Church & STATE:

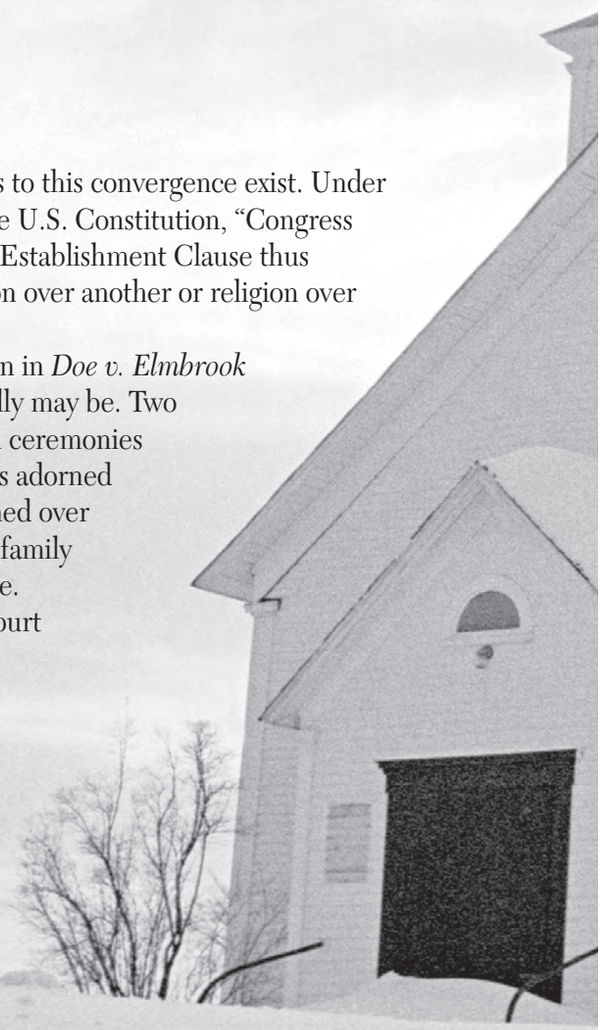
Blurring the Lines

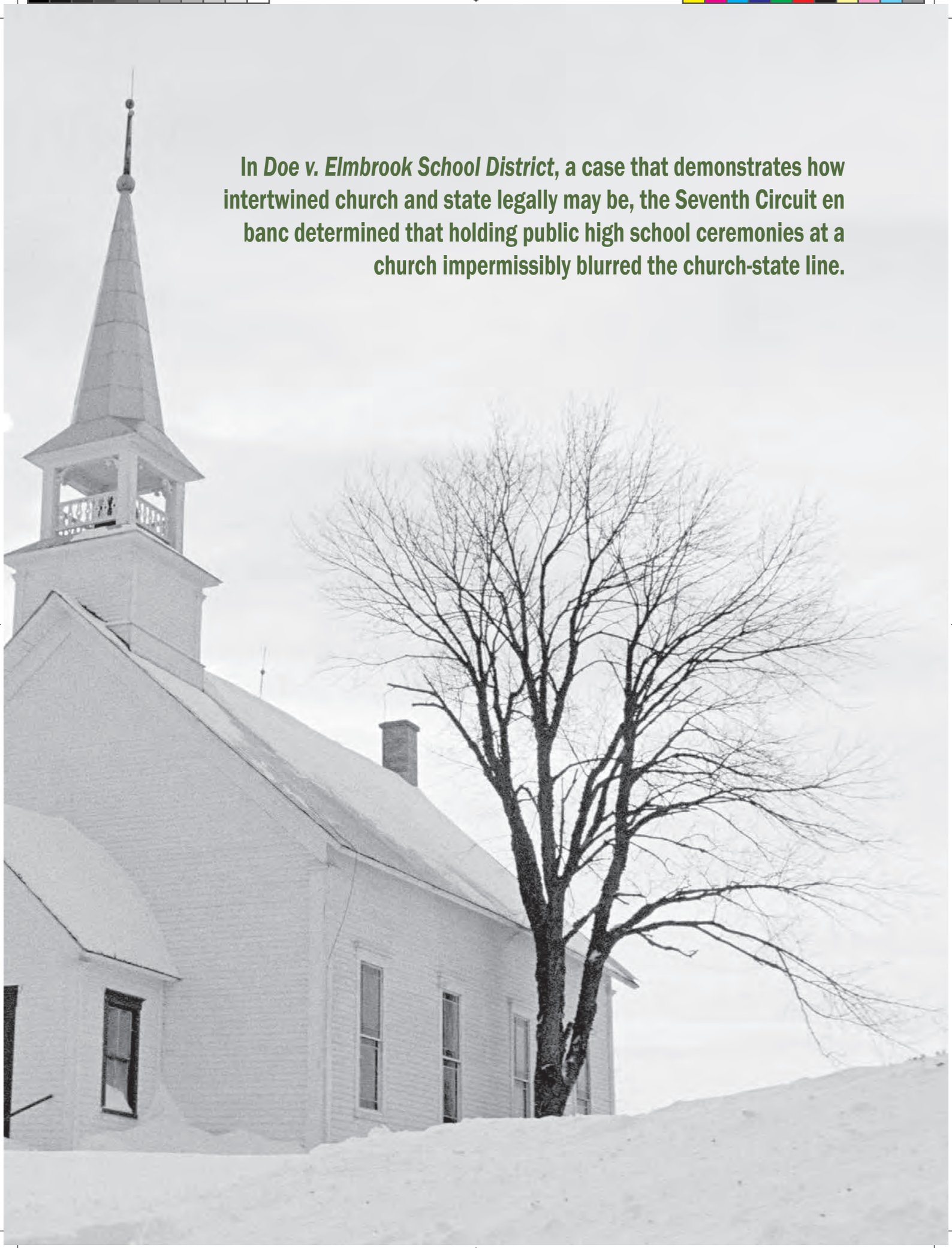
by Christopher P. Keleher

Church and state interaction is inevitable. However, limits to this convergence exist. Under the Establishment Clause of the First Amendment to the U.S. Constitution, "Congress shall make no law respecting an establishment of religion." The Establishment Clause thus prohibits the government from preferentially treating one religion over another or religion over nonreligion.[1]

The Seventh Circuit Court of Appeals' recent en banc decision in *Doe v. Elmbrook School District* dealt with how intertwined church and state legally may be. Two Brookfield, Wisconsin, public high schools held their graduation ceremonies at the Elmbrook Christian Church. The church lobby was adorned with proselytizing messages, and a 20-foot-tall cross loomed over the ceremony.[2] A group of past and present students and family members claimed the graduations violated the Establishment Clause. The Seventh Circuit initially disagreed.[3] But on July 23, 2012, the court en banc determined that holding the ceremonies at the church impermissibly blurred the church-state line.[4]

Before delving into the facts and legal reasoning of *Doe*, this article summarizes the fundamentals of an Establishment Clause claim. Establishment Clause standing is explored first, followed by the elements needed to demonstrate an Establishment Clause violation.





In *Doe v. Elmbrook School District*, a case that demonstrates how intertwined church and state legally may be, the Seventh Circuit en banc determined that holding public high school ceremonies at a church impermissibly blurred the church-state line.

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Establishment Clause Standing

While standing is a requirement for all suits, courts are notoriously sensitive to the issue in the Establishment Clause context. Article III of the U.S. Constitution requires a plaintiff to allege a redressable injury traceable to the defendant's conduct.[5] Generally, individuals cannot base standing in federal court solely on their status as payers of federal taxes.[6] But federal taxpayers *can* sue under the Establishment Clause if they establish a clear link between taxpayer status, the legislative enactment challenged, and a constitutional infringement.[7] The strict nature of this test is embodied by *Arizona Christian School Tuition Organization v. Winn*, in which taxpayers challenged an Arizona law permitting tax credits for money donated to religious schools.[8] The U.S. Supreme Court held the taxpayers lacked standing because they were not challenging a direct tax provision.[9]

Standing based on status as a state taxpayer is similarly limited. State taxpayers challenging a legislative prayer in *Hinrichs v. Indiana General Assembly* lacked standing because they could not show the legislature used tax dollars to implement the program.[10] The Seventh Circuit explained that it was the unconstitutional legislative appropriation of funds that provided "the link between taxpayer and expenditures necessary to support standing."[11]

Establishment Clause litigants must also satisfy prudential standing. Three prudential standing rules exist: 1) an individual's injured interest must fall within the zone of interests protected by the constitutional provision; 2) an individual may not litigate generalized grievances; and 3) an individual may not assert the interests of another.[12] There must be a personal injury other than the effect of seeing objectionable content. The Supreme Court has determined the psychological consequence of "observing conduct with which one disagrees … is not an injury sufficient to confer standing under Article III, even though the disagreement is phrased in constitutional terms."[13]

Standing is not academic. Blithely conferring standing disturbs the separation of powers, and those suing under the Establishment Clause must be especially wary.

Demonstrating an Establishment Clause Violation

In addition to satisfying standing requirements, claimants must prove the governmental action challenged 1) has no secular purpose, 2) advances or inhibits religion, or 3) fosters excessive entanglement with religion.[14] This test stems from *Lemon v. Kurtzman*, in which the U.S. Supreme Court held that state reimbursement of salaries for teachers who taught secular material in religious schools violated the Establishment Clause.[15] However, courts have recently refined this test to "whether the challenged governmental practice either has the purpose or [the] effect of endorsing religion."[16]

Conduct that neither advances nor inhibits religion does not implicate the Establishment Clause. "Governmental neutrality between religion and religion, and between religion and nonreligion is a significant factor in upholding governmental programs against Establishment Clause attack."[17] Neutrality is respected when the government extends benefits to individuals whose viewpoints, including religious ones, are diverse.[18] *Lemon*'s excessive-entanglement prong becomes a concern when government is enmeshed with religion, and the government risks "greater entanglement by attempting to enforce its exclusion of religious worship."[19]

Perceived endorsement is considered from the viewpoint of a reasonable observer, not a sensitive one. Whether the government endorses religion is not about "the perceptions of particular individuals or saving isolated non-adherents from the discomfort of viewing symbols of faith to which they do not subscribe."[20] And houses of worship are not totally off limits to governmental activity. Indeed, polling places in churches do not violate the Establishment Clause even though voters cast ballots next to crucifixes.[21]

Church and state can also coexist in the educational realm. A school's distribution of a religious group's flyers was upheld by the Seventh Circuit.[22] This ruling followed a U.S. Supreme Court decision permitting a Bible club to use school property.[23] Still, the educational context presents unique challenges, and the Supreme Court

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has warned about "protecting freedom of conscience from subtle coercive pressure in … schools."[24] This tension provides the backdrop for the Seventh Circuit's latest interpretation of the Establishment Clause.

The Facts of *Doe v. Elmbrook School District*

Brookfield Central High School and Brookfield East High School used their gymnasiums for graduations, but several overheated and crowded ceremonies prompted students to seek a different site.[25] Putting the issue to a vote, graduating seniors overwhelmingly chose Elmbrook Christian Church. The church was the venue for seven years until 2010, when the school district built a field house that accommodated the ceremony.[26] Although the graduations from 2002 through 2009 were secular celebrations, religious banners, symbols, and posters were visible in the church lobby.[27] Church members staffed information booths containing religious literature.[28] During the ceremony, attendees sat in pews filled with Bibles and hymnal books.[29] Bible quotations, portraits of Jesus, and Christian crosses were ubiquitous.[30] On the other hand, no church official spoke at the graduation.[31] No invocation, prayer, or benediction was conducted and the only literature school officials distributed was the graduation program.[32]

The Procedural History of *Doe v. Elmbrook School District*

The John Doe plaintiffs, a group of past and present students and family members, sought preliminary and permanent injunctions, a declaratory judgment, and damages. They alleged standing based on mental anguish, the use of tax dollars, and the fact that some plaintiffs declined to attend the ceremony because of the venue. As to the merits, the plaintiffs argued the ceremonies imposed religion on attendees, suggested governmental endorsement of religion, and conferred control of a secular event to a church. The school district countered that the presence of private religious symbols did not alter the ceremonies' secular nature and that the church was chosen for its convenience. The school district further asserted that incidental exposure to religious displays did not violate the Establishment Clause.

After the district court denied the plaintiffs' motion for a preliminary injunction, the parties filed cross-motions for summary judgment.

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The district court granted the school district's motion.[33] The Seventh Circuit affirmed, by a 2-1 vote.[34] Judge Easterbrook and Judge Ripple first determined the matter was not moot despite the school district moving the ceremony to a public field house. Their reasoning was twofold. First, plaintiffs who had attended graduation ceremonies still had live claims for damages. Second, the school district presented no evidence of a policy change regarding graduation ceremonies.[35] Indeed, the school district would not rule out using the church in the future if the need arose.

Proceeding to the merits, the majority found no evidence that Elmbrook Christian Church attempted to "influence the setting or the content of the ceremony" or that the school district used the setting to expose attendees to the church's message.[36] Moreover, any entanglement of church and state was "too *de minimis* to cause any real concern."[37] Judge Flaum dissented, finding coercion based on the "staffed information booths laden with religious literature and banners with appeals for children to join 'school ministries.'"[38] That view would ultimately prevail.

The En Banc Opinion

The Seventh Circuit reheard the case en banc, and a majority of the full court concluded the school district violated the Establishment Clause. Writing for the majority, Judge Flaum cautioned at the outset that the holding was limited. The decision was not "a broad statement about the propriety of governmental use of church-owned facilities."[39] Instead, the ruling was fact specific because of the uniqueness of the case: the involvement of minors, the importance of graduation, and the degree of proselytization.

After noting the three-pronged test of *Lemon v. Kurtzman* applied, the court framed its analysis as a "judicial interpretation of social facts which must … be judged in their unique circumstances."[40] The court emphasized three facts: 1) the pervasiveness of the iconography and proselytizing material; 2) the staffed information booths affixed with banners encouraging children to join religious ministries; and 3) the prominence of the 20-foot-tall cross.

The court concluded the environment was "aimed at nurturing Christian beliefs and gaining new adherents among those who set foot

inside the church."[41] Thus, the setting implied to nonadherents that the school district approved the church's message. "The sheer religiosity of the space created a likelihood that high schools students and their younger siblings would perceive a link between church and state."[42]

The court also held that in addition to conveying a message of endorsement, the venue choice was religiously coercive. The court could not meaningfully distinguish two cases involving prayer at public school events. The first was *Santa Fe Independent School District v. Doe*, in which the Supreme Court described the prayer as an "actual endorsement of religion."[43] Second, in *Lee v. Weisman*, the Supreme Court held the prayer was "an overt religious exercise in a secondary school environment."[44] While the Elmbrook graduation ceremony did not involve a prayer, its backdrop of religious symbols and proselytizing materials brought the case into the purview of *Santa Fe* and *Lee*. This precedent controlled because endorsement, especially as it relates to children, can be coercive.

The court also cited *Stone v. Graham*, the U.S. Supreme Court's decision forbidding the placement of the 10 commandments in public schools.[45] Unlike in *Stone*, in *Elmbrook*, the school district was not directly responsible for Elmbrook Church's iconography, but the district chose to hold the ceremonies in a venue in which these elements were present. This was problematic for the majority because religious displays can promote religious beliefs, and students might feel pressure to adopt them.[46]

In sum, the state cannot force a person to go to church against his or her will. The Seventh Circuit determined this principle was violated because the school district directed students to a proselytizing environment. The majority noted that if a school cannot create a pervasively religious environment in the classroom, "it appears overly formalistic to allow a school to engage in identical practices when it acts through a short-term lessee."[47] The majority thus concluded that because the graduation venue amounted to "an unacceptable amount of religious endorsement and coercion," it was impermissible under the Establishment Clause.[48]

Judge Hamilton concurred, focusing on the dissent's criticisms. He acknowledged the dissent was on its strongest ground when analogizing case law permitting polling places in houses of worship. But Judge Hamilton distinguished those cases based on the fact that "voting usually takes place in non-consecrated parts of the church."[49] Moreover, objectors had the alternative of voting via absentee ballot. Finally, suits challenging the use of a church as a polling place would be futile because "the informed reasonable observer would know that many houses of worship … are used to make voting as convenient as possible."[50]

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The Dissent

Judge Ripple, Judge Easterbrook, and Judge Posner filed dissenting opinions. Stripped of subtlety, Judge Ripple charged the majority with deciding "an important federal question in a way that conflicts with relevant decisions of the Supreme Court" – quoting the standard for certiorari petitions set forth in Supreme Court Rule 10(c).[51] Judge Ripple scoffed at the idea the holding was limited to the underlying facts. He then criticized the majority's reliance on *Lee* and *Santa Fe*, asserting they were inapt because the students in those cases were coerced into participating in a religious activity. The iconography that motivated the majority "belonged to the landlord church, not the school."[52] Judge Ripple concluded, "In a building rented for a single occasion of several hours duration, the presence of religious iconography hardly raises a message of endorsement by the very temporary tenant, the District."[53]

Judge Easterbrook's dissent excoriated Establishment Clause jurisprudence as "plastic," "unconstitutionally vague," and "made up."[54] He said the majority's coercion finding was flawed because "the only message a reasonable observer would perceive is that comfortable space is preferable to cramped, overheated space."[55] Judge Easterbrook stressed that the school district was indifferent to religion, a point borne out by the move in 2010 to the field house.[56]

Judge Posner expressed disdain for the plaintiffs' case, the court's decision, and the Supreme Court's Establishment Clause jurisprudence. The coercion argument was "hyperbole": anyone attending a graduation at Elmbrook Church "no

more attends a religious ceremony than [does] the cleaning crew when it sweeps the church's aisles."[57] Judge Posner dismissed the religious icons and literature by noting "the interior is what it is. A church that rents space to a secular organization shouldn't be required to pretend it isn't a church."[58] For Judge Posner, the decision's implications were ominous: a confirmation that "courts are hostile to religion" and a spike in Establishment Clause suits.[59]

The Lessons of *Doe v. Elmbrook School District*

The five opinions in *Elmbrook* reflect the Rorschach-test quality of the Establishment Clause analysis. "Reasonable observer" is workable in theory, but when applied to the intrinsically subjective topic of religion, things get muddled. Reasonable minds will differ, and *Elmbrook* captures this struggle.

The disconnect between *Elmbrook*'s majority and dissent lies in each side's lodestar. The majority emphasized the graduation ceremony and the experience of nonadherent attendees. Given this perspective, and the church's interior, coercion was unmistakable. The dissent meanwhile stressed that government must be neutral between religion and nonreligion. The school district was neutral in seeking the most convenient location. Thus, both sides, although reaching opposite conclusions, adhered to Establishment Clause tenets. This likely fed the dissent's frustration.

The majority did its best with a unique set of facts and an amorphous doctrine. Contrary to the dissent's concerns, it is unlikely *Elmbrook* will spawn new lines of attack for Establishment Clause claimants. *Elmbrook* is virtually the only decision addressing the permissibility of a public school graduation in a church, and its holding may dampen any inclinations to select such a venue in the future. But *Elmbrook*'s detractors have a point. Using the Establishment Clause as a judicial warrant to parse the meaning of iconography may be viewed as aversion to religion. The decision also raises compelling questions about the neutrality principle. Permitting schools to rent space from private landlords but not churches undermines neutrality. And the majority may have eschewed the reality that secular motivations like capacity, comfort, and location can render a place of worship the best venue for certain activities.

Most Establishment Clause cases involve religious material or speech occurring in a school. *Elmbrook School District* was the reverse. The majority's limiting language notwithstanding, the decision stands as a rebuke to bringing school into church. Whether *Elmbrook* is ultimately a one-off ruling or the cornerstone of Seventh Circuit Establishment Clause jurisprudence, governmental officials would be wise to review their use of religious facilities.

Endnotes

[1]*McCreary Cnty. v. ACLU*, 545 U.S. 844, 883 (2005).
[2]*Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840 (7th Cir. 2012) (en banc).
[3]*Doe v. Elmbrook Sch. Dist.*, 658 F.3d 710 (7th Cir. 2011) (vacated Nov. 17, 2011).
[4]*Elmbrook Sch. Dist.*, 687 F.3d 840.
[5]*Hein v. Freedom From Religion Found.*, 551 U.S. 587, 597-98 (2007).
[6]*Freedom From Religion Found. v. Nicholson*, 536 F.3d 730, 737 (7th Cir. 2008).
[7]*Flast v. Cohen*, 392 U.S. 83, 102-03 (1968).
[8]*Arizona Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011).
[9]*Id.* at 1447.
[10]*Hinrichs v. Speaker of House of Representatives of the Indiana Gen. Assembly*, 506 F.3d 584, 598 (7th Cir. 2008).
[11]*Id.* at 600.
[12]*Valley Forge Christian Coll. v. Americans United for Separation of Church & State*, 454 U.S. 464, 474-75 (1982).
[13]*Id.* at 485-86.
[14]*Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).
[15]*Id.* at 616-17.
[16]*Cohen v. City of Des Plaines*, 8 F.3d 484, 489 (7th Cir. 1993).
[17]*McCreary Cnty.*, 545 U.S. at 860.
[18]*Rosenberger v. Rector & Visitors of the Univ. of Vir.*, 515 U.S. 819, 839 (1995).
[19]*Widmar v. Vincent*, 454 U.S. 263, 272 n.11 (1981).
[20]*Books v. Elkhart Cnty.*, 401 F.3d 857, 867 (7th Cir. 2005).
[21]*Rabinowitz v. Anderson*, No. 06-cv-81117 (S.D. Fla. __, 2007).
[22]*Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118*, 9 F.3d 1295, 1299-1300 (7th Cir. 1993).
[23]*Westside Cmty. Unit Sch. Dist. v. Mergens*, 496 U.S. 226, 247-48 (1990).
[24]*Lee v. Weisman*, 505 U.S. 577, 592 (1992).
[25]*Elmwood Sch. Dist.*, 687 F.3d at 844.
[26]*Id.*
[27]*Id.* at 847.
[28]*Id.* at 846.
[29]*Id.* at 847.
[30]*Id.* at 846.
[31]*Id.* at 863 (Ripple, J., dissenting).
[32]*See id.* at 847 (discussing the school superintendent's assurances that "no religious literature would be distributed").
[33]*Id.* at 842.
[34]*Elmwood Sch. Dist.*, 658 F.3d 710.
[35]*Id.* at 719.
[36]*Id.* at 733.
[37]*Id.* at 734.
[38]*Id.* at 735 (Flaum, J., dissenting).
[39]*Elmwood Sch. Dist.*, 687 F.3d at 842.
[40]*Id.* at 850 (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 315 (2000)).
[41]*Id.* at 853.
[42]*Id.*
[43]*Santa Fe Indep. Sch. Dist.*, 530 U.S. at 305, 308.
[44]*Lee*, 505 U.S. at 588.
[45]*Stone v. Graham*, 449 U.S. 39 (1980)
[46]*Elmwood Sch. Dist.*, 687 F.3d at 855.
[47]*Id.* at 856.
[48]*Id.* at 844.
[49]*Id.* at 860 (Hamilton, J., concurring).
[50]*Id.*
[51]*Id.* at 862 (Ripple, J., dissenting).
[52]*Id.*
[53]*Id.*
[54]*Id.* at 869 (Easterbrook, J., dissenting).
[55]*Id.* at 870.
[56]*Id.*
[57]*Id.* at 876 (Posner, J., dissenting).
[58]*Id.*
[59]*Id.* at 877.