

**KEEPING WITH THE PRINCIPLE OF  
NEUTRALITY: WHY COURTS SHOULD NOT  
EXTEND *ELMBROOK*'S MISTAKEN  
ESTABLISHMENT CLAUSE ANALYSIS**

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#### INTRODUCTION

Imagine a city that has an above average population of homeless individuals, many of whom are forced to sleep out on the streets and often find themselves victims of violence. The city council decides to help these individuals by providing them shelter so that they may be out of harm's way. However, the location that would provide the largest area to shelter and house these individuals in the community happens to be a building owned by a religious organization. This religious building, like almost any other, is adorned with symbols of the particular religion, banners proclaiming religious messages, and pamphlets placed around the building advertising an opportunity to learn more about and join the religion. The proposed shelter program would also consequently cause the religious organization to incur additional expenses due to hosting it. So the city helps by paying the church a rental fee for its use of the facilities, just as it would have paid to any private property owner that would have granted them use of their facilities. Under these circumstances would the city have violated the Establishment Clause?

It would seem unlikely that a city, or any other government entity, has violated the Establishment Clause by simply utilizing

a religious building to conduct an event or program.<sup>1</sup> Most individuals would understand that the government's purpose here is to advance a secular program or activity and not the very religion itself when it rents a building to host an event or program like the one described above. It also seems hard to reasonably believe that the government would be attempting to coerce individuals into conforming and joining a religion by bringing them into the religious building in an effort to help them find shelter or food. Unfortunately, our current Establishment Clause jurisprudence has left the courts in a state of confusion as to how it should be properly applied in numerous situations.<sup>2</sup>

As a consequence of the Seventh Circuit's recent decision in *Doe ex rel. Doe v. Elmbrook School District*, holding that hosting a high school graduation in a church is a violation of the Establishment Clause,<sup>3</sup> courts are further pointed in a direction that runs against the principle of neutrality. The *Elmbrook* majority reasoned that even though the school had a secular purpose in hosting the graduation, the choice to utilize a "pervasively religious environment" was in and of itself an Establishment Clause violation.<sup>4</sup> The court then solidified its holding by reasoning that the school had coerced its students to participate in religious exercises by placing them into a religious environment.<sup>5</sup>

This case leaves us with yet another decision that fortifies the metaphorical "'wall' [of separation] between church and

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<sup>1</sup> See *Otero v. State Election Bd. of Okla.*, 975 F.2d 738, 741 (10th Cir. 1992) (finding the use of a church as a polling place was not a violation of the Establishment Clause). *But see Doe ex rel. Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 860 (7th Cir. 2012) (en banc) (Hamilton, J., concurring) (citing *Otero*, 975 F.2d at 741; *Berman v. Bd. of Elections*, 420 F.2d 684, 685 (2d Cir. 1969)) (discussing when religious buildings are used as polling places the voting typically takes place in non-consecrated common areas of the building and away from a religious environment), *cert. denied*, 134 S. Ct. 2283 (2014).

<sup>2</sup> See *Utah Highway Patrol Ass'n v. Am. Atheists, Inc.*, 132 S. Ct. 12, 15 (2011) (Thomas, J., dissenting from denial of certiorari). Justice Thomas explains the lower courts feel they are in "Establishment Clause purgatory" as the courts have "appl[ie]d different tests" between themselves. *Id.* at 15-16 (quoting *ACLU v. Mercer County*, 432 F.3d 624, 636 (6th Cir. 2005)).

<sup>3</sup> *Elmbrook*, 687 F.3d at 856 (majority opinion).

<sup>4</sup> *Id.* at 853, 856.

<sup>5</sup> *Id.* at 855.

state.”<sup>6</sup> As a result of *Elmbrook*, courts now have the legal reasoning and precedent available to invalidate the use of a religious building used in conjunction with any government program or activity, even those secular in nature.<sup>7</sup> Indeed, *Elmbrook* has already contradicted prior case law regarding the use of a religious building for a government activity or program.<sup>8</sup> Its rationale also flies in the face of the principle of neutrality, a bedrock principle of the Establishment Clause.<sup>9</sup> Furthermore, the holding expands the coercion test beyond its intended bounds by wrongly applying it in a case where there was no government direction or instruction to participate in a formal religious exercise, and applies the test to the presence of a religious environment created by private actors.<sup>10</sup> Effectively, the Seventh Circuit has over-broadened the coercion test by stripping it of the key element of a “forced choice”<sup>11</sup> to partake in religious activity.<sup>12</sup>

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<sup>6</sup> The Supreme Court itself has said that such a metaphor is not an apt description of proper Establishment Clause jurisprudence. *See Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) (“The concept of a ‘wall’ of separation is a useful figure of speech . . . . But the metaphor itself is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state.”).

<sup>7</sup> Chief Judge Easterbrook explained in his dissent that “[a]ll of the objections . . . [made] to graduation in a church apply to voting in a church” as “all churches are ‘pervasively religious.’” *Elmbrook*, 687 F.3d at 871 (Easterbrook, C.J., dissenting). The majority of the court seemed to acknowledge this is indeed a very logical next step and attempted to stress the limitation to which their opinion must be held. *Id.* at 843 (majority opinion) (quoting *Porta v. Klagholz*, 19 F. Supp. 2d 290, 303 (D.N.J. 1998)) (arguing that it was the “evidence of . . . religious iconography” that “underscore[d] how this case differs”).

<sup>8</sup> *See Otero v. State Election Bd.*, 975 F.2d 738, 741 (10th Cir. 1992) (finding no violation in the use of a church as a polling place); *cf. Cooper v. U.S. Postal Serv.*, 577 F.3d 479, 494-97 (2d Cir. 2009) (remanding with an order to remove religious materials displayed on postal service counters explaining that there is no Establishment Clause violation when a church merely operates a contract postal unit and keeps religious materials separate from the government function).

<sup>9</sup> *See McCreary County v. ACLU*, 545 U.S. 844, 860 (2005). Under the principle of neutrality a government may not take sides in a way that shows favor to one particular religion over another without committing a violation of the Establishment Clause. *Id.*

<sup>10</sup> *See Elmbrook*, 687 F.3d at 855-56 (finding the school district did not engage in coercion but that students might imitate others).

<sup>11</sup> *See generally* Cynthia V. Ward, *Coercion and Choice Under the Establishment Clause*, 39 U.C. DAVIS L. REV. 1621, 1639-41, 1646-49 (2006).

<sup>12</sup> *See Elmbrook*, 687 F.3d at 855-56 (“[T]he school district did not coerce overt religious activity. . . . The fact that graduation attendees need not do anything but participate in the graduation ceremony and take advantage of religious offerings if they so choose does not rescue the practice.”).

This Comment seeks to prevent the slippery slope within the Establishment Clause that may now arise as a result of *Elmbrook*'s abandonment of the principle of neutrality. First, it argues that when a government utilizes a religious building, courts should examine if the government or government entity is acting neutrally toward the religion instead of impermissibly benefiting and advancing it, rather than using the endorsement analysis through the lens of a reasonable observer. This approach will allow governments to continue beneficial programs that happen to indirectly involve religion, so long as they act neutrally, with a secular purpose, and do not provide benefits that would directly or primarily advance the religion. Secondly, this Comment proposes that courts should only apply the coercion analysis when there is an actual governmental direction to participate in a religious exercise, rather than over broadening the test and applying it against the presence of a "religious environment." Keeping the focus on whether actual government direction or instruction is given will prevent diluting the underlying values associated with the coercion test, as well as keep the balance in check with the Free Exercise Clause.

Part I of this Comment examines the history of Establishment Clause jurisprudence, provides an in depth look at the *Elmbrook* decision, and highlights cases with a similar factual background. Part II analyzes the problems arising from *Elmbrook*'s overextension of the coercion test and reviews concerns that have been addressed with the reasonable observer standard. Part III then argues that courts should not apply the reasonable observer standard when a government or government entity utilizes a religious building and that courts should only apply the coercion analysis in particular situations. And lastly, Part IV applies these arguments through case testing and hypothetical examples and describes how the Seventh Circuit should have ruled in *Elmbrook*.

## I. BACKGROUND

### A. *Establishment Clause Jurisprudence and Tests*

Embedded in the earliest roots of American history we find a background that heavily involved religion; after all, one of the

primary reasons the Pilgrims and Puritans first came to the New World was to escape the religious persecution they faced in England as part of the Separatists movements.<sup>13</sup> The fear of a similar government mandated religion arising in America led our Founding Fathers to add language in the First Amendment to the United States Constitution that provides: “Congress shall make no law respecting an establishment of religion . . . .”<sup>14</sup> The Supreme Court has interpreted this language, known as the Establishment Clause, to prohibit a wide array of government action that otherwise would impermissibly further or benefit religion.<sup>15</sup> In an effort to add some clarity to the murky waters of Establishment Clause jurisprudence, the Court has taken three different approaches to resolving Establishment Clause issues.<sup>16</sup> They include the *Lemon* test,<sup>17</sup> the endorsement test,<sup>18</sup> and the coercion test.<sup>19</sup>

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<sup>13</sup> County of Allegheny v. ACLU, 492 U.S. 573, 589-90 (1989), *abrogated by* Town of Greece v. Galloway, 134 S. Ct. 1811, 1821 (2014); *see also* PEREZ ZAGORIN, HOW THE IDEA OF RELIGIOUS TOLERATION CAME TO THE WEST 188-90 (2003).

<sup>14</sup> U.S. CONST. amend. I. *See generally* Allegheny, 492 U.S. at 589-90.

<sup>15</sup> Everson v. Bd. of Educ., 330 U.S. 1, 15-16 (1947) (listing numerous bans the Court believed the Establishment Clause encompassed). It was in *Everson* that the Establishment Clause was also first applied to the states through the incorporation principles of the Fourteenth Amendment. *Id.* at 15.

<sup>16</sup> The Court has at times also relied on other factors when deciding specific cases, such as the prevailing history around the alleged violation, but those instances have been few. For instance, Justice Breyer provided a contrasting swing vote in *Van Orden v. Perry* and *McCreary County v. ACLU*, which contained similar fact scenarios, but ended with different results. *Compare* Van Orden v. Perry, 545 U.S. 677 (2005), with *McCreary County v. ACLU*, 545 U.S. 844 (2005). In *Van Orden*, he explained that the forty-year history of the display outside the Texas state capital with no legal challenges brought against it was a key factor in determining that there was not an Establishment Clause violation. 545 U.S. at 702 (Breyer, J., concurring in the judgment). He contrasted this with the display in *McCreary* where a legal challenge had been brought almost immediately. *Id.* at 703. *Marsh v. Chambers* also found the Court using history as the key factor in upholding legislative prayer: “In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society.” 463 U.S. 783, 788, 792 (1983) (“Clearly the men who wrote the First Amendment Religion Clauses did not view paid legislative chaplains and opening prayers as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress.”).

<sup>17</sup> *See infra* notes 20-22 and accompanying text.

<sup>18</sup> *See infra* notes 23-29 and accompanying text.

<sup>19</sup> *See infra* notes 30-40 and accompanying text.

### 1. The *Lemon* Test

Prior to 1971 there was no official test used by the courts to determine Establishment Clause violations. The Supreme Court, recognizing the need for clarity,<sup>20</sup> established a three-part test that would henceforth become known as the *Lemon* test.<sup>21</sup> It asks: whether (1) the government has a secular purpose in its actions, (2) the government action has the principal or primary effect of advancing or inhibiting religion, or (3) the government has become excessively entangled with the religion.<sup>22</sup>

### 2. Justice O'Connor's Endorsement Analysis

In 1984, Justice O'Connor formulated a second approach in her concurring opinion in *Lynch v. Donnelly* that would become

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<sup>20</sup> The Court first began its discussion of the relevant law by acknowledging that the Establishment Clause was confusing in its own regard, and they could "only dimly perceive the lines of demarcation." *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

<sup>21</sup> *Id.* at 612-13.

<sup>22</sup> *Id.* While the *Lemon* test has provided some useful assistance to courts in attempting to define the boundaries of Establishment Clause jurisprudence, some Justices have expressed their disagreement with the test. See *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 397-400 (1993) (Scalia, J., concurring in the judgment) (arguing against the continued use of the *Lemon* test and stating that previous opinions have weakened its viability). Justice Scalia has gone so far as to call it a "ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried." *Id.* at 398. In *Allegheny*, Justice Kennedy argued he did not believe *Lemon* should be the primary test used by the Court. *County of Allegheny v. ACLU*, 492 U.S. 573, 655 (1989) (Kennedy, J., concurring and dissenting in part). Then, Justice Rehnquist argued that he saw "little use" for *Lemon*, and that it "has no basis" in our constitutional history. *Wallace v. Jaffree*, 472 U.S. 38, 112 (1985) (Rehnquist, J., dissenting). This disagreement over the *Lemon* test has caused the Court to sporadically apply it, apply only parts of it, or disregard it altogether. See *McCreary County v. ACLU*, 545 U.S. 844, 850 (2005) (centering on the purpose prong of *Lemon*); *Van Orden v. Perry*, 545 U.S. 677, 686 (2005) (disregarding *Lemon*) ("Whatever may be the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence, we think it not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds."); *Jaffree*, 472 U.S. at 55-60 (applying *Lemon*). Nonetheless, the *Lemon* test, or at least some of its elements, has continued to influence the Court's analysis in various contexts of the religion clauses jurisprudence. See *Zelman v. Simmons-Harris*, 536 U.S. 639, 668-69 (2002) (O'Connor, J., concurring) (explaining the *Lemon* test is central to the analysis in cases where government provides some sort of aid to religious schools); *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 335-37, 339 (1987) (applying the *Lemon* test when the government provides religion with a form of accommodation such as an exemption).

known as the endorsement test.<sup>23</sup> Advocating for what she believed was a clarification of the current Establishment Clause doctrine, she argued a violation could occur when the government has endorsed a religion.<sup>24</sup> When examining a religious display under the endorsement test, a court asks if the government has either subjectively intended to endorse or send a message of approval or disapproval of religion, or if a government display has objectively conveyed such a message to observers.<sup>25</sup>

In *County of Allegheny v. ACLU*, the Court adopted Justice O'Connor's standard, finding it offered "a sound analytical framework" for analyzing certain Establishment Clause violations.<sup>26</sup> Through the endorsement test, the Court examines the governmental practice or religious symbols in question through the lens of a reasonable observer to determine if such an observer would believe a message of government endorsement is being conveyed.<sup>27</sup> The reasonable observer is deemed to know and understand the history and context of the practice and symbols in question, as this background knowledge helps shape the way that the observer would hypothetically look at the issue.<sup>28</sup> It is this collective knowledge that makes the reasonable observer "a

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<sup>23</sup> 465 U.S. 668, 692 (1984) (O'Connor, J., concurring). The majority opinion in *Lynch* analyzed the case under the *Lemon* prongs and found that a display of a crèche posed no violation. *Id.* at 685 (majority opinion).

<sup>24</sup> *Id.* at 687, 690 (O'Connor, J., concurring). Endorsement, according to Justice O'Connor, conveys "a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Id.* at 688.

<sup>25</sup> *Id.* at 690 ("[W]e must examine both what Pawtucket intended to communicate in displaying the crèche and what message the city's display actually conveyed.").

<sup>26</sup> *Allegheny*, 492 U.S. at 595 (citing *Lynch*, 465 U.S. at 688, 690, 692).

<sup>27</sup> *See, e.g., Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) (stating that the question is "whether an objective observer . . . would perceive it as a state endorsement" (quoting *Jaffree*, 472 U.S. at 76 (O'Connor, J., concurring))); *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 777 (1995) (O'Connor, J., concurring in the judgment); *Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095, 1119 (10th Cir. 2010) (quoting *Weinbaum v. City of Las Cruces, N.M.*, 541 F.3d 1017, 1031 (10th Cir. 2008)); Nathan P. Heller, Note, *Context Is King: A Perception-Based Test for Evaluating Government Displays of the Ten Commandments*, 51 VILL. L. REV. 379, 391-93 (2006).

<sup>28</sup> *Allegheny*, 492 U.S. at 630-31 (O'Connor, J., concurring in part).

personification of a community ideal of reasonable behavior, determined by the [collective] social judgment.”<sup>29</sup>

### 3. Justice Kennedy's Coercion Analysis

While *Allegheny* saw an adoption of the endorsement test by a majority of the Court, it also provided the then newest Supreme Court Justice an opportunity to express his own views on the Establishment Clause. In his opinion, Justice Kennedy argued that the clause prohibited government from “coerc[ing] anyone to support or participate in any religion or its exercise.”<sup>30</sup> Three years later in *Lee v. Weisman*,<sup>31</sup> he secured a majority of the Court to forbid prayers from being given at a high school commencement ceremony.<sup>32</sup> In *Lee*, the Court focused on the specific direction that the school gave to its students that they partake in a religious exercise that the Court deemed to be obligatory.<sup>33</sup>

The Court also explained that a slightly different approach for the coercion test is necessary when children and public schools are involved.<sup>34</sup> It acknowledged certain “heightened concerns,” due to the nature of the prayer’s setting, and the way in which it was given, gave need for this different approach:

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<sup>29</sup> *Pinette*, 515 U.S. at 779-80 (O'Connor, J., concurring in part) (alteration in original) (quoting W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 175 (5th ed. 1984)). Justice Stevens argued for a slightly different standard that would not impute as much knowledge to rise to the level of a “community ideal” and believed we should look through the eyes of a reasonable nonadherent. *See id.* at 799-800 n.5 (Stevens, J., dissenting). In any instance a child’s perceptions have been found to be an “insufficient basis” under the endorsement analysis. *See infra* note 38 and accompanying text.

<sup>30</sup> *Allegheny*, 492 U.S. at 659 (Kennedy, J., concurring and dissenting in part). In doing so, Justice Kennedy expressed his disagreements not only with *Lemon*, but also with Justice O'Connor’s endorsement analysis and employment of a reasonable observer standard. *Id.* at 655, 668-69 (arguing the endorsement analysis is flawed and unworkable); *see also* *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1821 (2014) (describing the dissenting Justices’ argument in *Allegheny*).

<sup>31</sup> 505 U.S. 577 (1992). The Court in *Lee* addressed the question of whether a school that brought in clergy to offer religious prayers at a graduation ceremony was in violation of the Establishment Clause. *Id.* at 580.

<sup>32</sup> *Id.* at 587.

<sup>33</sup> *Id.* at 586 (explaining the direction and performance of a formal religious exercise was a dominant fact in the case).

<sup>34</sup> *Id.* at 592-93 (“Our decisions . . . recognize . . . that prayer exercises in public schools carry a particular risk of indirect coercion. The concern may not be limited to the context of schools, but it is most pronounced there.”) (citations omitted).

The undeniable fact is that the school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students . . . . This pressure, though subtle and indirect, can be as real as any overt compulsion. . . . [F]or the dissenter of high school age, who has a reasonable perception that she is being forced by the State to pray in a manner her conscience will not allow, the injury is no less real.<sup>35</sup>

Recognizing that the pressure to conform could be felt by children psychologically, the Court then explained that as the prayers had become an integral part of the ceremony, students were thereby forced to sit through a ceremony that would compel them to conform.<sup>36</sup>

While the narrow concept of government *directly* coercing someone to conform to a religious practice is fairly easy to understand,<sup>37</sup> *indirect* coercion is a broad expansion on the historical understanding of the word. This split in the coercion analysis is slightly different from the endorsement test, where children are not allowed to be "reasonable observers."<sup>38</sup> The Court also has explained that a student vote may not alleviate the concerns of coercion of a student population, as voting "does nothing to protect minority views but rather places the students

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<sup>35</sup> *Id.* The basis for this reasoning was that even though an adult would be able to comprehend that they were not being required to partake in the prayer, a student might feel they have to conform because others around them are participating or because the authority figure of the school is allowing the prayer to go through. *See id.* at 593; *see also* Marianna Moss, *How Are Reasonable Children Coerced? The Difficulty of Applying the Establishment Clause to Minors*, 10 U.C. DAVIS J. JUV. L. & POL'Y 379, 407-409 (2006) (discussing the differences in the Establishment Clause tests when applied to minors).

<sup>36</sup> *Lee*, 505 U.S. at 593. The Court rejected an argument that graduations were "voluntary" because they were not required. *Id.* at 595. It explained that if a student were to skip their graduation they would be forfeiting the intangible benefits that had driven them to succeed in school in the first place. *Id.*

<sup>37</sup> *See* Timothy C. Caress, Note, *Is Justice Kennedy the Supreme Court's Lone Advocate for the Coercion Element in Establishment Clause Jurisprudence? An Analysis of Lee v. Weisman*, 27 IND. L. REV. 475, 483 (1993) ("Direct' coercion may be defined as government action that forbids or compels a certain behavior . . .").

<sup>38</sup> *Rusk v. Crestview Local Sch. Dist.*, 379 F.3d 418, 420-22 (6th Cir. 2004) (explaining that prior Supreme Court precedent shows students may not be "reasonable observers" under endorsement analysis, specifically because they are susceptible to psychological forces).

who hold such views at the mercy of the majority.”<sup>39</sup> Regardless of the viewpoint a court uses to analyze coercion, in order for a violation to be found the court must also determine if the exercise in question is one that is “formal[ly] religious.”<sup>40</sup>

*B. Doe ex rel. Doe v. Elmbrook School District*

In 2000, the Elmbrook School District in Brookfield, Wisconsin began holding its graduation ceremonies at Elmbrook Church.<sup>41</sup> The push for the move came from the then senior class who voiced multiple complaints in regards to the previous graduation site, the high school’s gymnasium.<sup>42</sup> The students proposed the move to the school administration, which later approved the idea.<sup>43</sup> During the administration’s consideration of the move, the students also took a vote on using the church and overwhelmingly voted in approval of the move.<sup>44</sup> This process continued each year, with ballots containing other secular venues as alternative options, until 2006 when the school administration

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<sup>39</sup> *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 304 (2000). The Court explained that because the school sponsored and facilitated the students to vote on having a prayer, the religious message was attributable to the school. *Id.* at 305-06, 308-10; *but cf. Adler v. Duval Cnty. Sch. Bd.*, 250 F.3d 1330, 1337-38 (11th Cir. 2001) (finding religious speech is not attributable to the school when a student gives a religious speech, and the students only voted on whether a speech could be given without specifying what the content would be).

<sup>40</sup> *See Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 31 (2004) (Rehnquist, C.J., concurring in the judgment) (finding the recitation of “under God” in the Pledge of Allegiance is not a “religious exercise”); *Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1038-39 (9th Cir. 2010) (also finding the Pledge of Allegiance is a patriotic and not religious exercise despite the recitation of the phrase “under God” and stipulating the coercion test from *Lee* applies only to religious exercises).

<sup>41</sup> *Doe ex rel. Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 844 (7th Cir. 2012) (en banc), *cert. denied*, 134 S. Ct. 2283 (2014). Elmbrook Church was “a local Christian evangelical and non-denominational” church. *Id.* The church was large enough that Judge Posner considered it to be a “megachurch.” *Id.* at 873 (Posner, J., dissenting).

<sup>42</sup> *Id.* at 844 (majority opinion). The students said the gymnasium was “too hot, cramped and uncomfortable,” there was not ample seating and space, those who could find a seat “had to sit on hard wooden bleachers or folding chairs,” and lastly that “there was no air conditioning.” *Id.*

<sup>43</sup> *Id.* at 844-45. The student council presented the idea specifically to the district’s superintendent who was a member of church, but the Does did not allege any misuse or abuse of his office in the selection of the church. *Id.*

<sup>44</sup> *Id.* at 845.

determined a vote “would be pointless” as the previous year ninety percent of the senior class selected the church.<sup>45</sup>

Elmbrook Church, like any other, contained various religious symbols and literature located throughout the building.<sup>46</sup> As attendees would walk through the church to the ceremony location, they would pass by banners that contained religious messages and pamphlets geared toward students.<sup>47</sup> In particular, there was a large Latin cross that hung above the dais where the main part of the graduation took place.<sup>48</sup> Bibles, hymnals, and other religious materials in the pews were also not removed for the graduation ceremonies.<sup>49</sup>

However, the church also contained many secular amenities that heavily factored into the students’ call to change the venue of the ceremony.<sup>50</sup> Such amenities included: air-conditioning, “access[] [for] persons with disabilities,” “abundant free parking,” “well maintained landscaped grounds,” a large open dais at the front of the auditorium that students would proceed across during the ceremony, a podium from which school officials and students could give speeches, large video screens that showed close-ups of the students receiving their diplomas, and pews with padded seating and backs that seated around 3,000 people.<sup>51</sup> The church also only charged the school a standard rental rate of around \$2,000-2,200 per graduation ceremony.<sup>52</sup>

The plaintiffs were collectively a group of “current and former students” of the school district, as well as their parents.<sup>53</sup> While they attended different graduations throughout the school’s usage of the church, the plaintiffs were all either members of faiths other than Christianity or claimed no faith at all.<sup>54</sup> The plaintiffs

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<sup>45</sup> *Id.* at 845 nn.3-4.

<sup>46</sup> *Id.* at 845-47.

<sup>47</sup> *Id.* at 846 n.9.

<sup>48</sup> *Id.* at 846. During the first graduation at the church the cross was inadvertently covered; in subsequent graduations the church refused the district’s requests to cover the cross, as it had a policy against covering any permanent religious displays. *Id.*

<sup>49</sup> *Id.* at 846-47.

<sup>50</sup> *Id.* at 844.

<sup>51</sup> *Does v. Elmbrook Joint Common Sch. Dist. No. 21*, No. 09-C-0409, 2010 WL 2854287, at \*3 (E.D. Wis. July 19, 2010), *rev’d sub nom. Doe ex rel. Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840 (7th Cir. 2012) (en banc), *cert. denied*, 134 S. Ct. 2283 (2014).

<sup>52</sup> *Id.* at \*4.

<sup>53</sup> *Elmbrook*, 687 F.3d at 847.

<sup>54</sup> *Id.* at 848 n.13.

brought suit in 2009 alleging that the use of the church was a violation of the Establishment Clause and sought an injunction to prevent further graduations.<sup>55</sup>

The District Court held that the district's use of the church was not a violation of the Establishment Clause.<sup>56</sup> On appeal to the Seventh Circuit, the lower court's ruling was affirmed.<sup>57</sup> However, upon a rehearing en banc, the decision was reversed.<sup>58</sup>

### 1. The En Banc Majority Opinion

Judge Flaum started off the en banc majority opinion by attempting to stress the limited scope of *Elmbrook's* holding.<sup>59</sup> The majority then began its analysis of the school district's use of the church under Justice O'Connor's endorsement test, reasoning that the religious environment of the church itself would lead attendees to perceive a link between church and school.<sup>60</sup> Specifically, the majority found that during the graduation the symbols of the church<sup>61</sup> were intertwined with the symbols of the school in such a way that they believed would imply to a reasonable observer "the school district [had] placed its imprimatur on Elmbrook Church's message."<sup>62</sup> The majority

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<sup>55</sup> *Id.* at 848. The plaintiffs alleged that the graduation made them feel "uncomfortable, upset, offended, unwelcome, and/or angry because of the religious setting" and that they believed other secular venues were available at a comparable price. *Id.* (internal quotation marks omitted).

<sup>56</sup> *Does*, 2010 WL 2854287, at \*10, 13-15.

<sup>57</sup> *Doe ex rel. Doe v. Elmbrook Sch. Dist.*, 658 F.3d 710, 712 (7th Cir. 2011), *rev'd en banc*, 687 F.3d 840 (7th Cir. 2012), *cert. denied*, 134 S. Ct. 2283 (2014).

<sup>58</sup> *Elmbrook*, 687 F.3d at 843.

<sup>59</sup> *Id.* The majority attempted to say its ruling "should not be construed as a broad statement about the propriety of governmental use of church-owned facilities." *Id.* The opinion then briefly touched on prior case law, explaining their takes on the three most common Establishment Clause tests and that each case "must be judged in [its] unique circumstances." *Id.* at 849-50 (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 315 (2000)). The court noted that they viewed the endorsement test as a part of *Lemon's* effect prong. *Id.* The majority opinion also explained its analysis would not attempt to determine what purpose the school had, nor would they need to analyze it under the excessive entanglement prong of *Lemon*. *Id.* at 851 n.15 (explaining there was no argument made by the *Does* that the school district did not have a secular purpose in selecting the church as the graduation venue).

<sup>60</sup> *Id.* at 853. The court explained that there is no doubt in anyone's mind that a religious building contains a religious message. *See id.* at 852.

<sup>61</sup> *See supra* notes 46-49 and accompanying text.

<sup>62</sup> *Elmbrook*, 687 F.3d at 853.

reasoned that because the church was such a “proselytizing environment” a reasonable observer would believe that the district would only select to use the church “if the [School] District approved of the Church’s [religious] message.”<sup>63</sup> By this reasoning, the majority found the school had endorsed the church’s pervasively religious environment and, thereby, its religious message and the religion itself.<sup>64</sup>

The majority then shifted its focus towards the coercion test.<sup>65</sup> Relying on Justice Blackmun’s concurrence in *Lee*, they reasoned that when a government endorses a religion, individuals, especially students, would feel compelled to conform to that religion.<sup>66</sup> They then argued that there was a form of coercive pressure present during the graduation, even though the court found the school “did not coerce overt religious activity.”<sup>67</sup> The majority reasoned that students might feel the need to “honor the day in a similar manner” when they observed their fellow classmates engaging in religious exercises, intermingling with the church’s workers, or taking pictures with the church’s symbols.<sup>68</sup> In line with this, the court believed that the placement of the students in a “pervasively religious environment” was done in such a way that created a “captive audience” and brought about impermissible coercion.<sup>69</sup>

## 2. Judge Hamilton’s Concurring Opinion

Judge Hamilton concurred with the majority opinion, but wrote separately to address fears raised by the dissenting

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<sup>63</sup> *Id.* at 854. *But see supra* notes 50-52 and accompanying text. The court explained that their reasonable observer would understand that the religious symbols were obviously the church’s and not placed there by the school. *Elmbrook*, 687 F.3d at 853-54.

<sup>64</sup> *Elmbrook*, 687 F.3d at 853-54.

<sup>65</sup> *Id.* at 854-55.

<sup>66</sup> *Id.* at 855 (citing *Lee v. Weisman*, 505 U.S. 577, 605 n.6 (1992) (Blackman, J., concurring)).

<sup>67</sup> *Id.* (“The Supreme Court’s decisions in *Lee* and *Santa Fe* cannot be meaningfully distinguished from the case at bar on the ground that the school district did not coerce overt religious activity.”).

<sup>68</sup> *Id.* (quoting *Wallace v. Jaffree*, 472 U.S. 38, 60 n.51 (1985) (which argued “[t]he law of imitation operates” when a student observes his fellow classmates engaging in the described activities)).

<sup>69</sup> *Id.* at 855-56.

judges.<sup>70</sup> Most notably, Judge Hamilton addressed the argument put forth by the dissenters that the reasonable observer standard is flawed.<sup>71</sup> He advocated that judges should look at the specific facts of a case from the viewpoint of “reasonable nonadherents.”<sup>72</sup> Judge Hamilton believed this solution would lessen the chance that judges might inadvertently impute their own subjective beliefs into the hypothetical reasonable observer and that it would better protect religious minorities.<sup>73</sup> Judge Hamilton also addressed the concern that the majority’s holding would present new challenges to current government practices, namely voting in religious buildings, believing the individual facts of those situations sets them apart from *Elmbrook*.<sup>74</sup> He argued that voting done in churches typically occurs outside of a religious environment and that there are available alternative voting locations that are not present in graduation ceremonies.<sup>75</sup>

### 3. Judge Ripple’s Dissenting Opinion

Judge Ripple<sup>76</sup> began his dissent by explaining the majority’s assertion that its holding is applicable only to the present issue was faulty and, in reality, the majority had extended current doctrine far beyond what was envisioned.<sup>77</sup> He argued that the

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<sup>70</sup> *Id.* at 857 (Hamilton, J., concurring).

<sup>71</sup> *Id.* at 857-59.

<sup>72</sup> *Id.* at 858 (“[A]s judges, we must do our level best to overcome our individual perspectives. We can do so by deliberately trying to see the situation from others’ points of view.”).

<sup>73</sup> *Id.* Judge Hamilton argued that the dissenters were instead taking the approach to the problem that accused the Does of being “hypersensitiv[e]” and were rather applying an “obtuse’ observer” standard. *Id.* at 857.

<sup>74</sup> *Id.* at 859-60 (“In terms of history and circumstances . . . the informed reasonable observer would know that many houses of worship from many faiths, along with a wide variety of other public and private spaces, are used to make voting as convenient as possible. From this more complete perspective, there is no endorsement of a particular faith . . .”).

<sup>75</sup> *Id.* at 860 (explaining voting takes places in “common areas” of religious buildings and absentee voting would allow a voter to cast his vote from home if the only physical location around happened to be a church).

<sup>76</sup> Judge Ripple authored the panel opinion originally affirming the District Court’s holding. *Doe ex rel. Doe v. Elmbrook Sch. Dist.*, 658 F.3d 710, 712 (7th Cir. 2011), *rev’d en banc*, 687 F.3d 840 (7th Cir. 2012), *cert. denied*, 134 S. Ct. 2283 (2014).

<sup>77</sup> *Elmbrook*, 687 F.3d at 862 (Ripple, J., dissenting).

I cannot accept . . . the majority’s view that its holding today is only a fact-specific application of these general principles and that this case is nothing

majority's reliance on *Lee* and *Santa Fe* was incorrect, as those cases were crucially distinguishable, and, as a consequence, the majority had extended their rationales.<sup>78</sup> In his opinion, the majority placed too much weight on an analogy that holding a graduation in a church is like "bringing church to the schoolhouse."<sup>79</sup> Judge Ripple argued that the "rental was [nothing] other than an arm's-length business transaction between the District and the church."<sup>80</sup>

He then argued that the majority's citation to certain cases was mistaken, as there must be more than mere government proximity to religious symbols before coercion or endorsement can be found.<sup>81</sup> He explained that a reasonable observer would not conclude a school had endorsed religion, as they would understand the religious view was that of the church and not the school.<sup>82</sup> As Judge Ripple pointed out, attendees would understand the renting of a building does not rise to the level of endorsement of another's

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more than the judicial analogue of an excursion ticket "good for this day and train only." In my view, today's holding significantly alters existing principles in Establishment Clause analysis . . . .

*Id.* (quoting *Smith v. Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting)).

<sup>78</sup> *Id.* at 862-63 ("The court's decision today rests on its extension of . . . *Lee* and *Santa Fe* beyond the boundaries of their rationales. . . . The difficulty is that the record simply does not show the same *governmental* endorsement, sponsorship or coercion of any religious activity.").

<sup>79</sup> *Id.* at 863. Judge Ripple disagreed with the contention of the majority that mere presence of religious symbols at a graduation where a school is renting the building satisfies findings of both endorsement and coercion. *Id.* He believed that the detailed discussion of the symbols of the church by the majority was unnecessary, as any individual that has ever been to a church would find similar symbols, and there was no evidence that the church ever altered its symbols substantially because of the graduation. *Id.*

<sup>80</sup> *Id.* ("The space at the church was among the rental spaces available in the area. . . . that the church regularly makes . . . available to groups for other assemblies. . . . There is no indication that the church made any special concession from its usual rental policies in order to attract the [school] . . . .").

<sup>81</sup> *Id.* at 864 ("[T]he majority asks that we accept . . . students will perceive the same endorsement and . . . coercion from the incidental presence of iconography, ornamentation and literature in the building rented . . . for several hours . . . . Our Establishment Clause jurisprudence fortunately . . . . require[s] far more than proximity . . . on the ground of endorsement . . . or coercion.").

<sup>82</sup> *Id.* at 865 ("Indeed, it would be totally unreasonable for any student to attribute to the District any endorsement of the message of the iconography; it belongs to—and they know it belongs to—someone else. It symbolizes the landlord's view, not the District's view.").

views.<sup>83</sup> Judge Ripple further argued that the majority's focus on the plaintiffs' negative feelings they experienced while attending the graduation are not an appropriate basis for finding a violation.<sup>84</sup> He then expressed his belief that the majority's ruling would have negative effects on religion across the "American civil life."<sup>85</sup> Judge Ripple concluded his dissent with a message of worry over what the majority's holding might mean for other instances where government utilizes a "pervasively religious" institution.<sup>86</sup>

#### 4. Chief Judge Easterbrook's Dissenting Opinion

Chief Judge Easterbrook started his dissent by explaining his disagreement with the current state of Establishment Clause doctrine, specifically with the endorsement test.<sup>87</sup> Agreeing with Judge Ripple, he argued a reasonable observer would not believe the school district had endorsed the church's religious message

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<sup>83</sup> *Id.* ("In a building rented for a single occasion of several hours duration, the presence of religious iconography hardly raises a message of endorsement by the very temporary tenant, the District."). Judge Ripple also analogized the school's renting to other locations. *Id.* ("[I]f the District had chosen to rent a local movie theater for its graduation, no reasonable person would have thought that the advertisements for the coming attractions adorning the lobby bore any endorsement from the high school.").

<sup>84</sup> *Id.* at 865-66 ("The Establishment Clause forbids the government from endorsing a religion or a religious practice . . . . But the Establishment Clause does not, and cannot, protect an individual from personal emotional and psychological unpleasantness."). Judge Ripple explained that allowing a religious environment to play a part would create a large expansion upon the doctrine. *See id.* at 866.

<sup>85</sup> *Id.* at 866-67 ("It would seem that the probable . . . result of this new direction . . . is that institutions determined to be 'pervasively religious' will be excluded from . . . the civil polity. . . . Only a religious entity that strips itself down to a vanilla version of its real self is to be acceptable. . . .").

<sup>86</sup> *Id.* at 866-68 ("Under the approach it announces today, judges apparently are to determine whether a religious institution is too 'pervasively religious' to make any participation, including a mere contractual arrangement, between the institution and the civil community unconstitutionally coercive."). To him, this was a dangerous expansion upon the Establishment Clause doctrine. *Id.* at 866 ("In accepting this argument, the court removes the governing case law from its doctrinal moorings and creates a new and, in my view, dangerous principle in Establishment Clause jurisprudence."). Judge Ripple also expressed concern over what this may mean in the area of education and a teacher's individual ability to freely express their own personal and private religious beliefs. *Id.* at 867.

<sup>87</sup> *Id.* at 869 (Easterbrook, C.J., dissenting) ("If the current establishment-clause doctrine had been announced by Congress or an administrative agency, the Supreme Court would declare it unconstitutionally vague. . . . Standards such as . . . the 'no endorsement' rule . . . are hopelessly open-ended . . .") (citations omitted).

simply by renting it.<sup>88</sup> Chief Judge Easterbrook further explained that the mere presence of religious symbols should not tip the scales towards endorsement, as government is entitled to be neutral with respect to religion.<sup>89</sup> He also argued that in contrast to *Lee* and *Santa Fe*, there was no formal prayer involved in the graduation and so there was no risk of coercion to conform to the religion.<sup>90</sup> Chief Judge Easterbrook concluded with an analogy to the use of religious buildings as polling places and explained that all of the arguments made by the majority could just as equally apply to using a church as a polling location.<sup>91</sup>

### 5. Judge Posner's Dissenting Opinion

Judge Posner also began his dissent with a discussion of his belief that courts are unguided when applying the Establishment Clause.<sup>92</sup> He acknowledged that in an area of the law that is undoubtedly guided by an individual's own personal emotions and beliefs it is not uncommon that judges will be easily swayed by their own inner beliefs.<sup>93</sup> Judge Posner then distinguished the cases relied upon by the majority and argued that *Elmbrook*

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<sup>88</sup> *Id.* at 870 (“The record does not show . . . the District rented space from Elmbrook Church because of its status as a church . . . . The only message a reasonable observer would perceive is that comfortable space is preferable to cramped, overheated space.”) (citation omitted).

<sup>89</sup> *Id.* (“Elmbrook Church is full of religious symbols—but any space is full of symbols. . . . Neutrality requires the state to treat religious beliefs and symbols the same as secular beliefs and symbols, not to disfavor religion.”) (citation omitted).

<sup>90</sup> *Id.* at 870-71 (citing *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Lee v. Weisman*, 505 U.S. 577 (1992)) (“[N]o prayer or other worship occurred during the School District’s graduations; no signs of assent were elicited, so no one was at risk of ostracism for withholding them.”). Chief Judge Easterbrook also questioned the majority’s logic that endorsement is also somehow coercive. *Id.* at 871.

<sup>91</sup> *Id.* at 871-72. Chief Judge Easterbrook explained that “all churches are ‘pervasively religious.’” *Id.* at 871.

<sup>92</sup> *Id.* at 872 (Posner, J., dissenting) (“The case law that the Supreme Court has heaped on the defenseless text of the establishment clause is widely acknowledged, even by some Supreme Court Justices, to be formless, unanchored, subjective and provide no guidance.”).

<sup>93</sup> *Id.* at 873 (“A judge’s political orientation is a particularly important clue to his or her likely vote in a case arising under the religion clauses of the First Amendment . . . .”). Judge Posner then advocated for judges to view all religions as equal and useful, so that we do not begin judging one as more religious than another, but rather we should view them on equal footing. *See id.*

should not be decided alongside them.<sup>94</sup> He next pointed out that there is a crucial difference between the government's placement of religious symbols inside a school and the mere presence of symbols in a church that a government uses; as well as between a one-day rental versus everyday use of a church.<sup>95</sup>

Judge Posner argued that in situations where the government utilizes a religious building, courts should treat the church like other private property owners, who are free "to rent space to government enterprises," rather than narrowing in on the fact that it is a religious organization.<sup>96</sup> He next called into question the majority's assertion that the church's environment was coercive, as he found no evidence that anyone had converted to the religion because they had attended one of the graduations in the church.<sup>97</sup> Judge Posner concluded his opinion by expressing his concerns over what the majority's decision could mean for other government programs that involve the use of religious buildings.<sup>98</sup> He also expressed a worry that the nation may take a sour view of the majority's opinion and view it as judicial contempt of religion.<sup>99</sup>

## 6. Justice Scalia's Dissent from the Denial of Certiorari

After being held over for review from the October 2013 calendar to the October 2014 calendar,<sup>100</sup> the Supreme Court

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<sup>94</sup> *Id.* at 874 (citing *Santa Fe*, 530 U.S. at 305, 308; *Lee*, 505 U.S. at 588) ("[T]here is no evidence that school officials endorsed or encouraged this or any other religious activity during the graduation. This distinguishes the two cases on which the plaintiffs mainly rely, both of which involved school-sanctioned prayer at public school events.").

<sup>95</sup> *Id.* ("Religious decor would be inappropriate in a public school classroom—it would signal an 'actual endorsement of religion.' But the auditorium of Elmbrook Church is no more a classroom than the National Cathedral in Washington is when public school students are taken on a tour of it." (quoting *Santa Fe*, 530 U.S. at 305)).

<sup>96</sup> *Id.* at 875. Judge Posner then describes how churches can be useful to their communities by providing communities with a rental venue large enough to host events, meetings, and even government activities like polling. *Id.*

<sup>97</sup> *Id.* at 875-76 ("There is no suggestion that holding a high-school graduation at the Elmbrook Church has ever triggered a conversion.").

<sup>98</sup> *Id.* at 877 ("The likely effects of today's decision will be . . . to initiate what federal law does not need: a jurisprudence of permissible versus impermissible rentals of church space to public schools and other public entities.").

<sup>99</sup> *Id.* ("The likely effects of today's decision will be, first, to confirm the view of many religious Americans that the courts are hostile to religion . . .").

<sup>100</sup> *Docket*, SUP. CT. U.S., <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/12-755.htm> (last visited Oct. 2, 2014).

finally acted on *Elmbrook* and issued a denial of certiorari in June of 2014.<sup>101</sup> Justices Scalia and Thomas, however, dissented from the Court's denial and voted to either grant the petition and hear the case, or, at the very least, vacate and remand the case to the Seventh Circuit to be reheard in light of *Town of Greece v. Galloway*.<sup>102</sup>

Justice Scalia first argued that *Town of Greece* had "abandoned the antiquated 'endorsement test'" and accordingly the rationale used by the Seventh Circuit was incorrect.<sup>103</sup> Justice Scalia explained that the endorsement test is an "infinitely malleable standard" that is an outdated and inappropriate analysis to use in Establishment Clause jurisprudence.<sup>104</sup> Justice Scalia secondly argued that *Town of Greece* made it clear that under the coercion test there must be an instruction or pressure to engage in a formal religious exercise for coercion to be present.<sup>105</sup> According to him, "it [was] beyond dispute that no religious exercise whatever occurred."<sup>106</sup>

### C. Use of Religious Buildings for School Purposes

There have been a few cases that have dealt specifically with a school's use of a religious building. In *Bauchman v. West High School*, the Tenth Circuit held that there was no Establishment Clause violation when a school choir performed Christian songs at religious venues.<sup>107</sup> There, the plaintiffs alleged that the selection of sites "dominated by crucifixes and other religious symbols"

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<sup>101</sup> *Elmbrook Sch. Dist. v. Doe ex rel. Doe*, 134 S. Ct. 2283, 2283 (2014).

<sup>102</sup> *Id.* at 2284 (Scalia, J., dissenting from denial of certiorari).

<sup>103</sup> *Id.* ("After *Town of Greece*, the Seventh Circuit's declaration . . . that the endorsement test remains part of 'the prevailing analytical tool' for assessing Establishment Clause challenges misstates the law.") (citation omitted).

<sup>104</sup> *Id.* (citing *County of Allegheny v. ACLU*, 492 U.S. 573, 592-94 (1989); *id.* at 670-71 (Kennedy, J., concurring and dissenting in part)).

<sup>105</sup> *Id.* at 2284-85. Justice Scalia explained that the personal offense an individual may feel when in proximity to religion does not give rise to a constitutional violation. *Id.* ("[A]n Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views." (quoting *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1826 (2014))).

<sup>106</sup> *Id.* at 2285 ("At most, respondents complain that they took offense at being in a religious place. Were there any question before, *Town of Greece* made obvious that this is insufficient to state an Establishment Clause violation.") (citation omitted).

<sup>107</sup> *Bauchman v. West High Sch.*, 132 F.3d 542, 552 n.8, 554-56 (10th Cir. 1997).

violated their rights under the Establishment Clause.<sup>108</sup> The court, however, found that the school acted with a permissible purpose in selecting the location,<sup>109</sup> and the selection of a religious location did not have the principal effect of endorsing religion.<sup>110</sup> In addition, the court noted that, by itself, the selection of a religious venue for the singing of religious songs did not rise to the level of prayer restricted under *Lee*, and, as such, the coercion analysis was inapplicable to the case.<sup>111</sup>

Additionally, two state supreme courts have previously found that no violation occurs when a school utilizes a religious building for graduation purposes.<sup>112</sup> In *Miller v. Cooper*, the Supreme Court of New Mexico found that there were sufficient justifications for refusing to enjoin a school from utilizing a church for its graduation.<sup>113</sup> And in *State ex rel. Conway v. District Board of Joint School District No. 6*, the Wisconsin Supreme Court also found that there was no violation when a church was used to host graduation exercises.<sup>114</sup>

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<sup>108</sup> *Id.* at 546.

<sup>109</sup> *Id.* at 554-55. The court explained that there were multiple secular reasons why a school would select a church for performances, such as the acoustic superiority to high school gyms or cafeterias, “adequate seating capacity,” and an environment that could better “showcase [the] choir” and “serious choral music.” *Id.* at 554. The court noted that the selection of a religious environment alone is not enough to support the finding of impermissible purpose. *Id.* at 554-55.

<sup>110</sup> *Id.* at 555-56. The court first explained that simply because there may be an incidental benefit towards the religion does not automatically invalidate the selection. *Id.* at 555. It then explained that a reasonable observer would not “perceive” an endorsement based upon the history and context “of public education in Salt Lake City.” *Id.* at 555-56.

<sup>111</sup> *Id.* at 552 n.8 (“[W]e do not believe the singing of religious songs alone constitutes prayer. Nor do we consider the singing of religious songs in religious venues to constitute prayer without additional facts showing that such activity took place in a worshipful context.”).

<sup>112</sup> *Miller v. Cooper*, 244 P.2d 520, 521 (N.M. 1952); *State ex rel. Conway v. Dist. Bd. of Joint Sch. Dist. No. 6*, 156 N.W. 477, 480 (Wis. 1916).

<sup>113</sup> *Miller*, 244 P.2d at 520-21 (explaining that it was the only building in the area that could comfortably accommodate the ceremony and that the mere usage of the building would not automatically transform the occasion into a religious one).

<sup>114</sup> *Conway*, 156 N.W. at 480 (“The holding of graduation exercises in a church is not in itself the giving of sectarian instruction . . . . To say that a person attending such place once a year is compelled to attend a place of worship would be giving prominence to form rather than to substance.”).

## II. PROBLEMS WITH *ELMBROOK*'S ESTABLISHMENT CLAUSE ANALYSIS AND WHAT IT MEANS MOVING FORWARD

### A. *Elmbrook's Application of an Unreasonable "Reasonable Observer" and Transferred Endorsement in Religious Environments*

The vast majority of Establishment Clause jurisprudence has typically pertained to religious speech, expression, or symbolism on government property. *Elmbrook*, however, flipped that setting and addressed the implications of what occurs when the government goes to a religious property or setting. The Seventh Circuit's holding effectively lays the groundwork for courts to find government use of virtually any religiously affiliated building or property an impermissible endorsement of religion.<sup>115</sup> The majority did so by abandoning the principle of government neutrality with religion and instead turning on an unreasonable assumption that a reasonable observer would only conclude that the school was sending a message of approval by utilizing a church embellished with a variety of types of religious paraphernalia.<sup>116</sup>

Members of the Supreme Court and legal scholars alike have time and time again asserted their disagreement with the reasonable observer standard of the endorsement test.<sup>117</sup> Courts

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<sup>115</sup> *Doe ex rel. Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 867-68 (7th Cir. 2012) (en banc) (Ripple, J., dissenting), *cert. denied*, 134 S. Ct. 2283 (2014). Judge Ripple outlines the potential consequences he foresees in following the majority's line of reasoning, specifically noting the issue of voting in a church. *Id.* Chief Judge Easterbrook also expressed this concern. *See supra* note 91 and accompanying text.

<sup>116</sup> *Id.* at 853-54 (majority opinion).

<sup>117</sup> *See Utah Highway Patrol Ass'n v. Am. Atheists, Inc.*, 132 S. Ct. 12, 19-20, 19 n.7 (2011) (Thomas, J., dissenting from denial of certiorari). Justice Thomas explains his displeasure not only with the various and unpredictable ways that lower courts will apply the "reasonable observer" standard, but also with the very idea that a mistaken belief of endorsement is allowed to find a violation. *Id.* ("[This] is perhaps the best evidence that our Establishment Clause jurisprudence has gone hopelessly awry."); *Salazar v. Buono*, 559 U.S. 700, 720-21 (2010) (plurality opinion) (questioning whether the reasonable observer standard still remains appropriate framework for Establishment Clause issues); *County of Allegheny v. ACLU*, 492 U.S. 573, 668-69 (1989) (Kennedy, J., concurring and dissenting in part); *see also* Sumahn Das, *Salazar v. Buono: A Missed Opportunity to Clarify the Reasonable Observer Test*, 11 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 125, 142-46 (2011) (arguing "The Court's Reasonable Observer Test is an Inappropriate Mechanism to Decide Establishment Clause Cases"); Susan Hanley Kosse, *A Missed Opportunity to Abandon the Reasonable Observer Framework in Sacred Text Cases: McCreary County v. ACLU of Kentucky*

are continually unsure as to what standard they should hold the hypothetical reasonable observer to.<sup>118</sup> And even if a so-called standard could be formulated, there still remains an overlying concern that judges may inadvertently impute their own subjective beliefs into the hypothetical reasonable observer.<sup>119</sup> Recent studies demonstrate the basis of this concern by showing decisions in Establishment Clause cases can be predictably decided based on the deciding judge's political beliefs.<sup>120</sup>

In *Capitol Square Review and Advisory Board v. Pinette*, a portion of the Court characterized their disagreement with the reasonable observer test by explaining it focused upon "transferred endorsement."<sup>121</sup> In *Pinette*, the Court was faced with a request from the Ku Klux Klan that they be allowed to place a cross in the public square next to the Ohio statehouse.<sup>122</sup> While the Court found that there would be no Establishment Clause violation if a religious symbol was placed next to the statehouse, the majority split on the analysis of finding no violation.<sup>123</sup> The

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*and Van Orden v. Perry*, 4 FIRST AMENDMENT L. REV. 139, 141-42 (2006) (calling the reasonable observer standard "flawed" and "recommend[ing its] elimination").

<sup>118</sup> See *Utah Highway Patrol Ass'n*, 132 S. Ct. at 19-20 ("Whether a given court's hypothetical observer will be 'any beholder . . . or the average beholder, or . . . the 'ultra-reasonable' beholder' is entirely unpredictable.") (quoting *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 768 n.3 (1995)).

<sup>119</sup> See Eric B. Ashcroft, Note, *American Atheists, Inc. v. Davenport: Endorsing a Presumption of Unconstitutionality Against Potentially Religious Symbols*, 2012 BYU L. REV. 371, 374-75 (calling the reasonable observer analysis "maligned" by the "subjective analysis by judges" into determining what is "reasonable," fostering unpredictability); Christal L. Hoo, Comment, *Thou Shalt not Publicly Display the Ten Commandments: A Call for a Reevaluation of Current Establishment Clause Jurisprudence*, 109 PENN ST. L. REV. 683, 692-93 (2004) (explaining it is "impossible" to have a truly objective observer because some aspects of perception will be "imput[ed]" (quoting E. Gregory Wallace, *When Government Speaks Religiously*, 21 FLA. ST. U. L. REV. 1183, 1220 (1994))).

<sup>120</sup> See Gregory C. Sisk & Michael Heise, *Ideology "All the Way Down"? An Empirical Study of Establishment Clause Decisions in the Federal Courts*, 110 MICH. L. REV. 1201, 1204-05 (2012). Professors Sisk and Heise explain that, according to their studies, Establishment Clause claimants have a 2.25-times greater chance of succeeding in a case "before a judge appointed by a Democratic president than one appointed by a Republican president." *Id.* at 1205.

<sup>121</sup> *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 768 (1995).

<sup>122</sup> *Id.* at 757-58.

<sup>123</sup> *Id.* at 770 (plurality opinion); *id.* at 771 (Thomas, J., concurring) (arguing the Klan's purpose may have involved a religious symbol but was more properly viewed as a political one); *id.* at 783 (O'Connor, J., concurring in part) (applying the endorsement

plurality opinion rejected a transferred endorsement test, alleging it would effectively negate the difference between private religious speech protected by the Free Exercise Clause and government religious speech restricted by the Establishment Clause.<sup>124</sup> It also explained it was best not to start down a path that would cause implications to settled law dealing with government programs and policies that incidentally benefit religion.<sup>125</sup> Justice Scalia explained that the principle of transferred endorsement was broader than the issue in *Pinette*, even analogizing it to school districts that would have to determine when they might be falsely adjudged of adopting a religious viewpoint.<sup>126</sup>

The Seventh Circuit's opinion in *Elmbrook* fully embodies this theory of transferred endorsement. It argues that even if the government were truly acting neutrally with respect to the religion, a reasonable observer would naturally presume government endorsement of speech simply because it is assumed the government or its entity approves of the religious symbols.<sup>127</sup> Even against a history and context that reveals secular government motives, a hypothetical reasonable observer still could transfer private religious expression from religious symbols onto the government and presume the government must approve of the

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test but finding that any misperceptions could be cured through the use of a disclaimer); *id.* at 794 (Souter, J., concurring in part) (believing the alternative to place a disclaimer would prevent the government from appearing to take a position on religious beliefs). Justice Scalia issued the plurality opinion of the Court that was joined by Chief Justice Rehnquist and Justices Kennedy and Thomas. *Id.* at 757 (plurality opinion).

<sup>124</sup> *Id.* at 764-68 (plurality opinion). Justice Scalia did note, however, that if the government was to do something that would aggravate the mistake, then there might be potential for a violation; however, he did not explain exactly what this would look like beyond "governmental *favoritism*." *Id.* at 766.

<sup>125</sup> *Id.* at 768 (citing *Witters v. Washington Dept. of Servs. for the Blind*, 474 U.S. 481 (1986); *Mueller v. Allen*, 463 U.S. 388 (1983)). Justice Scalia explained his disapproval for the idea that even such reasonable confusion should be enough to find a neutral government program invalid. *Id.* ("It has radical implications for our public policy to suggest that neutral laws are invalid whenever hypothetical observers may—even reasonably—confuse an incidental benefit to religion with state endorsement.") (emphasis omitted).

<sup>126</sup> *Id.* at 767-68 ("Petitioners' rule would require school districts . . . to guess whether some undetermined critical mass of the community might nonetheless perceive the district to be advocating a religious viewpoint.")

<sup>127</sup> See *Doe ex rel. Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 853-54 (7th Cir. 2012) (en banc), *cert. denied*, 134 S. Ct. 2283 (2014).

religious message when it utilizes a religiously affiliated building. This rationale furthers the presumption of unconstitutionality that the reasonable observer test carries.<sup>128</sup>

In order to facilitate their holding, the *Elmbrook* majority turned its focus almost exclusively on the religious displays.<sup>129</sup> This narrowed focus on the symbols not only goes against Supreme Court precedent,<sup>130</sup> but also embodies what Judge Posner argues as perceived hostility toward religion.<sup>131</sup> Under this improper analysis, governments would be forced to weigh whether a religious building contains too much religious speech or symbolism if they wish to utilize the religious building for secular programs.<sup>132</sup> But the catch, as Chief Judge Easterbrook points out, is that all religious buildings contain religious symbols and so all could very easily be deemed to be too “pervasively religious.”<sup>133</sup> Picking up right where the Seventh Circuit left off, it would be all too easy for another court to find that a reasonable observer would believe that an election commission would not have authorized the use of a religious building as a polling place unless it had approved of the religious message the symbols conveyed to voters.<sup>134</sup> As noted before, this contrasts with prior case law

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<sup>128</sup> See *Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095, 1103 (10th Cir. 2010) (Kelly, J., dissenting from a denial of rehearing en banc) (explaining that simply focusing on the fact that there is a religious symbol associated with a government activity tells a court nothing by itself and evinces hostility toward religion when courts presume endorsement from the presence of religion).

<sup>129</sup> *Elmbrook*, 687 F.3d at 853-54.

<sup>130</sup> *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984) (“Focus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause.”).

<sup>131</sup> *Elmbrook*, 687 F.3d at 877 (Posner, J., dissenting). Judge Posner explains his belief that such hostility toward religion from the courts is likely to be felt by the American people. See *supra* note 99 and accompanying text.

<sup>132</sup> See *Elmbrook*, 687 F.3d at 877. Judge Posner also asserts that such reasoning poses a new jurisprudence under the law, where courts must decide if rentals of a church are in violation. *Id.*; see *supra* note 98 and accompanying text. This concern is echoed by Judge Ripple, that putting the determination of a church’s environment to the courts will allow them to create “safe religion[s]” that are “vanilla version[s]” of our current religions. See *Elmbrook*, 687 F.3d at 866-68 (Ripple, J., dissenting).

<sup>133</sup> See *Elmbrook*, 687 F.3d at 871 (Easterbrook, C.J., dissenting).

<sup>134</sup> Although the majority of the Seventh Circuit attempted to limit its holding to the specific facts of *Elmbrook*, 687 F.3d at 843, there is nothing to stop another court from picking up where they left off. Many aspects of voting in a church are similar to the graduation in the church. Voters may have to wait in long lines, potentially for hours, and would be exposed to and remain in the presence of religious banners, signs,

regarding such use of religious buildings.<sup>135</sup>

*B. The Improper Application and Extension of the Coercion Test in Elmbrook*

The court in *Elmbrook* also improperly applied the coercion test by overexerting the test's doctrine. Rather than focusing on the question of whether the school *instructed* or *directed* a religious exercise, the Seventh Circuit wrongly applied the coercion test to the presence of a religious environment.<sup>136</sup> In doing so, the court expanded the holdings of *Lee* and *Santa Fe* to effectively include *private* religious exercise.<sup>137</sup> This application strips away the key element of the coercion analysis of a "forced choice" put to an individual to conform.<sup>138</sup> Turning the focus of the coercion test on an individual's presence in or proximity to a religious environment and their feelings towards it is a misapplication of the law. This method presents additional worries for schools if a student engages in a personal religious exercise when the school takes them to a pervasively religious environment, or if the school employs teachers who wear religious symbols.<sup>139</sup>

Arguably, one could say the Supreme Court began to move towards an expanded use of the coercion test by looking at Justice Steven's opinion from *Santa Fe*.<sup>140</sup> But legal scholars have professed that this use of both tests together has quite possibly confused courts even further when dealing with Establishment

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symbols, pamphlets, and possibly employees of the church. *But see supra* notes 74-75 and accompanying text.

<sup>135</sup> See *Otero v. State Election Bd. of Okla.*, 975 F.2d 738, 741 (10th Cir. 1992).

<sup>136</sup> *Elmbrook*, 687 F.3d at 855; *see also supra* notes 105-06 and accompanying text.

<sup>137</sup> *Elmbrook*, 687 F.3d at 855.

<sup>138</sup> Ward, *supra* note 11, at 1639-41, 1646-49. Professor Ward explains that to be coerced there must be a choice put forth to the individual to coerce them to partake in specific activity or to act a certain way. *Id.* at 1647 ("[T]he first element, a forced choice . . . defines the entirety of the test."). Without this presented choice to either participate or not participate in a religious exercise there is no threat or fear of sanctions. *Id.* at 1646-47.

<sup>139</sup> *Elmbrook*, 687 F.3d at 866-68 (Ripple, J., dissenting) ("Will the schoolteacher be permitted to wear her necklace adorned with the Star of David . . . [or] ashes in the form of a cross on his forehead at the beginning of Lent? Will the Muslim teacher be allowed to cover her head with a scarf in the classroom?").

<sup>140</sup> *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 305, 307-08, 310 (2000) (analyzing the case under both the coercion and the endorsement tests).

Clause violations.<sup>141</sup> Furthermore, the Court clarified in *Town of Greece* that the coercion test is used to determine if a government direction or instruction to participate in religion constitutes an offense and not how an individual would perceive a religious practice or religion in their presence.<sup>142</sup> Given the current state of Establishment Clause jurisprudence, removing such a central element from the coercion test may only further hinder the courts.

While the court in *Elmbrook* found that the school did not coerce or instruct anyone to participate in a religious exercise, the court believed students would feel the compulsion to imitate their fellow classmates if they observed them freely participating in religious exercises.<sup>143</sup> In reality, the only “choice” presented to the students by the school was whether or not to attend a secular graduation ceremony.<sup>144</sup> This line of reasoning used by the Seventh Circuit presents a slippery slope to finding coercive activity when a school instructs its students to attend a field trip<sup>145</sup> to various missions, churches, or other religious buildings, that are “pervasively Christian, proselytizing environment[s]” and where a student observes classmates partaking in private religious exercises and decides to join them.<sup>146</sup> In these situations, although the school would have posed no instruction or choice to

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<sup>141</sup> See Sara R. Grossman, Comment, *The Football Game Prayer Decision: How the Supreme Court Dropped the Ball in Santa Fe*, 38 HOUS. L. REV. 615, 642-43 (2001) (arguing that by using both tests together the Court does not provide clarity for lower courts); Ross Schmierer, Comment, *An Attempt to Pick up the Fallen Bricks of the Wall Separating Church and State After Santa Fe v. Doe*, 67 BROOK. L. REV. 1291, 1305-06 (2002) (arguing that by “utiliz[ing] different principles . . . to analyze [a] specific Establishment Clause area,” the Court does not “provide . . . coherent” and clear guidance to lower courts).

<sup>142</sup> *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1825-26 (2014).

<sup>143</sup> See *supra* notes 67-68 and accompanying text.

<sup>144</sup> *Lee v. Weisman*, 505 U.S. 577, 595 (1992). The Supreme Court has, however, explained that a high school graduation is in essence “involuntary” for the student, but this is still simply an instruction to attend a graduation and not an instruction to partake in a religious exercise. *Id.* (“Attendance may not be required by official decree, yet it is apparent that a student is not free to absent herself from the graduation exercise in any real sense of the term ‘voluntary’ . . .”).

<sup>145</sup> While one could argue that a field trip is voluntary, it may not be if the lessons learned on the trip are something the student could receive or fully comprehend only if the student actually attended the event. In this sense, like a graduation, it may not be officially required but still involuntary in a sense.

<sup>146</sup> *Doe ex rel. Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 855 (7th Cir. 2012) (en banc), *cert. denied*, 134 S. Ct. 2283 (2014).

participate in a religious exercise, they would have nonetheless been deemed to have placed the students in a religious environment and allowed the “law of imitation” to run its course as the school did in *Elmbrook*.<sup>147</sup>

### III. COURTS SHOULD NOT FOLLOW THE SEVENTH CIRCUIT’S PROGRESSION AWAY FROM THE PRINCIPLE OF NEUTRALITY

#### A. *The Principle of Neutrality Should Guide Courts’ Analyses*

At the core of the Establishment Clause is the principle that a government must remain neutral in matters pertaining to religion.<sup>148</sup> Many justices and scholars have found that President Thomas Jefferson’s call for a “wall of separation between Church & State”<sup>149</sup> is unfeasible.<sup>150</sup> Collectively, society should first

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<sup>147</sup> *Id.*

<sup>148</sup> *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1, 18 (1947).

<sup>149</sup> Letter from Thomas Jefferson, U.S. President, to the Danbury Baptist Ass’n (Jan. 1, 1802), available at <http://www.loc.gov/loc/lcib/9806/danpre.html>. Thomas Jefferson advocated for a wall of separation, believing that any religious matter should be left specifically to the individual alone and that the government should not effect beliefs on such matters. *Id.*

<sup>150</sup> See, e.g., *County of Allegheny v. ACLU*, 492 U.S. 573, 657-58 (1989) (Kennedy, J., concurring and dissenting in part) (“In this century, as the modern administrative state expands to touch the lives of its citizens in such diverse ways . . . it is difficult to maintain the fiction that requiring government to avoid all assistance to religion can in fairness be viewed as serving the goal of neutrality.”); *Wallace v. Jaffree*, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting) (“It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortunately the Establishment Clause has been expressly freighted with Jefferson’s misleading metaphor for nearly 40 years.”); *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) (“The concept of a ‘wall’ of separation is a useful figure of speech probably deriving from views of Thomas Jefferson. . . . But the metaphor itself is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state.”); *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971) (noting “total separation is not possible in an absolute sense”); *Walz v. Tax Comm’n of N.Y.*, 397 U.S. 664, 669 (1970) (“The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State.” (quoting *Zorach v. Clauson*, 343 U.S. 306, 312 (1952))); *Engel v. Vitale*, 370 U.S. 421, 445-46 (1962) (Stewart, J., dissenting) (“I think that the Court’s task, in this as in all areas of constitutional adjudication, is not responsibly aided by the uncritical invocation of metaphors like the ‘wall of separation,’ a phrase nowhere to be found in the Constitution.”); David K. DeWolf, *Ten Tortured Words*, 85 DENV. U. L. REV. 443, 449 (2007) (reviewing STEPHEN MANSFIELD, *TEN TORTURED WORDS: HOW THE FOUNDING FATHERS TRIED TO PROTECT RELIGION IN AMERICA . . . AND WHAT’S HAPPENED SINCE* (2007)) (explaining Mansfield’s argument that the metaphor should not be taken as “authoritative”); John Kevin

recognize that such a strict separation of church and state is an unworkable approach in today's world. And while courts must, and rightly should, intervene when government does in fact engage in activity that constitutes establishment, this does not mean that courts need to view religion with hostility and as completely incompatible with government.<sup>151</sup> Courts must strike a balance where the government and religion can work together in a neutral manner to accomplish secular purposes that help further society. An extension of *Elmbrook's* rationale would prevent society as a whole from keeping with the principle of neutrality and would instead create judicial hostility through an unreasonable presumption of government establishment of religion.

*B. Courts Should Not Apply the Endorsement Analysis When Government Utilizes a Religious Building*

For a time, the Court held that the government presence in a pervasive religious environment was seen as heavily convincing evidence of an Establishment Clause violation.<sup>152</sup> However, this legal reasoning has since been repudiated as unsound.<sup>153</sup> It follows then that when the government uses a religious building, a court should not presume a reasonable observer would perceive a symbolic union between the two simply because of the government's presence in a religious environment. When a court primarily focuses on the fact that the government is in a close proximity to religious symbols, and what a reasonable observer would unreasonably assume of that proximity, it creates an unfair

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Moore, Case Note, Board of Education of Kiryas Joel Village School District v. Grumet: *A Missed Opportunity for the Supreme Court to Clarify Establishment Clause Analysis*, 46 MERCER L. REV. 1189, 1191 (1995).

<sup>151</sup> *Everson*, 330 U.S. at 18 (“[The First] Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary.”).

<sup>152</sup> See *Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 389-92 (1985), *overruled by Agostini v. Felton*, 521 U.S. 203 (1997); *Aguilar v. Felton*, 473 U.S. 402, 408-14 (1985), *overruled by Agostini v. Felton*, 521 U.S. 203 (1997). *Ball* also reasoned that students would be unable to discern the difference between their normal public school classes and religious classes. *Ball*, 473 U.S. at 389-92. Oddly, this seems to apply the reasonable observer standard in a different manner to the students.

<sup>153</sup> *Agostini*, 521 U.S. at 227-28 (“To draw this line based solely on the location of the public employee is neither ‘sensible’ nor ‘sound’ . . .”).

bias in favor of finding a violation.<sup>154</sup> Courts could potentially become hostile toward religion, opening up the possibility for a court to hold that religious symbols could be found to be *too religious* and thereby casting a judicial opinion on the very merits of the religion. This assumption, which is based upon transferred endorsement, would strip away the government's ability to utilize religious buildings for beneficial secular programs or activities when those buildings might provide the best venue available.

To circumvent this problem, courts should not apply the endorsement and reasonable observer analysis when the government utilizes a religious venue for a secular event. As virtually all religious buildings contain their respective symbols and are pervasively religious, the reasonable observer analysis harbors a presumption of unconstitutionality against the use of a religious building.<sup>155</sup> Rather, courts should discern whether the government's behavior properly conforms to the principle of neutrality or, if instead, the government is impermissibly bestowing benefits and aid onto the religion. Under this approach, a court would compare any incidental and secondary benefits the religion might receive against the overall benefits and furtherance of the secular program or activity, instead of casting a judgment on the religious symbols or religion itself. This is similar to the analysis where courts look at government aid being provided to a religion,<sup>156</sup> since here the government would also be directly paying a religious organization. This approach also remains in line with precedent where the government has provided aid

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<sup>154</sup> *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984) ("Focus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause.").

<sup>155</sup> *See Doe ex rel. Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 871 (7th Cir. 2012) (en banc) (Easterbrook, C.J., dissenting), *cert. denied*, 134 S. Ct. 2283 (2014).

<sup>156</sup> *See Agostini*, 521 U.S. at 222-23 (asking whether the government acted with a purpose of advancing religion or if the aid had the effect of advancing it); *see also Mitchell v. Helms*, 530 U.S. 793, 807 (2002) (plurality opinion) (explaining the test used is a modified version of the *Lemon* test). In *Mitchell*, Justice Thomas advocated that the difference between direct and indirect programs is nothing more than arbitrary, and the idea of government neutrality should guide our analysis. *Id.* at 815-19. Justice O'Connor, however, argued in her concurrence that there is indeed a difference between the two, and cases of direct aid should involve added criteria *Id.* at 841-45 (O'Connor, J., concurring).

toward a secular interest that happened to incidentally benefit religion.<sup>157</sup>

The specific benefits under scrutiny in each situation would turn heavily on the specific facts of the usage to determine if they were actually impermissible rather than incidental. Evidence of religion being improperly furthered could be shown through findings of: excessive rental fees being paid to the religious organization, payments being made by the government on behalf of the religious organization that are not consistent with the secular program or use of the building, or the government enacting a program that in part encourages attendance at separate religious events put on by the organization. In these hypothetical instances, an actual government benefit is bestowed on the religion that impermissibly advances it. Conversely, the mere usage of a religious building, the passive exposure to religious symbols by individuals attending the program, and the possibility that a few people may voluntarily attend other religious events because of the government's use are better classified as incidental benefits to the religion. This approach remains in line with the principle of neutrality by not forcing

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<sup>157</sup> See *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 842-44 (1995) (the benefit conferred on religion was incidental to the government's provision of secular services on a religion-neutral basis); *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 768 (1995) ("The 'transferred endorsement' test would also disrupt the settled principle that policies providing incidental benefits to religion do not contravene the Establishment Clause. That principle is the basis for the constitutionality of a broad range of laws, not merely those that implicate free-speech issues."); *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 10 (1989) (plurality opinion) ("The nonsectarian aims of government and the interests of religious groups often overlap, and this Court has never required that public authorities refrain from implementing reasonable measures to advance legitimate secular goals merely because they would thereby relieve religious groups of costs they would otherwise incur."); *Wallace v. Jaffree*, 472 U.S. 38, 69-70 (1985) (O'Connor, J., concurring) ("A statute that ostensibly promotes a secular interest often has an incidental or even a primary effect of helping or hindering a sectarian belief."); *Widmar v. Vincent*, 454 U.S. 263, 273 (1981) ("[T]his Court has explained that a religious organization's enjoyment of merely 'incidental' benefits does not violate the prohibition against the 'primary advancement' of religion."); *Green v. Haskell Cnty. Bd. of Comm'rs*, 568 F.3d 784, 799 (10th Cir. 2009) ("[N]ot every governmental activity that confers a remote, incidental or indirect benefit upon religion is constitutionally invalid." (quoting *Bauchman v. West High Sch.*, 132 F.3d 542, 555 (10th Cir. 1997))); *Koenick v. Felton*, 190 F.3d 259, 267 (4th Cir. 1999) ("[A] statute does not automatically violate the Establishment Clause simply because it confers an incidental benefit upon religion.").

government to turn away religious organizations for fear of a misperceived symbolic union.

However, this analysis does raise the concern that by removing the reasonable observer's analysis of perceiving what a government action could mean we may be more easily allowing a government to disguise actual endorsement. Proponents of this concern would argue that government could hide its preference<sup>158</sup> for a religion by alleging the only preference it actually had was for the building or venue's secular amenities. This argument fails, however, as a court could identify a government preference for the underlying religion from the actual actions taken by the government in selecting the religious building as the venue.<sup>159</sup> If the government acts neutrally throughout the selection process, as the Establishment Clause requires, then no issue would arise. But if for example there was another location that provided better amenities, cost, distance, etc., and the government still chose the religious building, then there are likely grounds for finding a religious preference in the selection process. The court must step into the shoes of a prospective renter and, while not getting preemptively held up or narrowing in on the fact that a specific location is in fact religious, pick the location that best fits the needs of the program or activity and compare it to the location the government selected.

There is also the underlying worry of religious establishment in these instances as the government is directly providing money to a religion with no relative ability to control what it is put towards.<sup>160</sup> Because it is possible that the funds could eventually be put towards some religious purpose, this again raises the argument that the renting of a religious building will have the

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<sup>158</sup> "Preference" as well as "favoritism" has been recognized by the Court to also mean "endorsement." See, e.g., *Pinette*, 515 U.S. at 763; *County of Allegheny v. ACLU*, 492 U.S. 573, 593 (1989) (citing *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 27-28 (1989) (Blackmun, J., concurring)); *Edwards v. Aguillard*, 482 U.S. 578, 593 (1987); *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring); *Sch. Dist. of Abington v. Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring).

<sup>159</sup> *Pinette*, 515 U.S. at 766. Justice Scalia recognized and addressed this concern when he formulated his test in *Pinette*. *Id.* He explained that giving preference or showing "favoritism" toward the religious speech would create an impression of endorsement that accurate. *Id.*

<sup>160</sup> See *Mitchell*, 530 U.S. at 818-19 (acknowledging that prior cases have identified "special Establishment Clause dangers" when it is money that is given as aid).

effect of primarily advancing religion. Under a strict “wall of separation” analysis this argument is logical, but when the government acts neutrally and does not prefer a religion in its selection process, then such an argument loses traction.<sup>161</sup> If the selection process is completed in a neutral manner, so as to not prefer a specific religious venue over another or over a nonreligious venue, then it can be said the money for rent was given to the church on neutral terms and not to advance the religion itself. What the religious organization then does with the money would be an internal furtherance, rather than the government giving them money to expressly further a religious program.

*C. Courts Should Not Apply the Coercion Test Unless There Is an Actual Instruction or Direction to Participate in a Formal Religious Exercise*

Justice Blackmun once noted his belief that the coercion and endorsement tests are very closely intertwined.<sup>162</sup> However, the Seventh Circuit’s holding in *Elmbrook*—that the presence in a religious environment, or of religious symbols, without a government instruction to participate in religious exercises is coercive—is incorrect.<sup>163</sup> Justice Kennedy originally advocated his view that government may not coerce anyone into supporting religion because of his disagreement with the endorsement test.<sup>164</sup> When courts focus instead on the religious symbols or type of environment a person is present in, like under the endorsement

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<sup>161</sup> *Id.* at 819 n.8 (noting that prior cases involving direct payments contained questionable likelihood that the payments were given neutrally).

<sup>162</sup> *Lee v. Weisman*, 505 U.S. 577, 605-06, 605 n.6 (1992) (Blackmun, J., concurring) (“As a practical matter . . . anytime the government endorses a religious belief there will almost always be some pressure to conform.”).

<sup>163</sup> *See supra* notes 68-69 and accompanying text.

<sup>164</sup> *See County of Allegheny v. ACLU*, 492 U.S. 573, 659, 668-69 (1989) (Kennedy, J., concurring and dissenting in part) (“[T]hat cases arising under the Establishment Clause should be decided by . . . whether a ‘reasonable observer’ may ‘fairly understand’ government action to ‘sen[d] a message to nonadherents that they are outsiders . . .’ is a[n] . . . unwelcome[] addition to our tangled Establishment Clause jurisprudence.”).

analysis, they strip away part of the very legal meaning of coercion and compulsion.<sup>165</sup>

More recently, the Court clarified that the coercion test is meant to analyze whether the government has attempted to “solicit[]” or “direct[] the public to participate” in religious exercises.<sup>166</sup> Justice Kennedy pointed out in *Town of Greece* that in everyday life individuals encounter various kinds of speech with which they may disagree or take offense.<sup>167</sup> But these negative feelings that an individual may have toward what can be analogized to a religious environment are not enough to constitute a form of coercion.<sup>168</sup> Through *Town of Greece*, the Court simplified the analysis; accordingly, there must be some form of pressure, direction, or instruction from the government to constitute coercive behavior.<sup>169</sup>

As such, courts should not follow the Seventh Circuit’s lead and apply the coercion test when students are placed within pervasively religious environments. Doing so, as Judge Ripple sternly put it, would “remove[] the governing case law from its doctrinal moorings and create[] a new . . . dangerous principle in Establishment Clause jurisprudence.”<sup>170</sup> To more effectively keep the interests Justice Kennedy had intact, and to keep with the principle of government neutrality, courts should only apply the coercion test when a government has put forth an actual choice to participate in religious exercises.

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<sup>165</sup> See BLACK’S LAW DICTIONARY 315, 348 (10th ed. 2014). The legal definition of “coercion” requires compulsion of an individual to partake in something against his will due to a threat. *Id.* at 315. This requires us to then look at the legal definition of “compulsion.” Here we see that “compulsion” can take the form of an “obedience to orders,” synonymous to following a direction or instruction. *Id.* at 348.

<sup>166</sup> *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1826 (2014).

<sup>167</sup> *Id.* (“Adults often encounter speech they find disagreeable; and an Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views . . .”).

<sup>168</sup> *Id.* (“The analysis would be different if [the government] directed the public to participate in the prayers . . . or indicated that their decisions might be influenced by a person’s acquiescence in the prayer opportunity.”); see also *supra* note 105.

<sup>169</sup> *Town of Greece*, 134 S. Ct. at 1827 (“[I]n the general course [government entities] do not engage in impermissible coercion merely by exposing constituents to prayer they would rather not hear and in which they need not participate.”) (emphasis added).

<sup>170</sup> *Doe ex rel. Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 866 (7th Cir. 2012) (en banc) (Ripple, J., dissenting), *cert. denied*, 134 S. Ct. 2283 (2014).

In *Croft v. Perry*, the Fifth Circuit laid out a simplistic three-part test that should be used to analyze whether coercion was present.<sup>171</sup> The court reasoned that “unconstitutional coercion occurs when: (1) the government directs (2) a formal religious exercise (3) in such a way as to oblige the participation of objectors.”<sup>172</sup> Requiring courts to similarly place the emphasis on finding an actual government direction to participate in a religious exercise covers the concerns of Justice Kennedy and protects schools from violations being improperly found if a student voluntarily engages in religious exercise.

Keeping the analysis on the necessity of finding an actual direction from the government helps protect schools from inadvertently being deemed to have coerced students by placing them in a religious environment.<sup>173</sup> If courts are otherwise allowed to find students are coerced when they are merely in the presence of religious symbols, then courts will effectively retreat to the legal rationale relied upon in *School District of City of Grand Rapids v. Ball*.<sup>174</sup> Following the Seventh Circuit's lead creates a concern that if fellow students or teachers wear religious symbols, or if students are taken to religious areas on field trips that are deemed too pervasively religious, the school could be said to have coerced a “captive audience” by way of proximity to the symbols. Additionally, this starts us down a path that brings in true private religious speech and expression under the coercion analysis.

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<sup>171</sup> 624 F.3d 157, 169 (5th Cir. 2010). *Croft* dealt with a group of parents who sued Texas Governor Rick Perry arguing that the amendment to the Texas pledge of allegiance adding the words “one state under God” violated the Establishment Clause. *Id.* at 161. When the court analyzed this challenge under the coercion test they concluded that the pledge was not a “religious exercise”; therefore, there was no coercion to participate in a religious exercise. *Id.* at 170.

<sup>172</sup> *Id.* at 169 (quoting *Doe ex rel. Doe v. Beaumont Indep. Sch. Dist.*, 173 F.3d 274, 285 (5th Cir. 1999)).

<sup>173</sup> See *Elmbrook*, 687 F.3d at 867 (Ripple, J., dissenting).

<sup>174</sup> 473 U.S. 373, 389-92 (1985) (“This pervasive [religious] atmosphere makes on the young student’s mind a lasting imprint that the holy and transcendental should be central to all facets of life.” (quoting Donald A. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part II. The Nonestablishment Principle*, 81 HARV. L. REV. 513, 574 (1968))), *overruled by Agostini v. Felton*, 521 U.S. 203 (1997).

## IV. APPLICATION

*A. Government Use of Religious Buildings Would Not Immediately Result in a Violation*

To help provide a better idea of what this analysis would look like, this Comment will analyze a couple of prior cases and hypotheticals in which the government has utilized a religious building.

Beginning first with *Elmbrook*, if the Seventh Circuit had analyzed the case by looking for impermissible benefits evidencing an advancement of religion, it would have found no Establishment Clause violation. Looking at the process of selecting a new graduation location, they would have recognized the student council was motivated because of the poor conditions of the previous graduation venue<sup>175</sup> and not because it sought to include a religious message in their graduation. The court would have understood that the selection process did not entail a student body vote to include prayer as a part of the graduation. Rather, it was simply a vote for a different graduation venue.<sup>176</sup> Therefore, the court should have found no preference of a religion.<sup>177</sup> The court would have also likely found that there was no preference in the continued selection of the church as a preference of a religious message, as the students continued to select a location they found to be suitable because of its amenities.<sup>178</sup> The court would have discovered that the rate paid to the church was not an excessive amount and was in fact a “standard” rental rate.<sup>179</sup> At most, the rental payments and selection of the church were “indirect benefits,” and any effect of furthering of the church’s religious message would have been voluntary and indirect to the

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<sup>175</sup> See *supra* note 42 and accompanying text.

<sup>176</sup> See *supra* note 44 and accompanying text; see also *Adler v. Duval Cnty. Sch. Bd.*, 250 F.3d 1330, 1338-39 (11th Cir. 2001) (distinguishing a student vote to allow a speech that did not specify it would be religious from the kind of vote taken in *Santa Fe*).

<sup>177</sup> See *supra* note 44 and accompanying text; see also *Adler*, 250 F.3d at 1338-39.

<sup>178</sup> See *supra* notes 50-51 and accompanying text.

<sup>179</sup> See *supra* note 52 and accompanying text.

graduation.<sup>180</sup> Upon these findings, the Seventh Circuit would and should have affirmed the lower court's holding.

Turning to a situation like the one from *Otero v. State Election Board of Oklahoma*, which also allows us to frame the analysis in the context of a church used as a polling location, a court would find, as the Tenth Circuit did, that no violation would occur.<sup>181</sup> A court would know from the history that many different locations are used, and those selected are done so neutrally and not for their religious message.<sup>182</sup> The court would understand from the context of elections that the building is only used one day out of the year to facilitate the gathering of a large group of people. It would understand that the purpose behind the use of a religious building as a polling location is to provide more available venues for the public to exercise their right to vote. The court would then find that there is no direct benefit to the religious message and the primary effect of the use is to help the election process move along smoothly. And again, if there were any benefit to the religious group, it would be indirect. The group may have some new and continuous visitors, who normally may not have come into the religious building, but so might any other building, secular or sectarian, that facilitated a polling location.

Moving toward a hypothetical scenario where a government works with a religious organization in a community to provide shelter to individuals in need, a court again would find no violation. In such a situation, unless the government had selected the religious building because of a preference for the religion or its message, the court would be able to begin by finding neutrality in the selection process, as the government preferred the venue for its amenities. The secular purpose identifiable in utilizing a church in this hypothetical is to provide a greater ability for individuals to receive assistance and shelter. As the court looks to see if the government is only providing funds to the religion for

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<sup>180</sup> As Judge Posner stated, there was no evidence to support an assertion that someone who had attended the graduation at the church had been "converted" to follow the church's religion. *See supra* note 97 and accompanying text.

<sup>181</sup> *Otero v. State Election Bd. of Okla.*, 975 F.2d 738, 740-41 (10th Cir. 1992). Interestingly enough, the Tenth Circuit did not mention the endorsement test or reasonable observer. It relied instead on the *Lemon* test even though the Supreme Court had adopted the endorsement test just three years before. *Id.*

<sup>182</sup> *See supra* note 74 and accompanying text.

expenses directly related with the program, it would have to analyze how much is being paid to the religion compared with the actual expenses of the program. If there is an excessive amount being paid, then there may be evidence that the primary effect of funds is to advance the religion, and not the program itself. But if the court finds an amount that is more properly in line with the actual expenses, then this shows the government is likely acting neutral and not providing an impermissible benefit to the religion.

*B. Government Use of Religious Buildings or Presence in a Religious Environment Would Not Be Deemed Coercive*

This Comment argues that courts should not follow the change *Elmbrook* makes to the coercion test; accordingly, this Comment will look here at how the coercion test should have been applied in *Elmbrook*. Again, the key factors that courts should look for are (1) a direction to participate (2) in a formal religious exercise and (3) the feeling of the need to conform and participate in the religious exercise.<sup>183</sup> In *Elmbrook*, had the court not misconstrued the coercion test as it did, it would not have found any compulsory direction to conform to a religion coming from the school.<sup>184</sup> The court would have instead found that the only direction presented to the students was to attend a graduation ceremony that contained no formal religious exercises. But because a graduation is not necessarily “voluntary,”<sup>185</sup> the court’s decision would have then turned on whether the entrance into a religious building is coercive in and of itself.

Although the en banc opinion did not address this matter, the panel opinion did.<sup>186</sup> The panel opinion explained that while “[e]ntering a [religious building] may be of religious significance to some,” it is not the type of “inherently religious activity” Justice

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<sup>183</sup> See *supra* note 172 and accompanying text.

<sup>184</sup> As the Seventh Circuit admitted, they found “the school district did not coerce overt religious activity.” *Doe ex rel. Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 855-56 (7th Cir. 2012) (en banc), *cert. denied*, 134 S. Ct. 2283 (2014).

<sup>185</sup> *Lee v. Weisman*, 505 U.S. 577, 594-95 (1992); see also *supra* notes 143-44 and accompanying text.

<sup>186</sup> *Doe ex rel. Doe v. Elmbrook Sch. Dist.*, 658 F.3d 710, 728 (7th Cir. 2011), *rev’d en banc*, 687 F.3d 840 (7th Cir. 2012), *cert. denied*, 134 S. Ct. 2283 (2014).

Kennedy found was barred in *Lee*.<sup>187</sup> Based on this explanation and precedent, the en banc court should have found that there was no direction put forth by the school to participate in a formal religious exercise and therefore no coercion. In addition, if anyone present at the graduation had decided to freely join in such an exercise upon seeing another individual express his or her own views, this would have been a completely voluntary act, the type that the Free Exercise Clause protects.

#### CONCLUSION

While the Supreme Court has utilized various tests when confronted with an Establishment Clause challenge, it has never strayed from keeping with the principle of neutrality. However, the Seventh Circuit in *Elmbrook* forged a path away from neutrality and Court precedent. Consequently, courts now have the legal reasoning available to find Establishment Clause violations whenever the government utilizes a religious building. Courts will also be faced with the choice of either now following *Elmbrook's* divergence from the traditional coercion test or keeping a strict approach to the coercion test, applying it only when there is an actual direction presented by the government.

There have been many arguments that the reasonable observer is inherently flawed in its application, as it is objectively used to find a violation based on a judge's inherent subjective beliefs. A prime example of this flaw is evidenced by the ability of a court to find that something constitutes a violation when there may have been no subjective intent to send a message of endorsement. It is because of reasons such as these that the courts should not utilize the endorsement test to analyze instances where the government has utilized a religious building. To prevent the unfair presumption that would flow from a reasonable observer

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<sup>187</sup> *Id.* Writing for the panel, Judge Ripple explained that although some individuals are prohibited by their faith from entering the house of worship of another, the subjective beliefs of those individuals are not enough to make the act of entering a church an "objectively religious activity." *Id.* at 728 n.18. However, there could be a possible Free Exercise Clause violation. *Id.* (citing *Otero v. State Election Bd. of Okla.*, 975 F.2d 738, 741 (10th Cir. 1992)). But the chances of that claim succeeding are unlikely. *See id.*; *supra* note 106 and accompanying text (explaining that the attendance of a graduation ceremony in a church is not a formal religious exercise); *see also supra* notes 109-14 and accompanying text.

mistakenly perceiving endorsement based on the religious environment, courts should instead utilize a test that focuses on whether impermissible benefits have been conferred to the religion. By doing so, the courts would more properly ask if the government has truly acted in line with the principle of neutrality.

Additionally, as shown in *Town of Greece*, viewing the coercion test as applicable to a religious environment is incorrect. At its core, the coercion test is focused on directions or instructions from the government to conform to a religion. While the indirect analysis used in public school contexts deals with psychological feelings, in each of this test's prior applications, there was always some form of direction presented to the students by the school. Allowing courts to believe that students conform merely because of their presence in a religious environment or near symbols removes a key element from the analysis. Courts should instead limit the coercion analysis, direct or indirect, to cases where a government actually issues a direction to partake in a formal religious exercise.

Following the approaches advocated by this Comment will ensure that the principle of neutrality remains a part of Establishment Clause analysis. Further, it will prevent incorrect, and at times unfair, presumptions from running through the courts under both the endorsement and coercion tests.

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\* The author is a May 2015 Juris Doctor candidate at the University of Mississippi School of Law. He received his Bachelor of Science degree from Texas A&M University in 2012. He wishes to thank Professor George Cochran for his help in working out the kinks of the early drafts of this Comment, and for his guiding, insightful, and firm criticism that helped strengthen the arguments of this Comment. He also wishes to thank Professor Jack Wade Nowlin for his guidance, support, and insightful lectures over the Establishment Clause, as well as his family, friends, and editors at the *Mississippi Law Journal* for their support and help in editing this Comment. The author also wishes to note that the arguments made herein are not meant to favor any one particular religion, but rather that religion as a whole should not be discriminated against by the courts simply because they are a religion.