

Town of Greece v. Galloway: The Establishment Clause and the Rediscovery of History

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The thesis of this essay is that *Town of Greece v. Galloway* marks a major inflection point in the development of the law of the Establishment Clause.¹ A jurisprudence that had been oddly untethered from history has come to embrace it. Going forward, the language of the decision itself will cause great changes in how Establishment Clause cases are decided. But even more important, 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.

The essay has four parts. First, I describe the general trend of renewed judicial focus on the history of the Bill of Rights. Second, I provide a summarized narrative of how Establishment Clause cases have typically treated history and historical government practice. Third, I set out what *Town of Greece* says about history and what this means for Establishment Clause cases. Fourth, I predict how the

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¹ 134 S.Ct. 1811 (2014).

rediscovery of history will play out in the development of Establishment Clause cases.

I. The March of History through the Bill of Rights

It is a peculiar feature of history that the more time that has elapsed since an event, often the more we know about it. We know much more today about the politics of medieval Japan or the economic life of Victorian England than did the medieval Japanese or the 19th-century English, respectively. We even know a lot more about the Vietnam War than did the generation that fought it; for example, we know much more now about the Vietnamese perspective on that conflict than we did even 20 years ago.

This phenomenon—that historical knowledge increases with time—is a function of changes over time in the organization and accessibility of data on the one hand, and changes in perspective on the other. Over time, historians can gather more data about certain events. Documents that were hidden come to light. Data dispersed in many locations can be collated and analyzed. New technologies appear that make information more organized and more accessible.²

The increase in chronological distance also gives the latter-day observer a less self-interested perspective of events than those who were personally swept up in them. Few today are personally exercised about the Teapot Dome scandal that aroused great passions in the 1920s; none of the parties involved are still alive. That emotional distance allows us to view the scandal, its causes, and its effects more objectively. In addition, greater chronological distance allows an observer to better determine what the most important factors in any particular sequence of events may be.

This phenomenon is also true of the American Founding, and in particular the adoption of the Bill of Rights. For example, we now know much more about the Founding than did observers 70 or 80 years ago when the Bill of Rights was being incorporated against the states. The information we have about the Founding is better organized and accessible. And we have a better idea of which historical details from the time were important and which were not.

² See, e.g., Google, Company Overview, <https://www.google.com/about/company> (“Google’s mission is to organize the world’s information and make it universally accessible and useful.”); see also *infra* note 47.

This increased historical knowledge about the history of the Founding era has important effects on the law. Because constitutional jurisprudence is particularly attuned to history, any changes in our historical knowledge of the Founding can have significant effects on Bill of Rights jurisprudence.³

Indeed, in recent years the expansion and organization of historical data concerning the Bill of Rights has worked great changes in constitutional law. Amendment by amendment, the Supreme Court has reinterpreted the Bill of Rights in the light of this new historical data, specifically historical data concerning the Anglo-American law, the American colonies, and the Founding itself.

Many examples demonstrate the trend. In 2000, the Court recast the Sixth Amendment right to trial by jury by examining “the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation’s founding.”⁴ In 2004, the Court made fundamental changes to the Sixth Amendment’s protection of a criminal defendant’s right to confront the witnesses testifying against him by looking to “the historical background of the [Confrontation] Clause to understand its meaning.”⁵ In 2008, the Court decided the landmark *District of Columbia v. Heller*, initiating the modern era of Second Amendment litigation.⁶ Both the *Heller* majority and its dissent focused on history to reach their conclusions.⁷ The disagreement was not about the importance of history in interpreting the Second Amendment, but what that history

³ Note that by “history,” I do not mean any of the different originalist theories of constitutional interpretation or their competitors. I mean instead the use of history as part of the interpretive process, which is common to most interpretive schools. See, e.g., Jack M. Balkin, *Alive and Kicking*, *Slate.com* (Aug. 29, 2005), http://www.slate.com/articles/news_and_politics/jurisprudence/2005/08/alive_and_kicking.single.html (“Living constitutionalists draw upon precedent, structure, and the country’s history to flesh out the meaning of the text. They properly regard all of these as legitimate sources of interpretation.”).

⁴ *Apprendi v. New Jersey*, 530 U.S. 466, 478 (2000).

⁵ *Crawford v. Washington*, 541 U.S. 36, 43 (2004).

⁶ 554 U.S. 570 (2008).

⁷ See *id.* at 598 (examining “the history that the founding generation knew” to interpret the Second Amendment); *id.* at 642 (Stevens, J., dissenting) (examining “contemporary concerns that animated the Framers”).

demonstrated. Similarly, the Fourth Amendment has long been rooted in historical understandings.⁸

This trend has in recent years begun to reach the Religion Clauses. In 2012, the Court decided *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, which relied on both the Free Exercise Clause and the Establishment Clause to declare the existence of a “ministerial exception” to employment discrimination laws.⁹ Chief Justice John Roberts, writing for a unanimous Court, began his constitutional analysis with a lengthy discussion of English and colonial government practices concerning the hiring of church ministers, including extensive interference with the selection of clergy.¹⁰ The Court then applied this historical reality to explain what the Religion Clauses mean today:

It was against this background that the First Amendment was adopted. Familiar with life under the established Church of England, the founding generation sought to foreclose the possibility of a national church. . . . By forbidding the “establishment of religion” and guaranteeing the “free exercise thereof,” the Religion Clauses ensured that the new Federal Government—unlike the English Crown—would have no role in filling ecclesiastical offices. The Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own.¹¹

Hosanna-Tabor thus stands not just for the proposition that there is a constitutionally mandated ministerial exception. It stands also for a principle of judicial method: that the historical background of the religion clauses serves to delineate their scope today.

From the data above, the trend is clear: in Bill of Rights cases generally and the religion clauses specifically, history has become an

⁸ See, e.g., *United States v. Jones*, 132 S. Ct. 945, 950 & n.3 (2012) (examining the “original meaning of the Fourth Amendment,” because “we must assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted”).

⁹ 132 S.Ct. 694, 702 (2012). The Becket Fund was counsel to the petitioner, *Hosanna-Tabor Evangelical Lutheran Church and School*, in the appeal.

¹⁰ *Id.* at 702–04.

¹¹ *Hosanna-Tabor*, 132 S.Ct. at 703.

increasingly important interpretive tool, not just for one wing or the other of the Court, but for all of the justices.

II. History and the Establishment Clause 1947–2014

However clear the trend may be in the context of Bill of Rights cases generally, it is impossible to understand *Town of Greece* and the significance of the case's treatment of history unless one is familiar with the tensions within Establishment Clause jurisprudence.

Modern Establishment Clause jurisprudence has had a garbled and, at times, admittedly confused approach toward history as an interpretive tool. To see why, we have to look back at how the Court has treated history and the Establishment Clause from 1947 until 2014. The narrative divides into two phases.

A. *The First Phase: Everson*

The first phase began 67 years ago, with *Everson v. Board of Education of Ewing Township*, a case that dealt with the busing of students to religious schools.¹² *Everson* marks the first time that the Supreme Court decided a claim concerning an establishment of religion by a non-federal entity, and resulted in the incorporation of the Establishment Clause against the states. The case launched modern Establishment Clause jurisprudence.

Everson also marks the first time that the Court discussed history and the Establishment Clause.¹³ But as Professor Michael McConnell has pointed out, the *Everson* Court's "careless description of history" left much to be desired.¹⁴ McConnell notes that the *Everson* Court gave a "truncated" account of the history behind the adoption of the Establishment Clause that relied far too heavily on the 1785 rejection of Patrick Henry's Assessment Bill in Virginia and the enactment of Thomas Jefferson's Bill for Establishing Religious Freedom instead.¹⁵ The *Everson* Court looked at only a tiny part of the history and thus focused too exclusively on the reasons offered against establishment,

¹² 330 U.S. 1 (1947).

¹³ An earlier Establishment Clause case involving the federal government did not include any discussion of history. *Bradfield v. Roberts*, 175 U.S. 291 (1899).

¹⁴ Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 *Wm. and Mary L. Rev.* 2105, 2108 (2003).

¹⁵ *Id.*

without taking into account either the pro-establishment side of the debate or the process of disestablishment that was going on in the states before, during, and after the Founding.¹⁶ Most important, it meant that the Court ignored the question of what an “establishment of religion” actually was.

Everson's approach to history set the tone for Establishment Clause cases decided throughout the 1950s and 1960s. Although cases such as *McGowan v. Maryland* looked in detail at specific practices at the time of the Founding, the analysis consistently circled back to *Everson's* treatment of the Virginia debate over assessments as the paradigmatic statement of the historic meaning of the Establishment Clause.¹⁷

B. *The Second Phase: Lemon*

But 24 years after *Everson*, the Supreme Court adopted a very different approach to history. In *Lemon v. Kurtzman*, the Court did not rely on *Everson's* version of history but instead specifically stated that it could not know either the history behind the Establishment Clause or consequently what it meant.¹⁸ Thus Chief Justice Warren Burger began his discussion with this confession: “Candor compels acknowledgment . . . that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law.”¹⁹ Then later, “The language of the Religion Clauses of the First Amendment is at best opaque, particularly when compared with other portions of the Amendment.”²⁰ The Court then surrenders, stating that “[i]n the absence of precisely stated constitutional prohibitions, we must draw lines.”²¹ The *Lemon* Court then drew those lines not by looking to the history of religious establishments in the Founders’ experience, or even the state religious establishments that lasted for decades after

¹⁶ *Id.*

¹⁷ 366 U.S. 420, 437–40, 442–44 (1961); see also *Ill. ex rel. McCollum v. Board of Ed. of Sch. Dist. No. 71*, 333 U.S. 203, 210–12 (1948); *Zorach v. Clauson*, 343 U.S. 306, 312 (1952); *Torcaso v. Watkins*, 367 U.S. 488, 492–94 (1961); *Engel v. Vitale*, 370 U.S. 421, 428 n.11 (1962); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 216–17 (1963); *Walz v. Tax Comm’n*, 397 U.S. 664, 667–68 (1970) (all relying on *Everson's* account).

¹⁸ 403 U.S. 602 (1971).

¹⁹ *Lemon*, 403 U.S. at 612.

²⁰ *Id.*

²¹ *Id.*

the Founding. Instead, the Court looked to the “cumulative criteria developed by the Court” during the 24 preceding years of Establishment Clause cases to “glean[]” *Lemon*’s now-familiar three-prong test, which examines the purpose of the government action at issue, its effects, and whether it unduly entangles the government in religion.²² Thus the currently governing Establishment Clause standard in all of the lower courts was born as an *ipse dixit* derived from a patently impressionistic survey of just 24 years of precedent.

It is hard to overstate the impact that this move had on how the lower courts processed Establishment Clause claims. *Lemon* created a single, universally applicable Establishment Clause standard while at the same time detaching Establishment Clause analysis (in the lower courts) from the examination of historical practice.²³ The three-pronged *Lemon* test—purpose, effects, entanglement—has staying power in the lower courts for several reasons. It is simple on its face: it provides the sort of test that those courts are used to applying. It doesn’t have any strong competitor tests that the Supreme Court has set forth. And it privileges judicial power because the abstract terms of the test give courts license to reframe legislative and even executive action in ways that could reflect personal policy choices.²⁴ Put another way, if the *Lemon* test were a municipal ordinance rather than a doctrine developed by the Supreme Court, it might well be struck down as void for vagueness.²⁵

²² *Id.* at 612–13. Justice Brennan later quoted this “gleaning” language in his dissent in *Marsh v. Chambers*. See discussion in the section immediately following this one.

²³ I do not claim that once *Lemon* was decided, the Supreme Court stopped referring to history in Establishment Clause cases—far from it. Instead, my argument is that *Lemon* marked a shift from one way of thinking about history and the Establishment Clause to another. More importantly, in the lower courts *Lemon* almost completely displaced history as a mode of Establishment Clause analysis.

²⁴ This is true even when courts do not want that level of unbridled judicial discretion. For example, just last month a federal judge reluctantly ordered a Ten Commandments monument removed from the lawn of the city hall in Bloomfield, New Mexico, stating that “in performing the role of [the endorsement test’s reasonable] observer, the Court is thrust into a realm of pretend and make-believe, guided only by confusing jurisprudence and its own imagination.” *Felix v. City of Bloomfield*, 2014 WL 3865948 at *10 (D.N.M. Aug. 7, 2014).

²⁵ The void-for-vagueness doctrine prohibits laws that do not provide sufficient guidance to those they regulate: “[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process

The *Lemon* test's staying power is doubly ironic. First, the test has been heavily criticized for most of its existence.²⁶ Given the ongoing criticism of the test, it is surprising to some that it has lasted as long as it has. Second, the test provides a decapitated kind of guidance. The Supreme Court has in recent years almost routinely ignored the test. But because it has never expressly overruled *Lemon*, *Lemon* remains the law of the land in all 12 of the regional circuits. Put another way, *Lemon* will remain the law until the Supreme Court specifically abrogates it.

C. *The Second Phase and Legislative Prayer: Marsh v. Chambers*

Twelve years after *Lemon*, the Court confronted for the first time the constitutionality of legislative prayer. *Marsh v. Chambers* was a challenge to the Nebraska legislature's practice of having a paid chaplain (in this case, a Presbyterian) deliver prayers at legislative sessions, a practice that every other state legislature and both houses of Congress had engaged in.²⁷ The Supreme Court upheld the practice in an opinion written, like *Lemon*, by Chief Justice Warren Burger. The Court upheld the practice, relying principally on the fact that legislative prayer was an accepted practice at the time of the Founding and indeed was something the Framers themselves practiced when they met.²⁸ Three justices—William Brennan, Thurgood Marshall, and John Paul Stevens—dissented. Justice Brennan stated in his opinion that

The Court makes no pretense of subjecting Nebraska's practice of legislative prayer to any of the formal "tests" that have traditionally structured our inquiry under the Establishment Clause. That it fails to do so is, in a sense, a good thing, for it simply confirms that the Court is carving

of law" *FCC v. Fox Television Stations, Inc.*, 132 S.Ct. 2307 (2012) (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)).

²⁶ See *infra* subsection titled "General Dissatisfaction with Establishment Clause Precedent."

²⁷ 463 U.S. 783 (1983). In 2011, the Hawaii Senate had ceased holding legislative prayer after the threat of a lawsuit; in the wake of *Town of Greece*, it now may apparently consider reinstating the practice. Catherine Cruz, *Legislature, Council Weighs High Court Prayer Ruling*, KITV.com (May 5, 2014), <http://www.kitv.com/news/legislature-council-weighs-high-court-prayer-ruling/25827358>.

²⁸ *Marsh*, 463 U.S. at 790–92.

out an exception to the Establishment Clause, rather than reshaping Establishment Clause doctrine to accommodate legislative prayer.²⁹

Justice Brennan was right: the opinion did not explain how the rule set forth in *Marsh* fit together with the rest of Establishment Clause jurisprudence. It dealt instead with the discrete issue of legislative prayer, in effect saying that “the Framers did it so it must be permissible,” and not much else. The lack of overt connection between the *Lemon* line of precedent and the *Marsh* line of precedent set up the conflict that led to *Town of Greece*.³⁰

D. The Endorsement Test Corollary to Lemon

Meanwhile, the *Lemon* test continued to expand. In 1984, a year after *Marsh* was decided, the Supreme Court expanded the *Lemon* test significantly. In her concurring opinion in *Lynch v. Donnelly*, Justice Sandra Day O’Connor posited what became a corollary to the *Lemon* test, at least as the lower courts applied Establishment Clause precedent: the endorsement test.³¹ The test states that a “second and more direct infringement [of the Establishment Clause] is government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.”³²

Since Justice O’Connor first proposed that gloss on *Lemon*, the Supreme Court has found “endorsement” in just six cases.³³ And it has ignored it in many others where the test might have been expected to apply if it were truly a test of general application.³⁴ However, as

²⁹ *Id.* at 796 (Brennan, J., dissenting).

³⁰ See *infra* subsection entitled “*Lemon* and *Marsh* in Conflict.”

³¹ 465 U.S. 668 (1984).

³² *Id.* at 688 (O’Connor, J., concurring).

³³ *Wallace v. Jaffree*, 472 U.S. 38, 59–60 (1985); *Sch. Dist. of City of Grand Rapids v. Ball*, 473 U.S. 373, 392 (1985), overruled by *Agostini v. Felton*, 521 U.S. 203 (1997); *Edwards v. Aguillard*, 482 U.S. 578, 593 (1987); *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 599 (1989); *Doe. v. Santa Fe Indep. Sch. Dist.*, 530 U.S. 290, 308 (2000); *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 866 (2005).

³⁴ See, e.g., *Van Orden v. Perry*, 545 U.S. 677, 686 (2005) (plurality op.) (Ten Commandments case decided the same day as the *McCreary* Ten Commandments

with the original *Lemon* test, the endorsement test has become one that the lower courts feel duty-bound to apply, even if the Supreme Court does not feel so obligated. Thus the endorsement test has in most lower courts become part of the second prong of the *Lemon* test—“effects.”³⁵

E. General Dissatisfaction with Establishment Clause Precedent

The result of this headless jurisprudence has been widespread dissatisfaction among academics, lawyers, and judges alike.

Professors specializing in law and religion issues aren’t satisfied and frequently publish critiques of the Supreme Court’s Establishment Clause decisions.³⁶ Church-state litigators aren’t satisfied either. Individual decisions are welcomed by one side or the other, but few litigators if any would say that they are satisfied with Establishment Clause jurisprudence as a whole, regardless of where they are on the ideological spectrum.

Lower court judges certainly aren’t satisfied. There have been numerous lower court opinions openly prodding the Supreme Court to fix the jurisprudence in this area of the law. Judge Frank Easterbrook of the U.S. Court of Appeals for the Seventh Circuit has written:

Standards such as those found in *Lemon* . . . and the “no endorsement” rule, not only are hopelessly open-ended but also lack support in the text of the first amendment and do not have any historical provenance. They have been made up by the Justices during recent decades. 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. See generally Leonard W. Levy, *The Establishment Clause: Religion and the First Amendment* (2d ed. 1994); Philip Hamburger, *Separation of Church and State* 89–107 (2002); Michael W. McConnell, *Establishment*

case, but ignoring the *Lemon* and endorsement tests); *id.* at 700 (Breyer, J., concurring) (in controlling concurrence, declining to apply the *Lemon*/endorsement test and seeing “no test-related substitute for the exercise of legal judgment”).

³⁵ *Am. Atheists, Inc. v. Port Authority of N.Y. and N.J.*, 2014 WL 3702452 at *9 (2d Cir. July 28, 2014) (applying endorsement test as part of *Lemon*’s second prong).

³⁶ See, e.g., Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 *Univ. Chi. L. Rev.* 115 (1992); Jesse H. Choper, *The Endorsement Test: Its Status and Desirability*, 18 *J.L. & Pol.* 499 (2002).

and Disestablishment at the Founding, Part I: Establishment of Religion, 44 Wm. & Mary L. Rev. 2105 (2003). Holding a high school graduation in a church does not “establish” that church any more than serving Wheaties in the school cafeteria establishes Wheaties as the official cereal. See also Michael W. McConnell, Coercion: The Lost Element of Establishment, 27 Wm. & Mary L. Rev. 933 (1986).³⁷

Fellow Seventh Circuit Judge Richard Posner added his own criticism: “The case law that the Supreme Court has heaped on the defenseless text of the establishment clause is widely acknowledged, even by some Supreme Court Justices, to be formless, unanchored, subjective and provide no guidance.”³⁸

Perhaps the most memorable statement in this vein was from Judge Ferdinand Fernandez, who wrote a concurring opinion in a 2008 appeal to the Ninth Circuit:

I applaud Judge [Kim McLane] Wardlaw’s scholarly and heroic attempt to create a new world of useful principle out of the Supreme Court’s dark materials. Alas, even my redoubtable colleague cannot accomplish that. 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 become more fathomable. Would that courts required neutrality in the area of religion and nothing more or less.³⁹

This sort of open criticism of Supreme Court precedent from court of appeals judges is unusual and infrequent—in most areas of the law. In Establishment Clause decisions, it has become commonplace, however, as the lower courts attempt to reconcile seemingly contradictory strands of Supreme Court precedent and express their resentment that the Court has made their task so difficult.

Most important, the justices themselves have expressed their dissatisfaction with the current state of Establishment Clause

³⁷ Doe ex rel. Doe v. Elmbrook School Dist., 687 F.3d 840, 869 (7th Cir. 2012) (Easterbrook, J., dissenting).

³⁸ *Id.*, at 872 (Posner, J., dissenting).

³⁹ Card v. City of Everett, 520 F.3d 1009, 1023–24 (9th Cir. 2008) (Fernandez, J., concurring).

precedent—and in particular the *Lemon* test and its endorsement corollary—be it in concurrences or dissents.⁴⁰

F. *Lemon* and *Marsh* in conflict

Into this general dissatisfaction with the Establishment Clause, and the tension between *Lemon* and *Marsh* specifically, came an effort by Americans United for Separation of Church and State and the American Civil Liberties Union to bring test cases concerning municipal legislative prayer.⁴¹ The apparent rationale behind this effort was that *Marsh* was viewed as an aberration and *Lemon*/endorsement the norm. The strategy behind the ACLU/AUSCS initiative was to pick off what could be viewed as an outlier doctrine that allowed legislative prayer to persist. In this point of view, *Marsh*'s blessing of legislative prayer ran directly counter to the way most Establishment Clause cases were decided under the *Lemon*/endorsement test. And municipalities were a much easier target than state legislatures, both because they'd be more likely to roll over after being sued and because *Marsh* itself concerned the practices of a state legislature.

The tension that the ACLU and AUSCS saw was a real one—*Lemon* and *Marsh* had quite different approaches to analysis of Establishment Clause claims. *Lemon* dictated an abstract, anti-historical

⁴⁰ See, e.g., *Utah Highway Patrol Ass'n v. Am. Atheists, Inc.*, 132 S.Ct. 12, 12–23 (2011) (mem.) (Thomas, J., dissenting from denial of cert.) (collecting cases and criticizing *Lemon* and endorsement tests); *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 669 (1989) (Kennedy, J., dissenting) (criticizing endorsement test “flawed in its fundamentals and unworkable in practice”); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 768 n.3 (1995) (plurality opinion, Scalia, J., joined by Rehnquist, C.J., Kennedy and Thomas, JJ.) (“[The endorsement test] supplies no standard whatsoever . . . It is irresponsible to make the Nation’s legislators walk this minefield.”); *Salazar v. Buono*, 130 S. Ct. 1803, 1819 (2010) (Kennedy, J., joined by Roberts, C.J., and Alito, J.) (“Even if [the endorsement test] were the appropriate one, but see [*Allegheny* and *Pinette*]”); *id.* at 1824 (Alito, J., concurring) (“Assuming that it is appropriate to apply the so-called ‘endorsement test,’ this test would not be violated [here].”); *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”).

⁴¹ Americans United was founded as an anti-Catholic organization known as “Protestants and Other Americans United for Separation of Church and State.” See, e.g., *Protestants and Other Ams. United for Separation of Church and State v. O’Brien*, 272 F.Supp. 712 (D.D.C. 1967). AUSCS has never publicly disavowed its anti-Catholic origins.

approach to deciding Establishment Clause questions, while *Marsh* took a concrete historically rooted approach.

Indeed, *Lemon's* three questions are quite abstract: Does government have the purpose of promoting or discouraging religion? Does the government action in question have the effect of promoting or discouraging religion? And does the government action in question excessively entangle government with religion?

By contrast, *Marsh* relies entirely on historical practice and very little other reasoning. As Chief Justice Burger wrote in the opinion, the existence of the historical practice of legislative prayer is, standing alone, sufficient grounds to uphold the practice.⁴² There is no effort in the opinion to delineate any broader, principled framework for deciding Establishment Clause cases. And we don't find out anything about how the Founders thought about establishments generally; the focus is strictly on legislative prayer. Thus, if anything, *Marsh* is *overly* concrete.

Lemon and *Marsh* have something in common—they have *ipse dixit* at their core. *Lemon's* very brief canvassing of Establishment Clause jurisprudence of the preceding 24 years leaps to an announcement of the three prongs. And *Marsh* announces that the Framers practiced legislative prayer, so it must be permissible, without situating that claim in a broader framework for deciding constitutional claims. Neither approach is terribly helpful to lower court judges who have to apply principles to a wide variety of facts. *Lemon's* prongs are too abstract to be true principles, while *Marsh's* focus on the specific history of legislative prayer is too concrete to be applied to fact scenarios outside the immediate context of legislative prayer.

But these differences explain how the lower courts have applied the two cases. It is *Lemon's* abstract nature and *Marsh's* concrete nature that has dictated their very different careers in the lower courts. *Lemon* purports to provide a comprehensive test for Establishment Clause cases, and that claim to comprehensiveness is a useful tool for lower courts. It gives judges elements to work with, even if the prongs themselves are far too abstract to provide consistent results in different courts dealing with different factual scenarios. By contrast, *Marsh's* exclusive focus on legislative prayer means that it is applied by courts in that context only.

⁴² *Marsh*, 463 U.S. at 790–92.

In any event, it is this tension that the ACLU and AUSCS attempted to exploit by bringing municipal prayer cases. Their hope would have been that municipal prayer might fall sufficiently outside the scope of *Marsh* that they could get courts to apply the *Lemon*/endorsement test instead. They succeeded in the lower courts in several cases, including *Town of Greece*—the Second Circuit ruled in AUSCS’s clients’ favor, on grounds that the town’s prayer practices violated the endorsement test.⁴³ Thus the stage was set for a remarkable convergence of the *Lemon* test, the endorsement test corollary, *Marsh*, and the rise of history in Bill of Rights litigation.

III. *Town of Greece*: A Third Phase?

The case did not disappoint. Although the Supreme Court did not overrule the endorsement test or *Lemon*, in *Town of Greece* it marked a very big change in how the Court deals with history in Establishment Clause cases.

A. *The Majority Opinion*

Justice Anthony Kennedy, writing for the majority, rejects Justice Brennan’s suggestion in his *Marsh* dissent that *Marsh* “‘carv[ed] out an exception’ to the Court’s Establishment Clause jurisprudence[.]” stating that “*Marsh* stands for the proposition that it is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted. Any test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change.”⁴⁴

This statement means at least two remarkable things. First, in the conflict between *Lemon* and *Marsh*, *Marsh* is not so much the exception as it is the rule. *Marsh*’s historical analysis trumps the *Lemon* test, not the other way around. Second, the Court introduces a “historical override” to all Establishment Clause claims. “Any test” a lower court applies must be accompanied by (or probably *preceded* by) a historical analysis, and that analysis trumps the other considerations. This use of history is not reflexive: “Yet *Marsh* must not be understood as permitting a practice that would amount to a constitutional violation

⁴³ *Galloway v. Town of Greece*, 681 F.3d 20 (2d Cir. 2012).

⁴⁴ *Town of Greece*, 134 S. Ct. at 1819 (emphasis added; citations omitted).

if not for its historical foundation. The case teaches instead that the Establishment Clause must be interpreted ‘by reference to historical practices and understandings.’”⁴⁵

The Court later expands on the point:

The prayer opportunity in this case *must* be evaluated against the backdrop of historical practice. As a practice that has long endured, legislative prayer has become part of our heritage and tradition, part of our expressive idiom, similar to the Pledge of Allegiance, inaugural prayer, or the recitation of “God save the United States and this honorable Court” at the opening of this Court’s sessions.⁴⁶

Thus, the particular governmental practice being challenged under the Establishment Clause must be evaluated “against the backdrop of historical practice.” And those practices that have “long endured” and become “part of our heritage and tradition” should be upheld, even if they were practices, such as recitation of the Pledge of Allegiance in schools, that were not practiced at the time of the Founding.⁴⁷

The *Town of Greece* majority also went out of its way to reject a specific dictum from *County of Allegheny v. ACLU* that has plagued

⁴⁵ *Id.* (citing *Cnty. of Allegheny*, 492 U.S. at 670 (Kennedy, J., concurring in judgment in part and dissenting in part)).

⁴⁶ *Id.* at 1825 (emphasis added).

⁴⁷ *Id.* *Town of Greece’s* treatment of history also contains confirmation of the phenomenon of the increase of historical knowledge over time. See *supra* note 2. The Court states:

Although no information has been cited by the parties to indicate how many local legislative bodies open their meetings with prayer, this practice too has historical precedent. See Reports of Proceedings of the City Council of Boston for the Year Commencing Jan. 1, 1909, and Ending Feb. 5, 1910, pp. 1–2 (1910) (Rev. Arthur Little) (“And now we desire to invoke Thy presence, Thy blessing, and Thy guidance upon those who are gathered here this morning . . .”).

Id. at 1819. The quote derives from a source—Boston City Council Proceedings in 1909–1910—cited in the Becket Fund’s amicus brief. See Becket Fund Br. at 15–16. The Becket Fund found this resource by using Google Books. Thus had Google Books not yet existed, this point might not have been made in the Becket Fund’s brief or in the Court’s opinion.

many lower court Establishment Clause decisions:

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 *Marsh* did not violate this principle because the particular chaplain had "removed all references to Christ."⁴⁸

The *Town of Greece* Court rejected that reasoning:

This proposition is irreconcilable with the facts of *Marsh* and with its holding and reasoning. *Marsh* nowhere suggested that the constitutionality of legislative prayer turns on the neutrality of its content. . . . Nor did the Court imply the rule that prayer violates the Establishment Clause any time it is given in the name of a figure deified by only one faith or creed. . . . To the contrary, the Court instructed that the "content of the prayer is not of concern to judges," provided "there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief."⁴⁹

The Court thus expressly rejects the idea that courts must weed out those historical practices that refer to a specific religious faith. The required historical analysis announced by the Court is not to be subjected to a rule of proportional representation enforced against the challenged practice.⁵⁰

B. The Other Opinions

The foregoing understanding of the meaning of *Town of Greece* is borne out by the principal dissent by Justice Elena Kagan and the concurrences by Justices Samuel Alito and Clarence Thomas, respectively. Thus Justice Alito wrote:

In the case before us, the Court of Appeals appeared to base its decision on one of the Establishment Clause "tests" set out in the opinions of this Court, but if there is any inconsistency

⁴⁸ 492 U.S. 573, 603 (1989) (quoting *Marsh*, 463 U.S. at 793, n.14).

⁴⁹ *Town of Greece*, 134 S.Ct. at 1821–22 (quoting *Marsh*, 463 U.S. at 794–95).

⁵⁰ The majority opinion contains a number of other conclusions that will have great effects on Establishment Clause jurisprudence but are not related to the issue of history. For example, the Court rejected the idea that mere offense can constitute forbidden coercion. *Id.* at 1826 ("Offense, however, does not equate to coercion.").

between any of those tests and the historic practice of legislative prayer, the inconsistency calls into question the validity of the test, not the historic practice.⁵¹

Similarly, Justice Thomas's concurring opinion focused squarely on historical practices at the Founding: "the municipal prayers at issue in this case bear no resemblance to the coercive state establishments that existed at the Founding."⁵² He also suggested that the crucial question in future Establishment Clause cases would be "*what constituted an establishment.*"⁵³

Importantly, Justice Kagan's principal dissent also agreed that history had an important role to play. In the context of legislative prayer, Kagan referred to "the protective ambit of *Marsh* and the history on which it relied."⁵⁴ The principal dissent's primary disagreement with the majority opinion was thus not about whether historical practice provided a justification for legislative prayer, but whether the specific facts presented in *Town of Greece* fell within the scope of that historical practice. Justice Kagan also engaged in an extensive historical discussion of the treatment of religious minorities and demonstrated (correctly) that concern for the protection of religious minorities was part of the Founders' religious settlement. Indeed, history is so pervasive a theme in the opinions issued by the justices that the only opinion that does not mention history at all is Justice Stephen Breyer's short stand-alone dissent.

The most remarkable aspect of the differences of opinion among the justices in *Town of Greece*, especially given the tone of the opinions, is their fairly broad-based agreement. The majority and the principal dissent do not differ all that much when it comes to the overarching structure of the law concerning legislative prayer. Both agree that legislative prayer is constitutional under some circumstances; there are now nine votes for legislative prayer instead of the six in *Marsh*. Both agree that faith-specific legislative prayer is also constitutional under some circumstances. Both agree that pluralism and the protection of religious minorities are important First Amendment values. And both agree that history is a guide to the

⁵¹ *Id.* at 1834 (Alito, J., concurring) (internal citation omitted).

⁵² *Id.* at 1837 (Thomas, J., concurring).

⁵³ *Id.* at 1838 (emphasis in original).

⁵⁴ *Id.* at 1849 (Kagan, J., dissenting).

perplexed judge who confronts an Establishment Clause challenge. The remaining difference is over the *subtests* within that historical analysis and how the historical analysis applies to the specific practice of municipal prayer. The dissent believes the historical record does not favor prayer practices like Greece's, while the majority disagrees. But that is a relatively small area of disagreement. That the justices could agree on so much in this fraught area of the law augurs well for the prospects of an eventual consensus position on the Court regarding how to approach Establishment Clause cases.

IV. Conclusion: What Does *Town of Greece* Say and What Does That Mean?

A. What Does Town of Greece Say About the Role of History?

To sum up, the majority opinion in *Town of Greece* resolved several major points concerning the role history has to play in Establishment Clause analysis:

- The case continued the trend toward reliance on history in Bill of Rights cases. The Establishment Clause, like the Second Amendment, the Fourth Amendment, the Fifth Amendment, and the Sixth Amendment, is defined, at least in part, by what the Framers thought.
- The case also resolved the conflict between *Lemon* and *Marsh* in favor of *Marsh*. *Marsh's* historical approach trumps *Lemon's* abstract approach.
- In fact, courts *must* apply the historical analysis in deciding Establishment Clause cases. Looking at history is logically the first step in any Establishment Clause analysis.
- Evidence of historical practice is not to be used in an uncritical fashion; but by the same token, historical practices need not be religiously neutral to be upheld.
- Particular practices that have long endured—such as the Pledge of Allegiance, inaugural prayer, or the recitation of “God save the United States and this honorable Court”—should be upheld, even if the Framers themselves did not participate in them.
- Perhaps most important, the Court does not simply make findings regarding how particular historical data could be applied to particular facts in the case before it. Instead the Court sets out a methodology for lower courts to integrate history into *their* analysis of Establishment Clause cases.

- There is broad support on the Court for the historical approach, although the justices differ strongly over how it should be applied to the specific practice of municipal legislative prayer.

Town of Greece can thus be said to mark a major inflection point—the beginning of a third phase—in the treatment of history in Establishment Clause cases, both at the Supreme Court and in the lower courts. The first phase, from 1947 until 1971, involved *Everson*'s truncated account of the history of the Establishment Clause and thereby reserved most if not all of the historical analysis to itself. The second phase, from 1971 until 2014, was dominated by *Lemon*'s know-nothing approach to the history of the Establishment Clause. By “gleaning” three abstract principles from 24 years of precedent, the Court made it almost impossible for lower courts to integrate historical analysis into their decisionmaking processes, and bound them to a *Lemon*/endorsement test that the Court itself did not follow. In the third phase, the Court commands lower courts to conduct historical analysis and gives them a methodology for doing so. As set forth below, this will have significant effects on future Establishment Clause cases.

B. How Will Town of Greece Affect Future Establishment Clause Cases?

There are several likely results from the *Town of Greece* decision.

1. *Municipalities are likely to win legislative prayer cases.* First, within the narrow confines of legislative prayer litigation, municipalities are likely to win cases in all three categories of legislative prayer case—rotating volunteer prayer-givers, paid chaplain, and council-member-led. *Town of Greece* means that municipalities with rotating non-official prayer-givers are more likely to win. Only if a municipality decides to adopt an express preference for a particular religious tradition will it be in danger of liability. Paid chaplains are rare when it comes to municipalities, but they likely remain protected by *Marsh*, as they were before *Town of Greece* was issued. Councilmember-led prayers are an interesting category because they have not yet been fully litigated. As a category they fall in between rotating volunteers and paid chaplains, however, so they too are likely to be upheld, particularly if the council (or equivalent body) does not adopt an express preference for a particular religious tradition.

2. *Lemon/endorsement is on its last legs.* The majority opinion goes out of its way to negate the *County of Allegheny* dictum, and the Court's tone does not make it sound as if *County of Allegheny*, perhaps the leading endorsement case, is likely to last much longer. Perhaps the most telling fact is that neither the majority opinion nor the principal dissent relies on or applies the *Lemon* or endorsement tests, although Justice Kagan does refer in passing to the "imprimatur" concept associated with endorsement, and the three-justice part of Justice Kennedy's opinion refers to the "reasonable observer." Indeed, the only citation to *Lemon* is in Justice Breyer's stand-alone dissent, and even that makes no mention of *Lemon's* three-prong test. That neither the majority nor the dissent applied the *Lemon/endorsement* framework to decide an important Establishment Clause case that the lower courts decided using precisely that framework is an indication that the test is lacking viability. Given the proper set of facts, the Court is likely to discard the test.

3. *Outcomes in Supreme Court cases will not change much; lower court outcomes will.* Importantly, as we pointed out in the Becket Fund's amicus brief, the historical approach we advocated and *Town of Greece* adopted will change Establishment Clause doctrine but would not have changed outcomes in previously decided Supreme Court cases. Cases like *Texas Monthly*,⁵⁵ *Kiryas Joel*,⁵⁶ *Torcaso*,⁵⁷ and *Hosanna-Tabor* would have come out the same way, but the jurisprudential superstructure in which those decisions were embedded would have been entirely different.⁵⁸ The change would of course make a major shift in the outcomes in the lower courts, which until now have been bound by the anti-historical *Lemon/endorsement* test, but the law at the Supreme Court level would change surprisingly little.

⁵⁵ *Texas Monthly v. Bullock* 489 U.S. 1 (1989) (overturning a Texas statute that exempted religious publications from paying state sales tax).

⁵⁶ *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687 (1994) (holding that school district coinciding with the neighborhood boundaries of a religious group was an unconstitutional aid to religion).

⁵⁷ *Torcaso v. Watkins*, 367 U.S. 488 (1961) (reaffirming that Constitution prohibits states and federal government from requiring any kind of religious test for public office—in this specific case, as a notary public).

⁵⁸ See Becket Fund Br., *supra* note*, at 20–27.

4. *Lower courts will examine history in Establishment Clause cases.* As noted above, under the *Lemon*/endorsement regime, lower courts were largely unable to address historical arguments. With *Town of Greece*, they have now not only been empowered to look for historical support (or lack thereof) for particular government practices, but also have been commanded to consider historical practice. There are several advantages to this development. Instead of applying the endorsement test, which forces judges into the uncomfortable and irreducibly subjective role of psychological representative of society, the historical approach gives judges objective facts to work with. The context for any given practice that is challenged is no longer the judge's mind, but the ascertainable facts of historical tradition. Moreover, courts will be able to take advantage of the huge amount of historical scholarship that has been developed in the 43 years since *Lemon* was decided. That will provide further context to the claims before the court.

5. *Lower courts will begin answering the question: "What constitutes an establishment?"* In his *Town of Greece* concurrence, Justice Thomas posed the question of "*what constituted an establishment.*" The majority's opinion empowers lower courts to begin this historical inquiry into a feature of public life far more familiar to the Framers than it is to us today. In particular, courts will begin to determine the *categories* of establishment. We pointed out in our *Town of Greece* amicus brief that—at least based on the historical data we have today—there are four rough categories of establishment: government coercion, government control of churches, government funding of churches, and government delegation of powers to churches.⁵⁹ We expressly based these categories on Prof. McConnell's seminal history of establishment at the Founding.⁶⁰ McConnell identified these different features of an establishment of religion, and in exhausting detail (and over 580 footnotes) described how these establishments functioned in the colonial period, including the differences between the various colonies. He grouped them differently in "*Establishment and Disestablishment*" than we did—we put three of his categories under the more general heading of "*government coercion*"—but otherwise the

⁵⁹ *Id.* at 17–22.

⁶⁰ McConnell, *Establishment and Disestablishment at the Founding*, *supra* note 14.

historical understanding is common to his article and our brief. The part new to our brief is that we suggested dispensing with *Lemon* and relying on the historical approach instead. And under our approach, if a government action falls into one of these categories, then it can run afoul of the Establishment Clause. If it doesn't fall into any of these categories, then it isn't an establishment of religion and there is no violation.⁶¹

In practice, this would mean that the first questions a judge would ask when confronted with an Establishment Clause claim are "What category or categories of establishment are being claimed here?" and "Does the challenged government action fall within those categories?" For example, in the case of a challenge to a government-funding program, the judge would ask, "Is this program similar to the kinds of government financial support of churches that the Founders knew?" rather than the almost-philosophical questions of "Does this have the effect of advancing religion?" or "Is the government endorsing religion?" And judges would have source material to grapple with: the Founders' now well-documented understanding of what sort of government funding contributed to an "establishment of religion." That will allow judges to make concrete applications of law to facts, and in the process lead to a more coherent Establishment Clause jurisprudence over time.

6. *There will be less disagreement about church and state.* In the end, the historical approach that we advocated for in our amicus brief and that the Court inaugurated in *Town of Greece* is likely to create much more consensus on Establishment Clause issues. That is especially likely because of the narrowness of the disagreement between the majority opinion and the principal dissent in *Town of Greece*.

* * *

The historical approach that the Court employed in *Town of Greece* will probably make activists at both ends of the political spectrum

⁶¹ At the Clark Lecture in March 2014, *supra* n.*, Prof. Perry Dane suggested that the four forms of establishment we identified in our *Town of Greece* amicus brief left out an important form of establishment: the government's official proclamation of a "church by law established." See McConnell, *supra* n.14, at 2108. I suspect that this would also have been viewed as a characteristic of an establishment by the Founders.

unhappy, because their preferred policies would not be the law. Those who believe that the United States should be officially proclaimed a “Christian nation” will have to give up on that, short of a constitutional amendment. Others—like AUSCS—who don’t like “under God” in the Pledge of Allegiance, “In God We Trust” on the coinage, or legislative prayers like those in *Town of Greece* itself will have to rely on the legislative process rather than litigation to obtain their preferred policy outcomes. But for those in the middle, the historical approach promises to turn down the temperature on this corner of the culture wars. That is something we should all welcome.