ALABAMA V. ACLU: A MISSED OPPORTUNITY TO CORRECT FLAWED ESTABLISHMENT CLAUSE JURISPRUDENCE

For the Americans the ideas of Christianity and liberty are so completely mingled that it is almost impossible to get them to conceive of the one without the other . . . How could society escape destruction if, when political ties are relaxed, moral ties are not tightened? And what can be done with a people master of itself if it is not subject to God? [1]

—Alexis de Tocqueville

This law of nature, being coeval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this . . . The doctrines thus delivered we call the revealed or divine law, and they are to be found only in the holy scriptures . . . Upon these two foundations, the law of nature and the law of revelation, depend all human laws . . . ."[2]

—William Blackstone

I. INTRODUCTION

In *State of Alabama v. American Civil Liberties Union of Alabama,*[3] the Alabama Supreme Court was supposed to decide if displaying the Ten Commandments and opening court with clergy-led prayers violated the Establishment Clause of the First Amendment to the United States Constitution. However, in a decision handed down in January of 1998, the Alabama Supreme Court avoided answering this question and dismissed the case without prejudice.[4] In refusing to rule on the merits of the case, the court effectively returned all the litigants to "square one."[5] At first glance, the case appeared insignificant: the ACLU sought an injunction against a local, circuit court judge in Etowah County, Alabama from opening court with clergy-led prayers and displaying the Ten Commandments in his courtroom. However, *Alabama v. ACLU* soon ignited a fervor in the national media.[6] The intensity of the public debate over the actions of a single circuit judge in Etowah County should not be

---

1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 293-94 (J. P. Mayer, ed., George Lawrence, trans., Harper Perennial 1988) (1850).

2 1 WILLIAM BLACKSTONE, COMMENTARIES *41-42.

3 711 So. 2d 952 (Ala. 1998).

4 *Id.* at 964-65.

5 Mark Hansen, *Decalogue Debate back to Square One*, A.B.A. J., Mar. 1998, at 22.

6 *Alabama*, 711 So. 2d at 959.

surprising, given our nation's history, however. Religion is and has always been a central part of the American culture.[7] Nine of the original thirteen colonies expressly declared the promotion of the Christian religion to be a reason for their existence.[8] The founding fathers viewed religion as an indispensable part of American culture, necessary for the survival of the republic.[9] Even recent Presidential addresses for religious holidays acknowledge our religious heritage.[10]

---

[7] "We are a religious people whose institutions presuppose a Supreme Being." Zorach v. Clauson, 343 U.S. 306, 313 (1952).

[8] *See generally* HENRY STEELE COMMANGER, DOCUMENTS OF AMERICAN HISTORY (1948). The charter of Virginia, dated 1606, stated that the colonists were traveling to the New World to "to make Habitation . . . and to deduce a Colony of sundry of our People into that Part of *America*, commonly called VIRGINIA. . . . in propagating of *Christian* Religion to such People, as yet live in Darkness . . . [to] bring . . . a settled and quiet Government." *Id.* at 8 (original spelling retained). The charter for Massachusetts, dated 1629, stated: "[O]ur said People . . . may be soe religiously, peaceablie, and civilly governed, as their good Life and orderlie Conversacon, maie wynn and incite the Natives of Country, to the Knowledg and Obedience of the onlie true God and Sauior of Mankind, and the Christian Faythe . . . ." *Id.* at 18 (original spelling retained) (ellipses in original). The charter for Maryland, dated 1632, stated:

> [O]ur well beloved and right trusty Subject Caecillius Calvert, Baron of Baltimore, . . . being animated with a laudable, and pious Zeal for extending the Christian Religion, . . . hath humbly besought Leave of Us, that he may transport . . . a numerous Colony of the English Nation to a certain Region, . . . partly occupied by Savages, having no Knowledge of the Divine Being . . . .

Id. at 21 (original spelling retained). STEPHEN K. MCDOWELL & MARK A. BELILES, AMERICA'S PROVIDENTIAL HISTORY 32-33 (1988). The charter of North Carolina establishes that colony for "The propagation of the gospel." *Id.* at 54-55. The charter of Rhode Island declared that "The colonies are to pursue with peace and loyal minds their sober, serious, and religious intentions . . . in holy Christian faith . . . ." *Id.* at 59. Settlers in Georgia, as well, were "to live wholly to the Glory of God." *Id.* at 55. PAT ROBERTSON, AMERICA'S DATES WITH DESTINY (1986) [hereinafter ROBERTSON]. The charters of Connecticut, New Hampshire, and New Jersey also reflected their Christian goals. *Id.*

[9] *See generally* JOHN EIDSMOE, CHRISTIANITY AND THE CONSTITUTION (1987) [hereinafter EIDSMOE]. "[T]rue religion affords to government its surest support." *Id.* at 124 (quoting George Washington). W.D. LEWIS, WASHINGTON'S FAREWELL ADDRESS AND WEBSTER'S FIRST BUNKER HILL ORATION (1910). President George Washington stated:

> Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. In vain would that man claim the tribute of patriotism, who should labor to subvert these great pillars . . . reason and experience both forbid us to expect that national morality can prevail in the exclusion of religious principle.

Id. at 23-24. John Adams stated: "Our Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other." ROBERTSON, *supra* note 8, at 93-94.

[10] *See* Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083 (1996)[hereinafter Epstein]. An address by President Clinton stated:

> [A]s we celebrate the birth of Jesus Christ, the Prince of Peace, let us not forget His lesson that one day we will be asked whether we lived out His love in ways that treated all of our brothers and sisters as we would have treated Him, even

The United States Supreme Court also viewed religion as part of the fabric of American society when it acknowledged and allowed non-sectarian, governmental religious expression in *Lynch v. Donelly*:[11] "There is an unbroken history of official acknowledgement by all three branches of government of the role of religion in American life from at least 1789."[12] The Court in *Lynch* found that "[o]ur history is replete with official references to the value and invocation of Divine guidance",[13] and that this was evidenced by our national motto, "In God We Trust"; national holidays, such as Christmas and Thanksgiving; and the mural of Moses with the Ten Commandments in the chambers of the Supreme Court.[14]

Like *Alabama v. ACLU*, the *Lynch* case represented just another battle in the long-running war over the proper interpretation of the First Amendment's Establishment Clause.[15] Battles over the precise meaning of the Establishment Clause have polarized the nation into two main camps. In one camp are those who would eradicate all traces of religious belief entirely from American government; in the other are those who wish to allow governmental acknowledgment of religion.[16]

Alabama v. ACLU is the second part in the history of the ACLU's attempt to prohibit invocations and the display of the Ten Commandments in an Alabama courtroom. In *Alabama Freethought Association v.*

> the least of them. He taught us all to seek peace and to treat all people with love.

Id. at 2114 (quoting Remarks on Lighting the National Christmas Tree, 1994 Pub. Papers 2159 (Christmas message of President William J. Clinton 1994)). President George H.W. Bush stated:

> By His words and by His example, Christ has called us to share our many blessings with others. As individuals and as a Nation, in our homes and in our communities, there are countless ways that we can extend to others the same love and mercy that God showed humankind when He gave us His only Son. During this holy season and throughout the year, let us look to the selfless spirit of giving that Jesus embodied as inspiration in our own lives—giving thanks for what God has done for us and abiding by Christ's teaching to do for others as we would do for ourselves.

Id. at 2114-15 (quoting Message on the Observance of Christmas, 1991 Pub. Papers 1591 (Christmas message of President George H. W. Bush 1991)).

[11] 465 U.S. 668 (1984).

[12] *Id.* at 674.

[13] *Id.* at 675.

[14] *Id.* at 676-77.

[15] The First Amendment states that: "Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST. amend. I.

[16] Examples of legal organizations promoting strict separation of church and state are Americans United for the Separation of Church and State, American Civil Liberties Union (ACLU), and People for the American Way. Examples of legal organizations promoting tolerance for governmental acknowledgement of religion are American Center for Law and Justice (ACLJ), the Rutherford Institute, and the National Legal Foundation.

Moore[17] the ACLU joined with the Alabama Freethought Association to enjoin Judge Roy Moore from holding invocations in the Etowah County Circuit Court and from displaying a hand-carved replica of the Ten Commandments in his courtroom.[18] Judge Moore had previously invited clergy from the county to open court sessions with prayer.[19] Those jurors not willing to participate in the prayer were free to remain outside.[20] Judge Moore's hand-carved display of the Ten Commandments adorned the court wall along with other displays which included the Declaration of Independence, a portrait of George Washington, a portrait of Abraham Lincoln, the Mayflower Compact, a brass eagle, the Seal of the State of Alabama, a brass scale, a large wooden clock, and a United States flag.[21] In response to the suit against Judge Moore, Alabama Governor Fob James filed a declaratory judgment action against the ACLU in the Montgomery County Circuit Court to establish the constitutionality of clergy-led invocations and the display of the Ten Commandments in the court of Etowah County Alabama.[22] The United States District Court for the Northern District of Alabama dismissed the claim against Judge Moore due to the plaintiff's lack of standing.[23] *Moore* and *Alabama v. ACLU* both presented the same two issues: first, whether the clergy-led invocations were constitutional, and second, whether the display of the Ten Commandments was constitutional. In a court order dated, November 22, 1996, the state circuit court ruled against the State of Alabama, declaring Judge Moore's practice of courtroom prayer unconstitutional under the *Lemon* test, and the cases *Harvey v. Cobb County*[24] and *North Carolina Civil Liberties Union v. Constangy*,[25] but the court allowed the continued display of the Ten Commandments.[26] The ACLU asked the court to reconsider its decision permitting Judge Moore's Ten Com-

---

[17] 893 F. Supp. 1522 (N.D. Ala. 1995).

[18] William P. Gray, Jr., Legal Advisor to the Governor of Alabama, The case of Judge Roy Moore and the Religion Clauses: A Brief History 22 (Mar. 7, 1997) (unpublished manuscript prepared for Fob James, Governor of Alabama).

[19] *Id.* at 20.

[20] *Id.*

[21] Brief of the State of Alabama at 14, Alabama v. ACLU, (Ala. 1997) (Nos. 1960927, 1960572, 1960839).

[22] Amicus Brief of members of Alabama delegation to 105th Congress of UNITED STATES at 1, Alabama v. ACLU, (Ala. 1997) (Nos. 1960927, 1960572, 1960839).

[23] *Moore*, 893 F. Supp. at 1544 (finding neither an "imminent threat of being called before defendant's court," nor any taxpayer funds supporting the clergy or Ten Commandments display).

[24] 811 F. Supp. 669 (N.D. Ga. 1993).

[25] 947 F.2d 1145 (4th Cir. 1991).

[26] First order, Alabama v. ACLU, No. CV-95-919-PR (Montgomery County Cir. Ct. Ala. Nov. 22, 1996).

mandments display.[27] In a "final order" dated February 10, 1997, the state circuit court declared that Judge Moore's display of the Ten Commandments was unconstitutional as well under *Harvey*,[28] which held that, according to the Supreme Court decision, *Stone v. Graham*,[29] such practices violated the Establishment Clause.[30]

The State then appealed the circuit court's final order to the Supreme Court of Alabama.[31] In a 5-0[32] decision, the court dismissed the State's claim and vacated the judgments of the circuit court, allowing Judge Moore's practices to continue.[33] The court, however, refused to rule on the merits of the State's claim that courtroom invocations and courtroom displays of the Ten Commandments were constitutional. Instead, the court declared that: First, the state's claims against Judge Moore and the defendants' counterclaims against the state and Chief Justice Hooper were non-justiciable,[34] and second, any controversy between the state and the ACLU had already been presented in the United States District Court, from which the ACLU failed to appeal the decision.[35] Justice Maddox filed a concurring opinion stating that a justiciable controversy did exist and that the majority should have overturned the circuit court's orders on the merits, preventing further litigation between the same parties.[36] Justice Maddox argued that the lower court's orders should be overturned because the United States Supreme Court seemed to be moving away from the *Lemon* test used by the trial court.[37] Instead of explicitly relying on any of the Supreme Court's three established Establishment Clause tests,[38] Justice Maddox adopted the "Real Threat and Mere Shadow" test,[39] relying largely on a law review article by Asso-

---

[27] Second Order, Alabama v. ACLU, No. CV-95-919-PR (Montgomery County Cir. Ct. Ala., Feb. 10, 1997).

[28] *Id.*

[29] 449 U.S. 39 (1980).

[30] *See* discussion of *Harvey v. Cobb County*, *infra* Part III.B.

[31] *Alabama*, 711 So. 2d at 959.

[32] *See id.* at 965 (listing four Justices who recused themselves).

[33] *Id.* at 964-65.

[34] *Id.* at 964.

[35] *Id.* at 962, 964 (district court dismissed the plaintiff's claim due to a lack of standing).

[36] *Id.* at 965 (Maddox, J., concurring).

[37] *Id.* at 969 (Maddox, J., concurring).

[38] See discussion *infra* Section III (discussing the *Lemon*, *Marsh*, historical, and endorsement tests).

[39] *Alabama*, 711 So. 2d at 974 (Maddox, J., concurring) (quoting Justice Goldberg's observation that "the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow." *School Dist. of Abington Township., Penn. v. Schempp*, 374 U.S. 203, 308 (1963) (Goldberg, J., concurring, joined by Harlan, J.)).

ciate Professor Laura Underkuffler-Freund for his proposition that the primary purpose of the Establishment Clause was to protect freedom of conscience.[40] In applying this "Real Threat and Mere Shadow" test, Justice Maddox found that the prayers and the Ten Commandments display presented "no 'real threat,' but at most, a 'mere shadow.'"[41]

The United States Supreme Court generally uses the three tests in Establishment Clause cases that are addressed in Section III. Due to the controversy surrounding *Alabama v. ACLU*, a similar lawsuit will most certainly appear again in the future. If the same suit comes before the Alabama Supreme Court in the future, the Alabama Supreme Court should declare the practice of courtroom prayer constitutional under the historical test used in *Marsh v. Chambers*,[42] although the practice would still pass Constitutional muster under either the three-part test used in *Lemon v. Kurtzman*[43] or the "endorsement test."[44] Furthermore, the court should find the display of the Ten Commandments constitutional under either the *Lemon* test or the endorsement test.

In Section II, this article gives a brief synopsis of the three current Establishment Clause tests developed by the Supreme Court. Section III critiques the three "tests" already applied in this case. Specifically, Section III shows why the decisions of *North Carolina Civil Liberties Union v. Constangy*,[45] and *Harvey v. Cobb County*[46] which the Montgomery County Circuit Court used in its evaluation and the "Real Threat, Mere Shadow" test proposed by Justice Madddox[47] should not be used to determine the constitutionality of the court invocations and the display of the Ten Commandments if this case comes before the Alabama Supreme Court again. Section IV applies the proper Establishment Clause tests currently used by the United States Supreme Court and demonstrates that the practice of invocations and the display of the ten commandments are constitutional.

---

[40] *Alabama*, 711 So. 2d at 976 (Maddox, J., concurring).

[41] *Id.* at 977 (Maddox, J., concurring).

[42] 463 U.S. 783 (1983).

[43] 403 U.S. 602 (1971).

[44] The "endorsement test" was first enunciated in a concurring opinion by Justice O'Connor in *Lynch v. Donnelly*, 465 U.S. at 690 (O'Connor, J., concurring). It was used again in the later case of *Allegheny County v. ACLU*. Allegheny County v. ACLU, 492 U.S. 573, 630 (1989) (O'Connor, J., concurring).

[45] 947 F.2d 1145 (4th Cir. 1991).

[46] 811 F. Supp. 669 (N.D. Ga. 1993).

[47] *Alabama*, 711 So. 2d at 977 (Maddox, J., concurring).

II. THE SUPREME COURT AND THE ESTABLISHMENT CLAUSE

The modern era of Supreme Court interpretation of the Establishment Clause began in 1947 with the decision of *Everson v. Board of Educ. of the Township of Ewing*.[48] A majority of the Court upheld a state statute reimbursing the parents of parochial school children for bus transportation to school.[49] Although the Court found no violation of the Establishment Clause, it declared the need for a "wall of separation" between the church and state and also declared that government should pursue a policy of strict neutrality in religious matters.[50] After *Everson*, the Court vigorously pursued a policy of "separation of church and state" in the context of schools. It subsequently struck down school invocations,[51] Bible reading,[52] and displays of the Ten Commandments.[53]

In *Lemon v. Kurtzman*,[54] the Court struck down a Rhode Island statute which reimbursed non-public schoolteachers (most of whom were Catholic) for teaching non-religious subjects.[55] In deciding *Lemon*, the Court developed the first of the modern Establishment Clause tests. The test voids legislative statutes or actions for violating the Establishment Clause unless they meet the following three-prong test: (1) they must contain a "secular legislative purpose;" (2) "[their] principal or primary effect must be one that neither advances nor inhibits religion;" and (3) "the statute[s] must not foster an 'excessive entanglement with religion.'"[56]

In 1983, in *Marsh v. Chambers*,[57] the Court declined to apply the *Lemon* test for the first time, holding that prayers given by a state-funded chaplain before the opening sessions of the Nebraska state legislature were constitutional.[58] In so holding, the Court declared that "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

---

[48] 330 U.S. 1 (1947).

[49] *Id.* at 18.

[50] *Id.* at 16,18. *See also* Walz v. Tax Comm'n, 397 U.S. 664, 716 (1970) ("[O]ne of the mandates of the First Amendment is to . . . keep government neutral, not only between believing sects, but also between believers and nonbelievers.").

[51] Engel v. Vitale, 370 U.S. 421 (1962).

[52] Abington v. Schempp, 374 U.S. 203 (1963).

[53] Stone v. Graham, 449 U.S. 39 (1980).

[54] 403 U.S. 602 (1971).

[55] *Id.*

[56] *Id.* at 612-13 (quoting *Board of Educ. v. Allen*, 392 U.S. 236, 243 (1968) and *Waltz*, 397 U.S. at 674) (mentioning three evils from which the Establishment Clause was supposed to protect: "sponsorship, financial support, and active involvement of the sovereign in religious activity." (quoting *Waltz*, 397 U.S. at 668)).

[57] 463 U.S. 783 (1983).

[58] *See id.* at 794-95.

with prayer has become part of the fabric of our society."[59] The Supreme Court in *Marsh* recognized that America's Founding Fathers, who wrote the First Amendment, also sanctioned opening legislative assemblies with prayer.[60] Therefore, the Court reasoned that the historical evidence shed light on the Founders' original intent, which supported Nebraska's practice of legislative prayer.[61]

The *Lynch v. Donnelly*[62] decision, decided a year after the *Marsh* decision, combined the *Lemon* test with the *Marsh* historical test and declared constitutional a nativity display sponsored by the city of Pawtucket, Rhode Island.[63] In her concurring opinion, however, Justice O'Connor suggested that an "endorsement test" should be used instead of the *Lemon* test.[64] Under this test, the government must not "[intend] to convey a message of endorsement or disapproval of religion" nor must its effect be to communicate to the community that it endorses or disapproves of religion.[65]

Courts applying the endorsement test, should ask whether a "reasonable observer" would perceive a government practice as "conveying a message of endorsement of religion."[66] The recent case of *Capitol Square Review and Advisory Bd. v. Pinette*[67] further clarifies the endorsement test. In *Pinette*, Justice Scalia, writing for the majority, stated that the endorsement test only regulates governmental religious activity.[68] The Establishment Clause has never proscribed private religious expression unless the government discriminates in favor of the particular private religious exercise.[69] The majority equated favoritism and promotion with

---

[59] *Id.* at 792.

[60] *Id.* at 788.

[61] *Id.* at 790 ("In this context, historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress – their actions reveal their intent."). *See also* Epstein, *supra* note 10, at 2154-55 (discussing the Original Intent argument found in *Marsh* as a means of interpreting the Establishment Clause).

[62] 465 U.S. 668 (1984).

[63] *Lynch*, 465 U.S. at 675, 685. Justice O'Connor, in her concurrence, upheld the nativity display because the surrounding secular displays nullified any perceived endorsement by the government. *Id.* at 692 (O'Connor, J., concurring).

[64] *Id.* at 690.

[65] *Id.* at 691-92.

[66] Allegheny County v. ACLU, 492 U.S. 573, 630 (1989) (O'Connor, J., concurring in part and concurring in judgment) (In *Allegheny* a nativity display was held unconstitutional because the surrounding secular displays did not neutralize the perceived endorsement of the religious display because of its prominent location).

[67] 515 U.S. 753 (1995).

[68] *Id.* at 763-64.

[69] *Id.*

endorsement.[70] Also, in *Pinette*, Justice O'Connor defined the reasonable observer as someone who is "deemed aware of the history and context of the community and the forum in which the religious display appears," not just an uninformed passer-by.[71] O'Connor viewed context as a key element of the endorsement test.

To summarize, since *Lynch*, the United States Supreme Court has used three tests in determining whether government action violates the Establishment Clause. The first test, introduced in *Lemon*, consists of three parts: purpose, effect, and entanglement. The historical-precedent test, found in *Marsh*, requires the court to examine historical evidence in discerning the original intent of the framers regarding the Establishment Clause. The most recent test, the endorsement test used by the Supreme Court in *Lynch*, *Allegheny County v. ACLU*,[72] and *Pinette*, directs the court to examine whether the government action endorses religion, or can be seen as endorsing religion by a "reasonable observer."[73] This test looks at the context of the action or display.[74]

III. WHY *NORTH CAROLINA CIVIL LIBERTIES UNION V. CONSTANGY*, *HARVEY V. COBB COUNTY* AND THE "REAL THREAT, MERE SHADOW" TEST SHOULD NOT BE USED IN THIS CASE.

A. The Inapplicability of North Carolina Civil Liberties Union v. Constangy

The Montgomery County Circuit Court cited *North Carolina Civil Liberties Union v. Constangy*[75] as authority for prohibiting court invocations.[76] *Constangy*, however, is inapplicable and if the case were to be brought again, the court should not apply it for two reasons: (1) The court erred in its application of the *Marsh* test in *Constangy*, and (2) *Constangy* is factually distinguishable from this case.

First, in *Constangy* the Fourth Circuit Court of Appeals erred in its application of the *Marsh* test. The Fourth Circuit refused to apply the

---

[70] *Id.*

[71] *Id.* at 780 (O'Connor, J., concurring in part and concurring in judgment).

[72] 492 U.S. 573 (1989).

[73] "[G]overnment practice [must] not have the effect of communicating a message of government endorsement . . . of religion." *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring). "[T]he question is 'what viewers may fairly understand to be the purpose of the display.'" *Allegheny*, 492 U.S. at 595; "[T]he reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious display appears." *Pinette*, 515 U.S. at 780 (O'Connor, J., concurring in part and concurring in the judgement).

[74] *See Lynch*, 465 U.S. at 691-92.

[75] 947 F.2d 1145 (4th Cir. 1991).

[76] First Order, Alabama v. ACLU, No. CV-95-919-PR (Montgomery County Cir. Ct. Ala. Nov. 22, 1996).

Marsh test because "judicial prayer in the courtroom is not legitimated under the Establishment Clause by past history or present practice."[77] However, there was a national history of courtroom prayer and a state history of such prayer in Alabama. Judicial prayer is as deeply embedded in our nation's history as the legislative prayer that was found constitutional in *Marsh*.[78] There is no logical distinction between judicial prayer and legislative prayer when both are given by a clergyman. *Marsh* must be applied to courtroom prayer as well. The United States Supreme Court in *Marsh* stated emphatically that the "opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country."[79] The Supreme Court noted in *Lynch v. Donnelly*[80] that "there is an unbroken history of official acknowledgement by all three branches of government of the role of religion in American life from at least 1789."[81] The first Chief Justice of the United States Supreme Court, John Jay, actually encouraged the practice of opening courts with prayer.[82] John Jay – one of the three authors of the Federalist Papers[83] – is regarded as one of the foremost expositors of constitutional principles.[84] Furthermore, the first United States Supreme Court and the early circuit courts all opened court sessions with prayer.[85] Associate Justice William Patterson, a

---

[77] *Constangy*, 947 F.2d at 1149.

[78] *See Marsh*, 463 U.S. at 790 ("No more is Nebraska's practice of over a century, consistent with two centuries of national practice, to be case aside."). *See also, infra* notes 79-88 and accompanying text for historical evidence of courtroom prayer.

[79] *Marsh*, 463 U.S. at 786.

[80] 465 U.S. 668 (1984).

[81] *Id.* at 674.

[82] In 1790, federal district court judge, Richard Law, anticipating the arrival of Chief Justice John Jay to open circuit court, asked whether Circuit Justices "would wish to have a Clergiman [sic] attend as Chaplin [sic], as has been generally the Custom in the New England States, upon such Occasions." Letter from Richard Law to John Jay (Feb. 24, 1790), in 2 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, at 11 (Maeva Marcus et al eds., 1988) [hereinafter 2 DOCUMENTARY HISTORY]. Chief Justice John Jay responded as follows: "The custom in New England of a clergyman's attending, should in my opinion be observed and continued." Letter from John Jay to Richard Law (Mar. 10, 1790). *Id.* at 13.

[83] ALEXANDER HAMILTON, JAMES MADISON, AND JOHN JAY, THE FEDERALIST PAPERS (Clinton Rossiter, ed., Penguin Books 1961) (1787-88).

[84] EIDSMOE, *supra* note 9, at 164.

[85] On May 3, 1790, circuit court opened in Boston, Mass., with Chief Justice Jay and Associate Justice Cushing in attendance. After the grand jury was sworn in and Chief Justice Jay gave the jurors their charge, "the throne of grace was addressed in a well adapted prayer by the Rev. Dr. Howard." HERALD OF FREEDOM (Boston), May 4, 1790 *quoted in* 2 DOCUMENTARY HISTORY, *supra* note 82, at 60-61. On Nov. 3, 1790, circuit court opened in Boston, again with Chief Justice Jay and Associate Justice Cushing attending. "After the usual forms were gone through with (sic) . . . the Throne of Grace was addressed

delegate to the Constitutional Convention from New Jersey, opened circuit court in New Hampshire by delivering a charge to the jury emphasizing religion and morality and quoting scripture.[86] James Wilson, another Associate Justice, who was present during many of the court prayers in the 1790's was also a delegate to the Constitutional Convention.[87] The national history of opening federal courts with prayer continues with the present-day Supreme Court, which opens each session with an invocation.[88] Thus, the trial court's holding declaring courtroom prayer arranged by the judge to be unconstitutional[89] contradicts the long-standing traditions of court-prayer dating back to the Framers of the Constitution. Moreover, the early justices which encouraged the practice of courtroom prayer did so subsequent to the adoption the First Amendment. It is contrary to reason that those charged with upholding the Establishment Clause would encourage the very conduct they thought the First Amendment prohibited.

Not only are there national traditions of courtroom prayer, but there are long-standing traditions of courtroom prayer in the state of Alabama as well. The majority in the Alabama Supreme Court noted that litigation in this case arose out of complaints gathered by the ACLU from many circuits in the state that held invocations before court sessions.[90] Courtroom prayer had adherents in many circuits of Alabama at

---

in prayer, by the Rev. Dr. Stillman." 2 DOCUMENTARY HISTORY, *supra* note 82, at 104-05 (internal quotation marks and footnote omitted). On May 12, 1791, circuit court opened in Boston, again with Chief Justice Jay and Associate Justice Cushing in attendance. The Chief Justice gave "a short and elegant extempore Charge" and "The Throne of Grace was then addressed in prayer, by the Rev. Mr. West." COLUMBIAN CENTINEL (Boston), May 14, 1791, *quoted in* 2 DOCUMENTARY HISTORY, *supra* note 82, at 164-65. *See also id.* at 11,13, 192, 232, 276, 317, 331, 406, 412, 430, 475, 496 (for further examples of early circuit courts opening with prayer).

[86] On May 19, 1800, circuit court opened in Portsmouth, New Hampshire, with Associate Justice Patterson in attendance. "After the Jury were empanelled, the Judge delivered a most elegant and appropriate Charge . . . Religion and Morality were pleasingly inculcated and enforced, as being necessary to good government, good order and good laws, for 'when the righteous are in authority, the people rejoice'" (a reference to Proverbs 29:2). "After the Charge was delivered, the Rev. Mr. Alden addressed the Throne of Grace, in an excellent well adapted prayer." UNITED STATES ORACLE, May 24, 1800, in 3 DOCUMENTARY HISTORY 436 (1988).

[87] 2 DOCUMENTARY HISTORY, *supra* note 82, at 406, 412, 430, 475.

[88] *Marsh*, 463 U.S. at 786 (noting that the cry "God save the United States and this Honorable Court" is an invocation). "[An invocation is] a prayer of entreaty (as at the beginning of a service of worship)." MERRIAM – WEBSTER'S COLLEGIATE DICTIONARY 617 (10th ed. 1994).

[89] First order, Alabama v. ACLU, No. CV-95-919-PR.

[90] *Alabama*, 711 So. 2d at 954 (quoting the ACLU's letter to the former Chief Justice of the Alabama Supreme Court).

the time the ACLU threatened an injunction in 1995.[91] Ministers had voluntarily offered courtroom prayers for decades in Etowah County.[92]

Secondly, *Constangy* is inapplicable because it is factually distinguishable. In *Constangy*, the judge himself led the prayer before court.[93] This is vastly different from inviting a minister to come, voluntarily, to give an invocation, as was the case in *Alabama*. There is a greater chance that citizens will perceive a governmental endorsement of religion when an officer of the government actually offers the prayer.[94] Judge Moore invited clergy to give an invocation before court, preserving the symbolic separation between church and state by allowing a representative of the church to pray. In *Constangy*, the judge acted both as the state and the church in giving the prayer. Therefore, *Constangy* only prohibited invocations offered by the judge. Thus, *Constangy* decision should not be used by the Supreme Court of Alabama in deciding the constitutionality of court invocations.

B. The Inapplicability of Harvey v. Cobb County

The Montgomery County Circuit Court also relied on *Harvey v. Cobb County*[95] in deciding the constitutionality of the display of the Ten Commandments.[96] In the event that this case again comes before the Supreme Court of Alabama, the court should not rely on *Harvey* in determining the constitutionality of the display of the Ten Commandments for two reasons: (1) the United States District Court for the Northern District of Georgia erred in deciding *Harvey*, and (2) *Harvey* is also factually distinguishable from the present case.

First, the district court in *Harvey* reached the erroneous conclusion that the display of the Ten Commandments is always prohibited on government property unless "neutralized" due to its misinterpretation of the United States Supreme Court case, *Stone v. Graham*.[97] The court in *Harvey* came to this conclusion by relying on the Supreme Court's declaration in *Stone* that the primary purpose for posting the Commandments

---

[91] *See id.* at 955 (discussing the ACLU's threats to sue in 1995 if courtroom prayer was not stopped).

[92] Brief of the State of Alabama at 5, Alabama v. ACLU, (Ala. 1997) (Nos. 1960927, 1960572, 1960839).

[93] *Constangy*, 947 F.2d at 1152.

[94] The endorsement test asks whether a government practice could be seen by as endorsing religion. *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring).

[95] 811 F. Supp. 669 (N.D. Ga. 1993).

[96] Second Order, Alabama v. ACLU, No. CV-95-919-PR (Montgomery County Cir. Ct. Ala. Feb. 10, 1997).

[97] 449 U.S. 39 (1980).

is religious in nature.[98] Thus, *Harvey* interpreted *Stone* as *always* forbidding the public display of the Ten Commandments on government property unless they are part of a larger historical display.[99] *Stone* prohibited the display of the Ten Commandments in a public school, but the decision must be read in light of the particular facts of that case. In *Stone*, the state government of Kentucky posted the commandments in all public schools.[100] The United States Supreme Court stated that its primary concern was the influence of the Commandments upon children, who might read and obey the commandments.[101] The Court reiterated this same concern in the later case of *Wallace v. Jaffree*.[102] In distinguishing Presidential Proclamations laced with religious references from school prayer, Justice Powell's concurrence noted that "when government-sponsored religious exercises are directed at impressionable children who are required to attend school . . . government endorsement is much more likely to result in coerced religious beliefs."[103]

A narrower reading of *Stone* is plausible when one considers the Tenth Circuit case of *Anderson v. Salt Lake City Corporation*.[104] In *Anderson*, Salt Lake City allowed a fraternal organization to erect a three by five-foot, granite engraving of the Ten Commandments on the courthouse grounds.[105] The plaintiffs asserted that the placement of the monument violated the Establishment Clause and sought its removal.[106] The Court of Appeals for the Tenth Circuit permitted the permanent display to remain, finding it had "both secular and sectarian effects."[107] The court explained that it would be unreasonable "to require the removal of a passive monument, involving no compulsion [to view or attend or support in any way], because its accepted precepts, as a foundation for law, reflect the religious nature of an ancient era."[108] The court in *Anderson* properly focused on whether the observers were compelled to view the display.

---

[98] 811 F. Supp. at 678 (citing *Stone*, 449 U.S. at 41).

[99] *Harvey*, 811 F. Supp. at 671 (no Ten Commandments on government property). *See also id.* at 677-78.

[100] *Stone*, 449 U.S. at 39.

[101] *Id.* at 42 ("If the posted copies of the Ten Commandments are to have any effect at all, it will be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments.").

[102] 472 U.S. 38 (1985).

[103] *Id.* at 81 (O'Connor, J., concurring).

[104] 475 F.2d 29 (10th Cir. 1973).

[105] *Id.* at 30.

[106] *Id.*

[107] *Id.* at 34.

[108] *Id.*

The Colorado Supreme Court reached a similar result in *State v. Freedom from Religion Foundation.*[109] In *Freedom from Religion Foundation,* the plaintiffs sued for the removal a four-foot tall replica of the ancient stone tablets that contained the Ten Commandments.[110] A fraternal organization donated the display and placed it on the State Capitol grounds.[111] The court allowed the monument to remain in a decision which upheld the State's maintenance and display of the Ten Commandments on public property.[112] It held that the monument did not cast judgment on anyone who did not subscribe to those particular beliefs embodied in the Ten Commandments.[113] Thus, the court in *Freedom from Religion Foundation* also recognized that compulsion to view or agree with the display was not present.

The later United States Supreme Court case of *Lynch v. Donnelly,*[114] also, narrows *Stone.* As mentioned earlier, the United States Supreme Court's opinion in *Lynch v. Donnelly* notes that the display of Moses with the Ten Commandments in its courtroom is constitutional.[115] Thus, the *Lynch* decision effectively limits the *Stone* decision to prohibiting the government-sponsored display of the Ten Commandments only in public schools.[116]

Stone prohibits the posting of the Ten Commandments in schools because of the context of the display and the impressionable nature of children. The grounds of a state capitol or courthouse are traditional areas of display for historical and religious legal codes unlike the halls of a school where children may not understand that religious legal codes also have secular significance. Also, there is less compulsion to view or accept the display in an adult atmosphere such as a courtroom where the Ten Commandments are surrounded by other items of historical significance. The district court in *Harvey* failed to acknowledge the obvious contextual differences between placing a display of the Ten Commandments (a legal code) in a court of law versus placing it in a school. It ignored this distinction despite United States Supreme Court, federal, and state cases which hold to the contrary. Thus, *Harvey* is inapplicable due to its erroneous conclusion that the Ten Commandments are always prohibited on government property unless "neutralized" by other displays.

---

[109] 898 P.2d 1013 (Colo. 1995), *cert. denied,* 516 U.S. 1111 (1996).
[110] *Id.* at 1016.
[111] *Id.*
[112] *Id.* at 1016-17.
[113] *Id.* at 1026-27.
[114] 465 U.S. 668.
[115] *Lynch,* 465 U.S. at 678.
[116] *Id.* at 679-80.

Secondly, *Harvey v. Cobb County* in inapplicable because like *Constangy*, *Harvey* is factually distinguishable from the present case. In *Harvey*, the Ten Commandments were written on a three by five-foot panel and placed alone in an alcove.[117] The display was not part of a courtroom decoration, but was placed in a hall outside the courtrooms.[118] Furthermore, the display not only contained the Ten Commandments but also words of Jesus from the New Testament. The display read in part: "Jesus said: 1. Thou shalt love the LORD thy GOD with all thy heart, and with all thy soul, and with all thy mind. 2. Thou shalt love thy neighbor as thyself. On these two commandments hang all the law and the prophets."[119] However, *Harvey* should be interpreted to forbid only the solitary display and the prominent location of the Ten Commandments according to *Lynch v. Donnelly*.[120] Although the court in *Harvey* also disapproved of the unique Christian message in that display of the Ten Commandments due to the inclusion of Jesus' words,[121] *Lynch* and *Marsh* do not require complete separation as long as government conduct is "tolerable" and acknowledges widely held beliefs.[122] This holds true even if, as in the United States Supreme Court chambers, Moses is included in the display, holding the Commandments, though this would seem to be an express endorsement of a specific religion.[123]

The present case is factually distinguishable from *Harvey*. Judge Moore's hand-carved display of the Ten Commandments adorned the court wall along with other displays which included the Declaration of Independence, a portrait of George Washington, a portrait of Abraham Lincoln, the Mayflower Compact, a brass eagle, the Seal of the State of Alabama, a brass scale, a large wooden clock, and a United States flag.[124] Also, Judge Moore's much smaller display of the Ten Commandments contained no mention of Jesus or any other verses except the Ten Commandments. Finally, the display did not sit in a hallway outside several

---

[117] *Harvey*, 811 F. Supp. at 671.

[118] *Id.* at 671.

[119] *Id.* at 672.

[120] 465 U.S. 668 (1984) (allowing the display of a crèche sponsored by the city because it was surrounded by other, secular displays and did not occupy a central place in the overall display).

[121] *Harvey*, 811 F. Supp. at 677.

[122] *Lynch*, 465 U.S. at 673 ("Nor does the constitution require complete separation of church and state"); *Marsh*, 463 U.S. at 792 (stating that government conduct which happens to "harmonize" with religious canons is not always barred, the government is allowed a "tolerable acknowledgment of beliefs widely held among the people of this country.").

[123] *Id.* at 678 ("This history [America's religious heritage] may help explain why the Court consistently has declined to take a rigid, absolutist view of the Establishment Clause.").

[124] Brief of the State of Alabama at 14, Alabama v. ACLU, (Ala. 1997) (Nos. 1960927, 1960572, 1960839).

courtrooms and clerks' offices as in *Harvey*,[125] but inside the judge's courtroom alongside other decorations. Displaying the Ten Commandments *in a courtroom* is not necessarily unconstitutional according to the United States Supreme Court.[126] Moreover, *Harvey* is not the proper authority to decide the issue in this case due to key factual differences.

C. Analysis of Justice Maddox's Suggested Test

The "Real Threat or Mere Shadow" test proposed by Justice Maddox in his concurring opinion in *Alabama v. ACLU* should not be applied if this case comes before the Alabama Supreme Court again. The basic flaw in the "Real Threat" test is that it begs the question of whether the disputed practice is constitutional. Although Justice Maddox used *Marsh* as a model for deciding this case,[127] he upheld the courtroom invocations and display of the Ten Commandments because they presented no "real threat of an establishment of religion" based on the fact that the Court in *Marsh* found similar practices constitutional.[128] A court using the "Real Threat" test, in effect, declares that certain practices present no real threat of establishing religion if they are constitutional. In other words, the test merely declares that the practice is constitutional if it is constitutional. The "Real Threat" test is not a test at all, but only a another way of stating that all novel Establishment Clause questions are constitutional if they are analogous in some way to some past practice that was found constitutional.

Although Maddox relied on *Marsh*,[129] the "Real Threat" test was not the test used in *Marsh*. In *Marsh*, the Court looked beyond intervening cases that addressed whether legislative prayer was a "real threat" or a "mere shadow" to the intentions and actions of those who drafted the First Amendment.[130] A court using the *Marsh* test in examining Judge Moore's practices would not simply ask if they presented a "real threat" but would examine state and national history to determine the history of such practices and whether individuals associated with the framing of

---

[125] *Harvey*, 811 F. Supp. at 671.

[126] *Lynch*, 465 U.S. at 677 (citing an example of an appropriate religious display by the government: "The 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 the Ten Commandments.").

[127] *Alabama*, 711 So. 2d at 977 (Maddox, J., concurring) ("*Marsh* provides a more suitable model for deciding this case . . . .").

[128] *Id.* (Maddox, J., concurring) ("I cannot conclude that the practices challenged here are different from those that other courts have held constitutional. I reach this conclusion in part because . . . the facts of this case are analogous to those in *Marsh*.").

[129] *Id.* (Maddox, J., concurring).

[130] Marsh v. Chambers, 463 U.S. 783, 788-89 (1983).

the Constitution would consider such practices a "real threat".[131] The "Real Threat" test merely stated a conclusion which one could not reach without first using the *Marsh* test.

IV. ANALYSIS UNDER THE RELEVANT TESTS

Alabama v. ACLU addresses two separate government actions: the opening invocation of the court and the display of the Ten Commandments. These two actions require two separate tests for analysis because while court and legislative invocations have historical significance, the display of the Ten Commandments may not have been as uniformly practiced throughout history. Because *Marsh* addressed government sponsored prayer, the *Marsh* test is the better test to use for court invocations. However, the practice of courtroom prayer, as exercised in this case, would still pass constitutional muster under the endorsement test or the *Lemon* test. Because of its specificity in dealing with government-sponsored prayer, *Marsh* may not be readily applicable to the Ten Commandments display. The Supreme Court has typically applied either the *Lemon* test or the endorsement test to decide the constitutionality of religious displays on government property as in *Lynch*, *Allegheny*, and *Pinette*, although the endorsement test has been used more often in recent years. Therefore, the display of the Ten Commandments should be analyzed under either the more modern endorsement test or the older, *Lemon* test.

A. The Constitutionality of Invocations Opening Court Sessions

1. The Marsh, Historical Test Applied

Although some past cases have used the *Lemon* test, or no test, to strike down state-sponsored prayer, they have always involved an educational setting.[132] The Supreme Court has only addressed government-sponsored prayer, in a non-school setting, in one case – *Marsh*.[133] Thus, since *Alabama v. ACLU* concerns prayer in a government setting rather

---

[131] *Id.* at 791 ("This unique history leads us to accept the interpretation of the First Amendment draftsmen who saw no real threat to the Establishment Clause arising from a practice of prayer similar to that now challenged.").

[132] *See generally* Engel v. Vitale, 370 U.S. 421 (1962) (striking down school prayer); Abbington School Dist. v. Schempp 374 U.S. 203 (1963) (striking down school prayer); Wallace v. Jaffree, 472 U.S. 38 (1984) (striking down a moment of silence before class because it would promote prayer); Lee v. Weisman, 505 U.S. 577 (1992) (school could not provide for "nonsectarian" prayer to be given at ceremonies by a clergyman selected by the school).

[133] *See generally* Marsh v. Chambers, 463 U.S. 783 (1983).

than an educational setting, *Marsh* is better suited to decide the issue than either the *Lemon* or endorsement tests.

In upholding invocations before legislative sessions,[134] the Supreme Court in *Marsh* used its own invocation as one example which legitimized legislative prayer.[135] However, *Marsh* has implications beyond legislative prayer. Justice Kennedy opined on the possible application of the *Marsh* test:

> *Marsh* stands for the proposition, not that specific practices common in 1791 are an exception to the otherwise broad sweep of the Establishment Clause, but rather that the meaning of the Clause is to be determined by reference to historical practices and understandings. Whatever test [the court] choose[s] to apply must permit not only legitimate practices two centuries old but also any other practices with no greater potential for an establishment of religion.[136]

Two recent cases have used the *Marsh* test to uphold invocations before governmental bodies other than state legislatures. *Snyder v. Murray City Corp.*,[137] a Tenth Circuit case, applied *Marsh* and permitted invocations given by citizens before city council meetings.[138] After holding that invocations before council meetings were constitutional, the court in *Snyder* found the city's rejection of one citizen's prayer constitutional because the prayer was irreverent and sarcastic and it would have hindered the city's goal of creating a solemn atmosphere.[139] The situation in *Snyder* is somewhat analogous to that in *Alabama v ACLU*. Both cases examine the constitutionality of official governmental bodies opening sessions with an invocation given by volunteers. Furthermore, in both cases, citizens of the town or county are present.

The federal case *Coles v. Cleveland Board of Education*[140] also used the *Marsh* test to uphold invocations given before school board meetings.[141] The court in *Coles* noted that since the prayer occurred before a "public deliberative body" in an "adult atmosphere" *Marsh* was the

---

[134] *Marsh*, 463 U.S. at 793.

[135] *Id.* at 786.

[136] *Allegheny*, 492 U.S. at 670 (Kennedy, J., dissenting).

[137] 124 F.3d 1349 (10th Cir. 1997).

[138] *Id.* at 1354.

[139] *Id.* ("In contrast, [the plaintiff's] prayer itself disparages those who believe in the propriety of public prayer. Clearly, the content of [the plaintiff's] prayer is in conflict with the City's legitimate objectives in presenting such prayers. *Marsh* controls the issue before us, and we find no violation of the Establishment Clause.").

[140] 950 F. Supp. 1337 (N.D. Ohio 1996).

[141] *Id.* at 1347 ("Because the prayer at issue is the prayer of a public deliberative body and occurs in a fundamentally adult atmosphere, rather than in a student or school oriented atmosphere, the case fits most closely into the Supreme Court's *Marsh* analysis. As such, the practice of opening prayer does not violate the Establishment Clause of the Constitution.").

proper test.[142] Again, *Coles* presented a situation similar to that in *Alabama v. ACLU* where a clergyman offered an opening invocation - a practice firmly grounded in the early history of our nation,[143] and the history of Etowah County,[144] - which occurred in an adult atmosphere and on behalf of a public deliberative body. Thus, under the *Marsh* test, Judge Moore's practice of inviting clergy to open court with prayer is constitutional.

2. The Endorsement Test Applied

Although *Marsh* is the most analogous case because it addresses government invocations, recent trends indicate the Supreme Court's preference for the endorsement test.[145] The endorsement test focuses primarily on the "purpose" and "effect" prongs of the *Lemon* test which determine if the government action intends to establish or has the effect of establishing religion.[146] Using the endorsement test, the court looks at the effect of the government action by asking whether a reasonable observer would perceive the government as endorsing religion.[147] The Supreme Court has explained that a reasonable observer is "one who is aware of the context and history" of the action.[148] A judge opening court with prayer may not necessarily intend to endorse religion, but may merely want to encourage respect for long-standing traditions and create a solemn atmosphere. Also, in *Alabama v. ACLU*, a reasonable observer would be aware of the long-standing historical traditions of opening national courts[149] and the Etowah County Circuit Court[150] with prayer and would thereby realize the ceremonial nature of such an action. Under the endorsement test, the practice would, therefore, probably be within constitutional constraints.

---

[142] *Id.*

[143] *See supra* notes 79-88 (showing the history of courtroom prayer).

[144] *See supra* notes 90-92 and accompanying text discussing Etowah County's tradition of courtroom prayer.

[145] *See generally*, Capital Square Review and Advisory Bd. v. Pinette, 515 U.S. 753 (1995), *and* Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995) (Both cases mention only the endorsement test). *But see* Agostini v. Felton, 521 U.S. 203 (1997) (applying the *Lemon* test to analyze a state program supplying religious schools with free remedial instruction).

[146] Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring).

[147] *Pinette*, 515 U.S. at 777 (O'Connor, J., concurring) ("When the reasonable observer would view a government practice as endorsing religion, I believe it is our duty to hold the practice invalid.").

[148] *Id.* at 780 (O'Connor, J., concurring).

[149] *See supra* notes 79-88 (showing national history of opening courts with prayer).

[150] *See supra* notes 90-92 and accompanying text discussing Etowah County's tradition of courtroom prayer.

3. The Lemon Test Applied

The state practice of opening court with prayer would also satisfy the three parts of the *Lemon* test. The case of *Marsa v. Wernik*[151] is one example of an application of this test to invocations before a public deliberative body such as a city council meeting or a court. In *Marsa*, the New Jersey Supreme Court applied the *Lemon* test to determine the constitutionality of prayers given to open city council meetings.[152] The New Jersey Supreme Court decided *Marsa* before the United States Supreme Court decided *Marsh*, thus the court in *Marsa* did not address the *Marsh*, historical-precedent test to decide the constitutionality of opening city council meetings with prayer. Addressing the first part of the *Lemon* test, the court found a secular purpose of solemnifying the atmosphere of the meetings and held that a religious purpose would be acceptable for the invocations as long as that religious purpose did not override or dominate the secular purpose of the invocations.[153] The court in *Marsa* then applied the second prong of the *Lemon* test by examining the context and history of the activity to determine its primary effect.[154] The court found the primary effect of the prayers to neither advance nor inhibit religion due to the local history of invocations, the denial of any specific religious purpose, the non-compulsory nature of the meetings, and the non-impressionable nature of the audience.[155] The *Marsa* court did not see a need address the third part of the *Lemon* test - entanglement - because doing so would be redundant.[156] The court reasoned that

---

[151] 430 A.2d 888 (N.J. 1981).

[152] *Id.* at 891.

[153] The court stated:

> In sum, even though some of the invocations may, when used in a public meeting, inject a religious motif that would otherwise be absent, that religious dimension is not predominant and does not in our view denigrate or dispel the presence of a secular goal. The first part of the tripartite standard tolerates some religious purpose, as long as there is also a bona fide and demonstrable secular purpose. That is present in this case. An objective of the opening exercises is to create at municipal council meetings an atmosphere conducive to . . . conscientious deliberations . . . .

Id. at 896.

[154] The court further stated:

> [W]e conclude that the primary effect of the opening exercises of the council meetings of the [county] is not to promote or inhibit religion. . . . The exercise in its contextual setting is not suggestive of religion or religious ritual; it is conducted as part of a legislative session before a local legislative body. . . . Here, the exercises reflect an established practice . . . not unlike many long-standing traditions including legislative invocations . . . .

Id. at 898-99.

[155] *Id.* at 899.

[156] *Marsa*, 430 A.2d at 894.

when the government conducts religious activities and the primary purpose and effect of those activities is religious, then the government has already excessively entangled itself with religion, thus obviating the need to address the entanglement prong.[157] The court then concluded that because the invocation had a secular purpose and because the invocation did not have an effect of advancing religion, the city council could not have excessively entangled itself with religion.[158] Since the court in *Marsa* found all three parts of the *Lemon* test satisfied, it held that invocations before city council meetings did not violate the Establishment Clause.[159]

Another case also demonstrates the proper application of the *Lemon* test to invocations given by a government body. In *Bogen v. Doty*,[160] the Eighth Circuit also addressed the issue of whether invocations given voluntarily by a non-paid clergyman before county board meetings met the *Lemon* test requirements.[161] First, the court found the invocations

---

[157] The court stated:

> In this context, where the conduct itself is undertaken directly by governmental officials or personnel, the third element of the tripartite test excessive government entanglement is effectively embraced by the other standards of the test. In such a situation, if direct governmental action constitutes a "religious" practice under the initial components of the three-prong test, namely, the absence of a secular purpose or a primary or principal effect inhibiting or advancing religion, then, by definition, government itself can be said to be actually and directly engaged . . . .

Id.

[158] The court stated:

> In sum, most of the considerations relevant in ascertaining the primary effect of a particular governmental practice under the Establishment Clause collectively suggest in this case that the effect of the opening exercise or procedure followed in the Borough of Metuchen is not predominantly or primarily one that serves to encourage or inhibit religion. In a constitutional sense, its impact upon religion as such may even be regarded as de minimis and thus, in terms of First Amendment strictures, unobjectable . . . Several factors, to summarize, merge and coalesce in this case to permit the challenged practice to survive the First Amendment attack made upon it. These involve the secular purpose of the practice, the neutral content of most of the invocations, the lack of a denominational tone or sectarian emphasis, and the absence of a religious or quasi-religious setting or the involvement of clergy. Additionally, the lack of a formal official authorization of the contents of the practice, the nonreligious context of its use as part of a legislative meeting and its relatively incidental role in the public meeting, as well as the nonmandatory participation of adults, as opposed to children, and its grounding in a longstanding tradition, all contribute to the conclusion that the First Amendment has not been offended.

Id. at 899.

[159] *Id.* at 900.

[160] 598 F.2d 1110 (8th Cir. 1979).

[161] *Id.* at 1111.

had a secular purpose even with a clergyman giving the invocation.[162] Secondly, the court held that the primary effect of all invocations among people of differing religious views is to establish a solemn atmosphere, regardless of whether an individual perceives a religious motive.[163] Thirdly, the court examined the magnitude of political divisiveness of the invocations to determine whether there was excessive government entanglement with religion.[164] The court found the political divisiveness of the action minimal since no public funds were expended on the invocations, thus holding that the clergy-led invocations did not violate the entanglement prong.[165]

The previous two cases, *Marsa* and *Bogen*, illustrate how the practice of court invocations in *Alabama* satisfy the *Lemon* test. First, prayer has a secular purpose of solemnifying the occasion and creating a serious atmosphere.[166] The government action does not require the purpose to be purely secular; rather, a secular purpose need only be present and legitimate.[167] Second, the kind of prayers offered in Judge Moore's courtroom neither advanced nor inhibited religion because of their nonproselytizing nature.[168] Opening court sessions with prayer does not advance religion but merely accommodates the religious nature of the jurors who wish to remain during the prayer.[169] Furthermore, neutral gov-

---

[162] *Id.* at 1113 ("The challenged invocation practice reflects a clearly secular purpose. It is directed toward establishing a solemn atmosphere and serious tone for the board meetings. There is certainly nothing sinister in that purpose. Nor can we say that a prayer will not advance that goal.").

[163] The court stated:

> It is no doubt true that some who hear the prayers will treat those moments as ones for religious reflection and thought. However, we are satisfied that a primary effect of this activity will simply be the accomplishment of the board's purpose of establishing order and a solemn tone for the meeting. Without meaning to appear cynical, we suggest that establishing solemnity is the primary effect of all invocations at gatherings of persons with differing views on religion.

Id. at 1114.

[164] *Id.*

[165] *Id.* ("One aspect of entanglement is the divisive political potential of the program . . . [h]owever, we do not see this divisive potential as being of the same caliber as the annual appropriation of public funds anticipated but forbidden in *Lemon v. Kurtzman*.").

[166] *Marsa*, 430 A.2d at 898; *Bogen*, 598 F.2d at 1113. *See supra* notes 151 and 160.

[167] *Lynch*, 465 U.S. at 680. *See also Constangy*, 947 F.2d at 1150 (quoting Wallace v. Jaffree, 472 U.S. 38, 42 (1985)).

[168] *Marsa*, 430 A.2d at 898-99; *Bogen* 598 F.2d at 1114. *See supra* notes 152 and 161. *See also Marsh*, 463 U.S. at 792 (finding that the founders did not consider opening prayers as a proselytizing activity).

[169] *Marsh*, 463 U.S. at 792 (stating that legislative prayer is "simply a tolerable acknowledgement of beliefs widely held among the people of this country," then *citing* Zorach

ernment policies that benefit religion cannot be said to "advance religion" under the second part of the *Lemon* test.[170] Also, long-standing government traditions which could be seen as benefiting religion, such as Congressional prayers, a prayer room in the Capitol, and national religious holidays have been deemed constitutional.[171] Finally, there is no entanglement between religion and the state. In *Alabama v. ACLU*, the court neither hired a chaplain nor told him what to say.[172] Thus, under *Lemon* test judge can constitutionally invite a clergyman to voluntarily offer an invocation in his courtroom.

B. The Constitutionality of the Ten Commandments display

The proper test for judging the display of the Ten Commandments in Judge Moore's courtroom would be either the endorsement test or the *Lemon* test. In *Stone v. Graham*,[173] the Supreme Court previously analyzed the display of the Ten Commandments using the *Lemon* test.[174] Furthermore, *Lemon* has not been explicitly abandoned by the Supreme Court. Justice Scalia, in *Lamb's Chapel v. Center Moriches Free Union School District*,[175] emphasized that the *Lemon* test, although used less frequently, is still good law.[176] Even though *Lemon* is good law, the endorsement test should probably be applied before resorting to the *Lemon* test. Recent Supreme Court cases dealing with the Establishment Clause such as *Lynch v. Donnelly*,[177] *Allegheny County v. American Civil Liberties Union, Greater Pittsburgh Chapter*,[178] *Capitol Square Review and Advisory Bd. v. Pinette*,[179] and *Rosenberger v. Rector and Visitors of*

---

v. Clauson, 343 U.S. 306, 313 (1952) "[w]e are a religious people whose institutions presuppose a Supreme Being.").

[170] *Pinette*, 515 U.S. at 764 ("[w]e have consistently held that it is no violation for government to enact neutral policies that happen to benefit religion.").

[171] *Lynch*, 465 U.S. at 675 (regarding the religious nature of Thanksgiving and Christmas). *Id.* at 674 (Congressional prayers by a paid chaplain before each session of the U.S. Congress and Senate are constitutional). *Id.* at 677 (Chapels in the Capitol for religious worship and meditation are constitutional).

[172] First order, Alabama v. ACLU, No. CV-95-919-PR (Montgomery County Cir. Ct. Ala. Nov. 22, 1996); Brief of the State of Alabama at 7,8, Alabama v. ACLU, (Ala. 1997) (Nos. 1960927, 1960572, 1960839).

[173] 449 U.S. 39 (1980).

[174] *Id.* at 40.

[175] 508 U.S. 384 (1993).

[176] *Id.* at 398-99 (Scalia, J., concurring) (likening the *Lemon* test to a "ghoul" in a "late-night horror movie" which refuses to be killed and is useful to keep around).

[177] 465 U.S. 668 (1984).

[178] 492 U.S. 573 (1989).

[179] 515 U.S. 753 (1995).

University of Virginia[180] used the endorsement test instead of the *Lemon* test and most of these cases involved religious displays.[181]

1. The Endorsement Test Applied

As stated previously, the endorsement test simply asks whether a reasonable observer, aware of the history and context of the action, would perceive an endorsement of religion in the government's actions.[182] Examining the history and context of the Ten Commandments display, a reasonable observer aware of the history would not perceive an endorsement of religion. Although the history of the Ten Commandments is inherently religious, it is also one of the oldest legal documents known to mankind. Experts have testified that the Ten Commandments "established ethical or moral principles [which] were expressions of universal standards of behavior common to all western societies . . . . It was agreed that these moral standards . . . have played a large role in the development of the common law . . . ."[183] Furthermore, the context of the Ten Commandments display would discourage any perceived endorsement of religion. The Ten Commandments are a legal code. A court of law, by its very nature, is one of the most appropriate places to display a legal code. The Supreme Court itself has the Ten Commandments prominently displayed in its courtroom.[184] Other cases have held that the government-sponsored display of the Ten Commandments is constitutional.[185] Moreover, the display is not alone in Judge Moore's courtroom, but shares the walls with many other historical items such as the Declaration of Independence, the Mayflower Compact, a portrait of Abraham Lincoln, a por-

---

[180] 515 U.S. 819 (1995).

[181] *See id.* at 841 (allowing a religious newspaper to be funded by the University of Virginia because "neutrality [was] apparent in the State's overall scheme . . . [because] . . . [t]he program respects the critical difference 'between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.'"). *Pinette*, 515 U.S. at 763-64 (using the endorsement test in addressing a State's refusal to allow a cross to be displayed on public property). *Id.* at 772 (O'Connor, J., concurring, joined by Justice Souter and Justice Breyer) (using the endorsement test). *See generally, Lynch*, 465 U.S. at 687 (O'Connor, J., concurring) (applying the endorsement test for a crèche display) *and Allegheny*, 492 U.S. 573 (applying the endorsement test for a crèche display).

[182] *Pinette*, 515 U.S. at 779-80.

[183] State v. Freedom From Religion Found., 898 P.2d 1013, 1024 (Colo. 1995), *cert. denied*, 516 U.S. 1111 (1996).

[184] *Lynch*, 465 U.S. at 677.

[185] *See generally* State v. Freedom From Religion Found., 898 P.2d 1013 (Colo. 1995), *cert. Denied*, 516 U.S. 1111 (1996); Anderson v. Salt Lake City Corp., 475 F.2d 29 (10th Cir. 1973).

trait of George Washington, and the State Seal of Alabama.[186] Thus, the display of the Ten Commandments could not be perceived as an endorsement of religion by the reasonable observer who is aware of the history and context of the display.

2. The Lemon Test Applied

Although, not used recently by the Supreme Court, the *Lemon* test has not been *explicitly* abandoned for Establishment Clause cases.[187] However, even under the three-part *Lemon* test, Judge Moore's display of the Ten Commandments is constitutional.[188] As stated previously, the first prong of the *Lemon* test requires some secular purpose. The test does not require an exclusive secular purpose.[189] The historical and legal nature of the Ten Commandments suffice to establish a secular purpose for display. Secondly, the Supreme Court has stated that a passive display containing religious themes neither advances nor inhibits religion significantly.[190] The Court has also stated that the effect of a religious display can be minimized if the display is supplemented with other secular displays which neutralize the prominence of the religious display.[191] The display of the Ten Commandments is clearly supplemented by other historical items on the court walls.[192] Third, the display does not entangle the government with religion. Divisive political potential is a key aspect of entanglement.[193] If there is no public funding of the display,

---

[186] Brief of the State of Alabama at 14, Alabama v. ACLU (Ala. 1997) (Nos. 1960927, 1960572, 1960839).

[187] Granzeier v. Middleton, 955 F. Supp. 741, 746 (E.D. Ky. 1997) (noting that a majority of Justices seem to have abandoned the *Lemon* test *implicitly* because of non-use in recent cases); *See also, Lynch*, 465 U.S. at 679 ("[w]e have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area.").

[188] *Granzeier*, 955 F. Supp. at 748 (although it seems probable to the district court that the Supreme Court has adopted the endorsement test, the district court also used the *Lemon* test.).

[189] *Lynch*, 465 U.S. at 680.

[190] *See id.* at 683 (a crèche displayed on public property neither advanced nor inhibited religion significantly because other displays neutralized the effect). *But cf. Allegheny*, 492 U.S. at 599-600 (finding that the prominent location of the crèche created endorsement).

[191] Allegheny County v. ACLU, 492 U.S. 573, 598 (1989) (noting that the crèche display in *Lynch* was constitutional because it was surrounded by other, secular Christmas displays, unlike the creche display in *Allegheny* which was placed in a place of prominence and too far away from the other neutralizing displays).

[192] *See supra* note 21 and accompanying text.

[193] *Bogen* 598 F.2d at 114 ("One aspect of entanglement is the divisive political potential.").

divisive political potential is minimal.[194] Judge Moore's display is not maintained by the state, nor is it funded or required by the State.[195] Thus, under the *Lemon* test, the courtroom display of Judge Moore's personal copy of the Ten Commandments is constitutional.

V. CONCLUSION

In *Alabama v. ACLU* the Supreme Court of Alabama needed to correct the flawed decision of the Montgomery County Circuit Court by ruling on the merits. Instead, the majority refused to even touch the Establishment Clause issue because of procedural difficulties which could have been overcome according to one Justice. By avoiding ruling on Judge Moore's practices, the Supreme Court of Alabama has ensured that the battle between the State of Alabama and the ACLU will continue until one side gives up, the Alabama Supreme Court rules on the merits, or the United States Supreme Court eventually grants certiorari to hear this case or a similar one. The Alabama Supreme Court can hardly be blamed, however, for denying standing and refusing to enter the muddied waters of the United States Supreme Court's sea of Establishment Clause jurisprudence. This confusion is readily apparent when one considers the vagueness of the "reasonable observer" in the endorsement test or the "primary effect" and "entanglement" requirements of the *Lemon* test. Courts using these tests have no hard and fast rules to follow. Thus, the Alabama Supreme Court's trepidation over entering this area of law are understandable, but in failing to decide on the merits, the court missed an opportunity to give guidance to its lower courts. The lack of certainty in Alabama over the exact status of Judge Moore's prayers and display will certainly cause many questions for the legislature, other judges in the state, and citizens selected for jury duty. The Alabama Supreme Court could have supplied some certainty if it had been able to apply the *Marsh* test and the endorsement test upholding the invocations and the display of the Ten Commandments. Indeed, if this case reaches the Alabama Supreme Court again, the court should rule on the merits, applying the proper tests and protecting Judge Moore and other judges in Alabama by dispensing with the fallacy that every religious acknowledgement on the part of government amounts to an establishment of religion as contemplated by the founding fathers.

Timothy R. Fox

---

[194] *See id.* (noting that a lack of public funding minimizes the divisive political potential).

[195] *See* First order, Alabama v. ACLU, No. CV-95-919-PR (finding that Judge Moore carved the display himself).