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Constitutional Law: Thou Shalt Not Establish Religion

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CASE COMMENTS

CONSTITUTIONAL LAW: THOU SHALT NOT ESTABLISH RELIGION

Glassroth v. Moore, 335 F.3d 1282 (11th Cir. 2003)

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Appellant, the Chief Justice of the Alabama Supreme Court, erected a two-and-one-half ton monument of the Ten Commandments in the rotunda of the Alabama State Judicial Building.[1] The monument, which Appellant installed to reflect the moral foundation of law, was also engraved with quotations from secular sources and adorned the rotunda along with two other displays.[2] Appellees filed suit in the United States District Court for the Middle District of Alabama,[3] alleging that Appellant's actions were unconstitutional.[4] Finding that Appellant's purpose in displaying the monument was non-secular and that the monument's primary effect was to advance religion, the district court concluded that Appellant's actions were unconstitutional.[5] The United States Court of Appeals for the

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* To my parents, Peter and Marta, and my sister, Lizette, for whose constant encouragement I am deeply grateful.

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1. Glassroth v. Moore, 335 F.3d 1282, 1284 (11th Cir. 2003). The 5,280-pound granite monument is in the shape of a cube, approximately three feet wide by three feet deep by four feet tall. Glassroth v. Moore, 229 F. Supp. 2d 1290, 1294 (M.D. Ala. 2002). The top of the monument is carved as two sloping tablets with rounded tops, similar to an open Bible resting on a lectern. *Id.* at 1294-95. The tablets are engraved with the Ten Commandments, excerpted from the King James Bible. *Id.* Each side of the monument depicts quotations from secular sources. *Id.* at 1295. The monument is located directly across from the main entrance to the judicial building. *Id.* at 1294. The rotunda also contains a marble plaque with quotations from Dr. Martin Luther King, Jr. and Frederick Douglass and a brass plaque with the Bill of Rights. *Id.* at 1296. The district court noted, however, that a person standing directly in front of the monument cannot see either plaque. *Id.*

2. *Glassroth*, 335 F.3d at 1286-87.

3. *Glassroth*, 229 F. Supp. 2d 1290. The three Appellees are practicing attorneys in the Alabama courts. *Glassroth*, 335 F.3d at 1288. The instant court concluded that two Appellees, who altered their behavior as a result of the monument, had standing to bring the suit against Appellant. *Id.* at 1292. The court thus found it unnecessary to determine whether the third Appellee also had standing. *Id.* at 1293.

4. *Glassroth*, 335 F.3d at 1288. Appellees sought a declaratory judgment that Appellant's actions were unconstitutional and an injunction to remove the monument. *Id.*

5. *Id.* After Appellant declined to remove the monument voluntarily within thirty days of the district court's judgment, the district court entered an order enjoining him from failing to remove the monument from the public areas of the Judicial Building. *Id.*

Eleventh Circuit affirmed the district court's decision and HELD that Appellant's display violated the Establishment Clause of the First Amendment[6] by purposely acknowledging the Judeo-Christian God and suggesting that the state endorsed Christianity.[7]

The Establishment Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion."[8] The language of the Establishment Clause, however, offers little guidance regarding its application.[9] Accordingly, the Supreme Court has attempted to define the scope of the clause by employing several tests and standards.[10]

In *Lemon v. Kurtzman*,[11] the Supreme Court articulated a three-part test for determining whether government action violates the Establishment Clause.[12] In *Lemon*, the Court considered whether from two states statutes providing state aid to church-related elementary schools were unconstitutional.[13] The Rhode Island act authorized a fifteen-percent salary supplement to teachers of secular subjects in nonpublic schools.[14] The Pennsylvania act authorized reimbursement to nonpublic schools for certain secular education services, including teachers' salaries, textbooks, and instructional material.[15] Both statutes contained restrictions to guarantee that secular and religious educational functions remained separate and to ensure that state financial aid supported only secular functions.[16]

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

7. *Glassroth*, 335 F.3d at 1296-97.

8. U.S. CONST. amend. I.

9. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) ("The language of the Religion Clauses of the First Amendment is at best opaque . . . .").

10. The Supreme Court has varied its Establishment Clause jurisprudence by employing the *Lemon* test, *Lemon*, 403 U.S. 602, 612, the historical test, Marsh v. Chambers, 463 U.S. 783, 790 (1983), the endorsement test, Wallace v. Jaffree, 472 U.S. 38, 56 (1985), and the coercion test, Lee v. Weisman, 505 U.S. 577, 587 (1992). In fact, Chief Justice Burger noted that the Court has "repeatedly emphasized [its] unwillingness to be confined to any single test or criterion in this sensitive area." Lynch v. Donnelly, 465 U.S. 668, 679 (1984).

11. 403 U.S. 602 (1971).

12. *Id.* at 612-13.

13. *Id.* at 606.

14. *Id.* at 607. The three-judge court found that Rhode Island's nonpublic elementary schools accommodated approximately twenty-five percent of the state's pupils, ninety-five percent of whom attended schools affiliated with the Roman Catholic Church. *Id.* at 608.

15. *Id.* at 609. Pennsylvania entered into contracts with schools comprising more than twenty percent of all pupils in the state. *Id.* at 610. More than ninety-six percent of these pupils attended church-related schools, most of which were affiliated with the Roman Catholic Church. *Id.*

16. *Id.* at 613.

The Court analyzed the statutes under its newly formulated three-part test.[17] To withstand constitutional scrutiny under the Establishment Clause, the statute first must have a secular purpose.[18] Second, its primary effect must neither be to advance nor inhibit religion.[19] Finally, it must not excessively entangle the government with religion.[20]

The Court noted that the legislative intent of the statutes was not to advance religion but rather to enhance the quality of secular education in all schools.[21] Nonetheless, the Court found that continuous state surveillance and policing was necessary to ensure compliance with the restrictions of the statutes.[22] Because they fostered an intimate relationship between church and state,[23] the statutes failed the third part of the test. Accordingly, the Court held that both statutes violated the Establishment Clause.[24]

Despite the prevailing Establishment Clause test set forth in *Lemon*, in *Marsh v. Chambers*[25] the Court declined to apply or address it, employing instead a historical analysis.[26] In *Marsh*, the Court considered whether the Nebraska legislature's practice of beginning each session with a prayer led by a state-employed chaplain was unconstitutional.[27] Noting that such practice is "deeply embedded in the history and tradition of this country,"[28] the Court provided a historical account of legislative prayer by paid chaplains.[29] Because the draftsmen of the First Amendment also engaged

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17. *Id.* at 612-13.

18. *Id.* at 612.

19. *Id.* Subsequent courts have further defined the second part of the *Lemon* test in terms of whether a reasonable observer would perceive the practice in question as endorsing religion. Glassroth v. Moore, 229 F. Supp. 2d 1290, 1302 (M.D. Ala. 2002) (citing County of Allegheny v. ACLU, 492 U.S. 573, 630 (1989) (O'Connor, J., concurring in part and concurring in the judgment)).

20. *Lemon*, 403 U.S. at 613.

21. *Id.*

22. *Id.* at 619-22.

23. *Id.* at 622. The Court explained that excessive entanglement can also arise out of the "divisive political potential" of a state statute or program. *Id.* at 622.

24. *Id.* at 609, 611.

25. 463 U.S. 783 (1983).

26. *Id.* at 790-91. *Marsh* was the first instance since *Lemon* where the Supreme Court did not resort to a three-part test in deciding an Establishment Clause case. Wallace v. Jaffree, 472 U.S. 38, 63 (1985) (Powell, J., concurring). The appellate court did apply *Lemon*, however, and concluded that the practice violated all three parts of the test. Chambers v. Marsh, 675 F.2d 228, 234-35 (8th Cir. 1982).

27. *Marsh*, 463 U.S. at 784.

28. *Id.* at 786.

29. *Id.* at 787-89. The Continental Congress, beginning in 1774, adopted the traditional practice of opening its sessions with a prayer offered by a paid chaplain. *Id.* at 787. The First Congress also adopted the practice of selecting a chaplain to open each session with a prayer. *Id.* at 787-88. Three days after Congress authorized the appointment of paid chaplains, final agreement

in prayer in the First Congress, the Court reasoned, the Establishment Clause cannot be interpreted to find the challenged action unconstitutional.[30]

According significant weight to the unbroken, two-hundred-year practice of legislative prayer,[31] the Court explained that invoking divine guidance on a public lawmaking body is not an establishment of religion.[32] Rather, the Court characterized the practice as a recognition of beliefs widely held by the people of this country.[33] The Court thus held that Nebraska's chaplaincy practice did not violate the Establishment Clause.[34]

Subsequently, in *Lynch v. Donnelly*,[35] the Court returned to the settled principles of *Lemon*, although it applied a relaxed version of the test.[36] In *Lynch*, the Court considered whether the Establishment Clause prohibited a city from including a nativity scene in its annual Christmas display.[37] In addition to the nativity scene, the display contained figures of Santa Claus and reindeer, a Christmas tree, carolers, and colored lights.[38]

Before delving into *Lemon*'s three-part inquiry,[39] however, the Court engaged in a historical analysis.[40] The Court stated that "[t]here is an

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was reached on the language of the Bill of Rights. *Id.* at 788.

30. *Id.* at 788, 791. In his dissent, Justice Brennan noted that had the Court judged legislative prayer under *Lemon*, the Court would have struck it down as a clear violation of the Establishment Clause. *Id.* at 796 (Brennan, J., dissenting).

31. *Id.* at 790. The Court stated, "'It is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it. Yet an unbroken practice . . . is not something to be lightly cast aside.'" *Id.* (quoting Walz v. Tax Comm'n, 397 U.S. 664, 678 (1970)) (alteration in original).

32. *Id.* at 792.

33. *Id.* Emphasizing that religion is deeply embedded in our society, the Court cited Justice Douglas's earlier observation that "[we] are a religious people whose institutions presuppose a Supreme Being." *Marsh*, 463 U.S. at 792 (quoting Zorach v. Clauson, 343 U.S. 306, 313 (1952)).

34. *Id.* at 786.

35. 465 U.S. 668 (1984).

36. *Id.* at 696 (Brennan, J., dissenting).

37. *Id.* at 670-71.

38. *Id.* at 671.

39. *See supra* text accompanying notes 17-20 (explaining *Lemon*'s three-part test).

40. *See Lynch*, 465 U.S. at 673-78. The Court began its historical analysis by observing that, beginning in the early Colonial Period, "a day of Thanksgiving was celebrated as a religious holiday to give thanks for the bounties of Nature as gifts from God." *Id.* at 675. The Court proceeded to state that "Executive Orders and other official announcements of Presidents and of the Congress have proclaimed both Christmas and Thanksgiving National Holidays in religious terms." *Id.* at 676. The country's religious heritage is also evident in the national motto, "In God We Trust," and in the language of the Pledge of Allegiance, according to the Court. *Id.* Lastly, the Court indicated that art galleries supported by public revenues display religious paintings of the fifteenth and sixteenth centuries. *Id.* For example, the National Gallery in Washington "has long exhibited masterpieces with religious messages, notably the Last Supper, and paintings depicting the Birth of Christ, the Crucifixion, and the Resurrection." *Id.* at 676-77.

unbroken history of official acknowledgement by . . . [the] government of the role of religion in America[]."[41] The Court further noted that the nativity scene represents a historic religious event which has been acknowledged in the Western World for twenty centuries and in this country for two centuries.[42] The Court rejected the proposed interpretation of the Establishment Clause as requiring a "'wall' between church and state."[43]

Additionally, the Court characterized *Lemon*'s three-part test as merely "useful" in determining what constitutes permissible action under the Establishment Clause.[44] In evaluating whether the display satisfied *Lemon*'s first part, the Court clarified that *Lemon* does not require an "exclusively secular" purpose.[45] Rather, the Court noted that any secular purpose, such as celebrating the holiday and depicting the holiday's origin, is sufficient under *Lemon*, regardless of the display's religious nature.[46] The Court then evaluated whether the display's primary effect was to advance religion,[47] concluding that the display had merely a remote and indirect effect on religion.[48] Lastly, the Court determined that neither the content nor maintenance of the display engendered continuous contact with church authorities, and it thereby avoided excessive entanglement between government and religion.[49] Finding that the display satisfied all

41. *Id.* at 674.

42. *Id.* at 685-86.

43. *Id.* at 673 (quoting Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947)). The concept of a "wall" of separation was coined by Thomas Jefferson in his letter to the Danbury Baptist Association. Wallace v. Jaffree, 472 U.S. 38, 91 (1985) (Rehnquist, J., dissenting). Jefferson was in France at the time the Bill of Rights was passed by Congress and ratified by the States. *Id.* at 92 (Rehnquist, J., dissenting). Consequently, Justice Rehnquist refers to him as a "less than ideal source of contemporary history as to the meaning of the Religion Clauses of the First Amendment." *Id.* (Rehnquist, J., dissenting).

44. *Lynch*, 465 U.S. at 679. Moreover, the Court recognized that it has repeatedly been unwilling to confine itself to a single test in this area. *Id.* Although the majority noted that the objective in Establishment Clause cases is to prevent unnecessary intrusion of the church and state upon one another, it conceded that absolute separation of the two is neither possible nor required by the Constitution. *Id.* at 672-73.

45. *See id.* at 681 n.6.

46. *Id.* at 681.

47. *Id.* at 681-83.

48. *Id.* at 683. The Court analogized this case to *Marsh*, noting that the display of the nativity scene is "no more an advancement or endorsement of religion than the Congressional and Executive recognition of the origins of the Holiday itself as 'Christ's Mass,' or the exhibition of literally hundreds of religious paintings in governmentally supported museums." *Id.*

49. *Id.* at 684. The Court also rejected the argument that excessive entanglement resulted in this case from political divisiveness. *Id.* Specifically, the Court stated, "A litigant cannot, by the very act of commencing a lawsuit, however, create the appearance of divisiveness and then exploit it as evidence of entanglement." *Id.* at 684-85.

three parts of the *Lemon* test, the Court upheld its constitutionality.[50] However, the Court's decision seemed to be based primarily on its historical analysis.[51]

While the instant court addressed *Marsh*'s applicability to the instant case, it nonetheless applied the *Lemon* test[52] in determining that Appellant's action violated the Establishment Clause.[53] Before proceeding with its analysis under *Lemon*, however, the court acknowledged that *Lemon*'s three-part test, although the prevailing doctrine, has received much criticism.[54] The instant court first concluded that Appellant's purpose in displaying the monument was not secular.[55] Rejecting Appellant's argument that the Ten Commandments as presented in the monument held purely secular relevance,[56] the court based its conclusion primarily upon Appellant's words.[57] While Appellant argued that the monument depicted the moral foundation of law, the court found it was ultimately an inherently religious monument, thereby failing the first part of the *Lemon* test.[58]

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50. *Id.* at 685.

51. *See* Wallace v. Jaffree, 472 U.S. 38, 63 n.5 (1985) (Powell, J., concurring).

52. Glassroth v. Moore, 335 F.3d 1282, 1297-98 (11th Cir. 2003); *see supra* text accompanying notes 17-20.

53. *Glassroth*, 335 F.3d at 1295-97.

54. *Id.* at 1296. "The three-part test has simply not provided adequate standards for deciding Establishment Clause cases, as this Court has slowly come to realize." *Wallace*, 472 U.S. at 110 (Rehnquist, J., dissenting).

55. *Glassroth*, 335 F.3d at 1296-97.

56. *Id.* at 1296. The district court conceded that the Ten Commandments have a secular aspect. Glassroth v. Moore, 229 F. Supp. 2d 1290, 1300 (M.D. Ala. 2002). Experts testified that the Ten Commandments were a foundation of American law and that America's founders relied upon the Ten Commandments as a source of absolute moral standards. *Id.* Nonetheless, the court considered the sacred aura of the monument to be overwhelming. *Id.*

57. *Glassroth*, 335 F.3d at 1296. The court gave significant consideration to Appellant's words both at the monument's unveiling ceremony and at trial. *Id.* At the unveiling ceremony, Appellant remarked:

> By the authority vested in me by the Constitution of the State of Alabama as Chief Justice of the Alabama Supreme Court, . . . I'm pleased to present this monument depicting the moral foundation of our law.
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> . . . By placement of this monument in the rotunda housing [of] the Alabama Supreme Court, . . . this monument will serve to remind the appellate courts and judges of the circuit and district courts of this state, . . . of the truth stated in the preamble of the Alabama Constitution, that in order to establish justice, we must invoke "the favor and guidance of Almighty God."

Glasroth, 229 F. Supp. 2d at 1321-22. At trial, Appellant admitted that his purpose in installing the monument was to acknowledge God's law and God's sovereignty, specifically the God of the Holy Scripture. *Glassroth*, 335 F.3d at 1287.

58. *Glassroth*, 335 F.3d at 1295-97.

The instant court further analyzed whether the primary effect of Appellant's display was to advance religion.[59] Opining that nothing on the monument de-emphasized its religious nature, the court concluded that a reasonable observer would feel as though the State of Alabama were endorsing Christianity.[60] The instant court thus stated that Appellant's display failed the second part of the *Lemon* test.[61] Ending its analysis under *Lemon* at the second part, the court concluded that the display violated the Establishment Clause.[62]

Although it recognized that *Marsh*'s historical test is an alternative standard by which to decide Establishment Clause cases,[63] the instant court engaged in a narrow reading of *Marsh*.[64] The court maintained that there was no evidence of an "'unbroken history'" of displaying religious symbols in judicial buildings.[65] The court concluded, therefore, that *Marsh* did not validate Appellant's display.[66] Additionally, the instant court heeded the Supreme Court's warning against a broad reading of *Marsh*,[67] insisting that "*Marsh* plainly does not stand for the sweeping proposition . . . that all accepted practices 200 years old and their equivalents are constitutional today."[68]

In analyzing whether Appellant's display of the Ten Commandments violated the Establishment Clause, the instant court redefined *Lemon*, overlooked similarities with *Lynch*, and misconstrued *Marsh*. While *Lynch* suggested that the *Lemon* test is only a useful guideline,[69] the instant court mechanically applied *Lemon*, paying little, if any, attention to its limitations.[70] Furthermore, the instant court inverted *Lynch*'s interpretation

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59. *Id.* at 1297; *see supra* note 19.

60. *Glassroth*, 335 F.3d at 1297.

61. *Id.*

62. *Id.*

63. *Id.* at 1298.

64. *Id.*

65. *Id.* (quoting Marsh v. Chambers, 463 U.S. 783, 792 (1983)).

66. *Id.*

67. *Id.* Appellant insisted that *Marsh* be read more broadly, claiming that the issue turns on "'whether the monument's acknowledgements of God as the source of law and liberty in America parallel similar acknowledgements of God at the time of America's founding.'" *Id.* (quoting Brief for Appellant at 44, *Glassroth*, 335 F.3d 1282).

68. *Id.* (quoting County of Allegheny v. ACLU, 492 U.S. 573, 603 (1989)) (alteration in original).

69. *See supra* note 44 and accompanying text; *see also* Wallace v. Jaffree, 472 U.S. 38, 112 (1985) ("In *Lynch* we reiterated that the *Lemon* test has never been binding on the Court . . . .").

70. *See Glassroth*, 335 F.3d at 1295-96. For *Lemon*'s limitations, see, for example, *Tangipahoa Parish Bd. of Educ. v. Freiler*, 530 U.S. 1251, 1253 (2000) (Scalia, J., dissenting from denial of certiorari) (citing instances in which Justices Scalia, Thomas, Kennedy, and O'Connor, and Chief Justice Rehnquist expressed disapproval of *Lemon*); *see also County of Allegheny*, 492 U.S. at 655-56 (Kennedy, J., concurring in the judgment in part and dissenting in part); *Wallace*,

of the first part of the *Lemon* test.[71] *Lynch* suggested that only a secular purpose is needed to satisfy the first part of *Lemon*.[72] However, despite the strong evidence in the record of the secular relevance of the Ten Commandments,[73] the instant court treated its religious aspect as a per se violation of *Lemon*.[74] The instant court therefore redefined *Lemon*'s first part, requiring that the display have an exclusively secular purpose.[75]

Additionally, the instant court overlooked facts which may have warranted an alternative result. Concluding that the display also violated the second part of the *Lemon* test, the instant court based its finding on the monument's placement and physical characteristics.[76] The court drew a somewhat unconvincing distinction between the display in the instant case and that in *Lynch* to justify its conclusion. The instant court gave minimal weight to the historical quotations surrounding the Ten Commandments monument and to the two secular plaques adorning the rotunda,[77] concluding that none of these sufficiently detracted attention from the religious aspect of the monument.[78] The instant court focused instead on its appearance and location.[79] The instant court, therefore, concluded that the monument's effect was that of state endorsement of Christianity.[80] Distinguishing *Lynch*, the instant court noted that each figure in the Christmas display had its own focal point, thereby mitigating the religious meaning of the nativity scene.[81] However, like the Ten Commandments monument, the nativity scene in *Lynch* was in a highly visible location and was nearly life-size.[82]

Lastly, the instant court correctly recognized that *Marsh* is an independent basis upon which to uphold a challenged action that fails the *Lemon* test.[83] However, the instant court arguably misconstrued *Marsh*. The instant court questioned whether there is an "unambiguous and

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472 U.S. at 108-12 (Rehnquist, J., dissenting).

71. *Compare Glassroth*, 335 F.3d at 1296-97, *with* Lynch v. Donnelly, 465 U.S. 668, 681 n.6 (1984).

72. *Lynch*, 465 U.S. at 681 n.6.

73. *Glassroth*, 335 F.3d at 1296.

74. *See id.* at 1296-97 (quoting Glassroth v. Moore, 229 F. Supp. 2d 1290, 1301 (M.D. Ala. 2002)) (affirming district court's finding that a secular purpose was lacking because of Appellant's belief that the monument represents more than a "'sort of . . . secular moral code'").

75. *See id.*

76. *Id.* at 1297.

77. *See supra* text accompanying note 2.

78. *See Glassroth*, 335 F.3d at 1297.

79. *See id.*

80. *Id.*

81. Glassroth v. Moore, 229 F. Supp. 2d 1290, 1304 (M.D. Ala. 2002) (distinguishing Lynch v. Donnelly, 465 U.S. 668 (1984)).

82. *Lynch*, 465 U.S. at 706 (Brennan, J., dissenting).

83. *Glassroth*, 335 F.3d at 1297-98.

unbroken history" of displaying religious symbols in judicial buildings.[84] Because it considered historical evidence only of religious displays, the court conducted its analysis at the wrong level of abstraction.[85] Instead, the instant court should have followed the example of the Court in *Lynch*, and explored the history of government acknowledgement of religion and of God.[86]

Had the instant court generalized its inquiry, it might have validated the monument's constitutionality.[87] As both *Marsh* and *Lynch* indicated, the government has long recognized the role of religion in American life.[88] Additionally, Appellant presented evidence that judges throughout history have acknowledged the moral foundation of the law and have relied upon it in their decisions.[89] Lastly, Appellant noted that depictions of the Ten Commandments appear in several governmental buildings, specifically on the East Portico of the United States Supreme Court Building, on the entrance door to the United States Supreme Court's courtroom, and on the Spirit of Justice statute in the United States Justice Department Building.[90]

Marsh is a more appropriate basis for deciding the instant case than is *Lemon*.[91] The three-part *Lemon* test is premised upon the mistaken notion

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84. *Id.* at 1298. The district court phrased the issue even more specifically, asking whether "members of the Continental Congress displayed the Ten Commandments in their chambers." *Glassroth*, 229 F. Supp. 2d at 1308.

85. *See Lynch*, 465 U.S. at 673-75 (focusing on the history of government acknowledgement of religion); *see also* ACLU v. Capitol Square Review & Advisory Bd., 243 F.3d 289, 300 (6th Cir. 2001) (considering historical evidence of acknowledgements of God rather than evidence of religious displays).

86. *See supra* text accompanying notes 39-42.

87. The Court in *Lynch* upheld the constitutionality of the Christmas display primarily because of its historical foundation. *See supra* notes 50-51 and accompanying text. Thus, had the instant court engaged in a similar historical analysis, it likely would have found the monument constitutional.

88. *See supra* notes 29 and 40 and accompanying text.

89. *Glassroth*, 229 F. Supp. 2d at 1306; *see also* Susan McPherson, Address, *The Heart of the Rhetoric: Legal Arguments Surrounding the Ten Commandments Monument in the Alabama Judicial Building*, 33 CUMB. L. REV. 647, 657 (2002/2003) (discussing how American law stems from God's law, which is summarized in the Ten Commandments).

90. *Glassroth*, 229 F. Supp. 2d at 1307.

91. "'[T]he meaning of the [Establishment] Clause is to be determined by reference to historical practices and understandings.'" Lee v. Weisman, 505 U.S. 577, 631 (1992) (Scalia, J., dissenting) (quoting County of Allegheny v. ACLU, 492 U.S. 573, 670 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part)). "[O]ur interpretation of the Establishment Clause should 'compor[t] with what history reveals was the contemporaneous understanding of its guarantees.'" *Id.* at 632 (Scalia, J., dissenting) (quoting Lynch v. Donnelly, 465 U.S. 668, 673 (1984)) (second alteration in original). "'[T]he line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers.'" *Id.* (Scalia, J., dissenting) (quoting Sch. Dist. v. Schempp, 374 U.S. 203, 294 (1963) (Brennan, J., concurring)).

that the Establishment Clause mandates a wall of separation between church and state.[92] As such, the *Lemon* test precludes the government from recognizing the significance of religion as the basis for American law and civil order in society. Furthermore, *Lemon* would likely invalidate many of our nation's longstanding religious traditions, including the national motto, "In God We Trust," its presence on our money, the opening of court proceedings with reference to God, the declaration of Thanksgiving as a holiday, and the reference to God in the Pledge of Allegiance.[93]

The Establishment Clause was instead designed to prohibit the establishment of a national religion and to prevent discrimination among sects.[94] Indeed, *Marsh* comports with this interpretation of the First Amendment, as it references historical practices and understandings.[95] Several cases have emphasized the significance of history in interpreting the Establishment Clause, consistently quoting Justice Holmes's aphorism that "a page of history is worth a volume of logic."[96]

The instant court's application of both *Lemon* and *Marsh* contributed to the inconsistency and unpredictability associated with the Establishment

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92. Justice Rehnquist noted that the purpose and effect parts of the *Lemon* test were inherited from *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947), and are therefore based upon "the same historical deficiencies as the wall concept itself: they are in no way based on either the language or intent of the drafters." Wallace v. Jaffree, 472 U.S. 38, 108 (1985) (Rehnquist, J., dissenting). According to Chief Justice Rehnquist, the wall metaphor is a "mistaken understanding of constitutional history." *Id.* at 92 (Rehnquist, J., dissenting). Thus, Justice Rehnquist concludes that "[t]he three-part test represents a determined effort to craft a workable rule from a historically faulty doctrine." *Id.* at 110 (Rehnquist, J., dissenting). The majority in *Lynch* also recognized that "the metaphor itself is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state." *Lynch*, 465 U.S. at 673. Furthermore, Justice Brennan stated in *Marsh* that:

> "[N]eutrality" and "separation" do not exhaust the full meaning of the Establishment Clause . . . . It is indeed true that there are certain tensions inherent in the First Amendment itself, or inherent in the role of religion and religious belief in any free society, that have shaped the doctrine of the Establishment Clause, and required us to deviate from an absolute adherence to separation and neutrality.

Marsh v. Chambers, 463 U.S. 783, 809 (1983) (Brennan, J., dissenting).

93. *See Lee*, 505 U.S. at 631 (Scalia, J., dissenting) (quoting *County of Allegheny*, 492 U.S. at 670 (Kennedy, J., concurring in the judgment in part and dissenting in part)) ("'[A] test for implementing the protections of the Establishment Clause that, if applied with consistency, would invalidate longstanding traditions cannot be a proper reading of the Clause'"). One view of why these features of public life are held to be consistent with the Establishment Clause is that they have lost true religious significance. *Marsh*, 463 U.S. at 818.

94. *Wallace*, 472 U.S. at 98 (Rehnquist, J., dissenting).

95. *See supra* notes 27-29 and accompanying text.

96. N.Y. Trust Co. v. Eisner, 256 U.S. 345, 349 (1921). Both *Lee* and *Wallace* quote Justice Holmes. *Lee*, 505 U.S. at 632 (Scalia, J., dissenting); *Wallace*, 472 U.S. at 79 (O'Connor, J., concurring in the judgment).

Clause.[97] As it stands, the three-part *Lemon* test is not an adequate standard for deciding Establishment Clause cases.[98] Therefore, if the Supreme Court continues to uphold *Lemon*, it should refine the test to align it more closely with the underlying purpose of the First Amendment.[99] Alternatively, the Court may opt to examine future Establishment Clause cases in accordance with *Marsh*. In either case, as Justice O'Connor has suggested, the Court should strive to frame a principle that is supported by the history and language of the First Amendment and capable of consistent application.[100]

97. *Wallace*, 472 U.S. at 107 (Rehnquist, J., dissenting) ("[I]n the 38 years since *Everson* our Establishment Clause cases have been neither principled nor unified."); *see also* Elenore Cotter Klingler, Case Comment, *Constitutional Law: Endorsing a New Test for Establishment Clause Cases*, 53 FLA. L. REV. 995, 1004 (2001) (noting that the Supreme Court "has left the determination of an appropriate test in doubt").

98. *Wallace*, 472 U.S. at 110 (Rehnquist, J., dissenting). Although *Lemon* has not been overruled, in at least two Establishment Clause cases, the Supreme Court has essentially ignored it. *Lee*, 505 U.S. at 587; *Marsh*, 463 U.S. at 790-91. The Court has thus recognized its irrelevance in some contexts. *Lee*, 505 U.S. at 644 (Scalia, J., dissenting). Additionally, in cases where the Court has applied the *Lemon* test, the Court considerably loosened its requirements. *See Lynch*, 465 U.S. at 696 (Brennan, J., dissenting). The Court's commitment to *Lemon*, therefore, may only be superficial. However, it is not clear why the Supreme Court has not abandoned *Lemon*. The continued criticism surrounding the *Lemon* test could encourage courts to decide Establishment Clause cases on an ad hoc basis. *Wallace*, 472 U.S. at 63 (Powell, J., concurring). In fact, the Court has already developed several alternative tests. *See supra* note 10.

99. *Wallace*, 472 U.S. at 68-69 (O'Connor, J., concurring in the judgment).

100. *Id.* at 69 (O'Connor, J., concurring in the judgment) (quoting Jesse H. Choper, *Religion in the Public Schools: A Proposed Constitutional Standard*, 47 MINN. L. REV. 329, 332-33 (1963)).