

AN EDUCATIONAL UPDATE FROM
THE SOUTHEAST LAW INSTITUTE™, INC.

To: Interested Persons
Date: November 6, 2018 General Election
From: A. Eric Johnston
Re: Proposed Alabama Constitutional Amendments:
Alabama Sanctity of Unborn Life (Amendment #2)
Religious Freedom and the Ten Commandments (Amendment #1)

Alabama Sanctity of Unborn Life

The Alabama general election will be held on November 6, 2018. There will be a number of constitutional amendments on the ballot. The most important one on the ballot will be a proposed constitutional amendment recognizing the sanctity of unborn life in Alabama. The text of that amendment reads as follows:

- (a) This state acknowledges, declares, and affirms that it is the public policy of this state to recognize and support the sanctity of unborn life and the rights of unborn children, including the right to life.
- (b) This state further acknowledges, declares, and affirms that it is the public policy of this state to ensure the protection of the rights of the unborn child in all manners and measures lawful and appropriate.
- (c) Nothing in this constitution secures or protects a right to abortion or requires the funding of an abortion.

The complete proposed amendment will not appear on the ballot. This is what you will see on the ballot:

“Proposing an amendment to the Constitution of Alabama of 1901, as amended; to declare and otherwise affirm that it is the public policy of this state to recognize and support the sanctity of unborn life and the rights of unborn children, most importantly the right to life in all manners and measures appropriate and lawful; and to provide that the constitution of this state does not protect the right to abortion or require the funding of abortion.”

Since 1973, abortion has been legal in the United States. A decision by SCOTUS in *Roe v. Wade* opened the door for virtually unlimited abortion. Through the years, subsequent SCOTUS cases have upheld *Roe* and enlarged on it. In some cases, certain regulation has been permitted. Through the work of the Alabama Pro-Life Coalition (“APLC”), a significant number of regulations have been passed that reduce the number of abortions and protect women’s healthcare, as much as legally permitted, from the substandard care they receive in abortion clinics.

The unique thing about the *Roe* decision is that opposition to it has never gone away. *Roe* was a very badly decided case with no legitimate constitutional underpinnings. The case was based on “an exercise of raw judicial power” as then Justice Byron White said in a dissent to the case.

The pro-life community continues to work toward the day when abortion will again be outlawed. Abortion is based on the terrible concept that the unborn child is not a person within the meaning of the U.S. Constitution. Because we amend the Alabama Constitution to recognize personhood will not undo *Roe*.

However, with Brett Kavanaugh now a SCOTUS Justice, we see the possibility that *Roe* may be reversed. Judicial, political and popular opinion opposition to *Roe* has remained constant for 45 years. Because it was such an illegitimate decision, our hope and expectation are that *Roe* will be reversed and sanity concerning the sanctity of life will be restored.

Therefore, this proposed constitutional amendment is a very important public policy statement for Alabama. We cannot say for sure how SCOTUS may rule if it reversed *Roe*, but the chances are it would either reestablish personhood of the unborn child or return the issue to the states. In either event, with approval of this constitutional amendment, the State of Alabama would be obligated then to enact statutes to criminalize the act of abortion. However, if it fails, it will be a significant setback to protecting life in Alabama.

The stakes are high. SLI supports this amendment and urges a yes vote on it. Please get out the vote on this. SLI looks forward to the time when it will be able to work with APLC to rid the State of Alabama of this horrific murdering of her children.

Religious Freedom and the Ten Commandments

Another important constitutional amendment on the ballot will seek approval for language to permit the Ten Commandments to be posted on public property. We have received many inquiries already about our opinion on whether we support this and whether it has some good effect. The purpose of this Educational Update is to give a frank assessment of the proposal. It is helpful if you see the wording:

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“Every person shall be at liberty to worship God according to the dictates of his or her own conscience. No person shall be compelled to attend, or, against his or her consent, to contribute to the erection or support of any place of religious worship, or to pay tithes, taxes, or other rates for the support of any minister of the gospel. Property belonging to the state may be used to display the Ten Commandments, and the right of a public school and public body to display the Ten Commandments on property owned or administrated by a public school or public body in this state is not restrained or abridged. The civil and political rights, privileges, and capacities of no person shall be diminished or enlarged on account of his or her religious belief. No public funds may be expended in defense of the constitutionality of this amendment.

The Ten Commandments shall be displayed in a manner that complies with constitutional requirements, including, but not limited to, being intermingled with historical or educational items, or both, in a larger display within or on property owned or administrated by a public school or public body.”

The complete proposed amendment will not appear on the ballot. This is what you will see on the ballot.

“Proposing an amendment to the Constitution of Alabama of 1901, providing for certain religious rights and liberties; authorizing the display of the Ten Commandments on state property and property owned or administrated by a public school or public body; and prohibiting the expenditure of public funds in defense of the constitutionality of this amendment.”

The proposed amendment contains somewhat limited free exercise and establishment provisions. This supplements existing Alabama constitutional protections in Article I, §3, Religious Freedom and §3.01, the Alabama Religious Freedom Amendment. However, the proposed amendment focuses on displaying the Ten Commandments, which is not significant legally to protecting religious rights and seems to be the real objective of the amendment.

The war over religious freedom in the public square is not determined by whether the Ten Commandments can be posted on public property, *viz.*, city halls, courtrooms, public schools, *etcetera*. The war on religious freedom is much broader and involves actual encroachments on religious rights. This is the subject of many of our Educational Updates. However, for some, the posting of the Ten Commandments continues to be an important issue. The importance of this proposed constitutional amendment is mainly to the fact that it is a statement of public policy by the State of Alabama on religious freedom generally and more specifically, on the posting of the Ten Commandments.

There are significant attacks on religious freedom today. However, whether the Ten Commandments can be posted is not among those. The law is fairly well settled. There are two important cases that define the issue. Both were decided at the same time (2005) and make clear the parameters of the issue. In *McCreary County v. ACLU*, the U.S. Supreme Court (“SCOTUS”) applied the judicial “Lemon test” that determined that a display of the Ten Commandments in a Kentucky courthouse was unconstitutional. The Lemon test has three parts: (1) does the law have a secular purpose; (2) is the primary effect of the law to promote or inhibit religion; and (3) does it create an excessive entanglement with religion? SCOTUS held that the first prong, no secular purpose, was violated.

At the same time, SCOTUS decided the case of *Van Orden v. Perry* which upheld the posting of the Ten Commandments on the Texas State Capitol grounds. The facsimile of the Ten Commandments was in a larger display containing 17 monuments and 21 historical markers. The Court determined that the display, taken as a whole, had a secular purpose and did not violate either of the other prongs of the Lemon test.

Specifically, as to public schools, *Stone v. Graham* (1980) specifically held that public schools cannot post the Ten Commandments. While there is no case similar to the *Van Orden* case in public schools, the same principles of *Van Orden* would probably apply.

As you see from the language of the proposed amendment, it says state property may be used to display the Ten Commandments, if it “complies with constitutional requirements.” That is only so if it is in conformity with the above cited cases. The fact that citizens of Alabama pass a constitutional amendment stating this right will not preempt the U.S. Constitution and its interpretation by SCOTUS. Whether SCOTUS ever reconsiders the “Ten Commandments” issue will not result from this amendment and it will not be a determinative factor.

While it may be an incentive for some public officials to make historical displays, it does not give them any greater rights than they have already. In fact, in the old Supreme Court Chamber of the Alabama State Capitol, there has existed a historical display of legal documents, including the Ten Commandments, since about 2002. SLI contended with this very issue at that time. Those efforts resulted in the posting of the display by then Attorney General Bill Pryor.

In conclusion, SLI supports this constitutional amendment. We believe the Ten Commandments is an important statement of laws that are part of the foundation of American laws. More importantly, the statement of religious rights can be useful in future religious freedom litigation. We urge citizens to vote for the proposal. Public officials are well advised to get competent legal advice on the Ten Commandments issue before acting on the amendment if it passes. SLI is available for that advice at no charge.