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# Written in Stone: Why Renewed Attempts to Post the Ten Commandments in Public Schools Will Likely Fail

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## Written in Stone: Why Renewed Attempts to Post the Ten Commandments in Public Schools Will Likely Fail

[W]e are not aware of any case involving the posting of the Ten Commandments in public schools that has been held to be Constitutional.<sup>1</sup>

John Bason, spokesman for the North Carolina Attorney General's Office.

We are now telling districts, "Don't put them up because it's unconstitutional, and if you do, realize this puts you in a position of exposed liability."<sup>2</sup>

Brad Hughes, spokesman for the Kentucky School Boards Association.

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1. Eric Dyer, *Commandments Bill Clears House*, RALEIGH NEWS & REC., July 27, 2001, at A1.

2. Linda B. Blackford, *Insurer Won't Cover Ten Commandments Cases*, HERALD-READER, Sept. 8, 1999 ("[T]he insurance company that covers 150 of 176 school boards won't pay for any legal costs regarding posting the Ten Commandments because it's considered an 'intentional act.'"). In July 2000, Kentucky addressed this issue with KY. REV. STAT. ANN. § 304.12-260 (Michie 2002). The statute prohibited insurers from refusing to pay legal costs "[b]ecause the posting of the Ten Commandments in a public school building is a lawful posting of a historical document under KRS 158.195." *Id.* The lawfulness of posting the Ten Commandments under KY. REV. STAT. ANN. § 158.195, which nowhere mentions the Ten Commandments, is in question, however, following a federal court order that a Kentucky school district remove copies of the Decalogue. *See Doe v. Harlan County Sch. Dist.*, 96 F. Supp. 2d 667, 679 (E.D. Ky. 2000) (granting plaintiffs' preliminary injunction and ordering the removal of the displays); *see also* Sherry Jones, *Biblical Laws Won't Go Up on Brunswick School Walls*, WILMINGTON MORNING STAR, Nov. 6, 2001, at A1 (quoting Brunswick County School Board member Glenda Browning, "If the legislature intended for [North Carolina] schools to display the Ten Commandments along with other historical documents . . . the legislators should have agreed to pay any legal fees associated with a law suit."); Sherry Jones, *Commandments Issue on Hold*, WILMINGTON MORNING STAR, Oct. 25, 2001, at A1 [hereinafter Jones, *Commandments Issue*] (stating that a recent case in Texas involving separation of church and state cost a school district \$800,000).

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## INTRODUCTION

In 2001, the legislatures in at least ten states considered bills authorizing the posting of the Ten Commandments in public schools.<sup>3</sup> In two states, North Carolina and North Dakota, such bills became law.<sup>4</sup> Indiana and South Dakota already had enacted legislation

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3. *See, e.g.*, H.B. 756, 2001 Reg. Sess. (Ala. 2001) (authorizing the display of the Ten Commandments on property owned or administered by a public school); H.B. 26, 2001 Reg. Sess. (Ky. 2001) (permitting the posting of religious, historical, or literary documents appropriate to the course, including the Ten Commandments); H.B. 1112, 120th Leg., 1st Reg. Sess. (Me. 2001) (allowing the prominent display of the Ten Commandments in public schools); S.B. 15, 91st Leg., 2001 Reg. Sess. (Mich. 2001) (allowing the display of the Ten Commandments in public schools); H.B. 1512, 2001 Reg. Sess. (Miss. 2001) (authorizing public school districts to display the Ten Commandments in classrooms); H.B. 681, 2001 Sess. (N.C. 2001) (allowing the display of religious objects or documents in public schools); S.B. 2177, 57th Leg. Assem., Reg. Sess. (N.D. 2001) (authorizing the display of the Ten Commandments in public schools); H.B. 1145, 48th Leg. Sess., 1st Sess. (Okla. 2001) (authorizing the posting of the Ten Commandments in any public building of the state); H.B. 2086, 71st Leg. Assem., 2001 Reg. Sess. (Or. 2001) (directing school districts, upon approval of voters within the district, to include the teaching of the Ten Commandments in the history curriculum and to post a copy of the Ten Commandments in each school of the district); S.B. 828, 102nd Gen. Assem. (Tenn. 2001) (authorizing the observance of the Ten Commandments on state property).

4. N.C. GEN. STAT. § 115C-81(g) (2001) was amended by adding a new section as follows:

A local school administrative unit may display on real property controlled by that local school administrative unit documents and objects of historical significance that have formed and influenced the United States legal or governmental system and that exemplify the development of the rule of law, such as the Magna Carta, the Mecklenburg Declaration, the Ten Commandments, the Justinian Code, and documents set out in subdivision (3a) of this subsection. This display may include, but shall not be limited to, documents that contain words associated with a religion; provided however, no display shall seek to establish or promote religion or to persuade any person to embrace a particular religion, denomination of a religion, or other philosophy. The display of a document containing words associated with a religion shall be in the same manner and appearance generally as other documents and objects displayed and shall not be presented or displayed in any fashion that results in calling attention to it apart from the other displayed documents and objects. The display also shall be accompanied by a prominent sign quoting the First Amendment of the United

permitting the display of the Ten Commandments in 2000.<sup>5</sup> In Alabama, several attempts were mounted to amend the state's constitution to allow the posting of the Decalogue<sup>6</sup> in public schools.<sup>7</sup> The Alabama amendments took an approach similar to that of the Ten Commandments Defense Act that passed the United States House of Representatives in 1999<sup>8</sup> before failing to be considered by the Senate.

Renewed attempts to post the Ten Commandments in public schools have been linked to this country's recent school shootings, and in particular the incident at Columbine High School in 1999.<sup>9</sup>

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States Constitution as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Student Citizen Act of 2001, ch. \_\_\_, § 2(d), 2001 N.C. Sess. Laws \_\_\_, \_\_\_ (codified at N.C. GEN. STAT. § 115C-81(g) (2001)), available at [http://www.ncleg.net/SessionLaws2001\\_/sl20010363/default.htm](http://www.ncleg.net/SessionLaws2001_/sl20010363/default.htm) (on file with the North Carolina Law Review). In North Dakota, what began as a bill to allow the posting of the Ten Commandments became a broader, more ambiguous law in conference committee. See N.D. CENT. CODE § 15.1-06-17.1 (Supp. 2001) (expanding the statute to authorize postings of religious objects and documents of "cultural, legal, or historical significance").

5. Both the Indiana and South Dakota laws allow the display of the Ten Commandments in public school classrooms, together with other documents of legal, cultural, or historical significance, as long as the display of the Ten Commandments is presented in the same manner and appearance as the other documents and is not displayed in a way that calls attention to the Ten Commandments apart from the other documents included in the display. See IND. CODE ANN. § 4-20.5-21-2 (Michie Supp. 2002); S.D. CODIFIED LAWS § 13-24-17.1 (Michie 2002).

6. The terms "Ten Commandments" and "Decalogue" will be used interchangeably throughout this Comment.

7. No discussion of the Ten Commandments and Alabama would be complete without the saga of Governor Fob James and Judge Roy Moore. After Judge Moore's courtroom display of the Ten Commandments was declared unconstitutional by an Alabama court, Governor Fob James threatened to call out the National Guard and the state troopers to prevent removal of the plaque from Moore's courtroom. See Ken Ringle, *God and Country; Judge Roy Moore Is Taking His Religious Beliefs to the Highest Court*, WASH. POST, Oct. 3, 1997, at B1. Moore refused to transform his lone display of the Decalogue into a historical display by adding documents like the Magna Carta. *Id.* "He has specifically declared it a religious display, which some Christians consider forbidden by the Bible as a 'graven image.'" *Id.* (quoting Martin McCaffrey, president of the Alabama chapter of the ACLU). Supporters have set up a Web site, [www.judgemoore.org](http://www.judgemoore.org), selling lapel pins and stone replicas to generate money for a defense fund. *Id.* Stone replicas of Moore's Ten Commandments sell for \$24.95. *Id.*

8. H.R. 1501, 106th Cong. (1999). For a detailed discussion of the Ten Commandments Defense Act, see Part II.A, *infra*.

9. See, e.g., Robert Parham, *Ten Commandments and a Number of Views*, ORLANDO SENTINEL, Apr. 2, 2000, at A1, available at 2000 WL 3591174 ("The rationale for supporting the [Ten Commandments Defense Act] was the school killings at Columbine . . . . Bill Sponsor, Rep. Robert B. Aderholt, R-Ala., said that posting the Ten Commandments 'is one step that states can take . . . toward an end to children killing

Later in the same year, the Family Research Council (“FRC”) initiated a campaign it dubbed “Hang Ten” to encourage public officials to post the Decalogue in public buildings and schools.<sup>10</sup> The FRC insisted that “a nationwide movement for the Ten Commandments was emerging.”<sup>11</sup> The FRC’s assertions were supported by a Gallup poll conducted in June 1999 showing that seventy-four percent of Americans approved of posting the Ten Commandments.<sup>12</sup> Not surprisingly, civil liberties groups denounced these efforts and threatened litigation against schools that erected displays.<sup>13</sup>

Standing squarely in the path of these renewed efforts is the 1980 United States Supreme Court case, *Stone v. Graham*.<sup>14</sup> In *Stone*, the Court reversed a Kentucky Supreme Court ruling that upheld the constitutionality of a state law requiring the posting of the Ten Commandments in every public school classroom in the state.<sup>15</sup> The Court stated, “The pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature . . . thus [violating] the Establishment Clause of the Constitution.”<sup>16</sup>

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children.’ ”); Joyce Howard Price, *States Mull Commandments in Schools*, WASH. TIMES, Feb. 20, 2000, at C4, available at 2000 WL 4148865 (“The campaign to get the Ten Commandments displayed on schoolroom walls was sparked by the bloodshed at Columbine High School.”). See generally Daniel Gordon, *Dead Students, An American Story and Answer: A Sociological Analysis of Fundamentalism Explaining the Legalization of Religious Textualism*, 40 WASHBURN L.J. 13, 16 (2000) (discussing the posting of the Ten Commandments in public schools as a reaction to the events at Columbine).

10. Press Release, Family Research Council (Oct. 13, 1999) (on file with the North Carolina Law Review).

11. Price, *supra* note 9.

12. See Mark Gillespie, *Most Americans Support Prayer in Public Schools*, GALLUP NEWS SERV., July 9, 1999, at <http://www.gallup.com/poll/releases/pr990709.asp> (last visited Oct. 30, 2001) (on file with the North Carolina Law Review). Participants were asked to indicate whether they would “generally favor or oppose” a variety of proposals concerning religion and public schools, including “[a]llowing public schools to display the Ten Commandments.” *Id.* Seventy-four percent indicated that they favored the proposal, twenty-four percent opposed it, and two percent had no opinion. *Id.*

13. See Jones, *Commandments Issue*, *supra* note 2; see also Memorandum from Deborah K. Ross, Executive Legal Director of the ACLU of North Carolina to North Carolina School Board Attorneys, Superintendents, and School Board Chairs 1 (Aug. 27, 2001) (on file with the North Carolina Law Review) [hereinafter ACLU Memorandum] (“Local school districts risk legal action if they follow this law and post the Ten Commandments.”). The religious publication *Christianity Today* also openly opposed posting the Decalogue in public schools. See Darryl Brown, *Hang Ten? Thou Shalt Avoid Ten Commandments Tokenism*, CHRISTIANITY TODAY, Mar. 6, 2000, at 36 (“[P]osting the Ten Commandments lends itself to tokenism . . . [W]e must be careful neither to crusade for nor to accept mere symbols.”).

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

15. *Id.* at 43.

16. *Id.* at 41, 43.

This Comment addresses the renewed efforts to post the Ten Commandments in public schools and assesses the likelihood of their success. Employing North Carolina's statute as an example, this Comment argues that legislative attempts to direct school districts toward a posting of the Decalogue that evades *Stone's* proscriptions have failed. Part I reviews the relevant case law from *Stone v. Graham* to the most recent Ten Commandment cases.<sup>17</sup> Part II examines the legislative response to *Stone*, from Congressional court-stripping efforts embodied in the Ten Commandments Defense Act to efforts by the states to encourage displays that evade *Stone's* proscription. This section offers a close reading of one of these state statutes to determine whether the guidance it offers locates a loophole in the law that could allow a constitutional posting in a public school.<sup>18</sup> Part III examines the two permissible uses of the Ten Commandments in the public arena and analyzes whether these exceptions can be extended to permit a constitutional school posting.<sup>19</sup> This Comment concludes with a brief look at the efforts of a state school board association to apprise local school districts of risks in attempting to test these state statutes.<sup>20</sup>

### I. STONE AND ITS PROGENY

In 1978, Kentucky enacted a statute requiring the posting of a "durable, permanent copy of the Ten Commandments" on the walls of every public elementary and secondary classroom in the state.<sup>21</sup> The plaques were purchased with private funds and placed in approximately two-thirds of Kentucky's classrooms.<sup>22</sup> Sydell Stone,

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17. See *infra* notes 21–64 and accompanying text.

18. See *infra* notes 65–133 and accompanying text.

19. See *infra* notes 134–58 and accompanying text.

20. See *infra* notes 171–76 and accompanying text.

21. KY. REV. STAT. ANN. § 158.178 (Michie 1980). In relevant part, the statute provides:

(1) It shall be the duty of the Superintendent of Public Instruction, provided sufficient funds are available as provided in subsection (3) of this section, to ensure that a durable, permanent copy of the Ten Commandments shall be displayed on a wall in each public elementary and secondary school classroom in the Commonwealth. The copy shall be sixteen (16) inches wide by twenty (20) inches high.

(2) In small print below the last commandment shall appear a notation concerning the purpose of the display, as follows: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States."

*Id.*

22. The sponsor of the original bill, Claudia Riner, and her husband raised approximately \$200,000, which was sufficient to purchase plaques for approximately

along with several other Kentucky residents, brought suit, arguing that the law violated the Establishment Clause.<sup>23</sup> The statute was upheld as constitutional by the trial court, a decision later affirmed by an equally divided Supreme Court of the Commonwealth of Kentucky.<sup>24</sup>

*Stone* made its way to the United States Supreme Court, where a *per curiam* opinion was handed down without oral argument or briefs on the merits.<sup>25</sup> The brief opinion begins by setting out the three-part test expressed in *Lemon v. Kurtzman*<sup>26</sup> for determining whether a challenged statute violates the Establishment Clause. *Lemon* requires that the statute at issue have a secular legislative purpose, that its principal or primary effect be one that neither advances nor inhibits religion, and that the statute does not foster “an excessive government entanglement” with religion.<sup>27</sup> The Court concluded that the Kentucky statute violated the first prong of *Lemon* and therefore violated the Establishment Clause.<sup>28</sup>

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20,000 of Kentucky’s 30,000 classrooms. *See Supreme Court Rejects Ten Commandments Law*, LOUISVILLE TIMES, Nov. 17, 1980, at A1.

23. *Stone v. Graham*, 599 S.W.2d 157, 157 (Ky. 1980); *see* U.S. CONST. art. III, § 2.

24. *Stone*, 599 S.W.2d at 157. The court’s vote was a tie, three to three. *Id.* The court stated, “[we] fail to see how this law advances religion beyond the fact that it may bring to one’s attention the basic tenets of a particular scheme of Western philosophical thought. Nor do [we] see how this statute fosters excessive government entanglement with religion, with emphasis on *excessive*.” *Id.* at 158. In his dissent, Justice Lukowsky focused on the law’s constitutionality under the Kentucky constitution, writing, “[t]he Kentucky Bill of Rights does not permit such a mandatory display.” *Id.* at 159 (Lukowsky, J., dissenting). The Kentucky Bill of Rights provides, “No preference shall ever be given by laws . . . to any particular creed.” KY. CONST. BILL OF RIGHTS § 5.

25. *Stone v. Graham*, 449 U.S. 39, 47 (1980) (Rehnquist, J., dissenting).

26. 403 U.S. 602 (1971).

27. *Id.* at 612–13 (quoting *Waltz v. Tax Comm’n*, 397 U.S. 664, 668 (1970)). In recent Establishment Clause jurisprudence, the second and third inquiries of *Lemon* have been collapsed into the question of whether the display has the effect of government endorsement of religion. *See Lynch v. Donnelly*, 465 U.S. 668, 690–92 (1984) (O’Connor, J., concurring). Two recent Supreme Court cases may modify the factors the Court uses in assessing whether aid to religion has an impermissible effect, but it is unclear whether this change extends beyond the realm of funding of religious schools. *See Mitchell v. Helms*, 530 U.S. 793 (2000) (holding that federal funding distributed to state agencies who in turn provide educational materials and supplies to both public and private religious schools did not violate the Establishment Clause); *Agostini v. Felton*, 521 U.S. 203 (1997) (holding that the provision of public school teachers to Title I parochial school students did not violate the Establishment Clause). The modified factors to be analyzed are whether the Government aid: (1) results in governmental indoctrination; (2) defines its recipients by reference to religion; or (3) creates an excessive entanglement. *Helms*, 530 U.S. at 808. The modifications to the effect prong were accepted only by a plurality, with whom Justices O’Connor and Breyer concurred in the judgment while expressing strong reservations with the plurality’s reasoning. *Id.* at 837–38 (O’Connor, J., concurring).

28. *Stone*, 449 U.S. at 43.

The Court held that, notwithstanding the statute's avowed purpose and requirement of a notation at the bottom of each plaque indicating the "secular application of the Ten Commandments,"<sup>29</sup> the purpose of the statute requiring the posting was not secular, but plainly religious in nature.<sup>30</sup> "The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact."<sup>31</sup> The Court noted that the Commandments do not simply address secular matters.<sup>32</sup> Rather, the first four Commandments concern the religious duties of a believer to his God.<sup>33</sup>

The Court distinguished this situation from cases where the Commandments are "integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like."<sup>34</sup> The Court stated emphatically, "[p]osting of religious texts on the wall serves no such educational function."<sup>35</sup> The Court concluded that the effect of such a posting will be to persuade children to venerate or meditate upon the Commandments.<sup>36</sup> While this result might be

29. See KY. REV. STAT. ANN. § 158.178(2) (Michie 1980).

30. *Stone*, 449 U.S. at 41; see also Alan Dershowitz, *Ten Commandments Aren't Gun Control*, L.A. TIMES, June 20, 1999, at M5 ("Not only are the Ten Commandments explicitly religious, they favor one kind of religion, monotheism . . . over the hundreds of other religions practiced by minorities in our heterogeneous nation.").

31. *Stone*, 449 U.S. at 41. Professor Kuntz wrote,

Although the Kentucky law professed only a 'secular application of the Ten Commandments,' the statements of its proponents arouse suspicions that they were using the posting of the document as part of a religious agenda that would substitute Creationism for Darwinian evolution . . . [forcing] a religious test of professing a Creator God on teachers.

Paul Grimly Kuntz, *The Ten Commandments on Schoolroom Walls? Why Did the Supreme Court Reject the 1978 Kentucky Statute (Stone v. Graham)? Could Such a Law Succeed?*, 9 J.L. & POL'Y 1, 7 (1997). " 'One of the virtues of [having] the framed Ten Commandments posted in schools' . . . is that [because] 'the atheistic doctrine of evolution . . . so contradicts the Ten Commandments teachers would be ill at ease teaching that doctrine with the Commandments on the wall.' " *Id.* (quoting a local minister, Jack Roberts in F. W. Woolsey, *Crusading for the Commandments: Who is Rev. Jack Roberts and Why Is He Fighting So Hard to Return the Ten Commandments to the Walls of Bullit County Classrooms?*, LOUISVILLE COURIER-J., July 3, 1981, at 7) (alterations in original).

32. *Stone*, 449 U.S. at 41-42 (citing *Exodus* 20:12-17; *Deuteronomy* 5:16-21). The latter six commandments are commonly referred to as the "second table." For a recitation of these six commandments, see *infra* note 132.

33. *Id.* at 42 (citing *Exodus* 20:1-11; *Deuteronomy* 5:6-15). The first four Commandments are commonly referred to as the "first table."

34. *Id.* (citing *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 225 (1963)).

35. *Id.*

36. *Id.* It should be noted that while still addressing the legislative intent behind the Kentucky statute at this point, the Court also examines the effect the law will have as an aid in discerning the legislature's intent. See *id.*



desirable in a private context, its creation in a public school setting constitutes an unconstitutional state objective.<sup>37</sup>

In his dissent, Justice Rehnquist argued that the Court regularly accords deference to legislative statements of a statute's purpose in Establishment Clause cases.<sup>38</sup> Here, Rehnquist asserted, the Kentucky legislature determined that the Commandments "have had a significant impact on the development of secular legal codes of the Western World."<sup>39</sup> Justice Rehnquist maintained that the overlap of the statute's secular purpose, demonstrating the role played by the Commandments in the development of Western civilization and law, with "what some may see as a religious objective," is not sufficient to render the statute unconstitutional.<sup>40</sup>

*Stone* speaks specifically to the public school context, but other postings of the Ten Commandments on public property have fared no better. The difficulties associated with public postings are illustrated in *Books v. City of Elkhart*.<sup>41</sup> In denying certiorari, the Court declined to hear an appeal from the city of Elkhart, Indiana, which had been ordered by the United States Court of Appeals for the Seventh Circuit to remove a monument inscribed with the Ten Commandments from the front lawn of its municipal building.<sup>42</sup>

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37. *Id.*

38. *Id.* at 43–44 (Rehnquist, J., dissenting) (citing *Comm. for Pub. Educ. v. Nyquist*, 413 U.S. 756 (1973); *Sloan v. Lemon*, 413 U.S. 825 (1973); *Lemon v. Kurtzman*, 403 U.S. 602 (1971)).

39. *Id.* at 45 (Rehnquist, J., dissenting). "The trial court concluded that evidence submitted substantiated this determination." *Id.* (Rehnquist, J., dissenting). For an article challenging claims that the Commandments played a foundational role in the formation of American law, see Steven K. Green, *The Fount of Everything Just and Right? The Ten Commandments as a Source of American Law*, 24 J.L. & RELIGION 525, 525, 558 (2000).

40. *Stone*, 449 U.S. at 44 (Rehnquist, J., dissenting).

41. 235 F.3d 292 (7th Cir. 2000), *cert. denied*, 532 U.S. 1058 (2001).

42. *City of Elkhart v. Books*, 532 U.S. 1058, 1060 (2001). "The monument had found a home in front of the Elkhart City Hall four decades earlier as a tie-in for a promotional campaign for a movie—Hollywood producer Cecil B. DeMille's biblical extravaganza 'The Ten Commandments.'" Rob Boston, *The Ten Commandments: A Sequel—How a Publicity Stunt by Hollywood Producer Cecil B. DeMille Wound Up at the Supreme Court—And What Happened When It Did*, CHURCH & STATE, July–Aug. 2001, at 9–10. DeMille heard about a project to post copies of the Ten Commandments in juvenile halls begun by a former juvenile court judge and head of the Fraternal Order of Eagles (FOE) and "carefully exploited the situation to ensure maximum publicity for his movie . . ." *Id.* at 10. Yul Brynner, who portrayed Pharaoh in the film, appeared at the unveiling of a Ten Commandments monument in Milwaukee the week of the film's opening. *Id.* Charlton Heston, who played Moses, also made a personal appearance at another ceremony. *Id.* "Ironically, the monument that has sparked so much fuss was until a few years ago covered with weeds and vines. Many town residents didn't even know it was there until a groundskeeper cleaned it off one day in 1998." *Id.* at 9.

While denials of certiorari carry no precedential value, *Books* is of particular interest as it offers a view into the present Court's thinking via the majority and dissenting opinions that accompany it. The majority explicitly endorsed the reasoning of the Court of Appeals as its basis for denial of certiorari.<sup>43</sup> In *Books*, the Seventh Circuit rejected the notion that surrounding the Ten Commandments with other secular symbols negated any message of endorsement, stating that "the placement of the American Eagle gripping the national colors at the top of the monument hardly detracts from the message of endorsement; rather, it specifically links religion . . . and civil government."<sup>44</sup> In his dissent, however, Chief Justice Rehnquist distinguished the situation in *Books*, a monument standing outside a municipal building, from the public school context of *Stone*. He wrote,

*Stone's* finding of an impermissible purpose is hardly controlling here. In *Stone*, the posting effectively induced schoolchildren to meditate upon the Commandments during the school day. We have been "particularly vigilant" in monitoring compliance with the Establishment Clause in that context, where the State exerts "great authority and coercive power" over students through mandatory attendance requirements.<sup>45</sup>

In the Chief Justice's opinion, the monument at issue in *Books* would not produce the same result as a school posting. Therefore, *Stone's* concerns are absent here.<sup>46</sup>

At least two inferences may be drawn from *Books*. First, because at least four votes are required to grant certiorari, the Court's denial may demonstrate that, at most, only three Justices are willing to consider a posting outside the school context, which is, at least to the dissenters, an easier case<sup>47</sup> than *Stone*.<sup>48</sup> Second, the Chief

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43. "The reasons why this case is not one that merits certiorari are explained in detail in Judge Ripple's thoughtful opinion for the Court of Appeals." *Books*, 532 U.S. at 1059.

44. *Books v. City of Elkhart*, 235 F.3d 292, 307 (7th Cir. 2000), *cert. denied*, 532 U.S. 1058 (2001).

45. *Books*, 532 U.S. at 1061 (Rehnquist, C.J., dissenting) (citing *County of Allegheny v. ACLU*, 492 U.S. 573, 620 n.69 (1989); *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987)). Note the blending of purpose and effect in Rehnquist's analysis. See *supra* note 40.

46. *Books*, 532 U.S. at 1061 (Rehnquist, C.J., dissenting).

47. The term "easier" is used only in the sense that, in the opinion of the dissenters, as can be gleaned from the quote from *Books*, a posting of the Ten Commandments outside the school context appears to be less constitutionally problematic than a posting in a public school. See *supra* note 45 and accompanying text.

Justice's statement regarding the Court's "particular vigilance" in the public school context is surprising, given that he authored the dissent in *Stone*. By noting the compulsory nature of student attendance, the Chief Justice has bolstered *Stone*'s result by supplying an additional rationale not explicitly offered in *Stone*'s original opinion. The justification for proscribing postings of the Commandments in schools appears only to increase the likelihood that future postings in the public school context will be held unconstitutional.<sup>49</sup>

In addition to *Books*, two other recent cases, *Indiana Civil Liberties Union v. O'Bannon*<sup>50</sup> in the Seventh Circuit and *ACLU of Kentucky v. McCreary County*<sup>51</sup> in the Eastern District of Kentucky, provide insight into the current state of Establishment Clause jurisprudence in relation to public postings of the Ten Commandments. In each case, the courts found that the displays violated the purpose and effect prongs of *Lemon*.<sup>52</sup> In *O'Bannon*, the Court of Appeals for the Seventh Circuit affirmed a preliminary injunction forbidding the erection of a new monument on the Statehouse grounds engraved with the Ten Commandments alongside secular historical texts.<sup>53</sup> As it did in *Books*, the court asserted that the presence of other historical texts in close proximity to the Commandments constitutes an impermissible endorsement by the

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48. Such a conclusion is necessarily speculative. Given a different context, one or more justices in the majority in *Books* might consider another non-scholastic posting to be constitutional. *But see Books*, 532 U.S. at 1059 (endorsing the reasoning of the Court of Appeals). While it is often asserted that the Ten Commandments may be constitutionally posted as part of a historical display, the endorsed rationale of the Seventh Circuit was that "the placement of the American Eagle gripping the national colors at the top of the monument hardly detracts from the message of endorsement; rather it specifically links religion . . . and civil government." *Books*, 235 F.3d at 307; *cf. ACLU of Kentucky v. McCreary County*, 145 F. Supp. 2d 845, 851 (E.D. Ky. 2001) (stating that a display of the Ten Commandments alongside the Magna Carta, the Declaration of Independence, the Bill of Rights, the Star Spangled Banner, the Mayflower Compact, a picture of Lady Justice, the National Motto "In God We Trust," and the Preamble to the Kentucky Constitution "accentuates the religious nature of the Ten Commandments," imbuing them "with a national significance constituting endorsement").

49. It should be noted, however, that dissents from denial of certiorari have been described as "the purest form of dicta." *Books*, 532 U.S. at 1058 n.1 (Stevens, J., opinion respecting denial of certiorari) (quoting *Singleton v. Comm'r*, 439 U.S. 940, 944-45 (1978)). Nevertheless, future attempts to justify postings almost certainly must confront the issue of the compulsory nature of student attendance.

50. 259 F.3d 766 (7th Cir. 2001).

51. 145 F. Supp. 2d 845 (E.D. Ky. 2001).

52. *See O'Bannon*, 259 F.3d at 772-73; *McCreary County*, 145 F. Supp. 2d at 851-52.

53. *O'Bannon*, 259 F.3d at 768. A previous display, erected in 1958 and containing only the Ten Commandments, had been destroyed by vandals in 1991. *Id.* The previous display had been part of Cecil B. DeMille's promotional campaign. *See Boston, supra* note 42.

state.<sup>54</sup> The court also rejected the display's stated purpose of reminding society of its "core values," stating that "[t]he Commandments are historical, secular core values only to those who adhere to them."<sup>55</sup> The court concluded that "[t]his is all the more true since the version here, as noted, maintains the religion-based commandments."<sup>56</sup> In other words, the observer's reasonable perception is not merely of the state's endorsement of the Commandments' prohibitions on stealing or killing, but of affirmative religious duties, such as keeping the Sabbath holy and worshipping the one God.<sup>57</sup>

In *ACLU of Kentucky v. McCreary County*, the district court extended its preliminary injunction against two counties and one school district to prevent the continued exhibition of a display including the Ten Commandments and other historical documents.<sup>58</sup> Following the reasoning of *Books*, the district court stated, "Given the religious nature of this document, placing it among these patriotic and political documents, with no other religious symbols or moral codes of any kind, imbues it with a national significance constituting endorsement."<sup>59</sup> The perception of the reasonable observer is characterized as "understand[ing] that the counties promote that one religious code as being on a par with our nation's most cherished secular symbols and documents."<sup>60</sup>

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54. "[A]n observer who views the entire monument may reasonably believe that it impermissibly links religion and law since the Bill of Rights and the 1851 Preamble are near the sacred text. This would signal that the state approved of such a link, and was sending a message of endorsement." *O'Bannon*, 259 F.3d at 773 (citing *Books v. City of Elkhart*, 235 F.3d 292, 307 (7th Cir. 2000), *cert. denied*, 532 U.S. 1058 (2001)).

55. *Id.* at 771. As this court previously had decided *Books*, the state appears to have relied on the governor's recitation of the monument's stated purpose as a reminder of our nation's "core values" and to stress that it was only one of many statues and monuments on the statehouse grounds. *Id.* at 771-72.

56. *Id.* at 771.

57. For those who hold religious views contrary to those expressed in the Commandments' first table, this perceived endorsement sends the message that "they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

58. See *ACLU of Kentucky v. McCreary County*, 145 F. Supp. 2d 845, 846 (E.D. Ky. 2001). The original displays contained only the Ten Commandments. *Id.* During the course of the litigation, the displays were amended with the addition of other documents. *Id.* After the amended displays were ruled unconstitutional and an injunction was issued, the displays were further altered to include even more historical documents. *Id.* For a complete list of documents contained in the display, see *id.*

59. *Id.* at 851.

60. *Id.*

This examination of *Stone* and its progeny leads to the following conclusions. First, *Stone* not only remains good law, but its foundations arguably have been strengthened with the additional justification offered in Chief Justice Rehnquist's dissent in *Elkhart v. Books*.<sup>61</sup> Second, the results of recent cases demonstrate that even postings attempted outside the public school context are often ruled unconstitutional.<sup>62</sup> Finally, given the Supreme Court's favorable review of the Seventh Circuit Court of Appeals's reasoning in *Books v. Elkhart*, the perception that a display containing the Ten Commandments can be rendered constitutional simply by surrounding it with a number of historical documents may well be mistaken.<sup>63</sup> In each of these cases, whether the Ten Commandments are posted alone or alongside other historical documents, the postings have been deemed impermissible endorsements.<sup>64</sup>

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61. See *supra* notes 38–45 and accompanying text.

62. See *supra* notes 50–60 and accompanying text. There have been at least two cases outside the public school context where a posting of the Decalogue has survived a legal challenge. See *Suhre v. Haywood County*, 55 F. Supp. 2d 384 (W.D.N.C. 1999). In *Suhre*, an atheist challenged the display of the Ten Commandments and Lady Justice on the courthouse wall of the Haywood County Courthouse. *Id.* at 386. The action was dismissed twice. See *Suhre v. Haywood County*, 1997 U.S. Dist. LEXIS 5013 (W.D.N.C. Mar. 18, 1997) (dismissing case because the plaintiff lacked standing); *Suhre v. Bd. of Comm'rs*, 894 F. Supp. 927 (W.D.N.C. 1995) (dismissing on the grounds of legislative immunity). The Court of Appeals for the Fourth Circuit twice reversed the district court. *Suhre v. Haywood County*, 131 F.3d 1083 (4th Cir. 1997) (finding that the plaintiff had standing and remanding for trial); *Suhre v. Haywood County*, No. 95-2474 (4th Cir. Dec. 28, 1995) (finding that the cause of action was not barred by legislative immunity). The trial court dismissed the third suit as well. *Suhre v. Haywood County*, 55 F. Supp. 2d 384, 384 (W.D.N.C. 1999) (determining that the display did not violate the Establishment Clause). The plaintiff died before an appeal could be filed. In addition, *State v. Freedom From Religion Foundation Inc.*, 898 P.2d 1013 (Colo. 1995) (en banc), was a case before the Colorado Supreme Court in which the plaintiff challenged the constitutionality of a monument bearing an inscription of the Ten Commandments located on public property. *Id.* at 1014. The monument was erected in connection with Cecil B. DeMille's promotional campaign for his film, "The Ten Commandments." *Id.* at 1017; see *supra* note 42. Though the *Books* case is factually similar to *Freedom*, the state supreme court in *Freedom* reached the opposite conclusion from the holding in *Books*. *Freedom*, 898 P.2d at 1014. The Colorado Supreme Court reversed the Colorado Court of Appeals, holding that "the content and context of the monument negate any suggestion that the government is endorsing religion." *Id.* at 1025. *Freedom* may be viewed as representing the earlier, now perhaps abandoned, view that neutralization of a religious document could be accomplished by the inclusion of other historical documents. *Id.* at 1024; see *infra* note 64.

63. See *supra* notes 43–44 and accompanying text.

64. Several cases contain language suggesting that by including other religious documents certain contexts might sufficiently neutralize the perception of endorsement. See, e.g., *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) ("[A] typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content."); *ACLU of Kentucky v. McCreary County*, 145 F. Supp. 2d

## II. THE LEGISLATIVE RESPONSE

In recent years, the United States Congress and state legislatures have pursued two strategies in crafting legislation permitting postings of the Ten Commandments that can survive a legal challenge. The first strategy is to enact a law that simply states that a posting of the Ten Commandments is constitutional. The second is to permit, but not require, postings and provide guidance as to how a Ten Commandments display should be created. Neither strategy has yet been successful.

### A. *Ten Commandments Defense Act*

The first strategy was an amendment to the House of Representatives' 1999 Juvenile Justice Reform Act<sup>65</sup> ("JJRA") designated the Ten Commandments Defense Act<sup>66</sup> ("TCDA"). In the wake of the Columbine school shootings, the House considered the addition of three approaches to reducing youth violence in the JJRA: regulating sex and violence in entertainment; stricter gun control laws; and posting the Ten Commandments in public schools.<sup>67</sup> Gun control measures and restrictions on sex and violence in the media failed to be adopted, but the TCDA passed with bipartisan support.<sup>68</sup> The Senate failed to consider the TCDA, but even if it had been enacted, it likely would not have survived judicial review.

The TCDA declared that the power to post the Ten Commandments is one of the powers reserved to the states by the Tenth Amendment.<sup>69</sup> Section 1202(c) of the Act directs, "The courts

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845, 851 (E.D. Ky. 2001) (noting the display contained no other religious symbols or moral codes). The issue of constitutionally permissible contexts is addressed at length in Part III, *infra*.

65. H.R. 1501, 106th Cong. (1999).

66. *Id.* §§ 1201–02.

67. See Hanna Rosin, *Winning by the Book; Columbine Helps Christian Activists Pass Long-Sought Amendments*, WASH. POST, June 21, 1999, at A3; see also Janet Parshall, *Congress Has the Right to Challenge Court Ruling*, VENTURA COUNTY STAR, July 4, 1999, Lexis, Nexis Library, News Group File (editorial) (on file with the North Carolina Law Review) ("If the Ten Commandments had been hanging in Columbine High School, would two teen-age gunmen have so callously taken the lives of their classmates and ultimately themselves?").

68. See Rosin, *supra* note 67. The reaction to the amendment's adoption ranged from celebration to shock. "After all these school shootings we thought maybe we could get a discussion going, introduce some ideas, but this is tremendous." *Id.* (quoting Janet Parshall, Family Research Council). "This is a unique day in church-state history. Never before in a 24-hour period has there been such a massive attack in the U.S. House of Representatives on so many legislative fronts." *Id.*

69. H.R. 1501, § 1202(a) ("Display of Ten Commandments—The power to display the Ten Commandments on or within property owned or administered by the several States or

constituted, ordained, and established by the Congress shall exercise the judicial power in a manner consistent with the foregoing declarations.”<sup>70</sup> Failing to recognize *Stone*, the Act purports to authorize postings that would plainly run afoul of *Stone*’s concerns. For example, the TCDA makes no distinction between school and non-school settings.<sup>71</sup> The Act also fails to require any consideration of context, size, or prominence, nor does it offer any direction in determining which version or versions of the Decalogue could or should be chosen.<sup>72</sup> Each posting of the Ten Commandments held unconstitutional by the courts, from *Stone* to *Books* to *O’Bannon*, apparently would be authorized under the TCDA.<sup>73</sup> A Supreme Court that wished to maintain current Establishment Clause jurisprudence almost certainly would invalidate the TCDA.<sup>74</sup>

### B. State Statutes

A second strategy, granting “permission” to post the Ten Commandments, has been pursued by more than a dozen states.<sup>75</sup> Legislatures in four of these states—North Carolina, Indiana, North Dakota, and South Dakota—have succeeded in enacting such statutes.<sup>76</sup> While the language of these four statutes varies, each is essentially composed of the same three elements. First, the statutes

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political subdivisions thereof is hereby declared to be among the powers reserved to the States respectively.”). The Tenth Amendment provides, “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X. Even if it were accepted that the power to post the Ten Commandments was a power reserved to the states, the incorporation of the First Amendment via the Due Process Clause of the Fourteenth Amendment still could render a posting under the TCDA unconstitutional. While the power to “establish” a religion may have been reserved to the states prior to incorporation of the First Amendment, this is likely no longer the case. *See* Sch. Dist. of Abington v. Schempp, 374 U.S. 203, 216 (1963) (stating that the Fourteenth Amendment has rendered the states as incompetent as Congress to enact laws establishing religion).

70. H.R. 1501, § 1202(c).

71. The TCDA grants the states the power to create displays “on or within property owned or administered” by the state. *Id.* § 1202(a). Because public school property falls within this definition, *Stone*’s prohibition against school postings represents an obvious difficulty.

72. A detailed discussion of the difficulties inherent in choosing among various versions of the Ten Commandments can be found in Part III, *infra*.

73. *See* § 1202.

74. *But cf.* Joel L. Thollander, Note, *Thou Shalt Not Challenge the Court? The Ten Commandments Defense Act as a Legislative Invitation for Judicial Reconsideration*, 4 N.Y.U. J. LEGIS. & PUB. POL’Y 205, 238 (2000–2001) (arguing that the TCDA presents the Court with the opportunity to reconsider *Stone*, “if only to clarify the Court’s position on public Decalogue displays”).

75. *See supra* notes 3–7 and accompanying text.

76. *See supra* notes 4–5 and accompanying text.

specifically identify the Ten Commandments as an object or document that may be displayed.<sup>77</sup> Second, the statutes designate where the display may occur.<sup>78</sup> Finally, the statutes describe, with varying degrees of specificity, the manner in which the Ten Commandments may be displayed.<sup>79</sup>

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77. See N.C. GEN STAT. § 115C-81(g)(3b) (2001) (“A local school administrative unit may display . . . documents . . . such as . . . the Ten Commandments . . .”); IND. CODE ANN. § 4-20.5-21-2 (Michie Supp. 2002) (“An object containing the words of the Ten Commandments may be displayed . . .”); N.D. CENT. CODE § 15.1-06-17 (Supp. 2001) (“An object or document containing the words of the Ten Commandments may be displayed . . .”); S.D. CODIFIED LAWS § 13-24-17.1 (Michie 2002) (“An object or document containing the words of the Ten Commandments may be displayed . . .”).

78. See N.C. GEN STAT. § 115C-81(g)(3b) (2001) (allowing display “on real property controlled by that local school administrative unit”); IND. CODE ANN. § 4-20.5-21-2 (allowing display “on real property owned by the state”); N.D. CENT. CODE § 15.1-06 (allowing display “in a public school classroom or public school building, or at any public school event”); S.D. CODIFIED LAWS § 13-24-17.1 (allowing display “in any public school classroom, public school building, or at any public school event”).

79. See N.C. GEN STAT. § 115C-81(g)(3b) (2001). The statute designates:

[D]ocuments and objects of historical significance that have formed and influenced the United States legal or governmental system and that exemplify the development of the rule of law . . . . This display may include, but shall not be limited to, documents that contain words associated with a religion; provided however, no display shall seek to establish or promote religion or to persuade any person to embrace a particular religion, denomination of a religion, or other philosophy. The display of a document containing words associated with a religion shall be in the same manner and appearance generally as other documents and objects displayed and shall not be presented or displayed in any fashion that results in calling attention to it apart from the other displayed documents and objects. The display also shall be accompanied by a prominent sign quoting the First Amendment of the United States Constitution as follows: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”

N.D. CENT. CODE § 15.1-06. The statute designates:

[T]ogether with other documents of cultural, legal, or historical significance, which have influenced the legal and government systems of the United States and this state. The display of an object or document containing the words of the Ten Commandments must be in the same manner and appearance generally as other objects and documents displayed and may not be presented or displayed in any fashion that results in calling attention to the object or document apart from the other displayed objects or documents.

IND. CODE ANN. § 4-20.5-21-2. The statute designates:

[A]long with other documents of historical significance that have formed and influenced the United States legal or governmental system. Such display of an object containing the words of the Ten Commandments shall be in the same manner and appearance generally as other documents and objects displayed, and shall not be presented or displayed in any fashion that results in calling attention to it apart from the other displayed documents and objects.

S.D. CODIFIED LAWS § 13-24-17.1. The statute designates:



Three states purport to allow postings specifically in public schools,<sup>80</sup> while Indiana's grant of permission extends to all "real property owned by the state."<sup>81</sup> Of the four statutes, North Carolina's offers the most comprehensive guidance concerning the manner or context in which posting must occur.<sup>82</sup> Therefore, this Comment will employ the North Carolina statute as an exemplar in its analysis of these state statutes' efficaciousness and constitutionality.

While courts attempt to ascertain the actual purpose of a statute when making a determination of constitutionality,<sup>83</sup> it is important in this instance also to examine what legal purpose a state statute permitting posting of the Decalogue has the *capacity* to serve. In other words, it is necessary to conceptually demarcate the legal limits of this type of state action. Under our federalist system of government, the enactments of lone state legislatures are as powerless as acts of Congress to abrogate the rights granted by the First Amendment to the Constitution of the United States.<sup>84</sup> A law promulgated by a state, either allowing or forbidding a particular act, can at most only create or foreclose the possibility that legal action

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[A]long with other objects and documents of cultural, legal, or historical significance that have formed and influenced the legal and governmental systems of the United States and the State of South Dakota. Such display of an object or document containing the words of the Ten Commandments:

(1) Shall be in the same manner and appearance generally as other objects and documents displayed; and

(2) May not be presented or displayed in any fashion that results in calling attention to it apart from the other displayed objects and documents.

80. The states are North Carolina, North Dakota, and South Dakota. *See supra* note 78.

81. *See supra* note 78; IND. CODE ANN. § 4-20.5-21-2. Because the focus of this Comment is public school displays of the Decalogue, it will not specifically address this aspect of the Indiana statute.

82. *See supra* note 79. The North Carolina statute includes all the general requirements of the other three, e.g., "same manner and appearance," prohibition on "calling attention to it apart from the other displayed objects or documents," and placement in context with other "documents and objects of historical significance." N.C. GEN. STAT. § 115C-81(g)(3b) (2001). The statute also adds additional requirements. *See id.*

83. *See Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

84. *See Wallace v. Jaffree*, 472 U.S. 38, 48-49 (1985) (stating that "the proposition that the several states have no greater power to restrain individual freedoms protected by the First Amendment than does the Congress of the United States" is "firmly embedded in our constitutional jurisprudence"). "[W]hen the Constitution was amended to prohibit any State from depriving any person of liberty without due process of law, that Amendment imposed the same substantive limitations on the States' power to legislate that the First Amendment had always imposed on the Congress' power." *Id.* at 49. This is not to say that a state legislature could not *enact* a plainly unconstitutional law, e.g., declare Catholicism the established religion of North Carolina, but rather that such a law would not withstand a constitutional challenge.

may be brought *under the laws of that state*.<sup>85</sup> But given that any plaintiff challenging a posting of the Ten Commandments can (and certainly will) claim that the posting violates the Establishment Clause of the First Amendment rather than any state provision, state statutes purporting to permit postings do nothing more than foreclose a legal option that plaintiffs would be very unlikely to pursue. Therefore, for purposes of precluding a legal challenge, such statutes may be *de facto* legal dead-letters.<sup>86</sup>

Assuming that state lawmakers are aware of this reality, what purpose might such statutes serve?<sup>87</sup> There are three possibilities. First, lawmakers may want to encourage postings of the Ten Commandments, while at the same time avoiding strong evidence of any non-secular intentions that could be used to invalidate any resulting display under *Lemon*'s first prong, which requires a "secular legislative purpose."<sup>88</sup> Such encouragement, however, has its own constitutional problems. For example, the North Carolina statute is effectively an amendment and expansion of an already enacted law describing permissible document postings in public schools.<sup>89</sup> The Supreme Court invalidated a state statute having a similar effect in *Wallace v. Jaffree*.<sup>90</sup>

In *Jaffree*, the Court held that the addition of the words "voluntary prayer" to a law permitting a moment of silence, and therefore already protecting students' rights to silently pray, was intended either to convey state endorsement of religion or "was

85. For example, a state statute that forbids "X" creates the possibility that legal action can be brought *under that state's laws* if "X" occurs. A state statute that permits "X," or declares that "X" is lawful, forecloses the possibility that legal action can be brought *under that state's laws* if "X" occurs. The obvious exception is an instance when the state law arguably violates a provision of the state's own constitution. In that case, a legal claim could be brought under state law, albeit state constitutional law.

86. A similar assertion was made by the legal counsel for the North Carolina School Boards Association:

The issue of religion in the schools is a matter of federal constitutional law, of which the final arbiter is the United States Supreme Court. State law cannot supersede federal constitutional decisions made by the U.S. Supreme Court. Therefore, the new North Carolina statute does not and cannot alter in any way the prohibitions that previously existed.

Memorandum from Allison B. Schafer, Legal Counsel and Director of Policy, to School Board Chairs, Superintendents, and School Board Attorneys (Aug. 29, 2001) (on file with the North Carolina Law Review) [hereinafter Memorandum].

87. See *infra* note 154 and accompanying text.

88. *Lemon*, 403 U.S. at 612 ("First, the statute must have a secular legislative purpose . . .").

89. See N.C. GEN. STAT. § 115C-81(g)(3a) (2001). For a list of documents named in the statute, see *supra* note 79.

90. 472 U.S. 38, 61 (1985).

enacted for no purpose.”<sup>91</sup> As there was no suggestion that the statute was either meaningless or was enacted irrationally, the Court held that the statute violated the purpose prong of the *Lemon* test.<sup>92</sup>

Because the North Carolina statute does not require schools to post the Decalogue, the statute appears to have no legal force. But even though no action is demanded of local schools, adding the Ten Commandments to the previously valid statute may have the practical effect of encouraging school districts to contemplate displays. The imprimatur of the legislative branch lends courage to the hesitant. An inference reasonably can be drawn from the statute that the lawmakers encourage the posting of the Ten Commandments in the classroom. If a court were to find, then, as the ACLU of North Carolina contends, that the legislature’s purpose in passing the law was “to promote the Ten Commandments,”<sup>93</sup> the statute could be ruled a facially unconstitutional attempt to “advance a particular religious belief.”<sup>94</sup> Moreover, through these statutes, the legislature may be communicating to the court its belief that the law should not be construed to prohibit such postings. The lawmakers may be offering an alternative constitutional interpretation in hopes of effectuating a change in the law.<sup>95</sup> Finally, lawmakers may believe there are loopholes in *Stone* and that legitimate postings of the Ten Commandments are possible. Thus, the statutes may be an attempt to correct, in the minds of local school officials, what the legislators view as the mistaken belief that any public school display of the Ten Commandments is unconstitutional.

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91. *Id.* at 59.

92. *Id.* at 64–65.

93. Evidence of this impermissible purpose may not be difficult to find. See Associated Press, *N.C. Lawmaker Forwarded White Supremacist E-mail to Fellow Assembly Members* (Aug. 22, 2001), Lexis, Nexis Library, News Group File, All (on file with the North Carolina Law Review). Representative Don Davis, a member of the North Carolina General Assembly and sponsor of the Ten Commandments legislation, forwarded the following email to every member of the state house and senate. “Two things made this country great: White men & Christianity . . . . Every problem that has arisen [sic] can be directly traced back to our departure from God’s Law and the disenfranchisement of White men.” *Id.* “The author [of the e-mail forwarded by Davis] says the country was founded on the Christian Bible and state laws based on the Ten Commandments, which contributed to the nation’s early success. But now the nation is in decline, it says.” *Id.* Davis responded to reporters, “There’s a lot of it that’s truth, the way I see it . . . . Who came to this country first—the white man, didn’t he? That’s who made this country great.” *Id.*

94. ACLU Memorandum, *supra* note 13, at 1; see Dershowitz, *supra* note 30, at M5 (discussing the Ten Commandments as “favoring one kind of religion, monotheism”).

95. For an argument in support of this reading of such statutes, see *supra* note 77 and accompanying text.

If the statute is not unconstitutional on its face, it may be reasonable to view these state statutes as presenting a description to local school officials of the conditions believed by the lawmakers to be necessary and sufficient for producing a constitutional posting of the Ten Commandments. The statutes then may represent each legislature's alternative constitutional interpretation of the Establishment Clause. The following sections examine the North Carolina statute in light of the pronouncements of *Stone* and its progeny to determine whether the guidance offered by the statute describes a "loophole" in the state of the law.

### 1. The Manner and Appearance Requirement

The North Carolina statute's requirement that the Decalogue be displayed in the same manner and appearance as accompanying documents and in such a way that will not call attention to it<sup>96</sup> appears to serve the purpose of evading certain defects identified by the courts in evaluating previous postings. In *Books*, for example, Justice Stevens stated that the "graphic emphasis" of the first two lines of the monument's text "is hard to square with the proposition that the monument expresses no particular religious preference."<sup>97</sup> Similarly, in *O'Bannon*, the Court of Appeals for the Seventh Circuit objected to the larger size of the lettering in which the Ten Commandments were inscribed, as well as the tablet-shaped format of the monument.<sup>98</sup> The four-sided nature of the display also contributed to an isolation of the Ten Commandments from the other texts from certain perspectives.<sup>99</sup>

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96. See *supra* notes 4, 79.

97. *City of Elkhart v. Books*, 532 U.S. 1058, 1059 (2001). These two lines read: "THE TEN COMMANDMENTS—I AM the LORD thy God" in what Justice Stevens described as "significantly larger font." *Id.*

98. "The limestone blocks are tablet-shaped, so, particularly given its height [seven-foot tall], even from afar the religious nature of the monument is suggested to observers." *Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d 766, 772 (7th Cir. 2001). The monument is a four-sided limestone block. The two wider sides have rounded arcs at the top, "a form typically used in artistic depictions of the stone tablets delivered by Moses upon returning from Mt. Sinai." *Id.* at 768. The Bill of Rights is displayed on one of the wider, tablet-shaped sides. *Id.* at 769.

99. "[A]pproaching from one side, an observer would only see the Ten Commandments, reasonably leading he [sic] or she [sic] to believe that the monument only displayed the sacred text." *Id.* at 773. "A reasonable observer would not necessarily link all three of these texts to society's legal development and history. A reasonable person will think religion, not history." *Id.* But see *id.* at 776 (Coffey, J., dissenting) ("It seems far more reasonable to assume that a person taking the time to gaze upon the beautiful edifice will look at all three sides, and draw conclusions from the whole.").

These examples demonstrate that a display satisfying the manner and appearance requirement of the North Carolina statute should, at the very least, use the same font size for all documents, arrange the documents or objects so that all appear simultaneously in an observer's visual field, and perhaps eschew a tablet-shaped format, either for the entire display or accompanying documents.<sup>100</sup> That is to say, the "loophole" in *Stone*, if it exists, would require these modifications.

## 2. The Accompanying Documents Requirement

The North Carolina statute permits the display of "documents and objects of historical significance that have formed and influenced the United States legal or governmental system and that exemplify the development of the rule of law."<sup>101</sup> The amended subsection

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100. Common sense suggests that complying displays also would avoid prominent placement of the Decalogue at the top or center of the display, or as the first document.

101. N.C. GEN. STAT. § 115C-81(g)(3b) (2001). Courts consistently have recognized the historical significance of the Ten Commandments. "[T]he text of the Ten Commandments has played a role in the secular development of our society and can no doubt be presented by the government as playing such a role in our civic order." *Books v. City of Elkhart*, 235 F.3d 292, 302 (7th Cir. 2000), cert. denied, 532 U.S. 1058 (2001) (noting the frieze above the Chief Justice's chair in the Supreme Court depicting the Ten Commandments). But see *Boston*, supra note 42, at 12 (examining the U.S. Constitution to deny the role of the Ten Commandments as the basis of U.S. law).

The claim that U.S. law is based on the Ten Commandments is usually asserted and accepted as truth without historical evidence. For example, Chief Justice Rehnquist, in his recent *Books* dissent, referred to "the foundational role of the Ten Commandments in secular, legal matters." *Books*, 532 U.S. at 1062 (Rehnquist, C.J., dissenting). But he cited no precedent or scholarly authority for that view.

Steven K. Green has argued that while the position that the Ten Commandments "have served to inform our notions of right and wrong and, as such, have influenced the development of Western law of which the American legal system is a part" is a noncontroversial one, the further claim of a "direct relationship between [American] law and the Ten Commandments" is without support in the historical record. Green, supra note 39, at 558. Green reports, for example, "In Virginia, an attempt to base a system on the Decalogue ended early with the colony quickly resorting to common law." *Id.* at 542 (citing Perry Miller, *Religion and Society in the Early Literature of Virginia*, in PERRY MILLER, *ERRAND INTO THE WILDERNESS* 99-140 (1956)). "The clearest contrast is seen in Rhode Island where its founders, exiles from Winthrop's godly experiment, expressly rejected arguments that the Old Testament should serve as a model for law. Roger Williams . . . repudiated claims that the Mosaic law bound New Testament Christians and turned to English law for authority." *Id.* Green notes:

In his *Letter Concerning Toleration*, a document of influence in America equal to his *Second Treatise of Government*, John Locke rejected the Mosaic concept of law that had been popular among Puritans. The 'law of Moses,' Locke wrote, 'in no way obligates Christians' and as such could not be a part of the law of the commonwealth.

*Id.* at 544. "The influence of Locke and other Enlightenment thinkers on late colonial attitudes toward the law cannot be over stated . . . . As a result, the legal and political

names three such documents: the Magna Carta, the Mecklenburg Declaration, and the Ten Commandments. This subsection also refers to documents specified in subdivision (3a).<sup>102</sup> But as *Books, O'Bannon*, and *McCreary County* indicate, surrounding a religious document with other objects of secular historical significance may only succeed in imbuing it “with a national significance constituting endorsement.”<sup>103</sup> *McCreary County* is particularly of interest here because one of the displays deemed unconstitutional in that case consisted of *practically every document* named or referenced in the North Carolina statute.<sup>104</sup> The “accompanying documents” requirement cannot then be sufficient to achieve a constitutional posting; rather, such a requirement appears under *Books, O'Bannon*, and *McCreary County* to almost ensure a display’s unconstitutionality. Therefore, unless some further requisite of the statute succeeds in negating endorsement in a display that complies with the statute’s conditions, the “accompanying documents” requirement is not one of the conditions necessary to provide the loophole lawmakers seek.<sup>105</sup>

### 3. Additional Requirements

The statute further states that documents containing “words associated with a religion” may be included in the display, but the display may not be limited to only such documents.<sup>106</sup> This requirement suggests that a display consisting only of religious

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documents of the founding era reveal practically no reliance on the Decalogue . . .” *Id.* at 545.

102. § 115C-81(g)(3b). The documents named in (3a) are the preamble to the North Carolina Constitution, the Declaration of Independence, the United States Constitution, the Mayflower Compact, the national motto, the National Anthem, the Pledge of Allegiance, writings, speeches, documents, and proclamations of the founding fathers and presidents, Supreme Court decisions, and acts of Congress, including the published text of the Congressional Record. § 115C-81(g)(3a).

103. *ACLU of Kentucky v. McCreary County*, 145 F. Supp. 2d 845, 851 (E.D. Ky. 2001). For a discussion of *Books, O'Bannon*, and *McCreary County*, see *supra* notes 41–60.

104. Only two documents of national significance referred to by the North Carolina statute were absent from the *McCreary County* display: the Pledge of Allegiance and Supreme Court decisions. Additionally, the *McCreary County* display contained a picture of Lady Justice. For the entire list of documents or objects in the *McCreary County* display, see *supra* note 48. For the list of documents referenced by the North Carolina statute, see *supra* note 102 and accompanying text.

105. This conclusion is an interesting contrast to the discussion of the constitutionality of the frieze located in the Supreme Court. See *infra* Part III.A. The accompanying images in the frieze do not seem to be a significant part of the rationale for the display’s constitutionality.

106. § 115C-81(g)(3b).

documents would not comply with the statute.<sup>107</sup> This requirement also may be read to forbid a type of display deemed impermissible in *McCreary County* where “the defendants had excerpted a small portion of [other documents] to include only that document’s reference to God or the Bible with little or no surrounding text.”<sup>108</sup> If the Decalogue is the sole religious document in the display, however, the risk is that a message of state endorsement, “promot[ing] that one religious code as being on a par with our nation’s most cherished secular symbols and documents,” will be sent.<sup>109</sup>

This concern is addressed by the statute’s next requirement that “no display shall seek to establish or promote religion or to persuade any person to embrace a particular religion, denomination of a religion, or other philosophy.”<sup>110</sup> A close reading reveals that the concern of the statute at this point is *intent*, i.e., “no display shall *seek to establish . . .*”<sup>111</sup> In other words, compliance with the statute must involve motivations other than an intent to establish or promote religion. Left unaddressed, however, is the *effect* of the display. The plain language of the statute seems to indicate that so long as a posting is not the result of impermissible motivations, a display otherwise reflecting the statute’s description will be acceptable, even if the effect is that of endorsement. Such a result would yield an unconstitutional posting, because any successful posting under *Lemon* must not only evidence a permissible intent but also evade any effect that constitutes endorsement.<sup>112</sup>

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107. For instance, the plain language of the statute would seem to forbid a display that consisted only of the Ten Commandments; a display that consisted of the Ten Commandments, selected Psalms, and the Sermon on the Mount; or even a display consisting of the Ten Commandments, the Four Noble Truths of Buddhism, and the Tao Te Ching. *See id.* Of course, some of these documents seem excluded by the “historical significance” requirement also contained in the statute. *See supra* note 79 and accompanying text. Furthermore, the requirement that the display not be limited to only documents containing “words associated with a religion” seems to technically exclude a display consisting of the following documents: the Ten Commandments, the Declaration of Independence, the Preamble to the North Carolina Constitution, and the national motto, because all make reference to “God” or a “Creator,” plainly words “associated with a religion.”

108. *McCreary County*, 145 F. Supp. 2d at 846 n.1 (quoting *ACLU of Kentucky v. McCreary County*, 96 F. Supp. 2d 679, 684 (E.D. Ky. 2000)).

109. *Id.* at 851.

110. § 115C-81(g)(3b).

111. *Id.* (emphasis added).

112. *See Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). In *Lynch v. Donnelly*, 465 U.S. 668 (1984), Justice O’Connor recast the *Lemon* test as an inquiry into whether the government’s action constitutes endorsement or disapproval of religion. “It has never been entirely clear, however, how the three parts of the [*Lemon* test] relate to the principles enshrined in the establishment clause. Focusing on . . . endorsement or

Thus, a public school closely following the North Carolina statute's guidelines likely still would produce an unconstitutional posting.

#### 4. Further Problems

The North Carolina statute also leaves unanswered a serious, if not immediately obvious question—which version of the Decalogue should be chosen? During the 2000 presidential campaign, reporters asked George W. Bush which version of the Ten Commandments he supported for public displays. A Texas newspaper reported the exchange as follows: “Mr. Bush, pausing in search of an answer, replied ‘the standard version.’ After laughs from reporters, he added, ‘Surely we can agree as a society on a version everybody can agree to.’”<sup>113</sup> While the variation between versions of the Decalogue may seem trivial at first glance, the differences actually evidence significant theological disputes.<sup>114</sup>

Professor Lubet notes the differences between the Protestant and Catholic versions of the Decalogue. For Protestants, the second commandment reads, “Thou shalt not make thee *any* graven image . . . ; Thou shalt not bow down thyself unto them, nor serve them.”<sup>115</sup> But this commandment is nowhere to be found in the standard Catholic catechism.<sup>116</sup> This difference is one that has been used as “ammunition in a classic religious assault.”<sup>117</sup> Lubet cites the commandment's use by anti-Catholic writers who have accused the Catholic Church of mutilating the Commandments.<sup>118</sup> Noting the Framers' deep concern over the perils of religious strife, Lubet argues

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disapproval of religion clarifies the *Lemon* test as an analytical device.” *Id.* at 688–89 (O'Connor, J., concurring).

113. Susan Feeney, *Bush Campaign Hits Washington*, DALLAS MORNING NEWS, June 23, 1999, at A23.

114. Steven Lubet, *The Ten Commandments in Alabama*, 15 CONST. COMMENT. 471, 474 (1998).

115. *Deuteronomy* 8:9 (King James). The complete text of verse nine continues, “for I the LORD thy God *am* a jealous God, visiting the iniquity of the fathers upon the children unto the third and fourth *generation* of them that hate me.” *Id.*

116. Lubet, *supra* note 114, at 475. The Catholic version achieves ten commandments by splitting the prohibition “thou shalt not covet” into two separate commandments. *See id.*

117. *Id.* at 476.

118. *Id.* (citing JOSEPH LEWIS, *THE TEN COMMANDMENTS* 26 (1946)). Lubet writes, “It takes almost no effort to locate contemporary websites that repeat and expand upon this anti-Catholic theme.” *Id.* “[O]ne . . . calls upon ‘Papists, . . . if they have any sense of shame’ to cease ‘worshiping God carnally in wood and stone.’” *Id.* (quoting <http://www.smartlink.net/douglas/calvin/bk1ch11.html#seven.htm> (last visited on Oct. 13, 1998)).



that the Establishment Clause's solution is aimed at preventing theological disputes from becoming political ones.<sup>119</sup>

The use of composite<sup>120</sup> or "secularized" versions of the Decalogue has been suggested as an attempt to avoid problems of denominational favoritism or even to create a "secular legislative purpose."<sup>121</sup> Professor Kuntz cites the example of Colonel Nimrod McNair's version of the first table of commandments, which restates them as "I. Show proper respect for authority; II. Have a singleness of purpose; III. Use effective communication in word or deed; and IV. Provide proper rest, recreation, and reflection."<sup>122</sup> Such contemporary interpretations may buttress the argument that the purpose of displaying them is secular, but referring to them as "The Ten Commandments" appears to be a disingenuous attempt to serve two masters.<sup>123</sup>

Secularized versions of the Decalogue also highlight problems of interpretation and meaning.<sup>124</sup> Versions of the Sixth Commandment, or the Fifth for Catholics, differ in whether the prohibition is against "murder" or "killing."<sup>125</sup> Religious authorities state, "the shade of difference between the two . . . is relevant to discussions of war, law

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119. *Id.* at 477. "There cannot, and should not, be any official orthodoxy, enshrining the tenets (or commandments) of one denomination to the derogation of another." *Id.*; see also Dershowitz, *supra* note 30 ("So let the religious wars begin, as Jews and Christians vie for their particular version of the Ten Commandments to be established as the official, state-sponsored account . . .").

120. See *Suhre v. Haywood County*, 55 F. Supp. 2d 384, 391 (W.D.N.C. 1999) (reporting the testimony of an expert witness that the version of the Ten Commandments contained in the challenged display "is not from any known religion").

121. Kuntz, *supra* note 31, at 24–25.

122. *Id.* at 25–26 (citing NIMROD MCNAIR, ABSOLUTE ETHICS: A PROVEN SYSTEM FOR TRUE PROFITABILITY (1987)).

123. For a criticism of arguments in support of characterizing the Ten Commandments as "Americanized" and "inherently secular," see George Will, *Cringing Arguments Defend Religion*, ABILENE REP.-NEWS, Aug. 11, 1998, at <http://www.reporter-news.com> (last visited Oct. 29, 2001) (on file with the North Carolina Law Review) (criticizing characterizations of the Ten Commandments that assert "their prevalence over time has caused them to evolve into a nonreligious, moral framework for a secular society").

124. "There are significant and devout differences in interpretations of the meaning and applications of the Ten Commandments as a representative of religious values: 'no other gods (trinity),' 'graven images (idols),' 'murder (combat, capital punishment)' . . . 'covet (capitalism)' . . ." Jim Huff, *Neutrality Essential*, SATURDAY OKLAHOMAN, Aug. 7, 1999, Lexis, Nexis Library, News Group File (editorial) (last visited Oct. 29, 2001) (on file with the North Carolina Law Review); see also Dershowitz, *supra* note 30 ("Literally read, the Decalogue includes 19 different commands and prohibitions. The Jews begin with 'I am the Lord thy God,' whereas Christians regard that verse as merely a preamble.").

125. See Nick Anderson, *Ten Commandments Proposal Illustrates Peril to Politicians*, L.A. TIMES, July 14, 1999, at A5.

and capital punishment.<sup>126</sup> Controversies over how strictly the prohibitions should be read also abound. Muslim groups recently protested the image of Muhammad depicted in the frieze of the Supreme Court as a violation of the prohibition against “graven images”<sup>127</sup> found in the Second Commandment. The Seventh Commandment’s prohibition against adultery can be read as forbidding re-marriage after divorce.<sup>128</sup> The instruction to honor the Sabbath does not distinguish whether Saturday or Sunday is the appropriate day of rest.<sup>129</sup>

One commentator has wondered “why America, a country with a vast majority of Christian believers, would turn to a core Jewish legal text as an answer . . . ?”<sup>130</sup> Historically, Christians have at times rejected the notion that they were bound by the Mosaic law.<sup>131</sup> Others have argued that “Christianity should have Six commandments, not Ten,” using a passage in Matthew to support their claim.<sup>132</sup>

This brief sampling of theological disputes demonstrates the potential for discord that the choice of one version over another can elicit.<sup>133</sup> As the foregoing discussion has highlighted, the North

126. *Id.* (quoting Robert Franklin, president of the Interdenominational Theological Center in Atlanta). “It is ‘well intentioned but naive’ . . . for politicians ‘to simply insist that we can boil down what is in fact a somewhat complicated text.’” *Id.*

127. See Joan Biskupic, *Lawgivers: From Two Friezes, Great Figures of Legal History Gaze Upon the Supreme Court’s Bench*, WASH. POST, Mar. 11, 1998, at H1.

128. See Mark 11:12 (King James) (“Whoever shall put away his wife and marry another, committeth adultery against her.”).

129. See Ira Rifkin, *Ten Commandments? Which 10? Protestant, Jewish and Catholic-Lutheran Versions Are Very Similar but Do Have Differences*, ORLANDO SENTINEL, June 19, 1999, at A1, available at 1999 WL 2815271.

130. See Gordon, *supra* note 9, at 16.

131. See Green, *supra* note 39, at 542, 544 (citing Roger Williams and John Locke as examples).

132. Gregg Easterbrook, *Hang Six at* [http://www.beliefnet.com/story/11/story\\_1110\\_1.html](http://www.beliefnet.com/story/11/story_1110_1.html) (last visited Oct. 24, 2001) (on file with the North Carolina Law Review). The assertion relies on a passage in Chapter 10 of *Matthew*. A young man asks Jesus how he may obtain entry into heaven. When Jesus answers that he must keep the commandments, the young man asks, “Which [ones]?” Jesus replies, “You shall not murder; you shall not commit adultery; you shall not steal; you shall not bear false witness. Honor your father and mother. Also you shall love your neighbor as yourself.” *Matthew* 17:19 (New Revised Standard). “It turns out that the four commandments Jesus deletes are the ones concurring formal religious practice.” See Easterbrook, *supra*. Easterbrook further argues that the reason Christian denominations overlook this passage is that it seems to say that “denominations are not particularly that important.” *Id.*

133. Anderson, *supra* note 125. Anderson quotes Rep. Jerrold Nadler’s question during floor debate of the TCDA:

Are our public buildings to be Catholic because the local Catholic majority votes that the Catholic version found in the Douay Bible should be in the public

Carolina statute does not appear to provide the loophole in *Stone* that lawmakers may have hoped to achieve. It is interesting to note that this result obtains, even though the North Carolina statute is the most comprehensive of those enacted. The following section of this Comment examines those displays which have been held constitutional in an effort to determine if any posting of the Ten Commandments in public schools can pass constitutional muster.

### III. IN SEARCH OF A CONSTITUTIONAL POSTING

Even though current state statutes fail to describe a constitutional posting of the Ten Commandments in a public school, the courts have permitted certain public displays of the Decalogue.<sup>134</sup> Furthermore, language in *Stone* may intimate circumstances in which a school display could be acceptable.<sup>135</sup> The Court in *McCreary County* identified these circumstances as those in which the Ten Commandments are incorporated into an appropriate school curriculum and those in which the Ten Commandments are part of a legal-historical display.<sup>136</sup> This section addresses the two “permissible uses” discussed in *McCreary County* to determine whether there may be a permissible public school posting of the Ten Commandments under *Stone* and its progeny.

#### A. *The Courtroom Display*

High above the Supreme Court Chief Justice’s chair appear two tablets on which are inscribed the Roman numerals I–X.<sup>137</sup> It is a

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buildings? . . . . Or perhaps they should be Protestant because the local majority decides for the King James version of the Ten Commandments, which is very different from the Catholic version. Or maybe the Jews have a majority in the local district, and they decide the Masoretic text should be in public buildings.”

*Id.*

134. The most notable permitted display is the frieze on the south wall of the Supreme Court. See *infra* note 137 and accompanying text.

135. In describing the context in which the Kentucky postings occurred, the majority writes, “This is not a case in which the Ten Commandments are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like.” *Stone v. Graham*, 449 U.S. 39, 42 (1980) (per curiam) (citing *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203, 225 (1963)).

136. *ACLU of Kentucky v. McCreary County*, 145 F. Supp. 2d 845, 852–53 (E.D. Ky. 2001) (citing *County of Allegheny v. ACLU*, 492 U.S. 573, 652–53 (1989) (Stevens, J., concurring in part, dissenting in part)).

137. “The East wall frieze is located directly above the Bench and focuses on two male figures that represent ‘Majesty of Law’ and ‘Power of Government.’ The tablet between them symbolized the first ten amendments to the Constitution, also known as the Bill of

popular misconception that these tablets, occupying the most prominent and conspicuous position in the room, represent the Ten Commandments.<sup>138</sup> They do not. These tablets, and the smaller ones appearing on the courtroom's iron gates, actually represent the ten amendments that make up the Bill of Rights.<sup>139</sup> Moses, however, is depicted rather inconspicuously, next to Hammurabi and four figures away from Confucius, on the south wall of the Supreme Court. The figures are part of a frieze depicting great lawmakers of history.<sup>140</sup> In the depiction, Moses carries two tablets inscribed in Hebrew.<sup>141</sup>

In answering the question of whether there can be a permissible school posting of the Ten Commandments under *Stone* and its progeny, it may be useful to examine the elements that make the Supreme Court frieze constitutional and may be importable to the public school context. Another way to conceptualize the examination is to inquire why this display does not evidence an endorsement.<sup>142</sup> A

Rights." *Courtroom Friezes: East and West Walls*, Office of the Curator, Supreme Court of the United States (on file with the North Carolina Law Review).

138. See, e.g., John McCaslin, *First Forever*, WASH. TIMES, June 23, 1999, at A9 ("And yes . . . those tablets bearing the Roman numerals one through 10—also emblazoned on every gate ringing the main courtroom—represent the Ten Commandments."); Parshall, *supra* note 67, ("Notwithstanding the ruling in *Stone*, the Ten Commandments are featured on the Supreme Court's bronze doors, and are displayed above the justices' bench."); Will, *supra* note 123 (expressing incredulity at the Curator of the Court's insistence that the tablets symbolize the Bill of Rights).

139. See *supra* note 137; see also Letter from Adolph A. Weinman, sculptor of the Supreme Court friezes, to Cass Gilbert, architect of Supreme Court building (Oct. 31, 1932) (indicating the titles of these friezes as, "East Wall: 'Majesty of the Law and the Power of Government,' showing the figure of Law, resting on the *tablet of the ten amendments to the Constitution known as the Bill of Rights* and Government with the faces, symbol of executive power.") (emphasis added) (on file with the North Carolina Law Review).

140. The figures on the south wall are Menes, Hammurabi, Moses, Solomon, Lycurgus, Solon, Draco, Confucius, Octavian, and the allegorical figures of Fame, Authority, Light of Wisdom, and History. *Courtroom Friezes: North and South Walls*, Office of the Curator, Supreme Court of the United States (on file with the North Carolina Law Review). On the north wall, the frieze depicts Justinian, Muhammad, Charlemagne, King John, Louis IX, Hugo Grotius, Sir William Blackstone, John Marshall, Napoleon, and the allegorical figures of Liberty and Peace, Right of Man, Equity, and Philosophy. *Id.*

141. "Prophet, lawgiver, and judge of the Israelites. Mosaic law is based on the Torah, . . . which includes the Ten Commandments. In the frieze, Moses is depicted holding two tablets representing the Commandments." *Id.*

142. The comments of Justice Stevens in *County of Allegheny v. ACLU* are the Court's single pronouncement on the constitutionality of the frieze:

[A] carving of Moses holding the Ten Commandments, if that is the only adornment on a courtroom wall, conveys an equivocal message, perhaps of respect for Judaism, for religion in general, or for law. The addition of carvings depicting Confucius and Mohammed may honor religion, or particular religions, to an extent that the First Amendment does not tolerate . . . . Placement of secular figures such as Caesar Augustus, William Blackstone, Napoleon

short answer is that in this context, where the Court is heir to the long line of judges and lawgivers represented by the frieze, artistic and symbolic representations of “law” are intuitively appropriate.<sup>143</sup>

The most noticeable detail of this display is the breadth of its inclusion of cultures and figures.<sup>144</sup> Unlike the state statutes examined in the previous section that generally call for the inclusion of one religious document, the Decalogue, and a group of documents drawn mainly from American history,<sup>145</sup> the Supreme Court’s display presents figures associated with many different religious traditions such as Confucius,<sup>146</sup> Muhammad,<sup>147</sup> and varied historical figures such as Menes,<sup>148</sup> Draco,<sup>149</sup> and Napoleon.<sup>150</sup> As the stated purpose of the display is to “portray the development of law,”<sup>151</sup> the choice to represent such a wide array of contributors avoids the perception that

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Bonaparte, and John Marshall alongside these three religious leaders, however, signals respect not for great proselytizers but for great lawgivers. It would be absurd to exclude such a fitting message from a courtroom, as it would to exclude religious paintings by Italian Renaissance masters from a public museum.

County of Allegheny v. ACLU, 492 U.S. 573, 652–53 (1989) (Stevens, J., concurring in part, dissenting in part). For a discussion contrasting the frieze with school displays, see *infra* notes 145–53 and accompanying text.

143. See *supra* note 140.

144. See *supra* note 140.

145. As a non-American document, the Magna Carta is one exception to this statement. See N.C. GEN. STAT. § 115C-81(g)(3a) (2001).

146. “Chinese philosopher whose teachings stressed harmony, learning and virtue. Within 300 years of his death, the Chinese State adopted his teachings as the basis for government.” *Courtroom Friezes: North and South Walls*, *supra* note 140, at 6.

147. “The Prophet of Islam. He is depicted holding the Qur’an. The Qur’an provides the primary source of Islamic Law. Prophet Muhammad’s teachings explain and implement Qur’anic principles.” *Id.* The representation of Muhammad has drawn protests from Muslims. See Julia Duin, *Religious Symbols Grace High Court*, WASH. TIMES, Nov. 13, 1997, at A2, available at 1997 WL 3689284. A coalition of Muslim groups asserted that, because graven images are forbidden by the Islamic faith, the depiction was a form of sacrilege. See Biskupic, *supra* note 127. The Muslim groups asked that Muhammad’s image be sandblasted or otherwise removed. *Id.* In response to the controversy, this explanation was added to tourist materials: “The figure is a well intentioned attempt by the sculptor to honor Muhammad, and it bears no resemblance to Muhammad. Muslims generally have a strong aversion to sculpted or pictured representations of their Prophet.” *Id.*

148. Menes, a king of ancient Egypt, was one of the earliest recorded lawgivers. See *Courtroom Friezes: North and South Walls*, *supra* note 140, at 5.

149. Draco was the first to commit the Athenian laws to a paper form. *Id.* at 6.

150. Napoleon directed and published the recodification of French law generally known as the Code Napoleon or Civil Code. *Id.*

151. See *id.* at 5 (“Faithful to classical sources and drawing from many civilizations, Weinman [the designer and sculptor of the frieze] designed a procession of ‘great lawgivers of history’ to portray the development of law.”).

one religious tradition is being endorsed along “with our nation’s most cherished secular symbols and documents.”<sup>152</sup>

Another important distinction between the frieze and the school displays authorized by the North Carolina statute may be the manner in which the Ten Commandments are represented. The partially visible tablets are inscribed with Hebrew letters, making them, for English speakers at least, allusive rather than expressive of any actual text. This purely symbolic form avoids the difficulty of choosing between versions of the Decalogue discussed in Part II.<sup>153</sup>

How does this relate to a possible school posting? What if a school imported an exact replica of the Supreme Court display, so that the upper four walls of a classroom were ringed with the identical friezes? Would this be constitutional?

*Lemon*’s two hurdles must be cleared to achieve a constitutional posting. First, the act of creating this display could not be motivated by an impermissible intent,<sup>154</sup> i.e., this could not be an attempt to promote religion in a display of the Ten Commandments. A secular, educational purpose would be required.<sup>155</sup> The most likely permissible purpose would be to portray the development of law similarly to the design of the frieze.<sup>156</sup> Second, the display of the frieze must not result in the perception of endorsement. This is where the potential problem lies. Schoolrooms are not courtrooms. The reasonable observer whose perception is the object of our inquiry is not an adult, but a child. More importantly, this child is not an infrequent visitor, but a minor required by law to report to the classroom on a daily basis for a number of years. The question that perhaps should be asked is one that might be best answered by a psychologist or social scientist,<sup>157</sup> and it is this—what does the educational experience predispose a child to think of objects that teachers choose to hang on the wall? Do students take this act as a sign of approval, disapproval, or neutrality?

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152. *ACLU of Kentucky v. McCreary County*, 145 F. Supp. 2d 845, 851 (E.D. Ky. 2001).

153. See *supra* notes 113–32 and accompanying text.

154. See *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

155. See *id.*

156. See Weinman, *supra* note 139.

157. I argue in the next section that the Court in *Stone* has given its own answer to this empirical inquiry. See *infra* notes 158–70 and accompanying text.

B. *Stone and the Curriculum Integration Exception*

As stated in *Stone* and *McCreary*, the use of the Ten Commandments in public schools is permissible when integrated into an appropriate school curriculum.<sup>158</sup> When presented objectively as part of a secular program of education, study of the Bible for its literary and historic qualities may be effected in a manner consistent with the First Amendment.<sup>159</sup> Several courts have applied the *Lemon* test to invalidate instances of Bible study in public school classrooms, however.<sup>160</sup> Therefore, even though the Ten Commandments may be used, if the purpose or effect is endorsement, the practice can be invalidated. When making a determination of the constitutionality of teaching the Bible in public schools under *Lemon*, a court may use a comprehensive list of factors including: (1) whether supervision and control of the course is under the exclusive direction of the school board; (2) whether hiring and firing of the staff teaching the course is conducted in the same manner as it is with all other teachers; (3) whether the teachers are state certified; (4) whether inquiry was made into the teacher's religious beliefs; (5) whether the school board selects teaching materials; (6) whether the course is offered as an elective; (7) whether the school board received contributions from private organizations for the courses; and (8) whether the course is

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158. *Stone v. Graham*, 449 U.S. 39, 42 (1980) (per curiam); *ACLU of Kentucky v. McCreary County*, 145 F. Supp. 2d 845, 852 (E.D. Ky. 2001).

159. *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203, 225 (1963) (stating that the Bible may be studied objectively as part of a secular program of education). The Court did not find the statutes at issue to be constitutional but mentioned school study of the Bible as a disclaimer. *Id.*

160. See *Hall v. Bd. of Sch. Comm'rs of Conecuh County*, 656 F.2d 999, 1002-03 (5th Cir. 1981) (prohibiting teaching of Bible course as literature because primary effect was advancement of religion); *Herdahl v. Pontotoc County Sch. Dist.*, 933 F. Supp. 582, 596 (N.D. Miss. 1996) (prohibiting the teaching of a Bible course that taught the Bible as a "history textbook" because it "is inherently religious instruction, rather than objective, secular education, since much of the Bible is not capable of historic verification and can only be accepted as a matter of faith"); *Doe v. Human*, 725 F. Supp. 1499, 1501-02 (W.D. Ark. 1989), *permanent injunction granted*, 725 F. Supp. 1503, 1508 (W.D. Ark. 1989) (prohibiting teaching of Bible classes taught in school building during school hours when the primary purpose of the instruction may not have been to advance religion but the advancement of religion was its primary effect), *aff'd*, 923 F.2d 857 (8th Cir. 1990), *cert. denied*, 499 U.S. 922 (1991); *Wiley v. Franklin*, 468 F. Supp. 133, 151 (E.D. Tenn. 1979) (prohibiting teaching of Bible classes because primary purpose of classes was religious in nature); *Vaughn v. Reed*, 313 F. Supp. 431, 434 (W.D. Va. 1970) (pre-*Lemon* case prohibiting teaching of Bible class by private teachers in public schools because such instruction impermissibly suggests that the state is aiding religion).

taught in an objective manner with no attempt to indoctrinate children as to the truth or falsity of the Bible.<sup>161</sup>

Assuming that the Ten Commandments are integrated into a permissible study of the Bible, or into a history, comparative religion, or world civilization class, does *Stone* allow the document to be posted on school walls? Almost certainly, the answer is still *no*. Looking at the language from *McCreary County*, the court is very careful to employ the word “use.”<sup>162</sup> Nowhere does the court say “post” or “display.” The reason *McCreary County* is so careful in its choice of words may be the sentence that follows *Stone*’s famous pronouncement about curriculum integration.<sup>163</sup> The language is unqualified. “Posting of religious texts on the wall serves no such educational function.”<sup>164</sup> Had the sentence begun “This posting,” the Court’s words could be understood to refer specifically to the Kentucky display before it. In that case, it would seem the option is left open for other situations where an educational function might be served. But because “posting” is not modified in this way, the implication of the statement’s plain language is that the act of posting religious documents on walls *inherently* serves a non-educational function.<sup>165</sup> According to *Stone*, “[i]f the posted copies of the Ten Commandments are to have any effect at all, it will be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments.”<sup>166</sup> Arguably, the Court’s statement declares that the educational experience is such that when religious texts are posted on the walls, a child naturally will take this act as a sign of endorsement or approval, a signal of the document’s value in the eyes of the one effecting the posting, if by no other reason than the choice

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161. See *Crockett v. Sorenson*, 568 F. Supp. 1422, 1431 (W.D. Va. 1983) (citing *Vaughn v. Reed*, 313 F. Supp. 431, 433–34 (W.D. Va. 1970)). For examples of the application of these factors, see *supra* note 160.

162. *McCreary County*, 145 F. Supp. 2d at 852–53 (“The Supreme Court has recognized two constitutionally permissible uses of the Ten Commandments within the public arena. The first is where “the Ten Commandments are integrated into the school curriculum . . . .”) (emphasis added). The second is when they are part of a legal-historical display. See *supra* note 136 and accompanying text.

163. *Stone v. Graham*, 449 U.S. 39, 42 (1980) (per curiam).

164. *Id.*

165. Consider this situation, however: A comparative religions teacher displays a copy of the Protestant Ten Commandments alongside a copy of the Catholic Ten Commandments as part of a classroom exercise to identify their differences. Given the context, a court might find that this is an acceptable instance of curriculum integration. See *supra* note 163 and accompanying text.

166. *Stone*, 449 U.S. at 42. If a posting has the effect Justice Stevens describes, then the result goes beyond an impermissible endorsement of a particular religion and has progressed into promotion.



to display.<sup>167</sup> The Court concludes, “[h]owever desirable this might be as a matter of private devotion, it is not a permissible state objective under the Establishment Clause.”<sup>168</sup>

What remains then is to give meaning to the Court’s term “use.” The Decalogue may not be posted on the walls, but certainly “use” means it may be discussed or included in course materials, textbooks, or even handouts. These uses are common ways that educational functions are accomplished.<sup>169</sup> In sum, if this analysis of *Stone’s* unqualified pronouncement is correct, then there is no loophole. There is no set of conditions necessary and sufficient, that, when met, yield a constitutional posting within the public school context.<sup>170</sup>

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167. This should not be surprising given the common classroom practice of posting exemplary work or noteworthy events. The child whose finger painting is taped to the refrigerator is taught immediately, “This is of value, and what is of value gets displayed.”

168. *Stone*, 449 U.S. at 42.

169. The rejoinder to this observation is almost certainly, “Yes, but putting things on the wall is also a common way of accomplishing educational purposes. Every chemistry classroom has the Table of the Elements displayed, and every geography class is replete with Mercator projections.” A response is that these objects are merely descriptive instruments, while the Ten Commandments is a normative document. A Mercator projection does not call upon us to obey it, but rather to use it. But a better response takes account of the expressive quality of certain speech acts. When a message is paired with an action, whether spoken words are involved or not, e.g., wearing an armband in protest, it has moved into the realm of symbolic speech, or “speech plus.” In this field, the form that the expression takes is essential to the message. Using the facts of *Cohen v. California*, 403 U.S. 15 (1971), Professor Arnold Loewy provides a telling example. In this case, Cohen wears a jacket on which he has written “Fuck the Draft.” *Id.* at 16. Loewy asks, “Couldn’t Cohen have communicated exactly the same message if he had written ‘The draft is bad’ or ‘I don’t like the draft’ or ‘Down with the Draft’ on his jacket?” The answer is that Cohen’s act is not simply about communicating information, but rather about conveying his emotional response to the draft to those who view his message. E-mail from Arnold Loewy, Professor of Law, University of North Carolina School of Law, to Robert Hensley, student, University of North Carolina School of Law (Aug. 27, 2002) (on file with the North Carolina Law Review). Likewise, posting the Ten Commandments is also symbolic speech. The effect of posting a religious document is often the elicitation of a response, veneration, or meditation, according to Justice Stevens, that is not present when the same material is presented in a textbook or through a classroom discussion. See *Stone*, 449 U.S. at 42. Descriptive instruments like the Periodic Table or Mercator projections have no emotive content that can be enhanced or diminished by their form of presentation.

170. The conclusion of the legal counsel for the North Carolina School Boards Association is much the same. “As clearly indicated by the case law discussed above, any school system that sets out to find a ‘constitutional way’ to post the Ten Commandments and attempts to hide this purpose by adding historical documents is very unlikely to prevail.” Memorandum, *supra* note 86, at 7.

## CONCLUSION

In the four states with statutes currently permitting the display of the Ten Commandments, local school boards already are being asked to post the document. So far, in North Carolina at least, the proposals generally have been viewed with great skepticism.<sup>171</sup> This result may be attributed to a widely disseminated memorandum from the North Carolina School Boards Association (“NCSBA”).<sup>172</sup> This cautionary document included a summary of relevant case law and concluded as follows:

We are not aware of any reported case in the country in which the posting of the Ten Commandments in a public school has been found to be permissible under the Constitution. Please tread very carefully as you consider this issue . . . . Lawsuits are very expensive and can divert considerable attention away from instructional issues. Additionally, if you intentionally and knowingly participate in a violation of clearly established law you could risk losing your qualified immunity from personal liability and your insurance coverage.<sup>173</sup>

As this Comment has argued, the guidance offered by the current statutes will not yield a constitutional posting. Even North Carolina’s statute, the most comprehensive of any enacted, fails to address the concerns of *Books* and *O’Bannon* with regard to

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171. See Jones, *Commandments Issue*, *supra* note 2 (stating that “members of the Brunswick County Board of Education aren’t sure they want to be the first district to test a new state law”); Deuce Niven, *Commandments Proposal Tabled by School Board*, FAYETTEVILLE OBSERVER, Sept. 11, 2001, at A1 (“Board members tabled a request from William Hannah and his son . . . to post the Ten Commandments in the county schools.”), available at <http://www.fayettevilleobserver.com> (last visited Sept. 12, 2001) (on file with the North Carolina Law Review); Neil Offen, *Posting Religious Rules Studied: Although the State Legislature Says It’s Possible, Is It Legal*, CHAPEL HILL HERALD, Nov. 21, 2001, at 1 (quoting board member Susan Halkiotis, “Since when have we been thinking about doing this?”).

172. See Memorandum, *supra* note 86, at 1 (“[T]he Executive Director of the North Carolina Branch of the ACLU has told us that three major law firms in the state have already volunteered to bring such a case against any school system that posts the Ten Commandments pursuant to this legislation.”). Enclosed with the document that was sent to school board chairs, superintendents, and school board attorneys was a memorandum from the ACLU of North Carolina explaining the Union’s position in the matter. See ACLU Memorandum, *supra* note 13. Citing language from *McCreary County*, the ACLU memorandum stated, “Placing historic documents around the Ten Commandments will not make these religious tenets any less religious or their posting more constitutionally permissible.” *Id.* at 1. As to the North Carolina statute, the document states, “We believe this law provides both incorrect and incomplete information on the posting of the Ten Commandments in the public schools.” *Id.* at 1.

173. Memorandum, *supra* note 86, at 8.

accompanying documents, and also fails to give any guidance in choosing one version of the Ten Commandments over another.<sup>174</sup> For school districts that believe that “if the governor signed it, it must be lawful,” the potential consequences are devastating. The cost of a lawsuit is not merely financial.<sup>175</sup> For public schools, who arguably deliver the most important service provided by state government, the costs will be time, energy, and human resources not directed toward education. Even if the analysis of this Comment and the opinions of legal counsel for the NCSBA and the ACLU of North Carolina are mistaken,<sup>176</sup> any loophole in the law is necessarily small and cannot conceivably permit the ubiquitous, permanent postings lawmakers apparently desire. School boards that gamble with their schoolchildren’s resources on an unlikely possibility are recklessly disregarding the clear statements of the courts as well as their duty to the children with whom they have been entrusted.

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174. See *supra* notes 113–32 and accompanying text.

175. Costs should not be underestimated. See Niven, *supra* note 171, at A1 (quoting school board attorney Bill Phipps, “Don’t get me wrong, I wouldn’t mind making an extra \$150,000 to \$200,000 in legal fees this year. That’s about what it would take to fight this.”).

176. The Attorney General’s Office arguably may be added to this list, with its concession that individual school districts’ application of the law is vulnerable to challenge. See Dyer, *supra* note 1.