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Cover Page Footnote

Chapman Distinguished Professor, University of Tulsa College of Law. I thank my administrative assistant, Rita Langford, and my research assistants, Carol Pettit and Briana Ross, for their help on this Essay. I also thank Charles W. Adams, Stuart Banner, Rev. Richard E. Barton, Martin H. Belsky, Benjamin Block, Marianne Blair, Fay Botham, Marc Brettler, William P. Brown, Erwin Chemerinsky, Judge Avern Cohn, Morris Dees, Davison R. Douglas, David A. Friedman, Stephen Green, Marsha Cope Huie, Ayesha Khan, William Messer, Tamara Piety, Rabbi Charles Sherman, Norman Stillman, and Stephanie J. Wilhelm.

ESSAY

THE TEN COMMANDMENTS ON THE COURTHOUSE LAWN AND ELSEWHERE

*Paul Finkelman**

INTRODUCTION

The U.S. Supreme Court recently heard two Ten Commandments cases, one from Kentucky¹ and one from Texas.² Shortly before agreeing to hear these cases the Court refused to grant certiorari in *Glassroth v. Moore*,³ the controversial case involving a Ten Commandments monument weighing more than 5000 pounds that the former chief justice of Alabama, Roy Moore, placed in the rotunda of the Alabama Supreme Court building. At the heart of all three cases is a conflict over the meaning of the First Amendment.

Typically these cases arise when public officials, or members of the general public, want to place a monument or plaque containing the text of the Ten Commandments on public property. The motivations for these monuments are varied. Some people believe that displaying the Ten Commandments will enhance public morality or support for the legal system. For example, in the 1940s a Minnesota juvenile court judge, E. J. Ruegemer, began a campaign to post the Ten Commandments throughout the country because he was “[d]isheartened by the growing number of youths in trouble” and believed the Commandments would “provide them with a common

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1. *ACLU of Ky. v. McCreary County, Ky.*, 354 F.3d 438 (6th Cir. 2003), *cert. granted*, 73 U.S.L.W. 3235 (U.S. Oct. 12, 2004) (No. 03-1693). This case involves the posting of the Ten Commandments as a document on the walls of a county courthouse.

2. *Van Orden v. Perry*, 351 F.3d 173 (5th Cir. 2003), *cert. granted*, 73 U.S.L.W. 3235 (U.S. Oct. 12, 2004) (No. 03-1500). This case involves a stone monument about six feet high on the grounds of the Texas State Capitol.

3. 335 F.3d 1282 (11th Cir. 2003), *cert. denied*, 540 U.S. 1000.

code of conduct.”⁴ Proponents of these monuments and postings assert that the Ten Commandments represent the single most important influence in the development of our legal system. Others, like Chief Justice Roy Moore, seem to want to post the Ten Commandments to proclaim their view that we are a nation “under God” or even that we must always respect a “higher authority” in law.⁵ This goal contrasts with the command of the First Amendment that the government may not establish religion.⁶

At first glance, the constitutionality—or rather the *unconstitutionality*—of these monuments seems to be almost too obvious to require much thought, litigation, or even analysis. The Ten Commandments clearly comprise a religious text. The Commandments are found in two places in the Bible: Exodus 20 and Deuteronomy 5. For Jews, the Ten Commandments (known to Jews as the “Ten Words”⁷) are both a statement of faith and a declaration of rules or laws. They are part of a larger biblical code of rules and laws that were promulgated in the Jewish Bible to govern ancient Israel.⁸ Christians see the Commandments as a statement of rules and part of their basic theology. For most Christians and Jews in the United States, the Ten Commandments have come to symbolize biblical law. It is not unusual to find them in a sanctuary or on the outside walls of a house of worship. Thus, the Commandments themselves are clearly religious in their origin and in their substance, because a number of them refer to “God.”⁹

In addition to being religious in the most obvious sense of the term, any display of the Ten Commandments will inevitably favor one faith or one denomination over all others. As I will demonstrate below, Jews, Catholics, Lutherans, and most Protestants differ in the way

4. *Books v. City of Elkhart, Ind.*, 235 F.3d 292, 294 (7th Cir. 2000).

5. Consider for example the following testimony by Chief Justice Roy Moore:

Q. Do you agree that the monument, the Ten Commandments monument, reflects the sovereignty of GOD over the affairs of men?

A. Yes.

Q. And the monument is also intended to acknowledge GOD’s overruling power over the affairs of men, would that be correct?

A. It reflects those concepts, the laws of nature and of nature’s GOD.

Q. So the answer would be yes?

A. Yes.

Completely Corrected Version, Volume III Of VII, The 3rd Day Of Non-Jury Bench Trial at 34, *Glassroth v. Moore*, 229 F. Supp. 2d 1290 (M.D. Ala. 2002) (No. 01-CV-1268).

6. See U.S. Const. amend. I (“Congress shall make no law respecting an establishment of religion . . .”).

7. William P. Brown, *Introduction, in The Ten Commandments: The Reciprocity of Faithfulness 1* (William P. Brown ed., 2004) [hereinafter *Reciprocity of Faithfulness*].

8. See *The Torah: A Modern Commentary* 539 (W. Gunther Plaut ed., Union of American Hebrew Congregations 1981) (1962) [hereinafter *The Torah*]; see also *Reciprocity of Faithfulness*, *supra* note 7, at 1-2.

9. See, e.g., *Exodus* 20:1-17 (King James).

they number and organize the Commandments. These religions, and denominations within them, also differ in how they translate the Commandments from the original Hebrew into English. Thus, any display of the Commandments is inherently sectarian, because it must choose a translation, ordering, and numbering system that will favor, or endorse one or more religions, and therefore disfavor other religions. Such monuments are, in constitutional terms, preferential,¹⁰ and as such fail the endorsement test set out in *County of Allegheny v. ACLU*.¹¹

While important to Jews and Christians, the Ten Commandments have no place at all in Hinduism, Buddhism, Taoism, and other non-western faiths. These faiths do not consider the Jewish Bible to be part of their theological apparatus, and thus the Commandments are not part of their belief system.¹² Muslims consider the Jewish Bible to be a holy text, and thus while the Ten Commandments may have some religious value, they are clearly not central to the faith.¹³

Furthermore, the jurisprudence on the public display of the Ten Commandments *seems* clear. In *Stone v. Graham*,¹⁴ the Court held that posting the Ten Commandments in a public school violated the Establishment Clause of the First Amendment. In the twenty-five years since that case, Justices have favorably cited *Stone* a number of times¹⁵ and given no hint that it might be permissible to put the Ten

10. This of course means that Ten Commandments Monuments would fail the “non-preferential test” or the endorsement test set out by some Justices. As the Court noted in *Capitol Square Review and Advisory Board v. Pinette*:

In *Allegheny*, the Court alluded to two elements of the analytical framework supplied by *Lemon v. Kurtzman*, 403 U.S. 602 (1971), by asking “whether the challenged governmental practice either has the purpose or effect of ‘endorsing’ religion.” We said that “the prohibition against governmental endorsement of religion ‘preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred.’”

515 U.S. 753, 786-87 (Souter, J., concurring in part and concurring in the judgment) (citations omitted).

11. 492 U.S. 573 (1989); *see also* Douglas Laycock, *Theories of Interpretation: Free Exercise Clause and Establishment Clause*, in *Religion and American Law: An Encyclopedia* 516, 522-23 (Paul Finkelman ed., 2000) [hereinafter *Religion and American Law*].

12. Certainly the substance of some of the commandments is part of these, and indeed all, religions and cultures. I know of no culture, for example, that does not prohibit stealing or theft, which is a prohibition in the Ten Commandments.

13. *See* Ann Elizabeth Mayer, *Islam*, in *World Religions: Selections from the Sixteen-Volume Macmillan Encyclopedia of Religion* 583-609 (1987) [hereinafter *World Religions*]; *Islam*, in Josh McDowell and Don Stewart, *Handbook of Today’s Religions* (1983), available at http://www.greatcom.org/resources/handbook_of_todays_religions/default.htm (last visited Jan. 28, 2005) [hereinafter *Handbook of Today’s Religions*].

14. 449 U.S. 39 (1980).

15. *See, e.g., Pinette*, 515 U.S. at 794 n.2; *Bd. of Educ. v. Grumet*, 512 U.S. 687, 720 (1994); *Edwards v. Aguillard*, 482 U.S. 578, 584-85 (1987); *Sch. Dist. of Grand Rapids*

Commandments on public property. This has been the position of the lower courts as well. In *Books v. City of Elkhart*,¹⁶ the U.S. Court of Appeals for the Seventh Circuit had no trouble deciding that a Ten Commandments monument on public property violated the Establishment Clause. The Supreme Court denied certiorari, although three Justices dissented. The dissenters apparently believed that the placement of this monument on public grounds was not necessarily a violation of the Establishment Clause.¹⁷

Despite the fact that placing these monuments on public property seems like an obvious Establishment Clause violation, supporters of public displays of the Ten Commandments offer two main arguments for permitting them.¹⁸ The first is that these monuments are religiously “neutral” and therefore are not in effect sectarian and thus ought to be permitted. The second is that the Ten Commandments are the moral foundation of law or the moral foundation of American law and thus Ten Commandments monuments are not necessarily religious at all. Rather, proponents of this view argue that the monuments are historical in nature, commemorating what they claim to be the paramount source of law for the United States. For example, in 1918 a judge in Allegheny County, Pennsylvania noted, at the dedication of a Ten Commandments plaque in the county courthouse, that in accepting the plaque “the County was recognizing the role of the Commandments in the formation of our laws and the sacrifices made in World War I.”¹⁹ Similarly, Chief Justice Rehnquist noted in his dissent on the denial of certiorari in *Books*, “the Commandments have secular significance as well, because they have made a substantial contribution to our secular legal codes.”²⁰

v. Ball, 473 U.S. 373, 385 (1985); *Wallace v. Jaffree*, 472 U.S. 38, 56 n.41, 60 n.50, 64 (1985); *Lynch v. Donnelly*, 465 U.S. 668, 679-80, 687, 691, 696 n.2, 699, 714 (1984).

16. 235 F.3d 292, 294 (7th Cir. 2000).

17. See *City of Elkhart, Ind. v. Books*, 532 U.S. 1058, 1061 (2001).

18. See *Modrovich v. Allegheny County*, 385 F.3d 397 (3rd Cir. 2004), for a discussion of the “historical” monument argument. This third argument, offered in some cases, is that a particular monument has been in place so long that it has been “historical” and should be treated as such. A courthouse in Pittsburgh, for example, contained a Ten Commandments plaque that was mounted after World War I to commemorate the war dead. Such an argument might indeed be persuasive if the monument was designed, not to honor the Ten Commandments, but rather to honor some other secular cause, such as homage to the war dead. In such a case, the Ten Commandments are not the central purpose of the monument, but can be seen as only incidental to the larger issue. In the same way, a monument to the war dead decorated with angels would probably be constitutional, even though a monument of an angel might arguably be an endorsement of Christianity. The distinction here is between a monument that has the Ten Commandments on it, but whose main theme or purpose is secular, such as honoring fallen soldiers, and a monument designed to glorify or praise the Ten Commandments per se. Most Ten Commandments monuments, including the one in Alabama and the two currently before the Court, cannot be defended on historical or secular grounds.

19. *Id.* at 405.

20. *Books*, 532 U.S. at 1061.

This Essay explores both of these contentions and concludes that neither can withstand careful scrutiny. Moreover, this Essay demonstrates that the proponents of these monuments in the leading case, *Books v. City of Elkhart*,²¹ misled the district court and court of appeals on the nature of the text on the monument. This is significant for the current litigation before the Supreme Court, because the monument at issue in *Books* is virtually identical to the monument at issue in *Van Orden v. Perry*.²²

I. CAN A TEN COMMANDMENTS MONUMENT BE NEUTRAL?

In protesting the denial of certiorari in *Books v. City of Elkhart*,²³ Chief Justice William Rehnquist, who was joined by Justices Scalia and Thomas, stressed that the monument in question was essentially neutral. The Chief Justice, relying on the record created in the district court, asserted that the monument at issue in this case was designed to accommodate Jewish, Catholic, and Protestant beliefs and scripture. Rehnquist wrote:

The specific text was developed by representatives of the Jewish, Catholic, and Protestant faiths who sought to create a nonsectarian version of the Commandments. In addition to the text, the monument depicts an eye within a pyramid similar to the one displayed on the one-dollar bill, an American eagle grasping the American flag, two small Stars of David, and a similarly sized symbol representing Christ: two Greek letters, Chi and Rho, superimposed on each other.²⁴

The Chief Justice's position, of course, ignores the critical issue that such a monument, even if neutral, would seem like an establishment of religion to Hindus, Buddhists, Sikhs, Taoists, followers of many Native American faiths, and practitioners of other faiths that are not based on Judaism or Christianity. Followers of those faiths do not consider the Jewish Bible (the Old Testament) to be a sacred text for them, and thus the Ten Commandments are not part of their faith. Muslims accept the Jewish Bible as a holy scripture, but it is not central to their faith and they do not embrace the Ten Commandments as part of their doctrine. A Ten Commandments monument thus sends a message to these Americans that they are not considered to be part of the mainstream of society, but are "outsiders." As the United States become increasingly pluralistic, a Ten Commandments monument on public property will become increasingly problematic for developing a society that embraces

21. 235 F.3d at 292.

22. 351 F.3d 173 (5th Cir. 2003), *cert. granted*, 73 U.S.L.W. 3235 (U.S. Oct. 12, 2004) (No. 03-1500).

23. 532 U.S. at 1059.

24. *Id.* at 1060 (Rehnquist, C.J., dissenting).

people of all faiths. Needless to say, atheists and agnostics are also likely to be offended by such a monument and the Chief Justice's claim that the Ten Commandments monument is "nonsectarian."²⁵ The Chief Justice's position also fails to address the powerful point made by Justice John Paul Stevens:

Even though the first two lines of the monument's text appear in significantly larger font than the remainder, they are ignored by the dissenters. Those lines read: "THE TEN COMMANDMENTS—I AM the LORD thy God." The graphic emphasis placed on those first lines is rather hard to square with the proposition that the monument expresses no particular religious preference—particularly when considered in conjunction with those facts that the dissent does acknowledge—namely, that the monument also depicts two Stars of David and a symbol composed of the Greek letters Chi and Rho superimposed on each other that represent Christ.²⁶

Despite the implications of Justice Stevens's observation that any monument that proclaims "I am the Lord thy God" must be religious and sectarian, Chief Justice Rehnquist and Justices Scalia and Thomas clearly believe it is possible to imagine some sort of "majoritarian" notion of the Ten Commandments which might allow for a nonsectarian monument. I do not find compelling or persuasive the notion that the Ten Commandments, which come from the Bible, could be nonsectarian, because the Commandments are from a religious text and because any translation of that text is inherently sectarian. However, clearly at least three Justices do believe there can be a nonsectarian version of the Ten Commandments, and so it is useful to explore why they are incorrect in this belief. The Chief Justice wanted to take *Books* in order to determine if the monument was permissible, because, as he asserted, "the Commandments have secular significance . . . because they have made a substantial contribution to our secular legal codes."²⁷

Presumably, the Chief Justice's argument is predicated on the notion that the Ten Commandments monuments at issue in *Books* and in *Van Orden v. Perry* are nonsectarian or religiously or denominationally neutral. If, however, these monuments are not neutral or nonsectarian—if indeed it is impossible to have a Ten Commandments monument that is neutral or nonsectarian—then presumably even the Chief Justice and his two allies in *Books* would concede that the monument cannot be allowed to stand on public property. This part illustrates that it is not in fact possible to have a neutral Ten Commandments monument.

There are at least four separate versions of the ordering of the Ten Commandments: Jewish, Catholic, Lutheran, and general

25. *Id.*

26. *Id.* at 1059 (Stevens, J., concurring).

27. *Id.* at 1061 (Rehnquist, C.J., dissenting).

Protestant.²⁸ Furthermore, these faiths, as well as different denominations within these faiths, use different translations of the Commandments.²⁹ The monuments that have been at issue in various cases have been distinctly sectarian, usually using either a traditional Protestant text and numbering system,³⁰ or, as in the case of the monuments at issue in both *Books*³¹ and *Van Orden v. Perry*,³² a Lutheran numbering system.³³ Furthermore, all of these faiths, and many denominations within these faiths, use different translations of the Bible when presenting the Ten Commandments. Thus, no monument can be neutral or nonsectarian, because any ordering of the Commandments or translation of the original Hebrew text will reflect the position of one or more faiths and exclude that of other faiths.

An understanding of the biblical text and the use of that text by Jews, Catholics, Lutherans, and Protestants illustrates the impossibility of a neutral or nonsectarian monument. This understanding requires a discussion of the biblical text, the problem of translating this text, and the theological or denominational use of the text by various faiths. We begin with the text itself.

28. Lutherans are, of course, Protestants; however, for purposes of clarity, references in this Essay to "Protestants" will be to all Protestants other than Lutherans. Lutherans, for purposes of this Essay, will be treated as a separate faith, apart from other Protestants.

29. Consider these different translations of Exodus 20:2-3. The *King James Version* has translated these verses as, "I *am* the LORD thy God, which have brought thee out of the land of Egypt, out of the house of bondage. Thou shalt have no other gods before me." The Bible: Authorized King James Version with Apocrypha 89 (Oxford Univ. Press 1998) (1997) [hereinafter *King James Version*]. The Jehovah's Witness version of the Bible has the following translation: "I am Jehovah your God, who have brought you out of the land of Egypt, out of the house of slaves. You must never have any other gods against my face." New World Translation of the Hebrew Scriptures 258-59 (1953) [hereinafter *New World Translation*]. The *Living Bible* states, "I am Jehovah your God who liberated you from your slavery in Egypt. You may worship no other god than me." The Living Bible: Paraphrased, A Thought-for-Thought Translation 47 (Tyndale House Publishers, Inc. 1971) (1971) [hereinafter *The Living Bible*]. The *Revised Standard Version*, a Protestant Bible, states, "I am Jehovah thy God, who brought thee out of the land of Egypt, out of the house of bondage. Thou shalt have no other gods before me." The Holy Bible: Revised Standard Version 92 (Herbert G. May & Bruce M. Metzger eds., Oxford Univ. Press 1989) (1946) [hereinafter *Revised Standard Version*]. And in the *International Children's Bible*, the translation is, "I am the Lord your God. I brought you out of the land of Egypt where you were slaves. You must not have any other gods except me." International Children's Bible, available at <http://www.therain.org/studies/tenicb.html> (last visited Jan. 25, 2005).

30. This was the text of the monument at issue in *Glassroth v. Moore*, 335 F.3d 1282, 1285 (11th Cir. 2003) (quoting text of monument at issue in litigation).

31. 235 F.3d 292, 296 (7th Cir. 2000).

32. 351 F.3d 173 (5th Cir. 2003).

33. See *infra* notes 62-67 and accompanying text.

A. *The Ten Commandments Text*

The Ten Commandments are found in Chapter 20 of the Book of Exodus. They are later repeated (although not word-for-word) in Chapter 5 of Deuteronomy. Because all of the Ten Commandments monuments rely on the text from Exodus 20, the rest of this Essay will use and discuss only that text. Exodus 20 was, of course, originally written in Hebrew, and thus any monument that presents the Ten Commandments in English relies on a translation.³⁴ As I note below, there is no such thing as a neutral or nonsectarian translation of this biblical text.³⁵ Indeed, even the numbering of the verses in the Commandments is subject to religious and theological dispute.

1. Verse Numbering

As with the rest of the Pentateuch, the verses in Exodus 20 are numbered; however, this numbering is contested. Jews consider the Ten Commandments to come from verses 2-14 of Exodus 20. Traditional Christian Bibles take the same text, but reorganize the verses, numbering them 2-17.³⁶ Thus, a reference to any particular verse of the Ten Commandments in a text might confuse readers. For example, a Protestant or Catholic might refer to verse 14—the adultery prohibition—but a Jew would assume this is a reference to the prohibition on coveting. This text numbering does not, in the end, directly affect any of the Ten Commandments monuments, but it does illustrate how any discussion of the Ten Commandments leads to theological conflict.

34. It is possible to imagine a Ten Commandments monument in the original Hebrew. While such a monument would avoid any preferential translations, the ordering of the Commandments, as I make clear below, would be preferential. However, since almost no one could read the monument it might be considered less of a burden on the First Amendment. Such a monument on public land would, I believe, still violate the Constitution, because it would still be a religious and sectarian monument. In addition, such a monument could legitimately be seen as an endorsement of Judaism because anyone seeing the monument who knew that it was in Hebrew would assume that this was a “Jewish” monument because only Jews still use Hebrew as liturgical language.

35. See *infra* Part I.A.1.

36. In the Jewish numbering system, verse 13 reads as follows: “You shall not murder./ You shall not commit adultery./ You shall not steal./ You shall not bear false witness against your neighbor.” The Torah, *supra* note 8, at 554. Catholic and Protestant translations separate these four statements into four separate verses, thus increasing the total number of verses by three, from fourteen to seventeen. See, e.g., The New American Bible: Translated from the Original Languages With Critical Use of All the Ancient Sources by Members of the Catholic Biblical Association of America 55 (The Catholic Press 1970) (1953) [hereinafter New American Bible]; Revised Standard Version, *supra* note 29, at 92-93.

2. Numbering the Commandments

While the numbering of the verses does not affect any Ten Commandments monuments, the number of the Commandments themselves does. While many Americans probably believe that the Ten Commandments are a universally accepted list of ten “dos and don’ts,” this is emphatically not the case. First, there are far more than ten separate commandments in the Ten Commandments. Second, the “dos and don’ts” are far from simple. It is hard to imagine, for example, that most Americans who respond to advertising that suggests they buy what others own, really believe that they should not “covet”—that is desire—the things their neighbors have. Similarly, it is unlikely that most Protestants who decorate their Christmas trees with angels understand that they are directly violating their Second Commandment.³⁷ Finally, the ordering, numbering, and translation from the original Hebrew of the Commandments is neither simple nor consistent across faiths. The list is not a simple list. Adherents to those faiths that accept the Ten Commandments do not agree on the numbering of the Commandments, the content of each Commandment, the translation of the Commandments, or even their meaning. For instance, Jews, Catholics, and Protestants³⁸ have different numbering systems for the Commandments themselves. Moreover, not all Protestants have the same numbering system. Lutherans³⁹ differ in their numbering of the Commandments from both Catholics and other Protestants.⁴⁰

The problem of numbering the Commandments undermines any claim to neutrality in a Ten Commandments monument. This is true

37. The Second Commandment, as found in the *King James* translation of the Bible reads, “[t]hou shalt not make unto thee any graven image, or any likeness of anything that is in the heaven above, or that is in the earth beneath, or that is in the water under the earth.” King James Version, *supra* note 29, at 89-90. Clearly glass angels, many Christmas tree ornaments, and various other forms of religious sculpture are “likeness[es] of anything [or something] that is in the heaven above,” and as such violate the plain meaning of this Commandment.

38. Orthodox Christians have a numbering system that was nearly identical to that of traditional Protestant numbering, or to be more chronologically correct, the traditional Protestant numbers are the same as those used by the Greek Orthodox Church of the United States and the Orthodox Church in America (“OCA”). The one difference is that Orthodox Christians include Exodus 20:2 (“I am the Lord thy God, which have brought thee out of the land of Egypt, out of the house of bondage.”) as part of their first Commandment. See Rev. George Mastrantonis, *The Ten Commandments*, at <http://www.goarch.org/en/ourfaith/articles/article7115.asp> (last visited Jan. 25, 2005); see also Orthodox Church in America, *The Ten Commandments*, at http://www.oca.org/pages/orth_chri/orthodox-faith/bible-and-church-history/The-Ten-Commandments.html (last visited Jan. 25, 2005).

39. See Luther’s *Small Catechism with Explanation* 9-12 (Concordia Publishing House 1991) (1943) [hereinafter *Luther’s Small Catechism*].

40. As I will note below, Jews and Protestants also have different translations of these Commandments, which in fact have significant theological implications. See *infra* Part I.A.3.

even if the monument does not specifically show “numbers.” The monument in Texas, for example, does not have numbers in front of each verse. However, the monument provides a clear outline of a numbering scheme. The Texas monument was given to the state by the Fraternal Order of the Eagles (“FOE”) and is virtually identical to all other FOE Monuments (including the one litigated in *Books v. City of Elkhart*).⁴¹ These monuments do not have a numbering system, per se, but they do have ten lines that are set out by not being indented—what is known in word processing as “hanging indentations.” The implication is that these are the Ten Commandments, while the lines that are indented are part of the previous “hanging indented” Commandment. The scheme followed by this monument follows exactly the numbering scheme of the Lutheran Catechism. Thus, this presentation of the Commandments is in fact an endorsement of Lutheran doctrine.

The numbering system matters. It is a significant part of religious doctrine for all faiths that accept the Bible. Any Ten Commandments monument must ultimately choose one numbering system, or one order for the Commandments, and by doing so, it will endorse one faith and of course reject, or exclude, other faiths.

For Jews the First Commandment is an affirmative statement: “I the LORD am your God who brought you out of the land of Egypt, the house of bondage.”⁴² This sentence⁴³ stands alone for Jews as the First Commandment. It is a statement of faith that in itself is a Commandment. It is a statement, of course, that can only apply to Jews, as they are the people who were “brought . . . out of the land of Egypt, the house of bondage.”⁴⁴ No Christians adopt this verse as a Commandment. Most Protestants do not consider this to be part of the Ten Commandments. Rather, it is for them simply a prefatory statement. Roman Catholics and Lutherans incorporate this sentence into their First Commandment, but it does not stand alone. Thus, there are actually three versions of “the First Commandment”—Jewish, Protestant, and Catholic/Lutheran.

The Second Commandment is equally complicated. For Jews, this Commandment contains verses 3-6 of Exodus 20, beginning with the words: “You shall have no other gods beside Me,”⁴⁵ and continuing with verses 4-6. Verse 4 declares: “You shall not make for yourself a sculptured image, or any likeness of what is in the heavens above, or

41. 235 F.3d 292, 296 (7th Cir. 2000).

42. This is the translation found in *The Torah*, *supra* note 8, at 539. The *King James Version*, which is used for the Texas monument and the Kentucky plaques, uses this language: “I am the LORD thy God, which have brought thee out of the land of Egypt, out of the house of bondage.” See *King James Version*, *supra* note 29, at 89.

43. *Exodus* 20:2.

44. *The Torah*, *supra* note 8, at 539.

45. *Id.*

on the earth below, or in the waters under the earth.”⁴⁶ For Protestants, the Second Commandment contains only verses 4-6, beginning with “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.”⁴⁷ Thus, the verses constituting the Protestant First and Second Commandments form the entirety of the Second Commandment for Jews.

Catholics and Lutherans, on the other hand, consider their First Commandment to include everything that is the Jewish First and Second Commandments, as well as everything that is in the Protestant First and Second Commandment.⁴⁸ Thus, their First Commandment contains all of verses 2-6.

The most obvious substantive difference in these numbering schemes concerns the emphasis on sculpture or graven images. The prohibition on “graven images” stands alone as the Second Commandment for Protestants,⁴⁹ which reflects ideological and theological aspects of the Protestant reformation in most of Europe. Jews, Catholics, and Lutherans do not make this provision a separate commandment.⁵⁰ Thus, monuments or plaques—such as the ones at issue in *Glassroth v. Moore*⁵¹ and *ACLU of Kentucky v. McCreary County, Ky.*⁵²—which have as the Second Commandment a prohibition on graven images—are distinctly Protestant and should be seen as an endorsement of mainstream Protestant theology. Similarly, a monument, such as the one in *Van Orden v. Perry*,⁵³ which makes the prohibition on graven images part of the First Commandment, is correctly interpreted as an endorsement of the Lutheran or Catholic faith. Both numbering schemes are a rejection of the Jewish Commandments.

The fact that Jews, Protestants, Catholics, and Lutherans all have different First and Second Commandments, leads to a different numbering system throughout the rest of the Commandments. Jews and Protestants both finish their Second Commandment at the same place, with a ban on “sculptured”⁵⁴ or “graven” images, a ban on bowing down or serving such sculptures, and an admonition to “keep

46. *Id.*

47. King James Version, *supra* note 29, at 89-90.

48. See New American Bible, *supra* note 36, at 55 (sponsored by The Bishops' Committee of the Confraternity of Christian Doctrine and has the imprimatur of Patrick Cardinal O'Boyle, Archbishop of Washington; it is an example of a Catholic version of The Bible).

49. See King James Version, *supra* note 29, at 89-90.

50. See, e.g., The Torah, *supra* note 8, at 541-42.

51. 333 F.3d 1282, 1285 (2003), *cert. denied*, 540 U.S. 1000.

52. 354 F.3d 438, 443 n.2 (6th Cir. 2003), *cert. granted*, 73 U.S.L.W. 3235 (U.S. Oct. 12, 2004) (No. 03-1693).

53. 351 F.3d 173 (5th Cir. 2003), *cert. granted*, 73 U.S.L.W. 3235 (U.S. Oct. 12, 2004) (No. 03-1500).

54. See The Torah, *supra* note 8, at 539.

my commandments.”⁵⁵ Jews and Protestants have the same numbering system for Commandments three through ten, but not the same translations. As already noted, the First Commandment for Catholics and Lutherans contains the verses that make up the first two Jewish and Protestant commandments. Thus, for the remaining commandments, Catholics and Lutherans are essentially one commandment behind Jews and Protestants. For example, the Seventh Commandment for Catholics is a prohibition on stealing, but that is the Sixth Commandment for Protestants and Jews. Their Seventh Commandment is a prohibition on adultery. Thus, an admonition from a Catholic to “remember the Seventh Commandment” (don’t steal) would have a very different meaning for a Protestant or a Jew (don’t commit adultery).

What follows is a brief explanation of the numbering of the Commandments. As I noted above, the Commandments are found in Exodus 20, verses 2-14 for Jews and 2-17 for Christians.

There are in fact at least thirteen separate admonitions in these verses to “do” something, or “not do” something. There are also a number of threats from God directed at those who do not obey these Commandments. Different faiths divide these verses in different ways.

a. *The Jewish Ten Commandments*

The Plaut translation of the Bible provides the following explanation for the Jewish Ten Commandments:⁵⁶

[T]he division of the commandments themselves is not certain. There are altogether thirteen sentences in the accepted Jewish versions (seventeen in the Christian) but we cannot conclude from the text itself what comprises the first commandment, what the second, and so forth. For while there are thirteen mitzvot [commandments] to be found in the text, their allocation to ten commandments can be done in various ways. It is not surprising, therefore, that there are different traditions in this respect. The prevailing Jewish division is as follows:

1st commandment: “I am the Lord . . .” (verse 2); this may be considered a preamble, implying the duty to believe in God;

2nd commandment: “You shall have no other gods beside Me. You shall not make for yourself a sculptured image . . .” (verses 3-6);

3rd commandment: “You shall not swear falsely . . .” (verse 7);

4th commandment: “Remember the sabbath day . . .” (verses 8-11);

55. King James Version, *supra* note 29, at 90.

56. The Torah, *supra* note 8, at 534.

5th commandment: "Honor your father and your mother" (verse 12);

6th commandment: "You shall not murder" (verse 13);

7th commandment: "You shall not commit adultery" (verse 13);

8th commandment: "You shall not steal" (verse 13);

9th commandment: "You shall not bear false witness . . ." (verse 13);

10th commandment: "You shall not covet . . ." (verse 14).⁵⁷

b. *Protestant Ten Commandments*

Most Protestants do not consider verse 2 to be one of the Ten Commandments. Rather, they consider it more of a preamble to the Ten Commandments. Thus, what is the Second Commandment for Jews is the First Commandment for Protestants. Obviously this requires the Protestants to renumber some other commandment to get to ten. The same issue also exists for Catholics and Lutherans. Protestants, Catholics, and Lutherans do this in different ways. The traditional Protestant numbering of the verses (using the *King James Version*) looks like this:

[1st commandment: Verse 3] Thou shalt have no other gods before me.

[2nd commandment: Verses 4-6] Thou shalt not make unto thee any graven image. . . .

[3rd commandment: Verse 7] Thou shalt not take the name of the LORD thy God in vain; . . .

[4th commandment: Verses 8-11] Remember the sabbath day

[5th commandment: Verse 12] Honour thy father and thy mother

[6th commandment: Verse 13] Thou shalt not kill.

[7th commandment: Verse 14] Thou shalt not commit adultery.

[8th commandment: Verse 15] Thou shalt not steal.

[9th commandment: Verse 16] Thou shalt not bear false witness against thy neighbour.

[10th commandment: Verse 17] Thou shalt not covet⁵⁸

57. *Id.* (citations omitted).

c. *The Roman Catholic Ten Commandments*

The Catholic ordering of the Commandments is not the same as the Protestant. The key difference is in the First and Second Commandments and the Ninth and Tenth Commandments. The Catholic Church does not have a separate prohibition on graven images. Rather, what is the Second Commandment for Protestants is subsumed in the First Commandment for Catholics. To get to “ten” Commandments the Catholic Church then divides what is the Tenth Commandment for Jews and Protestants into two separate Commandments, making it both the Ninth Commandment and the Tenth Commandment. Thus, the Catholic numbering and translation, based on the Catholic Catechism,⁵⁹ and using the *New American Bible*⁶⁰ translation, looks like this:

[1st Commandment: Verses 2-6] “I, the LORD, am your God, who brought you out of the land of Egypt, that place of slavery. You shall not have other gods besides me. You shall not carve idols for yourselves in the shape of anything in the sky above or on the earth below or in the waters beneath the earth; you shall not bow down before them or worship them. . . .

[2nd Commandment: Verse 7] “You shall not take the name of the LORD, your God, in vain

[3rd Commandment: Verses 8-11] “Remember to keep holy the sabbath day.

[4th Commandment: Verse 12] “Honor your father and your mother

[5th Commandment: Verse 13] “You shall not kill.

[6th Commandment: Verse 14] “You shall not commit adultery.

[7th Commandment: Verse 15] “You shall not steal.

[8th Commandment: Verse 16] “You shall not bear false witness against your neighbor.

[9th Commandment: Verse 17] “You shall not covet your neighbor’s house. You shall not covet your neighbor’s wife, nor his male or female slave, nor his ox or ass, . . .

58. King James Version, *supra* note 29, at 89-90. The *King James Version* does not actually list the Commandment numbers as is done in *The Torah*, *supra* note 8, at 534.

59. See Catechism of the Catholic Church 505-606 (1994).

60. *New American Bible*, *supra* note 36, at 55.

[10th Commandment: Verse 17] “You shall not covet . . . anything else that belongs to him.”⁶¹

d. *The Lutheran Ten Commandments*

The Lutheran ordering of the Commandments has elements of both the non-Lutheran Protestants and the Roman Catholics. Like the Catholics, the Lutherans do not have a separate prohibition on graven images. Rather, what is the Second Commandment for most other Protestants is subsumed in the First Commandment for Lutherans. To get to “ten” Commandments, the Lutheran Church, like the Catholic Church, divides what is the Tenth Commandment for Jews and other Protestants into two separate Commandments. However, according to the Lutheran Catechism, this is done by splitting verse 17 into two separate commandments. Thus, the Lutheran Ten Commandments, from *Luther’s Small Catechism*,⁶² look like this:

The First Commandment [Verse 3:] You shall have no other gods. . . .

The Second Commandment [Verse 7:] You shall not misuse the name of the Lord your God. . . .

The Third Commandment [Verse 8:] Remember the Sabbath day by keeping it holy. . . .

The Fourth Commandment [Verse 12:] Honor your father and your mother. . . .

The Fifth Commandment [Verse 13:] You shall not murder. . . .

The Sixth Commandment [Verse 14:] You shall not commit adultery. . . .

The Seventh Commandment [Verse 15:] You shall not steal. . . .

The Eighth Commandment [Verse 16:] You shall not give false testimony against your neighbor. . . .

The Ninth Commandment [Verse 17:] You shall not covet your neighbor’s house. . . .

61. *Id.*

62. Luther’s *Small Catechism*, *supra* note 39. As with the *King James Version*, *supra* note 29, at 89-90, *Luther’s Small Catechism* does not actually list the Commandment numbers as is done in *The Torah*, *supra* note 8, at 534 and in the *Catechism of the Catholic Church*, *supra* note 59, at 505-606.

The Tenth Commandment [Verse 17:] You shall not covet your neighbor's wife, or his manservant or maidservant, his ox or donkey, or anything that belongs to your neighbor.⁶³

As the foregoing illustrates, it is quite impossible to have a theologically neutral version of the Ten Commandments. Any monument that contains the Ten Commandments must choose among a variety of numbering systems, and in doing so endorse one religion over others. Illustrative of this is the Seventh Circuit's analysis of the monument at issue in *Books v. City of Elkhart*.⁶⁴ This monument, like the one in Texas at issue in *Van Orden v. Perry*,⁶⁵ was created by the Fraternal Order of the Eagles.⁶⁶ These FOE Monuments are clearly not neutral. They are neither nonsectarian nor nondenominational. Nor can they be seen as "non-preferential." The FOE monuments, scattered throughout the nation, contain a numbering system that endorses a specific religious faith (Lutheran) with a translation that comes from the Protestant *King James* version of the Bible.⁶⁷ In *Books*, the Seventh Circuit asserted that another FOE monument was nonsectarian.⁶⁸ The Seventh Circuit wrote as follows:

In the 1940s, a juvenile court judge in Minnesota, E. J. Ruegamer, inaugurated the Youth Guidance Program. Disheartened by the growing number of youths in trouble, he sought to provide them with a common code of conduct. He believed that the Ten Commandments might provide the necessary guidance. Judge Ruegamer originally planned to post paper copies of the Ten Commandments in juvenile courts, first in Minnesota and then across the country. To help fund his idea, he contacted the Fraternal Order of Eagles ("FOE"), a service organization dedicated to promoting liberty, truth, and justice. At first, FOE rejected Judge Ruegamer's idea because it feared that the program might seem coercive or sectarian. In response to these concerns, representatives of Judaism, Protestantism, and Catholicism developed what the individuals involved believed to be a nonsectarian version of the Ten Commandments because it could not be identified with any one

63. Luther's Small Catechism, *supra* note 39, at 9-12.

64. 235 F.3d 292, 294 (7th Cir. 2000) ("In response to those concerns, representatives of Judaism, Protestantism, and Catholicism developed what the individuals involved believed to be a nonsectarian version of the Ten Commandments because it could not be identified with any one religious group.").

65. 351 F.3d 173 (5th Cir. 2003), *cert. granted*, 73 U.S.L.W. 3235 (U.S. Oct. 12, 2004) (No. 03-1500). This case involves a stone monument about six feet high on the grounds of the Texas State Capitol. The monument says it was donated by the Fraternal Order of the Eagles.

66. *Id.* at 176 ("The Ten Commandments monument was a gift of the Fraternal Order of Eagles, . . .").

67. See *King James Version*, *supra* note 29, at 89-90.

68. *Books*, 235 F.3d at 294.

religious group. After reviewing this version, FOE agreed to support Judge Ruegamer's program.⁶⁹

These assertions about the nonsectarian nature of the FOE monuments are simply untrue. With the exception of some minor word changes in the fourth and fifth line of the text, dealing with graven images, the text on all FOE monuments is exactly the same as in the *King James Version* of the Bible. Similarly, as I have noted above, the structuring of the Commandments is identical to the Lutheran Catechism. Rather than being nonsectarian, this monument endorses the structure of the Ten Commandments adhered to by Lutherans and a translation followed by many Protestant denominations.

3. Translating the Commandments

As the discussion of the text of the FOE monuments illustrates, it is impossible to have a neutral or nondenominational English version of the Ten Commandments, just as it is impossible to have a neutral or nondenominational numbering of the Ten Commandments. The Ten Commandments are found in two parts of the Bible: Exodus 20 and in a slightly different form in Deuteronomy 5. The original text was, of course, written in Hebrew. Any translation of an ancient text requires skill and a complex set of decisions. Should the translator seek to offer a word-for-word rendition of a text, or should a translator seek to provide the essence—the meaning—of the text? Such a decision-making process is complicated by religious belief and theology.

My point here is not to choose sides or suggest that a particular translation—whether it be Jewish, Catholic, Lutheran, general Protestant, or non-denominational—is correct, or “right,” or superior to another. Nor was it my intention above to argue that one numbering system is better, more correct, or superior to another. Rather, it is to simply illustrate the point that the translation of the Commandments is heavily connected to theology, religious practice, and denominational needs.

This, of course, once again underscores that *any* monument with a translation of the Ten Commandments would involve privileging one faith's translation over another. Before turning to the multitude of translations of the Bible, it is worth noting how theology may dictate the use of particular words in a translation. The *King James Version* of the Bible translates Exodus 20:4 as, “[t]hou 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.”⁷⁰ The Catholic *New American Bible*, however, translates this

69. *Id.*

70. King James Version, *supra* note 29, at 89-90.

as, “[y]ou shall not carve idols for yourselves in the shape of anything in the sky above or on the earth below or in the waters beneath the earth.”⁷¹ This text does not separate the first part of the clause from the second, as the *King James Version* does. Thus, while truncating the line may be consistent with some Protestant interpretations of Exodus 20:4, it would undermine the Catholic meaning. Moreover, the Catholic translation to “not carve idols”⁷² is substantively different from the Protestant *King James Bible* translation not to make “any graven images”⁷³ found on the plaque in Kentucky and the FOE monument in Texas.

These differences are of course theological. The Protestant reformation made it a point to destroy statues in Catholic churches and cathedrals, as the Reformationists turned those buildings into Protestant churches. The Catholic Church, however, retained statues of saints, of the Virgin Mary, and of course of Jesus. Thus, the Catholic Church’s translation reflects theology and practice, as well as perhaps a goal to provide the “true” meaning of the Commandment, rather than a word-for-word translation.

Another famous translation problem, or choice, comes in Exodus 20:13. The *King James Version* of the Bible translates the verse as “[t]hou shalt not kill.”⁷⁴ This is the translation on the FOE monument in Texas, in the older *Geneva Bible*,⁷⁵ preferred by the Puritans, and in what is considered the American Standard Edition.⁷⁶ The *Revised Standard Version*⁷⁷ modernizes the “Thou” to “You,” translating the line into “You shall not kill.”⁷⁸ *The Reader’s Digest Bible*⁷⁹ also uses this translation as do American Catholic Bibles, such as *The New American Bible*,⁸⁰ and *The Jerusalem Bible*.⁸¹

71. New American Bible, *supra* note 36, at 55.

72. *Id.*

73. King James Version, *supra* note 29, at 89-90.

74. King James Version, *supra* note 29, at 90.

75. The Geneva Bible: A Facsimile of the 1560 Edition 33 (Univ. of Wisconsin Press 1969) (1560) [hereinafter Geneva Bible].

76. The Holy Bible Containing the Old and New Testaments Translated Out of the Original Tongues 21 (American Revision Committee ed., Thomas Nelson & Sons 1901) (1611) [hereinafter American Standard Edition].

77. Revised Standard Version, *supra* note 29.

78. *Id.* at 93.

79. The Reader’s Digest Bible: Condensed from the Revised Standard Version Old and New Testaments (Bruce M. Metzger ed., 1982) [hereinafter Reader’s Digest Version].

80. New American Bible, *supra* note 36, at 55.

81. The Jerusalem Bible 102 (Doubleday & Co., Inc. 1966) (1961). For a translation of this as “[t]hou shalt do no murder,” see The Holy Bible: A Translation from the Latin Vulgate in the Light of the Hebrew and Greek Originals 66 (Sheed & Ward 1956) (1944) [hereinafter English Catholic Bible]. This text, the official *English Catholic Bible*, has the imprimatur of Bernardus Cardinal Griffin, Archbishop of Westminster.

Jewish Bibles, following well accepted Jewish theological traditions and careful scholarly attention to the original Hebrew, translate this line as “You shall not murder.”⁸² Some modern Protestant Bibles, such as the *New Revised Standard Bible*⁸³ and *The Living Bible*,⁸⁴ which is used in many Protestant churches in the United States, also use the term “murder” instead of “kill.”

For some denominations and faiths this difference in translation is significant. There is a clear legal difference between to kill and to murder, and this difference has had, and continues to have, important theological implications. Members of pacifist denominations and faiths, such as Quakers and Mennonites, in part, base their refusal to serve in the military on the grounds that “killing” violates the Ten Commandments. Various faiths place differing significance on the translation of the word. The Plaut commentary notes that “only unauthorized homicide is meant by the text, and the older translation ‘You shall not kill’ was too general and did not represent the more specific meaning” of the original Hebrew.⁸⁵ “Hence the claims of pacifists, who would see this command as a prohibition of all killing including that legitimized by the state during warfare, cannot be sustained. The same is true for the abolition of capital punishment.”⁸⁶ The point here is not whether this commentary is correct or not, but rather to illustrate how the choosing of one word—kill—rather than another word—murder—indicates that the Texas monument, the Kentucky Plaque, and other representations of the Ten Commandments have, in effect, endorsed one religious and theological tradition and rejected another. Thus, the choice in translating the original Hebrew text of one word over the other cannot be deemed neutral or non-preferential.

The second line of the Texas monument illustrates yet another major translation problem. This monument reads, “[T]hou shalt have no other gods before me.”⁸⁷ This is the same as verse 3 of the *King James Version*.⁸⁸ It differs, however, from Jewish and Catholic

82. The Torah, *supra* note 8, at 554; *see also* Tanakh: A New Translation of The Holy Scriptures According to the Traditional Hebrew Text 116 (The Jewish Publication Society 1985) [hereinafter Tanakh]. For a commentary on this, noting that the commandment prohibits “illicit killing,” *see* The Jewish Study Bible 150 (Adele Berlin & Marc Zvi Brettler eds., 2004). This volume notes that “[t]he King James Version’s ‘thou shalt not kill’ is too broad; it implies that even capital punishment and war are prohibited, whereas the Torah sometimes mandates these.” *Id.*

83. Holy Bible with Apocrypha: New Revised Standard Version 65 (American Bible Society 1989) (1977) [hereinafter New Revised Standard Version].

84. *Supra* note 29, at 48 (“You must not murder.”).

85. The Torah, *supra* note 8, at 557.

86. *Id.*

87. Reply Brief for Plaintiff at 15, Van Orden v. Perry, 351 F.3d 173 (5th Cir. 2003) (No. 02-51184).

88. King James Version, *supra* note 29, at 89-90.

translations. The Catholic *New American Bible* translates this line as “You shall not have other gods besides me.”⁸⁹ The Catholic *Jerusalem Bible* translates this line as “You shall have no gods except me.”⁹⁰ One Catholic Bible uses the following translation: “Thou shalt not have strange gods before me.”⁹¹ Jewish translations also differ. The *Tanakh*, by the Jewish Publication Society, translates this as “[y]ou shall have no other gods besides Me.”⁹² But the Plaut translation reads “[y]ou shall have no other gods beside Me.”⁹³ The difference between “beside” and “besides” is substantial, and of course neither agrees with the Texas monument’s term “before me.” The phrase “beside” me suggests that there might be other Gods in the universe and that the Ten Commandments might even allow someone to believe in these other Gods, or at least acknowledge their existence, but the followers of the Ten Commandments cannot make the other Gods the primary or first God. Thus, the recipients of the Ten Commandments cannot put another god “next to”—or “beside”—the God of the Hebrews. Presumably they might have another God behind or after him. The term “besides” me implies an exclusivity of belief—that there can be only one God to believe in. The Protestant *Living Bible* uses this language: “You may worship no other god than me.”⁹⁴ The Jehovah’s Witness’s Bible states it as, “[y]ou must never have any other gods against my face.”⁹⁵ The wording in the *International Children’s Bible* is, “[y]ou must not have any other gods except me.”⁹⁶ *Luther’s Small Catechism* is a simple: “You shall have no other gods.”⁹⁷

Line 4 of the Texas monument—“[t]hou shalt not take the name of the Lord thy God in vain”—is the same text as Exodus 20:7 in the *King James Version* of the Bible.⁹⁸ Other Bibles have a very different text. The Plaut and Jewish Publication Society Jewish translations offer this text: “You shall not swear falsely by the name of the LORD

89. *New American Bible*, *supra* note 36, at 55. The text of the Ten Commandments from this Bible, along with the explanation that it is the “Official Catholic Bible,” is also found online. Church of the Rain, Studies: The Ten Commandments, at <http://www.therain.org/studies/tennab.html> (last visited Jan. 25, 2005).

90. *The Jerusalem Bible*, *supra* note 81, at 81.

91. *The Holy Bible: Translated from the Vulgate Latin 83* (John Murphy Co. 1914) (1582 and 1609) [hereinafter *Holy Bible Translated*]. This volume was “authorized by the Hierarchy of England and Wales and the Hierarchy of Scotland.” *Id.* The *English Catholic Bible* translation uses the following language: “Thou shalt not defy me by making other gods thy own.” *English Catholic Bible*, *supra* note 81, at 66.

92. *Tanakh*, *supra* note 82, at 102.

93. *The Torah*, *supra* note 8, at 539.

94. *The Living Bible*, *supra* note 29, at 47.

95. *New World Translation*, *supra* note 29, at 259.

96. *International Children’s Bible*, *supra* note 29.

97. *Luther’s Small Catechism*, *supra* note 39, at 9.

98. *King James Version*, *supra* note 29, at 90.

your God.”⁹⁹ The *Living Bible* translates this as, “[y]ou shall not use the name of Jehovah your God irreverently, nor use it to swear to a falsehood.”¹⁰⁰ The Jehovah’s Witness text is: “You must not take up the name of Jehovah your God in a worthless way.”¹⁰¹ The *International Children’s Bible* simply states: “You must not use the name of the Lord your God thoughtlessly.”¹⁰² Catholic translations for this verse are inconsistent. *The Jerusalem Bible* translates it as, “[y]ou shall not utter the name of Yahweh your God to misuse it,”¹⁰³ while the *New American Bible*¹⁰⁴ uses the same translation as the *King James Version* for the first half of verse seven, but not the second half.¹⁰⁵ The authorized translation for English Catholics is “[t]hou shalt not take the name of the Lord thy God lightly on thy lips.”¹⁰⁶ As with other verses, different faiths and denominations, using various translations of the Bible, offer different texts, which often contain different meanings.

There are of course substantial differences between these translations. The Jewish translation would not prohibit common swearing—saying “God damn”—for example. The *Living Bible* translation, with its prohibition on using the name of God “irreverently”¹⁰⁷ might ban such language. More significantly, the Jewish translation seems to go to a kind of perjury not to “swear to a falsehood,” while the taking of the Lord’s name “in vain” has a less legalistic meaning. Again, these translation differences underscore the sectarian nature—the preferentialism—of the Texas monument and all other Ten Commandments monuments.

The differences in the way the Commandments are translated have important theological implications. But for our purposes it is clear that whatever translation appears on a monument or plaque, the line on the monument or plaque will favor one translation of the Bible over others, and privilege some faiths and denominations over others.

It should be clear, then, that a Ten Commandments monument on government property would in fact be an endorsement of one faith and a rejection of other faiths. In other words, there can be no neutral display of the Ten Commandments. Similarly, any monument

99. The Torah, *supra* note 8, at 540; see also Tanakh, *supra* note 82, at 115.

100. The *Living Bible*, *supra* note 29, at 47.

101. New World Translation, *supra* note 29, at 259.

102. *International Children’s Bible*, *supra* note 29.

103. The *Jerusalem Bible*, *supra* note 81, at 81.

104. *New American Bible*, *supra* note 36, at 55.

105. The full verse in the *New American Bible*, is as follows: “[y]ou shall not take the name of the Lord, your God, in vain. For the Lord will not leave unpunished him who takes his name in vain.” *New American Bible*, *supra* note 36, at 55. The *King James Version* reads: “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.” *King James Version*, *supra* note 29, at 90.

106. English Catholic Bible, *supra* note 81, at 66.

107. The *Living Bible*, *supra* note 29, at 48.

which numbers the Commandments or has them displayed in an order that implies a numbering system, would also be an endorsement of one faith's understanding of Exodus 20 and a simultaneous rejection of another faith's. Thus, when the government puts up a Ten Commandments monument, it in effect endorses one or more faiths and rejects others. Therefore, the monument and plaque at issue in the Texas and Kentucky cases cannot be seen as either non-preferential or nonsectarian. In effect, the monuments and plaques choose sides.

B. *Non-Judeo/Christian Religions and the Ten Commandments*

For an increasing number of Americans the Ten Commandments have no religious significance. People who are not Christians or Jews, including Buddhists, Hindus, Jains, Taoists, and Sikhs, do not accept the Pentateuch¹⁰⁸ as a central text of their faith. For them the Ten Commandments are not the foundation of their religion or their law. Indeed, the Ten Commandments were not meant for them.

The Ten Commandments were given to the ancient Israelites by their God and were initially directed to them. Exodus 20 begins, "I am the Lord your God who brought you out of the land of Egypt, the house of bondage."¹⁰⁹ This is a statement from the God of the Israelites to the Israelite people. "Implicit in this biblical view is that God is Israel's king, hence its legislator."¹¹⁰ The Commandments that followed were theologically directed to the people of Israel. Christians later adopted the Commandments because, as one theological scholar notes, "Christians interpret the Old Testament in light of the New Testament"¹¹¹ and "the prologue invokes not only the exodus narrative but also the story of the cross."¹¹² For Christians, therefore, the prologue also says, in effect, "I am the LORD your God, who was incarnate in Jesus Christ, born in a manger, died on a cross *for you*. So remember who you are and act accordingly."¹¹³

Thus, while the Ten Commandments speak directly to Jews, and indirectly to Christians, they have no relevance to the religious life of people who are not of these faiths. Supporters of Ten Commandments monuments argue that even if people do not accept the Bible, the Commandments themselves are a set of universal truths that can apply to people of all faiths. But, can this be true? A brief

108. The Pentateuch is the name given to the first five books of the Old Testament. See The Torah, *supra* note 8, at xvii.

109. *Id.* at 539.

110. The Jewish Study Bible, *supra* note 82, at 148.

111. Nancy J. Duff, *Should the Ten Commandments Be Posted in the Public Realm? Why the Bible and Constitution Say, "No,"* in Reciprocity of Faithfulness, *supra* note 7, at 166.

112. *Id.*

113. *Id.*

examination of the first four Commandments for Jews and most Protestants (and the first three for Catholics and Lutherans) illustrates why the Ten Commandments cannot be considered universal.

The First Commandment for Jews is “I am the Lord your God who brought you out of the land of Egypt, out of the house of bondage.”¹¹⁴ This Commandment is hardly universal; it is, in fact, very specific and applies to Jews and only Jews. The Protestant first commandment— “[t]hou shalt have no other Gods before me”¹¹⁵—is obviously inapplicable to a Hindu, Jain, or Sikh who worship many Gods, a Confucian who has deified Confucius, or a Buddhist, who has a nontheistic concept of God.¹¹⁶ The ban on graven images, the Second Commandment for Protestants and part of the First Commandment for Catholics, would make no sense to Hindus, Buddhists, Jains, Confucians, Sikhs, or Shintoists. Similarly, it is hard to imagine how any of the followers of these faiths would find it wrong to take the name of the Israelite God in vain. None of these faiths even have a concept of a Sabbath, so followers surely could not be expected to “remember the Sabbath day and keep it holy.”¹¹⁷

It is also clear that followers of these faiths may have very different notions of some of the other Commandments. There is no evidence that all faiths condemn envy, which is the essential command of the Jewish and Protestant Tenth Commandment (and the Catholic and Lutheran Ninth and Tenth Commandments).¹¹⁸ Notions of adultery vary from culture to culture and faith to faith. For some Hindus a ban on killing is central to their faith¹¹⁹ and might fit with the traditional translation of the Protestant Sixth Commandment, “[t]hou shalt not kill,”¹²⁰ but might not fit with the Jewish translation as “[t]hou shalt not murder.”¹²¹

Thus, it is impossible to make a serious argument that the Ten Commandments are “universal,” or can in any way apply to the followers of most religions that do not accept the Jewish Bible as the basis of their theology and eschatology. A Ten Commandments

114. See The Torah, *supra* note 8, at 539.

115. See King James Version, *supra* note 29, at 89.

116. See World Religions, *supra* note 13. A basic introduction to the beliefs of these and other non-western faiths can also be found in *Handbook of Today's Religions*, *supra* note 13.

117. The Torah, *supra* note 8, at 547.

118. Compare the explanation of Buddhism in *Handbook of Today's Religions*, *supra* note 13, with the Tenth Commandment in *The Torah*, *supra* note 8, at 554, 558, and the Ninth and Tenth Commandments in the *New American Bible*, *supra* note 36, at 55.

119. See *Hinduism*, in *Handbook of Today's Religions*, *supra* note 13.

120. See King James Version, *supra* note 29, at 89; see also *supra* notes 74-86 and accompanying text.

121. See The Torah, *supra* note 8, at 554; see also *supra* notes 74-86 and accompanying text.

monument on public space can be seen as an attack on the faith of many Americans and a statement that followers of non-western religions are not true Americans or that their faiths are not worthy of respect.

II. THE TEN COMMANDMENTS AS THE MORAL FOUNDATION OF LAW

A second argument in favor of allowing Ten Commandments monuments to be displayed in public places focuses on the historical importance of the Ten Commandments, and more generally, the Bible. For example, before the U.S. District Court for the Middle District of Alabama in *Glassroth v. Moore*, Chief Justice Roy Moore of Alabama testified:

I put the Ten Commandments monument—you call it the “Ten Commandments monument,” it’s been called that so much, I refer to it as “the monument”—reflecting the moral foundation of law. I put the monument in the building for the purpose of restoring the moral foundation of law. And to do that, one must recognize the source of those moral laws, which is GOD.¹²²

Moore believed that, in the suit directed at his Ten Commandments monument, “[w]hat’s on trial is the acknowledgment of GOD from which all our forefathers said justice is derived.”¹²³

The essence of this argument is that American law is based primarily, or fundamentally, on biblical law. The strongest argument for this is that much of American law came from British law, and early British law was tied to the Church and Christianity in general. However, the claim that the Ten Commandments, or even the Bible, are the moral foundation of American law, does not stand up to careful scrutiny.

A. Colonial and Early American Law

The sources of law for the American colonies, and later the United States, are broad and varied. The principal early source is the common and statutory law of England, including the Magna Carta. Also influential was the law coming out of the non-common law courts of England, such as equity, chancery, admiralty, orphans, and ecclesiastical. The founding generation—those who participated in the American Revolution and the creation of the nation under the Constitution—was influenced by many English sources of law, such as

122. Completely Corrected Version, Volume III Of VII, The 3rd Day Of Non-Jury Bench Trial at 38, *Glassroth v. Moore*, 229 F. Supp. 2d 1290 (M.D. Ala. 2002) (No. 01-CV-1268).

123. *Id.* at 127.

the Magna Carta and the English Bill of Rights,¹²⁴ as well as non-legal sources like the works of such Enlightenment thinkers as John Locke, John Trenchard and Thomas Gordon, the authors of “Cato’s Letters,” and other English Libertarian Philosophers.¹²⁵ Other sources of American law include Roman law, the civil law of continental Europe in the post-Roman period, private international law, biblical law, and Germanic tribal law.¹²⁶

While English law had some biblical roots, by the time of the American settlement, and especially by the time of the Revolution, the Bible and religious issues had long been surpassed by more practical concerns, especially in the American colonies. Central to the development of American law has been what Justice Oliver Wendell Holmes, Jr. called “the felt necessities of the times.”¹²⁷ That is, much of American law has not been borrowed from other sources. Instead, it developed through the actions and writings of courts, legislators, legal theorists, activists and reformers, and political leaders, as they responded to events, experiences, and controversies throughout America’s history. Much of early American law developed in this way. For example, the laws regulating land usage, water, slavery, and the rights of married women all reflected the felt necessities of the colonies, rather than English tradition or biblical law.¹²⁸

Proponents of the moral foundation of law theory stress the religious references in English law, and by English commentators like Henry de Bracton.¹²⁹ At the time of the Revolution, few Americans read Bracton, whose treatises were in Latin. Americans did, however, focus on the Magna Carta (1215), but that document was not in fact religiously based. The Magna Carta addressed various legal subjects, including inheritance; the legal obligations of guardians and the rights of underage heirs; land ownership and sale; marriage; the rights of widows; satisfaction of debts; taxation; feudal dues and services; dispensation of justice by the courts; jury trials and trial procedure;

124. An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown (Bill of Rights), 1689, 1 W. & M., sess. 2, c.2 (Eng.)

125. The English Libertarian Heritage, from The Writings of John Trenchard and Thomas Gordon in the Independent Whig and Cato’s Letters 37 (David L. Jacobson ed., Bobbs-Merrill Company, Inc. 1965) (1755) [hereinafter English Libertarian Heritage].

126. See Lawrence Friedman, A History of American Law 11-104 (2d ed. 1985); Kermit L. Hall, The Magic Mirror 9-27 (1989); 1 Melvin I. Urofsky & Paul Finkelman, A March of Liberty: A Constitutional History of the United States 45-46, 61, 168 (2002).

127. Oliver Wendell Holmes, Jr., The Common Law 1 (1881).

128. See Friedman, *supra* note 126, at 65-68, 85; Hall, *supra* note 126, at 35-39; see also William E. Nelson, The Americanization of the Common Law 1-10 (1975).

129. See generally Completely Corrected Version, Volume III Of VII, The 3rd Day Of Non-Jury Bench Trial at 31, Glassroth v. Moore, 229 F. Supp 2d 1290 (M.D. Ala. 2002) (No. 01-CV-1268); Henry de Bracton, On the Laws and Customs of England (Samuel E. Thorne trans., 1968).

proportionality in punishment; the credibility of evidence in courts; taking of property without compensation; honesty and fairness in courts; and travel by merchants into and out of England.¹³⁰ The Magna Carta made no reference to either the Ten Commandments as a whole or any particular one of the Commandments. But, with no reference to the Ten Commandments, the Magna Carta contains principles that are central to our legal culture today, including assertions that no person can be “taken or imprisoned or disseised [sic] or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land”¹³¹ and that “[t]o no one will we sell, to no one will we refuse or delay, right or justice.”¹³²

The concessions granted by King John in the Magna Carta were largely limited to the baronial families at the top of the rigidly structured feudal system. In the early seventeenth century, Sir Edward Coke began to use the Magna Carta to argue for an expansion of rights and liberties to all people in Britain.¹³³ Coke had served as Attorney General for Queen Elizabeth and as Chief Justice under King James I. In 1628 he asserted on the floor of Parliament that the Magna Carta “will have no ‘sovereign.’”¹³⁴ Most of the early colonial charters contained a clause asserting that the colonists would have the rights of natural born English citizens. As a result of Coke’s influence, by 1630—the year of the founding of the Massachusetts Bay colony—these “rights” had begun to include those found in the Magna Carta. When American colonists spoke of their “rights as Englishmen,” both in the early colonial period and more importantly at the time of the Revolution, they had in mind, among other things, the rights and privileges found in the Magna Carta. Indeed, the colonists incorporated many of the concepts of the Magna Carta, such as trial by jury, into their own political and legal systems. Coke also influenced the development of colonial law, and ultimately American law, through his four-volume treatise, *Institutes of the Laws of England*, which was widely read by American lawyers throughout the colonial period.¹³⁵ This essentially secular text helped shape American notions of liberty.

130. Magna Carta, in 1 Documents of American Constitutional and Legal History 1-2 (Melvin I. Urofsky & Paul Finkelman eds., 2d ed. 2002).

131. *Id.* at sec. 39.

132. *Id.* at sec. 40.

133. Catherine Drinker Bowen, *The Lion and the Throne: the Life and Times of Sir Edward Coke (1552-1634)* 452-53 (1985); J.R. Tanner, *English Constitutional Conflicts of the Seventeenth Century, 1603-1689*, at 62-63 (Greenwood Press 1983) (1928).

134. Tanner, *supra* note 133, at 63 (quoting a May 17, 1628 debate in the House of Commons).

135. Edward Coke, *The First Part of the Institutes of the Laws of England* (Garland Publishing Co. 1979) (1832); see also Friedman, *supra* note 126, at 46-48; Hall, *supra* note 126, at 17-18, 54-55.

In the period following the Glorious Revolution of 1689 American colonists expanded the notion of the “rights of Englishmen.” These now included the protections set out in the English Bill of Rights, which Americans of the revolutionary period often called “the second Magna Carta.”¹³⁶ The English Parliament passed the Bill of Rights in 1689¹³⁷ and required that the incoming monarchs, King William III and Queen Mary II, assent to it.¹³⁸ Parliament invited William and Mary to take the English throne in 1689 in the wake of the “Glorious Revolution,” which overthrew King James II and brought an end in Britain to the concept of the divine right of kings.¹³⁹ The English Bill of Rights was designed to make the King and Queen subject to the laws of Parliament and to control their power in relation to their subjects.¹⁴⁰ It addressed various issues, including the passage of laws; taxation; the keeping of a standing army; the right to petition the Monarch for grievances; the election of legislators; and freedom of speech for members of Parliament.¹⁴¹ The Bill of Rights prohibited excessive bail and fines and cruel and unusual punishment while guaranteeing the right to a jury trial to all criminal defendants.¹⁴² Like the Magna Carta, the 1689 English Bill of Rights was highly influential in the colonies; many of the colonies incorporated liberties guaranteed by the Magna Carta and later the 1689 English Bill of Rights directly into their statutes.¹⁴³ The English Bill of Rights did not mention any one of the Ten Commandments or the Ten Commandments as a whole.

That same year, in addition to the Bill of Rights, Parliament passed The Toleration Act of 1689.¹⁴⁴ This Act granted political equality to most Protestant dissenters in England. It is important to understand, however, that the laws passed after the Glorious Revolution, especially the Toleration Act, were incomplete protections of liberty. Circumstances in America led to greater expansions of liberty and religious freedom in the century between the adoption of the English Bill of Rights and the ratification of the far more expansive American Bill of Rights in 1791. Indeed, American constitutional and legal developments from the late seventeenth century until the early eighteenth century rejected the more restrictive English rules in favor

136. Leonard W. Levy, *Bill of Rights (English)*, in 1 *Encyclopedia of the American Constitution* 113 (Leonard W. Levy ed., 1986).

137. *See* Bill of Rights, 1689, 1 W. & M., sess. 2, c. 2 (Eng.).

138. *See* Lois G. Schwoerer, *The Declaration of Rights, 1689*, at 19, 26 (1981).

139. *See id.* at 159-62.

140. *Id.*

141. Bill of Rights, 1689, 1 W. & M., sess. 2, c. 2 (Eng.).

142. *Id.*

143. *See* 1 Bernard Schwartz, *The Bill of Rights: A Documentary History* 3-4, 40-41 (1971).

144. An Act for Exemptin Their Majesties Protestant Subjects, Dissenting from the Church of England from the Penalties of Certain Laws (The Toleration Act), 1689, 1 W. & M., c. 18 (Eng.).

of a more expansive notion of fundamental liberties and a decreased power of the state to regulate personal behavior, including religious belief and practice.¹⁴⁵ And, significantly, the framers of the United States Constitution rejected the anti-Catholicism of the English Bill of Rights as well as its support of an established church.

The Bible was one of the sources that influenced the development of early colonial law. This influence was characterized by enormous temporal and regional variations. Four early New England colonies—Plymouth, Massachusetts Bay, Connecticut, and New Haven—were far more influenced by the Bible than the other colonies.¹⁴⁶ The influence of biblical law was at its apex in the Plymouth, Massachusetts Bay, and New Haven colonies between 1620 and the 1680s.¹⁴⁷ On the other end of the spectrum was Rhode Island, which was founded by Rev. Roger Williams, who had been exiled from Massachusetts Bay in part because of his refusal to accept the religious aspects of its legal culture. Williams and the Rhode Island colony he created explicitly rejected biblically-based codes.¹⁴⁸

This early biblical influence began to disappear by the end of the seventeenth century. The Glorious Revolution led to a new royal charter for Massachusetts Bay, ending the “experiment” of this extremely religious colony. The new charter removed almost all references to biblical law and replaced them with common law practices and procedures. Although Massachusetts law still retained a few remnants of biblical law after 1691, the laws of the colony in this period, and later the state, were essentially secular, based primarily on English law, indigenous law, and local custom.¹⁴⁹ The Salem Witch Trials also diminished support for a reliance on the Bible in American law.

In the four Massachusetts and Connecticut colonies, as in all the other colonies, biblical law should not be confused with the Ten Commandments. The Ten Commandments are but two short passages within the many books of the Bible. Even in those colonies most influenced by the Bible, the influence of the Ten Commandments themselves (as opposed to the influence of biblical law as a whole) was proportionately insignificant, as it was largely limited to particular civil and criminal statutes—and judicial decisions interpreting those statutes—that were, or might have been, patterned after the Decalogue’s provisions. Yet, even in these colonies—often

145. Urofsky & Finkelman, *supra* note 126, at 1-38.

146. Bradley Chapin, *Criminal Justice in Colonial America, 1606-1660*, at 5 (1983).

147. *Id.*

148. Edmund S. Morgan, *Roger Williams: The Church and the State* (1967); W. Clark Gilpin, *William, Roger, in Religion and American Law*, *supra* note 11, at 558-61.

149. *See* Nelson, *supra* note 128.

called the Bible Commonwealths—biblical law was not always paramount.

The Mayflower Compact illustrates the significance of man-made law, and the rejection of biblical law, even among the most devout of the early American settlers. The Compact was an agreement written and signed by the male settlers of the Plymouth Colony in 1620—known in American history as the Pilgrims—and is often seen as the first act of self-government in the American colonies.¹⁵⁰ This document begins with a direct reference to god, with the words, “[i]n the name of God, Amen.” It also acknowledges that the settlers have moved to America “for the Glory of God and the advancement of the Christian Faith” as well as for the “Honour of our King and Country.”¹⁵¹ But after these brief religious references, the Compact ignores religion and God, and makes no mention of the Ten Commandments or the Bible. Although these settlers were extremely religious, significantly they did not turn to biblical sources when stating the premise for the creation of their new government. Rather, the Plymouth settlers pledged themselves to create a “Civil Body Politic” and to “enact, constitute and frame such just and equal Laws, Ordinances, Acts, Constitutions and Offices, from time to time, as shall be thought most meet and convenient for the general good of the Colony.”¹⁵² In other words, in setting out the legal foundation of their new society, the deeply religious Pilgrims acknowledged God in their founding document but did not turn to the Bible or the Ten Commandments as source for their law.

Many laws of the early colonies and the early states—such as prohibitions on theft or perjury—of course mirrored the Ten Commandments. But, it cannot be said that the English settlers of the New World would not have enacted these statutes absent the Ten Commandments. Laws punishing theft and perjury are found in virtually every known culture and were deeply ingrained in the laws of pre-Christian England as well as in the English common law.¹⁵³ All of

150. See The Mayflower Compact, in 1 Documents of American Constitutional and Legal History, *supra* note 130, at 8-9; Urofsky & Finkelman, *supra* note 126, at 10.

151. The Mayflower Compact, *supra* note 150, at 8; see also The Mayflower Compact, available at <http://www.yale.edu/lawweb/avalon/amerdoc/mayflower.htm> (last visited Jan. 27, 2005).

152. The Mayflower Compact, *supra* note 150, at 9-10.

153. Many of the rules set forth in the Ten Commandments also appear in other legal codes. Indeed, prohibitions against murder, theft, perjury, and adultery are virtually universal in human society, and were in place in societies that existed before the advent of Judaism and Christianity, as well as in later societies that were influenced minimally or not at all by Judaism and Christianity. The Code of Hammurabi, the earliest compilation of Babylonian law (circa 2200 B.C.E.), predated Mosaic law by one thousand years but prohibited murder, adultery, stealing, and bearing false witness. The Romans developed rules punishing murder, theft, adultery, and perjury independently of whatever Jewish law they may have encountered. Long before Christianity brought the Ten Commandments to the Germanic Tribes of

the colonies of course banned murder, but significantly, none of the colonies or the states adopted the *King James Version's* translation of the commandment that said "[t]hou shalt not kill."¹⁵⁴ The colonies and states were able to make a distinction between murder—which they banned—and “killing” which might be prohibited, depending on the circumstances of the act.

Those instances in which a biblical source existed for colonial statutes involved a small fraction of the laws as a whole (and the instances in which that source was the Ten Commandments were an even smaller subset of the laws). Vast areas of the law developed wholly independent of the Bible. These include the laws regulating indentured servants, agricultural inspection (especially tobacco in Virginia and Maryland), inheritance, wages and prices, the use of water (riparian law), land ownership (real estate law), taxation, relations with the Indians, trade, and the process of making laws and electing governors and legislative bodies.¹⁵⁵ Many other areas of colonial and early American law developed in a fashion that was either antithetical to biblical teachings or totally irrelevant to them. Examples of this include the law of slavery, divorce and marriage law, the law of sexual morality, inheritance law, and punishment.

The Bible calls for a slave who has been maimed to be freed by his master, whereas, prior to independence, virtually none of the colonies imposed any prohibitions on the types of punishment that could be inflicted upon slaves. Indeed, Virginia, the largest slaveholding colony, actually prohibited masters from manumitting their slaves. The early colonial slave codes did not criminalize the intentional taking of innocent slaves' lives, despite the fact that the Ten Commandments would have prohibited such homicides, whether the prohibition was against killing or murder. The Bible envisions an event known as a “jubilee” at which all existing slaves are freed, to take place every fifty years,¹⁵⁶ but American law did not recognize any such event. Even more striking is a biblical law found in Exodus 21, the chapter immediately following the Ten Commandments. There the Bible set out the rules for “When man sells his daughter as a slave”¹⁵⁷ *The Jewish Study Bible* explains that this is a special case of a “father selling his minor daughter for the purpose of

central Europe, or to the Celtic peoples of Britain, these societies too had adopted similar laws. Native Americans punished murder and theft, as did the cultures of China and India. Indeed, it would be almost impossible to find a culture that did not punish all or most of these forms of behavior.

154. *Exodus* 20:13 (King James).

155. See generally William Waller Henning, *The Statutes at Large: Being a Collection of All the Laws of Virginia from the First Session of the Legislature in the Year 1619, reprinted in Colony Laws of Virginia 1619-1660* (John D. Cushing ed., 1978) (compiling the laws of the Virginia Colony).

156. See *Leviticus* 25:10 (King James).

157. *Exodus* 21:7 (Tanakh).

marriages or concubinage in the purchaser's family."¹⁵⁸ It is of course impossible to imagine any of the American colonies adopting laws that allowed men to sell their daughters as slaves or concubines.

Under biblical law, divorce could only be initiated by the husband. In contrast, some colonies allowed women to initiate divorce. And although the Bible allows polygamy—and with regard to some relations, like the levirate marriage,¹⁵⁹ seems to mandate it—all of the colonies prohibited it. Even the regulation of sexual morality departed from biblical teachings in that the New England colonies punished pre-marital and non-marital sex, although Mosaic law does not. The other colonies similarly proscribed such behavior, although enforcement was rare. Furthermore, none of the colonies, apart from those in Massachusetts and Connecticut, punished adultery by death, though the Bible does. Indeed, some of the colonies never criminalized adultery, leaving treatment of this behavior to the civil arena. Nor did the American colonies ever adopt biblical concepts of adultery, which occurred only when a married woman had relations with someone who was not her husband.¹⁶⁰

The Bible envisions that the first born son would receive a "double portion" of inheritance.¹⁶¹ Massachusetts Bay adopted this provision in the seventeenth century, but outside New England the rest of the colonies rejected it, and instead accepted the English rules of primogeniture with the eldest son inheriting all of his father's land.¹⁶² Under biblical law a widow does not inherit, or at least this is implied by the levirate marriage.¹⁶³ Rather, the brother inherits by marrying the widow. In all of the colonies, widows could inherit outright through provisions in wills, and even without wills they were entitled to their dower rights.¹⁶⁴ In no colony was a man, even if single, expected to marry his brother's widow as the Bible required (the

158. The Jewish Study Bible, *supra* note 82, at 153.

159. "Biblical law requires the brother of a deceased, childless man to marry the widow in order that the 'firstborn will succeed in the name of the dead brother, and his name will not be blotted out of Israel.'" Daniel Sinclair, *Levirate Marriage*, in *Oxford Dictionary of the Jewish Religion* 416 (R.J. Zwi Werblowsky & Geoffrey Wigoder eds., 1997).

160. According to one source,

The extramarital intercourse of a married man is not *per se* a crime in biblical or later Jewish law. This distinction stems from the economic aspect of Israelite marriage: the wife as the husband's possession . . . , and adultery constituted a violation of the husband's exclusive right to her; the wife, as the husband's possession, had no such right to him.

Adultery, in 2 *Encyclopedia Judaica* 313 (1971); see also *Adultery*, in *A Dictionary of the Bible* 7 (W.R.F. Browning ed., 1996).

161. *Deuteronomy* 21:16 (King James).

162. See Marylynn Salmon, *Women and the Law of Property in Early America* 142, 152-53 (1986).

163. See *Deuteronomy* 25:5 (King James).

164. See Salmon, *supra* note 162, at 147-84.

levirate marriage). Finally, none of the colonies adopted the biblical punishment of stoning.

The influence of biblical law faded rapidly in the United States during the eighteenth century, due, in part, to the increasing religious heterogeneity and secularization of the colonies.¹⁶⁵ The trend in American law during this time was to limit and minimize the effect of biblical law on American legal codes. By this time, even the most ardent supporters of religion fully understood that biblical law was inadequate and often antithetical to the needs of the American colonies. For example, while several early New England colonial statutes criminalized disrespecting one's parents, including an early Massachusetts law that made such behavior a capital offense, none of those statutes survived into modern American law. Virtually all of them, if not all, were in fact off the books by the end of the Revolution.

The experiences of the Puritan colonies had illustrated the dangers of a religiously-based legal system. Massachusetts Bay became notorious for implementing laws that came to be seen as bizarre, antidemocratic, and indeed "un-American."¹⁶⁶ The Salem Witch trials are only the most obvious examples of how the religiously-based legal culture of seventeenth century Massachusetts *did not* set a pattern for law in the United States. In the seventeenth century, Massachusetts hanged four Quakers for preaching in the colony.¹⁶⁷ Massachusetts also rejected notions of tolerance and democracy, expelling religious dissidents like Roger Williams and Anne Hutchinson.¹⁶⁸ Capital crimes included adultery and bestiality.¹⁶⁹ And, while no American legal system ever endorsed such behavior, after Independence neither

165. In 1684, Governor Thomas Dongan of New York reported to his superiors in London, stating,

[h]ere bee [sic] not many of the Church of England; [a] few Roman Catholicks [sic]; abundance of Quakers preachers men and Women especially; Singing Quakers; Ranting Quakers; Sabbatarians; Antisabbatarians; Some Anabaptists; some Independants; some Jews; in short of all sorts of opinions there are some, and the most part, of none at all.

Governor Dongan's Report on the State of the Province Etc. As to Religion (1684), in 2 Ecclesiastical Records of the State of New York 879-80 (1901).

166. See Friedman, *supra* note 126, at 69-70; Hall, *supra* note 126, at 31, 33.

167. See Chapin, *supra* note 146, at 58.

168. See W. Clark Gilpin, *Williams, Roger*, in Religion and American Law, *supra* note 11, at 558-61; Bryan F. Le Beau, *Trial of Anne Hutchinson*, in Religion and American Law, *supra* note 11, at 537-39.

169. Richard Godbeer, *The Cry of Sodom: Discourse, Intercourse, and Desire in Colonial New England*, 52 William and Mary Q. 259, 260 (1995); William Offutt, *Bestiality and Sodomy Prosecutions in Early America*, in Religion and American Law, *supra* note 11, at 27-28. For a striking example of the harshness of punishments in the "Bible colonies" see the discussion of the bestiality prosecution and execution of Thomas Granger, along with the killing of numerous farm animals, described in William Bradford, *Of Plymouth Plantation, 1620-1647*, at 320-21 (Alfred A. Knopf 1952) (1856).

did any follow the biblical rule and endorse capital punishment for such offences. Much of what became the central legal rights of the United States—due process of law; fair jury trials; the right to confront witnesses; the right against self-incrimination; the right to counsel; prohibitions on cruel and unusual punishments; limitations on capital offenses; freedom of speech; and most of all freedom of religion—is properly seen as a reaction to the legal culture of the Puritan colonies, and not as an endorsement of that culture.

Most of the political documents coming out of Great Britain and the colonies, from the time of the Magna Carta to the time of the American Revolution and sometimes beyond, included perfunctory, formalistic references to God. In understanding this, it must be remembered that Great Britain, and a majority of the early American colonies, had established churches (England still does today). The established churches were arms of the state, used by the state to implement its policies. The appropriation of religious terminology was an effort to cloak the actions of government, or the political goals of the document's drafters, with holy authority. Thus, for example, the Magna Carta, the English Bill of Rights, and Blackstone's *Commentaries*, while essentially secular, have some references to God. The substance of these documents and volumes, however, does not pertain to God's word or biblical law, but to the nature of civil government, inheritance, crimes, land tenure, and the like.

The practice of invoking divine authority had ebbed by the time of the American Founding. The Declaration of Independence includes references in the beginning to the "Laws of Nature and of Nature's God,"¹⁷⁰ a "Creator,"¹⁷¹ and a reference in the end to "divine Providence,"¹⁷² but these are non-biblical references. The primary author of the Declaration, Thomas Jefferson, was a deist, and his references to a supreme being are clearly not references to the God of the Bible. Rather, they are invocations of enlightenment notions of natural rights. As a Deist, Jefferson notes that some basic concepts—equality and the rights to "[l]ife, Liberty, and the pursuit of Happiness"¹⁷³—are "self-evident"¹⁷⁴ and are supported by "the Laws of Nature and of Nature's God."¹⁷⁵ But, these are not references to the God of the Bible, or to a Christian God. Rather, they are to a more generic, nonsectarian, nontheistic, higher authority.

Equally as important, in the Declaration of Independence Jefferson appeals to notions of popular sovereignty and self-determination. He asserts the right of the colonists to create their own nation through

170. The Declaration of Independence para. 1 (U.S. 1776).

171. *Id.* at para. 2.

172. *Id.* at para. 32.

173. *Id.* at para. 2.

174. *Id.*

175. *Id.* at para. 1.

self-government. Jefferson does not invoke God's name, or even "Nature's God" to justify this. Nor does he claim that the new nation is formed on the basis of God's law or any biblical authority. Rather, he asserts, in language that becomes the basis of the American political structure, that "[g]overnments are instituted among Men, deriving their just Powers from the consent of the governed."¹⁷⁶ Jefferson reaffirms that governments are created by people—not by God or by Kings with divine rights to rule—and thus "it is the Right of the People to alter or to abolish" a government if they wish.¹⁷⁷ The Declaration is devoid of any references to biblical law or the Ten Commandments.

The Declaration is central to the moral foundation of the United States. The assertions that "all men are created equal"¹⁷⁸ and that they are entitled "[l]ife, Liberty, and the Pursuit of Happiness" go to the heart of the moral and ethical foundation of American society and American law. Jefferson does not assert these moral truths based on the Bible, biblical law, or the Ten Commandments. Rather, they are, like the Declaration itself, created by the will of the people. In essence, the moral foundation of American law becomes the right of the people to declare themselves independent and to assert their equality and their claim to self-government.

Following the Revolution, the central legal documents of the United States—the Constitution and the Bill of Rights—did not include even a perfunctory or formalistic reference to God. Rather than relying on divine authority, the Constitution is "ordain[ed]" by "the People of the United States."¹⁷⁹ The foundation of the law of the United States thus emanates from the nature of representative government—what Jefferson called "the consent of the governed"¹⁸⁰—and needs no external or divine authority for its support. The United States Constitution is devoid of religious references, apart from banning religious tests for holding office¹⁸¹ and giving the President and other officers the choice of being sworn into office by either oath or affirmation.¹⁸² Indeed, these two clauses illustrate how the American founding was simultaneously deeply secular, respectful of religious diversity, and conscious of the need to protect religious minorities. The ban on religious tests for office-

176. *Id.* at para. 2.

177. *Id.*

178. *Id.*

179. U.S. Const. pmbl.

180. The Declaration of Independence, para. 2 (U.S. 1776).

181. U.S. Const. art. VI, cl. 3. Although the U.S. Constitution barred religious tests for office-holding, most of the early state constitutions did not; most state constitutions abolished religious tests for voting, but contained religious tests for office-holding. Most of the state constitutional provisions imposing religious tests for holding office were, however, removed by the 1820s.

182. U.S. Const. art. II, § 1, cl. 8; U.S. Const. art. VI, cl. 3.

holding¹⁸³ made the United States unique among western nations. Throughout Europe, office-holding was tied to religious belief. Americans believed that an oath of some kind was necessary to hold office, but declined to make it a *religious* oath, allowing office-holders to “swear (or affirm)” their support of the Constitution.¹⁸⁴

Clearly, the founders did not see the law as biblically-based. Rather, the founding generation viewed the common law as a repository of human experience, embodying concepts of justice, equity, and the rule of law, rather than representing divine principles. American colonists cited the Magna Carta, Coke’s *Institutes*, Blackstone’s *Commentaries*, and other English legal sources in their struggle against the Crown and Parliament.¹⁸⁵ At the time of the American Revolution, the substantive provisions of the Magna Carta and the English Bill of Rights became central to the process of the drafting of the state constitutions and, later, the United States Constitution. The United States Constitution and the Bill of Rights incorporated many of the substantive provisions of both documents, sometimes word-for-word. The founders were also uncomfortable with some of the religious aspects of the non-Puritan colonies. For example, colonial Virginia, like England, and like most of the other colonies, had an established church and required public support of the Church and its ministers. In the decade before the Revolution, Virginia authorities jailed nearly fifty Baptist ministers for unlicensed preaching and other infractions.¹⁸⁶ Immediately after the Revolution, Virginia retained an establishment, shifting from the Anglican Church to the Episcopal Church. During this period Baptists and other dissenters were forced to support the official church of the colony. This establishment in Virginia lasted until 1786, when Virginia effectively disestablished its official church.¹⁸⁷ In the era of the American Revolution and the early national period, most other states eliminated their endorsements of religion and their ties to an established church, and the founders enacted, as part of the First Amendment, a prohibition on establishments of religion at the federal level.

The debates over the United States Constitution in the Philadelphia Convention of 1787 illustrate the minor role of both the Bible and the Ten Commandments in American law. In these wide-ranging debates, the founders mentioned Roman law, European Continental law, British law, and various other legal systems, but no delegate ever

183. U.S. Const. art. VI, cl. 3.

184. U.S. Const. art. II, § 1, cl. 8; U.S. Const. art. IV, cl. 3.

185. See Bernard Bailyn, *The Ideological Origins of the American Revolution* 30-31 (1967).

186. Thomas J. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* 135 (1986).

187. *An Act for Establishing Religious Freedom*, reprinted in 13 William Waller Hening, *Laws of Virginia* 84 (Univ. Press of Virginia 1969) (1823).

mentioned the Ten Commandments or the Bible. The only serious discussion of religion led to the clause prohibiting religious tests for office-holding.¹⁸⁸

Indeed, many of the delegates to the Philadelphia Convention made statements during the debates expressing the view that religion should be left to the private sphere. James Madison noted in one debate that “[r]eligion itself may become a motive to persecution & oppression.—These observations are verified by the Histories of every Country antient [sic] & modern.”¹⁸⁹ South Carolina’s Charles Pinckney described “[o]ur true situation” as “a new extensive Country containing within itself the materials for forming a Government capable of extending to its citizens all the blessings of civil & religious liberty—capable of making them happy at home.”¹⁹⁰ Similarly, George Read of Delaware declared, in a debate over the power of Congress, that “the Legislature ought not to be too much shackled. It would make the Constitution like Religious Creeds, embarrassing to those bound to conform to them & more likely to produce dissatisfaction and Scism, than harmony and union.”¹⁹¹ This illustrates how the framers believed that minimizing the connection between religious law and civil law was integral to American liberty. Benjamin Franklin’s famous final speech at the Convention further supports this analysis, as he used religious beliefs to illustrate his skepticism of those who claim to have a monopoly on truth. Franklin told the delegates:

I confess that there are several parts of this constitution which I do not at present approve, but I am not sure I shall never approve them: For having lived long, I have experienced many instances of being obliged by better information or fuller consideration, to change opinions even on important subjects, which I once thought right, but found to be otherwise. It is therefore that the older I grow, the more apt I am to doubt my own judgment, and to pay more respect to the judgment of others. Most men indeed as well as most sects in Religion, think themselves in possession of all truth, and that wherever others differ from them it is so far error. Steele, a Protestant in a Dedication tells the Pope, that the only difference between our Churches in their opinions of the certainty of their doctrines is, the Church of Rome is infallible and the Church of England is never in the wrong. But though many private persons think almost as highly of their own infallibility as of that of their sect, few express it so naturally as a certain french lady, who in a dispute with her sister, said “I don’t know how it happens, Sister but

188. See 1 *The Records of the Federal Convention of 1787* (Max Farrand ed., rev. ed. 1937).

189. 1 *id.* at 135.

190. 1 *id.* at 402.

191. 1 *id.* at 582.

I meet with no body but myself, that's always in the right—*Il n'y a que moi qui a toujours raison.*"¹⁹²

Post-1787 political and legal developments were highly influenced by the writings of James Madison, Alexander Hamilton, and John Jay in the *Federalist Papers*.¹⁹³ These essays, written to explain the Constitution to the voters during the ratification process, are generally considered to be among the most important, if not the most important, discussions of the meaning of the United States Constitution at the time of ratification. The words "Bible," "scripture," and "Ten Commandments" do not appear in any of the essays that make up the *Federalist Papers*.¹⁹⁴ Clearly, the three authors saw no connection between either the Ten Commandments or the Bible and the Constitution they were defending. The authors of the *Federalist Papers* referred to the gods and religions of the ancient world in a few places and once, in *Federalist No. 43*, to "the transcendent law of nature and of nature's God,"¹⁹⁵ but otherwise never mentioned God. The reference to "nature's God" is suggestive of the Deist views of Jefferson or Benjamin Franklin, rather than of the Old Testament God. There are a few references to religion in the *Federalist Papers*, almost always to denounce religious intolerance and to note the dangers of mixing of church and state. In *Federalist No. 10*, Madison famously pointed out, "A zeal for different opinions concerning religion, concerning government, and many other points, as well of speculation as of practice" has historically

divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other, than to co-operate for their common good. So strong is this propensity of mankind, to fall into mutual animosities, that where no substantial occasion presents itself, the most frivolous and fanciful distinctions have been sufficient to kindle their unfriendly passions, and excite their most violent conflicts.¹⁹⁶

In the first essay in the *Federalist Papers*, Alexander Hamilton asserted that, "[f]or, in politics as in religion, it is equally absurd to aim at making proselytes by fire and sword. Heresies in either can rarely be cured by persecution."¹⁹⁷ Similarly, in *Federalist No. 31*, Hamilton declared that "those mysteries in religion, against which the

192. 2 *id.* at 641-42.

193. *The Federalist* (George W. Carey & James McClellan eds., 2001).

194. This is based on a word search of *The Federalist Papers*, on the Thomas Databases of the Library of Congress, at <http://www.thomas.loc.gov> (last visited Jan. 25, 2005).

195. *The Federalist No. 43*, at 229 (James Madison) (George W. Carey & James McClellan eds., 2001).

196. *The Federalist No. 10*, at 44 (James Madison) (George W. Carey & James McClellan eds., 2001).

197. *The Federalist No. 1*, at 2 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

batteries of infidelity have been so industriously leveled” are “incomprehensible to common sense.”¹⁹⁸ Using examples of history to support the Constitution, *Federalist No. 19* argued that in the Swiss Confederation “controversies on the subject of religion” had three times “kindled violent and bloody contests” that “severed the league.”¹⁹⁹ The implication of this point was that America was better off under a Constitution that effectively separated religious and political issues.

B. *Ten Commandments and American Jurisprudence*

The claim that the Ten Commandments is a foundational document is not supported by the Supreme Court’s jurisprudence. The U.S. Supreme Court has only used the term “Ten Commandments” in twenty-two cases.²⁰⁰ In none of these cases does the Court use the Ten Commandments as legal authority. A large number of the cases using the term “Ten Commandments” contain a reference to *Stone v. Graham*,²⁰¹ and/or other cases involving the posting of the Ten Commandments. It is worth recalling that in *Stone v. Graham* the Court struck down a statute requiring the posting of the Ten Commandments in public schools. The closest any Justice comes to using the Ten Commandments for validation of a conclusion is in footnote 2 of Justice Potter Stewart’s dissent in *Griswold v. Connecticut*.²⁰² There Justice Stewart noted, “[t]o be sure, the injunction contained in the Connecticut statute coincides with the doctrine of certain religious faiths. But if that were enough to invalidate a law under the provisions of the First Amendment relating to religion, then most criminal laws would be invalidated.”²⁰³ This is, at most, a recognition that some laws coincide with the doctrines of the Ten Commandments, and not a use of the Ten Commandments as a legal authority.

While the Supreme Court has never cited to the Ten Commandments as authority for law, or even as a source of law, it has cited many other sources of law that predate the Revolution, as well

198. The *Federalist* No. 31, at 151 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

199. The *Federalist* No. 19, at 94-95 (Alexander Hamilton and James Madison) (George W. Carey & James McClellan eds., 2001).

200. This is based on a search of “Commandments” in the Supreme Court Cases Database on <http://www.westlaw.com>. “Commandments” actually comes up twenty-three times, but in one case, *Fay v. New York*, 332 U.S. 261, 288 (1947), the reference is not to the biblical Commandments. There are also a smattering of cases which refer to one of the Commandments, such as the “Fourth Commandment” or the “Third Commandment.” See *Mitchell v. Helms*, 530 U.S. 793, 824 (2000); *McGowan v. Maryland*, 366 U.S. 420, 470, 475, 477 n.20 (1961) (Frankfurter, J., concurring).

201. 449 U.S. 39 (1980).

202. 381 U.S. 479, 529 n.2 (1965) (Stewart, J., dissenting).

203. *Id.* (citing *Exodus* 20:2-17 (King James)).

as to some sources and public figures from the early national and antebellum periods. For example, there are thirty-seven Supreme Court citations to the *Federalist Papers*, but, as already noted, the *Federalist Papers* did not rely on the Ten Commandments or the Bible. Many of these citations use the *Federalist Papers* as an authority for a legal proposition or to support the Justice's legal analysis. For example, in *United States v. Locke*,²⁰⁴ Justice Kennedy wrote, "[t]he authority of Congress to regulate interstate navigation, without embarrassment from intervention of the separate States and resulting difficulties with foreign nations, was cited in the *Federalist Papers* as one of the reasons for adopting the Constitution."²⁰⁵ Even more recently, in *Cook v. Gralike*,²⁰⁶ Justice Kennedy favorably quoted an earlier use of the *Federalist Papers* as a source for his decision: "As noted in the concurring opinion in *Thornton*, '[n]othing in the Constitution or The *Federalist Papers* . . . supports the idea of state interference with the most basic relation between the National Government and its citizens, the selection of legislative representatives.'"²⁰⁷ Significantly, the *Federalist Papers* have been cited as authority in some of our most important recent Supreme Court decisions, including *Clinton v. New York*,²⁰⁸ *Seminole Tribe v. Florida*,²⁰⁹ *U.S. Term Limits, Inc. v. Thornton*,²¹⁰ and *United States v. Lopez*.²¹¹

The Court has also relied on other historical sources. The Supreme Court has cited the Declaration of Independence more than 200 times. In his dissent in *McConnell v. Federal Election Commission*,²¹² Justice Scalia cited the Declaration of Independence to bolster his interpretation of the First Amendment. Similarly, in *Grutter v. Bollinger*,²¹³ Justice Thomas cited the Declaration to argue that affirmative action violates the fundamental principle of equality set out in the Declaration. These citations illustrate that the Supreme Court views the Declaration of Independence as a foundational document for our legal system and our Constitutional order.

There are at least forty-eight citations to President Abraham Lincoln (this excludes references to things like "Fort Abraham Lincoln" or the "Abraham Lincoln Life Insurance Company"). Many

204. 529 U.S. 89 (2000).

205. *Id.* at 99 (citing *The Federalist* No. 12 (Alexander Hamilton), No. 44 (James Madison), No. 64 (John Jay)).

206. 531 U.S. 510 (2001).

207. *Id.* at 528 (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 842 (1995) (Kennedy, J., concurring)).

208. 524 U.S. 417, 450 (1998).

209. 517 U.S. 44, 92 (1996).

210. 514 U.S. at 841.

211. 514 U.S. 549, 577 (1995).

212. 540 U.S. 93, 255 (2003) (Scalia, J., dissenting).

213. 539 U.S. 306, 378 (2003).

quote or cite to Lincoln favorably as a legitimate interpreter of American law. The Court has cited or referred to Thomas Jefferson over 165 times (again, this number does not include references to the use of Jefferson's name, such as in Thomas Jefferson University.) There are over 350 cites to Blackstone's *Commentaries*, many using Blackstone as an authority for our law. The Court has also cited the great English jurist, Chief Justice Lord Mansfield more than 325 times. The Court has cited the Bill of Rights as a document more than one thousand times, which suggests how important that document has been to the development of our legal culture. There are over 65 citations to the Magna Carta.²¹⁴

These citations to the *Federalist Papers*, Thomas Jefferson, Magna Carta, Abraham Lincoln, the English Bill of Rights, Blackstone's *Commentaries*, the Bill of Rights, and the Declaration of Independence illustrate the most important historical sources for our legal system and our constitutional development. Significantly, the Ten Commandments do not appear to have ever been used as a source or an authority by the highest court of the United States.

CONCLUSION

Monuments to the Ten Commandments thus do not reflect an objective or accurate representation of the historical development of American law. Rarely have American lawmakers turned to the Commandments for guidance. Those laws that dovetail with the Commandments, such as prohibitions on stealing or perjury, are found in virtually all cultures. However, most of the other provisions of the Commandments have never been part of our law, at least since independence. Rather than reflecting our legal heritage, to a great extent the Ten Commandments fly in the face of the evolution of American law, which has been towards secular freedoms and liberties and towards greater religious diversity. Furthermore, the founders of the United States did not turn to biblical sources in general, or the Ten Commandments in particular, as a source of law. Thus, there is no historical foundation for a claim that a monument or a plaque to the Ten Commandments, such as the ones at issue in the Kentucky and Texas cases, are rooted in our legal and political history. The framers of the Constitution and the founders of the nation valued freedom of expression, freedom of thought, and freedom of belief and worship—they thus rejected as a source of law a set of precepts or “commandments” that would have limited the right of people to believe what they want and worship as they wish.

214. This is based on a search of “Abraham Lincoln,” “Thomas Jefferson,” “Blackstone and Commentaries,” “Lord Mansfield,” “Bill of Rights,” and “Magna Carta” in the Supreme Court Cases database on <http://www.westlaw.com>.

More importantly, the founders valued political self-determination. In creating the Constitution they did not appeal to the Bible, God, or the Ten Commandments for authority, but rather, declared “[w]e the people . . . do ordain and establish this Constitution for the United States of America.”²¹⁵ In asserting their right to “ordain” their own form of government, the framers merely implemented what Jefferson had proclaimed to the world: that “[g]overnments are instituted among Men, deriving their just powers from the consent of the governed.”²¹⁶ Such a theory of law and government precluded relying on laws that were handed down to the people by *any* outside authority. By declaring in our Constitution that there would be no religious tests for national office-holding, the Framers rejected the religious tests inherent in the Ten Commandments. The Ten Commandments require that adherents accept only “one God,” and have “no other God,” and “not bow down” to statues (or idols in the Catholic translation), but the Constitution has no such tests and does not require that anyone even believe in God in order to hold office. In *McGowan v. Maryland*,²¹⁷ the Supreme Court upheld this understanding of the Constitution. The framers clearly rejected religious orthodoxy in what was already a religiously diverse nation.

The Ten Commandments are a statement of faith and belief for Jews and Christians. Some of the Commandments offer universal “truths” found in most societies. For example, the Commandments prohibit adultery, stealing, perjury, and depending on the translation, murder. But other aspects of the Commandments are clearly theological and sectarian, such as the assertion of one God, the creation of a Sabbath, or the ban on graven images.

Still other aspects of the Commandments are neither theological nor legalistic. The admonition to honor one’s parents has never been part of the law of the United States, nor is it essentially theological. The notion that children should support parents in their old age is neither universally accepted in the United States nor enforceable where it has been enacted into law. Only thirty states have such laws,²¹⁸ which is down substantially from the 1950s, when forty-five states had them.²¹⁹ Moreover, enforcement of these laws is scattered at best, because, as one commentator noted, Americans believe “that parental support should be a moral obligation, not one that is legally imposed.”²²⁰ Perhaps because Americans seem reluctant to have the

215. U.S. Const. pmbl.

216. The Declaration of Independence para. 2 (U.S. 1776).

217. 366 U.S. 420 (1961).

218. Shannon Frank Edelstone, *Filial Responsibility: Can the Legal Duty to Support Our Parents Be Effectively Enforced?*, 36 Fam. L.Q. 501, 502-03 (2002).

219. John Walters, *Pay Unto Others as They Have Paid Unto You: An Economic Analysis of the Adult Child’s Duty to Support an Indigent Parent*, 11 J. Contemp. Legal Issues 376, 376 (1999).

220. Edelstone, *supra* note 218, at 505.

government enforce a moral code—even one rooted in the Ten Commandments—enforcement of filial support statutes is notoriously weak and famously ineffective.²²¹ Indeed, the strongest arguments for filial responsibility laws are economic: that the government would save substantial amounts of money if children were forced to support their indigent parents.²²² Laws requiring children to support parents are based on notions of contract or on public spending policy.²²³ The bottom line here is that one of the most fundamental moral principles of the Ten Commandments—to honor one's parents—is virtually unenforceable. At best the principle is translated into a welfare statute requiring children to pay money to the state if their parents ask for public assistance. Short of attempting to require a transfer of money from children to the government, the state does not attempt to require that children take any responsibility for their parents. Nor does the state, nor can the state, impose an obligation that children “honor” their parents.

The last Commandment for Jews and Protestants (which forms the last two Commandments for Catholics and Lutherans) is an admonition against coveting. This Commandment(s) illustrates yet one more way in which the Ten Commandments are antithetical to the American legal and cultural experience. The *King James Version* of the Bible translates this Commandment(s) as: “Thou shalt not covet thy neighbour's house, . . . Nor anything that *is* thy neighbour's [sic].”²²⁴ This Commandment seems to stand in opposition to a capitalist, consumer culture that has long been at the root of American life. Whole industries—advertising, automobiles, clothing, and cosmetics—are predicated on the idea of wanting what your neighbor has. Americans learn from an early age to “covet thy neighbour's house”²²⁵ and two huge industries, real estate and home building, thrive because of this. We even have a tax code that subsidizes this covetousness. “Keeping up with the Joneses” is a tried and true aspect of American culture. The prohibition on envy found at the end of the Commandments may be an ethical goal of Judaism and Christianity, but it can hardly be seen as part of the foundation of either American law or culture.

Indeed, it is hard to imagine how most of the Commandments could be understood to be foundational for American law. Most of the Commandments could not be enacted into law and withstand a constitutional challenge. The first five Commandments for Protestants (one god, no graven images, not taking the Lord's name in

221. *Id.* at 506-07.

222. Walters, *supra* note 219, at 378-79.

223. See generally Seymour Moskowitz, *Filial Responsibility Statutes: Legal and Policy Considerations*, 9 J.L. & Pol'y 709, 713-16 (2001).

224. *Exodus* 20:17 (King James).

225. *Id.*

vain, observe the Sabbath, and honor parents) would clearly be unconstitutional. It is hard to imagine how we could even have a statute requiring children to honor their parents. One wonders what its provisions might entail. The Protestant and Jewish Seventh Commandment (prohibiting adultery) was once enforceable in this country, but it is probably no longer enforceable. Indeed, the expansive protection of privacy and liberty in *Lawrence v. Texas*²²⁶ would seem to preclude any investigation or prosecution for adultery. Similarly, the last Commandment for Jews and Protestants (coveting) could hardly be banned by statute. Even the Protestant and Jewish Ninth Commandment (prohibition on bearing false witness), is only enforceable under limited circumstances. We may be legally obligated to tell the truth to police officers or in court, but this is not so in daily life, where lying is permissible. Thus, at most we can only be sure that laws against stealing and murder (although not always killing) would be upheld under modern constitutional standards.

In the end, Ten Commandments monuments, plaques, or framed documents are sectarian, supporting the theological interpretations and biblical translations of particular groups, usually Protestants or Lutherans. These monuments and postings endorse a particular faith, and, by doing so, exclude other Christians and Jews who have a different numbering system or translation of the Commandments. They also, of course, exclude the many Americans who are neither Christian nor Jewish. The Ten Commandments are not part of the liturgy or text of many Native American religions, as well as Islam, Hinduism, Buddhism, Taoism, other non-Western faiths, and nontheistic belief systems. By endorsing a particularistic version of the Ten Commandments, the state sends a message of inclusiveness to some Protestants or Lutherans, while in effect implying to others—Jews, Catholics, other Christians, followers of Native American religions, Muslims, Hindus, Buddhists, Taoists and others—that they

226. In *Lawrence v. Texas*, the Court noted:

Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.

539 U.S. 558, 562 (2003). In his dissent, Justice Scalia makes the point that in overturning *Bowers v. Hardwick*, 478 U.S. 186 (1986), as the Court did in *Lawrence*, the Court undermined authority for any laws prohibiting adultery. Scalia wrote:

State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers*' validation of laws based on moral choices. Every single one of these laws is called into question by today's decision; the Court makes no effort to cabin the scope of its decision to exclude them from its holding.

Lawrence, 539 U.S. at 590 (Scalia, J., dissenting).

are outsiders, and that their religious values and beliefs have less value within the political culture of the nation. As such, they have no place on the courthouse lawn or on public property.