

SUPREME COURT SPLIT ON PUBLIC DISPLAY OF TEN COMMANDMENTS

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

© 2005 James C. Kozlowski

On June 27, 2005, the Supreme Court of the United States decided two cases involving a display of the Ten Commandments on public property. In the case of *Van Orden v. Perry*, No. 03-1500, 2005 U.S. LEXIS 5215 (U.S. 2005), the Court had to determine “whether the Establishment Clause of the First Amendment allows the display of a monument inscribed with the Ten Commandments on the Texas State Capitol grounds.” In the case of *McCreary County v. ACLU*, No. 03-1693, 2005 U.S. LEXIS 5211 (U.S. 2005), the issue was whether the posting of a version of the Ten Commandments on the walls of two county courthouses violated the Establishment Clause.

The Establishment Clause of the First Amendment to the U.S. Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." This prohibition of establishment applies to the States and their political subdivisions through the Fourteenth Amendment.

In *Van Orden*, a 5-4 majority on the Court found the monument was constitutional, while in *McCreary*, by the same 5-4 margin, the Court found the display was unconstitutional. In both *Van Orden* and *McCreary*, the majority focused on the context and history of a particular Ten Commandments display in determining whether governmental actions were constitutionally secular or unconstitutionally religious in nature. In *Van Orden*, a monument donated by a private fraternal organization had existed on the capitol grounds for more than forty years without any controversy. In contrast, the displays in *McCreary* were the product of a rather blatant attempt by government officials to endorse a particular set of religious values.

PASSIVE FORTY YEAR HISTORY

In *Van Orden*, the Supreme Court noted that “[t]he 22 acres surrounding the Texas State Capitol contain 17 monuments and 21 historical markers commemorating the ‘people, ideals, and events that compose Texan identity’.” The monuments are: Heroes of the Alamo, Hood's Brigade, Confederate Soldiers, Volunteer Fireman, Terry's Texas Rangers, Texas Cowboy, Spanish-American War, Texas National Guard, Ten Commandments, Tribute to Texas School Children, Texas Pioneer Woman, The Boy Scouts' Statue of Liberty Replica, Pearl Harbor Veterans, Korean War Veterans, Soldiers of World War I, Disabled Veterans, and Texas Peace Officers. As described by the Court, “[t]he monolith challenged here stands 6-feet high and 3-feet wide. It is located to the north of the Capitol building, between the Capitol and the Supreme Court building.”

Its primary content is the text of the Ten Commandments. An eagle grasping the American flag, an eye inside of a pyramid, and two small tablets with what appears to be an ancient script are carved above the text of the Ten Commandments. Below the text are two Stars of David and the superimposed Greek letters Chi and Rho, which represent Christ. The bottom of the monument

bears the inscription "PRESENTED TO THE PEOPLE AND YOUTH OF TEXAS BY THE FRATERNAL ORDER OF EAGLES OF TEXAS 1961."

As noted by the Court, "[t]he legislative record surrounding the State's acceptance of the monument from the Eagles -- a national social, civic, and patriotic organization -- is limited to legislative journal entries."

After the monument was accepted, the State selected a site for the monument based on the recommendation of the state organization responsible for maintaining the Capitol grounds. The Eagles paid the cost of erecting the monument, the dedication of which was presided over by two state legislators.

Thomas Van Orden testified that, since 1995, he had encountered the Ten Commandments monument during his frequent visits to the Capitol grounds to use the law library. In 2001, forty years after the monument's erection and six years after Van Orden's frequent encounters with the monument, he sued various Texas state officials in federal court, seeking "a declaration that the monument's placement violates the Establishment Clause and an injunction requiring its removal."

The federal district court held that the monument did not contravene the Establishment Clause because "the State had a valid secular purpose in recognizing and commending the Eagles for their efforts to reduce juvenile delinquency." Further, the district court determined that "a reasonable observer, mindful of the history, purpose, and context, would not conclude that this passive monument conveyed the message that the State was seeking to endorse religion." The federal appeals court affirmed the judgment of the district court. The Supreme Court then granted Van Orden's petition to review the case.

Writing for the Court majority, Chief Justice William Rehnquist noted that twin themes run throughout Establishment Clause jurisprudence, each with a very different face. On one hand, Supreme Court case law has recognized "the strong role played by religion and religious traditions throughout our Nation's history." On the other hand, the Supreme Court opinions have also acknowledged "the principle that governmental intervention in religious matters can itself endanger religious freedom."

Our institutions presuppose a Supreme Being, yet these institutions must not press religious observances upon their citizens. One face looks to the past in acknowledgment of our Nation's heritage, while the other looks to the present in demanding a separation between church and state. Reconciling these two faces requires that we neither abdicate our responsibility to maintain a division between church and state nor evince a hostility to religion by disabling the government from in some ways recognizing our religious heritage.

According to the Court, the Establishment Clause does not make it "necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence." On the contrary, the Court rejected the notion that "the Establishment Clause bars any and all governmental preference for religion over irreligion."

Applying these principles to what the Court characterized as “the sort of passive monument that Texas has erected on its Capitol grounds,” the Court focused its Establishment Clause analysis on the nature of the monument in light of our Nation's history. According to the Court, “[t]here is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789.”

For example, both Houses passed resolutions in 1789 asking President George Washington to issue a Thanksgiving Day Proclamation to “recommend to the people of the United States a day of public thanksgiving and prayer, to be observed by acknowledging, with grateful hearts, the many and signal favors of Almighty God.” 1 Annals of Cong. 90, 914. President Washington's proclamation directly attributed to the Supreme Being the foundations and successes of our young Nation.

Similarly, the Court characterized the challenged display on state capitol grounds as an acknowledgment of the “role played by the Ten Commandments in our Nation's heritage.” The Court found such displays are “common throughout America,” including the Supreme Court.

We need only look within our own Courtroom. Since 1935, Moses has stood, holding two tablets that reveal portions of the Ten Commandments written in Hebrew, among other lawgivers in the south frieze. Representations of the Ten Commandments adorn the metal gates lining the north and south sides of the Courtroom as well as the doors leading into the Courtroom. Moses also sits on the exterior east facade of the building holding the Ten Commandments tablets... So too a 24-foot-tall sculpture, depicting, among other things, the Ten Commandments and a cross, stands outside the federal courthouse that houses both the Court of Appeals and the District Court for the District of Columbia. Moses is also prominently featured in the Chamber of the United States House of Representatives.

In the opinion of the Court, such “displays and recognitions of the Ten Commandments bespeak the rich American tradition of religious acknowledgments.” While recognizing the “religious significance” of the Ten Commandments in general and the monument in particular, the Court held that “[s]imply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause.” In this particular instance (unlike the companion opinion in *McCready* described below), the Court found no evidence of a “primarily religious purpose” in allowing the monument to be erected on the grounds of the Texas state capitol.

Texas has treated her Capitol grounds monuments as representing the several strands in the State's political and legal history. The inclusion of the Ten Commandments monument in this group has a dual significance, partaking of both religion and government. We cannot say that Texas' display of this monument violates the Establishment Clause of the First Amendment.

In reaching its conclusion, the Court took particular note of the fact that Van Orden himself had “apparently walked by the monument for a number of years before bringing this lawsuit.” As a

result, the Court affirmed the judgment of the lower courts rejecting Van Orden's Establishment Clause claims.

SECTARIAN MOTIVATION

As described by the Court in *McCreary*, the issues were "whether a determination of the counties' purpose is a sound basis for ruling on the Establishment Clause complaints, and whether evaluation of the counties' claim of secular purpose for the ultimate displays may take their evolution into account." In this particular case, executives of two counties had posted a version of the Ten Commandments on the walls of their courthouses prompting several lawsuits alleging violations of the Establishment Clause.

The federal district court entered a preliminary injunction ordering that the display be removed from each County Courthouse "immediately" and that no county official "erect or cause to be erected similar displays." In determining whether the governmental purpose was historical or religious, the district court concluded that the original display "lacked any secular purpose" because the Commandments "are a distinctly religious document, believed by many Christians and Jews to be the direct and revealed word of God."

Although the Counties had maintained that the original display was meant to be educational, "the narrow scope of the display -- a single religious text unaccompanied by any interpretation explaining its role as a foundational document -- can hardly be said to present meaningfully the story of this country's religious traditions."

Subsequently, the legislative body of each county adopted a resolution calling for a more extensive exhibit meant to show that the Commandments are Kentucky's "precedent legal code." The result in each instance was a modified display of the Commandments surrounded by texts containing religious references as their sole common element.

After changing counsel, the counties revised the exhibits again by eliminating some documents, expanding the text set out in another, and adding some new ones a third display. The ACLU challenged this third display and petitioned the district court to supplement its injunction to include a prohibition against this third display. In response, the counties maintained that their governmental purpose was not an endorsement of religion, but "to demonstrate that the Ten Commandments were part of the foundation of American Law and Government" and "to educate the citizens of the county regarding some of the documents that played a significant role in the foundation of our system of law and government."

In the opinion of the district court, "the Commandments' foundational value" was "a religious, rather than secular, purpose." Moreover, the district court found "the assertion that the Counties' broader educational goals are secular crumbles upon an examination of the history of this litigation." Specifically, the district court understood the Counties "clear" purpose in posting the Commandments was "not to educate," particularly "[i]n light of the Counties' decision to post the Commandments by themselves in the first instance, and later to 'accentuate' the religious objective by surrounding the Commandments with 'specific references to Christianity'."

Further, the district court found “the effect of the third display was to endorse religion because the reasonable observer will see one religious code placed alongside eight political or patriotic documents, and will understand that the counties promote one religious code as being on a par with our nation's most cherished secular symbols and documents.” In the opinion of the district court, a reasonable observer would also “know something of the controversy surrounding these displays, which has focused on only one of the nine framed documents: the Ten Commandments.”

The federal appeals court affirmed the district court’s judgment. According to the federal appeals court, “displaying the Commandments bespeaks a religious object unless they are integrated with other material so as to carry a secular message.” In this particular instance, the appeals court found “the Counties offered no support for their claim that the Ten Commandments ‘provided the moral backdrop’ to the Declaration of Independence or otherwise ‘profoundly influenced’ it.” The Supreme Court granted the counties’ petition to review this determination.

Writing for the Court majority, Justice David Souter noted that “[t]he touchstone for our analysis is the principle that the First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.”

When the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides. Indeed, the purpose apparent from government action can have an impact more significant than the result expressly decreed.

According to the Court, in Establishment Clause analysis, it made “practical sense” to scrutinize the governmental purpose in attempting to understand the “official objective” as evident to an “objective observer” taking into account “traditional external signs that show up in the text, legislative history, and implementation of the statute, or comparable official act.” In some cases, however, the Court acknowledged that “the government action itself bespoke the purpose.” In this particular instance, the Court rejected what it characterized as the Counties’ proposed “naïve” inquiry into governmental purpose wherein “any transparent claim to secularity” would satisfy the Establishment Clause. To do so, in the opinion of the Court, “would cut context out of the enquiry, to the point of ignoring history, no matter what bearing it actually had on the significance of current circumstances.”

[G]overnment action must have "a secular purpose"... [A]lthough a legislature's stated reasons will generally get deference, the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective. When a governmental entity professes a secular purpose for an arguably religious policy, the government's characterization is, of course, entitled to some deference. But it is nonetheless the duty of the courts to distinguish a sham secular purpose from a sincere one.

As we said, the Court often does accept governmental statements of purpose, in keeping with the respect owed in the first instance to such official claims. But in those unusual cases where the claim was an apparent sham, or the secular purpose secondary, the unsurprising results have been findings of no adequate secular object, as against a predominantly religious one... [A] secular purpose must be serious to be sufficient... The purpose inquiry is not satisfied by the mere existence of some secular purpose, however dominated by religious purposes.

According to the Court, “[o]ne consequence of taking account of the purpose underlying past actions is that the same government action may be constitutional if taken in the first instance and unconstitutional if it has a sectarian heritage.”

[I]t will matter to objective observers whether posting the Commandments follows on the heels of displays motivated by sectarianism, or whether it lacks a history demonstrating that purpose. But where one display has a history manifesting sectarian purpose that the other lacks, it is appropriate that they be treated differently, for the one display will be properly understood as demonstrating a preference for one group of religious believers as against another.

Applying these principles to the facts of the case, the Court found the Counties modified the and provided “additional insight into their purpose” only after they were sued. Further, the Court found the second display continued to demonstrate the government’s sectarian objective which was “enhanced by serial religious references and the accompanying resolution’s claim about the embodiment of ethics in Christ.”

[T]he second version was required to include the statement of the government’s purpose expressly set out in the county resolutions, and underscored it by juxtaposing the Commandments to other documents with highlighted references to God as their sole common element. The display’s unstinting focus was on religious passages, showing that the Counties were posting the Commandments precisely because of their sectarian content.

In the opinion of the Court, the second display and the resolution taken together “presented an indisputable, and undisputed, showing of an impermissible purpose.”

As cited by the Court, the stated purpose for the third exhibit, "Foundations of American Law and Government," was "to erect a display containing the Ten Commandments that is constitutional to demonstrate that the Ten Commandments were part of the foundation of American Law and Government... providing the moral background of the Declaration of Independence and the foundation of our legal tradition."

In analyzing the purpose of this third display, the Supreme Court found “[n]o new resolution authorized this one, nor did the Counties repeal the resolutions that preceded the second.” As described by the Court, this third display contained nine framed documents of equal size, including “one of them setting out the Ten Commandments explicitly identified as the “King James Version” at Exodus 20:3-17.” Assembled with the Commandments were framed copies of the Magna Carta, the Declaration of Independence, the Bill of Rights, the lyrics of the Star

Spangled Banner, the Mayflower Compact, the National Motto, the Preamble to the Kentucky Constitution, and a picture of Lady Justice. Each document in this third display included a statement about its historical and legal significance. The comment on the Ten Commandments read as follows:

The Ten Commandments have profoundly influenced the formation of Western legal thought and the formation of our country. That influence is clearly seen in the Declaration of Independence, which declared that 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.' The Ten Commandments provide the moral background of the Declaration of Independence and the foundation of our legal tradition.

The Court characterized this third attempt as an apparent attempt on the part of the Counties to "keep a religious document on the walls of courthouses constitutionally required to embody religious neutrality." In the opinion of the Court, it therefore made sense to examine the Counties' latest action "in light of their history of unconstitutional practices."

Having found "ample support for the District Court's finding of a predominantly religious purpose behind the Counties' third display," the Supreme Court affirmed the judgment of the federal appeals court in upholding the preliminary injunction. In so doing, however, the Court did not "decide that the Counties' past actions forever taint any effort on their part to deal with the subject matter." Rather, the Court limited its holding to the principle that "purpose needs to be taken seriously under the Establishment Clause and needs to be understood in light of context."

Within the context of this particular case, the Court rejected as "implausible" the Counties' argument that the governmental purpose had changed from "the broad assertion that the Commandments provide the moral background of the Declaration of Independence" to a supposedly more innocuous claim that "many of the Commandments regarding murder, property, theft, coveting, marriage, rest from labor and honoring parents are compatible with the rights to life, liberty and happiness." In reaching this conclusion, the Court cautioned that it was not holding that "a sacred text can never be integrated constitutionally into a governmental display on the subject of law, or American history." Rather, the Court limited its "constitutional enquiry" to the context of this particular display and determined "the counties' manifest objective" and "the development of the presentation" indicated a sectarian purpose which violated the Establishment Clause.