Nine Justices and Ten Commandments – USA: Religion, the Supreme Court and the law - the battle for secularism

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While the politically manipulated controversy over the proposed Islamic center in Lower Manhattan will eventually end, there is one dispute over religious symbolism and identity that remains, apparently, endless. I'm referring to the continuing effort by state and local governments to post the Ten Commandments in public places.

Believe it or not, a familiar Ten Commandments case is now heading back to the Supreme Court. The court has spent years making a nearly complete hash out of the public display of religious symbols, and the prospect of watching lawyers and justices engage in still more contorted efforts to attach supposedly secular meaning to obviously sectarian objects and texts is not a pleasant one. But the case could provide a window on how committed the Roberts court is to the project that some justices have clearly embraced, that of carving out more space for religion in the public square.

The new/old case is McCreary County v. American Civil Liberties Union of Kentucky, which the Supreme Court last encountered in 2005. Its history is convoluted, which is part of the point. Eleven years ago, officials of two Kentucky counties, McCreary and Pulaski, decided to post framed paper copies of the Ten Commandments on the courthouse walls. Faced with a lawsuit, they retooled the display to make the Commandments part of a bigger collection of documents, most of which happened to be religiously oriented, including the national motto, "In God We Trust," and a statement by Abraham Lincoln that "the Bible is the best gift God has ever given to man."

In case of separation of church and state, the retirement of Justice John Paul Stevens is likely to have the greatest impact. When this tactic did not satisfy a federal district judge, who ordered the displays removed immediately, the counties tried again. They came up with the "Foundations of American Law and Government" displays, which included the Ten Commandments along with nine other documents, including the lyrics of "The Star-Spangled Banner" and the texts of the Declaration of Independence and Magna Carta. An explanation informed viewers that "the Ten Commandments have profoundly influenced the formation of Western legal thought and the formation of our country" and have provided "the moral background of the Declaration of Independence."

The federal courts remained unimpressed. The district court's preliminary order to remove the display was upheld by the United States Court of Appeals for the Sixth Circuit and, over a stinging dissenting opinion by Justice Antonin Scalia, by the Supreme Court. Justice David H. Souter, writing for the 5-to-4 majority, cited a 1980 Supreme Court decision that overturned a Kentucky law requiring a copy of the Ten Commandments to be posted in every public school classroom. In that decision, Stone v. Graham, the court described the Commandments as "an instrument of religion." Justice Souter said the First Amendment's inclusion of the clause prohibiting the "establishment" of religion meant that "the government may not favor one religion over another, or religion over irreligion." He added that when the government departs from that principle, "nothing does a better job of roiling society."

Noting that “reasonable observers have reasonable memories,” Justice Souter said that an observer of the Foundations display “would probably suspect that the counties were simply reaching for any way to keep a religious document on the walls of courthouses constitutionally required to embody religious neutrality.”

That seemed to be that. But what happened next illustrates the tenacity of those, in Kentucky and across the country, who are bound and determined to have those Commandments on the wall. As a procedural matter, the case was only at the preliminary injunction stage when it reached the Supreme Court, with the result that the justices returned it, still alive, to the Federal District Court in London, Ky., for a potential trial. In an effort to bolster their case, the counties passed resolutions in 2007 declaring that the Foundations display was not an attempt to endorse religion. In a 2008 final judgment, Chief Judge Jennifer B. Coffman ruled against the counties. In June, the Court of Appeals affirmed that ruling over a fierce dissent by Judge James L. Ryan, who criticized the Supreme Court’s “persistent hostility to religion.” Judge Ryan’s dissenting opinion also praised Justice Scalia’s “powerful and logically compelling” dissent in the 2005 case, and added that he looked forward to the day when “the Supreme Court rediscovers the history and meaning of the words of the religion clauses of the First Amendment.”

A dissenting opinion like that is basically a memo to the four justices who dissented the last time: take this case if you think you can pick up a fifth vote. In addition to Justice Scalia, the dissenters were Justices Clarence Thomas and Anthony M. Kennedy along with Chief Justice William H. Rehnquist, casting one of the last votes of his life. Looking at today’s court, substituting Chief Justice John G. Roberts Jr. for his predecessor, and adding Justice Samuel A. Alito Jr., who replaced a majority voter, Justice Sandra Day O’Connor, it is quite plausible to imagine five justices willing to take the counties at their word and conclude that the displays are about civics and not religion. That’s what the counties’ lawyer, Mathew D. Staver, dean of the Liberty University School of Law is predicting. “It’s pretty clear to everyone” that the Supreme Court has moved in his direction, Mr. Staver told the Courier-Journal in Louisville last week, after the announcement that the counties would bring their case back to the Supreme Court.

The American Civil Liberties Union has evidently reached the same conclusion. It decided against filing a Supreme Court appeal in still another Ten Commandments case in still another Kentucky county, Grayson County, in which a different three-judge panel of the Sixth Circuit earlier this year upheld the Foundations of American Law and Government display.

There is no doubt the court is changing, in ways that may not be immediately obvious. Cases that concern the separation of church and state are among those on which the retirement of Justice John Paul Stevens is likely to have the greatest impact. For years, Justice Stevens was the Supreme Court’s strictest separationist. For example, in the abortion context, he was the only justice willing to articulate the position that laws incorporating the view that life begins at conception are theological exercises that should be invalidated on Establishment Clause grounds. (The fact that we may soon have to endure another debate over embryonic stem cell research makes me miss Justice Stevens and his wisdom all the more.) Justice Stevens lost most of his battles in the religion cases, but even in defeat he set a marker and made a record. For example, he wrote a powerful dissent this spring from a splintered and nearly incoherent decision that let Congress get away with swapping public land for private under the foot of a five-foot-tall cross on a hilltop in the Mojave National Preserve. In his opinion in that case, Salazar v. Buono, Justice Stevens said the cross sent a “starkly” and “inescapably sectarian message” that couldn’t be evaded by deeming the cross a memorial to the fallen soldiers of World War I.

Until I began to research the latest chapter in the Kentucky Ten Commandments saga, I had no idea that Foundations of American Law and Government displays have basically gone viral, popping up all

over the place in the five years since the court's ruling in the McCreary County case. The South Carolina Legislature enacted a law to permit the Foundations display to be erected "in a visible, public location in the public buildings of this state and its political subdivisions." Any such display "must include" a description of the Ten Commandments as the Kentucky counties described them, as "the moral background of the Declaration of Independence and the foundation of our legal tradition."

The rapid spread of the Foundations displays apparently stems from legal advice based on an interpretation of a single sentence in Justice Souter's opinion in the original McCreary County case. In concluding that, when assessed in their context, the Kentucky counties' displays lacked an authentic secular purpose, Justice Souter noted that the court did not "have occasion here to hold that a sacred text can never be integrated constitutionally into a governmental display on the subject of law, or American history."

I think it was a misreading, in 2005, to understand this sentence as a green light for gaming the system. For one thing, Justice Souter's response to the Foundation display's description of the Ten Commandments as the moral underpinning of the Declaration of Independence amounted to incredulity bordering on sarcasm. The description was "puzzling," Justice Souter wrote, because "the Commandments are sanctioned as divine imperatives, while the Declaration of Independence holds that the authority of government to enforce the law derives from the 'consent of the governed.' " The secular purpose "has to be genuine, not a sham," he said, adding that the counties appeared to assume that, to the contrary, "any trivial rationalization would suffice." I find it hard to read those words and imagine that Justice Souter, a serious churchgoing Episcopalian, meant to suggest that some other Foundations display on some other courthouse wall would receive the court's blessing.

But that was in 2005, and here we are in 2010 — same Commandments, different court.

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