

**STATE OF TENNESSEE**

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April 1, 2008

Opinion No. 08-74

Constitutionality of Senate Bill 4104/House Bill 4089

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**QUESTION**

Whether Senate Bill 4104/House Bill 4089, which permits public schools to offer a course on the Bible and its impact in literature, art, music, culture, and politics, is constitutional.

**OPINION**

Yes. Senate Bill 4104/House Bill 4089 appears to be constitutional.

**ANALYSIS**

Senate Bill 4104/House Bill 4089 provides as follows:

SECTION 1. Tennessee Code Annotated, Title 49, Chapter 6, Part 10, is amended by adding the following as a new, appropriately designated section: 49-6-10\_\_.

(a) The state board of education is authorized to approve a curriculum for an elective state funded course consisting of a nonsectarian, nonreligious academic study of the Bible and its influence on literature, art, music, culture, and politics. The curriculum and associated textbook shall meet academic rigor and standards of the state board of education in the same manner as required for approval of any other elective course and textbook approved by the state board and shall meet the requirements of the Constitutions of the United States and Tennessee. The course provided for in this section shall:

(1) Be taught in an objective and nondevotional manner with no attempt made to indoctrinate students as to either the truth or falsity of the biblical materials or texts from other religious or cultural traditions;

(2) Not include teaching of religious doctrine or sectarian interpretation of the Bible or of texts from other religious or cultural traditions; and

(3) Not disparage or encourage a commitment to a set of religious beliefs.

b) An LEA that elects to offer a course and utilize an associated textbook approved in accordance with subsection (a) of this section shall implement such course in accordance with the Constitutions of the United States and Tennessee, including the manner in which the course is taught in the classroom and the assignment by the LEA of the individual teaching the course. The individual assigned to teach the course shall meet all certification requirements and all other provisions of this chapter relating to personnel employed by local units of administration. In addition, no person shall be assigned to teach such course based in whole or in part on any religious test, profession of faith or lack of faith, prior or present religious affiliation or lack of affiliation, or criteria involving particular beliefs or lack of beliefs about the Bible or in violation of Title 49, Chapter 6, Part 80 or Section 49-6-2906.

SECTION 2. This act shall take effect July 1, 2008, the public welfare requiring it.

The United States Constitution provides that the state and federal governments “shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” U.S. Const., Amends. 1, 14. The Free Exercise Clause of the Constitution “forbids governmental restrictions or impediments upon the religious beliefs and, with certain qualifications, upon the religious practices of the individual.” *Wiley v. Franklin*, 468 F. Supp. 133, 143 (E.D. Tenn. 1979).<sup>1</sup> The Establishment Clause requires the government to maintain strict neutrality, neither aiding nor opposing religion. *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963). In the *Abington Township* case, a state required at the opening of the school day the selection and reading of Bible verses, followed by the recitation of the Lord's Prayer by the students in unison. The Court held that this statute violated the Establishment Clause and that to strike down the statute would not conflict with the Free Exercise Clause:

[W]e cannot accept that the concept of neutrality, which does not permit a State to require a religious exercise even with the consent of the majority of those affected, collides with the majority's right to free exercise of religion. While the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to anyone, it has never meant that a majority could use the machinery of the State to practice its beliefs. 374 U.S. at 225-226 (footnote omitted).

A legislative enactment does not contravene the Establishment Clause if (1) it has a secular legislative purpose, (2) its principal or primary effect neither advances nor inhibits religion, and (3) it does not foster “excessive government entanglement” with religion. *Committee for Public Education and Religious Liberty v. Regan*, 444 U.S. 646, 653 (1980); *Lemon v. Kurtzman*, 403 U.S.

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<sup>1</sup>See also subsequent decisions, *Wiley v. Franklin*, 474 F.Supp. 525 (E.D.Tenn. 1979), and *Wiley v. Franklin*, 497 F.Supp. 390 (E.D.Tenn. 1980).

602, 612-613 (1971). If a statute fails to meet any one of the three tests — purpose, effect, or entanglement — it will not survive an attack brought under the Establishment Clause. *Stone v. Graham*, 449 U.S. 39, 40-41 (1980) (invalidating statute requiring copy of Ten Commandments to be displayed in classrooms).

On the other hand, the Supreme Court has held that there would be no constitutional problem with including study of the Bible or of religion, if presented objectively as part of a secular program of education. See *Abington Township*, 374 U.S. at 225 (Bible may constitutionally be used in an appropriate study of history, civilization, ethics, or comparative religion); *Stone v. Graham*, 449 U.S. at 42 (Ten Commandments cannot be posted on classroom walls but could be used in course on ethics).

With regard to the three-part test set forth above, the drafters of Senate Bill 4104/House Bill 4089 appear to have gone to considerable lengths in order to comply with Supreme Court opinions on religious materials in public schools. The bill specifically requires that the course be a “**nonsectarian, nonreligious academic** study of the Bible and its influence on literature, art, music, culture, and politics.” (Emphasis added). The bill further mandates in paragraph (a) that the curriculum and associated textbooks “shall meet the requirements of the Constitutions of the United States and Tennessee.” In paragraph (b) of the bill, the local school boards are given the responsibility for making sure that “the manner in which the course is taught in the classroom and the assignment . . . of the individual teaching the course” are accomplished in such a way that the course is academic rather than religious in nature. By its own terms, therefore, the course envisioned by this bill must:

- (1) Be taught in an objective and nondevotional manner with no attempt made to indoctrinate students;
- (2) Not include teaching of religious doctrine or sectarian interpretation of the Bible or of texts from other religious or cultural traditions; and
- (3) Not disparage or encourage a commitment to a particular set of religious beliefs.

In light of the provisions of Senate Bill 4104/House Bill 4089, the bill appears to pass all three parts of the tripartite test established by the Supreme Court in *Lemon v. Kurtzman*,<sup>2</sup> *supra*, and subsequently applied in cases such as *Regan*, *supra*, as discussed above. The bill has a secular purpose — to authorize an elective public school course that is a nonreligious, nonsectarian, academic study of the Bible and its impact in literature, art, music, culture, and politics. The bill’s

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<sup>2</sup>The *Lemon* test has been criticized in some cases. See, e.g., *Orden v. Perry*, 545 U.S. 677 (2005). In that case, the Court found that the *Lemon* test was “not useful” in determining whether a display of the Ten Commandments on the Texas Capitol grounds violated the Establishment Clause. *Id.* At the same time, the Court did not reject use of the test in other contexts.

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principal or primary effect should neither advance nor inhibit religion. Nor does the bill appear, either in intent or in actual effect, to foster “excessive government entanglement” with religion.

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