AFFIRMING RELIGIOUS AND TRADITIONAL HERITAGE: CONSTITUTIONAL GUIDELINES FOR DISPLAYING RELIGIOUS DOCUMENTS ON PUBLIC PROPERTY

The following are constitutional guidelines for state and municipal governments and agencies that desire to display historical and traditional documents that may include religious references without running afoul of the separation of church and state.

Overview.

In the wake of two recent Supreme Court decisions not to review the constitutionality of displays of the Ten Commandments along with other historical documents, the constitutional status of such displays has not been firmly established.[1] While the unconstitutionality of governmental posting of the Decalogue alone has been clearly established since the Supreme Court's 1990 decision in *Stone v. Graham*,[2] the constitutionality of posting religious and secular historical and traditional documents is not directly controlled by the holding or reasoning of that case. The Rutherford Institute believes that the inclusion of the Decalogue in the same context as other significant principal documents of the history of law, such as the Declaration of Independence, the Magna Carta and the Bill of Rights, addresses the Supreme Court's concerns by both grounding the display in a demonstrable secular purpose and by negating the apparent endorsement of the Judeo-Christian belief system that is inherent in a display of a religious item standing alone. This approach already has been adopted by the Court and the federal courts of appeals in cases that have ruled constitutional the display of religious holiday symbols on public property.[3]

Discussion.

The unconstitutionality of posting the Ten Commandments standing alone is clearly established. In 1980, the Supreme Court in *Stone v. Graham*[4] struck down a Kentucky statute requiring the Ten Commandments to be posted in public classrooms. The Court applied the three-part test set forth in *Lemon v. Kurtzman*[5] to determine whether the statute was permissible under the Establishment Clause.[6] Pursuant to this test, a statute must have a secular legislative

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[1] *O'Bannon v. Indiana Civil Liberties Union*, 259 F.3d 766 (7th Cir. 2001), *reh. den.*, 2001 U.S. App. LEXIS 21505, *cert. den.*, 2002 U.S. LEXIS 1195 (February 25, 2002); *Books v. City of Elkhart*, 235 F.3d 292 (7th Cir. 2000), *cert. den.*, 532 U.S. 1058 (2001).

[2] 449 U.S. 39 (1980) (*per curiam*).

[3] *See Lynch v. Donnelly*, 465 U.S. 668 (1984); *Allegheny v. ACLU*, 492 U.S. 573 (1989).

[4] 449 U.S. 39.

[5] *See Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1970) (promulgating the *Lemon* test which states that for the Court to find a governmental action constitutional under the Establishment Clause "the [action] must have a secular... purpose... its principal or primary effect must be one that neither advances nor inhibits religion... [and] the [action] must not foster an excessive government entanglement with religion").

[6] 449 U.S. at 41-43

purpose, its primary effect must not be one which advances or inhibits religion, and it must not foster an excessive governmental entanglement with religion.[7] Although the statute required that a statement of secular purpose be included with each posting, the Court found the disclaimer was insufficient evidence of a secular purpose,[8] stating that "an 'avowed' secular purpose is not sufficient to avoid conflict with the First Amendment."[9] The Court also found it inconsequential that the posted copies of the Ten Commandments were financed by private contributions, because "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."[10] The Court did assert, however, that the Ten Commandments could be integrated into the school curriculum, where the Bible could be constitutionally used for studying history, civilization and other subjects.[11]

The current issue of the constitutionality of displays of diverse secular and religious documents, however, is not directly controlled by the holding or reasoning of *Stone v. Graham*. The inclusion of the Commandments in the same context with other principal documents of history and law, such as the Declaration of Independence, the Magna Carta and the Bill of Rights, addresses the *Lemon* test concerns by both grounding the display in a demonstrable "secular purpose," and reducing concerns relating to the "primary effect" prong of *Lemon*. Further, this approach effectively addresses concerns raised by the Supreme Court's Endorsement Test by negating the apparent endorsement of the Judeo-Christian belief system that is inherent in a sole display of a religious item standing alone.

This approach is congruent with the treatment of religious displays on public property held constitutional by the Supreme Court. In 1989, a divided Supreme Court ruled in *County of Allegheny v. ACLU*[12] that a creche located in a county courthouse, which was surrounded by a floral arrangement and a sign proclaiming "Gloria in Excelsis Deo," violated the Establishment Clause.[13] At the same time, the Court held that a holiday display outside a county office building, which consisted of a menorah and a Christmas tree alongside a sign proclaiming, "Salute to Liberty," was a permissible commemoration of the holiday season.[14] Justices Blackmun and O'Connor expressed the view that has become the principal view in "mixed message" Establishment Clause cases that when deciding an Establishment Clause question, a court must determine whether the governmental action amounts to an endorsement of religion as viewed by the "reasonable observer." In other words, the test is whether "the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denomination as an endorsement, and by nonadherents as a disapproval, of their individual

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7 *Id.*. at 40 (citing *Lemon v. Kurtzman*, 403 U.S. at 612-13).

8 *Id.* at 41.

9 *Id.*

10 *Id.* at 42 (quoting *Engel v. Vitale*, 370 U.S. 421, 431 (1962)).

11 *Stone*, 449 U.S. at 42.

12 492 U.S. 573 (1989).

13 *Id.* at 621.

14 *Id.*

religious choices."[15] Accordingly, Blackmun and O'Connor found it necessary to examine the particular setting and composition of each display.[16] In *Lynch v. Donnelly*, the Court held that a creche placed alongside a variety of secular holiday ornamentations, such as Christmas trees, lights and a plastic Santa Claus, was constitutional.[17] When viewed in this context, the creche became part of a celebration of the secular aspects of Christmas, and did not amount to a governmental endorsement of religion.[18] Since *Allegheny*, the majority of lower courts that have decided "creche" or "menorah" cases have relied on Blackmun and O'Connor's contextual analysis.[19] In general, these cases indicate that the courts are much more willing to permit religious displays when they are placed alongside other less sectarian ones, since such displays tend to diminish the impression of governmental endorsement of religion.

In *Harvey v. Cobb County*,[20] the Eleventh Circuit Court of Appeals adopted the United States Supreme Court's rationale from *Lynch* and *Allegheny*, which emphasized the secular effect of a holiday religious display, in analyzing a Ten Commandments display in a courtroom. The *Harvey* court affirmed the Georgia district court's decision, which held that a framed panel of the Ten Commandments and the Great Commandment could legally be displayed in a county courthouse as long as the panel also included nonreligious historical items.[21] Courts have extended this rationale to cases involving permanent displays other than the Ten Commandments. For example, in *Washegesic v. Bloomingdale Public Schools*,[22] the Sixth Circuit Court of Appeals held that a portrait of Jesus Christ hanging alone in a public high school hallway constituted a violation of Establishment Clause principles. The court explained, however, that the case "would be different if the school had placed representative symbols of many of the world's great religions on a common wall."[23] To date, only the Seventh Circuit

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[15] *Id.* at 597 (quoting *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 390 (1985)).

[16] *Allegheny*, 492 U.S. at 594. The Supreme Court had used this same rationale six years earlier in *Lynch v. Donnelly*, 465 U.S. 668 (1984).

[17] *Id.* at 671.

[18] *Id.*

[19] *See, e.g., Kaplan v. City of Burlington*, 891 F.2d 1024, 1025-30 (2nd Cir. 1989), *cert. denied*, 496 U.S. 926 (1990); *ACLU of Kentucky v. Wilkinson*, 895 F.2d 1098, 1105 (6th Cir. 1990); *Doe v. Clawson*, 915 F.2d 244, 246-47 (6th Cir. 1990); *Lubavitch Chabad House, Inc. v. City of Chicago*, 917 F.2d 341 (7th Cir. 1990); *State v. Freedom from Religion Foundation*, 898 P.2d 1013, 1028 (Colo. 1995), *cert. denied*, 516 U.S. 909 (1996); *Elewski v. City of Syracuse*, 123 F.3d 51 (2nd Cir. 1997); *ACLU v. City of Florissant*, 186 F.3d 1095 (8th Cir. 1999).

[20] 811 F. Supp. 669 (N.D. Ga. 1993), *aff'd* 15 F.3d 1097 (11th Cir. 1994).

[21] 811 F.Supp. at 670.

[22] 33 F.3d 679 (6th Cir. 1994).

[23] *Id.* at 684. Likewise, the attorneys general of South Carolina and California have opined that displaying the Ten Commandments on public school property does not violate the Establishment Clause where the display contains both secular and religious information and is presented for historical and educational purposes. *See* South Carolina Attorney Gen. Opinion: Guidelines for Religious Liberty in Public Schools, August 10, 1998; California Attorney General Op. No. 96-507,

Court of Appeals in Chicago has ruled that a permanent public display of the Ten Commandments with other historical documents violates the Establishment Clause.[24] The Seventh Circuit has left open the possibility that a display of the Ten Commandments that does not display the Decalogue more prominantly than other secular documents may pass constitutional muster.[25]

Conclusion.

In view of the above authority, The Rutherford Institute sees no constitutional impediment to posting the Decalogue in conjunction with other historical traditional and legal documents, under the following conditions:

1. The posting is done for an express and legitimate secular purpose, such as affirming the country's diverse civic heritage.

2. The Decalogue should not be placed in a position that is more prominent than other documents, such as in height, size or visibility.

3. Arrangements should include at least several other documents that are predominantly nonreligious, such as the Declaration of Independence, portions of the United States Constitution including the Preamble, selected articles and/or the Bill of Rights, the Magna Carta, state constitutional provisions, the Gettysburg Address and other federal and state historical documents.[26]

4. Whenever possible, donated private funds should be used for the display.

5. The arrangement as a whole should not appear to create a symbolic union with governmental authority, particularly by being located in close proximity to signs or symbols of governmental authority, such as in entrance areas of government buildings, executive offices and hearing chambers.

The Institute's legal staff is available for further information or assistance on this topic at tristaff@rutherford.org.

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[24] See *Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d 766 (7th Cir. 2001); *Books v. City of Elkhart*, 235 F.3d 292 (7th Cir. 2000). The Seventh Circuit decides federal appeals from the states of Wisconsin, Illinois and Indiana.

[25] *O'Bannon*, 259 F.3d at 772-73.

[26] The Supreme Court itself displays a diverse mix of secular and sacred "lawgivers" and symbols on the walls of its Court Chamber, including Moses with the Ten Commandments. Moses, Confucius and Solon also appear in the building's exterior reliefs.