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COMMENTS

STONE v. GRAHAM: A FRAGILE DEFENSE OF INDIVIDUAL RELIGIOUS AUTONOMY

"The day that this country ceases to be free for irreligion it will cease to be free for religion—except for the sect that can win political power."[1]

INTRODUCTION

No earthly institution is more vital or central to the human condition than is religion. Religion serves as the vehicle by which man formulates moral and theological guidelines that are used to govern and interpret daily human existence. Because of this pivotal role religion has played in the development of civilization, history abounds with examples of men and women zealously fighting to secure and preserve their own religious autonomy.

Nowhere has this struggle for religious freedom been more fundamental to social evolution than in the United States.[2] Because Americans are, as Justice Douglas wrote, "a religious people whose institutions presuppose a Supreme Being,"[3] they have been particularly vigilant in their search for religious individuality and equality. Perhaps in agreement with the sentiment later expressed in Nietzsche's maxim, "[c]onvictions are more dangerous enemies of truth than lies,"[4] the framers of the Constitution sought to insure religious autonomy through the broad dictates of the first amendment,[5] a provision premised on the assumption that certain

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[1] Zorach v. Clauson, 343 U.S. 306, 325 (1951) (Jackson, J., dissenting).

[2] *See* S. AHLSTROM, A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE (1972); C. BEARD, RISE OF AMERICAN CIVILIZATION (1930); W. SWEET, THE STORY OF RELIGION IN AMERICA (1930).

[3] Zorach v. Clauson, 343 U.S. 306, 313 (1951).

[4] W. KAUFMANN, THE PORTABLE NIETZSCHE 63 (2d ed. 1968).

[5] "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I, cl. 1.

provinces of human speculation should be afforded immunity from the shifting tides of political fortune. Justice Jackson's assertion with regard to the Bill of Rights is particularly applicable to the religion clauses of the first amendment: "The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them as legal principles to be applied by the courts."[6]

Americans have been especially cautious to prevent any form of religious hegemony to enter the classrooms of the public schools. As noted by the Supreme Court, "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools,"[7] and a strong feeling exists that the public schools, as provinces of the educational training of children, should forever be free from sectarian influence.[8] Because of this philosophy, American courts have shown little hesitation in striking down laws deemed to contravene the religious autonomy of public school students.

The United States Supreme Court recently ventured once again into this sensitive area of jurisprudence with its decision in *Stone v. Graham.*[9] In *Stone,* a closely divided Court[10] issued an opinion reversing a ruling by the Kentucky Supreme Court concerning the constitutionality of Kentucky Revised Statutes (KRS) section 158.178. Referred to here as the Ten Commandments Act, this statute required that a copy of the Ten Commandments be placed by the state government in all elementary and secondary school classrooms in Kentucky.[11]

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[6] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

[7] Shelton v. Tucker, 364 U.S. 479, 487 (1960).

[8] W.O. DOUGLAS, THE BIBLE AND THE SCHOOLS 58 (1966).

[9] 49 U.S.L.W. 3369 (U.S. Nov. 18, 1980).

[10] Although the Court split five votes to four, Chief Justice Burger and Justice Blackmun dissented solely on the ground that the case should be given plenary consideration. *Id.* at 3370.

[11] The text of the statute reads as follows:

> (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

By way of rather perfunctory opinions,[12] the members of the equally-divided Kentucky Supreme Court upheld the statute, finding that the law contravened neither the state nor the federal constitution.[13] The United States Supreme Court disagreed, however, ruling that the motivation for the law was religious rather than secular in nature and thus violated the first amendment.[14]

This comment contends that the United States Supreme Court, while reaching a correct result in *Stone,* artlessly and imcompletely applied the traditional constitutional test established by the Court for application in establishment clause cases. Furthermore, the scope of the decision reflects an insensitivity to the present uncertain state of American political and judicial evolution. Prior to the *Stone* decision, one commentator said the Ten Commandments Act was so blatantly unconstitutional as to deserve only cursory attention;[15] however, the legal issues involving the interaction of government and religion in the public schools cannot be so summarily dismissed. Rather, a searching examination of the traditional analytical structure devised and applied by the Supreme Court in establishment clause cases is called for. Such a rigorous inquiry is not manifested in the *Stone* decision, and, therefore, this comment will attempt a more exhaustive examination of establishment clause law as applied to the facts in *Stone* and

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> 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."
>
> (3) The copies required by this section shall be purchased with funds made available through voluntary contributions made to the state treasurer for the purpose of this section.

KY. REV. STAT. § 158.178 (1978) [hereinafter cited as KRS].

[12] The opinions are remindful of Justice Harlan's observation in an earlier establishment clause case:

> I think it deplorable that this case should have come to us with such an opaque opinion by the State's highest court. With all respect that court's handling of the case savors of a studied effort to avoid coming to grips with this anachronistic statute and to "pass the buck" to this Court.

Epperson v. Arkansas, 393 U.S. 97, 114-15 (1968) (Harlan, J., concurring).

[13] 599 S.W.2d 157 (Ky. 1980).

[14] Stone v. Graham, 49 U.S.L.W. 3369 (U.S. Nov. 18, 1980).

[15] Comment, *Separation of Church and State: Education and Religion in Kentucky,* 6 N. KY. L. REV. 125, 151 (1979).

will suggest an alternative analysis more consistent with prior Supreme Court rulings.

I. SUPREME COURT EXPLICATION OF THE ESTABLISHMENT CLAUSE

In order to receive judicial sanction, a statute such as the Ten Commandments Act must withstand scrutiny under the establishment clause[16] of the first amendment.[17] The United States Supreme Court, in wrestling with a number of cases involving religion and government interaction over the past forty years, has devised a test to be used in establishment clause cases, a test that reflects the Court's quest for preservation of religious autonomy.

This test has developed in a piecemeal fashion.[18] The starting point and background for Supreme Court pronouncements on the establishment clause is *Everson v. Board of Education*,[19] decided in 1947. Despite upholding the use of public funds for transportation of parochial school students,[20]

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[16] In analyzing the case history of religion in the public schools, this comment does not focus on the free exercise clause of the first amendment as this is the approach the Supreme Court has taken, despite the suggestion of several commentators that the Court should view the religion clauses as a unit. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 813-23 (1978); Fink, *The Establishment Clause According to the Supreme Court: The Mysterious Eclipse of Free Exercise Values*, 27 CATH. U. L. REV. 207, 212 (1978); Pfeffer, *Freedom and/or Separation: The Constitutional Dilemma of the First Amendment*, 64 MINN. L. REV. 561, 564 (1980). *Contra*, Katz, *Freedom of Religion and State Neutrality*, 20 U. CHI. L. REV. 426 (1953); Kauper, *Church and State: Cooperative Separation*, 60 MICH. L. REV. 1, 7-18 (1961). This controversy is beyond the scope of this comment, and the focus here will be on the establishment clause only. It should be noted, however, that the Court's concern with free exercise values has played an important role in the development of the current establishment clause test. See note 25 *infra* and the accompanying text for a discussion of the influence of free exercise values.

[17] A number of cases clearly establish that the first amendment is applicable to the states through the fourteenth amendment. Abington School District v. Schempp, 374 U.S. 203, 215-17 (1963); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Cantwell v. Connecticut, 310 U.S. 296 (1940).

[18] *See* Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part II*, 81 HARV. L. REV. 513, 529-90 (1968); Pevar, *Public Schools Must Stop Having Christmas Assemblies*, 24 ST. LOUIS U. L.J. 327, 339-44 (1980); Comment, *Educational Vouchers: Addressing the Establishment Clause Issue*, 11 PAC. L.J. 1061, 1069-71 (1980).

[19] 330 U.S. 1 (1947).

[20] *Id.* at 17.

Justice Black's majority opinion enunciated a strict separation or "no aid" standard[21] reminiscent of Jefferson's proverbial "wall of separation between Church and State."[22]

This no-aid standard proved to be short-lived, however, and subsequent Court decisions reflected a retreat from the rigid philosophy of *Everson.*[23] A strict separation theory became unrealistic in a complex, modern society where extensive government actions and intrusions are the norm.[24] Furthermore, the inflexible requirement of *Everson* failed to encompass the freedom from governmentally-imposed burdens envisioned by the free exercise clause.[25] Thus, the wall of separation constructed by Justice Black in *Everson* became a "blurred, indistinct and variable barrier,"[26] and the Court proceeded to construct a standard that would take into account the necessary accommodation between religious institu-

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[21] Mr. Justice Black pronounced in dicta the following statement, which has become the most influential assertion in establishment clause cases:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa.* In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."

Id. at 15-16.

[22] A. KOCH & W. PEDEN, THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 332 (1944).

[23] The holding in *Everson* itself was not logically consistent with Justice Black's no-aid standard. *See* Everson v. Board of Educ., 330 U.S. 1, 19 (1947) (Jackson, J., dissenting).

[24] Giannella, *supra* note 18, at 514-15; Gianella, *Lemon and Tilton: The Bitter and the Sweet of Church-State Entanglement,* 1971 SUP. CT. REV. 147, 151.

[25] The Court noted this factor in Walz v. Tax Comm'n, 397 U.S. 664, (1970): *"Adherence to the policy of neutrality that derives from an accommodation of the Establishment and Free Exercise Clauses* has prevented the kind of involvement that would tip the balance toward government control of churches or governmental restraint on religious practice." *Id.* at 669-70 (emphasis added).

[26] Lemon v. Kurtzman, 403 U.S. 602, 614 (1971).

tions and the state.

This notion of accommodation arose first from the interaction of two decisions that soon followed *Everson*. In *McCollum v. Board of Education*,[27] the Court struck down a program whereby school officials released children from classes for religious instruction within the school buildings.[28] Relying upon the use of school property as the dispositive distinction in *McCollum*, the Court's decision in *Zorach v. Clauson*[29] upheld a similar program where the children received the religious instruction off school property.[30] The *Zorach* majority opinion asserted that it was not impermissible for the schools to "*accommodate* their schedules for a program of *outside* religious instruction."[31]

This recognition of a zone of permissible accommodation resulted in the enunciation of what has come to be the prevailing philosophical posture of the Court in establishment clause adjudication, a philosophy that can be characterized best as judicial "neutrality."[32] The Court first effectuated this nebulous concept of neutrality in *Abington School District v. Schempp*.[33] Striking down the practice of prayer and biblical devotional exercises in public classrooms,[34] the Court sought to crystalize the philosophy of neutrality by means of a bifurcated test that required a law to have both a secular purpose and a primary effect that neither advances nor inhibits religion.[35]

Walz v. Tax Commissioner,[36] a 1970 decision, expanded

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[27] 333 U.S. 203 (1948).

[28] *Id.* at 212.

[29] 343 U.S. 306 (1952).

[30] *Id.* at 315.

[31] *Id.* (emphasis added).

[32] Throughout the establishment clause cases, the Court has declared allegiance to this philosophy of neutrality. *See* Roemer v. Board of Pub. Works, 426 U.S. 736, 747 (1976); Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 788 (1973); Abington School Dist. v. Schempp, 374 U.S. 203, 222 (1963). However, as Justice Harlan noted, "[N]eutrality is . . . a coat of many colors." Board of Educ. v. Allen, 392 U.S. 236, 249 (1968) (Harlan J., concurring). Many variations of this neutrality concept are available. *See* TRIBE, *supra* note 16, at 820-21; Gianella, *supra* note 18, at 513-22.

[33] 374 U.S. 203 (1963).

[34] *Id.* at 224.

[35] *Id.* at 222.

[36] 397 U.S. 664 (1970).

the scope of the *Schempp* test. Upholding state tax exemptions for church property,[37] Chief Justice Burger's majority opinion sought to further clarify the Court's conception of neutrality and the need for church-state accommodation in establishment clause cases.[38] The opinion formulated an additional criterion, forbidding excessive entanglement between church and state.[39]

The standards set forth in *Schempp* and *Walz* were fused in *Lemon v. Kurtzman*[40] in 1971 to form the tripartite test used by the Court in establishment clause cases to this day. Declaring a state law allowing the purchase of services from church-related elementary and secondary schools to be unconstitutional,[41] Chief Justice Burger's majority opinion set forth the criteria that have been used in all subsequent cases involving church-state interaction in education:[42] "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive entanglement with religion."[43]

Though a number of lower courts have used the *Lemon* test in cases of religious activities in public schools or other public areas,[44] the Court, until *Stone*, had been presented

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[37] *Id.* at 675.

[38] See note 25 *supra* and accompanying text for a discussion of this concern on the part of the Court.

[39] 397 U.S. at 674.

[40] 403 U.S. 602 (1971).

[41] *Id.* at 625.

[42] *See* Committee for Pub. Educ. v. Regan, 444 U.S. 948 (1980); Wolman v. Walter, 433 U.S. 229 (1977); Roemer v. Board of Pub. Works, 426 U.S. 736 (1976); Meek v. Pittenger, 421 U.S. 349 (1975); Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973); Hunt v. McNair, 413 U.S. 734 (1973); Levitt v. Committee for Pub. Educ., 413 U.S. 472 (1973).

[43] Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) [hereinafter referred to as the *Lemon* test].

[44] *See, e.g.,* Meltzer v. Board of Pub. Instruction, 548 F.2d 559, 576-77 (5th Cir. 1977), *rev'd in part on other grounds,* 577 F.2d 311 (5th Cir. 1978) (en banc), *cert. denied,* 439 U.S. 1089 (1979) (involved distribution of Bibles in public schools); Ring v. Grand Forks Pub. School Dist. No. 1, 483 F. Supp. 272 (D.N.D. 1980) (involved use of the Ten Commandments in public schools); Gilfillan v. City of Philadelphia, 480 F. Supp. 1161 (E.D. Pa. 1979) (involved use of public funds in construction of platform for papal visit); Chess v. Widmar, 480 F. Supp. 907 (W.D. Mo. 1979) (involved use of university buildings for religious meetings). *But see* Anderson v. Salt Lake City

only with cases involving public aid to sectarian schools as forums for application of the tripartite test.[45] In light of this background, the use of the *Lemon* test in the *Stone* decision represents a significant feature of the ruling and symbolizes the Court's continued allegiance to the establishment clause analysis that has evolved over the past four decades. Thus, recognizing that the *Lemon* test criteria should be viewed "only as guidelines with which to identify instances in which the objectives of the establishment clause have been impaired,"[46] this comment will examine the use of this test in *Stone* and will offer an alternative analysis of the issues presented by that case.

II. SECULAR LEGISLATIVE PURPOSE

Dating from the landmark decision of *McCulloch v. Maryland*,[47] the Supreme Court has had the difficult task of ascertaining legislative motives. In *McCulloch*, Chief Justice Marshall asserted that the Court would be forced to overturn a legislative action "should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government."[48] Subsequently the job of reading the minds of legislators has become one of the more frequent and demanding of the Court's duties.[49]

Corp., 475 F.2d 29 (10th Cir. 1973) *cert. denied*, 414 U.S. 87 (1973) (involved monolith on city property with inscriptions including the Ten Commandments); Kent v. Comm'r of Educ., 402 N.E.2d 1340 (Mass. 1980) (involved period of prayer in public schools).

[45] It should be noted that the Court has on occasion strongly indicated that the *Lemon* test should be utilized in *all* establishment clause cases. *See* Meek v. Pittinger, 421 U.S. 349, 358 (1975); Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 772 (1973).

[46] Meek v. Pittinger, 421 U.S. 349, 359 (1975). It should be noted here that although the *Lemon* test has been adopted by a majority of the Supreme Court, not all current justices agree upon its effectiveness. See Committee for Pub. Educ. v. Regan, 444 U.S. 948, 955-56 (1980) (Stevens, J., dissenting); Roemer v. Maryland Pub. Works Bd. 426 U.S 736, 767-70 (1976) (White, J., concurring). For one commentator's analysis of how the different members of the Court construe the establisment clause in cases of public aid to parochial education, see W. PETERSON, THY LIBERTY IN LAW 157 (1978).

[47] 17 U.S. (4 Wheat.) 316 (1819).

[48] *Id.* at 423.

[49] For extensive discussion of the scope and legitimacy of this Court function, see

As noted earlier, this inquiry into legislative motivations became part of establishment clause adjudication by means of the test formulated by the Court in *Schempp*.[50] Of the three criteria in the *Lemon* test, however, the requirement of a secular legislative purpose has been the least important tool for finding a statute unconstitutional.[51] Rarely has this requirement been determinative of establishment clause claims,[52] and the most succinct characterization of the Court's actions in this area perhaps came from the New Jersey Supreme Court when it declared that "[f]or an enactment to pass the test of having a secular purpose, little more is required than a reasonable legislative statement announcing a colorable secular design."[53]

Given this background, the most remarkable facet of the *Stone* decision is the Court's sole reliance upon this prong of the *Lemon* test in striking down the Ten Commandments Act.

Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive,* 1971 SUP. CT. REV. 95; Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970).

[50] See text accompanying note 35 *supra* for recognition of the secular purpose test in *Schempp.*

[51] For explanations of the basic reasons for this development, see TRIBE, *supra* note 16, at 835; Note, *Establishment Clause Analysis of Legislative and Administrative Aid to Religion,* 74 COLUM. L. REV. 1175, 1178-81 (1974).

[52] Abington School Dist. v. Schempp, 374 U.S. 203 (1963) and Epperson v. Arkansas, 393 U.S. 97 (1968) are the only cases prior to *Stone* that were decided upon the grounds of the secular purpose test. Labeled as defunct by some commentators (see Note, *supra* note 51, at 1200), the weakness of the secular purpose test and its perceived relationship to the primary effect test was perhaps best phrased by one writer in this manner:

> The purpose test really represents the furthest limit of the effect test, and the ultimate question remains whether the aid produces an effect which advances or inhibits religion, a result which obviously violates neutrality. The unstated premise of the purpose test is that aid which lacks a secular purpose inevitably produces a religious effect. The presence of a single primary secular goal removes a scheme of aid from this pure case and ushers it past the first element of the Supreme Court's test regardless of any sectarian purposes which also might be present.

Comment, *A Workable Definition of the Establishment Clause: Allen v. Morton Raises New Questions,* 62 GEO. L.J. 1461, 1464-65 (1974).

[53] Resnick v. East Brunswick Township Bd. of Educ., 389 A.2d 944, 954 (N.J. 1978). This sentiment has been expressed by the Supreme Court on a number of occasions. *See* Wolman v. Walter, 433 U.S. 229, 236 (1977); Lemon v. Kurtzman, 403 U.S. 602, 613 (1971).

Concluding that "the posting of the Ten Commandments in public schoolrooms has *no* secular legislative purpose,"[54] the majority of the Court dismissed the avowed secular legislative purpose as mere contrivance.[55] Justice Rehnquist, in his dissent in *Stone,* correctly noted that the "Court's summary rejection of a secular purpose articulated by the legislature and confirmed by the state court is without precedent in establishment clause jurisprudence."[56]

The majority in *Stone* rationalized this circumvention of the articulated purpose of the Kentucky legislature primarily by use of the *Schempp* decision. As the Court correctly noted, the school district involved in *Schempp* argued that the mandated religious exercises reflected secular motivations, such as the promotion of moral and ethical values.[57] A fundamental difference is evident, however, between the *Schempp* and *Stone* fact patterns in that the statute in *Schempp* manifested no secular purpose on its face,[58] whereas the Ten Commandments Act expressly stated a secular purpose.[59] This difference goes further than the mere timing of the articulation of the secular purpose, however, and merits a more exhaustive inquiry into legislative intent than the Court afforded the Ten Commandments Act in *Stone.*[60]

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[54] Stone v. Graham, 49 U.S.L.W. 3369, 3369 (U.S. Nov. 18, 1980) (emphasis added).

[55] *Id.* See note 11 *supra* for the text of KRS § 158.178(2), which contains the purpose of the statute.

[56] Stone v. Graham, 49 U.S.L.W. 3369, 3370 (U.S. Nov. 18, 1980) (Rehnquist, J., dissenting).

[57] *Id.* at 3369.

[58] Furthermore, some justices in *Schempp* and in *Epperson,* the other establishment clause case decided under the secular purpose test, felt that a secular purpose was arguably present even though none was contained on the face of the statute itself. *See* Epperson v. Arkansas, 393 U.S. 97, 113 (1968) (Black, J., concurring); Abington School District v. Schempp, 374 U.S. 203, 224 (1963).

[59] See note 11 *supra* for the text of the statute. Particular attention is directed toward KRS § 158.178(2).

[60] In response to Justice Rehnquist's recitation of such cases as *Nyquist* and *Lemon,* wherein the court had deferred to legislative assertions of secular purpose, the majority in *Stone* distinguished these cases as having a clear secular purpose since they involved government aid to parochial schools. Stone v. Graham, 49 U.S.L.W. 3369, 3370 n.5 (U.S. Nov. 18, 1980). Such a distinction is extremely fragile. While such a difference may be probative of legislative intent where no purpose is expressed, such full reliance on the distinction in the face of a formulated secular

Several factors seriously militate against reliance upon the secular purpose test in *Stone*. One factor is the enormous proof problems which inhere in such an inquiry. As the Court has noted: "inquiries into congressional motives or purposes are a hazardous matter,"[61] and any decision resting solely upon such a difficult examination will thereby be weakened in terms of clarity and forcefulness.[62] Though such practical complexities obviously should not serve as an impenetrable barrier in such a vital area as establishment clause jurisprudence, the insight of one commentator on this matter is instructive and sound: "Where a court can support a judgment invalidating a decision on grounds other than unconstitutional motivation, it usually should do so."[63]

An additional problem in *Stone* surfaces with regard to the Court's discussion of the religiousness of the Decalogue. After justifying its action by the use of *Schempp*, the Court reinforces its position by asserting the essentially religious character of the Ten Commandments.[64] Such an analysis has two serious flaws. First, the nature of a legislative action should not be viewed as determinative of the motivation behind such an action. While an inquiry into the nature of the Decalogue could perhaps be probative of legislative purpose, especially if no purpose has been formulated, such an inquiry should not be viewed as dispositive of the purpose issue where the statute's drafters expressed a contrary intent. Second, the Decalogue arguably possesses secular ramifications, a fact seemingly ignored by the Court. While it is true that the Decalogue is a sacred text, it is equally undeniable that "the Ten Commandments have had a significant impact on the develop-

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motivation is unconvincing.

[61] United States v. O'Brien, 391 U.S. 367, 383 (1968). For a perceptive and exhaustive discussion of the difficulties inherent in legislative motivation inquiries, see Brest, *supra* note 49, at 116-30; Ely, *supra* note 49, at 1212-17.

[62] This is especially true in a situation such as that in *Stone*, in which the Court did not give the case plenary consideration. As Justice Rehnquist observed, the Court's conclusions were supported only by "its own ipse dixit." Stone v. Graham, 49 U.S.L.W. 3369, 3370 (U.S. Nov. 18, 1980) (Rehnquist, J., dissenting).

[63] Brest, *supra* note 49, at 134.

[64] Stone v. Graham, 49 U.S.L.W. 3369, 3369 (U.S. Nov. 18, 1980).

ment of secular legal codes of the western world,"[65] and evidence to that effect was presented to the trial court.[66] As will be noted later, the principal status of the Decalogue in American society is a religious one,[67] but the reality of its secular impact lends weight to the argument that the expressed motivation of the Kentucky legislature actually was the reason for passage of the Ten Commandments Act.[68]

A final, prudential consideration that argues against the course of action pursued in the *Stone* decision is the preservation of political capital. The *Stone* ruling comes at a point in American history when the political climate has created the very real potential for dangerous future assaults upon the religious autonomy protected by the establishment clause.[69] Given such a political atmosphere, the Court should render decisions involving religion with clarity and forceful, logical analysis rather than with superficial conclusions supported by "its own ipse dixit."[70] By taking the former course of action,

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[65] *Id.* at 3370 (Rehnquist, J., dissenting).

[66] Brief of Amicus Curiae Kentucky Heritage Foundation at 11, 599 S.W.2d 157 (Ky. 1980). A number of commentators have expounded upon the interrelationship between the Decalogue and Western legal evolution. *See* Edles, *Biblical Parallels in American Law,* 84 CASE & COMMENT No. 1 at 10, 11 (1979); Radin, *Solving Problems by Statute,* 14 ORE. L. REV. 90 (1934).

[67] See notes 73-84 *infra* and accompanying text for a discussion of the religious nature of the Decalogue and its perception as essentially a religious symbol.

[68] The Court's cavalier rejection of any secular purpose behind the Ten Commandments Act is also puzzling in light of the Court's refusal to review another establishment clause case just prior to *Stone.* In Florey v. Sioux Falls School Dist., 464 F. Supp. 911 (D.S.D. 1979), *aff'd,* 619 F.2d 1311 (8th Cir. 1980), *cert. denied,* 49 U.S.L.W. 3351 (U.S. Nov. 11, 1980), both the trial court and the Court of Appeals for the Eighth Circuit upheld the use in the public schools of religious symbols and activities in observance of religious holidays. The court ruled that these observances were sufficiently integrated into the school curriculum and accepted the regulation's avowed secular purpose of enriching the educational experience of the students.

The Supreme Court's refusal to grant certiorari in *Florey* seems inconsistent with its analysis in *Stone.* While it can be persuasively argued that the activities in *Florey* were of a different nature and served a more secular function than the use of the Decalogue in *Stone,* it is inconsistent to argue that the purpose behind the regulations in *Florey* is clearly secular while at the same time implying that the avowed purpose in *Stone* is only an inept contrivance.

[69] See notes 122-25 *infra* and accompanying text for a discussion of this political situation.

[70] Stone v. Graham, 49 U.S.L.W. 3369, 3370 (U.S. Nov. 18, 1980) (Rehnquist, J., dissenting).

the Court could enhance its public stature, conserving political capital for difficult decisions that may lie ahead. Unfortunately, this avenue was not taken in the *Stone* ruling. While its decision may have reached a proper result, the Court's frontal attack upon the veracity of Kentucky's legislators will not endear the justices to the legislators or to the public.

The factors discussed in the above analysis lead to the conclusion that the Supreme Court's use of the secular purpose test in *Stone* constitutes a serious weakness in that decision. The Court's unsupported declaration that no secular purpose existed seems an unnecessary and injudicious disregard of legislative authority, and the categorical denial of the secular impact of the Decalogue appears unsound and superficial. The Court's method resulted in an opinion lacking the breadth and persuasiveness needed at this stage in the jurisprudence of religion. This result could have been avoided by reliance upon the broader and firmer legal grounds of the balance of the *Lemon* test.

III. PRIMARY EFFECT WHICH NEITHER ADVANCES NOR INHIBITS RELIGION[71]

The primary effect standard first articulated in *Schempp* has proven extremely damaging to laws suspect as violations of the establishment clause. In its effort to preserve the long-cherished goal of state neutrality in matters of religion,[72] the Supreme Court has been vigilant in its implementation of this aspect of the *Lemon* test. Reliance upon the primary effect test would have provided the Court in *Stone* with a much

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[71] Since the primary effect and entanglement standards of the *Lemon* test were devised from a search for neutrality springing from the recognized need for accommodation in this area (see notes 18-43 *supra* and accompanying text for a sketch of this development), there is extensive interaction and overlap between these two criteria. Thus, judicial opinions in this area are not totally consistent in that various considerations may from time to time be used under the rubric of both these standards. For this reason, the analysis of *Stone* under the primary effect and entanglement theories found in this comment should be viewed only as a proposed model adaptable to this particular fact pattern rather than a universal analysis used throughout establishment clause adjudication.

[72] See notes 27-32 *supra* and accompanying text for a discussion of this neutrality doctrine and its origins.

more flexible and suitable analytical framework through which to examine the Ten Commandments Act than that provided by use of the secular purpose standard. Analysis of *Stone* under this prong of the tripartite test will focus on three issues: (1) the religious nature of the Ten Commandments, (2) the integration of the Decalogue into the school curriculum, and (3) the Court's functional definition of the term "primary effect."

A. *Religious Nature of the Ten Commandments*

In order to recognize instances of state actions advancing religion, it is essential at the outset to construct an interpretation of the word "religion." The initial attempt by the Supreme Court to craft such a definition for first amendment purposes came in *Davis v. Beason,*[73] where the following standard was articulated:

> The term "religion" has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will. . . . The first amendment to the Constitution . . . was intended to allow every one under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience. . . .[74]

The Court subsequently expanded this definition in a number of decisions, many of which focused on free exercise claims,[75] but the conventional concept of religion as expounded in *Davis* has remained a focal point in establishment clause cases.[76]

Given this definition of religion, it can hardly be denied that the Decalogue is inherently a religious document. Al-

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[73] 133 U.S. 333 (1890).

[74] *Id.* at 342.

[75] *See* Welsh v. United States, 398 U.S. 333 (1970); United States v. Seeger, 380 U.S. 163 (1965); Torasco v. Watkins, 367 U.S. 488 (1961); United States v. Ballard, 322 U.S. 78 (1944).

[76] Even the commentators who argue for a more expansive definition of religion for free exercise clause purposes still support the *Davis* standard in establishment clause situations. *See* TRIBE, *supra* note 16, at 826-33; Note, *Toward a Constitutional Definition of Religion,* 91 HARV. L. REV. 1056, 1087 (1978).

though the Ten Commandments do have secular ramifications that could provide the motivation for enactment of a law such as the Ten Commandments Act,[77] the religiousness of the Decalogue cannot be ignored or underestimated when examining its effect on American society. Several distinguished theologians and commentators have expounded upon the religious significance of the Ten Commandments,[78] and the divine edicts found in the first part of the Decalogue fall squarely within the area of the relations of man "to his Maker" set forth in *Davis*.[79] Many children undoubtedly first came into contact with the Decalogue in the context of organized religious instruction outside the schoolroom, and it would be absurd not to expect that the child's awareness of the Ten Commandments in that religious environment would strongly influence the child's perception in a public classroom as well.

Perhaps even more crucial is the public perception of the Decalogue. The effect of any such document will be determined primarily by the manner in which the public perceives it, and recognition of this public perception by the Court in *Stone* would have been much more persuasive than was its clumsy attempt to find a non-secular purpose based on its characterization of the Decalogue as a purely religious object. This public perception of the Decalogue as a religious symbol was noted by the Court of Appeals for the Tenth Circuit in *Anderson v. Salt Lake City Corp.*[80] *Anderson* involved the constitutionality of the erection of a granite monolith upon

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[77] See notes 65-66 *supra* and accompanying text for a discussion of the secular ramifications of the Decalogue.

[78] *E.g.*, KUNG, ON BEING A CHRISTIAN (1974).

[79] The first three commandments read as follows:

> Thou shalt have no other gods before me. Thou shalt not make unto thee any graven image, or any likeness of any thing that is in heaven above, or that is in the earth beneath, or that is in the water under the earth: Thou shalt not bow down thyself to them, nor serve them: for I the Lord thy God am a jealous God, visiting the iniquity of the fathers upon the children onto the third and fourth generation of them that hate me; And shewing mercy unto thousands of them that love me, and keep my commandments. Thou shalt not take the name of the Lord thy God in vain; for the Lord will not hold him guiltless that taketh his name in vain. Remember the sabbath day, to keep it holy. *Exodus* 20:3-8.

[80] 475 F.2d 29 (10th Cir. 1973).

which the Ten Commandments were inscribed, along with other religious and non-religious symbols. The court allowed the monolith to remain, finding the Ten Commandments to involve both secular and religious connotations and further finding that the use of the Decalogue on the monolith was primarily for historical purposes.[81] In the process of its decision, however, the court observed "that a large portion of our population believes they [the Ten Commandments] are Bible based."[82]

This perception of the Decalogue as an essentially religious document is further underscored by the furor that arose over the decision as to which version of the Decalogue should be placed in Kentucky classrooms pursuant to the Ten Commandments Act. In determining that the primary effect of Bible readings in public classrooms was a religious one, the Court in *Schempp* pointed to the use of alternative versions of the Bible in concluding that the Scriptures were predominantly religious in nature.[83] *Stone* presented an analogous situation. As pointed out by a dissenting justice on the Kentucky Supreme Court, when a committee of religious leaders met to decide upon the official version of the Decalogue to be placed in the classrooms, so much dissension and disagreement resulted that the group failed to fulfill its purpose.[84] This failure highlights the perception of the Decalogue as a religious symbol of the highest order.

B. Curriculum Integration of the Ten Commandments

Throughout its early pronouncements forbidding the practice of various religious exercises in the public classrooms, the Supreme Court took great pains to indicate that its decisions did not mandate complete banishment of any mention of the Bible or religion in the schools. As long as religious matters were integrated into the curriculum in an objective, neutral and educational manner, the Court observed, such

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[81] *Id.* at 34.
[82] *Id.* at 33.
[83] Abington School Dist. v. Schempp, 374 U.S. 203, 224 (1963).
[84] Stone v. Graham, 599 S.W.2d 157, 160 (Ky. 1980) (Lukowsky, J., dissenting).

practices would be both acceptable and desirable. Justice Clark's majority opinion in *Schempp* clearly evinces this sentiment:

> In addition, it might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment.[85]

Although the Court has not further refined the idea of curriculum integration, this concept has become a major battleground in establishment clause litigation.[86] This issue requires a more rigorous analysis than that found in the earlier cases involving religious activities in public schools, and the recent increase in the use of this curriculum integration concept in establishment clause litigation indicates the likelihood that the Court will have more to say on the issue in the near future. Given these developments, it is unfortunate that the *Stone* decision did not give closer attention to this concept.[87] Unlike prayer and daily Bible readings, the arguably secular ramifications of the Decalogue and its relatively neutral placement in the classroom provide a fact pattern that represents an action closer to curriculum integration than is found in any other of the Court's establishment clause decisions. Thus, *Stone* would have provided a convenient occasion for further refinement of the doctrine.

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[85] Abington School Dist. v. Schempp, 374 U.S. 203, 225 (1963).

[86] For two recent examples of this development, see Wiley v. Franklin, 474 F. Supp. 529 (E.D. Tenn. 1979); Florey v. Sioux Falls School Dist., 464 F. Supp. 911 (D.S.D. 1979), *aff'd*, 619 F.2d 1311 (8th Cir. 1980), *cert. denied*, 49 U.S.L.W. 3351 (U.S. Nov. 11, 1980).

[87] In *Stone*, the opinion of the Court briefly mentions that this was not a case where the requisite curriculum integration existed. Stone v. Graham, 49 U.S.L.W. 3369, 3369 (U.S. Nov. 18, 1980). This cursory assertion, however, does not present the more extensive explication that would have been desirable, and such incomplete analysis by the Court in an opinion relying upon the secular purpose test bespeaks the general incoherence of the opinion.

Had the Court more closely examined the curriculum integration issue, it probably would have found that the Ten Commandments Act provided for insufficient integration. The actual opinion of the Court, however, only tersely expressed this conclusion.[88] Most students would probably pay little attention to the "small print" assertion of the secular application of the Decalogue.[89] In order to overcome the public perception of the Decalogue as a purely religious document,[90] the posting of the Decalogue would have to be accompanied by a verbal, instructive explication of its secular impact. As the Court noted in *Stone*, the mere posting of the Ten Commandments would have the effect only of inducing "the school children to read, meditate upon, perhaps to venerate and obey, the Commandments. However desirable this might be as a matter of private devotion, it is not a permissible state objective under the Establishment Clause."[91]

C. *The Court's Functional Definition of the Term "Primary Effect"*

Due to the complexity of the issues often presented in establishment clause cases, the laws involved often have multiple effects. As noted earlier,[92] despite its predominantly religious nature, the Decalogue arguably may produce secular effects as well. Thus, it is imperative that the meaning of "primary effect" be clearly identified.

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[88] 49 U.S.L.W. 3369, 3369 (U.S. Nov. 18, 1980).

[89] See note 11 *supra* for the text of KRS § 158.178(2), which required that a statement of the "secular application of the Ten Commandments" be included on each posted copy of the Decalogue.

[90] See notes 80-84 *supra* and accompanying text for a discussion of the Decalogue as a religious creed.

[91] Stone v. Graham, 49 U.S.L.W. 3369, 3369 (U.S. Nov. 18, 1980). The role that this concept of curriculum integration can play in a case like *Stone* was intimated by Ring v. Grand Forks Pub. School Dist. No. 1, 483 F. Supp. 272 (D.N.D. 1980). Faced with a fact pattern nearly identical to that in *Stone* (the chief difference was that no secular legislative purpose was expressed on the face of the North Dakota Statute), the Court in *Ring* ruled that the avowed secular purpose was not being realized by the posting of the Ten Commandments "without explanation, instruction or *program* related to the document." *Id.* at 274 (emphasis added).

[92] See notes 65-66 *supra* and accompanying text for a discussion of the secular ramifications of the Decalogue.

After a series of varying interpretations,[93] the Court in *Committee for Public Education v. Nyquist*[94] established the current explication of "primary effect." In noting that a law may have multiple effects, the Court concluded: "Our cases simply do not support the notion that a law found to have a 'primary' effect to promote some legitimate end under the State's police power is immune from further examination to ascertain whether it also has the direct and immediate effect of advancing religion."[95] As one commentator noted, this pronouncement has the expansive effect of requiring that any religious effect be remote or incidental in nature.[96]

Application of this *Nyquist* standard in *Stone* would have been devastating to the Ten Commandments Act, leading inexorably to the conclusion that the statute created the impermissible primary effect of advancing religion. The Decalogue, while producing some degree of secular effects, most certainly transmits religious effects that are anything but remote or incidental.

The primary effect test would have provided the *Stone* court with a coherent and persuasive judicial instrument with which to strike down the Ten Commandments Act. Prior Court pronouncements concerning the definition of the term "religion" and the proper use of religious objects in the classroom, coupled with the Court's *Nyquist* explication of the term "primary effect," lead to the conclusion that the statute has an impermissible primary effect of advancing religion. Application of this primary effect standard in *Stone* would have produced a more thorough and appropriate discussion of the meaning of the term religion, and the Court also could have more fully delineated the concept of curriculum integration, an increasingly important facet of establishment clause adjudication. Such action by the Court could have resulted in a vigorous and forceful opinion reinforcing religious neutrality in the public schools, thereby averting reliance on the secular

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[93] *See* Tilton v. Richardson, 403 U.S. 672 (1971); Board of Educ. v. Allen, 392 U.S. 236 (1968); Abington School Dist. v. Schempp, 374 U.S. 203 (1963).

[94] 413 U.S. 756 (1973).

[95] *Id.* at 783 n.39 (1973).

[96] TRIBE, *supra* note 16, at 840.

purpose test and avoiding the resulting muddled analysis.

IV. EXCESSIVE GOVERNMENTAL ENTANGLEMENT WITH RELIGION[97]

In implementing the *Lemon* test, Chief Justice Burger found exploration of three factors useful in discussing the entanglement prong of the tripartite analysis: "the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority."[98] Though specifically developed in the context of public aid to parochial schools, these criteria can be adjusted somewhat to provide a functional analytical structure through which application of the entanglement test may proceed, an application that could have provided a convenient forum in *Stone* for a discussion of some of the more fundamental aspects of establishment clause jurisprudence.

A. *Character and Purposes of the Benefited Institutions*

Perhaps the most important consideration in the minds of the Supreme Court justices in cases involving religion and education has been the character and purpose of the public school. The Court has never tolerated "laws that cast a pall of orthodoxy over the classroom,"[99] and throughout its establishment clause adjudications the Court has frequently remarked upon the dangerous impressionability of youth.[100] This judicial concern and its importance in litigation such as *Stone* was perhaps best expressed by Professor Tribe:

> Nothing could be more expressive of our society's commitment to a particular religious practice than our willingness to use, as a forum for that religion, the facilities through which basic norms are transmitted to our young. It is thus

[97] See note 71 *supra* for a discussion of the interaction and overlap between the primary effect and excessive entanglement theories.

[98] Lemon v. Kurtzman, 403 U.S. 602, 615 (1971).

[99] Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967).

[100] *See* Roemer v. Board of Pub. Works, 426 U.S. 736, 752 (1976); Tilton v. Richardson, 403 U.S. 672, 684 (1971); Lemon v. Kurtzman, 403 U.S. 602, 610 (1971); Abington School Dist. v. Schempp, 374 U.S. 203, 307 (1963) (Goldberg, J., concurring).

> unsurprising that no major religious activity, however "voluntary," has been allowed to take place in the facilities through which we inculcate values for the future.[101]

These considerations obviously should weigh heavily in any evaluation of a statute such as the Ten Commandments Act. That a religious symbol such as the Decalogue is placed in the environment of our public schoolrooms automatically raises suspicions of excessive entanglement between government and religion,[102] and a firm acknowledgement of this in *Stone* would have acutely underscored the Court's continued vigilance in deterring any manifestation of indoctrination in the province of public education.

B. *Nature of the Aid Provided by the State*

The nature of state assistance to religious activities in the schools is of vital importance in determining both the primary effect of the activity and any resulting entanglement between government and religion. The Kentucky General Assembly sought to circumvent the excessive entanglement problem by requiring that the displayed copies of the Decalogue be purchased by voluntarily contributed funds.[103] The legislators failed to recognize, however, that pure monetary assistance is not the only form of governmental aid to religion proscribed by the establishment clause. That non-monetary state assistance is also prohibited is evident from examination of early Court decisions involving the accomodation theory—decisions that served as the catalyst for the eventual neutrality-oriented

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[101] TRIBE, *supra* note 16, at 825.

[102] This special judicial concern for the public schools may have been an important factor in the decisions reached in a long line of rulings upholding the use of religious symbols in *public areas. Cf.* Allen v. Morton, 495 F.2d 65 (D.C. Cir. 1973) (nativity scene in federal park adjacent to White House); Anderson v. Salt Lake City Corp., 475 F.2d 29 (10th Cir. 1973) (monument inscribed with Ten Commandments on courthouse grounds); Paul v. Dade County, 202 So. 2d 833 (Dist. Ct. App. Fla. 1967), *cert. denied,* 207 So. 2d 690 (Fla. 1967), *cert. denied,* 390 U.S. 1041 (1968) (light in shape of Latin cross on courthouse during Christmas season); Meyer v. Oklahoma City, 496 P.2d 789 (Okla. 1972), *cert. denied,* 409 U.S. 980 (1972) (large Latin cross maintained on public property through tax revenues).

[103] See note 11 *supra* for the text of KRS § 158.178(3), the private financing provision of the Ten Commandments Act.

Lemon test.[104]

As noted earlier, the Supreme Court distinguished *Zorach* from its predecessor, *McCollum,* primarily by noting the differing degrees of involvement between the schools and the religious instruction in question.[105] Though Justice Douglas acknowledged that the state could to some degree accommodate religious activities, his majority opinion in *Zorach* made it clear that certain forms of state aid to religion were impermissible. He declared the assistance in *McCollum* too excessive because "the classrooms were used for religious instruction and the force of the public schools was used to promote that instruction."[106] This statement suggests that the area of proscribed aid encompasses far more than the mere monetary support contemplated by the Kentucky legislators; indeed, the use of tax-supported physical structures themselves and their administrative apparatus likewise appears to be prohibited.[107]

Inextricably coupled with this idea of governmental aid by use of physical facilities is a more metaphysical, abstract conception of assistance—the power and authority of the pub-

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[104] See notes 18-43 *supra* and accompanying text for a treatment of the development of the *Lemon* test.

[105] See notes 27-31 *supra* and accompanying text for a discussion of the *McCollum* and *Zorach* decisions.

Two commentators have noted that the differing nature of the political environments at the time of these decisons may account for the different rulings. *See* L. PFEFFER, GOD, CAESAR, AND THE CONSTITUTION 191 (1975); T. WARSHAW, RELIGION, EDUCATION AND THE SUPREME COURT 32 (1979). However, after receiving Supreme Court reaffirmation as recently as Meek v. Pittinger, 421 U.S. 349, 359 (1975), the *Zorach* rationale remains operative.

Furthermore, a great number of lower court decisions have relied on the *McCollum-Zorach* reasoning in cases involving released-time programs or use of school buildings for religious meetings. *See* Chess v. Widmar, 480 F. Supp. 907 (W.D. Mo. 1979); Lanner v. Wimmer, 463 F. Supp. 867 (D. Utah 1978); Johnson v. Huntington Beach Union High School Dist., 137 Cal. Rptr. 43 (Ct. App.) *cert. denied,* 434 U.S. 877 (1977); Trietley v. Board of Educ., 409 N.Y.S.2d 912 (App. Div. 1978).

[106] Zorach v. Clauson, 343 U.S. 306, 315 (1952).

[107] This concern with the use of the machinery of the public schools to advance religion was an important factor in a series of cases striking down the distribution of Bibles in the schools. *See* Meltzer v. Board of Pub. Instruction, 548 F.2d 559 (5th Cir. 1977), *rev'd in part on other grounds,* 577 F.2d 311 (5th Cir. 1978) (en banc), *cert. denied,* 439 U.S. 1089 (1979); Goodwin v. Cross County School Dist., 394 F. Supp. 417 (E.D. Ark. 1973); Brown v. Orange County Bd. of Pub. Instruction, 128 So. 2d 181 (Fla. App. 1960), *aff'd,* 155 So. 2d 371 (Fla. 1963); Tudor v. Board of Educ., 100 A.2d 857 (N.J. 1953), *cert. denied,* 348 U.S. 816 (1954).

lic schools. Given the role played by schools in American society,[108] the observance of any religious activity within their confines fosters the impression that the schools have thereby stamped their imprimatur upon such activities. The Court recognized this important form of governmental assistance and its accompanying coercive results in the landmark decision of *Engel v. Vitale*:[109] "When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."[110]

Though briefly alluding to this concept,[111] the failure of the Supreme Court in *Stone* to fully develop this idea within the proper parameters of the primary effect or excessive entanglement tests constitutes a failure to further refine and accentuate this vital facet of establishment clause jurisprudence. The excessive entanglement of governmental assistance to religion that inheres in the Ten Commandments Act plays a crucial role in the overall effect of advancing religion. Placement of the authority inherent in the public schools behind the Decalogue can only lead to a greater respect or veneration for the Christian religion on the part of the students. However desirable one may view this result on an individual plane, such a consequence constitutes an unacceptable contravention of the neutrality mandated by the first amendment.[112]

C. *Relationship Between Government and Religious Authority*

An additional aspect of the entanglement analysis which could have been utilized persuasively by the Supreme Court

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[108] See notes 99-102 *supra* and accompanying text for a discussion of the importance of the public school environment in establishment clause cases.

[109] 370 U.S. 421 (1962).

[110] *Id.* at 431.

[111] The Court briefly acknowledged this concept of the *Engel* decision. Stone v. Graham, 49 U.S.L.W. 3369, 3370 (U.S. Nov. 18, 1980). This fleeting reference to an important establishment clause consideration contributes to the clumsiness of the decision.

[112] See notes 27-32 *supra* and accompanying text for a discussion of the neutrality doctrine and its origins.

in *Stone* concerns the risks of impermissible action involved in government-religion relationships. In examining the relationship between governmental and religious authorities in establishment clause cases, the Court's analysis has been colored constantly by the concept of potentiality. The Court frequently has observed that the first amendment forbids any law *respecting* an establishment of religion,[113] thus requiring close scrutiny of the potential for undue involvement between religion and public education in each case.

In this regard the duration of church-state contacts often proves decisive in determining potential establishment clause contraventions.[114] Continuous and long-term contacts obviously increase the risk of breaches of the neutrality that the first amendment seeks to effect. The Ten Commandments Act poses this very risk. Given the sensitive role played by public schools,[115] the concern connected with the idea of potentiality should be intensified in such cases. The permanent display of the Decalogue in the public classrooms that the Ten Commandments Act envisions would serve to foster a long-term relationship between religion and public education, a relationship that heightens the potential for further, more damaging unconstitutional involvement in the future.[116]

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[113] *E.g.*, Lemon v. Kurtzman, 403 U.S. 602, 612 (1971); McGowan v. Maryland, 366 U.S. 420, 441-42 (1961).

[114] Tilton v. Richardson, 403 U.S. 672, 688 (1971); Lemon v. Kurtzman, 403 U.S. 602, 619 (1971). The importance of the duration of the religion-government contacts probably can be viewed as determinative in a group of cases upholding the *temporary* use of religious symbols in the public schools. *See* Florey v. Sioux Falls School Dist., 464 F. Supp. 911, 916 (D.S.D. 1979), *aff'd*, 619 F.2d 1311 (8th Cir.), *cert. denied*, 49 U.S.L.W. 3351 (U.S. Nov. 11, 1980); Lawrence v. Buchmueller, 243 N.Y.S.2d 87 (Sup. Ct. 1963); Baer v. Kolmorgen, 181 N.Y.S.2d 230 (Sup. Ct. 1958).

[115] See notes 99-102 *supra* and accompanying text for a discussion of the importance of the public school environment in establishment clause adjudication.

[116] Though it has been criticized by many commentators (for a recent, well-reasoned article to this effect, see Gaffney, *Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy*, 24 ST. LOUIS U.L.J. 205 (1980)), an additional consideration under the entanglement test was proffered by *Lemon*, namely the potential for political divisiveness. Lemon v. Kurtzman, 403 U.S. 602, 622 (1971). The thought involved is that political fragmentation and divisiveness along religious lines is an undesirable occurrence, and any law likely to result in such a dispute quite possibly entails excessive church-state entanglement. In this regard the widespread negative reaction to the Supreme Court's decision in *Stone* may reflect this very problem. For a representative example of this

CONCLUSION

As Justice Holmes so cogently observed, the Constitution "is an experiment, as all life is an experiment."[117] It is an experimental attempt to form a republic in which the necessary ingredients for a cohesive and organized society are maintained, while at the same time sustaining individual autonomy. As American society becomes increasingly complex, the danger of encroachment upon individual autonomy intensifies. Thus, no greater and more crucial challenge confronts the United States Supreme Court than does the defense of this cherished autonomy from external assault.

In light of the central role religion plays in the lives of individuals and in society generally,[118] perhaps no facet of human autonomy is more deserving of judicial guardianship than is religious self-determination. The sectarian autonomy envisioned by the first amendment necessarily contemplates a freedom from any form of religious hegemony and from indoctrination in a governmental province such as the public schools. Such freedom undoubtedly requires a judiciary that will not retreat from its responsibility of enforcing state neutrality in matters of religion.

Although the United States Supreme Court's holding in *Stone v. Graham* properly reversed a Kentucky Supreme Court decision that had given a victory to forces hostile to governmental neutrality in matters of religion, the United States Supreme Court's opinion is disappointing. Reliance upon the secular purpose prong of the *Lemon* test is the opinion's major weakness,[119] as evinced by the above analysis of *Stone* under the primary effect and excessive entanglement standards.[120] The Court's unsupported and arguably incorrect assertions concerning legislative motivation are surprising in

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public outrage to *Stone,* see the letters to the editor in The Courier-Journal, Dec. 29, 1980, § A, at 6.

[117] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[118] See notes 2-6 *supra* and accompanying text for a description of the importance of religion.

[119] See notes 54-70 *supra* and accompanying text for a discussion of this aspect of the *Stone* decision.

[120] See notes 71-116 *supra* and accompanying text for a discussion of the possibilities in *Stone* for use of these strands of the tripartite test.

light of the relatively minor role played by such an inquiry in past establishment clause cases.[121] Moreover, the more substantive and fundamental considerations involved in the latter two prongs of the tripartite test would have provided the Court with a more logically-secure foundation for its decision, while simultaneously avoiding casting doubt upon the good faith of the Kentucky General Assembly.

The *Stone* opinion is even more regrettable in the face of the current political atmosphere. While the term "conservative revolution" is much overused, such a concept does convey the general drift in America today toward more traditional values. As might be expected, such a philosophical movement carries with it the impulse of a "moral majority" to impose its perceptions and notions of divine truth upon society as a whole. These impulses have already manifested themselves in religious-oriented legislative enactments,[122] and such actions seem likely to proliferate in the future.

As some have noted, the current political climate makes more likely a serious constitutional clash between the judicial and legislative branches in the near future.[123] The *Stone* case provided the Court with an opportunity to lessen the possibility of such an undesirable intergovernmental confrontation. Instead, the Court's ruling diminished its political capital[124] and provided a muddled and unconvincing rejection of the use of religious symbols in public classrooms. One scholar has suggested that the justices in *Stone* were attempting to discourage any "chiseling away at the perimeters" of its church-state doctrine.[125] It is regrettable, however, that, in preserving its existing body of establishment clause jurisprudence, the Court emphasized the relatively unimportant secular purpose test

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[121] See notes 51-53 *supra* and accompanying text for a discussion of this development of establishment clause jurisprudence.

[122] A recent example of this was Senator Helms' effort in 1979 to amend the Supreme Court Jurisdiction Act (S. 450, 96th Cong., 1st Sess.) to include a provision removing all jurisdiction from the federal courts to hear challenges to voluntary school prayer programs. S. 438, 96th Cong., 1st Sess. (1979).

[123] TIME, Dec. 1, 1980, at 74.

[124] See notes 69-70 *supra* and accompanying text for a discussion of this possible depletion of political capital.

[125] TIME, Dec. 1, 1980, at 74 (quoting Professor Jesse Choper).

while ignoring direct treatment of the other two prongs of the *Lemon* test. In so doing, the Court forfeited an opportunity to advance and clarify this vital and potentially explosive area of constitutional law.

J. David Smith, Jr.