2013

Student-Initiated Religious Activity in Public Schools: Walking the Fine Line Between Neutrality and Hostility

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Working title: Student-initiated religious activity in public schools: walking the fine line between neutrality and hostility.

I. Introduction.

It is the night of the final football game of the season at a local high school. The bright lights of the stadium expose the bleachers, which are slowly becoming overcrowded with enthused fans. The players are excited, joyful, and a little nervous. Before they go out onto the field, there is one tradition to honor: they take a knee and join together, as a team, in a prayer. The main purpose of this prayer in not to honor a divine being or to encourage any sectarian belief. They join together to reinforce camaraderie. They pray to gain confidence and encourage good sportsmanship.

Pre-game spiritual rituals and prayers specifically have been used for decades by professional coaches and athletes and now are becoming widely popular across high schools and universities in the nation.[1] The question that is lurking in the minds of the constitutional law scholars and practitioners remains unanswered by the Supreme Court. Namely, what are educators to do when their students initiate and engage in such spiritual activity?

When embarking on a search for the answer, one must be mindful of the two unchanging propositions: students have a constitutionally-protected right to engage in acts of worship on the premises of a public school[2] and school employees are not permitted to initiate or encourage any religious activity that involves students.[3] These principles reflect the both sides of the First Amendment religious coin, the first reflecting the rights granted to the students by the "Free

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[1]Phil Jackson,"Sacred Hoops," Edward A. Liva, Villanova Law Review at 801 http://www.nytimes.com/2005/10/30/sports/football/30religion.html?pagewanted=all,)

[2] Santa Fe

[3] Santa Fe, Weisemen, Ducanville.

Exercise Clause" and the second addressing the separation requirement of the "Establishment Clause".[4] In theory, these "dual concepts" of the two clauses "are meant to address opposite concerns,"[5] however, such distinction is best suited for legal textbooks and encyclopedias. In practice, there is an undeniable tension between the First Amendment religious clauses.[6] The antagonism is bluntly apparent in the issues presented by the line of case similar to Borden v. East Brunswick Board of Edu. Specifically, what is the role that educators are required or permitted to take during student-initiated, student-led religious activity? The lack of guidelines from the Supreme Court and absence of a specific framework places an uneasy burden of public school's employees. Public schools' administrators' task of discerning the constitutionally appropriate behavior is complicated further still by the lack of consistency among circuits in choosing and applying a legal standard.[7] In addition, in their struggle to strike the appropriate level of neutrality, the courts in many cases abandoned the core constitution values and required school employees to show hostility towards student's beliefs.

The need for guidance and the return to our original constitutional traditions especially pressing when one considers recent developments in the law. There is a line of recent cases where the courts have allowed a moment of silence at schools and even student-initiated prayers

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[4] § 1:3. Analytical frameworks for adjudication of religion issues in the school context under th...Education Law: First Amendment, Due Process and Discrimination LitigationReligion Issues and Public Education*

[5] Bagley v. Raymond School Dept, 1999 ME 60, 728 A.2d 127, 135

[6] See, e.g., Committee For Public Ed. and Religious Liberty v. Nyquist, 413 U.S. 756, 788, 792, 93 S. Ct. 2955, 2975, 37 L. Ed. 2d 948 (1973) ("This court has recognized that tension inevitably exists between the Free Exercise Clause and the Establishment Clause and that it may often not be possible to promote the former without offending the latter. As a result of this tension, our cases require the State to maintain an attitude of neutrality neither advancing nor inhibiting religion."); John E Nowak & Ronald D Rotunda, Constitutional Law § 17., p. 1307 (6th ed 2000) ("There is a natural antagonism between a command not to establish religion and a command not to inhibit its practice. This tension between the clauses often leaves the Court with having to choose between competing values in religion cases. The general guide here is the concept of 'neutrality.' The opposing values require that the government act to achieve only secular goals and that it achieve them in a religiously neutral manner, unfortunately, situations arise where government may have no choice but to incidentally help or hinder religious groups or practices.")

[7] McCreary County, Kentucky v. American Civil Liberties, 2004 WL 2802966 (U.S.), 3-4 (U.S.,2004)

at graduation ceremonies.[8] The Supreme Court has passed the opportunity to bring clarity into this issue by denying the certiorari petition in Borden v. East Brunswick Edu.[9] Dis. This comment will argue that it is time for the Supreme Court to fashion a more workable standard for determining violation of Establishment Clause in cases of student-initiated and student-led religious activities. As the law operates right now, especially in the Third Circuit, the actions of the school staff are hostile towards religion.[10] This cannot be squared away with our constitutional traditions: the Constitution demands a separation of church and state but it also forbids the preference of no-religion over religion.[11] Part II of this comment will discuss the relevant Supreme Court precedent and focus on the utility of the main three tests in the public school context as well as note unique approaches that have been adopted by other by other circuits in dealing with the questions of religious activity in schools. Part III will analyze the Third Circuit's opinion in Borden in detail and will point out the dangers of the holding. Finally, Part V will present the two part analysis that would be a better standard as applied to the sensitive subject of public schools.

II. Background:

Attempting to resolve the great mystery of the Establishment Clause jurisprudence and shape the appropriate standard for the inquiry, the Supreme Court has developed three tests – the *Lemon* test, the coercion test and the endorsement test.[12] The success of all of these tests has been consistently questioned not only by the academics but by the Justices themselves.[13] One of the reasons for vehement criticism is the Court's failure to indicate which of the three tests is to

[8] See e.g. Duval County
[9] Cert Petition Denied
[10] Borden
[11] Renquist dissent in that case where he dissents a lot Wien...
[12] New England Law review article
[13] Enumerate the sources that question the tests, and indicate specifically which one is which.

be applied in a specific set of circumstances.[14] Over the years, the Supreme Court, as well as the circuit courts, has been free to apply any one or any combination of the test.

A. The Lemon Test.

According to Justice Scalia, the Lemon test is "[l]ike 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...."

Developed in the case of *Lemon v. Kurtzman*, Chief Justice Burger explained that to comply with the spirit of the Constitution a government action must (1) have a secular purpose, (2) "its principal or primary effect must be one that neither advances nor inhibits religion" and (3) the government action must not "foster an excessive government entanglement with religion.[15] However, over its existence the Lemon test has inspired much criticism.[16] The opponents of the Lemon test condemn its framework for being extremely arbitrary and allowing the Justices to utilize a "we know it when we see it" approach.[17] Justice Scalia went as far as to say "[w]hen we wish to strike down a practice it forbids, we invoke it, ... when we wish to uphold a practice it forbids, we ignore it entirely[.]"[18] Other Justices and scholars have not been kind to the Lemon test either.[19] Over the years the Justices referred to the test as "non-binging" or "no more than

[14] Not sure where its coming from, but will be able to substantiate it.
[15] Lemon v Kurtzman at 612-613
[16] (see e.g. Justice Rehnquist dissenting in Santa Fe, collecting opinions criticizing Lemon, Hugh Baxter, Managing Legal Change: The transformation of Establishment Clause Law, 46 UCLA L. Rev 343, 382 (1998)).
[17] (see Scalia concurrence in Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 399, 113 S. Ct. 2141, 2150, 124 L. Ed. 2d 352 (1993).
[18] (see Scalia concurrence in Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 399, 113 S. Ct. 2141, 2150, 124 L. Ed. 2d 352 (1993).
[19] See e.g. Renquist dissenting and collecting opinions that criticize the lemon test.

helpful signposts."[20] Despite the clever rhetoric and sharp challenges, the *Lemon* test was never overruled and remains good law.[21]

More fundamental objections have been made against the *Lemon* test. There is no foundation in our history or the constitutional tradition that would explain why the three prongs express the requirements of the Establishment Clause.[22] Why is the "effect of advancing religion" given the same meaning as the law "respecting establishment of religion?[23] How is it possible to differentiate between the allowable entanglement and excessive entanglement with religion?[24]

The limitations of the Lemon test are particularly patent when it was applied to resolve cases arising out of religious issues in public schools: the outcomes of the cases are unpredictable, irreconcilable, and most importantly, simply unreasonable.[25] For example, the Court held that it was appropriate for a State to provide parochial schools with geography textbooks that presumably contained maps of the United States, but the State may not provide the maps of the US to parochial schools to use in Geography class.[26] In addition, the Entanglement prong represents a number of issues because states generally regulate the curriculum for classes that teach religion in public schools, or even school aid cases for parochial schools.[27]

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[20] (see Hunt v. McNair, 413 U.S. 734, 741).
[21] 1 Education Law § 1:3
[22] Hugh Baxter, Managing Legal Change: The Transformation of Establishment Clause Law, 46 UCLA L. Rev. 343, 385 (1998)
[23] Id.
[24] Id.
[25] See (See Rehnquist dissent in Wallace v. Jaffree, 472 U.S. 38 at 110-111: "A State may lend textbooks on American colonial history, but it may not lend a film on George Washington, or a film projector to show it in history class. A State may lend classroom workbooks, but may not lend workbooks in which the parochial school children write, thus rendering them nonreusable.9 A State may pay for bus transportation to religious schools10 but may not pay for bus transportation from the parochial school to the public zoo or natural history museum for a field trip"
[26] Id.
[27] Id.

A. Endorsement Test

Justice O'Connor offered the Endorsement test as a response to the vehement criticism of Lemon.[28] As an attempt to "do more than erect a constitutional 'signposts,'... to be followed or ignored in a particular case as our predilections may dictate" and to "frame a principle for constitutional adjudication that is not only grounded in the history and language of the first amendment, but one that is also capable of consistent application to the relevant problems[,]"[29]Justice O'Connor explained that Establishments Clause violations would be analyzed from an objective standpoint of a "reasonable observer familiar with the history and context of" the action/display. If the reasonable observer would perceive the action as a government endorsement of religion, the action/display would be in violation of the Establishment Clause.[30] The basic rationale and the inquiry were initially clear and offered a great promise of clarity into the Establishment Clause jurisprudence. However, once applied, the reasonable observer test brought a myriad of familiar issues and sentiments into the inquiry. Specifically, many questions arose with how informed and skillful those mystical observers are? How much weight are the courts going to assign to each characteristic? What consideration would be most dispositive to this observer: governmental intent, history of the display or the tradition, context in which such tradition is carried out, or is he to look to the totality of the circumstances?

The Endorsement test was developed in the context of passive religious displays.[31] Justice O'Connor subsequently modified the suggested approach, stressing that the observer would be

[28] (Lynch v. Donnelly, 465 U.S. at 687-689 O'Connor, concurring).
[29] (Wallace v. Jaffree, 472 U.S. 38, 68-69)
[30] (County of Allegheny v. ACLU, 492 U.S. 573, 592(1989)).
[31] See Lynch v. Donnolly

fully familiar with the community in which the action took place.[32] The Supreme Court had used the Endorsement Test in the context of student-initiated prayer at a public school in Santa Fe.[33] In that case, the Court explained that the observer would be an "objective Santa Fe High School" student.[34]Justice Stevens explained that the "text and history of the policy" reinforced the perception of the student.[35] However, this classification is still insufficient to bring uniformity to the reasonable observer, and because of great differences in applications among the circuits, many scholars have suggested abandoning the test altogether.[36]

B. Coercion test

Justice Kennedy first articulated his coercion test in *County of Allegheny v. ACLU.*[37] The test would invalidate government actions that "further the interest of religion through the coercive power of government" by either "compelling or coercing participation or attendance at a religious activity" or "delegating government power to religious groups."[38] The test, however, was not used to decide the case; instead, it patiently waited for its opportunity to become the law, which presented itself in the form of *Lee v. Weisman.*[39] Writing for the majority, Justice Kennedy held that a rabbi reciting a non-secular prayer at a graduation ceremony was a violation of the Establishment Clause.[40] The opinion observed that "[i]t is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise."[41] After dismissing school's argument that attendance at the graduation

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[32] (Allegheny v. ACLU, 492 U.S. 573 at 631).
[33] See santa fe
[34] Santa fe
[35] Santa Fe
[36] Get some info on who suggests abandonment
[37]Hugh Baxter, Managing Legal Change: The Transformation of Establishment Clause Law, 46 UCLA L. Rev. 343, 387-88 (1998)
[38] ID
[39] ID
[40] (Lee v. Weisman, 505 U.S. 577, 587).
[41] Id.

was voluntary as being formalistic,[42] the Court found coercion in *Wiesman* because of substantial involvement of the school officials in the religious exercise.[43] Specifically, it was the state officials who directed the performance of the religious exercise, invited the rabbi, and suggested a form of the prayer that was to be presented at the ceremony. Additionally, Justice Kennedy found another form of coercion: "[t]he undeniable fact is that the school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction. This pressure, though subtle and indirect, can be as real as any overt compulsion."[44]

Writing a vehement dissent, Justice Scalia appropriately cautioned the court of the dangers of placing peer pressure on the same footing as governmental coercion.[45] Failure to distinguish private societal pressure, such as peer pressure, and the strong-armed coercion from the government was a fatal flaw in application of the coercion test in *Lee.*[46] Justice Scalia's fears came to life in *Santa Fe*, where Justice Stevens, arguably, expanded the role peer pressure played in the finding of unconstitutional coercion. In *Santa Fe,* the court invalided practice of a delivery of a pre-game prayer by a student chaplain.[47] Unlike in *Lee*, the activity involved a varsity football game and the student's attendees were not required to do anything during the prayer.[48] Nonetheless, the school district did not divorce itself enough from the prayers by retaining a certain level of control over the substance of the massage and there was a hint of bad faith on the

[42] Id at "[l]aw reaches past formalism. And to say a teenage student has a real choice not to attend her high school graduation is formalistic in the extreme." at 594-595
[43] Id.
[44] Id at 594
[45] Id at 640 Scalia dissenting.
[46] Lemon is Dead.
[47] Santa fe 530 U.S. 290
[48] Id

part of the district in attempting to reinstate unconstitutional prayers at the football games.[49] While correctly decided, the case substantially undermines validity of coercion test by placing a greater emphasis on societal pressure: "[t]he constitutional command will not permit the District to exact religious conformity from a student as the price of joining her classmates at a varsity football game."[50] The continued confusion of the governmental strong-arming and private critic of one's beliefs removes the coercion test further away from its initial historic validity. After all, it is conceivable that if a group of students with significant social status initiate an act of worship on public school grounds and another student is felt compelled to participate as a result of "peer pressure," he might be entitled to a favorable verdict applying coercion test.

C. Noteworthy Approaches Taken by Circuits to Student-Initiated Religious Activity/Imaginary.

1. The 10th Circuit's Hybrid Lemon/Endorsement.

The Tenth Circuit relies on a combination of the *Lemon* and endorsement tests, the "hybrid *Lemon*/endorsement test to ascertain if there is a violation of the Establishment Clause.[51] The test has three prongs, the first two prongs resemble the *Lemon* test, the inquiry focuses on 1) whether the government conduct was motivated "by an intent to indorse religious" and 2) whether "the conduct has the effect of endorsing religion."[52] Application of the first two prongs involves an objective standard, specifically, the governmental action must be viewed from the eyes of an objective observer, "who is aware of the purpose, context, and history" of the action or a symbol,

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[49] 309-310

[50] At 313 (In Lee the occasion was very significant, a one-time graduation from high school, while here we have a mere attendance of a football game)

[51] See Weinbaum v. City of Las Cruces, N.M., 541 F.3d 1017, 1030-32 (10th Cir. 2008), Am. Atheists, Inc. v. Davenport, 637 F.3d 1095, 1119 (10th Cir. 2010), Green v. Haskell County Bd. of Com'rs, 574 F.3d 1235 (10th Cir. 2009)

[52] Weinbaum at 1030. For sure

the information that is not simply limited from viewing the challenged display.[53] The court also considers the secular justification given by the government, and unless the justification appears to be a sham or secondary to a religious purpose, the court will defer to the government's professed purpose.[54] In certain cases, where the government "involves itself with a religious institution, Lemon's excessive entanglement prong comes into play."[55] Moreover, the school context slightly changes these objective inquiries:[56] "the relevant objective observer ... is an adult who is aware of the history and context of the community and forum in which the religious display appears, and who understands that the display of a religious symbol in a school context may raise particular endorsement concerns, because of the pressure exerted on children by the law of imitation."[57]

In Wienbaum, the court applies the hybrid Lemon/endorsement test to resolve a challenge to a student-created mural at an elementary school in the city of Las Cruses. The mural at issue was created by school-children-participants in the after school program with help and supervision of a local artist.[58] One of the panels on the mural contained wooden crosses, the imagery that was at the heart of the Establishment clause violation claim.[59] At the suggestion of the students, the school placed the mural on the school property recognizing in the display the students who participated in the program.[60]Applying the legal framework, the court concluded that the school's district secular justifications were valid.[61] The court further noted that a reasonable

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[53] Id at 1031 fore su
[54] ID.
[55] Id.
[56] ID at 1032 (for sure
[57] Weinbaum v. City of Las Cruces, N.M., 541 F.3d 1017, 1032 (10th Cir. 2008)
[58] Weinbaum
[59] Id.
[60] id
[61] BTW Elementary children created the collage, taking the images from the school's neighborhood and the Las Cruces community. The mural identifies unique aspects of BTW. Moreover, display of the mural recognizes the work of the "latch-key" students who participated in the after-school program. Weinbaum points only to the mural's

observer would not believe that the mural had the effect of endorsing religion because students designing the mural saw the crosses as an "emblematic to their community" as opposed to a religious symbol.[62]

2. The Combination of Coercion Test and Lemon Test.

In Adler v. Duval County School Bd, the Eleventh Circuit addressed whether a school policy permitting a graduating class to elect a student speaker to give a message at the graduation ceremony was a violation of the Establishment Clause.[63] Applying the combination of the Lemon test and coercion test, the court concluded that facially the policy passed constitutional muster.[64]

Beginning its analysis under the coercion test, the court distinguished Adler from Lee by stressing that the school officials did not maintain any control over the message to be delivered.[65] The content of the message was completely at the discretion of the student-volunteer and the school district merely provided a platform for its delivery.[66] Even though the record showed that the majority of student-volunteers delivered a religious message,[67] the court reasoned that lack of censorship was insufficient to establish the necessary level of control that was present in Lee.[68] Furthermore, unlike the students in Lee who were required to stand during the prayer, Duval County students were not required or encouraged to participate in the activity in any way.[69]

The court further analyzed the issue under the Lemon framework concluding that all three prongs were satisfied.[70] The "purpose" prong was satisfied because the proposed secular purpose

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content, declining to address its context and history. As such, Weinbaum cannot unseat the District's secular justifications.

[62] Id.

[63] Duval county

[64] Id.

[65] Adler v. Duval County Sch. Bd., 250 F.3d 1330, 1333-34 (11th Cir. 2001)

[66] Id

[67] Adler v. Duval County Sch. Bd., 250 F.3d 1330, 1333-34 (11th Cir. 2001)

[68] Id.

[69] Id.

[70] id

of allowing student to direct their own graduation ceremony was a valid one and did not appear to be a sham.[71] In addition, the text of the policy itself did not reveal any religious purpose.[72] The effect prong was satisfied because the policy allowed students to choose a message on any topic.[73] Finally, the district divorced itself from the message completely, thus there could be found no impermissible entanglement with religion.[74]

3. The Fifth Circuit Approach in Ducanville.

In *Ducanville*, the Fifth Circuit used a combination of the Lemon test, Endorsement test and the Coercion test to invalidate practice by a basketball coach who led his team in a pre-game prayer.[75] The action was brought by a student and her farther challenging the practice of permitting the coach to team prayers at practices.[76] The school district argued that they could not prevent its employees from participating in student prayers without violating the employee's Free Exercise rights,[77] the court disagreed by stressing that "the principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause".[78] The court further stressed that because the religious practice took place during school-controlled, curriculum-related activities, the actions of the coach could be interpreted directly as the actions of the school.[79] The court further noted that the coach's participation in the prayers improperly engaged the school with endorsement of religion.

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[71] Id at 1334
[72] ID.
[73] Adler v. Duval County Sch. Bd., 206 F.3d 1070, 1089 (11th Cir. 2000) cert. granted, judgment vacated, 531 U.S. 801, 121 S. Ct. 31, 148 L. Ed. 2d 3 (2000) and opinion reinstated, 250 F.3d 1330 (11th Cir. 2001)
[74] Id.
[75] Doe v. Duncanville Indep. Sch. Dist., 70 F.3d 402, 406-07 (5th Cir. 1995)
[76] Id.
[77] Id at 407
[78] Id.
[79] Id.

The court further addressed whether the school employees were allowed to treat student's religious beliefs with "deference and respect."[80] In the footnote, the court stressed that the Establishment Clause required the school employees to be respectful of the students' beliefs.[81] Nonetheless, the court never explained what behavior by a school official is permitted or recommended to satisfy this requirement. Instead, the court noted that "[n]othing compels DISD employees to make their non-participation vehemently obvious or to leave the room when the students pray."[82] The court went on to say that if employees decided to join hand in prayer or "otherwise manifest approval and solidarity with student religious exercises, they cross the line between respect for religion and endorsement of religion."[83] Nevertheless, the court never completely explained to which extent an employee may show the "deference and respect." In an attempt to expand on these issues in the concurrence, Judge Jones stated that "the line between deference and sympathetic reverence is a fine one and that cannot and should not be policed."[84]

III. Analysis

A. The Uniqueness of relationship between students and educators requires a different approach than other Establishment Clause challenges.

Public school is "at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is more vital to keep out divisive forces than in its schools."[85] The public entrusts school officials to educate, protect and inculcate

[80] At 406 n.4
[81] Id.
[82] Id.
[83] Id.
[84] 42 New Eng. L. Rev. 363
[85] Illinois ex. Rel. McCollum v. Board of Ed. 333 U.S. 203, 231(1948) (frankfurter, J)

values in children.[86] Therefore, constitutional challenges in public schools require a heightened concern in Establishment Clause as well as Free Exercise cases. Additional considerations of student's maturity level and peer-pressure reinforce this point. More importantly, however, is the consideration of student's emulation of their teachers, and the mentor-like relationship that students form with their teachers, coaches, advisors and other school personnel.[87] Educators recognize this relationship and attempt to teach proper values and attempt to assist in student's development as individuals.[88] When teachers show hostility toward student's beliefs it may make students feel uncomfortable and forgo their religious practice at school, or even question the validity of their religious convictions. Hence, there is an imperative need for a standard that would accommodate the constitutional requirement that public school employees display respect to non-distracting student-initiated religious activity. This need is poorly satisfied by the tests that are currently used by the Supreme Court.

B. The Implications of Borden v. East Brunswick Sch. Dist and the New Law in the Third Circuit.

1. Factual Background.

Coach Marcus Borden is an award winning football coach at East Brunswick High School. For twenty-three years of his career as a head football coach, Borden and his team engaged in two pre-game rituals, which were initiated by his predecessor. During a pre-game dinner at the school's cafeteria, Borden, the players, the cheerleaders, and other invited guests would recite a prayer. Sometimes, member of a local clergy would be invited for this occasion and sometimes

[86] McCreary County, Kentucky v. American Civil Liberties, 2004 WL 2802966 (U.S.), 15-16 (U.S.,2004)
[87] See e.g. (The importance of the student–teacher relationship, especially interpersonal involvement, in optimizing student motivation is highlighted.) Edwards v. Aguillard, 482 U.S. 578, 584, 107 S.Ct. 2573, 2577-78, 96 L.Ed.2d 510 (1987)
[88] http://www.csuchico.edu/kine/documents/teachersasrolemodels.pdf,

Borden would lead the prayer himself. The prayer would begin by Borden asking everyone to stand. Some participants would bow their heads and others "stared into the distance."[89]

Second tradition involved a prayer in a locker room: prior to the game, the coaches and the players would "take a knee" together and after discussing the strategy for the upcoming game, Borden would lead his players in a non-sectarian prayer. The prayer recited was as follows:

> Dear lord, please give us today in our quest in our game, our championship. Give us the courage and determination that we would need to come out successful. Please let us represent our families and community well. Lastly, please guide our players and opponents so that they can come out of this game unscathed, no one is hurt.[90]

After several complaints regarding Borden's involvement in the team player, Dr. Jo Ann Magistro, the Superintendent of the school, instructed Borden to cease the practice of praying with his team. Borden ceased participating in the prayer. However, he requested guidelines as to what he would be permitted to do if his students were to engage in the prayer? Was he to remain motionless or to leave the room? Was he allowed to "take a knee" with his players or silently bow his head. The school district failed to provide such guidance.

As a result of the lack of guidance, Borden completely ceased participation in any religious activity: when his students prayed during the dinner, he remained motionless while his students prayed.[91] He continued to "take a knee" during the strategy discussion at the locker room, but stood up when his students began to pray.[92] As a result of his actions, one student reported feeling "awkward" and claimed that it was detrimental to the "teams morale and team spirit."[93]

2. The Decision of the District Court

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[89] 42 New Eng. L. Rev 363 at 371 Deposition of Marcus Borden at 30
[90] Borden v. Sch. Dist. of Twp. of E. Brunswick, 523 F.3d 153, 160 (3d Cir. 2008)
[91] Borden v. School Dist. of the Tp. of East Brunswick, 2008 WL 4600060 (U.S.), 4
[92] Id.
[93] Id.

The district court granted Borden's motion for summary judgment, holding that Borden's secular gestures of bowing his head in silence and "taking a knee with his team" were permissible under the Establishment Clause.[94] In arriving to this conclusion, the court applied the endorsement test, noting that no reasonable observer would believe that Borden's goal would be to endorse religion.[95] The court rejected the district's contention that Borden's silent acts of respect were coercive on his students.[96]

3. Critical Analysis of the Third Circuits Reasoning.

a. Reliance on Endorsement Test Only is Insufficient to Show establishment clause violation in the context of public schools.

The court explained that there were three tests to ascertain whether a public employee's act violated the Establishment clause but declined to apply the Lemon and the coercion test. Instead, relying on the endorsement test only, the court proceeded to hold that Borden's behavior was unconstitutional. In choosing to utilize Endorsement Test only, the court relied heavily on Santa Fe. However, this reliance on Santa Fe is completely misplaced: when invalidating the schools' policy in Santa Fe, the court applied both the endorsement and coercion test. The Court relied on a multitude of factors including questionable purpose of the policy proposed by the school district. Aside from questionable reliance on precedent, there still remains an issue of the choice of a poor test to be the only guiding principle to gauge unconstitutionality of behavior. The main problem with the endorsement test is that the "objective" reasonable observer is not objective at all. Instead, whether an action violates the constitutional principles largely depends on the presuppositions of the observer.[97] Also, as the decisions of many courts indicate, the knowledge and characteristics that are imputed to this hypothetical observer vary greatly among

[94] Cert petition
[95] Id
[96] Id
[97] Michael Stokes Paulsen, Lemon Is Dead, 43 Case W. Res. L. Rev. 795, 815-16 (1993)

the judges who apply the test, and thus, the standard is "merely a cloaking device, obscuring intuitive judgments made from the individual judge's own personal perspective."[98] Some scholars go as far as to say that the endorsement test does not resemble anything that could be called "law."[99]

b. Faulty Application of the Endorsement Test by the Third Circuit.

The inherent flaws of the endorsement test are perfectly exemplified by the application of the test to the facts in Borden. In this case, as is clear from the concurring opinions, the judges assign different characteristics and impute different level of knowledge on the "objective" reasonable observer. As a result of the poor application of the endorsement test, Third Circuit opinion creates bad law which requires some school employees to violate student's Free Exercise rights *and* the Establishment Clause by showing hostility towards religion.

First, the court explained that the endorsement test does not focus on the government's "subjective purpose when behaving in a particular manner, but instead focuses on the perception of the reasonable observer."[100] This characterization is not in accord with the Supreme Court precedent that the Third Circuit so heavily relied on. Specifically, in Santa Fe, Justice Kennedy noted that "when a government entity professes secular purpose for an arguably religious policy, the government's characterization is, of course, entitled to some deference." While the inquiry may not focus on the governmental intent directly, the reasonable observer, who is familiar with *all* pertinent facts and the context of the action, would theoretically be able to glean over the governmental intent for the challenged action.[101] In this case, Borden showed good faith attempts to remedy his past violations of the Establishment Clause. In addition, the reasonable observer

[98] Id at 816
[99] Id.
[100] Borden v. Sch. Dist. of Twp. of E. Brunswick, 523 F.3d 153, 175 (3d Cir. 2008)
[101] Need to cite here, probably donnolly or stanta fe.

would be aware of Borden's representations, under oath, that he did not intent to pray and merely wished to show respect for his player when they prayed.[102] The court did not have to consider this fact as dispositive; nonetheless, some weight must be given to Borden's intent as a part of the overall context of the action, as required by the endorsement test.

The most dangerous consequence of the court's holding, however, is the designation of one's history as the dominant factor in condemning an action as an impermissible endorsement of religion.[103] In considering whether Borden's acts of respect were violating the Establishment Clause, the court focused solely on the activities he initiated and participated in prior to the litigation.[104] The lead opinion explicitly states that if it were not for "Borden's twenty-three years of organizing, participating in, and leading prayer with his team, this conclusion would not be so clear as it presently is."[105] The court went on to stress this point by agreeing that bowing one's head and taking a knee could be construed as signs of respect and pointing out that "if a football coach, who had never engaged in prayer with his team, were to bow his head and take a knee while his team engaged in a moment of reflection or prayer, we would likely reach a different conclusion because the same history and context of endorsing religion would not be present."[106] The "context" in this court consideration was only Borden's history.

As a result of the court conclusion, it would be impossible for an academic institution to "cure" past violations of the Establishment Clause. Even good-faith attempts of school districts to bring a practice within the constraints of the Establishment Clause would be in vain according to the Third Circuit. Such a decision places a significant burden on school officials because of the ever-changing landscape of the First Amendment Jurisprudence. The only way a school

[102] Concurrence at 186.
[103] The majority opinion.
[104] Id at 178.
[105] Id.
[106] Id at 178 -179

district would be able to comply with the constitutional restrictions is abandoning the prohibited practice altogether as opposed to attempting to change it. Such a holding cannot be squared away with the precedent of the Supreme Court and other circuits, which permits modifications of past unconstitutional policies as perfectly valid way of bringing the challenged practice into the constraints of the Establishment Clause.[107] If one were to consider the facts of *Adler* under the Third Circuit's holding, the significant emphasis on history as opposed to all other context would likely lead one to conclude that the altered graduation policy would not pass constitutional muster.

Lastly, the court provided no guidelines as to what behavior would be appropriate in Borden's case, the key issue of the dispute. Taking away the possibility of bowing his head in silence, the only options left to Borden are to remain motionless while his students pray or to leave the room. The record in the case showed that such behavior made his students feel uncomfortable. The effect of his attempts to show vehement non-participation is discouragement of the student-initiated prayer and appearance of hostility towards the students' beliefs, which in itself is impermissible under the Establishment Clause. Affording no deference to Borden's expertise as a coach and an educator, the court foreclosed the possibility of Borden showing respect for his team during their prayer, and act that was an important tradition for the players. Borden's display of disproval of his player's actions caused a detriment to the player's morale and team spirit.

1. The Return to our Constitutional Traditions is Needed.

The Court's interpretations of the Establishment Clause requirements are in a state of "hopeless disarray."[108] The multi-test approach has created a substantial lack of certainty[109] and

[107] See Duval County Discussed above.
[108] Rosenberger, 515 U.S. at 861, Thomas, concurring

has shifted the focus of the inquiry from determining constitutionality of the challenged action to endless attempts at discovering which of the faulty tests will get us to the correct answer. The concentration on shaping the appropriate legal framework caused many courts to abandon consideration of our basic constitutional principles, which should be the main signposts in guiding the courts' decisions.

Religious diversity among numerous Christian denominations was central to the origin of our Nation.[110] That is precisely why the Founders added to the Constitution a declaration that "Congress shall make no law respecting an establishment of religious, or prohibiting the free exercises thereof."[111] Today, as the religious and ethnic diversity in the United States has expanded dramatically, these words grant religious freedom and equality to everyone, "the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism."[112]

In his dissent in *Wallace*, Justice Rehnquist analyzed the history and record of creation of the First Amendment, and explained that the main motivating force behind the Establishment Clause was the fear that "one sect might obtain a pre-eminence, or two combine together, and establish religion to which they would compel others to conform."[113] The Justice concluded that by saying Madison's intention was to prohibit the establishment of a *national* religion and to prevent discrimination by the government between sects. [114]

Finally, one of the principle purposes of the Establishment Clause is to ensure an individual's freedom to worship according to his own convictions as opposed to the strong arm of the

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[109] James A. Campbell, Newdow Calls for A New Day in Establishment Clause Jurisprudence: Justice Thomas's "Actual Legal Coercion" Standard Provides the Necessary Renovation, 39 Akron L. Rev. 541, 550 (2006)
[110] County of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573, 589, 109 S. Ct. 3086, 3099, 106 L. Ed. 2d 472 (1989)
[111] See U.S. Constitutuion, see also County of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573, at 589-590.
[112] Wallace v. Jaffree 472 U.S., at 52
[113] Wallace v. Jaffree, 472 U.S. 38, 96, 105 S. Ct. 2479, 2510, 86 L. Ed. 2d 29 (1985)
[114] Id.

government, according to Justice Rehnquist, "[c]ongress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience."[115] Thus, the government not permitted to use its power to punish one for practicing certain belief because the aim of the Constitution is to prevent religious procession.[116] Furthermore, the government is not allowed to condition a receipt of a benefit or a privilege upon one's required participation in any religious activity.[117]

Considering the history and the original intent of the Framers, it is evident that the Constitution does not require *complete neutrality* towards religion but instead in "identifying workable limits to the government's license to promote the free exercise of religion."[118] In sum, instead of focusing on the most neutral way of approaching religious activity in school, the court should analyze the action by relying on the following Constitutional principles: (1) the governmental action may not establish one national religion, (2) the challenged action must not give preference to religion over non-religion or discriminate among religious denominations and (3) government may not use its power or resources to force an individual to participate or alternatively to cease her participation in a religion.

2. Coercion Test in Combination with the Purpose Prong of Lemon would be a Better Standard for Interpretation of the Establishment Clause Challenges.

There is an undeniable need for the Court to articulate a single standard for consideration of the Establishment Clause violations in public schools. The lack of clarity and predictability as to validity of each legal framework results in a significant waste of public resources on litigation that could have been avoided. Additionally, interpretation accepted by various courts lack

[115] Wallace v. Jaffree, 472 U.S. 38, 96, 105 S. Ct. 2479, 2510, 86 L. Ed. 2d 29 (1985)
[116] County of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573, 591, 109 S. Ct. 3086, 3100, 106 L. Ed. 2d 472 (1989)
[117] Michael Stokes Paulsen, Lemon Is Dead, 43 Case W. Res. L. Rev. 795, 797 (1993)
[118] Wallace v. Jaffree, 472 U.S. 38, 83, 105 S. Ct. 2479, 2503, 86 L. Ed. 2d 29 (1985)

coherency and consistency. The combination of the "modified" coercion test and the purpose prong of the Lemon test is a standard that allows for preservation of our core constitutional values, provides safeguards against chilling student religious activity, and bring the much-needed clarity and predictably into the First Amendment Jurisprudence.

The framework for analysis would require the court to ask whether a school official's action or policy directly or indirectly compels any form of religious exercise.[119] The second question requires the court to look at the purpose of the governmental action. The purpose must be secular. The professed governmental purpose should be given deference unless it plainly appears that the explanation for the policy is a sham.

It is important to note that in applying the modified coercion test requires the interpretation as supplemented by Justice Scalia in his dissent in *Lee.* First, the coercion test reflects the basic principle that the government "cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice."[120] While the coercion theory as articulated by Justice Kennedy is an excellent one, its application is Lee was faulty. Specifically, one must not impute a non-governmental social pressure to the action of the government only because the pressure is occurring in a government-provided forum.[121] An extension of the coercion test to include peer pressure is not warranted by our constitutional tradition. The Constitution is meant to protect the people from the government, and not from other private citizens.

To address the heightened concern requirement of peer pressure at schools,[122] and to prevent the court from going into a "psycho-journey,"[123]the school policies should reflect that any

[119] See Generally Lee v. Weisman, and Lemon is dead at 797.
[120] Weisman.
[121] Michael Stokes Paulsen, Lemon Is Dead, 43 Case W. Res. L. Rev. 795, 798 (1993)
[122] Weisman majority opinion.

participation by any student in the religious activity is voluntary, thereby allowing the school district to divorce itself even further from the religious action.

The second questions serves as a safety net in cases where the government action is structured in a way that the school district is divorced from the action, but the action clearly appears to favor religion over non-religion or any religious faith over another. The "purpose prong" is not to be read as requiring complete indifference to religion but rather as a mechanism for policing bad faith in cases similar to *Santa Fe,* where the purpose of selecting a "student chaplain" was that merely of reinstating a prayer at the football game.[124]

The main benefit of the coercion inquiry is that it can peacefully co-exist with Free Exercise rights of the students by allowing to mark a distinction between constitutionally required accommodation of religious practices and impermissible governmental forcing of religion onto students.[125] Furthermore, it would allow for symbolic and respectful acts on the part of the school employees as long as the religious activity is truly student initiated, thus illuminating the necessity to scrutinize school officials conduct.

3. Application of the Test to the Facts of *Borden.*

The application of the modified coercion/purpose test to Borden would shift the focus from Borden's prior history, to whether Borden's actions in any way forced any of the players to participate in the religious activity. It is clear that historic activity that Borden engaged would be unconstitutional under this framework. Specifically, because Borden initiated the prayer at the pre-game dinner and *requested* everyone to stand, his players felt coerced to participate in the religious behavior.[126] Borden's historic religious behavior is further vulnerable to criticism

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[123] Scalia dissenting in Weisman
[124] Santa Fe
[125] Michael Stokes Paulsen, Lemon Is Dead, 43 Case W. Res. L. Rev. 795, 798 (1993)
[126] See discussion part prior

considering the dynamics of the coach-player relationship.[127] Because the coach is in a position of control over his players, it is possible that some of the students felt coerced to participate in the recitation of grace and the prayer in the locker room out of fear of reprimand or retaliation. However, after Borden was approached by the superintendent he ceased his participation in any religious activity with his players.[128] He represented that the only activity he wanted to engage in was to show a silent symbols of respect by bowing his head and taking a knee with his players. His representations appear to be in good faith,[129] therefore meeting the requirements of the purpose prong. Because the actions he wishes to engage in are passive, it cannot be said that they are coercive to his players. The only issue that remains is Borden's email to his co-captains inquiring about the team's further desire to engage in their established tradition.[130] However, because Borden specifically stated in the email that whatever decision the players make would be "fine with him," [131] his actions could hardly be interpreted as coercion. Therefore, as long as the prayers were truly student-initiated and Borden merely engaged in symbolic acts of respect, his actions stratify the Establishment Clause.

IV. Conclusion.

The Supreme Court's precedent in the area of the Establishment Clause jurisprudence lacks cohesiveness and clarity. The search for an appropriate standard has blind-sighed the inquiry from analyzing of how one should get to the answer as opposed to concentrating on what the Constitution requires the answer to be. The usage of multiple tests places a significant burden on public school officials in attempting to discern the acceptable behavior by their employees. The Court has consistently stressed that students are permitted to engage in religious activity on the

[127] Discussion part prior
[128] Discussion prior
[129] The lead opinion stated that they do not doubt Borden's representation.
[130] See notes prior
[131] New Eng. L. Rev 363

territory of a public schools during school hours, however, considering the level of religious diversity of our society, further intervention and clarification from the Court is imperative in order to properly accommodate the student's constitutional rights. The dangerous decisions like *Borden*, which require school officials to show hostility to students' religious practices, reinforce this point further still.

It is time for the Court to abandon unnecessary and highly criticized tests in favor of adopting a single approach. Modified coercive test offers a framework that would allow the courts to balance the requirements of both the Establishment Clause and Free Exercise Clause as well as bring the inquiry back to the ideas of our constitutional traditions. Finally, acceptance of a single test would permit public school officials to estimate whether certain kinds of behavior are in violation of the Establishment clause, and the school personnel will no longer be required to walk the fine line between neutrality and hostility.