

# The Ten Commandments in Public Schools: Thou Shalt Not Post?

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## Descriptive Context

### Introduction

On June 27, 2005, the U.S. Supreme Court issued companion decisions addressing the posting of the Ten Commandments on public property. In seemingly disparate opinions, the Court permitted the placement of the Decalogue on a granite statue on the Capitol grounds in Texas (*McCreary v. ACLU*), but struck down framed postings inside two Kentucky county courthouses (*Van Orden v. Perry*).

As comparative religion, religious studies, and character education gain popularity within public school curricula across the nation, school divisions may find closer analysis of these two decisions—and their constitutional underpinnings—particularly instructive. To ascertain what materials may appear—and in what context—within public school classrooms, on bulletin boards, and in common areas, Virginia school divisions may be well advised to review not only case precedent, but also relevant state statutes, regulations, and guidelines regarding religious activity and instruction in the public schools.

Central to the analysis of cases addressing religious instruction or materials in the public schools is, of course, the Establishment Clause of the First Amendment, which states that “...Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof....”<sup>1</sup> The Establishment Clause has formed the basis for numerous challenges to school postings of the Ten Commandments or the National Motto, as well as Pledge of Allegiance recitations.

In the last four decades, these challenges have typically been resolved through application of the three-pronged *Lemon* test, first articulated by the U.S. Supreme Court in 1971. Although subsequently revised and refined, the substance of the ruling remains intact; to pass constitutional muster, the activity in question must (i) have a secular purpose; (ii) not have the primary effect of either advancing or inhibiting religion; and (iii) not foster excessive governmental entanglement.<sup>2</sup>

Sometimes implicated in cases addressing government use or display of certain religious images or speech—such as the national motto or the Pledge—is “ceremonial deism.” Cited in a dissenting Supreme Court opinion in 1984 (post-*Lemon*), the concept is based on the premise that certain practices remain “protected from Establishment Clause scrutiny chiefly because they have lost through rote repetition any significant religious content.”<sup>3</sup> Whether applying *Lemon* or “ceremonial deism” (or a combination thereof), federal courts have upheld use of the national motto on currency. In one such case, the 9<sup>th</sup> Circuit Court of Appeals went so far as to state that “In God We Trust” has “no theological or ritualistic impact.” The U.S. Supreme Court has declined to review these decisions.<sup>4</sup>

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<sup>1</sup>U.S. Constitution, First Amendment.

<sup>2</sup>*Lemon v. Kurtzman*, 403 U.S. 602; 91 S. Ct. 2105; 29 L. Ed. 2d 745 (1971).

<sup>3</sup>*Lynch v. Donnelly*, 465 U.S. 668 at 716, 104 S.Ct. 1355, 79 L.Ed. 2d 604 (1984).

<sup>4</sup>*Gaylor v. United States*, 74 F.3d 214 (10<sup>th</sup> Cir. 1996), cert. den'd, 517 U.S. 1211 (1996); *O'Hair v. Blumenthal*, 462 F.Supp. 19 (W.D. Tex. 1978), aff'd sub nom. *O'Hair v. Murray*, 588 F.2d 1144 (5<sup>th</sup> Cir. 1978) (per curiam), and cert. den'd, 442 U.S. 930 (1979); *Aronow v. United States*, 432 F.2d 242 at 243 (9<sup>th</sup> Cir. 1970)-

But what of the Ten Commandments? Can the *Lemon* test, “ceremonial deism,” or other analyses support displays or postings in public schools today? If so, what manner or modes of display would be permissible? What kinds of Decalogue displays or practices should Virginia school divisions avoid?

### **Judicial Review of Ten Commandment Displays: Early Cases**

The high court directly addressed Ten Commandment postings in 1980, invalidating a Kentucky statute requiring classroom posting of the Ten Commandments in *Stone v. Graham*.<sup>5</sup> The challenged statute required the postings to be supported by private contributions, to measure 16 inches by 20 inches, and to include language—“in small print”—indicating that “[t]he secular purpose 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.”<sup>6</sup>

Relying on the *Lemon* test, the Court found that the statute failed the first prong—that of secular purpose. Specifically rejecting the contention that the “small print” affirmed the postings’ secular purpose, the Court stated that the Decalogue is an “undeniably a sacred text” that is not limited to secular matters. Integral to the Court’s reasoning was the nature of the first of the commandments, which address humanity’s relationship with—and duties owed to—God. The “pre-eminent purpose” for the posting, according to the Court, was “plainly religious....”<sup>7</sup>

Significantly, the Court did not invalidate all uses of the Ten Commandments in the public schools. Inclusion of the Decalogue in “an appropriate study of history, civilization, ethics, comparative religion,” or other legitimate integration into curriculum may well withstand scrutiny. The challenged postings, however, served no educational function, and the use of private funding to support postings was insufficient to erase the implication of state legislative support for the postings.<sup>8</sup>

Also invalidated by judicial action in 1980 was a 1927 North Dakota statute that directed local school boards as well as public institutions of higher education to “cause a placard containing the ten commandments of the Christian religion to be displayed in a conspicuous place in every schoolroom, classroom, or other place where classes convene for instruction.” Public funds supported the postings.<sup>9</sup>

Here, as in *Stone*, the *Lemon* test figured prominently. The federal district court found “not even a pretense of a secular purpose in the statute....” Despite defendant’s argument that the Ten Commandments provide the “cornerstone of our legal system” and “thus have become secular in nature,” the court focused instead on the sectarian nature of the first three commandments, the lack of explanation of purpose on the postings themselves, and the statute’s specific mandate that the Decalogue “of the Christian religion” be posted. The court concluded that the statute failed not only the *Lemon* secular purpose requirement—but also the second prong—that the activity not advance religion.<sup>10</sup>

### **Recent and Differing Perspectives**

While the *Stone* decision may seem to have resolved any lingering concerns regarding public classroom postings, the Ten Commandment postings have nonetheless garnered renewed attention in recent years. In 1997, Alabama circuit court judge Roy Moore refused to remove a wooden plaque of the Ten Commandments from his courtroom. Despite the ensuing controversy, Moore was elected chief justice of the Alabama Supreme Court, and was nominated to the 11<sup>th</sup> Circuit Court of Appeals. However, Moore’s subsequent defiance of a federal court order to remove a granite monument of the Ten

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<sup>5</sup>*Stone v. Graham*, 449 U.S. 39; 101 S. Ct. 192; 66 L. Ed. 2d 199 (1980).

<sup>6</sup>449 U.S. at 40, n. 1.

<sup>7</sup>*Id.* at 41.

<sup>8</sup>*Id.*

<sup>9</sup>*Ring v. Grand Forks Public School Dist. No. 1*, 483 F.Supp. 272 (1980), citing N.D. Cen. Code § 15-47-10.

<sup>10</sup>483 F.Supp. at 273, 274.

Commandments he had placed on the Alabama Supreme Court grounds resulted in his removal from the bench by an Alabama judicial ethics panel.<sup>11</sup>

Perhaps fueled by this controversy as well as by the Columbine High School shootings, the “Hang Ten” movement gained prominence in supporting postings in public schools. Following various school shootings, state legislatures—and the U.S. Congress—considered variations of legislation authorizing Ten Commandment displays in schools and on state property. Then-current public opinion also seemed to support these postings; a 1999 Gallup poll indicated approximately 75% support for the postings.<sup>12</sup> A 2003 survey sponsored by the First Amendment Center and the American Journalism Review indicated 62% respondent support for posting of the Decalogue in government buildings.<sup>13</sup>

Further complicating the posting issue are not only the various traditions, texts, and tenets of world religions, but the different texts followed by those faith traditions that do incorporate the Ten Commandments. Scholars note that the ancient Hebrew text differs from a Protestant King James translation, and that Roman Catholics and Lutherans follow yet another text. Thus, even if a school posting passes constitutional muster, which translation should be used, and who decides?<sup>14</sup>

### State Legislative Actions

In the new millennium, the movement also captured the attention of state legislatures. In 2000, the **Indiana** legislature enacted legislation authorizing the display of the Ten Commandments on public property “along with other documents of historical significance that have formed and influenced the United States legal or governmental system.” The display was not to depict the Ten Commandments in a manner distinctive from the other historical materials. Finally, the statute clearly provided for the continued display of any existing free-standing Ten Commandment monuments.<sup>15</sup>

The 2000 session of the **South Dakota** Legislature adopted similar statutory language, authorizing the display of the Ten Commandments in public school facilities “along with other objects and documents of cultural, legal, or historical significance that have formed and influenced the legal and governmental systems of the United States and the State of South Dakota.” As in the Indiana statute, the display was to “be in the same manner and appearance generally as other objects and documents displayed....”<sup>16</sup>

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<sup>11</sup>CNN.com Law Center, “Ten Commandments judge removed from office” (November 14, 2003); <<http://www.cnn.com/2003/LAW/11/13/moore.tencommandments/>>; “Ten Commandments monument moved: New poll says Americans disapprove of federal court order”

(November 14, 2003) <<http://www.cnn.com/2003/LAW/08/27/ten.commandments/index.html>>

<sup>12</sup>Baptist Standard, Frolik, J., *Cleveland Plain Dealer*, “Will Ten Commandments Make Everyone Act Better?” (June 5, 2000) <[http://www.baptiststandard.com/2000/6\\_5/pages/commandments.html](http://www.baptiststandard.com/2000/6_5/pages/commandments.html)>

<sup>13</sup>Christian Century, “Most favor pledge, decalogue in schools - News - pledge of allegiance and ten commandments - joint survey of First Amendment Center and the American Journalism Review” (August 23, 2003)

[http://www.findarticles.com/p/articles/mi\\_m1058/is\\_17\\_120/ai\\_107397249/print](http://www.findarticles.com/p/articles/mi_m1058/is_17_120/ai_107397249/print); see also, The Interfaith Alliance & The Interfaith Alliance Foundation, “The ‘Hang Ten’ Campaign” (June 1, 2001) <

<http://www.interfaithalliance.org/site/apps/nl/content2.asp?c=8dJIIWMCE&b=829121&ct=147351>>; Stateline.org, T. Danitz, “Push for Ten Commandments To Return To Schools,” (Thursday, March 2, 2000) <<http://www.stateline.org/live/ViewPage.action?siteNode/d=136&language/d=1&content/d=13943>>

<sup>14</sup>Anti-Defamation League, “The Ten Commandments Controversy: A First Amendment Perspective” (2005) <[http://www.adl.org/religious\\_freedom/resource\\_kit/ten\\_commandments.asp](http://www.adl.org/religious_freedom/resource_kit/ten_commandments.asp)>

<sup>15</sup>Indiana General Assembly, HB 1180 (2000); I.C. 4-20.5-21-2 (2006) <<http://www.in.gov/legislative/ic/code/title4/ar20.5/ch21.html>>; I.C. 36-1-16 (2006) <<http://www.in.gov/legislative/ic/code/title36/ar1/ch16.html>>

<sup>16</sup>S.D. Codified Laws §13.1-24-17.1 <<http://legis.state.sd.us/statutes/DisplayStatute.aspx?Type=Statute&Statute=13-24-17.1>>. Four years later, in 2005, the legislature adopted HRC 1101, citing the propriety of Bible study for “its literary and historic qualities.... when presented objectively as part of a secular program of education....” The measure urged public schools to “exercise due diligence to ensure that the freedom of religious expression....is not inhibited.” South Dakota Legislature, House Concurrent Resolution No. 1011 (2005).

Also in 2000, the **Kentucky** General Assembly adopted SJR 57, authorizing the posting of the Ten Commandments in “classrooms by any public school teacher and on other public property, when incorporated into an historical display along with other historic documents....” Echoing *Lemon* language, the resolution dictated that “[t]he purpose of the display shall not be to advance religion, but to advance the important **secular purpose** [emphasis added] of illustrating how the Bible and the Ten Commandments have influenced the faith, morals, and character of American leaders....” Copies of the resolution itself were to be incorporated in these displays to “advance the **secular purpose** [emphasis added] of making citizens of the Commonwealth more knowledgeable concerning the...formative influence of the Bible and the Ten Commandments on American leaders, institutions, and law....”<sup>17</sup>

In 2001, the **North Carolina** General Assembly adopted the “N.C. History Taught/Student Citizen Act,” allowing school boards to display the Ten Commandments among those “documents and objects of historical significance that have formed and influenced the United States legal or governmental system and that exemplify the development of the rule of law”—specifically citing the Magna Carta, the Mecklenburg Declaration, the Justinian Code, and other documents. While mirroring the appearance and manner language of the Indiana and South Dakota statutes, the North Carolina statute additionally required an accompanying “prominent” posting of the First Amendment of the U.S. Constitution.<sup>18</sup>

### **The Supreme Court Rules Again: *McCreary* and *Van Orden***

By summer 2004, the tangle of sometimes inconsistent state and federal judicial rulings on the posting issue—perhaps further complicated by a range of state legislative attempts to address the controversy—had yielded nine state appeals to the U.S. Supreme Court.<sup>19</sup> In a 2001 decision, the 7<sup>th</sup> Circuit Court of Appeals had upheld an injunction against the installation of a Ten Commandments monument on the Indiana statehouse grounds. The original 1950s monument had been destroyed by vandalism; the replacement version, supported by private donations, was to include not only the Decalogue but also the United States Bill of Rights and the Preamble to the Indiana Constitution.<sup>20</sup>

Again, the *Lemon* test directed the Court’s reasoning. In *Indiana Civil Liberties Union v. O’Bannon*, the Court noted that “the display of secular texts along with the Ten Commandments does not automatically lead to a finding that the purpose in erecting the monument is primarily secular.”<sup>21</sup> Citing the inclusion of the “religion-based” first Commandments, the tablet design, and the separation of the Commandments from the other secular texts on the monument, the 7<sup>th</sup> Circuit found that the *Lemon* secular purpose prong had not been met. In addition, the Court found that the monument would also fail the primary effect prong; despite the presence of secular monuments on the statehouse grounds, the unique tablet-shaped monument (with the Decalogue in the largest lettering and its lack of explicit connection to the other constitutional texts) would convey, at least to the “reasonable person,” the impression of a religious text advanced by state government.<sup>22</sup> In 2002, the U.S. Supreme Court denied certiorari.

Conflicting results in Decalogue rulings across the country—monuments upheld in the Third, Fifth, and Tenth Circuits, and invalidated in the Sixth, Seventh, and Eleventh—coupled with increasing public,

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<sup>17</sup>Education Commission of the States, ECS StateNotes, Religion: School Prayer, Moment of Silence, Other Policies Concerning Religion (July 2000) <<http://www.ecs.org/clearinghouse/13/38/1338/htm>>; see also, Council of State Governments, C. Hicks, “Breeding, budgeting, and bible verses,” <<http://csg.org/pubs/Documents/sgn0005BreedingBudgeting.pdf>>; Indiana General Assembly, HB 1180 (2000); Kentucky General Assembly, SJR 57 (2000).

<sup>18</sup>N.C. G.S. 115C-81 <[http://www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter\\_115C/GS\\_115C-81.html](http://www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_115C/GS_115C-81.html)>; see also, North Carolina General Assembly, H. 195 (2001)<<http://www.ncga.state.nc.us/gascripts/BillLookUp/BillLookUp.pl?Session=2001&Bill/D=H195>>

<sup>19</sup>First Amendment Center, *First Amendment Topics*, “Indiana is 9<sup>th</sup> state to ask high court for Commandments ruling,” (Associated Press, July 11, 2004) <<http://www.firstamendmentcenter.org/news.aspx?Id=13676>>

<sup>20</sup>*Indiana Civil Liberties Union v. O’Bannon*, 259 F.3d 766 (2001), cert. denied, 534 U.S. 1162, 122 S.Ct. 1173, 152 L.Ed. 117 (2002).

<sup>21</sup>259 F.3d at 771.

<sup>22</sup>*Id.* at 771, 772.

congressional, and state interest in the issue—may have swayed the Supreme Court to hear appeals from the Fifth (display invalidated) and Sixth (display upheld) Circuits in 2005.<sup>23</sup>

On June 27, 2005, two opinions emerged from the high Court—yet the rulings were hardly reflective of overwhelming judicial consensus. One decision featured a four-justice plurality—including the Chief Justice, and was accompanied by three individual concurrences (one by a non-plurality justice) and two “joined” dissenting opinions. The other decision, with a 5-justice majority, included a single separate concurrence (by one of the majority justices), and a dissenting opinion, in which three justices joined either in whole or in part.

At issue in *Van Orden v. Perry* was the inclusion of a 1961 Ten Commandment monument, donated by the Fraternal Order of the Eagles, among nearly 40 other monuments or markers on the Texas capitol grounds; the various displays were to memorialize the “people, ideals, and events that compose Texan identity.”<sup>24</sup> Noting its own “Januslike” cases addressing the Establishment Clause, balancing the “strong role played by religion...throughout our nation’s history” with “the principle that governmental intervention in religious matters can itself endanger religious freedom,” the Court ultimately upheld the installation.<sup>25</sup>

Interestingly, while not discarding application of *Lemon* in Establishment Clause cases, the Court stated the test was “not useful” in addressing “the sort of passive monument” challenged in *Van Orden*. Integral instead to the plurality opinion was “the nature of the monument and...our Nation’s history.”<sup>26</sup> The Court noted the depiction of Moses and the tablets on the frieze of its own building, as well as judicial and governmental acknowledgments of the Decalogue throughout U.S. history. While recognizing the inherently religious nature of the Commandments—and the Texas monument—the Court nonetheless stated that religious content alone was insufficient to render the monument violative of the Establishment Clause.<sup>27</sup> Distinguishing the “passive” Texas monument with *Stone*’s constantly-viewed, “plainly religious” classroom postings, the Court concluded that the Texas monument, as part of the overall Capitol grounds displays, had “dual significance”—reflective of history and religion. The Texas monument would stand.<sup>28</sup>

Gold-framed Decalogue county courthouse postings, rather than a free-standing monument, were the focus of *McCreary v. ACLU of Kentucky*. Installed as sole displays in 1999, the postings were subsequently modified to include other documents, such as the Declaration of Independence, in “smaller frames, each either having a religious theme or excerpted to highlight a religious element.”<sup>29</sup> Here, in contrast to *Van Orden*, the Court chose to embrace the *Lemon* analysis, focusing on the purported secular purpose of the display.

Stating that the secular purpose must be “genuine, not a sham and not merely secondary to a religious objective,”<sup>30</sup> the Court found the posting’s initial “solo” display especially compelling. While the Ten Commandments, the Court stated, have indeed influenced influence civil law, they nonetheless convey a “religious statement” when displayed alone, in the manner of the original courtroom postings. Only when challenged by legal action did the counties modify the displays, and the modifications themselves highlighted religious themes and included a resolution indicating that the new companion

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<sup>23</sup>*Van Orden v. Perry*, No. 03-1500, Brief of Amicus Curiae the States of Indiana, Alabama, Delaware, Florida, Kansas, North Dakota, South Carolina, Utah and Virginia in Support of the Respondents (July 6, 2004).

<sup>24</sup>*Van Orden v. Perry*, 545 U.S. \_\_\_, 125 S.Ct. 2854, 162 L.Ed. 2d 607 (2005).

<sup>25</sup>125 S.Ct. at 2859.

<sup>26</sup>*Id.* at 2861.

<sup>27</sup>*Id.* at 2863.

<sup>28</sup>*Id.* at 2864. The plurality opinion was announced by Chief Justice Rehnquist; Justices Scalia, Kennedy, and Thomas joined. Justices Scalia and Thomas also supplied concurring opinions, and Justice Breyer added an opinion concurring in the judgment. Three dissenting opinions were offered, one by Justice Stevens, joined by Justice Ginsburg; one by Justice O’Connor; and one by Justice Souter, joined by Justices Stevens and Ginsburg.

<sup>29</sup>*McCreary v. ACLU of Kentucky*, 545 U.S. \_\_\_, 125 S.Ct. 2722 at 2729, 162 L.Ed.2d 729 (2005).

<sup>30</sup>125 S.Ct. at 2735.

postings must feature Christian references. Further modifications sought to cast the display with documents of significance to American government.<sup>31</sup>

### Distribution of Justices: *Van Orden* and *McCreary*

Key: ♦ = Lead opinion/concurrence/dissent    ☑ = Joining

#### *Van Orden* (Monument Upheld)

	Rehnquist	Breyer	Ginsburg	Kennedy	O'Connor	Scalia	Souter	Stevens	Thomas
Plurality	♦			☑		☑			☑
Concurrence						♦			
Concurrence									♦
Concurrence (not among plurality)		♦							
Dissent			☑		☑			♦	
Dissent					♦				
Dissent			☑				♦	☑	

#### *McCreary* (Display Invalidated)

	Rehnquist	Breyer	Ginsburg	Kennedy	O'Connor	Scalia	Souter	Stevens	Thomas
Majority		☑	☑		☑		♦	☑	
Concurrence					♦				
Dissent	☑			☑ (in parts)		♦			☑

But a majority of the justices (five) were not persuaded, firmly stating that “[n]o reasonable observer could swallow the claim” that the previously articulated religious objectives had been abandoned.<sup>32</sup> The Court nonetheless did not preclude future redemption of the flawed display, but held that “purpose needs to be taken seriously under the Establishment Clause and needs to be understood in light of context...”<sup>33</sup> The Court re-emphasized the need for governmental neutrality in religious matters and concluded that “predominantly religious purpose” of the display did not pass constitutional muster.<sup>34</sup>

### State and Congressional Responses

In response to *McCreary*, the 2006 **Kentucky** General Assembly adopted HB 277, directly addressing religious postings in schools as well as other public buildings. The measure authorized public schools to post “[h]istoric artifacts, monuments, symbols, and texts, including but not limited to religious materials...within the framework of applicable legal precedents, if they are displayed in connection with a course of study that is academic, balanced, objective, and not devotional in nature, and that neither favors nor disfavors religion generally or any particular religious belief...” Also authorizing such “balanced, objective” displays on public property, the measure also specifically called for the restoration of the Ten Commandments monument to the state Capitol grounds, “in accordance with legal precedent” and consistent with the “balanced, objective” proscriptions.<sup>35</sup>

Perhaps taking a cue from Congress’ ill-fated Safeguarding Our Religious Liberties Act, the 2006 Kentucky legislature also considered SB 236, which would forbid Kentucky courts from construing the state Constitution “prohibit the display on public property of the Ten Commandments in a historical context.”<sup>36</sup>

<sup>31</sup> *Id.* at 2738-2739.

<sup>32</sup> *Id.* at 2740.

<sup>33</sup> *Id.* at 2741.

<sup>34</sup> *Id.* at 2742-2743; 2745.

<sup>35</sup> Kentucky Legislature, HB 277 (2006) <<http://www.lrc.ky.gov/record/06RS/HB277/bill.doc>>

<sup>36</sup> Kentucky Legislature, SB 236 (2006) <<http://www.lrc.ky.gov/record/06RS/SB236/bill.doc>>

Although not addressing school postings, the 2006 Session of the **Georgia** legislature passed HB 941, authorizing courthouse postings of the “Foundations of American Law and Government”—specifically, the Mayflower Compact; the Ten Commandments; the Declaration of Independence; the Magna Carta; the text of ‘The Star-Spangled Banner’; the national motto of the United States of America; the Preamble to the Georgia Constitution; the Bill of Rights of the United States Constitution; and a picture of Lady Justice.<sup>37</sup>

Also in 2006, the **Louisiana** legislature enacted SB 476, authorizing the printing and display of “religious history impacting the law” in public buildings. Specifically named as such texts are the Ten Commandments as well as the Mayflower Compact, the Declaration of Independence, and other materials. An explanation of the “Context for Acknowledging America's Religious History” is to accompany these displays, and is to denote, among other things, the “Ten Commandments as one of the foundations of our legal system.”<sup>38</sup>

Similarly, **Tennessee** examined HB 2921 and SB2442, addressing the inclusion of the Ten Commandments among those historical documents that may be displayed on public property.<sup>39</sup> The **Oklahoma** legislature considered SB 1878, allowing counties to display the Ten Commandments monuments after having been advised by the Office of the Attorney General or the Office of the District Attorney regarding the “constitutional manner” of creating the display.<sup>40</sup>

Not limited to debate among southern or “Bible Belt” states, the Ten Commandments issue has also reached the 2005 or 2006 sessions of state legislatures in **Arizona**,<sup>41</sup> **Idaho**,<sup>42</sup> **Michigan**,<sup>43</sup> and **Missouri**.<sup>44</sup>

**Congress** had not been immune to the controversy. Pre-*McCreary* and *Van Orden*, the Ten Commandments Defense Act of 2003 (H.R. 2045) would have declared as reserved to the states “[t]he power to display the Ten Commandments” on public property.” The measure was referred to the House Judiciary Committee’s subcommittee on the Constitution.<sup>45</sup>

In 2005, House Concurrent Resolution 12 acknowledged the Ten Commandments as “a declaration of the fundamental principles that are the cornerstone of a fair and just society” and would have required the Decalogue to be “prominently displayed” at the U.S. Capitol.<sup>46</sup> Had the measure passed, the proposed Capitol display would have joined other Ten Commandment displays on federal property at the nation’s capital. The Ten Commandments, sometimes accompanied by Moses, appear within in the U.S. Supreme Court, on a carved door, and on its exterior frieze; as a statue in the Rotunda

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<sup>37</sup>Georgia General Assembly, HB 941 (2006) <[http://www.legis.state.ga.us/legis/2005\\_06/versions/hb941\\_HB\\_941\\_AP\\_7.htm](http://www.legis.state.ga.us/legis/2005_06/versions/hb941_HB_941_AP_7.htm)>

<sup>38</sup>Senate Bill No. 476< <http://www.legis.state.la.us/billdata/streamdocument.asp?d/d=388801>>

<sup>39</sup>Tennessee General Assembly, HB2921/SB2442 (2006) Bill Summary <<http://www.legislature.state.tn.us/>>

<sup>40</sup>Oklahoma House of Representatives, Committee Amendments, SB 1878 (2006) < [http://www.okhouse.gov/Committees/CommitteeReports/SB\\_1878\\_A.pdf](http://www.okhouse.gov/Committees/CommitteeReports/SB_1878_A.pdf)>

<sup>41</sup>Arizona House Concurrent Memorial No. 2011 (2006) <<http://www.azleg.gov/legtext/47leg/2r/bills/hcm2011s.pdf>> (urging Congress’ adoption of S520 and HR1070).

<sup>42</sup>Idaho Legislature, Senate Joint Memorial No. 119 <[http://search.state.id.us/search97cgi/s97\\_cgi.exe?action=View&VdkVgwKey=http%3A%2F%2Fwww%3Estate%2EId%2Eus%2Foasis%2F2006%2FSJM119%2Ehtml&doctyp e=raw&Collection=2006+Session+Legislation](http://search.state.id.us/search97cgi/s97_cgi.exe?action=View&VdkVgwKey=http%3A%2F%2Fwww%3Estate%2EId%2Eus%2Foasis%2F2006%2FSJM119%2Ehtml&doctyp e=raw&Collection=2006+Session+Legislation)>(urging the passage of federal H.R. 1070 and S. 520, limiting federal court jurisdiction over posting cases).

<sup>43</sup>Michigan House Fiscal Agency, Legislative Analysis, HB 4433 < <http://www.legislature.mi.gov/documents/2005-2006/billanalysis/House/pdf/2005-HLA-4433-1.pdf>>(allowing displays on public property if displayed with other historical documents and in a manner consistent with such other documents).

<sup>44</sup>Missouri Journal of the House, House Resolution No. 1176 (2005)< <http://www.house.mo.gov/bills051/jrn/jrn070.htm>>; see also, Missouri Divisions of Research and Computer Information Systems, Senate Weekly Bill Status Report, Senate Resolution No. 901 (2005)<<http://www.senate.mo.gov/05info/billtext/intro/SR901.htm>>

<sup>45</sup>108<sup>th</sup> Congress, H.R. 2045 <<http://thomas.loc.gov/cgi-bin/query/z?c108:H.R.2045:>>

<sup>46</sup>109<sup>th</sup> Congress, H.Con.Res. 12 < <http://thomas.loc.gov/cgi-bin/query/z?c109:H.CON.RES.12:>>

of the Library of Congress; as an inset in the floor of the National Archives, and as a statue at the Ronald Reagan Building.<sup>47</sup>

The “Safeguarding Our Religious Liberties Act,” introduced in December 2005 as H.R. 4576, sought to remove the jurisdiction of courts created by Congress and the U.S. Supreme Court to “hear or decide any question pertaining to the interpretation of, or the validity under the Constitution” of the “recitation, display, acknowledgement, or use” of the Ten Commandments, the Pledge of Allegiance, or the National Motto. As of February 16, 2006, the measure remained in the Subcommittee on Courts, the Internet, and Intellectual Property of the House Judiciary Committee.<sup>48</sup>

The more broadly-titled “Constitution Restoration Act of 2005” (H.R. 1070; S. 520) would have removed from U.S. Supreme Court review suits against federal, state, or local governments regarding the governmental entity’s “acknowledgment of God as the sovereign source of law, liberty, or government.”<sup>49</sup>

### **The Issue in Practice in the Commonwealth**

In 1994, the Virginia General Assembly statutorily directed the Board of Education to develop, in consultation with the Office of the Attorney General, guidelines addressing “constitutional rights and restrictions relating to prayer and other religious expression in the public schools.”<sup>50</sup> Issued in 1995—pre-dating *McCreary* and *Van Orden* by a decade--the Board’s *Guidelines for Religious Activities in Public Schools* continue to provide the following straightforward guidance for school divisions:

Religious symbols or religious texts, such as the Ten Commandments, may not be posted in the public schools when the purpose or primary effect is to advance religion, but may be posted on a temporary basis as part of an academic lesson or curriculum. The public schools, however, may properly teach students important values, ethics and morality, but not through religious indoctrination. The Ten Commandments, the Bible, as well as other religious materials may be studied for bona fide educational purposes.<sup>51</sup>

In 2001, the General Assembly amended the Standards of Quality to direct the Board of Education to authorize, “as an elective in grades nine through twelve with appropriate credits toward graduation, a comparative religion class that focuses on the basic tenets, history, and religious observances and rites of world religions.”<sup>52</sup> While there are no Standards of Learning curriculum guidelines for the comparative religion elective, clearer guidance for study of the Ten Commandments lies within the Board’s Curriculum Framework materials for History and Social Science and for World History and Geography to 1500 A.D. These materials remain consistent with the 1995 *Guidelines*; the Decalogue appears in history and geography learning objectives not for the inculcation of religious belief, but for “bona fide educational purposes.” Specifically, the Ten Commandments are cited among “written law codes” and religious beliefs of ancient civilizations and appear within the study of cultural influences in the

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<sup>47</sup>The National Conservative Weekly, Human Events Online, C. Devorah, Exclusive Photo Essay: God in the Temples of Government (Part I: November 23, 2003) <<http://www.humanevents.com/article.php?id=2441&c=1&tb=1&pb=1&gd=03102005>>; (Part II: December 19, 2003) <<http://www.humanevents.com/article.php?id=2664>>

<sup>48</sup>The Library of Congress, H.R. 4576, 109<sup>th</sup> Congress (2005) <<http://capwiz.com/au/webreturn/?url=http://thomas.loc.gov/cgi-bin/query/z?c109:H.R.4576:>>

<sup>49</sup>The Library of Congress, S.R. 520, 109<sup>th</sup> Congress (2005) <<http://thomas.loc.gov/cgi-bin/query/z?c109:S.520:>>; The Library of Congress, H.R. 1070, 109<sup>th</sup> Congress (2005) <<http://thomas.loc.gov/cgi-bin/query/z?c109:H.R.1070:>>

<sup>50</sup>1994 Acts of Assembly, c. 801; 2001 Acts of Assembly, cc. 688, 820; Va. Code § 22.1-203.2 (2006).

<sup>51</sup>Virginia Board of Education, *Guidelines for Religious Activities in the Public Schools* at 3 (1995)[hereinafter referred to as *Guidelines*].

<sup>52</sup>2001 Acts of Assembly, c. 651; see also, Supt. Memo No. 117, August 17, 2001. In a “mini-recodification” of the Standards in 2004, the General Assembly removed this directive from the SOQ to a new Code section, requiring local school boards to authorize the comparative religion elective. In 2006, however, the statute was amended to allow the state Board of Education, rather than the local boards, to authorize the elective, thereby leaving inclusion of the course within the curriculum at local school board discretion. Va. Code § 22.1-202.1 (2005); 2004 Acts of Assembly, c. 955; 2006 Acts of Assembly, c. 90.



“contemporary world.”<sup>53</sup> The Board’s teacher resources for these areas include lesson plans and materials citing the Decalogue within ancient monotheistic religions and, along with Hammurabi’s Code, the Napoleonic Code, and the Law Code of Justinian.<sup>54</sup>

Despite the 1995 guidelines and SOL framework, the General Assembly sought more definitive guidance on the posting of the Ten Commandments in public schools in 2002. The House of Delegates narrowly passed HB 161 (52-46), which directed the Board of Education, in consultation with the Office of the Attorney General, to develop guidelines regarding the display of not only the Ten Commandments in the public schools, but specific excerpts from documents such as the Declaration of Independence, the Virginia Constitution, and other materials identified as “transcendent values in historical texts.” School boards would be empowered, but not required, to post these texts consistent with the Board’s guidelines. The measure never reached the full Senate, as the bill was passed by indefinitely by the Senate Committee on Education and Health.<sup>55</sup> That same year, however, postings of “In God We Trust” fared better; the legislature adopted uncodified acts requiring local school boards to “prominently post the statement, “In God We Trust,” the National Motto, enacted by Congress in 1956,’ in a conspicuous place in each of their schools for all students to read.”<sup>56</sup>

In 2004, consistent with actions occurring in other state legislatures, the Virginia General Assembly also sought to preserve state judicial authority over Ten Commandment displays. The legislature considered, but declined to pass, HJR 285, urging Congress to “continue to preserve Virginia’s sovereignty related to public expressions of religious faith in the Commonwealth” and to reserve to the states authority over Ten Commandment displays.<sup>57</sup>

## **CEPI Summary**

Despite ongoing debates and sometimes less-than-crystalline judicial rulings, Virginia school divisions may continue to find solid guidance in the Board’s *Guidelines for Religious Activity in the Public Schools*. School boards are well-advised to consider the nature and purpose of any Decalogue postings, as the *Guidelines* clearly prohibit, consistent with *Lemon* analysis, those postings whose “purpose or primary effect is to advance religion....” However, some displays may indeed pass muster; the Ten Commandments may be posted “on a temporary basis as part of an academic lesson or curriculum.” The *Guidelines* clearly confirm that the Decalogue or the Bible “may be studied for bona fide educational purposes.”<sup>58</sup> Virginia Department of Education Standards of Learning Curriculum Framework materials and resources also clearly outline those Decalogue concepts appropriately incorporated in instruction.

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<sup>53</sup>Virginia Board of Education, Curriculum Framework, World History and Geography to 1500 A.D., Standard WHI.3b; Standard WHI.3d (2001) <[http://www.doe.virginia.gov/VDOE/Instruction/History/hist\\_8.pdf](http://www.doe.virginia.gov/VDOE/Instruction/History/hist_8.pdf)>; Virginia Board of Education, Curriculum Framework, History and Social Science Standards of Learning, Standard WHI.3b; Standard WHI.3d; Standard WHI.14a (2001) <<http://www.doe.virginia.gov/VDOE/Instruction/History/histframework2001.pdf>>

<sup>54</sup>Virginia Board of Education, History and Social Science Standards of Learning Enhanced Scope and Sequence, World History and Geography to 1500 A.D (2004) <<http://www.doe.virginia.gov/VDOE/EnhancedSandS/histWHI.pdf>>; Virginia Board of Education, History and Social Science Standards of Learning Enhanced Scope and Sequence, World Geography (2004) <<http://www.doe.virginia.gov/VDOE/EnhancedSandS/histWG.pdf>>; see generally, Virginia Department of Education, Enhanced Scope and Sequence <<http://www.doe.virginia.gov/VDOE/EnhancedSandS/>>

<sup>55</sup>2002 Virginia General Assembly, House Bill No. 161 <<http://leg1.state.va.us/cgi-bin/legp504.exe?021+ful+HB161H1>>; Legislative Information System, Bill Summary, HB 161 (2002) <<http://leg1.state.va.us/cgi-bin/legp504.exe?021+sum+HB161>>

<sup>56</sup>2002 Acts of Assembly, cc. 891; 895. Legislation also passed requiring similar postings in certain local government buildings and all Virginia courtrooms. 2002 Acts of Assembly, cc.485; 894. All “In God We Trust” postings were to include the “national motto” designation. The Office of the Attorney General must provide legal defense of the school and local government building postings, while the courtroom postings were contingent upon General Assembly appropriations.

<sup>57</sup>2004 Virginia General Assembly, House Joint Resolution No. 285 <<http://leg1.state.va.us/cgi-bin/legp504.exe?041+ful+HJ285E>>; Legislative Information System, Bill Summary, HJR 285 (2004) <<http://leg1.state.va.us/cgi-bin/legp504.exe?041+sum+HJ285>>

<sup>58</sup>*Guidelines, supra* note 51.

In creating any postings, lessons from *Van Orden* and *McCreary* are also instructive. Certainly teachers would be wise to include any Ten Commandment postings within a display of other “law codes,” using consistent typeface and manner of display for each such code. Clarification of the context of the posting—indicating, as noted in the SOL resources, the role of the various law codes in the development of civilizations, legal systems, and cultures—may also help ensure that the display is not construed as an endorsement of any religious doctrine. Any such clarification or explanation should be carefully crafted; the “implausible disclaimer”<sup>59</sup>—perhaps simply designating the Decalogue as the basis of civil law while displaying the same alone or in a manner distinctive from companion codes—will not legitimize an otherwise flawed posting.

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