The Ten Commandments
Round Three

McCREARY COUNTY v. ACLU

SUPREME COURT OF THE UNITED STATES
125 S. Ct. 2722
June 27, 2005

OPINION: Justice Souter...In the summer of 1999...McCreary County and Pulaski County, Kentucky...put up in their respective courthouses large, gold-framed copies of an abridged text of the King James version of the Ten Commandments, including a citation to the Book of Exodus. In McCreary County, the placement of the Commandments responded to an order of the county legislative body requiring "the display to be posted in 'a very high traffic area' of the courthouse." In Pulaski County, amidst reported controversy over the propriety of the display, the Commandments were hung in a ceremony presided over by the county Judge-Executive, who called them "good rules to live by" and who recounted the story of an astronaut who became convinced "there must be a divine God" after viewing the Earth from the moon. The Judge-Executive was accompanied by the pastor of his church, who called the Commandments "a creed of ethics" and told the press after the ceremony that displaying the Commandments was "one of the greatest things the judge could have done to close out the millennium." In both counties, this was the version of the Commandments posted:

> **Thou shalt have no other gods before me.**
> **Thou shalt not make unto thee any graven images.**
> **Thou shalt not take the name of the Lord thy God in vain.**
> **Remember the sabbath day, to keep it holy.**
> Honor thy father and thy mother.
> Thou shalt not kill.
> Thou shalt not commit adultery.
> Thou shalt not steal.
> Thou shalt not bear false witness.
> Thou shalt not covet.
> **Exodus 20:3-17**.

In each county, the hallway display was "readily visible to...county citizens who use the courthouse to conduct their civic business, to obtain or renew driver's licenses and permits, to register cars, to pay local taxes, and to register to vote."

In November 1999, the ACLU of Kentucky...sought a preliminary injunction against maintaining the displays...Within a month, and before the District Court had responded to the request for injunction, the legislative body of each County authorized a second, expanded display, by nearly identical resolutions reciting that the Ten Commandments are "the precedent legal code upon which the civil and criminal codes of... Kentucky are founded," and stating several grounds for taking that position: that "the Ten Commandments are codified in Kentucky's civil and criminal laws"; that the Kentucky House of Representatives had in 1993 "voted unanimously...to adjourn ...'in remembrance and honor of Jesus Christ, the Prince of Ethics'"; that the "County Judge and... magistrates agree with the arguments set out by Judge Roy Moore" in defense of his "display of the Ten Commandments in his courtroom"; and that the "Founding Fathers had an explicit understanding of the duty of elected officials to publicly acknowledge God as the source of America's strength and direction."

As directed by the resolutions, the Counties expanded the displays of the Ten Commandments in their locations...In addition to the first display's large framed copy of the edited King James version of the Commandments, the second included eight other documents in smaller frames, each either having a religious theme or excerpted to highlight a religious element. The documents were the "endowed by their Creator" passage from the Declaration of Independence; the Preamble to the Constitution of Kentucky; the national motto, "In God We Trust"; a page from the Congressional Record of February 2, 1983, proclaiming the Year of the Bible and including a statement of the Ten Commandments; a proclamation by President Abraham Lincoln designating April 30, 1863, a National Day of Prayer and Humiliation; an excerpt from President Lincoln's "Reply to Loyal Colored People of Baltimore upon Presentation of a Bible," reading that "the Bible is the best gift God has ever given to man"; a proclamation by President Reagan marking 1983 the Year of the Bible; and the Mayflower Compact.

After argument, the District Court entered a preliminary injunction on May 5, 2000, ordering that the "display...be removed from each County Courthouse immediately" and that no county official "erect or cause to be erected similar displays." The court's analysis of the situation followed the three-part formulation first stated in *Lemon v. Kurtzman*[1]. As to governmental purpose, it concluded that the original display "lacked any secular purpose" because the Commandments "are a distinctly religious document, believed by many Christians and Jews to be the direct and revealed word of God." Although the Counties had maintained that the original display was meant to be educational, "the narrow scope of the display -- a single religious text unaccompanied by any interpretation explaining its role as a foundational document -- can hardly be said to present meaningfully the story of this country's religious traditions." The court found that the second version also "clearly lacked a secular purpose" because the "Counties narrowly tailored their selection of foundational documents to incorporate only those with specific references to Christianity."

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[1]Case 1A-R-042 on this website.

The Counties filed a notice of appeal from the preliminary injunction but voluntarily dismissed it after hiring new lawyers. They then installed another display in each courthouse, the third within a year. No new resolution authorized this one, nor did the Counties repeal the resolutions that preceded the second. The posting consists of nine framed documents of equal size, one of them setting out the Ten Commandments explicitly identified as the "King James Version" at Exodus 20:3-17 and quoted at greater length than before:

> **Thou shalt have no other gods before me.**
> **Thou shalt not make unto thee any graven image, or any likeness of any thing that is in heaven above, or that is in the earth beneath, or that is in the water underneath the earth: Thou shalt not bow down thyself to them, nor serve them: for I the LORD thy God am a jealous God, visiting the iniquity of the fathers upon the children unto the third and fourth generation of them that hate me.**
> **Thou shalt not take the name of the LORD thy God in vain: for the LORD will not hold him guiltless that taketh his name in vain.**
> **Remember the sabbath day, to keep it holy.**
> **Honour thy father and thy mother: that thy days may be long upon the land which the LORD thy God giveth thee**.
> Thou shalt not kill.
> Thou shalt not commit adultery.
> Thou shalt not steal.
> Thou shalt not bear false witness against thy neighbour.
> Thou shalt not covet thy neighbour's house, thou shalt not covet thy neighbor's wife, nor his manservant, nor his maidservant, nor his ox, nor his ass, nor anything that is thy neighbour's.

Assembled with the Commandments are framed copies of the Magna Carta, the Declaration of Independence, the Bill of Rights, the lyrics of the Star Spangled Banner, the Mayflower Compact, the National Motto, the Preamble to the Kentucky Constitution, and a picture of Lady Justice. The collection is entitled "The Foundations of American Law and Government Display" and each document comes with a statement about its historical and legal significance. The comment on the Ten Commandments reads:

> "The Ten Commandments have profoundly influenced the formation of Western legal thought and the formation of our country. That influence is clearly seen in the Declaration of Independence, which declared that 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.' The Ten Commandments provide the moral background of the Declaration of Independence and the foundation of our legal tradition."

The ACLU moved to supplement the preliminary injunction to enjoin the Counties' third display, and

the Counties responded with several explanations for the new version, including desires "to demonstrate that the Ten Commandments were part of the foundation of American Law and Government" and "to educate the citizens of the county regarding some of the documents that played a significant role in the foundation of our system of law and government." The court, however, took the objective of proclaiming the Commandments' foundational value as "a religious, rather than secular, purpose" under *Stone v. Graham*[2] and found that the assertion that the Counties' broader educational goals are secular "crumbles...upon an examination of the history of this litigation." In light of the Counties' decision to post the Commandments by themselves in the first instance, contrary to *Stone*, and later to "accentuate" the religious objective by surrounding the Commandments with "specific references to Christianity," the District Court understood the Counties' "clear" purpose as being to post the Commandments, not to educate.

The Court also found that the effect of the third display was to endorse religion because the "reasonable observer will see one religious code placed alongside eight political or patriotic documents, and will understand that the counties promote that one religious code as being on a par with our nation's most cherished secular symbols and documents" and because the "reasonable observer would know something of the controversy surrounding these displays, which has focused on only one of the nine framed documents: the Ten Commandments."

...The Circuit majority stressed that under *Stone*, displaying the Commandments bespeaks a religious object unless they are integrated with other material so as to carry "a secular message." The majority judges saw no integration here because of a "lack of a demonstrated analytical or historical connection between the Commandments and the other documents." They noted in particular that the Counties offered no support for their claim that the Ten Commandments "provided the moral backdrop" to the Declaration of Independence or otherwise "profoundly influenced" it. The majority found that the Counties' purpose was religious, not educational, given the nature of the Commandments as "an active symbol of religion stating 'the religious duties of believers.'"...We granted certiorari and now affirm...

CONCURRENCE: Justice O'Connor...[**These Clauses]...embody an idea that was once considered radical: Free people are entitled to free and diverse thoughts, which government ought neither to constrain nor to direct.**

Reasonable minds can disagree about how to apply the Religion Clauses in a given case. But the goal of the Clauses is clear: to carry out the Founders' plan of preserving religious liberty to the fullest extent possible in a pluralistic society. By enforcing the Clauses, we have kept religion a matter for the individual conscience, not for the prosecutor or bureaucrat. **At a time when we see around the world the violent consequences of the assumption of religious authority by government, Americans may count themselves fortunate: Our regard for constitutional boundaries has protected us from similar travails, while allowing private religious exercise to flourish. The well-known statement that "we are a religious people" has proved true.**

[2]Case 1A-R-057 on this website.

Americans attend their places of worship more often than do citizens of other developed nations...and describe religion as playing an especially important role in their lives. Those who would renegotiate the boundaries between church and state must therefore answer a difficult question: <u>Why would we trade a system that has served us so well for one that has served others so poorly</u>?

The foregoing is emphasized, for it seems to provide fair warning to those who would radically alter the Court's Religion Clause jurisprudence. As much as I disagree with some decisions, overall it does seem that religion is doing rather well in America compared to the rest of the world.

Our guiding principle has been James Madison's -- that "the Religion...of every man must be left to the conviction and conscience of every man."...Government may not coerce a person into worshiping against her will, nor prohibit her from worshiping according to it. It may not prefer one religion over another or promote religion over nonbelief. *Everson*[3]. It may not entangle itself with religion. *Walz*[4]. And government may not, by "endorsing religion or a religious practice," "make adherence to religion relevant to a person's standing in the political community." *Wallace v. Jaffree*[5]...

It is true that many Americans find the Commandments in accord with their personal beliefs. **<u>But we do not count heads before enforcing the 1st Amendment</u>**. *West Virginia Bd. of Ed. v. Barnette*[6] ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them <u>beyond the reach of majorities</u> and officials and to establish them as legal principles to be applied by the courts.") Nor can we accept the theory that Americans who do not accept the Commandments' validity are outside the 1st Amendment's protections. **<u>There is no list of approved and disapproved beliefs appended to the 1st Amendment</u>** -- and the Amendment's broad terms ("free exercise," "establishment," "religion") do not admit of such a cramped reading. It is true that the Framers lived at a time when our national religious diversity was neither as robust nor as well recognized as it is now. They may not have foreseen the variety of religions for which this Nation would eventually provide a home. They surely could not have predicted new religions, some of them born in this country. But they did know that **<u>line-drawing between religions is an enterprise that, once begun, has no logical stopping point</u>**. They worried that "the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects." The Religion Clauses, as a result, protect adherents of all religions, as well as those who believe in no

[3]Case 1A-R-022 on this website.

[4]Case 1A-R-039 on this website.

[5]Case 1A-R-068 on this website.

[6]Case 1A-S-9 on this website.

religion at all...In my opinion, the display at issue was an establishment of religion in violation of our Constitution...

DISSENT: Justice Scalia/Rehnquist/Thomas/Kennedy...On September 11, 2001 I was attending in Rome, Italy an international conference of judges and lawyers, principally from Europe and the United States. That night and the next morning virtually all of the participants watched, in their hotel rooms, the address to the Nation by the President of the United States concerning the murderous attacks upon the Twin Towers and the Pentagon, in which thousands of Americans had been killed. The address ended, as Presidential addresses often do, with the prayer "God bless America." The next afternoon I was approached by one of the judges from a European country, who, after extending his profound condolences for my country's loss, sadly observed "How I wish that the Head of State of my country, at a similar time of national tragedy and distress, could conclude his address 'God bless _____.' It is of course absolutely forbidden."

Perhaps Justice Scalia has a point. We shall see. Such a conclusion is happily not forbidden in the U.S.A., thank **God**.

That is one model of the relationship between church and state -- a model spread across Europe by the armies of Napoleon, and reflected in the Constitution of France, which begins "France is a ...secular...Republic." Religion is to be strictly excluded from the public forum. This is not, and never was, the model adopted by America. George Washington added to the form of Presidential oath prescribed by Art. II, §1, cl. 8, of the Constitution, the concluding words "so help me God." The Supreme Court under John Marshall opened its sessions with the prayer, "God save the United States and this Honorable Court." The First Congress instituted the practice of beginning its legislative sessions with a prayer. The same week that Congress submitted the Establishment Clause as part of the Bill of Rights for ratification by the States, it enacted legislation providing for paid chaplains in the House and Senate. The day after the 1st Amendment was proposed, the same Congress that had proposed it requested the President to proclaim " a day of public thanksgiving and prayer, to be observed, by acknowledging, with grateful hearts, the many and signal favours of Almighty God." President Washington offered the first Thanksgiving Proclamation shortly thereafter, devoting November 26, 1789 on behalf of the American people "to the service of that great and glorious Being who is the beneficent author of all the good that is, that was, or that will be,"...thus beginning a tradition of offering gratitude to God that continues today...And of course the 1st Amendment itself accords religion (and no other manner of belief) special constitutional protection...

With all of this reality (and much more) staring it in the face, how can the Court *possibly* assert that "the 1st Amendment mandates governmental neutrality between...religion and nonreligion" and that "manifesting a purpose to favor...adherence to religion generally" is unconstitutional? Who says so? Surely not the words of the Constitution. Surely not the history and traditions that reflect our society's constant understanding of those words. Surely not even the current sense of our society, recently reflected in an Act of Congress adopted unanimously by the Senate and with only 5 nays in the House of Representatives, criticizing a Court of Appeals opinion that had held "under God"

in the Pledge of Allegiance unconstitutional. (reaffirming the Pledge of Allegiance and the National Motto ("In God We Trust") and stating that the Pledge of Allegiance is "clearly consistent with the text and intent of the Constitution"). Nothing stands behind the Court's assertion that governmental affirmation of the society's belief in God is unconstitutional except the Court's own say-so, citing as support only the unsubstantiated say-so of earlier Courts going back no farther than the mid-20th century. And it is, moreover, a thoroughly discredited say-so. It is discredited, to begin with, because a majority of the Justices on the current Court (including at least one Member of today's majority) have, in separate opinions, repudiated the brain-spun "*Lemon* test" that embodies the supposed principle of neutrality between religion and irreligion...And it is discredited because the Court has not had the courage (or the foolhardiness) to apply the neutrality principle consistently.

What distinguishes the rule of law from the dictatorship of a shifting Supreme Court majority is the absolutely indispensable requirement that judicial opinions be grounded in consistently applied principle. That is what prevents judges from ruling now this way, now that -- thumbs up or thumbs down -- as their personal preferences dictate. Today's opinion...admits that it does not rest upon consistently applied principle. In a revealing footnote, the Court acknowledges that the "Establishment Clause doctrine" it purports to be applying "lacks the comfort of categorical absolutes." **What the Court means by this lovely euphemism is that sometimes the Court chooses to decide cases on the principle that government cannot favor religion, and sometimes it does not...**

I have cataloged elsewhere the variety of circumstances in which this Court -- even *after* its embrace of *Lemon*'s stated prohibition of such behavior -- has approved government action "undertaken with the specific intention of improving the position of religion." *Edwards v. Aguillard*[7]. Suffice it to say here that when the government relieves churches from the obligation to pay property taxes, when it allows students to absent themselves from public school to take religious classes, and when it exempts religious organizations from generally applicable prohibitions of religious discrimination, it surely means to bestow a benefit on religious practice -- but we have approved it. *Walz. Zorach*[8]. Indeed, we have even approved (post-*Lemon*) government-led prayer to God. *Marsh*[9]...The Court explained that "to invoke Divine guidance on a public body entrusted with making the laws is not...an 'establishment' of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country." (**Why, one wonders, is not respect for the Ten Commandments a tolerable acknowledgment of beliefs widely held among the people of this country?**)

...What...could be the genuine "good reason" for occasionally ignoring the neutrality principle? I suggest it is the **instinct for self-preservation**, and the recognition that the Court...cannot go too far

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[7]Case 1A-R-077 on this website.

[8]Case 1A-R-025 on this website.

[9]Case 1A-R-065 on this website.

down the road of an enforced neutrality that contradicts both historical fact and current practice without losing all that sustains it: **the willingness of the people to accept its interpretation of the Constitution as definitive, in preference to the contrary interpretation of the democratically elected branches**.

This is rare. Is Justice Scalia making decisions based upon the "willingness of the people to accept what he does"? Is that dangerous? If "majority always rules," why have a constitution at all?

Besides appealing to the demonstrably false principle that the government cannot favor religion over irreligion, today's opinion suggests that the posting of the Ten Commandments violates the principle that the government cannot favor one religion over another. That is indeed a valid principle where public aid or assistance to religion is concerned (*Zelman*[10]) or where the free exercise of religion is at issue (*Church of Lukumi Babalu Aye*[11]), but it necessarily applies in a more limited sense to public acknowledgment of the Creator. If religion in the public forum had to be entirely nondenominational, there could be no religion in the public forum at all. One cannot say the word "God," or "the Almighty," one cannot offer public supplication or thanksgiving, without contradicting the beliefs of some people that there are many gods, or that God or the gods pay no attention to human affairs. **With respect to public acknowledgment of religious belief, it is entirely clear from our Nation's historical practices that the Establishment Clause permits this disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists.** The Thanksgiving Proclamation issued by George Washington at the instance of the First Congress was scrupulously nondenominational -- but it was monotheistic. In *Marsh* we said that the fact the particular prayers offered in the Nebraska Legislature were "in the Judeo-Christian tradition" posed no additional problem because "there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief."

Historical practices thus demonstrate that there is a distance between the acknowledgment of a single Creator and the establishment of a religion. The former is, as *Marsh* put it, "a tolerable acknowledgment of beliefs widely held among the people of this country." The three most popular religions in the United States, Christianity, Judaism, and Islam -- which combined account for 97.7% of all believers -- are **monotheistic**. All of them, moreover (Islam included), believe that the Ten Commandments were given by God to Moses, and are divine prescriptions for a virtuous life. **Publicly honoring the Ten Commandments is thus indistinguishable, insofar as discriminating against other religions is concerned, from publicly honoring God. Both practices are recognized across such a broad and diverse range of the population -- from Christians to Muslims -- that they cannot be reasonably understood as a government endorsement of a particular religious viewpoint...**

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[10]Case 1A-R-102 on this website.

[11]Case 1A-R-091 on this website.

Justice Stevens' writing [in *Van Orden* v. *Perry*[12]] is largely devoted to an attack upon a straw man. "Reliance on early religious proclamations and statements made by the Founders is...problematic," he says, "because those views were not espoused at the Constitutional Convention in 1787 nor enshrined in the Constitution's text." But I have not relied upon (as he and the Court in this case do) mere "proclamations and statements" of the Founders. I have relied primarily upon official acts and official proclamations of the United States or of the component branches of its Government, including the First Congress's beginning of the tradition of legislative prayer to God, its appointment of congressional chaplains, its legislative proposal of a Thanksgiving Proclamation, and its re-enactment of the Northwest Territory Ordinance; our first President's issuance of a Thanksgiving Proclamation; and invocation of God at the opening of sessions of the Supreme Court. The only mere "proclamations and statements" of the Founders I have relied upon were statements of Founders who occupied federal office, and spoke in at least a quasi-official capacity -- Washington's prayer at the opening of his Presidency and his Farewell Address, President John Adams' letter to the Massachusetts Militia, and Jefferson's and Madison's inaugural addresses. The Court and Justice Stevens, by contrast, appeal to no official or even quasi-official action in support of their view of the Establishment Clause -- only James Madison's Memorial and Remonstrance..., written before the federal Constitution had even been proposed, two letters written by Madison long after he was President, and the quasi-official *inaction* of Thomas Jefferson in refusing to issue a Thanksgiving Proclamation. The Madison Memorial and Remonstrance, dealing as it does with enforced contribution to religion rather than public acknowledgment of God, is irrelevant; one of the letters is utterly ambiguous as to the point at issue here, and should not be read to contradict Madison's statements in his first inaugural address, quoted earlier; even the other letter does not disapprove public acknowledgment of God, unless one posits (what Madison's own actions as President would contradict) that reference to God contradicts "the equality of *all* religious sects." And as to Jefferson: the notoriously self-contradicting Jefferson did not choose to have his non-authorship of a Thanksgiving Proclamation inscribed on his tombstone. What he did have inscribed was his authorship of the Virginia Statute for Religious Freedom, a governmental act which begins "Whereas Almighty God hath created the mind free..."

It is no answer for Justice Stevens to say that the understanding that these official and quasi-official actions reflect was not "enshrined in the Constitution's text." The Establishment Clause, upon which [he] would rely, *was* enshrined in the Constitution's text, and these official actions show *what it meant.* There were doubtless some who thought it should have a broader meaning, but those views were plainly rejected. Justice Stevens says that reliance on these actions is "bound to paint a misleading picture," but it is hard to see why. What is more probative of the meaning of the Establishment Clause than the actions of the very Congress that proposed it, and of the first President charged with observing it?

Justice Stevens also appeals to the undoubted fact that some in the founding generation thought that the Religion Clauses of the 1st Amendment should have a *narrower* meaning, protecting only the Christian religion or perhaps only Protestantism. I am at a loss to see how this helps his case, except

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[12]Case 1A-R-106 on this website.

by providing a cloud of obfuscating smoke. (Since most thought the Clause permitted government invocation of monotheism, and some others thought it permitted government invocation of Christianity, he proposes that it be construed not to permit any government invocation of religion at all.) At any rate, those narrower views of the Establishment Clause were as clearly rejected as the more expansive ones. Washington's First Thanksgiving Proclamation is merely an example. *All* of the actions of Washington and the First Congress upon which I have relied, virtually all Thanksgiving Proclamations throughout our history, and *all* the other examples of our Government's favoring religion that I have cited, have invoked God, but not Jesus Christ. Rather than relying upon Justice Stevens' assurance that "the original understanding of the type of 'religion' that qualified for constitutional protection under the 1st Amendment certainly did not include...followers of Judaism and Islam," I would prefer to take the word of George Washington, who, in his famous Letter to the Hebrew Congregation of Newport, Rhode Island, wrote that:

> "All possess alike liberty of conscience and immunities of citizenship. It is now no more that toleration is spoken of, as if it was by the indulgence of one class of people, that another enjoyed the exercise of their inherent natural rights."

The letter concluded, by the way, with an invocation of the one God:

> "May the father of all mercies scatter light and not darkness in our paths, and make us all in our several vocations useful here, and in his own due time and way everlastingly happy."

Justice Stevens says that if one is serious about following the original understanding of the Establishment Clause, he must repudiate its incorporation into the 14th Amendment, and hold that it does not apply against the States. This is more smoke...

Justice Stevens argues that original meaning should not be the touchstone anyway, but that we should rather "expound the meaning of constitutional provisions with one eye towards our Nation's history and the other fixed on its democratic aspirations." This is not the place to debate the merits of the "living Constitution"...Even assuming, however, that the meaning of the Constitution ought to change according to "democratic aspirations," why are those aspirations to be found in Justices' notions of what the Establishment Clause ought to mean, rather than in the democratically adopted dispositions of our current society? As I have observed above, numerous provisions of our laws and numerous continuing practices of our people demonstrate that the government's invocation of God (and hence the government's invocation of the Ten Commandments) is unobjectionable -- including a statute enacted by Congress almost unanimously less than three years ago, stating that "under God" in the Pledge of Allegiance is constitutional. To ignore all this is not to give effect to "democratic aspirations" but to frustrate them.

Finally, I must respond to Justice Stevens' assertion that I would "marginalize the belief systems of more than 7 million Americans" who adhere to religions that are not monotheistic. Surely that is a gross exaggeration. The beliefs of those citizens are entirely protected by the Free Exercise Clause

and by those aspects of the Establishment Clause that do not relate to government acknowledgment of the Creator. Invocation of God despite their beliefs is permitted not because nonmonotheistic religions cease to be religions recognized by the religion clauses of the 1st Amendment, but because **governmental invocation of God is not an establishment**. Justice Stevens fails to recognize that in the context of public acknowledgments of God there are legitimate competing interests: On the one hand, the interest of that minority in not feeling "excluded"; but on the other, the interest of the overwhelming majority of religious believers in being able to give God thanks and supplication *as a people,* and with respect to our national endeavors. **Our national tradition has resolved that conflict in favor of the majority.** It is not for this Court to change a disposition that accounts, many Americans think, for the phenomenon remarked upon in a quotation attributed to various authors, including Bismarck, but which I prefer to associate with Charles de Gaulle: **"God watches over little children, drunkards, and the United States of America."**

...The same result follows if the Ten Commandments display is viewed in light of the government practices that this Court has countenanced in the past. The acknowledgment of the contribution that religion in general, and the Ten Commandments in particular, have made to our Nation's legal and governmental heritage is surely no more of a step towards establishment of religion than was the practice of legislative prayer we approved in *Marsh*, and it seems to be on par with the inclusion of a creche or a menorah in a "Holiday" display that incorporates other secular symbols, see *Lynch*; *Allegheny*[13]. The parallels between this case and *Marsh* and *Lynch*[14] are sufficiently compelling that they ought to decide this case, even under the Court's misguided Establishment Clause jurisprudence.

Of course, I believe *Marsh* was wrongly decided and, even more so, that *Lynch* and *Allegheny* were very bad decisions. However, even that trilogy can be reconciled with a decision to deny the Ten Commandments display in the courthouse. Does anyone care to comment on what differences there may be between a non-denominational prayer to open a legislative session, a nativity scene with Santa Claus junk around it and the first two commandments of the Old Testament? Take a close look at what they say and decide for yourself whether, as Justice Scalia suggests, “the parallels are compelling.” Finally, please picture yourself a follower of a non-Christian religion going into a courthouse where justice is expected to be blind, but you find that justice, if determined by what is hanging on the wall, is defined only in Christian terms. If that doesn’t persuade, then picture yourself as a Christian seeking justice in a courthouse who’s chief judge decides to place an image of Buddha on the wall behind him.

...The frequency of these displays testifies to the popular understanding that the Ten Commandments are a foundation of the rule of law, and a symbol of the role that religion played, and continues to play, in our system of government. Perhaps in recognition of the centrality of the Ten

[13]Case 1A-R-085 on this website.

[14]Case 1A-R-066 on this website.

Commandments as a widely recognized symbol of religion in public life, the Court is at pains to dispel the impression that its decision will require governments across the country to sandblast the Ten Commandments from the public square. The constitutional problem, the Court says, is with the Counties' *purpose* in erecting the Foundations Displays, not the displays themselves. The Court adds in a footnote: "One consequence of taking account of the purpose underlying past actions is that the same government action may be constitutional if taken in the first instance and unconstitutional if it has a sectarian heritage." **This inconsistency may be explicable in theory, but I suspect that the "objective observer" with whom the Court is so concerned will recognize its absurdity in practice...Displays erected in silence (and under the direction of good legal advice) are permissible, while those hung after discussion and debate are deemed unconstitutional. Reduction of the Establishment Clause to such minutiae trivializes the Clause's protection against religious establishment; indeed, it may inflame religious passions by making the passing comments of every government official the subject of endless litigation...**

Absolutely agreed on that point! The history of how these displays got on the wall should be irrelevant to the issues in this case.

What Justice Kennedy said of the creche in *Allegheny* is equally true of the Counties' original Ten Commandments displays:

> "No one was compelled to observe or participate in any religious ceremony or activity. The counties did not contribute significant amounts of tax money to serve the cause of one religious faith. The Ten Commandments are purely passive symbols of the religious foundation for many of our laws and governmental institutions. Passersby who disagree with the message conveyed by the displays are free to ignore them, or even to turn their backs, just as they are free to do when they disagree with any other form of government speech."

Nor is it the case that a solo display of the Ten Commandments advances any one faith. They are assuredly a religious symbol, but they are not so closely associated with a single religious belief that their display can reasonably be understood as preferring one religious sect over another. The Ten Commandments are recognized by Judaism, Christianity, and Islam alike as divinely given...I would reverse the judgment of the Court of Appeals.