STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

April 13, 2015

Opinion No. 15-34

Constitutionality of Legislation Designating The Holy Bible as the Official State Book

Question

Would legislation designating The Holy Bible as the official state book of Tennessee violate the First Amendment to the United States Constitution or Article I, § 3, of the Tennessee Constitution?

Opinion

Yes, designating The Holy Bible as the official state book of Tennessee would violate the Establishment Clause of the First Amendment to the federal Constitution and Article I, § 3, of the Tennessee Constitution, which provides "that no preference shall ever be given, by law, to any religious establishment or mode of worship."

ANALYSIS

Tennessee House Bill 615/Senate Bill 1108, 109th Gen. Assem. (2015), would add a new section to Tenn. Code Ann. § 4-1-301 to provide that "The Holy Bible is hereby designated as the official state book." This proposed law is contemplated as an amendment to the part of the Tennessee Code that designates by law official "State Symbols," such as the official state flag, the great seal of the state of Tennessee, the official salute to the Tennessee flag, official state songs and poems, the official state slogan, the official state tree, the official state rock, and the official state beverage.

A "symbol" is something that represents or stands for something else. Merriam-Webster's Collegiate Dictionary (10th ed. 1997). When the legislature chooses an official state symbol, it is in effect saying that the symbol, whether it be a poem, a flag, a rock, or a glass of milk, stands for and represents the State and its values in a positive way. For example, the legislation designating milk the official state beverage did so in express recognition of the many health benefits of milk, especially for the children of Tennessee. Acts 2009, Ch. 31. Thus, these designations of "official state symbols" inherently carry the imprimatur and endorsement of the government.

"Surely the place of the Bible as an instrument of religion cannot be gainsaid . . . ." *Abington School District v. Schempp*, 374 U.S. 203, 224 (1963). The Bible is commonly understood to mean the Christian scriptures, or holy text, consisting of the books of the Old and New Testaments. The adjective "holy" connotes something "devoted entirely to the deity or the work of the deity," something "worthy of complete devotion" because it is "perfect in goodness

and righteousness," something "venerated as sacred." Merriam-Webster's Collegiate Dictionary (10th ed. 1997). In short, the Bible, like the Ten Commandments, is a sacred text in the Christian faith.[1]

Both the federal and the Tennessee Constitutions prohibit governmental establishment of religion. The Establishment Clause of the First Amendment to the U.S. Constitution provides that "Congress shall make no law respecting an establishment of religion . . . ." In even more specific terms, Article I, § 3, of the Tennessee Constitution provides "that no preference shall ever be given, by law, to any religious establishment or mode of worship." (Emphasis added.) The Tennessee Supreme Court has characterized this constitutional protection against religious establishment as "substantially stronger" than the protection afforded by the Establishment Clause of the federal Constitution. *State ex rel. Comm'r of Transp. v. Eagle*, 63 S.W.3d 734, 761 (Tenn. Ct. App. 2001) citing *Carden v. Bland*, 288 S.W.2d 718, 721 (Tenn. 1956).

The First Amendment was in fact born of "a profound commitment to religion and a profound commitment to religious liberty." *McCreary County v. ACLU*, 545 U.S. 844, 885 (2005) (O'Connor, J., concurring). It does not diminish religion to keep it out of the hands of government. Rather, it elevates and exalts religion to do so by giving religion special protection and status. Although many Americans find the Bible or the Ten Commandments in accord with their personal beliefs, "we do not count heads before enforcing the First Amendment" because the "'very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.'" *Id.* (citation omitted).

Analysis of the constitutionality of the proposed legislation begins with the principle that the "First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion." *Everson v. Board of Ed. of Ewing*, 330 U.S. 1, 15-16, (1947). The principle of neutrality means that the government may neither favor one religion over another religion nor favor religion over non-religion. The Supreme Court has continued to reinforce the neutrality principle as the guiding principle for courts faced with the question of whether a government action violates the Establishment Clause: government may not favor one religion over another, or religion over irreligion. *McCreary County v. ACLU*, 545 U.S. 844, 876 (2005). "[I]nvoking neutrality is a prudent way of keeping sight of something the Framers of the First Amendment thought important." *Id.* Neutrality is crucial "to guard against the civic divisiveness that follows when the government weighs in on one side of religious debate; nothing does a better job of roiling society, a point that needed no explanation to the descendants of English Puritans and Cavaliers (or Massachusetts Puritans and Baptists)." *Id.*

The principle of neutrality may be violated if the government endorses (or disapproves of) religion or a particular religion. *Lynch v. Donnelly*, 465 U.S. 668, 687-88 (1984) (O'Connor, J., concurring). "Endorsement sends a 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." *Id.*

[1] The Ten Commandments "are undeniably a sacred text in the Jewish and Christian faiths." *Stone v. Graham*, 449 U.S. 39, 41 (1980).

When a law is challenged as a violation of the Establishment Clause, the principle of neutrality is generally implemented through a tri-partite test first formulated by the U.S. Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). To withstand an Establishment Clause challenge, (1) the law must have a secular legislative purpose (the "purpose prong"); (2) its principal or primary effect must be one that neither advances nor inhibits religion (the "effect prong"); and (3) the statute must not foster "an excessive government entanglement with religion" (the "entanglement prong"). *Id.* at 612-13.

Lemon's purpose prong is designed to keep government neutral and to prevent it from promoting a particular point of view in religious matters. *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 335 (1987). Manifesting a purpose to favor one faith over another, or adherence to religion generally, clashes with the "understanding . . . that liberty and social stability demand a religious tolerance that respects the religious views of all citizens . . . ." *Zelman v. Simmons-Harris*, 536 U.S. 639, 718 (2002) (Breyer, J., dissenting).

Lemon's effect prong is likewise designed to ensure government neutrality. It requires that the government action not have the effect of communicating a message of government endorsement of religion. *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring). Practices that have such an effect, whether intentionally or unintentionally and whether in reality or only in the public perception, are invalid. *Id.* at 690.

In light of the neutrality principle, courts applying the *Lemon* test focus on whether the challenged government action has the purpose or the effect of "endorsing" religion or a particular religion. The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse religion, and the effect prong asks whether—irrespective of government's actual purpose—the practice under review in fact conveys a message of endorsement. *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring). An affirmative answer to either question makes the challenged practice invalid. *Id.*

The purpose test requires that a government activity have a secular purpose, but that test is not satisfied by the mere existence of some secular purpose. *Id.* at 691. The secular purpose must be primary, serious, and plausible; the articulation of the secular purpose must be sincere and not a sham. *McCreary County v. ACLU*, 545 U.S. 844, 864 (2005). When determining whether a government action has a predominantly religious purpose, the courts must look at the purpose with the eye of an "objective observer." *Id.* at 862. Sometimes there are external indications of the purpose; sometimes the government action itself bespeaks the purpose; and sometimes common sense requires the conclusion that a religious objective permeated the government's action. *Id.* at 862-63.

Invoking these tests and principles, the Supreme Court in *McCreary* struck down a display of the Ten Commandments as a violation of the Establishment Clause because it "convey[ed] an unmistakable message of endorsement to the reasonable observer." *McCreary County v. ACLU*, 545 U.S. 844, 884 (2005) (O'Connor, J., concurring). Also based on these same tests and principles, the Supreme Court has found the religious character of the Ten Commandments preeminent even when the government had avowed a secular purpose of showing the Ten Commandments as the fundamental legal code of Western Civilization and the Common Law. *Id.*

at 865, n.12, citing *Stone v. Graham*, 449 U.S. 39 (1980). And the Supreme Court has found, contrary to the government's articulated secular purpose, that music education or the teaching of literature were not the actual secular objects behind laws requiring public school teachers to lead recitations from the Lord's Prayer and readings from the Bible. *Id.*, citing *Abington School District v. Schempp*, 374 U.S. 203 (1963).

Stone was prompted by posting the Ten Commandments in Kentucky's public schools. Because the Ten Commandments "are undeniably a sacred text in the Jewish and Christian faiths," their display in public classrooms violated the First Amendment's bar against establishment of religion. *Stone v. Graham*, 449 U.S. 39 (1980). Despite the government's articulation of a secular, general educational purpose, the Supreme Court found a predominantly religious purpose in the government's posting of the Commandments, because of their prominence as "an instrument of religion." *Id*., at 41, n. 3. In other words, taking an objective and common-sense view, the display of the text of the Commandments could presumptively be understood as meant to advance religion.

The same result obtains here. Like the Ten Commandments, the Bible is undeniably a sacred text in the Christian faith. Legislative designation of The Holy Bible as the official book—as an official symbol—of the State of Tennessee, when viewed objectively, must presumptively be understood as an endorsement of religion and of a particular religion. Irrespective of the legislation's actual purpose, common sense compels the conclusion that designation of the Bible as the official state book in practice and effect conveys a message of endorsement. Such an endorsement violates the Establishment Clause of the federal Constitution, regardless of whether the message of endorsement is intentional or unintentional and regardless of whether the message is conveyed in reality or only in the public perception.

Tennessee's constitutional requirement "that no preference shall ever be given, by law, to any religious establishment or mode of worship" is substantially stronger than the federal protection against government endorsement of religion or of a religion. Thus, designating The Holy Bible as the official state book would violate Article I, § 3, of the Tennessee Constitution even more definitively than it would violate the federal Establishment Clause.

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