(2009) 11 Ecc LJ 329–339 © Ecclesiastical Law Society

COMMENT

Keeping the Commandments

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

On 25 February 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 40 years before. It was one of a dozen old signs and markers in the same park. A new religious group, called Summum, sought permission to put up a monument with their Seven Principles of faith. The city refused. Summum 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 Summum*,[1] 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 favour 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. The Court concluded that government speech is simply 'not bound by the free speech clause', 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 offence.

1 (2009) 129 S Ct 1125.

https://doi.org/10.1017/S0956618X0999007X Published online by Cambridge University Press

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 characterisation 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 monuments 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 wrote, serve to 'solemnize public occasions, express confidence in the future, and encourage the recognition of what is worthy of appreciation in society'.[2] 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

2 *Lynch v Donnelly* (1984) 465 US 668, 686.

https://doi.org/10.1017/S0956618X0999007X Published online by Cambridge University Press

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'.[3] 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 recognises 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 recognises this in private property laws of 'adverse possession': an open, continuous and notorious use of a property will eventually 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 recognises the pressure of time in its rules of pleading and procedure. It sets statutes of limitations on many claims and penalises 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; once a public religious display has reached its proverbial 'forty years', however, surely we would do best to leave it alone.

doi:10.1017/S0956618X0999007X

The Maintenance of Closed Anglican Churchyards

Stephen White
Visiting lecturer, Cardiff Law School

In 2004, this *Journal* published a case note of a decision by District Judge Thomas in the Gloucester County Court.[1] At issue was the leeway permitted a District or Parish Council in discharging its obligation of maintaining a closed Anglican churchyard 'by keeping it in decent order and its walls and fences in good repair'.[2] The Parochial Church Council had passed responsibility for maintaining the churchyard to the Parish Council,[3] which, in turn, had

3 *Jackman v Rosenbaum* (1922) 260 US 22, 31.
1 *Lydbrook Parochial Church Council v Forest of Dean District Council* (2004) 7 Ecc LJ 494.
2 Local Government Act 1972, s 215(1).
3 Ibid, s 215(2).