

Thou Shalt Honor Thy Establishment Clause: An Analysis of Ten Commandments Displays in Georgia Courthouses



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In 2005, the United States Supreme Court, in *McCreary County v. ACLU*, determined the posting of a historical display that included the Ten Commandments in two county courthouses in Kentucky violated the First Amendment establishment clause, 545 U.S. 844 (2005). In 2006, the Georgia legislature passed a law authorizing a nearly identical historical display to be posted in Georgia courthouses. O.C.G.A. § 45-13-51 (2006). Similar to the display in *McCreary*, an authorized Georgia historical display must include the Mayflower Compact; the Ten Commandments; the Declaration of Independence; the Magna Carta; The Star-Spangled Banner; the national motto of the United States of America; the Preamble to the state Constitution; the Bill of Rights; and a picture of the Lady Justice. *Id.*

Does the Georgia law fly in the face of the establishment clause? Those who would rush to such a conclusion need to

look closer. In *McCreary*, the Supreme Court was clear that in ruling the display unconstitutional, it was not holding that sacred texts can never be incorporated into a government display on law and religion. 545 U.S. at 874. Indeed, on the very same day the Supreme Court found the historical display unconstitutional in *McCreary*, it ruled that a Ten Commandments display in Texas authorized pursuant to state legislation did not violate the establishment clause in *Van Orden v. Perry*, 545 U.S. 677 (2005). In *Van Orden*, the Ten Commandments display was one of 17 other monuments along with 21 historical markers that were meant to commemorate the “people, ideals, and events that compose Texan identity.” *Id.* at 681. Significant to the plurality decision in *Van Orden* was the dual purpose of the Ten Commandments display in its context with the other monuments and the fact that it had been erected more than 40 years ago. *Id.* at 682-92.

While the Supreme Court has developed and employed a number of tests to guide its establishment clause analysis, the *McCreary* Court looked to the purpose behind the government action. 545 U.S. at 860. Beginning with the premise that the “First Amendment mandates government neutrality between religion and religion, and between religion and non religion,” the focus of the Supreme Court’s analysis was on whether the government had a “secular purpose” for the display or a predominant purpose of “advancing religion.” *Id.* In order to determine the “purpose” behind the display, the Supreme Court utilized an “objective observer analysis,” asking whether an objective observer who takes into account the text, legislative history and implementation of the statute would find that the government officials acted with a secular purpose or with

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a primarily religious purpose. *Id.* at 862. In *McCreary*, the Supreme Court looked at these factors and concluded that an objective observer would find that county officials, who were responsible for the legislation and the actual posting of the displays, acted with a primarily religious purpose. *Id.* at 869-74.

As the Georgia law was passed by the state Legislature but can be applied by local governments, a challenge could come against the constitutionality of the statute as promulgated, against the constitutionality of the statute as applied, or both. Would an objective observer find that the Georgia Legislature acted with a secular or religious motive? What type of behavior on the part of local government officials would an objective observer find to be indicative of a religious motive? There are enough similarities and differences between the Kentucky and Georgia displays to warrant a side-by-side comparison in the hopes of gaining some insight into whether the Georgia law would withstand such an inquiry and how application of the law could affect the analysis.

In *McCreary*, the Supreme Court rejected the government's stated purpose which was in part "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." 545 U.S. at 871 (internal quotations and citation omitted). While noting that the government's stated purpose is usually afforded deference, the Court added that the government's stated secular purpose must be genuine and not merely a "sham" or

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"secondary objective." *Id.* at 864. In rejecting the government's stated purpose in *McCreary*, the Supreme Court looked at the development of the displays and their metamorphosis from a Ten Commandments display to the historical display it ultimately became. See *id.* at 869-71. The initial displays consisted of large abridged text versions of the King James Ten Commandments. *Id.* at 851. After initial litigation, both of the counties involved passed legislation authorizing a second display on the grounds that the Ten Commandments are "the precedent legal code upon which the civil and criminal codes of . . . Kentucky are founded." *Id.* at 853. In these second displays, other documents also were put up that, though smaller, also contained religious themes. *Id.* After the district court issued a preliminary injunction requiring the displays be removed, the counties put up the final version that came before the Supreme Court. *Id.* at 855. This

display was entitled "The Foundations of American Law and Government Display." *Id.* at 856. The Supreme Court determined the claimed secular purpose to be merely a litigating position as the latest display was not the result of a new legislative authorization and the second display was not officially repudiated. *Id.* at 871.

In promulgating O.C.G.A. § 45-13-51, the Georgia Legislature determined that there is a need to "educate and inform the public about the history and background of American Law." O.C.G.A. § 45-13-51(a)(2). Given the Supreme Court usually affords deference to a Legislature's stated purpose and that O.C.G.A. § 45-13-51 was not born nor altered in the midst of ongoing litigation, it is certainly plausible that the stated secular objective would be accepted by the courts. But the legislative history of O.C.G.A. § 45-13-51 raises the possibility that there is more here than initially meets the eye. Specifically, the bill's initial purpose called for making legislative findings "to recognize the religious heritage of America." Georgia Bill History, 2006 Reg. Sess. H.B. 941. It also called for the "Secretary of State to prepare documents relative to that religious heritage" and for "the Attorney General to defend counties who display documents relative to the religious heritage of America." *Id.* While the statute as passed has a stated secular purpose, the objective observer analysis involves looking beyond the statute's stated purpose by taking into account its legislative history. As such, it is likely that a court would consider the initial

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purpose of the introduced bill as well as conversations, debates and public statements made by the sponsors of the bill and those involved in making it into law. See *McCreary*, 545 U.S. at 862.

The content of the legislation also is a consideration in the objective observer analysis. In *McCreary*, the Supreme Court not only looked to the selected documents in its analysis but also looked to historic legal documents that were missing from the authorized displays. 545 U.S. at 872-73. The Court found it "odd" that a collection of foundational American documents would fail to include the Constitution of the United States and the Fourteenth Amendment while including the Magna Carta. *Id.* While the Court found this to be "baffling," apparently the Georgia Legislature did not bring that § 45-13-51 also includes the Magna Carta in its authorized display while failing to include the U.S. Constitution and the Fourteenth Amendment. See O.C.G.A. § 45-13-51(c). The Court in *McCreary* also was perplexed by the posted explanation that the Ten Commandments influence is "clearly seen in the Declaration of Independence." 545 U.S. at 873. The Georgia Legislature also adopted this language to be posted as part of the display. See O.C.G.A. § 45-13-51(d). Since such issues gave the Court pause once, it is certain to be a relevant factor to be considered in determining the legality of the Georgia statute.

The objective observer analysis also looks to the application of the law in question when determining whether the government has acted with a secular purpose. In *McCreary*, the Supreme Court took note that a county executive was accompanied by his pastor for the ceremony introducing the Ten Commandments display. 545 U.S. at 869. In so doing, the Supreme Court concluded that a reasonable observer would find the counties intended to "emphasize and celebrate the Commandments' religious message." *Id.*

Going forward, government officials choosing to put historical displays in Georgia courthouses would be well advised to take measures to ensure their message is a secular one consisting of history and law rather than faith and

religion. For even if the hidden motive of a government official is a religious one, "[a] secret motive stirs up no strife and does nothing to make outsiders of nonadherents." *McCreary*, 545 U.S. at 863. When government officials are discussing whether to put up a historical display, any conversations revealing a religious motive could later be seized upon by a challenger to the display. The same holds true for government officials presenting a religious message either through their own words or through the

words of religious speakers at dedication ceremonies. Awareness of the message being sent through the words and actions of government officials is so important because in establishment clause analysis "detail is key." *Id.* at 867. ■

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