McCreary County v. ACLU

125 S. Ct. 2722*, 162 L. Ed. 2d 729**
Decided June 27, 2005
Majority opinion by SOUTER, J.; O'CONNOR, J., concurring; SCALIA, J., dissenting

Issues: Is purpose a sound basis for determining whether an Establishment Clause violation has occurred? *2728, **740. Is evolution of the presentation at issue a factor to be used when determining purpose? *2728, **740.

Facts: Petitioners, two counties, on two occasions, erected displays in their courthouses that included abridged versions of the Ten Commandments pursuant to county resolutions. *2728-29, **741-42. Later modifications of this display included the addition of other documents with religious themes. *2728-29, **741-42. After suits were filed by the ACLU in federal district court, a preliminary injunction was issued to remove the displays. *2730-31, **743-44. In response, the counties erected a third display, absent county resolutions, which included the abridged versions of the Ten Commandments and eight other secular documents, all in equal-sized frames. *2730-31, **743-44. The counties' stated objective in displaying the documents was "to educate the citizens of the county regarding some of the documents that played a significant role in the foundation of [their] system of law and government." *2731, **744. The district court, upon motion by the ACLU, supplemented the preliminary injunction to include this new display. *2731, **744. A divided panel of the Sixth Circuit Court of Appeals affirmed. *2731, **745.

Rules: The Establishment Clause of the First Amendment provides: "Congress shall make no law respecting an establishment of religion…." *2729, **742 n.3. A Counties' purpose for erecting a display is a sound basis for determining whether an Establishment Clause violation has occurred. *2728, **740-41. The developmental history of the display is a factor when determining its purpose. *2728, **740-41.

Holding: The Supreme Court found that the counties' displays violated the First Amendment's Establishment Clause due to their predominantly religious purpose, and thus upheld the preliminary injunction requiring their removal. *2745, **760.

Rational: Examination of purpose makes practical sense as it is both the everyday work of judges throughout the country and is "a staple of statutory interpretation." *2734, **747. It is proper for a court to look through the entire evolution of a display to determine its purpose because a reasonable, objective observer would not forget about the previous displays, to argue otherwise "just bucks common sense," and such probative evidence should not be ignored. *2737, **750-51. The two resolutions can be looked to as evidence of purpose of the third display because the resolutions were not repudiated in any way. *2740, **754. The objective observer was provided no evidence to disregard the conceded religious objectives of the previous displays and thus could only reach the conclusion that the counties' third display lacked a secular purpose and was erected in violation of the Establishment Clause. *2740, **754. Even though deference has been given to a state actor's explicit purpose in the past, doing so here would not be proper because here, based on the history, such a method is not appropriate in Establishment Clause cases. *2735, **750 n.13.

McCreary County v. ACLU Analysis

Brief & Analysis by Frank J. Ducoat

On June 27, 2005, the United States Supreme Court pronounced that counties' purpose is a sound basis for determining whether an Establishment Clause violation has occurred and evolution of the presentation is a factor when determining purpose.[1] For the following reasons, both of the Court's holdings were incorrect.

The majority's first holding lacks the support of precedent or consistency, either of which undermine its credibility. Under the Court's new approach to determining Establishment Clause violations, it appears that actual purpose is irrelevant *if* an objective observer would feel alienated by such a display.[2] While the majority concedes that deference to a government's explicit purpose is in order,[3] it discards its own jurisprudence and wholly relies on an objective observer. Contrary to settled jurisprudence,[4] the majority decrees from the bench that governments should not be trusted to mean what they say when, in a court's opinion, the purported purpose is disingenuous or "secondary to a religious objective."[5] So while requiring an objective observer, the majority uses a subjective interpretation of the government's

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[1] McCreary County v. ACLU, 125 S. Ct. 2722, 2728 (2005).

[2] *See id*. at 2757 (Scalia, J., dissenting) (suggesting "[T]he legitimacy of a government action with a wholly secular effect would turn on the *misperception* of an imaginary observer that the government officials behind the action had the intent to advance religion." (emphasis in original)).

[3] *Id.* at 2735 (*citing* Santa Fe Independent School Dist. v. Doe, 530 U.S. 290, 308 (2000); Edwards v. Aguillard, 482 U.S. 578, 586-87 (1987)). *See infra*, n.7.

[4] *See id.* at 2758 n.9 (Scalia, J., dissenting) and cases cited therein (noting that previous cases have required "compelling evidence" to counter a government's purported purpose).

[5] *Id.* at 2735.

objective: specifically, their own.[6] Precedent required the majority in this case to give deference to the Counties' stated secular purpose[7] or, alternatively, consistency with their own opinion would have required them to overrule the holdings imposing deference and burden the counties' to show, without weight being given to explicitly stated objectives, the display has a purely secular purpose. It did neither.

Furthermore, this holding lacks basic common sense. Purposes, by their very nature, are subjective. Why someone does something is best, and often only, deciphered by the reasons they voice. To require a totally objective determination of purpose in Establishment Clause cases will always end with the same result: a violation will be found because religious documents, *ipso facto*, will always contain some degree of religious purpose.[8] While the majority asserts there may be a situation where a display of the Ten Commandments does not violate the First Amendment,[9] it fails to provide a single specific example and its holding effectively prevents one from surfacing.

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[6] *See, e.g.,* McCreary County, 125 S. Ct. at 2740 ("In a collection of documents said to be "foundational" to American government, it is at least odd to include a patriotic anthem, but to omit the Fourteenth Amendment, the most significant structural provision adopted since the original Framing…."). The majority, in addition to voicing its personal opinions as to what documents are more important than others, fails to justify its conclusion that their "objective observer" is any more familiar with the text of the Fourteenth Amendment than the National Anthem. Except, of course, unless the objective observer is a learned Supreme Court Justice.

T[7] The majority asserts that while deference is useful in economic legislation, it is not the standard in Establishment Clause cases. *Id.* at 2736 n.13. *Contra, supra,* n.4. The majority, however, fails to explain why deference is any less reliable in Establishment Clause cases than it is in economic legislation and a reason is not immediately apparent.

[8] While, in the majority's view, the test is not "rigged in practice" and "has not been fatal very often," *Id.* at 2735, the new approach adopted is sure to prove this assumption false.

[9] *Id.* at 2741. The majority also recognizes the contradiction in their holding based on the fact that their own courtroom frieze depicts Moses holding tablets including some of the Ten Commandments. It goes on to say, "Moses is found in the company of other figures, not only great but secular," *Id.* at 2741 n.23, suggesting secular displays can minimize the non-secular

The Court's second holding is also troubling. By considering the previous, now nonexistent, displays in the Counties' courthouses, the Court in effect holds that anyone who has committed a constitutional violation cannot take steps to reform their actions and conform with constitutional mandates. The unfair burden this "one bite at the apple" approach will place on governments of all sizes, especially the smaller ones that lack the resources that may be necessary for in-depth constitutional aforethought, is apparent. If a permissible display can never replace an impermissible one because the exhibition is tainted from inception, the obvious result will be inaction on the part of governments and the effect of said inaction will be a failure on the part of communities to educate their citizens as to the historical foundations of their neighborhoods, their governments, and their laws.

The Supreme Court should have reversed the decision below and remanded the case for a determination of whether the third display, and the third display alone, had a "secular legislative purpose,"[10] not taking into account previous constitutional errors made by the counties.[11]

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effect of a religious display. The majority does not explain the fact the Counties' displays were also accompanied by great and secular documents. Eight of them to be exact.

[10] Lemon v. Kurtzman, 403 U.S. 602, 612 (1971). This case is the long-standing precedent for what constitutes an Establishment Clause violation.

[11] Such a determination was never made at the appropriate level. The District Court found an analysis of the third display was "analytically meaningless" given its timing after the first preliminary injunction was issued, ACLU v. McCreary County, 96 F. Supp.2d 679, 682 (E.D. Ky. 2000).