Posting the Ten Commandments as a Historical Document in Public Schools

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I. INTRODUCTION

The notion of religion being introduced in a public school setting is a controversial and socially divisive topic. When the church encroaches on the state's domain, courts are called upon to adjudicate the matter as a constitutional issue.¹ If public schools impose religion on students, courts invoke the Constitution's Establishment Clause, which states: "Congress shall make no law respecting an establishment of religion."²

The courts should prepare themselves for a new round of Establishment Clause cases. "Hang Ten"—a movement to post the Ten Commandments in public schools and buildings—has arrived, raising intense debate in communities and state legislatures across the nation.³ By mid-May of 2000, three states had enacted laws allowing public schools to "Hang Ten" in classrooms, but with a caveat—only if the Ten Commandments are posted alongside documents like the Declaration of Independence or United States Constitution.⁴ According to "Hang Ten" proponents, such classroom displays ostensibly present the Ten Commandments as a historical document, not a religious tenet, contributing to a secular educational display of fundamental historic documents.⁵

Is "Hang Ten" permissible under the Establishment Clause? Supreme Court decisions leave ample room for debate. In Stone v. Graham,⁶ the Court ruled that public schools could not post the Ten Commandments in classrooms because of its clear religious nature.⁷ In Stone, however, the Commandments hung alone.⁸ Instead, the constitutionality of "Hang Ten" could hinge on Lynch v. Donnelly⁹ and Allegheny v. ACLU.¹⁰ In those cases, the Court upheld government holiday displays of religious imagery—a nativity

³. See infra Part III.B for discussion of the "Hang Ten" movement.
⁵. See infra notes 194-96 and accompanying text for descriptions of "Hang Ten" displays.
⁷. Id. at 42.
⁸. Id. at 39.
scene and menorah—because they were “secularized” by other items in the display that negated the religious nature of those two symbols.\textsuperscript{11}

There are movements to “Hang Ten” in government buildings and property in many communities, including schools, court houses, and municipal buildings in general. This Note focuses on “Hang Ten” displays in public schools, where the targeted audience—schoolchildren—may be particularly vulnerable to direct or subtle religious influence. This Note examines Stone, Lynch, Allegheny, and other Supreme Court cases that may provide an answer to the constitutional question prompted by “Hang Ten.” Part II outlines the Supreme Court’s development of Establishment Clause analyses in its case law, examines the characteristics of the Court’s currently used “endorsement” analysis to church-state cases, reviews the Court’s methods of determining government purpose behind religious activities, and examines the treatment of church-state cases involving schoolchildren. Part III provides background information on the Ten Commandments and the “Hang Ten” movement, suggests a framework for analyzing the constitutionality of “Hang Ten” displays, and proposes a result consistent with that framework. Part IV concludes with a recommendation that courts should strike down “Hang Ten” displays if they are intended to promote religious ideals. The author also offers some afterthoughts relevant to this new development in public schools.

II. BACKGROUND

Thomas Jefferson wrote that the Establishment Clause builds a “wall of separation between church and State.”\textsuperscript{12} Yet almost two hundred years later, the Supreme Court’s handling of church-state cases reveals the lack of any unifying theory consistent with this metaphor. In the past thirty years, the Court’s application of an Establishment Clause analysis has evolved and changed on an almost case-by-case basis. One frustrated federal district court described this ongoing variation as “the random approach by the Supreme Court to its analysis of Establishment Clause cases.”\textsuperscript{13} A review of the Court’s treatment of Establishment Clause cases is warranted.

A. FROM LEMON TO LYNCH: THE SEARCH FOR A UNIFYING ESTABLISHMENT CLAUSE TEST

In the past three decades, the Supreme Court has applied several different tests to Establishment Clause cases, often times tailoring its analyses to the specific facts of a particular case. The Court has often referred to a

\begin{itemize}
  \item \textsuperscript{11} See infra notes 46-96 and accompanying text for discussion on the Court’s analyses of these cases.
  \item \textsuperscript{13} ACLU v. Eckels, 589 F. Supp. 222, 223 (S.D. Tex. 1984).
\end{itemize}
three-factor test set forth in *Lemon v. Kurtzman*\(^\text{14}\) to determine if church-state relations violated the Establishment Clause. Known as the *Lemon* test, a statute or state practice is permissible under the Establishment Clause if it meets the following criteria: "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 government entanglement with religion."\(^\text{15}\) If any of these prongs are not met, the statute or practice is unconstitutional.\(^\text{16}\)

The Supreme Court used the *Lemon* test in *Stone v. Graham*\(^\text{17}\) to review a Kentucky law mandating display of the Ten Commandments in public schools.\(^\text{18}\) The statute required that the Commandments be displayed in every Kentucky elementary and secondary public schoolroom, paid for with money contributed from private sources.\(^\text{19}\) Particularly notable of the statute was the requirement that a statement reading "[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" be placed under the Commandments.\(^\text{20}\) This statement indicated the Kentucky legislature's intention to present the Ten Commandments as a document of secular significance.

The Court struck down the statute in a brief per curiam ruling.\(^\text{21}\) Finding no secular legislative purpose to the law under the first prong of the

\(\text{14. 403 U.S. 602 (1971).}\)

\(\text{15. Id. at 612-13 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).}\)

\(\text{16. See Stone v. Graham, 449 U.S. 39, 40-41 (1980) (noting that if any of the three *Lemon* prongs are not met, the statute is unconstitutional and the reviewing court need not inquire further into the remaining prongs).}\)

\(\text{17. Id. at 39.}\)

\(\text{18. See id. at 40-41 (stating and employing the *Lemon* test to the Kentucky statute).}\)

\(\text{19. The Kentucky statute read:}\)

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

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

\(\text{(3) The copies required by this section shall be purchased with funds made available through voluntary contributions made to the State Treasurer for the purposes of this section.}\)


\(\text{21. Id. at 43 (deeming the statute unconstitutional).}\)
Lemon test, the Court refrained from even considering the second and third prongs of the Lemon test.\textsuperscript{22} Kentucky's avowed secular purpose of displaying the Commandments as an historically influential legal code was not legitimate.\textsuperscript{23} The Court concluded that there was no educational purpose to the statute, and its only effect would "be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments."\textsuperscript{24} Even though there may have been a secular purpose to promote moral values in schoolchildren, to accomplish such a purpose by posting the Ten Commandments was determined to be an unconstitutional religious practice.\textsuperscript{25}

The Court applied a starkly different test to a case involving a state's regulation of solicitations by religious organizations. In Larson \textit{v. Valente},\textsuperscript{26} plaintiffs challenged a Minnesota solicitation law\textsuperscript{27} that distinguished between religious organizations that obtained more than fifty percent of their funds from nonmembers and those that did not.\textsuperscript{28} The Court found that the law was discriminatory on its face for exempting larger religious organizations from its requirements, such as the Catholic church, but not lesser-known sects.\textsuperscript{29} Additionally, the Court examined the legislative history to find a discriminatory intent by Minnesota lawmakers.\textsuperscript{30}

Because the statute favored some religious organizations over others, the Court declined to use the Lemon test.\textsuperscript{31} Instead, noting that "denominational neutrality"\textsuperscript{32} is the touchstone of the Establishment Clause, the Court applied strict scrutiny to the Minnesota statute.\textsuperscript{33} Finding neither a

\begin{enumerate}
\item See id. at 41 ("We conclude that Kentucky's statute requiring the posting of the Ten Commandments in public schoolrooms had no secular legislative purpose, and is therefore unconstitutional.").
\item See id. (noting that the statute's labeling requirement did not obscure the undeniable religious nature of the Ten Commandments and its place in the Christian and Jewish religions).
\item Id. at 42.
\item Id. at 41.
\item See Stone, 449 U.S. at 41 (noting that the presence of a secular purpose to a law does not automatically "avoid conflict with the First Amendment").
\item 456 U.S. 228 (1982).
\item See MINN. STAT. § 309.515(b) (1978) (amended 1983) (exempting religious organizations from the registration and reporting requirements of the solicitation law if they received more than half of their contributions from their own members).
\item See Larson, 456 U.S. at 220 (describing the provisions of the statute).
\item See id. at 246-47 & n.23 (asserting that the statute's fifty percent exemption favored "well-established churches" as opposed to newer or smaller sects that rely on soliciting funds from people in public places).
\item See id. at 254 (noting legislative intentions to deliberately exempt a Roman Catholic Archdiocese from the statute's requirements, yet include, in the words of one legislator, "people that are running around airports").
\item See id. at 252 ("[T]he Lemon \textit{v. Kurtzman }'tests' are intended to apply to laws affording a uniform benefit to \textit{all} religions, and not to provisions like § 309.515, subd. 1(b)'s fifty percent rule, that discriminate \textit{among} religions.").
\item Id. at 246.
\item See Larson, 456 U.S. at 246 ("[W]hen we are presented with a state law granting a
close fit between the law and its purpose nor a compelling government interest at stake, the Court ruled for the plaintiffs.\textsuperscript{34} The Court found that the statute's "fifty per cent rule sets up precisely the sort of official denominational preference that the Framers of the First Amendment forbade."\textsuperscript{35} \textit{Larson} stands as a rare Establishment Clause case in which the Court applied strict scrutiny to church-state relations.\textsuperscript{36}

Shortly after \textit{Stone} and \textit{Larson}, the Court shifted its analysis once again and decided \textit{Marsh v. Chambers}\textsuperscript{37} and \textit{Lynch v. Donnelly}\textsuperscript{38} using a "historical practice" criterion.\textsuperscript{39} In \textit{Marsh}, a member of the Nebraska state legislature challenged its traditional practice of opening each work day with a prayer administered by a state-paid chaplain.\textsuperscript{40} Neglecting to use the \textit{Lemon} test,\textsuperscript{41} the Supreme Court instead examined the daily prayers in reference to historical practice. Specifically, the Court noted that the nation's First Congress voted to pay a chaplain to administer daily prayers in Congress within the same week it approved a draft of the First Amendment.\textsuperscript{42} It found that this historical evidence showed that the nation's founding fathers accepted government-sponsored prayer in Congress, and therefore, the same practice was allowable in the Nebraska legislature.\textsuperscript{43} It also found that although the daily prayers were a religious practice, they did not amount to an establishment of religion, but a long standing social tradition with no denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its constitutionality.\textsuperscript{44}

\textsuperscript{34} See \textit{id.} at 255 (noting that the Minnesota law was "not closely fitted to the furtherance of any compelling governmental interest... [and] therefore violates the Establishment Clause").

\textsuperscript{35} \textit{Id.}

\textsuperscript{36} The Court may have abandoned the strict scrutiny test employed in \textit{Larson}. See Norman Dorsen & Charles Sims, \textit{The Nativity Scene Case: An Error of Judgement}, 1985 U. ILL. L. REV. 837, 841-42, 849-50 (questioning the Court's use of less strict tests in Establishment Clause cases when strict scrutiny may have been a better criterion).

\textsuperscript{37} 463 U.S. 783 (1983).


\textsuperscript{39} See John E. Nowak & Ronald D. Rotunda, \textit{Constitutional Law} 1230-31 (5th ed. 1995) (discussing the Supreme Court's examination of the historical acceptance of the challenged practices in both cases).

\textsuperscript{40} See \textit{Marsh}, 463 U.S. at 784 (describing the Nebraska legislature's regular practice of beginning work days with a prayer).

\textsuperscript{41} The Court provided no explanation why the \textit{Lemon} test was not applicable. This was clearly noted by Justice Brennan in dissent. \textit{Marsh}, 463 U.S. at 796 (Brennan, J., dissenting) ("The Court makes no pretense of subjecting Nebraska's practice of legislative prayer to any of the formal 'tests' that have traditionally structured our inquiry under the Establishment Clause.").

\textsuperscript{42} See \textit{id.} at 788-89 (describing how the nation's First Congress and many early state legislatures opened daily business with prayers).

\textsuperscript{43} See \textit{id.} at 790 ("It can hardly be thought that... Members of the First Congress... intended the Establishment Clause of the Amendment to forbid what they had just declared acceptable.").
POSTING THE TEN COMMANDMENTS

overly harmful effects.\(^4\) Again relying on history, the Court reasoned that the First Congress could not have deemed the prayers coercive the same week it had debated church-state interaction.\(^5\)

In Lynch, the Supreme Court confronted the city of Pawtucket’s forty year practice of displaying a Christian nativity scene, or crèche, along with a Christmas tree and other holiday symbols in a downtown park during the holiday season.\(^6\) The Court began its analysis by outlining numerous historical practices in which government officially acknowledged or sponsored religion in everyday life.\(^7\) The Court acknowledged use of the Lemon test in past cases, but emphasized its “unwillingness to be confined to any single test or criterion” in church-state cases,\(^8\) and then focused its analysis on the nativity scene “in the context of the Christmas season.”\(^9\)

Instead, the Court used both the Lemon test and a historical practice analysis akin to the one employed in Marsh.\(^10\)

The Court first upheld Pawtucket’s right to display the crèche after applying the Lemon test in reference to the city’s overall physical display during the Christmas season.\(^11\) It found that the city’s intention to celebrate the national Christmas holiday with depictions of traditional Christmas themes, including a re-creation of the holiday’s origin—the crèche—was a legitimate secular purpose.\(^12\)

Secondly, the inclusion of the crèche in the display did not have the principal effect of advancing religion. Although the Court acknowledged an effect, it employed an historical practice rationale similar to its reasoning in Marsh and concluded that its effect was merely incidental relative to other acceptable practices involving church-state relations.\(^13\) Because activities like

\(^{44.}\) See id. at 792 (describing the prayers as a historical custom with no potential for coercive government establishment of religion).

\(^{45.}\) See id. at 790-92 (explaining how congressional debate indicated an acceptance of the prayers).

\(^{46.}\) See Lynch v. Donnelly, 465 U.S. 668, 671 (1984) (listing the other figures and decorations on display, including a Santa Claus house, reindeer pulling Santa’s sleigh, Christmas carolers, large candy canes, colored lights, various animals, and a “SEASONS GREETINGS” banner).

\(^{47.}\) See id. at 676-77 (referring to official recognition of the Christmas and Thanksgiving holidays, state payment of religious ministers in the armed forces, printing of “In God We Trust” on currency, presentation of religious artwork in the National Gallery, and the permanent display of Moses and the Ten Commandments in the Supreme Court itself).

\(^{48.}\) Id. at 679.

\(^{49.}\) Id.

\(^{50.}\) See id. at 681 (relying on the Lemon test’s purpose prong); id. at 674-77 (outlining historical examples of acceptable government practices involving religion).

\(^{51.}\) Lynch, 465 U.S. at 687.

\(^{52.}\) See id. at 681 (“The display is sponsored by the city to celebrate the Holiday and to depict the origins of that Holiday. These are legitimate secular purposes.”).

\(^{53.}\) See id. at 681-83 (finding that the display of the crèche along with the other decorations was no more beneficial to religion than state funding of transportation to religion-
using public funds to buy textbooks for parochial school students and financing church-affiliated schools was traditionally acceptable, so was the crèche display.\textsuperscript{54}

Finally, the Court returned to the \textit{Lemon} test and rationalized that the overall display passed its entanglement prong since it involved only minimal administrative participation, there was no contact with religious organizations, and the $200 value of the crèche was insignificant.\textsuperscript{55}

In her concurrence, Justice O’Connor agreed with the majority that the display had a secular purpose\textsuperscript{56} and no principal effect on religion.\textsuperscript{57} However, her conclusion was reached through a two-prong “endorsement” analysis derived from the \textit{Lemon} test.\textsuperscript{58} For Justice O’Connor, the two key questions were 1) whether the government actor was intending to endorse religion, reflected in the purpose prong of \textit{Lemon}; and 2) whether the effect of the practice created a public perception that the government actor endorsed religion, reflected in \textit{Lemon}’s effect prong:\textsuperscript{59}

[First Prong] The proper inquiry under the purpose prong of \textit{Lemon}, I submit, is whether the government intends to convey a message of endorsement or disapproval of religion.

... [Second Prong] What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion. It is only practices having that effect, whether intentionally or unintentionally, that make religion relevant, in reality or public perception.\textsuperscript{60}

“An affirmative answer to either question” made the government practice unconstitutional.\textsuperscript{61} Under this analysis, Justice O’Connor concluded that the city had not intended to endorse religion, nor had its display created such a perception.\textsuperscript{62}

\textsuperscript{54} See \textit{id.} (noting that the crèche display was no more offensive to the Establishment Clause than the exhibition of religious art in government-supported museums and other situations where the government tangentially involves itself with religion in a manner not violative of the Establishment Clause).

\textsuperscript{55} See \textit{id.} at 684 (finding that the city’s involvement with the display was of such a small degree that no excessive entanglement existed).

\textsuperscript{56} See \textit{Lynch}, 465 U.S. at 692 (O’Connor, J., concurring) (noting that the crèche was just a traditional display accompanying the secular celebration of the holiday season).

\textsuperscript{57} See \textit{id.} at 693 (O’Connor, J., concurring) (“It cannot fairly be understood to convey a message of government endorsement of religion.”).

\textsuperscript{58} See \textit{id.} at 690-91 (defining the endorsement test as a better developed and refined framework of the principles stated in \textit{Lemon}).

\textsuperscript{59} See \textit{id.} at 691-92 (explaining the endorsement analysis).

\textsuperscript{60} \textit{Id.}

\textsuperscript{61} \textit{Lynch}, 465 U.S. at 690 (O’Connor, J., concurring).

\textsuperscript{62} See \textit{id.} at 693 (O’Connor, J., concurring) (agreeing with the majority that the display
In dissent, Justice Brennan sharply criticized the ease with which the Court found the display to have a secular purpose with no religious effect. He particularly emphasized the effect on nonreligious or religious minorities viewing the display. Upon seeing a symbol strongly associated with the mystical beliefs of Christianity, Justice Brennan believed that non-Christians might conclude that their religions are not entitled to the same benefits and recognition by the state.

Justice Brennan's concerns about the effects of such "religious chauvinism" were considered at length in the district court's opinion, particularly with regard to the potential effects on children. A clinical psychologist testifying for the plaintiffs opined that symbols are particularly important to young children, and that religious symbols have special significance due to their superhuman nature. The display's nativity scene would suggest to young children of non-Christian faiths that they were abnormal since their religions were excluded. However, a philosophy professor testifying for the city believed that the religious impact of the crèche would be minimal. Arguing that all symbols operate in context, he asserted that although the crèche was itself religious, its significance would be dulled. He rationalized that viewers would not be in a religious mindset must be taken in context, its purpose was to celebrate the Christmas holiday, and any religious impact of the crèche's inclusion in the display on viewers would be negated by the other secular decorations.

63. See id. at 700-01 (Brennan, J., dissenting) (asserting that the city had a sectarian purpose of granting prestige on one religion); see also Donnelly v. Lynch, 525 F. Supp. 1150, 1158-59 (D.R.I. 1981). In Donnelly, the Mayor of Pawtucket held a press conference in front of the nativity scene after the plaintiffs had sued the city. Id. at 1158. The press conference was described as "more in the nature of a rally, with the Mayor talking emotionally about patriotism, freedom and the Pawtucket tradition of a nativity scene, and vowing to fight vigorously the ACLU's attempt to take Christ out of Christmas." Id. at 1159.

64. See Lynch, 465 U.S. at 701 (Brennan, J., dissenting) ("The effect on minority religious groups...is to convey the message that their views are not similarly worthy of public recognition nor entitled to public support. It was precisely this sort of religious chauvinism that the Establishment Clause was intended forever to prohibit.").

65. Id.

66. See Donnelly, 525 F. Supp. at 1159-61 (outlining testimony about the psychological impacts of the display).

67. Id. In terms of Pawtucket's crèche, the "symbol's impact on a child would be heightened by the magical quality of the display's bright lights and gifts of candy from Santa." Id. Also included in the display was a Santa Claus house featuring a live Santa handing out candy. Id. at 1155. Colored lights illuminated the entire display, and Christmas music played in the background. Id. at 1155-56. The nativity scene was approximately life-sized, featuring Mary and Joseph kneeling before the baby Jesus, angels, kings, and shepherds. Id. at 1156.

68. Id. at 1159. The psychologist concluded that the nativity scene's inclusion reinforces a suggestion that non-Christians are somehow "less important" than Christians. Id.

69. See id. at 1160-61 (discussing the testimony of Dr. David Freeman about the crèche's impact on observers).

70. See id. at 1161 (describing Dr. Freeman's opinion that the effect of the crèche was to help induce a holiday mood to "spend money in shopping" and not to make a religious
but rather a "holiday" mindset, and the overall physical context of the display was secular.\textsuperscript{71}

\textbf{B. ENDORSEMENT BECOMES THE CRITICAL ESTABLISHMENT CLAUSE TEST}

The issue of religious symbols in secular context reappeared in \textit{Allegheny v. ACLU}.\textsuperscript{72} At issue were two holiday displays: 1) a framed crèche in a county courthouse,\textsuperscript{73} and 2) a Chanukah menorah alongside a Christmas tree and on county property.\textsuperscript{74} Acknowledging the "endorsement" test as the proper analysis, Justice Blackmun authored a divided opinion finding the crèche a violation of the Establishment Clause, but the menorah display permissible.\textsuperscript{75}

The Court first decided the easier case of the crèche. The singular display of the crèche, with nothing to detract from its religious symbolism, amounted to a direct endorsement of Christianity.\textsuperscript{76} It stood alone, surrounded by a flower frame in a conspicuous part of the courthouse.\textsuperscript{77} Thus, the religious impact of the crèche was not negated by any secular surroundings. The flower frame only heightened the emphasis on the crèche.\textsuperscript{78}

The more difficult case was the menorah display. In a plurality opinion, six of the justices found the display permissible under the Establishment

\begin{itemize}
  \item \textsuperscript{71} See \textit{Donnelly}, 525 F. Supp. at 1160 (discussing the psychologist's opinion that religious symbols only have an effect in religious settings). A religious symbol would have important significance in a setting where people are in a religious mindset. However, a religious symbol would not have the same impact in secular settings. For example, when viewing religious art in a museum, the art would have little religious impact since the viewer is in a museum, which purpose is to display a wide variety of art, and the viewer's mindset is geared towards academic or aesthetic thoughts—not religion. Accordingly, the effect of Pawtucket's display would not be to induce any religious response, but rather to create a general feeling of holiday celebration and joy during the Christmas season. \textit{Id.}
  \item \textsuperscript{72} 492 U.S. 573 (1989).
  \item \textsuperscript{73} See \textit{id.} at 580-81. The crèche was not alone. Poinsettia plants and small evergreen trees were placed on each side of it. \textit{Id.} at 580. The Court considered the plants and trees as a decorative frame, not detracting from but highlighting the importance of the nativity scene. \textit{Id.} at 599.
  \item \textsuperscript{74} \textit{Id.} at 581-82, 587. The menorah was eighteen feet tall and the Christmas tree forty-five feet tall. \textit{Id.} at 587. At the foot of the tree was a sign reading: "During this holiday season, the city of Pittsburgh salutes liberty. Let these festive lights remind us that we are the keepers of the flame of liberty and our legacy of freedom." \textit{Id.} at 582.
  \item \textsuperscript{75} See \textit{id.} at 621. Only Justices Blackmun and O'Connor enthusiastically embraced the endorsement test as a "sound analytical framework for evaluating governmental use of religious symbols" and found the crèche violative but the menorah display acceptable. \textit{Id.} at 595.
  \item \textsuperscript{76} See \textit{id.} at 601 ("[The city] has chosen to celebrate Christmas in a way that has the effect of endorsing a patently Christian message . . . ").
  \item \textsuperscript{77} See \textit{Allegheny}, 492 U.S. at 599-600 (noting that the crèche was placed in the "most beautiful part" of the courthouse, further suggesting the county's endorsement of the display).
  \item \textsuperscript{78} See \textit{id.} at 599 (analogizing the flower frame to a Christian cross surrounded by Easter lilies).
\end{itemize}
Clause. Justice Blackmun\(^79\) and Justice O'Connor\(^80\) concluded that the display was not a government endorsement of Judaism, but a recognition of diverse traditions of holiday celebration since the menorah was displayed alongside the tree—two symbols popularly associated with the holiday season.\(^81\) Justice Kennedy, in an opinion joined by Justices Rehnquist, Scalia, and White, found the display permissible under a different analysis. Identifying the touchstone of the Establishment Clause to be government coercion, Justice Kennedy concluded that the display did not indicate the county's support to proselytize Judaism.\(^82\)

Justice Brennan, joined in part by Justice Marshall and Justice Stevens, found the menorah/tree display unconstitutional.\(^83\) Whereas Justices Blackmun and O'Connor concluded that the secular Christmas tree—an item popularly associated with the holiday festivities—dulled the religious nature of the menorah, Justice Brennan came to the opposite result. For him, the menorah, a symbol strongly associated with Judaism, gave religious significance to the otherwise commonplace tree.\(^84\) Although it could be contended that a Christmas tree had both secular and religious components, the menorah's presence emphasized the tree's religious significance—a symbol celebrating the birth of Jesus Christ—thus amounting to an endorsement of both Judaism and Christianity.\(^85\)

Allegheny confirmed Justice O'Connor's endorsement test as the Court's preferred Establishment Clause analysis.\(^86\) Despite the Justices' divergent conclusions regarding the displays' constitutionality, Justice Blackmun noted in the Court's opinion that the endorsement test first set forth in Lynch had the consensus of the current Court\(^87\) and that it provided a "sound analytical

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79. See id. at 617 (holding that the Christmas tree was the dominant symbol in the display, and its secular nature negated the menorah's religious symbolism); id. at 620 (holding that the effect of the tree and menorah together symbolized the country's celebration of different holiday season traditions).

80. See id. at 635-36 (O'Connor, J., concurring) (concluding that the display was a celebration of pluralism and cultural diversity during the holiday season).

81. See id. at 620 (finding the display permissible); id. at 635-36 (O'Connor, J., concurring) (same).

82. See Allegheny, 492 U.S. at 659 (Kennedy, J., concurring) (arguing that the Establishment Clause only bars the government from coercing individuals to participate in religion or "establishing" a religion by granting it direct benefits).

83. Id. at 637 (Brennan, J., concurring and dissenting).

84. See id. at 641 (Brennan, J., dissenting) (acknowledging a contextual approach to the display and finding that the menorah dominated the Christmas tree); id. at 654 (Stevens, J., dissenting) (concluding that the tree was now religious in light of the menorah).

85. See id. at 644 (arguing that the Establishment Clause does not allow simultaneous promotion of more than one religion in the name of pluralism or diversity).

86. See id. at 592-95 (discussing reasons why the endorsement test was the proper analysis).

87. See Allegheny, 492 U.S. at 597 (noting that the majority of justices in Lynch agreed upon the principles of the endorsement test, and that the Court had since adopted those principles).
framework. Justice Blackmun further noted that the Court had generally relied on endorsement-like analyses in many of its previous Establishment Clause cases. More specifically, he noted that the Lemon test offered no means to differentiate between permissible and impermissible government endorsements of religion. Under the endorsement analysis, as in the Lemon test, government purpose was a key factor. However, the endorsement test's approach to purpose, with its emphasis on perceived endorsement, provided a more straightforward means to determine if government practices were unconstitutional. Lemon simply asked whether the government action had a "principal or primary effect" but provided little guidance on what constituted such an effect. The endorsement test clarified this inquiry—impermissible government involvement with religion exists when the public perceives that government is endorsing religion. The endorsement test therefore clarified the principles stated in Lemon, and was thus a better test than the Lemon analysis. Since Allegheny, the Court has continued its reliance on the endorsement test for Establishment Clause cases.

C. Determining Government Purpose

With the exception of the Marsh "historical practice" analysis, the decisive tests employed by the Court place importance on the legislative intent of challenged statutes. Justice O'Connor's endorsement test explicitly calls for an inquiry into the government actor's intentions. The Lemon test's first prong similarly required that a "statute must have a secular, legislative purpose." The Court's per curiam opinion in Stone was based on

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88. Id. at 595.
89. See id. at 599-94 (noting numerous cases where the Court had emphasized "endorsement" or similar concepts as touchstones for considering Establishment Clause cases).
90. See id. at 594 (noting the inadequacies of the Lemon test).
91. See id. at 592 (noting that the Court pays "particularly close attention to whether the challenged governmental practice either has the purpose or effect of 'endorsing' religion").
92. See Allegheny, 492 U.S. at 595 (noting that the endorsement test "articulates a method for determining whether the government's use of an object with religious meaning has the effect of endorsing religion").
95. See Allegheny, 492 U.S. at 595 (noting that the endorsement test better articulates the principles stated in Lemon).
97. See Lynch, 465 U.S. at 690 (O'Connor, J., concurring) (stating that a finding of endorsement depends on what the government intended to communicate and what was actually communicated).
98. Lemon, 403 U.S. at 612.
its conclusion that the "pre-eminent purpose"\textsuperscript{99} of posting the Ten Commandments on school walls was religious.\textsuperscript{100} In \textit{Larson}, the Court specifically looked to the history of the Minnesota statute to find an intent by legislators to favor some religions over others.\textsuperscript{101}

Several cases speak to how the Court discerns such legislative intentions. In \textit{Wallace v. Jaffree},\textsuperscript{102} the Court noted the possibility that some state legislatures may use false pretenses to disguise religious intentions.\textsuperscript{103} \textit{Wallace} involved an Alabama statute providing a one minute period of silence for meditation or voluntary prayer at the start of each day in public schools.\textsuperscript{104} The Court struck down the statute after determining its purpose was religious and not secular.\textsuperscript{105} Writing for the majority, Justice Stevens emphasized the statements of state Senator Donald Holmes, the statute's original sponsor, in legislative hearings.\textsuperscript{106} Speaking before his colleagues, Senator Holmes related his intention "to accomplish the return of voluntary prayer in our public schools . . . ."\textsuperscript{107} These explicit statements by the bill's sponsor before the rest of the state legislature illustrated a clear religious motive underlying the law, despite the fact that the facial language of the statute merely permitted voluntary prayer or meditation.\textsuperscript{108} In concurring opinions, Justice O'Connor, the original proponent of the endorsement test, and Justice Powell, spoke of possible "sham" purposes of state legislatures, and concluded that courts should look to legislative hearings to determine their true intentions.\textsuperscript{109}

\begin{itemize}
\item \textsuperscript{100} See \textit{id}. (stating that the "legislative recitation of a supposed secular purpose"—the small print notation of the Ten Commandments' legal relevance—did not disguise the Commandments' undeniable religious nature).
\item \textsuperscript{101} See \textit{Larson v. Valente}, 465 U.S. 228, 254-55 (1982) (finding that some Minnesota senators wanted to protect a Roman Catholic Archdiocese but not other religious groups from a solicitation law).
\item \textsuperscript{102} 472 U.S. 38 (1985).
\item \textsuperscript{103} See \textit{id}. at 59-60 (noting that despite the state's argument that it was merely accommodating voluntary prayer in schools, the state's true intentions were to "characterize prayer as a favored practice").
\item \textsuperscript{104} The Alabama statute read:
\begin{quote}
At the commencement of the first class of each day in all grades in all public schools, the teacher in charge of the room in which each such class is held may announce that a period of silence not to exceed one minute in duration shall be observed for meditation or voluntary prayer, and during any such period no other activities shall be engaged in.
\end{quote}
\item \textsuperscript{105} See \textit{Wallace}, 472 U.S. at 56 (finding no secular purpose to the statute).
\item \textsuperscript{106} See \textit{id}. at 56-57 (quoting a speech by Senator Holmes to the Alabama legislature).
\item \textsuperscript{107} S. 81-357, Reg. Sess., at 921 ( Ala. 1981), \textit{cited in Wallace}, 472 U.S. at 57 n.43.
\item \textsuperscript{108} \textit{ALA. CODE} § 16-1-20.1 (1995). For full text of the statute, see \textit{supra} note 104.
\item \textsuperscript{109} See \textit{Wallace}, 472 U.S. at 64 (Powell, J., concurring) ("[T]his secular purpose must be 'sincere'; a law will not pass constitutional muster if the secular purpose articulated by the
In *Edwards v. Aguillard*, the Court further clarified the scope of an inquiry into the true legislative intent of state laws. *Edwards* dealt with a Louisiana statute requiring schools to teach both "creation-science" and "evolution-science" if schools chose to teach either theory. The stated purpose of the statute was "protecting academic freedom." Restating that a statute's secular purpose "be sincere and not a sham," the Court struck down the Louisiana law, emphasizing statements by the statute's sponsor in legislative hearings indicating a religious motivation. In a concurring opinion, Justice Powell, joined by Justice O'Connor, noted that an inquiry into legislative history also included a review of the "goals and activities" of organizations referred to in legislative hearings. Justice Powell made this statement in reference to a creation scientist who testified in support of the bill before the legislature.

In *Santa Fe Independent School District v. Doe*, the Court's most recent Establishment Clause case, the Court ruled that a public school district's policy permitting student-led prayer before high school football games was unconstitutional. Although prayers were student-led, the district's policy constructed a specific mechanism allowing prayer by providing for student elections to determine which students would lead prayers, and the prayers

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were delivered at a school sponsored event—football games. These two factors showed "actual or perceived endorsement" of religion. More specifically, the facial purpose of the pre-game prayer policy "to solemnize the event" was textual evidence of the school district's purpose to encourage religion.

Yet in determining if the purpose of the school district's policy was to endorse religion, the Court believed it should not "stop at an analysis of the text of the policy," but should also examine "the circumstances surrounding its enactment." Indeed, evidence existed suggesting that the school district had permitted or promoted sectarian practices at its schools for several years. In one particular instance, a teacher handed out fliers to his students for a religious revival and vehemently denounced one student's religion in class. Refusing "to turn a blind eye to the context in which this policy arose," the Court held that the school district's policy amounted to unconstitutional endorsement of school prayer.

D. THE IMPORTANCE OF PROTECTING SCHOOLCHILDREN

Another general theme recurring throughout the Court's Establishment Clause cases is its recognition of age-related differences among those exposed to alleged state-sponsored religious practices. This concept was initially hinted at in early pre-

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121. See id. at 307-08 (describing the prayer invocations as school-endorsed because they were spoken at a school function, on school property, with school loudspeaker equipment).
122. Id. at 307.
123. Santa Fe Indep. Sch. Dist., 530 U.S. at 298 n.6. The purpose as stated in the policy's text was "to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition." Id. The Court found that a "religious message is the most obvious method of solemnizing an event." Id. at 291.
124. Id. at 307 ("Thus, the expressed purposes of the policy encourage the selection of a religious message . . .").
125. Id. at 315.
126. Id.
127. See id. at 295 (noting that Christian invocations were allowed at prior sporting events and graduation ceremonies).
128. Doe v. Santa Fe Indep. Sch. Dist., 168 F.3d 806, 810 (5th Cir. 1999). Jane Doe II's seventh grade history teacher distributed fliers for a Baptist revival in class. Id. After Jane Doe II asked if non-Baptists could attend, the teacher asked what religion she was. Id. Upon learning she was Mormon, the teacher "launched into a diatribe about the non-Christian, cult-like nature of Mormonism, and its general evils." Id. This led other students to comment (in reference to Jane Doe II's religion) that "[h]e sure does make it sound evil," and "[g]ee, . . . it's kind of like the KKK, isn't it?" Id.
129. Santa Fe Indep. Sch. Dist., 530 U.S. at 315.
130. See id. at 316 (holding that "the simple enactment of this policy, with the purpose and perception of school endorsement of student prayer, was a constitutional violation").
and instruct students about particular religious tenets during normal school hours. The Court condemned the practice because the state was clearly aiding religious proselytization in public schools since it was actually providing students for religious indoctrination. Concurring in judgment, Justice Frankfurter saw danger in the practice because schoolchildren are prone to imitate others, and not likely to digress from group norms. Students who did not share the same faiths as the religious instructors would either follow their peers and learn of different faiths, or risk feeling alienated within the school environment.

In *School District of Abington v. Schempp*, plaintiffs challenged a Pennsylvania law and a Baltimore school board rule, both of which mandated Bible readings at the start of each school day, but allowed objecting students to not participate in the exercises upon the written request of parents or guardians. The Court struck down the statute and the school board rule as state-sponsored religious ceremonies. In a concurrence similar to Justice Frankfurter's opinion in *McCollum*, Justice Brennan remarked that the participation exemptions had little real effect since schoolchildren "are disinclined at this age to step out of line or to flout..."
Thus, the Court again recognized the vulnerability of children to religious indoctrination in the school setting.

In a series of cases involving the free exercise of religion in state-sponsored public forums, the Court addressed age-based distinctions and their relation to the susceptibility of individuals to the effects of religious activities. In *Widmar v. Vincent*, the Court found that the University of Missouri's exclusion of a religious student group from its buildings amounted to unconstitutional discrimination. The Court held that the group's religious activities would only result in an incidental benefit to religion. It felt that university students, as opposed to younger students, were theoretically mature enough to recognize that the organization's activities were independent of the university and could resist any peer pressure associated with religious expression. The Court later extended this conclusion to public secondary school students in *Board of Education v. Mergens*, involving a student group's petition to form a Christian club at its high school. Writing for the majority, Justice O'Connor stated that "secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis."

The Court also noted the age factor in other cases relevant to government sponsorship of religion. In the *Marsh* decision, the Court's upholding of daily prayer in the Nebraska legislature was predicated not only on traditional historical acceptance of legislative prayers, but also on the maturity of the offended participant. The Court noted that "the individual claiming injury by the practice is an adult, presumably not readily susceptible to 'religious indoctrination,' ... or peer pressure ...."

This distinction was further highlighted in *Edwards* as one reason to

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140. Id. at 290.
143. Id. at 277.
144. See id. at 273-74 (noting that although the group's activities were religious, they were not directly supported by the state, and its message was not overtly conspicuous since more than one hundred other student groups existed on campus).
145. See id. at 274 n.14 ("University students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion.").
147. Id. at 250.
148. Id.
hold Louisiana’s evolution-science requirement unconstitutional. The Edwards Court noted that students in public elementary and secondary schools are not only required to attend school, but are easily impressionable at their age. Thus, it is both the compulsory attendance of public schooling and the vulnerability of age that creates a need to protect schoolchildren.

In Lee v. Weisman, the Court held unconstitutional a Providence, Rhode Island policy of allowing graduation ceremonies at public middle and secondary schools to include brief prayers. Although this time relying on Justice Kennedy’s “coercion” test first enunciated in Allegheny as the basis for its plurality decision, the Court also considered the need for protecting susceptible students as an important factor in its decision. Stating that there are “heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary schools,” Justice Kennedy’s majority opinion specifically cited psychological research showing the influence of peer pressure on adolescents to conform with group activities. In the classroom, “the risk of compulsion is especially high.” Although graduation ceremonies are technically not compulsory, students uniformly attend their graduation ceremonies, the result being analogous to mandatory classroom attendance. The graduation prayers amounted to at least state persuasion, or even state compulsion, of students to participate in a religious act, and was therefore a violation of the Establishment Clause.

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150. See Edwards v. Aguillard, 482 U.S. 578, 583-84 (noting that elementary and secondary school students are easily influenced, vulnerable to peer pressure, and apt to regard their teachers as role models and emulate them).
152. Id. at 591.
153. See id. at 587 (“[T]he Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise.”). The Court’s use of Justice Kennedy’s “coercion” test can most likely be explained by the fact that his vote was needed in order to strike down the school’s practice—the result the majority of justices wanted. Justices Rehnquist, Scalia, Thomas, and White dissented. Id. at 631 (Scalia, J., dissenting). The remaining justices needed Justice Kennedy to secure the outcome acceptable to them even if it meant neglecting the endorsement test for the time being. Justice Souter concurred with Justice Kennedy’s coercion analysis. Id. at 609 (Souter, J., concurring). However, Justices Blackmun, Stevens, and O’Connor concurred only with the outcome, but specifically noted that Establishment Clause violations are “not predicated on coercion.” Id. at 604 (Blackmun, J., concurring). Instead, they quoted the endorsement analysis in Allegheny as the correct approach to use. Id. at 604-05.
154. See id. at 592-93 (discussing the risks of indirect religious coercion in public schools).
155. Id. at 592.
156. See Lee, 505 U.S. at 593-94 (listing scholarly journal articles on adolescent behavior and peer pressure).
157. Id. at 596.
158. See id. at 595 (noting that although high school graduation is not mandatory, it is “one of life’s most significant occasions” and that society expects that all teenagers attend their graduation ceremonies).
159. See id. at 599 (holding that the prayers were unconstitutional in a situation where
Thus, the Court's particular concern with the vulnerability of young children factors into its Establishment Clause cases involving religion in public schools. This is relevant because the “Hang Ten” movement targets both public schools and other government buildings. The Court’s emphasis on the need to protect schoolchildren from religious indoctrination may be a critical factor differentiating “Hang Ten” displays in schools from those in other settings.

III. ANALYSIS

A. THE TEN COMMANDMENTS

The Ten Commandments are revered as fundamental religious tenets in the Christian, Jewish, and Islamic faiths. In these traditions, God related the Ten Commandments to Moses on Mount Sinai. They are a compact between God and the Israelites, in which God ordered Moses and his followers to embrace the Ten Commandments in exchange for his divine protection and benevolence. God inscribed the Commandments on two tablets. The first tablet contains purely theological Commandments (one through four), and the second espouses ethical Commandments (five through ten).

[First Commandment] Thou shalt have no other gods before me.

[Second Commandment] 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 . . . .

[Third Commandment] Thou shalt not take the name of the Lord thy God in vain . . . .

[Fourth Commandment] Remember the sabbath day, to keep it holy. Six days shalt thou labour . . . . But the seventh day is the sabbath of the Lord thy God: in it thou shalt not do any work, thou, nor thy son, nor thy daughter, thy manservant, nor thy maidservant . . . . For in six days the Lord made heaven and earth, the sea, and all that in them is . . . .

[Fifth Commandment] Honour thy father and thy mother . . . .

[Sixth Commandment] Thou shalt not kill.

[Seventh Commandment] Thou shalt not commit adultery.

[Eighth Commandment] Thou shalt not steal.

[Ninth Commandment] Thou shalt not bear false witness against thy neighbor.

[Tenth Commandment] Thou shalt not covet thy neighbor's house, thou shalt not covet thy neighbor's wife, nor his manservant, nor his maidservant, nor his ox, nor his ass, nor anything that is thy neighbor's. 168

These Commandments have played a central role in Christianity. 169 Jesus directly incorporated the Commandments into his teachings, as noted in several parts of the Bible. 170 Christian scholars invoke the Ten Commandments as a major article of faith. 171 The role of the

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168. Exodus 20:3-17 (King James).
170. See Mark 10:17-20 (King James):

[There came one running, and kneeled to him, and asked him, Good Master, what shall I do that I may inherit eternal life? And Jesus said unto him . . . . Thou knowest the commandments, Do not commit adultery, Do not kill, Do not steal, Do not bear false witness, Defraud not, Honour thy father and mother.

For other parts of the Bible in which Jesus refers to the Commandments in his teachings, see Luke 18:18-22 and Matthew 22:34-40.

171. See CLEMENT CROCK, THE COMMANDMENTS IN SERMONS 1 (1935) ("[F]aith alone is not sufficient for salvation. We must also keep the Commandments. Faith, it is true, teaches us what
Commandments in the history of Christian society has been profound:

Irenaeus recognized it as a universal law common to Jews and Gentiles, and receiving new sanction rather than abrogation from Jesus Himself. It came to be commonly used in the instruction of catechumens and was identified by the Schoolmen with natural law. Luther gave fresh prominence to it through his use and exposition of it in his catechisms, and along with the Lord's Prayer it was used as the basis of instruction in the Christian life in all the Reformed tradition[s]. Our interpretation of the commandments must take account of the fact that the law was fulfilled in Christ, and that its true meaning is found in His words and life.\(^{172}\)

In modern times, the Commandments resonate among those "longing for a set of norms that can be relied upon . . . . In contemporary, secularized Western society there is a wistful longing for such norms, upon which individual and family could depend in all circumstances."\(^{173}\)

B. **THE "HANG TEN" MOVEMENT**

The recent movement to post the Ten Commandments in public schools began in the wake of several school shootings involving both student victims and perpetrators across the country.\(^{174}\) These incidents traumatized both the communities directly involved and the nation at large, prompting many individuals to speak to an apparent absence of moral guidelines for today's youth—an absence remedied by an affirmation of religion. In the words of one young man whose brother was wounded in the Paducah, Kentucky school shootings: "We must bring God back into our families and, yes, once again hang the Ten Commandments as a visible sign to everyone that there is good and there is wrong."\(^{172}\) Popularly dubbed the "Hang Ten" movement,\(^{175}\) advocates of posting the Ten Commandments in public classrooms include individual citizens acting alone or with others,\(^{177}\) well-

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\(^{172}\) God is, what He has done for us, and what He has destined us for. But we must also know and do the will of God.

\(^{173}\) THE NEW INTERNATIONAL DICTIONARY OF THE CHRISTIAN CHURCH 243 (J. D. Douglas et al. eds., 1974).


\(^{175}\) See Michael D. Simpson, *After the Shootings, the Lawsuits*, NAT'L EDUC. ASS'N TODAY, Feb. 1, 2000, at 18 (discussing fatal school shootings in Jonesboro, Arkansas; Pearl, Mississippi; Springfield, Oregon; Edinboro, Pennsylvania; Paducah, Kentucky; and Littleton, Colorado).

\(^{176}\) Cal Thomas, *Is It Really "a Turning Point for Our Country"?*, LAS VEGAS REV.-J., May 26, 1999, at 9B.

\(^{177}\) See Hanna Rosin & William Claiborne, *Taking the Commandments Public: Indiana Passes Bill Allowing Display in Schools, Other Government Facilities*, WASH. POST, Feb. 8, 2000, at A03 (referring to the movement to post the Ten Commandments in public places as "Hang Ten").
organized religious lobbying groups, and politicians. Popular support for "Hang Ten" has resulted in several local school districts taking independent action to post the Commandments in public schools. Some members of these communities applaud decisions to bring religion into public schools. At the school board meeting of Adams County, Ohio, where the local high school displays the Ten Commandments on an actual monument, a crowd of 1500 gathered in support of the display. In some cases, local decisions to "Hang Ten" have resulted in developments unforeseen by its sponsors. In most cases, local American Civil Liberty Union chapters have filed suit, or threatened to file suit, against local government bodies, alleging violations of the Establishment Clause. Federal courts have issued diverging opinions on cases involving public displays of the Ten Commandments.

lobbying local county and city politicians to post the Commandments in schools).

178. See John Rivera, Push for Posting 10 Commandments Gaining in States; "Hang Ten" Campaign Seeks to Bypass Church-State Issue, BALT. SUN, Feb. 14, 2000, at 1A (discussing activities of the nationally renowned Family Research Council to support posting the Commandments in public buildings).


180. See Judy Jones, Bible Laws to Go Up in Harlan Schools: School Board Votes 5-0 to Let Volunteers Post Ten Commandments, COURIER-J. (Louisville, Ky.), Aug. 18, 1999, at 1A (describing a local school board decision to post the Ten Commandments in school).


182. See Steve Benen, The Ten Commandments Crusade, CHURCH & STATE, May 1, 1999, at 1 (describing a "boisterous" rally where participants waved miniature U.S. flags and sang patriotic songs like "Proud to Be an American").

183. Joe Frolik, Hang Ten? Debate Touches Nation; Schools and Others Draw Fire, Support for Displays, STAR TRIB. (Minneapolis, Minn.), June 3, 2000, at 7B. Public school officials in Altoona, Pennsylvania erected a display featuring the Ten Commandments, but also allowed equal access to the display for all religious organizations. Id. Soon afterwards, Wiccans, atheists, and other groups also added documents to the display. Id. Within a few weeks, the school shut down the entire display. Id. This case would be considered a "public forum" situation, in which the government creates an open forum for freedom of expression. See supra notes 142-48 and accompanying text for discussion of public forum cases.

184. See Joseph Gerth, Judge Orders Bible Laws: Suit Challenged Commandments, COURIER-J. (Louisville, Ky.), May 6, 2000, at 1A (discussing the legal status of lawsuits filed against various Kentucky county bodies by local ACLU chapters).

185. See Books v. City of Elkhart, 235 F.3d 292, 307 (7th Cir. 2000) (holding that a Ten Commandments monument on city municipal building grounds violates the Establishment Clause); ACLU v. McCreary County, 145 F. Supp. 2d 845, 853 (E.D. Ky. 2001) (extending an
In several states, grassroots “Hang Ten” movements prompted lawmakers to propose legislation permitting the Commandments to be posted in public schools and other government buildings. Ten state legislatures have already debated various versions of such bills. Sponsors withdrew their bills or they were defeated in floor votes in a number of

injunction removing “Hang Ten” displays from Harlan county schools and McCreary and Pulaski county government buildings until a trial on the merits proceeds). The Supreme Court has subsequently denied Books on petition for writ of certiorari, letting the court of appeals’ decision stand. 121 S. Ct. 2209, 2209-10 (2001). But see Suhre v. Haywood County, 55 F. Supp. 2d 384, 399 (W.D.N.C. 1999) (holding that a reasonable observer would not conclude that a county courthouse bas relief of “Lady Justice” in between two Ten Commandments plaques amounts to government endorsement of religion because the display has a historic and secular purpose of illustrating ethical and legal origins).

Books is more analogous to Stone than to typical “Hang Ten” displays, where the Commandments are in close physical proximity to secular documents or symbols. In Books, a Ten Commandments plaque was located on the northeast corner of municipal city grounds, whereas Revolutionary War and freedom monuments were located on the southeast corner. Books, 235 F.3d at 295-96. More typical of “Hang Ten” displays are the situations in Suhre and McCreary, where the Ten Commandments were in very close proximity to other documents. In Suhre, the Ten Commandments were written on two plaques on both sides of a “Lady Justice” bas relief holding a sword and the “scales of justice.” Suhre, 55 F. Supp. 2d at 386-87. The display was behind the judge’s chair and in between United States and North Carolina flags. Id.

The facts of McCreary present a typical “Hang Ten” display, featuring copies of the Ten Commandments, along with excerpts from the Declaration of Independence, Bill of Rights, Star Spangled Banner, and various other documents, posted in public school rooms and government buildings in Kentucky. McCreary, 145 F. Supp. 2d at 846-47.

Although “Hang Ten” is principally targeted towards schools, it is also relevant to displays located on noneducational government building property. Indeed, the situations in Lynch and Allegheny involved noneducational government building property, not public schools. See supra notes 46-96 and accompanying text for discussion on the displays in those cases. Courts could make a distinction between “Hang Ten” displays located in public schools and those located on other government properties. It is the author’s belief that if “Hang Ten” displays are struck down in public schools, they may not necessarily be struck down in other settings because of the different nature of the displays’ surroundings and the presence or absence of schoolchildren. What is needed is a comprehensive decision analyzing all the factual situations presented in Stone, Lynch, Allegheny, and the recent “Hang Ten” developments and differentiating them based on 1) displays located in public schools with the presence of schoolchildren and those located in other public areas without schoolchildren, 2) permanent displays and those presented only during the holiday season, and 3) Ten Commandments displays and those featuring religious symbols associated with the holidays like crèches and menorahs. A full trial on its merits of the McCreary displays may result in a distinction between displays in schools and those in nonschool settings.

186 See Christi Parsons, 10 Commandments Raise Cain: A School Board Decision to Not Post the 10 Commandments Inspired Some Residents to Launch a Grass-Roots Movement to Make Their Cause a State Law, CHI. TRIB., Feb. 8, 2000, at N1 (discussing the interplay among community involvement, school board debate, and the introduction of legislation to allow posting the Ten Commandments in Illinois).

states. In a few states, however, legislation was passed and signed into law permitting display of the Ten Commandments on public property—so long as they are posted with other nonreligious documents. For example, the Indiana Code 4-20.5-21-2 reads:

An object containing the words of the Ten Commandments may be displayed on real property owned by the state along 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.

Both Kentucky and South Dakota have enacted similar legislation.

188. See id. (discussing the status of state Hang Ten bills). Bills failed to pass, died in session or committee, or were withdrawn from consideration in Colorado, Florida, Georgia, Illinois, Iowa, Mississippi, and Oklahoma. Id.

189. IND. CODE § 4-20.5-21-2 (2000).

190. A Kentucky resolution enacted in April 2000 modified a state statute allowing for display of historical documents in public schools. The statute reads:

Local boards may allow any teacher or administrator in a public school district of the Commonwealth to read or post in a public school building, classroom, or event any excerpts or portions of: the national motto; the national anthem; the pledge of allegiance; the preamble to the Kentucky Constitution; the Declaration of Independence; the Mayflower Compact; the writings, speeches, documents, and proclamations of the founding fathers and presidents of the United States; United States Supreme Court decisions; and acts of the United States Congress including the published text of the Congressional Record. There shall be no content-based censorship of American history or heritage in the Commonwealth based on religious references in these writings, documents, and records.

KY. REV. STAT. ANN. § 158.195 (Michie 1996). The Resolution modifies the statute to specifically include the Ten Commandments:

Documents depicting the Ten Commandments may be posted in classrooms by any public school teacher and on other public property, when incorporated into an historical display along with other historic documents as described in KRS 158.195. The purpose of the display shall not be to advance religion, but to advance the important secular purpose of illustrating how the Bible and the Ten Commandments have influenced the faith, morals, and character of American leaders who, in turn, have shaped American law, public policy, and institutions.


191. South Dakota’s statute reads:

An object or document containing the words of the Ten Commandments may be displayed in any public school classroom, public school building, or at any public school event, along with other objects and documents of cultural, legal, or historical significance that have formed and influenced the legal and
C. CONSIDERING THE CONSTITUTIONALITY OF "HANG TEN" DISPLAYS

The laws of Indiana, Kentucky, South Dakota, and other "Hang Ten" provisions initiated at local levels, attempt to conform to the post-\textit{Stone} and post-\textit{Lynch}/\textit{Allegheny} rulings of the Supreme Court. In other words, although \textit{Stone} holds that the Ten Commandments cannot be placed in public schools as an individual document,\footnote{192} \textit{Lynch} and \textit{Allegheny} may allow them to be posted alongside secular items that would negate its religious character.\footnote{193} Examples of such displays/proposals in schools and other public buildings include:

\begin{itemize}
  \item A display featuring the Ten Commandments along with excerpts from the Declaration of Independence, the constitution of Kentucky, the Mayflower Compact, and President Ronald Reagan's proclamation declaring 1983 "The Year of the Bible," in the Harlan County school system in Kentucky.\footnote{194}
  \item A proposed display to include the Ten Commandments along with the Bill of Rights, the Emancipation Proclamation, the United States' flag, and dollar bills bearing the words "In God We Trust" in Gibson City schools in Illinois.\footnote{195}
  \item A bill allowing displays featuring the Ten Commandments along with documents like the North Carolina constitution, Declaration of Independence, the national anthem, and writings and speeches of the Founding Fathers and Presidents of the United States in North Carolina schools.\footnote{196}
\end{itemize}

Determining whether such displays are constitutional depends upon consideration of the following two factors: 1) the majority of Supreme Court justices have regularly employed Justice O'Connor's endorsement test of Establishment Clause cases since its inception in \textit{Lynch}; and 2) the displays 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:

\begin{itemize}
  \item Shall be in the same manner and appearance generally as other objects and documents displayed; and
  \item May not be presented or displayed in any fashion that results in calling attention to it apart from the other displayed objects and documents.
\end{itemize}


\footnote{192} See supra notes 16-25 and accompanying text for discussion of the \textit{Stone} case.

\footnote{193} See supra notes 46-96 and accompanying text for discussion of the \textit{Lynch} and \textit{Allegheny} cases.

\footnote{194} See Gerth, supra note 184 (describing Harlan County's display).

\footnote{195} See Rebecca Loda, \textit{Ten Commandments Decision Postponed}, \textit{THE PANTAGRAPH} (Bloomington, Ill.), Nov. 4, 1999, at A6 (describing a display proposed to the local school board).

deemed permissible by the Court in *Lynch* and *Allegheny*, and its accompanying analyses, are not analogous to the "Hang Ten" displays because: a) the character of the displays is fundamentally different, and b) the setting of the displays is fundamentally different.

1. Differentiating Between "Hang Ten" and *Lynch/Allegheny* Displays, and the Applicability of the Endorsement Test

The "Hang Ten" displays are not analogous to the displays deemed permissible in *Lynch* and *Allegheny*. In *Lynch*, the Court held that the crèche’s inclusion in the city’s display must be examined in its wider Christmas context, and that the display’s overall purpose was to celebrate the holiday season. Likewise, in *Allegheny*, the menorah/tree display was permissible because the tree served to secularize the menorah, and the display’s purpose was to celebrate diverse holiday traditions.

However, the "Hang Ten" displays do not present a collection of documents which, in totality, celebrate or symbolize a single overall theme. Instead, their focus has the opposite result. They emphasize the importance of individual documents which, taken separately, bear some fundamental significance to the nation. This is the key distinction between the *Lynch/Allegheny* and "Hang Ten" displays.

For example, if a public school posts an educational display featuring 1) the United States Constitution, 2) the Gettysburg Address, and 3) the Ten Commandments under a sign reading "Fundamental Documents of United States History," its purpose is to highlight the individual importance of each document separately. These three documents retain distinct characteristics and messages which cannot be "merged" into some abstract theme, unlike the elements of the displays in *Lynch* and *Allegheny*, which merged to symbolize the general theme of holiday celebration. In essence, the message communicated by the display is: "These are three individual documents which are fundamental to United States history." Therefore, such a display would actually amount to a separate endorsement of the United States Constitution, a separate endorsement of the Gettysburg Address, and a separate endorsement of the Ten Commandments, each one...


198. Id. at 681.

199. See *Allegheny v. ACLU*, 492 U.S. 573, 617-18 (1989) ("The widely accepted view of the Christmas tree as the preeminent secular symbol of the Christmas holiday season serves to emphasize the secular component of the message communicated by other elements of an accompanying holiday display, including the Chanukah menorah.").

200. See *id.* at 620 (stating that the display’s purpose was to celebrate diverse holiday customs).

201. See *supra* notes 46-96 and accompanying text for the Court’s analyses of the displays in those cases.
of them being presented as a "fundamental document of United States history."

If anything, the Ten Commandments may actually be highlighted in the viewer’s mind, because unlike the United States Constitution and the Gettysburg Address, the Ten Commandments did not originate from the United States, pre-dates United States history by thousands of years, and is the only patently religious document of the three. The situation would therefore be more analogous to the one in Stone where the Commandments hung alone. There, the Court explicitly noted that despite labels fixed to the Commandments asserting their secular importance, the "pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature .... and no legislative recitation of a supposed secular purpose can blind us to that fact."202

This kind of display, which is purposefully designed to award special recognition to individual documents, could not pass the endorsement test’s purpose prong because it is intentionally designed to communicate a message that the Ten Commandments, a plainly religious document, is fundamental to United States history. Nor should it satisfy the endorsement test’s perceived endorsement prong because an individual confronted by it could likely conclude that, in the government’s view, the Ten Commandments, separately, (and the United States Constitution and Gettysburg address, separately) is fundamental to United States history. This hypothetical display is in fact akin to many of the actual or proposed "Hang Ten" displays in the sense that it is the only non-United States document presented. Thus, such a display would fail the endorsement test.

The actual religious effect of such a display would also be heightened given its setting in schools. The context of the Lynch and Allegheny displays were not only physical, but temporal. They were displayed for only a few weeks of the year—an important fact since the Supreme Court viewed the displays “in the proper context of the Christmas Holiday season.” The Court deemed those displays permissible as government celebrations of the

202. From a psychological standpoint, religious language is unique because it can invoke powerful, emotional responses among audiences. See PAUL W. PRUYSER, A DYNAMIC PSYCHOLOGY OF RELIGION 124-25 (1976). Critics of “Hang Ten” also point out that the Commandments are often the only religious item within “Hang Ten” displays. See Loda, supra note 195 (discussing an ACLU member’s viewpoint that posting the Commandments along with secular documents would be akin to posting them alone since it is the only religious document in the display).


204. Id. at 41.

205. Id.


207. See supra notes 194-96 and accompanying text for examples of actual and proposed displays where the Commandments is the only non-United States document.

holidays during the holiday season. On the other hand, the "Hang Ten" displays could theoretically be posted in every classroom of a public school for the entire school year, and remain there the entire time a student enters the school and then graduates. In other words, students would be confronted continuously, perhaps for years, with a display urging them to recognize the importance of the Ten Commandments to the nation's history.

The potential indoctrinating effects of such an environment could be powerful, as noted in the statements of Justices Frankfurter, Brennan, and Kennedy, particularly in public schools, which are, in comparison to colleges or universities, generally more confined, smaller, and homogenous. The potential for religious indoctrination, subtle or direct, or the harmful effects of "religious chauvinism," are not insignificant. Compulsory attendance of public schools as mandated by law only heightens the psychological vulnerabilities schoolchildren may have to religious influence. The existence of external peer pressure to conform with the activities or beliefs of others may be significant. Also, children are at a vulnerable point in their lives when they begin to foster and internalize religious concepts. Given the Supreme Court's persistent dicta

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210. See supra notes 189-91 and accompanying text for the Indiana, Kentucky, and South Dakota laws. There are no time restrictions imposed, and the laws theoretically allow schools to post the Commandments in every classroom. Id.
211. See supra notes 131-60 and accompanying text for a discussion of the Supreme Court's approach to children versus adults.
213. See Lynch, 465 U.S. at 701 (Brennan, J., dissenting) (discussing the potential effects of introducing one particular religion in schools on members of other faiths).
214. See B. Bradford Brown, Perceptions of Peer Pressure, Peer Conformity Dispositions, and Self-Reported Behavior Among Adolescents, 22 DEVELOPMENTAL PSYCHOL. 521, 521 (1986) ("Conformity to peers is often considered one of the hallmarks of adolescent behavior. Studies have shown that peer conformity dispositions (willingness to conform to peers) as well as conformity behavior increase from childhood through adolescence."); L.B. Brown & D.J. Fallant, Religious Belief and Social Pressure, 10 PSYCHOL. REP. 815, 814 (1962) (describing measurements of religious belief among adolescents under social pressure and concluding that "religious beliefs are susceptible to social influences"); Deborah J. Laible et al., The Differential Relations of Parent and Peer Attachment to Adolescent Adjustment, 29 J. YOUTH & ADOLESCENCE 45, 55-56 (2000) (concluding that peers of adolescents have a greater influence on their social adjustment than parents).
215. See JAMES BISSETT PRATT, THE RELIGIOUS CONSCIOUSNESS: A PSYCHOLOGICAL STUDY 108 (1971) (describing adolescence as "the flowering time for religion . . . . No other period is so fateful in its influence upon the whole of life. The line of direction which the individual is to follow through all his years is usually determined in this critical period"); David Elkind, The Origins of Religion the Child, in CURRENT PERSPECTIVES IN THE PSYCHOLOGY OF RELIGION 269, 269-78 (1977) (discussing the development of religious concepts among children); W. Chad Nye &
recognizing the vulnerability of children to religious indoctrination, \textsuperscript{216} constitutional review of "Hang Ten" classroom displays should generate intense examination, more so than in \textit{Lynch} or \textit{Allegheny}, where schoolchildren were not the principal audience to the displays at issue. \textsuperscript{217}

2. The Endorsement Test and Textual Purpose

The endorsement test requires that the stated purpose of the government policy or law must not endorse religion. \textsuperscript{218} This mandate requires courts to examine a law or policy on its face. \textsuperscript{219} Of the three laws mentioned above, the stated purpose in Kentucky's law is secular, not religious, \textsuperscript{220} and the Indiana and South Dakota laws state no purpose, but simply permit posting the Commandments along with other documents. \textsuperscript{221} However, the very fact that all three states specifically speak to the Ten Commandments should generate judicial suspicion. Again, \textit{Stone} expressly holds that the "pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature" \textsuperscript{222} despite any "legislative recitation of a supposed secular purpose." \textsuperscript{223} Thus, despite the lack of any stated purpose or an avowed secular purpose, courts should at least review the laws of Indiana, Kentucky, and South Dakota, very skeptically, and proceed to an investigation of government intent not stated in the law or policy's text.

\textsuperscript{216} See supra notes 131-60 and accompanying text for discussion on the Court's treatment of schoolchildren.

\textsuperscript{217} Because of the presence of schoolchildren, classroom "Hang Ten" displays deserve a stricter scrutiny than that employed in \textit{Lynch} and \textit{Allegheny}. However, the only Establishment Clause case in which the Supreme Court raised its standard of review to strict scrutiny was in \textit{Larson v. Valente}. See supra notes 26-36 and accompanying text for discussion of that case. The Court may have abandoned that test.

\textsuperscript{218} See supra notes 59-61 and accompanying text for a description of the endorsement test.


\textsuperscript{220} See supra note 190 for the text of the statute. However, given the language of the resolution, one could still argue that although the resolution's purpose is not to directly proselytize, it still highlights the importance of the Bible and the Ten Commandments, imparting on them a special recognition by the state that may amount to an endorsement.

\textsuperscript{221} See supra notes 189 and 191 and accompanying text citing the Indiana and South Dakota laws.


\textsuperscript{223} Id.
3. The Endorsement Test and Nontextual Purpose

As stated in numerous Supreme Court cases, and reconfirmed most recently in *Santa Fe Independent School District*, an examination of governmental purpose proceeds "beyond just the text of the policy." Such an examination includes not just an investigation of the legislative record, but its "legislative history, or its interpretation by a responsible administrative agency." Indeed, the "historical context," including "the specific sequence of events leading to passage of the statute" and "the circumstances surrounding its enactment" should be examined. Courts must be vigilant to determine if a law or policy's secular purpose is "sincere and not a sham."

The "Hang Ten" movement and its supporters seem pre-eminently motivated by a desire to inculcate religiously based morals in people. Testifying before a congressional subcommittee, survivors of the Littleton, Colorado massacre urged legislators to "hang the Ten Commandments" in schools. Another student speaking on a nationwide radio program asserted, "[I]t's time to change our nation's direction .... America's young people need to know that God loves them." The Family Research Council (FRC), the nationwide organization that organized the official "Hang Ten" movement, has made explicit remarks stating "what we're trying to remind [students] with the hanging of the Ten Commandments is there is a moral code of behavior." Not surprisingly, the FRC has intensely lobbied congressional representatives to support "Hang Ten" by sending them Ten Commandment plaques as signs of support for "Hang Ten." Kentucky

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224. See supra notes 97-130 and accompanying text for a discussion of the Supreme Court's inquiry into governmental purpose behind the text.
228. *Id.* at 595.
229. *Id.* at 597.
232. See Thomas, supra note 175 (quoting testimony of Stephen Keene and Adam Campbell before the congressional subcommittee).
235. See Rivera, supra note 178 (quoting remarks by Janet Parshall, spokeswoman for the organization).
236. See id. (discussing the FRC's activities). The affiliation of government "Hang Ten" efforts with the FRC should garner judicial suspicion. In *Allegheny*, the Supreme Court considered whether the state had endorsed the proselytizing message of the menorah's owner—a religious Jewish organization. Allegheny v. ACLU, 492 U.S. 573, 621 n.70. Noting that
state Senator Albert Robinson, sponsor of the “Hang Ten” bill in his state, told journalists that “God wants the Ten Commandments . . . That’s where we come from.” Senator Robinson’s statements as the bill sponsor should suffice to indicate a clear religious intent behind the bill, as the Supreme Court has previously looked to legislators’ statements to determine intent.

Likewise, the Supreme Court’s persistent scrutiny of “sham” secular purposes disguising religious motivations seems directly relevant to “Hang Ten.” Attorneys working with municipal bodies are deliberately trying to create permissible displays by “secularizing the document to satisfy the federal government . . . If you don’t, you run the risk of having the courts strike down what you have done. You have to keep the process clean. Don’t even say the word religion.” One attorney for the North Carolina School Boards Association warned school boards to “be very careful and to work with your board attorney to make sure you do it correctly.” In such instances, it seems evident that some “Hang Ten” advocates are deliberately pursuing actions to post the Ten Commandments in schools with the other documents merely acting as secondary items to legalize the display. Such attempts should qualify as a “sham” because the Supreme Court looks for government purpose “beyond just the text of the policy” and into “the circumstances surrounding its enactment.” It is likely that such intentions would be enough to show impermissible government purpose.

If there is a secular purpose behind “Hang Ten” to foster positive morals among the country’s youth, some of the rhetoric espoused by “Hang Ten” advocates is at least sectarian and divisive, and at worst downright intolerant. In the Kentucky Senate debate of its “Hang Ten” law, Senator Robinson declared, “[w]hen the boat came to these great shores, it did not have an atheist, a Buddhist, a Hindu, a Muslim, a Christian and a Jew.

since there were no factual findings that that organization used the menorah to proselytize Judaism, and that no challenge was raised along such lines, the Court abandoned that issue. Id. However, if the Court’s dicta is dispositive, then the FRC’s close involvement with “Hang Ten” may amount to a state’s endorsement of religious proselytization vis-à-vis a private organization.

237. Americans United for Separation of Church and State, Around the States, CHURCH & STATE, May 1, 2000, at 22.


239. See supra notes 109-15 and accompanying text discussing the Supreme Court’s wariness of "sham" secular purposes.


241. Sherry Jones, School Boards Call for Budget Resolution, MORNING STAR (Wilmington, N.C.), Sept. 17, 2001, at 1B.


243. Id. at 315.
Ninety-Eight percent plus of these people were Christians.” In the Kentucky House debate, the legislature’s sole Jewish member was singled out and asked if she “believed in Jesus and whether he ‘rose from the dead.’” On the televised “Geraldo Rivera Show,” Georgia Representative Bob Barr, a “Hang Ten” advocate, called California Representative Maxine Waters “hateful” during a debate on the issue. Apparently, some politicians in support of “Hang Ten” are not averse to singling out and deriding their opponents.

Although the “Hang Ten” movement was originally intended as a virtuous attempt to restore or inculcate ethical values in people, a small minority of supporters may be driven more by bigotry and intolerance. Dennis Pape, the leader of a midwestern chapter of the American Family Association working to “Hang Ten” in every county courthouse of Michigan and Wisconsin, stated, “The Founding Fathers set up a Christian nation. They did not set up a Buddhist nation.” Mr. Pape’s efforts to “Hang Ten” are apparently related to his concern that “barbarians are ransacking America.” In a similar vein, South Carolina Board of Education member Harry Jordan stated “screw the Buddhists and kill the Muslims” during a board meeting on “Hang Ten.” Mr. Jordan’s comments are ironic considering that “Hang Ten” was initially prompted by violent school shootings, and the Sixth Commandment itself proscribes killing.

IV. CONCLUSION

A. HOW SHOULD COURTS EXAMINE “HANG TEN” DISPLAYS?

Using the endorsement analysis, and recognizing that “Hang Ten” displays are substantially different from those in Lynch and Allegheny, courts should closely examine “Hang Ten” displays in schools, whether codified in law or enacted by substate bodies. In particular, courts should heed the warnings of the Supreme Court regarding religious endorsement disguised as “sham” secular interests. Examining statutory or policy text should not be the end point of judicial analysis. Instead, courts must look beyond the text to the entire context of “Hang Ten” displays to determine whether the government actor intends to endorse or proselytize religion. In particular, courts should closely examine such displays if schoolchildren are the

244. *Infaming Intolerance*, COURIER-J. (Louisville, Ky.), Feb. 17, 2000, at 10A.
246. Rothstein, *supra* note 179. Representative Waters replied, “You’re a fine one to talk about the Commandments.” *Id.*
248. *Id.*
targeted audience.\textsuperscript{250} In such an environment, the wall separating Church and State "must be kept high and impregnable."\textsuperscript{251} If such intentions exist, whether they be well-meaning or just manifestations of intolerance, courts should strike down such displays.

The "Hang Ten" movement shows no sign of slowing down. In addition to schools, courthouses have now become the focus of "Hang Ten." Even though the Seventh Circuit ordered displays removed from the courthouses of two Kentucky counties,\textsuperscript{252} nearly a quarter of the state's courthouses retain Ten Commandments displays.\textsuperscript{253} Even the Chief Justice of the Alabama Supreme Court made headlines. Judge Roy Moore moved a granite tablet of the Ten Commandments, also engraved with quotes by Thomas Jefferson and James Madison, into the courthouse lobby—late at night after the other judges had gone home.\textsuperscript{254}

\textbf{B. ARE THERE ALTERNATIVES TO "HANG TEN"?}

The perception of "moral decay" among the nation's youth remains a national problem in the minds of many people.\textsuperscript{255} How can public schools address this issue? Should it even be an issue for public schools to address? Some commentators suggest that the Ten Commandments could be severed, separating the clearly religious commandments from those that espouse ethical messages, and only post the latter in schools.\textsuperscript{256}

However, reinterpreting, revising, or editing the Commandments itself would be challenging and controversial.\textsuperscript{257} Moreover, the usefulness of even

\textsuperscript{250} See \textit{supra} notes 131-60 and accompanying text for discussion on the importance of protecting vulnerable schoolchildren from religious indoctrination.

\textsuperscript{251} McCollum v. Bd. of Educ., 333 U.S. 203, 212 (1948).


\textsuperscript{254} See Dahleen Glanton, \textit{Judge Unveils Bible-based Monument; 10 Commandments Display Challenged}, CHI. TRIB., Aug. 16, 2001, at N1 (describing the actions of Chief Justice Roy Moore, also known as "the 10 Commandments judge").

\textsuperscript{255} See Rob Morse, \textit{Great Ticket, Bad Button}, S.F. EXAMINER, Aug. 8, 2000, at A2 (describing a Council of Civil Society report that America is in "moral decline" and explaining the activities of high profile politicians to combat sexually explicit and violent music lyrics, media content, and video games).

\textsuperscript{256} See Mark Davis, \textit{We're Seeking Kids of Character}, FORT WORTH STAR TELEGRAM, June 20, 1999, at 4 (arguing that the Commandments as a whole should not be posted, but the Fifth, Sixth, Seventh, Eighth, and Ninth Commandments remain important ethical messages); \textit{Let the Commandments Be Secular}, ST. PETERSBURG TIMES, Nov. 24, 1998, at 12A (arguing for rewording and posting the Commandments as: Do not kill; Do not commit adultery; Do not steal; Do not lie; Do not be jealous of others; Respect your parents; Do not curse or disparage the beliefs of others; Rest one day every week).

posting a severed and secularized version of the Commandments in schools, let alone a religious one, remains to be seen. Critics of "Hang Ten" suggest that posting religious or ethical messages in schools to discourage violence would not only be useless, but would have the effect of cheapening the victims of such tragedies. If posting messages in schools seems like an ineffective method to prevent or discourage school violence. As one "Hang Ten" critic opined, "If posting the Ten Commandments and having a moment of silent prayer is the best people can come up with to solve the problem of violence in schools, one wonders if they wouldn't be better off in another job and out of the legislature." If posting documents on walls is the preferred means to combat school violence, will legislatures “mandate that the rest of the Bible be stenciled across school walls” after the next outbreak of school violence? A better approach may be for schools to simply offer classes about comparative religions and their core values to interested students. Indeed, a critical, comprehensive, and secular study of religion is fully constitutional, and would ideally serve to deepen respect for common society, agreeable to members of all faiths or the nonreligious, would be challenging and controversial. For instance, the First Commandment clearly condemns those who believe in religions other than the monotheistic western faiths. Id. The Second Commandment’s proscription of making images or likenesses seems to contradict the display of religious imagery used in many places of worship. Id. Also, its extension of responsibility for the sinful acts of individuals to their family members conflicts with the modern concept of punishing only the perpetrators of crimes and not their families. Id. The Fourth Commandment’s Sabbath Day requirement also poses problems. Muslims consider Friday the day for religious observance. Jews practice and rest on Saturday, and Christians practice and rest on Sunday. However, only Seventh Day Adventists strictly continue to follow the Sabbath Day requirement. Other religions may not even reserve a day of the week for religious practice, but celebrate and observe on a seasonal or celestial basis. For example, Wiccans celebrate on full moons, solstices, and equinoxes. Id. Also, the Fourth and Tenth Commandments’ reference to servants is outdated, as it refers to the ancient practice of slavery, which is now universally condemned. Also, wives are not considered property in modern-day America. Id. The Sixth Commandment’s proscription of killing is largely ignored today by people of all faiths. Only Quakers and a few other pacifist religions strictly adhere to non-violence. Id. Thus, some would argue that revising or editing the Ten Commandments in a way that would truly apply to a modern day, multifaith society would be nearly impossible.

258. See Loda, supra note 195 (quoting a “Hang Ten” critic who said “it’s a grave injustice to the kids and teachers killed in Columbine to suggest they would have been saved by a document on the wall”).


261. See Charles C. Haynes, “Hang Ten” Movement Ill-Advised, THE TENNESSEAN, Feb. 20, 2000, at 4B (arguing that a better way to promote values is not to post the Commandments on school walls but by discussing the meaning of the Commandments in religious traditions).

262. See Stone v. Graham, 449 U.S. 39, 42 (1980) (“The Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like.”).
values of all religions.263

A movement to promote religious values in schoolchildren not only seems unconstitutional, but misplaced, ineffective, and intolerant. In the words of one “Hang Ten” critic, Reverend Barry Lynn, “Religion is not some sort of silver bullet to be employed by politicians to ward off whatever evil they deem to be menacing our republic. If religion is to be meaningful, it must be cultivated voluntarily in the hearts and minds of believers.”264 Thomas Jefferson’s wall dividing church and state can hopefully separate your child’s education from your child’s indoctrination.

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263. Andrew Stephen, When God is Expelled from School, NEW STATESMAN, Feb. 21, 2000, at 20 (“[T]he lack of education means that instead of increased tolerance for, say, Muslims, there is bigotry. I’m constantly astonished by the number of otherwise well-educated Americans who believe the Muslim faith to be synonymous with terrorism.”).
