

Topic Proposal

Name:

Editor:

Advisor:

Subject: Why the Third Circuit, in *Freethought Society v. Chester County*, should have reached the same conclusion as the Eleventh Circuit in *Glassroth v. Moore*, thus holding that a plaque of the Ten Commandments affixed to a county courthouse was a violation of the Establishment Clause.

Background

The United States Court of Appeals for the Third Circuit recently delivered an opinion allowing a plaque of the Ten Commandments to remain affixed outside the Chester County Courthouse in West Chester, Pennsylvania. Within a week of this decision, the Eleventh Circuit Court of Appeals concluded that a monument of the Ten Commandments, located in the rotunda of the Alabama State Judicial Building, was a violation of the Establishment Clause and must be removed. The difference? According to the courts, the plaque in Pennsylvania has a historical value that the newly installed monument in Alabama lacks.

The Establishment Clause, found within the First Amendment to the United States Constitution, prohibits any law respecting an establishment of religion. In 1971, the Supreme Court created a three-step test for determining whether a religious display is in violation of the Establishment Clause. First, the display must have a valid secular purpose; second, it must not advance or inhibit any religion; and third, it must not foster a substantial government tie to religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971).

Since *Lemon*, the Third Circuit has adopted the endorsement test, discarding the 1971 *Lemon* test. The endorsement test asks whether a reasonable observer would view a display as being associated with a particular religion or as being a disapproval of that observer's religion.

In *Freethought Society v. Chester County*, the Third Circuit held that a plaque of the Ten Commandments on the Chester County Courthouse was not a violation of the Establishment Clause of the First Amendment. The Court considered two issues in making its determination: first, what principles of Establishment Clause jurisprudence should be used in deciding the case, and second, whether the focus should be on the 1920 erection of the plaque or on the 2001 declination to remove it. 334 F.3d 247, 250 (3rd Cir. 2003). With respect to the first issue, the court chose to use the endorsement test, as opposed to the *Lemon* test, for determining whether the Establishment Clause was being violated by the County Commissioners' refusal to remove the plaque. *Id.* Regarding the second issue, the court concluded that the appropriate focus should be on the 2001 refusal to remove the plaque, as opposed to its 1920 placement. By using the endorsement approach, the court concluded that a reasonable observer would not see the plaque as an endorsement of religion because of its age. Also, by focusing on the events of 2001 as opposed to 1920, the court concluded that the County Commissioners had a legitimate secular purpose for refusing to remove the plaque.

Shortly after *Freethought Society* was decided in the Third Circuit, the Eleventh Circuit ruled in a similar case involving a monument of the Ten Commandments recently placed in the state judicial building. This monument was held to be in violation of the Establishment Clause because of the religious purpose for its placement, thus failing the *Lemon* test.

Preliminary Thesis Formulation

In holding that the refusal by County Commissioners to remove a plaque of the Ten Commandments was not a violation of the Establishment Clause, the Third Circuit in *Freethought Society v. Chester County* reached an erroneous conclusion. Just as the Ten Commandments monument in the Alabama State Judicial Building was found by the Eleventh

Circuit to be a violation of the Establishment Clause, so too should the plaque on the Chester County Courthouse.

Scope of the Comment

This case comment will focus on the incorrect assessment used by the Third Circuit in *Freethought Society v. Chester County*. More specifically, it will address why the Third Circuit should have given greater weight to the religious connotations behind the placement of the plaque in Chester County. Also, it will address why the refusal to remove the plaque *does* violate both the *Lemon* test and the endorsement test. It will look to the recent Eleventh Circuit decision in *Glassroth v. Moore* as a contrast to the Third Circuit decision, pulling from this case reasoning as to why the Third Circuit's holding should be reversed.

Bibliography

Cases

Freethought Society v. Chester County, 334 F.3d 247 (3rd Cir. 2003).

- Topic of this case comment. The Third Circuit holds that a plaque of the Ten Commandments may remain on the county courthouse because a reasonable person would not perceive the plaque as an endorsement of religion by the county.

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

- Ten Commandments monument was displayed for non-secular purposes and must be removed because it constitutes the state's endorsement of religion.

Lemon v. Kurtzman, 403 U.S. 602 (1971).

- Supreme Court establishes a three-part test for determining whether a violation of the Establishment Clause has occurred.

King v. Richmond County, 331 F.3d 1271 (2003).

- The constitutionality of a government's use of a predominantly religious symbol turns on the context in which it appears.

Tenafly Eruv Association v. Borough of Tenafly, 309 F.3d 144 (3rd Cir. 2002).

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

Lynch v. Donnelly, 465 U.S. 668 (1984).

- In her concurring opinion, Justice O'Connor clarifies *Lemon*, establishing the "Endorsement Test."

Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384 (1993).

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

County of Allegheny v. American Civil Liberties Union, 492 U.S. 573 (1989).

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

Capitol Square Review and Advisory Board v. Pinette, 515 U.S. 753 (1995).

- Justice Scalia acknowledges use of the Endorsement Test in religious display cases.

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

- Discussing *Lemon* criticisms made by current Supreme Court Justices.

Stone v. Graham, 449 U.S. 101 (1980).

- The Ten Commandments is an inherently religious message.

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

- Court of Appeals for Sixth Circuit refuses to allow the placement of a Ten Commandments monument on state capitol grounds.

Marsh v. Chambers, 463 U.S. 783 (1983).

- Supreme Court holds that the Nebraska Legislature's practice of opening each legislative day with a prayer by a chaplain does not violate the Establishment Clause.

Indiana Civil Liberties Union v. O'Bannon, 259 F.3d 766 (2001).

- Seventh Circuit holds that the state's acceptance of a monument containing the Ten Commandments, to be placed on statehouse grounds, violated the Establishment Clause.

Statutes

U.S. Const. amend. I

- Contains the Establishment Clause, which is the basis of the controversy in *Freethought Society v. Chester County*.

Law Review Articles

Stephanie Francis Ward, *In with the Old, Out with the New*, 2 ABA Journal eReport 26 (2003).

- Looking at the historical importance of a religious display, and explaining why the Third Circuit allowed a plaque of the Ten Commandments to remain affixed to a county courthouse, while the Eleventh Circuit ordered a monument of the Ten Commandments to be removed.

Susan E. McPherson, *The Heart of the Rhetoric: Legal Arguments Surrounding the Ten Commandments Monument in the Alabama Judicial Building*, 33 Cumb. L. Rev. 647 (2003).

- Explaining the basic legal arguments as to why the Ten Commandments monument in Alabama should or should not be removed.

Ten Commandments Plaque Does Not Violate Establishment Clause, 21 No. 8 McQuillin Mun. Law Rep. 5 (2003).

- Explanation of *Freethought Society v. Chester County*.

Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 Cal. L. Rev. 673 (2002).

- Discussing the Supreme Court's transformation of the Establishment Clause during the last fifty years.

William M. Howard, *First Amendment Challenges to Display of Religious Symbols on Public Property*, 107 A.L.R. 5th 1 (2003).

- Analysis of state and federal cases that consider First Amendment challenges to the display of religious symbols on public property.