

**HOW MUCH IS TOO MUCH? THE
APPLICATION OF THE *DE MINIMIS*
DOCTRINE TO THE FOURTH
AMENDMENT**

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INTRODUCTION

Many Americans would venture that their constitutional rights are absolute, but that is generally not the case.¹ Through the principles established under the often-used *de minimis* doctrine, courts continue to struggle with allowing constitutional breaches in the name of government interest. Under the doctrine, a violation may be held to be so minimal as to not be of the concern of the law. The Supreme Court has noted, “There is, of

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¹ Some constitutional rights are absolute. *See, e.g.*, *Boyd v. Dutton*, 405 U.S. 1, 2 (1972) (noting that a person charged with a felony has an absolute constitutional right to an attorney).

course a *de minimis* level of imposition with which the Constitution is not concerned.”² When evaluating Fourth Amendment violations under the *de minimis* doctrine, the results are much more serious than in some other areas. Such abuses may result in criminal punishment if the intrusion is deemed reasonable and suppression if it is not. However, that is not to say that there is anything wrong with the application, as the Fourth Amendment cannot be construed as absolute in the same way that other constitutional rights may be—the word “unreasonable”³ prevents that. An absolute Fourth Amendment right would prevent all searches and seizures without an appropriate warrant. The Court addressed this issue in *Illinois v. McArthur*, holding, in a lengthy explanation, “We nonetheless have made it clear that there are exceptions to the warrant requirement. When faced with special law enforcement needs, diminished expectations of privacy, minimal intrusions, or the like, the Court has found that certain general, or individual, circumstances may render a warrantless search or seizure reasonable.”⁴

The Supreme Court has only applied the *de minimis* doctrine in a relatively small number of cases. Through studying these cases, it becomes apparent that no tests exist and large gaps appear, causing great uncertainty as to whether the *de minimis* principle applies. With even fewer Fourth Amendment cases to evaluate, the application becomes more and more uncertain. This Article will explore the situations in which the Court has determined if the *de minimis* doctrine applies. The various attempts to apply the principle have left lower courts struggling to follow suit, and as this Article will explain, rightfully so. Though allowing *de minimis* intrusions are necessary and an application of common sense to our law, it is nearly impossible to set bright line rules that delineate when an unconstitutional Fourth Amendment event is *de minimis*.

² *Ingraham v. Wright*, 430 U.S. 651, 674 (1977).

³ U.S. CONST. amend. IV.

⁴ 531 U.S. 326, 330 (2001).

I. HISTORY OF THE *DE MINIMIS* DOCTRINE

The *de minimis* doctrine is a somewhat recent tool used by the Supreme Court of the United States. The term itself was first used in 1796⁵ and was then ignored entirely by the Court until 1865.⁶ The full maxim, *de minimis non curat lex*, means “[t]he law does not concern itself with trifles.”⁷ Courts may use the doctrine to find that a claim is so trivial that a decision need not be made on the merits of the case.⁸ “Litigants lose when their stance is cast as trivial or when they fail to persuade the judge that their adversary has made a trivial claim.”⁹

Several inconsistencies concerning the doctrine should first be mentioned. Certainly the Court will not always use the exact phrase “*de minimis*,” and as such, it has developed a few synonyms.¹⁰ Understandably, “minimal,” “modest,” and “miniscule” may be used to the same effect as *de minimis*.¹¹ “Technical”¹² is also synonymous. Further, the doctrine can be used in two distinct ways—it can protect the government’s interests or the citizen’s liberty. A conservative court or judge will often apply the doctrine for the former purpose; liberals often opt for the latter.¹³

⁵ *Ware v. Hylton*, 3 U.S. 199, 268 (1796) (mentioning, almost in passing, the term “[d]e *minimis non curat lex*”).

⁶ *McAndrews v. Thatcher*, 70 U.S. 347, 359 (1865) (finding that damage of 1/144th of a ship was *de minimis*, calling it “nothing to speak of”).

⁷ BLACK’S LAW DICTIONARY 496 (9th ed. 2009). The term “*de minimis*” alone means “[t]riffing or “minimal.” *Id.*

⁸ Anita Bernstein, *Civil Rights Violations = Broken Windows: De minimis Curet Lex*, 62 FLA. L. REV. 895, 897-98 (2010).

⁹ *Id.* at 897.

¹⁰ In conducting my research on the general history of the *de minimis* doctrine, I limited my search to Supreme Court cases that specifically contained the phrase “*de minimis*.”

¹¹ *U.S. Dep’t of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 507 n.4 (1994) (Ginsburg, J., concurring).

¹² *Tex. State Teachers Ass’n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792 (1989) (A “claim can be characterized as purely technical or *de minimis*.”); *Farrar v. Hobby*, 506 U.S. 103, 117 (1992).

¹³ This is quite understandable. If the issue were over a statute that limits the First Amendment, conservatives would argue that the government had an interest in limiting the right. If the issue were protecting voters’ rights, liberals (especially in the beginning of reapportionment cases) would use it to say that the variations in districts are not *de minimis* amounts. See *infra* notes 25-34 and accompanying text.

This section examines major themes of the *de minimis* doctrine and attempts to explain the boundaries established by the Court. Throughout the Supreme Court's history, the doctrine's application has more or less been limited to a variety of issues. This Article will show why the Court uses it as it does and refuses to extend it to other areas. In some instances, the Court has endeavored to set some bright line rules concerning what is *de minimis* and what is not. These rules provide some guidelines but leave much to be desired.

A. Major Areas of Application

Several themes of *de minimis* jurisprudence are easily discernible as one wades through the Supreme Court cases on the subject. The majority of cases involve numbers, whether time, percentages, people, or money. Therefore, as our economy expanded, and American workers lost more and more money through taxes and began receiving more rights through labor unions, the doctrine was used to squash or strengthen many arguments. The voting rights era saw application of the *de minimis* doctrine to assist in the determination of what deviations in apportionment plans were acceptable. More recently, the doctrine has been applied to issues such as copyright violations, the First Amendment freedoms, the Eighth Amendment's ban on cruel and unusual punishment, and the Fourth Amendment's prohibition on unreasonable searches and seizures.

The first significant area of *de minimis* doctrine application began in 1895 concerning taxation. *Maricopa & P. R. Co. v. Territory of Arizona* dealt with a company's refusal to pay approximately \$1,200 in taxes for railroad tracks located on an Indian reservation.¹⁴ The "small amount" of the penalty on this tax was held to be *de minimis*.¹⁵ In *Fairbank v. United States*, the Supreme Court issued a huge blow to the doctrine as applied to constitutional imperatives.¹⁶ *Fairbank* concerned the

¹⁴ 156 U.S. 347, 350 (1895).

¹⁵ *Id.* at 352.

¹⁶ 181 U.S. 283 (1901).

constitutionality of a stamp tax on foreign bills of lading.¹⁷ The Court noted, “A 10-cent tax or duty is in conflict with that provision as certainly as a 100-dollar tax or duty. Constitutional mandates are imperative. The question is never one of amount, but one of power. The applicable maxim is, ‘*Obsta principiis*,’¹⁸ not, ‘*De minimis non curat lex*.’”¹⁹ Therefore, the tax was struck down as there was a violation of the Constitution, regardless of how *de minimis* it might be.²⁰

Beginning in the 1940s, the *de minimis* doctrine began to be applied to unions and labor cases. In *Mabee v. White Plains Publishing Co.*, a lower court held that White Plains was not subject to the relevant statute, because the defendant’s business was rather small, and only 0.5% of its business was interstate.²¹ However, the Supreme Court found that because Congress made no distinction on business size, application of the *de minimis* doctrine was inappropriate.²² Another case the same year held that employees could be docked fifteen minutes of pay because it took that much time to get to their stations from the time clock.²³ However, the Court noted that if the time difference were seconds or even a few minutes, it would likely be a *de minimis* amount.²⁴

¹⁷ *Id.* at 283. The issue was whether the tax violated the provision that “[n]o tax or duty shall be laid on any Articles exported from any state.” U.S. CONST. art. I, § 9.

¹⁸ “*Obsta principiis*” means to “[w]ithstand beginnings; resist the first approaches or encroachments.” BLACK’S LAW DICTIONARY 1183 (9th ed. 2009).

¹⁹ *Fairbank*, 181 U.S. at 291-92.

²⁰ *Id.* at 312. This principle has been affirmed in several other tax-related cases. In *Fulton Corp. v. Faulkner*, the Court said that although “[t]he tax is so small in amount as to have no practical impact at all, [the Supreme Court has] never recognized a ‘*de minimis*’ defense to a charge of discriminatory taxation under the Commerce Clause.” 516 U.S. 325, 333 n.3 (1996). *See, e.g.*, *Memphis Natural Gas Co. v. Stone*, 335 U.S. 80, 103-04 (1948) (“[A] State tax on interstate commerce does not become a valid one merely because ‘it’s only a little one.’ And even in these days, an unconstitutional exaction by a State of \$3,400 is not *de minimis*.”); *see also* *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 582 n.15 (1997); *Associated Indus. v. Lohman*, 511 U.S. 641, 650 (1994).

²¹ 327 U.S. 178, 180, 181 (1946).

²² *Id.* at 181-82 (“We need not stop to consider what different scope, if any, the maxim *de minimis* might have in cases arising thereunder. Here, Congress had made no distinction on the basis of volume of business.”).

²³ *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 692 (1946).

²⁴ *Id.*

Voter disenfranchisement cases amount to a large number of *de minimis* applications. The first such use was in Justice Harlan's dissent in the 1962 case of *Baker v. Carr*, where he argued that Tennessee's departure from its Constitution concerning voter disenfranchisement was *de minimis*.²⁵ Five years later, the Court acknowledged that *de minimis* deviations are never avoidable.²⁶ In *Kirkpatrick v. Preisler*,²⁷ the Court refused to fix a certain percentage deviation, noting, "We can see no nonarbitrary way to pick a cutoff point at which population variances suddenly become *de minimis*. Moreover, to consider a certain range of variances *de minimis* would encourage legislators to strive for that range rather than for equality as nearly as practicable."²⁸ However, the Supreme Court has since provided some guidelines to states. Deviations of 16.5%,²⁹ 13.1%,³⁰ and 5.97%³¹ have been found not to be *de minimis*. In *Gaffney v. Cummings*, the Court held, "Deviations no greater than 8% are . . . to be deemed *de minimis*."³² This standard has since been loosened to allow for deviations no greater than 10%,³³ though the

²⁵ 369 U.S. 186, 335-36 (1962) (Harlan, J., dissenting).

²⁶ *Swann v. Adams*, 385 U.S. 440, 444 (1967) ("*De minimis* deviations are unavoidable, but variations of 30% among senate districts and 40% among house districts can hardly be deemed *de minimis* and none of our cases suggests that differences of this magnitude will be approved without a satisfactory explanation grounded on acceptable state policy.>").

²⁷ 394 U.S. 526 (1969)

²⁸ *Id.* at 531.

²⁹ *Connor v. Finch*, 431 U.S. 407, 418 (1977) ("[D]eviations of 16.5% in the Senate districts and 19.3% in the House districts can hardly be characterized as *de minimis*.").

³⁰ *White v. Weiser*, 412 U.S. 783, 790 (1973) (referencing *Wells v. Rockefeller*, 394 U.S. 542 (1969) ("*Kirkpatrick* and *Wells* invalidated state reapportionment statutes providing for federal congressional districts having total percentage deviations of 5.97% and 13.1%, respectively.>").

³¹ *Id.* (referencing *Kirkpatrick*, 394 U.S. at 531).

³² 412 U.S. 772, 775 (1973).

³³ *Finch*, 431 U.S. at 418 ("The maximum population deviations of 16.5% in the Senate districts and 19.3% in the House districts can hardly be characterized as *de minimis*; they substantially exceed the 'under-10%' deviations the Court has previously considered to be of prima facie constitutional validity. . . ."). *See also* *Brown v. Thomson*, 462 U.S. 835, 842 (1983) (A "deviation under 10% falls within this category of minor deviations.>").

Court maintains that *de minimis* exceptions should only be allowed in “unavoidable” instances.³⁴

The Supreme Court first mentioned the *de minimis* doctrine with regard to the First Amendment in *New York v. Ferber*, holding that “[t]he value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not *de minimis*.”³⁵ In 1992, the Court furthered that idea, finding that “the First Amendment does not apply to [several types of speech] because their expressive content is worthless or of *de minimis* value to society.”³⁶ A nude exotic-dancing ban was found constitutional in *City of Erie v. Pap’s A.M.*, because, although a violation of freedom of expression, it was *de minimis* since it could be done in pasties or a G-string, “[leav[ing] ample capacity to convey the dancer’s erotic message.”³⁷ The Court has noted that it is natural to think that the portion of time (and therefore, salary) a public school teacher spends reading from the Bible daily to students is *de minimis*, though this argument is offensive to the Court.³⁸ In *Elk Grove Unified School District v. Newdow*, Justice O’Connor’s concurrence included one of the most important statements to date concerning the *de minimis* doctrine.³⁹ In determining whether the words “In God We Trust” could be construed as a violation of the First Amendment, Justice O’Connor suggested, “There are no *de minimis* violations of the Constitution—no constitutional harms so slight that the courts are obliged to ignore them.”⁴⁰ However, Justice O’Connor’s

³⁴ *Weiser*, 412 U.S. at 790 (holding that district deviations “were not ‘unavoidable,’ and the districts were not as mathematically equal as reasonably possible”); see also *Kirkpatrick*, 394 U.S. at 531. Recently, in *League of United Latin American Citizens v. Perry*, the Court held that a “discriminatory effect cannot be dismissed as *de minimis*.” 548 U.S. 399, 467 (2006).

³⁵ 458 U.S. 747, 762 (1982)

³⁶ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 400 (1992).

³⁷ 529 U.S. 277, 301 (2000) (“Being ‘in a state of nudity’ is not an inherently expressive condition [N]ude dancing of the type at issue here is expressive conduct, although we think that it falls only within the outer ambit of the First Amendment’s protection.”).

³⁸ *Hein v. Freedom From Religion Found.*, 551 U.S. 587, 601 n.2 (2007).

³⁹ 542 U.S. 1, 36-37 (2004) (O’Connor, J., concurring).

⁴⁰ *Id.* Justice O’Connor continued, “Given the values that the Establishment Clause was meant to serve, however, I believe that government can, in a discrete category of cases, acknowledge or refer to the divine without offending the

suggestion has been held to be inaccurate, as the Court has found that such violations are permissible as long as the restriction has “sufficient tailoring or justification.”⁴¹

Another use of the doctrine concerns the use of force against inmates. The Eighth Amendment’s ban on “cruel and unusual punishments”⁴² was found to hold that use of physical force was *de minimis* unless it was force “repugnant to the conscience of mankind.”⁴³ In *Hudson v. McMillian*, the Supreme Court held that an inmate’s “bruises, swelling, loosened teeth, and a cracked dental plate [were] not *de minimis*,”⁴⁴ though the Fifth Circuit considered them “minor” and found that “minor harms do not rise to constitutional proportions.”⁴⁵ The Court also reversed a Fourth Circuit decision that found a *de minimis* use of force in *Wilkins v. Gaddy*.⁴⁶ In *Wilkins*, the petitioner’s injuries from being slammed onto a concrete floor, punched, kicked, kneed, and choked included a bruised heel, lower-back pain, increased blood pressure, migraine headaches, dizziness, depression, panic attacks, and nightmares of the assault.⁴⁷

Beyond these major categories, the *de minimis* doctrine has been applied to a variety of other situations. Copyright infringement is often excused as *de minimis*.⁴⁸ An “improperly obtained guilty plea[] is not so slight as to be capable of being

Constitution. . . . These references are not minor trespasses upon the Establishment Clause to which I turn a blind eye. Instead, their history, character, and context prevent them from being constitutional violations at all.” *Id.* at 37.

⁴¹ *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 529 (2001) (“Although the First Circuit decided that the restriction’s burden on speech is very limited, there is no *de minimis* exception for a speech restriction that lacks sufficient tailoring or justification.”); see also *City of Erie*, 529 U.S. at 301.

⁴² U.S. CONST. amend. VIII.

⁴³ *Hudson v. McMillian*, 503 U.S. 1, 10 (1992) (quoting *Whitley v. Albers*, 475 U.S. 312, 327 (1986) (internal quotation marks omitted)).

⁴⁴ *Id.* at 10.

⁴⁵ *Hudson v. McMillian*, 929 F.2d 1014, 1015 (5th Cir. 1990).

⁴⁶ 130 S. Ct. 1175, 1179-80 & n.2 (2010).

⁴⁷ *Id.* at 1177.

⁴⁸ See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 364 (1991) (“[C]opyright protects only those constituent elements of a work that possess more than a *de minimis* quantum of creativity.”); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (Blackmun, J., dissenting) (“Photocopying an old newspaper clipping to send to a friend” or “pinning a quotation on one’s bulletin board” has a *de minimis* effect on the author.).

characterized as *de minimis*.⁴⁹ The ten-day suspension of a student was found not to be *de minimis* and may have violated the student's right to due process in *Goss v. Lopez*.⁵⁰ Requiring justices of the peace to wait two years to run for the legislature is a *de minimis* burden on political aspirations.⁵¹ "[T]he requirement that [a DUI] offender attend an alcohol abuse education course can only be described as *de minimis*."⁵² These varied applications of the doctrine show the flexibility that courts may use in its application.

It took many years for the *de minimis* doctrine to become a powerful force in Supreme Court jurisprudence, but today, it is active in many areas. These expansions often occurred as our country moved through significant periods in our history. The development of unions and industry was the first. The civil rights era brought about application in voter disenfranchisement cases. The civil liberties movement and strong media presence of the last few decades brought about the doctrine's First Amendment application. And though difficult to ascertain, technology could surely be our next huge growth. Nonetheless, the question remains: how much is too much? When is an act *de minimis*, and when will the fury of the Constitution reign down, invalidating a search or seizure? Though this is not an easy answer, the Supreme Court has given us some limited guidance.

B. The Amount of De Minimis

As mentioned *infra*, the *de minimis* doctrine is often used in regard to numbers—and understandably so. Numbers cases can be divided into three categories: (1) cases in which a percentage of the total is found to be *de minimis*, (2) cases where a total dollar amount is *de minimis*, and (3) voting rights and reapportionment

⁴⁹ *Mempa v. Rhay*, 389 U.S. 128, 136 (1967).

⁵⁰ 419 U.S. 565, 576 (1975) (“[A]s long as a property deprivation is not *de minimis*, its gravity is irrelevant to the question whether account must be taken of the Due Process Clause.”).

⁵¹ *Clements v. Fashing*, 457 U.S. 957, 967 (1982).

⁵² *Blanton v. City of N. Las Vegas*, 489 U.S. 538, 544 n.9 (1989).

cases.⁵³ Better understanding of the ranges allowed by the Supreme Court in each category is necessary in order to discern the impact the *de minimis* doctrine has on the law generally, particularly with later discussions on the Fourth Amendment.

Several *de minimis* cases have been decided based on the percentage of the relevant amount when compared to the whole. In *Spiegel's Estate v. Commissioner*, the Supreme Court held that \$70 out of \$1,000,000 (0.007%) was a *de minimis* amount.⁵⁴ The Court later ruled that acquiring ten of a total 3,500 stores (0.286%) was *de minimis*.⁵⁵ Also, 0.3% of a market share fits well within the doctrine.⁵⁶ In 1865, the Court found that damage to 1/144th (0.694%) of a ship was *de minimis*.⁵⁷ In *Ellis v. Brotherhood of Railway, Airline & Steamship Clerks, Freight Handlers, Express & Station Employees*, the Court held that 0.7% of an annual budget was *de minimis*, though the amount was not exempted from the statute in question.⁵⁸ Therefore, there seems to be a general consensus that only fractions of a percent will count as *de minimis*, though the Court has not considered the issue with higher amounts.

On other occasions, the Court has used the *de minimis* doctrine when considering a single amount or number of items, rather than those as parts of a whole.⁵⁹ For example, in *Tumey v. Ohio*, the Court evaluated whether payment of a judge only when a defendant is convicted can be ignored since the payment was so small as to be *de minimis*.⁶⁰ Finding that the judge received

⁵³ For information about voting rights cases, see *supra* notes 25-34 and accompanying text. These cases are not discussed in this section (and especially with the percentage cases), because they are a very distinct group. The Court would almost certainly never consider ten percent a *de minimis* amount in any other situation.

⁵⁴ 335 U.S. 701, 733 (1949).

⁵⁵ *United States v. Von's Grocery Co.*, 384 U.S. 270, 294 (1966).

⁵⁶ *United States v. Aluminum Co. of Am.*, 377 U.S. 271, 282 (1964).

⁵⁷ *McAndrews v. Thatcher*, 70 U.S. 347, 359 (1865) ("[T]he portion remaining was a mere damaged remnant under water, abandoned as not worth saving, and amounting only in value, to about 1/144th part of the whole. Such a remnant—nothing to speak of—comes within the rule '*de minimis*.'").

⁵⁸ 466 U.S. 435, 449-50 (1984).

⁵⁹ In addition to the cases presented *infra*, Justice Frankfurter, in his dissent in *Memphis Natural Gas Co. v. Stone*, opined that a tax of \$3,400 per year was not *de minimis*. 335 U.S. 80, 104 (1948) (Frankfurter, J., dissenting).

⁶⁰ 273 U.S. 510, 531-532 (1927)

approximately twelve dollars from the case in question, the Court found that the prospect of receiving the money could not be considered “a minute, remote, trifling, or insignificant interest.”⁶¹ In another case, 192 fish being caught by an individual was considered a *de minimis* number.⁶² As recently as 1987, the Court held that “values of approximately \$2,700 and \$1,816” are not *de minimis*.⁶³ Perhaps, very understandably, \$0.04 was considered *de minimis*.⁶⁴ In 1992, the Court held, in *Wyoming v. Oklahoma*, that \$500,000 was not *de minimis*, though it amounted to less than one percent of total taxes.⁶⁵ The very next year, \$900 per month was determined not to be *de minimis*.⁶⁶ These figures give some idea as to the Court’s interpretation of *de minimis* amounts, but still provide no universal standard.

In *Citizens United v. FEC*, Justice Stevens advocated for a *de minimis* standard in his dissent:

The Court also protests that a *de minimis* standard would “requir[e] intricate case-by-case determinations.” But *de minimis* tests need not be intricate at all. A test that . . . [applied to] organizations if they received less than a fixed dollar amount of business donations in the previous year, or if such donations represent less than a fixed percentage of their total assets, would be perfectly easy to understand and administer.⁶⁷

Thus, as Justice Stevens argued, having a specified *de minimis* standard is certainly possible, although the Court has yet to make such an attempt.

⁶¹ *Id.*

⁶² *Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017, 1028 n.12 (1983).

⁶³ *Hodel v. Irving*, 481 U.S. 704, 714 (1987).

⁶⁴ *Lehnert v. Ferris Faculty Ass’n*, 500 U.S. 507, 545 (1991) (“[W]e may reasonably assume that roughly four cents of each petitioner’s service fee was used to report on extra-unit litigation. Surely, this amount is *de minimis*.”).

⁶⁵ 502 U.S. 437, 453 n.11 (1992) (“We would not, in any event, readily find the amount here to be *de minimis*. True, the taxes lost have amounted to less than 1% of revenues received by Wyoming, but even this fractional percentage exceeds \$500,000 per year. Wyoming approaches this case viewing such a drain on its tax base year after year . . .”).

⁶⁶ *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 54 (1993).

⁶⁷ 130 S. Ct. 876, 937 n.14 (2010) (Stevens, J., dissenting).

Figure 1 – De Minimis Interests

De Minimis Doctrine Protecting the Defendant's Interests		
	<i>De Minimis</i>	<i>Not De Minimis</i>
\$0.00	\$5.00	
<i>De Minimis</i>	\$0.04	\$1,816.00 <i>Not De Minimis</i>
<i>Unknown</i>		
De Minimis Doctrine Protecting the Government's Interests		

Therefore, while not all *de minimis* uses involve numerical values, there are those that do give some guidance as to when the Court is willing to make the application. In dealing with percentages, the Court has consistently held that those lower than 0.7% are within the *de minimis* range. However, this is not to say that a higher percentage could not be found to also be *de minimis*. It should also be noted that the Court often raises the *de minimis* doctrine sua sponte, and that, therefore, the lack of application to higher percentages may be a showing of their unwillingness to go any higher. With regard to monetary amounts that are not a part of a specific amount, the application is less defined and much more difficult to apply to other situations. Certainly, a few cents is determined to be *de minimis*, and amounts of thousands of dollars are not, but the Court is silent on the gap between the two (see Figure 1). There are other occasions where an individual number (such as fish) can be found *de minimis*. This usage is applied on a case-by-case basis. Finally, *Wyoming v. Oklahoma* suggests that there are situations in which an amount may comply with the percentage requirement to be *de minimis*, but the amount itself is so large that it does not qualify.

These understandings concerning the history of the *de minimis* doctrine will help guide our exploration into the relatively recent application to Fourth Amendment principles. *De minimis* standards are used to hold that violations of the law—even the Constitution—are tolerable, as long as they remain minimal. Despite Justice O'Connor's suggestion that “[t]here are

no *de minimis* violations of the Constitution,”⁶⁸ the Supreme Court’s rulings hold otherwise. Hence, it is necessary to recognize the *de minimis* standard and amounts in order to determine whether a Fourth Amendment violation—time, amounts, immeasurable intrusions, or otherwise—has crossed the mostly invisible line between *de minimis* and unreasonable.

II. THE SUPREME COURT’S APPLICATION OF THE *DE MINIMIS* DOCTRINE TO THE FOURTH AMENDMENT

While the first use of the term “*de minimis*” appeared in a United States case in 1796,⁶⁹ it was not until 1977 that the term would first appear within the context of the Fourth Amendment.⁷⁰ Since that time, the application has “flourished” in that the Court has used the phrase in a handful of cases. These cases cover a variety of subjects concerning the reasonability of searches and seizures, and when combined with previous uses of the doctrine, we are better able to understand how the Court determines whether an otherwise Fourth Amendment act is *de minimis*. In some situations, “cases have turned on the Court’s view that the individual’s interest invaded is so attenuated that there has been no search or seizure within the meaning of the Amendment There are other cases where the Court has indicated that the intrusion may be so minimal that it would summarily reject claims of unreasonableness.”⁷¹ Thus, there are two applications of the *de minimis* doctrine to the Fourth Amendment—the first involves situations in which the intrusion was so minimal as to be deemed no intrusion at all, and the second, situations where the court will recognize an intrusion but find it to be reasonable.

Certainly, an issue for discussion is whether such intrusions should be allowed. As Justice O’Connor mentioned, it is perhaps true that no *de minimis* violations of the Constitution should be allowed, but our jurisprudence does not explicitly acknowledge

⁶⁸ Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 36 (2004).

⁶⁹ Ware v. Hylton, 3 U.S. 199, 268 (1796).

⁷⁰ Connally v. Georgia, 429 U.S. 245, 251 (1977).

⁷¹ THOMAS K. CLANCY, THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION 509 n.274 (2008).

this.⁷² In *United States v. Bailey*, the Sixth Circuit argued, in a lengthy explanation, that *de minimis* intrusions are only allowed if they do not violate a legitimate expectation of privacy.⁷³

We consider it irrelevant whether a particular governmental intrusion is classified as a “search” or as a “seizure.” What matters is whether it violates an individual’s legitimate expectation of privacy. Therefore, it is not necessary to speculate whether a beeper “searches” or “seizes” anything. Furthermore, the fourth amendment does not overlook *de minimis* intrusions. An intrusion is not *de minimis* if it violates an individual’s legitimate expectation of privacy. The Government’s argument that beeper surveillance is too minor an intrusion to constitute a search begs the question: the intrusion is minor only if it does not violate protected individual privacy.⁷⁴

At least one Supreme Court justice has also mentioned that acceptance by society is not a justification for such minimal intrusions. In Justice Brennan’s dissent in *Michigan Department of State Police v. Sitz*, he opined:

I would hazard a guess that today’s opinion will be received favorably by a majority of our society, who would willingly suffer the minimal intrusion of a sobriety checkpoint stop in order to prevent drunken driving. But consensus that a particular law enforcement technique serves a laudable purpose has never been the touchstone of constitutional analysis.⁷⁵

However, despite these worthy arguments, the Supreme Court has overruled them in order to protect interests they consider more indispensable than one’s Fourth Amendment protections.

Like other uses of the *de minimis* doctrine, Fourth Amendment cases can be divided into several categories for easier

⁷² *Newdow*, 542 U.S. at 36-37.

⁷³ 628 F.2d 938, 940 (6th Cir. 1980).

⁷⁴ *Id.*

⁷⁵ 496 U.S. 444, 459 (1990) (Brennan, J., dissenting).

understanding.⁷⁶ Some cases seek to apply the standard to a number—whether a part of an object or an amount of time. Others attempt to measure the intrusion of an act which cannot be measured in numbers, but rather make an objective, reasonableness evaluation of the situation. This Article will first examine the former group of cases.

A. *Easily Measurable Intrusions*

The case of *United States v. Jacobsen* concerned the reasonableness of destroying part of the defendant's property.⁷⁷ A package was damaged during shipping, and FedEx employees "observed a white powdery substance They summoned a federal agent, who removed a trace of the powder, subjected it to a chemical test and determined that it was cocaine. The question presented was whether the Fourth Amendment required the agent to obtain a warrant before he did so."⁷⁸ The Supreme Court concluded that the original seizure of the package was reasonable, but acknowledged that a lawful seizure "can nevertheless violate the Fourth Amendment because its manner of execution unreasonably infringes possessory interests protected by the Fourth Amendment's prohibition on 'unreasonable seizures.'"⁷⁹ The appropriate test requires the Court to "balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion."⁸⁰ Finding that the government had a substantial interest in the procedure, the cocaine was lawfully detained, and only a trace of it was taken in the test, the violation was *de minimis* and did not render the seizure unreasonable.⁸¹ Therefore, the trace of cocaine, which went unnoticed by the defendants, was akin to 0.7% or \$0.04 in

⁷⁶ While the historical section of this Article was limited to Supreme Court cases specifically mentioning the term "*de minimis*," this section will expand that to include related terms such as "minimal intrusion."

⁷⁷ 466 U.S. 109 (1984).

⁷⁸ *Id.* at 111.

⁷⁹ *Id.* at 124.

⁸⁰ *Id.* at 125 (quoting *United States v. Place*, 462 U.S. 696, 703 (1983)).

⁸¹ *Id.*

other cases where the amount was *de minimis*.⁸² The miniscule amount, though technically a violation of the Fourth Amendment, was excused as *de minimis* because “the safeguards of a warrant would only minimally advance Fourth Amendment interests.”⁸³

In a case similar to *Jacobsen*, *Cardwell v. Lewis* looked at the destruction of the defendant’s property to determine whether it was of a *de minimis* nature.⁸⁴ After a lawful arrest, Lewis’s car was seized and examined by police.⁸⁵ In an attempt to connect him to a wreck with another vehicle, the examiner removed some paint from the exterior of Lewis’s car.⁸⁶ The Court held that since there was no reasonable expectation of privacy in the paint samples, their seizure for examination was reasonable.⁸⁷ Further, the Court compared the case to *Coolidge v. New Hampshire*, holding that the more extensive search and taking of vacuum sweepings in *Coolidge* was very different from the taking of paint samples in

⁸² See *supra* notes 57, 64 and accompanying text.

⁸³ *Jacobsen*, 466 U.S. at 125. *Jacobsen* has been influential in many cases before lower courts. See *United States v. Contreras-Cortez*, 41 Fed. Appx. 252, 255 (10th Cir. 2002) (finding that passing on a package which was suspected of containing contraband was *de minimis*); *Artes-Roy v. City of Aspen*, 31 F.3d 958, 963 (10th Cir. 1994) (holding that the entry of the city chief building inspector into Artes-Roy’s home without a warrant was a violation of the Fourth Amendment, but was a *de minimis* violation). “Plaintiff argues that defendant’s intrusion cannot be considered *de minimis* in light of the significant injuries that she alleged occurred as a result of defendant’s entry into her home. The point, [however,] is not that the harm[] . . . [is] small but that there is no actionable [constitutional] wrong.” *Id.* (quoting *Hessel v. O’Hearn*, 977 F.2d 299, 304 (7th Cir. 1992)); *Auster Oil & Gas, Inc. v. Stream*, 764 F.2d 381, 390 (5th Cir. 1985) (allegations of police conducting a search and seizure by placing plastic capsules containing microchips in Auster’s oil wells was more than *de minimis* infringement).

⁸⁴ 417 U.S. 583 (1974) (plurality opinion). While *Cardwell* did not expressly use the term “*de minimis*,” the Court in *Jacobsen* considered it implied. In a summary of the holding of *Cardwell*, the Court wrote that it concerned an “examination . . . [of whether taking the paint] was a *de minimis* invasion of constitutional interests.” *Jacobsen*, 466 U.S. at 125.

⁸⁵ *Cardwell*, 417 U.S. at 587-88.

⁸⁶ *Id.* at 588.

⁸⁷ *Id.* at 588-94. In *Tackett v. State*, the Arkansas Supreme Court examined Tackett’s claim that police seizing paint scrapings, the front bumper, grill, and other parts of his vehicle was, as Tackett argued, more intrusive than *Cardwell*. 822 S.W.2d 834 (Ark. 1992). The court held that Tackett had no privacy in the exterior of the vehicle and that because probable cause existed, the removal of the auto parts was not unreasonable. *Id.* at 836.

Cardwell.⁸⁸ Thus, paint samples may be considered *de minimis*, but vacuum sweepings are not, creating what seems like a very fine line in the application of *de minimis* standards.

In *Connally v. Georgia*, the Court examined whether a justice of the peace receiving \$5.00 per search warrant he issued violated the defendant's Fourth Amendment rights.⁸⁹ Connally had been convicted of possession of marijuana.⁹⁰ The Georgia Supreme Court held, "[W]e are not persuaded that a Justice of the Peace would violate his oath to earn a \$5.00 fee and are inclined to the view that the amount involved in issuing or refusing to issue a search warrant falls within the *de minimis* rule. The justice of the peace testified that he had refused to issue search warrants on some occasions."⁹¹ However, the United States Supreme Court found the amount not to be *de minimis* and therefore held that the issuance of the search warrant violated Connally's constitutional rights.⁹² Two important distinctions should be made with *Connally* as compared to the other measurable cases. First, the *de minimis* doctrine was used to protect the defendant here, rather than to provide justification for the government action. Therefore, *Connally* cannot be read as holding that any amount above \$5.00 is not *de minimis* generally, but instead that such a low amount can be considered not to fall within the doctrine when—and only when—it is being used to *protect* the defendant.⁹³ Secondly, while one warrant earned the justice only \$5.00, the justice had issued over 10,000 within a couple of years, amounting to a substantial amount of money.⁹⁴ The larger sum (over \$50,000) could have

⁸⁸ *Cardwell*, 417 U.S. at 594 n.9 (citing *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (finding that since Coolidge's car could not be seized following his arrest in his home—despite various justifications from the state—the seizure of vacuum sweepings was not so minimal as to allow the evidence to be admissible)).

⁸⁹ 429 U.S. 245, 246 (1977).

⁹⁰ *Id.* at 245.

⁹¹ *Connally v. State*, 227 S.E.2d 352, 355 (1976).

⁹² *Connally*, 429 U.S. at 251.

⁹³ See Figure 1 for a graphical illustration of this distinction as it applies to the *de minimis* doctrine, generally.

⁹⁴ *Connally*, 429 U.S. at 356 n.3 (noting that from January 1, 1973 until the time of the pre-trial hearing, the justice had issued over 10,000 warrants. However, the Court did not note the date of the hearing.).

unquestionably been a factor in the Court's judgment on the *de minimis* issue.⁹⁵

Figure 2 – De Minimis Amounts of Time

Intrusion of a Person				
<i>De Minimis</i>	<i>Unknown</i> 20 minutes	90 minutes	<i>Unreasonable</i>	
<i>De Minimis</i>			Over 29 hours <i>De Minimis?</i>	Unknown <i>Unreasonable</i>
Intrusion of a House, Paper, or Effect				

Several cases have attempted to define when a length of time for a search or seizure becomes unreasonable under the Fourth Amendment and is no longer a *de minimis* intrusion. Such evaluations are divided as to whether the protected object under the Amendment was a person or either a house, paper, or effect, as shown in Figure 2, *supra*.⁹⁶ The Court held in *Illinois v. McArthur* that the seizure of the defendant's home for two hours while they obtained a search warrant was reasonable.⁹⁷ In *United States v. Van Leeuwen*, the Court held that the "29-hour detention of [the] mailed package [was] reasonable given [the] unavoidable delay in

⁹⁵ The court in *Buritica v. United States*, following the decision in *Connally*, found that paying cash payments in the amount of \$100-&400 to customs officials for interdicting drug smugglers was not *de minimis*. 8 F. Supp. 2d 1188, 1194-95 (N.D. Cal. 1998).

⁹⁶ In *United States v. LaFrance*, the First Circuit made an important distinction between intrusion and detention of inanimate objects protected by the Fourth Amendment:

Where inanimate objects are concerned, detention is merely the period during which government agents exercise dominion and control over the property. Detention of an inanimate object is one-dimensional; it may vary *only* in length of time. Intrusion, however, is two-dimensional; it can vary both in its nature and extent. Indeed, an intrusion may be so insignificant as to go unnoticed and thus have only a *de minimis* impact on any protected property interest.

879 F.2d 1, 6 (1st Cir. 1989) (footnote omitted) (citations omitted) (internal quotation marks omitted).

⁹⁷ 531 U.S. 326, 332-33 (2001).

obtaining [a] warrant and minimal nature of [the] intrusion.”⁹⁸ In *United States v. Place*, the seizure of defendant’s person for a ninety-minute period without probable cause was held to be unreasonable.⁹⁹ “[A]lthough we decline to adopt any outside time limitation for a permissible *Terry* stop, we have never approved a seizure of the person for the prolonged 90-minute period involved here.”¹⁰⁰ Further, in *Place*, the Court acknowledged that the *Model Code of Pre-Arrest Procedure* suggests no more than twenty minutes for a *Terry* stop.¹⁰¹ However, the Court considered the twenty minute rule to be too unyielding.¹⁰² Thus, with regard to non-person objects protected by the Amendment, the line between *de minimis* and unreasonableness is some point after

⁹⁸ *Id.* at 333 (summarizing the holding in *United States v. Van Leeuwen*, 397 U.S. 249, 253 (1970)). Lower courts have differed on whether the twenty-nine-hour period in *Van Leeuwen* is considered to be the outer bounds of reasonableness. Compare *United States v. Hillison*, 733 F.2d 692, 696 (9th Cir. 1984) (“[T]he period of detention of the package prior to the search was nine hours, far less than the 29 hours held reasonable in *Van Leeuwen*.” This sentence has been interpreted as being the outer bounds of what is reasonable. *United States v. Dass*, 849 F.2d 414, 415 (9th Cir. 1988) (holding that detaining packages for seven to twenty-three days allowed for suppression of the evidence because it violated the Fourth Amendment)) with *People v. Link*, 32 Cal. Rptr. 2d 149, 152-53 (1994) (finding disagreement “with the *Dass* majority that there is anything in [*Van Leeuwen*] suggesting twenty-nine hours is the bounds of reason” and holding that a warrantless seizure for just over two days was reasonable). Still others have held that less time than the twenty-nine hours in *Van Leeuwen* may be unreasonable. See, e.g., *United States v. Regan*, 687 F.2d 531, 538 (1st Cir. 1982) (holding that a twenty-two-hour detention of luggage based on reasonable suspicion alone was not reasonable and that the government should have protected its interests by having detector dogs more easily accessible).

⁹⁹ 462 U.S. 696, 709-10 (1983) (“Given the enforcement problems associated with the detection of narcotics trafficking and the minimal intrusion that a properly limited detention would entail, we conclude that the Fourth Amendment does not prohibit such a detention. On the facts of this case, however, we hold that the police conduct exceeded the bounds of a permissible investigative detention of the luggage.”).

¹⁰⁰ *Id.* (footnote omitted).

¹⁰¹ *Id.* at 710 n.10 (referencing MODEL CODE OF PRE-ARREST PROCEDURE § 110.2(1) (1975)). Several courts have dealt with traffic stops consisting of less time than twenty minutes, and all have found those times to be reasonable. See, e.g., *United States v. Rivera*, 570 F.3d 1009, 1013 (8th Cir. 2009) (holding that a stop of seventeen minutes, including time to get a radio response, read and sign a consent form, and walk a drug dog around the car, was reasonable); *United States v. Robinson*, 455 F.3d 832 (8th Cir. 2006) (finding that a stop with exact duration unknown, but questioning which created probable cause after only a few minutes, made the initial intrusion *de minimis*).

¹⁰² *Place*, 462 U.S. at 710 n.10.

twenty-nine hours.¹⁰³ The seizure of persons is certainly *de minimis* if fewer than twenty minutes and unreasonable if more than ninety minutes, but the gap in between must be filled in by a reasonableness standard based on the facts.¹⁰⁴

¹⁰³ This category should perhaps be further divided. Seizing someone's home for twenty-nine hours might have had a different result. However, the lack of Supreme Court cases on the topic allows speculation on how the Supreme Court might treat such cases. The First Circuit performed a thorough analysis of *Place* as it applies to seizure of property in *United States v. LaFrance*, 879 F.2d 1, 10 (1st Cir. 1989) (finding that a 135-minute detention of a package was not unreasonable under the Fourth Amendment). The court noted:

Consequently, though the duration of a detention is an important consideration in evaluating the intrusiveness of a package's detainer, it is neither the mirror image of unreasonableness nor the yardstick against which the suitability of police procedures must inevitably be measured. In the ordinary case, a judge will not be able to calculate whether an intrusion goes beyond the pale merely by holding a stop watch to a sequence of events.

Id. at 7.

The First Circuit went on to specify three factors that determine reasonableness of the time that a seizure may be continued, including: "(1) investigatory diligence, (2) length of detention, and (3) information conveyed to the suspect. . . . While there is some play among these factors, each has a theoretical outer limit which alone might render detention unconstitutional." *Id.* (referencing the origin of these factors in *Place*, 462 U.S. at 709-10; *United States v. West*, 731 F.2d 90, 92 (1st Cir. 1984)). *See also* *United States v. Allen*, 990 F.2d 667, 672 (1st Cir. 1993) (holding that a seizure of five hours was permissible); *United States v. Teslim*, 869 F.2d 316, 323 (7th Cir. 1989) (twenty-five-minute seizure was reasonable).

The Fourth Circuit has a five-factor test for its application of *Place*:

(1) [T]he duration of time the suspect is delayed by the stop; (2) whether the police acted diligently; (3) whether the detention of the subject of the search was *unnecessarily* prolonged; (4) whether the authorities made it absolutely clear that they planned to reunite the suspect and his possessions at some future time, and how they planned to do it; and (5) the importance of the governmental interest alleged to justify the intrusion.

United States v. Alpert, 816 F.2d 958, 964 (4th Cir. 1987) (citations omitted).

¹⁰⁴ Many lower courts have tackled the issue of a reasonable amount of time regarding seizures of people, often applying *Place*. In *United States v. Acosta-Colon*, the First Circuit found that holding a suspect for thirty minutes resulted in an unreasonable Fourth Amendment event when law enforcement could not show any attempt to confirm or dispel their suspicion. 157 F.3d 9, 20-21 (1st Cir. 1998) ("[A]n investigatory detention of close to 30 minutes . . . is hardly a trivially intrusive affair."). *See also* *United States v. \$557,933.89, More or Less, in U.S. Funds*, 287 F.3d 66 (2d Cir. 2002) (overnight detention based on reasonable suspicion is unreasonable); *United States v. Frost*, 999 F.2d 737, 742 (3rd Cir. 1993) (forcing Frost to wait eighty minutes while a drug-sniffing dog was transported was reasonable because officers demonstrated proper diligence). *But see* *United States v. Peralez*, 526 F.3d 1115, 1121

An ever-developing issue today is that of electronic surveillance—either through cell site location information (CSLI) or a global positioning system (GPS) device. In *United States v. Jones*, the Supreme Court, in a decision by Justice Scalia, refused to hold that monitoring Jones’s location for twenty-eight days alone was a Fourth Amendment event.¹⁰⁵ In a concurring opinion, Justice Alito argued, “We need not identify with precision the point at which the tracking of this vehicle became a search, for the line was surely crossed before the four week mark. Other cases may present more difficult questions.”¹⁰⁶ Thus, Justice Alito would argue that there is an amount of time that would be considered *de minimis* under the Fourth Amendment and its application of the *Katz* reasonable expectation of privacy test. However, Justice Scalia countered:

And even accepting that novelty, it remains unexplained why a 4 week investigation is “surely” too long and why a drug-trafficking conspiracy involving substantial amounts of cash and narcotics is not an “extraordinary offens[e]” which may permit longer observation. What of a 2 day monitoring of a suspected purveyor of stolen electronics? Or of a 6 month monitoring of a suspected terrorist? We may have to grapple with these “vexing problems” in some future case where a classic trespassory search is not involved and resort must be had to *Katz* analysis; but there is no reason for rushing forward to resolve them here.¹⁰⁷

Scalia’s argument is precisely the problem with using the *de minimis* doctrine with the Fourth Amendment. Many factors have to be considered, such as the severity of the crime or the length of the time monitored, and to have law enforcement or even magistrates to decide the issue on their own under a totality of the circumstances test leaves much to be desired. Nonetheless, courts

(8th Cir. 2008) (finding that although some questioning unrelated to a traffic stop is allowed, such questioning that more than doubles the stop created an unreasonable seizure, although the questioning was only thirteen minutes, much less than the *de minimis* limit established by the *Model Code*); see also *supra* note 101.

¹⁰⁵ *United States v. Jones*, 132 S. Ct. 945, 954 (2012).

¹⁰⁶ *Id.* at 964 (Alito, J., concurring).

¹⁰⁷ *Id.* at 954 (majority opinion) (citations omitted).

are struggling with this precise issue, holding that certain uses of GPS or CSLI data are unconstitutional precisely because of the amount of time the surveillance was used.¹⁰⁸

These cases involving measurable quantities represent the clearest rules under the *de minimis* principle. With time, the Court has set some guidelines with what is reasonable based on the object protected, but it remains uncertain whether these are the outer bounds of reasonableness. *Connally* provides some parameters, but also raises many other questions as well. *Jacobsen*, *Cardwell*, and *Coolidge* are slightly more determinative, standing for the *Place* test that requires a balancing between the minimization of intrusions and the protection of governmental interests. Finally, *Jones* raises lots of questions and provides no answers, leaving those for another day.

B. Measuring the Immeasurable

While *de minimis* numbers cases have proven to be rather difficult for lower courts to apply,¹⁰⁹ the second group of cases presents much more difficulty. It is one thing to have a case with a clear measurement—whether an amount of time or a part of a defendant's property being taken. However, when determining whether, for example, a specific action by law enforcement is a *de*

¹⁰⁸ In *United States v. Graham*, the court analyzed many cases on precisely this issue. Ultimately the court summarized the situation:

[C]ourts have concluded that the Fourth Amendment is only implicated when the government surveillance of historical cell site location data occurs over a sufficiently long—albeit undefined—period of time so as to implicate a person's legitimate expectation of privacy. None of these decisions have explicitly defined the length of time at which a request for cell site location data must be supported by probable cause, but . . . [one judge] suggested that thirty days might be an appropriate limit.

846 F. Supp. 2d 384, 389 (D. Md. 2012). Cell site data is much less accurate than GPS data, and that fact may allow for a longer time period to be allowed for CSLI than GPS data. Interestingly, with the remand of the *Jones* case, the government is taking Mr. Jones back to trial—this time seeking to use four months of CSLI data in lieu of the twenty-eight days of GPS data produced in the first case. Jeffrey Brown, *Jones II: This Time, the Government Seeks to Use Cell Site Location Information*, CYBERCRIME REVIEW (Apr. 1, 2012), <http://www.cybercrimereview.com/2012/04/jones-ii-cell-site-location-data.html> (last visited Feb. 27, 2013).

¹⁰⁹ *Supra* notes 82, 97, 100-03.

minimis intrusion, the results become much more uncertain. Just as in the cases with more measurable results, these intrusions are at a level “with which the Constitution is not concerned.”¹¹⁰

In *Pennsylvania v. Mimms*, the defendant was pulled over for driving with an expired license plate.¹¹¹ Officers asked Mimms to step out of the car and, upon doing so, they saw a bulge in his clothing that appeared to be a weapon.¹¹² He was subsequently charged and convicted of carrying a concealed deadly weapon and carrying a firearm without a license.¹¹³ The Pennsylvania Supreme Court reversed the conviction on the ground that asking Mimms to exit his vehicle “was an impermissible seizure.”¹¹⁴ However, on appeal before the United States Supreme Court, the Court ruled that “the intrusion into the driver’s personal liberty occasioned . . . by the order to get out of the car . . . [c]an only be described as *de minimis*.”¹¹⁵ *Mimms* was later extended to passengers riding in a vehicle in *Maryland v. Wilson*,¹¹⁶ though Justice Stevens dissented, arguing that “[t]o order passengers about during the course of a traffic stop, insisting that they exit and remain outside the car, can hardly be classified as a *de minimis* intrusion.”¹¹⁷ Thus, in *Mimms* and *Wilson*, the interests

¹¹⁰ Bell v. Wolfish, 441 U.S. 520, n. 21 (1979) (quoting *Ingraham v. Wright*, 430 U.S. 651, 674 (1977)).

¹¹¹ 434 U.S. 106, 107 (1977).

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 107-08 (internal quotation marks omitted). The Pennsylvania Supreme Court acknowledged that the stop and pat down were both constitutionally permissible individually. *Id.* at 111-12. However, since the court held that it was unconstitutional to require Mimms to exit his car, officers would not have seen the bulge, and therefore, would not have conducted the pat down and discovered the weapon. *Id.* at 108 (original case available at *Commonwealth v. Mimms*, 370 A.2d 1157 (Pa. 1977)).

¹¹⁵ *Id.* at 111. The Court went on to note that “[t]he driver is being asked to expose to view very little more of his person than is already exposed What is at most a mere inconvenience cannot prevail when balanced against legitimate concerns for the officer’s safety.” *Id.*

¹¹⁶ 519 U.S. 408, 415 (1997). In *People v. Gonzalez*, the Illinois Supreme Court extended *Wilson* to say that “an officer possesses the authority to control, in various ways, the movements of passengers during traffic stops,” and that this intrusion is *de minimis*. 704 N.E.2d 375, 383 (Ill. 1998). Thus, while *Wilson* simply holds that passengers can be ordered out of the vehicle, *Gonzalez* finds that the passengers can also be told what to do and prevented from leaving the scene. *Id.*

¹¹⁷ *Wilson*, 519 U.S. at 420 (Stevens, J., dissenting).

of officer safety win out, because the liberty of the driver and passengers is violated by what is a relatively unimportant intrusion by comparison.¹¹⁸

One of the more common issues of *de minimis* application today is in regard to the reasonableness of the use of force. In *Graham v. Connor*, the Supreme Court held, “Not every push or shove, even if it may later seem unnecessary in the peace of a judge’s chambers,’ violates the Fourth Amendment.”¹¹⁹ To determine what types of force or injuries¹²⁰ will be deemed *de minimis*, courts, considering “the fact that police officers are often forced to make split-second judgments . . . about the amount of force that is necessary in a particular situation,” will evaluate “whether the officers’ actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to

¹¹⁸ *Id.* at 414-15. Lower courts have applied *Mimms* broadly to mean that “[c]oncerns about officer safety justify such a ‘*de minimis*’ intrusion upon an individual’s liberty.” *United States v. Williams*, Crim. Action No. H-05-68, 2005 U.S. Dist. LEXIS 33848, at *5 (S.D. Tex. Sept. 2, 2005); *see also* *United States v. Stanfield*, 109 F.3d 976, 982-83 (4th Cir. 1997); *Ruvalcaba v. City of Los Angeles*, 64 F.3d 1323 (9th Cir. 1995) (Burns, J., concurring) (“[T]he officer’s safety takes precedence under these circumstances because the additional intrusion is *de minimis*. . .” *Id.* at 1329.). In another string of cases, courts have looked at whether *Mimms* can be used to find that a minimally intrusive Fourth Amendment event without reasonable suspicion—such as an unlawful traffic stop—can be found to be *de minimis*. In *Bingham v. City of Manhattan*, for example, the officer was accused of pulling over the plaintiff without having observed a traffic violation. The officer, however, argued that absent wrongful motivation on the basis of race, an unlawful traffic stop is *de minimis*. The court found, “An unlawful traffic stop, however, is not such a *de minimis* violation.” 341 F.3d 939, 947 (9th Cir. 2003). In *Richardson v. Newark*, the court, attempting to answer the question of “whether unlawful traffic stops are sufficiently intrusive to be of constitutional magnitude or, stated another way, whether freedom from arbitrary traffic stops is a constitutionally protected right,” held that they would not apply the *de minimis* doctrine to unlawful traffic stops without precedent to the contrary. 449 F. Supp. 20, 22 (D. Del. 1978).

¹¹⁹ *Graham v. Connor*, 490 U.S. 386, 396 (1989) (internal quotation marks removed) (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973)). While this comment concerned Eighth Amendment rights of prisoners, it is relevant, generally, in a Fourth Amendment context as well.

¹²⁰ Courts look at whether both the injury and the force are *de minimis*. “[D]e minimis injuries do not necessarily establish *de minimis* force.” *Smith v. Mensinger*, 293 F.3d 641, 649 (3d Cir. 2002).

their underlying intent or motivation.”¹²¹ As in *Graham*, most of these cases arise in a § 1983 action in which a plaintiff attempts to recover damages for injuries sustained from the use of excessive force during a search or seizure.¹²²

The constitutionality of a protective sweep¹²³ was evaluated in *Maryland v. Buie*.¹²⁴ In its discussion, the Court found *Terry* compelling.¹²⁵ In *Terry*, the Court held, “Even a limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience.”¹²⁶ Thus, as recognized in *Buie*, this intrusion of a *Terry* frisk was not *de minimis*.¹²⁷ Nevertheless, the search of the defendant’s house

¹²¹ *Graham*, 490 U.S. at 397 (citations omitted). The Fifth Circuit, however, applies a subjective standard, and the injury “is defined entirely by the context in which the injury arises.” *Williams v. Bramer*, 180 F.3d 699, 704 (5th Cir. 1999).

¹²² *Graham*, 490 U.S. at 388. The Tenth Circuit has held that “to recover on an excessive force claim, a plaintiff must show: (1) that the officers used greater force than would have been reasonably necessary to effect a lawful seizure, and (2) some actual injury caused by the unreasonable seizure that is not *de minimis*, be it physical or emotional.” *Fisher v. City of Las Cruces*, 584 F.3d 888, 894 (10th Cir. 2009) (quoting *Cortez v. McCauley*, 478 F.3d 1108, 1127 (10th Cir. 2007)); see also *Watts v. County of Sacramento*, 65 F. Supp. 2d 1111, 1119 (E.D. Cal. 1999), *rev’d on other grounds*, 256 F.3d 886 (9th Cir. 2001) (holding that lifting a suspect up by handcuffs is not clearly a *de minimis* use of force); *Am. Fed’n of Labor & Cong. of Indus. Org. v. City of Miami*, 637 F.3d 1178, 1191 (11th Cir. 2011) (exposure to pepper fumes for short time was not excessive force); *Payton v. City of Florence*, 413 Fed. Appx. 126, 133 (11th Cir. 2011) (grabbing and twisting arm in such a way that ultimately required plaintiff to have surgery was not *de minimis*); *Cook v. City of Bella Villa*, 582 F.3d 840, 859 (8th Cir. 2009) (use of a taser may be unreasonable if the victim’s resistance is *de minimis*); and see *Wertish v. Krueger*, 433 F.3d 1062, 1067 (8th Cir. 2006) (“[R]elatively minor scrapes and bruises and the less-than-permanent aggravation of a prior shoulder condition were *de minimis* . . .”).

¹²³ “A ‘protective sweep’ is a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others.” *Maryland v. Buie*, 494 U.S. 325, 327 (1990).

¹²⁴ *Id.*

¹²⁵ *Terry v. Ohio*, 392 U.S. 1, 30 (1968) (holding that if an officer has reasonable suspicion and a belief the suspect may be armed, the officer may stop and “conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.”).

¹²⁶ *Buie*, 494 U.S. at 333 (quoting *Terry*, 392 U.S. at 24-25).

¹²⁷ *Id.* at 333-34. At least one court has ruled that “[n]o invasion of the sanctity of the home can be dismissed as *de minimis*.” *Loria v. Gorman*, 306 F.3d 1271, 1284 (2d Cir. 2002) (among its reasoning, the court cited *Kyllo v. United States*: “[T]here is certainly no exception to the warrant requirement for the officer who barely cracks

in conjunction with the execution of an arrest warrant was held to be constitutional.¹²⁸ The Court held:

But we permitted the intrusion, which was no more than necessary to protect the officer from harm. Nor do we here suggest, as the State does, that entering rooms not examined prior to the arrest is a *de minimis* intrusion that may be disregarded. We are quite sure, however, that the arresting officers are permitted in such circumstances to take reasonable steps to ensure their safety after, and while making, the arrest. That interest is sufficient to outweigh the intrusion such procedures may entail.¹²⁹

The Court seems to acknowledge that even in situations in which the intrusion is above the level they are willing to consider *de minimis*, an intrusion will still be held reasonable if done in the interest of officer safety.

Several other issues have been addressed briefly. One such topic is whether physical touching can be *de minimis*, and therefore, meaning no seizure has occurred. In *United States v. Mendenhall*, the Supreme Court noted that “some physical touching of the person of the citizen” may result in a seizure.¹³⁰ Therefore, there are certainly forms of touching that do not result in a seizure, but the Supreme Court has not expanded on this issue.¹³¹ Another issue was addressed in *Skinner v. Railway Labor*

open the front door and sees nothing but the non[-]intimate rug on the vestibule floor.” 533 U.S. 27, 37 (2001)). Using the *Buie* standard, the Ninth Circuit has held that requiring an occupant of a room being searched to show their hands is a *de minimis* intrusion. *United States v. Enslin*, 327 F.3d 788, 796 (9th Cir. 2003).

¹²⁸ *Buie*, 494 U.S. at 334.

¹²⁹ *Id.*

¹³⁰ 446 U.S. 544 (1980).

¹³¹ Lower courts, however, have often dealt with the issue. “[I]t is also clear that a mere touch is not per se a seizure under the Fourth Amendment.” *Carlson v. Bukovic*, 621 F.3d 610, 621 (7th Cir. 2010). “Certain types of non-restraining physical contact, without a concomitant showing of authority, are just too minor to constitute a ‘seizure’ for Fourth Amendment purposes without doing violence to that word.” *Acevedo v. Canterbury*, 457 F.3d 721, 725 (7th Cir. 2006). For examples of *de minimis* touching, see *Leaf v. Shelnett*, 400 F.3d 1070 (7th Cir. 2005) (nudging); *United States v. Young*, 105 F.3d 1, 5 (1st Cir. 1997) (“fleeting contact with jacket or belt”); and see *United States v. Bernardo-Rodriguez*, No. 94-2094, 1995 U.S. App. LEXIS 14704, at *7 (1st Cir. June 13, 1995) (gentle poke of abdomen).

Executives' Association.¹³² In *Skinner*, the Court held that although drug testing amounted to a search within the Fourth Amendment, “the privacy interests implicated by the search are minimal, and where an important governmental interest [is] furthered by the intrusion,” no suspicion is necessary.¹³³

While the *de minimis* doctrine has only been used in a relatively small number of Supreme Court cases concerning the Fourth Amendment, the information we can glean from them about the doctrine is very important. *Jacobsen* alone has been cited forty-six times concerning its application of the *de minimis* principle and continues to be very influential.¹³⁴ Typically, the doctrine is used to excuse a Fourth Amendment violation, often in the interest of ensuring the safety of law enforcement (such as with the use of force, ordering passengers out of a vehicle, or protective sweeps). In other situations, it is used as a way to validate an otherwise unconstitutional search or seizure. However, like with the *de minimis* doctrine, generally, several gaps have yet to be filled and several issues yet to be discovered as far as Supreme Court jurisprudence is concerned.

III. USE OF PRECEDENT TO CREATE RULES AND ANALYZE NEW ISSUES

As this Article has shown, the Court’s guidance on the application of the *de minimis* doctrine is rather scattered and unhelpful. In Justice Stevens’s dissent in *Citizens United*, he encouraged the development of *de minimis* tests for campaign financing.¹³⁵ Likewise, it is possible to develop a few tests that are applicable within the context of the Fourth Amendment. However, there are some conceivable instances in which reasonableness of

¹³² 489 U.S. 602 (1989).

¹³³ *Id.* at 624. *But see* Am. Fed’n of Teachers-West Virginia v. Kanawha Cnty Bd. of Educ., 592 F. Supp. 2d 883 (S.D. W.Va. 2009) (holding that random drug testing of teachers was unconstitutional).

¹³⁴ A Westlaw search with the search terms “*Jacobsen* w/100 ‘*de minimis*’” was conducted in the all state and federal cases database on Apr. 3, 2011. While many of these cases are drug-related, *Jacobsen* has been applied in a variety of instances. *See supra* note 82.

¹³⁵ *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 937 n.14 (2010) (Stevens, J., dissenting).

an Amendment event would vary on a case-by-case basis, so tests are difficult.¹³⁶

There are several ways in which these issues could be solved. The current system seems to be one of complete reasonableness on a case-by-case basis. The Court uses the doctrine when and where it chooses with little explanation or guidelines for future cases. One solution is to set a *de minimis* level of intrusion that will be allowed, and everything below that level is constitutionally acceptable. However, this would be difficult to apply as there are numerous circumstances that could arise that would necessitate law enforcement breaking this level in an otherwise reasonable manner. Another option is to set floor and ceiling amounts, and allow courts to fill in the gap on a case-by-case basis. This provides some guidelines for law enforcement, but allows courts to look at all of the interests under a *Place*-like balancing test. Also, courts could take Justice O'Connor's opinion¹³⁷ and proceed under the notion that there are no *de minimis* violations to the Constitution and that even the slightest abuse results in, among other remedies, suppression of evidence. Conversely, and finally, we could also assume that all violations are *de minimis* and should be deemed reasonable based on the best judgment of law enforcement. The pros and cons of these possibilities become apparent when discussed within an example.

At the time the Fourth Amendment was written, the world was a different place. A search could only result in a cost to the

¹³⁶ In *United States v. Everett*, the Sixth Circuit refused to create a bright line rule that any amount of questioning unrelated to a traffic stop was unconstitutional.

Because the vast weight of authority is against a bright-line rule, and because such a rule would not even serve its intended purpose as a bulwark against pretextual police activity, we join our sister circuits in declining to . . . [impose] a categorical ban on suspicionless unrelated questioning that may minimally prolong a traffic stop." 601 F.3d. 484, 492 (6th Cir. 2010).

The court continued in its analysis, refusing to set a bright line rule for *de minimis* activity as well: "[H]aving just refused to set a bright line at zero, we cannot very well select another arbitrary quantity of time and proclaim that any prolongation less than that amount is categorically '*de minimis*'—as convenient as such a rule might be." *Id.* at 493 (emphasis omitted).

¹³⁷ *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 36-37 (2004).

person being searched in a limited number of ways. Today, many costs are passed on during a search. Suppose law enforcement lawfully obtains a search warrant for John's south Florida home and arrive to execute it in the early afternoon. John left for vacation with the air conditioner turned off, and the sweltering July heat has raised the temperature to around 105 degrees. Unable to work otherwise, the officers turn the air conditioner on the lowest temperature on the thermostat. Police conduct their search, find an abundance of cocaine, and leave, neglecting to turn off the air conditioner. John returns from his vacation a week later to a very chilly home and ultimately, an electric bill nearly \$300 more than usual for the summer months. Should that expense make the search unreasonable (and thus, suppress the evidence) or should a court write it off as *de minimis*?¹³⁸

At first glance, it seems absurd that the evidence should be found inadmissible because of an increase in a criminal's electric bill. However, the focus cannot be on criminality—suppose no drugs had been found; perhaps John was mistaken for his twin brother. Now, he cannot pay his electric bill or feed his children. As one scholar noted, “A rule that excludes evidence only if there is no evidence to exclude is self-defeating.”¹³⁹ Therefore, there should be some point at which this intrusion is found to be unreasonable. Perhaps \$300 is still a *de minimis* amount, but where is the line?¹⁴⁰ The *Bailey*¹⁴¹-*Cardwell*¹⁴² standard would say that if John had a legitimate expectation of privacy in his air conditioner, the search should be found unreasonable. Under

¹³⁸ There are, of course, a multitude of related hypotheticals. Is stopping a car for an extended period of time when the person has to run the heat because of the cold weather *de minimis*? Can a GPS device be placed on a car when, although a very small amount, it does decrease the gas mileage of the vehicle (though this placement was struck down on other grounds in *United States v. Jones*, 132 S. Ct. 945 (2012))? These are all issues that have arisen with modern technology and were incomprehensible at the time the Fourth Amendment was written.

¹³⁹ Lloyd L. Weinreb, *Your Place or Mine? Privacy of Presence under the Fourth Amendment*, 1999 SUP. CT. REV. 253, 274-75 (1999).

¹⁴⁰ This issue could, of course, give rise to due process violations as well, and damages might be recoverable. Here, however, we are simply focused on reasonability of the search.

¹⁴¹ *United States v. Bailey*, 628 F.2d 938, 940 (6th Cir. 1980).

¹⁴² *Cardwell v. Lewis*, 417 U.S. 583, 588-94 & n.9 (1974).

Connally,¹⁴³ where \$5.00 was held not to be *de minimis*, so too might John's expenses. Suppose we try to set a bright line rule for this type of situation. Do we try to set the amounts high to prevent this argument except in extreme situations? Should a gap be left to interpretation of the courts, and if so, do we allow courts to look at various factors such as the person's income to decide application? And finally, suppose we consider all such similar cases to be unreasonable within the Fourth Amendment. Would opening the refrigerator to search for drugs become an unconstitutional intrusion because law enforcement let the cold air out?

The above hypothetical presents the obvious issues with the *de minimis* doctrine, and demonstrates that there is not a good solution. Justice Stevens's suggestion of creating a test would work somewhat easily with some situations, but setting an outer boundary in Fourth Amendment cases just seems as if it would complicate the situation.

CONCLUSION

Throughout the *de minimis* doctrine's long but largely undeveloped history, the Supreme Court has used it to justify many decisions. From restricting First Amendment freedoms to criticizing state reapportionment plans, the doctrine has made a significant impact. However, none of the applications is perhaps more influential as it has been on the Fourth Amendment. Through the *de minimis* doctrine's application, the Court has ruled that there is an entire area of governmental action that cannot be construed as unreasonable because it is too minimal to be considered a worthwhile interest. While applied to a variety of cases concerning the Fourth Amendment, its use remains largely ambiguous. There has been no attempt to create any sort of test, and although some clues have been given as to what is considered *de minimis* and what is not, lower courts have struggled with these cases as the "clues" are nowhere near bright line rules. However, as this Article has shown, there is no good resolution to the issue. All solutions either result in unintelligible results or

¹⁴³ *Connally v. Georgia*, 429 U.S. 245 (1977).

leave us with no better standard than we have now—a requirement of evaluating reasonableness. Perhaps, though, the Founding Fathers included the word “unreasonable” for a reason. Unlike other rights, the Fourth Amendment is not strict and absolute, but a weighing of several factors and interests, and the doctrine is simply a way to eliminate those cases which are, for a lack of a better term, *de minimis*.

