

*DOE V. ELMBROOK SCHOOL DISTRICT AND THE
IMPORTANCE OF REFOCUSING
ESTABLISHMENT CLAUSE JURISPRUDENCE*

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ABSTRACT—Establishment Clause jurisprudence is notoriously convoluted. In a recent case, *Doe v. Elmbrook School District*, the Seventh Circuit found unconstitutional a public school district's practice of conducting high school graduation ceremonies in the sanctuary of an evangelical Christian church. The case illustrated the particular difficulty of assessing the constitutionality of government activity that takes place in a house of worship. This Note suggests that refocusing Establishment Clause jurisprudence on liberty of conscience is a historically appropriate and simpler way of measuring potential Establishment Clause violations, both when religion invades government and when government goes to church.

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I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should “make no law respecting an establishment of religion, or prohibiting the free exercise thereof,” thus building a wall of separation between Church & State.

—Thomas Jefferson, *Letter to the Danbury Baptist Association* (1802)[†]

INTRODUCTION

He attended worship services in the Capitol building,¹ but Thomas Jefferson famously interpreted the First Amendment as “a wall of separation between church and state.”² Although not all scholars agree that Jefferson’s interpretation of the Establishment Clause³ is accurate,⁴ his idea of the wall of separation endures, and just how high or thick or impermeable that “wall” ought to be has eluded scholars, jurists, and other state actors for more than two hundred years.⁵ Today, most Establishment

[†] PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 1 (2002) (quoting Letter from Thomas Jefferson to Messrs. Nehemiah Dodge, Ephraim Robbins & Stephen S. Nelson, a Comm. of the Danbury Baptist Ass’n in the State of Conn. (Jan. 1, 1802) (quoting U.S. CONST. amend. I), in Daniel L. Dreisbach, “Sowing Useful Truths and Principles”: *The Danbury Baptists, Thomas Jefferson, and the “Wall of Separation,”* 39 J. CHURCH & ST. 455, 468–69 (1997) (footnote omitted)).

¹ William A. Glaser, Comment, *Worshiping Separation: Worship in Limited Public Forums and the Establishment Clause*, 38 PEPP. L. REV. 1053, 1054 (2011).

² Thomas E. Buckley, S.J., *The Religious Rhetoric of Thomas Jefferson*, in THE FOUNDERS ON GOD AND GOVERNMENT 53, 71 (Daniel L. Dreisbach et al. eds., 2004).

³ “Congress shall make no law respecting an establishment of religion” U.S. CONST. amend. I.

⁴ See, e.g., Robert G. Natelson, *The Original Meaning of the Establishment Clause*, 14 WM. & MARY BILL RTS. J. 73, 77–78 (2005) (arguing that relying on Madison’s and Jefferson’s philosophies to interpret the Religion Clauses is “wildly inaccurate” and Jefferson’s direct role in the drafting and adoption of the First Amendment was “rather insignificant”); *contra* *Everson v. Bd. of Educ.*, 330 U.S. 1, 10–13 (1947).

⁵ The proscriptions embodied in the Establishment Clause apply equally to state legislatures under the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

Clause issues arise when religion enters the governmental sphere—for example, in the context of prayer in public schools,⁶ government funding for parochial schools,⁷ and displays of the Ten Commandments in courthouses⁸ or public parks.⁹

But the Establishment Clause applies equally to government activity in church. Just as religion can invade government, so, too, can the government violate the Establishment Clause by entering religions' hallowed ground. In the summer of 2012, the Seventh Circuit held in *Doe v. Elmbrook School District* that the Establishment Clause forbids a public high school from conducting its graduation ceremony “in the sanctuary of a non-denominational Christian church.”¹⁰ The case highlighted the question of when a state entity can and cannot conduct government business in a house of worship. The Seventh Circuit did not articulate a clear standard for resolving that question.

The government's ability to conduct business in a house of worship affects more than just the location of public schools' commencement ceremonies, as in *Elmbrook School District*. Many churches function as polling places.¹¹ Judges frequently order defendants to participate in overtly religious twelve-step programs.¹² The list of government activities occurring in churches goes on. Do these practices also violate the Establishment Clause? Does allowing graduations and other civic ceremonies to take place in houses of worship give too much control to private religious entities? Should a court ever bless government entities acting in religious spaces?

⁶ See, e.g., *Lee v. Weisman*, 505 U.S. 577, 580, 599 (1992) (holding that clergy offering prayer at an official public school graduation ceremony violated the Establishment Clause).

⁷ See, e.g., *Lemon v. Kurtzman*, 403 U.S. 602, 609–11 (1971) (finding the First Amendment to prohibit a Pennsylvania statute providing public funds for nonpublic schoolteacher “salaries, textbooks, and instructional materials”).

⁸ See, e.g., *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 851–58 (2005) (approving of the grant of a preliminary injunction barring the display of large, readily visible copies of the Ten Commandments in two county courthouses in the state of Kentucky). Interestingly, a frieze in the Supreme Court of the United States' courtroom featuring historical lawmakers includes a depiction of the Ten Commandments. *Id.* at 874. The constitutionality of that particular display has not been contested in court.

⁹ See, e.g., *Van Orden v. Perry*, 545 U.S. 677, 681–83 (2005) (plurality opinion) (concluding that the Establishment Clause permitted a display of the Ten Commandments on the grounds of the Texas State Capitol).

¹⁰ 687 F.3d 840, 843 (7th Cir. 2012) (en banc).

¹¹ See, e.g., *City of Chicago Tentative/Preliminary List of Polling Places for the March 18, 2014 Primary Election*, BOARD OF ELECTION COMMISSIONERS FOR THE CITY OF CHICAGO (2013), available at <http://perma.cc/CT4G-FUDN>.

¹² See Derek P. Apanovitch, Note, *Religion and Rehabilitation: The Requisition of God by the State*, 47 DUKE L.J. 785, 785–86, 790–91 (1998).

This Note suggests that the Establishment Clause should be read in concert with the Free Exercise Clause¹³ and offers an approach to determining when government activity can and cannot take place in church. Reading the Establishment Clause as forbidding unreasonable impingement upon liberty of conscience offers a historically accurate and widely applicable approach to future Establishment Clause cases arising in houses of worship and elsewhere. This reading is consistent with the principles the Establishment Clause was originally meant to protect—namely, the freedom of religious conscience, which “was the first individual right to be widely regarded as inalienable.”¹⁴

Part I closely examines *Doe v. Elmbrook School District* to demonstrate the difficulty of navigating current Establishment Clause jurisprudence. This look at *Elmbrook School District* highlights the particular risk of impinging upon liberty of conscience when government activity occurs in a house of worship. Part I then looks briefly at current trends in religious and civic participation in the United States, suggesting that houses of worship are becoming the best, and in some cases, only available spaces for traditional civic activities. Next, Part II provides a broad overview of recent Establishment Clause jurisprudence. Part III explores the origins of the Establishment Clause and the Founders’ justifications for and perceptions of the Clause, as well as the protections it was meant to afford. Finally, Part IV articulates a way to read the Establishment Clause in concert with the Free Exercise Clause to focus on protecting liberty of conscience. Courts should interpret both Clauses to protect liberty of conscience—the freedom of thought, morality, and faith. It then considers whether and when the Establishment Clause permits state activity in church, concluding that when a government activity occurring in a house of worship restricts a reasonable person’s ability to make choices about matters of morality and religion, such activity violates the Establishment Clause.

I. GOVERNMENT IN CHURCH

The text of the Establishment Clause forbids Congress from making any law “respecting an establishment of religion.”¹⁵ While the most attention-grabbing Establishment Clause cases involve religion entering a

¹³ “Congress shall make no law . . . prohibiting the free exercise [of religion] . . .” U.S. CONST. amend. I.

¹⁴ Steven G. Calabresi et al., *State Bills of Rights in 1787 and 1791: What Individual Rights Are Really Deeply Rooted in American History and Tradition?*, 85 S. CAL. L. REV. 1451, 1470 (2012) (citing Barry Alan Shain & Rogers M. Smith, *Introduction* to THE NATURE OF RIGHTS AT THE AMERICAN FOUNDING AND BEYOND 1, 2 (Barry Alan Shain ed., 2007)).

¹⁵ U.S. CONST. amend. I.

secular government environment such as a school,¹⁶ when the government goes to church, the values underlying the Establishment Clause are especially in danger of being undermined. Specifically, government activity in a house of worship risks compromising the principle of liberty of conscience embodied in the Establishment Clause.¹⁷ With a petition for a writ of certiorari pending in the case,¹⁸ *Doe v. Elmbrook School District* provides one recent example of government activity in church. The case calls for a broader discussion of what the Establishment Clause requires. Whether religion enters a government sphere or the government conducts some business in a house of worship, the Establishment Clause's demand is the same: protection of individuals' freedom of conscience. Examining government activity in church can help clarify the doctrinal confusion currently masking the purity of the First Amendment. Doing so will help to return the unmoored Establishment Clause doctrine to its original theory about the relationship between government and its people: government should not prescribe a particular religion or practice thereof.

A. A Close Look at *Doe v. Elmbrook School District*

In *Doe v. Elmbrook School District*, a divided en banc Seventh Circuit found unconstitutional the practice of conducting a public high school's graduation ceremonies in the sanctuary of a nondenominational, evangelical Christian church.¹⁹ The Does, a group of non-Christian students and their parents,²⁰ challenged the school district's nearly decade-old practice of holding high school graduation in the Elmbrook Church under the Establishment Clause.²¹ Although the court claimed that its decision was not "a broad statement about the propriety of governmental use of church-owned facilities,"²² ultimately, *Elmbrook School District* highlights the issue of governmental use of religious facilities and raises—but does

¹⁶ See, e.g., *Lee v. Weisman*, 505 U.S. 577, 580, 599 (1992) (finding that prayers delivered by members of clergy at a public school graduation ceremony violated the Establishment Clause).

¹⁷ See *infra* Part III.

¹⁸ Petition for a Writ of Certiorari, *Elmbrook Sch. Dist. v. Doe*, No. 12-755 (U.S. filed Dec. 20, 2012).

¹⁹ 687 F.3d 840, 843–44 (7th Cir. 2012) (en banc). The court notes a discrepancy between the parties about how to properly label the space in which the graduation ceremonies took place, but the room is clearly a religious venue in which the Elmbrook Church "holds its weekend worship services." *Id.* at 844 n.1.

²⁰ *Id.* at 847–48.

²¹ *Id.* at 842, 844–45.

²² *Id.* at 843 ("We do not speculate whether and when the sanctuary of a church, or synagogue, or mosque could hold public school ceremonies in a constitutionally appropriate manner."); *but see id.* at 862 (Ripple, J., dissenting) ("I cannot accept, as a threshold matter, the majority's view that its holding today is only a fact-specific application of these general principles and that this case is nothing more than the judicial analogue of an excursion ticket 'good for this day and train only.'" (quoting *Smith v. Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting))).

not clearly answer—the question: When, if ever, may the government constitutionally conduct business in a church?²³

Prior to the en banc hearing, the district court and a three-judge panel of the Seventh Circuit had both found that the school district's practice of holding high school graduation ceremonies at Elmbrook Church did *not* violate the Establishment Clause.²⁴ The en banc Seventh Circuit then reversed, finding that the school district's controversial²⁵ custom of renting²⁶ the church facilities for graduation ceremonies and festivities²⁷ “convey[ed] an impermissible message of endorsement” accompanied by impermissible coercion in violation of the Establishment Clause.²⁸

The majority found the location of the graduation ceremony unconstitutional under the endorsement test and the coercion test. Writing for the en banc majority, Judge Flaum focused on the “indisputably and emphatically Christian” atmosphere of Elmbrook Church.²⁹ The court made several references to the “proselytizing elements” at Elmbrook Church, such as banners appealing to children to join school ministries and a 15–20 foot tall Latin cross—a preeminent symbol of Christianity that is “pregnant with expressive content.”³⁰ This inventory of symbols added up, according to the majority, to an impermissible endorsement of religion as measured by a reasonable observer, in violation of the endorsement test interpretation of the Establishment Clause.³¹ The court did not provide a clear explanation of how this exposure to religious symbols and imagery “established” religion in violation of the First Amendment.³²

²³ Note that throughout this Note the term “church” is used generally to include cathedrals, churches, gurdwaras, mosques, synagogues, temples, and other houses of worship.

²⁴ *Elmbrook Sch. Dist.*, 687 F.3d at 842; *Doe v. Elmbrook Sch. Dist.*, 658 F.3d 710, 712 (7th Cir.), *rev'd en banc*, 687 F.3d 840 (7th Cir. 2011).

²⁵ *Elmbrook Sch. Dist.*, 687 F.3d at 847 (describing the almost immediate negative reaction to the practice coming from parents, the Freedom from Religion Foundation, the ACLU of Wisconsin, the Anti-Defamation League, and Americans United for Separation of Church and State).

²⁶ The District paid the Church a standard rental rate of \$2000–\$2200 for each graduation ceremony and \$500–\$700 for honors night. The money came from student fundraisers as well as the District's general revenues. *Id.* at 845.

²⁷ One of the District's two major high schools used a chapel in Elmbrook Church “for its senior honors night.” *Id.* at 844.

²⁸ *Id.* at 856.

²⁹ *Id.* at 845–47 (inventorying the Christian references, symbols, and interactions that students and guests saw and experienced during graduation festivities).

³⁰ *Id.* at 850–52 (quoting *Texas v. Johnson*, 491 U.S. 397, 405 (1989)).

³¹ *Id.* at 853–54; *see Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring); *infra* Part II.

³² *See Elmbrook Sch. Dist.*, 687 F.3d at 876 (Posner, J., dissenting) (“The idea that mere exposure to religious imagery, with no accompanying proselytizing, is a form of religious establishment has no factual support, as well as being implausible.”).

The majority also found the school district's use of Elmbrook Church to be impermissibly coercive³³ under the coercion test articulated in *Lee v. Weisman*³⁴ and *Santa Fe v. Doe*.³⁵ Both of those cases focused on strong-armed participation in a religious exercise—in those instances, prayer—as a violation of the Constitution.³⁶ Although it called endorsement and coercion “two sides of the same coin,”³⁷ the *Elmbrook School District* majority did not clearly articulate how the school district's perceived endorsement of religion translated into coerced participation in a religious exercise. The ceremony at issue in *Elmbrook School District* did not involve overt religious activity (such as prayer), and the graduation ceremony itself was admittedly secular.³⁸ Nevertheless, the majority found the practice unconstitutional under *Lee* and *Santa Fe*.³⁹ In *Elmbrook School District*, the visibility of religious iconography and presence of church staff members in the “proselytizing environment” during the graduation ceremonies were foundational to the court's reasoning.⁴⁰

Judge Ripple, joined by Chief Judge Easterbrook and Judge Posner, dissented. He took particular issue with the majority's analysis under the coercion test.⁴¹ Judge Ripple argued that the majority's reliance on a detailed account of the religious symbols in the Elmbrook Church suggested that a religious entity would have to become “a vanilla version of its real self” to pass the majority's version of both the endorsement and coercion tests.⁴² The dissenters found *Lee* and *Santa Fe* distinguishable on the grounds that the graduation ceremony at issue in *Elmbrook School District* did not involve sponsorship, endorsement, or coercion of any religious activity.⁴³ Judge Ripple doubted that students would “perceive the

³³ *Id.* at 854 (majority opinion).

³⁴ 505 U.S. 577, 593–95, 598–99 (1992) (invalidating a practice of including prayers at high school graduation ceremonies on the grounds that participation was not truly voluntary and therefore constituted coerced participation in a religious exercise).

³⁵ *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 301 (2000) (holding unconstitutional student-led prayer at high school football games).

³⁶ *Id.* at 294; *Lee*, 505 U.S. at 580.

³⁷ See *Elmbrook Sch. Dist.*, 687 F.3d at 855–56; see also *id.* at 870 (Easterbrook, C.J., dissenting) (criticizing the majority on this point).

³⁸ *Id.* at 864 (Ripple, J., dissenting).

³⁹ *Id.* at 855 (majority opinion).

⁴⁰ See *id.*

⁴¹ *Id.* at 862 (Ripple, J., dissenting) (predicting that the majority's holding “may result in another form of coercion—the coercion of religious entities to conform to a judicially crafted notion of an acceptable ‘civil religion’”).

⁴² *Id.* at 866. Judge Ripple anticipated that future applications of the majority's approach would lead to the creation of a “civil religion” and a society in which even incidental contact with a “pervasively religious” organization would amount to impermissible coercion. *Id.* at 867.

⁴³ *Id.* at 863–64 (“[I]t certainly cannot be maintained that, like in *Lee* and in *Santa Fe*, [the graduating students and their guests] were coerced into participating, actively or passively, in any religious ceremony or activity.”).

same endorsement and the same coercion from the *incidental* presence of iconography, ornamentation and literature” as they would from the display of the Ten Commandments or the saying of a prayer in a public school classroom.⁴⁴ He read the majority’s combined endorsement–coercion approach as overly broad (without “principled limitation”) and as inappropriately requiring judges to determine whether “a religious institution is too ‘pervasively religious’ to make any participation . . . between the institution and the civil community unconstitutionally coercive.”⁴⁵

Judge Ripple’s dissent disagreed with the majority’s endorsement test analysis, too. The court’s repeated references to the “pervasively” religious atmosphere and “proselytizing” nature of the Elmbrook Church setting indicated that perhaps a “less religious-looking” church (e.g., a Quaker meeting hall) would, in the majority’s view, be a constitutionally acceptable setting in which to hold a public high school graduation ceremony.⁴⁶ This quantification of religiosity is new in Establishment Clause jurisprudence and appears to go beyond the demands of the endorsement test.⁴⁷ Boiling down the Establishment Clause to ask “how religious is too religious?” is a vague, discretionary standard that fails to provide clear guidance for future cases. Whether such an assessment of “sheer religiosity”⁴⁸ would be limited to this type of momentous (and essentially mandatory) occasion is unclear. Graduation ceremonies are certainly not the only significant occasions in civil life, nor are they the only “effectively obligatory”⁴⁹ events in the life of a high school student.⁵⁰ The majority did not explicitly limit its approach to the facts of the case, leaving open many questions about whether and how it would apply to other areas of public life, such as voting or small-town government meetings in houses of worship.

In ruling against Elmbrook School District, the court emphasized its desire to avoid formalism in its application of precedents arising from situations in which religion came to the schoolhouse (e.g., in the form of classroom prayers) to this instance of a school activity occurring in a

⁴⁴ *Id.* at 864 (emphasis added).

⁴⁵ *Id.* at 866, 868 (“[T]oday’s holding requires that the state assume the affirmative obligation of avoiding any association with a ‘pervasively religious’ organization when that association would require an individual to be exposed—even incidentally and passively—to expressions of that organization’s ‘religiosity.’”).

⁴⁶ *See id.* at 866–67.

⁴⁷ *See id.* at 866. In his dissenting opinion, Judge Ripple questioned whether this approach would mean that the “sheer religiosity” of symbols like a schoolteacher’s Star of David necklace or a Muslim teacher’s headscarf would constitute government endorsement of religion as well. *Id.* at 867.

⁴⁸ *Id.* at 853 (majority opinion).

⁴⁹ *Id.* at 854.

⁵⁰ *See id.* at 867 (Ripple, J., dissenting) (“What principled distinction does the court suggest to ensure that the approach it establishes in this case will not spread its dominion . . . ?”).

church.⁵¹ But the dissenters disagreed quite emphatically with the majority's analogy to bringing church to the schoolhouse;⁵² they preferred instead to characterize the school district as a very temporary lessee of Elmbrook Church.⁵³ The dissenters further argued that following the approach of this decision, judicial determination of whether a house of worship is "too religious" (such that it is "pervasively religious" and therefore violates the Establishment Clause as the location of a government activity) could easily lead to governmental preference for one "safe" or less aggressive religion over another.⁵⁴ Such a preference (or "a jurisprudence of church furnishings"⁵⁵) is precisely one of the outcomes that the Establishment Clause is designed to prevent.

The way in which *Doe v. Elmbrook School District* will impact future cases (or choice of graduation venues) need not be as dire as the dissent predicted. As this discussion demonstrates, trying to work through the web of Supreme Court precedents and various tests used to interpret the Establishment Clause can be duplicative and confusing in a given case. Turning back to the original purposes of the Clause and its authors' intentions may provide a more consistent approach to separating church and state and elucidate whether the Establishment Clause ever permits state activity in a house of worship.⁵⁶ Developing a more consistent approach is especially important as the likelihood of government activity occurring in church increases.

B. An Increasing Likelihood of Government Going to Church

Founders' comments and working drafts of what became the First Amendment suggest that the Establishment Clause was designed to protect

⁵¹ *Id.* at 856 (majority opinion) (citations omitted) ("[I]f constitutional doctrine teaches that a school cannot create a pervasively religious environment in the classroom, or at events it hosts, it appears overly formalistic to allow a school to engage in identical practices when it acts through a short-term lessee.").

⁵² *See, e.g., id.* at 874 (Posner, J., dissenting) ("It will not do to equate school activity at a church to church activities at a public school.").

⁵³ *See, e.g., id.* at 865 (Ripple, J., dissenting) (making several references to the Church as a "landlord" and the District as a "tenant"); *see also id.* at 874 (Posner, J., dissenting) ("The difference between a public school's using a church two or three hours a year and its using it a thousand-odd hours a year is one of degree rather than of kind, but differences of degree are inescapable grounds of legal distinctions.").

⁵⁴ *See id.* at 868–69 (Ripple, J., dissenting); *see also id.* at 877–78 (Posner, J., dissenting) (predicting that if Elmbrook Church were not evangelical but instead a barer New England Congregational church the outcome of the case would change).

⁵⁵ *Id.* at 878 (Posner, J., dissenting).

⁵⁶ *See* Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CALIF. L. REV. 673, 675 (2002) ("Only if we know why we want to separate church and state will we be able to give consistent, defensible answers to doctrinal questions about how we ought to go about separating church and state.").

individual liberty of conscience—freedom of faith and morality.⁵⁷ Under this reading, freedom from government-induced participation in a religious exercise is the cornerstone of what the Establishment Clause protects. If this is true, then can government activity occur in houses of worship so long as it does not involve religious exercises? If the government may conduct business in religious spaces, does that make the church just another organ of the state? What if a high school student or voter or member of a civic association objects because his religion does not allow him to enter a certain type of religious building? Couldn't such a religious transgression itself be characterized as a religious act? Already the streamlined “no coerced religious activity” interpretation of the Establishment Clause seems oversimplified and faces questions without easy or uniform answers.

One alternative possibility is that the constitutionality of government activity taking place in a religious space depends in part upon the availability of secular spaces that could serve the same function. The Seventh Circuit suggested as much in *Doe v. Elmbrook School District* when it stated, “[I]f a church sanctuary were the only meeting place left in a small community ravaged by a natural disaster, we would confront a very different case.”⁵⁸ A natural disaster, however, is not the only possible reason a church would be the only available forum: secular spaces that can host events of the magnitude of a high school graduation or presidential election-day polling are not as common as they once were. Participation in traditional secular, civic organizations is declining.

The Establishment Clause demands a very fact-specific inquiry in each case. Some research suggests that the facts in an increasing number of cases may reveal a lack of secular facilities in which to conduct a range of government activities—events like school graduations, referenda or caucus meetings, park district classes, and voting. In some communities, government activities that once took place in a VFW hall or at a Lions Club post may now only be feasible in a “megachurch,” of which there are about 1600 in the United States today.⁵⁹ The average seating capacity of a megachurch⁶⁰ is larger than many secular facilities, particularly in small towns.

Simultaneously, participation in traditional civic and community organizations is declining. “[A]ctive involvement in community

⁵⁷ See *infra* Part III.

⁵⁸ 687 F.3d at 843–44.

⁵⁹ See *Fast Facts About American Religion*, HARTFORD INST. FOR RELIGION RES., http://hrr.hartsem.edu/research/fastfacts/fast_facts.html#mega (last visited Nov. 28, 2013). “Megachurch” is characterized in part as having a congregation of more than 2000 people in attendance weekly. *Id.*

⁶⁰ In a survey of 304 megachurches, the average seating capacity of the churches’ largest sanctuaries was “1,778, with a median of 1,500.” WARREN BIRD, LEADERSHIP NETWORK, & SCOTT THUMMA, HARTFORD INST. FOR RELIGION RESEARCH, A NEW DECADE OF MEGACHURCHES: 2011 PROFILE OF LARGE ATTENDANCE CHURCHES IN THE UNITED STATES 4–5 (2011).

organizations” fell by 45% between 1985 and 1994.⁶¹ Between 1950 and 1997, 4-H, “the nation’s largest youth development organization,”⁶² experienced a 26% decline in membership.⁶³ The global service network Lions Club International lost 58% of its members between 1967 and 1997.⁶⁴ The Masons, one of the oldest civic associations in the country (dating from 1733), lost a whopping 71% of their members between 1927 and 1997.⁶⁵ Together, these concurrent trends indicate that as civic associations shrink and lose their physical presences and megachurches swell in congregation size and overall numbers, the physical spaces available for large-group gatherings are increasingly religious. These trends suggest that courts may face an increasing number of cases like *Doe v. Elmbrook School District*, which arose because the school lacked a large enough air-conditioned space to host graduation. Although secular spaces were available for the Elmbrook graduation ceremonies,⁶⁶ such alternatives will not be available in every community. Thus, the need for a clearer standard regarding when state activity may constitutionally occur in a house of worship is ever growing. In the face of the changing landscape of religious and secular participation, understanding the Establishment Clause as a safeguard of liberty of conscience is especially important, because physical intermingling of state activity and religious space may occur with more and more frequency.

1. *Other Examples of Government Activity in Church.*—In *Everson v. Board of Education*, the Supreme Court asserted, “Neither [a state nor the federal government] can force nor influence a person to go to or to remain away from church against his will”⁶⁷ Yet there are plenty of examples where people *are* forced to go to church—for instance, to exercise their constitutional right to vote, to comply with a court order to participate in a twelve-step rehabilitation program, or to participate in an event they are effectively required to attend, as was the case in *Elmbrook School District*. Are these blatant violations of the Establishment Clause?

⁶¹ ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 60 (2000).

⁶² *About 4-H*, 4-H, <http://www.4-h.org/about> (last visited Nov. 28, 2013).

⁶³ PUTNAM, *supra* note 61, at 438.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 844 (7th Cir. 2012) (en banc), *petition for cert. filed*, No. 12-755 (U.S. Dec. 20, 2012).

⁶⁷ 330 U.S. 1, 15 (1947).

a. *Voting: “The defining way that citizens participate in governing.”*⁶⁸—At least two federal circuit courts of appeals have allowed governments to use churches as polling places.⁶⁹ Additionally, several state statutes explicitly permit the use of religious spaces for polling, so long as any objector is allowed to vote by absentee ballot.⁷⁰ In his concurring opinion in *Elmbrook School District*, Judge Hamilton distinguished voting from the impermissible high school graduation ceremony on several points. First, he noted that voting typically occurs “in non-consecrated parts of the church,” in contrast to the graduation ceremony, which took place in the sanctuary of Elmbrook Church.⁷¹ Second, churches are just some of the wide variety of public and private spaces in which voting occurs,⁷² whereas the graduation occurred in only one location. Finally, Judge Hamilton distinguished the private, individual act of voting in a voting booth from “a symbolic rite of passage” (like the graduation ceremony) and asserted that the risk of government endorsement is diminished in the former situation.⁷³

Judge Hamilton failed to account for the possibility that being in a church has a psychological effect on voters’ preferences.⁷⁴ It is not clear that even if there were a measureable psychological effect, however, it would constitute coercion on the part of the government because casting a ballot would not be a religious act. Still, courts should consider whether churches as polling places commandeer individuals’ liberty of conscience. In doing so, they should be especially cognizant of the important place voting holds in American democracy and history as well as the possibility that casting one’s first ballot at age eighteen is its own rite of passage into adult citizenship. Courts should also recognize that voters cannot anticipate the impact the venue will have on the votes they cast when deciding whether to vote absentee or in person. The rise in early and absentee voting⁷⁵ does not diminish the constitutional rights or concerns of those who continue to vote in person on Election Day.

⁶⁸ *Elmbrook Sch. Dist.*, 687 F.3d at 860 (Hamilton, J., concurring).

⁶⁹ See *Otero v. State Election Bd.*, 975 F.2d 738, 739 (10th Cir. 1992); *Berman v. Bd. of Elections*, 420 F.2d 684, 686 (2d Cir. 1969) (per curiam).

⁷⁰ See, e.g., 10 ILL. COMP. STAT. ANN. 5/19-1, 2 (West 2010 & Supp. 2013) (permitting all registered Illinois voters to vote by absentee ballot).

⁷¹ *Elmbrook Sch. Dist.*, 687 F.3d at 859–60 (Hamilton, J., concurring).

⁷² *Id.* at 860.

⁷³ *Id.*

⁷⁴ See Jeremy A. Blumenthal & Terry L. Turnipseed, *The Polling Place Priming (PPP) Effect: Is Voting in Churches (or Anywhere Else) Unconstitutional?*, 91 B.U. L. REV. 561, 566 (2011).

⁷⁵ See Padmananda Rama, *Record Number of Early Votes Expected Ahead of Election Day*, NPR (Sept. 24, 2012, 5:43 PM), <http://www.npr.org/blogs/itsallpolitics/2012/09/24/161701153/record-number-of-early-votes-expected-ahead-of-election-day>.

If “voting is the method by which we ‘share in the sovereignty of the state’ and which ‘ought to stand foremost in the estimation of the law,’”⁷⁶ courts should jealously guard it from a government-sponsored religious influence. With due respect to the march of time, exercising the right of suffrage is more consequential than high school graduation. That does not mean that polling and graduation ceremonies occurring in churches deserve separate “tests,” but rather that the inquiry about polling should be relatively more searching. As Chief Judge Easterbrook put it:

If graduation in a church is forbidden because renting a religious venue endorses religion, and if endorsement is coercive, then renting a religious venue for voting must be equally unconstitutional.

....

It is easier to justify graduation in a church than voting in a church. No one should feel obliged by conscience or faith to give up his influence in governance—and that’s what voting represents.⁷⁷

For these reasons, it should not be easier for polling to take place in a church than for a public high school graduation ceremony to take place there. Although high school graduation is “an integral part of American cultural life”⁷⁸ and “[e]veryone knows that in our society and in our culture high school graduation is one of life’s most significant occasions,”⁷⁹ voting represents the sole means by which most Americans participate in their own governance. Voting is a sacrosanct democratic activity. If and when polling takes place in a house of worship, judges ought to be particularly sensitive to the potential for influence on voters’ choices. The setting may impinge upon the conscience of the individual and the free choice that is the foundation of a democratic vote. All instances of government activity occurring in a house of worship should be analyzed within a framework in which the Establishment Clause is the protector of freedom of conscience.

b. Twelve steps over the line?—Another example of an area in which government commonly intermingles with religion is court-mandated participation in drug or alcohol addiction recovery programs. The best known (and arguably, most effective⁸⁰) approaches are the twelve-step programs administered by Alcoholics Anonymous (AA) and its offspring, Narcotics Anonymous (NA). Both have their origins in Christianity and are overtly religious models for addiction recovery.⁸¹ How can courts

⁷⁶ *Elmbrook Sch. Dist.*, 687 F.3d at 868 (Ripple, J., dissenting) (quoting 3 THE PAPERS OF ALEXANDER HAMILTON 544–45 (Harold C. Syrett & Jacob E. Cooke eds., 1962)).

⁷⁷ *Id.* at 871–72 (Easterbrook, C.J., dissenting).

⁷⁸ *Lee v. Weisman*, 505 U.S. 577, 583 (1992).

⁷⁹ *Id.* at 595.

⁸⁰ Apanovitch, *supra* note 12, at 786.

⁸¹ See *Kerr v. Farrey*, 95 F.3d 472, 480 (7th Cir. 1996) (“A straightforward reading of the twelve steps shows clearly that the steps are based on the monotheistic idea of a single God or Supreme

constitutionally mandate participation in such programs? As at least one district court has found, “Although AA is not a traditional form of religious worship, the First Amendment applies to ‘any religious activit[y] or institution[], whatever [it] may be called, or whatever form [it] may adopt to teach or practice religion.’”⁸²

According to some courts and commentators, judges cannot properly order participation in AA,⁸³ at least not without offering completely secular alternatives.⁸⁴ These courts insist that both the endorsement test and the coercion test prohibit mandatory participation in such twelve-step programs as the only rehabilitative option.⁸⁵ Requiring secular alternatives comports with the understanding of the Establishment Clause as the protector of freedom of conscience. This dictate parallels the provisions in some state statutes that allow voters who object to casting their ballots in a house of worship to vote by absentee ballot instead. Though voting represents the fundamental way in which citizens participate in their democratic government, addiction rehabilitation represents an intensely personal, self-reflective process. During that sensitive, searching process, individuals are particularly vulnerable to influence. In that situation, the government should be particularly wary of influencing rehabilitative program participants and their understanding of or belief in God. Courts, too, should be especially sensitive to Establishment Clause concerns in that context.

II. THE CURRENT STATE OF ESTABLISHMENT CLAUSE DOCTRINE

To assess the constitutionality of government activities taking place in houses of worship, judges need both a clearer understanding of the motivations behind the Establishment Clause and a clearer articulation of the proper analysis to apply from the Supreme Court. If the Establishment

Being.”); ALCOHOLICS ANONYMOUS, A BRIEF GUIDE TO ALCOHOLICS ANONYMOUS 13 (1972) (listing the twelve steps of Alcoholics Anonymous, seven of which include references to God). *But see id.* at 10 (“A.A. is *not* a religious organization. All members are free to decide on their own personal ideas about the meaning of life.”).

⁸² *Freedom from Religion Found., Inc. v. McCallum*, 179 F. Supp. 2d 950, 968 (W.D. Wis.) (quoting *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947)), *on reconsideration in part*, 214 F. Supp. 2d 905 (W.D. Wis. 2002), *aff’d*, 324 F.3d 880 (7th Cir. 2003).

⁸³ *See, e.g., Griffin v. Coughlin*, 673 N.E.2d 98, 105 (N.Y. 1996); Christopher M. Meissner, Note, *Prayer or Prison: The Unconstitutionality of Mandatory Faith-Based Substance Abuse Treatment*, 54 CLEV. ST. L. REV. 671, 674–75 (2006) (arguing that drug courts cannot constitutionally assign unwilling offenders to residential twelve-step or otherwise religiously based treatment centers).

⁸⁴ *But see* Scott Roberts, *The Constitutionality of Prison-Sponsored Religious Therapeutic Communities*, 15 REGENT U. L. REV. 69, 69 (2002) (defending the constitutionality of voluntary religious therapeutic communities in prisons and jails).

⁸⁵ *See* Emily M. Gallas, Comment, *Endorsing Religion: Drug Courts and the 12-Step Recovery Support Program*, 53 AM. U. L. REV. 1063, 1083, 1095 (2004). *But see* Apanovitch, *supra* note 12, at 789 (arguing that the coercion analysis allows impermissible relationships between the state and AA to persist and that the principle of separation of church and state should guide courts’ analysis of AA programs).

Clause focuses on liberty of conscience, as this Note suggests, it should be read with the other religion clause in the First Amendment: the Free Exercise Clause.⁸⁶ A move toward interpreting the Establishment Clause in conjunction with the Free Exercise Clause might appear to be a significant doctrinal shift, especially because the Supreme Court has noted “that these two Clauses ‘often exert conflicting pressures’”⁸⁷ and “that there can be ‘internal tension . . . between the Establishment Clause and the Free Exercise Clause.’”⁸⁸ However, an alternative reading of the two Clauses—one where the Clauses buttress each other—would help reconcile precedents and develop an approach better suited to cases like *Elmbrook School District* in which a government entity conducts business in a house of worship. As the doctrine stands now, lower courts cannot know which of the Supreme Court’s holdings actually controls in Establishment Clause cases.

A. *Erecting a Wall*: *Everson v. Board of Education*

Starting with *Everson v. Board of Education* in 1947,⁸⁹ modern Establishment Clause jurisprudence has lacked clear rules.⁹⁰ In *Everson*, the Court adopted Thomas Jefferson’s phrasing to declare that the Establishment Clause was meant “to erect ‘a wall of separation between church and State’” that “must be kept high and impregnable.”⁹¹ In the same case that it announced this “wall of separation” (of which the Court “could not approve the slightest breach”⁹²), the Court surprisingly held that the Clause permitted the state of New Jersey to use taxpayer funds to pay for parochial school bus fares.⁹³ Justice Black focused the majority opinion on religious persecution as the motivating force behind the First Amendment.⁹⁴ He framed the Establishment Clause in terms of avoiding religious

⁸⁶ U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .”).

⁸⁷ *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 702 (2012) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005)).

⁸⁸ *Id.* (omission in original) (quoting *Tilton v. Richardson*, 403 U.S. 672, 677 (1971) (plurality opinion)).

⁸⁹ 330 U.S. 1 (1947).

⁹⁰ *See, e.g., Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 869 (7th Cir. 2012) (en banc) (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.”), *petition for cert. filed*, No. 12-755 (U.S. Dec. 20, 2012); *Utah Highway Patrol Ass’n v. Am. Atheists, Inc.*, 132 S. Ct. 12, 13, 15, 17, 21 (2011) (Thomas, J., dissenting from denial of certiorari) (calling the Establishment Clause jurisprudence (among other things) “in shambles,” “confound[ing],” “impenetrable,” “little more than intuition and a tape measure,” and akin to a “ghoul”).

⁹¹ *Everson v. Bd. of Educ.*, 330 U.S. 1, 16, 18 (1947) (citing *Reynolds v. United States*, 98 U.S. 145, 164 (1879)).

⁹² *Id.* at 18.

⁹³ *Id.* at 17.

⁹⁴ *Id.* at 8–12.

persecution,⁹⁵ which gave short shrift to the broader understanding of the Clause as protecting liberty of conscience. The apparent inconsistency within the decision (between the stark language about the existence of a “wall of separation” and a holding that seemed to breach that wall) did not go unnoticed.⁹⁶

Everson began the still continuing inconsistency in Establishment Clause jurisprudence. Some of the doctrinal confusion is due in part to the cursory understanding of the Establishment Clause encouraged by the simplified “wall of separation” approach. Forty-two years after *Everson*, in *County of Allegheny v. ACLU*, the Supreme Court again tried to make the demands of the Establishment Clause seem straightforward: “[G]overnment may not promote or affiliate itself with any religious doctrine or organization, may not discriminate among persons on the basis of their religious beliefs and practices, may not delegate a governmental power to a religious institution, and may not involve itself too deeply in such an institution’s affairs.”⁹⁷ That succinct summary reflects the spirit (if not the exact text or practical realities⁹⁸) of the Establishment Clause. But the Court’s precedents from before and after *Allegheny* reveal that application of the Clause to specific facts has been quite complicated.⁹⁹ Ever since *Everson*, the doctrine of separation has been “enshrined” and revered.¹⁰⁰ Separation of church and state, however, is not necessarily the same as protecting individual freedom of conscience. Now, perhaps not surprisingly, the Court “is sharply divided on the standard governing Establishment Clause cases,”¹⁰¹ leading circuit courts to sometimes rely on their own precedents instead of the Supreme Court’s.¹⁰²

⁹⁵ See Feldman, *supra* note 56, at 683–84 (arguing that Justice Black’s opinion distorted the eighteenth-century view by presenting liberty of conscience as a rationale for avoiding religious prosecution).

⁹⁶ See, e.g., *Zorach v. Clauson*, 343 U.S. 306, 311–13 (1952) (recognizing that the First Amendment does not demand separation of church and state “in every and all respects,” for if it did, state and religion would be “hostile, suspicious, and even unfriendly” “aliens to each other”).

⁹⁷ 492 U.S. 573, 590–91 (1989) (footnotes omitted).

⁹⁸ See *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (“A law may be one ‘respecting’ the forbidden objective [of the establishment of religion] while falling short of its total realization. . . . A given law might not *establish* a state religion but nevertheless be one ‘respecting’ that end in the sense of being a step that could lead to such establishment . . .”).

⁹⁹ In *Lemon v. Kurtzman*, for example, the Court noted, “The language of the Religion Clauses of the First Amendment is at best opaque.” *Id.*

¹⁰⁰ HAMBURGER, *supra* note †, at 478.

¹⁰¹ *Am. Atheists, Inc. v. Duncan*, 616 F.3d 1145, 1156 (10th Cir.), *amended and superseded on reh’g sub nom. Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095 (10th Cir. 2010).

¹⁰² See, e.g., *id.*

B. *A Twist: The Lemon Test*

A transformative moment in Establishment Clause jurisprudence came with *Lemon v. Kurtzman*¹⁰³ in 1971. In that case, the Supreme Court articulated the three-part “*Lemon* test,” which functioned as the dominant standard for several years, even though its precedential strength was doubted almost immediately by the Supreme Court itself.¹⁰⁴ Under the *Lemon* test, statutes (1) “must have a secular legislative purpose,” (2) must not have a primary effect of advancing or inhibiting religion, and (3) must not produce excessive entanglement of government with religion.¹⁰⁵

Each prong of the *Lemon* test problematically left open immediate, unanswered questions about definitions—for example, how to measure the “primary effect” of a statute.¹⁰⁶ The Court recognized that the separation of church and state envisioned by the “wall of separation” view of the Establishment Clause is blurry and fact intensive.¹⁰⁷ That recognition marked a distinct change from the definitive pronouncement of separate and discrete spheres of church and state announced in *Everson*.

1. *The Endorsement Test.*—The prongs of the *Lemon* test eventually diverged into separate lines of reasoning, splitting into the modern jurisprudential tangle.¹⁰⁸ In her concurring opinion in *Lynch v. Donnelly*,¹⁰⁹ Justice O’Connor first articulated the “endorsement test,” focusing chiefly on the “primary effect” and “excessive entanglement” prongs of *Lemon*.¹¹⁰ The endorsement test asks whether a reasonable observer would interpret the government’s action to either endorse or denounce a particular religion. It turns on “whether a reasonable observer, apprised of the circumstances and history of the disputed governmental practice, would conclude that it

¹⁰³ 403 U.S. at 614–15 (holding two state statutes unconstitutional on grounds of excessive entanglement, and noting that the Court’s previous holdings did not mandate “total separation between church and state” (and that such separation was impossible in an absolute sense)).

¹⁰⁴ See, e.g., *Hunt v. McNair*, 413 U.S. 734, 741 (1973) (calling the *Lemon* test’s three prongs “no more than helpful signposts”).

¹⁰⁵ *Lemon*, 403 U.S. at 612–13; see also *Freedom from Religion Found., Inc. v. McCallum*, 179 F. Supp. 2d 950, 966 (W.D. Wis.) (“[A] publically funded program does not violate the establishment clause if (1) it has a secular purpose; (2) it does not result in governmental indoctrination; (3) it does not define its participants by reference to religion; and (4) it does not create excessive entanglement.”), *on reconsideration in part*, 214 F. Supp. 2d 905 (W.D. Wis. 2002), *aff’d*, 324 F.3d 880 (7th Cir. 2003).

¹⁰⁶ See Cynthia V. Ward, *Coercion and Choice Under the Establishment Clause*, 39 U.C. DAVIS L. REV. 1621, 1627–29 (2006).

¹⁰⁷ *Lemon*, 403 U.S. at 614 (“[T]he line of separation, far from being a ‘wall,’ is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.”).

¹⁰⁸ See Christopher J. Heaney, Note, *Cooking Up a New Lemon Test: The Establishment Clause, Displays of Religious Objects, and Lessons from India*, 10 FIRST AMEND. L. REV. 559, 566–84 (2012).

¹⁰⁹ 465 U.S. 668, 687–94 (1984) (O’Connor, J., concurring); *id.* at 687 (majority opinion) (holding that a crèche included in the city of Pawtucket’s Christmas display was not a violation of the Establishment Clause).

¹¹⁰ *Id.* at 689–92 (O’Connor, J., concurring).

conveys a message of endorsement or disapproval of religious faith.”¹¹¹ The endorsement test quickly became the Supreme Court’s dominant approach to interpreting the *Lemon* test and the Establishment Clause.¹¹² Like *Lemon*, it also came under fire for being elusive due to the always hard-to-define “reasonable person” standard.¹¹³ However, asking whether a reasonable observer would perceive endorsement in a particular activity or message is not necessarily too vague a constitutional test. Particularly in the context of religion, where the spectrum of nonbelievers and faithful is so varied and broad, inquiring about a “reasonable” person may be the only way to come to a consensus about a given set of facts in which government and religion overlap.

2. *The Coercion Test.*—Despite the fact that the three prongs of the *Lemon* test had fractured, the Court refused to directly reconsider it in 1992, when the Court heard *Lee v. Weisman*.¹¹⁴ Nonetheless, the Court seemed to announce a new test that centered on coerced religious activity.¹¹⁵ Justice Kennedy originally introduced the concept of coercion in his opinion in *County of Allegheny v. ACLU* in 1989.¹¹⁶ In *Allegheny*, the Court applied the endorsement test from *Lynch* to find that a standalone crèche¹¹⁷ placed in a position of prominence in the county government building violated the Establishment Clause.¹¹⁸ Concurring in part of the judgment and dissenting in part, Justice Kennedy articulated two “distinct [but] not unrelated” limiting principles present in the Court’s precedents: (1) “government may not coerce anyone to support or participate in any religion or its exercise” and (2) government “may not . . . give direct benefits to religion” such that it effectively establishes a state religion.¹¹⁹ Justice Kennedy focused on the coercion concept as the crux of the Establishment Clause inquiry,¹²⁰ and introduced the idea of direct versus

¹¹¹ *Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 857 (7th Cir. 2012) (en banc) (Hamilton, J., concurring), *petition for cert. filed*, No. 12-755 (U.S. Dec. 20, 2012).

¹¹² See Feldman, *supra* note 56, at 698 (noting that as of 2002, every member of the then-current Court had accepted the endorsement test as “the test”).

¹¹³ See, e.g., *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 800 n.5 (1995) (Stevens, J., dissenting) (agreeing to the relevance of an endorsement analysis but criticizing Justice O’Connor’s articulation of the “reasonable observer”).

¹¹⁴ 505 U.S. 577, 587, 599 (1992) (holding that a prayer delivered by a member of the clergy at a high school graduation violated the Establishment Clause).

¹¹⁵ See Elizabeth Barker Brandt, *Lee v. Weisman: A New Age for Establishment Clause Jurisprudence?*, 23 GOLDEN GATE U. L. REV. 535, 535 (1993) (noting that Justice Kennedy’s majority opinion did not conduct an identifiable application of the *Lemon* test).

¹¹⁶ 492 U.S. 573, 659–62 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part).

¹¹⁷ The term “crèche” refers to a Christmas nativity scene.

¹¹⁸ *Allegheny*, 492 U.S. at 601–02.

¹¹⁹ *Id.* at 659 (Kennedy, J., concurring in the judgment in part and dissenting in part).

¹²⁰ *Id.* at 662 (“Absent coercion, the risk of infringement of religious liberty by passive or symbolic accommodation is minimal.”).

indirect coercion. In suggesting that even the latter could violate the Establishment Clause, Kennedy's opinion foreshadowed *Lee*.¹²¹

The coercion test asks whether a government actor has induced or compelled participation in a religious exercise. Coercion is not the same as indoctrination, which typically evokes some kind of conversion. Coercion does not demand that much; it refers to "forced" involvement in a religious act, including *effectively* required participation short of literal demand. This test tracks most closely with the idea of liberty of conscience embodied in the Establishment Clause. In *Lee*, where the Court considered the issue of prayer delivered by clergy at a graduation ceremony, the Court reasoned, "[I]f citizens are subjected to state-sponsored religious exercises, the State disavows its own duty to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people."¹²² The coercion test thus most faithfully resembles James Madison's understanding of the Establishment Clause as functioning to protect the free exercise of religion,¹²³ because it focuses on whether the government is impinging upon liberty of conscience—the freedom to choose for oneself whether and how to relate to some higher being.

To fail the coercion test, a government entity need not forcibly compel actual participation in a religious act.¹²⁴ Indeed, in *Lee*, the Court faced a situation of "indirect coercion"¹²⁵ because attendance at graduation was not compulsory—nor was actual participation in the prayer. To some extent, the Court effectively gleaned government coercion from peer pressure. Justice Scalia vigorously dissented on this point; he took particular issue with the majority's assertion that psychological pressure to stand or at least observe respectful silence during the graduation prayer would indicate participation in the religious exercise, and therefore impermissibly coerce participation.¹²⁶ The Court nonetheless held that government cannot include a religious activity or ritual, such as prayer, in an event at which attendance is virtually—including socially—obligatory, such as the graduation ceremonies at issue in *Lee* and *Elmbrook School District*.¹²⁷

¹²¹ *Id.* at 660–61. See Ward, *supra* note 106, at 1630–32.

¹²² *Lee v. Weisman*, 505 U.S. 577, 592 (1992).

¹²³ See *infra* Part III; see also Andy G. Olree, "Pride Ignorance and Knavery": James Madison's Formative Experiences with Religious Establishments, 36 HARV. J.L. & PUB. POL'Y 211, 213–14 (2013).

¹²⁴ See *Lee*, 505 U.S. at 593 (calling the pressure to stand or at least remain silent during a prayer at a high school graduation ceremony "subtle and indirect" but capable of being "as real as any overt compulsion").

¹²⁵ Ward, *supra* note 106, at 1626 (emphasis omitted).

¹²⁶ *Lee*, 505 U.S. at 636–38 (Scalia, J., dissenting).

¹²⁷ *Id.* at 596 (majority opinion) (noting "the fact that attendance at the graduation ceremonies is voluntary in a legal sense does not save the religious exercise"). The Court distinguished *Marsh v. Chambers*, 463 U.S. 783 (1983), where nine years earlier it had upheld the practice of beginning state legislative sessions with a prayer. See *Lee*, 505 U.S. at 596–97.

Coercion might seem dependent on government endorsement of religion¹²⁸ because a message of government sponsorship or approval influences the perception of whether one is actually free to abstain from participating in a religious act. Understanding coercion and endorsement together in this way is a more wholesale inquiry into whether the location and content of a government activity impinge upon liberty of conscience. Yet the relationship between endorsement and coercion is doctrinally unclear.¹²⁹ In the 2009 case *Pleasant Grove City v. Summum*, the Supreme Court indicated that endorsement differs from coercion.¹³⁰ In *Elmbrook School District*, Judge Ripple in dissent criticized the majority for failing to clearly articulate the connection between endorsement and coercion.¹³¹ The Seventh Circuit had previously stated a straightforward test for coercion, which lacked any reference to endorsement, in *Kerr v. Farrey*. In 1996, the court wrote, “In our view, when a plaintiff claims that the state is coercing him or her to subscribe to religion . . . only three points are crucial: first, has the state acted; second, does the action amount to coercion; and third, is the object of the coercion religious or secular?”¹³² In light of this confusion and inconsistency, returning to the original understanding¹³³ of the First Amendment offers a clearer way to approach Establishment Clause cases that arise both when government goes to church and when religion enters a government sphere.

III. ORIGINS OF THE ESTABLISHMENT CLAUSE

The Religion Clauses appear first in the First Amendment for a reason: liberty of religious conscience was the first-recognized individual, inalienable right.¹³⁴ When the Bill of Rights was ratified in 1791, eight out of fourteen states included Establishment Clause analogs in their state

¹²⁸ See *Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 866 (7th Cir. 2012) (en banc) (Ripple, J., dissenting) (“[The Establishment Clause] protects the individual from the government’s coercing him, because of governmental endorsement, to join or participate actively or passively in the activity of any religion.”), *petition for cert. filed*, No. 12-755 (U.S. Dec. 20, 2012).

¹²⁹ *Id.* at 871 (Easterbrook, C.J., dissenting) (“[T]he government’s expression of its own views does not coerce anyone else to do anything . . .”).

¹³⁰ 555 U.S. 460, 481 (2009) (holding that the placement of permanent monuments in a public park is a form of government speech).

¹³¹ See *Elmbrook Sch. Dist.*, 687 F.3d at 862–63 (Ripple, J., dissenting) (citing *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 312 (2000); *Lee*, 505 U.S. at 587).

¹³² *Kerr v. Farrey*, 95 F.3d 472, 479 (7th Cir. 1996).

¹³³ Focusing on original intent is an increasingly popular method of constitutional interpretation. See Brian A. Licher & David P. Baltmanis, *Foreword: Original Ideas on Originalism*, 103 NW. U. L. REV. 491, 491 (2009). See generally Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549 (2009).

¹³⁴ Calabresi et al., *supra* note 14.

constitutions.¹³⁵ The emphasis on being free from established religion has been significant and enduring since the earliest days of the Constitution.

George Washington believed that religion and morality were indispensable to political prosperity,¹³⁶ and “thought it proper, accordingly, to support and endorse religious sentiments that support the common good.”¹³⁷ This is not to suggest that Washington disapproved of the disestablishment directive in the Establishment Clause. It does, however, illustrate that what many contemporary jurists, scholars, and citizens consider the command of the Establishment Clause—namely, a hermetically sealed separation between religion and government—was not the uniform understanding of the proper relationship between faith and governance when the First Amendment was adopted in 1791.¹³⁸

In contrast to Washington, James Madison, the principal author of the First Amendment, “denounced the idea that religion should be promoted because it is conducive to good citizenship.”¹³⁹ He “objected to the establishment of religion” in part because of “political alienation”—it “degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority.”¹⁴⁰ Madison also feared for “the corruption of religion itself” that might result from establishment.¹⁴¹

Thomas Jefferson did not condone government endorsement of religion either. His famous language about the “wall of separation” spurred the dominant contemporary understanding of the Establishment Clause.¹⁴² Although the Establishment Clause itself mentions no such separation (commanding only that “Congress shall make no law respecting an

¹³⁵ *Id.* at 1472.

¹³⁶ Vincent Phillip Muñoz, *Religion and the Common Good: George Washington on Church and State*, in *THE FOUNDERS ON GOD AND GOVERNMENT*, *supra* note 2, at 1, 6.

¹³⁷ *Id.* at 18; *see also* FRANK LAMBERT, *THE FOUNDING FATHERS AND THE PLACE OF RELIGION IN AMERICA* 259–60 (2003) (highlighting Washington’s “hope that civic responsibility would accompany religious freedom in the new republic” and belief in the importance of churches as the foundation of good government and promoters of republican virtues).

¹³⁸ For example, in *Everson v. Board of Education*, four Supreme Court justices agreed that “[the Establishment Clause] was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion.” 330 U.S. 1, 31–32 (1947) (Rutledge, J., joined by Frankfurter, Jackson & Burton, JJ., dissenting).

¹³⁹ Andrew Koppelman, *Phony Originalism and the Establishment Clause*, 103 NW. U. L. REV. 727, 747 (2009).

¹⁴⁰ *Id.* (quoting James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), *reprinted in* *THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON* 10–11 (Marvin Meyers ed., rev. ed. 1981)).

¹⁴¹ *Id.*

¹⁴² *See* Letter from Thomas Jefferson to Messrs. Nehemiah Dodge, Ephraim Robbins & Stephen S. Nelson, *supra* note †; *see also* HAMBURGER, *supra* note †, at 2–3 (noting the disparity between disestablishment and separation of church and state).

establishment of religion”¹⁴³), the Supreme Court notably adopted Jefferson’s notion of such rigid separation in the 1947 case *Everson v. Board of Education*.¹⁴⁴ In doing so, the Court did not simply adopt a reading of the Establishment Clause different from the literal text. For the first time, it explicitly declared a constitutional right to separation of church and state, a First Amendment freedom.¹⁴⁵ Even though the Court has transitioned away from that rigid formulation of separate spheres for religion and government,¹⁴⁶ uncertainty remains regarding how far separated church and state must be. This uncertainty is not surprising given that the “wall of separation” did not even exist during Jefferson’s time. Indeed, Congress “provid[ed] for paid [c]haplains for the House and Senate” during the First Session of the First Congress.¹⁴⁷

Draft versions of the First Amendment Religion Clauses referred explicitly to conscience.¹⁴⁸ James Madison’s first draft proposal for what became the Establishment Clause read, “The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.”¹⁴⁹ Even after the word “conscience” disappeared from drafts of the Amendment, this Lockean¹⁵⁰ idea of freedom of conscience remained of paramount importance.¹⁵¹ Both coerced religious exercise and preferential systems favoring one religion over another would violate freedom of conscience.¹⁵²

Liberty of conscience is inherent in the Free Exercise Clause (“Congress shall make no law . . . prohibiting the free exercise [of religion]”¹⁵³). One way to analyze Establishment Clause cases in a way that is motivated by liberty of conscience is to view the Establishment Clause *in pari materia* with the Free Exercise Clause rather than as an isolated command. Recent insights gleaned from documents relating to the ratification debate support this idea that the prohibition on establishment

¹⁴³ U.S. CONST. amend. I.

¹⁴⁴ 330 U.S. 1, 16 (1947).

¹⁴⁵ See HAMBURGER, *supra* note †, at 449, 455.

¹⁴⁶ See, e.g., *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971) (“Some relationship between government and religious organizations is inevitable.”).

¹⁴⁷ *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984).

¹⁴⁸ Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 399–404 (2002).

¹⁴⁹ *Id.* at 402 (quoting 1 ANNALS OF CONG. 434 (Joseph Gales ed., 1789)).

¹⁵⁰ For a survey of the theoretical underpinnings of the Establishment Clause (and John Locke’s influence in particular), see *id.* at 372–98.

¹⁵¹ *Id.* at 401–04; see also HAMBURGER, *supra* note †, at 92–107 (describing American religious dissenters’ focus on freedom from legislation inhibiting religious exercise, including explicit references to “rights of conscience”).

¹⁵² Feldman, *supra* note 148, at 405.

¹⁵³ U.S. CONST. amend. I.

was meant to protect the free exercise of religion.¹⁵⁴ Viewing the Establishment Clause in this way comports with the understanding that members of the founding generation wanted to bar the federal government from one fundamental transgression: compelling conscience. In particular, the Founders feared that the government would levy taxes for religious purposes, in violation of dissenters' liberty of conscience—their freedom of thought and morality.¹⁵⁵

This interpretation is consistent with the motivations of James Madison, “the leading architect of the religion clauses.”¹⁵⁶ Madison believed that the “‘free exercise of religion’ was impossible as long as a religious establishment continued because establishment insiders could never be trusted to leave dissenters alone.”¹⁵⁷ “For Madison, there could be no such thing as a legal system that protected religious liberty while also establishing religion.”¹⁵⁸ Understanding the Establishment Clause as a means to give effect and meaning to the Free Exercise Clause reconciles Jefferson’s idea of a “wall of separation” with the reality of some intermingling of church and state, which has been present in the United States since the First Congress.

IV. DIVINING A TEST

This understanding of the Establishment and Free Exercise Clauses working together to protect liberty of conscience is notably absent from the current Establishment Clause doctrine. Given the split approaches that followed *Lemon*, the remaining precedential significance of that case is unclear.¹⁵⁹ Chief Justice Rehnquist’s plurality opinion in the 2005 case *Van*

¹⁵⁴ See Feldman, *supra* note 148; Natelson, *supra* note 4, at 88–90; see also Glaser, *supra* note 1, at 1059 (footnote omitted) (“The First Amendment was not designed to protect citizens from religion, but to protect religion from government interference. Some laws aimed at protecting the free exercise of religion require a purpose that is not primarily ‘secular.’”).

¹⁵⁵ Feldman, *supra* note 148, at 351–52, 399 (“The primary reason not to have an established religion, then, was the protection of liberty of conscience of dissenters.”).

¹⁵⁶ *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 703 (2012) (quoting *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1446 (2011)).

¹⁵⁷ Olree, *supra* note 123, at 271.

¹⁵⁸ *Id.* at 276.

¹⁵⁹ The *Lemon* test is disfavored by many, and many thought it gone only to see it rise again. See, e.g., *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398–99 (1993) (Scalia, J., concurring in the judgment) (“Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again The secret of the *Lemon* test’s survival, I think, is that it is so easy to kill.”). In *Lamb’s Chapel*, Justice Scalia pointed directly to several concurring and dissenting opinions that delivered what should have been fatal blows to *Lemon*, including parts of *Lee v. Weisman*, 505 U.S. 577 (1992); *County of Allegheny v. ACLU*, 492 U.S. 573 (1989); *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985); *Widmar v. Vincent*, 454 U.S. 263 (1981); *New York v. Cathedral Academy*, 434 U.S. 125 (1977); *Roemer v. Board*

*Orden v. Perry*¹⁶⁰ explicitly rejected an application of the *Lemon* test to a “passive monument” on the Texas State Capitol grounds, in favor of an analysis based on the “nature of the monument” and “our Nation’s history.”¹⁶¹ Still, references to the *Lemon* test continue to appear in circuit court decisions. For example, the Seventh Circuit treated it as a given that a governmental practice in a house of worship violates the First Amendment “if it lacks a legitimate secular purpose.”¹⁶² Such a practice is unconstitutional if it has the primary effect of communicating government endorsement or disapproval of religion.¹⁶³

One way to reconcile these precedents might be to think of them in terms of the “state action” doctrine—the government cannot instigate, encourage, or coerce religious activity, but must welcome religious activity that is the result of private judgment in the public sphere.¹⁶⁴ This is consistent with the understanding that liberty of conscience underlies both the Establishment Clause and the Free Exercise Clause. Most importantly, courts should assess constitutionality in terms of whether the government action impinges upon an individual’s ability to make her own decisions about morality and religion.

This approach is especially useful for (though not limited to) situations in which government activity occurs in a house of worship, like in *Doe v. Elmbrook School District*. Requiring people to enter a church to participate in a government activity—be it high school graduation, voting, or something else—immediately raises the question of whether those people can truly exercise their liberty of conscience in that setting. Reading the two Religion Clauses together, and honing in on liberty of conscience as the motivation behind both, would move the focus away from the inventory of religiosity that occurred in *Elmbrook*,¹⁶⁵ while not doing away with it entirely. A message of endorsement (understood as such, perhaps, because of an abundance of religious icons) can still inform a court about whether a

of Public Works, 426 U.S. 736 (1976); and *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973). *Id.* But see Penny J. Meyers, Note, *Lemon Is Alive and Kicking: Using the Lemon Test to Determine the Constitutionality of Prayer at High School Graduation Ceremonies*, 34 VAL. U. L. REV. 231, 233 (1999) (arguing that the *Lemon* test provides the best way to protect individual freedom and separation of church and state).

¹⁶⁰ 545 U.S. 677, 681–83 (2005) (plurality opinion) (holding that a six-foot-tall depiction of the Ten Commandments on the Texas State Capitol grounds, as part of an array of twenty-one historical markers and seventeen monuments on the grounds, did not violate the Establishment Clause).

¹⁶¹ *Id.* at 686.

¹⁶² *Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 861–62 (7th Cir. 2012) (en banc) (Ripple, J., dissenting) (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971)), *petition for cert. filed*, No. 12-755 (U.S. Dec. 20, 2012).

¹⁶³ *See id.* (citing *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000); *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) (O’Connor, J., concurring)).

¹⁶⁴ Michael W. McConnell, *State Action and the Supreme Court’s Emerging Consensus on the Line Between Establishment and Private Religious Expression*, 28 PEPP. L. REV. 681, 682 (2001).

¹⁶⁵ *See Elmbrook Sch. Dist.*, 687 F.3d at 851–54.

reasonable person would experience coercion of conscience. The constitutionality of state activity in a house of worship ought not turn only on an assessment of *how religious* the religious space is. Simply taking an inventory of religiosity fails to truly confront what makes one physical location coercive and another not. Still, some assessment of “religiosity” may be relevant for purposes of deciding whether a reasonable person would be unduly influenced by those surroundings to the point of impinging his freedom to make moral and religious judgments. This comports with the understanding that the Establishment Clause was meant as a guarantor of individual freedom of conscience.¹⁶⁶

None of the Supreme Court precedents articulating glosses on the *Lemon* test arose in a context like *Doe v. Elmbrook School District* in which the state went to church; instead, they were all situations in which some element of religion entered a government “space,” either physical or ceremonial.¹⁶⁷ That distinction affects the analysis under any given test, but does not require a wholly different standard—the First Amendment makes no distinction based on physical location of the impermissible intermingling of government and religion. Furthermore, these tests are all judicial creations; indeed, the First Amendment says nothing explicitly about government *endorsing* religion (or lack thereof) or *coercing* participation therein (or precluding such participation).¹⁶⁸ Still, a test that focuses on coercion, informed by any perceived messages of endorsement, perhaps best reflects the Founders’ concern with liberty of conscience and their conception of the Establishment Clause as a method by which to protect the Free Exercise Clause.

A. Liberty of Conscience Applied to Government Activity in Church

In addition to high school graduation ceremonies, voting and court-ordered rehabilitation are just two examples of junctions between government and religion. They help to illustrate that just as was the case at the Founding, when Congress began funding the Capitol chaplain, church and state are not entirely distinct entities. These examples further illustrate just how important it is to develop a more comprehensive and coherent view of the Establishment Clause because of the large number of circumstances in which government and religion interact. Courts should read the Establishment Clause in conjunction with the Free Exercise Clause because they both grew out of the same belief in a right to liberty of conscience.

A critical distinction underlying a liberty of conscience-centered test for the Establishment Clause is that government activity occurring in a

¹⁶⁶ See *supra* Part III.

¹⁶⁷ See *supra* Part II.

¹⁶⁸ *Elmbrook Sch. Dist.*, 687 F.3d at 869 (Easterbrook, C.J., dissenting) (noting that *Lemon* and the endorsement tests are not “restatements of the [F]irst [A]mendment’s meaning”).

house of worship is not exactly the same as religious activity taking place in a school or another government-owned building. In the former scenario, even acting as a temporary tenant of a church may indicate some government approval or endorsement of religion; it immediately raises the possibility that the state is impinging on individuals' liberty of conscience by effectively forcing them to enter a religious space. That heightened sensitivity demands an especially nuanced understanding of what constitutes religious activity. In contrast, when religion enters a civic space, such as a religious student club, people may feel freer to abstain from the religious practice because they are in neutral or secular physical surroundings. In any event, the Supreme Court should articulate clear guiding principles within which lower court judges can exercise their reasoned judgment with respect to specific facts, either by granting certiorari in *Elmbrook School District* or addressing a similar case. The Court should refocus lower courts' inquiries on unbridled morality and faith, asking whether a particular practice limits attendees' ability to form free thoughts about religion, without government interference.

The government cannot effectively "require[] participation in a religious exercise" without violating the Establishment Clause (and the Free Exercise Clause).¹⁶⁹ Such blatant coercion is a definitive violation of the spirit of the Establishment Clause, as evidenced by its purpose of protecting liberty of conscience. Chief Judge Easterbrook referenced this original purpose in his dissenting opinion in *Elmbrook School District*. He wrote, "The actual Establishment Clause bans laws respecting the *establishment* of religion—which is to say, taxation for the support of a church, the employment of clergy on the public payroll, and mandatory attendance or worship."¹⁷⁰ Recognizing the doctrinal move away from the original idea of liberty of conscience to separation of church and state helps to explain the other perceived purposes of the Establishment Clause that the Supreme Court and lower courts continue to apply.

Re-centering Establishment Clause analysis on its protection of liberty of conscience will streamline courts' inquiries. Courts should ask: was a reasonable person's liberty of conscience impinged upon because this activity occurred in this space? Liberty of conscience means freedom to decide for oneself what is morally right and one's relationship with, or the existence of, a higher being. The Establishment Clause certainly "forbids coercive pressure on an individual to support or to participate in a religious activity."¹⁷¹ But forced participation in religious activity is not the only potential violation of the Establishment Clause. Focusing the analysis on "no unreasonable impingement on liberty of conscience" would maintain

¹⁶⁹ *Lee v. Weisman*, 505 U.S. 577, 594 (1992).

¹⁷⁰ *Elmbrook Sch. Dist.*, 687 F.3d at 869 (Easterbrook, C.J., dissenting).

¹⁷¹ *Id.* at 862 (Ripple, J., dissenting) (citing *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 312 (2000); *Lee*, 505 U.S. at 587, 592–93).

the spirit of each prong of the *Lemon* test without causing the avalanche of separate tests that followed from it. Of course, this streamlined inquiry is not perfect, and it leaves room for argument, particularly about what constitutes “religious activity” and what would make a “reasonable” person’s conscience impermissibly influenced by the government.

In assessing whether a government activity occurring in a house of worship is coercive in this sense, the part of the church in which the state activity occurs may be informative.¹⁷² But divining constitutionality solely from a floor plan is neither instructive nor practical. Even in a jurisprudential context as requisitely fact-specific as the Establishment Clause, definitively permitting government to conduct its business in a fellowship hall devoid of religious icons, but not a chapel, would invite an even bigger mess.¹⁷³

In assessing whether participating in a government activity in the same physical space as those icons and materials would impinge upon a reasonable person’s liberty of conscience, courts should question whether exposure to religious icons or proselytizing materials is “incidental” to the secular activity. Although “[w]e require far more than proximity before we vitiate civil–religious relationships on the ground of endorsement, symbolic union or coercion,”¹⁷⁴ physical proximity or intermingling does matter when we think about the degree of influence religious symbols may carry. That is not to say that “pervasively religious” institutions can never host the civil polity, as Judge Ripple feared in *Elmbrook School District*.¹⁷⁵ It merely demonstrates that under a “no unreasonable impingement on liberty of conscience” standard, such pervasively religious buildings may or may not be constitutionally permissible venues for government activity.

The constitutionality of state activity in church cannot turn on availability of space¹⁷⁶ because the fact that a religious space is convenient or accommodating does not affect whether a reasonable person’s liberty of conscience would be impinged upon by the person’s presence in that space to take part in the activity. The text of the Establishment Clause does not demand such distinctions. Precisely because the motivations behind the Establishment Clause are so difficult to apply to specific facts, its

¹⁷² See, e.g., *id.* at 860 (Hamilton, J., concurring) (distinguishing impermissible use of a church sanctuary for high school graduations from permissible use of churches as polling places (citing *Otero v. State Election Bd.*, 975 F.2d 738, 741 (10th Cir. 1992))).

¹⁷³ One can easily imagine future disagreements. If a smaller congregation uses a larger church’s youth lounge for weekly worship, is the youth lounge safely secular for use by a government entity, or is it a worship space in which civic activities like high school graduation ceremonies may not occur?

¹⁷⁴ *Elmbrook Sch. Dist.*, 687 F.3d at 864 (Ripple, J., dissenting).

¹⁷⁵ See *id.* at 866.

¹⁷⁶ But see *id.* at 860 (Hamilton, J., concurring) (referring to the use of houses of worship as polling places and noting the “sometimes frantic effort to find enough places willing to put up with the traffic and disruption that go with running an election”).

protections are particularly vulnerable to subtle erosion.¹⁷⁷ It is therefore paramount to avoid “[t]he hazards of placing too much weight on a few words or phrases of the Court.”¹⁷⁸ Just as the Founders “recognized that even the best intentions of people of faith can lead to division, exclusion, and worse,”¹⁷⁹ so, too, can the intentions of government actors.

CONCLUSION

This Note has attempted to articulate a constitutionally sound and straightforward standard for assessing the constitutionality of government activity occurring in houses of worship. The point is not to suggest a “single mechanical formula that can accurately draw the constitutional line in every case.”¹⁸⁰ No such mechanical test exists, nor would it be wise to formulate one here. The point is to rescue the proper Establishment Clause inquiry from purgatory and re-inject it with its original promise. In attempting to do so, this Note demonstrates the unique challenges of applying the Establishment Clause to government activity that occurs in houses of worship.

Government activity in church is not a definitive sin under the Establishment Clause. However, the original concern for freedom of conscience is especially important when government goes to church. One reason is that even entering a house of worship could be a sin to believers of certain faiths.¹⁸¹ Centering Establishment Clause analysis on whether the government unreasonably impinges upon liberty of conscience reflects the Framers’ intentions for the Establishment Clause, as well as the concerns articulated in the three prongs of the *Lemon* test and its offspring, including the endorsement and coercion tests. Reframing Establishment Clause jurisprudence to support the liberty protected by the Free Exercise Clause does not ignore Jefferson’s conception of the wall of separation between church and state, but it does reject the notion of entirely distinct spheres of operation. Whether the Establishment Clause blesses state activity in church hinges not on physical space alone, but on whether the activity involves government influence over religious participation and the inalienable freedom that it entails.

¹⁷⁷ See *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984) (O’Connor, J., concurring).

¹⁷⁸ *Walz v. Tax Comm’n*, 397 U.S. 664, 670 (1970).

¹⁷⁹ *Elmbrook Sch. Dist.*, 687 F.3d at 861 (Hamilton, J., concurring).

¹⁸⁰ *Van Orden v. Perry*, 545 U.S. 677, 699 (2005) (Breyer, J., concurring in the judgment).

¹⁸¹ For example, members of the Orthodox Jewish faith are restricted from entering non-Jewish houses of worship. See *Berman v. Bd. of Elections*, 420 F.2d 684, 684 (2d Cir. 1969) (per curiam).