

SOLOMON AND THE SUPREME COURT

In my synagogue, prominently displayed over the location where the holy Torahs (first five books of the Bible) are kept, the Ten Commandments are displayed. In the magnificent courtroom of the Pennsylvania Supreme Court in Harrisburg, over the backs of the presiding Justices, are a picture of Moses and the Ten Commandments.

As the realtors like to say, **LOCATION, LOCATION LOCATION.**

The United States Supreme Court has ruled on the constitutionality of a government display of the Ten Commandments.

Many will howl and scream that the Supreme Court did not come out with a clear decision, lacked the resolve to create a bright-line rule, or was dominated by wimps of the left or wimps of the right. The truth is that the United States Supreme Court, in fine biblical tradition, acted like Solomon and offered a compromise which reveals who in this most interesting controversy is acting with a pure heart.

Solomon did not create a compromise by "splitting the baby," but rather suggested to competing mothers that they split the baby in order to see who really cared the most for the child. The woman whose baby it was not, was willing to see the child killed and split. The woman who really loved the child was willing to relinquish control and give the baby to the pretender-mother. The wisdom of Solomon was that he understood that the more loving parent would show her character through self-sacrifice.

What the Supreme Court of the United States did in the Ten Commandments case was to look at the facts of each individual case, and in essence say that if you want the government to be about religion, that is not the American way. If you want the government to stand for principles of integrity, the same way that many religions do, that is a good thing.

In *McCreary v. American Civil Liberties Union*, Justice Souter wrote the opinion. In a lecture given by Justice Souter shortly after 9/11, the judge talked not about 9/11 but rather about the treatment of Japanese Americans during the scariest days of World War II and the treatment of Blacks in the south in the '50s during the Jim Crow segregation era. Souter recommended to the assembled lawyers that they re-read Saroyan's "The Human Comedy," and he lectured that all the law is about is "how you treat people." Souter showed that same philosophy in his opinion.

The battle of the Ten Commandments concerns how to analyze the role of government and religion. The Court had to decide whether to abandon prior precedent ensconced within the important decision of *Lemon v. Kurtzman*. In determining whether the government has violated the Commandment (pun intended) not to establish religion, the issue was whether the government has "a secular legislative purpose" behind its actions. "When the government acts with the ostensible and predominant purpose of advancing religion, it violates the central Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides." Justice Souter, appointed to the Supreme Court by President George H. W. Bush, noted that the original Biblical text makes an unmistakably religious statement dealing with religious obligations and with morality subject to religious sanction. "When the government initiates an effort to place a statement alone in public view, religious object is unmistakable."

The Court admitted that its own premises contain words of lawgivers, including a depiction of Moses holding the Ten Commandments. A majority of the court agreed with the findings of the trial court that there was a predominantly religious purpose behind the county's display. The United States has been debating the subject of religion since its founding. Thomas Jefferson refused to issue a Thanksgiving Proclamation because he believed they violated the Constitution. Madison objected to a religious tax, and Franklin's motion to open sessions of the constitutional convention with a prayer was defeated! Hamilton did not think that invocation of a higher authority was necessary.

The concurring opinion by Justice O'Connor appointed by President Reagan, stressed that "Free people are entitled to free and diverse thoughts, which government ought neither to constrain nor to direct." Justice O'Connor believes that religion should be a matter for individual conscience, "not for prosecutor or bureaucrat." O'Connor even invokes the war on terrorism, and writes that the consequences of assumption of religious authority by government are often violent. "Americans may count themselves fortunate: our regard for constitutional boundaries has protected us from similar travails, while allowing private religious exercise to flourish."

In the companion decision of *Thomas Van Orden v. Perry*, the minority in *McCreary* gained the upper hand. *Van Orden* was written by Chief Justice Rehnquist, appointed by President Reagan, which garnered the approval of Justices Scalia, Kennedy and Thomas. He was able to cobble together a majority, because Justice Breyer, appointed by President Clinton, joined the four conservatives. Breyer joined the majority in striking down the Ten Commandments in the Kentucky case, and also joined the majority in

upholding the Ten Commandments in the Texas case! The key to the controversy, might be in understanding exactly what Justice Breyer was thinking. Breyer's intellectual concurring opinion notes that when it comes to the establishment clause, the cases are all over the place. The establishment clause tolerates prayers in open legislative meetings, references to and invocations of the Deity in the public words of public officials, public references to God on coins. Breyer argues that there is no "test-related substitute for the exercise of legal judgment".

The Texas case concerned a large granite monument bearing the text of the Ten Commandments located on the grounds of the Texas state capitol. Breyer was impressed that the context of the display demonstrated that non-religious aspects of the tablet's message predominate. Breyer stressed that the Texas display was present for 40 years, and it was not erected as part of a religious debate concerning the role of government in promoting religious values.

It does not take a brilliant legal analysis to appreciate that a majority of the judges are concerned about the fad use of religion to color current political debate. Courts would rather err on the side of prohibiting a religious display during the heat of public discourse rather than taking sides in boiling controversies.

Wuss, or wisdom? The public will be best served by judges who struggle over the important issues of the day and are cognizant that in the past bad decisions have been made which appeal to conclusions reached by polsters. Legal precedent and development of decisions based upon the facts of each case has served civilization well, and interestingly, is most consistent with biblical law as well! Will Americans, like the real mother in the Solomon story, sacrifice their private feelings for the rule of law?

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