Writing on the Wall of Separation: Understanding the Public Posting of Religious Duties and Sectarian Versions of Sacred Texts as an Establishment Clause Violation in Ten Commandment Cases

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Abstract

This Note seeks an answer to the question of whether public displays of the Ten Commandments violate the Establishment Clause of the Constitution. In analyzing this question the author first explains the language of the traditional and American hybrid form of the Decalogue. From there, the author describes the three part standard the Supreme Court adopted in Lemon v. Kurtzman to analyze possible violations of the Establishment Clause. Once this framework is in place, the Note lays out how courts have split in their determinations of whether public displays of the Ten Commandments, both the traditional and hybrid models, is a violation of the Establishment Clause. Ultimately, the author proposes that the Establishment Clause proscribes public displays of any version of the Ten Commandments because it contravenes all three prongs of the Lemon test.

KEYWORDS: Establishment Clause, Ten Commandments, Lemon v. Kurtzman, Decalogue
WRITING ON THE WALL OF SEPARATION: UNDERSTANDING THE PUBLIC POSTING OF RELIGIOUS DUTIES AND SECTARIAN VERSIONS OF SACRED TEXTS AS AN ESTABLISHMENT CLAUSE VIOLATION IN TEN COMMANDMENTS CASES

David C. Pollack*

INTRODUCTION

When a moving company arrived in Montgomery last summer to relieve the Alabama State Judicial Building of a two-and-a-half ton granite monument entrenched in its rotunda, the movers were greeted by shouts of “Pray the wheels crumble!” and “Lord, it’s never too late to repent.” One protester even demanded: “Cowards! Open the door! Let me in there!” The monument was inscribed with a translation of the Ten Commandments from the King James Bible and was often the site of prayer services attended by government officials and other members of the public. Its shape—two adjacent tablets, each rounded at the top—recalled

* J.D. candidate, Fordham University School of Law, 2005; B.A., History, Johns Hopkins University, 2001. I wish to express my sincere thanks to Marc Stern of the American Jewish Congress and Professor Abraham Abramovsky for their assistance and (especially) their patience in helping me complete this Note. I also wish to thank my family for their encouragement and attention. Finally, I dedicate this Note to my late grandfather, Bernard Meislin, whose love of Jewish culture, writing, and law (not to mention athletics) earned the adoration of all that were fortunate enough to have known him. I miss him more every day, and I only hope that I am making him proud.


2. Id.

3. Throughout this Note, the terms “Decalogue” and “Ten Commandments” are used interchangeably to refer to any and all of the common renderings of the biblical text, Exodus 20:2-14 (Jewish Publication Society) and Deuteronomy 5:6-18 (Jewish Publication Society). As explained below, this necessary shorthand obfuscates important differences in the way distinct religious traditions have translated, divided, named, and enumerated the relevant text. See infra notes 27-90 and accompanying text.


5. Id. at 1285. The two tablets were arranged side by side, corresponding to one traditional religious view of the division between the Commandments. See id. at 1285 n.1 (quoting defendant Alabama Chief Justice Roy Moore’s assertion that the Commandments inscribed on one tablet “represent[ ] the duties which we owe to GOD,” whereas the Commandments inscribed on the other tablet “represent[ ] the duties
that most ancient of religious documents, which in keeping with its namesake, summons divine authority to literally command its readers to obey between ten and twelve religious duties.6 Installed in 2001 by former Alabama Supreme Court Chief Justice Roy Moore, shortly after his election and campaign as the “Ten Commandments Judge,”7 the monument and its removal signaled the end of an ordeal that lasted more than a decade.8 This legal sideshow featured everything from popular protest9 and wasteful lawsuits10 to threats of civil disobedience by Moore11 and a governor’s rhetoric recalling Alabama’s notorious stand against desegregation.12 It was only pursuant to multiple federal court orders,13 the last com-

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6. As explained below, what some denominations consider a formal Commandment, others do not; likewise, what certain sects view as two separate Commandments, others view as only one. See infra notes 27-90 and accompanying text.

7. Glassroth, 335 F.3d at 1288.

8. Moore made his name as a Decalogue-brandishing bureaucrat while serving as a state circuit court judge in Etowah County. Id. at 1284. Elected in 1992, he soon hung behind the bench in his courtroom a wooden plaque into which he had personally hand-carved a version of the Ten Commandments. Id.; Marlon Manuel, ATLANTA J. AND CONST., Nov. 1, 1998, at 14A. Moore regularly invited clergy members to lead prayer at jury-organizing sessions, Glassroth, 335 F.3d at 1284, and when the American Civil Liberties Union requested that he discontinue the practice and remove the plaque he refused and litigation ensued. See State ex rel. James v. ACLU of Ala., 711 So. 2d 952, 967 (Ala. 1998). After a higher Alabama court judge ordered him to remove the plaque, Moore flouted the order, winning the attention and support of then-governor Fob James. See Robert R. Baugh, Applying the Bill of Rights to the States: A Response to William P. Gray, Jr., 49 ALA. L. REV. 551, 551 (1998).

9. See supra notes 1-2 and accompanying text.

10. Glassroth, 335 F.3d at 1284 (referring to “two high-profile lawsuits in 1995 . . . one filed by a nonprofit organization seeking an injunction and the other brought by the State of Alabama seeking a declaratory judgment that then-Judge Moore’s actions were not unconstitutional”).


12. See Baugh, supra note 8, at 511 n.3 (comparing James’ vow to forcibly prevent the removal of Moore’s hand-carved Decalogue from the courtroom to the actions of former Alabama governor George Wallace, who, in 1963, “stood in the schoolhouse door at the University of Alabama to prevent the registration of two black students”).

13. See Gettleman, supra note 1.
ing in no uncertain terms from the Eleventh Circuit, that Moore’s penchant for Decalogue-posting ceased.

The Alabama spectacle and other cases involving the posting of the Ten Commandments on government property scream out for a clear response to the question: On which side of Thomas Jefferson’s “wall of separation between church and State” do public displays of the Ten Commandments fall? This Note seeks to answer the question by analyzing the text of the Ten Commandments as a religious document. Because many of the Commandments explicitly purport to mandate and forbid particular theological beliefs and worship, and because the document is vulnerable to a number of conflicting sectarian interpretations, I will argue that the Establishment Clause of the First Amendment forbids its public posting.

Part I of this Note discusses the religious obligations set forth in apodictic fashion in the Decalogue. It also explains that three major religions—Judaism, Catholicism, and Protestantism—each maintain a disparate and conflicting version of the document, notwithstanding the endeavors of some to elide all differences in so-called “ecumenical” or hybrid versions of the text. Part II considers the case law in the area, discussing the relevant applications of the Establishment Clause to Ten Commandments displays. Part III then examines the split between courts regarding the constitutional implications of publicly posting a version of the Ten Commandments inspired by Protestant translation and enumeration. Part III also looks at the posting of the hybrid versions of the Commandments and the split between courts over whether the putative amalgamation of the versions fairs any better under constitutional

14. Glassroth, 335 F.3d at 1303 ("The rule of law does require that every person obey judicial orders . . . . The chief justice of a state supreme court, of all people, should be expected to abide by that principle. We do expect that . . . when the time comes Chief Justice Moore will obey that order. If necessary, the court order will be enforced. The rule of law will prevail.").

15. See Gettleman, supra note 1. Since refusing to obey court orders to remove the monument, Judge Moore has been removed from office. Jeffrey Weiss, Ten Commandments are back; But this courthouse display isn’t stirring up as much trouble, DALLAS MORNING NEWS, Feb. 14, 2004, at 4G. In place of the old monument, the Alabama Supreme Court created a display of “historical documents” alongside English and Hebrew versions of the Ten Commandments. The display included copies of the Magna Carta, the Declaration of Independence, and the Bill of Rights among other documents. Id.


17. U.S. Const. amend. I ("Congress shall make no law respecting an establishment of religion . . . .").
scrutiny. Finally, Part IV suggests an answer to each split, arguing both that the choice of the recognized Protestant version impermissibly endorses one denomination over all others and that the ecumenical version of the Commandments is no less constitutionally infirm.

**PART I. THE DECALOGUE, ITS VARIOUS INTERPRETATIONS, AND ITS POSTING IN AMERICA**

Because some may be unfamiliar with the Ten Commandments, section A of this part of the Note briefly discusses their place in Western religion. Section B then analyzes the text of the Commandments themselves, focusing on both the theological nature of the edicts and the substantive differences between the authoritative versions of the Decalogue propagated by the major religious denominations. Finally, Section C considers the various hybrid versions of the Ten Commandments in America and proposes federal and state legislation seeking to guarantee their public posting.

**A. Background**

According to the Hebrew Bible, the ancestors of the Jewish people, referred to as the Hebrews, were enslaved in Egypt until a deity known as "YHVH," or God, brought them out of the land through a series of miracles. Amidst thunder and lightning, and atop a cloud-covered mountain outside Egypt, the narrative states, God gave two stone tablets to the leader of the Hebrews, Moses. On the tablets, God inscribed what many refer to—not without a

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18. According to studies by associates at the Graduate School of the City of New York, just under two million Americans considered themselves to be followers of the Buddhist, Hindu, Sikh, or Taoist religions in 2001, while another approximately 1.9 million considered themselves atheists or agnostics. *Largest Religious Groups in the USA, at* [http://www.adherents.com/rel_USA.html#religions](http://www.adherents.com/rel_USA.html#religions) (last visited Oct. 5, 2004) [hereinafter Adherents.com]. More than 27 million labeled themselves "secular." *Id.*

19. At least one other law student has undertaken an in-depth analysis of the Ten Commandments. See Tarik Abdel-Monem, *Note, Posting the Ten Commandments as a Historical Document in Public Schools*, 87 IOWA L. REV. 1023, 1041-43 (2002). Although I hope and believe that I have added a new perspective, particularly with respect to the differing versions of the Commandments, I recognize that a law Note is not the place for an exhaustive theological treatise on the Ten Commandments. For a more thorough examination of the religious, moral, and historical issues surrounding the Decalogue, see generally Walter J. Harrelson, *The Ten Commandments and Human Rights* 15-18 (1997) and his discussion of other secondary sources.


controversy in its own right—as the Ten Commandments. Although most sects of the major western religions accept the basis of this account, they are wedded to their particular interpretations of the Hebrew text. This is true not only with respect to the choice of translation of the Bible as a whole—the King James version for Protestants, for instance—but also with respect to the divisions, enumeration, and translation of the Decalogue in particular.


23. Deuteronomy 10:4; see Youngblood, supra note 5, at 30. The Bible actually refers to the Ten Commandments as the aseret haddevarim, “the ten things,” while current Jewish sources refer to them as aseret hadibrot, or “the ten utterances.” See ETZ HAYIM: TORAH AND COMMENTARY 441 (Jewish Publication Society ed., 2001) [hereinafter ETZ HAYIM]. To further complicate the issue, scholars debate whether these ten “things” or “utterances” were the same Ten Commandments that we are familiar with today, as there is evidence of “another Decalogue” located in Exodus 34:14-26. HARRISON, supra note 19, at 27-33.

24. See Lemon v. Kurtzman, 403 U.S. 602, 628-29 (1971) (detailing the conflict between Protestants and Catholics over the use of the King James version of the Bible in public schools).

25. See id.

26. See ACLU Neb. Found. v. City of Plattsmouth, 358 F.3d 1020, 1032 (8th Cir. 2004) (citing one source which discusses a nineteenth-century massacre resulting from a debate over which denomination's version of the Commandments should be posted in public schools). Although I have found no book-length scholarly treatment of the different versions of the Decalogue corresponding to the major religious denominations, scholars routinely refer to differences and conflicts between each denomination's version of the Ten Commandments. E.g., HARRISON, supra note 19, at 40 (displaying chart comparing versions of the Ten Commandments); Bernard Meislin, The Role of the Ten Commandments in American Judicial Decisions, in JEWISH LAW ASSOCIATION STUDIES III, at 190, 205-09 (A. M. Fuss, ed., 1987) (same) [hereinafter Meislin, Role of the Ten Commandments]; Youngblood, supra note 5, at 34-35 (same); see Bill Broadway, A New Judgment Day for Decalogue Displays; As Issue Nears High Court, Argument Develops over Differing Versions of Ten Commandments, WASH. POST, Oct. 23, 2004, at B9. There are also disagreements over accounts of the Decalogue within religious groups. ETZ HAYIM, supra note 23, at 442. Irrespective of this fact, however, this Note focuses on the tension between the major religions themselves on the issues of division, enumeration, and translation of the Decalogue. Of course, these divergences in translation are more significant than those that inevitably arise from differences in style and word choice. Cf. Brief of Amicus Curiae American Jewish Congress at 6, Glassroth v. Moore, 335 F.3d 1282 (11th Cir. 2003) (Nos. 02-16708-DD, 02-16949-DD) (explaining that these divergences reflect a "theological difference of great moment," and are not merely "insignificant differences of style and word choice inevitable in any translation"); HARRISON, supra note 19, at 38.
B. Religious Obligations Within—and Sectarian Disputes Over—the Decalogue

1. The Duty to Worship God Alone

The first obligation enumerated in the Decalogue is a purely religious one: “I the LORD am your God who brought you out of the land of Egypt, the house of bondage.” These words constitute a requirement to “believe in God’s existence . . . [i.e. to believe in] a cause and motive force behind all that exists,” to “accept the yoke of God’s sovereignty [and] to recognize God as the Supreme Authority.” Thus, anyone sympathetic to the notion that God might not exist, including atheists and agnostics, are guilty of “a sin against the virtue of religion” through their beliefs. According to one research group, 902,000 atheists and 991,000 agnostics lived in America in 2001.

Although Judaism and Christianity are in agreement that God alone must be worshiped, they differ with regard to how this tenet is expressed in the revelatory text. The prevailing Hebrew version of the Decalogue makes the words “I am the LORD thy God, who brought thee out of the land of Egypt, out of the house of bondage,” the First Commandment, while Christian denominations often consider this verse a prologue to the rest of the text. In addition, Christian versions of the Decalogue often omit the reference to redemption from Egypt. As one commentator observed, this difference is not only “important and real,” but “theologically inspired.” It reflects the fact that the Exodus story is fundamen-


28. See Etz Hayim, supra note 23, at 442 (internal quotation marks omitted). But see id. (noting that other Jewish commentators over the years have disagreed that this Commandment, in itself, orders readers to believe in God).


32. See Meislin, Role of the Ten Commandments, supra note 26, at 205.

33. See Harrelson, supra note 19, at 43-45; Meislin, Role of the Ten Commandments, supra note 26, at 205; see also Glassroth v. Moore, 335 F.3d 1282, 1285 (11th Cir. 2003) (noting that Moore’s Decalogue monument began with the phrase “I am the Lord thy God” and omits the reference to slavery in Egypt).

34. Harrelson, supra note 19, at 38.
tal to the Jewish faith, while it occupies a less prominent role in Christianity.\textsuperscript{35}

The Second Commandment in Judaism is thus the First Commandment according to most Christian denominations.\textsuperscript{36} It prohibits polytheism and any other religious practice not centered on the author-deity: "You shall\textsuperscript{37} have no other gods beside me."\textsuperscript{38} While the Commandment can also refer, metaphorically, to an obligation to refrain from "rever[ing] a creature in place of God . . . [such as] power, pleasure, race . . . etc,"\textsuperscript{39} the most obvious reading regards beliefs in other "gods or demons" and clearly forbids "false pagan worship."\textsuperscript{40} Thus, the text explicitly rejects the beliefs maintained by Wiccans and other arguably polytheistic and nontheistic faiths, such as Buddhism and Hinduism.\textsuperscript{41} There were 1,082,000 Buddhists, 766,000 Hindus, and 307,000 Wiccans\textsuperscript{42} residing in the United States in 2001;\textsuperscript{43} other non-biblical faiths such as Sikhism and Native American religions grew at rates greater than one-hundred percent between 1990 and 2000.\textsuperscript{44}

\begin{itemize}
\item \textsuperscript{35} Cf. Meislin, \textit{Role of the Ten Commandments}, supra note 26, at 205.
\item \textsuperscript{36} See id. at 205-06.
\item \textsuperscript{37} The King James version of the Bible, used by most English-speaking Protestants, renders all affected Commandments as "thou shalt" rather than "you shall." \textit{Exodus} 20:3-5, 7, 13-17 (King James). Some homilies attach religious significance to this point:

Yes, it is true that God was speaking to Moses and at the same time to the more than one million Israelites. But He did not speak as an individual would be [sic] to a mass of people, as from "me" to "you all," as from "me" singular to "you" plural. No. What we have here is more than a million people being spoken to as to each man and woman and child, using the second person singular "thou."

\item \textsuperscript{38} \textit{Exodus} 20:3 (Jewish Publication Society); see Harrelson, supra note 19, at 40 (displaying traditional Catholic and Protestant division); \textit{The Torah: A Modern Commentary}, supra note 27, at 534 (displaying traditional Jewish division).
\item \textsuperscript{39} \textit{Catechism}, supra note 30, at 515.
\item \textsuperscript{40} Id.
\item \textsuperscript{42} Adherents.com, supra note 18. Included in this number are those Americans who consider themselves "Druids" or "Pagans." Id.
\item \textsuperscript{43} Id.
\item \textsuperscript{44} Id.
\end{itemize}
2. "Graven Images"

According to the Jewish version of the Decalogue, the following passage is a continuation of the injunction against polytheism:

You shall not make for yourself a sculptured image, or any likeness of what is in the heavens above, or on the earth below, or in the waters under the earth. You shall not bow down to them or serve them. For I the LORD your God am an impassioned God, visiting the guilt of the parents upon the children, upon the third and upon the fourth generations of those who reject Me, but showing kindness to the thousandth generation of those who love Me and keep My commandments.\

In most Protestant sects (and in Eastern Orthodox Christianity), however, the prohibition of polytheistic belief stands alone as the First Commandment, while the duty to refrain from creating "graven images," comprises the Second Commandment in its entirety. More significantly, according to Catholic sources, the injunction against graven images is either encompassed within the First Commandment (the injunction against polytheism) or omitted entirely. This fact not only distinguishes the numbering of the Catholic version—each successive Catholic Commandment is one ordinal number behind its counterpart in the Protestant and Jewish versions—but also reflects deep divisions at the core of Protestant and Catholic identity.

On the one hand, the Commandment against graven images played a crucial role in the Protestant Reformation. In what was "[o]ne of the earliest, and certainly one of the most intense controversies to erupt in the sixteenth century," according to one historian of Christianity, Reformed Church leaders brandished their Second Commandment to advocate the removal of paintings and

45. Exodus 20:4-6 (Jewish Publication Society) (verse numbers omitted). To complicate matters, some scholars and religionists posit an "original" version of the Commandments, written on the stone tablets themselves, which is more concise. See Harrelson, supra note 19, at 33-34.
46. Exodus 20:4-6 (King James).
47. Harrelson, supra note 19, at 40.
48. Id.
49. Cf. Meislin, Role of the Ten Commandments, supra note 26, at 190. Interestingly, the Lutheran faith follows the Catholic tradition in this respect, omitting the Commandment against graven images from its Decalogue and maintaining the Catholic enumeration. See David C. Steinmetz, The Reformation and the Ten Commandments, 43 Interpretation 256, 257 (1989).
50. Steinmetz, supra note 49, at 257.
51. Id.
They argued that the use of religious icons could and did lead to veneration of inanimate objects, fettering meaningful religious worship. In fact, John Calvin and other fathers of Protestantism also saw the rejection of the Eucharist—a rejection central to the doctrine of most Reformed Churches—as inextricably linked to the directive of the Second Commandment. “[T]he veneration of the elements of bread and wine” was, for these leaders, like “the veneration of images and icons . . . substituting the creature for the creator, robbing God of the glory that belongs to God alone.”

On the other hand, Catholic authorities not only gainsaid this logic, but also held fast to the essential value of religious images to “‘admonish and remind’ Christians to direct their worship” properly. Like the Eucharist, which remains a fundamental practice of Catholicism to the present day, holy images were “sensible signs that point to transcendent realities.” Accordingly, Catholic doctrine today encourages “the veneration of icons—of Christ, but also of the Mother of God, the angels, and all the saints,” so long as it is “‘a respectful veneration,’ not the adoration due to God alone.” This logical but subtle explanation has caused Catholic authorities to deal with the Commandment in a variety of ways. Thus, while some scholars argue that the Church has essentially “excised the injunction against graven images,” others—including Catholic authorities themselves—argue that Catholicism continues to incorporate the essential message of the injunction within its First Commandment. In either case, the prohibition of images is less prominent in Catholic tradition than in most Protestant traditions, at the very least not accounting for an apodictic Commandment in and of itself.

52. Id. at 258.
53. Id. Luther’s ideology, which supported the use of images in worship, was the exception to this general trend. See id. at 259.
54. Id. at 258-65.
55. Id. at 262.
56. Id. at 263 (quoting sixteenth century Catholic theologian John Eck); see CATECHISM, supra note 30, at 516-17.
57. Steinmetz, supra note 49, at 263.
58. CATECHISM, supra note 30, at 516-17.
59. Meislin, Role of the Ten Commandments, supra note 26, at 190.
60. CATECHISM, supra note 30, at 516. Still other Catholic sources interpret the proscription to bar only the “carv[ing of] idols for yourselves,” not the creation of an “image” or a “likeness” which resembles the deity. Exodus 20:4 (New American Bible) (emphasis added). But see CATECHISM, supra note 30, at 516 (using the word “image” in discussing the Commandment).
Predictably, the differences between Protestants and Catholics on this point were and continue to be a major source of anti-Catholic sentiment. In his 1923 screed, *The Decalogue*, an Archdeacon of Westminster Abbey devoted more than a fifth of his argument to the Commandment against graven images.

Much of this section was an attack on Catholicism. The Anglican clergyman alleged that "the Church of Rome" feared and shunned the Commandment, either "following it up with laboured misrepresentations" or "omit[ting] it wholly." Such renderings were, according to the author, a "mental degradation . . . unintelligible outside the Church of the dark ages, and the Roman Church which is their legitimate successor." Given this error in such a fundamental doctrine, it was no wonder that Catholicism sanctioned acts akin to the worship of "the golden calves in Palestine" and the practices of "the cultivated heathens in the first four centuries."

Today, anti-Catholic websites parrot these accusations of heresy, while some Catholic websites respond in kind, attacking particular sects of Protestants for even discussing the Commandment and its place in Catholicism.

3. Other Religious Obligations in the Decalogue

The Third Commandment according to Judaism and most denominations of Protestantism is, for the above reasons, the Second Commandment in Catholicism. This Commandment has been

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61. See R.H. Charles, *The Decalogue: Being the Warburton Lectures Delivered in Lincoln's Inn and Westminster Abbey*, 1919-1923, at 74-75 (T. & T. Clark, ed. 1926) (declaring that "no Christian Church, whether Anglican, Reformed or Eastern, omits the second Commandment save that of Rome . . . What she has to do is to justify . . . [this] omission . . ."); see also Catholics Take Out One of the Ten Commandments!, at http://www.jesus-is-lord.com/tencomma.htm (last visited Oct. 10, 2004) (declaring that Catholics' "perverted Bibles have something that approximates the commandment to not make images, but since their leaders tell them they are too spiritually dumb to understand the Bible, they don't read it (or read it with muddy eyeballs") [hereinafter Jesus-is-lord.com].

63. Id. at 70.
64. Id. at 84.
65. Id. at 75.
68. See Harrelson, *supra* note 19, at 40.
described as the "vaguest" edict in the pericope, and its meaning is disputed.\textsuperscript{69} In Jewish tradition, the duty, at least on its face, is narrow: \textsuperscript{71} "You shall not swear falsely by the name of the LORD your God; for the LORD will not clear one who swears falsely by His name."\textsuperscript{72} For followers of Christianity, however, the obligation is more general, forbidding any manner of "tak[ing] the name of the LORD thy God in vain."\textsuperscript{73} Any attempt to criticize God is thus forbidden by the Commandment, as an individual may not "introduce [the name of God] into his own speech except to bless, praise, and glorify it."\textsuperscript{74}

The Fourth Commandment in Judaism and Protestantism (Third Commandment in Catholicism) admonishes the reader to:

Remember the Sabbath day and keep it holy. Six days you shall labor and do all your work, but the seventh day is a Sabbath of the LORD your God: you shall not do any work—you, your son or daughter, your male or female slave, or your cattle, or the stranger who is within your settlements. For in six days the LORD made heaven and earth and sea, and all that is in them, and He rested on the seventh day; therefore the LORD blessed the Sabbath day and hallowed it.\textsuperscript{75}

While the text of this Commandment is not often debated, Jews and Christians differ on the manner in which the Sabbath is commemorated. While Christians observe Sunday as the Sabbath, religious Jews observe the Sabbath on Saturday and adhere to a host of complex Sabbath regulations not incorporated into Christian religious law.\textsuperscript{76}

\textsuperscript{69} See Josiah Derby, The Third Commandment, 21 JEWISH BIBLE Q. 21, 24-25 (1993).
\textsuperscript{70} See id. at 25.
\textsuperscript{71} But see The Torah: A Modern Commentary, supra note 27, at 540 (noting that "others render [the Hebrew verb as] 'take in vain' or 'abuse,'" suggesting a possible broader interpretation).
\textsuperscript{72} Exodus 20:7 (Jewish Publication Society).
\textsuperscript{73} Exodus 20:7 (King James); cf. Exodus 20:7 (New American Bible).
\textsuperscript{74} Catechism, supra note 30, at 518. Catholicism also holds that the Commandment forbids even the "improper use" of the names of "the Virgin Mary and all saints." Id. at 519.
\textsuperscript{75} Exodus 20:8-11 (Jewish Publication Society) (verse numbers omitted); see Youngblood, supra note 5, at 34-35 (charting differences between the Fifth (Fourth) Commandments in Exodus and Deuteronomy); cf. Deuteronomy 5:12-15 (Jewish Publication Society) (differing from the Exodus version in its statement that the Sabbath must be "observe[d]" rather than "remember[ed]" and explaining the rationale of the Commandment as a commemoration of God's redeeming the Hebrews from slavery in Egypt, rather than His creating the world).
\textsuperscript{76} Steinmetz, supra note 49, at 263.
4. Commandments Not Regarding Worship

While the Fifth (Fourth) Commandment, which obligates respect for one's parents, is interpreted relatively uniformly across denominational lines, the translation of the Sixth (Fifth) Commandment is yet another contentious issue. As understood in the accepted Jewish version, the decree prohibits only "murder", for most Christians, however, the decree is broader, declaring, "Thou shalt not kill." As one Jewish commentator notes, "'kill' and 'murder' are words whose integrity is carefully guarded." Whereas the former "designates any taking of human life," the latter "is reserved for unauthorized homicide, usually of a malicious nature." Thus, the Jewish version of the Commandment does not speak to "homicide of . . . a judicial or military nature." For at least some Jews, this fact epitomizes the difference between their own faith, "a realistic, hard-headed system, committed to a law of justice," and Christianity, which "naively and unrealistically" nurtures "a chaos of love."

The Seventh (Sixth) Commandment, which forbids adultery, the Eighth (Seventh) Commandment, which prohibits stealing, and the Ninth (Eighth) Commandment, which enjoins bearing false witness, are again translated in a relatively uniform manner, other than differences in verse division.

At the last verse, however, the Catholic division of the Commandments again differs from the general Protestant and Jewish versions. What the Jewish and Protestant traditions count as the entire Tenth Commandment, "You shall not covet your neighbor's wife, or his male or female slave, or his ox or his ass, or anything

77. See Exodus 20:12 (Jewish Publication Society); Exodus 20:12 (King James); Exodus 20:12 (New American Bible).
80. See Exodus 20:13 (King James); Exodus 20:13 (New American Bible).
81. Blidstein, supra note 78, at 159.
82. Id.
83. Id.
84. Id.
85. See id.
86. There is some controversy as to whether this Commandment actually prohibits kidnapping rather than stealing. See Brief Amicus Curiae American Jewish Congress at 6, Glassroth v. Moore, 335 F.3d 1282 (11th Cir. 2003) (Nos. 02-16708-DD, 02-16949DD).
86. Harrelson, supra note 19, at 40; see Exodus 20:13 (Jewish Publication Society); Exodus 20:13-16 (King James); Exodus 20:13-16 (New American Bible).
that is your neighbor's," that the Catholic Church divides into two. It is not clear exactly where in the text this division arises, but Catholic authorities state that "the ninth commandment forbids carnal concupiscence," while "the tenth forbids coveting another's goods."

C. Hybrid Decalogues and the Posting of the Ten Commandments in America

1. "Unique" Versions

Despite the difficulty inherent in defining the Ten Commandments, many Americans have long been fascinated by them. Capitalizing on this fact, Hollywood producer Cecil B. DeMille, whose biblical extravaganza "The Ten Commandments" hit theaters at the height of the Cold War, worked with an organization called the Fraternal Order of Eagles ("FOE") to publicize his film. Together, FOE and DeMille erected as many as 2000 graphite monuments, each engraved with "unique" versions of the Decalogue, and often accompanied by elaborate dedication rituals including clergy. Before embarking on the project, however, FOE official and juvenile judge E.J. Ruegemer discussed the plan with "representatives" of the three major religious groups in America at the time: Protestantism, Catholicism, and Judaism. To counter

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87. Exodus 20:14 (Jewish Publication Society); Exodus 20:17 (King James).
88. See Harrelson, supra note 19, at 40; Youngblood, supra note 5, at 34-35.
89. Catechism, supra note 30, at 602.
90. Id.
91. As Meislin recognized, some early Americans held the Ten Commandments in such high regard that they chose to believe, incorrectly, "that the Decalogue . . . [was] incorporated in the common law." Bernard J. Meislin, Jewish Law in American Tribunals 25 (1976) [hereinafter Meislin, Jewish Law]. This ideology "died hard," but did eventually give way to the "conventional Anglican viewpoint" that "Old Testament laws were consigned no 'farther than (to) that people to whom they were given.'" Id. at 25-27 (citation omitted) (alteration in original). Yet scholars and judges still debate the degree to which the Decalogue actually infiltrated the early American legal system. Compare Steven K. Green, The Fount of Everything Just and Right? The Ten Commandments as a Source of American Law, 24 J. L. & Religion 525, 558 (2000) (concluding that "the most that could be said about the relationship of the Ten Commandments to the law is that the former has influenced legal notions of right and wrong . . . [b]ut to insist on a closer relationship . . . lacks historical support"), with Stone v. Graham, 449 U.S. 39, 45 (1980) (Rehnquist, J., dissenting) (asserting that it is "undeniable . . . that the Ten Commandments have had a significant impact on the development of secular legal codes of the Western World").
92. State v. Freedom from Religion Found., 898 P.2d 1013, 1016-17 (Colo. 1995); Broadway, supra note 26; see Books v. City of Elkhart, 235 F.3d 292, 294-95 (7th Cir. 2000).
the concerns of sectarian rivalry engendered by the lack of an authoritative version of the Commandments, the representatives attempted to create a hybrid version that would satisfy all religious bents.

Apparently, the task was not easily accomplished. In the succeeding years, FOE created at least three distinct versions of the Commandments in its attempt to hue closest to none of the standard Jewish, Protestant, or Catholic versions of the text. Thus, a monument erected in Elkhart, Indiana and ordered removed in 2001 was engraved with an FOE-fashioned text unburdened by the traditional restriction to ten distinct statements:

The Ten Commandments
I AM the LORD thy God.
Thou shalt have no other gods before me.
Thou shalt not make to thyself any graven images.
Thou shalt not take the Name of the Lord thy God in vain.
Remember the Sabbath day, to keep it holy.
Honor thy father and thy mother, that thy days may be long upon the land which the Lord thy God giveth thee.
Thou shalt not kill.
Thou shalt not commit adultery.
Thou shalt not steal.
Thou shalt not bear false witness against thy neighbor.
Thou shalt not covet thy neighbor’s house.
Thou shalt not covet thy neighbor’s wife, nor his manservant, nor his maidservant, nor his cattle, nor anything that is thy neighbor’s.

Another monument, located on state capitol grounds in Denver, Colorado and ruled constitutional by the Colorado State Supreme Court in 1995, displays a different text, which enumerates ten distinct obligations:

THE TEN COMMANDMENTS
I AM the LORD thy God
I. Thou shalt have no other gods before me.
II. Thou shalt not take the Name of the Lord thy God in Vain.

94. See Freedom from Religion Found., 898 P.2d at 1016-17.
95. Id.
96. The first of these three versions is transcribed in Books, 235 F.3d at 296, the second in Freedom from Religion Foundation, 898 P.2d at 1016, and the third in Indiana Civil Liberties Union v. O’Bannon, 259 F.3d 766, 768-69 (7th Cir. 2001).
98. Id. at 296.
III. Remember the Sabbath day to keep it holy.
IV. Honor thy father and thy mother that thy days may be long upon the land which the Lord thy God giveth thee.
V. Thou shalt not kill.
VI. Thou shalt not commit adultery.
VII. Thou shalt not steal.
VIII. Thou shalt not bear false witness against thy neighbor.
IX. Thou shalt not covet thy neighbor’s house.
X. Thou shalt not covet thy neighbor’s wife, nor his manservant, nor his maidservant, nor his cattle, nor anything that is thy neighbor’s.

The similarities as well as the differences between the monuments are significant. While the Elkhart text apparently includes the words, “I AM the LORD thy God,” as the First Commandment, in accordance with the traditional Jewish enumeration, the Denver monument seems to include it only as an introduction, in the manner of most Christian versions. Neither text, however, contains the reference to redemption from Egypt alongside these words, as does the prevailing Jewish rendering. In addition, the Elkhart monument follows Jewish and Protestant traditions by treating the prohibition of graven images as a distinct Commandment, whereas the text of the Denver monolith, like the Catholic Decalogue, omits it. Yet, both monuments contain two separate Commandments regarding coveting, as Catholicism teaches, and neither monument translates the Commandment regarding homicide as a proscription against “murder.” Instead, both texts declare, “Thou shalt not kill,” choosing the prevailing Christian translation over the standard Jewish version.

2. Laws on Decalogue Displays

In recent years, legislators have sought to ensure the constant display of the Ten Commandments in a variety of public settings. While a smattering of laws requiring the posting of the Decalogue were enacted before 1999, school shootings, such as that perpetrated in Columbine, Colorado, facilitated a burgeoning of at-

100. *Id.* at 1016.
101. *See supra* notes 27-35 and accompanying text.
102. *See supra* notes 27-35 and accompanying text.
103. *See supra* notes 36-67 and accompanying text.
104. *See supra* notes 87-90 and accompanying text.
105. *See supra* notes 78-84 and accompanying text.
106. *See supra* notes 78-84 and accompanying text.
tempts to enact such laws.\textsuperscript{107} Most conspicuously, the House of Representatives proposed the Ten Commandments Defense Act,\textsuperscript{108} which purported to overrule Supreme Court precedent by asserting the right to post the Decalogue as a power reserved to the states under the Tenth Amendment.\textsuperscript{109} The Act, which the Senate declined to consider, did not offer guidance on which version of the Ten Commandments was to be posted and what restrictions, if any, controlled its placement.\textsuperscript{110} Following in the footsteps of the national body, two states passed similar legislation in 2000\textsuperscript{111} and another ten states considered similar bills in 2001,\textsuperscript{112} including an attempt by Alabama to amend the state constitution to allow for Decalogue posting.\textsuperscript{113} Although many of the state bills are specific enough to include manner and appearance requirements and an accompanying document requirement,\textsuperscript{114} none specify which version of the Ten Commandments must be posted.\textsuperscript{115}

Such laws have apparently fueled the litigious fire. Since 1999, courts have decided a litany of cases involving the public display of the Decalogue, a majority of which have resulted in victories for plaintiffs seeking removal of Ten Commandments displays.\textsuperscript{116} On the other hand, the Third Circuit,\textsuperscript{117} the Fifth Circuit,\textsuperscript{118} and the Colorado Supreme Court\textsuperscript{119} have upheld the display of a plaque

\textsuperscript{109} Thollander, \textit{supra} note 108, at 206.
\textsuperscript{110} Hensley, \textit{supra} note 107, at 814.
\textsuperscript{111} Indiana and South Dakota. \textit{Id.} at 802-03.
\textsuperscript{112} \textit{Id.} at 802.
\textsuperscript{113} \textit{Id.} at 803.
\textsuperscript{114} \textit{Id.} at 814-26.
\textsuperscript{115} \textit{Id.} It should be noted, however, that the replacement display in the Alabama Supreme Court building has apparently attempted to address this issue by displaying the original Hebrew text of the Ten Commandments adjacent to the King James translation. \textit{See National Public Radio} (National Public Radio radio broadcast, Feb. 8, 2004 (1:00 pm)), \textit{available at LEXIS, News Library}.
\textsuperscript{116} See the cases discussed at length in Part III of this Note as well as \textit{ACLU of Ohio Foundation, Inc. v. Ashbrook}, 375 F.3d 484 (6th Cir. 2004), \textit{McGinley v. Houston}, 361 F.3d 1328 (11th Cir. 2004), and \textit{Indiana Civil Liberties Union v. O'Bannon}, 259 F.3d 766 (7th Cir. 2001), among others.
\textsuperscript{117} Freethought Soc'y v. Chester County, 334 F.3d 247, 270 (3d Cir. 2003).
\textsuperscript{118} Van Orden v. Perry, 351 F.3d 173, 182 (5th Cir. 2003).
\textsuperscript{119} State v. Freedom from Religion Found., 898 P.2d 1013, 1027 (Colo. 1995).
and two monuments, respectively, all of which boldly pronounce the religious duties of the Decalogue.

PART II. BUTTRESSING THE WALL: THE SUPREME COURT'S ESTABLISHMENT CLAUSE JURISPRUDENCE

Because the maintenance of the wall separating church and state is a tricky business, it has required a delicate balance of principles and analysis rather than the simple application of a bright-line rule. This part of the Note will seek to adumbrate this balance as it is conveyed by the Supreme Court's interpretation of the constitutional command: "Congress shall make no law respecting an establishment of religion . . ." Part A discusses the framework with which to analyze Establishment Clause issues. Part B then looks to the first of three prongs of the framework, which prohibits governmental acts motivated by a predominantly religious purpose. Part C explains the second prong, which forbids any government from advancing or endorsing religion, while Part D describes the last prong of the test, requiring governments to refrain from entangling themselves in religious issues and sectarian disputes.

A. The Lemon Test

It was not until 1971, almost twenty-five years after the Court held the Establishment Clause to apply against the states, that the Court could articulate a test to analyze claims of Establishment Clause violations. In Lemon v. Kurtzman, the Court concluded that to pass muster under the Establishment Clause, "[f]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive . . ."

120. It is a necessary business, nonetheless. Although the "wall metaphor" has been questioned at times, see Wallace v. Jaffree, 472 U.S. 38, 107 (1985) (Rehnquist, J., dissenting), the Court long ago decided that it was an entirely appropriate standard for which to strive. Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947). Indeed, if anything, the difficulties in separating church from state require more, not less, judicial vigilance. See County of Allegheny v. ACLU, 492 U.S. 573, 591 (1989) (recognizing the duty of the Court to protect against the "myriad, subtle ways in which Establishment Clause values can be eroded") (citations omitted).
121. See Allegheny, 492 U.S. at 591 (finding that the values protected by the Establishment Clause are "not susceptible to a single verbal formulation").
122. U.S. Const. amend. I.
123. Everson, 330 U.S. at 18; see Steven B. Epstein, Rethinking the Constitutionality of Ceremonial Deism, 96 Colum. L. Rev. 2083, 2125 (1996).
government entanglement with religion.”

Thus, the *Lemon* test included a purpose prong, an effect prong, and an entanglement prong, all of which the government had to pass in order to avoid a violation. Although advocates of a closer relationship between church and state—as well as some separationists—have vociferously derided *Lemon*, the Court has continued to use it, analyzing both statutes and governmental actions to ensure they conform to *Lemon*’s strictures.

B. Religious Purpose Written in *Stone*

Nine years after the *Lemon* decision, the Court in *Stone v. Graham* relied on the first prong of the *Lemon* test to invalidate a Kentucky statute compelling the display of a “permanent copy of the Ten Commandments” on the walls of every state public school classroom. Refusing to be “blind[ed]” by the legislature’s “avowed” secular purpose,” the majority demonstrated that the “pre-eminent purpose” of the statute was “plainly religious” and therefore unconstitutional. The Court first observed that the Decalogue is “undeniably a sacred text in the Jewish and Christian faiths.” While the Commandments could be appropriately used in a “study of history, civilization, ethics, comparative religion or the like,” the Court explicitly distinguished such a case from that of mere display: “Posting of religious texts on the wall serves no such educational function.” The concomitant posting of a disclaimer purporting to recognize the “secular application of the Ten Commandments” as a foundational legal text, simply could not change the text itself. Although some Commandments addressed “arguably secular matters,” the Court explained that “the first part of the Commandments” did not. Commandments requiring reverence of “the Lord God,” refraining from “idolatry,” “not using the Lord’s name in vain” and “observing the Sabbath

125. *Id.* at 612-13 (internal quotation marks and citations omitted).
130. *Id.* at 41.
131. *Id.*
132. *Id.* at 42.
133. *Id.*
134. *See id.* at 41.
135. *See id.* at 41-42.
Day,” were “religious duties,” pure and simple, and they betrayed 
the legislature’s lack of a sufficient secular purpose.\textsuperscript{136}

While four justices dissented from the denial of plenary re-
view,\textsuperscript{137} only one, Justice Rehnquist, wrote an extensive dissent. 
Without challenging the Court’s analysis of the text of the Decca-
logue, Justice Rehnquist declared that the majority should have de-
ferred to the state’s avowed purpose.\textsuperscript{138} It was “undeniable,”\textsuperscript{139} he 
asserted, that the Kentucky Legislature was correct in describing 
the impact of the Ten Commandments on American law as “signifi-
cant,” a fact which should have validated the state’s avowed secular 
purpose.\textsuperscript{140}

\section*{C. The Endorsement Test and Holiday Displays}

In the 1980’s, the Court decided two cases of holiday displays, 
\textit{Lynch v. Donnelly}\textsuperscript{141} and \textit{County of Allegheny v. ACLU},\textsuperscript{142} which 
focused on and refined the effect prong of the \textit{Lemon} test. In a 
nebulous opinion,\textsuperscript{143} the majority in \textit{Lynch} upheld the display of a 
nativity scene in a privately-owned park.\textsuperscript{144} The Court focused on 
the “context” of the display, which included items deemed secular, 
such as “a Santa Claus house,” a “teddy bear” and a large “SEA-
SONS GREETINGS” banner.\textsuperscript{145} Purporting to apply the \textit{Lemon} 
framework, the Court’s analysis left questions about why and how 
the display conformed to its purpose and effect prongs.\textsuperscript{146}

The concurring opinion of Justice O’Connor, however, was 
clearer. Justice O’Connor’s rationale, which clarified the second 
prong of \textit{Lemon}\textsuperscript{147} and which the Court later adopted in \textit{Allegheny},

\begin{itemize}
\item \textsuperscript{136} See id. at 42.
\item \textsuperscript{137} Chief Justice Burger and Justice Blackmun dissented because they would have 
given the case plenary hearing. \textit{Id.} at 43. Justice Stewart dissented from the reversal. 
\textit{Id.}
\item \textsuperscript{138} \textit{Id.} (Rehnquist, J., dissenting).
\item \textsuperscript{139} \textit{Id.} at 45 (Rehnquist, J., dissenting).
\item \textsuperscript{140} \textit{Id.}
\item \textsuperscript{141} 465 U.S. 668 (1984).
\item \textsuperscript{142} 492 U.S. 573 (1989).
\item \textsuperscript{143} See \textit{Id.} at 594 (Blackmun, J., concurring) (criticizing the \textit{Lynch} majority opin-
ion for exhibiting a rationale that was “none too clear”).
\item \textsuperscript{144} \textit{Lynch}, 465 U.S. at 687.
\item \textsuperscript{145} \textit{Id.} at 671, 679.
\item \textsuperscript{146} See \textit{Allegheny}, 492 U.S. at 594.
\item \textsuperscript{147} As originally put forth in her \textit{Lynch} concurrence, Justice O’Connor purported 
to reinterpret both the purpose and effect prongs of \textit{Lemon}. See \textit{Lynch}, 465 U.S. at 
691 (O’Connor, J., concurring) (proposing a more “proper inquiry under the purpose 
prong of \textit{Lemon}”). Since \textit{Allegheny}, lower courts have split on how to properly inter-
pret the Supreme Court’s adoption of Justice O’Connor’s analysis. Some courts view 
it as eliminating the purpose prong of \textit{Lemon}, see Freethought Society v. Chester
suggested that the Establishment Clause "prohibits government from . . . 'making adherence to a religion relevant in any way to a person's standing in the political community.'"148 Thus the Court was required to decide whether a display "communicat[ed] a message of government endorsement or disapproval of religion."149 If the display effectively branded "nonadherents" as "outsiders, not full members of the political community,"150 it would violate this endorsement test. Likewise, if the display assured "adherents" that they were "insiders, favored members of the political community," this too would violate the test.151 Clarifying this inquiry in her Allegheny concurrence, Justice O'Connor indicated that judges must determine what the content of the message is to the "reasonable observer."152 In another concurrence in a later case, Justice O'Connor fleshed out this notion to some degree, suggesting that this "hypothetical observer" should be "presumed to possess a certain level of information that all citizens might not share," including the context and history of a religious display.153 Such information, then, could help the observer determine whether the message discloses "disapproval of his or her particular religious choices . . . ."154

In Allegheny itself, the Court again analyzed holiday displays, considering both a crèche and a display featuring a menorah and a Christmas tree.155 This time, the Court found the crèche to be unconstitutional and the display featuring the menorah and Christ-
mas tree permissible.\textsuperscript{156} Although \textit{Allegheny} did not overrule \textit{Lynch}, and indeed continued to use "context" as the controlling standard,\textsuperscript{157} the case was significant for two reasons relevant to Decalogue display. First, as noted above, a majority of the court accepted the zero-tolerance rationale of Justice O'Connor's \textit{Lynch} concurrence, promising, at least in theory, to root out all instances of government endorsement or disapproval of the "reasonable observer's" religious choices.\textsuperscript{158} Accordingly, the court described the crèche as an outright display of government approval of Christianity, unabated by secular context, while the menorah and Christmas tree sent a decidedly secular winter holiday message. The Court also cited \textit{Larson v. Valente}\textsuperscript{159} for the proposition that "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."\textsuperscript{160} Thus, government displays "may not demonstrate a preference for one particular sect or creed (including a preference for Christianity over other religions)."\textsuperscript{161} With this holding, the Court suggested that denominational bias is a relevant factor militating against the government in the calculus of the constitutionality of religious displays.

\textbf{D. Entanglement and "The Clearest Command of the Establishment Clause"}

In the \textit{Larson} case, a Minnesota statute imposed registration and reporting requirements only on those religious organizations that received more than fifty percent of their funding from outside organizations.\textsuperscript{162} Holding that the rule "engender[ed] a risk of politicizing religion,"\textsuperscript{163} the Court purported to set aside the \textit{Lemon} test, holding that any rule "granting a denominational pref-
ference” was “suspect” and could only be valid if it passed strict judicial scrutiny.\textsuperscript{164} Because Minnesota could not show that its law was closely tailored to fit its stated governmental objective, the “clearest command of the Establishment Clause” invalidated the legislation.\textsuperscript{165}

But, the Court also implicitly recognized another rationale for its decision. Noting that, of the three prongs of the \textit{Lemon} test, the third prong was “most directly implicated in the present case,” the Court discussed “the problems of entanglement” generally, even when there is no direct evidence of discrimination between groups.\textsuperscript{166} Any “state inspection and evaluation of the religious content of a religious organization,” the court concluded, “is fraught with the sort of entanglement that the Constitution forbids.”\textsuperscript{167} The mere fact of such a close “relationship” between church and state was “pregnant with dangers of excessive government direction . . . of churches.”\textsuperscript{168}

1. \textit{Sectarian Aid and Kiryas Joel}

In subsequent Establishment Clause decisions, the Supreme Court as well as other state and federal courts have employed both of the rationales discussed in \textit{Larson} to strike down government legislation respecting religion and religious groups. On the one hand, in \textit{Kiryas Joel v. Grumet},\textsuperscript{169} the Court struck down a statute because of its tendency to prefer one religious denomination over other groups.\textsuperscript{170} Finding that the statute, which created a separate school district to include only the members of a particular Orthodox Jewish sect,\textsuperscript{171} impermissibly aided a particular religion, the Court concluded that it “failed the test of neutrality.”\textsuperscript{172} Because there was “no assurance that the next similarly situated group seeking a school district of its own will receive one,”\textsuperscript{173} the Court itself had to intervene “to foreclose religious favoritism” by invalidating even the first attempt to establish such a scenario.\textsuperscript{174} “The legislature,” the Court explained, “might fail to exercise govern-

\begin{itemize}
\item \textsuperscript{164} Id. at 246.
\item \textsuperscript{165} Id. at 244, 255.
\item \textsuperscript{166} Id. at 252.
\item \textsuperscript{167} Id. at 255 (emphasis added) (citations omitted).
\item \textsuperscript{168} Id.
\item \textsuperscript{169} 512 U.S. 687 (1994).
\item \textsuperscript{170} Id. at 709-10.
\item \textsuperscript{171} Id. at 693.
\item \textsuperscript{172} Id. at 709.
\item \textsuperscript{173} Id. at 703.
\item \textsuperscript{174} Id. at 710.
\end{itemize}
mental authority in a religiously neutral way.'\textsuperscript{175} Speaking in tones reminiscent of its "clearest command" language in Larson, the Court found such a possibility to be anathema to "a principle at the heart of the Establishment Clause, that government should not prefer one religion to another, or religion to irreligion."\textsuperscript{176}

2. Government Involvement in Religious Affairs and Disputes: The Kosher Cases

On the other hand, however, at least four justices in Kiryas Joel were also troubled by their observation that the redistricting was "substantially equivalent to defining a political subdivision . . . by a religious test."\textsuperscript{177} This refusal to accept such "a purposeful and forbidden fusion of governmental and religious functions" because of the "fusion" itself (and regardless of neutrality concerns) was a veiled reference to the entanglement prong of the Lemon test, as Justice Blackmun noted.\textsuperscript{178}

Indeed, courts have used Lemon's entanglement prong to invalidate other laws in the same vein. Most notably, a state high court and two federal appeals courts have applied the prong to strike down "kosher fraud" statutes, which seek to codify Jewish dietary restrictions in secular law by penalizing food vendors that improperly claim to follow such restrictions.\textsuperscript{179} Thus, in Ran-Dav's County Kosher, Inc. v. State,\textsuperscript{180} the Supreme Court of New Jersey recognized that kosher fraud statutes were invalid because they allowed "enforcement by religious personnel of a sectarian or religious law."\textsuperscript{181} Not only had the state created an Advisory Committee "consist[ing] entirely of rabbis,"\textsuperscript{182} but it also charged the committee with a purely religious job: "polic[ing] the . . . religious pu-

\textsuperscript{175} Id. at 703.
\textsuperscript{176} Id.
\textsuperscript{177} Id. at 702. Though Justice Kennedy did not formally join the plurality on this point, his concurrence seemed to speak to the same issue. Id. at 728 (Kennedy, J., concurring) (noting that one such fundamental limitation imposed by the Establishment Clause is that government may not use religion as a criterion to draw political or electoral lines).
\textsuperscript{178} See id. at 710 (Blackmun, J., concurring). Justice Blackmun also argued that the Court's neutrality test was essentially an application of Lemon's second prong. Id. (Blackmun, J., concurring).
\textsuperscript{180} 129 N.J. 141 (1992).
\textsuperscript{181} Id. at 159.
\textsuperscript{182} Id. at 158.
rity”\textsuperscript{183} of kosher food. This arrangement allowed the resolution of disputations that were “ineluctably religious in tenor and content,”\textsuperscript{184} and created an impermissible “interrelationship between government and religion,” which the entanglement prong of the Lemon test forbade.\textsuperscript{185} For comparable reasons, the Fourth Circuit and the Second Circuit struck down similar legislation.\textsuperscript{186}

\section*{PART III. CIRCUIT SPLITS: TO POST OR NOT TO POST}

While all courts agree that the Decalogue is, at least primarily, a religious document,\textsuperscript{187} there is disagreement as to whether, or to what extent, other factors somehow mitigate the affront to the Establishment Clause represented by the public display of theological obligations.\textsuperscript{188} This part of the Note will detail the competing arguments on this question. Because, however, there are two discrete versions of the Ten Commandments that generally lead to litigation when posted—the Protestant version (or approximations thereof) and the amalgamation texts created by FOE—this Note deals with each separately. Section A of this Part outlines the split in cases of displays closely resembling the Protestant Decalogue, paying close attention to how courts come out on the question of whether the sectarian bent of the text is constitutionally significant. Section B describes the split in FOE-monument cases, focusing especially on

\begin{itemize}
\item \textsuperscript{183} Id. at 157.
\item \textsuperscript{184} Id. at 159.
\item \textsuperscript{185} See id. at 158 (citations and internal quotation marks omitted).
\item \textsuperscript{186} See Commack Self Serv. Kosher Meats, Inc. v. Weiss, 294 F.3d 415 (2d Cir. 2002); Junkins, \textit{supra} note 179, at 1087-91 (discussing Barghout v. Bureau of Kosher Meat & Food Control, 66 F.3d 1337 (4th Cir. 1995)).
\item \textsuperscript{187} Freethought Soc'y v. Chester County, 334 F.3d 247, 265 (3d Cir. 2003) (noting that “the case has yet to be made that the Ten Commandments themselves have lost their primary religious significance or that they have taken on a primarily secular purpose”). The terms “religious” and “secular” themselves are difficult to define in the abstract. See George C. Freeman III, \textit{The Misguided Search for the Constitutional Definition of “Religion,”} 71 \textit{Geo. L.J.} 1519, 1553 (1983) (quoting William James for the proposition that religion likely has “no one essence”) (citations omitted). The Supreme Court has said relatively little on the matter. \textit{Id.} at 1524-28.
\item \textsuperscript{188} Of course, there are other issues disputed between and within circuits, as exhibited by the dissent in ACLU Nebraska Foundation v. City of Plattsmouth, 358 F.3d 1020, 1043-50 (8th Cir. 2004) (Bowman, J., concurring in part and dissenting in part) (disputing the majority's conclusions on: 1) the definition or at least the parameters of the “reasonable observer” in religious display cases; 2) whether the symbols on the FOE monument enhances or mutes religious significance; 3) how to, and whether to, weigh historical value of a monument; 4) whether the purpose prong of the Lemon test constitutes an inquiry independent of Justice O'Connor's endorsement/disapproval analysis).
\end{itemize}
whether the purported hybrid of Christian and Jewish versions in any way answers the concerns of the Establishment Clause.

A. New Testament "Summaries" and The King James Version of the Decalogue

Of the Circuit Courts that have decided cases involving a Protestant version of the Ten Commandments, at least two, the Eleventh Circuit and the Third Circuit, have given consideration to the question of whether the sectarian bent of the text should inform the constitutional inquiry. 189 Although the cases involved different facts relevant to the context of the monument, both opinions referred to testimony and briefing on the fact that the posted text derived from Protestantism. In addition, two district courts, one weighing in on either side of the debate, help flesh out both sides of the argument.

1. The Eleventh Circuit Approach

In deciding Glassroth v. Moore, 190 the case of the "Ten Commandments Judge" discussed above, 191 a unanimous panel of the Eleventh Circuit recognized the importance of the various versions of the Decalogue in ordering the removal of the display. First, in its rendition of the facts, the court recounted Roy Moore's sanctimonious rise to chief justice of the state supreme court, 192 and then considered the details of the monument that he installed upon arrival. 193 In this context, the panel noted that Moore's display featured "[e]xcerpts from Exodus 20:2-17 of the King James Version of the Holy Bible, the Ten Commandments." 194 The opinion then described the text of the monument:

The left [tablet] reads:

I AM THE LORD THY GOD
THOU SHALT HAVE NO OTHER GODS BEFORE ME
THOU SHALT NOT MAKE UNTO THEE ANY GRAVEN IMAGE

189. The Sixth Circuit also dealt with the issue of a Protestant version of the Decalogue. See ACLU of Ky. v. McCreary County, 354 F.3d 438, 443 n.2 (6th Cir. 2003) (quoting the posted version of the Commandments, which concluded with the words "King James Version").
190. 335 F.3d 1282 (11th Cir. 2003).
191. See supra notes 1-15 and accompanying text.
192. Glassroth, 335 F.3d at 1285 n.1, 1299 n.3.
193. Id. at 1285.
194. Id.
THOU SHALT NOT TAKE THE NAME OF THE LORD
THY GOD IN VAIN
REMEMBER THE SABBATH DAY, TO KEEP IT HOLY
The right [tablet] reads:
HONOUR THY FATHER AND THY MOTHER
THOU SHALT NOT KILL
THOU SHALT NOT COMMIT ADULTERY
THOU SHALT NOT STEAL
THOU SHALT NOT BEAR FALSE WITNESS
THOU SHALT NOT COVET

Calling attention to the fact that the monument contained eleven statements and not ten, the court found that the question of how to divide the relevant text had caused “[d]ifferent faiths [to] dispute” the issue. “For example, many Jews and some Christians consider the ‘First Commandment’ to be ‘I am the Lord thy God,’” while most Christians understand the First Commandment as an injunction against worship of “all other gods before me,” the Second Commandment for Jews. The court also recognized that there is disagreement as to whether the beginning of the edict is properly rendered, “Thou shalt” or “You shall.” The testimony on the issue of conflicting interpretations of the Decalogue, therefore, disclosed a “significance” to which the court would return in its analysis.

In its application of the Lemon framework, the court took due note of both Moore’s testimony admitting his religious purposes and the lack of sufficient secular content around the large monument, failing to mute the monument’s religious message. The court did not, however, stop at this cursory level of analysis. Quoting Larson v. Valente, it explained that “[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.” By posting one particular version of the Exodus pericope, the defendant was tak-

195. Id.
196. Id. at 1285 n.1.
197. Id.
198. Id.
199. Id.; see supra notes 36-41 and accompanying text.
200. Glassroth, 335 F.3d at 1285 (rendering the proscription against idolatry as “[t]hou shalt [or You shall] have no other gods before me”) (second alteration in original); see supra note 37 and accompanying text.
201. Glassroth, 335 F.3d at 1285.
202. Id. at 1296.
203. Id. at 1297.
204. 456 U.S. 228 (1982).
205. Glassroth, 335 F.3d at 1299 n.3.
ing a side in the "deep theological disputes"\textsuperscript{206} that "lurk[ ] behind the disparate accounts."\textsuperscript{207} While recognizing that some of the differences between the versions "might seem trivial or semantic,"\textsuperscript{208} the court found that even the general decision to take excerpts from "the King James Version of the Bible, which is a Protestant version," was problematic.\textsuperscript{209} This was true because "Jewish, Catholic, Lutheran, and Eastern Orthodox faiths use different parts of their holy texts" to compose their versions of the Commandments,\textsuperscript{210} and because of "the conflict between Catholics and Protestants,"\textsuperscript{211} resulting from the use of the Protestant Bible in public schools in the nineteenth century.\textsuperscript{212} This centuries-old conflict was anathema to a court that observed the strictures of the separation of church and state.\textsuperscript{213}

Finally, the court considered "but one example" of the myriad conflicts in the interpretation of the Commandments.\textsuperscript{214} Having mentioned the dispute over the First Commandment,\textsuperscript{215} the panel now focused on "the Hebrew translation of the Sixth [Fifth for Catholics] Commandment."\textsuperscript{216} Because it prohibited "only murder"\textsuperscript{217} it directly contradicted the King James version, which enjoined "all killings."\textsuperscript{218} Demonstrating that this dispute was not a mere divergence in linguistic style but a serious theological row, the court cited the testimony of a rabbi in a previous Ten Commandments display case.\textsuperscript{219} The rabbi testified to his belief that "this ['Thou shalt not kill'] version of the Sixth Commandment,"\textsuperscript{220} far from being an acceptable variant of the injunction against mur-

\textsuperscript{206} Id. (quoting Steven Lubet, \textit{The Ten Commandments in Alabama}, 15 Const. Comment. 471, 474-76 & n.18 (1998)).
\textsuperscript{207} Id.
\textsuperscript{208} Id.
\textsuperscript{209} Id.
\textsuperscript{210} Id.
\textsuperscript{211} Id. (citing Lemon v. Kurtzman, 403 U.S. 602, 628-29 (1971)).
\textsuperscript{212} Id.
\textsuperscript{213} Id. (noting that the Catholic version, like the Lutheran version but unlike the mainstream Protestant version displayed by Moore, treats the proscription against killing or murder as "the Fifth Commandment, not the Sixth").
\textsuperscript{214} Id.
\textsuperscript{215} See supra notes 32-35 and accompanying text.
\textsuperscript{216} Glassroth, 335 F.3d at 1299 n.3.
\textsuperscript{217} Id.
\textsuperscript{218} Id.; see supra notes 78-84 and accompanying text.
\textsuperscript{219} Id. (citing Harvey v. Cobb County, 811 F. Supp. 669, 677 (N.D. Ga. 1993)).
\textsuperscript{220} Id. (alteration in original).
der, was rather a "mistranslation of the original Hebrew," which "frequently appear[ed] in Christian versions.

To elaborate, the court might have also considered, as did a district court in Georgia examining another Decalogue-display case, the practical implications of a governmental decision to choose the Christian translation of this Commandment over the standard Jewish version. The difference between "kill" and "murder," the district court pointed out, is "extraordinarily important." Not only was there a vast theoretical chasm in the relative breadth of the two verbs, but the distinction also had real world consequences. Posting a biblical tenet prohibiting all killing "implicates some of the most controversial social issues of the day, including war, abortion and capital punishment."

2. The Third Circuit Approach

In contrast to the Eleventh Circuit, the Third Circuit, in Freethought Society v. Chester County, chose not to give serious consideration to the words of the Decalogue itself. Deciding that a plaque, which contained "a Protestant version" of the Commandments, could remain affixed to the wall of a county courthouse, the unanimous panel made only brief reference to the text of the plaque in the facts section of the opinion.

In that section, the court quoted the more elaborate version of the biblical text displayed on the courthouse wall:

THE COMMANDMENTS
THOU SHALT HAVE NO OTHER GODS BEFORE ME.
THOU SHALT NOT MAKE UNTO THEE ANY GRAVEN IMAGE, OR ANY LIKENESS OF ANY THING THAT IS IN HEAVEN ABOVE, OR THAT IS IN THE EARTH BENEATH, OR THAT IS IN THE WATER UNDER THE EARTH:

221. Id.
222. Id.
223. Id.
225. Id.
226. Id.
227. 334 F.3d 247 (3d Cir. 2003).
228. Id. at 247. The two cases were filed at roughly the same time. Freethought Society was filed on June 26, 2003. Glassroth was filed five days later. 335 F.3d at 1282.
229. Freethought Soc'y, 334 F.3d at 249.
230. Id. at 270.
231. Id. at 252-53.
THOU SHALT NOT BOW DOWN THYSELF TO THEM, NOR SERVE THEM:
For I the Lord Thy God am a Jealous God, Visiting the Iniquity of the Fathers upon the Children unto the Third and Fourth Generation of Them that Hate me. And Shewing Mercy unto Thousands of Them that Love Me and Keep My Commandments.

THOU SHALT NOT TAKE THE NAME OF THE LORD THY GOD IN VAIN:
For the Lord will not Hold him Guiltless that Taketh His Name in Vain.

REMEMBER THE SABBATH DAY, TO KEEP IT HOLY.
SIX DAYS SHALT THOU LABOR AND DO ALL THY WORK:
BUT THE SEVENTH DAY IS THE SABBATH OF THE LORD THY GOD: IN IT THOU SHALT NOT DO ANY WORK, THOU, NOR THY SON, NOR THY DAUGHTER, THY MANSERVANT, NOR THY MAIDSERVANT, NOR THY CATTLE, NOR THY STRANGER THAT IS WITHIN THY GATES:
For in Six Days the Lord Made Heaven and Earth, the Sea, and All That in Them is, and Rested the Seventh Day, Wherefore the Lord Blessed the Sabbath Day, and Hallowed it.

HONOR THY FATHER AND THY MOTHER:
That Thy Days May be Long upon the Land which the Lord Thy God Giveth Thee.

THOU SHALT NOT KILL.
THOU SHALT NOT COMMIT ADULTERY.
THOU SHALT NOT STEAL.
THOU SHALT NOT BEAR FALSE WITNESS AGAINST THY NEIGHBOUR.
THOU SHALT NOT COVET THY NEIGHBOUR'S HOUSE.
THOU SHALT NOT COVET THY NEIGHBOUR'S WIFE, NOR HIS MANSERVANT, NOR HIS MAIDSERVANT, NOR HIS OX, NOR HIS ASS, NOR ANY THING THAT IS THY NEIGHBOUR'S.

SUMMARY
THOU SHALT LOVE THE LORD THY GOD WITH ALL THINE HEART, AND WITH ALL THY SOUL AND WITH ALL THY MIND.
THOU SHALT LOVE THY NEIGHBOUR AS THYSELF.²³²

The court noted that the text came from three parts of the Protestant Bible. Unlike the posted text in Glassroth, which only con-

²³² Id.
tained the well-known pericope from *Exodus* 20:2-17 and *Deuteronomy* 5:6-21, the instant text also included a so-called "summary" from the New Testament book of Matthew. As a rabbi named Leonard Gordon testified, this fact alone made the text objectionable to adherents of Judaism. The very inclusion of a "summary" portion of the plaque "implie[d] that certain commandments are more important than others," an idea at odds with the Jewish understanding of the Decalogue. In addition, like the experts in *Glassroth*, Rabbi Gordon recognized the distinction between "kill" and "murder" to be a contentious issue between Jewish and Christian interpretations of the Sixth (Fifth) Commandment. Finally, Rabbi Gordon testified that the plaque's omission of "the First Commandment in Jewish tradition: 'I am the Lord your God who brought you out of the land of Egypt'" sent a decidedly Christian message.

Despite these denominational conflicts, however, the court did not consider the Protestant focus of the text to cut against the defendant's case. After summarizing Rabbi Gordon's assertions in a footnote, the court pointed to contrary testimony from one of the defendants, a county commissioner. The commissioner, whose denial of the plaintiff's request to remove the plaque led to the litigation, described himself as "a practicing Reform Jew" and opined that his coreligionists would not care about or even notice the distinctions noted by Rabbi Gordon.

Concomitantly, in the main text of its opinion, the court described at length the testimony of a Father Francis X. Meehan, who declared that the posted version of the text would not be offensive to Catholics. The priest also testified, however, that there was "at least one critical difference in the Catholic interpretation of the Ten Commandments." Whereas the posted version contained the standard Protestant and Jewish injunction against the creation of any likeness or image, the standard Catholic version, as set out

233. *Id.* at 253.
234. *Id.*
235. *See id.* at 253 & n.1.
236. *Id.* at 253 n.1.
237. *Id.*
238. *Cf. id.*
239. *Id.*
240. *Id.* at 255.
241. *Id.* at 253 n.1.
242. *Id.*
243. *Id.* at 253.
in the New American Bible, "uses the word 'idols' in place of 'graven images.'"244

In its analysis of the message sent by the plaque, the court looked almost exclusively to the physical and historical context of the display, without considering its text. Discounting the fact that a religious organization had donated the plaque amid a religious ceremony,245 the court emphasized both the fact that a famous architect had designed the building in 1920246 and the fact that the plaque was adjacent to an entrance no longer used.247 While the court did briefly distinguish "the language of the Ten Commandments"248 from phrases like "In God We Trust," it did not fully elaborate on this distinction.249 The court therefore never made explicit its reasons for failing to consider the decidedly Protestant bent of the display.

While the court might have simply discounted the rabbi's testimony, which declared that posting the Christian version of the Commandments on the plaque sends a message of disapproval to Jews, the panel might also have implicitly accepted other reasoning. A Kentucky district court judge, for instance, based his decision to rule a Decalogue display constitutional on an aversion to even discussing which version of the Decalogue was posted.250 The chief judge offered two alternative rationales to explain his decision not to consider the source of the display on which he was ruling. First, he posited that a court was not in the position to determine which denomination's version of the Decalogue is posted, because judges ought not become involved in "theological distinctions that are not the proper business of the Court."251 Second, he asserted that conflicting versions of the Decalogue were irrelevant, given the "reasonable observer" standard posited by Justice O'Connor. While the hypothetical reasonable observer has

244. Id.
245. Id. at 251 ("Judge J. Frank E. Hause, the keynote speaker at the dedication ceremony, admonished those in attendance: Have you remembered the Sabbath Day to keep it holy? If you disobey the commandments here and escape punishment, there is yet the punishment which will surely be meted out on the day of judgment.").
246. Id. at 266 (citing Marsh v. Chambers, 463 U.S. 783 (1983), for the proposition that "history can transform the effect of a religious practice").
247. E.g., id. at 266-67.
248. Id. at 264.
249. Id. at 264-65. The court noted that the national motto, "In God We Trust," unlike the Ten Commandments, was "not taken directly from the Bible" and is "non-sectarian." Id. at 264.
251. Id. at 797.
been presumed to have the capacity to scrutinize the context of a display on the level of an interior decorator.\textsuperscript{252} Forester ruled that such an observer would not grasp the "subtle distinction[s]" between the various versions of the Commandments.\textsuperscript{253}

**B. FOE's Attempt at Ecumenism**

As noted above,\textsuperscript{254} many Ten Commandments cases involve monuments donated to local governments by FOE.\textsuperscript{255} Like the displays of the Protestant version of the Commandments, different FOE monument cases vary with regard to the physical setting of the monument,\textsuperscript{256} though some facts are fairly uniform. The monuments are between three and six feet high, are usually positioned on public land and are inscribed with purported amalgamations of the standard Jewish, Catholic, and Protestant versions of the Decalogue.\textsuperscript{257} In addition, the face of each monument contains a combination of symbols including "two small tablets engraved with the Ten Commandments written in a Semitic script, an eye within a triangle, and an eagle gripping an American flag . . . two six-point stars [and] the intertwined [Greek] symbols ‘chi’ and ‘rho.’"\textsuperscript{258} Each monument is also inscribed with a dedication to the city in which it was donated.\textsuperscript{259}

While some courts simply presume the text of the monument to be religious, asking whether the external context of the monument mutes the religious message,\textsuperscript{260} other courts have gone into more depth in discussing the essential nature of the text of the Ten Commandments. These latter courts, which have given due attention to

\begin{itemize}
  \item \textsuperscript{252} Am. Jewish Cong. v. Chicago, 827 F.2d 120 (7th Cir. 1987) (Easterbrook, J., dissenting) (asserting that current Establishment Clause strictures require "scrutiny more commonly associated with interior decorators than with the judiciary").
  \item \textsuperscript{253} Mercer, 219 F. Supp. 2d at 797.
  \item \textsuperscript{254} See supra notes 91-106 and accompanying text.
  \item \textsuperscript{255} See ACLU Neb. Found. v. City of Plattsmouth, 358 F.3d 1020, 1025 (8th Cir. 2004) (noting that the monument donated to Plattsmouth bore a "very close resemblance to scores of other Ten Commandments monuments given by the Fraternal Order of the Eagles to towns and cities in the 1950s and 1960s").
  \item \textsuperscript{256} Compare Van Orden v. Perry, 351 F.3d 173, 175-76 (5th Cir. 2003) (describing a monument on Texas capitol grounds), with ACLU Neb. Found., 358 F.3d at 1025 (describing the monument as being in a park ten blocks from city hall).
  \item \textsuperscript{257} E.g., ACLU Neb. Found., 358 F.3d at 1025; Van Orden, 351 F.3d at 176; State v. Freedom from Religion Found., 898 P.2d 1013, 1016 (Colo. 1995).
  \item \textsuperscript{258} ACLU Neb. Found., 358 F.3d at 1025 (footnotes omitted); cf. Van Orden, 351 F.3d at 176.
  \item \textsuperscript{259} ACLU Neb. Found., 358 F.3d at 1025 (footnotes omitted); cf. Van Orden, 351 F.3d at 176.
  \item \textsuperscript{260} See, e.g., Adland v. Russ, 307 F.3d 471, 480-81 (6th Cir. 2002).
\end{itemize}
external context but also have considered the Decalogue as a self-contained document, are themselves split. On the one hand, the Eighth Circuit, discussing particular Commandments in its analysis, found that a government’s display of a list of religious injunctions, as put forth in the FOE version of the Decalogue, is more constitutionally infirm than mere “acknowledgment” of a generic “God.” On the other hand, the Fifth Circuit and the Supreme Court of Colorado, speaking only generally of the comprehensive Decalogue and not paying particular attention to the words therein, have taken the view that the message conveyed by the Ten Commandments can be secular. The following subsection of the Note focuses on this split.

1. The Eighth Circuit Approach

In ACLU Nebraska Foundation v. City of Plattsmouth, the Eighth Circuit decided that a five-foot monument inscribed with a hybrid version of the Ten Commandments identical to that inscribed in the Elkhart, Indiana monument, in a public park near city hall violated the Establishment Clause. In considering how to apply the Supreme Court’s holding in Larson v. Valente, the court explored two distinct concepts related to the factious nature of the Ten Commandments as a religious document. First, echoing the Glassroth court, the panel noted that the “choice of Commandments,” in terms of which denomination’s version the government chose to post, did “indeed express religious preference.” The “deep and divisive disagreement” between adherents of Protestantism, Catholicism, and Judaism over the content of the text was real, and it existed irrespective of FOE’s purported “amalgam” of Protestant, Catholic, and Jewish interpretations. Second, the court found that, far from simply displaying a list of universally applicable moral axioms, the monument’s text exhibited a series of

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261. See ACLU Neb. Found., 358 F.3d at 1042 (“The monument does much more than acknowledge God; it is an instruction from the Judeo-Christian God on how He requires His followers to live.”).
262. See Van Orden, 351 F.3d at 182; Freedom from Religion Found., 898 P.2d at 1027.
263. 358 F.3d 1020 (8th Cir. 2004).
264. See supra notes 94-95 and accompanying text.
265. 358 F.3d at 1025.
266. 456 U.S. 228 (1982); see ACLU Neb. Found., 358 F.3d at 1032-33.
267. ACLU Neb. Found., 358 F.3d at 1032.
268. See id. (quoting several sources that discuss the contentious and violent nature of religious disagreement).
269. See id. at 1026.
sectarian "religious beliefs," every one of which was "a rejection of contrary views."270 Thus, even on its face, the monument "snub[bed] polytheistic sects, such as Hinduism, as well as non-theistic sects, such as Buddhism, and the non-religious."271

Although the court declined to apply the strict scrutiny analysis of Larson,272 it considered the capacity of the Ten Commandments to be divisive in its discussion of the Lemon framework.273 Applying the purpose prong of Lemon, the court looked primarily to the text of the monument274 to show that it not only "possesse[d] a religious nature," as other courts had pointed out,275 but that it also patently advanced an argument in support of a contentious religious view. The monument’s declaration of the “existence and supremacy of God,”276 for instance, as well as the prescription of “exclusively religious” behavior277 made it more likely that the government was motivated by a desire to promote particular religious beliefs.278

Furthermore, even the arguably secular Commandments, such as the prohibition against stealing, were not unproblematic. “It is one thing for Plattsmouth to say one should not steal,” the court stated.279 “[I]t is quite another for Plattsmouth to say there is a God who said, ‘Thou shalt not steal.’”280 Thus, the “religious tenor” of even the “secular” Commandments gave credence to the plaintiff’s argument that the government’s motivation in displaying them was to promote their “putative source”—“the LORD thy God”—rather than to discourage the admittedly wrongful act.281

The court used the same evidence to both apply the effect prong of Lemon and to distinguish Marsh v. Chambers, a case that side-stepped the Lemon framework.282 After explaining that the external context of the monument did not heal its constitutional defect, the court concluded that Justice O’Connor’s reasonable observer would “perceive this monument as an attempt by Plattsmouth to

270. Id. at 1033.
271. Id. at 1032-33.
272. Id. at 1033-34.
273. Id. at 1034-36.
274. Id. at 1036 (“We begin with the words and symbols on the monument.”).
276. ACLU Neb. Found., 358 F.3d at 1036.
277. Id.
278. See id.
279. Id.
280. Id.
281. Id.
282. 463 U.S. 783 (1983); see ACLU Neb. Found., 358 F.3d at 1042.
steer its citizens in the direction of mainstream Judeo-Christian religion."283 Likewise, the court found "fatal fault" in the defendant's attempt to describe the monument as "merely an acknowledgment of God."284 Seeking to show that the monument was no different than the nonsectarian benediction upheld in Marsh, the defendants failed to realize that the monument's text "is an instruction from the Judeo-Christian God on how He requires His followers to live."285 To reduce the Ten Commandments to a bland recognition of faith would "diminish[ ] their sanctity to believers and belie[ve] the words themselves."286 While a dissenting opinion disagreed on most of these points,287 a concurring opinion emphatically "join[ed] and applaud[ed] most of the Court's excellent opinion,"288 urging that the court should also have applied Larson strict scrutiny.289 Quoting the majority's rejection of the "mere acknowledgment" argument, the concurrence underscored the court's finding that "[t]he words on the monument clearly prefer Christianity and Judaism."290

2. The Approach of the Fifth Circuit and the Colorado Supreme Court

Both the Fifth Circuit and the Supreme Court of Colorado took a different tack than the Eighth Circuit in deciding on the validity of FOE monuments on government property.291 Although each court gave its own theory on the essential nature of the Ten Commandments, both spent little or no time considering the text of the Commandments as had the Eighth Circuit. While the Fifth Circuit, in Van Orden v. Perry,292 did not even transcribe the text of the monument it was analyzing, the Colorado Supreme Court did so in State v. Freedom from Religion Foundation.293

I AM the LORD thy God
I. Thou shalt have no other gods before me.

283. ACLU Neb. Found., 358 F.3d at 1042.
284. Id.
285. Id.
286. Id.
287. See id. at 1043-50 (Bowman, J., dissenting).
288. Id. at 1042 (Arnold, J., concurring).
289. See id. at 1043 (Arnold, J., concurring).
290. Id. (Arnold, J., concurring).
292. 351 F.3d 173 (5th Cir. 2003).
293. 898 P.2d at 1016.
II. Thou shalt not take the name of the Lord thy God in vain.
III. Remember the Sabbath day to keep it holy.
IV. Honor thy father and thy mother that thy days may be long upon the land which the Lord thy God giveth thee.
V. Thou shalt not kill.
VI. Thou shalt not commit adultery.
VII. Thou shalt not steal.
VIII. Thou shalt not bear false witness against thy neighbor.
IX. Thou shalt not covet thy neighbor's house.
X. Thou shalt not covet thy neighbor's wife, nor his manservant, nor his maidservant, nor his cattle, nor anything that is thy neighbor's.294

Asserting that this "unique version"295 of the Decalogue did "not reproduce exactly the Ten Commandments as accepted by any particular sect," the court failed to discuss the monument's striking resemblance to the Catholic version of the Decalogue. Though the text of the monolith excluded the prohibition of "graven images"—the Second Commandment according to the Jewish and Protestant versions of the text296—for instance, the court summarily concluded that it reflected "reconciliation and diversity more than any sentiment of intolerance."297 Rather than taking note of the monument's two separate Commandments against coveting—also at odds with the Jewish and Protestant versions of the biblical passage298—the Court looked to the monument's Jewish and Christian icons299 as more evidence of harmony.

Aside from the ecumenism issue, however, there was another argument regarding the nature of the Ten Commandments as a whole which could be found in both the Colorado Supreme Court's opinion and the Fifth Circuit opinion. The Colorado court suggested that the Commandments were essentially "expressions of universal standards of behavior common to all western societies."300 Without acknowledging the injunctions against other forms of religious worship found throughout the Decalogue, the court held that it could not concede to disestablishmentarian argu-

294. Id.
295. Id. at 1023.
296. See supra notes 45-67 and accompanying text.
298. See supra notes 85-90 and accompanying text.
299. Freedom from Religion Found., 898 P.2d at 1023 (describing "the juxtaposition of the Christian Chi and Rho [symbolizing Jesus Christ] with the Jewish Star of David").
300. Id. at 1024.
ments that would only be "exaggerat[ing] the effect of benign religious messages . . . ."301

Similarly, the Fifth Circuit emphasized that "the Commandments have a secular dimension as well as a religious meaning."302

Seemingly taking the position that the only "religious" aspect of the Commandments was their purported source, the panel, like the Colorado Supreme Court, failed to discuss the patently religious duties noted by the Supreme Court in Stone.303 The Fifth Circuit did, however, harken back to Justice Rehnquist's dissent in Stone, asserting that the Decalogue's "influence upon the civil and criminal laws of this country" was axiomatic.304 The court further suggested that "even those" that did not accept the biblical narrative "cannot deny" this;305 to do so would be to seek a "constitutional right to be free of government endorsement of its own laws."306

PART IV. TAKING TEXT SERIOUSLY: RECOGNIZING THE DISPLAY OF THEOLOGICAL OBLIGATIONS AND PARTICULARIST RENDERINGS OF BIBLICAL PASSAGES ON GOVERNMENT PROPERTY AS AN IMPERMISSIBLE ENDORSEMENT OF RELIGION AND A VIOLATION OF THE "CLEAREST COMMAND" OF THE ESTABLISHMENT CLAUSE

Because raw emotion pervades the atmosphere in the debate over the legal ramifications of displaying the Ten Commandments in public, it is crucial that judges and commentators focus on the text of the Decalogue itself in analyzing this issue. Thus, this part of the Note reaches its conclusion—that the Ten Commandments cannot be publicly displayed—through an analysis of the words of the biblical pericope. Section A concentrates on the theological nature of the Commandments and argues that their public posting conveys a sense of government endorsement of religion to a reasonable observer, violating the second prong of the Lemon test. Returning to the first prong of Lemon, section B contends that in most cases, the act of posting the Decalogue on government property betrays an impermissible religious purpose. Section C then concludes that because there is no standard version of the Deca-

301. Id. at 1026.
302. Van Orden v. Perry, 351 F.3d 173, 179 (5th Cir. 2003).
303. See id. at 181 ("Even those who would see the decalogue as wise counsel born of man's experience rather than as divinely inspired religious teaching cannot deny its influence upon the civil and criminal laws of this country.").
304. Id.
305. Id.
306. Id. at 182.
logue to which all religions conform, the government violates Lemon’s third prong by entangling itself in religious affairs whenever it chooses to post one of the many extant versions of the document.

A. Religious Duties in Black and White: Impermissible Government Endorsement of Religion

In ACLU v. McCreary County, one of the cases for which the Supreme Court granted certiorari, the Sixth Circuit correctly noted that the Decalogue, unlike a crèche or other “passive symbol[s]” of religion, is an “active symbol” containing “blatantly religious content.” Quoting the Supreme Court in Stone, the McCreary court explained that the Commandments from God were “religious duties of believers.” Nothing could be clearer from reading the text itself.

The most striking religious identifier of the Ten Commandments is that the first several obligations are express requirements enjoining religious worship and belief in the most fundamental theological issues. For instance, “I am the LORD your God,” the First Commandment in the Jewish text and the introduction included in most Christian versions, requires the belief in a particular God. Likewise, the next verse in the pericope included in each version, “You shall have no other gods beside me,” prohibits, perhaps even more directly, all polytheistic belief. If reasonable observers of a monument bearing these words would attribute them to the government, they would naturally assume a governmental instruction, or at the very least a suggestion by the government, to obey these precepts.

As Allegheny and Justice O’Connor’s concurrence in Lynch teach, such an overture violates the Establishment Clause. By encouraging monotheistic worship, the government “communicat[es] a message of government endorsement . . . of religion,” setting the government’s imprimatur on the theological principle at the core of

307. 354 F.3d 438 (6th Cir. 2003).
308. Id. at 455.
309. Id. (quoting Stone, 449 U.S. at 42).
310. See supra text accompanying notes 27-35.
311. See supra text accompanying notes 36-41.
312. A reasonable person could easily assume this, considering the fact that the words are enshrined on government property and that there is often much pomp and circumstance associated with Ten Commandment dedication ceremonies. See supra note 91 and accompanying text; see also Books v. City of Elkhart, 235 F.3d 292, 295 (7th Cir. 2000).
Western religion. The nearly two million Americans who consider themselves atheists and agnostics are thus effectively dubbed "outsiders, not full members of the political community," unless they abandon their own ideologies regarding the question of a deity. Another subset of Americans greater than two million in number likewise have their beliefs marginalized as a result of the nontheistic and polytheistic theological religions to which they subscribe, making "adherence to [their] religion relevant . . . [to their] standing in the political community." The "accompanying message" of the text to adherents of these theological duties, treating them as "insiders, favored members of the political community," is equally impermissible and seals the fate of the posting as a violation of the modified effect prong of the Lemon test.

Other Commandments, of course, enjoin behavior also proscribed by civilizations other than those dominated by monotheistic religion. While some argue that even these Commandments are not entirely secular in nature, this notion misses the point. The public veneration of a document which plainly compares the desire to practice dissenting religious beliefs with the failure to observe basic moral imperatives is, to say the least, religious discrimination against all citizens practicing such dissenting beliefs. Whatever the value of the Decalogue within a religious tradition, a government in the United States may not officially compare murder or killing (Sixth Commandment according to Protestant tradition), stealing (Eighth Commandment according to Protestant tradition), and lying under oath (Ninth Commandment according to Protestant tradition) with the practice of religious worship that differs from that practiced by the majority. Indeed, even to compare those that follow their own religious ideologies with those who dishonor their parents (Fifth Commandment according to Protestant tradition) and commit adultery (Seventh Commandment according to Protestant tradition)—two nearly universal ethical transgressions—"sends a message to nonadherents that they are outsiders, not full

314. See id.; Adherents.com, supra note 18.
317. See, e.g., Stone v. Graham, 449 U.S. 39, 41-42 (1980) (stating that "honoring one's parents, killing or murder, adultery, stealing, false witness, and covetousness" are "arguably secular matters") (emphasis added).
members of the political community."\textsuperscript{318} As Allegheny tells us, this the government may not do.\textsuperscript{319}

**B. Seeking to Post the Commandments: An Impermissibly Religious Purpose**

The above reasoning should hold irrespective of the font size used for each Commandment. Even if a government chose to post a text of the Decalogue that enlarged the Commandments that do not regard worship, such as those against stealing and lying, a reasonable observer would still read government endorsement of a religion into the text. So long as the Commandments requiring monotheistic worship, the sanctification of God's name and the observance of the Sabbath are legible, their literal message—an instruction to the reader to follow the imperatives—is religious. If, however, a government were to follow the lead of the Alabama Supreme Court and surround the document with other lawgiving texts, such as the Magna Carta and the Bill of Rights,\textsuperscript{320} the result would not be so clear according to the reasonable person test.

There would be a substantial likelihood, however, that such an action would be invalidated based on an impermissibly religious governmental purpose, the first prong of the *Lemon* test.\textsuperscript{321} For instance, in the case of the display created in the Alabama Supreme Court six months after the deposed Chief Justice's display was removed,\textsuperscript{322} a religious motivation is particularly likely. Although acting Chief Justice Gorman Houston claimed at the time that the Alabama justices ordered the construction of the display to educate citizens on the foundations of Alabama and United States law,\textsuperscript{323} such an "avowed secular purpose"\textsuperscript{324} is unlikely. It is doubtful that the Alabama justices would be so motivated by a sudden interest in legal history that they would construct a display including the Ten Commandments so soon after Moore's Decalogue was removed. The more likely explanation for this governmental action is that the Court wished to maintain some semblance of the Decalogue monument built by former Chief Justice Moore, "The Ten Commandments Judge," an act of unambiguously religious

\begin{footnotes}
\begin{enumerate}
\item[318.] Allegheny, 492 U.S. at 595 (quoting Lynch, 465 U.S. at 688).
\item[319.] Id.
\item[320.] See supra note 15.
\item[321.] See supra notes 124-27 and accompanying text.
\item[322.] See supra notes 1-15 and accompanying text.
\item[323.] See National Public Radio, supra note 115.
\end{enumerate}
\end{footnotes}
motivation. Despite the justices’ desire to moderate the raw offensiveness of Moore’s display by placing other documents around the Decalogue, their actions belie a desire to replicate Moore’s work out of a similarly religious—albeit tempered—motivation or a desire to appeal to Moore’s religious constituency. While the United States Supreme Court has not often parsed the meaning of the phrase “religious purpose,” it would seem that even the latter motivation should be deemed improper. After all, a government official acting as a surrogate of a religious organization determined to execute an act with a decidedly religious motivation would be no different than a government actor expressing and acting on that motivation itself.

C. Not Just Any Ten: “The Clearest Command” and The Decalogue

1. Background

In light of the strictures of Lemon’s purpose prong, it seems difficult to believe that any amount of “context,” short of an in-depth critical study of the text, could save a government display which was clearly designed to showcase the Decalogue. Yet some who urge judicial recognition of “the foundational role of the Ten Commandments in secular, legal matters,” remain unconvinced. While the debate over the historical role of the Commandments in the development of American law is alive and well, it should be noted that at least one admirer of the Decalogue agreed that the lack of an agreed-upon version of the document was a “sensible

325. Glassroth v. Moore, 335 F.3d 1282, 1296 (11th Cir. 2003) (“Chief Justice Moore testified candidly that his purpose in placing the monument in the Judicial Building was to acknowledge the law and sovereignty of the God of the Holy Scriptures, and that it was intended to acknowledge ‘God’s overruling power over the affairs of men.’”).

326. Id. at 1286 (noting that Moore was supported by groups like the “Coral Ridge Ministries, an evangelical Christian media outreach organization . . . [which] used its exclusive footage of the installation [of the monument] to raise funds for its own purpose and for Chief Justice Moore’s legal defense, which it [underwrote]”).

327. Indeed, the court has eschewed descending any deeper than necessary into the term “religious” in any context. See Freeman, supra note 187, at 1524-25.


329. See generally Green, supra note 91, at 531 (examining “the historical basis for claims that the Ten Commandments is the fundamental legal code of Western Civilization and the Common Law of the United States.”).
enough” reason to prohibit its public posting. Bernard Meislin, who wrote a still-authoritative book on the influence of Jewish law on its American counterpart, also wrote extensively on the particular influence of the Ten Commandments. In an article on the latter subject, he noted that differences between the distinct versions of the text “have grown with the passage of time.” Indeed, because “the trend of major religions has been away from Decalogue harmony,” all efforts to create a truly ecumenical version of the text in the modern period were necessarily flawed.

Any attempt at Decalogue reconciliation prescribed by state officials would be anathema to church and constitutionally abhorrent to the state. It has been tried and rejected. Display of a version of the Ten Commandments drawn by state officials from the three major faiths but conforming to the authorized version of none was forbidden by the New York State Education Commissioner. As early as 1803, the Chief Justice of New Hampshire’s highest court wrote, “It has not pleased God to enlighten by his grace any government with the gift of understanding the scriptures.”

Such vaticinations proved prescient. Efforts of governments to post particular version of the Ten Commandments are almost always constitutionally infirm. Public Decalogue displays fail “the test of neutrality,” as set out by the Court in Kiryas Joel, because the different versions of the text are in irresolvable conflict; regardless of which version the polity chooses, it necessarily accepts the view of one denomination while rejecting that of another. Moreover, even if it were possible to find a perfectly neutral version of the Commandments, a government would have to violate “the entanglement test,” as applied in the kosher fraud law cases, to create it. Polities would have to establish committees of rabbis, priests, and ministers to sort out the complicated distinctions between the Commandments of each sect and to decide which should be displayed, an anathema to the third prong of Lemon.

330. See Meislin, Role of the Ten Commandments, supra note 26, at 190.
331. Meislin, Jewish Law, supra note 91.
332. See generally Meislin, Role of the Ten Commandments, supra note 26 passim. He was in the process of writing a book on the subject before his death in 1988.
333. Meislin, Role of the Ten Commandments, supra note 26, at 190.
334. Id.
335. Id. (citations omitted).
2. The Use of Icons in Religious Observance: Catholics vs. Protestants

The most apparent illustration of this twin-prong argument regards the Commandment against "graven images," which is included prominently in the Jewish and Protestant versions as the Second Commandment, but is either excised or embedded in the Catholic version. Whether the government posts a Decalogue which prominently displays this Commandment, as the city of Elkhart did, or it displays a monument that omits this Commandment, as the city of Denver did, the polity entangles itself in a theological debate that is centuries old. For instance, if the government includes the Commandment in the display, it implicitly demonstrates a hostility to religious icons. This position is at odds with Catholicism and favors the Protestant view, a blatant failure to maintain neutrality between religious denominations as Larson and Kiryas Joel command. Likewise, a posting that does not include the Commandment takes the Catholic view on the issue—that religious icons may and should be venerated—and is equally damning. Additionally, even if a government were to attempt to resolve this dispute amicably, it would likely have to create an advisory board made up of clergy from each side of the debate to sort through the history and theology underpinning the conflict. Because a secular commission composed largely of clergy would have to apply Christian and Protestant theology to decide the issue, the board would constitute the application "by religious personnel of a sectarian or religious law," an impermissible entanglement akin to the advisory board of rabbis in the kosher fraud cases.

3. Deliverance from Exile and the Commandment Regarding Homicide: Judaism vs. Christianity

Just as Catholics and Protestants have incentives to insist on a particular version of the Decalogue, should one be publicly displayed, so too does the Jewish community. As the Eleventh Circuit noted in Glassroth, Judge Moore's Commandments included the phrase "I AM the LORD thy God," but did not include the continuation of the biblical verse acknowledging the Exodus story ("who

338. See supra notes 45-67 and accompanying text.
339. See supra notes 91-100 and accompanying text.
340. See supra notes 45-67 and accompanying text.
341. See supra notes 45-67 and accompanying text.
342. See Ran-Dav's, 129 N.J. at 158.
brought you out of the land of Egypt, the house of bondage").\textsuperscript{343} This is a story cherished by the Jewish people, as it is what inexorably links the Commandments themselves to the people's mythic deliverance by God, the very fact that suffuses the document with its essential meaning in Jewish tradition.

Likewise, the Commandment regarding homicide is an issue that at least some Jews regard as a staunch difference between their faith and Christianity.\textsuperscript{344} A literal translation of the Hebrew text yields a Commandment forbidding only "murder" and not all killing, as most Christian versions of the text would have it. Again, a government that publicly displays a Decalogue that flouts Jewish versions of these Commandments effectively prefers the Christian view of the text and Christian thought on these matters to the Jewish view. To even get involved in such matters, like the attempts by several governments to regulate the definition of Jewish dietary laws, is a violation of the entanglement prong of \textit{Lemon}.\textsuperscript{345} This is true not only because it will lead to official preference of Judaism or Christianity over the other, but because these are the types of "varying doctrinal interpretations" which the entanglement test simply forbids the government to resolve.\textsuperscript{346}

\textbf{Conclusion}

One of the strangest features of judicial opinions and legal commentary regarding the public displays of the Ten Commandments is how little time is spent reading the very text inscribed on the monument, the fate of which is being commented on or decided. Peculiar Establishment Clause arguments to the contrary notwithstanding,\textsuperscript{347} it seems odd that a judge would not discuss the text of a document the fate of which he or she will decide. As I have argued, a close reading of the document shows that it contains what clearly may not be posted on government property—unequivocal endorsement of particular religious duties. That there are also undeniable universal truths within the Ten Commandments makes the document not less abhorrent, but more, when displayed in the

\footnotesize 343. \textit{Exodus} 20:2; \textit{see} \textit{The Torah: A Modern Commentary}, \textit{supra} note 27, at 534 (enumerating Commandments according to the "prevailing Jewish division" and noting that this division of the Commandments differs from "the Greek Church Fathers, and most Protestant churches" as well as some Jewish sources). Some translations begin, "I, the Lord, am your God." \textit{See Etz Hayim}, \textit{supra} note 23, at 442.

344. \textit{See supra} notes 78-84 and accompanying text.

345. \textit{See supra} notes 177-86.


347. \textit{See supra} notes 245-49 and accompanying text.
public square. In equating the practices of religious and nonreligious minorities—who worship other deities or no god at all, create graven images in their worship, and observe the Sabbath differently or not at all—with those that lie, steal, and murder, the government explicitly disapproves of those minorities. A reasonable person viewing this would rightly feel that the government has established a de facto religious ideology that discriminates against all nonadherents. Additionally, courts should not remain blissfully ignorant of the fact that different versions of the Decalogue exist and that they conflict with one another in ways that are not meaningless and often contentious. The politicization of religion in America is already regretfully apparent. To add fuel to the fire by allowing Catholics, Jews, and Protestants to fight amongst themselves as to whose version of the Decalogue should be publicly displayed in a particular polity is, to borrow a phrase, “as senseless in policy as it is unsupported in law.”
