

NOTE:THE DECALOGUE IN THE PUBLIC FORUM: DO PUBLIC DISPLAYS OF THE TEN COMMANDMENTS VIOLATE THE ESTABLISHMENT CLAUSE?

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Introduction

On August 1, 2001, a national controversy erupted when Alabama Chief Justice Roy Moore unveiled in the rotunda of the State Judicial Building a monument inscribed with the Ten Commandments. ¹ As the ensuing litigation and the public statements of the colorful and impassioned Justice Moore attracted national media attention, scores of similar lawsuits were taking place in less celebrated venues from Plattsmouth, Nebraska, ² to Chester County, Pennsylvania. ³ The question in all of these cases was whether the Ten Commandments could be displayed on public property without violating the Establishment Clause of the First Amendment.

Many of the monuments at the heart of the controversy had stood undisturbed on courthouse lawns and in public parks since the 1950s, when the Fraternal Order of Eagles, a national service organization, donated hundreds of them to local and state governments. ⁴ The monuments had their genesis in Minnesota, where juvenile court judge E.J. Ruegemer proposed that the Ten Commandments could serve as a valuable code of conduct for the young people who appeared in his courtroom. Judge Ruegemer's interest in promoting [*184] the Decalogue coincided with the release of the movie, "The Ten Commandments," directed by Cecil B. DeMille. DeMille, seeing an opportunity to promote his film, encouraged the Eagles to erect copies of the Mosaic tablets at numerous courthouses and city halls across the country.

Whether viewed merely as a shameless movie promotion or as an ambitious attempt to shape the morals of young people, the monuments have sparked a debate about what it means to have an establishment of religion. As a

¹ See [Glassroth v. Moore, 229 F. Supp. 2d 1290 \(M.D. Ala. 2002\)](#).

² See [ACLU v. City of Plattsmouth, 186 F. Supp. 2d 1024 \(D. Neb. 2002\)](#).

³ See [Freethought Soc'y v. Chester County, 191 F. Supp. 2d 589 \(E.D. Penn. 2002\)](#), rev'd, [334 F.3d 247 \(3d Cir. 2003\)](#).

⁴ The history given here of the Ten Commandments monuments is taken from [Books v. City of Elkhart, 235 F.3d 292, 294-95 \(7th Cir. 2000\)](#) and State v. Freedom from [Religion Found., 898 P.2d 1013, 1017 \(Colo. 1995\)](#).

result, small towns and state governments have become embroiled in costly litigation and the courts have become sharply divided over the interpretation of the First Amendment.

Roadmap

The purpose of this note is to show that depictions of the Ten Commandments displayed on government property generally do not violate the Establishment Clause of the First Amendment.⁵ An additional purpose of this note is to demonstrate that, in many cases, excluding the Ten Commandments from government property actually violates the First Amendment. Such exclusion impermissibly discriminates against speech on the basis of viewpoint.

Part I of this note is an examination of *Stone v. Graham*, the only Supreme Court case that directly addresses the constitutionality of the presence of the Ten Commandments on government property. In this section the author will explain why *Stone's* vitality is in question and how its unique factual setting limits its usefulness as precedent.

Part II examines the current division in the lower courts about the constitutionality of Ten Commandments displays on government property.

Part III analyzes the Supreme Court's increasingly protective view of religious speech and explains why the current Court is more likely to approve of displays of the Ten Commandments on public property. Specifically, this section addresses how the Court might approve such displays by employing forum analysis and an updated version of the *Lemon* test.

[*185] Part IV demonstrates that many Ten Commandments monuments appear in some type of public forum and that their exclusion from such fora constitutes impermissible viewpoint discrimination.

I. The Supreme Court Strikes Down the Display of the Ten Commandments in *Stone v. Graham*

Any discussion of the constitutionality of a Ten Commandments display must begin with *Stone v. Graham*, the only United States Supreme Court opinion to address the issue.⁶ In *Stone*, the Court struck down a Kentucky statute that required the posting of the Ten Commandments in public school classrooms in the Commonwealth.⁷ As Supreme Court opinions go, *Stone* is brief, taking up only eight pages, including the dissent. It is, however, regularly cited by lower courts as precedent for declaring displays of the Ten Commandments on government property unconstitutional.⁸

The *Stone* Court based its decision on the three-part Establishment Clause test announced in *Lemon v. Kurtzman*, which requires that government action (1) have a secular purpose; (2) have a principal or primary effect that neither advances nor inhibits religion; and (3) does not foster an excessive government entanglement with religion.⁹ In an apparent attempt to pass the first prong of the *Lemon* test, the Kentucky legislature had required that each display be accompanied by the following inscription explaining the purpose behind the legislation: "The secular application

⁵ The [First Amendment to the United States Constitution](#) states, in its entirety, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." [U.S. Const. amend. I](#).

⁶ [449 U.S. 39 \(1980\)](#) (per curiam).

⁷ [Id. at 41-43](#).

⁸ See, e.g., [Adland v. Russ](#), 307 F.3d 471, 480-81 (6th Cir. 2002), cert. denied, 123 S. Ct. 1909 (2003); [Books v. City of Elkhart](#), 235 F.3d at 302; [ACLU v. City of Plattsmouth](#), 186 F. Supp. 2d 1024, 1032 (D. Neb. 2002); [ACLU v. Hamilton County](#), 202 F. Supp. 2d 757, 764 (E.D. Tenn. 2002); [Freethought Soc'y v. Chester County](#), 191 F. Supp. 2d at 595-96; [ACLU v. McCreary County](#), 145 F. Supp. 2d 845, 848 (E.D. Ky. 2001); [Ind. Civil Liberties Union v. O'Bannon](#), 110 F. Supp. 2d 842, 849 (S.D. Ind. 2000).

⁹ [Stone](#), 449 U.S. at 40-41 (citing [Lemon v. Kurtzman](#), 403 U.S. 602, 612-13 (1971)).

of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States." ¹⁰ The Court rejected this articulation of a secular purpose as a sham and forcefully stated in an oft-quoted passage that "the Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no [*186] legislative recitation of a supposed secular purpose can blind us to that fact."¹¹

The Court's holding appeared to indicate that inherently religious objects like the Ten Commandments cannot be displayed on government property without running afoul of the Establishment Clause. Then-Justice William H. Rehnquist criticized the majority opinion as a "summary rejection of a secular purpose articulated by the legislature and confirmed by the state court [that was] without precedent in Establishment Clause jurisprudence." ¹² In fact, the Court's ruling made no mention of factual findings made at trial where Judge N. Williams, Jr., wrote,

The Legislature has declared the Ten Commandments to be the fundamental legal code of Western Civilization and the common law of the United States. There was proof submitted here that substantiates that declaration. The common law grew under the influence of men who were free to know and study the Ten Commandments and to adopt the principles of the canon law as it related to various subjects under consideration. ¹³

In apparent exasperation, Justice Rehnquist summarized the Court's decision as a "cavalier summary reversal, without benefit of oral argument or briefs on the merits, of the highest court of Kentucky." ¹⁴

Legal commentators on both sides of the Ten Commandments debate echoed Justice Rehnquist's criticism of the Stone opinion. ¹⁵ One supporter of the displays disapproved of the Court's dismissive treatment of the legislature's articulated purpose,

It was odd - and not consistent with precedent - for the Court to indulge a presumption that the use of religious materials must have a religious purpose... . [Stone] stands on shaky footing, because the [*187] Justices seemed to assume that the only reason the Commandments could possibly be there was to advance a religious doctrine. ¹⁶

Steven K. Green, who has challenged other Ten Commandments displays in court, called the analysis in Stone "less than satisfying," ¹⁷ explaining,

As justification for the posting, the Kentucky legislature had required a notation be attached to the bottom of each display asserting that the Ten Commandments served "as the fundamental legal code of Western Civilization and the Common Law of the United States." Even though the Supreme Court held the law unconstitutional, it left the Kentucky legislature's assertion un rebutted... . Adding to the uncertainty of the ruling, the per curiam [sic] opinion

¹⁰ [Id. at 41](#).

¹¹ Id. (emphasis added).

¹² [Id. at 43](#) (Rehnquist, J., dissenting).

¹³ App. to Pet. for Writ of Cert. at 38, [Stone v. Graham, 449 U.S. 39 \(1980\)](#) (No. 80-321) (emphasis added).

¹⁴ [Stone, 449 U.S. at 47](#) (Rehnquist, J., dissenting).

¹⁵ See, e.g., Stephen L. Carter, *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion* (1993); Steven K. Green, *The Fount of Everything Just and Right? The Ten Commandments as a Source of American Law*, 14 *J.L. & Religion* 525 (1999-2000).

¹⁶ Carter, *supra* note 15, at 208.

¹⁷ See Green, *supra* note 15, at 529.

did not refute Justice William Rehnquist's claim that it was "equally undeniable" that the Ten Commandments "has had a significant impact on the development of secular legal codes of the western world." ¹⁸

Given the Court's truncated treatment of the Kentucky legislature's articulated purpose, it is little wonder that lower courts are divided on the issue of whether the Ten Commandments may be displayed on government property. ¹⁹

Some lower courts continue to cite *Stone* for the proposition that the Ten Commandments are per se religious and, as such, their display on government property can serve no valid secular purpose. ²⁰ This interpretation of *Stone* is incorrect and should be rejected for three reasons.

First, the Court itself has rejected the per se approach to analyzing Ten Commandments displays, "In *Stone* [our] decision forbidding the posting of the Ten Commandments did not mean that no use could ever be made of the Ten Commandments, or that the Ten Commandments played an exclusively religious role in the history of [*188] Western Civilization." ²¹ The Court's admonition contrasts sharply with the Seventh Circuit's position that the Ten Commandments cannot "be stripped of their religious, indeed sacred, significance and characterized as a moral or ethical document." ²²

Second, the holding in *Stone* should not be applied to displays of the Ten Commandments that appear outside of a school setting, such as a courthouse lawn or a state park. *Stone* is essentially a case about religion in the classroom as is evidenced by the Court's reliance on the school prayer cases of *Abington School District v. Schempp* and *Engel v. Vitale*. ²³ Understandably, the Court "has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools" because their unique characteristics increase the danger of religious coercion. ²⁴ Nevertheless, this danger of coercion does not exist when the Ten Commandments are displayed as a monument in other public settings, and *Stone* should not be cited to strike down such displays.

Third, post-*Stone* decisions indicate that the Supreme Court is unlikely to judge a Ten Commandments display using the same version of the *Lemon* test that was articulated in *Stone*. For example, less than four years after *Stone*, in a case that approved of government use of a religious symbol on public property, Justice Sandra Day O'Connor proposed a "clarification" of the *Lemon* test that would account for the perceptions of a reasonable observer. ²⁵ There is even some doubt that the Court would apply the *Lemon* test at all. As the Court stated in *Lynch v. Donnelly* in reference to the *Lemon* test, "we have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area." ²⁶ Furthermore, at least six of the sitting Supreme

¹⁸ *Id.* (citations omitted).

¹⁹ Compare *State v. Freedom from Religion Found.*, 898 P.2d 1013 (Colo. 1995) (upholding the display of a Ten Commandments monument), with *Books v. City of Elkhart*, 235 F.3d 292 (7th Cir. 2000) (striking down the display of a Ten Commandments monument in a comparable factual situation).

²⁰ See cases cited supra note 8.

²¹ [Edwards v. Aquillard](#), 482 U.S. 578, 593-94 (1987).

²² [Books](#), 235 F.3d at 302.

²³ [Stone](#), 449 U.S. at 41-42 (citing [Abington Sch. Dist. v. Schempp](#), 374 U.S. 203 (1963) and [Engel v. Vitale](#), 370 U.S. 421 (1962)).

²⁴ [Edwards](#), 482 U.S. at 583-84.

²⁵ [Lynch v. Donnelly](#), 465 U.S. 668, 691-94 (1984) (plurality opinion) (O'Connor, J., concurring); see also [Allegheny County v. ACLU](#), 492 U.S. 573, 595 (1989) (plurality opinion) (Blackmun, J.) (stating that Justice O'Connor's concurrence in *Lynch* "provides a sound analytical framework for evaluating governmental use of religious symbols").

Court Justices have criticized Lemon: Chief Justice Rehnquist ²⁷ and Justices Scalia, ²⁸ [*189] Thomas, ²⁹ Stevens, ³⁰ Kennedy, ³¹ and O'Connor. ³² It is also worth noting that only two of the justices from the Stone Court remain on the bench, one of whom, Chief Justice Rehnquist, was the author of the dissenting opinion. Since that time, he has been joined by at least two others, Justices Scalia and Thomas, who would permit some displays of the Ten Commandments on government property. ³³

Stone has exerted a significant influence in the battle over the Ten Commandments, an influence that is unwarranted in light of the case's highly fact-specific nature and the significant developments that have occurred in Establishment Clause case law since it was decided. Nevertheless, the courts that have interpreted Stone are far from being in agreement.

II. Split Between the Lower Courts

The controversy surrounding the Stone decision is reflected in lower federal and state courts, which are sharply divided over the constitutionality of displaying the Ten Commandments on government property. ³⁴ On one side of the split are the Sixth, [*190] Seventh, Eighth, and Eleventh Circuits, which oppose the monuments; on the other side are the Third, Fifth, and Tenth Circuits and the Colorado Supreme Court, which favor the monuments. The facts of each case are strikingly similar and are briefly set out below.

A. Seventh Circuit: Books v. City of Elkhart

²⁶ [Lynch, 465 U.S. at 679.](#)

²⁷ See [Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 319 \(2000\)](#) (Rehnquist, C.J., dissenting) ("Lemon has had a checkered career in the decisional law of this Court.").

²⁸ [Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398 \(1993\)](#) (Scalia, J., concurring) ("Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, Lemon stalks our Establishment Clause jurisprudence once again.").

²⁹ See [City of Elkhart v. Books, 532 U.S. 1058, 1060-61 \(2001\)](#) (Rehnquist, C.J., dissenting) (denying certiorari from [Books v. City of Elkhart, 235 F.3d 292 \(7th Cir. 2000\)](#)).

³⁰ [Comm. for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 671 \(1980\)](#) (Stevens, J., dissenting) (lamenting the "sisyphian task of trying to patch together the 'blurred, indistinct and variable barrier' described in Lemon" (citation omitted)).

³¹ [Allegheny County v. ACLU, 492 U.S. 573, 595 \(1989\)](#) (Kennedy, J., concurring in judgment in part and dissenting in part) (stating that he did "not wish to be seen as advocating, let alone adopting, [the Lemon] test as our primary guide in [holiday display cases]").

³² See [Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 346, 348 \(1987\)](#) (O'Connor, J., concurring in judgment) (suggesting a reformulation of the inquiry framed by the Lemon test).

³³ See [Books, 532 U.S. at 1060-61 \(2001\)](#) (Rehnquist, C.J., dissenting) (denying certiorari from [Books v. City of Elkhart, 235 F.3d 292 \(7th Cir. 2000\)](#)).

³⁴ Compare [Adland v. Russ, 307 F.3d 471 \(6th Cir. 2002\)](#) (striking down display of Ten Commandments on government property), cert. denied, **123 S. Ct. 1909 (2003)**; [Books v. City of Elkhart, 235 F.3d 292 \(7th Cir. 2000\)](#) (similar holding); [Harvey v. Cobb County, 811 F. Supp. 669 \(N.D. Ga. 1993\)](#) (similar holding); [Doe v. Harlan County Sch. Dist., 96 F. Supp. 2d 667 \(E.D. Ky. 2000\)](#) (similar holding); [ACLU v. McCreary County, 96 F. Supp. 2d 679 \(E.D. Ky. 2000\)](#) (similar holding); [ACLU v. Pulaski County, 96 F. Supp. 2d 691 \(E.D. Ky. 2000\)](#) (similar holding); [Ring v. Grand Forks Pub. Sch. Dist., 483 F. Supp. 272 \(D.N.D. 1980\)](#) (similar holding); and [DiLoreto v. Bd. of Educ., 87 Cal. Rptr. 2d 791 \(Cal. Ct. App. 1999\)](#) (similar holding), with [Freethought Soc'y v. Chester County, 334 F.3d 247 \(3d Cir. 2003\)](#) (upholding display of Ten Commandments on government property); [Anderson v. Salt Lake City Corp., 475 F.2d 29 \(10th Cir. 1973\)](#) (similar holding); [Suhre v. Haywood County, 55 F. Supp. 2d 384 \(W.D.N.C. 1999\)](#) (similar holding); and [State v. Freedom from Religion Found., 898 P.2d 1013 \(Colo. 1995\)](#) (similar holding).

In *Books v. City of Elkhart*, the Seventh Circuit held that the presence of a granite Ten Commandments monument at the city municipal building violated the Establishment Clause.³⁵ The monument was one of the hundreds that had been created through the collaborative efforts of Cecil B. DeMille and the Fraternal Order of Eagles.³⁶ It was inscribed with the following version of the Ten Commandments,

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.

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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.³⁷

The monument also contained inscriptions of two tablets with Hebrew text, an all-seeing eye, an American eagle, an American flag, two Stars of David, and the Greek letters Chi and Rho.³⁸ It shared the lawn in front of the municipal building with a Revolutionary War Monument donated by the Daughters of the American Revolution³⁹ and a "Freedom Monument," which bore this inscription: "BEHOLD FRIEND, YOU ARE NOW ON HALLOWED GROUND FOR HERE BURNS FREEDOMS <LB>SIC<RB> HOLY LIGHT."⁴⁰

The Seventh Circuit concluded that the Ten Commandments monument violated the Establishment Clause because it failed the first and second prongs of the Lemon test.⁴¹ Specifically, the court held that the monument

³⁵ [Books, 235 F.3d 292](#).

³⁶ See [id. at 294-95](#). See also [Adland, 307 F.3d at 475](#) (describing a similar monument donated to the Commonwealth of Kentucky in 1971).

³⁷ [Books, 235 F.3d at 296](#).

³⁸ *Id.*

³⁹ [id. at 295-96](#).

⁴⁰ [id. at 296](#).

⁴¹ [id. at 302-07](#) (citing [Lemon v. Kurtzman, 403 U.S. 602 \(1971\)](#)).

violated Lemon's first prong because the city's articulated secular purpose "of recognizing the historical and cultural significance of the Ten Commandments" was "not sufficient to avoid conflict with the First Amendment." ⁴² Citing *Stone v. Graham*, the Court observed that the Ten Commandments cannot "be stripped of their religious, indeed sacred, significance and characterized as a moral or ethical document." ⁴³ Finally, the Court concluded that the monument violated Lemon's second prong because "an objective observer" would "perceive [the monument] as a state endorsement of religion." ⁴⁴

B. Sixth Circuit: *Adland v. Russ* and *ACLU v. McCreary County*

In *Adland v. Russ*, the Sixth Circuit struck down a proposed display of the Ten Commandments at the Kentucky capitol. ⁴⁵ The monument had been donated by the Fraternal Order of Eagles and [*192] was identical to the monument in *Books*. ⁴⁶ The Commonwealth proposed to place the Ten Commandments in a "historical and cultural display" near a clock that was one of the largest in the world. ⁴⁷ The proposed display would also contain memorials of the Civil War, Vietnam Prisoners of War, and former civil servants. ⁴⁸

The court struck down the monument as an impermissible endorsement of religion. Citing *Stone*, it rejected the Commonwealth's avowed secular purpose to "remind Kentuckians of the Biblical foundations of the laws of the Commonwealth," ⁴⁹ holding that it was "insufficient, standing alone, to satisfy the secular purpose requirement [of the Lemon test]." ⁵⁰

In *ACLU v. McCreary County*, the Sixth Circuit rejected separate displays of the Ten Commandments at two county courthouses and a public school. ⁵¹ The displays were essentially identical and consisted of framed copies of the following documents in identical sizes: the Star Spangled Banner, the Declaration of Independence, the Mayflower Compact, the Bill of Rights, the Magna Carta, the National Motto, the Preamble to the Kentucky Constitution, the Ten Commandments, a depiction of Lady Justice, and an explanatory document entitled "The Foundations of American Law and Government Display." ⁵²

⁴² [Id. at 304.](#)

⁴³ [Id. at 302](#) (citing [Stone v. Graham, 449 U.S. 39 \(1980\)](#)).

⁴⁴ [Id. at 306.](#)

⁴⁵ [307 F.3d 471, 475 \(6th Cir. 2002\)](#), cert. denied, **123 S. Ct. 1909 (2003)**.

⁴⁶ See [id. at 475-76](#); supra notes 36-38 and accompanying text.

⁴⁷ [Adland, 307 F.3d at 477.](#)

⁴⁸ *Id.*

⁴⁹ [Id. at 480-81.](#)

⁵⁰ [Id. at 481.](#)

⁵¹ No. 01-5935, 2003 WL 23014362, at 22 (6th Cir. Dec. 18, 2003).

⁵² *Id.* at 3. In the school display the explanatory document and Lady Justice do not appear. *Id.* In their places are a Kentucky statute authorizing the posting of historical displays in schools and a school board resolution stating, among other things, that the "many documents [comprising the display], taken as a whole, have special historical significance to our community, our country, and our country's history." *Id.* at 26 (Ryan, J., dissenting) (alteration in original).

The Sixth Circuit held that the displays violated the Establishment Clause because they failed the first prong of the Lemon test.⁵³ Despite the presence of secular documents in the displays, the court stated that they were constitutionally defective under *Stone* because they [*193] did not "integrate the Ten Commandments with a discussion or display of a secular subject matter."⁵⁴

C. Eleventh Circuit: *Glassroth v. Moore* and *King v. Richmond County*

In its most recent pronouncement on the Ten Commandments, the Eleventh Circuit struck down a display that had been erected by Alabama Chief Justice Roy Moore in the rotunda of the Alabama State Judicial Building.⁵⁵ The display consisted of a single granite block inscribed on its top with a Protestant version of the Ten Commandments and with quotations from secular sources on each side of the monument's base.⁵⁶ The court held that the display lacked a secular purpose as was evidenced by Justice Moore's own admissions, saying, "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."⁵⁷ Similarly, the display failed the effect prong of the Lemon test because of its appearance, its location, the selection of secular quotations on its sides, "and the inclusion on its face of the text of the Ten Commandments, which is an "undeniably ... sacred text.""⁵⁸

In an earlier case, *King v. Richmond County*, the court had approved of the use of a stylized version of the Ten Commandments on a county seal.⁵⁹ The seal contained an outline of two stone tablets with the Roman numerals I through X imposed over a sword.⁶⁰ The court accepted the county's contention that the original purpose of the design was to help viewers, many of whom were illiterate, to recognize that documents containing the seal were legally valid.⁶¹ The court also held that the design passed the effect prong of the Lemon test because the seal was used solely to authenticate legal documents, it did not contain the text of the Commandments, the [*194] design was small, and it incorporated a secular symbol with the Ten Commandments.⁶² All these factors reduced the likelihood that a reasonable observer would interpret the seal as an endorsement of religion.⁶³

D. Eighth Circuit: *ACLU v. City of Plattsmouth*

⁵³ *Id.* at 17. Although the author of the majority opinion also believed that the displays violated the second prong of Lemon, his analysis of this issue failed to garner a majority of the panelists' votes. See *id.* at 22 (Gibbons, J., concurring) ("I express no opinion as to whether the displays violate the 'effect/endorsement' prong of the Lemon test."); *id.* at 39 (Ryan, J., dissenting) ("The opinions of my brother, Judge Clay, on [the second prong of the Lemon test], are his own and do not represent those of the majority of the panel.").

⁵⁴ *Id.* at 13.

⁵⁵ [Glassroth v. Moore, 335 F.3d 1282, 1284 \(11th Cir. 2003\)](#), cert. denied, **124 S. Ct. 497 (2003)**.

⁵⁶ [Glassroth, 335 F.3d at 1285-86](#).

⁵⁷ [Id. at 1296](#).

⁵⁸ [Id. at 1297](#) (alteration in original) (quoting [Stone v. Graham, 449 U.S. 39, 41 \(1980\)](#)).

⁵⁹ [331 F.3d 1271, 1286 \(11th Cir. 2003\)](#), reh'g and reh'g en banc denied, 2003 WL 21946400 (Aug. 6, 2003).

⁶⁰ [King, 331 F.3d at 1274](#).

⁶¹ [Id. at 1278](#).

⁶² [Id. at 1283-86](#).

⁶³ [Id. at 1286](#).

The Eighth Circuit recently held that a monument inscribed with the Ten Commandments, and located in a city park, violated the Establishment Clause.⁶⁴ The monument had been donated by the Eagles and was identical to the monuments in Books and Adland.⁶⁵ There were no other monuments in the park, except for small plaques bearing the names of individuals who had donated some of the park's equipment.⁶⁶

Citing Stone, the court held that the monument violated the purpose prong of the Lemon test.⁶⁷ Although the district court had found it impossible to determine why the city had accepted the monument in the first place,⁶⁸ the Eighth Circuit found "undisputed evidence of Plattsmouth's [religious] purpose in accepting, erecting and maintaining the monument ... in the content and context of the monument itself."⁶⁹ Similarly, the court held that the monument violated the effects prong of the Lemon test because "nothing about the park setting secularizes the pronounced religiosity of the monument."⁷⁰ Somewhat confusingly, however, the court also penalized the city for mixing religious and secular symbols on the monument itself because the symbols "impermissibly linked patriotism and government to the religious teaching on the monument."⁷¹

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E. Third Circuit: Freethought Society v. Chester County

The Third Circuit approved a display of the Ten Commandments on a county courthouse exterior in Freethought Society v. Chester County.⁷² In 1920, a group called the Religious Education Council donated to Chester County, Pennsylvania, a large bronze plaque inscribed with a Protestant version of the Ten Commandments.⁷³ The county affixed the plaque near what was then the main entrance to the courthouse and seat of county government.⁷⁴ Significantly, when the complaint was filed the only other plaques on the courthouse exterior were administrative signs, a historical marker, and a "no-skateboarding" sign.⁷⁵ Other monuments such as veterans memorials and historical markers were located near the courthouse.⁷⁶ In 2001, the county commissioners refused a request to remove the plaque.⁷⁷

⁶⁴ *ACLU v. City of Plattsmouth*, No. 02-2444, 2004 WL 298965 (8th Cir. Feb. 18, 2004).

⁶⁵ See *id.* at 1; [supra notes 36-38, 46](#) and accompanying text.

⁶⁶ *Id.* at 2.

⁶⁷ *Id.* at 12.

⁶⁸ [ACLU v. City of Plattsmouth](#), 186 F. Supp. 2d 1024, 1033 n.10 (D. Neb. 2002).

⁶⁹ Plattsmouth, 2004 WL 298965 at 11 (emphasis added).

⁷⁰ *Id.* at 16.

⁷¹ *Id.*

⁷² [334 F.3d 247 \(3d Cir. 2003\)](#).

⁷³ [Id. at 249](#).

⁷⁴ [Id. at 249-50](#).

⁷⁵ [Id. at 254](#).

⁷⁶ [Id. at 254 n.2](#).

⁷⁷ [Id. at 255](#).

The Third Circuit held that the plaque did not violate the Establishment Clause because a reasonable observer familiar with the history of the display would not regard the plaque as an endorsement of religion.⁷⁸ In reaching this conclusion, the court parted ways with the Sixth and Seventh Circuits by considering the actions of the current county commissioners, who, in 2001, refused to remove the plaque, rather than the actions of the commissioners who in 1920 accepted the plaque from its religious donors.⁷⁹ The court was satisfied that the commissioners' purpose was to preserve a historical artifact, a consideration that was absent from the analysis in Books and Adland.⁸⁰ In a further departure from both the Sixth and Seventh Circuits, the Third Circuit was satisfied that the commissioners had a legitimate, "non-sham secular purpose" in maintaining the plaque because they believed that it demonstrated one of the key sources of American law.⁸¹

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F. Fifth Circuit: Van Orden v. Perry

In Van Orden v. Perry, the Fifth Circuit held that a display of the Ten Commandments on the grounds of the Texas State Capitol did not violate the Establishment Clause.⁸² The display consisted of a granite monument that had been donated by the Fraternal Order of Eagles and was identical to the monuments in Books, Adland, and Plattsmouth.⁸³ The monument appeared among other statues and plaques memorializing African American legislators, the Confederacy, the Alamo, the Mexican War, pioneers, and veterans.⁸⁴ Several religiously-inspired displays also appeared at the capitol grounds including the Confederate Seal with the motto "'Deo Vindice' (God will judge)," an inscription above the Supreme Court bench reading "'Sicut Patribus, Sit Deus Nobis' (As God was to our fathers, may He also be to us)," and a flag bearing the Mexican eagle and serpent, which is a symbol of Aztec prophecy.⁸⁵

The court upheld the district court's finding that the legislature's decision to display the monument served the valid secular purpose of "recognizing and commending a private organization for its efforts to reduce juvenile delinquency."⁸⁶ The display also passed the effects prong of the Lemon test because it appeared in a context that celebrated the "people, ideals and events that compose Texan identity."⁸⁷ The Fifth Circuit parted ways with the Sixth Circuit by concluding that the influence of the Ten Commandments on the civil and criminal laws of the United States was undeniable.⁸⁸ Finally, the court sided with the Third Circuit by holding that the reasonable observer

⁷⁸ [Id. at 262-67.](#)

⁷⁹ [Id. at 262.](#)

⁸⁰ [Id. at 269-70.](#)

⁸¹ [Id. at 267.](#)

⁸² [351 F.3d 173, 182 \(5th Cir. 2003\).](#)

⁸³ [Id. at 176](#); see also [supra notes 36-38, 46, 65](#) and accompanying text.

⁸⁴ [Van Orden, 351 F.3d at 175-76.](#)

⁸⁵ [Id. at 176.](#)

⁸⁶ [Id. at 178](#) (quoting Van Orden v. Perry, No. A-01-CA-833-H, 2002 U.S. Dist. LEXIS 26709, at 14 (W.D. Tex. Oct. 2, 2002)).

⁸⁷ [Id. at 180](#) (quoting H. Con. Res. 38, 77th Leg., R.S. (2001)).

⁸⁸ Compare [id. at 181](#), with ACLU v. McCreary County, No. 01-5935, 2003 WL 23014362, at 20 (6th Cir. Dec. 18, 2003) ("Upon seeing the Ten Commandments, which sticks out in the displays like a proverbial 'sore thumb,' a 'reasonable person will think religion, not history.") (quoting [Ind. Civil Liberties Union v. O'Bannon, 259 F.3d 766, 773 \(7th Cir. 2001\)](#)).

would conclude that the decision to leave the monument in place was motivated by a desire to preserve a longstanding tradition.⁸⁹

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G. Tenth Circuit: *Anderson v. Salt Lake City Corp.*

In *Anderson v. Salt Lake City Corp.*, the Tenth Circuit upheld the display of the Ten Commandments on government property against an Establishment Clause challenge.⁹⁰ Once again, the monument was one of those donated by the Fraternal Order of Eagles and was identical to the monuments in Books, Adland, Plattsmouth, and Van Orden.⁹¹ It had been placed at the entrance to the city-county courthouse.⁹²

The Tenth Circuit held that the display did not violate the Establishment Clause because the "monolith is primarily secular, and not religious in character; that neither its purpose or [sic] effect tends to establish religious belief."⁹³ The opinion did not indicate whether the Ten Commandments display shared the courthouse grounds with any other monuments, nor did it state whether the city had articulated a secular purpose for the display. *Anderson* has been questioned because its holding pre-dates the Supreme Court's opinion in *Stone*.⁹⁴ However, the Tenth Circuit has yet to overrule *Anderson*, and it remains good law.⁹⁵

H. Colorado Supreme Court: *State v. Freedom from Religion Foundation*

In *State v. Freedom from Religion Foundation*, the Supreme Court of Colorado upheld the display of a Ten Commandments monument that had been donated by the Fraternal Order of Eagles and that was identical to the monuments in Books, Adland, Plattsmouth, Van Orden, and *Anderson*.⁹⁶ The monument was located in a public park in an area known as the "Capitol Complex Grounds,"⁹⁷ which was also home to monuments commemorating Native Americans, Hispanics, veterans, the Challenger astronauts, Arbor Day, and soil conservation.⁹⁸ The park also contained a replica of the Liberty Bell **[*198]** with an inscription from the Bible, "Proclaim liberty throughout the land and unto all the inhabitants thereof."⁹⁹

Again in sharp contrast to the holdings in Books and Adland, the court held that "the monument represents the secular objective intended at the outset, recognition of a historical, jurisprudential cornerstone of American legal

⁸⁹ [Van Orden, 351 F.3d at 182.](#)

⁹⁰ [475 F.2d 29 \(10th Cir. 1973\).](#)

⁹¹ [Id. at 30](#); see also [supra notes 36-38, 46, 65, 83](#) and accompanying text.

⁹² [Anderson, 475 F.2d at 30.](#)

⁹³ [Id. at 34.](#)

⁹⁴ [Summum v. Callaghan, 130 F.3d 906, 910 n.2 \(10th Cir. 1997\).](#)

⁹⁵ [Id. at 912 n.8.](#)

⁹⁶ *State v. Freedom from Religion Found.*, [898 P.2d 1013, 1016-17 \(Colo. 1995\)](#). See also [supra notes 36-38, 46, 65, 83, 91](#) and accompanying text.

⁹⁷ *Freedom from Religion Found.*, [898 P.2d at 1015.](#)

⁹⁸ [Id. at 1015-16.](#)

⁹⁹ [Id. at 1016](#) (quoting Leviticus 25:10 (King James)).

significance." ¹⁰⁰ The court's conclusion was based on the context in which the monument appeared: "The display of monuments in Lincoln Park teaches a history of rich cultural diversity - due to our past it would be inaccurate to ignore a history that includes religion." ¹⁰¹ In fact, the court went one step further and suggested that ordering the removal of the monument would be hostile to religion,

We believe it would result in ... callous indifference ... to exaggerate the effect of benign religious messages by suggesting they automatically inculcate religion. The flaw of such a result would be to assume improper motive and to credit inappropriate religious involvement by the State in every message of historical or solemn significance in which religious precepts may also be attributed to the words and symbols used... . While we are to be vigilant to bar state conduct that results in the establishment of religion, we are not to engage in an exercise intended to require government to prefer non-believers over believers. ¹⁰²

This statement by the Colorado Supreme Court proposes a seemingly new way to look at the debate over displaying the Ten Commandments by suggesting that the question of establishment is inextricably tied to the issue of unfair exclusion. As novel as the court's statement may seem, it is faithful to a trend in the United States Supreme Court that is increasingly protective of religious speech in the public forum.

III. Increasing Protection for Religious Speech

The Supreme Court's modern jurisprudence has been marked by the ebb and flow of competing interpretations of the Establishment [***199**] Clause. Although it can be difficult to predict the ascendancy of any particular theory, there is a noticeable trend in the Court that is increasingly protective of private religious speech on public property. In order to understand that trend, it is necessary to trace the recent history of the Court's Establishment Clause jurisprudence.

In 1971, the Supreme Court announced the three-part Lemon test to analyze whether government action constitutes a violation of the Establishment Clause. ¹⁰³ "First, the statute must have a secular purpose; ¹⁰⁴ second, its principal or primary effect must be one that neither advances nor inhibits religion; ¹⁰⁵ finally, the statute must not foster "an excessive government entanglement with religion." ¹⁰⁶

In 1984, Justice O'Connor "clarified" the second prong of the Lemon test in her concurring opinion in *Lynch v. Donnelly*. ¹⁰⁷ According to Justice O'Connor, the proper inquiry in examining government use of religious symbols was whether the challenged government action had "the effect of communicating a message of government endorsement or disapproval of religion." ¹⁰⁸ This inquiry depended on what the government intended to communicate in displaying the religious symbol and what message the government's display actually conveyed.

¹⁰⁰ [Id. at 1026.](#)

¹⁰¹ [Id. at 1025.](#)

¹⁰² [Id. at 1026](#) (emphasis added). See also Trisha A. Vicario, Casenote, Religious Monuments Under Attack: Undermining Religion for the Benefit of the Irreligious in *Books v. City of Elkhart*, 235 F.3d (7th Cir. 2000), [25 Hamline L. Rev. 151 \(2001\)](#).

¹⁰³ [Lemon v. Kurtzman, 403 U.S. 601 \(1971\)](#).

¹⁰⁴ [Id. at 612.](#)

¹⁰⁵ *Id.* (citation omitted).

¹⁰⁶ [Id. at 613](#) (citation omitted).

¹⁰⁷ [465 U.S. 668, 691-94 \(1984\)](#) (O'Connor, J., concurring).

¹⁰⁸ [Id. at 692](#) (O'Connor, J., concurring).

¹⁰⁹ Thus, at least according to Justice O'Connor, who has been known to provide the crucial fifth vote in Establishment Clause cases, the government could display an inherently religious symbol such as a creche or a menorah so long as a reasonable observer would not perceive such a display as an endorsement of religion. ¹¹⁰ Under this formulation, the government can avoid an Establishment Clause violation by including secular symbols in an otherwise religious display. ¹¹¹

In *Capitol Square Review and Advisory Board v. Pinette*, the Supreme Court extended even greater protection to displays of religious symbols on government property. ¹¹² In *Pinette*, a state [*200] agency had refused to allow the Ku Klux Klan to erect a large cross in a public park in which other private groups had been allowed to erect religious and secular displays of their own. ¹¹³ The state argued that allowing the cross on government property would constitute an impermissible endorsement of religion. ¹¹⁴ The Court disagreed.

Writing for a plurality, Justice Scalia stated that private religious speech on government property was entitled to as much protection as private secular speech. ¹¹⁵ The state agency had argued that displaying the cross would be an impermissible endorsement of religion because "an observer might mistake private expression for officially endorsed religious expression." ¹¹⁶ The Court's response to this defense revealed a division over application of the endorsement test.

Justice Scalia interpreted the endorsement test as prohibiting "promotion" of or "favoritism" toward religion. ¹¹⁷ Thus, government does not violate the endorsement test when it allows "purely private" religious speech to occur in a "traditional or designated public forum, publicly announced and open to all on equal terms." ¹¹⁸ Justice Scalia emphasized that the endorsement inquiry was limited to "either expression by the government itself, or else government action alleged to discriminate in favor of private religious expression or activity." ¹¹⁹ The test, therefore, that was proposed by the state amounted to a "transferred endorsement" test because it "attributed to a neutrally behaving government private religious expression." ¹²⁰

Justice O'Connor objected to what she deemed "an exception to the endorsement test for the public forum context." ¹²¹ For Justice O'Connor, the endorsement inquiry was not limited to a review of the objective actions of

¹⁰⁹ [Id. at 690](#) (O'Connor, J., concurring).

¹¹⁰ See [Allegheny County v. ACLU, 492 U.S. 573, 626-27 \(1989\)](#) (plurality opinion) (O'Connor, J., concurring in part and concurring in the judgment); [Lynch, 465 U.S. at 691-94](#) (O'Connor, J., concurring).

¹¹¹ See [Allegheny County, 492 U.S. 573](#).

¹¹² [515 U.S. 753 \(1995\)](#).

¹¹³ [Id. at 758-59](#).

¹¹⁴ *Id.*

¹¹⁵ [Id. at 760](#).

¹¹⁶ [Id. at 763](#) (plurality opinion by Scalia, J.).

¹¹⁷ *Id.*

¹¹⁸ [Id. at 770](#).

¹¹⁹ [Id. at 764](#) (citations omitted).

¹²⁰ *Id.*

¹²¹ [Id. at 772](#) (O'Connor, J., concurring in the judgment).

government. Rather, "the endorsement test necessarily focuses upon the perception of a reasonable, informed observer." ¹²² Thus, "when the reasonable observer would view a government practice as endorsing religion," the practice is invalid. ¹²³ **[*201]** Even so, according to Justice O'Connor, the display of a cross in Capitol Square did not violate the Establishment Clause because a "reasonable observer would not interpret the State's tolerance of the Klan's private religious display in Capitol Square as an endorsement of religion." ¹²⁴

Pinette may signal a new way in which the Court will scrutinize displays of the Ten Commandments. ¹²⁵ Professor Erwin Chemerinsky has identified a three-way split in the Court on the issue of whether private religious speech on government property violates the Establishment Clause. ¹²⁶ This split portends well for supporters of the Ten Commandments displays.

One view is that there is a strong presumption that religious speech on government property violates the Establishment Clause. ¹²⁷ This view represents the thinking of Adland, Books, Plattsmouth, and McCreary County, which described the Ten Commandments as practically per se religious, thus creating an irrebuttable presumption that their public display cannot serve a secular purpose.

A second view of religious speech on government property is that such speech may be excluded only if "it would be tantamount to the government creating a church or coercing religious participation." ¹²⁸ This view represents the plurality opinion in Pinette and supports the display of privately-donated Ten Commandments monuments on government property because private religious speech does not involve coercion or government establishment of an official church. ¹²⁹

Finally, a third view of religious speech on government property is that religious speech must be excluded if a reasonable observer would perceive it as being a government endorsement of religion. ¹³⁰ This view is represented by Justice O'Connor's concurring opinion in Pinette. ¹³¹ Justice O'Connor approved of the display of the cross in Pinette because a reasonable informed observer who is deemed **[*202]** "aware of the history and context of the community and forum in which the religious display appears" would not interpret the display as a government endorsement of religion. ¹³² She further noted that a sign disclaiming ownership removed any doubt of government endorsement. ¹³³ Justice O'Connor would likely approve of many of the Ten Commandments monuments that appear on government property. Her reasonable informed observer would be aware that in many

¹²² [Id. at 773.](#)

¹²³ [Id. at 777.](#)

¹²⁴ [Id. at 782.](#)

¹²⁵ See Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 12.2.4, at 1168-71 (2d ed. 2002).

¹²⁶ *Id.*

¹²⁷ *Id.* at 1170-71.

¹²⁸ *Id.* at 1171.

¹²⁹ See [Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 765-66 \(1995\)](#) (quoting [Bd. of Ed. v. Mergens, 496 U.S. 226, 250 \(1990\)](#)) ("There is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.").

¹³⁰ See Chemerinsky, *supra* note 125, 12.2.4, at 1170-71.

¹³¹ See [Pinette, 515 U.S. at 772-73](#) (O'Connor, J., concurring).

¹³² [Id. at 780.](#)

¹³³ [Id. at 776.](#)

cases the monuments were donated by a private, secular organization, such as the Fraternal Order of Eagles. Furthermore, her reasonable observer would take into account the inscriptions on many of the monuments that disclaim public sponsorship.

Regardless of the tension between competing points of view, the Supreme Court has increasingly rejected government claims that religious speech must be excluded from a public forum in order to prevent actual or perceived state endorsement of religion.¹³⁴ In particular, "the State may not, on the claim of misperception of official endorsement, ban all private religious speech from the public square, or discriminate against it by requiring religious speech alone to disclaim public sponsorship."¹³⁵ Professor Chemerinsky has written of this trend that favors protecting private religious speech in the public square:

If a government action can be characterized as a restriction of private religious speech, it can be challenged as violating the First Amendment's protection of freedom of speech and the challenger has a strong likelihood of prevailing; no longer will such cases be **[*203]** seen as exclusively or even predominantly involving the establishment clause.¹³⁶

Thus, Ten Commandments monuments that have been donated to government by private parties may survive an Establishment Clause challenge if they can be characterized as private religious speech in the public square.

Whatever constitutional theories continue to divide the Supreme Court, the result has been increasing protection for private religious speech on public property. For supporters of the Ten Commandments displays, however, the legality of any individual display will depend on whether it appears in a public forum.

IV. The Ten Commandments are Protected Speech in the Public Forum

States and localities that are home to Ten Commandments monuments usually find themselves on the defensive against Establishment Clause challenges. However, the increasingly visible doctrine of forum analysis may provide an opportunity for Ten Commandments proponents to finally go on the offensive and assert their Free Speech and Free Exercise rights in the public square.

Speech that takes place on government property enjoys varying degrees of protection depending on the property's designation as a traditional public forum; a limited, or designated, public forum; or a nonpublic forum.¹³⁷ A traditional public forum is a place, like a street or a park, which has "'immemorially ... time out of mind' been held in the public trust and used for purposes of expressive activity."¹³⁸ A limited public forum is "public property which the State has opened for use by the public as a place for expressive activity."¹³⁹ A nonpublic forum is "public property which is not by tradition or designation a forum for public communication."¹⁴⁰

¹³⁴ See, e.g., [Good News Club v. Milford Cent. Sch.](#), 533 U.S. 98 (2001) (declaring unconstitutional a public school policy excluding religious club from school facilities); [Rosenberger v. Rector of Univ. of Va.](#), 515 U.S. 819 (1995) (declaring unconstitutional a state university's policy of denying student funds to a religious publication); [Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.](#), 508 U.S. 384 (1993) (declaring unconstitutional a school board's policy of denying religious groups the use of school facilities); [Bd. of Ed. v. Mergens](#), 496 U.S. at 250 (upholding the Equal Access Act, which prohibited federally supported schools that open their facilities to non-curricular student groups from denying equal access to other student groups based on the religious, political, or other content of their speech); [Widmar v. Vincent](#), 454 U.S. 263 (1981) (declaring unconstitutional a state university's policy of preventing student groups from using school facilities for religious worship).

¹³⁵ [Pinette](#), 515 U.S. at 769.

¹³⁶ Chemerinsky, *supra* note 125, 12.2.4, at 1163.

¹³⁷ [Perry Educ. Ass'n v. Perry Local Educators' Ass'n](#), 460 U.S. 37, 44-46 (1983).

¹³⁸ [Int'l Soc'y for Krishna Consciousness v. Lee](#), 505 U.S. 672, 680 (1992) (citation omitted).

¹³⁹ [Perry](#), 460 U.S. at 45.

In both traditional and limited public fora, the government is forbidden from discriminating against speech based on its content unless such discrimination serves a compelling government interest **[*204]** and is narrowly tailored to serve that interest.¹⁴¹ This inquiry is known as strict scrutiny.¹⁴² In the third type of public forum, the nonpublic forum, "control over access to [the] forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral."¹⁴³ This test might be referred to as the reasonableness standard.

While the Supreme Court has typically applied the public forum analysis to traditional forms of speech such as protests¹⁴⁴ and concerts,¹⁴⁵ the analysis has also been applied to passive speech. Thus, in *Pinette*, the Court applied forum analysis in order to conclude that the government violated the Free Speech rights of the Ku Klux Klan when it prohibited the Klan from erecting a large Latin cross in a public park.¹⁴⁶ The park was "a traditional or designated public forum, publicly announced and open to all on equal terms."¹⁴⁷ By its own admission, the government discriminated against private speech on the basis of its content when it excluded the cross.¹⁴⁸

Granted, content-based discrimination in a public forum is permissible where necessary to avoid an Establishment Clause violation.¹⁴⁹ As the Court stated in *Pinette*,

Giving sectarian religious speech preferential access to a forum close to the seat of government (or anywhere else for that matter) would violate the Establishment Clause... . And one can conceive of a case in which a governmental entity manipulates its administration of a public forum close to the seat of government (or within a government building) in such a manner that only certain religious groups take advantage of it, creating an impression of endorsement that is in fact accurate.¹⁵⁰

[*205] However, given an open forum and private sponsorship, an erroneous conclusion of state endorsement of religion does not create a violation of the Establishment Clause.¹⁵¹

Many of the Ten Commandments monuments appear in either traditional or limited public fora and are, therefore, entitled to protection against viewpoint and content-based discrimination. For example, in *Books*, the monument stood in front of the city's municipal building along with a structure called the "Freedom Monument" and a

¹⁴⁰ [Id. at 46.](#)

¹⁴¹ [Boos v. Barry, 485 U.S. 312 \(1988\).](#)

¹⁴² Black's Law Dictionary 1435 (7th ed. 1999).

¹⁴³ [Cornelius v. NAACP, 473 U.S. 788, 806 \(1985\).](#)

¹⁴⁴ See, e.g., [Gerritsen v. City of Los Angeles, 994 F.2d 570 \(9th Cir. 1993\).](#)

¹⁴⁵ See, e.g., [Ward v. Rock Against Racism, 491 U.S. 781 \(1989\).](#)

¹⁴⁶ [Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 \(1995\).](#)

¹⁴⁷ [Id. at 770.](#)

¹⁴⁸ [Id. at 761.](#)

¹⁴⁹ [Id. at 761-62.](#)

¹⁵⁰ [Id. at 766.](#)

¹⁵¹ [Id. at 769](#); see also [Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 \(1993\)](#); [Widmar v. Vincent, 454 U.S. 263 \(1981\)](#).

Revolutionary War monument that had been donated by the Daughters of the American Revolution.¹⁵² In *Indiana Civil Liberties Union v. O'Bannon*, the Indiana Limestone Institute intended to donate to the State a monument bearing the text of the Ten Commandments, the Bill of Rights, and the preamble to the Indiana Constitution.¹⁵³ The State proposed to place the monument in a "park-like lawn area" adjoining the statehouse.¹⁵⁴ Also contained within this park-like area were monuments and statues, some of which had been donated by private parties, honoring the National Road, coal miners, George Washington, Christopher Columbus, Vice President Thomas A. Hendricks, and former governors of the state.¹⁵⁵ Nevertheless, the district court enjoined the state from erecting the monument.¹⁵⁶

In *Freedom from Religion Foundation*, the Fraternal Order of Eagles donated a Ten Commandments monolith to the State.¹⁵⁷ The monument was placed in a state park adjacent to the state capitol amid other monuments commemorating Native Americans, the Civil War, Pearl Harbor, the Challenger astronauts, veterans, and other activities ranging from Arbor Day to soil conservation efforts.¹⁵⁸

The Texas State Capitol, also home to a Ten Commandments display, contains sixteen monuments commemorating, among other things, the Alamo, the Confederacy, African American legislators, pioneers, women, and veterans.¹⁵⁹ Such monuments "document the [*206] struggles and the successes that Texans have experienced in the past and serve to inspire us as we face the challenges of today."¹⁶⁰

As the above examples illustrate, many states and localities have transformed their courthouse lawns and municipal buildings into spaces for celebrating culture, history, and law by filling them with privately donated monuments. The Tenth Circuit has held that this practice of placing privately donated monuments on public property transforms such property into a "limited public forum,"¹⁶¹

The County has permitted the Order of Eagles, a private fraternal organization, to place on government property a display espousing the Eagles' views. The installation of the monolith is enough to transform the property into a limited public forum as it has more recently been defined by the Supreme Court... . By allowing access to the

¹⁵² [235 F.3d 292, 295-96 \(7th Cir. 2000\)](#).

¹⁵³ [110 F. Supp. 2d 842, 844-45 \(S.D. Ind. 2000\)](#).

¹⁵⁴ [Id. at 844](#).

¹⁵⁵ *Id.*

¹⁵⁶ [Id. at 859](#).

¹⁵⁷ [898 P.2d 1013, 1016-17 \(Colo. 1995\)](#). This display of the Ten Commandments was upheld by the Colorado Supreme Court. [Id. at 1026-27](#).

¹⁵⁸ [Id. at 1015-16](#).

¹⁵⁹ [Van Orden v. Perry, 351 F.3d 173, 175-76 \(5th Cir. 2003\)](#).

¹⁶⁰ [Id. at 180](#) (citation omitted).

¹⁶¹ [Sumnum v. Callaghan, 130 F.3d 906, 919-21 \(10th Cir. 1997\)](#). In *Sumnum*, Salt Lake County refused to erect on the courthouse lawn a monolith bearing a church's religious tenets. Because the courthouse lawn also contained a Ten Commandments monument, the Tenth Circuit remanded the case and instructed the district court to apply the proper forum analysis. [Id. at 919-22](#).

Eagles, the County has opened the forum to at least some private expression, clearly choosing not to restrict the forum to official government uses.¹⁶²

The breadth of the Tenth Circuit's holding is a critical development. It mirrors a trend at the Supreme Court which has "reconceptualized" traditional Establishment Clause cases as "involving government content-based discrimination against speech."¹⁶³ If the Tenth Circuit is correct in classifying the Salt Lake County Courthouse lawn as a limited public forum, then privately-donated Ten Commandments monuments in that and similar settings must be preserved. To exclude them based on their religious content would constitute impermissible viewpoint discrimination in a limited public forum. As the Supreme Court held in *Rosenberger v. Rector of the University of Virginia*, the government may not "exercise viewpoint discrimination [in a limited public forum], even when the limited public forum is one of its own creation."¹⁶⁴

The preceding review begins to show the implication of forum analysis for many of the Ten Commandments cases. Typically, [*207] parcels of public property at the seat of government act as a showcase for monuments celebrating local history and culture. Yet, in many cases the Ten Commandments are excluded from these fora because they present a religious viewpoint about history and culture. This is impermissible viewpoint-based discrimination.

As one example of the discriminatory treatment of the Ten Commandments, note the premise in *O'Bannon*, which immediately singled out the Ten Commandments and created a presumption that the speech was impermissible, "With the unambiguous religious nature of the Ten Commandments as our starting point, the State is obligated to articulate a valid secular purpose for the display of this sacred text."¹⁶⁵ The State responded that its purpose in displaying the Commandments was to exhibit "a reminder of our nation's core values and ideals" and to "venerate important documents that reflect the history and ideals animating American government ... [and] add[] to the rich historical context presented to visitors to the State capitol."¹⁶⁶ The court rejected the State's articulated purpose because it was unconvinced that the Ten Commandments actually had any relation at all to America's "secular governmental structures."¹⁶⁷

As another example of the discriminatory treatment afforded to the Ten Commandments, consider the following from the district court's opinion in *ACLU v. McCreary County*: "Although the Supreme Court typically gives deference, in religion cases, to the government's articulated purpose, where the Ten Commandments are at issue the Court has rejected the proffered purpose and found instead that the document is a sacred text which has a religious purpose."¹⁶⁸

The disregard for the articulated secular purposes in *O'Bannon* and *McCreary County* is a prime example of how some federal courts treat displays of the Ten Commandments in a discriminatory manner.¹⁶⁹ In both cases the

¹⁶² [Id. at 919.](#)

¹⁶³ See Chemerinsky, *supra* note 125, 12.2.4, at 1170-71.

¹⁶⁴ [515 U.S. 819, 829 \(1995\).](#)

¹⁶⁵ [110 F. Supp. 2d 842, 851 \(S.D. Ind. 2000\).](#)

¹⁶⁶ *Id.* (alterations in original) (citations omitted).

¹⁶⁷ See [id. at 852.](#)

¹⁶⁸ [145 F. Supp. 2d 845, 848 \(E.D. Ky. 2001\)](#) (emphasis added).

¹⁶⁹ See [Edwards v. Aguillard, 482 U.S. 578, 586-87 \(1987\)](#) (stating that the Court is "normally deferential" to "articulations of a secular purpose" that are "sincere and not a sham"); [Mueller v. Allen, 463 U.S. 388, 394-95 \(1983\)](#) (stating that the Court is

courts rejected the articulated purposes by scrutinizing, not the objective acts of the government, but the **[*208]** content of the speech.¹⁷⁰ This occurs, in part, because federal courts often decide the constitutionality of the displays on motions for preliminary injunctions or summary judgment and without the benefit of expert testimony.¹⁷¹ Frequently, the only basis to undermine the State's articulated purpose is the Supreme Court's statement in *Stone v. Graham* that "the Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact."¹⁷² Given the widespread use of *Stone* in this way, it is difficult to imagine any articulated purpose that will survive the scrutiny of the federal courts.

The special treatment accorded to the Ten Commandments because of their "unambiguous religious nature" contradicts the clear command of the Supreme Court which stated, "The State may not, on the claim of misperception of official endorsement, ban all private religious speech from the public square, or discriminate against it by requiring religious speech alone to disclaim public sponsorship."¹⁷³ When a speaker is excluded from the public square solely because he offers a religious viewpoint on law and culture, the government infringes on the speaker's rights of Free Exercise and Free Speech. As the Supreme Court stated,

Vital First Amendment speech principles are at stake here. The first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and, if so, for the State to classify them. The second, and corollary, danger is to speech from the chilling of individual thought and expression.¹⁷⁴

Similarly, there is a danger to liberty when government is given the power to examine the motives of its citizens who erect monuments to the Ten Commandments.

Consider the case of Judge James DeWeese, an Ohio state judge, who decorated his courtroom walls with framed copies of the Bill of **[*209]** Rights and the Ten Commandments.¹⁷⁵ Also appearing in the courtroom were portraits of Thomas Jefferson, James Madison, and Alexander Hamilton accompanied by quotes related to the jury system, a portrait of Abraham Lincoln, the Ohio seal, and the Ohio motto: "With God, All Things Are Possible."¹⁷⁶ The district court concluded that Judge DeWeese's purpose in displaying the Ten Commandments in his courtroom was educational. Specifically, the judge's purpose was the following:

(1) To instruct individuals that our legal system is based on moral absolutes from divine law handed down by God through the Ten Commandments and (2) to help foster debate between the philosophical positions of moral absolutism (as set forth in the Ten Commandments) and moral relativism in order to address what he perceives to be a moral crisis in this country.¹⁷⁷

"reluctant to attribute unconstitutional motives to the States, particularly when a plausible secular purpose for the State's program may be discerned").

¹⁷⁰ See supra notes 165-67 and accompanying text.

¹⁷¹ See, e.g., [McCreary County, 145 F. Supp. 2d 845](#); [ACLU v. City of Plattsburgh, 186 F. Supp. 2d 1024 \(D. Neb. 2002\)](#); [Ind. Civil Liberties Union v. O'Bannon, 110 F. Supp. 2d 842 \(S.D. Ind. 2000\)](#); [Books v. City of Elkhart, 79 F. Supp. 2d 979 \(N.D. Ind. 1999\)](#).

¹⁷² [449 U.S. 39, 41 \(1980\)](#) (emphasis added) (footnote omitted).

¹⁷³ [Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 769 \(1995\)](#) (plurality opinion).

¹⁷⁴ [Rosenberger v. Rector of Univ. of Va., 515 U.S. 819, 835 \(1995\)](#).

¹⁷⁵ [ACLU v. Ashbrook, 211 F. Supp. 2d 873, 876 \(N.D. Ohio 2002\)](#).

¹⁷⁶ [Id. at 877 n.3](#).

¹⁷⁷ [Id. at 888](#).

Judge DeWeese used the display of the Ten Commandments as an educational tool when he addressed visitors to the courtroom and made no reference to the Commandments during official proceedings.¹⁷⁸ In fact, Judge DeWeese was fulfilling a widely recognized judicial function which finds its approval in the Code of Judicial Conduct: A judge "may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice."¹⁷⁹

Nevertheless, in sweeping language, a federal district court not only struck down the display of the Ten Commandments, but actually censored the Judge's view of law and culture solely because it was religious,

Judge DeWeese's methods, however, are constitutionally deficient, because the debate the Judge seeks to foster is inherently religious in character... . A state actor officially sanctioning a view of moral absolutism in his courtroom by particularly referring to the Ten Commandments espouses an innately religious view and, thus, crosses the line created by the Establishment Clause.¹⁸⁰

[*210] Recall that Judge DeWeese did not refer to the Ten Commandments in official courtroom proceedings, but merely used them in support of his judicial philosophy when addressing visitors.¹⁸¹

It is likely to be of little comfort to Judge DeWeese that he is still free to discuss his judicial philosophy on the sidewalk or in his home. The district court's ruling amounts to official disapproval of his judicial philosophy merely because it is based on religious principles. The Judge's colleagues, for example, would be free under the district court's ruling to espouse a secular judicial philosophy in the courtroom because a secular judicial philosophy is not "an innately religious view."¹⁸²

The district court's ruling forces Judge DeWeese and others like him either to withdraw from the debate about the origin and meaning of law, or to rephrase their arguments in non-religious terms.

Forcing religious arguments to be restated in other terms asks a citizen to "bracket" religious convictions from the rest of her personality, essentially demanding that she split off a part of her self. Says [legal theorist Michael] Perry: "To bracket them would be to bracket - indeed, to annihilate - herself. And doing that would preclude her - the particular person she is - from engaging in moral discourse with other members of society."¹⁸³

Whatever path Judge DeWeese chooses, both he and society lose because a unique voice has been silenced through government coercion, which is precisely the kind of evil that the First Amendment was designed to prevent.

Conclusion

Some federal courts are preventing private parties from speaking up in the public square about America's religious heritage, a heritage that was once thought "indispensable to the maintenance of republican institutions."¹⁸⁴ Despite the recognized role of the Ten Commandments in our nation's past, the current state of affairs chills thought and expression by discriminating against a viewpoint that **[*211]** would link the Ten Commandments to America's law and culture.¹⁸⁵ Insofar as they have relied on Stone in banishing the Ten Commandments from the

¹⁷⁸ *Id.*

¹⁷⁹ Code of Judicial Conduct Canon 4 (1972).

¹⁸⁰ [211 F. Supp. 2d at 888-89](#) (emphasis added).

¹⁸¹ [Id. at 888](#).

¹⁸² [Id. at 889](#).

¹⁸³ Carter, *supra* note 15, at 56 (quoting Michael J. Perry, *Morality, Politics, and Law* 72-73 (1988)).

¹⁸⁴ Alexis de Tocqueville, *Democracy in America* 305-06 (Alfred A. Knopf 1994) (1835).

public square, these courts have ignored important developments in the law, including the reasonable observer test and forum analysis, that would dictate a different result.

In the debate over America's legal heritage, to deny speakers access to the public forum, based solely on the religious content of their speech, is a flagrant betrayal of the Establishment Clause. To do so "sends a message" that religious speakers are "outsiders [and] not full members of the political community."¹⁸⁶ "When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant."¹⁸⁷

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¹⁸⁵ See, e.g., [Books v. City of Elkhart, 235 F.3d 292, 302 \(7th Cir. 2000\)](#); [ACLU v. McCreary County, 145 F. Supp. 2d 845, 849 n.15 \(E.D. Ky. 2001\)](#); Green, *supra* note 15, at 525-26 (conceding that the Ten Commandments have "influenced the development of Western law" while at the same time disputing that the Ten Commandments are the "primary historical basis" for American law).

¹⁸⁶ [Lynch v. Donnelly, 465 U.S. 668, 688 \(1984\)](#) (O'Connor, J., concurring).

¹⁸⁷ [Rosenberger v. Rector of Univ. of Va., 515 U.S. 819, 829 \(1995\)](#).