

O'CONNOR, J., concurring

**SUPREME COURT OF THE UNITED STATES**

No. 03–1693

MCCREARY COUNTY, KENTUCKY, ET AL., PETI-  
TIONERS *v.* AMERICAN CIVIL LIBERTIES  
UNION OF KENTUCKY ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SIXTH CIRCUIT

[June 27, 2005]

JUSTICE O'CONNOR, concurring.

I join in the Court's opinion. The First Amendment expresses our Nation's fundamental commitment to religious liberty by means of two provisions—one protecting the free exercise of religion, the other barring establishment of religion. They were written by the descendents of people who had come to this land precisely so that they could practice their religion freely. Together with the other First Amendment guarantees—of free speech, a free press, and the rights to assemble and petition—the Religion Clauses were designed to safeguard the freedom of conscience and belief that those immigrants had sought. They embody an idea that was once considered radical: Free people are entitled to free and diverse thoughts, which government ought neither to constrain nor to direct.

Reasonable minds can disagree about how to apply the Religion Clauses in a given case. But the goal of the Clauses is clear: to carry out the Founders' plan of preserving religious liberty to the fullest extent possible in a pluralistic society. By enforcing the Clauses, we have kept religion a matter for the individual conscience, not for the prosecutor or bureaucrat. At a time when we see around the world the violent consequences of the assumption of religious authority by government, Americans may count



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When we enforce these restrictions, we do so for the same reason that guided the Framers—respect for religion's special role in society. Our Founders conceived of a Republic receptive to voluntary religious expression, and provided for the possibility of judicial intervention when government action threatens or impedes such expression. Voluntary religious belief and expression may be as threatened when government takes the mantle of religion upon itself as when government directly interferes with private religious practices. When the government associates one set of religious beliefs with the state and identifies nonadherents as outsiders, it encroaches upon the individual's decision about whether and how to worship. In the marketplace of ideas, the government has vast resources and special status. Government religious expression therefore risks crowding out private observance and distorting the natural interplay between competing beliefs. Allowing government to be a potential mouthpiece for competing religious ideas risks the sort of division that might easily spill over into suppression of rival beliefs. Tying secular and religious authority together poses risks to both.

Given the history of this particular display of the Ten Commandments, the Court correctly finds an Establishment Clause violation. See *ante*, at 19–25. The purpose behind the counties' display is relevant because it conveys an unmistakable message of endorsement to the reasonable observer. See *Lynch v. Donnelly*, 465 U. S. 668, 690 (1984) (O'CONNOR, J., concurring).

It is true that many Americans find the Commandments in accord with their personal beliefs. But we do not count heads before enforcing the First Amendment. See *West Virginia Bd. of Ed. v. Barnette*, 319 U. S. 624, 638 (1943) (“The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and

