US Supreme Court weakens church/state separation in Ten Commandments rulings

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On June 27, the US Supreme Court ended its 2004-2005 term with two decisions on the constitutionality of government-sponsored Ten Commandments displays, upholding 5-4 a granite monument on the grounds of the Texas state capitol building while ruling by the same 5-4 margin that posters inside Kentucky county courthouses must be removed. While conflicting, the rulings as a whole mark a further erosion of the separation between church and state.

The nine high court justices issued 10 different opinions in the two cases. None of the opinions, however, focused on the significance the founders gave to the separation of church and state in establishing the United States, the first constitutional republic formed expressly on the secular, rationalist views of the European Enlightenment. A minority of the Supreme Court justices supported the proposition that the Constitution does not prohibit the government from openly promoting "monotheism."

At issue in both cases was the scope of the First Amendment's "establishment clause," which reads: "Congress shall make no law respecting an establishment of religion." The Supreme Court applies the establishment clause to state governments as well as to Congress on the theory that the Fourteenth Amendment, enacted for reconstruction after the Civil War, prohibits the states from denying their inhabitants federal constitutional rights.

The different origins and settings of the Texas capitol monument and the Kentucky courthouse posters were used to justify the apparently contradictory rulings in the two cases.

The granite monument the Supreme Court allowed to remain in the Texas case, *Van Orden v. Perry*, was donated in 1961 by the Fraternal of Eagles, which provided plaques and monuments for courthouses and other public areas throughout the country with funds obtained from Hollywood mogul Cecille B. DeMille, then promoting his film *The Ten Commandments*. The monument stands among 17 other monuments on 22 acres of open space surrounding the state capitol building. Its inscription begins, in large lettering, "I AM The LORD Thy God," and lists the King James Bible version of the commandments.

In the Kentucky case, *McCreary County v. American Civil Liberties Union*, two counties were sued in 1999 immediately after placing posters of the Ten Commandments in their courthouses. In response to litigation, the counties surrounded the posters with other writings—the lyrics to the "Star Spangled Banner," the Magna Carta and the Declaration of Independence—and called the collection the "Foundations of American Law and Government Display." The high court ruled that the establishment clause barred the display.

The Texas decision was hailed by the fundamentalist Christian right, which has made public displays of the Ten Commandments a cause célèbre. "We are thanking God that he has heard our prayers," announced Reverend Rob Schenk of the National Clergy Council, who announced that his group intends to install a similar monument on Capitol Hill in Washington DC.

No opinion in the Texas case obtained five votes, however, so the plurality opinion by Chief Justice William Rehnquist is not binding precedent. The deciding vote was cast by Associate Justice Stephen G. Breyer, a Clinton appointee who usually votes with the liberal bloc.

Tony Hileman, executive director of the American Humanist Association, said the Supreme Court "bowed to public pressure," a position substantiated by Breyer's cringing concurrence. Calling the case "borderline," Breyer attempted to justify switching sides from his vote on the Kentucky case by making the absurd argument that the monument—which lists five religious injunctions before the five secular ones—serves a "a primarily nonreligious purpose." He also maintained that the monument's 40-year history showed that it was not "divisive."

Suggesting political motivations behind his vote, Breyer wrote, "to reach a contrary conclusion here, based primarily on the religious nature of the tablets' text would, I fear, lead the law to exhibit a hostility to religion" that "might well encourage disputes concerning the removal of longstanding depictions of the Ten Commandments from public buildings across the Nation." The argument that rulings enforcing government neutrality actually exhibit "hostility" to religion is a canard of religious fundamentalists. Breyer is saying that voting against the Texas monument would generate too much wrath against the Supreme Court.

Chief Justice William Rehnquist wrote the lead opinion in the Texas case, joined by Associate Justices Antonin Scalia, Anthony Kennedy and Clarence Thomas. Because Breyer concurred separately, Rehnquist's views constitute a plurality rather than a majority and therefore do not technically constitute binding precedent.

Rehnquist concluded that the "religious significance" of the monument did not require its removal because "Moses was a lawgiver as well as a religious leader" and therefore "the inclusion of the Ten Commandments monument ... has a dual significance, partaking of both religion and government."

The premise of Rehnquist's argument is that "our institutions presuppose a Supreme Being" so this dual purpose is constitutionally appropriate. In fact, he is turning history on its head. The framers considered the prohibition against government sponsorship of religion so important that they placed the establishment clause first in the Bill of Rights. This injunction was foundational for the new nation precisely because the founders' rationalist views dictated that religious conceptions were solely the domain of private thought and

conscience, and that government arose through the agreement of the governed, not from divine intervention in human affairs.

The Constitution begins "We the People" because the new government was expressly established on the principle of the consent of the governed. A strikingly secular document, the Constitution includes, besides the establishment clause, the provision that "no religious test shall ever be required as a qualification to any office or public trust under the United States."

Associate Justice John Paul Stevens penned a dissent to the Texas decision, defending Supreme Court precedents enforcing the separation of church and state. He wrote that the court has "repeatedly reaffirmed that neither a State nor the Federal Government 'can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.'" Stevens continued, quoting decades of Supreme Court precedent, that "the Establishment Clause requires the same respect for the atheist as it does for the adherent of a Christian faith," and that "the individual freedom of conscience protected by the First Amendment embodies the right to select any religious faith or none at all."

It is a measure of the decay of bourgeois democracy in the United States that only Associate Justice Ruth Bader Ginsburg joined Stevens' dissent. (Associate Justices David Souter and Sandra Day O'Connor dissented in separate opinions.)

As recently as 1968, the Supreme Court defended unanimouslythe separation of church and state, striking down a law prohibiting the teaching of evolution in public schools in *Epperson v. State of Arkansas*. "Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice," wrote Associate Justice Arthur Goldberg on behalf of all nine justices. "It may not be hostile to any religion or to the advocacy of no religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite."

In the Kentucky case upholding a lower court injunction against courthouse Ten Commandments displays, Souter wrote the majority opinion, basing the ruling on the displays' "predominantly religious purpose." He dismissed the counties' efforts to "secularize" the exhibit by surrounding the Ten Commandments with other documents, writing, "it is at least odd to include a patriotic anthem, but to omit the Fourteenth Amendment, the most significant structural provision adopted since the initial framing," and "no less baffling to leave out the original Constitution of 1787 while quoting the 1215 Magna Carta."

"If an observer found these choices and omissions perplexing in isolation," Souter added, "he would be puzzled for a different reason" when reading "the Counties' posted explanation that the 'Ten Commandments' influence is clearly seen in the Declaration of Independence,'" because "the observer would find that 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.'"

Antonin Scalia penned a particularly foul and disingenuous dissent, even by his standards. Joined by Rehnquist, Thomas and Kennedy—the Texas case plurality—Scalia begins with a purported anecdote about some unnamed judge from an unidentified European nation saying to him, after hearing Bush's address to the nation following the September 11, 2001 terrorist attacks, "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."

Scalia calls this "a model of the relationship between church and state ... spread across Europe by the armies of Napoleon," which "is not, and never was, the model adopted by America." Instead, Scalia cherry picks sundry facts from US history—George Washington added "so help me God" to the presidential oath, Chief Justice John Marshall opened the Supreme Court with "God save the United States and this Honorable Court," coins bear the motto "In God we trust," and so forth—to argue that "we are a religious people whose institutions presuppose a Supreme Being."

Scalia flippantly dismisses Thomas Jefferson's famous metaphor that the establishment clause stands as a "wall between church and state," calling this great intellect "notoriously self-contradicting." He labels James Madison's historic "Memorial and Remonstrance Against Religious Assessments" irrelevant because it was written before the Constitution, and discounts the fact, emphasized by Stevens' dissent in the Texas case, that any religious views of the founders "were not espoused at the Constitutional Convention in 1787 nor enshrined in the Constitution's text."

Scalia goes on: "With all this reality (and much more) staring it in the face, how can the Court *possibly* assert that 'the First Amendment mandates governmental neutrality between religion and nonreligion,' and that 'manifesting a purpose to favor adherence to religion generally' is unconstitutional? Who says so?" (the emphasis is Scalia's).

Scalia concludes that the government can constitutionally advocate "monotheism" and mocks the more than half-century of Supreme Court precedents directly contradicting his theocratic views: "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-twentieth century."

Here the supposed "strict constructionist" and opponent of "activist courts" virtually dismisses with a wave of the hand the principle of respect for precedent established by previous court decisions, a cornerstone of Anglo-American jurisprudence. Such willful and arbitrary "jurisprudence" is a hallmark of Scalia, who makes a virtue of proceeding in his rulings from the outcome dictated by his right-wing political views, and cobbling together whatever arguments can be assembled to justify his partisan prejudices.

With the religious right clamoring for another Scalia or Thomas to replace O'Connor, who generally voted in favor of church/state separation, the conditions are in place for a further juridical shift in the direction of theocracy. The inability of the erstwhile liberals of the Democratic Party to resist these antidemocratic elements is epitomized by Breyer's cowardly vote in favor of the Texas monument.