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Making a Case for a Age-Sensitive Establishment Clause Test

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MAKING A CASE FOR AN AGE-SENSITIVE ESTABLISHMENT CLAUSE TEST

I. INTRODUCTION

The Milford Central School District opened its school building after normal school sessions to use by the community for activities related to "instruction in any branch of education, learning or the arts" and for "social, civic and recreational meetings and entertainment events, and other uses pertaining to the welfare of the community."[1] This community use policy was developed pursuant to New York Education Laws § 414, which gives local school boards the authority to "adopt reasonable regulations" governing the use of school property for public purposes.[2] The Milford community use policy also contained the restriction that school property could not be used for religious purposes.[3]

The Good News Club, a group whose self-proclaimed purpose is to "instruct children in family values and morals from a Christian perspective,"[4] sought permission to hold their weekly meetings in the Milford Central School building after the close of the regular school day.[5] The Club previously met at the Milford Center Community Bible Church, and the Milford School District provided students with bus transportation to the meetings. The district had, however, discontinued the bus

1. *The Good News Club v. Milford C. Sch.*, 533 U.S. 98, 102 (2001).

2. N.Y. Educ. Laws § 414 (McKinney 2000).

3. *Good News*, 533 U.S. 98, 102. New York Education Laws § 414 lists specific uses to which school facilities may be put, although it does not specifically include or exclude use of the buildings by religious organizations or for religious purposes. The statute mentions religion in two contexts, stating that admission fees charged for activities occurring in the school building may not benefit religious organizations and that graduation exercises held by the school may not include a religious service. The validity of the use policy exclusion of religious use was not an issue in this case, although an argument could be made that such a restriction was not authorized by the statute.

4. *The Good News Club v. Milford C. Sch.*, 21 F. Supp. 2d 147, 149 (N.D.N.Y 1998).

5. *Id.*

service in 1996.[6]

The interim superintendent denied the Club's request to use the school building on the ground that the content of club meetings was "the equivalent of religious worship."[7] In arriving at this characterization of the Club's activities, the superintendent relied on materials provided by the Club that were used in teaching lessons at Club meetings.[8] The Milford school board later upheld the superintendent's decision.[9] The Club brought suit, alleging that the school board's refusal to allow them use of the building infringed upon their free speech rights.[10] The district court granted summary judgment for Milford, finding that the Club engaged in religious instruction and that the proposed use was therefore in violation of the use policy.[11] The Second Circuit affirmed;[12] the Club appealed, and the Supreme Court granted certiorari.[13]

In a six to three decision, the Supreme Court held that Milford violated Club members' free speech rights by denying them access to the school building after regular school sessions.[14] The Court reasoned that while Milford had established a limited public forum from which some forms of speech might be excluded, speech could not be barred from the forum solely on the basis of its viewpoint.[15] The Court held that

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6. *Id.*

7. *Good News*, 533 U.S. at 103.

8. *The Good News Club v. Milford C. Sch.*, 202 F.3d 502, 507 (2d. Cir. 2000). An excerpt, included in the district court's opinion is characteristic of the nature of these materials. In one lesson, outlined in a guide for teachers, children are to be instructed that "If you have received the Lord Jesus as your Saviour from sin, you belong to God's special group – His family. . . . If you obey God, you'll not be ashamed when the Lord Jesus comes. . . . Just as the Lord Jesus rose again from the dead, those who believe in Him will also be raised from their graves. If you should die before the Lord Jesus comes again, your body will be placed in a grave. But when he gives the signal, your body will be raised from the grave; it will be changed into a body like that of the Lord Jesus; and you will be caught up to meet Him in the air. . . .When you tell someone of the Lord Jesus and he receives Him as Saviour from sin, both of you are made glad. If a person does not receive the Lord Jesus as Saviour, he will not be able to go to Heaven." *Good News*, 21 F. Supp. 2d at 155–56.

9. *Good News*, 533 U.S. at 103.

10. *Id.* The Club initially also made arguments under Fourteenth Amendment Equal Protection and the Religious Freedom Restoration Act of 1993, but the Court only considered the free speech issue. *Id.* at 98.

11. *Good News*, 21 F. Supp. 2d at 160.

12. *Good News*, 202 F.3d at 504.

13. *Good News*, 533 U.S. at 98.

14. *Id.* at 102.

15. *Id.* at 107.

by denying the Club access to the school building, Milford engaged in viewpoint discrimination because it allowed other groups that addressed the social and moral development of children to meet in the building.[16] The Court also rejected Milford's Establishment Clause defense, stating that Milford could not legitimately argue that allowing the Club to meet in the school building would lead to the perception that the school endorsed the Club's activities or that the community would feel coerced to participate in them.[17] In coming to this decision, the Court rejected the argument that the age of the children involved required special consideration of the Establishment Clause issue.[18]

The purpose of this article is to show that the Court should have considered the age of the children involved in this case in determining whether permitting the Club to meet in the school would violate the Establishment Clause and to propose a test that would allow the Court to make an age sensitive determination without deviating from established precedent. Part II gives an overview of recent cases considering Establishment Clause challenges to a religious presence in public schools to highlight the factors the Court has used in deciding these cases. Part III briefly reviews free speech jurisprudence in public schools as an example of an area of constitutional interpretation where the Court has considered the age of schoolchildren in determining the scope of a constitutional right. Part IV proffers arguments that the Court should consider the age of the audience of a religious message in Establishment Clause cases, both from dicta in previous cases and from the various amicus briefs submitted in support of Milford. Part V outlines an age-sensitive Establishment Clause test for use in public school cases.

II. CURRENT STATE OF ESTABLISHMENT CLAUSE JURISPRUDENCE

The Supreme Court has consistently struggled with Establishment Clause cases.[19] The Court has developed a

16. *Id.* at 111.

17. *Id.* at 113–114.

18. *Id.* at 114–115.

19. *See* Ronna G. Schneider, *Getting Help with Their Homework: Schools, Lower Courts, and the Supreme Court Justices Look for Answers Under the Establishment*

number of tests in deciding these cases, and the individual justices have widely varying opinions as to how Establishment Clause challenges to state action should be decided.[20] The most concrete Establishment Clause test was constructed by the court in *Lemon v. Kurtzman*.[21] The *Lemon* test outlined three factors to use in determining whether government action constituted an impermissible establishment of religion. A violation was found if: (1) the action did not have a secular purpose, (2) the action had a primary effect of advancing or inhibiting religion, and (3) the action involved excessive government entanglement with religion.[22] The Court has since strayed from *Lemon* without officially overruling it, leaving Establishment Clause jurisprudence in a mild state of confusion.[23]

A. *Board of Education v. Mergens*[24]

In 1990, in *Board of Education v. Mergens*, the Court, relying solely on the *Lemon* test, denied a school's Establishment Clause defense. The Court considered a

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Clause, 53 Admin. L. Rev. 943, 943–44 (2001) ("Yet the Court's Establishment Clause jurisprudence, at least in the last two decades, has lacked clarity, certainty, and consistency. The Court's last decision of the century and the first three decisions of the new millennium illustrate this judicial dissention. An analysis of those four Supreme Court decisions, as well as the lower court decisions that have subsequently grappled with Establishment Clause issues in the school context reflect the Court's sometimes shifting, and usually divided, Establishment Clause jurisprudence."); Lisa Langendorfer, Comment, *Establishing a Pattern: An Analysis of the Supreme Court's Establishment Clause Jurisprudence*, 33 U. Rich. L. Rev. 705, 705 (1999) ("The Establishment Clause has been greatly litigated, with more than seventy cases decided by the United States Supreme Court since the 1940s, yet the Court has been unable to agree for any amount of time on a standard method for determining if the Establishment Clause has been violated.").

20. Schneider, *supra* n. 19 at 956–57 (discussing the various positions of the Justices on Establishment Clause issues); Langendorfer, *supra* n. 19 (outlining the tests used in Establishment Clause cases and explaining the perspective of each current justice on this issue); Penny J. Meyers, Note, *Lemon is Alive and Kicking: Using the Lemon Test to Determine the Constitutionality of Prayer at High School Graduation Ceremonies*, 34 Val. U. L. Rev. 231 (1999) (reviewing the various tests used in Establishment Clause cases).

21. 403 U.S. 602 (1971).

22. *Id.* at 612–13.

23. Schneider, *supra* n. 19, at 960–95 (analyzing lower courts' struggle to apply the Court's inconsistent Establishment Clause precedent); Langendorfer, *supra* n. 19, at 709–10 (discussing the Court's failure to use the *Lemon* test consistently).

24. 496 U.S. 226 (1990).

challenge to the Equal Access Act,[25] which prohibits public secondary schools that receive federal funding from denying access to a limited public forum by student groups based on the content of the speech expressed at their meetings.[26] The Court found that each of the factors of the *Lemon* test were met and subsequently rejected the school's Establishment Clause argument.[27] The Court concluded that the Act's purpose of preventing discrimination on the basis of speech was a sufficient secular purpose.[28] In determining whether the Act had a primary effect of advancing religion, the Court considered whether there was a risk that students in the school would perceive government endorsement of religion by allowing such groups to hold meetings in the building.[29] The Court held that high school students were mature enough to understand that schools "do not endorse everything they fail to censor" and that the Act's requirement that school officials not participate in religious group meetings obviated any further risk that students would perceive endorsement.[30] The Court also held that having a faculty member oversee meetings for administrative purposes did not amount to excessive government entanglement with religion.[31]

B. Lamb's Chapel v. Center Moriches Union Free School District[32]

The Court's analysis in *Lamb's Chapel* presents a move away from the *Lemon* test. Lamb's Chapel applied to use school facilities to show a film series offering a religious perspective on child-rearing and other family issues.[33] The school district denied the request because of the religious content of the films.[34] The district argued on appeal that allowing the films to

25. 20 U.S.C. § 4071 (2001).

26. 20 U.S.C. § 4071(a) (2001).

27. *Mergens*, 496 U.S. at 248–49.

28. *Id.*

29. *Id.* at 250.

30. *Id.* at 250–51.

31. *Id.* at 253.

32. 508 U.S. 384 (1993).

33. *Id.* at 388.

34. *Id* at 389. The school district had adopted a community use policy that prohibited use of school facilities "by any group for religious purposes," pursuant to state law. *Id.* at 387.

be shown in the school would violate the Establishment Clause.[35]

In rejecting the Establishment Clause justification for denying Lamb's Chapel access to the school facilities, the Court referred to the *Lemon* test and held that the state action in this case was permissible.[36] The Court did not engage in an in-depth application of the *Lemon* factors to the facts of this case but simply referred to the test and stated that it rendered the district's action impermissible.[37] The Court instead focused on why there was no danger of the community perceiving government endorsement of religion if the school allowed the film series to be presented by the church.[38] Because the films were to be shown after school hours and would have been open to the public, and considering that the building had been used for other community purposes, the Court reasoned that perception of endorsement was not a reasonable fear in this case.[39] The Court also stated that any benefit to religion "would have been no more than incidental."[40]

While the majority in this decision seemed to silently discredit *Lemon,* Justice Scalia's concurrence directly voiced his dissatisfaction with the *Lemon* test. In his concurring opinion, Scalia harshly criticized the majority for using the *Lemon* test, arguing that six of the nine justices had rejected the test in previous cases.[41] He accused the Court of arbitrarily applying *Lemon* to regulate government action. [42]

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35. *Id.* at 395.

36. *Id.*

37. *Id.*

38. *Id.* (In considering endorsement, the Court relied on its opinion in *Widmar v. Vincent*, 454 U.S. 263, 272 (1981), where the Court stated that the challenged government activities did not "endorse or promote any of the particular ideas aired there.") The *Widmar* Court did, however, base its decision on the *Lemon* test. *Id.* at 271.

39. *Lamb's Chapel*, 508 U.S. at 395.

40. *Id.*

41. *Id.* at 398 ("As to the Court's invocation of the *Lemon* test: Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District.").

42. *Id.* at 399.

C. *Rosenberger v. TheUniversity of Virginia*[43]

Following the Court's lukewarm treatment of the *Lemon* test in *Lamb's Chapel*, its decision in *Rosenberger* marked a further departure from this precedent. In this case, student editors of a religious magazine brought suit against the University for refusing to fund the publication, alleging, *inter alia*, that refusal based on the content of the magazine violated their free speech and press rights.[44] The University defended its action as necessary to avoid violating the Establishment Clause.[45]

In rejecting the University's argument, the Court omitted any direct reference to *Lemon*, focusing instead on the concept of neutrality and stating that a government program that is neutral towards religion will not violate the Establishment Clause.[46] The Court determined that a government program that extends benefits to all groups, regardless of religious content or perspective, ensures the desired neutrality.[47] The Court alluded to some of the *Lemon* factors, stating that a court must determine the purpose of the action[48] and must consider the effects of the action, although the effects inquiry was framed in terms of perception of endorsement.[49] While the Court briefly mentioned these other considerations, the holding was based on the neutrality concern.[50]

D. *Good News*[51]

By the time the Court heard *Good News*, there was no clear method for deciding Establishment Clause cases challenging religious group access to public schools. The Court seemed to

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43. 515 U.S. 819 (1995).

44. *Id.* at 827. The group also argued that the University's actions violated their free exercise of religion and created an equal protection problem. *Id.*

45. *Id.* at 828.

46. *Id.* at 839.

47. *Id.*

48. *Id.* at 838–39.

49. *Id.* at 841–42.

50. *Id.* at 845–6. ("The neutrality commanded of the State by the separate Clauses of the First Amendment was compromised by the University's course of action. . . .That course of action was a denial of the right of free speech and would risk fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires.").

51. *Good News*, 533 U.S. 98.

have taken Justice Scalia's admonitions in *Lamb's Chapel* to heart and implicitly put the *Lemon* test to rest in *Rosenberger*. *Lamb's Chapel* emphasized the importance of limiting any perception of government endorsement of a religious message in schools while *Rosenberger* added the element of government neutrality towards religion. In *Good News,* the Court's application of both factors led to its conclusion that allowing the Good News Club (hereinafter "Club") to meet in the school building did not violate the Establishment Clause.

1. Neutrality

The Court flatly rejected any suggestion that Milford's refusal to allow the Club access to the school met the neutrality requirement.[52] In fact, the Court expressed concern that the community would perceive government hostility towards religion if the school district was allowed to prohibit the Club from using school facilities for its meetings.[53] While the Court did not expressly label it as such, this concern is related to neutrality. Because other groups were permitted to use the school building according to the community use policy, the Court found that reasonable members of the public could interpret a prohibition of religious groups as an expression of government hostility toward such groups.[54]

2. Endorsement

The Court's consideration of the endorsement issue in *Good News* had two components: (1) the risk of perception of school endorsement and (2) a corresponding risk that the community would subsequently feel coerced to participate in the religious activities.[55] The Court considered the coercion issue first and decided that the relevant audience for its inquiry was the parents of the elementary school children, because the children needed their parents' permission to attend Club meetings.[56]

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52. *Id.* at 114 ("The Good News Club seeks nothing more than to be treated neutrally and given access to speak about the same topics as are other groups. Because allowing the Club to speak on school grounds would ensure neutrality, not threaten it, Milford faces an uphill battle in arguing that the Establishment Clause compels it to exclude the Good News Club.").

53. *Id.* at 118.

54. *Id.*

55. *Id.* at 114-15.

56. *Id.* at 115.

The Court concluded that it was not reasonable to argue that the parents of Milford school children would believe that the school supported the religious message of the Club.[57] The Court then stated that the need for parental permission obviated any risk that the children would be coerced into participating in Club activities.[58] The Court reasoned that the children could not be coerced because their parents would not be confused about endorsement.

After deciding that the parents were the only relevant audience, the Court went on to address the argument that the children themselves would perceive school sponsorship of the Club.[59] The Court found that there were insufficient facts to demonstrate that children attending the school would be affected by the presence of the Club.[60] The Court concluded its Establishment Clause discussion on a harsh note, stating that even if there was a risk that the children would perceive endorsement, this would not be sufficient to uphold Milford's rejection of the Club: "We decline to employ Establishment Clause jurisprudence using a modified heckler's veto, in which a group's religious activity can be proscribed on the basis of what the youngest members of the audience might misperceive."[61]

While the Court repeatedly asserted that the decisions in *Lamb's Chapel* and *Rosenberger* compelled the holding in *Good News*,[62] the facts of these previous cases are distinguishable. The Court could reasonably have held that Milford's actions were justified without calling into question the continued

57. *Id.*

58. *Id.*

59. *Id.* at 117–18.

60. *Id.* (The Court's reasoning for this assertion is somewhat confusing. This section addresses both children who would be Club members and those who just attend the regular sessions of the school but doesn't clearly differentiate between the two in describing what facts control. "There is no evidence that young children are permitted to loiter outside classrooms after the school day has ended. Surely even young children are aware of events for which their parents must sign permission forms. The meetings were held in a combined high school resource room and middle school special education room, not in an elementary school classroom. The instructors are not schoolteachers. And the children in the group are not all the same age as in the normal classroom setting; their ages range from six to twelve.").

61. *Id.*

62. *Id.* at 107 (in the context of viewpoint discrimination), 113-16 (in the context of the Establishment Clause).

viability of these cases.[63] The Court could have used this case as an opportunity to clean up Establishment Clause jurisprudence and create a test for use in public school cases that would offer guidance to lower courts and local school boards.

E. A New Approach

The Supreme Court has attempted to develop one test for use in all Establishment Clause cases. The *Lemon* test, although the most organized of these attempts, has proved insufficient for general use, as evidenced by the Court's selective use of its factors.[64] In recent Establishment Clause cases, the Court has, in effect, used different tests for different kinds of cases without acknowledging or providing a coherent explanation for its reasons for doing so, as the previous discussion of relevant cases suggests.[65]

In her concurrence in *Board of Education v. Grumet*,[66] Justice O'Connor recognized the Court's unwillingness to use *Lemon* in all circumstances and its struggle to compose a

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63. The challenged religious activity in *Lamb's Chapel* was to take place in the evening and was intended for adults, not the children who attended the school. *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 959 F.2d 381, 384 (2d Cir. 1992). This is distinguishable from *Milford,* where the Good News Club sought access to the children themselves. *Rosenberger* can easily be distinguished on the facts because it dealt with a college, rather than an elementary school. The students were much older and the religious presence was introduced by members of the college community, rather than an outside religious organization, as was the case in *Milford*. The Court in *Rosenberger* also had to consider the effects of their decision on freedom of the press, as the activity in question was the publication of a student newspaper. *Rosenberger*, 515 U.S. at 835.

64. *See Lamb's Chapel,* 508 U.S. at 398 (Scalia, J., dissenting) ("Over the years, however, no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's [the *Lemon* test] heart. . . and a sixth has joined an opinion doing so . . . 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."); *see e.g.* Schneider, *supra* n. 19, 944–45 (describing how Justice O'Connor adjusted the prongs of the *Lemon* test in deciding *Agostini v. Felton*, 521 U.S. 203 (1997)).

65. *See e.g.* William F. Cox, *The Original Meaning of the Establishment Clause and its Application to Education*, 13 Regent U. L. Rev. 111, 122 (2000-2001) ("A uniform standard for interpreting the Establishment Clause has escaped the Supreme Court. Sometimes, for instance, parochial institutions and/or attendees are denied monies or resources because they foster religious orientation. At other times, similar resources are allowed for parochial institutions because to instill safeguards to keep the resources pointed in a secular direction constitutes excessive entanglement with religion that is equally unconstitutional.").

66. 512 U.S. 687 (1994).

singular test for use in Establishment Clause cases.[67] She warned that attempting to stretch one rule to accommodate all Establishment Clause cases may have negative effects on this jurisprudence: "And setting forth a unitary test for a broad set of cases may sometimes do more harm than good. Any test that must deal with widely disparate situations risks being so vague as to be useless."[68] O'Connor argued that the Court should be willing to develop different tests for different kinds of Establishment Clause cases:

> But the same constitutional principal may operate very differently in different contexts. We have, for instance, no one Free Speech Clause test. We have different tests for content-based speech restrictions, for content-neutral speech restrictions, for restrictions imposed by the government acting as employer, for restrictions in nonpublic fora, and so on. This simply reflects the necessary recognition that the interests relevant to the Free Speech Clause inquiry – personal liberty, an informed citizenry, government efficiency, public order, and so on – are present in different degrees in each context.[69]

The Court should look to First Amendment jurisprudence for guidance in establishing a new Establishment Clause approach. As Justice O'Connor noted, the area of free speech is one in which the Court has developed multiple tests for determining whether the government has violated individual rights. This is also an area where the Court has considered the age of the audience of a particular message in determining whether the speaker should be able to express their message in a given forum.[70] The next section of this paper briefly reviews free speech jurisprudence in public school cases as an example of how the Court could approach the Establishment Clause.

III. FREE SPEECH IN PUBLIC SCHOOLS

The quintessential student speech case is *Tinker v. Des Moines Independent Community School District*, decided in

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67. *Id.* at 718 (O'Connor, J., concurring).

68. *Id.*

69. *Id.*

70. *See infra* Part III (discussing free speech cases where the Court considers the age of the audience).

1969.[71] In this case, a handful of students wore black armbands to school to show their objection to the Vietnam War.[72] The principal of the school learned of the plan to wear the armbands and adopted a school policy that any student wearing one would be suspended until he or she returned to school without it.[73] The students in this case wore the armbands despite the policy and were suspended from school for almost a month.[74] The students brought suit challenging this policy on the ground that it violated their right to free speech.[75]

The Supreme Court recognized the students' First Amendment right to free speech and found the school policy to be unconstitutional.[76] The Court's reasoning can be summarized in the oft-cited quote: "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[77] The Court further stated that such a stifling of student speech or expression can only be justified where the school administrators have reason to think that such speech would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school."[78]

Since deciding *Tinker*, the Court has qualified the right of students to uninhibited speech in public schools. In two subsequent cases, the Court upheld restrictions on student speech, largely due to concerns for the younger members of the audience.

A. Bethel School District v. Fraser[79]

In *Bethel School District v. Fraser,* the Court recognized that the age of an audience was an essential consideration in situations where a student's right to free speech was asserted. Matthew Fraser, a high school student, made a speech nominating one of his friends as a candidate for student

71. 393 U.S. 503 (1969).
72. *Id.* at 504.
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.* at 514.
77. *Id.* at 506.
78. *Id.* at 509 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (1966)).
79. 478 U.S. 675 (1986).

government at an assembly that all students were required to attend.[80] He was later suspended because school administrators considered his speech to be obscene, therefore violating a disciplinary rule prohibiting the use of obscene or profane language.[81] Fraser brought suit challenging his suspension, arguing that the school's action violated his right to freedom of speech.[82]

The Court upheld the school's disciplinary action.[83] Acknowledging that *Tinker* protected student speech, the Court also recognized that "the constitutional rights of students in public schools are not automatically coextensive with the rights of adults in other settings."[84] The Court asserted that school officials have the authority to prohibit or punish speech that "would undermine the school's basic educational mission."[85] In support of its holding, the Court referred to a number of cases where it limited First Amendment rights in order to protect children from sexually explicit speech.[86] In deciding *Fraser,* the Court emphasized the potentially negative effects of Fraser's speech on the younger students in attendance: "The speech could well be seriously damaging to its less mature audience, many of whom were only fourteen years old and on the threshold of awareness of human sexuality."[87]

The *Fraser* Court also recognized the school's role as protector of children when acting *in loco parentis.*[88] Considering the advisability of judicial intervention in these cases, the Court stated that the school board is the most appropriate body to make decisions concerning whether certain types of speech are acceptable in public schools.[89]

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80. *Id.* at 677.

81. *Id.* at 678.

82. *Id.* at 679.

83. *Id.* at 685.

84. *Id.* at 682 (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 340–42 (1985)).

85. *Id.* at 685.

86. *Id.* at 684–85. (*referring to Ginsberg v. N.Y.*, 390 U.S. 629 (1968) (upholding a statute banning the sale of sexually explicit material to minors); *Bd. of Educ. v. Pico*, 457 U.S. 853 (1982) (allowing a school board to remove books from a school library that are "vulgar"); *F.C.C. v. Pacifica Found.*, 438 U.S. 726 (1978) (rejecting the argument that a radio station has a right to broadcast vulgarity and giving weight to the fact that the specific broadcast in question was aired at a time when children would be listening).).

87. *Id.* at 683.

88. *Id.* at 684.

89. *Id.* at 683.

B. Hazelwood School District v. Kuhlmeier[90]

In *Hazelwood School District v. Kuhlmeier*, the Court took *Fraser* one step further, allowing school officials to prohibit certain kinds of speech in student newspapers.[91] Here, the school principal decided that two articles intended for publication in the paper were inappropriate and ordered them removed.[92] The Court relied heavily on *Fraser's* reasoning in upholding the principal's action, again emphasizing that educational decisions are the responsibility of local communities, not federal judges,[93] and expressing concern that the material was not appropriate for a less mature audience.[94] This consideration of the maturity of the audience of the articles was even extended to potential readers who did not attend the school, such as younger brothers and sisters.[95] The Court also expressed an endorsement concern:

> Educators are entitled to exercise greater control over this. . . form of student expression [student publications] to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to materials that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school.[96]

C. Analysis

A review of these free speech cases shows that the Supreme Court is willing to consider the age of an audience in determining the scope of a speaker's right to free expression. Where particular forms of speech may disrupt the school

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90. 484 U.S. 260 (1988).

91. *Id.* at 276.

92. *Id.* at 264. One article described three students' experiences with pregnancy and the principal was concerned both that the identity of these students would be obvious from the context of the story and that the material was inappropriate for younger students. The other article described one student's experience with divorce, and the principal concluded that the story unfairly portrayed one of the parents without allowing either parent to respond to the story or to consent to its publication. *Id.* at 263.

93. *Id.* at 273.

94. *Id.* at 271.

95. *Id.* at 274–275.

96. *Id.* at 271.

environment or have negative effects on younger students, the Court will limit the breadth of this fundamental First Amendment right.

In light of this aspect of the Court's free speech jurisprudence, its refusal to make a parallel inquiry in the Establishment Clause context appears disingenuous. As discussed earlier, the Court, in *Milford,* refused to consider the perspective of the children in order to prevent using a "modified heckler's veto" where the possible misperceptions of the youngest members of an audience mandated restriction of the challenged activities.[97] Yet, this is exactly what the Court has done in the free speech context. The cases above illustrate that the Court is willing to censor speech for the sake of the youngest ears that may hear it. The Court's refusal to do so in Establishment Clause jurisprudence without distinguishing these two areas of law is simply inconsistent.

IV. ARGUMENTS FOR CONSIDERATION OF AGE IN ESTABLISHMENT CLAUSE CASES

A. Previous Supreme Court Statements Considering Age in Establishment Clause Cases

The suggestion that the Court consider the age of the audience of a religious message when determining if there is an Establishment Clause violation is not a new one. The Court made statements to this effect in dicta in a number of recent cases. In *Edwards v. Aguillard,*[98] the Court acknowledged that there are special concerns when applying the *Lemon* test in the context of an elementary or secondary school.[99] In other cases, the Court addressed the age of the audience when considering the specific elements of Establishment Clause inquiries: endorsement, coercion, and neutrality.

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97. *See supra* Part II.D.2 (discussing the Court's reasoning in *Milford*).

98. 482 U.S. 578 (1987).

99. *Id.* at 583–84 ("The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools. Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable and their attendance is involuntary."). *Edwards v. Aguillard* was overruled by *Agostini v. Felton,* 521 U.S. 203 (1997), but this piece of dicta remains instructive.

The Court has referenced age when determining whether state action would create a perception of endorsement. In considering whether there was a likelihood of perceived endorsement of religion with a state program that provided classes to nonpublic (mostly sectarian religious) school students in the public schools, the Court specifically considered the age of the children in attendance at the public school:

> The inquiry into this kind of effect must be conducted with particular care when many of the citizens perceiving the governmental message are children in their formative years. The symbolism of a union between church and state is most likely to influence children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as of free and voluntary choice.[100]

Additionally, in *Mergens*,[101] the Court used the age of the students to support the contention that there was no reasonable concern that the students attending the high school would perceive endorsement: "We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis."[102]

The Court also considered age relevant when determining whether individuals would feel coerced by a state action relating to religion. In *Tilton v. Richardson*[103] the Court stated that college students "are less impressionable and less susceptible to religious indoctrination."[104] The older age of an audience was relied on again in *Marsh v. Chambers*[105] when a state congressperson challenged the practice of opening each legislative day with a prayer: "Here, the individual claiming injury by the practice is an adult, presumably not readily susceptible to religious indoctrination or peer pressure."[106] In both of these cases, the Court used the age of the audience to support the holding that there was no Establishment Clause violation. The Court concluded that the individuals in these

100. *Sch. Dist. of the City of Grand Rapids v. Ball*, 473 U.S. 373, 390 (1985).

101. 496 U.S. 226 (1990). *See supra* Part II.A. discussing *Mergens*.

102. *Id.* at 250.

103. 403 U.S. 672 (1971).

104. *Id.* at 686.

105. 463 U.S. 783, 792 (1983).

106. *Id.*

cases were mature enough that they would not be easily coerced by the activities of others.

The Court also used age in considering whether government action was neutral toward religion. The Court used age in *Widmar v. Vincent* to support their holding of no Establishment Clause violation. This time when considering the neutrality of a state policy, the Court noted: "[u]niversity students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion."[107]

B. Arguments of Amicus Curiae in Good News

A number of religious, civil liberties, and school administration organizations submitted amicus briefs to the Court in support of Milford's actions denying the Good News Club access to the school facilities. Many of these organizations argued that the age of the children in this case made such action necessary to avoid violating the Establishment Clause for two main reasons: (1) that young children are more impressionable than high school and college students, and (2) that Congress made age relevant when enacting the Equal Access Act.

Some of these organizations cited psychological research indicating that children age six to twelve are less cognitively mature than older students and are therefore more likely to perceive school endorsement of any activities that take place in the school.[108] Psychologist Jean Piaget concluded that pre-adolescent children are not able to "think on an abstract logical level, to reason by hypothesis, and to engage in independent analysis."[109] Psychologist Eric Erikson found that a child of this age "lacks the ability to make distinctions between his views, others' views, and the views of his school."[110] Children, being

107. 454 U.S. 263, 274 n. 14 (1981).

108. Brief of Amici Curiae Anti-Defamation League; Hadassah — The Women's Zionist Organization of America, Inc.; National Coalition for Public Education and Religious Liberty; and National Council of Jewish Women at 20–21, *Good News* (No. 99-2036); Brief of Amici Curiae Americans United for Separation of Church and State, The American Civil Liberties Union, The American Jewish Committee, The New York Civil Liberties Union, and People for the American Way Foundation at 14–15, *Good News* (No. 99-2036).

109. Brief for Americans United for Separation of Church and State at 14.

110. *Id.* at 14–15.

limited in their cognitive abilities, will not be able to appreciate the difference between formal classroom instruction and activities that take place after school in the same classrooms.[111] Such children are likely to perceive school endorsement of any activities conducted in the school building.

Amici also cited psychological research indicating that pre-adolescent children are more susceptible to peer pressure than older children.[112] The authors of one brief worry that "an elementary school student faced with his or her peers attending the Good News Club's meetings would very well feel coerced by peer pressure to attend and to 'receive [Jesus Christ] as [his or her] Savior.'"[113] This fear is not alleviated by the requirement of parental permission because students not allowed to attend Club meetings would feel "excluded, different, and diminished within their own school."[114] While there may be no coercion by school officials themselves to participate in Club activities, the sociology of an elementary school works to put this pressure on the students.

Amici also relied on the Equal Access Act[115] to support their arguments that the age of the children in this case created an Establishment Clause concern.[116] The drafters of this Act originally included elementary schools in its coverage but ultimately limited its provisions to secondary schools after widespread objections from members of Congress.[117] These objections were based on a concern that young children "are unable to appreciate the distinction between neutrality and sponsorship, that they lack the maturity to undertake action without school supervision and involvement, and that they are particularly impressionable and subject to coercion and

111. There is some confusion over the facts of *Good News* as to what time the Club sought to use the school building for its meetings. There is evidence that they petitioned the school board to enter the building prior to the end of the school day so that their meeting could begin directly after regular instruction ended. *Good News*, 21 F. Supp. 2d 147, 149 (1998).

112. Brief of Anti-Defamation League at 21.

113. *Id.* at 21–22.

114. *Id.* at 22.

115. *See* text accompanying *supra* n. 25.

116. Brief of Americans United for Church and State at 15; Brief of Anti-Defamation League at 22–23; Brief of the American Jewish Congress at 29, *Good News* (No. 99-2036); Brief of National School Boards Association, American Association of School Administrators, Horace Mann League at 21, *Good News* (No. 99-2036).

117. Brief of Americans United for Church and State at 15.

manipulation by others."[118] Amici referenced this Act as evidence that Congress recognized that there are different considerations in assessing potential Establishment Clause violations when the audience of a religious message includes young children and, in turn, argued that the judicial branch should do the same.

V. AN-AGE SENSITIVE ESTABLISHMENT CLAUSE TEST

This section proposes a test for use in Establishment Clause cases challenging religious activities in public schools. Under this test, the Court must first determine the age range for the intended audience of a religious message. If the audience is pre-adolescent (generally younger than twelve) the Court should consider the extent to which a perception of government endorsement of religion is likely. If the audience is older than twelve, the Court should determine if the school's position on religious activities within the school is neutral toward religion.[119] This test does not directly consider the elements of the *Lemon* test because the Court itself has been hesitant to use them; however, considerations of endorsement and neutrality in this age-sensitive test are derived from *Lemon*.[120]

The idea of separating the two inquiries is not a novel one. In arguing that the Court should adopt multiple Establishment Clause tests, Justice O'Connor suggested that some cases require a consideration of endorsement, while others would be better decided on neutrality, although not in the context of age, as this article suggests is necessary.[121]

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118. *Id.* at 16 n. 8.

119. For this test to function efficiently, it is necessary to set a bright-line division between the two categories of Establishment Clause inquiries. The age of twelve was chosen because this tends to be the age where children move from the childish world of elementary school into the more adult-like world of middle school or junior high. Using the age of twelve essentially allows courts to use one inquiry for elementary schools and one for schools that house the higher grades. I chose not to set the line at the level of the school itself because some small school districts, like Milford, have only one school building for all grades.

120. Langendorfer, *supra* n. 19 at 709 (discussing Justice O'Connor's revision of the purpose and effects prongs of the *Lemon* test into the endorsement test) and at 716 (examining Justice Souter's use of neutrality to supplement the *Lemon* test).

121. *Grumet*, 512 U.S. at 720 (O'Connor, J., concurring) ("Some cases. . . involve government actions targeted at particular individuals or groups, imposing special duties or giving special benefits. Cases involving government speech on religious topics. . .seem to me to fall into a different category and to require an analysis focusing on whether the speech endorses or disapproves of religion, rather than on whether the

A. Children Younger than Twelve

As discussed earlier, the Court has attempted to discern Establishment Clause violations by considering whether school actions may lead students to believe that the school supports or endorses the religious activities occurring in the school.[122] This fear of perceived endorsement has been discredited in cases where the students are old enough to understand that a school does not endorse all the activities that take place on school grounds.[123]

It logically follows from the assertion that older students will not perceive endorsement, that younger students will, or, at least, might perceive it. The Court's reliance on the age and maturity of students in cases like *Mergens* is empty without recognition that the cases may have been decided differently if the students had been younger.[124] It is inconsistent for the Court to rely on age when the students are older and cognitively mature but to ignore it when they are young and potentially confused by a religious presence in their school.

Under the prescribed test, the Court would consider whether average children under the age of twelve in a particular situation would perceive official school endorsement of religious activities occurring at the school. This would be a context-based inquiry, looking at the children in a particular school. The school board most properly makes the decision, and the Court should afford such decisions great weight in considering challenges to the school board's authority.[125]

B. Children Older than Twelve

Review of previous Supreme Court decisions indicates that the Court is not convinced that older students will perceive school endorsement of religion solely because religious activities are permitted to take place on school property.[126] In

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government action is neutral with regard to religion.").

122. *See supra* Part II discussing *Mergens* and *Lamb's Chapel*.

123. *See supra* Part II.C. discussing *Rosenberger*.

124. *See supra* Part II.A. discussing *Mergens*. *See e.g.* Brief of Americans United for Church and State at 14.

125. As stated earlier, the Court has long held that decisions regarding public education should be made by the local communities and not by federal judges. *See supra* Part III.A. discussing *Fraser*.

126. *E.g. Mergens*, 496 U.S. at 250–51; *Widmar*, 454 U.S. at 274 n. 14.

light of the psychological research finding that adolescent children are more able to engage in abstract, higher order thinking, the Court's position on this issue is reasonable.[127] In *Rosenberger*, where the Court was confronted with an Establishment Clause defense in the context of a state university, it focused not on age, but on the government's neutrality towards religion.[128] This neutrality inquiry makes sense when the audience is composed of older students. Where there is no reasonable fear of perceived school endorsement, the government's priority should be to create policies that are neutral toward religion.

Under the proposed test, if the intended audience is composed of students older than twelve, the Court must determine whether the school board's policy on extra-curricular activities is neutral toward religion. An appropriate policy would allow religious groups to meet in the school on the same terms as other organizations. In many of the situations where members of an intended audience are older than twelve, the Equal Access Act would control, as this audience would be composed of students at a secondary school.[129]

C. Applying the Test to Good News

The benefits of an age-sensitive Establishment Clause test can most clearly be seen by considering how it would have affected the outcome of *Good News*. Before addressing this question, however, it must be remembered that the Court in *Good News* considered the relevant audience to be the parents of the schoolchildren, and not the children themselves.[130] This represented a fundamental flaw in the Court's reasoning, regardless of what test the Court used to evaluate the Establishment Clause argument. The Club sought access to the school in order to share its religious message with the children in attendance. While parental permission was required for

127. *See supra* Part IV.B. discussing psychological research cited in amicus briefs.

128. *Rosenberger*, 515 U.S. at 845–846.

129. *See supra* Part II.A with accompanying text and footnotes.

130. *Good News*, 533 U.S. at 115 ("[T]o the extent we consider whether the community would feel coercive pressure to engage in the Club's activities, the relevant community would be the parents, not the elementary school children. It is the parents who choose whether their children will attend the Good News Club meetings. Because the children cannot attend without their parents' permission, they cannot be coerced into engaging in the Good News Club's religious activities.").

students to attend Club meetings, the parents were not the intended recipients of the religious message. The students of the Milford Central School, both those who attended the Club meetings and those who did not, represented the audience that would be affected by the presence of the Club in the school. The children would be aware that the Club met in the school building and could potentially perceive official school endorsement of the club's activities simply by virtue of its presence in the school. Even though the children would know that parental permission was required to attend the meetings, they could still perceive endorsement because there are other school activities that require parental permission that are school endorsed.[131] While it is not inappropriate for the Court to consider the perspective of the parents of Milford school children, the Court must also consider the perspective of the intended audience of the religious message. In this case, that audience is Milford school children, ages six to twelve.[132]

Assuming that the Court chose the correct audience for its Establishment Clause inquiry, under the test proposed in this Article, the Court would then consider whether a reasonable child between the ages of six and twelve would perceive school endorsement of the Club's activities. This is a fact-based inquiry, and many of the necessary facts were not part of the record of this case as it came up as an appeal of the lower court's grant of Defendant's motion for summary judgment.[133] The Court would have to remand this case for further fact-finding. There are three basic sets of facts to consider: the other clubs and organizations that were permitted to meet in the school building, the format of the Club's meetings, and the time the Club sought to use the building.

From the record it appears that only three other organizations were permitted to meet in the school building: the Boy Scouts, the Girl Scouts, and the 4-H Club.[134] This may lead to an enhanced risk that the children would perceive endorsement of the Good News Club's activities. The school

131. Brief for Americans United for Church and State at 22 ("A child who is sent home with a permission slip [to attend Good News Club meetings], much like the one his parents complete to allow him to participate in a school-sponsored field trip, is likely to perceive this as the school's promotion of the event.").

132. *Good News*, 533 U.S. at 103.

133. *Good News*, 533 U.S. at 104.

134. *Good News*, 21 F. Supp. 2d at 154.

established a limited public forum, and the record suggests that this forum was not widely used by the community for non-school related activities. It is likely that the children were unaccustomed to adults entering the building for purposes other than regular classroom instruction. It is also likely that the younger students perceived that the other clubs using the school for meetings were related to official school instruction, because they thought of the school as being used solely for school-related activities. While there are no constitutional concerns with students perceiving endorsement of the 4-H Club, perceived endorsement of a religious message violates the Establishment Clause under this test.

If the facts indicated that the school building was used by a number of community organizations for various purposes and that the students were aware of these uses, the risk of student perception of endorsement of each of these activities would diminish. If the young students saw the school building being frequently used for obviously nonschool-related activities, such as dance classes or adult organization meetings, they would be more likely to understand that not everything that happens in the school building is part of the official curriculum. Justice Marshall made a similar argument in his concurrence in *Mergens*:

> But the crucial question is how the [Equal Access] Act affects each school. If a school already houses numerous ideological organizations, then the addition of a religion club will most likely not violate the Establishment Clause because the risk that students will erroneously attribute the views of the religion club to the school is minimal. . . But if the religion club is the sole advocacy-oriented group in the forum. . . then the school's failure to disassociate itself from the religious activity will reasonably be understood as an endorsement of that activity.[135]

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135. *Mergens*, 496 U.S. at 266 (Marshall, J., concurring). For a discussion of forum domination by religious groups *see* Steven G. Gray, *The No Religion Zone: Constitutional Limitations on Religious Association in the Public Sphere*, 85 Minn. L. Rev. 1885, 1902–1903 (2001) ("Private religious domination of public forum is problematic in a general way because it communicates to society that a particular religious group has a favored status not shared by other religious groups [or nonreligious individuals]. Furthermore, it is particularly problematic because it forces nonadherents of the dominant religion to forego access to the forum to avoid participating in the favored religion's sectarian activities.").

While the issues in *Mergens* differ from *Good News* in that *Mergens* deals with the Equal Access Act and a high school, Marshall's sentiment remains relevant here. Where the wider community routinely uses a school building for broad purposes, students will be more likely to consider the building to be a community institution where they attend classes and sometimes go for other purposes. Although they may not be able to engage in abstract thinking,[136] students will understand the function of their school in the context in which they experience it.

Another factual inquiry concerns the format of the Club meetings. A number of amici argued that the Club was structured too much like a regular class and that this would contribute to a misunderstanding that the Club was part of official school instruction.[137] The record contains a brief description of the format of Club meetings:

> The Club opens its session with Ms. Fournier taking attendance. As she calls a child's name, if the child recites a Bible verse the child receives a treat. After attendance, the Club sings songs. Next Club members engage in games that involve, *inter alia*, learning Bible verses. Ms. Fournier then relates a Bible story and explains how it applies to Club members' lives. The Club closes with prayer. Finally, Ms. Fournier distributes treats and Bible verses for memorization.[138]

Again, however, the record would have to be developed further in order to determine the extent to which the Club meetings resemble normal classroom instruction.

The concern is that children would be more likely to perceive endorsement if the Club meetings proceeded like classes. If the meeting was conducted by a single individual standing at the chalkboard while the children sat at desks in rows, the children would be more likely to equate the Club meeting with formal classroom instruction. If the Club meeting varied from this traditional model of classroom learning, the participants and observers would have an easier time distinguishing the Club from school. This could be accomplished by using multiple instructors, alternative seating

136. *See supra* Part IV.B. discussing psychological research cited in amicus briefs.

137. Brief of Americans United for Separation of Church and State at 26; Brief of the American Jewish Congress at 25–26.

138. *Good News*, 533 U.S. at 103.

arrangements, and encouraging behavior not customary in traditional classrooms, like talking without raising hands or walking around the room at will.

Perception of endorsement derived from the structure of Club meetings is more likely to affect those students attending the meeting than students who do not attend, but either hear about the meetings second-hand or pass by the classroom and look inside. This does not reduce the importance of this factual inquiry into the format of club meetings. While children need parental permission to attend the meetings, receipt of this permission does not relax the school's constitutional obligations to the students in attendance. Even if the perception of endorsement of the club meeting has positive effects on the children, the requirement that students not be confused as to the school's role in the religious activities occurring within the school building is a constant one that cannot be excused. A related factual inquiry considers the time the Club requested to use the building. This fact was not clear from the record in *Good News*. If the Club met directly after regular school sessions ended, children would be more likely to think that the meeting was part of the curriculum. This was another concern raised by the amici.[139] If students had to return home first and then be driven back to the school by their parents, they would be more likely to distinguish Club meetings from official classroom instruction because of the lapse in time.[140]

It is clear that the Court would have had to remand this case in order to decide it using the age-sensitive test for Establishment Clause violations. An argument was made that the Court should have done so anyway.[141] But using this age-sensitive test would have produced a result that was reasonable for the Milford School District and the children attending Milford Central School. If there were facts legitimating the concern that the children would perceive official school endorsement of the Club's activities and message, the Club would have been forced to find an

139. Brief of Amercians United for Separation of Church and State at 17–19; Brief of the American Jewish Congress at 24; Brief of Anti-Defamation League at 24–26; Brief of the New York State School Board Association, Inc. at 10–11, *Good News* (No. 99-2036); Brief of National School Boards Association at 17–18.

140. While this may be inconvenient for parents, it is not the responsibility of the public school system to provide convenient access to religious instruction.

141. *Good News*, 533 U.S. at 140–141 (Souter, J., dissenting).

alternative site for its meetings or adjust the format or timing of their meetings to eliminate the potential for confusion. If the facts indicated that the children in the school would not reasonably perceive endorsement, the Club would then be permitted to meet in the manner and time requested.

VI. CONCLUSION

The debate over what the Framers intended in drafting the Establishment Clause began immediately after ratification of the Constitution and has continued ever since. Some rely on Thomas Jefferson's sentiment when he wrote in a letter that a "wall of separation" should divide church and state.[142] Others look to the tradition of religion in the founding of this country and argue that the Framers could not have intended to restrict all government aid to religion.[143] This debate is not one that can be brought to the Supreme Court for a final adjudication. Disputes over the appropriate relationship between religion and government will likely continue indefinitely, regardless of how the Court approaches the issue in individual cases.

The best the Court can do is to try to ensure that the government "make[s] no law respecting an establishment of religion."[144] At this point in history, exactly what this means in any given situation is unclear. Recent Court decisions indicate that government policies that create a perception of official endorsement of religion or that are not neutral toward religion violate this constitutional mandate, but the Court may change its position on these policies in a future case. The fate of the *Lemon* test shows that no test is invincible; but whatever method the Court uses to decide these cases, it must acknowledge that different concerns arise when the forum for a religious message is a public elementary school and when the audience of such a message includes young children. The Court has recognized this in the context of free speech and has allowed school administrators to censor student speech to the extent necessary to preserve order and protect younger, less mature students from the psychological harm that may result

142. J. Clifford Wallace, *The Framers' Establishment Clause: How High the Wall?*, 2001 BYU L. Rev. 755, 761 (2001).

143. *See e.g. id.;* Mark W. Cordes, *Politics, Religion, and the First Amendment*, 50 DePaul L. Rev. 111 (2000).

144. U.S. Const. amend. I.

from being exposed to disruptive or inappropriate speech. Educators need the same power to limit religious activities in schools to ensure that all students feel that their religious beliefs are respected, both by the school and the state.

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