



MEMORANDUM

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Ten Commandments

The Ten Commandments form a bright strand in the fabric of America's heritage and legal development. It is the position of the ACLJ that the historical and moral value of the Ten Commandments to American society and culture merit public recognition, and that such recognition by the government does not "establish" a religion under the First Amendment.

This iconic symbol in American legal history and society has come under fire over the last half-century. Organizations like the ACLU and the Freedom From Religion Foundation claim that the public display of the Ten Commandments on government property is a government "establishment" of religion under the First Amendment of the United States Constitution. The ACLJ is dedicated to defending the constitutionality of the public display of the Ten Commandments as a foundational document in our national heritage and society.

The Public Display of the Ten Commandments on Government Property May be Constitutional if Done Properly

The Supreme Court has established tests for religion cases, but, in reality, it interprets the Establishment Clause and the Free Exercise clause on a case by case basis, and does not always follow case law. For example, on June 27, 2005, the Supreme Court decided two critically important cases involving the display of the Ten Commandments. Both cases were decided by a deeply divided court with votes of 5-4. In the Texas case (*Van Orden v. Perry*, 545 U.S. 677 (2005)), the Justices upheld the constitutionality of a Ten Commandments monument donated by the Fraternal Order of Eagles displayed outside the state capitol some 40 years ago. In the Kentucky case (*McCreary County v. ACLU*, 545 U.S. 844 (2005)), the high court concluded that posting the Commandments inside a courthouse was unconstitutional because the history of the display indicated a religious purpose for its display.

Under the Supreme Court's interpretation of the First Amendment in these cases, the public display of the Ten Commandments on government property may serve a valid secular

governmental purpose and is not an inherent endorsement of a religion. *Van Orden*, 545 U.S. 687–89. But, if there is a predominately religious purpose for displaying the Ten Commandments, the Court has held that it may violate the First Amendment to allow such a display. *McCreary County v. ACLU*, 545 U.S. 844 (2005).

According to some lower courts, a display in a courthouse that does not indicate a predominantly religious purpose, and that includes the Ten Commandments along with other historical documents such as the Declaration of Independence and the Magna Carta does not violate the First Amendment, and is consistent with the Supreme Court’s ruling in *McCreary County*. See *ACLU v. Grayson County*, 591 F.3d 837 (6th Cir. 2010) (holding that a courthouse display of nine historical documents, including the Ten Commandments, that was sponsored by a reverend, did not violate the Establishment Clause); see also, *ACLU of Kentucky v. Mercer County*, 432 F.3d 624 (6th Cir. 2005) (holding the same for a similar courthouse display of ten foundational documents).

While the Court decides these issues on a case by case basis, it seems that the display of the Ten Commandments in courthouses and capital buildings does not violate the Court’s view of the First Amendment when there is a secular purpose for the display, the display is paid for by private parties, and the display includes other equally prominent foundational documents.

In the public school context, the Court held in *Stone v. Graham*, 449 U.S. 39 (1980) that the state could not require privately donated Ten Commandments displays to be put on the walls of its schools. Since then, the Supreme Court has yet to rule on the issue of the Ten Commandments in public schools. Presumably, given the recognized historical value of the Ten Commandments, the Court should not prohibit their display in the absence of a clear showing that the display has the effect of endorsing a particular religion. A display would be most likely to be upheld if it was in the context of other historical documents holding significance in American legal history.

The Supreme Court also has recognized that it is important for the government to accommodate and acknowledge religion as part of our national heritage, and that the Ten Commandments played an important role in our nation’s history. In 1892, the Supreme Court stated that “this is a religious nation.” *Church of the Holy Trinity v. United States*, 143 U.S. 457, 470 (1892). The Court has discussed the historical role of religion in our society and concluded that “[t]here is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789.” *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984). In *Abington v. Schempp*, 374 U.S. 203, 212 (1963), the Court recognized that “religion has been closely identified with our history and government.” Such recognition is nowhere more affirmatively expressed than in *Zorach*, in which the Court stated that “[w]e are a religious people whose institutions presuppose a Supreme Being.” 343 U.S. at 313. Nevertheless, this country has witnessed a long struggle over governmental acknowledgments of the religious identity of the American people.