How Are Reasonable Children Coerced? The Difficulty of Applying the Establishment Clause to Minors

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Introduction

Every morning at Lincoln Junior High students recite the pledge of allegiance. Jane Reeves does not mind the exercise – in fact, she does not give it much thought; having said it every morning for many years has made it routine. During the pledge, her thoughts are occupied by coming up with explanations of why she has not done the math homework once again.

Jack Lane, a highly intelligent child, has asked his parents questions about G-d since he was three years old. However, his parents, being not at all religious, have not given him any definite answers, and Jack is pretty sure there is no G-d. Jack finds the pledge a little silly; he does not wish to recite it, but is embarrassed to be the only abstainer.

Finally, Mary Elkin comes from a devout Christian home; after she and her parents go to church every Sunday, the family discusses the week's sermon. The pledge is tantamount to a prayer to Mary. She deeply believes that G-d protects and watches over America, and feels a very personal connection with G-d when she recites the pledge.

The pledge of allegiance is only one of many activities that mention G-d in which nearly all school children participate. Other similar activities include various forms of prayers, moments of silence, etc. The students' perceptions and feelings about these activities vary based on many factors, such as religious background, age, experience, and intelligence. Such activities may or may not violate the Establishment Clause of the First Amendment[1] depending on the voluntariness of student participation, the purpose (religious or secular) of the exercises, and the test used by the court to determine the legality of such activities.

This Article will explore the existing Establishment Clause tests with special attention to the role the tests play in situations involving children. Part I will examine the Establishment Clause and its conflicts with the Free Exercise

[1] U.S. CONST. amend. I (stating that "Congress shall make no law respecting an establishment of religion . . . ").

and Free Speech Clauses. It also will analyze the different tests developed by the Supreme Court to determine whether government actions violate the Establishment Clause. Part II will discuss the conflict between the existing Establishment Clause tests with special attention to their applications to children.

Part III will examine the tort approach to determining a child's reasonableness and apply the tort standard to the endorsement analysis of the Establishment Clause. It will conclude that, in Establishment Clause challenges involving children, (1) the *Lemon* test does not apply because *Lemon* is disfavored and rarely used; (2) the endorsement test is inapplicable because tort law renders the determination of a child's reasonableness almost entirely subjective, making it all but impossible to apply the endorsement test to a school situation where many children are involved, and (3) the "coercion" test, although too permissive of governmental religious accommodations when applied to adults, is the best test for situations involving children, because it makes allowances for the their youth, impressionability, and special susceptibility to peer pressure. Building a better "coercion test" may prove especially important in the coming years, with the main proponent of the "endorsement test" (Justice O'Connor) being replaced by Justice Samuel Alito, who may well provide the fifth and decisive vote for the application of the coercion test to all Establishment Clause controversies.

I. Establishment Clause Background

This part will explore the history of the Establishment Clause and its relationship with the free exercise and free speech clauses of the First Amendment. Then, it will analyze the different Establishment Clause tests the Supreme Court has devised and the case law applying those tests. The case law survey will reveal inconsistencies among the cases involving children: in some instances, the Court makes allowances for the special sensitivity of children; in others, it expects the same level of maturity and understanding from children that it expects from adults.

The Establishment Clause of the First Amendment provides in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . ."[2] As numerous cases reveal, the Establishment Clause often conflicts with the free exercise and free speech clauses. The case law makes apparent that the Court views this dichotomy between non-establishment and free exercise /free speech rights as the primary one.

However, another dichotomy exists in Establishment Clause jurisprudence, as yet unrecognized by the Supreme Court, involving children. Some controversies, such as the daily in-school recitation of the pledge of allegiance, directly impact children, because students personally engage in such activities. Other Establishment Clause controversies, such as parochial school funding, impact children only indirectly: although the students are the ultimate beneficiaries of such funding, they are likely unaware of it.

The following section will demonstrate that (1) the Supreme Court decides Establishment Clause cases primarily by assessing the conflict with the free speech and free exercise clauses – and that, on the whole, the Court views the Establishment Clause as the weakest of the three; and (2) the Court hardly, if at all, notes important distinctions between religious controversies that directly affect children and those that do so only indirectly.

A. Conflict Between the Establishment Clause and the Free Speech Clause

A common scenario of a conflict between the Establishment Clause and the free speech clause involves a religious group wishing to hold meetings on public school or State university premises. Typically, the school administration denies such requests, not wishing to violate the Establishment Clause, while allowing non-religious groups to

[2] U.S. CONST. amend. I.

conduct their business on campus.[3] In such cases, the Supreme Court performs the same analysis regardless of whether the situation arises at a secondary school or a university, and the conflict usually resolves in favor of free speech.[4] The Court reasons that by allowing non-religious groups to meet on campus, the school creates a "limited public forum,"[5] which prohibits "content-based" discrimination.[6] In

[3] *See* Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001) (permitting a Bible study club to meet on elementary school premises); Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995) (holding that, by denying the funds to a student organization which published a religious newspaper, the University of Virginia violated the group's free speech rights; funding the publication would not violate the Establishment Clause because the program is neutral to religion); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) (holding that the school district engaged in viewpoint discrimination by not allowing the church to use school facilities for religious film viewing; allowing such activity does not violate the Establishment Clause); Bd. of Ed. of the Westside Cmty. Sch. v. Mergens, 496 U.S. 226 (1990) (holding that the school district violated a religious student group's free speech rights by denying it permission to meet on school premises); Widmar v. Vincent, 454 U.S. 263 (1981) (holding that University of Missouri had created a limited open forum, which obligated it to permit a religious group to meet on campus).

[4] *See supra* note 3; *see also* Rebecca A. Valk, *Good News Club v. Milford Central School: A Critical Analysis of the Establishment Clause as Applied to Public Education*, 17 ST. JOHN'S J. LEGAL COMMENT 347, 350 (2003) (stating that "Supreme Court holdings … seem to suggest that as long as the speech in question survives Free Speech analysis, it must be constitutional").

[5] *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37**,** 45-46 (1983) (explaining the possibility of three types of fora: (1) the traditional public forum consists of "places which . . . have been devoted to assembly and debate;" (2) the limited or designated public forum "consists of public property which the state has opened for use by the public as a place for expressive activity;" and (3) the non-public forum consists of "public property which is not by tradition or designation a forum for public communication").

[6] *See* Good News Club v. Milford Cent. Sch., 533 U.S. 106 (2001) (stating that although by establishing a limited public forum "the State is not required . . . to engage in every type of speech," the State's power to restrict the speech is limited, and "[t]he restriction must not discriminate against speech on the basis of viewpoint."); Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 828 (1995) (stating that "[i]t is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys"); Lamb's Chapel v. Ctr.

such cases, "speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint."[7]

In short, the free speech clause carries more weight than the Establishment Clause in a limited public forum. In none of these cases did the Supreme Court make a distinction between secondary school and university students; nor did it distinguish between cases like *Mergens*, where the religious group seeking to meet on school premises was composed of students attending that school,[8] and *Lamb's Chapel*, where the religious group consisted of adults who wished to view religious films on school premises.[9]

B. Conflict Between the Establishment Clause and the Free Exercise Clause

Most examples of the non-establishment/free exercise conflict involve adults.[10] In *Wisconsin v. Yoder*,[11] however, the conflict concerns children, albeit indirectly. In that case, the Supreme Court upheld parents' rights to discontinue their children's formal education beyond the eighth grade for religious reasons. [12] The Court held that compelling parents to comply with the law mandating formal education until age sixteen unconstitutionally imposes on their religious beliefs

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Moriches Union Free Sch. Dist., 508 U.S. 384, 394 (1993) (stating that even in a non-public forum, "the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject").

[7] *Good News Club*, 533 U.S. at 112; *accord Lamb's Chapel*, 508 U.S. 384; *Rosenberger*, 515 U.S. 819.

[8] 496 U.S. 226 (1990).

[9] 508 U.S. 384 (1993).

[10] *See e.g.*, Goldberg v. Weinberger, 475 U.S. 503 (1986) (upholding the power of Air Force to forbid one of its personnel to wear a yarmulke while in uniform); Walz v. Tax Comm'n, 397 U.S. 664 (1970) (upholding state law exempting houses of worship from property taxes).

[11] 406 U.S. 205 (1972).

[12] *Id.*

and practices.[13] The Court acknowledged that granting "an exception from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause,"[14] but nevertheless decided that the free exercise rights of parents prevails.[15] The Court did not consider the possible effect of the ruling on children, such as a perception that the government may favor the Amish religion by exempting their parents from a general law on religious grounds.

Certainly, cases exist where the Court upheld laws restricting free exercise of religion in some way.[16] But the Court did not analyze those cases as a conflict between free exercise and non-establishment. Rather, the Court found that the government had a secular purpose for enacting the regulations in question, and therefore, non-establishment was not an issue.[17]

In sum, in cases where the Court recognized a true conflict between free exercise and non-establishment, it reasoned that the government must maintain religious neutrality, and by attempting to forbid or remove all things religious in nature, the government shows hostility towards religion.[18] Thus, if a government action attempts to stop a

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[13] *See* Wisconsin v. Yoder, 406 U.S. 205, 218 (1972) (stating that "[t]he impact of the compulsory-attendance law on [the parents'] practice of the Amish religion is . . . inescapable, for the Wisconsin law affirmatively compels them . . . to perform acts undeniably at odds with fundamental tenets of their religious beliefs").

[14] *Id.* at 220-21.

[15] *Id.* at 221.

[16] *See* Employment Div. v. Smith, 494 U.S. 872 (1990) (upholding a denial of benefits to a petitioner who used peyote in sacramental ceremonies); Braunfeld v. Brown, 366 U.S. 599 (1961) (upholding the Constitutionality of Sunday closing laws); Reynolds v. United States, 98 U.S. 145 (1878) (upholding a law banning polygamy).

[17] *See supra* note 16.

[18] *See* Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 839 (1995) (stating that "a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion"); Lynch v. Donnelly, 465 U.S. 668, 673 (1984) (stating that "the Constitution [does not] require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any").

religious practice or expression in the name of non-establishment, the Supreme Court will likely rebuff the government for the sake of free exercise;[19] but if the government enacts a general law that incidentally effects religion, the Court will likely uphold it.[20]

Non-establishment prevailed over free exercise in a few recent cases. For example, in *Lee v. Weisman*, the Court invalidated a high school graduation prayer, [21] and in *County of Allegheny v. ACLU Greater Pittsburgh*, the Court ordered a courthouse to remove a crèche from the Grand Staircase. [22] However, those cases are atypical. In *Lee*, the Court uncharacteristically took into account the youth and impressionability of the children; the Court's opinion indicates that the outcome probably would have been different had the situation involved adults,[23] as was the case in *Marsh v. Chambers*.[24] In *Allegheny*, the Court essentially split the difference in deciding which holiday religious displays could remain inside the courthouse, ordering the government to remove the crèche but leaving other Christmas decorations and a menorah in place.[25]

In sum, occasional invalidations of governmental accommodations of religion notwithstanding, in the past several decades, the Court has been more protective of free exercise of religion than non-establishment. The next section will explore the various tests formulated by the Supreme Court to help the government and the lower courts to determine whether a violation of the Establishment Clause occurred.

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[19] *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972); *Walz v. Tax Comm'n*, 397 U.S. 664 (1970) (upholding a state law exempting religious organizations from property taxes for properties used exclusively for religious worship).

[20] *See supra* note 16.

[21] 505 U.S. 577 (1992).

[22] 492 U.S. 573, 602 (1989).

[23] *See* Lee v. Weisman, 505 U.S. 577 (1992) (stating that "[t]he influence and force of a formal exercise in a school graduation are far greater than the prayer exercise we condoned in *Marsh*").

[24] 463 U.S. 783, 792 (1983) (upholding state legislation prayers).

[25] 492 U.S. 573, 602 (1989).

C. The Various Establishment Clause "Tests"

Over the years, the Supreme Court has developed several tests used to scrutinize government actions for violations of the Establishment Clause. They are the historical approach, the *Lemon* test, ceremonial deism, the endorsement test and the coercion test. This section will analyze these tests and their applicability to children.

1. *The Historical Approach*

Many Justices place tremendous value on the fact that historically, religion played an important role in the political and cultural development of this country.[26] As Justice Scalia stated in his dissent in *Lee v. Weisman*, "the Establishment Clause must be construed in light of the '[g]overnment policies of accommodation, acknowledgement, and support for religion [that] are an accepted part of our political and cultural heritage'" and "the meaning of the Clause is to be determined by reference to historical practices and understandings."[27] Supporters of the historical approach reason that certain practices have value because the creators of the Constitution engaged in them, or are valid because they have historical significance.[28] For example, in *Marsh v.*

[26] *See, e.g.*, Marsh v. Chambers, 463 U.S. 783, 792 (1983) (stating that "there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society."); County of Allegheny v. ACLU Greater Pittsburgh, 492 U.S. 573, 670 (1989) (stating that "[a] test for implementing the protections of the Establishment Clause that, if applied with consistency, would invalidate longstanding traditions cannot be a proper reading of the Clause."); *infra* note 129.

[27] *Lee*, 505 U.S. at 631 (Scalia, J., dissenting) (quoting County of Allegheny v. ACLU Greater Pittsburgh, 492 U.S. 573, 657, 670 (1989)).

[28] *See id.* at 633 (stating that "[f]rom our Nation's origin, prayer has been a prominent part of governmental ceremonies and proclamations"); County of Allegheny v. ACLU Greater Pittsburgh, 492 U.S. 573, 670 (1989) (Kennedy, J., concurring in part and dissenting in part, joined by Chief Justice Rehnquist, Justice Scalia and Justice White) (stating that "[w]hatever test we choose to apply must permit … legitimate practices two centuries old"); Lynch v. Donnelly, 465 U.S. 668, 680 (1984) (stating that "[t]he City … has principally taken note of a significant historical religious event long celebrated in the Western World. The crèche in the display depicts the historical origins of this traditional event long recognized as a National Holiday.").

Chambers, the Court upheld legislative prayers, because "[i]n light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society."[29]

When the Court applied the historical approach to its Establishment Clause cases, its analysis centered on whether the Founding Fathers would have approved a particular government action, such as legislative prayer, as discussed in *Marsh v. Chambers*.[30] While Justice Burger admitted that the longevity of the practice does not make it constitutional,[31] he nevertheless stated that "[i]t can hardly be thought that in the same week Members of the First Congress voted to appoint . . . a chaplain for each House and . . . to approve the draft of the First Amendment . . ., they intended the Establishment Clause . . . to forbid what they had just declared acceptable."[32]

Scholars generally reject the historical approach. Scholar E. Gregory Wallace feels that the Framers' reasoning as to the acceptability of certain governmental religious practices is unknown and cannot be applied to today's controversies.[33] Scholar Rena Bila points out that not only is the historical record ambiguous, but since the Framers authored the Bill of Rights, our society has undergone numerous changes in its religious composition, and religious practices acceptable at the end of the eighteenth century would offend many people today.[34] Moreover, Bila continues,

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[29] 463 U.S. 783, 792 (1983).
[30] *Id.*
[31] *See id.* (stating that "[s]tanding alone, historical patterns cannot justify contemporary violations of constitutional guarantees").
[32] *See* E. Gregory Wallace, *When Government Speaks Religiously*, 21 FLA. ST. U. L. REV. 1183, 1214 (1994) (quoting Marsh v. Chambers, 463 U.S. 783, 790 (1983)).
[33] *See id.* at 1215 (stating that "[w]hat is missing from [the historical] approach is a more principled explanation for why the founders did not think that legislative chaplains and prayers offend the Establishment Clause.")
[34] Rena M. Bila, *The Establishment Clause: a Constitutional Permission Slip for Religion in Public Education*, 60 BROOK. L. REV. 1535, 1545 (1995).

applying the historical approach is especially inappropriate in the public school context, because the education system has changed dramatically since the enactment of the Bill of Rights, and the Framers' intentions are inapplicable to today's controversies surrounding public education.[35]

In sum, legal scholars oppose applying the historical approach to modern Establishment Clause controversies.[36] The Supreme Court evidently concurred: with the exception of *Marsh v. Chambers*,[37] between 1971 and 1984, the Court applied the *Lemon* test in all Establishment Clause cases.[38] This underscores the recognition articulated in *Marsh* that the historical approach alone does not justify upholding Establishment Clause violations.[39] In cases where a historical religious practice was upheld, the historical significance of the practice was considered in conjunction with other established tests, like coercion or endorsement.[40] As Justice Holmes famously wrote,

> [i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.[41]

Thus, the historical approach does not and cannot drive Establishment Clause jurisprudence. Its reasoning is flawed,

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[35] *See id.* at 1545.
[36] *See supra* notes 33-35 and the accompanying text.
[37] 463 U.S. 783 (1983).
[38] Newdow v. U.S. Cong., 328 F.3d 466, 485 (9th Cir. 2003), *rev'd on other grounds by* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004) (vacating for lack of justiciability, but not addressing any of the First Amendment issues).
[39] *See supra* note 31.
[40] *See* Lynch v. Donnelly, 465 U.S. 668 (1984) (upholding a government-owned nativity scene display at a park); County of Allegheny v. ACLU Greater Pittsburgh, 492 U.S. 573 (1989); Lee v. Weisman, 505 U.S. 577 (1992).
[41] Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

and as a practical matter, it holds little sway with the Court.[42]

2. *Ceremonial Deism*

Justice Brennan announced the ceremonial deism test in his dissenting opinion in *Lynch v. Donnelly*, where the Court upheld a government-owned Christmas display in a park.[43] Under that test, the government would not violate the Establishment Clause if it recognized and allowed certain religious expression that has lost its religious significance through constant repetition.[44]

Persuasive scholarship rejects ceremonial deism. Wallace stated that it is unclear that people do not attach religious significance to such phrases as "in G-d we trust."[45] In his opinion, people rarely think about such phrases, but it is uncertain whether such words would "fail to inspire religious thoughts" if people stopped to think about them.[46] In addition, ceremonial deism is biased against religion, since the test presumes that religious phrases have lost their meaning, but secular phrases such as "justice for all" have not.[47] Finally, in applying the ceremonial deism test, courts would have to scrutinize the religious potency of the message – a task they are not equipped to perform.[48]

Likewise, Professor Stephen Epstein strongly opposes ceremonial deism. In his article *Rethinking the Constitutionality of Ceremonial Deism*, he applied the Establishment Clause jurisprudence to ceremonial deism activities such as legislative prayers, prayers at Presidential inaugurations, Presidential addresses invoking the name of G-d, the invocation "G-d save the United States and this Honorable Court," the phrase "under G-d" in the pledge of allegiance, and the national motto "in G-d we trust."[49] Epstein

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[42] *See supra* note 38 and accompanying text.
[43] 465 U.S. 668, 716 (1984) (Brennan, J., dissenting).
[44] *Id.*
[45] *See* Wallace, *supra* note 32, at 1217.
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *See Epstein, supra* note 218, at 2137-54.

found them all, except for invoking the name of G-d in Presidential addresses, unconstitutional.[50] He stressed that legislative Christian prayers "sectarian nature cannot be ignored"[51] and Presidential inaugurations are televised and accessible to students who may watch the events in public classrooms.[52] Additionally, the pledge of allegiance is "recited in public schools, where impressionable children are a captive audience."[53] Epstein concluded that if the Court truly means that the government may not endorse religion and make a significant minority of the country's population feel like outsiders, "the Court should have the intellectual honesty and fortitude to recognize that ceremonial deism violates a core purpose of the Establishment Clause."[54]

Thus, scholars reject ceremonial deism.[55] They reason that (1) the assumption that people do not attach religious significance to certain phrases is questionable;[56] (2) the test is biased against religion;[57] (3) its application requires courts to assess the religious significance of the contested practice;[58] and (4) the application of Establishment Clause jurisprudence shows the unconstitutionality of many ceremonial deism practices.[59]

3. *The Lemon Test*

The *Lemon* test is a fleshed-out variation of the purpose-and-effect test formulated in *School District of Abington Tp. v. Schempp*.[60] In *Schempp*, the Supreme Court stated that "to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a

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[50] *See id.*
[51] *See id.* at 2138.
[52] *See id.* at 2140, 2141
[53] *See id.* at 2152.
[54] *See id.* at 2174.
[55] *See supra* notes 45-54 and accompanying text.
[56] *See supra* note 46 and accompanying text.
[57] *See supra* note 47 and accompanying text.
[58] *See supra* note 48 and accompanying text.
[59] *See supra* notes 49-54 and accompanying text.
[60] 374 U.S. 203 (1963) (invalidating Bible reading and recitation of prayer in public schools and holding that government actions must have a secular purpose and primary effect of neither advancing nor inhibiting religion).

primary effect that neither advances nor inhibits religion."[61] Eight years after *Schempp*, the Court decided *Lemon v. Kurtzman*, holding that governmental aid to nonpublic schools violates the Establishment Clause. [62] In *Lemon*, the Court announced a three pronged test: (1) the statute must have a secular legislative purpose; (2) the principal or primary effect [of the statute] must be one that neither advances nor inhibits religion; and (3) the statute must not foster excessive entanglement with religion.[63]

Lemon dominated the Establishment Clause jurisprudence for over a decade.[64] Although the Supreme Court has never explicitly overruled or discarded the *Lemon* test, the Court is reluctant to apply it, and Justices frequently express their distaste for it.[65] Their hostility may be that the *Lemon* test invalidates too many governmental accommodations of religion;[66] today's more conservative Court regularly abandons *Lemon* when it wishes to uphold such accommodations.[67]

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[61] Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 222 (1963).
[62] 403 U.S. 602 (1971).
[63] *Id.* at 612-613.
[64] *See supra* note 38 and accompanying text.
[65] *See Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring) ("Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches . . . School District."); Lee v. Weisman, 505 U.S. 577, 644 (1992) (stating that "Lemon test … has received well-earned criticism from many Members of this Court").
[66] *See, e.g.*, Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985) *overruled by* Agostini v. Felton, 521 U.S. 203 (1997) (invalidating the school district shared time and community education program as violating the primary effect prong of *Lemon*); Meek v. Pittenger, 421 U.S. 349 (1975) *overruled by* Mitchell v. Helms, 530 U.S. 793 (2000) (invalidating the state's instructional equipment load program); Comm. for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973) (invalidating a program providing partial tuition reimbursements to sectarian and non-sectarian private school students).
[67] *See Lamb's Chapel v. Center Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 399 (1993) (Scalia, J., concurring) (stating that "[w]hen we wish to strike down a practice [*Lemon*] forbids, we invoke it . . .; when we wish

On the whole, scholars criticize *Lemon*. Professors Jesse Choper and Brian Serr feel that it steps on the toes of the free exercise guaranty.[68] Choper also argues that the excessive entanglement prong puts too much power in the hands of the courts.[69] For example, since government dictates the appropriate curriculum to parochial schools, thus perpetuating the entanglement with religion, the propriety of such regulation should not be determined by the presence or absence of financial aid.[70] Finally, Choper argues that *Lemon* lends itself to ad-hoc decisions incapable of reconciliation.[71]

The *Lemon* test does have some modest support. Scholar Matthew Kammerer feels that, although some governmental entanglement with religion is inevitable, *Lemon* makes it easier to identify the line where that involvement becomes excessive.[72] Additionally, Scholar Carole Kagan states that many of *Lemon*'s problems result not from the test itself, but the Court's refusal to apply it "where consistency with the Court's articulated goal of neutrality would lead to

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to uphold a practice it forbids, we ignore it entirely); Valk, *supra* note 4, at 359 (stating that Justice Scalia "believes [*Lemon*] is too arbitrary: the Court has used it when it desires to invalidate an activity it forbids, but when the Court wishes to uphold an activity forbidden by the test, it is simply disregarded.").

[68] *See* Brian J. Serr, *A Not-So- Neutral "Neutrality:" an Essay on the State of the Religion Clauses on the Brink of the Third Millennium*, 51 BAYLOR L. REV. 319, 333 (1999) (stating that by invalidating a government action that has an *effect* of advancing religion, rather than the one that was *intended* to advance religion, *Lemon*'s second prong conflicts with *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990), which held that government actions having an effect of advancing religion violate the free exercise clause.); Jesse H. Choper, *The Endorsement Test: Its Status and Desirability*, 18 J.L. & POL. 499, 501 (2002) (stating that *Lemon* "makes virtually all exemptions from onerous obligations for religion unconstitutional").

[69] *See* Choper, *supra* note 68, at 502.

[70] *See id.*

[71] *See id.* at 503 (citing examples of inconsistent results produced by *Lemon* such as allowing states to lend textbooks to parochial schools because they can be screened for religious content, but prohibiting the provision of other equipment, such tape recorders, films, and maps).

[72] Matthew Paul Kammerer, *County of Allegheny v. A.C.L.U.: Perpetuating the Setting Factor Myth*, 954 (1990).

seemingly awkward results."[73] Finally, Scholar Robert Kilroy points out that *Lemon* is the only test that has "attracted a majority of the modern Court."[74]

Thus, although some scholars believe that the *Lemon* test is a viable tool for resolution of Establishment Clause controversies, most scholars agree with the Court's criticism of it and feel that *Lemon* has outlived its usefulness.[75]

4. *The Coercion Test*

Justice Kennedy articulated the coercion test in his partially dissenting opinion in *County of Allegheny v. ACLU Greater Pittsburgh*.[76] He felt that the government was within the Establishment Clause boundaries as long as the government did not explicitly or implicitly coerce its citizens to participate in any religious observances.[77]

So far, the coercion test has not been widely accepted, and some Justices and both conservative and liberal scholars criticize it.[78] Conservatives argue that the test invalidates government actions that appropriately accommodate the free exercise of religion,[79] while liberals feel that the test lacks teeth and will uphold obvious Establishment Clause

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[73] Carole F. Kagan, *Squeezing the Juice from Lemon: Toward a Consistent Test for the Establishment Clause*, 22 N. KY. L. REV. 621, 634 (1995).

[74] Robert L. Kilroy, *A Lost Opportunity to Sweeten the Lemon of the Establishment Clause Jurisprudence: an Analysis of Rosenberger v. Rector and Visitors of the University of Virginia*, 6 CORNELL J.L. & PUB. POL'Y 701, 712 (1997).

[75] *See supra* notes 68-71 and accompanying text.

[76] 492 U.S. 573 (1989) (invalidating the display of a crèche at a courthouse; upholding a display of other Christmas decorations and a menorah).

[77] *See id.* (Kennedy, J., concurring in part and dissenting in part).

[78] *Lee v. Weisman*, 505 U.S., 577, 632 (1992) (Scalia, J., dissenting) (criticizing coercion test: "[a]s its instrument of destruction, the bulldozer of its social engineering, the Court invents a boundless, and boundlessly manipulable, test of psychological coercion").

[79] *See* Serr, *supra* note 68, at 334 (stating that the coercion test "provides opponents of religion more power to frustrate the religious practices of others than *Smith*'s Free Exercise doctrine gives to religious practitioners to pursue their own religious practices").

violations.[80] Arguably, both sides have a point: on one hand, liberals are not comforted by the knowledge that only coercion will invalidate a governmental religious action, and a Christmas display at a courthouse was not deemed coercive enough;[81] on the other hand, conservatives respond, if coercion can be implied as well as expressed, many perfectly legitimate government actions will be invalidated because one person may perceive another's public religious expression as "coercive," such as a non-sectarian prayer at a graduation.[82]

One difference between the coercion and the endorsement tests is that, as Scholar Paula Cohen points out, Justice Kennedy was especially troubled by the position of reasonable dissenters.[83] Such concern is contrary to the endorsement test's approach, which concentrates on the position of the majority.[84]

An implicit, though unacknowledged, adult-child dichotomy exists in applying the coercion test. While Justice Kennedy applies his test rather strictly to adults,[85] he is more

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[80] *See* Wallace, *supra* note 32, at 1224 (stating that "[t]he failure to show a principled link between coercion and proselytization underscores a major flaw in the coercion test. It cannot explain why a large cross atop city hall is necessarily coercive if its passive display does not obligate anyone to participate in religious exercise.").

[81] County of Allegheny v. ACLU Greater Pittsburgh, 492 U.S. 573 (1989) (Kennedy, J., concurring in part and dissenting in part).

[82] *See* Serr, *supra* note 68, at 334 (stating that "[t]he coercion test has been used to strike down such innocuous practices as a prayer at public school graduation ceremonies").

[83] Lee v. Weisman, 505 U.S. 577, 593 (1992) (stating that "for the dissenter of high school age, who has a reasonable perception that she is being forced by the State to pray in a manner her conscience will not allow, the injury is . . . real"). *See* Paula Savage Cohen, *Psycho-Coercion, a New Establishment Clause Test: Lee v. Weisman and Its Initial Effect*, 73 B.U. L. REV. 501, 513 (1993) (stating that "[t]he Court observed that a 'reasonable dissenter' must either stand or maintain respectful silence during the invocation and benediction," which may appear as participation in, or approval of, the prayers).

[84] *See infra* notes 110-111.

[85] *See* Stephen E. Gottlieb, *Three Justices in Search of a Character: The Moral Agenda of Justices O'Connor, Scalia and Kennedy*, 49 RUTGERS L. REV. 219, 259 (1996) (stating that "Kennedy's limit reflects his respect for

sensitive about recognizing possible "coercion" of children.[86] For example, the coercion test would not invalidate a crèche and a menorah display in a courthouse,[87] even though courthouses are a place of government business where all citizens must go to resolve disputes or serve as jurors. Kennedy argued that "[t]he crèche and the menorah are purely passive symbols of religious holidays" and "[p]assersby who disagree with the message conveyed by these displays are free to ignore them . . . ."[88]

However, Justice Kennedy took a completely different approach in *Lee v. Weisman*, where he not only considered the subtle implied coercion of ostensibly voluntary school-sponsored graduation prayers, but also recognized that high school students are more impressionable and vulnerable to subtle intimidation, such as peer pressure.[89] Additionally, the Court recognized the importance of graduation in a child's life, noting that missing high school graduation is not a viable way to avoid school-sponsored prayer, no matter how non-sectarian.[90]

The Ninth Circuit recognized the validity of the coercion test as applied to children and used it in *Newdow v. United States Congress* to invalidate the school policy requiring a teacher-led recitation of the pledge of allegiance.[91]

Finally, as discussed below,[92] the idea of implicit coercion in voluntary school prayer has precedent in the

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character: strong people . . . should resist the pressures of everyday life, including unwelcome religious ones . . .").

[86] *See* Lee v. Weisman, 505 U.S. 577, 593 (1992).

[87] County of Allegheny v. ACLU Greater Pittsburgh, 492 U.S. 573 (1989) (Kennedy, J., concurring in part and dissenting in part).

[88] *Id.* at 664.

[89] 505 U.S. 577, 593 (1992).

[90] *Id.* at 595 (stating that "a student is not free to absent herself from the graduation exercise in any real sense of the term "voluntary," for absence would require forfeiture of those intangible benefits which have motivated the student through youth and all her high school years").

[91] 328 F.3d 466 (9th Cir. 2002), *rev'd on other grounds by* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004) (vacating for lack of justiciability, but not addressing any of the First Amendment issues).

[92] *See infra* notes 256-259 and accompanying text.

Establishment Clause jurisprudence. In *Engel v. Vitale*, the Court rejected constitutionality of school prayer.[93] The absence of formal compulsion and reference to a specific religion had not saved the constitutionality of the school regulation.[94] Thus, by applying the concept of implied coercion expansively in a school setting, Justice Kennedy follows established precedent.

Overall, while scholars still debate the merits of the coercion test,[95] Justice Kennedy has demonstrated the test's flexibility in finding implicit coercion when it comes to children,[96] and the Ninth Circuit has strengthened the test's viability by applying it in the pledge of allegiance case.[97] Also, the coercion test as applied to children finds precedent in Establishment Clause jurisprudence.[98]

5. *The Endorsement Test*

In a concurring opinion in *Lynch v. Donnelly*, Justice O'Connor articulated the endorsement test.[99] The endorsement test requires an analysis of a reasonable observer's reaction to a government-sponsored action: if a reasonable observer perceives a government action as an endorsement of religion, that action violates the Establishment Clause.[100]

In *Capitol Square Review and Advisory Board v. Pinette*, Justice O'Connor clarified that the "applicable observer is similar to the 'reasonable person' in tort law, who 'is not to be identified with any ordinary individual, who might occasionally do unreasonable things,' but is 'rather a personification of a community ideal of reasonable behavior,

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[93] 370 U.S. 421 (1962).
[94] *Id.* at 430-32.
[95] *See supra* notes 78-82 and accompanying text.
[96] *See supra* notes 89-90 and accompanying text.
[97] *See supra* note 91 and accompanying text.
[98] *See supra* notes 93-94 and accompanying text.
[99] 465 U.S. 668 (1984) (O'Connor, J., concurring).
[100] *See* Choper, *supra* note 68 (stating that the endorsement test takes into account a reasonable observer's perceptions of governmental religious accommodations).

determined by the [collective] social judgment.'" [101] Then, in *Wallace v. Jaffree* Justice O'Connor refined the concept of a reasonable observer and added the requirement that he must be "acquainted with the text, legislative history, and implementation of the statute."[102]

Scholars and other Justices criticized the endorsement test. Wallace was uncomfortable that the endorsement test acknowledges activities such as legislative prayer, official recognition of Thanksgiving, and placing "In G-d we trust" on our currency.[103] These activities, he stated, "look more like official endorsements of religion."[104] Similarly, Justice Kennedy disagreed with Justice O'Connor that governmental religious expressions such as phrases "in G-d we trust" and "G-d save the United States" would pass the endorsement test.[105] Instead, Kennedy agreed with Wallace; in his dissent in *Allegheny*, he wrote that "[f]ew of our traditional practices recognizing the part religion plays in our society can withstand scrutiny under a faithful application of [the endorsement test]."[106]

In addition, scholars criticize the definition of a reasonable observer. Choper feels that Justice O'Connor has not defined her "hypothetical observer"[107] well.[108] Scholar Benjamin Sachs echoes that sentiment; stating that the formulation of the reasonable observer "fails to resolve whether the observer will have the perspective of one in the

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[101] 515 U.S. 753, 779-780 (1995) (O'Connor, J., concurring in part and concurring in the judgment) (quoting W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts 175 (5th ed. 1984)) (upholding a display of a cross at a plaza next to state capitol).

[102] 472 U.S. 38, 76 (1985) (O'Connor, J., concurring) (invalidating a state law mandating a moment of silence in public school for meditation or voluntary prayer).

[103] *See* Wallace, *supra* note 32, at 1219.

[104] *See id.*

[105] *See infra* note 177-178 and accompanying text.

[106] County of Allegheny v. ACLU Greater Pittsburgh, 492 U.S. 573, 670 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part).

[107] Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring).

[108] *See* Choper, *supra* note 68, at 511.

religious majority or religious minority, and whether the observer will have the perspective of an adherent or a nonadherent of the religion on display."[109] Nevertheless, Sachs concludes that the reasonable observer belongs to the religious majority,[110] a view with which Gottlieb concurs.[111]

Finally, Justice Stevens feels that the requirement of the reasonable observer being "acquainted with the text, legislative history, and implementation of the statute"[112] is too burdensome, and therefore, unrealistic.[113] In his dissenting opinion in *Pinette*, he stated that Justice O'Connor's reasonable observer is a "well-schooled jurist, a being finer than the tort-law model" requires.[114]

Thus, according to legal scholars and Supreme Court Justices, the endorsement test is not a viable approach to resolving Establishment Clause controversies.[115] It makes illogical exceptions;[116] it does not define well the nature of the reasonable observer;[117] and finally, it places unrealistic expectations on the education level and sophistication of the reasonable observer.[118]

D. Earlier (Pre-Lemon) Establishment Clause Cases Involving Children

In many early Establishment Clause cases decided by the Supreme Court, the issue was governmental funding of

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[109] Benjamin I. Sachs, *Whose Reasonableness Counts?*, 107 YALE L.J. 1523, 1526 (1998).
[110] *Id.*
[111] *See* Gottlieb, *supra* note 85, at 258.
[112] 472 U.S. 38, 76 (1985) (O'Connor, J., concurring) (invalidating a state law mandating a moment of silence in public school for meditation or voluntary prayer).
[113] *See* Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 800 (1995) (Stevens, J., dissenting).
[114] *Id.*
[115] *See supra* notes 103-114 and accompanying text.
[116] *See supra* notes 103-106 and accompanying text.
[117] *See supra* notes 108-111 and accompanying text.
[118] *See supra* notes 112-114 and accompanying text.

educational expenses, such as school transportation,[119] textbooks and computers,[120] or public school instructors teaching remedial courses at parochial schools.[121] However, in those cases the children were only indirectly affected by the government action. After all, few students ask who funds their school bus, textbooks and instructors. The funding decisions directly affect primarily the school itself, or the students' parents.

In contrast, children are much more directly affected by the moments of silence, "released time" programs, the pledge of allegiance and other activities in which they may or must participate. Yet most of the earlier cases involving classroom religious practices did not analyze the challenged regulations from the students' perspective.[122] Moreover, until *Lemon*, there were no articulated tests for Establishment Clause analysis. Only in the more recent cases did the Court inquire how children perceive religious practices and regulations that affect their everyday school life.[123]

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[119] *See* Everson v. Bd. of Educ., 330 U.S. 1 (1947) (upholding a New Jersey program providing school bus transportation to both public and private school students).

[120] *See* Mitchell v. Helms, 530 U.S. 793 (2000) (upholding state provision of educational materials and equipment to public and private schools and overruling *Meek v. Pittenger*, 421 U.S. 349 (1975), and *Wolman v. Walter*, 433 U.S. 229 (1977)).

[121] *See* Agostini v. Felton, 521 U.S. 203 (1997).

[122] *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578 (1987) (applying the *Lemon* test, holding that a state law mandating teaching Creationism if evolution is taught violates the Establishment Clause); Wallace v. Jaffree, 472 U.S. 38 (1985) (applying the *Lemon* test, holding that a state law providing a moment of silence for "meditation or voluntary prayer" violates the Establishment Clause); Epperson v. Arkansas, 393 U.S. 97 (1968) (invalidating the ban on teaching evolution); Engel v. Vitale, 370 U.S. 421 (1962) (invalidating school prayers).

[123] *See* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 143 (2001) (Souter, J., dissenting) (stating that the difference in maturity between college and high school students warrants a different result); Lee v. Weisman, 505 U.S. 577 (1992) (holding that children would feel coerced to participate in the school non-sectarian prayer, because children are more sensitive); Bd. of Ed. of the Westside Cmty. Sch. v. Mergens, 496 U.S. 226 (1990) (stating that "secondary school students are mature enough and are likely to understand that a school does not endorse or support student

In *Engel v. Vitale*, the Court invalidated voluntary classroom prayers.[124] *Engel* raised the issue of coercion in an ostensibly voluntary activity. The school district defended classroom prayers based on the fact that student participation was not mandatory.[125] The Court responded, however, that the Establishment Clause "is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not."[126] Nor could the school district salvage its regulation by asserting that the prayer was non-denominational. The Court stated that "[t]he fact that the prayer may be denominationally neutral can[not] . . . free it from the limitations of the Establishment Clause."[127]

In the dissent, Justice Stewart concentrated on the ostensible voluntariness of the regulation.[128] The unstated implication was that if the regulation were directly coercive, he would have invalidated it. However, that is not clear from Stewart's opinion. He stated that "[w]hat is relevant to the issue . . . [is] the history of religious traditions of our people, reflected in countless practices of the institutions and officials of our government."[129] He approvingly cited examples of invocations of divine protection by the Supreme Court, Congress, and Presidents "from George Washington to John F. Kennedy."[130]

Six years after *Engel*, in *Epperson v. Arkansas*, the

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speech that it merely permits on a nondiscriminatory basis").

[124] 370 U.S. 421 (1962).

[125] *Id.* at 430.

[126] *Id.* at 430. Justice Kennedy acknowledged the impermissibility of indirect, subtle coercion. *See* County of Allegheny v. ACLU Greater Pittsburgh, 492 U.S. 573, 661 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part). Nevertheless, Kennedy gives indirect coercion teeth only when the test applies to children. *See* Lee v. Weisman, 505 U.S. 577 (1992).

[127] *Engel*, 370 U.S. at 430.

[128] *Id.* at 445 (Stewart, J., dissenting) (stating that he "cannot see how an 'official religion' is established by letting those who want to say a prayer say it").

[129] *Id.* at 446 (Stewart, J., dissenting).

[130] *Id.* (Stewart, J., dissenting).

Court invalidated a state law prohibiting the teaching of evolution.[131] In its decision, the Court did not analyze the perceptions of the students, the teachers, or the public. Nor did it distinguish between secondary school and university students. Rather, the Court concentrated on the fact that "Arkansas did not seek to excise from the curricula of its schools and universities all discussion of the origin of man."[132] The Court found that attempt to be "contrary to the mandate of the First . . . Amendment to the Constitution."[133]

This part described the background and the history of the Establishment Clause jurisprudence. It also reviewed the existing Establishment Clause tests and the relevant scholarship exploring their strengths and weaknesses. Finally, it summarized earlier Establishment Clause cases involving children.

The next part will explore the differences between the Establishment Clause tests as applied to school situations. The section will demonstrate that while cases applying coercion and the *Lemon* test allow for a special impressionability in children, the endorsement test does not.

II. Differences Between Establishment Clause Cases As Applied To Children

The Supreme Court has not articulated a special Establishment Clause test for children. Some existing tests – such as coercion and *Lemon* – allow for differences between adults' and children's perceptions.[134] The endorsement test, however, applies to adults and school-age children in the same way.[135]

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[131] 393 U.S. 97 (1968).
[132] *Id.* at 109.
[133] *Id.*
[134] *See* Lee v. Weisman, 505 U.S. 577 (1992); Edwards v. Aguillard, 482 U.S. 578 (1987).
[135] Bd. of Educ. of the Westside Cmty. Sch. v. Mergens, 496 U.S. 226 (1990).

A. The Endorsement Test: No Distinction for Children

As mentioned above,[136] the government would violate the Establishment Clause under the endorsement test if a reasonable observer, familiar with the legislative history and text of the regulation, perceives a government action as endorsing religion.[137] When the Court applies the endorsement test to situations involving school children, the Court does not acknowledge their special impressionability.[138] Moreover, in some cases, the Court or concurring opinions summarily conclude that certain statutes or activities endorse religion without inquiring into anyone's perceptions.[139]

In applying the endorsement test, the Court does not acknowledge that children are more impressionable than adults. In *Board of Education of the Westside Community Schools v. Mergens*, the Court upheld the Nebraska Equal Access Act, which mandated that public schools receiving federal funding and maintaining a limited public forum[140] must not deny anyone permission to hold meetings on premises based on "religious, political, philosophical, or other content"[141] of the speech.[142] That act required Westside High School to permit a religious club to hold meetings on its premises, because the school created a limited public forum by granting other clubs that privilege.[143] The Court held that the Equal Access Act did not violate the Establishment Clause, because "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."[144] In the *Mergens* opinion, Justice O'Connor cited

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[136] *See supra* notes 99-102 and accompanying text.
[137] Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753 (1995).
[138] *See infra* notes 142-151.
[139] *See infra* notes 152-155.
[140] See *supra* note 5 and accompanying text.
[141] 20 U.S.C. §§ 4071-4074 (2005).
[142] Bd. of Educ. of the Westside Cmty. Sch. v. Mergens, 496 U.S. 226 (1990).
[143] *Id.* at 247.
[144] *Id.* at 250.

School District of Grand Rapids v. Ball[145] and quoted the portion of that case where the Court stresses the special impressionability of children.[146] Nevertheless, in her *Mergens* analysis, she simply stated without further reference to the students' age and experience that secondary school students are "mature enough."[147]

Ten years later, the Court decided *Santa Fe Independent School District v. Doe*.[148] In *Santa Fe*, Respondents alleged that student-led, student-initiated prayer before football games violated the Establishment Clause.[149] The Court invalidated the prayer and concluded that an objective student observer would "unquestionably perceive the inevitable pregame prayer as stamped with her school's seal of approval."[150] Justice Stevens's opinion of the Court, joined by Justice O'Connor, applied the endorsement test in the same manner as O'Connor did in *Mergens*: it did not state whether an objective student's perception of the school's approval of the prayer stems from the student's youthful impressionability or if students were held to the adult standard.[151]

In other cases involving school activities, neither the Court's nor Justice O'Connor's concurring opinions make clear whether the reasonable observer is an adult or a student. In *Wallace v. Jaffree*, the Court held that the Alabama statute mandating a minute of silence for "meditation or voluntary prayer" in school impermissibly endorses religion. [152] The Court did not state whether adults, students, or both would perceive the statute as endorsing religion, but instead, concentrated on the legislature's intent.[153] Justice O'Connor's

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[145] 473 U.S. 373 (1985) (invalidating the school district's time and community education programs) *overruled by* Agostini v. Felton, 521 U.S. 203 (1997).
[146] Bd. of Educ. of the Westside Cmty. Sch. v. Mergens, 496 U.S. 226, 250 (1990).
[147] *Id.*
[148] 530 U.S. 290 (2000).
[149] *Id.* at 294.
[150] *Id.* at 308.
[151] *See id.*
[152] 472 U.S. 38, 59-60 (1985).
[153] *See id.*

concurring opinion in *Wallace* concluded that "the message actually conveyed to objective observers by [the challenged statute] is approval of the child who selects prayer over other alternatives during a moment of silence."[154] Like the majority opinion, the concurrence did not specify whether the "objective observer" is an adult or a student.[155]

Finally, in a concurring opinion in *Lee v. Weisman* joined by Justice O'Connor, Justice Souter concluded that a high school graduation prayer constituted an impermissible endorsement of religion without analyzing anyone's perceptions, either adults' or students'.[156] While the conclusion of endorsement may be correct, Justice Souter's analysis did not faithfully apply the endorsement test as its author originally articulated.[157]

Thus, when the Court applies the endorsement test to Establishment Clause cases involving young students, it makes no allowances for the youth, lack of experience and maturity of children.[158] In some cases, it is uncertain whose perceptions the Court took into account in deciding whether a government action endorsed religion.[159] This approach contrasts with the coercion and *Lemon* tests, which allow for the special sensitivity of children.[160]

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[154] *Id.* at 78.
[155] *See id.* (O'Connor, J., concurring).
[156] 505 U.S. 577 (1992) (Souter, J., concurring).
[157] For a discussion of the endorsement test as formulated by Justice O'Connor, see *supra* notes 99-102 and accompanying text.
[158] *See supra* notes 142-151 and accompanying text.
[159] *See supra* notes 152-155 and accompanying text.
[160] *See infra* notes 183, 261 and accompanying text.

B. The Lemon and Coercion Tests: Sensitivity to the Special Impressionability of Children

In contrast to the endorsement test, the *Lemon* and coercion tests treat children with special sensitivity by considering their youth, inexperience and impressionability in determining the constitutionality of governmental religious actions.[161]

1. *Coercion*

The Court, applying the coercion test in *Lee v. Weisman*, held that a non-sectarian school-sponsored graduation prayer violates the Establishment Clause.[162] Justice Kennedy contrasted the high school graduation prayer in *Lee* with the legislative prayer in *Marsh v. Chambers*,[163] where he did not find coercion, and stated that the reason for the different outcomes is special sensitivity of children.[164]

Justice Kennedy also considered the peer pressure that children feel when all or most students participate in a school-sponsored prayer.[165] Unlike Justice O'Connor, who wrote that although "the possibility of student peer pressure remains, . . . there is little if any risk of official state endorsement or coercion where no formal classroom activities are involved,"[166] Justice Kennedy considered peer pressure an important part of the equation. His opinion in *Lee* stated that peer pressure, "though subtle and indirect, can be as real as

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[161] *Id.*
[162] 505 U.S. 577 (1992).
[163] 463 U.S. 783 (1983).
[164] 505 U.S 577, 596 (1992) (pointing out that "[t]he influence and force of a formal exercise in a school graduation are far greater than the prayer exercise we condoned in *Marsh*").
[165] *See* Wallace, *supra* note 32, at 1224-25 (stating that Justice Kennedy takes into account not only the direct coercion "in the classic sense of an establishment of religion that the Framers knew, but also indirect forms of coercion such as peer pressure on schoolchildren to participate in state-led classroom prayers"); Valk, *supra* note 4, at 364-65; David Schimmel, *Graduation Prayers Flunk Coercion Test: an Analysis of Lee v. Weisman*, 76 ED. LAW REP. 913, 917 (1992).
[166] Bd. of Educ. of the Westside Cmty. Sch. v. Mergens, 496 U.S. 226, 251 (1990).

any overt compulsion."[167] Finally, as far as Justice Kennedy was concerned, the non-sectarian nature of the prayer in *Lee* had not saved it from being unconstitutional. At best, reducing the number of objectors ameliorated the harm.[168]

The Ninth Circuit adopted the coercion test in *Newdow v. United States Congress*,[169] where it found that the pledge of allegiance violates the Establishment Clause because it contains the phrase "under G-d."[170] The court drew a specific parallel between *Lee* and the case at bar; it stated that "[t]he school district's policy here, like the school's action in *Lee*, places students in the untenable position of choosing between participating in an exercise with religious content or protesting."[171]

The *Newdow* court also echoed *Lee* in stressing the students' age, impressionability, and susceptibility to peer pressure.[172] The court noted a "coercive effect" of being present in the classroom every day "as peers recite the statement 'one nation under G-d.'"[173] Finally, the court found that the legislative history of the pledge supports the finding of coercion; the opinion quoted President Eisenhower's speech at the signing ceremony: "From this day forward, the millions of our school children will daily proclaim . . . the declaration of our Nation and our people to the Almighty."[174]

Justice Souter criticized the coercion test, finding it

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[167] Lee v. Weisman, 505 U.S. 577, 593 (1992).

[168] *Id.* at 594 (stating that "[t]hat the intrusion was in the course of promulgating religion that sought to be civic or nonsectarian . . . does not lessen the offense or isolation to the objectors. At best it narrows their number . . . .").

[169] 328 F.3d 466 (9th Cir. 2003), *rev'd on other grounds*, Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004) (vacating for lack of justiciability, but not addressing any of the First Amendment issues).

[170] *Id.*

[171] *Id.* at 488.

[172] *See id.* (stating that "[t]he coercive effect of the policy here is particularly pronounced in the school setting given the age and impressionability of schoolchildren, and their understanding that they are required to adhere to the norms set by their school, their teacher and their fellow students").

[173] *Id.* at 488.

[174] *Id.* at 488.

more restrictive than the endorsement test. [175] While that generalization can be correct – "endorsing" religion is ordinarily a lesser action than "coercing" it – the converse also can be true, especially when the coercion test recognizes subtle psychological pressure, as it did in *Lee*.[176] In *Lynch v. Donnelly*, Justice O'Connor made clear that certain religious phrases such as "in G-d we trust" do not violate the endorsement test.[177] Presumably, the phrase "one nation under G-d," part of the pledge of allegiance, is one example, since the pledge is supposed to "encourag[e] the recognition of what is worthy of appreciation in society."[178] However, Justice Kennedy, the author of the coercion test rejects this application of the endorsement test.[179]

Thus, as the preceding discussion demonstrates, in contrast to the endorsement test, the coercion test is applied to children more leniently than to adults. The coercion test considers subtle psychological influences such as peer pressure to which children are vulnerable as well as the student's youth, impressionability, and lack of experience.[180]

2. *Lemon*

The Supreme Court applied the *Lemon* test to a situation involving children in *Edwards v. Aguillard*, invalidating a law requiring schools to teach creationism if

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[175] *See* Lee v. Weisman, 505 U.S. 577 (1992) (Souter, J., concurring) (citing instances where the endorsement test invalidated Establishment Clause violations where the coercion test would not).

[176] *See id.* at 588 (stating that "[t]he potential for divisiveness is of particular relevance here. . . because it centers around an overt religious exercise in a secondary school environment where . . . subtle coercive pressures exist . . . ").

[177] *See* Lynch v. Donnelly, 465 U.S. 668, 693 (1984) (O'Connor, J., concurring) (stating that phrases such as "in G-d we trust" "serve . . . the legitimate secular purposes of solemnizing public occasions . . . and encouraging the recognition of what is worthy of appreciation in society").

[178] *Id.*

[179] *See* County of Allegheny v. ACLU Greater Pittsburgh, 492 U.S. 573 (1989) (Kennedy, J., concurring in part and dissenting in part) (stating that "[e]ither the endorsement test must invalidate scores of traditional practices . . . or it must be twisted and stretched to avoid inconsistency with practices we know to have been permitted in the past . . . .").

[180] *See supra* notes 165-168 and accompanying text.

they chose to teach evolution.[181] Justice Brennan wrote that the Court must be especially vigilant in monitoring compliance with the Establishment Clause in secondary institutions, because families entrust their children to public schools for education, and the government must be careful not to inculcate children with religious values foreign to the family culture.[182] Specifically, Justice Brennan stated that "[s]tudents in [secondary schools] are impressionable and their attendance is involuntary."[183] *Lemon* might have invalidated the same law if it applied to a university where adults are taught; after all, many governmental actions were struck down under *Lemon*.[184] However, the fact remains that the Court recognized and took into account that children are involved and their school attendance is mandatory.[185]

Interestingly, Justice O'Connor did not join the portion of the opinion where the Court discussed children's impressionability and susceptibility to peer pressure,[186] although O'Connor concurred with the rest of the opinion, including the holding that invalidated the challenged practice.[187]

Thus, as the discussion above demonstrates, the *Lemon* and coercion tests are sensitive to the pressures children face in school, whether direct pressure from the administration to participate in religious events or the subtle peer pressure to conform exerted by fellow students.[188]

The last section has described a conflict in applying various Establishment Clause tests to situations involving adults and children. While the endorsement test makes no distinction between adults and children in determining the reasonableness of public reaction to governmental religious

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[181] 482 U.S. 578, 584 (1987) (invalidating a law that requires secondary schools to teach creationism if they chose to teach evolution).
[182] *Id.*
[183] *Id.*
[184] *See supra* note 66.
[185] *See Edwards*, 482 U.S. at 584.
[186] *See id.*
[187] *Id.* at 580.
[188] *See supra* Part II(B)(1)-(2).

accommodations, the *Lemon* and coercion tests are more accepting of children's youth and inexperience.[189]

The next section will conclude that the coercion test is the appropriate tool for resolving Establishment Clause disputes involving children. The discussion will demonstrate that, although the coercion test can be too accepting of governmental religious actions when it comes to adults, it shows a lot of sensitivity to children.

III. The Case For Using A Child-Sensitive Coercion Test In Establishment Clause Cases Involving Children

This section will analyze the workability of existing Establishment Clause tests when applied to children and conclude that, despite some shortcomings, the coercion test is the most applicable because it takes into account the special sensitivity of children – a concept mandated by tort law.

A. From Tort Law: The Relevant Standard of Reasonableness for Children

The two major Establishment Clause tests – the endorsement test and the coercion test – decide Establishment Clause controversies by analyzing the public perception of governmental accommodations of religion.[190] The endorsement test, however, invalidates a governmental religious action if a reasonable observer – borrowed from tort law – perceives such an action as an endorsement of religion.[191] The following section will explore the tort law's reasonableness standard for children and apply that standard to the endorsement test. The section will demonstrate that the pure tort model renders the endorsement test impractical in a school situation. However, the coercion test, while not explicitly adopting the tort-like reasonableness standard,

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[189] *See supra* Part II(A)-(B).
[190] For the description of the establishment and coercion tests, see *infra* Part I(B)(4)-(5).
[191] *See supra* note 101 and accompanying text.

complies with the spirit of tort law by treating children with special sensitivity and taking into account their youth, impressionability, and inexperience.

1. *Basic Tort Law on "Reasonableness" of Children*

The Second Restatement of Torts takes age, intelligence, and experience into account when determining the reasonableness of a child's behavior[192] and many states adopted that portion of the Restatement.[193] The Restatement of Torts takes the position that society has enough experience to determine the level of care to expect from children at various development stages in their lives.[194] On one hand, the community cannot expect the same level of care from a preteen that it expects from adults. On the other hand, some children have superior intelligence and maturity, so it would be unjust to "give them a break" and expect less care from them than they are capable of.[195] The Restatement explains that "[i]t is impossible to lay down definite rules as to whether any child, or any class of children, should be able to appreciate and cope with the dangers of many situations."[196] Children of all ages and intelligence have not had the life experience of adults and the special standard "arises out of the public interest in their welfare and protection."[197]

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[192] RESTATEMENT (SECOND) OF TORTS § 283A (1965).

[193] *See, e.g.*, Garrison v. St. Louis, I.M. & S.R. Co., 123 S.W. 657 (Ark. 1909) (stating that "[t]he standard for judging the conduct of a minor is not the care and prudence that would be exercised by an adult, but only that of one of his age, intelligence, and discretion; and it cannot be said as a matter of law that a minor is guilty of contributory negligence under circumstances that would declare an adult to be guilty of such negligence"); Marfyak v. New England Transp. Co., 179 A. 9 (Conn. 1935) (stating same); Harris v. Indiana Gen. Serv. Co,. 189 N.E. 410 (Ind. 1934) (stating same); Harvey v. Cole, 153 P.2d 916 (Kan. 1944) (stating same).

[194] RESTATEMENT (SECOND) OF TORTS § 283A (1965).

[195] *Id.*

[196] *Id.*

[197] *Id.*

2. *Applying the Tort Law Reasonableness Standard to Children*

Different children, depending on their age, intelligence, religious upbringing (denomination and level of observance), and social experience (e.g., growing up in a religiously diverse community or one dominated by a single religion) will perceive different government actions in their own way and, according to tort law, their perceptions are reasonable.[198] For example, a teenager who starts his morning with a daily prayer might attach more significance to the phrase "under G-d" in the pledge of allegiance than a seven year-old who does not know the pledge by heart and has not developed the propensity for critical thinking. Alternatively, an atheist in an overwhelmingly Christian town may be highly attuned to a "pledge to G-d" in a way that the majority of devout Christians (who would not see the pledge as a real prayer) would not.

For the above reasons, the inquiry in *Santa Fe School District v. Doe* should not have ended with the simplistic question, would reasonable students consider the pregame prayer reasonable? Rather, under the tort law,[199] the inquiry should have been whether the Petitioner, considering her age, intelligence and experience (necessarily including the denomination and intensity of her religious beliefs), would perceive a pregame prayer as the school's endorsement of religion.

The recognition that children are less experienced and need more protection than adults is demonstrated in both criminal and civil cases. For instance, in *Globe Newspaper Co. v. Superior Court for Norfolk County*, the newspaper challenged an order of a trial judge closing a criminal trial from the general public.[200] The trial court relied on a state statute that mandates excluding the press and general public from the courtroom during the testimony of a minor victim of

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[198] *Id.*
[199] *See id.*
[200] Globe Newspaper Co. v. Super. Ct. for Norfolk County, 457 U.S. 596 (1982).

specified sexual offenses.[201] The Supreme Court stated that "[w]here . . . the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest."[202] The Court acknowledged that "safeguarding the physical and psychological well-being of a minor" is a compelling interest.[203] However, rather than allowing a blanket closure, the Court held that the "trial court can determine on a case-by-case basis whether closure is necessary to protect the welfare of a minor victim."[204] In making the ruling, the trial court should weigh "the minor victim's age, psychological maturity and understanding . . . ."[205] This holding echoes tort law's recognition that children should be treated based on their age, maturity, and experience.

As discussed below, it is impractical to apply the pure tort standard of a child's reasonableness to Establishment Clause cases in school settings.[206] However, this obstacle need not prevent the Court from importing the general principle of tort's reasonableness standard for children into Establishment Clause cases. The main purpose of having a different reasonableness standard for children is that they have less education and life experience than adults and are therefore more vulnerable. For that reason, society should show more understanding and accord more protection to children. Justice Kennedy's coercion test imports that concept into the Establishment Clause jurisprudence. For example, the coercion test in *Lee* lacks a detailed analysis of the students' age, intelligence, and experience (having been brought up as an atheist) mandated by tort law. However, the coercion test complies with the spirit of the tort standard: the reasonableness analysis when applied to children is more subjective than when applied to adults. By noting that children (especially young children) are more impressionable

[201] *Id.* at 598.
[202] *Id.* at 606-7.
[203] *Id.* at 607.
[204] *Id.* at 608.
[205] *Id.*
[206] *See infra* Part III(B)(4).

because they do not have the maturity of adults to withstand peer pressure, the Court complied with the main principle of tort law's reasonable child standard.

Thus, it is possible and necessary to implement the tort concept of treating children with more sensitivity into Establishment Clause cases involving school settings. Such implementation recognizes important differences between children and adults and leads to decisions that adequately reflect those differences.

B. The Inapplicability of the Ceremonial Deism, Lemon, and Endorsement Tests to Establishment Clause Cases Involving School Settings

1. *The Historical Approach*

As discussed above, the historical approach would uphold a government action if it comes from a long-standing historical practice.[207] The historical approach is flawed for several reasons: (1) some historical practices, while deemed inoffensive when adopted, would offend the public today as the understanding of constitutional liberties expands; (2) children do not always know the history of certain activities, and may perceive an activity conducted for the sake of tradition to be a religious practice; and (3) it is unclear how old the practice must be to be deemed historical enough for the Court to uphold it for the sole reason that it is historical.

First, as discussed above, some historical traditions become offensive as society becomes more progressive.[208] While it is easy to conclude that we should preserve the historical practices that led us to prosperity and liberty, accepting anything for the sole purpose of preserving such historical traditions can lead to perilous results. Upholding a religious practice for its historical significance may lead us back to the time when freedom of religion essentially meant

[207] *See supra* Part I(B)(1).
[208] *See supra* note 34 and accompanying text.

freedom to belong to any monotheistic religion.[209] The reason this country expanded constitutional rights after the civil war was to abolish historical practices such as slavery.[210] Therefore, wariness in applying the historical approach is warranted in order to avoid honoring traditions which have become repugnant to society.

Additionally, some traditions – like the pledge of allegiance – are historically significant precisely because they reflect the American allegiance to religious values, if not specifically to a particular religion.[211] Such allegiance to religion was held unconstitutional in *Lee*, where the prayers were non-denominational in nature, but contained allusions to an "all-purpose" G-d.[212]

Moreover, the historical approach's premise is that the public knows that the disputed practice is undertaken for historical, rather than religious reasons. This assumption falls apart when the relevant public consists of children, who do not always know the historical background of their school activities. While a certain activity may be preserved not for the purpose of establishing a religion but simply to continue a practice started by the authors of the Establishment Clause, students may not know it and perceive the activity to be religious in nature. For instance, many schools may not teach students about the history of the pledge of allegiance.[213] Without that background, a student could easily conclude that the pledge declares America as a monotheistic country – a perception with which the Ninth Circuit agreed.[214] Additionally, even if students understood that the main reason for performing an activity is to preserve a historical tradition, they may not understand or accept why that particular tradition

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[209] *See* Torcaso v. Watkins, 367 U.S. 488 (1961) (invalidating a requirement of a declaration of belief in G-d as a condition for holding public office).

[210] *See* U.S. CONST. amend. XIII, §1 (invalidating slavery).

[211] *See infra* notes 218-221.

[212] Lee v. Weisman, 505 U.S. 577 (1992).

[213] The history of the pledge of allegiance certainly was not taught in Shea High in Pawtucket, Rhode Island, which I attended.

[214] Newdow v. U.S. Cong., 328 F.3d 466, 487 (2003), *cert. granted in part by* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004).

is worthy of preservation. Such lack of understanding or acceptance may lead to a feeling of coercion to participate in an arguably religious activity.

Finally, it is unclear how long the practice must exist to be deemed worth preserving. The phrase "under G-d" was added to the pledge of allegiance in 1954.[215] It is unclear (1) whether fifty years reciting that version of the pledge is long enough to be considered a historical practice; (2) who decides when a practice becomes historical; and (3) when a practice is worthy of preservation for history's sake.

Thus, the historical approach to the Establishment Clause controversies is unsound. It is not a useful guide, because it is vague and overly malleable by those who wish to uphold even the most overtly religious public practices.

2. *Ceremonial Deism*

As explained above, under ceremonial deism, certain phrases and practices have lost their religious meaning through frequent repetition, and for that reason, do not violate the Establishment Clause.[216] The discussion below demonstrates that ceremonial deism is inapplicable in situations involving school settings, because (1) the premise that frequent repetition strips certain phrases of their religious meaning is invalid; (2) there is no standard to guide the courts in determining which phrases have come under the ceremonial deism rubric; (3) without the religious context, some phrases such as "one nation under G-d" have no meaning; and (4) observing such ceremonial deism practices as legislative or inaugural prayers may leave a lasting impression on children and make them less likely to question the validity of those practices at a later time.

The assumption that repetition removes the religious connotation from certain phrases is unfounded. Justice Brennan suggests that often-repeated phrases such as "in G-d we trust" and "one nation under G-d" fall in a category of

[215] *See infra* note 218.
[216] *See supra* Part I(B)(2).

phrases that lost their religious meaning.[217] However, many regular churchgoers may recite prayers mechanically every week for many years while thinking of something else, but it does not mean that all prayers or references to G-d have lost their religious significance.

Another flaw of ceremonial deism is that there is no standard to help decide which phrases and practices have lost their religious significance and which have not. For example, if the ceremonial deism test were to decide the fate of the pledge, it is unclear which factors would determine whether religious meaning attaches to the phrase "under G-d." Ceremonial deism provides no guidance for whether the history of the pledge, the meaning students attach to it, or the amount of time the pledge has existed would determine whether it has religious significance.

The pledge of allegiance is mostly about patriotism, but the phrase "under G-d" has not been a part of the pledge since its inception. Congress added it in 1954 after a sermon by the Reverend George M. Docherty.[218] In his sermon, the Reverend implied that the pledge needed to distinguish America from its Cold War enemy, the Soviet Union.[219] In the debate that ensued following the sermon, "Representatives and Senators . . . referred to atheism as being amoral, evil, and certainly un-American."[220] Additionally, a factor in adding "under G-d" to the pledge was that "American schoolchildren needed to be indoctrinated with the belief that America is a nation under G-d."[221]

Thus, even if people rarely think about the phrase "under G-d," it was added to the pledge to demonstrate to the world and to American citizens that the United States is a religious country and to inculcate religious values in American youth. This motivation impelled the Ninth Circuit to invalidate the pledge in *Newdow v. U.S. Congress*; the Court

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[217] 465 U.S. 668, 716 (1984) (Brennan, J., dissenting).
[218] *See* Stephen B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2118 (1996).
[219] *See id.* at 2119.
[220] *See id.*
[221] *See id.*

stated that "[t]o recite the Pledge is not to describe the United States; instead, it is to swear allegiance to the values for which the flag stands; unity, indivisibility, liberty, justice, and – since 1954 – monotheism." [222]

In addition, the request "G-d save the United States and this honorable Court," which opens the sessions of the Supreme Court,[223] only has a religious context. If that phrase has lost its religious meaning, there is no reason for its pronouncement other than empty adherence to tradition. The problem is that even though the phrase likely retains some religious significance, Justice Brennan would be unable to abandon it.

Finally, upholding legislative and inauguration prayers has a direct impact on children. While watching congressional sessions or Presidential inaugurations in class or for a school assignment, prayers influence students, even if they do not pray along with Congress or the President. The impression that legislative sessions and Presidential inaugurations start with a sectarian prayer is engraved in children's minds from their youth. Therefore, they are less likely to question the legitimacy of those activities or other governmental religious expression.

Thus, ceremonial deism cannot be applied to school settings. Although most Establishment Clause tests provide only tentative guidance, ceremonial deism is especially unwieldy because of the difficulty determining which religious practices have lost their religious significance, and due to that difficulty, the test is unlikely to yield consistent results. Additionally, some practices that allegedly have lost their religious meaning make a lasting impression on young students, which might make them less likely to question such practices when they become adults.

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[222] 328 F.3d 466, 487 (2003), *cert. granted in part*, Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004).

[223] County of Allegheny v. ACLU Greater Pittsburgh, 492 U.S. 573, 672 (1989) (Kennedy, J., concurring in part and dissenting in part).

3. *The Lemon Test*

As stated above, to pass the *Lemon* test, a statute (1) must have a secular purpose; (2) must not have a primary effect of advancing or inhibiting religion; and (3) must not excessively entangle with religion.[224] The *Lemon* test was not designed to analyze the situation from the public's perspective: its analysis concentrated on the legislature's intent, the statute's effect on advancement or inhibition of religion, and the possibility of excessive governmental entanglement with religion.[225] For that reason, *Lemon* is equitable in its application, because it does not expect an equal understanding of governmental policy and historical context of regulations from adults and children. Also, as mentioned above, the Court considered the special impressionability of school students in one case applying *Lemon*,[226] where the controversy directly impacted students' lives.

Lemon is not the best test to apply to a school setting. In the past decade in Establishment Clause jurisprudence, the Court has moved from examining the legislature's intent and effect of the laws on advancement or inhibition of religion generally to inquiring into the public's perception of governmental religious accommodations.[227] Additionally, the *Lemon* test is unlikely to play a major role in Establishment Clause controversies, because the Court and much of the legal scholarship disfavor it.[228] Thus, *Lemon* has no significant future in Establishment Clause cases involving school settings.

4. *The Endorsement Test*

As stated above, a government action would fail the endorsement test if, in the opinion of a reasonable observer, that action endorses religion.[229] Justice O'Connor specified

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[224] Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).
[225] For a discussion of the *Lemon* test, *see supra* Part (I)(B)(3).
[226] *See supra* note 181-185 and accompanying text.
[227] *Lemon*, which concentrates on the legislature's actions, was developed in 1971 (*see supra* Part I(B)(3)), while the endorsement and coercion tests, which analyze the situation from the public's perspective, were articulated in 1984 and 1989, respectively (*see supra* Parts I(B)(4) and I(B)(5)).
[228] *See supra* notes 65-71 and accompanying text.
[229] *See supra* notes 99-102.

that the reasonable person standard is borrowed from tort law[230] and that the observer must be "acquainted with the text, legislative history, and implementation of the statute."[231]

The endorsement test is inapplicable in a school setting for several reasons. First, importing the pure tort standard of a reasonable child into the test is impractical, because (1) that standard would allow schools to implement only those activities acceptable to the most sensitive student, and (2) the reasonable person standard favors the majority's point of view. Moreover, the requirement of an "informed observer" places too high a burden on children who, depending on their age, have had little or no education in relevant subjects.

In most circumstances, the concept of importing a standard from one area of law into another is prudent, and has precedent. Contracts principles have been applied to property law,[232] and tort law intertwines with contract law.[233] However, the tort law's reasonable person standard is unworkable in Establishment Clause cases involving school settings.

First, the reasonable child standard in tort law is largely subjective.[234] That standard is easy to apply in a negligence case, where the finder of fact must decide the reasonableness of one child. Such a standard, however, becomes unwieldy in a school, where there is a possibility of as many reasonable opinions as students. Even in the same class, with all children roughly the same age, the levels of intelligence and experience differ. If a reasonable child were the standard governing Establishment Clause controversies in

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[230] *See supra* note 101 and accompanying text.

[231] Capitol Square Review Bd. v. Pinette, 472 U.S. 38, 76 (1995) (O'Connor, J., concurring).

[232] *See* Michael Madison, *The Real Properties of Contract Law*, 82 B.U. L. REV. 405 (2002) (suggesting that contract principles should apply to conveyances as well as leases).

[233] *See* RESTATEMENT (SECOND) OF TORTS §768 (recognizing tortious interference with a contract).

[234] *See* RESTATEMENT (SECOND) OF TORTS § 283A (1965) (stating that the finder of fact must take into account a child's age, intelligence and experience when determining his reasonableness).

schools, many suitable activities would have to be abandoned if one student, because of her age, intelligence, or experience, reasonably perceived such activity as the school's endorsement of religion. For example, a class in Biblical characters in literature may appear as an endorsement of Christianity and/or Judaism to a Muslim student, since the Bible, not the Koran, is the source of the characters. Similarly, an atheist student would perceive such a class as endorsing religion versus non-religion, since Biblical characters are deemed important enough to have a course devoted to them.

Second, by definition, tort law's reasonable person represents the majority view: if most people think the defendant behaved negligently, then he should be liable for his actions. Such an approach works well in negligence cases. In Establishment Clause controversies, however, the majority would likely agree with the government, since the government usually expresses the majority's religious views.[235]

Generally, considering the minority point of view may seem unfair and contrary to the democratic principles of this country: we elect public officials by a majority of votes, and we expect the minority to conform. Yet, taking into account and abiding by the minority view is not unprecedented, as the concept of electoral college,[236] judicial review[237] and case law outside the First Amendment context demonstrate.[238]

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[235] *See e.g.*, Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753 (1995) (holding that the state did not violate the Establishment Clause by permitting a private party to erect an unattended cross on grounds of state capitol); Lynch v. Donnelly, 465 U.S. 668 (1984) (upholding a government-owned nativity scene display at a park).

[236] U.S. CONST. art. II, § 1, cl. 2 (mandating electoral college).

[237] *See* Marbury v. Madison, 5. U.S. 137 (1803) (establishing judicial review).

[238] *See*, *e.g.*, Lawrence v. Texas, 123 S.Ct. 2472 (2003) (holding that a Texas law criminalizing consensual gay sodomy is unconstitutional); Grutter v. Bollinger, 123 S.Ct. 2325 (2003) (holding a state university's affirmative action program constitutional); Ellision v. Brady, 924 F.2d 872 (9th Cir. 1991)(holding that in determining whether conduct was sufficiently pervasive to constitute sexual harassment, courts must consider the perspective of a reasonable woman).

Employment discrimination law concentrates on the reasonableness of the victim's perspective. For example, in *Ellison v. Brady*, one of the two main issues was the applicable standard in determining "whether conduct is sufficiently severe or pervasive to . . . create a hostile working environment . . . ."[239] The Ninth Circuit held that "in evaluating the severity and pervasiveness of sexual harassment, [courts] should focus on the reasonableness of the victim." [240] The court explained that if the test were that of a reasonable person, harassment would continue simply because such conduct was common, which would deprive harassment victims of remedies.[241]

Drawing a parallel between employment discrimination law and Establishment Clause jurisprudence, the reasonable person test would allow courts to continue upholding violations of the Establishment Clause because Christian practices are common. Therefore, as *Brady* suggests, it is important to analyze the challenged religious practices from a non-Christian point of view.[242] Justice Kennedy echoed this view: "[w]hile in some societies the wishes of the majority might prevail, the Establishment clause of the First Amendment is addressed to this contingency and rejects the balance urged upon us."[243]

Another shortcoming of the endorsement test is that it expects a level of knowledge from casual observers that goes far beyond tort's reasonableness standard, as Justice Stevens observed in *Pinette*.[244] Justice O'Connor effectively has departed from the tort standard by adding the requirement of acquaintance with the legislative path of a challenged statute.[245] The "community ideal" of most localities does not study legislative history or even text of statutes. The new

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[239] Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991).
[240] *Id.* at 878 (stating that "in evaluating the severity and pervasiveness of sexual harassment, we should focus on the perspective of the victim").
[241] *Id.* at 878.
[242] 924 F.2d 872 (9th Cir. 1991).
[243] Lee v. Weisman, 505 U.S. 577, 596 (1992).
[244] *See supra* note 113 and accompanying text.
[245] *Pinette*, 515 U.S. at 779-80.

standard, therefore, is more analogous to a reasonable diligent lawyer than a reasonable casual observer. To apply Justice O'Connor's new standard to tort law, if a driver collides with a road barrier erected by a local municipality, determining the driver's reasonableness would turn not only on his observance of the speed limit and seat belt laws, but also on whether the driver, acquainted with the city's road work plans, exercised reasonable caution in driving.

It is unclear how the new standard – expecting a high level of knowledge from a reasonable person – applies to children. Although O'Connor's opinions do not address the point specifically, it seems that the same requirement of higher knowledge would apply to children as well as adults, since the endorsement test applies in the same way to both. Such an expectation makes the burden on a child challenger of a government action surmountable only by child prodigies, but not the vast majority of the children.

Thus, the endorsement test is inapplicable in school situations. The pure tort standard of a reasonable observer is impractical in a school setting, because (1) it reduces the range of suitable school activities to those acceptable to the most sensitive student, and (2) it ignores the feelings of religious minorities. Moreover, the requirement of acquaintance with the history and context of governmental actions, when applied equally to children and adults, decreases the chances of invalidation of Establishment Clause violations in school settings.

C. A Child-Sensitive Coercion Test: The Appropriate Tool for Resolving Establishment Clause Controversies Involving Children

As mentioned above, the coercion test would invalidate a government action that expressly or impliedly coerced the public to participate in religious events or to accept religious values.[246] The coercion test is the optimal tool for the resolution of Establishment Clause disputes arising

[246] *See supra* notes 76-77 and accompanying text.

in school settings. First, although the test shows little understanding for the feelings of adults,[247] it is very sympathetic to children in school situations.[248] Second, the coercion test as applied in *Lee* has precedent in the Establishment Clause jurisprudence.[249] Finally, the coercion test complies with the main purpose of the tort law – showing understanding for younger and inexperienced children that do not possess the maturity and understanding society expects from adults.

The coercion test appears stricter than the endorsement test: even if some government actions or regulations endorse religion, they do not necessarily coerce citizens to subscribe to any religious doctrine.[250] Conversely, if the public is coerced to participate in a religious event or accept certain religious values, then the government necessarily endorses that religion. Therefore, the endorsement test seems more restrictive of the government than the coercion test. For example, *County of Allegheny v. ACLU* demonstrated this principle where Justice O'Connor, applying the endorsement test, declared the display of the nativity scene at the courthouse unconstitutional, while Justice Kennedy, applying the coercion test, stated that the crèche was not coercive.[251]

The *Allegheny* case, however, involved adults.[252] When it comes to children, the coercion test acquires considerable latitude. Although Justice Kennedy does not reserve the concept of implied coercion exclusively to children,[253] the implied coercion acquires "teeth" only when applied to children. In *Allegheny*, Justice Kennedy offered the courthouse visitors the option of looking the other way if they

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[247] *See supra* note 85 and accompanying text.
[248] *See supra* notes 89-90 and accompanying text.
[249] *See infra* notes 256-259 and accompanying text.
[250] *See supra* note 175 and accompanying text.
[251] *See County of Allegheny v. ACLU Greater Pittsburgh*, 492 U.S. 573 (1989) (Kennedy, J., concurring in part and dissenting in part).
[252] *See id.*
[253] *See id.* at 661 (stating that "coercion need not be a direct tax in aid of religion or a test oath. Symbolic recognition or accommodation of religious faith may violate the Clause in an extreme case.").

disagreed with the crèche display.[254] In *Lee*, the option of not participating in a graduation prayer was rejected because of peer and school administration pressure – a kind of coercion to which the children are particularly vulnerable.[255]

In addition, the coercion test has roots in the early Establishment Clause jurisprudence. The coercion analysis employed in *Lee* was performed by Justice Black in *Engel v. Vitale*.[256] Justice Black stated that "[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."[257] Justice Kennedy echoed this idea of indirect coercion by the school in *Lee v. Weisman*: "[e]ven for those students who object to the religious exercise, their attendance and participation in the state-sponsored religious activity are in a fair and real sense obligatory, though the school district does not require attendance as a condition for receipt of the diploma."[258] Kennedy added, perhaps in response to the future critics who would point out the difference in applying the coercion test in *Allegheny* and *Lee*, that "without reference to . . . principles [dividing the public in recent cases], the controlling precedents as they relate to prayer and religious exercise in primary and secondary public schools compel the holding . . . that the policy of the city of Providence is an unconstitutional one."[259] Kennedy did not specify the precedents he was referring to, but *Engel* comes to mind immediately.

Finally, the coercion test provides a happy medium between not differentiating between adults and children at all and applying the pure tort standard of reasonableness in a school setting that designates the most impressionable child as the least common denominator. Justice Kennedy acknowledged the special sensitivity of students by

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[254] *See id.* at 664.
[255] *See supra* note 90 and accompanying text.
[256] 370 U.S. 421 (1962).
[257] *Id.* at 431.
[258] 505 U.S. 577, 586 (1992).
[259] *Id.*

recognizing their susceptibility to peer pressure,[260] as well as the pressure from school officials. Moreover, *Lee* stated that the choice of protesting or participating at government-sponsored prayer may or may not be acceptable to mature adults, but "the State may not, consistent with the Establishment Clause, place primary and secondary school children in this position."[261] Such deference to the students' sensitivity is an excellent adaptation of the tort's reasonableness standard for children.

Thus, while the coercion test permits the government too much in the way of religious activities and displays when applied to adults, courts should apply it to school settings, incorporating all the factors considered in *Lee*.[262]

Conclusion

As this note has discussed, the coercion test is the best tool for the resolution of the Establishment Clause disputes arising in school settings. The endorsement test is inapplicable to children, because Justice O'Connor's reasonable observer standard is borrowed from tort law, which mandates that in evaluating the reasonableness of a child, the fact finder must take into account the child's age, intelligence, and experience. [263] This standard works in negligence law, because the discussion always centers on a particular child, whose age, intelligence and experience can be factored into the finding of reasonableness. In Establishment Clause situations, the analysis usually involves a multitude of children of different ages, intelligence, and experiences. For that reason a completely subjective analysis is not viable.

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[260] *See Lee v. Weisman*, 505 U.S. at 593 (stating that "[r]esearch in psychology supports the common assumption that adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention.").
[261] *Id.*
[262] *See supra* notes 164-168.
[263] *See supra* note 101 and accompanying text.

The *Lemon* test, as demonstrated, can take into account children's special impressionability and sensitivity.[264] But the Court and commentators heavily disfavor *Lemon*, and the test is almost completely retired. Any realistic discussion of which test today's Court should use must focus on tests that still draw some adherence from current Justices.

Justice Kennedy's coercion test too often permits governmental religious accommodations; for example, it demands a high degree of tolerance from non-adherent adults towards religious displays on government property.[265] However, in *Lee v. Weisman*,[266] Justice Kennedy and the Court applied the coercion test with special sensitivity to a situation involving children. In evaluating governmental actions for Establishment Clause violations, the Court should consider the children's youth, impressionability, and susceptibility to peer pressure. It did so in *Lee*, but has not done so consistently, in recent years or earlier. Such analysis fulfills the spirit of the tort law requirement that evaluates children more subjectively than adults. For those reasons, the coercion test – with proper allowances for childhood – is the proper test to apply to Establishment Clause controversies in school settings.

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[264] *See supra* notes 181-183 and accompanying text.
[265] *See supra* note 254.
[266] 505 U.S. 577 (1992).