MOORE ESTABLISHMENT OR MERE ACKNOWLEDGMENT: A CRITIQUE OF THE *MARSH* EXCEPTION AS APPLIED IN *GLASSROTH V. MOORE*, 335 F.3D 1282 (11TH CIR. 2003)

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I. INTRODUCTION

Glassroth v. Moore[1] from the Eleventh Circuit Court of Appeals has created an uproar but has done little to clarify the perpetually uncertain area of Establishment Clause jurisprudence. In *Moore*, the court determined that a Ten Commandments monument located in the Alabama State Judicial Building failed the three-prong *Lemon v. Kurtzman* test[2] and was not deeply embedded in American history and tradition as announced in the *Marsh* exception.[3] The district court concluded that the monument violated the Establishment Clause and ordered Alabama Chief Justice Roy Moore to remove it within thirty days of the verdict.[4] The Eleventh Circuit Court of Appeals affirmed, reissuing a stern order to Chief Justice Moore to remove the monument.[5]

Aside from the societal attention garnered by the decision, *Moore* has

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[1] 335 F.3d 1282 (11th Cir. 2003).

[2] 403 U.S. 602 (1971). The *Lemon* test requires: 1) the challenged practice must have a secular purpose ("purpose" prong); 2) its principal or primary effect must be one that neither advances nor inhibits religion ("effect" prong); and 3) the challenged practice must not foster an excessive government entanglement with religion ("fostering" prong). This test is endorsed and used by Justices favoring a "strict separation" approach to the Establishment Clause. Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 986 (Aspen L. & Bus. 1997). This approach advocates that government and religion should be separated to the greatest extent possible. *Id*. at 977.

[3] *Moore*, 335 F.3d at 1298. The *Marsh* exception allows a challenged practice to pass constitutional muster if it is "deeply embedded in the history and tradition of this country" even if the practice may offend one or more of the *Lemon* prongs. Chemerinsky, *supra* n. 2, at 1004. Although it is commonly referred to as an "exception" to the *Lemon* test, *Marsh* indicates that a court need not apply *Lemon* if there is strong historical support for a government practice of supporting religion. *Id*. *Marsh* allows courts to avoid religious establishment issues and other Establishment Clause tests by focusing exclusively on history. *Id* at 1005. Thus, this Note will refer to *Marsh* alternately as an "exception" to *Lemon* and as a general "analysis." *Marsh* is likely favored by Justices favoring an "accommodation approach" in which the government violates the Establishment Clause only if it establishes a church or coerces religious participation. *Id*. at 981.

[4] *Glassroth v. Moore*, 229 F. Supp. 2d 1290, 1319 (M.D. Ala. 2002).

[5] *Moore*, 335 F.3d at 1303.

also yielded significant legal, political, and historical ramifications. The Supreme Court has yet to announce a cohesive and definitive standard regarding Establishment Clause issues; thus, lower courts have predictably differed regarding the proper standards to adopt and apply to governmental religious displays and activities.[6] Courts have adjudicated the Ten Commandments issue previously with wavering results,[7] waffling between various interpretations of the oft-disputed but oft-applied *Lemon* test[8] while seemingly unable to reconcile the array of inconsistencies. Thus, courts purporting to apply the same standards have inevitably produced divergent results.[9] In *Moore*, the court deviated from established legal and historical rationale in concluding that the Ten Commandments display was not deeply embedded in American society, and thus, not within the *Marsh* exception to the *Lemon* test.[10]

The Religion Clauses of the First Amendment[11] are rooted in the American ideals of free expression of religion. The Framers of the Constitution undoubtedly realized that religious liberty was a centerpiece to the new Republic, effectively severing ties with the religiously oppressive monarchical reigns of the Old World. Currently, however, there is no applicable bright-line rule regarding religious displays and symbols and the

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[6] The *Lemon* test is the most frequently used approach to Establishment Clause issues. Chemerinsky, *supra* n. 2, at 986. However, there have been many cases where *Lemon* was not applied. *See e.g. Bd. of Educ. v. Grumet***,** 512 U.S. 687 (1994) (finding favoritism for one religion by creating a school district contiguous with a religious community violates the Establishment Clause); *Lynch v. Donnelly*, 465 U.S. 668 (1984) (allowing a nativity scene on government property); *Marsh v. Chambers*, 463 U.S. 783 (1983) (allowing government payment of a legislative chaplain because of the history of the practice).

[7] *See e.g. Freethought Socy. of Greater Phila. v. Chester County*, 334 F.3d 247 (3rd Cir. 2003) (holding a Ten Commandments plaque located on a historically significant courthouse did not violate the Establishment Clause because no government entity had done anything to highlight its existence in over eighty years); *Adland v. Russ*, 307 F.3d 471 (6th Cir. 2002) (ruling that returning a large, granite Ten Commandments monument from storage to a prominent position on the capitol grounds would violate the Establishment Clause); *but see Anderson v. Salt Lake City Corp*., 475 F.2d 29, 34 (10th Cir. 1973) (holding that a Ten Commandments monument located near a courthouse entrance and maintained by the government did not violate the Establishment Clause because it was nothing more than a depiction of a historically important monument with both secular and sectarian effects); *ACLU of Ky. v. Mercer County*, 240 F. Supp. 2d 623 (E.D. Ky. 2003) (holding the inclusion of the Ten Commandments in a courthouse display did not violate the Establishment Clause because the display had the legitimate purpose of acknowledging the historical influence of the Ten Commandments on the development of American laws).

[8] Several Justices have criticized the *Lemon* test. Chemerinsky, *supra* n. 2, at 986. Justice Scalia has expressly called for *Lemon* to be overruled on multiple occasions. *See e.g. Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 399 (1993) (Scalia, J., concurring); *Lee v. Weisman*, 505 U.S. 577, 644 (1992) (Scalia, J., dissenting).

[9] *See supra* n. 7.

[10] *Moore*, 335 F.3d at 1298.

[11] The First Amendment begins with the words: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I.

issue intensely revolves around the distinction between the mere acknowledgment and affirmative establishment of religion. General evidence shows that the Framers did not intend the Establishment Clause to preclude every public display of religion but only to prevent a national establishment of a particular religion.[12] The *Moore* court neglected to conduct a complete analysis regarding the history of religious displays and Establishment Clause jurisprudence.[13] In doing so, the court erroneously concluded that certain acknowledgments of historically significant religious symbols, such as the Ten Commandments, are not deeply embedded in American traditions, and thus, not within the *Marsh* exception.

This Note will posit that the *Moore* court ultimately reached the correct legal conclusion under the *Lemon* test,[14] but misapplied the *Marsh* exception by ignoring relevant precedent and historical evidence showing that the symbolism of the Ten Commandments is deeply embedded in American history and traditions. Section II of this Note narrates the factual background of the *Moore* case, details the positions held by the respective parties, and outlines the court's holding.[15] Section III of this Note scrutinizes the court's approach to the constitutional issue, demonstrating how the court misapplied the *Marsh* exception.[16] This Note concludes that the *Moore* decision sets a precedent that could alter religious freedoms guaranteed by the Framers of the First Amendment by misinterpreting the original effect of both the Establishment Clause and the *Marsh* exception.[17]

II. BACKGROUND

The facts of *Moore* are at once familiar and unique. On one hand, this was not the first time a Ten Commandments display had been at issue before an American court.[18] In fact, this was not the first time a challenge

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[12] Thomas Jefferson declared that only the legislature should make no law regarding religion, and James Madison originally proposed only to forbid the establishment of a national religion. *Zwerling v. Reagan*, 576 F. Supp. 1373, 1376 (C.D. Cal. 1983).

[13] The *Moore* court cited only one source in its entire *Marsh* analysis, quoting a brief phrase from *County of Allegheny v. ACLU*, 492 U.S. 573, 603-604 (1989). The quote warned that a "broad reading of *Marsh* would gut the core of the Establishment Clause" and that "*Marsh* plainly does not stand for the sweeping proposition . . . that all accepted practices 200 years old and their equivalents are constitutional today." *Moore*, 335 F.3d at 1298 (internal citations omitted).

[14] *See supra* n. 2 (explaining the *Lemon* test in full detail). The physical appearance of a challenged practice is relevant under *Lemon's* "effect" prong. *Id*.

[15] *See infra* nn. 18-71 and accompanying text.

[16] *See infra* nn. 72-167 and accompanying text.

[17] *See infra* nn. 168-173 and accompanying text.

[18] *See e.g. Anderson*, 475 F.2d at 34 (holding that a Ten Commandments monument located near a

had been instituted against such a display in a judicial building.[19] However, *Moore* is unique because the display was funded, supported, and instituted primarily by a state Chief Justice rather than a city council or a group of county commissioners.[20] Furthermore, Chief Justice Moore made clear his intentions of acknowledging the foundational significance of the Ten Commandments and the sovereignty of God over the American justice system.[21] He presented an abundance of evidence illustrating that such acknowledgments are historically embedded in American society and do not violate the First Amendment.[22] This section serves as an introduction into the factual background of this case, the respective positions of the parties, and an explanation of the *Moore* decision.

A. The Facts

Roy Moore was elected to his position as Chief Justice of Alabama in November 2000.[23] He fulfilled his campaign promises by installing a monument containing excerpts from the Ten Commandments in the rotunda of the Alabama State Judicial Building.[24] The granite monument weighed 5280 pounds, was approximately three feet wide by three feet deep by four feet tall, and was located across from the main entrance of the building.[25] The top of the monument was carved as two tablets with rounded tops.[26] The tablets were engraved with the Ten Commandments as excerpted from the Book of Exodus in the King James Bible.[27] Each side of the monument contained quotations from various historical documents and authorities relating nature's laws to God's laws, including excerpts from the Declaration of Independence, the national motto "In God We Trust," and

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courthouse entrance and maintained by the government did not violate the Establishment Clause because it was nothing more than a depiction of a historically important monument with both secular and sectarian effects).

[19] *See e.g. Mercer County*, 240 F. Supp. 2d at 623 (holding the inclusion of the Ten Commandments in a courthouse display did not violate the Establishment Clause because the display had the legitimate purpose of acknowledging the historical influence of the Ten Commandments on the development of American laws).

[20] *Moore*, 335 F.3d at 1285. *See e.g. Anderson*, 475 F.2d at 30 (indicating that a Ten Commandments display was funded by the city council and maintained with city and county funds).

[21] *Id*. at 1286.

[22] *See* Appellant's Br., *Glassroth v. Moore*, 335 F.3d 1282 (11th Cir. 2003) (No. 02-16708-DD and No. 02-16949-DD) (listing several sources and providing evidence in support of Chief Justice Moore's positions).

[23] *Moore*, 335 F.3d at 1284.

[24] *Id*. at 1285.

[25] *Id*.

[26] *Id*.

[27] *Id*.

quotations from James Madison and William Blackstone.[28]

Chief Justice Moore subsequently added two smaller plaques to the rotunda regarding the moral foundation of the law.[29] One brass plaque displayed quotations from Martin Luther King, Jr. and Frederick Douglass while the other plaque displayed the text of the Bill of Rights.[30] These displays were both located seventy-five feet from the Ten Commandments monument.[31] As administrative head of the judicial building, Chief Justice Moore had final authority over decorations to be placed in the rotunda.[32] The Chief Justice did not use any government funds in installing or creating the monument.[33]

The three plaintiffs in *Moore* were practicing attorneys in the Alabama courts.[34] The plaintiffs claimed that because of the monument's location in the rotunda of the judicial building, they necessarily had to come in contact with it.[35] The crux of their argument was that the monument offended each of them and made them feel like "outsiders."[36] Each of them has entered, and will subsequently have to enter, the building as a result of their professional obligations.[37] Furthermore, the plaintiffs claimed that they visited the judicial building less often and enjoyed the rotunda less because of the presence of the monument.[38]

The three plaintiffs sued Chief Justice Moore pursuant to 42 U.S.C. §

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[28] *Moore*, 229 F. Supp. 2d at 1295.

[29] *Moore*, 335 F.3d at 1287-88.

[30] *Id*. The Martin Luther King, Jr. quote read:

> A just law is a man-made code that squares with the moral law or the law of God. An unjust law is a code that is out of harmony with the moral law. To put it in terms of St. Thomas Aquinas: An unjust law is a human law that is not rooted in eternal law and natural law.

Moore, 229 F. Supp. 2d at 1324. The Frederick Douglass quote read:

> The first work of slavery is to mar and deface those characteristics of its victims which distinguish men from things, and persons from property. Its first aim is to destroy all sense of high moral and religious responsibility. It reduces man to a mere machine. It cuts him off from his Maker, it hides him from the laws of God.

Id. at 1324-1325.

[31] *Moore*, 335 F.3d at 1288. The Chief Justice declined to include a speech by Martin Luther King, Jr. or a symbol of atheism alongside the monument because it would "diminish the very purpose of" the monument, which was to acknowledge the sovereignty of God over the moral foundations of our laws and lawmakers. *Id*.

[32] *Id*. at 1285.

[33] *Id*.

[34] *Id*.

[35] *Id*.

[36] *Id*. at 1288.

[37] *Id*.

[38] *Id*.

1983[39] claiming that his actions violated the Establishment Clause of the First Amendment.[40] They sought a declaratory judgment that his actions were unconstitutional and an injunction to force him to remove the monument.[41]

Chief Justice Moore made several arguments to support his contention that the Ten Commandments are historically significant as the moral and legal foundation for many American laws and principles. First, he argued that the display was constitutional because judges throughout our nation's history have acknowledged the moral foundation of law, and indeed, have depended upon it in reaching their decisions.[42] Second, Chief Justice Moore posited that the monument's acknowledgment of God was part of our nation's history like the legislative prayer upheld in *Marsh*.[43] Third, the Chief Justice produced evidence of numerous Ten Commandments displays in government buildings both in Washington D.C. and across the nation.[44]

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[39] This federal statute reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (West 2003).

[40] *Moore*, 335 F.3d at 1288.

[41] *Id*.

[42] The Brief for Appellant Moore listed several cases from 1819-2001 that document the chronological pronouncements of the moral foundation of law, including the Supreme Court in *United States v. International Minerals & Chemical Corp*., 402 U.S. 558, 565 (1971) (Stewart, Harlan & Brennan, JJ., dissenting). Appellant's Br. at 6-8, *Moore*, 335 F.3d 1282.

[43] Chief Justice Moore pointed to other similar acknowledgments of God to support his position. These acknowledgments included President Washington's congressionally-solicited Thanksgiving Proclamation, the reenactment of the Northwest Ordinance, the references in forty-nine constitutions to God or religion, court decisions calling for the veneration of religion, the upholding of blue laws, and the repeated upholding of "In God We Trust" on American currency. *Id.* 18-19.

[44] Chief Justice Moore's evidence included religious inscriptions in Congress, at the Lincoln Memorial, and at the Tomb of the Unknown Soldier. Also noted were the prayer room at the Capitol, statues of Moses and Paul the Apostle in the Library of Congress, and a mural in the Pennsylvania Supreme Court courtroom with Moses carving the Ten Commandments and a full version of the text of the Ten Commandments. *Id*. at 21.

B. The Lower Court Opinion

After a seven-day bench trial, the Middle District Court of Alabama ultimately held that Chief Justice Moore's actions violated the Establishment Clause because his purpose in displaying the monument was non-secular and the monument's primary effect was to advance religion.[45] In determining whether the Chief Justice acted for a non-secular purpose under *Lemon's* "purpose" prong, the court considered a speech given by the Chief Justice at the monument's unveiling, the Chief Justice's trial testimony and exhibits, and the physical context of the monument itself.[46] In each instance, the court determined that Chief Justice Moore acted for the non-secular purpose of acknowledging the sovereignty of God over the nation's laws and lawmakers.[47] The analysis also emphasized the "obtrusive[,] year-round" nature of the monument in determining that the Chief Justice's actions were an "obvious effort to proselytize on behalf of a particular religion."[48] Moreover, the monument violated the "effect" prong of the *Lemon* test because a reasonable observer would find nothing on the monument to de-emphasize its religious nature, and thus, would feel as though the State of Alabama was advancing or endorsing Christianity.[49] Therefore, the monument violated the first two prongs of the *Lemon* test and in turn violated the Establishment Clause.[50]

Next, the court analyzed the monument under the *Marsh* exception to the *Lemon* test and concluded that the monument was not within the exception.[51] The Supreme Court in *Marsh v. Chambers* upheld the constitutionality of the Nebraska Legislature's practice of employing a chaplain to lead it in prayer at the beginning of each session even though this government activity would violate *Lemon*.[52] There was no violation of the Establishment Clause because the prayer was "deeply embedded in the history and tradition of [the United States]."[53] To invoke Divine Guidance on a public body entrusted with making laws was not an establishment of

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[45] *Moore*, 335 F.3d at 1288. These factors are relevant under the first two prongs of the *Lemon* test. *See supra* n. 2.

[46] *Moore*, 229 F. Supp. 2d at 1297. The Chief Justice had clarified his intentions of acknowledging the sovereignty of God over the moral foundation of our laws and lawmakers. *Id*.

[47] *Id*.

[48] *Id*. at 1307.

[49] *Id*. at 1297.

[50] The court did not reach a direct conclusion regarding the "fostering" prong of the *Lemon* test. *Id*.

[51] *Id*. at 1308.

[52] *Marsh*, 463 U.S. at 792.

[53] *Id*. at 786.

religion or even a step towards such an establishment.[54] Recognizing that not all government displays of religion are a violation of the Establishment Clause, the Court explained that the practice of opening legislative sessions with prayer "is simply a tolerable acknowledgment of beliefs widely held among the people of [the United States.]"[55] The Court indicated that the practice of legislative prayer has coexisted with principles of disestablishment and religious freedom since colonial times.[56] Moreover, it was noted that the announcement "God save the United States and this Honorable Court" occurs at all sessions of the Supreme Court and in other courts across the country.[57] Therefore, *Marsh* emphasizes the Court's acknowledgment that the Framers often considered God to be sovereign over the laws and lawmakers of the nation. However, the district court in *Moore* ultimately determined that the Ten Commandments display was not deeply embedded in American traditions, and thus, not within the *Marsh* exception because there was no evidence that the Framers displayed or directly approved of exact monuments in early American courthouses.[58]

The court entered the judgment and gave Chief Justice Moore thirty days to remove the monument voluntarily.[59] An order was entered enjoining him for failing to remove the monument after he declined to comply with the thirty-day ultimatum.[60] The Chief Justice appealed, and the district court stayed its injunction pending appeal.[61]

C. The Holding of the Eleventh Circuit Court of Appeals

On appeal, the Eleventh Circuit Court of Appeals affirmed the district court's opinion that Chief Justice Moore's display was a violation of the Establishment Clause.[62] The Establishment Clause analysis again focused on the three-prong *Lemon* test.[63] First, the court relied heavily on the Chief Justice's own words to determine that he did not act for a non-secular purpose under the "purpose" prong of *Lemon*.[64] Second, the monument

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[54] *Id*. at 792.
[55] *Id*.
[56] *Id*. at 786.
[57] *Id*.
[58] *Moore*, 229 F. Supp. 2d at 1308.
[59] *Id*. at 1319.
[60] *Glassroth v. Moore*, 242 F. Supp. 2d 1067 (M.D. Ala. 2002).
[61] *Id*. at 1068.
[62] *Moore*, 335 F.3d at 1303.
[63] *Id*. at 1295.
[64] *Id*. at 1296. The Chief Justice made clear his intentions of acknowledging the sovereignty of God

violated the "effect" prong of the *Lemon* test because a reasonable observer would find nothing on the monument to de-emphasize its religious nature, and thus, would feel as though the State of Alabama was advancing or endorsing Christianity.[65] Therefore, the court affirmed the lower court by holding that the monument failed two of *Lemon's* three prongs, thus violating the Establishment Clause.[66]

Like the district court, the Eleventh Circuit then applied the *Marsh* exception to determine that Chief Justice Moore's display was not deeply embedded in American history and traditions.[67] In reviewing whether the Framers made similar acknowledgments of religious symbols, the court narrowly framed the issue around whether the Framers actually displayed the Ten Commandments at the early sessions of Congress.[68] The court decided that there was no unbroken history of displaying religious symbols in American judicial buildings.[69] In addition, the court emphasized the size and location of the monument over the historical relevance of the Ten Commandments in determining that the display was not within the *Marsh* exception.[70] Finally, the court issued a stern order to Chief Justice Moore to remove the monument because the "rule of law will prevail."[71]

III. ANALYSIS

This Note posits that the *Moore* court incorrectly concluded that a Ten Commandments display *per se* violates the Establishment Clause of the First Amendment. The court ultimately reached the correct result under *Lemon* because, under that test, the physical appearance of a display is a relevant factor.[72] However, the court improperly applied the *Marsh* exception because the symbolism of the Ten Commandments is deeply embedded in American history and tradition, and thus, displaying the Ten Commandments should not be unconstitutional.[73]

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over the laws and lawmakers of the nation. *Id*.

[65] *Id*. at 1297. This was despite the fact that the monument contained several secular, non-Biblical passages in addition to the text of the Ten Commandments. *See supra* nn. 24-33 and accompanying text(describing the display in full detail).

[66] The court did not reach a direct conclusion regarding the third "fostering" prong of the *Lemon* test. *Moore*, 335 F.3d at 1297.

[67] *Id*. at 1298.

[68] *Id*.

[69] *Id*.

[70] *Id.*

[71] *Id*. at 1303.

[72] The physical appearance of a challenged practice is relevant for the *Lemon* test but not the *Marsh* exception. *See supra* nn. 2-3.

[73] *Id*.

First, the court narrowly applied *Marsh* by failing to analyze or recognize the historical background and case precedent illustrating that the Ten Commandments are deeply embedded in American history and tradition. Second, rather than an examination into the physical structure of a Ten Commandments display, the court should have examined the historical and symbolic nature of the Ten Commandments to determine whether it is deeply embedded.[74] The court should have recognized that Ten Commandments displays mirror several similar acknowledgments of God by the Founding Fathers, the American court system, Congress, and nearly every American President, and is thus, deeply embedded in American history and tradition. Third, the court did not cite several recent cases that have upheld similar displays because of the historical significance of the Ten Commandments.[75] Although the court was correct that the physical structure of the monument violated the first two prongs of *Lemon*,[76] it was incorrect in holding that the Ten Commandments display was not within the *Marsh* exception because the symbolism of the Ten Commandments is deeply embedded in American history and tradition. Applying a broader, more thorough interpretation of *Marsh* will ensure that the integrity of the Establishment Clause and of our historical institutions will be constitutionally protected for future generations of Americans.

A. The Court Did Not Extensively Analyze either the Intent of the Framers or the Unambiguous and Unbroken History of Public Religious Displays Illustrating that some Religious Symbols are Deeply Embedded in American History and Tradition

The *Moore* court declined a probing analysis into the intent of the Framers as mandated by *Marsh*. In determining whether a symbol is deeply embedded in history, courts should actually assess the historical evidence and the underlying intent of the Establishment Clause.[77] The *Moore* court would have found that the Ten Commandments display was deeply embedded in American history and tradition had it properly analyzed the historical evidence as required by *Marsh*.[78]

Second, the *Moore* court mistakenly determined that there was no

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[74] *See supra* n. 3. The *Marsh* exception requires courts to determine whether a challenged practice is deeply embedded in the history and tradition of the United States. 463 U.S. 783. In *Moore*, the Court failed to cite any historical evidence in its entire *Marsh* analysis. 335 F.3d at 1298.

[75] *See supra* nn. 44-66 and accompanying text.

[76] The physical appearance of a display is relevant under the *Lemon* test. *See supra* n. 2.

[77] *Marsh*, 463 U.S. at 783.

[78] *Id*.

American tradition of publicly displaying religious symbols.[79] Every American institution, from the Supreme Court to the Office of the President to Congress, has publicly recognized the tradition of religion in American law and culture.[80] While these facts sometimes become muddled, the evidence is abundant and illustrative. This section will illustrate that Chief Justice Moore's Ten Commandments display was deeply embedded within the mainstream of American public traditions.

1. The court did not conduct a thorough analysis into the intent of the Framers as mandated by *Marsh* to determine whether the Ten Commandments display was deeply embedded in American history and tradition

> *On every question of construction [we should] carry ourselves back to the time when the Constitution was adopted; recollect the spirit manifested in the debates; and instead of trying [to find] what meaning may be squeezed out of the text, or invented against it, conform to the probable one, in which it was passed.*
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> –Thomas Jefferson[81]

In *Marsh*, the Supreme Court placed much weight on the fact that in the same week Members of the First Congress voted to appoint and pay a chaplain for each House, it also voted to approve the draft of the First Amendment for submission to the states.[82] Given these actions by the Framers, the Court determined that the Framers could not have intended the Establishment Clause to forbid what it had just declared acceptable.[83] Therefore, the intent of the Framers must be considered an intricate piece of a proper *Marsh* analysis.

The Founding Fathers believed that the Ten Commandments formed an important part of the moral foundation of law. For instance, James Madison, often considered the "Chief Architect of the Constitution,"[84] declared in 1778 that "[w]e have staked the future of all of our political institutions upon the capacity of mankind for self-government; upon the capacity . . . to govern ourselves, to control ourselves, to sustain ourselves

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[79] *Moore*, 335 F.3d at 1298.

[80] *See infra* nn. 102-128 and accompanying text.

[81] Dr. Norman Geisler & Frank Turek, *Legislating Morality* 95 (Bethany Press Intl. 1998).

[82] 463 U.S. at 790.

[83] *Id*.

[84] William J. Federer, ed. *America's God Country Encyclopedia of Quotations* 409 (AMERISEARCH, INC. 2000).

according to the Ten Commandments of God."[85] John Adams declared "[i]f 'Thou shalt not covet,' and 'Thou shalt not steal,' were not commandments of Heaven, they must be made inviolable precepts in every society, before it can be civilized or made free."[86] John Quincy Adams stated "[t]he law given from Sinai was a civil and municipal as well as a moral and religious code . . . laws essential to the existence of men in society and most of which have been enacted by every nation which ever professed any code of laws."[87] Many other Founding Fathers likewise documented their respect for the principles embodied in the Ten Commandments and how these principles were to be incorporated into the new government.[88]

Zwerling v. Reagan provides an effective illustration of a thorough historical analysis into the intent of the Framers and acknowledgments of religion.[89] Decided shortly after *Marsh*, *Zwerling* involved a First Amendment challenge to President Reagan's proclamation of 1983 as Year of the Bible.[90] The court examined the Framers' intent underlying the Establishment Clause, noting that Thomas Jefferson had declared that only the "*legislature should make no law* respecting an establishment of religion or prohibiting the free exercise thereof," and James Madison originally proposed only to forbid the establishment of a "national religion."[91] The probing analysis concluded that Madison and Jefferson were not concerned with the discussion or recognition of religion in general.[92] The court cited to *Marsh*[93] after determining that President Reagan's proclamation was a continuation of the "unimpeachable historical fact concerning the place of the Bible and Judeo-Christian philosophy [] in our national heritage."[94]

Much of this same reasoning could justifiably be applied to a Ten Commandments display. The *Moore* court did not fully analyze the

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[85] *Id*. at 411.

[86] David Barton, *Original Intent: The Courts, the Constitution, & Religion* 172 (Wallbuilder Press 1996). In a letter to Thomas Jefferson, Adams also once wrote "The Ten Commandments and the Sermon on the Mount contain my religion." Federer, *supra* n. 84, at 13.

[87] Barton, *supra* n. 86, at 172.

[88] John Witherspoon, signer of the Declaration of Independence, proclaimed "[t]he Ten Commandments . . . are the sum of the moral law." *Id*. at 173. Dewitt Clinton, U.S. Senator and the first proponent of the Twelfth Amendment, noted "[t]he laws which regulate our conduct are the laws of man and the laws of God." *Id*. Finally, Revolutionary soldier and U.S. Congressman William Findley declared "the Ten Commandments or Decalogue . . . was incorporated in the judicial law." *Id*.

[89] 576 F. Supp. 1373.

[90] *Id*.

[91] *Id*. at 1375.

[92] *Id*.

[93] *Id*. at 1378 (noting that the historical precedents surrounding the issuance of Presidential proclamations were consistent with *Marsh's* declaration that the Framers viewed legislative prayer as no real threat to the Establishment Clause).

[94] *Id*.

underlying intent of the Framers illustrating that not all public acknowledgments of religion violate the Establishment Clause. Thus, the court erroneously concluded that the Ten Commandments display was not deeply embedded in American history and tradition.

2. The court did not recognize the unambiguous and unbroken history of public displays of religion illustrating that the Ten Commandments display was deeply embedded in American history and tradition

The *Moore* court did not conduct a probing analysis into the actions of the Framers and their successors as articulated by *Marsh* to determine whether Chief Justice Moore's display was a continuation of the unambiguous and unbroken American tradition of public displays of religion. Instead, the court only briefly discussed historical precedent[95] while quickly dismissing the display as not within the *Marsh* exception.[96]

Moreover, the exception was applied from a narrow and restrictive perspective. For instance, the court stated that there was no evidence of an "unambiguous and unbroken history" of displaying religious symbols in judicial buildings.[97] The *Moore* opinion also noted that there was no evidence that the Ten Commandments were publicly displayed at the time of the Bill of Rights.[98] Ultimately, these were the only reasons the court announced to support its conclusion that the display was not firmly embedded in American history and tradition, and thus, not within the *Marsh* exception.

Chief Justice Moore was correct in his contention that official acknowledgment of the moral foundation of law has been continuous throughout the nation's history.[99] Chief Justice Rehnquist has affirmatively recognized that the Ten Commandments form at least part of the moral foundation of American legal codes.[100] In addition, he noted that the Commandments have greatly influenced legal codes across the world for thousands of years,[101] and our nation's laws must be included in that list. The applicable test should have been whether Chief Justice Moore's display mirrored similar public displays during the time of the Founders and

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[95] *See supra* n. 13.

[96] *Moore*, 335 F.3d at 1298.

[97] *Id*. (citing *Marsh*, 463 U.S. at 792).

[98] *Id*.

[99] *See supra* nn. 42-44 and accompanying text. (describing the evidence presented in support of Chief Justice Moore's contentions).

[100] *Stone v. Graham*, 449 U.S. 39, 45 (1980) (Rehnquist, J., dissenting).

[101] *Id*.

beyond.

A look into the minds and actions of the Framers shows that they actually encouraged and participated in public displays of religion. For instance, on July 7, 1777, a request was placed to Congress to print or import more Bibles.[102] Congress agreed and subsequently ordered the Bibles imported, recognizing the "universal importance" of the Bible.[103] On September 25, 1789, Congress requested the President to declare a national day of Thanksgiving.[104] President Washington concurred with the request and proclaimed "it is the duty of all nations to acknowledge the providence of Almighty God, to obey His will, to be grateful for His benefits, and humbly to implore His protection and favor."[105] Significantly, this request was made on the *exact same day* that Congress approved the final wording of the First Amendment.[106]

Moreover, the following excerpt recounts the planned activities for George Washington's inauguration as President on April 30, 1789:

> [O]n the morning of the day on which our illustrious President will be invested with his office, the bells will ring at nine o'clock, when the people may go up to the house of God and in a solemn manner commit the new government, with its important train of consequences, to the holy protection and blessing of the Most high. An early hour is prudently fixed for this peculiar act of devotion and . . . is designed wholly for prayer.[107]

This outwardly public display of religion, memorializing one of the most monumental events in American history, occurred at the same time the Framers were contemplating the Bill of Rights.[108] The nature of Washington's inauguration was arguably no less "religious" than Chief Justice Moore's display.

Perhaps the most compelling evidence that the Founders actually encouraged public displays of religious and moral symbolism can be found

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[102] Barton, *supra* n. 86, at 103. The request was then referred to a Congressional committee, which subsequently submitted the following request to Congress: "[T]hat the use of the Bible is so universal, and its importance so great . . . your Committee recommend that Congress will order the Committee of Commerce to import 20,000 Bibles from Holland, Scotland, or elsewhere, into the different ports of the States of the Union." *Id*.

[103] *Id*.

[104] *Id*. at 115.

[105] *Id*.

[106] *Id*. This analysis is strikingly similar to the *Marsh* Court's finding that Congress did not intend to forbid the appointment of legislative chaplains because it had just declared the practice acceptable during the same week.

[107] *Id*. at 113 (quoting *The Daily Advertiser*, 2 (Apr. 23, 1789)).

[108] *Marsh*, 463 U.S. at 788.

in the passage of the Northwest Ordinance.[109] Article III of the Ordinance states: "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."[110]

This Ordinance was approved by the House and Senate in July and August of 1789 and signed into law by President Washington shortly thereafter.[111] Note again that this was the same Congress that was simultaneously framing the religion clauses of the First Amendment.[112]

Nearly every American President has publicly acknowledged the symbolic importance of religion as a guiding force over the nation.[113] In addition, the Supreme Court has recognized the religious nature of our traditions and customs on many occasions.[114] Several courts across the nation have constitutionally upheld the national motto, "In God We Trust."[115] Furthermore, this motto is engraved in the House of Representatives, on American coins and currency, and over the entrance to the Senate.[116] The motto has been determined to be merely "ceremonial" and "inspirational" rather than an affirmative establishment of religion.[117] The legislature has enacted a national day of prayer and determined that the

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[109] Barton, *supra* n. 86, at 40.

[110] *Id*. (citing *Constitutions*, 364 (1813)).

[111] *Id*.

[112] *Id*. at 103.

[113] These instances include the most respected leaders in American history. In an 1861 speech, Abraham Lincoln declared that he could not succeed "[w]ithout the assistance of that Divine Being" but that "[w]ith that assistance I cannot fail." Federer, *supra* n. 84, at 377. In his Inaugural Address, President Lincoln articulated that "[i]ntelligence, patriotism, Christianity, and a firm reliance on Him . . . are still competent to adjust in the best way all our present difficulty." *Id*. at 378. In 1935, President Roosevelt stated that it was impossible to read the history of the United States "without reckoning with the place the Bible has occupied in shaping the advances of the Republic." *Id*. at 538. President Kennedy proclaimed in his Inaugural Address that "[t]he rights of man come not from the generosity of the state but from the hand of God." *Id*. at 346. In 1992, President George H. W. Bush declared "[t]he Lord our God be with us . . . that all the peoples of the earth may know that the Lord is God; there is no other." *Id*. at 84.

[114] In 1892, the Supreme Court stated that "this is a religious people . . . [and] nation." *Church of the Holy Trinity v. U.S.*, 143 U.S. 457, 465, 471 (1892). Again in 1952, it was proclaimed "[w]e are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). Ten years later, the Court reinforced that the "history of man is inseparable from the history of religion." *Engel v. Vitale*, 370 U.S. 421, 434 (1962). Finally, the Supreme Court determined that the Bible is worthy for its literary and historical qualities, and to study it may not offend the First Amendment if presented in an objective manner. *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 224 (1963).

[115] *See e.g*. *Aronow v. U.S.*, 432 F.2d 242 (9th Cir. 1970); *O'Hair v. Murray*, 588 F.2d 1144 (5th Cir. 1979), *cert. denied*, 442 U.S. 930 (1979); *Gaylor v. U.S.*, 74 F.3d 214 (10th Cir. 1996), *cert. denied*, 517 U.S. 1211 (1996).

[116] *ACLU v. Capital Square Rev.*, 20 F. Supp. 2d 1176 (S.D. Ohio 1998).

[117] *Aronow*, 432 F.2d at 243-44.

Pledge of Allegiance to the American flag shall describe our country as "one nation under God."[118] In addition, the final words of the oath of office for the President are currently "so help me God."[119]

The *Moore* court also failed to consider several court pronouncements that acknowledge the moral foundation of law and its relation to the historical significance of the Ten Commandments.[120] Significantly, the Ten Commandments are posted in several government buildings across the nation, including in at least two different locations within the Supreme Court.[121] Chief Justice Warren Burger reminded us that a permanent depiction of Moses with the Ten Commandments is located in the "very chamber in which oral arguments . . . were heard."[122] Three so-called "liberal" Supreme Court Justices, Justices Brennan, Marshall, and Stevens, have observed that this display conveys an "equivocal . . . message, perhaps a respect for Judaism, for religion in general, or for law."[123] Moreover, Chief Justice Rehnquist has opined that the Establishment Clause does not require the public sector to be insulated from all things that may have a religious significance or origin.[124]

Chief Justice Moore's display did not give preference to a particular religion when viewed in this "moral and legal foundational" context. First, it is generally accepted that many religions and societies adopt some of the same natural law and moral codes as espoused in the Ten Commandments.[125] Second, the display did not reflect a preference for a certain religion so much as it indicated a general respect for and satisfaction

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[118] *Suhre v. Haywood County*, 55 F. Supp. 2d 384, 396-97 (W.D.N.C. 1999).

[119] *Id.*

[120] The Supreme Court of Pennsylvania declared in 1859: "Law can never become entirely infidel; for it is essentially founded on the moral customs of men, and the very generating principle of these is most frequently religion." *Commw. v. Nesbit*, 34 Pa. 398, 411 (1859). In *Berry v. School District of the City of Benton Harbor*, the court indicated that the Founding Fathers converted moral virtues into political rights as is evidenced by the Declaration of Independence, the Preamble to the Constitution, and the Bill of Rights. 467 F. Supp. 695, 713 (W.D. Mich. 1978). Furthermore, the court warned that it is dangerous to drift away from the "truth and the justice" intended by the Founding Fathers if we consider these political rights without considering the ingredients of their moral foundation. *Id*. In 1961, Justice Douglas articulated that our institutions are "founded on the belief . . . that there is a moral law which the State is powerless to alter," that the government must respect these individual rights "conferred by the Creator," and that "the body of the Constitution . . . [and] the Bill of Rights enshrined those principles." *McGowan v. Md.*, 366 U.S. 420, 562-563 (1961) (Douglas, J., dissenting).

[121] Barton, *supra* n. 86, at 171.

[122] *Id*. (quoting *Lynch*, 465 U.S. at 677).

[123] *Id*. (quoting *Allegheny*, 492 U.S. at 652).

[124] *Stone*, 449 U.S. at 45-46.

[125] B.A. Robinson, *The Ten Commandments*, http://www.religioustolerance.org/chr_10c1.htm (last updated Dec. 1, 2001).

with the foundations of American law.[126] Chief Justice Moore, as head judicial officer of Alabama, was merely paying respect to the secular laws that necessarily must govern his courthouse.

These public acknowledgments of religious symbolism by no means comprise an exhaustive historical list.[127] Although the *Moore* court could not find exact instances of the Framers displaying the Ten Commandments, it seems that Chief Justice Moore's Ten Commandments display mirrors similar public acknowledgments of God during the founding of our nation and beyond. The Ten Commandments are, like the practice of opening legislative sessions with prayer in *Marsh*, merely a "tolerable acknowledgment of beliefs widely held among the people of the United States."[128] Moore's display was an extension of the unambiguous and unbroken practice of public recognition of religious symbolism. Thus, the court's analysis neglected to consider historical evidence showing that the Ten Commandments display was deeply embedded within the institutional mainstream of American traditions.

B. *The Court's Application of* Marsh *was Misdirected and Incomplete because it Erroneously Focused its Analysis on the Physical Structure of the Monument rather than the Symbolic Significance of the Ten Commandments*

Under *Marsh*, the *Moore* court incorrectly focused on the physical structure of the Ten Commandments monument rather than analyzing whether the Ten Commandments have become deeply embedded in American history and traditions. Courts can accurately determine whether a Ten Commandments display is deeply embedded in American history and tradition by applying a broader, more thorough interpretation of the *Marsh* exception. While the *Moore* court recognized the applicability of *Marsh* in this case,[129] it seemed to misunderstand the *Marsh* exception that has been articulated by previous decisions. Thus, the court's application of *Marsh* was misdirected and incomplete.

Despite the historical significance of the Ten Commandments, the court focused its analysis primarily on the size and prominent location of the Ten

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[126] This analysis parallels *Marsh*, where it was permissible for the Nebraska legislature to continually reappoint a chaplain of the same denomination (Presbyterian). His long tenure was not a preference for his religious views but evidence that the body appointing him was satisfied with his performance and personal qualities. *Marsh*, 463 U.S. at 793.

[127] *See* Barton, *supra* n. 86. This book contains too many instances of public religious acknowledgments to exhaust in this Note.

[128] *Id*. at 792.

[129] *Moore*, 335 F.3d at 1298.

Commandments monument.[130] The court's analysis seemed to confuse and intermingle the *Lemon* test with the *Marsh* exception. Indeed, *Lemon's* "effect" prong requires an analysis into whether a "reasonable observer" would perceive the physical appearance of a display as a government establishment of religion, but the *Marsh* exception only requires the court to determine whether a certain practice or symbol is embedded in American history and tradition.[131] If a practice passes *Marsh*, it does not violate the Establishment Clause even though it might not pass constitutional muster under the *Lemon* test. *Marsh* and *Lemon* are two distinct analyses, and nowhere in *Marsh* does the Supreme Court mandate an examination into the physical structure of a historical practice or symbol. The court erroneously shifted the focus of the *Marsh* exception primarily on the physical structure of the monument rather than supporting its analysis with evidence showing the historical significance of the Ten Commandments.[132] *Marsh* cannot serve as an exception to *Lemon* when the court conflates the two tests.[133] Thus, the court misunderstood and misapplied the *Marsh* exception by focusing its analysis almost exclusively on the physical structure of the Ten Commandments display.

C. *The Court did not Follow Previous Applications of* Marsh *as Articulated by the Supreme Court and the Sixth Circuit*

Notably, the First Amendment was not adopted in order to remove every last public expression of religion.[134] In *ACLU of Ohio v. Capitol Square Review and Advisory Board* ("*Capitol Square*"), the Sixth Circuit applied *Marsh* to the Ohio state motto, "With God All Things Are Possible."[135] The plaintiffs, among other requests, were attempting to prevent the motto from being displayed at the entrance to the statehouse.[136] Interestingly, the Sixth Circuit's *Marsh* analysis focused solely on the symbolism of the motto while the physical appearance of the impending display was not even mentioned by the court.[137] This was true even though

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[130] *Id.* The court declined Chief Justice Moore's request to consider whether the monument's acknowledgment of God as the source of law and liberty in America parallels similar acknowledgments of God at the time of America's founding. *Id*.

[131] *See supra* nn. 2-3.

[132] *Moore*, 335 F.3d at 1298.

[133] Appellant's Br. at 17, *Moore*, 335 F.3d 1282.

[134] *ACLU of Ohio v. Capitol Square Rev. and Advisory Bd.*, 243 F.3d 289, 300 (6th Cir. 2001) (quoting *Chaudhuri v. State of Tenn.*, 130 F.3d 232, 236 (6th Cir. 1997)).

[135] *Capitol Square*, 243 F.3d at 289.

[136] *Id*. at 292.

[137] *Id*. at 301.

the motto was to be bronzed and prominently displayed near the Ohio statehouse entrance at dimensions of twelve feet, four inches, by ten feet, nine inches.[138]

The motto clearly passed constitutional muster under *Marsh* because the Framers could not have intended to prevent the government from adopting a motto "just because [it] has 'God' at its center."[139] This was despite the fact that there was no direct evidence that the Continental Congress displayed this exact motto, or even a similar motto, in its chambers.[140] The court acknowledged and accepted that the motto's origins could be traced to the Judeo-Christian Bible.[141] This thorough analysis was supported with examples of the Framers' own acknowledgments of God[142] to determine that the motto was indeed deeply embedded in American history.[143] Thus, unlike *Moore*, the *Marsh* analysis in *Capitol Square* was thorough, contained several references to the Founding Fathers, focused on the substantive rather than the physical nature of the display, and was soundly supported with case precedent and historical evidence.

The Eleventh Circuit did not follow the lead of the Supreme Court and the Sixth Circuit in its application of *Marsh*. The Supreme Court in *Marsh* never mandated an examination into the physical structure of a symbol, and the Sixth Circuit did not add this requirement in *Capitol Square*. Moreover, neither the Supreme Court nor the Sixth Circuit were concerned with the religious origins of the respective symbols. In *Moore*, the court cited authority regarding the "physical imposition" of such a monument, and thus found a legitimate violation of the first two *Lemon* prongs.[144] However, the court failed to cite authority and evidence necessary for a proper historical analysis as required by *Marsh*. Instead of following *Capitol Square*, the court applied its own version of the *Marsh* exception by erroneously emphasizing the physical structure of the Ten Commandments monument while bypassing the historical evidence.

D. The Court Did Not Consider Several Cases that have Upheld the Constitutionality of Ten Commandments Displays because of the

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[138] *Id*. The large bronze plaque containing the state motto is currently displayed at the entrance to the statehouse. *Id*.

[139] *Id*.

[140] *Id*.

[141] *Id*. at 312.

[142] The court analyzed and articulated, among other evidence, that the Framers "were not in the least disposed . . . from acknowledging the existence of" God or from declaring religion "necessary to good government and the happiness of mankind." *Id*. at 301.

[143] *Id*.

[144] *See supra* n. 2.

Historical and Secular Significance Symbolized by the Displays

Across the country, courts have upheld the constitutionality of Ten Commandments displays generally because of the historical and secular significance of the Ten Commandments in the development of American legal codes.[145] The *Moore* court de-emphasized that the Ten Commandments portion of Moore's monument was merely part of a larger display acknowledging the historical origins of American law.[146]

In *Anderson v. Salt Lake City*,[147] a court found that a monument depicting the Ten Commandments was nothing "more than a depiction of a historically important monument with both secular and sectarian effects."[148] The *Anderson* monument was placed in a prominent place near a courthouse entrance, and the city commissioners authorized the installation and maintenance of lighting equipment to "illuminate and enhance" the display.[149] Unlike *Moore*, this was all accomplished with both city and county funds.[150] The court held that it did not seem reasonable to remove a "passive monument, involving no compulsion," merely because its substance "reflect[ed] the religious nature of an ancient era."[151] Although *Anderson* was decided before *Marsh*,[152] the Establishment Clause analysis in *Anderson* focused generally on the monument's symbolic importance of reflecting the moral foundation of law. Consistent with a proper *Marsh* analysis, the *Anderson* court was not concerned that the monument measured three by five feet,[153] which was larger than Moore's monument.[154]

More recently, in *ACLU of Kentucky v. Mercer*,[155] a court found that a so-called "Foundations of American Law and Government display" located

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[145] *See infra* nn. 147-166 and accompanying text.

[146] *See supra* nn. 42-44 and accompanying text. Each side of the monument contained quotations from various historical documents and authorities relating the natural law to God's laws, including the Declaration of Independence, the national motto "In God We Trust," James Madison, and William Blackstone. Chief Justice Moore subsequently added two smaller plaques to the rotunda regarding the moral foundation of the law. One brass plaque contained quotations from Martin Luther King, Jr. and Frederick Douglass and the other plaque contained the Bill of Rights. Both of these displays were located seventy-five feet from the Ten Commandments monument. *Id*.

[147] 475 F.2d 29.

[148] *Id*. at 34.

[149] *Id*. at 30.

[150] *Id*.

[151] *Id*. at 34.

[152] *Marsh* was decided ten years after *Anderson*. *See supra* n. 7. However, this Note posits that the *Anderson* court utilized similar reasoning as would a proper *Marsh* analysis.

[153] 475 F.2d at 30.

[154] *Moore*, 335 F.3d at 1285. Chief Justice Moore's monument measured only three by four feet.

[155] 240 F. Supp. 2d 623 (E.D. Ky. 2003).

in a county courthouse did not violate the Establishment Clause.[156] The display in part included the Ten Commandments, the Mayflower Compact, the national motto "In God We Trust," the Star Spangled Banner, and the Bill of Rights.[157] The inclusion of the Ten Commandments did not violate the Establishment Clause because the display had the legitimate secular purpose of acknowledging the historical influence of the Ten Commandments on the development of our laws.[158]

Similarly, in *Suhre v. Haywood County*,[159] a county courtroom display of plaques containing the Ten Commandments was held constitutional.[160] The display also included other "secular" objects such as the sword of justice and scales of justice flanked by American and North Carolina flags.[161] In upholding the display under *Lemon*, the court emphasized that the Ten Commandments plaque was the smallest part of the display.[162] The court also acknowledged that the display was "no more an endorsement of religion than . . . [the] legislative prayers approved in *Marsh*."[163] Importantly, the court explained that the display was nothing more than an effort to recall the origin of modern law, by reference to an ancient source of law and justice, as the overall message of the display was "equal justice before the law."[164] The court opined that the plaintiff's angst resulted more from his own intolerance of others rather than a desire to protect his own atheistic convictions.[165]

Chief Justice Moore's monument was also part of a larger display that contained several quotations from various historical documents and authorities.[166] Furthermore, the Chief Justice added two additional plaques to the rotunda, one containing the Bill of Rights and the other containing quotations from Martin Luther King, Jr. and Frederick Douglass.[167] Thus,

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[156] *Id.* The court determined it was not necessary to apply *Marsh*, concluding that the display had a legitimate secular purpose of acknowledging the historical and legal significance of the Ten Commandments. *Id*. at 625.

[157] *Id*. at 623-24.

[158] *Id*. at 625. Note again that Chief Justice Moore's display also contained similar secular components, including quotations from the Declaration of Independence, the Bill of Rights, Martin Luther King, Jr., James Madison, and William Blackstone. *See supra* nn. 25-33 and accompanying text.

[159] 55 F. Supp. 2d 384.

[160] *Id*. at 396.

[161] *Id*. at 387.

[162] *Id*. at 395-96.

[163] *Id*. at 396.

[164] *Id*. at 397.

[165] *Id*. at 398.

[166] *Moore*, 335 F.3d at 1286. This is true even though the Ten Commandments acknowledgment was the most prominent part of the overall display.

[167] *Id*. at 1287-88; *see supra* n. 30 (describing the quotations in full detail).

the display taken as a whole seems, like *Suhre*, to be an effort to recall the origins of modern law. Moreover, the symbolic nature of the overall display conveys a message of equal justice and reflects the foundation of the very laws that Chief Justice Moore was required to uphold. Although *Marsh* could not be directly applied in each case, it may be concluded that the displays in *Anderson*, *Mercer*, *Suhre*, and *Moore* have become deeply embedded in the history of the United States as a mere acknowledgment of the moral foundations of American law and justice.

IV. CONCLUSION

> *If we forget what we did, we won't know who we are. I am warning of an eradication of the American memory, that could result, ultimately, in an erosion of the American spirit.*
>
> –President Reagan's Farewell Address[168]

Applying a broader interpretation of *Marsh* to include historically significant religious symbols would not violate the core of the Establishment Clause but would uphold the principles and intentions espoused by the drafters of our founding documents. The *Moore* holding contravenes the original meaning of the Establishment Clause by transforming an acknowledgment of history into an establishment of religion. *Marsh* cannot serve as a legitimate exception unless courts actually fully consider historical and legal evidence to determine whether a public religious activity is deeply embedded in American history and tradition. While the court reached the correct legal conclusion under *Lemon*,[169] its narrow application of *Marsh* may produce unintended results and, as applied, necessitate the further removal of similar passive acknowledgments of our history.

For instance, many government buildings across the nation contain prominent displays of ancient Greek mythological symbols, such as images of gods and goddesses.[170] Under *Moore*, these symbols, which are religious in origin, must apparently be removed if someone is offended by their

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[168] *Prepared Text of President Reagan's Farewell Address to the Nation*, Associated Press (Jan. 12, 1989).

[169] *See supra* n. 2. The physical appearance of a display is relevant under *Lemon*.

[170] *Christian Offended by Greek Goddess at Courthouse*, http://www.covenantnews.com/freedom/archives/004123.html (last accessed Nov. 30, 2003). This article notes that Themis, the ancient goddess of law and order, has traditionally been a symbol at U.S. courthouses. *Id*.

presence on government buildings.[171] Are these Greek symbols deeply embedded in the history and tradition of the United States? If the Ten Commandments are not part of American history, can it plausibly be argued that symbols of Greek mythology are more embedded in our traditions? Courts may be pressed into selective religious discrimination when applying the *Marsh* exception.

Perhaps the most interesting debate that could flow from the court's holding revolves around the fate of similar acknowledgments and displays, including the Supreme Court's own prominent Ten Commandments display.[172] *Moore's* application of the *Marsh* exception requires that 1) the Framers participated in the exact same practice, and 2) there is an "unambiguous and unbroken history" of the exact same practice.[173] This narrow interpretation implies that the Supreme Court's own tradition of displaying the Commandments in its chambers should be deemed unconstitutional since there is apparently no evidence that the Framers directly displayed the Ten Commandments during deliberations.[174] Since the *Moore* holding appears to contravene the traditions of the Supreme Court and the intent and actions of the Founding Fathers, should courts follow the former or the latter?

A broader, more thorough application of *Marsh* would prevent these unintended results from occurring. It is impossible to ascertain whether a Ten Commandments display is deeply embedded in American society unless courts actually fully consider the historical and legal evidence under the *Marsh* exception. A complete historical analysis would have revealed that there is an unambiguous and unbroken American tradition of the public acknowledgment of God. Also, several recent cases have upheld Ten Commandments displays because of the historical and secular significance of the displays. *Marsh* should be applied as it was intended by the Supreme Court—to protect certain public symbols and practices that are an important part of our history and traditions. This sound approach will ensure that both the integrity of the Establishment Clause and of our historical institutions will be constitutionally preserved for future generations of Americans.

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[171] *Id*. A South Dakota man has recently asked a South Dakota law professor to help him sue to remove the Greek goddess Themis from the top of a county courthouse. *Id*. Interestingly, the man is using the same legal arguments used by the plaintiffs in *Moore*. *Id*.

[172] Barton, *supra* n. 86, at 171.

[173] 335 F.3d at 1298.

[174] *Id*.