

## CONTEXT IS IN THE EYE OF THE BEHOLDER: ESTABLISHMENT CLAUSE VIOLATIONS AND THE MORE-THAN-REASONABLE PERSON

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### INTRODUCTION

For years, the United States has been engaged in “a vigorous national debate over religion’s role in government.”<sup>1</sup> That debate is now at the forefront of our legal system as the United States Supreme Court prepares to rule on the constitutionality of displays of the Ten Commandments on governmental property.<sup>2</sup> It has been twenty-five years since the Court last considered whether public postings of the Ten Commandments violated the Establishment Clause of the First Amendment.<sup>3</sup> Today, the Supreme Court is on the brink of two legal decisions that will impact the entire nation and that likely will overturn the decisions of several United States Courts of Appeals.<sup>4</sup>

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1. Joan Biskupic, *Commandments Cases May Hinge on One High Court Justice*, USA TODAY, Mar. 3, 2005, at 2A.

2. *See id.*; Charles Lane, *Division of Church, State at High Court; Ten Commandments Displays on Government Land at Issue*, WASH. POST, Mar. 3, 2005, at A3.

3. *See Stone v. Graham*, 449 U.S. 39 (1980); Joan Biskupic, *Court Enters Debate over Display of Commandments*, USA TODAY, Mar. 2, 2005, at 1A–2A.

4. There is currently a circuit split amongst the appellate courts regarding the constitutionality of Ten Commandments displays. Depending on how the Supreme Court rules, case law in some circuits may be overturned. *See, e.g.,* *Modrovich v. Allegheny County*, 385 F.3d 397, 399 (3rd Cir. 2004) (holding that a plaque of the Ten Commandments affixed to a county courthouse did not violate the Establishment Clause because of the age and historical importance of the plaque); *Van Orden v. Perry*, 351 F.3d 173, 182 (5th Cir. 2003) (finding that a Ten Commandments monument near the state Capitol Building does not violate the Establishment Clause because of the context in which it appears), *cert. granted*, 125 S. Ct. 346 (2004). *But see* *ACLU Neb. Found. v. City of Plattsmouth*, 358 F.3d 1020, 1039 (8th Cir. 2004) (holding that a Ten Commandments monument displayed in a public park violated the Establishment Clause because it failed the purpose prong of the *Lemon* test); *Glassroth v. Moore*, 335 F.3d 1282, 1296–97 (11th Cir. 2003) (finding that the placement of a monument of the Ten Commandments in the rotunda of a state courthouse violated the Establishment Clause because it was contrary to the purpose prong of the *Lemon* test), *cert. denied*, 540 U.S. 1000 (2003); *ACLU of Ky. v. McCreary County*, 354 F.3d 438, 440 (6th Cir. 2003) (affirming an injunction issued by a district court that ordered three separate displays of the Ten Commandments to be removed), *cert. granted*, 125 S. Ct. 310 (2004); *Books v. City of Elkhart*, 235 F.3d 292, 294 (7th Cir. 2000) (holding that a monument

The Establishment Clause prohibits any law “respecting an establishment of religion.”<sup>5</sup> The Fourteenth Amendment arguably makes the Establishment Clause binding on the states,<sup>6</sup> and the Supreme Court has frequently adjudicated cases where state governmental agencies have allegedly violated the Establishment Clause.<sup>7</sup>

The proper analysis to determine such Establishment Clause violations is a point of contention in the federal courts.<sup>8</sup> The officially accepted Supreme Court test was developed in 1971 in *Lemon v. Kurtzman* and is typically referred to as “the *Lemon* test.”<sup>9</sup> However, Justice O’Connor later offered a clarification in her concurring opinion in the 1984 case, *Lynch v. Donnelly*.<sup>10</sup> This clarification created what is popularly known as the “endorsement test.”<sup>11</sup> The result of Justice O’Connor’s clarification has been uncertainty and disagreement over the appropriate standard for analyzing purported Establishment Clause violations.

With the issue now before the Supreme Court, commentators expect that the Court will rule on the appropriate method for interpreting Establishment Clause violations as the alleged violations relate to displays of the

located in front of the city Municipal Building that displays the Ten Commandments is violative of the Establishment Clause).

5. U.S. CONST. amend. I.

6. See U.S. CONST. amend. XIV, § 1.

7. See Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 757, 770 (1995) (holding that a state does not violate the establishment clause when it permits a private party to display a religious symbol in a traditional public setting); County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 578–79, 620 (1989) (deciding that a crèche holiday display is unconstitutional because it violates the Establishment Clause, while a menorah holiday display does not violate the First Amendment because it appears next to a Christmas tree and a liberty sign); Wallace v. Jaffree, 472 U.S. 38, 40, 61 (1985) (finding that an Alabama statute authorizing a period of silence “for meditation or voluntary prayer” violates the Establishment Clause of the First Amendment) (internal citation and quotation marks omitted); Lynch v. Donnelly, 465 U.S. 668, 670–71, 687 (1984) (holding that a municipality’s annual Christmas display, which includes a crèche, does not violate the Establishment Clause of the First Amendment); Stone, 449 U.S. at 39, 42–43 (concluding that a Kentucky statute requiring that copies of the Ten Commandments be posted in public school classrooms violates the Establishment Clause); Lemon v. Kurtzman, 403 U.S. 602, 606–07 (1971) (holding that state statutes in Pennsylvania and Rhode Island that provide state aid to church-related schools are unconstitutional).

8. See Kent Greenawalt, *Quo Vadis: The Status and Prospects of “Tests” Under the Religion Clauses*, 1995 SUP. CT. REV. 323, 359–66. Greenawalt discusses how the Supreme Court’s *Lemon* test has been more or less abandoned and how there is disagreement amongst the Supreme Court Justices over exactly how the analysis should now work. *Id.*

9. 403 U.S. at 612–13. The *Lemon* test requires that the statute have a “secular legislative purpose,” that its primary effect “neither advances nor inhibits religion,” and that it does not “foster an excessive government entanglement with religion.” *Id.*

10. 465 U.S. at 690–92. Justice O’Connor suggested a clarification to the *Lemon* test that collapsed the purpose and effects prongs of *Lemon* into one. The real question, according to Justice O’Connor, was whether an objective observer would perceive a challenged governmental action as endorsing religion. *Id.*

11. *Id.*; see, e.g., Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363, 1372 (2000); Greenawalt, *supra* note 8, at 324.

Ten Commandments. To make this ruling, the Court will most likely engage in an analysis of the reasonable observer who is viewing a Ten Commandments display. A reasonable observer analysis was part of both appellate court decisions now on certiorari, and the arguments now before the Court each discussed the role of the reasonable observer.<sup>12</sup> However, one of the crucial cases in the reasonable observer debate is not one being argued before the Court. In *Freethought Society v. Chester County*, the Third Circuit Court of Appeals ruled on the constitutionality of a Ten Commandments display after considering whether a reasonable observer would view the display as a governmental endorsement of religion.<sup>13</sup> Although the plaintiff in that case did not appeal to the Supreme Court, the Third Circuit's decision is cited in both cases now before the Court, once in the Fifth Circuit's majority opinion, and once in the Sixth Circuit's dissent.<sup>14</sup> A proper understanding of the Third Circuit's holding is crucial because the holding was based on the perceptions of the "reasonable observer," and a reasonable observer analysis is likely to be part of the Supreme Court's ruling.

In *Freethought*, the Third Circuit concluded that displaying a plaque of the Ten Commandments in the Chester County Courthouse was not a violation of the Establishment Clause.<sup>15</sup> The court stated that the appropriate question to ask in determining whether displaying the plaque violated the Establishment Clause was whether a "reasonable observer would perceive the display as a government endorsement of religion."<sup>16</sup> However, this Note argues that the reasonable person standard used by the Third Circuit really is a more-than-reasonable person standard.<sup>17</sup> The more-than-reasonable person is a heightened standard, originally developed by Justice

12. See *Van Orden v. Perry*, 351 F.3d 173, 182 (5th Cir. 2003) (discussing the perceptions of the reasonable observer), *cert. granted*, 125 S. Ct. 346 (2004); *ACLU of Ky. v. McCreary County*, 354 F.3d 438, 460 (6th Cir. 2003) ("A reasonable observer of the displays cannot connect the Ten Commandments with a unifying historical or cultural theme that is also secular."), *cert. granted*, 125 S. Ct. 310 (2004); see also Brief for Petitioner at 9, *Van Orden* (No. 03-1500) ("The reasonable observer would surely see the Ten Commandments monument as the government endorsing religion because of its placement, its context, and its content.") (emphasis in original); Respondents' Brief at 9, *Van Orden* (No. 03-1500) ("[T]he reasonable observer would not conclude that the Ten Commandments monument on the Texas Capitol Grounds conveys a message of religious endorsement."); Brief for Petitioners at 6, *McCreary County* (No. 03-1693) ("No reasonable observer would consider the Foundations Display an endorsement of religion."); Brief for Respondents at 9, *McCreary County* (No. 03-1693) ("The displays' content, context, and location all lead the reasonable observer to view them as symbolically endorsing religion.").

13. 334 F.3d 247, 251, 270 (3rd Cir. 2003).

14. See *McCreary County*, 354 F.3d at 471 (Ryan, J., dissenting); *Van Orden*, 351 F.3d at 182.

15. *Freethought Soc'y*, 334 F.3d at 270.

16. *Id.* at 258.

17. *Id.* at 259 (adopting Justice O'Connor's reasonable person standard, requiring the objective observer to know the age and history of the plaque).

O'Connor in *Wallace v. Jaffree*.<sup>18</sup> The use of this standard enabled the Third Circuit to conclude that displaying a plaque of the Ten Commandments—an inherently religious text—did not constitute governmental endorsement of religion.<sup>19</sup>

If the Third Circuit had used a normal reasonable person analysis, and if it had consistently analyzed the *Freethought* case through the lens of an objective observer, it likely would have concluded that the Ten Commandments plaque *was* a governmental endorsement of religion. After all, there have been numerous other cases in Establishment Clause jurisprudence concluding that displays of the Ten Commandments constitute an improper governmental endorsement of religion.<sup>20</sup>

This Note will analyze the Third Circuit's application of Justice O'Connor's more-than-reasonable person standard in *Freethought Society v. Chester County* and will explain why that standard should not become the accepted method of analysis in Establishment Clause jurisprudence. Part I will explain the Supreme Court's three-part *Lemon* test, as well as the subsequent clarification to the test proposed by Justice O'Connor. It will also look at Justice O'Connor's adoption of the more-than-reasonable person as the objective observer. Finally, it will explain how the endorsement test has since been incorporated into the Supreme Court's analysis of Establishment Clause violations.

Part II will present the Third Circuit's decision in *Freethought Society v. Chester County*, highlighting the court's use of both the *Lemon* test and the endorsement test in reaching its conclusion. This section will look at the relevant facts and the lower court's decision before discussing the Third Circuit's analysis.<sup>21</sup> It will pay specific attention to the court's use of the more-than-reasonable person as its objective observer and to the court's

18. 472 U.S. 38, 76 (1985) (O'Connor, J., concurring in judgment). Here, Justice O'Connor stated that the relevant issue in the case was whether 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." *Id.*

19. *Freethought Soc'y*, 334 F.3d at 270.

20. *See, e.g.*, *Stone v. Graham*, 449 U.S. 39, 42–43 (1980) (holding that postings of the Ten Commandments on walls of public schools violates the Establishment Clause); *Glassroth v. Moore*, 335 F.3d 1282, 1284 (11th Cir. 2003) (ordering that a monument of the Ten Commandments must be removed from the rotunda of the Alabama State Judicial Building because it was a violation of the Establishment Clause), *cert. denied*, 540 U.S. 1000 (2003); *Adland v. Russ*, 307 F.3d 471, 474–75 (6th Cir. 2002) (holding that a display of the Ten Commandments on the State Capitol grounds would be considered an endorsement of religion and therefore would be unconstitutional); *Books v. City of Elkhart*, 235 F.3d 292, 294 (7th Cir. 2000) (holding that a monument located in front of the city Municipal Building that displayed the Ten Commandments violates the Establishment Clause).

21. A detailed factual analysis is crucial in cases involving potential Establishment Clause violations because the context of a Ten Commandments display can alter its effects. *See County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 596–97 (1989).

application of the subjective observer in the effects prong of the *Lemon* test.

Part III will examine the reasonable person, as it is defined in tort law, and will compare it to Justice O'Connor's more-than-reasonable person. Tort law's reasonable person definition will be used as the proper lens of analysis because it is from tort law that Justice O'Connor contends she draws the criteria of her "reasonable person."<sup>22</sup> This section will also explain the flaws in Justice O'Connor's analysis, showing how she has misinterpreted the tort law standard of the reasonable person, thus making it harder to prove an Establishment Clause violation.

Part IV will scrutinize the Third Circuit's decision and will discredit Justice O'Connor's more-than-reasonable person, suggesting instead that a true reasonable person standard should be applied when using either the *Lemon* test or the endorsement test. It will explain that the common flaw in both tests is the application of this more-than-reasonable person as the objective observer, and it will demonstrate how *Freethought Society v. Chester County* is an example of a court reaching an erroneous conclusion because of this analysis.

Finally, Part V will consider the potential effects that the Third Circuit's decision may have on the outcome of the imminent Supreme Court ruling if the Court were to follow in the direction of *Freethought* and were to apply a more-than-reasonable person standard. It will briefly examine the two appellate court cases now on certiorari that reference the *Freethought* case and will explain why the Third Circuit's erroneous ruling could negatively impact the Supreme Court's holding in the two cases now before the Court.

## I. HISTORICAL DEVELOPMENT OF ESTABLISHMENT CLAUSE JURISPRUDENCE—FROM *LEMON* TO ENDORSEMENT

### A. *Lemon v. Kurtzman's Three-Prong Test for Determining Establishment Clause Violations*

In 1971, the United States Supreme Court established a three-prong test for determining whether the Establishment Clause of the First Amendment had been violated. In *Lemon v. Kurtzman*, two state statutes providing for state aid to church-related elementary and secondary schools were ques-

22. See *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 779–80 (1995) (O'Connor, J., concurring in part and concurring in judgment) (citing W. PAGE KEETON, ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* 175 (5th ed. 1984)).

tioned as violative of the Establishment Clause.<sup>23</sup> The test developed by the Supreme Court for analyzing the existence of a violation was the *Lemon* test, which asked: (1) whether the challenged law or conduct had a secular legislative purpose, (2) whether the principal or primary effect of the challenged law either advanced or inhibited any religion, and (3) whether the challenged law created an excessive entanglement between government and religion.<sup>24</sup> The first prong of *Lemon*, commonly referred to as the purpose prong, requires courts to determine whether the stated secular purpose for a religious display is sincere and is not a “sham” offered by the government to cover a religious purpose.<sup>25</sup> Yet, in most instances, the Court will defer to the government’s stated intention for a display.<sup>26</sup> *Lemon*’s second prong—the effects prong—requires the court to consider the “totality of circumstances” surrounding a religious display in order to determine whether a reasonable person would believe that the display constituted a governmental endorsement of religion.<sup>27</sup> The third prong in the *Lemon* test looks to see whether there has been an excessive entanglement between government and religion.<sup>28</sup>

#### B. Clarifying *Lemon*—Justice O’Connor’s Endorsement Test

In a 1984 concurring opinion to the decision in *Lynch v. Donnelly*, Justice O’Connor offered what she called a clarification to the then-current Establishment Clause doctrine.<sup>29</sup> She stated that there were two primary ways in which the government could violate the Establishment Clause: “excessive entanglement with religious institutions” and “government endorsement or disapproval of religion.”<sup>30</sup> She saw this second violation as the more direct of the two, explaining that “[e]ndorsement sends a message

23. 403 U.S. 602, 606 (1971).

24. *Id.* at 612–13. The Supreme Court subsequently stated that if a statute violates any of the three *Lemon* principles, it must be struck down as a breach of the Establishment Clause. See *Stone*, 449 U.S. at 40–41.

25. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) (citing *Wallace v. Jaffree*, 472 U.S. 38, 75 (1985) (O’Connor, J., concurring in judgment)) (adopting Justice O’Connor’s position that legislatures may sometimes enunciate sham secular purposes in order that their statutes or actions will pass constitutional scrutiny under the Establishment Clause).

26. *Id.* (“When a governmental entity professes a secular purpose for an arguably religious policy, the government’s characterization is, of course, entitled to some deference.”).

27. *Books v. City of Elkhart*, 235 F.3d 292, 304 (7th Cir. 2000) (citing *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 597 (1989) (“[T]he government’s use of religious symbolism is unconstitutional if it has the effect of endorsing religious beliefs, and the effect of the government’s use of religious symbolism depends upon its context.”)).

28. *Lemon*, 403 U.S. at 613.

29. 465 U.S. 668, 687 (1984) (O’Connor, J., concurring).

30. *Id.* at 687–88.

to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.”<sup>31</sup> Justice O’Connor focused on both the government’s intention and on the “objective meaning of the statement in the community.”<sup>32</sup> The endorsement test thus states that the effect of a religious display is determined by the message that the government’s action communicates—what viewers of the display may reasonably understand its purpose to be.<sup>33</sup> This understanding is dependent on the context in which the display appears.<sup>34</sup>

Justice O’Connor later defined the objective observer of her endorsement test as an individual who is aware of the history of (1) the religious display, (2) the context in which it appears, and (3) the reasons for the governmental placement or implementation.<sup>35</sup> She explained that the objective observer should possess this higher level of knowledge because an endorsement inquiry should not be based on the subjective perspective of isolated nonadherents who are uncomfortable with a religious display.<sup>36</sup> Instead, the applicable observer should be comparable to “a personification of a community ideal of reasonable behavior,”<sup>37</sup> whom Justice O’Connor equates to the reasonable person as defined in tort law.<sup>38</sup> She saw this ideal person as an individual with knowledge of the history and context of a religious display.<sup>39</sup>

### C. After Endorsement—A Lack of Uniformity

After Justice O’Connor’s development of the endorsement test in *Lynch*, the Supreme Court has gradually incorporated an endorsement analysis into its decisions in Establishment Clause cases.<sup>40</sup> Use of the tradi-

31. *Id.* at 688.

32. *Id.* at 690 (internal quotation marks omitted).

33. See *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 595 (1989) (explaining Justice O’Connor’s endorsement analysis).

34. *Id.*

35. See *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 779–81 (1995) (O’Connor, J., concurring in part and concurring in judgment) (explaining why she uses the more-than-reasonable person); *Wallace v. Jaffree*, 472 U.S. 38, 76 (1985) (O’Connor, J., concurring in judgment) (defining her “reasonable person”).

36. *Capitol Square*, 515 U.S. at 779 (O’Connor, J., concurring in part and concurring in judgment).

37. *Id.* at 780 (quoting KEETON ET AL., *supra* note 22, at 175).

38. *Id.* at 779–80. Justice O’Connor is incorrect in her comparison to the law of torts, because the law of torts actually runs counter to the sort of reasonable person that Justice O’Connor has created. See *infra* Part III for further explanation.

39. *Capitol Square*, 515 U.S. at 780 (O’Connor, J., concurring in part and concurring in judgment).

40. Adler, *supra* note 11, at 1372.

tional version of the *Lemon* test seems to have vanished,<sup>41</sup> and in its place is a hybrid of *Lemon* and endorsement, constantly being molded to fit the facts of a particular case. Thus, although *Lemon* has yet to be overturned, the Supreme Court now appears to incorporate an endorsement test analysis into Establishment Clause cases, asking whether a challenged display or action will likely be perceived by adherents as governmental endorsement of religion or by nonadherents as governmental disapproval of their religious choices.<sup>42</sup> This incorporation is found in the effects prong of the *Lemon* test, which the Court now sees as asking whether governmental use of religious symbols has the *effect* of endorsing religion.<sup>43</sup> The Court makes this determination based on a reasonable person's interpretation of the context in which a religious symbol appears.<sup>44</sup>

## II. *FREETHOUGHT SOCIETY V. CHESTER COUNTY* AND THE MORE-THAN-REASONABLE PERSON

### A. *Factual Background*

At a dedication ceremony in December of 1920, a plaque displaying a Protestant version of the Ten Commandments was placed on the east façade of the Chester County Courthouse in West Chester, Pennsylvania.<sup>45</sup> The Religious Education Council of Chester County requested permission to erect this bronze plaque, and the County Commissioners accepted the donation to the Courthouse.<sup>46</sup> All known members of the Religious Education Council were clergy or laymen of Protestant denominations.<sup>47</sup> The dedication ceremony consisted of hymns being sung and a prayer of dedication.<sup>48</sup> The ceremony stressed both the religious and secular significance of the Ten Commandments.<sup>49</sup> The plaque, positioned near the entrance to the Courthouse, remains in place eight decades later.<sup>50</sup>

The plaque itself contains a text of the Ten Commandments from the King James Version of the Bible. Today, over 250,000 people visit the

41. Greenawalt, *supra* note 8, at 359.

42. County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 597 (1989).

43. *Id.*

44. *Id.*

45. *Freethought Soc'y v. Chester County*, 334 F.3d 247, 249, 251 (3d Cir. 2003).

46. *Id.*

47. *Freethought Soc'y v. Chester County*, 191 F. Supp. 2d 589, 590 (E.D. Pa. 2002).

48. *Id.*

49. *Freethought Soc'y*, 334 F.3d at 251.

50. *Id.* at 249–50.



Chester County Courthouse every year, and, until 2001, everyone entering the building walked past the Ten Commandments plaque on their way inside.<sup>51</sup> However, the main entrance to the Courthouse was relocated in 2001 for security reasons, so now only the title of the plaque—“The Commandments”—is legible to a passerby.<sup>52</sup>

The Chester County Courthouse is itself historically significant. The Courthouse was built in 1846 and was later placed on the National Register of Historic Places.<sup>53</sup> However, when the application for this designation was submitted, there was no mention of the Ten Commandments plaque.<sup>54</sup> Although the age of the plaque is not obvious by observation alone, the plaque does appear to be older than other administrative signs on the building.<sup>55</sup>

Since the plaque’s erection in 1920, Chester County has done nothing to draw attention to the plaque, to celebrate it, or to maintain it.<sup>56</sup> The plaque did not receive any direct attention at all until 2001, when legal counsel for a member of the community requested that it be taken down.<sup>57</sup> Sally Flynn is a member of the Freethought Society of Greater Philadelphia—an organization comprised of atheists, agnostics, and other “free-thinkers.”<sup>58</sup> She commenced action in the District Court for the Eastern District of Pennsylvania after Chester County refused to remove the plaque on her request.<sup>59</sup> Ms. Flynn finds the plaque offensive and often takes steps to avoid seeing it.<sup>60</sup> She has been aware of the plaque’s presence since 1960, but she did not become an atheist until 1996.<sup>61</sup>

Ms. Flynn primarily argued that the effect of the Ten Commandments plaque was to cause a reasonable observer to believe that Chester County was endorsing religion.<sup>62</sup> She argued that because the plaque was donated by the Religious Education Council for religious purposes and was accepted by the County, its presence violated the Establishment Clause.<sup>63</sup> The defendants contended that the focus in the case should be on the 2001 ac-

51. *Id.* at 250, 252.

52. *Id.* at 253.

53. *Id.*

54. *Id.*

55. *Id.* at 254.

56. *Id.* at 251.

57. *Id.* at 255.

58. *Id.* at 254.

59. *Id.* at 255.

60. *Freethought Soc’y v. Chester County*, 191 F. Supp. 2d 589, 593 (E.D. Pa. 2002).

61. *Freethought Soc’y*, 334 F.3d at 254.

62. *Id.* at 250.

63. *Id.*

tion of the County Commissioners.<sup>64</sup> Also, the defendants maintained that because of the plaque's long history, the reasonable observer would *not* see it as an endorsement of religion.<sup>65</sup>

In an evidentiary hearing, the current Chester County Commissioners explained their belief that the plaque has a secular purpose because of its dual nature.<sup>66</sup> One Commissioner testified that he felt the Ten Commandments "symbolize[d] civilization," while a second Commissioner defended the plaque as symbolic of the "two wing theory of our polity."<sup>67</sup>

*B. The Decision of the United States District Court for the Eastern District of Pennsylvania*

The District Court for the Eastern District of Pennsylvania held the Ten Commandments plaque to be unconstitutional, violating the Establishment Clause of the First Amendment.<sup>68</sup> The court stated that Chester County's acceptance of the plaque in 1920 constituted a governmental abandonment of neutrality and an intent to promote a particular religious view.<sup>69</sup> It gave no weight to the views of the current Chester County Commissioners, reasoning that the crucial issue was instead the government's purpose at the time of the pertinent action—the 1920 acceptance and erection of the plaque.<sup>70</sup> The court further concluded that the plaque's effect, of endorsing the importance of a predominantly religious text from a Protestant interpretation, runs afoul of Establishment Clause jurisprudence.<sup>71</sup>

*C. The Decision of the Third Circuit Court of Appeals*

On appeal, the Third Circuit saw two issues that needed to be decided: first, what were the correct principles of Establishment Clause jurisprudence that should be used in deciding the case, and second, should the focus of the court's analysis be on the 1920 erection of the plaque or the 2001 refusal by the County Commissioners to remove it?<sup>72</sup> The court concluded

64. *Id.*

65. *Id.*

66. *Freethought Soc'y v. Chester County*, 191 F. Supp. 2d 589, 597 (E.D. Pa. 2002). The plaque's dual nature refers to its religious and secular purposes. *Id.*

67. *Id.* at 597–98. The second commissioner continued on to explain that this "two wing theory of our polity" was one where "faith and reason . . . as a historical reality worked together to create and maintain the American experiment." *Id.* at 598.

68. *Id.* at 600–01.

69. *Id.* at 597.

70. *Id.* at 598.

71. *Id.* at 599.

72. *Freethought Soc'y v. Chester County*, 334 F.3d 247, 250 (3d Cir. 2003).

that the relevant inquiry comes from Justice O'Connor's endorsement test, asking "whether a reasonable observer would perceive the display as a government endorsement of religion."<sup>73</sup> The Third Circuit also decided that the focus of its inquiry should be on the County Commissioners' inaction in 2001 and not the action of the Commissioners in 1920.<sup>74</sup>

### 1. The Correct Establishment Clause Framework

Because of the extensive criticism the *Lemon* test has received in recent years,<sup>75</sup> the Third Circuit held that the correct analysis in religious display cases comes from Justice O'Connor's endorsement test. The court explained that this approach collapses the purpose and effects prongs of *Lemon* into a single inquiry and asks whether a reasonable observer—one familiar with the history and context of the display—would find the challenged governmental action to be an endorsement of religion.<sup>76</sup>

Although the Third Circuit held that the correct Establishment Clause framework was Justice O'Connor's endorsement test, it nevertheless also evaluated the case using *Lemon*. The court saw the key difference between the *Lemon* test and the endorsement test to be the purpose prong of *Lemon*, reasoning that the effects prong is coequal to an endorsement test analysis, both of which focus on the perceptions of the reasonable observer.<sup>77</sup> Under the purpose prong of the *Lemon* test, a legitimate secular purpose is also required.<sup>78</sup>

### 2. The Proper Time Frame

The County Commissioners' actions are relevant when analyzing the *Lemon* test's purpose prong. The outcome of this analysis changes, depending on whether the focus is placed on the 1920 Commissioners' purpose for erecting the plaque or on the 2001 Commissioners' purpose for refusing to remove it. In determining the County's purpose, the Third Circuit held that an inquiry should not only be made into the original motivation for displaying the plaque, but should also be made regarding the Commissioners'

73. *Id.* at 258.

74. *Id.* at 251.

75. See *Freethought Soc'y*, 191 F. Supp. 2d at 594 (describing the opinions of the four Supreme Court Justices who have criticized *Lemon* in recent years).

76. *Freethought Soc'y*, 334 F.3d at 250.

77. *Id.* at 250–51.

78. *Id.* at 251.

reasons for leaving the plaque in place in 2001.<sup>79</sup> It reasoned that focusing on the events of 2001, as opposed to the events of 1920, was consistent with its view of the endorsement test, which considers the reasonable observer's perception of the plaque today.<sup>80</sup>

The court primarily focused on the events of 2001 because this time frame was the context in which the court's reasonable observer would view the plaque. The reasonable observer, aware of the age and history of the plaque, would feel its effects in the present day, and the court reasoned that it would not make sense to consider this present day effect while only analyzing the original 1920 purpose for the plaque's erection.<sup>81</sup> It is more logical to consider the present day purpose for keeping the plaque in place when considering the present day effect that the plaque has on observers.

### 3. Applying Endorsement and *Lemon*

In its application of the endorsement test, the Third Circuit conceded that the Ten Commandments possess an "inherently religious message."<sup>82</sup> However, the court looked to Supreme Court precedent, where the context of an otherwise religious display can affect the display's overall message and can affect whether the display is seen as an endorsement of religion.<sup>83</sup> Here, the age and history of the plaque create a context that changes its effect.<sup>84</sup>

The key point for the court hinged on whether a passerby who walked up the steps of the Courthouse to read the text of the Ten Commandments would reasonably believe that by declining to remove this plaque, the County was endorsing religion.<sup>85</sup> The court held that a "reasonable observer" of the Ten Commandments plaque was an individual aware of the history of the plaque and of Chester County.<sup>86</sup> This reasonable observer was presumed to know the history of the Chester County Courthouse; he or she was also presumed to know that the County has not held any sort of

79. *Id.* at 261–62; *see also* *Books v. City of Elkhart*, 235 F.3d 292, 304 (7th Cir. 2000) (explaining that the court must assess the "totality of circumstances" surrounding a display when determining whether a reasonable person would perceive it as an endorsement of religion).

80. *Freethought Soc'y*, 334 F.3d at 262.

81. *Id.*

82. *Id.*

83. *Id.* at 263 (referencing *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring) (finding a religious crèche was not an endorsement of religion when viewed in the context of the entire display)).

84. *Id.* at 264.

85. *Id.*

86. *Id.* at 265 (adopting Justice O'Connor's more-than-reasonable person standard for applying the endorsement test).

ceremony to commemorate the plaque during its eighty-year span.<sup>87</sup> And because of this knowledge of the plaque's context, the reasonable observer would not see the plaque as a governmental endorsement of religion, but would instead consider the plaque to be part of a historic monument.<sup>88</sup>

Under its *Lemon* test analysis, the Third Circuit disregarded the district court's focus on Chester County's original purpose for accepting the plaque.<sup>89</sup> The court instead gave considerable deference to the County, believing that the Commissioners had professed a "non-sham" secular purpose in their refusal to remove the plaque.<sup>90</sup> The effects prong of *Lemon*—identical to an endorsement test analysis—also passed constitutional muster for the same reasons the endorsement test succeeded.<sup>91</sup>

#### 4. A Subjective Secular Purpose

Although the Third Circuit had little difficulty concluding that displaying the Ten Commandments plaque on the Chester County Courthouse was not a governmental endorsement of religion, it did not take into consideration whether an *objective* reasonable observer would believe the plaque had a secular purpose.<sup>92</sup> The court deferred to the testimony of the Chester County Commissioners, who said that the secular purpose of the plaque was that the Ten Commandments formed the basis of much of American law and polity.<sup>93</sup> The court relied on a subjective inquiry into the Commissioners' purpose.<sup>94</sup> No objective inquiry was made into whether a reasonable observer would perceive the plaque as the celebration of a foundational legal document. The court conceded that it did not consider any objective perspective when questioning the existence of a secular purpose.<sup>95</sup>

87. *Id.* at 266.

88. *Id.*

89. *Id.* at 267. The district court noted that the views of the current County Commissioners were of little, if any, value in evaluating the original purpose of the County in erecting the plaque. *Freethought Soc'y v. Chester County*, 191 F. Supp. 2d 589, 598 (E.D. Pa. 2002).

90. *Freethought Soc'y*, 334 F.3d at 267.

91. *Id.* at 269.

92. *Id.* at 268.

93. *Id.* at 267.

94. *Id.*

95. *Id.* at 268.

### III. WHOSE PERCEPTIONS SHOULD CONTROL? OBJECTIVE VERSUS SUBJECTIVE, AND REASONABLE VERSUS MORE-THAN-REASONABLE

Since the inception of the endorsement test, a central question of endorsement analysis has emerged: whose perceptions should control?<sup>96</sup> Should the court look to a subjective observer or to an objective observer?<sup>97</sup> And, if the court looks to an objective observer, who is the “reasonable person” the court should use in this analysis? These same questions apply to the effects prong of the *Lemon* test, because that analysis mirrors an endorsement test analysis.<sup>98</sup>

#### A. Justice O’Connor’s Standards of Analysis

At the same time as she introduced the endorsement test, Justice O’Connor also considered and defined the appropriate analytical perspective. Further, she defined her “reasonable person,” focusing on the objective perspective of the community and also giving credence to the subjective perspective of the government when analyzing *Lemon*’s purpose prong. Through this objective lens, she defined her reasonable person consistent with the reasonable person defined in tort law.

##### 1. Using an Objective *and* a Subjective Perspective

When Justice O’Connor first introduced her endorsement test in *Lynch v. Donnelly*, she considered the question of whose perspective should control.<sup>99</sup> She said the meaning of a statement to its audience depended on both the intention of the speaker<sup>100</sup> and on the “objective” meaning of the statement to the community.<sup>101</sup> Justice O’Connor argued that some observers could discern the intent of a display by examining the context in which it appears, while other observers would instead rely on what the city stated as its reason for the placement of the display.<sup>102</sup> Therefore, it would be necessary to examine both the objective and subjective components of the message being communicated in order to determine whether an inappropriate meaning existed.<sup>103</sup>

96. Greenawalt, *supra* note 8, at 371.

97. *Id.*

98. *Freethought Soc’y*, 334 F.3d at 269.

99. See 465 U.S. 668, 690 (1984) (O’Connor, J., concurring).

100. In *Lynch*, the speaker was the city of Pawtucket that placed a crèche in its holiday display. *Id.*

101. The people in the city of Pawtucket, viewing the crèche, were the “community” whose understanding of the objective meaning of the display mattered. *Id.*

102. *Id.*

103. *Id.*

Justice O'Connor looked at both an objective and subjective analysis. She argued that under *Lemon's* purpose prong, the proper inquiry should be whether the government intended to convey a message of endorsement or disapproval of religion—a subjective examination.<sup>104</sup> However, even if this step passed constitutional muster, it was still necessary to determine the effect that the government's practice had on the community at large—an objective examination.<sup>105</sup> And, only practices having the effect of communicating a message of government endorsement or disapproval of religion, either intentionally or unintentionally, would be relevant.<sup>106</sup> Thus, although Justice O'Connor used both an objective and subjective perspective in her analysis, the constitutionality of a government's actions truly depended on the objective perspective of the community.

Further weight was given to the importance of the perspective of the objective observer in Justice O'Connor's concurrence in *Wallace v. Jaffree*. In that case, Justice O'Connor again stated that the relevant issue was whether an *objective observer* would perceive a state endorsement of religion.<sup>107</sup> And later, in *Capitol Square Review and Advisory Board v. Pinette*, Justice O'Connor stated that the endorsement test should not focus on the perception of individual observers, but should instead look to the objective meaning of the government's statement to the community.<sup>108</sup> The question should not be whether there is any person who would find an endorsement of religion; the question should be whether a reasonable person would perceive a governmental endorsement or disapproval of religion.<sup>109</sup>

## 2. The More-than-Reasonable Person

Justice O'Connor's endorsement test calls for an objective observer, whom this Note defines as the more-than-reasonable person. It is this fictitious individual's perceptions that the endorsement test uses in determining whether there has been an Establishment Clause violation. Justice O'Connor asks whether a "reasonable observer"—one who is familiar with the text, legislative history, and implementation of a display—would consider that display to be a governmental endorsement of religion.<sup>110</sup>

104. *Id.* at 691. This examination is subjective because it looks to the intent of the government alone and does not consider the interpretation of a message by the community.

105. *Id.* at 692.

106. *Id.*

107. *Wallace v. Jaffree*, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring in judgment).

108. 515 U.S. 753, 779 (1995) (O'Connor, J., concurring in part and concurring in judgment).

109. *Id.*

110. *Wallace*, 472 U.S. at 76 (O'Connor, J., concurring in judgment).

Justice O'Connor extensively defined her "reasonable person" in the 1995 case *Capitol Square Review and Advisory Board v. Pinette*, equating her standard to the standard used in tort law.<sup>111</sup> She argued that because her endorsement test created an objective standard for analyzing the meaning of governmental statements and displays, it was comparable to the reasonable person used in tort law.<sup>112</sup> This person, she stated, "is not to be identified with any ordinary individual, who might occasionally do unreasonable things, but is rather a personification of a community ideal of reasonable behavior, determined by the collective social judgment."<sup>113</sup> She argued that when she chose a hypothetical observer who was presumed to possess a level of knowledge that all citizens may not share, she was simply acknowledging the reality that there will always be some person who will perceive an endorsement of religion, and that such an individual's views should not control.<sup>114</sup> In an effort to make sure that one particular viewer's observations would not control, Justice O'Connor made her reasonable observer an individual who was aware of the history and context of the community and of the forum in which a religious display appears.<sup>115</sup>

### 3. The Fault in Justice O'Connor's Standards

Most people who view religious displays in public forums "will *not be aware* of the history of the community and forum to the degree [Justice] O'Connor assumes for her reasonable person."<sup>116</sup> In reality, most people *will* perceive an endorsement of religion in situations where Justice O'Connor's more-than-reasonable person would not.<sup>117</sup> A true reasonable person, as this Note will prove, will only have an ordinary amount of knowledge of the law and history encompassed in a display.<sup>118</sup> In Establishment Clause cases—where the crucial concern is the actual perception of the objective observer—"Justices should not impute to 'reasonable people' a knowledge of legal and political matters that far exceeds that of ordinary people."<sup>119</sup> Justice O'Connor misinterprets the reasonable person

111. 515 U.S. at 779–80 (O'Connor, J., concurring in part and concurring in judgment).

112. *Id.* at 779.

113. *Id.* at 779–80 (internal quotation marks and alteration omitted) (quoting KEETON ET AL., *supra* note 22, at 175).

114. *Id.* at 780. Justice O'Connor further explained that her adoption of the hypothetical observer with a heightened level of knowledge did not mean that she was choosing to consider the perceptions of the majority of people in a community over lone nonadherents. *Id.*

115. *Id.*

116. Greenawalt, *supra* note 8, at 372 (emphasis in original).

117. *Id.*

118. *Id.* at 374.

119. *Id.*



standard in tort law. Thus, a close examination of what the tort law standard actually is highlights the flaws in Justice O'Connor's more-than-reasonable person.

*B. The Objective Observer as the Accepted Standard in Tort Law*

In determining whether a governmental endorsement of religion may be perceived to exist, the first question to ask is, whose perceptions should be used?<sup>120</sup> If a subjective perspective of any given citizen's perception was used, the result would be "governmental paralysis" because there would always be at least one citizen who sees the government's position as either endorsement or disapproval of a religion.<sup>121</sup> Instead, by adopting the objective perspective of the "reasonable observer," a potential Establishment Clause violation can be examined through a more neutral lens.

The use of an objective observer to determine Establishment Clause violations is not a new concept. Tort law, for example, uses this same objective analysis. Section 283 of the Restatement (Second) of Torts states that the standard of the reasonable man is one "which the community demands must be an objective and external one, rather than that of the individual judgment, good or bad. . . . It must be the same for all persons, since the law can have no favorites."<sup>122</sup> One of the frequently mentioned rationales for favoring this objective perspective lies in administrative convenience.<sup>123</sup> For example, there would be many administrative expenses in trying to assess the differing mental capacities, skills, and views of different individuals.<sup>124</sup> Oliver Wendell Holmes, Jr., supported the use of the objective perspective, stating that:

[One rationale is] the impossibility [or difficulty] of nicely measuring a man's powers and limitations. . . . But a more satisfactory explanation is that, when men live in society, a certain average of conduct, a sacrifice of individual peculiarities going beyond a certain point, is necessary to the general welfare.<sup>125</sup>

As the law of torts demonstrates, Justice O'Connor was correct in focusing on an objective perspective in her endorsement test. Although the government's purpose should still be ascertained, the importance of how

120. Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266, 291 (1987).

121. *Id.*

122. RESTATEMENT (SECOND) OF TORTS § 283 cmt. c (1965).

123. Richard W. Wright, *Negligence in the Courts: Introduction and Commentary*, 77 CHI.-KENT L. REV. 425, 466-67 (2002).

124. *Id.* at 467.

125. *Id.* at 468 (quoting OLIVER WENDELL HOLMES, *THE COMMON LAW* 86 (Mark DeWolfe Howe ed., Little, Brown & Co. 1963) (1881)).

the objective observer perceives the display should control. Tort law tells us that it would make sense to apply an objective perspective consistently throughout an entire Establishment Clause analysis, thus also considering whether an objective observer would see a secular purpose. With this proper perspective thus established, the next question becomes, who is the objective observer?

C. Who is the “reasonable person”?

The objective observer is described as a reasonable observer. But, who is this reasonable person? According to the Restatement (Second) of Torts, “[t]he reasonable man is a fictitious person, who is never negligent, and whose conduct is always up to standard. He is not to be identified with any real person.”<sup>126</sup> He is an individual with *ordinary* mental and physical capacities and skills.<sup>127</sup> The qualities of a reasonable man that are important differ with the various situations in which this standard is applied.<sup>128</sup> Such flexibility is important because it allows the reasonable observer to be molded to fit a given situation, but this is precisely the problem under Establishment Clause jurisprudence. Because courts are able to craft their reasonable observer in different manners depending on the facts of a case, there is inconsistency amongst the circuits regarding when the Establishment Clause has been violated.<sup>129</sup> And, as this analysis of the Third Circuit’s decision will show, there is both a proper and improper way to define the reasonable person in the Establishment Clause context.

IV. APPLYING THE REASONABLE PERSON AS THE OBJECTIVE OBSERVER  
IN *FREETHOUGHT SOCIETY V. CHESTER COUNTY*

The Third Circuit’s holding in *Freethought Society v. Chester County* is erroneous for several reasons. First, the court did not properly apply an objective perspective in analyzing the existence of a legitimate secular purpose for displaying the Ten Commandments plaque. It only looked to the subjective perspective of the 2001 County Commissioners. Second, the use of Justice O’Connor’s more-than-reasonable person as the objective observer was improper. This standard assumes too much of the average community member in Chester County. And third, even if the more-than-reasonable person perspective had been correct, the court did not apply the

126. RESTATEMENT (SECOND) OF TORTS, *supra* note 122, § 283 cmt. c.

127. Wright, *supra* note 123, at 466.

128. RESTATEMENT (SECOND) OF TORTS, *supra* note 122, § 283 cmt. d.

129. *See supra* note 4.

standard uniformly so as to reach a proper conclusion. Instead, it selectively chose specific historical facts of which its reasonable person would be aware.

A. *The Third Circuit's Failure to Consistently Apply the Perspective of the Objective Observer*

One of the Third Circuit's conclusions was that Chester County had a legitimate secular purpose in refusing to remove the Ten Commandments plaque.<sup>130</sup> The County Commissioners believed that the plaque formed much of the basis of American law and polity, and this subjective perspective was adopted by the court for legitimizing a governmental secular purpose.<sup>131</sup> However, the Third Circuit admitted that it did not consider whether a reasonable, objective observer would have reached this same conclusion.<sup>132</sup> It never questioned whether an objective observer would believe the Ten Commandments plaque was celebrating a foundational legal document.<sup>133</sup> Instead, the court simply ignored the issue.

Although courts typically defer to the government in identifying the secular purpose of a religious display, courts should not entirely discount whether the community—whom the objective observer should represent—would be able to identify this purported secular purpose. The Third Circuit stated that it expressed no opinion regarding what an objective inquiry into the secular purpose of the plaque would reveal.<sup>134</sup> This omission in analysis only weakens the credibility of the court's conclusion. Justice O'Connor has stated that while the subjective perspective of the government may be considered, the heart of the existence of an Establishment Clause violation lies in the effect a display has on the objective observer.<sup>135</sup> So, for the Third Circuit to exclude such an analysis is contrary to judicial precedent.

B. *The More-than-Reasonable Person: An Unrealistic Expectation*

Where the Third Circuit did look to the perceptions of the objective observer, it improperly applied Justice O'Connor's more-than-reasonable person standard. The court adopted her view that a reasonable observer is

130. *Freethought Soc'y v. Chester County*, 334 F.3d 247, 268 (3d Cir. 2003) (explaining that "it appears [the Commissioners] honestly believed [the plaque] served the secular purpose of demonstrating one of the key sources of American law").

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *See Lynch v. Donnelly*, 465 U.S. 668, 690–92 (1984) (O'Connor, J., concurring).

presumed to be knowledgeable regarding the general history of a display and of the community in which the display appears.<sup>136</sup> Thus, the “reasonable observer” is more knowledgeable than an uninformed passerby.<sup>137</sup> However, this heightened knowledge requirement is not the correct standard. It is not a fair and accurate representation of the regular citizen. The goal in looking through the lens of the objective, reasonable person is to determine how the Ten Commandments plaque will be perceived by the average community member. It is presumptuous to assume that such an individual will be aware of the historical implications of the plaque. The court, by applying a more-than-reasonable person standard, actually reverted back to a partially subjective standard. It started moving away from the community ideal—what the average community member is knowledgeable of—and toward the overly knowledgeable citizen as its “objective” observer.

The court’s conclusions under the endorsement test, and thus under the effects prong of *Lemon*, are erroneous because of the Third Circuit’s use of the more-than-reasonable person standard. Its conclusions were: (1) the “reasonable observer” would be aware of the approximate age of the plaque and the fact that Chester County has not highlighted its existence since its erection; (2) the “reasonable observer” would believe the plaque itself was historic because of its age and its placement on a historic Courthouse; and (3) the “reasonable observer” would believe the County’s inaction to remove the plaque was due to its desire to preserve a longstanding plaque and not to endorse religion.<sup>138</sup> If a true reasonable person standard, comparable to that in tort law, had been applied, these conclusions could not have been reached.

### 1. The Age of the Ten Commandments Plaque

All of the Third Circuit’s conclusions are premised on a more-than-reasonable person who has a higher level of knowledge regarding the history of the Ten Commandments plaque and the history of the Chester County Courthouse. However, the court confesses that “the age of the Ten Commandments plaque is not obvious from viewing the plaque itself.”<sup>139</sup> The court thus acknowledges that its reasonable observer had to know more than was discernible by simply looking at the plaque. And, even if the plaque appears older than the administrative signs near it, this appearance

136. *Freethought Soc’y*, 334 F.3d at 259.

137. *Id.*

138. *Id.* at 251.

139. *Id.* at 254.

does not necessarily result in a conclusion that the plaque must be old enough to carry a historical significance that detracts from its religious text. Also, there is no reason to assume that the average community member is aware of every action the County has taken in the past eighty years. To say that a community member would know that the plaque had never been celebrated in any manner is to assume the people of Chester County possess a level of knowledge that they very likely do not. Therefore, the court's first conclusion—that the “reasonable observer” would be aware of the approximate age of the plaque and that Chester County had done nothing to highlight or celebrate that plaque in the last eighty years—cannot be supported when a true reasonable person standard is applied.

## 2. Historical Significance of the Ten Commandments Plaque

The court's second conclusion, that the reasonable observer would believe the plaque was historically important, also fails when a more-than-reasonable person standard is not applied. Knowledge that the Chester County Courthouse is historically significant, having a place on the National Register of Historic Places, is not something the common population would necessarily be aware of. Although there is a small plaque affixed to the Courthouse stating that the building has been placed on the National Register of Historic Places, that plaque, like the Ten Commandments plaque, is located on the east side of the Courthouse, away from the main entrance to the building.<sup>140</sup> Because the only portion of text on the Ten Commandments plaque that passersby can read from a distance is the title, “The Commandments,”<sup>141</sup> people walking by the Courthouse would not be able to read the smaller plaque noting the historical significance of the Courthouse. The reasonable person is presumed to have ordinary mental and physical capacities,<sup>142</sup> and such ordinary capacities surely do not entail an encyclopedic knowledge of the history of a County Courthouse and the religious plaque affixed thereon.

## 3. The County's Refusal to Remove the Plaque

By establishing that the Third Circuit's first two conclusions would fail when an appropriate reasonable person standard is applied, it becomes more clear that the court's third conclusion is speculative at best. The *reasonable* person, who is not necessarily knowledgeable of the plaque's his-

140. *Id.*

141. *Id.* at 253.

142. Wright, *supra* note 123, at 466.

torical significance, would have no reason to conclude that Chester County's refusal to remove a plaque that offended certain community members was the result of a desire to preserve a longstanding historical display. It seems more likely that the community would perceive the County's inaction as an endorsement of a religious text that offended certain community members.

*C. The More-than-Reasonable Person Would Have Perceived the Ten Commandments Plaque as a Governmental Endorsement of Religion in Violation of the Establishment Clause*

Even if the Third Circuit had been correct in applying the perspective of the more-than-reasonable person, it did not apply this standard consistently. The court seems to have selectively applied its more-than-reasonable person standard, only according knowledge of certain historical facts to the objective observer. If the court found the correct analysis to be Justice O'Connor's more-than-reasonable person, then it should have uniformly applied that standard and taken into consideration *all* of the facts that this overly-knowledgeable observer would have.

The court states that a "reasonable person" would be aware of the age of the Ten Commandments plaque. If this were true, then that person should also be aware of the context in which the plaque was erected in 1920. He or she should be aware that the plaque was donated by the Religious Education Council—a group comprised solely of clergy and laymen of Protestant denominations.<sup>143</sup> He or she should be aware that at the dedication ceremony, a prayer was given and a hymn was sung.<sup>144</sup> And, he or she should be aware that the keynote speaker preached, "Have you remembered the Sabbath Day to keep it holy? If you disobey the commandments here and escape punishment, there is yet the punishment which will surely be meted out on the day of judgment."<sup>145</sup>

Also, the court concluded that the "reasonable observer" would believe the plaque was historic because of its placement on an historic Courthouse. However, if the "reasonable observer" knows the history of the Chester County Courthouse, he or she also knows that when the application for placing the Courthouse on the National Register of Historic Places was submitted, there was no mention of the Ten Commandments plaque.<sup>146</sup>

143. *Freethought Soc'y v. Chester County*, 191 F. Supp. 2d 589, 590 (E.D. Pa. 2002).

144. *Id.*

145. *Freethought Soc'y*, 334 F.3d at 251.

146. *Id.* at 253.

Thus, the “reasonable person” would conclude that the plaque does not hold the same historical significance as the Courthouse itself.

The more-than-reasonable person should possess knowledge that would lead him or her to conclude that the Ten Commandments Plaque on the Chester County Courthouse *is* a governmental endorsement of religion in violation of the Establishment Clause. The 1920 dedication of the plaque constituted the County’s endorsement of a religious text, and therefore the Commissioners’ 2001 refusal to remove the plaque cannot be seen as a desire to maintain the existence of a secular symbol. The Commissioners’ inaction can only be seen as an attempt to keep a religious symbol affixed to a governmental building.

*D. The Ten Commandments Plaque—An Establishment Clause Violation*

The reasonable observer—unaware of the history of either the Ten Commandments plaque or the Chester County Courthouse—would view this plaque as the government’s endorsement of a Protestant perspective of a religious text. Also, even if the reasonable observer *were* aware of the plaque’s history, he or she would *still* conclude that the plaque was an endorsement of religion. The Ten Commandments plaque is the only significant display on the Chester County Courthouse. Although there are smaller signs, such as a no-skateboarding sign and a historic certification plaque,<sup>147</sup> there are no other displays of great consequence, such as the Declaration of Independence or the Bill of Rights. A display solely featuring the Ten Commandments is much less likely to be perceived as having a secular purpose compared to a display where other secular symbols are also present.<sup>148</sup>

The Supreme Court has held that the Ten Commandments are undeniably a sacred religious text, “and no legislative recitation of a supposed secular purpose can blind us to that fact.”<sup>149</sup> The Commandments are not confined to strictly secular matters. Rather, they begin by commenting on the religious duties of believers, including “worshipping the Lord God alone, avoiding idolatry, not using the Lord’s name in vain, and observing the Sabbath Day.”<sup>150</sup>

It does not matter that in this case the Ten Commandments plaque was funded solely by a private organization, with no governmental support. As

147. *Id.* at 254.

148. *See Adland v. Russ*, 307 F.3d 471, 482 (6th Cir. 2002).

149. *Stone v. Graham*, 449 U.S. 39, 41 (1980).

150. *Id.* at 42 (citing *Exodus* 20: 1–11; *Deuteronomy* 5: 6–15).

the Supreme Court has noted, the mere posting of copies of the Ten Commandments by the legislature constitutes official support by the state government, in violation of the Establishment Clause.<sup>151</sup> Here, the Chester County Commissioners allowed a plaque of the Ten Commandments to be placed on the County Courthouse in 1920 and then refused to remove the plaque in 2001, even after learning that community members found it offensive.

Because the context in the *Freethought* case does not change the inherently religious message that the Ten Commandments possess, the plaque *does* constitute a governmental endorsement of religion, violating the Establishment Clause.

*E. Persuasive Authority Holds that Ten Commandments Displays Violate the Establishment Clause*

Although judicial decisions of other appellate courts are not controlling on the Third Circuit, they are still worthy of consideration. Prior to the Third Circuit's decision, both the Sixth and Seventh Circuits heard cases considering whether displays of the Ten Commandments on governmental property were violative of the Establishment Clause, and both courts concluded that these displays constituted governmental endorsement of religion.<sup>152</sup> The Third Circuit distinguished both of these cases because neither addressed the argument that history could provide a context affecting the perceptions of the reasonable observer.<sup>153</sup> However, the historical context of the Ten Commandments plaque in West Chester, Pennsylvania, is not enough to prevent the reasonable observer from perceiving the plaque as a governmental endorsement of religion.

In *Adland v. Russ*, the Sixth Circuit held that a monument of the Ten Commandments could not be taken out of storage and placed on state capitol grounds.<sup>154</sup> The court stated that "the Ten Commandments convey a religious message, a message that cannot be diminished by a simple recitation that the display is not for religious purposes."<sup>155</sup> Although this case is distinguishable because it involved the placement of a monument, it still

151. *Id.*

152. *See Adland*, 307 F.3d at 474–75 (holding that a monument of a nonsectarian version of the Ten Commandments could not be placed on state capital grounds because it violated the Establishment Clause); *Books v. City of Elkhart*, 235 F.3d 292, 294 (7th Cir. 2000) (concluding that a monument of the Ten Commandments violated the Establishment Clause).

153. *Freethought Soc'y v. Chester County*, 334 F.3d 247, 269–70 (3d Cir. 2003).

154. *Adland*, 307 F.3d at 474–75, 490.

155. *Id.* at 488.



demonstrates the view of the Sixth Circuit that the Ten Commandments contain an inherently religious message.

The Seventh Circuit, in *Books v. City of Elkhart*, held that a Ten Commandments monument, displayed on the lawn in front of a local municipal building, had the purpose and effect of endorsing religion.<sup>156</sup> The court stated that “the history of the City’s involvement in the placement of this particular monument serves to emphasize a religious purpose in its display.”<sup>157</sup> Also, an objective observer viewing the monument would see a religious display placed at the center of the local government. And this placement would cause a perception of governmental religious endorsement.<sup>158</sup>

The Third Circuit was too quick in dismissing the holdings of the Sixth and Seventh Circuits, especially regarding the Seventh Circuit’s decision in *Books*, where the monument had been in place since 1958. Although this time frame does not span as far back as the Chester County display’s history, the *Books* monument’s age would still seem to link the cases enough for the Third Circuit to have addressed the Seventh Circuit’s decision more deliberately.

#### V. THE EFFECTS OF *FREETHOUGHT* ON THE FUTURE OF ESTABLISHMENT CLAUSE JURISPRUDENCE

Since the Third Circuit’s holding in *Freethought*, there have been several decisions in other appellate courts, and a subsequent decision in the Third Circuit itself, regarding Ten Commandments displays on government property.<sup>159</sup> Two of these cases, both of which reference the *Freethought* holding, were recently argued before the Supreme Court of the United States.<sup>160</sup> And, arguments for both cases included discussion of the perceptions of the reasonable observer.<sup>161</sup>

Although *Freethought* was not one of the cases heard by the Supreme Court, its effects may still be felt because both of the cases that were heard

156. See *Books*, 235 F.3d at 302–04.

157. *Id.* at 303.

158. *Id.* at 306.

159. See *supra* note 4.

160. See *ACLU of Ky. v. McCreary County*, 354 F.3d 438, 471 (6th Cir. 2003) (Ryan, J., dissenting) (referencing *Freethought* for the proposition that a non-sham secular purpose offered by the county commissioners was sufficient to show a secular purpose in displaying the Ten Commandments), *cert. granted*, 125 S. Ct. 310 (2004); *Van Orden v. Perry*, 351 F.3d 173, 182 (5th Cir. 2003) (quoting *Freethought* for the proposition that the history of a display affects a viewer’s perception of its meaning), *cert. granted*, 125 S. Ct. 346 (2004); see also Linda Greenhouse, *The Ten Commandments Reach the Supreme Court*, N.Y. TIMES, Feb. 28, 2005, at A10.

161. See *supra* note 12.

on certiorari referenced the *Freethought* decision, either in majority or dissent.<sup>162</sup> In *Van Orden v. Perry*, the Fifth Circuit looked to the Third Circuit's decision in *Freethought* to support its conclusion that the history of a Ten Commandments display downplays the religious undertones of the monument.<sup>163</sup> At issue in *Van Orden* was a granite monument etched with the text of the Ten Commandments that had sat on Texas State Capitol grounds since 1961.<sup>164</sup> The monument also contained depictions of ancient Hebrew script, an American eagle, and two small Stars of David.<sup>165</sup> The plaintiff in *Van Orden* argued that there was no legitimate secular purpose for the display and that "a reasonable viewer would perceive the display of the decalogue as a State advancement and endorsement of religion favoring the Jewish and Christian faiths."<sup>166</sup> However, the court disagreed.

The Fifth Circuit quoted *Freethought*, stating that "[t]he 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."<sup>167</sup> The Fifth Circuit went on to hold that it was not persuaded that "a reasonable viewer touring the Capitol and its grounds, informed of its history and its placement, would conclude that the State [was] endorsing the religious rather than the secular message of the decalogue."<sup>168</sup> However, as this Note has argued, the conclusion of the Third Circuit was erroneous and did not properly employ the reasonable person analysis.<sup>169</sup> Therefore, it is unconvincing for the Fifth Circuit to argue that a reasonable viewer would believe that a Ten Commandments display was *not* an endorsement of religion, and it would be erroneous for the Supreme Court to follow the Fifth Circuit's example and adopt the more-than-reasonable person standard used in *Freethought*.

Unlike the Fifth Circuit, the Sixth Circuit Court of Appeals held in *ACLU of Kentucky v. McCreary County* that three displays of the Ten

162. See *McCreary County*, 354 F.3d at 471 (Ryan, J., dissenting) (referencing *Freethought* for the proposition that a non-sham secular purpose offered by the county commissioners was sufficient to show a secular purpose in displaying the Ten Commandments); *Van Orden*, 351 F.3d at 182 (quoting *Freethought* for the proposition that the history of a display affects a viewer's perception of its meaning).

163. *Van Orden*, 351 F.3d at 182.

164. *Id.* at 176.

165. *Id.* The monument also contained depictions of an eye inside a pyramid, which resembled the symbol on a one-dollar bill, and a symbol representing Christ: the Greek letters Chi and Rho, superimposed on each other. *Id.*

166. *Id.* at 176–77.

167. *Id.* at 182.

168. *Id.*

169. See *supra* Part IV.

Commandments did violate the Establishment Clause.<sup>170</sup> The displays were located in three separate counties in Kentucky.<sup>171</sup> In two of the counties, the displays were posted in county courthouse; in the third county, the displays appeared in local schools.<sup>172</sup> Seven individuals filed suit arguing that the displays violated the Establishment Clause, and the Sixth Circuit found that “[a] reasonable observer of the displays cannot connect the Ten Commandments with a unifying historical or cultural theme that is also secular.”<sup>173</sup>

Although the majority did not cite the Third Circuit’s decision in *Freethought*, the dissenting opinion used *Freethought* as an example of an appellate court finding that a Ten Commandments plaque did not violate the Establishment Clause because the County Commissioners “believed that the Ten Commandments contributed to the development of American law.”<sup>174</sup> The dissent pointed to a line of argument in *Freethought* that this Note has demonstrated is flawed.<sup>175</sup> The Third Circuit’s *Freethought* decision was erroneous because it only focused on the subjective perspective of the County Commissioners, and it failed to consider whether the community would agree that the Ten Commandments plaque was in fact a “significant basis of American law and the American polity.”<sup>176</sup> Again, as the Supreme Court examines the *McCreary* case, it should not adopt the dissent’s rationale in as far as it follows the conclusions of the Third Circuit in *Freethought*.

#### CONCLUSION

The purpose of the Establishment Clause is to prohibit any law that respects an establishment of religion. When analyzing potential Establishment Clause violations, the “totality of circumstances” surrounding a governmental action must be considered.<sup>177</sup> The development of Establishment Clause jurisprudence has brought Justice O’Connor’s endorsement test into the purview of many courts’ analyses. Thus, the role of the reasonable person has become crucial. There is no justification for creating a more-than-reasonable person as the objective observer to perceive poten-

170. 354 F.3d at 440.

171. *Id.*

172. *Id.*

173. *Id.* at 460.

174. *Id.* at 471 (Ryan, J., dissenting).

175. *See supra* Part IV.A.

176. *Freethought Soc’y v. Chester County*, 334 F.3d 247, 267 (3d Cir. 2003).

177. *Books v. City of Elkhart*, 235 F.3d 292, 304 (7th Cir. 2000).

tial Establishment Clause violations. Using this sort of person will inevitably lead to improper conclusions of law.

In *Freethought Society v. Chester County*, the Third Circuit Court of Appeals applied this more-than-reasonable person standard and concluded that a plaque of the Ten Commandments affixed to a county courthouse was not a violation of the Establishment Clause.<sup>178</sup> By applying the correct reasonable person standard, it is easy to conclude that the Ten Commandments plaque is a violation of the Establishment Clause. A *reasonable* person would not view the plaque on the Chester County Courthouse without thinking that it was a governmental endorsement of religion.<sup>179</sup>

The impact of the Third Circuit's decision in *Freethought* is now being felt as other appellate courts adopt or consider the Third Circuit's reasoning. What is clear is that "context matters" when considering Establishment Clause violations.<sup>180</sup> But what remains unclear is the perspective from which that context is viewed and interpreted. The Supreme Court will likely undertake a reasonable person analysis in ruling on the Ten Commandments cases now before it.<sup>181</sup> The Court should not follow the standard of the Third Circuit by examining Ten Commandments displays through the lens of the more-than-reasonable person. However, if the Court does adopt a more-than-reasonable person standard, it must make clear that such a person should have knowledge of *all* significant historical and contextual facts—not just those facts that help a court reach the conclusion it wishes.<sup>182</sup> The creation of a uniform reasonable person standard would help bring an end to the discrepancy in Establishment Clause case law and would bring clarity to this important area of constitutional law.

178. *Freethought Soc'y*, 334 F.3d at 270.

179. *See supra* Part IV.B.

180. *Greenhouse*, *supra* note 160, at A10.

181. The Supreme Court likely will consider the role of the reasonable observer in its analysis because both parties in each case discussed the role of the reasonable observer in determining Establishment Clause violations. *See supra* note 12.

182. *See Smith*, *supra* note 120, at 292 (discussing how "a purely fictitious character will perceive precisely as much, and only as much, as its author wants it to perceive; and there is no empirical touchstone or outside referent upon which a critic could rely to show that the author was wrong").