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Keeping the Commandments

John Witte

Director of the Center for the Study of Law and Religion
Alonzo L. McDonald Distinguished Professor, Emory University

Abstract

This brief Article defends the Supreme Court case of Pleasant Grove v. Sumnum (2009), which upheld a longstanding display of a privately-donated Decalogue monument in a public city park. Old religious displays in public life like this deserve greater deference, and the First Amendment Establishment Clause should not provide a taxpayer with a heckler's veto over a community's decision to maintain the symbol.

Keywords: First Amendment; religious symbols; establishment clause; *Pleasant Grove* case

On February 25, 2009, a unanimous United States Supreme Court upheld the constitutionality of a Ten Commandments monument in a city park in the state of Utah. The monument had been privately donated forty years before. It was one of a dozen old signs and markers in the same park. A new religious group, called Sumnum, sought permission to put up a monument with their Seven Principles of faith. The city refused. Sumnum then sued under the First Amendment. It charged the city with violating the free speech clause by discriminating against its Seven Principles. It also threatened to charge the city with violating the religious establishment clause by displaying the Ten Commandments alone. This left the city with a hard choice: take down the Ten Commandments or put up the Seven Principles.

The Supreme Court would have none of it. In *Pleasant Grove City v. Sumnum*, 129 S.Ct. 1125 (2009), the Court treated the Ten Commandments monument as a form of permissible government speech. A government "is entitled to say what it wishes," Justice Alito wrote for the Court, and it may select and reflect certain views in favor of

others. It may express its views by putting up its own tax-paid monuments or by accepting monuments donated by private parties whose contents it need not fully endorse. In this case, city officials had earlier accepted a Ten Commandments monument on grounds that it reflected the “[a]esthetics, history, and local culture” of the city. The free speech clause does not give a private citizen a “heckler’s veto” over that old decision. Nor does it compel the city to accept every privately donated monument once it has accepted the first. Government speech is simply “not bound by the free speech clause,” the Court concluded, or subject to judicial second-guessing under the First Amendment. Government officials are “accountable to the electorate” for their speech, and they will be voted out of office if their views cause offense.

It helped the *Pleasant Grove* Court that there were a dozen monuments in the city park, only one of which was religious in content. It also helped that this was a forty-year-old monument that had never been challenged in court before. That allowed other Supreme Court justices to concur in this surprisingly unanimous decision. But the case turned on the characterization of the Ten Commandments monument as a form of government speech. That trumped countervailing concerns about religious establishments or private speech rights. And that shifted the judgment about the propriety of maintaining such religious monument from the courts to the people.

This is better reasoning than the Court had offered in its earlier cases on religious symbols in public life. In some of these earlier cases, the Court had allowed religious symbols and ceremonies to withstand First Amendment scrutiny only if they were bleached and bland enough to constitute a permissible form of “ceremonial deism.” Symbols and rituals of this sort, Justice O’Connor’s wrote, serve to “solemnize public occasions, express confidence in the future, and encourage the recognition of what is worthy of appreciation in society” [*Lynch v. Donnelly*, 465 U.S. 668, 686 (1984)]. This, in my view, is a dangerous form of constitutional exorcism. In other earlier cases, the Court had allowed government to display religious symbols only if they were sufficiently diluted and buffered by non-religious symbols of comparable size and greater number. For every holy family in a county crèche, there had to be a herd of plastic reindeer, for every bust of Moses in a courthouse, a frieze of founding fathers. This is a mandatory form of postmodernist cluttering.

The *Pleasant Grove* Court wisely forgoes such arguments with fresh new arguments from democracy and tradition that do not deny or dilute the religious qualities of these symbols. The Court leaves it to elected government officials to reflect and represent the views of the people, including their religious views. It leaves it to the people to debate and decide whether the government’s representation of their views is adequate or outmoded. Courts will step in only if the government coerces citizens to accept these religious views, or if the government’s speech violates privacy, endangers society, or violates the constitution. A merely passive display of a generic religious text is not enough to trigger a judicial intervention. Had the city put up a flaming Ku Klux Klan cross, the courts would have jumped in immediately. This strikes me as a healthier form of democratic rule than the traditional system of giving a single citizen a “heckler’s veto” over majoritarian views.

The age of a religious display should also play a part in the delicate calculus of its constitutionality. The longer a religious symbol has stood open and unchallenged in the public square, the more deference it deserves. “If a thing has been practiced for two hundred years by common consent,” Justice Holmes once wrote, “it will take a strong case for the [Constitution] to affect it” [*Jackman v. Rosenbaum*, 260 U.S. 22, 31 (1922)]. Over time, religious symbols become embedded in the culture and tradition of a community and harder to remove. And, over time, the right to challenge them diminishes in strength and becomes harder to press.

The law recognizes the power of time in its historical preservation and zoning rules that “grandfather” various old (religious) uses of property that do not comport with current preferred uses. It also recognizes this in our private property laws of “adverse possession”: an open, continuous, notorious use of a property eventually will vest in the user. Those legal ideas should have a bearing on these religious symbolism cases, leaving older displays more secure but new displays more vulnerable.

The law further recognizes the pressure of time in its rules of pleading and procedure. The law sets statutes of limitations on many claims and penalizes parties for sitting too long on their rights. These legal ideas, too, should have a bearing in these religious symbolism cases. Challenges to older government actions concerning religious symbols should be harder to win than challenges to new government initiatives. The law does not set statutes of limitations on constitutional cases, of course. But surely once a public religious display has reached its proverbial “forty years,” surely we would do well to leave it alone.