# THE TEN COMMANDMENTS IN ALABAMA

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This brief essay approaches the well-known "Alabama Ten Commandments" controversy from the perspective of interest group strategy. The situation, of course, has been endlessly analyzed in both legal and political terms, each side staking out a determined position regarding the display of the Decalogue on a courtroom wall. As a strict separationist (indeed, as a prototypical card-carrying ACLU loyalist), I propose here to explore the issue from a slightly different angle: Why is it worth fighting over?

To absolutists, of course, everything is worth fighting over, if only in the name of the mythic slippery slope—allow the Ten Commandments today and next week we will have to worry about a national catechism! But absolutism has its costs in terms of moral, political, and actual capital. Every time the Ten Commandments are banned from the walls of a public building, the religious right is energized and moderates are alienated from the civil liberties camp. Given that price, one has to ask if the principle involved is worth the cost of victory, much less the possible consequence of defeat.

Thoughtful writers such as Stephen Carter,[1] Michael Perry[2] and Stephen Presser,[3] have called for increased receptiveness to religious values in public life. Certainly, the constant stream of Establishment Clause litigation is regarded by many believers as a form of secular tyranny.[4] It is useful, therefore, to consider whether opposition to posting the Ten Commandments can be justified on something more than reflexive grounds.

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1. Stephen Carter, *The Culture of Disbelief* (BasicBooks, 1993).
2. Michael Perry, *Morality, Politics, and Law* (Oxford U. Press, 1988).
3. Stephen Presser, *Recapturing the Constitution* (Regenry Publishing, 1994).
4. Carter, *The Culture of Disbelief* at 123 (cited in note 1).

## THE CONTROVERSY

Judge Roy Moore, of Etowah County, Alabama, is determined to keep the Ten Commandments hanging on his courtroom wall. Governor Fob James supports him to the hilt, to the point of threatening to call out the National Guard if that's what it takes to prevent the judge's carved wooden plaque from being removed. Said Governor James, "the only way those Ten Commandments . . . [will] be stripped from that courtroom is with the force of arms."[5]

Backing for the Ten Commandments has come from every quarter. Thousands of Alabamans rallied behind Judge Moore, and statements of editorial encouragement have appeared from Massachusetts to California. I have located at least two "Support Judge Moore" web pages, and there are probably many others that my modest Internet skills failed to discover. Decalogue plaques have lately been mounted in public buildings in North Carolina, South Carolina, and Texas, with others promised or promoted in Michigan, Wisconsin, and elsewhere. Not to be outdone in their support for the Judeo-Christian tradition, the United States House of Representatives overwhelmingly passed a resolution endorsing the display of the Ten Commandments in every public schoolroom and courtroom in the nation.[6]

The Alabama Supreme Court neatly sidestepped the issue, dismissing (for lack of standing) a lawsuit between Judge Moore and the American Civil Liberties Union.[7] Still, it seems certain that the issue will reemerge, as religious groups have made Judge Moore a national symbol in their campaign to re-emphasize religion in public life (and in public buildings).[8]

The lines are clearly drawn. Liberals cite cases such as *Stone v. Graham*[9] to show that the Decalogue display clearly violates the separation of church and state. Conservatives, on the other hand, are eager to overturn the last 30 years of church-

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5. John Bacon, *Alabama Governor Ready to Defend Prayer in Court*, USA Today 3A (Feb. 6, 1997).

6. H. Con. R. 31, 105th Cong., 1st Sess. (March 5, 1997) in 143 Cong. Rec. D183-01; H. Con. R. 31, 105th Cong., 1st Sess. (March 4, 1997) in 143 Cong. Rec. H715-07, H716); *House Backs Ten Commandment Display*, The New York Times B10 (Mar. 6, 1997).

7. *Ex parte State ex rel. James v. ACLU of Alabama*, 711 So. 2d 952 (Ala. 1998).

8. Malcolm Daniels, *Ten Commandments Issue Far From Over, Moore Says*, Montgomery Advertiser 1A (Apr. 12, 1998).

9. 449 U.S. 39 (1980) (ruling against schoolroom displays of the Ten Commandments).

state jurisprudence, using the Ten Commandments case to show how foolish and coercive (in their view) the law has become. A "Religious Freedom Amendment" to the Constitution, narrowly defeated in the House of Representatives but sure to be reintroduced, would guarantee the people's right to "recognize their religious beliefs, heritage, or traditions on public property."[10]

## THE QUESTION

Religious activists regard the Ten Commandments as virtually non-negotiable, arguing that the ethics of the Decalogue are accepted by Christians, Jews, and Muslims.[11] Even people who would otherwise consider themselves separationists—rejecting organized prayer in the schools and opposing city hall creche exhibits, for example—may see scant harm in displaying an ancient moral code that enjoys such broad consensus. Stephen Carter refers to the Ten Commandments as embodying "spiritual but not necessarily religious values,"[12] and considers an earlier ban to rest on "shaky footing."[13] The Commandments do not stand only for religious doctrine, Carter points out, but have also had a "significant secular impact on the development of the secular legal codes of the Western World."[14]

So the question for civil libertarians has to be whether relenting on the Decalogue displays might be just the sort of strategic retreat that could defuse the general confrontation and lower the level of rhetorical combat. Fundamentalists often accuse civil libertarians of hostility to religion, finding proof in the Ten Commandments struggle that they have to fight for every inch of expressive space in the public square.[15] Perhaps a show

10. H.J. R. 78, 105th Cong., 1st Sess. (June 4, 1998) in 144 Cong. Rec. H4078-04; *House Wisely Votes to Kill Prayer Amendment*, The Baltimore Sun 12A (June 15, 1998).

11. According to one report, the National Clergy Council, a conservative ministerial group, believes that "the Commandments' code of ethics is accepted by Christianity, Judaism and Islam, the three monotheistic religions [that] reflect the heritage of America." *Federal Bible Display Draws Debate* The Sunday Oklahoman 17 (May 3, 1998). That ecumenical sentiment, however, is not universal. For example, South Carolina state school board member Henry Jordan defended his proposal to display the Ten Commandments in the state's public schools with the battle cry "Screw the Buddhists and kill the Muslims." Gerrie Ferris Finger, *School Board Member Derides Buddhists, Muslims*, The Atlanta Constitution C6 (May 17, 1997).

12. Carter, *The Culture of Disbelief* at 189 (cited in note 1).

13. Id. at 208. The reference is to *Stone v. Graham*, 449 U.S. 39 (1980) (prohibiting a decalogue display in Kentucky public schools).

14. Id. at 208 (quoting Justice Rehnquist's dissenting opinion in *Stone v. Graham*, 449 U.S. 39, 45 (1980)).

15. Id. at 213-75.

of good faith, of empathy and understanding, could remove the discussion to the realm of principle rather than conflict.

It would be easy, even tempting, to conclude that Decalogue displays are practically innocuous, even in strong separationist terms. As a moral code, the Ten Commandments cover mostly basic territory: don't murder, don't steal, don't testify falsely. Even its more "ethical" components—honor your mother and father, don't covet—are fairly universal. And the straightforward religious commands—remember the Sabbath, no graven images—are sufficiently ambiguous as to avoid contradicting the beliefs of most Americans.[16]

Nonetheless, posting the Ten Commandments turns out to be a quintessentially religious act—not because it favors religion over nonreligion, but rather because it inevitably places one form of doctrinal expression ahead of others. Even the most forceful advocates for relaxing the "wall of separation" recognize that government should not be in the business of recognizing or preferring one religious sect over another, but, for reasons that I will explain below, this turns out to be the unavoidable consequence of mounting a display of the Ten Commandments.

## THE TEN COMMANDMENTS

Even though the House of Representatives universalized the Ten Commandments as "fundamental principles that are the cornerstones of a fair and just society,"[17] the fact is that there are at least five distinctive versions of the Decalogue.[18] In some cases the differences among them might seem trivial or semantic, but lurking behind the disparate accounts are deep theological disputes.

To be sure, all Christians and Jews accept the same text of Exodus 20:1-17, where the commandments first appear in the Bible.[19] And it is clear from elsewhere in the text that God gave Moses a covenant of Ten Commandments.[20] But the relevant

16. The commandment on "graven images" is potentially the most controversial, as will be developed below in a different context. See notes 24-30 and accompanying text. Many faiths allow or use physical representations of their deities, but I am not aware of any contemporary American religions whose adherents worship the actual "images," as opposed to the divinity being represented.

17. 143 Cong. Rec. H715-07, H716 (cited in note 6); see also *House Backs Ten Commandment Display*, The New York Times B10 (Mar. 6, 1997).

18. Jewish, Catholic, Protestant, Lutheran, and Eastern Orthodox.

19. They appear again in Deuteronomy 5:6-21.

20. Exodus 34:28 ("and he wrote upon the tablets the words of the covenant, the

chapter of Exodus actually contains 17 separate verses, with no indication as to how the parts should be numbered or organized. So boiling them down to ten distinct, plaque-sized commandments, especially given the need for abbreviation on a wall-mounted display, requires some considerable elision and interpretation. Consequently, the choice of a specific text or organization must denote a choice of one tradition over others.

To begin, the First Commandment for Jews is traditionally, *I am the Lord your God, who brought you out of the land of Egypt, out of the house of slavery.*[21] This Commandment is entirely missing from most Christian texts—perhaps because it seems too insular and perhaps because it is not phrased in the imperative (the original Hebrew text speaks literally of ten "words," not ten commandments[22]). In any event, that omission causes the Jewish Second Commandment (*You shall have no other Gods before me*[23]) to more or less become the Christian First, with the necessary numerical adjustments continuing down the line.

The differences get stickier as we proceed, because the Christian versions themselves part company almost immediately. In many Protestant renditions, including the one I found on a "support Judge Moore" web page, the Second Commandment is *You shall not make for yourself a carved image . . . you shall not bow down to them nor serve them.*[24] This prohibition against "graven images," is included in the Jewish Second Commandment, but it is not found anywhere in the version used in the standard Catholic catechism. (They fill the space by splitting the erstwhile Tenth Commandment in two).

And here is where the trouble lies. I am no church historian, so I do not know why the Catholic usage omits graven images. According to one intolerant writer, however, it is because "it would interfere with the most lucrative part of their ritual—the worship and adoration of saints."[25] Continuing his overt anti-

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ten commandments"); Deuteronomy 4:13 ("and he declared unto you his covenant, which he commanded you to perform, even ten commandments, and he wrote them upon two tablets of stone"); Deuteronomy 10:4 ("and he wrote on the tablets, according to the first writing, the ten commandments, which the Lord spoke unto you in the mount out of the midst of the fire in the day of the assembly, and the Lord gave them unto me.").

21. Exodus 20:2.

22. Umberto Cassuto, *A Commentary on the Book of Exodus* 238 (Israel Abrahams, Magnes Press, 1967).

23. Exodus 20:3.

24. Exodus 20:4-6.

25. Joseph Lewis, *The Ten Commandments* 26 (Freethought Press Ass'n, 1946).

Catholic animus, the writer explains "Catholics not only make 'graven images' in direct prohibition and violation of the Second Commandment, but they also worship these images in defiance of an angry and vengeful God."[26]

So we see that the different rendering of the Ten Commandments is used as ammunition in a classic religious assault. In the case I just quoted it becomes an occasion for virulent anti-Catholicism, concluding with the accusation that the Catholic Church intentionally publishes "a mutilated set of Commandments."[27] Nor is this merely a historical confrontation. It takes almost no effort to locate contemporary websites that repeat and expand upon this anti-Catholic theme. Consider one relatively mild comment, "the Papists, having rejected the clear testimony of Scripture, have adopted religious images."[28] Or a more caustic one that calls upon "Papists, . . . if they have any sense of shame" to cease "worshiping God carnally in wood and stone."[29] And finally,

> The Church of Rome is reproved and condemned, which, from the Alpha of its religion to the Omega, is wholly idolatrous. Romanists make images of God the Father, painting him in their church windows as an old man; and an image of Christ on the crucifix; and, because it is against the letter of this commandment, they sacrilegiously blot it out of their catechism, and divide the tenth commandment into two.[30]

I don't want to attribute such anti-Catholic bigotry (or any other sort) to the supporters of Judge Moore or to anyone else who is eager for the Decalogue to hang on a courtroom wall. But the above examples manifestly demonstrate how textual differences can be used to fan the fires of religious contempt. To the faithful, scripture matters. Which leads us directly to the essential purpose of the First Amendment.

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26. Id.

27. Id. at 26, 28-29. The author continues in the vein at some length. "Even the crucifix, which is worshiped and adored today, is as much an idolatrous instrument as the image of a man or woman." Id. at 27. Nor does he limit his scorn to differences over the Second Commandment. He considers the Catholic division of the Tenth Commandment to be a "monumental piece of brazen deceit and hypocracy." Id. at 31.

28. Http://www.idontkno.ab.ca/books/newslett/actualnls/testprom/htm (search conducted Winter 1998; material since has been removed from website).

29. Http://www.smartlink.net/~douglas/calvin/bk1ch11.html#seven.htm (visited on Oct.13,1998).

30. Http://www.iclnet.org/pub/resources/text/ipb-e/epl-09/wat10-08.txt (visited on Oct. 13, 1998).

As is well known to readers of *Constitutional Commentary*, the Framers of our Constitution were deeply concerned about the perils of religious conflict. Wisely recognizing that entanglement of religion and government could only lead to heightened strife, they were determined to keep their new union free from the denominational struggles that had tortured Europe. [31]

The Framers agreed, therefore, that there should be "no law respecting an establishment of religion." Their goal was not to suppress religion, but rather to free it from the temptations of secular power. Since there can be no law respecting an establishment of religion, no group can attempt to dominate another, and no sect need fear official domination. There cannot, and should not, be any official orthodoxy, enshrining the tenets (or commandments) of one denomination to the derogation of another.

As so often is true, the Framers' solution was both judicious and prescient. Even so simple an act as displaying the Ten Commandments on a courtroom wall turns out to be freighted with theological significance. Centuries-old disputes between Catholics and Protestants are played out in the passages of their respective Ten Commandments. The purpose of the First Amendment, of course, is precisely to prevent such purely religious differences from spilling over into the political arena.

## CONCLUSION

I began this essay by wondering whether the Ten Commandment displays ought to be tolerated by First Amendment purists, much as we have been able to live with the prayerful invocations that begin each session of Congress and the monetary motto, "In God We Trust," not to mention the Supreme Court's own call to order, "God Save This Honorable Court." There is a level of civic, nonsectarian benediction that can coexist peacefully, if not quite rigorously, with the establishment clause.

But, as it turns out, the Ten Commandments do not fit easily into this category. Indeed, it takes naivete—one is tempted to say ignorance, but that would be too strong—to believe that a

31. John Noonan, *The Lustre of Our Country* (U. of California Press, 1998); Michael McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409 (1990); Jesse Choper, *Securing Religious Liberty: Principles for Judicial Interpretation of the Religion Clauses* (U. of Chicago Press, 1995) reviewed by Matthew Symanski at 14 Const. Comm. 395 (1997).

single rendition of the Ten Commandments could be considered universal and nonsectarian. [32]

True, any disputes over the text of the Decalogue have been submerged, barely noticed by most Americans at least during this century. But that may well be because there has never been an issue of official endorsement. The Jewish Decalogue is displayed in synagogues and the various Catholic and Protestant renditions are mounted in their respective churches. Religion is religion and the government stays out of it.[33]

In other words, the First Amendment works. And that is why Judge Moore should take down his plaque.

32. Even conservative proponants of school prayer agree that state "governments may not promote the interests of any particular sect." Presser, *Recapturing the Constitution* at 228 (cited in note 3).

33. There is a depiction of the Ten Commandments in the main courtroom of the United States Supreme Court, but it is entirely representational—there is no text at all, but only Roman numerals I-X. Julia Duin, *Religious Symbols Grace High Court*, The Washington Times A2 (Nov. 13, 1997).