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"Publicly Honoring God"

Justice Antonin Scalia on the Ten Commandments

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JUSTICE ANTONIN SCALIA ON THE TEN COMMANDMENTS
EDITED BY BENJAMIN SNYDER AND PETER SPRIGG
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"Publicly Honoring God"

JUSTICE ANTONIN SCALIA
ON THE TEN COMMANDMENTS

Introduction by Tony Perkins

"Nino" Scalia and the Justices' New Clothes

When the Supreme Court recently ruled *against* the public display of the Ten Commandments by McCreary and Pulaski Counties in Kentucky, Justice Antonin Scalia was primed. He was ready once again to skewer the illogic, the faulty understanding of American history, and the flawed appreciation of the Constitution that marked the slender 5-4 majority's decision.

Don't tell the ACLU, but Scalia is right. He's right about American history. When Patrick Henry uttered the immortal words—*Give me liberty or give me death!*—he spoke them in a church: St. John's in Richmond, Virginia. When Paul Revere waited on the opposite shore for that famous signal—*One if by land, two if by sea*—it was from Boston's Old North Church that the lanterns shone. Paul Revere's ride is commonly seen as a precipitating event in the American Revolution, which secured our liberties and gave us the Constitutional order under which we live.

And don't tell the ACLU about this: When the U.S. Congress assembled in 1799 to attend the official memorial service for George Washington, they gathered

ANTONIN SCALIA is Associate Justice, United States Supreme Court. Appointed by President Reagan, he took his seat September 26, 1986. Justice Scalia received his A.B. from Georgetown University and the University of Fribourg, Switzerland, and his LL.B. from Harvard Law School, and was a Sheldon Fellow of Harvard University from 1960-1961. He was appointed Judge of the United States Court of Appeals for the District of Columbia Circuit in 1982.

in a church. It was the old German Lutheran Church in Philadelphia. Many of the Members who sat in those pews had voted for the First Amendment. The ACLU would have us believe that this same First Amendment now forbids any government acknowledgment of our religious heritage.

In "Nino" Scalia's words: "Says who?" Not the Founders of this Republic. Surely not the people in whose name the Constitution was established. And not the American people today.

These Supreme Court edicts "breathe with hostility to religion." They have no basis in our history. They have no basis in the Constitution as it was written, as it was approved, and as we lived under it for a century and a half. They have no basis in the democratically expressed will of the American people.

Only since 1947, with the *Everson* ruling, have we seen a line of confused cases on church and state that have convulsed our country. These rulings have led to absurdities, results both laughable and sorrowful. The Supreme Court's liberal majority says the government may provide books to students in religious schools but not maps. Even Daniel Patrick Moynihan could not resist poking fun at them. "What about an *Atlas?* That's a book of maps."

The Supreme Court has ruled that a community may put up a crèche at Christmas time *provided there are enough Santas and reindeer surrounding it.* Perhaps the Kentuckians were too respectful of the Ten Commandments in this case. Perhaps their reverent display might have fared better with liberals on this Court if they had taken a different approach.

Suppose they had depicted Moses in a red cap, wearing a white fur-trimmed red coat, riding a sleigh down Mount Sinai. The sleigh could have been pulled by 12 reindeer, each named for one of the Twelve Tribes of Israel. The tablets then might have been displayed as presents in the back of the sleigh. Would that have passed muster with the liberal majority on the Supreme Court? It's worth a try. We could call it *protest art.*

Justice Scalia's dissent in this case is not unlike his dissent in the infamous *Planned Parenthood v. Casey* (1992) ruling. There, the liberal majority upheld legalized abortion by saying with all solemnity: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of life." Scalia has responded to that pompous confection, that constitutional cotton candy with the ridicule it deserves—Ah, the sweet mystery of life passage, the passage *that ate the rule of law!*

Americans are indebted once again to Justice Antonin Scalia. He has had the courage, the intellect and, yes, the faith, to speak truth to power. He has been willing to stand against the illogic of such statements as this one: "The First Amendment mandates government neutrality between…religion and nonreligion." Says who? And *how?* How exactly is such nonsense ever to be applied in practice? What *is* neutrality between religion and nonreligion? Are we to find it at the precise midpoint between up and down? The Justices who wrote those words will continue to be praised by *The New York Times.* Their edict will be hailed by talking heads; it will be received wisdom among the chattering classes. But Nino Scalia is like the little boy in the story who sees the Emperor's nakedness. Scalia points to the Justices as they stride down the fashion runway and tells us the all-too-embarrassing truth.

Tony Perkins
Washington, DC
July 2005

[Editor's Note:

On June 27, 2005, the United States Supreme Court handed down decisions in two cases involving the display of the Ten Commandments on government property. In one case (Van Orden v. Perry), a 5-4 majority ruled that a Ten Commandments monument could remain on the grounds of the Texas State Capitol . In the other, however (McCreary County, Ky. v. ACLU of Kentucky), the court ruled (also 5-4) that the display of the Ten Commandments on the wall of a Kentucky courthouse, as one of nine framed documents representing "The Foundations of American Law and Government," was unconstitutional.

Below are excerpts from Supreme Court Justice Antonin Scalia's dissenting opinion in the Kentucky case. Ellipses (. . .) indicate where material from the original opinion has been omitted. Footnotes and technical legal citations have also been omitted from this publication. The complete text of the decisions in these cases can be found on the Family Research Council website at: http://www.frc.org/get.cfm?i=LH05F06.]

The Supreme Court ruled that this monument could remain on the grounds of the Texas State Capitol.

McCREARY COUNTY, KENTUCKY, et al.,
v.
AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY et al.

Excerpt from Dissenting Opinion
by Justice Antonin Scalia

[June 27, 2005]

. . .

I

A

On September 11, 2001 I was attending in Rome, Italy an international conference of judges and lawyers, principally from Europe and the United States. That night and the next morning virtually all of the participants watched, in their hotel rooms, the address to the Nation by the President of the United States concerning the murderous attacks upon the Twin Towers and the Pentagon, in which thousands of Americans had been killed. The address ended, as Presidential addresses often do, with the prayer "God

The Supreme Court ruled that the display of this framed copy of the Ten Commandments, which appeared with other framed documents in a Kentucky courthouse, was unconstitutional.

bless America." The next afternoon I was approached by one of the judges from a European country, who, after extending his profound condolences for my country's loss, sadly observed "How I wish that the Head of State of my country, at a similar time of national tragedy and distress, could conclude his address 'God bless ______.' It is of course absolutely forbidden."

That is one model of the relationship between church and state–a model spread across Europe by the armies of Napoleon, and reflected in the Constitution of France, which begins "France is [a] . . . secular . . . Republic." Religion is to be strictly excluded from the public forum. This is not, and never was, the model adopted by America. George Washington added to the form of Presidential oath prescribed by Art. II, §1, cl. 8, of the Constitution, the concluding words "so help me God." The Supreme Court under John Marshall opened its sessions with the prayer, "God save the United States and this Honorable Court." The First Congress instituted the practice of beginning its legislative sessions with a prayer. The same week that Congress submitted the Establishment Clause as part of the Bill of Rights for ratification by the States, it enacted legislation providing for paid chaplains in the House and Senate. The day after the First Amendment was proposed, the same Congress that had proposed it requested the President to proclaim " a day of public thanksgiving and prayer, to be observed, by acknowledging, with grateful hearts, the many and signal favours of Almighty God." President Washington offered the first Thanksgiving Proclamation shortly thereafter, devoting November 26, 1789 on behalf of the American people " 'to the service of that great and glorious Being who is the beneficent author of all the good that is, that was, or that will be,' " thus beginning a tradition of offering gratitude to God that continues today. The same Congress also reenacted the Northwest Territory Ordinance of 1787, 1 Stat. 50, Article III of which provided: "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." And of course the First Amendment itself accords religion (and no other manner of belief) special constitutional protection.

These actions of our First President and Congress and the Marshall Court were not idiosyncratic; they reflected the beliefs of the period. Those who wrote the Constitution believed that morality was essential to the well-being of society and that encouragement of religion was the best way to foster morality. The "fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself." *School Dist. of Abington Township v. Schempp* (1963). President Washington opened his Presidency with a prayer and reminded his fellow citizens at the conclusion of it that "reason and experience both forbid us to expect that National morality can prevail in exclusion of religious principle." President John Adams wrote to the Massachusetts Militia, "we have no government armed with power capable of contending with human passions unbridled by morality and religion. … Our Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other." Thomas Jefferson concluded his second inaugural address by inviting his audience to pray:

> "I shall need, too, the favor of that Being in whose hands we are, who led our fathers, as Israel of old, from their native land and planted them in a country flowing with all the necessaries and comforts of life; who has covered our infancy with His providence and our riper years with His wisdom and power and to whose goodness I ask you to join in supplications with me that

He will so enlighten the minds of your servants, guide their councils, and prosper their measures that whatsoever they do shall result in your good, and shall secure to you the peace, friendship, and approbation of all nations."

James Madison, in his first inaugural address, likewise placed his confidence "in the guardianship and guidance of that Almighty Being whose power regulates the destiny of nations, whose blessings have been so conspicuously dispensed to this rising Republic, and to whom we are bound to address our devout gratitude for the past, as well as our fervent supplications and best hopes for the future."

Nor have the views of our people on this matter significantly changed. Presidents continue to conclude the Presidential oath with the words "so help me God." Our legislatures, state and national, continue to open their sessions with prayer led by official chaplains. The sessions of this Court continue to open with the prayer "God save the United States and this Honorable Court." Invocation of the Almighty by our public figures, at all levels of government, remains commonplace. Our coinage bears the motto "IN GOD WE TRUST." And our Pledge of Allegiance contains the acknowledgment that we are a Nation "under God." As one of our Supreme Court opinions rightly observed, "We are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson* (1952).

With all of this reality (and much more) staring it in the face, how can the Court possibly assert that " 'the First Amendment mandates governmental neutrality between ... religion and nonreligion,' " and that "[m]anifesting a purpose to favor . . . adherence to religion generally," is unconstitutional? Who says so? Surely not the words of the Constitution. Surely not the history and traditions that reflect our society's constant understanding of those words. Surely not even the current sense of our society, recently reflected in an Act of Congress adopted unanimously by the Senate and with only 5 nays in the House of Representatives criticizing a Court of Appeals opinion that had held "under God" in the Pledge of Allegiance unconstitutional. Nothing stands behind the Court's assertion that governmental affirmation of the society's belief in God is unconstitutional except the Court's own say-so, citing as support only the unsubstantiated say-so of earlier Courts going back no farther than the mid-20th century. And it is, moreover, a thoroughly discredited say-so. It is discredited, to begin with, because a majority of the Justices on the current Court (including at least one Member of today's majority) have, in separate opinions, repudiated the brain-spun "Lemon test" [*Lemon v. Kurtzman* (1971)] that embodies the supposed principle of neutrality between religion and irreligion. And it is discredited because the Court has not had the courage (or the foolhardiness) to apply the neutrality principle consistently.

What distinguishes the rule of law from the dictatorship of a shifting Supreme Court majority is the absolutely indispensable requirement that judicial opinions be grounded in consistently applied principle. That is what prevents judges from ruling now this way, now that–thumbs up or thumbs down–as their personal preferences dictate. Today's opinion forthrightly (or actually, somewhat less than forthrightly) admits that it does not rest upon consistently applied principle. In a revealing footnote, the Court acknowledges that the "Establishment Clause doctrine" it purports to be applying "lacks the comfort of categorical absolutes." What the Court means by this lovely euphemism is that sometimes the Court chooses to decide cases on the principle that government cannot favor religion, and sometimes it does not. The footnote goes on to say that "[i]n special instances we have found good reason" to dispense with the principle, but "[n]o such

reasons present themselves here." It does not identify all of those "special instances," much less identify the "good reason" for their existence.

I have cataloged elsewhere the variety of circumstances in which this Court–even after its embrace of *Lemon*'s stated prohibition of such behavior–has approved government action "undertaken with the specific intention of improving the position of religion," Suffice it to say here that when the government relieves churches from the obligation to pay property taxes, when it allows students to absent themselves from public school to take religious classes, and when it exempts religious organizations from generally applicable prohibitions of religious discrimination, it surely means to bestow a benefit on religious practice–but we have approved it. Indeed, we have even approved (post-*Lemon*) government-led prayer to God. In *Marsh v. Chambers*, the Court upheld the Nebraska State Legislature's practice of paying a chaplain to lead it in prayer at the opening of legislative sessions. The Court explained that "[t]o invoke Divine guidance on a public body entrusted with making the laws is not . . . an 'establishment' of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country." (Why, one wonders, is not respect for the Ten Commandments a tolerable acknowledgment of beliefs widely held among the people of this country?)

The only "good reason" for ignoring the neutrality principle set forth in any of these cases was the antiquity of the practice at issue. That would be a good reason for finding the neutrality principle a mistaken interpretation of the Constitution, but it is hardly a good reason for letting an unconstitutional practice continue. We did not hide behind that reason in *Reynolds v. Sims*, (1964), which found unconstitutional bicameral state legislatures of a sort that had existed since the beginning of the Republic. And almost monthly, it seems, the Court has not shrunk from invalidating aspects of criminal procedure and penology of similar vintage. What, then, could be the genuine "good reason" for occasionally ignoring the neutrality principle? I suggest it is the instinct for self-preservation, and the recognition that the Court, which "has no influence over either the sword or the purse," cannot go too far down the road of an enforced neutrality that contradicts both historical fact and current practice without losing all that sustains it: the willingness of the people to accept its interpretation of the Constitution as definitive, in preference to the contrary interpretation of the democratically elected branches.

Besides appealing to the demonstrably false principle that the government cannot favor religion over irreligion, today's opinion suggests that the posting of the Ten Commandments violates the principle that the government cannot favor one religion over another. That is indeed a valid principle where public aid or assistance to religion is concerned, or where the free exercise of religion is at issue, but it necessarily applies in a more limited sense to public acknowledgment of the Creator. If religion in the public forum had to be entirely nondenominational, there could be no religion in the public forum at all. One cannot say the word "God," or "the Almighty," one cannot offer public supplication or thanksgiving, without contradicting the beliefs of some people that there are many gods, or that God or the gods pay no attention to human affairs. With respect to public acknowledgment of religious belief, it is entirely clear from our Nation's historical practices that the Establishment Clause permits this disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists. The Thanksgiving Proclamation issued by George Washington at the instance of the First Congress was scrupulously nondenominational–

but it was monotheistic. In *Marsh v. Chambers*, we said that the fact the particular prayers offered in the Nebraska Legislature were "in the Judeo-Christian tradition," posed no additional problem, because "there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief."

Historical practices thus demonstrate that there is a distance between the acknowledgment of a single Creator and the establishment of a religion. The former is, as *Marsh v. Chambers* put it, "a tolerable acknowledgment of beliefs widely held among the people of this country." The three most popular religions in the United States, Christianity, Judaism, and Islam–which combined account for 97.7% of all believers–are monotheistic. All of them, moreover (Islam included), believe that the Ten Commandments were given by God to Moses, and are divine prescriptions for a virtuous life. Publicly honoring the Ten Commandments is thus indistinguishable, insofar as discriminating against other religions is concerned, from publicly honoring God. Both practices are recognized across such a broad and diverse range of the population–from Christians to Muslims–that they cannot be reasonably understood as a government endorsement of a particular religious viewpoint.

...

III

Even accepting the Court's *Lemon*-based premises, the displays at issue here were constitutional.

A

To any person who happened to walk down the hallway of the McCreary or Pulaski County Courthouse during the roughly nine months when the Foundations Displays were exhibited, the displays must have seemed unremarkable–if indeed they were noticed at all. The walls of both courthouses were already lined with historical documents and other assorted portraits; each Foundations Display was exhibited in the same format as these other displays and nothing in the record suggests that either County took steps to give it greater prominence.

Entitled "The Foundations of American Law and Government Display," each display consisted of nine equally sized documents: the original version of the Magna Carta, the Declaration of Independence, the Bill of Rights, the Star-Spangled Banner, the Mayflower Compact of 1620, a picture of Lady Justice, the National Motto of the United States ("In God We Trust"), the Preamble to the Kentucky Constitution, and the Ten Commandments. The displays did not emphasize any of the nine documents in any way: the frame holding the Ten Commandments was of the same size and had the same appearance as that which held each of the other documents.

Posted with the documents was a plaque, identifying the display, and explaining that it "contains documents that played a significant role in the foundation of our system of law and government." The explanation related to the Ten Commandments was third in the list of nine and did not serve to distinguish it from the other documents. It stated:

"The Ten Commandments have profoundly influenced the formation of Western legal thought and the formation of our country. That influence is clearly seen in the Declaration of Independence, which declared that, 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.' The Ten Commandments provide the moral background of the Declaration of Independence and the foundation of our legal tradition."

B

On its face, the Foundations Displays manifested the purely secular purpose that the Counties asserted before the District Court: "to display documents that played a significant role in the foundation of our system of law and government." That the Displays included the Ten Commandments did not transform their apparent secular purpose into one of impermissible advocacy for Judeo-Christian beliefs. Even an isolated display of the Decalogue conveys, at worst, "an equivocal message, perhaps of respect for Judaism, for religion in general, or for law." But when the Ten Commandments appear alongside other documents of secular significance in a display devoted to the foundations of American law and government, the context communicates that the Ten Commandments are included, not to teach their binding nature as a religious text, but to show their unique contribution to the development of the legal system. This is doubly true when the display is introduced by a document that informs passersby that it "contains documents that played a significant role in the foundation of our system of law and government."

The same result follows if the Ten Commandments display is viewed in light of the government practices that this Court has countenanced in the past. The acknowledgment of the contribution that religion in general, and the Ten Commandments in particular, have made to our Nation's legal and governmental heritage is surely no more of a step towards establishment of religion than was the practice of legislative prayer we approved in *Marsh v. Chambers* (1983), and it seems to be on par with the inclusion of a créche or a menorah in a "Holiday" display that incorporates other secular symbols. The parallels between this case and *Marsh* and *Lynch* [*Lynch v. Donnelly* (1984)] are sufficiently compelling that they ought to decide this case, even under the Court's misguided Establishment Clause jurisprudence.

Acknowledgment of the contribution that religion has made to our Nation's legal and governmental heritage partakes of a centuries-old tradition. Members of this Court have themselves often detailed the degree to which religious belief pervaded the National Government during the founding era. Display of the Ten Commandments is well within the mainstream of this practice of acknowledgment. Federal, State, and local governments across the Nation have engaged in such display. The Supreme Court Building itself includes depictions of Moses with the Ten Commandments in the Courtroom and on the east pediment of the building, and symbols of the Ten Commandments "adorn the metal gates lining the north and south sides of the Courtroom as well as the doors leading into the Courtroom." Similar depictions of the Decalogue appear on public buildings and monuments throughout our Nation's Capital. The frequency of these displays testifies to the popular understanding that the Ten Commandments are a foundation of the rule of law, and a symbol of the role that religion played, and continues to play, in our system of government.

. . .

C

. . .

The Court has in the past prohibited government actions that "proselytize or advance any one, or . . . disparage any other, faith or belief," or that apply some level of coercion (though I and others have disagreed about the form that coercion must take). The passive display of the Ten Commandments, even standing alone, does not begin to do either. What Justice Kennedy said of the créche in *Allegheny County* is equally true of the Counties' original Ten Commandments displays:

> "No one was compelled to observe or participate in any religious ceremony or activity. [T]he count[ies] [did not] contribut[e] significant

> amounts of tax money to serve the cause of one religious faith. [The Ten Commandments] are purely passive symbols of [the religious foundation for many of our laws and governmental institutions]. Passersby who disagree with the message conveyed by th[e] displays are free to ignore them, or even to turn their backs, just as they are free to do when they disagree with any other form of government speech."

Nor is it the case that a solo display of the Ten Commandments advances any one faith. They are assuredly a religious symbol, but they are not so closely associated with a single religious belief that their display can reasonably be understood as preferring one religious sect over another. The Ten Commandments are recognized by Judaism, Christianity, and Islam alike as divinely given.

. . .

In sum: The first displays did not necessarily evidence an intent to further religious practice; nor did the second displays, or the resolutions authorizing them; and there is in any event no basis for attributing whatever intent motivated the first and second displays to the third. Given the presumption of regularity that always accompanies our review of official action, the Court has identified no evidence of a purpose to advance religion in a way that is inconsistent with our cases. The Court may well be correct in identifying the third displays as the fruit of a desire to display the Ten Commandments, but neither our cases nor our history support its assertion that such a desire renders the fruit poisonous.

. . .

For the foregoing reasons, I would reverse the judgment of the Court of Appeals.

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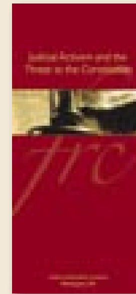

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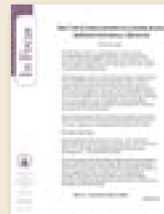

InFocus: The Ten Commandments Under Siege: A Constitutional Defense IF05D01
Drawing on the Family Research Council's friend-of-the-court briefs to the Supreme Court, William Saunders explains that the courts are using an inadequate and confusing standard to determine what actions constitute an "establishment of religion," and argues that a simple "coercion" test is more consistent with the Founders' original intent.
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