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

To: **Interested Persons**
Date: **November 2024**
From: **A. Eric Johnston**
RE: **The Demise of *Lemon* and the Ten Commandments**

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof …." The First Amendment to the U.S. Constitution protects our first liberties, *viz.*, our religious rights. The Free Exercise Clause is to protect our ability to worship and act as we believe. The Establishment Clause is to prohibit the government from establishing an official religion or telling us how to worship or what to believe. These clauses were meant to work together, but activist federal courts have created an unnecessary tension between them. Opinions beginning in 1971 found virtually any public religious activity, including speech, a prohibited Establishment Clause violation.

In the 1940's SCOTUS took charge of these two clauses and whether activities were state or federal, they were incorporated by the 14th Amendment allowing federal courts to interpret. The retreat from religious freedom began in the 1960's, when prayer and Bible reading was removed from public schools on this basis. The real problem for religious freedom came in 1971 when SCOTUS decided the *Lemon v. Kurtzman* case.

Lemon created a three-prong test (pejoratively called the "Lemon Test") for which violation of any prong resulted in an unlawful establishment of religion. To survive the test the action (1) must have a secular legislative purpose, (2) its principal or primary effect must be one that neither advances nor inhibits religion, and (3) must not foster an excessive government entanglement with religion. As you can see, this is a very subjective test which in actual application resulted in virtually every activity being an Establishment Clause violation. Federal courts used *Lemon* to remove most religious activities and speech from public or government places.

For many years, SCOTUS hinted at overruling *Lemon* and did not always apply it. However, lower federal courts continued to use it. In *Lamb's Chapel v. Center Moriches Union Free School District*, Justice Antonin Scalia famously said about the Lemon Test: "Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys…."

Finally, in *Kennedy v. Bremerton School District* (2022), SCOTUS buried that ghoul saying, among other things, "in place of *Lemon* and the endorsement test, this court has instructed the Establishment Clause must be interpreted by 'reference to historic practices and understandings'." What does that mean now? It means *Lemon* was bad law, just like *Dobbs* finding *Roe v. Wade* was bad law and there is no constitutional right to abortion. SCOTUS is repairing the decades of activist damage. Liberals are furious. See the SLI September Educational Update. But we are now on the right legal track.

This has renewed interest in the recognition of Ten Commandments jurisprudence. The most famous case is *Glassroth v. Moore*, resulting in the removal of a Ten Commandments monument from the Alabama Supreme Court building. We also have Alabama Constitution Article I Section 3.02, Amendment No. 942, which provides for public display of the Ten Commandments "in a manner that complies with [U.S.] Constitutional requirements, including, but not limited to, being intermingled with historical educational items, or both…" There was such a display of items in the Old Supreme Court Chamber in the Alabama Capital Building. There was never any contest of the constitutionality of that display.

The state of Louisiana recently passed a statute that requires the display of the Ten Commandments in all public schools. That case is on its way to SCOTUS. The decision there will be instructive. In the meantime, Alabama should reconsider its position on our legal and religious heritage.

There are different views. Eradicating all religious symbols from the public square creates an erroneous view of history. There is no doubt that western culture, particularly of the English-speaking peoples was based on a Judeo-Christian foundation. The Common Law, the law from England adopted and still in effect in this country, is replete with religious underpinnings. SCOTUS Justice Joseph Story (1812-1845) famously said words to the effect that America is a Christian nation, not that you have to be a Christian to live here, but we are guided by Christian principles. There are many quotes and documents from our history that recognize these influences on our culture. None are more universal or profound than the Ten Commandments.

To renew our recognition of this heritage, there's no better place to begin than in the Alabama Supreme Court building. We are not suggesting a return under the circumstances of *Glassroth*. Those had a decidedly religious basis and message. Those facts and the subjective analysis under *Lemon* resulted in a bad precedent. But now, without *Lemon*, the Alabama Supreme Court should consider providing a display of these profound and instructive documents.

Some may see it as a religious display related to the sovereignty of God over the state, as Chief Justice Roy Moore did, while others will see it as a legal or historical, whether they are Christian, Jew, Muslim, Hindu, Atheist, *etcetra.* In *Glassroth*, Federal Judge Myron Thompson applied, *inter alia*, *Lemon's* purpose prong to say Chief Justice Moore's testimony and evidence "reflects his purpose, that he erected the monument with an improper purpose." Whether Judge Thompson was correct or incorrect in his assessment of the evidence, he said "the court stresses that it is not disagreeing with Chief Justice Moore's beliefs regarding the relationship of God and the state. Rather the court disagrees with the Chief Justice to the extent that it understands him to being saying that, as a matter of American law, the Judeo-Christian God must be recognized as sovereign over the state, or even that the state may adopt that view." To the extent that Thompson is saying the government cannot direct our religious beliefs, he is correct, though it is not unconstitutional for government to acknowledge God, e.g., "In God We Trust."

Following *Kennedy's* elimination of the Lemon Test, courts must now apply an analysis by "reference to historical practices and understanding." A display in historical context, along with other foundational documents, is constitutional. What the display is saying is up to the observer. If it is not accompanied with religious activity, it is constitutional. The subjective Lemon Test can no longer be used to imply or insinuate improper motives to those who display.

The posting of the Ten Commandments alone as statements of law and history may be constitutional. This would be particularly true if its introduction is in a legal and historical context without religious proselytization. Also, this should not preclude reference to its origins. Certainly, if they are presented with other historical statements or documents in this manner, it is constitutional.

That, then, suggests the question about who can display. *Glassroth* was against Chief Justice Moore singularly as Chief Justice. Neither the Alabama Supreme Court as an entity, nor any of the other Justices were parties to that lawsuit. A constitutional display approved by the Justices of the Alabama Supreme Court was not the subject of *Glassroth*. If there is such a display, it does not mean that Judge Thompson would not get the case, which he likely would. But, there is a reasonable chance no lawsuit contesting such a display would be filed. Displays in a similar fashion can be made in other public buildings, parks, or other public places. The decisions to make such displays will up to those government officials who may now, without fear of the Lemon Test, display historical documents that are important to our historical understanding of who we are and the trajectory of our culture.

Why is the issue important? In this day of fractious threatening debate, knowing and preserving our heritage is important. Democrats claim and act as if Republicans are a threat to democracy. Actually, just the opposite is true. To tear down and deny our heritage is to deny what the U.S. is and that for what it has stood for 248 years. It is not a religious issue, but a political one. Liberals advocate a majoritarian democracy and not a democratic republic. Removal of the basis for our historic constitution and freedoms then open the way to government as the basis for rights, i.e. socialism not freedom given by "the laws of nature and of Nature's God.

NOTE: This memo is not meant to be an in-depth legal analysis but a summary of where such an analysis would take us. There are at least six or more SCOTUS cases with very compelling support. If anyone wants those citations, let us know.