THE MISCONCLUSIONS OF THE THIRD CIRCUIT IN *FREETHOUGHT SOCIETY V. CHESTER COUNTY* AND THE SUBSEQUENT FAILURE OF THE ENDORSEMENT TEST

Written By: Kirsten K. Wendela

INTRODUCTION

The Establishment Clause in the First Amendment of the United States Constitution prohibits any law "respecting an establishment of religion."[1] With the development of the Fourteenth Amendment, the Establishment Clause has been binding on the states, and the Supreme Court has adjudicated Establishment Clause cases with relative frequency.[2] One of the latest Appellate Court cases analyzing the Establishment Clause was *Freethought Society v. Chester County*, in which the Third Circuit Court of Appeals held that a plaque of the Ten Commandments affixed to a county courthouse did not violate the Establishment Clause.[3] The Third Circuit adopted the endorsement test as its means for identifying a possible Establishment Clause violation, even though the endorsement test is not the officially accepted method used by the United States Supreme Court in these types of cases. While the endorsement test is becoming more commonly used in Establishment Clause cases today, and while it has been supported by all nine Supreme Court Justices, the test continues to be flawed and not defined with enough precision to prevent the possibility of reaching multiple conclusions.

This comment will examine the endorsement test in light of *Freethought Society v. Chester County*, using the Third Circuit case as a model to demonstrate the flaws in the endorsement test. Part I of this comment will develop the history of Establishment Clause jurisprudence. It will look at the Supreme Court's formation of the *Lemon* test and how this method of interpretation has changed over the years to incorporate, in varying degrees, Justice

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[1] U.S. CONST. amend. I.

[2] ______

[3] Freethought Society v. Chester County, 334 F.3d 247 (2003).

O'Connor's endorsement test. Part II will present *Freethought Society v. Chester County*, explaining the reasoning of the Third Circuit and the application of the endorsement test to that case. Part III will discuss why the Third Circuit's holding in *Freethought* was erroneous. And, by so doing, will present an argument as to why the endorsement test should not be adopted by the United States Supreme Court as the new standard for identifying Establishment Clause violations.

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

1. Lemon v. Kurtzman: *A Three-Part Test for Determining Establishment Clause Violations*

In 1971, the United States Supreme Court established a three-prong test in *Lemon v. Kurtzman* for determining whether the Establishment Clause of the First Amendment of the United States Constitution had been violated. The test asked (1) whether the challenged law or conduct had a secular legislative purpose; (2) whether the principal or primary effect of the challenged law either advanced or inhibited any religion; and (3) whether the challenged law created an excessive entanglement between government and religion.[4] While the *Lemon* test has yet to be overturned, it has been criticized over the years, and the argument has been made numerous times that the Supreme Court often distorts or misapplies the test in particular cases.[5] (ADD).

2. The Modification of the Lemon *Test – Justice O'Connor's "Endorsement" Test*

In light of the problems and criticisms of the *Lemon* test, Justice O'Connor offered a clarification in *Lynch v. Donnelly*, focusing on the role of the government's endorsement of

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[4] Lemon v. Kurtzman, 403 U.S. 602, 612-613 (1971).
[5] Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 Mich. L. Rev. 266, 269 (1987).

religion in Establishment Clause cases.[6] Under the endorsement test, the question becomes, would a reasonable, informed observer perceive a challenged governmental action as endorsing religion?[7]

3. The Modern Approach for Analyzing Establishment Clause Violations

Today, all nine Supreme Court justices have shown support for the endorsement test.[8] However, the Supreme Court has yet to adopt the endorsement test as its new standard for interpreting Establishment Clause violations.[9] Also, the test has faced heavy criticisms from legal scholars. (Smith article. Need more research here).

II. THE THIRD CIRCUIT'S USE OF THE ENDORSEMENT TEST IN CONCLUDING THAT THE ESTABLISHMENT CLAUSE WAS NOT VIOLATED IN *FREETHOUGHT SOCIETY V. CHESTER COUNTY*

1. Factual Background of the Case

In December of 1920, a plaque of the Ten Commandments was affixed to the Chester County Courthouse in West Chester, Pennsylvania.[10] The plaque was placed near the entrance to the Courthouse, where it has remained for over eight decades.[11] The Religious Education Council of Chester County had requested permission to erect a bronze plaque containing a Protestant version of the Ten Commandments, and the County Commissioners accepted this donation to the courthouse.[12] The dedication ceremony stressed both the religious and secular significance of the Ten Commandments.[13]

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[6] Lynch v. Donnelly, 465 U.S. 668, ___ (1984). (Need explanatory parenthetical or addition to text).
[7] (see Freethought at 250)
[8] (See Adler footnote 41 for citations)
[9] Smith at 274-275.
[10] Freethought Society v. Chester County, 334 F.3d 247, 249, 251 (3rd Cir. 2003).
[11] *Id.* at 249.
[12] *Id.*at 249, 251.
[13] *Id.* at 251.

Today, over 250,000 people visit the Chester County Courthouse each year, and until 2001, everyone visiting the building would walk past the Ten Commandments plaque on their way inside.[14] However, the main entrance to the Courthouse was relocated in 2001 for security reasons, so now only the title of the plaque, "The Commandments," is legible to a passerby.[15] The text of the Ten Commandments comes from the King James version of the bible, as does the Summary, also included on the plaque.[16] This summary comes from the New Testament, which is not a part of the Jewish Bible, and would therefore be found offensive to people of the Jewish faith.[17] However, there is nothing offensive in this version to the Roman Catholics.

Since its erection in 1920, Chester County has done nothing to draw attention to the plaque, to celebrate it, or to maintain it.[18] However, the county refused to remove the plaque in 2001 after counsel for a member of the community requested that it be taken down.[19] Sally Flynn is a member of the Freethought Society of Greater Philadelphia – an organization comprised of atheists, agnostics, and other "freethinkers."[20] She commenced action in the District Court for the Eastern District of Pennsylvania after Chester County refused to remove the plaque.[21] Ms. Flynn had been aware of the presence of the plaque since 1960, but she did not become an atheist until 1996.[22]

2. The Decision by the Pennsylvania District Court

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[14] *Id.* at 250, 252.
[15] *Id.* at 253.
[16] *Id.*
[17] *Id.* (Explanatory regarding the significance of different religious groups being offended by the contents of the plaque and the importance of this in light of the current lawsuit.)
[18] *Id.* at 251.
[19] *Id.* at 255.
[20] *Id.* at 254.
[21] *Id.*
[22] ______

The District Court for the Eastern District of Pennsylvania declared the Ten Commandments plaque unconstitutional – holding that it violated the Establishment Clause of the First Amendment.[23] The court conducted a two-day evidentiary hearing, concluding _____.

3. The Decision by the Third Circuit Court of Appeal

The Third Circuit saw before it two issues to be decided in *Freethought Society v. Chester County*. First, what were the correct principles of Establishment Clause jurisprudence that should be used in deciding the case, and second, should the focus of the court's analysis be on the 1920 erection of the plaque or the 2001 refusal by County Commissioners to remove it?[24] The court concluded that the case should be analyzed using Justice O'Connor's endorsement test – a modification of the Supreme Court's original test established in *Lemon v. Kurtzman*.[25] It also decided that the focus of its inquiry should be on the 2001 declination to remove the plaque and not the 1920 placement.[26]

The Third Circuit – in concluding that Justice O'Connor's endorsement test was the correct means of analyzing *Establishment* Clause violations – concluded that the relevant inquiry should be whether a reasonable observer would perceive the religious display as an endorsement of religion by the government.[27] The court interpreted this to mean that the reasonable observer in *Freethought Society* must be an individual who is aware of the plaque's history and must also be aware of the context in which the plaque appears.[28] Based on this analysis, the Third Circuit concluded that the history of the plaque changes the way in which a reasonable observer would view it, and therefore it would not be viewed as a governmental endorsement of religion.[29] The

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[23] *Id.* at255.
[24] *Id.* at 250.
[25] *Id.*
[26] *Id.* at 251.
[27] *Id.* at 258.
[28] *Id.* at 259.
[29] *Id.* at 265-266.

court also emphasized that Chester County had done nothing to maintain the plaque during the past eighty years, further reinforcing the reasonable observer's conclusion that the plaque was not an endorsement by the state of religion.[30]

The *Lemon* test was also used to analyze *Freethought*, not because the Third Circuit believed the test should be used, but because this was still the judicially accepted test by the United States Supreme Court.[31] Using *Lemon*, the Third Circuit concluded that the County Commissioners did have a legitimate secular purpose in their refusal to remove the plaque, based on the County Commissioners' own testimony.[32] Because of this legitimate secular purpose, the Third Circuit concluded that the Establishment Clause had also not been violated based on the *Lemon* test.[33]

III. THE ERRONEOUS CONCLUSIONS BY THE THIRD CIRCUIT IN *FREETHOUGHT SOCIETY V. CHESTER COUNTY* PROVE THE INABILITY OF THE ENDORSEMENT TEST TO SUCCESSFULLY ADJUDICATE ESTABLISHMENT CLAUSE VIOLATIONS

<u>Main Points of Part III</u>

I. The Third Circuit said that "the relevant inquiry in determining whether a religious display violates the Establishment Clause is whether a reasonable observer would perceive the display as a government endorsement of religion." However, it uses a "reasonable observer" standard that requires a greater knowledge than the average passerby on the street. A reasonable observer in this case should not be expected to know the history of the Ten Commandments plaque. Therefore, the Third Circuit uses too strict a standard.

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[30] *Id.* at 266.
[31] *Id.* at 250.
[32] *Id.* at 267.
[33] ______

II. The Third Circuit gives little consideration to the effect on the people of Chester County that will result from the County's refusal to remove the plaque. Even if we focus on the events of 2001, as opposed to 1920, the conclusion can still easily be reached that the government is endorsing religion by blatantly refusing to acknowledge the feelings and concerns of the religious minority.

a. The court is wrong in saying that the County has taken no action involving the plaque in the past eighty years. This lawsuit brings the religious connotations of the plaque to light in the modern day, and the County's refusal to accommodate the plaintiffs in *Freethought* shows its lack of respect for minority religious groups.

III. Because the endorsement test can be used to come to the opposite conclusions reached by the Third Circuit, this proves the inability of the test to draw necessary lines between right and wrong conclusions in Establishment Clause cases. The ease with which the Third Circuit is able to misapply the endorsement test shows why the test should not be adopted over the *Lemon* test as the new standard. While *Lemon* may itself be far from perfect, Justice O'Connor's endorsement test is not stronger or better.

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- Third Circuit adopts the endorsement test, instead of using the *Lemon* test, for determining whether a religious display violates the Establishment Clause.

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- In his concurring opinion, Justice Scalia criticizes the *Lemon* test.

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- Justice O'Connor's concurrence lays out a reasonable person standard for identifying religious connotations to public displays.

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