"And What Do You Say I Am?": The Meaning of the Kentucky Display

*By Gerard V. Bradley**

In *McCreary County v. ACLU*, a bare majority of the Supreme Court affirmed that secularism is still the overriding principle of church-state law. Their "touchstone" was the "principle" which "mandates governmental neutrality between...religion and nonreligion." But that's actually not quite it. "Neutrality" between something and its absence—such as "religion" and "nonreligion"—would be (if it is imaginable at all) at least *some* of the thing. "Neutrality" between, say, a desert climate and a tropical climate would be someplace like Northern Indiana: rains here quite a bit but nothing like it does in the Amazon.

If "neutrality" means anything here it would seem to mean: middle, or compromise, half-way. But that is definitely *not* the Court's deal on religion. It is still Richard Neuhaus's infamous Naked Public Square—secularism or the *absence* of religion. The Court's principle is really "nonreligion" as "neutrality between religion and irreligion."

The *McCreary* Court also fiddled—to no good end—with the "purpose" part of the nine-lived *Lemon* test. Now, both of these moves are significant in themselves. Each swings free from the facts of *McCreary* and of Decalogue displays of all sort. They are Establishment Clause tools for all seasons. But their portable and lasting importance is uncertain, because Justice O'Connor was part of the majority.

Almost everything else *McCreary* said was bogged down in the convoluted facts of the case. To simplify: There were three successive displays, each with its own legislative history sounding in patriotic piety: 'America had and has something very important to do with religion, and by God we are going to say so.' The Court concluded that county authorities were trying to get as much religion into public space as the Court's inane precedents would permit. ("Inane" is my word, not the Court's.). Probably so. But the *McCreary* majority said that was unconstitutional.

Constitutional litigation over Decalogue displays is thus far from over. The conflicting holdings in *McCreary* and *Van Orden*, O'Connor's retirement, the fact-specific decision in *McCreary* all portend renewed efforts to get some evidence of the Decalogue's influence upon our law and culture into public space. For that reason, and because the array of documents examined in *McCreary* is found already in many other locales, it is worth clarifying one more confusion in the Court's opinion: what the display is about.

The Court did not seem to know. The majority wrote of the display as "odd," "baffling," and "perplexing." A "reasonable observer" would "throw up his hands": What does it all mean? What is truly perplexing, though, is the Justices' perplexity, for the answer stares them in the face every workday.

Let's say that a "reasonable observer" is someone who works at the Supreme Court, or anyone at all who has visited the chamber in which oral argument in *McCreary* was heard. The frieze above depicts eighteen individuals presented to the viewer as constituents of a class, as a multi-member set. These figures—Hammurabi, Confucius, Justinian, Moses, Muhammad, and the rest—are a diverse lot, hailing from vastly different cultures and historical eras, possessed of different worldviews. What are they doing together in the frieze? What is the set-defining characteristic? They are all male, deceased, influential. But the reasonable viewer does not conclude that the frieze is simply about powerful dead men. At least three of the figures—Moses, Confucius, and Muhammad—are great religious figures. Most, however, are not. So the reasonable viewer does not take the set's defining characteristic to be religion. A reasonable observer who knows a little history sees before long that the frieze depicts a set of great human *Lawgivers*.

Consider now a reasonable observer of the Kentucky displays. Our observer sees eleven equal size frames containing a total of nine documents. All nine are presented in the same manner. None is held out to the eye as primary, special, separate. Any reasonable observer would conclude—as does anyone who views the Supreme Court frieze—that the individual specimens are members of a set.

What is *this* set's principle of unity? Many were produced by recognized political authority. But the Star Spangled Banner was not. Neither was the Decalogue. The Mayflower Compact and the Declaration of Independence were not, either: They are manifestos by people on the cusp of political organization. Some of the "political" documents are scarcely more than prayers—the Kentucky Constitution Preamble and the National Motto are two examples. Two—the Decalogue and the Magna Carta—are foreign imports. The Mayflower Compact has a foot on two shores, composed by English settlers anchored off the Massachusetts coast.

What do the individual members of *this* set have in common? Neither Lady Justice nor the Bill of Rights includes an explicit reference to God. All the others do, and the First Amendment refers to "religion." Both Lady Justice and the Bill of Rights make sense, moreover, in light of background convictions about equal human dignity, unconditional human rights, and limited government instituted *for* the people. These convictions suggest, if they do not imply, an objective moral order: Rights do not depend upon power or prestige or upon some majority's (or powerful minority's) shifting view of what is advantageous to them. Human dignity and human rights have sources beyond the willing and wishes of people.

The God spoken of by the Kentucky documents is transcendent and intelligent, a greater-than-human source of meaning and value. The documents as a whole show that their human authors considered themselves dependent upon this God's continuing care. This care for humans according

to a divine plan is most often called Providence, and the documents reflect heartfelt recognition of it, e.g., "In God We Trust." Many of the texts—the Preamble, the Mayflower Compact, the first part of the Decalogue—make clear that humans owe God thanks, prayer, homage.

A reasonable observer sees that the Kentucky displays contain a great deal of divergent detail, much that is time- and place-bound, many complaints about particular temporal rulers, contingent political plans and the like. The reasonable observer's eye sees as well much that is grander, more exalted, even timeless. This observer's eye fixes upon the pervading common themes: God, and God's direction of and care for human persons. The documents are also pervaded by law, *nomos*, what is right to do, small and large: What is the morally sound way for government to treat people? How do people joined together in political community properly treat each other? What does justice require? How do we show respect for all humankind? What has God said to help us answer these important questions?

The reasonable observer sees that a unifying theme of the Kentucky display is the objective moral law as the effect or deliverance of God—ethical monotheism. The reasonable observer sees, too, that the documents evince a particular ethical monotheism, and its specific influence upon a particular nation: the United States of America. The reasonable observer concludes that the documents' unifying theme is that biblical ethical monotheism has shaped our basic law and our political tradition.

The Kentucky displays are really one frame of the Supreme Court frieze, brought into very sharp focus. They depict how *one* of history's great Lawgivers—Moses—shaped *our* country, its laws and political institutions. And just in case, viewers of the courthouse displays read that it is about "Foundations of American Law and Government."

The Supreme Court's witness in favor of this theme is not limited to its own interior artwork. The Court fifty-eight years ago stamped Madison's *Memorial and Remonstrance* as the Magna Carta of religious liberty in America. Appended in its entirety to *Everson v. Board of Education*,[1] and excerpted many times since by members of this Court, Madison's ode to freedom declares: "It can be truly said, therefore, that today, as in the beginning, our national life reflects a religious people who, in the words of Madison, are 'earnestly praying, as . . . in duty bound, that the Supreme Lawgiver of the Universe . . . guide them into every measure which may be worthy of his (blessing . . .).[2]

This is the message of the Kentucky documents: the American people, a religious nation, acknowledge that their actions as a people are guided by the Supreme Lawgiver, and they—that is, *we*—give thanks.

Many times since *Everson* was decided in 1947 has the Court affirmed Madison's central point. Just five years later, in *Zorach v. Clauson*, the Court gave unqualified approval to the proposition that "[w]e are a religious people whose institutions presupposes a Supreme Being."[3] The Court in *Schempp* later affirmed and elaborated upon this recognition, saying that the "fact that the Founding Fathers believed devotedly that there was a God and the unalienable rights of man were rooted in Him is *clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself.*"[4] The *Schempp* Court said that "their"—that is, the Founders'—writings "evidence" those convictions. The question that Schempp poses about this case is whether the Declaration of Independence "evidence[s]" beliefs about the divine ground of inalienable rights, not what the Declaration expressly recites.

Schempp referred to two of the documents on display in Kentucky—the Mayflower Compact and that part of the Constitution known as the Bill of Rights. But this was no exhaustive list. The Court listed those two documents instead as members of a huge set of writings: those "from the Mayflower Compact"—written in 1620—"to the Constitution itself"—written from 1789 to 1791.[5] In between those temporal poles lies the Declaration of Independence. In it our founders declared: "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."[6]

The counties asserted throughout the litigation that the Ten Commandments supply the "moral background" of the Declaration of Independence, a claim from which they retreated in the Supreme Court.[7] The majority was nonetheless puzzled: What could these two documents have in common, since one is about "divine imperatives," and the other says that public authority derives from the "consent of the governed?"[8]

The Supreme Court majority did not strain to find an answer. In truth, however, the Decalogue provides potent evidence of human equality and the ground for inalienable human rights, too. The moral duties of the Second Table of the Decalogue are objective; that is, they are categorical and universal. It is simply wrong for anyone to murder, steal, bear false witness. These duties logically entail a class of beneficiaries who are thereby vouchsafed unconditional ("inalienable") human rights. Everyone has a right not to be murdered, not to be lied to, not to be a victim of theft, no matter who would do the killing or stealing or lying, and no matter what reason they offer for doing it.

The Supreme Court (and the Sixth Circuit, too, for that matter) missed the whole point of Jefferson's appeal to the "Laws of Nature and of Nature's God."[9] The point was precisely that there is a higher moral law—and a Supreme Lawgiver—to which even the monarch of the world's most powerful country must bow. In case the earthly king refuses, God's creatures could justifiably resist oppression by appeal to that same transcendent morality.

In truth and as Lincoln suggested, the Declaration of

Independence is the "frame" into which the Framers placed the United States Constitution. John Quincy Adams—whom the Sixth Circuit cited as Jefferson's collaborator on the Declaration[10]—said that the Constitution "was the complement to the Declaration of Independence; founded upon the same principles, carrying them out into practical execution, and forming with it, one entire system of national government."[11] Adams also stated that "[t]he Declaration of Independence and the Constitution of the United States[] are parts of one consistent whole, founded upon one and the same theory of government."[12]

The Kentucky displays include our national Bill of Rights presumably because it is our country's highest political expression of the concepts found in the Declaration of Independence: government bound to respect the equal inalienable rights of human persons. The Mayflower Compact also manifests ethical monotheism that, for the Pilgrims, meant primarily the Ten Commandments. The Compact was written "In the name of God" and "in the presence of God."[13] The colonists covenanted together to establish "a civil body politic for our better ordering and preservation."[14] The Magna Carta expresses the idea that the rights of man are inalienable and are God-given. Blackstone describes the declaration of rights and liberties in the Magna Carta as conforming to the natural liberties of all individuals that were endowed by God at creation and are vested by the immutable law of nature. It is easy to see here, too, that the Ten Commandments help us to make sense of what the Englishmen of the thirteenth century were saying.

Our National Motto—"In God We Trust"— succinctly expresses the ethical monotheism woven throughout the other documents. As the Court stated in Lynch v. Donnelly, the National Motto is part of the "unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789."[15] The National Motto not only presupposes but also expresses America's devotion to a unitary God who acts according to a divine creative plan, for the benefit of all humankind. The Kentucky displays include the Star Spangled Banner. The National Motto is derived from the line in the anthem that states, "And this be our motto, 'in God is our trust.'"

Lady Justice symbolizes our fair and unprejudiced system of justice and the ideals that it embodies. These ideals include the notion that men are equal in dignity and thus deserving of equal justice. In our heritage, these notions of human dignity and equality owe very much to our belief in a transcendent Creator God who has made known His will for us, through revelation and by endowing us with reason sufficient to discern important moral truths: persons with reason.

Our precious rights and liberties—political, civil, religious—are rooted in God's law. So states the Preamble to the Kentucky Constitution in terms redolent of Madison's great *Memorial and Remonstrance*: "We the People of Kentucky [are] grateful to Almighty God for the civil, political and religious liberties we enjoy."[16] Almost every other state constitution recognizes in its Preamble a Supreme Being; only three could be said to lack any approving invocation or reference to God.

The nine documents manifest, in varying but mutually reinforcing ways, the influence of a "Lawgiver" God upon our thinking and practices concerning human rights and limited government. The historical fact is indisputable: Biblical ethical monotheism is that influence. No one suggests that Confucius and Muhammad played any meaningful role in our founding period. They did not. But the God who delivered the two tablets to Moses certainly did. To the extent—if any—that the Court's precedents suggest that the Establishment Clause requires government to pretend otherwise, so much the worse for those precedents.

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Footnotes

[1] 330 U.S. 1, 63–72 (1947) (appx. to Rutledge, J., dissenting).

[2] Sch. Dist. of Abington Township v. Schempp, 374 U.S. 203, 213 (1963).

[3] 343 U.S. 306, 313 (1952).

[4] *Schempp*, 374 U.S. at 212-13.

[5] *Id.*

[6] The Declaration of Independence para.2 (U.S. 1776).

[7] McCeary County v. ACLU, 125 S. Ct. 2722, 2741 n. 21 (2005).

[8] *Id.* at 2741

[9] The Declaration of Independence para.1 (U.S. 1776).

[10] *Id.* at 452 n.5.

[11] Daniel L. Driesbach, I*n Search of a Christian Commonwealth: An Examination of the Selected Nineteenth-Century Commentaries on References to God and the Christian Religion in the United States Constitution*, 48 Baylor L. Rev. 927, 970 (1996) (quoting John Quincy Adams, The Jubilee of the Constitution, Address before New York Historical Society (April 30, 1939), *reprinted in* 6 J. Christian Jurisprudence 2, 5 (1986)).

[12] *Id.*

[13] The Mayflower Compact para. 1-2 (U.S. 1620).

[14] *Id.* at para. 2.

[15] 465 U.S. 668, 674 (1984).

[16] Ky. Const. pmbl.