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The Court's Purpose: Secular or Anti-strife?

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Under the constitutional vision articulated last year in the Supreme Court's Ten Commandments decisions, it seems that particular clauses of the Constitution import within themselves a kind of emergency escape clause, or interpretive direction, warning judicial users: "Do not apply if overly divisive." The majority in the case involving exhibits of the Ten Commandments in Kentucky courthouses, *McCreary Cty. v. ACLU*, applied a familiar standard in holding that the displays violated the Establishment Clause. The plurality and concurrence in the Texas case, *Van Orden v. Perry*, although concluding that the statue commemorating the Ten Commandments should remain standing on the State Capitol grounds, refrained from adopting any such orderly approach. Indeed, Justice Breyer's tie-breaking vote appears to have been primarily based on the attempt to avoid the strife that removing a monument reciting the Ten Commandments might have occasioned.

Far from representing a radical exercise in judicial "say-so," as Justice Scalia would have it, the decision that the courthouses of two counties in Kentucky could not constitutionally persist in foregrounding the Ten Commandments as part of a display on "The Foundations of American Law and Government," demonstrated a rather traditional reliance upon the Court's established precedents. Justice Souter, writing for the five-member majority, rigorously applied the first prong of the three-part test derived from *Lemon v. Kurtzman,* a 1971 case holding certain types of state financial aid to religious schools unconstitutional. From this, he concluded that the events leading up to the counties' presentation of the displays—including several forerunner exhibitions and county legislative resolutions stating that the Ten Commandments are "the precedent legal code upon which the civil and criminal codes of . . . Kentucky are founded"—showed that no predominantly secular purpose underlay the courthouse exhibitions.

Nor are the substantive criticisms that the dissent leveled at the deployment of this "secular purpose" standard particularly persuasive. As the majority articulated it, the test bore substantial resemblance to those in other segments of the Court's jurisprudence—including equal protection and voting rights. Some of the dissenters themselves have endorsed reconciling the Court's reasoning under the Religion Clauses with approaches in similar areas of constitutional law, and have been instrumental in generating those other approaches. In a 1993 decision about whether a town had violated the free exercise rights of members of a church practicing the Santeria religion, Justice Scalia explained that "comparison with other fields supports,

rather than undermines, the conclusion we draw today." Comparison with these other fields also supports the understanding of "secular purpose" articulated by the majority in *McCreary*.

Inquiries into governmental and legislative purpose form a standard component of constitutional decision-making, particularly in the race discrimination context, where the Court, in the 1976 case *Washington v. Davis*, announced that a particular official action or law must both be motivated by a discriminatory purpose and result in a disparate racial impact to violate the Equal Protection Clause of the Fourteenth Amendment. In considering race-based claims, the Court has often looked to the particular series of events leading up to the challenged decision in determining whether the government acted in accordance with a discriminatory purpose. Similarly, in *McCreary*, Justice Souter exhaustively described the three successive Ten Commandments displays—each seemingly attempting to further mask the non-secular purpose—as well as the counties' resolutions with regard to them in reaching the conclusion that the government's purpose was not secular.

The majority also specified that the counties' purpose needed to be "predominantly" secular, rather than simply motivated partly by religion and partly by other secular motives. Although Justice Scalia excoriated this requirement as a new and unjustified invention, the language of predominance is familiar from the racial gerrymandering arena. Likewise, the "searching review of the [legislative] record" that the Court performed to ascertain whether or not a secular purpose predominated echoed the reasoning undergirding a very different majority's decision in 1997 in the *City of Boerne v. Flores*. In that case, which invalidated certain provisions of the federal Religious Freedom Restoration Act, the majority opinion, authored by Justice Kennedy, and joined by Justices Rehnquist, Thomas, and Scalia, as well as Stevens and Ginsburg, scrutinized the legislative history to ascertain whether the measures Congress had taken were congruent and proportional with the attempt to remedy discrimination against religious groups and practitioners.

It is, in addition, possible to reconcile the *McCreary* majority's emphasis on secular governmental purpose with the outcome of the Texas capitol case. Whereas the sequence of successive exhibits in Kentucky and the counties' legislative resolutions about them clearly evinced a predominantly sectarian purpose, the installation of the Ten Commandments monument in 1961 did not carry with it such evident markers of non-secular purpose. Furthermore, the Court has, in the past, held that the religious implications of certain kinds of historical artifacts or practices have become worn away over time, thus neutralizing any initially sectarian motivations underlying them.

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The problem with the two Ten Commandments decisions, however, is that the Court refrained from attempting to bring them into accord. Justice Breyer, who did not concur in the plurality's opinion in *Van Orden*, but cast the deciding vote, reached his determination through the exercise of "legal judgment" rather than invocation of the Court's precedent. Although he explained that "the Texas display . . . *might* satisfy this Court's more formal Establishment Clause tests" (emphasis added), he did not rely on these tests, or on the secular or non-secular purpose of those who erected the monument, but rather on "the basic purposes of the First Amendment's Religion Clauses themselves."

The primary such purpose was, he opined, to avoid "religiously based divisiveness." Because the

Workers prepare to move the Ten Commandments monument from public view at the judicial building in Montgomery.

Ten Commandments monument on the lawn of the Texas Capitol had been challenged only once in forty years, he reasoned, "as a practical matter of *degree* this display is unlikely to prove divisive." By contrast, a Supreme Court decision to remove such a marker "might well encourage disputes." While some scholars have noted that the Court's judgments rarely deviate substantially from the norms of the contemporary society, it is unusual to find opinions actually stating as their bases a desire to avoid constitutionally-created conflict.

The vision articulated by Justice Breyer's concurrence bears within it dangers similar to those entailed by Justice Scalia's demagogic dissent in *McCreary*. Justice Scalia, in his most extreme judicial statement yet in favor of governmental religious expression, significantly commenced his opinion by invoking the events of September 11, then continued by explaining that, in his view, government should be able to endorse a monotheistic God. It is perhaps not incidental that, in this rhetoric, the war on terror and the culture wars are not here too far apart. The dissent is also firmly—almost shamelessly—majoritarian, insisting that 97% of Americans who believe in religion are part of a monotheistic faith, and citing an Act of Congress reaffirming the religious language in the Pledge of Allegiance. Neither the Constitution, nor the Court's interpretation of it, are incompatible with the value that these religious practitioners place upon monotheism. The Constitution simply assumes that in America, a place where religious dissenters sought refuge and where even the original state constitution of South Carolina specifically provided a way in which fifteen men could together form a new sect, it is unnecessary for government to impose a particular vision of religion, or a particular version of the Ten Commandments (which differ significantly among Protestants, Catholics, and Jews), on everyone else.

Justice Scalia's opinion, despite its majoritarian emphasis, is far from avoiding divisiveness, but, perhaps, neither is Justice Breyer's. When the Court, as it did last fall, issues decisions that seem so inconsistent to the "reasonable observer"—the same one from whose vantage point the assessment of secular purpose occurs—it cannot help but cause consternation among people of all persuasions. This is even more the case when the Court eschews the attempt to apply enduring if evolving principles and substitutes for them "legal judgment," however good or experienced that judgment might be. Whether or not the government's purpose is secular, the Court's seems to be anti-strife.

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