THE SUPREME COURT'S COERCION TEST: INSUFFICIENT CONSTITUTIONAL PROTECTION FOR AMERICA'S RELIGIOUS MINORITIES

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INTRODUCTION

The organizing principle of coercion has assumed increasing importance in First Amendment establishment of religion jurisprudence. The first clause in the First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[1] The Supreme Court's decision in *Lee v. Weisman* introduced coercion as a First Amendment standard.[2] The *Lee* Court stated 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, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'"[3] Recently, the Court has expanded the coercion test to cover activities that employ indirect coercion, or coercion imposed by majorities with the tacit sanction of government entities.[4]

This Note argues that the coercion test as currently formulated by the Supreme Court is an insufficient bulwark against constitutional violations under the religious Establishment Clause of the First Amendment. The coercion standard, and by implication, the endorsement standard, do not maintain the framework that the Founders, specifically James Madison, promulgated in order to protect religious and political liberty. Part I of the Note will chronicle the development of the coercion principle as an alternative or addition to the Court's other tests for the establishment of religion. The note will then outline the Madisonian model of religious liberty.

Part II will examine three ways that the coercion test fails to account for the various possibilities of establishment violations. First, the coercion standard fails to detail a coherent approach to those " borderline" establishment cases that involve what some have termed either "civil religion" or "ceremonial deism." Second, the concept of coercion cannot

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1 U.S. CONST. art. I, § 1, cl. 1.

2 505 U.S. 577 (1992)

3 *Id.* at 587 (alteration in original) (quoting Lynch v. Donnelly, 465 U.S. 668, 678 (1984)). *Compare* School Dist. v. Schempp, 374 U.S. 203, 223 (1963) (holding that coercion is not necessary for an establishment clause violation).

4 *See* Santa Fe Indep. Sch. Dist. v. Doe, 120 S. Ct. 2266 (2000).

adequately address what has become the most contentious of religious establishment disputes: how to balance the right to religious speech with the strictures against governmental establishment of religion.[5] This part of the essay will focus on the Supreme Court's recent ruling in *Good News Club v. Milford Central School*.[6] Third, the coercion standard is inherently limited by its conceptual boundaries; it is a test that narrowly focuses on coercion within institutional settings and the ability of dissenters to respond to that institutional coercion. Cases that follow *Lee* will demonstrate the severe limitations of its approach. Finally, Part III argues that the Supreme Court is drifting toward the coercion test as something more than a threshold standard for government actions concerning religious establishment. Any wholesale adoption of the coercion standard as both a constitutional floor and ceiling would insufficiently protect religious liberty in the United States.

I. THE ORIGINS OF THE COERCION STANDARD

A. DOCTRINAL DEVELOPMENT

The Supreme Court's most widely applied test for impermissible establishments of religion is the three-prong test laid out in *Lemon v. Kurtzman*.[7] In that case, the Court held that a statute must have a secular legislative purpose, its principal effect must not advance or inhibit religion, and the statute must not foster "'an excessive government entanglement with religion.'"[8] Violation of any prong demands that the law be struck down.[9] The Court struck down a Rhode Island statute which provided a supplement for teachers' salaries at non-public schools and a Pennsylvania statute that provided for salary and cost reimbursements for the teaching of secular subjects at non-public schools.[10] The Court found that both statutes fostered "an impermissible degree of entanglement" between religion and the government.[11] The Court observed that the "surveillance necessary to ensure that teachers play a strictly nonideological role gives rise to entanglements between church and state."[12]

Some perceive the *Lemon* test as uncertain and insufficiently subtle to resolve the often complicated issues of free exercise and establishment

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5 *See generally* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 995 (1997).

6 121 S. Ct. 2093 (2001).

7 403 U.S. 602 (1971). *See also* Steven G. Gey, *When is Religious Speech Not "Free Speech"?*, 2000 U. ILL. L. REV. 379 (2000).

8 *Id.* at 613, (quoting Walz v. Tax Commission, 397 U.S. 664, 674 (1970)).

9 *Id.* at 612.

10 *Id.* at 606.

11 *Id.* at 615.

12 *Id.* at 621-22.

cases.[13] Justice Scalia noted in 1993 that five sitting justices had previously criticized *Lemon* and a sixth had joined an opinion doing so.[14] Nonetheless, "the views of five Justices that [a] case should be reconsidered or overruled cannot be said to have effected a change in Establishment Clause law."[15]

Justice O'Connor has consistently counseled for a refinement of *Lemon.* O'Connor's endorsement test focuses on the purpose and effects of government action "in order to make them more useful in achieving the underlying purpose of the First Amendment."[16] The endorsement test requires that "[e]very government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion.ë[17] Endorsement is to be measured by the perceptions of a reasonable observer who is "aware of the history and content of the community and forum in which the religious display [or activity] appears.ë[18]

Justice O'Connor's endorsement test can fairly be characterized as a species of the coercion test.[19] Justices Stevens and O'Connor disagree over the reasonable observer standard however. They differ as to whether the standard should be the "aware" observer who feels a degree of religious coercion or whether, in Justice Stevens' formulation, "*some* reasonable observers would attribute a religious message to the State."[20] Justice O'Connor, on the other hand, argues that the "endorsement inquiry is not about the perceptions of particular individuals or saving isolated non-adherents from the discomfort of viewing symbols of a faith to which they do not subscribe[,]" lest such a standard sweep away "'all

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13 Chief Justice Rehnquist has stated that *Lemon* "has no basis in the history of the amendment it seeks to interpret, is difficult to apply and yields unprincipled results. . ." Wallace v. Jaffree 472 U.S. 38, 112 (1985) (Rehnquist, J., dissenting). Justice Scalia is probably the most ardent opponent of *Lemon.* "When 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." Lamb's Chapel v. Center Moriches Union Free School Dist. 508 U.S. 384, 399 (1993).

14 *Lamb's Chapel*, 508 U.S. at 398. Professor Steven Gey argues that the "true target of the antagonism many critics direct toward the three-part *Lemon* test is the separation [of church and state] principle at the core of *Lemon.*" *Religious Coercion and the Establishment Clause*, 1994 U. ILL. L. REV. 463, 470 (1994).

15 Agostini v. Felton, 521 U.S. 203,ë217 (1997).

16 *Jaffree*, 472 U.S. at 69 (1985). *See also* Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753, 772 (1995) (O'Connor, J., concurring in judgment); County of Allegheny v. ACLU, 492 U.S. 573,ë623 (1989) (O'Connor, J., concurring in part and concurring in the judgment).

17 Lynch v. Donnelly, 465 U.S. 668,ë694 (1984).

18 *Pinette*, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring in judgment).

19 The endorsement test focuses on the recipients of the message at issue and their perceptions while the coercion test focuses on the circumstances of the hearer/observer. Both, however, ultimately rely on contextual surroundings to determine the constitutionality of a message.

20 *Pinette* at 807 (Stevens, J.,ëdissenting).

government recognition and acknowledgement of the role of religion in the lives of our citizens.' "[21]

Michael Perry has grouped the endorsement and coercion tests into what he calls the moderate version of the nonestablishment norm in constitutional jurisprudence.[22] The moderate version allows that "government *may* affirm a certain few very basic religious beliefs, but government may do so *only* noncoercively . . . The excepted beliefs are these: there is a God, who created us and who both loves us and judges us . . . and because [of this] . . . we are all sacred."[23] As Justice O'Connor has noted, the "moderate" version seeks to maintain some government recognition of religion while forbidding any element of coercion in that recognition.

Although the Court in *Lee* did not explicitly reject the *Lemon* test, the majority seemed to suggest that a coercion analysis should proceed before any application of *Lemon.* The Court explained that it did "not . . . reconsider *Lemon v. Kurtzman* . . . The government involvement with religious activity in this case is pervasive, to the point of creating a state-sponsored and state-directed religious exercise."[24] The government activity at issue in *Lee* was a nonsectarian prayer given by a rabbi at a public junior high school graduation.[25] The Providence, Rhode Island, school system permitted, as a policy, a school's principal to invite a clergy member to give benedictions and invocations at graduation ceremonies.[26] School officials provided a pamphlet entitled "Guidelines for Civic Occasions."[27] Prepared by the National Conference of Christians and Jews, the pamphlet counseled a nonsectarian prayer emphasizing

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[21] *Id.* at 779 (quoting County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 623 (O'Connor, J., concurring in part and concurring in judgment)). Note that Justice O'Connor's concern for allowing simply any reasonable person to serve as the measure of the state's endorsement of religion is that these uninformed people (including any "isolated non-adherents") would apparently not understand the difference between historically recognized state involvement with religion and constitutionally impermissible endorsement. *Id.* at 780. The plurality opinion in *Pinette* would have limited the endorsement test to "expression *by the government itself*, or else government action alleged to *discriminate in favor* of private religious expression or activity." *Id.* at 764 (citation omitted). Five justices, however, held that "impermissible message[s] of endorsement can be sent in a variety of contexts, not all of which involve direct government speech or outright favoritism." *Id.* at 774 (O'Connor, J., concurring in part and concurring in judgment).

[22] Michael J. Perry, *Freedom of Religion in the United States: Fin de Siècle Sketches*, 75 IND. L. J. 295, 308-32 (2000).

[23] *Id.* at 310.

[24] 505 U.S. 577, 587 (1992).

[25] *Id.* at 581. *See generally* Martin J. McMahon, Annotation, *Constitutionality of Regulation or Policy Governing Prayer, Meditation, or "Moment of Silence" in Public Schools*, 110 A.L.R. Fed. 211 (2001) (summarizing the jurisprudence of this topic).

[26] *Id.*

[27] *Id.*

"inclusiveness and sensitivity."[28] The invocation and benediction generally celebrated the accomplishments of the students, mentioning "God" twice and "Lord" once.[29]

The Court emphasized two facts in finding an Establishment Clause violation.[30] First, the principal, through the Guidelines and unsolicited advice that the prayer be nonsectarian, "directed and controlled the content of the prayers."[31] Second, the Court pointed out that for those who objected to the prayers, "attendance and participation in the state-sponsored religious activity are in a fair and real sense obligatory."[32] In accounting for the coercion itself, Justice Kennedy, writing for the majority, emphasized the locale—a public school—and the age of the students. Kennedy observed that this "concern may not be limited to the context of schools, but it is most pronounced there."[33] The Court focused on the students' dilemma of either participating in a graduation ceremony with a prayer or protesting the prayer by staying at home or leaving the auditorium. The *Lee* Court made much of the children's age, noting that "[w]e do not address whether that choice is acceptable if the affected citizens are mature adults, but we think the State may not, consistent with the Establishment Clause, place primary and secondary school children in this position."[34] Therefore, the Court restricted the ruling to the institutional factors that defined the controversy—the setting of the school, its control of the message, and the age and vulnerability of the children. Commentators have noted that the Court "never indicated that both factors were required to strike down the policy or that the second factor alone [coercion] would not suffice to support a finding of unconstitutionality."[35]

Santa Fe Independent School District v. Doe presents a different set of facts and a different analysis. The Santa Fe high school provided for student elections to determine, first, whether there should be an "invocation" before high school football games, and, second, which student should deliver that invocation during the course of one football season.[36] The Court invoked the *Lemon* test out of necessity when the school district stated that there had yet to be any prayers (and, therefore, no coer-

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28 *Id.*

29 *Id.* at 581-82.

30 *See e.g.*, Tanford v. Brand, 932 F. Supp. 1139, 1142 (S.D. Ind. 1996) (demonstrating the two-step formulation that most courts use when applying the *Lee* test), *aff'd*, 104 F.3d 982 (7th Cir. 1997).

31 *Lee* at 588.

32 *Id.* at 586.

33 *Id.* at 592.

34 *Id.* at 593.

35 Colin Delaney, Note, *The Graduation Prayer Cases: Coercion by Any Other Name*, 52 VAND. L. REV. 1783, 1804 (1999).

36 *See Santa Fe Indep. Sch. Dist.*, 530 U.S. 290, 297.

cion) under the most recent policy. The Court emphasized that the policy lacked a secular legislative purpose, violating the first prong of *Lemon*.[37] Nonetheless, even this invocation of *Lemon* was couched in the language of potential coercion, finding improper school action in "empower[ing] the student body majority with the authority to subject students of minority views to constitutionally improper messages."[38] The majority also held that, to an objective observer, the purpose of the invocation was to promote the school's interest in fostering prayer.[39]

The Court addressed the same three coercion issues that were of concern in *Lee*—the institutional setting of the school, the school's control of the activity, and the age of the students. Nonetheless, there were subtle differences that the school district sought to use in distinguishing *Lee*. The school district distinguished the cases on the grounds that while a graduation is mandated by its importance, a football game is a voluntary social event.[40] But the majority emphasized the social desirability of attending and participating in extracurricular events and held that "'the State 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.'"[41] Although a football game takes place outside the hours and hallways of the school, it is still a part of the school and its officially sanctioned activities.[42]

Alternatively, the school district argued that the election by students was a "circuit-breaker" in the school's involvement in the invocation, thus precluding any finding of coercion.[43] Emphasizing prior attempts by the school to sanction student-led prayer, the majority argued that the election "reflects a device the District put in place that determines whether religious messages will be delivered at home football games."[44] The *Santa Fe* Court "refuse[d] to turn a blind eye to the context in which this policy arose, and that context quells any doubt that this policy was implemented with the purpose of endorsing school prayer."[45] Nor did

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37 *Id.* at 313-16.

38 *Id.* at 316. Professor Gey argues that the majority relied on *Lemon* to strike down the policy. Gey, *supra* note 7, at n.13. The majority opinion, however, seems to rely most heavily on *Lee* as well as the endorsement test.

39 *Id.* at 308.

40 *Id.* at 310.

41 *Id.* at 312 (quoting *Lee*, 505 U.S. 577,e596 (1992)).

42 At oral argument, the counsel for the respondent students noted that high school football in Texas was tantamount to being an obligatory social activity. Respondent's Oral argument, *Santa Fe Indep. Sch. Dist.*, 530 U.S. 290 (2000) (No. 99-62).

43 *Id.* at 305.

44 *Id.* at 311.

45 *Id.* at 315. The Court held that any assessment of the context of government activity must employ the "objective observer" test that Justice O'Connor formulated in her "endorsement" gloss on Lemon. "[O]ne of the relevant questions is 'whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive

the school intend to create an open forum when it limited student speech to an "invocation" "solemnizing" the event.[46]

Finally, the majority relied on the age of the students: "To assert that high school students do not feel immense social pressure, or have a truly genuine desire, to be involved in the extracurricular event that is American high school football is formalistic in the extreme."[47] Just as in *Lee*, the "voluntary" nature of the event does not cleanse it of any coercive purpose. The students are still susceptible to pressures, which while not formally exerted by the school, would require them to either attend and conform or stay away and protest.

While the school election in *Santa Fe* does provide a new twist to the coercion issues addressed by *Lee*, it essentially contemplates the same three issues: the institutional setting of the activity, the institution's control over that activity, and the impressionability/vulnerability of those within the institution. *Santa Fe* merely states that the coercion test in *Lee* cannot be circumvented by a majoritarian process. The *Santa Fe* Court observed that "the majoritarian process implemented by the District guarantees, by definition, that minority candidates will never prevail and that their views will be effectively silenced."[48] The *Santa Fe* ruling extends the boundaries of *Lee* to include older students, events that are arguably more peripheral to school matters, and procedures that carry out school wishes via appeal to majoritarian student sentiment. Like many lower court decisions, the Supreme Court in *Santa Fe* applied all three prongs of the *Lemon* test—purpose, effect, and entanglement, the endorsement test, and the *Lee* coercion test.[49]

B. AN ALTERNATIVE MODEL

The Founders envisioned the Establishment Clause as a bulwark against majoritarian oppression and coercion. Thus any present Establishment Clause standard should be assessed according to the Founders' understanding of the principles embedded in the First Amendment.[50] In

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it as a state endorsement of prayer in public schools.'" *Id.* at 307, (quoting *Jaffree*, 472 U.S. 38, 73 (1985)) (O'Connor, J., concurring in judgment). For Justice O'Connor, the "history and ubiquity" of a practice can sanitize its religious nature. "It is . . . the longstanding existence of practices . . . as well as their nonsectarian nature, that leads me to the conclusion that those particular practices . . . do not convey a message of endorsement." *County of Allegheny*, 492 U.S. 573, 630-31 (1989) (O'Connor, J., concurring in part and concurring in judgment).

[46] *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 303-06.

[47] *Id.* at 311 (quotation marks omitted).

[48] *Id.* at 304.

[49] *See generally* ACLU of New Jersey v. Black Horse Pike Reg'l Bd. of Educ., 84 F.3d 1471 (3d Cir. 1996); Ingebretsen v. Jackson Pub. Sch. Dist., 88 F.d 274 (5th Cir. 1994); Harris v. Joint Sch. Dist. No. 241, 41 F.3d 447 (9th Cir. 1994).

[50] The best source for determining the Founders' intent is to be found in *The Federalist*. James Madison, along with Alexander Hamilton and John Jay, under the name "Publius,"

Federalist No. 10, Madison cautions against the rule of majorities who can "sacrifice to its ruling passions and interest both the public good and the rights of other citizens."[51] To protect the public good and individual and minority rights against such "majority factions" is "the great object to which our inquiries are directed."[52] Madison warns that "[a] zeal for different opinions concerning religion [among other matters] . . ."[has] divided mankind into parties . . . and rendered them much more disposed to vex and oppress each other than to cooperate for their common good."[53] For Madison, this dilemma is resolved by the creation of a federal republic, with separate branches of government.[54] According to Madison, the size of the republic is essential, for the influence of any particular interest that would invade minority rights is attenuated by a more populous unit. The larger the republic the "less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength and to act in unison with one another."[55] Therefore, the Madisonian framework requires that different levels and branches of government act as a check on the excesses of majority factions that impinge on minority rights.

In 1785, Madison wrote his Memorial and Remonstrance in response to Patrick Henry's proposal to the Virginia legislature that, although no denomination could qualify as the official church of the state, an assessment should be established for the support of the "Christian Religion" in general.[56] Madison foresaw, in such an establishment of religion, harms to the individual, the state, the public good, and religion itself.[57] Madison argued "[r]eligion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate."[58] Madison saw Henry's bill as a betrayal of the ideal of the United States as a religious asylum, "degrad[ing] from the equal rank of Citizens all those whose opinions in

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jointly authored *The Federalist* in order to convince the thirteen original states to ratify the recently formulated Constitution. Two of the most famous essays in the collection, numbers 10 and 51, were written by Madison. JAMES MADISON ET AL., THE FEDERALIST PAPERS (George W. Carey & Willmoore Kendall eds., Arlington House, 1966) (1788).

51 *Id.* at 80.

52 *Id.* A faction is a "majority or minority . . . who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community." *Id.* at 78.

53 *Id.* at 79.

54 *See generally, id.* at 77-84, 320-25.

55 *Id.* at 83.

56 James Madison, *Memorial and Remonstrance, in* A DOCUMENTARY HISTORY OF RELIGION IN AMERICA TO THE CIVIL WAR 262-67 (Gaustad, E. ed., 1982).

57 *Id.*

58 *Id.* at 262.

religion do not bend to those of the religious authority."[59] Madison also believed state support would harm the religion itself, in that non-Christians would realize "that [Christianity's] friends are too conscious of its fallacies to trust it to its own merits."[60]

We can extract four principles from Madison's writings: 1) the purpose of republican government is to restrain the effects of majority rule on minority rights and the public good; 2) religious belief is one of those "inflaming passions" that can lead to majority oppressions; 3) the threat of majoritarian imposition is particularly acute in the smaller, more homogenous, units of the republic; and 4) government intervention in religious affairs violates the equal protection due to each group and individual. The adequacy of any Establishment Clause standard must be appraised according to Madison's principles and their corollaries.

II. THE LIMITATIONS OF THE COERCION PRINCIPLE

A. COERCION APPLIED TO THE "CIVIL RELIGION" CASES

"Civil religion" cases demonstrate the limitations of coercion analysis. These cases reveal that both the coercion test and the endorsement test require an ambiguous *de minimis* religious content in order to even trigger application of the respective tests. The term "civil religion" was coined by sociologist Robert Bellah and refers to practices that ceremonially invoke American religious origins and national loyalties in a largely nonsectarian, but clearly Judeo-Christian, tradition.[61] Another name for these practices is "ceremonial deism." Examples such as "the designation of 'In God We Trust' as our national motto, or the references to God contained in the Pledge of Allegiance to the flag can best be understood . . e as form[s of] 'ceremonial deism protected from Establishment Clause scrutiny chiefly because they have lost through rote religious repetition any significant religious content."[62] The best-known Supreme Court case on "ceremonial deism" is *Marsh v. Chambers*, in which the Court found that prayers at the beginning of a legislative session do not violate the Establishment Clause.[63]

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59 *Id.* at 265.

60 *Id.* at 264.

61 ROBERT N. BELLAH, BEYOND BELIEF: ESSAYS ON RELIGION IN A POST-TRADITIONAL WORLD (1970).

62 Lynch v. Donnelly, 465 U.S. 668, 716 (1984) (Brennan, J., dissenting) (citation omitted).

63 Marsh v. Chambers 463 U.S. 783 (1983). The Court noted that in "the very courtrooms in which the United States District Judge and later three Circuit Judges heard and decided this case, the proceedings opened with an announcement that concluded, 'God Save the United States and this Honorable Court.' The same invocation occurs at all sessions of this Court." *Id.* at 786. *Compare* Perry, *supra* note 22, at 317 n.71 (arguing that the practice in *Marsh* was unconstitutional because public funds were used for religious purposes).

The boundaries of "ceremonial deism" can be difficult to discern and limit. One scholar has observed that "[t]he implications of ceremonial deism are far-reaching because courts frequently employ this amorphous concept as a springboard from which to hold that other challenged practices do not violate the Establishment Clause."[64] In both *Lee* and *Santa Fe*, the dissenting justices claimed that the prayers at issue served a solemnizing purpose rather than embodying any kind of substantive religious content.[65] The idiom of ceremonial deism is often history or tradition, which validates a constitutionally questionable practice through long and repeated usage. In his dissent in *Lee*, Justice Scalia noted that "[t]he history and tradition of our Nation are replete with public ceremonies featuring prayers of thanksgiving and petition."[66]

In *Marsh*, the Court upheld the subsidized prayers in the Nebraska legislature because of its historical pedigree: "It can hardly be thought that in the same week Members of the First Congress voted to appoint and to pay a chaplain . . . and also voted to approve the draft of the First Amendment[,] . . . they intended the Establishment Clause of the Amendment to forbid what they had just declared acceptable."[67] It is not likely that such unambiguous historical evidence would be frequently available to dispose of difficult cases, however.[68]

The coercion standard basically employs two factors on a sliding scale: the content of the message conveyed, and the coercion employed in communicating that message (or, alternatively, the extent or degree of endorsement). In other words, a legislative prayer, like that in *Marsh*, would be impermissible if it contained sectarian, divisive, or preferential

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64 Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2086 (1996). Epstein argues that each finding of *de minimis* religious content erodes the Establishment Clause, providing an expanded array of analogies for each subsequent case containing colorable similarities. *Id.* at 2086-89.

65 The dissents in both cases take the schools' stated intent at face value. "The Court grants no deference to— and appears openly hostile toward—the policy's stated purposes, and wastes no time in concluding that they are a sham." *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 322 (Rehnquist, C. J., dissenting).

66 *Lee*, 505 U.S. at 632 (Scalia, J., dissenting). The original intent of the founding generation for the Establishment Clause, if determinable at all, is highly contested. See generally JON BUTLER, AWASH IN A SEA OF FAITH: CHRISTIANIZING THE AMERICAN PEOPLE (1990) for the "myth" of the Christian nation. "In this view the motives of exploration and emigration, colonial laws, revolutionary and army camp sermons, and calls for fast and thanksgiving days all demonstrated the nation's historic Christian practice. Laws passed to secure Christian allegiance in the populace now were taken to reflect it." *Id.* at 285.

67 *Marsh*, 463 U.S. at 790.

68 Note that the phrase "under God" was not added to the Pledge of Allegiance until 1954. *See* Act of June 14, 1954, Pub. L. No. 83-396, 68 Stat. 249 (1954) (codified at 36 U.S.C. § 172 (1994)).

sentiments that expressed more than Judeo-Christian "civil religion."[69] On the other hand, the nonsectarian, non-proselytizing nature of a prayer does not constitutionally save the practice if the Court determines that there has been endorsement and/or coercion.[70] This suggests that the two-step analysis provided in *Lee* must first meet a *de minimis* threshold of impermissible religious content.[71] If there is not a sufficiently religious component to the message, then the coercion/endorsement test does not apply; the difficulty is in defining *de minimis* or preferential.

The coercion and endorsement tests are unhelpful in creating a principled *de minimis* standard. A recent case from the Seventh Circuit highlights the inability of those two tests to resolve the borderline cases that raise issues of *de minimis* nonpreferentialism. In *Books v. City of Elkhart*, the court ruled that a monument on the grounds of the municipal building, inscribed with an amalgamation of Jewish, Protestant, and Catholic versions of the Ten Commandments, was unconstitutional as an establishment of religion.[72] Ignoring *Lemon's* third prong of "excessive entanglement," the court effectively applied the "endorsement" purpose and effects test.[73] Applying the "purpose" prong, the court made a refinement not required by Supreme Court rulings. According to the Seventh Circuit, "[g]iven the obvious religious nature of the text itself, it falls to the City of Elkhart to demonstrate that it has taken steps to 'obviate its religious purpose.'"[74] Since the tablet also failed the effects prong of the endorsement test, it would not have been sufficient for the city to affix a disclaimer to the monument, since the limited number of monuments on the grounds would lead a reasonable observer to conclude that

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69 *See Marsh*, 463 U.S. at 794-95 ("The content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief.").

70 *See Lee*, 505 U.S. at 590. "The suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds strikes us as a contradiction that cannot be accepted." Of course, that contradiction is exactly what the Court approved in the *Marsh* decision. In fact, the chaplain in *Marsh* had removed references to Christ in his prayers only after a Jewish lawmaker complained in 1980. *Marsh*, 463 U.S. at 793 n.14.

Justice Souter's concurrence in *Lee* emphasized that nonsectarian, nonpreferential messages sponsored by the government were impermissible because the intentions of the Founders precluded it and because judges should not be asked to make fine theological distinctions between sectarian pronouncements and supposedly harmless nonpreferentialism. *Lee*, 505 U.S., 609-31. For Justice Souter, *Marsh* was distinguishable because it did not direct "any religious message at the citizens . . . [the legislators] lead." *Id.* at 630 n.8. But if the imprimatur of the state is at issue, as Justice Souter suggests, then the intended audience of the message surely cannot be dispositive. Even so, constituents would surely hear such a message, no matter to whom it was "directed."

71 *See supra* text accompanying footnotes 23-25.

72 Books v. City of Elkhart, 235 F.3d 292 (7th Cir. 2000).

73 While acknowledging that *Lemon* "remains the prevailing analytical tool," the court basically applied the "endorsement" gloss of *Lemon*. *Id.* at 301.

74 *Id.* at 304 n.8.

"these Commandments are displayed on land designated by the government as 'hallowed ground.'"[75]

The coercion standard loses virtually almost all of its hermeneutic vitality when it is applied beyond the context of a closed environment. Justice Kennedy, who is the foremost proponent of a coercion-based approach to Establishment Clause cases, has differed with the Court in "religious display" cases similar to *Books*. In *Allegheny v. ACLU*, Justice Kennedy dissented from the majority in voting to uphold the display of a crèche in a county courthouse stairwell, framed by a sign saying "Glory to God in the Highest."[76] Kennedy argued that "[p]assersby who disagree with the message conveyed by these displays are free to ignore them, or even to turn their backs, just as they are free to do when they disagree with any other form of government speech."[77]

Thus, it seems, Justice Kennedy's coercion principle dissipates when it leaves the confines of the classroom (or any other milieu that the government dominates).[78] By narrowing the focus of Establishment Clause jurisprudence to the perspective of the person who is subjected to government ratification of religion and unable to dissent without attracting opprobrium, the coercion standard leaves the state free to embark on a program of religious approval and disapproval, as long as dissenters are free to turn their backs.[79] While Justice Kennedy recognizes a difference between free speech and Establishment Clause jurisprudence,[80] his concept of coercion remains focused on the significance to the individual (reasonable) dissenter, not on the significance of the message itself.[81] Furthermore, the more sophisticated the dissenter, the more he can fend for himself.[82] Therefore, if one fails to meet the criteria—vulnerable, susceptible, captive—then one has not been coerced, no

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75 *Id.* at 306. *Compare Pinette*, 515 U.S. 753, 782 (O'Connor, J., concurring).

76 County of Allegheny v. ACLU, 492 U.S. 573 (1989) (forbidding a crèche, while allowing display of a menorah, next to a Christmas tree and a sign reading "Salute to Liberty," in front of a courthouse). *Compare* Lynch v. Donnelly, 465 U.S. 668 (1984) (upholding the display of a crèche in Pawtucket, Rhode Island, which was surrounded by various secular Christmas items—Christmas tree, reindeer, Santa Claus house and sleigh).

77 *Allegheny*, 492 U.S. at 664 (Kennedy, J., concurring in the judgment in part and dissenting in part).

78 *See Lee*, 505 U.S. at 592 ("[P]rayer exercises in public schools carry a particular risk of indirect coercion. The concern may not be limited to the context of schools, but it is most pronounced there.").

79 Perhaps Justice Kennedy's views arise from looking at the Establishment Clause through the prism of free speech. If that is so, then institutional coercion begins to look like forced "indoctrination," while religious displays remain just so much background noise from the "public square" that the listener is free to filter out.

80 *Lee*, 505 U.S. at 591-92.

81 *Id.* at 592 ("[I]n the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce.").

82 *Id.* at 593 ("We do not address whether that choice [participation or protest] is acceptable if the affected citizens are mature adults . . .").

matter how strong the government assertion or how inconvenienced or outnumbered the dissenter is.

Justice O'Connor's endorsement test does not adequately deal with the concerns of the individual dissenter either. Her concurrence in *Pinette* argued that the "endorsement inquiry is not about the perceptions of particular individuals or saving isolated non-adherents from the discomfort of viewing symbols of a faith to which they do not subscribe."[83] Analogizing this reasonable observer to the "reasonable person" in tort law, Justice O'Connor says the inquiry is not "whether *any* person could find an endorsement of religion, whether *some* people may be offended by the display, or whether *some* reasonable person *might* think [the State] endorses religion."[84] This reasonable observer embodies a "community ideal,"[85] with a knowledge of the "history and context of the community and forum."[86]

Unfortunately, the "reasonable person" standard can lead to further condemnation of dissenters' beliefs. In *Books*, the dissenting opinion noted that the plaintiffs are "not reasonably informed citizens, but are demonstrating an outright hostility to religion . . . . which perhaps explains why, other than these two plaintiffs, no one complained to Elkhart about the Ten Commandments monument during the forty years it stood outside the Municipal Building."[87] The result, therefore, is that the complainant's reasonableness, not the permissibility of the government's message, becomes the measure of Establishment Clause adherence. In a Fifth Circuit case upholding "voluntary" prayer at a high school graduation, the court noted that dissenters "attending graduation to experience and participate in the community's display of support for the graduates . . . should not be surprised to find the event affected by community standards."[88] If this is the appropriate Establishment Clause standard, then the Madisonian framework has been turned on its head. Rather than protect the particularly vulnerable minority in a small, homogenous community, the endorsement test rules the minority's complaint invalid because it is outside the mainstream of community opinion.

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83 Capitol Square Advisory Rev. Bd. v. Pinette, 515 U.S. 753, 779 (1995) (concurring in judgment).

84 *Id.* at 780 (quoting Americans United for Separation of Church and State v. Grand Rapids, 980 F.2d 1538, 1544 (6th Cir. 1992)). Justice O'Connor argues that this does not favor the views of the majority over those of dissenters, or in Laurence Tribe's phrasing, "reasonable non-adherents." *Id.*

85 *Id.*

86 *Id.*

87 *Books*, 235 F.3d 277-78 (Manion, J., concurring in part and dissenting in part). One must inquire how Judge Manion knows that nobody complained in forty years.

88 Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963, 972 (5th Cir. 1992).

B. BALANCING THE ESTABLISHMENT CLAUSE WITH FREE SPEECH

One of the most contentious issues in Establishment Clause jurisprudence is the intersection of that clause of the First Amendment with the First Amendment guarantees of free speech. The Supreme Court has tried to balance the interests of religion and nonreligion. The balancing approach "means that religion will generally not be constitutionally entitled to benefits unavailable to nonreligion, nor will it be denied benefits that are generally available to nonreligion."[89] Predictably, the balancing approach "has pleased absolutely no one."[90]

Cases involving religion's role in the public sphere vis a vis other expressions have dominated the Court's docket over the last twenty years. For example, a state university must fund, from student activity monies, a student newspaper with a religious viewpoint when it funds other student endeavors in an attempt to stimulate public debate.[91] But the university is not constitutionally required to refund student activity fees devoted to groups with whom individual students do not agree.[92] In allowing registered student groups to use its facilities as a public forum, a university cannot refuse to extend such privileges to religious groups.[93] Any public school that receives public funds may not, if it opens its facilities to non-curricular student groups, deny equal access to student meetings with any religious or political content.[94] A school district that opens its doors to community and civic groups during evenings and weekends cannot exclude religious groups from such access.[95] Government may not exclude purely private religious speech from a traditional or designated public forum.[96] Religious speech that may be imputed to a school is not allowed when the school controls access to speech, thereby creating something less than a "limited public forum."[97] Commentators have noted that these cases could portend a sea change in Establishment Clause litigation strategies. The issue of "whether student-delivered prayers are allowed at public school graduation might be analyzed in terms of whether allowing them is a violation of the Establishment

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89 William P. Marshall, *What is the Matter with Equality?: An Assessment of the Equal Treatment of Religion and Nonreligion in First Amendment Jurisprudence*, 75 IND. L. J. 193 (2000).

90 *Id.* Marshall promotes the idea of equality, not as substantively superior to other theories of the religion clauses, but because it promotes "doctrinal stability." *See id.* at 215.

91 Rosenberger v. Rectors & Visitors of Univ. of Va., 515 U.S. 819 (1995).

92 Bd. of Regents of the Univ. of Wisc. Sys. v. Southworth, 529 U.S. 217 (2000).

93 Widmar v. Vincent, 454 U.S. 263 (1981).

94 Bd. of Educ. of Westside Cmty. Schs. v. Mergens, 496 U.S. 226 (1990).

95 Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993).

96 Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753 (1995) (This per se rule garnered only a four-vote plurality).

97 Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000).

Clause and also as to whether prohibiting them is an impermissible content-based discrimination against religious speech."[98]

Recently, the Supreme Court overturned a decision of the Second Circuit, which split with the Eighth Circuit.[99] In *Good News Club v. Milford Central School*, the Second Circuit found that an elementary school was allowed to exclude a religious group from using school property for worship services.[100] A chapter of the Good News Club, run by a local minister and his wife, purported to offer instruction "in moral values from a Christian perspective" for children ages six to twelve.[101] Its parent organization, a missionary organization called Child Evangelism Fellowship, provided material and training to Club leaders.[102] A typical Club meeting included memorization of Bible verses, a lesson taken from a specific Bible verse or story, singing songs and playing games.[103] Finally, a "challenge and invitation" segment, according to the materials, separates the children into groups of the "saved" and the "unsaved", the former being asked (in a typical lesson) "to give Him first place in your life" while the latter are asked "Will you believe on Him, trusting Him to save you?"[104]

The Club petitioned to use school property for its meetings after school.[105] The school, relying on its "Community Use Policy," which opened the school to the general public but forbade use for religious purposes, denied the request.[106] The school said that the instruction was not about " 'development of character and . . . morals from a religious perspective, but were in fact the equivalent of religious instruction itself.' "[107] The Club then sought an injunction against the school, based on, among other claims, free speech violations under the First and Fourteenth Amendments.[108]

The Second Circuit panel, recognizing that limits on speech are based on the nature of the forum, found that the Milford schools had

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98 CHEMERINSKY, *supra* note 5, at 995.

99 Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001).

100 202 F.3d 502 (2d Cir. 2000). *Cf.* Good News Club v. City of Ladue Sch. Dist., 28 F.3d 1501 (8th Cir. 1994).

101 202 F.3d at 504. The group takes its name from the "good news" of the gospel of Jesus Christ. *Id.*

102 *Id.*

103 *Id.* at 505-06.

104 *Id.*

105 *Id.* at 506.

106 *Id.* at 506-07.

107 *Id.* at 507. Groups granted permission to use the facilities included the Boy Scouts, the Girl Scouts, and 4-H. *Id.* at 504.

108 *Id.* at 507.

created a "limited public forum."[109] If restrictions on speech in a limited public forum are reasonable and viewpoint neutral, then they pass constitutional muster.[110] Relying on precedent, the court found that the exclusion of de facto religious worship/Sunday school from school facilities was reasonable, particularly given the perception of government sponsorship in an elementary school.[111] The requirement of viewpoint neutrality is qualified by the doctrine that speech protection extends only to "'expressive activity of a genre similar to those that government has admitted to the limited forum.'"[112] Although the school had previously allowed the Boy Scouts and Girl Scouts to use facilities for purpose of leadership and civics instruction, none of "these clubs' activities remotely approached the type of religious instruction and prayer provided by the Club."[113] Therefore, the restriction was content-based, which is allowed, not viewpoint-based, which is not.[114]

The *Good News* opinion of the Supreme Court rejected the reasoning of the Second Circuit and required the school to open its doors to religious organizations and activities of any kind when the school creates a limited public forum.[115] The majority effectively dodged questions regarding the nature of the Club's activities by "conclud[ing] that the Club's activities do not constitute mere religious worship, divorced from any teaching of moral values."[116] Justice Thomas darkly hints of persecution in the school's action and the Second Circuit's decision: "It is apparent that the unstated principle of the Court of Appeals' reasoning is its conclusion that any time religious instruction and prayer are used to discuss morals and character, the discussion is simply not a 'pure' discussion of those issues."[117]

While it may appear that the Court leaves open the possibility that a school may restrict its forum and exclude full-blown worship services

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109 *Id.* at 509. Note that the Supreme Court has held that "selective access does not transform government property into a public forum." Perry Educ. Ass'n. v. Perry Local Educators' Ass'n., 460 U.S. 37, 47 (1983).

110 *See Rosenberger*, 515 U.S. at 819-20, 829-30 (1995). The Court also held that speech restrictions may be permissible if they preserve the purpose of the limited forum.

111 *Milford*, 202 F.3d 502, 509.

112 *Id.* at 510 (quoting Travis v. Owego-Apalachin Sch. Dist., 927 F.2d 688, 692 (2d Cir. 1992)).

113 *Id.* at 511.

114 *Id. See generally* Supreme Court amicus brief for twenty scholars of religion; Brief for Appellant, *Milford*, 121 S. Ct. 296 (2000) (No. 99-2036) (arguing that religious content is impossible to separate from religious viewpoint).

115 533 U.S. 98.

116 *Id.* at 2102 n.4. As Justice Souter's dissent notes, the majority misstates the Second Circuit's decision when it says that "[d]espite Milford's insistence that the Club's activities constitute 'religious worship,' the Court of Appeals made no such determination." *Id.* The Appeals Court had stated that "it is difficult to see how the Club's activities differ materially from . . . 'religious worship.'" 202 F.3d at 510.

117 121 S. Ct. at 2102.

from its property, the Court's insistence that any religious activity is a "viewpoint" actually throws open the doors to religious activity whenever a school authorizes an airing of any "viewpoint." The *Good News* Court found "[t]he only apparent difference between . . [the showing of a film expressing opinions from a religious standpoint] and the activities of the Good News Club is that the Club chooses to teach moral lessons from a Christian perspective through live storytelling and prayer, whereas Lamb's Chapel [an earlier 'equal access' case][118] taught lessons through films."[119] Therefore, religious activity of any stripe is merely a "mode" of discussion and pedagogy, which must be granted equal access and time if the forum is even partially an open one.[120] Justice Souter, in dissent, noted that unless the broad generality of the ruling were somehow limited, "any public school opened for civic meetings must be opened for use as a church, synagogue, or mosque."[121]

One commentator, echoing Justice Souter, believes that this ruling must surely be the stopping point in majoritarian religious pressure. Due to the "equal access granted to religious student clubs, angry cries that religion has been banished from the public schools w[ill] lose their effectiveness in creating pressure for reintroducing officially sponsored religious exercises."[122] Yet there is no principled stopping point in the majority's opinion—religious exercises must always be granted equal access.[123] The *Good News* Court found that "[b]ecause allowing the Club to speak on school grounds would ensure neutrality, not threaten it, [the school district] faces an uphill battle in arguing that the Establishment Clause compels it to exclude the Good News Club."[124] In short, religion must always be given equal access even though a limited public forum can exclude certain other groups and topics.[125]

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118 Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993). Ironically, the *Milford* case involves the same New York law as that at issue in *Lamb's Chapel.*

119 121 S. Ct. at 2101.

120 Nor would it avail a school district to attempt to limit an equal access policy by restricting the purposes of the forum. Every forum topic touches on the welfare of the community and the moral and character development of children—these are the very purposes of education. Every discussion, therefore, triggers the equal access rule.

121 121 S. Ct. at 2117 (Souter, J., dissenting).

122 James L. Underwood, *Essay: Applying the Good News Club Decision in a Manner That Maintains the Separation of Church and State in Our Schools*, 47 VILL. L. REV. 281, 283 (2002).

123 *Leading Case*, 115 HARV. L. REV. 396, 402 (2001). "Good News makes clear that once a school district has adopted an access policy permitting any sort of activity related to character development, religious clubs need only frame their activities in such terms to fall within the district's limited public forum." *Id.*

124 121 S. Ct. at 2104.

125 It is worth noting that the Supreme Court has not been particularly solicitous of religious expression that is unorthodox or unconventional. *See, e.g.*, Employment Division v. Smith, 494 U.S. 872 (1990) (holding that laws of general applicability provide no exception for religious practitioners absent legislative intervention, in spite of disproportionate burden on

Furthermore, the *Good News* opinion lays the groundwork for future decisions in line with its holding by misstating and marginalizing precedent. Justice Thomas distinguishes the *Lee* decision by stating that coercion existed there because "attendance at the graduation exercise was obligatory."[126] Under this analysis, the whole "coercion" rationale can apply only when schools require attendance at school events. *Lee*, however, was not so limited in its scope. The majority in *Lee* determined that although a school does not require attendance at graduation exercises in order to receive a diploma, attendance, due to the importance of the event and peer pressure, is in a "fair and real sense obligatory."[127] This category of state actions is much wider than the merely obligatory. By sleight-of-hand, *Good News* adopts Scalia's dissent in *Lee*, which suggests that voluntary events can never be obligatory and that "psychological" coercion is a nonexistent phenomenon.[128]

Good News also skews the relevant unit of analysis for the coercion or endorsement test. In determining who would sustain coercive pressure, the *Good News* majority found that "the relevant community would be the parents, not the elementary school children."[129] In Justice Thomas's analysis, the perceptions of the children, those most affected, are "irrelevant," in spite of the Supreme Court's repeated assertions that young children deserve special protections.[130] Justice Souter disagreed, maintaining "the proper focus of concern in assessing effects includes the elementary school pupils who are invited to meetings, . . . who see peers heading into classrooms for religious instruction as classes end, and who are addressed by the 'challenge' and 'invitation.'"[131]

Not only does the majority opinion give short shrift to the perceptions of the most vulnerable, it also contemptuously dismisses the views of religious minorities, dissenters, or nonconformists. The Court refuses to "employ Establishment Clause jurisprudence using a modified heckler's veto, in which a group's religious activity can be proscribed on the basis of what the youngest members of the audience might mis-

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religious minorities); Heffron v. Int'l. Soc. for Krishna Consciousness, 452 U.S. 640 (1981) (upholding restrictions on nonmainstream religious expression under the time, place, and manner test).

126 121 S. Ct. at 2104.

127 505 U.S. at 586.

128 *Id.* at 638-39 (Scalia, J., dissenting). The *Good News* majority also misstates the holding in *Santa Fe* by distinguishing it as not involving a public forum. 121 S. Ct. at 2104. The *Santa Fe* Court held, following *Lee*, that a coercion analysis requires not only state involvement (the nature of the forum) but also a finding of coercion. *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 316.

129 121 S. Ct. at 2104.

130 See, *e.g.*, Bd. of Educ. of Westside Cmty. Sch. v. Mergens, 496 U.S. 226, 250 (1990); Sch. Dist. v. Ball, 473 U.S. 373, 390 (1985); Widmar v. Vincent, 454 U.S. 263, 274 n.14 (1981).

131 121 S. Ct. at 2119 n.4 (Souter, J., dissenting).

perceive."[132] Any religious minority might be safely classed as a "heckler" who is merely thwarting the majority's exercise of its religious and political muscle.

Even if the concerns of the "hecklers" are valid, the Court imposes a crude balancing test that truly enshrines majority will as controlling. The Court gives great weight to "countervailing constitutional concerns related to rights of other individuals in the community. In this case, those countervailing concerns are the free speech rights of the Club and its members."[133] The Court's calculus suggests that if a majority of an aggregated community prefers religious activities, which a minority sees as coercive or as government-endorsed, then the majority must carry the day. The Court declined to find "the danger that children would misperceive the endorsement of religion is any greater than the danger that they would perceive a hostility toward the religious viewpoint if the Club were excluded from the public forum."[134] In one conclusory sentence, the Court assumes that the perceptions of dissenters are "misperceptions" and validates the views of the majority. Rather than apply the endorsement test in a meaningful way or remand the case for more factual development, Justice Thomas "balances" dissenter "misperceptions" with majority "perceptions" and unsurprisingly finds the former lacking in substance.

Nor would de facto religious domination of an "open" forum ever present an Establishment Clause violation. The Court "would not find an Establishment Clause violation simply because only groups presenting a religious viewpoint have opted to take advantage of the forum at a particular time."[135] Although Justice Thomas had just cited Justice O'Connor's concurrence in *Pinette* to support the "heckler" theory, refusing to find de facto religious domination a violation runs directly counter to her concurrence, which represented the narrowest holding in *Pinette*. O'Connor took care to emphasize that the Establishment Clause could be violated even if the government neither intends nor actively encourages the endorsement of religion.[136] O'Connor stated that "at some point . . . a private religious group may so dominate a public forum that a formal policy of equal access is transformed into a demonstration of approval."[137] O'Connor argued that "[o]ur Establishment Clause jurisprudence should remain flexible enough to handle such situations when they arise . . . [T]he Establishment Clause inquiry cannot be dis-

132 *Id.* at 2106.

133 *Id.*

134 *Id.*

135 *Id.* at 2107 n.9.

136 *Pinette*, 515 U.S. 753, 777 (1995) (O'Connor, J., concurring in judgment).

137 *Id.*

tilled into a fixed per se rule."[138] *Good News* attempts to replace this "flexibility" with a per se rule that is explicitly disapproved in *Pinette.*

The *Good News* ruling could upset the result in cases like *Berger v. Rensselaer Central School Corporation.*[139] In *Berger*, a parent of elementary school children sued to enjoin the distribution of Bibles, by Gideon International, during classroom time.[140] The court took issue with the school's classification of the case as a free speech matter, which it called an attempted "definitional coup,"[141] on two grounds. First, children "cannot be expected to make subtle distinctions between speakers or instructors invited by the Corporation and those whose invitations are self-initiated."[142] Second, in spite of the fact that the school had allowed talks by the Boy Scouts and 4-H, the school would not allow all content into the forum, and Bible distribution was assumed to convey content, not viewpoint.[143]

The rationale of cases like *Berger* is in jeopardy,[144] creating a clash between the coercion doctrine of a "captive audience" and the interests of viewpoint neutrality.[145] There is an argument that Bible distribution is less "coercive" than the graduation prayers in *Lee*: a Bible can be returned to its giver in a way that a spoken prayer cannot. There is also the

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138 *Id.* at 778.

139 Berger v. Rensselaer Cent. Sch. Corp., 982 F.2d 1160 (7th Cir. 1993).

140 *Id.* at 1162.

141 *Id.* at 1165

142 *Id.* at 1166.

143 The school had also previously allowed the distribution of materials by the "Jesus' Love Foundation," which was, according to the plaintiff, "religious in its treatment of citizenship and lifestyle." *Id.* at 1163. If the plaintiff had objected to those materials, the case would have been closer to the facts in *Good News.* The court may have nonetheless relied on the age of the children and their inability to distinguish endorsement from an open forum in order to enjoin the practice.

144 This is assuming that the distribution of Bibles could also be classified as "viewpoint" in the same way that activities of the Good News Club convey general principles of citizenship and conduct comparable to those espoused by the Boy Scouts and 4-H. One commentator has suggested that the Court could have ruled that the Establishment Clause does not forbid permitting such activities, nor do free speech protections demand its accommodation. The result would be a patchwork of state laws that would either forbid, mandate, or allow such practices. *See* Michael C. Dorf, *The Supreme Court Case that Pits Free Speech Against Church-State Separation*, FINDLAW'S WRIT (Feb 21, 2001) *at* <http://writ.news.findlaw.com/dorf/20010221.html>. Such an approach would, from the perspective of the Madisonian framework, be the worst possible outcome. States and localities in which there is the political will and power to impose these regulations against the wishes of religious minorities would immediately enact such legislation. In those communities where dissenters are sufficiently powerful, such legislation could be effectively lobbied against. The result would be that the persons our system of government is designed to protect—the vulnerable, isolated, or powerless—would be most harmed by the Supreme Court's unwilllingness to lay down a firm constitutional principle.

145 The court in *Berger* resolved this dilemma by saying that a "designated public forum is a place. Children, of course, are not. Nor does it follow that, having opened a child's mind to one 'use,' the child's mind must be opened to all uses." *Berger*, 982 F.2d at 1167.

issue of which coercion test the Court would apply to the case. Justice Kennedy has stated that the government may engage in nominally religious speech as long as those "who disagree with the message conveyed by these [religious] displays are free to ignore them, or even to turn their backs, just as they are free to do when they disagree with any other form of government speech."[146]

The distribution of Gideon Bibles would involve no affirmative act by a student (she could merely sit in her seat and receive the Bible, either choosing to accept or reject it) since it does not "in effect require[ ] participation in a religious exercise."[147] Conceptually unable to resolve the dilemmas of a limited public forum issue, the coercion doctrine would perforce give way to either a *Lemon*-style analysis or an endorsement analysis. Or, perhaps even worse, the coercion doctrine would apply and would never violate the Establishment Clause as long as the speech is expressing a private viewpoint and the forum is public.[148] According to James Madison, this would leave the dissenter vulnerable to a majority who might "sacrifice to its ruling passions and interest both the public good and the rights of other citizens."[149]

C. COERCION AS LIMITING CONCEPT

The philosopher Alan Wertheimer has defined coercion claims as involving a coercer, A, who coerces B to do some act, X.[150] Coercive acts violate the voluntariness of people's actions, in which the will is "overborne" by some internal condition or external pressure, or when B can make a rational choice, but his volition is constrained by A.[151] Wertheimer theorizes that the law[152] uses a two-pronged theory of coercion,

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146 County of Allegheny v. ACLU, 492 U.S. 574, 664 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part).

147 *Lee*, 505 U.S. at 594.

148 *See Pinette*, 515 U.S. at 770. "Religious expression cannot violate the Establishment Clause where it (1) is purely private and (2) occurs in a traditional or designated public forum, publicly announced and open to all on equal terms." *But see* Gey, *supra* note 7, at 444 ("[P]rivate religious speech may be so dominant, so prominently placed, or so persistent that it becomes a fixture of the public forum . . . effectively forcing the dissenter out of the forum . . . [and sending] the message that he or she is not welcome as a full-fledged member of the political community.").

149 MADISON, *supra* note 49, at 80.

150 *See* ALAN WERTHEIMER, COERCION 5 (1987).

151 *See id.* at 9-10.

152 Werthheimer analyzes contract, tort, marriage, and criminal law, among other areas, in formulating his generalizations. Wertheimer thinks the law allows us to apply theories of coercion. "For better or worse, our moral views about coercion are somewhat inchoate. The law, by its very nature, attempts to make those inchoate beliefs reasonably consistent and explicit." *Id.* at 13. Yet he is wary of the outcome-oriented approach of the courts. "[T]he theory of coercion that underlies the law (if there is a theory) may derive from practical or policy considerations that would be ignored or rejected by the best philosophical account. The law . . . is bound to yield a conservative account of coercion." *Id.* at 14.

involving a choice and a proposal.[153] An act is legally coercive only if "(1) A's proposal creates a choice situation for B such that B has no reasonable alternative but to do X and (2) it is wrong for A to make such a proposal to B."[154]

One important factor in evaluating a legally cognizable coercion claim is the standard by which the coerced person, or person under duress, is to be judged. In contract law, the Restatement First on duress states that whether B would be coerced by A's proposal is determined by B's susceptibility, not that of an average or idealized person. The Restatement observes that "[p]ersons of a weak or cowardly nature are the very ones that need protection. The courageous can usually protect themselves."[155] In contrast, the criminal law, as embodied in the Model Penal Code, applies a variant of the reasonable person standard. "It is an affirmative defense . . . [if B] was coerced . . eby the use of, or a threat to use, unlawful force . . . which a *person of reasonable firmness in his situation* would have been unable to resist."[156]

Placing the concept of coercion within the context of Establishment Clause jurisprudence is a difficult task. Yet the Court in *Lee v. Weisman* attempted to make explicit a theory of coercion for the Establishment Clause.[157] Applying the two-pronged theory of coercion to Justice Kennedy's opinion, the school's proposal would have to 1) create a choice situation for Deborah Weisman 2) such that she had no choice but 3) to do an act, and 4) it would have to be wrong for the school to make such a proposal. Since the school chose to have a prayer and partially dictated its content,[158] it "place[d] objectors in the dilemma of participating, with all that implies, or protesting[,]"[159] thereby creating a choice situation.[160] Such a "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,"[161] thereby robbing the dissenter of a voluntary choice. As a result, "a reasonable dissenter could believe that the group exercise signified her own participation or approval of it."[162] Such a proposal is wrong since "the State cannot re-

153 *See id.* at 172.

154 *Id.*

155 RESTATEMENT (FIRST) OF CONTRACTS § 492 (1932).

156 MODEL PENAL CODE § 2.09 (2000) (emphasis added).

157 *Lee*, 505 U.S. 577.

158 *See id.* at 580-81.

159 *Id.* at 593.

160 The Court discounted the argument that Deborah Weisman could choose not to attend her junior high school graduation. "[T]o say a teenage student has a real choice not to attend her high school graduation is formalistic in the extreme." *Id.* at 595.

161 *Id.* at 593.

162 *Id.*

quire one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice."[163]

The Court also weighed in on the standard that should be applied in judging the reaction of the coerced person. The dissenter should be "reasonable."[164] Perhaps more importantly, the Court limited its finding, by both context and age of observer: "[w]e do not address whether that choice [between participation and protest] is acceptable if the affected citizens are mature adults, but we think the State may not, consistent with the Establishment Clause, place primary and secondary school children in this position."[165]

Despite its seemingly broad sweep, Justice Kennedy's coercion doctrine is so constricted that it is truly not applicable outside its narrow fact pattern; cases from the lower courts illustrate the limited reach of the doctrine. In *Tanford v. Brand*, an Indiana district court held that a nondenominational prayer at a college graduation was not a violation of the Establishment Clause.[166] The plaintiffs, two law students, a law professor, and an undergraduate,[167] were, according to the court, differently situated than Deborah Weisman. First, they represent adult dissenters, who should not "'reasonably . . . believe that the group exercise signifie[s] her own participation or approval' of the prayer or its religious message, but rather her tolerance or respect for the views of others."[168] Second, the graduation ceremony was large and impersonal,[169] so that a "nonadherent could dissent without being noticed and without fear of being identified as a nonconformist."[170] The district court found the prayer to be more like a prayer before a legislature, "'a tolerable acknowledgement of beliefs widely held among the people of this country.'"[171]

In a similar case, a faculty member at Tennessee State University filed a motion for a preliminary injunction against prayers at university functions, including graduation ceremonies.[172] After complaints from Dr. Chaudhuri, a professor of mechanical engineering, the university dis-

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163 *Id.* at 596.

164 *Id.* at 593.

165 *Id.*

166 *Tanford*, 932 F. Supp. 1139, *aff'd*, 104 F.3d 982 (7th Cir. 1997).

167 *Id.* at 1140.

168 *Id.* at 1144 (alteration in original).

169 *Id.* Over 30,000 people attended the graduation ceremony at issue. The court also noted that the law students had the "meaningful alternative[ ]" of attending the law school commencement, which had no invocation or benediction. *Id.*

170 *Id.*

171 *Id.* at 1146 (quoting Marsh v. Chambers, 463 U.S. 783, 792 (1983)). *Marsh*, however, was not decided on the innocuous nature of the prayer, but rather on the "unique history" of chaplaincy in the United States Congress. *See Marsh* at 791.

172 Chaudhuri v. Tennessee, 130 F.3d 232 (6th Cir. 1997).

continued its practice of including "invocations and benedictions at certain university events."[173] The President of the university informed graduation planners that a "moment of silence"[174] would be appropriate in lieu of prayers.[175] At graduation, "the speaker asked everyone to rise and remain silent . . . [A] group of people began to recite the Lord's Prayer aloud. Many audience members joined in . . . and loud applause followed."[176] School officials disavowed any advance knowledge of the spontaneous response.[177]

The Sixth Circuit distinguished *Lee* on several grounds, in finding both the prayers and the moment of silence to be constitutional.[178] First, Dr. Chaudhuri was encouraged, but not required, to attend university functions and graduation.[179] Second, even if he was obliged to attend, "[t]here was absolutely no risk that Dr. Chaudhuri . . . would be indoctrinated by exposure to the prayers."[180] Finally, "the obvious difference between plaintiffs such as Dr. Chaudhuri and children at an impressionable stage of life 'warrants a difference in constitutional results.'"[181] The court also applied the endorsement test, finding that a "reasonable observer, it seems to us, would conclude that the nonsectarian prayers delivered at TSU events were intended to solemnize the events and encourage reflection."[182]

These two cases reflect the institutional limits of a coercion (and endorsement) approach to the Establishment Clause. The only ways the *Tanford* and *Chaudhuri* ceremonies differ from that in *Lee* are that the plaintiffs were not children, the venue was a bigger one, and there was a decreased "obligation" to attend the ceremonies. But the Establishment Clause is premised on a more comprehensive theory. As the *Santa Fe* Court noted, "sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are

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173 *Id.* at 233.

174 The Supreme Court's only holding on a "moment of silence" is Wallace v. Jaffree, 472 U.S. 38 (1985), in which the Court struck down an Alabama statute since the only expressed purpose for the statute was to return voluntary prayer to the schools. *Id.* at 43. *But see* Bown v. Gwinnett, 112 F.3d 1464 (11th Cir. 1997), in which the court upheld a Georgia statute providing for a moment of quiet reflection in which students were neither encouraged to pray nor listen to the prayers of others.

175 *Chaudhuri*, 130 F.3d at 235.

176 *Id.*

177 *See id.*

178 *See id.* at 237-38.

179 *See id.* at 239.

180 *Id.*

181 *Id.*

182 *Id.* at 237. The only prayer in the factual record was a 1991 commencement prayer that mentioned God twice and the "Heavenly Father" five times. *Id.* at 234. The dissent noted the university's recent history of including invocations that called on Jesus Christ, and stated that "[t]he mere omission of the name Jesus Christ does not ipso facto render an otherwise Christian prayer neutral." *Id.* at 241.

nonadherents 'that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.'"[183]

The plaintiff's brief in *Chaudhuri* stated that limiting the coercion principle to the secondary school milieu of *Lee* would "turn the Establishment Clause into a children's rights measure."[184] Indeed, applying either the individualized duress standard in contracts or the Model Penal Code's "person of reasonable firmness in his situation"[185] standard would demand that courts analyze each coercion claim individually. Instead, the courts have chosen to create categories on which the validity of coercion claims will turn. It would not be "reasonable" for an adult dissenter to believe that her actions represent a coerced approval of state actions; instead her participation merely represents "her tolerance or respect for the views of others."[186] A "reasonable" adult dissenter, therefore, is different from a "reasonable" adolescent dissenter.

By conditioning the reasonableness of a dissenter's perceptions on his or her age, the lower courts' coercion analysis effectively transforms the test into Justice O'Connor's endorsement test. The endorsement test does not inquire "about the perceptions of particular individuals or saving isolated nonadherents from the discomfort of viewing symbols of faith to which they do not subscribe."[187] Rather, according to Professor Stephen Gey, "Justice O'Connor relays the message to religious minorities that their perceptions are wrong; or, even worse, that their perceptions do not matter."[188] More than simply suggesting "tolerance or respect for the views of others,"[189] the endorsement test requires such respect in the form of a dissenter's accommodation. It is a classic bootstrap argument: since these invocations are nothing more than the views of others that deserve tolerance and respect, then standing during them can signify nothing more than tolerance and respect.[190]

Rather than apply the individualized duress standards of contracts or criminal law in the Establishment Clause cases, the endorsement test ignores the individual in favor of the idealized observer. The *Pinette* Court

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183 *Santa Fe Indep. Sch. Dist.*, 530 U.S. 310 (quoting Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring)).

184 *Chaudhuri*, 130 F.3d at 239.

185 *See supra* notes 155-56 and accompanying text.

186 *Tanford*, 932 F. Supp. at 1144.

187 *Pinette*, 515 U.S. at 779 (O'Connor, J., concurring).

188 Gey, *supra* note 7, at 481.

189 *Tanford*, 932 F. Supp. at 1144.

190 This tautology demonstrates another of the drawbacks of the coercion approach: the requirement of an act. "[I]f 'the act of standing or remaining silent' during a graduation prayer is 'an expression of participation' in the prayer, why is walking by an overtly Christian display in respectful silence not also 'an expression of participation' in the display?" Gey, *supra* note 7, at 503.

stated that "the applicable observer is similar to the 'reasonable person' in tort law, who . . is "a personification of a community ideal of reasonable behavior, determined by the [collective] social judgment."[191] This approach violates two fundamental conclusions. First, it violates the Madisonian framework, which is dedicated to protecting the interests of minorities and the public good from the impositions of a majority faction.[192] Second, it imposes on religion, in all its diversity, a rationality and reasonableness that is inappropriate within the context of a Constitution that guarantees the free exercise of religion.[193]

III. CONCLUSION

There is no consensus on the Supreme Court that the coercion standard should be the measure of First Amendment Establishment Clause claims.[194] Furthermore, the scope of "coercion" remains largely undecided, with some justices advocating a narrow interpretation of the concept, while others advocate a more contextualized, broader conceptualization.[195] Scholars have argued that the coercion standard remains too imprecise and subject to case-by-case interpretation, making it even less predictable than the maligned *Lemon* test.[196]

This Note argues, however, that not only does the coercion standard lack any meaningful guiding definition, it also remains subject to its institutional matrix. The two leading cases applying the coercion standard, *Lee v. Weisman* and *Santa Fe v. Doe*, involve disputes in public schools. The similar settings of those cases—the nature of the institution, the extent of its control, and the vulnerability of those subject to its control—have an effect which skew the results and suggest that the coercion standard, when applied in different contexts, would not protect either religious liberty or restrain government action to a constitutionally sufficient

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191 *Pinette*, 515 U.S. at 780-81 (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 175 (5th ed. 1984)) (alteration in original).

192 As commentators have recognized in the context of free speech, "[i]f we must have a 'central meaning' of the First Amendment, we should recognize that the dissenters . . . stand at the center of First Amendment and not at its periphery." STEVEN H. SHIFFRIN, DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA 10 (1999).

193 The two fundamental ingredients of religion are: "beliefs (historical, mythological, theological, philosophical) and actions related to those beliefs (ethical, liturgical, social, political)." GAUSTAD, *supra* note 57, at 2. Therefore, to reduce religious belief to reason and rationality misconstrues and disserves the purposes of religion.

194 *See* Comm. for Public Educ. v. Nyquist, 413 U.S. 756, 786 ("[P]roof of coercion . . . [is] not a necessary element of any claim under the Establishment Clause.").

195 *See Lee*, 505 U.S. at 638 (Scalia, J., dissenting) ("I would deny that the dissenter's interest in avoiding *even the false appearance of participation* constitutionally trumps the government's interest in fostering respect for religion generally.") (emphasis in original).

196 *See* Gey, *supra* note 7, at 492.

degree. And where attendance is not mandatory or socially desirable, the test doesn't apply at all.[197]

The plurality in *Capitol Square Review and Advisory Board v. Pinette* did not use a coercion standard, but both its opinion and the concurrence of the endorsement test's greatest advocate, Justice O'Connor, suggests the triumph of the coercion paradigm.[198] If a space is "open to a wide variety of uses"[199] and "the government has not fostered or encouraged"[200] the appearance that private speech is state-sponsored, there can be no Establishment Clause violation. This rule suggests that a dissenter is not protected from any private speech on any multi-use government property, even if that property becomes a de facto church, so dominated by one religious group that the property is perceived to be theirs. Since the dissenter can always turn his back or walk away, he is not being coerced to do anything.

Similarly, the "reasonable observer" test of the endorsement standard leaves the non-mainstream dissenter out in the cold. According to O'Connor, the "state has not made religion relevant to standing in the political community simply because a particular viewer might feel uncomfortable."[201] The endorsement test is not about "saving isolated nonadherents from . . . discomfort."[202] The Establishment Clause is not subject to a "heckler's veto."[203] This "objective" test has been referred to as the Court's "We Know It When We See It" Establishment Clause jurisprudence.[204] As long as no "reasonable" person has been made to feel that she is less than a full-fledged citizen because of government involvement with religion, then any harm is negligible.

James Madison argued that governmental protections of the religious and nonreligious should be especially solicitous of the minority dissenter, particularly where her numbers are so small that the majority pays little heed to her community status.[205] The case of a junior high school student in Texas illustrates the necessity of such protection. Prayers at her school were conducted at graduation, at awards ceremonies, and before and after basketball games.[206] Gideon Bibles were distributed in fifth grade and the school's choir often sang explicitly Christian songs.[207] When she elected not to participate in the basketball game prayers, one

197 *Good News*, 121 S. Ct. 2093.
198 *Pinette*, 515 U.S. 753.
199 *Id.* at 762.
200 *Id.* at 766.
201 *Id.* at 780 (O'Connor, J., concurring in part and concurring in the judgment).
202 *Id.* at 779 (O'Connor, J., concurring in part and concurring in the judgment).
203 *Good News*, 121 S. Ct. at 2106.
204 *See* Gey, *supra* note 7, at 447.
205 *See supra* notes 50-60 and accompanying text.
206 Doe v. Duncanville Indep. Sch. Dist., 994 F.2d 160, 161-63 (5th Cir. 1993).
207 *Id.*

spectator yelled out "Isn't she a Christian?" and her history teacher subsequently called her "a little atheist."[208] All statements could be constitutionally permissible, if the definition of coercion or endorsement were sufficiently narrow. The Madisonian framework of the First Amendment was intended to protect religious minorities, dissenters, and nonconformists from the impositions of the majority: current Supreme Court doctrine augurs the abandonment of that principle.

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[208] *Id.* at 162-63.