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The Ten Commandments Return to School and Legal Controversy Follows Them*

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The United States Supreme Court confronted the issue of a classroom display of the Ten Commandments almost 25 years ago in the case of *Stone v. Graham.*[1] In that case, the Court struck down a Kentucky statute that required the posting of the Ten Commandments in all public school classrooms. In a per curiam opinion, the Court summarily reversed a decision of the Supreme Court of Kentucky and concluded that the statute violated the First Amendment's Establishment Clause because it had no secular purpose.[2]

The Court reached this conclusion despite the fact that each copy of the Ten Commandments was required to include a small print notation referencing the secular significance of the Ten Commandments as a source of law.[3] The Court rejected the argument that this self-serving declaration was sufficient evidence of the existence of a secular purpose. Instead, it announced that "[t]he pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature."[4] The Court drew this conclusion because the Ten Commandments had no legitimate educational function since they were not integrated into the teaching of any appropriate subject such as history, ethics or comparative religion.[5] In addition, the Court noted that "the first part of the Ten Commandments concerns the religious duties of believers."[6]

Three Justices dissented in Stone, taking issue with the Court's decision to dispose of the case summarily rather than requiring briefing and oral argument in the case. In his dissenting opinion, Chief Justice Rehnquist, then an Associate Justice, criticized the

[1] 449 U.S. 39 (1980) (per curiam).

[2] The requirement that the government have a secular purpose to justify a practice challenged on Establishment Clause grounds is rooted in the Supreme Court's decision in *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

[3] The notation stated that "[t]he 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." 449 U.S. at 41.

[4] *Id.*

[5] *Id.* at 42.

[6] *Id.* In singling out the first part, the Court referred specifically to "worshipping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day. *See* Exodus 20: 1-11; Deuteronomy 5: 6-15." *Id.* It contrasted the first part with the second part that contained "arguably secular matters, such as honoring one's parents, killing or murder, adultery, stealing, false witness, and covetousness. *See* Exodus 20: 12-17; Deuteronomy 5: 16- 21." *Id.* at 41-42.

majority's refusal to defer to the secular purpose articulated by the Kentucky legislature.[7] The Chief Justice characterized the Ten Commandments as a whole as having secular importance. In his view, this justified the posting of the Ten Commandments in their entirety rather than an edited version that removed those Commandments that are religious in nature.[8] Chief Justice Rehnquist's opinion also commented on the futility of attempting complete separation of the state from everything that has its origins in religion or has religious meaning in light of the fact that the "Court has recognized that 'religion has been closely identified with our history and government.'"[9]

Just as in the case of school prayer and other controversial church/state issues, the Court's decision declaring unconstitutional the posting of the Ten Commandments did not put the issue to rest. The "Hang Ten" movement, an organized effort to promote posting the Ten Commandments on public property,[10] received renewed support in the wake of the school shootings in Columbine and elsewhere. Currently, a number of states, including Indiana,[11] North Carolina,[12] and South Dakota,[13] have enacted statutes authorizing the posting of the Ten Commandments in public buildings including schools.

Efforts to promote the public display of the Ten Commandments have resulted in lawsuits objecting to their presence on public property. This litigation includes Establishment Clause challenges to monuments erected on the grounds of schools[14] and statehouses,[15] plaques affixed to courthouse entrances[16] and posters on the walls of classrooms[17] and courtrooms.[18] Recently, the Supreme Court agreed to decide two cases involving the display of the Ten Commandments on public property.[19] However, neither

[7] *Id.* at 43-44 (Rehnquist, J., dissenting).

[8] *Id.* at 45 n.2 (Rehnquist, J., dissenting).

[9] *Id.* at 46 (quoting *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 212 (1963)).

[10] Larry Copeland, *Morality Makes a Stand*, USA TODAY, March 30, 2000, at 1A.

[11] IND. CODE ANN. § 4-20.5-21-2 (Michie 2004).

[12] N.C. GEN. STAT. § 115C-81(g)(3b) (2004).

[13] S.D. CODIFIED LAWS § 13-24-17.1 (Michie 2004).

[14] *See, e.g., Baker v. Adams County/Ohio Valley Sch. Bd.* (6th Cir. 2004) (monument on public high school grounds unconstitutional).

[15] *See, e.g., Van Orden v. Perry*, 351 F.3d 173 (5th Cir. 2003), *cert. granted*, 125 S. Ct. 346 (2004) (monument on state capitol grounds constitutional).

[16] *See, e.g., Modrovich v. Allegheny County*, 385 F.3d 397 (3d Cir. 2004) (plaque of Ten Commandments affixed to courthouse entrance constitutional).

[17] *See, e.g., ACLU v. McCreary County*, 354 F.3d 438 (6th Cir. 2003), *cert. granted*, 125 S. Ct. 310 (2004) (classroom display unconstitutional).

[18] *See, e.g., ACLU of Ohio v. Ashbrook*, 375 F.3d 484 (6th Cir. 2003) (courtroom display unconstitutional).

[19] *ACLU v. McCreary County*, 354 F.3d 438 (6th Cir. 2003), *cert. granted*, 125 S. Ct. 310 (2004); *Van Orden v. Perry*, 351 F.3d 173 (5th Cir. 2003), *cert. granted*, 125 S. Ct. 346 (2004).

of the cases before the Court this Term involves a display on public school property,[20] a location that in the past has called for a stricter degree of church/state separation than other public property.

The outcomes of recent judicial decisions considering the constitutionality of the display of the Ten Commandments have not been uniform. While the courts have all applied similar legal standards, considering both whether the government had a secular purpose[21] for its display and whether the display gave the appearance of government endorsement of religion,[22] their analysis has been far from uniform. Courts have disagreed over a number of critical issues including how to assess government expressions of a secular purpose,[23] how to evaluate the place of the Ten Commandments in the history of American law,[24] how to characterize the historical context of the challenged display,[25] and whether displaying the Ten Commandments along with other documents of secular significance legitimizes a secular purpose for the display and eliminates any risk of government endorsement of religion.[26]

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[20] While the Sixth Circuit in *ACLU v. McCreary County*, 354 F.3d 438 (6th Cir. 2003), *cert. granted*, 125 S. Ct. 310 (2004), struck down both courtroom and classroom displays of the Ten Commandments, the Supreme Court granted certiorari to review only the courthouse aspect of the case.

[21] The requirement of a secular purpose is part of the 3-part Establishment Clause test first announced in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). While the *Lemon* test has undergone some alterations over the years, *see, e.g.*, *Agostini v. Felton*, 521 U.S. 203, 222-23 (1997), the Court has continued to utilize the purpose prong of the test in cases involving Establishment Clause challenges to public school practices. *See, e.g.*, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308-09 (2000) (striking down prayers before home football games).

[22] The endorsement test has its origins in Justice O'Connor's concurring opinion in *Lynch v. Donnelly*, 465 U.S. 668, 690-92 (1984) (O'Connor, J., concurring). The endorsement inquiry asks "whether or not a reasonable observer would believe that a particular action constitutes an endorsement of religion by the government." *ACLU of Ohio v. Ashbrook*, 375 F.3d 484, 492 (6th Cir. 2003). In this inquiry, the reasonable observer "must be deemed aware of the history and context" of the challenged conduct. *Capitol Square Review Bd. v. Pinette*, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring).

[23] *Compare Freethought Soc'y v. Chester County*, 334 F.3d 247, 267 (3d Cir. 2003) (accepting asserted secular purpose for courthouse plaque) *with ACLU of Ohio v. Ashbrook*, 375 F.3d 484 (6th Cir. 2003) (rejecting asserted secular purpose for courtroom display).

[24] *Compare Freethought Soc'y v. Chester County*, 334 F.3d 247, 267 (3d Cir. 2003) ("the Ten Commandments have an independent secular meaning in our society because they are regarded as a significant basis of American law and the American polity, including the prohibitions against murder and blasphemy") *with Books v. City of Elkhart*, 235 F.3d 292 (7th Cir. 2000), *cert. denied*, 532 U.S. 1058 (2001) ("we do not think it can be said that the Ten Commandments, standing by themselves, can be stripped of their religious, indeed sacred, significance and characterized as a moral or ethical document").

[25] *Compare Freethought Soc'y v. Chester County*, 334 F.3d 247, 267 (3d Cir. 2003) (taking into consideration historical significance of courthouse plaque to find an absence of government endorsement of religion) *with Books v. City of Elkhart*, 235 F.3d 292 (7th Cir. 2000), *cert. denied*, 532 U.S. 1058 (2001) (finding historical context of decision to place monument in front of municipal building did not dilute the religious message of the display).

[26] *Compare Van Orden v. Perry*, 351 F.3d 173 (5th Cir. 2003), *cert. granted*, 125 S. Ct. 346 (2004) (finding Ten Commandments monument on capitol grounds to be constitutional in the context of its display

One example of a recent judicial approach to the issue of a public school display of the Ten Commandments occurred in Kentucky, the site of the controversy in *Stone v. Graham*. In *ACLU v. McCreary County*,[27] the Harlan County School District was sued by the ACLU after it posted the Ten Commandments in its schools. In the face of a lawsuit challenging the practice, the school district added other documents to its wall display and claimed that the expanded display was designed to "create a public forum . . . for the purpose of posting historical documents which played a significant role in the development, origins or foundations of American or Kentucky law."[28] Among the added documents were the Declaration of Independence, the national motto of "In God We Trust," the Mayflower Compact, the Star Spangled Banner, the Bill of Rights, the Magna Carta and the Preamble to the Kentucky Constitution.[29] Despite this effort to secularize the practice,[30] the Sixth Circuit Court of Appeals found the display to be unconstitutional.

In its opinion, the court reasoned that the Ten Commandments were not connected to the other documents on display and that they were "not integrated with the secular study of American law or government,"[31] despite the school district's assertions that they were. In the absence of such a connection, the Ten Commandments "sticks out like a proverbial 'sore thumb'" so that a reasonable observer will find religious significance in the display.[32] According to the court, this conclusion will even be more obvious since the reasonable observer will know that the Ten Commandments was originally on display without other historical documents and that those other documents only came to be included after the threat of litigation surfaced.[33] While the court concluded that "*Stone* established no *per se* rule that displaying the Ten Commandments in an educational setting is unconstitutional,"[34] the court nonetheless found that the school district had not integrated the display of the Ten Commandments with a secular message.

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together with 16 other monuments) *with Baker v. Adams County/Ohio Valley Sch. Bd.* (6th Cir. 2004) (finding presence of 4 monuments with secular content erected after litigation commenced did not alter the religious purpose behind the decision to erect a monument inscribed with the Ten Commandments).

[27] *ACLU v. McCreary County*, 354 F.3d 438 (6th Cir. 2003), *cert. granted*, 125 S. Ct. 310 (2004).

[28] *Id.* at 446-47.

[29] *Id.* at 443.

[30] The decision to add other nonreligious documents to the display to render it constitutionally acceptable is based on the Supreme Court's decision in *Lynch v. Donnelly*, 465 U.S. 668 (1984). In that case, the Court upheld the display of a crèche on public property so long as the display was accompanied by other nonreligious symbols of the holiday season such as Santa Clause, reindeer, and candy canes. *See also County of Allegheny v. ACLU*, 492 U.S. 573 (1989). While the reasoning of the crèche cases may be influential in cases involving displays in front of and inside statehouses and courthouses, it is far from certain that they will influence the outcome of cases challenging similar displays in the public school context.

[31] 354 F.3d at 450.

[32] *Id.* at 460.

[33] *Id.* at 461.

[34] *Id.* at 448.

Despite the Sixth Circuit's ruling, if the Supreme Court upholds the displays before it this Term, all of which involve situations where the Ten Commandments are not displayed alone, other school districts are likely to follow the lead of the Harlan County School District and broaden out their displays to include other documents of historical and/or legal significance in an effort to avoid Establishment Clause problems. If those other documents are connected to the Ten Commandments in a logical way, are not posted only after litigation against the school district has commenced and do not appear to be displayed solely to promote religion, courts may be willing to permit the Ten Commandments to be part of a public school display. However, a failure to integrate the documents into the curriculum may make the school district's efforts vulnerable to challenge on the grounds that the school district lacks a secular purpose and that the display will be perceived to be an endorsement of religion by knowledgeable observers. Despite all the uncertainty that surrounds the issue, the one certainty is that whatever the Supreme Court decides, additional legal challenges will continue.