2004


Lauren A. Cates

Follow this and additional works at: http://digitalcommons.law.villanova.edu/vlr

Part of the Constitutional Law Commons, First Amendment Commons, and the Religion Law Commons

Recommended Citation
Available at: http://digitalcommons.law.villanova.edu/vlr/vol49/iss5/2

This Issues in the Third Circuit is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository. For more information, please contact Benjamin.Carlson@law.villanova.edu.
Issues in the Third Circuit

FREETHOUGHT SOCIETY v. CHESTER COUNTY AND THE TEN COMMANDMENTS DEBATE: THE BUCK STOPS HERE FOR ESTABLISHMENT CLAUSE CHALLENGES TO RELIGIOUS PUBLIC DISPLAYS IN THE THIRD CIRCUIT

I. Introduction

The concept of separation of church and state is familiar to Americans; most would consider it fundamental to our character as a democratic nation.\(^1\) This concept, however, is not as well defined in jurisprudential doctrine as the fundamental notions of free speech, free press or equal protection under the laws.\(^2\) Judicial interpretations of the Establishment Clause have created an ambiguous line of reasoning and an apparent disavowal of any one specific test to determine Establishment Clause violations.\(^3\) Among the factual situations governed by the Establishment Clause are religious public displays and government aid to parochial schools.\(^4\)

The Supreme Court appears to prefer a case-by-case approach to deciding Establishment Clause challenges to religious public displays, such as the Ten Commandments, focusing on history and context as understood by a reasonable observer.\(^5\) Such a fact-specific nature of the Court's analysis inevitably leads to inconsistent holdings in the courts.\(^6\) Although inconsistent jurisprudence normally increases the likelihood of Supreme


3. For a discussion of the Court's apparent disavowal of any specific test, see infra notes 24–82 and accompanying text.


5. For a discussion of the endorsement test and the reasonable observer standard, see infra notes 62–82 and accompanying text.

6. For a discussion of the Court's infrequent grant of certiorari in religious

(907)
Court review, the context-specific nature of these challenges is compatible with the Supreme Court's case-by-case standard. The Court has not granted certiorari to a Ten Commandments public display case in over twenty years. Thus, in the Third Circuit, the buck stops with Freethought Society v. Chester County, the 2003 debate-provoking pronouncement of what constitutes acceptable public displays of a religious nature.

This Casebrief identifies the Third Circuit's preferred analysis of public displays challenged under the Establishment Clause and serves as a guide to practitioners bringing or defending against these challenges in the Third Circuit. Part II reviews the Supreme Court's decisions that establish the current interpretations of Establishment Clause doctrine. Part III analyzes Freethought Society, setting forth the Third Circuit's methodology and reasoning in upholding a Ten Commandments display against an Establishment Clause challenge. Part IV supports the prediction that the Supreme Court will reluctantly grant certiorari to religious public display cases; furthermore, the Court is unlikely to create a new test public display cases and the various circuit court decisions on the issue, see infra notes 134–53 and accompanying text.

7. For a discussion of the Supreme Court's promotion of a case-by-case analysis that is necessarily context-specific, see infra notes 56–60, 71–72 and accompanying text.


9. 334 F.3d 247, 270 (3d Cir. 2003) (allowing display of Ten Commandments on Chester County courthouse because of 'Ten Commandments' historical context and secular meaning in American legal tradition).

10. For further discussion of this author's prediction the circuit courts will be the final arbiters of most religious public display cases, see infra notes 134–45 and accompanying text.

11. For an analysis of the Third Circuit's opinion in Freethought Society, see infra notes 99–120 and accompanying text.

12. For a discussion of the Supreme Court's Establishment Clause jurisprudence, see infra notes 24–82 and accompanying text.

13. For an analysis of the Third Circuit's reasoning to uphold the religious display in Freethought Society, see infra notes 103–20 and accompanying text.
for these cases. That section demonstrates the importance of the Third Circuit's opinion in Freethought Society in light of the recent "Hang-Ten" movement, among others, which advocates public displays of the Ten Commandments in response to recent rashes of school violence and terrorism. Part V concludes with suggestions for practitioners in the Third Circuit, identifying the necessary elements of an Establishment Clause challenge or defense and recommending approaches for effective litigation of this issue.

II. THE SUPREME COURT AND THE ESTABLISHMENT CLAUSE

A. The Historical Roots of the Establishment Clause

Religion and politics have had an interesting interplay throughout American history. Since Thomas Jefferson first posited that there should be a "wall of separation" between established religion and government, there has remained a common understanding that religion has a role in political development. The familiar words "In God We Trust," along with other forms of ceremonial deism, are reminders of an ac-

14. For support of this author's prediction, see infra notes 123-27, 134-44 and accompanying text.

15. For a discussion of the "Hang-Ten" movement, see infra notes 128-32 and accompanying text.

16. For suggestions to Third Circuit practitioners, see infra notes 155-66 and accompanying text.


18. See, e.g., David Little, Thomas Jefferson's Religious Views and Their Influence on the Supreme Court's Interpretation of the First Amendment, in CONSCIENCE AND BELIEF, supra note 17, at 270-71 (citing famous letter written by Jefferson containing "wall of separation" language). Jefferson phrased what has become a tenet of American democracy: "I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between Church and State." Id. (quoting Letter from Thomas Jefferson to a Committee of the Danbury Baptist Association (Jan. 1, 1802), reprinted in A. KOCH & W. PEDEN, THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 332-33 (1944)).


20. See, e.g., Steven B. Epstein, Rethinking the Constitutionality of Ceremonial Deism, 96 COLUM. L. REV. 2083, 2094-96 (1996) (defining ceremonial deism). The author divides ceremonial deism into two categories, "core" and "fringe." See id. at 2095 (naming categories). "Core" ceremonial deism includes practices that are deemed noncontroversial as a result of little or no litigation challenging these practices and no court ever having declared these practices unconstitutional. See
cepted and lengthy affair between religion and government. Because the language of the Establishment Clause—"Congress shall make no law respecting an establishment of religion"—does not provide concrete guidelines for courts to follow, it is important to note how the Supreme Court has interpreted and applied the clause to constitutional challenges of religious displays.

B. Establishment Clause Jurisprudence: Is There a Test?

The legislative history of the Establishment Clause is rather sparse, offering no definitive statement of the Establishment Clause’s meaning or of the restrictions it imposes on government. Courts, therefore, are forced to interpret the Establishment Clause without a clear statement from the legislature that passed the amendment. The 1947 case Everson

id. (describing concept of "core" ceremonial deism). Examples include: (1) reciting "God save the United States and this Honorable Court" to begin judicial proceedings; and (2) use of the Bible to administer oaths. See id. (listing examples).

"Fringe" ceremonial deism includes those practices that have given rise to considerable litigation and findings of unconstitutionality. See id. (defining concept of "fringe" ceremonial deism). Examples include: (1) government displays of nativity scenes; and (2) religious displays on government property. See id. at 2095–96 (listing examples). Epstein posits that “[t]he implications of ceremonial deism are far-reaching because courts frequently employ this amorphous concept as a springboard from which to hold that other challenged practices do not violate the Establishment Clause.” Id. at 2086.


[T]he adjudication of Supreme Court cases involving religion is often an exercise in trying to balance two competing myths—America as a “Christian” nation versus America as a “secular” nation—while remaining constitutionally committed to a third, dominant myth: the theory of religious freedom at the heart of our public life.

Id.


23. See, e.g., Lemon, 403 U.S. at 612 (describing language of Establishment Clause as “opaque” and lacking specific instruction as to what is constitutionally prohibited by clause). For a discussion of the Supreme Court’s interpretation and application of the Establishment Clause, see infra notes 31–82 and accompanying text.

24. See, e.g., LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 99 (2d ed. 1994) (noting that legislative debate on Establishment Clause was uneventful). The following description demonstrates the uselessness of the House debates in clarifying the meaning and scope of the Establishment Clause:

The debate as unreliably reported was sometimes irrelevant, usually apathetic and unclear. Ambiguity, brevity, and imprecision in thought and expression characterize the comments of the few members who spoke. That the House understood the debate, cared deeply about its outcome, or shared a common understanding of the finished amendment seems doubtful. Only a few members participated.

Id.

25. See id. at 99–100 (noting absence of guidance from Framers as to Establishment Clause’s meaning).
is the beginning of modern Establishment Clause jurisprudence because it attempted to define the scope of the clause. Since Everson, the Court has created a scattered judicial doctrine on the subject. A brief overview of the Court’s opinions will reveal the competing tests and the current prevailing test for religious display cases that the Third Circuit used to uphold the Ten Commandments display in Freethought Society.

1. The First Test: Lemon v. Kurtzman

The Court created the first test for deciding Establishment Clause violations in the 1971 case Lemon v. Kurtzman. Citizens challenged two states’ statutes providing state funding to religious elementary and secondary schools. The Court identified a three-part test aimed at correcting

27. See id. at 15–16 (giving basic meaning of Establishment Clause). The Everson majority described the basic scope of the clause:

The “establishment of religion” clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbelief, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.

Id.

28. See, e.g., Lynch v. Donnelly, 465 U.S. 668, 687–88 (1984) (O’Connor, J., concurring) (announcing endorsement test for Establishment Clause challenges to religious public displays); Marsh v. Chambers, 463 U.S. 783, 795 (1983) (failing to apply any particular test to uphold Nebraska statute allowing public funds to pay for chaplain’s services in local legislature); Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) (announcing three-part test for Establishment Clause violations). Each of these cases represents a separate approach to the Establishment Clause. Compare Lynch, 465 U.S. at 687–88 (applying endorsement test), with Marsh, 463 U.S. at 795 (lacking test), and Lemon, 403 U.S. at 612–13 (creating three-part test). Marsh is considered an anomaly because the Court relied on the historical significance of legislative chaplains to reach its result, as opposed to the Lemon test that was popularly used at that time. See, e.g., Bell, supra note 2, at 1294–95 (explaining that Marsh departed from Court’s consistent application of Lemon in 1980s because Marsh focused on history).

29. For a discussion of the Court’s Establishment Clause opinions relevant to public display cases, see infra notes 38–43, 49–82 and accompanying text. For a discussion of the test the Third Circuit used in Freethought Society, see infra notes 99–102, 106–20 and accompanying text.
31. See id. at 607 (holding two states’ statutes unconstitutional).
32. See id. at 607–11 (describing Rhode Island and Pennsylvania statutes at issue). Rhode Island’s statute authorized the state to subsidize the salaries of non-
"the three main evils against which the Establishment Clause was intended to afford protection."\textsuperscript{33} The three evils are government sponsorship, financial support and active involvement in religious activity.\textsuperscript{34} Hence the three-part \textit{Lemon} test: (1) the statute must have a secular legislative purpose; (2) the primary effect of the statute may neither advance nor inhibit religion; and (3) the statute may not promote "excessive government entanglement with religion."\textsuperscript{35} Applying this test, the Court held that both of the challenged statutes violated the Establishment Clause.\textsuperscript{36} The Court would stress in later opinions, however, that there is no stringent test applicable to all Establishment Clause cases.\textsuperscript{37}

The Court first ruled on a public display of the Ten Commandments in the 1980 case \textit{Stone v. Graham}.\textsuperscript{38} The Kentucky legislature passed a law that required posting the Ten Commandments in every public school classroom.\textsuperscript{39} Applying the \textit{Lemon} test, the Court held the law unconstitutional.\textsuperscript{40} Because the statute in question had to survive all three prongs of the test to pass constitutional muster, the Court needed no further analysis once the Kentucky statute failed the first prong of the \textit{Lemon} test.\textsuperscript{41} Justice Rehnquist's dissent in \textit{Stone} questioned the majority opinion's importance because it was a \textit{per curiam} opinion, issued without argument before the Court.\textsuperscript{42} \textit{Stone}, however, remains the Court's only word on the particular issue of Ten Commandments displays.\textsuperscript{43}

\begin{itemize}
\item Public school teachers. See \textit{id.} at 607 (explaining statute). Pennsylvania's statute authorized the superintendent to make contracts with nonpublic schools to purchase their services; these contracts were essentially reimbursements for non-public school expenditures. See \textit{id.} at 609-10 (outlining statute).
\item 33. \textit{Id.} at 612.
\item 34. See \textit{id.} (citing \textit{Walz v. Tax Comm'n}, 397 U.S. 664, 668 (1970) (allowing government tax breaks for religious institutions)) (listing three evils).
\item 35. See \textit{id.} at 612-13 (outlining three-part test that can be gleaned from Court's prior cases). The formulation of this test was the Court's first identification of a theme from its earlier Establishment Clause cases. See \textit{id.} at 612 (noting that "cumulative criteria" have been "developed by the Court over many years").
\item 36. See \textit{id.} at 607 (finding statutes unconstitutional).
\item 37. See, e.g., \textit{Lynch v. Donnelly}, 465 U.S. 668, 678-79 (1984) (declaring there is no rigid test to be applied in Establishment Clause cases).
\item 38. 449 U.S. 39, 40-41 (1980) (\textit{per curiam}) (applying \textit{Lemon} test to hold Kentucky statute unconstitutional).
\item 39. See \textit{id.} at 39-40 (recounting statute that required posting of Ten Commandments).
\item 40. See \textit{id.} at 40-41 (declaring Kentucky statute unconstitutional).
\item 41. See \textit{id.} (noting that statute is unconstitutional if it violates any of \textit{Lemon}'s three prongs).
\item 42. See \textit{id.} at 47 (Rehnquist, J., dissenting) (describing opinion as "a cavalier summary reversal, without benefit of oral argument or briefs on the merits").
\item 43. For further discussion of the view that \textit{Stone} is the only guidance available from the Supreme Court for Ten Commandments displays thus far, see \textit{infra} note 144 and accompanying text.
\end{itemize}
The *Lemon* facts are a common scenario within which Establishment Clause challenges arise: state aid to religious schools. Stone represents another situation in which the Establishment Clause is implicated: public displays of religious symbols such as the Ten Commandments or a nativity scene. This religious display category was the central issue before the Third Circuit in *Freethought Society*, and is also the center of an intense national debate about Ten Commandments displays specifically. Despite the categorical distinction in the types of cases in which religious constitutional issues arise, the *Lemon* test was considered the prevailing analysis for Establishment Clause cases until the Court tailored the inquiry for religious display challenges.

2. **Refining the Inquiry: The Endorsement Test of Lynch v. Donnelly**

a. The Majority Opinion

Although the Court has not expressly overruled *Lemon*, the Court adapted the *Lemon* test to better accommodate religious display challenges. In the 1984 case *Lynch v. Donnelly*, residents challenged a town’s annual Christmas display that contained a crèche (a religious scene depicting Christ’s birth). Chief Justice Burger’s majority opinion acknowledg-
edged the "role of religion in American life from at least 1789" and noted the government's continued recognition and subsidization of religious holidays. The majority opinion also described other references to "our religious heritage" and various instances of ceremonial deism. Highlighting these permissible acknowledgements of religion allowed the majority to focus on the history and context of the city's purportedly religious display, and ultimately led the Court to uphold that display.

The justices disavowed any rigid formula with which to decide the case. The majority announced a case-by-case approach that called for "line-drawing [because] no fixed, per se rule can be framed." Although it mentioned the Lemon factors as important to any analysis, the Court stated its "unwillingness to be confined to any single test or criterion in this sensitive area." The Court found that the display had a secular purpose after examining the crèche within the context of the Christmas display as a whole, and the Court noted that no one had complained about the crèche's inclusion in the display for over forty years. Consequently, the Court upheld the display against an Establishment Clause challenge. Although the majority made clear that it was not constrained to follow a rigid test, the Court did not explicitly define the scope of its analysis.

b. Justice O'Connor's Concurrence

Justice O'Connor's concurring opinion clarified the majority's approach and established the endorsement test that the Third Circuit later used to uphold the display in Freethought Society. Justice O'Connor identi-

51. Id. at 674 (noting role of religion in American history).
52. See id. at 676 ("Thus it is clear that the Government has long recognized—indeed it has subsidized—holidays with religious significance.").
53. Id. at 676.
54. See id. at 676–77 (noting that religiously inspired paintings hang in National Gallery in Washington, D.C. and scene of Moses with Ten Commandments hangs in Supreme Court's Chambers). For further discussion of ceremonial deism, see supra note 20 and accompanying text.
55. See Lynch, 465 U.S. at 679 (declaring that Court's inquiry must focus on "the crèche in the context of the Christmas season").
56. See id. at 678 ("This history may help explain why the Court consistently has declined to take a rigid, absolutist view of the Establishment Clause.").
57. Id. (advocating case-by-case approach).
58. Id. at 679 (refusing to follow rigid formula).
59. See id. at 684–85 (noting display has secular purpose and crèche has been included in display for over forty years); id. at 680 (identifying secular purposes of display as celebrating national holiday and depicting origins of holiday).
60. See id. at 687 (finding display constitutional).
61. For a discussion of the Lynch Court's refusal to follow any strict test, see supra notes 56–58 and accompanying text.
62. See Lynch, 465 U.S. at 690 (O'Connor, J., concurring) (focusing on government endorsement of religion). Although there are four justices in the court's opinion and four dissenting justices, there is still a majority opinion (as opposed to a plurality) because Justice O'Connor specifically joined the majority. She wrote only to clarify the endorsement test. For a discussion of the Third Circuit's em-
fied two instances in which the government violates the Establishment Clause: (1) excessive government entanglement with religious institutions, and (2) government endorsement or disapproval of religion. She described government endorsement of religion as the "more direct infringement" on the First Amendment guarantee. Justice O'Connor attempted to elucidate the Lemon analysis and the Court's religion clause doctrine in general.

The endorsement test asks: (1) what the government intended to convey by the challenged display; and (2) what message the challenged display actually conveyed. Justice O'Connor related these two inquiries of the endorsement test to the purpose and effect prongs of the Lemon analysis. The purpose prong, which requires that the government activity have a secular purpose, asks "whether the government intends to convey a message of endorsement or disapproval of religion." The effect prong asks whether the government, in reality or according to public perception and regardless of intention, communicates "a message of government endorsement or disapproval of religion." In agreement with the majority, Justice O'Connor found that the city's display did not violate the endorsement test.

Like the majority of the Lynch Court, Justice O'Connor focused on the display's history and context as part of the case-by-case approach to these Establishment Clause challenges. She stressed that "[e]very employment of the endorsement test for the religious display in Freethought Society, see infra notes 99–102, 106–16 and accompanying text.


64. See id. at 688 (O'Connor, J., concurring) (finding endorsement of religion to be more obviously violative of Establishment Clause than excessive entanglement). Government endorsement legitimizes religion and sends the message that followers of the endorsed religion are favored members of the civic community; those who do not adhere to the endorsed beliefs are outsiders. See id. (O'Connor, J., concurring) (offering consequences of government endorsement of religion).

65. See id. at 687 (O'Connor, J., concurring) (declaring that she was writing "to suggest a clarification of [the Court's] Establishment Clause doctrine").

66. See id. at 690 (O'Connor, J., concurring) (noting that to decide whether city's display endorsed religion included examining city's intended message and what message was actually conveyed; test is both subjective and objective).

67. See id. (O'Connor, J., concurring) (noting that "purpose and effect prongs of the Lemon test represent these two aspects of the meaning of the city's action").

68. See id. at 691 (O'Connor, J., concurring) (explaining purpose prong of Lemon).

69. See id. at 692 (O'Connor, J., concurring) (explaining effect prong of Lemon).

70. See id. at 694 (O'Connor, J., concurring) (finding that city's display containing crèche did not endorse religion); id. at 691 (O'Connor, J., concurring) (finding that city did not include crèche in larger display to highlight its religious significance).

71. See id. at 676 (noting long history of government subsidization of religious holidays); id. at 679 (focusing inquiry on display in context of Christmas season); id. at 692–93 (O'Connor, J., concurring) (noting crèche was traditional and gov-
ernment practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion."72 Thus, both the majority and Justice O'Connor agreed on a case-by-case analysis with a focus on history and context, which the Third Circuit ultimately employed in *Freethought Society.*73

c. Clarifying and Reaffirming the Endorsement Test

Following the *Lynch* decision, the Court continued to reference the endorsement test and solidified its position as the preferred analysis in public display cases.74 In *Allegheny v. ACLU,*75 the Court analyzed two holiday displays in Pittsburgh: a crèche in the grand staircase of the courthouse and a menorah at the entrance to a city government building.76 After citing the *Lemon* test, the majority noted that "subsequent decisions further have refined" the inquiry by focusing on whether the governmental display endorses religion.77 The *Allegheny* majority observed, "the *Lynch* concurrence provides a sound analytical framework for evaluating governmental use of religious symbols."78 Focusing on each display's overall context, the Court held that the crèche had the unconstitutional effect of endorsing religion, but the menorah did not because of its placement next to a Christmas tree and the display's overall theme of liberty.79

Justice O'Connor also concurred in *Allegheny,* but wrote specially to clarify her concurrence in *Lynch* as the official test for analyzing Establishment Clause challenges.80 In reiterating the importance of history and

72. *Id.* at 694 (O'Connor, J., concurring) (describing case-by-case approach).
73. For a discussion of the *Lynch* Court's support for the case-by-case approach, see *supra* notes 56–61, 71–72 and accompanying text. For a discussion of the Third Circuit's use of history and context in *Freethought Society,* see *infra* notes 99–116 and accompanying text.
74. *See, e.g., Allegheny v. ACLU,* 492 U.S. 573, 597 (1989) (declaring that "since *Lynch,* the Court has made clear" that endorsement test is preferred).
76. *See id.* at 578–79 (examining two holiday displays in Pittsburgh under Establishment Clause; finding one display permissible and one impermissible).
77. *See id.* at 592 (stating "[i]n recent years, we have paid particularly close attention to whether the challenged governmental practice either has the purpose or effect of 'endorsing' religion").
78. *See id.* at 595 (supporting idea that endorsement test currently is preferred analysis in religious display cases). Justice Blackmun's majority opinion cited *Lynch* for the "essential principle" of the Establishment Clause. *See id.* (citing *Lynch v. Donnelly,* 465 U.S. 668, 687 (1984)) (declaring that focus of inquiry is whether government appears to make religion relevant to one's political position).
79. *See id.* at 579–88 (offering detailed description of location and overall display, in addition to historical and religious meanings of crèche and menorah); *id.* at 621 (offering holding of case).
80. *See id.* at 631 (O'Connor, J., concurring) (noting that "no alternative test has been suggested that captures the essential mandate of the Establishment Clause as well as the endorsement test does, and it warrants continued application and refinement").
context, Justice O'Connor explained that the reasonable observer standard is used to evaluate the display. The reasonable observer standard is the perspective of one informed of the history and context within which the government displays the religious symbol, and one who can distinguish a secular purpose from a purely religious one. The Third Circuit followed this methodology in *Freethought Society*, invoking the reasonable observer as one with knowledge of local history and customs.

III. THE THIRD CIRCUIT, THE TEN COMMANDMENTS AND CHALLENGES UNDER THE ESTABLISHMENT CLAUSE: *FREETHOUGHT SOCIETY V. CHESTER COUNTY*

The Chester County courthouse exterior bears a bronze plaque of the Ten Commandments. Sally Flynn and the Freethought Society, of which Flynn is a member, challenged this display of the Ten Commandments under the Establishment Clause. The Third Circuit found the plaque's display on the courthouse to be within the bounds of the First Amendment. Although the Third Circuit has not been very active in Establishment Clause cases, its decision in *Freethought Society* offers a detailed analysis with which to decide religious display cases. The opinion serves

81. See id. at 630 (O'Connor, J., concurring) (referring to reasonable observer's need for history and context in evaluating whether government conveys message of endorsing religion).

82. See id. (O'Connor, J., concurring) (referring to how reasonable observer would generally understand religious display in light of history and context). Justice O'Connor further refined the endorsement test, incorporating the reasonable observer standard:

The question under endorsement analysis, in short, is whether a reasonable observer would view such longstanding practices as a disapproval of his or her particular religious choices, in light of the fact that they serve a secular purpose rather than a sectarian one and have largely lost their religious significance over time.

Id. at 651 (O'Connor, J., concurring).

83. For a discussion of the Third Circuit's invocation of the endorsement test's reasonable observer standard in *Freethought Society*, see infra notes 106–08 and accompanying text.


85. See id. at 250 (identifying plaintiffs).

86. See id. at 271 (holding display constitutional and vacating permanent injunction to remove plaque).

87. See, e.g., Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly, 309 F.3d 144, 151 (3d Cir. 2002) (challenging borough's selective enforcement of ordinance under Free Exercise Clause); ACLU v. Township of Wall, 246 F.3d 258, 266 (3d Cir. 2001) (challenging township's holiday display; dismissed because plaintiffs did not have standing to sue); ACLU v. Black Horse Pike Bd. of Educ., 84 F.3d 1471, 1488 (3d Cir. 1996) (holding policy allowing students to vote on whether to have prayer at graduation ceremony violated First Amendment; court applied Lemon test). The Third Circuit has not addressed public display challenges under the Establishment Clause recently. See generally *Tenafly Eruv Ass'n, Inc.*, 309 F.3d 144 (addressing religion clause of First Amendment, but not Establishment Clause specifically). While the issue in *Wall* concerned a religious display, the Third Circuit did not review the
as a guide to practitioners who wish to bring or defend Establishment Clause challenges in the Third Circuit.88

A. The Essential Facts

The facts are essential to Establishment Clause challenges of religious public displays because the Supreme Court’s jurisprudence advances a case-by-case approach that is necessarily fact-sensitive.89 Sally Flynn has been a resident of Chester County in Pennsylvania since 1960 and recently became a member of the Freethought Society, a forum for atheists, agnostics and freethinkers.90 Prior to commencing this action, Flynn’s attorney sent a letter to the Chester County Commissioners requesting that the county remove the plaque.91 Flynn decided to file this action after the County Commissioners refused to remove the Ten Commandments plaque from the courthouse façade.92 Chester County officials denied Flynn’s request, arguing that the circumstances of the plaque’s initial acceptance from the Religious Education Council at the courthouse’s dedication ceremony, as well as the plaque’s current status, supported their decision.93

The bronze plaque has a fifty-inch height and thirty-nine inch width.94 It is surrounded by several secular signs of comparable size, such as a “No Smoking” sign.95 The new entrance to the courthouse is some

constitutionality of that display because the plaintiffs lacked standing to sue. See Wall, 246 F.3d at 266 (noting lack of standing). Thus, Freethought Society is important as a recent pronouncement concerning religious displays in the Third Circuit. See Freethought Soc’y, 334 F.3d at 250 (noting subject of challenge). For a detailed discussion of the Third Circuit’s analysis in Freethought Society, see infra notes 103–20 and accompanying text.

88. For a discussion of the guidelines revealed in Freethought Society, see infra notes 155–66 and accompanying text.

89. For a discussion of the Supreme Court’s case-by-case approach, see supra notes 56–58, 71–72 and accompanying text.

90. See Freethought Soc’y, 334 F.3d at 250 (describing Flynn and Freethought Society). The court seemed disturbed by the length of Flynn’s residence in Chester County prior to this complaint: “Flynn ... noticed the plaque as early as 1960 but was apparently not bothered enough by it to complain until 2001.” Id. at 250. The court also acknowledged, however, that “Flynn has considered herself an atheist since approximately 1996.” See id. at 254 (noting length of Flynn’s adherence to atheism).

91. See id. at 255 (recounting Flynn’s actions prior to filing suit).

92. See id. (noting that Flynn filed action in Eastern District of Pennsylvania after county denied her request for removal).

93. See id. at 250–51 (identifying county’s focus on history of plaque, its acceptance from Religious Education Council, and current status of plaque when county refused request for removal).

94. See id. at 254 (providing dimensions of plaque).

95. See id. (noting other signs placed near Ten Commandments plaque). In addition to the Ten Commandments plaque, there is: (1) a “No Smoking” sign; (2) a West Chester Borough Historic Architecture Certification plaque; (3) a listing of business hours; (4) notification that the courthouse is on the National Register of Historic Places; and (5) a “No Skateboarding” sign. See id. (listing signs). There
distance away from the former entrance where the plaque is located, and
the words on the plaque are barely legible to passersby. The county has
not made any efforts to maintain or highlight the plaque since its accept-
ance. This exact location and physical description of the plaque pro-
vided the necessary context within which the Court could apply the
appropriate test—the endorsement test—to determine whether the dis-
play violated the Establishment Clause.

B. Choosing the Applicable Test

Following a detailed recitation of the facts, the Third Circuit reviewed
the development of Establishment Clause jurisprudence to determine the
appropriate test to apply in this case. First, the court reviewed the Lemon
test and quickly discounted its importance by noting that it has “received
much criticism.” The court then highlighted the endorsement test as a
clarification of the oft-criticized Lemon test. The court elected to follow
the endorsement test and briefly applied the Lemon analysis in the
alternative.

are also other plaques and memorials in the general province of the Ten Com-
mandments. See id. at 254 n.2 (describing other monuments and plaques and their
approximate distances from Ten Commandments plaque).

96. See id. at 253–54 (describing outer façade of courthouse and placement of
plaque in context of surrounding landscape). The plaque was situated as follows:
There are six Corinthian columns in front of the façade of the Court-
house upon which the plaque is affixed; from certain angles, the columns
obscure the plaque, though the plaque is clearly visible when standing
directly in front of it. The portico in front of the east façade, where the
Ten Commandments plaque is displayed, spans 64 feet. Only the title,
“The Commandments,” is legible to a passerby on the sidewalk in front of
the Courthouse. . . . To read the text of the Commandments, it is neces-
sary to climb the steps leading to the historic entrance. But since this
entrance was closed in 2001 for security reasons and to cut costs, and the
new entrance is located further north along the sidewalk, there is no rea-
son for a visitor to the Courthouse to climb these steps.

Id.

97. See id. at 250 (recalling county’s assertion that it did nothing to maintain
or celebrate plaque); id. at 254 (noting other uses of courthouse, i.e., rallies or
speeches, when one could notice Ten Commandments, but probably does not no-
tice it because nothing is done to highlight or show deference for plaque).

98. For a discussion of the Third Circuit’s use of context to apply the endorse-
ment test, see infra notes 103–16 and accompanying text.


100. See id. at 256 n.4 (referring to Lemon test and citing various instances in
which it has been criticized; collecting criticisms of Lemon).

101. See id. at 256 (describing Justice O’Connor’s concurrence in Lynch as
clarifying Lemon).

102. See id. at 250 (“[W]e believe that Justice O’Connor’s modification of
Lemon, known as the ‘endorsement’ test, applies in religious display cases of this
type. . . . [h]owever, in an abundance of caution, we will also analyze the case
under the much maligned Lemon test.”).
C. Testing the Facts

The court began its analysis by acknowledging the inherent religiousness of the Ten Commandments.103 This observation, however, did not prohibit a finding of constitutionality because “the context of an otherwise religious display can render the message of the overall display as not endorsing religion.”104 With this premise, the court examined the plaque in light of its historic conveyance and its current context.105

1. An Analysis Under the Endorsement Test

The Third Circuit did not frame the endorsement test exactly as stated by the Supreme Court in Lynch and Allegheny.106 Instead, the court framed the inquiry as “whether a reasonable observer, aware of the history of the plaque, would view it as an endorsement of religion by the County.”107 Although the Third Circuit did not phrase the inquiry as a two-part test, the court applied both prongs of Justice O’Connor’s endorsement test.108

As for the purpose prong of the endorsement test, the court found that Chester County did not intend to endorse religion by refusing to remove the plaque in 2001.109 The Third Circuit chose to focus on the County Commissioners’ refusal to remove the plaque upon Flynn’s request in 2001, and not on the circumstances of the plaque’s acceptance in

103. See id. at 262 (applying endorsement test). The court noted: “As a preliminary matter, we cannot ignore the inherently religious message of the Ten Commandments.” Id. The court cited Stone v. Graham, 449 U.S. 39, 41 (1980), to support this proposition. See id. (noting Stone’s holding). Because the inherent religiousness of the Ten Commandments was contrary to the Third Circuit’s holding in this case, the court distinguished Stone by opining that it is “fairly limited to its facts.” See id. (distinguishing facts of Stone).

104. See id. at 263 (noting that, in Lynch, Supreme Court found religious display did not endorse religion because of display’s history and context).

105. See id. at 251 (describing dedication ceremony where Religious Education Council gave plaque to Chester County). For a recitation of the plaque’s current surroundings, see supra notes 95–97 and accompanying text.

106. For the language of the endorsement test as stated in Lynch, see supra notes 66–69 and accompanying text. For a discussion of the Allegheny decision’s addition of the reasonable observer standard to the endorsement test, see supra notes 80–82 and accompanying text.

107. See Freethought Soc’y, 334 F.3d at 251 (stating inquiry under endorsement test).

108. For a discussion of Justice O’Connor’s two-part endorsement test, see supra note 66 and accompanying text. For a discussion of the Third Circuit’s formulation of the endorsement test, see supra note 107 and infra note 116 and accompanying text.

109. See Freethought Soc’y, 334 F.3d at 266 (noting County Commissioners’ intent). The court held: “[v]iewed in this context, the Commissioners’ refusal to remove the plaque appears even less like an endorsement of religion and more likely motivated by the desire to preserve a plaque that has become part of the Courthouse.” Id. The importance of context is evident here. See id. (same).
1920, because the refusal was more relevant to the inquiry. The court found that the setting in which the plaque is currently displayed does not send a message that the government endorses religion, specifically because the county has done nothing to maintain or highlight the plaque.

As for the effect prong of the endorsement test, the court determined that a reasonable observer with knowledge of the courthouse’s history would not perceive the plaque as symbolizing government endorsement of religion. Moreover, the court found that the main entrance’s relocation away from the entrance near the plaque further decreased the likelihood that a reasonable observer would perceive the plaque as endorsing religion.

The age and history of the Ten Commandments plaque were significant in the Third Circuit’s decision. The Chester County courthouse is a historic landmark, thus the plaque inherits historical significance from being conveyed at the courthouse’s dedication in 1920. The court summarized its application of the endorsement test by noting that the overall effect of the display did not endorse religion.

110. See id. at 262 (determining that focus on contemporary events would allow for consistent application of endorsement test: “[i]t would not make sense for us to focus on the present day effect of the plaque, and yet only consider the original purpose for erecting the Ten Commandments plaque”).

111. See id. at 266-67 (listing factors that allow reasonable observer to conclude that county does not endorse religion).

112. See id. at 265 (offering perspective of reasonable observer). The court attributed certain assumptions to the reasonable observer in Chester County, namely that he or she would be informed about the age of the plaque, the general history of the county and the fact that the county has not maintained or celebrated the plaque since its acceptance. See id. at 260, 267 (identifying characteristics of reasonable observer). Thus, “[t]he reasonable observer, knowing the age of the Ten Commandments plaque, would regard the decision to leave it in place as motivated, in significant part, by the desire to preserve a longstanding plaque.” Id. at 265.

113. See id. at 266 (noting that old entrance to courthouse is closed, which detracts “from the obviousness and accessibility of the plaque,” further minimizing its religious message).

114. See id. at 253–67 (applying endorsement test to facts, constantly referring to history of plaque and context of display).

115. See id. at 266 (noting importance of fact that courthouse has been placed on National Register of Historic Places); id. at 249 (noting that county received plaque at dedication ceremony in 1920).

116. See id. at 251 (listing court’s conclusions under endorsement test). The court summarized:

Applying the “endorsement” test, we conclude that: (1) the reasonable observer would be aware of the approximate age of the plaque and the fact that the County has done nothing since it was erected to highlight or celebrate the plaque; (2) because of the plaque’s age and its placement on an historic Courthouse, the reasonable observer would believe that the plaque itself is historic; and (3) the reasonable observer would not believe that the County’s inaction was motivated by a desire to endorse religion, or some religious practice... but rather by a desire to preserve a longstanding plaque.

Id.
2. A Brief Reference to the Lemon Test

The Third Circuit briefly analyzed the case under the Lemon test. Extracting the purpose and effect prongs of the Lemon test, which are the key components of the endorsement test, the court held that the plaque's display of the Ten Commandments passed constitutional muster. The court found that the County Commissioners' refusal to remove the plaque for historical reasons was a legitimate secular purpose that satisfied "the relatively low threshold required by the purpose prong of Lemon." To show that the plaque satisfied the effect prong of the Lemon test, the court incorporated its analysis under the endorsement test (which it equated with the effect prong) and ended its discussion.

IV. Analysis: The Importance of the Third Circuit's Opinion in Freethought Society and the Infrequency of Certiorari from the Supreme Court

The Third Circuit's opinion in Freethought Society is important to the current legal landscape because of recent attempts to display the Ten Commandments—dubbed the "Hang-Ten" movement. "Hang-Ten" proponents argue that recent rashes of school violence and the war on terrorism warrant displaying the Ten Commandments to remind Americans that laws are based on a moral code. Although the Supreme Court already addressed this issue in Stone v. Graham, which invalidated a statute that required posting the Ten Commandments in public school classrooms, the Court's later jurisprudence has created a window of oppor-

117. See id. at 267 (entitling section "The Lemon Test (Purpose and Effect)"). The court appears to apply the Lemon analysis out of caution, rather than because of the test's importance as legal precedent. See id. at 250 (describing Lemon analysis as cautionary measure).

118. See id. at 269 (holding that "Commissioners' refusal to remove the plaque passes constitutional muster under both the purpose and effect prongs of Lemon").

119. See id. at 267 (referring to low threshold requirement and finding that Commissioners offered legitimate reasons for refusing to remove plaque). The court recounted some of the Commissioners' statements at the trial that led to this conclusion. See id. (recounting testimony).

120. See id. at 269 (incorporating endorsement discussion because "effect under the Lemon test is cognate to endorsement").

121. See generally Abdel-Monem, supra note 45, at 1024 (describing "Hang Ten" movements and offering predictions of how Supreme Court jurisprudence may address these movements).

122. See id. at 1043 (noting that "Hang-Ten" began after school shootings rocked national audiences and local communities where those shootings occurred). For further discussion of school violence and the September 11, 2001 attacks as the impetus for religious revival, see infra notes 128–32 and accompanying text.

123. For a discussion of the Supreme Court's holding in Stone v. Graham, see supra notes 38–43 and accompanying text.
tunity for proponents of “Hang-Ten.” Moreover, the Court’s adherence to a strict case-by-case analysis of religious displays under the preferred endorsement test makes it unlikely that the Court will grant certiorari to many cases in the possible surge of religious display challenges that may develop out of “Hang-Ten.” Although the Court has granted certiorari to two of these recent cases, the Court is not likely to create a new test; this leaves the circuits to adjudicate these issues in their respective jurisdictions under the prevailing endorsement test, which allows for the possibility of inconsistent holdings in light of its fact-specific inquiry.

A. The “Hang-Ten” Movement

The Third Circuit’s opinion in Freethought Society is important in light of the “Hang-Ten” movement, which advocates posting the Ten Commandments in public schools and government buildings. Proponents of “Hang-Ten” argue that violent outbreaks in schools militate displaying the Ten Commandments to ignite a return to morality. Support for “Hang-Ten” is strongest at the local level, with grassroots campaigns encouraging local school districts to post the Ten Commandments. State

124. See, e.g., Allegheny v. ACLU, 492 U.S. 573, 614 (1989) (focusing on effect of overall setting to uphold city’s display of menorah). Arguably, the overall setting of a Ten Commandments display could secularize its religious message. See, e.g., Bell, supra note 2, at 1274-75 (explaining concept of secularization, where Supreme Court has justified certain religious expressions because of their context or tradition).


126. For a discussion of the Court’s decision to grant certiorari in two Ten Commandments display cases, see infra notes 134-45 and accompanying text.

127. For a discussion of the fact-specific inquiries used in religious display cases, see supra notes 56-61, 71-72 and accompanying text.


129. See, e.g., Abdel-Monem, supra note 45, at 1034 (listing proponents’ arguments); Derek H. Davis, The Ten Commandments As Public Ritual, 44 J. OF CHURCH & STATE 221, 221 (2002) (noting that Columbine and other school shootings led to national “outcry . . . for a return to religious values”).

130. See, e.g., Abdel-Monem, supra note 45, at 1044-45 (observing popular support for “Hang-Ten” at local level and identifying grassroots efforts to prompt legislative action in favor of issue); Brian Lewis, 200 Turn Out to Support Courthouse Display, THE TENNESSEAN, Oct. 18, 2002, at 1B (reporting outpour of citizen support after County Commissioners voted to place Ten Commandments in courthouse as part of larger historical display); State Officials Handed Commandments, BUCYRUS TELEGRAPH FORUM, Oct. 15, 2003, at 2A (reporting Christian Coalition’s program of giving framed copies of Ten Commandments to local legislators to
legislatures, prompted by conservative politicians and strong religious lobbies, have debated the issue and some have passed legislation to permit posting the Ten Commandments.\textsuperscript{131} With a growing public sentiment for moral revival—especially in the wake of the Columbine High School shootings, the September 11, 2001 attacks and the war on terrorism—legislatures and courts are likely to confront the issue of public religious displays.\textsuperscript{132} The Third Circuit, after its opinion in \textit{Freethought Society}, now has

hang in their offices; noting that Alabama case \textit{Glassroth v. Moore}, 335 F.3d 1282 (11th Cir. 2003), sparked this program).

131. See, \textit{e.g.}, Abdel-Monem, supra note 45, at 1043–44 (describing supporters of “Hang-Ten” as “individual citizens acting alone or with others, well-organized religious lobbying groups, and politicians”); \textit{see id.} at 1046 (noting that some states have passed legislation in support of “Hang-Ten”); \textit{id.} at 1044–45 n.178–83 (collecting articles recounting local displays of support for religious postings). These legislatures have tailored their respective statutes to comport with Supreme Court doctrine—namely that the overall display cannot endorse religion—by requiring that the display include other non-religious historical references. \textit{See, e.g.}, \textit{id.} at 1046 (noting that enacted legislation requires posting along with other non-religious documents); \textit{see also} \textit{Lynch v. Donnelly}, 465 U.S. 668, 680 (1984) (determining that exclusively focusing on religious nature of display or activity would violate Establishment Clause); \textit{Davis}, supra note 129, at 226 (noting phenomenon of “créche strategy,” named after créche in \textit{Lynch}, where local governments are circumventing judicial opinions by posting Ten Commandments with other historical documents in order to “secularize” government religious displays). Indiana, Kentucky and South Dakota have enacted such legislation. \textit{See, e.g.}, Abdel-Monem, supra note 45, at 1046 (naming states). For example, South Dakota’s statute allows the government to display the Ten Commandments:

An object or document containing the words of the Ten Commandments may be displayed in any public school classroom, public school building, or at any public school event, along with other objects and documents of cultural legal, or historical significance that have formed and influenced the legal and governmental systems of the United States and the State of South Dakota. Such display of an object or document containing the words of the Ten Commandments: (1) Shall be in the same manner and appearance generally as other objects and documents displayed; and (2) May not be presented or displayed in any fashion that results in calling attention to it apart from the other displayed objects and documents.

\textit{Id.} at 1046 n.191 (quoting S.D. CODIFIED LAWS § 13-24-17.1 (Michie 2000)).

guidelines with which to handle this potential onslaught of Ten Commandments cases.133

B. How Often Will the Supreme Court Weigh in on the Issue?

The Supreme Court has granted certiorari to only two of the recent religious public display cases, despite the inconsistencies among the circuits.134 In 2004, the Supreme Court granted certiorari to a Fifth Circuit opinion upholding a Ten Commandments display and a Sixth Circuit opinion affirming an injunction to remove three separate Ten Commandments displays.135 The Court’s willingness to hear these two cases came as a surprise.136 Although the Court will hear argument on these cases and decide the constitutionality of the displays, the Court is likely to continue to apply the endorsement test.137

Commandments plaque hung in local courthouse for six-month anniversary of September 11, 2001 attacks).

133. For a discussion of the guidelines set forth in Freethought Society, see infra notes 155–66 and accompanying text.

134. See, e.g., Supreme Court Decides It Shall Not, Justices Decline to Hear Case on Ten Commandments, WINSTON-SALEM J., Feb. 26, 2002, at A1 (noting Supreme Court’s denial of certiorari in Seventh Circuit case that refused to grant state permission to construct Ten Commandments monument for state capitol). Although courts have reached “different conclusions” on the issue, “[o]nly the Supreme Court can resolve the question, and it chose . . . to steer clear for now.” See id. (noting denial of certiorari despite inconsistencies).


136. See Gibson, supra note 8 (noting that “the court signaled it would pass on the issue” by denying certiorari to case involving Alabama Supreme Court Justice Roy Moore’s refusal to remove Ten Commandments monument from courthouse rotunda); THE U.S. CONSTITUTION ONLINE, at http://www.usconstitution.net/constcur.html (“In a surprise move, the justices decided to step into a fray, to rule on the constitutionality of displays of the Ten Commandments on public property.”) (last visited Oct. 22, 2004).

137. See, e.g., Elk Grove Sch. Dist. v. Newdow, No. 02-1626, 2004 U.S. LEXIS 4178, at *53–54 (June 14, 2004) (O’Connor, J., concurring) (insisting that endorsement test is prevailing test for Establishment Clause challenges). The Court’s opinion in Newdow further supports the infrequency with which the Court will hear cases involving the religion clauses of the First Amendment, for the Court dodged a constitutional holding and relied on the plaintiff’s lack of standing. See id. at *27 (noting lack of standing).
Also in 2004, however, the Court denied certiorari to the highly controversial Eleventh Circuit case ordering an Alabama Supreme Court Justice to remove a Ten Commandments monument from the state courthouse.\[138\] In 2002, the Supreme Court quietly denied certiorari to a Ten Commandments monument planned for display in a state park in *Indiana Civil Liberties Union v. O'Banner*.\[139\] Moreover, in 2001, the Supreme Court denied certiorari to an Establishment Clause challenge of a Ten Commandments monument in *Books v. City of Elkhart*.\[140\] In denying the city's petition for certiorari after the Seventh Circuit ruled for the plaintiffs, the Supreme Court noted the specific factual circumstances of the monument's dedication and physical display that made it unconstitutional.\[141\] Only three Justices opposed the denial of certiorari,\[142\] which bolsters the contention that the current court will not frequently grant certiorari to similar cases.\[143\] For now, *Stone v. Graham* remains the Supreme Court's only word on the issue, and will remain so unless the Court overrules it in this coming term.\[144\] As long as the endorsement test remains the prevailing method of analysis for religious display cases, the circuit courts will be left to sort through the facts of each particular religious display and determine whether the display constitutes an endorsement of religion in violation of the Establishment Clause.\[145\]


\[139\] 259 F.3d 766, 768 (7th Cir. 2001) (affirming preliminary injunction to prevent constructing monument pending resolution of constitutionality issue, but declaring that result should be same), *cert. denied*, 534 U.S. 1162 (2002).


\[142\] See id. at 1059 (Rehnquist, J., dissenting) (joining Chief Justice Rehnquist in his dissent were Justices Scalia and Thomas).

\[143\] See, e.g., FOXNEWS.COM, *High Court to Decide Ten Commandments Issue* (Oct. 12, 2004), at http://www.foxnews.com/printer_friendly_story/0,3566,135165,00.html (noting "justices have repeatedly refused to get involved in Ten Commandments disputes," with "only three conservative justices complain[ing]" about that refusal).

\[144\] See, e.g., Gregory M. Bartlett, *Displaying the Ten Commandments on Public Property: The Kentucky Experience: Wasn't It Written in Stone?*, 30 N. Ky. L. Rev. 163, 187 (2003) (declaring that *Stone* remains controlling precedent in cases involving public displays of Ten Commandments). The Court is set to decide the two Ten Commandments display cases in June, 2005. See Gibson, supra note 8, at 1A (noting that Court will hear arguments in February, 2005 and issue opinion in June, 2005).

\[145\] For a discussion of the endorsement test as the preferred analysis for public religious displays, see supra notes 49-82 and accompanying text.
C. Other Circuits’ Recent Confrontations with Religious Display Cases

Other circuit courts have addressed recent challenges to religious displays.\(^ {146} \) For example, in November 2003, the Fifth Circuit declared that a forty-two-year-old monument of the Ten Commandments on the grounds of a state capitol building did not amount to government endorsement of religion.\(^ {147} \) The Fifth Circuit cited *Freethought Society* to highlight the monument’s historical importance; the Supreme Court has recently granted certiorari to decide this issue.\(^ {148} \) In that same year, the Sixth Circuit reached a different conclusion, finding Ten Commandments displays in two county courthouses and one public school building unconstitutional; the Supreme Court granted certiorari to this case as well.\(^ {149} \) The Eighth Circuit, in a 2004 opinion that distinguished *Freethought Society*, held a Ten Commandments monument in a public park unconstitutional because the government actively maintained the monument and it had no historical

---


147. See *Van Orden*, 351 F.3d at 182 (finding that display of Moses with Ten Commandments did not violate Establishment Clause).

148. See id. at 181–82 (noting that “history matters here” and that history supports finding of secular purpose; citing *Freethought Society*). For a discussion of the Court’s decision to grant certiorari, see *supra* notes 134–37 and accompanying text.

149. See *McCreary*, 354 F.3d at 441–42 (describing displays). For a discussion of the Court’s decision to grant certiorari, see *supra* notes 134–37 and accompanying text.
Finally, in the most controversial of these recent decisions, the Eleventh Circuit rendered diverging opinions in two Establishment Clause cases. In May of 2003, the court upheld the use of a state seal containing Roman numerals I-X meant to symbolize the Ten Commandments. In late 2003, however, the Eleventh Circuit declared a two-and-one-half-ton monument of the Ten Commandments in a courthouse rotunda unconstitutional and distinguished *Freethought Society* in its holding. Although the circuits have rendered inconsistent opinions, all

150. See *Plattsmouth*, 358 F.3d at 1042 (finding Ten Commandments monument unconstitutional). The Eighth Circuit focused on a few key factors, namely that the city did not have a secular purpose in accepting and erecting the plaque, the city maintained the plaque and the surroundings did not secularize the religious message of the Ten Commandments. See *id.* at 1035–41 (identifying factors). The Eighth Circuit used these factors to distinguish *Freethought Society* by noting that the City of Plattsmouth, unlike Chester County, actively maintained the monument. See *id.* at 1039 (noting maintenance). Moreover, the Plattsmouth monument was relatively new, thirty-five years old, and stood alone in the park with nothing to detract from its religiousness. See *id.* at 1039–40 (recounting age and location).


152. See *King*, 331 F.3d at 1286 (finding county seal constitutional). The court focused on four factors to reach this holding: (1) the use of the seal is limited to authentication of legal documents; (2) the seal contains a sword in addition to the tablet inscribed with Roman numerals I-X; (3) the seal is relatively small and is usually placed at the bottom or final page of the document; and (4) the actual text of the Ten Commandments is not displayed on the seal. See *id.* at 1283–86 (describing four factors). These factors made it unlikely that a reasonable observer would view the seal as a government endorsement of religion. See *id.* at 1286 (noting reasonable observer’s perspective). Moreover, the seal has been used for at least 130 years. See *id.* (noting duration of use).

153. See *Glassroth v. Moore*, 335 F.3d 1282, 1297 (11th Cir. 2003) (finding monument in rotunda of courthouse unconstitutional), cert. denied, No. 03-468, 2003 U.S. LEXIS 7973, at *1* (Nov. 3, 2004). This case is notable for its shock value because the Chief Justice of the Alabama Supreme Court erected the monument with his own funds after being elected on a platform “to restore the moral foundation of law.” See *id.* at 1285 (describing election platform and noting that erection of monument fulfilled campaign promise). In fact, Chief Justice Moore was known as the “Ten Commandments Judge” throughout his campaign. See *id.* (noting nickname). The plaintiffs were three practicing attorneys forced to face the monument every time they entered the courthouse. See *id.* at 1288 (identifying plaintiffs). The Eleventh Circuit distinguished its holding in *Glassroth* from the Third Circuit’s opinion in *Freethought Society*. See *id.* at 1299–1300 (distinguishing cases). The Eleventh Circuit determined that the brand-new monument that Chief Justice Moore constructed had no historical significance, unlike the plaque in *Freethought Society*. See *id.* (noting monument’s lack of historical importance). Moreover, Chief Justice Moore specially designed the monument for display in the courthouse rotunda, whereas Chester County did not maintain the plaque. See *id.* (noting that Alabama Chief Justice highlighted monument).
have applied the law consistently to evaluate each specific display within its respective history and context as the Supreme Court's jurisprudence requires. 154

V. Conclusion

The decision in Freethought Society instructs practitioners litigating Establishment Clause issues in the Third Circuit that certain key factors may be necessary to a successful litigation strategy. 155 For example, the court focused on the history and overall context in which the government displayed the religious symbol. 156 The court assumed the reasonable observer had the requisite knowledge of that history and context. 157 Hence, a plaque with a long history is more likely to survive scrutiny. 158 Moreover, although the inclusion of other secular symbols within the religious display diluted the religiosity of the plaque in Freethought Society, such inclusion will not necessarily remove the purpose or effect of government endorsement in all instances. 159

Litigators should focus on the aforementioned factors, being as fact-specific as possible in presenting their cases. 160 The endorsement test appears to be the Third Circuit's preferred analysis and should constitute the primary argument for religious display cases brought under that court's

154. For a discussion of the circuit courts' opinions and their reliance on history and context, see supra notes 146–53 and accompanying text.

155. For a discussion of important litigation factors, see infra notes 156–66 and accompanying text.

156. For a discussion of the Third Circuit's focus on history and context in Freethought Society, see supra notes 103–16 and accompanying text.

157. For the Third Circuit's description of the reasonable observer in Freethought Society, see supra note 107 and accompanying text.

158. For a discussion of the Third Circuit's reliance on the plaque's age in Freethought Society, see supra notes 114–15 and accompanying text.

159. For a discussion of the Third Circuit's reliance on the plaque's age in Freethought Society, see supra notes 95–97 and accompanying text.

160. For a discussion of the fact-specific inquiry in Freethought Society, see supra notes 103–20 and accompanying text. For a discussion of the importance of factual inquiries in the case-by-case approach required to apply the endorsement test to Establishment Clause challenges in general, see supra notes 62–72 and accompanying text. Litigators should also focus on the threshold issue of standing, which is important in Establishment Clause challenges of public displays because the plaintiffs' injuries are usually non-economic. See, e.g., Valley Forge Christian Ass'n v. Ams. United for Separation of Church and State, 454 U.S. 464, 485 (1982) (stating that plaintiffs must show some injury other than "the psychological consequence presumably produced by the observation of conduct with which one disagrees"). There are, however, instances where plaintiffs challenging public religious displays suffer economic injuries. See, e.g., Glassroth v. Moore, 335 F.3d 1282, 1292 (11th Cir. 2003) (noting that plaintiff attorneys altered their behavior to avoid confronting Ten Commandments monument in courthouse's rotunda; for example, they paid to have documents delivered to courthouse by messenger, which constituted economic injury), cert. denied, No. 03-468, 2003 U.S. LEXIS 7973, at *1 (Nov. 3, 2004).
The Lemon test should also be argued in the alternative, however, bearing in mind the court's use of the endorsement test is the equivalent of Lemon's second prong.\textsuperscript{162}

Those challenging religious displays should look to the 2004 Eighth Circuit and 2003 Eleventh Circuit opinions, which distinguished \textit{Freethought Society} and found that two Ten Commandments displays violated the Establishment Clause.\textsuperscript{163} These circuits seized on the facts that each display's overall effect did not overshadow the religiosity of the Ten Commandments and that the display's historical importance was minimal, if it existed at all.\textsuperscript{164} Those defending against Establishment Clause challenges should focus on the display's history and overall secular context, as did the defendant county in \textit{Freethought Society}, arguing that context has secularized the religious object over time.\textsuperscript{165} Whatever one's personal stance is on the issue of government religious displays, the recent "Hang-Ten" movement is sure to fill the circuit courts' dockets with Establishment Clause cases, and the buck is likely to stop with the Third Circuit's decision in \textit{Freethought Society}, providing the final word in that circuit until the Supreme Court devises a new test with which to analyze religious public display cases.\textsuperscript{166}

\textit{Lauren A. Cates}

\textsuperscript{161} For a discussion of the Third Circuit's preference for the endorsement test in-religious display cases and as the primary analysis in \textit{Freethought Society}, see \textit{supra} notes 99–102, 106–16 and accompanying text.

\textsuperscript{162} For a discussion of the Third Circuit's application of the Lemon test as a cautionary measure, see \textit{supra} notes 117–20 and accompanying text.

\textsuperscript{163} See ACLU v. Plattsmouth, 358 F.3d 1020, 1042 (11th Cir. 2004) (finding that monument of Ten Commandments located in public park violated Establishment Clause); \textit{Glassroth}, 335 F.3d at 1297 (finding that monument of Ten Commandments violated Establishment Clause). For the Eighth Circuit's arguments distinguishing \textit{Freethought Society}, see \textit{supra} note 150 and accompanying text. For the Eleventh Circuit's arguments distinguishing \textit{Freethought Society}, see \textit{supra} notes 151–52 and accompanying text.

\textsuperscript{164} See Plattsmouth, 358 F.3d at 1036 (declaring "[n]othing in the monument's [surroundings] suggests its religious message might not be its raison d'etre"); \textit{id.} at 1039 (highlighting that thirty-five-year-old monument is no historical artifact); \textit{Glassroth}, 335 F.3d at 1297 (affirming district court's conclusion that monument creates "[an] overwhelmingly holy aura" in courthouse rotunda).

\textsuperscript{165} For a discussion of the Third Circuit's reliance on history and context in \textit{Freethought Society}, see \textit{supra} notes 103–20 and accompanying text.

\textsuperscript{166} For a discussion of the possible flood of litigation from the "Hang-Ten" movement, see \textit{supra} notes 131–32 and accompanying text. For a discussion that the circuit courts may be the final arbiters of religious public display cases because the Supreme Court may not frequently grant certiorari to religious display cases, nor create a new test, see \textit{supra} notes 134–45 and accompanying text.