

THOU SHALT NOT
CHALLENGE THE COURT?
THE TEN COMMANDMENTS DEFENSE
ACT AS A LEGISLATIVE INVITATION
FOR JUDICIAL RECONSIDERATION

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“My belief is that if I say something, it goes. I am the law. If you don’t like it, you die. If I don’t like you or I don’t like what you want me to do, you die.”¹

—*Eric Harris*

“Thou shalt not kill.”²

—*Commandment Six of the Decalogue*

INTRODUCTION

Eric Harris and Dylan Klebold might have suspected that their killing spree would lead to tighter school security, tougher sentences for young criminals, or more stringent gun control laws. They probably would not have guessed, however, that their depravity would inspire a movement to post the Ten Commandments in schools like Colorado’s Columbine High School. But, in June of 1999, the United States House of Representatives, galvanized by the tragedy at Columbine, amended the Juvenile Justice Reform Act (JJRA)³ to include the

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1. James Barron, *The Words: Warnings from a Student Turned Killer*, N.Y. TIMES, May 1, 1999, at A12 (quoting Web site of Eric Harris, one of two students responsible for shootings at Columbine High School).

2. “Decalogue” will be used interchangeably with “Ten Commandments” throughout this note. This rendering of Commandment Six is taken from a frieze displayed in a North Carolina courthouse that was the subject of litigation in *Suhre v. Haywood County*, 55 F. Supp. 2d 384, 387 (W.D.N.C. 1999). For the full text of that version of the Decalogue, see *infra* note 115.

3. H.R. 1501, 106th Cong. (1999).

Ten Commandments Defense Act (TCDA).⁴ The amendment declared the power to display the Decalogue on public property to be among the powers the Tenth Amendment reserves for the states. The TCDA's opponents condemned the measure as unconstitutional, pointing primarily to *Stone v. Graham*,⁵ a 1980 Supreme Court decision striking down a Kentucky statute requiring the posting of the Ten Commandments in that state's public schools.

This note argues that the TCDA, should it become law,⁶ would be best understood as an invitation to the Court to reconsider its holding in *Stone*. Although the Supreme Court, in *City of Boerne v. Flores*,⁷ recently rejected a congressional challenge to its interpretative authority, Justice O'Connor's dissent in that case highlights the productive role legislative invitations can play in constitutional development.⁸ The Court should grant the TCDA more deference than it afforded the congressional legislation in *Boerne* for three reasons: (1) the *Stone* decision that the TCDA challenges was a *per curiam*, 5-4 split summarily overturning a state legislature's finding; (2) changes in Establishment Clause jurisprudence over the last twenty years make *Stone*'s reconsideration both timely and desirable; (3) the unusual structure of the TCDA—implicitly checking a possible usurpation by the Court and disbursing power to the states, rather than the more typical congressional arrogation of power—suggests that the Court should review both *Stone* and the TCDA with care.

I

DECALOGUE DISPUTES: *STONE V. GRAHAM* AND THE TEN COMMANDMENTS DEFENSE ACT

A. *Stone v. Graham*

In 1978, the Kentucky legislature passed a statute mandating the display of the Ten Commandments in the state's public school classrooms, provided that the funds necessary for the displays were gener-

4. *Id.* §§ 1201-1202.

5. 449 U.S. 39 (1980) (*per curiam*).

6. The Juvenile Justice Reform Act, along with its Ten Commandments amendment, was still before a Senate-House conference committee as of the date of this article's publication. The delay is attributable to other controversial provisions, related to gun control, that have stalled compromise on the bill since June of 1999. Michael Romano, *Gun Control May Not Stay in Justice Bill: GOP Leaders Consider Striking Provisions from Juvenile Plan*, DENV. ROCKY MTN. NEWS, Feb. 19, 2000, at 7A.

7. 521 U.S. 507, 524 (1997).

8. *See id.* at 544 (O'Connor, J., dissenting).

ated through voluntary contributions.⁹ The statute required that each copy of the Decalogue include an inscription explaining that 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.”¹⁰ The Kentucky Civil Liberties Union filed suit, claiming that the statute violated the Establishment Clause of the First Amendment as applied to the states through incorporation by the Fourteenth Amendment. The state trial court upheld the constitutionality of the statute, and the plaintiffs appealed to the Kentucky Supreme Court.¹¹ One justice, having previously participated in the case as Kentucky’s Attorney General, recused himself, and an evenly divided Kentucky Supreme Court affirmed the trial court’s holding without issuing an official opinion of its own.¹² Nevertheless, three of the six justices filed personal opinions on the matter; two supporting the statute, and one desiring to strike it down.

Applying the three-prong test summarized in *Lemon v. Kurtzman*¹³ without expressly referencing it, Justice Clayton reasoned that the Bible’s religious nature does not preclude its legitimate use for secular purposes, including historical and literary ends.¹⁴ In particular, the Justice found Kentucky’s purported use of the Ten Commandments as a set of rules to “promote moral and legal behavior among its youth” perfectly acceptable.¹⁵ Justice Clayton concluded that the statute did not lead to excessive government entanglement with religion, and reasoned that its effect was permissible, as it failed to advance religion “beyond the fact that it may bring to one’s attention the basic

9. *Stone*, 449 U.S. at 40 n.1 (citing KY. REV. STAT. ANN. § 158.178(3) (Michie 1980)). The Kentucky statute at issue in *Stone* did not specify the version of the Decalogue to be displayed. For examples of Ten Commandments displays at the center of later litigation, see *infra* notes 104, 115.

10. *Stone*, 449 U.S. at 40 n.1 (quoting KY. REV. STAT. ANN. § 158.178(2) (Michie 1980)). The Kentucky legislature undoubtedly required this inscription after reading *Anderson v. Salt Lake City Corp.*, 475 F.2d 29 (10th Cir. 1973), in which the Tenth Circuit upheld the placement of a granite monument inscribed with the Decalogue on state property in Utah. The court in *Anderson* held that the historical significance of the Ten Commandments made the monument primarily secular, but noted that an “accompanying plaque explaining the secular significance of the Ten Commandments” would have made the decision easier. *Id.* at 34.

11. *Stone v. Graham*, 599 S.W.2d 157 (Ky. 1980), *rev’d*, 449 U.S. 39 (1980).

12. *Stone*, 599 S.W.2d at 157.

13. 403 U.S. 602, 612-13 (1971) (providing formulation of test most commonly applied in Establishment Clause litigation, requiring satisfaction of three prongs in order to uphold challenged legislation: (1) secular legislative purpose; (2) principal effect that neither advances nor inhibits religion; and (3) no excessive government entanglement with religion).

14. *Stone*, 599 S.W.2d at 157.

15. *Id.* at 157-58.

tenets of a particular scheme of Western philosophical thought.”¹⁶ Characterizing the Decalogue as a philosophical and ethical document, Justice Clayton declared its display on public property not only constitutional, but also praiseworthy: “The Ten Commandments statute is not an invasion of a right; it is a cornerstone of knowledge upon which school boards, teachers, and parents may begin to build the intellectual foundations of Kentucky’s youth.”¹⁷ Justice Stephenson wrote a concurring opinion, emphasizing the historical significance of the Ten Commandments and highlighting the fact that the statute received funding through voluntary contributions, not from state taxes.¹⁸ Justice Stephenson further suggested that should the Decalogue’s public display prove unconstitutional, a public posting of the Preamble to the Kentucky Constitution, with its appeal to “Almighty God,” might also fail to survive constitutional challenge.¹⁹

Justice Lukowsky, voting to reverse the trial court, argued that the necessity of choosing one version of the Ten Commandments as the state’s “official” version to be posted constituted an impermissible entanglement with religion.²⁰ Admitting that the last six or seven Commandments were not distinctly religious, Justice Lukowsky maintained that it “would be ludicrous for one to say that the ‘Six Commandments’ can be used for a nonreligious purpose. The Ten Commandments are unitary and indivisible, regardless of the version, and are, as a whole, a creed.”²¹ Rather than applauding the Decalogue’s use for nonreligious moral instruction, Justice Lukowsky decried as unconstitutional the exposure of public school children to “the moral precepts of a creed.”²²

The Supreme Court agreed to hear *Stone*, and reversed Kentucky’s high court in a *per curiam*, 5-4 decision expressing the views of Justices Brennan, White, Marshall, Powell, and Stevens.²³ The Court declined to hear oral argument and declined briefing on the issues. Chief Justice Burger and Justice Blackmun, as well as Justice Stewart, dissented from summary reversal, and Justice Rehnquist filed

16. *Id.* at 158.

17. *Id.*

18. *Id.*

19. *Id.* The Preamble to the Kentucky Constitution reads: “We, the people of the Commonwealth of Kentucky, grateful to Almighty God for the civil, political and religious liberties we enjoy, and invoking the continuance of these blessings, do ordain and establish this Constitution.” KY. CONST. pmbll., *quoted in Stone*, 599 S.W.2d at 158.

20. *Stone*, 599 S.W.2d at 160 (Lukowsky, J., dissenting).

21. *Id.* at 161 (Lukowsky, J., dissenting).

22. *Id.*

23. *Stone*, 449 U.S. at 39.

the only dissenting opinion, arguing that the Court should have shown greater deference to the Kentucky legislature's findings.²⁴

Explicitly applying the *Lemon* analysis, the *Stone* majority found that the Kentucky legislature had no secular purpose for requiring posting of the Decalogue, and disposed of the case without reaching the statute's religious effect or its potential for fostering a government entanglement with religion. Dismissing as pretextual the state's argument that 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,"²⁵ the Court asserted that "[t]he pre-eminent 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."²⁶ Seeing through what it found to be Kentucky's secular sleight of hand, the Court concluded that

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.²⁷

In dissent, Justice Rehnquist complained that the majority gave short shrift to the Kentucky legislature's findings: "This Court regularly looks to legislative articulations of a statute's purpose in Establishment Clause cases and accords such pronouncements the deference they are due."²⁸ Conceding the religious nature of the Ten Commandments, Justice Rehnquist nevertheless insisted that the Decalogue's impact on the development of secular legal codes "permitted [Kentucky] 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."²⁹ In short, Justice Rehnquist found inappropriate and unwarranted a "cavalier summary reversal, without benefit of oral argument or briefs on the merits, of the highest court of Kentucky."³⁰

24. *Id.* at 43.

25. *Id.* at 41 (quoting KY. REV. STAT. ANN. § 158.178(2) (Michie 1980)).

26. *Stone*, 449 U.S. at 41 (citation omitted).

27. *Id.* at 42.

28. *Id.* at 43-44 (Rehnquist, J., dissenting).

29. *Id.* at 45 (Rehnquist, J., dissenting).

30. *Id.* at 47 (Rehnquist, J., dissenting).

B. *The Ten Commandments Defense Act*

Although the brusque pronouncement in *Stone* has not been the last word on the constitutionality of Decalogue displays on public property,³¹ it represents the Supreme Court's only statement directly addressing the secular application of the Ten Commandments. Its absolutist terms constitute both the impetus for, and the centerpiece of opposition to, the amendment dramatically dubbed the "Ten Commandments Defense Act" by its sponsor, Rep. Robert Aderholt of Alabama. In June of 1999, nineteen years after *Stone* and two months after the tragedy at Columbine High School, the House passed this controversial amendment to the JJRA.³² Officially christened "TITLE XII—RIGHTS TO RELIGIOUS LIBERTY,"³³ the amendment opens with congressional findings that the Declaration of Independence, or-

31. See *infra* notes 106-24 and accompanying text.

32. H.R. 1501, 106th Cong. (1999).

33. The entire text of the amendment reads as follows:

TITLE XII—RIGHTS TO RELIGIOUS LIBERTY
SEC. 1201. FINDINGS.

The Congress finds the following:

(1) The Declaration of Independence declares that governments are instituted to secure certain unalienable rights, including life, liberty, and the pursuit of happiness, with which all human beings are endowed by their Creator and to which they are entitled by the laws of nature and of nature's God.

(2) The organic laws of the United States Code and the constitutions of every State, using various expressions, recognize God as the source of the blessings of liberty.

(3) The First Amendment to the Constitution of the United States secures rights against laws respecting an establishment of religion or prohibiting the free exercise thereof made by the United States Government.

(4) The rights secured under the First Amendment have been interpreted by courts of the United States Government to be included among the provisions of the Fourteenth Amendment.

(5) The Tenth Amendment reserves to the States respectively the powers not delegated to the United States Government nor prohibited to the States.

(6) Disputes and doubts have arisen with respect to public displays of the Ten Commandments and to other public expression of religious faith.

(7) Section 5 of the Fourteenth Amendment grants the Congress power to enforce the provisions of the said amendment.

(8) Article I, Section 8, grants the Congress power to constitute tribunals inferior to the Supreme Court, and Article III, Section 1, grants the Congress power to ordain and establish courts in which the judicial power of the United States Government shall be vested.

SEC. 1202. RELIGIOUS LIBERTY RIGHTS DECLARED.

(a) DISPLAY OF TEN COMMANDMENTS.—The power to display the Ten Commandments on or within property owned or administered by the several States or political subdivisions thereof is hereby declared to be among the powers reserved to the States respectively.

ganic laws of the United States Code, and all state constitutions “recognize God as the source of the blessings of liberty.”³⁴ Highlighting the tension that animates so much of Establishment Clause jurisprudence, the TCDA next notes that the First Amendment secures rights “against laws respecting an establishment of religion . . . made by the United States Government.”³⁵ These rights against a federal establishment of religion have also “been interpreted by courts of the United States Government” to preclude the states from such establishment.³⁶ The TCDA further finds that the “Tenth Amendment reserves to the States respectively the powers not delegated to the United States Government nor prohibited to the States.”³⁷ In perhaps the only controversial finding, the amendment announces that “[d]isputes and doubts have arisen with respect to public displays” of the Ten Commandments.³⁸ While the TCDA itself constitutes evidence of disagreement over the propriety of Decalogue postings, noting the constitutional “doubts” without acknowledging the Supreme Court’s pronouncement in *Stone* seems disingenuous at best. Nevertheless, following these revealing declarations, the TCDA simply asserts that “[t]he power to display the Ten Commandments on or within property owned or administered by the several States or political subdivisions thereof is

(b) EXPRESSION OF RELIGIOUS FAITH.—The expression of religious faith by individual persons on or within property owned or administered by the several States or political subdivisions thereof is hereby—

(1) declared to be among the rights secured against laws respecting an establishment of religion or prohibiting the free exercise of religion made or enforced by the United States Government or by any department or executive or judicial officer thereof; and

(2) declared to be among the liberties of which no State shall deprive any person without due process of law made in pursuance of powers reserved to the States respectively.

(c) EXERCISE OF JUDICIAL POWER.—The courts constituted, ordained, and established by the Congress shall exercise the judicial power in a manner consistent with the foregoing declarations.

H.R. 1501, 106th Cong. §§ 1201-1202 (1999). Section 1202 includes three distinct subsections: (1) the Ten Commandments Defense Act; (2) the protection for expressions of religious faith on public property; and (3) the directive to the lower courts to respect the amendment. Though related, the subsections are predicated on different portions of constitutional text, and in the interest of clarity this note will examine only the TCDA.

34. *Id.* § 1201(2).

35. *Id.* § 1201(3). It is interesting that the TCDA’s findings state that the Declaration of Independence, state constitutions, and organic laws of the United States all recognize God, but no mention is made of the Constitution with respect to this issue. Should the Constitution, not explicitly referencing God, be set against these other founding legal documents? Clearly the TCDA assumes harmony between them.

36. *Id.* § 1201(4).

37. *Id.* § 1201(5).

38. *Id.* § 1201(6).

hereby declared to be among the powers reserved to the States respectively.”³⁹

1. *The TCDA House Debate*

Unfortunately, few legislative materials exist to shed light on the purpose of the amendment, or to illustrate what those who voted for its passage believed it would accomplish. The debate preceding the House vote, however, provides a glimpse into the thoughts of those presumably most supportive of, and most opposed to, the measure. The amendment’s sponsor, Representative Aderholt, asserted that its purpose was simply to empower states to decide for themselves whether or not to post the Decalogue on public property.⁴⁰ Only implicitly acknowledging *Stone*, Representative Aderholt argued that the Ten Commandments have “deep rooted significance for our Nation and its history” and thus “should not be excluded from the public square.”⁴¹ He also employed a comparative analysis,⁴² pointing out that the House Chamber was replete with images of

great lawgivers throughout history. Blackstone, Jefferson, Hammarabbi, and the list goes on. However, on the main door to this Chamber is the relief of Moses, the most prominent place in the Chamber. He looks directly at the Speaker.

Above the dais, are the words, in God we trust and each day in this Chamber we open with prayer by our Chaplain. Religious expression is not absent from this public building, and it is not fair to say that public buildings in each of the States are precluded from recognizing this heritage.⁴³

If the House may constitutionally display Moses as the most prominent lawgiver, Representative Aderholt argued, how could the Constitution forbid the states from publicly and prominently displaying the law he delivered?

Representative Aderholt went beyond this negative formalism, however, to argue that since the Ten Commandments “represent the very cornerstone of Western civilization,” their display on public property was entirely appropriate and “consistent with our Nation’s

39. *Id.* § 1202(a).

40. 145 CONG. REC. H4458 (daily ed. June 16, 1999) (statement of Rep. Aderholt).

41. *Id.*

42. This form of analysis is reminiscent of Justice Stephenson’s argument that finding the Decalogue’s public posting constitutionally unsound would require a similar judgment with respect to postings of the Preamble to the Kentucky Constitution. *See supra* note 19 and accompanying text.

43. 145 CONG. REC. H4458 (daily ed. June 16, 1999) (statement of Rep. Aderholt).

heritage.”⁴⁴ Not only is the Decalogue of historical, legal, and cultural significance, but the Ten Commandments most importantly represent, for Representative Aderholt, a legitimate means of state-sponsored moral instruction. Although “simply posting the Ten Commandments will not change the moral character of our Nation overnight,” Representative Aderholt insisted that “it is one step that States can take to promote morality and work toward an end of children killing children.”⁴⁵ Rep. Robin Hayes of North Carolina echoed support for the ethical application of the Decalogue. Pensively speculating that the current school-aged generation “no longer understands the difference between right and wrong,”⁴⁶ he argued that the states “should have the opportunity to expose their students to a timeless code which, I believe, could instill ageless values.”⁴⁷ Rep. Mark Souder of Indiana adopted a more radical approach, arguing that prohibiting public displays of the Ten Commandments under the Establishment Clause amounted to a form of religious discrimination against our culture’s “central” tradition:

We now have diversity, and in the schools we allow posting of posters from the Hindu background, from the Mexican background, prayers from Indian faiths, but not the Ten Commandments.

. . . .

. . . We are not trying to restrict other people’s rights. We are trying to bring the rights back for the central faith of this country.⁴⁸

While the TCDA’s proponents spoke in ringing terms of history and culture, its opponents highlighted Supreme Court precedent. Rep. Robert Scott of Virginia argued that the amendment unconstitutionally “singl[ed] out . . . one religion,” thus elevating that religion above others.⁴⁹ Alluding to more recent developments in the Supreme Court’s Establishment Clause jurisprudence, Representative Scott asserted, “The case law clearly establishes that placing religious articles such as the Ten Commandments outside the context of other secular symbols, in a government establishment is a violation of the Establishment Clause.”⁵⁰ Rep. Chet Edwards of Texas, alluding to *Stone*, admonished the TCDA’s proponents to “[l]isten to what the Supreme Court said. The Supreme Court has clearly stated in its cases that the

44. *Id.*

45. *Id.*

46. 145 CONG. REC. H4459 (daily ed. June 16, 1999) (statement of Rep. Hayes).

47. *Id.*

48. 145 CONG. REC. H4460 (daily ed. June 16, 1999) (statement of Rep. Souder).

49. 145 CONG. REC. H4458 (daily ed. June 16, 1999) (statement of Rep. Scott).

50. *Id.* For a discussion of the emerging context analysis in the Supreme Court’s jurisprudence, see *infra* Part III.B.

preeminent purpose for posting the Ten Commandments on the schoolroom walls is plainly religious in nature.”⁵¹ Representatives Scott and Edwards insisted on deference to Supreme Court doctrine, and Representative Scott protested that “now is not the time on a juvenile justice bill to be debating complex constitutional principles that have nothing to do with juvenile crime.”⁵²

Rep. Jerrold Nadler of New York, sounding a similar theme of congressional deference, complained that the TCDA “attempts to say that the Congress finds what is constitutional and what is not It is usurpation of the power of the courts.”⁵³ Representative Nadler also pointed out that differences exist between the Catholic, Protestant, and Jewish versions of the Decalogue, and, echoing Kentucky’s Justice Lukowsky, argued that any choice among these would constitute an impermissible state entanglement with religion.⁵⁴

2. *The TCDA’s Mechanics*

Though meager in legislative history, the TCDA’s structure is straightforward.⁵⁵ As Representative Aderholt explained, the amendment finds the power to post the Ten Commandments on state property within those reserved to the states by the Tenth Amendment.⁵⁶ An examination of the Tenth Amendment reveals that, according to the House, this power must (1) not have been delegated to the federal government by the Constitution; and (2) not have been withheld by it from the state governments. The first proposition seems fairly uncontroversial, though the TCDA should not be read to proscribe the fed-

51. 145 CONG. REC. H4460 (daily ed. June 16, 1999) (statement of Rep. Edwards).

52. 145 CONG. REC. H4458 (daily ed. June 16, 1999) (statement of Rep. Scott).

53. 145 CONG. REC. H4459 (daily ed. June 16, 1999) (statement of Rep. Nadler).

54. *See id.* Representative Nadler also pointed out that
The Ten Commandments say a number of things It says, “I am the Lord, thy God, who has brought thee forth from Egypt. Thou shalt have no other Gods before me, for I, the Lord thy God, am a jealous God, visiting the sins of the fathers on the children even unto the third and fourth generations.”

Do most religious groups in this country really believe that God visits the sins of the fathers on the children to the third and fourth generations?

. . . .

. . . States should not take a position on that by putting that in the courtroom or the schools.

Id.

55. *See supra* note 33.

56. *See supra* text accompanying note 41. The Tenth Amendment reads: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X.

eral government from displaying the Ten Commandments.⁵⁷ Rather, the TCDA simply indicates that, while the federal government may have the power to post the Ten Commandments on federal property, it has no power to legislate posting on property belonging to the several states. Certainly, the Constitution contains no explicit textual delegation of such power. The second proposition raises difficult questions, however, for it involves the precise issue in the litigation surrounding the Ten Commandments: Does the First Amendment prohibit states from displaying the Decalogue on public property? In *Stone*, the only case in which the Supreme Court addressed that question, it answered with a resounding “yes.”

Although the House appears to be waging war with the Court over the meaning of the First Amendment, an argument could be made that the TCDA plays no such belligerent role. Because Congress should be presumed to have enacted legislation in harmony with the Constitution, courts and states might infer that the power to display the Decalogue is guaranteed to the states by the TCDA on the condition that the Establishment Clause, as interpreted by the Court, is not offended. Under this reading, the TCDA might be understood as congressional encouragement for the states to work with the Supreme Court in devising settings and curricula into which the Decalogue might be appropriately incorporated. Given the Court’s recent claim that proper context can neutralize any religious endorsement, this may be plausible.⁵⁸ Thus, the TCDA could be read as follows: The power to display the *neutralized* Ten Commandments is reserved to the states.

This interpretation, however, seems forced and implausible for two reasons. First, while recent Establishment Clause cases have been more ambivalent, *Stone* speaks in uncompromising terms: The Decalogue is wholly religious, and, at least in the public school setting, posting the Decalogue is impermissible. Second, the debate preceding the TCDA’s passage indicates that its proponents do not believe *Stone* to be a faithful interpretation of the First Amendment, suggesting that Congress envisioned some form of confrontation with the Court.⁵⁹

57. Consider Representative Aderholt’s argument, *supra* text accompanying note 43, that the Establishment Clause should not bar state displays of the Decalogue since it posed no obstacle to the flattering representation of Moses in the House Chamber.

58. Justice O’Connor asserted in *Lynch v. Donnelly*, 465 U.S. 668 (1984), a case involving the public display of a creche, that context can negate “any message of endorsement.” *Id.* at 692 (O’Connor, J., concurring).

59. See Representative Aderholt’s claim, *supra* text accompanying note 41, that finding a public display of the Decalogue unconstitutional is inconsistent with our nation’s religious heritage.

Thus, without explicitly referencing the Establishment Clause outside of its findings, the TCDA challenges the Court's interpretation and application of that clause in *Stone*. Because the challenge is implicit, the nature and extent of the TCDA's conflict with both *Stone* and the Court's Establishment Clause jurisprudence are murky. The challenge, however, is unmistakable. Even the amendment's structure is provocative, more closely resembling a declaratory judgment than a typical exercise of legislative power. Flexing its interpretative muscles, the House, through the TCDA, construes the Tenth Amendment, obliquely redefining the Establishment Clause in the process.

The above demonstrates the relevance of the perplexing question raised by the TCDA's opponents: Can Congress declare something constitutional that the Court has found unconstitutional? This note argues that Congress has not only the power, but also the duty to interpret the Constitution, and, when it believes the Court has misunderstood that document in a particular case, Congress has a responsibility to pass legislation designed to afford the Court an opportunity to correct itself. Such legislation, of which the TCDA represents one example, should not be condemned as an illegitimate exercise of power not delegated by the Constitution, but rather should be welcomed as a well-intentioned invitation for the Court to revisit those decisions Congress believes to be erroneous.

II

CONGRESSIONAL POWERS OF CONSTITUTIONAL INTERPRETATION: JUDICIAL SUPREMACY AND THE LEGISLATIVE INVITATION

A. *Three Models of Interpretive Authority*

Congressional interpretive power might be classified in three general categories: (1) judicial exclusivity, in which Congress has no interpretive power;⁶⁰ (2) congressional deference, in which Congress has the power, even the duty, to interpret the Constitution, with the caveat that such interpretation must always be in harmony with the Supreme Court's pronouncements;⁶¹ and (3) constitutional coor-

60. See Paul Brest, *Congress as Constitutional Decisionmaker and Its Power to Counter Judicial Doctrine*, 21 GA. L. REV. 57, 61 (1986) (critiquing advocates of judicial exclusivity, who "hold that legislatures ought to focus on policymaking without regard to constitutional questions, leaving these to the courts.").

61. See generally Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997) (defending holding in *Cooper v. Aaron*, 358 U.S. 1 (1958), that all nonjudicial officials are bound to obey Constitution as interpreted by Supreme Court).

dinacy, in which Congress has the power and duty to interpret the Constitution for itself, regardless of what judicial positions have been taken on the meaning of a particular clause.⁶² Under either the first or second model, the TCDA would probably be unconstitutional as a violation of the separation of powers. These models posit that Congress simply may not pass legislation in conflict with the Court's interpretation of the Constitution, and the TCDA is undoubtedly not intended to harmonize with *Stone*. Under some version of the third model, however, faithfulness to the Constitution might require such legislation. That is, if Congress has a duty to interpret the Constitution, when it reaches a conclusion as to the meaning of a particular clause, and that conclusion is at odds with a Supreme Court holding, fidelity to the Constitution obliges Congress to make its opinion known through legislation. Whether or when, as a normative matter, its opinion should control the Court is a question beyond the scope of this note; the current Court is convinced that its own judgments must control. Given this reality, legislation such as the TCDA is properly viewed as an invitation for the Court to reconsider its previous interpretation of the constitutional clause at issue.

One key observation undermines the viability of judicial exclusivity: The Constitution directs that all Senators and Representatives "shall be bound by Oath or Affirmation, to support this Constitution."⁶³ Presumably, for this oath to have substance for a legislator, it must instruct that Representatives and Senators be satisfied with the constitutionality of every piece of legislation for which they vote.⁶⁴ To make that determination, legislators must engage in constitutional interpretation, particularly if the bill in question addresses a constitutional issue the Supreme Court has not yet addressed.

Once the propriety—even necessity—of congressional constitutional interpretation is granted, the important question becomes whether Congress has the right to enact statutes at odds with Supreme Court pronouncements of constitutional meaning. While Representa-

62. See generally Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994) (arguing that separation of powers among coordinate branches of government gives President equal and independent authority to interpret Constitution).

63. U.S. CONST. art. VI, cl. 3.

64. Senator Sam Ervin argued that "[e]very Congressman is bound by his oath to support the Constitution, and to determine to the best of his ability whether proposed legislation is constitutional when he casts his vote in respect to it." Peter H. Schuck & Michael E. Ward, *Constitutional Rights: Acid Test for Conservatives*, in THE JUDICIARY COMMITTEES: A STUDY OF THE HOUSE AND SENATE JUDICIARY COMMITTEES 172, 175 (Peter H. Schuck ed., 1975) (quoting Letter from Senator Sam Ervin to Michael E. Ward (Aug. 25, 1971)).

tives Scott, Nadler, and Edwards would answer with an unwavering “no,” the Supreme Court has been more equivocal.⁶⁵ The striking history of claims to interpretive authority by non-judicial officers further suggests that a congressional claim to some version of constitutional coordinacy should be taken seriously.

B. *Coordinate Claims by Non-Judicial Officers*

James Madison, as a member of the first Congress in 1789, famously argued that it is

incontrovertibly of as much importance to this branch of the Government as to any other, that the constitution should be preserved entire. It is our duty, so far as it depends upon us, to take care that the powers of the constitution be preserved entire to every department of Government.⁶⁶

While Madison acknowledged that the “exposition of the laws” was generally the judiciary’s province, he vigorously denied any superiority of the judiciary in marking out the power of departments of the government with respect to each other: “There is not one Government on the face of the earth . . . in which provision is made for a particular authority to determine the limits of the constitutional division of power between the branches of the Government.”⁶⁷ Thirty-five years later, after his tenure as President, Madison continued to believe that, “[a]s the Legislative, Executive, and Judicial departments of the United States are co-ordinate, and each equally bound to support the Constitution, it follows that each must, in the exercise of its functions, be guided by the test of the Constitution according to its own interpretation of it.”⁶⁸ Writing in 1804, Thomas Jefferson noted that “the opinion which gives to the judges the right to decide what laws are constitutional, and what not, not only for themselves in their own sphere of action, but for the legislature and executive also, in their spheres, would make the judiciary a despotic branch.”⁶⁹ These arguments seem to place both Jefferson and Madison squarely within the constitutional coordinacy camp.

Presidents Jackson, Lincoln, and Roosevelt have also weighed in on the question of congressional interpretive power. Jackson, vetoing

65. See *infra* notes 82-95 and accompanying text.

66. 1 ANNALS OF CONG. 520 (Gales & Seaton 1834).

67. *Id.*

68. Letter from James Madison to Unknown Recipient (1834), in 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON, 1829-1836, at 349 (R. Worthington 1884).

69. Letter from Thomas Jefferson to Mrs. John Adams (Sept. 11, 1804), in 11 THE WRITINGS OF THOMAS JEFFERSON 49, 51 (Albert Ellery Bergh ed., 1907).

the bill that would have established a second national bank, forcefully argued:

If the opinion of the Supreme Court covered the whole ground of this act, it ought not to control the coordinate authorities of this Government. The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others. It is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judicial decision. The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both. The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve.⁷⁰

President Lincoln also argued that the Court's opinion in *Dred Scott v. Sandford*,⁷¹ while conclusive as to the slave Scott, could be ignored as precedent fixing constitutional meaning generally. While Supreme Court judgments are "entitled to very high respect and consideration in all parallel cases by all other departments of the Government," Lincoln urged that "if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, . . . the people will have ceased to be their own rulers."⁷²

Lincoln's recognition of the finality of a particular decision may represent a qualification of Jackson's apparently more radical coordinacy, and Franklin Roosevelt's 1935 letter to a congressional committee concerning pending coal mining regulation reflects an increasing respect for the interpretive authority of the Court:

Manifestly, no one is in a position to give assurance that the proposed act will withstand constitutional tests, for the simple fact that you can get not ten but a thousand differing legal opinions on the subject. But the situation is so urgent and the benefits of the legis-

70. ANDREW JACKSON, VETO MESSAGE TO THE SENATE (July 10, 1832), *reprinted in 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897*, at 576, 582 (James D. Richardson ed., 1896).

71. 60 U.S. (1 How.) 393 (1856).

72. ABRAHAM LINCOLN, FIRST INAUGURAL ADDRESS, *reprinted in 6 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897*, at 5, 9 (James D. Richardson ed., 1897).

lation so evident that all doubts should be resolved in favor of the bill, leaving to the courts, in an orderly fashion, the ultimate question of constitutionality. A decision by the Supreme Court relative to this measure would be helpful as indicating, with increasing clarity, the constitutional limits within which this Government must operate I hope your committee will not permit doubts as to constitutionality, however reasonable, to block the suggested legislation.⁷³

While Roosevelt accepts the Court's interpretation of constitutional clauses as controlling and final, here he suggests that Congress should be free to pass legislation that appears to conflict with a decision of the Court so long as any possibility exists that the bill would eventually be upheld. Such a model would appear to grant Congress virtually unlimited discretion in any scenario involving a controversial constitutional question upon which the Supreme Court had issued a closely split decision. Additionally, as Roosevelt noted, such legislation would provide the Court with an opportunity to clarify the "constitutional limits" constraining the legislature on that issue.

Although these arguments for non-judicial constitutional interpretation may reflect different understandings of the relation between the President—or the Congress—and the Court, these instrumental American figures agree that the executive and legislative branches have the power to interpret the Constitution, and to act prospectively on their interpretation, regardless of whether the Supreme Court has addressed the relevant issues. Most early political theory on separation of powers and constitutional interpretation was propounded outside of the judiciary; the Supreme Court's doctrine of its own interpretive authority, which today dominates the field, was developed comparatively recently. While the Court's view of the supremacy of judicial interpretation of the Constitution may be somewhat at odds with the more radical coordinacy models of Madison, Jefferson, and Jackson, it does not necessarily conflict with a weaker version of constitutional coordinacy, such as the one characterized in Roosevelt's 1935 letter.

73. Letter from Franklin D. Roosevelt to Representative Samuel B. Hill (July 6, 1935), in 4 *THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT* 297, 297-98 (Random House 1938).

C. *Judicial Supremacy and the Legislative Invitation: The Court's Perspective*

The Supreme Court's first unambiguous claim to interpretive supremacy came in the 1958 case of *Cooper v. Aaron*,⁷⁴ in which the Court rebuked a state governor's refusal to implement the desegregation mandate of *Brown v. Board of Education*.⁷⁵ Referring to John Marshall's familiar exclamation in *Marbury v. Madison*⁷⁶ that "[i]t is emphatically the province and duty of the judicial department to say what the law is,"⁷⁷ the Court in *Cooper* asserted: "This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system."⁷⁸ Because the Court is "supreme in the exposition of the law," its interpretations of the Constitution become, according to *Cooper*, "the supreme law of the land."⁷⁹ The problem with this formulation lies not so much in its claim for interpretive supremacy as in its assumption that Supreme Court judgments become supreme law. If the constitutional analysis contained within the Court's specific judgments becomes the generally applicable law, it would apparently be illegal for Congress to pass statutes that conflict with the Court's perspective on the Constitution. If a Supreme Court holding is merely the final interpretation of the Constitution as applied to the facts of a particular case, however, Congress may legitimately play an active role in attempting to channel the Court's future jurisprudence in a direction that it believes to be more faithful to the supreme law embodied in the Constitution.⁸⁰

While *Cooper* stands as a powerful assertion of interpretative supremacy, its holding was not without qualification. In *Cooper*, the Court acknowledged that the *Brown* decision

was unanimously reached by this Court only after the case had been briefed and twice argued and the issues had been given the most serious consideration. Since the first *Brown* opinion three new Justices have come to the Court. They are at one with the Justices still

74. 358 U.S. 1 (1958).

75. 347 U.S. 483 (1954).

76. 5 U.S. (1 Cranch) 137 (1803).

77. *Id.* at 177.

78. *Cooper*, 358 U.S. at 18.

79. *Id.*

80. This perspective harmonizes with Lincoln's claim that, while *Dred Scott* was binding as to the parties involved in that litigation, it did not foreclose the other branches from ignoring the decision's authority as precedent. See *supra* text accompanying note 72.

on the Court who participated in that basic decision as to its correctness, and that decision is now unanimously reaffirmed.⁸¹

This emphasis on the Court's unity would be singularly unnecessary if its decisions were beyond the challenge of the other branches of government. In fact, *Cooper's* reaffirmation of *Brown* reveals an implicit assumption that the governor's "disobedience" functioned as an invitation to reconsider that decision.

In his concurrence, Justice Frankfurter reemphasized the importance of deference to judicial interpretations when "the declaration of what 'the supreme Law' commands on an underlying moral issue is not the dubious pronouncement of a gravely divided Court but is the unanimous conclusion of a long-matured deliberative process."⁸² Justice Frankfurter qualified *Cooper's* holding even further, noting that

Every act of government may be challenged by an appeal to law, as finally pronounced by this Court. Even this Court has the last say only for a time. Being composed of fallible men, it may err. But revision of its errors must be by orderly process of law. The Court may be asked to reconsider its decisions, and this has been done successfully again and again throughout our history.⁸³

While Justice Frankfurter was probably contemplating the Attorney General's practice of appealing lower court decisions in order to provide the Court with an opportunity to reevaluate old doctrine, there appears to be no principled reason to exclude congressional legislation from the forms by which such an invitation might be extended. Though the Court's pronouncements may be final, they must also be "act[s] of government" subject to challenge by appeal to the Constitution. In this sense, judicial supremacy is not at odds with a weak version of constitutional coordinacy in which challenges to the Court are seen not as usurpations of power, but rather as invitations to the Court to revise earlier mistakes.

In 1997, the Court revisited the doctrine of judicial supremacy in *City of Boerne v. Flores*.⁸⁴ While *Cooper* addressed state dissension, *Boerne* addressed and invalidated the Religious Freedom Restoration Act (RFRA),⁸⁵ congressional legislation designed to overturn the Court's restrictive free exercise opinion in *Employment Division v.*

81. *Cooper*, 358 U.S. at 19.

82. *Id.* at 24 (Frankfurter, J., concurring). Note that Justice Frankfurter self-consciously placed "supreme Law" in quotes, revealing his discomfort with a strong reading of the majority opinion.

83. *Id.* at 23 (Frankfurter, J., concurring) (quoting his concurrence in *United States v. United Mine Workers*, 330 U.S. 258, 308 (1947)).

84. 521 U.S. 507 (1997).

85. Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (1995).

Smith.⁸⁶ The RFRA story is, in many ways, analogous to that of the TCDA. After the Court declared in *Smith* that there were no constitutional exemptions from validly passed, neutral laws of general applicability, Congress crafted RFRA to require the application of an older, more stringent test, to justify indirect legislative infringement on religious exercise.⁸⁷ Rather than simply declaring what the First Amendment should mean under a power to interpret the Constitution, Congress based RFRA on its enforcement power under Section Five of the Fourteenth Amendment. The Court, however, looked beyond this enforcement argument, and overturned RFRA as a violation of the separation of powers.⁸⁸ The Court in *Boerne* agreed that, within its “sphere of power and responsibilities,” Congress has both the power and the duty “to make its own informed judgment on the meaning and force of the Constitution.”⁸⁹ Once the Court has interpreted the clause at issue, however, the Court’s reading controls.⁹⁰

Despite *Boerne*’s strong language, fundamental ambiguity as to the legitimacy of constitutional coordinacy runs through the majority opinion. The Court suggests that, as an exercise of constitutional interpretation, RFRA is not only misguided, but actually “beyond congressional authority.”⁹¹ The opinion implies, however, that such interpretation is not inherently a usurpation of the Court’s function, but simply that, when cases and controversies arise, the Court must rely on its own judgment of constitutional meaning, and not on that of the legislature.⁹²

86. 494 U.S. 872 (1990).

87. For an analysis of RFRA’s relation to *Smith*, see Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. REV. 437, 466, 472-73 (1994).

88. “Congress does not enforce a constitutional right by changing what the right is. It has been given the power ‘to enforce,’ not the power to determine what constitutes a constitutional violation.” *Boerne*, 521 U.S. at 519.

89. *Id.* at 535.

90. *See id.* at 536 (stating that when Government acts against existing judicial interpretation of Constitution, Court will honor its own precedents rather than Government’s departures therefrom).

91. *Id.*

92. *See id.*

When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed. RFRA was designed to control cases and controversies, such as the one before us; but as the provisions of the federal statute here invoked are beyond congressional authority, it is this Court’s precedent, not RFRA, which must control.

In dissent, Justice O'Connor presented a powerful argument for a weak version of constitutional coordinacy. Justice O'Connor did not dissent from *Boerne* because she disagreed with the Court's claim for interpretive supremacy, but because she believed that the precedent by which the Court evaluated RFRA was itself infirm. As judicial supremacy made "correction through legislative action" of the Court's constitutional interpretations "practically impossible,"⁹³ Justice O'Connor argued that the Court should take the opportunity RFRA created to reexamine, and overturn, its decision in *Smith*:

If the Court were to correct the misinterpretation of the Free Exercise Clause set forth in *Smith*, it would simultaneously put our First Amendment jurisprudence back on course and allay the legitimate concerns of a majority in Congress who believed that *Smith* improperly restricted religious liberty. We would then be in a position to review RFRA in light of a proper interpretation of the Free Exercise Clause.⁹⁴

While the Court is apparently unanimous in its view that congressional interpretations of constitutional text at odds with its own pronouncements are not controlling, Justice O'Connor's position represents a persuasive argument for the propriety and efficacy of legislation challenging the Court's controversial constitutional interpretations. Seeing RFRA, and the TCDA, as invitations for the Court to revisit old decisions harmonizes the Court's desire for interpretative

Id.

93. *Id.* at 548 (O'Connor, J., dissenting) (quoting *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 63 (1996)).

94. *Boerne*, 521 U.S. at 545 (O'Connor, J., dissenting). The idea of interpretative confrontation as invitation was advanced in 1982 by then-professor (now Ninth Circuit judge) John Noonan in his testimony before Congress for the proposed Human Life Bill:

It is clear that Congress will reach, if the proposed statute is enacted, a conclusion different from the Court's in *Roe v. Wade* on the meaning of person in the Fourteenth Amendment. It does not follow that the statute is void. It follows, rather, that the Court may, and should, change its mind, give deference to the congressional findings and declarations, and overrule *Roe v. Wade*.

. . . .

To suppose that the statute proposed is a challenge to judicial review assumes a radical—I am inclined to say willful—misunderstanding of the functions of Court and Congress. A decision of the Supreme Court interpreting the Constitution is neither infallible nor eternal nor unchangeable The Court has often corrected itself The proposed Act is an invitation to the Court to correct its error itself.

Human Life Bill: Hearing on S. 158 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 97th Cong. 265, 268-69 (1982) (citation omitted) (statement of John Noonan).

supremacy with a congressional duty to faithfully support the Constitution.

III

THREE STRENGTHS OF THE TCDA AS A LEGISLATIVE INVITATION TO RECONSIDER *STONE*

The Court condemned state dissension from its *Brown* holding in the later *Cooper* case and declined, in *Boerne*, RFRA's implicit invitation to reconsider its *Smith* decision. The Court should accept the invitation extended by the TCDA to reevaluate *Stone*, however, for the following three reasons: (1) *Stone*'s "undemocratic" character; (2) changes in Establishment Clause jurisprudence since *Stone*; and (3) the TCDA's professed goal of protecting state interests.

A. *Stone*'s "Undemocratic" Character

In *Cooper* the Court emphasized that the issues addressed in the controversial desegregation cases had been briefed, twice argued, and given serious consideration. The *Stone* decision, on the other hand, contained a laconic, unsigned majority opinion that summarily swept away the presumptively legitimate findings of a state legislative body. The Court did not ask for briefs on the matter, nor did it allow time for oral argument. The current Chief Justice complained, in dissent, that the Court's approach to the controversial issue in *Stone* was "cavalier."⁹⁵ Surely such an effortless dismissal of a controversial constitutional question constitutes a prime candidate for review. Furthermore, as Justice Rehnquist argued in his dissent, *Stone* was remarkable in overturning Kentucky's legislative process without so much as allowing the state to brief or argue its case. Given the fact that the Court's decision turned on finding Kentucky's alleged secular purposes for posting the Commandments pretextual, this seems an especially egregious breach of the deference the separate powers within our federal system usually accord each other.

Additionally, as *Cooper*'s emphasis on the Court's unanimity in *Brown* implies, the greater the division that exists within the Court on a particular constitutional question, the more room there should be for a dialogue with Congress concerning the meaning of the Constitution with respect to that issue. Although the Supreme Court is not directly accountable to the people, its continuing institutional authority depends to some extent on its ability to maintain the people's support

95. *Stone*, 449 U.S. at 47 (Rehnquist, J., dissenting).

and confidence.⁹⁶ As the Court itself acknowledged in *Planned Parenthood v. Casey*, “[t]he Court’s power lies . . . in its legitimacy, a product of substance and perception that shows itself in the people’s acceptance of the Judiciary as fit to determine what the Nation’s law means and to declare what it demands.”⁹⁷ This need for public acceptance does not mean that the Court should easily bend with the prevailing political wind, but it does suggest that for the weaker reeds in the Court’s jurisprudence—those decisions that lack the legitimizing force of judicial consensus—the Court should take popular disagreement seriously. Because the 5-4 split in *Stone* does not inspire confidence that, as *Casey* recommends for the Court’s decisions, “the justification claimed . . . [is] beyond dispute,”⁹⁸ the Court should welcome the chance to consider the TCDA as input from a democratically elected body.

One might respond to this argument by observing that the Court in *Smith* was fundamentally divided,⁹⁹ yet *Boerne* rejected RFRA’s congressional challenge to reconsider that opinion. *Stone*, however, can be distinguished from *Smith*. The *Smith* split had the practical consequence of upholding Oregon’s contraband statutes, leaving room for the state legislature to create exemptions for religious users if it so chose.¹⁰⁰ As such, *Smith* might be considered a democratic decision, arguably requiring less justification for the judicial position taken. *Stone*, in glibly brushing aside the judgment of Kentucky’s legislative body, must be considered an “undemocratic” decision, demanding a more persuasive rationale. Because *Stone* was decided without briefs or oral argument, does not represent a judicial consensus, and overturned the legislative judgment of the state of Kentucky, the current

96. See, e.g., ROBERT G. McCLOSKEY, *THE AMERICAN SUPREME COURT* 9 (2d ed., rev. by Sanford Levinson 1994) (stating that “the mandates of the Supreme Court must be shaped with an eye not only to legal right and wrong, but with an eye to what popular opinion would tolerate.”); Neal Devins, *How Not to Challenge the Court*, 39 WM. & MARY L. REV. 645, 659-60 (1998) (explaining that “lacking the powers of purse and sword . . . the Court’s authority is necessarily tied to ‘the people’s acceptance of the Judiciary.’”) (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 865 (1992)).

97. 505 U.S. at 865.

98. *Id.*

99. The *Smith* decision was split 6-3 as to the judgment, and 5-4 as to the rationale. Justice O’Connor agreed with the dissent’s methodology, but, in applying it to the facts in *Smith*, voted with the majority to uphold the Oregon contraband statute that made no exception for the religious use of peyote. See *Employment Div. v. Smith*, 494 U.S. 872, 891 (1990) (noting that dissenters join Justice O’Connor’s concurring opinion, but dissent from its judgment).

100. See *id.* at 890, 907.

Court should accept the congressional invitation to revisit that decision.

B. Changes in Establishment Clause Jurisprudence Since *Stone*

Not only was the Court in *Stone* split 5-4, but, after twenty years, four of the five Justices in the majority have left the bench, with only Justice Stevens remaining. Of the dissenters, the only one to write vigorously against the *per curiam* decision remains, and has become the Chief Justice. This change constitutes a pragmatic argument for the timeliness of a reconsideration of *Stone*, and the evolution of constitutional doctrine suggests reconsideration as well. Since *Stone*, two important Supreme Court cases involving the constitutionality of seasonal creche displays on public property have brought substantive modifications to Establishment Clause jurisprudence. *Lynch v. Donnelly*¹⁰¹ and *County of Allegheny v. ACLU*¹⁰² have effectively shifted the Court's focus from *Lemon's* three-prong approach, relied on in *Stone*, to a context-dependent endorsement test that turns on the effect that a religious display would have on a reasonable observer.¹⁰³ Incorporating this change in emphasis has led to fluctuating results in Decalogue cases addressed by the lower courts.

In a 1992 case, a federal district court in Georgia found unconstitutional a "framed panel of the Ten Commandments and the Great Commandment" displayed in the state court building.¹⁰⁴ Echoing

101. 465 U.S. 668 (1984) (holding that city's display of creche along with numerous secular symbols did not have effect of endorsing religion).

102. 492 U.S. 573 (1989) (finding creche, located in grand staircase of county courthouse, had effect of endorsing religion, and therefore violated Establishment Clause).

103. See, e.g., *Allegheny*, 492 U.S. at 597 ("[T]he government's use of religious symbolism is unconstitutional if it has the effect of endorsing religious beliefs, and the effect of the government's use of religious symbolism depends upon its context.").

104. *Harvey v. Cobb County*, 811 F. Supp. 669 (N.D. Ga. 1993), *aff'd*, 15 F.3d 1097 (11th Cir. 1994). The panel contained the following text:

1. Thou shalt have no other gods before me.
2. 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 unto the third and fourth generation of them that hate me; and shewing mercy unto thousands of them that love me, and keep my commandments.
3. Thou shalt not take the name of the LORD thy God in vain; for the LORD will not hold him guiltless that taketh his name in vain.
4. Remember the Sabbath day, to keep it holy. Six days shalt thou labour, and do all thy work: 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, nor thy cattle,

Stone, the court held these to be “essentially religious texts in the Jewish and Christian traditions.”¹⁰⁵ Applying the new endorsement analysis, the court in *Harvey v. Cobb County* found that the panel’s isolated nature, located “alone in the alcove . . . high on the wall” and without “countervailing secular passages or symbols,”¹⁰⁶ made it impermissible, as “[n]o viewer could reasonably think that it occupies this location without the support and approval of the government.”¹⁰⁷ The court granted a four-month stay of the removal order to allow the state to “include the panel in a larger display of non-religious, historical items, which may bring it within constitutional parameters.”¹⁰⁸

Two years after *Harvey* the Colorado Supreme Court, using a similar analysis, found a monument bearing the Decalogue in a public park permissible in *State v. Freedom from Religion Foundation* (hereinafter *Freedom*).¹⁰⁹ While the *Harvey* plaque had hung prominently by itself in a hall of the courthouse, the Decalogue monolith in *Freedom* stood in a public park surrounded by “several much more prominent monuments” that “sufficiently neutralize[d] its religious character resulting in neither an endorsement nor a disapproval of religion.”¹¹⁰ The court in *Freedom* evaded *Stone*’s absolutist implications by ex-

nor thy stranger that is within thy gates: for six days the LORD made heaven and earth, the sea, and all that in them is, and rested the seventh day: wherefore the LORD blessed the Sabbath day, and hallowed it.

5. Honor thy father and thy mother: that thy days may be long upon the land which the LORD thy God giveth thee.
6. Thou shalt not kill.
7. Thou shalt not commit adultery.
8. Thou shalt not steal.
9. Thou shalt not bear false witness against thy neighbor.
10. 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.

Jesus said: 1. Thou shalt love the LORD thy GOD with all thy heart, and with all thy soul, and with all thy mind. 2. Thou shalt love thy neighbor as thy self. On these two commandments hang all the law and the prophets.

Harvey, 811 F. Supp. at 671-72.

105. *Id.* at 671.

106. *Id.* at 678.

107. *Allegheny*, 492 U.S. at 599-600, *quoted in Harvey*, 811 F. Supp. at 678.

108. *Harvey*, 811 F. Supp. at 671.

109. 898 P.2d 1013 (Colo. 1995).

110. *Freedom*, 898 P.2d at 1018-19. The Colorado court used the “reasonable person” analysis elaborated by Justice O’Connor in her concurrence in *Lynch* to test for the message conveyed by the monument, noting that the “meaning of a statement to its audience depends both on the intention of the speaker and on the ‘objective’ meaning of the statement in the community.” *Lynch*, 465 U.S. at 690, *quoted in Freedom*, 898 P.2d at 1021.

plaining that the Establishment Clause imposes more restrictive limitations in a public school setting, “where young and impressionable minds are in need of greater protection.”¹¹¹ In *Stone*, the Supreme Court’s “vigilance to avoid and protect against coercion properly prevailed over a fear that the prohibition might be hostile to religion School religion cases require a more stringent analysis because of the age of the minds affected, and because students are captive audiences, especially susceptible to influence.”¹¹² Outside of the public school context, however, the “undeniably religious nature” of the Decalogue may be neutralized by a context that detracts from its religious message. Here, a monument with a melange of secular and religious symbolism, including the Ten Commandments, set in a park amidst other nonreligious statues, merely “teaches a history of rich cultural diversity,”¹¹³ and “represents the secular objective intended at the outset, recognition of a historical, jurisprudential cornerstone of American legal significance.”¹¹⁴

Only two months prior to the House passage of the TCDA, a district court in North Carolina upheld a frieze depicting the Decalogue on the back wall of the Haywood County courtroom.¹¹⁵ Looking to the frieze’s secular purpose, the court in *Suhre v. Haywood County* noted that the ceremony dedicating the work had focused on the historical development of the law and the importance of the Ten Commandments to the “Judicial Code of every civilized nation on earth.”¹¹⁶ The court distinguished *Stone* on the grounds that the posting in *Stone* was the result of a legislative enactment, not part of a

111. *Freedom*, 898 P.2d at 1022.

112. *Id.* at 1022-23.

113. *Id.* at 1025.

114. *Id.* at 1026.

115. *Suhre v. Haywood County*, 55 F. Supp. 2d 384 (W.D.N.C. 1999). The full text of the frieze reads as follows:

- I Thou shall [sic] have no other God before me.
- II Thou shalt not make unto thee any graven image.
- III Thou shalt not take the name of the lord thy god in vain.
- IV Remember the sabbath day to keep it holy.
- V Honor thy father and thy mother.
- VI Thou shalt not kill.
- VII Thou shalt not commit adultery.
- VIII Thou shalt not steal.
- IX Thou shalt not bear false witness.
- X Thou shalt not covet.

Id. at 387. Note the difference between the versions posted in *Harvey* and *Suhre*. Perhaps the modesty of the rendition at issue in *Suhre*, as much as anything else, explains why this frieze was held permissible, while the imperious plaque in *Harvey* was struck down.

116. *Id.* at 386.

display, and that in *Stone* the Ten Commandments were not integrated into the school curriculum.¹¹⁷ Additionally, the court in *Suhre* held that the remarks dedicating the frieze, delivered in 1932 and revealing that its purpose was to “honor and respect the development of the judicial system,” could not have been pretextual (as in *Stone*) because the lawsuit could not have then been anticipated.¹¹⁸ Moving to the religious effect of the frieze, the court reasoned that “the average person in Haywood County would not perceive the display as entirely religious; the Ten Commandments have become a part of public life.”¹¹⁹ Furthermore, the Decalogue’s juxtaposition with the American and North Carolina flags and a portrait of the blindfolded Lady Justice helped neutralize its religious effect.¹²⁰ Perhaps most revealingly, the district court concluded with a reference to Justice Goldberg’s famous admonition that the “measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow.”¹²¹ The Ten Commandments frieze displayed prominently in Haywood County’s courthouse, the court concluded, was “[n]othing more than [the] shadow”¹²² of a threat to the Establishment Clause.

As the recent line of Decalogue cases suggests, no single rule governs the permissibility of posting the Ten Commandments on public property. Furthermore, a consensus has not yet been reached as to the appropriate judicial test to be used in making such a determination. The *Lemon* test relied on in *Stone* has increasingly come under attack, with the third “excessive entanglement” prong disappearing from the case law.¹²³ Justice O’Connor’s assertion that Establishment Clause

117. *Id.* at 394 n.3.

118. *Id.* at 394.

119. *Id.* at 395.

120. *Id.* at 396.

121. *Id.* at 398 (quoting *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 308 (1963) (Goldberg, J., concurring)).

122. *Suhre*, 55 F. Supp. 2d at 398 (“In sum, the display in the Haywood County Courthouse no more violates the First Amendment than the frieze on the south wall of the Supreme Court.”).

123. One commentator stated:

The *Lemon* test has not been overruled, but as one court recently noted, “It seems probable that the Supreme Court has abandoned [it].” In its place, the Court has applied a number of other analyses including historical review, strict scrutiny, the so-called “coercion test,” and the “endorsement test,” a modification of *Lemon* championed by Justice O’Connor.

Brian T. Coolidge, Comment, *From Mount Sinai to the Courtroom: Why Courtroom Displays of the Ten Commandments and Other Religious Texts Violate the Establishment Clause*, 39 S. TEX. L. REV. 101, 105 (1997) (alteration in original) (citations omitted) (quoting *Granzeier v. Middleton*, 955 F. Supp. 741, 748 (E.D. Ky. 1997)).

jurisprudence cannot be “distilled into a fixed, *per se* rule”¹²⁴ is, in practice, the controlling principle in such cases. This principle allows wide judicial discretion in finding religious endorsements by the state. Nevertheless, it appears that some form of an endorsement test, requiring the state to demonstrate both a secular legislative purpose and a permissible practical effect for religious displays, will be used in the future to determine whether religious displays on public property violate the Establishment Clause.¹²⁵ The case law developing this test undermines *Stone*’s facile dismissal of public Decalogue displays on both counts.

With respect to the secular purpose requirement, courts before and since *Stone* have balanced the Decalogue’s religious nature against its possible secular uses.¹²⁶ *Stone*, on the other hand, merely noted the “plainly religious nature” of the Ten Commandments, and declined to consider whether or not there could be countervailing secular uses flowing from the indisputably religious document. Although *Stone* has been cited approvingly in the Supreme Court’s Establishment Clause jurisprudence,¹²⁷ its methodology was undermined by the *Lynch* decision, in which the Court noted:

Focus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause.

The Court has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but only when it has concluded there was no question that the statute or activity was motivated wholly by religious considerations.¹²⁸

124. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 778 (1995) (O’Connor, J., concurring). “In the end, I would recognize that the Establishment Clause inquiry cannot be distilled into a fixed, *per se* rule. Thus, ‘[e]very government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion.’” *Id.* (alteration in original) (quoting *Lynch*, 465 U.S. at 694 (O’Connor, J., concurring)).

125. *See, e.g., Lynch*, 465 U.S. at 690 (O’Connor, J., concurring). Justice O’Connor notes that

The purpose prong of the *Lemon* test asks whether government’s actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government’s actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid.

Id.

126. *See, e.g., Anderson v. Salt Lake City Corp.*, 475 F.2d 29 (10th Cir. 1973); *Suhre*, 55 F. Supp. 2d at 384; *Freedom*, 898 P.2d at 1013; *Stone*, 599 S.W.2d at 157.

127. *See Allegheny*, 492 U.S. at 619; *Lynch*, 465 U.S. at 680.

128. *Lynch*, 465 U.S. at 680. *See also Allegheny*, 492 U.S. at 619 (“While no sign can disclaim an overwhelming message of endorsement, *see Stone v. Graham*, . . . an ‘explanatory plaque’ may confirm that in particular contexts the government’s associ-

Although the Court was apparently making room for *Stone* with this qualification, the statement implies that *Stone* does not stand for the proposition that posting the Ten Commandments can never have a secular purpose, but merely for the proposition that the particular statute at issue in *Stone* was “wholly” religiously motivated.

In addition to subsequent modifications of the secular purpose analysis, two other factors add dimensions to the possible effect of Decalogue displays not taken into account by the Court in *Stone*. First, as the court in *Freedom* argued, there may be a significant distinction between posting the Ten Commandments in public schools and displaying them in other public environments.¹²⁹ Whether or not the public school setting constituted an implicit factor in *Stone*’s analysis, *Stone* cannot stand for the proposition that a display of the Ten Commandments on public property may never be constitutionally permissible, especially since the Supreme Court itself is home to a judicially endorsed frieze depicting the Decalogue.¹³⁰ The second factor

ation with a religious symbol does not represent the government’s sponsorship of religious beliefs.”)

129. E. Gregory Wallace has argued that, in the Establishment Clause context, public education is of special concern for several reasons. First, attendance is compulsory. Second, public education, as Donald Giannella has observed, “directly touches upon religious concerns, such as the meaning of existence and the sources and nature of human values.” Donald A. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development Part II: The Nonestablishment Principle*, 81 HARV. L. REV. 513, 561 (1968). Third, unlike the outside world where students are exposed to other speakers besides the government, the state generally is the sole authoritative voice in the public school. Fourth, younger children usually lack the knowledge, maturity, and reasoning skills needed to evaluate critically what their teachers tell them. Finally, students are rewarded or penalized based on how well they “learn” what they are taught.

E. Gregory Wallace, *When Government Speaks Religiously*, 21 FLA. ST. U. L. REV. 1183, 1196 n.64 (1994).

130. Justice Stevens, concurring and dissenting in part in *Allegheny*, argued that public use of a religious symbol would be prohibited

only when its message, evaluated in the context in which it is presented, is nonsecular. For example, a carving of Moses holding the Ten Commandments, if that is the only adornment on a courtroom wall, conveys an equivocal message, perhaps of respect for Judaism, for religion in general, or for law. The addition of carvings depicting Confucius and Mohammed may honor religion, or particular religions, to an extent that the First Amendment does not tolerate any more than it does “the permanent erection of a large Latin cross on the roof of city hall.” . . . Placement of secular figures such as Caesar Augustus, William Blackstone, Napoleon Bonaparte, and John Marshall alongside these three religious leaders, however, signals respect not for great proselytizers but for great lawgivers. It would be absurd to exclude such a fitting message from a courtroom, as it would to exclude religious paintings by Italian Renaissance masters from a public museum.

relates to the increasing importance of context in religious display cases. Although not addressed by *Stone*, every court since has incorporated context into its analysis of the religious effect produced by a display of the Ten Commandments. Justice Stevens, the lone justice from the *Stone* majority remaining on the bench, justified the Supreme Court's frieze on contextual grounds: If the context emphasizes the Decalogue as a historical source of law, its placement in a courtroom is appropriate.¹³¹ Justice Stevens's justification raises questions as to what level of contextualization, and what contexts, can neutralize the impermissible religious effect of the Ten Commandments in different settings. For example, can a public school display of the Ten Commandments ever be neutralized with the right contextual form and substance? Although the *Stone* decision casts doubt on this proposition, Justice Rehnquist's dissent suggests that incorporation into the curriculum might be one method of rescuing the Decalogue from its otherwise impermissible religious effect.¹³²

An increasingly important element of the endorsement test, developed by the Supreme Court after its decision in *Stone*, is the use of a "reasonable observer" as a measuring stick in determining the endorsement effect of a religious display on public property.¹³³ Justice O'Connor, the most vocal proponent of the reasonable observer analysis, argues that this hypothetical person should be an idealized observer judicially constructed with knowledge of the "history and context of the community and forum in which the religious display appears," as well as with an understanding of the religious nature of the symbol in question.¹³⁴ Justice Stevens prefers an analysis linked more closely with the actual perceptions and reactions of individuals offended by the religious display.¹³⁵ In either case, a more localized Establishment Clause jurisprudence that measures constitutional violations by reference to the actual or idealized reactions of local observers suggests a more decentralized approach to the Establishment Clause as, arguably, the TCDA intends to effect.¹³⁶

Allegheny, 492 U.S. at 652-53 (citations omitted) (quoting *id.* at 661 (Kennedy, J., concurring in judgment in part and dissenting in part)). Justice Stevens further admits that "[a]ll these leaders, of course, appear in friezes on the walls of our courtroom." *Id.* at 653 n.13.

131. *Id.* at 652-53.

132. See *Stone*, 449 U.S. at 45.

133. See *Pinette*, 515 U.S. at 780-81 (O'Connor, J., concurring).

134. *Id.* at 779-80 (O'Connor, J., concurring).

135. *Id.* at 799 (Stevens, J., dissenting).

136. To the extent that the endorsement-to-a-reasonable-observer test is advanced by the Court in analyzing Establishment Clause suits, the states (through their own legislatures and courts) may be better situated to determine what effect a litigated display

Thus, the changes in the makeup of the Court and in Establishment Clause jurisprudence in the twenty years since *Stone* make a reconsideration of that decision appropriate, even if only to clarify and extend its holding to answer abounding questions. Was the school setting a central element of the Court's decision? What role did or might context play? Would the reasonable observer analysis be more effectively implemented by state judges with greater local expertise? Accepting the TCDA's invitation to reexamine *Stone* would afford the Court an opportunity to address these questions.

C. *The TCDA's State-Protective Structure*

The unusual structure of the TCDA—augmenting state autonomy rather than curtailing it, and challenging the Court's reach into what is allegedly state jurisdiction—demands greater deference from the Court than did RFRA's radical expansion of federal power in *Boerne*. While Court decisions like *Cooper* and *Boerne* have helped entrench judicial supremacy within our legal and political structures, the separation of powers relied on in these cases functions as an argument for the continuing importance of congressional constitutional interpretation, not as an argument against it. In defense of some version of constitutional coordinacy, James Madison noted: "The several departments being perfectly co-ordinate by the terms of their common commission, neither of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers."¹³⁷ James Wilson understood that this coordinate vision of his fellow Framers had profound consequences for the success of the separation of powers system: "[I]f one part should, at any time, usurp more power than the constitution gives, or make an improper use of its constitutional power, one or both of the other parts may correct the abuse, or may check the usurpation."¹³⁸

The *Cooper* and *Boerne* decisions harmonize with the Framers' arguments for coordinacy on this point: The need for judicial review is premised on the desire to preserve the Constitution by protecting against government's usurpation of powers not delegated to it. For the Court, this means policing Congress to ensure that it remains within the bounds of, primarily, Article I and the Bill of Rights. When the Court strikes down legislation because it usurps powers reserved to

would have on a reasonable observer familiar with that state's history and the display's context.

137. THE FEDERALIST NO. 49, at 314 (James Madison) (Clinton Rossiter ed., 1961).

138. 1 THE WORKS OF JAMES WILSON 299, 300 (Robert Green McCloskey ed., 1967).

the states, or involves an exercise of power prohibited by the Bill of Rights, the Court appropriately fulfills its role. As Wilson's quote suggests, however, this balance of powers reasoning cuts both ways. If, as Justice Frankfurter once affirmed, "the ultimate touchstone of constitutionality is the Constitution itself" and not what the Court has said about it,¹³⁹ the Constitution may, at times, need to be protected against power usurpation by the judiciary. With the TCDA, the House claims, in essence, that the Supreme Court has usurped the states' constitutionally guaranteed right to post the Decalogue on state property. Although the merits of this claim may be questionable, if there were ever a time when a congressional assertion of constitutional meaning would be appropriate, it would be under such circumstances. Given the political reality of judicial supremacy, the Court might well find Congress's claims of judicial overreaching unpersuasive, and simply reiterate its holding in *Stone*. The gravity of the claim, however, demands at least a respectful response from the Court.

The TCDA is also unusual in its expansion of state rather than federal power. This may be an important distinction between RFRA and the TCDA; RFRA potentially federalized a broad range of state regulation by requiring the application of a compelling interest test to each and every indirect infringement on religious liberty created by state legislation.¹⁴⁰ The TCDA's utilization of the Tenth Amendment—to find something beyond the reach of congressional power, rather than within it—is striking, and suggests that the Court review the TCDA with an extra measure of care. The Supreme Court has held, in the Tenth Amendment context, that the states are represented in, and their interests protected by, the structure of the federal union.¹⁴¹ While the Court originally propounded that argument to uphold legislation in which Congress appeared to be infringing on state autonomy, the argument might also serve to bolster congressional legislation, such as the TCDA, that seeks to protect or enlarge state autonomy as against potential overreaching by the Court.

139. *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 491-92 (1939) (Frankfurter, J., concurring).

140. For an acute analysis of RFRA's federalism problems, see Eisgruber & Sager, *supra* note 87, at 466.

141. Specifically, the Court stated that the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself. It is no novelty to observe that the composition of the Federal Government was designed in large part to protect the States from overreaching by Congress.

Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 550-51 (1985) (citation omitted).

The TCDA asks the Court to harmonize *Stone* with *Smith* and release a subject over which it has claimed dominion back into the hands of state legislatures. Because the TCDA functions to enlarge state autonomy at the expense of federal power by structurally implying a usurpation by the Court of state authority, the Court should grant it a greater measure of deference than it accorded RFRA. While the Court will, and should, feel free to disagree with the judgment of Congress, respect for the states it represents should prompt the Court to use the invitation provided by the TCDA to reconsider and clarify its holding in *Stone*.

IV

CONGRESSIONAL CHALLENGE AS IMPLICIT INVITATION

An important objection to analyzing the TCDA as an invitation for reconsideration is that the amendment does not describe itself as such. Rather, it formally recognizes, as reserved to the states, a power that had previously been a source of “dispute.” The TCDA makes no reference to *Stone*, and acknowledges the Court’s Establishment Clause jurisprudence only by conceding that the First Amendment has been incorporated through the Fourteenth Amendment to apply to the states.¹⁴² This structural weakness, however, may be a strategic strength, as it challenges the Court without directly confronting the Court’s interpretive authority, and extends an invitation without explicitly submitting to judicial supremacy.

In failing to explicitly address either the Establishment Clause itself or the Court’s Establishment Clause jurisprudence, the TCDA obscures both the nature and the scope of its challenge to *Stone*. If the Supreme Court distinguishes school from non-school settings when evaluating the constitutionality of posting the Ten Commandments, does the TCDA reject that distinction? On its face, the amendment applies to all state property without distinguishing between school and courthouse. By failing to explicitly require any contextualization for Decalogue displays, is the House rejecting this important element of the Court’s endorsement analysis? Does the TCDA simply reject the endorsement analysis outright? Neither the amendment, nor its meager legislative history, provide much guidance in answering these difficult questions.

142. See H.R. 1501, 106th Cong. § 1201(4) (1999).

The statute's ambiguity and indirection, however, make the invitation analysis more attractive.¹⁴³ The House has not substituted a new jurisprudence to replace the Court's Establishment Clause case law; the TCDA's terse declaration could not function as a judicial rule to be applied flexibly to every scenario in which a question about public use of the Decalogue might arise. The alleged existence of a Tenth Amendment power to post the Decalogue cannot mean that the Establishment Clause retains no vitality with respect to the Ten Commandments—the TCDA itself “finds” that the First Amendment “secures rights against laws respecting an establishment of religion.”¹⁴⁴ The reserved power to post the Decalogue, therefore, is circumscribed by the First Amendment in such a way that judicial interpretation of the Establishment Clause remains necessary; it is, in fact, presupposed by the TCDA.

The TCDA's bold assertion of interpretative authority serves to protect Congress's claims for constitutional coordinacy, while simultaneously avoiding a direct assault on the Court's integrity. By framing its disagreement with *Stone's* First Amendment holding in Tenth Amendment terms, the TCDA gives the Court room to incorporate congressional judgment into its evolving Establishment Clause jurisprudence without relinquishing its claim to interpretive supremacy.

CONCLUSION

When Congress is convinced that the Supreme Court has misinterpreted or misapplied a constitutional directive, it has both the power and the duty to pass legislation designed to afford the Court an opportunity to correct its mistake. The Court will not be bound by this congressional interpretative judgment, and may decide to reiterate its earlier analysis or holding. When confronted with such an invitation, however, the Court should not respond indignantly, nor should it lightly dismiss the constitutional challenge as beyond the proper powers of Congress. Instead, the Court should accept the invitation from Congress with a degree of deference—the deference due a coordinate branch of the government that is acting in accordance with its sworn duty to uphold the Constitution.

143. Neal Devins has criticized RFRA for being too direct, noting that *Boerne's* “chief, if not only, complaint with RFRA was that the statute operated as a naked power grab, transferring from the Court to Congress the power to define constitutional standards of review The Supreme Court had no choice but to view RFRA as a frontal assault on its authority.” Devins, *supra* note 96, at 646, 654.

144. H.R. 1501, 106th Cong. § 1201(3) (1999).

The TCDA's legislative invitation for judicial reconsideration of *Stone* should be considered with particular care for three reasons. First, in *Stone* a divided Court summarily rejected the judgment of Kentucky's legislature—thus reaching a profoundly undemocratic decision—without the benefit of briefing or oral argument. Second, changes in Establishment Clause jurisprudence in the twenty years since *Stone* make its reconsideration desirable, even if only to clarify the Court's position on public Decalogue displays. Third, the TCDA's protective stance towards the states, in preventing federal usurpation of state interests and powers, should be treated with respect even if the Court eventually rejects Congress's reading of the Tenth Amendment.

If posting the Ten Commandments on public property constitutes a threat to the Establishment Clause, then the TCDA will provide the Supreme Court with an occasion to update and reinforce *Stone*. On the other hand, the Decalogue may represent only the shadow of a threat to the Constitution. If so, the TCDA provides the Court with an opportunity to reconsider *Stone*, perhaps reinforcing the Court's legitimacy in the eyes of its skeptics in the process. Is moral instruction a praiseworthy secular purpose of the Decalogue, as Kentucky's Justice Clayton believes, or, as Justice Lukowsky concludes, an impermissible forcing of the "moral precepts of a creed" upon vulnerable schoolchildren? A majority of the House of Representatives is apparently convinced, in the wake of the Columbine tragedy, that ethical pedagogy may not be easily torn from its historically religious moorings. Whatever one's view with respect to the public posting of the Ten Commandments, the TCDA can only lead to a refining of the Court's Establishment Clause jurisprudence, and should spur movement toward a national consensus on this controversial issue.