TESTS AND PRONGS AND FACTORS, OH MY!: AN EXAMINATION OF THE SEVENTH CIRCUIT'S DECISION IN *DOE EX REL. DOE V. ELMBROOK SCHOOL DISTRICT*

JACK C. MARSHALL*

Cite as: Jack C. Marshall, *Tests and Prongs and Factors, Oh My!: An Examination of the Seventh Circuit's Decision in* Doe ex rel. Doe v. Elmbrook School District, 8 SEVENTH CIRCUIT REV. 193 (2012), *at* http://www.kentlaw.iit.edu/Documents/Academic Programs/7CR/v8-1/marshall.pdf.

INTRODUCTION

The Establishment Clause of the First Amendment to the U.S. Constitution provides that "Congress shall make no law respecting an establishment of religion."[1] These ten words have frustrated scholars, lower courts, and at times, the U.S. Supreme Court itself.[2] Confusion over the correct interpretation of the Establishment Clause recently manifested itself in the Seventh Circuit Court of Appeals.[3] In 2010, the U.S. District Court for the Eastern District of Wisconsin held that a suburban school district's practice of holding its graduation

* J.D. candidate, May 2013, Chicago-Kent College of Law, Illinois Institute of Technology; B.A., May 2010, University of Illinois at Urbana-Champaign.

[1] U.S. CONST. amend I.

[2] *See* County of Allegheny v. ACLU, 492 U.S. 573, 674-76 (1989) (Kennedy, J., concurring in part and dissenting in part) ("Deciding cases on the basis of such an unguided examination of marginalia is irreconcilable with the imperative of applying neutral principles in constitutional adjudication.").

[3] Doe *ex rel.* Doe v. Elmbrook Sch. Dist., 687 F.3d 840, 842 (7th Cir. 2012).

ceremonies in a church comported with the Establishment Clause.[4] On appeal, a three-judge panel of the Seventh Circuit Court of Appeals affirmed the judgment of the District Court.[5] The plaintiffs then filed a petition for rehearing en banc.[6] The Seventh Circuit granted the petition and, sitting en banc, reversed the decision of the three-judge panel, finding that the school district's practice of holding graduation in a church violated the Establishment Clause.[7] Judge Ripple, Judge Posner, and Judge Easterbrook filed dissenting opinions.[8]

This Comment will (1) provide a brief summary of current Establishment Clause jurisprudence; (2) review graduation venue litigation prior to *Doe ex rel. Doe v. Elmbrook School District*; (3) analyze the reasoning of the Seventh Circuit's en banc opinion; and (4) assert that the en banc opinion improperly applied the endorsement and coercion tests.

I. MODERN ESTABLISHMENT CLAUSE JURISPRUDENCE

A. Confusion in the Courts

There is significant disagreement among federal courts and within the Supreme Court itself over how to correctly analyze cases that arise under the Establishment Clause.[9] In 1992, a First Amendment expert

[4] Does 1, 7, 8, and 9, individually v. Elmbrook Joint Common Sch. Dist. No. 21, No. 09-C-0409, 2010 WL 2854287, at *15 (E.D. Wis. July 19, 2010) *aff'd sub nom.* Doe *ex rel.* Doe v. Elmbrook Sch. Dist., 658 F.3d 710 (7th Cir. 2011), reh'g en banc granted, opinion vacated (Nov. 17, 2011) and *rev'd and remanded sub nom.* Doe *ex rel.* Doe v. Elmbrook Sch. Dist., 687 F.3d 840 (7th Cir. 2012).

[5] Doe *ex rel.* Doe v. Elmbrook Sch. Dist., 658 F.3d 710, 734 (7th Cir. 2011), reh'g en banc granted, opinion vacated (Nov. 17, 2011).

[6] Doe *ex rel.* Doe, 687 F.3d at 842.

[7] *Id*. at 856.

[8] *Id*. at 861, 869, 872.

[9] Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 861 (1995) (Thomas, J., concurring) ("[O]ur Establishment Clause jurisprudence is in hopeless disarray.").

and former federal appellate judge said simply of the U.S. Supreme Court's Establishment Clause jurisprudence: "It is a mess."[10] More recently, a scholar likened the U.S. Supreme Court's repeated attempts to formulate comprehensive Establishment Clause analyses to "a Creole chef continually tinkering with his recipe for jambalaya."[11] Indeed, Justice Thomas himself once wrote, "[o]ur jurisprudential confusion [in Establishment Clause cases] has led to results that can only be described as silly."[12]

No case illustrates the Establishment Clause dilemma better than *County of Allegheny v. ACLU*.[13] In *Allegheny*, the plaintiff challenged the constitutionality of a nativity scene located inside a courthouse and a 45-foot Christmas tree and 18-foot menorah located in front of a government building.[14] These simple facts spawned a 5-4 decision and four separate opinions, all interpreting the Court's Establishment Clause jurisprudence differently.[15] Ultimately, the Court held that the nativity scene violated the Establishment Clause while the tree and menorah did not.[16] *Allegheny* demonstrates the Court's own struggle with the Establishment Clause and further complicates lower courts' understanding of how to properly decide Establishment Clause cases. *Doe ex rel. Doe v. Elmbrook School District* further exemplifies this confusion through its improper application of the endorsement and coercion tests.

[10] Michael W. McConnell, Exchange, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 120 (1992).

[11] Lynn S. Branham, *"The Devil is in the Details": A Continued Dissection of the Constitutionality of Faith-Based Prison Units*, 6 AVE MARIA L. REV. 409, 412 (2008).

[12] Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 45 n. 1 (2004) (Thomas, J., concurring).

[13] 492 U.S. 573 (1989).

[14] *Id.* at 579, 582-83.

[15] *Id*. at 623-79.

[16] *Id*. at 621.

B. The Three Establishment Clause Tests

Courts use three tests to determine whether governmental action violates the Establishment Clause: (1) the *Lemon* test;[17] (2) the endorsement test;[18] and (3) the coercion test.[19] The Court's various attempts to simplify the application of the tests further convoluted the way federal district courts and federal courts of appeal utilized them to properly adjudicate cases arising under the Establishment Clause.[20]

1. The *Lemon* Test

In *Lemon v. Kurtzman*, the U.S. Supreme Court overturned a Pennsylvania statute that permitted salary subsidies for parochial school teachers.[21] In its analysis, the Court applied a three-prong test that came to be known as the *Lemon* test. [22] To pass the *Lemon* test, the challenged governmental action must (1) "have a secular legislative purpose"; (2) have a "principal or primary effect . . . that neither advances nor inhibits religion"; and (3) "not foster an excessive government entanglement with religion."[23] However, as one First Amendment scholar and former federal appellate judge noted, "[e]ach part of the *Lemon* test is deeply ambiguous . . . Consequently, the lower federal courts and state courts have given the test widely

[17] Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

[18] *Cnty. of Allegheny*, 492 U.S. at 593-94.

[19] Lee v. Weisman, 505 U.S. 577, 587 (1992).

[20] Erin R. Doyle, Casenotes, *Endangering the Great Divide: Challenges to the Establishment Clause in Van Orden v. Perry*, 31 S. ILL. U. L.J. 123, 130 ("[T]he Court's inability to draw a consistent line has created convoluted and ambiguous Establishment Clause jurisprudence.").

[21] *Lemon*, 403 U.S. at 602.

[22] *Id*.

[23] *Id*. at 612-13 (internal quotation omitted).

different and seemingly contradictory interpretations, and they often ignore it altogether to avoid undesirable results."[24]

a. Lemon's *First Prong: Secular Purpose*

To satisfy the first prong of the *Lemon* test, the challenged governmental action must have a secular purpose.[25] However, in *McCreary County, Kentucky v. American Civil Liberties Union of Kentucky*,[26] the Supreme Court stated that the challenged governmental action need not be exclusively secular; rather, it need only be predominantly secular.[27] However, Judge Easterbrook, one of the dissenters in *Doe*,[28] has severely criticized such an analysis.[29]

Further, courts disagree as to whether they should examine the governmental action as a whole or focus solely on the religious component.[30] While the Supreme Court has said that "[f]ocus[ing] exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause,"[31] the Court had not always adhered to this approach.[32] For example, in *Wallace v. Jaffree*, the Court examined an Alabama statute that authorized a moment of silence before each school day for

[24] Michael W. McConnell, *Stuck with a Lemon: A new test for establishment clause cases would help ease current confusion*, 83 A.B.A. J. 46, 46 (Feb. 1997).

[25] *Lemon*, 403 U.S. at 612-13.

[26] 545 U.S. 844 (2005).

[27] *Id*. at 860.

[28] Doe *ex rel.* Doe v. Elmbrook Sch. Dist., 687 F.3d 840, 869 (7th Cir. 2012).

[29] *See Am. Jewish Cong. v. City of Chicago*, 827 F.2d 120, 130 (7th Cir. 1987) (Easterbrook, J., dissenting) ("It would be appalling to conduct litigation under the Establishment Clause as if it were a trademark case, with experts testifying about whether one display is really like another, and witnesses testifying they were offended—but would have been less so were the crèche five feet closer to the jumbo candy cane.").

[30] Wallace v. Jaffree, 472 U.S. 38, 86 (1985) (J., Burger, dissenting).

[31] Lynch v. Donnelly, 465 U.S. 668, 680 (1984).

[32] *Wallace*, 472 U.S. at 58-59.

"'meditation or voluntary prayer.'"[33] In its analysis, the Court focused exclusively on the words "or voluntary prayer" because "the only significant . . . difference is the addition of the words 'or voluntary prayer.'"[34] Without clear direction from the Supreme Court, lower courts are left guessing whether to examine challenged government action as a whole or to only scrutinize the religious component.

b. Lemon's *Second Prong: Principal Effect Must Not Advance or Inhibit Religion*

To satisfy *Lemon*'s second prong, governmental action must not have the primary effect of advancing or inhibiting religion.[35] This effect-based analysis is also fraught with problems. Specifically, "it fails to specify a baseline for comparison."[36] Lower courts are left to determine whether the "primary effect" of the challenged action "advanc[es] or inhibt[s] religion."[37] This becomes especially complicated when the challenged action contains both religious and secular components.[38]

c. Lemon's *Third Prong: Excessive Entanglement*

To satisfy *Lemon*'s third prong, governmental action must not foster excessive entanglement with religion.[39] The *Lemon* Court described "excessive entanglement" as government action that would result in "comprehensive, discriminating, and continuing state

[33] 472 U.S. 38, 40 (1985) (citing Ala. Code § 16-1-20.1 (Supp. 1984)).

[34] *Id*. at 58-59.

[35] Lemon v. Kurtzman , 403 U.S. 602, 612-13 (1971).

[36] McConnell, *supra* note 24.

[37] *Id*.

[38] *Id*. (McConnell elaborates, "If a government program extends benefits to a wide spectrum of private groups, secular as well as religious, does this 'advance' religion? The answer, according to the courts, is sometimes 'yes,' sometimes 'no.'").

[39] *Lemon*, 403 U.S. at 612-13.

surveillance."[40] The *Lemon* Court explained that the excessive entanglement prong centers on the evaluation of three factors: (1) "the character and purposes of the institutions that . . . benefit[]" from the governmental action; (2) "the nature of the aid that the State provides" to religious institutions; and (3) "the resulting relationship between the government and the religious authority."[41] However, because all religious institutions necessarily maintain at least some form of contact with governmental entities, "there is no way to tell whether the entanglement is excessive."[42] As a result, "[t]he cases are all over the map."[43]

The Court's inconsistent application of the *Lemon* test has brought the test under great scrutiny.[44] Justice Scalia likened the *Lemon* test to a "ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried."[45] However, regardless of Scalia's disdain for the *Lemon* test, because *Lemon* has not been expressly overruled, it is still binding precedent on lower courts.[46]

2. The Endorsement Test

Originally authored by Justice O'Connor in *Lynch v. Donnelly*,[47] the endorsement test is essentially a narrower version of the second

[40] *Id*. at 619.

[41] *Id*. at 615.

[42] McConnell, *supra* note 24 at 47.

[43] *Id.*

[44] Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 399 (Scalia, J., concurring) ("When we wish to strike down a practice [the *Lemon* test] forbids, we invoke it; when we wish to uphold a practice it forbids, we ignore it entirely." (citation omitted)).

[45] *Id*. at 398.

[46] Books v. Elkhart Cnty., Ind., 401 F.3d 857, 862-63 (7th Cir. 2005) ("Despite persistent criticism from several of the Justices, *Lemon* has not been overruled, and we are compelled to follow the approach it established.").

[47] 465 U.S. 668 (1984).

prong of the *Lemon* test.[48] The endorsement test prohibits government entities "from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred."[49] To satisfy the endorsement test, "an objective, reasonable observer, aware of the history and context of the community and forum in which the religious display appears," must not "fairly understand the display to be a government endorsement of religion."[50]

However, Justice O'Connor further complicated the endorsement test in *Elk Grove Unified School District v. Newdow*.[51] There, she laid out four additional factors which must be examined before concluding that governmental action violates the Establishment Clause: (1) history and ubiquity; (2) absence of worship or prayer; (3) absence of reference to a particular religion; and (4) minimal religious content.[52] She also asserted that judges must weigh the facts before them against the aforementioned factors to determine if the challenged governmental action conveys a message that religion or a religious belief is "favored" or "preferred."[53]

3. The Coercion Test

The third and final test that the Supreme Court uses in Establishment Clause cases is the coercion test.[54] The coercion test provides that "government may not coerce anyone to support or participate in religion or its exercise."[55] However, in the context of

[48] *Id. at* 688-89. ("It has never been entirely clear, however, how the three parts of the [*Lemon*] test relate to the principles enshrined in the Establishment Clause. Focusing on … endorsement or disapproval of religion clarifies the *Lemon* test as an analytical device.").

[49] Wallace v. Jaffree, 472 U.S. 38, 70 (1985) (J., O'Connor, concurring opinion).

[50] *Books*, 401 F.3d at 867 (internal quotation omitted).

[51] 542 U.S. 1 (2004).

[52] *Id*. at 37-43.

[53] *Id*. at 34.

[54] *See* Lee v. Weisman, 505 U.S. 577, 587 (1992).

[55] *Id*. at 577.

public schools, the Supreme Court has only used the coercion test in cases involving formal religious exercises.[56] For example, in *Lee v. Weisman*, the Supreme Court applied the coercion test where a rabbi led the attendees of a school graduation ceremony in a prayer complete with religious language including, "O God we are grateful to You," "We give thanks to You," and "AMEN."[57] The Court struck down the prayer because it coerced those present to participate in a religious exercise.[58] Similarly, in *Santa Fe Independent School District v. Doe*, the Supreme Court applied the coercion test where a student chaplain led a crowd in prayer over a school's public address system prior to home football games.[59] Because the prayers were "infused with explicit references to Jesus Christ and . . . appeal[ed] to distinctively Christian beliefs," the Court found that it coerced those present to participate in a religious exercise.[60]

II. GRADUATION LITIGATION PRIOR TO DOE EX REL DOE

Only a few cases have directly addressed the constitutionality of holding graduation ceremonies in religiously affiliated buildings.[61] In 1916, the Wisconsin Supreme Court heard a challenge to a school district's practice of holding graduation in local churches.[62] Because the court found that "[t]he holding of graduation exercises in a church

[56] Newdow v. U.S. Cong., 328 F.3d 466, 480-81 (9th Cir. 2002), *rev'd sub nom.* Elk Grove Unified School District v. Newdow, 542 U.S. 1 (2004).

[57] 505 U.S. at 581-82.

[58] *Id*. at 599.

[59] Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 299 (2000).

[60] *Id*. at 299 n.7.

[61] Christine Rienstra Kiracofe, *Going to the Chapel, and We're Gonna…Graduate?: Do Public Schools Run Afoul of the Constitution by Holding Graduation Ceremonies in Church Buildings?* 266 Educ. L. Rep. 583, 589 (2011).

[62] State *ex rel.* Conway v. Dist. Bd. of Joint Sch. Dist. No. 6 of Towns of Plymouth, Wonewoc, and City of Elroy, 156 N.W. 477, 480 (Wis. 1916).

is not in itself the giving of sectarian instruction," it held that the district had not violated Wisconsin's state constitution.[63]

In 1952, the New Mexico Supreme Court heard a challenge to a school district's practice of holding graduation in a Presbyterian church.[64] Noting that "[t]he churches were the only buildings in the . . . community with sufficient seating capacity to accommodate the pupils and the people of the community,"[65] the court held that the practice did not violate the Establishment Clause.[66]

In 1974, the U.S. District Court of the Eastern District of Wisconsin—the same court that decided *Doe ex rel. Doe v. Elmbrook School District*—heard *Lemke v. Black*.[67] In *Lemke*, the court found that a school district's practice of holding graduation at a Roman Catholic church violated the Establishment Clause because the school district failed to show "an overriding secular need to use those particular facilities."[68] However, the District Court's decision was subsequently vacated on appeal as moot.[69]

In 2010, the U.S. District Court for the District of Connecticut decided *Does v. Enfield Public Schools*.[70] There, students and parents challenged the district's practice of holding high school graduation ceremonies at a Christian church.[71] The *Enfield* court focused on the issues of endorsement, coercion, and excessive entanglement with religion.[72] With respect to endorsement, the court found that a reasonable observer would likely believe that "holding . . . graduations at First Cathedral constitutes an impermissible endorsement of religion because it conveys the message that certain religious views are

[63] *Id*. at 480-81.
[64] Miller v. Cooper, 56 N.M. 355, 356 (1952).
[65] *Id*. at 356.
[66] *Id*. at 357.
[67] 376 F.Supp. 87 (E.D. Wis. 1974).
[68] *Id*. at 89.
[69] Lemke v. Black, 525 F.2d 694 (7th Cir. 1975).
[70] 716 F.Supp.2d 172 (D.Conn. 2010).
[71] *Id*. at 175.
[72] *Id*. at 185-202.

embraced by Enfield Schools, and others are not."[73] With respect to coercion, the court found that, "by requiring a graduating senior—or a parent of one—to enter First Cathedral in order to be able to participate in his or her graduation—or to watch their child graduate—Enfield Public Schools has coerced plaintiffs to support religion."[74] And with respect to excessive entanglement, the court found that the school district's modifications of the physical interior of the church constituted excessive entanglement of religion.[75]

Thus, different courts have emphasized vastly different aspects of the practice of holding public graduation ceremonies in religious buildings. While some courts emphasize practicality, such as the New Mexico Supreme Court's recognition of inadequate alternative spaces for the graduation ceremonies[76], others, such as the United States District Court for the District of Connecticut, focus intensely on the religiousness of the space itself.[77]

Further, courts give varying weight to the endorsement, coercion, and *Lemon* tests. Like the *Enfield* court, an intense scrutiny on the religious components of the interior, physical components of the church would formed the basis for the Seventh Circuit's *en banc* opinion in *Doe ex rel. Doe v. Elmbrook School District*.[78]

[73] *Id*. at 188-89.

[74] *Id*. at 201.

[75] *Id*. at 198-99.

[76] Miller v. Cooper, 56 N.M. 355 (1952).

[77] 716 F.Supp.2d 172 (D.Conn. 2010).

[78] Doe *ex rel.* Doe v. Elmbrook Sch. Dist., 687 F.3d 840, 842 (7th Cir. 2012); 716 F.Supp.2d 172 (D.Conn. 2010).

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

A. Factual Background

Elmbrook School District is located in Brookfield, Wisconsin, a western suburb of Milwaukee.[79] The District has two high schools, Brookfield Central and Brookfield East.[80] In 2000, Brookfield Central began holding its graduation ceremony in the main sanctuary of Elmbrook Church, a non-denominational, evangelical Christian church; Brookfield East followed suit in 2002.[81] Additionally, Brookfield Central rented a smaller room in the Church for its senior honors night.[82]

The original idea to hold Brookfield Central's graduation ceremony in the Church came from the officers of the senior class of 2000.[83] They believed the current venue, the school's gymnasium, was "too hot, cramped, and uncomfortable."[84] Further, "those attending were packed in; they had to sit on hard wooden bleachers or folding chairs; and there was no air conditioning."[85] The student officers proposed the idea to hold graduation in the church, which "had more comfortable seats, air conditioning and ample free parking," to the District Superintendent and the entire senior class.[86] The senior class subsequently voted in favor of the proposal.[87] The Principal made the final decision to use the Church, and the Superintendent approved.[88]

---

[79] Doe *ex rel.* Doe v. Elmbrook Sch. Dist., 658 F.3d 710, 734 (7th Cir. 2011), reh'g en banc granted, opinion vacated (Nov. 17, 2011).

[80] *Id*.

[81] *Id*. at 713.

[82] *Id*.

[83] *Id*.

[84] *Id*.

[85] *Id*. at 734.

[86] *Id*.

[87] *Id*.

[88] *Id*.

A similar process took place at Brookfield East in 2002.[89] Between 2002 and 2005, the senior class voted to choose between two or three venues, one of which was always the church.[90] Each time, the Church "invariably emerged the overwhelming favorite."[91] In 2006, the principals of the schools discontinued the "pointless" voting process and continued holding graduation at the Church.[92] The Church charged the School District a "standard rate" between $2,000.00 and $2,200.00 for each graduation ceremony.[93]

The atmosphere of the Church itself was unsurprisingly dominated by Christian imagery and symbols.[94] Crosses and other religious symbols could be found on the exterior and interior of the Church.[95] Upon entering the Church, visitors passed through the Church lobby, which contained tables and stations holding evangelical literature and pamphlets, some of which were titled "young adults," "couples ministry," "middle school ministry," "high school ministry," and "college ministry."[96] Church personnel manned these stations during the 2002 and 2009 graduation ceremonies; in fact, in 2002 they passed out religious literature during the ceremony.[97]

The ceremony itself took place at the front of the Church, where a large Latin cross was fixed to the wall and hung over the dais.[98] While the Church refused to veil the cross during the ceremony, it did agree to remove all non-permanent religious symbols from the dais.[99] During the ceremony, graduating seniors sat in the front and center rows of

[89] *Id*.
[90] *Id*.
[91] *Id*.
[92] Doe *ex rel*. Doe v. Elmbrook School District, 687 F.3d 840, 845 (7th Cir. 2012).
[93] *Id*. at 714.
[94] *Id*. at 715.
[95] *Id*.
[96] *Id*. at 714-15.
[97] *Id*.
[98] *Id*. at 734.
[99] *Id*.

pews of the Church's main level, while guests sat in other pews.[100] Bibles and hymnal books remained in the pews, as well as other religious literature such as a donation envelope and a yellow "Scribble Card for God's Little Lambs."[101]

Objections to the District's decision to hold the graduation ceremony at the Church began in 2001, one year after the first ceremony was held at the Church.[102] Over the years, parents, non-profit organizations and interest groups objected to holding graduation at the Church.[103] In response to these objections, the Superintendent often noted that the District was in the process of obtaining funding for a new field house and for renovations to the school's gymnasium, and that the school could host its graduation ceremony in either location. After several efforts to obtain funding failed, the District finally obtained the necessary funds to build a new field house.[104]After the field house was completed in 2010, both high schools moved their graduation ceremonies to the field house.[105]

The plaintiffs in *Doe ex rel. Doe v. Elmbrook School District* are current and former non-Christian students of Elmbrook School District.[106] They "felt uncomfortable, upset, offended, unwelcome, and/or angry" because of the intense religious atmosphere inside and outside of the Church.[107] The plaintiffs alleged that there were alternative, religiously neutral venues that would have sufficed for the graduation ceremony; though the School District contended none were as attractive as the Church for the price.[108]

[100] *Id*.
[101] *Id*. at 715.
[102] *Id*.
[103] *Id*. at 715-17.
[104] *Id*. at 734.
[105] *Id*.
[106] *Id*.
[107] *Id*. at 717.
[108] *Id*.

B. The District Court's Decision

Noting that "the [Supreme] Court has sidestepped *Lemon* in several Establishment Clause cases,"[109] the District Court used the coercion test, the endorsement test, and the excessive entanglement prong of the *Lemon* test and found no constitutional violation.[110]

In its coercion test analysis, the District Court found that the School District did not impermissibly coerce graduation ceremony attendees.[111] The coercion test prohibits governmental entities from coercing individuals to participate in religion or religious exercises.[112] In *Lee v. Weisman*[113] and *Santa Fe Independent School District v. Doe*,[114] the U.S. Supreme Court struck down the practice of reading a prayer before a high school graduation ceremony and football games, respectively. The District Court in *Doe ex rel. Doe v. Elmbrook School District* distinguished *Lee* and *Santa Fe* because this case involves "exposure to religious symbols" as opposed to "coerced religious participation."[115]

Regarding the excessive entanglement prong of the *Lemon* test, the court in *Doe ex rel. Doe v. Elmbrook School District* noted that the School District maintained complete control of the graduation ceremonies, limited its interaction with the Church to arranging the

---

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

[110] *Id*. at *15.

[111] *Id*. at *10.

[112] Lee v. Weisman, 505 U.S. 577, 587 (1992).

[113] 505 U.S. 577, 587 (1992).

[114] 530 U.S. 290 (2000).

[115] Doe *ex rel.* Doe v. Elmbrook School District, 658 F.3d at 710, 718 (quoting Does 1, 7, 8, 9, individually, 09-C-0409, 2010 WL 2854287, at *9 (E.D. Wis. July 19, 2010) *aff'd sub nom.* Doe *ex rel.* Doe v. Elmbrook Sch. Dist., 658 F.3d 710 (7th Cir. 2011), reh'g en banc granted, opinion vacated (Nov. 17, 2011) and *rev'd and remanded sub nom.* Doe *ex rel.* Doe v. Elmbrook Sch. Dist., 687 F.3d 840 (7th Cir. 2012)).

rental, attempted to have non-permanent religious items removed from the Church, and in no way delegated its authority to the Church.[116] Thus, the court found no violation under the *Lemon* test.[117]

In its endorsement analysis, the court "'assess[ed] the totality of the circumstances' surrounding the event to determine whether an 'objective, reasonable observer, aware of the history and context of the community and forum' would fairly understand the event to be a government endorsement of religion."[118] Ultimately, the Seventh Circuit found that the School District's decision to hold graduation ceremonies in a church "holds symbolic force,"[119] but that a reasonable observer who understood the reasons for holding graduation in the Elmbrook Church, namely the adequate space, modern amenities, close location, and reasonable cost, would not understand the decision to constitute an endorsement of religion.[120]

C. The Seventh Circuit's Three-Judge Panel Decision

The three-judge panel that heard *Doe ex rel. Doe v. Elmbrook School District* on appeal was comprised of Judge Ripple, Judge Flaum, and Chief Judge Easterbrook.[121] Judge Ripple wrote the majority opinion in which Chief Judge Easterbrook joined.[122] Judge

[116] Does 1, 7, 8, 9, individually, 09-C-0409, 2010 WL 2854287, at *14 (E.D. Wis. July 19, 2010) *aff'd sub nom.* Doe *ex rel.* Doe v. Elmbrook Sch. Dist., 658 F.3d 710 (7th Cir. 2011), reh'g en banc granted, opinion vacated (Nov. 17, 2011) and *rev'd and remanded sub nom.* Doe *ex rel.* Doe v. Elmbrook Sch. Dist., 687 F.3d 840 (7th Cir. 2012).

[117] *Id*.

[118] *Id*. at *11 (quoting Books v. Elkhart Cnty, Ind,. 401 F.3d 857, 866-67 (7th Cir. 2005).

[119] *Id*. at *13.

[120] *Id*. at *12-13.

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

[122] *Id*.

Flaum's dissenting opinion formed the basis for what would later be the *en banc* opinion for the entire Seventh Circuit.[123]

The majority opinion conducted its Establishment Clause analysis in two parts: coercion and endorsement.[124] Regarding coercion, the majority found that "the Establishment Clause does not shield citizens from encountering the beliefs or symbols of any faith to which they do not subscribe" and that "graduates are not forced—even subtly—to participate in any religious exercise."[125] The court also noted that the attendees of the graduation ceremony are not forced to take pamphlets or to sit through attempts at proselytization and that the encounter with religion is "purely passive and incidental to attendance at an entirely secular ceremony."[126] Thus, the court found that the passive religious iconography present in Elmbrook Church did not coerce those present to participate in religion or religious exercise.[127]

Regarding endorsement, the court asked whether "a reasonable person, apprised of the circumstances surrounding the [practice]" and "familiar with the history of the government practice at issue" would understand the graduation ceremony to endorse religion.[128] Noting that the church was rented at the suggestion of the graduates themselves, the court found that "an objective observer would understand the religious symbols and messages in the [Church] and on Church grounds to be part of the underlying setting as the District found it rather than as an expression of adherence or approval by the school."[129]

---

[123] *Id*. at 734-40; Doe *ex rel*. Doe v. Elmbrook School District 687 F.3d 840, 842-56. (7th Cir. 2012).

[124] *Id.* at 725-34.

[125] *Id.* at 727 (internal citations omitted).

[126] *Id.*

[127] *Id.* at 728-29.

[128] *Id.* at 730 (quoting Milwaukee Deputy Sheriffs' Ass'n v. Clarke, 588 F.3d 523, 528 (7th Cir. 2009).

[129] *Id.* at 731.

Thus, the three-judge panel found no coercion and no endorsement of religion and therefore held the practice of holding the graduation ceremonies in Elmbrook Church constitutional.[130]

D. The Seventh Circuit's En Banc Decision

Similar to the District Court of Connecticut in *Enfield*, the Seventh Circuit focused its analysis on endorsement and coercion in its *en banc* decision in *Doe ex. rel. Doe v. Elmbrook School District*.

1. The *En Banc* Panel's Endorsement Analysis

The *en banc* decision in *Doe ex. rel. Doe v. Elmbrook School District* found that holding the graduation ceremony in Elmbrook Church impermissibly endorsed religion.[131] Several facts contributed to this finding: "a 15 to 20 foot tall Latin cross," the passing out of religious pamphlets, a poster depicting pop culture icons next to Jesus, religious banners hanging from the ceiling, and pews supplied with Bibles, hymnals, and other religious literature.[132] In general, the court found that the "sheer religiosity of the space created a likelihood that high school students and their younger siblings would perceive a link between church and state."[133]

2. The *En Banc* Panel's Coercion Analysis

The *en banc* decision found that holding the graduation ceremony in Elmbrook Church "carried an impermissible aspect of coercion."[134] Specifically, the *en banc* panel found that holding graduation in the Elmbrook Church was coercive for two reasons. First, present in this case was the concern from *Lee v. Weisman* that "graduation

[130] *Id*. at 734.
[131] Doe *ex rel.* Doe v. Elmbrook Sch. Dist., 687 F.3d 840, 852 (7th Cir. 2012).
[132] *Id*. at 852-53.
[133] *Id*. at 853.
[134] *Id*. at 856.

ceremonies were effectively obligatory even if attendance was technically voluntary."[135] And given that graduation ceremonies were obligatory, the Elmbrook School District violated the principle that "'[n]either a state nor the Federal Government . . . can force nor influence a person to go to or to remain away from church against his will.'"[136]

IV. ANALYSIS OF THE SEVENTH CIRCUIT'S *EN BANC* OPINION

A. The Court Expands, Without Precedent, the Possibility of Finding Unconstitutional Government Endorsement/Coercion by the Religiousness of a Particular Space

The Supreme Court has never found that a school that attempted to *decrease* the degree of religiousness of a particular space violated the Establishment Clause.[137] The majority decision thus expands the concepts of coercion and endorsement of religion into a new realm of Establishment Clause jurisprudence. While each Establishment Clause case "calls for line drawing" and "no fixed, *per se* rule can be framed,"[138] the majority decision in *Doe ex rel. Doe v. Elmbrook School District* applies the coercion and endorsement tests in an entirely new way.

Indeed, the majority mistakes previous Supreme Court precedent where schools increased the religiousness of a previously *secular* space to the facts of this case, where the school district attempted to *decrease* the religiousness of a previously *religious* space. The majority wrote, "If . . . a school cannot create a pervasively religious environment in the classroom . . . it appears overly formalistic to allow

[135] *Id*. at 854.

[136] *Id*. at 855 (alteration in original) (quoting Everson v. Bd. of Educ. of Ewing Twp., 330 U.S. 1, 15 (1947)).

[137] A review of Establishment Clauses cases involving schools yielded findings of unconstitutionality only where schools used religion in a certain way or interacted with a religious institution.

[138] Lynch v. Donnelly, 465 U.S. 668, 678 (1984).

a school to engage in identical practices when it acts through a short-term lease."[139] There, the Seventh Circuit misstated what Elmbrook School District did in this case. Elmbrook School District did not "create a pervasively religious environment" but rather, the District temporarily leased an already-existing religious space for the use of a completely secular activity while removing as much of the religious iconography and imagery as possible.[140] This case would be very different if Elmbrook School District *increased* the religiousness inside the Church. But that is not what occurred here. Conversely, the administration of Elmbrook School District tried to make the atmosphere of the church as religiously-neutral as possible; a fact the Seventh Circuit overlooked in its analysis.

B. The Majority Improperly Applies the Endorsement Test by not using the "Reasonable Observer" Standard

In its endorsement analysis, the Seventh Circuit did not ask whether a *reasonable observer* would perceive holding graduation inside Elmbrook Church as an endorsement of religion.[141] Rather, the Seventh Circuit wrote, "[r]egardless of the purpose of school administrators in choosing the location, the sheer religiosity of the space created a likelihood that *high school students and their younger siblings* would perceive a link between church and state. That is, the activity conveyed a message of endorsement."[142] Justice O'Connor, the author of the endorsement test, expressly rejected this form of subjective analysis.[143] In *Elk Grove Unified School District v. Newdow*, she wrote:

---

[139] Doe *ex rel.* Doe v. Elmbrook School District 687 F.3d 840, 856. (internal citations omitted).

[140] *Id*. at 846.

[141] Salazar v. Buono, 559 U.S. 700, 1824 (2010) (Roberts, J., concurring) ("The endorsement test views a challenged display through the eyes of a hypothetical reasonable observer.").

[142] *Id*. at 853 (emphasis added).

[143] *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 34-35 (2004).

> Nearly any government action could be overturned as a violation of the Establishment Clause if a "heckler's veto" sufficed to show that its message was one of endorsement. 'There is always *someone* who, with a particular quantum of knowledge, reasonably might perceive a particular action as an endorsement of religion."[144]

Thus, by conducting its analysis through the eyes of the high school students and their younger siblings, the Seventh Circuit engaged in the exactly opposite type of analysis that the "reasonable observer" standard requires: whether "an *objective*, reasonable observer, *aware of the history and context of the community and forum in which the religious display appears*, would fairly understand the display to be a government endorsement of religion."[145]

C. The En Banc Opinion Improperly Applies the Coercion Test

The majority used the coercion test in its analysis of *Doe ex. rel. Doe v. Elmbrook School District*.[146] However use of the coercion test was inappropriate in this case, and furthermore, the court conducted the test improperly. First, in the context of public schools, the coercion test has only been applied to cases involving formal religious exercises.[147] For instance, in *Lee*, the Court applied the coercion test to a high school's practice of reading a prayer at its graduation ceremony[148] and in *Santa Fe*, the Court applied the coercion test to a high school's practice of reading a prayer over the public

---

[144] *Id*. at 35 (quoting Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 780 (1995)).

[145] Books v. Elkhart Cnty. Ind, 401 F.3d 857, 867 (7th Cir. 2005) (emphasis added) (internal quotations omitted).

[146] Doe *ex rel.* Doe v. Elmbrook Sch. Dist., 687 F.3d 840, 854-56 (7th Cir. 2012).

[147] Croft v. Perry, 624 F.3d 157, 169-70 (5th Cir. 2010).

[148] Lee v. Weisman, 505 U.S. 577, 587 (1992).

announcement system before a football game.[149] Thus, even applying the coercion test to *Elmbrook* constituted a departure from Establishment Clause jurisprudence, which has limited its application.

Second, the Seventh Circuit relied on its finding of "government endorsement" to subsequently find that such "endorsement" also constituted coercion of religion.[150] In support of this reasoning, the majority cites *Wallace v. Jaffree*.[151] However, because *Wallace* involved a statute authorizing students to use a moment of silence for prayer, a formal religious exercise,[152] the majority's reliance on *Wallace* to distinguish it from *Lee* and *Santa Fe* is unconvincing.

Further, the *en banc* opinion of *Doe ex rel. Doe v. Elmbrook School District* blurs the line between the endorsement and coercion tests. In its opinion, the majority states, "the practice of holding high school graduation ceremonies in the Elmbrook Church sanctuary conveys an impermissible message of endorsement. Under the circumstances here, the message of endorsement carried an impermissible aspect of coercion."[153] However, as Judge Easterbrook notes in his dissenting opinion, "the majority does not explain how endorsement coerces."[154] And indeed, it is difficult to reconcile cases like *Lee* and *Santa Fe* where prayers were read aloud at a graduation ceremony and a high school football game,[155] with the fact that the Elmbrook School District's entire graduation ceremony was secular in nature.[156]

[149] Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 299 (2000).

[150] 687 F.3d at 856.

[151] *Id*. at 855 (citing *Wallace v. Jaffree*, 472 U.S. 38 (1985)).

[152] *Wallace v. Jaffree*, 472 U.S. 38, 40 (1985).

[153] *Id*. at 856.

[154] 687 F.3d at 870 (Easterbrook, J., dissenting).

[155] Lee v. Weisman, 505 U.S. 577 (1992); Santa Fe Indep. Sch. Dist v. Doe, 530 U.S. 290 (2000).

[156] 687 F.3d at 842.

D. The En Banc Opinion Leaves No Room for Practicality

Suppose that Elmbrook School District was not located in a suburb of Milwaukee, but was instead located in a rural part of central Wisconsin where Elmbrook Church was the only space that could adequately and comfortably hold the graduation ceremony attendees. Would the "pervasively religious" atmosphere of the Church still constitute government endorsement and coercion of religion if it were the only available option? Unlike the analysis conducted by the New Mexico Supreme Court in *Miller v. Cooper*,[157] the majority opinion does not leave room for this possibility, nor does it acknowledge the rigidity of its holding. Indeed, there is ample evidence in the record showing the inadequate functionality of the school's gymnasium.[158] While the *en banc* opinion acknowledged this fact in the "Facts" section,[159] it failed to consider it in its analysis.

CONCLUSION

Without clear direction from the U.S. Supreme Court, courts are left guessing how to correctly apply the *Lemon*, coercion, and endorsement tests. The inconsistent results between the District Court, three-judge panel, and *en banc* panel of the Seventh Circuit in *Doe ex rel. Doe v. Elmbrook School District* exemplify this principle. Courts engage in exhaustive analyses, but are left with inconsistent and

[157] 56 N.M. 355 (1952).

[158] Doe *ex rel.* Doe v. Elmbrook Sch. Dist., 687 F.3d 840, 844 n.2 ("In September 1999, the senior class officers sent a letter to Superintendent Gibson making their case for the Church: 'We request that the site of the ceremony be changed to an auditorium in Elmbrook Church . . . The seating in the Brookfield Central Gymnasium is very limited, causing the atmosphere to be very busy and perhaps even chaotic. On top of the crowding, the temperature in the Gymnasium gets extremely hot in the month of June. We feel that the Elmbrook Church will overcome the limitations of space and temperature control, providing ample comfortable seating and an air-conditioned room. The cushioned seats are also much more comfortable in comparison to the hard, wooden bleachers available at school.').

[159] *Id*. at 844.

conflicting results. Here, the Seventh Circuit's endorsement analysis took on a subjective viewpoint and its coercion analysis was stretched beyond the area of a religious exercise. Until the U.S. Supreme Court either formulates a comprehensive Establishment Clause analysis or directly addresses the constitutionality of holding graduation ceremonies in religious venues, it is likely that courts will continue to make inconsistent rulings.