

EAGLES TEN COMMANDMENTS PARK MONUMENT FAILS "LEMON" TEST

James C. Kozlowski, J.D., Ph.D.

© 2004 James C. Kozlowski

Prior to the "Plattsmouth" opinion described herein, at least four federal appeals courts and one state supreme court have considered the constitutionality of a public park monument donated by the Fraternal Order of Eagles in a public park. In each instance, these "Eagles" monuments displayed the Ten Commandments in a manner similar to the monument at issue in "Plattsmouth." There has been disagreement among these earlier opinions on the question of whether such displays in public parks violated the Establishment Clause of the United States Constitution. In light of such apparent conflict among the federal circuit courts on this particular issue, one might expect the United States Supreme Court to attempt to resolve the dispute in a future opinion clarifying the applicability of the Establishment Clause. In the meantime, as the most recent decision on point, "Plattsmouth" illustrates the general legal principles a court is likely to apply in similar situations.

FACTS OF THE CASE

In the case of *ACLU Nebraska Foundation v. City of Plattsmouth*, No. 02-2444 (8th Cir. 2004), a resident of the City of Plattsmouth, Nebraska and the ACLU Nebraska Foundation (ACLU) alleged that Plattsmouth's display of a Ten Commandments monument violated the Establishment Clause of the United States Constitution. The federal district court agreed and granted ACLU's motion for summary judgment. Plattsmouth appealed.

The approximately five-foot-tall granite monument at issue in this lawsuit contained an inscription of "the Ten Commandments." Above the inscription were two small tablets engraved with the Ten Commandments written in a Semitic script, an eye within a triangle (also referred to as the Egyptian "all-seeing eye" and can be seen atop a pyramid on the back of a dollar bill), and an eagle gripping an American flag. Below it were two six-point stars (the six-point star is the Star of David, a symbol of the Jewish religion), the intertwined symbols "chi" and "rho" (the Greek letters "chi" and "rho" are used to symbolize Christ in the Christian religion), and a small scroll reading, "PRESENTED TO THE CITY OF PLATTSMOUTH NEBRASKA BY FRATERNAL ORDER OF EAGLES PLATTSMOUTH AERIE NO.365 1965."

The Ten Commandments monument belonged to Plattsmouth. The monument stood in Memorial Park ten blocks from Plattsmouth City Hall. The park, at forty-five acres the largest park in the City, was also owned by Plattsmouth. Pedestrians, picnickers, and others using the park have an unrestricted view of the Ten Commandments as written on the monument.

Permanent markers may not be placed in the park without the permission of Plattsmouth.

The City has no formal policy regarding the acceptance of permanent markers; rather, it makes such decisions on a case-by-case basis. No other monument, statue or the like is within eyeshot of the subject monument. A large plaque containing the names of donors is located by the main entrance to the park. Individual pieces of recreational equipment, such as grills and benches, bear plaques identifying their donors.

No contemporaneous City resolutions, minutes, proclamations or other records survive from the period, so there is little evidence of the process by which the monument was accepted and installed. What is known is the following: the Eagles donated the monument to Plattsburgh in 1965. The Eagles is a national organization responsible for many philanthropic and community-enhancing contributions to Plattsburgh. The Eagles chose the words and symbols and had them engraved on the monument. The Ten Commandments, also referred to as the Decalogue, are an amalgam of those used in the Protestant, Catholic and Jewish religions.

Other than the scroll's reference to Plattsburgh, the monument bears a very close resemblance to scores of other Ten Commandments monuments given by the Fraternal Order of the Eagles to towns and cities in the 1950s and 1960s. As noted by the court, the history of the Eagles' Ten Commandments project began with a Minnesota juvenile court judge who saw the Ten Commandments as the cure for juvenile delinquency.

LEMON TEST

In its lawsuit, the ACLU claimed Plattsburgh's display of the Ten Commandments monument violated the Establishment Clause of the First Amendment. In pertinent part, the Establishment Clause provides: "Congress shall make no law respecting an establishment of religion." Originally, the Establishment Clause barred only Congress from establishing religion, but it has since been applied to the states through the Fourteenth Amendment. The First Amendment to the U.S. Constitution therefore prohibits Plattsburgh from making any laws "respecting an establishment of religion."

In determining the monument violated the Establishment Clause, the federal district court had applied the test for constitutionality first announced by the Supreme Court of the United States in the case of *Lemon v. Kurtzman*, 403 U.S. 602, 612-13, 29 L. Ed. 2d 745, 91 S. Ct. 2105 (1971). Under the three-part "Lemon" test, a law is permissible under the Establishment Clause only if: (1) it has a secular legislative purpose, (2) its primary or principal effect is neither to advance nor to inhibit religion, and (3) it does not foster excessive government entanglement with religion. Further, to pass the Lemon test, a challenged governmental action must satisfy all three parts.

SECULAR PURPOSE?

Under part one of the Lemon test, the federal appeals court noted that Plattsburgh had to "articulate a secular purpose for erecting and maintaining its Ten Commandments monument." In so doing, however, the court acknowledged that "Plattsburgh's purpose need not be exclusively secular." Rather, "Lemon requires only "a secular purpose."

According to the court, this secular purpose requirement “aims at preventing the relevant governmental decisionmaker from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters.”

The Establishment Clause forbids the state from declaring religious truth... [T]he state may not declare articles of faith. The state may not express an opinion about religious matters. It may not encourage citizens to hold certain religious beliefs.

Applying these principles to the facts of the case, the court considered ‘Plattsmouth's purpose in 1965 in accepting the monument and having it installed on public property.’ While the court indicated it would “accord some deference to Plattsmouth's avowed purpose,” the court also stated it would “distinguish a sham secular purpose from a sincere one.” In this particular instance, the court found “the words and symbols on the monument” conveyed a message which was “undeniably religious.” Specifically, the court found “[t]he Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact.”

I AM the LORD thy GOD is rather hard to square with the proposition that the monument expresses no particular religious preference - particularly when considered in conjunction with the fact that the monument also depicts two Stars of David and a symbol composed of the Greek letters Chi and Rho superimposed on each other that represent Christ. The monument declares the existence and supremacy of God, and prescribes a code of behavior. Some of the rules of behavior are exclusively religious...

Although several of the Commandments have secular applications (not stealing comes to mind) the monument presents even these rules with a religious tenor because their putative source is “the LORD thy God,” not the City of Plattsmouth or the courts or another secular source. It is one thing for Plattsmouth to say one should not steal; it is quite another for Plattsmouth to say there is a God who said, “Thou shalt not steal.”

Furthermore, in the opinion of the court, there was nothing in the monument's surroundings which would suggest that its message and purpose was not religious.

Plaques and nameplates in remembrance of, or in thanks to, various individuals adorn other park items as well as a wall by the main entrance to the park. Unlike the monument, however, these messages of thanks and recognition do not appear on well-known religious symbols nor are they accompanied by any religious text.

We also note the monument shares its environs with trees and recreational equipment provided by Plattsmouth for purely secular purposes. But none

reflects an intent to merely complement an otherwise secular setting by drawing on one of the Ten Commandments' secular applications. Rather, the monument's religious purpose stands naked in the middle of the park with no evident purpose but to endorse and advance its religious message. Indeed, Plattsmouth concedes it "does not assert that it displays the monument in order to show the secular role and influence of the Ten Commandments."

In the absence of any first-hand knowledge of the acceptance or installation of the monument, Plattsmouth's City Administrator had testified that it was "safe to assume the purpose of installing the monument was to show gratitude to the Eagles for their civic contributions." As noted by the appeals court, the district court had "discredited and discounted this proposed secular purpose." Similarly, the appeals court found the Administrator's assumed secular purpose "runs counter to the undisputed evidence."

While there is undisputed evidence the Plattsmouth Eagles is a venerated organization whose good works makes it worthy of gratitude and public honor, the monument does not mention its contributions. The monument was a gift *from* the Eagles *to* the City of Plattsmouth and on a small scroll at the bottom of the monument the Eagles properly take credit for the gift. But the Eagles and its civic contributions are not the subject or object of the monument. Rather, donation of the monument *was* one of the Eagles' many well-intended contributions to Plattsmouth.

As noted by the appeals court, "Plattsmouth's motivation is at issue here, not the Eagles'." Under such circumstances, the appeals court found it was "particularly difficult to reconcile Plattsmouth's purported purpose of thanking the Eagles with the undisputed history of the Eagles Ten Commandments project."

The Eagles donated this monument as a part of its nationwide campaign to spread its version of the Ten Commandments; Plattsmouth's purpose in erecting it was nothing more complex than the adoption of that goal. Plattsmouth may well have been concerned that refusing the monument would offend the Eagles, but that is hardly a valid secular purpose for departing from the strictures of the Establishment Clause.

Accordingly, the appeals court concluded that "Plattsmouth's purpose in installing the monument was solely religious." In so doing, however, the court did not rule that all religious displays on public property were invalid. On the contrary, the court acknowledged that "[t]here are secular purposes for displaying the Ten Commandments, just as there are for other religious teachings."

There is no doubt that the state can display the Ten Commandments, if it does so with a secular purpose and in a proper context. The question remains whether the advocates of displaying the Commandments are truly willing to limit the use of this sacred text for secular purposes.

Just because there are permissible secular purposes for displaying the Ten Commandments, however, does not mean there is always a secular purpose for such a display.

In this particular case, however, the court found Plattsmouth was "motivated wholly by religious considerations."

Plattsmouth abandoned its duty to religious neutrality and acted with the intent of promoting a particular point of view in religious matters. By expressing a religious truth, Plattsmouth began establishing religion in 1965 when it installed its monument.

PRIMARY EFFECT?

Moving on to the second prong of the Lemon test, the federal appeals court noted that the "primary effect" part of the test required the challenged government action to "neither advance nor inhibit religion." According to the court, the primary effect of Plattsmouth's monument is "what viewers may fairly understand to be its purpose," irrespective of the government's actual purpose.

[W]here the purpose prong looked to the government's actual purpose, this [primary effect] prong asks what the government is perceived to intend by the display. Government action will fail the effects prong if it is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by nonadherents as a disapproval, of their individual religious choices.

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... In assessing the situation before us, we must ask whether an objective observer familiar with the history and placement of the Ten Commandments monument would perceive it as a state endorsement of religion.

Further, the court acknowledged that "[t]he effect of the government's use of religious symbolism depends on its context." Moreover, the court found "[t]he context of a government religious display may be determinative of its effect." In this particular instance, the court determined that "[t]he context of the monument does nothing to secularize it."

To any reasonable viewer it would be clear the park and monument are public property and Plattsmouth could remove, alter, or add to it at will. The monument's religiosity stands in sharp contrast to, and therefore is

amplified by, the recreational uses of the space. Nothing about the park setting secularizes the pronounced religiosity of the monument...

Specifically, the inclusion of the patriotic symbol of an eagle gripping a flag on the monument impermissibly links patriotism and government to the religious teaching on the monument.

Further, the court found “[t]he monument's endorsement of multiple Judeo-Christian faiths, instead of one particular sect, is no less of an establishment than endorsement of one alone.”

The First Amendment protects not only Christians and Jews, but atheists, animists, pagans, wicca and everyone alike, no matter whether they are inside or outside the religious mainstream.

The Establishment Clause guarantees religious liberty and equality to the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism. The Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all. We are all of us on a search for truth, and the Establishment Clause prohibits the government from purposefully steering us in a particular direction.

In the opinion of the court, “[t]he reasonable viewer would perceive this monument as an attempt by Plattsmouth to steer its citizens in the direction of mainstream Judeo-Christian religion” in violation of the Establishment Clause.

Accordingly, the three judge panel of federal appeals court , in a 2-1 vote, “held Plattsmouth's Ten Commandments monument fails both the purpose and effect prongs of the Lemon test, and therefore violates the Establishment Clause of the First Amendment.” As a result, the appeals court affirmed the judgment of the district court in favor of ACLU.

In a February 18, 2004 press release, issued on the date of the decision, representatives for Plattsmouth indicated they would file petition for the full federal appeals court to reconsider this case.