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Two Decisions, Two Worldviews –The Ten Commandments Cases

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The cases originated in Kentucky and Texas, and the particulars of the two cases differ in significant ways–at least according to a majority of the justices. In Kentucky, two counties had moved to display the Ten Commandments, along with other documents, in 1999. Controversy quickly ensued, and lawsuits were filed claiming that the displays represented an unconstitutional establishment of religion. In Texas, a monument that included the text of the Ten Commandments had stood for 40 years on the grounds of the Texas Capitol. The original plaintiff in that case charged that passing by the monument with the Ten Commandments represented a violation of his own constitutional rights.

Both decisions saw the Court divided five to four, though some justices switched sides from one case to the other. The Court ruled that the Kentucky displays must be removed, since those particular displays were, the justices argued, the result of a religiously motivated purpose. The Texas monument was allowed to stay because the justices ruled that this particular monument did not represent an unconstitutional establishment of religion. Taken together, the two decisions sent a decidedly mixed signal. Adding further confusion, the Court asserted that displays including explicitly religious texts, such as the Ten Commandments, must be scrutinized on a case-by-case basis. Thus, the lawyers are likely to be busy for many years to come.

The justice who played the deciding role in both decisions was Justice Stephen Breyer. Writing a concurring opinion in the Texas case, Justice Breyer argued that legal judgment was required in the "difficult borderline cases" that rest on particular facts, rather than generalized principles. In other words, Justice Breyer argued that the judges must use their own judgment and intuition in order to determine whether or not a particular display violates constitutional principle.

Oddly enough, Justice Breyer asserted that the "determinative" issue in the Texas case was the fact that four decades had passed "in which the presence of this monument, legally speaking, went unchallenged." He compared this to the Kentucky case, in which controversy had emerged even before the documents had been displayed.

Justice Breyer's legal theory merits closer scrutiny. The obvious problem with his argument is the fact that he would be unwilling to apply the same theory in similar cases. His thesis is that many years of no controversy indicates, by his "legal judgment," that the expression or display serves a secular purpose. What about school prayer? Public prayer was allowed in public schools for many decades–far longer than the Texas monument has existed–and yet Justice Breyer would be very unlikely, to say the least, to argue that a long period lacking in controversy in that case should be similarly

interpreted.

Elsewhere, Justice Breyer argued: “In certain contexts, a display of the tablets of the Ten Commandments can convey not simply a religious message but also a secular moral message (about proper standards of social conduct). And in certain contexts, a display of the tablets can also convey a historical message (about a historic relation between those standards and the law)–a fact that helps to explain the display of those tablets in dozens of courthouses throughout the Nation, including the Supreme Court of the United States.”

A similar argument seemed to serve as something of a foundation for the seven other written opinions.

In his majority opinion in the Kentucky case, Justice David Souter ventured into psychology. Holding that the Kentucky displays were unconstitutional, Souter wrote: “We hold that the counties’ manifest objective may be dispositive of the constitutional inquiry, and that the development of the presentation should be considered when determining its purpose.”

The county governments’ “manifest objective” is thus a matter of the Court’s interpretation, along with “the development of the presentation.” This means that the Court–at least as represented by its majority–considers itself competent to judge the motivations of the parties involved, even though this may have no bearing upon the actual nature of the display.

As usual, Justice Antonin Scalia was scathing in his dissent. In his dissenting opinion released in the Kentucky case, Justice Scalia argued that the Court’s argument “that the government cannot favor religious practice is false.” Furthermore, he argued that the majority’s opinion “extends the scope of that falsehood even beyond prior cases,” and that “even on the basis of the Court’s false assumptions the judgment here is wrong.”

Scalia’s argument reaches far beyond the Kentucky and Texas cases. He holds that the Court has developed an open hostility to religious expression that warps its constitutional interpretation. Furthermore, he argues that this is a recent and unfounded development.

“Nothing stands behind the Court’s assertion that governmental affirmation of the society’s belief in God is unconstitutional except the Court’s own say-so, citing as support only the unsubstantiated say-so of earlier Courts going back no farther than the mid-20th century,” he asserted.

As he continued, Scalia argued that the Court’s “brain-spun” test for religious establishment has left a wake of confusion. The justice argued that “the Court has not had the courage (or the foolhardiness) to apply the neutrality principle consistently.”

In a devastating passage, Scalia points to the root of the problem with the majority opinion. “What distinguishes the rule of law from the dictatorship of a shifting Supreme Court majority is the absolutely indispensable requirement that judicial opinions be grounded in consistently applied principle. That is what prevents judges from ruling now this way, now that–thumbs up or thumbs down–as their personal preferences dictate. Today’s opinion forthrightly (or actually, somewhat less than forthrightly) admits that it does not rest upon consistently applied principle.”

Groups on both sides of the controversy claimed some form of victory. Jay Sekulow, chief counsel for the American Center for Law and Justice [ACLJ] expressed satisfaction that the Court had allowed the Texas monument to stay. “It is very encouraging that the Supreme Court understands the historical and legal significance of displaying the Ten Commandments and moved to protect thousands of monuments now in place across America,” he said. At the same time, he expressed lament that “the High Court’s decision in the Kentucky case is likely to create more questions and confusion in this area of church/state law.”

The liberal group People for the American Way [PAW] claimed victory, pointing to what it described as an “affirmation of the constitutional principle of government neutrality toward religion.” People for the American Way Foundation President Ralph G. Neas said: “While we disagree with how the Court applied that principle to the facts in Texas, we are very pleased that that Court has rejected efforts to dismantle church-state separation.” The American Civil Liberties Union [ACLU] released a statement arguing that the Court’s decision in the Kentucky case “contains some of the Court’s most powerful language in years on the question of the government’s role in religion and society.”

In the end, the two decisions settled very little. The Court established no clear test for determining the constitutionality of Ten Commandments displays, and the contorted and shifting arguments contained in the various written opinions offer what can only be described as contradictory principles. The decision threatens to unleash a virtually endless torrent of lawsuits and court challenges to displays that contain any religious symbols or content.

Sadly, the decisions seem to represent an extension of secularism as America's established faith. It is hard to disagree with Justice Scalia when he asserts that the Kentucky decision "ratchets up this Court's hostility to religion."

Regardless of the Court's arguments, no serious person can deny that the Ten Commandments are foundational to the Western system of law. The foundation of our legal system was not established in the *Upanishads*, the *Bhagavad Gita* or the writings of Confucius. Modern Western civilization emerged from an explicitly Christian context, and the Ten Commandments–representing the law as handed down by God–were understood to undergird the law as established by men and governments.

The public display of the Ten Commandments is no substitute for the church's responsibility to teach and preach the Word of God and to bear witness to the Gospel of the Lord Jesus Christ. Of all people, Christians must understand that our allegiance to the Ten Commandments is not based in a secular principle, nor do we admire the Ten Commandments for their secular content.

Nevertheless, we must understand that these decisions, taken together, represent more government hostility toward religious expression–even in the form of a public acknowledgement of the historical influence of the Ten Commandments. We won't have to wait long to see where the Court will go from here–even more Ten Commandments cases are already on the way.

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