Glassroth v. Moore: Precedent for the Sterilization of American Legal History

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I. INTRODUCTION

[1] On July 31, 2001 the former Chief Justice of the Alabama Supreme Court, Roy Moore, installed a 5,280 pound granite monument depicting the Ten Commandments in the rotunda of the Alabama State Judicial Building.[1] The following day, Chief Justice Moore, often referred to as the "Ten Commandments Judge,"[2] made a speech, stating that the monument depicted the "moral foundation of law" and should "serv[e] to remind the [courts] and members of the bar . . . that in order to establish justice we must invoke 'the favor and guidance of almighty God.'"[3] On July 1, 2003 the Eleventh Circuit held that

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[1] Glassroth v. Moore, 229 F. Supp. 2d 1290, 1294 (M.D. Ala. 2002). There are two tablets capping the top of the monument that "are engraved with the Ten Commandments as excerpted from the book of Exodus in the King James Bible." *Id.* at 1294-95. On the sides of the monument there are fourteen carved quotations along with their identifying label or author's name. *Id.* at 1295. These carvings included quotations from the Declaration of Independence, George Mason, James Madison, William Blackstone, the National Motto, the Alabama Constitution's Preamble, George Washington and the Judiciary Act of 1789. *Id.*

[2] *Glassroth*, 229 F. Supp. 2d at 1294; Dahleen Glanton, *Judge Unveils Bible-Based Monument; 10 Commandments Display Challenged*, CHICAGO TRIBUNE, Aug. 16, 2001, at N1. As a circuit court judge of Etowah County, Alabama, Justice Moore erected a hand-carved plaque of the Ten Commandments in his courtroom. *Glassroth*, 229 F. Supp. 2d at 1293-94. The ACLU brought two actions against Justice Moore, seeking a declaratory judgment that Justice Moore's display was unconstitutional, but they were dismissed in both cases. Alabama Freethought Ass'n. v. Moore, 893 F. Supp. 1522 (N.D. Ala. 1995); Alabama *ex rel*. James v. ACLU of Alabama, 711 So. 2d 953 (Ala. 1988). Justice Moore capitalized on the publicity of these cases, and labeled himself the "Ten Commandments Judge" during his campaign for Chief Justice. *Glassroth*, 229 F. Supp. 2d at 1294.

[3] *Glassroth*, 229 F. Supp. 2d at 1296.

this monument violated the Establishment Clause of the First Amendment and ordered its removal.[4]

[2] This note will analyze how this decision deviates from the history of the First Amendment and cases interpreting it, while creating a disturbing and chilling effect on the U.S. government's ability to represent its own history.[5] Judge Thompson, presiding over Chief Justice Moore's lower court case, first failed to consider whether Chief Justice Moore was the appropriate defendant. Second, Judge Thompson failed to recognize the holdings of previous case law, despite applying the reasoning from those very cases.

II. BACKGROUND INFORMATION

[3] Chief Justice Moore's placement of the Ten Commandments monument immediately sparked national coverage and criticism.[6] On October 30, 2001, the American Civil Liberties Union (ACLU), under the name of three Alabama attorneys, filed a lawsuit against Chief Justice Moore in Alabama District Court.[7] In the lawsuit,

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[4] *Id.* at 1319.

[5] This note will focus only on Justice Glassroth's Establishment Clause claims, excluding other First Amendment issues that his acts raise, such as Free Speech.

[6] *See National Briefing South: Alabama: Religious Display In Court Building*, N.Y. TIMES, Aug. 2, 2001, at A14; Jeffrey Gettleman, *Alabama Judge Sneaks Granite Ten Commandments Into Court After Similar Defiant Aact*, L.A. Times, Aug. 2, 2001 ("Roy Moore has done it again. . . . Moore and a couple of workmen sneaked a 5,280-pound granite monument to the Ten Commandments into the rotunda . . . [and] didn't ask anyone's permission").

[7] Press Release, American Civil Liberties Union, ACLU Lawsuit Says Ten Commandments Display in Alabama Courthouse Sends a Message of Exclusion (Oct. 30, 2001), *available at* http://archive.aclu.org/news/2001/n103001b.html(last visited Jan. 15, 2004). The ACLU has been involved in numerous disputes with Justice Moore, stemming from his display of the Ten Commandments in his courtroom and his leading of prayer at the openings of trials. *See* Alabama Freethought Association v. Moore, 893 F. Supp. 1522

each of the named plaintiffs stated that the monument "ma[de] him or her feel like an 'outsider.'"[8]

[4] After a November 18, 2002 district court ruling against Chief Justice Moore, an order was granted, directing him to remove the monument within 30 days.[9] Justice Moore, in response to the district court's permanent injunction,[10] filed a notice of appeal and was granted a temporary stay of the district court's ruling.[11] On appeal, the Eleventh Circuit affirmed the lower court's decision[12] and finally ordered the monument's removal.[13] Chief Justice Moore, refusing to submit, again filed a motion for a temporary stay, pending the outcome of a petition of writ of mandamus and prohibition to the Supreme Court, but was denied on both the motion[14] and the writ.[15]

[5] After employing every legal avenue, Chief Justice Moore refused to remove the monument and protested along with hundreds of Christian activists in Alabama's state

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(N.D. Ala 1995); Alabama ex rel. James v. ACLU of Alabama, 711 So. 2d 952 (Ala. 1998).

[8] *Glassroth*, 229 F. Supp. 2d at 1298 ("The plaintiffs have all testified that they have been injured as a direct result of their contact with the monument . . . .").

[9] *Id.* at 1319.

[10] Glassroth v. Moore, 229 F. Supp. 2d 1067 (M.D. Ala. 2002).

[11] Glassroth v. Moore, 242 F. Supp. 2d 1068, 1068-69 (M.D. Ala. 2002).

[12] *Glassroth*, 335 F.3d 1282, 1284 (11th Cir. 2003).

[13] Glassroth v. Moore, 275 F. Supp. 2d 1347, 1349-50 (M.D. Ala. 2003).

[14] Glassroth v. Moore, 278 F. Supp. 2d 1272, 1273 (M.D. Ala. 2003).

[15] Glassroth v. Moore, 540 U.S. 1000 (2003).

capitol.[16] Chief Justice Moore later submitted to the court's order and agreed to allow the state to remove the monument,[17] but was immediately suspended[18] and later removed from the judiciary due to his initial refusal to submit to the order.[19]

III. HISTORY OF THE ESTABLISHMENT CLAUSE & RELIGIOUS SYMBOLISM

a. *The First Amendment*

[6] The First Amendment begins with the proclamation that "Congress shall make no law respecting an establishment of religion . . . ."[20] The exact meaning and implications of this clause have been in debate since its ratification in 1791.[21]

[7] There are three major approaches to interpreting the meaning of the Establishment Clause.[22] The first, strict separation, requires complete separation between church and state.[23] The second, neutrality, requires that the government not favor one or

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[16] Edward Walsh, Alabama's Chief Justice Defies Court Order; Moore Refuses to Remove Ten Commandments Monument from State Building, The Washington Post, Aug. 23, 2003, at A06.

[17] Jeffrey Gettleman, *Monument Is Now Out of Sight, But Not Out of Mind*, N.Y. TIMES, Aug. 28, 2003, at A14.

[18] *Id.*

[19] *Judicial Courage in Alabama*, N.Y. TIMES LATE EDITION, Nov. 14, 2003, at A28.

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

[21] "This is a particularly difficult for these provisions because there is no apparent agreement among the framers as to what they meant." ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 1238 (Richard A. Epstein et al., Aspen Law & Business 2001).

[22] *Id*. at 1266-67.

[23] *Id.* at 1239. "The court has sometimes described the Religion Clauses as erecting a 'wall' between church and state," but this theory fails to recognize the "practical aspects

more religions over others or any religion over secularism.[24] The final theory, accommodation / equality, only requires that the government recognize the social importance of religion and "accommodate its presence in government."[25]

[8] When referencing the Establishment Clause's history, the Supreme Court has stated that "[i]t is sufficient to note that for the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity."[26] There are two primary evils that have been recognized by the Supreme Court. "Government can run afoul of that prohibition in two principle ways. One is excessive entanglement with religious institutions. . . . The second and more direct infringement is government endorsement or disapproval of religion."[27] The Supreme Court has subsequently

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of the relationship that in fact exists between church and state." Lynch v. Donnelly, 465 U.S. 668, 673 (1983).

[24] CHEMERINSKY, *supra* note 21, at 1267-68.

[25] *Id*. at 1269-71. "[T]he government violates the establishment clause only if it literally establishes a church, coerces religious participation, or favors on religion over others." *Id. See, e.g.*, *Lynch*, 465 U.S. at 673 ("Nor does the Constitution require complete separation . . . it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.").

[26] Walz v. Tax Commission, 397 U.S. 664, 668 (1970). The fine balance needed to enforce this Clause while not infringing on other Constitutional rights, such as those created in the Free Exercise or Free Speech Clauses, requires a case-by-case analysis. *Id.*

[27] Lynch v. Donnelly, 465 U.S. 668, 687-88 (1983). Excessive entanglement "give[s] the institutions access to government or governmental powers not fully shared by nonadherents of the religion, and foster the creation of political constituencies along religious lines." *Id.* at 688. Endorsement and disapproval send messages to nonadherents and adherents that they are outsiders. *Id.*

produced a test and exceptions that are designed to guide the courts, when First Amendment issues arise.

b. *The Lemon Test*

[9] In *Lemon v. Kurtzman,*[28] the Supreme Court devised a three-part test for indicating when a violation of the Establishment Clause arises. First, the governmental action or statute must have a "secular purpose."[29] Second, the statute's "principal or primary effect must be one that neither advances nor inhibits religion."[30] Finally, "the statute must not foster 'an excessive government entanglement with religion.'"[31] As

[28] 403 U.S. 602 (1971). In *Lemon*, the Supreme Court addressed whether "Pennsylvania and Rhode Island statut[e] providing state aid to church-related elementary and secondary schools" violated the Establishment Clause. *Id.* at 606. One statute provided reimbursement for nonpublic school teacher's salaries and instructional materials, while the other provided a direct supplement of a percentage of their salaries. *Id.* at 606-11. Both statutes required that the institutions accepting subsidies use them for solely secular purposes. *Id.* The Court recognized that the statutes had a clearly secular purpose, *Id.* at 613, but held that "the cumulative impact of the entire relationship arising under the statutes . . . involves excessive entanglement between government and religion." *Id.* at 614. The Court analyzed the nature of church-related schools, stating that they have "a significant religious mission and that a substantial portion of their activities is religiously oriented." *Id.* at 613. The Court stated that excessive entanglement was inevitable, since "comprehensive, discriminating, and continuing state surveillance [would] inevitably be required to ensure that these restrictions [were] obeyed and the First Amendment otherwise respected." *Id.* at 619.

[29] *Lemon*, 403 U.S. at 612 (citing Bd. of Educ. v. Allen, 392 U.S. 236, 243 (1968)). The purpose does not have to be solely secular, but having some secular objectives does not guarantee constitutionality. *See* Abington Sch. Dist. v. Schempp, 374 U.S. 203, 223-24 (1963).

[30] *Lemon*, 403 U.S. at 612 (citing Bd. of Educ. v. Allen, 392 U.S. at 243

[31] *Id*. at 613 (quoting Walz v. Tax Commission, 397 U.S. 664, 674 (1970)).

illustrated by *Lemon*, it is not necessary to prove all three elements of this test; an Establishment Clause violation is perpetuated when any prong is violated.[32]

[10] The first step in analyzing the *Lemon* test, as well as the Establishment Clause, is to define "statute" and "law." This definition clearly extends to any state or federal law or statute.[33] The definition has also been gradually expanded to apply to any state or federal conduct.[34]

[11] "It has never been entirely clear, however, how the three parts of the test relate to the principles enshrined in the Establishment Clause."[35] The *Lemon* test has also received serious criticism from many judges and commentators.[36] But, "even though

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[32] *See* Stone v. Graham, 449 U.S. 39, 40-41 (1980) ("If a statute violates any of these three principles, it must be struck down under the Establishment Clause.").

[33] *See* Everson v. Bd. of Educ., 330 U.S. 1 (1947) (holding that the Due Process Clause of the Fourteenth Amendment applied the Establishment Clause to the states).

[34] This definition has been applied to strike down governmental conduct that has no relation to any form of legislation. *See e.g.*, County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573 (1989) (examining the use of state/county property for religious displays); Lee v. Weisman, 505 U.S. 577 (1992) (examining the practice of using clergy members to offer invocations and prays during high school graduations); Wallace v. Jaffree, 472 U.S. 38 (1985) (examining prayer service in public schools).

[35] Lynch v. Donnelly, 465 U.S. at 688-89.

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> 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. . . . Over the years, however, no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart, and a sixth joined an opinion doing so.

Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (citations omitted) (Scalia, J., concurring); Hunt v. McNair, 413 U.S. 734, 741 (1973)

some Justices and commentators have strongly criticized Lemon, both the Supreme Court and [other courts] continue to use Lemon's three-prong analysis."[37]

c. *The Marsh Exception*

[12] Should governmental conduct or laws fail to meet the *Lemon* test, the exception established in *Marsh v. Chambers*[38] may justify holding the conduct or law constitutional. Practices which display an "unambiguous and unbroken history" and have "become part of the fabric of our society" should not be struck down since they are a "tolerable acknowledgment of beliefs widely held among the people of this country."[39]

[13] The *Marsh* exception is extremely narrow, and satisfying the exception does not always guarantee constitutionality. The Court in *County of Allegheny v. American Civil Liberties Union*[40] stated: "Marsh plainly does not stand for the sweeping proposition . . . that all accepted practices 200 years old and their equivalents are constitutional

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(stating that the three *Lemon* prongs were "no more than helpful signposts"). *See also* Wallace v. Jaffree, 472 U.S. 38, 110 (1985) (Rehnquist, J., dissenting).

[37] *See e.g.* King v. Richmond County, 331 F.3d 1271, 1276 (11th Cir. 2003). *But see Lynch*, 465 U.S. at 679 ("[W]e have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area.").

[38] 463 U.S. 783 (1983). In *Marsh*, members of the Nebraska Legislature brought an action seeking to enjoin the state from allowing a chaplain to initiate their legislative session with a prayer. *Id.* at 784-85. This practice has existed in the Nebraska Legislature since colonial times and has consistently been performed. *Id.* at 787-98. The Court held, "[t]he unbroken practice for two centuries in the National Congress and for more than a century in Nebraska and in many other states gives abundant assurance that there is no real threat 'while this Court sits.'" *Id.* at 795 (citing Panhandle Oil Co. v. Mississippi ex. rel. Knox, 277 U.S. 218, 233 (1928).

[39] *Id.* at 792.

[40] 492 U.S. 573 (1989).

today."[41] The Court reveals this reservation in *Marsh* when discussing the "unique history" of the legislature's practice that led them to believe that it presented no potential threat.[42]

[14] The question that then presents itself: what facts constitute a "unique history"? Justice Brennan hoped that the Court's decision in *Marsh* "would prove to be only a single, aberrant departure from [the] settled method of analyzing Establishment Clause cases."[43] The following cases addressed this exception in relation to governmental use of religious symbolism, and they clearly indicate that Justice Brennan's fear of expanded application was justified.

d. *Cases Specifically Addressing Religious Symbolism*

1. Lynch v. Donnelly:[44]

[15] In *Lynch*, the Supreme Court held that a crèche[45] erected and funded by a township and displayed on privately owned property in the town's square did not violate the Establishment Clause.[46] The Court stated that the metaphor of erecting a "wall" between government and religion is not wholly accurate, since some interrelationship

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[41] *Id.* at 603.

[42] *Marsh*, 463 U.S. at 791.

[43] *Lynch*, 465 U.S. at 695-96 (Brennan, J., dissenting).

[44] 465 U.S. 668 (1984).

[45] Also referred to as a nativity scene.

[46] *Lynch*, 465 U.S. at 687.

between the two is inevitable.[47] They also stated that complete separation was not required.[48]

[16] Applying the *Marsh* exception, the Court referenced the "unbroken history of official acknowledgement by all three branches of government of the role of religion in American life from at least 1789."[49] The Court then stated that there was no evidence showing subtle advocacy for particular religious beliefs, as the display depicted the historical origins of a tradition long recognized by the "Western World." The Court also noted that the amount of religion advanced by the display "requires far less ongoing, day-to-day interaction between church and state than religious paintings in public galleries."[50]

[17] One of the more salient elements of the *Lynch* decision is Justice O'Connor's concurrence. As the swing vote, her concurrence carries stronger weight than a usual appended opinion.[51] Justice O'Connor first addressed the idea of endorsement and its impact on the public.[52]

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[47] *Id.* at 672-73.

[48] *Id.* at 673.

[49] *Id.* at 674.

[50] *Id.* at 680-85.

[51] *See* Freethought Society v. Chester County, 334 F.3d 247, 256 (3rd Cir. 2003) ("Justice O'Connor's concurrence in *Lynch* is particularly significant because it decide the outcome of the case; without her vote the justices were split four to four.").

[52] *Lynch*, 465 U.S. at 688. "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." *Id.* at 688-89.

[18] Justice O'Connor's next analyzed the intended message of the government's acts and the actual message being displayed.[53] She stated that, "[t]he meaning of a statement to its audience depends both on the intention of the speaker and on the 'objective' meaning of the statement in the community."[54] Justice O'Connor noted, "[c]elebration of public holidays, which have cultural significance even if they also have religious aspects, is a legitimate secular purpose."[55] She commented that government celebration of holidays are "extremely common" and are not generally understood as an endorsement of the holiday.[56] Finally Justice O'Connor warned, "[e]very government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion."[57]

[19] Opposing the majority, Justice Brennan, joined by Justices Marshall, Blackmun and Stevens, strongly dissented.[58] Recalling his hope that the Court's decision in *Marsh* was only a "single, aberrant departure," Justice Brennan claimed that allowing

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[53] *Id.* at 690.

[54] *Id*.

[55] Lynch v. Donnelly, 465 U.S. 668, 691 (1984) (O'Connor, J., concurring). Justice O'Connor concluded, "Pawtucket's display of its crèche, I believe, does not communicate a message that the government intends to endorse the Christian beliefs represent by the crèche." *Id.* at 692. "[T]he overall holiday setting changes what viewers may fairly understand to be the purpose of the display – as a typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content." *Id.* at 692.

[56] *Id.* at 692.

[57] *Id.* at 694.

[58] *Id.*

the crèche, in the current case, departed from any prior case law.[59] First, he stated that the Christmas display "simply did not reflect a 'clearly secular . . . purpose.'"[60]

[20] Turning to the public's perception of the crèche, Justice Brennan stated that for some, "[t]he 'primary effect' of including a nativity scene in the city's display is . . . to place the government's imprimatur of approval on the particular religious beliefs exemplified by the crèche."[61] After noting that the government's acts also violate the entanglement test,[62] he continued to question the majority's application of *Marsh*.[63] Justice Brennan stated, "the story of Christ is in no sense a part of 'history' nor an unavoidable element of our national 'heritage.'"[64] Justice Brennan further commented that a government supported depiction of the crèches has not lost its religious meaning through "rote repetition" or assuming some other secular purpose.[65]

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[59] *Id.* at 695-97.

[60] Lynch v. Donnelly, 465 U.S. 668, 698 (1984) (quoting Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. 756, 773 (1973).

[61] *Id.* at 701. Justice Brennan further noted that "It was precisely this sort of religious chauvinism that the Establishment Clause was intended forever to prohibit." *Id.*

[62] *Id.* at 702. "[T]he city has done nothing to disclaim government approval of the religious significance of the crèche, to suggest that the crèche represents only one religious symbol among many others, . . . or to disassociate itself from the religious content of the crèche." *Id.* at 706.

[63] *Id.* at 711.

[64] Lynch v. Donnelly, 465 U.S. 668, 712 (1984). "Unlike the poetry of Paradise Lost which students in a literature course will seek to appreciate primarily for esthetic or historical reasons, the angels, shepherds, Magi, and infant of Pawtucket's nativity scene can only be viewed as symbols of a particular set of religious beliefs." *Id.* at 713.

[65] *Id.* at 716-717. Justice Blackmun, in his dissent, joined by Justice Stevens, fully agreed with Justice Brennan's analysis and further claimed, "the majority does an injustice to the

2. Stone v. Graham:[66]

[21] In *Stone*, the Supreme Court held that a Kentucky statute requiring the posting of the Ten Commandments[67] in all public classrooms purchased with private funds, violated the Establishment Clause.[68] The Court stated that "[t]he pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature,"[69] and that "[t]he Commandment's do not confine themselves to arguably secular matters."[70]

[22] Justice Rehnquist issued a strong dissent, claiming that the majority could find "no support beyond [their] own *ipse dixit*."[71] Justice Rehnquist recounted, "[t]his Court regularly looks to legislative articulations of a statute's purpose . . . and accords . . . the deference they are due."[72] He noted that the Court has recognized that "'religion has been closely identified with our history and government'"[73] and that "'[the] history of

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crèche and the message that it manifests" by assigning it a secular meaning. *See* Lynch v. Donnelly, 465 U.S. at 726-27 (Blackmun, J., dissenting).

[66] 449 U.S. 39 (1980).

[67] Each display of the Ten Commandments had, at its base, in small print, the following text: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States." *Id.* at 41.

[68] *Id.* at 39-41.

[69] *Id.* at 41.

[70] *Id.*

[71] Stone, 449 U.S. at 43 (Rehnquist, J., dissenting).

[72] *Id.* at 43-44.

[73] *Id.* at 46 (quoting Abington Sch. Dist. v. Schempp, 374 U.S. 203, 212 (1963)).

man is inseparable from the history of religion.'"[74] Quoting former Justice Jackson, Justice Rehnquist stated, "I should suppose it is a proper, if not an indispensable, part of preparation for a worldly life to know the roles that religion and religions have played in the tragic story of mankind."[75]

3. Lamb's Chapel v. Center Moriches Union Free School District:[76]

[23] In *Lamb's Chapel*, the Supreme Court held that permitting an evangelical church group to use state property to display a film series[77] would not violate the Establishment Clause.[78] The Court stated "the challenged governmental action has a secular purpose, does not have the principle or primary effect of advancing or inhibiting religion, and does not foster an excessive entanglement with religion."[79] The Court found that, since the film series would not be shown during school hours, was not funded by the school, and would have been open to the public, no members of the community would assume that the District was endorsing any religious creed.[80]

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[74] *Id.* (quoting Engel v. Vitale, 370 U.S. 421, 434 (1962)).

[75] *Id.* (quoting McCollum v. Board of Education, 333 U.S. 203, 235-36 (1948)).

[76] 508 U.S. 384 (1993).

[77] This film series was a "[f]amily oriented movie – from a Christian perspective." *Id.* at 389. The movie discussed a psychologist's views on the "undermining influences of the media that could only be counterbalanced by returning to traditional, Christian family values instilled at an early age." *Id.* at 388.

[78] *Id.* at 395. This property was open to social, civic, and recreational use, but was controlled by school board issued rules. *See Id.* at 386-87.

[79] *Id.* at 395.

[80] *Id*.

4. Capitol Square Review and Advisory Board v. Pinette:[81]

[24] In *Capitol Square Review*, the Supreme Court held that denying the Ku Klux Klan the ability to erect a cross on the Columbus Statehouse Plaza, which is usually open for public use and displays,[82] violated the Establishment Clause.[83] The Court began its analysis by noting the similarities between *Capitol Square Review* and *Lamb's Chapel*.[84] The Court stated, "as a matter of Establishment Clause jurisprudence, we have consistently held that it is no violation for government to enact neutral policies that happen to benefit religion."[85] The Court continued that "[t]here is a crucial difference between *government* speech endorsing religion . . . and *private* speech endorsing religion," but this "distinction disappears whenever private speech can be mistaken for government speech."[86]

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[81] 515 U.S. 753 (1995).

[82] The plaza, Capitol Square, was available for public use and was regulated by the Capitol Square Review and Advisory Board. *Id.* at 758. This board had allowed displays including a lighted tree for Christmas, a menorah during Chanukah, and United Way fundraising displays. *Id.*

[83] *Id.* at 770.

[84] *Id.* at 763. "The state did not sponsor respondents' expression, the expression was made on government property that had been open to the public for speech, and permission was requested through the same application process and on the same terms required of other private groups." *Id.*

[85] Capitol Square Review and Advisory Board v. Pinette, 515 U.S. 753, 764 (1995). The Court distinguished *Allegheny* and *Lynch*, stating that the location of the display and time span that the display was presented were decisive factors. *Id.*

[86] *Id.* at 765. "[G]iving sectarian religious speech preferential access to a forum close to the seat of government (or anywhere else for that matter) would violate the Establishment Clause." *Id.* at 766.

[25] The majority distinguished *Allegheny*[87] from the current facts by stating that the Columbus Statehouse Plaza was "open to all on an equal basis," unlike the staircase of the County Courthouse.[88] The Court basically established the rule that, while nonpublic government property cannot be used for personal religious representations, public government property can be used for this expression.[89] The Court stated that allowing use of nonpublic grounds would constitute sponsorship or favoring of sectarian religious expression.[90]

[26] Justice O'Connor, joined by Justices Souter and Breyer, concurred with the majority's opinion, but criticized the majority's simplification of and deviation from the Establishment Clause tests.[91] First, Justice O'Connor stated that "an impermissible message of endorsement can be sent in a variety of contexts"[92] and the majority, by relying on the public versus private distinction, simply dissolved the endorsement test.[93]

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[87] *Supra* notes 108-37 and accompanying text.

[88] Capitol Square Review and Advisory Board v. Pinette, 515 U.S. at 764.

[89] *Id.*

[90] *Id.*

[91] *Id.* at 772.

[92] *Id.* at 774.

[93] *See Id.* ("[O]ur prior cases do not imply that the endorsement test has no place where private religious speech in a public forum is at issue"). *Id.* at 775. Justice O'Connor does not seem satisfied with the majority's passing recognition that "giving sectarian religious speech preferential access to a [public] forum close to the seat of government would violate the Establishment Clause . . . since it would involve content." Capitol Square Review and Advisory Board v. Pinette, 515 U.S. 753, 766 (1995). The majority seems to reserve the Endorsement Test as a secondary measure proceeded by the public / private distinction, while Justice O'Connor uses the distinction as an evidence of endorsement.

[27] Second, Justice O'Connor focused on the definition of the "reasonable observer" within the Endorsement Test. She stated, "[t]here is always *someone* who . . . reasonably might perceive a particular action as an endorsement of religion."[94] She declared that the history and ubiquity of a practice provides a context for the reasonable observer[95] and a "collective standard" should gauge the "objective meaning" of the practice.[96] Finally, Justice O'Connor concluded that the apparent flexibility of the endorsement test is actually "a virtue and not a vice," because it offers "sensitivity to the unique circumstances and context of a particular challenged practice."[97]

[28] Justice Souter, in his own concurrence, reiterated the failure of the majority to utilize the endorsement test.[98] He stated that by creating the alternative public versus private distinction, the majority "create[d] a serious loophole in the protection provided by the endorsement test."[99] He stated, "governmental bodies and officials are left with generous scope to encourage a multiplicity of religious speakers to erect displays in public forums."[100] He also concluded that a sign either marking the Klan's cross as

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[94] *Id*. at 780 (emphasis in original).

[95] Capitol Square Review and Advisory Board v. Pinette, 515 U.S. at 780.

[96] *Id.* at 779.

[97] *Id*. at 782-83 ("[I]t may not always yield results with unanimous agreement at the margins").

[98] *Id*. at 783.

[99] *Id.* at 791.

[100] *Id.* at 791-92.("By allowing government to encourage what it cannot do on its own, the *per se* rule would tempt a public body to contract out its establishment of religion.").

private speech without any government support or marking a distinct area of the state's property as a place for all private unendorsed speech, would suffice to subdue any reasonable inference of endorsement.[101]

[29] Justice Stevens, in his dissent, dissects the majority's application of the facts and warns that they have created a larger Establishment Clause transgression than previously existed.[102] First, addressing the object in question, Justice Stevens stated, a "freestanding wooden cross was unquestionably a religious symbol, [and] observers may well have received completely different messages from that symbol."[103] He claimed that the cross did convey an unavoidable religious message.[104]

[30] Turning to the majority's opinion that this message could be avoided, Justice Stevens stated that sending such a message was unavoidable.[105] He noted that a sign or some other indication of non-endorsement would only increase the Establishment Clause violation.[106] He also dispelled the majority's distinction between public and private government property, claiming, "[m]any (probably most) reasonable people do not know the difference between a 'public forum,' a 'limited public forum,' and a 'nonpublic

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[101] Capitol Square Review and Advisory Board v. Pinette, 515 U.S. at 793-94.

[102] *Id.* at 797.

[103] *Id.* at 798.

[104] *Id.*

[105] *Id.* at 799.

[106] *Id.* at 801 ("[T]he location of a stationary, unattended sign generally is both a component of its message and an implicit endorsement of that message by the party with the power to decide whether it may be conveyed from that location.").

forum.'"[107] Finally, Justice Stevens stated that the other displays on the Capitol Square in no way detracted from a cross' non-secular image.[108]

5. County of Allegheny v. ACLU:[109]

[31] In *County of Allegheny*, the Supreme Court held that a crèche[110] displayed on steps of the Allegheny County Courthouse violated the Establishment Clause, while a large Chanukah menorah[111] displayed outside of the County Building, did not.[112] The majority began by recalling their opinion in *Lynch*,[113] and defining their standard of "endorsement."[114] They stated, "[t]here is no doubt, of course, that the crèche itself is

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[107] *Id.* at 807.

[108] *Id.* at 808. "Most significant . . . is the menorah that stood in Capitol Square . . . . In my opinion, both displays are equally objectionable. Moreover, the fact that the state has placed its stamp of approval on two different religions instead of one only compounds the constitutional violation." *Id.*

[109] 492 U.S. 573 (1989).

[110] The county permitted a Roman Catholic society to display this crèche on the Courthouse steps for eight years prior to this decision. *Id.* at 579. The crèche has a plaque stating that it was donated by the society. *Id*. at 580.

[111] The county permitted a Jewish group to display this menorah on the County Building for 7 years prior to this action. *Id.* at 581-82. The menorah is next to the city's 45-foot decorated Christmas tree and a sign entitled "Salute to Liberty." *Id.*

[112] *Id*. at 578-79.

[113] *Id.* at 594. "The rationale of the majority opinion in *Lynch* is none too clear. . . ." *Id.* First, the Court complained that *Lynch* did not discern a measure for distinguishing endorsement. *Id.* Second, the Court questioned why the display of the crèche in *Lynch* gave only "indirect, remote, and incidental" benefits to religion. *Id.*

[114] "The prohibition against governmental endorsement of religion 'preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is *favored* or *preferred*.'" County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 593 (1989) (citing Wallace v. Jaffree, 472 U.S. 38, 60 (1985).

capable of communicating a religious message,"[115] and unlike *Lynch*, "nothing in the context of the display detract[ed] from the crèche's religious message."[116] The majority focused heavily on the placement of the crèche within the courthouse[117] and stated that a sign disclosing the crèche's owners did not alter the conclusion that its placement constituted an endorsement of religion.[118]

[32] Turning to the Chanukah menorah, the majority first noted the menorah's placement among other holiday displays.[119] They stated that the combination of the menorah, a Christmas tree, and a sign reading "Salute to Liberty," conveyed a secular image of the entire display.[120] The majority held that "it is not 'sufficiently likely' that [Pittsburgh] residents will perceive the . . . [display] as an 'endorsement' or 'disapproval of their individual religious choices.'"[121]

[33] Justice O'Connor concurred, commenting on the majority's attempt to solidify a rule surmounting the endorsement test.[122] Although agreeing that the crèche constituted

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[115] *Allegheny*, 492 U.S. at 598.

[116] *Id.* "[T]he crèche sits on the Grand Staircase, the 'main' and 'most beautiful part' of the building that is the seat of county government. No viewer could reasonably think that it occupies this location without the support and approval of the government." *Id.* at 599-600.

[117] *Id.* at 599.

[118] *Id.* at 600.

[119] *Id.* at 614.

[120] *Allegheny*, 492 U.S. at 616.

[121] *Id.* at 620 (citing Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373, 390 (1985)).

[122] *Id.* at 623.

an Establishment Clause violation, Justice O'Connor reiterated her thesis that the sensitive application of the endorsement test to the unique circumstances and context of a challenged practice is the only way to accurately test for an Establishment Clause violation in this type of case.[123]

[34] Justice Brennan, joined by Justices Marshall and Stevens, dissented, in part, to the majority's holding that the placement of the Chanukah menorah did not violate the Establishment Clause.[124] Justice Brennan first questioned the secular nature of a Christmas tree and the holiday of Chanukah.[125] Stating that neither symbol had completely secular aspects,[126] Justice Brennan proceeded to dismantle the majority's argument that allowing both symbols celebrates "pluralism" and does not favor any

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[123] *Id.* at 628-29. Justice O'Connor further discussed the notion of historical practice and its application to the endorsement test.

> Under the endorsement test, the 'history and ubiquity' of a practice is relevant not because it creates an 'artificial exception from that test. On the contrary, the 'history and ubiquity' of a practice is relevant because it provides part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion.

Id. at 630.

[124] *Id.* at 637.

[125] *Id.* at 639-40. "That the tree may, without controversy, be deemed a secular symbol if found alone does not mean that it will be so seen when combined with other symbols or objects." *Id.*

[126] Justice Brennan stated the placement of the menorah, in contrast to the Christmas tree, only further developed the religious meaning of the tree. *Id.* at 640-42.

religion.[127] Justice Brennan concluded that including additional religious symbols to an already unconstitutional display would not reestablish constitutionality.[128]

[35] Justice Kennedy, joined by Chief Justice Rehnquist, Justice White, and Justice Scalia, strongly dissented from the both the majority view and Justice Brennan's opinion, Justice Kennedy wrote that "[t]his view of the Establishment Clause reflects an unjustified hostility toward religion, a hostility inconsistent with our history and our precedents . . . ."[129] Justice Kennedy recognized that "[g]overnment policies of accommodation, acknowledgment, and support for religion are an accepted part of our political and cultural heritage."[130]

[36] Justice Kennedy discussed two limiting principles: that the government may not coerce anyone to support or participate in any religion or its exercise; and may not give direct benefits to religion in such a degree that it in fact "establishes a [state] religion or religious faith, or tends to do so."[131] He stated, that absent some form of coercion, "the

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[127] *Allegheny*, 492 U.S. at 644. "I know of no principle under the Establishment Clause, however, that permits us to conclude that governmental promotion of religion is acceptable so long as one religion is not favored." *Id.*

[128] *Id.* at 645-46.

[129] *Id.* at 655.

[130] *Id.* at 657. "Rather than requiring government to avoid any action that acknowledges or aids religion, the Establishment Clause permits government some latitude in recognizing and accommodating the *central role religion plays in our society*." *Id.* (emphasis added) (citing *Lynch*, 465 U.S. at 678; *Walz*, 397 U.S. at 669).

[131] *Id.* at 659 (quoting *Lynch*, 465 U.S. at 678). In further defining coercion, Justice Kennedy stated that coercion means "*direct* coercion in the classic sense of an establishment of religion that the Framers knew. . . . Symbolic recognition or accommodation of religious faith may violate the clause in an extreme case." *Id.* at 660-61.

risk of infringement of religious liberty by passive or symbolic accommodation is minimal."[132]

[37] Justice Kennedy affirmed that the "county sought to do nothing more than 'celebrate the season' and to acknowledge . . . the historical background and religious, as well as secular, nature of the . . . holidays."[133] He claimed that the government in no way used its power to coerce to further the interests of Christianity or Judaism by allowing a crèche and menorah to be displayed.[134] He further stated that the majority completely invalidated the case law established in *Lynch* and improperly focused on the importance between public and private government property.[135]

[38] Finally, Justice Kennedy's final point focused on the endorsement test, which he refers to as "a recent, and . . . most unwelcome, addition to [the] tangled Establishment Clause jurisprudence."[136] He stood clearly against the idea that the endorsement test's application of a reasonable person can sufficiently indicate an Establishment Clause violation.[137] He stated "the historical relevance and understanding of a practice is only part of the analysis, since there are other practices that also pose no greater potential for

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[132] *Allegheny*, 492 U.S. at 662.

[133] *Id*. at 663. "This interest falls well within the tradition of government accommodation and acknowledgement of religion that has marked our history from the beginning." *Id.*

[134] *Id.* at 664.

[135] *Id.* at 667-68.

[136] *Id.* at 668-69. "Although a scattering of our cases have used 'endorsement' as another word for 'preference' or 'imprimatur,' the endorsement test applied by the majority had its genesis in Justice O'Connor's concurring opinion in *Lynch*." *Id.*

[137] *Allegheny*, 492 U.S. at 699.

an establishment of religion."[138] He also claimed, "the majority's approach . . . threatens to trivialize constitutional adjudication," since a court must apply the strict rule of counting the number of objects that may be considered religious and then must determine whether they are "sufficiently 'separate.'"[139]

6. Freethought Society v. Chester County:[140]

[39] In *Freethought Society*, the Third Circuit held that a plaque displaying the Ten Commandments on the exterior of the Chester County, Pennsylvania Courthouse did not violate the Establishment Clause.[141] The circuit court began by begrudgingly recognizing the *Lemon* test.[142] The court paid specific attention to Justice O'Connor's "endorsement test" from *Lynch*.[143] Accordingly, the court formulated the main issue as: "whether a reasonable observer would perceive the display as government endorsement of

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[138] *Id.* at 670.

[139] *Id.* at 675.

[140] 334 F.3d 247 (3d Cir. 2003).

[141] *Id.* at 270. The plaque, installed and dedicated in 1920, is a 50-inch by 29-inch bronze representation of the King James Version of the Ten Commandments. *Freethought Society of Greater Philadelphia v. Chester County*, 191 F. Supp. 2d 589, 591 (E.D. Pa. 2002). "[T]he Ten Commandments plaque stands out against the white stone blocks it is mounted on." *Id.* No other plaque, except a two small "no smoking" signs, adorn that side of the building, and "the Ten Commandments tablet dominates the left . . . of [that side's] façade. *Id.*

[142] *Freethought Society*, 334 F.3d at 256. The court recognized that the "decision has received much criticism," and exhumed Justice Scalia's *Lamb's Chapel* late-night horror movie ghoul. *Id.*

[143] *Id.* at 257-58.

religion."[144] The Third Circuit held that this "reasonable observer" "must be presumed to have an understanding of the general history of the display and the community in which it is displayed."[145]

[40] The court addressed the history of the plaque.[146] Applying the endorsement test, the court stated, "the context of an otherwise religious display can render the message of the overall display as not endorsing religion."[147] Consequently, the court held that the plaque did not violate the Establish Clause because, "while the reasonable observer may perceive the Ten Commandments (in the abstract) as portraying a religious message, he or she would view the *plaque* as a reminder of past events in Chester County."[148]

[41] Interestingly, the court continued, in dictum, to state that "a contemporary decision to erect such a plaque could not be motivated by historic preservation; rather it

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[144] *Id.* at 258. "Recent Supreme Court decisions . . . have not applied the *Lemon* test. Instead, in cases involving Establishment Clause challenges to private individuals' use of government resources, the Court has applied the endorsement test . . . dispens[ing] with the 'entanglement' prong . . . and collaps[ing] its 'purpose' and 'effect' prongs into a single inquiry." *Id.* (citing Tenafly Eruv Assoc., Inc. v. Borough of Tenafly, 309 F.3d 144, 174 (3rd Cir. 2002)).

[145] *Freethought Society*, 334 F.3d at 259.

[146] *Id.* at 261-62. The court addressed the original intention behind the hanging of the plaque , as well as the reasons behind a denial of a recent request to remove it, stating that the main focus should remain of the recent denial, with only consideration given to the original purpose. *Id*.

[147] *Id.* at 263.

[148] *Id.* at 265.

would appear much more likely that the County Commissioners were motivated by religion."[149]

IV. COMMENTS ON THE COURT'S HOLDING

a. Why was Chief Justice Moore the defendant?

[42] As an elected official of the State of Alabama, Chief Justice Moore was an inappropriate defendant for the plaintiff's action. As quoted previously, the First Amendment states, "Congress shall make no law respecting an establishment of religion . . . ."[150] The scope of this clause has extended past the limited definitions of Congress and establishment, to encompass any action by the government, which amounts to an excessive entanglement with or approval of any religion.[151]

[43] When a governmental action has been challenged as violating the Establishment Clause, courts applying *Lemon* have tested the "secular purpose" prong by examining the government's intent for taking the action in question.[152] The courts have

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[149] *Id.* The court tempers this statement, stating that the a reasonable person is more likely to perceive the Ten Commandments as an endorsement,

> [E]specially where there is nothing else in the context of the display that would change the views of the reasonable observer such as exists in the frieze in the courtroom of the United States Supreme Court, which portrays Moses carrying the Ten Commandments along side . . . John Marshall, William Blackstone, and Caesar Augustus."

Id.

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

[151] *See supra* notes 21-27 and accompanying text.

[152] *See e.g.*, *Lynch v. Donnelly*, 465 U.S. 668, 691 (1984) (referencing the "intention of the speaker" to common government celebration of holidays). "The Establishment Clause, at the very least, prohibits *government* from appearing to take a position on

recognized that this analysis must identify two different intents, namely the original intent of government's actions and the current intent for allowing the product of those actions to remain.[153]

[44] The question then arises, why was Chief Justice Moore named as the defendant in this case? According to the district court, "Chief Justice Moore has final authority over what decorations may be placed in the Judicial Building rotunda."[154] This was an extremely important fact, which enabled the district court to solely use Justice Glassroth's actions and intent when applying the first prong of *Lemon*.

[45] Chief Justice Moore's "final authority," however, was simply a fiction. Chief Justice Moore was merely an elected official[155] and ultimately a servant of the state of Alabama. The state, through a Judicial Inquiry Commission, had the power at any point in Justice Glassroth's term to censure, suspend, expel or otherwise sanction him.[156] The

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questions of religious belief . . . ." County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 593 (1989) (emphasis added).

[153] Freethought Society v. Chester County, 334 F.3d 247, 263 (3rd Cir. 2003).

> Although the County's original purpose for affixing the plaque to the façade of the Courthouse would certainly inform the determination of whether the stated purpose for leaving it in place was a sham, we conclude that the primary focus should be on the events of 2001, when the County refuse Flynn's request [to remove the plaque].

Id.

[154] Glassroth v. Moore, 229 F. Supp. 2d 1290, 1294 (M.D. Ala. 2002).

[155] *Id.*

[156]

> The court shall have authority, after notice and public hearing (1) to remove from office, suspend without pay, or censure a judge, or apply such other sanction as may prescribed by law, for violation of a Canon of

state displayed this power by expelling Chief Justice Moore when he refused to take down the monument after his final appeal.[157]

[46] On the surface, the distinction of whether Justice Glassroth or the State of Alabama was named as the defendant does not seem to be determinative, but on closer inspection, this seems to be a tactical move by the plaintiffs and a serious error by the court. Chief Justice Moore, without the consent or financing of any other governmental entity, erected the monument in question.[158] He had specific intentions, which will be discussed below, but those intentions were personal. The legislative, executive, and judicial branches of Alabama's government, which had the power to request the monument's removal, sanction Chief Justice Moore, or expel him and have the monument removed, were basically silent on this issue. Their tacit approval of the monument was much more of a governmental action than those taken by Chief Justice Moore.

[47] This affects the lower court's analysis in one of two ways. First, Chief Justice Moore's actions could be viewed as simply a citizen who was given the authority to erect any type of monument on state property. Then only the government's intentions for

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> Judicial Ethics, misconduct in office, failure to perform his or her duties . . . .

ALA. CONST. of 1901, art. VI, *amended by* ALA. CONST. of 1901. amend. 581. An Alabama Judicial Inquiry Commission can file a complaint with the Alabama Supreme Court, claiming a violation of Judicial Ethics. *Id*.

[157] *Judicial Courage in Alabama*, N.Y. TIMES, Nov. 14, 2003, at A28.

[158] *Glassroth*, 229 F. Supp. 2d at 1294.

allowing the monument to remain would be considered.[159] Second, Justice Moore's actions could be considered the original intent behind the monument, and the government's intent behind not removing the monument would be considered successful. In this instance, Chief Justice Moore's intentions would then be secondary to the government's intent to leave the monument in the courthouse.[160]

[48] In either instance, naming the government as a defendant would effectively neutralize a large amount of the evidence that the district court judge relied upon. In his recitation of the facts, Judge Thompson heavily focused on Chief Justice Moore's campaign slogan, his relation to Coral Ridge Ministries, his speeches about the monument, and his subsequent actions in relation to the display.[161] From these facts, Judge Thompson initially stated, "[t]hat Chief Justice Moore's purpose in displaying the monument was non-secular is self-evident."[162] If the right party, namely the State of Alabama, had been named as the defendant, these facts and conclusion would either be irrelevant or simple secondary to the state's intent for allowing Chief Justice Moore to erect and maintain *his* monument.

b. *Does the monument on its own display a non-secular purpose?*

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[159] This type of Establishment Clause examination would parallel the analysis applied in *County of Allegheny v. ACLU,* 492 U.S. 573 (1989).

[160] This type of Establishment Clause examination would parallel the analysis applied in *Freethought Society v. Chester County*. 334 F.3d 247 (3d Cir. 2003).

[161] *Glassroth*, 229 F. Supp. 2d at 1294-97.

[162] *Id*. at 1299. "That the Ten Commandments monument's primary effect advances religion is also self-evident." *Id*. at 1302.

[49] Judge Thompson's statement that "Chief Justice Moore's non-secular purpose is also evident from the monument itself,"[163] is extremely questionable. Judge Thompson found "[i]ts sloping top and the religious air of the tablets unequivocally call to mind an open Bible resting on a lectern."[164] He also noted that the quotations on the sides of the monument "speak solely to non-secular matter, that is, to the importance of religion and the sovereignty of God in our society; these non-Biblical quotations are physically below and not on the same plane with the Biblical one."[165] After visiting the monument, Judge Thompson opined that "there is the ineffable but still overwhelming sacred aura of the monument."[166]

[50] Judge Thompson distinguished Chief Justice Moore's monument from other well-known religiously related artwork displayed in the U.S. Supreme Courthouse, on a government building in Washington, D.C., on the U.S. Justice Department Building, and in the Pennsylvania Supreme Courtroom.[167] He stated, "[I]n each of these displays, the

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[163] *Id.* at 1300.

[164] *Id.* On the top of the monument, two tablets containing the Ten Commandments are carved out of rough stone, which are slightly tilted into each other and down towards the reader. *Id.* (image *available at* http://www.morallaw.org/ Pictures/moore&monument.jpg (last visited March 9, 2004*)*.

[165] *Id*.

[166] *Glassroth*, 229 F. Supp. 2d at 1300.

[167] *Id.* These include,

> (1) Moses, among other historical lawgivers, holding two blank tablets on the East Portico of the United States Supreme Court Building; (2) a carving of two tablets with the numbers I through X on the entrance door to the United States Supreme Court's courtroom; (3) a pylon in front of the E. Barrett Prettyman Building in Washington D.C. with (among other things) two tablets engraved with Hebrew writing; (4) two blank tablets at the feet of the Spirit of Justice statue in the United States Justice

Ten Commandments are situated in a secular context and the secular nature of the display is apparent and dominant."[168] Judge Thompson concluded that "this monument leaves no room for ambiguity about its religious appearance,"[169] without outwardly addressing the true content of the monument.

[51] When only considering the monument alone, Judge Thompson's representations of it are seriously questionable. The quotations on the sides of the monument originate from fourteen sources.[170] Half of the sources are direct adages and slogans from state and federal government, which reference God in some fashion, while also addressing liberty, trust, independence and allegiance.[171] The other half contains quotations from historical figures, which address the moral underpinnings of law.[172] Although it is impossible to call this set of quotations purely secular, Judge Thompson

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> Department Building; and (5) a mural in the Pennsylvania Supreme Court courtroom with Moses carving the Ten Commandments and a full version of the text of the Ten Commandments.

Id. The court also referenced two seventh circuit cases, which held monuments containing the Ten Commandments violated the Establishment Clause. *Id*. (citing Indiana Civil Liberties Union v. O'Bannon, 259 F.3d 766 (7th Cir. 2001); Books v. Elkhart, 235 F.3d 292 (7th Cir. 2001)).

[168] *Glassroth*, 229 F. Supp. 2d at 1300.

[169] *Id*.

[170] The monument depicts quotes from the Declaration of Independence, George Mason, James Madison, William Blackstone, the National Motto, the Constitution of Alabama, the National Anthem, the Judiciary Act of 1789, George Washington, John Jay, the Pledge of Allegiance, the legislative history of the Pledge of Allegiance, James Wilson, and Thomas Jefferson. *See Id.* at app. B.

[171] *Id*.

[172] *Id*.

does an injustice to their creators when he encapsulates them as "still speak[ing] solely to non-secular matters . . . ."[173]

[52] While Judge Thompson stated that the tilt of the tablets resembles a bible on a lectern,[174] another viewer, could see the resemblance of a counselor's podium in a courtroom. This same viewer could reasonably view the monument as depicting, what has been quoted on its four sides, namely the religious underpinnings of American law. When viewed in isolation of its surrounding personalities, Chief Justice Moore's monument seems to be nothing more than a 5,280-pound block of granite that depicts a recorded fact about American legal history.[175]

c. Chief Justice Moore's Ten Commandments, Lemon, and Marsh

[53] Assuming arguendo that Chief Justice Moore was an appropriate defendant, Judge Thompson's holding still failed to adequately address the three prongs of the *Lemon* test and the *Marsh* exception. Under the first prong of the *Lemon* test, Judge Thompson concluded that Chief Justice Moore's monument had no arguably secular appearance.[176] As previously discussed, it is unreasonable to state that only a non-secular

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[173] *Id*. at 1300.

[174] *Glassroth*, 229 F. Supp. 2d at 1300.

[175] "We are a religious people whose institutions presuppose a Supreme Being. . . . [W]e find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence." Zorach v. Clauson, 343 U.S. 306, 313 (1953). *See also* Lynch v. Donnelly, 465 U.S. 668, 674 (1984).

[176] "The only way to miss the religious or non-secular appearance of the monument would be to walk through the Alabama State Judicial Building with one's eyes closed." Glassroth v. Moore, 229 F. Supp. 2d at 1300.

purpose is evident from the monument itself. When one supplements this analysis with Chief Justice Moore's reputation, past statements, and actions relating to the monument, it is evident that a "secular purpose" still existed.

[54] Chief Justice Moore, while unveiling the monument, stated that the monument:

> [S]erves to remind the Appellate Courts and judges of the Circuit and District Court of this State and members of the bar who appear before them, as well as the people of Alabama who visit the Alabama Judicial Building, of the truth stated in the Preamble to the Alabama Constitution that in order to establish justice we must involve 'the favor and guidance of almighty god.'[177]

Chief Justice Moore, in this speech, subsequent speeches, and in the courtroom continuously stated that the monument depicted the "Moral Foundation of Law."[178] At its simplest level, this monument served as a reminder of American legal history. All fourteen quotes on the sides of the monument attest to this history.[179] Agencies of state and federal government have directly adopted seven of the fourteen quotes.[180] Judge Thompson found the fact that these quotes sat beneath the Ten Commandments carving is

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[177] *Id*. at 1296. On the other hand, Justice Moore also

> [E]xpressed disagreement with those judges and other government officials who 'purport that it is government—and not God—who gave us our rights.' He said that these officials have 'turned away from those absolute standards that serve as the moral foundation of law.' In the Chief Justice's opinion, to restore this moral foundation of law, 'we must first recognize the source from which all morality springs . . . [by] recogniz[ing] the sovereignty of God.'

Id.

[178] *Id*. at 1296, 1303.

[179] *See supra* note 167 and accompanying text.

[180] *See supra* note 168-69 and accompanying text.

dispositive of Chief Justice Moore's non-secular purpose. A reasonable observer, however, could have easily found their placement a simple indication of their context.[181]

[55] It is unreasonable to ignore Chief Justice Moore's statements relating to the significance of the religious underpinnings of the American legal history represented in his monument.[182] Ultimately this monument simply depicted history. Chief Justice Moore's monument, although having religious aspects, has a secular purpose, much like Justice O'Connor's statements about governmental celebration of holidays in *Lynch v. Donnelly*.[183] If governmental representations of history, which contain a religious element, are considered to be purely non-secular representations, there would be no feasible way to depict government's historical roots.

[56] Turning to *Lemon's* second prong, Judge Thompson found that Chief Justice Moore's monument had the purpose and effect of "endorsing" religion.[184] Judge Thompson began by defining the standard that would be applied to determine whether the monument constituted an endorsement.[185] In applying this "reasonable observer"

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[181] It is common practice in legal writing to place commentaries and interpretations of the rule of law, after a statement of that law. RICHARD K. NEUMANN, JR., LEGAL REASONING AND LEGAL WRITING 95-115 (Richard A. Epstein et al. eds., 2001).

[182] *See supra* note 176.

[183] *Lynch*, 465 U.S. at 691.

[184] *Glassroth*, 229 F. Supp. 2d at 1302.

[185] In referencing *Lynch v. Donnelly*, *Capitol Square Review & Advisory Bd. v, Pinette*, and *Lamb's Chapel v. Moriches Union Free Sch. Dist.* Judge Thompson assemble a test that "consider[ed] whether the monument ha[d] the impermissible effect of endorsing religion with respect to a 'reasonable observer' aware of the history and context of the community and forum in which the monument appears." *Glassroth*, 229 F. Supp. 2d at 1303.

standard, Judge Thompson was observant of Chief Justice Moore's campaign name, his campaign slogan "to restore the moral foundation of law," and his unveiling speech, as well as the fact that the Judicial Building rotunda is not a public forum.[186] Therefore, any "reasonable observer" would be acutely aware of Chief Justice Moore's fascination with the moral foundation of American law.

[57] It is highly questionable whether the "reasonable observer" standard, which Judge Thompson purports to extract from previous case law, would actually find Chief Justice Moore's monument constituting an "endorsement" of religion. This same type of "reasonable observer" standard has been applied to uphold the constitutionality of initiating state legislative sessions with prayer by a chaplain,[187] a township funding and erecting a crèche,[188] a school board allowing evangelical church groups to display religious films after hours on public school property,[189] and a county allowing the display of a menorah and Christmas tree outside of their County Building.[190] While these governmental practices obviously have non-secular features, the U.S. Supreme Court has not considered them an "endorsement" of religion. It tests logic to claim that a monument depicting the Ten Commandments in reference to American legal history is more religiously illustrative than a state supported display of a crèche or menorah.

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[186] *But see supra* note 93 and accompanying text (recognizing that most reasonable people would not know the difference between forum types).

[187] Marsh v. Chambers, 463 U.S. 783, 793 (1983).

[188] *Lynch*, 465 U.S. at 687.

[189] Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 395 (1993).

[190] *County of Allegheny*, 492 U.S. at 578-79.

[58] While one could easily argue, as Judge Thompson did, that unlike previous cases, Chief Justice Moore has provided the "reasonable observer" with a clear indication of his non-secular message, this claim fails for two reasons. First, Chief Justice Moore's attempt to *remind* other judges and counselors of the historical moral underpinnings of the law did not contain an uneven amount of material indicating that a specific religion dominated or should be considered when viewing this history.[191] Second, Judge Thompson's conclusion of the "reasonable observer" being aware of Chief Justice Moore's statements and actions is extremely short sighted. After a short time, Chief Justice Moore's campaign slogan, speeches and previous antics will fade away from the public's conscience, and the only basis for observing the monument will be its outward appearance.

[59] The fact that these actions will fade away so quickly, illustrates the paradox created by Judge Thompson's holding. As discussed above, Judge Thompson distinguished Justice Moore's monument from five other well known religiously related artwork in or on public buildings.[192] While discussing each piece of artwork, Judge Thompson never once referenced the intentions of the commissioning party.[193] In the instant case, Judge Thompson's main focus was on Justice Moore's past conduct, with

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[191] The Ten Commandments are texts of the Jewish and Christian faiths. Glassroth v. Moore, 229 F. Supp. 2d 1290, 1299 (2002). The quotes on the sides of the monument represent historical figures with diverse religions, ranging from James Madison, an Episcopalian, to Thomas Jefferson, an agnostic. Adherents.com, *Religious Affiliations of U.S.* Presidents, *available at* http://www.adherents.com/adh_presidents.html (last visited April 12, 2005).

[192] *See supra* note 167.

[193] *Glassroth*, 229 F. Supp. 2d at 1300-01

only passing attention to the substance of the monument in question.[194] The resulting question is this: how does the government remind it citizens, judges, and counselors of the religious underpinnings of American law? Under Judge Thompson's reasoning, this goal of "reminding" the public, although merely being a representation of history, is simply unconstitutional.

[60] The *Marsh* exception further clarifies this point. While listing constitutional displays containing the Ten Commandments,[195] Judge Thompson noted that the Ten Commandments have become a traditional display in courthouses. If the U.S. Supreme Courthouse bears a painting of Moses holding the Ten Commandments,[196] it can be assumed these types of depictions have become a "tolerable acknowledgment of beliefs widely held among the people of this country."[197]

V. CONCLUSION

[61] After addressing the question of whether Chief Justice Moore's monument truly displays a non-secular purpose, it is simple to see why he was the optimal defendant. Judge Thompson was able to weave Chief Justice Moore's reputation, statements, and actions together with his own subjective observations about the monument, to prove an airtight violation of the Establishment Clause. Judge Thompson

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[194] *Id*. at 1300-02.

[195] *See supra* note 167.

[196] Glassroth v. Moore, 229 F. Supp. 2d 1290 (M.D. Ala. 2002). Contrary to Judge Moore's statement, no amount of company included in the painting with Moses can temper the non-secular elements of this painting.

[197] Marsh, 463 U.S. at 792.

cleverly diverted most attention away from the actual substance of the monument, which on its own cannot reasonably be considered a totally non-secular piece of art.

[62] Furthermore, even assuming that Chief Justice Moore was an adequate defendant, Judge Thompson simply failed to recognize and follow Supreme Court case law. In applying the reasoning of the very holdings that he ignored, Judge Thompson failed to recognize the secular element of this monument, namely depicting a historical fact of the American legal system.

[63] In 1954, the House of Representatives recorded in their House Report, "[t]he inclusion of God in our pledge therefore would further acknowledge the dependence of our people and our Government upon the moral directions of the Creator."[198] The Supreme Court has also recognized this indisputable tie between the history of the U.S. government and religion.[199] Judge Thompson's decision in this case, and other recent judicial decisions,[200] have created dangerous precedent for other courts to strike down state and federal government attempts to represent their own history.

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[198] H.R. Rep. No. 83-1693, at 3 (1954), *reprinted in* 1954 U.S.C.C.A.N 2339, 2341 (House Report of the adoption of the Pledge of Allegiance).

[199] *See e.g.*, Sch. Dist. v. Schempp, 374 U.S. 203 (1963); Zorach v. Clauson, 343 U.S. 306, 313 (1952).

[200] *See* Books v. City of Elkhart, 235 F.3d 292 (7th Cir. 2000); Indiana Civil Liberties Union v. O'Bannon, 259 F.3d 766 (7th Cir. 2001).