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"Is Posting of Ten Commandments in Schools
Constitutional?"

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The continued revival of interest among state legislatures in posting the Ten Commandments in public schools may present to the U.S. Supreme Court an opportunity to reverse yet another decades-old, landmark precedent, this time one that prohibits such displays on grounds that they promote religion in violation of the First Amendment's Establishment Clause.

Although time expired in the legislative session before the Texas House of Representatives could approve a Senate bill to post the Ten Commandments in classrooms, the Longhorn State and several others are likely to pass such bills in the near term, aligning them with a dozen other states, including North Dakota and South Dakota, that already permit displays of the Commandments in public schools.

Posting the Ten Commandments on walls of classrooms was common in American schools before the Supreme Court, in *Stone v. Graham* (1980), declared the practice unconstitutional. The Court, in a 5-4 per curiam decision (an unsigned opinion), struck down a Kentucky statute that required display of the Commandments in every public school classroom.

The Court held that displays of the Ten Commandments serve a "plainly religious" purpose, which ran afoul of the governing "Lemon Test." In *Lemon v.*

Kurtzman (1971), the Court held that programs challenged under the Establishment Clause must have a secular purpose. The Court wrote, "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."

Although copies of the Commandments were purchased by private funds, the mere posting provided official state support for religion. Portions of the Ten Commandments could have been regarded as secular in purpose, such as honoring one's parents, killing, adultery, stealing, false witness and covetousness. But other sections are clearly religious in nature: worshipping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath.

Stone v. Graham and its prohibition on the display of the Ten Commandments in public schools remains the law in the United States. Optimism that Stone may be reversed, particularly among states that have reintroduced, or will reintroduce, postings of the Commandments, is derived from a particular detail in the Kentucky statute, and two more recent Supreme Court decisions that punctuate the shifting standards in Establishment Clause jurisprudence.

The Kentucky statute required the conspicuous posting in every public schoolroom of a large blowup of the Ten Commandments. The size and projection of the Commandments undercut any hope of "saving" such postings under the Lemon Test.

In 2005, in Van Orden v. Perry, however, the Court upheld the placement of a six-foot Ten Commandments monument amidst 21 historical markers and 17 other monuments in a 22-acre park surrounding the Texas State Capital in Austin, against an Establishment Clause challenge. Chief Justice William Rehnquist acknowledged

the religious nature of the Commandments, "but simply having religious content or promoting a message consistent with religious doctrine does not run afoul of the Establishment Clause." Rehnquist distinguished the "passive" nature of the display, which represented a part of the state's political and legal history, from the conspicuous posting of the Ten Commandments in public schools, at issue in *Stone*, since they "confronted" students.

The Court's ruling in *Van Orden*, then, suggested a strategy to states wishing to permit postings of the Ten Commandments in public schools: Place the Commandments within a display that includes other historical, legal, and cultural documents and milestones, and avoid the conspicuous blowup of the posting that doomed the Kentucky law. This is precisely what the states of South Dakota and North Dakota have done in enacting statutes permitting the "passive" display of the Commandments. The South Dakota law, for example, provides that the Commandments "shall be" presented in the same "manner and appearance generally as other objects and documents displayed," and cannot be "presented or displayed in any fashion that results in calling attention to it apart from the other displayed objects and documents."

Displays of the Ten Commandments in public schools received additional support in the form of the Supreme Court's decision in 2022, upholding the right of a Washington high school football coach to pray on the 50-yard line after games, against an Establishment Clause challenge. In *Kennedy v. Bremerton*, the Court, in a 6-3 opinion written by Justice Neil Gorsuch, held that the coach's prayers were a private expression of his faith and not government endorsement of religion, even though they, like postings of the Ten Commandments, were offered at a state sanctioned event, held on state property, funded by state taxpayers.

The Court's ruling in Kennedy sounded the death knell of the Lemon Test and its requirement that laws have a secular purpose. The Supreme Court's evolving Establishment Clause jurisprudence has significantly lowered the wall between church and state and suggests that the North and South Dakota statutes permitting display of the Ten Commandments in public schools, like those across America, will be sustained, if they face legal challenges.