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Adopting a Respectful Posture toward Teacher Religious Expression: An Establishment Clause Analysis of North Carolina's Respect for Student Prayer and Religious Activity Law

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ADOPTING A RESPECTFUL POSTURE TOWARD TEACHER RELIGIOUS EXPRESSION: AN ESTABLISHMENT CLAUSE ANALYSIS OF NORTH CAROLINA'S RESPECT FOR STUDENT PRAYER AND RELIGIOUS ACTIVITY LAW

*Brian S. Gwyn**

I. INTRODUCTION

"It's a sad day in America when we can't tell a coach they can bow their head when a student is leading a prayer."[1] This statement by North Carolina State Senator Warren Daniel encapsulates the sentiment of those who supported a recently enacted law clarifying the rights of school employees. Depending on your politics, you may view Senator Daniel's assessment as a sign of progress or confirmation that religious rights are being eroded.

Senator Daniel's statement was prompted by an issue that arose in McDowell County, N.C. in 2012. The McDowell County School Board purportedly told high school athletic coaches that they had to leave the locker room if students spontaneously engaged in prayer before or after athletic events.[2] Lawmakers, seeing this as an encroachment against religious freedom, attempted to restore the balance by passing Senate Bill 370, the Respect for Student Prayer/Religious Activity law ("S.B. 370")[3] in June of 2014. In passing S.B. 370, Senator Stan

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1. Laura Leslie, *House Panel OKs Prayer for Faculty*, WRAL (June 3, 2014), http://www.wral.com/house-panel-oks-prayer-for-faculty/13697305/#uWFvfeGD2UfcW1Qy.99.

2. David Exum, *McCrory Signs Bingham-sponsored Prayer Bill into Law*, THE DISPATCH, June 23, 2014, http://www.the-dispatch.com/article/20140623/News/306239990.

3. The Respect for Student Prayer/Religious Activity Act, S.B. 370, 2013–2014 Sess. (codified in N.C. GEN. STAT. § 115C-407.30–33), *available at* http://www.ncleg.net/Sessions/2013/Bills/Senate/PDF/S370v6.pdf.

Bingham, one of the primary sponsors of the bill, said the new law would remedy situations like those in McDowell County because it would allow coaches to maintain their roles as sources of "instruction, guidance, and inspiration."[4]

Opponents of the law argue that a coach's unique supervisory role providing "instruction, guidance, and inspiration" is precisely why they should not participate in student-led prayer.[5] On August 25, 2014, Americans United for Separation of Church and State ("Americans United")[6] entered the fray and sent each school district in North Carolina a letter, warning them that compliance with the law could violate the First Amendment's Establishment Clause.[7] In their letter, Americans United argued that allowing teachers to lead or participate in student religious activity would violate the Constitution.[8]

Soon after, the Alliance Defending Freedom ("A.D.F."),[9] an organization of Christian attorneys who advocate for religious freedom, fired back with a follow-up letter to North Carolina school districts, telling them they need not "flee the room"[10] when students engage in

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4. Mary Anderson, *New law clarifies students' right to pray*, THE COURIER-TRIBUNE, June 21, 2014, http://courier-tribune.com/news/new-law-clarifies-students-right-pray ("The students rely on their coach for instruction, guidance, and inspiration. . . . Instead of leaving the room, Senate Bill 370 allows the coach to adopt a respectful posture during a student-led prayer, thus maintaining his connection with his athletes.").

5. Letter from Americans United for Separation of Church and State to North Carolina Boards of Education (August 25, 2014), *available at* https://www.au.org/files/NC%20School%20Board.pdf [hereinafter *Americans United Letter*].

6. Americans United for Separation of Church and State is an organization "dedicated to preserving the constitutional principle of church-state separation as the only way to ensure religious freedom for all Americans." AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE: OUR MISSION, https://www.au.org/about/our-mission (last visited Mar. 1, 2015).

7. *Americans United Letter*, *supra* note 5.

8. *Id.* ("[T]he Establishment Clause of the First Amendment to the U.S. Constitution prohibits school personnel from leading or participating in student religious activity.").

9. A.D.F., founded by Christian attorneys in 1994, "advocates for the right of people to freely live out their faith." ALLIANCE DEFENDING FREEDOM: ABOUT US, http://www.alliancedefendingfreedom.org/about (last visited Mar. 1, 2015).

10. Letter from Alliance Defending Freedom to North Carolina School Superintendents (September 2, 2014), *available at* http://www.adfmedia.org/files/NCSchoolsLetter.pdf.

religious activity.[11] A.D.F. argued that school employees, "when not on contract time,"[12] had a constitutionally protected right to "engage in public and private religious expression with anyone and at any location (including school property)."[13] In their view, during "contract time," employees could be present during student prayer to provide supervision and even "bow[] their heads,"[14] as long as they did not "actively participate" in the religious expression.[15]

The ongoing debate over S.B. 370 illustrates the doctrinal tension that currently exists regarding religious expression among students and school employees. Although S.B. 370 was enacted to simplify complicated First Amendment law, it may actually lead to greater confusion among teachers, administrators, students, and parents.[16] This Note examines S.B. 370 in light of existing First Amendment jurisprudence. Part II provides an overview of how courts have analyzed Establishment Clause cases. Part III discusses how courts have treated Establishment Clause concerns in the face of teachers' First Amendment claims. Part IV analyzes the applicable provisions of S.B. 370. Finally, Part V argues that the degree to which school staff may participate in religious activities with students is a close question of law that varies greatly depending on the unique facts and circumstances of each case. Therefore, while S.B. 370 may survive a facial challenge, it likely encourages religious conduct that violates the Establishment Clause.

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11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. Given that national groups such as Americans United and A.D.F. have publicly drawn dramatically opposite conclusions about the constitutionality of S.B. 370, it is not difficult to imagine that teachers will be confused about what their rights actually are. Portions of the law that purport to provide a clear standard, regardless of the context, may violate First Amendment. *See* N.C. GEN. STAT. § 115C-407.32(b) (2014) ("[Teachers may] participat[e] in religious activities on school grounds that are initiated by students at reasonable times before or after the instructional day so long as such activities are voluntary for all parties . . . ."); *see also* N.C. GEN. STAT. § 115C-407.32(c) (2014) (Teachers "may adopt a respectful posture" during extracurricular activities when students engaged in voluntary prayer).

II. THE ESTABLISHMENT CLAUSE

The First Amendment to the Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[17] The bedrock of the Establishment Clause rests on two fundamental principles: (1) a "wall of separation between Church and State" exists to protect both believers and nonbelievers;[18] and (2) the government may not coerce or encourage citizens to adopt different beliefs and practices.[19] Conversely, while the Establishment Clause creates a negative right, the Free Exercise Clause creates a positive right, one that protects religious liberty and allows individuals freedom to practice the religion of their choice.[20]

It is sometimes unclear where the Free Exercise Clause ends and the Establishment Clause begins, especially when the exercise of one's beliefs involves state action.[21] As a result, the two First Amendment clauses often are at odds with one another and the Supreme Court has struggled to articulate a uniform, lasting, standard to evaluate Establishment Clause claims.[22] As Parts II.A and B explain, the applicable Establishment Clause tests and their methodology largely

17. U.S. CONST. amend. I.

18. Everson v. Bd. of Educ. of Ewing Twp., 330 U.S. 1, 16 (1947) (upholding a New Jersey district's practice of reimbursing families for transportation expenses, regardless of whether children attended public or private schools, based on the fact that the practice was neutral toward religion).

19. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 12.3.1 (3d ed. 2006) ("[T]he government may not compel or punish religious beliefs; people may think and believe anything that they want.").

20. *Id.*

21. *See, e.g.*, Good News Club v. Milford Cent. Sch., 533 U.S. 98, 102–03 (2001) (finding no Establishment Clause violation where a Christian club used school facilities after the instructional day); Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 822–23 (1995) (finding no Establishment Clause violation if public university were to spend funds on Christian student organization where the Free Speech and Free Exercise Clauses compelled the expenditures, since other student organizations received similar funds.).

22. *See* Lynch v. Donnelly, 465 U.S. 668, 679 (1984) ("[W]e have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area."); Doe v. Duncanville Indep. Sch. Dist., 70 F.3d 402, 405 (5th Cir. 1995) (noting "modern Establishment Clause jurisprudence is rife with confusion.").

depend on the context of each case.[23] To highlight the doctrinal differences, Part II.A describes early Supreme Court cases that employed a stricter test for government involvement with religion and Part II.B discusses various tests that have evolved over time, often providing a more lenient standard for government officials than the predecessor test.

A. Impregnable Wall of Separation

Public schools are often at the intersection of this doctrinal tension between the Establishment Clause and Free Exercise Clause.[24] In 1947, in *Everson v. Board of Education of Ewing Township,*[25] the Supreme Court declared that the constitution requires a "wall of separation" between church and state.[26] In *Everson*, a New Jersey statute allowed local districts discretion to structure student transportation to and from school.[27] Based on the law, local districts like Ewing Township decided to reimburse parents whose children traveled to and from school via public transit.[28] While some parents of children in public schools claimed the benefit, reimbursements were also claimed by parents whose children were enrolled in private Catholic schools.[29] Soon after, a citizen brought suit, alleging that the statute violated the Establishment Clause.[30] On review, the Court upheld the statute, determining that the law was neutral to religion, in that it allowed districts to cover transportation costs of both public and private parochial school students.[31] Thus, while the Court declared that there is "a wall between church and state," it was not breached in this case.[32]

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23. *Id.* ("[W]e have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area.").

24. Lee v. Weisman, 505 U.S. 577, 592 (1992) ("The concern [about indirect coercion] may not be limited to the context of schools, but it is most pronounced there.").

25. 330 U.S. 1 (1947).

26. *Id.* at 16 (quoting *Reynolds v. United States*, 98 U.S. 145 (1878)).

27. *Id.* at 3.

28. *Id.*

29. *Id.*

30. *Id.* at 3–4.

31. *Id.* at 18.

32. *Id.*

Everson proved to be a seminal case in the Court's development of the neutrality principle. In 1968, in *Epperson v. Arkansas*,[33] the Court invalidated an Arkansas law that banned the teaching of evolution in schools receiving public funds, largely because the law failed to maintain religious neutrality like the statute at issue in *Everson*.[34]

Three years later, in *Lemon v. Kurtzman*, the Supreme Court consolidated its reasoning from *Everson*, *Epperson*, and other cases[35] to articulate a workable standard for analyzing Establishment Clause claims.[36] In *Lemon*,[37] the Court invalidated statutes in Pennsylvania and Rhode Island that provided resources directly to religious schools for the purpose of teaching secular subjects.[38] The Court held that to survive Establishment Clause scrutiny, a government program must: (1) have a valid secular purpose;[39] (2) not have the "principal or primary effect" of either "advanc[ing] []or inhibit[ing] religion"[40] and (3) not create "an excessive government entanglement with religion."[41]

To evaluate the purpose of the statutes, the Court looked first to the stated intent.[42] Since the laws had the purpose of "enhanc[ing] the quality of the secular education in all schools," the Court gave deference

33. 393 U.S. 97 (1968).

34. *Id.* at 109 ("Arkansas' law cannot be defended as an act of religious neutrality. Arkansas did not seek to excise from the curricula of its schools and universities all discussion of the origin of man. The law's effort was confined to an attempt to blot out a particular theory because of its supposed conflict with the Biblical account, literally read. Plainly, the law is contrary to the mandate of the First, and in violation of the Fourteenth, Amendment to the Constitution."). In its holding, the Court ruled that schools may not organize their curriculum around a particular set of religious beliefs. *Id.* at 106.

35. *See, e.g.*, Walz v. Tax Comm'n, 397 U.S. 664 (1970); Bd. of Educ. v. Allen, 392 U.S. 236 (1968).

36. Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).

37. *Id.*

38. *Id.* at 606–07.

39. *Id.* at 612.

40. *Id.*

41. *Id.* at 612–13. To distinguish *Lemon* from *Everson*, the Court noted that in *Lemon*, the government provided funding directly to the private schools. *Id.* at 621.

42. *Id.* at 613.

to this stated secular purpose.[43] When looking at the effect of the statutes, the Court found that they primarily benefited religious schools.[44]

From 1971–1992, the *Lemon* test was the primary method of analysis for Establishment Clause cases.[45] However, as Part II.B illustrates, in the wake of new competing Establishment Clause tests, the *Lemon* test has lost its status as the gold standard within the doctrine.[46]

B. Penetrating the Wall

As the makeup of the Court changed, dissatisfaction with the *Lemon* test became apparent.[47] Slowly, the "wall of separation," traditionally kept high and impregnable, became malleable and permeable, as Justices increasingly chose to focus on the original intent of the founding fathers.[48] As a result, new tests emerged, supplementing, and even on occasion supplanting, the *Lemon* Test.[49] In the modern era,

43. *Id.* at 613.

44. *Id.* at 609. Since the states became involved in the "details of administration," the result was an entanglement violation. *Id.* at 615.

45. Robert C. Stelle, Comment, *Religious Freedom in the Twenty-First Century: Life Without Lemon*, 23 S. ILL. U. L.J. 657, 663 (1999).

46. *Id.* at 664.

47. *See, e.g.*, Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring) ("Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys."); Lynch v. Donnelly, 465 U.S. 668, 688–89 (1984) (O'Connor, J., concurring) ("It has never been entirely clear, however, how the three parts of the [*Lemon*] test relate to the principles enshrined in the Establishment Clause.").

48. Wallace v. Jaffree, 472 U.S. 38, 98-99 (1985) (Rehnquist, J., dissenting) ("the Court's opinion in *Everson*—while correct in bracketing Madison and Jefferson together in their exertions in their home State leading to the enactment of the Virginia Statute of Religious Liberty—is totally incorrect in suggesting that Madison carried these views onto the floor of the United States House of Representatives when he proposed the language which would ultimately become the Bill of Rights.").

49. *See e.g.*, *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring) (upholding a town crèche display because there was no endorsement either through intent or effect); Marsh v. Chambers, 463 U.S. 783, 795 (1983) (upholding legislative prayer based on a historical practices test); Larson v. Valente, 456 U.S. 228, 252 (1982) (invalidating a Minnesota statute that discriminated against religious organizations based on strict scrutiny test).

the Supreme Court has employed at least five Establishment Clause tests in addition to *Lemon*: (1) the strict scrutiny test;[50] (2) the historical practices test;[51] (3) the modified *Lemon*/endorsement test;[52] (4) the coercion test;[53] (5) and the neutrality test.[54]

1. Strict Scrutiny Test

The first departure from the *Lemon* test occurred in the 1982 decision, *Larson v. Valente*,[55] where the Court invalidated a Minnesota statute imposing regulations only on certain religious organizations.[56] In *Larson*, the Minnesota Charitable Solicitation Act required non-profit organizations to register with the state and comply with various requirements, such as reporting costs and expenditures.[57] If the organization spent an "unreasonable amount" on management and fundraising expenses, the state would revoke its charitable solicitation

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50. *Larson*, 456 U.S. at 246 (invalidating a Minnesota law because it was not narrowly tailored to a compelling government interest).

51. *Marsh*, 463 U.S. at 792-93 (upholding legislative prayer where the historical pattern demonstrated that it was never intended to be prohibited by the Establishment Clause).

52. *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring) (upholding a town crèche display because there was no endorsement either through intent or effect).

53. Lee v. Weisman, 505 U.S. 577, 587 (1992) (invalidating adult-led prayer at middle and high school graduation ceremony based on the coercive effect of the structured environment).

54. Agostini v. Felton, 521 U.S. 203, 230 (1997) (allowing New York district to implement federally-funded program that involved providing remedial instruction to students at private schools on the basis that the program operated with "equal force" when the services were provided off campus). The neutrality test is also sometimes referred to as the "nondiscrimination test." JAMES RAPP, EDUCATION LAW § 2.01(4)(d)(iii) (Matthew Bender & Co. 2014). As most opinions employ multiple tests, it is sometimes difficult to tease out the difference between the neutrality test and the endorsement test, in particular. In many cases, their reasoning overlaps. *See, e.g.*, Bd. of Educ. of Westside Comm. Schs. v. Mergens By and Through Mergens, 496 U.S. 226, 250 (1990). This Note distinguishes the neutrality test from the endorsement test in that the neutrality test requires the government to protect private religious speech, even if one could reasonably attribute it to the government. The endorsement test includes the latter limitation.

55. 456 U.S. 228, 246 (1982).

56. *Id.* at 255.

57. *Id.* at 230–31.

license.[58] Originally, religious organizations were exempt from such requirements, but in 1978, the Minnesota legislature amended the act to only exempt religious organizations receiving over half of their funds from members or affiliated organizations.[59] In their holding, the *Larson* Court used a strict scrutiny standard, similar to the standard used in equal protection cases, to strike down the statute.[60] The Court held that the nexus between the fifty percent rule at issue in the case was not "necessary" to any "compelling interest" the state offered, and therefore was impermissible under the First Amendment.[61]

2. Historical Test

Similarly, in *Marsh v. Chambers*,[62] the Court determined that the *Lemon* test was inapplicable to the context of legislative prayer.[63] In *Marsh*, the Court was faced with a challenge to the Nebraska legislature's practice of opening each session with prayer.[64] Instead of applying the *Lemon* test, as the lower court did,[65] the Supreme Court relied on the "historical" and "unbroken practice" of legislative prayer dating back to colonial times.[66] While the Court acknowledged that "historical patterns" alone do not justify constitutional violations,[67] such practices do provide insight into the actual intent of the Framers.[68] Ultimately, the Court determined that legislative prayers were constitutional regardless of a *Lemon* analysis because the "historical pattern" suggested they were never intended to be proscribed.[69]

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58. *Id.* at 231 (citing S 309.555 Subd. La Supp. 1982).
59. *Id.* at 231–32.
60 *Id.* at 246 (invalidating a Minnesota law because it was not narrowly tailored to a compelling government interest).
61. *Id.* at 255.
62. 463 U.S. 783 (1983).
63. *Id.* at 792.
64. *Id.* at 784–85.
65. *Id.* at 786.
66. *Id.* at 795.
67. *Id.* at 790.
68. *Id.*
69. *Id.* at 786.

3. Endorsement Test

In 1984, Justice O'Connor created an entirely new test in her concurring opinion in *Lynch v. Donnelly*.[70] In *Lynch*, the Court upheld Pawtucket, Rhode Island's annual crèche, which included religious symbols unique to Christmas.[71] The majority noted that the Court need not be confined to one test, but still relied heavily on *Lemon*.[72] In her concurring opinion, Justice O'Connor utilized the first two prongs of *Lemon* to articulate an alternative test—the endorsement test.[73] In conducting the endorsement analysis, the Court asks "whether a reasonable observer would believe that a particular action constitutes an endorsement of religion by the government."[74]

The endorsement test is relatively strict compared to other tests discussed below, in that it takes less government action to cross the threshold into being an Establishment Clause violation.[75]

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70. 465 U.S. 668, 688–89 (1984) (O'Connor, J., concurring).

71. *Id.* at 671 (majority opinion).

72. *Id.* at 679, 684.

73. *Id.* at 687–88 (O'Connor, J., concurring).

74. *Id.* at 690; Adland v. Russ, 307 F.3d 471, 479 (6th Cir. 2002). Under the endorsement test, the entanglement prong of the *Lemon* test is deemphasized, because it often proved to be the most difficult prong to define. *Lynch*, 465 U.S. at 690. Instead of a separate criterion, an entanglement violation would exist if the government action would be reasonably perceived as religious endorsement. *Id.* at 688. Subsequently, Establishment Clause cases that invoke the *Lemon* Test generally rely on the version modified by the endorsement test. *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 668-69 (2002) (O'Connor, J., concurring) ("In *Agostini v. Felton*. . . . we folded the entanglement inquiry into the primary effect inquiry."); Good News Club v. Milford Cent. Sch., 533 U.S. 98, 116 (2001); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308 (2000) ("In cases involving state participation in a religious activity, one of the relevant questions is 'whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools.'"); *Adland*, 307 F.3d at 479 (using endorsement test deny the relocation of Ten Commandments monument to state capitol grounds).

75. *See, e.g.*, Wigg v. Sioux Falls Sch. Dist. 49-5, 382 F.3d 807, 815 (8th Cir. 2004) (using neutrality test and finding no violation for teacher's noncurricular involvement; Doe v. Wilson County Doe v. Wilson Cnty. Sch. Sys., 564 F. Supp. 2d 766, 792–93 (M.D. Tenn. May 29, 2008) (using endorsement test and finding violation for teacher's noncurricular involvement).

4. Coercion Test

In 1992, the Court decided *Lee v. Weisman*,[76] which invalidated prayer at school graduation ceremonies, determining that it "coerced" students into participating in religious activity.[77] This "coercion test," enunciated by Justice Kennedy, is based on the idea that regardless of the more strict *Lemon* analysis, the Constitution does not permit religious coercion.[78]

In *Lee*, the school district permitted principals to invite members of the clergy to provide invocations and benedictions at middle and high school graduation ceremonies.[79] Daniel Weisman objected to the practice prior to his daughter's middle school graduation exercise, but the school principal nevertheless invited a rabbi to deliver prayers.[80] During the ceremony, students stood for the Pledge of Allegiance and remained standing during the prayers.[81]

In deciding *Lee,* the Court sidestepped more strict tests because, in Justice Kennedy's view, the facts of the case violated a standard even more lenient to government actors.[82] The Court expressed concern for the impressionability of young students, who are more likely to be coerced into or out of religious activity than adults.[83] Whereas acts of religious endorsement, such as the prayer in *Lee*, can be carefully weighed by adults, young students may see the actions at directive, strengthening the possibility of religious coercion.[84]

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76. 505 U.S. 577 (1992).

77. *Id.* at 599, 609.

78. *Id.* at 587 ("[A]t 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 . . . .").

79. *Id.* at 581.

80. *Id.* at 581.

81. *Id.* at 583.

82. *Id.* ("We can decide the case without reconsidering the general constitutional framework by which public schools' efforts to accommodate religion are measured. Thus we do not accept the invitation of petitioners and *amicus* the United States to reconsider our decision in *Lemon v. Kurtzman.).* "

83. *Id.* at 592.

84. *Id.* There are some signs, however, that this concern for the age of the student may be less relevant to the present Court. Good News Club v. Milford Cent. Sch., 533 U.S. 98, 115 (2001) (noting as irrelevant the fact that students participating in the after-school religious club were of elementary-school age where parents had

The Court's heightened concern for religious coercion among students articulated in *Lee* continued in *Santa Fe Independent School District v. Doe*,[85] where the Court invalidated a school's practice of allowing an elected speaker to give an invocation before each home football game.[86] Like *Lee*, in *Santa Fe*, the Court applied the coercion test, finding that students attending the football games had little choice regarding participation.[87] Therefore, the pre-game prayers violated the Establishment Clause.[88]

5. Neutrality Test

In an increasing number of cases, the Court has focused on the First Amendment expectations of the religious actors.[89] Though the

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given permission). Admittedly, the Court has not been clear on this point and lower courts still sometimes make the distinction. *See, e.g.*, Doe v. Wilson Cnty. Sch. Sys., 564 F. Supp. 2d 766, 795 (M.D. Tenn. May 29, 2008) (noting the "influential effect" on 5th grade students of adults wearing "I Prayed" stickers); Daugherty v. Vanguard Charter Sch. Acad., 116 F. Supp. 2d 897, 908 (W.D. Mich. 2000) ("The Court recognizes that the age of the 'audience' is an important factor in the analysis."); *but see* Herdahl v. Pontotoc Cnty. Sch. Dist., 933 F. Supp. 582, 590 (N.D. Miss. 1996) (resolving concerns about impressionability of students based on parent's informed written consent). While concerns for coercion still exist, some justices have come to different conclusions about what constitutes coercion. For example, Justice Kennedy based his opinion in *Lee* on that fact that "subtle coercion" by the state pressured students to participate in a religious practice. Lee v. Weisman, 505 U.S. 577, 588 (1992). In his dissent, Justice Scalia agreed that coercion violates the Establishment Clause, however, he did not find it. *Id.* at 641–42 (Scalia, J., dissenting) ("But there is simply no support for the proposition that the officially sponsored nondenominational invocation and benediction read by Rabbi Gutterman—with no one legally coerced to recite them—violated the Constitution of the United States."). Therefore, even the same test can be employed in different ways, creating different results.

85. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 311–12 (2000) ("We stressed in *Lee* the obvious observation that 'adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention.'").

86. *Id.* at 317.

87. *Id.* at 309.

88. *Id.* at 317.

89. *See, e.g.*, Good News Club, 533 U.S. at 120 (finding no Establishment Clause violation if religious group gained access to facilities after-school based on the creation of a limited public forum); Rosenberger v. Rector & Visitors of the

Court does not universally refer to it as such, this test can best be described as the "neutrality test."[90] In *Board of Education of Westside Community Schools v. Mergens*,[91] the Court upheld the Equal Access Act (EAA), which requires schools that accept federal funds to refrain from discrimination based on content or viewpoint when granting access to facilities.[92] Based on *Mergens*, if at least one noncurricular group is allowed access to school facilities, any group requesting access must be given similar access.[93] The neutrality test was further developed in *Rosenberger v. Rector & Visitors of the University of Virginia*,[94] where the Court held that the distribution of student fees by a public university to a student religious publication was not an Establishment Clause violation.[95] There, the Court reasoned that the students' speech was private, not public speech and that government endorsement or coercion concerns were minimal in light of other school-funded student organizations.[96]

Univ. of Va., 515 U.S. 819, 841–42 (1995) (finding no Establishment Clause violation if public university were to provide religious organization with funds, similar to other nonreligious student groups); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 397 (1993) (Kennedy, J., concurring) ("Given the issues presented as well as the apparent unanimity of our conclusion that this overt, viewpoint-based discrimination contradicts the Speech Clause of the First Amendment and that there has been no substantial showing of a potential Establishment Clause violation, I agree with Justice SCALIA that the Court's citation of Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), is unsettling and unnecessary."); Bd. of Educ. of Westside Comm. Schs. v. Mergens By and Through Mergens, 496 U.S. 226, 250 (1990).

90. Zelman v. Simmons-Harris, 536 U.S. 639, 652–53, 697 (2002) (upholding Ohio vouchers to religious schools based on their neutrality with respect to religion).

91. *Mergens*, 496 U.S. 226. While many observers point to later cases as sources of the neutrality test, *Mergens* was the first test that started to hint at using neutrality principles associated with free speech jurisprudence in the school setting when analyzing Establishment Clause claims.

92. *Id.* at 231.

93. *Id.* at 235 (holding that Christian club would not violate Establishment Clause where other noncurricular clubs, such as a scuba-diving club and chess club, had similar access).

94. 515 U.S. 819 (1995).

95. *Id.* at 834.

96 *Id* at 850 (O'Connor, J., concurring) ("Given this wide array of nonreligious, antireligious and competing religious viewpoints in the forum supported by the University, any perception that the University endorses one particular viewpoint would be illogical.").

Two years after *Rosenberger*, the Court decided *Agostini v. Felton*,[97] which revisited *Aguilar v. Felton*,[98] a prior Court decision that enjoined New York school districts from sending Title I teachers to private religious schools to provide remedial instruction.[99] Using the *Lemon* test, the *Aguilar* Court had held that while "well-intentioned," the program created "excessive entanglement of church and state."[100]

In reversing the twelve-year-old injunction put in place by *Aguilar*,[101] the Supreme Court in *Agostini* signaled just how significant the doctrinal shift had become.[102] For the first time, the Court allowed a comprehensive, federally funded program that provided aid to private schools,[103] based solely on the neutrality principle.[104]

Most recently, the Court extended the neutrality principle to the elementary school context in *Good News Club v. Milford Central School*.[105] In *Good News*, a private Christian organization challenged an elementary school's denial of access to the cafeteria for weekly meetings after school.[106] Whereas the EAA upheld in *Mergens* only applied to secondary schools,[107] the Court in *Good News* declared that even with young students, schools cannot discriminate in which groups are allowed access to school facilities.[108]

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

98. Aguilar v. Felton, 473 U.S. 402 (1985).

99. *Id.*

100. *Id.* at 414.

101. *Agostini*, 521 U.S. at 208.

102. *Id.* at 240–41 (Souter, J., dissenting) ("The result [of the majority's decision] is to repudiate the very reasonable line drawn in *Aguilar* and *Ball*, and to authorize direct state aid to religious institutions on an unparalleled scale, in violation of the Establishment Clause's central prohibition against religious subsidies by the government.").

103. *Id.*

104. The Court held that as long as the government was being neutral, it need not discriminate against students who attended religious schools. *Id.* at 231.

105. Good News Club v. Milford Cent. Sch., 533 U.S. 98, 113–14 (2001) (finding no Establishment Clause violation if religious group gained access to facilities after-school based on the creation of a limited public forum).

106. *Id.* at 103.

107. Bd. of Educ. of Westside Comm. Schs. v. Mergens By and Through Mergens, 496 U.S. 226, 233 (1990).

108. *Good News*, 533 U.S. at 115.

In sum, Parts II.A and B illustrate the complex nature of the Establishment Clause doctrine. In various cases, the Court has employed the *Lemon* test, strict scrutiny test, historical practices test, endorsement test, coercion test, and neutrality test. As Part II.B shows, the utility of each test often depends on the specific context of the case.[109] Part III discusses how courts analyze Establishment Clause claims against a teacher's First Amendment rights.

III: BALANCING THE ESTABLISHMENT CLAUSE WITH A TEACHER'S FIRST AMENDMENT RIGHTS

While the Establishment Clause restricts religious expression by the government, teachers still have individual rights as citizens of the United States. These rights, however, may be limited while a teacher is on the job. As an employer, the government is responsible for both carrying out its mission and also respecting the rights of its employees.[110] When taking action that restricts employee conduct, the government must balance the employee's First Amendment interests with the government's interests.[111] On one hand, the employee's interest is at its peak when speaking about a matter of public concern or exercising other constitutionally protected rights.[112] On the other hand, the orderly operation of an agency or Establishment Clause concerns weigh in favor of the government.[113] However, if the employees' speech takes place during their normal duties, then the government's discretion usually prevails.[114]

Part III.A provides a brief overview of teacher First Amendment rights. Parts B, C, and D look at Establishment claims and teacher rights

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109. *See supra*, Part II.

110. *See, e.g.*, Pickering v. Bd. of Educ. of Tp. High Sch. Dist. 205, 391 U.S. 563, 568 (1968) ("The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.").

111. *Id.*

112. *Id.*

113. *Id.*

114. Garcetti v. Ceballos, 547 U.S. 410, 426 (2006) (finding no First Amendment protection where expressions were made pursuant to plaintiff's job duties).

in three distinct employment contexts: curricular activities, extracurricular activities, and noncurricular activities. Finally, Part III.E summarizes how courts approach Establishment Clause cases in the face of teacher First Amendment claims.

A. Overview

Curricular activities refer to "the whole body of courses offered by an educational institution or one of its branches."[115] While it is true that teachers, just as students, "do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gates,"[116] teachers have very few First Amendment rights when engaged in curricular activities.[117] For example, in *Hazelwood v. Kuhlmeier*,[118] the Supreme Court gave *school officials* the authority to restrict speech in school-sponsored activities when there was a legitimate pedagogical interest.[119] While *Hazelwood* focused on student speech, the implication was that school authorities could restrict teacher speech as well[120]

Similarly, in *Garcetti v. Ceballos*,[121] the Court held that public employee speech that occurs pursuant to official duties does not enjoy the protections of the First Amendment.[122] For teachers, this tends to

115. Bd. of Educ. of Westside Comm. Schs. v. Mergens By and Through Mergens, 496 U.S. 226, 237 (1990). Courts also sometimes refer to "school-sponsored activities," which encompass both curricular and extracurricular activities. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988). School-sponsored activities include activities that one could "reasonably perceive[ ] to bear the imprimatur of the school." *Id.* at 271.

116. Tinker v. Des Moines Ind. Comm. Sch. Dist., 393 U.S. 503, 506 (1969).

117. *See generally* Neal H. Hutchens, *Silence at the Schoolhouse Gate: The Diminishing First Amendment Rights of Public School Employees*, 97 KY. L.J. 37 (2008).

118. 484 U.S. 260 (1988) (upholding school's authority to edit content of school newspaper).

119. *Id.* at 273.

120. Hutchens, *supra* note 117 at 64 ("Though the case centered on student speech, the majority stated that in the context of school-sponsored speech these limitations could be applied to teachers and "other members of the school community.").

121. 547 U.S. 410 (2006) (finding no First Amendment protection where expressions were made pursuant to plaintiff's job duties).

122. *Id.*

mean that their Free Speech and Free Exercise rights are stronger the further away from the schoolhouse doors the activity occurs.[123] However, that does not mean that the government's interest in preventing an Establishment Clause violation completely disappears.[124]

Rather, courts tend to vary on how they analyze an Establishment claim in the face of a teacher's First Amendment claim.[125] The outcome often depends on two factors: the level of the teacher's involvement and the activity's proximity to students.[126] Within the "involvement" factor courts have created three distinctions for religious activity: leading, participating, or supervising.[127] Leading involves the teacher taking active direction over the activity.[128] Participation tends to include decision-making,[129] recitation,[130] or any "expression of religious belief" other than "passive" presence.[131] Supervision implies a "custodial

123. *See, e.g.*, Wigg v. Sioux Falls Sch. Dist. 49-5, 382 F.3d 807, 815 (8th Cir. 2004) (finding no Establishment Clause violation where teacher participated in after-school religious club).

124. *See, e.g.*, Doe v. Wilson Cnty. Sch. Sys., 564 F. Supp. 2d 766, 795 (M.D. Tenn. May 29, 2008) (finding Establishment Clause violation even when religious activity occurred before school).

125. RONNA GREFF SCHNEIDER, EDUCATION LAW: FIRST AMENDMENT, DUE PROCESS AND DISCRIMINATION LITIGATION § 1:21 (2014) (noting that Establishment Clause violations may exist if teachers engage in religious expression during their normal duties); W. COLE DURHAM & ROBERT SMITH, RELIGIOUS ORGANIZATIONS AND THE LAW § 12:6 (2013) (discussing different free speech frameworks in public schools, such public forum analysis and government-employee speech analysis).

126. SCHNEIDER, *supra* note 125 at § 1:21; DURHAM & SMITH, *supra* note 125 at § 12:6 (noting that schools may restrict teacher speech if it could "disrupt [the] school's operation").

127. Bd. of Educ. of Westside Comm. Schs. v. Mergens By and Through Mergens, 496 U.S. 226, 253 (1990).

128. *Id.* at 252.

129. Reed v. Van Hoven, 237 F. Supp. 48, 56 (W.D. Mich. 1965) (holding that teachers may not select prayers or Bible readings during prayer sessions before and after school).

130. Doe v. Duncanville Indep. Sch. Dist., 70 F.3d 402, 411 (5th Cir. 1995) (Mahon, J., dissenting in part).

131. Daugherty v. Vanguard Charter Sch. Acad., 116 F. Supp. 2d 897, 911 (W.D. Mich. 2000) (denying plaintiff's claim of Establishment Clause violation where there was no evidence that teachers actually participated in the religious expression).

purpose[]" that is "nonparticipatory,"[132] "merely to ensure order and good behavior."[133] With respect to the "proximity" factor, courts often distinguish between three types of activities: (1) curricular, (2) extracurricular, and (3) noncurricular activities.[134] As Part III. B. shows, teacher First Amendment rights vary in each of these different contexts.

B. Curricular Activities

Curricular activities refer to "the whole body of courses offered by an educational institution or one of its branches."[135] With respect to religious expression, teachers' free exercise rights are limited by the same Establishment Clause concerns as the school as a whole.[136] During curricular activities, Establishment Clause violations trump interests in religious expression on behalf of school officials.[137]

1. Supreme Court Decisions Related to Teacher Religious Expression in the Classroom

The religious expression of teachers has rarely been the sole focus of Supreme Court case law. However, some of the Court's cases implicate teacher rights in the way that they analyze school expressions

132. *Mergens*, 496 U.S. at 236 (holding that teacher supervision of Christian club after school would not constitute Establishment Clause violation).

133. *Id.* at 253. In *Mergens*, the Court also suggested that proper supervision required that the school "dissociate itself" from the religious speech. *See id.* at 270 (Brennan, J., dissenting).

134. *Id.* at 237–38; Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271–72 (1988).

135. *Mergens*, 496 U.S. at 237. Courts also sometimes refer to "school-sponsored activities," which encompass both curricular and extracurricular activities. *See Hazelwood*, 484 U.S. at 271. School-sponsored activities include activities that one could "reasonably perceive[] to bear the imprimatur of the school." *Id.* at 271.

136. Wallace v. Jaffree, 472 U.S. 38, 71–72 (1985) (noting that precedents do not allow teachers to compose and recite official prayers).

137. Although staff are generally not allowed to "lead" or "actively participate" in religious activities, there are some outlying cases and circumstances. *See, e.g.*, Wigg v. Sioux Falls Sch. Dist., 382 F.3d 807, 815 (8th Cir. 2004) (finding no Establishment Clause violation where teacher participated in after-school religious club).

of religion.[138] In *Engel v. Vitale*,[139] the Supreme Court invalidated a law that required a prayer to be read by the teacher each school day.[140] *Engel* was decided before *Lemon*, but it analyzed the Establishment Clause claim by looking at the "indirect coercive pressure" that is felt when government encourages religion.[141] Further, the Court stated that the Establishment Clause was created to protect both government and religion.[142] By limiting the actions of the school, the Court implicitly limited the religious freedom of teachers.

Similarly, in *Wallace v. Jaffree*,[143] the Court invalidated a statute that required time set aside for meditation or prayer.[144] In *Wallace*, the complaint indicated that the plaintiff's teachers had actually facilitated classroom prayer during the set aside time.[145] While the Court did not directly address the teachers' actions,[146] the holding implicitly limited their rights to religious expression in the classroom by finding the statute invalid.[147] The Court analyzed the claim using the *Lemon* test, finding that the statute did not have a secular purpose.[148]

2. Lower Court Decisions Related to Teacher Religious Expression in the Classroom

The Supreme Court has not dealt with religious expression during curricular activities since *Wallace*. As a result, lower courts have

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138. *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578, 587 (1987) (holding Louisiana law unconstitutional where the stated purpose was to protect academic freedom for teachers, but the result was to restrict such freedom); *Wallace*, 472 U.S. at 73 (noting that if teachers told students they could use moment of silence to pray that would constitute endorsement of religion); Engel v. Vitale, 370 U.S. 421 (1962) (invalidating school-sponsored prayer led by teachers).

139. 370 U.S. 421.

140. *Id.* at 424.

141. *Id.* at 430–31.

142. *Id.* at 431 ("[A] union of government and religion tends to destroy government and degrade religion.").

143. *Wallace*, 472 U.S. at 38.

144. *Id.* at 40.

145. *Id.* at 42.

146. *Id.* at 41–42.

147. *Id.* at 55–56.

148. *Id.*

taken their cue from other education contexts[149] and often use the modified *Lemon*-endorsement test.[150]

For example, in *Holloman v. Harland*,[151] the Eleventh Circuit held that a teacher's practice of soliciting prayer requests and enforcing a moment of silence violated the Establishment clause.[152] The court used a modified *Lemon*-Endorsement test in which the Court looked at whether the teacher had a valid secular purpose and whether the principal or primary effect was to advance religion.[153] The court commented that in *Agostini*, the Supreme Court had collapsed the third *Lemon* prong into the second.[154] Citing several Supreme Court precedents, including *Wallace*, the Eleventh Circuit determined that the teacher's intent to "teach students compassion, pursuant to the [state's] character education plan," while an "ostensibly secular purpose" was constitutionally impermissible because of its "avowedly religious means."[155] Additionally, the teacher's action had the effect of "promot[ing] pray[er], a religious activity."[156] Moreover, using language of the endorsement test, the court declared that the activity could "reasonably appear to be an 'endorsement (of religion).'"[157] Therefore, the teacher's actions violated the Establishment Clause.[158]

These examples illustrate that the closer the teacher is to classroom activities, the weaker a teacher's First Amendment rights

149. *See, e.g.*, Holloman ex rel. Holloman v. Harland, 370 F.3d 1252, 1284–85 (11th Cir. 2004) (applying endorsement test to assess Establishment Clause claim during curricular activity based on the Supreme Court's use of such test in the school funding context).

150. *See, e.g., id.* (using endorsement test to find Establishment Clause violation where teacher solicited prayer requests from students); Marchi v. Bd. of Coop. Educ. Servs. of Albany, 173 F.3d 469, 475–76 (2d Cir. 1999) (using endorsement test to see possible Establishment Clause violation where teacher sent letter to parents including references to religion); Freshwater v. Mt. Vernon Cty. Sch. Dist. Bd. of Educ., 1N.E.3d 335, 489 (Ohio 2013) (using endorsement test to find no Establishment Clause violation where teacher kept a Bible on his desk).

151. *Holloman*, 370 F.3d 1252.

152. *Id.* at 1289.

153. *Id.* at 1285.

154. *Id.* at 1284–85.

155. *Id.* at 1286.

156. *Id.*

157. *Id.*

158. *Id.*

become. Part III.C explores teacher rights in settings removed from the classroom, yet which still inherently bear the risk of being attributed to the school.

C. Extracurricular Activities

Extracurricular activities, such as athletics, drama, or band occupy an imperfect middle ground between curricular and noncurricular activities. Activities are considered extracurricular if they function outside of the school day yet still maintain the curricular qualities of defined knowledge or skills established by the school that students must develop or demonstrate.[159] While extracurricular activities are nominally voluntary for the student, they are also considered "directly related" to a school's curriculum.[160]

However, it is well settled that schools may not lead religious expression during extracurricular activities.[161] Even if religious activity is nominally student-initiated, courts are often skeptical if there has been a history of school-sponsorship.[162] For example, in *Santa Fe Independent School District v. Doe*,[163] the Supreme Court invalidated student-led prayer before football games where there had been years of school

159. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988) (noting that school-sponsored activities include "publications, theatrical productions, and other expressive activities. . . so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.").

160. Bd. of Educ. of Westside Comm. Schs. v. Mergens By and Through Mergens, 496 U.S. 226, 237–38 (1990).

161. *See, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 301–32 (2000); Lee v. Weisman, 505 U.S. 577, 587 (1992) (finding that schools may not coordinate prayers during graduation ceremonies). Under *Hazelwood*, these activities are still school-sponsored, and thus may bear the imprimatur of the school. *Hazelwood*, 484 U.S. at 271. In *Lee v. Weisman*, the Supreme Court invalidated the speech of a religious graduation speaker. *Lee*, 505 U.S. at 599. Employing the coercion test, the Court argued that even though students had the option of attending, they did not reasonably have the option to leave once they arrived. *Id.* at 593–94. Further, Justice Kennedy, who wrote the majority opinion, was not convinced that a graduation is truly an optional experience for students, because it is such an important part of schooling. *Id.* at 595.

162. Doe v. Duncanville Indep. Sch. Dist., 70 F.3d 402, 406 (5th Cir. 1995).

163. 530 U.S. 290 (2000).

sponsorship.[164] In *Santa Fe*, the Court's holding did not turn on the participation or symbolic conduct of staff members, but whether the invocation was sufficiently student-led in light of years of school encouragement of pre-game prayer.[165] The Court primarily employed the coercion test[166] by looking at the effect pre-game prayers could have in a stadium full of students participating in a voluntary extracurricular activity closely connected to the school.[167]

In the event of a facial challenge against a law or policy, courts often apply some version of the *Lemon* test.[168] Since the decision involved a facial challenge of the school's modified policy, the majority in *Santa Fe* applied the *Lemon* test in addition to the coercion test, holding that the school's involvement in establishing the student-led invocation was an "excessive entanglement" with religion, violating the third prong of *Lemon*.[169]

Similarly, in *Doe v. Duncanville Independent School District*,[170] decided before *Santa Fe*, the Fifth Circuit found coach participation in student-initiated prayers to violate the Establishment Clause because the prayers took place "during school-controlled, curriculum-related activities that members of the basketball team are required to attend."[171] In *Duncanville*, the coach either led or participated in prayers before practice and games for twenty years.[172] Using the endorsement test, the court held that the coach could not participate in the student prayers because of the school-sponsored nature of the activity.[173] However, the court did note that the Establishment Clause does not prevent staff members from treating students' religious beliefs and practices with

164. *Id.* at 304.
165. *Id.* at 305–06.
166. *Id.* at 300.
167. *Id.* at 310.
168. *See id.* at 305–06.
169. *Id.*
170. 70 F.3d 402 (5th Cir. 1995).
171. *Id.* at 406.
172. *Id.* at 404.
173. *Id.* at 406. The district court went so far as to preclude "supervision" of student prayer as well, which the Fifth Circuit did not explicitly criticize. *Id.* The court pointed out that as an extracurricular activity instead of a noncurricular activity, the perception of school endorsement would preclude even supervision. *Id.*

deference and respect.[174] While coaches do not have to make their non-participation "vehemently obvious or to leave the room when students pray," they still should not "join hands in a prayer circle or otherwise manifest approval and solidarity with student religious exercises. . . ."[175]

One area that remains unclear is what actions would constitute "supervising" such that it would cross the line into endorsement. The dissent in *Duncanville* expanded on this point by clarifying that while staff members cannot "encourage[] or promot[e]" student prayer, the "only questions here are how teachers may respond to student-initiated prayers and to what extent the school may 'supervise' the prayers."[176] While the dissenting judge agreed that staff members could not "actively join[] in the student-led prayers," she said the courts should not "reach into the minds of individual teachers to prescribe their responses to student-initiated prayers."[177]

In 2007, the Third Circuit attempted to address this issue raised by the *Duncanville* dissent in *Borden v. School District of Township of East Brunswick.*[178] In *Borden,* the court invalidated active participation by staff members,[179] but left the door open for symbolic conduct, such as bowing one's head or kneeling.[180] The lead opinion did not find such symbolic conduct to be inherently participatory, but used the endorsement test to see "whether a reasonable observer familiar with the history and context of the display would perceive the display as a government endorsement of religion."[181] In *Borden*, a football coach bowing his head during student prayer, coupled with a history of coach-led prayer, violated the Establishment Clause under the endorsement test.[182] The concurring justice, however, felt that such symbolic conduct would likely be deemed religious endorsement *even without* the history of coach-led prayer, particularly in the coercive context of the football

174. *Id.* at 406 n.4.

175. *Id.*

176. Doe v. Duncanville Indep. Sch. Dist., 70 F.3d 402, 409 (5th Cir. 1995) (Jones, J., dissenting).

177. *Id.* at 409–410.

178. 523 F.3d 153 (3d Cir. 2008).

179. *Id.* at 167.

180. *Id.* at 178–79.

181. *Id.* at 175.

182. *See generally id.*

locker room.[183] Since the three-judge panel in *Borden* issued three different opinions, the case only serves to underscore the complicated nature of symbolic religious conduct by teachers during extracurricular activities.

D. Noncurricular Activities

Unlike curricular or extracurricular activities, noncurricular activities "do[] not directly relate to the body of courses offered by the school"[184] and have only a loose relationship with the school.[185] These activities occur outside of instructional time and usually involve no more than physical access to the school grounds in a limited public forum.[186] The most familiar noncurricular activities are after school clubs, such as chess club, or informal gatherings that are unconnected to the school curriculum, such as Boy Scout or Girl Scout meetings.[187]

While it is unclear whether teachers can supervise extracurricular religious expression by students, that right seems to be well-established in the noncurricular setting.[188] For example, Justice O'Connor wrote in *Board of Education of Westside Community Schools v. Mergens*[189] that the Equal Access Act (EAA) was constitutional, noting that school staff were only allowed to be involved in after-school religious activities for "custodial" or supervisory purposes.[190] Actual participation, rather than supervision, would suggest school sponsorship.[191] This emphasis on

183. *Id.* at 179–80 (McKee, J., concurring).

184. Bd. of Educ. of Westside Comm. Schs. v. Mergens By and Through Mergens, 496 U.S. 226, 227 (1990).

185. Good News Club v. Milford Cent. Sch., 533 U.S. 98, 113 (2001); *Mergens*, 496 U.S. at 239–40.

186. *Good News*, 533 U.S. at 113; Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995); *Mergens*, 496 U.S. at 240 (allowing Christian club to have access to facilities after school where school had created a limited public forum by allowing other non-curricular clubs).

187. *Good News*, 533 U.S. at 113; *Mergens*, 496 U.S. at 240; Doe v. Wilson Cnty. Sch. Sys., 564 F. Supp. 2d 766, 778 (M.D. Tenn. 2008).

188. *Mergens*, 496 U.S. at 253 (holding that teachers could supervise after school Christian club without violating the Establishment Clause).

189. *Id.* at 226.

190. *Id.* at 253.

191. *Id.* at 251.

supervision rather than participation is also echoed by other cases.[192]

It is less clear whether teachers may actually participate in noncurricular activities. The Supreme Court has emphasized that, at least in the university setting, noncurricular activities can be characterized as private speech, which is beyond the scope of the Establishment Clause.[193] However, the Court has not addressed this issue directly in the elementary and secondary school context, though it did make a passing reference to teacher involvement in *Good News*.[194]

With no Supreme Court precedent directly on point, lower courts have used various approaches to determine the constitutionality of teacher participation in noncurricular activities.[195] Courts typically use the neutrality test in this context,[196] though in some cases the endorsement test has been employed.[197]

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192. Daugherty v. Vanguard Charter Sch. Acad., 116 F. Supp. 2d 897, 911 (W.D. Mich. 2000); Reed v. Van Hoven, 237 F. Supp. 48, 56 (W.D. Mich. 1965) ("The role of the teacher at these pre- or post-school sessions is strictly that of one charged with the responsibility of maintaining order.").

193. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 842 (1995) (finding no Establishment Clause violation if public university were to provide religious organization with funds, similar to other nonreligious student groups).

194. Good News Club v. Milford Cent. Sch., 533 U.S. 98, 117 (2001) ("*Edwards* involved the content of the curriculum taught by state teachers *during the schoolday* to children required to attend. Obviously, when individuals who are not schoolteachers are giving lessons after school to children permitted to attend only with parental consent, the concerns expressed in *Edwards* are not present.") (emphasis in original).

195. *See, e.g.*, Wigg v. Sioux Falls Sch. Dist. 49-5, 382 F.3d 807, 815 (8th Cir. 2004) (finding no Establishment Clause violation where teacher participated in after-school religious club because conduct constituted private speech); Doe v. Wilson Cnty. Sch. Sys., 564 F. Supp. 2d 766, 795 (M.D. Tenn. 2008) (finding Establishment Clause violation where staff members attended religious event before school and wore "I Prayed" stickers throughout the day).

196. *See, e.g.*, *Wigg*, 382 F.3d at 815.

197. *Wilson Cnty.*, 564 F. Supp. 2d at 793. The coercion test is not relevant in this context, as students may freely choose whether or not to participate. Bd. of Educ. of Westside Cmty. Schs. v. Mergens, 496 U.S. 226, 252 (1990) ("To the extent that a religious club is merely one of many different student-initiated voluntary clubs, students should perceive no message of government endorsement of religion.").

For example, in *Wigg v. Sioux Falls School District 49-5*,[198] the Eighth Circuit used the neutrality test to uphold a teacher's right to participate in a noncurricular religious club meeting held outside of instructional hours, even though the club included students who were in the teacher's class during the school day.[199] The Eighth Circuit, relying on language in *Santa Fe*, held that teacher involvement in noncurricular clubs constitutes private speech and is beyond the Establishment Clause's concern.[200] The *Wigg* court also found support in *Mergens,* even though that case did not actually reach the question of whether staff participation would constitute an Establishment Clause violation.[201] In *Wigg*, the court pointed to *Mergens'* guidance that there is a "crucial difference" between government speech and private speech.[202] As a result of *Wigg* and *Mergens*, using the neutrality test when evaluating noncurricular private speech makes it likely that a teacher has a First Amendment free speech or free exercise right to actively participate in or even lead a religious club.[203]

Conversely, in *Doe v. Wilson County School System*,[204] a federal district court in Tennessee used the endorsement test to invalidate staff participation in a "See You At the Pole™" event before school.[205] These events, which are held in many schools across the across the country,

198. 382 F.3d. at 807.

199. *Id.* at 815.

200. *Id.* ("With the guidance of *Doe* and *Santa Fe*, we conclude that Wigg's participation in the after-school Club constitutes private speech.").

201. *Id.* at 813. While *Mergens* implied that there might be an Establishment Clause issue associated with staff participation in noncurricular activities, it did not decide that issue because the Equal Access Act provided a bar to such conduct. Bd. of Educ. of Westside Cmty. Schs. v. Mergens, 496 U.S. 226, 252–53 (1990).

202. *Id.*

203. *Id.* Therefore, as other decisions have solidified noncurricular activities as involving "private speech," *Mergens* is actually cited as a supporting argument for allowing teachers to participate in after-school religious clubs. *Wigg*, 382 F.3d at 813. While teacher participation may be reconciled with *Mergens* on a constitutional basis, that does not address the issue of why the Equal Access Act does not continue to be a barrier to such involvement. It could be that even if SB 370 does not violate the Establishment clause, it does explicitly violate the federal Equal Access Act. That question is beyond this scope of this Note.

204. 564 F. Supp. 2d 766 (M.D. Tenn. 2008).

205. *Id.* at 794–95.

involve students praying together at the school flagpole.[206] In *Wilson*, students and parents gathered at the flagpole and recited prayers together for between 20 and 35 minutes before school.[207] Staff members were present and participated, but they did not lead any of the prayers.[208]

Although the event occurred before school, the court found that school staff crossed the line into endorsement of religion.[209] The court pointed out that in addition to bowing his head in prayer during the flagpole prayer event,[210] the principal also wore an "I Prayed" sticker throughout the school day as he visited classrooms.[211] Therefore, it is possible that the court chose the endorsement test instead of the neutrality test because the actions of the school staff had an effect beyond the noncurricular activity.

E. Summary

In sum, teachers' First Amendment protections become more limited the closer their religious activity intersects with the required school curriculum.[212] During curricular activities, teachers' rights to religious expression are limited because their conduct may be attributed to the school, making the school susceptible to Establishment Clause violations.[213] During extracurricular activities, teachers may be present in

206. *Id.* at 781.

207. *Id.*

208. *Id.* at 781–82.

209. *Id.* at 794–95.

210. *Id.* at 782.

211. *Id.* at 786.

212. *See, e.g.*, Garcetti v. Ceballos, 547 U.S. 410, 421 (2006) (noting that public employees do not enjoy First Amendment protection during the course of their required duties); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) (holding that school officials can exercise authority over school-sponsored activities); *cf.* Wigg v. Sioux Falls Sch. Dist. 49-5, 382 F.3d 807, 815 (8th Cir. 2004) (finding no Establishment Clause violation where teacher participated in after-school religious club).

213. SCHNEIDER, *supra* note 125 at § 1:21 ("Courts have generally rejected teachers' free exercise and free speech claims when school authorities have limited or prohibited the teachers from engaging in religious expression during the course of the teacher's official responsibilities."); Durham & Smith, *supra* note 125 at § 12:6 (pointing out government's unique role as "sovereign and employer" in the context of public schools, specifically in regards to a free speech analysis).

a custodial capacity, but they may not participate in student religious expression.[214] During noncurricular activities, teachers may be able to participate in religious activities on school grounds, provided that it is clear they are acting in a private capacity.[215] As discussed above, the Court's three fundamental distinctions are not always clear to stakeholders, and laws like S.B. 370 attempt to bring clarity to unsettled First Amendment jurisprudence.

IV. THE NORTH CAROLINA RESPECT FOR STUDENT PRAYER AND RELIGIOUS ACTIVITY ACT

S.B. 370 was passed in 2014 to clarify student and teacher religious rights. Part IV.A discusses in greater detail the legislative history of S.B. 370. Part IV.B describes the rights that S.B. 370 codifies for school employees. Part IV.C describes additional provisions of the law that are relevant to teacher rights, such as the savings clause and the severability clause. Finally, Part IV.D summarizes the legal effect of S.B. 370 regarding teacher rights to religious expression at school.

A. Legislative History

S.B. 370 was prompted by two events in McDowell County during the fall of 2012.[216] A first-grade student at West Marion Elementary School was selected to read a poem she wrote about her grandfather at a Veterans Day school assembly.[217] In the poem, the student wrote that her grandfather, who was a veteran, "prayed to God for strength, he prayed to God for peace."[218] Prior to the assembly, a member of the community who discovered the content of the poem expressed concerns to West Marion's principal that a poem read aloud at

214. Bd. of Educ. of Westside Cmty. Schs. v. Mergens, 496 U.S. 226, 253 (1990).

215. *See, e.g.*, Wigg v. Sioux Falls Sch. Dist. 49-5, 382 F.3d 807, 815 (8th Cir. 2004).

216. Exum, *supra* note 2.

217. *Outrage results after school officials force girl to remove word from veteran's poem*, WSOCTV.COM (Dec. 3, 2012), http://www.wsoctv.com/news/news/local/outrage-results-after-school-officials-force-girl-/nTMCd/ ("He prayed to God for strength, he prayed to God for peace.").

218. *Id.*

a school assembly with a reference to "God" appeared to be a school endorsement of religion.[219] After consultation between the school principal and the district superintendent, the student was asked to not read that line during the assembly.[220] Also that year, the McDowell County School Board purportedly told high school athletic coaches that they had to leave the locker room if students engaged in student-initiated prayer before or after games.[221] Coaches apparently were upset by this regulation, as evidenced by subsequent comments by lawmakers that it is a "sad day" when coaches are not allowed to "bow their head[s]" when students pray.[222]

Other lawmakers declared that North Carolina had taken the separation of church and state too far.[223] Three North Carolina legislators[224] proposed a law that would keep districts from limiting student and staff religious expression.[225] Opponents of S.B. 370 questioned the necessity and constitutionality of the bill,[226] arguing that some of the language may run afoul of the Establishment Clause because it allows teachers to endorse religious practices.[227]

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219. Todd Starnes, *School Orders Child to Remove God From Poem*, FOX NEWS RADIO, http://radio.foxnews.com/toddstarnes/top-stories/school-orders-child-to-remove-god-from-poem.html (last visited Mar. 1, 2015).

220. *Id.*

221. *See* Exum, *supra* note 2 and accompanying text.

222. *See* Leslie, *supra* note 1.

223. Leslie, *supra* note 1 ("Anything about separation of church and state, all that stuff, it's not even in the Constitution. We need to remember what principles this country was founded on.").

224. The primary sponsors of S.B. 370 were Stan Bingham, Warren Daniel, and Ralph Hise. SENATE BILL 370 / S.L. 2014-13, NORTH CAROLINA GENERAL ASSEMBLY, http://www.ncleg.net/gascripts/BillLookUp/BillLookUp.pl?Session=2013&BillID=S370&votesToView=all (last visited Mar. 2, 2015) [hereinafter *Bill History*]. Hise is the only one of the three who represents McDowell County. SENATE REPRESENTATION BY COUNTY, NORTH CAROLINA GENERAL ASSEMBLY, http://www.ncleg.net/gascripts/members/memberList.pl?sChamber=senate (last visited Apr. 7, 2015).

225. *See* S.B. 370, Sess. Law 2014–13, §1 (N.C. 2014) (codified in N.C. GEN. STAT. § 115C-407).

226. Leslie, *supra* note 1.

227. *Id.* ("[The law] gets into the entanglement issue under the First Amendment [because it allows] teachers [to participate] in a way that crosses the line and endorses the practice . . . .").

Initially, the language of S.B. 370 included only a basic explanation of student and staff rights.[228] However, later drafts included more detailed descriptions of student rights,[229] as well as a grievance procedure,[230] savings clause,[231] and severability clause.[232] S.B. 370 quickly passed the Senate in 2013, but was not heard in the House until June 2014.[233] After a debate, which included comments critical of the bill by Rep. Glazier and others,[234] S.B. 370 passed the House by a vote of 106 to 9,[235] and Governor Pat McCrory signed the bill into law on June 10, 2014.[236]

B. Religious Rights for Staff

S.B. 370 was codified as N.C. Gen. Stat. § 115C-407.30–32. Specifically, N.C. Gen. Stat. § 115C-407.32(b) ("Section (b)"), allows school staff to participate in student-led non-curricular religious activities, as long as they do not conflict with other academic responsibilities.[237] Additionally, N.C. Gen. Stat. § 115C-407.32(c)

228. The Respect for Student Prayer and Religious Activity Act, S.B. 370, Sess. Law 2014–13 (N.C. 2014) (as filed on Mar. 19, 2013), http://www.ncleg.net/Sessions/2013/Bills/Senate/PDF/S370v0.pdf.

229. N.C. GEN. STAT. § 115C-407.30 (2014).

230. N.C. GEN. STAT. § 115C-407.31 (2014).

231. N.C. GEN. STAT. § 115C-407.33 (2014).

232. S.B. 370, Sess. Law 2014–13, §3 (N.C. 2014).

233. SENATE BILL 370 / S.L. 2014-13, NORTH CAROLINA GENERAL ASSEMBLY, http://www.ncleg.net/gascripts/BillLookUp/BillLookUp.pl?Session=2013&BillID=S370&votesToView=all (last visited March 2, 2015) [hereinafter *Bill History*].

234. During the House Committee debate, Representative Glazier offered an amendment to remove phrasing that would allow teachers to "adopt a respectful posture" when students were engaged in voluntary prayer, but it was struck down. Leslie, *supra* note 1. In an attempt to ease Glazier's concerns, the committee added a severability clause designed to keep the remainder of the bill intact if any provision is struck down by the courts. Audio recording: North Carolina House Debate on Senate Bill 370 (June 4, 2014), http://www.ncleg.net/DocumentSites/HouseDocuments/2013-2014%20Session/Audio%20Archives/2014/06-04-2014.mp3 (starting at 1:37:45). Ultimately, Rep. Glazier voted for the bill, though he continued to express his reservations during the House debate. *Id.*

235. *Bill History*, *supra* note 233.

236. Anderson, *supra* note 4.

237. N.C. GEN. STAT. § 115C-407.32(b) (2014).

("Section (c)") allows teachers to "adopt a respectful posture" during student-led extracurricular religious activities.[238]

In Section (b), "conflict" most likely means "to occur at the same time," which would distinguish the provision from one that protects conduct during extracurricular activities, such as athletics or theater. However, one could argue that a "conflict" does not exist unless private conduct is incompatible or frustrates the purpose of a school responsibility.[239] For example, a football coach may think he can participate in a pre-game prayer because it would supplement, not interfere with his responsibilities as a football coach. As a counter example, if a teacher was assigned to supervise students in the cafeteria after school, yet left to participate in prayer with a religious noncurricular club, a "conflict" would exist. Thus, an argument could be made that a plain reading of the statute allows staff participation in any religious expression (extracurricular or noncurricular) on school grounds before or after school.

Still, the fact that the law permits participation in "religious activities"[240] suggests that the event itself is religious in nature, as opposed to religious expression within an event of a different character.[241] Since extracurricular activities cannot be religious, because they are established by the school,[242] Section (b) would be limited to noncurricular activities. Additionally, by inserting the phrase "voluntary for all parties"[243] the law suggests that "religious activities" are outside of an employee's contractual time, and thus would not include events or clubs that teachers are assigned to supervise.

Furthermore, if staff were allowed to participate in any religious expression before or after school, there would be no need to protect their

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238. N.C. GEN. STAT. § 115C-407.32(c) (2014).

239. *Conflict Definition*, MERRIAM-WEBSTER ONLINE DICTIONARY, http://www.merriam-webster.com/dictionary/conflict (last visited Mar. 2, 2015) ("competitive or opposing action of incompatibles").

240. N.C. GEN. STAT. § 115C-407.32(b) (2014).

241. For example, participation in a Christian-themed non-curricular club could be considered a "religious activity" different from participating in prayer (religious expression) before a football game (extracurricular activity).

242. *See, e.g.*, Engel v. Vitale, 370 U.S. 421, 436 (1962) (holding that an official prayer, established by the school, violates the Establishment Clause).

243. N.C. GEN. STAT. § 115C-407.32(b) (2014).

right to "adopt a respectful posture"[244] during a game-time prayer. Since laws are presumed to be constitutional,[245] Section (b) likely refers to noncurricular events while Section (c) refers only to extracurricular events. Therefore, for the remainder of this Note, Section (b) will be said to apply only to noncurricular activities, while Section (c) will apply to extracurricular activities. In addition to Section (b) and Section (c), S.B. 370 includes limitations on how the law may be interpreted. Part IV.C discusses the law's savings clause and severability clause.

C. Additional Relevant Provisions

1. Savings Clause

S.B. 370 includes a savings clause, codified as N.C. Gen. Stat. § 115C-407.33 ("savings clause"), which forbids courts from construing the law in a way that allows school districts to "take any action in violation of the Constitution of North Carolina or the United States."[246] A savings clause is defined as "an exemption from the general operation of a statute."[247] It is generally used to preserve existing rights in the event that a statute is being repealed.[248] However, if the plain meaning of the statute suggests otherwise, the savings clause itself is given no effect.[249] Here, if the savings clause is to be given full effect, S.B. 370 could never be ruled unconstitutional. If the statute does not permit conduct prohibited by the Constitution, then by definition the only conduct protected by S.B. 370 is that which is constitutional. Therefore, applying savings clause jurisprudence, if a court finds the plain language of the

244. N.C. GEN. STAT. § 115C-407.32(c) (2014).

245. Illinois v. Krull, 480 U.S. 340, 351 (1987).

246. N.C. GEN. STAT. § 115C-407.33 (2014) ("This Article shall not be construed to direct any local board of education to take any action in violation of the Constitution of North Carolina or the United States. The specification of rights in this Article shall not be construed to exclude or limit religious liberty or free speech rights otherwise protected by federal, State, or local law.").

247. *Id.* at § 21:12.

248. *Id.* at § 47:12.

249. *Id.* ("[A] repugnancy between a saving clause and an act's purview does not void the enacting part, but invalidates the saving clause.").

statute to authorize unconstitutional conduct, the savings clause will be ruled invalid.

2. Severability Clause

S.B. 370 also includes a severability clause, codified in N.C. Gen. Stat. 115C-407.33, section 3 ("severability clause").[250] If any provision is found to be unconstitutional either facially or as applied, the provision is to be severed and the remaining provisions are still given effect.[251] In other words, if the courts were to strike down one section of the law, the remaining provisions would still be in effect.

D. Legal Effect of S.B. 370

S.B. 370 expands the rights of teachers in N.C. schools. As discussed in Part II, the First Amendment rights of teachers during extracurricular and noncurricular activities remain somewhat unclear. On one hand, cases like *Lee* and *Santa Fe* teach that if religious speech is part of an official school function, religious activity led by adults is prohibited.[252] On the other hand, cases such as *Mergens*, *Good News*, and *Wigg* suggest that religious activity outside of instructional hours, as part of a noncurricular group, would be permissible since it represents "private speech."[253] Still, other cases have failed to find an absolute free exercise or free speech right in such an activity,[254] and view any participation, even symbolic, as a violation of the Establishment Clause.[255] Therefore, based on the unique facts and jurisdiction of each

250. Senate Bill 370, Session Law 2014–13, §3 (codified in N.C. GEN. STAT. § 115C-407.33 (2014)).

251. *Id.*

252. Lee v. Weisman, 505 U.S. 577, 593 (1992).

253. Good News Club v. Milford Cent. Sch., 533 U.S. 98, 120 (2001); Bd. of Educ. of Westside Cmty. Schs. v. Mergens, 496 U.S. 226, 250 (1990); Wigg v. Sioux Falls Sch. Dist. 49-5, 382 F.3d 807, 815 (8th Cir. 2004).

254. Quappe v. Endry, 772 F. Supp. 1004, 1014 (S.D. Ohio 1991).

255. *Id.* at 1014; Doe v. Wilson Cnty. Sch. Sys., 564 F. Supp. 2d 766, 778 (M.D. Tenn. 2008) (finding Establishment Clause violation where staff members bowed their heads during prayer before school and wore "I Prayed" stickers throughout the day).

case, teachers may or may not have the right to participate in or lead religious activities with students present.

S.B. 370 creates an affirmative right for teachers to "adopt a respectful posture" [256] and to participate in extracurricular and noncurricular activities. [257] With such a wide variance in the way religious expression has been addressed by the courts, the real question becomes whether S.B. 370's expansion of religious rights violates the Establishment Clause.

V. DOES S.B. 370 VIOLATE THE ESTABLISHMENT CLAUSE?

Since S.B. 370 expands teachers' rights to engage in religious expression in schools, as Part IV explained,[258] the constitutionality of the statute must be analyzed under the Establishment Clause. To accomplish this task the two central provisions of S.B. 370 should be analyzed independently: Section (b), which protects a teacher's right to participate with students in noncurricular activities[259] and Section (c), which protects a teacher's right to "adopt a respectful posture" during student-led extracurricular religious expression. [260] To pass muster under the Constitution, each provision must survive both facial and as applied challenges. Under a facial challenge, there must be no set of facts that the law can be constitutional.[261] With an as applied challenge, the law must be unconstitutional only as applied to particular facts and circumstances.[262]

Part V.A analyzes the constitutionality of Section (b) using the endorsement test and the neutrality test. Part V.B analyzes Section (c) using the coercion, endorsement, and neutrality tests. Finally, Part V.C

256. N.C. GEN. STAT. § 115C-407.32(c) (2014).

257. N.C. GEN. STAT. § 115C-407.32(b) (2014).

258. *See supra* Part IV.

259. N.C. GEN. STAT. § 115C-407.32(b) (2014).

260. N.C. GEN. STAT. § 115C-407.32(c) (2014).

261. WILLIAM J. RICH, MODERN CONSTITUTIONAL LAW § 1:5 (3d ed. 2014) ("Only in exceptional cases will judges declare that statutes and ordinances are void on their face; in such cases, judges must consider 'every conceivable situation which might possibly arise' and conclude that the legislation is, nevertheless, always unconstitutional.").

262. *Id.*

looks at the effect of both the savings clause and the severability clause on the constitutionality of S.B. 370.

A. Can Teachers Participate in Noncurricular Religious Activities?

Regarding staff participation in student-led activities that are not school sponsored, S.B. 370 is likely to be constitutional. As described in Part III, in recent years, courts have analyzed noncurricular activity using the neutrality test.[263] However, in some cases, courts have used the endorsement test when the facts and circumstances suggest the religious activity may be attributed to the school and not the individual teacher's private expression.[264] Therefore, Part V.A.1 analyzes the constitutionality of Section (b) using the neutrality test while Part V.A.2 analyzes the provision using the endorsement test.

1. Neutrality Test

Under the neutrality test, the government may give deference to First Amendment expression as long as it does not discriminate for or against religion.[265] Using this test, the emphasis is on the private rights of the individual as opposed to the government.[266]

Here, Section (b) allows teachers to participate in noncurricular student-led religious activities as long as it is "voluntary for all parties."[267] Using the neutrality test, this provision will likely be considered constitutional. While participation conflicts with the reasoning used in *Mergens*, the *Mergens* Court never actually ruled on whether teachers could participate in noncurricular activities. Rather, the Court did not have to reach that question because the Equal Access Act (EAA) limited teacher conduct to custodial supervision.[268] In fact,

263. *See supra* Part III.

264. *Id.*

265. JAMES RAPP, EDUCATION LAW § 2.01 (Matthew Bender & Co. 2014).

266. *Id.*

267. N.C. GEN. STAT. § 115C-407.32(b) (2014).

268. Bd. of Educ. of Westside Cmty. Schs. v. Mergens, 496 U.S. 226, 251 (1990). Indeed, S.B. 370 may violate the EAA, but that beyond the scope of this Note.

Mergens made clear that if considered private speech, an Establishment Clause analysis is unnecessary.[269]

While not directly on point, subsequent Supreme Court cases have convinced some lower courts that teacher participation in noncurricular activities would satisfy the neutrality test.[270] Applying the reasoning of the Eighth Circuit in *Wigg v. Sioux Falls School District 49-5*,[271] the teacher's actions will be seen as private speech and would not implicate government endorsement.[272] Further, using this test, there would not be any restrictions on the teacher with respect to the students involved.[273] For example, the fact that students assigned to the teacher's class during the school day also participated in the religious activity would not prohibit the teacher from participating as well.[274]

2. Endorsement Test

In some noncurricular activity cases, courts have used the endorsement test. Under the endorsement test, the Court looks at whether a secular purpose exists, and whether the principal or primary effect either advances or inhibits religion.[275] As a tool in this analysis, the Court asks whether a reasonable person observing the activity would perceive school endorsement.[276] While it is a close question, a court would not likely find S.B. 370 to violate the endorsement test.

First, a court would likely find that the law has a secular purpose under the first prong of the endorsement test.[277] S.B. 370 purports to

269. *Id.* at 250.

270. Wigg v. Sioux Falls Sch. Dist. 49-5, 382 F.3d 807, 815 (8th Cir. 2004) (citing *Mergens* and *Santa Fe* in support of treating teacher involvement in religious activities after school as "private speech.").

271. *Id.*

272. *Id.*

273. *Id.* at 815–16 (allowing teacher to participate in religious activities after school at the same campus at which she worked).

274. *Id.*

275. Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring) (finding town crèche display was not "intended to endorse [n]or [have] the effect of endorsing Christianity.").

276. *See, e.g.*, Adland v. Russ, 307 F.3d 471, 479 (6th Cir. 2002).

277. To have a secular purpose, the expressed intent of the law must not be to advance religion. Lemon v. Kurtzman, 403 U.S. 602, 613 (1971). Typically, great deference is given to the purpose stated by the legislature, *id.*, though there must be a

"clarify religious activity for school personnel."[278] As described in Part IV, S.B. 370 was prompted in part by a school district that told coaches to leave the room if students engaged in prayer before a game.[279] As a result, the legislature was concerned that the teacher's free exercise rights were being violated out of confusion over the Establishment Clause.[280] Thus, the legislature would likely argue that the purpose of S.B. 370 was not to advance religion, but rather to protect religious rights.

On the other hand, future litigants could argue that S.B. 370 has no other real purpose other than the advancement of religion. If the law extends protections to religious expression that were not otherwise protected, certainly one could argue there is not a valid secular purpose.[281]

Ultimately, however, courts have found that protecting citizens from religious discrimination is a valid secular purpose.[282] While in *Mergens*, the EAA protected both religious and nonreligious speech,[283] Justice O'Connor explicitly stated in her concurring opinion in *Wallace* that based on the Free Exercise Clause, if a statute's intent is to "lift[] a government-imposed burden on the free exercise of religion," the statute has a valid secular purpose.[284] Therefore, even if some legislators were motivated by a nonsecular purpose, S.B. 370 would still meet the *Mergens* standard. Thus, a court would likely find the protection—even expansion—of religious rights to be a secular purpose.

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connection between the stated purpose and the means used by the law to reach that purpose. Wallace v. Jaffree, 472 U.S. 38, 64 (1985) (Powell, J., concurring) ("[The] secular purpose must be 'sincere'; a law will not pass constitutional muster if the secular purpose articulated by the legislature is merely a 'sham.'").

278. Senate Bill 370, Session Law 2014-13, § 1 (codified in N.C. GEN. STAT. § 115C-407.32 (2014)).

279. Exum, *supra* note 2.

280. *Id.*

281. Indeed, news reports and legislative debate centered on the concern that teachers were not able to freely express their religious beliefs around their students, suggesting a potential impermissible purpose. *See* Leslie, *supra* note 1.

282. Bd. of Educ. of Westside Cmty. Schs. v. Mergens, 496 U.S. 226, 248–49 (1990) ("Congress' avowed purpose—to prevent discrimination against religious and other types of speech—is undeniably secular.").

283. *Id.*

284. Wallace v. Jaffree, 472 U.S. 38, 83 (1985) (O'Connor, J., concurring).

Second, to satisfy the endorsement test the provision must not have the principal or primary effect of advancing or inhibiting religion.[285] In this case, resolution of the effects prong would likely hinge on whether a staff member's religious expression was viewed as an endorsement of religion by the students.[286] While the Supreme Court has not addressed this narrow issue, recent circuit court opinions suggest that a final determination would be a fact-intensive inquiry.[287]

In *Doe v. Wilson County School System*,[288] a Tennessee federal district court disapproved of staff participation in a flagpole prayer event held on school grounds before the beginning of the instructional day.[289] Under these circumstances most courts have applied the neutrality test.[290] However, the *Wilson* court chose to apply the endorsement test, largely because the principal wore an "I Prayed" sticker on campus during the remainder of the school day,[291] and the court was concerned about the symbolism of the principal's participation in the noncurricular activity.[292] While it is not clear whether the court would have ruled the same way in the absence of the principal's sticker, the outcome of *Wilson* suggests that there may be certain fact patterns where endorsement proves to be more salient than neutrality.

Here, *Wilson*'s isolated example of a court applying the endorsement test to noncurricular activities provides little guidance in how a court would interpret S.B. 370. Since *Wilson* relied heavily on unique facts, a court applying the endorsement test to S.B. 370 would likely find no facial violation of the Establishment Clause. Particular facts connected to a unique situation could change the interpretation

285. *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668, 694 (1984) (O'Connor, J., concurring) (finding town crèche display was not "intended to endorse [n]or [have] the effect of endorsing Christianity.").

286. *See, e.g.*, Doe v. Wilson Cnty. Sch. Sys., 564 F. Supp. 2d 766, 792 (M.D. Tenn. May 29, 2008).

287. *Id.* at 793.

288. *Id.*

289. *Id.* at 795.

290. *See supra* text accompanying notes 270–74.

291. *Wilson*, 564 F. Supp. 2d 766, 795 (M.D. Tenn. 2008).

292. *Id.* ("This telegraphed to believers and non-believers alike their identification with those who gathered to pray on that day. Such religious activity by school authority figures on school property in the presence of young students has an influential effect on such students.").

significantly, but absent those facts, S.B. 370 would not likely be seen as endorsing religion.

3. Constitutionality of Section (b)

In sum, under either the neutrality or endorsement test, Section (b) would likely pass a facial challenge. Similarly, this provision would most likely survive an "as applied" challenge. However, if the court chooses to use the endorsement test, an "as applied" challenge may be successful, if the facts and circumstances create a connection between the teacher and the required curriculum.

B. Can Teachers "Adopt a Respectful Posture" During Extracurricular Religious Expression?

While S.B. 370 is may survive a facial challenge, there is a good chance the law could be deemed unconstitutional as applied to school-sponsored extracurricular activities. Indeed, mere supervision is constitutional in either the extracurricular or noncurricular setting,[293] and as other cases, such as *Mergens* indicate, this "custodial" function rarely implicates an Establishment concern.[294] S.B. 370, however, may be interpreted to go beyond mere supervision. It is less clear which test courts would use for the Section (c) provision; therefore, Part V.B will use each likely alternative (neutrality, coercion, and endorsement).[295]

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293. Bd. of Educ. of Westside Cmty. Schs. v. Mergens, 496 U.S. 226, 253 (1990).

294. *Id.* at 236.

295. While the neutrality test has been employed most often in the noncurricular setting, it is used less often in the extracurricular setting. *See e.g.*, *id.* at 252 (allowing religious non-curricular club to meet after school because school had allowed other non-curricular clubs to meet); Wigg v. Sioux Falls Sch. Dist. 49-5, 382 F.3d 807, 815 (8th Cir. 2004); Borden v. Sch. Dist. of Twp. of E. Brunswick, 523 F.3d 153, 175 (3d Cir. 2008) (using endorsement test to invalidate coach's symbolic expression that would reasonably be perceived as endorsing religion). As extracurricular activities are closer in nature to the required school curriculum, the Supreme Court has been more likely to employ the coercion test in these situations. *See, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 311 (2000); Lee v. Weisman, 505 U.S. 577, 595 (1992). Still, courts have also shown a willingness to adopt the more strict endorsement test standard in these situations as well. *Borden*,

Part V.B.1 analyzes the constitutionality of Section (c) using the neutrality test, while Parts V.B.2 and 3 analyze the law using the coercion and endorsement test, respectively.

1. Neutrality Test

Under the neutrality test, courts allow religious expression by government actors if it is exercised as a private citizen and other similar nonreligious expression would be allowed as well.[296] Here, Section (c) allows teachers to "adopt a respectful posture" when students engage in prayer during an extracurricular activity.[297] The neutrality analysis may depend partially on whether *Garcetti v. Ceballos*[298] applies to teachers. In *Garcetti*, the Court held that public employee First Amendment rights are not implicated when they occur in the course of the normal duties.[299] The Court notably failed to address whether this principle applied in schools,[300] though lower courts have done so.[301]

If *Garcetti* does apply to teachers, they would not have a protected First Amendment interest during extracurricular activities. This means schools as employers could limit teacher expression during these times. However, *Garcetti* does not explicitly prohibit a state from creating such a religious protection, so long as it does not result in an Establishment Clause violation. If *Garcetti* does not apply to teachers, then they would retain First Amendment protections during extracurricular activities, and the neutrality test would likely be used to uphold Section (c) because the protected action of the teacher would need to be preserved in order to maintain neutrality toward religion.

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523 F.3d at 175 (using endorsement test to invalidate coach's symbolic expression that would reasonably be perceived as endorsing religion).

296. *Wigg*, 382 F.3d at 815.

297. N.C. GEN. STAT. § 115C-407.32(c) (2014). This language is different from "participate" which is used on 407.32(b) with regards to noncurricular activities. N.C. GEN. STAT. § 115C-407.32(b) (2014).

298. 547 U.S. 410, 425 (2006) (noting that the Court need not decide in the present case whether *Garcetti* analysis would apply to teachers).

299. *Id.* at 421.

300. *Id.* at 425.

301. Evans-Marshall v. Bd. of Educ. of Tipp City. Exempted Sch. Vill. Sch. Dist., 624 F.3d 332, 334 (6th Cir. 2010) (applying *Garcetti* to teachers and finding no teacher First Amendment protections pursuant to official duties).

Notwithstanding *Garcetti*, if courts apply the neutrality test, Section (c) will likely be deemed constitutional, particularly if the protected expression is not considered overtly religious. Under Section (c), teachers are not allowed to engage in religious expression.[302] Rather, they are required to be respectful of student religious expression, and they "may adopt a respectful posture."[303] In that sense, a court could decide that a coach was being neutral toward religion, even if he bowed his head or put his knee to the ground. However, such action could also be construed as an endorsement of religion, which is why many cases involving similar actions implicate the coercion or endorsement test.

2. Coercion Test

Under the coercion test, courts would analyze whether having the teacher adopt a respectful posture would coerce students into religious activity. In the context of extracurricular activities, the Court has found it appropriate to use this test because the activity is not truly voluntary in the same sense as noncurricular activities.[304]

Determining whether there is coercion usually relies heavily upon context.[305] For example, in *Lee*, the Court found coercion in a school district's practice of inviting religious speakers to give prayers at graduation ceremonies, both at the middle and high school levels.[306] Since young students are more impressionable, the Court held that the graduation prayer would impermissibly direct student thought, leaving dissenters no practical options for non-participation.[307] Similarly, in *Santa Fe*, the Court viewed as coercive a school's practice of allowing an elected student speaker give an invocation before the crowd prior to

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302. *See* N.C. GEN. STAT. § 115C-407.32(c) (2014) (stating that teachers can be present while a student group prays, and that they cannot be disrespectful of the students but may instead adopt a respectful posture.).

303. *Id.*

304. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 311–12 (2000); Lee v. Weisman, 505 U.S. 577, 595 (1992).

305. *Santa Fe*, 530 U.S. at 308; *Lee*, 505 U.S. at 592–93; Borden v. Sch. Dist. of Twp. of E. Brunswick, 523 F.3d 153, 181 (3d Cir. 2008) (McKee, J., concurring) (analyzing a coach's symbolic expression under the coercion test given the unique environment of a sports locker room).

306. *Lee*, 505 U.S. at 599.

307. *Id.* at 593.

football games.[308] In that case, the Court was skeptical that the prayer was "student-led," as the school had a history of sponsoring prayer before football games.[309] Further, by taking place in front of the entire crowd, the Court looked at the coercive effect such a large-scale display would have on students who did not wish to participate.[310]

Moreover, some opinions have found staff-led religious expression invalid without respect to a history of school-sponsored prayer.[311] For example, in *Borden*, the concurring opinion found that bowing one's head and kneeling during student-led prayer constituted impermissible coercion, even beyond the particular facts of the case.[312]

Here, Section (c) allows a teacher or coach to "adopt a respectful posture" with students,[313] but it does not permit the large-scale prayer such as at a graduation ceremony or in front of a full football stadium. Still, as in *Borden* and *Duncanville*, in the close-knit environment of sports or other extracurricular activities, students may feel more pressure to participate in prayer if it looks like the teacher is praying as well. Students may be less likely to avoid participation if doing so appears to go against the wishes of the authority figure in the room.

Thus, if a court analyzed Section (c) using the coercion test, it would likely pass a facial challenge. However, it would likely fail an "as applied" challenge if any particular facts or circumstances suggested the prayer was not purely student-led.

3. Endorsement Test

The endorsement test is much more strict than the neutrality or coercion test in that it takes less government action to cross the threshold into being an Establishment Clause violation.[314] Using this test, as in

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308. *Santa Fe*, 530 U.S. at 301.

309. *Id.* at 306–07. Similarly, *Borden* relied heavily on the prior impermissible pattern of school sponsorship of prayer. *Borden*, 523 F.3d at 178–79.

310. *Id.* at 295.

311. *Id.* at 179 (McKee, J., concurring) (noting that symbolic expression may still have been prohibited even without the history of school-endorsement of prayer).

312. *Id.* at 179.

313. N.C. GEN. STAT. § 115C-407.32(c) (2014).

314. *See e.g.*, Wigg v. Sioux Falls Sch. Dist. 49-5, 382 F.3d 807, 815 (8th Cir. 2004) (finding no Establishment Clause violation using neutrality test where teacher participated in after-school religious club); Doe v. Wilson Cnty. Sch. Sys., 564 F.

Borden and *Duncanville*,[315] it is not clear whether allowing the teacher to "adopt a respectful posture"[316] on its own would be enough to constitute a violation. Since Section (c) only allows supervision, as opposed to participation,[317] there may still be scenarios in which the endorsement test could be satisfied. For example, if the teacher stood in the room with his hands behind his back and his eyes open, that could be considered a respectful posture, yet it may not rise to the level of an endorsement of the religious activity, because it is not typically associated with prayer.

Other courts may nonetheless find that no set of facts could make the provision constitutional. However, courts that have used the endorsement test in the past have never found such innocuous conduct to be endorsement, instead focusing on overt acts such as bowing one's head or kneeling.[318] In this context, a court would likely find an Establishment violation under the endorsement test, as the Supreme Court did in *Santa Fe*,[319] and lower courts did in *Duncanville*[320] and *Borden*.[321]

Therefore, it is less clear whether an Establishment Clause violation would exist for bowing one's head or kneeling in the absence of a history of government endorsement. In the context of a close-knit locker room of players, this conduct by the coach, who is in a position of authority and is an extension the government, may be seen as advancing religious beliefs, just as in *Borden*[322] and *Duncanville*.[323]

Supp. 2d 766, 795 (M.D. Tenn. 2008) (finding that certain practices by the school did not have a secular purpose and consequently such practices led to the school being excessively entangled with religion in violation of the Establishment Clause).

315. *Borden*, 523 F.3d at 175 ; Doe v. Duncanville Indep. Sch. Dist., 70 F.3d 402, 405 (5th Cir. 1995). Though *Duncanville* nominally employs the *Lemon* test, it relies heavily on the modified endorsement version discussed in *Mergens*. *Duncanville*, 70 F.3d at 406.

316. N.C. GEN. STAT. § 115C-407.32(c) (2014).

317. *Id.*

318. *Borden*, 523 F.3d at 175 (denying a coach the right to bow his head or kneel during student-led prayer).

319. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 315 (2000).

320. *Duncanville*, 70 F.3d at 406 n. 4. .

321. *Borden*, 523 F.3d at 175.

322. *Id.* at 178.

323. *Duncanville*, 70 F.3d at 406.

4. Constitutionality of Section (c)

If courts opt to use the neutrality test when evaluating teacher religious expression during extracurricular activities, Section (c) will likely be upheld. However, if courts use either the coercion or endorsement test, the provision may be invalid as applied to teachers who bow their heads or kneel in the presence of student-led prayer. Still, the inquiry will be heavily fact-based and a history of school sponsorship of religious activity would most likely be needed to find the statute unconstitutional.

C. Effect of the Savings Clause and Severability Clause

Legislators added a savings clause[324] and a severability clause[325] to S.B. 370 in an effort to preserve its constitutionality. S.B. 370's savings clause requires courts to construe the law in a way that is constitutional.[326] In the event that effort fails, the severability clause requires that the remainder of the law stay in effect.[327]

While seemingly making the law impervious to challenge, the savings clause is not an absolute protection.[328] If the court's interpretation of the plain language of the statute conflicts with the Constitution, a court's interpretation stands and the savings clause fails.[329] It is not clear what impact this would have on S.B. 370. If it is a close question, would the court simply protect the teacher's action as constitutional? Would the court put the teacher's action outside of the law's protection, making the S.B. 370 constitutional, but the teacher's action unconstitutional? The outcome would likely be determined by the level of confidence the court has in its analysis.

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324. Senate Bill 370, Session Law 2014-13, (codified in N.C. GEN. STAT. § 115C-407.33 (2014)).

325. Senate Bill 370, Session Law 2014-13, § 3 (codified in N.C. GEN. STAT. § 115C-407.33 (2014)).

326. Senate Bill 370, Session Law 2014-13, (codified in N.C. GEN. STAT. § 115C-407.33 (2014)).

327. Senate Bill 370, Session Law 2014-13, § 3 (codified in N.C. GEN. STAT. § 115C-407.33 (2014)).

328. NORMAN SINGER & SHAMBIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 47:12 (2014).

329. *Id.*

VI. CONCLUSION

Justice Thomas once wrote that "[o]ur [Establishment Clause] jurisprudential confusion has led to results that can only be described as silly."[330] Regardless of political affilation, this statement likely rings true in the analysis of S.B. 370. Parts II and III have described the varying tests that can be employed to resolve Establishment Clause concerns during various extracurricular and noncurricular school activities. Part IV described the North Carolina legislature's recent attempt to "clarify"[331] complex First Amendment precedent by allowing teachers to participate in student-led noncurricular activities before or after school and "adopt a respectful posture" during student-initiated extracurricular prayer.[332] Part V illustrated the inherent danger of this clarity. Teachers may engage in conduct they believe to be lawful, only to have it deemed unconstitutional. Further, by encouraging potential Establishment Clause violations on a day-to-day basis, impressionable students may be coerced into adopting the religious beliefs of their teachers.

In the end, simplifying the tension between the Establishment Clause on one hand and the Free Speech and Free Exercise Clauses on the other hand, could add clarity to the constitutional issues raised by S.B 370. However, the reality is that there will always be inevitable tension between closely related First Amendment doctrines and any clarity by the North Carolina General Assembly carries a risk of distorting all three provisions. Therefore, lawmakers should tread lightly when addressing these delicate issues of religion, recognizing that even good intentions can lead to the deprivation of rights that are fundamental to American society.

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330. Elk Grove Unified Sch. Dist. v. Newdow, 541 U.S. 1, 45 n. 1 (2004) (Thomas, J., concurring).

331. N.C. GEN. STAT. § 115C-407.30–33 (2014).

332. *Id.* at § 115C-407.32(c).