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Justices Disallow Ten Commandments in Courthouses

In Separate Decision, Court Upholds Displays on Government Land

By Fred Barbash
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In separate opinions today, the Supreme Court signaled that the permissibility of government sponsored displays of the Ten Commandments depends on circumstances.

If the exhibit appears to have been erected with a religious purpose, it violates the Bill of Rights Establishment Clause prohibition on government sponsorship of religion, five justices said in a case from Kentucky.

In another case, another majority of justices allowed a display in Texas, saying that a religious display that is also "historical" in its impact is permissible, whatever the "purpose" of those who erected it.

With these and four other opinions, the court concluded its current term. Chief Justice William H. Rehnquist, who is being treated for thyroid cancer, did not announce his resignation as some had speculated he might.

The decisions, issued by two different majorities of justices using different tests of constitutionality, are likely to continue, rather than settle, the long-running argument over when state, local and federal governments may display religious symbols or allow their display on government property.

"Split decisions make people go and fight again," said Barry Lynn, head of Americans United for Separation of Church and State, an organization which has been fighting this particular fight for decades.

One of today's cases came from Kentucky, where two counties posted large copies of the Ten Commandments in their courthouses, prompting lawsuits by the American Civil Liberties Union.

After the challenge, the counties modified their exhibits several times in apparent attempts to make them appear less religious and more historic.

One of the counties, for example, eventually accompanied the Commandments with statements designed to show their importance in the development of American law.

But Justice David Souter, writing for a 5-4 court majority, said it was the counties' original religious purpose that mattered, not its later "transparent" attempts to obscure that purpose.

He called the successive alterations of the Ten Commandments displays mere "litigation" tactics, that do not

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hide the actual reason they were originally posted. "The world is not made brand new every morning," he wrote.

"When the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides."

It is the "counties' manifest objective" that is dispositive, he said.

Souter was joined by Justices John Paul Stevens, Sandra Day O'Connor, Ruth Bader Ginsburg and Stephen Breyer.

Dissenters in *McCreary County v. American Civil Liberties Union of Kentucky* were Chief Justice William H. Rehnquist, Antonin Scalia, Clarence Thomas and Anthony Kennedy.

The second case at issue today concerned a display on the grounds of the Texas capitol. Among 21 historical markers and 17 monuments surrounding the capitol is a 6-foot high monolith inscribed with the Ten Commandments. The state accepted the monument from the Fraternal Order of Eagles and defended it as a tribute to the Eagles rather than as an endorsement of religion.

In evaluating its constitutionality, Chief Justice William H. Rehnquist said that traditional tests such as religious purpose are not useful "in dealing with the sort of passive monument that Texas has erected."

Instead, he said, "our analysis is driven both by the nature of the monument and our Nation's history," which includes numerous governmental acknowledgements of the role of religion in the "foundations and successes" of the nation, among them a frieze at the U.S. Supreme Court itself that includes a depiction of Moses holding the Ten Commandments.

Writing for a 5-4 court, he said the Texas display was part of an "unbroken history of official acknowledgements by all three branches of government of religion's role in American life."

"Of course," Rehnquist wrote, "the Ten Commandments are religious--they were so viewed at their inception and so remain. . . . But Moses was a lawgiver as well as a religious leader. And the Ten Commandments have an undeniable historical meaning. . . ."

Rehnquist was joined by Scalia, Kennedy and Thomas on the opinion and by Breyer on the result. Breyer called it "a difficult borderline case where none of the Court's various tests for evaluating Establishment clause questions can substitute for the exercise of legal judgment."

Stevens, Ginsburg, O'Connor and Souter dissented.

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