

Court Split Over Commandments

Justices Forbid Copies on Walls of Courthouses but Allow Monuments

By Charles Lane

Washington Post Staff Writer

Tuesday, June 28, 2005; A01

A sharply divided Supreme Court issued a split decision on the public display of the Ten Commandments on government property yesterday, forbidding framed copies on the walls of two rural Kentucky courthouses while approving a 6-foot-tall granite monument on the grounds of the Texas Capitol in Austin.

In a pair of 5 to 4 votes, the court ruled that the commandments were put up in Kentucky six years ago with the unconstitutional purpose of favoring monotheistic religion but that the Texas monument, erected in 1961, is a less blatantly religious statement tinged with secular historical and educational meaning as part of a group of similar markers on the grounds.

The decisions were announced on a day of high drama at the court, with many of those in attendance waiting -- in vain, as it turned out -- for a retirement announcement from Chief Justice William H. Rehnquist. Justices on both sides of the Ten Commandments issue aimed strong criticism at each other as they read their opinions from the bench.

Yet for all the intensity, the net result of the decisions -- the first on the Ten Commandments from the court in 25 years -- may have been to leave the law more or less unchanged, legal analysts said.

The court did not scrap complicated legal balancing tests it has used to evaluate the constitutionality of governmental religious statements, as some supporters of the public display of the commandments had urged. Nor did it take the opportunity to rule out the official embrace of popular religious symbols, as some opponents of the displays had hoped.

Instead, the decisive vote in the cases was cast by Justice Stephen G. Breyer, who sized up each one in terms of its particular history and his view of the "basic purposes" of the First Amendment, which prohibits the creation of a state religion.

In a separate concurring opinion in the Texas case, Breyer found it "determinative" that the Texas monument, donated by the Fraternal Order of Eagles, had stood for 40 years without anyone's complaining, whereas the Kentucky displays sparked litigation almost as soon as they were put up in 1999.

"This [Texas] display has stood apparently uncontested for nearly two generations. That experience helps us understand that as a practical matter of degree this display is unlikely to prove divisive," Breyer wrote.

But he added, referring to the Kentucky displays, that "in a Nation of so many different religious 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."

Each side in the case claimed victory. Steven R. Shapiro, legal director of the American Civil Liberties Union, whose Kentucky affiliate had challenged the courthouse displays, said that "a majority of the court in both cases has now clearly reaffirmed the principle that government may not promote a religious message through its display of the Ten Commandments."

Jay Sekulow, chief counsel of the American Center for Law and Justice, a conservative Christian legal organization that backs the displays, said the decision means many similar monuments provided to state and local governments by the Fraternal Order of the Eagles, along with long-established paintings or sculptures of the commandments, are probably on safe ground.

The court is expected to announce today whether it will hear challenges to the display of the commandments on school property in two Ohio locales; a Harlan County, Ky., display of the commandments on school classroom walls; and a Richland County, Ohio, judge's posting of the command-

ments on his courtroom's wall.

"The road map is keep your mouth shut about the religious purpose, talk about secular and historical things, and you can probably get away with it," said Douglas Laycock, a professor of constitutional law at the University of Texas.

Certainly the two cases proved divisive for the court itself, with Justice Antonin Scalia reading a passionate dissent on the Kentucky ruling from the bench. Scalia said the decision was inconsistent with the Founding Fathers' own views and "ratchets up this court's hostility to religion."

He invoked the experience of Sept. 11, 2001, noting that he had been in Rome on that day, and that after President Bush had concluded his speech to the nation with "God Bless America," a European judge had confided that he was sad Europe's leaders no longer make such religious references in their speeches.

Scalia was joined in full by Rehnquist and Justice Clarence Thomas, and in part by Justice Anthony M. Kennedy.

But Justice David H. Souter, who wrote the opinion in the Kentucky case, joined not only by Breyer but also by Justices John Paul Stevens, Sandra Day O'Connor and Ruth Bader Ginsburg, warned listeners in the courtroom that Scalia would "allow government to espouse the core religious beliefs of some religions."

In his written opinion, Souter argued that strict official "neutrality" toward religion is the best antidote to contemporary culture wars.

"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," he wrote. "This is no time to deny the prudence of understanding the [First Amendment] to require the Government to stay neutral on religious belief, which is reserved for the conscience of the individual."

The two Kentucky counties, McCreary and Pulaski, first posted copies of the King James version of the commandments in their respective courthouses in the summer of 1999.

After the ACLU sued, the two counties passed resolutions calling the commandments the "precedent legal code" for Kentucky's laws. They also added other religious-themed historical documents, such as President Abraham Lincoln's declaration of a national day of prayer in 1863.

After a federal judge ordered that display taken down in 2000, the counties added several secular documents, such as the Magna Carta and the lyrics of "The Star-Spangled Banner."

But Souter wrote that the changes could not disguise the counties' true purpose, which, he said, was "to emphasize and celebrate the Commandments' religious message."

The Texas monument is one of 38 such items on the sprawling 22-acre state Capitol grounds. It features an eagle grasping the American flag; an eye inside a pyramid; two small stone tablets; two Stars of David; two Greek letters -- Chi and Ro -- symbolizing Christ; and a large-print text of the commandments.

A homeless man, Thomas Van Orden, sued for the monument's removal, saying it conveyed an offensive state endorsement of religion each time he walked by it.

But Breyer was joined in permitting the monument by Rehnquist, who wrote on behalf of himself, Scalia, Kennedy and Thomas that "the Ten Commandments have an undeniable historical meaning. . . . Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the [First Amendment.]

The cases are *McCreary County, Ky., v. American Civil Liberties Union of Kentucky*, No. 03-1693, and *Van Orden v. Perry*, No. 03-1500.

© 2005 The Washington Post Company