



ISSUE BRIEF

THE TEN COMMANDMENTS UNDER SIEGE: A CONSTITUTIONAL DEFENSE

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For Christians and Jews, and perhaps for others, the Ten Commandments are unquestionably the word of God. They provide a divine standard by which we know right from wrong, and by which we judge our actions. This paper does not examine the truth of that understanding.

Rather, this paper seeks to understand and explain how the courts of the United States have treated the public display of the Ten Commandments. It must be noted that this inquiry does not address actions Congress or the executive branch might take if it were determined that the courts had acted outside their authority in this matter. Members of each branch of the national government do, of course, take an oath to uphold the Constitution; thus, unconstitutional actions by one branch do not provide an excuse for inaction by the other branches.

However, the question of how the federal courts have treated the display of the Ten Commandments is particularly important since two cases on this issue are pending before the Supreme Court.

The Facts of the Cases

One case is from Texas (*Thomas Van Orden v. Rick Perry in his Official Capacity as Governor of Texas and Chairman, State Preservation Board, et al.*); the other is from Kentucky (*McCreary County, Kentucky, et al. v. ACLU of Kentucky, et al.*).

The Texas case involves the display of the Ten Commandments on the grounds of the Texas State Capitol. The Ten Commandments monument was donated in 1961 by the Fraternal Order of Eagles, a service organization that has had seven U.S. presidents as members. The precise text used in the monument had been carefully developed for the Eagles by representatives of the Jewish, Protestant, and Catholic faiths.

Scattered throughout the 22 acres of the State Capitol grounds are 17 other monuments

and memorials to various people, events, and ideals that have contributed to the culture and history of Texas. The Capitol and grounds are listed on the National Registry of Historic Places and designated as a protected National Historic Landmark. In fact, the Capitol and grounds satisfy the federal definition of a museum and are cared for by a professional curator.

The Ten Commandments monument is located in the northwest section of the grounds. In the same area are six other monuments, including ones to Korean War veterans, to World War I veterans, and to Texans who died at Pearl Harbor. Other monuments in the area are dedicated to the "Texas Pioneer Woman" and to "Texas Children."

In Kentucky, the Ten Commandments were originally displayed in courthouses in framed copies, privately donated. Federal courts held that the display (which, before the hearing in the case, had been enlarged by the addition of copies of other historical documents) had to be removed. In response, the Kentucky counties whose displays had been challenged revised their displays. The revised display of the "foundations of American Law and Government" consisted of eleven framed documents (or portions thereof): the Mayflower Compact, the Declaration of Independence, the Magna Carta, the Bill of Rights, the words of "The Star-Spangled Banner," the preamble to the Kentucky Constitution, the symbol of Lady Justice, and the Ten Commandments. The displays were in the lobby hallways, not in the courtrooms. Within the courthouses of the counties involved, there were other historical displays as well. For instance, one of the counties has more than 150 additional historical documents posted in public areas of the courthouse.

The Legal Tests Involved

In both Texas and Kentucky, federal courts held that the displays of the Ten Commandments were unconstitutional. The First Amendment of the Constitution provides that "Congress shall make no law respecting an establishment of religion." In essence, the judges in each case held that the display of the Ten Commandments was an unconstitutional establishment by the state of Texas and by the Kentucky counties.

To determine whether some governmental action violates the "establishment clause" of the First Amendment, the federal courts employ the "*Lemon test*," which takes its name from a 1971 Supreme Court decision dealing with these matters, *Lemon v. Kurtzman*, 403 U.S. 602. The *Lemon test* has been revised and refined in subsequent cases. As currently understood, it seems to ask two questions: (1) Is the purpose of the challenged governmental action to "endorse" religion? (2) Is the effect of the challenged action, regardless of the government's actual intention, to convey the impression that government is endorsing religion?

The existing tests are based upon a prior Supreme Court case, *Everson v. Board of Education*, 330 U.S. 1 (1947). However, in *Everson*, the Court misunderstood and

misstated American history. It failed to review the most reliable sources of the Founders' intentions regarding the question of "establishment." Further, the Court's interpretation of "establishment" was wholly inconsistent with the practice of Congress in the first days of our republic.

The Family Research Council, along with Focus on the Family, filed "friend of the court" briefs in each case. (The full text of each is available on our website at www.frc.org.) We argued that the existing legal standard that the courts use in deciding these cases is inadequate, unclear, and confusing, and should be changed. The Supreme Court itself has, in various cases, indicated that it is considering rejecting the current tests in favor of clearer standards.

Therefore, Focus on the Family and FRC have argued that the courts should adopt a "coercion" test rather than continue to rely on existing tests that are based on serious historical errors. This "coercion" test is in accord with the Founders' intention. The question the courts should ask is whether the challenged governmental action privileges one religion or one denomination over others, and then compels those of different beliefs to conform to the dictates of the privileged religion or denomination. In other words, governmental action would violate the establishment clause if the government compelled Baptists to conform to Presbyterian doctrine, or if it compelled Christians to follow Jewish practices (or vice versa). Man should be free to worship God according to the dictates of his conscience. Government may not compel him to do otherwise. Such a test conforms with the original meaning of the Constitution and should be adopted in place of current tests.

Though FRC and Focus on the Family believe it would be far better to replace the current tests with the "coercion" test, we also argued in the alternative (in order to protect the right to display the Ten Commandments) that, even if the Supreme Court uses the current test – a most stringent and hostile standard – the actions in Texas and Kentucky are permissible since it is indisputably true that the Ten Commandments have played a crucial role in shaping the values and legal system of the United States (indeed, of all Western civilization). In what was the last Supreme Court case to consider the public display of the Ten Commandments, *Stone v. Graham* in 1980, the Supreme Court clearly indicated that if the display of the Ten Commandments had a secular purpose (and subsequent cases have made it clear this need not be the only purpose) it would be permissible. The displays in Texas and in Kentucky clearly have the secular purpose of educating the people about the basis of our system of laws.

Conclusion

The facts of both the Texas and the Kentucky cases should satisfy any fair-minded Supreme Court justice that the displays in question have, under current legal standards, a partially secular purpose. The Texas monument stands among many other monuments concerned with other persons and events that have shaped Texas history;

the Kentucky displays place the Ten Commandments among other documents that played a crucial role in shaping the beliefs, values, and legal system of the United States. Of course, it would be preferable for the Court to reject the existing tests and to adopt a coercion test. This would be historically true to the Founders' understanding. It would only penalize governmental action that forced one person to conform to another's beliefs. It would respect the right to religious freedom of all Americans. While we cannot know what the Supreme Court will do in these cases, we can pray that they will do the right thing this summer when these two landmark cases are decided.

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