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The Ten Commandments and Public Property: What Can We Learn From the Supreme Court's Two 2005 Decisions?[1]

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During its 2004–2005 term, the U.S. Supreme Court addressed many controversial issues, including displays of the Ten Commandments on public property. Two cases were decided in this area. One decision held that displays of the Ten Commandments on the walls of two county courthouses were not permitted under the establishment clause of the First Amendment because evidence showed that they were erected for a religious, rather than a secular, purpose. In contrast, the other case held that a display of the Commandments on a monument on the Texas State Capitol grounds was permitted because evidence showed that it served primarily secular purposes.

This article reviews the holdings in these cases and attempts to make some initial predictions about the state of the law going forward. It concludes with citations to several cases from lower federal courts—some of which had been held in abeyance pending the Supreme Court's decisions—that have been decided since the Supreme Court issued its rulings.

Introduction

In *McCreary County v. American Civil Liberties Union of Kentucky,* ___ U.S. ___, 125 S.Ct. 2722, 162 L.Ed.2d 729 (2005), the U.S. Supreme Court found displays on the walls of two Kentucky courthouses to be unconstitutional; both displays included the

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Ten Commandments. The Court held that these displays violated the establishment clause of the First Amendment, which applies to the states through the due process clause of the Fourteenth Amendment. On the same day that it decided *McCreary County*, the Court also decided *Van Orden v. Perry*, ___ U.S. ___, 125 S.Ct. 2854, 162 L.Ed.2d 607 (2005), in which it upheld the display of the Ten Commandments on a monument on the Texas State Capitol grounds.

The establishment clause provides that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I. In *McCreary County* and *Van Orden*, the nine members of the Court serving at the time of the decisions showed that they are sharply divided on the following question: When and under what circumstances does a display of the Ten Commandments on public property constitute an "establishment of religion"? Both cases resulted in 5–4 votes; the difference in result was caused by Justice Breyer switching sides.

Justice Souter wrote the majority opinion in *McCreary County*. His opinion was joined by Justices Stevens, O'Connor, Ginsburg, and Breyer. There was also a concurring opinion by Justice O'Connor and a dissenting opinion by Justice Scalia; the dissenting opinion was joined in total by the late Chief Justice Rehnquist and by Justice Thomas, and in two out of three parts by Justice Kennedy. In *Van Orden*, four justices (Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas) joined a plurality opinion written by Chief Justice Rehnquist. Justice Breyer concurred in the judgment of those four; that is, he agreed with the result but not necessarily with the reasoning underlying the result. There were three dissenting opinions, one by Justice Stevens, with Justice Ginsburg concurring; one by Justice Souter, with Justices Stevens and Ginsburg concurring; and one by Justice O'Connor. In her very brief dissent, Justice O'Connor stated that she "essentially" agreed with Justice Souter's decision in *McCreary County* and also cited her own concurring opinion in that case.

With so many differing views, it may seem difficult to evaluate the Supreme Court's current stance concerning displays of the Ten Commandments. However, by examining Justice Souter's majority opinion in *McCreary County* and Justice Breyer's

explanation of why the *Van Orden* display differed from those struck down by the Court in *McCreary County*, it is possible to determine what a majority of the justices agreed on.

McCreary County v. American Civil Liberties Union of Kentucky

The McCreary County case involved two Kentucky counties that posted large copies of an abridgement of the King James version of the Ten Commandments in public hallways within their courthouses. This action prompted a lawsuit by the American Civil Liberties Union of Kentucky, which alleged that the counties had violated the establishment clause. Each county's governing board then adopted a resolution that called on the county executive "to read or post the Ten Commandments as the precedent legal code upon which the civil and criminal codes of the Commonwealth of Kentucky are founded," and that also called for a more extensive display.

In the second displays, posted less than a month after the suit was filed, the Ten Commandments were again posted by the counties, pursuant to nearly identical resolutions of the county governing bodies that stated that the Commandments were "the precedent legal code upon which the civil and criminal codes of the Commonwealth of Kentucky are founded." In these displays, the Ten Commandments were surrounded by smaller, framed copies of portions of eight historical documents, "each either having a religious theme or excerpted to highlight a religious element," according to the Court. The counties' resolutions stated that these documents had been selected "without censorship because of any Christian or religious references in these writings, documents, and historical records." Included in the new portion of the displays were an excerpt from the Declaration of Independence (the passage concerning how people are "endowed by their Creator"); the preamble to the Kentucky Constitution; a page from the *Congressional Record* and a proclamation from President Ronald Reagan, both declaring 1983 the Year of the Bible; a proclamation from President Abraham Lincoln marking April 30, 1863, as a National Day of Prayer and Humiliation; a statement by President

Lincoln that "[t]he Bible is the best gift that God has ever given to man," taken from his "Reply to Loyal Colored People of Baltimore upon Presentation of a Bible"; and the Mayflower Compact.

The district (trial) court applied to the displays the three-part test set out by the U.S. Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), which is often used by the Court in establishment clause cases. That test forbids governmental involvement with religion unless three requirements are met: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion'."

The district court found, among other things, that the first and second displays failed the first part of the test because the government's action lacked any secular purpose but instead promoted a religious objective. As to the first displays, which included only the Ten Commandments, the district court noted that the Commandments "are a distinctly religious document, believed by many Christians and Jews to be the direct and revealed word of God." While the counties claimed an educational purpose for this display, the court reasoned that "[t]he narrow scope of the display—a simple 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." The second displays lacked a secular purpose, the district court found, because the counties had tailored the selection of foundational, historical documents that accompanied the Commandments to include only those that referred specifically to Christianity. The court therefore enjoined the exhibition of the displays in the county buildings, and the counties removed them. However, the counties did not repeal the resolutions applicable to the second displays.

Without adopting any further resolutions, each of the two counties then posted an exhibit called The Foundations of American Law and Government Display. This exhibit consisted of nine framed documents of equal size, accompanied by a plaque stating that the display "contains documents that played a significant role in the foundation of our

system of law and government." One document consisted of a longer version of the Ten Commandments (identified as the "King James Version"), along with an explanation stating that the Commandments have had a great influence on the formation of Western legal thought. The other documents, each of which was accompanied by a statement about its legal and historical significance, were the Magna Carta, the Declaration of Independence, the Bill of Rights, the lyrics to the *Star-Spangled Banner,* the Mayflower Compact, the national motto, the preamble to the Kentucky Constitution, and a depiction of Lady Justice.

The walls of the courthouses "were already lined with historical documents and other assorted portraits" at the time that the Foundations displays were installed, according to Justice Scalia's dissenting opinion. Further, "each 'Foundations' display was exhibited in the same format as these other displays, and nothing in the record suggest[ed] that either County took steps to give it greater prominence."

On motion of the plaintiff, the district court responded to the counties' latest action by including the third displays in its injunction, despite the counties' stated purposes: (1) showing that the Commandments were part of the foundation of American law and government and (2) educating county citizens about "some of the documents that played a significant role in the foundation of our system of law and government." The court disagreed, again finding that the purpose of the displays was religious rather than educational. In the court's view, the objective of proclaiming the Commandments' foundational value did not serve a secular, but a religious, purpose; the court also found that the counties' "clear" purpose was to post the Commandments, not to educate.

A divided panel of the federal Court of Appeals for the Sixth Circuit affirmed the district court's decision. The majority of the three judges on the panel saw no demonstrated analytical or historical connection between the Commandments and the other documents that would cause the display to carry a secular rather than a religious message. The court of appeals also found, among other things, that the history of the litigation was itself evidence of the counties' religious objective.

The U.S. Supreme Court heard the case next. As an initial matter, the Court held, in an opinion written by Justice Souter, that the counties' purpose in displaying the documents, its "manifest objective," was a sound basis for ruling on the establishment clause complaints. The Court also held that it could take the "evolution" of the displays into account in evaluating the counties' claim that the final version of the displays had a secular purpose. Declaring that it had not decided, under an earlier case involving the Ten Commandments (*Stone v. Graham*, 449 U.S. 39 [1980]), "the constitutionality of every possible way the Commandments might be set out by the government," and that "under the Establishment Clause detail is key," the Court set out to examine the evidence concerning the progression to the third displays.

Neutrality toward religion was the "touchstone" of the Court's analysis. "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." While the Court will generally defer to a legislature's stated secular reasons for its action, "the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective."

The Court explained that "[t]he question is what viewers may fairly understand to be the purpose of the display," which in turn relies on its context. The Court found that the counties' religious purpose had not changed from the first displays to the third. It pointed, for example, to the counties' failure to repeal the resolutions authorizing the second displays. The Court critiqued as "puzzling" some of the choices of items for the third displays, and it went so far as to say that the counties' new statements of purpose for those displays "were presented only as a litigating position," since the governing boards had not taken any further authorizing action for the new displays.

The Court determined that there was ample support for the district court's finding of a predominantly religious purpose behind the displays, and it affirmed the Sixth Circuit's decision upholding the injunction. The Court noted, however, that it was *not* deciding "that the [c]ounties' past actions forever taint any effort on their part to deal

with the subject matter." It explained that "[w]e hold only that purpose needs to be taken seriously under the establishment clause and needs to be understood in light of context; an implausible claim that government purpose has changed should not carry the day in a court of law any more than in a head with common sense."

The Court also took pains to note that it was not holding "that a sacred text can never be integrated constitutionally into a governmental display on law or American history." It held out as an example the frieze in its own courtroom, which shows Moses holding tablets with a portion of the Ten Commandments in Hebrew. Moses is accompanied by 17 other (primarily secular) lawgivers. In the Court's view, "there is no risk that Moses would strike an observer as evidence that the National Government was violating neutrality in religion."

In response to the Court's "purpose" analysis, Justice Scalia asserted, in a portion of his opinion joined by the other three dissenting justices, that the Court was actually replacing the original secular purpose test from *Lemon* "with the heightened requirement that the secular purpose 'predominate' over any purpose to advance religion." In Justice Scalia's view, the Court had "shift[ed] the focus of *Lemon*'s purpose prong from the search for a genuine, secular motivation to the hunt for a predominantly religious purpose," thereby converting "what ha[d] in the past been a fairly limited inquiry into a rigorous review of the full record."

Van Orden v. Perry

The *Van Orden* case, while in some ways similar to *McCreary County*, also has important factual differences. The Texas display is on a monument on the 22 acres of grounds surrounding the State Capitol, and it is one of 17 monuments and 21 historical markers that commemorate "the people, ideals, and events that compose Texas identity." It is six feet high and three-and-a-half feet wide, and it has been in place since 1961. While the Ten Commandments are the primary text, three items are depicted above the Commandments: an eagle grasping an American flag, an eye within a pyramid, and two small tablets with writing on them. Below the Commandments are two Stars of David, as

well as a symbol consisting of the Greek letters for Christ's name, chi and rho, superimposed on each other. At the bottom of the monument is the inscription "Presented to the people and youth of Texas by the Fraternal Order of Eagles of Texas 1961."

No recorded complaints were made about the monument until 2001, when Thomas Van Orden sued for (1) a declaration that the monument's placement violated the establishment clause and (2) an injunction requiring the monument to be removed. The district court determined that the state "had a valid secular purpose in recognizing and commending the Eagles for their efforts to reduce juvenile delinquency," and found no violation of the establishment clause. The court also found that a reasonable observer who knew of the "history, purpose, and context" of "this passive monument" would not conclude that it conveyed a message that the state was endorsing religion. The Court of Appeals for the Fifth Circuit agreed, and it affirmed the district court's holdings as to the monument's purpose and effect.

In his plurality opinion affirming the decision of the Fifth Circuit Court, Chief Justice Rehnquist observed that the Court's cases applying the establishment clause have pointed, "Januslike," in two directions. "One face looks toward the strong role played by religion and religious traditions throughout our Nation's history," while the other "looks toward the principle that governmental intervention in religious matters can itself endanger religious freedom." He noted that the Court must "neither abdicate [its] 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." Chief Justice Rehnquist cited another Supreme Court case (*Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 [1995]) that warns against the "risk [of] fostering a pervasive bias or hostility to religion, which would undermine the very neutrality the establishment clause requires."

Following some (but not all) of the same ideas, Justice Breyer, in his opinion concurring in the result, explained that the establishment clause, and its companion, the free exercise clause ("Congress shall make no law . . . prohibiting the free exercise [of religion]", U.S. Const. amend. I) seek to ensure full religious liberty and tolerance for all,

while avoiding the religion-based divisiveness "that promotes social conflict, sapping the strength of government and religion alike." Further, the clauses seek to maintain that "separation of church and state" that is critical for religion and freedom to coexist.

Justice Breyer noted that the religion clauses seek to maintain the basic principles stated by Justice O'Connor in her concurrence in *McCreary County*: these clauses, along with other First Amendment guarantees such as freedom of speech, seek to allow free people to have "free and diverse thoughts, which government ought neither to constrain nor to direct." Justice O'Connor explained that the guiding principle was James Madison's view concerning religion: that each person's religion must be left to his or her conviction and conscience.

Further, said Justice O'Connor, under the religion clauses, government is not to coerce or prohibit persons in their worship; it is "not to prefer one religion over another or promote religion over nonbelief." Government "may not entangle itself with religion," and it is not to use religious endorsement to make religious adherence "relevant to one's standing in the political community." These restrictions are enforced, according to Justice O'Connor, out of respect for religion's special role in society.

Despite these restrictions, however, "the establishment clause does not compel the government to purge from the public sphere all that in any way partakes of the religious," according to Justice Breyer. Indeed, such absolutism, in addition to being inconsistent with national traditions, would tend to promote the type of social conflict that the establishment clause tries to avoid.

Justice Breyer noted further that merely trying to measure neutrality is not enough, in all cases, to draw the constitutional line. It is sometimes difficult to determine what type of legal rule is "neutral," and "untutored devotion" to neutrality can lead to hostility toward the religious. Other tests tried by the Court have also produced inconsistent results. Justice Breyer concluded that "[i]f the relation between government and religion is one of separation, but not of mutual hostility and suspicion, one will inevitably find difficult borderline cases" that must be resolved not by a test, but by "the exercise of legal judgment." Such judgment is not personal, he asserted, but remains true

to the clauses' underlying purposes, while taking account of context and consequences measured in light of those purposes. There is "no exact formula [that] can dictate a resolution to such fact-specific cases."

According to Justice Breyer, *Van Orden* was such a borderline case. While it was true that the Ten Commandments on the Texas monument had a religious message, one had to go further and look at how the text was used—that is, at its context—to determine whether there was an establishment clause violation. Justice Breyer explained that in some contexts, the Ten Commandments can convey a secular moral message about proper standards of conduct, or a historical message about the relationship between those moral standards and the law. In the context at hand, Justice Breyer found that the placement and physical setting in *Van Orden* suggested that the State of Texas intended for the "nonreligious aspects of the tablets' message to predominate." The monument's 40-year history on the capitol grounds was evidence that this had been the effect. According to Justice Breyer, the motive of the group that gave the monument was secular and ethics based: the Eagles had consulted with a committee that included members of several faiths to find a nonsectarian text; moreover, the fact that the display had been donated distanced the state further from the religious part of the Commandments' message.

Justice Breyer also noted that the physical setting of the monument, in a large park with other Texas monuments, provided "a context of history and moral ideals." This, along with the inscription explaining the monument's origin, conveyed the message that "the State sought to reflect moral principles, illustrating a relation between ethics and law that the State's citizens, historically speaking, have endorsed."

One other factor was very important to Justice Breyer in determining the dominant message of the monument. For 40 years, no one had challenged the presence of the monument, and this lack of challenges was not the result of any known "climate of intimidation." It was these 40 years, rather than any "set of formulaic tests," that suggested strongly to Justice Breyer "that few individuals, whatever their system of beliefs, are likely to have understood the monument as amounting, in any significantly

detrimental way, to a government effort to favor a particular religious sect, primarily to promote religion over nonreligion, to 'engage in' any 'religious practic[e],' to 'compel' any 'religious practic[e],' or to 'work deterrence' of any 'religious belief'." (The quotation is from the concurring opinion of former justices Goldberg and Harlan, *School District of Abingdon Township v. Schempp*, 374 U.S. 203, 305 [1963]. Justice Breyer included several favorable references to this opinion in his *Van Orden* analysis.) Rather, the 40 years without incident suggested to Justice Breyer that visitors to the capitol grounds "considered the religious aspect of the tablets' message as part of what is a broader moral and historical message reflective of a cultural heritage."

What, then, of the courthouse displays in *McCreary County*? Why did Justice Breyer reach a different conclusion in that case? According to the justice, "the short (and stormy) history of the courthouse Commandment displays demonstrates the substantially religious objectives of those who mounted them, and the effect of this readily apparent objective upon those who view them." The history in that case "indicates a governmental effort substantially to promote religion, not simply an effort primarily to reflect, historically, the secular impact of a religiously inspired document." Furthermore, in today's world, in a nation where there is a plethora of beliefs, "a more contemporary state effort to focus attention upon a religious text is certainly likely to prove divisive in a way that [the] longstanding, pre-existing [Texas] monument has not."

Justice Breyer noted that his decision that the Texas display was constitutional was based more on consideration of the basic purposes of the First Amendment's religion clauses than on any particular test, although he thought that the Texas display might pass the three-part test of *Lemon v. Kurtzman*. The Texas display "has stood apparently uncontested for nearly two generations," indicating "that as a practical matter of *degree* [it] is unlikely to prove divisive." And Justice Breyer noted that "this matter of degree" was "critical in a borderline case such as this one."

Further, Justice Breyer feared that reaching a contrary result based primarily on the religious nature of the monument's text would "lead the law to exhibit a hostility toward religion that has no place in our establishment clause traditions." It "might well

encourage disputes concerning the removal of longstanding depictions of the Ten Commandments from public buildings across the Nation," thereby creating "the very kind of religiously based divisiveness that the establishment clause seeks to avoid."

Justice Breyer was careful to note that he did not agree with the plurality's analysis of the extent to which, for example, government might show any preferences for or acknowledgment of religion in our society. He agreed, rather, with the concurring opinion of former justices Goldberg and Harlan, in *Abingdon,* that "[t]he First Amendment does not prohibit practices which by any realistic measure create none of the dangers which it is designed to prevent and which do not so directly or substantially involve the state in religious exercise or in the favoring of religion as to have meaningful and practical impact." Displaying the Texas monument was, in Justice Breyer's view, such a practice. He explained that while he agreed with the principles of establishment clause jurisprudence stated by Justice O'Connor in her concurrence in *McCreary County*, he disagreed with her as to their application in this case.

What Do the Cases Mean?

Perhaps the main message of these two cases is that displays of the Ten Commandments are more likely to be upheld if they are historical or artistic in nature and have been in place for a long time. In addition, more comprehensive displays with a clearly stated secular purpose related to law or history, a purpose that is not a "sham," have a better chance of being upheld, even if they happen to include the Ten Commandments or other religious texts. On the other hand, if public officials decide to place the Ten Commandments in a public space without some very clear consideration and statement of a dominant secular purpose for the display, that decision is likely to be overturned by the courts if challenged.

These ideas are supported by several lower court opinions that have been issued since *McCreary County* and *Van Orden* were decided last June. Perhaps most significant is a subsequent decision of the federal Sixth Circuit Court of Appeals. That court

rendered the opinion striking down the display in the *McCreary County* case that resulted in an appeal to the Supreme Court.

The later case concerned another display of the Ten Commandments alongside other historic documents. The display was conceded by the county involved to be materially identical to the third display that was found unconstitutional in *McCreary County*. *American Civil Liberties Union of Kentucky v. Mercer County, Kentucky*, 432 F.3d 624 (6th Cir. 2005) In contrast to its decision in *McCreary County*, however, the court of appeals held that the Mercer County display was permissible,

In a carefully reasoned opinion, the court of appeals affirmed the district court's finding that the county clearly had a secular, rather than a sectarian, purpose in allowing the display to be erected. Specifically, it was erected to recognize the historical significance of the documents included in it as part of American legal history. It also agreed with the district court that the Mercer County display did not endorse religion. In reaching its conclusions, the court of appeals carefully applied the limits that the Supreme Court had imposed on its holding in *McCreary County* (see the discussion of *McCreary County* above). It also quoted favorably from a Seventh Circuit case, *Books v. Elkhart County (Books II)*, 401 F.3d 857 (7th Cir. 2005), decided before the Supreme Court ruled in *McCreary County*, that applied the same type of analysis to a similar fact situation.

Several cases involving Ten Commandments monuments have also been decided since the Supreme Court rulings. These include *ACLU Nebraska Foundation v. City of Plattsmouth, Nebraska*, 419 F.3d 772 (8th Cir. 2005), in which the Court of Appeals for the Eighth Circuit held in an *en banc* decision that a monument similar to the one at issue in *Van Orden*, which was donated by the Fraternal Order of Eagles and had stood in a Nebraska city park for decades without challenge, did not violate the Establishment Clause. Rather, the monument made permissible, passive use of the Ten Commandments to acknowledge the role of religion in United States history. There were two dissenting judges in *ACLU Nebraska Foundation*, who thought that the monument was placed so that its religious message stood alone with nothing to suggest a broader historical or secular context message.

District court decisions holding that Ten Commandments monuments—all donated by the Fraternal Order of Eagles several decades ago and displayed on public property—do not violate the Establishment Clause include *Twombly v. City of Fargo*, 388 F.Supp.2d 983 (D.N.D. 2005); *Card v. City of Everett*, 386 F.Supp.2d 1171 (W.D.Wash. 2005) (also holds that state constitution clause barring establishment of religion is not violated); and *Russelburg v. Gibson County, Indiana*, 2005 WL 2175527 (S.D. Ind. 2005). See also *Society of Separationists v. Pleasant Grove City*, 416 F.2d 1239 (10th Cir. 2005), a Ten Commandments monument case in which the Court of Appeals for the Tenth Circuit reversed the district court's granting of a defense motion for judgment on the pleadings and remanded the case for further proceedings, including development of a better factual record.

One last case of interest is *O'Connor v. Washburn University*, 416 F.3d 1216 (10th Cir. 2005), in which the Tenth Circuit follows the guidance of *McCreary* and *Van Orden* in conducting a detailed Establishment Clause analysis. *O'Connor* involved a challenge to a sculpture displayed on a public university campus, where it was alleged (1) that the university had the improper motive of disparagement of the Catholic religion when it selected, displayed, or retained the sculpture as part of an outdoor art display, and (2) that the primary effect of displaying the sculpture was to foster hostility to religion. The court of appeals upheld the university's action in allowing the display. While not a Ten Commandments case, the court's exploration of Establishment Clause issues after *McCreary* and *Van Orden* is helpful.