AN EDUCATIONAL UPDATE FROM
THE SOUTHEAST LAW INSTITUTE™, INC.

To: **SLI Supporters**
Date: **July 2005**
From: **A. Eric Johnston**
Re: **U.S. Supreme Court Issues Ten Commandments Rulings: Part I**

The U.S. Supreme Court has issued opinions in two cases trying to explain when it is appropriate for a governmental entity to display the Ten Commandments. Even after studying the cases, it is still not clear when it might be permissible. What seems to be clear is that whether the Ten Commandments may be displayed in a given situation depends on who is in control of the Court. Both cases were decided on the same day.

McCreary County, Kentucky v. ACLU

Two Kentucky counties made three attempts at displaying in their courthouses the Ten Commandments as historical documents. The first effort was the Ten Commandments alone, then with some additional documents which all had a religious reference, and finally with a number of other historical documents without necessarily having religious reference (Magna Carta, Declaration of Independence, Bill of Rights, lyrics of the Star Spangled Banner, *etc*.). The deciding factor for the Court was that the purpose of the counties was religious and therefore it did not matter the context of the display, all of which were unconstitutional as a violation of the Establishment Clause of the First Amendment to the U.S. Constitution.

The opinion was written by Justice Souter and joined by Justices Stevens, O'Connor, Ginsburg and Breyer. All are liberal justices, except for O'Connor who is a moderate, but usually on moral issues swings to the liberal side. This majority relied exclusively on the first prong of the *Lemon* test (a judicial test for Establishment Clause issues which can be used subjectively for virtually any decision the Court wants to reach) which states that a government action must have a secular purpose. Because the purpose of these counties was to display the Ten Commandments, which is religious and regardless of how they did it, it is unconstitutional. Souter's Opinion is as simple as that.

Souter also employed the "endorsement test," a judicial test originally authored by Justice O'Connor, involving what a reasonable observer thinks. The majority agreed that a reasonable observer would see through the counties' evolutionary process to the religious purpose. Because the purpose is religious, the display violated the secular purpose prong of *Lemon* and is therefore unconstitutional. These counties had asked the court to abandon the *Lemon* test. It is seldom used by the U.S. Supreme Court, but because it has not been abandoned, inferior federal courts always feel obligated to use it. It is a very subjective and improper test which, as Justice Scalia has observed in the past, will arise from the grave and stalk unwary litigants. It is just so in this case.

Souter noted the counties changed lawyers three times and with each lawyer the display of documents. To a reasonable observer it would seem, if he knew that history, the counties were trying to comply with the law. However, Souter misuses the endorsement test. The reasonable observer, as Scalia points out in his dissent, would merely be walking down the hall in the courthouse and would not be aware of the history of how the documents came to be hanging on the walls, if in fact he even noticed the documents at all. I agree with this: I have been going to the Jefferson County, Alabama courthouse for 32 years. On June 23, 2005, I noticed for the first time an engraving of "Lex Divini" with ten Roman numerals above one of the entrance arches.

It is convenient for the Court to resurrect the secular purpose prong of the *Lemon* test, as well as extend O'Connor's endorsement test, to find unconstitutional a display which in its final form should have been constitutional. If the counties had originally hung their exhibit in its final form, would it have been constitutional? Maybe. The lesson to be learned is, apparently, federal courts do not appreciate the genuine efforts of government to conform to constitutional principles. An improper motive will always be assigned when involving Establishment Clause litigation.

Justice Scalia dissented and was joined by Chief Justice Rehnquist and Justices Thomas and Kennedy (the latter being somewhat of a surprise). Scalia pointed out that from the days of George Washington until now, the views of our people have changed very little. We still have our motto "In God We Trust," our Pledge of Allegiance contains the acknowledgement to our nation being "under God," and sessions of the U.S. Supreme Court still open with "God save the United States and this Honorable Court." He suggested that the three most popular religions in the United States, Christianity, Judaism and Islam, accounted for 97.7 of all believers, and all three of which recognize the validity of the Ten Commandments. His point is that religion was and is an important part of the fabric of who we are. Religion makes a unique contribution to the development of our legal system. To acknowledge religion does not attempt to convey any binding nature of its dogma.

Of particular interest to most of us, the question arises of whether it is now necessary to sandblast the facades of many judicial buildings across America because they have depictions of Moses or the Ten Commandments. Souter did acknowledge depictions in and on the U.S. Supreme Court building, but he said, they are depicted with many

lawgivers and that is acceptable. Obviously, that is a self-serving and convenient statement for Souter to make, since as his opinion was delivered by the court, he sat under the very image of Moses and the Ten Commandments.

The goal of these Kentucky counties was to display the Ten Commandments so as to recognize its important basis in American law. This does not convert anyone and is not proselytization. Yet, federal courts will use any test they can to remove this important part of America's heritage. Though 97.7 percent of religions in American may currently believe in the significance of the Ten Commandments, the courts will not permit their recognition. The dogma of other religions are not found as a major part in past or present American history. If we become detached from our heritage, then we are no longer who we say we are. Look at America today. Maybe it is true.

Van Orden v. Rick Perry, Governor of Texas

In this companion case, the Court reached an entirely different conclusion by a different method. The opinion is authored by Chief Justice Rehnquist and he is joined once again, as in the dissent above, by Justices Scalia, Kennedy and Thomas (a plurality). Additionally, Justice Breyer concurs in the judgment, though not the reasoning. This makes the majority. While the display of the Ten Commandments in the Kentucky courthouses were as a result of recent acts, the display of a six foot monolith on the grounds of the Texas State Capitol had been there for forty years and the man who was objecting to it had walked past it for six years before he filed his lawsuit. It was a part of 21 historical markers and 17 monuments on the grounds.

Rather than use the secular purpose prong of the *Lemon* test, the plurality in this case determined that the reasonable observer (rather than a critical nitpicking historian) would conclude that the monument would not convey a message of religion but a part of our nation's history. The *Lemon* test was summarily avoided and the Court recognized the importance of America's religious heritage, pointing out the several references or depictions of Moses with the Ten Commandments in and on the U.S. Supreme Court building and around Washington. The plurality pointed out the obvious religious nature of the Ten Commandments both at the time of their inception and until now. They are an important part of America's history. This display of the Ten Commandments is constitutional.

Justice Thomas offered his insightful concurring opinion. He observed that the incoherence of the Court's decisions leaves courts, governments, believers and nonbelievers alike confused. He observed that the opinion of courts that "under God" has only an historic meaning does not deprive it of its religious meaning. He concluded by saying "the unintelligibility of this Court's precedent raises the further concern that, either in appearance or in fact, adjudication of Establishment Clause challenges turns on judicial predilections . . . The outcome of constitutional cases ought to rest on firmer grounds than the personal preferences of judges."

As if to prove Thomas' point, there is the concurrence by Justice Breyer. He properly observed that the "Establishment Clause does not compel the government to purge from the public square all that in anyway partakes of the religious." As if to try to draw the two cases together, he observed this case is a "borderline case" and the Court has "found no single mechanical formula that can accurately draw the constitutional line in every case. The forty year age of the monument convinced him. As we shall analyze next month, Breyer held the key to those two cases, but not to the issue.

A much more heated analysis is given by Justice Stevens in his dissent. He believes the sole function of the Texas monument is a religious statement. He believes there is a strong presumption in the Establishment Clause against any display of religious symbols on public property. He sees it simply as a religious statement and, therefore, unconstitutional. Stevens is known for his judicial analytical hostility to religion.

Conclusion

How do you reconcile these two opinions? Breyer said the Texas monument had been there forty years and was okay. On the other hand, the Souter-led majority in *McCreary* found the counties had an improper motive because they were trying to find a way to display the Ten Commandments. If the *Van Orden* lawsuit had been brought shortly after the Texas monument was erected, would it have been unconstitutional? The unfortunate conclusion is that these cases demonstrate a severely divided U.S. Supreme Court which is incapable of answering the question of how or when a religious text can be displayed in anyway on public property. If the element of longevity is pivotal, then no future display that is contemporaneously contested will be constitutional.

We believe the separately written opinions by Scalia (in *McCreary*) and Thomas (in *Van Orden*) accurately describe what America's constitutional jurisprudence should permit. That is, acknowledgement of religion by government is permitted in public places, so long as there is not a message of pressure or proselytization. To recognize our true religious heritage is the real basis for the religion clauses of our First Amendment. Most Judeo-Christian denominational dogma recognize the voluntary nature of Bible-based religion. No one is forced to believe or act in a certain way. While our beliefs may range from free will to predestination, none translates to any governmental policy or religious oath or affirmation. Why is it so difficult for learned justices to understand these very simple truths? In the end, the Souter-led rulings are preposterous. The liberal justices are desperately trying to find a way to keep our religious history silent.