad reaching government program neutral in design."[202] Similarly, the *Santa Fe* Court's problem with the SFISD policy centered on the government's involvement in two aspects of the policy. First, the SFISD policy provides permission for and guidance in holding the election.[203] Second, "the policy, by its terms, invites and encourages religious messages."[204]

When a system of student selection favors those maintaining the majority viewpoint, the method of selection is not neutral. The school district has a responsibility to provide students who espouse a

200. *Id.*
201. *See id.* at 839.
202. *Id.*
203. *See Santa Fe*, 120 S. Ct. at 2276.
204. *Id.*

minority viewpoint a neutral and fair opportunity to access the forum.[205] A policy that selects students on the basis of random selection would serve to provide access to the forum on the basis of criteria other than religion.[206] Such a selection process renders any connection between the school district and possible religious speech tenuous at best.[207]

The random selection of a student speaker from a pool of volunteers for each home game presents the best alternative for avoiding Establishment Clause concerns.[208] Just because the selection of a solitary speaker by majority vote is impermissible, it does not necessarily follow that a constitutional policy would have to guarantee minority access to the forum.[209] In fact, the *Santa Fe* decision states that "the fact that only one student is permitted to give a content-limited message suggests that this policy does little to 'foster free expression.'"[210] The reasoning in the *Santa Fe* decision suggests that the provision of a viewpoint neutral method of selection that opens the forum to all speakers on equal terms and eliminates content-based restriction would be acceptable.[211]

Random selection reduces the likelihood of any perception that the school district has created a procedure that can be

205. *See* Swanson, *supra* note 20, at 1433.

206. *See* Recent Case, *Constitutional Law—Establishment of Religion—Third Circuit Holds that Prayer at Graduation is Unconstitutional Even if it Results From a Student Vote.* ACLU v. Black Horse Pike Reg'l Bd. of Educ., 84 F.3d 1471 (3d Cir. 1996), 110 HARV. L. REV. 781, 784 (1997) [hereinafter Recent Case] (stating that the Supreme Court has held some forms of religious expression at school function acceptable as long as speakers, *i.e.* students, were chosen in a religiously neutral manner).

207. *See id.*

208. *See* Swanson, *supra* note 20, at 1440-41 (suggesting that "the larger the number of students who are elected randomly in addition to the majority-selected speaker, the more likely it is that a court will uphold the selection procedure").

209. *See* Swanson, *supra* note 20, at 1432.

210. 120 S. Ct. at 2279.

211. Such a policy could provide, for example: "The student body may randomly select a different student from a pool of volunteers for a public speaking opportunity before each game. The speaker will have five minutes to address any topic he or she feels is important to the community. The purpose of this policy is to learn how to effectively address a large public gathering and stimulate discussion of a variety of issues. The district in no way endorses the opinions expressed by individual students."

manipulated as a means of endorsing majority religious speech.[212] "In the realm of private speech or expression, government regulation may not favor one speaker over another."[213] Furthermore, a random selection policy creates the opportunity for a different speaker at each of the district's six home games. Thus, there is the potential for a variety of students to access the forum. While a majority may have a stronger voice in the forum under such a policy, government manipulation and majority control of the forum would no longer constitute barriers to access. Any individual holding a minority viewpoint would have the same opportunity to gain access to the forum as an individual holding a majority viewpoint. The assurance that a random selection program is run in a manner that is truly random is the biggest hurdle to the effectiveness of this method.

Once a school district has granted a randomly-selected speaker access to a limited public forum it cannot regulate the student's speech on the basis of viewpoint.[214] Under the principles of the limited public forum, the school district can limit speech to the "limited and legitimate purposes for which the forum was opened,"[215] but the district can "no more prohibit the speaker from delivering a prayer than mandate that prayer occur."[216] Such an appearance of neutrality is especially important in SFISD since the district's history would lead the reasonable observer to believe that the policy was put in place to provide sectarian prayer.[217]

A policy that provides students with the latitude to address the myriad topics outside the control of school officials may not

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212. Random selection provides a better solution than a simple disclaimer. A statement by the government that the views of the speaker are not its own cannot displace the government manipulation of a forum to favor a majority viewpoint. However, a random selection system paired with a disclaimer would help to provide adequate protection. Recent Establishment Clause cases involving equal access to a government forum have advocated the use of a disclaimer as an addition to the creation of a neutral and open limited public forum. *See* Capitol Square Advisory and Review Bd. v. Pinette, 515 U.S. 753, 788 (1995); Rosenberger v. Rectors and Visitors of the Univ. of Va., 515 U.S. 819, 852 (1995); Bd. of Educ. of Westside Cmty. Sch. v. Mergens, 496 U.S. 226, 270 (1990); Widmar v. Vincent, 454 U.S. 263, 276 (1981).

213. *Rosenberger*, 515 U.S. at 828.

214. *See id.* at 829.

215. *Id.*

216. Recent Case, *supra* note 206, at 785.

217. *See Santa Fe*, 120 S. Ct. at 2278 (stating that the district's policy plainly reveals an endorsement of religion through election of a speaker and a message to solemnize the event).

appeal to everyone. Some districts may not wish to risk giving students such expansive permission to address the community. Such a policy does, however, succeed in returning the impression of open and indiscriminate use of a forum. A method of investigating Establishment Clause issues that forces government entities to provide forums that are truly open to all viewpoints best serves the Establishment Clause's purpose of promoting religious freedom and the Free Speech Clause's ideal of creating a marketplace of ideas.

B. The Results of the Integrated Endorsement Test as Applied to Santa Fe

The SFISD policy fails to survive an endorsement test inquiry. The popular election of student speakers places the majority in control of the forum and essentially removes any opportunity for the expression of a minority viewpoint. Additionally, SFISD's traditional support of overtly Christian prayer at football games and other school events demonstrates the endorsement of a particular religious viewpoint.[218] Thus, the policy runs afoul of the Establishment Clause.

SFISD could have improved its chances for surviving endorsement test scrutiny by adopting a policy more closely aligned with the principles of public forum analysis. Providing for the random selection of a student speaker for each game, in addition to reciting a disclaimer, would have created a more tenable claim of neutrality. Even with the district's history of promoting evangelical Christianity, those two policy decisions would show the district's clear intent to disassociate itself from the speech and relinquish institutional control of the channel of communication. Random selection would allow an individual holding a minority viewpoint a neutral and equal opportunity to gain access to the forum and would extinguish many lingering questions as to the motivation of the district.

VI. Conclusion

The adoption of the per se rule espoused by the plurality in *Pinette* would provide some much-needed stability to Establishment Clause jurisprudence. The public forum analysis goals of general

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218. *See id.* at 2279.

access and indiscriminate use of the forum help create a marketplace of ideas, while also eliminating many of the fears of government endorsement of religion in Establishment Clause cases. Furthermore, even when all of the requirements of a designated or traditional public forum are not met, the principles of public forum analysis provide much-needed guidance to the Court and to institutions attempting to avoid Establishment Clause violations. The closer the government entity's policy adheres to the principles of public forum doctrine, the more likely it is to pass constitutional muster. It is here that the endorsement test, as articulated by Justice O'Connor in *Pinette* and utilized by the Court in *Santa Fe*, offers a needed contextual basis for determining if a government policy has the effect of communicating a message of either government endorsement or disapproval of religion.

One of the beauties of Texas high school football is that students and the people in a community feel like they have an ownership interest in their team. Through the use of public forum principles, the Supreme Court can ensure that all students can have a sense of ownership in all aspects of school-sponsored events as well.