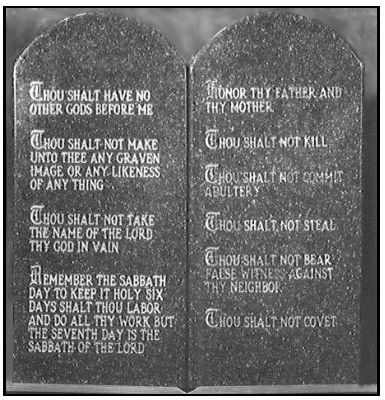
> business, and they insist upon my taking it in hand. I take their papers, put them in my *green bag*, and determine that I will attend to their cases when at Marshfield. When arrived at this place, my mind becomes so taken up with its manifold enjoyments that I forget all about the green bag, *unless there happens to come a rainy day.* In that event I sometimes look at the musty papers; but it is not infrequently the case that the bag travels from Boston to the sea-shore, and thence to the mountains and back again, without ever being disturbed. The truth is, you cannot mention the *fee* which I value half as much as I do a morning walk over my farm, the sight of a dozen yoke of my oxen furrowing one of my fields, or the breath of my cows, and the pure ocean air."

Charles Lanham, The Private Life of Daniel Webster 87 (Harper & Bros. 1852) (emphasis in original).



Lemon-ade

The "sisyphean task of trying to patch together the blurred, indistinct, and variable barrier [between church and state] described in *Lemon*" has confounded the Supreme Court and everyone else for the past 30 years. But a new development in Ten Commandments litigation offers some hope for at least a sliver of tide-proof isthmus between the usual Establishment Clause factions.

Last year, Jeffrey Adkins, represented by the Indiana Civil Liberties Union, filed a lawsuit in the United States District Court for the Southern District of Indiana, challenging a display of the Gettysburg Address, the Mayflower Compact, and the Ten Commandments in his local county courthouse. Settlement negotiations ensued, reasonable minds differed but reached common ground, and on February 9, 2001, the court approved a settlement under which,

> No later than January 31, 2001, the defendant shall create within the Washington County Courthouse a display separate from any existing display. The display shall contain pictorial representations of the following historical figures who are recognized as "lawgivers". In addition to the pictorial representation, there shall be displayed a representative sampling or excerpt of the laws associated with the historical figure, as more fully set out below. Each element of the display shall be the same size as all other elements and no aspect of the display shall be highlighted or made more or less obvious than any other aspect of the display. All text shall be in the same type size and font. The "lawgivers" and their related "laws" are as follows.
>
> Hammurabi — *The Hammurabi Code*
>
> Moses — *The Ten Commandments*
>
> Justinian — *The Justinian Code*
>
> King John — *The Magna Carta*
>
> Chief Dekanawida — *The Iroquois Constitution*
>
> William Blackstone — *Commentaries on the Law of England*
>
> Thomas Jefferson — *The United States Constitution*
>
> Thurgood Marshall — *Brown v. Board of Education*
>
> The parties further agree that defendant shall put a separate explanation concerning the display which shall be the same size as the pictorial representations and the sample laws in the display and which shall indicate:
>
> Throughout human history society has been instructed by various laws and the

> lawgivers who assisted in their creation. What follows are a sample of both laws and lawgivers.

In addition, the settlement provided for some flexibility (under which the *Green Bag* might suggest a substitute for Jefferson):

> The parties agree that defendant may, in its discretion, add additional laws and lawgivers to the display. But, in no event shall the number of lawgivers and their laws be less than eight.

The agreed-upon octaptych is on display in the Washington County courthouse.

Although the parties to the *Adkins* case have not abandoned their original litigating positions, they do appear to have arrived at a formula for peaceful relations between inveterate adversaries: stick with the Eight Greats, their laws, and the "separate explanation" disclaimer. Truly, this must be the product of Divine Inspiration, who spreads her wings behind Truth and Justice on the west wall frieze in another courthouse, in Washington, DC.

Sadly, there is every reason to fear that the *Adkins* formula may not catch on, the illogical life of the Establishment Clause being what it is, and so the parties should consider a fallback position. One solution that has not yet failed is philosopher-comedian Steve Martin's proposal for the "Nine Suggestions."

Committee for Public Education and Religious Liberty v. Regan, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting); *10 commandments settlement reached*, Indiana Lawyer, Dec. 6, 2000, at 10; *Adkins v. Washington County, Indiana*, No. NA-00-143-C B/G (S.D. Ind. Feb. 9, 2001); Steve Martin, *The Ethicist*, The New Yorker, Mar. 5, 2001, at 50.

Steve Martin's "Nine Suggestions"

Change all the "Thou shalt not"s to "Don't"s. Cut the one about coveting your neighbor's wife (now regarded as "too little too late"). Change the word "Commandments" to "Suggestions." You now have "The Nine Suggestions." This should make everyone happy.

Beware of the Frog

The analogy, according to H.W. Fowler, "is perhaps the basis of most human conclusions, its liability to error being compensated for by the frequency with which it is the only form of reasoning available." But this overall utility is no excuse for perpetuating "the essential stupidity of … fabricated analogies, against which no warning can be too strong."

So be warned against the famous story of the complacent frog, told here by a respected jurist:

> Scientists say that if you place a healthy frog in a shallow pan of boiling water, it will instantly sense disaster and leap out of the pan. Place that same healthy frog in a shallow pan of warm water, and it will bask in environmental delight. If you then slowly turn up the heat, the frog will acclimate to the rising temperature and will remain in that pan until boiled to death.

Federal and state judges, law professors, bureaucrats, even national political leaders have relied on this frog story as an analogy to explain everything from the dangers of gradually growing imbalances in our global ecosystem, to the failure of some judges to protest steadily increasing caseloads, to regimes to alter social norms, to public complacence in the face of slow erosion of civil liberties, to the growth of Medicare entitlements, to, well, anything else gradual.

The problem with this striking image of the frog – and, by analogy, humanity – trapped by its ignorance or insensitivity as the end draws slowly nearer is that it is wrong, at least with respect to the frog. Scientists do not say that frogs behave that way. Frogs, individually and collectively, are very sensitive and responsive to environmental conditions.

Six years ago *Fast Company* reported on the science of the complacent frog story. The magazine inquired at the National Museum of