2002

The Show Must Go on as Academic Freedom Saves the Day: But Where Does Academic Freedom End and the Establishment Clause Begin and Has the Seventh Circuit Restricted the Limited Public Forum in Linnemeir v. Board of Trustees of Purdue University

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THE SHOW MUST GO ON AS ACADEMIC FREEDOM SAVES THE DAY: BUT WHERE DOES ACADEMIC FREEDOM END AND THE ESTABLISHMENT CLAUSE BEGIN AND HAS THE SEVENTH CIRCUIT RESTRICTED THE LIMITED PUBLIC FORUM IN LINNEMEIR v. BOARD OF TRUSTEES OF PURDUE UNIVERSITY?

I. INTRODUCTION

Art and entertainment can take a number of forms; for example, artistic expression can be as simple as a mural displayed in the hallway of a public school. Additionally, artistic expression can also be performed on stage such as when choirs perform concerts for the public. Many times, however, public schools and universities perform plays that run into significant First Amendment challenges. Such First Amendment challenges can occur when the artistic expression or performance relates to religion.

The United States Constitution states that "Congress shall make no law respecting an establishment of religion." This phrase has been interpreted to prohibit the establishment of a state church or religion. The Supreme Court has stated that under the First Amendment:

1. See Gernetzke v. Kenosha Unified Sch. Dist. No. 1, 274 F.3d 464, 466 (7th Cir. 2001) (stating student mural part of larger collection of artwork done by extra-curricular groups).
3. See Linnemeir v. Bd. of Trs. of Purdue Univ., 260 F.3d 757, 758 (7th Cir. 2001) (discussing university's plans to show performance of play entitled Corpus Christi written by Terrance McNally). The Seventh Circuit spelled the plaintiff Linnemeir, whereas the district court classified the plaintiff as Linnemeier. For the purposes of this Note, this distinction between the two spellings will remain intact, as the Seventh Circuit opinion will be classified with the Linnemeir designation and the district court opinion will be classified with the Linnemeier designation.
4. See Gernetzke, 274 F.3d at 466-67 (discussing plaintiff's contention that school principal violated their constitutional rights to religious freedom by removing mural containing cross); Linnemeir, 260 F.3d at 758 (stating plaintiffs contention that university violated Establishment Clause by supporting anti-Christian play); Duncanville Indep. Sch. Dist., 70 F.3d at 407 (stating plaintiff's contention that singing religious school theme song at all school events transformed permissible practice of singing song into actual state endorsement of religion).
5. U.S. CONST. amend. I.
6. See, e.g., Lynch v. Donnelly, 465 U.S. 668, 672 (1984) (stating purpose of Establishment Clause and Free Exercise Clause is "to prevent, as far as possible, the intrusion of either [the church or state] into the precincts of the other" (quoting Lemon v. Kurtzman, 403 U.S. 602, 614 (1971)). In Lemon, the Court stated that
Amendment a state may not sponsor a program or practice that disparages any particular religion or belief. In determining if a practice violates the Establishment Clause, courts often look to whether the program or practice is conducted in either a public or non-public forum. This determination is significant because private expression in the limited or traditional public forum will be given wider latitude as it relates to any perceived Establishment Clause violation.

the authors of the religion clauses of the First Amendment sought to prohibit the establishment of a state church or religion because of the great dangers that a state religion or church would impose on the American people. See 403 U.S. at 612.

7. See Epperson v. Ark., 393 U.S. 97, 106-07 (1968). In Epperson, the Court stated that:

Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.

Id. at 103-04.

8. See Good News Club v. Milford Cent. Sch., No. 99-2036, 2001 U.S. LEXIS 4312, at *15-16 (June 11, 2001) (stating parties stipulated school district created limited public forum when school opened its facilities to student groups after school, but also stating if parties had not stipulated this fact, determining type of forum would have to be resolved); Santa Fe Indep. Sch. Dist. v. Doe, 550 U.S. 290, 303 (2000) (holding "selective access does not change government property into public forum," and while granting access to one student does not preclude finding of limited public forum, school election system ensures only majoritarian message will be put forth); Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 758, 770 (1995) (plurality opinion) (stating religious expression of cross on public or limited public forum if purely private and publicly announced to all on equal terms cannot violate Establishment Clause); Widmar v. Vincent, 454 U.S. 263, 277 (1981) (stating school that created forum, which was generally open to all groups cannot seek to enforce exclusion based on religious speech).

9. See Pinette, 515 U.S. at 770 (stating "Religious expression cannot violate the Establishment Clause where it (1) is purely private and (2) occurs in a traditional or designated public forum, publicly announced and open to all on equal terms."). It is important to note however, that this per se rule of private speech in the public forum has only received plurality support on the Supreme Court. See id. at 757. Instead, the concurring justices in Pinette added the important fact that the state had included an adequate disclaimer which made clear the state’s role in expression to the community and removed any doubt about any perceived state approval of the religious message. See id. at 776 (O’Connor, J., concurring). In Pinette, the state did not endorse the religious expression, and while the expression was made on government property, it was requested via the same process and on the same terms as other private groups. See id. at 763; see also Bd. of Educ. v. Mergens, 496 U.S. 226, 250 (1990) (stating Christian after-school club is private speech because secondary school students are mature enough to understand that club resembles private speech endorsing religion which does not violate the First Amendment as opposed to government speech endorsing religion which would violate Establishment Clause).
Such Establishment Clause issues often arise in the context of public schools and universities. Examples of Establishment Clause cases in public schools and universities include student-run religious publications and student-led prayers during graduation exercises. Establishment Clause issues have also arisen in more traditional classroom settings. In these types of cases, an additional concern for academic freedom surfaces. At the same time, however, courts have held that the classroom is not a public forum for professors. Schools and school officials must be aware that even activities that are seen as possible entertainment or expressive aspects of the curriculum can violate the Establishment Clause. As a result, school policies or programs that rise to an endorsement

10. See Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 837 (1995) (noting University of Virginia argued funding Christian publication through mandatory student fees violated Establishment Clause); Widmar, 454 U.S. at 265 (noting University of Missouri at Kansas City argued it could not allow religious group to use its facilities any longer because school policy prohibited use of religious worship or religious teaching based upon perceived violation of Establishment Clause); Gernetzke v. Kenosha Unified Sch. Dist. No. 1, 274 F.3d 464, 466-67 (7th Cir. 2001). While the claim in Gernetzke was a religious freedom claim and not an Establishment Clause claim, the action was predicated on the principal not wanting to invite possible Establishment Clause litigation. See Gernetzke, 274 F.3d at 466; see also Martha M. McCarthy, "A Wink and a Nod" to Student-Initiated Devotions in Public Schools, 139 EDU. LAW REP. 1, 15-16 (Jan. 2000) (stating ambiguous definitions and inconsistent legal standards of Establishment Clause are frustrating to school personnel who devote time and energy to church/state controversies and because of ambiguity, litigation will follow).

11. See Santa Fe, 530 U.S. at 295 (stating respondents moved for temporary restraining order to prevent school district from going forward with student-led prayer at graduation because it violated Establishment Clause); see also Rosenberger, 515 U.S. at 837 (stating petitioner’s claim that alleged production of Christian magazine through student activity funds violated Establishment Clause).

12. See, e.g., Brown v. Woodland Joint Unified Sch. Dist., 27 F.3d 1373, 1377 (9th Cir. 1994) (noting parent’s objection to part of school curriculum that suggested students compose rhymes and chants similar to Wicca religion); Roberts v. Madigan, 921 F.2d 1047, 1055 (10th Cir. 1990) (“The removal of material from the classroom is acceptable when it is determined that the materials are being used in a manner that violates the Establishment Clause guarantees.”); Grove v. Mead Sch. Dist. No. 354, 753 F.2d 1528, 1531 (9th Cir. 1985) (discussing student’s objection to reading The Learning Tree because it was offensive to her religious beliefs).


14. See Edwards v. Cal. Univ. of Pa., 156 F.3d 488, 491 (3d Cir. 1998) (stating public university professor does not have First Amendment right to decide what will be taught in classroom).

15. See McCarthy, supra note 10, at 15 (stating school personnel must devote substantial time and energy to ensure they act in accordance with principles of Establishment Clause).
or disparagement of a particular religion, violate the Establishment Clause.16

While courts often look to the public forum doctrine,17 they also grant schools and universities wide discretion for academic freedom, whereby a school may decide its own curriculum and teaching methods.18 When a court grants a school the ability to decide its own curriculum, expressive activities bring about differing views.19 These types of expressive activities might be prevented, however, if school officials do not allow students their free speech rights.20

In Linnemeir v. Board of Trustees of Purdue University,21 the United States Court of Appeals for the Seventh Circuit considered whether a state university violated the Establishment Clause by producing a play, Corpus Christi, which depicts Jesus Christ as a homosexual engaging in homoerotic acts with his disciples.22 The

16. See Santa Fe, 530 U.S. at 317 (holding school district's policy of allowing student to give prayer at home football games violated Establishment Clause); Ep- person v. Ark., 393 U.S. 97, 106-07 (1968) (holding state practice only allowing teachers to teach creationism and prohibiting them from teaching evolutionism violated Establishment Clause because it acted as aid to Christian religion); Doe v. Duncanville Indep. Sch. Dist., 70 F.3d 402, 407 (5th Cir. 1995) (looking at whether using religious theme song will have affect of advancing or endorsing religion).

17. See, e.g., Santa Fe, 530 U.S. at 304 (holding mere election system of student prayer speaker does not create limited public forum, and therefore, prayer during home football game takes place in non-public forum and violates Establishment Clause); Bd. of Educ. v. Mergens, 496 U.S. 226, 240 (1990) (stating school created limited public forum and therefore could not prohibit noncurriculum related student groups from equal access to school facilities on basis of that group's speech); Widmar v. Vincent, 454 U.S. 263, 277 (1981) (holding because university created public forum, it could not exclude religious group on basis of group's religious speech).

18. See Brown v. Woodland Joint Unified Sch. Dist., 27 F.3d 1373, 1379 (9th Cir. 1994) (holding that if Establishment Clause violation arose whenever "student believed that a school practice either advanced or disapproved of a religion, school curricula would be reduced to lowest common denominator" and would make students ultimate curriculum review committee unto themselves); Roberts v. Madi- gan, 921 F.2d 1047, 1055 ("[S]chool officials must be allowed, within certain bounds, to exercise discretion in determining what materials or classroom prac- tices are being used appropriately."); Grave, 753 F.2d at 1533 ("Local school boards have broad discretion in the management of schools."").

19. See Linnemeir v. Bd. of Trs. of Purdue Univ., 260 F.3d 757, 759 (7th Cir. 2001) (stating First Amendment supports school role in fostering expression of views that are antagonistic to majoritarian Christian viewpoint).

20. See Ralph D. Mawdsley & Charles J. Russo, Religious Expression and Teacher Control of the Classroom: A New Battleground for Free Speech, 107 EDUC. LAW REP. 1, 14 (Apr. 18, 1996) (stating while "free speech has expanded students' expressive rights, the role of expression in the classroom" has not been decided and courts must balance need for school officials to direct learning).

21. 260 F.3d 757 (7th Cir. 2001).

22. See id. at 758 (stating plaintiffs argue presenting play will violate First Amendment because school will be sponsoring anti-Christian beliefs).
Seventh Circuit held that the theater where the play was to be performed was like a classroom, and therefore was a non-public forum. The court decided the case under the theory of academic freedom and gave the university discretion in determining whether to perform the play. The court stated that under the theory of academic freedom, the government had a strong interest in providing a stimulating, well-rounded education and this mission would be crippled if the court did not permit the performance.

This Note examines the holding and rationale the Seventh Circuit used to determine whether the university theater was a non-public forum, and why the court decided the case under an academic freedom argument. Part II of this Note details the facts of Linnemeir. Part III provides an overview of the anti-religious segment of Establishment Clause jurisprudence, the public forum doctrine and Establishment Clause issues that have arisen in artistic expression and entertainment related activities in the public schools. Part IV of this Note explains the Seventh Circuit's rationale for its holding and Judge Coffey's reasons for his dissent. Part V analyzes the court's reasoning as it pertains to prior authority. Finally, Part VI examines the impact that this decision will have on future Establishment Clause cases, and will briefly examine the impact on future artistic expression and entertainment activities that take place in the public school setting.

II. FACTS

Indiana University-Purdue University at Fort Wayne is a state-run institution of higher learning. Jonathan Gilbert was a theater major at the university with an emphasis on directing, and was enrolled in a course entitled "Senior Performance Project." In or-

23. See id. at 760 (holding "[c]lassrooms are not public forums").
24. See id. ("the school authorities and the teachers, not the courts, [should] decide whether classroom instruction shall include works by blasphemers").
25. See id. at 759 (stating if court ruled in favor of preliminary injunction, other scholarly works would be prohibited from being taught at public universities).
26. For a further discussion of the underlying facts of the case, see infra notes 31-45.
27. For a further discussion of the background, see infra notes 46-140.
28. For a further discussion of the narrative analysis, see infra notes 141-61.
29. For a further discussion of the critical analysis, see infra notes 162-91.
30. For a further discussion of the impact this case will have on artistic and entertainment related school activities, see infra notes 192-210.
31. See Linnemeir, 260 F.3d at 758.
order to fulfill his course requirements, Gilbert directed a play of his choosing, Terrance McNally’s *Corpus Christi.* The play portrays Joshua, a Jesus Christ figure, as the protagonist who is a homosexual engaging in sexual relations with his disciples.

Before the play could be performed, Gilbert’s selection had to be approved by a five-member faculty review board. This five-member board never evaluated the viewpoint of any proposed production. Rather, the board only “inquire[d] of the student the reasons for selecting a particular project and how that student is prepared to undertake that project.” The play was to be performed at the studio theater on the Indiana University-Purdue University at Fort Wayne campus.

Initially, eleven residents of the state of Indiana and twenty-one members of the Indiana General Assembly filed suit, alleging the university and its Board of Trustees would violate the Establishment

*of Trs. of Purdue Univ., 760 F.3d 757 (7th Cir. 2001) (discussing course was requirement for all theater majors and that course was to serve “as the curricular capstone, during [the student’s] final semester”). The course catalog explained that “[s]tudents will develop, with their advisor, a public performance or presentation appropriate to their area of emphasis.” *Linnemeier II, 155 F. Supp. 2d at 1036. Furthermore, the theater department placed an emphasis on the need for its major students to obtain both classroom study and theater production experience as a way of “educat[ing] its students in the art, craft and discipline of the theater.” *Id. n.3.

33. *See Linnemeier v. Ind. Univ.-Purdue Univ. Fort Wayne, (“Linnemeier I”) 155 F. Supp. 2d 1044, 1048 n.2 (N.D. Ind. 2001), injunction denied, Linnemeier v. Indiana Univ.-Purdue Univ. Fort Wayne, 155 F. Supp. 2d 1034 (N.D. Ind. 2001), stay denied sub nom., Linnemeir v. Bd. of Trs. of Purdue Univ. 260 F.3d 757 (7th Cir. 2001) (stating Gilbert’s major and concentration and his ultimate decision to direct *Corpus Christi* with permission of university’s faculty).

34. *See Linnemeier II, 155 F. Supp. 2d at 1036 (stating theme of play). The play itself contains graphic language at times. See *Linnemeier*, 260 F.3d at 758. For instance, while the Jesus Christ like character is hanging on the cross, one of his disciples shouts to him, “Hey faggot! If I was the Son of God I wouldn’t be hanging here with my dick between my legs.” *Id.*

35. *See Linnemeier II, 155 F. Supp. 2d at 1036 (stating Gilbert submitted proposal sheet to five member faculty committee for approval).

36. *See id. at 1036-37 (stating theater department chair testified theater department never evaluated viewpoint of work proposed as part of course requirement and remains viewpoint neutral as to all theater productions).

37. *Id. at 1036.

38. *See id. at 1036 (stating where production was to take place). The university argued that the studio theater was not only available to university students or students who are theater majors at the school. See *id. at 1037. Indiana University-Purdue University argued that it permitted outside groups to use the theater’s facilities, but to date, only one outside group had taken the opportunity to use the studio theater. See *id.* Larry Life, the chairperson of the theater department, and the school’s chancellor, both agreed that the studio theater was available and open to outside groups without regard to the content of the outside group’s speech. See *id.*
Clause if the production was performed at the studio theater.\textsuperscript{39} Eventually, all but three plaintiffs were dismissed as lacking standing.\textsuperscript{40} The three remaining plaintiffs petitioned the Northern District Court for the State of Indiana for a preliminary injunction to prevent the play from being performed.\textsuperscript{41} After the district court denied the preliminary injunction, the plaintiffs filed an appeal with the Seventh Circuit seeking a stay pending their appeal from the district court’s refusal to grant a preliminary injunction.\textsuperscript{42}

The district court held that the studio theater was a limited public forum and that the university could not discriminate against the viewpoint of those speaking without violating the First Amendment’s free speech guarantee.\textsuperscript{43} While the Seventh Circuit disagreed with the district court’s finding, it agreed with the ultimate holding and allowed the play to go forward.\textsuperscript{44} The Seventh Circuit held that it should be up to the university and not the courts to decide “whether classroom instruction [should] include works by blasphemers.”\textsuperscript{45}

\begin{footnotesize}
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\item See Linnemeier I, 155 F. Supp. 2d at 1047-48 (setting forth various parties in litigation). In this original opinion by the district court, the judge dismissed all but three of the plaintiffs who were residents of Indiana because the rest of the plaintiffs did not have standing. See id. at 1055.
\item See id. at 1055 (stating motion to dismiss is denied as to three plaintiffs).
\item See Linnemeier II, 155 F. Supp. 2d at 1035-36 (setting forth remaining three plaintiffs’ motion to enjoin university from putting on production of Corpus Christi).
\item See Linnemeir, 260 F.3d at 758 (discussing plaintiffs’ motion to stay pending appeal of district court’s refusal to grant preliminary injunction).
\item See Linnemeier II, 155 F. Supp. 2d at 1042-43 (stating university created public forum at studio theater and could not discriminate against viewpoint of those speaking).
\item See Linnemeer, 260 F.3d at 760 (denying motion to stay and therefore allowing play to go forward).
\item Id. (holding courts should not decide whether production should go on, rather decision should be left to school officials). The judges agreed that the theater was not a limited public or traditional public forum as the district judge had ruled, but rather that the theater was a non-public forum. See id. “But the jurists parted ways after that.” Patricia Manson, Curtain Rising for Play Judges Deem Offensive, 147 CHI. DAILY L. BULL., Aug. 10, 2001, at 1. The Seventh Circuit stated that the district court opinion focused on whether the university theater was a limited public forum or a non-public forum. See Linnemeier, 260 F.3d at 759-60. The district court found that the university theater was a limited public forum and that the play did not violate the Establishment Clause. See Linnemeier II, 155 F. Supp. 2d at 1040-41. It is interesting to note that the district judge felt that if the theater was found to be a non-public forum, the court was required to undergo a Lemon analysis to see if in fact the school violated the Establishment Clause. See id. at 1040.
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III. BACKGROUND

The United States Constitution states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." This guarantee is often an issue in public school and university settings. Issues have arisen in the context of (1) an individual school curriculum; (2) school clubs that are for entertainment or extracurricular activities; and (3) expressive and overt entertainment activities such as the production of a play, concert, or artwork. In school curriculum cases, the

46. U.S. CONST. amend. I.

48. See Brown v. Woodland Joint Unified Sch. Dist., 27 F.3d 1373, 1376-77 (9th Cir. 1994) (plaintiffs objected to use of "Impressions" reading curriculum because it endorsed and promoted practice of witchcraft). The Impressions series is a teaching aid that attempts to get children enthusiastic about reading as well as get children to read faster. See id. at 1377; see also Grove v. Mead Sch. Dist. No. 354, 753 F.2d 1528, 1531 (9th Cir. 1985) (plaintiffs objected to use of The Learning Tree in curriculum because it was offensive to student's Christian beliefs). The Learning Tree was assigned to a sophomore high school student as part of a literature class. See Grove, 753 F.2d at 1531. The plaintiff in Grove, alleged that by not prohibiting the book from its curriculum, the school board violated the First Amendment religion clauses. See id. at 1533.

49. See Good News Club, 2001 U.S. LEXIS 4312, at *26-27 (June 11, 2001) (discussing school district's allegation that exclusion of Christian after-school club was acceptable because school had compelling interest not to violate Establishment Clause); see also Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 825-26 (1995) (stating student-run publication's purpose was to "facilitate discussion which fosters an atmosphere of sensitivity to and tolerance of Christian viewpoints").

50. See Linnemeir, 260 F.3d at 758 (stating plaintiffs moved for preliminary injunction to stop performance of play because school violated First Amendment by publicly endorsing anti-Christian beliefs). For a further discussion of school related artistic and entertainment related school cases, see supra note 4 and accompanying text.
question is whether the classroom instruction itself violates the Establishment Clause.\textsuperscript{51} In determining whether violation has occurred, courts often focus on whether the area in question, usually a classroom, hallway or school theater, is a public or non-public forum.\textsuperscript{52} Making such a determination is important because a "religious" message that is purely private and that occurs in a public forum will not be viewed as a violation of the Establishment Clause so long as the state adequately makes clear the state's role in the message.\textsuperscript{53}

A. Government's Sponsorship of Anti-Renligious Speech May Violate the Establishment Clause

The language of the Establishment Clause makes clear that if the government endorses a particular religion, that endorsement violates the Constitution.\textsuperscript{54} Moreover, courts have stated that state-

\textsuperscript{51} See \textit{Brown}, 27 F.3d at 1381 (holding school curriculum which suggests children compose rhymes and chants similar to Wicca religion does not violate Establishment Clause because they constitute minute part of the curriculum, and that objective observer would not view materials as religious rituals endorsing witchcraft); \textit{Roberts v. Madigan}, 921 F.2d 1047, 1055-56 (10th Cir. 1990) (stating school decision to prohibit public school teacher from reading Bible quietly during class's quiet reading period was not government disapproving of Christianity, but rather school exercising its discretion in determining what materials or classroom practices are appropriate); \textit{Grove}, 753 F.2d at 1594 (holding instruction of novel \textit{The Learning Tree} did not violate Establishment Clause because it was a comment on American subculture). While these cases all took place in the typical classroom setting, they are particularly important in contrasting how the Seventh Circuit in \textit{Linnemeir} found that the studio theater, where \textit{Corpus Christi} was to be performed, resembled a classroom. See 260 F.3d at 759.

\textsuperscript{52} For a discussion of the importance of distinguishing between a public and non-public forum in Establishment Clause litigation, see infra notes 82-116 and accompanying text. See also \textit{Washhegesic v. Bloomingdale Pub. Schs.}, 33 F.3d 679, 684 (6th Cir. 1994) (rejecting school's contention that hallway represented limited public forum and portrait of Jesus did not violate Establishment Clause).

\textsuperscript{53} For a discussion of how the state can successfully argue against Establishment Clause violations in public forums see supra note 9 and accompanying text. It is important to note that Justice Scalia has received only plurality support for his \textit{per se} rule that purely private speech in a public forum that is open to all will not violate the Establishment Clause. See Capitol Square Review and Advisory Bd. v. \textit{Pinette}, 515 U.S. 753, 770 (1995) (plurality opinion). Rather, the concurring justices in \textit{Pinette} focused on whether the state action would be perceived as a state endorsement of religion; yet, they ultimately came to same conclusion of the majority. See \textit{Pinette}, 515 U.S. at 776 (O'Connor, J., concurring) (rejecting \textit{per se} rule but stating that disclaimer removes "doubt about state approval of . . . religious message").

\textsuperscript{54} See \textit{Santa Fe Indep. Sch. Dist. v. Doe}, 530 U.S. 290, 309-10 (2000) ("School sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are non-adherents 'that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.'"); \textit{County of Allegheny v. ACLU}, 492 U.S. 573, 605 (1989) (stating that "re-
sponsored programs or practices that are anti-religious in nature will also violate the Establishment Clause.\(^5\)

In *Grove v. Mead School District No. 354*,\(^6\) a sophomore in a public high school was assigned to read *The Learning Tree*.\(^7\) The student felt the book was offensive to her Christian beliefs because it disparaged her Christian faith.\(^8\) The court looked to the three-prong Establishment Clause test set forth in *Lemon v. Kurtzman*,\(^9\) to determine whether including the novel in the curriculum was unconstitutional.\(^10\)

In *Lemon*, the Court developed a three-prong test to evaluate whether the state actually violated the Establishment Clause.\(^11\) The test required that (1) the state action have a secular legislative purpose, (2) the primary effect of the action neither advance nor inhibit religion, and (3) the state action may not "foster an excessive government entanglement with religion."\(^12\) In *Lemon*, however, the Court noted that total separation of church and state is not possible, but by providing this three-part test, it attempted to draw lines

guardless of history, government may not demonstrate a preference for a particular faith); *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (stating authors of Religion Clauses "did not simply prohibit the establishment of a state church or a state religion, an area history shows they regarded as very important and fraught with great dangers. Instead they commanded that there should be 'no law respecting an establishment of religion.'").

55. See Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373, 390 (1985) (stating government practice cannot advance nor inhibit religion or its practices); *Epperson v. Ark.*, 393 U.S. 97, 106 (1968) (holding state may not adopt programs or practices that oppose any religion); *Grove*, 753 F.2d at 1534 (ruling that for challenged state action to pass constitutional muster, it must have secular purpose that does not advance or inhibit religion nor foster excessive state entanglement with religion).

56. 753 F.2d 1528 (9th Cir. 1985).

57. See id. at 1531 (stating student assigned book as part of enrollment in literature class).

58. See id. (expressing parent and student's objection to book alleging it violated religion clauses of the First Amendment).


60. See *Grove*, 753 F.2d at 1534 (holding "to pass constitutional muster, [a] challenged state action (1) must have a secular purpose, (2) must have a primary effect that neither advances nor inhibits religion and (3) must not foster excessive state entanglement with religion"); see also *Lynch v. Donnelly*, 465 U.S. 668, 691 (1984) (O'Connor, J., concurring) (stating proper inquiry under *Lemon* is "whether the government intends to convey a message of endorsement or disapproval of religion").


62. See id.; see also *Walz v. Tax Comm'n*, 397 U.S. 664, 697 (1970) (indicating statute must not foster "an excessive entanglement with religion").
to guide proper judicial interpretation. While in \textit{Grove}, the court used the \textit{Lemon} test, courts "have evaluated state action challenged on Establishment Clause grounds" under three complementary and sometimes overlapping tests. The first test is the \textit{Lemon} three-prong approach. Second, the endorsement test asks whether the government endorsed religion by its action. Third, the coercion test asks whether the government "coerced anyone to support or participate in religion or its exercise." Using this test, a "school-sponsored activity [will] contravene the First Amendment when '(1) the government directs (2) a formal religious exercise (3) in such a way as to oblige the participation of objectors.'" Courts have stated that "[t]he decision to apply a particular Establishment Clause test rests upon the nature of the Establishment Clause violation asserted."

In \textit{Grove}, the court found that the school district did not violate the Establishment Clause by including \textit{The Learning Tree} in a minor part of the school curriculum. Furthermore, the court stated that no violation of the Establishment Clause occurred because of the absence of student coercion and the critical threat posed to public education if the book were prohibited.

The Ninth Circuit elaborated on whether an anti-religious message violated the Establishment Clause in \textit{Brown v. Woodland Joint Unified School District}. In \textit{Brown}, the court ruled on whether in-

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63. \textit{See Lemon}, 403 U.S. at 614-15 ("[T]otal separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable.").

64. Freiler v. Tangipahoa Parish Bd. of Educ., 185 F.3d 337, 343 (5th Cir. 1999).

65. \textit{See id.} (stating that \textit{Lemon} test is test with longest lineage).

66. \textit{See id.} ("[T]he government unconstitutionally endorses a religion when it 'conveys a message that religion is favored, preferred or promoted over other beliefs'") (quoting County of Allegheny v. ACLU, 492 U.S. 573, 593 (1989)).


68. \textit{Freiler}, 185 F.3d at 343 (quoting Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963, 970 (5th Cir. 1992)).

69. \textit{Id.} at 344. \textit{See id.} (electing to use coercion test where state action does not direct participation in religious exercise); \textit{but see Doe v. Duncanville Indep. Sch. Dist.}, 70 F.3d 402, 405 (5th Cir. 1995) (setting out three Supreme Court Establishment Clause tests but using endorsement test to determine issue).

70. \textit{See Grove}, 753 F.2d at 1534 (stating \textit{The Learning Tree} not establishment of religion or anti-religion but part of collection of "religiously neutral books in a review of English literature, as a comment on American subculture").

71. \textit{See id.} at 1538-34 (suggesting "state interest in providing well-rounded public education would be critically impeded by accommodation of Grove's wishes").

72. 27 F.3d 1373 (9th Cir. 1994). The issue in \textit{Brown} focused on whether the school district's inclusion of the \textit{Impressions} learning series, which is composed of
cluding chants and rhymes similar to the Wicca religion in the school curriculum violated the Establishment Clause. The Ninth Circuit held that including the chants and rhymes did not violate the Establishment Clause. The court reasoned that when a government practice impermissibly disapproves of a religion, it is likely to be perceived as a state disapproval of an individual religious choice. The Ninth Circuit again looked to the Lemon test in its analysis and found that there would be no perceived infringement on other faiths. Ultimately, the Brown court came to the same conclusion as the court in Grove, namely, the court found that the alleged infringement of the Establishment Clause had not occurred.

In Roberts v. Madigan, the Tenth Circuit faced a similar question and also agreed that school officials must carry out their duties in a way that does not disparage a particular religion. Once again, the court used the Lemon test to ultimately determine that the

children composing rhymes and chants similar to that of the Wicca religion, promoted the practice of witchcraft in violation of the Establishment Clause. See id. at 1377. In ruling that an objective observer would not see the inclusion of the rhymes and chants as religious rituals, the court also stated that to do so would severely hamper the ability of a school to decide for itself the proper school curricula. See id. at 1381.

73. See id. at 1376 (stating issue as whether classroom activities in public school setting required children to practice witchcraft in violation of Establishment Clause).

74. See id. at 1384 (concluding school district’s inclusion of Impressions series did not violate Establishment Clause).

75. See id. at 1378 (“A government practice has the effect of impermissibly advancing or disapproving of religion if it is ‘sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the non-adherents as a disapproval, of their individual religious choices.’”).

76. See id. at 1381 (stating objective observer in position of young student would not view them as endorsement of Wicca).

77. See Brown, 27 F.3d at 1385 (holding plaintiffs did not raise genuine issue of material fact indicating violation of Establishment Clause).

78. 921 F.2d 1047 (10th Cir. 1990).

79. See id. at 1054 (10th Cir. 1990) (stating school officials must carry out their duties “in a way that neither endorses nor disparages a particular religion or religion in general”). The Roberts court had to decide whether a teacher who reads his Bible quietly in his classroom during silent reading period at his desk violated the Establishment Clause. See id. at 1049. In holding that the school district acted correctly by disallowing the school teacher from reading his Bible silently during class time, the Roberts court reasoned that school officials must be allowed to exercise discretion in determining what materials or classroom practices are appropriate. See id. at 1055. In so ruling, the circuit court dismissed the teacher’s claim that the school was disapproving towards the Christian religion. See id. at 1055. The Tenth Circuit went as far as to say that the school district was forced to act because the Establishment Clause required such action. See id. at 1050. In effect, the court reasoned that the professor was actually teaching his religion by silently reading his book during silent reading period. See id.
school district had not disapproved of the Christian religion.80 Finally, even the Supreme Court has indicated that a state practice opposing a particular religion or its doctrine will violate the Establishment Clause.81 Consequently, courts have taken the view that as long as the state is neutral towards religion, it has not violated the Establishment Clause.82

B. Public Forum Doctrine

While courts state that an anti-religious message can violate the Establishment Clause, they also distinguish between government speech endorsing a religious message and purely private speech endorsing a particular religious message.83 This distinction is particularly important in artistic and entertainment-related school activities, where a school may argue the activity is merely private speech rather than a religious policy or practice endorsed by the school.84 Courts often utilize the public forum doctrine to distin-

80. See id. at 1053-54 (noting state action must meet all three prongs of Lemon test to pass constitutionality under Establishment Clause). The Roberts court pointed out that the first two prongs of the Lemon test require the government to be neutral with respect to religion. See id. at 1053-54.

81. See Epperson v. Ark., 393 U.S. 97, 106-07 (1968) ("[T]he State may not adopt programs or practices in its public schools or colleges which 'aid or oppose' any religion.").

82. See Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373, 382 (1985) (stating preeminent goal of First Amendment to promote governmental neutrality towards religion). But see Dhananjai Shivakumar, Neutrality and the Religion Clauses, 33 Harv. C.R.-C.L. L. Rev. 505, 556-57 (1998) (stating neutrality towards religion actually follows course that is pro-religion because it "is in line with the interests of adherents of mainstream religions" while minority religions are pushed aside).

83. See e.g., Bd. of Educ. v. Mergens, 496 U.S. 226, 250 (1990). The Mergens court noted:

[T]here 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. We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis.

Id. (emphasis added); see also, Michael W. McConnell, State Action and the Supreme Court’s Emerging Consensus on the Line Between Establishment and Private Religious Expression, 28 Pepperdine L. Rev. 681, 682 (2001) (stating if religious activity is attributable to government it is unconstitutional, but if attributable to private parties, "any attempt to censor or discriminate against private religious activity would . . . raise serious questions under the Free Speech and Free Exercise Clauses").

84. See e.g., Good News Club v. Milford Cent. Sch., No. 99-2036, 2001 U.S. LEXIS 4312, at *10-11 (2001) (stating after school club’s activities ranged from singing songs to playing games involving learning Bible verses); Weshegesic v. Bloomingdale Pub. Sch., 33 F.3d 679, 684 (6th Cir. 1994) (stating Jesus Christ portrait in school hallway violated Establishment Clause because hallway was not limited public forum and school could not properly separate itself from any perceived endorsement of Christianity). In Good News Club, the Supreme Court held
guish whether speech is private speech or a government endorsement of a religious or anti-religious message. The public forum doctrine, therefore, seeks to establish general access and indistinguishable use to foster a marketplace of ideas, while "eliminating . . . the fears of government endorsement of religion in Establishment Clause cases." Courts have established three separate possible forums: (1) the traditional public forum, (2) the limited public forum and (3) the non-public forum. The majority of the Establishment Clause litigation surrounding the public forum doctrine focuses on whether the state has created a limited public forum or a non-public forum. The significance lies in the arguments available to the state; if the state can successfully argue that the forum is a traditional or limited public forum, courts are less likely to believe the state is the actual speaker, and therefore, are likely to rule that the state did not violate the Establishment Clause. Consequently, the public forum doctrine is critical in Es-

that the school had created a limited public forum and that excluding the club on the basis of its religious viewpoint would amount to viewpoint discrimination in violation of the First Amendment. See Good News Club, 2001 U.S. LEXIS 4312, at *19.

85. See e.g., Mergens, 496 U.S. at 250 (noting difference between private speech that does not violate Establishment Clause and government speech that does violate Establishment Clause); Widmar v. Vincent, 454 U.S. 263, 277 (1981) (holding school's exclusionary policy in public forum violated Constitution); see also Richard J. Anson, Jr., Drawing Lines in the Shifting Sand: Where Should the Establishment Wall Stand? Recent Developments in Establishment Clause Theory: Accommodation, State Action, the Public Forum, and Private Religious Speech, 8 TEMPLE POL. & CIV. RTS. L. REV. 1, 3-4 (1998) (stating courts have used public forum doctrine to determine when private individual has right to express a religious opinion in fora created by government).


88. See Brody v. Spang, 957 F.2d 1108, 1117 (3d Cir. 1992) (deciding whether high school commencement was limited public forum or non-public forum).

89. See e.g., Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 770 (1995) (plurality opinion) ("Religious expression cannot violate the Establishment Clause where it (1) is purely private and (2) occurs in a traditional or designated public forum, publicly announced and open to all on equal terms."); see also id. at 776 (O’Connor, J., concurring) (stating presence of disclaimer also important in deciding whether state actually endorsed religious message and also disclaimer helped to remove doubt of state endorsement); Widmar, 454 U.S. at 277 (noting when university created forum open to other student groups, it could not enforce content-based exclusion based on religious speech because it violated content-neutral speech regulation).
tablishment Clause cases to determine whether artistic expression and entertainment related activities with religious overtones violates the Establishment Clause. Initialy, courts must examine what constitutes public and limited forums because this determination characterizes the Establishment Clause issue.

1. **Public and Limited Public Forums**

While public parks and streets are both traditional public forums, limited public forums are much less defined. Limited public forums are created “by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers or for the discussion of certain subjects.” Some places in which courts have indicated the existence of limited public forums include “municipal theaters” or public school facilities open to student clubs for expressive activity pursuits. The establishment of a public or limited public fo-

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90. *See e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 304 (2000) (explaining granting one student access to stage to say prayer does not “necessarily preclude a finding that a school has created a limited public forum”); *Mergens*, 496 U.S. at 290 (holding after-school Christian club meetings were held in limited public forum because other student groups given same access); *Widmar*, 454 U.S. at 277 (holding university could not exclude groups on basis of content of their speech because it had opened up facilities to other student groups); *see also* Good News Club v. Milford Cent. Sch., No. 99-2036, 2001 U.S. LEXIS 4312 at *15, 26 (June 11, 2001) (deciding school rooms for use by after school clubs were limited public fora and deciding whether school violated Establishment Clause by having group use its facilities).

91. *See Perry Educ. Assoc. v. Perry Local Educator’s Assoc.*, 460 U.S. 37, 46 (1983) (indicating state may only exclude in public forum based on compelling governmental interest). Because a state can only regulate in the public forum based upon a compelling state interest, it becomes important to see what type of forum an area is because the state has greater restriction powers to exclude the speech if it is not by tradition or designation a public forum. *See id.*

92. *See e.g.*, *Brody*, 957 F.2d at 1117 (noting streets and parks are public forums and state can only enforce time, place and manner restrictions or content-based restrictions that are necessary to serve compelling state purpose and that limited public forums are created when state deliberately opens up area to public); *Doe v. Village of Crestwood*, 917 F.2d 1476, 1478 (7th Cir. 1990) (deciding public park is public forum); *Frels*, *supra* note 86, at 243 (suggesting limited public forum harder to define than traditional public forum because court needs to examine governmental intent and extent of use granted to public to create limited public forum).


95. *See Good News Club* 2001 U.S. LEXIS 4312, at *15-16 (holding determination whether state excluded private speaker unconstitutionally depends on nature of that forum). In *Good News Club*, the after-school facilities represented a limited public forum. *See id.* at *16. The students wished to form a Christian club at the
rum is significant in Establishment Clause litigation because religious expression will be given greater latitude in either a traditional or limited public forum when it "is purely private and . . . publicly announced and open to all on equal terms."\textsuperscript{96} The type of forum is frequently determined by governmental intent plus the extent of the use of the area at issue.\textsuperscript{97} "The government does not create a [limited] public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse."\textsuperscript{98} 

The Supreme Court decided an Establishment Clause issue in \textit{Capitol Square Review and Advisory Board v. Pinette}.\textsuperscript{99} In \textit{Pinette}, the Court scrutinized whether the state violated the Establishment Clause by erecting a private cross in a public forum adjacent to state government offices.\textsuperscript{100} In ruling the cross was constitutional, the Supreme Court stated that the religious expression the cross represented was purely private expression in a public forum and a plurality adopted a \textit{per se} rule stating that private religious expression in a public forum that is open to all will not violate the Establishment Clause.\textsuperscript{101} The plurality noted that if the state was concerned about possible public misconceptions regarding state endorsement, it could require all displays to be identified in the square as pure pri-

\textsuperscript{96} Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 770 (1995) (plurality opinion). Again, this rule has received only the support of four Supreme Court justices, but in her concurrence, Justice O'Connor stated that a sign disclaiming state sponsorship or endorsement of the religious message in the public forum will help to satisfy the endorsement test of the Establishment Clause. \textit{See id.} at 776 (O'Connor, J., concurring); \textit{see also} McConnell, \textit{supra} note 83, at 682 (stating determination of public sphere is important because religion "need not be private in its \textit{expression} or \textit{effects}" because public sphere need only be neutral and pluralistic, not necessarily secular) (emphasis added).

\textsuperscript{97} For a discussion of instances where courts have found limited public forums as well as instances where courts have found non-public forums, see \textit{supra} note 90 and accompanying text.

\textsuperscript{98} Cornelius, 473 U.S. at 802; \textit{see also} Piarowski v. Ill. Cmty. Coll. Dist. 515, 759 F.2d 625, 629 (7th Cir. 1985) (explaining occasional use by outsiders is not enough to establish public forum).


\textsuperscript{100} \textit{See id.} at 757 (setting forth issue decided in litigation).

\textsuperscript{101} \textit{See id.} at 770 (plurality opinion) (holding cross sponsored by private group is purely private and does not violate Establishment Clause).
vate displays of expression; the concurring justices looked to the
sign erected next to the cross disclaiming any state endorsement as
helpful in overcoming the endorsement test.102

While Pinette allowed a private group to display a cross in a
traditional public forum, courts generally take a much narrower
view when a religious service is performed in a public forum.103 In
Doe v. Village of Crestwood,104 the Seventh Circuit ruled a religious
service held under governmental auspices conveyed a message of
approval or endorsement of religion.105 In Village of Crestwood, how-
ever, the Establishment Clause question focused on the act of per-
forming an actual religious service.106 In this case, the Seventh
Circuit stressed that while the act was to be conducted in a public
forum, it was done so under governmental auspices, making the
service itself a violation of the Establishment Clause.107 The Sev-
enth Circuit ruled that "[a] government may not close its public
forums to religious practice by private parties."108

2. Non-Public Forums

When courts look at school Establishment Clause cases in a
non-public forum, they are more likely to find a constitutional viola-
tion because the state cannot allege purely private speech.109 In
Santa Fe Independent School District v. Doe,110 the Supreme Court

102. See id. at 769 ("If Ohio is concerned about misperceptions, nothing pre-
vents it from requiring all private displays in the square to be identified as such
[and] [t]hat would be a content-neutral 'manner' restriction that is assuredly con-
stitutional."); see also id. at 776 (O'Connor, J., concurring) (stating disclaimer helps
to remove doubt as to state endorsement of private cross).

103. See Doe v. Vill. of Crestwood, 917 F.2d 1476, 1478 (7th Cir. 1990) (hold-
ing religious service that was part of larger Italian festival conveyed message of
endorsement by state in violation of Establishment Clause).

104. 917 F.2d 1476 (7th Cir. 1990).

105. See id. at 1478 ("A religious service under governmental auspices necessa-
arily conveys the message of approval or endorsement [and] [p]revailing doctrine
condemns such endorsement, even when no private party is taxed or coerced in
any way.").

106. See id. at 1477 (stating Village of Crestwood was sponsoring Italian festi-
val where mass was to be celebrated in public park).

107. See id. at 1478. But see id. at 1484 (Coffey, J., dissenting) (stating majority
erred by "focusing exclusively on nature of mass . . . rather than on how the authentic
Italian mass relates to the expression of traditional Italian culture surrounding the
mass").

108. Vill. of Crestwood, 917 F.2d at 1478.

because high school home football games took place in non-public forum and
degree of school involvement in pre-game prayer was extensive, Establishment
Clause was violated because it "put school-age children who objected in an untena-
ble position").

ruled that a student run prayer at football games violated the Establishment Clause.111 In Santa Fe, the Court determined the school did not intend to open the pre-game prayer ceremony to indiscriminate use by the student body.112 Even though the school held an election to decide who would say the prayer, the Court determined the school failed to create a limited public forum by guaranteeing that certain voices and religions would not be the ones saying the prayer.113 The Court stressed that the degree of school involvement in the prayer process made it clear that the pre-game prayers bared the imprint of the state and put the school age children who opposed the prayers in an untenable position.114 In non-public forums containing substantial school involvement, therefore, courts are likely to find the school violated the Establishment Clause.115 While Santa Fe was concerned with an Establishment Clause issue arising at a high school football game, issues often arise in the classroom where both the anti-religious segment of the Establishment Clause and the public forum doctrine play a central role.116

C. Religion and the Arts in Public School Settings and the Classroom

Establishment Clause issues in public schools are not restricted to school prayer; many Establishment Clause cases touch upon entertainment related activities that are both in the school curricula and being conducted on school grounds.117 In Doe v. Duncanville

111. See id. at 317 (stating school prayer policy has purpose of and encourages delivery of prayer at additional important school events).
112. See id. at 303 ("The Santa Fe school officials simply do not 'evince either by policy or by practice,' any intent to open the pre-game ceremony to 'indiscriminate use' . . . by the student body generally.").
113. See id. at 304 (stating election system to decide who says pre-game prayers ensures delivery of only those messages deemed appropriate or majority by school district policy).
114. See id. at 305.
115. See Santa Fe, 530 U.S. at 308 (stating relevant question in cases involving state participation in religious activity is whether objective observer would perceive government action as state endorsement of prayer in public schools).
116. For background material on anti-religious speech and the Establishment Clause, see supra notes 54-81 and accompanying text.
117. See Doe v. Duncanville Indep. Sch. Dist., 70 F.3d 402, 407 (5th Cir. 1995) (examining whether singing of religious theme song at public school choir concerts and performances violates Establishment Clause). While the Duncanville court was concerned with a school choir allegedly violating the Establishment Clause, the Supreme Court in Good News Club examined whether a club engaging in the entertainment related activities of singing songs and engaging in entertaining games to help learn Bible verses violated the Establishment Clause. See Good News Club v. Milford Cent. Sch., No. 99-2036, 2001 U.S. LEXIS 4312 at *26 (June 11, 2001).
Independent School District,\textsuperscript{118} for example, the Fifth Circuit examined whether a choir’s religious theme song performed at concerts violated the Establishment Clause.\textsuperscript{119} The student who brought the action received academic credit for her participation in the choir.\textsuperscript{120} The school choir in \textit{Duncanville} provided entertainment for the community, and was also part of the school curriculum.\textsuperscript{121} In deciding that the choir’s religious theme song did not violate the Establishment Clause, the court held that the song did not advance or endorse religion.\textsuperscript{122} In doing so, the Fifth Circuit strayed away from both the \textit{Lemon} and coercive test, and instead used Justice O’Connor’s endorsement test to determine any possible Establishment Clause violations.\textsuperscript{123}

In \textit{Washegesic v. Bloomingdale Public Schools},\textsuperscript{124} the Sixth Circuit decided whether a copy of a famous portrait of Jesus Christ displayed as artwork in a public school hallway violated the Establishment Clause.\textsuperscript{125} The Sixth Circuit held that the portrait of Jesus did not satisfy all three prongs of the \textit{Lemon} test, leading the court to order removal of the portrait.\textsuperscript{126} The concurring judge in \textit{Washegesic} felt constrained by the \textit{Lemon} analysis and, though agreeing with the majority, felt as if the ruling trivialized the Constitution.\textsuperscript{127}

\begin{itemize}
\item \textsuperscript{118} 70 F.3d 402 (5th Cir. 1995).
\item \textsuperscript{119} See id. at 407 (examining whether theme song of choir containing religious content violated Establishment Clause).
\item \textsuperscript{120} See id. (indicating participation was required to receive academic credit).
\item \textsuperscript{121} See id. (stating members of choir receive academic credit for their participation).
\item \textsuperscript{122} See id. ("Neither does utilizing \textit{The Lord Bless You and Keep You} as a theme song advance or endorse religion.").
\item \textsuperscript{123} See \textit{Duncanville Indep. Sch. Dist.}, 70 F.3d at 405 (rejecting use of \textit{Lemon} and coercive effect tests in favor of test that asks whether governmental practice appears to endorse religion). In \textit{Pinette}, Justice O’Connor explained that “[w]hen the reasonable observer would view a government practice as endorsing religion, I believe it is our duty to hold the practice invalid.” See \textit{Pinette}, 515 U.S. 753, 777 (1995) (O’Connor, J., concurring). In \textit{Lynch}, Justice O’Connor set out what she believed to be the crucial inquiry in Establishment Clause cases, namely that the governmental practice does not have the effect of communicating a message of government endorsement or disapproval of religion. See \textit{Lynch v. Donnelly}, 465 U.S. 668, 690 (1984) (O’Connor, J., concurring).
\item \textsuperscript{124} 35 F.3d 679 (6th Cir. 1994).
\item \textsuperscript{125} See id. at 683-84.
\item \textsuperscript{126} See id. (ordering school to remove portrait of Jesus).
\item \textsuperscript{127} See id. at 684-85 (Guy, J., concurring) (noting agreement with majority that school violated Establishment Clause by hanging portrait of Jesus in school hallway, but hoping that people would keep matters like this out of court and have more resiliency in these types of cases).
\end{itemize}
It is also necessary examine how courts view classroom behavior in an Establishment Clause context.\(^{128}\) Courts often focus on the nature of the religious material in the classroom, paying particular attention to how and what role the religious material plays in classroom instruction.\(^{129}\) Courts allow schools to exercise their discretion in determining classroom materials and whether particular conduct endorses religion.\(^{130}\) Educators must maintain a delicate balance of directing learning, while still maintaining students’ free speech and free exercise rights in the classroom.\(^{131}\)

In Edwards v. Aguillard,\(^{132}\) the Supreme Court was asked to decide whether the Louisiana Creationism Act violated the Establishment Clause.\(^{133}\) The act prohibited the teaching of evolution in public schools unless it was accompanied by the teaching of creationism.\(^{134}\) The Court found the act to be unconstitutional because it failed the first prong of the Lemon test, namely that the act had a religious purpose.\(^{135}\) The state alleged that in fact the act was an attempt to protect academic freedom, however, the Court found that the act diminished “academic freedom by removing the flexibility to teach evolution without also teaching creation science.”\(^{136}\)

While in Edwards, the Court dealt with an actual state statute, courts have distinguished between purely private religious speech by students and speech that acts as a government endorsement of a particular practice or religion.\(^{137}\) Courts, however, draw a line as to the role a teacher’s speech plays because teachers do not have a

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128. See Linnemeir, 260 F.3d at 759 (equating studio theater where Corpus Christi performed with public school classroom).
129. See, e.g., Bishop v. Aronov, 926 F.2d 1066, 1071 (11th Cir. 1991) (holding classrooms not public forums); Roberts v. Madigan, 921 F.2d 1047, 1055 (10th Cir. 1990) (noting Establishment Clause inquiries in classroom focus on manner of use of materials at issue).
130. See Roberts, 921 F.2d at 1055 (stating use of books on American Indian religion could violate Establishment Clause if books were taught in proselytizing manner, but do not necessarily violate Establishment Clause when viewed only for content).
131. See Mawdsley & Russo, supra note 20, at 14 (stating school officials must maintain balance to safeguard free speech rights of students and maintain their right to be free to direct learning).
133. See id. at 580-81 (setting out issue that was presented).
134. See id. at 581 (setting forth what Creationism Act purported to accomplish).
135. See id. at 593 (stating real purpose of Creationism Act was to reform curriculum to conform with particular religious viewpoint).
136. See id. at 586 n.6.
137. See Doe v. Duncanville Indep. Sch. Dist., 70 F.3d 402, 409 n.1 (5th Cir. 1995) (Jones, J., concurring and dissenting) (stating students may read their Bibles, say grace before meals and pray before tests, but schools cannot administer
First Amendment right to decide what will be taught in their classroom. The school board, however, is often given broader authority to determine what should and should not be classroom material. Many of these cases turn on whether the school board has satisfied the Establishment Clause inquiry as set out in Lemon, but others utilize the endorsement or coercive test.

IV. NARRATIVE ANALYSIS

A. The Majority Opinion

In Linnemeir, the Seventh Circuit disagreed with the district court and held that the university theater was a non-public forum. The majority, however, came to the same conclusion as the district court in that the play could go on as scheduled. In coming to its conclusion, the majority first looked at the subject matter of the play itself and conceded that the play was blasphemous. The court, however, gave complete deference to school and university authorities to determine whether classroom instruction should include the works of such blasphemers. If the court had found that the university violated the Establishment Clause, the majority stated such a finding would have a profound effect on university curricula. The majority made the distinction that if the state university had a policy of promoting these anti-Christian beliefs, the school would have violated the Establishment Clause. Here, such rules to prevent students from doing this because to do so would violate students' First Amendment rights.

138. See Edwards v. Cal. Univ. of Pa., 156 F.3d 488, 491 (3d Cir. 1998) (concluding public university professor does not have First Amendment right to decide what will be taught in his classroom).

139. See id. at 492 (stating university acted as speaker and was entitled to make content-based choices regarding professor's syllabus).

140. For a further discussion of the three Establishment Clause tests, see supra notes 61-69 and accompanying text.

141. See Linnemeir, 260 F.3d at 760 (holding university theater is classroom which is not public forum); see also id. at 761 (Coffey, J., dissenting) (stating evidence proposing studio theater as limited public forum was "hallow").

142. See id. at 760 (denying plaintiffs' motion to stay pending appeal and allowing play to proceed as scheduled).

143. See id. at 758 (noting "[t]he play is indeed blasphemous . . . most believing Christians will be shocked and offended").

144. See id. at 760 ("The school authorities and the teachers, not the courts, decide whether classroom instruction shall include works by blasphemers.").

145. See id. at 758 (finding if university was prohibited from providing venue for expression of antagonistic Christian beliefs, then works of Voltaire, Hobbes, Marx, Freud, Mill, Sartre and others could not be taught).

146. See generally County of Allegheny v. ACLU, 492 U.S. 573, 610 (1989) ("A secular state, it must be remembered, is not the same as an atheistic or antireligious state. A secular state establishes neither atheism nor religion as its official
however, the court did not find that the school had such a policy.\footnote{147} First, the court focused on the fact that it was a student, Jonathan Gilbert, and not the school theater department, who selected the play.\footnote{148} Second, the majority stated that there was no evidence that if the play attacked a different religion other than Christianity, that the university would have prevented that play from being performed.\footnote{149} Finally, the majority stated that the university went to great lengths to disclaim any perceived endorsement of the play's message "by publicly disclaiming that by exhibiting Corpus Christi it is allaying itself with the enemies of Christianity."\footnote{150}

B. The Dissent

Judge Coffey, in his dissent, believed that if Corpus Christi was to be performed at the studio theater, the court would "with a wink and a nod, tolerate government sponsored attacks on religion."\footnote{151} Despite its different holding, the dissent agreed with the majority that the university theater was not a public forum.\footnote{152} "But the jurists parted ways after that."\footnote{153} The dissent first questioned the evidence that the trial judge relied on in his decision that the studio theater was a limited public forum.\footnote{154} Because the dissent also be-

\footnote{147. See Linnemeir, 260 F.3d at 759 (holding no evidence presented that university was hostile towards Christianity and that it was student's own idea to direct this play).}

\footnote{148. See id. (stating no faculty or university member told student to put on production, rather it was his own idea).}

\footnote{149. See id. (stating plaintiffs produced no evidence that university authorities would have prevented play attacking some other religion). This lack of evidence is significant because it undercuts the dissenter's theory that the school was engaged in viewpoint discrimination. See id. at 767 (Coffey, J., dissenting).}

\footnote{150. Id. at 760.}

\footnote{151. See id. at 760 (Coffey, J., dissenting). Judge Coffey believed that by allowing the play to go on, it would allow further anti-religious speech or attacks on religion to flourish and flood forums where any religion could be the next target sanctioned by the government. See id.}

\footnote{152. See Linnemeir, 260 F.3d at 763-74 (Coffey, J., dissenting) (questioning evidence district judge relied on in determining studio theater was limited public forum).}

\footnote{153. Manson, supra note 45.}

\footnote{154. See Linnemeir, 260 F.3d at 762-63 (Coffey, J., dissenting). First, the dissent did not believe that the two statements made by the chancellor and the theater department head were enough to establish a limited public forum. See id. at 763. Furthermore, the dissent questioned whether the theater was actually even available to the entire student body, let alone the outside community by illustrating that only three students out of the entire student body would be staging productions in the studio theater this year. See id.}
lieved the studio theater was a non-public forum, it believed that the government, and not the individual, was the speaker.\textsuperscript{155} Because the dissent believed that the university was the speaker, it then underwent the three-prong \textit{Lemon} analysis to determine whether the university practice of allowing the play to go forward was a constitutional violation.\textsuperscript{156} Using this analysis, the dissent ultimately concluded that the University's tacit sponsorship of \textit{Corpus Christi} violated the First Amendment.\textsuperscript{157}

Next, the dissent attacked the grounds of academic freedom which the majority utilized in reaching its conclusion.\textsuperscript{158} While Judge Coffey supported wide protection for academic freedom, he decided that this academic freedom argument could not override the religious rights of those protected under the Establishment Clause.\textsuperscript{159} Furthermore, he distinguished the works of Darwin and Marx, which the majority compared to \textit{Corpus Christi}, by explaining that Darwin and Marx are only incompatible with Christian beliefs, whereas \textit{Corpus Christi} is an outright disparagement and mockery of fundamental Christian beliefs.\textsuperscript{160} Finally, the dissent concluded that even if the Studio Theater was classified as a limited public forum, he would still grant the stay because the school might be engaged in viewpoint discrimination.\textsuperscript{161}

\section*{V. Critical Analysis}

The Seventh Circuit acknowledged that \textit{Corpus Christi} was a blasphemous play.\textsuperscript{162} Blasphemy is defined as "[i]rreverence to-

\begin{itemize}
\item \textsuperscript{155} \textit{See id.} at 764 ("My conclusion is that in this case it is the government, and not the private individual, that is doing the speaking.").
\item \textsuperscript{156} \textit{See id.} (discussing \textit{Lemon} three-prong test).
\item \textsuperscript{157} \textit{See id.} at 765 (stating disapproval of Christianity in this case may send message to adherents of Christian faith that they are not full members of political community (citing Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring))).
\item \textsuperscript{158} \textit{See id.} (stressing while academic freedom plays vital role on college campuses, academic freedom has limits and universities must respect Constitutional religious rights).
\item \textsuperscript{159} \textit{See Linnemeir}, 260 F.3d at 766 ("I want to make clear that [academic freedom] has limits and universities must respect the religious rights of all protected in the First Amendment."). The dissent believed that while there is wide protection for academic freedom, courts have never held that universities lie entirely beyond the reach of students' First Amendment rights. \textit{See id.}
\item \textsuperscript{160} \textit{See id.} (stating play itself can only be characterized as vulgar attack on Christianity).
\item \textsuperscript{161} \textit{See id.} at 767-68 (stating injunction should be granted because more evidence is needed to show whether school is allowing anti-Christian speech to be allowed while not allowing other anti-religious speech to be put forth).
\item \textsuperscript{162} \textit{See id.} at 760.
\end{itemize}
ward God, religion, a religious icon, or something considered sacred.”

The court, therefore, acknowledged that the play itself was a front towards the Christian faith because it showed irreverence towards something sacred, in this case, the life and death of Jesus Christ. However, the court did not say that the play rose to a level so as to violate the Establishment Clause. Unlike previous circuit court opinions that have used one of the three delineated Establishment Clause tests in determining whether a specific classroom activity violates the Establishment Clause, the majority in this case never underwent an Establishment Clause analysis. Instead, the majority used academic freedom as its rationale for allowing the public performance of Corpus Christi to go forward. By neglecting Establishment Clause analysis and responding only with an academic freedom rationale, the Seventh Circuit blurred future Establishment Clause questions by permitting schools to support or justify artistic expression without passing one of the three Establishment Clause tests. Schools can now argue that under academic freedom, school officials are the ultimate authority as to whether the action should or should not go forward. By relying on academic freedom rather than conducting an Establishment Clause inquiry, the Seventh Circuit majority decided the case without the analysis other courts have deemed proper in determining whether artistic, entertainment or an academic curricula item violates the Establishment Clause. While courts have often used an academic

163. BLACK'S LAW DICTIONARY 164 (7th ed. 1999).
164. See Linnemeir, 260 F.3d at 758 (stating most Christians will be shocked and offended by dialogue and premise of play).
165. See id. at 759.
166. See, e.g., Doe v. Duncanville Indep. Sch. Dist., 70 F.3d 402, 407 (5th Cir. 1995) (undergoing endorsement test analysis to see whether public performance of religious theme song by public school choir violated Establishment Clause); Washgesic v. Bloomingdale Pub. Sch., 33 F.3d 679, 683 (6th Cir. 1994) (undergoing Lemon analysis to determine whether piece of artwork depicting Jesus Christ displayed for all in school hallway violated Establishment Clause); Brown v. Woodland Joint Unified Sch. Dist., 27 F.3d 1373, 1378 (9th Cir. 1994) (undergoing Lemon three part analysis to determine whether inclusion of Impressions series violated Establishment Clause); Grove v. Mead Sch. Dist. No. 354, 753 F.2d 1528, 1534 (9th Cir. 1985) (going through Lemon three part analysis to see if inclusion of The Learning Tree in curriculum violated Establishment Clause).
167. See Linnemeir, 260 F.3d at 760 (stating school authorities should properly decide what works of blasphemers should be included in classroom instruction).
168. See id. (“Academic freedom, and states' rights, alike demand deference to educational judgments that are not invidious.”)
169. See id. (stating this "is a matter for the state university, not for federal judges, to determine").
170. See id. (offering academic freedom as rationale to defer to University judgment). This is not to say that the Seventh Circuit ultimately decided the case
freedom argument to supplement the Establishment Clause inquiry, most courts have also undergone an Establishment Clause analysis as well to supplement their holding.171 The method of analysis the court used in this case, however, gives school officials broader range to decide their own curriculum. This holding changes future litigation because under this ruling, artistic expression and entertainment related activities can now possibly sidestep the traditional tests and utilize the academic freedom rationale only in supporting their action. Had the majority utilized both academic freedom and an accompanying Establishment Clause test, it would have followed previous court opinions and provided the additional hurdle that schools need to overcome in Establishment Clause cases.172 After this case, therefore, the line of where academic freedom ends and Establishment Clause begins is blurred.173

The dissenting judge used the Lemon test to dismiss the majority's academic freedom argument, yet his ultimate conclusion that the play failed to satisfy the Lemon analysis was incorrect.174 The dissent focused on the purpose of the governmental conduct in this case.175 The purpose prong of the Lemon test however, asks whether the government intended to convey a message of endorsement or disapproval of religion.176 As the dissent correctly stated, the First Amendment seeks to protect neutrality towards religion.177 The dissenter, however, failed to acknowledge the steps the univer-

incorrectly, only that its ultimate decision lacked the analysis that other courts have utilized in similar Establishment Clause inquiries. For a discussion of courts using the varying Establishment Clause tests to determine an alleged Establishment Clause violation, see supra notes 61-69 and accompanying text.

171. Compare Edwards v. Cal. Univ. of Pa., 156 F.3d 488, 492 (3d Cir. 1998) (undergoing no Lemon analysis but stressing that academic freedom and First Amendment compel conclusion that professor does not have constitutional right to choose curriculum in contravention of University's dictates), with Duncanville Indep. Sch. Dist., 70 F.3d at 402 (undergoing endorsement test analysis but stating that if court removed all religious music from choir's repertoire, it would eliminate seventy-five percent of choral music).

172. For a discussion of court decisions using Establishment Clause analysis in the public school curriculum context, see supra notes 56-77, 117-40 and accompanying text.

173. See Linnemeir, 260 F.3d at 760 (stating cases like this should be left to school officials to decide rather than courts).

174. See id. at 765-66 (Coffey, J., dissenting) (attempting to show production of play does not satisfy Lemon test).

175. See id. at 765 (stating first prong of Lemon test focuses on purpose of governmental conduct).


177. See Linnemeir, 260 F.3d at 765 (Coffey, J., dissenting) ("Both endorsement and disapproval are prohibited in light of the preeminent goal of the First Amendment to promote government 'neutrality' toward religion.")
sity took to remain neutral by not engaging in content discrimination and by disclaiming any possible endorsement. The purpose of the state action in this case was to allow students to direct theater productions of their own choosing, irrespective of their viewpoint, therefore, it was quite different than the state action in Edwards in which the state’s purpose was to undermine teaching scientific evolution and conform curriculum to religious theory of creationism. Furthermore, the production of Corpus Christi was part of the larger curriculum of the university theater season because it was to be performed in association with other entertainment productions that in no way presented Establishment Clause issues. This court should have reasoned that because Corpus Christi was part of a larger curriculum of public entertainment, as The Learning Tree was part of a larger literary curriculum in Grove, it therefore should not have violated the Establishment Clause.

While the majority opinion did not engage in an Establishment Clause analysis in determining whether this entertainment related activity violated the First Amendment, all three justices came to the correct judgment in overruling the district court’s assessment that

178. See id. at 759-60 (stating university included disclaimer in playbill and had “been scrupulous in disclaiming that by exhibiting Corpus Christi it is alllying itself with the enemies of Christianity”); see also Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 769 (1995) (plurality opinion) (stating that if state is concerned about possible misconceptions public may have about cross, it can require all displays to be identified as private displays via disclaimer). For a factual overview of the University’s selection process, see supra notes 35-37 and accompanying text; Daniel Parish, Private Religious Displays in Public Fora, 61 U. Chi. L. Rev. 253, 289 (1994) (stating that allowing displays in public forums with adequate disclaimers strike adequate balance between eliminating all religious displays in public forums altogether with giving religious displays free run in public forums).

179. See Edwards v. Aguillard, 482 U.S. 578, 593 (stating purpose of Creationism Act was to conform curriculum into particular religious viewpoint).

180. See Linnemeier v. Ind. Univ.-Purdue Univ. Fort Wayne, 155 F. Supp. 2d 1034, 1037 (N.D. Ind. 2001), stay denied sub nom., Linnemeier v. Bd. of Trs. of Purdue Univ., 260 F.3d 757 (7th Cir. 2001) (stating production of Corpus Christi was one of nine plays to be performed during theater season and that all were chosen without regard to viewpoint).

181. See, e.g., Brown v. Woodland Joint Unified Sch. Dist., 27 F.3d 1373, 1381 (9th Cir. 1994) (reasoning because challenged selections constitute only minute part of entire Impressions curriculum, ensures that objective observer will find no Establishment Clause violation); Grove v. Mead Sch. Dist., 753 F.2d 1528, 1541 (9th Cir. 1985) (Canby, J., concurring) (stating “the issue however, is not whether the work disapproves of any particular religious vision, but whether such inclusion in the public school curriculum indicates, intentionally or not, that the government joins in that disapproval”); see also Lynch, 465 U.S. at 694 (O’Connor, J., concurring) (setting out endorsement test by stating that “Every government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion.”).
the studio theater represented a limited public forum.\textsuperscript{182} The court was correct in determining that the theater itself was a non-public forum.\textsuperscript{183} As the majority stated, both parties and the district judge spent "a lot of time debating whether the university's theater is really a public forum."\textsuperscript{184} The Seventh Circuit ultimately decided correctly on the public forum issue, especially when considering the two factors used in deciding whether the state has formed a limited public forum.\textsuperscript{185} Courts have looked to governmental intent and more importantly to the extent of use of the area at issue to help illustrate whether the state created a limited public forum.\textsuperscript{186} The school could only point to one group outside of the university's own theater department who had used the theater in the last thirty years.\textsuperscript{187} Second, the university did not have a written policy but only the testimony of two administrators as to whether the theater was in fact opened to all.\textsuperscript{188} The testimony of the administrators was, as the dissenting judge claimed, "hallow."\textsuperscript{189} These two facts taken together solidified the position that the theater was a non-public forum.\textsuperscript{190} Because the school did not satisfy

\textsuperscript{182} See \textit{Linnemeier}, 260 F.3d at 760 (holding studio theater to be a classroom and therefore non-public forum).

\textsuperscript{183} See \textit{id}.

\textsuperscript{184} \textit{Id.} at 759-60.

\textsuperscript{185} See \textit{Frels}, \textit{ supra} note 86, at 243 (stating two factors courts look at in determining whether state has created limited public forum are government intent and extent of use).

\textsuperscript{186} See \textit{Santa Fe Indep. Sch. Dist. v. Doe}, 530 U.S. 290, 304 (2000) (reasoning school did not necessarily form limited public forum for simple fact that only one student was granted access to stage); see also \textit{Bd. of Educ. v. Mergens}, 496 U.S. 226, 235 (1990) ("A limited forum exists whenever a public secondary school grants an offering to or opportunity for one or more non-curriculum related student groups to meet on school premises during non-instructional time."); see also \textit{Frels}, \textit{ supra} note 86, at 243.

\textsuperscript{187} See \textit{Linnemeier v. Ind. Univ.-Purdue Univ. Fort Wayne}, 155 F. Supp. 2d 1034, 1037 (N.D. Ind. 2001), \textit{stay denied sub nom.}, Linnemeier v. Bd. of Trs. of Purdue Univ., 260 F.3d 757 (7th Cir. 2001) (stating only one high school drama group outside of university's general theater season had used studio theater in past thirty years).

\textsuperscript{188} See \textit{Linnemeier}, 260 F.3d at 761 (Coffey, J., dissenting) (stating school had no formal written policy discussing forum but only had testimony of two university administrators stating they opened up theater to all groups).

\textsuperscript{189} See \textit{id}. (stating administrators produced no evidentiary support in addition to their self-serving testimony).

\textsuperscript{190} See \textit{Perry Educ. Ass'n v. Perry Local Educators' Ass'n}, 460 U.S. 37, 53 (1983) (stating where government property is not dedicated to open communication, government can restrict access). See generally \textit{Brody v. Spang}, 957 F.2d 1108, 1117 (3d Cir. 1992) (ruling state creates limited public forum by deliberately opening area up to public as long as it maintains such an open forum, and that government does not create limited public forum by inaction or by permitting limited discourse).
the extent of the use requirement and failed to support it with any tangible governmental intent in the form of a written policy, the theater was correctly ruled a non-public forum.\footnote{191}

VI. IMPACT

The impact of this case is twofold. First, this case has blurred the line between the Establishment Clause and academic freedom by using only an academic freedom analysis to support its holding.\footnote{192} Because the court did not utilize one of the three Establishment Clause tests set out by the Supreme Court, it gives public schools and universities greater autonomy to decide for themselves what should or should not be in the curriculum.\footnote{193} This could have future implications on such activities like choir, theater or art classes that represent artistic expression or entertainment performances in the academic setting.\footnote{194} Not only are plays given freer reign because of this academic freedom ruling, but other forms of art and entertainment are given wider latitude as well.\footnote{195} This case solidifies other court decisions that have stated schools should be given the authority to decide their own curriculum, however, this case fails to supplement its holding with the additional hurdle of an Establishment Clause inquiry that other courts have used.\footnote{196} Now, under the theory of academic freedom, the state can release itself from possible Establishment Clause inquiries in areas of artistic expression and entertainment even if the area is not opened to the

\footnote{191. For a discussion of the proper analysis in determining a limited public forum, see supra notes 92-98 and accompanying text.}

\footnote{192. See Linnenmier, 260 F.3d at 760 (ruling academic freedom demands deference to state university to decide this matter).}

\footnote{193. See id. at 760 (giving deference to schools and school officials to decide these matters, not courts).}

\footnote{194. See id. (stating university is proper decision maker in this case, not judiciary). But see Doe v. Duncanville Indep. Sch. Dist., 70 F.3d 402, 408 (5th Cir. 1995) (using endorsement test to conclude singing religious theme song at concerts did not violate Establishment Clause because it neither advances nor endorses religion). While Linnenmier gives deference to the state university in these cases of entertainment related curriculum items, the court in Duncanville underwent Establishment Clause judicial inquiry to approve the school’s practice. See id.}

\footnote{195. See Linnenmier, 260 F.3d at 760 (holding theater like classroom and therefore academic freedom allows production to go forward). But see Washegesic v. Bloomingdale Sch. Dist., 33 F.3d 679, 681 (6th Cir. 1994) (noting portrait not part of group of paintings nor is it in conjunction with any class or educational program).}

\footnote{196. See Roberts v. Madigan, 921 F.2d 1047, 1055 (10th Cir. 1990) (stating “school officials must be allowed, within certain bounds, to exercise discretion in determining what materials or classroom practices are being used appropriately”); see also Grove v. Mead Sch. Dist., 753 F.2d 1528, 1533 (9th Cir. 1985) (“Local school boards have broad discretion in the management of schools.”).}
public.\textsuperscript{197} One way of accomplishing this result would be as the court did here, to allow school officials and administrators rather than the courts to decide whether to allow certain religious, or anti-religious material from going forward.\textsuperscript{198} Certainly, some Establishment Clause analysis is still necessary in many cases, however, \textit{Lin-nemeir} opens the question as to where academic freedom ends and Establishment Clause inquiry begins. This determination can be particularly significant where there is entertainment or artistic expression open to the public that is performed as part of a student's academic credit.\textsuperscript{199}

The second major impact of this case relates to the public forum doctrine.\textsuperscript{200} This case has solidified and impacted the public forum doctrine by placing definite limits on when a party can successfully argue that the state has created a limited public forum.\textsuperscript{201} Such limitations will have profound effects on artistic expression and entertainment related activities in public schools because it will be harder for public schools to separate themselves from the artistic expression or entertainment related activity.\textsuperscript{202} No longer can the state or party seeking to establish a limited public forum merely rely on the statements of officials in stating that the forum is open to the public.\textsuperscript{203} Rather, either the party seeking to establish a limited public forum must show either that the state has opened the forum to a number of groups thereby creating a limited public forum, or that the state has adopted such policy into writing.\textsuperscript{204} This require-

\textsuperscript{197} But see Edwards v. Cal. Univ. of Pa., 156 F.3d 488, 492 (3d Cir. 1992) (stating academic freedom argument limited to school district or university administration and does not extend to professors).

\textsuperscript{198} See Linnemeir, 260 F.3d at 760.

\textsuperscript{199} For a discussion of the Fifth Circuit's Establishment Clause analysis in a similar case, see \textit{supra} notes 118-25 and accompanying text.

\textsuperscript{200} For a discussion of the public forum doctrine, see \textit{supra} notes 82-116 and accompanying text.

\textsuperscript{201} See Linnemeir, 260 F.3d at 760 (holding studio theater is classroom and therefore non-public forum and rejecting university administrators claims they opened up theater to public and created limited public forum).

\textsuperscript{202} See \textit{supra} note 113.

\textsuperscript{203} See Linnemeir, 260 F.3d at 761 (Coffey, J., dissenting) (stating court will not rely on hallow statements of government officials to establish limited public forum). It is important to note that both the dissent and the majority agreed on the fact that the theater was a non-public forum, with the majority comparing the theater to a classroom and the dissent rejecting the administrators' statements. See \textit{supra} notes 141, 154 and accompanying text. Either way, all three justices were in agreement that the administrator's statements coupled with the one time use of the theater by an outside group did not constitute enough to create a limited public forum. See \textit{supra} notes 141, 154 and accompanying text.

\textsuperscript{204} See, e.g., Good News Club v. Milford Cent. Sch., No. 99-2036, 2001 U.S. LEXIS 4312 at *16 (June 11, 2001) (stating parties stipulation that after school
ment will affect many artistic and entertainment related activities that occur in public schools outside of the classroom. Because the court unequivocally held the university theater to be a non-public forum, for the state to separate itself from the "religious" entertainment or expressive activity, it cannot successfully argue that the activity was purely private in a limited public forum without the show of evidence that either outside groups using the space or the school had a formal open policy. A party therefore, must demonstrate either evidence showing that many groups have utilized the forum thereby creating a limited public forum, or prove that the state has adopted language creating a limited public forum into writing. Without either of these being demonstrated to the court, it appears that the forum will remain a non-public forum, and therefore eliminate the state's possible defense that the artistic expression or entertainment related activity was purely private in a limited public forum, and that they adequately disclaimed any perceived endorsement. This result could impact expressive and entertainment activities at universities and public schools primarily because without either a past history or a formal school policy, a non-public forum will be in place, which will mean the university can reasonably regulate an individual's speech. While in this case, the university supported the student's selection of the play, perhaps next time, based on non-public forum grounds, the university might allege they have the right to reasonably regulate the non-public area to prevent the artistic expression from going forward.

Universities can look to this case on two separate fronts as it relates to art and entertainment on their campuses that raise Establishment Clause questions. One the one hand, if the artistic expres-

facilities were limited public forum because many other after school clubs used facilities); Bd. of Educ. v. Mergens, 496 U.S. 226, 235 (1990) ("A limited forum exists whenever a public secondary school grants an offering to or opportunity for one or more non-curriculum related student groups to meet on school premises during non-instructional time.").

205. See Linnemair, 260 F.3d at 759-60 (recognizing important distinction that because court held that theater was classroom, school was entitled to academic freedom). The court, however, said nothing as to what analysis would be appropriate if the play was not being performed for academic credit.

206. By holding that the theater was in fact a non-public forum, the Seventh Circuit rejected the statements of school administrators that the studio theater was open for outside use, although only one outside group in the last thirty years had taken advantage of this opportunity. See Linnemair, 260 F.3d at 761 (Coffey, J., dissenting). Thereby, the court in effect held that mere assertions of an opening by a school to establish a limited public forum are insufficient. See id. at 762.

207. See supra note 113.

208. See Anson, Jr., supra note 85, at 5 (stating government can reasonably regulate speech in non-public forums).
sion or entertainment comes solely from a student as part of a class, the school seems to be safe from violating the Establishment Clause based on a school's ability to decide its curriculum. On the other hand, as it relates to artistic expression and entertainment related activities that occur on public school grounds, the state or party supporting the activity will be unsuccessful in arguing that the activity takes place in a public forum unless the party can show a pattern or practice that the school opened the forum up to public use. While the court allowed schools greater autonomy when it comes to artistic expression and entertainment related activities, the court perhaps curtailed the school from arguing that the "religious" entertainment activity took place in a limited public forum. While in this case the school supported Jonathan's Gilbert's production of Corpus Christi, perhaps the next school will not. In this hypothetical case however, the school will be free from any alleged violation of a student's free speech because it will be in a non-public forum which will give the school the opportunity to reasonably regulate the area.

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209. See Linnemeir, 260 F.3d at 760 (stating academic freedom demands deference to education judgment by schools that are not invidious).
210. See id. at 759.