

No. 02-51184

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

THOMAS VAN ORDEN,

Plaintiff/Appellant

v.

RICK PERRY, in his official capacity as Governor of Texas and Chairman,
State Preservation Board et al.

Defendants/Appellees.

On Appeal from the United States District Court for the Western District of Texas,
Austin Division
Civil No. A 01 CA 833 H, The Honorable Harry Hudspeth, Judge

**BRIEF OF *AMICUS CURIAE* LIBERTY COUNSEL
IN SUPPORT OF DEFENDANTS/APPELLEES
FOR AFFIRMANCE OF THE DISTRICT COURT'S DECISION**

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INTEREST OF *AMICUS CURIAE*

Liberty Counsel is a civil liberties education and legal defense organization which has represented numerous parties, and has argued before numerous Federal and State Appellate Courts, including the United States Supreme Court.

Liberty Counsel has a particular interest in public displays of religious symbols; Counsel having written extensively regarding public displays of The Ten Commandments. As this issue is of great public importance, the undersigned believe that its Brief will provide a unique perspective on the issues in the case and can assist this Court in reaching a constitutional resolution.

Liberty Counsel has obtained permission from Plaintiff and Defendants to file this Brief.



CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Plaintiff/Appellant

Thomas Van Orden

Defendants/Appellees

Parties

State Preservation Board

Rick Perry, as Governor of Texas & Chairman, State Preservation Board

Bill Ratliff, former Co-Vice Chairman, State Preservation Board and Senate President

David Dewhurst, Co-Vice Chairman, State Preservation Board and Senate President

James E. "Pete" Laney, former Co-Vice Chairman, State Preservation Board and House Speaker

Tom Craddick, Co-Vice Chairman, State Preservation Board and House Speaker

David Cain, former Member of the State Preservation Board

Chris Harris, Member of the State Preservation Board

Tony Goolsby, former Member of the State Preservation Board

Peggy Hamrick, Member of the State Preservation Board

Jocelyn Levi Straus, Member of the State Preservation Board

Rick Crawford, former Executive Director of the State Preservation Board

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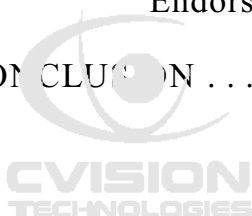


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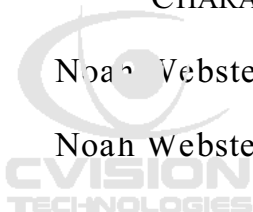
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ARGUMENT

I.

THE TEN COMMANDMENTS PLAYED AN IMPORTANT ROLE IN DEVELOPMENT OF AMERICAN LAW

The removal of the Ten Commandments from our public society would require defacing public property and erasing volumes of law. Visitors to the National Archives desiring to view the original Constitution and Declaration of Independence must first pass the Ten Commandments at its entrance. Among 24 famous lawgivers in the U.S. House chamber, only the Moses faces forward, presiding over the speaker's chair. Moses and Ten Commandments occupy the central position over the Chief Justice's seat in the United States Supreme Court. *See Lynch v. Donnelly*, 465 U.S. 668, 677 (1984). The Ten Commandments is prominent in public places because played a significant role in the foundation of American law.

When a governmental practice has been "deeply embedded in the history and tradition of this country," such a practice will not violate the Establishment Clause because the practice has become part of the "fabric of our society." *See Marsh v. Chambers*, 463 U.S. 783, 786 (1983). The Ten Commandments played a significant role in the development of American law. The incorporation of the Ten Commandments in law and policy pre-dates the Constitution. This intermingling of the Ten Commandments into American law and government was long before the appearance of legislative prayers. The drafters of the First Amendment would never have dreamed they were abolishing the Decalogue. The monument at issue has a historical purpose, although the Ten Commandments have religious roots.

For many years, courts, legislatures and our Founding Fathers have referred to

the Ten Commandments and their impact on our culture and legal system. The Supreme Court has often recognized the impact the Ten Commandments has played on our system of law and government. *See Griswold v. Connecticut*, 381 U.S. 479, 529 n.2 (1965)(Stewart, J., dissenting)(most criminal prohibitions coincide with prohibitions in Ten Commandments); *McGowan v. Maryland*, 366 U.S. 420, 459 (1961)(Frankfurter, J., concurring)(“Innumerable civil regulations enforce conduct which harmonizes with religious canons. State prohibitions of murder, theft and adultery reinforce commands of the decalogue.”); *Stone v. Graham*, 449 U.S. 39, 45 (1980)(Rehnquist, J., dissenting)(“[T]he Ten Commandments have had a significant impact on the development of secular legal codes of the Western World.”); *Lynch v. Donnelly*, 465 U.S. 668, 677-78 (1984)(describing the depiction of Moses with the Ten Commandments on the wall of the Supreme Court chamber and stating that such acknowledgments of religion demonstrate that “our history is pervaded by expressions of religious beliefs....”); *Edwards v. Aguillard*, 482 U.S. 578, 593-94 (1987)(acknowledging that the Ten Commandments did not play an exclusively religious role in the history of Western civilization).

Each commandment has played some significant role in the foundation of our system of law and government. Twelve of the thirteen original colonies adopted the *entire* Decalogue into their civil and criminal laws. Joseph Story, the eminent Supreme Court Justice who served from 1811 to 1845, remarked:

Now, there will probably be found few persons in this, or any other Christian country, who would deliberately contend, that it was unreasonable, or unjust to foster and encourage the Christian religion generally, as a matter of sound policy, as well as of revealed truth. In fact, every American colony, from its foundation down to the revolution, with the exception of Rhode Island (if indeed, that state be an exception,) did openly, by the whole course of its laws and institutions, support and

sustain, in some form, the Christian religion; and almost invariably gave a peculiar sanction to some of its fundamental doctrines. And this has continued to be the case in some of the states down to the present period, without the slightest suspicion, that it was against the principles of public law, or republican liberty.

Joseph Story, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, §1867 (1833).¹

A. The First Commandment.

The First Commandment states, “Thou shalt have no other gods before me.” In 1610, Virginia required its leaders to give “allegiance” to God, “from whom all power and authority is derived,” and who is the “King of kings, the Commander of commanders, and Lord of hosts.” The law stated:

[S]ince we owe our highest and supreme duty, our greatest and all our allegiance to Him from whom all power and authority is derived, and flows as from the first and only fountain, and being especially soldiers impressed in this sacred cause, we must alone expect our success from Him who is only the blesser of all good attempts, the King of kings, the Commander of commanders, and Lord of hosts, I do strictly command and charge all Captains and Officers of what quality or nature soever, whether commanders in the field, or in town or towns, forts or fortresses, to have a care that the Almighty God be duly and daily served, and that they call upon their people to hear sermons, as that also they diligently frequent morning and evening prayer themselves by their own example and daily life and duties herein, encouraging others thereunto.

Articles, Laws, and Orders, Divine, Politic and Martial for the Colony of Virginia, reprinted in Donald S. Lutz, ed., COLONIAL ORIGINS OF THE AMERICAN CONSTITUTION: A DOCUMENTARY HISTORY at 315-16 (hereafter “COLONIAL ORIGINS”).

In 1641, Massachusetts law stated, “If any man after legal conviction shall have or worship any other god but the Lord God, he shall be put to death. Deut. 13.6, 10, Deut. 17.2, 6, Ex. 22.20.” *Massachusetts Body of Liberties (1641), reprinted in W. H.*

¹Rhode Island adopted the last six of the Commandments, but not the first four. See Alvin W. Johnson, *Sunday Legislation*, 23 KY. L.J. 121-124 (1934-35).



Whitmore, *THE COLONIAL LAWS OF MASSACHUSETTS* at 33 (1890).

Even today, most every state constitution continues to reference God or a Supreme Being. See *American Civil Liberties Union v. Capitol Square Review and Advisory Bd.*, 243 F.3d 289, 296 n.6 (6th Cir. 2000). The preamble to Alabama's Constitution of 1901 states that the people are "invoking the favor and guidance of almighty God...." The 1820 Preamble to Maine's constitution describes God as "the Sovereign Ruler of the Universe." West Virginia's Preamble to the 1872 constitution "reaffirms our faith in an constant reliance upon God." These phrases are reflections of an idea and belief in the preeminence of God that flows directly from the First Commandment. Indeed, our national motto proclaims, "In God We Trust," not "In Gods We Trust."

B. The Second Commandment.

The Second Commandment forbids the making of idols. In 1680, the New Hampshire colony enacted an idolatry law that stated, "Idolatry. It is enacted by ye Assembly and ye authority thereof, yet if any person having had the knowledge of the true God openly and manifestly have or worship any other god but the Lord God, he shall be put to death. Ex. 22.20, Deut. 13.6 and 10." *General Laws and Liberties of New Hampshire 1680, reprinted in COLONIAL ORIGINS* at 6. The 1780 Constitution of Massachusetts stated in Part I, Article II, "It is the right as well as the duty of all men in society, publicly, and at stated seasons, to worship the SUPREME BEING, the great creator and preserver of the universe." How can a constitution declare that it is the duty of citizens to worship God without admitting the converse that the duty is breached when a one worships idols?



C. The Third Commandment.

The Third Commandment relates to not taking God's name in vain. The Third Commandment was adopted by Virginia in 1610 ("That no man blaspheme God's holy name upon the pain of death") and by Connecticut in 1639 ("If any person shall blaspheme the name of God the Father, Son, or Holy Ghost . . . he shall be put to death"). See COLONIAL ORIGINS at 316; THE CODE OF 1650 at 28-29. In a 1921 the Maine Supreme Court stated:

To curse God means to scoff at God; to use profanely insolent and reproachful language against him. This is one form of blasphemy under the authority of standard lexicographers. To contumeliously reproach God, His Creation, government, final judgment of the world, Jesus Christ, the Holy Ghost, or the Holy Scriptures as contained in the canonical books of the Old and New Testament, under the same authorities, is to charge Him or Them with fault, to rebuke, to censure, to upbraid, doing the same with scornful insolence, with disdain, with contemptuousness in act or speech. This is another form of blasphemy. But as particularly applicable, perhaps, to the present case, it is blasphemy to expose any of these enumerated Beings or Scriptures to contempt and ridicule. To have done any one of these things is blasphemy under the statute as well as at common law. It was not necessary for the state to prove that the respondent did them all.

State v. Mockus, 113 A. 39, 42 (Me. 1921).

Other colonies passed similar laws: Massachusetts in 1641, *Massachusetts Body Of Liberties* (1641), reprinted in William MacDonald ed., SELECT CHARTERS AND OTHER DOCUMENTS ILLUSTRATIVE OF AMERICAN HISTORY, 1606-1775 (1993) at 87 (hereafter SELECT CHARTERS); Connecticut in 1642, *Capital Laws of Connecticut* (1642), reprinted in COLONIAL ORIGINS at 230; New Hampshire in 1680, *General Laws and Liberties of New Hampshire* (1680), reprinted in COLONIAL ORIGINS at 6; Pennsylvania in 1682, *An Act for Freedom of Conscience* (1682), reprinted in COLONIAL ORIGINS at 289; Collinson Read ed., PENNSYLVANIA IN 1700, AN

ABRIDGMENT OF THE LAWS OF PENNSYLVANIA 32 (1801); Pennsylvania in 1741, *An Act to Prevent the Grievous Sins of Cursing and Swearing within this Province and Territories*, reprinted in Joseph Brevard ed., 1 LAWS OF THE COMMONWEALTH OF PENNSYLVANIA (1810) at 7; South Carolina in 1695, *Blasphemy-Profaneness* (1695), reprinted in 1 ALPHABETICAL DIGEST OF THE PUBLIC STATUTE OF SOUTH CAROLINA 264 (1814) at 87-88; and North Carolina in 1741, *Vice and Immorality* (1741), reprinted in John Haywood ed., A MANUAL OF THE LAWS OF NORTH CAROLINA, ARRANGED UNDER DISTINCT HEADS, IN ALPHABETICAL ORDER (1814) at 264.

The Florida Supreme Court stated:

This court has never defined the legal meaning of the word “profanity” so far as this writer has been able to discover, but a number of other courts of last resort have done so, and practically all of them, following pretty closely the dictionary meaning, define it as the use of words importing “an imprecation of Divine vengeance,” of “implying Divine condemnation,” or words denoting “irreverence of God and holy things,”--blasphemous. These decisions doubtless hark back to the third Commandment of the decalogue: “Thou shalt not take the name of the Lord thy God in vain.”

Cason v. Baskin, 20 So.2d 243, 247 (Fla. 1944)(*en banc*).

Commander-in-Chief George Washington issued numerous military orders during the American Revolution that first prohibited swearing and then ordered an attendance on Divine worship, thus relating the prohibition against profanity to a religious duty. Typical of these orders, Washington declared:

The General most earnestly requires and expects a due observance of those articles of war established for the government of the army which forbid profane cursing, swearing, and drunkenness; and in like manner requires and expects of all officers and soldiers not engaged on actual duty, a punctual attendance on Divine Service to implore the blessings of Heaven upon the means used for our safety and defense.

John C. Fitzpatrick, ed., *General Orders, Headquarters, Cambridge, July 4, 1775*, THE WRITINGS OF GEORGE WASHINGTON at 309 (1931).

Washington began issuing such orders to his troops as early as 1756 during the French and Indian War, and continued the practice throughout the American Revolution, issuing similar orders in 1776, 1777, 1778 and other years. See Jared Sparks, ed., 2 *The Writings of George Washington* at 167 (1836) (from his "Orderly Book," an undated order issued in 1756). See also John C. Fitzpatrick, ed., *General Orders, Head-Quarters, New York, August 3, 1776*, 4 WRITINGS OF GEORGE WASHINGTON 367 (1932).

The Third Commandment also affected the history of American jurisprudence. Judge Zephaniah Swift, author of the first legal text published in America, explained why civil authorities enforced the commandment's prohibition against blasphemy and profane swearing:

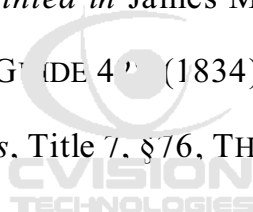
Crimes of this description are not punishable by the civil arm merely because they are against religion. Bold and presumptuous must he be who would attempt to wrest the thunder of heaven from the hand of God and direct the bolts of vengeance where to fall. The Supreme Deity is capable of maintaining the dignity of His moral government and avenging the violations of His holy laws. His omniscient mind estimates every act by the standard of perfect truth and His impartial justice inflicts punishments that are accurately proportioned to the crimes. But short-sighted mortals cannot search the heart and punish according to the intent. They can only judge by overt acts and punish them as they respect the peace and happiness of civil society. This is the rule to estimate all crimes against civil law and is the standard of all human punishments. It is on this ground only that civil tribunals are authorized to punish offences against religion.

Zephaniah Swift, 2 A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 320 (1976).

The laws against blasphemy and profanity based on the Third Commandment continued beyond the Founding Era. During the eighteenth and nineteenth century, several states passed laws based on the Third Commandment: Connecticut in 1784, *An Act for the Punishment of Divers Capital and Other Felonies*, 1 THE PUBLIC STATUTE



LAWS OF THE STATE OF CONNECTICUT 295-96 (1808); New Hampshire on February 6, 1791, *An Act for the Punishment of Profane Cursing and Swearing*, THE LAWS OF THE STATE OF NEW HAMPSHIRE, THE CONSTITUTION OF THE STATE OF NEW HAMPSHIRE, AND THE CONSTITUTION OF THE UNITED STATES, WITH ITS PROPOSED AMENDMENTS 280-281, 286-287 (1797); *see also An Act for the Punishment of Certain Crimes not Capital*, CONSTITUTION AND LAWS OF THE STATE OF NEW-HAMPSHIRE TOGETHER WITH THE CONSTITUTION OF THE UNITED STATES 277 (1805); Vermont in 1791, *An Act for the Punishment of Drunkenness, Gaming, and Profane Swearing*, STATUTES OF THE STATE OF VERMONT 51 (1791); *An Act for the Punishment of Divers Capital and other Felonies* (March 8, 1787), STATUTES OF THE STATE OF VERMONT 75; Virginia in 1792, Joseph Tate ed., A DIGEST OF THE LAWS OF VIRGINIA, WHICH ARE OF A PERMANENT CHARACTER AND GENERAL OPERATION 453-454 (1823); *see also An Act for the Effectual Suppression of Vice, and Punishing the Disturbers of Religious Worship and Sabbath Breakers*, 1 THE REVISED CODE OF THE LAWS OF VIRGINIA: BEING A COLLECTION OF ALL SUCH ACTS OF THE GENERAL ASSEMBLY, OF A PUBLIC AND PERMANENT NATURE AS ARE NOW IN FORCE 554-556 (1819); Pennsylvania in 1794, *Act of April 22, 1794*, AN ABRIDGMENT OF THE LAWS OF PENNSYLVANIA 380 (1801); Maine on February 24, 1821, Jeremiah Perley, 7 THE MAINE JUSTICE: CONTAINING THE LAWS RELATIVE TO THE POWERS AND DUTIES OF JUSTICES OF THE PEACE 236 (1823); *see also An Act Against Blasphemy and Profane Cursing and Swearing*, LAWS OF THE STATE OF MAINE 66-67 (1822); Tennessee in 1834, *Breaking the Sabbath*, reprinted in James Mitchell, THE TENNESSEE JUSTICE'S MANUAL AND CIVIL OFFICER'S GUIDE 47 (1834); Massachusetts on November 4, 1835, *Of Towns and Town Officers*, Title 7, § 76, THE REVISED STATUTES OF THE COMMONWEALTH OF



MASSACHUSETTS 185 (1836); and New York in 1836, *Of Profane Cursing and Swearing*, Rev. Stat. 673, Art 6, *reprinted in* George C. Edwards, TREATISE OF THE POWERS AND DUTIES OF THE JUSTICES OF THE PEACE AND THE TOWN OFFICERS IN THE STATE OF NEW YORK 379-380 (1836).

In 1824, the Supreme Court of Pennsylvania (in a decision subsequently invoked authoritatively and endorsed by the U. S. Supreme Court²) reaffirmed that the civil laws against blasphemy were derived from divine law:

The true principles of natural religion are part of the common law; the essential principles of revealed religion are part of the common law; so that a person vilifying, subverting or ridiculing them may be prosecuted at common law.

Updegraph v. Commonwealth, 11 Serg. & Rawle 393, 401 (Penn. 1824), 1824 WL 2393.

The court then noted that Pennsylvania's anti-blasphemy laws had been authored by an original Justice on the U. S. Supreme Court who also signed the Constitution:

The late Judge Wilson, of the Supreme Court of the United States, Professor of Law in the College in Philadelphia, was appointed in 1791, unanimously by the House of Representatives of this State to "revise and digest the laws of this commonwealth. . . ." He had just risen from his seat in the Convention which formed the Constitution of the United States, and of this State; and it is well known that for our present form of government we are greatly indebted to his exertions and influence. With his fresh recollection of both constitutions, in his course of Lectures (3d vol. of his works, 112), he states that profaneness and blasphemy are offences punishable by fine and imprisonment, and that Christianity is part of the common law. It is vain to object that the law is obsolete; this is not so; it has seldom been called into operation because this, like some other offences, has been rare. It has been retained in our recollection of laws now in force, made by the direction of the legislature, and it has not been a dead letter.

Id. at 403.



²*See Church of the Holy Trinity v. U. S.*, 143 U. S. 457, 470-471 (1892).

Noah Webster, an American legislator and judge, affirmed that both of these categories of law were derived from the third commandment:

When in obedience to the third commandment of the Decalogue you would avoid profane swearing, you are to remember that this alone is not a full compliance with the prohibition which [also] comprehends all irreverent words or actions and whatever tends to cast contempt on the Supreme Being or on His word and ordinances [i.e., blasphemy].

Noah Webster, 8 LETTERS TO A YOUNG GENTLEMAN (1823); *see also* Noah Webster, A COLLECTION OF PAPERS 296 (1843).

D. The Fourth Commandment.

The Fourth Commandment states, “Remember the sabbath day to keep it holy.” The Fourth Commandment was adopted by Virginia in 1610, New Haven in 1653, New Hampshire in 1680, Pennsylvania in 1682 and 1705, South Carolina in 1712, North Carolina in 1741 and Connecticut in 1751. *See Articles, Laws, and Order, Divine, Politic and Martial for the Colony of Virginia (1610-1611)*, COLONIAL ORIGINS at 316-317; Charles J. Hoadly, RECORDS OF THE COLONY OR JURISDICTION OF NEW HAVEN, FROM MAY, 1653, TO THE UNION, TOGETHER WITH THE NEW HAVEN CODE OF 1656 (1858) at 605; *General Laws and Liberties of New Hampshire (1680)*, COLONIAL ORIGINS at 10-11; *An Act for Freedom of Conscience (Pennsylvania 1682)*, COLONIAL ORIGINS at 288; *An Act to Restrain People from Labor on the First Day of the Week*, 1 LAWS OF THE COMMONWEALTH OF PENNSYLVANIA (1810) at 25-26; *see also* ABRIDGEMENT OF THE LAWS OF PENNSYLVANIA 362 (1801); *Title 160: Sunday*, 2 ALPHABETICAL DIGEST OF THE PUBLIC STATUTE LAW OF SOUTH CAROLINA 272-75 (1814); *Vice and Immorality (1741)*. A MANUAL OF THE LAWS OF NORTH CAROLINA 264 (1814); *An Act for the Due Observation of the Sabbath, or Lord's Day*, 1 THE PUBLIC STATUTE LAWS OF THE STATE OF CONNECTICUT 577-78 (1808); *see also* Swift,

2 *A System of the Laws* 325-26.

In 1775, and throughout the American Revolution, George Washington issued military orders directing Sabbath observance. His order of May 2, 1778, at Valley Forge was typical:

The Commander in Chief directs that divine service be performed every Sunday at 11 o'clock in those brigades to which there are chaplains; those which have none to attend the places of worship nearest to them. It is expected that officers of all ranks will by their attendance set an example to their men.

Fitzpatrick, ed., *General Orders, Head-Quarters, Valley Forge, Saturday, May 2, 1778*, 9 WRITINGS OF GEORGE WASHINGTON 342 (1934).

In the Federal Era and well beyond, states continued to enact and reenact Sabbath laws. In 1787, Vermont enacted a ten-part law to preserve the Sabbath. *See An Act for the Due Observation of the Sabbath*, STATUTES OF THE STATE OF VERMONT 155 (1791). In 1791, Massachusetts enacted an eleven-part law. *See Of the Observance of the Lord's Day and the Prevention and Punishment of Immorality*, THE REVISED STATUTES OF THE COMMONWEALTH OF MASSACHUSETTS 385-86 (1836). In 1792, Virginia enacted an extensive eight-part law, written by Thomas Jefferson and sponsored by James Madison. *See An Act for the Effectual Suppression of Vice, and Punishing the Disturbers of Religious Worship, and Sabbath Breakers*, 1 THE REVISED CODE OF THE LAWS OF VIRGINIA, 554-56 (1819); *see also A DIGEST OF THE LAWS OF VIRGINIA* 453-54 (1823); Robert A. Rutland, ed., *Bills for a Revised State Code of Laws*, 8 THE PAPERS OF JAMES MADISON, 391-96 (1973); Julian P. Boyd, ed., *The Revisal of the Laws, 1776-1786*, 2 THE PAPERS OF THOMAS JEFFERSON, 322 (1950). In 1798, New Jersey enacted a 21-part law *see An Act for Suppressing Vice and Immorality*, LAWS OF THE STATE OF NEW JERSEY 329-33 (1800). In 1799, New

Hampshire enacted a fourteen-part law. *See An Act for the Better Observation of the Lord's Day, and for Repealing All the Laws Heretofore Made for that Purpose*, reprinted in CONSTITUTION AND LAWS OF THE STATE OF NEW HAMPSHIRE, 290-93 (1805). In 1821, Maine enacted a thirteen-part law. *See An Act Providing for the Due Observation of the Lord's Day*, LAWS OF THE STATE OF MAINE at 67-71 (1822).

The Sabbath day is recognized in Article I, Section 7, Paragraph 2 of the U.S. Constitution: "If any Bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law...." Similarly, the Missouri Supreme Court observed:

It is provided that if the Governor does not return a bill within 10 days (Sundays excepted), it shall become a law without his signature. Although it may be said that this provision leaves it optional with the Governor whether he will consider bills or not on Sunday, yet, regard being had to the circumstances under which it was inserted, can any impartial mind deny that it contains a recognition of the Lord's Day as a day exempted by law from all worldly pursuits? The framers of the Constitution, then, recognized Sunday as a day to be observed, acting themselves under a law which exacted a compulsive observance of it. If a compulsive observance of the Lord's Day as a day of rest had been deemed inconsistent with the principles contained in the Constitution, can anything be clearer than, as the matter was so plainly and palpably before the Convention, a specific condemnation of the Sunday law would have been engrafted upon it? So far from it, Sunday was recognized as a day of rest.

Missouri v. Chicago B. & Q. R. Co., 143 S.W. 785, 803 (Mo. 1912).

The Supreme Court ruled that Sunday closing laws are Constitutional. *See McGowan v. Maryland*, 366 U.S. 420 (1961). The Sabbath was considered part of common law:

Remember the Sabbath day to keep it holy; six days shalt thou labor and do all thy work; but the seventh day is the Sabbath of the Lord thy God. In it thou shalt not do any work." This divine pronouncement became part of the Common Law inherited by the thirteen American colonies and by the sovereign States of the American union.

Bertera's Hopewell Foodland, Inc. v. Masters, 236 A.2d 197, 200-01 (Pa. 1967); see also *Theisen v. McDavid*, 16 So. 321, 323 (Fla. 1894); *Gillooley v. Vaughn*, 110 So. 653, 655 (Fla. 1926); *Rogers v. Georgia*, 4 S.E.2d 918, 919 (Ga. App. 1939); *Paramount-Richards Theatres v. City of Hattiesburg*, 49 So.2d 574, 577 (Miss. 1950) (“Sunday laws have a divine origin”).

A 1830 New York law declared: “Civil process cannot, by statute, be executed on Sunday, and a service of such process on Sunday is utterly void and subjects the officer to damages.” *General Rules Applicable to a Summons, Warrant of Attachment*, NY Rev. Stat. 675, reprinted in Edwards, JUSTICES OF THE PEACE IN THE STATE OF NEW YORK at 38. Similar laws may be found in Pennsylvania, See *Charter of Liberties and Frame of Government of the Province of Pennsylvania in America* (1682), reprinted in COLONIAL ORIGINS at 281; Pennsylvania on October 14, 1705, *An Act to Restrain People from Labor on the First Day of the Week*, 1 LAWS OF THE COMMONWEALTH OF PENNSYLVANIA 25 (1810); Vermont on March 9, 1787, *An Act for the Due Observation of the Sabbath*, STATUTES OF THE STATE OF VERMONT 157 (1791); Connecticut in 1796, *Of Crimes Against Religion*, reprinted in Swift, 2 A SYSTEM OF THE LAWS 326 (1796); and New Jersey on March 16, 1798, *An Act for Suppressing Vice and Immorality*, William Paterson ed., LAWS OF THE STATE OF NEW JERSEY, REVISED AND PUBLISHED UNDER THE AUTHORITY OF THE LEGISLATURE, 329-30 (1800).

Examples of the early implementation of the Fourth Commandment are seen in Virginia in 1610, *Articles, Laws, and Orders, Divine, Politic and Martial for the Colony of Virginia*, reprinted in COLONIAL ORIGINS at 316-17; the New Haven laws of 1653, Charles J. Hoadly, RECORDS OF THE COLONY OR JURISDICTION OF NEW HAVEN, FROM MAY, 1653, TO THE UNION, TOGETHER WITH THE NEW HAVEN CODE OF 1656, at 605 (1858); the New Hampshire laws of 1680, *General Laws and Liberties*

of New Hampshire, reprinted in COLONIAL ORIGINS at 10-11; the Pennsylvania laws of 1682, *An Act for Freedom of Conscience*, reprinted in COLONIAL ORIGINS at 288; and in Pennsylvania on October 4, 1705, *An Act to Restrain People from Labor on the First Day of the Week*, 1 LAWS OF THE COMMONWEALTH OF PENNSYLVANIA 25-26 (1810), *see also* ABRIDGEMENT OF THE LAWS OF PENNSYLVANIA, 362 (1801); the South Carolina laws of 1712, Title 160: *Sunday*, 2 ALPHABETICAL DIGEST OF THE PUBLIC STATUTE LAW OF SOUTH CAROLINA 272-75 (1814); the North Carolina laws of 1741, *Vice and Immorality*, A MANUAL OF THE LAWS OF NORTH CAROLINA 264 (1814); and the Connecticut laws of 1751, *An Act for the Due Observation of the Sabbath, or Lords Day*, 1 THE PUBLIC STATUTE LAWS OF THE STATE OF CONNECTICUT 577-78 (1808), *see also* Swift, 2 A SYSTEM OF THE LAWS 325-26 (1796).

E. *The Fifth Commandment.*

The Fifth Commandment exhorts children to honor their parents. A 1642 Connecticut law cited to the Fifth Commandment for this proposition:

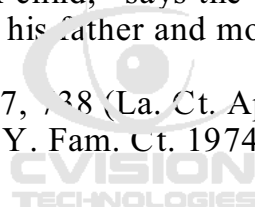
If any child or children above sixteen years old, and of sufficient understanding shall curse or smite their normal father or mother, he or they shall be put to death; unless it can be sufficiently testified that the parents have been very unchristianly negligent in the education of such children, or so provoke them by extreme and cruel correction that they have been forced thereunto to preserve themselves from death [or] maiming. Ex. 21:17, Lev. 20, Ex. 20:15.

THE CODE OF 1650 at 29; *see also* COLONIAL ORIGINS at 230.

The Louisiana Court of Appeals observed:

“Honor thy father and thy mother,” is as much a command of the municipal law as it is a part of the Decalogue, regarded as holy by every Christian people. “A child,” says the code, “whatever be his age, owes honor and respect to his father and mother.”

Ruiz v. Clancy, 157 So. 737, 738 (La. Ct. App. 1934); *see also* *Pierce v. Yerkovich*, 363 N.Y.S.2d 403, 414 (N.Y. Fam. Ct. 1974); *Mileski v. Locker*, 178 N.Y.S.2d 911,



916 (N.Y. Sup. Ct. 1958); *Beaty v. McGoldrick*, 121 N.Y.S.2d 431, 432 (N.Y. Sup. Ct. 1953).

F. The Sixth Commandment.

The Sixth Commandment simply states, “Thou shalt not kill.” Citations to the incorporation of this Commandment in state laws are numerous. A Kentucky court stated:

The rights of society as well as those of appellant are involved and are also to be protected, and to that end all forms of governments following the promulgation of Moses at Mt. Sinai has required of each and every one of its citizens that “Thou shalt not murder.” If that law is violated, the one guilty of it has no right to demand more than a fair trial, and if, as a result thereof, the severest punishment for the crime is visited upon him, he has no one to blame but himself.

Young v. Commonwealth, 52 S.W. 963, 966 (Ky. Ct. App. 1932).

As recently as 1998, a Wisconsin appeals court quoted a 1974 Indiana Supreme Court opinion which stated, “Virtually all criminal laws are in one way or another the progeny of Judeo-Christian ethics. We have no intention to overrule the Ten Commandments.” *Wisconsin v. Schultz*, 582 N.W.2d 112, 117 (Wis. App. 1998)(quoting *Sumpter v. Indiana*, 306 N.E.2d 95, 101 (Ind. 1974)).

G. The Seventh Commandment.

The Seventh Commandment states, “Thou shalt not commit adultery.” A 1641 Massachusetts law declared, “If any person committeth adultery with a married or espoused wife, the adulterer and the adulteress shall surely be put to death. Ex. 30.14.” COLONIAL ORIGINS at 84. Similar laws were enacted by Connecticut in 1642,³ Rhode



³*Code of 1650* at 28-29; see also COLONIAL ORIGINS at 230.

Island in 1647,⁴ New Hampshire in 1680⁵ and Pennsylvania in 1705.⁶ The Texas Criminal Appeals court opined:

The accused would insist upon the defense that the female consented. The state would reply that she could not consent. Why? Because the law prohibits, with a penalty, the completed act. “Thou shalt not commit adultery” is our law as well as the law of the Bible.

Hardin v. State, 46 S.W. 803, 808 (Tex. Crim. App. 1898).

The Washington Supreme Court observed, “Adultery, whether promiscuous or not, violates one of the Ten Commandments and the statutes of this State.” *Schreifels v. Schreifels*, 287 P.2d 1001, 1005 (Wash. 1955).

H. The Eighth Commandment.

The laws reflected by the Eighth Commandment’s prohibition against theft (“Thou shalt not steal”) are too numerous to cover. James Kent, one of the “Fathers of American Jurisprudence,” wrote, “To overturn justice by plundering others tended to destroy civil society, to violate the law of nature, and the institutions of Heaven.” James Kent, 1 COMMENTARIES ON AMERICAN LAW 7 (1826). Not only have the laws against theft been derived from the Eighth Commandment, *see Hollywood Motion Picture Equipment Co. v. Furer*, 105 P.2d 299, 301(Cal. 1940), but also laws protecting the integrity of elections, *see Doll v. Bender*, 47 S.E. 293, 300 (W.Va. 1904)(Dent, J. concurring), as well as the U.S. Constitution’s Takings Clause. *See Pennsylvania Co. v. United States*, 214 F. 445, 455 (W.D. Pa. 1914); *see also Utah v. Donaldson*, 99 P. 447, 449 (Utah 1909); *De Rinzie v. Colorado*, 138 P. 1009, 1010 (Colo. 1913);

⁴*See Colonial Origins*, at 189-90.

⁵*See Colonial Origins*, at § 9.

⁶*See An Act Against Adultery and Fornication, 1705* in 1 LAWS OF THE COMMONWEALTH OF PENNSYLVANIA at 25-27 (1810).

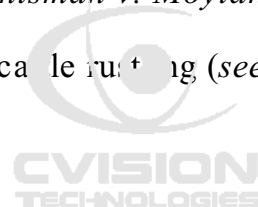
Addison v. Florida, 116 So 629 (Fla. 1928); *Missouri v. Gould*, 46 S.W.2d 886, 889-890 (Mo. 1932); *Succession of Onorato*, 51 So.2d 804, 810 (La. 1951); *Anderson v. Maddox*, 65 So.2d 299, 301-302 (Fla. 1953).

I. The Ninth Commandment.

The Ninth Commandment prohibits perjury or bearing “false witness”. This Commandment is a foundation of our judicial system. Connecticut enacted a perjury law in 1642. *See* THE CODE OF 1650 at 28-29; *see also* COLONIAL ORIGINS at 230. Similar laws declaring their basis in the Decalogue were enacted by Massachusetts in 1641, by Rhode Island in 1647, and by New Hampshire in 1680. *See* COLONIAL ORIGINS at 7, 84, 88, 190-91. The Oregon Supreme Court stated, “No official is above the law. ‘Thou shalt not bear false witness’ is a command of the Decalogue, and that forbidden act is denounced by the statute as a felony.” *Watts v. Gerking*, 228 P. 135, 141 (Or. 1924); *see also Hosford v. Mississippi*, 525 So.2d 789, 799 (Miss. 1998).

J. The Tenth Commandment.

The Tenth Commandment prohibits coveting. Former President John Adams stated, “If ‘Thou shalt not covet’ and ‘Thou shalt not steal’ were not commandments of Heaven, they must be made inviolable precepts in every society before it can be civilized or made free.” Francis Adams, ed., 4 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES at 9 (1851). This Commandment has been cited as the basis of civil laws against defamation, (*see Winsock, Lubin & Co. v. Marks*, 42 P. 142, 145 (Cal, 1895)), election fraud, (*see Doll v. Bender*, 47 S.E. 293, 300-01 (W.Va. 1904)(Dent, J. concurring)), white collar crime (*see Chisman v. Moylan*, 105 So. 2d 186, 189 (Fla. App. Ct. 1958)), and modern forms of cable routing (*see Swift & Co. v. Peterson*, 233 P.2d 216, 231 (Or. 1951)).



One would have to rewrite American history to conclude that the Ten Commandments played an insignificant role in the foundation of law and government. William Findley observed that the Ten Commandments were “incorporated in the judicial law.” William Findley, OBSERVATIONS ON “THE TWO SONS OF OIL” at 36 (1812). John Quincy Adams, the sixth president, stated, “The law given on Sinai was a civil and municipal as well as a moral and religious code.” James M. Alden, ed., LETTERS OF JOHN QUINCY ADAMS, TO HIS SON, ON THE BIBLE AND ITS TEACHINGS, at 61 (1850). In 1950, the Florida Supreme Court declared:

A people unschooled about the sovereignty of God, the Ten Commandments, and the ethics of Jesus, could never have evolved the Bill of Rights, the Declaration of Independence, and the Constitution. There is not one solitary fundamental principle of our democratic policy that did not stem directly from the basic moral concepts as embodied in the Decalogue. . . .”

Florida v. City of Tampa, 48 So.2d 78, 79 (Fla. 1950); *see also Commissioners of Johnston County v. Lacy*, 93 S.E. 482, 487 (N.C. 1917)(“Our laws are founded upon the Decalogue. . . .”).

II.

PUBLIC RECOGNITION THAT AMERICAN LAW AND GOVERNMENT HAS ROOTS IN THE TEN COMMANDMENTS DOES NOT VIOLATE THE *LEMON* TEST

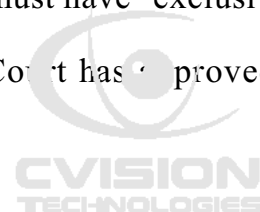
The Supreme Court has not yet overruled its test for Establishment Clause violations announced in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). A majority in *Lynch v. Donnelly*, 465 U.S. 668 (1984), stated that the second and third prongs of the *Lemon* test should focus on whether a governmental action was an “endorsement” of religion. In *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), the Court adopts this refinement of the *Lemon* test and asks (1) whether the government has a secular purpose for the action and (2) whether the primary effect of the action is to endorse

religion. *Id.* at 593-94. “The endorsement test prohibits speech that a reasonable observer would think is an endorsement of religion by the government.” *Granzeier v. Middleton*, 173 F.3d 568, 573 (6th Cir. 1999). *See also Murray v. City of Austin, Texas*, 947 F.2d 147, 156 (5th Cir. 1991).

The first prong of the endorsement test of *Lynch* and *County of Allegheny* asks whether there is a secular purpose. The second prong asks whether, in the eyes of a reasonable observer, the action endorses religion. The third prong, (now merged into the second prong), asks whether there is excessive governmental entanglement.

A. The Display Has A Secular Purpose

A governmental action will be invalidated under the purpose prong *only* if the action is “entirely motivated by a purpose to advance religion.” *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985); *see also Bowen v. Kendrick*, 487 U.S. 589, 602 (1988)(a court “may invalidate a statute only if it is motivated wholly by an impermissible purpose”); *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984) (“The Court has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but only when it has concluded there was no question that the statute or activity was motivated wholly by religious considerations”). A statute may satisfy Lemon’s first prong even if it is “motivated in part by a religious purpose.” *Wallace*, 472 U.S. at 56. “The Court has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but **only when it has concluded there was no question that the statute or activity was motivated wholly by religious considerations.**” *Lynch*, 465 U.S. at 680 (emphasis added). “Were the test that the government must have ‘exclusively secular’ objectives, much of the conduct and legislation this Court has approved in the past would have been invalidated.” *Id.* at 681 n6.

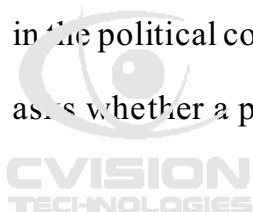


The proper inquiry under the purpose prong is whether the action was *wholly* motivated by a religious purpose, not whether there is some religious purpose along with other secular purposes. “Unless it seems to be a sham, ... the government’s assertion of a legitimate secular purpose is entitled to deference.” *ACLU v. Capitol Square Rev. and Adv. Bd.*, 243 F.3d 289, 307 (6th Cir. 2001)(en banc).

Courts must be “deferential to a [government’s] articulation of a secular purpose,” *Edwards v. Aguillard*, 482 U.S. 578, 586 (1987). This is true particularly where “a legislature expresses a plausible secular purpose” for a policy or action. *Wallace*, 472 U.S. at 74 (O’Connor, J., concurring in the judgment). A court must accept the articulated purpose unless it is insincere or a “sham,” *Edwards*, 482 U.S. at 586-87, or the statute at issue has a “preeminent purpose” which is “plainly religious in nature,” *Stone v. Graham*, 449 U.S. 39, 41 (1980). The Supreme Court will not attribute an unconstitutional purpose where a “plausible” secular purpose may be discerned from the action or policy. *See Mueller v. Allen*, 463 U.S. 388, 394-95 (1983). Clearly, a “plausible secular purpose” of the display at issue is to acknowledge the role of the Ten Commandments in the development of American law and government.

B. The Display Does Not Have The Primary Effect Of Endorsing Religion

“What is crucial [under the second prong of *Lemon*] is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion. It is only practices having that effect, whether intentionally or unintentionally, that make religion relevant, in reality or public perception, to status in the political community.” *Lynch*, 465 U.S. at 692 (O’Connor, J. concurring). The test asks whether a practice conveys endorsement, query “whether an objective observer,

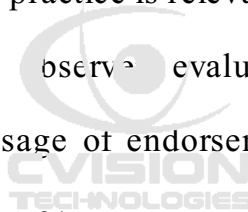


acquainted with the text, legislative history, and implementation of the statute, would perceive it as state endorsement....” *Capitol Square*, 243 F.3d at 302 (quoting *Wallace*, 472 U.S. at 76 (O’Connor, J. concurring)).

The objective observer is “deemed aware of the history and context of the community and forum in which the religious display appears.” *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 779-780 (1995)(O’Connor, J., concurring). However, “the endorsement inquiry is not about the perceptions of particular individuals or saving isolated nonadherents from ... discomfort It is for this reason that the reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious display appears.” *Id.*; see also *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 119 (2001). Regarding the objective observer, the Supreme Court stated,

There is always someone who, with a particular quantum of knowledge, reasonably might perceive a particular action as an endorsement of religion. A State has not made religion relevant to standing in the political community simply because a particular viewer of a display might feel uncomfortable. It is for this reason that the reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious display appears. As I explained in *Allegheny*, “the ‘history and ubiquity’ of a practice is relevant because it provides part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion.” Nor can the knowledge attributed to the reasonable observer be limited to the information gleaned simply from viewing the challenged display.

Pinette, 515 U.S. at 780. “Under the endorsement test, the ‘history and ubiquity’ of a practice is relevant not because it creates an ‘artificial exception’ from that test. On the contrary, the ‘history and ubiquity’ of a practice is relevant because it provides part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion.” *County of*



Allegheny, 492 U.S. at 630 (O'Connor, J., concurring).

If a practice has a history and ubiquity, that is to be taken into account in viewing the context of the displays in order to determine whether they send a message of endorsement of religion. There is ample historical evidence that the Ten Commandments played a significant role in the foundation of American law and government. The history of its placement in this case does not convey a message of endorsement.

CONCLUSION

The Ten Commandments profoundly shaped American law and government, having both a secular and religious aspect, becoming even more secular when in the context of other secular items. The monument challenged in this case does not violate the Establishment Clause.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail delivery, in both printed and electronic format, this 25th day of March, 2003, to the following:

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CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir. R. 32(a)(7)(C)(i), the undersigned certifies this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,977 words, excluding the parts of the brief exempted by Fed. R. App.



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