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Freethought Society of Greater Philadelphia v. Chester County: The Desirability of a De Minimis Exception to the Supreme Court's Establishment Clause Jurisprudence

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Freethought Society of Greater Philadelphia v. Chester County: The Desirability of a De Minimis Exception to the Supreme Court’s Establishment Clause Jurisprudence

In *Freethought Society of Greater Philadelphia v. Chester County*, the Third Circuit upheld the constitutionality of a display of the Ten Commandments on the facade of the Chester County, Pennsylvania courthouse. The court held that the County’s refusal to take down the plaque was not motivated by a desire to endorse religion, but rather by a desire to “preserve a longstanding plaque.” It also stated that the plaque was not a “real threat” to separation of church and state, thus invoking the spirit of the legal maxim “*de minimis non curat lex*” or “the law does not bother with trifles.” This article examines the *Freethought* decision and concludes that it reached an incorrect result by misapplying both tests used by courts to decide Establishment Clause cases. The Third Circuit confused “history” and “context” in its endorsement test analysis and attributed extremely unrealistic knowledge to the reasonable observer used in the endorsement test. It also did not fully apply the *Lemon* test. Comparison with Ten Commandments cases in other circuits underscores the Third Circuit’s errors. Finally, the article investigates the use of the legal maxim “*de minimis non curat lex*” and determines that the maxim should not be applied in Establishment Clause cases because it is incongruous with the purpose of the Bill of Rights.

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INTRODUCTION

On July 1, 2003, the Eleventh Circuit Court of Appeals announced its decision in *Glassroth v. Moore*.¹ Finding Alabama Supreme Court Chief Justice Roy Moore’s installation of a 5,280-pound granite monument of the Ten Commandments in the rotunda of Alabama State Judicial Building to be a violation of the Establishment Clause, the court upheld an order requiring the monument’s removal. The decision was the focus of considerable media scrutiny, fueled by the feelings of many that the court was trying to destroy the “moral foundation of [the] law.”² Protestors assembled in front of the judicial building, refusing to leave and threatening to block any attempt to move the monument.³ The saga was yet another reminder of the controversy engendered by court decisions dealing with religious symbols in public places.⁴

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1. 335 F.3d 1282 (11th Cir. 2003), *cert. denied*, 540 U.S. 1000, 124 S. Ct. 497 (2003).

2. Manuel Roig-Franzia, *Jurist Defies Deadline on Monument*, Washington Post, Aug. 21, 2003, at A01.

3. *Id.*

4. Other examples of controversial Establishment Clause cases involving religious symbols include *County of Allegheny v. ACLU*, 492 U.S. 573, 109 S. Ct. 3086 (1989) (holding display of creche to violate Establishment Clause, while finding display of menorah constitutional) and *Lynch v. Donnelly*, 465 U.S. 668,

Just days before the Eleventh Circuit handed down its decision in *Glassroth*, the Third Circuit ruled on another case involving the Ten Commandments. In *Freethought Society of Greater Philadelphia v. Chester County*,⁵ the court upheld the constitutionality of the display of a plaque of the Ten Commandments on the facade of the Chester County courthouse. Unlike *Glassroth*, there was no public uproar or extensive media coverage. However, *Freethought* is the more significant case from a legal perspective. This article examines the *Freethought* decision and evaluates how the Third Circuit reached its decision. Part I presents a brief overview of the Supreme Court's Establishment Clause jurisprudence. This section will establish that in deciding an Establishment Clause case, courts must look to both the *Lemon*⁶ test and the endorsement test as articulated by Justice O'Connor in *Lynch v. Donnelly*⁷ and *County of Allegheny v. ACLU*.⁸ Part II examines *Freethought's* facts and discusses the Court's reasoning for finding the display constitutional. Part III argues that the court misapplied both Establishment Clause tests. The court failed to distinguish between "history" and "context" in its endorsement test analysis, charged the "reasonable observer" with far too much knowledge, and overextended the holding of a prior Establishment Clause case, *Marsh v. Chambers*.⁹ Part IV suggests that the underlying reason for the court's decision was that it believed the display to be a *de minimis* violation of the Establishment Clause which did not merit the attention of the court. Part IV further examines the legal maxim "*de minimis non curat lex*," and its use in the constitutional context. This section will show that the maxim has occasionally been utilized by courts, and that the Supreme Court has at least hinted at its use. Part V concludes that a *de minimis* exception should not be created in order to avoid making difficult decisions regarding the meaning of the Establishment Clause and that such an exception would be incompatible with the purpose of the Bill of Rights.

I. HISTORY OF THE SUPREME COURT'S ESTABLISHMENT CLAUSE JURISPRUDENCE

The problem of reaching a consistent approach to resolving Establishment Clause¹⁰ cases has plagued the Supreme Court for

104 S. Ct. 1355 (1984) (upholding constitutionality of display of creche).

5. 334 F.3d 247 (3rd Cir. 2003) (cert. not sought).

6. *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105 (1971).

7. 465 U.S. 668, 104 S. Ct. 1355 (1984).

8. 492 U.S. 573, 109 S. Ct. 3086 (1989).

9. 463 U.S. 783, 103 S. Ct. 3330 (1983).

10. The Establishment Clause, which is contained in the First Amendment,

decades. After only deciding one case in the nineteenth century under the Establishment Clause, *Bradfield v. Roberts*,¹¹ the Court spent much time in the twentieth century trying to determine the clause's meaning.¹² Recent decisions, such as *Lynch v. Donnelly*¹³ and *County of Allegheny v. ACLU*,¹⁴ illustrate a Court deeply divided as to what government action is impermissible under the Establishment Clause. While a full review of the Court's extensive Establishment Clause jurisprudence is outside of the scope of this casenote, an examination of the two major tests¹⁵ which have emerged from those cases is necessary in order to understand how the Third Circuit erred in *Freethought*.

A. *The Lemon Test*

While it has taken a number of different directions on the meaning of the Establishment Clause, the Supreme Court achieved a modicum of consistency in Establishment Clause jurisprudence for about twenty years by utilizing the test developed in *Lemon v. Kurtzman*¹⁶ in 1971.¹⁷ The *Lemon* test is actually a combination of the criteria used to decide Establishment Clause cases in the years leading up to the *Lemon* decision.¹⁸ In order to pass constitutional scrutiny under *Lemon*, a government action must have a secular legislative purpose, its principal or primary effect must be one that

reads "Congress shall make no law respecting an establishment of religion . . ." U.S. Const. amend. I. The Establishment Clause was made applicable to the states via the Fourteenth Amendment. U.S. Const. amend. XIV.

11. 175 U.S. 291, 20 S. Ct. 121 (1899).

12. See generally Francis Graham Lee, *Wall of Controversy—Church-State Conflict in America* (1986).

13. 465 U.S. 668, 104 S. Ct. 1355 (1984).

14. 492 U.S. 573, 109 S. Ct. 3086 (1989).

15. While *Lemon* and the endorsement test continue to be the most commonly used tests in Establishment Clause cases, several others have also been utilized. The coercion test, which Justice Kennedy introduced in *Allegheny*, was later adopted by the majority in *Lee v. Weisman*, 505 U.S. 577, 112 S. Ct. 2649 (1992). Under the coercion test, the government is prevented from coercing anyone to support or participate in religion or its exercise. *Id.* at 587. Also, the Supreme Court's holding in *Marsh v. Chambers*, 463 U.S. 783, 103 S. Ct. 3330 (1983), which held legislative prayer to be constitutional because the practice existed at the time of the First Congress, is frequently cited. *Marsh* is discussed in more detail later in this paper.

16. 403 U.S. 602, 91 S. Ct. 2105 (1971).

17. Jon Veen, Note, *Where Do We Go From Here? The Need for Consistent Establishment Clause Jurisprudence*, 52 Rutgers L. Rev. 1195 (2000).

18. See *Lemon*, 403 U.S. at 612, 91 S. Ct. at 2111 (citing *Walz v. Tax Commission*, 397 U.S. 664, 668, 90 S. Ct. 1409, 1411 (1970); *Board of Education v. Allen*, 392 U.S. 236, 243, 88 S. Ct. 1923, 1926 (1968)).

neither advances nor inhibits religion, and there must be no excessive government entanglement with religion.¹⁹

In *Lemon*, the Court was called upon to determine the constitutionality of two statutes from Rhode Island and Pennsylvania which provided state aid to nonpublic schools. The Court found that the statutes had the valid secular purpose of enhancing the quality of education in all schools covered by the compulsory attendance laws, thus passing the first prong.²⁰ However, the Court believed that both statutes created excessive government entanglement with religion because of the likelihood that teachers in public schools would be unable to remain neutral towards religion while teaching their classes.²¹ Having failed *Lemon*'s third prong, the statutes were struck down.

Although *Lemon* provides a bright-line test for deciding Establishment Clause cases, it has been vigorously criticized by judges and scholars alike.²² Over the protests of Justice Brennan, the *Lemon* test was strangely ignored in the important Establishment Clause case of *Marsh v. Chambers*.²³ By the early 1990s, several members of the Supreme Court had expressed their displeasure with the test, or certain parts of it. Justice Scalia went as far as to compare *Lemon* to a "ghoul in a late-night horror movie" that refuses to go away despite being "repeatedly killed and buried."²⁴

Nonetheless, *Lemon* remains good law. As the Court put it in *Lamb's Chapel v. Center Moriches Union Free School District*,²⁵ "*Lemon*, however frightening, has not been overruled."²⁶ The various circuit courts continue to cite *Lemon*,²⁷ and until it is overruled, no Establishment Clause case is properly decided without consideration of its three prongs.

19. *Id.*

20. *Id.* at 613, 91 S. Ct. at 2111.

21. *Id.* at 617, 91 S. Ct. at 2113.

22. See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 319, 120 S. Ct. 2266, 2284 (2000) (Rehnquist, C.J., dissenting) ("*Lemon* has had a checkered career in the decisional law of this court"); see also, Comm. for Pub. Ed. & Religious Liberty v. Regan, 444 U.S. 646, 671, 100 S. Ct. 840, 856 (1980) (Stevens, J., dissenting) (expressing desire to abandon altogether "the Sisyphean task of trying to patch together the 'blurred, indistinct, and invariable barrier' described in *Lemon*"); Jesse H. Choper, *The Endorsement Test: Its Status and Desirability*, 18 J. L. & Pol. 499, 503 (2002) (referring to *Lemon* as a "conceptual disaster area").

23. 463 U.S. 783, 103 S. Ct. 3330 (1983).

24. *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 398, 113 S. Ct. 2141, 2149 (1993) (Scalia, J., concurring).

25. *Id.*

26. *Id.* at 395 n.7, 113 S. Ct. at 2148 n.7.

27. For recent cases which utilized the *Lemon* test, see *Glassroth v. Moore*, 335 F.3d 1282 (11th Cir. 2003) and *Adland v. Russ*, 307 F.3d 471 (6th Cir. 2002).

B. *The Endorsement Test*

The other major test employed in Establishment Clause cases is the endorsement test,²⁸ which was first articulated by Justice O'Connor in her concurring opinion in *Lynch v. Donnelly*.²⁹ O'Connor presented the endorsement test as a refinement of the *Lemon* test. Beginning with the premise that "the Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community," she explained that government action directly infringes this command if it either purposefully or unintentionally has "the effect of communicating a message of government endorsement or disapproval of religion."³⁰

In order to determine whether a particular practice unconstitutionally endorses religion, O'Connor looked to the "reasonable observer."³¹ The relevant inquiry is whether or not a reasonable observer would perceive the challenged display as a government endorsement of religion.³² In *Capitol Square Review and Advisory Board v. Pinette*,³³ O'Connor analogized her reasonable observer to the reasonable person in tort law.³⁴ She proposed that the reasonable observer was a "personification of a community ideal of reasonable social judgement."³⁵ Finally, the reasonable observer must know the "history and context" of the forum in which the religious display appears.³⁶

Applying the test in *Lynch*, O'Connor concluded that the City of Pawtucket's inclusion of a creche in its annual Christmas display was constitutional.³⁷ The creche was positioned near other secular Christmas items, such as a Santa Claus, a sleigh, and candy-striped poles.³⁸ Key to this finding of constitutionality was her belief that the secular objects which surrounded the creche, and "the overall holiday setting," changed what viewers would perceive to be the purpose of the display.³⁹

28. For an in-depth discussion of the endorsement test, see Jesse H. Choper, *The Endorsement Test: Its Status and Desirability*, 18 J.L. & Pol. 499, 503 (2002).

29. 465 U.S. 668, 104 S. Ct. 1355 (1984).

30. *Id.* at 692, 104 S. Ct. at 1369.

31. *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 779, 115 S. Ct. 2440, 2455 (1995).

32. *Id.*

33. *Id.* at 779, 780, 115 S. Ct. at 2455.

34. *Id.* at 779, 115 S. Ct. at 2455.

35. *Id.* at 780, 115 S. Ct. at 2455 (citing W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on Law of Torts* 175 (5th ed. 1984)).

36. *Id.*

37. *Lynch v. Donnelly*, 465 U.S. 668, 694, 104 S. Ct. 1355, 1370 (1984).

38. *Id.* at 671, 104 S. Ct. at 1358.

39. *Id.* at 692, 104 S. Ct. at 1369.

O'Connor used the endorsement test to reach the opposite result in another case involving a creche. In *County of Allegheny v. ACLU*,⁴⁰ the creche in the County courthouse sat alone, with none of the secular symbols of Christmas that were present in *Lynch*. Finding that "the display of religious symbols in public areas of core government buildings runs a special risk of making religion relevant, in reality or public perception, to status in the political community," O'Connor found the display unconstitutional.⁴¹ She distinguished *Lynch* because the creche in *Allegheny* stood alone, without any of the secular objects present in *Lynch* which prevented the perception of a government endorsement of religion.⁴² Thus, O'Connor reiterated the importance of evaluating the entire setting where the religious symbol in question was placed.

While the endorsement test has gained adherents over the years, it, like *Lemon*, has been subject to considerable criticism. Justice Stevens delivered a stinging criticism of O'Connor's "reasonable observer," in his dissent in *Capitol Square Review and Advisory Board v. Pinette*.⁴³ He believed that O'Connor charged the reasonable observer with far too much knowledge, arguing that she had assumed an "ultrareasonable observer," who was aware of "the vagaries of this Court's First Amendment jurisprudence."⁴⁴ Stevens instead believed that "[f]or a religious display to violate the Establishment Clause, I think it is enough that *some* reasonable observers would attribute a religious message to the State."⁴⁵

In sum, the Supreme Court's Establishment Clause jurisprudence is far from clear. Due to the multitude of tests which have been developed, lower courts struggle to find the proper framework for deciding the Establishment Clause cases which come before them. While a single, uniform test would provide much needed clarity, the Court seems unlikely to develop one in the near future. Thus, lower courts are left with no choice but to continue applying the *Lemon* and endorsement tests.

II. THE *FREETHOUGHT* DECISION: FACTS AND ANALYSIS

A. *The Facts of Freethought*

In 1920, the Chester County Commissioners accepted a bronze plaque displaying a Protestant version of the Ten Commandments

40. 492 U.S. 573, 109 S. Ct. 3086 (1989).

41. *Id.* at 626, 109 S. Ct. at 3119.

42. *Id.*

43. 515 U.S. 753, 115 S. Ct. 2440 (1995).

44. *Id.* at 807, 115 S. Ct. at 2469.

45. *Id.*, 115 S. Ct. at 2470.

from an organization known as the Religious Education Council.⁴⁶ A dedication ceremony was held, at which both religious and secular themes were mentioned.⁴⁷ Judge Frank E. Hause delivered the following admonition to those in attendance: “Have you remembered the Sabbath Day, to keep it holy? If you disobey the commandments here and escape punishment, there is yet the punishment which will surely be meted out on the day of judgment.”⁴⁸ Hause also stated that “with very few exceptions, every statute on our books can be traced to the Ten Commandments, which are the foundation stone of all civilized countries.”⁴⁹ The plaque, which was over four feet tall and over three feet wide, was then affixed near what was then the entrance to the courthouse.⁵⁰

The plaque largely sat alone on the facade of the courthouse. The only other plaques nearby were a no skateboarding sign, a sign noting that the building was on the National Register of Historical places, and some plaques concerning courtroom hours.⁵¹ The plaque sat next to the historic entrance of the courthouse, although that entrance was closed for security reasons.⁵² The title “The Ten Commandments” was legible to a passerby on the sidewalk, although the court stated that visitors have “no reason to go there.”⁵³ Also, there was testimony that the area near the plaque was sometimes used for public gatherings, such as political rallies.⁵⁴

In 2001, Sally Flynn, an atheist and member of the Freethought Society of Greater Philadelphia, filed suit after the Chester County Commissioners denied her request to have the plaque removed.⁵⁵ Flynn alleged that the plaque violated the Establishment Clause of the First Amendment because it amounted to the endorsement of religion by the County.⁵⁶ The County asserted that the long history of the plaque and the fact that the County had not taken any action to highlight or celebrate the plaque since its placement, changed the overall effect of the plaque so that when it was viewed in context, a reasonable observer would not perceive it to be a government endorsement of religion.⁵⁷

46. *Freethought Society of Greater Philadelphia v. Chester County*, 334 F.3d 247, 251 (2003).

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 254.

51. *Id.*

52. *Id.* at 253-54.

53. *Id.* at 250.

54. *Id.* at 254.

55. *Id.* at 255. The Freethought Society is a “forum for atheists, agnostics, and other ‘freethinkers’ to meet, socialize, and exchange ideas.” *Id.* at 254.

56. *Id.*

57. *Id.*

B. The Third Circuit's Analysis

After explaining the development of the endorsement test, the court set out to apply it. It first noted that “the history and ubiquity” of a practice was relevant because it provides part of the context in which a reasonable observer evaluates whether a government practice conveys a message which endorses religion. The court continued by acknowledging the Supreme Court’s pronouncement in *Stone v. Graham*⁵⁸ that “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.”⁵⁹ Arguing that such symbols do not exist in a vacuum, however, the court emphasized context.⁶⁰ Seizing on O’Connor’s statement that history should be considered in evaluating context,⁶¹ the court proclaimed that “the age and history of the plaque provide[s] a context which changes the effect of an otherwise historical plaque.”⁶²

The court then looked to whether a reasonable observer would view the plaque as the County’s endorsement of religion. Recalling the history of the plaque, the court concluded that the reasonable observer would view the plaque as a “reminder of past events in Chester County.”⁶³ According to the court, the reasonable observer would not see an endorsement of religion, but rather a desire on the part of the County to preserve a longstanding plaque.⁶⁴ The court also presumed that the reasonable observer would know that “the County has not held a ceremony to commemorate the anniversary of the plaque, or even installed lights to draw attention to the plaque at night.”⁶⁵

Concluding its endorsement analysis, the court stated that the issue was “best framed” by *Marsh v. Chambers*, a Supreme Court decision which upheld the constitutionality of Nebraska’s practice of legislative prayer.⁶⁶ The court found it significant that “the Supreme Court has acknowledged the proposition that history can transform the effect of religious practice.”⁶⁷

58. 449 U.S. 39, 101 S. Ct. 192 (1980).

59. *Freethought*, 334 F.3d at 262 (quoting *Stone*, 449 U.S. at 41, 101 S. Ct. at 194).

60. *Id.*

61. *See County of Allegheny v. ACLU*, 492 U.S. 573, 630, 109 S. Ct. 3086, 3121 (1989) (O’Connor, J., concurring).

62. *Freethought*, 334 F.3d at 264.

63. *Id.* at 265.

64. *Id.*

65. *Id.* at 266.

66. *Id.* at 265 (citing *Marsh v. Chambers*, 463 U.S. 783, 103 S. Ct. 3330 (1983)).

67. *Id.*

The court then turned to its analysis under the test set forth in *Lemon v. Kurtzman*.⁶⁸ After noting that *Lemon* had been severely criticized, the court acknowledged that *Lemon* might be utilized by the Supreme Court upon review and therefore, proceeded to analyze the case under that framework.⁶⁹ The court began by considering the first prong of the test, which requires a secular purpose for the challenged government action. Looking to testimony at the trial court level, the court believed the County's assertion that the purpose of maintaining the plaque was to represent the "'two wing theory of our polity' in which faith and reason worked together to create and maintain the American experiment."⁷⁰

After completing the first prong of the *Lemon* test, the court declined to continue with an analysis under the other two prongs. Instead, it stated that "effect under the *Lemon* test is cognate to endorsement" and simply declared that the County commissioner's refusal to remove the plaque "passes constitutional muster under both the purpose and effect prongs of *Lemon*."⁷¹ The court concluded its opinion by conveying its belief that the plaque in question did not, in the words of Justice Goldberg, present a "real threat" of establishing a religion, but was rather a "mere shadow."⁷² There were no dissenting opinions.

III. PROBLEMS WITH THE *FREETHOUGHT* DECISION

The Third Circuit's opinion in *Freethought* is troubling because it did not comport with the Supreme Court's Establishment Clause jurisprudence. It misapplied the endorsement test, paid mere lip service to applying the test set forth in *Lemon v. Kurtzman*, and overextended the narrow holding of *Marsh v. Chambers*. A point-by-point breakdown of the court's analysis is useful in revealing the inadequacy of the court's decision.

A. *The Freethought Court Misapplied the Endorsement Test*

1. *The court failed to distinguish between "history" and "context" in conducting its endorsement analysis*

There are numerous problems with the court's endorsement analysis. Although it cited Justice O'Connor's concurrence in

68. 403 U.S. 602, 91 S. Ct. 2105 (1971).

69. *Freethought*, 334 F.3d at 261.

70. *Id.* at 267 (quoting *Freethought Soc'y v. Chester County*, 191 F. Supp. 2d 589, 598 (E.D. Pa. 2002)).

71. *Id.* at 269.

72. *Id.* at 270.

Allegheny as support for its position,⁷³ the court apparently did not consider the remarkable similarity between *Allegheny* and *Freethought*. Both cases involved an unquestionably religious symbol on display in a government building. In both cases, the religious symbol stood alone, with no secular objects to distract from the symbol's religious impression. The similarities should have required the Third Circuit to reach the same decision that O'Connor did in *Allegheny*—that the religious display was unconstitutional. O'Connor's admonition that the display of religious symbols in core government buildings requires extra scrutiny⁷⁴ also should have provided further guidance. The Ten Commandments, as the Supreme Court noted in *Stone v. Graham*,⁷⁵ are unquestionably religious, and the County courthouse is certainly a core government building. These facts should have amounted to a *per se* violation of the Establishment Clause under the endorsement analysis.

Instead, the court erroneously reached the opposite conclusion. It failed to heed O'Connor's warning about the special risk of displaying religious symbols in core government buildings. Even more troubling is the court's failure to distinguish "history" and "context" in the endorsement analysis. The Third Circuit repeatedly stated that history provides a context that changes how the reasonable observer would regard the plaque. The problem is that O'Connor made clear that "the history and ubiquity of a practice is relevant because it provides *part* of the context"⁷⁶ in which the reasonable observer views the display. Thus, history is a part of context, but it is not the end, or even the most important element of, the analysis. However, the Third Circuit ended its analysis there. By confusing "history" with "context," it failed to fully consider the factor that was ultimately dispositive in both *Lynch* and *Allegheny*: the presence (or lack thereof) of secular objects near the religious symbol which lessened the sectarian nature of the display. The court should have extended this analysis to its logical conclusion: because nothing in the setting of the plaque detracted from its undeniably religious nature, the plaque was unconstitutional.

The court's reliance on O'Connor's statement in *Allegheny* that history can change the context in which the reasonable observer views the challenged practice is also misplaced. O'Connor was referring to practices which fit into the category of ceremonial

73. *Id.* at 264.

74. See *County of Allegheny v. ACLU*, 492 U.S. 573, 626, 109 S. Ct. 3086, 3119 (1989) (O'Connor, J., concurring).

75. 449 U.S. 39, 41, 101 S. Ct. 192, 194 (1980).

76. *Allegheny*, 492 U.S. at 630, 109 S. Ct. at 3121 (emphasis added).

deism,⁷⁷ such as having “In God we trust” on currency or opening court with the phrase “God save this honorable court.” These phrases, through repetition, can be seen as having “lost their religious significance.”⁷⁸ Even if one agrees with this assertion, the Ten Commandments, however, are taken directly from Scripture and are a religious text.⁷⁹ The mere presence of the plaque on the courthouse wall has in no way diminished the clearly religious nature of the Ten Commandments. As a result, the “context” in which the reasonable observer views the plaque does not change merely due to the passage of time. If a plaque of the Ten Commandments is to withstand a constitutional challenge, it must be surrounded by other secular objects, similar to the creche in *Lynch*, which reduce the message of government endorsement of religion that would be perceived by the reasonable observer.

The court also failed to heed O’Connor’s explicit warning against using history in the manner which it did. In *Allegheny*, O’Connor noted that historical acceptance of a practice does not guarantee its constitutionality where the practice violates the values of the Establishment Clause.⁸⁰ She also made clear that an inherently religious symbol such as a creche can not be displayed on its own in a government building without other secular items nearby to detract from the symbol’s religious nature.⁸¹ *Freethought* presented a very similar situation, with the major distinction being that the plaque

77. The phrase “ceremonial deism” was coined by former Yale Law School Dean Walter Rostow in a 1962 lecture he delivered at Brown University. He defined the term to encompass a “class of public activity, which . . . could be accepted as so conventional and uncontroversial as to be constitutional.” Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 Colum. L. Rev. 2083, 2091 (1996).

78. For instance, in *Lynch*, Justice Brennan argued that the practices which have been classified as ceremonial deism are “uniquely suited to serve such wholly secular purposes as solemnizing public occasions, or inspiring commitment to meet some national challenge in a manner that simply could not be fully served in our culture if government were limited to purely nonreligious phrases.” *Lynch v. Donnelly*, 465 U.S. 668, 104 S. Ct. 1355, 1382 (1983) (Brennan, J., dissenting). In *Allegheny*, the plurality considered the Court’s invocation, the national motto, and the Pledge of Allegiance as examples of ceremonial deism, “a form of acknowledgment of religion that ‘serves in the only way possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society.’” *Allegheny*, 492 U.S. at 596 n.46, 109 S. Ct. at 3101 n.46.

79. For a critique of the concept of ceremonial deism, see Epstein, *supra* note 77, at 2091 (arguing that almost every practice cited as an example of ceremonial deism, such as the pledge, the national motto, and inaugural prayers cannot pass constitutional muster when subjected to the endorsement test).

80. 492 U.S. at 630, 109 S. Ct. at 3121.

81. *Id.* at 626-27, 109 S. Ct. at 3118-19.

present in *Freethought* had been on the courthouse wall for a long period of time. Given O'Connor's statement that historical acceptance does not, on its own, validate such a practice, the *Freethought* court should have reached a result consistent with *Allegheny*.

2. *The Court Erred by Assigning Unrealistic Knowledge to the "Reasonable Observer"*

The court's next error in applying the endorsement test was the exceedingly unrealistic knowledge and impressions which they attributed to O'Connor's reasonable observer. Given that the Supreme Court has declared that the Ten Commandments are an undeniably religious text,⁸² it follows that a reasonable observer would also view the plaque in question that way. Instead, the court stated that the reasonable observer would view the plaque "as a reminder of past events in Chester County."⁸³ Remarkably, the court provided absolutely no justification as to why a reasonable person, faced with a plaque of the Ten Commandments, would view it not as a religious document, but instead as a reminder of past events. The court did not suggest what "past events" the reasonable observer would associate with the plaque. It seems far more plausible that the reasonable observer would associate the Ten Commandments with the Bible, or religion in general. Such an impression would send the message that the County endorses "religion over nonreligion,"⁸⁴ which is constitutionally impermissible.⁸⁵

The court also declared that a reasonable observer would view the plaque's placement on the court's facade as being motivated by the County's "desire to preserve a longstanding plaque."⁸⁶ Again, the court provided no insight as to why the reasonable observer would believe this.

82. *Stone v. Graham*, 449 U.S. 39, 41, 101 S. Ct. 193, 194 (1980).

83. *Freethought Society of Greater Philadelphia v. Chester County*, 334 F.3d 247, 265 (2003).

84. *Epperson v. Arkansas*, 393 U.S. 97, 104, 89 S. Ct. 266, 270 (1968).

85. The specific version of the Ten Commandments which were posted also undermines the County's argument that the display had a secular purpose. For instance, after the First Commandment, the plaque included language such as, "For I the Lord Thy God am a Jealous God, visiting the Iniquity of the Fathers upon the Children unto the Third and Fourth Generation of Them that Hate me." *Freethought*, 334 F.3d at 252. Since no civilized legal system permits punishing persons other than those responsible for a crime, the County would seem to have no argument that such principles are the foundation of American law. Furthermore, there was testimony from one Jewish expert that this Protestant version of the Ten Commandments would be objectionable to Jews. *Id.* at 253.

86. *Id.* at 251.

Next, the court declared that the reasonable observer would “know that the County has not held a ceremony to commemorate the anniversary of the plaque, or even installed lights to draw attention to the plaque at night.”⁸⁷ This statement is remarkable for several reasons. First, by assuming that the reasonable observer would know that the County has never had a ceremony to celebrate the plaque, the court charged the observer with knowledge of every event occurring in Chester County since the installation of the plaque. While the reasonable observer is required to have a general knowledge of the history of the practice, the court here transforms the observer into an all-knowing individual. Attributing such knowledge to the observer is an obvious misapplication of the endorsement test.

Furthermore, the suggestion that the observer knows that the County has not “installed lights to draw attention to the plaque at night,” is extremely unrealistic and misses the point of the endorsement test entirely. Even if the reasonable observer knows this, a religious document does not necessarily require spotlights to create the impression that the government is endorsing religion. Use of such attenuated and fact particular analysis suggests that the court was starting from a premise of constitutionality.

B. The Court Did Not Fully Apply the Lemon Test

Another problem with the court’s opinion is its failure to fully apply the *Lemon* test. While the court did reach an acceptable answer to the first prong of the inquiry (that the plaque was there to celebrate the place of the Commandments in the development of the law), this does not exhaust *Lemon*. After completing the first prong of *Lemon*, the court was required to find that the principal or primary effect of the challenged government action be one that neither advances nor inhibits religion and that there was no excessive government entanglement with religion.⁸⁸ Instead, the court decided that “since effect under the *Lemon* test is cognate to endorsement,” it would not conduct analysis under the “purpose and effect prongs of *Lemon*.”⁸⁹

Thus, the court completely ignored the final prong of excessive government entanglement and did not directly address, using the *Lemon* standard, the effect prong. The endorsement test requires a different standard, i.e., that of the reasonable person, than *Lemon* for determining the effect of the challenged display.⁹⁰ The court avoided the different question that *Lemon* raises: Does the plaque have the

87. *Id.* at 266.

88. 403 U.S. 602, 612-613, 91 S. Ct. 2105 (1971).

89. 334 F.3d 247, 269 (2003).

90. 492 U.S. 573, 630, 109 S. Ct. 3086, 3121 (1989).

primary effect of advancing religion?⁹¹ Given the unquestionably religious nature of the Ten Commandments and the lack of any secular context to lessen the religious effect, the answer should have been yes. Rather than address this difficult question, however, the court unfortunately avoided it altogether.

C. *The Court Overextended the Holding of Marsh v. Chambers*

Rather than apply the contextual analysis required by the endorsement test, the Court instead relied on *Marsh v. Chambers*, in which the Supreme Court upheld legislative prayer as being constitutional.⁹² The Third Circuit felt that this case was significant because it showed that “the Supreme Court has acknowledged the proposition that history can transform the effect of religious practice.”⁹³

The difficulty with this assertion is that *Marsh* is inapplicable to the facts at hand in *Freethought*. As E. Gregory Wallace has noted, “*Marsh* is of little use unless the challenged practice has a history that reaches back to the practices of the Founders.”⁹⁴ Chester County presented no evidence that the Ten Commandments were posted in courtrooms when the Bill of Rights was drafted. Without that established history, *Marsh* is inapplicable because the opinion does not explain why the founders did not think legislative prayer violated the Establishment Clause. Moreover, even assuming that such evidence was available, the Supreme Court has warned that a broad reading of *Marsh* would “gut the core of the Establishment Clause,”⁹⁵ and that “*Marsh* plainly does not stand for the sweeping proposition that all practices 200 years old and their equivalents are constitutional today.”⁹⁶

The other problem with *Marsh* is that it is an anomaly in the Supreme Court’s Establishment Clause jurisprudence. In the period leading up to the decision, the Court had analyzed Establishment Clause cases by applying the *Lemon* test. Without explanation, the Court in *Marsh* avoided the *Lemon* test altogether. Instead, the Court held that the challenged practice of legislative prayer was “part of the

91. 403 U.S. 602, 612-613, 91 S. Ct 2105 (1971).

92. *Freethought*, 334 F.3d at 265-66 (citing *Marsh v. Chambers*, 463 U.S. 783, 103 S. Ct. 3330 (1983)).

93. *Id.* at 266.

94. E. Gregory Wallace, *When Government Speaks Religiously*, 21 Fla. St. U. L. Rev. 1183, 1215 (1994).

95. *County of Allegheny v. ACLU*, 492 U.S. 573, 604, 109 S. Ct. 3086, 3106 (1989).

96. *Id.* at 603, 109 S. Ct. at 3106.

fabric of our society.”⁹⁷ This suggests that the Court considered legislative prayer as an example of “ceremonial deism.” Thus, *Marsh* has limited precedential value because it is a serious deviation from Establishment Clause jurisprudence. This was reinforced in *Allegheny* when the plurality rejected Justice Kennedy’s attempt to broaden the holding of the case.⁹⁸ As a result, *Marsh* should only be used to justify religious practices which were engaged in at the time the Bill of Rights was written, and there is no evidence to suggest that the posting of Ten Commandments in courtrooms was such a practice.⁹⁹ Even in light of *Marsh*, the fact that the Framers believed a practice to be constitutional should not end a modern inquiry into the challenged practice’s constitutionality. As Oliver Wendell Holmes once noted, “[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.”¹⁰⁰ At the time of America’s founding, nearly one hundred percent of this nation’s citizens were Christian, most of whom were Protestant.¹⁰¹ Today, however, Christians comprise less than eighty percent of the American population.¹⁰² As Stephen Epstein has argued, “if there is to be freedom of religion in this country today of the type that the Framers contemplated 220 years ago, some practices that seemed perfectly permissible then cannot be perfectly permissible now.”¹⁰³ Because America now consists of a considerable number of people who believe in non-Christian religions, or no religion at all, courts must reconsider the constitutionality of religious displays which suggest that any one religion is preferred by the government.

D. Comparison to Similar Cases in other Circuits

A comparison of the decision in *Freethought* to similar cases decided in other circuits further reveals the Third Circuit’s errors. As mentioned in the introduction, *Glassroth v. Moore* was decided just

97. *Marsh v. Chambers*, 463 U.S. 783, 792, 103 S. Ct. 3330, 3336 (1983).

98. *Allegheny*, 492 U.S. at 603, 109 S. Ct. at 3106.

99. Dustin Zander, *Thou Shalt Not Post the Ten Commandments on the Courtroom Wall: Judge Ray Moore and the Constitution*, 9 Kan. J.L. & Pub. Pol’y 371, 376 (1999).

100. Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 469 (1897).

101. Epstein, *supra* note 77 (citing Anson Phelps Stokes & Leo Pfeffer, *Church and State in the United States* 39 (1964)).

102. Bureau of the Census, U.S. Dep’t of Commerce, *Statistical Abstract of the United States 2003*, at 67 (2003).

103. Epstein, *supra* note 77, at 2158.

days after *Freethought*, but held that the monument of the Ten Commandments in question was unconstitutional.¹⁰⁴ The Eleventh Circuit noted that the display of the Ten Commandments present in *Glassroth* was not placed in any sort of secular context to reduce the monument's religious significance.¹⁰⁵ It also fully applied the *Lemon* test and found that the display failed the test's purpose and effect prongs.¹⁰⁶

Perhaps the most interesting aspect of the *Glassroth* decision is its rejection of the *Marsh*-based argument that Justice Moore presented in defense of the monument.¹⁰⁷ Moore argued for a broad reading of *Marsh*.¹⁰⁸ He contended that since there were some acknowledgments of God at the time of the Founders, modern acknowledgments like the monument should be tolerated as well.¹⁰⁹ However, the Eleventh Circuit noted that there was no evidence that the Ten Commandments were placed in courthouses at the time the Bill of Rights was proposed and adopted, and, as such, *Marsh* was inapplicable.¹¹⁰

In the Seventh Circuit case of *Books v. City of Elkhart*,¹¹¹ the court held that a large monument of the Ten Commandments displayed in front of a local municipal building was unconstitutional.¹¹² Using both the endorsement test and *Lemon*, the court found that the monument had the effect of endorsing religion.¹¹³ Again, the lack of a secular context was central to the court's holding.¹¹⁴

Finally, the Eighth Circuit held in *Adland v. Russ* that a monument of the Ten Commandments donated by the Fraternal Order of Eagles in 1971 could not be placed on the state capitol grounds.¹¹⁵ The court determined that such a monument placed in public by the government could not pass muster under the endorsement test.¹¹⁶ The *Freethought* court took note of the latter two cases, but distinguished

104. *Glassroth v. Moore*, 335 F.3d 1282 (11th Cir. 2003).

105. *Id.*

106. *Id.* at 1296-97.

107. *Id.* at 1298 (“[t]hat there were some government acknowledgments of God at the time of the country’s founding and indeed are some today, however, does not justify under the Establishment Clause a 5280-pound granite monument placed in the central place of honor in a state’s judicial building.”).

108. *Id.*

109. *Id.*

110. *Id.*

111. 235 F.3d 292 (7th Cir. 2000).

112. *Id.* at 307.

113. *Id.*

114. *Id.* at 306 (noting that the monument in question stood alone).

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

116. *Id.* at 489.

them based on its flawed argument that history alone can change the context in which a reasonable observer views the Ten Commandments.¹¹⁷

Thus, the Seventh, Eighth, and Eleventh Circuits have all issued decisions which stand in contrast to the Third Circuit's opinion in *Freethought*. Unlike the Third Circuit, the other circuit courts properly considered the physical context in which the challenged display appeared. Furthermore, the other circuits have refused to use *Marsh* to circumvent the application of the contextual analysis required by the endorsement test. The decisions of these circuit courts provide further evidence that the Third Circuit erred in *Freethought*.

IV. *DE MINIMIS* VIOLATION OF THE ESTABLISHMENT CLAUSE?

While the *Freethought* court purported to rely solely on the *Lemon* and endorsement tests, one could argue that there was another underlying reason for its decision. Perhaps most revealing is the court's decision to quote Justice Goldberg who stated that "the measure of constitutional adjudication is the ability and willingness to distinguish between real threat, and mere shadow."¹¹⁸ The Third Circuit similarly noted that it believed that the plaque in question was a "mere shadow" rather than a "real threat."¹¹⁹ Ultimately, it appears that the court believed that a plaque that did not offend anyone for eighty years should simply be left alone. While it could not (without considerable twisting and stretching) pass the tests which would make it constitutional, the court upheld the display of the plaque anyway.

The court thus appears to invoke the legal maxim of "*de minimis non curat lex*," or "the law does not concern itself with trifles."¹²⁰ Indeed, Justice Brennan equated the "mere shadow" language of Justice Goldberg with the maxim in his dissenting opinion in *Marsh*.¹²¹ What is unclear is whether or not that doctrine should have application in the context of the Establishment Clause. A brief explanation of the maxim and its uses is appropriate before discussing its desirability as a part of Establishment Clause analysis.

117. *Freethought Society of Greater Philadelphia v. Chester County*, 334 F.3d 247 (3d Cir. 2003).

118. *Id.* at 266 (citing *Abington School District v. Schempp*, 374 U.S. 203, 308, 83 S. Ct. 1560, 1616 (1963) (Goldberg, J.)).

119. *Id.*

120. Jeff Nemerofsky, *What is a "Trifle" Anyway?*, 37 Gonz. L. Rev. 315, 316 (2002).

121. *Marsh v. Chambers*, 463 U.S. 783, 818, 103 S. Ct. 3330, 3349 (1983) (Brennan, J., dissenting).

A. *History of the Maxim*

The legal maxim *de minimis non curat lex* has actually been interpreted in numerous ways. A few examples include “[t]he law does not care for trifles”; “the law does not concern itself with trifles”; “equity will not concern itself with trifles”; “the law disregards trifles”; and “the law cares not for small things.”¹²² The maxim has its roots in the English Court of Chancery, which formulated a number of maxims to help steer its legal decision making in resolving royal disputes.¹²³ These legal maxims are generally referred to as “maxims of equity.”¹²⁴ One of the most frequently quoted statements on these maxims, by historian John Norton Pomeroy, says, “They are not the practical and final doctrines or rules which determine the equitable rights of individual persons . . . [but] are rather the fruitful germs from which these doctrines and rules have grown by a process of natural evolution.”¹²⁵

The usual function of the maxim is to place “outside the scope of legal relief the sorts of intangible injuries, normally small and invariably difficult to measure, that must be accepted as the price of living in society.”¹²⁶ The maxim signifies that “mere trifles and technicalities must yield to practical common sense and substantial justice,” so as “to prevent expensive and mischievous litigation, which can result in no real benefit to complainant, but which may occasion delay and injury to other suitors.”¹²⁷

The maxim has been used in a variety of contexts, including contract, tort, civil, and criminal matters.¹²⁸ For instance, in *Deutsch v. United States*,¹²⁹ a prisoner alleged that a correctional officer removed pens from Deutch’s locker and did not return them.¹³⁰ He sought four dollars and twenty cents in damages, which represented the cost of the pens.¹³¹ The court held that the relief Deutsch sought was a “trifle” and not worthy of adjudication.¹³² Similarly, in *Schlictman v. New Jersey Highway Authority*,¹³³ a motorist

122. Nemerofsky, *supra* note 120, at 316.

123. *Id.* at 323.

124. *Id.*

125. *Id.* (quoting 1 John Norton Pomeroy, *A Treatise on Equity Jurisprudence* § 361 (4th ed. 1918)).

126. *Id.*

127. *Id.* at 325.

128. *Id.*

129. No. Civ. A. 95-1728, 1995 WL 136959 (E.D. Pa. 1995), *aff’d*, 67 F.3d 1080 (3d Cir. 1995).

130. *Id.*

131. *Id.*

132. *Id.*

133. 579 A.2d 1275 (N.J. Super. Ct. Law Div. 1990).

complained that a roll of toll tokens he bought inadvertently contained a slug and filed a lawsuit demanding twenty dollars and thirty-five cents in damages.¹³⁴ The court found the claim to be "not meritorious," but rather "vexatious and harassing."¹³⁵ It believed that "[t]he loss that the plaintiff will have to bear as a result of the dismissal of this count is one of any number of trifling inconveniences that we all commonly encounter in our daily lives."¹³⁶

The areas where the maxim should not be invoked are less clear. The protection of an individual's constitutional rights is an area where the courts disagree on the applicability of a *de minimis* exception. For instance, in *Lewis v. Woods*,¹³⁷ the court stated that "a violation of constitutional rights is never *de minimis*."¹³⁸ Continuing, the court noted that "[b]y making deprivation of such [constitutional] rights actionable. . . the law recognizes the importance to organized society that those rights be scrupulously observed."¹³⁹ Other courts have been less sweeping in their protection of rights from the *de minimis* doctrine. In *Pullman v. Dudley*,¹⁴⁰ the court stated that the *de minimis* doctrine is not applicable "if a substantial right has been violated."¹⁴¹ Thus, only substantial rights would be protected.

B. The Use of the De Minimis Doctrine in Establishment and Free Exercise Cases

The United States Supreme Court has yet to explicitly invoke *de minimis non curat lex* to dispose of an Establishment Clause case. However, it has used the principle that the maxim embodies to decide cases, and individual justices have mentioned the maxim in various opinions.

One could argue that the maxim is the basis for the Court's decision in *Marsh v. Chambers*. The Court had been using the *Lemon* test for over a decade when it abruptly abandoned it, claiming that the practice of legislative prayer did not amount to a "real threat."¹⁴² In his dissent, Justice Brennan noted that "[s]imply put, the Court seems to regard legislative prayer as at most a *de minimis* violation, somehow unworthy of our attention."¹⁴³

134. *Id.*

135. *Id.* at 1280.

136. *Id.* at 1280-81.

137. 848 F.2d 649 (5th Cir. 1988).

138. *Id.* at 651.

139. *Id.*

140. 77 S.W.2d 592 (Tex. Civ. App. 1934).

141. *Id.* at 595.

142. *Marsh v. Chambers*, 463 U.S. 783, 818, 103 S. Ct. 3330, 3349 (1983) (Brennan, J., dissenting).

143. *Id.*

The *Lynch* opinion also implies the use of a *de minimis* exception. Decided the term after *Marsh*, the Court engaged in a half-hearted application of *Lemon*, only to eventually state that “any notion that these symbols pose a real danger of establishment of a state church is far-fetched indeed.”¹⁴⁴ Again, rather than subject the questioned practice to the full scrutiny of the tests designed for determining the constitutionality of such displays, the Court fell back on the idea that the practice is not “a real threat.” Such a position certainly invokes at least the spirit of *de minimis*.

Perhaps the most telling reason why the Court has not yet explicitly invoked the maxim is its unfortunate reluctance to handle the cases in which the maxim would be most appropriate. Cases addressing the constitutionality of the national motto and the incantation of “God save the United States and this Honorable Court” have been avoided. As Leonard Levy points out, those cases “should be held unconstitutional as a matter of principle, although the rule *de minimis non curat lex* might justify a more practical judgment.”¹⁴⁵ However, Levy notes that the Court has successfully avoided those cases in order to avoid running afoul of public opinion.¹⁴⁶

V. THE DESIRABILITY OF A *DE MINIMIS* EXCEPTION

A. Arguments in Favor of a *De Minimis* Exception

Scholars disagree about desirability of creating a *de minimis* exception to the Establishment Clause.¹⁴⁷ One of the earliest and most important Americans to consider the use of the maxim was James Madison.¹⁴⁸ Madison felt that the Constitution “forbids everything like an establishment of a national religion.”¹⁴⁹ He considered chaplains for Congress, military and naval chaplains, and presidential proclamations “recommending fasts and thanksgivings”

144. *Lynch v. Donnelly*, 465 U.S. 668, 686, 104 S. Ct. 1355, 1366 (1984).

145. Leonard W. Levy, *The Establishment Clause: Religion and the First Amendment* 153-54 (1994).

146. *Id.*

147. For arguments in favor of a *de minimis* exception, see *id.*, at 241 (arguing that a *de minimis* exception is a common sense way to avoid having the public discredit the Supreme Court) and Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. Chi. L. Rev. 195, 207-08 n.59 (1992) (suggesting that challenges to currency and other invocations of God should be dismissed as *de minimis*). For an argument against, see Epstein, *supra* note 77, at 2168 (arguing that those in the religious majority may favor a *de minimis* exception in order to ignore concerns of religious minorities).

148. Levy, *supra* note 145, at 123.

149. *Id.*

examples of “a national religion.”¹⁵⁰ Rather than let these examples exist as legitimate precedent, he favored the application of “the legal aphorism of *de minimis non curat lex*.”¹⁵¹

One argument made in favor of a *de minimis* exception is closely tied to the concept of ceremonial deism. The general idea is that phrases like “under God,” in the Pledge of Allegiance no longer have religious significance. As one commentator noted, “we need not melt down the national currency to get rid of ‘In God We Trust.’ Rote recitation of God’s name is easily distinguished as a *de minimis* endorsement.”¹⁵² According to this line of thought, no reasonable person could perceive such phrases as government endorsement of religion.

Leonard Levy has argued that a *de minimis* exception would be useful in protecting the credibility of the Supreme Court and, in turn, the wall of separation between church and state.¹⁵³ He believes that if the Court declared the pledge or national motto unconstitutional, the public would “publically discredit” the Court and would be tempted to “retaliate” against the wall of separation between church and state.¹⁵⁴ He believes that rather than be offended by minor references to religion or religious practice in public life, atheists and others should “howl in glee at the corruption of religion by irreverent ceremonial references to God,” such as those in the Pledge or on our money.¹⁵⁵ Ultimately, he believes separationists should “let sleeping dogmas lie.”¹⁵⁶

The inclusion of a *de minimis* exception to the Court’s Establishment Clause jurisprudence would provide the Court with a logical and coherent way of dealing with the cases it has thus far largely decided to avoid. Perhaps most importantly, it would allow the Court to avoid more decisions like *Marsh v. Chambers*, which completely ignore precedent and defy any sort of logical analysis in their quest to reach a result which would not create public outcry.

Another rationale for a *de minimis* exception is that many popular and traditional practices would be struck down if courts were to apply the current Establishment Clause jurisprudence to them. In his dissent in the highly controversial case dealing with the Pledge of Allegiance, *Newdow v. United States*,¹⁵⁷ Judge Fernandez of the Ninth Circuit feared that without recognition of

150. *Id.*

151. *Id.*

152. Sullivan, *supra* note 147, at 207-08 n.59.

153. Levy, *supra* note 145, at 241.

154. *Id.*

155. *Id.*

156. *Id.*

157. 328 F.3d 466 (2003).

the *de minimis* tendency of these practices to establish a religion in the United States, “we will soon find ourselves prohibited from using our album of patriotic songs” such as “God Bless America.”¹⁵⁸ He felt that the removal of these practices would “remov[e] a vestige of the awe that all of us . . . must feel at the immenseness of the universe”¹⁵⁹ According to this line of thought, a *de minimis* exception would protect these traditions from being declared unconstitutional.

B. Why a De Minimis Exception Should Not Be Adopted

Despite these arguments, an exception to the Establishment Clause based on the concept of *de minimis non curat lex* would be improper. There are several persuasive arguments which support this position.

Most proponents of the *de minimis* exception suggest it would best be used in cases involving the pledge, the national motto, and the like. The obvious problem with this is that these potential Establishment Clause violations cannot be called “trivial.” One need look no further than the furious public reaction to *Newdow* than to recognize that these are matters of significant importance.¹⁶⁰ To suggest that a *de minimis* exception should be applied “ignores the equally fervent views of those who would move heaven and earth to keep those two words [under God] in the Pledge.”¹⁶¹ A nation’s pledge of Allegiance is, to some degree, a reflection of the principles and ideals of that nation. The answer to the question of whether or not Congress may declare that our nation is one “under God” will speak volumes as to the meaning of the Establishment Clause, as would a ruling on whether or not a religious document such as the Ten Commandments can be posted on a courthouse wall.

Furthermore, almost all of the practices which have formed the subject matter of the Supreme Court’s Establishment Clause jurisprudence could be called “trifles.” The creches in *Lynch* and *Allegheny* did not likely signal an imminent theocracy in the United States.¹⁶² Similarly, the commencement prayer in *Lee v. Weisman*¹⁶³ did not, as Judge Fernandez in *Newdow* noted, tend to establish a

158. *Id.* at 492.

159. *Id.* at 493.

160. Martin Kasindorf, *Court Ruling on the Pledge Ignites Furor; Use of ‘Under God’ Unconstitutional*, USA Today, June 27, 2002, at A01.

161. Steven G. Gey, “Under God,” *The Pledge of Allegiance, and Other Constitutional Trivia*, 81 N.C. L. Rev. 1865, 1914-15 (2003).

162. *Id.* at 1916.

163. 505 U.S. 577, 112 S. Ct. 2649 (1992).

religion in the United States.¹⁶⁴ But the important issue in both, as Stephen G. Gey has noted, “was the combination of government with religion that created the violation by shifting to the objector the onus of avoiding the religious exercise.”¹⁶⁵ Cases involving the Ten Commandments, the pledge, and legislative prayer involve the same combination. Thus, these cases fall within a long tradition of similar challenges to the Establishment Clause, and unless the Court wishes to get out of the business of determining the clause’s meaning altogether (as it understandably might), it should not create a *de minimis* exception to avoid them.

As former Chief Justice John Marshall so famously stated in *Marbury v. Madison*, “[i]t is emphatically the province and duty of the of the judicial department to say what the law is.”¹⁶⁶ Those who suggest that the Supreme Court utilize *de minimis* to protect the credibility of the Court ignore this command and invite the judicial branch to practice a dangerous jurisprudence of public sentiment. Indeed, such a position conflicts with the intentions of the Framers. Federal judges are given lifetime appointment under Article III of the Constitution precisely because they are to be insulated from the passions and politics of the majority. The Supreme Court must sometimes make unpopular decisions when they are required by the Constitution and to suggest that the Court should make decisions based on their “credibility” in the eyes of the general public degrades the entire judicial branch.

Another problem with creating a *de minimis* exception is that it is not consistent with the purpose of the Bill of Rights. As the Supreme Court noted in *McIntyre v. Ohio Elections Commission*,¹⁶⁷ “the purpose behind the Bill of Rights . . . [is] to protect unpopular individuals”¹⁶⁸ The majority of Americans may well believe that plaques of the Ten Commandments in courthouses and the words “under God” in the pledge of allegiance are harmless. As a result, courts may be tempted to declare suits which challenge these perceived trifles as *de minimis*. Leonard Levy wisely notes, however, that what is trifling to the majority may be threatening and offensive, even persecuting, to a minority.¹⁶⁹ It is simply too easy for the religious mainstream to argue that pledging allegiance to a nation “under God” whose motto is “In God We Trust” creates only

164. *Newdow v. United States*, 328 F.3d 466, 492 (2003).

165. Gey, *supra* note 161, at 1903.

166. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

167. 514 U.S. 334, 115 S. Ct. 1511 (1995).

168. *Id.* at 357.

169. Levy, *supra* note 145, at 242.

a *de minimis* Establishment Clause violation.¹⁷⁰ In cases such as these, supporters of the *de minimis* doctrine seem to be telling minority groups such as atheists and agnostics that their beliefs not only do not deserve constitutional protection, but that they are not even worthy of the court's time. Such a position is antithetical to the principles of the Bill of Rights and to the sense of justice to which our judicial system should aspire. As Arnold H. Loewy has argued, "a society designed to accommodate cultural diversity cannot afford to place a 'badge of inferiority' on some of its citizens."¹⁷¹

Finally, using the maxim of *de minimis non curat lex* in Establishment Clause cases could lead to a gradual, but steady erosion of the wall of separation between church and state. As the Supreme Court has stated, "The breach of neutrality that is today a trickling stream may all to soon become a raging torrent."¹⁷² Court decisions have shown a tendency to use an "any more than" syllogism to uphold various religious practices.¹⁷³ For instance, when *Lynch* was decided, the Court in part argued that the creche in question was not "any more objectionable than" the practice of legislative prayer which they had previously upheld in *Marsh*. If continued, this type of thinking could lead to larger, more substantial violations in the future. Thus, it is important to pull the "weed out at its roots"¹⁷⁴ by refusing to allow *de minimis* violation of the Establishment Clause.

CONCLUSION

The Third Circuit's decision in *Freethought* is troubling on several levels. First, it misapplied the endorsement test, and then it refused to completely apply *Lemon*. In an attempt to justify its use of history to uphold the plaque, it overextended the limited holding of *Marsh v. Chambers*. Finally, it declared the plaque to be only a "mere shadow," rather than a real threat to the Establishment Clause. By doing so, it applied the spirit of the legal maxim "*de minimis non curat lex*." While some have argued that the maxim should have a place in the Supreme Court's Establishment Clause

170. Epstein, *supra* note 77, at 2168.

171. Arnold H. Loewy, *Rethinking Government Neutrality Towards Religion Under the Establishment Clause: The Untapped Potential of Justice O'Connor's Insight*, 64 N.C. L. Rev. 1049, 1051 (1986).

172. *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203, 225, 83 S. Ct. 1560, 1573 (1963).

173. Epstein, *supra* note 77, at 2167.

174. *Id.*

jurisprudence, its use would be incongruous with the principles behind the Bill of Rights. If Thomas Jefferson's famous wall of separation of church and state is to remain standing, courts must be vigilant in stopping even the smallest erosions of its foundation.

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