

**Not a Prayer in Protecting the Reasonable Observer:  
Borden shows the Endorsement Test is Just Not Working**  
By: Genevieve Deppe

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**I. Introduction**

Marcus Borden (“Borden” or “Coach Borden”) is a football coach and high school teacher who sued the East Brunswick School District (“School District”) for prohibiting his participation in student-initiated prayer.<sup>1</sup> Before the lawsuit, Borden led the football team in prayer for more than two decades from 1983 to 2005.<sup>2</sup> In 2005, three parents complained about the prayers to the Superintendent of the high school in the same week.<sup>3</sup> One of the parents told the Superintendent that the prayer made her son feel uncomfortable, and he did not want to participate.<sup>4</sup> The principal and the athletic director told Borden to stop leading the team in prayer.<sup>5</sup> After several more parents complained, the Superintendent sought legal advice regarding the Establishment Clause from the school district’s legal counsel.<sup>6</sup>

The school district’s counsel sent Borden a memorandum with official guidelines regarding prayer on school property.<sup>7</sup> These guidelines prohibited a school official from “participat[ing] in any student-initiated prayer.”<sup>8</sup> Borden emailed the co-captains of the team to ask them to poll the players to determine whether to continue the tradition of prayer.<sup>9</sup> The players voted to continue the prayer.<sup>10</sup> At the pre-game invitation-only dinners in the school

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<sup>1</sup> *Borden v. Sch. Dist. of the Township of E. Brunswick*, 523 F.3d 153, 153 (3d Cir. 2008), *cert. denied*, (Mar. 2, 2009).

<sup>2</sup> *Id.* at 159-161.

<sup>3</sup> *Id.* at 160.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 166.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

cafeteria, Borden bowed his head as the team prayed.<sup>11</sup> Additionally, after the team discussed strategy in the locker room before the football games, Borden took a knee as the team prayed.<sup>12</sup> During the 2005 football season, Borden filed suit against the school district claiming the guidelines were unconstitutional on their face and violated his constitutional rights to freedom of speech, academic freedom, freedom of association and due process.<sup>13</sup>

The district court in New Jersey agreed with Coach Borden that he should be able to bow his head and take a knee while the football team prayed.<sup>14</sup> The Third Circuit agreed with the school district that the guidelines were necessary to avoid an Establishment Clause violation.<sup>15</sup> But the Third Circuit acknowledged a dilemma for another day, stating “[w]ithout Borden’s twenty-three years of organizing, participating in, and leading prayer with his team, this conclusion would not be so clear as it presently is.”<sup>16</sup> The Supreme Court denied certiorari on March 2, 2009.<sup>17</sup>

This paper analyzes Establishment Clause jurisprudence in the context of prayer in public schools and concludes that the increasingly popular endorsement test’s reasonable observer is unworkable.<sup>18</sup> After this introduction, Section II explains the evolution of the Establishment

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<sup>11</sup> *Id.* at 159, 170.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 168.

<sup>14</sup> *Borden v. E. Brunswick Sch. Dist.*, 2006 WL 4844119 (D.N.J. Jul. 26, 2006). The Third Circuit opinion quoted the district court judge entering his ruling on record from the bench, stating, “I agree that an Establishment Clause violation would occur if the coach initiated and led the activity, but I find nothing wrong with remaining silent and bowing one’s head and taking a knee as a sign of respect for his players’ actions and traditions, nor do I believe would a reasonable observer.” *Borden*, 523 F.3d at 164.

<sup>15</sup> *Borden*, 523 F.3d at 174-80.

<sup>16</sup> *Id.* at 178.

<sup>17</sup> *Borden v. Sch. Dist. of Township of E. Brunswick*, \_\_\_ S. Ct. \_\_\_, 2009 WL 498167 (Mar. 2, 2009). Although the Court denied certiorari in *Borden*, it granted certiorari in *Salazar v. Buono*, 129 S. Ct. 1313, 2009 WL 425076 (Feb. 23, 2009). The issue in *Salazar* is whether an eight-foot-tall cross can remain standing in a national preserve in California. Although *Salazar* is a display case, it will be the first case where the Roberts Court rules directly on an Establishment Clause issue.

<sup>18</sup> Compare e.g. *Sherman v. Township High Sch. Dist. 214*, 594 F. Supp. 2d 981, 981 (N.D. Ill. 2009) (holding that Illinois statute requiring moment of silence in schools violated Establishment Clause) with e.g. *Gaines v. Anderson*,

Clause tests that govern prayer in schools. Section III then examines the Supreme Court’s two most recent decisions involving prayer in school to give a detailed snapshot of this particular slice of Establishment Clause jurisprudence. Next, Section IV analyzes the flaws of the endorsement test. Section V provides a proposed solution of adopting a presumption of unconstitutionality. An athletic coach, or other public school employee, may rebut the presumption with a legitimate reason for particular actions during the student-initiated prayer. Finally, Section VI offers a brief conclusion. The separation of church and state invokes strong sentiments in Americans, both inside and outside of the legal profession.<sup>19</sup> Combining religious issues with public schooling results in the prayer-in-school cases generating large amounts of publicity and interest.<sup>20</sup> This important issue deserves a better test.

## **II. The Court’s Toolbox for the Establishment Clause: The Evolution of the Establishment Clause Tests**

The first part of the First Amendment to the Federal Constitution provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”<sup>21</sup> The Fourteenth Amendment incorporates this provision equally to the states, including public school systems.<sup>22</sup> The Supreme Court has established at least four tests for

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421 F. Supp. 337, 337 (D.C. Mass. 1976) (holding no Establishment Clause violation where statute requires moment of silence or prayer in public schools).

<sup>19</sup> See e.g. Susan Jacoby, *Keeping the Faith, Ignoring the History*, 11 N.Y. Times WK (Mar. 1, 2009) (also available at 2009 WLNR 3929960).

<sup>20</sup> Mark W. Cordes, *Prayer in Public Schools After Santa Fe Independent School District*, 90 Ky. L. J. 1, 1, (2002). Cordes describes the cases in his introduction as “cultural flashpoints.” See also Bill Finley, *Coach is Allowed to Pray with Team*, N.Y. Times D3 (July 27, 2006) (also available at 2006 WLNR 12933428).

<sup>21</sup> U.S. Const. amend. I. This portion of the First Amendment provides both the Establishment Clause and the Free Exercise Clause. Although the Free Exercise Clause is outside the scope of this paper, it is frequently in tension with the Establishment Clause and deserves to be acknowledged briefly. Essentially, the Free Exercise Clause prohibits the government from interfering with an individual’s religion. See John E. Burgess, *Recent Development, Lamb’s Chapel v. Center Moriches Union Free School District*, 113 S. Ct. 2141 (1993): *A Critical Analysis of the Supreme Court’s First Amendment Jurisprudence in the Context of Public Schools*, 47 Vand. L. Rev. 1939, 1948 (1994). Existing Establishment Clause jurisprudence makes clear that a public school faculty member represents the state, thus curtailing the teacher’s religious actions leading students in the school. See e.g. *Steele v. Van Buren Pub. Sch. Dist.*, 845 F.2d 1492 (8th Cir. 1988) (holding that band teacher could not lead band in prayer before class).

<sup>22</sup> U.S. Const. amend. XIV; *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 301 (2000).

interpreting Establishment Clause violations: the wall of separation, the *Lemon* test, the coercion test, and the endorsement test.<sup>23</sup> This section explains the evolution of these tests for two reasons. First, a basic understanding of the tests is necessary to understand Establishment Clause case law, especially because courts often employ a combination of the tests to reach a holding. Second, understanding the evolution of the Establishment Clause tests clarifies why the Court created the endorsement test and how the test fails to solve the problems it was created to remedy. Understanding the evolution of these tests lays a foundation for an Establishment Clause test more deeply rooted in the Constitution.

### **A. Wall of Separation**

The Supreme Court first substantially analyzed the Establishment Clause in *Everson v. Board of Education of Ewing Township*.<sup>24</sup> In *Everson*, a taxpayer challenged a state statute that allowed the Board of Education to reimburse parents for money spent on public bus transportation by their children to attend school, regardless of whether the child attended public school or private parochial school.<sup>25</sup> The Court said, “The ‘establishment of religion’ clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.”<sup>26</sup> Further, “[t]he First Amendment has erected a wall between church and state. That wall must be kept high and impregnable.”<sup>27</sup> Despite the metaphor of a “wall of separation,” the Court held that the statute did not violate the Establishment Clause because the state acted

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<sup>23</sup> *Borden*, 523 F.3d at 175 (mentioning *Lemon*, coercion, and endorsement); Marcia S. Alembik, *The Future of the Lemon Test: A Sweeter Alternative for Establishment Clause Analysis*, 40 Ga. L. Rev. 1171, 1177-87 (2006) (mentioning *Lemon*, historical practices, endorsement, coercion, and neutrality).

<sup>24</sup> 330 U.S. 1, 1 (1947).

<sup>25</sup> *Id.* at 3.

<sup>26</sup> *Id.* at 15.

<sup>27</sup> *Id.* at 17.

neutrally “in its relations with groups of religious believers and non-believers” and “[s]tate power is no more to be used so as to handicap religions, than it is to favor them.”<sup>28</sup>

*Everson* displayed a problematic disconnect between its rule of a “wall of separation” and the application of this rule to the facts because a “high and impregnable” wall seemingly would not allow the state to pay for parochial school bussing.<sup>29</sup> A true “wall of separation” between the state and religion would certainly provide a bright-line rule for the Establishment Clause to ensure government neutrality.<sup>30</sup> However, this strict separation would be untenable. As *Everson* admits, a strict separation would handicap religious activity, which was not the Establishment Clause’s purpose.<sup>31</sup> Moreover, strict separation ignores the Establishment Clause’s tension with the Free Exercise Clause.<sup>32</sup> Thus, subsequent cases have chipped away at the “wall of separation.”

## **B. The *Lemon* Test**

The Supreme Court attempted to achieve a more viable test than the “wall of separation” with the *Lemon* test. In the landmark case *Lemon v. Kurtzman*, the Supreme Court provided a three-prong test to determine whether a state action violates the Establishment Clause.<sup>33</sup> Under this test, the government violates the Establishment Clause if it meets any of these three prongs: (1) the purpose of the state action is to aid or promote religion; (2) the primary effect of the action is to aid or promote religion; or (3) the result of the action is excessive entanglement with

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 18.

<sup>31</sup> *Id.* at 17.

<sup>32</sup> David Crump, *Natural Selection, Irreducible Complexity, and the Bacterial Flagellum: A Contrarian Approach to the Intelligent Design Debate*, 36 *Pepp. L. Rev.* 1, 44-45 (2008) (“The ‘wall of separation’ metaphor, although picturesque, is not very useful because there are many circumstances in which government must be involved with religion to ensure free exercise or avoid discrimination against religion...otherwise a police officer could not guide traffic to and from a church.”).

<sup>33</sup> 403 U.S. 602, 612-13 (1971).

religion.<sup>34</sup> *Lemon* explained that “far from being a ‘wall,’” the division between church and state is a “blurred, indistinct, and variable barrier.”<sup>35</sup> *Lemon* thus avoided the strict separation of *Everson* but maintained a focus on neutrality within the three prongs.<sup>36</sup>

In *Widmar v. Vincent*, the Supreme Court applied the *Lemon* test to a case involving religion in a public university.<sup>37</sup> The university wanted to prohibit religious groups from using school facilities, though it allowed non-religious groups to use the facilities.<sup>38</sup> Applying *Lemon*’s first and third prongs, the Supreme Court said allowing the religious group to meet would have a secular purpose and avoid entanglement with religion through an open-forum policy including non-discrimination against religious speech.<sup>39</sup> Then the Court focused on the second prong, explaining any “incidental benefit” a religious group received by using the facilities would not violate the prohibition against the “primary advancement” of religion prong.<sup>40</sup> Thus, the Court held that the university must allow the religious groups to use the facilities where the university had opened its facilities for use by other student groups.<sup>41</sup>

Two dominant criticisms of *Lemon* are especially important.<sup>42</sup> First, judges apply *Lemon* in a seemingly arbitrary fashion because determining the first prong of purpose of the state action

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 614. The opinion lists necessary and permissible contacts between church and state such as building and zoning regulations.

<sup>36</sup> John Bickers, *Of Non-Horses, Quantum Mechanics, and the Establishment Clause*, 57 U. Kan. L. Rev. 371, 376 (2009).

<sup>37</sup> 454 U.S. 263, 271 (1981).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 272.

<sup>40</sup> *Id.* at 274.

<sup>41</sup> *Id.* at 277.

<sup>42</sup> Lisa M. Kahle, Student Author, *Making “Lemon-Aid” From the Supreme Court’s Lemon: Why Current Establishment Clause Jurisprudence Should be Replaced By a Modified Coercion Test*, 42 San Diego L. Rev. 349, 349 (2005). Kahle lists three problems with the *Lemon* test, corresponding with the three *Lemon* prongs. For purposes of this paper, problems with the first two prongs have been distilled into a single critique of being arbitrary.

and the second prong of the primary effect of the action have proven extremely subjective.<sup>43</sup> Second, *Lemon* makes members of minority religious groups feel like outsiders.<sup>44</sup> Although Justice Powell described *Lemon* as the only “coherent” Establishment Clause test in 1985,<sup>45</sup> recent Supreme Court school prayer cases either ignore *Lemon* or impose extreme modifications.<sup>46</sup> However, the Supreme Court has not overruled *Lemon*. Thus, some circuits, such as the Fourth Circuit in *Mellen v. Bunting*, have repeated that they will continue to follow *Lemon*.<sup>47</sup> Other circuits, such as the Third Circuit in *Borden v. School District of the Township of East Brunswick*, have chosen to rely on the coercion or the endorsement tests.<sup>48</sup>

### C. The Coercion Test

Some Justices of the Supreme Court have advocated for the coercion test. Justice Kennedy, writing for the majority, used a soft form of the coercion test in *Lee v. Weisman* to hold that a middle school and high school violated the Establishment Clause where the school’s graduation ceremony included a prayer.<sup>49</sup> Justice Kennedy noted that even though attendance at graduation was not mandatory, the prayer at graduation had the effect of coercing any student who wanted to attend his graduation to participate in the prayer.<sup>50</sup> This coercion test looks at whether the government is “coerc[ing] anyone to support or participate in religion or its

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<sup>43</sup> *Id.* For example, for the first prong which requires the court to determine whether the purpose of the state action is to aid or promote religion, Justices disagree over how to decide what the purpose is. When different people put up a religious display or participate in prayer, they often have different purposes. *Lemon* provides no guidance for whose purpose controls.

<sup>44</sup> W. Scott Simpson, *Lemon Reconstituted: Justice O’Connor’s Proposed Modifications of the Lemon Test for Establishment Clause Violations*, 1986 B.Y.U. L. Rev. 465, 471-74 (1986).

<sup>45</sup> *Wallace v. Jaffree*, 472 U.S. 38, 63 (1985) (Powell, J., concurring).

<sup>46</sup> *Good News Club v. Milford C. Sch.*, 533 U.S. 98, 127-30 (2001); *Santa Fe*, 530 U.S. at 290.

<sup>47</sup> 327 F.3d 355, 370 (4th Cir. 2003) (“During the past decade, we have emphasized that the *Lemon* test guides our analysis of Establishment Clause challenges.”).

<sup>48</sup> 523 F.3d at 175.

<sup>49</sup> 505 U.S. 577, 581 (1992).

<sup>50</sup> *Id.*

exercise.”<sup>51</sup> In his dissent in *Lee*, Justice Scalia advocated for a bright-line version of the coercion test which would only find an Establishment Clause violation if the school compelled religious activity by using a penalty.<sup>52</sup>

In the context of all Establishment Clause cases; including displays of the Ten Commandments,<sup>53</sup> nativity scenes as part of holiday displays,<sup>54</sup> and educational vouchers used for parochial schools;<sup>55</sup> few cases rely on the coercion test. Nor has a majority of the Supreme Court ever supported the coercion test.<sup>56</sup> However, the Court has mentioned the coercion test repeatedly in recent school prayer cases.<sup>57</sup> Thus, this limited overview of the coercion test is helpful though this paper focuses on problems with the endorsement test because courts rely on this test most heavily.<sup>58</sup>

#### **D. The Endorsement Test**

The endorsement test has become the most popular Establishment Clause test.<sup>59</sup> In 1984, Justice O’Connor developed the endorsement test in her concurrence in *Lynch v. Donnelly*.<sup>60</sup> *Lynch* required the Court to determine the constitutionality of a crèche, or Nativity scene, as part of a larger holiday display including reindeer and Santa.<sup>61</sup> The town in *Lynch* put up the holiday

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<sup>51</sup> *Id.* at 587

<sup>52</sup> 505 U.S. at 640 (Scalia, J., dissenting).

<sup>53</sup> *E.g. McCreary Co., Ky. v. Am. Civ. Liberties Union*, 545 U.S. 844, 844 (2005).

<sup>54</sup> *E.g. Co. of Allegheny v. Am. Civ. Liberties Union*, 492 U.S. 573, 573 (1989).

<sup>55</sup> *Zelman v. Simmons-Harris*, 536 U.S. 639, 654-58 (2002).

<sup>56</sup> John Tyler, *Is Worship a Unique Subject or a Way of Approaching Many Different Subjects? Two Recent Decisions that Attempt to Answer this Question Set the Second and Ninth Circuits on a Course Toward State Entanglement with Religion*, 59 Mercer L. Rev. 1319, 1326 (2007).

<sup>57</sup> *Santa Fe*, 530 U.S. at 312 (“Even if we regard every high school student’s decision to attend a home football game as purely voluntary, we are nevertheless persuaded that the delivery of a pregame prayer has the improper effect of coercing those present to participate in an act of religious worship”); *Lee*, 505 U.S. at 593.

<sup>58</sup> *E.g. Am. Civ. Liberties Union of N. J. v. Black Horse Pike Regl. Bd. of Educ.*, 84 F.3d 1471, 1471 (3d Cir. 1996); *Brown v. Gilmore*, 258 F.3d 265, 265 (4th Cir. 2001); *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 274 (5th Cir. 1996).

<sup>59</sup> Paul E. McGreal, *Social Capital in Constitutional Law: The Case of Religious Norm Enforcement Through Prayer at Public Occasions*, 40 Ariz. St. L. J. 585, 618 (2008).

<sup>60</sup> 465 U.S. at 668, 687-94 (1984) (O’Connor, J. concurring).

<sup>61</sup> *Id.*

display each year in a park owned by a non-profit organization near the heart of the shopping district.<sup>62</sup> The Court upheld the entire display, reasoning that a secular reason existed for the crèche.<sup>63</sup> Justice O'Connor suggested the endorsement test as a clarification to *Lemon*.<sup>64</sup> She emphasized *Lemon*'s failure to protect religious minorities, stating, "[e]ndorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders."<sup>65</sup>

In 1990, the Supreme Court used the endorsement test as part of its *Lemon* analysis in *Board of Education of Westside Community Schools v. Mergens*.<sup>66</sup> In *Mergens*, a group of high school students wanted to form a religious club at school.<sup>67</sup> Like other clubs at the school, participation in the club would be voluntary and open to any student.<sup>68</sup> Justice O'Connor, writing for the plurality, explained that the *Lemon* analysis in *Widmar* applied.<sup>69</sup> As in *Widmar*, the Court said, the secular purpose prong and entanglement prong were clear and the issue was whether the primary effect prong was met.<sup>70</sup> Unlike in *Widmar*, however, the *Mergens* Court used the endorsement test's reasonable observer to determine whether the effect prong was met.<sup>71</sup>

The school district argued that because the religious club would meet at a public school, "an objective observer in the position of a secondary school student will perceive school support

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<sup>62</sup> *Id.* at 671 (majority).

<sup>63</sup> *Id.* at 685.

<sup>64</sup> *Id.* at 687-94 (O'Connor, J. concurring).

<sup>65</sup> *Id.*

<sup>66</sup> 496 U.S. 226, 250 (1990) (plurality).

<sup>67</sup> *Id.* at 232.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 248-50 (citing *Widmar*, 454 U.S. at 271).

<sup>70</sup> *Mergens*, 496 U.S. at 249; *Widmar*, 454 U.S. at 274.

<sup>71</sup> *Mergens*, 496 U.S. at 249-50; *Widmar*, 454 U.S. at 274.

for such religious meetings.”<sup>72</sup> The Court disagreed, stating, “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.”<sup>73</sup> Furthermore, the Court explained “there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.”<sup>74</sup> In holding that the school district must allow the formation of the religious club, the Court indicated neutrality as a way to follow the Establishment Clause while avoiding the problems of the “wall of separation.”<sup>75</sup>

The Supreme Court has formally adopted the endorsement test,<sup>76</sup> making it the only test besides *Lemon* to garner a majority of Supreme Court support.<sup>77</sup> Under the endorsement test, a court asks whether the state action communicates “a message of government endorsement or disapproval of religion.”<sup>78</sup> Courts often consider the age of the student when analyzing whether a school district communicated a message that the school endorsed religion.<sup>79</sup> The Supreme Court explicitly stated that the endorsement test was “one of the relevant questions” involving school participation in religious activity.<sup>80</sup> Indeed, the *Borden* court relied exclusively on the endorsement test to hold that Borden’s behavior violated the Establishment Clause.<sup>81</sup> As the Court uses the endorsement test in more cases, the endorsement test’s problems become clearer.

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<sup>72</sup> *Mergens*, 496 U.S. at 249 (plurality).

<sup>73</sup> *Id.* at 250.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 248 (“the message is one of neutrality rather than endorsement”).

<sup>76</sup> *Allegheny*, 492 U.S. at 589-94.

<sup>77</sup> *Alembik*, *supra* n. 23, at 1177-82.

<sup>78</sup> *Modrovich v. Allegheny County*, 385 F.3d 297, 401 (3d Cir. 2004); *accord Rusk v. Crestview Loc. Sch. Dist.*, 379 F.3d 418, 421 (6th Cir. 2004).

<sup>79</sup> *Compare Rusk*, 379 F.3d at 421 (explaining general heightened concerns about the impressionability of elementary school students) *with Chaudhuri v. St. of Tenn.*, 130 F.3d 232, 237 (6th Cir. 1997) (holding that a generic prayer at a public university function would not lead a reasonable observer to conclude that the university was attempting to indoctrinate college-educated adults).

<sup>80</sup> *Santa Fe*, 530 U.S. at 308.

<sup>81</sup> *Borden*, 523 F.3d at 175.

Predictably, as an evolution of *Lemon*, the endorsement test shares many of *Lemon*'s problems.<sup>82</sup> Now, in addition to criticizing the *Lemon* test for seemingly arbitrary holdings and failing to protect minority interests, justices and commentators also criticize the endorsement test.<sup>83</sup>

### **III. The Endorsement Test Now: *Good News Club* and *Santa Fe***

This section examines the two most recent and relevant Supreme Court decisions involving religion in public schools.<sup>84</sup> These cases show that the Court continues to use Establishment Clause jurisprudence in an arbitrary fashion. This inherent subjectivity leaves religious minority interests unprotected because judges may consciously or unconsciously create holdings reflecting their personal biases.

#### **A. *Good News Club v. Milford Central School***

In *Good News Club v. Milford Central School*, two parents submitted a request to the school district's superintendent to have weekly Good News Club ("Club") meetings after school in the cafeteria.<sup>85</sup> The Club would be open to any child who wanted to sing Bible songs, hear Bible lessons, and memorize scripture.<sup>86</sup> The school district denied the parents' request for the Club to meet at school in an effort to avoid violating the Establishment Clause, and the parents filed suit.<sup>87</sup> Writing for the majority, Justice Thomas did not mention *Lemon*. Instead, he emphasized the Establishment Clause's focus on neutrality, using aspects of both the

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<sup>82</sup> William Trunk, *The Scourge of Contextualism: Ceremonial Deism and the Establishment Clause*, 49 B. C. L. Rev. 571, 576 (2008).

<sup>83</sup> Mark Strasser, *The Protection and Alienation of Religious Minorities: On the Evolution of the Endorsement Test*, 2008 Mich. St. L. Rev. 667, 667 (2008).

<sup>84</sup> Although *Elk Grove Unified School District v. Newdow* was a more recent case, the holding rested on standing so it will not provide much guidance. 542 U.S. 1, 1 (2004). Similarly, *Zelman*'s holding on education vouchers provides guidance more for the legislature and does not focus on religion within the school. 536 U.S. at 639.

<sup>85</sup> 533 U.S. at 103.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 104, 112.

endorsement and the coercion tests.<sup>88</sup> The Court said that, as in *Widmar*, the reasonable observer would not perceive endorsement because organizations, in addition to the Club, could use school facilities.<sup>89</sup> Moreover, the reasonable observer would note that Club meetings did not occur during school hours and were open to any student who obtained parental consent.<sup>90</sup> Even if one small child would perceive endorsement, the Court explained, “[we] decline to employ Establishment Clause jurisprudence using a modified heckler’s veto, in which a group’s religious activity can be proscribed on the basis of what the youngest members of the audience might misperceive.”<sup>91</sup> The Supreme Court held that the school district could not prohibit the Club from meeting after school.<sup>92</sup>

**B. *Santa Fe Independent School District v. Doe***

In 2000, in *Santa Fe Independent School District v. Doe*, the Supreme Court decided whether a student saying a prayer over a public address system before a football game violated the Establishment Clause.<sup>93</sup> The school district allowed the student to deliver a nonsectarian prayer based on a two-part voting system.<sup>94</sup> The students voted in the first election to determine whether a student would say a prayer before the football game and then in the second to determine which particular student would say the prayer.<sup>95</sup> The Court held these prayers violated the Establishment Clause based on the school’s history of prayer and that the school ran the voting, which would leave the reasonable observer to conclude that the school endorsed prayer.<sup>96</sup>

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<sup>88</sup> *Id.* at 113-19.

<sup>89</sup> *Id.* at 113 (citing *Widmar*, 454 U.S. at 271.)

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 119.

<sup>92</sup> *Id.* at 120.

<sup>93</sup> 530 U.S. at 294.

<sup>94</sup> *Id.* at 297.

<sup>95</sup> *Id.* at 298.

<sup>96</sup> *Id.* at 311.

The Court in *Santa Fe* used the endorsement test in a large section of the opinion. As in *Borden*, the *Santa Fe* Court mentioned the history of the prayer as a factor which would influence the reasonable observer's opinion.<sup>97</sup> Additionally, the Court noted that apart from the text of the voting policy, the reasonable observer may perceive endorsement because football games are school-sponsored and on school property surrounded by "cheerleaders and band members dressed in uniforms sporting the school name and mascot."<sup>98</sup> On the other hand, one could argue that because the reasonable observer would know that the students voted to have the prayer at the football game, a reasonable person would conclude that the prayer was student-initiated and voluntary because the school did not require any student to attend football games. However, according to the Court, the observer will "*unquestionably* perceive the inevitable pregame prayer as stamped with her school's seal of approval."<sup>99</sup> *Santa Fe* is thus a good example of the subjectivity and unpredictability of these cases.

The opinion also compared the facts in *Santa Fe* to the facts in *Lee*.<sup>100</sup> Perhaps the Court did not rely exclusively on the endorsement test to avoid problems with the reasonable observer, discussed in the next section. Notably, the Court did not make clear which test controlled the holding or whether both were essential.

*Santa Fe* underscored the importance of government neutrality toward majority and minority religious viewpoints<sup>101</sup> and emphasized that the Court remains concerned about protecting religious minorities' interests.<sup>102</sup> Although student voting may help to ensure that the

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<sup>97</sup> *Santa Fe*, 530 U.S. at 311; *Borden*, 523 F.3d at 178.

<sup>98</sup> *Santa Fe*, 530 U.S. at 307-08.

<sup>99</sup> *Id.* (emphasis added).

<sup>100</sup> *Id.* at 304-313 (citing *Lee*, 505 U.S. at 594).

<sup>101</sup> The *Santa Fe* majority stated, "[t]he whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views." *Id.* at 304 (citing *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000)).

<sup>102</sup> *Santa Fe*, 530 U.S. at 304; Strasser, *supra* n. 83, at 716.

prayer is student-initiated, elections place religious minorities at the mercy of the majority.<sup>103</sup>

Moreover, *Santa Fe* explained “fundamental rights may not be submitted to vote.”<sup>104</sup> *Good*

*News*, however, seemed to establish the outer limit of protecting religious minorities’ interests by comparing someone who is offended by a prayer to a heckler.<sup>105</sup>

#### **IV. How the Endorsement Test Fails**

The Court has failed to define critical characteristics of the reasonable observer. Thus, the endorsement test fails to achieve Justice O’Connor’s original goals of protecting minority interests and clarifying *Lemon*.<sup>106</sup>

##### **A. The Endorsement Test Fails to Define Critical Characteristics of the Reasonable Observer**

Because of the endorsement test’s reliance on the relatively undefined reasonable observer, courts have developed a system of deciding these cases based on very specific facts from previous cases. Instead of endorsement test precedent developing in any predictable fashion, courts have given the reasonable observer many different attributes. The Sixth Circuit stated that it was more inclined to compare a dispute to a fact pattern with precedential value than to simply apply a test because of the highly factually-specific nature of the Establishment Clause cases.<sup>107</sup>

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<sup>103</sup> Cordes, *supra* n. 20, at 30.

<sup>104</sup> *Santa Fe*, 530 U.S. at 304 (citing *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943)).

<sup>105</sup> *Good News*, 533 U.S. at 119; Strasser, *supra* n. 83, at 717 (“Yet there is something amiss in analogizing the individual who is sincerely offended by a religious display to a heckler. Hecklers are often characterized as wrongly denying another right to speak. By contrast, in this kind of case an individual reports her sincere reaction and is then pejoratively analogized to a heckler.”) (citations omitted).

<sup>106</sup> *Lynch*, 465 U.S. at 687 (O’Connor, J., concurring).

<sup>107</sup> *Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 376 (6th Cir. 1999) (“A single factual difference...can serve to entangle or free a particular [school] practice from the reach of the Clause’s constitutional prohibition.”).

## 1. Who is the Reasonable Observer?

Case law varies regarding whether the reasonable observer in school prayer cases is a student, a parent, or a member of the community. In *Santa Fe*, the reasonable observer was a student at the school.<sup>108</sup> In *Good News*, the Court said the “relevant community would be the parents, not the elementary school children”<sup>109</sup> but later explained “even if we were to inquire into the minds of schoolchildren in this case, we cannot say the danger that children would misperceive the endorsement of religion is any greater than the danger that they would perceive a hostility toward the religious viewpoint if the Club were excluded.”<sup>110</sup> Similarly in *Rusk v. Crestview Local School District*, the Sixth Circuit gave separate analyses with parents and students as the reasonable observer, while ultimately holding parents were the reasonable observer.<sup>111</sup> *Borden* avoided specifying altogether who the reasonable observer would be.

## 2. What Does This Reasonable Observer Know?

Justice O’Connor developed high standards for the reasonable observer. In her concurrence in *Capitol Square Review & Advisory Board v. Pinette*, a case holding that a state did not violate the Establishment Clause by allowing a private party to display an unattended cross on the grounds of the state capitol, she offered significant guidance as to what the reasonable observer knows.<sup>112</sup> Justice O’Connor described the reasonable observer as “similar to the ‘reasonable person’ in tort law,” but her reasonable observer knows much more than community ideals of reasonable behavior and collective social judgment.<sup>113</sup> She explained that

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<sup>108</sup> 530 U.S. at 308.

<sup>109</sup> 533 U.S. at 115.

<sup>110</sup> *Id.* at 118.

<sup>111</sup> 379 F.3d at 421.

<sup>112</sup> 515 U.S. 753, 757 (1995) (O’Connor, J., concurring).

<sup>113</sup> *Id.* at 780.

the reasonable observer is familiar with the history and context of the community and forum as well as any legislative history if the alleged Establishment Clause issue involves a statute.<sup>114</sup>

The other justices do not require the reasonable observer to know quite as much. Indeed, Justice Stevens has called Justice O'Connor's version of the reasonable observer "a being finer than the tort-law model," an "ultrareasonable" observer, and a "well-schooled jurist."<sup>115</sup> Justice Stevens, in his dissent in *Capitol Square*, says that the endorsement test does not require the reasonable observer to have an awareness of the general history of the alleged Establishment Clause violation.<sup>116</sup>

At the circuit court level, cases contradict each other within some circuits regarding what the reasonable observer knows. For example, the Ninth Circuit held that a Christmas display in a public park in San Diego did not convey a message of endorsement because the reasonable observer would know that the city had a first-come, first-serve permit policy and hosted an "eclectic range of uses throughout the year."<sup>117</sup> In a different case, the Ninth Circuit described the reasonable observer as "reasonable but unknowledgeable" about delineations in a park marking the private nature of a particular parcel of land.<sup>118</sup>

Within the *Borden* court, the judges also debated what a reasonable observer would know.<sup>119</sup> The majority said a reasonable observer would know about Coach Borden's history of praying with the team, as in *Santa Fe*.<sup>120</sup> The *Borden* court further explained that the reasonable observer would consider: "(1) Is the team engaging in a moment of silence, or is someone

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<sup>114</sup> *Id.*; see also *Wallace*, 472 U.S. at 76 (O'Connor, J., concurring).

<sup>115</sup> *Capitol Square*, 515 U.S. at 781, 800 n.5 (Stevens, J., dissenting).

<sup>116</sup> *Id.* at 800 n.5 (Stevens, J., dissenting).

<sup>117</sup> *Kreisner v. City of San Diego*, 1 F.3d 775, 784 (9th Cir. 1993).

<sup>118</sup> *Kong v. City & Co. of San Francisco*, 18 Fed. Appx. 616, 618 (9th Cir. 2001) (citing *Freedom from Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 494 (7th Cir. 2000)).

<sup>119</sup> 523 F.3d at 153.

<sup>120</sup> *Id.* at 176 ("we must consider all of his private prayer activities with his team as the Supreme Court did in *Santa Fe*").

speaking? (2) If a person is speaking, is he saying a prayer? (3) If it is a prayer, is it a player or the coach reciting the prayer? and (4) Who decided to say the prayer?”<sup>121</sup> However, two of the judges wrote concurring opinions stating that they thought the reasonable observer would think differently and have different knowledge about Coach Borden’s actions.<sup>122</sup>

One concurring judge said the reasonable observer’s knowledge would be akin to looking at a photograph of the team in the locker room praying.<sup>123</sup> Another concurring judge argued the reasonable observer should know everything that happened in the litigation.<sup>124</sup> Under this view, the judge would find no endorsement violation because Borden said he was merely showing respect for the players’ decision to pray before games.<sup>125</sup> Confusion over what the reasonable observer would know decreases the endorsement test’s ability to promote neutrality as required by the Establishment Clause and results in contradictory holdings both within cases and within circuits.

## **B. The Endorsement Test Fails to Protect Religious Minorities**

Justice O’Connor indicated that the reasonable observer in the endorsement test would be able to better protect minority interests from feeling as though they were “outsiders” or “not full members of the political community.”<sup>126</sup> Although Justice O’Connor developed the reasonable observer to protect religious minority interests, whether an observer finds an alleged Establishment Clause reasonable likely depends on whether the observer is atheist, Christian, or

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<sup>121</sup> *Id.* at 179 n.25.

<sup>122</sup> *Id.* at 180-81 (McKee, J., concurring); *Id.* at 186 (Barry, J., concurring).

<sup>123</sup> *Id.* at 180-81 (McKee, J., concurring).

<sup>124</sup> *Id.* at 186 (Barry, J., concurring).

<sup>125</sup> *Id.*

<sup>126</sup> *Lynch*, 465 U.S. at 688 (O’Connor, J., concurring).

Muslim.<sup>127</sup> The Court has not clarified whether the reasonable observer follows a majority or minority religion or whether the reasonable observer follows no religion.

Justice Stevens has advocated for the reasonable observer to be a member of a group who does not share the religious beliefs of a particular prayer or holiday display.<sup>128</sup> For example, if the issue were whether a town could display a menorah in December, Justice Stevens would say that the reasonable observer may be Christian or Hindu but not Jewish.<sup>129</sup> On one hand, the Court may be avoiding this delineation to acknowledge that reasonable people within religious groups may disagree over whether a symbol would convey a message of endorsement. On the other hand, by ignoring the viewpoint of a nonadherent, the reasonable observer seems “at odds with the fundamental purpose of the endorsement test,” which Justice O’Connor rightly developed to protect religious minorities.<sup>130</sup>

Subsequent clarifications to the test seemingly define an outer limit for endorsement test protection of religious minorities. In *Elk Grove Unified School District v. Newdow*, Justice O’Connor explained that given the “dizzying religious heterogeneity of our Nation, adopting a subjective approach would reduce the test to an absurdity.”<sup>131</sup> And in *Good News*, the Court implied that using a subjective reasonable observer would be akin to allowing the Establishment Clause to become a heckler’s veto.<sup>132</sup> Somehow the test that was developed to protect minority religious viewpoints now “is applied to validate practices that seem to violate the express terms of the test and to reject the reasonableness of those individuals feeling offended when their

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<sup>127</sup> Susan H. Kosse, *A Missed Opportunity to Abandon the Reasonable Observer Framework in Sacred Text Cases: McCreary County v. ACLU of Kentucky and Van Orden v. Perry*, 4 First Amend. L. Rev. 139, 168 (2006).

<sup>128</sup> *Capitol Square*, 515 U.S. at 753 (Stevens, J., dissenting).

<sup>129</sup> These facts were presented in *Allegheny*. 492 U.S. at 573.

<sup>130</sup> Anjali Sakaria, *Worshipping Substantive Equality Over Formal Neutrality: Applying the Endorsement Test to Sect-Specific Legislative Accommodations*, 37 Harv. C.R.-C.L. L. Rev. 483, 493 (2002).

<sup>131</sup> 542 U.S. at 35 (O’Connor, J., concurring).

<sup>132</sup> 533 U.S. at 120.

religious views or practices are ignored or undermined.”<sup>133</sup> Indeed, Justice Thomas suggested that offended non-adherents may be too sensitive but majority adherents are justifiably offended when religious displays are removed.<sup>134</sup> Professor Cole states, “the [endorsement] test provides few clear guidelines, and appears to turn on judges’ inevitably subjective assessments of a hypothetical reasonable observer’s perceptions about the cultural significance of state practices.”<sup>135</sup>

### C. The Endorsement Test Fails to Clarify *Lemon*

Instead of resolving ambiguities left open with *Lemon*, the endorsement test has created more uncertainty for both lower courts and litigants. Increased uncertainty exists because the Establishment Clause tests overlap with each other a great deal, and the Supreme Court has neither explicitly overruled *Lemon* nor clarified when to use *Lemon*, coercion or the endorsement test.<sup>136</sup> Moreover, often courts mention each of the three tests but don’t clarify whether a particular action violates the Establishment Clause under each test. For example, in *Doe v. Duncanville Independent School District*, the Fifth Circuit quickly marched through the three tests in one short paragraph.<sup>137</sup> Then, the court held that a basketball coach’s participation in prayer “improperly entangles [the coach] in religion and signals an unconstitutional endorsement of religion.”<sup>138</sup> The *Duncanville* court did not mention the coercion test in its analysis or clarify whether the holding could have rested solely on either the endorsement test or the *Lemon* test. In

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<sup>133</sup> Strasser, *supra* n. 83, at 667.

<sup>134</sup> Strasser, *supra* n. 83, at 723 (citing *Van Orden v. Perry*, 545 U.S. 677, 696-97 (2005) (Thomas, J., concurring)).

<sup>135</sup> David Cole, *Faith and Funding: Toward an Expressivist Model of the Establishment Clause*, 75 S. Cal. L. Rev. 559, 584 (2002).

<sup>136</sup> Strasser, *supra* n. 83, at 669.

<sup>137</sup> 70 F.3d 402, 402 (5th Cir. 1995).

<sup>138</sup> *Id.* at 406.

*Borden*, the Third Circuit held that an Establishment Clause violation existed under the endorsement test and used only short footnotes to mention the coercion test and *Lemon* test.<sup>139</sup>

The uncertainty regarding the reasonable observer, and the Establishment Clause more generally, is likely to lead to a circuit split. Although the majority of the Supreme Court has yet to see a circuit split, Justice Scalia would have granted certiorari in *Bunting v. Mellen* to resolve the split he asserts *Mellen* created between the Fourth Circuit and the Sixth and Seventh Circuits.<sup>140</sup> The Fourth Circuit held that a university could not say a prayer during a routine dinner at Virginia Military Institute (“VMI”).<sup>141</sup> In contrast, the Sixth and Seventh Circuits have both held that prayers during university graduations do not violate the Establishment Clause.<sup>142</sup> Even if no circuit split develops over prayer at the university level, what the Establishment Clause requires at the high school level and younger are painfully ambiguous for school districts. The Supreme Court has yet to grant certiorari for a case with facts similar to *Borden* where the Third Circuit was required to ascertain what specific level of participation a coach may have during student-initiated prayer. And fact situations similar to *Borden* are sure to occur in the future.

## **V. Recommendations**

The endorsement test fails to clarify *Lemon* as Justice O’Connor intended.<sup>143</sup> Instead, the endorsement test has developed the same two problems as *Lemon*. First, courts apply the test in an arbitrary manner. This arbitrary application increases unpredictability between circuits and even between judges sitting on the same court. Although the majority of the Supreme Court

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<sup>139</sup> 523 F.3d at 175 n.18, n.19.

<sup>140</sup> 541 U.S. 1019, 1019 (2004).

<sup>141</sup> *Mellen*, 327 F.3d at 355.

<sup>142</sup> *Chaudhuri*, 130 F.3d at 232; *Tanford v. Brand*, 104 F.3d 982, 982 (7th Cir. 1997).

<sup>143</sup> See *supra* notes 65-66 and accompanying text.

does not see a split between the circuits regarding whether prayer at the university level is constitutional because of differences between VMI and most universities,<sup>144</sup> erratic case law indicates that differences between courts are likely to increase.<sup>145</sup> Second, the test fails to protect minority interests. For these reasons, the reasonable observer in the endorsement test should be abandoned for school prayer cases.

The Court should adopt a presumption of unconstitutionality for all prayer in school. The school district, or coach, could rebut the presumption with certain legitimate reasons. A more uniform pattern to school prayer cases can develop when courts no longer have to engage in the fiction of describing who the reasonable observer is and what he would know in a given situation. Next, this section outlines the central tenants of a presumption of unconstitutionality, counters potential concerns, and then applies the presumption to fact patterns from recent school prayer cases.

## **A. Presumption of Unconstitutionality Test**

### **1. The Test**

The Court should adopt a presumption of unconstitutionality for at least the narrow slice of Establishment Clause cases involving religion in school.<sup>146</sup> At least two law review articles have advocated for a presumption of unconstitutionality for religious display cases.<sup>147</sup> As

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<sup>144</sup> 541 U.S. at 1021-22 (2004) (“Given the unique features of VMI, we do not know how the Fourth Circuit would resolve a case involving prayer at a state university... while the importance of this case might have justified a decision to grant, it is not accurate to suggest that a conflict of authority would have mandated such a decision.”).

<sup>145</sup> Compare *Van Orden*, 545 U.S. at 677 with *McCreary*, 545 U.S. at 844. See also Bickers, *supra* n. 36, at 372 (calling *Van Orden* and *McCreary* contradictory); Steven G. Gey, *Reconciling the Supreme Court’s Four Establishment Clauses*, 8 U. Pa. J. Const. L. 725, 725 (“It is by now axiomatic that the Supreme Court’s jurisprudence is a mess.”).

<sup>146</sup> In *Borden*, the parties agreed that the locker room and dinner were private fora. 523 F.3d at 171. In *Santa Fe*, the Court declined to specify the classification of forum but implied that a high school football game was not a limited public forum. 530 U.S. at 303-04. *Lee* did not mention forum at all. For these reasons, this paper does not focus on classifying the forum.

<sup>147</sup> Although both articles recommend using a presumption of unconstitutionality, the articles use different reasoning to reach the result that a presumption of unconstitutionality would be the correct test and apply the presumption of

Professor Hill points out, presumptions may serve at least two purposes in the Establishment Clause context.<sup>148</sup> First, presumptions manage uncertainty in our legal system.<sup>149</sup> A central problem with the endorsement test, just as with *Lemon*, is that judges apply the test in an arbitrary and inconsistent manner.<sup>150</sup> Starting with a presumption of unconstitutionality would explicitly create a bias against prayer in schools and presumably stabilize some of the school prayer holdings.

Second, presumptions serve to counteract “systemic biases or predispositions on the part of the fact-finder.”<sup>151</sup> This presumption avoids making a court guess what the reasonable observer would perceive from the situation, which gives undue weight to a majority view. In other words, a presumption of unconstitutionality would constrain a judge from applying a majoritarian viewpoint while avoiding the problems discussed above of reframing the reasonable observer as a reasonable non-adherent.<sup>152</sup> Thus, a presumption of unconstitutionality would better protect the religious minorities Justice O’Connor described in *Lynch*.<sup>153</sup>

The school district, or public school employee, may rebut this presumption by demonstrating a legitimate purpose. Two standard legitimate purposes should be neutrality and lack of school involvement. Neutrality means the school is not aligned with one particular religion over another or one particular religion over nonreligion.<sup>154</sup> Neutrality as a legitimate

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unconstitutionality differently. Kosse, *supra* n. 127, at 139; B. Jessie Hill, *Putting Religious Symbolism in Context: A Linguistic Critique of the Endorsement Test*, 104 Mich. L. Rev. 491, 491 (2005).

<sup>148</sup> Hill, *supra* n. 147, at 539.

<sup>149</sup> *Id.* at 540 (citing Ronald J. Allen, *Burdens of Proof, Uncertainty, and Ambiguity in Modern Legal Discourse*, 17 Harv. J. L. & Pub. Pol’y 627, 633 (1994)).

<sup>150</sup> See *supra* Section IV.

<sup>151</sup> Hill, *supra* n. 147, at 540.

<sup>152</sup> See *supra* Section IV(B).

<sup>153</sup> *Lynch*, 465 U.S. at 687 (O’Connor, J., concurring).

<sup>154</sup> Most simply, this type of neutrality may be a foil from the type of nonpreferentialism Justice Rehnquist proposed in his dissent in *Wallace*. 472 U.S. at 92-100 (Rehnquist, J., dissenting). Justice Rehnquist did not see any Establishment Clause violations between religion and nonreligion. Although scholars have broken down neutrality into specific subtypes, the nuances of neutrality are not the focus of this paper. Keith Werhan, *Navigating the New*

purpose builds on a substantial history of Supreme Court Establishment Clause interpretations.<sup>155</sup> For example, the oldest Supreme Court case substantially analyzing the Establishment Clause, *Everson*, emphasized neutrality's importance.<sup>156</sup> And the most recent Supreme Court school prayer case, *Good News*, started its analysis by focusing on neutrality.<sup>157</sup>

A school district's history of prayer should undermine the school's neutrality. For example, Coach Borden's history of leading the team in prayer should undermine his assertion that he merely wanted to show respect for the team.<sup>158</sup> In particular circumstances, however, prior history may be negated if neutrality is shown for a certain amount of time. For example, in the religious display context, we have seen symbols once considered religious, such as Saint Nicholas, become secularized into Santa Clause.<sup>159</sup> Similarly, if at one point a school only allowed Bible study groups to use classroom facilities, but then allowed all groups, religious and nonreligious, to use classroom facilities for several decades regardless of religious affiliation, the school should easily be able to rebut the presumption of unconstitutionality.

The second legitimate purpose that should rebut the presumption should be lack of school involvement. Lack of school involvement is rooted in the Establishment Clause's "wall of separation" but avoids *Everson*'s impracticalities.<sup>160</sup> A court may analyze several considerations regarding whether school involvement is low enough to rebut the presumption of unconstitutionality. If the school requires all students to attend the event where the prayer will

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*Neutrality: School Vouchers, the Pledge, and the Limits of a Purposive Establishment Clause*, 41 Brandeis L. J. 603, 604-613 (2003); Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 Emory L. J. 43, 46 (1997).

<sup>155</sup> *Santa Fe*, 530 U.S. at 304; *Agostini v. Felton*, 521 U.S. 203, 232-235 (1997); *Mergens*, 496 U.S. at 248.

<sup>156</sup> 330 U.S. at 1.

<sup>157</sup> 533 U.S. at 114 (stating "a significant factor in upholding governmental programs in the face of Establishment Clause attack is their *neutrality* towards religion) (emphasis in original) (citing *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 839 (1995)).

<sup>158</sup> *Borden*, 523 F.3d at 159.

<sup>159</sup> Hill, *supra* n. 147, at 525-26.

<sup>160</sup> See *supra* n. 29-32 and accompanying text.

occur, the school is involved because then each student does not have any choice whether to hear the prayer. Similarly, if the prayer is in the classroom during school hours, the school is involved because it controls all aspects of the environment.

Students may pray voluntarily in school as long as the school is not involved. Accordingly, using a lack of school involvement to rebut the presumption strikes the appropriate balance between a school district's concerns about violating the Establishment Clause and students' First Amendment rights to free exercise and free speech.<sup>161</sup> *Mergens* and *Santa Fe* highlighted this balance as an important aspect of the Establishment Clause within the larger First Amendment.<sup>162</sup>

Other legitimate purposes may arise in some circumstances. For example, an authentic need for supervision should be able to rebut the presumption of unconstitutionality. In this way, a teacher may remain in the room if a group of his five-year-old students wanted to say a prayer before getting on a bus to go on a field trip. Admittedly, imagining these precocious five-year-olds organizing independent prayer requires some imagination, but the example serves to show that other legitimate purposes may exist as esoteric fact patterns arise. Though the idea of requiring the court to expressly articulate a legitimate purpose is somewhat subjective, this level of subjectivity is in line with other areas of law that require intrinsic value judgments.

When she developed the endorsement test, Justice O'Connor said "it has never been entirely clear...how the three prongs of [*Lemon*] relate to the principles enshrined in the Establishment Clause."<sup>163</sup> And the *Lemon* court admitted "[t]he language of the Religion

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<sup>161</sup> *Santa Fe*, 530 U.S. at 290; *Lee*, 505 U.S. at 577; Cordes, *supra* n. 20, at 1.

<sup>162</sup> *Santa Fe*, 530 U.S. at 290; *Mergens*, 496 U.S. at 250; Cordes, *supra* n. 20, at 31 ("[T]he real and most fundamental message of *Santa Fe* is simply this: The state has no business promoting prayer in schools and any attempt to do so will be unconstitutional.").

<sup>163</sup> *Lynch*, 465 U.S. at 688-89 (O'Connor, J., concurring).

Clauses of the First Amendment is at best opaque.”<sup>164</sup> Deciphering the First Amendment’s text “Congress shall make no law respecting an establishment of religion” is no easy task.<sup>165</sup> But by looking at the evolution of Establishment Clause jurisprudence two central concerns emerge. The presumption of unconstitutionality test is strongly rooted in the Court’s consistent focus on neutrality and protecting religious minorities. Indeed, state neutrality and the protection of religious minorities seem to be “the very *raison d’être* of the Establishment Clause.”<sup>166</sup>

## **2. Potential Concerns with the Presumption of Unconstitutionality Test**

Because this test would apply to Establishment Clause cases involving religion in school, opponents may argue the test will result in line drawing over what constitutes “religion.” For example, using this test would change the analysis for moment of silence cases. If the history of the moment of silence indicated the moment of silence was for prayer, the presumption would exist. On the other hand, if the history of the moment of silence indicated that the silence was for reflection or to give the students a quiet moment before the start of the school day, the presumption of unconstitutionality would not exist because a moment of silence is not intrinsically religious. Despite these potential ambiguities, under this test, courts will no longer be able to hide behind the reasonable observer and cursorily conclude that other results would just be “unreasonable.” Realistically, courts may apply a presumption of unconstitutionality differently.<sup>167</sup> However, even if minor differences amongst holdings develop, the presumption should still serve to provide some needed consistency between close cases.

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<sup>164</sup> *Lemon*, 403 U.S. at 612.

<sup>165</sup> U.S. Const. amend. I.

<sup>166</sup> *Chandler v. Siegelman*, 230 F.3d 1313, 1315 (11th Cir. 2000).

<sup>167</sup> Hill, *supra* n. 147, at 543 (asserting that this may be the strongest critique of a presumption of unconstitutionality).

## **B. Applying the Presumption of Unconstitutionality Test**

This section demonstrates how the presumption of unconstitutionality would apply to several of the cases discussed previously in this paper. Further, this section slightly alters several fact patterns to demonstrate the different results between existing Establishment Clause holdings and potential holdings under the presumption of unconstitutionality.

The presumption of unconstitutionality would produce the same holding that the endorsement test produced in *Borden*.<sup>168</sup> The presumption of unconstitutionality would apply because the situation involved prayer in a public school. Coach Borden would not be able to rebut the presumption through a showing of neutrality because he would not be able to prove that he was not aligned with one religion over another or one particular religion over nonreligion. Nor would he be able to rebut the presumption by demonstrating lack of school involvement. Although, presumably, a school does not require students to participate in football, the school remains heavily involved in operating the football program. For example, the team wears uniforms provided by the school and prays before games that the school district scheduled. Further, high school students do not need to be supervised. Though the reasoning differs, the endorsement test and the presumption of unconstitutionality produce the same result under *Borden*'s facts.

What if Coach Borden knew the law was a presumption of unconstitutionality instead of whether a reasonable observer would perceive the school's actions as an endorsement of religion? Coach Borden may have chosen to leave the room while the football players prayed to avoid litigation if he knew he would face a presumption of unconstitutionality. If, as he claimed, his sincere purpose in bowing his head and taking a knee while the team prayed was to show

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<sup>168</sup> 523 F.3d at 153.

deference and respect,<sup>169</sup> he could explain to the team that the law requires him, as a representative of the school, to remain neutral towards religion and this is done most easily when he leaves the team alone to pray.

To see how a presumption of unconstitutionality would likely result in a different holding than the endorsement test, imagine a “Coach Smith” who had no history of praying with the team. The Third Circuit implied that without Borden’s history of praying with the team, the reasonable observer likely would not perceive a message of endorsement.<sup>170</sup> Unlike *Borden*, assume that Coach Smith never emailed anyone from the team asking whether they wanted to pray before football games.<sup>171</sup> Assume the team independently decided to pray before games and Coach Smith takes a knee while they pray. The presumption of unconstitutionality would apply because this situation involves prayer in a public school. Even with no history of praying with the team, Coach Smith would not be able to rebut the presumption by showing neutrality or lack of school involvement for the same reasons explained above using the *Borden* facts. Thus, this test would presumably result in a different holding than a case using the endorsement test where the reasonable observer’s perceptions would emphasize the history of the prayer.<sup>172</sup>

The presumption of unconstitutionality would result in the same holding reached by the Court in *Good News* using the endorsement and coercion tests.<sup>173</sup> A Bible study group using school facilities would trigger the presumption of unconstitutionality because the situation involves religion in a public school. The school could easily rebut the presumption by demonstrating neutrality. The school could point to other groups using school facilities after

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<sup>169</sup> *Id.* at 176 (“Borden has stated that his intention in taking a knee and bowing during prayer is to show signs of respect to his team, not endorse religion.”).

<sup>170</sup> *Id.* at 178.

<sup>171</sup> *Id.* at 162.

<sup>172</sup> *See id.* at 178.

<sup>173</sup> 533 U.S. at 103.

school to prove that the school is not aligned with one particular religion over another or one particular religion over nonreligion. Although the holding in a situation such as *Good News* is the same using the presumption test, the analysis is simpler because the court does not need to engage in the fiction of what a reasonable observer would know in the situation. Further, the presumption protects minority religious interests from judges imposing a majoritarian bias while also avoiding the problems described above of labeling the reasonable observer as the reasonable nonadherent.<sup>174</sup>

In a situation with facts identical to those of *Santa Fe*, a court using the presumption of unconstitutionality test would find an Establishment Clause violation just as the Court did in *Santa Fe*, using the endorsement and coercion tests.<sup>175</sup> The presumption of unconstitutionality would apply because the situation involves prayer in a public school. As in *Santa Fe*, the school may try to show its actions were neutral because the students voted to have a prayer.<sup>176</sup>

Although a student-voting system may show a lack of school involvement, voting does not demonstrate neutrality. Elections, by their very nature, place the decision in majority group's hands, clearly aligning the majority religion group's choice over the minority. Even with student voting, the school was actively involved in the prayer because it controlled all aspects of the voting system and the public address system. Thus, under existing tests and the presumption of unconstitutionality test, *Santa Fe*'s facts violate the Establishment Clause.

The presumption of unconstitutionality would produce a markedly different analysis and outcome for prayers at the university level. Notably, the Supreme Court has not yet ruled whether prayer at a university graduation violates the Establishment Clause. As mentioned

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<sup>174</sup> See *supra* n. 128-30 and accompanying text.

<sup>175</sup> 530 U.S. at 311.

<sup>176</sup> *Id.* at 307.

above, the Sixth and Seventh Circuits have held that a university does not violate the Establishment Clause by allowing a nonsectarian prayer at graduation.<sup>177</sup> To reach this holding, the cases use a confusing jumble of the *Lemon* test, the coercion test, and the endorsement test as well as mentioning how tradition can solemnize certain public occasions.<sup>178</sup>

The presumption of unconstitutionality proceeds differently. As explained with the examples at the high school level using variations of the facts from *Borden* and *Santa Fe*, the presumption of unconstitutionality applies because the situation involves prayer in a public school. The universities in the Sixth and Seventh Circuit would not be able to rebut the presumption of unconstitutionality for the same reasons that a school in a situation similar to *Santa Fe* would not be able to rebut the presumption, namely the universities have no way to demonstrate neutrality and are substantially involved in the graduation. Thus, a court using the presumption of unconstitutionality should hold that prayer at a university graduation violates the Establishment Clause. This analysis is simpler than the endorsement test analysis and would not result in a different holding for VMI, avoiding any split between the circuits.

The Establishment Clause's emphasis on neutrality and protecting religious minorities' interests should not vary depending on whether the school is an elementary school, high school or university. The presumption of unconstitutionality provides the same protection regardless of age, majority religion, minority religion, or nonreligion. Reasoning in school prayer cases based on whether the school is a high school or university serves only as a red herring. School prayer

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<sup>177</sup> *Chaudhuri*, 130 F.3d at 232; *Tanford*, 104 F.3d at 982.

<sup>178</sup> *E.g. Chaudhuri*, 130 F.3d at 237 (“A reasonable observer would not conclude that [the university] was trying to indoctrinate the audience”); 130 F.3d at 239 (“We cannot accept the notion that Dr. Chaudhuri was ‘coerced’ into participating in the prayers merely because he was present”); *Tanford*, 104 F.3d at 986 (university’s practice of invocation for more than 150 years is “tolerable acknowledgement of beliefs widely held among people of this country”); 104 F.3d at 986 (“University’s inclusion of a brief non-sectarian invocation and benediction does not have primary effect of endorsing or disapproving religion, and there is no excessive entanglement of church and state”).

cases cannot hinge on the age of the student when the Court has not committed to using the student as a reasonable observer. For example, in *Good News*, where the school was an elementary school, the Court said the reasonable observer was a parent.<sup>179</sup> But in *Santa Fe*, where the school was a high school, the Court said the reasonable observer was a student.<sup>180</sup> Even if the Court committed to using the student as the reasonable observer, basing holdings on the age of the student further highlights the endorsement test's problems. No elementary age student would have the immense underlying knowledge that the Court gives the reasonable observer.<sup>181</sup> The presumption of unconstitutionality avoids using the age of the student to mask an actual analysis of the school's neutrality.

## **VI. Conclusion**

The Supreme Court should adopt a presumption of unconstitutionality for school prayer cases. The endorsement test evolved because *Lemon* failed to protect religious minorities and was subject to arbitrary application. But the endorsement test fails in the same way *Lemon* failed. Applying a presumption of unconstitutionality to religion in public schools, which could then be rebutted through a showing of neutrality or lack of school involvement, would best provide public school students with their Establishment Clause protections.

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<sup>179</sup> *Good News*, 533 U.S. at 115.

<sup>180</sup> *Santa Fe*, 530 U.S. at 308.

<sup>181</sup> *See supra* Section (IV)(A)(2).