

Government Displays of Religious Symbols

Whether a government may display religious symbols depends on the setting, divisiveness, and consequences of the display.

The 2005 U.S. Supreme Court issued two different decisions on whether a government may display religious symbols and sacred text on public property under the First Amendment Establishment Clause, which prohibits government from creating a state religion. In *Van Orden v. Perry*, the Court allowed a six-foot-high Ten Commandments monument to be located on Texas' capitol grounds (545 U.S. ___ (2005)). In *McCreary County v. ACLU of Kentucky*, the Court forbade hanging copies of the Ten Commandments on the walls of two county courthouses (545 U.S. ___ (2005)).

Both cases were decided by a 5-to-4 vote in which Justice Breyer provided the fifth vote, and both depended on the context of the case for the outcome. The context includes the physical setting, the historical divisiveness, and the consequences of the displays. The decisions underscore the Court's case-by-case approach to deciding church-state controversies, which resists drawing clear lines.

The First Amendment Establishment Clause boundary between church and state remains unchanged and unclear.

These two cases leave largely unchanged the First Amendment boundary between church and state as it affects the permissibility of government displays of religious symbols or government endorsement of religious content. While some constitutional experts

argue that the Establishment Clause requires a strict separation between church and state that is best achieved by avoiding government entanglements with religion, others argue that such strict separation leads to government hostility to religion.

The U.S. Supreme Court tried to find a middle ground between separation and endorsement.

The outcomes of these cases reflect the sharp divide within the Court and illustrate the importance the Court places on the purpose of the government's action and the context and history of that action. The cases appear to leave in place the balancing test in *Lemon v. Kurtzman* that the Court uses to evaluate constitutional questions about government's religious statements and its ability to sponsor public displays of popular religious symbols. (The U.S. Supreme Court's three-part test in *Lemon v. Kurtzman* (403 U.S. 602 (1971)) asks whether the government's action has a secular purpose, advances or inhibits religion, or fosters an excessive entanglement with religion.)

In the Court's last case on the public display of the Ten Commandments, *Stone v. Graham* (449 U.S. 39 (1980)), the justices struck down by five to four, a Kentucky law requiring public schools to post the Ten Commandments in every classroom. The same issue was raised again in 2003 when then-Alabama Supreme Court Justice Roy Moore refused to obey a federal court order to remove a Ten Commandments monument in the state supreme court building.

The Research Department of the Minnesota House of Representatives is a nonpartisan office providing legislative, legal, and information services to the entire House.

In *Van Orden v. Perry*, the Court allowed a Ten Commandments monument to be located on Texas' capitol grounds.

In 1961 the Fraternal Order of Eagles, a national patriotic organization, donated the Ten Commandments monument to the state. The Texas organization that maintained the 22 acres of capitol grounds recommended the site where the monument was to be placed, among many other monuments and markers. (In oral argument before that Court, Mr. Chemerinsky, the attorney representing Mr. Van Orden, acknowledged that the Eagles donated many similar monuments throughout the country to promote Cecil B. DeMille's movie, "The Ten Commandments." It is only recently that people have sued to have the monuments removed from public property.)

In 2001, a homeless lawyer sued to have the monument removed, asserting it violated the Establishment Clause. (The lawyer sued under 42 U.S.C. section 1983, under which a person asserts that his or her constitutionally protected rights, privileges, or immunities have been violated.) The federal district court let the monument remain because the state had a valid secular purpose in acknowledging the Eagles' efforts to reduce juvenile delinquency and because a reasonable person, given the history, purpose, and context of the monument, would not conclude that it represented government endorsement of religion. The Fifth Circuit and the Supreme Court affirmed the district court's ruling.

The Supreme Court based its decision upon the nature of the monument and the historical significance of religion in American life. The Court wrote that having religious content or promoting a message consistent with religious doctrine does not, by itself, violate the Establishment Clause. In examining the context in which the religious text was used, the Court found that the monument conveyed a secular moral message about proper standards of social conduct and the historical relationship between those standards and the law.

The Court distinguished the monument from the classroom context in *Stone* where the Court relied on previous school prayer cases to find that the Kentucky statute had an improper and plainly religious purpose.

In *McCreary County v. ACLU of Kentucky*, the Court forbade framed copies of the Ten Commandments hung in two Kentucky county courthouses.

The American Civil Liberties Union (ACLU) sued under 42 U.S.C. section 1983, to prohibit McCreary and Pulaski counties from hanging copies of the Ten Commandments in the county courthouses in 1999. County officials responded by passing resolutions calling the Ten Commandments the "precedent legal code" and surrounding the displays with historical documents containing religious references; later they again revised and renamed the display, adding secular documents.

Using the *Lemon* test, the district court issued an injunction, finding that all three displays lacked a secular purpose. The Supreme Court held that determining the counties' purpose provided a sound basis for ruling on the Establishment Clause complaint. The Court said that government acted improperly in posting the Ten Commandments in the courthouses. The Court looked to readily discoverable facts in the statute's text, its legislative history, and its implementation to determine the government purpose. Although the Court defers to a legislature's stated reasons for its action, the *Lemon* test requires government's secular purpose to be genuine, not a sham and not secondary to a religious purpose. The Court rejected the counties' argument that it should infer purpose only from the latest series of actions. The Court found that the entire sequence of county actions, including the context and history, made clear that advancing religion was the paramount purpose of the courthouse displays.