Making sense of the Ten Commandments cases

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By now, much has been written about the Supreme Court's two decisions on government displays of the Ten Commandments. The decisions are indeed long (137 pages total, plus pictures) and unwieldy (10 different opinions, with shifting alliances). They failed to produce a rule that will eliminate litigation in similar disputes. But perhaps that was too much to expect.

The split decisions will lead some to decry them as useless. Another view, however, is that the opinions simply reflect the practical difficulty of protecting against government promotion of religion without relegating all religion to the private realm. For now, the answer to whether it is constitutional to display the Ten Commandments on government property lies between the decisions banning the Kentucky courthouse displays and allowing the monument on the Texas Capitol grounds. A closer look reveals what we won and what we lost.

First, the win. In the Kentucky case, ***McCreary County v. ACLU***, Justice David Souter, writing for a 5-4 majority, reaffirmed the principle that the "First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion." In this case, the principle of neutrality, which was explicitly and disturbingly abandoned by the dissent, could not square with the obvious government attempts to advance religion.

McCreary relies on the common (though rarely determinative) requirement that laws have a secular purpose, a requirement that serves to protect against an establishment violation. Under the facts of *McCreary* — where the county government had recently posted the Ten Commandments, passed resolutions showing the religious purpose for doing so, then attempted unconvincingly to disguise that purpose in response to litigation — the secular purpose was hard to find. The evidence of a "predominantly religious" purpose was overwhelming.

This victory was tempered by the decision's strong focus on "purpose," which will inevitably lead to some attempts to obscure religious purposes and thereby skirt the ruling. Where monuments have been longstanding, with little explicit religious history, they are likely to withstand challenge — which leads to what we lost.

In the Texas case, ***Van Orden v. Perry***, Justice Stephen Breyer, who had voted with the majority in *McCreary*, switched sides, joining in the judgment that upheld the Texas monument. In his concurring opinion, which is the controlling rule of the case, Justice Breyer acknowledged the various goals of the Establishment Clause and the lack of a singular rule to reach them. He noted that there will inevitably be difficult borderline cases — like *Van Orden* — that require the exercise of legal judgment.

In such a case, legal judgment "must reflect and remain faithful to the underlying purposes of the Clauses, and it must take account of context and consequences measured in light of those purposes." Justice Breyer's flexible approach acknowledges that a slavish adherence to a strict standard in all cases would also "tend to promote the kind of social conflict the Establishment Clause seeks to avoid."

In Texas, the monument at issue had a 40-year history on the state capitol grounds. Recognizing that the Ten Commandments have historical and moral significance, in addition to their obvious religious import, Justice Breyer found that "the context suggests that the state intended the display's moral message—an illustrative message reflecting the historical 'ideals' of Texans—to predominate." The physical setting of the monument — in a large park containing other historical displays — supported this interpretation. The fact that it had long stood unchallenged sealed his conclusion.

Breyer's opinion distinguishes the apparent motives in *Van Orden* from those in *McCreary*, and warns that a "more contemporary state effort to focus attention upon a religious text is certainly likely to prove divisive in a way that this longstanding, pre-existing monument has not." It also notes that removal of the Texas monument (and, by implication, many others) may evince hostility toward religion and stoke the fires of the culture wars. While it grandfathers certain Ten Commandments displays on government property, *Van Orden* cannot be said to open the door to new ones.

Government-sponsored religious monuments are always constitutionally suspect and theologically questionable. Any rule that puts government in the position of making religious decisions threatens the freedom of religion. Those who share the BJC perspective on religious liberty will continue to promote the Ten Commandments (and other scriptural mandates) in a way that the Bible encourages: by writing them on our hearts, as the prophet Jeremiah instructed.

Until the broader public is persuaded that religious freedom requires a rejection of government-sponsored religion, we will continue to oppose attempts to erect unconstitutional displays. As we do so, we will make the most of what we won in these decisions, reluctantly agreeing with Justice Breyer, that our defeat in *Van Orden* may have been necessary to prevent a more destructive backlash.