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Small Town Establishment of Religion in *ACLU of Nebraska Foundation v. City of Plattsmouth*, 419 F.3d 772 (8th Cir. 2005); *Eagles Soaring in the Eighth Circuit*

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* Keith T. Peters, B.A. 2002, Cedarville University; J.D. expected May 2006, University of Nebraska College of Law (NEBRASKA LAW REVIEW, Articles Editor, 2005). Thank you to my beloved wife Karin for her love and unending support; my parents for their commitment to the Author of the Decalogue; Professor Richard Duncan for his helpful discussions and insight into this subject; Jefferson Downing for allowing me access to many of the original documents cited herein; Austin McKillip, Michael Kuhn, and Tracy McKay for their helpful insight and advice.
The Ten Commandments, often referred to as the Decalogue, and several other religious symbols are inscribed on the face of the challenged monument. Long ago, there was no doubt that the Ten Commandments were given to establish a religious form of government. The Ten Commandments are a Near East suzerain-vassel treaty between Yahweh and the Nation of Israel. They can be understood as the Constitution of Israel as well as a basis for its criminal law code, and “although [the parameters of] certain crimes were expanded and

3. 419 F.3d 772 (8th Cir. 2005).
5. “Decalogue” is the English translation of the Greek word dekalogos. New SHORTER OXFORD ENGLISH DICTIONARY 605 (4th ed. 1993). It is used to refer to the Ten Commandments, since deka means “ten” and logos means “speech.” Id.
6. Plattsmouth II, 419 F.3d at 773.
8. ANTHONY PHILLIPS, ANCIENT ISRAEL'S CRIMINAL LAW: A NEW APPROACH TO THE DECALOGUE 6 (1970). A suzerain–vassel treaty was a treaty between a king (suzerain) and his subjects (vassels). In a typical treaty, a vassal, because of “certain historical events enumerated in the prologue of the treaty, bound himself in absolute obedience to the Hittite king, but was left free to determine his state’s internal affairs. While it was presupposed that the Hittite king would give to the vassal his protection, no specific obligations were laid upon him, and he was not a ‘party’ to the treaty.” Id. at 3.
reinterpreted, no new crimes were added to her law . . . .”9 Plattsmouth's monument proclaims a message similar to that which Moses brought down from Mount Sinai, as well as an inscription denoting who erected that particular monument:

the Ten Commandments
I AM the LORD thy God.
Thou shalt have no other gods before me.
Thou shalt not make to thyself any graven image.
Thou shalt not take the Name of the Lord thy God in vain.
Remember the Sabbath day to keep it holy.
Honor thy father and thy mother that thy days may be long upon the land which the Lord thy God giveth thee.
Thou shalt not kill.
Thou shalt not commit adultery.
Thou shalt not steal.
Thou shalt not bear false witness against thy neighbor.
Thou shalt not covet thy neighbor's house.
Thou shalt not covet thy neighbor's wife nor his manservant nor his maidservant, nor his cattle nor anything that is thy neighbor's.

PRESENTED TO THE CITY OF PLATTSMOUTH, NEBRASKA BY FRATERNAL ORDER OF EAGLES PLATTSMOUTH AERIE NO. 365–1965.10

The text of the monument and the organization which donated it are at the center of many lawsuits around the county. The Fraternal Order of Eagles ("Eagles")11 donated scores12 of these granite monu-

9. Id. at 10.
11. The Fraternal Order of Eagles was founded in Seattle, Washington in 1898 and maintains its headquarters in Milwaukee, Wisconsin. The Eagles have about 800,000 members and an additional 350,000 members of its women's auxiliary in over 1,800 aeries (local chapters) across the United States and Canada. Nebraska and Iowa have forty-three and forty aeries respectively. Todd Von Kampen, Plattsmouth Sued To Remove Marker ACLU Nebraska follows up its 6-month-old promise to take the city to court over the Ten Commandments, OMAHA WORLD-HERALD, May 18, 2001, at A19. For additional information about the Eagles, see the website of the Fraternal Order of the Eagles International, http://www.foe.com (last visited Feb. 14, 2006).
12. In the panel opinion, the majority concluded that the Eagles donated "scores" of monuments. Plattsmouth, 358 F.3d at 1025. The dissent concluded that there were “thousands.” Id. at 1046 (Bowman, J., dissenting). In another Eagles monument case, the court found that "Cecil B. DeMille distributed some 5,500 stone copies" of the Decalogue. Chambers v. City of Frederick, 373 F. Supp. 2d 567, 569 (D. Md. 2005). The national Eagles' organization does not know how many monu-
ments to towns, cities, and states across the United States during the 1950s and 1960s. The monuments were then erected on public property. The municipalities and states that received these monuments as gifts now face allegations by the ACLU and similar organizations that the monuments violate the United States Constitution's Establishment Clause. The current debate surrounding the Eagles' monuments involves whether a government body's display of the Decalogue purports to establish a religion or religious form of government, or whether the monument is displayed as a history lesson in the foundation of the laws of American government or as a permanent "thank you" to the Eagles.

The Plattsmouth monument's message and location have spawned a lengthy legal battle. On May 17, 2001, the ACLU and local plaintiff John Doe sued the city to remove the monument. Nebraska District Court granted a motion on May 17, 2001 by plaintiff ACLU Nebraska and plaintiff John Doe for an order allowing the use of a pseudonym. See Docket Proceedings at A-1, ACLU Neb. Found. v. City of Plattsmouth, 186 F. Supp. 2d 1024 (D. Neb. 2002) (on file with the NEBRASKA LAW REVIEW) [hereinafter Docket Proceedings]. On September 21, 2004, United States District Court Judge Richard Kopf heard arguments on a lawsuit filed by the ACLU on behalf of Doe seeking to prohibit the Omaha World-Herald from publishing his true identity. Apparently the "cat already [was] out of the bag" on Doe's true identity. According to several exhibits provided by the World-Herald, Doe trumpeted his religious beliefs and publicly indicated he was the person behind the lawsuit. Judge Kopf ruled that the newspaper could publish Doe's identity, partly because the United

13. Plattsmouth, 358 F.3d at 1025.

14. See, e.g., Indiana Civil Liberties Union v. O'Bannon, 259 F.3d 766, 768 (7th Cir. 2001) (upholding an injunction prohibiting the defendant from placing a Ten Commandments monument on the grounds of the Indiana state capitol); Chambers, 373 F. Supp. 2d at 573 (holding that the city's sale of a parcel of land which contained an Eagles monument to the Fraternal Order of Eagles did not violate the Establishment Clause); Mercier v. City of La Crosse, 305 F. Supp. 2d 999, 1011 (W.D. Wis. 2004), rev'd, 395 F.3d 693, 705-06 (7th Cir. 2005) (holding that the city's sale of a parcel of land on which an Eagles monument stood did not violate the Establishment Clause), en banc reh'g denied, Nos. 04-1321 & 04-1524, 2005 U.S. App. LEXIS 3480 (7th Cir. Feb. 28, 2005); Kimbley v. Lawrence County, 119 F. Supp. 2d 856, 858 (S.D. Ind. 2000) (holding that a Ten Commandments monument displayed on the grounds of the Lawrence County Courthouse violated the Establishment Clause). In Everett, Washington, a twenty-one-year-old resident sued to remove an Eagles monument standing in front of Everett's police headquarters. Rachel Tuinstra, Constitutionality Debated in Suit Over Monument, SEATTLE TIMES, Oct. 6, 2004, at B4.

15. The district court granted a motion on May 17, 2001 by plaintiff ACLU Nebraska and plaintiff John Doe for an order allowing the use of a pseudonym. See Docket Proceedings at A-1, ACLU Neb. Found. v. City of Plattsmouth, 186 F. Supp. 2d 1024 (D. Neb. 2002) (on file with the NEBRASKA LAW REVIEW) [hereinafter Docket Proceedings]. On September 21, 2004, United States District Court Judge Richard Kopf heard arguments on a lawsuit filed by the ACLU on behalf of Doe seeking to prohibit the Omaha World-Herald from publishing his true identity. Apparently the "cat already [was] out of the bag" on Doe's true identity. According to several exhibits provided by the World-Herald, Doe trumpeted his religious beliefs and publicly indicated he was the person behind the lawsuit. Judge Kopf ruled that the newspaper could publish Doe's identity, partly because the United
district Court Judge Richard G. Kopf, relying largely on the Supreme Court opinion in Stone v. Graham, ruled that the monument had the unconstitutional effect of endorsing religion and granted summary judgment for the plaintiffs. The city appealed and a three judge panel of the Eighth Circuit Court of Appeals ruled two to one that the monument had the unconstitutional purpose and effect of establishing religion. The Eighth Circuit granted the city's petition for rehearing and the court of appeals, sitting en banc, heard oral argument on September 15, 2004. Before the Eighth Circuit could release its opinion, the United States Supreme Court granted certiorari in two similar cases involving the Ten Commandments: Van Orden v. Perry and McCreary County v. ACLU. The Eighth Circuit delayed its decision until after the Supreme Court ruled in Van Orden v. Perry and McCreary County v. ACLU on June 27, 2005.

Volumes could be written on the mountain of Establishment Clause jurisprudence. Therefore, this Note will examine the Eighth Circuit Court of Appeals' decision in Plattsmouth II in light of other cases which involved Eagles Ten Commandments monuments. This Note presents three assertions: first, the Eighth Circuit properly applied the Supreme Court's opinion in Van Orden and allowed Plattsmouth to keep its monument; second, Plattsmouth's monument should remain even under the Court's current analysis, first asserted in Lemon v. Kurtzman; and finally, the Supreme Court should interpret the Establishment Clause to allow all of the Eagles' monuments to remain on public property. In order to better understand the rocky

States Supreme Court has never upheld a court order restricting a newspaper prior to publication. See Todd Cooper, Paper May Print Name in Commandments Case, Judge Says, OMAHA WORLD-HERALD, Sept. 22, 2004, at B1.


17. 449 U.S. 39 (1980) (per curiam). The Supreme Court found that a Kentucky statute requiring public schools to post the Ten Commandments had "no secular legislative purpose" and was therefore unconstitutional despite Kentucky's attempt to articulate a secular purpose. Id. at 41. The Court continues to "distinguish a sham secular purpose from a sincere one" when evaluating an Establishment Clause challenge. See Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308 (2000).


22. Michael Gans, clerk of the Eighth Circuit Court of Appeals in St. Louis, predicted that the en banc panel would delay its opinion. John Ferak, Court Takes Up Religious Monuments; Texas, Kentucky Cases Similar to Plattsmouth's, OMAHA WORLD-HERALD, Oct. 13, 2004, at A1. The Eighth Circuit waited for the Supreme Court's decisions because of similar facts involved in all cases.


terrain upon which the court climbed to evaluate the city's monument, section II.A provides a brief summary of the Supreme Court's Establishment Clause jurisprudence by focusing on its treatment of Ten Commandments monuments in Van Orden and McCreary County. Section II.B describes five appellate court opinions involving Ten Commandments monuments donated by the Eagles. Part III details the revelation detailed by the Eighth Circuit Court of Appeals in Plattsmouth II. Section IV.A concludes that the Eighth Circuit made the correct decision and enumerates a four point test for future Eagles monuments. Section IV.B argues that Plattsmouth's monument also passes the Supreme Court's Lemon test and heighten “purpose” requirement under McCreary County. Section IV.C argues that the Supreme Court should categorically exempt Eagles monuments from typical Establishment Clause analysis. Finally, Part V will summarize the questions resolved and the questions that remain for the Eagles' Ten Commandments monuments in the Eighth Circuit and the United States.

II. THE SUPREME COURT'S MOST RECENT ESTABLISHMENT CLAUSE JURISPRUDENCE AND A SURVEY OF SIMILARLY SITUATED MONUMENTS

The United States Supreme Court's Establishment Clause jurisprudence is criticized, even by its own members, for inconsistently applying tests and reaching inconsistent results.\(^26\) The Supreme Court has refused to apply one single test to interpret the Establishment Clause, instead using different tests in Lemon v. Kurtzman [hereinafter the “Lemon test”],\(^27\) Larson v. Valente,\(^28\) Marsh v. Chambers,\(^29\)

\(^{26}\) See, e.g., County of Allegheny v. ACLU, 492 U.S. 573, 665–66 n.4 (1989) (Kennedy, J., dissenting) (arguing that the majority's basis for resolving the instant case is inconsistent with the approach established in recent Supreme Court precedent).

\(^{27}\) 403 U.S. 602 (1971). The principles annunciated in this opinion have widely become known as the Lemon test. See, e.g., Larson v. Valente, 456 U.S. 228, 237 n.10 (1982) (referring to the test announced in Lemon as the "Lemon test"). Significant modifications of this test have occurred since its first declaration. See, e.g., Allegheny, 492 U.S. at 665–66.

\(^{28}\) 456 U.S. 228 (1982).

\(^{29}\) 463 U.S. 783 (1983). Some have suggested that Marsh play a larger role in Establishment Clause jurisprudence. See Ashley M. Bell, Comment, “God Save This Honorable Court": How Current Establishment Clause Jurisprudence Can Be Reconciled With the Secularization of Historical Religious Expressions, 50 Am. L. Rev. 1273 (2001). However, the Supreme Court rejected the opportunity to expand the principles of Marsh in Allegheny. There, the Court noted, “Marsh plainly does not stand for the sweeping proposition... that all accepted practices 200 years old and their equivalents are constitutional today.” Allegheny, 492 U.S. at 603–04.
and Lee v. Weisman. The Supreme Court’s recent decisions in Van Orden v. Perry and McCreary County v. ACLU further emphasize that the Supreme Court will evaluate a religious display based on the facts and circumstances of each case. However, the Court’s decisions in Van Orden and McCreary County provide the background with which the Eighth Circuit evaluated the Plattsmouth monument. Therefore, this Note will briefly discuss the reasoning and holding of each opinion in turn.

A. Fresh Interpretation from Van Orden v. Perry and McCreary County v. ACLU; Fog on the Mountain

Since the dedication of its state capitol on May 16, 1888, the State of Texas has allowed seventeen monuments to be placed on its twenty-two acre grounds. In 1961, by joint resolution of the Texas House and Senate, the legislature accepted a Ten Commandments monument from the Eagles. The legislative records did not reveal Texas's purpose in erecting the monument. The state selected a site for the

30. 505 U.S. 577, 592 (1992) (holding an invocation at a high school graduation ceremony exerted “coercive pressure” on students to participate, contrary to the Establishment Clause).
33. The Court allowed one Ten Commandments display to remain but removed two others. However, time will probably reveal that supporters of the Ten Commandments benefited most from the Court's opinions. McCreary County removed only two Ten Commandments displays based on a subjective analysis of the counties’ purpose. See McCreary County, 125 S. Ct. at 2745. Van Orden will likely allow thousands of Ten Commandments displays to remain because of its broad language. See generally Van Orden, 125 S. Ct. 2854.
36. Because of the lack of legislative records, the parties in Van Orden tried the case on stipulated facts. Those facts were as follows:

1. [T]he sparse legislative history “contain[s] no record of any discussion about the monument, or the reasons for its acceptance, and is comprised entirely of House and Senate Journal entries”; (2) the State selected the site on the recommendation of the Building Engineering and Management Division of the State Board of Control; (3) the expenses “were borne exclusively by the Eagles”; (4) the monument requires virtually no maintenance; and (5) the dedication of the monument was presided over by Senator Bruce Reagan and Representative Will Smith. There is no official record that any other person participated.

Id.
monument and two legislators presided over its dedication, but the Eagles paid for the monument to be installed.\textsuperscript{37} The monument stood unmoved except for a 1993 decision by the State Preservation Board to reorient the monument to place it in a direct line between the legislative chambers, the state supreme court building, and the governor's executive office.\textsuperscript{38}

Beginning in 1995, Thomas Van Orden frequently encountered the monument while visiting the law library in the supreme court building, which is located northwest of the capitol grounds.\textsuperscript{39} Van Orden graduated from Southern Methodist University Law School and was, at one time, a licensed attorney.\textsuperscript{40} In 2001, Van Orden sued numerous state officials to remove the monument. After a bench trial, the court found that the state had a secular purpose for displaying the monument and that the reasonable observer would conclude that the passive monument did not endorse religion.\textsuperscript{41} On appeal, the Fifth Circuit Court of Appeals affirmed.\textsuperscript{42}

On June 27, 2005, a divided Supreme Court, whose members wrote a total of seven opinions, affirmed the judgment of the Fifth Circuit. Chief Justice Rehnquist wrote the plurality opinion\textsuperscript{43} which Justices Scalia,\textsuperscript{44} Kennedy, and Thomas\textsuperscript{45} joined. Justice Breyer concurred in the judgment.\textsuperscript{46} Justices Souter, Stevens, Ginsburg, and O'Connor

\begin{itemize}
\item \textsuperscript{37} Van Orden, 125 S. Ct. at 2858 (plurality opinion).
\item \textsuperscript{38} Van Orden, 351 F.3d at 181. The uncontroverted testimony of the board's executive director "explained that the Decalogue's location was carefully chosen by the Board's professional staff to reflect the role of the Commandments in the making of law." Id. This fact was omitted in the Supreme Court's plurality opinion. See generally Van Orden, 125 S. Ct. 2854.
\item \textsuperscript{39} Van Orden, 125 S. Ct. at 2858 (plurality opinion).
\item \textsuperscript{40} Id.
\item \textsuperscript{41} Id. at 2858–59. The District Court applied the Lemon test: "[f]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) (citations omitted).
\item \textsuperscript{42} Van Orden, 351 F.3d at 175.
\item \textsuperscript{43} Van Orden, 125 S. Ct. at 2858 (plurality opinion).
\item \textsuperscript{44} Justice Scalia filed a concurring opinion stating that the Court should adopt a consistent method of Establishment Clause jurisprudence based on the principle that "there is nothing unconstitutional in a State's favoring religion generally, honoring God through public prayer and acknowledgment, or, in a nonproselytizing manner, venerating the Ten Commandments." Id. at 2864 (Scalia, J., concurring).
\item \textsuperscript{45} Justice Thomas filed a concurring opinion in which he argued that the Court should return to the original meaning of the Establishment Clause, reverse prior holdings that incorporated the Establishment Clause under the Fourteenth Amendment's Due Process Clause, and analyze violations of the Establishment Clause depending on whether the activity placed the claimant under undue coercion. See id. at 2864–68 (Thomas, J., concurring).
\item \textsuperscript{46} Id. at 2868 (Breyer, J., concurring).
\end{itemize}
wrote a total of three dissenting opinions. In order to best understand the current interpretation of the Establishment Clause under *Van Orden*, this Note will consider the plurality opinion and Justice Breyer's concurring opinion.

The plurality opinion first discussed the "two faces" of the Court's Establishment Clause jurisprudence and then analyzed the display according to "the nature of the monument and... our Nation's history." The faces are oriented in opposite directions: the first face examined the "strong role played by religion and religious traditions throughout our Nation's history," while the second face "looked[] toward the principle that governmental intervention in religious matters can itself endanger religious freedom." To the plurality, these two faces represented the Court's dual responsibilities to articulate the contours of the Establishment Clause in order to uphold both and offend neither. However, no member of the Court could blindly look only through the eyes of the second face and conclude that the Establishment Clause prohibited "all governmental acknowledgments, preferences, or accommodations of religion..." The plurality ignored the *Lemon* test because the test's factors were "no more than helpful signposts," many of the Court's recent Establishment Clause cases did not apply *Lemon*, and it was "not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds.”

47. Justice Stevens filed a dissenting opinion, which Justice Ginsburg joined. *Id.* at 2873 (Stevens, J., dissenting). Justice O'Connor filed a dissenting opinion. *Id.* at 2891 (O'Connor, J., dissenting). Justice Souter filed a dissenting opinion, which Justices Ginsburg and Stevens joined. *Id.* at 2892 (Souter, J., dissenting). The discussion of these dissenting opinions is omitted because the principles discussed in these opinions are generally explained in Justice Souter's opinion in *McCreary County*. See generally *McCreary County v. ACLU*, 125 S. Ct. 2722 (2005).

48. *Van Orden*, 125 S. Ct. at 2860 (plurality opinion).

49. *Id.* at 2861.

50. *Id.* at 2859.

51. *Id.*

52. *Id.* ("Reconciling these two faces requires that we neither abdicate our responsibility to maintain a division between church and state nor evince a hostility to religion by disabling the government from in some ways recognizing our religious heritage...").

53. *Id.*

54. *Id.* at 2860 n.3 (citing *id.* at 2876 (Stevens, J., dissenting) (recognizing that the Establishment Clause permits some governmental "recognition" or "acknowledgment" of religion); *id.* at 2894 n.4 (Souter, J., dissenting) (discussing a number of permissible displays with religious content)).

55. *Id.* at 2861 (quoting *Hunt v. McNair*, 413 U.S. 734, 741 (1923)).

56. *Id.* (citing *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Good New Club v. Milford Cent. Sch.*., 533 U.S. 98 (2001)).

57. *Id.*
After rejecting *Lemon*, the plurality turned its analysis to the "nature of the monument and ... our nation's history." The plurality concluded that the nation's history contained an "unbroken ... official acknowledgment by all three branches of government of the role of religion in American life from at least 1789," that our nation's buildings contain many depictions and sculptures of the Ten Commandments, and that the Court's opinions recognized the Decalogue's role in society.

The plurality concluded that, in certain cases, this history permitted a monument with obvious religious significance because displays that simply have religious content or a message consistent with a religious doctrine do not automatically violate the Establishment Clause. The plurality seemed to suggest that it could not look only into the first face and disregard the purpose and context in which the religious message is communicated. The plurality observed that the Court's decisions in *Stone v. Graham* and *Edwards v. Aguillard*, were examples of a context—public schools—where the Court has "been particularly vigilant in monitoring compliance with the Establishment Clause . . . ." The plurality cited *Stone* as an example where the government's "pre-eminent purpose" was "plainly religious" and therefore contrary to the Establishment Clause. The plurality concluded that there was no evidence in the record by which it could conclude that Texas had a religious purpose and the context of the monument on the state capitol grounds, coupled with its passive use of

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58. Although the plurality dismissed a point-by-point analysis of *Lemon*, it did consider the state's purpose in erecting the monument, see id. at 2864 n.11, and the context in which the monument was placed, see id. These two analyses are similar to the first two prongs of the *Lemon* test. See supra note 41 and accompanying text.

59. *Van Orden*, 125 S. Ct. at 2861 (plurality opinion).

60. *Id.* (quoting *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984)).

61. *Id.* at 2862–63. The plurality noted that the Supreme Court's own courtroom contains several depictions of the Ten Commandments. Furthermore, the plurality found that the Decalogue was visible in the United States Capitol, on the floor of the National Archives, Inside the Department of Justice, on the front of the Ronald Reagan Building that houses the Court of Appeals and District Court for the District of Columbia, and in the Chamber of the United States House of Representatives. *Id.*

62. *Id.* at 2863 (citing *McGowan v. Maryland*, 366 U.S. 420, 442 (1961); *id.* at 462 (Frankfurter, J., concurring)).

63. *Id.*


67. *Id.* at 2864 n.11 (quoting *Stone*, 449 U.S. at 41). The plurality did not consider a situation where a monument was placed with a primarily religious purpose. *Id.*
the Ten Commandments, did not run afoul of the Establishment Clause.68

In his concurring opinion, Justice Breyer relied heavily on a concurring opinion by Justice Goldberg in School District of Abington Township v. Schempp.69 Justice Breyer found "that there is no simple and clear measure which by precise application can readily and invariably demark the permissible from the impermissible."70 Rather, Justice Breyer determined that one should look to the underlying purposes of the Establishment and Free Exercise71 Clauses. Justice Breyer argued that for the government to follow the principles of both clauses, it must "avoid excessive interference with, or promotion of the religious" but also must not "purge from the public sphere all that in any way partakes of religion."72 In this pursuit, Justice Breyer concluded that "one will inevitably find difficult borderline cases" where there would be no "test-related substitute for the exercise of legal judgment."73 Justice Breyer's exercise of legal judgment sought to remain true to the underlying purposes of the "Religion Clauses," take into account the context of the display, and consider the consequences of the Court's decision in light of the purposes of the Clauses.74

Because Justice Breyer determined Van Orden presented a borderline case, he exercised his "legal judgment."75 Justice Breyer considered the monument's use of a religious text and determined that the circumstances surrounding the monument's installation suggested that Texas intended the non-religious aspects of the monument to dominate.76 The circumstances surrounding the Eagles' choice to donate the monument, as well as the other historical monuments in the area, led Justice Breyer to believe that the state predominately intended the monument to portray moral and historical messages.77 Justice Breyer noted that the forty-year presence of the monument meant that the public considered the monument part of the state's broader moral and historical heritage.78 Furthermore, Justice Breyer feared that a contrary decision would "lead the law to exhibit a hostil-

68. Id. at 2864. As an example of the monument's passive display of the Decalogue the plurality pointed out that the petitioner "apparently walked by the monument for a number of years before bringing this lawsuit." Id.
69. 374 U.S. 203, 305 (1963) (Goldberg, J., concurring).
70. Van Orden, 125 S. Ct. at 2868 (Breyer, J., concurring) (quoting Schempp, 374 U.S. at 306 (Goldberg, J., concurring)).
71. U.S. CONST. amend. I ("Congress shall make no law ... prohibiting the free exercise [of religion].").
72. Van Orden, 125 S. Ct. at 2868 (Breyer, J., concurring).
73. Id. at 2869.
74. Id.
75. Id.
76. Id. at 2869–70.
77. Id. at 2870.
78. Id.
ity toward religion that has no place in our Establishment Clause tra-
ditions." 879 Finally, Justice Breyer concluded that the monument was
not even the beginning of a slippery slope toward a state-established
religion. 880

The Supreme Court released McCreary County on the same day as
Van Orden but the decision and reasoning therein show a different
view of the mountain. In McCreary County, a five to four majority of
the Court determined that the counties 881 had an unconstitutionally
religious purpose for posting the Ten Commandments and the dis-
plays were therefore unconstitutional. 882 In the summer of 1999, Mc-
Creary County and Pulaski County, Kentucky, posted a gold-framed
copy of the King James Version of the Ten Commandments in their
respective courthouses. 883 The McCreary County legislative body
passed an ordinance which required the Decalogue be posted in a high
traffic area in the courthouse. Pulaski County held a ceremony where
the county judge–executive and his pastor hung the monument and
made several comments to the crowd concerning the Divine God and
the moral importance of the Ten Commandments. 884 In November
1999, the ACLU sued both counties for violation of the First Amend-
ment. 885 The United States District Court for the Eastern District of
Kentucky granted injunctions in both cases, but instead of taking
down the display, both counties passed resolutions which acknowl-
edged the religious foundations of Kentucky and added several other
religious references to the display. 886 The court granted the ACLU's
motions for an injunction against both counties, and the counties did
not pursue an appeal. Soon after, the counties posted a third display

79. Id. at 2871.
80. Id.
81. The Court chose to join the petitions of McCreary County and Pulaski County
together because both displayed the Ten Commandments in a similar fashion.
82. Id. at 2732.
83. Id. at 2728.
84. Id.
85. Id. at 2729.
86. Id. at 2729–30.

The documents were the “endowed by their Creator” passage from the
Declaration of Independence; the Preamble to the Constitution of Ken-
tucky; the national motto, “In God We Trust”; a page from the Congres-
sional Record of February 2, 1983, proclaiming the Year of the Bible and
including a statement of the Ten Commandments; a proclamation by
President Abraham Lincoln designating April 30, 1863, a National Day
of Prayer and Humiliation; an excerpt from President Lincoln’s “Reply to
Loyal Colored People of Baltimore upon Presentation of a Bible,” reading
that “[t]he Bible is the best gift God has ever given to man”; a proclama-
tion by President Reagan making 1983 the Year of the Bible; and the
Mayflower Compact.
Id. (citing ACLU v. McCreary County, 96 F. Supp. 2d 679, 684 (E.D. Ky. 2000);
ACLU v. Pulaski County, 96 F. Supp. 2d 691, 695–96 (E.D. Ky. 2000)).
and explained its purpose for the new version: "to educate the citizens of the county regarding some of the documents that played a significant role in the foundation of our system of law and government." The district court subsequently expanded the injunctions to include the third display, finding the display did not contain a secular purpose. After the Sixth Circuit Court of Appeals affirmed, the United States Supreme Court granted certiorari.

The Supreme Court examined the counties' actions under the first prong of the Lemon test and concluded that the monument lacked a secular purpose. The Court rejected the counties' argument that their true purpose was unknowable; rather, the Court stated that a government body will violate the purpose requirement when "openly available data supported a commonsense conclusion that a religious objective permeated the government's action." The Court then rejected the counties' ascribed purpose, holding that the evidence clearly indicated the counties had a religious purpose. The Court compared the counties' purported purposes with the purported purpose in Stone. After analyzing the counties' successive displays of the Decalogue, the Court concluded that the "[c]ounties were simply reaching for any way to keep a religious document on the walls of courthouses constitutionally required to embody religious neutrality." Therefore, the Court affirmed the judgment and required the counties to remove the displays.

B. Five Courts Rule on Eagles Monuments; Thou May and Thou Shalt Not Allow Eagles Ten Commandments Monuments

Monuments, such as the one in Plattsmouth's park, were distributed throughout the United States in the 1950s and 1960s. This section will consider cases where the ACLU or similar organizations challenged a government body's right to retain an Eagles monument

87. Id. at 2731.
88. ACLU v. McCreaery County, 354 F.3d 438 (6th Cir. 2003).
90. McCreaery County, 125 S. Ct. at 2732–33.
91. Justice Souter delivered the opinion of the Court, in which Justices Stevens, O'Connor, Ginsberg, and Breyer joined. Justice Scalia filed a dissent which was joined by Chief Justice Rehnquist and Justice Thomas. Justice Kennedy also joined parts II and III of the dissent. Id. at 2748. An analysis of the dissenting opinion is beyond the scope of this Note, but is discussed briefly infra section IV.B.
92. Id. at 2735.
93. Id. at 2737.
94. Id. at 2738 (citing Stone v. Graham, 449 U.S. 39 (1980) (per curiam)).
95. Id. at 2741.
96. See supra note 12.
on government property. These challenges have produced opinions from one state supreme court and four federal courts of appeals. The five opinions will be discussed in chronological order, focusing on facts that are comparable, distinguishable, or pertinent to Platts-mouth II's outcome.

In the early 1970s, the Tenth Circuit Court of Appeals heard the first challenge to an Eagles monument in Anderson v. Salt Lake City Corp. At first, the Board of Commissioners of Salt Lake City and Salt Lake County informally allowed the Eagles to place a monument on Salt Lake City property near the city–county courthouse. Sometime later, the city and county installed lighting, at their expense, to highlight the display. The plaintiffs sued to remove the monument as a violation of the Establishment Clause. The court first evaluated the monument under the Lemon test to determine the monument's primary purpose and effect. The court then reviewed other Establishment Clause cases which found the public display of several religious items to be constitutional. The court determined that the Ten Commandments had both religious and secular aspects and that both

97. This Note will not consider cases where the government body sold the monument to a private citizen or organization in order to avoid an Establishment Clause challenge. See generally Mercier v. Fraternal Order of Eagles, 395 F.3d 693 (7th Cir. 2005) (holding that the sale of a parcel of land which contained an Eagles monument to the Eagles did not violate the Establishment Clause); Chambers v. Fredrick, 373 F. Supp. 2d 567 (D. Md. 2005) (same).
99. The Fifth Circuit Court of Appeals also issued an opinion regarding an Eagles monument. Van Orden, 351 F.3d 173. This opinion is omitted in light of the subsequent Supreme Court opinion.
100. 475 F.2d 29 (10th Cir. 1973), cert. denied, 414 U.S. 879 (1973).
101. Id. at 30. The purpose of the monument was “to inspire all who pause to view them, with a renewed respect for the law of God, which is our greatest strength against the forces that threaten our way of life.” Id. Arguably, this monument would not be allowed to stand with this articulated purpose today. Although the Tenth Circuit did not overrule Anderson when it decided Summan, the panel declined to follow the reasoning or holding of Anderson. See supra notes 77–82 and accompanying text.
103. Id. at 32.
104. Id. at 32–33 (citing Paul v. Dade County, 202 So. 2d 833 (Fla. App. 1967), cert. denied, 207 So. 2d 690 (Fla. 1967), cert. denied, 390 U.S. 1041 (1968) (finding that the primary purpose of a string of lights on the side of a courthouse, in the form of a Latin Cross was for a seasonal display); Allen v. Morton, 333 F. Supp. 1088 (D.D.C. 1971) (finding that plaques installed on a crêche explaining the secular purpose and history of the pageant allowed the overall effect to be secular); Meyer v. Oklahoma, 496 F.2d 789 (Okla. 1972), cert. denied, 409 U.S. 980 (1972) (finding
were emphasized on the monument. The court concluded that it did
"not seem reasonable to require the removal of a passive monument, involving no compulsion, because its accepted precepts, as a foundation for law, reflect the religious nature of the ancient era."\(^{105}\) The court held that neither the purpose nor the effect of the monument tended to establish a religious form of government and allowed the monument to remain.

The Colorado Supreme Court, in *State v. Freedom From Religion Foundation, Inc.*,\(^{106}\) took the second opportunity to pass judgment on an Eagles monument. In 1955, the State of Colorado allowed a monument, slightly smaller than that in Plattsmouth’s park, to be placed on state grounds one block from the state capitol, in Lincoln Park.\(^{107}\) Not counting trees or other shrubs dedicated to state and national history, Lincoln Park also contained no less than eight statues or monuments—one as tall as forty-five feet high.\(^{108}\) The court’s statement of facts also provides the most detailed description of the Eagles’ purpose in donating the monuments, as declared by Judge E.J. Ruegemer, a Minnesota Juvenile Court Judge and Chair of the Eagles’ Youth Guidance Committee.\(^ {109}\) Judge Ruegemer wanted to place copies of the

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105. *Id.* at 33 (citing Erwin N. Griswold, *Absolute is in the Dark—A Discussion of the Approach of the Supreme Court to Constitutional Questions*, 8 *Utah L. Rev.* 167, 173–76 (1963)).


107. *Id.* at 1016. However, the writings, symbols and text of the monument are described to be the exact replica of the monument in Plattsmouth’s park. See *supra* note 6 and accompanying text.

108. The court also describes a large statue of a Native American and a buffalo; a monument to soldiers who served and died in the Civil War; a bench dedicated as a Pearl Harbor monument; seven Aspens planted in memory of the Challenger Astronauts; a forty-five foot tall Veterans War Memorial; a statue in tribute to J.P. Martinez; a World War II Hispanic Congressional Medal of Honor recipient, and other Coloradans of Hispanic descent; a replica of the Liberty Bell with a quote from *Leviticus*, “Proclaim liberty throughout the land and unto all inhabitants thereof”; and a flagpole honoring those who served in the military campaign known as the Spanish–American War. *Freedom From Religion Found.*, 898 P.2d at 1015–16.

109. The state produced an affidavit from Judge Ruegemer stating the purpose of the monuments. The court’s summary of Ruegemer’s affidavit is the most thorough and accurate statement of the Eagles’ purpose:

In 1943, a Minnesota juvenile court judge decided to address what he perceived as a need of many juveniles he had encountered in his court. Believing these juveniles were “without any code of conduct or standards by which to govern their actions,” the judge thought “they could benefit from exposure to one of mankind's earliest codes of conduct, the Ten Commandments.” He made clear, however that such exposure “was not to be a religious instruction of any kind.” The juvenile judge decided to post a copy of the Ten Commandments in state juvenile courts across the country as part of a nationwide youth guidance program. The judge was
Ten Commandments in public places to inform youth that there were standards to govern their actions.\textsuperscript{110} Near the time when the Youth Guidance Committee decided to distribute copies of the Ten Commandments, Hollywood Producer Cecil B. DeMille, producer of the movie \textit{The Ten Commandments}, contacted Judge Ruegemer and asked if the monuments could be distributed in connection with his movie release.\textsuperscript{111} DeMille played a significant role in the widespread distribution of the monuments and intended the monuments to be part of his advertising campaign.\textsuperscript{112}

The Colorado Supreme Court applied the \textit{Lemon} test\textsuperscript{113} and held that the content and the setting of the monument were sufficient to "neutralize its religious character resulting in neither an endorsement nor a disapproval of religion."\textsuperscript{114} In determining the state's purpose, the court distinguished \textit{Stone} and a federal district court holding in \textit{Ring v. Grand Forks Public School District No. 1},\textsuperscript{115} from the Tenth of the opinion that the commandments would demonstrate to the youths coming in contact with the juvenile courts that there were long "recognized codes of behavior to guide and help them."

As chair of the Youth Guidance Committee of the Fraternal Order of Eagles (the "Eagles"), the judge presented his idea to the Eagles for financial support. Initially the Eagles rejected the notion of sponsoring the National Youth Guidance Program because it was felt that such distribution "might seem coercive or sectarian." However, after representatives of the Jewish, Protestant, and Catholic faiths were able to develop a version of the Ten Commandments which was not identified with any particular religious group, the Eagles agreed to support such a youth program.

At the same time, the juvenile judge received a telephone call from motion picture producer Cecil B. DeMille, who was then producing the movie "The Ten Commandments." Mr. DeMille suggested distributing copies of the Ten Commandments to coincide with the release of the movie. As a promotion of his movie, no doubt, Mr. DeMille suggested that bronze plaques be produced with the Ten Commandments imprinted for distribution throughout the country. Because "the original Ten Commandments were on granite," the judge suggested and DeMille agreed that stone or granite tablets produced by local Minnesota granite companies would be "more suitable." Various local chapters or "aeries" of the Eagles paid for the stone monuments and donated them as part of the youth guidance program in several local and state governments, including Colorado.

\textit{Id.} at 1017 (citations omitted).

110. \textit{Id.}

111. \textit{Id.}

112. \textit{Id.}

113. The Colorado Supreme Court applied the \textit{Lemon} test as modified by the Supreme Court's decision in \textit{Allegheny}. \textit{Id.} at 1023.

114. \textit{Id.} at 1019.

115. 483 F. Supp. 272, 274 (D.N.D. 1980) (noting that when a statute requires public schools to post a copy of the Ten Commandments, "[t]here is not even a pretense of a secular purpose in the statute or in the defendants' compliance with the statute").
Circuit holding in *Anderson.* The court distinguished *Stone* and *Ring* because those cases considered state statutes which required public school classrooms to post copies of the Ten Commandments. The Colorado Supreme Court determined that Establishment Clause standards in schools "require a more stringent analysis because of the age of the minds affected, and because students are captive audiences, especially susceptible to influence." The court concluded that the monument did not have the effect of endorsing religion because of the other, much larger monuments in the vicinity. The court also held that the reasonable observer would note the immediate context of the monument—the many other displays and monuments in the area—and find the park was more of a "museum setting which, 'though not neutralizing the religious content of a religious [item], negates any message of endorsement of that content.'" The intent of the Eagles, coupled with the context of the message, allowed the Colorado monument to pass constitutional muster.

The Seventh Circuit Court of Appeals, in *Books v. City of Elkhart,* gave the third ruling on a monument donated by the Eagles. In May of 1958, the city of Elkhart, Indiana allowed a monument, slightly larger than that in Plattsmouth's park, to be placed on the lawn in front of the city's municipal building. The municipal building lawn also contained two war memorials. Almost forty years later, the plaintiffs sued to remove the monument as a violation of the First Amendment. The court first examined the monument's history and found that town representatives and three members of the clergy were present at the monument's dedication ceremony. The clergy challenged those in attendance to accept the Ten Commandments in order to participate.

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116. See supra notes 100–05.
118. Id. at 1025 (quoting Lynch v. Donnelly, 465 U.S. 668, 692 (1984)).
120. *Books,* 235 F.3d at 295–96.
121. Id. at 297.
122. Id. at 295 (citing THE ELKHART TRUTH, May 31, 1958, at 1). Reverend W.W. Kendall, outgoing president of the Elkhart Ministerial Association; Father William Gieranowski, assistant pastor of St. Vincent's Catholic Church; and Rabbi M.E. Finkelstein of Temple Israel each gave a brief challenge. Id.
to provide redemption from strife and fear, to engrave the Ten Com-
mandments upon their hearts, and to dedicate their lives to the high
ideals inherent in American life.123 Before trial, the city’s Common
Council passed a resolution stating that the structure was “a histori-
cal and cultural monument that reflects one of the earliest codes of
human conduct.”124

The Seventh Circuit found that the monument violated the first
and second prongs of the Lemon test.125 The court’s first finding fore-
shadowed its conclusion: “[a]s a starting point, we do not think it can
be said that the Ten Commandments, standing by themselves, can be
stripped of their religious, indeed sacred, significance and character-
ized as a moral or ethical document.”126 The court ignored the city’s
resolution and instead placed significance on the messages of the
three clergy who spoke at the monument’s dedication. The court
found that the city’s purpose was to “urge the people of Elkhart to
embrace the specific religious code of conduct taught in the Ten
Commandments.”127

The court also found that the reasonable observer would believe
that the monument had the principle or primary effect of advancing
religion because it was placed at the seat of government, the munici-
pal building.128 The monument was an impermissible endorsement of
religion “because City Hall is so plainly under government ownership
and control, every display and activity in the building is implicitly
marked with the stamp of government approval.”129 The religious
message at the dedication ceremony and placement of the monument
at the seat of government precipitated the Seventh Circuit’s holding
that the monument was unconstitutional.

The Tenth Circuit Court of Appeals heard the fourth objection to
an Eagles monument in Summum v. City of Ogden.130 In 1966, the
city allowed an Eagles monument, very similar to Plattsmouth’s, to be
placed on the lawn outside the city’s municipal building.131 The lawn
also contained a memorial to a police officer, a tree from a sister city,
and a plaque. Followers of the Summum religion132 sued the city, and

123. Id.
124. Id. at 297.
125. The Books court applied the Lemon test as modified by Allegheny and examined
whether the monument had the purpose or effect of endorsing religion. Id. at
302–04.
126. Id. at 302.
127. Id. at 303.
128. Id. at 306.
129. Id. at 305 (quoting Am. Jewish Cong. v. City of Chicago, 827 F.2d 120, 128 (7th
Cir. 1987)).
130. 297 F.3d 995 (10th Cir. 2002).
131. Id. at 997.
132. Before they brought suit to remove the Ten Commandments monument, follow-
ers of the Summum religion proposed adding their own monument bearing the
alleged the monument violated the Establishment Clause and the First Amendment’s Free Speech Clause.\textsuperscript{133} The district court applied the Tenth Circuit’s decision in \textit{Anderson}\textsuperscript{134} and granted summary judgment for the city on both claims.\textsuperscript{135} The plaintiffs appealed the decision. During oral argument before the court of appeals, the plaintiffs’ counsel conceded that, absent an en banc reconsideration of \textit{Anderson}, the Tenth Circuit panel could not reverse the district court ruling on the plaintiffs’ Establishment Clause claim. This concession prompted the court of appeals to ignore the plaintiffs’ Establishment Clause argument, although it indicated in a footnote that it would have considered that claim because of the Supreme Court’s decision in \textit{Stone} and the Tenth Circuit’s decision in \textit{Summum v. Callaghan}.\textsuperscript{136} The court then reversed the district court’s decision which granted summary judgment on the plaintiffs’ free speech claim.

The Sixth Circuit Court of Appeals, in \textit{Adland v. Russ},\textsuperscript{137} took the fifth opportunity to review the municipal display of an Eagles Ten Commandments monument. The Eagles donated the monument in the 1950s and it stood on the grounds of the Kentucky state capitol until 1980, when it was removed for the capitol’s renovation.\textsuperscript{138} On April 21, 2000, Governor Paul E. Patton signed into law Senate Joint Resolution Number 57 which directed the Department for Facilities Management:

\begin{quote}
[R]elocate the monument inscribed with the Ten Commandments which was displayed on the Capitol grounds for nearly three decades to a permanent site on the Capitol grounds near Kentucky's floral clock to be made part of a historical and cultural display including the display of this order to remind Kentuckians of the Biblical foundations of the laws of the Commonwealth.\textsuperscript{139}
\end{quote}

\begin{footnotes}
\item\textsuperscript{133} \textit{U.S. Const. amend. I} ("Congress shall make no law . . . abridging the freedom of speech . . . "). \textit{Summum} alleged that display of the Ten Commandments while refusing to display the Seven Principles of Summum monument violates Summum’s right to free speech. \textit{Summum}, 297 F.3d at 999.
\item\textsuperscript{134} See supra notes 100-05 and accompanying text.
\item\textsuperscript{135} The district court found that the city had adopted the speech of the various monuments on the municipal grounds as its own and adding a Summum monument would allow Summum to dictate the city’s expression. \textit{Summum}, 297 F.3d at 999.
\item\textsuperscript{136} 130 F.3d 906 (10th Cir. 1997) (finding that the plaintiffs had alleged facts sufficient to state claim under the Free Speech Clause and remanding for further proceedings). The court also indicated that it would have considered the plaintiffs’ claims even if \textit{Anderson} was still good law because each Establishment Clause case is decided upon its unique facts. \textit{Summum}, 297 F.3d at 1000 n.3.
\item\textsuperscript{137} 307 F.3d 471 (6th Cir. 2002), \textit{cert. denied}, 538 U.S. 999 (2003).
\item\textsuperscript{138} \textit{Id.} at 476.
\item\textsuperscript{139} \textit{Id.} at 474-75.
\end{footnotes}
The resolution's preamble included seventeen clauses reciting the Kentucky Senate's purposes in enacting the resolution.\textsuperscript{140} The cultural display was to include a thirty-four foot floral clock, the Eagles' monument, and seven other memorials, plaques, or markers to remember various historical events. Shortly after the resolution was signed, the plaintiffs\textsuperscript{141} sued to enjoin the state from erecting the monument.\textsuperscript{142} The district court found that the monument was unconstitutional under all three prongs of the \textit{Lemon} test.\textsuperscript{143}

On appeal, the Sixth Circuit evaluated the monument under the \textit{Lemon} test.\textsuperscript{144} The court, like the Seventh Circuit in \textit{Books}, quoted heavily from \textit{Stone} and concluded that the legislature's avowed purpose was insufficient, by itself, to satisfy the secular purpose requirement. The court then considered the language of the resolution and the intended physical context of the monument. The court found the language of the resolution impermissibly focused only on the Biblical foundations of Kentucky law: "[s]election 7 of the Resolution states that the Commonwealth considers the Ten Commandments 'to be the precedent legal code of the Commonwealth.'"\textsuperscript{145} The court also found that the monument's great stature in comparison to the other smaller markers suggested "that they are secondary in importance to the Ten Commandments . . . ."\textsuperscript{146}

\begin{itemize}
\item \textsuperscript{140} Id. at 476. Several of the clauses were dedicated to quotes from Samuel Adams, Fisher Ames, George Washington, Andrew Jackson, John Quincy Adams, Abigail Adams, Woodrow Wilson, and Jimmy Carter affirming their beliefs in God, the Bible, or Christianity. \textit{Id}.
\item \textsuperscript{141} "The named plaintiffs include Rabbi Jonathon Adland, Reverend Johanna Bos, Reverend James Greenlee, Reverend Gilbert Schroerlucke, Jeff Vessels, and the American Civil Liberties Union of Kentucky (ACLU)." \textit{Adland v. Russ}, 107 F. Supp. 2d 782, 784 (E.D. Ky. 2000).
\item \textsuperscript{142} Id. at 783.
\item \textsuperscript{143} Id. at 785–87.
\item \textsuperscript{144} \textit{Adland}, 307 F.3d at 479. The dissent argued that the claim was not ripe for adjudication because it did not satisfy any of the Sixth Circuit's requirements in \textit{Nat'l Rifle Ass'n of Am. v. Magau}, 132 F.3d 272, 284 (6th Cir. 1997): "[A] likelihood that the harm complained of will actually occur; that the record is sufficiently developed to make the case fit for judicial resolution; and that the parties will suffer hardship if relief is denied." \textit{Adland}, 307 F.3d at 492–94.
\item \textsuperscript{145} \textit{Adland}, 307 F.3d at 481 (quoting S.J. Res. 57, 2000 Reg. Sess. (Ky. 2000)). The court acknowledged that it has
\[N]either the desire nor the authority to resolve disputes about whether the Commonwealth's legal system owes more to the Magna Carta or the Code of Hammurabi than the Ten Commandments. But that said, in addressing the Commonwealth's avowed secular purpose for displaying an overtly religious symbol such as the Ten Commandments, we cannot ignore the Commonwealth's adoption of a view that emphasizes a single religious influence to the exclusion of all other religious and secular influences.
\item \textsuperscript{146} Id. at 481–82.
\item \textsuperscript{147} Id. at 482.
\end{itemize}
The Six Circuit also determined that the monument impermissibly endorsed religion to the objective observer. The court compared the monument to the religious displays in Allegheny and found that:

(1) the Commonwealth intends to display a document that is inherently religious; (2) the display will be on the grounds of the State Capitol; (3) the format of the monument emphasizes the Commandments' religious directives; (4) the Ten Commandments monument will be the largest monument in the display; (5) the intended "cultural and historical display" set forth in Section 8 lacks a readily discernable unifying theme; and, (6) the Resolution, which will be posted with the monument, tends to amplify the religious message . . . .

The Sixth Circuit then affirmed the district court ruling because the monument violated the purpose and effects prongs of the Lemon test.

III. ACLU OF NEBRASKA FOUNDATION v. CITY OF PLATTSMOUTH

From this mountain of Establishment Clause jurisprudence, the Eighth Circuit, en banc, considered another Eagles monument in ACLU of Nebraska Foundation v. City of Plattsmouth (Plattsmouth II). The ACLU Nebraska Foundation and John Doe, a resident of Plattsmouth, alleged that the city's display of a Ten Commandments monument violated the Establishment Clause. The text of the Ten Commandments dominates the face of the approximately five-foot tall by three-foot wide granite structure. Above the text are two small tablets with the Ten Commandments engraved in Semitic script, an eye within a triangle, and an eagle gripping a flag. Below the text are two six-point stars, the intertwined symbols of chi and rho, and a small round scroll recognizing the monument as a gift from the Plattsmouth Aerie.

The monument stands in Memorial Park, the city's largest public park, more than ten blocks away from Plattsmouth City Hall. The monument stands under a large tree in the corner of the park several

147. Id. at 489 (citation omitted).
148. 419 F.3d 772 (8th Cir. 2005).
149. See supra note 15.
150. Plattsmouth II, 419 F.3d at 772.
151. See discussion supra Part I.
152. Plattsmouth II, 419 F.3d at 773.
153. ACLU Found. v. City of Plattsmouth, 358 F.3d 1020, 1025 (8th Cir. 2004). The court did not determine the exact origin of the Semitic script engraved in the small tablets, it only noted that "for the purposes of this discussion it matters only that they purport to be a replica of the original Ten Commandments." Id. at 1025 n.2. The pyramid containing an eye is similar to that seen on the back of a dollar bill and is also referred to as the "all-seeing eye." Id. at 1025 n.3.
154. Id. at 1025. According to the court, the six-point star, commonly known as the Star of David, is a reference to the Jewish Religion. Id. at 1025 n.4. Further, the court noted that "[t]he Greek letters ‘chi’ and ‘rho’ are used to symbolize the Christian religion." Id. at 1025 n.5.
155. Id. at 1025.
hundred feet from the parking lot, on a grassy knoll. The knoll sits between a recreation area containing a barbeque grill, benches, picnic tables, and a permanent shelter, and Fourth Avenue, the adjacent street.\textsuperscript{156} No other statues or monuments with historic or legal merit are visible within the immediate vicinity of the monument.\textsuperscript{157} The front or text side of the monument faces Fourth Avenue, away from the recreation area. The monument is visible to motorists and pedestrians, but one must enter the park to read the text of the monument.\textsuperscript{158} The monument does not require any regular maintenance except mowing around its concrete base.\textsuperscript{159}

Except for a few incidental details, the installation of the monument remains a mystery. No contemporaneous city resolutions, minutes, proclamations, or other records survive from the period as evidence of the process used to install the monument.\textsuperscript{160} When the court made its decision, it knew only the following: the monument was donated in 1965; it was donated by the Plattsmouth aerie; the Eagles are a national philanthropic and community organization; the Eagles chose the text and symbols which were engraved on the monument; the version of the Ten Commandments is an amalgam of those used in Protestant, Catholic, and Jewish religions; Art Hellwig, Street Commissioner of the city in 1965, other city employees, employees of Consumers Public Power, and employees of W.E. Cady, Inc., erected the monument; and Hellwig was an officer of the Eagles at the time, but it was unclear whether the city employees were acting in their official or personal capacities.\textsuperscript{161} As for the city's present purpose for retaining the monument, the city administrator at the time of the suit, John G. Winkler, stated as follows:

The Fraternal Order of Eagles has been for many years a valued organization in Plattsmouth and has contributed in many ways to our city through its philanthropic and community-enhancing activities. Although neither I nor any current member of city government were serving in that capacity in 1965, it is safe to assume that the Eagles monument which is the subject of this lawsuit

\textsuperscript{156} Id.; Winkler Affidavit, supra note 2, ¶ 4, 6. At the time of the suit Winkler was the chair of the Plattsmouth city council and submitted an affidavit on behalf of the Defendants. Id. at ¶ 1.


\textsuperscript{158} Plattsmouth, 358 F.3d at 1025. Also, those hoping to avoid or view the monument are not permitted to park on 4th Avenue in front of the monument. Winkler Affidavit, supra note 2, ¶ 6.

\textsuperscript{159} Plattsmouth, 358 F.3d at 1025–26. At some time after the commencement of litigation, the monument was toppled over and city employees re-erected it. Id. at 1026.

\textsuperscript{160} Id.

\textsuperscript{161} Id.; see also Religious Monument Brings ACLU, PLATTSMOUTH J., July 13, 2000, at 1.
was accepted by the city and placed in Memorial Park out of gratitude to the Eagles for their civic work.162

The city must give its permission before something may be placed on public property. However, there are no formal policies which govern the acceptance process and applications are decided on a case by case basis.163 Through the years, the city allowed pieces of recreational equipment or structures from local fraternal groups, clubs, or individuals to be scattered throughout the park. Most of these objects bear plaques identifying their donors.164

The individual plaintiff, John Doe,165 is a resident and taxpayer of Plattsmouth who frequently came into unwelcome contact with the monument while driving to and from his home.166 Doe testified that he avoided using the park for recreational activities except when a scheduled event required his attendance.167 When he did attend an event, Doe avoided the corner of the park where the monument is located.168 Doe said he would use the park more often were it not for the monument. Doe, a professed atheist, believed that the monument "calls for [his] death and the death of billions of people."169 The ACLU Nebraska Foundation, of which Doe is a member, participated in the action to assert the rights and interests of its twelve local members, including those of Doe.170 The plaintiffs sued to remove the monument as a violation of the United States Constitution, federal law,171 and also article I, section 4 of the Nebraska Constitution.172

162. Winkler Affidavit, supra note 2, ¶ 14.
163. Plattsmouth, 358 F.3d at 1026.
164. Id. at 1026; Winkler Affidavit, supra note 2, ¶¶ 7–10. In Memorial Park, only three other plaques give honor to donors: a plaque on the picnic shelter donated by the Lions Club; a plaque on the grill donated by a deceased man; and a plaque at the entrance of the park listing the names of donors who gave to the construction of the park. Plaintiffs'-Appellants' Brief at 4, Plattsmouth, 358 F.3d 1020 (No. 02-2444) [hereinafter Plaintiffs' Brief].
165. See supra note 15.
166. Plattsmouth, 358 F.3d at 1026.
167. Id.
169. Defendants'-Appellants' Brief at 7–8, Plattsmouth, 358 F.3d 1020 (No. 02-2444) [hereinafter Defendants' Brief].
170. Plattsmouth, 358 F.3d at 1026.
172. That section states as follows:

All persons have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences. No person shall be compelled to attend, erect or support any place of worship against his consent, and no preference shall be given by law to any religious society, nor shall any interference with the rights of conscience be permitted. No religious test shall be required as a qualification for office, nor shall any person be incompetent to be a witness on account of his religious beliefs; but nothing herein shall be construed to dispense with oaths and affirmations. Religion, morality, and knowledge, however, being essential to
The United States District Court for the District of Nebraska entered summary judgment for the plaintiffs. The Honorable Richard G. Kopf first found that Doe had standing to bring the claim because he suffered an injury in fact: "he has curtailed his use of Memorial Park because of the presence of the monument, and there is no reason to disbelieve him." The ACLU had standing to bring the suit "because it represent[ed] Doe and he has standing."

After applying the Lemon test, the court rejected the city's current purpose because there was "scant evidentiary support for [its] assertions" and because in Stone and Books "the focus is properly on the primary purpose for display of the Ten Commandments, not whether some secular purpose, however secondary or speculative, can be articulated." The court found that the monument had the impermissible effect of endorsing religion because the "edifice, proclaiming 'I AM the LORD thy God,' is a centerpiece of a significant public place" and "nothing about the physical setting of the monument negates the endorsement effect of displaying the religious message of and religious symbols inscribed on the Ten Commandments monument. On the contrary, the endorsement effect is magnified." The district court entered judgment and later awarded attorneys' fees.

Good government, it shall be the duty of the Legislature to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction.

NEB. CONST. art I, § 4.

173. ACLU Neb. Found. v. City of Plattsmouth, 186 F. Supp. 2d 1024, 1036 (D. Neb. 2002). The district court dismissed the claim under the Nebraska Constitution because it was barely addressed by the parties and there was no state law directly on point. Id. at 1030.

174. The district court applied the higher standard of an "injury in fact." Id. at 1030–31. See, e.g., Freedom From Religion Found., Inc. v. Zielke, 845 F.2d 1463 (7th Cir. 1988) (dismissing the plaintiffs' claim as without standing because they did not alter their behavior to avoid the religious symbol).

175. Plattsmouth, 186 F. Supp. 2d at 1031.

176. Id. See, e.g., Warth v. Seldin, 422 U.S. 490, 511 (1975) (stating that organizations have standing if they allege that their members "are suffering immediate or threatened injury as a result of the challenged action").

177. Judge Kopf "confine[d] [his] discussion to the first two prongs of the Lemon test, as modified by the Allegheny endorsement test." Plattsmouth, 186 F. Supp. 2d at 1031.

178. Id. at 1033.

179. Id. at 1034.

180. Id.

181. Id. at 1035.

182. ACLU Neb. Found. v. City of Plattsmouth, 199 F. Supp. 2d 964 (D. Neb. 2002). Judge Kopf also proposed his own solution: "[I]f I had a choice, and rather than decide this case, I would gently require that the parties and their talented lawyers eat a meal together, and then amicably resolve this easily resolvable case." Plattsmouth, 186 F. Supp. 2d at 1035. Perhaps they should barbeque in Plattsmouth's park.
A divided panel of the Eighth Circuit Court of Appeals affirmed the district court's decision. The panel concluded that both plaintiffs had standing to bring an Establishment Clause claim and determined that the monument should be evaluated under the Lemon test as modified by the endorsement test, rather than the strict scrutiny standard of Larson v. Valente. In order for Plattsmouth to pass the "purpose" prong, the panel required the city to articulate "a secular purpose." In the panel's eyes, the purpose prong did not require that the purpose be unrelated to religion—that would amount to a requirement that the government show callous indifference to religious groups, and the Establishment Clause has never been so interpreted. Rather, Lemon's 'purpose' requirement aims at preventing the relevant governmental decisionmaker . . . from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters.

183. ACLU Neb. Found. v. City of Plattsmouth, 358 F.3d 1020, 1042 (8th Cir. 2004).
184. Judge Kermit E. Bye wrote for the two to one majority. Id. at 1024. Judge Richard S. Arnold concurred in the judgment, but wrote separately to reflect his belief that the monument was invalid under the Larson test. Id. at 1043 (Arnold, J., concurring in judgment).
185. Id. at 1026–31 (majority opinion). Arguments for and against the plaintiffs' standing are beyond the scope of this Note. For an argument on why plaintiffs should not have standing to challenge the "feeling of exclusion occasioned by the recognition that a religious majority," because it is a byproduct of democracy, see Noah Feldman, From Liberty to Equality: The Transformation of the Establishment Clause, 90 CAL. L. REV. 673, 709–12 (2002); Jesse H. Choper, Beyond Separatism: Church and State: The Endorsement Test: Its Status and Desirability, 18 J.L. & POL. 499, 522–23 (2002) (arguing that in a pluralistic culture some beliefs will receive recognition in our nations laws and some will not; plaintiff should not have standing to address this inequality); David Harvey, It's Time to Make Non-Economic Standing Take a Seat in "Religious Display" Cases, 40 DUQ. L. REV. 313, 321 (2002) (arguing that plaintiff should have to assert some type of "palpable injury from the plaque"); Marc Rohr, Titiing at Crosses: Nontaxpayer Standing to Sue Under the Establishment Clause, 11 GA. ST. U. L. REV. 495 (1995) (describing the Establishment Clause standing requirements under Supreme Court and Circuit precedent).
187. Plattsmouth, 358 F.3d. at 1032. Under Larson, a statute is subject to strict scrutiny if it discriminates on its face. Strict scrutiny, although argued by Plaintiffs in their brief, was not applicable because the challenged government activity did not create a "practical, tangible benefit or burden for adherents of a specific religion." Id. at 1033. See, e.g., Sklar v. Comm'r of Internal Revenue, 282 F.3d 610 (9th Cir. 2002); Wilson v. Nat'l Labor Relations Bd., 920 F.2d 1282 (6th Cir. 1990).
188. Plattsmouth, 358 F.3d at 1035 (quoting Lynch, 465 U.S. at 681 n.6).
189. Id. (quoting Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter–Day Saints v. Amos, 483 U.S. 327, 335 (1987)).
The court first considered whether Plattsmouth had a secular purpose when it installed the monument and then considered whether Plattsmouth had a secular purpose when it decided to keep the monument. Although records of the monument's receipt and installation were absent from the proceedings, the panel found "undisputed evidence of Plattsmouth's purpose in accepting, erecting, and maintaining the monument . . . in the content and context of the monument itself." The panel determined that the content, and therefore the monument's message, was "undeniably religious" and found nothing in the setting that would detract from the monument's religious content. Next, the panel rejected the city administrator's affidavit, which presented Plattsmouth's purported purpose for the monument's installation, as "counter to the undisputed evidence." The panel found that the "Eagles donated this monument as a part of its nationwide campaign to spread its version of the Ten Commandments." Consequently, "Plattsmouth's purpose in erecting it was nothing more complex than the adoption of that goal." Finally, the panel rejected Plattsmouth's arguments concerning the cost of removal, artistic value, and historic preservation, holding that these justifications were "but a pretext for keeping the monument on public land without a secularizing context." Therefore, the panel determined that the monument failed the purpose prong of the Lemon test and violated the Establishment Clause.

The panel also considered whether the monument's primary effect was to advance or inhibit religion according to the reasonable observer, a hypothetical person "more informed about the monument and its history than are uninformed passers-by." The court ana-

190. Id. at 1036. The court derived this standard from Books, even though, unlike Books, no record of religious ceremonies survived from the monument's installation. Id.
191. Id. See Stone v. Graham, 449 U.S. 39, 41 (1980) (per curiam) ("The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact."); see also City of Elkhart v. Books, 532 U.S. 1058, 1058 (2001) (Stevens, J., opinion respecting denial of certiorari) ("[The phrase] 'I AM the LORD thy God . . . is rather hard to square with the proposition that the monument expresses no particular religious preference—particularly when considered in conjunction with . . . [the fact] that the monument also depicts two Stars of David and a symbol composed of the Greek letter Chi and Rho superimposed on each other that represent Christ.'").
192. Plattsmouth, 358 F.3d at 1037.
194. Id. The court did not consider the most systematic explanation of the Eagles' purpose in donating the monuments. See supra note 109 and accompanying text.
195. Id. at 1039.
196. Id. at 1040. See Books, 235 F.3d at 306; see also Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 779–81 (1995) (O'Connor, J., concurring). The Eighth Circuit considers the endorsement question as part of Lemon's effects
analyzed the monument under the Supreme Court's decisions in *Lynch* and *Allegheny* and, like the Sixth and Seventh Circuits, demanded a common theme before the monument could be classified as part of the city's cultural heritage. From the panel's perspective, "[t]he reasonable viewer would perceive this monument as an attempt by Plattsmouth to steer its citizens in the direction of mainstream Judeo-Christian religion. This it cannot do." Finally, the panel found that the monument did more than acknowledge God—that it also served as "an instruction from the Judeo-Christian God on how He requires His followers to live." Therefore, the panel determined that the monument had the unconstitutional purpose and effect of endorsing religion.

Shortly after the panel published its decision, the Eighth Circuit Court of Appeals granted Plattsmouth's petition for review and vacated the panel's decision. The court, sitting en banc, heard oral argument in fall of 2004, but did not make its decision until after the United States Supreme Court's decisions in *Van Orden* and *McCreary County*. After reviewing the plurality opinion and Justice Breyer's concurring opinion in *Van Orden*, the court determined that *Van Orden* governed Plattsmouth's monument.

In a ten to two hold-prong unlike other Circuits which have created a whole new endorsement test to replace the *Lemon* test. Compare *Plattsmouth*, 358 F.3d at 1040 n.10, with Freethought Soc'y v. Chester County, 334 F.3d 247, 250 (3d Cir. 2003).

The panel's reasonable observer was aware of the monument's history and the history of the Eagles' national project; would know that city employees participated in erecting the monument in 1965 and again in 2001; would recognize the Ten Commandments as sacred to the Judeo-Christian and Islamic religions and would understand the significance of the symbols on the monument; would know that other donated items in the park did not display a religious message; would be aware that Plattsmouth offered its purpose over thirty-five years after the monument was erected; and would know that the reasonable observer does not have to accept the city's explanation for allowing the monument to remain. *Plattsmouth*, 358 F.3d at 1040.

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197. *Plattsmouth*, 358 F.3d at 1041.
198. *Id.* *See Books*, 235 F.3d at 306; Adland v. Russ, 307 F.3d 471, 483–84 (6th Cir. 2001) (requiring a "discernible unifying theme").
199. *Plattsmouth*, 358 F.3d at 1042. One of the few courts to rely on *Marsh* was the Third Circuit. *See Freethought Soc'y*, 334 F.3d at 265–66 (applying the historical precedents test to a Ten Commandments monument affixed to a county courthouse).
201. Judge Pasco M. Bowman II concurred in the panel's decision to apply the *Lemon* test but dissented from its decision. The reasoning of that dissent is omitted from this Note because Judge Bowman authored the en banc court's majority opinion. *See id.* at 1043 (Bowman, J., concurring in part and dissenting in part).
203. ACLU Neb. Found. v. City of Plattsmouth (*Plattsmouth II*), 419 F.3d 772, 776 (8th Cir. 2005).
The court reversed the decision of the panel and district court. The court found two similarities between Plattsmouth's monument and the monument in *Van Orden*. First, both monuments make a “passive—and permissible—use” of the text of the Ten Commandments to acknowledge the role of religion and God in our nation's heritage and, second, both monuments had stood without question for decades.

The court identified four reasons behind the first conclusion. First, the court noted that passive acknowledgments of the Ten Commandments were present on prominent government buildings such as the Library of Congress, the National Archives, the Department of Justice, the Court of Appeals for the District Court for the District of Columbia, and the United States House of Representatives. Second, the court considered the Supreme Court's decisions acknowledging the role of religion in United States history. Third, the court considered recent Supreme Court decisions that directly or indirectly recognized the role of religion in the nation's life. Finally, the court considered *Van Orden*’s requirement that it neither “abdicate [its] responsibility to maintain a division between church and state nor evince a hostility to religion by disabling the government from in some ways recognizing our religious heritage.”

The court reversed the panel's decision and declared that Plattsmouth's monument was not different “in any constitutionally significant way from Texas's display of a similar monument in *Van Orden*.” Shortly after the Eighth Circuit's decision, the ACLU decided not to appeal to the United States Supreme Court. Plattsmouth's saga appears to be over.

204. Thirteen judges originally heard the case, but Richard Sheppard Arnold died on September 23, 2004. The remaining twelve judges decided the case. *Id.* at 776 n.1.

205. *Id.* at 776–77.

206. *Id.* at 778.

207. *Id.* at 777.

208. *Id.*

209. *Id.*

210. *Id.* at 778 (quoting *Van Orden* v. Perry, 125 S. Ct. 2854, 2859 (2005) (plurality opinion)).

211. Plattsmouth II, 419 F.3d at 778.

212. The ACLU Nebraska Foundation unanimously decided not to appeal the Eighth Circuit en banc's decision to the United States Supreme Court. ACLU director Tim Butz commented that the ACLU “was just out of options . . . .” Nelson Lampe, *State ACLU Votes to End Fight*, *Lincoln J. Star*, Sept. 28, 2005, at B1.
IV. THE EIGHTH CIRCUIT EN BANC PROPERLY PERMITTED PLATTSMOUTH'S EAGLES MONUMENT TO SOAR OVER THE MOUNTAIN

The Eighth Circuit en banc correctly held in *Plattsmouth II* that the Eagles' monument does not offend the Establishment Clause. The evidence clearly proved that Plattsmouth did not establish monotheism as its official religion when it allowed the monument to be installed. In order to analyze the *Plattsmouth II* decision, this Part will consider the new test presented in *Van Orden* and applied by the Eighth Circuit in *Plattsmouth II*. It will then argue that the Eighth Circuit could have allowed the city to keep its monument even under a traditional Lemon test analysis including the heightened “purpose” requirement from the Supreme Court’s holding in *McCreary County*. Finally, this Part argues that the Supreme Court should create a “grandfather clause” to exempt the Eagles’ monuments from the typical Establishment Clause analysis.

A. The Eighth Circuit En Banc Correctly Keeps the Eagles’ Monument Grounded

The *Van Orden* plurality and Justice Breyer’s concurrence have established a new test that will allow lower courts to permit religious displays, especially the Eagles’ Ten Commandments monuments. This section melts down the main elements of the opinions which rendered judgment in *Van Orden* to provide a framework for future argument concerning religious displays. The *Van Orden* test has four main elements for a religious display: (1) it must be passive to be permissible; (2) it must be recognized in the United States’ historical tradition; (3) it must have its own historical tradition; and (4) it must have at least one secular purpose.

First, the display must be passive to be permissible. This means that a display of the Ten Commandments must be “a far more passive use” of the Ten Commandments than a mandatory display in elementary schoolrooms. The Supreme Court will likely find that a display is a passive recognition of religion if it has similar characteristics to one or more of the following. First, a display is passive if a citizen such as the petitioner in *Van Orden*, who disagrees so strongly with

213. ACLU Neb. Found. v. City of Plattsmouth, 358 F.3d 1020, 1039 (8th Cir. 2004), rev’d, 419 F.3d 772 (8th Cir. 2005) (“By expressing a religious truth, Plattsmouth began establishing religion in 1965 when it installed its monument.”).

the monument that he sued to compel its removal, can walk by it for six years before filing suit.\footnote{Van Orden, 125 S. Ct. at 2858, 2864 (plurality opinion).} This consideration provides the best empirical evidence of the religious display's impact in the community, especially on those who vehemently disagree with a religious display. Second, a display is passive if it is comparable to similar depictions of the religious symbols on significant government buildings such as the United States Capitol, the Ronald Reagan Building, the Washington Monument, the Jefferson Memorial, and the Lincoln Memorial.\footnote{Id. at 2863 n.9.} This factor promotes a uniform application of the Constitution on both federal and state actors. Third, a display is passive if it does not favor any particular religious sect, promote religion over non-religion, compel religious practice, or detour religious belief.\footnote{Id. at 2870 (Breyer, J., concurring) (citing School Dist. of Abington Twp. v. Schempp, 374 U.S. 203 (1963) (Goldberg, J., concurring)).} This consideration allows government to recognize religion's impact on our society but prohibits it from promoting or compelling a particular belief. Finally, physical location may also contribute to a passive use of a religious text.\footnote{Id.} This factor allows a court to consider the obvious—a religious monument in the middle of the steps to the capitol communicates a more overt message than one in the corner of a park.

The Eighth Circuit correctly compared the passive nature of Plattsmouth's monument and its use of the Ten Commandments to the monument in Van Orden.\footnote{ACLU Neb. Found. v. City of Plattsmouth (Plattsmouth II), 419 F.3d 772, 775 (8th Cir. 2005).} First, like the petitioner in Van Orden, Doe observed the monument for some time before he brought suit.\footnote{ACLU Neb. Found. v. City of Plattsmouth, 186 F. Supp. 2d 1024, 1028–29 (D. Neb. 2003).} Doe's own conduct speaks for itself. While an objector need not call down fire and brimstone at the first sight of a religious display, he or she should challenge the display or, failing that, to accept it. Second, the monument is engraved with the Ten Commandments, religious symbols, and other non-religious symbols. Many of these symbols appear on significant federal government buildings,\footnote{See generally Van Orden, 125 S. Ct. at 2862–63 (plurality opinion).} but no one would argue that the federal government established a monotheistic religion. The Plattsmouth II court correctly compared the city's monument to other passive and permissible displays of the Decalogue on federal government buildings. Third, the Eagles specifically created the text of the monument as a non-sectarian version of the Ten Commandments.\footnote{See supra note 109 and accompanying text.} The Eagles' decision to create a new version of
the commandments points to a passive use of the Decalogue.\textsuperscript{223} This version does not steer the reader to one specific denomination, compel religious practice, or promote a particular religious belief. Fourth, Plattsmouth's monument stood in a corner of its forty-five-acre park, facing away from the recreational equipment, picnic tables, benches, and shelters.\textsuperscript{224} Because of the monument's location, Doe would have to make a special trip inside the park to read the text of the monument and observe its symbols.\textsuperscript{225} The park-goer finds the monument among other items typically found in a park, including several donations from others in the community. These structures and equipment each bear a plaque declaring the name of its donor. Therefore, the \textit{Plattsmouth II} court properly found that the monument passively displayed a religious text. Other counties, cities, and towns which seek to keep their Eagles monument should, like Plattsmouth, point out its passive nature and passive surroundings to support an argument that the monument is permissible.

Second, the display's text must be recognized in the United States' historical tradition. This factor is easy to satisfy when considering an Eagles monument and other longstanding acts or displays which recognize religion. The Decalogue has "an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789."\textsuperscript{226} More specifically, it is chiseled on many prominent buildings,\textsuperscript{227} referenced in United States Supreme Court opinions,\textsuperscript{228} honored in legislative resolutions,\textsuperscript{229} and praised in executive manuscripts.\textsuperscript{230} These references give the Decalogue "an undeniable historical meaning . . . ."\textsuperscript{231} The Court's decision allows government to continue its practice of recognizing the relationship between the Ten Commandments and the law.\textsuperscript{232} The Court's

\begin{enumerate}
\item \textsuperscript{223} See supra note 109 and accompanying text.
\item \textsuperscript{224} \textit{Plattsmouth II}, 419 F.3d at 774.
\item \textsuperscript{225} \textit{Plattsmouth}, 186 F. Supp. 2d at 1028-29.
\item \textsuperscript{226} \textit{Van Orden}, 125 S. Ct. at 2861 (plurality opinion). The plurality argued that all nine Justices agreed to an extent and that "[e]ven the dissenters do not claim that the First Amendment's 'Religion Clauses' forbid all governmental acknowledgments, preferences, or accommodations of religion." \textit{Id.} at 2860 n.3 (citing \textit{id.} at 2877 (Stevens, J., dissenting); \textit{id.} at 2894 n.4 (Souter, J., dissenting)).
\item \textsuperscript{227} \textit{Id.} at 2862-63. The Court noted that passive acknowledgments of the Ten Commandments were present on prominent government buildings such as the Library of Congress and National Archives, the Department of Justice, the Court of Appeals for the District Court for the District of Columbia, and the United States House of Representatives. \textit{Id.}
\item \textsuperscript{228} \textit{Id.} at 2863 (citing McGowan v. Maryland, 366 U.S. 420, 442 (1961)).
\item \textsuperscript{229} \textit{Id.} (citing S. Con. Res. 13, 105th Cong. (1997); H.R. Con. Res. 31, 105th Cong. (1997)).
\item \textsuperscript{230} \textit{Id.} (citing \textit{Public Papers of the Presidents}, Harry S. Truman, 1950, at 157 (1965)).
\item \textsuperscript{231} \textit{Id.}
\item \textsuperscript{232} \textit{Id.} at 2869-70 (Breyer, J., concurring).
\end{enumerate}
typical Lemon analysis and commitment to neutrality without considering the nation's history would lead to invocation or approval of results which partake not simply of that non-interference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious.\footnote{233}

The Eighth Circuit properly observed similar historical traditions in the text of Plattsmouth's monument. The court likened the city's display to the national historical traditions.\footnote{234} Because there is no problem with the federal government's decision to acknowledge the Decalogue, states and their political subdivisions should be allowed to make similar displays. Although Plattsmouth's display does not include seventeen other displays and twenty-one other monuments,\footnote{235} its display of an Eagles monument is proportionate to the town's size, population, and historically significant organizations.

Third, the display must have its own historical tradition. This factor was not very important to the plurality, which only noted that the petitioner walked by the monument for six years before bringing suit.\footnote{236} The plurality likely did not rely on the monument's tenure because to do so would have undermined the dissent\footnote{237} in McCreary County. However, Justice Breyer focused on the forty years which passed between the monument's installation and the petitioner's challenge. To him, "those forty years suggest more strongly than can any set of formulaic tests that few individuals, whatever their system of beliefs, are likely to have understood the monument" as either encouraging or discouraging religion.\footnote{238} Justice Breyer's opinion is best understood as what some may call a "grandfather clause"\footnote{239} to the First Amendment. As described above in section II.A, Breyer's opinion did not offer a typical analysis of Texas's monument; rather, it allowed a monument which the Court may not permit a government to erect today.\footnote{240} Breyer's grandfather clause functions to exempt historically significant structures or actions specifically because of their historical significance. Justice Breyer's vote allowed Texas to retain its monu-

\footnote{233}{Id. at 2869 (quoting Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 306 (1961)).}
\footnote{234}{ACLU Neb. Found. v. City of Plattsmouth (Plattsmouth II), 419 F.3d 772, 776–77 (8th Cir. 2005).}
\footnote{235}{Van Orden, 125 S. Ct. at 2858 (plurality opinion).}
\footnote{236}{Id. at 2864.}
\footnote{237}{McCreary County v. ACLU, 125 S. Ct. 2722, 2748 (2005) (Scalia, J., dissenting).}
\footnote{238}{Van Orden, 125 S. Ct. at 2870–71 (plurality opinion).}
\footnote{239}{"A provision that creates an exemption from the law's effect for something that existed before the law's effective date; specifically, a statutory or regulatory clause that exempts a class of persons or transactions because of circumstances existing before the new rule or regulation takes effect." BLACK'S LAW DICTIONARY 718 (8th ed. 2004).}
\footnote{240}{See id.}
ment; therefore, his analysis must be considered and potentially argued in order to prevail.241

The Plattsmouth II court correctly noted that the city's monument stood in Memorial Park without objection for over thirty-five years.242 The Plattsmouth II court correctly found that the monument should be grandfathered out of a Lemon analysis. The court compared the Van Orden decision to another grandfather clause in Marsh v. Chambers.243 In Marsh, the Court allowed Nebraska to continue its century-old tradition of opening the legislative session with a prayer. The Plattsmouth II court recognized the applicability of a grandfather clause because of the monument's uninterrupted tenure in the park. A government body which seeks to protect a religious display, and specifically an Eagles monument, should point out the display's tenure in consideration of the potential of its exemption from Lemon.

Finally, the display must have at least one secular purpose, or have no evidence of a religious one. Both the plurality and Justice Breyer noted that there was no evidence in Van Orden which suggested that Texas had a religious purpose when it installed and maintained the monument.244 Justice Breyer was able to use his "legal judgment"245 and conclude that the display did not violate the Constitution because it did not have a religious purpose. The state's lack of a religious purpose allowed the Court to distinguish other cases where the government body displayed the Ten Commandments with a "plainly religious," "pre-eminent purpose."246 Conversely, the Supreme Court in McCreary County upheld the lower court's ruling because the counties did not have a secular purpose.247 By comparing these two opinions, it is clear that strong evidence of a religious purpose will convince a majority of the Court to remove the display without further examination. The Van Orden Court was able to

241. Justice Breyer's concurrence may become a phenomenon similar to a concurrence by Justice Powell in Regents of University of California v. Bakke, 438 U.S. 265 (1978) (Powell, J., concurring). Because Justice Powell cast the deciding fifth vote in Bakke, lower courts decided cases based on his opinion. See, e.g., Talbert v. City of Richmond, 648 F.2d 925 (4th Cir. 1981). Justice Breyer's opinion may become a catalyst for similar discussion.

242. ACLU Neb. Found. v. City of Plattsmouth (Plattsmouth II), 419 F.3d 772, 778 (8th Cir. 2005).

243. 463 U.S. 783 (1983). Those who have suggested that Marsh play a larger role in Establishment Clause jurisprudence may see an answer to their prayers in Van Orden and Plattsmouth. See Bell, supra note 29.

244. Van Orden v. Perry, 125 S. Ct. 2854, 2864 (2005) (plurality opinion); id. at 2871 (Breyer, J., concurring).

245. Id. at 2869 (Breyer, J., concurring).

246. Id. at 2864 n.11 (plurality opinion) (quoting Stone v. Graham, 449 U.S. 39, 41 (1980) (per curiam)).

distinguish *McCreary County* and avoid the purpose inquiry because the record did not reflect the state's purpose.\(^\text{248}\)

In *Plattsmouth II*, the court did not comment on Plattsmouth's purpose, but chose to compare other portions of *Van Orden* to the city's situation.\(^\text{249}\) However, if the court had considered the city's purpose, it would have only found evidence to keep the monument.\(^\text{250}\) The only evidence of Plattsmouth's purpose when it allowed the monument to be installed came from an affidavit by the city administrator.\(^\text{251}\) In it, he proffered several non-"sham" secular purposes including the historic value of the monument, its beauty, and the cost of removal. The *Plattsmouth II* court correctly observed that the city's monument has more in common with the Ten Commandments display in *Van Orden* than *McCreary County*. Other government bodies that seek to retain religious displays should highlight the historical purpose and current state of the display.

After careful examination of the opinions in *Van Orden* and *Plattsmouth II*, it is evident that the Supreme Court etched a new test into the Establishment Clause mountain. The *Van Orden* test set out four main elements for maintaining a religious display: (1) it must be passive to be permissible; (2) it must be recognized in the United States' historical tradition; (3) it must have its own historical tradition; and (4) it must have a secular purpose. Even though Plattsmouth's ordeal is over, other counties, cities, and towns in the United States should argue under the framework of the *Van Orden* test to keep an Eagles monument on public property.\(^\text{252}\)

**B. Plattsmouth's Eagles Monument Soars Over the Mountains of Lemon and McCreary County**

Even if the Eighth Circuit evaluated Plattsmouth's monument under a traditional *Lemon* test analysis, including the Supreme Court's enhanced purpose requirements in *McCreary County*,\(^\text{253}\) the

\(^{248}\) *Van Orden*, 125 S. Ct. 2854 (plurality opinion).

\(^{249}\) ACLU Neb. Found. v. City of Plattsmouth (*Plattsmouth II*), 419 F.3d 772 (8th Cir. 2005).

\(^{250}\) See supra section II.B.

\(^{251}\) See supra note 162 and accompanying text.

\(^{252}\) See Twombly v. City of Fargo, 388 F. Supp. 2d 983 (D.N.D. 2005) (applying the *Van Orden* test to permit Fargo to retain its Eagles monument).

\(^{253}\) *McCreary County* v. ACLU, 125 S. Ct. 2722, 2736 (2005). In his dissent, Justice Scalia points out that the majority raised the secular purpose standard from a secular purpose to a "heightened requirement that the secular purpose 'predominate' over any purpose to advance religion." *Id.* at 2757 (Scalia, J., dissenting). While I agree with his reasoning, a full discussion of the Supreme Court's purpose requirement is beyond the scope of this Note. Therefore, I will evaluate Plattsmouth's monument under the heightened *McCreary County* standard.
city would be allowed to keep its monument. The *Lemon* test requires that a religious activity or display have a secular purpose, its primary effect must neither advance nor inhibit religion, and it must not foster an excessive entanglement between government and religion. Because the ACLU conceded that the monument did not foster excessive governmental entanglement with religion, this section will limit this inquiry to the first two prongs of the test. Unlike the Court's finding in *McCreary County*, Plattsmouth's display was not erected or maintained with a mainly secular purpose nor did the city proffer a "sham" purpose during the lawsuit. The city's display also does not have the effect of endorsing religion under a traditional *Lemon* analysis. The monument does not endorse religion or bring any benefit to religion. Therefore, the Eighth Circuit could have upheld the monument under the *Lemon* test.

1. **Plattsmouth's Purpose Surpasses the Lemon and McCreary County Requirements for Purpose**

The subjective nature of the purpose prong is one of the most important factors in determining a government entity's true purpose. The purpose prong is designed to ask what the city subjectively in-

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254. The court noted that it would have found that the monument was constitutional under a traditional *Lemon* test analysis if required to do so. However, it did not elaborate at length on its reasoning. *Plattsmouth II*, 419 F.3d at 778 n.8.

255. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). Several members of the Court have criticized *Lemon* on other grounds. Justice Scalia offers the most poignant criticism of *Lemon*:

Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening little children and school attorneys of Center Moriches Union Free School District. Its most recent burial, only last Term, was, to be sure, not fully six-feet under: our decision in *Lee v. Weisman* conspicuously avoided using the supposed “test” but also declined the invitation to repudiate it. Over the years, however, no fewer than five of the sitting Justices have, in their own opinions, personally driven pencils through the creature's heart (the author of today's opinion repeatedly), and a sixth has joined an opinion doing so.


256. ACLU Neb. Found. v. City of Plattsmouth, 358 F.3d 1020, 1026 (8th Cir. 2004), rev'd, 419 F.3d 772 (8th Cir. 2005). Also, the Supreme Court appears to have incorporated the entanglement prong into the effects test in *Agostini v. Felton*, 521 U.S. 203 (1997). Some argue that entanglement is only a problem if the religious activity or display advances or inhibits religion; therefore, the endorsement test now covers all three original *Lemon* prongs. *Michael W. McConnell, John H. Garvey & Thomas C. Berg, Religion and the Constitution* 275-76 (2002).

257. See *supra* note 162 and accompanying text.

258. See *supra* note 189 and accompanying text.
tends by the display.\textsuperscript{259} Under \textit{McCreary County}, a court should honor the particular government entity's purported purpose unless it finds an "unusual cas[e] where the claim was [1] an apparent sham or [2] the secular purpose [was] secondary . . . ."\textsuperscript{260} In this type of case, a court should find that there was no "adequate secular object" compared to a "predominately religious one."\textsuperscript{261} Under the \textit{McCreary County} standard, Plattsmouth's purpose was not a sham, nor was it wholly secondary.

Plattsmouth's city administrator proffered several non-"sham" secular purposes in his affidavit\textsuperscript{262} and the city's monument has more in common with the Ten Commandments display in \textit{Van Orden} than \textit{McCreary County}. First, like \textit{Van Orden} but unlike \textit{McCreary County}, the monument's historical context does not communicate a religious purpose. Plattsmouth's monument has no contemporaneous records from the monument's installation by which a court could determine the city's purpose for erecting the monument.\textsuperscript{263} Conversely, the \textit{McCreary County} Court had much information regarding each county's purpose. The Court's enhanced purpose requirement is predicated by the counties' multiple displays of the Ten Commandments,\textsuperscript{264} the counties' resolutions which required the Ten Commandments to be posted,\textsuperscript{265} and the religious ceremonies which accompanied the original display's installation.\textsuperscript{266} The \textit{McCreary County} Court held that religious displays should be treated differently: "where one display has a history manifesting sectarian purpose that the other lacks, it is appropriate that they be treated differently, for the one display will be properly understood as demonstrating a preference for one group of

\textsuperscript{259} See Lynch v. Donnelley, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring) ("The purpose prong of \textit{Lemon} asks whether government's actual purpose is to endorse or disapprove of religion."). Because O'Connor's concurring opinion was adopted by the majority in \textit{Allegheny}, the endorsement test is often the proper inquiry into both the purpose and effect prongs. County of Allegheny v. ACLU, 492 U.S. 523, 585 (1989). "Thus the endorsement test calls for enquiry into both the subjective intention of the governmental 'speaker' and the 'objective' meaning of the statement in the community." Feldman, \textit{supra} note 185, at 695 (quoting \textit{Lynch}, 465 U.S. at 690) (O'Connor, J., concurring).

\textsuperscript{260} \textit{McCreary County} v. ACLU, 125 S. Ct. 2722, 2736 (2005).

\textsuperscript{261} \textit{Id}.

\textsuperscript{262} See \textit{supra} note 162 and accompanying text.

\textsuperscript{263} ACLU Neb. Found. v. City of Plattsmouth, 358 F.3d 1020, 1026 (8th Cir. 2004), \textit{rev'd}, 419 F.3d 772 (8th Cir. 2005).

\textsuperscript{264} \textit{McCreary County}, 125 S. Ct. at 2736–37 (deciding that the Court should examine all three displays of the Ten Commandments in order to determine the counties' purpose).

\textsuperscript{265} \textit{Id} at 2728.

\textsuperscript{266} \textit{Id}. at 2738 (determining that the counties intended a religious message because the "county executive was accompanied by his pastor, who testified to the certainty of the existence of God").
religious believers as against another." Where the McCreary County Court found much evidence of the counties' religious purpose, there is no evidence of the historical context of Plattsmouth's monument, save for an opinion by the current city administrator and the fact that the monument stood for thirty-five years without interruption. Because Plattsmouth's monument is so different in its historical context from McCreary County, the Eighth Circuit could not have found that Plattsmouth had a primarily religious purpose in erecting or maintaining its monument.

The Plattsmouth II court could also have investigated the Eagles' purpose when it donated the monuments, as found in State v. Freedom From Religion Foundation, Inc., but it would find no religious purpose that would justify the monument's removal. According to Freedom From Religion Foundation, the Eagles did not intend the monuments "to be religious instruction of any kind" but rather to "show . . . youngsters that there were such recognized codes of behavior to guide and help them." The Eagles' purpose should be interpreted as secular because courts have recognized that government has a secular purpose when it encourages public decency, preservation of moral standards and values of our society as a whole, or protection of

267. Id. at 2737 n.14.
268. That opinion is as follows:

The Fraternal Order of Eagles has been for many years a valued organization in Plattsmouth and has contributed in many ways to our city through its philanthropic and community-enhancing activities. Although neither I nor any current member of city government were serving in that capacity in 1965, it is safe to assume that the Eagles monument which is the subject of this lawsuit was accepted by the city and placed in Memorial Park out of gratitude to the Eagles for their civic work.

Winkler Affidavit, supra note 2, ¶ 14.


270. Freedom From Religion Found., 898 P.2d at 1024 n.16 (quoting Judge E.J. Ruegamer). A former president of Harvard University could have used Judge Ruegamer's advice to avoid the conclusions expressed in the President's Report:

Despite the importance of moral development to the individual student and the society, one cannot say that higher education has demonstrated a deep concern for the problem. . . . Especially in large universities, the subject is not treated as a serious responsibility worthy of sustained discussion and determined action by the faculty and administration.


Dallas Willard, Professor of Philosophy at USC, responds:

[The] failure of will on the part of educators that Bok courageously points out is inevitable. Had he strolled across Harvard Yard to Emerson Hall and consulted with some of the most influential thinkers of our nation, he would have discovered that there now is no recognized knowledge upon which projects of fostering moral development could be based.

the moral sensibilities of a substantial segment of the population. Also, Hollywood producer Cecil B. DeMille became involved in the installation of the monuments to promote his movie The Ten Commandments, not to promote a religion. In accepting this monument, it is clear that even if the Eagles' purpose is imputed to Plattsmouth, the city did not violate the Supreme Court's purpose requirement. Therefore, the Eighth Circuit would be faced with only three logical choices: adopt the city administrator's proposed purpose; assign the Eagles' purpose to the city; or find that the evidence was insufficient to determine the city's purpose in erecting the monument and move on to the second prong of the Lemon test.

Second, unlike McCreary County, the physical context in which Plattsmouth's monument is displayed is sufficiently secular to fulfill the purpose requirement. Before diving deeper into this reasoning, one must consider the Supreme Court's warning: "[f]ocus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause." Plattsmouth has several secular items which are part of the park as required by McCreary County. The monument stands near a recreation area containing a barbecue grill, benches, picnic tables, and a permanent shelter. Each of these items contains a plaque bearing the name of its donor and the date on which it was donated. While it is true that no other statues or monuments with historic significance are visible within the immediate vicinity of the monument, the Supreme Court only requires other contextually related secular items to be part of the area. For example, in Lynch v. Donnelly, the Supreme Court upheld a crèche displayed by the City of Pawtucket, Rhode Island in a private shopping center because the crèche was displayed in the context of the holiday season and amongst other secular items. The Lynch decision requires that some secular items which would normally belong in the particular context be displayed along with the religious item. Plattsmouth's religious item, a Ten Commandments monument, is displayed along with other secular items typically found in a park of Plattsmouth's size. The other items in the park place the

274. McCreary County v. ACLU, 125 S. Ct. 2722, 2731 (2005).
275. ACLU Neb. Found. v. City of Plattsmouth, 358 F.3d 1020 (8th Cir. 2004), rev'd, 419 F.3d 772 (8th Cir. 2005); Winkler Affidavit, supra note 2, ¶¶ 4, 6.
277. Id.
280. Id. at 682.
monument in a physical context focused on the history and traditions of small town life. Therefore, the physical context of the monument does not offend the Supreme Court's purpose requirement.

Finally, the city remained neutral when it provided its current purposes for retaining the monument. The city should be allowed to recognize the Eagles' contributions, the artistic value of the monument, and the longevity of the monument's position. Unlike the counties' purported purpose in \textit{McCreary County}, there is no evidence that the city offered these purposes in a disingenuous manner. From the record in \textit{Plattsmouth II}, the Eighth Circuit en banc clearly could have found that the city did not offer a "sham" purpose or have a secondary secular purpose about its Eagles monument.

2. What Affects the Reasonable Observer?

The Supreme Court modified its interpretation of the "effects" prong of the \textit{Lemon} test after Justice O'Connor's concurring opinion in \textit{Lynch v. Donnelly} argued that the Court should consider whether the religious activity or display was an endorsement or disapproval of religion in the mind of the "reasonable observer." The endorsement test asks whether the monument "is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by nonadherents as disapproval, of their individual religious choices." Likewise, a display must not send a "message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." Although the endorsement test has been criticized, most members of the

\begin{itemize}
  \item 281. \textit{Winkler Affidavit}, supra note 2, ¶ 4, 6.
  \item 282. The counties argued that their purpose was "to demonstrate that the Ten Commandments were part of the foundation of American Law and Government and to educate the citizens of the county regarding some of the documents that played a significant role in the foundation of our system of law and government." \textit{McCreary County v. ACLU}, 125 S. Ct. 2722, 2731 (2005) (citing ACLU v. McCreary County, 145 F. Supp. 2d 845, 848 (E.D. Ky. 2001)).
  \item 283. \textit{Lynch}, 465 U.S. at 687 (O'Connor, J., concurring).
  \item 285. ACLU Neb. Found. v. City of Plattsmouth, 358 F.3d 1020, 1040 (8th Cir. 2004) (quoting \textit{Allegheny}, 492 U.S. at 595), rev'd, 419 F.3d 772 (8th Cir. 2005).
  \item 286. \textit{Lynch}, 465 U.S. at 688 (O'Connor, J., concurring).
  \item 287. Discerning the qualities of the reasonable observer has been recognized and criticized by Scholars as an "ad-hoc, fact-based analysis of Establishment Clause problems." Choper, supra note 185, at 510–15; see also Michael W. McConnell, \textit{Religious Participation in Public Programs: Religious Freedom at a Crossroads}, 59 U. CHI. L. REV. 115, 149–51 (1992) (noting the impossibility of defining "endorsement," the tendency of the test to treat religion with suspicion and therefore collide with the Free Exercise Clause, the test's bias against religion and among religions, and the test's lack of historical support).
\end{itemize}
Court apply it using a mythical "reasonable observer." The "reasonable observer" knows the history of the display as a whole and the history of any religious objects which make up the display.

Under Lynch and Allegheny, a court may rely on the monument's context to determine its effect on the reasonable observer. In Lynch, the Supreme Court upheld a creche displayed by the City of Pawtucket in a private shopping center because the creche was displayed in the context of the holiday season and amongst other secular items. In Allegheny, the Supreme Court struck down a creche displayed inside the county courthouse without any secular items to mitigate its religious context, but allowed an eighteen-foot menorah because it stood next to a forty-foot Christmas tree. The menorah was permitted to remain, mostly because it was displayed in the context of a display recognizing "cultural diversity." Lynch and Allegheny drew boundary lines between the Court's view of impermissible establishment and permissible recognition of religion. The Plattsmouth II court would find that the monument's context is similar to the creche in Lynch and the menorah in Allegheny. The city pointed out the other donated items in the park and argued that it merely recognized the Eagles by keeping the monument. Like the constitutional displays in Lynch and Allegheny, the reasonable observer would find nothing out of the ordinary in Plattsmouth's Memorial Park; the park merely houses items donated by various individuals and organizations for the benefit of the community.

The court would also have to avoid several other pitfalls in considering the reasonable observer's perspective of the monument. First, the court must avoid the temptation to focus only on the text of the monument when it determines the monument's effect. Rather, the court should examine whether the religious text used in the display has been used in other constitutionally permissible settings. In this case, the Ten Commandments have often been used in permissible religious settings and have a secular as well as a religious purpose. Second, the court must avoid the temptation of reaching a decision which is openly hostile toward religion. Accordingly, the court could ex-

288. See Feldman, supra note 185, at 698.
291. See, e.g., Allegheny, 492 U.S. at 597 ("[T]he effect of the government's use of religious symbolism depends upon its context.").
293. Allegheny, 492 U.S. at 597.
294. Id. at 619.
295. See Defendants' Brief, supra note 169, at 25.
297. Van Orden, 125 S. Ct. at 2871 (Breyer, J., concurring).
amine whether any particular religion received benefits greater than those already approved by the Supreme Court. In Plattsmouth, it is impossible to say that any religion receives more benefit from the city keeping a Ten Commandments monument in the corner of its park, than from any of those actions already approved by the Supreme Court. Finally, the court must remember that Allegheny and Van Orden teach us that it is not necessary to purge all religious displays from government property.

As shown above, had the Eighth Circuit evaluated Plattsmouth’s monument under the Lemon test, including the heightened purpose requirement under McCreeary County, it would have found that the city did not have a religious purpose, nor did the monument have the effect of endorsing religion.

C. The Supreme Court’s Future Eagles Analysis; A Grandfather Clause to Pass Over Eagles Monuments

The Supreme Court’s decision in Van Orden and the Eighth Circuit’s decision in Plattsmouth II allowed both government entities to retain their monuments, but it is likely there will be future challenges to other Eagles donations. Therefore, the Supreme Court should create a “grandfather clause” to its typical Establishment Clause analysis for religious activities, displays, and, particularly, historically important Eagles Ten Commandments monuments. The Court has several compelling reasons to ignore a typical Lemon test analysis when it considers Eagles Ten Commandments monuments. First, all the Eagles’ monuments share the same constitutionally permissible underlying purpose. Second, the Eagles’ monuments were originally erected in the 1950s and 1960s and most have stood without interruption for the last forty to fifty years. Finally, a bright line rule for Eagles monuments prevents lower courts from ruling in a manner which is hostile towards religion.

300. See also Lynch, 465 U.S. at 691.
301. See supra note 239.
302. The phrase “Under God” in the Pledge of Allegiance is an example of an activity which the Court should grandfather in and exempt from typical Lemon test scrutiny. The Court will likely have this opportunity, should the recent holding in Newdow v. Congress of U.S., 383 F. Supp. 2d 1229 (E.D. Cal. 2005), be affirmed on appeal. The Ninth Circuit Court of Appeals will likely find that the Pledge is unconstitutional, as it found when it decided the merits in Newdow v. U.S. Congress, 328 F.3d 466 (9th Cir. 2003). Like the monument in Van Orden, the phrase “Under God” is not devoid of religious significance, however, it is rooted in more than fifty years of tradition and should be exempted from traditional Establishment Clause analysis and found to be constitutional.
First, the Court should exempt Eagles monuments from its typical *Lemon* test analysis because all of the monuments share a permissible purpose. All were donated by local chapters of the Eagles under a program sponsored by the national organization's Youth Guidance Committee to inform young people about moral standards which could govern their actions.\(^{303}\) The Eagles specifically wanted a non-sectarian version of the Ten Commandments to avoid the appearance that the monuments favored a particular version of the Ten Commandments or particular religious belief.\(^{304}\) Moreover, as was noted above, Cecil B. DeMille suggested that the Eagles distribute versions of the Decalogue to coincide with the release of his film *The Ten Commandments*.\(^{305}\) All of these factors should lead the Court to permit the Eagles' monuments on public property. Under *Van Orden*, the Court allowed a Ten Commandments display even though the Decalogue has religious meaning because of its significant historical contribution.\(^{306}\) If the Court had not recognized this contribution, government would be forced to remove all Ten Commandments references from public display or argue a fiction that the Ten Commandments have no religious significance. The former would surely "lead the law to exhibit a hostility toward religion that has no place in our Establishment Clause traditions."\(^{307}\) The latter would propagate a lie to believers and unbelievers—that frequency can remove a religious message from words or symbols.\(^{308}\) A government body that currently has an Eagles monument should be allowed to keep it because the underlying purpose of the monument does not offend the Establishment Clause. Rather, these monuments pay tribute to an organization which wanted to display a moral lesson for youth, the creativity of the producer of a classic movie, and the non-sectarian recognition of the moral fabric on which our country, the Constitution, and the premises on which the Establishment Clause were based.

Second, the Court should create an exception for Eagles monuments because all of the monuments were installed in the 1950s and 1960s, and most have stood without challenge since that time. This is the core reason for the grandfather clause. As Justice Breyer wrote:

> [Forty] years suggest more strongly than can any set of formulaic tests that few individuals, whatever their system of beliefs, are likely to have understood the monument as amounting, in any significantly detrimental way, to a...


\(^{304}\) Freedom From Religion Found., 898 P.2d at 1017.

\(^{305}\) *Id.*

\(^{306}\) See *Van Orden*, 125 S. Ct. at 2864 (plurality opinion); see also *id.* at 2870 (Breyer, J., concurring).

\(^{307}\) *Id.* at 2871 (Breyer, J., concurring).

\(^{308}\) *Id.* at 2866–67 (Thomas, J., concurring).
government effort to favor a particular religious sect, primarily to promote
religion over nonreligion, to engage in any religious practice, to compel any
religious practice, or to work deterrence of any religious belief.\textsuperscript{309}

The Court has granted similar exceptions for longstanding religious
traditions in the United States, such as legislative prayer in \textit{Marsh v. Chambers}.\textsuperscript{310} In \textit{Marsh}, the Court permitted the State of Nebraska to
continue its practice of opening its legislative session with prayer by a
paid chaplain because “the men who wrote the First Amendment Re-
ligion Clauses did not view paid legislative chaplains and opening
prayers as a violation of that Amendment . . . .”\textsuperscript{311} An Eagles grandfa-
thor clause would be similar to \textit{Marsh}, where the Congressional prac-
tice of prayer served as a constitutionally permissible example for
states to follow\textsuperscript{312} and the State of Nebraska itself enjoyed a long-
standing tradition of opening prayer.\textsuperscript{313} Ten Commandments dis-
plays, such as Eagles monuments, should enjoy a similar exception.
An Eagles grandfather clause is based partly on the tradition of dis-
playing the Ten Commandments on important government buildings,
and partly on the duration which each monument has stood without
question. The grandfather clause would allow the Court to pass
over\textsuperscript{314} Eagles monuments without stopping to evaluate whether the
reasonable observer would find that the monument as an endorse-
ment of religion.

Finally, the Court should create an exception for all Eagles monu-
ments because it prevents hostility towards religion in violation of the
“Religion Clauses.” This exception would also remove the temptation
for lower courts to remove monuments based on the history surround-
ing their installation or the context of the monument. In \textit{Books v. City of Elkhart},\textsuperscript{315} the Seventh Circuit removed Elkhart’s monument after
it examined the ceremony by which it was installed. However in \textit{Van
Orden} and \textit{Plattsmouth II}, the Supreme Court and Eighth Circuit al-
lowed Plattsmouth and Texas, respectively, to keep their monuments
because no record of the installations have survived. A grandfather
clause would correctly preclude lower courts from making this exami-
nation because it leads only to hostility against those government
body’s who had record of clergy present at a ceremony. It is illogical to
conclude that a citizen of Elkhart would think that her city estab-
lished a religious form of government after reading of the ceremony in

\textsuperscript{309} \textit{Id.} at 2870 (Breyer, J., concurring).
\textsuperscript{310} 463 U.S. 783, 792 (1983).
\textsuperscript{311} \textit{Id.} at 788.
\textsuperscript{312} \textit{Id.} at 792.
\textsuperscript{313} \textit{Id.} at 789–90 (citing Neb. Jour. of Council, General Assembly, 1st Sess., 16 (Jan.
22, 1855)).
\textsuperscript{314} \textit{See} \textit{Exodus} 12:12–13.
\textsuperscript{315} 235 F.3d 292 (7th Cir. 2000), \textit{cert. denied}, 532 U.S. 1058 (2001). \textit{See} \textit{supra} section
\textit{II.B}. 
an old paper; whereas, a citizen of Plattsmouth would conclude the opposite because he found nothing in a similar investigation. A grandfather clause would stop courts short of this investigation and allow government bodies to keep their Eagles monuments.

In a similar situation in Adland v. Russ,316 the Sixth Circuit Court of Appeals prevented Kentucky from re-installing an Eagles monument partly because the monument "physically dwarfs [the seven other historical monuments and massive floral clock and] implies that they are secondary in importance"317 However, the Supreme Court approved the Eagles' monument in Van Orden after considering the seventeen monuments and twenty-one historical markers on the Texas state capitol grounds.318 The Court should not allow the lower courts to involve themselves in a counting game or stature comparison which would require a government body to place a number of taller objects near the Eagles' monument for it be constitutional. The Eighth Circuit correctly avoided this pitfall, but Adland's decision does not suggest that all courts will be immune. The Court should remove this temptation for hostility and grandfather Eagles monuments.

V. CONCLUSION

The mountain of Establishment Clause jurisprudence has only become foggier since the Supreme Court's decisions in Van Orden v. Perry and McCreary County v. ACLU. The government must strike a delicate balance between the two requirements of the Constitution: that it "neither abdicate [its] responsibility to maintain a division between church and state nor evince a hostility to religion by disabling the government from in some ways recognizing our religious heritage ...."319 The Eighth Circuit en banc's decision in Plattsmouth II correctly struck that balance and allowed Plattsmouth, Nebraska to maintain the Eagles' monument in Memorial Park.

The Plattsmouth II court correctly applied the new elements of the Van Orden test and reversed the panel's decision. First, the Plattsmouth II court correctly determined that the monument was a passive display of a religious text. Second, the Plattsmouth II court correctly determined that the monument's text was recognized in the United States' historical traditions. Third, the Plattsmouth II court correctly recognized that Plattsmouth's monument had its own historical tradition. Finally, the Plattsmouth II court correctly found that the monument did not have a religious purpose. The monument did not stand

317. Id. at 477, 482.
319. Id. at 2859.
to acknowledge the city’s establishment of a monotheistic religion but rather to recognize a civic organization for its role in the community and to recognize the Ten Commandments role in the foundations of American government. Therefore, the Plattsmouth II court properly found that the monument was constitutionally permissible.

Even if the Plattsmouth II court had not chosen to apply the Van Orden test, it would have found that the monument was constitutional under a traditional Lemon test analysis. Under the heightened “purpose” requirements in McCreary County, the scant history of the monument’s installation would have required the court to embrace the city’s purported purpose, impute the Eagles’ purpose to the city, or find that the purpose could not be determined on the record. The Plattsmouth II court would also have found that the monument did not have the effect of advancing or inhibiting religion. The Constitution only requires other displays which would typically belong in the setting in order to balance the religious message of the monument. In Plattsmouth II, these items were the picnic benches, shelters, play ground items, and other park memorabilia. Under Van Orden and Lynch, the Constitution does not require a park full of other historical displays, but only other items which fit the setting in which the religious monument is displayed.

Finally, the Supreme Court should grandfather Eagles monuments into the Establishment Clause and ignore its typical Lemon test analysis. Eagles monuments share the same constitutionally permissible underlying purposes; were originally erected in the 1950s and 1960s; most have stood without interruption for the last forty to fifty years; and this bright line rule prevents lower courts from hostility towards religion.

Religion continues to be an important part of the lives of most Americans. The interaction between religion and government will continue to be an issue of debate in the parks, on the courthouse lawns, and in courtrooms across our country. The place and historical importance of the Ten Commandments will continue to be a divisive issue because of the Court’s conflicting decisions in Van Orden v. Perry and McCreary County v. ACLU. As the Court continues to define the boundaries of the Establishment Clause, the mountain of jurisprudence will only grow. Fortunately for Plattsmouth and many other communities in the Eighth Circuit, the boundaries clearly allow Eagles monuments to be displayed on public property.

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