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Thou Shalt Reasonably Focus on Its Context: Analyzing Public Displays of the Ten Commandments

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THOU SHALT REASONABLY FOCUS ON ITS CONTEXT: ANALYZING PUBLIC DISPLAYS OF THE TEN COMMANDMENTS

I. INTRODUCTION

Judge Roy S. Moore, former Chief Justice of the Alabama Supreme Court, brought public displays of the Ten Commandments into the headlines during the summer of 2003 when he refused to obey a federal judge’s order to remove a two-ton granite monument displaying the Ten Commandments from the rotunda of the Alabama Judicial Building.¹ His refusal to remove the monument instigated a spirited quest by many to allow the monument to remain in the rotunda.²

Although Judge Moore brought the issue of public Ten Commandments displays into the public arena, it was not an unfamiliar issue to the courts.³ Beginning in 1973, citizens of various cities began


² See, e.g., Melissa Mullins, Ten Commandments Caravan Headed for Washington, CYBERCAST NEWS SERVICE, Sept. 29, 2003, at http://www.cnsnews.com/Culture/archive/200309/CUL20030929c.html (last visited Aug. 19, 2004) (describing the five state “Save the Commandments Caravan” Tour, which ended at the Supreme Court in October 2003 asking the Supreme Court to hear Judge Moore’s case and to declare the Ten Commandments the moral foundation of the U.S. Constitution). Politicians also sought to keep Judge Moore’s monument available to the public. See Alabama Declines Offer to House Monument, BATON ROUGE ADVOC., Sept. 5, 2003, at 5B, available at 2003 WL 4884320 (reporting that Governor Ronnie Musgrave of Mississippi offered to display Judge Moore’s monument for a week in Mississippi and that he would encourage other governors to display the monument); Erin Stephenson, Religion Can’t Be Mandate, FORT COLLINS COLORADOAN, Sept. 1, 2003, at B1, available at 2003 WL 57879422 (reporting that former presidential candidate Alan Keyes led protests defying the federal judge’s orders to remove the monument).

³ See infra text accompanying note 5. In addition to Ten Commandments displays at courthouses, courts have considered the constitutionality of Ten Commandments displays at public schools. This Note will not address Ten Commandments displays in public schools. For cases regarding this issue, see Stone v. Graham, 449 U.S. 39 (1980); Baker v. Adams County, 310 F.3d 927 (6th Cir. 2002); DiLoreto v. Downy Unified School District Board of Education, 196 F.3d 958 (9th Cir. 1999); Doe v. Harlan County School District, 96 F. Supp. 2d 667 (E.D. Ky. 2000). For statutes authorizing displays of Ten Commandments in schools,
challenging the constitutionality of Ten Commandments monuments donated by the Fraternal Order of Eagles. 4 Twenty years later, when the Eleventh Circuit ruled on Judge Moore’s monument, five federal courts of appeals, various federal district courts, and one state supreme court had issued holdings on public Ten Commandments displays.5

In analyzing Ten Commandments displays, courts have employed the Endorsement Test, a modification of the Lemon Test, which focuses on the perceptions of a reasonable observer.6 However, courts have not always used a uniform reasonable observer standard. The reasonable observer may be informed: a reasonable observer in the Third Circuit knows the approximate age of a Ten Commandments plaque;7 and a reasonable observer in the Eleventh Circuit knows that Judge Moore campaigned under the slogan “Ten Commandments Judge.”8 The reasonable observer may be an uninformed passerby: a reasonable observer in the Sixth Circuit is unable to identify a unifying theme between the Ten Commandments, the Magna Carta, the Mayflower Compact, and other historical documents;9 and a reasonable observer in the Seventh Circuit concludes endorsement after viewing the Ten Commandments without first looking at the other documents in the display.10 The result of applying different standards of the reasonable

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4 See infra notes 119-30 and accompanying text.
5 The Third, Sixth, Seventh, Tenth, and Eleventh Circuits had issued rulings on public Ten Commandments displays prior to Judge Moore’s case. See infra text accompanying notes 112-14, 119-24, 133-40, and 146-56. The Fifth and Sixth Circuits ruled on Ten Commandments displays in the months following the Moore case. See infra text accompanying notes 138-43 and 157-63. The Eighth Circuit also ruled on a Ten Commandments monument following the Moore case, but the decision was vacated. See ACLU v. City of Plattsmouth, 358 F.3d 1020 (8th Cir. 2004), vacated by No. 02-2444, 2004 U.S. App. LEXIS 6636 (8th Cir. Apr. 6, 2004). The Colorado Supreme Court ruled on a public Ten Commandments display. See infra note 119. See infra notes 142 and 161 for district courts that have issued holdings on Ten Commandments displays.
6 See infra Part III.C.
7 See infra text accompanying note 135.
8 See infra text accompanying note 140.
9 See infra text accompanying note 161.
10 See infra text accompanying note 156.
observer is that courts issue inconsistent holdings regarding public Ten
Commandments displays.11

Because the number of challenges to public Ten Commandments
displays continues to grow12 and because politicians are seeking to enact
laws allowing the Ten Commandments to be posted on government
property,13 courts need a method to analyze Ten Commandments

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11 See infra text accompanying notes 168-70.
12 Mary Jacoby, The Teen, an Alderman, and Ten Commandments, ST. PETERSBURG TIMES, Aug. 17, 2003, at 1A, available at 2003 WL 56464320 (stating that in the 1990s there was only one significant ruling on the Ten Commandments, but that federal courts have ruled on Ten Commandments displays seventeen times since 2000); see also Warren Richey, Ten Commandments Challenges Spread; Disputes Have Arisen in 14 States; Many Rulings Go Against the Displays, CHRISTIAN SCI. MONITOR, Aug. 4, 2003, at 01, available at 2003 WL 5254701 (reporting that at the beginning of August 2002, disputes concerning Ten Commandments displays were underway in Arizona, Georgia, Indiana, Kansas, Maryland, Massachusetts, Montana, Nebraska, Pennsylvania, Texas, Utah, Washington, and Wisconsin). Within a nine-day period in September of 2003, two new lawsuits were filed against local government entities for Ten Commandments displays. See ACLU Sues Barrow County Over Court’s Commandments, AUGUSTA CHRON., Sept. 17, 2003, at B06, available at 2003 WL 63410456 (reporting that on September 16, 2003, the ACLU filed suit against Barrow County, Georgia for its display of the Ten Commandments at the county courthouse); Separationists Sue Over Pl. Grove Tablet, DESERET MORNING NEWS, Sept. 26, 2003, at B02, available at 2003 WL 64082380 (reporting that the Society of Separationists filed suit against the City of Pleasant Grove, Utah on September 25, 2003, for its display of the Ten Commandments in the local city park).

The State of Indiana has already enacted a law authorizing the Ten Commandments to be publicly displayed. See IND. CODE ANN. § 4-20.5-21-2 (West 2002). This statute permits the Ten Commandments to be displayed on any property owned by the state when
displays that will provide consistent results. This Note will address the constitutionality of public displays of the Ten Commandments under the Establishment Clause and will propose a new test that focuses on the type of the Ten Commandments displays. First, this Note will discuss the present constitutional framework for analyzing challenges to the Establishment Clause. Second, this Note will explore how courts have analyzed public Ten Commandments displays. Third, this Note will analyze those court decisions. Fourth, this Note will provide a model test for courts to use in analyzing public displays of the Ten Commandments.

II. THE ESTABLISHMENT CLAUSE

The First Amendment states that “Congress shall make no law respecting an establishment of religion.” During the past 225 years, three different theories of the Establishment Clause have become entrenched in Establishment Clause jurisprudence: strict separation, neutrality, and accommodation. Of the three theories, neutralism is the...
most advocated theory, and it has recently established a strong foothold in Establishment Clause jurisprudence due to Justice O’Connor’s introduction of the Endorsement Test, a test designed to promote neutrality. Part II of this Note will discuss the development and the application of the Endorsement Test. Part II.A will explain the Lemon Test, the Endorsement Test’s predecessor. Part II.B will trace the development of the Endorsement Test through the concurring opinions of Justice O’Connor. Finally, Part II.C will explore how federal circuits have applied the Endorsement Test.

A. The Lemon Test

In 1971, the Supreme Court ushered in a new era of Establishment Clause jurisprudence when it announced for the first time, in Lemon v. Kurtzman, an analysis for alleged Establishment Clause violations. After Lemon, to withstand a challenge to the Establishment Clause,
government action must have a secular purpose, its primary effect must neither advance nor inhibit religion, and it must not foster an excessive entanglement between government and religion.27

For approximately the next fifteen years, the Court applied the Lemon Test to almost all alleged Establishment Clause violations.28

27 After applying these three prongs to the Rhode Island and Pennsylvania statutes, the Court declared both statutes unconstitutional. Id. at 607. The Court held that both states had a secular purpose in enacting the statutes—to “enhance the quality of the secular education in all schools covered by the compulsory attendance laws.” Id. at 613. The Court did not reach a conclusion on whether the primary purpose of the statutes was to advance or inhibit religion because the Court concluded that the statutes created an excessive entanglement between government and religion. Id. at 613-14. The Court wrote:

We need not and do not assume that teachers in parochial schools will be guilty of bad faith or any conscious design to evade the limitations imposed by the statute and the First Amendment. We simply recognize that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral. Id. at 618. The Court reasoned that because government surveillance would be needed to make sure that the statutes were complied with, the statutes created an excessive entanglement. Id. at 619.

The Court took these three prongs from two previous Supreme Court cases; the first two prongs came from Board of Education v. Allen, 392 U.S. 236 (1968) and the third prong came from Walz v. Tax Commission, 397 U.S. 664 (1970). Id. at 612-13. In Allen, the Court upheld New York’s Education Law, which required local public schools to lend textbooks free of charge to all students in grades seven through twelve, regardless of whether the student attended a public or parochial school. 392 U.S. at 236-37. The Court stated the test for determining which contacts between church and state were permissible under the Establishment Clause was “[W]hat are the purpose and primary effect of the enactment?” Id. at 243. The Court held that New York’s purpose in enacting the statute, to further the educational opportunities of the students, was a legitimate purpose. Id. The Court further held that the primary effect of the statute was not to promote religion because parochial schools would not use the textbooks to teach religion. Id. at 248. In Walz, the Court upheld a New York City tax exemption granted to religious organizations for property used solely for religious worship. 397 U.S. at 664. In its reasoning, the Court stated, “We must also be sure that the end result—the effect—is not an excessive government entanglement with religion.” Id. at 674. The Court reasoned that New York City did not excessively entangle itself with religion because in granting the tax exemption, New York City did not transfer any of its revenue to a church, but rather, it only refrained from demanding certain taxes. Id. at 675. The Court further reasoned that the tax exemption did not create excessive entanglement because the exemption restricted the fiscal relationship between the city and the churches. Id. at 676.

28 The Court did not apply the Lemon Test in Marsh v. Chambers, 463 U.S. 783 (1983). In Marsh, the Court upheld Nebraska’s practice of paying a chaplain to pray before each legislative session. Id. at 783-84. The Court noted the long historical practice of opening legislative sessions with prayer: the Continental Congress opened each session with a prayer by a paid chaplain; the First Congress adopted a policy of selecting a chaplain to open each session with prayer; and the First Congress adopted this policy three days before the language of the Bill of Rights was agreed upon. Id. at 783-88. The Court reasoned that
Although the Lemon Test was applied consistently, it was not without its opponents. A frequent criticism of the Lemon Test was that it led to inconsistent, and often irreconcilable, results. See Jesse H. Choper, The Establishment Clause and Aid to Parochial Schools—An Update, 75 CAL. L. REV. 5, 6-7 (1987) [hereinafter Choper, Establishment Clause]. Choper provided a list of inconsistent decisions by the Supreme Court after it began using the Lemon Test: (1) government can finance bussing for children attending parochial schools, but government cannot finance bussing from the parochial school to cultural and scientific centers; (2) government can lend textbooks to children attending parochial schools, but government cannot lend instructional materials to either the parochial school or to the children attending the parochial school; (3) a public school teacher cannot enter a parochial school to provide remedial services, but the public school teacher can provide these services to children attending a parochial school when the children are outside of the parochial school; and (4) government cannot finance achievement tests when the parochial school prepares the tests, but government can finance achievement tests if the tests are prepared by state officials even if the tests are administered by parochial school teachers.

Another frequent criticism of the Lemon Test was that it created a tension between the Establishment Clause and the Free Exercise Clause. Jesse H. Choper, The Endorsement Test: Its Status and Desirability, 18 J.L. & POL. 499, 501 (2002) [hereinafter Choper, Endorsement Test]. Because the first prong of the Lemon Test required a secular purpose, it seemingly made all “exemptions from onerous obligations for religion unconstitutional.” Id.

Justice White repeatedly criticized the Lemon Test and argued that it imposed unnecessary tests for analyzing alleged Establishment Clause violations. See, e.g., Roemer v. Bd. of Pub. Works, 426 U.S. 736, 768 (1976) (White, J., concurring) (“The threefold test of Lemon I imposes unnecessary, and . . . superfluous tests for establishing ‘when the State’s involvement with religion passes the peril point’ for First Amendment purposes.”) (citation omitted)

Despite all the criticism of the Lemon Test, no elaboration on it can compare with Justice Scalia’s vivid description of it in 1993. See Lamb’s Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 398-99 (1993) (Scalia, J., concurring). Justice Scalia, joined by Justice Thomas, wrote, “Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, Lemon stalks our Establishment Clause jurisprudence once again, frightening the little child and school attorneys of Center Moriches Union Free School District.” Id. at 398. He explained:

"It is there to scare us (and our audience) when we wish it to do so, but we can command it to return the tomb at will. When we wish to strike down a practice it forbids, we invoke it; when we wish to uphold a practice it forbids, we ignore it entirely. Sometimes, we take a middle course, calling its three prongs “no more than helpful signposts.” Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him."

Id. at 399 (citations omitted).
O’Connor formulated the Endorsement Test, which she refined in a series of concurring opinions.  

B. The Development of the Endorsement Test

The Endorsement Test started small in 1984, articulated by Justice O’Connor in a concurring opinion not joined by any other Justice. But it grew, and it was adopted by a majority of the Supreme Court five years later and is still being used by the Court over twenty years later.

1. Lynch v. Donnelly: The Beginning of the Endorsement Test

In Lynch v. Donnelly, citizens of Pawtucket, Rhode Island, alleged that the city’s holiday display, which included a crèche, a Santa Claus house, reindeer, candy-striped poles, carolers, a Christmas tree, cut-outs of a clown, an elephant, and a teddy bear, and a “Seasons Greetings” banner, violated the Establishment Clause. Both the plurality and Justice O’Connor, in a concurrence, held that the display did not violate the Establishment Clause.

a. The Plurality Opinion

Applying the Lemon Test, the plurality held that the holiday display was constitutional. The plurality began its analysis by noting that the

30 See infra Part II.B.
31 See infra Part II.B.I.b.
32 See infra Parts II.B.3, II.C.
34 Lynch, 465 U.S. at 671. The city erected the holiday display in a park owned by a nonprofit organization. Id. A crèche is a visual representation of the manger scene shortly after the birth of Jesus in Bethlehem. County of Allegheny v. ACLU, 492 U.S. 573, 580 (1989). The crèche is an inherently religious symbol and to Christians, it is the “central religious symbol of the Christmas holiday.” Id. at 627. The crèche in Lynch consisted of figurines, ranging in size from five feet to five inches, of Baby Jesus, Mary, Joseph, angels, shepherds, kings, and animals. Lynch, 465 U.S. at 671.
35 Id. at 671. Chief Justice Burger wrote the plurality opinion and was joined by Justices Powell, White, and Rehnquist. Id. at 670.
36 Id. at 687. The Court repeatedly stated that the First Amendment does not require complete separation between church and state: “[T]otal separation of the two is not possible. . . . Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation. . . . [T]he Court consistently has declined to take a rigid, absolutist view of the Establishment Clause.” Id. at 672, 673, 678.

creèche must be examined within the context of the Christmas season.\textsuperscript{37} Given this context, the plurality reasoned that the city’s purposes of celebrating the holiday season and depicting the origins of Christmas were legitimate secular purposes.\textsuperscript{38} In assessing the effect of the display, the plurality noted that some government advancement of religion is permissible.\textsuperscript{39} Therefore, the plurality held that the display’s primary effect was not to advance religion because the benefit to Christianity was "indirect, remote and incidental."\textsuperscript{40}

b. The Concurrence

Agreeing with the plurality that the holiday display did not violate the Establishment Clause, Justice O’Connor began her concurrence by stating that government can violate the Establishment Clause in one of two ways: (1) excessive entanglement with private institutions; or (2) endorsement or disapproval of religion.\textsuperscript{41} Justice O’Connor defined endorsement as "send[ing] a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored

\textsuperscript{37} Id. The Court cited two previous cases, \textit{Stone v. Graham}, 449 U.S. 39 (1980) and \textit{School District of Abington Township v. Schempp}, 374 U.S. 203 (1963), in which the Court declared certain religious practices unconstitutional, but left open the possibility that the same religious practices might be constitutional within a different context. \textit{Lynch}, 465 U.S. at 679. For a discussion of \textit{Stone}, see infra Part III.A. In \textit{Abington}, the Court declared unconstitutional two state laws, which required daily Bible reading in public schools. 374 U.S. at 203. But the Court rejected the notion that the Bible cannot have a legitimate purpose in a student’s education. \textit{Id.} at 225. The Court wrote:

\begin{quote}
It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment.
\end{quote}

\textit{Id.}

\textsuperscript{38} \textit{Lynch}, 465 U.S. at 681.

\textsuperscript{39} Id. Prior to making this statement, the Court looked at previous government actions it had allowed: expenditures of public money on textbooks for sectarian schools, expenditures of public money for transporting students to sectarian schools, tax exemptions for church property, and federal grants to church-sponsored colleges. \textit{Id.} at 681-82. The Court then stated, “We are unable to discern a greater aid to religion deriving from inclusion of the crèche than from these benefits and endorsements previously held not violative of the Establishment Clause.” \textit{Id.} at 682.

\textsuperscript{40} \textit{Id.} at 683.

\textsuperscript{41} Id. at 688. Justice O’Connor explained that excessive entanglement between government and religious institutions could lead to religious institutions losing their independence, religious institutions receiving access to government or to governmental powers, and creating political constituencies based on religious belief. \textit{Id.} She then stated that excessive entanglement was not an issue. \textit{Id.} at 689.
members of the political community. Disapproval sends the opposite message."42 In determining whether government has endorsed religion, Justice O’Connor said that two messages must be analyzed: (1) the message government intended to convey; and (2) the message actually conveyed.43

To analyze a challenge to the Establishment Clause focusing on these two messages, Justice O’Connor refined both the purpose prong and the effects prong of the Lemon Test.44 According to Justice O’Connor, the relevant question under the purpose prong became “whether the government intends to convey a message of endorsement or disapproval of religion.”45 As to the effects prong, Justice O’Connor stated that a government practice may not have the effect of communicating a message of endorsement.46 She then explained that a setting may change the message of the display.47 In finding the display constitutional, Justice

42 Id. at 688. Some commentators have labeled this the “outsiders argument.” See generally W. Scott Simpson, Lemon Reconstituted: Justice O’Connor’s Proposed Modifications of the Lemon Test for Establishment Clause Violations, 1986 BYU L. Rev. 465, 472 (1986) (“[S]tate religiously-oriented activities should be closely scrutinized because they convey to religious minorities, who do not participate in those activities, a sense that they are outsiders.”).
43 Lynch, 465 U.S. at 690. Both messages must be analyzed, Justice O’Connor explained, because some listeners do not rely solely on the words themselves, rather they will examine the context of the message and ask questions of the speaker to discern the intended message, while others will rely completely on the words themselves. Id.
44 Id. at 690-91.
45 Id. at 691. Justice O’Connor found that the state did not intend to convey a message of endorsement through the crèche. Id. She stated the purpose in including the crèche in the holiday display was to celebrate the holiday through its traditional symbols and not to promote the religious content of the crèche. Id.
46 Id. at 692. Specifically, Justice O’Connor stated, “What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion. It is only practices having that effect, whether intentionally or unintentionally, that make religion relevant, in reality or public perception, to status in the political community.” Id.
47 Id. In Lynch, Justice O’Connor implied that the relevant perceptions were the perceptions of real human beings—either citizens of Pawtucket or citizens of the United States. Smith, supra note 20, at 291. In his article, Smith criticized this approach, arguing that allowing the perceptions of real humans to dictate would result in government paralysis. Id. Because the United States has such a great diversity of religions, almost any government action would be seen as an endorsement of religion by someone. Id. He also argued that allowing the perceptions to be based on a majority of citizens’ feelings would contradict the purpose of the Endorsement Test, because the religious viewpoint of the majority would be endorsed, while ignoring the religious choices of the minority. Id. at 292.
O’Connor did not deny the religious nature of the crèche, but stated that the holiday setting negated any message of endorsement.48

2. Wallace v. Jaffree: The Observer Becomes Objective

Justice O’Connor commenced her refinement of the Endorsement Test a year later in Wallace v. Jaffree.49 In Wallace, the plaintiffs challenged three Alabama statutes that provided for a minute of silence in all public schools for meditation or prayer and that authorized teachers to lead willing students in a prayer addressed to “Almighty God.”50 A plurality and Justice O’Connor, in a concurrence, held that the statutes violated the Establishment Clause.51

Justice O’Connor began her analysis of the statutes by stating that the Endorsement Test precludes government from conveying or attempting to convey a message that certain religious beliefs are favored, but that it does not preclude government from acknowledging religion.52

48 Lynch, 465 U.S at 692. Justice O’Connor compared the crèche in the holiday display to a religious painting in a museum. Id. Just as the museum setting negated any message of religious endorsement from a painting, the holiday display negated any religious endorsement from the crèche. Id.

She also compared the crèche to other government “acknowledgements” of religion such as legislative prayer, presidential declarations of Thanksgiving as a national holiday, printing “In God We Trust” on coins, and opening Supreme Court sessions with “God save the United States and this honorable court.” Id. at 692-93. Because these government acknowledgements have the purpose “of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society,” and because of their “history and ubiquity,” these practices do not have the effect of endorsing religion. Id. at 693.


50 Wallace, 472 U.S. at 40.

51 Id. at 61, 67. Justice Stevens wrote the plurality opinion and was joined by Justices Blackmun, Brennan, and Marshall. Id. at 40. Justice Powell wrote a concurring opinion. Id. at 62.

The plurality declared the statutes unconstitutional because the Alabama legislature lacked a secular purpose in enacting the statutes. Id. at 56. The plurality looked at statements made by Senator Donald Holmes, the sponsor of the statutes, in which he said that he wanted to put voluntary prayer back into schools. Id. at 57.

52 Id. at 70. At the beginning of her concurrence, Justice O’Connor articulated two reasons for why she believed the Endorsement Test was the better test for alleged Establishment Clause violations: (1) the Endorsement Test was capable of consistent application; and (2) the Endorsement Test inquired into the legislative purpose. Id. at 68-69.
As to the purpose prong, Justice O’Connor agreed with the plurality that Alabama lacked any secular purpose for the statutes. As to the effects prong, Justice O’Connor enunciated a succinct question for courts to use in analyzing the effect: “[W]hether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools.”

3. County of Allegheny v. ACLU: The Adoption of the Endorsement Test

The next major progression in the development of the Endorsement Test occurred four years later in County of Allegheny v. ACLU. In Allegheny, the plaintiffs challenged two holiday displays: (1) a crèche on the Grand Staircase of the Allegheny County Courthouse; and (2) a menorah placed alongside a forty-five foot decorated Christmas tree outside Pittsburgh’s City-County Building. The Court held, vis-à-vis five opinions, that the crèche, but not the menorah, violated the

53 Id. at 77.
54 Id. at 76. Because she had already concluded that the statutes violated the purpose prong, Justice O’Connor did not analyze the effects on the objective observer other than to say it seemed likely that the message conveyed to the objective observer was approval of the child who chose prayer over the available alternatives. Id. at 78.

In Wallace, Justice O’Connor changed the relevant perceptions; the relevant perceptions are no longer from any person but from an objective observer. Id. This approach has been met with much criticism. See William P. Marshall, “We Know It When We See It” The Supreme Court and Establishment, 59 S. CAL. L. REV. 495, 536-37 (1986) (arguing that true objectivity will never be achieved because people, whether areligious, separationists, or agnostics, would rather assume themselves as reasonable than use an external standard); Smith, supra note 20, at 292-95. Smith criticized this approach because the hypothetical objective observer will only know as much as its maker wants to know and because the hypothetical objective observer will be deemed aware of the legislative history, allowing the observer to know the government’s purpose, thus collapsing the two prongs of the Endorsement Test into one prong. Smith, supra note 20, at 292-95.


56 Allegheny, 492 U.S. at 578. Alongside the menorah and tree was a sign saluting liberty. Id. A menorah is a nine-branched candelabrum used by Jews to celebrate the holiday of Hanukkah. ACLU v. Schundler, 104 F.3d 1435, 1438 (3d Cir. 1997). The lighting of the candles in the menorah is the central event of Hanukkah. Id. However, Hanukkah is not one of the main religious holidays in Judaism. Id.
Establishment Clause. The first time, and despite a strenuous objection from Justice Kennedy, a majority of the Court used the Endorsement Test to analyze a challenge to the Establishment Clause. 57

57 Allegheny, 492 U.S. at 574. Justice Blackmun delivered the opinion of the Court, concluding that the crèche, but not the menorah, violated the Establishment Clause. Id. at 578-621. Justice O'Connor wrote a concurring opinion. Id. at 623-37. Justice Brennan wrote an opinion concurring in part and dissenting in part, arguing that both displays violated the Establishment Clause. Id. at 637-46. Justice Stevens wrote an opinion concurring in part and dissenting in part, also arguing that both displays violated the Establishment Clause. Id. at 646-55. Justice Kennedy wrote an opinion concurring in part and dissenting in part, arguing that both the crèche and the menorah were constitutional displays. Id. at 670-78.

58 Id. at 593-94. Justice Blackmun, joined by Justices Brennan, Marshall, Stevens, and O'Connor, wrote, “The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from ‘making adherence to a religion relevant in any way to a person’s standing in the political community.’” Id. (quoting Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring)).

In his dissent, Justice Kennedy, joined by Chief Justice Rehnquist and Justices Scalia and White, articulated three arguments against the Endorsement Test. Allegheny, 492 U.S. at 670-78. First, he argued that the Endorsement Test, if applied faithfully, would invalidate many of the country’s traditional practices. Id. at 671. He provided the example of Thanksgiving Proclamations, through which Presidents have established a national day of celebration and prayer. Id. He wrote, “It requires little imagination to conclude that these proclamations would cause nonadherents to feel excluded, yet they have been a part of our national heritage from the beginning.” Id. Justice Kennedy reasoned:

Either the endorsement test must invalidate scores of traditional practices recognizing the place religion holds in our culture, or it must be twisted and stretched to avoid inconsistency with practices we know to have been permitted in the past, while condemning similar practices with no greater endorsement effect simply by reason of their lack of historical antecedent. Neither result is acceptable.

Id. at 674

Second, Justice Kennedy argued that allowing a religious display to have its meaning changed because of its context allows for a “jurisprudence of minutiae.” Id. In Justice Kennedy’s words, the Endorsement Test:

[C]ould provide workable guidance to the lower courts, if ever, only after this Court has decided a long series of holiday display cases, using little more than intuition and a tape measure. Deciding cases on the basis of such unguided examination of marginalia is irreconcilable with the imperative of applying neutral principles in constitutional adjudication.

Id. at 675-76.

Third, Justice Kennedy argued that “the clearest illustration of the unwisdom of the endorsement test” is that the Endorsement Test lends itself to an inquiry of how many adhere to a particular religion, and he stated: “Those religions enjoying the largest following must be consigned to the status of least favored faiths so as to avoid any possible risk of offending members of minority religions.” Id. at 677. In one final statement of disgust for the Endorsement Test, Justice Kennedy said, “Indeed, were I required to choose
Justice O'Connor, along with Justices Blackmun, Brennan, Marshall, and Stevens, held that the crèche violated the Establishment Clause. In its reasoning, the Court stated that the crèche communicated a religious message. The Court differentiated this crèche from the crèche in Lynch. Unlike the crèche in Lynch, the crèche in the Allegheny between the approach taken by the majority and a strict separationist view, I would have to respect the consistency of the latter.” Id. at 678.

Despite Justice Kennedy’s denouncement of the Endorsement Test, Justice O’Connor continued to believe that the Endorsement Test asked the right questions about religious displays and that it was capable of consistent application. Id. at 628-29. Justice O’Connor explained that the Endorsement Test would not invalidate long-standing religious practices because imputing the reasonable observer with knowledge of the “history and ubiquity” of the challenged action would provide part of the context. Id. at 630-31.

Justice Kennedy also articulated his own test for alleged Establishment Clause violations: the Coercion Test. Id. at 659. Under the Coercion Test, government action is not unconstitutional under the Establishment Clause unless government coerces someone to support or to participate in a religious exercise or if government gives direct benefits to religious organizations in such a way as to create a state religion. Id. Applying the Coercion Test to the crèche and the menorah, Justice Kennedy found both displays constitutional because no one was compelled to participate in a religious activity, government did not spend significant amounts of taxpayer money to pay for the displays, and because the crèche and menorah were passive displays. Id. at 664. He further explained that anyone who disagreed with the crèche or menorah could easily ignore it. Id.

Justice Kennedy, Chief Justice Rehnquist, and Justices White, Scalia, and Thomas have continued to adhere to the Coercion Test. See Lee v. Weisman, 505 U.S. 577 (1992). However, Justice Kennedy and Justice Scalia have articulated different definitions of coercion. Id. at 636-44. According to Justice Scalia, coercion carries with it the “force of law and threat of penalty.” Id. at 640. But according to Justice Kennedy, coercion can be subtle and indirect. Id. at 592-93.

In Lee, the plaintiffs challenged a school policy that allowed the principle to invite clergy to give non-sectarian prayers at middle school and high school graduations. Id. at 580. Justice Kennedy, writing for the Court, found the policy unconstitutional because the school’s control of the graduation ceremony placed public and peer pressure on the graduating students to join the clergy in the prayer. Id. at 586, 593. Justice Scalia, writing for the dissent, found the policy to be constitutional because the graduating students were not required to attend the graduation ceremonies and because the students received no punishment for not joining the clergy in prayer. Id. at 640-44.

Justice Kennedy has continued to hold that coercion can be accomplished through social pressure. See Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 297-98 (2000). In Santa Fe, Justice Kennedy joined five other Justices in striking down a school policy that allowed student led prayers before high school football games. Id. As part of its reasoning, the Court explained that many students feel pressure to attend high school football games. Id. at 310-13.

59 Allegheny, 492 U.S. at 602.
60 Id. at 598. The Court stated the crèche’s religious meaning was “unmistакably clear” because it portrayed the nativity scene and because the words “Glory to God in the Highest” were written above the angel. Id.
61 Id. For a description of the crèche’s context in Lynch, see supra text accompanying note 34.
Courthouse had nothing in its context to detract from its religious message. Finally, the Court noted the location of the crèche: the Grand Staircase, the “most beautiful part” of the building. Because of this location, the Court held that no reasonable viewer could think that government did not support or approve the crèche.

Justices O’Connor and Blackmun parted ways with Justices Brennan, Marshall, and Stevens, and joined Chief Justice Rehnquist and Justices Kennedy, Scalia, and White, in holding that the menorah was constitutional. Justice Blackmun stated that the result of placing the

62 Allegheny, 492 U.S. at 598. The County of Allegheny tried to argue that the crèche’s context negated its religious message. Id. at 598-99. First, the county argued that the floral decoration surrounding the crèche detracted from its religious message. Id. The Court rejected this argument because the floral frame attracted the viewers’ attention to the crèche. Id. at 599. Second, the county argued that the crèche’s religious message was diminished because the crèche was in the background during the annual Christmas carol program. Id. The Court rejected this argument because most viewers observed the crèche when the choir was not singing and because most of the carols that were sung were religious in nature. Id.

63 Id.

64 Id. at 598-600. Allegheny contains a dispute regarding the identity of the observer. James M. Lewis & Michael L. Vild, Note, A Controversial Twist of Lemon: The Endorsement Test as the New Establishment Clause Standard, 65 NOTRE DAME L. REV. 671, 690-91 (1990). Justice Kennedy, in his dissent, used the phrases “reasonable observer” and “objective observer”; whereas, Justices Blackmun and O’Connor only used the phrase “reasonable observer.” Id. Lewis and Vild argued that because both Justices Blackmun and O’Connor used only “reasonable observer” that they viewed a reasonable observer as an improvement over an objective observer. Id. However, they contend that a reasonable observer is not an improvement. Id. They noted that “reasonable,” when used in other contexts such as torts, contracts, or criminal law is always used to standardize judgment. Id. at 691. They argued that one cannot standardize judgment in regards to religion, and wrote, “[A] reasonable Jew will have a different perspective than a reasonable Protestant or a reasonable Muslim, and a reasonable Atheist will have a different perspective than any Theist.” Id. at 692. They concluded, “Whereas reasonable people of different religions may agree upon the standard of care in building a haystack, they are likely to disagree on what constitutes an endorsement of religion.” Id. at 692-93; cf. ACLU v. Rutherford County, 209 F. Supp. 2d 799, 814 (M.D. Tenn. 2002). In Rutherford County, the court stated, “[R] eligious differences create more deep-seated emotions and harsh reactions than most any other subject. Religious fervor has divided families, friends, neighbors, communities, and even nations. The evening news is filled with accounts of nations embroiled in religious wars and conflicts . . . .” Id.

65 Allegheny, 492 U.S. at 621-32, 637, 655. Although Justices Brennan, Marshall, and Stevens agreed that the Endorsement Test was the correct test to use, they disagreed upon its application to the menorah. Id. at 643. They disagreed that a Christmas tree, a largely secular symbol of Christmas, could minimize the religious significance of the menorah. Id. at 639. Justice Brennan wrote, “That the tree may, without controversy, be deemed a secular symbol if found alone does not mean that it will be so seen when combined with other symbols or objects.” Id. Rather, he argued that the menorah could bring back some of the religious aspects of the Christmas tree. Id. at 640-43. He argued that because the
menorah next to the Christmas tree created a holiday setting that represented both Christmas and Chanukah. However, he explained that the display’s constitutionality depended on whether Pittsburgh intended to celebrate Christmas and Chanukah as religious holidays or as secular holidays. He held that a reasonable observer would conclude that Pittsburgh intended to celebrate them as secular holidays because the Christmas tree, a secular symbol of Christmas, was the dominant element in the display.

Justice O’Connor came to a different conclusion about the message received by a reasonable observer. Justice O’Connor’s reasonable observer received the message that Pittsburgh was trying to acknowledge cultural diversity and to convey tolerance of religious beliefs by recognizing that the winter holiday is celebrated in a diversity of ways. Justice O’Connor concluded that Pittsburgh conveyed a message of pluralism by accompanying the Christmas tree, a secular symbol, with a menorah, a Jewish symbol.

reasonable observer could conclude either that the Christmas tree minimized the religious significance of the menorah or that the menorah maximized the religious significance of the Christmas tree that both messages had to be analyzed. Id. at 642.

In addition, Justice Brennan disagreed that the Christmas tree was the predominant element in the display. Id. First, he argued that an eighteen-foot menorah was far more eye-catching than a regularly sized Christmas tree; and second, he argued that the single-messaged menorah dominated the Christmas tree, which lacked a clear message. Id. In conclusion, Justice Brennan wrote, “I shudder to think that the only ‘reasonable observer’ is one who shares the particular views on perspective, spacing, and accent expressed in JUSTICE BLACKMUN’s opinion, thus making analysis under the Establishment Clause look more like an exam in Art 101 than an inquiry into constitutional law.” Id. at 642-43.

66 Id. at 614.
67 Id. at 615. Justice Blackmun wrote, “The simultaneous endorsement of Judaism and Christianity is no less constitutionally infirm than the endorsement of Christianity alone.” Id.
68 Id. at 616-17. Justice Blackmun concluded that the forty-five foot Christmas tree was the predominant element in the display because it occupied the central position beneath the archway in the entrance to the City-County Building, while the eighteen-foot menorah was positioned on one side of the Christmas tree. Id. at 617.
69 Id. at 635-36.
70 Id. at 635. Justice O’Connor stated that the religious significance of the menorah was not neutralized by the Christmas tree or the liberty sign, but that the Christmas tree and the liberty sign changed the message of the display. Id.
The refinement of the Endorsement Test continued in *Capital Square Review & Advisory Board v. Pinette*. In *Pinette*, Justice O'Connor and Justice Stevens disagreed on the amount of knowledge that should be imputed to the reasonable observer.

Justice O'Connor began her concurrence by stating that the Endorsement Test should not focus on the actual perceptions of individuals, but rather on the perceptions of a reasonable observer who is similar to the “reasonable person” in tort law. She then imputed

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71 515 U.S. 753 (1995). In *Pinette*, the Ku Klux Klan applied for a permit to place a cross on Capital Square, a ten-acre plaza surrounding the statehouse in Columbus, Ohio. *Id.* at 757-58. Although Capital Square had been used as a gathering place for speeches and festivals for the past one hundred years, the Advisory Board denied the Ku Klux Klan’s application. *Id.*

The plurality, consisting of Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas, held, using a forum analysis, that the Advisory Board violated the Ku Klux Klan’s free speech rights because Capital Square was a public forum and because an Establishment Clause defense did not justify the Advisory Board’s content-based restriction in denying the Ku Klux Klan’s application. *Id.* at 761-63. The plurality refused to apply the Endorsement Test because, as Justice Scalia explained, there was a crucial difference between government speech endorsing religion and private speech, which the government protects under the Free Speech and Free Exercise Clauses. *Id.* at 765. The Endorsement Test was applied by Justice O’Connor, who wrote a concurring opinion joined by Justices Souter and Breyer, and by Justice Stevens, who wrote a dissenting opinion. *Id.* at 772-83, 797-815.


72 *Pinette*, 515 U.S. at 800 n.5.

73 *Id.* at 778-80. Justice O’Connor argued that allowing the reasonable observer to be based on the perceptions of an actual person would prohibit almost all governmental displays because “[t]here is always someone who, with a particular quantum of knowledge, reasonably might perceive a particular action as an endorsement of religion.” *Id.* at 780. Justice O’Connor further argued that government has not made religion relevant to political standing in the community merely because someone might feel uncomfortable viewing a religious display. *Id.*

The “reasonable person” in tort law is someone who “is not to be identified with any ordinary individual, who might occasionally do unreasonable things; he is a prudent and careful person, who is always up to standard . . . he is rather a personification of a community ideal of reasonable behavior, determined by the jury’s social judgment.”
knowledge to the reasonable observer.\textsuperscript{74} First, after stating that the knowledge of the reasonable observer is not limited to that simply gleaned from viewing the display, she imputed the knowledge that the cross is a religious symbol, that Capital Square was government property, and that the large building nearby was the seat of the state government.\textsuperscript{75} Second, she also accredited the reasonable observer with knowledge of the general history of Capital Square and with the ability to recognize the distinction between speech that government supports and speech that government allows in a public forum.\textsuperscript{76}

Justice Stevens disagreed with Justice O'Connor's definition of the reasonable observer.\textsuperscript{77} First, he argued that Justice O'Connor's reasonable observer is not equal to the reasonable person in tort law, but is rather a "well-schooled jurist, a being finer than the tort-law model."\textsuperscript{78} He explained, "The ideal human JUSTICE O'CONNOR describes knows and understands much more than meets the eye."\textsuperscript{79} Second, Justice Stevens advocated a per se rule that the location of a stationary, unattended display is an implicit endorsement by the party or person

\textsuperscript{74} Pinette, 515 U.S. at 780.
\textsuperscript{75} Id. at 780-81. Justice Stevens also agreed that this knowledge should be imputed to the reasonable observer. Id. at 806-07.
\textsuperscript{76} Id. at 780-82. Because a reasonable observer would know the general history of Capital Square, the reasonable observer, according to Justice O'Connor, would also know that Capital Square was a public park that had been used by various speakers in the past. Id. at 780.

For Justice O'Connor, the setting of the cross became as much a part of the context as did its location on government property. Id. Because a reasonable observer would know the difference between speech that government supports and speech that the government allows, Justice O'Connor concluded that a reasonable observer would not see the Ku Klux Klan's cross as an endorsement of religion. Id. at 782.

\textsuperscript{77} Id. at 800 n.5.
\textsuperscript{78} Id. Justice Stevens wrote:

I think this enhanced tort-law standard is singularly out of place in the Establishment Clause context. It strips of constitutional protection every reasonable person whose knowledge happens to fall below some "ideal" standard. Instead of protecting only the "ideal" observer, then, I would extend protection to the universe of reasonable persons and ask whether some viewers of the religious display would be likely to perceive a government endorsement.

Id. Justice Stevens would not impute the reasonable observer with the knowledge that Capital Square had housed prior private displays because, in his opinion, it was highly unlikely that many viewers knew this information. Id. at 808.

\textsuperscript{79} Id. at 800 n.5.
who owns that property. Because the cross was unattended and located on government property, Justice Stevens concluded that the cross violated the Establishment Clause.

5. Recent Establishment Clause Cases: The Reasonable Observer Remains Alive

In Establishment Clause cases following Pinette, the Supreme Court has been less than clear about which test it is using. Nonetheless, reasonable observer language still appears in the cases. In Santa Fe Independent School District v. Doe, the Court, in striking down a school policy that permitted student-led prayer before football games, stated, "Regardless of the listener’s support for, or objection to, the message, an objective Santa Fe High School student will unquestionably perceive the inevitable pregame prayer as stamped with her school’s seal of approval." In Zelman v. Simmons-Harris, the Court, in upholding

80 Id. at 801. Therefore, a reasonable observer would conclude that any display or symbol located on government property had been sponsored and endorsed by the government. Id. This analysis, argued Justice Stevens, would provide First Amendment protection to schoolchildren, traveling salesmen, and tourists who are not aware of the public nature of Capital Square. Id. at 808 n.14.

81 Id. at 815.

82 See, e.g., Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000). The Court in Santa Fe did not articulate which test it was using; rather, the Court stated that it was guided by the following principle it had announced in Lee v. Weisman, 505 U.S. 577 (1992):

The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause. It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which "establishes a [state] religion or religious faith, or tends to do so."

Id. at 302 (quoting Lynch v. Donnelly, 465 U.S. 668, 678 (1984)). The Court then analyzed the school prayer policy under both the Endorsement Test and the Coercion Test. Id. at 301-13; see supra note 58 (explaining how the Coercion Test was applied in Santa Fe Independent School District).

The Supreme Court has been ambiguous about the correct test to be applied in analyzing alleged Establishment Clause violations, which has been made clear in opinions by federal appellate courts. See, e.g., Freethought Soc’y v. Chester County, 334 F.3d 247, 256 (3d Cir. 2003) (“We must first determine the appropriate framework to use when analyzing whether the Ten Commandments plaque violates the Establishment Clause, an inquiry that is somewhat murky, even in light of the recent religious display cases decided by the Supreme Court.”).

83 See infra notes 86-87.


85 Id. at 308. The school policy, entitled “Prayer at Football Games,” authorized two student elections to determine if a prayer should be given before football games. Id. at 297. In the first election, students would vote on whether a “message[,]” “statement[,]” or
Ohio’s Pilot Project Scholarship Program, stated, “Any objective observer familiar with the full history and context of the Ohio program would reasonably view it as one aspect of a broader undertaking to assist poor children in failed schools, not as an endorsement of religious schooling in general.” The Supreme Court’s use of the reasonable observer standard in deciding Establishment Clause cases has been mirrored by the federal courts.

C. The Reasonable Observer Standard Applied by the Circuits

Soon after Lynch, the federal circuits began applying the Endorsement Test to Establishment Clause challenges. The circuits that have applied the Endorsement Test to alleged Establishment Clause violations, either as a separate test or as the effects prong of the Lemon Test, have adopted Justice O’Connor’s definition of the reasonable observer.

“invitation[]” should be given; in the second election, students would vote on a student speaker. Id. at 297-98. In the first election, the students voted to allow an invocation; and in the second election, the students chose a student speaker. Id. The Court did not discuss what the objective Santa Fe High School student would know about the policy and elections for the student led prayer; however, both Justice O’Connor and Justice Stevens agreed that an objective student would receive a message of endorsement. Id. at 292.

Ohio initiated the Pilot Project Scholarship Program to provide financial assistance to families in any school district that had failed to meet certain requirements. Id. at 644-45. The scholarship program provided parents with tuition aid if they elected to choose to send their children to any of the participating private schools and it provided extra money to public, community, and magnet schools when parents elected to send their children to those schools. Id. at 646-48.

In 1985, a year after the Lynch decision, the Tenth Circuit applied the Endorsement Test in a challenge to a county seal. Friedman v. Bd. of County Comm’rs, 781 F.2d 777 (10th Cir. 1985). In Friedman, the plaintiffs challenged a New Mexico county seal inscribed with a Latin Cross and the phrase “Con Esta Vencemos,” meaning “With this We Conquer.” Id. at 779. The court stated the inquiry into the effects prong of the Lemon Test as “the existence of a non-secular effect is to be judged by an objective standard, which looks only to the reaction of the average receiver of the government communication or average observer of the government action.” Id. at 781. In determining the effect on an average observer, the court heard the testimony of a county commissioner who stated that the cross represented the role of the Catholic Church in settling the southwest. Id. at 779. Two historians and an expert in heraldry also testified that the cross on the seal represented Catholicism, Christianity, and the Spaniards, and that religious conversion in the southwest was often done by force. Id. The court then held that the seal conveyed a message of endorsement because it recalled a less tolerant time and forecasted its return. Id. at 782.

See infra notes 90-94 and accompanying text. In 1997, the Third Circuit attempted to adopt Justice Stevens’ definition of the reasonable observer. ACLU v. Schundler, 104 F.3d 1435, 1447-48 (3d Cir. 1997). In Schundler, for thirty years Jersey City had displayed a
The federal circuits generally have not been afraid to impute the reasonable observer with knowledge that cannot be gathered from observing the display. 90 A reasonable observer in the Second Circuit does not wear blinders and is not focused solely on the religious display. 91 A reasonable observer in the Third Circuit has been imputed with knowledge of items that are of religious significance to Orthodox Jews and with the knowledge of how a city enforces its ordinances. 92

crèche during the Christmas season and a menorah during the nine days of Hanukkah on the city hall lawn. Id. at 1438. Jersey City argued that a “reasonable, informed observer” would know of Jersey City’s many celebrations of different cultures and religions. Id. at 1447. The Third Circuit rejected this argument. Id. at 1449. The court reasoned that an observer who was new to Jersey City and who had no knowledge of Jersey City’s history should not be deemed less reasonable, or provided with less constitutional protection, than a Christian or a Jew who had lived in Jersey City for twenty years. Id. at 1448-49.

Jersey City, after the initial complaint had been filed, modified the display and erected figures of Santa Claus and Frosty the Snowman and a red wooden sled alongside the crèche. Id. at 1439. In a subsequent suit, the Third Circuit declared this modified display constitutional. ACLU v. Schundler, 168 F.3d 92, 95 (3d Cir. 1999). The Third Circuit held that when analyzing the message conveyed to a reasonable observer, Jersey City’s tradition of erecting displays and hosting celebrations for various cultures and religions should be considered. Id. at 106.

For a critique of the court’s holding, see Gabriel Acri, American Civil Liberties Union of New Jersey v. Schundler: Established Endorsement in Need of “Supreme” Intervention, 40 CATH. LAW. 165 (2000). Acri argued that making a reasonable observer aware of the history and ubiquity of a religious display would make changing a religious display impossible. Id. at 189. A reasonable observer, knowing the history of an unconstitutional display, would suppose that the message remained the same and that the secular objects were added only to make the display constitutional. Id.

The Sixth Circuit demonstrated the difference between the knowledge of an ordinary observer and an informed observer. See ACLU v. Capital Square Review & Advisory Bd., 243 F.3d 289, 302-03 (6th Cir. 2001). In declaring Ohio’s state motto, “With God, All Things are Possible,” constitutional, the court imputed the reasonable observer with knowledge of forty-year old press releases, the text of the New Testament, and philosophical knowledge that contributed to the heritage of Ohio. Id. The court imputed this knowledge to the reasonable observer despite concluding that an average Ohio citizen would have no knowledge of the forty-year old press releases or have the vaguest notion of how the motto was chosen. Id.

90 See infra notes 91-94 and accompanying text.
91 Elewski v. City of Syracuse, 123 F.3d 51, 54 (2d Cir. 1997). In Elewski, the City of Syracuse had erected a crèche on a street corner. Id. at 52. The city had also decorated lamp posts around the city with greenery, wreaths, and colored lights, and decorated a park with bells, a snowman, and reindeer. Id. The court upheld the display of the crèche. Id. at 54-55. Because the reasonable observer is not focused solely on the crèche, the court reasoned that an observer would have remembered seeing the other decorations throughout the city and would have concluded that the city was not endorsing religion. Id. In addition, the court stated the reasonable observer would have known that the downtown merchants supported the display to encourage Christmas shopping. Id. at 55.
92 Tenafly Eruv Ass’n v. Borough of Tenafly, 309 F.3d 144, 176 (3d Cir. 2002). In Tenafly, an ordinance prohibited any person to place a sign or advertisement on any telephone pole
Courts in the Sixth, Ninth, and Eleventh Circuits have imputed reasonable observers with knowledge of the land where the display is located. In the Sixth and Ninth Circuits, the reasonable observers are deemed aware of the purposes behind a city erecting a monument with religious overtones.

An eruv is a ceremonial demarcation of an area, and its boundaries are designated by overhead utility lines and lechis. Orthodox Jews are prohibited by their faith from pushing or carrying any objects outside of their homes on the Sabbath or on Yom Kippur. However, Orthodox Jews permit themselves to do these activities on the Sabbath within an eruv. An eruv extends the boundary of the home, permitting Orthodox Jews to push strollers and wheelchairs between their home and synagogue.

For a more detailed explanation of an eruv, see Shira J. Schlaff, Comment, Using an Eruv to Untangle the Boundaries of the Supreme Court’s Religion-Clause Jurisprudence, 5 U. PA. J. CONST. L. 831 (2003).

93 Ams. United for Separation of Church & State v. City of Grand Rapids, 980 F.2d 1538, 1549 (6th Cir. 1992); Kreisner v. City of San Diego, 1 F.3d 775, 784 (9th Cir. 1993) (upholding a Christmas display in a public park because “the reasonable observer is aware of Balboa Park’s public forum nature and City’s first-come, first-served permit policy. Our observer realizes that the Park . . . host[s] an eclectic range of uses throughout the year”); Chabad-Lubavitch v. Miller, 5 F.3d 1383, 1390 n.11 (11th Cir. 1993) (holding that a menorah placed on the rotunda of the State Capital was constitutional because a reasonable observer “would view the menorah display fully aware that the Rotunda is a public forum in which a multiplicity of groups, both secular and religious, have sponsored displays”).

In Americans United for Separation of Church & State, Grand Rapids permitted the Chabad House to erect a twenty-foot menorah in Calder Plaza, a public park in the center of Grand Rapids that had previously been used for rallies, Hunger Walks, festivals, and sports exhibitions. 980 F.2d at 1539-40. In declaring the menorah constitutional, the Sixth Circuit stated, “To a reasonable observer, no display actually stands alone in this public forum. In the mind’s eye, the reasonable observer sees the menorah display as but one of a long series that has taken place since the Plaza was opened.” Id. at 1549. In rejecting the passerby as the standard reasonable observer, the court noted that the reasonable observer follows local politics and reads the newspapers. Id. at 1550. The dissent in Americans United for Separation of Church & State argued that Justice Stevens’ definition of the reasonable observer should be adopted and stated that the reasonable observer should not have to be familiar with the religious demographics of Grand Rapids, the city’s regulations concerning the use of Calder Plaza, or the past uses of Calder Plaza. Id. at 1558.

94 Brooks v. City of Oak Ridge, 222 F.3d 259 (6th Cir. 2000); Alvarado v. City of San Jose, 94 F.3d 1223 (9th Cir. 1996).

In Brooks, the City of Oak Ridge commissioned the making of the “Friendship Bell” to commemorate its fiftieth anniversary. 222 F.3d at 262. Oak Ridge was established in 1942 after President Theodore Roosevelt designated the land where it sits as the “Manhattan
Fueled by a desire to provide a test capable of consistent application in analyzing challenges to the Establishment Clause, Justice O’Connor introduced the Endorsement Test in her concurring opinion in *Lynch*.\(^{95}\) Although a majority of the Supreme Court implicitly adopted the Endorsement Test five years later in *Allegheny*,\(^{96}\) the Court has not been able to agree on what knowledge should be imputed to the reasonable observer.\(^{97}\) The Supreme Court’s failure to define the knowledge of a reasonable observer has resulted in courts using a variety of reasonable observers as they have struggled to determine the constitutionality of public Ten Commandments displays.

### III. The Ten Commandments and The Courts

In analyzing public Ten Commandments displays, lower courts have employed the Endorsement Test, but have not always reached consistent holdings on what knowledge should be imputed to the reasonable observer.\(^{98}\) Part III of this Note will explore how courts have handled public displays of the Ten Commandments. Part III.A will discuss the Project,” the site where the two atomic bombs that were dropped on Japan were built. *Id.* at 263 n.1. The purpose of the Friendship Bell was to commemorate Oak Ridge’s connection with Japan and its desire for international peace and friendship. *Id.* at 266. The Friendship Bell bared a strong resemblance to bells found in Buddhist temples. *Id.* at 262. The Friendship Bell was also cast in a traditional ceremony in Japan. *Id.* at 263. The Sixth Circuit held that the reasonable observer would not conclude that Oak Ridge was endorsing Buddhism because the reasonable observer would have knowledge of the bell casting ceremony, the bell’s adoption as a display of the city’s fiftieth anniversary, and the city’s statement that the bell was to commemorate Oak Ridge’s connection with Japan. *Id.* at 266. The court also assumed that the reasonable observer would not be swayed by any newspaper articles that tried to impute quasi-religious qualities to the bell. *Id.*

In *Alvarado*, the City of San Jose commissioned a sculpture of Quazaloacatl to commemorate the Mexican and Spanish contributions to the culture of San Jose. 94 F.3d at 1225. Quazaloacatl, a Mesoamerican creator-deity, was worshipped by the Aztec and Mayan civilizations until they were conquered by the Spanish in the sixteenth century. *Id.* at 1226. After the Spanish conquest, the religion of the Aztecs and Mayans died. *Id.* San Jose argued that because the worship of Quazaloacatl had ceased approximately five hundred years earlier that Quazaloacatl was no longer a religious figure. *Id.* at 1227. However, the plaintiffs argued that Quazaloacatl was a religious figure because worship of him was re-emerging with the Zapastistas, revolutionaries in southern Mexico. *Id.* at 1231. The Ninth Circuit held that the sculpture of Quazaloacatl would not convey a message of endorsement because a reasonable observer would be aware that the sculpture represented an ancient deity. *Id.* at 1232. The court also stated that the reasonable observer would not be an expert on religions practiced by revolutionary groups in Mexico. *Id.*

\(^{95}\) See *supra* notes 41–48 and accompanying text.

\(^{96}\) See *supra* note 58 and accompanying text.

\(^{97}\) See *supra* text accompanying notes 71–81.

\(^{98}\) See *infra* notes 168–70 and accompanying text.
Supreme Court’s limited treatment of the Ten Commandments. Part III.B will note various secular purposes courts have found for displaying the Ten Commandments. Part III.C will explore how courts have analyzed public displays of the Ten Commandments using the reasonable observer standard.

A. The Supreme Court and the Ten Commandments

The Supreme Court has provided minimal guidance on the constitutionality of public displays of the Ten Commandments. In *Stone v. Graham*, the Court struck down a Kentucky statute that required a copy of the Ten Commandments to be posted in all public school classrooms. In striking down the statute, the Court emphasized that the Ten Commandments are undeniably a sacred text. However, the Court did not rule out the possibility that a Ten Commandments display might be constitutional; the Court stated, “This is not a case in which the Ten Commandments are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like.”

B. Secular Purposes for Posting the Ten Commandments

The Ten Commandments, located in the Old Testament at Exodus 20:2-17 and Deuteronomy 5:6-21, is a sacred religious text to Protestants, Catholics, and Jews. Like the Court in *Stone*, lower courts have not

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99 *See infra* Part III.A.
100 *See infra* Part III.B.
101 *See infra* Part III.C.
102 The Supreme Court has only ruled on one case involving the Ten Commandments, *Stone v. Graham*, 449 U.S. 39 (1980). *See infra* text accompanying notes 103-06.
104 *Id.* at 41.
105 *Id.* Specifically, the Court stated, “The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact.” *Id.* The Court rejected Kentucky’s legislative purpose of displaying the Ten Commandments as a fundamental legal code. *Id.* The Court noted that the Ten Commandments are not limited to secular matters such as honoring parents, killing, adultery, stealing, lying, or coveting, but include religious duties of believers of worshipping God, not bowing down to idols, not taking the Lord’s name in vain, and observing the Sabbath. *Id.* at 41-42.
106 *Id.* at 42.
107 *Books v. City of Elkhart*, 235 F.3d 292, 296 (7th Cir. 2000). Although all three religions adhere to the Ten Commandments, the three religions disagree on the numbering of the Ten Commandments. Protestant churches number the Ten Commandments in the following manner:
1. You shall have no other gods before me.
2. You shall not make for yourself an idol.
3. You shall not misuse the name of the LORD your God.
4. Remember the Sabbath day by keeping it holy.
5. Honor your father and your mother.
6. You shall not murder.
7. You shall not commit adultery.
8. You shall not steal.
9. You shall not give false testimony against your neighbor.
10. You shall not covet.


The Lutheran and Roman Catholic Churches combine the first two commandments and divide the commandment on coveting into two commandments. 2 FRED H. KLOOSTER, OUR ONLY COMFORT: A COMPREHENSIVE COMMENTARY ON THE HEIDELBERG CATECHISM 925 (2001). The Ten Commandments for Lutherans and Catholics are numbered as follows:

1. You shall worship the LORD your God and serve Him only.
2. You shall not take the name of the LORD your God in vain.
3. Remember the Sabbath day by keeping it holy.
4. Honor your father and your mother.
5. You shall not murder.
6. You shall not commit adultery.
7. You shall not steal.
8. You shall not give false testimony against your neighbor.
9. You shall not covet your neighbor’s wife.
10. You shall not covet your neighbor’s goods.


As their first commandment, Jews use a declaration of faith, and then combine the first two commandments for Protestants into one commandment. ALAN. M. DERSHOWITZ, THE GENESIS OF JUSTICE: TEN STORIES OF BIBLICAL INJUSTICE THAT LED TO THE TEN COMMANDMENTS AND MODERN LAW 247-48 (2000). The Ten Commandments for Jews are numbered as follows:

1. I am the LORD your God.
2. You shall have no other gods before me.
3. You shall not swear.
4. You shall honor the Sabbath.
5. You shall honor your father and your mother.
6. You shall not kill.
7. You shall not commit adultery.
8. You shall not steal.
9. You shall not give false testimony.
10. You shall not covet.
11. You shall not swear.
12. You shall honor the Sabbath.

Id. at 247-52.

In lawsuits attacking public Ten Commandments displays, plaintiffs often argue that government is endorsing a religion because government has displayed the text of the Ten Commandments as adhered to by one religion. See, e.g., ACLU Claims Opposition to Ten Commandments Display Over Concern for Catholics: Catholic Group Rejects ACLU “Defense,”
been quick to overlook that the Ten Commandments are primarily a religious text. However, no court has been willing to say that posting the Ten Commandments cannot serve a secular purpose. Justice Stevens in Allegheny even provided a constitutional context in which the Ten Commandments could be publicly displayed. He stated that no message is more fitting for a courtroom than a display of Moses carrying the Ten Commandments, Mohammad, Confucius, Blackstone, Napoleon, and John Marshall. The Eleventh Circuit, in spring of 2003, found a

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Lifesite Daily News, Jan. 9, 2004, at http://www.lifesite.net/ldn/2004/jan/04010907.html (last visited Aug. 4, 2004) (reporting that the ACLU is arguing that the Iowa government favored Christians over Jews, Catholics, and Lutherans because the Ten Commandments displayed in the Iowa Statehouse quotes the Ten Commandments from the King James Version). This argument has been rejected by one court. See ACLU v. Mercer County, 219 F. Supp. 2d 777, 797 (E.D. Ky. 2002) (“The mere fact that the posted version may be more like a traditional Protestant version than the Catholic or Jewish versions does not mean that the posting of the Commandments favours one denomination or one religion over another.”). See Freethought Soc’y v. Chester County, 334 F.3d 247, 262 (3d Cir. 2003) (“As a preliminary matter, we cannot ignore the inherently religious message of the Ten Commandments.”); Books, 235 F.3d at 302 (“We do not think it can be said that the Ten Commandments, standing by themselves, can be stripped of their religious, indeed sacred, significance and characterized as a moral or ethical document.”). See Freethought Soc’y, 334 F.3d at 262 (“We do not believe that Stone holds that there can never be a secular purpose for posting the Ten Commandments, or that the Ten Commandments are so overwhelmingly religious in nature that they will always be seen only as an endorsement of religion.”); Books, 235 F.3d at 302 (“The text of the Ten Commandments no doubt has played a role in the secular development of our society and can no doubt be presented by the government as playing such a role in our civic order.”); Anderson v. Salt Lake City Corp., 475 F.2d 29, 33 (10th Cir. 1973) (quoting one of plaintiff’s attorneys as saying, “[T]he Ten Commandments is an affirmation of at least a precedent legal code”). But see Joseph R. Duncan, Jr., Privilege, Invisibility and Religion: A Critique of the Privilege That Christianity Has Enjoyed in the United States, 54 Ala. L. Rev. 617 (2003) (arguing that allowing the Ten Commandments to be posted in public offices under the assumption of it being a secular, historical document is an example of the privilege Christians have enjoyed since the foundation of the United States).

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Id. Justice Stevens commented that a display of this kind signaled respect for great lawmakers. Id. at 652-53. Justice Stevens was referring to the frieze on the north and south walls of the Supreme Court courtroom. The frieze was designed in 1931–1932 and includes a procession of “great lawgivers of history.” Office of the Curator, Supreme Court of the United States, Courtroom Friezes: North and South Walls (2002), http://www.supremecourtus.gov/about/northsouthwalls.pdf (last visited Aug. 19, 2004). The procession includes Menes, Hammurabi, Moses, Solomon, Lycurgus, Solon, Draco, Confucius, Octavian, Justinian, Muhammad, Charlemagne, King John, Louis IX, Hugo Grotius, Sir William Blackstone, John Marshall, and Napoleon. Id. Moses in the frieze is holding two tablets, on which appear commandments six through ten in Hebrew. Id. Moses also appears in the Supreme Court building on the East Pediment. Office of the Curator, Supreme Court of the United States, The East Pediment (2002),
constitutional use of the Ten Commandments in King v. Richmond County.112 Since 1872, the Superior Court of Richmond County, Georgia, had used as its seal a circle inscribed with two rectangular tablets with rounded tops.113 The court held that the county had articulated a secular purpose when it argued that the seal was adopted because the Ten Commandments were recognizable symbols of the law for its illiterate citizens.114

C. The Circuits and the Ten Commandments

In the past five years, the federal courts have experienced a dramatic increase in cases involving public Ten Commandments displays.115 Because the Supreme Court has provided little guidance on Ten Commandments displays,116 the decisions by lower federal courts are often hard to reconcile as the courts have employed different reasonable observers. The use of different reasonable observers is most visible by comparing the two decisions rendered by the Fifth Circuit and the Seventh Circuit regarding Fraternal Order of Eagles’ (“FOE”)...
monuments. The different reasonable observers are then exemplified by looking at the two Ten Commandments cases from the summer of 2003 and the cases regarding modified displays.

1. The Cases Involving Fraternal Order of Eagles’ Monuments

The use of different reasonable observers is seen by comparing the two decisions rendered by the Fifth Circuit and the Seventh Circuit regarding FOE monuments. In *Books v. City of Elkhart*, the plaintiffs

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117 See infra notes 119-30 and accompanying text.
118 See infra notes 131-63 and accompanying text.
119 See *Van Orden v. Perry*, 351 F.3d 173 (5th Cir. 2003); *Books v. City of Elkhart*, 235 F.3d 292 (7th Cir. 2000). See infra notes 133-43 and accompanying text for a discussion on the reasonable observer employed by the two circuits. Although the holdings are difficult to reconcile based on the courts’ analysis of the reasonable observer, the holdings are reconcilable on the purpose prong. The Seventh Circuit held that the City of Elkhart did not have a secular purpose in displaying the monument, because it concluded that the city had wanted to impress a religious code of conduct on its citizens and because the city had elected to have a Protestant minister, a Catholic priest, and a Jewish rabbi speak at the dedication of the monument. *Books*, 235 F.3d at 303. The Fifth Circuit held that the state of Texas had a secular purpose—recognizing the FOE’s efforts in reducing juvenile delinquency—in accepting and erecting the statute. *Van Orden*, 351 F.3d at 179.

The FOE donated more than four thousand Ten Commandments monuments throughout the 1950s, ’60s, and ’70s to state and local governments. Jacoby, supra note 12. In 1943, a Minnesota juvenile court judge, an FOE member, decided that he wanted to provide American youth with a code of conduct. State v. Freedom from Religion Found., 898 P.2d 1013, 1017 (Colo. 1995). His original plan was to place copies of the Ten Commandments in state juvenile courts, and he brought this idea to his local FOE aerie for financial support. Id. At first, his aerie denied financial support because they believed the Ten Commandments might be perceived as coercive or sectarian. Id. However, after Jewish, Protestant, and Catholic representatives agreed on a non-sectarian version of the Ten Commandments, the FOE agreed to finance this project. Id. During the same period, Cecil B. DeMille was producing the movie “The Ten Commandments” and he called up the judge and suggested distributing the copies of the Ten Commandments to coincide with the release of his movie. Id. DeMille and the judge then agreed that because the original Ten Commandments were on granite, that the donated copies would also be on granite. Id. Local FOE aeries, after paying for the manufacture of the monuments, donated them to their local governments. Id.

The FOE monuments are six feet high and three and a half feet wide. *Van Orden*, 351 F.3d at 176. The face of the monument is consumed with the text of the non-sectarian Ten Commandments. Id. Above the text are two small tablets containing ancient Hebrew script, and located between the tablets is an all-seeing eye within a pyramid. Id. Below the pyramid is an American eagle holding an American flag. Id. Beneath the text are two Stars of David and the Greek letters, Chi and Rho, superimposed upon each other, a symbol of Christ. Id. The monuments also contained plaques stating that they had been donated by the FOE. Id. For a picture of an FOE monument, see *Books v. City of Elkhart*, 235 F.3d 292, 309 (7th Cir. 2000).

In 2002, the Tenth Circuit heard a challenge to a 1966 FOE Ten Commandments monument donated to the City of Ogden, Utah. *Summan v. City of Ogden*, 297 F.3d 995
challenged the constitutionality of a 1958 FOE-donated Ten Commandments monument that sat on the front lawn of Elkhart’s municipal building. The Seventh Circuit held that the monument conveyed a message of endorsement to the reasonable observer. The (10th Cir. 2002). Because of a prior decision in 1973, the court was forced to take a different route other than declaring the monument constitutional or unconstitutional. In 1973, the Tenth Circuit had declared an FOE monument constitutional because it was a passive display that depicted a historically important document that had secular effects. Anderson v. Salt Lake City Corp., 475 F.2d 29, 33-34 (10th Cir. 1973). In 2002, adherents of the Summan religion petitioned Ogden to place a monument with its Seven Principles next to the FOE monument. Summan, 297 F.3d at 998. Upon appeal from the district court’s grant of summary judgment for Ogden, the Tenth Circuit, in 2002, stated it could not overrule Anderson and declare an FOE monument unconstitutional absent an en banc hearing. Id. at 999-1000. Instead, the Tenth Circuit decided the case based on the Free Exercise Clause and held that Ogden had established a non-public forum when it accepted the FOE monument. Id. at 1002. In addition, the court held that Ogden had engaged in unconstitutional viewpoint discrimination when it refused to accept the Summan monument. Id. at 1011. This decision held grave implications for the City of Casper, Wyoming. See Wyoming City Council Moves Ten Commandments, ASSOCIATED PRESS, Oct. 29, 2003, http://www.foxnews.com/story/0,2933,101546,00.html (last visited Aug. 4, 2004). Because an FOE monument stood in a public park, the Rev. Phelps petitioned Casper to allow him to place a monument stating that Matthew Shepard, a young, gay man murdered in 1998, went to hell because of his sexual orientation. Id. Rev. Phelps threatened to sue Casper, based on Summan, if it refused to permit his monument in the park. Id. As a result, Casper, to avoid litigation, moved the FOE monument to a plaza honoring historical documents. Id.

Also located on the twenty-five foot lawn were a Revolutionary War Monument and a Freedom Monument. Id. The Ten Commandments monument and the Revolutionary War Monument were located approximately the same distance from the entrance of the municipal building and from the sidewalk. Id. at 296 n.3. The city did not provide any maintenance to any of the three monuments. Id. at 295. In the Supreme Court’s denial of certiorari, Chief Justice Rehnquist, joined by Justices Scalia and Thomas, wrote a dissenting opinion. City of Elkhart v. Books, 532 U.S. 1058, 1059 (2001). The Chief Justice disagreed with the Seventh Circuit’s opinion and stated that the primary effect of the monument was not to endorse religion. Id. at 1062-63. He reasoned that because the monument was located on the front lawn of the Municipal Building that the secular significance of the Ten Commandments in establishing American law was emphasized. Id. He further reasoned that the secular significance was emphasized because the two other monuments celebrated the city’s history. Id. Compare Books, 235 F.3d at 292, with Freedom from Religion Found., 898 P.2d at 1013. In Freedom from Religion Foundation, an FOE monument was placed in Lincoln Park, a state-owned park across the street from the Colorado State Capital Building. 898 P.2d at 1015. Lincoln Park and the State Capital Building were both located in a three-block area called the Capital Complex Grounds. Id. At least fifteen other monuments were located throughout the Capital Grounds, and the closest monument to the FOE monument was over thirty-feet away. Id. at 1015-16. The court held that a reasonable observer would not see the FOE monument as an endorsement of religion because the monument did not stand alone in Lincoln Park, rather, it was in the vicinity of larger monuments. Id. at 1025. The court further reasoned that the FOE monument did not endorse religion because the other
court reasoned that any passerby or any individual approaching the municipal building would not view the FOE monument along with the other two monuments on the lawn as being a comprehensive display of the cultural heritage of Elkhart. The court reached this holding because the monument was located on the lawn at the seat of the city government, and because the format of the display did nothing to dilute its religious message.

Unlike the reasonable observer in *Books*, who only has knowledge about what he or she can see, the reasonable observer in *Van Orden v. Perry* is informed and is able to form conclusions using information not gleaned from looking at the monument. In *Van Orden*, the plaintiff challenged a 1961 FOE-donated Ten Commandments monument located on the State Capital Grounds in Texas. The court concluded that a reasonable observer would not perceive endorsement because a reasonable observer would be aware that sixteen other monuments were located on the Capital Grounds and that all the monuments described the Texan identity. The court also noted that the reasonable observer

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123 *Books*, 235 F.3d at 306. The court focused on what a passerby would see even though it had previously stated that the reasonable observer is one “familiar with the history and placement of the Ten Commandments monument.” *Id.*

124 *Id.* The court reasoned that even though the monument contained symbols of Judaism and Christianity the monument violated the Establishment Clause because Judaism and Christianity were not the only religions in Elkhart. *Id.* The court also reasoned that because the monument showed the American eagle gripping the flag, that the monument unconstitutionally linked government with Judaism and Christianity. *Id.* at 307. *Contra Freedom from Religion Found.*, 898 P.2d at 1023 (reasoning that the integration of the Star of David and the symbol of Christ acknowledged diversity and reconciliation between Judaism and Christianity, not intolerance of other religions).

125 *351 F.3d 173 (5th Cir. 2003).*

126 *See id.* at 178. The court stated, “This is the observation of a reasonable observer, not of the uninformed, the casual passerby, the heckler, or the reaction of a single individual.” *Id.* at 177-78.

127 *Id.* at 175-76. The State Capital Grounds in Texas consisted of twenty-two acres, on which sits seventeen monuments. *Id.* at 175. The other sixteen monuments included a memorial to Texas children, a tribute to Texas women, a memorial to Pearl Harbor veterans, a replica of the Statue of Liberty, a memorial to Korean War veterans, a memorial to the World War I veterans, *Van Orden v. Perry*, No. A-01-CA-833-H, 2002 U.S. Dist. LEXIS 26709, at *5 n.5 (W.D. Tex. Oct. 2, 2002), aff’d, *351 F.3d 113 (5th Cir. 2003)*, and a memorial to the Alamo soldiers. *Van Orden*, 351 F.3d at 175. The State Capital Grounds had previously been designated as a national Historic Landmark that was dedicated to displaying monuments showcasing the Texan identity. *Id.*

128 *Id.* at 182.
would know that the monument had stood for forty-two years without being challenged. In addition, the court stated that a reasonable observer would know that the monument was located directly between the legislative chambers, the office of the governor, and the Supreme Court Building, and would know that the Ten Commandments have influenced law-making bodies.

2. The Two Cases from Summer 2003

During the summer of 2003, the Third Circuit and the Eleventh Circuit handed down opinions regarding the constitutionality of Ten Commandments displays located at courthouses. Although the Third Circuit declared the display constitutional and the Eleventh Circuit declared the display unconstitutional, the two holdings are consistent as each court imputed substantial knowledge to the reasonable observer.

In Freethought Society v. Chester County, the Third Circuit held that a Ten Commandments plaque, which had been affixed to the facade of the Chester County courthouse for the past eighty years, did not violate the Establishment Clause. In holding that a reasonable observer

Id. at 181-82. The court noted the age of the monument lessened the inference to a reasonable observer that the state acted with an improper purpose. Id. at 182.

Id. at 181. In concluding, the court stated:

[W]e disserve no constitutional principle by concluding that a State's display of the decalogue in a manner that honors its secular strength is not inevitably an impermissible endorsement of its religious message in the eyes of our reasonable observer. To say otherwise retreats from the objective test of an informed person to the heckler's veto of the unreasonable or ill-informed—replacing the sense of proportion and fit with uncompromising rigidity at a costly price to the values of the First Amendment.

Id. at 182.

See Glassroth v. Moore, 335 F.3d 1282 (11th Cir. 2003), cert. denied, 72 U.S.L.W. 3309 (U.S. Nov. 3, 2003) (No. 03-468); Freethought Soc'y v. Chester County, 334 F.3d 247 (3d Cir. 2003).

See Gary Young, Thou Shalt, and Thou Shalt Not: Two Courts Give Two Very Different Rulings on Ten Commandments Displays, 25 NAT'L L.J. 7 (July 14, 2003). Young quoted Professor Douglas Laycock who stated that he was "absolutely certain" that the Third Circuit would have ruled the same way as the Eleventh Circuit had it had been presented with the same set of facts. Id.

334 F.3d 247 (3d Cir. 2003).

Id. at 250-51. The plaque, donated to the courthouse in 1920 by the Religious Education Council, was affixed to the facade next to the main entrance. Id. at 249-50. However, that entrance was closed a few years before the lawsuit and since then visitors have entered the courthouse seventy feet to the north. Id. Since receiving the plaque, the county did nothing to maintain its appearance. Id. at 250. The suit was brought by a Chester County resident who had noticed the plaque in 1960 but who was not bothered by
would not conclude that the county was endorsing religion, the court assumed that the reasonable observer would be informed about the approximate age of the plaque, would know that the county provided no maintenance to the plaque, and would be informed about the general history of the county. Armed with this knowledge, the reasonable observer, the court concluded, would view the plaque as part of the history of Chester County.

In the second Ten Commandments case decided in the summer of 2003, the Eleventh Circuit, in Glassroth v. Moore, declared a two and one-half ton monument bearing the Ten Commandments, which had been placed in the rotunda of the Alabama State Judicial Building by Judge Roy Moore, unconstitutional. The court held the monument conveyed a message of endorsement to the reasonable observer. The court used the Lemon Test to analyze the plaque’s constitutionality and used the Endorsement Test to analyze the effects prong.

The court looked at the purpose of the county commissioners who refused to take down the plaque in 2001 and not at the purpose of the government in accepting the plaque in 1920. The court held that the commissioners had a legitimate secular purpose in keeping the plaque on the façade because the commissioners believed the plaque symbolized how faith and reason worked together in creating the United States. In using the Endorsement Test, the court expressly adopted Justice O’Connor’s reasonable observer. The court stated, “[A] reasonable observer must be presumed to have an understanding of the general history of the display and the community in which it is displayed; the reasonable observer is more knowledgeable than the uninformed passerby.”

Although the court did not impute the reasonable observer with knowledge of the exact age of the plaque, but only with knowledge that the plaque had been affixed to the courthouse for a long time, the reasonable observer used this knowledge in determining the purpose of the plaque. The court stated:

The reasonable observer would perceive an historic plaque as less of an endorsement of religion than a more recent religious display not because the Ten Commandments have lost their religious significance, but because the maintenance of this plaque sends a much different message about the religious views of the County . . . . The reasonable observer, knowing the age of the . . . plaque, would regard the decision to leave it in place as motivated, in significant part, by the desire to preserve a longstanding plaque.

Id.
reasonable observer, the court noted, would know that Judge Moore had campaigned under the slogan “Ten Commandments Judge,” that Judge Moore had placed the monument in the rotunda to keep his campaign promise of restoring the moral foundation of the law, and that the rotunda was not a public forum where other groups could place displays.140

3. The Modified Displays

In addition to the holdings in Glassroth and Books,141 the majority of public Ten Commandments displays have been declared unconstitutional.142 Because of this, local government officials, attempting to comply with the Supreme Court’s holdings in Lynch and Allegheny,143 have put the Ten Commandments in a setting that attempts to negate their religious nature.144 This effort has not always saved FOE

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140 Glassroth v. Moore, 229 F. Supp. 2d 1290, 1303 (M.D. Ala. 2002), aff’d, 335 F.3d 1282 (11th Cir. 2003), cert. denied, 72 U.S.L.W. 3309 (No. 03-468). The court limited the reasonable observer’s knowledge by stating that the reasonable observer would not know about Judge Moore’s relationship with Coral Ridge Ministries, his numerous speeches, or his television and radio appearances over the past two years. Id.

141 See supra notes 120-24, 137-40 and accompanying text.


143 See supra notes 33-48, 55-70 and accompanying text.

144 See Noel E. Oman, Jefferson, Hammurabi Join Commandments: Maumelle Court Adds Words as Deterrent, ARK. DEMOCRAT-GAZETTE, Sept. 11, 2003, available at 2003 WL 62520122 (stating that Maumelle District Court Judge David Pake added the words of Thomas Jefferson, Hammurabi, Justinian, Blackstone, and Confucius to his courtroom display of the Ten Commandments). However, not all judges believe a context like this makes a Ten Commandments display constitutional. See Shirley Ragsdale, State Court Rejects Gift of Ten Commandments, DES MOINES REG., Sept. 18, 2003, at 1, available at 2003 WL 64150747 (reporting that Iowa Supreme Court Officials turned down a donation of ten historic plaques because one of the plaques contained the Ten Commandments).

Local governments, to protect themselves against lawsuits, have also moved Ten Commandments displays to private property or have sold the land the display is located on to a private party. See Jacoby, supra note 12 (reporting that the ACLU dropped its
monuments or other Ten Commandments displays as many of these courts employed an uninformed reasonable observer standard.\textsuperscript{145}

In \textit{Adland v. Russ},\textsuperscript{146} the Kentucky legislature adopted a provision to relocate a 1971 FOE-donated Ten Commandments monument from its current spot on the Capital Grounds, where it had sat for three decades, to a new site near the Floral Clock to become part of a historical and cultural display.\textsuperscript{147} The Sixth Circuit declared the display unconstitutional and began its reasoning by stating that the prominent placement of the monument would send the unmistakable message that Kentucky endorses the Ten Commandments.\textsuperscript{148} The court also held that a reasonable observer would not be able to identify a unifying theme between all the monuments and markers.\textsuperscript{149} Because a reasonable

\textsuperscript{145} See infra notes 146-56 and accompanying text.

\textsuperscript{146} 307 F.3d 471 (6th Cir. 2002).

\textsuperscript{147} Id. at 474-75. The Floral Clock, thirty-four feet in diameter and weighing 200,000 pounds, was located in a prominent place on the Capital Grounds and could be seen from the circular drive leading to the public parking lot. Id. at 477. The historical and cultural display also included a Kentucky Historical Society memorial sign, a “Welcome to Kentucky” plaque, a marker memorializing Kentucky POWS, and markers commemorating an author/journalist, a former governor, a former physical plant director, and a former cabinet member. Id.

\textsuperscript{148} Id. at 486. The court also held that Kentucky lacked a secular purpose in erecting the historical and cultural display because Section 8 of the Resolution, which directed the display to be erected, did not delineate the specific components of the display other than the Ten Commandments. Id. at 477, 481. The court concluded this meant that the other components of the display were secondary in importance to the Ten Commandments. Id. at 481. This conclusion was bolstered, the court noted, by the fact the FOE monument physically dwarfed the other seven monuments. Id. at 482.

\textsuperscript{149} Id. at 488. Additionally, the court held that nothing on the monument depleted the religious message of the Ten Commandments. Id. at 486-87. The court agreed with the Seventh Circuit that the linking of religious and secular symbols created an impermissible link between religion and government. Id.
observer could not identify a unifying theme, the court reasoned that a reasonable observer would focus on the monuments separately.\textsuperscript{150}

A reasonable observer also could not identify a unifying theme in \textit{Indiana Civil Liberties Union v. O'Bannon}.\textsuperscript{151} After an FOE monument donated to the state of Indiana was smashed in 1991, an Indiana state representative arranged to have a new monument built, one inscribed with the text of the Ten Commandments, the Bill of Rights, and the Preamble of the Indiana Constitution.\textsuperscript{152} The monument was to be placed in the two-acre park grounds around the capital alongside other monuments.\textsuperscript{153} The Seventh Circuit held that the primary effect of the new monument would be an endorsement of religion.\textsuperscript{154} The court reached this conclusion because the monument sat on government property and a reasonable person would think that the monument occupied its position with the government’s approval.\textsuperscript{155} Furthermore, the court noted that a viewer, when coming from certain directions, would only be able to see the Ten Commandments and not the other texts; therefore, the court reasoned that a reasonable observer would be unable to make any connection between the three texts.\textsuperscript{156}

The same reasonable observer who could not identify a unifying theme in \textit{Adland} and \textit{O'Bannon} could not identify one in \textit{ACLU v. McCreary County}.\textsuperscript{157} In \textit{McCreary County}, two counties and a school district erected “Foundations of American Law and Government” displays.\textsuperscript{158} Before these displays were erected, the two counties and the

\textsuperscript{150} Id.
\textsuperscript{151} 259 F.3d 766 (7th Cir. 2001).
\textsuperscript{152} Id. at 768.
\textsuperscript{153} Id. at 769. The other monuments included two monuments honoring the civil engineering of the National Road, a monument honoring Indiana women, two monuments depicting Civil War scenes, a monument describing the capital’s history, and statues of Christopher Columbus, George Washington, a coal miner, and two Indiana governors. \textit{Id.}
\textsuperscript{154} Id. at 772. The court also held that the State of Indiana had not articulated any secular purpose. \textit{Id.} The court analyzed a press release issued by Indiana Governor O’Brien in which he stated that the Ten Commandments would serve as a reminder of the nation’s core values. \textit{Id.} at 771. The court rejected this argument because the Ten Commandments, it reasoned, only served as a reminder of core values for those who adhere to the Ten Commandments. \textit{Id.}
\textsuperscript{155} Id. at 772.
\textsuperscript{156} Id. at 773. The court further reasoned that if a reasonable observer would be able to make a connection between the three texts, it would be one of religion, not one of history. \textit{Id.}
\textsuperscript{157} 354 F.3d 438 (6th Cir. 2003).
\textsuperscript{158} \textit{Id.} at 443. The displays included the texts of the Ten Commandments, the Magna Carta, the Declaration of Independence, the Bill of Rights, the Star-Spangled Banner, the
school district had attempted to display the Ten Commandments in two other settings.\textsuperscript{159} The Sixth Circuit held that the present amended displays most likely violated the Establishment Clause.\textsuperscript{160} The court first reasoned that a reasonable observer would not be able to identify a unifying theme between all the documents.\textsuperscript{161} Second, the court reasoned a reasonable observer would perceive endorsement because the locations of the displays, two courthouses and a public school, were

Mayflower Compact, the Preamble to the Kentucky Constitution, the symbol of Lady Justice, and the National Motto of the United States. \textit{Id.}

\textsuperscript{159} \textit{Id.} at 441-42. In 1999, the counties and the school district erected framed copies of the Ten Commandments. \textit{Id.} at 441. After lawsuits were filed against them, the counties and the school district amended the displays to include excerpts from the Declaration of Independence, the Preamble of the Kentucky Constitution, and the Mayflower Compact. The displays also included statements from the Congressional Record declaring 1983 the Year of the Bible, statements from President Lincoln declaring April 30, 1863, to be a day of prayer and humiliation and stating “[t]he Bible is the best gift God has ever given to man,” and statements from Ronald Reagan declaring 1983 to be the Year of the Bible. \textit{Id.} at 442. The plaintiffs were granted a preliminary injunction, and the counties and the school district were ordered to remove the displays. \textit{Id.} The counties and the school district then erected the “Foundations of American Law and Government Display.” \textit{Id.} at 443.

\textsuperscript{160} \textit{Id.} at 462. The court issued a preliminary injunction finding that the plaintiffs demonstrated a likelihood of succeeding on the merits. \textit{Id.}

\textsuperscript{161} \textit{Id.} at 460. The court noted that all the documents, save the Ten Commandments, are related to Western European or American culture since the year 1215. \textit{Id.} The court also stated that the problem of a reasonable observer not knowing the connection between all the documents as foundations of American law could not be overcome by the counties merely asserting it. \textit{Id.; see also} \textit{Turner} v. Habersham County, 290 F. Supp. 2d 1362 (N.D. Ga. 2003). In \textit{Turner}, the county displayed the Ten Commandments alongside the Declaration of Independence, the Mayflower Compact, the Bill of Rights, the Magna Carta, the National Anthem, and Lady Justice. \textit{Turner}, 290 F. Supp. 2d at 1366. In declaring the display unconstitutional, the court explained a reasonable observer, even a reasonable observer familiar with all the documents, would be unable to explain the connection between the documents. \textit{Id.} at 1372. \textit{Contra} ACLU v. Rutherford County, 209 F. Supp. 2d 799 (M.D. Tenn. 2002). In \textit{Rutherford County}, the county also erected a “Foundations of American Law and Government” display. \textit{Id.} at 803. This display included the Mayflower Compact, the Declaration of Independence, the Ten Commandments, the Magna Carta, the lyrics of The Star-Spangled Banner, the Preamble to the Tennessee Constitution, the Bill of Rights, and a picture of Lady Justice. \textit{Id.} at 803-04. The county included an explanation of each document’s significance. \textit{Id.} at 803. Although the court noted that the documents, except the Ten Commandments, were patriotic in nature, the court held the effect was not endorsement because the context as a whole conveyed a secular message of patriotism to the reasonable observer. \textit{Id.} at 811-12. However, the court did note that the county had probably not chosen “the most impressive examples” of United States legal history. \textit{Id.} at 812. According to the court, quotes from Confucius, Muhammad, King John, Louis IX, John Marshall, Hammurabi, Justinian, and Napoleon may have provided a “more thoughtfully-constructed display.” \textit{Id.} Although a reasonable observer would not perceive endorsement, the court granted the plaintiffs a preliminary injunction because the county lacked a secular purpose in erecting the display. \textit{Id.} at 813.
under government control. Third, a reasonable observer would perceive endorsement because of the history of the displays; a reasonable observer, the court stated, would be aware of the previous displays and would know that the controversy surrounding the displays focused only on the Ten Commandments.

4. The Ten Commandments Originally as Part of a Historical Display

Despite the above rulings and the use of an uninformed reasonable observer by several courts, the ACLU will not challenge the constitutionality of all public Ten Commandments displays when the Ten Commandments are portrayed as a historical document alongside other historical legal documents. In 2000, the ACLU challenged an FOE monument donated to Custer County, Montana. The ACLU agreed to drop its legal challenge if the county agreed to erect an “Evolution of Law” display. The ACLU further agreed that the Ten Commandments monument be moved to a museum.

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162 McCreary County, 354 F.3d at 460-61. Contra Rutherford County, 209 F. Supp. 2d at 812 (reasoning that the location of a courthouse “where justice is administered . . . and local government is seated” emphasizes the secular role of the Ten Commandments).

163 McCreary County, 354 F.3d at 461.

164 See infra notes 165-68 and accompanying text; see also Christopher Sherman, ACLU Won’t Fight Monument; the “Rock” in Polk’s Administration Building Includes More Than the Ten Commandments, ORLANDO SENTINEL, Oct. 3, 2003, at B3, available at 2003 WL 64970722 (reporting that the ACLU will not challenge the constitutionality of the “Foundation Rock” in Polk County, Florida, and quoting Howard Simon, executive director of the ACLU of Florida as saying, “Context is everything”). In addition to the Ten Commandments, Hammurabi’s Code, the Magna Carta, the Mayflower Compact, writings of John Adams, the preamble to the Florida Constitution, and twelve of the twenty-five declarations of rights are inscribed on the “Foundation Rock.” Christopher Sherman, Enthusiastic Crowd Greets Monument a Rock with the Ten Commandments in Polk Sparked Few Protests, ORLANDO SENTINEL, Sept. 12, 2003, at B1, available at 2003 WL 63278911. In addition, the “Foundation Rock” is dominated by a four hundred pound bronze replica of the Liberty Bell. Id.; cf. Harvey v. Cobb County, 811 F. Supp. 669 (N.D. Ga. 1993), aff’d, 15 F.3d 1097 (11th Cir. 1994) (granting a four month stay to Cobb County to make an unconstitutional display of the Ten Commandments constitutional by hanging non-religious, historical items near the Ten Commandments).


166 Consent Agreement, ACLU v. Custer County, (No. DV 99-21843), http://archive.aclu.org/court/custer_consent.html (last visited Aug. 19, 2004). The “Evolution of Law” display included the Ten Commandments, the Bill of Rights, the Magna Carta, the English Bill of Rights, and the Montana Constitution. Id. However, three years after agreement was reached by the ACLU and Custer County, the county had not erected the other four monuments. Stange, supra note 165. After the ACLU complained, the county elected to move the Ten Commandments monument to a museum. Id.
Commandments display, when placed in the context of a historical display, would not have the effect of endorsing religion.\textsuperscript{167}

The FOE cases, along with the two cases from the summer of 2003 and the modified display cases, demonstrate that the courts have not applied the same “reasonable observer” standard in analyzing Ten Commandments displays. This failure to apply the same standard has led to inconsistent results: FOE monuments, despite being uniform in appearance, have been declared both unconstitutional and constitutional;\textsuperscript{168} the location of a Ten Commandments monument next to a legal building may enhance the historical significance of the Ten Commandments or it may enhance the message of endorsement;\textsuperscript{169} and a reasonable observer, when viewing a “Foundations of American Law” display, may see nine historical documents or eight historical documents and one religious document.\textsuperscript{170} These inconsistent decisions are a result of the courts misapplying the reasonable person standard as articulated by Justice O’Connor.

IV. AN ANALYSIS OF THE REASONABLE OBSERVER STANDARD

In using the “reasonable observer” standard, most courts have declared public displays of the Ten Commandments unconstitutional because the displays conveyed a message of endorsement to the reasonable observer.\textsuperscript{171} However, the reasonable observer used by those

\textsuperscript{167} Consent Agreement, \textit{Custer County} (No. DV 99-21843).  
\textsuperscript{168} \textit{See supra} text accompanying notes 119-30.  
\textsuperscript{169} \textit{See supra} note 162 and accompanying text.  
\textsuperscript{170} \textit{See supra} note 161 and accompanying text.  
\textsuperscript{171} \textit{See supra} text accompanying notes 120-24, 137-40, 142, 149-63. Many of these same courts have also declared the Ten Commandments displays unconstitutional because government lacked a secular purpose in erecting the display. \textit{See supra} notes 129, 134, 148, 154. Government, in articulating a secular purpose for displaying the Ten Commandments, must remember that no court has denied the influence of the Ten Commandments on American law. \textit{See Stone v. Graham}, 449 U.S. 39, 42 (1980) (stating that the Ten Commandments may be appropriate in public schools in a study of history); \textit{Van Orden v. Perry}, 351 F.3d 173, 181 (5th Cir. 2003) (stating that no one can deny the influence of the Ten Commandments on American civil and criminal law); \textit{cf. Initial Brief of Appellants at 20-29, ACLU v. McCreary County}, 354 F.3d 438 (6th Cir. 2003) (No. 01-5935) (describing how each of the Ten Commandments was adopted into American law); Affidavit of David Barton in Support of Defendant’s Opposition to Plaintiff’s Motion for Contempt, or, in the Alternative, for Supplemental Preliminary Injunction, ACLU v. McCreary County 145 F. Supp. 2d 845 (E.D. Ky. 2001) (No. 99-507), http://www.lc.org/hotissues/attachments/Affidavit%20-%20David%20Barton%20re%20impact%20of%20ten%20commandments-%20McCreary.pdf (describing, in thirty-seven pages, how each one of the Ten Commandments has become deeply entrenched into American law); \textit{supra} note 115 (describing pictures of the Ten Commandments and Moses throughout the United States’
courts is not always the same reasonable observer used by Justice O’Connor or by other federal courts.172 The cases discussed in Part III of this Note indicate that four different types of Ten Commandments monuments or displays exist.173 Part IV of this Note will portray at least one problem associated with each type of display that demonstrates the inadequacies of the reasonable observer standard as applied by courts or as articulated by Justice O’Connor. Part IV.A will address the Ten Commandments originally as part of a historical display.174 Part IV.B will discuss the Ten Commandments as an already existing stand-alone display.175 Part IV.C will address the Ten Commandments as part of a historical display after having once been a stand-alone display.176 Part IV.D will analyze the Ten Commandments as a new stand-alone display.177

A. The Ten Commandments Originally as Part of a Historical Display

Although no court has ruled on the constitutionality of the Ten Commandments originally displayed as part of a historical display, these
are the displays that the courts will most likely find constitutional. Nevertheless, problems the government will face in defending these displays can be articulated.

First, opponents to the display will argue that the display equates the Ten Commandments with important historical documents. For example, the court in McCreary County held that a reasonable observer when viewing the “Foundations of American Law and Government” display would see one religious document, the Ten Commandments, surrounded by eight political documents and would conclude that the Ten Commandments were “on a par” with the political documents. But this reasoning does not comport with the Supreme Court’s reasoning in either Lynch or Allegheny; in both decisions the Court held that the context of the display changes the message received by the viewer. Therefore, under Lynch and Allegheny, a reasonable observer, when viewing the Ten Commandments as part of a historical display, would not view all of the documents separately and place them into categories of historical documents and religious documents; but rather, the reasonable observer would only see historical documents that were important to the foundation of American law because the context of the Ten Commandments, being surrounded by historical documents, negated the religious nature of the Ten Commandments.

Second, opponents to the display will argue that the government failed to include the necessary documents needed to negate the religious message of the Ten Commandments. For example, the court in Rutherford County, although holding that a reasonable observer would not conclude endorsement from its “Foundation of American Law and Government” display, hinted that the county may not have chosen the best documents to include in the display. This argument also finds no merit in Lynch or Allegheny. In deciding which holiday displays violated the Establishment Clause, the Supreme Court has never stated the proposition that the constitutionality of a holiday display depends on

178 See supra notes 162, 164 (explaining that the ACLU agreed to not challenge the “Foundation Rock” or the Custer County FOE monument). The display in Rutherford County only granted a preliminary injunction. Rutherford County, 209 F. Supp. 2d at 800.
179 See supra notes 158, 161 and accompanying text.
180 See supra notes 37-38, 47, 48, 62, 66-68 and accompanying text.
181 Cf. supra note 48 and accompanying text (explaining that the setting negated the religious message of the creche because everything in the holiday display celebrated a public holiday).
182 See supra note 161.
analyzing public displays of the ten commandments

exactly what figures or signs are included in the display.\textsuperscript{183} The displays in \textit{Lynch} and \textit{Allegheny} that the Court found constitutional were significantly different from each other: the display in \textit{Lynch} consisted of a crèche, a Christmas tree, reindeer, carolers, and many other secular figures, whereas the display in \textit{Allegheny} consisted only of a menorah, a Christmas tree, and a sign.\textsuperscript{184}

From these two decisions, it becomes apparent that the constitutionality of a holiday display does not depend on the particular contents of the display, but rather on whether the contents change the context of the religious symbol. However, a holiday display is different than a Ten Commandments display: a holiday display is erected for only a month or two each year, whereas a Ten Commandments display is a permanent display.\textsuperscript{185} Nonetheless, the same reasoning for holiday displays should apply to historical displays because although the historical display is permanent, its context has permanently negated the religious nature of the Ten Commandments in that display.\textsuperscript{186} Therefore, the constitutionality of a historical display that includes the Ten Commandments should not depend on whether the governmental entity included certain documents, but on whether the included documents negate the religious nature of the Ten Commandments.

\textbf{B. The Ten Commandments as an Already Existing Stand-Alone Display}

Ten Commandments displays that have existed for many years raise the issue of what determines the context of the contested display. In two of her concurring opinions developing the reasonable observer, Justice O'Connor enunciated two guidelines in determining the context of the display.\textsuperscript{187} First, she stated that factors in determining the context of a

\begin{footnotesize}
\begin{enumerate}
\item See \textit{Lynch v. Donnelly}, 465 U.S. 668, 694 (O'Connor, J., concurring) (“Every government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion.”).
\item See \textit{supra} text accompanying notes 34, 56.
\item See, e.g., \textit{ACLU v. Schundler}, 104 F.3d 1435, 1438 (3d Cir. 1997) (stating that Jersey City displayed its crèche on the days immediately before and after Christmas and its menorah on the nine days of Hanukkah); Freethought Soc’y v. Chester County, 334 F.3d 247, 251 (3d Cir. 2003) (stating that the Ten Commandments plaque had been affixed to the façade of the courthouse since 1920).
\item In addition, when analyzing public Ten Commandments displays, courts have not made a distinction between the temporary nature of holiday displays and the permanent nature of Ten Commandments displays. See, e.g., \textit{Adland v. Russ}, 307 F.3d 471, 484-90 (6th Cir. 2002); \textit{Books v. City of Elkhart}, 235 F.3d 292, 304-07 (7th Cir. 2000).
\item See \textit{supra} notes 54, 76 and accompanying text.
\end{enumerate}
\end{footnotesize}
statute are its text, legislative history, and implementation.\textsuperscript{188} Second, she declared that the history of the government land provided as much of the display’s context as did its location on government property.\textsuperscript{189}

In addition to these factors, lower courts have held that the history of the display is also part of its context.\textsuperscript{190} For example, the Third Circuit in \textit{Freethought Society} held that the history of the Ten Commandments plaque, that it had been affixed to the courthouse facade for eighty years, was part of the plaque’s context.\textsuperscript{191} Allowing the history of the contested display to be part of the context would alleviate Justice Kennedy’s concern that the Endorsement Test would invalidate many traditional practices.\textsuperscript{192} For example, if a person concluded endorsement after hearing a President’s Thanksgiving Proclamation, that person would not succeed in a lawsuit challenging the constitutionality of the Proclamation because that person would know that all Presidents, starting with George Washington, have issued religious Thanksgiving Proclamations.\textsuperscript{193}

Allowing the history of the display to be part of its context reinforces the idea that the purpose of the Establishment Clause is to prohibit government from making religion relevant to political life, rather than from prohibiting acknowledgements of religion that merely make people feel uncomfortable.\textsuperscript{194} Many of the FOE monuments existed for forty years before their constitutionality was challenged and the plaque on the Chester County courthouse had been affixed to the courthouse facade for eighty years.\textsuperscript{195} Although these long-standing monuments may bring discomfort to atheists, Muslims, or Hindus,\textsuperscript{196} the monuments are not completely religious in nature because they have gained civic significance,\textsuperscript{197} and this civic significance should be

\begin{itemize}
\item \textsuperscript{188} See supra text accompanying note 54.
\item \textsuperscript{189} See supra note 76 and accompanying text.
\item \textsuperscript{190} See supra notes 89, 135.
\item \textsuperscript{191} Freethought Soc’y v. Chester County, 334 F.3d 247, 260 n.10 (3d Cir. 2003).
\item \textsuperscript{192} See supra note 58.
\item \textsuperscript{193} See supra note 58.
\item \textsuperscript{194} See supra note 46.
\item \textsuperscript{195} See supra text accompanying notes 121, 127, 134.
\item \textsuperscript{196} See supra note 73 (explaining that government has not made religion relevant to one’s political standing merely when one feels uncomfortable viewing a religious display).
\item \textsuperscript{197} See City of Elkhart v. Books, 532 U.S. 1058, 1063 (2001) (Rehnquist, C.J., dissenting) (“[A] monument which has stood for more than forty years . . . has at least as much civic significance as it does religious.”).
\end{itemize}
This civic significance can be protected if the history of a Ten Commandments monument is treated similarly to the nature of government property, so that the reasonable observer is imputed not with knowledge of the precise history of the monument but with knowledge of the approximate age of the monument. Because imputing the reasonable observer with knowledge of the forum nature of government property protects private speech allowed by the government, imputing the reasonable observer with knowledge of the general history of a Ten Commandments monument would protect the monuments that have gained civic significance.

Already existing stand-alone Ten Commandments displays also raise the issue of whether the Endorsement Test can provide consistent results. A major criticism of the Lemon Test was that it yielded irreconcilable and inconsistent results, and one of Justice O'Connor's goals in developing the Endorsement Test was to provide a test capable of consistent application. But because the Endorsement Test is so fact-dependant, meaning that the constitutionality of a Ten Commandments monument depends on its placement in relation to the main entrance of a municipal building or that the constitutionality of a menorah depends on its height in comparison to the height of a Christmas tree, a "jurisprudence of minutiae" has and will continue to develop.

An example of this jurisprudence of minutiae can be seen in Justice Blackmun's reasoning in Allegheny. Justice Blackmun held that the eighteen-foot menorah was constitutional because it was located to the side of the forty-five foot Christmas tree, which was centered under the building's archway. However, by Justice Blackmun's reasoning, another holiday display consisting of a menorah and a Christmas tree might be declared unconstitutional if the Christmas tree was only fifteen feet taller than the menorah, rather than twenty-seven feet, and if the display as a whole, rather than just the Christmas tree, was centered.
under the archway.\textsuperscript{206} A jurisprudence of minutiae has developed when one display is declared constitutional and another display unconstitutional because of a few feet in height and centering.

Unfortunately, a jurisprudence of minutiae has already developed in cases involving FOE monuments. Although the FOE monuments are exact replicas of each other,\textsuperscript{207} courts have reached different conclusions regarding their constitutionality based upon their location in relation to government buildings and other monuments.\textsuperscript{208} A comparison of the locations of the FOE monuments in \textit{Books}, \textit{Van Orden} and \textit{Freedom from Religion Foundation} will portray this jurisprudence of minutiae.\textsuperscript{209} The monument in \textit{Books}, along with two other monuments, was located on the twenty-five foot wide front lawn of the municipal building.\textsuperscript{210} This monument was declared unconstitutional.\textsuperscript{211} The monument in \textit{Freedom from Religion Foundation} was located on the three block Capital Complex Grounds along with fifteen other monuments.\textsuperscript{212} The closest monument to the FOE monument was thirty feet away.\textsuperscript{213} The FOE monument was also located adjacent to a sidewalk.\textsuperscript{214} The monument in \textit{Van Orden} was located on the twenty-two acre Texas State Capital Grounds, along with sixteen other monuments.\textsuperscript{215} These two monuments were declared constitutional.\textsuperscript{216}

These cases can be reconciled on two different grounds. First, the cases can be reconciled by the fact that the Ten Commandments monument in \textit{Books} was in front of the government building, while the monuments in \textit{Van Orden} and \textit{Freedom from Religion Foundation} were located further away from government buildings.\textsuperscript{217} Second, the cases can be reconciled by the fact that the monuments in \textit{Van Orden} and in \textit{Freedom from Religion Foundation} were one of multiple monuments located throughout their respective state capital grounds, while the monument in \textit{Books} was only one of three monuments.\textsuperscript{218} However,
reconciling these cases on either of these two grounds does not provide courts in subsequent Ten Commandments cases with any clear standards.

The problem with the first reconciliation is that “in front” provides no clear definition. Courts could interpret “in front” to mean directly in front of the building, closer to the main sidewalk than the government building, anywhere but behind the building, or visible to a person approaching the front entrance. In addition, this reconciliation would only provide constitutional protection to a majority of people visiting the government building—those using the front entrance. In *Freedom from Religion Foundation*, those people who walk through the State Capital Grounds and past the Ten Commandments monument, rather than using the main entrance, would receive no constitutional protection because they have chosen not to use the most popular method of accessing the State Capital. Constitutional protection should not depend on the actions of the majority.219

The problem with the second reconciliation is that it would require courts to come up with a mathematical formula that considers the square footage of the government property and the number of monuments. Although the lawn in *Books* contained only three monuments, the lawn consisted of a much smaller area than the grounds in either *Van Orden* or *in Freedom from Religion Foundation*.220 More than likely, a visitor to the municipal building in Elkhart, Indiana, would be able to see all three monuments at once.221 However, a visitor to the Capital Grounds in either Colorado or Texas may only be able to see one or two monuments at once.222 Furthermore, requiring courts to determine if government has included enough monuments in a certain area does not comport with the Supreme Court’s requirement that the surrounding monuments, despite the number or their exact location, change the context of the religious element.223

219 See *supra* text accompanying footnote 43 (stating constitutional protection depends on the messages conveyed).
220 See *supra* notes 121, 127.
221 See *supra* note 121 and accompanying text (explaining that the three monuments were located on a twenty-five foot lawn).
222 See *supra* notes 122, 127 (explaining that in Colorado sixteen monuments were located through three square blocks and that in Texas seventeen monuments were located through twenty-two acres).
223 See *supra* Part III.A.
C. The Ten Commandments as Part of a Historical Display After Having Been a Stand-Alone Display

The amount of knowledge that should be imputed to a reasonable observer is an issue raised in analyzing a Ten Commandments monument that has been integrated into a historical display after originally being a stand-alone display. Throughout her concurring opinions, Justice O’Connor has imputed the reasonable observer with knowledge of the “history and ubiquity” of the challenged government action.224 The holdings of lower courts have shown that imputing the reasonable observer with the knowledge of the “history and ubiquity” of the government action generally permits the government to publicly acknowledge religion.225

However, one argument against imputing the reasonable observer with knowledge of the “history and ubiquity” of the display is that it precludes the government from modifying any display.226 The argument asserts that the reasonable observer, once aware of the unconstitutional display, would conclude that government intended to convey the same religious message despite the secular additions.227 In fact, the court in McCreary County relied on this proposition and held that the county’s “Foundations of American Law” display was unconstitutional because a reasonable observer would know that the county had erected the historical display only after the fear of litigation arose.228 This argument against imputing too much knowledge to the reasonable observer, although thought-provoking, is weakened after considering that the Supreme Court has provided so few standards relating to Ten Commandments displays.229 Requiring government to erect a

224 See supra note 48.
225 See Capital Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995) (imputing knowledge that the government land is a public forum allowed the Ku Klux Klan to display its crosses); Brooks v. City of Oak Ridge, 222 F.3d 259 (6th Cir. 2000) (imputing knowledge that the “Friendship Bell” was to commemorate the fiftieth anniversary of the nuclear attacks on Japan allowed the city to erect a bell resembling a bell found in Buddhist temples); ACLU v. Schundler, 168 F.3d 92 (3d Cir. 1999) (imputing knowledge of the city’s past celebrations of different religious events allowed the city to erect a holiday display); Elewski v. City of Syracuse, 123 F.3d 51 (2d Cir. 1997) (imputing knowledge of the city’s other holiday decorations allowed the city to erect a crèche). But see Glassroth v. Moore, 335 F.3d 1292 (11th Cir. 2003) (imputing knowledge of the Chief Justice’s earlier campaigns prohibited the Chief Justice from erecting a Ten Commandments monument).
226 Acri, supra note 89, at 198.
227 Id.
228 See supra text accompanying note 163.
229 See supra note 102 (explaining that the Supreme Court has only ruled on one case concerning the Ten Commandments).
Nonetheless, the underlying aspect of this argument is whether the reasonable person should be an informed observer or whether the reasonable observer can be an unknowledgeable passerby; this is the exact point that Justice Stevens and Justice O’Connor disagreed on in Pinette. Justice Stevens stated that the reasonable observer should not be required to know the general history of a display because this would prohibit those without that knowledge, such as schoolchildren, traveling salesmen, and tourists, from being protected against government endorsement of religion. However, Justice O’Connor argued that allowing anybody to be the reasonable person would prohibit all government acknowledgement of religion because there would always be someone who would infer endorsement.

Adopting Justice Stevens’ definition of the reasonable observer would allow anybody not aware of the history of the challenged display to invalidate a government practice that only indirectly and remotely benefits religion. If this definition were adopted, a traveling salesman, without knowing the history of Oak Ridge or the “Friendship Bell,” could infer that Oak Ridge was endorsing Buddhism by displaying the bell, or an electrician touring through the Borough of Tenafly, without knowing that the borough does not strictly enforce its ordinance, could infer that the borough was advocating Judaism by allowing Jews to hang lechis on telephone poles. The effect of allowing any passerby to invalidate a government practice would, for all practical purposes, prohibit government from making any acknowledgement of God, and this is something that the Supreme Court has never interpreted the Constitution as requiring. By imputing the reasonable observer with knowledge of the “history and ubiquity” of a display, courts rightfully prohibit anybody from invalidating a government practice unless they know the history of the display.

230 Initial Brief of Appellants at 45, ACLU v. McCreary County, 354 F.3d 438 (6th Cir. 2003) (No. 01-5935).
231 See supra notes 72-81 and accompanying text.
232 See supra notes 77-80 and accompanying text.
233 See supra note 73.
234 See supra note 94.
235 See supra note 92.
236 See supra note 20.
D. The Ten Commandments as a New Stand-Alone Display

Pursuant to the holdings in *Lynch* and *Allegheny*, courts are going to have a very difficult time finding newly erected stand-alone displays of the Ten Commandments on government property constitutional. First, unlike the context of the menorah in *Allegheny*, nothing in the generic context of a new stand-alone display negates the religious nature of the Ten Commandments. In addition, unlike stand-alone displays that have existed for several decades, new stand-alone displays do not have history as part of their context. Second, unlike the crèche in *Lynch*, a public Ten Commandments monument is not located on private property; rather, it is located at a courthouse, in a courtroom, or on capital grounds, which are properties that are likely to be known by almost all as government-owned.

Furthermore, one can argue that a new stand-alone Ten Commandments display is more religious than a stand-alone crèche, such as the one in *Allegheny*. A person with no knowledge of either a crèche or the Ten Commandments receives two different messages when viewing them. When viewing the crèche, this person would see a father and a mother, along with shepherds and animals, gazing at a newborn baby. The crèche itself, without any context, does not yield a religious message. On the other hand, the Ten Commandments clearly yield a religious message; the first line on FOE monuments reads, “THE TEN COMMANDMENTS—I AM the LORD thy God.” A person with no knowledge of the Ten Commandments would conclude that the Ten Commandments play an integral role to the religions that worship God. Against this backdrop, one could almost conclude that it would be impossible for a court to declare a new stand-alone display constitutional.

237 *See supra* notes 33-48, 55-70 and accompanying text.
238 *See supra* text accompanying note 56.
239 *See supra* note 124 and accompanying text.
240 *See supra* Part IV.B.
241 *See supra* note 34.
242 *Cf. supra* note 75 and accompanying text (explaining that both Justice O’Connor and Justice Kennedy agreed that the reasonable observer would know that Capital Square was government property).
243 *See supra* text accompanying notes 59-64.
244 *See supra* note 34.
245 *City of Elkhart v. Books*, 552 U.S. 1058, 1059 (2001). Justice Stevens wrote, “The graphic emphasis placed on those first lines is rather hard to square with the proposition that the monument expresses no particular religious preference.” *Id.*
However, the Ten Commandments are different than a crèche or a menorah, despite all three never having lost their religious nature. Unlike a crèche or a menorah, the Ten Commandments played a role in establishing American law. Present day courts admit that the last six commandments—honor your parents, do not kill, do not commit adultery, do not steal, do not give false testimony, and do not covet—are moral laws. However, historians have also traced the first four commandments—no other gods, no graven images, do not swear, and honor the Sabbath—as having been incorporated into American law.

First, the colonies incorporated the first four commandments into their respective laws. For example, in 1680, New Hampshire prohibited any man from openly worshipping or having another god. In 1610, Virginia prohibited any man from impiously or maliciously speaking against the Trinity and stated that any man who blasphemes the name of God will be put to death. In 1682, Pennsylvania required that all business be deferred from the Lord’s Day to the next day, unless an emergency arose.

Second, the Founding Fathers believed that the Ten Commandments were a sum of the law. John Quincy Adams, the fifth United States president, wrote:

The law given from Sinai was a civil and municipal as well as a moral and religious code... laws essential to the existence of men in society and most of which have been enacted by every nation which ever professed any

\[\text{\textsuperscript{246}}\] See supra notes 34, 56, 105.
\[\text{\textsuperscript{247}}\] See supra note 105.
\[\text{\textsuperscript{249}}\] See infra notes 255-57 and accompanying text.
\[\text{\textsuperscript{251}}\] ARTICLES, LAWS, AND ORDERS, DIVINE, POLITIC, AND MARTIAL FOR THE COLONY IN VIRGINIA (1610-1611), reprinted in COLONIAL ORIGINS, supra note 250, at 316.
\[\text{\textsuperscript{252}}\] CHARTER OF LIBERTIES AND FRAME OF GOVERNMENT OF THE PROVINCE OF PENNSYLVANIA IN AMERICA (1682), reprinted in COLONIAL ORIGINS, supra note 250, at 281.
code of laws. Vain indeed would be the search among the writings of profane antiquity [secular history] . . . to find so broad, so complete and so solid a basis for morality as this decalogue [Ten Commandments] lays down.254

William Findley, a soldier in the Revolutionary War and a U.S. Congressman stated, “[I]t pleased God to deliver, on Mount Sinai, a compendium of this holy law and to write it with His own hand on durable tables of stone. This law, which is commonly called the Ten Commandments or Decalogue . . . was incorporated in the judicial law.”255 Finally, John Weatherspoon, a signer of the Declaration of Independence stated, “[T]he Ten Commandments . . . are the sum of the moral law.”256

Next, the third commandment continued to appear in court decisions in the twentieth century. In 1921, the Maine Supreme Court held that crime of blasphemy can be committed by using “reproachful language” against God.257 In 1944, the Florida Supreme Court stated that profanity means “words denoting ‘irreverence of God and holy things.’”258 In addition, the fourth commandment continues to play a role in governing society. The Supreme Court declared in 1961 that Sunday closing laws are constitutional.259 The Constitution excludes Sundays from the ten days in which the President has to sign a bill passed by Congress.260 Various states have enacted laws restricting the sale of alcohol on Sunday.261

Although these examples prove that all ten of the commandments were incorporated into American law at some time, it is unlikely that any court will impute knowledge of these specific quotes, court holdings, or statutes to the reasonable observer.262 Indeed, a court that is unwilling to

254 JOHN QUINCY ADAMS, LETTERS OF JOHN QUINCY ADAMS TO HIS SON ON THE BIBLE AND ITS TEACHINGS 61, 70-71 (1850), quoted in BARTON, supra note 253, at 172.
255 WILLIAM FINDLEY, OBSERVATIONS ON “THE TWO SONS OF OIL” 22-23 (1812), quoted in BARTON, supra note 253, at 173.
256 JOHN WEATHERSPOON, WORKS 95 (1815), quoted in BARTON, supra note 253, at 173.
257 State v. Mockus, 113 A. 39, 42 (Me. 1921).
258 Cason v. Baskin, 20 So. 2d 243, 247 (Fla. 1944).
262 See Freethought Soc’y v. Chester County, 334 F.3d 247, 268 n.12 (3d Cir. 2003) (“[I]Indeed, the assumption . . . that the reasonable observer knows about . . . statements
make the reasonable observer aware of the connection between the Ten Commandments and the Magna Carta, the Declaration of Independence, the Bill of Rights, and the Mayflower Compact, is not going to allow the reasonable observer to have knowledge of quotes said over two hundred years ago.

However, the reasonable person standard can be applied in such a way as to make newly erected stand-alone displays constitutional. To start, in cases involving public forums, Justice O'Connor and lower courts have not required that the reasonable observer know of specific instances of how the land was previously used, only that the land had been used in the past by different groups. Similarly, a reasonable observer would not have to be imputed with knowledge of specific quotes by Founding Fathers, specific colonial laws, or specific court holdings, but only with the general knowledge that the Ten Commandments served as a basis for American law.

But it must now be analyzed whether this knowledge can be imputed to a reasonable observer. Although courts have not articulated specific standards on how to determine the knowledge of the reasonable observer, a number of principles regarding the knowledge of the reasonable observer are apparent from previous cases. First, a reasonable observer does not have infinite knowledge. Second, the reasonable observer may have more knowledge than the average person. Third, the reasonable observer takes actions to inform himself or herself. Based on these principles, it is not ill-fitting to impute the reasonable observer with the knowledge that the Ten Commandments served as a basis for American law. By only imputing this general knowledge, rather than knowledge of specific laws, quotes, and court holdings, the reasonable observer is recognized as not having infinite knowledge. Because every tourist or school child may not have this made by John Adams or the holdings of state court cases seems highly questionable.

263 See supra note 161 and accompanying text.
264 See supra notes 76, 93 and accompanying text.
265 Cf. Choper, Endorsement Test, supra note 29, at 510-21 (arguing the reasonable observer standard is decided by what judges think a reasonable observer should know).
266 See supra notes 94, 140.
267 See supra note 89.
268 See supra note 93 (explaining that the reasonable observer follows local politics and reads the newspaper).
general knowledge, the reasonable observer is recognized as having
more knowledge than the average person. Furthermore, this general
knowledge is not greater than other knowledge imputed to the
reasonable observer by lower courts, such as detailed knowledge of the
New Testament,269 knowledge of the significance of lechis for Orthodox
Jews,270 and knowledge of the general history of a county.271

Even if the knowledge that the Ten Commandments served as a
basis for American law is imputed to the reasonable observer, it also
must be analyzed how the reasonable observer will treat this knowledge
when viewing a newly erected stand-alone Ten Commandments
monument.272 Foremost to this analysis is the monument’s location on
government property.273 Not surprisingly, Supreme Court Justices have
disagreed on how the location of a Ten Commandments monument on
government property will affect a reasonable observer.274 Chief Justice
Rehnquist argued that displaying the Ten Commandments outside a
municipal building “emphasizes the foundational role of the Ten
Commandments in secular, legal matters.”275 Justice Stevens
disagreed.276 He not only advocated for a per se rule that a display with
religious features on government property was an implicit endorsement
by government,277 he also stated that it is hard to square the idea that
government is not endorsing religion when the Ten Commandments
begin with such a religious statement.278

The opinions of Chief Justice Rehnquist and Justice Stevens illustrate
the opposing messages a person may receive when viewing a Ten
Commandments monument on government property, and lower courts
have aligned themselves with both Justices.279 The problem with
analyzing how a reasonable person would react to a Ten
Commandments monument on government property, it is argued, is that
persons of different religious persuasions differ on what is reasonable.280

269 See supra note 89.
270 See supra text accompanying note 92.
271 See supra text accompanying note 135.
272 See supra note 122.
273 Cf. supra text accompanying note 80.
275 Id. at 1062 (Rehnquist, C.J., dissenting).
276 Id. at 1058.
277 See supra text accompanying note 80.
278 City of Elkhart, 532 U.S. at 1058.
279 See supra notes 124, 148, 155, 162 and accompanying text.
280 See supra note 64 (explaining that reasonable people of different religions are going to
disagree on what constitutes an endorsement of religion). Even people of the same religion
The criticism of making the relevant perceptions come from a “reasonable person” is that “reasonable,” when used in contexts such as contracts, torts, and criminal law, standardizes judgment. However, the reasonable observer standard is not dependent on what one believes or on whether one thinks the beliefs of another are reasonable, but rather, it is dependent upon how one reacts to government acknowledgements of religion, and that reaction can be standardized.

Courts have laid down principles on how a reasonable observer reacts to government acknowledgements of religion. First, a reasonable observer is not hostile to religion. Second, a reasonable observer uses his or her knowledge to provide context to the display. Applying these two principles, a reasonable observer, knowing that the Ten Commandments influenced American law, will understand that government is only recognizing one of the influences of American law. In addition, because the reasonable observer is not hostile to religion, the reasonable observer will not dismiss this secular purpose even if it indirectly benefits religion.

Therefore, under the Endorsement Test, all four types of Ten Commandments displays can be constitutional, provided government has a permissible secular reason for erecting the display. Unfortunately, many courts have been unwilling to adopt parts of the foregoing analysis. Because of this unwillingness, this Note will can differ on what constitutes an endorsement of religion. Beth Hatcher, Controversy Surrounding Display Splits Preachers, ATHENS BANNER-HERALD, Oct. 13, 2003, http://www.onlineathens.com/stories/101303/new_20031013013.shtml (last visited Aug. 4, 2003).

281 See supra note 64.
282 See supra note 43 and accompanying text (explaining that the Endorsement Test focuses on the message actually conveyed by a religious monument to determine how viewers react to the display).
283 Cf. supra notes 76, 91, 93 and accompanying text (explaining that when a reasonable observer sees a religious display, the reasonable observer recalls prior events and uses that knowledge in determining the purpose of the religious display).
284 Cf. Wallace v. Jaffree, 472 U.S. 38, 84 (1985) (O’Connor, J., concurring) (stating that the Establishment Clause is not hostile to religion); supra text accompanying notes 39-40, 52 (explaining that some acknowledgement of religion by government is okay).
285 See supra note 91 (explaining that a reasonable observer upon seeing a crèche during the holiday season would remember seeing the other Christmas decorations throughout the city); supra note 93 (explaining that a reasonable observer upon seeing a religious display on a public forum would remember the previous displays on the same land).
286 See supra Part IV.A-D.
287 See supra notes 120-24, 143-63 and accompanying text.
propose a new test to analyze public Ten Commandments displays that will provide more objective standards. These objective standards will allow courts to hand down more consistent holdings and recognize the civic significance of already existing stand-alone displays and the historical significance of the Ten Commandments as a basis of American law.

V. A PROPOSED TEST

Numerous problems have resulted from courts applying the reasonable observer standard to public displays of the Ten Commandments. By applying this standard, courts have often ignored the civic significance of long-standing displays; they have reached inconsistent results by focusing extensively on the context of the display; and they have prohibited government from recognizing the Ten Commandments as one of the foundations of American law. Despite these problems, all four types of displays can be constitutional.

Part V of this Note proposes a new test for courts to use in analyzing public Ten Commandments displays. This proposed test discards the reasonable person standard, preventing courts from imputing only the necessary knowledge to the reasonable observer to reach the court’s desired result. Instead, the test proposed by this Note focuses on the type of the Ten Commandments display. Focusing on the type of display allows the historical significance of the Ten Commandments and the civic significance of certain monuments to be recognized, while still allowing the display’s context to remain a determining factor. Under this proposed test, courts will engage in a two-step analysis to determine the constitutionality of public Ten Commandments displays. First, the court determines the type of display from one of four choices. Second, the court engages in the applicable test to determine if the display violates the Establishment Clause.

288 See supra text accompanying notes 120-24.
289 See supra notes 120-30, 162 and accompanying text; see also supra Part IV.B.
290 See supra notes 156, 161 and accompanying text; see also supra Part IV.D.
291 See supra Part IV.
292 See supra note 54.
293 See infra Part V.A.
294 See infra Part V.B.
A. The Four Types of Ten Commandments Displays

Under the proposed test, the first step in analyzing the constitutionality of a public Ten Commandments display is for the court to identify the display type. Four different types of Ten Commandments displays exist:

1. A Newly Erected Stand-Alone Display: A newly erected stand-alone display is a display that contains the text of only the Ten Commandments and has not gained local civic significance.

2. An Already Existing Stand-Alone Display: An already existing stand-alone display is a display that contains the text of only the Ten Commandments and has gained local civic significance.

3. Originally as Part of a Historical Display: The Ten Commandments are originally part of a historical display when the display contains the text of the Ten Commandments and other historical legal documents and when the first time the disputed Ten Commandments display was erected, it was within the historical display.

4. As Part of a Historical Display After Originally Being a Stand-Alone Display: The Ten Commandments are part of a historical display after originally being a stand-alone display when the display contains the text of the Ten Commandments and other historical legal documents and when the disputed display of the Ten Commandments became part of a historical display after it had previously been a stand-alone display.

Requiring courts to first determine the type of display forces them to begin with an objective inquiry, instead of a subjective determination, into the knowledge of the reasonable observer. Beginning with an objective inquiry should provide for more consistent results.

Although most Ten Commandments displays can easily be placed into one of the four categories, a few clarifications and warnings need to be given. First, while stand-alone displays contain the text of only the
Ten Commandments, they may contain engravings and plaques. Second, a historical display may be a single monument with texts of various documents engraved on it, a series of framed documents, or a series of monuments.

This Note further recognizes that because the provided definitions offer no guidelines for when a stand-alone display has gained civic significance, courts will struggle in determining when a stand-alone display has gained local civic significance. Without a doubt, not all cases will be as clear as the FOE displays, many of which stood for thirty to forty years without being challenged, the plaque on the facade of the Chester County courthouse, which stood for eighty years before being challenged, or, on the other end of the spectrum, Judge Moore's monument, which was surrounded by controversy for the entire two years of its existence. While this Note recognizes that courts will struggle with this issue, it does not want to set an arbitrary time period for when a display has gained civic significance because each display and community is unique and courts need to consider the characteristics of each display and its community. However, this Note does provide the following factors that courts could use to determine if a display has civic significance: the age of the display, the number of times the display has been relocated, the amount of present controversy regarding the display, the donor of the display and his or her relationship to the community, and any designations labeling the display or its location a historical landmark.

Courts may also struggle defining displays, which contain many documents, and therefore, are historical displays by definition but in which the Ten Commandments are significantly more prominent than any other document. Supporters of the display will argue that such a display is a historical display, while opponents will argue it is a stand-alone display. This Note suggests treating such a display as a historical display in order to maintain consistency in defining displays. 

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295 See supra note 119 (describing the various engravings and plaques on the FOE monuments).
296 See supra notes 147, 152, 158 and accompanying text (describing various historical displays).
297 See supra text accompanying notes 121, 127.
298 See supra text accompanying note 134.
299 See supra note 1.
300 Cf. supra Part IV.A (explaining that each display must be analyzed under its unique circumstances).
301 See infra Part V.B.
and to prevent courts from recasting displays as a different type to get the court's desired result. In addition, the proposed test for historical displays considers the size of the Ten Commandments in relation to the size of the other documents.302

B. The Proposed Test for Each Type of Display

After determining the type of display, the courts must then engage in the appropriate test. Because each type of display has a different history and a different context, each type of display is afforded its own test.

1. A Newly Erected Stand-Alone Display

A newly erected stand-alone display contains the text of only the Ten Commandments and has not yet gained civic significance.303 The proposed test for a newly erected stand-alone display is:

A newly erected stand-alone display shall be presumed unconstitutional unless the government can show that several elements in the display, or its context, negate the religious nature of the Ten Commandments.

This proposed test recognizes that newly erected stand-alone displays can be constitutional by permitting government to overcome the presumption of unconstitutionality. However, this proposed test also recognizes that often nothing in the display or its context negates the religious nature of the Ten Commandments.304 Because the display often contains nothing to negate the religious nature of the Ten Commandments, the presumption is that the display is unconstitutional and the burden to prove the display is constitutional is on the government.305 The burden on the government only requires it to prove that several elements negate the religious nature of the Ten Commandments;306 the test does not require government to prove that these elements significantly negate the religious nature of the Ten Commandments. This is because a Ten Commandments display is a

302 See infra Part V.B.3.
303 See supra Part V.A; supra note 177.
304 See supra Part IV.D.
305 See infra Parts V.B.2-4 (explaining that because the other types of displays have contexts which negate the religious nature of the Ten Commandments, the presumption is that those displays are constitutional).
306 See supra note 295 and accompanying text.
passive display; any observer can avoid seeing the display by diverting his or her eyes. Elements which could negate the religious nature of the Ten Commandments include: the display’s location, the integration of symbols from different religions on the monument, and a plaque recognizing the donor of the monument and stating the purpose in displaying the monument.

2. An Already Existing Stand-Alone Display

An already existing stand-alone display contains the text of only the Ten Commandments and has gained local civic significance. The proposed test for an already existing stand-alone display is:

An already existing stand-alone display shall be presumed constitutional unless it is shown that the religious significance of the display significantly outweighs the civic significance.

By presuming that an already existing display is constitutional, this proposed test allows government to recognize the civic significance of the display. The proposed test comports with Justice O’Connor’s definition of the reasonable observer in two ways. First, by presuming this display to be constitutional, courts cannot declare the display unconstitutional merely because one individual perceives endorsement. Courts can only declare the display unconstitutional if the religious nature of the display substantially outweighs the civic nature. Possible ways to show that the religious nature significantly outweighs the civic nature could include showing that the public controversy regarding the display has not dissipated since the display was erected, or showing that local citizens see the display as a place of worship. Second, by presuming this display to be constitutional, this proposed test rejects Justice Stevens’ argument that any display on

307 See supra note 58 (explaining that Justice Kennedy did not see the crèche in Allegheny as a violation of the Establishment Clause because it was a passive display and observers could divert their eyes to avoid seeing it).
308 See supra note 122 (explaining that the Colorado Supreme Court found an FOE monument constitutional in part because it was in the vicinity of fifteen other monuments).
309 See supra note 124 (explaining that the Colorado Supreme Court concluded an FOE monument symbolized tolerance of other religions because a Star of David and a symbol of Christ were inscribed on the monument).
310 See supra note 119 (explaining that the FOE monuments contained a plaque stating that the monument had been donated by the FOE).
311 See supra Part V.A.; supra note 175.
312 See supra note 73.
government property is a per se violation of the Establishment Clause. By rejecting Justice Stevens’ per se violation argument, government is not prohibited from making acknowledgments of religion that provide an indirect and remote benefit to religion. In addition, by presuming this display to be constitutional, the danger of creating a “jurisprudence of minutiae” feared by Justice Kennedy is removed. Courts no longer have to analyze where the monument is located in relation to the center of the archway or to the front door of the municipal building.

3. Originally as Part of a Historical Display

The Ten Commandments are originally part of a historical display when the display contains the text of other historical legal documents and when the first time the Ten Commandments were erected, they were part of the historical display. The proposed test for a Ten Commandments monument originally part of a historical display is:

A Ten Commandments monument originally part of a historical display shall be presumed constitutional unless it can be shown that the government lacked any intent to display the Ten Commandments as a historical document.

By presuming that a historical display is constitutional, this proposed test allows government to recognize the historical significance of the Ten Commandments without first determining if a reasonable observer would be able to establish a historical connection between the documents. But by allowing the display to be declared unconstitutional if the opponents can prove that government had no intent to display the Ten Commandments as a historical document, this proposed test does not let government hide behind an impermissible purpose.

This proposed test is consistent with the Supreme Court’s analyses in Lynch and Allegheny, in which the Court paid close attention to the context of the holiday displays. Historical displays are granted a

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313 See supra text accompanying note 80.
314 See supra text accompanying notes 39-41, 52.
315 See supra note 58; see also Part IV.B (demonstrating how a “jurisprudence of minutiae” has been created with the reasonable person standard).
316 See supra Part IV.B.
317 See supra Part V.A; supra note 174.
318 See supra notes 158-161 and accompanying text.
319 See supra text accompanying notes 33-48, 55-70.
presumption of constitutionality because the context of the Ten Commandments—surrounded by historical legal documents—negates the religious nature of the Ten Commandments.\textsuperscript{320} In addition, by presuming that the other historical legal documents have negated the religious nature of the Ten Commandments, a court is prevented from declaring a historical display unconstitutional merely because it believes that government did not include the necessary documents.\textsuperscript{321} The context of the display, however, may also be strong evidence to support the opponent’s argument that government acted with no intention to display the Ten Commandments as a historical document. For example, the opponents of the display could prove that government had no intention to acknowledge the historical value of the Ten Commandments by showing that the Ten Commandments are double the size of any other document.

4. As Part of a Historical Display After Originally Being a Stand-Alone Display

The Ten Commandments are part of a historical display after originally being a stand-alone display when the Ten Commandments display was first erected as a stand-alone display and then became part of a historical display.\textsuperscript{322} The proposed test for a Ten Commandments display that is part of a historical display after originally being a stand-alone display is:

\begin{quote}
A Ten Commandments display that is part of a historical display after originally being a stand-alone display shall be presumed constitutional unless it can be shown that the context of the historical display has not significantly negated the religious nature of the Ten Commandments.
\end{quote}

This proposed test provides a presumption of constitutionality for these displays to maintain consistency with all historical displays; in appearance there are no differences between historical displays when the Ten Commandments were originally part of the display and when they were not. Furthermore, this proposed test still comports with the holdings in \textit{Lynch} and \textit{Allegheny} declaring that the context of the display is determinative.\textsuperscript{323} Although the Ten Commandments were originally

\textsuperscript{320} See supra note 161.
\textsuperscript{321} See supra Part IV.A.
\textsuperscript{322} See supra Part V.A.; supra note 176.
\textsuperscript{323} See supra text accompanying notes 33-48, 55-70.
displayed as a religious document, the new context negates the religious nature of the Ten Commandments by surrounding them with historical legal documents.

However, because government may have acted with an impermissible purpose in erecting the first display of the Ten Commandments, thereby including the display’s history in the context of the historical display, government must put the Ten Commandments in a context that will significantly negate the religious nature of the Ten Commandments and erase any reminders that the Ten Commandments once stood as a stand-alone display. To do this, government may have to change the location of the Ten Commandments monument rather than erect the other monuments at the location of the original Ten Commandments display, or reframe the Ten Commandments to match the other framed documents.

Although the test proposed by this Note discards the reasonable person standard in analyzing each of the four types of public Ten Commandments displays, it retains the emphasis from Lynch and Allegheny that each display be analyzed within its context.324 This new test proposes to begin the analysis of the display’s context by starting with the type of the display, rather than with the knowledge of the reasonable observer.325 By switching the focus to the type of display, courts will begin their analysis from an objective standpoint. The result will be that courts will hand down consistent opinions and that the historical significance of the Ten Commandments and the civic significance of long-standing displays will be recognized.

VI. CONCLUSION

In determining the constitutionality of religious displays, either crèches, menorahs, or the Ten Commandments, the Supreme Court has stated that the context of the display is determinative. Currently, the context of the display is determined by the perceptions of the reasonable observer, and because the reasonable observer is a hypothetical construct, it must be imputed with knowledge. Supreme Court Justices have disagreed on the knowledge of the reasonable observer; and therefore, lower courts often impute the reasonable observer with varying levels of knowledge. The result is that courts hand down inconsistent decisions and that the historical significance of the Ten Commandments display...
Commandments and the civic significance of already existing stand-alone displays are not recognized.

This Note proposes a new test in analyzing Ten Commandments displays. Like the reasonable observer standard, this proposed test focuses on the context of the display; it looks at such factors as the age of the display, the location of the display, and the documents in the display. However, the starting point for this proposed test is the type of display. By focusing on the type of display, courts are starting with the same question and the same four types of displays to choose from; courts are no longer starting with many different reasonable observers who have varying degrees of knowledge. This will lead to more consistent holdings. In addition, focusing on the type of display will allow long-standing displays and historical displays to be declared constitutional because the proposed test recognizes that, although inherently religious, certain Ten Commandments displays have civic and historical value.

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