ANYTHING BUT ESTABLISHED: THE SEVENTH CIRCUIT’S DESERTION OF SUPREME COURT ESTABLISHMENT CLAUSE JURISPRUDENCE

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INTRODUCTION

When deciding whether a challenged governmental practice violates the Establishment Clause, courts must first ask whether the practice has been historically accepted throughout United States history.1 If looking to the historical background of the practice cannot resolve the question, only then may courts look to other Establishment Clause tests set forth by the Supreme Court, such as the endorsement, coercion, and purpose tests.2 In Freedom from Religion Foundation, Inc. v. Concord Community Schools, the Seventh Circuit skipped this

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2 Smith, 788 F.3d at 602-3.
first step and did not use the historical approach set forth in *Town of Greece*. By sidestepping this recent Supreme Court precedent, the Seventh Circuit misapplied important Establishment Clause jurisprudence. Because *Town of Greece* signaled a “sea change in constitutional law,” in the future, the Seventh Circuit should use the historical approach when analyzing whether the Establishment Clause is violated.

The Establishment Clause of the First Amendment provides that “Congress shall make no law respecting an establishment of religion.” To interpret this clause, the Supreme Court has “employed at least three ways to assess whether a local governmental body, such as a school, violates the Establishment Clause: the endorsement, coercion, and purpose tests.” Establishment Clause jurisprudence is widely criticized by Justices, judges, and academics. The *Lemon* test is one

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3 885 F.3d 1038 (7th Cir. 2018).
4 *Smith*, 788 F.3d at 602 (Batchelder, J., concurring in part and concurring in the result) (stating that “[w]hen the Supreme Court signals a sea change in constitutional law, I do not believe that we can lightly set it aside in a case implicating the same constitutional provision…Therefore…Town of Greece should inform our analysis here.”).
5 U.S. CONST. amend. I, cl. 1.
6 *Lee v. Weisman*, 505 U.S. 577 (1992) (stating that “the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which ‘establishes a [state] religion or religious faith, or tends to do so.’” (emphasis added)); *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984) (O’Connor, J., concurring) (“What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion. It is only practices having that effect, whether intentionally or unintentionally, that make religion relevant, in reality or public perception, to status in the political community.” (emphasis added)); *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971) (setting forth the purpose test and stating that “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an ‘excessive government entanglement with religion.’” (emphasis added)).
7 *Van Orden v. Perry*, 545 U.S. 677, 700 (2005) (Breyer, J., concurring) (declining to apply the *Lemon* and endorsement tests and stating that “I see no test-related substitute for the exercise of legal judgment”); id. at 694 (Thomas, J.
of the most widely used but highly criticized tests. Federal circuit courts have struggled to consistently apply the Lemon test, and one circuit court has recently abandoned the test all together. The Supreme Court itself departed from its use of the Lemon test in Town of Greece v. Galloway. In its place, the Court used a historical approach along with the coercion test to determine whether the Town of Greece could allow volunteer chaplains to open each legislative session with a prayer.


Comm. for Pub. Educ. and Religious Liberty v. Regan, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting) (citing Everson v. Board of Ed. of Ewing Tp., 330 U.S. 1, 18 (1947) (describing the Lemon test as “blurred, indistinct and variable”)); William P. Marshall, “We Know It When We See It” The Supreme Court and Establishment, 59 S. CAL. L. REV. 495, 497 (the role of the Lemon test to resolve any establishment inquiry “is ambiguous. At times the Court has described the test as a helpful signpost, at other times the Court has suggested that it can be discarded in certain circumstances, at still other times the Court has held that it must be rigorously applied.”).

New Doe Child #1 v. U.S., 901 F.3d 1015 (8th Cir. 2018).


Town of Greece, 572 U.S. at 575-576.
In *Freedom from Religion Foundation, Inc. v. Concord Community Schools*, the Seventh Circuit did not explicitly use the historical approach set forth in *Town of Greece*, the Supreme Court’s most recent Establishment Clause case.¹² Chief Judge Wood wrote the majority opinion and used three other Establishment Clause tests to find there was no Establishment Clause violation.¹³ The Court concluded under all three tests that a holiday program at issue was not impermissibly coercive, did not have an unlawful religious purpose, and a reasonable observer would not have viewed the program as a religious endorsement.¹⁴ However, not all the judges on the Seventh Circuit agreed with which Establishment Clause test or tests should be applied. In *Concord*, Judge Frank Easterbrook concurred in the judgment, but disagreed with the use and application of coercion test.¹⁵

The Supreme Court has given inconsistent guidance and has not explicitly overruled any Establishment Clause tests. The Seventh Circuit’s decision in *Concord* highlights the confusion among courts the Establishment Clause has created. The Eighth Circuit recently broke free from the *Lemon* test, becoming the first court of appeals to use the Supreme Court’s historical approach set forth in *Town of Greece v. Galloway*.¹⁶ Now that the Eighth Circuit has left the *Lemon* test behind, a shift in the federal courts Establishment Clause jurisprudence may occur. As the Eighth Circuit noted, *Town of Greece* is a “major doctrinal shift in Establishment Clause jurisprudence.”¹⁷ While the Supreme Court has developed multiple tests for analyzing the Establishment Clause, it has never adopted one clear test.¹⁸ Whether the circuit courts will continue to use the coercion, purpose,

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¹² 885 F.3d 1038, 1045-46 (7th Cir. 2018).
¹³ *Id.*
¹⁴ *Id.* at 1053.
¹⁵ *Id.* at 1038.
¹⁶ New Doe Child #1 v. United States, 901 F.3d 1015 (8th Cir. 2018).
¹⁷ *Id.* at 1028 (internal quotations omitted).
¹⁸ See Mitchell v. Helms, 530 U.S. 793, 869 (2000) (Souter, J., dissenting) (explaining that “[i]n all the years of its effort, the Court has isolated no single test of constitutional sufficiency”).
and endorsement tests, or resort to the reasoning of the Supreme Court in *Town of Greece*, is uncertain. However, until the Supreme Court clearly defines Establishment Clause jurisprudence by mandating one specific test, it is unlikely the Seventh Circuit will completely abandon any of the three older tests.

This note argues that federal circuit courts must follow the Supreme Court’s most recent guidance in *Town of Greece*. Courts must look to historical meaning, when applicable, to determine whether a challenged governmental action violates the Establishment Clause. Only then can courts look to other Establishment Clause tests, such as the endorsement, purpose, and coercion tests. This note will first explain the history of Establishment Clause jurisprudence and the various tests the Supreme Court has set forth. Second, this note will survey the different circuit court approaches to the Establishment Clause tests, in particular the Seventh Circuit and Eighth Circuit. Last, this note will analyze the benefits of using the historical method and suggest that courts should look to history, coupled with another Establishment Clause test if necessary, to evaluate whether a constitutional violation has occurred.

A. The History of the Establishment Clause

1. Early Establishment Clause History

When looking at a challenged governmental practice, the Supreme Court’s early Establishment Clause jurisprudence analyzed the history of disputed practices to determine whether a constitutional violation had occurred. In *Everson v. Board of Education*, the majority stated that the Establishment Clause should be interpreted in “light of its history.” Even the dissent agreed with this approach, commenting that “[n]o provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First

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19 *Everson v. Board of Education*, 330 U.S. 1, 10-11 (1947) (discussing the importance of the separation between church and state).
20 *Id.* at 14-15.
Amendment.” For the following two decades, the Supreme Court based its Establishment Clause findings on historical practices and understandings.

For example, in 1961, the Supreme Court considered whether a Maryland criminal statute which proscribed labor, business, and other commercial activities on Sundays violated the Establishment Clause. Appellants argued that “Sunday is the Sabbath day of the predominant Christian sects [and] the purpose of the enforced stoppage of labor on that day is to facilitate and encourage church attendance.” In its analysis, the Supreme Court stated that the history of Sunday Closing Laws in the United States was relevant to whether the statutes respect an establishment of religion. The Court looked as far back as colonial and English legislation, and observed that “English Sunday legislation was in aid of the established church.” However, the Court acknowledged that in recent times, there were “secular justifications [that] have been advanced for making Sunday a day of rest.” The Court held that the Sunday Closing Laws did not violate the Establishment Clause because “most of them, at least, are of a secular rather than of a religious character, and that presently they bear no

21 Id. at 33. (Rutledge, J., dissenting).
23 Id. at 422.
24 Id. at 431.
25 Id.
26 Id. at 432-33.
27 Id. at 434.
relationship to establishment of religion as those words are used in the Constitution of the United States."

In 1963, the Court in Abington School District v. Schempp stated that the line between “the permissible and impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers.” In Abington, two state statutes providing for Bible reading in public schools were held unconstitutional under the Establishment Clause. Seven years later, the Supreme Court analyzed the Establishment Clause under a historical approach again in Walz v. Tax Commission of City of New York. The issue in Walz was whether property tax exemptions to religious organizations for property used for religious worship violated the Establishment Clause. Finding that there was “no genuine nexus between tax exemption and establishment of religion,” the Court looked to an earlier case, which stated that “a page of history is worth a volume of logic.” The Court examined the governmental purpose for granting tax exemptions to religious institutions, and found that there was no strong case for finding this “historic practice” unconstitutional. As evidenced by McGowan and Abington, the Supreme Court’s mid to late twentieth century approach to the Establishment Clause was historical.

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28 Id. at 444.
30 Id. at 223.
32 Id. at 666-68.
33 Id. at 675-76. (citing New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921) (Holmes, J.).)
34 Id. at 686-87.
2. The Lemon Test

In *Lemon v. Kurtzman*, the Supreme Court broke from its traditional, historical approach and created a new Establishment Clause test. In *Lemon*, the issue was whether two statutes that provided state funding for non-public, religious schools violated the Establishment Clause. A Rhode Island Program allowed the state to provide a fifteen percent salary supplement to teachers who taught secular subjects at religious schools. The Pennsylvania statute had a similar reimbursement and also provided partial reimbursement for secular materials in the religious schools. In an 8-1 decision, the Court found the two Pennsylvania and Rhode Island statutes at issue were unconstitutional.

Striking down both statutes, the Court looked to its previous Establishment Clause jurisprudence in *Board of Education v. Allen* and *Walz v. Tax Commission* to develop the three prongs now known as the Lemon test. The Lemon test asks whether the government’s action (1) has a religious “purpose,” (2) has the “primary effect” of “advancing” or “endorsing” religion; and (3) fosters “excessive government entanglement with religion.” In *Lemon*, the Court focused its analysis on the third prong, finding that the “cumulative

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35 403 U.S. 602 (1971).
36 *Id.* at 606 (finding both statutes “unconstitutional under the Religion Clauses of the First Amendment, as the cumulative impact of the entire relationship arising under the statutes involves excessive entanglement between government and religion”).
37 *Id.* at 607.
38 *Id.*
39 *Id.* at 603.
impact of the entire relationship arising under the statutes in each State involves excessive entanglement between government and religion.”  

The Lemon test has been highly criticized for its malleability and self-contradiction by courts and commentators. Many Supreme Court Justices, past and present, are stark critics of the test. One of the Lemon tests biggest critics was Justice Scalia. In his concurrence in Lamb’s Chapel, Justice Scalia explained that “no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature’s heart [the Lemon test], and a sixth has joined an opinion doing so.” Justice Scalia refused to join

42 See id. at 613-614.
43 See, e.g., Lamb’s Chapel, 508 U.S. at 398 (Scalia, J.) (“As to the Court’s invocation of the Lemon test: 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.”); Doe v. Elmbrook Sch. Dist., 687 F.3d 840, 869-77 (7th Cir. 2012) (Easterbrook, J. & Posner, J., dissenting from en banc decision) (stating that Lemon and the “no endorsement” test are “hopelessly open-ended”); Jesse H. Choper, The Establishment Clause and Aid to Parochial Schools—An Update, 75 CALIF. L. REV. 5 (1987).
the majority opinion in *Lamb’s Chapel* because of the use of the *Lemon* test. While the *Lemon* test might first appear to be a simple three-part test, the problem is that the Court itself is wishy washy about how much deference it should be given. For example, in *Hunt v. McNair*, the Court stated that the three-part test was “no more than helpful signposts.” While the *Lemon* test was once the leading method for challenges to the Establishment Clause, the test has caused greater division than unity. Until five Justices of the Supreme Court specifically abrogate the rule, the circuit courts will continue to use the test.  

3. Revisiting the Historical Approach: *Marsh* and *Town of Greece*

In *Marsh v. Chambers* and *Town of Greece v. Galloway*, the Supreme Court returned to looking to history and traditional understandings of challenged governmental practices in analyzing whether legislative prayer violated the Establishment Clause. The question in *Marsh* was whether the Nebraska Legislature’s practice of offering opening prayers at legislative sessions, each session with a prayer led by a chaplain, who was paid by the state, violated the Establishment Clause. Writing for the majority, Justice Berger held the Nebraska Legislature’s practice did not violate the Establishment Clause. Instead of using the *Lemon* test, Justice Burger relied on history and the intent of the Framers of the United States.
States Constitution. Looking to the “unambiguous and unbroken history of more than 200 years,” he stated that “the practice of opening legislative sessions with prayer has become part of the fabric of our society.”

In 2014, the Supreme Court in *Town of Greece, N.Y. v. Galloway* again moved away from *Lemon’s* ahistorical analysis of the Establishment Clause. Breaking free from the *Lemon* test, the Court engaged in a historical analysis of legislative prayer, which dated back to the time the Framers drafted the First Amendment. Citizens in Greece, New York held town board meetings where a local clergyman would give an invocation. A town employee would call local religious institutions until she found a minister available for the monthly meeting. The town did not exclude or deny any prospective prayer-givers the opportunity, allowing ministers, laypersons, or even atheists to give the invocation. However, all prayer-givers were Christian. Two women, Susan Galloway and Linda Stephens, sued the town, saying that the prayer practice preferred Christian prayer over other religious and sponsored sectarian prayers.

The question was whether the practice of opening town board meetings with a prayer violated the Establishment Clause. The Supreme Court looked to the history of legislative prayer and recognized that “while religious in nature, [legislative prayer] has long been understood as compatible with the Establishment Clause.” The
appropriate test to be used, the Court said, “must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change.”61 Justice Kennedy also used the coercion test and evaluated whether a reasonable observer would think the prayers had a coercive tone or message.62 He recognized that “the reasonable observer is acquainted with this tradition and understand that its purposes are to lend gravity to public proceedings and to acknowledge the place religion holds in the lives of many private citizens, not to afford government an opportunity to proselytize or force truant constituents into the pews.”63

In making its decision, the Court stated that “there can be no doubt that the practice of opening legislative sessions with a prayer has become part of the fabric of our society.”64 The Court stated “that the Establishment Clause must be interpreted by reference to historical practices and understandings.”65 Essentially, under Town of Greece, any test under the Establishment Clause must look to history.66 In his concurrence, Justice Alito further explained that the practice of delivering a prayer at the beginning of each legislative session “was well established and undoubtedly well known.”67 Any inconsistency between Establishment Clause tests and the historic practice of legislative prayer, “calls into question the validity of the test, not the historic practice.”68

Ultimately, the Court decided that opening a town meeting with a prayer comported with tradition and was not coercive.69 Notably, the

62 Id. at 586-87. (citing County of Allegheny v. ACLU, 492 U.S. 573, 659 (1989)) (Kennedy, J., dissenting in part).
63 Id.
64 Id. at 577 (Kennedy, J., concurring in judgment in part and dissenting in part) (citing Marsh v. Chambers, 463 U.S. 783, 792 (1983)).
65 Id. at 565. (emphasis added).
66 Id.
67 Id. at 603.
68 Id.
69 Id. at 591-92.
Court did not analyze the case using the *Lemon* test. Justice Breyer’s dissent was the only part of the case to cite *Lemon*.\(^70\) In doing so, the Court did not explicitly overrule the *Lemon* test or any other Establishment Clause test.

*Town of Greece* created a two-pronged test. First, “[t]he Establishment Clause must be interpreted by reference to historical practices and understandings . . . Any test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and change.”\(^71\) Second, “[i]t is an elemental First Amendment principle that government may not coerce its citizens to support or participate in any religion or its exercise.”\(^72\)

4. The Endorsement Test

Justice O’Connor first proposed the Endorsement Test in her concurring opinion in *County of Allegheny v. ACLU* and was approved by a majority of the Court five years later in *Lynch v. Donnelly*.\(^73\) Justice O’Connor acknowledged that it is unclear “how the three parts of the [Lemon] test relate to the principles enshrined in the Establishment Clause.”\(^74\) Recognizing this, Justice O’Connor set forth a method to analyze the Establishment Clause – the Endorsement Test

\(^{70}\) *Id.* at 614-15 (Breyer, S., dissenting) (citing to *Lemon* v. Kurzman, 403 U.S. 602, 622 (1971) and stating that “[t]he question in this case is whether the prayer practice of the town of Greece, by doing too little to reflect the religious diversity of its citizens, did too much, even if unintentionally, to promote the “political division along religious lines” that “was one of the principal evils against which the First Amendment was intended to protect.”).

\(^{71}\) *Id.* at 577 (Kennedy, J., concurring in the judgment in part and dissenting in part) (internal citations omitted).

\(^{72}\) *Id.* at 586 (plurality opinion).


\(^{74}\) *Lynch*, 465 U.S. at 689.
– which asks whether “a government practice is perceived as an endorsement of religion.”\textsuperscript{75} Said a different way, the question is whether “the challenged governmental practice has . . . the purpose or effect of ‘endorsing’ religion.”\textsuperscript{76}

In \textit{County of Allegheny}, the majority found that the display of a menorah and a Christmas tree on public property was not an impermissible governmental endorsement of Christianity and Judaism.\textsuperscript{77} While the government “may celebrate Christmas in some manner and form,” it may not endorse the Christian religion.\textsuperscript{78} While the endorsement test has been used and accepted, like the \textit{Lemon} test, the endorsement test has not been without criticism.\textsuperscript{79} The Court in \textit{Town of Greece} did not use the endorsement test, but at the same time did not abrogate endorsement test.\textsuperscript{80} Therefore, circuit courts continue to apply the endorsement test.\textsuperscript{81}

\textsuperscript{75} \textit{Id}. at 689.
\textsuperscript{76} \textit{Cty. of Allegheny}, 492 U.S. at 592 (citing \textit{Engel v. Vitale}, 370 U.S. 421, 436 (1962)); \textit{see also} \textit{Wallace v. Jaffree}, 472 U.S. 38, 60 (1985) (using the endorsement test to find a moment-of-silence statute was an endorsement of prayer activities).
\textsuperscript{77} \textit{Cty. of Allegheny}, 492 U.S. at 574.
\textsuperscript{78} \textit{Id}. 601-602.
\textsuperscript{79} \textit{Id}. at 574 (Kennedy, J., dissenting) (discussing the endorsement test and stating that “[t]his Court's decisions, however, impose no such burden on demonstrating that the government has favored a particular sect or creed, but, to the contrary, have required strict scrutiny of practices suggesting a denominational preference”).
\textsuperscript{80} \textit{Smith v. Jefferson Cty. Bd. of Sch. Comm’rs}, 788 F.3d 580, 589 (6th Cir. 2015).
\textsuperscript{81} \textit{Id}. (explaining that “\textit{Town of Greece} gives no indication that the court intended to completely displace the endorsement test. The opinion does not address the general validity of the endorsement test at all; it simply explains why a historical view was more appropriate in the case at hand. We therefore apply the endorsement analysis here.”); \textit{see also} Freedom From Religion Foundation, Inc. v. Concord Community Schools, 885 F.3d 1038, n.1 (7th Cir. 2018) (“Indeed, there is debate among the Justices about the continuing validity of the endorsement test . . . at least the dissenting Justices in \textit{Trinity Lutheran Church of Columbia, Inc. v. Comer}, 137 S.Ct. 2012 n.4 (2017), suggested that the endorsement test is still with us.” (internal citations omitted)).
5. The Coercion Test

Justice Kennedy formulated what is now known as the coercion test. In *Lee*, public high schools and middle schools invited clergy to give invocations and benedictions at graduation ceremonies. Writing for the majority, Justice Kennedy found that the prayers conducted at the graduations violated the Establishment Clause because they effectively coerced students to support or participate in religion.

The Court recognized that in elementary and secondary schools, prayer exercises "carry a particular risk of indirect coercion." Focusing on the indirect and peer pressure put on students to stand as a group or be silent during the ceremony, the Court stated that "[i]t is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise."

In his dissent, Justice Scalia criticized the coercion test. He stated that "[t]he coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support by force of law and threat of penalty." He gave an example of the Colony of Virginia, where the Church of England forced ministers to deliver the doctrine and rites of the Church and all persons were required to go to church and observe the Sabbath. Justice Scalia did not disagree with the general idea that the government cannot coerce anyone to participate in religion, but he stated that the concept of coercion must be coupled with a "threat of

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83 *Id.*
84 *Id.* at 577-78.
86 Lee, 505 U.S. at 587.
87 *Id.* at 640-41.
88 *Id.* 640. (emphasis in original).
89 *Id.* 641.
penalty.”\textsuperscript{90} There was no specific threat of penalty at issue in \textit{Lee}, according to Justice Scalia.\textsuperscript{91} While the coercion test is not without its critics, the Court's use of the test in \textit{Town of Greece} indicates that the coercion test is still well and alive in the Court.\textsuperscript{92}

B. \textit{Varying Circuit Court Applications of Establishment Clause Tests}

What makes Establishment Clause jurisprudence different from other constitutional issues is the open criticism of the area of law by Supreme Court Justices and the courts of appeals.\textsuperscript{93} Because the

\textsuperscript{90} Id. at 642. (Easterbrook, J., dissenting) (citing American Jewish Congress v. Chicago, 827 F.2d 120, 132 (7th Cir. 1987)).

\textsuperscript{91} Id.

\textsuperscript{92} 572 U.S. 565, 584-87 (2014) (“The town of Greece does not violate the First Amendment by opening its meetings with prayer that comports with our tradition and does not \textit{coerce} participation by nonadherents.” (emphasis added)).

Supreme Court has set forth so many different tests, lower courts are tasked with sifting through the weeds of Supreme Court decisions to figure out which test to use. The Seventh Circuit in *Concord* applied three prominent tests, the purpose (*Lemon* test), endorsement, and coercion tests, to determine whether an Establishment Clause violation occurred. But, the court failed to follow the Supreme Court’s recent decision in *Town of Greece*, which says that courts must apply a historical analysis in deciding Establishment Clause cases. On the other hand, the Eighth Circuit in *New Doe Child #1 v. U.S.* declined to use the *Lemon* test entirely and opted for the *Town of Greece* historical approach. With the Seventh Circuit departing from recent Supreme Court precedent, and the Eighth Circuit leaving many of the old tests behind, Establishment Clause jurisprudence is more unclear than ever.

1. The Seventh Circuit’s Approach

The most significant problem with the modern state of the Supreme Court’s interpretation of the Establishment Clause is how it leaves lower courts to decide which test to use. Because of the wide variety of applicable tests, different results are reached using different tests. The Seventh Circuit has not been immune from this problem. Judges on the Seventh Circuit have recognized this juggling act – with multiple tests, comes multiple choices and outcomes.

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Clause jurisprudence is “confused”); William P. Marshall, “*We Know It When We See It*” *The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495, 495 (1986) (“From the outset it has been painfully clear that logical consistency and establishment clause jurisprudence were to have little in common.”).

94 Freedom From Religion Foundation, Inc. v. Concord Community Schools, 885 F.3d 1038 (7th Cir. 2018).


96 *New Doe Child #1 v. U.S.*, 901 F.3d 1015 (8th Cir. 2018).

97 Mitchell v. Helms, 530 U.S. 793, 857 (2000) (O’Connor, J., concurring) (noting how “there remains the question of which of the two irreconcilable strands of our Establishment Clause jurisprudence we should now follow.”).
As the Seventh Circuit noted in *Freedom from Religion Foundation, Inc. v. Concord Community Schools*, Supreme Court Justices have also been critical of Establishment Clause jurisprudence. In *Concord*, Chief Judge Wood analyzed whether the Establishment Clause was violated under all three of the Supreme Court’s approaches: the endorsement, coercion, and purpose tests.

The issue in *Concord* was whether a public high school’s holiday show violated the Establishment Clause. Through the Freedom From Religion Foundation, Inc., a high school student and his father brought a suit against a public school corporation. Concord High School’s “Christmas Spectacular,” was a holiday show that had “a particular focus on Christmas.” There were two parts to the show. The first half varied from year to year, but showcased non-religious songs and dances, which were tied to an annual theme. The second half, the section which was disputed, involved a 20-minute section called “The Story of Christmas.” In this segment, there were “religious songs interspersed with a narrator reading passages from the New Testament.” At the end of the act, students posed in a nativity scene.

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98 *Concord*, 885 F.3d at 1045 (citing Elmbrook Sch. Dist. v. Doe, 134 S. Ct. 2283 (2014) and noting that in their dissents, Justices Scalia and Thomas expressed the view that the Supreme Court has rejected the endorsement test) (citing Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2031 n.4 (2017) and stating that the dissenting Justices in *Trinity* suggested that the endorsement test is still relevant).

99 *Concord*, 885 F.3d at 1045.

100 *Id.*

101 *Id.* at 1041-42.

102 *Id.* at 1041.

103 *Id.*

104 *Id.*

105 *Id.*

106 *Id.*

107 *Id.* at 1042.
Because they took issue with the second half of the show, Plaintiffs brought suit against the school, asking for declaratory and injunctive relief.\footnote{108} Plaintiffs also asked for a preliminary injunction to prevent the school from showcasing the second half of the 2014 show in the upcoming December 2015 show.\footnote{109} In response, Concord offered to make two changes to the proposed version of the 2015 show: it would remove the scriptural reading from the nativity scene, and add two songs, “Ani Ma’amín” and “Harambee,” to represent Hanukkah and Kwanzaa.\footnote{110} The district court judge held that these changes were not enough to “address the Establishment Clause problems,” and granted the preliminary injunction.\footnote{111} After, Concord adopted further changes to the show.\footnote{112} They added Hanukkah and Kwanzaa songs, showed a two minute nativity scene with mannequins as opposed to students, and cut out the New Testament readings.\footnote{113} Both parties moved for summary judgment, and the district court held that the 2015 show did not violate the Establishment Clause, granting partial summary judgment in favor of Concord.\footnote{114}

On appeal, Plaintiffs argued that even with the changes to the second half of the Christmas Spectacular, the show still violated the Establishment Clause of the First Amendment.\footnote{115} The Court walked through each of the three Supreme Court’s tests to determine whether there had been a violation of the Establishment Clause.\footnote{116} The Court analyzed the Christmas Spectacular under the endorsement, coercion, and purpose tests.\footnote{117} Ultimately, the Court found that under any of the
tests, Concord’s 2015 show did not violate the Establishment Clause.\footnote{118}

When analyzing the Christmas Spectacular under the “purpose” test, the Seventh Circuit looked to the test’s root: \textit{Lemon v. Kurtzman}.\footnote{119} Interestingly, the Seventh Circuit did not explicitly call its method the \textit{Lemon} test, but it did reference the case.\footnote{120} Under the Seventh Circuit’s purpose test, the “practice is unconstitutional if it lacks a secular objective.”\footnote{121} Ultimately, the Seventh Circuit concluded that the primary purposes of the holiday program were entertainment and pedagogy, not religion.\footnote{122}

Concurring in the judgment, Judge Easterbrook stated that while he agreed the performance should be upheld, the court should have done so on other grounds.\footnote{123} He explained that “as a matter of history or constitutional text” a government does not establish “a religion through an artistic performance that favorably depicts one or more aspects of that religion’s theology or iconography.”\footnote{124} Judge Easterbrook further stated that “as both \textit{Lemon} and the no-endorsement approach are judicial creations rather than restatements of the first amendment’s meaning, they do not justify a claim by judges to have the final word. I have made this point elsewhere, so I do not present an extended argument here.”\footnote{125}

In \textit{Concord}, the Seventh Circuit indicated in a few different ways that it was refusing to use the \textit{Town of Greece} historical test. First, under the purpose test, the test does not require the court to “evaluate

\footnote{118 Id. at 1053.}
\footnote{119 Id. at 1049.}
\footnote{120 Id.}
\footnote{121 Id.}
\footnote{122 Id. at 1050.}
\footnote{123 Id. at 1053.}
\footnote{124 Id.}
\footnote{125 Id. (citing Doe ex rel. Doe v. Elmbrook Sch. Dist., 687 F.3d 840, 869 (7th Cir. 2012)).}
the quality or sufficiency of the historical analysis at issue.”  The Court in Town of Greece mandated that courts use a historical analysis to determine whether the challenged practice violated the Establishment Clause.  In defiance of sorts, Concord explicitly stated that the purpose test is unrelated to challenged historical practices.  Second, and more importantly, the Concord court did not apply the Town of Greece historical approach as one of its three methods in analyzing an Establishment Clause challenge.  Third, while using the endorsement test, the Seventh Circuit did mention that a “reasonable observer is aware of a situation’s history and context.”  However, merely mentioning that a practice’s history should be considered is not enough to satisfy Town of Greece.  Courts must actually engage in a historical analysis according to Town of Greece.

In sum, the court in Concord disagreed about the validity of the Lemon test and failed to use the most recently proposed Supreme Court test set forth in Town of Greece at all.  This indicates that there is disagreement on the use of Supreme Court Establishment Clause jurisprudence and reluctance to use the historical approach.  Because of the hodgepodge of Establishment Clause tests and questionability of which tests are “live,” Judge Wood used the endorsement, purpose, and coercion tests in her analysis.  However, the court failed to cover all the bases when it did not use the historical approach set forth in Town of Greece.

2. The Eighth Circuit’s Approach

In New Doe Child #1 v. U.S., the Eighth Circuit became the first circuit court to decline to use the Lemon test entirely.  In New Doe, id. (citing Books v. Elkhart Cty., Ind., 401 F.3d 857, 866 (7th Cir. 2005)) (explaining that “[t]he purpose prong of the Lemon test does not require us to evaluate the quality or sufficiency of the historical analysis embodied in the County's display.”).


128 Freedom From Religion Foundation, Inc. v. Concord Community Schools, 885 F.3d 1038, 1046 (7th Cir. 2018).

129 901 F.3d 1015 (8th Cir. 2018).
the Court recognized that this was the first time the circuit had analyzed an Establishment Clause issue since “the guidance of new Supreme Court precedent” in *Town of Greece*. The Eighth Circuit acknowledged that the Supreme Court had set forth numerous Establishment Clause tests, but had failed to commit to any specific one.

The issue in *New Doe Child #1* was whether placing the national motto on money violated the Establishment Clause. Looking to the Supreme Court’s most recent Establishment Clause jurisprudence, the Eighth Circuit noted *Town of Greece*’s “unequivocal directive: “[T]he Establishment Clause must be interpreted by reference to historical practices and understandings.” In deciding which test to use, the *New Doe Child #1* court acknowledged the major doctrinal shift since *Town of Greece*. The court stated that “[g]iven (1) Galloway’s unqualified directive that the Establishment Clause “must” be interpreted according to historical practices and understandings, (2) its emphasis that this historical approach is not limited to a particular factual context; and (3) the absence of any reference to other tests in the Court’s opinion, we agree” that there has been a “major doctrinal shift in Establishment Clause jurisprudence.”

In using *Town of Greece*’s historical approach, the Eighth Circuit asked two questions. First, what do the historical practices at hand “indicate about the constitutionality of placing the national motto on money?” And second, is the placement of the national motto on

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130 *Id.* at 1019 (citing Town of Greece, N.Y. v. Galloway, 572 U.S. 565 (2014)).
132 *Id.* at 1018-19.
133 *Id.* at 1020 (citing Town of Greece, N.Y., v. Galloway, 572 U.S. 565, 566 (2014)).
134 *Id.* (citing Felix v. City of Bloomfield, 847 F.3d 1214, 1219 (10th Cir. 2017) (Kelly, J., dissenting from the denial of rehearing en banc) and Smith v. Jefferson Cty. Bd. of Sch. Comm’rs, 788 F.3d 580, 602 (6th Cir. 2015) (Batchelder, J., concurring in part and concurring in the result)).
135 *Id.* (internal citations omitted).
136 *Id.* at 1021.
money impermissibly coercive?\textsuperscript{137} The court looked to the history of placing “In God We Trust” on U.S. money, which began in 1864.\textsuperscript{138} The court noted that the history of this practice was “unbroken” and that the government is not required to purge itself “of all religious reflection.”\textsuperscript{139} Ultimately, the court found that putting “In God We Trust” on U.S. coins comported with historical practices.\textsuperscript{140}

The court also supplemented it’s historical analysis by using the coercion test.\textsuperscript{141} But, the court stated that it was unnecessary to “probe the bounds of the coercion analysis in this case because it is even more apparent than in Galloway that the Government does not compel citizens to engage in a religious observance when it places the national motto on money.”\textsuperscript{142} The Eighth Circuit further clarified that historical analysis is not the only test, but one of the most important ones: “In other words, even when history indicates that a practice does not offend the Establishment Clause, but the Court’s other Establishment Clause tests suggest that it does, history alone cannot carry the day . . . [and] history is now the single most important criterion when evaluating Establishment Clause claims.”\textsuperscript{143}

\textbf{C. The Future of the Historical Approach}

\emph{Town of Greece} set forth a new approach to the Establishment Clause: first analyze the practice under history, and if that still leaves the constitutionality of the practice unresolved, then turn to the other tests, most preferably the coercion test. Despite this guidance, Establishment Clause jurisprudence continues to be a mishmash of

\begin{footnotes}
\item \textsuperscript{137} Id.
\item \textsuperscript{138} Id.
\item \textsuperscript{139} Id. at 1022. (citing ACLU Neb. Found. v. City of Plattsmouth, 419 F.3d 772, 778 (8th Cir. 2005).
\item \textsuperscript{140} Id. at 1023.
\item \textsuperscript{141} Id. (questioning “whether the appearance of ‘In God We Trust’ on U.S. money is coercive.”).
\item \textsuperscript{142} Id. (citing Mayle v. U.S., 891 F.3d 680, 684 (7th Cir. 2018)).
\item \textsuperscript{143} Id. at 1028 (Kelly, J., concurring) (internal citations omitted).
\end{footnotes}
tests. While some courts still use the Lemon test, its continuing applicability is questionable. As Judge Easterbrook of the Seventh Circuit noted, the Lemon test was “made up by the Justices during recent decades.”

The Eighth Circuit left behind the Lemon test in favor of the historical approach and the coercion test. On the other hand, the Seventh Circuit continues to use the Lemon test and fails to use the historical approach. This begs the question, what is the future of Establishment Clause jurisprudence and in particular, the historical approach?

In Concord, Judge Wood used a variety of Establishment Clause tests. Using three tests, the court arrived at one conclusion: the holiday show did not violate the Establishment Clause of the First Amendment. To sufficiently expound the point that the holiday show did not violate the Establishment Clause, it was a smart tactic to employ multiple tests. Judge Wood recognized that there is considerable disagreement about which test to employ, even among the Supreme Court Justices. Using three tests was an attempt to leave no doubt that no Establishment Clause violation had taken place.

However, the court in Concord did leave one puzzle piece unsolved. Although Town of Greece marked a “major inflection point” in Establishment Clause jurisprudence, the Seventh Circuit failed to

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144 Doe ex rel. Doe v. Elmbrook School Dist., 687 F.3d 840, 869 (Easterbrook, J., dissenting) (noting that the Lemon test is open-ended, lacks support in the text of the First Amendment, and has no historical derivation); see also Card v. City of Everett, 520 F.3d 1009, 1023-24 (9th Cir. 2008) (Fernandez, J., concurring) (“The still stalking Lemon test and the other tests and factors, which have floated to the top of this chaotic ocean from time to time in order to answer specific questions, are so indefinite and unhelpful that Establishment Clause jurisprudence has not been more fathomable.”).

145 Freedom from Religion Foundation, Inc. v. Concord Community Schools, 885 F.3d 1038, 1045-46 (7th Cir. 2018) (examining “the Spectacular as performed in 2015 under each of the Court’s approaches.”).

146 Id.

147 Eric Rassbach, Town of Greece v. Galloway: The Establishment Clause and the Rediscovery of History, 2014 CATO S. CT. REV. 71, 78 (2013-2014) (explaining that “the process of historical examination that Town of Greece has set in motion will continue to reshape how these cases are decided for years to come.”).
use the historical approach. *Town of Greece* was decided in 2014, making it one of the most recent Supreme Court cases examining the First Amendment’s Establishment Clause. There are various reasons why the Seventh Circuit may not have used the *Town of Greece* historical approach. Nevertheless, the court should have applied the most recent Supreme Court precedent, especially since *Town of Greece* marked a strong departure from previous cases.

If one looks closely at the *Concord* opinion, the Seventh Circuit used the word “history” on multiple occasions, potentially for the purpose of superficially following *Town of Greece*. Looking to the first paragraph of the opinion, Chief Judge Wood noted the history of Christmas. She stated “[s]ince ancient times, people have been celebrating the winter solstice.” Further, students have performed the “Christmas Spectacular,” the holiday show at issue, for decades. The only significant time the court mentioned *Town of Greece* was in a footnote concerning the validity of the endorsement test. The Seventh Circuit noted that *Town of Greece* did not make it explicit whether the endorsement test should still be used. But, a dissent in *Trinity v. Lutheran Church of Columbia v. Comer* “suggested that the endorsement test is still with us.” Semi-acknowledging the historical method is not enough, the Seventh Circuit unmistakably refrained from using the historical method.

It is unclear from the *Concord* opinion exactly why the Seventh Circuit failed to use the historical method in *Town of Greece*. One reason could be that court thought the holiday show at issue was not a

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149 *Concord*, 885 F.3d at 1048 (explaining that a “reasonable observer is aware of a situation’s history and context and encompasses the views of adherents and non-adherents alike.”).
150 *Id.* at 1040-41.
151 *Id.*
152 *Id.* at 1041.
153 *Id.* at 1045, n. 1.
154 *Id.*
155 *Id.* (citing Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S.Ct. 2012, 2031 n.4 (2017)).
“historical” practice per se, unlike the custom of beginning legislative sessions with prayer. The show in Concord had a lot of moving parts, including a nativity scene, Bible readings, and Christmas songs. There was not one historical practice for the court to analyze. However, the court could have looked to the history of Christmas and celebrating holidays in the public sphere. For instance, Christmas is a national holiday where the whole country takes the day off, and the Seventh Circuit referred to it as a secular event.

The Town of Greece decision mandates courts to look to history when analyzing whether a violation of the Establishment Clause has occurred. Was the Seventh Circuit’s brief mentioning of the history of the winter solstice and the decades old holiday show enough to satisfy Town of Greece’s historical requirement? Likely not. The Christmas Spectacular in Concord may not perfectly be a “historical practice,” such as opening a legislative session with a prayer.\footnote{\textit{Town of Greece}, 572 U.S. 565 (2014)} This does not offer the Seventh Circuit an excuse to ignore recent Supreme Court precedent. At the very least, the Seventh Circuit should have acknowledged the historical approach explained why the court was not using it.

\textbf{D. Why the Seventh Circuit Should (and Must) Employ the Historical Approach}

As a preliminary matter, it is important to recognize that the Supreme Court’s language surrounding the historical approach in Town of Greece is mandatory.\footnote{\textit{Id.} at 566.} The Court was clear that the Establishment Clause \textit{must} be interpreted according to historical practices and understandings.\footnote{\textit{Id.}} Further, the Supreme Court emphasized that the historical approach is not limited to any particular factual context.\footnote{\textit{Id.} at 566-67. Therefore, any Establishment Clause case that does not use a historical approach violates the Supreme Court’s rule.}

\footnote{\textit{Id.} at 566-67.}
The historical approach can help re-establish the Establishment Clause. The historical approach is not without its critics, and certainly is not a perfect test. The concurrence in *Town of Greece* noted that “history alone cannot carry the day,” suggesting that the historical approach should be combined with other Establishment Clause tests.\(^{160}\) But, the benefit of using the historical method in *Town of Greece*, in addition to other Establishment Clause tests, outweighs the consistent problems with the *Lemon* test. History can serve as a source of information and authority in Establishment Clause cases.

Looking to the use of history generally in American law, our system is a precedent-based system and the Constitution, a 231-year-old document, is the root of the Establishment Clause. The history of a practice can offer objectivity and authority.\(^{161}\) Using a historical method can also support the idea that some aspects of religion in government are acceptable. To some extent, it is impossible to remove all religion from politics. Further, a historical approach offers an external constraint on judicial subjectivity. As Erwin Chemerinsky stated, judges “want very much to make it appear that their decisions are not based on their personal opinions, but instead are derived from an external source.”\(^{162}\)

Other jurisprudence surrounding constitutional amendments demonstrates the trend that the Court looks to history in evaluating constitutionality of practices. As the Court noted in *United States v. Jones*, to analyze the meaning of the Fourth Amendment, the Court must “assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.”\(^{163}\) In evaluating the scope of the Sixth Amendment, the

\(^{160}\) *Id.*


\(^{163}\) 132 S. Ct. 945, 950 (2012) (analyzing whether attaching a GPS tracking device to a vehicle and monitoring the vehicles movement was a search in violation of the Fourth Amendment) (quoting *Kylo* v. U.S., 533 U.S. 27, 34 (2001)).
Court in *Apprendi v. New Jersey* looked to “the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation’s founding.”\(^{164}\) In the landmark Second Amendment case *District of Columbia v. Heller*, both the majority and the dissent of the Court used a historical approach in their opinions. Justice Scalia looked to “the history that the founding generation knew” when interpreting the meaning of the Second Amendment.\(^{165}\) This trend towards reliance on the Bill of Rights’ history demonstrates that analysis on history is defined by what the Framers thought. Because the Court uses history in evaluating other constitutional amendments, it follows that the Court should do the same in analyzing the Establishment Clause.

But on the other hand, history cannot resolve all problems. New practices may not have a specific history for a court to analyze. For instance, the Sixth Circuit in *Smith v. Jefferson Cty. Bd. of Sch. Comm’rs* recognized that in the case at hand, the “pure historical approach” was “of limited utility.”\(^{166}\) There are problems that the Framers might not have anticipated\(^{167}\) and historical practices may do little to enlighten courts. As the Supreme Court noted, “an awareness of history and an appreciation of the aims of the Founding Fathers do not always resolve concrete problems.”\(^{168}\) The problem with relying on history is that the times change, and so should our outlook on governmental practices. Courts should not use history as a tool to

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\(^{164}\) 530 U.S. 466, 478 (2000).

\(^{165}\) 554 U.S. 570, 598 (2008). In his dissent, Justice Stevens analyzed the “contemporary concerns that animated the Framers.” *Id.* at 642.

\(^{166}\) 788 F.3d 580, 588 (6th Cir. 2015) (stating that [i]n cases like this one that cannot be resolved by resorting to historical practices, we do not believe that *Town of Greece* requires us to depart from our pre-existing jurisprudence.”).

\(^{167}\) *Id.* (citing Wallace v. Jaffree, 472 U.S. 38, 80 (1985) (O’Connor, J., concurring in the judgment)).

legitimate governmental practices that are no longer acceptable and would violate the Establishment Clause.\textsuperscript{169}

But, the two-step test set forth in \textit{Town of Greece} inherently takes this problem into account. If history cannot resolve the question, then courts may look to the endorsement, coercion, and purpose tests. The Supreme Court in \textit{Town of Greece} overtly gave greater weight to history by mandating it be analyzed in Establishment Clause cases, and therefore courts must look to history.\textsuperscript{170} The language in \textit{Town of Greece} directs lower courts to examine the history of a practice when evaluating whether there has been a violation of the Establishment Clause. If history can demonstrate that a practice is well-settled in American history, no further test is necessary. But if history cannot resolve the issue, then courts may turn to the other Establishment Clause tests set forth by the Supreme Court.

\textbf{Conclusion}

Because \textit{Town of Greece} did not explicitly overturn any of the previous Establishment Clause tests, they are still fair game for lower courts to cherry pick which one to use. What the Supreme Court has made clear is that history must be taken into account in Establishment Clause cases. When the Seventh Circuit decided \textit{Concord}, it should have recognized the historical approach in \textit{Town of Greece} and analyzed the history of the practice in regard to the Establishment Clause.

\textsuperscript{169} County of Allegheny v. ACLU, 492 U.S. 573, 603 (1989) (“However history may affect the constitutionality of nonsectarian references to religion by the government, history cannot legitimate practices that demonstrate the government's allegiance to a particular sect or creed .... The legislative prayers involved in \textit{Marsh} did not violate this principle because the particular chaplain had 'removed all references to Christ.'”).

Clause. By declining to do so, the court failed to follow Supreme Court precedent that prescribes courts to look to history in Establishment Clause cases. In the future, the Seventh Circuit must at the very least acknowledge the historical approach explained in *Town of Greece*, and if applicable, engage in a dialogue about whether a historical practice comports with the Establishment Clause.