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# Texas Cheerleaders and the First Amendment: Can You Cheer for God at a Football Game

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# TEXAS CHEERLEADERS AND THE FIRST AMENDMENT: CAN YOU CHEER FOR GOD AT A FOOTBALL GAME?

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## I. INTRODUCTION—RELIGIOUS DOXOLOGY TAKES CENTER STAGE

The United States was founded upon Christian ideals; yet it was because of the variations of that faith that our Nation's forefathers sought to evade persecution and begin anew in the Americas. While the message "In God We Trust" became the doxology of the governmental infrastructure for the United States, the framers of the Constitution held religious liberties in high regard. The framers ensured that religious persecution exhibited by their European fathers would not be repeated. The framers' intent was to instill the premise that belief in God was critical to establishing a benevolent society, yet receptive to multiple practices of worship, including religions other than Christianity. Citizens of the United States would not succumb to religious persecution, as their ancestors; the state must refrain from establishing any religion.

Free speech and religious expression are foundational concepts that were critical in the formation of the United States Constitution and the history of the Nation. Citizens strive to maintain these liberties and vigilantly seek to protect them. The First Amendment includes language regarding the role the framers thought public entities should have in establishing religion or denying its expression. In concert with various free speech fora, public expression of religious ideals can cause consternation between entities that are pontificating a non-secular message and those charged with ensuring the government does not breach the intent of the Establishment Clause. With a short search of Free Exercise or Establishment Clause contests in United States' jurisprudence, it can be noted that a plethora of cases have been argued and adjudicated. The amount of litigation contested in state and national courts provides the conclusion that while the First Amendment protects these ideals, ambiguity continues as to their pragmatic implementation. The conflicts arising out of these contests are volatile due to the emotions conjured with religious faith and the duty to ensure government organs are not favoring, nor inhibiting, one religion over another.

First Amendment challenges encompassing religious establishment or protection of non-secular viewpoints often require a detailed deconstruction of the facts surrounding the points of contention as the arguments are complex. While Thomas Jefferson's proverbial "wall" separating church and state purports an unambiguous and stationary barrier, litigious contests continue to permeate the public school landscape. Proponents of the

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"wall" are fearful of those whose self-proclaimed mission it is to "save the souls of the lost" and view the school setting as an opportune stage to espouse such tenets. Likewise, affording individuals the right to freely articulate his or her religious beliefs in a public setting is fundamental to American constitutional entitlements.

Due to the varying religious culture throughout the Nation, communities often debate the emphasis religion should entail in one of the most public spheres of influence available, the local public school. As will be noted in this thesis, ambivalent theories regarding religious indoctrination pervade local communities. Courts, especially at the lower level, have been inclined to deviate from postulates previously contrived to address these religious challenges. Because of societal norms and mores, some courts are cavalier in their desire to move away from the theory of stare decisis et quieta non movere (to stand by things decided and not disturb settled points) and establish a return to early American judicial interpretation of religion in public schools.

The lens of permitting religious activities under the guise of free speech doctrine is reflected in the case of cheerleaders at Kountze High School placing religious messages on run-through banners during pre-game ceremonies at football games. The plaintiffs contend that they are employing their private free speech protections under the Free Exercise Clause of the First Amendment. They argue that because they have taken a vote among themselves to approve the messages placed on the banner, a limited public forum has been established, which divorces the school administrators from the activity, thus relieving them from violating the Establishment Clause. The position the cheerleaders have taken and approbated by the District Court is in error and is an attempt to circumvent prior case law to posture for protection of religious activities under free speech doctrine.

## II. A Historical Review of Religion in Public Schools

Following the Nation's inception, courts were quite tolerant of religious practices in the public sphere. Up until circa 1940, the government actually encouraged piety through acts such as Bible readings in school, frequent invocations of God, and physical representations of the Ten Commandments on public buildings.[1] A patriotic metanoia commenced in the 1930s illustrated by the fact that many schools throughout the United States required their students to stand, salute and pledge allegiance to the American flag before school each morning.[2] Many Jehovah's Witnesses became irate with this practice, claiming that it violated the commandment, "You shall have no other gods before me."[3] Jehovah Witness students who complied with the sectarian diktat were suspended and expelled from school for insubordination.[4] As World War II commenced across Europe

1. Nathan L. Essex, School Law and the Public Schools 15 (5th ed. 2012).
2. Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 592 (1940).
3. *Exodus* 20:3 (New International Version).
4. *Minersville Sch. Dist.*, 310 U.S. at 592.

and Asia, patriotic fervor increased throughout the United States, which left little tolerance for the Jehovah's Witness's perceived lack of nationalistic support.[5] As the realization that the United States was set to become a primary participant in the war, intolerance for the Jehovah's Witness's position increased and in some situations became violent.[6] Seeing no other recourse, the Jehovah's Witness denomination turned to the Supreme Court for shielding in a case that saw three children of the Gobitis family expelled from school when they refused to participate in the Pledge of Allegiance.[7] The family claimed that the Free Exercise Clause protected their religious objections to the ceremony.[8]

The Supreme Court validated the school district's position, believing that rituals designed to "secur[e] effective loyalty to the traditional ideals of democracy"[9] were crucial. In contrast to the normal démarche of the Supreme Court, three years later, it examined the issue again.[10] Three new justices and increasing violence toward the Jehovah's Witnesses gave cause for the Court to reconsider the *Minersville School District v. Gobitis* decision.[11] *West Virginia State Board of Education v. Barnette* reversed *Minersville School District*, concluding that an individual does not have to say what he or she does not believe.[12] The Court postulated that freedom of religion and speech are of a higher priority than national security interests, thus children of Jehovah's Witnesses could not be required to participate in the Pledge of Allegiance.[13]

In 1944, the Supreme Court fortified its posture by deciding a case regarding the ability of the government to decide the merits of any religion.[14] Guy Ballard was the leader of a religious movement entitled the "I Am Movement."[15] Ballard contended that he had personal encounters with Jesus and Saint Germain and was able to heal individuals outside of

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5. RONALD B. FLOWERS, THAT GODLESS COURT? SUPREME COURT DECISIONS ON CHURCH-STATE RELATIONSHIPS 27 (2d ed. 2005).

6. *Id.*

7. *See Minersville Sch. Dist.*, 310 U.S. at 592.

8. *Id.*

9. *Id.* at 598; *see also* FLOWERS, *supra* note 5, at 27 (Justice Felix Frankfurter's majority opinion declared that a national interest of the highest importance was at stake; the nation needed loyalty and unity of people and a flag salute is a primary way of achieving it. Justice Frankfurter went further to say, "[n]ational unity is the basis of national security . . . . The ultimate foundation of a free society is the binding tie of cohesive sentiment . . . . 'We live by symbols.' The flag is the symbol of our national unity, transcending all internal differences, however large, within the framework of the Constitution.").

10. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

11. *Id.*

12. *Id.*

13. *Id.* at 640–42 (Mindful of the fascist wave that was overtaking Europe, the Court was very cognizant of the state's intrusion into various liberties. Justice Robert Jackson eloquently identified the scope of liberties Americans enjoy by writing, "[b]ut freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order. If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").

14. United States v. Ballard, 322 U.S. 78, 81 (1944).

15. *Id.*

normal medical practice.[16] Based upon his self-proclaimed religious skills, he enticed people to send money in support of his mission.[17] The government conceived a theory that Ballard was defrauding those that were financially supporting him by claiming a falsity in his religion.[18] Thus, the query was, "does a civil court or the government have the right to evaluate the religious beliefs of a person or a group?"[19] The Court concluded that indeed the government did not have the right to evaluate the religious validity of an individual or group.[20]

The trend of prohibiting government interference in the rights of individuals to espouse their religious philosophies in the public sphere remained fairly intact for roughly the next two decades. Based upon a case adjudicated in 1940,[21] the Supreme Court established a framework by which it would evaluate religious liberties. The theory of "clear and present" danger would become the standard to the early 1960s.[22] Clear and present danger addressed the government's legal ability to chill individual or group rights to religious pontification in public areas.[23] In order for the government to prohibit religious activities, it had to show the activity presented an immediate threat to public safety, peace or order.[24] No longer could the government prohibit religious activity based upon the premise that it presented "some" danger to society. The government had to establish that the religious activity "presented a grave, significant, and current danger" before it intervened.[25] Ensuring individuals their right to espouse religious tenets was of primary importance during this time.

In the early 1960s, the sentiment for accepting religion in public schools began to alter. Judicially, the courts became less tolerant about allowing religion in schools, choosing instead to strengthen the Establishment Clause. Highlighting this period was the abeyance of requiring students in public schools to recite daily prayers. In 1962, the parents of ten students sued the New York schools challenging the constitutionality of a state law requiring public schools to start each day with a state-authorized prayer drafted by the State Board of Regents.[26] Justice Hugo Black, writing for the majority, stated

> [W]e think that the constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the

16. *Id.*
17. *Id.*
18. *Id*
19. FLOWERS, *supra* note 5, at 29.
20. *Ballard*, 322 U.S. at 81–83.
21. Cantwell v. Connecticut, 310 U.S. 296, 310–11 (1940).
22. FLOWERS, *supra* note 5, at 25.
23. *Id.*
24. *Id.*
25. *Id.*
26. Engle v. Vitale, 370 U.S. 421, 423 (1962).

> American people to recite as part of a religious program carried on by government.[27]

Limiting state-sponsored prayer continued to permeate the Supreme Court's docket as they negated a law in Pennsylvania, which required that at least ten verses from the Holy Bible be read without comment at the beginning of each school day.[28] During this period, it is apparent that courts, in general, held more weight for the Establishment Clause than the Free Exercise Clause. Ensuring the state did not become entangled within private religious practices was more important than ensuring Free Exercise rights were protected.

Various state legislatures and religious institutions sought to circumvent the chilling of prayer and Bible reading in public schools.[29] Praying as an individual was never in doubt, as long as it did not interrupt the regular school activities.[30] Monitoring individual worship would be near impossible to regulate, and it would violate the Free Exercise Clause, clashing with the intentions of the framers of the Constitution. In 1985, the Supreme Court adjudicated on this very notion.[31] In 1978, the State of Alabama passed a law that established a period of silent meditation in public schools, which could be used for any type of reflection (secular or non-secular) by the individual student.[32] In 1981, the Alabama Legislature amended the act to include the phrase, "or voluntary prayer."[33] The Court held that the only logical conclusion for including this phrase was to encourage students to pray.[34] Many states currently have laws authorizing a moment of silence for prayer or meditation in public schools, which may withstand scrutiny due to the sentiment that there is not a legislative intent to impose prayer.[35] These situations will continue to be reviewed on a case-by-case basis.

Understanding the cultural background and judicial history of the contention between the Free Exercise Clause and the Establishment Clause is crucial to interpreting the facts and overall meaning of the *Kountze* case.

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27. *Id.* at 425.

28. *See* School Dist. of Abington Twp. v. Schempp, 374 U.S. 203 (1963) (determining that schools filled with children provide a captive audience for religious indoctrination and therefore would hold contrary to constitutional intent; even if the schools provided for an opt-out provision, this would not correct the constitutional defects).

29. Wallace v. Jaffree, 472 U.S. 38, 61 (1985).

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *See, e.g.*, FLA. STAT. § 1003.45(2) (2013) ("The district school board may provide that a brief period, not to exceed 2 minutes, for the purpose of silent prayer or meditation be set aside at the start of each school day or each school week in the public schools in the district"); *see also* Brown v. Gilmore, 258 F.3d 265, 270, 276 (4th Cir. 2001) (holding that a Virginia silent prayer statute authorizing a "daily observance of one minute of silence" in all classrooms so that pupils may "meditate, pray, or engage in other silent activity" was neutral toward religion).

The introduction of this thesis is intended to define the history of the Nation's judicial interpretation of religious celebration in public schools. The post-war period solidified the notion that those representing state organs, especially public schools, should employ caution. Keeping state-sponsored religion separate from public schools was an important tenet of the Court. The individual liberties associated with practicing religion at school were notably protected, yet restrictions were placed upon the school as to its allowance to encourage religious moments.

## III. BACKGROUND—CHEERLEADERS ROOT FOR GOD

In September 2012, Kountze, Texas became a platform for a First Amendment challenge alleging a public school chilled the rights of student athletes to exercise their individual and collective constitutional guarantee under the Free Exercise Clause to practice a specific religion.[36] Cheerleaders often construct a "run-through sign," containing a sectarian message of encouragement (i.e. Go Hawks! or Beat the Eagles!), which the players advance through as they enter the competition arena. Run-through signs are a traditional form of school spirit throughout the nation and are a widely accepted practice of school spirit. The cheerleaders in Kountze, Texas departed from the typical secular tradition of these messages to promote specific sectarian content including Biblical verses.[37]

The superintendent, concerned the school was violating the Establishment Clause, requested a school administrator announce during school hours that the cheerleaders would henceforth be prohibited from including their religious messages on the run-through banners.[38] The posture by the school gave cause to the cheerleaders, represented by their parents, to argue the school was seeking to censor their speech in an unconstitutional manner.[39] Judge Steven Thomas of Hardin County granted a temporary injunction for the cheerleaders on October 18, 2012 based on three primary points: "1) A cause of action against the defendants exists; 2) Plaintiffs have a probable right to the relief sought; and 3) Plaintiffs will suffer a probable, imminent, and irreparable injury in the interim."[40] The court noted that the "Plaintiffs have no other adequate remedy at law because no amount of money can compensate them for the loss of their constitutional and statutory rights."[41] The court furthered the support for an immediate injunction citing the rights of a plaintiff to receive a permanent injunction for the perceived or real threat of injury.[42] Therefore, the cheerleaders were permitted to continue placing the religious messages on the run-

36. Order on Plaintiff's Application for Temporary Injunction at 4, Matthews v. Kountze Indep. Sch. Dist., No. 53526 (Dist. Ct. Tex. Oct. 18, 2012).

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id*; *see* TEX. CIV. PRAC. & REM. § 106.002(a) (West 1985) ("[T]he person aggrieved by the violation or threatened violation may sue for preventive relief, including a permanent or temporary

throughs for the remainder of the football season with a ruling set for June 2013.[43]

The plaintiffs' argument that the school had unconstitutionally prevented them from displaying their religious message was couched in the Free Exercise Clause, free speech doctrine, and equal protection of the law.[44] The plaintiff cheerleaders argued that their team was a non-curricular activity that did not intend to impart knowledge or skills on students; instead it was a fun activity encouraging school spirit.[45] The cheerleaders practiced on their own time, but never during the school day.[46] The Application for Permanent Injunction went to great measure to establish a detachment between the cheerleaders and the school in any official capacity.[47] The cheerleaders managed themselves with a member of the team leading the squad each week.[48] Two faculty "sponsors" were present at each practice in a non-participatory, custodial manner.[49] The contention described by the plaintiffs makes a concerted effort to eliminate the perceived or real association that the school has any responsibility for this organization, thus making them exempt from administrators dampening their free speech rights. All supplies required for the run-through banners were purchased with private funds, again, attempting to disassociate the activity from the auspice of the school.[50] Because this non-secular gemeinschaft is managed independently of the school, the plaintiffs argue they qualify to use the facility in a manner consistent with a limited public forum.[51]

On May 8, 2013, the district court in Hardin County executed a summary judgment order that confirmed the original injunction allowing the cheerleaders to place religious messages on the run-through banners.[52] The order was succinct in declaring that the cheerleaders' action did not create, nor would create, "an establishment of religion in the Kountze community."[53] In addition, the court furthered the contention by claiming the actions of the cheerleaders did not violate the Establishment Clause.[54] The *Kountze* decision fails to appropriately apply case law that has established precedence in religious contests and is a thinly-veiled attempt to employ judicial activism to perforate the separation of church and state.[55]

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injunction"); *see also* TEX. CIV. PRAC. & REM. § 110.005(a)(2) (West 1999) (a grievant may request "injunctive relief to prevent the threatened violation or continued violation").

43. Order on Plaintiff's Application for Temporary Injunction at 4–22, *Kountze Indep. Sch. Dist.*, No. 53526 (Dist. Ct. Tex. Oct. 18, 2012).

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. Summary Judgment Order at 2, *Kountze Indep. Sch. Dist.*, No. 53526 (Dist. Ct. Tex. May 8, 2013).

53. *Id.* at 1.

54. *Id.*

55. *Id.*

The *Kountze* conundrum is a quality example of the permutations of prior case law into the theory of religious activism in limited public fora enjoying the protection of free speech. In order to appreciate the court's acceptance of religion as speech, an acute examination of the claims by the plaintiff is required.

The foundation of the complaint relies on the hypothesis that the religious messages placed on the banners do not include the school administration's endorsement of the act. The plaintiffs' intentional exclusion of the administration's sanction permits them to claim their actions fall under free speech protection, thus the district does not have the authority to chill their rights to place religious messages on the banners. The plaintiffs' conclusion neglects important precedential concepts and makes numerous assumptions.

In their complaint, the cheerleaders broadly disassociate themselves from the auspice of the school's jurisdiction in order to establish themselves as a sovereign community with access and protection afforded an individual or group in a limited public forum. The plaintiffs enumerate multiple reasons as to why they are not associated with the school: tryouts judged by college cheerleaders, materials purchased by private donors, and faculty sponsors that serve in a custodial capacity are justifications for incorporation into free speech protection.[56] They contend that they have a constitutional right to control the content of the banner and are liberated from governmental control.[57]

## IV. Public Fora–The Stage for Free Speech

The high school football field is the stage where this contest occurs, yet first, it must be ascertained as to what type of forum a school-sponsored football game constitutes. The cheerleaders contend they have engaged in private speech because school officials were not associated with the selection of the team, nor has the school sanctioned the activity because the cheerleaders held a team vote as to whether or not to display the religious message.[58] The school did not open its football field for expression by any other students, especially at a school-sponsored activity.[59] These facts reduce the ability to employ the argument that the school established a limited public forum at the football game permitting the cheerleaders to place religious messages on their signs.

The Supreme Court recognized that there are various public fora where freedom of speech may be exercised, and it established the "public forum analysis."[60] A limited public forum is established when the school

56. *Id.*

57. *Id.*

58. Order on Plaintiff's Application for Temporary Injunction at 4–22, *Kountze Indep. Sch. Dist.*, No. 53526 (Dist. Ct. Tex. Oct. 18, 2012).

59. *Id.*

60. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45, 103 S. Ct. 948, 955 (1983) (holding that there are degrees of freedom of speech dependent upon the type of forum where

opens its facilities for speech or expression outside of non-school hours.[61] "The school is not required to create this type of forum, but once created, it is subject to the same regulations as a traditional public forum, and any restraint on speech must pass a strict scrutiny analysis."[62] A limited public forum exists if: "(1) there is a governmental interest in creating such a forum, or (2) outsiders seek access to the school and there is evidence that wide access has been granted before."[63] If the school allows access to its facilities by non-curricular communities, it must conform to the non-discrimination model.[64]

Should the school establish a limited public forum, it must comply with the Equal Access Act (EAA).[65] For any secondary school that receives federal funds and has established a limited public forum, the school must ensure a fair opportunity for all student groups to meet in the forum without regard to "the religious, political, philosophical, or other content of the speech at such meetings."[66] A secondary school that has created a limited public forum must allow groups to meet, as long as:

- The meeting is voluntary and student-initiated;
- Teachers or other school employees do not sponsor the group;
- School employees do not promote, lead or participate in a meeting;
- School employees are present at religious meetings only in a supervisory or non-participator capacity;
- The meeting does not materially and substantially interfere with the orderly conduct of educational activities within the school.[67]

Non-school persons may not direct, conduct, control, or regularly attend activities of student groups.[68] Schools may reject an application for a group to use school facilities if those activities cause "material[ ] and substantial[ ] interfere[nce] with the orderly conduct of educational activities within the school . . . ."[69] Schools may decline to provide equal access only

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the speech was delivered; three major categories were defined: traditional public forum, limited public forum and non-public forum).

61. *Id.*

62. KERN ALEXANDER & M. DAVID ALEXANDER, AMERICAN PUBLIC SCHOOL LAW 431 (8th ed. 2012).

63. *Id.*

64. *See* Lamb's Chapel v. Ctr. Moriches Union Free School Dist., 508 U.S. 384, 395 (1993) (holding that where a public school grants access to its facilities during non-school hours to secular organizations, it could not prohibit access to religious organizations simply because of the religious content of the activities to be engaged in by those organizations); *see also* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995) (a university's refusal to fund a student publication because the publication addressed issues from a religious perspective violated the Free Speech Clause); *see also* Good News Club v. Milford Centr. Schools, 533 U.S. 98, 119–20 (2001) (finding that when the state establishes a limited public forum allowing community use of school facilities after school, the state may not discriminate against speech on the basis of viewpoint and, accordingly, excluding a private Christian organization from use of facilities for meetings where children were taught moral lessons from a Christian perspective through live storytelling and prayer violated the Free Speech Clause of the First Amendment).

65. 20 U.S.C.S. § 4071(a) (LexisNexis 2014).

66. *Id.*

67. *Id.*

68. DAVID L. STADER, LAW AND ETHICS IN EDUCATIONAL LEADERSHIP 43 (2d ed. 2013).

69. 20 U.S.C.S. § 4071(c)(4) (LexisNexis 2014).

where there would be a clear and significant inference of endorsement.[70] While several points of this description reinforce the cheerleader's claim, a primary component that is absent is the capturing of an audience that may object to their religious views. The Ninth Circuit held that a student may not lead a school assembly in prayer in which attendance was voluntary.[71]

## V. Free Speech Protection for the Cheerleaders

Football games are a quintessential traditional school-sponsored activity that many high schools throughout the nation conduct on a regular basis. Various activities occur at these games, which are open to members of the student body. In fact, schools encourage participation by the students and community with great regularity. Kountze High School did not passively open a public location (the football field) for multiple speakers to express various messages. In contrast, the argument proffered by the cheerleaders is that the school authorized a single group to decide (presumably by a majority vote, yet not specified) what messages may be placed on the banners on public property without any official school guidance,[72] thereby enhancing the contention that the cheerleaders are, in fact, a private group.

The act of placing religious messages on the banners raises serious Establishment Clause issues. High school football games are a quintessential school-sponsored activity, and players running through the banners are often a part of that activity to enhance school spirit. Therefore, it is reasonable for any objective outside observer to conclude that the cheerleaders and the banners they created bear the imprimatur of the school. Naturally, the players and cheerleaders don uniforms that contain the school colors and mascots. The Fourth Circuit Court noted that by its very nature, "[a] school mascot or symbol bears the stamp of approval of the school itself," and to avoid affronting the students of the school in attendance at the game is a legitimate concern.[73] A natural disconnect exists between the cheerleaders and the school, yet the plaintiffs are attempting a circuitous maneuver around the notion that they are coupled with the school.

Freedom of speech is an extremely protected right in the United States. Religious speech, couched in free speech doctrine, is notably protected as well. Students in the public schools do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[74] The Court went further to articulate the point that schools do not have a

70. Culbertson v. Oakridge Sch. Dist. No. 76, 258 F.3d 1061, 1065 (9th Cir. 2001).

71. Collins v. Chandler Unified Sch. Dist., 644 F.2d 759, 762 (9th Cir. 1981).

72. Vikram David Amar & Alan E. Brownstein, *The Establishment Clause and the Free Speech Clause in the Context of the Texas High School Cheerleader Religious Banner Dispute*, JUSTIA.COM, (Nov. 12, 2012), http://verdict.justia.com/2012/11/09/the-establishment-clause-and-the-free-speech-clause-in-the-context-of-the-texas-high-school-cheerleader-religious-banner-dispute (last visited Mar. 28, 2014).

73. Crosby v. Holsinger, 852 F.2d. 801, 802 (4th Cir. 1988).

74. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

right to punish students for expressing their views on public school premises, irrelevant of the speech's location, unless the administration has reason to believe such expression will interfere with the work of the students.[75] Clearly, a school need not tolerate student speech that is inconsistent with its mission.[76] School facilities may be deemed to be public forums, only if school authorities have, by policy or practice, opened those facilities for indiscriminate use by the general public. In *Walz ex rel. Walz v. Egg Harbor Township Board of Education*, a parent sued the district claiming that a pre-kindergarten holiday party created a traditional public forum when students were allowed to exchange gifts.[77] However, one student was prohibited from exchanging gifts due to the fact that it contained religious messages.[78] The football field at Kountze High School was decidedly being used for school-sponsored activities (football games) with the school providing financial, organizational, and human support for the event. The school did not intend for the pre-game ceremonies to become a limited public forum. The plaintiffs have misapplied several of their points to draw the conclusion that a limited public forum was established.

In 1988, the Supreme Court adjudicated a case relative to a school district's authority to control student speech.[79] *Hazelwood v. Kuhlmeier* settled a significant contest between administrators endorsing the mission of the school through censorship and student journalism students claiming a First Amendment violation.[80] The school administration failed to publish two stories: the first story described three students' experience with pregnancy and the second "discussed the impact of divorce on students at the school."[81] The principal charged with screening the articles duly noted that even though the students who were pregnant were not identified in the story, there was enough information provided that identification was probable.[82] The principal was secondarily concerned that the references made about "sexual activity and birth control were inappropriate" for the age of students.[83] The principal was concerned for the parents identified in the story and conjectured that the appropriate thing to do was to offer the parents identified an opportunity in the story to comment.[84] "[T]he First Amendment rights of students in the public schools 'are not automatically coextensive with the rights of adults in other settings' and must be applied in light of the special characteristics of the school environment."[85] "A

75. *Id.* at 508.

76. *See* Boroff v. Van Wert City Bd. of Educ., 220 F.3d 465, 466 (6th Cir. 2000) (extending the boundaries of *Hazelwood* to include a Marilyn Manson t-shirt that promoted values that were inconsistent with the mission of the school; the school was permitted to ban the wearing of these t-shirts even though there was no proof of disruption).

77. Walz ex rel. Walz v. Egg Harbor Twp. Bd. of Educ., 342 F. 3d. 271, 274 (3d Cir. 2003).

78. *Id.*

79. Hazelwood v. Kuhlmeier, 484 U.S 260, 262 (1988).

80. *Id.*

81. *Id.* at 263.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 266 (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986)).

school need not tolerate student speech that is inconsistent with its 'basic educational mission,' even though the government could not censor similar speech outside the school . . . ."[86] "[S]chool facilities may be deemed to be public forums only if school authorities have 'by policy or by practice' opened those facilities 'for indiscriminate use by the general public,' or by some segment of the public . . . ."[87] "[S]chool officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community . . . ." if it runs anathema to the school's mission.[88]

A couple of points need to be analyzed in order to determine whether the speech had the endorsement of the school. Following the *Hazelwood* decision, free speech cases depended on the following issues: Did the speech occur as part of the curriculum or in a situation where it might be perceived as having the endorsement of the school? If not, the case will be resolved based on the *Tinker* test. If so, did school policy, either explicitly or implicitly by longstanding practice, indicate that the school-sponsored publication or event is a designated public forum? If the answer is yes, the *Tinker* doctrine again applies. "[I]f the school publication has been maintained as a non-public forum, then the doctrine announced in *Hazelwood* applies.[89] If the censorship had "no valid educational purpose," the First Amendment rights of students have been violated.[90]

Whether the free speech activity constitutes a designated public forum for a school-sponsored curricular activity has been controversial. A school in Florida invited students to paint murals on plywood separating hallways for a construction project.[91] Some students elected to paint religious-themed pictures that administrators requested be painted over as they purported the pictures violated the Establishment Clause.[92] The students charged the administration was violating the Free Exercise Clause.[93] A major tenet the court was forced to address was whether the activity was curricular.[94] Because a faculty supervisor was present and the essence of the project was to promote appreciation for art and school spirit, the court in fact concluded that the activity was curricular.[95] Suppression of the religious murals was permissible because it was not based on the viewpoint expressed by the mural but rather on content.[96] Referring back to the Kountze cheerleaders, the plaintiffs attempt in their complaint to posture that the supervision provided by the adults, who were faculty "sponsors," was completed in a perfunctory manner. Even though these sponsors were

86. *Id.* (quoting *Bethel*, 478 U.S. at 685).
87. *Id.* at 267 (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 47 (1983)).
88. *Id.*
89. MICHAEL IMBER & TYLL VAN GEEL, EDUCATION LAW 136 (4th ed. 2010).
90. *Id.*
91. Bannon v. Sch. Dist. of Palm Beach Cnty., 387 F.3d 1208, 1210 (11th Cir. 2004).
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.* at 1217.

mothers of the cheerleaders, the fact that they are faculty cannot be dismissed. Secondly, in *Bannon v. School District of Palm Beach Company*, the court determined that the primary impetus for the activity was art and school spirit. A correlation can be ascertained connecting the cheerleaders' run-through banners, designed to promote school spirit, with the *Bannon* decision. The cheerleaders, bearing the imprimatur of the school and developing artwork intended to increase school spirit, are undoubtedly making themselves representatives of the school at a school-wide event in which the school has not established a limited public forum.

## VI. TANGIBLE SECTARIAN OBJECTS – DO RELIGIOUS ICONS GO TOO FAR?

By the nature of placing religious messages on run-through banners, the cheerleaders display an object at a public school event to disseminate their missive. Excluding secular purposes, such as comparative study or cultural examinations, public schools must refrain from engaging in promoting religion through the display of symbols, icons, and messages. "Public schools may not display religious exhibits or other visual materials."[97] Displaying any type of religious picture or message could give the perception that the school is endorsing or establishing a certain type of religion. A school district and municipality in New Mexico used a logo, which consisted of three interlocking crosses surrounded by a sun.[98] The symbol was placed on various murals, paintings, and school vehicles.[99] Residents of the district brought separate federal challenges against the city and school district citing they were public entities that engaged in proselytizing to their respective constituents.[100] The court held that the district did not intend to use the logo in any sectarian means.[101] The image was part of the city's history and was not intended to endorse Christianity.[102] Though, in contrast, if secular intentions are not easily discerned, there is a strong chance courts will find a violation.

Various religious icons have been somewhat simple for the courts to declare a violation of state organs endorsing religion. A nativity scene placed on public school property is an indisputable example of a public school crossing the boundary between church and state, thus violating the Establishment Clause.[103] In spite of an outlier case in Texas, courts have been consistent regarding the exclusion of the Ten Commandments from public entities.[104] The Supreme Court held in *McCreary County Kentucky v. American Civil Liberties Union of Kentucky* that framed copies of the

97. NATHAN L. ESSEX, SCHOOL LAW AND THE PUBLIC SCHOOLS 27 (5th ed. 2012).
98. Weinbaum v. City of Las Cruces, 541 F.3d 1017, 1035 (9th Cir. 2008).
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. ESSEX, *supra* note 97, at 27.
104. Van Orden v. Perry, 351 F.3d 173, 182 (2005).

Ten Commandments on two Kentucky courthouses amounted to an accommodation of Christianity and a violation of church and state separation.[105] Juxtaposing *McCreary* with *Van Orden v. Perry* illustrates the complexity and sensitivity associated with the issue of displays on public property, especially school grounds.[106]

The complaint the cheerleaders filed against the school deviated from the paradigm previously described.[107] The plaintiffs relied upon the notion that all of the materials used to produce the run-through banners were purchased with private funds, thus bisecting the speech act from the school endorsing the exhibit by amplifying school funds were not associated with the speech on the banners.[108] If school monies had been directly attributable to the cheerleaders, it would be easily determined that the school was providing support for religious activities, which would be a luculent violation of the Establishment Clause. Establishing that school funds were not being used for purchasing materials to construct the banners was a crucial component for the plaintiffs' argument. However, the theory espoused in the complaint maintains very little weight. The Supreme Court disallowed a Kentucky statute that required all public schools to post the Ten Commandments, and the display copies were paid for with private funds.[109] The Kountze cheerleaders are on tenuous ground with the sign. As a religious object, the sign is impermissible. The fact that private donations sponsored the religious icons on public grounds is irrelevant.

## VII. GOVERNMENTAL COERCION – THE TEST FOR THE ESTABLISHMENT CLAUSE

As cases involving Establishment Clause questions matriculated through the American Court system, the Supreme Court, in adjudicating these cases formulated three tests designed to assess the coercive effect governmental policies have on establishing state-sponsored religion. The

105. McCreary Cnty. Ky. v. Am. Civil Liberties Union of Ky., 354 F.3d. 438, 461–62 (2005).

106. *Van Orden*, 351 F.3d at 182 (The Court held that a monument erected in 1962, which contained the Ten Commandments served a less blatant purpose, serving more historical and educational purposes. The statue was located among other secular items on Capitol grounds; those who opposed the monument contended that the first four or five commandments referenced solely Judeo-Christian religion, which was offensive to non-Judeo-Christians. Justice Breyer noted in the majority opinion that the statue in Texas had been standing for over forty years, whereas the Ten Commandments posted in Kentucky drew the ire of citizens as soon as they were posted.); Contra Washegesic v. Bloomingdale Pub. Sch., 33 F.3d 679 (6th Cir. 1994) (A portrait titled Head of Christ painted by Warner Sallman was solely hung at a conspicuous intersection in a high school hallway for thirty years and was held to be in violation of the Establishment Clause, thus requiring its removal.).

107. *Id.*

108. *Id.*

109. *See* Stone v. Graham, 449 U.S. 39 (1980) (insisting that the statute in question serves a secular legislative purpose, the Court found that the display had no educational function but that the preeminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature; the Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths and no legislative recitation of a supposed secular purpose can bind us to that fact).

*Lemon* test[110] was contrived from a case in 1971 that established a tri-partite examination to assess Establishment Clause claims. The three-part test stated that governmental action must: 1) Have a secular purpose; 2) have a primary effect that neither advances nor impedes religion; and 3) avoid "excessive . . . entanglement with religion."[111] Since this case, the *Lemon* test has been used with consistency, yet some Justices appear to be growing in their dissatisfaction with its separationist tenets.[112]

Some Supreme Court Justices are more inclined to employ an endorsement standard, which strikes down governmental action if an objective observer views an act as having the purpose or effect of endorsing or disapproving of religion. Lastly, the Court has relied upon the coercion test, which bases an Establishment Clause violation on whether there is direct or indirect governmental coercion on individuals to profess a faith.[113] As Establishment Clause contests continue to arise, American jurisprudence will rely on various coercion lenses to determine the extent of the violation.

## VIII. Religious Messages at Extra-Curricular Activities: Conflict at the Circuit Courts

While multiple components to the *Kountze* contest have been addressed in this thesis contrary to the district court's decision, the actual act of a proven school-associated organization (the cheerleaders) utilizing an extra-curricular venue to amplify their religious message is jurisprudentially significant. The plaintiffs attempt to characterize the messages, on the run-through banners, as permissible because the cheerleaders vote weekly as to what message will be displayed. Having cheerleaders vote on the inclusion of religious messages on the banners requires reference to a plethora of jurisprudence. The first segment to address is students voting for various religious messages to be stated or displayed at extra-curricular activities. As with the Kountze cheerleaders, they voted to determine what message would be placed on the banners.[114] To amplify this notion, the election was done solely with the cheerleaders and not the entire student population.[115]

In *Lee*, the Court held that it was unconstitutional for a district in Rhode Island to have a policy, which allowed a principal to invite clergy members to give a non-sectarian invocation or benediction at middle and

110. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

111. *Id.* at 612–13.

112. *See* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 395 (1993) (comparing the *Lemon* standard to a "ghoul" that rises from the dead "after being repeatedly killed and buried") (Scalia, J., concurring).

113. *See* Lee v. Weisman, 505 U.S. 577 (1992).

114. Order on Plaintiff's Application for Temporary Injunction at 4–22, Matthews v. Kountze Indep. Sch. Dist., No. 53526 (Dist. Ct. Tex. Oct. 18, 2012).

115. *Id.*

high school graduation ceremonies.[116] The Court concluded that a principal's invitation to a rabbi to present a non-sectarian prayer at a high school graduation violated the Establishment Clause.[117]

The Court majority reasoned that the policy had a coercive effect: students felt peer-pressure to participate in the devotionals that were conducted at the school-sponsored graduation ceremony. The Court was not persuaded that the voluntary nature of graduation exercises eliminated the constitutional infraction; students should not have to make a choice between attending their graduation ceremony and respecting their religious convictions.[118]

The cheerleaders established a coercive environment on two facets. First, the banners with the religious messages are created for the football team to run through as they enter the playing area. A football player or cheerleader that does not endorse the Judeo-Christian religion may feel compelled to participate in this action, forcing the athlete to set aside his or her religious beliefs to participate in the activity. Certainly those that did not vote for the action are having their minority viewpoint suppressed. Secondly, the banners are displayed at a football game, which entices all students and community members to attend. As stated earlier, football games are a quintessential part of American high school norms and community culture. The posting of such religious messages may cause great discomfort for those participating or attending the game, in that some individuals may opt not to participate because he or she does not espouse the messages on the banner. In essence, the student body member, whether an athlete or not, is forced to make a decision between his or her religion and participating. Those who purport that religious moments are appropriate to be included at school events have attempted circuitous maneuvers by initiating the activity through an election of the student population.

A circuit split exists over how to address this issue. Some federal courts, like the Fifth Circuit, seemed willing to accept this postulate when it t held that a student-led, non-sectarian graduation prayer, delivered by students, did not violate the Establishment Clause.[119] Additionally, the Eleventh Circuit Court in Alabama, addressed the issue of a statute that was challenged permitting nonsectarian, non-proselytizing, student-initiated

116. *See Weisman*, 505 U.S. at 577.

117. *Id.*

118. MARTHA M. MCCARTHY, NELDA H. CAMBRON-MCCABE & SUZANNE E. ECKES, PUBLIC SCHOOL LAW: TEACHERS' AND STUDENTS' RIGHTS 31 (2004).

119. *See* Jones v. Clear Creek Indep. Sch. Dist., 930 F.2d 416 (5th Cir. 1991), *vacated and remanded*, 505 U.S. 1215 (1992), *on remand*, 977 F.2d 963 (5th Cir. 1992) (affirming a district court opinion declaring that a school district's policy permitting graduating seniors to elect student volunteers to deliver nonsectarian, non-proselytizing invocations at graduation ceremonies did not violate the Establishment Clause); *see also* Doe v. Madison Sch. Dist. No. 321, 147 F.3d. 832 (9th Cir. 1998), *vacated on procedural grounds*, 177 F.3d. 789 (9th Cir. 1999) (holding constitutional before being vacated for mootness, that a school district policy that allowed the invitation of at least four students to offer an address, reading, song, prayer, musical presentation, poem, or any other pronouncement consisting of the students' choice of content).

prayer, invocations and benedictions at compulsory and non-compulsory school-related activities.[120] The issue was summarized thusly:

Do school officials have the ability (and duty) to impose content restrictions on purportedly "private speakers at school events," in order to achieve neutrality with respect to religion as the Chandlers contend, or do the Free Exercise and Free Speech Clauses require that school officials permit student religious speech at the same time, and in the same place and manner as secular speech, as De Kalb contends? Under the Chandlers' theory, student religious speech is attributable to the State thereby violating the constitutional requirement of neutrality. Students, therefore, cannot be permitted to speak freely in school if religion is the topic; the State has a positive duty to censor student speech if it is religious.[121]

The court held that permitting students to speak religiously did not constitute state approval or disapproval; therefore, the students' speech was not state- sponsored.[122] The court pontificated that there must be neutrality toward religious speech.[123] And tolerating students' religious expression meets that expectation. Once the court determined the religious speech qualified as protected private speech, it analyzed the case based upon the Free Speech Clause.[124] The court found suppression of private religious speech to be "the most egregious form of content-based censorship" viewpoint discrimination.[125] In contrast, the court amplified that a student's religious speech is not absolute.[126] The time, place, and manner that regulates secular speech is applicable.[127] When the state endorses or participates in the student-initiated speech, the speech becomes unconstitutional.[128] The *Chandler* decision posits that genuine, student-initiated religious speech must not be prohibited and the restrictions of time, place, and manner could not exceed non-religious speech.[129]

In contrast, several circuit courts concluded that student-led prayer withstood scrutiny and were found to be unconstitutional. The Ninth Circuit held that a school policy, allowing a student vote to decide whether or not to have a religious prayer at commencement, unconstitutional.[130] The court determined that the school had extensive involvement in the policy.[131] The school retained a large amount of control over the ceremony,

120. *See* Chandler v. James, 180 F.3d 1254, 1260 (11th Cir. 1999).

121. *Id.* at 1260.

122. *Id.*

123. *Id.*

124. *Id.* at 1265.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id* at 1266.

130. Harris v. Joint Indep. Sch. Dist. No. 241, 41 F.3d 447 (9th Cir. 1994), *cert. granted, judgment vacated by*, 515 U.S. 1154 (1994).

131. *Id.*

such as financial support, content of the program, and direction of the students.[132] The court specified that the State could not absolve itself of its constitutional obligation by delegating its responsibilities to a private party.[133] Irrespective of the fact that a disclaimer appeared in the graduation program, this act made no difference to the court.[134] Students were still aware the school was influencing the commencement exercises.[135] In addition, the court maintained that the school did not create an open forum because its policy silenced minority views by a majority vote.[136]

To draw these conclusions, the *Harris v. Joint Independent School District* court employed the coercion test described in *Lee* to declare the policy unconstitutional.[137] The court found the case indistinguishable from *Lee*, in that students were obligated to attend the ceremony and participate in the prayer.[138] The court also concluded that there was no secular purpose for the prayer and would fail the *Lemon* test's primary effect clause.[139] If a prayer of this nature were to be delivered at a church, its primary effect would be to advance religion.[140] Therefore, the effect of the prayer is indistinguishable between the church and school; the intent was to disseminate a religious message to the audience.[141] The Ninth Circuit therefore concluded that the prayer violated the Establishment Clause.[142] Importantly for the *Kountze* case, the court concluded that the prayer would be in violation of the Free Exercise Clause because the graduation ceremony did not qualify as an open or public forum.[143] The court demurred the Free Exercise claim by the high school, "[T]hese high school students are free to worship together as they please before and after the school day . . . and outside of the graduation ceremony. Moreover, by entering the public sphere and planning a state-controlled, state-sponsored meeting, the students entered the domain of the Establishment Clause."[144] The ambiguity raised regarding the creation of limited public fora was strongly addressed in this case by the declaration that a school still maintained a significant amount of state authority in graduation ceremonies.[145]

The Fifth Circuit addressed a challenge to a Mississippi statue, which allowed nonsectarian and non-proselytizing prayer at compulsory and non-

132. *Id.*
133. *Id.* at 455.
134. *Id.*
135. *Id.* at 455–56.
136. *Id.* at 456–57.
137. *Id.*
138. *Id.* at 457.
139. *Id.* at 458.
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.* (quoting Collins v. Chandler Unified Sch. Dist., 644 F.2d 759, 763 (9th Cir. 1981), *cert. denied*, 454 U.S. 863 (1981)).
145. *Id.*

compulsory school events.[146] Even though the statute had yet to be implemented, the court held the plaintiff did have standing to bring suit.[147] The legislation intended to "accommodate the free exercise of religious rights of its student citizens in the public schools."[148] The court concluded, "[t]his statement of purpose cannot be characterized as 'secular' because its clear intent is to inform students, teachers, and school administrators that they can pray at any school event so long as a student 'initiates' the prayer."[149] The court also found the district liable for excessive entanglement because school officials were permitted to lead students in prayer, and were permitted to discipline students who did not wish to participate.[150] In addition, the court also found the statute violated the coercion test because any person including clergy, teachers, and administrators, at compulsory events could lead prayers.[151] The court was very precise in declaring that this type of statute demonstrated favoritism and preferential treatment to religious indoctrination.[152]

In *ACLU v. Black Horse Pike Regional Board of Education*,[153] the Third Circuit analyzed a case where a high school that had a tradition of allowing clergy members to deliver a nonsectarian prayer at graduation if the senior class voted in favor of it. Local ministers rotated opportunities, in accordance with the school district's policy, to permit different denominations the opportunity to speak.[154] The school district sought to comply with the decision in *Lee* by reinforcing that no school member could endorse, organize, or promote prayer in any manner. The decision to allow a prayer at graduation was to be determined by the senior class.[155] And a student volunteer could only lead the prayer.[156]

The court found the policy unconstitutional on multiple points.[157] It referenced the free speech rights of students, and it highlighted that the graduation ceremony did not amount to a public forum.[158] The school's administration retained significant control over the ceremony when it did not permit a speaker from the American Civil Liberties Union ("ACLU") to speak about safe sex and condom distribution, who was requested by a student.[159] The school district was also to be found in violation of *Lee* because allowing students an election did not erase state involvement.[160] The court reasoned that students, in the minority, who did not vote in favor of

146. Ingebretsen v. Jackson Pub. Sch. Dist., 88 F.3d 274, 279 (5th Cir. 1996).
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.*
153. ACLU v. Black Horse Pike Reg'l Bd. of Educ., 84 F.3d 1471, 1475–87 (3d Cir. 1996).
154. *Id.* at 1475.
155. *Id.*
156. *Id.* at 1482–85.
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.*

the prayer, are being coerced to attend the ceremony.[161] The court concluded, "the Board cannot sanction coerced participation in a religious observance merely by disclaiming responsibility for the content of the ceremony."[162]

The school district argued that the intent was secular to promote free speech and to solemnize the event.[163] The court rejected that argument under the Lemon Test because the graduation ceremony was not viewed as a public forum, thus, the free speech argument was quickly dismissed.[164] The court also dismissed the school district's assertion that its policy was intended to satisfy a solemn event with a secular observance.[165] In the court's view, all graduation ceremonies are a solemn event and do not require sectarian involvement.[166] The court opined that leaving the choice of prayer to student vote "would certainly leave the reasonable non-adherent with the impression that his or her religious choices were disfavored."[167]

## IX. THE SUPREME COURT PROVIDES GUIDANCE: SANTA FE INDEPENDENT SCHOOL DISTRICT

Due to the ambiguity of the lower federal courts rulings regarding student-elected religious messages, the Supreme Court took up the issue of student-elected religious observances to solemnize important events. The facts and findings in *Santa Fe Independent School District v. Doe* strongly support the thesis that the Kountze cheerleaders have misapplied the Free Exercise Clause, whereby, forcing the district into violating the Establishment Clause.[168] In *Santa Fe*, a school district in Texas that was located in a heavily conservative Baptist community enacted a policy permitting a high school student, elected by the student body, to provide an invocation during pregame ceremonies at the school's home varsity football games.[169] In 1995, two sets of current or former students—a Catholic and a Morman—brought suit against the school district alleging 1) the school district maintained various policies and practices that violated the Establishment Clause, and 2) the school district adopted a policy in August of that year titled "Prayer at Football Games."[170] The policy authorized two elections.[171] The first determined whether invocation should be delivered at football games, and the second determined the spokesperson to deliver the message.[172] The policy also contained two parts.[173] The first part omitted

161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.* at 1487.
168. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 294–312 (2000).
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*

any requirement that the content of the invocation be nonsectarian and non-proselytizing.[174] The second portion termed that the "fallback" provision automatically added that limitation if the first selection were enjoined by the court.[175]

In October 1995, the United States District Court for the Southern District of Texas ordered the school district to modify the policy to permit only non-sectarian and non-proselytizing prayer.[176] The school promptly implemented the "fallback" provision, and it slightly adjusted the title of the policy from "prayer" to "invocation and/or message."[177] The court of appeals correctly concluded the policy as invalid.[178] Subsequently, the Supreme Court granted certiorari.[179]

The Supreme Court, in a rather "no-nonsense posture," held that a "carefully contrived procedure whereby a student elected as the high school student council chaplain would deliver a prayer over the public address system at football games was a veiled attempt to advance the religious beliefs of a heavily conservative Baptist community that controlled the school board policy."[180] The Court determined that one question seemed to amplify the contention in this case: Does the petitioner's policy permitting student-led, student-initiated prayer, at football games, violate the Establishment Clause?[181] Relying on *Lee*, the Court found similarities in that the prayer is authorized by a government policy on government property at a government-sponsored, school-related event. It is evident that the Santa Fe school officials do not, by policy or practice, intend to open the pregame ceremony to indiscriminate use. In fact, the policy allows only one student to give the prayer for the entire season.[182] In actuality, the invocation is subject to school regulations that confine the content and topic of the student's message.[183]

Electing one student to deliver a message that the district deems appropriate guarantees that a minority viewpoint will be suppressed. The Court held the issue of school districts establishing policy to permit only non-sectarian, non-proselytizing prayers invalid.[184] The Court rejected the philosophy of minimizing the intrusion on the audience because it opined that a majoritarian policy "does not lessen the offense or isolation to objectors.[185] At best it narrows their number, at worst increases their sense of isolation and affront."[186] The student election may ensure the majority is

174. *Id.*
175. *Id.*
176. *Id,*
177. *Id.*
178. *Id.*
179. *Id.*
180. ALEXANDER, *supra* note 62, at 239.
181. *Santa Fe*, 530 U.S. at 301–12.
182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.*

represented, but it does nothing to protect the minority, and likely intensifies their offense.

The school's policy permitting the student election is an attempt to divorce itself from the religious content, but by its own nature, it has failed to accomplish this necessary act. The reality is that the district's policy does the opposite of its claim of neutrality; it endorses specific acts and content. The degree of state involvement is high and "the imprint of the State . . . puts school-age children who objected in an untenable position[.]"[187] The District claimed that its premise was to solemnize the event, establish good sportsmanship and to establish the environment for competition.[188] This language is thinly-veiled as students clearly recognized that the election was being conducted to determine whether prayer should be part of the pre-game ceremony. Members of the listening audience must perceive the message as a public expression of the viewpoint of the majority.

The fact the cheerleaders voted with "no influence" from adult supervision, attempts to define this election as strictly led by students. Facially, the plaintiff voting in the *Kountze* situation holds many challenges. First, the adult sponsors claim to have a custodial role no different than that of "parent to child." The plaintiffs seek to have a reasonable person accept the fact that these individuals serve no purpose other than to prevent injuries and mediate juvenile disagreements. This thesis is farcical in that no philosophical or religious persuasion is provided between sponsors and athletes. The plaintiffs are dangerously close to encroaching upon the prohibition of coaches leading their teams in prayer before an athletic contest, in addition to school officials engaging in supervision over student-led elections.[189]

The District argues in the context of *Lee* that prayer at commencement ceremonies is "dramatically different" from attendance at high school football games. The school contends that football games are "no more than a passing interest to many students" and are "decidedly extra-curricular."[190] The concept of

> "extra-curricular is designed to diminish coercion to attend these games. However, there are some students whose attendance is mandated, such as players, cheerleaders, and band members. Some students have class credit dependent upon their attendance. The District minimizes the importance to many students of attending the games as a complete educational experience."[191]

187. *Id.* at 304.

188. *Id.*

189. Jager v. Douglas Cnty. Sch. Dist., 862 F.2d 824 (11th Cir. 1989); *see also* Doe v. Duncanville Indep. Sch. Dist., 70 F.3d 402 (5th Cir. 1995) (enjoining district employees and agents from participating in or supervising student-initiated prayers).

190. *Duncanville*, 530 U.S. at 309–10.

191. *Id.*

To assert that high school students do not feel immense social pressure or have a truly genuine desire, to be involved in the extra-curricular event that is American high school football is "formalistic in the extreme."

## X. CONCLUSION – CHRISTIAN NATIONALISTS ASSERT THEIR PHILOSOPHY IN COURT

The Kountze High School cheerleaders by nature of their request have reinforced the notion that courts are creations of human development with various lenses being applied by justices who subscribe to an activist theory in their rulings. The plaintiffs in *Kountze* base their argument, for posting religious messages on their run-through banners, on divorcing their association from the school auspice and establishing limited public forum for free speech by employing a team vote. Both the plaintiffs contend, and the court agrees, that this process does not violate the Establishment Clause of the First Amendment.[192] As this thesis has demonstrated, the argument proffered by the plaintiffs misapplies or ignores prior case law, yet is supported by the district court.[193]

In light of this overreach with precise and detailed case law in opposition to the ruling, the query that remains is, "How the court arrived at its conclusion supporting the cheerleaders?" The answer is actually predicated on a religious and political philosophy that is emanating from conservative cabals. These factions strongly believe that religion, especially a conservative Christianity, must be disseminated in the venue of public schools. Katherine Stewart has termed these groups as "Christian Nationalists."[194] The Christian Nationalist ideal can be summarized from Jerry Falwell's statement, "I hope to see the day when, as in the early days of our country, we don't have public schools . . . The churches will have taken them over again and Christians will be running them."[195] These activists see the decline as beneficial to their mission. If they cannot break down the doors to the schools, then they will be quite content to break the schools.[196]

The Supreme Court has made major decisions in the post-World War II era that defined the role of religion in public schools. In essence, jurisprudentially, a philosophy was eventuated that encouraged the separation of religion and public schools. Individual rights to practice his or her religion were maintained and even enhanced, but the courts, collectively, chilled public schools' ability to impart religious doctrine on their students. The Supreme Court, is a political organ, and thus oscillates with the political climate of those that select and confirm them. Even though justice is to

192. Order on Plaintiff's Application for Temporary Injunction at 4–22, Matthews v. Kountze Indep. Sch. Dist., No. 53526 (Dist. Ct. Tex. Oct. 18, 2012).

193. *Id.*

194. KATHERINE STEWART, THE GOOD NEWS CLUB: THE CHRISTIAN RIGHT'S STEALTH ASSAULT ON AMERICA'S CHILDREN 3 (2012).

195. JERRY FALWELL, AMERICA CAN BE SAVED 52–53 (1979).

196. STEWART, *supra* note 194, at 5.

remain blind, justices often reflect upon their own convictions as the appropriate lens to employ in order to resolve a conflict.

Circa 2000, a paradigm shift began to occur on the Supreme Court with Justices Scalia and Thomas on the conservative end of the political spectrum pontificating a philosophy that purported the founders of the Nation never intended to separate church and state.[197] This position obviously supports a contention that encourages entanglement, which would ultimately destroy the positive consensus that kept religion and schools separate.[198] Justice Scalia contends the Establishment Clause and the Free Exercise Clause "appl[y] only to the words and acts of government. It was never meant and has never been read by the court to serve as an impediment to purely private religious speech."[199] Conservative Justices are analyzing Establishment Clause and Free Exercise Clause contentions from the viewpoint of free speech doctrine. In essence, they are advocating that religious activity is really just speech from a religious viewpoint and any attempt to exclude religious activity is an infringement on the freedom of speech.[200] Religion, therefore, is in essence a viewpoint that is a kind of speech protected by the First Amendment.[201] The current conservative contingent has formulated the axiom that protecting the Establishment Clause maintaining secular public schools has, by de facto, created a religion of secularism and needs to be addressed accordingly.[202] Employing the doctrine of free speech from the First Amendment is paving the way for a rejection of the very idea that schools need to remain secular.[203] If the free speech argument for religious activities is accurate, then it seems that the Establishment Clause and Free Exercise Clause of the First Amendment are at best redundant, and at worst, meaningless. It is hard to conjure the notion that the framers would be that inept.

197. *Id.* at 3.
198. *Id.* at 80.
199. JEFFERY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT 114 (2007).
200. STEWART, *supra* note 194, at 90.
201. *Id.* at 91.
202. *Id.* at 93.
203. *Id.* at 95.