



THE PEW  
FORUM  
ON RELIGION  
& PUBLIC LIFE

# A Monumental Decision

## Supreme Court Considers Constitutionality of Ten Commandments Displays on Public Property

On March 2, 2005, the Supreme Court will hear oral arguments in *Van Orden v. Perry* (No. 03-1500) and *McCreary County v. American Civil Liberties Union of Kentucky* (No. 03-1693). The two cases involve challenges to several government-sponsored displays of the Ten Commandments. Those who are bringing the challenges contend that these displays amount to governmental endorsement of the Ten Commandments' religious message, and that such an endorsement violates the Establishment Clause of the First Amendment. Those who defend the displays argue that they reflect the government's constitutionally legitimate acknowledgment of the Ten Commandments' significant role in the development of American law and government.

In *Van Orden*, the U.S. District Court for the Western District of Texas rejected Thomas Van Orden's challenge to the presence on the State Capitol grounds of a stone monument inscribed with the Ten Commandments. The monument in question was given to the state of Texas in 1961 by the Fraternal Order of Eagles, which donated similar monuments to states and localities across the country during the 1950s and 1960s in an effort to provide young people with a code of moral conduct. Cecil B. DeMille, director of the film "The Ten Commandments" (1956), supported the Eagles in distributing the monuments. The monuments were inscribed with a version of the Ten Commandments developed with the cooperation of Protestant, Catholic and Jewish groups, which has led a number of courts to describe the text as "nonsectarian." In addition to the Commandments, the monument is inscribed with several patriotic and religious symbols, including the Star of David and the Greek letters Chi and Rho, which Christians use to represent Jesus Christ.

The Texas monument is located on the 22-acre Capitol grounds, along with 16 other statues or memorials that commemorate significant people and events in Texas history. In rejecting Van Orden's claim, the district court held that the state had accepted the display in order to honor the Eagles' work with young people, and to commend the secular moral code contained in the Commandments. Van Orden appealed the decision to the U.S. Court of Appeals for the Fifth Circuit, and, on November 12, 2003, a three-judge panel of that court affirmed the lower court's decision. Van Orden then successfully petitioned the U.S. Supreme Court to hear the case in its 2004-05 term.

In *McCreary County*, the U.S. District Court for the Eastern District of Kentucky held unconstitutional displays containing the Ten Commandments that had been placed in two counties' courthouses and another county's schools (the schoolhouse displays are

## LEGAL BACKGROUND

not before the Supreme Court in this case). In 1999, officials in McCreary and Pulaski Counties posted in their courthouses framed copies of the Ten Commandments, using the King James Version of the text. The counties' posting of the Ten Commandments was part of a nationwide effort by a coalition of groups, primarily evangelical Protestants, to encourage public display of the Commandments. The most visible of these efforts was that of Alabama Judge Roy Moore, who eventually lost his position as chief justice of the Alabama Supreme Court when he refused to obey a court order to remove a two-ton monument of the Commandments that he had placed in that court's rotunda.

The displays at issue in *McCreary County* were modified several times during the course of the litigation. When the plaintiffs first sued to have the Commandments removed, the counties expanded the displays to include several additional documents, each of which emphasized the important role of religion in American history and law. After the district court ordered the counties to remove the modified displays, the counties again altered the exhibits, this time adding eight documents, of the same size and framing as the Commandments text, collectively labeled "The Foundations of American Law and Government Display." In addition to the Ten Commandments, the exhibits include the Star Spangled Banner, the Declaration of Independence, the Mayflower Compact, the Bill of Rights, the Magna Carta, the National Motto, the Preamble to the Kentucky Constitution, Lady Justice and a one-page document explaining the display.

The district court held that the addition of secular materials to the exhibits did not alter the religious character of the Ten Commandments, and ordered the Commandments removed. The counties appealed, and a three-judge panel of the U.S. Court of Appeals for the Sixth Circuit upheld

the lower court's ruling. In a sharply divided opinion, issued on December 18, 2003, the court found that the counties had displayed the Ten Commandments to achieve religious rather than secular purposes, and thus held that the displays violated the Establishment Clause. The counties petitioned the U.S. Supreme Court, which agreed to hear the case in its 2004–05 term.

*Van Orden* and *McCreary County* offer the Supreme Court the opportunity to clarify its approach to a controversial question: Under what circumstances may the government sponsor the display of religious messages or objects? The Court's resolution of these cases will strongly influence future decisions on the constitutionality of government-sponsored holiday exhibits, the presence of religious expressions in official seals and mottoes, and the use of religious language in otherwise civic ceremonies such as reciting the Pledge of Allegiance.

## Constitutional Backdrop

The Supreme Court comes to *Van Orden* and *McCreary County* with a thick body of precedent applying the Establishment Clause to government sponsorship of religious displays. One of those decisions, *Stone v. Graham* (1980), directly addresses a government-sponsored display of the Ten Commandments. In *Stone*, the Court struck down a Kentucky statute that required public schools in the state to post a copy of the Ten Commandments in every classroom. The majority opinion relies heavily on a test drawn from the Court's decision in *Lemon v. Kurtzman* (1971), which asks: (1) whether the government lacked a bona fide secular purpose for engaging in the challenged action; (2) whether the primary effect of that action either "advances or inhibits religion"; and (3) whether the action excessively entangles the government with religion. If the answer to any of the three inquiries is in the affirmative, the challenged action violates the Establishment Clause. Recognizing the *Lemon* standard, the Kentucky legislature asserted

that the statute was designed to show students the secular importance of the Ten Commandments as “the fundamental legal code of Western Civilization and the Common Law of the United States.” The majority rejected that assertion and held that the statute lacked a plausible secular purpose for posting on classroom walls what the Court saw as “undeniably a sacred text.”

Then-Associate Justice William H. Rehnquist dissented, disagreeing with the majority’s refusal to defer to the Kentucky legislature’s avowed secular purpose for the statute. Even though the Decalogue is a sacred text and its posting may serve religious ends, Justice Rehnquist argued, the Ten Commandments also have an “undeniable” secular significance for the development of American law. Furthermore, he wrote, display of the Ten Commandments in Kentucky classrooms legitimately informs students of that significance. The Establishment Clause, Justice Rehnquist added, should not be read to require the government to ignore the secular, historical importance of religious ideas and movements simply because of their religious character.

In the decade following *Stone*, two decisions involving holiday displays sharpened and amplified the divergent approaches within the Court to the Establishment Clause. In *Lynch v. Donnelly* (1984), the city of Pawtucket, Rhode Island, created and maintained a Christmas display that included an array of objects and decorations, from Santa and a Christmas tree to cutout figures of a clown and elephant. The display also included a crèche (a Nativity scene portraying the birth of Jesus). The plaintiffs claimed that the city’s exhibition of the Christmas display, and especially the crèche, violated the Establishment Clause.

By a vote of five to four, the Supreme Court held that the Christmas display did not constitute an establishment of religion. Writing for the majority, Chief Justice Warren E. Burger reasoned that “there is an unbroken history of official acknowl-

edgment by all three branches of government of the role of religion in American life since 1789.” This unbroken history, he argued, suggests that the Establishment Clause should not be read to require the exclusion of religious images and messages from government-supported or -controlled displays. The majority found that the Christmas holiday had sufficient secular importance to justify the city’s support for the display, and that the city had included the crèche in the display to “depict the historical origins of this traditional event” rather than to express official support for any religious message that might be conveyed by its presence.

In dissent, Justice William J. Brennan scrutinized the city’s reasons for including the crèche, and found them constitutionally deficient. He argued that the city failed to demonstrate a “clearly secular purpose” for including the crèche because the other, non-religious objects were more than sufficient to achieve the city’s legitimate goals of encouraging goodwill and commerce. The crèche was added, Justice Brennan reasoned, because city officials desired to “keep Christ in Christmas.” He concluded that such a governmental objective, which aims to advance a particular faith, is fundamentally inconsistent with the core requirements of the Establishment Clause: to ensure official neutrality among religions and between religion and non-religion, and to separate the institutions of government from religious activity.

In a concurring opinion, Justice Sandra Day O’Connor offered a novel perspective from which to understand the Establishment Clause. Unlike the *Lynch* majority and dissent, which focused primarily on the perspectives of government officials, she put forth an approach that focused primarily on the perspective of an ordinary citizen. Justice O’Connor’s view, known now as the “endorsement test,” derives from her claim that “the Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person’s standing in the political community.” Either official endorsement or disapproval of religion, Justice

O'Connor argued, elevates some to special status because their beliefs have been officially recognized, and excludes from full membership those whose beliefs have not been sanctioned. Thus, courts should ask whether a reasonable person would view the government's actions as an endorsement of religion. Based on the facts presented in *Lynch*, Justice O'Connor concluded that a reasonable observer would not view the city's inclusion of a crèche in its Christmas display as an endorsement of Christianity. Such a person, she reasoned, would see the crèche amid all the secular artifacts of the holiday and perceive it as another "traditional symbol of the holiday."

Five years after *Lynch*, the Court returned to the question of government-sponsored religious displays in *County of Allegheny v. ACLU* (1989). The Allegheny County case involved two different displays in downtown Pittsburgh: a crèche placed on the "Grand Staircase" of the county courthouse, and a display outside a city office building that included a menorah, a Christmas tree and a sign proclaiming the city's "salute to liberty." In a splintered decision, the Court held unconstitutional the crèche display but approved the outside exhibit.

Justice Anthony Kennedy, in an opinion joined by Chief Justice Rehnquist and Justices Antonin Scalia and Byron White, concurred in the Court's decision to permit the display with the menorah, the Christmas tree and the liberty sign, but dissented from the majority's holding with respect to the crèche. Justice Kennedy's opinion elaborates the core theme advanced by the *Lynch* majority and by Justice Rehnquist's dissent in *Stone*. Contemporary interpretations of the Establishment Clause, he argued, must be consistent with the Clause's history, and that history discloses a continuing pattern of positive interaction between government and religion. To ignore that history is to manifest a "latent hostility to religion." Unless government has coerced someone to support or participate in religion, or has provided excessive direct support for religion, Justice Kennedy reasoned, the govern-

ment should have significant latitude to provide "flexible accommodation and passive acknowledgment" of religion. Justice Kennedy concluded that because the crèche and the display with the menorah, the Christmas tree and the liberty sign involved neither coercion nor excessive support, but only the government's "passive acknowledgment" of religious traditions, the displays did not violate the Establishment Clause.

In sharp contrast to Justice Kennedy's approach, Justice John Paul Stevens argued that neither display should have survived scrutiny under the Establishment Clause. In an opinion joined by Justices William Brennan and Thurgood Marshall, Justice Stevens argued that the two displays shared the same flaw — the official recognition of religion. Whether that recognition touches one, some or all religions, he reasoned, the Establishment Clause bars any law or official action "respecting religion." As such, religious symbols should be excluded from public displays unless the symbols are fully integrated into an unambiguously secular message. Justice Stevens gave as an example the Court's own frieze, which includes the figure of Moses holding the Ten Commandments. If Moses were the sole figure in a display, Stevens wrote, the message conveyed by the display would be "equivocal...perhaps of respect for Judaism, for religion in general, or for law." Because its message would be equivocal, he argued, the display would not meet the requirements of the Establishment Clause. Surrounded by secular and other religious lawgivers, however, the display "signals respect not for proselytizers but for great lawgivers," Stevens wrote. Such a display would satisfy the Establishment Clause standard because the official message conveyed by the display was unambiguously secular.

The remaining opinions in *Allegheny County* reveal a development of Justice O'Connor's endorsement test, in which the Establishment Clause inquiry turns on whether a reasonable observer would perceive the challenged governmental action as official endorsement or disapproval of religion. Justice O'Connor

explained the highly contextual character of the endorsement analysis as a check on any anti-religious hostility that might result from a too-restrictive approach to the Establishment Clause. “The Court has avoided drawing lines which entirely sweep away all government recognition and acknowledgment of the role of religion in the lives of our citizens,” she wrote, “for to do so would exhibit not neutrality but hostility to religion. Instead, the courts have made case-specific examinations of the challenged government actions...” Justice O’Connor asserted that although history “does not itself validate” government practices, such history “is relevant because it provides part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion.”

As applied to the two displays at issue in *Allegheny County*, Justice O’Connor concluded that the crèche represented an unconstitutional endorsement of Christianity. The crèche had been displayed by itself in the “most beautiful” location within the “seat of county government,” surrounded only by flowers and a sign that read “Glory to God in the Highest.” In contrast, the outside display, which included the menorah, Christmas tree and liberty sign, did not represent an endorsement of religion. Although she acknowledged the religious character of the menorah and the partial religious character of the Christmas tree, she argued that a reasonable observer would see in that holiday display a message of religious tolerance and diversity, without any disapproval of those who do not believe.

In the 16 years since *Allegheny County*, the Court has not decided a case involving government sponsorship of religious displays. During that time, the Court has significantly reduced the constitutional limits on the government’s ability to provide financial assistance to religious entities or activities, most notably in the Cleveland voucher case (*Zelman v. Simmons-Harris*, 2002). The Court has continued, however, to hold unconstitutional officially sponsored prayers at public school functions, including commencements

(*Lee v. Weisman*, 1993) and sporting events (*Santa Fe Independent School District v. Doe*, 2000).

The litigants in *Van Orden* and *McCreary County* face essentially the same three judicial approaches that were reflected in the *Allegheny County* opinions. Chief Justice Rehnquist and Justices Kennedy, Scalia and Clarence Thomas will likely focus on the government’s wide latitude under the Establishment Clause to acknowledge the importance of religion in American history and life, especially where such acknowledgments are deemed passive and non-coercive. Justices Stevens, David H. Souter and Ruth Bader Ginsburg will likely advocate a categorical prohibition on acts that officially recognize religion. Such a prohibition would not bar all official displays of the Ten Commandments, but it would dramatically restrict their number and contexts. Finally, Justice O’Connor, and perhaps Justice Stephen G. Breyer, will likely apply a highly fact-specific or “contextualist” test, which requires close attention to the details of the settings in which the Ten Commandments displays are viewed. Given this map of the Court’s most probable approaches to the core issue raised in *Van Orden* and *McCreary County*, it should come as no surprise that the litigants have devoted significant attention to addressing Justice O’Connor’s framework and concerns. Neither side is likely to prevail without her vote.

## The Case

A close reading of the Court’s prior Establishment Clause decisions allows one to predict, with a fair degree of confidence, the analyses most justices will apply in *Van Orden* and *McCreary County*. Predicting the contextualist analysis in these cases is much more difficult, although it is possible to identify several aspects of the challenged displays that a contextualist is likely to consider significant.

### THE STEVENS GROUP

Justices Stevens, Souter and Ginsburg will almost certainly vote to hold unconstitutional the displays

in both *Van Orden* and *McCreary County*. These justices closely scrutinize the justifications given by any public official for state sponsorship of religious messages. In these cases, they will treat very skeptically the defendants' claim that the displays are only intended to acknowledge the Ten Commandments' significance in the development of American law. They will demand a more detailed historical justification for how the Ten Commandments are the foundation of our legal tradition; they will not simply accept the government's assertion of that foundational status.

Another, closely related aspect of this skepticism will focus on the defendants' intent to "acknowledge" rather than "endorse" religion. For this group of justices, such acknowledgments of historical facts translate too readily into state affirmations of religious truth. In *Zorach v. Claiborn* (1952), Justice William O. Douglas wrote that "we are a religious people whose institutions presuppose a Supreme Being," a line that is regularly quoted as an example of an "acknowledgment" of religion. But some would argue that the word "presuppose" implies more than a recognition of historical importance; in their view it implies that the state continues to depend on God for its authority or legitimacy. For them, government must stay well away from any message that might amount to a profession of religious faith. Any acknowledgment of religion that is not closely circumscribed within an unambiguously secular context presents too great a risk of crossing that line.

This group also will focus on the religious text that is at the heart of the challenged displays. In 2001, Justice Stevens wrote a short opinion explaining the Court's decision not to review a ruling by the Seventh Circuit in *Elkhart v. Books*, which had held unconstitutional a city's display of a monument virtually identical to the one in *Van Orden*. Justice Stevens highlighted the words that appeared at the head of the monument's engraved text, in a font larger than the others: "THE TEN COMMANDMENTS — I AM the LORD thy GOD." For Justice Stevens,

this language established that all of the commandments were to be read as a set of religious obligations, commanded by a particular God. He also rejected the claim by defenders of the monument that the text was "nonsectarian." The fact that some Christians and Jews might agree on the wording of a command from a God they both worship does not make that wording nonsectarian, and certainly does not make the language any less religious, he argued. Justices Stevens, Souter and Ginsburg are likely to apply the same analysis to the versions of the Ten Commandments displayed in *Van Orden* and *McCreary County*. They also may focus on the history of interdenominational and interfaith conflicts that have surrounded the King James Version used in the *McCreary County* displays. Such historical conflicts underscore their concern that greater involvement of government in and with religion will ultimately lead to more civil conflicts, with great harm to both government and religion.

## THE REHNQUIST GROUP

Justices Rehnquist, Kennedy, Scalia and Thomas will almost certainly vote to uphold the constitutionality of the challenged displays. In sharp contrast with the Stevens group's attitude of skepticism about government officials' purposes, these justices adopt an attitude of considerable deference to choices and claims made by elected officials. This deference leads them to accept at face value public officials' assertions of the secular purposes for taking actions that touch on religion. For them, those who challenge such actions have a heavy burden of showing that the asserted purposes are fraudulent.

In the context of these cases, their attitude of deference will almost certainly lead them to accept the secular purposes asserted by the officials in both cases. Even though historical claims about the Ten Commandments' importance to American law are disputed, this group believes that courts are bound to accept officials' good-faith claims in the absence of proof that the claims are fraudulent. Plaintiffs in these cases, they will argue, have not met that burden of proof.

Moreover, the Rehnquist group accepts as constitutionally appropriate a quite robust understanding of government's ability to acknowledge the importance of religion in American life, whether that importance is defined in historical or contemporary terms. For them, the limit of deference is reached only when officials pressure individuals to accept or reject religion, or provide such heavy support to a particular religion that the government can be fairly accused of "proselytizing" for that faith. The Ten Commandments displays at issue in these cases, they will likely argue, do not present such dangers.

Finally, and of special importance to Justice Kennedy, the displays are not located in public schools. In contrast to the Decalogues struck down in *Stone*, these displays are not aimed at impressionable children; instead, their primary audiences are adults. Nor can they be fairly characterized as coercive. Adults are free to read them or ignore them as they see fit. Moreover, the displays do not provide the kind of support to a specific faith that might implicate the state in proselytizing. Instead, according to this line of reasoning, governmental support amounts only to the placement on public property of a well-recognized and widely accepted statement of belief and moral conduct.

## THE O'CONNOR GROUP

Justices O'Connor and Breyer are less predictable than the other justices on the Court. Nevertheless, it is possible to describe the factors that they might find most important.

In her concurrence in last year's Pledge of Allegiance decision (*Elk Grove v. Newdow*, 2004), Justice O'Connor defined the endorsement test as an examination of "whether the [challenged] ceremony or representation would convey a message to a reasonable observer, familiar with its history, origin, and context, that those who do not adhere to its literal message are political outsiders." In making this determination, Justice O'Connor wrote, a judge must examine the "history and ubiquity" of the challenged message, whether the

message involves "worship or prayer," whether the message refers to a particular religion and the extent of religious content in the message.

Some aspects of the display in *Van Orden* could lead a contextualist, such as Justice O'Connor, to find it constitutionally appropriate. For one thing, these monuments, unlike those at issue in *McCreary*, were not added in response to litigation seeking to remove the Ten Commandments. Furthermore, the Texas Ten Commandments monument has been in place for over 40 years, so a reasonable observer might perceive the Texas monument as a statement of cultural assumptions of that era, and perhaps even recognize the donors' intent to honor Jewish and Christian understandings of the text. The monument's setting on the Capitol grounds reinforces this interpretation. Since other monuments, including one honoring the Confederacy, are not likely to be perceived as expressions of the current government, the reasonable observer may not regard the Eagles' monument as a state-endorsed religious message.

In other respects, however, the Texas monument appears more troubling from a contextualist perspective. As Justice Stevens noted in *Elkhart v. Books* (2001), the monument's text is subordinate to a prominent religious claim: "I AM the LORD thy GOD." Such a message more closely resembles a command of worship than a generic reference to the historical importance of religion in American life or law. This characterization is reinforced by the text of the first three commandments, which comprise a significant part of the overall display and enjoin the reader to shun idolatry, to avoid improper use of the holy name and to observe the Sabbath. Despite the donors' attempt to make the text "nonsectarian," these commands are not the words of a generic, "ceremonial deism," such as Justice O'Connor found in the words "under God" in the Pledge of Allegiance. Instead they refer to a particular set of religious traditions and divinely ordained obligations. Moreover, the monument's placement, among the other statues and memorials widely dispersed on the Capitol grounds,

may not provide a sufficiently “secularizing” setting to negate the religious character of the Ten Commandments text.

O’Connor’s approach to the *McCreary County* displays may be similarly ambivalent. On the one hand, the Kentucky displays attempt to place the Ten Commandments within the context of a broader exhibit of foundational texts, both religious and secular. As part of the display, the Ten Commandments text is treated as one among a number of equally significant documents, with each presented in frames and type of roughly the same size. In this setting, a reasonable observer might be less likely to see the Ten Commandments as a state-endorsed command to worship a particular God in a particular way, and somewhat more likely to see the text as an historic artifact.

Other features of the Kentucky displays, however, might lead O’Connor to hold them unconstitutional. Although the Ten Commandments text is contained within a broader display, the display itself is situated in a courthouse, a setting that implies strong governmental support for the message presented — similar to the crèche at issue in *Allegheny County*. Moreover, the reasonable observer might know of the context in which the Ten Commandments displays were introduced to the courthouses. By initially posting only the Ten Commandments, then expanding the display to

include only documents that made reference to the importance of religion, the officials’ acts may have communicated to an observer an intent to promote religion over non-religion, and, more specifically, to promote the specific faith manifest in the King James Version of the Commandments. Moreover, the *McCreary County* displays are quite recent, and thus perhaps may lose the benefits of historical validation that can be claimed by the defenders of the Texas monument.

## Conclusion

In *Van Orden* and *McCreary County*, the constitutionality of government displays of the Ten Commandments will very likely be determined by the contextualists’ judgment and deciding votes. Justice O’Connor defends her contextualism as the most appropriate balance between respect for the religious sentiments of the majority and protection for the liberties of religious minorities and non-believers. Perhaps she is correct; but this approach has its own costs, as the last 15 years of litigation in the lower courts over holiday displays have shown. If determining the constitutionality of such displays, whether of holiday religious symbols or texts like the Ten Commandments, depends on considering the “unique circumstances” of each display, controversies of this type will remain a recurrent feature of our law and public life.

*Released on February 24, 2005*



THE PEW  
FORUM  
ON RELIGION  
& PUBLIC LIFE

THE PEW FORUM ON RELIGION & PUBLIC LIFE DELIVERS TIMELY, IMPARTIAL INFORMATION TO NATIONAL OPINION LEADERS ON ISSUES AT THE INTERSECTION OF RELIGION AND PUBLIC AFFAIRS; IT ALSO SERVES AS A NEUTRAL VENUE FOR DISCUSSIONS OF THESE MATTERS. THE FORUM IS A NONPARTISAN ORGANIZATION AND DOES NOT TAKE POSITIONS ON POLICY DEBATES. BASED IN WASHINGTON, D.C., THE FORUM IS DIRECTED BY LUIS LUGO AND IS A PROJECT OF THE PEW RESEARCH CENTER.

1615 L STREET, NW SUITE 700 WASHINGTON, DC 20036-5610  
202 419 4550 TEL 202 419 4559 FAX WWW.PEWFORUM.ORG

© 2005 Pew Research Center