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# The Supreme Court's Decisions on Ten Commandments Displays *McCreary County v. ACLU of Kentucky* and *Van Orden v. Perry*

On June 27, 2005, the Supreme Court issued sharply divided decisions in two cases involving constitutional challenges to government-sponsored displays of the Ten Commandments. In *McCreary County v. American Civil Liberties Union of Kentucky* (03–1693), a 5–4 majority held that two Kentucky counties had “predominantly religious” purposes in posting the Ten Commandments in their courthouses, and thus violated the First Amendment’s Establishment Clause. However, in *Van Orden v. Perry* (03–1500), an even more sharply divided court held that a Ten Commandments monument on the grounds of the Texas State Capitol did not run afoul of the Establishment Clause.

The court’s opinions in these cases, described in detail below, highlight profound differences among the justices in their understandings of the Establishment Clause. These differences have resulted in close and fragmented rulings in a wide range of Establishment Clause cases, ranging from aid to parochial schools (*Mitchell v. Helms*, 2000; *Zelman v. Simmons-Harris*, 2002), to prayer at public school events (*Lee v. Weisman*, 1992; *Santa Fe v. Doe*, 2000), to religious holiday displays on public property (*Allegheny County v. ACLU*, 1989), and now to government-sponsored displays of the Ten Commandments.

Justice Sandra Day O’Connor’s resignation from the court, announced on July 1, promises to make Establishment Clause jurisprudence even more complex. Because of sharp divisions within the court and the prospect of even more resignations, it is impossible to predict with any certainty how the High Court might rule on future public displays of the Ten Commandments. Until a future Supreme Court revisits the issue, however, the *McCreary County* and *Van Orden* decisions will provide the standard for judging the constitutionality of existing or future Commandments displays.

## *McCreary County v. ACLU of Kentucky*

In *McCreary County*, the court considered identical displays of the Ten Commandments that had originally been posted in the courthouses of two Kentucky counties in 1999. At first, the counties posted only the text of the Ten Commandments, but when plaintiffs challenged that posting, the counties expanded the displays to include

# LEGAL BACKGROUND

other documents, each focused on the importance of religion in American history and law. Following a court order to remove the expanded displays, the counties posted additional materials and labeled the new collections “The Foundations of American Law and Government Display.” The new exhibits included the Ten Commandments, along with displays of the Declaration of Independence, Magna Carta and other historical documents.

A federal district court held the displays unconstitutional, finding that the modified exhibits neither masked nor eliminated the religious motives behind the counties’ presentation of the Ten Commandments. A divided panel of the U.S. Court of Appeals for the Sixth Circuit affirmed the district court’s decision.

The Supreme Court granted the counties’ petition for review, and heard oral argument in the case on March 2, 2005. In its June 27 decision, the court affirmed the lower courts’ rulings and held that the counties’ displays violated the Establishment Clause.

### THE COURT’S OPINION

Justice David Souter wrote the majority opinion in *McCreary County*, joined by Justices O’Connor, Stephen Breyer, Ruth Bader Ginsburg and John Paul Stevens. The High Court affirmed both the holding and the reasoning of the lower courts. The two counties violated the Establishment Clause because they acted with a “predominantly religious purpose” in posting the Ten Commandments in their courthouses, the court determined.

At the heart of the majority’s opinion lies the principle that the government should be neutral with respect to religion. The principle requires government neutrality among religions as well as between

religious and secular beliefs. A lack of neutrality by the government in religious matters, the majority claimed, inevitably brings conflict and even the possibility of violence, dangers that are at least as real in the contemporary world as they were at the time of the Constitution’s ratification more than 200 years ago. In addition, the majority argued, government’s departure from neutrality marginalizes those who do not share the favored faith or faiths, effectively excluding them from that sense of full and equal status due to every member of the body politic.

Justice Souter argued that these threats to neutrality are especially acute when government invokes, in a visible and permanent manner, a text that is unquestionably religious. In such circumstances the

government bears a heightened burden to show that the display is consistent with constitutionally mandated neutrality. In posting a text that signals government approval of the religious over the secular, and of Christianity and Judaism over other faiths, the Kentucky counties failed to meet that heavy burden, Souter argued.

In assessing the neutrality of the counties’ displays, the majority returned to part of a much-maligned test drawn from an earlier case, *Lemon v. Kurtzman* (1971). In order to survive Establishment Clause scrutiny, the majority in *Lemon* held, the challenged action must arise from a “secular legislative purpose.” In particular, the majority in *McCreary County* said, “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” (slip opinion at 11\*).

Because of sharp divisions within the court and the prospect of even more resignations, it is impossible to predict with any certainty how the High Court might rule on future public displays of the Ten Commandments.

\* Citations in the text indicate page numbers from the individual, or slip, opinions that were issued shortly after the decision was announced. The slip opinions will later be published with other decisions in the case in bound volumes.

The counties stated that their placement of the displays did have a secular purpose, and argued that courts should not only be deferential to but bound by such an official statement of intent. But the majority rejected this assertion, arguing that under the *Lemon* test the government must do more than simply show that its conduct has a plausible secular purpose. Instead, Justice Souter said, the government must clearly show that it acted from motives that were predominantly, or primarily, secular. If the challenged conduct was primarily driven by religious motives, Justice Souter reasoned, the government's ability to articulate a secular motive does not cure the underlying constitutional flaw. Moreover, he continued, the government's own statements about its motives cannot foreclose further judicial inquiry, as the Kentucky counties argued, because the *Lemon* test's question about official motives must be answered from the perspective of a reasonable observer. Thus, Justice Souter concluded, courts must ask whether a reasonable observer would perceive that the government acted from primarily religious or secular motives in posting the challenged displays.

In *McCreary County*, the court concluded, a reasonable observer would have perceived that the counties wanted to invoke the religious character of the Ten Commandments. The counties attempted to mask this religious purpose by surrounding the religious text with other documents, first religious and then more broadly historical. The court held, however, that the additional documents failed to place the Ten Commandments in any plausibly secular context. The broader displays, even if they furthered a secular educational purpose, did not remove the reasonable perception that the counties' predominant motive in creating the displays was to exhibit and endorse the religious content of the Ten Commandments.

#### DISSENTING OPINION OF JUSTICE SCALIA

Justice Antonin Scalia wrote the lone dissenting opinion in *McCreary County*, part of which was joined by the other three dissenters, Chief Justice William Rehnquist and Justices Anthony Kennedy and Clarence Thomas. Only the chief justice and

Justice Thomas joined in the most significant aspect of the dissent, in which Justice Scalia set forth a new reading of the Establishment Clause that poses a fundamental challenge to — and rejection of — the vision held by the *McCreary County* majority.

In the portion of his opinion joined by all the dissenting justices, Justice Scalia disagreed with the majority's application of the *Lemon* test to the Kentucky displays and criticized the majority for making the test significantly more restrictive than in earlier cases. Most importantly, Scalia argued, the majority claimed that the test forbids any government action that has a *predominantly* religious purpose, even though the court's prior applications of the test held unconstitutional only governmental acts shown to have *exclusively* religious motives. This change, Justice Scalia stated, implies hostility to legislators who act from religious motives, even when those motives are intertwined with secular public purposes.

Supported by all the dissenters, Justice Scalia found that the courthouse displays at issue in *McCreary County* would satisfy any reasonable interpretation of the *Lemon* standard — however flawed he and others on the court might find that standard to be — because the Commandments' text had a manifest secular purpose and significance. Furthermore, although the Commandments are an indisputably religious text, their presence in a public display could well represent only a public acknowledgment of the Commandments' "contribution to the development of the legal system," or, more broadly, the contribution of religion in general "to our nation's legal and governmental heritage" (slip opinion at 22).

The parts of Justice Scalia's dissent that were joined only by the chief justice and Justice Thomas set forth a vision of the Establishment Clause that is both radically different from that held by the majority in *McCreary County* and unique in the recent history of Supreme Court jurisprudence. Although each of the justices who joined this part of the dissent have advanced some aspects of this vision in earlier opinions — most notably

then-Justice Rehnquist's dissenting opinion in *Wallace v. Jaffree* (1985) — the dissent in *McCreary County* represents the most ambitious statement of this vision to date.

At its core, the Establishment Clause jurisprudence advanced by Justice Scalia would restrict the requirement of governmental neutrality to contexts that involve public financial aid. For example, this approach would bar the government from preferring religious entities and individuals in funding programs. Apart from situations involving public financing, however, the Establishment Clause would not require the government to be neutral between religious and secular beliefs, or even among various religions. Drawing from a wide range of religious statements and acts of the founders, Justice Scalia argued that the original intent of the Establishment Clause did not preclude government from recognizing and endorsing the civic importance of religion. “Those who wrote the Constitution believed that morality was essential to the well-being of society and that encouragement of religion was the best way to foster morality” (slip opinion at 3). Such encouragement of religion, Justice Scalia reasoned, remains permissible for government today; the court's efforts to limit such encouragement have arisen not out of the Constitution's text or history, but instead from “the court's own say-so” (slip opinion at 6).

Moreover, according to Justice Scalia, the Establishment Clause does not require that governmental encouragement of religion must be neutral among all religions. Instead, the state may recognize and favor the shared understanding of a single Creator held by the Abrahamic monotheistic faiths — Christianity, Judaism and Islam. Justice Scalia wrote: “With respect to public acknowledgment of religious belief, it is entirely clear from our Nation's historical practices that the Establishment Clause permits this disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists” (slip opinion at 10). The government may publicly affirm faith in the Creator, he

argued, as long as the government does not actively engage in proselytizing or violate the right of free exercise.

Seen in light of this understanding of the Establishment Clause, the dissent concluded, the courthouse displays of the Ten Commandments do not transgress the strictures of the Establishment Clause. Judicial rejection of such displays — a prospect the dissent sees as likely in the wake of the *McCreary County* decision — represents the unjustified privileging of minority sensitivities at the expense of the majority. In adopting a definition of neutrality that maintains an excessive solicitude for the marginalized, the dissent concluded, the court ignored “the interest of the overwhelming majority of religious believers in being able to give God thanks and supplication *as a people*, and with respect to our national endeavors” (slip opinion at 16–17).

### *Van Orden v. Perry*

Compared with the displays at issue in *McCreary County*, the Ten Commandments monument at issue in *Van Orden* had enjoyed a much longer and less turbulent history. In 1961, the Fraternal Order of the Eagles donated the monument to the state of Texas — one of thousands of such monuments given by the Eagles — and it was placed on the grounds of the State Capitol, where it stands along with a number of other monuments and historical markers. In 2001, Thomas Van Orden brought suit, alleging that the monument's presence on the capitol grounds violated the Establishment Clause. A federal district court rejected Van Orden's claim, holding that the monument had a sufficiently secular purpose and effect, and the U.S. Court of Appeals for the Fifth Circuit affirmed the lower court decision. Van Orden successfully petitioned the Supreme Court for review, and the court heard oral argument in the case on March 2, 2005. On June 27, the Supreme Court affirmed the judgment of the lower federal courts, and dismissed Van Orden's challenge.

## THE MAJORITY'S DECISION

Five justices — the chief justice and Justices Breyer, Kennedy, Scalia and Thomas — voted to affirm the decision of the lower courts, rejecting Van Orden's Establishment Clause challenge. No single opinion, however, received the votes of all five justices. Therefore, for purposes of legal precedent, the court's decision rests on the narrowest rationale advanced by any member of the majority. In *Van Orden*, the narrowest ground can be found in Justice Breyer's concurring opinion, which is discussed in detail below. Nonetheless, the opinions of the other four justices in the majority also deserve close attention, if only because of the court's pending change in personnel.

## THE PLURALITY'S OPINION

Chief Justice Rehnquist wrote an opinion for the plurality, joined by Justices Kennedy, Scalia and Thomas. Where Justice Scalia's dissent in *McCreary County* attempted to chart a new path in Establishment Clause jurisprudence, the *Van Orden* plurality restated a theme that has become common over the past two decades. In deciding cases under the Establishment Clause, the chief justice asserted, courts must maintain a proper division between church and state, yet do so without "evin[ing] a hostility to religion by disabling the government from in some ways recognizing our religious heritage" (slip opinion at 4).

In the chief justice's analysis, two qualities of the Texas display bring it within the government's latitude to acknowledge "in some ways...our religious heritage." First, the display makes only a "passive" recognition of that religious heritage; it does not command those who view it to assent to, or even to read, its text. Second, the monument is located outside the Texas State Capitol, in a context free from any reasonable concern that the state will use the text to "press religious observances upon [its] citizens" (slip opinion at 4). This context is vastly different from that of public elementary and secondary schools, he argued, where government-sponsored religious exercises or displays are most closely scrutinized because of concerns about the

susceptibility of children to religious pressure. For these reasons, and the widespread recognition of the historical significance of the Ten Commandments, the plurality affirmed the dismissal of Van Orden's challenge.

## CONCURRING OPINIONS OF JUSTICE SCALIA AND JUSTICE THOMAS

Although Justice Scalia joined the chief justice's plurality opinion, he wrote separately to reemphasize the reasoning of his dissent in *McCreary County* as an alternative to the more traditional approach reflected in the plurality opinion in *Van Orden*. As he had in *McCreary County*, Justice Scalia argued that the Establishment Clause should be read to permit the state to engage in active encouragement of religion. "There is nothing unconstitutional," he wrote, "in a State's favoring religion generally, honoring God through public prayer and acknowledgment, or in a nonproselytizing manner, venerating the Ten Commandments" (slip opinion at 1).

Justice Thomas also joined the chief justice's plurality opinion, but like Justice Scalia, he wrote separately to emphasize a distinct and much narrower vision of the Establishment Clause. As he has argued in several recent concurring opinions (including *Cutter v. Wilkinson*, 2005), Justice Thomas would limit the Establishment Clause to the federal government. Notably, he would reject most of the court's modern Establishment Clause jurisprudence, which since *Everson v. Board of Education* (1947) has held that the Establishment Clause is "incorporated" in the 14th Amendment's Due Process Clause, and thus applies to the states as well as the federal government. In his concurring opinion, Justice Thomas argued that the *Everson* decision is not supported by the text or history of the Constitution, and should therefore be abandoned. The Establishment Clause, he concluded, does not apply to the states, which should be free to promote religion.

## CONCURRING OPINION OF JUSTICE BREYER

Justice Breyer provided the fifth vote for the majority in *Van Orden*, but he did not join the plurality

opinion. As already noted, because Justice Breyer reached his conclusion on narrower grounds than those asserted by the plurality, his opinion represents the controlling rationale arising from the decision.

Like Justice Souter’s opinion for the court in *McCreary County*, which he joined, Justice Breyer’s opinion identified neutrality as a core principle of Establishment Clause jurisprudence. In significant contrast to the majority opinion in *McCreary County*, however, Justice Breyer’s opinion in *Van Orden* treated such neutrality solely as a means of ensuring civil and political tranquility. The Establishment and Free Exercise Clauses, Justice Breyer wrote, “seek to avoid that divisiveness based upon religion that promotes social conflict, sapping the strength of government and religion alike” (slip opinion at 1).

In order to guard against such divisiveness, Justice Breyer argued, the government should maintain a posture of neutrality, neither favoring nor disfavoring any particular religion or religion generally. But neutrality, he continued, can itself become the agent of divisiveness, as would inevitably follow any attempt to “purge from the public sphere all that in any way partakes of the religious” (slip opinion at 2). The virtue of neutrality must be tempered with tolerance for some religious practices that might violate an absolutist view of church-state separation, Breyer wrote. Such tempering, he continued, cannot be reduced to any bright-line test; it demands the contextual “exercise of legal judgment” (slip opinion at 3).

Applying such judgment to the Texas monument case, Justice Breyer acknowledged the religious character of the Ten Commandments, and the legal scrutiny that should attend any publicly sponsored display of such texts. He balanced the text’s religious character, however, against the historical details of the monument’s donation by the Eagles, a “primarily secular” organization, along with the monument’s outdoor setting amidst a wide range of other markers that commemorate the “historical ideals of Texans” (slip opinion at 5).

One additional fact proved conclusive for Justice Breyer. “This display has stood apparently uncontested for nearly two generations,” he noted. “That experience helps us understand that as a practical matter of *degree* this display is unlikely to prove divisive” (slip opinion at 7). In other words, the Texas monument had generated almost none of the divisiveness that marked the entire history of the Ten Commandment displays at issue in *McCreary County*. Moreover, Justice Breyer reasoned, an order to remove the Texas monument — and the dozens of monuments like it across the country — would inevitably generate clashes, and “thereby create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid” (slip opinion at 7). Although he described the Texas monument as a “borderline case,” Justice Breyer’s concern for civil tranquility led him to the conclusion that leaving the monument in place was less religiously divisive than a judicial order to remove it.

## DISSENTING OPINIONS

In his dissenting opinion, which was joined by Justice Ginsburg, Justice Stevens responded directly to the plurality and to Justice Breyer’s “tempered” appraisal of the Texas monument. In response to the plurality’s recital of the Founders’ frequent invocations of religion, Justice Stevens suggested that such invocations should be distinguished from the public displays at issue in *Van Orden* and *McCreary County*. The plurality’s examples invariably reflect speeches, proclamations, letters or other pronouncements by public officials. In that respect, the messages are little different from the speeches and pronouncements of contemporary political leaders, Stevens noted. “The permanent placement of a textual religious display is different in kind” from officials’ messages, he argued. Public speeches by officials reflect the government’s voice only in part; “those oratories [also] have embedded with them the inherently personal views of the speaker as an individual member of the polity” (slip opinion at 17–18). However, a publicly displayed monument instead conveys the collective view of the government. Thus, Justice Stevens reasoned, the statements

of public officials that are central to the plurality's argument offer no precedent for permanent public displays of religious texts.

Justice Stevens directed the core of his dissent, however, against a claim central to Justice Breyer's concurrence: that a reasonable observer would view the monument as a statement of Texans' moral ideals, or as an acknowledgment of the historical significance of the Ten Commandments, and not primarily as a text stating religious tenets endorsed by the state. Justice Stevens found that conclusion implausible. Instead, he argued, a reasonable observer's perceptions would be dominated by the text itself, with its large heading "I AM the LORD thy God." The significance of the monument, Justice Stevens continued, cannot be determined apart from the substance of its text. And that text, he argued, strongly resists any characterization as a generic moral code or "passive" acknowledgment of a religious heritage, because it commands obedience to divinely prescribed norms and gives exclusively religious reasons and motives for such obedience. Given the religious character of the monument's text, the state faced a heavy burden to show its secular

justification for accepting and retaining the monument. In Justice Stevens' view, the state did not meet that requirement. Although the state may share the Eagles' desire to provide guidance that will "help wayward youths conform their behavior and improve their lives," the state may not use explicitly religious means — such as the text of the Ten Commandments — to achieve those ends (slip opinion at 9–10).

Justice Souter also wrote a dissenting opinion, arguing that the Texas monument is little different from the courthouse displays held unconstitutional in *McCreary County*. In both cases, he concluded, the government had failed to demonstrate a

predominantly secular motive for the displays. Justice O'Connor added a very brief dissent, in which she expressed agreement with Justice Souter and referred back to her concurring opinion in *McCreary County*.

### *Future Prospects for Public Displays of the Ten Commandments*

In light of Justice O'Connor's decision to leave the court and the prospect of other retirements in the near future, it is difficult to predict how a reconstituted Supreme Court would rule on other public displays of the Ten Commandments. Although it is unlikely that the court will take up a similar challenge in the near future, state and lower federal courts will almost certainly be confronted with constitutional challenges to such displays, and they will look to *McCreary County* and *Van Orden* for guidance.

Longstanding government displays of religious texts are far more likely to survive constitutional attack, especially if their surroundings are analogous to those of the Texas monument.

By its reasoning, the *McCreary County* majority acknowledged the possibility that some publicly sponsored displays of the Ten Commandments could withstand constitutional scrutiny. Such displays

must overcome a presumption of impermissible religious purposes, however. To meet that challenge, the government needs to do more than surround the Ten Commandments with secular texts or images. It must fit the Ten Commandments into a recognizably secular narrative, whether of history, philosophy, law or culture. Members of the court regularly point to the frieze in their building as an example of such a secular narrative: the border contains a number of historical lawgivers, including Moses, who holds tablets inscribed with numbers and Hebrew text.

The most important guide for future decisions could be found in Justice Breyer's concurring

opinion in *Van Orden*. Although Justice Breyer joined the majority opinion in *McCreary County*, and thus accepted Justice Souter's prescription for new displays, his *Van Orden* concurrence suggests that any new displays of the Ten Commandments face an uphill battle. In distinguishing the Texas monument from the Kentucky courthouse displays, Justice Breyer indicated that a display's settled history — or lack thereof — might be determinative. He wrote: "In today's world, in a nation of so many different religions and comparable nonreligious fundamental beliefs, a more contemporary state effort to focus attention upon a religious text is certainly likely to prove divisive in a way that this longstanding, pre-existing monument has not" (slip opinion at 7). New and recent displays, therefore, could find it difficult to pass constitutional scrutiny.

In contrast, longstanding government displays of religious texts are far more likely to survive constitutional attack, especially if their surroundings are analogous to those of the Texas monument. Older

displays that lack such context, and therefore focus the viewer more narrowly on the religious content of the text, may be more open to question. Even in these cases, however, Justice Breyer's concern about the divisive potential of litigation and judicial orders of removal may prove conclusive for many lower court judges.

Communities that have removed longstanding displays of the Ten Commandments pending the outcome of these two cases, and that now want to restore them, may present courts with the intriguing and open question of whether such displays should qualify as new or old. And communities may in the future choose to display religious texts with both content and historic legacy quite different from the Decalogue. In sum, like the Supreme Court's ambiguous decisions of the 1980s involving government displays of Christmas crèches and other symbols of religious holidays, *Van Orden* and *McCreary County* have by no means put to rest the issues raised by government support for religious messages.

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