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The Conundrum of Applying an Incoherent First Amendment Jurisprudence: Glassroth v. Moore

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THE CONUNDRUM OF APPLYING AN "INCOHERENT"[1] FIRST AMENDMENT JURISPRUDENCE: *Glassroth v. Moore*.[2]

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I. INTRODUCTION

During the night of July 31, 2001, Chief Justice Roy Moore rolled a 5,280 pound granite monument into the rotunda of the Alabama Supreme Court over which he presided.[3] The top of the monument was divided into two tablets, each of which was engraved with excerpts from Exodus 20:2-17 of the King James Bible.[4] Suit was quickly filed in district court to remove this "Ten Commandments" monument.[5] The plaintiffs, attorneys who practiced before the supreme court and were forced to walk by the monument in the course of their work, alleged that the monument violated the Establishment Clause of the First Amendment to the United States Constitution.[6] The district court agreed and issued an injunction ordering Justice Moore to remove the offensive monument.[7] Justice Moore refused to obey the directive of the district court and appealed to the Eleventh Circuit Court of Appeals.[8] The resulting firestorm of controversy ultimately culminated in the removal of the Chief Justice from his position on the court.

Few were surprised when the Court of Appeals upheld the ruling of the district court and affirmed the injunction. Presumably, the refusal of the United States Supreme Court to grant certiorari to Justice Moore's appeal gave credence to the Court of Appeals' decision. However, one could surmise that the Supreme Court's decision would have been different had the facts of Justice Moore's case been even *slightly* different. In fact, the "muddy waters" of the Supreme Court's

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* J.D. candidate, May 2005. The author would like to thank Professor Mark Modak-Truran for his assistance, both inside and outside the classroom, in framing the issues addressed in this Note.

1. Lee v. Weisman, 505 U.S. 577, 636 (1992) (Scalia, J., dissenting).
2. 335 F.3d 1282 (11th Cir. 2003), *cert. denied*, 124 S. Ct. 497 (2003).
3. *Id.* at 1285-86.
4. *Id.* The left tablet read as follows:
   Thou Shalt Have No Other Gods Before Me
   Though Shalt Not Make Unto Thee Any Graven Image
   Thou Shalt Not Take the Name of The Lord Thy God in Vain
   Remember the Sabbath Day, to Keep it Holy.
   The right tablet read:
   Honour thy Father and thy Mother
   Thou Shalt Not Kill
   Thou Shalt Not Commit Adultery
   Thou Shalt Not Steal
   Thou Shalt Not Bear False Witness
   Thou Shalt Not Covet.
5. *Id.* at 1284.
6. *Id.*
7. *Id.* at 1288.
8. *See Glassroth*, 335 F.3d at 1288.

Establishment Clause jurisprudence rarely produce predictable results.[9] The Court unabashedly engages in a case by case factual analysis.[10] Consequently, no criticism will be levied here against the Eleventh Circuit's application of Supreme Court precedent, since the precedent itself is confusing and disjointed. Rather, the purpose of this Note is to examine whether Justice Moore, had he utilized different arguments or changed his position to some extent, would have presented a sufficient constitutional argument before the Supreme Court to justify certiorari.

II. FACTS

The facts relevant to the instant case essentially began when Roy Moore campaigned for the office of Chief Justice of the Alabama Supreme Court.[11] Although Justice Moore never referred to himself as such, the lower court found that his campaign platform was that of the "Ten Commandments Judge" who would restore the moral foundations of the law.[12] Following his election, Justice Moore fulfilled his campaign promise and installed the Ten Commandments monument [hereinafter "the monument"] in the rotunda of the State Supreme Court.[13] In doing so, Justice Moore exercised his authority under the Alabama Constitution to place displays in the rotunda.[14] He was also careful to note that the monument had been financed entirely out of his own pocket; no government funds had been expended.[15]

The district court found that the monument was placed in such a manner that no one who entered the State Supreme Court building from the front could miss the monument.[16] The monument was located directly across from the main entrance in the rotunda.[17] Anyone who desired access to the public elevator, stairs, law library, or restrooms would have to pass by the monument.[18] The court found that Justice Moore purposefully placed the monument in this conspicuous location so that "everyone visiting the Judicial Building would see it."[19]

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9. *See* DeStefano v. Emergency Hous. Group, Inc., 247 F.3d 397, 405 (2d Cir. 2001) (speaking of the Establishment Clause, the court noted: "Although the Supreme Court has struggled for more than a century to translate those spare terms into concrete rules and consistent doctrine, the Court has found itself compelled by candor to acknowledge that it can only dimly perceive the boundaries of permissible government activity in this sensitive area. In the wake of a number of fragmented Court decisions over the past decade, *the governing law remains in doubt.*") (citing Mitchell v. Helms, 530 U.S. 793 (2000)) (internal quotes omitted) (emphasis added); Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 861 (1995) (noting that "[the Supreme Court's] Establishment Clause jurisprudence is in hopeless disarray") (Thomas, J., concurring). To illustrate, a recent Westlaw search by the author on the subject of First Amendment cases produced fifty-four results. Not a single case failed to be marked by a yellow flag.

10. *See* Lynch v. Donnelly, 465 U.S. 668, 678 (1984) ("In each case, the inquiry calls for line drawing; no fixed, *per se* rule can be framed.").

11. *Glassroth*, 335 F.3d at 1284-85.

12. *Id.* at 1285.

13. *Id.*

14. *Id.* (citing ALA. CONST. amend. 328, § 6.10; ALA. CODE § 41-10-275). The lower court noted that Justice Moore installed the monument without the approval or knowledge of any of the other Supreme Court Justices. *Id.*

15. *Id.*

16. *Id.*

17. *Glassroth*, 335 F.3d at 1285.

18. *Id.*

19. *Id.*

Besides the Ten Commandments, the monument also was engraved with a large-sized and several smaller-sized quotations.[20] These quotations were from secular sources.[21] The sloping top and "religious appearance"[22] of the tablets caused the monument to resemble an open Bible.[23] The court noted that the appearance and location of the monument caused one to feel that she was "in the presence of something not just valued and revered (such as a historical document) but also holy and sacred."[24]

When the monument was publicly unveiled, Justice Moore announced that he had placed the monument in order to depict the moral foundations of law.[25] He cited the Alabama Constitution as his basis for invoking "the favor and guidance of Almighty God."[26] Thus, in order to restore the moral foundation of the law, he stated that it was necessary to also recognize the source of morality itself.[27] He recounted instances in history where God had been openly acknowledged (presumably by government).[28]

Subsequent to the installation of the monument, Justice Moore denied two requests to place other displays in the rotunda.[29] The first request was for a monument containing the "I have a Dream" speech of the Rev. Martin Luther King Jr.[30] Justice Moore denied this display because he believed that the placement of a man's speech next to the word of God would diminish the purpose of the monument: to acknowledge the sovereignty of God over men.[31] The second request was for a display containing a symbol of atheism.[32]

Justice Moore did however add two other displays after the installation of the monument.[33] The first was a plaque entitled "Moral Foundation of Law"

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20. *Id.* at 1286.

21. *Id.* The court emphasized that the secular quotes had been placed *below* the Ten Commandments because Justice Moore believed that the words of men could not be placed "on the same plane as the Word of God." *Id.*

22. "Religious appearance" seems to be a vague and potentially biased description. For example, what exactly are the qualities of a "religious" object? Question may be raised as to why the district court judge did not use a more objective description of the monument. Perhaps the judge was taking an approach similar to that taken by Justice Stewart in the free speech context in Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (regarding obscenity: "I know it when I see it."). According to the court in *Glassroth*, the factfinder in this instance was expressing a subjective opinion for purposes of satisfying the reasonable observer test. *See infra* note 232, and accompanying text.

23. *Glassroth*, 335 F.3d at 1291.

24. *Id.* at 1286. The court also found that employees and visitors considered the building (or the rotunda) an appropriate and inviting place to pray. *Id.*

25. *Id.*

26. *Id.* (quoting ALA. CONST. pmbl.).

27. *Id.* at 1287.

28. *Id.* During the lower court trial, Justice Moore agreed under cross-examination that the monument reflected the sovereignty of God over the affairs of men, the monument was intended to acknowledge God's overruling power over the affairs of men, and that the God referred to was the God of the Holy Scriptures. *Id.*

29. *Glassroth*, 335 F.3d at 1287 (A third request to actually modify the existing monument was denied as well. The requested modification was to add a 50 foot tall marble statue of Charlton Heston holding the Ten Commandments monument above his head in order to commemorate the popular film "The Ten Commandments." Just kidding.)

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

which contained a quotation from the Rev. Martin Luther King Jr.'s letter from the Birmingham jail where he was imprisoned.[34] The quote regarded just laws and "the moral law or law of God."[35] The plaque also contained a quotation from Frederick Douglass which referred to slavery as hiding man "from the laws of God."[36] The plaque, like the monument, was paid for by Justice Moore entirely with his own money.[37] It measured forty-two inches by thirty-two inches.[38] The second display was a brass plaque which contained the Bill of Rights and measured thirty inches by thirty-six inches.[39] Justice Moore believed that these plaques comported with the "moral foundation of law" theme of the monument.[40] The court found that the plaques were diminutive when compared to the monument and were thus inconspicuous.[41]

Suit was filed by three attorneys who practiced in the Alabama courts.[42] Because of their professional obligations, each of the attorneys had entered the judicial building before and would have to enter the building again in the future.[43] The central location of the monument caused them to pass by it whenever they entered the judicial building.[44] The plaintiffs claimed that the monument offended them and made them feel like "outsiders."[45] Two of the plaintiffs claimed to have reduced their number of visits to the judicial building because of the monument.[46] One of the two had begun avoiding the building and had even purchased law books and an online research service to avoid use of the law library.[47]

The three plaintiffs requested a declaratory judgment that the actions of Justice Moore were unconstitutional under the Establishment Clause of the First Amendment of the United States Constitution.[48] The plaintiffs further requested that the court issue an injunction to force Justice Moore to remove the monument.[49] After a bench trial, the trial court ruled that Justice Moore's actions violated the Establishment Clause and gave him thirty days to voluntarily remove the monument.[50] He failed to do so, and the court subsequently filed an injunction ordering the removal of the monument.[51] Justice Moore appealed.[52]

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34. *Id.*
35. *Glassroth*, 335 F.3d at 1287.
36. *Id.* at 1287-88.
37. *Id.* at 1288.
38. *Id.*
39. *Id.*
40. *Id.*
41. *Glassroth*, 335 F.3d at 1288.
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.* They also claimed to enjoy the rotunda less due to the presence of the monument. *Id.*
47. *Glassroth*, 335 F.3d at 1288.
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*

III. BACKGROUND AND HISTORY OF THE LAW

The First Amendment provides, in relevant part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[53] The application of the clause reading "Congress shall make no law respecting an establishment of religion,"[54] is the subject of the following case law. The principal issue in *Glassroth* was whether the monument violated this so-called Establishment Clause. Although several tertiary issues were raised by Justice Moore on appeal, the cases dealt with in this section will be entirely concerned with the Establishment Clause issue. In keeping with the purpose of this Note, cases will be discussed which were not cited by the court in *Glassroth*, but which nevertheless have bearing on the Establishment Clause issue. The principal Supreme Court Establishment Clause cases relied upon by the court will be treated in full as well.

The modern establishment clause jurisprudence of the Supreme Court began in 1947 with the case *Everson v. Board of Education*.[55] The Court in *Everson* was concerned with whether a New Jersey statute which financially reimbursed parents of children for the expense of public transportation to and from parochial schools was a violation of the Establishment Clause.[56]

The first question raised was whether the Establishment Clause could even apply to the actions of the state, since the language of the Amendment clearly states that it applies only to the actions of the United States Congress.[57] The Court found that the First Amendment did in fact apply to actions of the states through the Due Process Clause of the Fourteenth Amendment.[58]

Justice Black, writing for the majority, next explored the issue of whether the challenged statute violated the Establishment Clause.[59] In an effort to define the boundaries of the Establishment Clause, he noted:

> [The Establishment Clause] means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or

53. U.S. CONST. amend. I.
54. *Id.*
55. 330 U.S. 1 (1947).
56. *Id.* at 3.
57. *See id.* at 7-8.
58. *Id.*
59. *Id.* at 8.

> secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."[60]

Despite the foregoing language, Justice Black nevertheless found that the statute in question did not violate the Establishment Clause.[61] He reasoned that the Establishment Clause "requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them."[62] Thus, a state law which was neutral in purpose (or had a "public purpose"), in that it did nothing more than facilitate a student's attendance of the school of her choice,[63] was held to be permissive under the Establishment Clause.[64] In doing so, the Court recognized that church and state relations could conceivably become intertwined at some indirect level, while still passing muster under the First Amendment.

Justice Jackson filed a dissent in which he argued that the Majority's decision was inconsistent with its reasoning.[65] He argued that a "complete and uncompromising separation of Church from State" meant that the State of New Jersey could not expend taxpayer funds in any manner which would directly or indirectly aid the parochial schools.[66]

Justice Rutledge also filed a dissenting opinion which argued for the "complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion . . . [n]ot simply an established church, but any law respecting an establishment of religion is forbidden."[67] He further urged a "complete division of religion and civil authority" based upon his reading of the history surrounding the adoption of the First Amendment.[68]

Perhaps the most widely cited Supreme Court case dealing with the Establishment Clause is *Lemon v. Kurtzman*.[69] *Lemon* regarded two state statutes which authorized the supplement of teachers' salaries in nonpublic schools.[70] The statutes specified, though, that the teachers could only be supplemented for the teaching of secular subjects.[71] Writing for the majority, Chief Justice Burger found the statutes to be unconstitutional under the Establishment Clause.[72]

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60. *Id.* at 15-16 (citing Reynolds v. United States, 98 U.S. 145, 164 (1878)).

61. *Everson*, 330 U.S. at 18.

62. *Id.* at 18.

63. Interestingly enough, Justice Black further noted that the statute may have actually encouraged parents to send their children to parochial schools. *Id.* at 17. This was still held not to be a violation. *Id.* at 18.

64. *Id.*

65. *Id.* at 19 (Jackson, J., dissenting).

66. *Id.*

67 *Everson*, 330 U.S. at 31-32 (Rutledge, J., dissenting).

68. *Id.* at 63.

69. 403 U.S. 602 (1971).

70. *Id.* at 607.

71. *Id.* More specifically, the teacher "must use only teaching materials which are used in the public schools." *Id.* at 608. The teacher is not allowed "to teach a course in religion for so long as or during such time as he or she receives any salary supplements . . . ." *Id.*

72. *Id.* at 625.

In making his decision, Chief Justice Burger elucidated a three part test for Establishment Clause challenges.[73] First, the challenged statute must have a secular legislative purpose.[74] Second, the principal or primary effect of the statute must not advance nor inhibit religion.[75] Third, the statute must not create "an excessive government entanglement with religion."[76] Applying the test to the set of facts before it, the Court found that the statutes in question had secular legislative purposes.[77] The Court also found that the principal effect of the statutes neither advanced nor inhibited religion.[78] However, the Court found that the statutes fostered an excessive entanglement of government with religion.[79] Violation of any prong of the test meant that the statute must fail.[80] The statutes were therefore unable to withstand constitutional scrutiny.

Justice Douglas filed a concurring opinion which emphasized the separation of church and state: "We have announced over and over again that the use of taxpayers' money to support parochial schools violates the First Amendment."[81] Quoting *Everson*, he noted "'No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.'"[82] The issue for Douglas, then, was not whether the government had become *excessively* entangled with religion. Rather, the issue was whether government was entangled *at all* with religion.[83]

In 1980, the Court, without granting certiorari, issued a per curiam opinion in the case of *Stone v. Graham*.[84] In *Stone*, the Court tested the constitutionality of a Kentucky statute which *required* the posting of the Ten Commandments in every classroom within the state's public schools.[85] Applying the *Lemon* test, the Court concerned itself primarily with whether the statute had a secular legislative purpose.[86] The Court found that an "avowed" secular purpose of the Kentucky legislature in this instance was inadequate:[87] "The pre-eminent purpose for post-

73. *Id.* at 612.

74. *Id.*

75. *Id.*

76. *Lemon*, 403 U.S. at 613. Although the Court still adheres to parts of this test in form, it has drastically departed in principle. *See infra* notes 114, 313 and accompanying text.

77. *Id.* at 613.

78. *Id.*

79. *Id.* at 621-22, 624-25. The Court actually seemed to suggest that the statutes in question did not cause excessive entanglement in and of themselves. However, the Court feared future consequences if more statutes were passed for similar reasons. As Chief Justice Burger noted: "while some involvement and entanglement are inevitable, lines must be drawn." *Id.* at 625.

80. *Id.* at 612-13. *See* Stone v. Graham, 449 U.S. 39, 40-41 (1980) ("If a statute violates any of [the *Lemon*] principles, it must be struck down under the Establishment Clause.").

81. *Lemon*, 403 U.S. at 640 (Douglas, J., concurring).

82. *Id.* (quoting *Everson*, 330 U.S. at 16).

83. *See id.* (emphasis supplied).

84. 449 U.S. 39.

85. *Id.* at 39-40 (emphasis supplied).

86. *Id.* at 41.

87. *Id.* The purpose of the statute, noted at the bottom of each Ten Commandments display, was stated as follows: "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.*

ing the Ten Commandments on schoolroom walls is plainly religious in nature."[88] The Court therefore made clear that it would be the Court, and not the State Legislature, that would decide whether the purpose of a statute was secular or not.[89]

Justices Burger and Blackmun dissented, stating simply that they would have granted certiorari and considered the merits of the case.[90] Justice Stewart dissented from the Supreme Court's substitution of their judgment for the judgment of the lower state courts which had upheld the statute.[91] He believed that the state courts had "applied wholly correct constitutional criteria in reaching their decisions."[92]

Justice Rehnquist filed a written dissent in which he criticized the majority's dismissal of the lower court's "statutory findings."[93] He argued instead that great "secular significance" could be found in the Ten Commandments.[94] Furthermore, he intimated that strict secularism was perhaps not a constitutionally mandated approach:

> The Establishment Clause does not require that the public sector be insulated from all things which may have a religious significance or origin. This Court has recognized that religion has been closely identified with our history and government and that the history of man is inseparable from the history of religion.[95]

Finally, he criticized the majority's "cavalier summary reversal" of the findings of the "highest court of Kentucky."[96]

Marsh v. Chambers,[97] decided the issue of whether the practice of opening each session of the Nebraska legislature with a prayer made by a chaplain paid through state funds violated the Establishment Clause.[98] Chief Justice Burger, writing for the majority, found the practice to be constitutional under the First Amendment.[99] In doing so, he did not apply the three part *Lemon* test. Instead, he based his decision on "[t]he unbroken practice for two centuries in the National Congress, for more than a century in Nebraska and in many other states" of paid chaplains and prayer before legislative sessions.[100] He noted:

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88. *Id.*
89. *Id.*
90. *Stone*, 449 U.S. at 43 (Burger & Blackmun, J.J., dissenting).
91. *Id.* (Stewart, J., dissenting).
92. *Id.*
93. *Id.* at 44-45 (Rehnquist, J., dissenting).
94. *Id.* at 45.
95. *Id.* at 45-46 (quoting Abington Sch. Dist. v. Schempp, 374 U.S. 203, 212 (1963); Engel v. Vitale, 370 U.S. 421, 434 (1962)) (internal quotes omitted).
96. *Stone*, 449 U.S. at 47.
97. 463 U.S. 783 (1983).
98. *Id.* at 784-785.
99. *Id.* at 793-94.
100. *Id.* at 795.

> The opening of session of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country. From colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom . . . [in] light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with a prayer has become part of the fabric of our society. [It] is simply a tolerable acknowledgment of beliefs widely held among the people of this country.[101]

Justice Brennan filed a lengthy dissent, claiming that the practice of legislative prayer violated principles of separation and neutrality found in the Establishment Clause.[102] Relying on the *Lemon* test, he placed particular emphasis on the fact that the practice of legislative prayer could have no secular purpose, and that it intruded on the rights of conscience held by individual legislators.[103]

Justice Stevens also dissented, taking issue with the fact that the Chaplain in question was a Presbyterian minister who had held the position for over sixteen years.[104] He reasoned that because of the Chaplain's length of tenure and his religious beliefs, and the fact that the legislature was composed of representatives of diverse religious backgrounds, the state was directly supporting one religion over others.[105]

In *Lynch v. Donnelly*,[106] the Court was called upon to decide whether a creche[107] displayed in a public park violated the Establishment Clause.[108] The creche was owned by a city in Rhode Island and was included in the city's annual Christmas display.[109] Writing for the majority, Chief Justice Burger found that the creche was not an unconstitutional endorsement of religion by the state.[110] He noted:

> No significant segment of our society and no institution within it can exist in a vacuum or in total or absolute isolation from all the other parts, much less from government. It has never been thought either possible or desirable to enforce a regime of total separation . . . [n]or does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.[111]

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101. *Id.* at 786-92.
102. *Id.* at 808 (Brennan, J., dissenting).
103. *Marsh*, 463 U.S. at 797-98.
104. *Id.* at 822-23 (Stevens, J., dissenting).
105. *Id.*
106. 465 U.S. 668 (1984).
107. A "crèche" is a nativity scene. *Id.* at 671.
108. *Id.* 670-71.
109. *Id.* at 671.
110. *Id.* at 685.
111. *Id.* at 673 (quoting Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 760 (1973) (citing Zorach v. Clauson, 343 U.S. 306, 314-15 (1952); McCollum v. Bd. of Educ., 333 U.S. 203, 211 (1948))) (internal quotes omitted). This statement marked the introduction of the accommodationist interpretation of the Establishment Clause. *See infra* note 282 and accompanying text.

He also cited the historical aspects of religion in government, arguing that "[t]here is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789 . . . '[w]e are a religious people whose institutions presuppose a Supreme Being.'"[112] As if to emphasize his point, he went on to state "[t]he very chamber in which oral arguments on this case were heard is decorated with a notable and permanent-not seasonal-symbol of religion: Moses with Ten Commandments [sic]."[113] Justice Burger specifically declined to apply the *Lemon* test, claiming that "we have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area."[114] Under this reasoning, the creche was found to be permissible under the Establishment Clause, despite its religious significance.[115]

Justice O'Connor concurred in the result, but wrote separately to "clarify" the Court's Establishment Clause jurisprudence.[116] According to her analysis, there were two ways in which government could infringe the Establishment Clause: First, it could become excessively entangled with religion.[117] Second, government could either endorse or disapprove of religion.[118] She concerned her opinion specifically with whether the government had endorsed religion by displaying the creche.[119] Endorsement, in her view, was violative of the Establishment Clause because it sent "a message to nonadherents that they are outsiders, not full members of the political community . . . ."[120] In order to determine whether the government had endorsed religion, she focused primarily on the purpose prong of the *Lemon* test.[121] The proper inquiry, she argued, was "whether the government intends to convey a message of endorsement or disapproval of religion."[122] However, she found that the creche in question did not constitute an endorsement of religion because it was understood in the context of the holiday season.[123] Thus, the message the government conveyed through the creche was secular in nature.[124]

Justice Brennan dissented, arguing that the government was endorsing, or approving, the Christian religion by funding the creche.[125] He argued that the

112. *Lynch*, 465 U.S. at 675 (quoting *Zorach*, 343 U.S. at 313).
113. *Id.* at 677.
114. *Id.* at 679.
115. *Id.* at 687.
116. *Id.* (O'Connor, J., concurring).
117. *Id.* at 687-88.
118. *Lynch*, 465 U.S. at 688.
119. *Id.* at 687-88.
120. *Id.* at 688.
121. *Id.* at 690-92.
122. *Id.* at 691. Although Justice O'Connor stated that the government's purposes in erecting or supporting the display were of primary relevance, she gave little indication as to how one should ascertain the purpose(s) of government. *Id.* at 690-92. Presumably to fill this gap, her opinions in later cases establish the "reasonable observer" test to determine whether the government has endorsed religion.
123. *Id.* at 691.
124. "The creche is a traditional symbol of the holiday that is very commonly displayed along with purely secular symbols . . . . Government celebration of the holiday is not understood to endorse the religious content of the holiday . . . ." *Lynch*, 465 U.S. at 692.
125. *Id.* at 701 (Brennan, J., dissenting).

Lemon test should apply, and that, despite the fact that the avowed purpose of the display was secular, the true religious nature of the display could be inferred.[126] He also took issue with the Court's interpretation of history, arguing that Christmas was not widely celebrated until well into the nineteenth century.[127]

Justice Blackmun also filed a dissent, noting in particular his belief that the Court had stripped the creche of any religious meaning.[128] The result, he reasoned, was that "Christians feel constrained in acknowledging [the] symbolic meaning [of the creche] and non-Christians feel alienated by its presence."[129]

The Court again had opportunity to rule on the constitutionality of a creche display in *County of Allegheny v. American Civil Liberties Union*.[130] Suit was filed to force the removal of two annual Christmas displays located in Pittsburgh.[131] The first display was a creche located on the staircase leading to the Allegheny County Courthouse.[132] The second display was a Chanukah menorah placed beside the City-County Building and next to a Christmas tree and a sign saluting liberty.[133]

Justice Blackmun, writing only for a plurality, upheld the constitutionality of the menorah, but struck down the creche.[134] Relying on *Everson, Lemon*, and *Lynch*, he argued that the essential question was whether the government had endorsed religion by its use of the displays.[135] By distinguishing the display in *Allegheny* from the display in *Lynch,* he found that the creche conveyed a distinctly religious message.[136] The menorah, however, imparted no such message because it was surrounded by the aforementioned Christmas tree and sign.[137]

Justice O'Connor wrote separately to summarize her test:

> The question under endorsement analysis, in short, is whether a reasonable observer would view such longstanding practices as a disapproval of his or her particular religious choices, in light of the fact that they serve a secular purpose rather than a sectarian one and have largely lost their religious significance over time.[138]

This test was satisfied no matter whether the state action had the purpose of endorsing religion, or whether it merely caused the effect of endorsing religion.[139] Based on this reasoning, she likewise found the creche to be an unconstitutional endorsement of religion, while the menorah escaped constitutional prohibition.[140]

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126. *Id.* at 698-702.
127. *Id.* at 723-24.
128. *Id.* at 726-27 (Blackmun, J., dissenting).
129. *Id.* at 727.
130. 492 U.S. 573 (1989).
131. *Id.* at 578.
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.* at 593-94.
136. *Allegheny*, 492 U.S. at 590-99. He noted in particular that the creche in *Allegheny* stood alone; there was no backdrop of non-religious Christmas symbols to "neutralize" the creche. *Id.* at 595-96.
137. *Id.* at 620-21.
138. *Id.* at 631 (O'Connor, J., concurring) (citing L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1294-96 (2d ed. 1988)).
139. *See id.* at 631-32.
140. *Id.* at 637.

Justice Brennan concurred as to the creche, but dissented as to the menorah.[141] He believed that the menorah was religious in nature just as the creche.[142] Justice Stevens filed yet another partial concurrence and partial dissent on the same grounds.[143] He emphasized the incongruence of the Court's decision in allowing the display of one religion to stand, while striking down the other.[144] He reasoned that there is always a risk that someone could be offended by the menorah, despite its arguably less-religious appearance.[145]

Justice Kennedy filed a dissenting opinion in which he rejected the plurality's endorsement analysis outright.[146] He reasoned that implicit in the endorsement analysis was "an unjustified hostility toward religion."[147] In place of the endorsement test, he proposed a different test:

> Our cases disclose two limiting principles: government may not coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, 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.[148]

He further recognized a "tradition of government accommodation and acknowledgment of religion that has marked our history from the beginning."[149] Because neither of the displays coerced religious practice or established a state church, they both easily passed constitutional muster under Kennedy's analysis.[150] He also found the displays were well within the realm of historic practice.[151]

The Supreme Court considered in *Capitol Square Review and Advisory Board v. Pinette*,[152] whether a Latin cross displayed on a public square adjacent to a statehouse violated the establishment Clause.[153] Unlike the displays in *Lynch* and *Allegheny*, the display in *Capitol Square* was erected by a private party.[154] Justice Scalia wrote for a plurality and took special note of this public/private distinction in upholding the display of the cross.[155] He concluded that government had no right to restrict wholly private religious speech in a public forum.[156] He was completely unconcerned with whether a reasonable observer might con-

141. *Id.* at 637-38 (Brennan, J., concurring in part, dissenting in part).
142. *Allegheny*, 492 U.S. at 638.
143. *Id.* at 654 (Stevens, J., concurring in part, dissenting in part).
144. *Id.*
145. *Id.* at 651.
146. *Id.* at 655 (Kennedy, J., dissenting).
147. *Id.*
148. *Allegheny*, 492 U.S. at 659 (quoting *Lynch*, 465 U.S. at 678) (internal quotes omitted).
149. *Id.* at 663.
150. *Id.* at 664-65.
151. *Id.* at 679.
152. 515 U.S. 753 (1995).
153. *Id.* at 757-59.
154. *Id.* at 758. The private party was, incredibly, the Ku Klux Klan. *Id.*
155. *Id.* at 764-65.
156. *Id.*

fuse the private speech with government endorsement of religion.[157] Summing up, he noted: "It has radical implications for our public policy to suggest that neutral laws are invalid whenever hypothetical observers may—*even reasonably*—confuse an incidental benefit to religion with state endorsement."[158]

Justice Thomas concurred in the judgment, but wrote separately to emphasize his belief that the Latin cross displayed was not religious in nature.[159] He pointed out the history of the Ku Klux Klan, and the fact that the cross was displayed not to convey a religious message, but instead to convey the nonreligious message of racism.[160]

Justices O'Connor and Souter each filed separate concurrences which continued to promulgate the reasonable observer test.[161] They were unwilling to completely discount the fact that a reasonable observer could under different facts be unsure of the origins of the display and so believe it to be a government endorsement of religion.[162] They also suggested that the factual differences between *Lynch, Allegheny*, and the instant case were not as extreme as the plurality decision suggested, since all three cases involved a public forum.[163]

Justices Stevens and Ginsburg each filed a dissent.[164] Justice Stevens argued that the Establishment Clause prevents any party, governmental or private, from erecting a "symbol of . . . religious character in, on, or before a seat of government."[165] Justice Ginsburg argued that the religious disclaimer on the display was inadequate, but at the same time refused to answer the question of whether a disclaimer could ever be deemed adequate to allow the placement of a religious symbol on public ground.[166]

On June 14, 2004, the Supreme Court decided the case of *Elk Grove Unified School District v. Newdow*.[167] As proof of the unsettled nature of the law in this area, the individual members of the Court filed four opinions, including a majority opinion and three dissents. While the majority opinion bears little relevance to the case at hand, the three dissents will be treated in detail.

The *Newdow* litigation arose when Michael A. Newdow, an atheist, filed suit to enjoin the Elk Grove School District [hereinafter "Elk Grove"] from including the words "under God" in the school's daily recital of the Pledge of Allegiance.[168] Newdow's daughter, who was not named in the suit, attended Elk Grove at the time of the filing.[169] Newdow alleged that the words "under God"

157. *Id.* at 765-66. However, he added that if the government gave "sectarian religious speech *preferential* access to the seat of government," an Establishment Clause violation could result (along with an obvious violation of the Free Exercise Clause). *Id.* at 766 (emphasis supplied). This would, in his mind, be a government endorsement of religion. *Id.*

158. *Capitol Square*, 515 U.S. at 768.

159. *Id.* at 770-72 (Thomas, J., concurring).

160. *Id.*

161. *Id.* at 772-94.

162. *Id.*

163. *Id.* at 774.

164. *Capitol Square*, 515 U.S. at 797-818.

165. *Id.* at 807 (Stevens, J., dissenting).

166. *Id.* at 817-18 (Ginsburg, J., dissenting).

167. 124 S. Ct. 2301 (2004). The case is so recent that it had to be incorporated after the first draft of this Note.

168. *Id.* at 2306-07.

169. *Id.* at 2306.

violated the Establishment and Free Exercise Clauses of the United States Constitution.[170] On appeal, the Ninth Circuit Court of Appeals had ruled that the Pledge was an unconstitutional violation of the Establishment Clause.[171]

A majority opinion, written by Justice Stevens and joined by Justices Kennedy, Souter, Ginsburg, and Breyer, reversed the Court of Appeals and found that Newdow lacked standing to sue on the Establishment Clause issue.[172] The Court found that Newdow's standing derived entirely from his relationship with his daughter, but that he was involved in state court litigation regarding custody of the child.[173] Thus, Newdow lacked the right to litigate as his daughter's next friend.[174] The Court further reiterated the existence of the so-called "domestic relations exception" that precludes the federal courts from interfering in custody disputes.[175] In finding that Newdow lacked standing to sue, the Court failed to reach the Establishment Clause issue.[176]

Chief Justice Rehnquist filed a dissenting opinion which was joined by Justices O'Connor and by Thomas as to Part I.[177] First, Justice Rehnquist noted that Newdow's standing did not stem from his daughter.[178] He noted instead that Newdow's standing derived from his *relationship* to his daughter.[179] Simply put, since Newdow was the father of his daughter, he had standing to sue on the Establishment Clause issue that affected his child.[180]

Since he found that Newdow had standing, Justice Rehnquist addressed the Establishment Clause issue. He began by describing the legislative history of the Pledge of Allegiance and, in particular, the addition of the words "under God" to the Pledge.[181] He found that the purpose of the words "under God" was "to contrast this country's belief in God with the Soviet Union's embrace of atheism."[182] He further found that the primary purpose of the Pledge was to promote patriotism and to bolster the nation, as opposed to describing the religious belief(s) of the nation.[183] But, he noted that the words "under God" could mean different things to different people, including "that God has guided the destiny of the United States . . . or that the United States exists under God's authority."[184]

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170. *Id.*
171. *Id.* at 2306-07.
172. *Id.* at 2305.
173. *Newdow*, 124 S. Ct. at 2307, 2311.
174. *Id.* at 2311.
175. *Id.* at 2309.
176. *Id.* at 2312. The Court's decision to find a lack of standing was openly criticized by all three dissenters. *Id.* at 2312-16. If nothing else, the majority opinion was one of the more ironic occurrences in constitutional history. For instance, Justice Stevens stated: "The standing requirement is born partly of an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government." *Id.* at 2308 (quoting Allen v. Wright, 468 U.S. 737, 750 (1984) (quoting Vander Jagt v. O'Neill, 699 F.2d 1166, 1178-79 (C.A.D.C. 1982) (Bork, J., concurring)) (internal quotes omitted). Justice Stevens has had little problem with the "powers of an unelected, unrepresentative judiciary" in other decisions.
177. *Id.* at 2312.
178. *Id.* at 2316 (Rehnquist, C.J., dissenting).
179. *Newdow*, 124 S. Ct. at 2316.
180. *Id.*
181. *Id.*
182. *Id.* (citing 100 *Cong. Rec.* 1700 (1954)).
183. *Id.* at 2317.
184. *Id.*

Continuing, he stated that the words "under God" reflect the attitudes of various historic national leaders, including George Washington, Abraham Lincoln, Woodrow Wilson, Franklin Delano Roosevelt, and Dwight D. Eisenhower.[185] In summary, he noted that "[a]ll of these events strongly suggest that our national culture allows public recognition of our Nation's religious history and character. . . [f]rom the time of our earliest history our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God."[186]

Because of this historical background, Justice Rehnquist found that the words "under God" did not convert the Pledge of Allegiance into a religious exercise.[187] Rather, he found that the Pledge "is a declaration of belief in allegiance and loyalty to the United States flag and the Republic that it represents."[188] This being the case, he viewed the words "under God" not as a government endorsement of religion, but as a recognition of the traditional belief that our Nation was founded on a fundamental belief in God.[189] Justice Rehnquist recognized that Newdow may disagree with him and others on this point, but he found that this was no reason to give Newdow a "'heckler's veto' over a patriotic ceremony willingly participated in by other students."[190]

Justice O'Connor concurred with Justice Rehnquist in his dissent, but did so on a completely different line of reasoning.[191] First, she found that, although Establishment Clause issues cannot be resolved by a single test, the test to be used in the instant case was the endorsement test.[192] She found that the endorsement test assumes the standpoint of an objective reasonable observer.[193] The reasonable observer does *not* form opinions from a purely subjective standpoint.[194] Rather, the reasonable observer evaluates the purportedly religious practice in the context of the history and origin of the practice.[195] The key, according to Justice O'Connor, was whether the purportedly religious practice nevertheless accomplished an "essentially secular purpose[]."[196] Many religious practices would inevitably accomplish this purpose because of the role religion has played in our nation's history.[197] Justice O'Connor termed such religious practices "ceremonial deism."[198]

185. *Newdow*, 124 S. Ct. at 2317-18.

186. *Id.* at 2319 (quoting H.R. REP. NO. 1693, 83d Cong., 2d Sess., 2 (1954)) (internal quotes omitted).

187. *Id.* at 2319.

188. *Id.*

189. *Id.* at 2319-20 (citing H.R. REP. NO. 1693, at 2). He further stated that "the descriptive phrase 'under God' cannot possibly lead to the establishment of a religion, or anything like it." *Id.* at 2320.

190. *Id.* at 2320.

191. *Newdow*, 124 S. Ct. at 2321 (O'Connor, J., concurring).

192. *Id.* at 2321. She believed that the endorsement test "captures the essential command of the Establishment Clause, namely, that government must not make a person's religious beliefs relevant to his or her standing in the political community by conveying a message that religion or a particular religious belief is favored or preferred." *Id.* (quoting *Allegheny*, 492 U.S. at 627 (quoting Wallace v. Jaffree, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring))) (internal quotes omitted).

193. *Id.*

194. *Id.*

195. *Id.* Justice O'Connor did not favor the idea that "[n]early any government action could be overturned as a violation of the Establishment Clause" by such a "heckler's veto." *Id.* Contrast this with Justice Stevens' approach in *Allegheny*. 492 U.S. at 638.

196. *Newdow*, 124 S. Ct. at 2322.

197. *Id.* She further noted that "[i]t is unsurprising that a Nation founded by religious refugees and dedicated to religious freedom should find references to divinity in its symbols, songs, mottoes, and oaths." *Id.*

198. *Id.* at 2323.

In order to determine whether the phrase "under God" constituted an instance of ceremonial deism, Justice O'Connor considered four factors: history and ubiquity, absence of worship and prayer, absence of reference to particular religion, and minimal religious content.[199] From the standpoint of a reasonable observer, she found that the words "under God" have been historically well accepted by the public,[200] the Pledge does not constitute religious worship,[201] the words "under God" refer only to a generic god,[202] and that the Pledge itself has little or no religious content.[203] Based on these findings, she concluded that the words "under God" carried no "religious freight" and that coercion to participate in the Pledge was not an issue because recitation of the Pledge is not religious in character.[204] Therefore, the phrase "under God" did not represent a government endorsement of religion and did not violate the Establishment Clause.[205]

Justice Thomas filed a separate concurrence which took quite a different approach to the Establishment Clause issue.[206] First, he noted that, as a matter of Supreme Court precedent, the Pledge policy is unconstitutional.[207] However, he qualified this statement by stating his belief that previous Supreme Court Establishment Clause precedent was wrongly decided.[208] He found the precedent to be faulty on two main points.[209] First, he argued that the Court had adopted an inaccurate definition of coercion.[210] Second, he argued that the Court had improperly incorporated the Establishment Clause to apply to the states.[211]

On the issue of coercion, Justice Thomas noted that the only "kind of coercion implicated by the Religion Clauses is that accomplished '*by force of law and threat of penalty.*'"[212] In addition, the coercion must relate to an officially established religion.[213] Because the Pledge policy did not coerce students to par-

199. *Id.* at 2323-27. She stated that whether the phrase "under God" constituted ceremonial deism was a "close question." *Id.* at 2323.

200. *Id.* at 2323-24.

201. *Id.* at 2324-25.

202. *Newdow*, 124 S. Ct. at 2326.

203. *Id.* at 2326-27.

204. *Id.* at 2325, 2327.

205. *Id.* at 2327.

206. *Id.* at 2327-33 (Thomas, J., concurring).

207. *Id.* at 2330.

208. *Newdow*, 124 S. Ct. at 2330. In particular, Justice Thomas reiterated Justice Scalia's dissent, which he joined in *Lee*. *Newdow*, 124 S.Ct. at 2330 (citing *Lee*, 505 U.S. at 640, (Scalia, J., dissenting)). *Lee* addressed the constitutionality of a school prayer held during graduation ceremonies at a public school. 505 U.S. at 580. Because the case did not pertain to display of a religious object, it has been omitted from this Note. However, it is useful to note at this point that *Lee* addressed the issue of coercion to participate in a religious exercise. *Id.* at 604. In addition, Justice Thomas noted in a footnote that the Court's decision in *Allegheny* led to a "silly" outcome. *Newdow*, 124 S. Ct. at 2327 n.1 (citing *Allegheny*, 492 U.S. 573).

209. *Newdow*, 124 S. Ct. at 2328-33.

210. *Id.* at 2328-30.

211. *Id.* at 2330-33. Presumably, although he does not explicitly say so, Justice Thomas's position would require the Court to overrule *Everson*, at least in part.

212. *Id.* at 2330 (citing *Lee*, 505 U.S. at 640 (Scalia, J., dissenting)).

213. *Id.* This implies, of course, that a *particular* religion must have been established. Elaborating, Justice Thomas noted "I find much to commend the view that the Establishment Clause 'bar[s] governmental preferences for *particular* religious faiths.'" *Id.* at 2332 (quoting Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 856 (1995) (Thomas, J., concurring)).

ticipate in a particular religious exercise which was established by the state, he found that the element of coercion was not present.[214]

On the issue of incorporation, Justice Thomas argued that, unlike the Free Exercise Clause, the Establishment Clause was never meant to apply to the states.[215] Instead, the Clause merely prohibited Congress from establishing a national religion or from interfering with state establishments of religion.[216] Thus, he found that the Establishment Clause is a "federalism provision – it protects state establishments from federal interference but does not protect any individual right."[217] In summary, he noted that there was no question of religious establishment and no religious liberty rights were at issue.[218] The Pledge therefore fully comported with the Constitution.[219]

IV. THE INSTANT CASE

With this background of Establishment Clause cases, we next turn to the individual holdings of the court in *Glassroth*. The court first acknowledged the principal established by the foregoing cases that "Establishment Clause challenges are not decided by bright-line rules, but on a case-by-case basis with the result turning on the specific facts."[220] With this in mind, the court turned to Justice Moore's attacks on the findings of fact of the district court.[221]

The first issue raised by Justice Moore was whether the district court judge should have been allowed to make findings of fact based on his personal perception of the Ten Commandments monument.[222] Justice Moore argued that the district court judge should not have made factual findings based on his perception of the monument, but rather should have viewed the monument simply in order to provide "physical context within which to assess the evidence admitted in the courtroom."[223] The court found this argument unpersuasive.[224]

First, the court noted that "'any kind of presentation to the jury or the judge to help the fact finder determine what the truth is and assimilate and understand the evidence is itself evidence.'"[225] Second, the court reasoned that "a party may not challenge as error a ruling or other trial proceeding invited by that party."[226]

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214. *Id.* at 2333.

215. *Newdow*, 124 S. Ct. at 2330. He cited, *inter alia*, the "text and history" of the Constitution for this proposition. *Id.*

216. *Id.*

217. *Id.* at 2331.

218. *Id.* at 2333.

219. *Id.*

220. Glassroth v. Moore, 335 F.3d 1282, 1288 (11th Cir. 2003), *cert. denied*, 124 S. Ct. 497 (2003) (citing King v. Richmond County, 331 F.3d 1271 (11th Cir. 2003)).

221. *Id.*

222. *Id.* at 1289.

223. *Id.*

224. *Id.* at 1289-90.

225. *Id.* at 1289 (quoting Lillie v. United States, 953 F.2d 1188, 1190 (10th Cir. 1992)). The court was careful to add that if the case had been decided on summary judgment, the judge's findings of fact would be inadmissible. *Id.* As it was, however, the case was decided on trial. *Id.* The judge's perceptions were therefore no different from a photograph of the monument admitted as evidence. *Id.*

226. *Glassroth*, 335 F.3d at 1290 (quoting United States v. Ross, 131 F.3d 970, 988 (11th Cir. 1997) (quoting Crockett v. Uniroyal, Inc., 772 F.2d 1524, 1530 n.4 (11th Cir. 1985))) (internal quotes omitted).

Justice Moore was in fact the party who requested that the district court judge visit the monument, so that the judge could view the monument "just like a juror would."[227] With these facts in mind, the court ruled that Justice Moore was actually attacking his own position, and the issue was therefore ruled in favor of the plaintiffs.[228]

Justice Moore also argued that the district court judge should not have relied on his subjective impressions of the monument in making his findings of fact.[229] The court ruled that this argument fell short as well.[230] The only reason given for rebuttal of this argument was the fact that Justice Moore had requested the judge's visit to the monument himself.[231] Nevertheless, the court found that the judge was merely "articulating findings about the impression the monument made on the viewer" which was required to satisfy the reasonable observer test.[232]

The last factual objection Justice Moore made was that the district court had made findings of fact which were not supported by the record.[233] Specifically, Justice Moore took issue with the judge's finding that "visitors and building employees consider the monument an appropriate, and even compelling, place for prayer."[234] Refusing to overturn the district court's findings of fact unless clearly erroneous, the court found that this specific finding was certainly plausible in light of the testimony of one of the plaintiffs and a witness at trial.[235]

Having dispensed with the factual issues raised by Justice Moore, the court turned to the legal issues.[236] The first question was whether the plaintiffs had standing to bring the instant lawsuit.[237] The court held that for Establishment Clause claims, the plaintiff must identify an actual personal injury suffered as a consequence of the action by the defendant, as opposed from mere psychological damage which comes about from observation of conduct with which one disagrees.[238] In this case, the plaintiffs would have standing if they were "forced to assume special burdens to avoid unwelcome religious exercises."[239] Under this reasoning, the court found that the three plaintiffs had standing because the actions of Justice Moore caused them to "feel like outsiders."[240] In addition, the fact that

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227. *Id.*

228. *Id.* at 1290-91. Justice Moore also argued that the judge's findings of fact should have been read into the record. *Id.* The court dismissed this claim, both because it was an "extraordinary" procedure, and because Justice Moore did not request the procedure at trial. *Id.*

229. *Id.* at 1291. As will be discussed *infra*, this is perhaps a more difficult issue than the court here makes it out to be. *See also supra* note 22.

230. *Glassroth*, 335 F.3d at 1291.

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. *Glassroth*, 335 F.3d at 1291.

237. *Id.* at 1291-92.

238. *Id.* at 1292 (citing Valley Forge Christian Coll. v. Ams. United for Sep. of Church & State, Inc., 454 U.S. 464, 485 (1982)).

239. *Id.* (quoting ACLU v. Rabun County Chamber of Commerce, Inc., 698 F.2d 1098, 1107 (11th Cir. 1983)) (internal quotes omitted).

240. *Id.*

two of the plaintiffs had altered their behavior was found to be clearly sufficient to establish standing.[241] Because two of the plaintiffs were undoubtedly found to have standing, the third was automatically ruled to have standing as well.[242]

The court next turned its attention to the heart of the case: the Establishment Clause issue. First, the court considered whether the Establishment Clause even applied to Justice Moore.[243] The court noted that the language of the First Amendment states that "Congress shall make no law."[244] Justice Moore, of course, is not Congress.[245] Regardless, the court, citing *Everson*, recognized that the First Amendment now applies to all laws through the Fourteenth Amendment.[246] Justice Moore argued, however, that the First Amendment did not apply to him because no "law" was involved.[247] He argued that his placement of the monument was merely governmental action which promoted religion, and not a law which commanded or prohibited religious conduct.[248] Without going into detail or explaining its reasoning, the court found that the decision in *Allegheny* stood "foursquare against the notion that the Establishment Clause permits government to promote religion so long as it does not command or prohibit conduct."[249]

Second, the court dealt with Justice Moore's argument that the First Amendment could not apply to him because his conduct was not religious in nature.[250] In support of this argument, he defined "religion" as "'the duty which we owe to our Creator, and the manner of discharging it.'"[251] Accordingly, the Ten Commandments do not involve the duties owed by individuals to their cre-

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241. *Id.*

242. *Glassroth*, 335 F.3d at 1293 (citing *Rabun County*, 698 F.2d at 1108-09). Additionally, the court found that it was the monument itself, not the personal religious beliefs of Justice Moore, which caused the plaintiffs' injury. *Id.* If the plaintiffs had merely disagreed with the views of Justice Moore, their injuries would have been nonredressable. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.* (citing Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947)). Incorporation of the First Amendment to apply to the states, although seemingly unquestioned by the Supreme Court since *Everson* was decided, has been criticized. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 678-79 (2002) ("[I]n the context of the Establishment Clause, it may well be that state action should be evaluated on different terms than similar action by the Federal Government. States, while bound to observe strict neutrality, should be freer to experiment with involvement in religion . . . than the Federal Government.") (Thomas, J., concurring) (internal quotes omitted) (citing Walz v. Tax Comm'n of New York, 397 U.S. 664, 699 (1970) (Harlan, J., concurring)); Newdow, 124 S. Ct. at 2330 ("[T]he Constitution left religion to the states.") (Thomas, J., concurring) (citing 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 1873 (5th ed. 1891); A. AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 32-42, 246-257 (1998)). *See also* RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (2d ed. 1997) (arguing from an historical and textual standpoint that the Fourteenth Amendment does not support incorporation of the Bill of Rights and its resulting application to the states.).

247. *Glassroth*, 335 F.3d at 1293 (citing Appellant's Brief at 19) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES 44).

248. *Id.*

249. *Id.* at 1294 (citing County of Allegheny v. ACLU, 492 U.S. 573, 612 (1989)). The court also quoted language from an Eleventh Circuit case which is more explanatory: "'[i]f a statute authorizing the teachers' activities would be unconstitutional, then the activities, in the absence of a statute, are also unconstitutional.'" *Id.* (quoting Jaffree v. Wallace, 705 F.2d 1526, 1533-35 (11th Cir. 1983), *aff'd sub nom.* Wallace v. Jaffree, 472 U.S. 38 (1985)).

250. *Id.*

251. *Id.* (quoting Appellant's Brief at 11-12) (quoting VIRGINIA DECLARATION OF RIGHTS art. I, § 16 (1776)).

ator, they merely "represent the moral foundation of secular duties that individuals owe to society."[252] The court, again citing *Allegheny*, disagreed.[253] The court found that the Supreme Court's definition of religion does not necessarily encompass a belief in a Creator, and that the Ten Commandments are inherently religious in nature, and not just a moral representation of secular duties.[254] Thus, the First Amendment yet again applied to Justice Moore's actions.

Next the court proceeded to apply the *Lemon* test to Justice Moore's actions.[255] The court first made the "obligatory observation" that the *Lemon* test is highly controversial,[256] and then applied the test nevertheless because it "'has not been overruled.'"[257]

Not surprisingly, Justice Moore easily failed the first prong of the test.[258] The court found that there was not even an arguable secular purpose for the monument, and that Justice Moore had expressly avowed religious purposes in erecting the monument.[259] Justice Moore argued that the district court had tried to "psychoanalyze" him in determining his purposes for erecting the monument.[260] The court was not persuaded, however, and found that Justice Moore's religious purposes were "self-evident."[261]

Although violation of the first prong meant that Justice Moore had already violated the Establishment Clause, the court also considered the "effects" prong of the *Lemon* test for the sake of "completeness."[262] In order to satisfy this prong, the trial court looked at whether a "reasonable observer" would consider the monument to be a government endorsement of religion.[263] The district court concluded that a reasonable observer would perceive the monument in this manner, and the court of appeals agreed.[264] Thus, Justice Moore failed both the purpose and the effects prongs of the *Lemon* test, and his actions therefore violated the Establishment Clause.[265]

Justice Moore made one final argument under the Establishment Clause under *Marsh v. Chambers*.[266] He argued that there is a substantial history of displaying the Ten Commandments in judicial buildings.[267] Under *Marsh*, such a

252. *Id.*

253. *Glassroth*, 335 F.3d at 1294 (citing *Allegheny*, 492 U.S. at 590).

254. *Id.* at 1294-95.

255. *Id.* at 1295 (citing Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971)).

256. *Id.* (citations omitted). This is a bit of an understatement. As will be seen in the analysis, *infra,* the Supreme Court has retained little more than the bare skeleton of the *Lemon* test, with only parts of its substance. In fact, depending on which Justice is speaking, the test has been expressly repudiated in whole or in part.

257. *Glassroth*, 335 F.3d at 1295 (quoting Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 395 n.7 (1993)).

258. *Id.* at 1296-97.

259. *Id.* at 1296.

260. *Id.* (citing *Wallace*, 472 U.S. at 74 (O'Connor, J., concurring)).

261. *Id.* at 1297.

262. *Id.*

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

264. *Id.* The district court based its conclusion on: "the appearance of the monument itself; its location and setting in the rotunda; the selection and location of the quotations on its sides; and the inclusion on its face of the text of the Ten Commandments, which is an 'undeniably . . . sacred text.'" *Id.* (quoting Stone v. Graham, 449 U.S. 39, 41 (1980)).

265. *Id.*

266. *Id.* (citing *Marsh*, 463 U.S. 783). For an analysis of *Marsh, see supra* 8-9.

267. *Glassroth*, 335 F.3d at 1298.

deeply embedded history or tradition would be sufficient to overcome the *Lemon* test.[268] Justice Moore further argued that "'the monument's acknowledgment[] of God as the source of law and liberty in America parallel[s] similar acknowledgments of God at the time of America's founding.'"[269] The court, however, pointed out that Justice Moore offered no proof that his action had such historic lineage,[270] and dismissed his claims with the plurality's assertion in *Allegheny* that "a broad reading of *Marsh* 'would gut the core of the Establishment Clause.'"[271]

The final issue Justice Moore brought before the court was whether he was compelled to obey the injunction of the district court.[272] Citing a long line of civil rights era cases in which disobedient state public officials were forced to follow the directives of a federal court, the court made short work of his assertion.[273]

V. ANALYSIS

The background and history of Establishment Clause case law contained herein demonstrates the unsettled nature of the law in this area.[274] The Supreme Court has not adopted an all-encompassing test for the resolution of cases such as Justice Moore's. While one may be tempted to believe that, even in the absence of reliable case law, Justice Moore's case is an easy example of an Establishment Clause violation, the truth may not be quite so clear. For example, keep in mind that the majority decision in *Allegheny*, relied upon so heavily by the court in *Glassroth*, was held by only *one person*: Justice Blackmun himself.[275] Although four other Justices concurred as to his decision regarding the creche, not a single one of them agreed with him in their reasoning.[276] This is hardly the kind of precedent which would compel a particular result in the instant case.[277]

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268. *Id.* at 1297 (citing Marsh v. Chambers, 463 U.S. 783, 795 (1983)).
269. *Id.* at 1298 (quoting Appellant's Brief at 44).
270. *Id.*
271. *Id.* (quoting *Allegheny*, 492 U.S. at 603-04).
272. *Id.* at 1301-02.
273. *Glassroth,* 335 F.3d at 1302-03.
274. Justice Oliver Wendell Holmes noted:

> Legal duties are logically antecedent to legal rights. What may be their relation to moral rights if there are any, and whether moral rights are not in like manner logically the offspring of moral duties, are questions which do not concern us . . . [t]hese are for the philosopher, who approaches the law from without as part of a larger series of human manifestations. The business of the jurist is to make known the content of the law; that is, to work upon it from within, or logically, arranging and distributing it, in order . . . so far as practicable.

OLIVER WENDELL HOLMES, THE COMMON LAW 175 (Harvard Univ. Press 1963) (1881). While most readers would undoubtedly agree with this assertion, the preceding Supreme Court case law suggests that the Court's Establishment Clause jurisprudence is greatly influenced by the individual Justices' moral and/or philosophical beliefs. Thus, the Justices approach Establishment Clause law "from without."

275. *Allegheny*, 492 U.S. at 578.
276. *Id.* at 578-608.
277. The splintered opinions in *Newdow* affirm this assertion. Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 2301 (2004).

A. Current Approaches to Establishment Clause Analysis

To figure out exactly where the individual Supreme Court members stand on their interpretation of the Establishment Clause, it is helpful to group them into three camps. The first camp is the accommodationists, and more or less includes Justices Scalia, Thomas, Kennedy, and Chief Justice Rhenquist. The accommodationist approach is best exemplified by Justice Kennedy's dissent in *Allegheny*, wherein he urged a simple two-part test to determine whether an Establishment Clause violation occurred.[278] First, has the government coerced anyone to participate in a particular religion?[279] Second, has the government granted such strong benefits that it has in effect set up a state church?[280] The accommodationist approach also places strong emphasis on historical religious practices which have been tolerated by the state.[281] Justice Burger introduced this approach in *Lynch*,[282] and Justice Rhenquist elaborated in his dissent in *Stone*.[283] The historical approach looks not only to historical religious practices that have existed since the time of the founding, but also to practices that have developed in more modern history.[284]

In short, the accommodationist approach recognizes that the Establishment Clause does not bar all church and state relations, and that some mixture of the two is not only inevitable, but is permissible. In order to determine whether the mixture has gone beyond the bounds of the Establishment Clause, the accommodationist looks to whether individuals are compelled to engage in certain religious practices, and looks also to whether the state's involvement with religion has been accepted historically.

The next approach could be characterized as the neutrality approach. This is the approach which was espoused by Justice O'Connor in her concurrence in *Allegheny*,[285] and reaffirmed in *Newdow*.[286] Justice O'Connor submits the following test: Has the government endorsed religion?[287] Whether or not it has is determined from the perspective of a "reasonable observer."[288] According to O'Connor's dissent in *Newdow*, the reasonable observer is required to consider the history and the origins of the religious practice or display in question.[289] Understandably, this test places great emphasis on the facts and circumstances of each individual case.[290] For instance, O'Connor essentially applied this test in *Lynch*, and found that the display in question was constitutional.[291] However,

278. 492 U.S. at 659 (Kennedy, J., dissenting).
279. *Id.*
280. *Id.*
281. *Id.* at 662.
282. Lynch v. Donnelly, 465 U.S. 668, 680 (1984).
283. Stone v. Graham, 449 U.S. 39, 46 (1980) (Rehnquist, J., dissenting).
284. *See Lee*, 505 U.S. at 631-32 (Scalia, J., dissenting) (Noting that prayer in public schools is a historical practice). Public school prayer is, of course, only as old as public school itself.
285. 492 U.S. at 623-36 (O'Connor, J., concurring).
286. *Newdow*, 124 S. Ct. at 2321-27 (O'Connor, J., concurring).
287. *Allegheny*, 492 U.S. at 630-39.
288. *Id.*
289. 124 S. Ct. at 2322 (O'Connor, J., dissenting).
290. *Allegheny*, 492 U.S. at 636.
291. *Lynch*, 465 U.S. at 687-94 (O'Connor, J., concurring).

she applied it to a similar creche in *Allegheny* and found the display to be unconstitutional.[292] The test also places great emphasis on the visual objects surrounding the allegedly religious display in question.[293] As the observant reader has undoubtedly noted, the "reasonable observer" test held primary importance in the court's decision in *Glassroth*.[294]

The third approach is the separationist approach. This approach is exemplified by Justice Brennan's dissent in *Lynch*,[295] the concurring opinions in *Lemon*,[296] the majority opinion in *Stone*,[297] the dissent in *Marsh*,[298] and the combined concurrence and dissents in *Allegheny*.[299] As its name implies, the separationist approach mandates a complete separation of church and state.[300] On the current Court, Justices Souter, Ginsburg, Stevens, and Breyer would locate themselves within the separationist camp. The separationist approach continues to make mention of all or part of the *Lemon* test, but essentially holds to an even simpler test: government can have no involvement with religion whatsoever.[301] The government must be completely secular in its relations to society.[302] The government absolutely cannot benefit religion in any manner, direct or indirect.[303] Government cannot be associated with religion by any means. As an example, the separationist approach believes that there will *always* be a reasonable observer who is offended by a potentially religious display located near a judicial building.[304] Justice Souter has utilized a reasonable observer test.[305] However, his test utilizes a more subjective reasonable observer than that of Justice O'Connor.[306] Thus, Justice Souter's reasonable observer is more predisposed to finding government endorsement of religion.

Justice Thomas has arguably introduced a fourth approach in his concurrence in *Newdow*.[307] This approach would leave the establishment clause issue essentially in the hands of the states.[308] Arguably the only time the establishment clause issue would arise would be in the context of coercion, where a state or the

292. 492 U.S. at 623-37 (O'Connor, J., concurring).

293. *Id.* at 624-27.

294. Glassroth v. Moore, 335 F.3d 1282, 1297-99 (11th Cir. 2003), *cert. denied*, 124 S. Ct. 497 (2003).

295. 465 U.S. at 694-726 (Brennan, J., dissenting).

296. Lemon v. Kurtzman, 403 U.S. 602, 625-42 (1971) (Douglas, J., concurring).

297. *Stone*, 449 U.S. at 39-43.

298. Marsh v. Chambers, 463 U.S. 783, 795-822 (1983) (Brennan, J., dissenting).

299. *Allegheny*, 492 U.S. at 623-80.

300. Its proponents adhere to Thomas Jefferson's oft-quoted statement: "We must erect a wall of separation between church and state." *See Lynch*, 465 U.S. at 673; Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947).

301. *See Lynch*, 465 U.S. at 698 (Brennan, J., dissenting); *Lemon*, 403 U.S. at 624-25 (Douglas, J., concurring); *Marsh*, 463 U.S. at 802 (Brennan, J., dissenting).

302. *Lynch*, 465 U.S. at 698 (Brennan, J., dissenting).

303. *Id.* at 701.

304. *See Allegheny*, 492 U.S. at 651 (Stevens, J., dissenting).

305. Examples are found in Justice Souter's opinions in several school funding cases which are not treated in this Note. *See* Agostini v. Felton, 521 U.S. 203, 247 (1992); Mitchell v. Helms, 530 U.S. 793 (2000); Zelman v. Simmons-Harris, 536 U.S. 639, 686 (2002).

306. *Compare supra* note 305, *with Allegheny*, 492 U.S. at 630-31 (O'Connor, J., concurring).

307. *Newdow*, 124 S. Ct. at 2327-33 (Thomas J., concurring). He alluded to this approach in *Zelman*. 536 U.S. at 679 (Thomas, J., concurring).

308. *Newdow*, 124 S. Ct. at 2330-31 (Thomas, J., concurring).

federal government has established a particular religion and is coercing adherence by the citizenry.[309] While Justice Thomas is still grouped with the accomodationists, it seems unlikely that his views will be shared by other members of the accommodationist group.[310]

It is with this convoluted background of precedent that the court in *Glassroth* approached the Establishment Clause question. The court reached for the only sure test it knew, the *Lemon* test, and attempted to make a decision based on these grounds.[311] However, it is important to note that the *Lemon* test was not the only route the court could have taken. Judging by the fact that the *Lemon* test is roundly criticized,[312] and essentially none of the justices currently sitting on the Supreme Court cling to the *Lemon* test in its entirety,[313] the court could have easily taken a different approach. As it was, the court seemed to use the *Lemon* test as modified by Justice O'Connor in *Lynch*,[314] and further modified by her reasonable observer test set forth in *Allegheny*.[315]

B. Application of the Accommodationist Approach

If the Court had applied Justice Kennedy's test from *Allegheny*,[316] Justice Moore's position could conceivably have been accepted in its entirety. First of all, Justice Moore was not attempting to compel religious practices. He merely placed the monument in the courthouse. Albeit, the monument was hard to miss. However, no one was compelled to bow down before the monument or to become a practicing Christian. There were no armed guards stationed about the monument to insure compliance with Justice Moore's mandate. Nor was there any evidence of Justice Moore's intent to compel religious behavior. His intent was merely to "remind" the public of what he believed to be the moral foundation of our law.

Second, there had been no action by the state to set up a state church. No state funds were expended in the placement of the monument. Justice Moore was not setting up a state church of the Ten Commandments with compulsory attendance by all. Furthermore, there has been a history of placing the Ten Commandments within courtrooms.[317] Although the court in *Glassroth* pointed

309. *Id.* at 2331-32.

310. The sole exception is perhaps Justice Scalia. Justice Scalia did not participate in the *Newdow* decision, so his thoughts on Justice Thomas's approach are unavailable. However, Justice Thomas did make extensive citation of Justice Scalia's dissents in previous cases. This suggests that the two Justices may share views on this approach.

311. *Glassroth*, 335 F.3d at 1295-98.

312. *Id.* at 1296.

313. *See Lee*, 505 U.S. at 644 (Scalia, J., dissenting) (noting with knowing cynicism that the *Lemon* test was ignored in the decision of the case); *Allegheny*, 492 U.S. at 655-56 (Kennedy, J., dissenting); Edwards v. Aguillard, 482 U.S. 578, 636-40 (1987) (Scalia, J., dissenting); Wallace v. Jaffree, 472 U.S. 38, 108-112 (1985) (Rehnquist, J., dissenting); Aguilar v. Felton, 473 U.S. 402, 426-30 (1985) (O'Connor, J., concurring); Roemer v. Bd. of Pub. Works of Md., 426 U.S. 736, 768-69 (1976) (White, J., concurring). Even though the test is sometimes still applied by the separationist Justices, they often use only the secular purpose prong or effect prong.

314. *Lynch*, 465 U.S. at 687-94.

315. 492 U.S. at 623-37 (O'Connor, J., concurring).

316. *Id.* at 659 (Kennedy, J., dissenting).

317. For example, *see Lynch*, 465 U.S. at 677 (statue of Moses and the Ten Commandments is found within the United States Supreme Court).

out that Justice Moore's placement of the Ten Commandments was more extreme than previously upheld placements,[318] this would be of little import when gauged by a test which ignores the perspective of the phantom reasonable observer.[319] The court in *Glassroth* also downplayed the historical significance of the monument, and criticized Moore for "presuppos[ing] a belief in God."[320] However, as Chief Justice Rehnquist, and even Justice O'Connor, noted in *Newdow*, this nation was founded on a pre-supposed belief in a deity.[321] Justice Moore's recognition of that fact is certainly not automatic grounds for violation of the Establishment Clause under an accommodationist approach. In addition, the accommodationist approach would likely have given more import to Justice Moore's avowed secular purposes in placing the monument.[322]

One could, however, surmise that Justice Moore's position was still too loud to be upheld in its entirety by an accommodationist Court. His position, at least, seems to have less of a secular purpose than the other government practices and displays in question in the other cases in this Note.

C. Application of a Neutrality Approach

The neutrality test, which essentially was applied by the court in *Glassroth*,[323] would likely have failed Justice Moore's position as it stood. Justice O'Connor's reasonable observer requires, as a threshold matter, that the government hold an ultimately secular purpose in its actions.[324] With this in mind, her reasonable observer would have had a hard time denying the religious import of the massive monument, especially with the force of Justice Moore's rhetoric backing it up. Although Justice Moore could argue the historical significance of the monument, it is unlikely that Justice O'Connor would find an instance of "ceremonial deism."[325] She would probably find that, since litigation was immediately instigated, the monument was not historically well tolerated like the display in *Lynch*,[326] and the Pledge in *Newdow*.[327] In addition, she would

318. *Glassroth*, 335 F.3d at 1300-01.

319. *See* Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 779-80 (1995).

320. *Glassroth*, 335 F.3d at 1295, 1297-98.

321. *Newdow*, 124 S. Ct. at 2319-20, 2322-23 (Rehnquist, C.J., & O'Connor, J., concurring).

322. The court in *Glassroth* found that, despite Moore's assertions to the contrary, his religious intentions were "self-evident." 335 F.3d at 1297. For instance, the court noted Moore's statement that the monument was intended to acknowledge "God's overruling power over the affairs of men." *Id.* at 1296. Contrast this with Chief Justice Rehnquist's approach in *Newdow*, wherein he associated the words "under God" with various religious statements by national figures. 124 S. Ct. at 2317 (Rehnquist, C.J., concurring). Examples include George Washington's citation of Psalm 121:1 at the first inauguration: "I raise my eyes toward the hills, Whence shall my help come?" *Id.*; Washington's first thanksgiving proclamation, which proclaimed "a day of public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favours of Almighty God," *Id.* at 2317 n.3 (quoting *Lynch*, 465 U.S. at 675 n.2) (internal quotations omitted); and Washington's statement "it is the duty of all Nations to acknowledge the problems of Almighty God, to obey His will, to be grateful for his benefits, and humbly to implore his protection and favor." *Id.* at 2317. Despite the association, Rehnquist nevertheless found the pledge to be entirely constitutional. *Id.* at 2320.

323. 335 F.3d 1282.

324. *Allegheny*, 492 U.S. at 631 (O'Connor, J., concurring).

325. *Id.* at 630.

326. 465 U.S. at 684.

327. 124 S. Ct. at 2317.

note that Moore's statement that the monument was meant to refer to the God of the Bible, and the fact that the King James Version of the Bible was utilized indicates that the government was endorsing a *particular* religion: Christianity.[328] Thus, exactly as the plaintiffs in *Glassroth* alleged, the monument would cause individuals to feel like outsiders because of their differing religious beliefs.

However, had Justice Moore truly desired to make the monument stick, he could have altered his position to at least warrant consideration by the neutrality position. For example, he could have changed the visual appearance of the monument. If he had chosen a thousand pound monument, instead of a five thousand pound monument, and if he had included Dr. Martin Luther King Jr.'s speech in closer proximity to the monument,[329] the reasonable observer would have been less likely to be offended. Also, he could have included various numberings of the Ten Commandments which are accepted by different religions.[330] Including more than one numbering would lessen the appearance that the government was endorsing a particular religion. In the alternative, Justice Moore could have simply placed blank tablets in the rotunda and added a figure of Moses or some other object to identify the tablets as the Ten Commandments.

Doubtless, Justice Moore would have had to make a stronger argument for the secular purposes behind the monument.[331] While his statements would likely have been sufficient as they stood for an accommodationist approach,[332] a neutrality approach would have required Moore's statements to convince a reasonable observer of his secular purposes. The *Glassroth* court's reasonable observer was certainly not convinced. Secular purposes in this case could have been recognition of the origins of law, or possibly even recognition of the traditional deity acknowledged by the nation, with whom the law has traditionally been associated.[333]

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328. *Cf. Allegheny*, 492 U.S. at 625-26 (O'Connor, J., concurring).

329. The reader will remember that this is an action which Justice Moore expressly refused to perform. *Glassroth*, 335 F.3d at 1287.

330. The *Glassroth* court alluded to this possibility. *Id.* at 1299 n.3. In a footnote, the court noted that the "Jewish, Catholic, Lutheran, and Eastern Orthodox faiths use different parts of their holy texts as the authoritative Ten Commandments . . . choosing which version of the Ten Commandments to display can have religious endorsement implications under the Establishment Clause." *Id.*

331. The court in *Glassroth*, following the available precedent, indicated that a secular purpose comports with the Establishment Clause, whereas a religious purpose violates same. *Id.* at 1296-97. The author posits that there is a logical inconsistency in this statement. The court itself admitted that "for First Amendment purposes religion includes non-Christian faiths and those that do not profess belief in the Judeo-Christian God; indeed *it includes a lack of any faith*." *Id.* at 1294 (citing *Allegheny*, 492 U.S. at 590) (emphasis added). Thus, *secularism itself* clearly falls within the category of a religious belief. Why then should the court be so willing to entertain practices which are associated with secular beliefs? Is this what the Constitution requires? Perhaps this is the issue Justice Kennedy had in mind when he noted that the endorsement test manifests an "unjustified hostility" toward traditional religion. *Allegheny*, 492 U.S. at 655 (Kennedy, J., dissenting).

332. *See supra* note 322 and accompanying text.

333. The *Glassroth* court suggested that secular purposes could include use of the Ten Commandments for secular studies of history, civilization, or comparative religion. 335 F.3d at 1295 (citing *Stone*, 449 U.S. at 42). Justice Moore argued that the monument was only meant to reflect the moral foundation of the secular duties that individuals owe to society. *Id.* at 1294. The court either did not believe that Justice Moore was sincere in this belief, or did not believe that this was truly a secular purpose.

Under O'Connor's opinion in *Newdow*, Justice Moore would have also been required to associate the monument only with a generic deity, and with no religion in particular.[334] He would not be able to refer, as he did, to "the God of the Holy Scriptures."[335]

D. Application of a Separationist Approach

Under a separationist approach it is clear that the monument would have failed. Any object of such traditional religious significance would be excluded from public places. For example, Justice Stevens would note that at least someone within the State of Alabama would find the display of the Ten Commandments to be religious in nature.[336] With the firm conviction that religious and secular life should be separate, this finding alone would be sufficient to violate the Establishment Clause. Further argument need not be made here because Justice Moore would be doomed to failure.

E. Application of Justice Thomas's Approach

Lastly, Justice Moore's case is evaluated here under Justice Thomas's approach in *Newdow*.[337] While it is unlikely at the present time that this test would be used to decide cases such as Justice Moore's, it is nevertheless relevant because it is held by one and possibly two Justices. In addition, the results it would produce are radically different from the results which would come and which have come from the approaches of the other Justices.

First, it is unlikely that Justice Thomas would consider Justice Moore's case to even be an Establishment Clause issue. Justice Thomas would reason that the Establishment Clause was meant only to apply to the federal government, and not to the states.[338] Thus, Justice Moore would be free even to place symbols of the Christian religion in the state courthouse. Given the fact that Justice Moore paid for the monument entirely from his own pocket, it is likely that Moore's arguments would be sufficient to pass constitutional scrutiny *with no modification whatsoever*.[339]

Trouble for Justice Moore under Justice Thomas's analysis would only arise if Justice Moore began a process of coercion.[340] For instance, if Justice Moore later instituted a policy requiring all visitors to the rotunda to engage in prayer at the Ten Commandments monument, or a requirement that the lawyers of Alabama memorize the contents of the Ten Commandments in order to be accepted by the

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334. *See Newdow*, 124 S. Ct. at 2325-26 (O'Connor, J., concurring).

335. *Glassroth*, 335 F.3d at 1296. It should be noted at this point that Justice Moore made no mention of the Christian religion. While he referred to "God" and to "the Holy Scriptures," he made no mention of "Jesus Christ." Thus, he arguably made no reference to a *particular* religion.

336. *Allegheny*, 492 U.S. at 650-51 (Stevens, J., concurring in part and dissenting in part). Obviously the offended plaintiffs in the *Glassroth* litigation prove this point.

337. *See Newdow*, 124 S. Ct. 2327-33 (Thomas, J., concurring).

338. *See id.* at 2328.

339. While Justice Thomas does express concern over the issue of state government preference of a particular religion, Justice Moore's stated position does not explicitly endorse a particular religion. *See supra* note 335.

340. *See Newdow*, 124 S. Ct. at 2331-32.

bar. However, it is also conceivable that these practices would be perfectly legitimate under Justice Thomas's analysis, provided that there was no establishment of religion.

More important are the federalism implications raised by Justice Thomas's approach. As he noted in *Newdow*, he believes that the primary purpose of the Establishment Clause was to actually protect state religious practices from federal intervention.[341] This being the case, Justice Moore's treatment at the hands of the Eleventh Circuit would have been reversed by this approach. Federal district courts would arguably have no place in directing the religious affairs of Justice Moore and the State of Alabama. The emphasis would be on allowing the State of Alabama to pursue its own religious course, and not allowing the individual plaintiffs in the *Glassroth* litigation to alter this course.[342]

F. The Glassroth Decision

Why did the court in *Glassroth* choose to apply the reasonable observer test? At the present, it is unclear how many Justices, aside from O'Connor, actually embrace the test.[343] Why did the court even make mention of the roundly criticized and archaic *Lemon* test? There are several possibilities. First, this could indicate a shift in the law; an emerging body of First Amendment jurisprudence which will attempt to find common ground between the accommodation and separation camps. More likely, however, the Eleventh Circuit was attempting to predict how the Supreme Court would vote on the matter. As the current Court stands, there are four accommodationists, one neutral, and four separationists. By inference it can be seen that the neutral vote is oftentimes the vote which will decide an Establishment Clause case.

In this instance, the court likely predicted that Justice O'Connor would perceive the Ten Commandments monument as an endorsement of religion by the state. At the same time, the court knew that the separationist camp would find Justice Moore's actions unconstitutional. This explains the tremendous weight the trial court and the appellate court placed on the "reasonable observer" test. It also explains why Justice Moore contested the district court's findings of fact so vigorously. For, despite the seemingly contradictory nature of his factual arguments,[344] it is plausible that he was trying to draw out the flaws in the reasonable observer test. After all, was not the reasonable observer in this instance the trial court judge himself? Why should the judge's perception of the Ten Commandments

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341. *Id.* at 2330.

342. As argued by Justice Thomas, the Establishment Clause creates no individual rights. *Newdow*, 124 S. Ct. at 2330 (Thomas, J., concurring). Ironically, this approach would also lend credence to Justice Moore's assertions that he is not subject to the injunction of the federal district court (assertions for which he was later removed from office!).

343. *See Zelman*, 536 U.S. 639. In *Zelman*, Justice Rehnquist, writing for the majority, applied a "reasonable observer" test. *Id.* at 652. However, the line of cases which lead up to and include *Zelman* are contained entirely to the area of public school funding. The author would argue that these cases are distinct from the instant case, which involves public display of a religious symbol. The only Justice who makes mention of the test in *Newdow* is the test's creator: Justice O'Connor. 124 S. Ct. at 2321 (O'Connor, J., concurring).

344. I.e., requesting that the trial court judge visit the monument and then contesting that he did so. *See Glassroth*, 335 F.3d at 1288-89.

monument be dispositive on the issue of whether the monument violated the Establishment Clause? What if the trial court judge and the plaintiffs themselves were the only observers in the State of Alabama who took offense at seeing the monument?[345] Whose reasonable observer should then win?[346] Is it even possible for a judge to step outside of his subjective opinion and make a judgment as a reasonable observer?[347] Will not the result of this inquiry be decided in every instance by the particular religion and/or biases of the judge himself?[348]

These are, of course, speculative questions. But perhaps they serve to make some sense out of the Justice Moore's arguments.

VI. CONCLUSION

As noted at the beginning of this Note, the author is of the opinion that the Eleventh Circuit did the best they could with the available precedent. However, in this sensitive area of the law, there exists the peculiar aspect of predicting the legal position of particular Supreme Court Justices. The court was faced with the task of predicting which way the swing vote would go in a deeply divided court. As evidenced by the Supreme Court's denial of certiorari,[349] the court

345. As noted *supra*, this would be sufficient to satisfy the separationists of the Supreme Court.

346. To illustrate this point, a recent discussion occurred between the author and a professor over whether a display found outside a state building was an unconstitutional government endorsement of religion. The author's reasonable observer believed that it was permissible public speech under *Capitol Square* and had nothing to do with government endorsement. The professor's reasonable observer, on the other hand, believed quite strongly that it was a clear case of government preference of the Christian religion. Whose reasonable observer should win? Justice O'Connor's concurrence in *Newdow* recommends that the reasonable observer form his or her opinion with the history and origins of the practice in mind. 124 S. Ct. at 2322 (O'Connor, J., concurring). The separationist approach, as evidenced in Stevens dissent in *Allegheny*, points out that there will *always* be a reasonable observer who could find the display offensive. 492 U.S. at 650-51 (Stevens, J., dissenting). If this is the case, how many agreeing reasonable observers are necessary under a neutrality approach to constitute a quorum?

347. Justice Stevens would likely argue no. *See Allegheny*, 492 U.S. at 650-51 (Stevens, J., dissenting). Justice O'Connor would likely argue yes. *See Newdow*, 124 S. Ct. at 2322 (O'Connor, J., concurring). The reader may decide for himself.

348. Speaking of, *inter alia*, the Establishment Clause, former judge Robert Bork argues that when "a cultural Court acts without guidance from the historic Constitution, the Justices [can] produce a coherent jurisprudence of individual rights only if they [] construct and agree upon a systematic moral philosophy. Moral philosophers have been unable to agree on such a philosophy; it is preposterous to suppose that a committee of lawyers could." ROBERT BORK, SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE 109. Others argue that a historic understanding of the Constitution is unknowable and/or impossible to apply in "hard" cases, and that the justices necessarily must base their decisions on their own moral or religious beliefs. *See* Mark C. Modak-Truran, *Legal Indeterminancy and the Reenchantment of the Law*, 53 CATH. U.L. REV. 709 (2004). But even assuming, *arguendo*, that a majority of justices were able to agree on a systematic moral philosophy in regards to Establishment Clause application, would the Court then be justified in imposing that moral philosophy on the rest of the nation in the absence of a definitive legal text? This is a question of the Court's legitimacy. *See* James L. Buckley, *The Constitution and the Courts: A Question of Legitimacy*, 24 HARV. J.L. & PUB. POL'Y 189, 191 (2000) (arguing that the Court has, in certain instances, wrongly taken "an approach to constitutional interpretation that has permitted American judges to carve their policy preferences into constitutional granite . . . .").

349. Moore v. Glassroth, 124 S. Ct. 497 (2003), *denying cert.* to 335 F.3d 1282.

350. *See supra* pp. 23-32. The court made conclusionary dismissals of several of the Chief Justice's claims, blindly citing to controversial and divided cases, such as *Allegheny*. *See Glassroth*, 335 F.3d at 1288-1303.

apparently made the right prediction in this case. But it is also clear that there are much deeper issues at stake here which were not even touched on by the court and have yet to be addressed.[350]

It is not inconceivable that the Supreme Court could take a case with facts similar to these in order to further define its position regarding the Establishment Clause, or for either the separationist or accommodationist camp to force a showdown. It is even more probable that a case such as this, with slightly different facts, could garner the neutral swing vote and survive constitutional scrutiny. Hopefully this brief Note will be of assistance to those practitioners who are involved in such a future Establishment Clause dispute.

350. *See supra* pp. 23-32. The court made conclusionary dismissals of several of the Chief Justice's claims, blindly citing to controversial and divided cases, such as *Allegheny*. *See Glassroth*, 335 F.3d at 1288-1303.