

# Findings

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## The Ten Commandments

### *Historical Education vs. Separation*

By Gena E. Walling and Stephen Daniels



In North Carolina, as in most states across the country, discussion of the appropriateness of posting the Ten Commandments in schools, courthouses and government

buildings has prompted a lot of debate. Displaying the Ten Commandments in or around government buildings, especially schools, has resulted in several lawsuits and U.S. Supreme Court rulings. Although the Supreme Court has said that it is unconstitutional for a legislature to require the posting of the Ten Commandments on the walls of classrooms,<sup>1</sup> the Ten Commandments may be posted under certain guidelines set forth by the Supreme Court—a Court that itself posts the Ten Commandments on the wall of its own courtroom.<sup>2</sup>

### **Church and State**

One must understand the phrase “separation of church and state” to understand why allowing the Ten Commandments to be posted in government buildings is truly not a violation of the Constitution.

The battle over allowing the posting begins with the Supreme Court’s judicially decreed doctrine of separation of church and state. The phrase “separation of church and state,” which appeared in a letter by Thomas Jefferson to the Danbury Baptist Church in 1802,<sup>3</sup> has generated intense battles and a misunderstanding of the First Amendment and the U.S. Constitution by most Americans. Jefferson never intended his letter to be a statement of fundamental principle that religion should have no influence on government. Instead, he was objecting to the idea of establishing a church by law. Interestingly, Jefferson began attending church services that were being held in the House of Representatives two days after writing his letter to the Danbury Baptists.<sup>4</sup>

Scholars have argued recently that Jefferson was in agreement with his fellow founders in asserting that religion was important for the well-being of the nation’s people and, in turn, their government.<sup>5</sup>

Separation of church and state does not mean separation of God from government, or vice versa. The separation is in the institutions and their relationships with people. These institutions of government and church each have a specific role to play within society. The founders intended that the roles, administrative functions and funds remain separate so that each citizen would have freedom of conscience to choose to worship God according to their own dictates.<sup>6</sup> Never did the founding fathers suggest that our nation was not answerable to God. Neither did the writers of the Constitution intend that there be a complete wall of separation between the institutions of church and state.<sup>7</sup> The Supreme Court clearly stated this in *Lynch v. Donnelly*:

*“The purpose of the Establishment and the Free Exercise Clause is to prevent, as far as possible, the intrusion of either [the church or the state] into the precincts of the other, but total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable. The concept of a wall of separation is a useful figure of speech, but it is a metaphor that serves as a reminder that the Establishment Clause forbids an established church or anything approaching it. But the metaphor itself is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state. It has never been thought either possible or desirable to enforce a regime of total separation...nor does the Constitution require complete separation of church and state.”<sup>8</sup>*

Presenting the Ten Commandments is an acknowledgment of our country’s heritage. To leave the Ten Commandments out of education is to overlook the historical foundation of our laws.

### **The Legislation**

The purpose of legislation allowing the posting of the Ten Commandments is to clarify for school boards that by law they may include the Commandments as part of a curriculum studying our government and/or legal system. Intimidated by potential litigation, some schools have excluded this important influence on our legal system from education. However, in the 1997 session, the North Carolina General Assembly passed legislation to ensure that public school teachers could post or read historic documents in public schools without censorship of the religious references in these documents.<sup>9</sup> It is important that lawmakers reinforce this freedom. Otherwise, by excluding the Ten Commandments, many schools would be denying students vital truth about the foundation of our legal system and our country’s laws.

Much of the fear about including the Ten Commandments within a curriculum is born out of the misunderstanding of the Supreme Court’s definition of separation of church and state and its decision regarding the posting of the Ten Commandments. The Supreme Court has suggested that the posting of the Ten Commandments as a part of a curriculum of American history or a study of our legal system is constitutional.<sup>10</sup> Legislation authorizing such posting is intended to clarify for school districts and citizens the current law regarding the posting of the Ten Commandments.

The posting of the Ten Commandments is legal, but what the Court has ruled as illegal is the promotion of one religion over another. The Ten Commandments is

consistently reflected in our civil and criminal code. The Court has clarified that teaching this historical fact is consistent with the U.S. Constitution's Establishment Clause, and the General Assembly can reinforce this by permissive legislation.

## The First Amendment

At the heart of the controversy surrounding the Ten Commandments is the First Amendment to the Constitution of the United States. It reads:

*Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the government for a redress of grievances.*

The First Amendment originally applied only to the federal government, leaving to the individual States to protect freedoms for their respective citizens within their constitutions.<sup>11</sup> Then, in a landmark opinion by the Supreme Court in 1940, the "Bill of Rights" was applied to the States through the Fourteenth Amendment.<sup>12</sup> The Court ruled that the Fourteenth Amendment incorporated the freedoms protected in the First Amendment for all citizens within the United States. Applying this to the area of religious freedom, the Court stated in *Everson v. Board of Education*: "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach."<sup>13</sup>

These rulings have paved the way for litigation against states that have enacted laws regarding religion. State laws that have been found unconstitutional include: a tax or license fee to distribute or sell religious material;<sup>14</sup> release-time for religious instruction when students must choose between secular classes and religious ones;<sup>15</sup> the composition and recitation of a state prayer in the public schools;<sup>16</sup> a requirement that public school students read Bible passages and the Lord's prayer;<sup>17</sup> the use of public school funds to pay private (nonreligious) school teachers to teach secular subjects within the parochial school;<sup>18</sup> the requirement of schools to post the Ten Commandments to promote moral behavior;<sup>19</sup> the requirement that evolution cannot be taught without creationism;<sup>20</sup> the placing of a nativity scene captioned, "Glory to God for the birth of Jesus Christ" on public grounds;<sup>21</sup> and the placing of a monument of the Ten Commandments outside of a municipal building.<sup>22</sup>

The controversy is most pervasive on the local level as a result of strategic threats by the local chapters of the American Civil Liberties Union (ACLU) against municipal governments. A recent example occurred in Wilkesboro, North Carolina, when the ACLU threatened to sue Wilkes County unless a plaque of the Ten Commandments was removed from the county courthouse. The threat of litigation was removed once a compromise had been reached.<sup>23</sup> Local governments will often submit to the ACLU simply to avoid the cost of litigation. Therefore, understanding the law and how to apply it is important for both government officials and citizens of this country.

## Historical Significance

The Ten Commandments hold a special place of historical significance in the founding of our country. Unlike the writings of other major world religions, the Ten Commandments is recognized as a document that played a key role in the founding of our nation. James Madison, known as the father of the Constitution, said:

*"We have staked the whole future of American civilization, not upon the power of government, far from it. We have staked the future of all of our political institutions upon the capacity of mankind for self-government; upon the capacity of each and all of us to govern ourselves, to sustain ourselves, according to the Ten Commandments of God."<sup>24</sup>*

In 1989, the Supreme Court said in *County of Allegheny v. ACLU, Pittsburgh* that "the text of the Ten Commandments no doubt has played a role in the secular development of our society and can no doubt be presented by the government as playing a role in our civic order."<sup>25</sup> As was mentioned earlier, the Supreme Court building itself displays the Ten Commandments being held by Moses prominently over the east portico and in the inner courtroom directly above the bench where the Justices are seated.<sup>26</sup>

Although the Ten Commandments has been recognized by the Supreme Court to have contributed to the founding principles behind our legal system, it has become a difficult task to teach this aspect of our legal system without legal challenges. The influence of the Ten Commandments on our governmental foundation and legal system needs to be taught to students and citizens because it is a significant part of our history.

According to Rabbi Daniel Lapin, founder of the nonprofit research organization Toward Tradition, posting the Ten

Commandments on the wall of our government buildings is "like having a menu in the window of a restaurant." The Ten Commandments is an expression of the principles that we support. It is a code of conduct upon which our country was founded; while it may be in conflict with other cultures, it is undeniably a vital part of the American culture. The principles of government found in the Bible are the very principles that have provided the freedoms we hold so dear.<sup>27</sup>

## The Test

In an effort to clarify when a state law, such as allowing the posting of the Ten Commandments, violates the Establishment Clause, the Court over the years has devised various tests/analytical tools. The analytical tool currently employed by the Supreme Court and used by lower courts is known as the Lemon test, taken from *Lemon v. Kurtzman*.<sup>28</sup> In order to satisfy *Lemon*, a court must determine "(1) whether the government activity in question has a secular purpose, (2) whether the activity's primary effect advances or inhibits religion, and (3) whether the government activity fosters excessive entanglement with religion."<sup>29</sup> To pass the test, the governmental action must not violate any one of these three prongs.<sup>30</sup>

The third prong of the Lemon test has been ruled not applicable to the posting of the Ten Commandments in schools.<sup>31</sup> This prong deals with questions of either mixing state funds with church funds or shared administrative tasks such as in *Lemon v. Kurtzman*. In *Lemon*, statutes in Pennsylvania and Rhode Island allowed the states to financially support nonpublic education through reimbursement or direct payment for secular subjects taught at the private schools. In order to implement the program, state officials had to monitor school records to be sure government funds were not spent on religious material and monitor the procedures that teachers used to ensure that the secular material was presented without mentioning religion. This administrative function over the implementation of education in a religious school was ruled to be an excessive entanglement with religion.<sup>32</sup> Because the posting of the Ten Commandments is not an entanglement with the administrative functions or funds of the church, the courts have ruled (and so it is likely to assume) that only the first two prongs apply.<sup>33</sup>

The first two prongs of the Lemon test are interested in the purpose and effect of the governmental action: (1) Did the government intend to promote a religion —

even under the guise of a secular purpose? (2) Even if the true intention is secular, does the provision have the *effect* of endorsing a religion?

### **Prong 1: Secular Purpose?**

A clearly stated secular purpose by the State is given deference by the Court, but it is the “Court’s duty to ensure that the purpose is sincere.”<sup>34</sup> In determining whether a secular purpose exists, the Supreme Court has simply required that the displays not be “motivated wholly by religious considerations.”<sup>35</sup> Writing for the majority in *County of Allegheny v. ACLU*, Justice Stevens stated a display is unconstitutional “only when its message, evaluated in the context in which it is presented, is nonsecular.”<sup>36</sup> The Court has not always adhered to these requirements. At times, the court’s application of the test has been stricter, requiring a complete separation suggesting that any potential religious motivation will render the display unconstitutional.<sup>37</sup> To determine a State’s sincerity of secular purpose, courts look at the “totality of the circumstances surrounding the placement and maintenance” of the display as well as the very appearance of the display.<sup>38</sup>

The Supreme Court has also noted that the Ten Commandments cannot be stripped of its religious nature because of the first four commandments regarding the worship of God. Some have argued that the Ten Commandments should be reduced to six, cutting out the first four that refer to God specifically. This would be an inaccurate representation of the document that has influenced our government. The Court stated that the religious nature of the Ten Commandments does not prevent it from being integrated into the school curriculum within “an appropriate study of history, civilization, ethics, comparative religion, or the like.”<sup>39</sup> The appropriate secular purpose, then, is the posting or presentation of the Ten Commandments as a part of a curriculum such as Civic Literacy, Government or U.S. History. All legislation that requires the posting of religious material (including the Ten Commandments) that has been challenged in court has been ruled unconstitutional.

The Supreme Court case most closely related to the posting of the Ten Commandments in schools is *Stone v. Graham*,<sup>40</sup> in which the state of Kentucky required the posting of the Ten Commandments to improve behavior in the schools. The Court determined that because it was required and had no secular purpose related to education, this Kentucky law was unconstitutional.

In addition, the Supreme Court appears to be suspicious of disclaimer-type language as found in two cases in which the Ten Commandments stood alone and a disclaimer was placed beneath it. The Court viewed this as a crafty way to violate the Establishment Clause, while trying to appear neutral. In *Stone v. Graham*, the school put a disclaimer at the bottom of the Ten Commandments that said, “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 Court said in response to this statement, “Such an avowed secular purpose is not sufficient to avoid conflict with the First Amendment. . . . No legislative recitation of a supposed secular purpose can blind us to [it’s religious nature].” The only secular purpose stated in the case was found in the disclaimer and the Court said this was not enough.<sup>41</sup>

The Seventh Circuit Court of Appeals in *Books v. City of Elkhart* said about the disclaimer language below a Ten Commandments monument, “The City’s resolution . . . proclaiming a secular purpose for the monument’s presence by recognizing the historical and cultural significance of the Ten Commandments, ought to be accorded no more weight than the avowed secular legislative purpose articulated by the Kentucky legislature in *Stone*.”<sup>42</sup> This also was the only secular purpose stated by the Kentucky State Legislature.

### **Prong 2: Endorsing a Religion?**

Under this test “the effect prong asks whether, irrespective of government’s actual purpose, the practice under review in fact conveys a message of endorsement or disapproval.”<sup>43</sup> Considering the circumstances surrounding the display and its appearance, the court must determine if a reasonable person would believe that the display amounts to an endorsement of religion.<sup>44</sup>

According to the Court’s test, the display containing religious material must not appear to endorse a religion. If the appearance of the display is religious, the court could rule that the intent is religious or the effect is religious. Either way, the display may be unconstitutional.

In *County of Allegheny*, the constitutionality of a nativity scene in the City Hall was challenged. The Court looked at the things that drew attention to the display and the location inside a municipal building. The Court ruled that a reasonable person would perceive that the government endorsed the Christian religion because the display was

surrounded by Christmas flowers that drew attention to the scene, the scene was located in the center of the building and had a plaque that declared ownership by a Catholic church. In the same case, a display of the menorah was not unconstitutional because it was part of a display with a Christmas tree and a sign that read “Salute to Liberty.” The court ruled that because this was not in the center of governmental activity and attention was not drawn to a particular religious symbol, a reasonable person would not see this display as an endorsement of a religion.<sup>45</sup>

The need to remain visually neutral was emphasized by the Supreme Court in its denial of certiorari (review) of *Books v. City of Elkhart, Indiana* (2001). A six-foot tall and three-and-one-half-foot-wide monument of the Ten Commandments had been placed in front of the city of Elkhart’s Municipal Building in 1958. The monument produced no controversy until 1998, when an atheist, offended by the monument, brought an action to have it ruled a violation of the Establishment Clause and removed. Although the Supreme Court denied review, the Court thought it important to mention that the very appearance of the monument was religious. The Court noted the textual emphasis the monument placed on the first commandment of “I am the Lord thy God,” because it was larger than the rest of the text. The Court also mentioned the religious symbols placed on the monument. The text and symbols made the monument appear religious. This, the Court said, was enough to violate the Establishment Clause.<sup>46</sup>

The Court has found displays with the Ten Commandments constitutional, such as the display of Moses holding the Ten Commandments in the Supreme Court. The Supreme Court’s display contains figures of other lawgivers including Augustus and Blackstone. The Court said that a display like this was constitutional because it did not endorse a religion by its appearance.<sup>47</sup>

### **What is Constitutional?**

According to the Supreme Court rulings, a display on public grounds that includes a religious document or image must have a clearly defined secular purpose and be visually neutral to be constitutional. Because courts give deference to a State’s secular purpose, the secular purpose should be clearly stated in the legislation. A display of the Ten Commandments must be intended to be a part of an educational curriculum that emphasizes the influence it has had on our government or the law, or as a part of a broader curriculum. Constitutional challenges can be minimized by

permissive legislation stating what is allowed rather than by compulsion by legislative enactment. Once the intent is clearly secular, then the display itself must appear neutral. Neutrality is defined by the courts as not drawing any attention to the Ten Commandments. This means that the Ten Commandments must not stand alone but be a part of a bigger display of other similarly influential documents.<sup>48</sup> It is likely that if it includes any religious symbols or special borders, or anything that might catch an onlooker's eye, it would be ruled unconstitutional. This formula of a clear secular intent and visual neutrality should render the display constitutional.

## Conclusion

The controversy surrounding the posting of the Ten Commandments has become a fixture in the debate on the separation of church and state—a standard that has been born from the misunderstanding of this concept. Nevertheless, the courts have created a legal standard by which the Ten Commandments may be constitutionally displayed.

The Establishment Clause within the First Amendment of the Constitution does not prohibit schools from teaching the influence of religion upon our government and our culture. An important part of education is understanding our history, and the Ten Commandments is an integral part of that history. Even the ACLU agrees that a presentation of the Ten Commandments as part of an historical display does not violate the Constitution as demonstrated in their compromise with the Wilkes County officials regarding the Ten Commandments in the courthouse. They agreed not to bring litigation against new displays containing the Ten Commandments and historic documents like the Declaration of Independence and the Magna Carta.<sup>49</sup>

Throughout the course of our nation's history, several writings have played a significant role. Among them is the Ten Commandments—a nationally recognized document of historical significance that played an important part in the founding of our nation. It is a commonly recognizable and widely accepted set of moral laws that have served as the foundation for much of our jurisprudence today. Their posting is not

an endorsement of religion, but an illustration of history. For this reason, it is appropriate that the Ten Commandments be displayed along with other documents of historical significance on school property. Legislation that meets this standard should be supported so that students may receive an accurate account of our history.

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*Gena E. Walling is a legal intern and Stephen Daniels is the Director of Research for the North Carolina Family Policy Council.*

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## Endnotes

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