

When Cheerleading Becomes State Action

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INTRODUCTION—*MATTHEWS V. KOUNTZE INDEPENDENT SCHOOL DISTRICT*

In fall 2012, the superintendent of the Kountze Independent School District in East Texas banned cheerleaders from displaying religious “run-through” banners at football games.¹ Before each game, the entire football team runs through banners approximately thirty-feet long by ten-

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1. Manny Fernandez, *Cheerleaders with Bible Verses Set Off a Debate*, N.Y. TIMES, Oct. 5, 2012, http://nytimes.com/2012/10/05/us/in-texas-cheerleaders-signsofffaith-atissue.html?pagewanted=all&_r=0.

feet wide.² The cheerleaders have been making the banners for approximately twenty years.³ In the past, the banners had said something encouraging about the Kountze team or something disparaging about the opponent.⁴ However, this year, the banners began to quote Bible verses, such as “I can do all things through Christ which strengthens me.”⁵

The superintendent’s ban came in response to a complaint by the Freedom from Religion Foundation, which argued that the signs violated the Establishment Clause.⁶ In response, the cheerleaders brought suit to enjoin the ban, arguing that the superintendent’s directive violated their free speech and free exercise rights under the Texas Constitution.⁷ Governor Rick Perry and state Attorney General Greg Abbott lent their support to the cheerleaders,⁸ arguing that the superintendent had acted under erroneous legal advice.⁹ The case became the subject of a series of articles in the *New York Times*¹⁰ and other national publications because it brought First Amendment rights into conflict. The individual rights of free speech and free exercise were pitted against the Establishment Clause.

After granting the cheerleaders a temporary injunction,¹¹ Judge Steven Thomas of the 356th Judicial District in Hardin County held a hearing in October 2012 on the cheerleaders’ request for an injunction.¹² The hearing

had all the trappings of a high-profile courtroom drama: Lawyers from both sides haggled over the Texas Constitution and the cheerleaders’ own constitution, a police officer with an assault rifle and binoculars was stationed on the roof, reporters filled the jury box, and one witness—Kieara Moffett, an 11th grade cheerleader—teared up on the stand during cross-examination.¹³

2. See Plaintiffs’ First Amended Petition, Application for Temporary Injunction and Application for Permanent Injunction at 13, *Matthews v. Kountze Indep. Sch. Dist.*, No. 53526 (Hardin Cnty. Ct. Tx. May 8, 2013), available at <http://fhmbk.com/wp-content/uploads/2012/11/00418451.pdf>.

3. *Id.*

4. See Fernandez, *supra* note 1.

5. *Id.*

6. U.S. CONST. amend. I; see also *id.*

7. See Plaintiff’s First Amended Petition, *supra* note 2, at 18.

8. Manny Fernandez, *Cheerleaders Gain Ally in Free Speech Fight*, N.Y. TIMES, Oct. 18, 2012, <http://www.nytimes.com/2012/10/18/us/governor-perry-backs-cheerleaders-in-fight-over-religious-banners.html>.

9. See *id.*

10. See, e.g., Molly Hennessy-Fiske, *Texas Cheerleaders Win on Bible Banners—for Now*, L.A. TIMES, Oct. 18, 2012, <http://articles.latimes.com/2012/oct/18/nation/la-na-nn-texas-cheerleaders-bible-banners->.

11. *Matthews v. Kountze Indep. Sch. Dist.*, No. 53526 (Hardin Cnty. Ct. Tx. May 8, 2013), available at <http://www.kountzeisd.org/userFiles/289/101812.pdf> (order granting temporary restraining order).

12. See Fernandez, *supra* note 8.

13. Fernandez, *supra* note 1.

Judge Thomas extended the temporary injunction for the plaintiff cheerleaders, finding imminent harm to the cheerleaders' private speech and religious exercise rights.¹⁴ The injunction enabled the cheerleaders to display their banners for the remainder of the season.

After the injunction was granted, the Kountze School Board changed its position, simultaneously maintaining that the cheerleaders' signs were the speech of the school district but that a ban of the signs was nonetheless unnecessary. Based on the defendant school district's new position, which was similar to the plaintiffs' argument, Judge Thomas granted the plaintiff cheerleaders' motion for summary judgment.¹⁵

The brief, conclusory summary judgment order states that the messages on the cheerleaders' banners "have not created, and will not create, an establishment of religion";¹⁶ therefore, the banners do not violate the Establishment Clause.¹⁷ The issue of an Establishment Clause violation, however, was not at issue between the parties who agreed on the constitutionality of the banners. Although the school district welcomed the result,¹⁸ it nevertheless filed an appeal to the state's Ninth Court of Appeals in Beaumont to seek clarification. The American Civil Liberties Union of Texas filed an amicus brief with the appeals court.¹⁹ The brief argues first that the banners are school-sponsored speech,²⁰ and as such, they violate the Establishment Clause.²¹ The court has not yet docketed oral arguments in the appeal. In addition, the Freedom from Religion Foundation welcomes the possibility of filing a separate suit in federal court on the Establishment Clause issue of the run-through banners.²²

The issue in the case is whether the cheerleaders' banner is constitutionally protected private speech or whether it becomes public speech imputed to the school. The plaintiffs successfully argued that the banners are private speech because cheerleading is not part of the instructional curriculum but rather a voluntary activity that takes place outside normal school hours.²³ Cheerleaders are chosen based on neutral criteria by cheerleaders from nearby Lamar

14. , *Kountze*, No. 53526, available at <http://www.kountzeisd.org/userFiles/289/101812.pdf> (order granting temporary injunction).

15. See Order Granting Motion for Summary Judgment at 1, *Matthews v. Kountze Indep. Sch. Dist.*, Tx. 365 Jud. Dist. (2013) (No. 53526), available at <http://fhmbk.com/wp-content/uploads/2012/11/00418451.pdf>.

16. *Id.* at 2.

17. *Id.*

18. Press Release, Kountze Indep. Sch. Dist., Kountze ISD Welcomes Court Ruling Upholding Board Decision to Allow "Run-Through" Banners (May 8, 2013), http://s3.amazonaws.com/scschoollfiles/289/kisd_release_-_decision_in_case_00432648.pdf.

19. Brief of Amici Curiae ACLU et al., *Kountze Indep. Sch. Dist. v. Matthews*, No. 09-13-00251-CV (Tex. App. Sept. 4, 2013).

20. *Id.* at 45.

21. *Id.* at 54.

22. See Kountze Independent School District's Third Amended Answer, Affirmative Defenses, Jury Demand and Request for Declaratory Relief at 3, *Matthews v. Kountze Indep. Sch. Dist.*, No. 53526 (May 8, 2013), available at <http://fhmbk.com/wp-content/uploads/2012/11/00418451.pdf>.

23. See Plaintiff's First Amended Petition, *supra* note 2, at 11.

University.²⁴ The group is student run, although faculty sponsors were present at practices.²⁵ In reply, the defendant school district opposed the injunction, arguing that the ban was legal and indeed required because the cheerleaders' message could be imputed to the school. The school district relied heavily on the Supreme Court precedent of *Santa Fe Independent School District v. Doe*, which held that student-initiated, student-led invocations before football games were a violation of the Establishment Clause.²⁶ The defendants pointed out that the cheerleaders had a constitution granted by the school, which required the cheerleaders to make the run-through banners.²⁷ In addition, the faculty member who serves as the sponsor of the team "reserves the right to enforce all parts of the Cheerleader Constitution."²⁸

The case is a useful vehicle to discuss state action for Establishment Clause claims in public school because state action is the determinative issue in the case. In this instance, there is no "play in the joints"²⁹ between the Free Exercise Clause and the Establishment Clause. If the signs are seen as private expression, they are constitutionally protected as free exercise. If the message is attributed to the school, there is state action triggering a violation of the Establishment Clause. Courts have tended to muddle the issue of state action with the merits of the alleged constitutional violation; however, here, each prong in the two-part inquiry necessary for a constitutional violation is distinct. A court must first determine whether the state is the actor.³⁰ Only after finding state action may the court discuss the constitutionality of the banners. If state action is found, the superintendent's ban is required; whereas, without state action, the ban itself is unconstitutional.

This Note will argue that the cheerleaders' run-through banners constitute state action, and thus, the superintendent's ban is necessary to avoid an Establishment Clause violation. The aim of this Note is to demonstrate that courts are more eager to find state action when the underlying claim involves establishment in public schools. Although courts do not acknowledge that they

24. *See id.* at 12.

25. *See id.*

26. 530 U.S. 290, 316 (2000).

27. Defendants' Response to Plaintiffs' Request for Temporary Injunction at 10, *Matthews v. Kountze Indep. Sch. Dist.*, No. 53526 (May 8, 2013), available at <http://fhmbk.com/wp-content/uploads/2012/11/00419580.pdf>, .

28. *Id.*

29. *Locke v. Davey*, 540 U.S. 712, 718–719 (2003) (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 669 (1970) ("[T]here are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause."))

30. *See* *The Civil Rights Cases*, 109 U.S. 3, 13 (1883) (mandating that Congress could only redress "state action" under its Fourteenth Amendment authority); Charles L. Black, Jr., *The Supreme Court, 1987 Term—Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 73 (1967). The only exception to the state action doctrine is the Thirteenth Amendment, which can be violated by private citizens. *See* U.S. CONST. amend XIII; *see also* *United States v. Reynolds*, 235 U.S. 133, 150 (1914) (holding that working off a debt under judicial supervision violates the Thirteenth Amendment); George Rutherglen, Essay, *State Action, Private Action, and the Thirteenth Amendment*, 94 VA. L. REV. 1367 (2008).

are applying a lower state action threshold in these cases, they are correct to do so because schools have enormous power to regulate the lives of students. Part I discusses how the legal scholarship supports the idea of a lower state action threshold for establishment claims in public school, although this Note's specific argument has not been made previously. First, scholars have noted that the state action doctrine is malleable because state inaction can always be framed as action. Second, courts apply the state action doctrine differently based on the nature of the underlying constitutional claim. Finally, the state action doctrine may be unique for Establishment Clause claims in general. Part II demonstrates that the lower state action threshold for the Establishment Clause in public schools is supported by case law and the relationship between the religion clauses. Like the military, public schools are an area of pervasive government regulation where a student has fewer free speech and free exercise rights. Because the government has greater leeway to direct private actors in these realms, declining to regulate can imply state approval. That is, when the power is present but not exercised, inaction can become state action. This idea finds support in case law and by analogy to other areas of state action law. Part III applies this understanding of state action to the *Kountze* case. The Note ends with a short summary and conclusion.

I. SCHOLARSHIP SUPPORTS THE IDEA THAT INACTION CAN BE SEEN MORE READILY AS STATE ACTION IN SOME SITUATIONS, SUCH AS FOR ESTABLISHMENT CLAUSE CLAIMS

In issuing his ban, Superintendent Weldon relied on legal advice that the Texas attorney general later called "erroneous,"³¹ which demonstrates how readily the state action doctrine leads to conflicting interpretations. Indeed, the doctrine has been called "a conceptual disaster area."³² A full discussion of the doctrine, which has been the subject of numerous articles,³³ is beyond the scope of this Note. However, three major ideas have emerged from state action scholarship that are relevant to this case. Taken in combination, these ideas support the argument that a lower threshold is required to find state action for religion in public schools. First, state inaction can always be framed as state action. Second, state action has not been applied uniformly. A finding of state action is often tied to whether the claim involves racial discrimination. Third, state action may be applied differently for Establishment Clause violations. In combination, these three ideas support the interpretation that courts correctly seek to find state action more readily for establishment in public schools. To date, however, nobody has argued that courts apply a distinct state action standard for these particular cases.

A. INACTION CAN ALWAYS BE FRAMED AS STATE ACTION

31. Fernandez, *supra* note 1.

32. Black, *supra* note 30, at 95.

33. See, e.g., *id.*; Henry J. Friendly, *The Public-Private Penumbra—Fourteen Years Later*, 130 U. PA. L. REV. 1289 (1982); Henry C. Strickland, *The State Action Doctrine and the Rehnquist Court*, 18 HASTINGS CONST. L.Q. 587 (1991).

Government is involved to some degree in almost all private behavior, and therefore, a firm boundary between action and inaction is elusive. As Professor Chemerinsky has observed “because the government always can regulate private behavior, it is difficult to articulate principles as to when the failure to do so is a constitutional violation . . . it is analytically possible to conceptualize any private infringement of constitutional values as a result of government inaction.”³⁴ Professors Karst and Horowitz agree: “[T]he state can be said to authorize all conduct that it does not prohibit.”³⁵ Professor Cherminsky has used the action/inaction problem as a justification for abandoning the state action requirement entirely because it is unnecessary and counterproductive.³⁶ The ability to conceive of inaction as action has allowed courts to apply varying standards for state action based on the nature of the claim and the context in which it arises. As will be argued in Part II, in areas where government has greater ability to regulate private behavior, courts properly read government toleration of private conduct as state action.

B. THE DOCTRINE IS APPLIED UNEVENLY, PARTICULARLY FOR EQUAL PROTECTION CASES

Courts have tended to view exercise of government’s normal functions as state action when the underlying constitutional claim involves equal protection: “From the late 1940s through the 1960s, the Court expansively defined what constitutes state action as part of trying to combat racial discrimination.”³⁷ Professors Glennon and Nowak argue that state action gets rolled into the constitutional analysis.³⁸ Without admitting it, the Supreme Court conflates the state action issue with the strict scrutiny standard applied to the merits of a racial-discrimination claim.³⁹ Similarly, without acknowledging it, courts are eager to find state action for Establishment Clause claims in public schools, and they are correct to do so. Courts do not wholly divorce the finding of state action from the nature of the underlying claim.

C. STATE ACTION MAY BE TREATED DIFFERENTLY FOR ESTABLISHMENT CLAUSE CLAIMS

The idea of a unique state action standard for establishment claims is not unprecedented in constitutional scholarship. A recent *Harvard Law Review* “Developments in the Law” article advocates abandoning the three-pronged test found in *Lemon v. Kurtzman* and replacing it with a

34. ERWIN CHERMINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 510–11 (3d ed. 2006).

35. Kenneth L. Karst & Harold W. Horowitz, *Reitman v. Mulkey: A Telophase of Substantive Equal Protection*, 1967 SUP. CT. REV. 39, 55.

36. Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 506 (1985)

37. CHERMINSKY, *supra* note 36, at 517. Equal protection cases are discussed more fully *infra*, section II.C.1.

38. Robert J. Glennon & John E. Nowak, *A Functional Analysis of the Fourteenth Amendment “State Action” Requirement*, 1976 SUP. CT. REV. 221, 227, 232.

39. *C.f. id.* at 224.

state action analysis.⁴⁰ Under *Lemon*, a law (1) must have a legitimate secular purpose, (2) must not have the primary effect of either advancing or inhibiting religion, and (3) must not result in an excessive entanglement of government and religion.⁴¹ *Lemon* has recently fallen into disuse by the Supreme Court but it has never been overruled.⁴² The “Developments in the Law” article advocates replacing *Lemon* with a detailed state action analysis because the second and third prongs of *Lemon* constitute an overlapping state action inquiry and because *Lemon* provides no guidance when the entity is arguably private.⁴³ “[I]t is precisely because the Establishment Clause is a structural limitation on government and not private actors that the state action question is important.”⁴⁴ For clearly sectarian behavior, the fundamental issue before a court is not *Lemon*, but rather state action.⁴⁵

Professors Lupu and Tuttle have argued that, because “the Establishment Clause imposes a constitutionally unique restraint on the state. . . . [T]he Court’s analysis of government responsibility under the Clause differs markedly from that under the Court’s broader state action doctrine.”⁴⁶

Moreover, Michael McConnell has recognized that the primary question in a public school establishment case is whether the activity is attributed to the school or a private actor.⁴⁷ He writes, “[i]n short, the emerging Establishment Clause jurisprudence can be seen as a specialized application of the state action doctrine.”⁴⁸ McConnell looked to the two establishment cases of the Supreme Court’s October 1999 Term to suggest that the seemingly opposite outcomes could be reconciled by state action.⁴⁹ On the one hand, in *Santa Fe*, the Court held that student-initiated prayer violated the Establishment Clause. On the other hand, in *Mitchell*, the Court held that a private religious school’s purchase of religious materials with federal funds was not a constitutional violation.⁵⁰ A plurality opinion in *Mitchell*, authored by Justice Thomas, noted that religious activities of private groups are not imputed to the government merely because

40. See *Developments in the Law—State Action and the Public/Private Distinction*, 123 HARV. L. REV. 1248, 1279 (2010).

41. *Id.*

42. See *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 862 (2005) (declining invitation to overrule the purpose prong of *Lemon*).

43. See *Developments in the Law*, *supra* note 40, at 1280.

44. *Id.* at 1284.

45. See *id.* at 1280.

46. Ira C. Lupu & Robert W. Tuttle, *The Faith-Based Initiative and the Constitution*, 55 DEPAUL L. REV. 1, 65 (2005).

47. Michael W. McConnell, *State Action and the Supreme Court’s Emerging Consensus on the Line Between Establishment and Private Religious Expression*, 28 PEPP. L. REV. 681, 681 (2001).

48. *Id.* at 682.

49. Compare *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 316 (2000) (holding that student-initiated prayer at a public school football game violated the Establishment Clause), with *Mitchell v. Helms*, 530 U.S. 793, 796 (2000) (plurality opinion) (holding that private school’s purchase of religious materials with government funding was not a constitutional violation).

50. See *Mitchell*, 530 U.S. at 801.

those groups receive some government support.⁵¹ A comparison of the two cases suggests that the different results may be attributable to the fact that one case arose out of a public school and one arose out of a private school. The Court was more eager to find state action in the public school case by imputing student speech to the school. In contrast, it viewed the religious school as a genuinely private actor whose actions could not be attributed to the government.

II. CASE LAW DEMONSTRATES THAT COURTS ARE CORRECTLY MORE WILLING TO FIND STATE ACTION FOR ALLEGED ESTABLISHMENT CLAUSE VIOLATIONS IN PUBLIC SCHOOLS

Supreme Court cases establish that schools are areas of pervasive government regulation. Schools have the power to limit students' exercise of individual rights. When that power is present but not exercised, student speech can be attributed to the school. Should that speech be sectarian, as is the case in *Kountze*, it violates the Establishment Clause. Case law establishes that schools and the military are unique because the government has more discretion to limit individual rights in these areas of pervasive government regulation. Indeed, when Establishment Clause claims are made in public schools, courts display a greater willingness to find state action, albeit without recognizing that they are applying a different state action standard. Support for a varying state action standard depending on the nature of the underlying constitutional claim and the context for that claim can be found in other areas of state action law.

A. LIKE THE MILITARY, PUBLIC SCHOOLS ARE AREAS OF PERVASIVE GOVERNMENT REGULATION, AS SHOWN BY CASES LIMITING INDIVIDUAL RIGHTS IN THOSE REALMS

Courts have repeatedly stressed the uniqueness of two areas, the military and public schools. These areas can be called “pervasively regulated.” Both institutions are created to further compelling government interests—to defend the nation and educate the young. In each, discipline is integral to the success of that government purpose. The need for discipline and uniformity to accomplish a compelling government interest is the basis for the Supreme Court’s limitation of free exercise and free speech rights in these areas. As shown herein, the government is granted enormous deference to curtail individual rights in these realms.

1. The Military

In *Goldman v. Weinberger*, the Supreme Court held that a Jewish Air Force psychologist did not have a right to wear a yarmulke indoors,⁵² despite the fact that he had worn his yarmulke without controversy for several years prior to the case.⁵³ The Court found that an Air Force regulation banning headgear indoors trumped Goldman’s free exercise rights because of the need

51. *See id.* at 809–11.

52. 475 U.S. 503, 504 (1986).

53. *See id.* at 526.

for discipline and uniformity in the military.⁵⁴ The plaintiff, Goldman, argued that the Air Force retaliated against him by only enforcing the regulation after he testified against the military in a court-martial.⁵⁵ *Goldman* demonstrates that even fundamental and unobtrusive free exercise must yield to a conflicting military regulation. It would be difficult to conceive of a better free exercise claim in the military than an ordained rabbi⁵⁶ psychologist who, while seeing patients, wore a yarmulke as his religion commands. The dissent recognized, “[t]he Court . . . evades its responsibility by eliminating, in all but name only, judicial review of military regulations that interfere with the fundamental constitutional rights of service personnel.”⁵⁷ *Goldman* demonstrates the extent of the military’s power to curtail the free exercise rights of its personnel.

Similarly, in *Brown v. Glines*, the Court upheld a Navy regulation that required personnel to get officer approval before circulating petitions on bases.⁵⁸ As in *Goldman*, the Court based its decision on the unique character of the military.⁵⁹ Moreover, in *Parker v. Levy*, the Supreme Court denied a habeas petition by a military doctor who had been court-martialed because he encouraged soldiers to disobey orders and refuse to go to Vietnam.⁶⁰ The Supreme Court has recognized that individual rights must yield to the government’s compelling purpose in military uniformity and discipline.

2. Public Schools

Several Supreme Court cases establish that public school administrators are also granted considerable deference to regulate private expression of students. On the one hand, “[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”⁶¹ On the other hand, however, “the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.”⁶² In *Morse v. Frederick*, for example, the Olympic Torch Relay for the 2002 Salt Lake City Winter Games passed through Juneau, Alaska.⁶³ The principal of a local high school, Juneau–Douglas High School (JDHS), permitted teachers to take their students to the street in front of the school to watch the relay.⁶⁴ JDHS senior Joseph Frederick and his friends were

54. *Id.* at 509–10.

55. *Id.* at 505.

56. *Id.* at 504.

57. *Id.* at 515 (Brennan, J., dissenting).

58. 444 U.S. 348, 350–51 (1980).

59. *Id.* at 354.

60. 417 U.S. 733, 743 (1974) (“This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society.”).

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

62. *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 682, (1986).

63. *See* 551 U.S. 393, 397 (2007) .

64. *See id.*

among the spectators.⁶⁵ When the torch passed by, they unfurled a fourteen-foot banner that read, “BONG HiTS 4 JESUS.”⁶⁶ The Court held that the principal was within her authority to confiscate the banner and suspend Frederick for ten days because his banner promoted illegal drug use: “The special characteristics of the school environment and the governmental interest in stopping student drug abuse—reflected in the policies of Congress and myriad school boards, including JDHS—allow schools to restrict student expression that they reasonably regard as promoting illegal drug use.”⁶⁷ Therefore, as in the military cases, the Court stresses the uniqueness of the school environment and the importance of the governmental interest to justify granting administrators deference to limit student free expression.

Moreover, in *Hazelwood School District v. Kuhlmeier*, a primary justification for allowing school administrators to censor a school-run magazine was that the messages printed therein could be attributed to the school.⁶⁸ The same fear attaches to free exercise in a public school. Notably, in the *Kountze* case, the biblical message on the run-through sign can be attributed to the cheerleaders, the football team, and the school as a whole. Just as the student speech espoused in a school newspaper can be imputed to the school, so can a cheerleaders’ religious message. By imputing private expression to public schools, courts engage in a more searching inquiry for state action.

The Seventh Circuit case *Hedges v. Wauconda Community Unit School District No. 118*,⁶⁹ decided prior to *Santa Fe*, is helpful to show that although students maintain core free exercise rights, the school has some ability to regulate religious expression. The opinion by Judge Easterbrook invalidated portions of a junior high school policy to limit religious speech at school. On the one hand, the school could not limit all religious speech.⁷⁰ The panel rejected the view that “whatever speech the school permits, it espouses.”⁷¹ On the other hand, the school could regulate the time and place of distribution of pamphlets and limit the distribution of pamphlets created by nonstudents to ten copies.⁷² In addition, the panel implied that the school could maintain neutrality by affirmatively stating that the view of the student speaker was not its view.⁷³ These cases show that schools have the power to regulate the free expression of students and that the school may need to take affirmative steps to distance itself from private speech.

B. SANTA FE AND THE “PRAYER IN SCHOOLS” CASES SUGGEST THAT THE SUPREME COURT REQUIRES A LOWER THRESHOLD TO FIND STATE ACTION FOR PUBLIC SCHOOL ESTABLISHMENT CLAIMS

65. *See id.*

66. *See id.*

67. *Id.* at 408 (internal quotations omitted) (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 603, 606 (1969)).

68. 484 U.S. 260, 272 (1988).

69. 9 F.3d 1295 (7th Cir. 1993).

70. *Id.* at 1297.

71. *Id.* at 1299.

72. *Id.* at 1302–03.

73. *Id.* at 1299.

The Kountze School District brief in opposition to an injunction primarily relies on *Santa Fe Independent School District v. Doe*⁷⁴ to support its claim that the cheerleaders' banner is state action and the ban is therefore required to prevent an Establishment Clause violation. *Santa Fe* is the latest in a long line of Supreme Court cases holding prayer in public schools unconstitutional. *Santa Fe*, however, is notable in that it finds state action by imputing student speech to the public school. The Supreme Court has shown an eagerness to find state action in these cases even though the same expression would properly be viewed as private in another context.

In *Santa Fe*, a Texas high school's elected student council chaplain initially broadcast a prayer over the public address system at all the varsity football team's games.⁷⁵ After an Establishment Clause complaint was filed in court, the school changed its policy.⁷⁶ Under the new policy, the school would conduct two ballots, first to determine whether an invocation should be given before football games and second to elect a student to give the invocation.⁷⁷ The school district argued that this was private speech by students outside the purview of the First Amendment.⁷⁸ But the Court held that the invocation was government speech in violation of the Establishment Clause.⁷⁹ Notably, the Court sustained a facial challenge to the policy before it had even been implemented,⁸⁰ a fact that troubled Chief Justice Rehnquist in dissent.⁸¹

Notably for the *Kountze* case, in finding state action, the Court placed an affirmative burden on the school to divorce itself from the student's private message:

Moreover, the District has failed to divorce itself from the religious content in the invocations. It has not succeeded in doing so, either by claiming that its policy is "one of neutrality rather than endorsement" or by characterizing the individual student as the "circuit-breaker" in the process. Contrary to the District's repeated assertions that it has adopted a "hands-off" approach to the pregame invocation, the realities of the situation plainly reveal that its policy involves both perceived and actual endorsement of religion. In this case, as we found in *Lee*, the "degree of school involvement" makes it clear that the pregame prayers bear "the imprint of the State and thus put school-age children who objected in an untenable position."

The District has attempted to disentangle itself from the religious messages by developing the two-step student election process. The text of the October policy, however, exposes the extent of the school's entanglement. The elections take place at all only because the school "board has chosen to permit students to deliver a brief invocation and/or message."⁸²

74. 530 U.S. 290 (2000).

75. *See id.* at 294.

76. *See id.*

77. *See id.* at 297–98.

78. *See id.* at 302.

79. *See id.* at 301.

80. *See id.* at 313–14.

81. *See id.* at 321 (Rehnquist, C.J., dissenting).

82. *Id.* at 305–06 (internal citations omitted).

For Justice Stevens, a school's routine functions—holding student council elections and hosting football games—allowed for a finding of state action. Should a student choose to offer a religious message, the school must actively distance itself from the religious pronouncement. Here, state action was triggered by the school's failure to act. Because the school's authority over students is so pervasive, it seems inevitable that there will be some entanglement between the school and a student's public pronouncement. A student could not publicly deliver a message without the school's approval: "the invocation is then delivered to a large audience assembled as part of a regularly scheduled, school-sponsored function conducted on school property. The message is broadcast over the school's public address system, *which remains subject to the control of school officials.*"⁸³ A public school creates the context in which a private message is delivered and retains control over the means of delivery. A message that would be private speech or free exercise in another context is thus viewed as delivered under the aegis of school officials. State action is triggered when the school retains power over the private message but declines to exercise that power.

Santa Fe is just the latest in a long string of cases on the Establishment Clause in public schools. "The Supreme Court's Establishment Clause jurisprudence has been remarkably consistent in sustaining virtually every challenge to government-sponsored religious expression or involvement in the public schools."⁸⁴ Prior to *Santa Fe*, in *Lee v. Weisman*, the Court held that a high school's inviting a local rabbi to deliver a nonsectarian invocation at a graduation ceremony was unconstitutional.⁸⁵ The Court in *Lee* went to great lengths to show the state's "pervasive"⁸⁶ involvement with the religious invocation delivered by the rabbi. Despite using a private actor as a conduit to deliver the message, the school triggered state action by inviting the rabbi.⁸⁷ In an establishment case, the Court will scrutinize the school's entire course of conduct to find state action. The ability to frame government inaction as action allows the court to apply a different standard in these cases.

Just as the Court stressed the unique nature of public schools to limit individual rights, it also stressed the uniqueness of schools in the "prayer in school" cases. In *Lee* and *Santa Fe*, the Court stressed the uniqueness public schools: "Our decisions . . . recognize, among other things, that prayer exercises in public schools carry a particular risk of indirect coercion."⁸⁸ Indirect coercion arises because "the school district's *supervision and control* of a high school graduation

83. *Id.* at 307 (emphasis added).

84. *Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 377 (6th Cir. 1999) (holding prayer before school board meetings unconstitutional).

85. 505 U.S. 577, 586 (1992).

86. *Id.* at 587.

87. *See id.* at 586.

88. *Lee*, 505 U.S. at 592; *see also Engel v. Vitale*, 370 U.S. 421 (1962) (holding government-sponsored prayer in public schools violates the Establishment Clause even though prayer was nondenominational and students were free to leave the room).

ceremony places public pressure, as well as peer pressure, on attending students.”⁸⁹ Indirect coercion has been used to justify strict separation of religion in public schools in *Lee* and *Santa Fe*. But this justification also supports a lower threshold for state action in public schools. School-age students are impressionable and subject to peer pressure.⁹⁰ The school retains great influence over the lives of students. The school’s power over students can lead to a finding of state action when the school offers a student a platform on which to deliver a religious message. A viewer understandably assumes that because a school has the power to regulate student speech, the school’s toleration of a public student message implies approval. Just as the nature of public schools makes them more susceptible to Establishment Clause violations, public schools’ special characteristics should make them more susceptible to a finding of state action. The Court has not recognized that the state action analysis is influenced by the fact that the claim arose in the pervasively regulated realm of public schools. Nonetheless, a searching state action inquiry is implicit in the “prayer in schools” cases.

C. WHETHER A COURT FINDS STATE ACTION IS INFLUENCED BY THE UNDERLYING CONSTITUTIONAL CLAIM AND THE CONTEXT IN WHICH IT ARISES

State action is not a uniform doctrine. The constitutional claim and facts have influenced courts’ state action determination. Notably, courts are more willing to find state action for equal protection violations than in other constitutional cases. In addition, courts appear to apply a heightened state action standard when the claim arises out of the pervasively regulated prison context. By analogy, these state action decisions support the argument that state action is more likely to be found for establishment claims in public school. As in establishment cases, courts place an affirmative duty on the government to remedy racial discrimination. In addition, public schools are comparable to prisons in that the lives of the citizens who pass through them are pervasively regulated pursuant to a compelling government purpose.

1. Courts Are More Willing to Find State Action for Racial Distinctions in Violation of Equal Protection

Law professors have noted the lower standard of state action for equal protection claims.⁹¹ The Second Circuit expressly adopted this view, holding that application of the so-called exceptions to the state action doctrine turned on whether the claim was based on racial discrimination.⁹² Similarly, courts have implicitly recognized a lower standard for Establishment Clause claims in public schools. In equal protection cases, courts seem to apply the strict scrutiny standard equally to the state action issue and the merits of the case. The Supreme Court

89. *Lee*, 505 U.S. at 593 (emphasis added).

90. *See id.* at 593.

91. *See, e.g.,* CHEMERINSKY, *supra* note 36, at 518; Glennon, *supra* note 40, at 227.

92. *See* *Lebron v. Nat’l R.R. Passenger*, 12 F.2d 388, 392, *rev’d on other grounds*, 513 U.S. 374 (1995).

found state action where a state court enforced a private covenant to discriminate on the basis of race in the landmark case of *Shelley v. Kramer*.⁹³ In addition, in *Burton v. Wilmington Parking Authority*, the Court found state action where the government leased space to a private restaurant that refused to serve blacks.⁹⁴ The *Burton* Court suggested that the government could have prohibited racial discrimination by the restaurant in the terms of the lease,⁹⁵ thus suggesting that failure to affirmatively regulate in that instance became state action: “By its inaction, the Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination.”⁹⁶ Both cases illustrate that the Court treated the government’s normal regulatory duties—leasing land and enforcing covenants—as state action because the underlying claim was based on racial discrimination. Similarly, a school’s normal duties, like hosting a football game and turning a public address system over to a student, were treated as state action in *Santa Fe*.

The only outer limit on state action in the race distinction cases is *Moose Lodge No. 107 v. Irvis*, in which the Court held that a private club’s refusal to serve the black plaintiff did not violate the Equal Protection Clause.⁹⁷ The *Irvis* plaintiff argued that the state action was triggered by the state liquor board’s grant of a liquor license to the private club.⁹⁸ The majority noted that if state action were found anytime a private association received a government benefit, the public/private distinction would be “emasculated.”⁹⁹ The Court did, however, enjoin a state liquor board regulation requiring that a private club obey its own constitution and bylaws insofar as those bylaws were racially discriminatory.¹⁰⁰ Significantly for state action in public schools, three justices dissented, relying on the fact that liquor licensing laws are “are primarily *pervasive regulatory schemes* under which the State dictates and continually supervises virtually every detail of the operation of the licensee’s business.”¹⁰¹ Thus, three Justices explicitly recognized that the greater the government regulation, the greater likelihood that state inaction will be treated as state action. Public schools are correspondingly areas of pervasive government regulation and therefore courts correctly search for state action when the underlying claim is for an Establishment Clause violation.

2. Courts Have Also Found State Action More Readily in Prisons

93. 334 U.S. 1 (1948).

94. 365 U.S. 715, 716 (1961).

95. *Id.* at 725.

96. *Id.* (emphasis added).

97. 407 U.S. 163, 175–76 (1972).

98. *See id.* at 165.

99. *Id.* at 173.

100. *See id.* at 178–79.

101. *Id.* at 185 (1972) (Brennan, J., dissenting); *see also id.* at 181 (Douglas, J., dissenting) (“The scheme of regulation is complete and pervasive.”).

The state action in prison cases demonstrate that the context in which the claim arises is relevant. In *West v. Atkins*, a prisoner sued a private physician who provided medical services in the prison.¹⁰² The Court held that because the physician was under contract with the state, he was acting under color of state law and was amenable to a section 1983 civil rights suit.¹⁰³ In contrast, in *Polk County v. Dodson*, the Court held that a public defender employed by the state was not a state actor.¹⁰⁴ Thus, a private physician who provided care in a prison was a state actor whereas a government-employed public defender was not. The Court distinguished the public defender from the prison doctor by saying that the public defender's loyalty was to his client, not to the government.¹⁰⁵ However, a doctor owes duties to his patient similar to the lawyer-client relationship. An alternative albeit unstated explanation for the different outcomes is that *West* arose out of the heavily regulated prison context and *Polk County* did not. These cases show that the Court is more willing to find state action by private actors in prisons.¹⁰⁶

Circuit Courts have taken the cue from the Supreme Court and found state action for prison and homeless-shelter establishment claims where a private entity was interposed between the citizen and the state. In *Americans United for Separation of Church and State v. Prison Fellowship Ministries*, the Eighth Circuit found an Establishment Clause violation for a private religious group that ministered to prisoners inside a state prison.¹⁰⁷ The Court found that the prison's providing extra benefits to prisoners based on their participation in the program triggered state action.¹⁰⁸ Once again, a court found state action for a prison administration's routine course of conduct, rewarding prisoners who enter rehabilitation programs. In addition, in *Community House, Inc. v. City of Boise*, the Ninth Circuit found that a city's leasing a homeless shelter to a religious group violated the Establishment Clause.¹⁰⁹ This case is analogous to *Burton* because a government contract was treated as state action. Government licensing and contracts, however, do not trigger state action for television stations that discriminate based on the content of advertisements¹¹⁰ or utility companies that do not provide due process before terminating service.¹¹¹ The difference between these cases and *Burton* and *Community House* must be the nature of the underlying claim in the former and the context in which it arose for the latter. Because the *Kountze* case involves the claim of establishment in the pervasively regulated

102. 487 U.S. 42 (1988).

103. *See id.* at 57.

104. 454 U.S. 312, 324–25 (1981).

105. *See id.* at 320.

106. *See also* O'Connor v. Donaldson, 422 U.S. 563 (1975) (holding that state mental hospital superintendent is acts under color of state law and is amenable to civil rights suit); Estelle v. Gamble, 429 U.S. 97 (1975) (holding that state corrections department medical director and two corrections officer were amenable to section 1983 suit).

107. 509 F.3d 406, 422 (8th Cir. 2007).

108. *See id.*

109. 490 F.3d 1041, 1052 (9th Cir. 2006).

110. *See* Columbia Broad. Sys. v. Democratic Nat'l Comm., 412 U.S. 94 (1973).

111. *See* Jackson v. Metro. Edison Co., 419 U.S. 345 (1974).

realm of public schools, the school's normal course of conduct should be more heavily scrutinized to find state action.

D. THIS RESULT FOLLOWS FROM THE RELATIONSHIP BETWEEN THE FREE EXERCISE CLAUSE AND THE ESTABLISHMENT CLAUSE

Justice Powell wrote for the majority in *Committee for Public Education v. Nyquist*, “this Court repeatedly has recognized that tension inevitably exists between the Free Exercise and Establishment Clauses, . . . and that it may often not be possible to promote the former without offending the latter.”¹¹² The two clauses are complementary; they work in tandem to ensure the separation of church and state.¹¹³ In public schools, the balance between the two clauses has shifted in favor of the Establishment Clause. We have seen that free exercise rights are limited for citizens in the military and public schools, among other possible areas. As free exercise rights shrink, the potential for an Establishment Clause violation expands. In public schools, courts implicitly recognize the greater potential for establishment by lowering the state action threshold. Courts, however, have not acknowledged that they are applying state action differently because of the nature of the claim. Whether a religious exercise is viewed as state action or private conduct determines the outcome of a case like *Kountze*: “Precisely the same conduct—leading prayers, for example—is constitutionally valued and protected if engaged in by private parties, though unconstitutional if done by the government.”¹¹⁴ In schools, there is less room for private conduct generally because the school can regulate public pronouncements. Therefore, courts impute those messages to the school, triggering state action.

E. COUNTERARGUMENTS AND RESPONSES THERETO

This Note's argument can be faulted for further curtailing students' already limited free exercise rights because schools will have to ban all student free exercise for fear that failure to ban the activity would be a constitutional violation. This is not the case, however. This Note merely recognizes and explains what courts already properly do in these cases. Courts have recognized that students retain core free speech and free exercise rights that a school cannot ban.¹¹⁵ For example, if a cheerleader had handed another student a pamphlet with the same Bible verse that was displayed on the Kountze banner, that would be constitutionally protected free exercise because there is no way that religious message could be imputed to the school. In that instance, the student is truly a private actor and the lower state action threshold will not affect

112. 413 U.S. 756, 788 (1973) (invalidating portions of state program to offer financial aid to nonpublic schools).

113. *See* *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 14 (1947).

114. McConnell, *supra* note 40, at 682.

115. *See, e.g.*, *Santa Fe Indep. Sch. Dist.*, 530 U.S. 290, 302–03 (2000); *Hedges v. Wauconda Community*, 9 F.3d 1295, 1297 (7th Cir. 1993).

that private conduct. But when otherwise private speech can be imputed to the school, as in *Kountze*, the courts must find state action for two reasons.

First, the Supreme Court itself stresses the special nature of the school. In *Lee* and *Santa Fe*, coercion concerns attach to student religious expression under the school's aegis. A student may feel like an outsider by viewing the school's toleration of a public religious message as state endorsement of a particular viewpoint.¹¹⁶ Peer pressure may prevent a student from signifying his disapproval of the message.¹¹⁷ Thus, schools have an affirmative duty to ban religious messages that can be imputed to the school lest state action be triggered by their failure to act. Second, when schools have discretion to ban some religious messages and not others, schools are likely to violate the Establishment Clause by preferring mainstream religious messages over others. As in *Santa Fe*, the tendency is for only majority viewpoints to find a public forum, while students with unpopular views are never given a chance to speak. For example, in *Kountze*, it is unlikely that the football team would ever run through a banner made by a member of the Westboro Baptist Church saying "God Hates Fags."¹¹⁸ The majoritarian nature of run-through banners ensures that only popular messages would appear. Even if an unpopular, controversial banner were displayed, the school may ban it for fear that it would disrupt the school's educational mission. In contrast, a popular religious opinion would be less controversial and less likely to be banned. Allowing majority or noncontroversial religious views to be aired at the expense of minority views violates a core idea of Establishment Clause jurisprudence, that government not "prefer one religion over another."¹¹⁹

One could also argue that the standard of state action should be wholly separate from the underlying claim. After all, whether a particular actor is the government or a private person is a question separate from whether an act is sectarian in nature. Whatever the theoretical appeal of a uniform state action standard, it has not been the Supreme Court's practice. The Court itself noted that "cases deciding when private action might be deemed that of the state have not been a model of consistency."¹²⁰ The only way to find consistency among the state action cases is to distinguish them by the underlying claim and the context in which that claim arises.

A hypothetical may help to illustrate how government inaction can become state action in an area of pervasive government regulation. Imagine a military parade of uniformed, active-duty soldiers marching down a public street in Ann Arbor, Michigan. If a row of soldiers in the parade announced that it planned to march while holding a thirty-foot banner quoting a Bible verse and the commanding officer did not object, display of that banner would be an unconstitutional Establishment Clause violation. It is a violation because each aspect of a soldier's dress and conduct is so regulated that officers' mere toleration of the display would

116. See *Santa Fe*, 530 U.S. at 309.

117. See *Lee v. Weisman*, 505 U.S. 577, 593 (1992).

118. See *Snyder v. Phelps*, 131 S. Ct. 1207, 1213 (2011) (holding that display of signs saying "God Hates Fags" and similar messages at a protest of a soldier's funeral was protected speech).

119. See *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 15 (1947).

120. *Edmondson v. Leesville Concrete Co.*, 500 U.S. 614, 632 (1991).

trigger state action, even though the soldiers acted of their own volition without any encouragement from authorities. The viewer knows that the individual rights of soldiers are subject to regulation; therefore, the government must approve of the message being displayed. For sake of comparison, imagine a parade down the same street in Ann Arbor. However, this time, the University of Michigan football team, not soldiers, is marching down the street in uniform. One row of players announces to the coach that it will hold a banner quoting a bible verse. That would not be an Establishment Clause violation because a state university does not have the military's (or a public high school's) power to regulate the private actions of its students. Because a state university is not a realm of pervasive government regulation, inaction by the university does not become state action. In fact, an attempt by the coach to prohibit the banner might be an unconstitutional infringement of the players' free exercise and free speech rights.

Mechanically, the Court would scrutinize the military's course of conduct to find state action. The military chose to have a parade of uniformed soldiers. At all relevant times, the military retained control over the course of the parade. It allowed soldiers to display a sign and it did not affirmatively distance itself from the message on that sign. On the other hand, the Court would not look at the University of Michigan's actions with the same level of scrutiny. Rather than looking at everything the university did leading up to the parade, the Court would properly conclude that the banner was the product of private choice. Unlike a public school, a state university need not affirmatively distance itself from a private message that could be imputed to the public entity. At the university level, the private conduct is not imputed to the university because observers know that the institution is not regulated to the same degree as a high school.

III. APPLICATION TO THE *KOUNTZE* CASE

Considering the lower threshold for a finding of state action for Establishment Clause claims in public schools, *Kountze* becomes a relatively straightforward case. The cheerleaders' banner can be imputed to the school and there is state action. Once state action is found, the message would violate *Lee*'s coercion test or the other Establishment Clause tests used by the Supreme Court. Therefore, the superintendent's ban was required to avoid a constitutional violation and it should be upheld.

A. STATE ACTION

Under *Santa Fe*, the message on the run-through banner can be imputed to the school. *Santa Fe* is remarkably similar to this case. Both involve student messages immediately prior to high school football games in Texas. On the state action issue, the cheerleader plaintiffs tried to distinguish *Santa Fe* based on the idea that "the Constitution is only violated when the 'State

affirmatively sponsors the particular religious practice or prayer.”¹²¹ The plaintiffs point out that in *Santa Fe*, the school held a student election to determine whether invocations should be offered before games. A second election determined which student would offer those invocations. However, this Paper has demonstrated that courts will carefully scrutinize a public school’s course of conduct to find state action. Here, as the defendants’ brief points out, the school took steps that allowed the banner to be displayed. First, the school sponsored the football team and hosted the game on its property.¹²² Cheerleading is a school-sponsored activity overseen by two faculty administrators.¹²³ The cheerleading team was created by the Cheerleader Constitution, which was granted by the school.¹²⁴ The Constitution requires the cheerleaders to make run-through banners.¹²⁵ School administrators have discretion to prohibit banners they deem offensive.¹²⁶ Although those facts amount to normal school functions, they will be read as action under the unique standard for these cases.

Santa Fe recognized that students retain a core of free exercise rights in public schools,¹²⁷ but this instance does not fall within that protected realm. Here, the school controls all aspects of the game. The football team, the cheerleading team, and the run-through banner only exist because the school has chosen to allow them to exist. A viewer knows the level of control a school exercises over the lives of its students. Therefore, “[i]n this context the members of the listening audience must perceive the pregame message as a public expression of the views of the majority of the student body delivered with the approval of the school administration.”¹²⁸ The school has taken no steps to distance itself from the message, which troubled the Court in *Santa Fe*.¹²⁹ In addition, in *Santa Fe*, the Court granted a facial challenge, assuming that the invocations would contain sectarian religious messages. Here, sectarian messages have already been displayed. The messages come from the Christian Bible, which is a preference of one religion over all others¹³⁰ in violation of the Establishment Clause.

B. THE MERITS

Once state action is found, the case can be disposed of under the coercion test of *Lee* and *Santa Fe*. *Lee* held a nondenominational prayer unconstitutional. Here, the potential for establishment is even greater because the banners—which quote the Judeo-Christian Bible exclusively—are decidedly sectarian. Attendance at the game is mandatory for the cheerleaders,

121. Defendants’ Response to Plaintiffs’ Request for Temporary Injunction at 7, *Matthews v. Kountze Indep. Sch. Dist.*, No. 53526 (May 8, 2013) (quoting *Sante Fe*, 530 U.S. at 313), *available at* <http://fhmbk.com/wp-content/uploads/2012/11/00419580.pdf>.

122. *Id.* at 10.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 11.

127. *See Santa Fe Indep. Sch. Dist.*, 530 U.S. 290, 302–03 (2000).

128. *Id.* at 308.

129. *Id.* at 291.

130. *See Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 15 (1947).

the football team, and probably the band.¹³¹ Coercion is exacerbated by the impressionable age of the students.¹³² Finally, it may appear to a student that the machinery of the state is being used to enforce the majority's religious beliefs.¹³³ Therefore, once state action is found, these run-through banners create the same issues that the Court focused on under its *Santa Fe* coercion analysis. Under the *Lemon* test, these banners violate the purpose prong and effect prong. The cheerleaders' primary purpose here is to advance their religious beliefs.

CONCLUSION

The controversial, nationally covered case of the Kountze cheerleaders illustrates the complicated question of state action for Establishment Clause claims in public schools. The determinative issue in the case is whether state action is triggered by banners made by the cheerleaders containing biblical verses. The entire football team runs through the banners before games. If the banners are indeed seen as speech by the school, they violate the Establishment Clause. On the other hand, if they are viewed as private speech, they are constitutionally protected. An examination of state action scholarship and precedent leads to the conclusion that, for Establishment Clause claims in public schools, courts correctly engage in a more searching inquiry to find state action.

Legal scholarship has reached three conclusions relevant to this case. First, inaction can always be read to be state action. Second, state action is a conceptual disaster area where courts' resolution of the state action issue is influenced by the nature of the underlying constitutional claim. Third, state action may be treated differently for Establishment Clause claims generally. This scholarship provides support for the argument that courts correctly engage in a more searching inquiry for state action in public school establishment cases. Because schools have greater power to regulate students' exercise of individual rights, courts will read failure to exercise that power as state action for Establishment Clause claims.

Further support for this argument comes from case law and the constitutional text. First, cases demonstrate that public schools, along with the military, are pervasively regulated by the government. Citizens in these realms have fewer rights to free speech and free exercise because of the compelling government purpose in running these unique institutions. Second, perhaps because of the government's greater ability to regulate these institutions, case law also shows that courts engage in a more searching state action inquiry when the underlying claim involves an Establishment Clause violation in public schools. Notably in *Santa Fe*, the Court found that student-led, student-initiated prayer could be imputed to the school, triggering state action. Third, analogy to other areas of state action law shows that courts vary their state action analysis based on the underlying constitutional claim and the type of the institution being sued. Specifically, courts have stretched to find state action for equal protection claims and where the

131. *See Santa Fe*, 530 U.S. at 311.

132. *See id.* at 311–12.

133. *See id.*

alleged unconstitutional conduct arose in a prison. Finally, from a textual perspective, this argument finds support in the relationship between the Free Exercise Clause and the Establishment Clause. Because the two clauses work in tandem to ensure the separation of church and state, when the Free Exercise side is limited, the potential for an Establishment violation correspondingly increases.

Application of this idea to the *Kountze* case shows that the cheerleaders' banner is state action. Because of the forum in which the banner is displayed, a reasonable viewer would believe that the school supports the religious message. The school has taken no affirmative steps to distance itself from the message. Once state action is found, these banners violate the Establishment Clause under *Santa Fe* or *Lemon*. As a result, the cheerleaders may have to replace the Book of Hebrews banner with something more mundane but constitutional, like "Pluck the Eagles."¹³⁴

134. See Fernandez, *supra* note 8.