S T A T E O F T E N N E S S E E
OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
NASHVILLE, TENNESSEE 37202

April 3, 2002

Opinion No. 02-039

Ten Commandments - Posting - Courthouse - Establishment Clause

QUESTIONS

1. Would a statute authorizing or requiring the posting of copies of the Ten Commandments in public buildings other than public schools violate the Establishment Clause of the First Amendment of the United States Constitution?

2. Would the answer to the first question be any different if there was a specific requirement for posting the Ten Commandments inside a courtroom?

3. Are the constitutional implications for the first and second questions any different if, without a statute, a county legislative body adopts a resolution approving the posting of copies of the Ten Commandments in public buildings and/or courtrooms in county courthouses?

OPINIONS

1. A statute authorizing or requiring the posting of the Ten Commandments in public buildings other than public schools would violate the Establishment Clause of the First Amendment of the United States Constitution.

2. A statute authorizing or requiring the posting of the Ten Commandments inside courtrooms of courthouses would also violate the Establishment Clause of the First Amendment of the United States Constitution.

3. A resolution of a county legislative body approving the posting of the Ten Commandments in public buildings and/or courtrooms in county courthouses would violate the Establishment Clause of the First Amendment of the United States Constitution.

ANALYSIS

The Establishment Clause of the First Amendment of the United States Constitution states: "Congress shall make no law respecting an establishment of religion." Courts have held this provision

applicable to states and their political subdivisions through the Fourteenth Amendment. *School District of Abington Township v. Schempp*, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963). Courts evaluate whether "state action" violates the Establishment Clause using a three part test enunciated by the United States Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). In order for a statute to be valid under the *Lemon* test, it must have a secular purpose, its principal or primary effect must be one that neither advances nor inhibits religion, and it must not create excessive government entanglement.[1]

In *Stone v. Graham*, 449 U.S. 39, 101 S.Ct. 192, 66 L.Ed.2d 199 (1980), the United States Supreme Court expressly held that a Kentucky statute requiring the posting of a copy of the Ten Commandments on walls of each public school classroom in the state violated the Establishment Clause. In applying the *Lemon* three-part test, the Court found the Kentucky statute to have "no secular purpose" even though the statute required the following notation in small print at the bottom of each display of the Ten Commandments: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States." The Court rejected this "avowed secular purpose" as "not sufficient to avoid conflict with the First Amendment." 449 U.S. at 41, 101 S.Ct. at 193-94. More specifically, the Court stated:

> The 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. The Commandments do not confine themselves to arguably secular matters, such as honoring one's parents, killing or murder, adultery, stealing, false witness, and covetousness. *See* Exodus 20: 12-17; Deuteronomy 5: 16-21. Rather, the first part of the Commandments concerns the religious duties of believers: worshiping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day. *See* Exodus 20: 1-11; Deuteronomy 5: 6- 15.
>
> This is not a case in which the Ten Commandments are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like. *Abington School District v. Schempp, supra*, at 225, 83 S.Ct., at 1573. Posting of religious texts on the wall serves no such educational function. If the posted copies of the Ten Commandments are

---

[1]In *Lee v. Weisman*, 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992), the Supreme Court did not expressly apply the *Lemon* test, but also expressly declined to reconsider *Lemon*. The United States Court of Appeals for the Sixth Circuit has continued to apply the *Lemon* test noting that "[t]he Supreme Court has not overturned or rescinded the *Lemon* test even as it has used its framework to shape differing analyses." *Simmons-Harris v. Zelman*, 234 F.3d 945, 952 (6th Cir. 2000). It should also be noted that " [i]f a statute fails any portion of this test, it violates the Establishment Clause." *Id.* at 951.

> to have any effect at all, it will be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments. However desirable this might be as a matter of private devotion, it is not a permissible state objective under the Establishment Clause. It does not matter that the posted copies of the Ten Commandments are financed by voluntary private contributions, for the mere posting of the copies under the auspices of the legislature provides the 'official support of the State . . . Government' that the Establishment Clause prohibits. 374 U.S., at 222, 83 S.Ct., at 1571; *see Engel v. Vitale*, 370 U.S. 421, 431, 82 S.Ct. 1261, 1267, 8 L.Ed.2d 601 (1962). Nor is it significant that the Bible verses involved in this case are merely posted on the wall, rather than read aloud as in *Schempp* and *Engel*, for 'it is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment.' *Abington School District v. Schempp, supra*, at 225, 83 S.Ct., at 1573. We conclude that § 158.178 (1980) violates the first part of the *Lemon v. Kurtzman*, test, and thus the Establishment Clause of the Constitution.

Id.

Since *Stone*, there have been a number of lower federal court decisions applying the *Lemon* test to legislative action at the state and local level requiring or permitting the posting of the Ten Commandments on public buildings such as courthouses and the grounds around such buildings. Those decisions have held that the posting of the Ten Commandments on such public buildings fails the secular purpose prong of the three-part *Lemon* test. *See Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d 766 (7th Cir. 2001)(The State's acceptance of a monument depicting the Ten Commandments and its placement on the grounds of the state house violated the Establishment Clause), *cert. denied*, 70 USLW 3444 (Feb. 25, 2002); *Books v. City of Elkhart*, 235 F.3d 292 (7th Cir. 2000)(A city's display of a monument inscribed with the Ten Commandments on the lawn of the city's municipal building violated the Establishment Clause.), *cert. denied*, 532 U.S. 1058, 121 S.Ct. 2209, 149 L.Ed.2d 1036 (2001); *American Civil Liberties Union of Kentucky v. McCreary County*, 145 F. Supp. 2d 845 (E.D. Ky. 2001)(The display of the Ten Commandments in a courthouse with other documents including the Magna Carta, the Declaration of Independence, the Bill of Rights, the Star Spangled Banner, the Mayflower Compact and picture of Lady Justice violated the secular purpose prong of the *Lemon* test and, therefore, contravened the Establishment Clause.); *Harvey v. Cobb County*, 811 F. Supp. 669 (N.D. Ga. 1993)(Display of framed panel of the Ten Commandments and the "Great Commandment" by itself in the county courthouse building violated the Establishment Clause.), *aff'd* 15 F.3d 1097 (11th Cir. 1994), *cert. denied*, 511 U.S. 1129, 114 S.Ct. 2138, 128 L.Ed.2d 867 (1994).[2]

[2]It should be noted that in *Harvey*, the district court did "stay its order of injunctive relief for four months to give Cobb county, in consultation with the plaintiffs, an opportunity to develop an educational display including the Ten Commandments panel." *Harvey*, 811 F.2d at 679.

In these cases, public officials have attempted to defend their actions by asserting an "avowed secular purpose." The courts have rejected such arguments. For example, in the *City of Elkhart*, the Seventh Circuit rejected the city's attempt to establish a secular purpose by a resolution issued on the "eve of this litigation" noting that the city's attempt "ought to be accorded no more weight than the avowed secular legislative purpose articulated by the Kentucky legislature in *Stone*." *City of Elkhart*, 235 F.3d at 304. Likewise, in *McCreary County*, the federal district court rejected four separate attempts by the county to articulate a "secular purpose" of "purporting to educate the citizens of McCreary and Pulaski counties . . . regarding the history of this nation's law and government . . ." as a basis for supporting the posting of the Ten Commandments in public buildings. *McCreary County*, 145 F.3d at 850. The district court noted that the defendants' purpose is "improper and violative of the Establishment Clause 'because it sends the ancillary message to . . . nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.'" *McCreary County*, 145 F.3d at 850 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984)(O'Connor, J., concurring).

On the other hand, some courts have held that the display of the Ten Commandments in a public building may not violate the Establishment Clause where the display in certain contexts has a "secular purpose." For example, in *Suhre v. Haywood County*, 55 F. Supp. 2d 384 (W.D.N.C. 1999), a federal district court held that the display of the Ten Commandments as tablets being held by a sculptured frieze of Lady Justice in a courtroom, which was part of the original construction of the courthouse in 1932, did not violate the Establishment Clause. Relying on *Lynch v. Donnelly*, 465 U.S. 668, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984)[3], the district court held that the "overall setting of the display, including Lady Justice's overwhelming presence, her scales of justices, her sword of justice, the columns, the clock, the arch and the flags 'changes what viewers may fairly understand to be the purpose of the display' and 'negates any message of endorsement of a [religious] content.'" *Suhre*, 55 F. Supp. 2d at 395. Likewise, in *State of Colorado v. Freedom from Religious Foundation*, 898 P.2d 1013 (Colo. 1995), *cert. denied*, 516 U.S. 1111, 116 S. Ct. 909, 133 L.Ed.2d 841 (1996), the Colorado Supreme Court held that the display of a monument originally erected in the 1950s by the Fraternal Order of the Eagles and inscribed with a version of the Ten Commandments and other religious and non-religious symbols in a state-owned park next to the state capitol along with various other monuments representing different historical and cultural events negated any suggestion that the government was endorsing religion and therefore did not violate the Establishment Clause. *See also* Tenn. Atty. Gen. Op. 96-022 (February 21, 1996)("the display of the Ten Commandments in a public building or on public property does not violate the Establishment Clause as long as the context does not have the effect of endorsing religion.").

Cases involving the Establishment Clause are often fact-based and difficult to distill into a clearly defined principle of law. Presently, there is no Tennessee statute authorizing or requiring the posting of the Ten Commandments in any public buildings. However, it is clear that if the General Assembly enacted a

---

[3]In *Lynch*, the Court held that the display of a Nativity scene on public property along with other secular decorations associated with the Christmas season did not violate the Establishment Clause because "[t]he evident purpose of including the creche in the larger display was not promotion of religious content of the creche but celebration of the public holiday through its traditional symbols." *Lynch*, 465 U.S. at 691-92, 104 S.Ct. 1355 (Connor, J., concurring)

statute which authorized or required the posting of the Ten Commandments in county buildings, such a statute would have no discernable secular purpose and would violate the Establishment Clause. The same would be true for a statute requiring or authorizing the posting of the Ten Commandments in a courtroom. For Establishment Clause analysis purposes, this Office can find no substantive distinction between posting of the Ten Commandments in the hallway of a county courthouse or in the courtroom of that same courthouse. Likewise, if a county legislative body adopted a resolution requiring or authorizing the posting of the Ten Commandments in a county building such as a courthouse, such a resolution would also violate the Establishment Clause as there is no discernable "secular purpose" for such a resolution.[4]

On the other hand, there may be certain contexts within which the display of the Ten Commandments could be held to not violate the Establishment Clause. As an example, the district court in *Suhre* found that the display of the Ten Commandments on tablets held by Lady Justice as part of a sculptured frieze in a courtroom which was part of the original construction in 1932 was in that context "secular" in its purpose and did not violate the Establishment Clause. *Suhre*, 55 F. Supp 2d at 395.

PAUL G. SUMMERS
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

MICHAEL W. CATALANO
Associate Solicitor General

Requested by:

Cornelia A. Clark
Director, Administrative Office of the Courts
511 Union Street
Nashville, TN 37243

[4]Actions of bodies of political subdivisions are considered "state action" subject to Establishment Clause analysis. *See Ehlers-Renzi v. Connelly School of the Holy Child*, 224 F.3d 283 (4th Cir. 2000)(County zoning ordinance exempting from special exception requirement parochial schools located on land owned or leased by church or religious organization was subject to Establishment Clause analysis.) Thus, whether posting the Ten Commandments is pursuant to a state statute enacted by the legislature or a resolution adopted by a county legislative body makes no difference for Establishment Clause analysis purposes.