Supplementary Material

Chapter 11: The Contemporary Era—Individual Rights/Religion/Establishment

McCreary County v. ACLU of Kentucky, 545 U.S. 844 (2005)

Governing officials in McCreary County were determined to post a copy of the Ten Commandments on the walls of the county courthouse. In 1999, McCreary County posted a gold-framed copy of the King James Version of the Decalogue. That fall, in response to a lawsuit initiated by the American Civil Liberties Union (ACLU), the county added eight small documents to the Ten Commandments display, all of which had religious overtones. They included President Reagan's Proclamation declaring 1983 the year of the Bible and the passage from the Declaration of Independence declaring that human beings are "endowed by their Creator" with certain inalienable rights. The federal district court was unmoved and ordered the displays removed from the courthouse. The county responded to this judicial defeat by making another attempt to post the Ten Commandments. This display consisted of nine documents of equal size and was entitled "The Foundation of American Law and Government Display." Materials included the King James Version of the Ten Commandments, the Magna Carta, the Mayflower Compact, and the lyrics of the Star Spangled Banner. The ACLU again filed a lawsuit, claiming that the display of the Ten Commandments violated the establishment clause of the First Amendment, as incorporated by the due process clause of the Fourteenth Amendment. The local federal district agreed the display was unconstitutional and that decision was affirmed by the Court of Appeals for the Sixth Circuit. McCreary County appealed to the Supreme Court.

The Supreme Court by a 5–4 vote ruled the display unconstitutional. Justice Souter's majority opinion asserted that the display of the Ten Commandments had no secular purpose. Why did he reach that conclusion? Why did the dissent disagree? Who had the better argument? Suppose that "The Foundation of American Law and Government Display" was the first effort that McCreary County made to display the Ten Commandments. Would the Supreme Court have made the same decision? To what extent should the court have based their decision on the reasonable inference that officials in McCreary County were determined to post the Ten Commandments one way or another?

McCreary County v. ACLU of Kentucky *was handed down on the same day that the Supreme Court decided* Van Orden v. Perry *(2005). Four justices insisted both displays were unconstitutional. Four believed both were constitutional. Justice Breyer who cast the decisive vote in both cases, was the only justice who distinguished between the two. We have excerpted Justice Breyer's concurring opinion in* Van Orden. *On what basis does he distinguish the two displays? Is his distinction sound?*

JUSTICE SOUTER delivered the opinion of the Court.

. . .

Twenty-five years ago in a case prompted by posting the Ten Commandments in Kentucky's public schools, this Court recognized that the Commandments "are undeniably a sacred text in the Jewish and Christian faiths" and held that their display in public classrooms violated the First Amendment's bar against establishment of religion. . . .

. . . The 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.

. . .

[*Lemon v. Kurtzman* (1971)] said that government action must have "a secular . . . purpose," and after a host of cases it is fair to add that although 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. . . .

. . .

The display rejected in *Stone v. Graham* (1980) had two obvious similarities to the first one in the sequence here: both set out a text of the Commandments as distinct from any traditionally symbolic representation, and each stood alone, not part of an arguably secular display. . . . The display in Stone had no context that might have indicated an object beyond the religious character of the text, and the Counties' solo exhibit here did nothing more to counter the sectarian implication than the postings at issue in *Stone*.

This is not to deny that the Commandments have had influence on civil or secular law; a major text of a majority religion is bound to be felt. The point is simply that the original text viewed in its entirety is an unmistakably religious statement dealing with religious obligations and with morality subject to religious sanction. When the government initiates an effort to place this statement alone in public view, a religious object is unmistakable.

In this second display, unlike the first, the Commandments were not hung in isolation, merely leaving the Counties' purpose to emerge from the pervasively religious text of the Commandments themselves. Instead, the 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. . . .

Today, the Counties make no attempt to defend their undeniable objective, but instead hopefully describe version two as "dead and buried." Their refusal to defend the second display is understandable, but the reasonable observer could not forget it.

. . . [A]lthough repeal of the earlier county authorizations would not have erased them from the record of evidence bearing on current purpose, the extraordinary resolutions for the second display passed just months earlier were not repealed or otherwise repudiated. Indeed, the sectarian spirit of the common resolution found enhanced expression in the third display, which quoted more of the purely religious language of the Commandments than the first two displays had done; for additions, ("I the LORD thy God am a jealous God") (text of Second Commandment in third display); ("the LORD will not hold him guiltless that taketh his name in vain") (text of Third Commandment); and ("that thy days may be long upon the land which the LORD thy God giveth thee") (text of Fifth Commandment). No reasonable observer could swallow the claim that the Counties had cast off the objective so unmistakable in the earlier displays.

Nor did the selection of posted material suggest a clear theme that might prevail over evidence of the continuing religious object. In a collection of documents said to be "foundational" to American government, it is at least odd to include a patriotic anthem, but to omit the Fourteenth Amendment, the most significant structural provision adopted since the original Framing. And it is no less baffling to leave out the original Constitution of 1787 while quoting the 1215 Magna Carta even to the point of its declaration that "fish-weirs shall be removed from the Thames."

[W]e do not decide that the Counties' past actions forever taint any effort on their part to deal with the subject matter. We 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 governmental purpose has changed should not carry the day in a court of law any more than in a head with common sense. . . .

. . .

[T]he principle of neutrality has provided a good sense of direction: the government may not favor one religion over another, or religion over irreligion, religious choice being the prerogative of individuals under the Free Exercise Clause. The principle has been helpful simply because it responds to one of the major concerns that prompted adoption of the Religion Clauses. The Framers and the citizens

of their time intended not only to protect the integrity of individual conscience in religious matters, but to guard against the civic divisiveness that follows when the government weighs in on one side of religious debate; nothing does a better job of roiling society, a point that needed no explanation to the descendants of English Puritans and Cavaliers (or Massachusetts Puritans and Baptists). . . .

. . .

. . . Today's dissent apparently means that government should be free to approve the core beliefs of a favored religion over the tenets of others, a view that should trouble anyone who prizes religious liberty. Certainly history cannot justify it; on the contrary, history shows that the religion of concern to the Framers was not that of the monotheistic faiths generally, but Christianity in particular, a fact that no Member of this Court takes as a premise for construing the Religion Clauses. . . . The Framers would, therefore, almost certainly object to the dissent's unstated reasoning that because Christianity was a monotheistic "religion," monotheism with Mosaic antecedents should be a touchstone of establishment interpretation. . . .

Historical evidence thus supports no solid argument for changing course (whatever force the argument might have when directed at the existing precedent), whereas public discourse at the present time certainly raises no doubt about the value of the interpretative approach invoked for 60 years now. We are centuries away from the St. Bartholomew's Day massacre and the treatment of heretics in early Massachusetts, but the divisiveness of religion in current public life is inescapable. This is no time to deny the prudence of understanding the Establishment Clause to require the Government to stay neutral on religious belief, which is reserved for the conscience of the individual.

. . .

JUSTICE O'CONNOR, concurring.

. . .

. . . Voluntary religious belief and expression may be as threatened when government takes the mantle of religion upon itself as when government directly interferes with private religious practices. When the government associates one set of religious beliefs with the state and identifies nonadherents as outsiders, it encroaches upon the individual's decision about whether and how to worship. In the marketplace of ideas, the government has vast resources and special status. Government religious expression therefore risks crowding out private observance and distorting the natural interplay between competing beliefs. Allowing government to be a potential mouthpiece for competing religious ideas risks the sort of division that might easily spill over into suppression of rival beliefs. Tying secular and religious authority together poses risks to both.

. . .

JUSTICE SCALIA, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, and with whom JUSTICE KENNEDY joins in part, dissenting.[1]

. . .

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. The "fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself." . . .

Nor have the views of our people on this matter significantly changed. Presidents continue to conclude the Presidential oath with the words "so help me God." Our legislatures, state and national, continue to open their sessions with prayer led by official chaplains. The sessions of this Court continue to open with the prayer "God save the United States and this Honorable Court." Invocation of the

[1] (footnote by editors) Justice Kennedy did not join Justice Scalia's criticism of neutrality or his claim that the Establishment Clause permitted the government to endorse monotheism.

Almighty by our public figures, at all levels of government, remains commonplace. Our coinage bears the motto, "IN GOD WE TRUST." And our Pledge of Allegiance contains the acknowledgment that we are a Nation "under God." As one of our Supreme Court opinions rightly observed, "We are a religious people whose institutions presuppose a Supreme Being." . . .

With all of this reality (and much more) staring it in the face, how can the Court possibly assert that the "'First Amendment mandates governmental neutrality between . . . religion and nonreligion,' " and that "[m]anifesting a purpose to favor . . . adherence to religion generally" is unconstitutional? Who says so? Surely not the words of the Constitution. Surely not the history and traditions that reflect our society's constant understanding of those words. . . .

. . .

Besides appealing to the demonstrably false principle that the government cannot favor religion over irreligion, today's opinion suggests that the posting of the Ten Commandments violates the principle that the government cannot favor one religion over another. That is indeed a valid principle where public aid or assistance to religion is concerned or where the free exercise of religion is at issue, but it necessarily applies in a more limited sense to public acknowledgment of the Creator. If religion in the public forum had to be entirely nondenominational, there could be no religion in the public forum at all. One cannot say the word "God," or "the Almighty," one cannot offer public supplication or thanksgiving, without contradicting the beliefs of some people that there are many gods, or that God or the gods pay no attention to human affairs. 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. . . .

Historical practices thus demonstrate that there is a distance between the acknowledgment of a single Creator and the establishment of a religion. . . . The three most popular religions in the United States, Christianity, Judaism, and Islam—which combined account for 97.7% of all believers—are monotheistic. All of them, moreover (Islam included), believe that the Ten Commandments were given by God to Moses, and are divine prescriptions for a virtuous life. Publicly honoring the Ten Commandments is thus indistinguishable, insofar as discriminating against other religions is concerned, from publicly honoring God. Both practices are recognized across such a broad and diverse range of the population—from Christians to Muslims—that they cannot be reasonably understood as a government endorsement of a particular religious viewpoint.

. . .

I have urged that *Lemon v. Kurtzman*'s (1971) purpose prong be abandoned, because even an exclusive purpose to foster or assist religious practice is not necessarily invalidating. But today's extension makes things even worse. By shifting the focus of *Lemon*'s purpose prong from the search for a genuine, secular motivation to the hunt for a predominantly religious purpose, the Court converts what has in the past been a fairly limited inquiry into a rigorous review of the full record. Those responsible for the adoption of the Religion Clauses would surely regard it as a bitter irony that the religious values they designed those Clauses to protect have now become so distasteful to this Court that if they constitute anything more than a subordinate motive for government action they will invalidate it.

Even accepting the Court's Lemon-based premises, the displays at issue here were constitutional.

On its face, the Foundations Displays manifested the purely secular purpose that the Counties asserted before the District Court: "to display documents that played a significant role in the foundation of our system of law and government." . . . That the displays included the Ten Commandments did not transform their apparent secular purpose into one of impermissible advocacy for Judeo-Christian beliefs. Even an isolated display of the Decalogue conveys, at worst, "an equivocal message, perhaps of respect for Judaism, for religion in general, or for law." . . . But when the Ten Commandments appear alongside other documents of secular significance in a display devoted to the foundations of American law and government, the context communicates that the Ten Commandments are included, not to teach their binding nature as a religious text, but to show their unique contribution to the development of the legal system. This is doubly true when the display is introduced by a document that informs passersby that it "'contains documents that played a significant role in the foundation of our system of law and government.'"

Acknowledgment of the contribution that religion has made to our Nation's legal and governmental heritage partakes of a centuries-old tradition. Members of this Court have themselves often detailed the degree to which religious belief pervaded the National Government during the founding era. Display of the Ten Commandments is well within the mainstream of this practice of acknowledgment. Federal, state, and local governments across the Nation have engaged in such display. The Supreme Court Building itself includes depictions of Moses with the Ten Commandments in the Courtroom and on the east pediment of the building, and symbols 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." . . . The frequency of these displays testifies to the popular understanding that the Ten Commandments are a foundation of the rule of law, and a symbol of the role that religion played, and continues to play, in our system of government.

. . .

By virtue of details familiar only to the parties to litigation and their lawyers, McCreary and Pulaski Counties, Kentucky, and Rutherford County, Tennessee, have been ordered to remove the same display that appears in courthouses from Mercer County, Kentucky, to Elkhart County, Indiana. Displays erected in silence (and under the direction of good legal advice) are permissible, while those hung after discussion and debate are deemed unconstitutional. Reduction of the Establishment Clause to such minutiae trivializes the Clause's protection against religious establishment; indeed, it may inflame religious passions by making the passing comments of every government official the subject of endless litigation.

. . .

[T]there was no reason for the Counties to repeal or repudiate the resolutions adopted with the hanging of the second displays, since they related only to the second displays. After complying with the District Court's order to remove the second displays "immediately," and erecting new displays that in content and by express assertion reflected a different purpose from that identified in the resolutions, the Counties had no reason to believe that their previous resolutions would be deemed to be the basis for their actions. After the Counties discovered that the sentiments expressed in the resolutions could be attributed to their most recent displays (in oral argument before this Court), they repudiated them immediately.

. . . The Court may well be correct in identifying the third displays as the fruit of a desire to display the Ten Commandments, but neither our cases nor our history support its assertion that such a desire renders the fruit poisonous.