Thou Shalt Not Display the Ten Commandments in School?

Courts to settle the issue following SCOTUS ruling on the Establishment Clause

By JOSHUA DUNN

In its 2022 landmark decision in *Kennedy v. Bremerton,* the U.S. Supreme Court officially buried the long-criticized *Lemon* Test that ostensibly framed Establishment Clause jurisprudence. The three-part test had held that government policy must have a secular purpose, must neither primarily advance nor inhibit religion, and must not create an "excessive entanglement" with religion. In *Bremerton,* the court held that, going forward, the Establishment Clause of the First Amendment must instead be interpreted in light of "historical practices and understandings." The court left the contours of this new "history and tradition" test unresolved. Now, a Louisiana law requiring that the Decalogue be posted in publicly funded schools will offer courts and, more than likely, the Supreme Court, the opportunity to determine the test's meaning.

In June 2024, Louisiana passed a law requiring all K–12 public and charter schools and state-funded universities to display a poster of the Ten Commandments in their classrooms. To foreclose compliance with the letter but not spirit of the law, the legislature required that each display be at least 11 by 14 inches, with the Ten Commandments "printed in a large, easily readable font."

Based on one bellwether of establishment opinion, the *New York Times,* Louisiana's law signals an incipient theocracy in America. Since Louisiana Governor Jeff Landry signed the law, nearly a dozen articles and op-eds in the Gray Lady have addressed it, most assuming its unconstitutionality. For instance, *Times* columnist Pamela Paul wrote that it

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Louisiana Governor Jeff Landry signed House Bill 71, requiring all public schools and universities to display the Ten Commandments in every classroom, into law on June 19, 2024. It has triggered a bevy of lawsuits challenging its fidelity to the Establishment Clause.

was obviously an attempt to "formalize precepts of Christian nationalism," and Charles Blow opined that, with this law and other recent legislation, Louisiana officials "are stifling freedoms and tilting toward Christian nationalism." You start with posters of the Ten Commandments and pretty soon, it seems, you'll have revival services and altar calls.

The law's defenders see things differently. For them, the statute reinforces the importance of the Ten Commandments in America's education history, and it includes several provisions intended to protect it from the inevitable legal challenges. Landry, in fact, has said that he "can't wait to be sued." The law mandates using the same version of the Ten Commandments displayed on a monument on the grounds of the Texas statehouse that the Supreme Court upheld in *Van Orden v. Perry* in 2005. It also stipulates that the displays should only be paid for with donated funds, not taxes. The displays are required to include a "context statement" that explains the significance of the Ten Commandments in the history of education in America, emphasizing their pedagogical rather than religious purpose. The statement discusses how the Ten Commandments were used in the *New England Primer* from 1688, the *McGuffey Readers* from the early 1800s, and Noah Webster's textbook *The American Spelling Book*. The act also allows schools to include displays of the Mayflower Compact, the Declaration of Independence, and the Northwest Ordinance.

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Five days after Louisiana passed its law, several organizations and individuals banded together to file litigation challenging it. In *Roake v. Brumley,* the American Civil Liberties Union, Americans United for Separation of Church and State, and the Freedom From Religion Foundation sued on behalf of Unitarian, Christian, Jewish, and atheist plaintiffs, including several with school-age children.

Their claim faces several obstacles. Inauspiciously, they begin by pointing to the Supreme Court precedent, *Stone v. Graham* (1980), which forbids displays of the Ten Commandments in public schools. But *Stone* relied on the *Lemon* Test, so its status as an authoritative precedent is uncertain. Despite this obvious difficulty, the claim doubled-down on *Lemon*'s obsolete reasoning by pointing out that one of the Louisiana bill's sponsors expressed religious motivations for supporting it. Representative Dodie Horton had said that she was backing the legislation in part because it "seeks to have a display of God's law in the classroom for children to see what He says is right and what He says is wrong."

This framing of the policy would clearly violate the secular-purpose prong of *Lemon*, but it is not clear that the religious motivations of one lawmaker make legislation presumptively unconstitutional in light of "historical practices and understandings." In fact, statements of religious motivation by public officials have been common throughout American history and especially so when the Bill of Rights was written. The plaintiffs' claim inadvertently highlights this difficulty by claiming that "there is no longstanding tradition of permanently displaying the Ten Commandments in public-school classrooms in Louisiana or the United States more generally." If that were true, then cases such as *Stone* would have been unnecessary. Instead, as the court indicated in *Bremerton,* it was the *Lemon* Test that was at odds with American history.

Perhaps sensing the difficulty of relying on overturned doctrine, the plaintiffs also assert that the Louisiana law is not neutral since it dictates a particular translation of the Ten Commandments commonly used by Protestants but not by Catholics or Jews. Thus, the law plays denominational favorites. However, there is no indication from the legislative record that Louisiana intended such a bias. Instead, it clearly sought to rely on a version already sanctioned by the court in *Van Orden v. Perry.* Of course, if a judge were to say that Louisiana could not favor one translation over another, the legislature would likely not object to requiring multiple translations be displayed, an outcome obviously not desired by the plaintiffs.

The plaintiffs simply face a difficult doctrinal environment. Virtually the entire history of education in America—prior to the court's now-overturned Establishment Clause jurisprudence from the second half of the 20th century—shows significant connections with religion. Of course, just because a law is constitutional or comports with historical practice does not mean it is wise or prudent. Religion has, after all, been a contentious subject for, well, all of human history. But there is no all-purpose constitutional prohibition against misguided laws, and attempts to strip schools of any religious content, even when historical in nature, have led to their own forms of conflict. In fact, in moving away from the *Lemon* Test, the court seemed motivated not only to clarify its understanding of the Establishment Clause but also to withdraw the judiciary from the endless disputes *Lemon* invited.

Lurking behind the law is one possible but controversial solution: school choice. For parents who believe a display of the Ten Commandments is a religious reference too far, school choice would allow them to find a more amenable environment for their children. Conveniently, Governor Landry signed a law creating Education Savings Accounts on the same day he signed the Ten Commandments mandate. It will be interesting to see how many parents who object to the in-school religious displays will now take advantage of ESAs to escape them.

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