Yale Law & Policy Review

Volume 18
Issue 2 *Yale Law & Policy Review*

Article 11

1999

A Political Process Argument for the Constitutionality of Student-Led, Student-Initiated Prayer

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A Political Process Argument for the Constitutionality of Student-Led, Student-Initiated Prayer

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Doe v. Santa Fe Independent School District, 168 F.3d 806 (5th Cir. 1999), *cert. granted*, 60 U.S.L.W. 3079 (U.S. Nov. 15, 1999) (No. 99-62).

> Under our Bill of Rights free play is given for making religion an active force in our lives. But if a religious leaven is to be worked into the affairs of our people, it is to be done by individuals and groups, not by the Government.[1]

Justice William O. Douglas's words, written nearly 40 years ago, demonstrate the constitutional tightrope on which religion walks.[2] From the inscription, "In God We Trust," on our currency to the words of the presidential oath, it is hard to dispute that religion permeates many aspects of American society. The critical inquiry, however, ponders whether religious exercise represents constitutionally protected free exercise or constitutionally condemned government endorsement.[3] The Supreme Court has performed this inquiry with respect to religion's presence in a myriad of areas, including school graduation ceremonies,[4] legislative sessions,[5] tax status,[6] tuition rebates,[7] and city-

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1. Engel v. Vitale, 370 U.S. 421, 442-43 (1962) (Douglas, J., concurring) (internal quotation omitted) (citations ommitted).

2. The First Amendment provides, in pertinent part, that: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I.

3. *See, e.g.*, Board of Educ. of Westside Community Sch. v. Mergens, 496 U.S. 226, 250 (1990) ("there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.").

4. *See* Lee v. Weisman, 505 U.S. 577 (1992) (holding unconstitutional school-imposed invocations and benedictions at public school graduation ceremonies).

5. *See* Marsh v. Chambers, 463 U.S. 783 (1983) (upholding the constitutionality of a practice of a chaplain opening state legislative sessions).

6. *See* Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989) (holding unconstitutional a Texas statute giving tax exemption to religious periodicals); Mueller v. Allen, 463 U.S. 388 (1983) (upholding annual tax deduction for parents of children in elementary and secondary schools run by religious organizations); Waltz v. Tax Comm'n of New York, 397 U.S. 664 (1970) (upholding tax exemption for property solely used for religious purposes).

7. *See* Essex v. Wolman, 409 U.S. 349 (1972) (holding unconstitutional annual tuition rebates for parents of children attending schools affiliated with religious organizations).

sponsored displays.[8] In Galveston, Texas, religion recently made its way into a new and unexpected locale, the high school football field.

In October 1995, the Santa Fe Independent School District adopted a policy permitting students to deliver a brief invocation during pre-game ceremonies of home varsity football games.[9] The football game policy provided for a student-selected, student-given "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."[10] The policy established a detailed process for determining whether a statement would precede football games. Each spring, the student body would vote, by a secret ballot, to decide whether a statement or invocation would be part of the pre-game ceremonies and, if so, which student volunteer would deliver the statement or invocation.[11] The student volunteer selected would present the message consistent with the goals and purposes of the policy.[12]

The Supreme Court's decision to address the constitutionality of this issue has attracted considerable political attention. Texas Governor George W. Bush and officials in eight other states have urged the Supreme Court to overturn the Fifth Circuit's holding that Santa Fe's football game policy is unconstitutional.[13] The United States House of Representatives passed a resolution in early November pressing the Supreme Court to allow prayer at sporting events.[14] Moreover, several members of Congress have written amicus briefs urging the Supreme Court to affirm the constitutionality of the school district's policy.[15]

This Case Note proposes a way to conceptualize religious jurisprudence in this and other cases. By employing a political process analysis of community norms, this Case Note concludes that the Supreme Court should reverse the Fifth Circuit and affirm the constitutionality of student-initiated, student-led prayer. When students initiate the prayer, as opposed to when the school im-

8. *See* County of Allegheny v. American Civil Liberties Greater Pittsburgh Chapter, 492 U.S. 573 (1989) (holding that the display of a creche inside a city building violated the First Amendment); Lynch v. Donnelly, 465 U.S. 688 (1984) (upholding a city-sponsored display of a creche as party of a Christmas display in a park).

9. *See* Brief for Petitioners at 2-3, Doe v. Santa Fe Independent Sch. Dist., 168 F.3d 806 (5th Cir. 1999), *cert. granted*, 60 U.S.L.W. 3079 (U.S. Nov. 15, 1999) (No. 99-62).

10. *See Santa Fe*, 168 F.3d at 812 (internal citations omitted).

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

12. *See id.*

13. *See* Brief on the Merits of Amici Curiae State of Texas, et al., *Santa Fe* (No. 99-62).

14. H.R. Con. Res. 199, 106th Cong. (1999) (expressing the sense of Congress that "prayers and invocations at public school sporting events are constitutional under the First Amendment" and that "the Supreme Court, accordingly, should uphold the constitutionality of such practices").

15. *See, e.g.*, Brief of Amici Curiae Congressman Steve Largent and Congressman J.C. Watts, *Santa Fe* (No. 99-62); Brief Amicus Curiae of Senator James M. Inhofe (R Oklahoma), et al., *Santa Fe* (No. 99-62).

poses the prayer, the prayer reflects the norms of the community that will be affected. In these cases, the community internalizes the coercive incidence of the policy and courts should afford greater deference to the desires of the community. As such, a subtle, but critical, difference exists between *Santa Fe* and prior cases where the Court has invalidated school prayer policies. Moreover, a political process inquiry may assist our understanding of the Court's prayer jurisprudence, a jurisprudence that has come under attack as chaotic and confusing.

I. JUDICIAL HISTORY

Two students and their parents filed a § 1983 action[16] against the Santa Fe Independent School District alleging that various policies of the school district violated the Establishment Clause of the First Amendment.[17] The United States District Court for the Southern District of Texas held that the policy, as written, was unconstitutional and ordered the school district to implement a more restrictive policy containing a "nonsectarian, nonproselytizing" requirement.[18]

On appeal, the Fifth Circuit affirmed in part, reversed in part, and reversed and remanded in part. Of relevance to this Case Note, the Fifth Circuit held that both the current football policy and the more restrictive version suggested by the plaintiffs fail to pass constitutional muster.[19] More specifically, the Fifth Circuit argued that because the policy permits prayer to be delivered to a "government-organized audience, by means of government-owned appliances and equipment, on government-controlled property, at a government-sponsored event," the prayer would "convey the message not only that the government endorses religion, but that it endorses a particular form of religion."[20] For that reason, the Fifth Circuit held that the football game policy violated the Supreme Court's *Lemon* Test[21] and Endorsement Test.[22]

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16. 42 U.S.C. § 1983. Section 1983 stipulates:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities, secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . .

Id.

17. *See Santa Fe,* 168 F.3d at 811. In addition to the football game policy, the plaintiffs challenged the constitutionality of the school district's graduation policy that empowered "the graduating senior class, with the advice and counsel of the senior class principal or designee, to elect by secret ballot to choose whether an invocation or benediction shall be part of the graduation exercise." *Id.* at 812.

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

19. *See generally* Doe v. Santa Fe Independent Sch. Dist., 168 F.3d. 806 (5th Cir. 1999).

20. *Id.* at 817-18.

21. In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Court established three criteria that a statute must satisfy in order to survive scrutiny under the Establishment Clause. First, the statute must have a secular purpose. Second, the statute's principal or primary effect must neither advance nor inhibit religion. Third, the statute must not foster excessive government entanglement with religion. *See id.* at 612-13; *see also* text accompanying *infra* notes 46-47.

22. *See Santa Fe*, 168 F.3d at 818. The Court articulated a test for unconstitutional government

After the Fifth Circuit denied rehearing and rehearing en banc,[23] the Supreme Court granted certiorari on the limited question of the constitutionality of student-led, student-initiated prayer at football games.[24]

II. APPLY POLITICAL PROCESS ANALYSIS TO STUDENT-LED, STUDENT-INITIATED PRAYER

Although the Supreme Court has yet to explore the specific question of student-led, student-initiated prayer,[25] the Court has pronounced fairly extensively on other school prayer issues. In various instances, the Court has struck down school prayer policies as violative of the separation of church and state embodied in the First Amendment. In *Engel v. Vitale*, the Court held that public school officials cannot require students to begin each day with an official, state-composed prayer containing the words, "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers, and our Country."[26] One year later, the Court held in *School District of Abington Township v. Schempp* that public school officials cannot require students to recite the Lord's Prayer or read from the Bible as part of a devotional exercise.[27] More recently, in *Lee v. Weisman*, the Court invalidated a school district's policy allowing school principals to invite clergy to give invocations and benedictions at graduations.[28]

A way to understand these prior decisions, as well as determine the appropriate resolution of *Santa Fe*, may lie in the political process theory. This theory was articulated in a well-known footnote in *United States v. Carolene*

endorsement of religion in *Allegheny v. ACLU*, 492 U.S. 573 (1989). The Endorsement Test instructs that government unconstitutionally endorses religion when "it conveys a message that religion is 'favored,' 'preferred,' or 'promoted' over other beliefs." *Id.* at 593; *see* text accompanying *infra* notes 51-52.

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

24. *See* 1999 WL 495635 (U.S.) ("The petition for a writ of certiorari is limited to the following question: Whether petitioner's policy permitting student-led, student-initiated prayer at football games violates the Establishment Clause."). It is also relevant to mention the recent Eleventh Circuit ruling in *Chandler v. James*, 180 F.3d 1254 (11th Cir. 1999), another case involving a challenge to student-led, student-initiated, student-led prayer at high school sporting events. The Eleventh Circuit upheld the constitutionality of the school district's policy permitting prayer, and even went so far as to hold that such a policy is required under the freedom of speech and freedom of expression clauses. *See id.* This circuit split increased the likelihood of the Court to grant certiorari. Moreover, the circuit split on the sole issue of prayer at sporting events probably influenced the Court's decision to limit its consideration accordingly.

25. *See* Editorial, *School Prayer Again*, WASH. POST, Nov. 20, 1999, at A22.

26. Engel v. Vitale, 370 U.S. 421, 422 (1962). The Court in *Engel* observed that, "it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government." *Id.* at 425.

27. *See* School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963).

28. *See* Lee v. Weisman, 505 U.S. 577 (1992); *but see* Westside Bd. of Educ. v. Mergens, 496 U.S. 226 (1990) (permitting public schools to allow student prayer groups to meet and worship if other student clubs are permitted at the school).

Products Company,[29] a case upholding a federal statute prohibiting the interstate shipment of "filled milk" on the basis that the statute required rational basis mode of review. In the footnote, Justice Stone indicated that mere rationality may not always be sufficient and presented what has come to be known as the political process theory:

> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. . . .
>
> Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities; whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.[30]

John Hart Ely elaborated on Stone's footnote in his work, *Democracy and Distrust*.[31] According to Ely, the footnote offers two instructions. First, the Court should strive to maintain the machinery of democratic government by ensuring that the channels of political participation and communication are kept open.[32] At the same time, the Court should also be concerned with what majorities do to minorities, particularly actions directed toward religious, national, and racial minorities and those infected by prejudice against them.[33] According to Ely, both instructions focus not on whether the substantial value involved is fundamental or important.[34] Rather, they focus on whether or not groups have been able to participate freely in either the political process by which values are appropriately identified and accommodated, or in the accommodation those processes have reached.[35]

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29. 304 U.S. 144 (1938).

30. *See id.* at 153 n.4 (citations omitted). The footnote began with a paragraph that appears inconsistent with the rest of the footnote:

> There may be a narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.

Id. This part of the footnote, in stating that the Court should enforce the "specific prohibitions of the Constitution," does not present a political process approach, but rather a pure interpretivism approach. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST 76 (1980). According Professor Lusky, Justice Stone's law clerk who was substantially responsible for the footnote, this inconsistency occurred because the first paragraph was added at the request of Chief Justice Charles Evans Hughes. *See* LOUIS LUSKY, BY WHAT RIGHT? A COMMENTARY ON THE SUPREME COURT'S POWER TO REVISE THE CONSTITUTION 110-11 (1975).

31. *See* Ely, *supra* note 30.

32. *See id.* at 76.

33. *See id.*

34. *See id.* at 77.

35. *See id.*

As such, the political process theory instructs courts on how they should determine whether a policy has struck a reasonable balance between order and liberty.[36] When a community internalizes the coercive incidence of a particular policy, courts are much less likely to second-guess political institutions on whether the tradeoff between liberty and order is reasonable.[37] When courts defer to the political process, they indicate that the willingness of the majority to bear a particular burden suggests that the policy in question does not embody the political underevaluation of liberty that "rights" are meant to prevent.[38] This theory explains the deference courts have afforded to laws under such constitutional provisions as the Privileges and Immunities Clause, the dormant Commerce Clause, and the Free Exercise Clause.[39]

While the political process theory has been developed for various areas of the law, most notably Fourth Amendment privacy questions,[40] the theory has not been extended to the First Amendment. Yet, a political process inquiry seems particularly appropriate for identifying the line between government establishment of religion and the free exercise of religion. When a community, through a political process, chooses to engage in religious exercise, that decision reflects the norms of the community that would be affected. Meanwhile, when a political process is absent, and the government imposes religion upon a community, the religious exercise no longer reflects the norms of the community. Rather, the members of the community are forced to accept norms that they do not necessarily wish to accept.

More specifically, this political process inquiry into community norms instructs us on the appropriate resolution of *Santa Fe*. A critical distinction exists between student-led, student-initiated prayer and school-mandated prayer. When students initiate the prayer, as determined by a vote or similar political process, the school merely permits the students to express religious views that they desire to express. In these cases of student-initiated prayer, the members of the community have decided to bear a particular burden on their rights, a burden that they support and that systematically and meaningfully affects them. By adopting a policy that burdens their rights, the students have voluntarily chosen a policy that reflects the norms they wish to celebrate.[41]

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36. *See* Dan M. Kahan & Tracey L. Meares, *The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1172 (1998).

37. *See id.*

38. *See id.*

39. *See* TRACEY L. MEARES & DAN M. KAHAN, URGENT TIMES: POLICING AND RIGHTS IN INNER-CITY COMMUNITIES 24 (1999).

40. For example, Professors Kahan and Meares have supported the application of the political process theory for various privacy inquiries in criminal procedure, including discretionary community policing, curfews, and gang-loitering provisions. *See* Kahan & Meares, *supra* note 36, at 1174-76.

41. At least two proponents of the political process theory, however, would likely disagree with the extension of the theory to school prayer issues. Professors Kahan and Meares have argued that the political process theory should not allow a Christian community to require mandatory prayer because "the

The process challenged in *Santa Fe* is a political one. The policy adopted by the school district ensures that prayer will only occur if the community so decides by vote. The student body votes whether a statement or invocation would be part of the football game ceremonies and, if so, which student volunteer would deliver the message.[42] This policy allows the community to decide, first, whether to speak at all, and, second, what to say. Because the prayer only occurs if the students so choose, the prayer reflects the norms of the community that will be affected. Consistent with the political process theory, this community support reveals that the prayer reflects that no reasonable interests are violated. Indeed, this community interest inquiry may bear notable relevance to high school football games, which have become forums that bring together the community and may be an ideal time to allow the political process to celebrate the norms of that community.[43]

In this light, we see a sharp contrast between student-led, student-initiated prayer and the school-mandated prayers that were struck down in *Engel*, *Shempp*, and *Lee*. Each of these cases involved a clear act of the government, or a government actor, such as the high school principal in *Engel*, to force religion upon students. The desire of the students to exercise prayer played no role in determining whether the prayer would occur. None of these cases entailed any semblance of a political process through which the community chose to withstand the coercive incidence of the policy. As a result, these prayers fail to reflect intrinsically the norms of the community. If anything, the prayers struck down in *Engel*, *Shempp*, and *Lee* reflected the norms that the government sought to impose on society. In such cases, the members of the community are not speaking their own words; instead, they are speaking the words imposed by the government.

III. APPLYING POLITICAL PROCESS ANALYSIS TO THE SUPREME COURT'S ESTABLISHMENT CLAUSE AND FREE EXERCISE JURISPRUDENCE

In addition to offering guidance in *Santa Fe*, a political process approach can explain the Court's freedom of religion jurisprudence. The Court's decisions in this area have received criticism for being contradictory and less than pellucid.[44] Under a political process inquiry, however, this jurisprudence be-

members of the community wouldn't necessarily see the requirement as burdensome and couldn't be assumed to care about the sensibilities of the non-Christians who do." MEARES & KAHAN, *supra* note 39, at 104.

42. *See* Brief for Petitioner at 3, Doe v. Santa Fe Independent Sch. Dist., 168 F.3d 806 (5th Cir. 1999), *cert. granted*, 60 U.S.L.W. 3079 (U.S. Nov. 15, 1999) (No. 99-62).

43. In the amicus brief of Texas public school students, the students described the high school football game as a "competition that has drawn together their community." Brief of Texas Public School Students, Their Parents, and the Liberty Legal Institute at 1, *Santa Fe* (No. 99-62).

44. *See* Laurie Asseo, ASSOCIATED PRESS, Nov. 15, 1999 (referring to the Court's school prayer jurisprudence as "jumbled"); *see also Santa Fe*, 168 F.3d at 814 ("As we have often observed, Establishment Clause jurisprudence is less than pellucid.").

comes much clearer.

The confusion surrounding the Court's jurisprudence stems from the First Amendment's two distinct religion clauses: "Congress shall make no law respecting an establishment of religion" and "Congress shall make no law . . . prohibiting the free exercise thereof."[45] These two clauses have given rise to separate bodies of case law. These two bodies of case law can, at times, seem to be confusing and contradictory. Yet, both bodies can be explained by a uniform and consistent political process inquiry into community norms.

The Court has articulated three main influential tests for Establishment Clause violations.[46] When a political process accompanies religious exercise, the exercise survives each of these three tests.

First is the *Lemon* test. In *Lemon v. Kurtzman*,[47] a ruling that struck down certain types of financial aid to public schools, the Court set forth three criteria that a statute must meet in order to withstand Establishment Clause attack: 1) the statute must have a secular purpose; 2) the statute's principal or primary effect must neither advance nor inhibit religion; and 3) the statute must not foster "an excessive government entanglement with religion."[48] The focus of the *Lemon* test is the existence of "excessive government entanglement." When prayer is the product of a voluntary and neutral political process, the prayer reflects the norms of the community, not the norms of the government. Moreover, because the political process merely permits the community to act as it desires, the government behaves with a secular purpose and neither advances nor inhibits religion. Therefore, the prayer is entangled with the community, not the government.

The second Establishment Clause test is the *Lee* test for government coercion. In *Lee v. Weisman*,[49] the Court invalidated a school policy permitting clergy-led prayer at high school graduation ceremonies. Under *Lee*, unconstitutional government coercion occurs when the government directs the performance of a formal religious exercise and when even those who object to the exercise are obliged to participate.[50] Again, prayer that is a product of a political process will pass this test. When a community voluntarily chooses to engage in prayer through vote or other political process, the prayer has been initiated by the community, not coerced by the government.

The final controlling Establishment Clause test is known as the Endorsement Test and was articulated in *Allegheny v. ACLU*.[51] Under *Allegheny*, the

45. U.S. CONST. amend I.

46. *See, e.g., Santa Fe*, 168 F.3d at 814 (identifying the three Establishment Clause tests developed by the Supreme Court).

47. 403 U.S. 602 (1971).

48. *Id.* at 612-13 (internal citations omitted).

49. 505 U.S. 577 (1992).

50. *See Lee*, 505 U.S. at 586.

51. 492 U.S. 573 (1989).

government unconstitutionally endorses religion when it conveys a message that religion is 'favored,' 'preferred,' or 'promoted' over other beliefs.[52] As with the prior two tests, a prayer that results from a political process survives this test. Such prayers have been endorsed by the community, not the government and they reflect the norms the community favors, prefers, and wishes to promote.

The political process theory also instructs our understanding of jurisprudence surrounding the Free Exercise clause. A controlling theme in these cases has been that the government cannot discriminate on the basis of the content of the speech. The Court has previously held that when the government creates a forum for speech, it cannot discriminate against religious speech.[53] In *Widmar v. Vincent*,[54] the Court held that a public university could not discriminate against religious speech based on its content or provide religious speech with less protection than other forms of expression.[55] In other words, if the government creates a neutral forum for free speech, it cannot discriminate based on religious content.[56] In *Board of Education of Westside Community Schools v. Mergens*,[57] the Court extended this boundary line to the high school context and identified "the crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."[58]

In these Free Exercise cases, the Court has permitted religious exercise when it is a product of the speech that the relevant community wishes to express. Likewise, a political process inquiry would protect only those religious exercises that are voluntarily chosen by the community. When the *Mergens* boundary line is unconstitutionally violated, the political process has not occurred.

Also relevant is the Court's 1993 decision to let stand[59] another Fifth Cir-

52. *Id.* at 593.

53. *See, e.g.*, Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 831 (1985) (holding at suppression of religious speech amounts to viewpoint discrimination); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 394 (1993) (holding that because religious speech is protected speech, the government may not censor its content).

54. 454 U.S. 263 (1981).

55. *Id.*

56. This argument has been a focus of the brief of the petitioner and of briefs of supporters of the petitioner. They have argued that the school district has constructed a neutral speech policy that permits students to determine the content of the message and engage in religious speech if they see fit. Therefore, the school district is not mandating religion but rather tolerating the exercise of free speech. If, on the other hand, the school district took action to prevent the religion statements, then it would violate free speech. *See, e.g.*, Brief for Petitioner at 16-48, *Santa Fe* (No. 99-62); Brief of Amici Curiae Congressman Steve Largent and Congressman J.C. Watts at 5-20, *Santa Fe* (No. 99-62).

57. 496 U.S. 226 (1990).

58. *See id.* at 250.

59. While a Supreme Court decision to deny certiorari carries no precedential value on the merits, it may offer some insights concerning the Court's direction. *See, e.g.*, Charles Cooper, *Conference: Race, Law and Justice: The Rehnquist Court and the American Dilemma*, 45 AM. U. L. REV. 567, 570 (1996).

cuit ruling in *Jones v. Clear Creek Independent School District*,[60] a decision that played a major role in the Fifth Circuit's opinion in *Santa Fe*. In *Clear Creek*, the Fifth Circuit upheld the constitutionality of the school district's policy permitting high school seniors to choose to deliver nonsectarian, non-proselytizing invocations at graduation ceremonies.[61] The policy at issue in *Clear Creek* was a neutral policy that permitted the students to determine whether or not to engage in religious speech. Therefore, as in *Santa Fe*, the existence of the prayer in *Clear Creek* depended upon a political process. Prayer only occurred if the members of the relevant community, which in this case were high school seniors, decided that they wanted to have the prayer at a community event, namely high school graduation. As a result, the prayer would reflect community norms rather than an attempt by the state to impose religious norms on the community.

CONCLUSION

Traces of religion appear throughout society. As Justice Scalia observed, "The history and tradition of our Nation are replete with public ceremonies featuring prayers of thanksgiving and petition."[62] Indeed, a political process approach can explain the permissibility of common practices involving religion that have not received judicial scrutiny. For example, many sport teams pray before or after games or when a player is injured. Similarly, almost every National Football League team has a team chaplain. In fact, the very body that will decide this case begins each of its sessions with the phrase, "God save the United States and this Honorable Court."[63] In each of these instances, the community that will be affected by the religious burden has voluntarily chosen to withstand that burden because the religious expression would reflect the norms they wish to celebrate. This voluntary community choice to allow prayers reflects the norms of the community which would be affected, whether those norms belong to the Dallas Cowboys, the United States Supreme Court, or the students in the Santa Fe Independent School District.

60. Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 16 U.S.L.W. 3819 (U.S. June 7, 1993) (No. 92-1564).

61. *See* Clear Creek Indep. Sch. Dist., 977 F.2d, at 965. The Fifth Circuit reconsidered this case after the Supreme Court handed down Lee, and still upheld the constitutionality of the district's policy. *See id.*

62. Lee v. Weisman, 505 U.S. 577, 632 (1992) (Scalia, J., dissenting).

63. *See* Charles Warren, THE SUPREME COURT IN UNITED STATES HISTORY 469 (1928).