University of Cincinnati Law Review

Volume 81 | Issue 4 Article 9

September 2013

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DOE EX REL DOE V. ELMBROOK SCHOOL DISTRICT AND THE CREATION OF THE PERVASIVELY RELIGIOUS ENVIRONMENT

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I. INTRODUCTION

Deeply woven into the fabric of our country is the idea that choice in religious matters should be made in the conscience of each individual rather than established through the directives of government. Decades after authoring the First Amendment, forever ensuring freedom of religious choice for all Americans, James Madison noted:

> The example of the Colonies, now States, which rejected religious establishments altogether, proved that all Sects might be safely & advantageously put on a footing of equal & entire freedom . . . . We are teaching the world the great truth . . . that Religion flourishes in greater purity, without than with the aid of Gov[ernment].[1]

Hardly the "truth" that Madison theorized it to be, the First Amendment's express declaration in the Establishment Clause that "Congress shall make no law respecting an establishment of religion" has generated much controversy throughout American history and continues to do so today.[2] In a tradition as old as the Constitution itself, Americans have called on courts to solve that controversy.

In *Doe ex rel. Doe v. Elmbrook School District*,[3] the United States Court of Appeals for the Seventh Circuit addressed the issue of whether certain actions by a government entity, here a public school district, violated the Establishment Clause of the First Amendment. In *Elmbrook*, former and current students and their parents alleged that the School District violated the Establishment Clause by holding graduation ceremonies in the main sanctuary of a local Christian evangelical and

∗ Associate Member, 2012–13 *University of Cincinnati Law Review*. The author would like to thank his family for their unending support.

1. Letter from James Madison to Edward Livingstone (July 10, 1822), *in* 9 THE WRITINGS OF JAMES MADISON: COMPRISING HIS PUBLIC PAPERS AND HIS PRIVATE CORRESPONDENCE, INCLUDING NUMEROUS LETTERS AND DOCUMENTS NOW FOR THE FIRST TIME PRINTED 98, 102–03 (Gaillard Hunt ed., 1910).

2. U.S. CONST. amend. I.

3. 687 F.3d 840 (7th Cir. 2012).

non-denominational church.[4] Sitting en banc, the Seventh Circuit, in a divided opinion, held that the practice violated the Establishment Clause because it represented an unconstitutional endorsement of religion by a state institution and the message of endorsement was coercive toward the attendees.[5] This Casenote addresses whether the Seventh Circuit's decision in *Elmbrook* unnecessarily expanded the scope of current United States Supreme Court Establishment Clause jurisprudence. Part II of this Casenote explains the current framework established by the U.S. Supreme Court for evaluating Establishment Clause questions. Part III details the Seventh Circuit's application of that interpretive framework to the facts of *Elmbrook*. Part IV suggests that the *Elmbrook* decision is inconsistent with U.S. Supreme Court precedent in that it mischaracterizes endorsement as mere exposure and unnecessarily expands coercion beyond forced religious participation. Finally, Part V of this Casenote calls for a renewed emphasis on the state's purpose when evaluating instances when a public institution interacts with a religious environment and also concludes by suggesting the implications of *Elmbrook* on public institutions.

II. FIRST AMENDMENT: THE ESTABLISHMENT CLAUSE

The majority decision in *Elmbrook* clearly reflects the position that the First Amendment demands that the government remain neutral between the religious and the secular, as well as between differing religions.[6] Central to those who advocate for neutrality is the idea that the First Amendment's purpose is to ensure that religious choice is left to the conscience of each human being and is devoid of any state influence or supervision. Moreover, neutrality prevents any one religion from being so closely associated with the state as to create divisiveness in society.[7] The decision by the majority in *Elmbrook* to focus on endorsement and coercion reflects an emphasis on the view that participation in religion must remain an individual choice that is completely uninfluenced by state actions.

A. Endorsement

Since 1971, federal courts have largely used the test established by the U.S. Supreme Court in *Lemon v. Kurtzman* as the lens through

4. *Id.* at 842.
5. *Id.* at 856.
6. *Id.* at 850.
7. *See* Marsh v. Chambers, 463 U.S. 783, 805–06 (1983) (Brennan, J., dissenting).

which to view Establishment Clause issues.[8] Under the *Lemon* test, actions by the state must: (1) have a secular purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) not foster excessive government entanglement with religion.[9]

The second element of the *Lemon* test assessing effects has largely developed into a process where courts consider whether state action or legislation seems to endorse or favor religion generally or one religion over another. The concept of analyzing effects as a product of endorsement was first introduced by Justice Sandra Day O'Connor in her concurrence in *Lynch v. Donnelly*.[10] There she argued that the question under the *Lemon* effects prong is not whether the action advances or inhibits religion; rather, the determinative issue is whether the government practice has "the effect of communicating a message of government endorsement or disapproval of religion."[11] This analytical framework was adopted by the Court in *County of Allegheny v. American Civil Liberties Union*, where it held that the nativity scene display standing alone on the steps of the Allegheny County Courthouse violated the Establishment Clause because the crèche was unmistakably a religious symbol and its display, in the context of no other decorations, represented an impermissible governmental endorsement of one religion over another.[12] In the same decision, the Court upheld as constitutional the December holiday display at the Allegheny city–county building consisting of a menorah, a Christmas tree, and a "salute to liberty" sign.[13] Unlike the crèche, the menorah was flanked by other symbols and a reasonable person viewing the display would not perceive government endorsement of one religion over another.[14] In *Books v. City of Elkhart, Indiana*, the Seventh Circuit expressly followed the analytical approach of *Allegheny* by holding that a display of a copy of the Ten Commandments on the lawn of the Elkhart Municipal building

8. 403 U.S. 602 (1971) (holding that Pennsylvania and Rhode Island statutes providing direct state aid to church-related elementary and secondary schools violated the First Amendment).

9. *Id.* at 612–13. When assessing purpose under the first prong of the *Lemon* test, courts look not only to expressed intent, but they also look beyond any stated purposes to the implicit intent behind the legislation or state action. *See, e.g.*, Stone v. Graham, 449 U.S. 39 (1980); McCreary Cnty., Ky. v. Am. Civil Liberties Union of Ky., 545 U.S. 844 (2005).

10. 465 U.S. 668 (1984). The majority held that the city of Pawtucket, Rhode Island did not run afoul of the Establishment Clause when it erected a Christmas display that included a Santa Claus house, a Christmas tree, a banner that read, "SEASONS GREETINGS," and a Nativity scene. Applying the *Lemon* test the Court held that the city had the secular purpose of celebrating Christmas as motivation for the display, and that the display did not have the effect of advancing or inhibiting religion nor did it create excessive entanglement between religion and government. *Id.* at 685.

11. *Id.* at 691–92 (O'Connor, J., concurring).

12. 492 U.S. 573, 598–602 (1989).

13. *Id.* at 620; *see also id.* at 635 (quoting "salute to liberty").

14. *Id.*

had the impermissible purpose of promoting religion and had the effect of advancing a religious viewpoint.[15] The Court stated that "[w]hen employing this analytical approach, we are charged with the responsibility of assessing the totality of the circumstances surrounding the display to determine whether a reasonable person would believe that the display amounts to an endorsement of religion."[16] Under the current interpretation of the *Lemon* test, any action by the government that, despite a secular purpose, has the effect of symbolically endorsing religion in the eyes of the reasonable person will be found to violate the First Amendment.[17]

B. Coercion

It is unclear what role, if any, coercion plays in the Supreme Court's evaluation of an issue under *Lemon*. However, the Court in recent years has introduced the element of coercion into its Establishment Clause jurisprudence.[18] In his opinion in *Lee v. Wiseman*, Justice Anthony Kennedy stated that "[i]t is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'"[19] In *Lee*, the Court considered whether a public high school may have a member of the clergy lead the attendees in a prayer at the school's graduation ceremony.[20] Finding the activity impermissible under the Establishment Clause, the majority emphasized the coercive aspect of allowing prayer at a high school graduation ceremony.[21] Simply the school's act of forcing students to stand as a demonstration of respect represented an implicit message of coerced participation.[22] The school's argument that attendance was voluntary was not persuasive, as the Court found that due to the overall significance of high school graduation in American society, attendance was in no real

15. 235 F.3d 292, 303–04 (7th Cir. 2000).

16. *Id.* at 304.

17. *See* Agostini v. Felton, 521 U.S. 203, 232–33 (1997) (the "entanglement" prong of the *Lemon* test has largely been subsumed under *Lemon*'s second prong and excessive entanglement between government and religion is viewed as resulting in impermissible endorsement of religion by the government).

18. For a thorough discussion of how a non-coercion standard may be a valuable framework for evaluating Establishment Clause issues see Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933 (1987).

19. 505 U.S. 577, 587 (1992) (quoting Lynch v. Donnelly, 465 U.S. 668, 669 (1984)).

20. *Id.* at 580.

21. *Id.* at 592.

22. *Id.* at 593.

sense voluntary.[23] In *Lee*, the Court made no attempt to reconcile its opinion with *Lemon* and its cases regarding school prayer. Instead, the Court deemphasized the application of *Lemon* in favor of a search for expressed or implicit government coercion of religious activity.[24]

The coercion analysis established in *Lee* provided the framework for the Supreme Court's latest decision on prayer in the public school context, *Santa Fe Independent School District v. Doe*.[25] In *Santa Fe*, a group of students and their parents filed a claim against the Santa Fe Independent School District alleging that the district's policy of permitting student-led, student-initiated prayer before football games violated the Establishment Clause.[26] Writing for the majority, Justice Stevens used the Court's coercion analysis in *Lee* to dismiss the school's principal arguments that the pre-game messages were not coercive because they were the product of student choice and that attendance at an extracurricular event, such as a football game, was completely voluntary.[27] The Court in *Santa Fe* emphasized that the transmission of religious beliefs is mainly the province of the private sector and allowing a student vote regarding prayer at football games "encourages divisiveness along religious lines in a public school setting."[28] Moreover, while the informal pressure for a student to attend a football game may have been less than the pressure to attend graduation, attendance at football games was part of the complete educational experience.[29] Regardless, much like the attendees at a graduation ceremony, the students were susceptible to the implicit pressure to participate in the prayer that resulted from being part of a traditional community gathering.[30] The Constitution, according to the Court, does not allow a school to force its students to make the choice between

23. *Id.* at 595.

24. *See generally* Stephen M. Durden, *In the Wake of* Lee v. Weisman*: The Future of School Graduation Prayer is Uncertain at Best*, 2001 B.Y.U. EDUC. & L.J. 111 (2001).

25. 530 U.S. 290 (2000). It is important to also note that the petitioners facially challenged the District's policy regarding prayer at football games despite the fact that the student-led prayers had not yet occurred. Although not acknowledging it, the Court analyzed the facts in *Santa Fe* under the *Lemon* test. Applying the "purpose" prong of the *Lemon* test, the Court held that the text of the policy preferring a religious message and the context of a tradition of prayer at football games in the District demonstrated that the District had the impermissible purpose of encouraging prayer at an important school event. *Id.*at 317. Justice Rehnquist in dissent not only criticized Justice Stevens for not elaborating on which Establishment Clause test he was applying, but also for holding that the policy is facially unconstitutional rather than waiting for an as-applied challenge to the policy. *Id.* at 318–19 (Rehnquist, J. dissenting).

26. *Id.* at 294.

27. *Id.* at 310.

28. *Id.* at 311.

29. *Id.* The Court went on to emphasize that some of the students, such as cheerleaders, team members, and band members were not at the game voluntarily. *Id.*

30. *Id.* at 312.

giving up certain rights and benefits as the price for not conforming to a religious practice endorsed or established by the state.[31]

The relationship between the traditional *Lemon* test and coercion remains unclear. In fact, the *Elmbrook* court acknowledged this ambiguity, stating "[a]part from how one views the coercion test in relation to the *Lemon* test, however, it is evident that if the state 'coerce[s] anyone to support or participate in religion or its exercise,' an Establishment Clause violation has occurred."[32] This statement by the court seems to suggest that actions by the state to coerce religious participation may alone be enough to create an Establishment Clause violation. The Seventh Circuit was unwilling to go that far (or acknowledge that it indeed had) and thus applied both the traditional *Lemon* analysis and the coercion test to analyze the Elmbrook School District's graduation ceremony.

III. *DOE EX REL DOE V. ELMBROOK SCHOOL DISTRICT*

A. Case History

In April 2009, current and former students of Elmbrook School District (School District) and their parents brought a claim against the School District in the United States District Court for the Eastern District of Wisconsin.[33] The plaintiffs (Does), all of whom are not Christians and felt "uncomfortable, upset, offended, unwelcome, and/or angry because of the religious setting [of the graduation ceremony]," [34] sought preliminary and permanent injunctions against the School District, monetary damages, and a declaratory judgment that it is unconstitutional to hold graduation ceremonies in a non-denominational, evangelical Christian church.[35] Both parties filed a motion for summary

31. *Id.*

32. Doe *ex rel.* Doe v. Elmbrook Sch. Dist., 687 F.3d 840,850 (7th Cir. 2012) (quoting Lee v. Wiseman, 505 U.S. 577, 587 (1984)).

33. *Id.* at 842.

34. *Id.* at 848. Doe 1 graduated from a School District high school in 2009. Doe 2 is Doe 1's parent. Doe 2 also has an older child whose graduation was held in the Church in 2005 and younger children who attend school in the School District. Doe 3 is one of Doe 2's younger children who will graduate from a School District high school no later than 2014. Does 4 and 9 are the parents of children currently attending School District schools. Does 5 and 6 are the parents of Does 7 and 8, who each had their graduation ceremonies at the Church in 2002 and 2005 respectively. Does 2, 4, 5 and 6 all pay property taxes that go to the School District. *Id.* at 847–48.

35. Does 1, 7, 8, 9, individually v. Elmbrook Joint Common Sch. Dist. No. 21, No. 09-C-0409, 2010 WL 2854287, at *1 (E.D. Wis. July 19, 2010), *aff'd sub nom.* Doe *ex rel.* Doe v. Elmbrook Sch. Dist., 658 F.3d 710 (7th Cir. 2011), *reh'g en banc granted*, *opinion vacated* (Nov. 17, 2011) *and rev'd and remanded sub nom*, Doe *ex rel.* Doe v. Elmbrook Sch. Dist., 687 F.3d 840 (7th Cir. 2012).

judgment.[36] The plaintiffs argued four points: (1) the graduation ceremonies at Elmbrook Church (Church) violated the Establishment Clause's provision precluding religious coercion; (2) a public school district holding graduation ceremonies at a religious institution represented an impermissible government endorsement of religion; (3) the School District's rental arrangement with the Church was excessive entanglement between religion and government; and (4) the School District was using taxpayer money to endorse religion.[37] Applying the current U.S. Supreme Court Establishment Clause jurisprudence, the district court granted the School District's motion for summary judgment and dismissed the case.[38]

The plaintiffs appealed the decision to the Seventh Circuit Court of Appeals.[39] In a 2-1 opinion written by Judge Ripple, the Seventh Circuit affirmed the district court's decision, emphasizing the heavily fact-based nature of an Establishment Clause inquiry.[40] The court further explained that the record did not indicate any evidence that the School District endorsed the Church's mission or its beliefs, nor did rental of the premises for the graduation ceremony result in excessive entanglement between the School District and the Church.[41] In dissent, Judge Flaum argued that the School District's graduation ceremonies at the Church conveyed a government endorsement of religion and were inherently coercive and divisive.[42]

In November 2011, the Seventh Circuit granted the Does' petition for rehearing en banc and vacated its original September 2011 decision. The final en banc decision was issued in July 2012.

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36. *Id.*

37. *Id.* at *8.

38. *Id.* at *15.

39. Doe *ex rel.* Doe v. Elmbrook Sch. Dist, 658 F.3d 710, 712 (7th Cir. 2011), *reh'g en banc granted, opinion vacated* (Nov. 17, 2011). The case was argued in front of Chief Judge Easterbrook, Judge Flaum and Judge Ripple.

40. *Id.* at 734.

41. *Id.* In its opinion, the Seventh Circuit emphasized that the proper lens to evaluate Establishment Clause challenges was through the test established in *Lemon v. Kurtzman*. *See* discussion *supra* Part II(A). Despite dismissing the coercion elements of the plaintiff's claims, the Court pointed out that in analyzing state-facilitated displays of religious iconography or messages, the preferred method of analysis for the U.S. Supreme Court is the *Lemon* test rather than an independent and exclusive coercion test. *Id.* at 729.

42. *Id.* at 740. Here Judge Flaum seemed to be echoing the dissent in *Zelman v. Simmons-Harris* where Justice Breyer expressed his belief that the Establishment Clause was meant to prevent religious conflict and divisiveness by ensuring that government would not prefer one religion over another. 536 U.S. 639, 723 (2002) (Breyer, J. dissenting).

B. Facts

U.S. Supreme Court precedent demands that courts reviewing an Establishment Clause issue engage in a detailed exploration of the context and factual situation in which the claim was brought as a means of assessing how government interacts with religion.[43] In its description of the facts, the Seventh Circuit emphasized the School District's decision-making process regarding the graduation ceremony, the surroundings of the Church on the day of the graduation, and the ensuing controversy over the facility.[44] The School District is a municipal public school district in Brookfield, Wisconsin.[45] There are two major high schools in the School District, Brookfield Central (Central) and Brookfield East (East).[46] In 2000, Central's senior class officers approached School District Superintendent, Matt Gibson, about moving the graduation ceremony to the Church, as the school's gymnasium was "too hot, cramped, and uncomfortable."[47] Gibson had no objection, and with an affirmative vote by the senior class, the principal of Central approved the move.[48] Similarly, after a vote of approval by the majority of seniors, East moved its graduation ceremonies to the Church in 2002.[49] The graduation ceremonies of each school continued to be held at the Church from 2000 to 2009 with a rental cost to the School District consistently between $2,000 and $2,200 per year for each school's graduation ceremony.[50] Funding for the graduation ceremonies was a combination of contributions from the senior class and the School District's general revenues, which were derived from property taxes.[51] In 2010, the School District ceased using the Church and the graduation ceremonies were moved to the School

43. Doe *ex rel*. Doe v. Elmbrook Sch. Dist., 687 F.3d 840, 843 (7th Cir. 2012).

44. *Id.* at 844–48.

45. *Id.* at 844.

46. *Id.*

47. *Id.* The court later noted that District Superintendent Gibson was a member of the Church for the entire period during which graduation ceremonies were held there. However, the court stated there was no evidence that Mr. Gibson influenced or attempted to influence the student vote. *Id.* at 845.

48. *Id.* at 844. Central also rented the Church, for at least some years after 2003, for senior honors night at a rate between $500 and $700. *Id.* at 845.

49. *Id.* at 845. Here the court noted that between 2000 and 2005 the students of the senior class of each school participated in advisory votes to choose between two or three other venues, which always included the Church as a choice. However, after continuous overwhelming support for the Church as a venue for graduation the Church was simply selected as the venue for the graduation ceremonies without a vote from the students between 2006–09. *Id*. This overwhelming support for the Church was evidenced by a vote of approval from 90% of the seniors who voted at East in 2005. *Id.* at 845 n.4.

50. Does 1, 7, 8, 9, individually v. Elmbrook Joint Common Sch. Dist. No. 21, No. 09-C-0409, 2010 WL 2854287, at *4 (E.D. Wis. July 19, 2010).

51. Doe *ex rel*. Doe v. Elmbrook Sch. Dist., 687 F.3d 840, 845 (7th Cir. 2012).

District's newly constructed field house.[52]

The Church is a local Christian evangelical and non-denominational religious institution.[53] As well as holding its own religious ceremonies, the Church often makes its facilities available to outside groups.[54] There are many religious symbols both inside and outside of the Church. The sign displaying the name "Elmbrook Church" contains a cross and there is a cross on the Church roof.[55] In the Church lobby there are religious posters on the wall, as well as tables and stations with religious literature and information, some of which is addressed to young adults.[56] Throughout its use by the School District, the permanent interior and exterior adornments and decorations of the Church remained largely unchanged during the graduation ceremonies, except for the introduction of school banners and a projection of the school name.[57] However, at the request of the School District's superintendent, the Church removed any non-permanent religious symbols from the dais where students with roles in the ceremony and school officials sat during the ceremony.[58] The graduating students sat in the front pews of the sanctuary while the guests filled in the remaining pews.[59] The pews were not emptied of religious materials and books used in normal services at the Church, but there was no evidence that any of these materials were placed there by the Church specifically for the School District's graduation ceremonies.[60]

In 2001, the School District received its first complaint regarding the graduation ceremonies.[61] A non-Christian parent objected to the School District's use of the Church because she did not want her child exposed to the Church's views regarding those who did not share the Church's teachings on faith.[62] Various lobbies and civil liberties groups voiced their concerns.[63] Chief among these groups was Americans United for

52. *Id.* at 847. Central High School's honors night was also moved to its newly renovated gymnasium in 2010.

53. *Id.* at 844.

54. *Id.* at 863.

55. *Id.* at 845–46.

56. *Id.* at 846. The District admitted that Church members manned the tables and passed out information at the 2002 and 2009 graduation ceremonies. *Id.*

57. *Id.* at 853. According to an email sent by Superintendent Gibson, the cross hanging over the dais was mistakenly covered by a janitor for the 2000 ceremony. It was never covered again during the eight subsequent years the School District used the Church for graduation ceremonies. *Id.* at 844 n.11.

58. *Id.* at 846.

59. *Id.* at 846–47.

60. *Id.* at 847.

61. *Id.*

62. *Id.*

63. *Id.* In 2001, the Freedom from Religion Foundation and the American Civil Liberties Union of Wisconsin expressed concerns about using the Church for graduation ceremonies. The Anti-

Separation of Church and State who contacted School District Superintendent Gibson in 2007.[64] Communicating with counsel, Superintendent Gibson stressed that although the ceremonies were held at the Church, there were no references to religion during the ceremony, and he assured counsel that no religious literature would be distributed.[65] Superintendent Gibson also reiterated that the School District was building a new field house that, upon its completion, could accommodate the ceremonies.[66] Both Central and East moved their graduation ceremonies to the field house immediately after it was completed.[67]

C. Judge Flaum and the Majority: Endorsement and Coercion

Having previously written the dissent in the Seventh Circuit's September 2011 decision, Judge Flaum authored the majority opinion in the July 2012 decision.[68] Reiterating many of the arguments he made in his initial dissent, Judge Flaum held that the School District's graduation ceremonies at the Church impermissibly endorsed religion under the test established in *Lemon*.[69] Moreover, the message of endorsement was religiously coercive under *Lee* and *Santa Fe*.[70]

1. Endorsement Analysis

The Does alleged that the practice of holding a public school graduation ceremony in a non-denominational, evangelical church effectively represented government endorsement of one religion over another.[71] The majority began its analysis of *Elmbrook* with the *Lemon* test, asking whether the primary effect of the government conduct advanced or inhibited religion.[72] The court concluded that the problem

Defamation League objected in 2002 as well. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 842; *see* Doe *ex. rel.* Doe v. Elmbrook Sch. Dist., 658 F.3d 710, 734–40 (7th Cir. 2012).

69. Doe *ex rel.* Doe v. Elmbrook Sch. Dist., 687 F.3d 840, 851–54 (7th Cir. 2012).

70. *Id.* at 854–56.

71. *Id.* at 851 n.15. In *Elmbrook*, the parties stipulated that the District had a secular purpose in choosing the Church as the venue for its graduation ceremonies. Therefore, the Court did not evaluate the first-prong of the *Lemon* test which considers the government's purpose with respect to the activity. *Id.* While the Does did argue excessive entanglement, the court did not consider the third-prong regarding "entanglement" as their decision rested on a violation of the second-prong of *Lemon* relating to effects. *Id.*

72. *Id.* at 851; *see supra* Part II(A).

with the School District's graduation ceremonies was that the religious symbols that adorned the Church promoted religious beliefs and created a "pervasively religious environment" where the attendees, particularly the students, may have felt pressure to adopt them.[73] Citing *Stone v. Graham*, the court found that the problem with the School District's graduation ceremony was essentially the same problem that is created when religious teachings, practices, and symbols are brought into the school environment.[74] By creating this analogy, Judge Flaum and the majority attempted to situate the graduation ceremony among U.S. Supreme Court precedent dealing with religious symbols and prayer in public schools.[75]

Though there was no allegation that the School District's purpose was to promote religion, the majority argued that the environment itself created the same effect of endorsement that is found when religious activities are brought into the school building. Then, in painstaking detail, the court explored the various religious symbols that contributed to the sheer "religiosity" of the space and the unmistakable link between church and state it perpetuated.[76] The court noted that a large Latin cross, the symbol of Christianity, adorned the interior of the auditorium in which the ceremony was held.[77] Lining the walls of the lobby adjoining the auditorium were posters and banners geared toward encouraging religious devotion among middle school and high school aged students.[78] Along the walls were tables and stations with pamphlets and information relating to themes and questions posed by the posters.[79] The pews in which the guests sat also contained religious materials, some of which were cards soliciting membership in the Church.[80] Moreover, mixed among the religious décor and literature

73. *Id.* at 856.

74. *Id.* at 851 (citing Stone v. Graham, 449 U.S. 39, 41–42 (1981) (holding that the posting of a copy of the Ten Commandments on the wall of each public school classroom in the state of Kentucky violated the Establishment Clause. Despite the Kentucky state legislature's insistence that the purpose of the posting was secular, the Court held that the posting of the Ten Commandments served no educational purpose and only induced the students to "read, meditate upon, perhaps to venerate and obey, the commandments")).

75. *Elmbrook*, 687 F.3d at 851; *see* Edwards v. Aguillard, 482 U.S. 578 (1987) (holding that a Louisiana statute requiring public schools that teach evolution to also teach creationism violated the Establishment Clause as the purpose of the statute was to endorse a religious doctrine); *see also*, Wallace v. Jaffree, 472 U.S. 38 (1985) (invalidating a state law allowing public school teachers to insist on a moment of silence in the classroom as a violation of the Establishment Clause because the law had no secular purpose).

76. *Id.* at 852–53.

77. *Id.* at 852.

78. *Id.*

79. *Id.*

80. *Id.*

were symbols of the school which the majority felt implied that the School District placed its "imprimatur" on the Church's message.[81] While the court noted that a reasonable observer would be aware that the materials and literature displayed were not placed there by the School District, the same reasonable observer may conclude that because the School District chose the Church for its graduation ceremony, it approved the Church's religious message.[82]

The majority quickly dispatched the argument that the School District exercised less control over the environment then they may have had over school-owned property. The court noted that this line of analysis regarding control would detract from the dispositive facts that the School District chose the Church over other venues and effectively required attendance at the graduation ceremony.[83] Relying on *Santa Fe*, the court concluded that even though the students voted overwhelmingly in support of the decision to hold graduation ceremonies at the Church, that vote did not save the administration's actions from being challenged on First Amendment grounds.[84] Furthermore, the court pointed out that a vote may have actually reinforced the minority status of those who hold beliefs not consistent with the majority.[85]

2. Coercion Analysis

After its finding of religious endorsement, the majority went on to hold that the practice was also religiously coercive under the precedent established in *Lee* and *Santa Fe*.[86] While both *Lee* and *Santa Fe* involved forced religious activity, the majority found those cases indistinguishable from *Elmbrook* in that the students at the graduation ceremony represented a "captive audience," and those students who may have held minority religious viewpoints were forced to watch their classmates reading the Church's pamphlets, posing for pictures in front of its religious iconography, or meditating on the various religious symbols.[87] According to the court, these activities "create a subtle

81. *Id.* at 853.

82. *Id.* at 853–54.

83. *Id.* at 854. Interestingly the Court suggested that if school officials would have attempted to rid the Church of much of its religious symbolism, those acts may have represented "excessive entanglement" in violation of *Lemon*'s third prong. *Id.*

84. *Id.* at 854.

85. *Id.* (quoting Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 305 (2000) ("[M]ajoritarian election might ensure that *most* of the students are represented, it does nothing to protect the minority; indeed, it likely serves to intensify their offense.")).

86. *Id.*; *see supra* Part II(B).

87. *Id.* at 855.

pressure to honor the day in a similar manner."[88] Relying on the argument in *Lee* that attendance at graduation ceremonies is not "voluntary," considering the societal and personal significance of the event, the majority was unwilling to allow choice of a religious venue for the ceremonies to force some into choosing not to attend.[89] Here, the implicit endorsement of religion due to the "pervasively religious" environment of the Church carried with it the subtle, but nonetheless, impermissible aspect of coercion.[90]

D. The Dissenters

1. Judge Ripple

Judge Ripple, in dissent, reiterated his view expressed as the majority author in the vacated September 2011 decision.[91] In that opinion, Judge Ripple argued that while the Church may be laden with religious symbols and iconography, there was no evidence that the School District associated itself in any way with those symbols, nor was there evidence that any efforts were made to stock the pews and surroundings with religious materials prior to the graduation.[92] In fact, the School District actively sought to remove non-permanent displays from the dais.[93]

88. *Id.* Here the majority relied on *Wallace v. Jaffree* where the U.S. Supreme Court noted that school children are more susceptible to the pressure to conform. 472 U.S. 38, 60 n.51 (1985). The Court in *Wallace* stated that "when the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing official religion is plain." *Id.* at 70 (quoting Engel v. Vitale, 370 U.S. 421, 430 (1962)).

89. *Id.* at 856; *see* Lee v. Wiseman, 505 U.S. 577, 578 (1984).

90. Judge Hamilton, in concurrence, addressed the dissenting positions of both Judge Ripple and Judge Posner. Attacking Judge Posner's contention that when lacking precedent, judges will retreat to their own religious perspective, Judge Hamilton argued that in order to adopt the perspective of a reasonable non-adherent, judges will deliberately try to see the situation from perspective of the non-adherent. *See id*. at 858 (Hamilton, J., concurring). In response to the dissent's fear that courts will now be in the business of parsing an environment's iconography as a means to evaluate endorsement, Judge Hamilton responded that the majority opinion did not decisively rest on the religious symbols and activities in the Church, rather the critical fact was that this "important rite of passage in life" for the students was held in any religious environment at all. *Id.* at 857. Finally, Judge Hamilton dismissed the dissent's analogy to voting in a religious environment stating that voting is often done in the non-consecrated parts of many different places of worship (churches, synagogues, mosques), voters have the option of early voting or absentee voting, and that voting is an individual act not a very public graduation ceremony. *Id.* at 860.

91. Doe *ex. rel.* Doe v. Elmbrook Sch. Dist., 658 F.3d 710, 712 (7th Cir. 2011).

92. *Id.* at 731.

93. *Id.* Later in his majority opinion in the 2011 decision, Judge Ripple addressed potential entanglement issues. Pointing to the U.S. Supreme Court's contention in *Agostini* that entanglement must be excessive, Judge Ripple held that the District's actions of removing certain religious decorations from the dais were *de minimis* and did not rise to the level of control or excessiveness required under *Agostini*. *Id.* at 734. Nor was the advisory student vote excessive entanglement as the

Moreover, the graduation ceremony itself was devoid of any references to religion or spirituality and was completely secular in its message.[94] Judge Ripple contended that the "objective observer" would understand that the religious decorations and information were part of the setting of the Church and did not mean that the School District, which had simply rented the space as other groups in the community had done in the past, implicitly sought to endorse the Church's message.[95] The School District did nothing more, in Judge's Ripple's view, than engage in "an arm's-length business transaction" to rent a building from a church.[96]

More than anything, Judge Ripple was concerned with the majority's assertion that its decision was nothing more than the application of general Establishment Clause principles to a new set of facts.[97] Instead, he argued, the decision in *Elmbrook* unnecessarily extended the holdings previously established in *Lee* and *Santa Fe*.[98] In both *Lee* and *Santa Fe*, students were forced to partake in religious activities that were endorsed by their respective schools. Unlike those cases, the School District's graduation ceremony, while in a church building, made no reference to religion, the Church itself, or any other religious institution.[99] Though Judge Ripple acknowledged that the audience may have been "captive" due to the gravity of the ceremony, they were not asked, like the audiences in *Lee* and *Santa Fe*, to participate in any religious activity or ceremony.[100] Absent a coerced religious ceremony, Judge Ripple argued that the majority view stood for the proposition that students feel the same coercive pressure and message of endorsement from the incidental presence of religious symbols or iconography that they do from direct, forced religious activity exemplified in *Lee* and *Santa Fe*.[101] The students and their guests, or any reasonable person for that matter, would understand that any church would have religious literature and

election was over a choice of venue for a completely secular ceremony. *Id.*

94. *Id.* at 734.

95. *Id.* at 731. Judge Ripple also noted that the record reflected that the graduates, and their parents by implication, understood that the Church was rented for the occasion because it was the preferred venue of the graduates participating in the ceremony. *Id.*

96. Doe *ex rel.* Doe v. Elmbrook Sch. Dist., 687 F.3d 840, 863 (7th Cir. 2012) (Ripple, J., dissenting).

97. *Id.* at 862.

98. *Id.*

99. *Id.* at 863.

100. *Id.* at 864. The concept of the "captive audience" was introduced in Justice Souter's concurring opinion in *Lee*, describing the students and their families who attended the graduation ceremony at issue in *Lee* where a religious speech was given. 505 U.S. 577, 630 (1984). The audience was "captive" in the sense that though attendance was not required by the school, given the importance of high school graduation in American society, attendance, according to the Court, was not voluntary in any real sense. *Id.* at 595.

101. *Elmbrook*, 687 F.3d at 864.

decorations and that those religious items belong to the church itself and not the group renting the building.[102]

Ultimately, Judge Ripple contended that rather than seeking to prevent government endorsement of religion or forced religious activity, courts would now be in the business of assessing whether a religious institution or environment is "too pervasively religious" to allow for any interaction between it and any government entity for fear of implicit coercion and endorsement.[103] He wondered what would become of the teacher who wears a Star of David necklace or gold cross lapel pin, a public high school athletic team entering a religious school for athletic competition, or those same School District graduating students who enter a church to vote in the next election.[104] The majority's decision, he argued, forces the state to avoid any association with a "pervasively religious group," thus permanently ostracizing those groups and preventing them from participating and becoming accepted into American society.[105]

2. Chief Judge Easterbrook

While echoing the views of his fellow dissenting judges, Chief Judge Easterbrook assumed a textual approach and declared that the standards established in *Lemon* have been created by Justices of the U.S. Supreme Court and have no basis in the Establishment Clause's text.[106] The purpose of the Establishment Clause, according to Judge Easterbrook, is to prevent laws, such as mandatory attendance at religious ceremonies or religiously delegated taxes that would represent the government establishing religion.[107] Here the School District needed an auditorium for its graduation ceremony, and it rented space for one day from the Church with no intention or desire to send any message other than perhaps that a "comfortable space is preferable to a cramped, over-heated space."[108] Though Judge Easterbrook stipulated that the Church was full of symbols, so too, he argued, are the United Center in downtown Chicago and the Hilton hotel.[109] Judge Easterbrook

102. *Id.* at 865.

103. *Id.* at 866.

104. *Id.* at 867–68.

105. *Id.*

106. *Id.* at 869 (Easterbrook, J., dissenting).

107. *Id.*

108. *Id.* at 870.

109. *Id.* The United Center is a large arena in Chicago, Illinois. It is home to the Chicago Bulls, a professional basketball team, and home to the Chicago Blackhawks, a professional hockey team. Outside the arena is a large statute of Michael Jordan, a former Bulls player. The arena also has the United Airlines' logo on the outside.

suggested that if the School District had held its graduation ceremonies in those venues there would have been no complaints that the School District had adopted basketball as its official sport or the Hilton chain as its official hotel.[110] According to Judge Easterbrook, "no reasonable observer believes that renting an auditorium for a day endorses the way the landlord uses that space the other 364 days."[111]

Judge Easterbrook also struggled with the majority's assertion that endorsement coerces. He argued that coercion in *Lee* and *Santa Fe* was defined as the fear of ostracism and ridicule that goes along with a student's refusal to participate in a religious activity.[112] The School District's graduation ceremony was completely devoid of any religious activity; therefore, no one was at risk of ostracism due to non-participation.[113] Moreover, Judge Easterbrook argued that endorsement and coercion are two separate concepts. The government may endorse its own point of view, even on religion, without coercing anyone to participate.[114] According to Judge Easterbrook, if endorsement and coercion are the same, as the majority reasons, and holding a graduation ceremony in a church endorses religion, then it must follow that holding government elections in a church represents an impermissible message of state endorsement of religion.[115] For Judge Easterbrook, a proper view of neutrality allows the government to rent religious venues for secular activities.[116]

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110. *Id.*

111. *Id.*

112. *Id.* at 870–71.

113. *Id.* at 871.

114. *Id.* Here Judge Easterbrook referenced the U.S. Supreme Court's explanation of the "government speech" doctrine in Johanns v. Livestock Marketing, 544 U.S. 550 (2005). In *Livestock* a group of associations and individuals who were required by the Department of Agriculture to pay an assessment on all cattle sales or importation brought suit against the Department of Agriculture claiming that the use of those funds for communications supporting beef to beef producers violated the First Amendment. *Id.* at 550. The Supreme Court held that beef communications were government speech since the message and content were controlled by the government. As a general rule, the government may use taxpayer funds to endorse its own message. *Id.* at 560–62.

115. *Elmbrook*, 687 F.3d at 871.

116. Judge Posner also wrote a dissent suggesting that Supreme Court case law regarding the Establishment Clause is in a state of disarray with no clear principles. Moreover, the text and history of the Establishment Clause were of no help in deciding whether a public school may hold its graduation ceremonies in a church. *Id.* at 872. Therefore, he lamented the fact that judges often retreat to their own personal beliefs regarding religion. *Id.* at 873. Judge Posner then went on in the remainder of his opinion to echo many of the views of Judge Easterbrook, reiterating in particular the District's secular purpose and the fact that exposure did not amount to coercion. *Id.* at 874–78. Particularly interesting is his assertion that the majority's reliance on the religious imagery of the Church will require the courts in future cases to assess the iconography and religious symbols of an environment that seeks to do business with the state. *Id.*

IV. DISCUSSION

For decades conservative members of the U.S. Supreme Court have been calling for an end to the use of the *Lemon* test in evaluating Establishment Clause issues. Most notably Justice Scalia has lamented that "[l]ike some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence . . . ."[117] The decision by the Seventh Circuit in *Elmbrook* yet again summoned the ghoul to find that the mere use of a religious space by a public school for its graduation ceremony represented state endorsement of religion. However, even more frightening is the new specter of *Elmbrook* and its emphasis on the implicitly coercive impact of a "religiously pervasive" environment.

The decision in *Elmbrook* mischaracterized mere interaction as endorsement and effectively eliminated any evaluation of purpose under the *Lemon* test. The court's decision also represented an unnecessary extension of the coercion doctrine and created an unworkable standard based on judicial perception of implicit, environmentally-created coercion.

A. Endorsement as a Product of the "Pervasively Religious Environment"

The majority in *Elmbrook* saw no distinction between instances when school administrators bring religious activities and symbols into school buildings and those times when pivotal school events, such as graduation, are celebrated in a church. The court contended that "[t]he constitutional flaw with such activity is that it necessarily conveys a message of endorsement."[118] The court then mistakenly went on to situate the School District's graduation ceremony alongside precedent dealing with religious activities and prayer in schools.[119] This analogy is flawed in two ways. First, mandates requiring school prayer and a

117. Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring in the judgment).

118. *Elmbrook*, 687 F.3d at 851.

119. *See, e.g.*, Stone v. Graham, 449 U.S. 39, 41 (1980); Wallace v. Jaffree, 472 U.S. 38 (1985); Edwards v. Aguillard, 482 U.S. 578 (1987) (Louisiana statute requiring that if evolution is taught in primary or secondary schools then creationism must also be taught has no secular purpose and impermissibly endorses religion by requiring creationism be taught over other theories); Sch. Dist. of Abington Twp., Penn. v. Schempp, 374 U.S. 203 (1963) (Pennsylvania statute required the reading of bible verses in public schools violated the Establishment Clause as the readings were part of the school curriculum and were supervised by school staff); Engel v. Vitale, 370 U.S. 421, (1962) (school policy requiring daily reading of a non-denominational prayer composed by the state's Board of Regents impermissibly represented state endorsement of certain religious ideas embodied in the prayer).

moment of silence force students to actively engage in religious ceremonies. The School District students were not required to participate in any religious activity whatsoever, nor were they even required to attend the graduation ceremony.[120] Second, the perception of state endorsement of religious activities in schools stems in large part from the fact that the activities are done on school property and are led by employees of the school. The graduation ceremony was devoid of any reference to religion and a one-day rental of a church for a graduation ceremony hardly carries with it the message of endorsement that a daily school prayer or bible reading does.[121]

The argument that the District's yearly one-day rental of the Church for a completely secular religious ceremony confuses the purpose of the endorsement test.[122] The current interpretation of *Lemon*'s second-prong requires that state action have the "effect of communicating a message of government endorsement of religion."[123] It is not a stretch to see how the reasonable person would believe that the introduction of prayer or religious symbols into the classroom would communicate a message of school endorsement of religion. However, to argue that the reasonable person would perceive that same effect when a public school rents a religious building on one occasion for a completely secular religious ceremony distorts the purpose of the endorsement test.[124] This view of "endorsement by exposure" has been rejected by the Supreme Court as well as other federal courts. In *Agostini v. Felton*, the Court, in upholding a New York City Board of Education program allowing public school teachers into parochial schools to provide remedial education, reinforced the position that "we no longer presume that public employees will inculcate religion simply because they happen to be in a sectarian environment."[125] Though district courts have adopted varying views, a number have rejected the view that the Establishment Clause is violated simply because a school holds certain events in a religious environment. In *Porta v. Klagholz*, a district court in New

120. The majority contended that attendance was not voluntary given the societal importance of high school graduation. *See supra* Part III(C)(2). The dissent argued that the ceremony was not technically mandatory. *See Elmbrook*, 687 F.3d at 864 (Ripple, J., dissenting).

121. *See supra* Part III(C)(2).

122. *See supra* Part II(A).

123. Lynch v. Donnelly, 465 U.S. 668, 691–92 (1984) (O'Connor, J., concurring). *See supra* Part II(A).

124. *See supra* Part II(A).

125. Agostini v. Felton, 521 U.S. 203, 234 (1997). The Court referenced its holding in *Zobrest v. Catalina Foothills Sch. Dist.*, where the Court held that placing a public employee in a school to provide interpretation skills for a deaf student did not violate the Establishment Clause. Justice Rehnquist wrote that "the Establishment Clause lays down no absolute bar to the placing of a public employee in a sectarian school. Such a flat rule, smacking of antiquated notions of 'taint,' would indeed exalt form over substance." 509 U.S. 1, 13 (1993).

Jersey upheld the constitutionality of a state statute allowing funding for a charter school operated in a church building stating that "the placement of a public school on church premises does not give rise to the presumption that religion is inculcated into the school, nor does it create a symbolic union between church and state."[126] Similarly, the majority in *Elmbrook* was unwilling to speculate on whether the state's choice of a religious environment for public school ceremonies always represents a transgression of the Establishment Clause.[127]

Recognizing that state endorsement of religion cannot be found solely in the School District's decision to hold its graduation ceremonies in a church, the court then, in a slight of hand, switched its analysis to whether graduation ceremonies in the Elmbrook Church ran afoul of the Establishment Clause.[128] This slight change in analytical perspective allowed the majority to search for endorsement in the specific environment and context in which the graduation took place, rather than endorsement of religion stemming from any forced religious activity in the ceremony itself. Thus, the court in *Elmbrook* framed the second-prong of the *Lemon* test in a manner consistent with how the Supreme Court has evaluated state-sponsored religious displays.[129] The *Elmbrook* court adopted the approach taken in *Books* and looked to "the totality of the circumstances surrounding the display to determine whether a reasonable person would believe that the display amounts to an endorsement of religion."[130] Thus, much like the religious display cases, the court took an accounting of all the religious symbols and iconography that adorned the Church to arrive at the conclusion that a reasonable observer could believe that in choosing such a "proselytizing environment" the School District endorsed the message of the Church.[131] Endorsement of religion by the School District was found in

126. 19 F. Supp. 2d 290, 302 (D.N.J. 1998); *see also* Verbena United Methodist Church v. Chilton County Bd. of Educ., 765 F. Supp. 704, 714 (M.D. Ala. 1991) (School Board may not deny a church access to a public high school auditorium for its church-sponsored baccalaureate mass as the practice did not result in a per se message of implicit state endorsement of religion). *But cf.* Spacco v. Bridgewater Sch. Dept., 722 F. Supp. 834 (D. Mass. 1989) (School District may not assign students to classroom space rented in a Roman Catholic Church as there was an implicit message of state endorsement stemming from the symbolism of the church); Does v. Enfield Public Sch., 716 F. Supp. 2d 172 (D. Conn. 2010) (public high school graduation ceremonies in a church represented an impermissible state entanglement with religion and coercion of students to adopt a certain religion). For a more thorough discussion of these cases, see Christine Rienstra Kiracofe, *Going to the Chapel, and We're Gonna . . . Graduate?: Do Public Schools Run Afoul of the Constitution by Holding Graduation Ceremonies in Church Buildings?*, 266 ED. LAW REP. 583 (2011).

127. Doe *ex rel*. Doe v. Elmbrook Sch. Dist., 687 F.3d 840, 844 (7th Cir. 2012).

128. *Id.* at 843–44.

129. *See supra* Part II(A).

130. Books v. City of Elkhart, 235 F.3d 292, 304 (7th Cir. 2000); *see also* Cnty. of Allegheny v. Am. Civil Liberties Union, 492 U.S. 573, 597 (1989).

131. *Elmbrook*, 687 F.3d at 854.

the environment itself rather than in any action by the School District requiring that the students participate in any religious activity.

The court, in focusing on the religious nature of the environment itself, was able to make an end-run around the fact that there was no school mandated religious activity, nor did the School District have any intention of endorsing religion. The *Elmbrook* court stated that preventing the School District from having graduation ceremonies at the Church was "consistent with well-established doctrine prohibiting school administrators from bringing church to the schoolhouse."[132] If that is true, then the scenario should have fallen squarely under the holding in *Stone*.[133] The reason it did not was because in *Stone*, though the state trumpeted a secular purpose, its true purpose was revealed solely through its act of affixing the Ten Commandments to the walls of a public school classroom.[134] Absent the classroom environment, the Ten Commandments may not carry the same message of religious endorsement. Compare this to *Van Orden v. Perry*, where the Court upheld the constitutionality of a monument inscribed with the Ten Commandments as part of a display on the grounds of the Texas State Capital.[135] The Court distinguished *Stone*, stating "[i]n the classroom context, we found that the Kentucky statute had an improper and plainly religious purpose."[136] According to the Court, the display at issue in *Van Orden* was a "far more passive use of those texts than was the case in *Stone*, where the text confronted elementary school students every day."[137] Plainly, the message of endorsement in *Stone* did not come from the inherently religious nature of the Ten Commandments themselves, but rather the way in which they were displayed demonstrated the state's purpose. In *Elmbrook*, the School District was not accused of having an express religious purpose in choosing the Church as the venue for its graduation ceremony.[138] Moreover, unlike *Stone*, the School District's act of holding the ceremony at the Church also did not reveal any true purpose to inject religion into an otherwise secular ceremony. Therefore, to arrive at its conclusion that the School District endorsed religion, the court must provide that purpose. It did so

132. *Id.* at 850.

133. *See supra* text accompanying note 74.

134. Stone v. Graham, 449 U.S. 39, 41 (1980).

135. 545 U.S. 677 (2005).

136. *Id.* at 690.

137. *Id.* at 691. Justice Rehnquist also noted the careful attention given to forced religious activity within the school environment. In *Lee*, the Court struck down prayer at a high school graduation ceremony. 505 U.S. at 577. However, the Court upheld the constitutionality of Nebraska's practice of having a prayer as part of the opening of its state legislature. Marsh v. Chambers, 463 U.S. 783, 793 (1983).

138. Doe *ex rel.* Doe v. Elmbrook Sch. Dist., 687 F.3d 840, 851 n.14 (7th Cir. 2012).

by using the interpretive framework established in the Supreme Court's religious display rulings and found implicit endorsement due to the nature and circumstances of the religious environment in which the graduation took place.[139]

This approach by the *Elmbrook* majority severely limits the purpose prong of the *Lemon* test by relegating its role to detecting state action that, on its face, has a religious purpose.[140] In fact, the majority in *Elmbrook* seemed to acknowledge its disregard for *Lemon*'s purpose prong stating that any analysis of the secular motivations of the School District would "impermissibly allow *Lemon*'s purpose inquiry to seep into the analysis of the likely effect of the School District's actions. *Lemon*'s purpose inquiry has rarely proved dispositive."[141] The *Elmbrook* standard ignores the state's purpose and allows judges to artificially attribute endorsement based on the context in which state action occurs. Under *Elmbrook*, religious endorsement can be imputed to any state activity that takes place in a "pervasively religious" environment, even if the state requires no religious action or even acknowledges that religion is part of the activity at all.

B. The "Religiously Pervasive Environment" and its Inherently Coercive Power

Relying heavily on the Supreme Court's decisions in *Lee* and *Santa Fe*, the court in *Elmbrook* saw no substantial difference between endorsement and coercion.[142] Although the students at the School District high schools were not asked to participate in a religious activity, as the students were in *Lee* and *Santa Fe*, the court found that the School District's choice to use a religious site for its graduation, signified that the "power, prestige, and financial support" of the School District was impermissibly placed behind a certain religious faith.[143] This position represented an extension of the coercion doctrine far beyond what was envisioned in the prior cases of *Lee* and *Santa Fe.* The decision also laid out a misguided test for coercion where judges will find implicit coercion in any state action that takes place in an environment that is deemed to be "pervasively religious." Rather than emphasizing the coercive action that a state may take in forcing students to participate in a religious activity, courts will have to look to whether the environment

139. *Id.* at 853.

140. Each dissent, on the other hand, would hold that the District's secular purpose would make the graduation ceremony constitutional.

141. *Elmbrook*, 687 F.3d at 853 n.16.

142. *Id.* at 855.

143. *Id.*

creates a coercive element that would otherwise be present when the state requires religious activity.

The decisions in *Lee* and *Santa Fe* were both premised on the principle that the "government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way 'which establishes a [state] religion or religious faith, or tends to do so."[144] In both cases, the state applied coercive pressure by requesting that the students in each situation *participate* in religious activity. In *Lee*, even the school administration's request for silence at the ceremony represented a subtle pressure to conform and ran the danger of coercing adherence.[145] Similarly, in *Santa Fe*, the delivery of the pre-game prayer over the public address system at a high school football game commanded those in attendance to participate in the act of worship, regardless of their individual beliefs.[146] The School District's graduation ceremony was devoid of any such school-sponsored religious activity. To find coercion, the court, much like it did in its finding of endorsement, relied on its argument that the Church represented a "pervasively religious" environment, and therefore the decision to direct students to attend the graduation ceremony represented coercion.[147] Once students had been forced into such a "proselytizing environment" there was the danger that a student who held a minority belief would witness classmates "taking advantage of the Elmbrook Church's offerings [literature] or meditating on its symbols . . . or speaking with staff members."[148] This, according to the court, "may create subtle pressure to honor the day in a similar manner."[149] Rather than focus on the actions of the state, the court created a hypothetical scenario where a non-adhering student seeing classmates gazing at the Church icons would suddenly feel pressured to disavow all previous religious beliefs or to take up the beliefs espoused by the Church.[150] Reasoning that a religious environment is somehow contagious and tainted has found no acceptance in prior Establishment Clause jurisprudence.[151] The holding the court announced in *Elmbrook* took no account of the purpose that the state may have had for renting or using religious space. A violation of the Establishment Clause under *Elmbrook* no longer requires the state to

144. Lee v. Wiseman, 505 U.S. 577, 587 (1984) (quoting Lynch v. Donnelly, 465 U.S. 668, 678 (1984)).

145. *Id.* at 593.

146. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 312 (2000).

147. *See* discussion *supra* Part IV(A).

148. *Elmbrook*, 687 F.3d at 855.

149. *Id.*

150. *Id.* at 875 (Posner, J., dissenting) (pointing out that there was never any suggestion that the graduation ceremony the Elmbrook Church ever caused anyone to convert religions).

151. *See supra* text accompanying note 125.

do anything more than utilize an environment that is judicially determined to be too "pervasively religious." The religious environment itself provides the coercive element, and the necessary state action is fulfilled by the state's mere interaction with such an environment.

V. CONCLUSION

While it may be time to heed Justice Scalia's advice and forever bury *Lemon*, it would be a mistake to allow in its place a standard that ignores any analysis of the state's purpose for its interaction with religion and encourages judges to seek out state endorsement of religion in a pervasively religious environment. Consideration of the state's purpose must play a more vital role in assessing instances where a public school interacts with religion outside the confines of the school building. When the Ten Commandments are posted on a classroom wall, it is not the Decalogue itself that provides endorsement of religion, it is the classroom context and the school's decision to post the Ten Commandments that represents an impermissible state endorsement of religion.[152] In *Van Orden*, the Supreme Court acknowledged that the same message of state endorsement of religion cannot apply to instances where the state interacts with religious symbols outside of the classroom as it does when the state brings those symbols into the classroom.[153] In cases where the state interacts with religious symbols in a non-classroom setting, courts should place a greater emphasis on the state's purpose rather than dismiss it as the *Elmbrook* majority did. A stronger analysis of purpose acknowledges the effect of endorsement that the introduction of religious symbols into the classroom environment may have, but distinguishes those situations from instances where the state interacts with religious environments with no motive to endorse religion or to coerce religious activities.

Though in its opinion the court did its best to narrow its holding, the actions taken by the court to redefine endorsement and coercion will have a lasting impact on the relationship between the state and religious institutions. Under *Elmbrook*, if a state institution wants to use a religious environment for a single secular event, then it must ensure that such an environment does not have any religious symbols. If there are symbols, the court cautions that an attempt to gain control of the environment or rid it of its religious overtones will run afoul of *Lemon*'s

152. Van Orden v. Perry, 545 U.S. 677, 691 (2005).

153. *Id.* ("*Edwards v. Aguillard* recognized that *Stone*—along with *Schempp* and *Engel*—was a consequence of the 'particular concerns that arise in the context of public elementary and secondary schools.' Neither *Stone* itself nor subsequent opinions have indicated that *Stone*'s holding would extend to a legislative chamber . . . or to capitol grounds.").

excessive entanglement prong.[154] Moreover, there is no barometer as to which environments are "pervasively religious" and which are not, since the court is the one to determine such a question. The safest course then would be for the state not to engage any religious environment, even in an arms-length transaction. As Judge Ripple stated, this course would mean that only "a religious entity that strips itself down to a vanilla version of its real self is to be acceptable in the important moments of American civil life."[155]

The application of the court's new standard for implicit coercion is impractical and unworkable. Rather than looking to whether the state coerced religious activity, a court will assess the religious institution in which an event occurs and if it finds that it is pervasively religious, then any interaction between the state and that institution will represent coerced religious activity. Moreover, given that the state is prevented by dangers of entanglement from modifying such an environment, the state is left with no choice but to find another venue. As a few members of the dissent point out, if the majority's definition of coercion is accepted, then public high school athletic teams may be precluded from entering parochial schools for athletic events, election boards may not be allowed to use religious institutions as polling places, and students will not be able to tour the National Gallery in Washington or listen to oral arguments in the Seventh Circuit.[156] This interpretation stretches the concept of coercion far beyond that envisioned by the Supreme Court.

The Seventh Circuit cannot be faulted for its effort to protect religious freedom and to ensure that choice in matters of religion is preserved in the conscience of each individual. This is certainly a liberty that should be protected from too much government interference. The tortured jurisprudential history of the Establishment Clause and the fractured nature of the *Elmbrook* opinion demonstrate that the framework for analyzing interactions between church and state is anything but settled. The pervading influence of religion in American society and the importance of religious freedom demand a clear standard. However, the answer is not in a standard that ignores any analysis of the state's purpose for its action and imputes into those actions unconstitutional religious endorsement and coercion based upon a judicial determination that an environment is too "pervasively religious."

154. *Elmbrook*, 687 F.3d at 878 n.18.

155. *Id.* at 866.

156. *Id.* at 867, 874.