Chapter Thirteen: Stone v. Graham (1980)

Thou Shalt Post These In Every Classroom

Three Big Things:

1. Kentucky required that the Ten Commandments be posted in all public-school classrooms with a little disclaimer underneath describing them as a "fundamental legal code of Western civilization."

2. The Court applied the "Lemon Test" and determined that the legislation had no clear secular purpose; it was thus a violation of the Establishment Clause of the First Amendment.

3. For most of the 1970s, "wall of separation" cases related to education had focused on efforts to support students in religious schools without running afoul of the "wall of separation." *Stone* marked a new wave of cases echoing their predecessors from the 1960s – just how far could religion be brought back into public schooling before it becomes "establishment"?

Background

The Supreme Court's split decision in *Stone v. Graham* was announced on November 17th, 1980. Less than two weeks earlier, Ronald Reagan had been elected President of the United States, initiating what would later be called the "Reagan Revolution" – a resurgence of conservative values and policies anchored in an idealized past. The events leading to *Stone* began years earlier, but its outcome sent a message to the faithful in the 1980s similar to that of *Engel v. Vitale* and *Abington v. Schempp* two decades before: America's fundamental values (meaning public promotion of Christianity) were under attack by intellectual elitists… aka "liberals." And some of them wore robes.

Less than a month after *Stone* was decided, John Lennon was assassinated. In January of 1981, Reagan took the oath of office and began "making America great again." In retrospect, the two events seem symbolic of a larger shift, but it's not like the 1970s had been great for either side of the cultural divide. The U.S. had weathered Watergate, Vietnam, and a major energy crisis before succumbing to (of all things) disco. Cult-leader "Reverend" Jim Jones had recently led his followers in mass suicide, a horrifying event from which the phrase "drinking the Kool-Aid" was coined. As the new year began, the U.S. was on Day 400-plus of the Iranian Hostage Crisis. Everyone knew the exact number each day because the evening news led with it every night.

The "Miracle on Ice" at the 1980 Olympics was nice, but that already felt like a *long* time ago.

In short, there were many for whom it may not have seemed like such a bad time to try to slip some old-time religion back into the classroom, and nothing was more old-time-y than the Ten Commandments.

Rules to Live By

There's nothing like a decade or two of perceived dissolution and chaos to make "law and order" look wonderfully shiny and reassuring, and the Decalogue fit the bill perfectly. It offered clear guidelines for proper living, literally set in stone, but minus the sort of detailed penalties and depressing legalistic minutia spelled out elsewhere in the Old Testament.

It didn't hurt that it was more-or-less universally revered – Protestants, Catholics, even Jews liked it. (You know – all the "real" religions.) What more could one ask?

The state of Kentucky required that a copy of the Ten Commandments be posted on the wall of every public-school classroom. The Commandments were purchased via private contributions, so no state money was used, and teachers were not required to discuss, promote, or even draw attention to the poster-quality graven images now adorning their classroom walls. At the bottom of each copy was this explanation:

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.

And yet, there were a few parents who for some reason thought this might violate the Establishment Clause. The case worked its way through the courts until it was accepted on appeal by the big one in D.C.

The Decision

Posting the Decalogue in public school classrooms without some overt historical, literary, or other academic purpose violated the Establishment Clause of the First Amendment as applied to the states by the Fourteenth. It had no valid secular purpose; it was just another ruse to nudge little people towards the majority faith of those in power.

The Court's decision was a 5-4 split, but nevertheless issued *per curiam*, meaning "by the court." Per curiam decisions were traditionally utilized in situations for which there was little need to elaborate on constitutional reasoning and the Court was so united as to eliminate the need for an identifiable voice speaking for the whole. Gradually over the course of the 20th century, however, the Court began allowing concurring opinions to per curiam decisions, then dissents… and eventually it became an unacknowledged tool for avoiding personal responsibility for controversial ideas or arguments.

In other words, per curiam opinions periodically allow a degree of avoidance and misdirection from a body otherwise recognized as unflinching and unafraid. Also, this is sad.

The Court's faux-nonymous majority opinion revisited the three-part "Lemon Test" laid out less than a decade before in *Lemon v. Kurtzman* (1971). Part one stated that in order to pass constitutional muster, a law must have a secular purpose to begin with. Clearly, the Court argued, that was not the case here. The Ten Commandments weren't being used to study the evolution of written law, or world cultures, or even as literature or general history. They were just… *there*.

This is not a case in which the Ten Commandments are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like. Posting of religious texts on the wall serves no such educational function. If the posted copies of the Ten Commandments are to have any effect at all, it will be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments. However desirable this might be as a matter of private devotion, it is not a permissible state objective under the Establishment Clause.

Nor was the majority impressed by the State's "who says they're religious?" defense:

The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact…

We conclude that {this legislation} violates the first part of the Lemon v. Kurtzman *test, and thus the Establishment Clause of the Constitution.*

Having failed the first test, there was no reason to discuss the remaining two. End of story.

The Dissent(s)

Four justices disagreed, but only one went to the trouble to elaborate as to why. Judging from his tone, Justice William Rehnquist (who'd later become Chief Justice) was shocked and a tad appalled that the Court wouldn't simply take state legislators at face value when they explained that posting religious laws without context in every school classroom regardless of age level or subject matter was actually part of a very important historical lesson on the evolution of Occidental jurisprudence. Because isn't that normally how lesson plans are put together – mass stapling of posters paid for by outsiders?

Rehnquist quoted from previous decisions extensively and rather effectively:

> *The Establishment Clause does not require that the public sector be insulated from all things which may have a religious significance or origin. This Court has recognized that "religion has been closely identified with our history and government" (*Abington School District v. Schempp*, 1963) and that "[t]he history of man is inseparable from the history of religion" (*Engel v. Vitale*, 1962). Kentucky has decided to make students aware of this fact by demonstrating the secular impact of the Ten Commandments…*

What was arguably his strongest rhetorical moment, however, came in one of his footnotes:

> *The Court's emphasis on the religious nature of the first part of the Ten Commandments is beside the point. The document as a whole has had significant secular impact, and the Constitution does not require that Kentucky students see only an expurgated or redacted version containing only the elements with directly traceable secular effects.*

It was a pretty good defense of a largely indefensible position. No wonder they put him in charge a few years later!

Aftermath

Stone was one of the first cases to rule that even a "passive display" of religion could nevertheless violate the Establishment Clause. It was from this reasoning the Court would subsequently take issue with certain government-sponsored Christmas displays and other state-sanctioned religious ceremonies. The Ten Commandments in particular would become a symbolic "line in the sand" on various state capital grounds or displayed in a public building or two. Consistent with the Court's decision in *Stone*, decisions in those future cases would often come down to context – *where* were they posted, *how* were they presented, and *why* were they included?

A few years later, in *Lynch v. Donnelly* (1984), Justice Sandra Day O'Connor wrote a concurrence in which she suggested a slight rethinking of the "Lemon Test" to emphasize the role of perceived "government endorsement or disapproval of religion." Rather than relying on purely technical or legal questions in establishment claims, she said, the Court must consider the "message" being sent as well as the one being received. As anyone who's ever had any kind of relationship with another person ever knows, those aren't always the same thing. When the message sender is the government, school officials, and teachers, and the receiver of the message is eleven years old, this dynamic is even more significant. "She doesn't have to say the prayer" or "he's not required to swear fealty to the flag" suddenly become rather silly rationalizations.

The 1980s would see a minor explosion of cases directly or indirectly related to the "wall of separation" between religion and public education. The question of equitable facility usage became a thing – can schools who allow community groups to meet on school grounds after-hours deny the same opportunity to religious groups? (Spoiler: Nope.) Indirect aid to religious institutions via tax credits for parents, secular school supplies, or simply sending over teachers kept coming before the Court, always in slightly different forms and forcing the Court to continually revise their solutions. There was even a brief foray into "Evolution vs. Creationism" before the decade was out.

By far the most interesting cases, however, would be ever-shifting efforts to circumvent *Engel*, *Abington*, and the rest by testing one problematic element at a time. Eventually, all sorts of religious expression in public schools would be framed as "student led," but in the 80s it started much more simply. What if schools weren't posting commandments, reading Bible verses, or leading students in prayers? What if every day simply began with a… "moment of silence"?

The religious right was finally going to have a few wins.

Excerpts from *Stone v. Graham* (1980), Per Curium Opinion

{Edited for Readability}

This Court has announced a three-part test for determining whether a challenged state statute is permissible under the Establishment Clause of the United States Constitution:

First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion… [and] finally the statute must not foster "an excessive government entanglement with religion." (*Lemon v. Kurtzman*, 1971) If a statute violates any of these three principles, it must be struck down under the Establishment Clause. We conclude that Kentucky's statute requiring the posting of the Ten Commandments in public school rooms has no secular legislative purpose, and is therefore unconstitutional.

The Commonwealth insists that the statute in question serves a secular legislative purpose, observing that the legislature required the following notation in small print at the bottom of each display of the Ten Commandments:

> *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.*

The trial court found the "avowed" purpose of the statute to be secular, even as it labeled the statutory declaration "self-serving." Under this Court's rulings, however, such an "avowed" secular purpose is not sufficient to avoid conflict with the First Amendment. In *Abington School District v. Schempp* (1963), this Court held unconstitutional the daily reading of Bible verses and the Lord's Prayer in the public schools, despite the school district's assertion of such secular purposes as

> *the promotion of moral values, the contradiction to the materialistic trends of our times, the perpetuation of our institutions and the teaching of literature.*

The preeminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact. The Commandments do not confine themselves to arguably secular matters, such as honoring one's parents, killing or murder, adultery, stealing, false witness, and covetousness. (See Exodus 20:12-17; Deuteronomy 5:16-21.) Rather, the first part of the Commandments concerns the religious duties of believers: worshipping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day. (See Exodus 20:1-11; Deuteronomy 5:6-15.)

This is not a case in which the Ten Commandments are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like. Posting of religious texts on the wall serves no such educational function. If the posted copies of the Ten Commandments are to have any effect at all, it will be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments. However desirable this might be as a matter of private devotion, it is not a permissible state objective under the Establishment Clause.

It does not matter that the posted copies of the Ten Commandments are financed by voluntary private contributions, for the mere posting of the copies under the auspices of the legislature provides the "official support of the State… Government" that the Establishment Clause prohibits (*Engel v. Vitale*, 1962). Nor is it significant that the Bible verses involved in this case are merely posted on the wall, rather than read aloud as in *Schempp* and *Engel*, for "it is no defense to urge that the religious practices here may be relatively minor

encroachments on the First Amendment" (*Abington*). We conclude that [this legislation] violates the first part of the *Lemon v. Kurtzman* test, and thus the Establishment Clause of the Constitution.

Excerpts from *Stone v. Graham* (1980), Dissenting Opinion by Justice William Rehnquist

{Edited for Readability}

The Court rejects the secular purpose articulated by the State because the Decalogue is "undeniably a sacred text." It is equally undeniable, however, as the elected representatives of Kentucky determined, that the Ten Commandments have had a significant impact on the development of secular legal codes of the Western World. The trial court concluded that evidence submitted substantiated this determination… Certainly the State was permitted to conclude that a document with such secular significance should be placed before its students, with an appropriate statement of the document's secular import…

The Establishment Clause does not require that the public sector be insulated from all things which may have a religious significance or origin. This Court has recognized that "religion has been closely identified with our history and government" (*Abington School District v. Schempp*, 1963) and that "[t]he history of man is inseparable from the history of religion" (*Engel v. Vitale*, 1962). Kentucky has decided to make students aware of this fact by demonstrating the secular impact of the Ten Commandments. The words of Justice Jackson, concurring in *McCollum v. Board of Education* (1948), merit quotation at length…

> *Perhaps subjects such as mathematics, physics or chemistry are, or can be, completely secularized. But it would not seem practical to teach either practice or appreciation of the arts if we are to forbid exposure of youth to any religious influences. Music without sacred music, architecture minus the cathedral, or painting without the scriptural themes would be eccentric and incomplete, even from a secular point of view…. I should suppose it is a proper, if not an indispensable, part of preparation for a worldly life to know the roles that religion and religions have played in the tragic story of mankind. The fact is that, for good or for ill, nearly everything in our culture worth transmitting, everything which gives meaning to life, is saturated with religious influences, derived from paganism, Judaism, Christianity – both Catholic and Protestant – and other faiths accepted by a large part of the world's peoples. One can hardly respect the system of education that would leave the student wholly ignorant of the currents of religious thought that move the world society for a part in which he is being prepared.*

I therefore dissent from what I cannot refrain from describing as a cavalier summary reversal, without benefit of oral argument or briefs on the merits, of the highest court of Kentucky…

The Court's emphasis on the religious nature of the first part of the Ten Commandments is beside the point. The document as a whole has had significant secular impact, and the Constitution does not require that Kentucky students see only an expurgated or redacted version containing only the elements with directly traceable secular effects.