Room for religion: What's allowed on government property?

by Marci A. Hamilton in the August 9, 2005 issue

Though the Supreme Court reached different results in two cases challenging government displays of the Ten Commandments, the court's message was quite clear: in deciding such issues, context is everything.

One case concerned two Kentucky counties which had directed their courthouses to display the Ten Commandments in highly visible areas. Upon a constitutional challenge by the American Civil Liberties Union, they added various resolutions, including a statement that the Ten Commandments were "the precedent legal code" for Kentucky law, a reference to the unanimous decision by the Kentucky House of Representatives in 1993 to adjourn "in remembrance and honor of Jesus Christ, the Prince of Ethics," an endorsement of Alabama judge Roy Moore's display of the Ten Commandments, and a declaration 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." Before the trial court could rule, the counties hired new lawyers, and then added framed copies of public documents intended to accentuate their religious purpose for posting the Ten Commandments, including 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 trial court ruled that the purpose behind each display was religious, not secular, and prohibited the displays. The Court of Appeals agreed. The counties never rescinded their earlier resolutions.

A 5-4 majority on the U.S. Supreme Court, in an opinion written by Justice David Souter, found the display violated the separation of church and state because the government's patent purpose was to endorse and further a religious message. In dissent, Chief Justice Rehnquist and justices Scalia, Kennedy and Thomas said they would have permitted the display, because, in their view, government should be free

to sponsor religious messages.

The Texas case involved a display on grounds surrounding the state capitol, featuring 21 historical markers and 17 monuments, including one 6-foot rendition of the Ten Commandments, which was donated by the Fraternal Order of the Eagles for the purpose of reducing juvenile delinquency. The monument contains an inscription stating that it was donated by the FOE “to the people and youth of Texas.” The Supreme Court characterized the posting as “passive.”

In another 5-4 decision, the court declared the Texas display constitutional. Chief Justice Rehnquist, joined by justices Scalia, Kennedy and Thomas, found no constitutional error in a government posting of a religious message. They were joined in a concurrence by Justice Breyer, who believed the government’s message was not overtly religious enough to justify holding it illegal. Justice Souter, writing for himself and justices Stevens, Ginsburg and O’Connor, held that the display was frankly religious, because the Ten Commandments are, by their content, religious.

As the swing vote, Justice Breyer was the one who determined that the Kentucky displays are unconstitutional and the Texas display constitutional. Four members of the court applied traditional separationist principles. The four more conservative members of the Court would have permitted the display of the Ten Commandments in virtually any context.

The court has drawn a distinction between governments’ aggressively backing religious messages on their own properties and the mere presence of a religious object on government property. The crucial question for courts is whether the government is actively facilitating or sponsoring the religious content of the message. It is all about context, which should not be very surprising. Most establishment clause cases are determined by context. In the end, the results are a matter of common sense rather than abstract theory.

The practical impact of these decisions is that challenges to antique plaques or monuments placed on government property will be dismissed, while those cases involving a contemporary government pushing the Ten Commandments’ religious message will continue their journeys through the courts.

In his dissent in the Kentucky case Scalia fails to live up to his typical brilliance. He defines the debate over the Ten Commandments just as it has been defined in the political arena, where there has been a persistent cry that the rule against prayer in

public schools and the challenges to “under God” in the Pledge of Allegiance and the display of the Ten Commandments on government property amount to “hostility” to religion in “the public square.” This is specious reasoning.

The “public square” is that space where Americans meet to exchange views—in the media, on the Internet and in all the places where people meet. This space is on private property 99.9 percent of the time, and it is filled with religious messages of all kinds. There may be voices in that public square that disapprove of some messages from some religious believers, but that does not mean the square is hostile to religion. The Commandments cases dealt not with the public square, but rather with government-sponsored speech on government, not private, property.

To say that the court’s establishment clause decisions are “hostile” to religion because they remove religion from the “public square” is the sort of hyperbole one might expect from interest group lobbyists. It falls well below the standard of a Supreme Court justice.

O’Connor, who has often been a swing vote in establishment clause cases, voted to find both displays unconstitutional. She said each display sent an unmistakably religious message because of the Commandments’ clear religious content.

In cases involving the public display of Christian crèches, O’Connor had introduced the doctrine that government may not “endorse” a particular religious viewpoint (which captures the spirit of the Ten Commandments decisions). Therefore, a solitary crèche on a courthouse interior stairway was deemed unconstitutional, because, in her words, it “conveys a message to nonadherents of Christianity that they are not full members of the political community, and a corresponding message to Christians that they are favored members of the political community.” But the case of a crèche coupled with secular symbols of the holiday season in a park in a city’s commercial district, and the case of a city’s display of a menorah, a Christmas tree and a sign saluting liberty were not deemed unconstitutional.

The Ten Commandments cases rest in no small part on O’Connor’s understanding of the establishment clause. These cases also underscore O’Connor’s pivotal role in defending no-establishment principles. Were her vote to be displaced by someone whose views on the establishment clause are closer to Scalia’s, the barriers to full-scale government support of particular religious messages could fall to the wayside.

It is difficult to predict how John Roberts, Bush’s appointee to fill O’Connor’s seat, will address establishment cases. If one examines his work in the (first) Bush and Reagan administrations, it would appear that he will be closer to Scalia. But in those cases he took his positions on behalf of clients. He has so far held his personal views close to the vest.