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## Lessons for Religious Liberty Litigation from Kentucky

Jennifer Anglim Kreder

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# Lessons for Religious Liberty Litigation from Kentucky

*Jennifer Anglim Kreder\**

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### I. Introduction

Since the horrible events of September 11, 2001, many deeply convicted and well-meaning Christians have been misled to fear that there is a war on religion being waged by other Americans, and even by our President, in addition to the war being waged against our nation by actual terrorists.<sup>1</sup> Acting out of this fear and the belief that the “Great Commission” requires Christians to spread the word of God,<sup>2</sup> some evangelical and fundamentalist Christians have begun injecting Christianity into government in unconstitutional ways. These “organized act[s] of civil disobedience” are, consistent with their religious ideology, abundantly righteous in their view.<sup>3</sup>

To physically memorialize their victories and to reach youth and future generations in this perceived war in ways thus far prohibited by the Supreme Court’s First Amendment jurisprudence, modern religious ideologues seek to call into question the Supreme Court’s Establishment Clause jurisprudence *en masse*. As one 2005 article noted of the movement’s origins:

Notwithstanding Supreme Court rulings suggesting that religious symbols standing alone on government property are unconstitutional, a number of organizations, the most well-known of which are the Family Research Council and Focus on the Family, have mobilized support for defending Ten Commandments displays on government property.

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1. *E.g.*, Barbara B. Hagerty, *Has Obama Waged a War on Religion?*, NAT’L PUB. RADIO (Jan. 8, 2012), <http://www.npr.org/2012/01/08/144835720/has-obama-waged-a-war-on-religion>.

2. *Matthew* 28:16–20 (International Version) (“[Go] and make disciples of all nations... teaching them to obey everything I have commanded you.”). This religious requirement is known as “the Great Commission.” See *The Great Commission*, WIKIPEDIA: THE FREE ENCYCLOPEDIA, (Last updated June 7, 2013), [http://en.wikipedia.org/wiki/Great\\_Commission](http://en.wikipedia.org/wiki/Great_Commission).

3. Adam Cohen, *Pulpit Freedom: Should Churches Endorse Political Candidates?*, TIME (Oct. 16, 2012), <http://ideas.time.com/2012/10/16/should-churches-endorse-political-candidates/> (reporting “Pulpit Freedom Sunday” to endorse Mitt Romney in churches across America, contrary to the provisions of the U.S. Tax Code that apply to these typically “non-profit” entities). It seems possible that the recent IRS scandal surrounding investigation of political activity is related to this wave of civil disobedience. See *e.g.*, Jonathan Weisman, *I.R.S. Chief Out after Protest Over Scrutiny of Groups*, N.Y. TIMES, May 15, 2013, at 1. *But see, e.g.*, Patrick Temple-West, *Insight: IRS Has Long History of Burying Non-profits in Paperwork*, REUTERS.COM (June 3, 2013 3:00 PM), <http://www.reuters.com/article/2013/06/03/us-usa-irs-applications-insight-idUSBRE95210L20130603> (“While conservative groups are currently grabbing headlines, a range of charitable non-profits [such as an atheist summer camp 501(c)(3)] say they too were unfairly targeted.”).

Lawmakers in Kentucky and Indiana have made a concerted effort to post Ten Commandments in schools. Indeed, Justice Roy Moore built his career on posting the Ten Commandments in courthouses—a career that even contemplated a third-party run for the presidency.<sup>4</sup>

Roy Moore was recently re-elected as the Chief Justice of the Supreme Court of Alabama,<sup>5</sup> but prior to taking the office for a second time, he was ousted from the bench after refusing to comply with a federal order to remove a massive Decalogue he installed in the courthouse, which also resulted in a legal fight costing Alabama taxpayers over \$550,000.<sup>6</sup> He became the President—and remains President Emeritus—of the Foundation of Moral Law.<sup>7</sup> The three-fold mission of the foundation was stated openly in 2004: “(1) defend the ‘right to acknowledge Almighty God’ (including the defense of Roy Moore); (2) ‘educate the public about the U.S. Constitution and the Godly foundation of the United States of America; and (3) ‘reestablish society with good morals and values as set forth in the Holy Bible.’”<sup>8</sup> It remains largely the same today.<sup>9</sup>

The legal strategy of right-leaning evangelicals and fundamentalists seems to be to outnumber and outlast their opponents. Presumably, those improperly using government to perpetuate religiosity hope they will buy time to persevere over those few with the litigation budget, time, and endurance to challenge the religious displays in court one by one. If those opposing them are forced to fight each Establishment Clause violation on a micro, case-by-case level, they eventually will find themselves like the plaintiffs in *Van Orden v. Perry*,<sup>10</sup> who were faced with multitudes of

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4. Susanna Dokupil, “*Thou Shalt Not Bear False Witness:*” “*Sham*” *Secular Purposes in Ten Commandments Displays*, 28 HARV. J.L. & PUB. POL’Y 609, 613–14 (2005) [hereinafter Dokupil].

5. See SUP. CT. OF ALA., <http://judicial.alabama.gov/supreme.cfm> (last visited May 27, 2013).

6. See generally *McGinley v. Houston*, 361 F.3d 1328 (11th Cir. 2004) (ruling in one of the various resulting cases dealing with the courthouse Decalogue).

7. See FOUND. FOR MORAL LAW, <http://morallaw.org/about/> (last visited May 27, 2013).

8. Dokupil, *supra* note 4, at 614 n.15 (citing *About the Foundation*, Foundation for Moral Law, Inc., available at <http://www.morallaw.org/about.htm> (last updated Nov. 15, 200)).

9. See FOUND. FOR MORAL LAW, *supra* note 7 (stating that the foundation’s focus is on “litigation,” which it describes as “represent[ing] individuals involved in religious liberties cases and fil[ing] *amicus curiae* (friend-of-the-court) briefs in state and federal courts,” and “education,” which it describes as “conduct[ing] seminars to teach the necessity and importance of acknowledging God in law and government”).

10. See *Van Orden v. Perry*, 545 U.S. 677 (2005) (holding that the Establishment

monuments that the Fraternal Order of Eagles successfully maneuvered to have installed on government property forty years earlier.<sup>11</sup> The sheer volume of the displays makes them difficult to attack on an individual basis. And, over time, courts tend to value the historical nature of a long-standing monument over its religiosity,<sup>12</sup> further entrenching such displays and insulating them from constitutional challenge.

Although it would be difficult—if not impossible—to prove empirically, the alienation of nonbelievers from modern American politics was likely fated by the enthusiastic injection of God into politics to distinguish America from the atheist Soviet bloc during the Cold War.<sup>13</sup> Litigating against the exclusion of nonbelievers and atheist messages from governmental religious displays unfortunately risks extending some of the Supreme Court’s less favorable precedent<sup>14</sup> despite today’s significantly more pluralistic society.<sup>15</sup> On the other hand, the potential consequences of failing to challenge governmental endorsement of religion are significant: the promotion of God via American politics may become increasingly mainstream and therefore legitimized over the long run. Nonbelievers may become even more ostracized in American society, particularly in the heartland and other areas where religion is deeply entrenched.<sup>16</sup> The balance of these risks may soon tip to one side or the other; the Supreme Court recently granted certiorari to decide whether the practice of the

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Clause was not violated by monument display).

11. Jess Bravin, *When Moses’ Laws Run Afoul of the U.S.’s, Get Me Cecil B. deMille*, WALL ST. J., Apr. 18, 2001, at A1.

12. See *infra* Part I(B).

13. See FRANCOISE CHAOY, *THE INVENTION OF THE HISTORIC MONUMENT* (Lauren M. O’Connell, trans., Cambridge Univ. Press 2001) (describing historical role monuments play in shaping society and history); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2024–26 (1996) (describing how legal documents and statements contribute to social norms, including faith).

14. See *infra* Part I.

15. See generally B. Jessie Hill, *Of Christmas Trees and Corpus Christi: Ceremonial Deism and Change in Meaning Over Time*, 59 DUKE L.J. 705 (2010); Frank Newport, *This Christmas, 78% of Americans Identify as Christian*, GALLUP (Dec. 24, 2009), <http://www.gallup.com/poll/124793/this-christmas-78-americans-identify-christian.aspx> (discussing that the 1950s were “a very religious decade, based on Gallup indicators.”).

16. See MARCI A. HAMILTON, *GOD V. THE GAVEL: RELIGION AND THE RULE OF LAW* (2005) (discussing lawyer-scholar’s evolution of thoughts about religious jurisprudence); Douglas Laycock, *Voting with Your Feet Is No Substitute for Constitutional Rights*, 32 HARV. J.L. & PUB. POL’Y 29, 39–40 (2009) (describing violence, intimidation and harassment of non-Christians in Santa Fe, Texas). *But see* Marc O. Girolami, *Recoiling from Religion*, 43 SAN DIEGO L. REV. 619 (2006) (critiquing Hamilton’s book).

Greece, New York, town board of opening its meetings with a prayer from the “chaplain of the month” violates the Establishment Clause.<sup>17</sup>

To be sure, most litigation in the religious liberty arena has focused on the Establishment Clause. Reviewing the complaints filed in such litigation shows that the cases start out by at least implicating doctrines other than the Establishment Clause, but in the end the Establishment Clause remains the focus of the litigation and the resulting judicial opinion.<sup>18</sup> At its heart, however, such litigation is about discrimination between competing points of view and the exclusion of non-mainstream or counter-cultural groups, and many of the recent cases concern ostracism of nonbelievers.<sup>19</sup>

This Article posits that for those seeking to remedy the unconstitutional ostracism of nonbelievers and others, future litigation should develop new, progressive theories. Part I analyzes the current prospects of Establishment Clause litigation for nonbelievers and others seeking to utilize the courts to uphold the church-state divide and demonstrates why a new path is necessary. Part II demonstrates that legal theories beyond the Establishment Clause, such as the Equal Protection Clause of the Fourteenth Amendment (or Equal Protection principles inherent in the Fifth Amendment), and the Religious Test Clause of Article VI, § 3, and their state constitutional corollaries, should be explored as a basis for challenging the injection of religion into government today. This Article concludes by calling for groups and individuals seeking to challenge the injection of God into American politics and civic life to brainstorm and share strategies, including by responding to this Article, to develop new, stronger legal theories to support such litigation.

## *II. Establishment Clause Litigation Prospects for Nonbelievers*

The Establishment Clause of the First Amendment provides that “Congress shall make no law respecting an establishment of religion, or

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17. See *Galloway v. Town of Greece*, 681 F.3d 20 (2d Cir. 2012), cert. granted, 2013 WL 2149803 (May 20, 2013) (No. 12-696) (finding Establishment Clause violation because prayer practice impermissibly endorsed a Christian viewpoint).

18. E.g., Second Amended Complaint at 10, *Nielson v. School District Five of Lexington & Richland Counties*, No. 3:12-cv-01427-CMC (D.S.C. Nov. 14, 2012), available at <http://ffrf.org/uploads/legal/Currie-SAC.pdf>; see also *infra* Part I (discussing Establishment Clause opinions).

19. See Susan Gellman & Susan Looper-Friedman, *Thou Shalt Use the Equal Protection Clause for Religion Cases (Not Just the Establishment Clause)*, 10 U. PA. J. CONST. L. 665, 673 (2008).

prohibiting the free exercise thereof . . . .”<sup>20</sup> “The underlying purpose of the First Amendment’s Religion Clauses is to assure the fullest possible scope of religious liberty and tolerance for all, to avoid the religious divisiveness that promotes social conflict, and to maintain the separation of church and state.”<sup>21</sup> The Founders maintained a heightened sensitivity to the divisive potential of religion in the new republic, as reflected upon by the Supreme Court in a landmark 1989 case, *County of Allegheny v. American Civil Liberties Union of Pittsburgh*:

This Nation is heir to a history and tradition of religious diversity that dates from the settlement of the North American Continent. Sectarian differences among various Christian denominations were central to the origins of our Republic. Since then, adherents of religions too numerous to name have made the United States their home, as have those whose beliefs expressly exclude religion.<sup>22</sup>

The *County of Allegheny* majority opinion held that a courthouse crèche would need to be removed, which would “deprive Christians of the satisfaction of seeing the government adopt their religious message as their own, but this kind of government affiliation with particular religious messages is precisely what the Establishment Clause precludes.”<sup>23</sup> On the other hand, not allowing governmental affiliation with a particular religious viewpoint does not equate to hostility toward religion. For example, three concurring Justices wrote:

The suggestion that the only alternative to governmental support of religion is governmental hostility to it represents a giant step backward in our Religion Clause jurisprudence. Indeed in its first contemporary examination of the Establishment Clause, the Court, while differing on how to apply the principle, unanimously agreed that government could not require believers or nonbelievers to support religions.<sup>24</sup>

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20. U.S. CONST. amend. I.

21. *Van Orden v. Perry*, 545 U.S. 677, 678 (2005).

22. *Cnty. Of Allegheny v. Am. Civil Liberties Union*, 492 U.S. 573, 589 (1989) (holding that a display of a crèche violated the establishment clause and that a display of Menorah next to a Christmas tree did not have an unconstitutional effect of endorsing Christian and Jewish faiths). For more historical discussion, see *Response in Opposition to The United States’ Motion to Dismiss, Am. Atheists v. Werfel*, No. 2:12-cv-00265 (E.D. Ky. Aug. 6, 2013), ECF No. 22, at 26-28, 31-32.

23. *Id.* at 601 n.51. This Part of the Court’s opinion was authored by Justice Blackmun and joined by Justices Brennan, Marshall, Stevens, and O’Connor.

24. *Id.* at 651 (partial concurrence and dissent of Brennan, J., Marshall, J., and Stevens, J.) (citations omitted).

It is commonly accepted that the Establishment Clause prohibits government from endorsing, giving favoritism, or promoting one religion over another.<sup>25</sup> In light of the fact that our political history is rife with references to God, many dispute the Jeffersonian conception of a constitutional wall between church and state that should prohibit any governmental invocation of deistic belief.<sup>26</sup> Even for those who reject the Jeffersonian view, it is hard to dispute that “[o]ne of the main goals of the Establishment Clause is to protect religious minorities like nonbelievers.”<sup>27</sup> At stake in current litigation brought by nonbelievers is the scope of the Establishment Clause’s protection of those who stand in opposition to organized religion, a group of Americans maligned in McCarthy-like fashion as stereotypically “un-American.”<sup>28</sup> According to Professor Caroline Mala Corbin, an expert in the Establishment Clause and nonbelievers, “[t]he perpetuation of these stereotypes also undermines the liberty of nonbelievers by making them less willing, or even afraid, to follow the dictates of their conscience.”<sup>29</sup>

Justice O’Connor was the most outspoken member of the Court in stating plainly and often that the Establishment Clause does indeed prevent favoritism of deistic belief over non-belief, but she was not the only one to adopt this position. The following are excerpts in reverse chronological order from the Supreme Court’s jurisprudence most relevant to this issue:

- “Our institutions presuppose a Supreme Being, yet these institutions must not press religious observations upon their citizens.” *Van Orden v. Perry*, 545 U.S. 677, 683 (2005) (plurality opinion, authored by Chief Justice Rehnquist, joined by Justices Scalia, Kennedy, and Thomas).

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25. E.g., Caroline M. Corbin, *Ceremonial Deism and the Reasonable Religious Outsider*, 57 UCLA L. REV. 1545, 1551 (2010) [hereinafter “Corbin I”] (“However, there is near unanimity among courts and commentators that the Establishment Clause forbids the government from preferring one or some religions over others.”).

26. *Id.* at 1545; see also Daniel L. Dreisbach, *A New Perspective on Jefferson’s Views on Church-State Relations: The Virginia Statute for Establishing Religious Freedom in its Legislative Context*, 35 AM. J. LEGAL HIST. 172 (1991); see also, e.g., Boris I. Bittker, *Interpreting the Constitution: Is the Intent of the Framers Controlling? If Not, What Is?*, 19 HARV. J.L. & PUB. POL’Y 9 (1995).

27. Caroline M. Corbin, *Nonbelievers and Government Speech*, 97 IOWA L. REV. 347, 347 (2012) (hereinafter “Corbin II”).

28. See *infra* Part II; see also, e.g., Douglas Laycock, *The Benefits of the Establishment Clause*, 42 DEPAUL L. REV. 373, 380 (1992) (“By making such statements, the government says the real American religion is watered-down Christianity, and everybody else is a little bit un-American.”).

29. Corbin II, *supra* note 27, at 347.

- The First Amendment “guarantee[s] religious liberty and equality to ‘the infidel, the atheist, or the adherent of the non-Christian faith such as Islam or Judaism.’” *Cnty. of Allegheny v. Am. Civil Liberties Union*, 492 U.S. 574, 590 (1989) (majority opinion, authored by Justice Blackmun, joined by Justices Brennan, Marshall, Stevens, and O’Connor).
- “[G]overnment cannot endorse the religious practices and beliefs of some citizens without sending a clear message to nonadherents that they are outsiders or less than full members of the political community . . .” *Cnty. of Allegheny*, 492 U.S. at 627 (O’Connor, J., concurring).
- “[T]he Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all.” *Wallace v. Jaffree*, 472 U.S. 38, 52-53 (1985) (majority opinion, authored by Justice Stevens, joined by Justices Brennan, Marshall, Blackmun, and Powell).
- “Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of nonreligion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.” *Epperson v. State of Ark.*, 393 U.S. 97, 103-04 (1968) (majority opinion, authored by Justice Fortas, joined by Chief Justice Warren and Justices Douglas, Brennan, White, and Marshall).
- “The fullest realization of true religious liberty requires that government . . . effect no favoritism among sects or between religion and nonreligion.” *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring, joined by Justice Harlan).
- “In the words of Jefferson, the clause against establishment of religion by law was intended to erect ‘a wall of separation between Church and State.’” *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 16 (1947) (majority opinion, authored by Justice Black, joined by Chief Justice Vinson and Justices Reed, Douglas, and Murphy).

Lower federal courts have struggled to apply the Supreme Court’s Establishment Clause jurisprudence ever since the Court issued its opinion in *Everson v. Board of Education* in 1947.<sup>30</sup> Even Supreme Court Justices admit that the Court has generated inconsistent, oftentimes conflicting, standards by which to apply the Establishment Clause.<sup>31</sup> The remainder of

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30. E.g., Christopher D. Tomlinson, *Changing the Rules of Establishment Clause Litigation: An Alternative to the Public Expression of Religion Act*, 61 VAND. L. REV. 261, 265 (2008) (“The few words of the . . . Establishment Clause . . . have created volumes of debate in recent years. . . .”).

31. See, e.g., Steven G. Gey, *Reconciling the Supreme Court's Four Establishment*

this Part will seek to contextualize these excerpts within a fuller scope of the Court's religious liberty jurisprudence, broken into the following sub-parts: A. School litigation, B. Religious displays litigation, C. Ceremonial deism, and D. Governmental speech. Part II demonstrates that new legal theories beyond the Establishment Clause are necessary for nonbelievers and others seeking to challenge the improper injection of religion into government and suggests what those new avenues might be.

### A. School Litigation

Decided in 1947, *Everson v. Board of Education* was the Supreme Court's first major Establishment Clause decision.<sup>32</sup> In that case, the Court held that a New Jersey program that supplied transportation to nonpublic school children who attended parochial schools did not violate the Establishment Clause.<sup>33</sup> In *Everson*, the Court described the scope of the Establishment Clause's prohibitions as follows:

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*.<sup>34</sup>

This decision was followed by many more cases which attempted to delineate the precise extent of religious activity that is permissible in schools. Categorically speaking, the Supreme Court has not found the

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*Clauses*, 8 U. PA. J. CONST. L. 725 (2006) (describing the problems with the Establishment Clause and the resulting inconsistencies, noting that "[a]t some point during the last ten years, one or more of the nine Justices have articulated ten different Establishment Clause standards").

32. Martha McCarthy, *Religion and Education: Whither the Establishment Clause?*, 75 IND. L.J. 123, 125 (2000) (noting that schools have become the battleground for some of the most notable Establishment Clause disputes).

33. *Id.* at 126 (mentioning that the *Everson* court was unanimous in endorsing such a posture between church and state).

34. *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 15 (1947).

establishment of voucher programs or bus transportation in support of school choice to amount to *per se* excessive entanglement between church and state; nor has the Supreme Court drawn a clear line demarcating acceptable generic educational support from impermissible endorsement of religious education.<sup>35</sup> Its opinions in this area have been limited to very fact-specific issues, leaving lower courts to review the plethora of school choice challenges on a case-by-case, oftentimes piecemeal, basis.<sup>36</sup> In contrast, some state Supreme Courts have found voucher programs unconstitutional under their respective state constitutions.<sup>37</sup>

The Court sought to delimit the range of permissible governmental support for parochial schooling in *Lemon v. Kurtzman*.<sup>38</sup> At stake in *Lemon* was a Pennsylvania statute authorizing the State to provide to nonpublic schools reimbursement for their expenses on teachers' salaries, instructional materials, and books used for certain secular purposes. The Court found that this arrangement constituted excessive entanglement between church and state. This opinion generated the "*Lemon Test*" so often repeated in Establishment Clause litigation and so often criticized in the academic literature.<sup>39</sup> Under the oft-cited *Lemon Test*, for a governmental practice that implicates religion to be permissible under the Establishment Clause, it must meet three requirements. First, it must have a secular purpose.

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35. See, e.g., Jason S. Marks, *What Wall? School Vouchers and Church-State Separation after Zelman v. Simmons-Harris*, 58 J. Mo. B. 354, 355 (2002) (detailing the history of the Establishment Clause).

36. See Michael A. Ronsenhouse, *Construction and Application of Establishment Clause of First Amendment – U.S. Supreme Court Cases*, 15 A.L.R. Fed. 2d 573 (2006) (explaining that the U.S. Supreme Court has not yet set up a clear test for the Establishment Clause).

37. See generally *La. Fed. of Teachers v. Louisiana*, Nos. 2013-CA-0120, 2013 WL 1878913 (La. May 7, 2013); *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006).

38. *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (holding that Pennsylvania's statutes that provided financial support to nonpublic elementary and secondary schools were unconstitutional); see also *Sloan v. Lemon*, 413 U.S. 825 (1973) (holding that a Pennsylvania act violated the Establishment Clause by providing reimbursement to parents for a portion of tuition they spent sending their children to a nonpublic school).

39. For just a few examples from authors of diverse political perspectives, see STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* 109-23 (1993); Kent Greenawalt, *Fundamental Questions About the Religion Clauses: Reflections on Some Critiques*, 47 SAN DIEGO L. REV. 1131, 1138 (2010); Ira C. Lupu, *The Trouble With Accommodation*, 60 GEO WASH L. REV. 743, 762 n.87 (1992); Robert H. Bork, *What to do about the First Amendment*, COMMENTARY MAGAZINE, Feb. 1995, at 23, available at <http://www.commentarymagazine.com/article/what-to-do-about-the-first-amendment/>; Stephen L. Carter & Gary J. Stimson, *The Establishment Clause in the Supreme Court: Rethinking the Court's Approach*, 72 CORNELL L. REV. 905, 908-35 (1987).

Second, its principle or primary effect must be one that neither advances nor inhibits religion. Third, it must not foster an excessive government entanglement with religion.

School vouchers have not been the only area of school litigation involving the Establishment Clause. The Court has found that when children go to school, including school functions like basketball games or graduation ceremonies, it is impermissible to inject religious components into these extracurricular activities.<sup>40</sup> This includes prayer, a moment of silence, the teaching of religion in schools, or invocation.<sup>41</sup>

For example, in *Lee v. Weisman*, the Court was faced with the issue of whether principals who invited members of the clergy to pray at the graduation ceremonies for middle school and high schools violated the Establishment Clause.<sup>42</sup> Justice Kennedy's majority opinion rejected what is referred to as the Non-Endorsement Test, discussed in Part I(B), *infra*, and suggested that, in his view, whether a practice should be deemed unconstitutional under the Establishment Clause should depend on whether there is direct or indirect coercion to participate in what is essentially a religious ritual.<sup>43</sup> The Court framed the issue of the case as "... whether the exposure to the government's religious expression is voluntary, and whether the governmental practice coerces religious belief."<sup>44</sup> The Court reasoned that, due to the circumstances of high school life, having a prayer at graduation ceremonies was impermissibly coercing participation in religious exercise.<sup>45</sup>

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40. See Ronsenhouse, *supra* note 36, at 573.

41. E.g., *Cnty. of Allegheny v. Am. Civil Liberties Union*, 492 U.S. 573, 603 (1989) (noting that in *Marsh* the Court recognized that "contemporary legislative prayers that have the effect of affiliating the government with any one specific faith or belief" are impermissible).

42. See *Lee v. Weisman*, 505 U.S. 577 (1992) (holding that a school could not provide for "nonsectarian" prayer to be given by clergymen selected by the school); see also *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam), (prohibiting recitation of The Lord's Prayer in school each morning); *Engel v. Vitale*, U.S. 421, 436 (1962) (finding prayer in school unconstitutional); *McCullum v. Bd. of Educ.*, 333 U.S. 203 (1948) (holding that teaching of religion in schools violated the Establishment Clause).

43. Robert A. Holland, *A Theory of Establishment Clause Adjudication: Individualism, Social Contract, and the Significance of Coercion in Identifying Threats to Religious Liberty*, 80 CAL. L. REV. 1595, 1627 (1992) ("Justice Kennedy rejected the endorsement test entirely and proposed that a violation of the Establishment Clause should depend on a showing of some kind of coercion. . . .").

44. *Lee*, 505 U.S. at 580.

45. *Id.* at 594 (acknowledging that the government may no more use social pressure to enforce orthodoxy than it may use more direct means).

The Court thus analyzed the reach of the Establishment Clause under a coercion principle, commonly referred to as the Non-Coercion Test.<sup>46</sup> The coercion principle posits that the State cannot give the impression that it officially endorses any particular religious belief or organization. However, the Court did not set forth a definition for what would be considered coercion to participate or even whether the existence of coercion would be assessed objectively or subjectively.<sup>47</sup> Expanding the Non-Coercion Test or employing it more frequently could lead to a more permissive standard of religious discrimination.

There is potential for more litigation in this area, especially arising out of Kentucky and Mississippi. Both states have a long history of Establishment Clause litigation and have continued to enact laws and pass resolutions that clearly defy Supreme Court jurisprudence or are intended to test its limits. For example, a 2000 Kentucky law<sup>48</sup> encourages school boards to inject *The Lord's Prayer* with the morning Pledge of Allegiance in direct contravention of *Stone v. Graham*,<sup>49</sup> which also arose out of a Kentucky bill. That bill was passed by the spouse of the main sponsor of unconstitutional religious legislation and resolutions in the Commonwealth ever since then, Representative Tom Riner.<sup>50</sup> An earlier Kentucky bill, enacted in 1990, authorized teachers covering the topic of evolution to also teach creationism and “read such passages in the Bible as are deemed

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46. Eric G. Anderson, *Protecting Religious Liberty Through the Establishment Clause: The Case of the United Effort Plan Trust Litigation*, 2008 UTAH L. REV. 739, 764 (2008).

47. See Holland, *supra* note 43, at 1601 (“[The court] felt no need to articulate a specific definition of coercion for future inquiries”).

48. KY. REV. STAT. ANN. § 158.175 (West 2012).

49. *Stone v. Graham*, 449 U.S. 39 (1980) (holding that a Kentucky statute requiring posting of the ten commandments on the walls of a public school classroom had a pre-eminent purpose which was plainly religious in nature).

50. See *infra* Part I(B)(2). Similarly, a 2000 resolution was passed “commending those churches and religious organizations that pray and fast for the leaders of the Commonwealth and the Nation.” H.R. Res. 191, 2000 Leg., Reg. Sess. (Ky. 2000) (adopted Apr. 14, 2000), available at <http://www.lrc.ky.gov/recarch/00rs/hr191.htm>. The Kentucky legislature also recently overrode the governor's veto that was premised on significant constitutionality concerns, to pass a Religious Freedom Restoration Act clone law. The law was set to take effect in June 2013. See generally KY RELIGIOUS FREEDOM BILL, <http://www.kentucky.com/2013/03/30/2580631/kentuckys-religious-freedom-bill.html>. Litigation challenging legislation requiring religious training materials and the display of a permanent religious plaque at the Kentucky Office of Homeland Security recently ended unsuccessfully for American Atheists, Inc. and the named plaintiffs that challenged it. See *Am. Atheists, Inc. v. Ky. Office of Homeland Sec.*, 133 S.Ct. 1582, 185 L.Ed. 2d 577 (Mar. 18, 2013), *cert. denied*.

necessary for instruction on the theory of creation . . . .”<sup>51</sup> Politically, it is seemingly impossible for politicians to resist such clearly unconstitutional antics.<sup>52</sup> Mississippi has a similar track record and recently passed new legislation to attempt to overcome its prior litigation losses to again inject prayer into schools.<sup>53</sup> Thus, we can look toward these two states as likely sources of additional case-by-case litigation concerning the Establishment Clause and schools.

### B. Religious Displays Litigation

Like the provision of governmental assistance for religious schools, the display of religious symbols on public property is often challenged under the Establishment Clause.<sup>54</sup> Sub-Part I(B)(1) will first lay out the major Supreme Court cases and analytical approaches. Sub-Part I(B)(2) will analyze the failure of the decisions based on subsequent developments after the Court remanded one of its lead cases, *McCreary County v. American Civil Liberties Union of Kentucky*,<sup>55</sup> back to federal courts within the Commonwealth of Kentucky. This story is not told in academic literature but has become a rallying point for a bold civil disobedience movement, which has captured the political processes in Kentucky, where state judges are elected rather than appointed.<sup>56</sup> Moreover, as relayed below, this movement has even won significant support from multiple

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51. KY. REV. STAT. ANN. § 158.177(1) (West 2012).

52. See Ian Urbina, *Lawmaker in Kentucky Mixes Piety and Politics*, N.Y. TIMES, Jan. 4, 2009, at A12, available at [http://www.nytimes.com/2009/01/04/us/04louisville.html?\\_r=0](http://www.nytimes.com/2009/01/04/us/04louisville.html?_r=0) (quoting Al Cross, Director of the Institute for Rural Journalism and Community Issues, University of Kentucky: “Politicians are afraid of attack ads that will say they voted against God if they vote against [such] measures . . .”).

53. See Dave Bohon, *Mississippi Legislature Passes School Prayer Bill*, THE NEW AMERICAN (Mar. 11, 2010), available at <http://www.thenewamerican.com/culture/faith-and-morals/item/14743-mississippi-legislature-passes-school-prayer-bill>; *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 277 (5th Cir. 1996) (describing prior litigation lost by State of Mississippi); see also, e.g., Joe Dryden, *The Religious Viewpoint Antidiscrimination Act: Using Students as Surrogates to Subjugate the Establishment Clause*, 82 MISS. L.J. 127 (2013) (analyzing the new wave of attempts to inject prayer back into schools); accord, Melissa Rogers, *The Texas Religious Viewpoints Antidiscrimination Act and the Establishment Clause*, 42 U.C. DAVIS L. REV. 939 (2009).

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

55. *McCreary Cty. v. Am. Civil Liberties Union*, 545 U.S. 844, 881 (2005) (holding that a determination of these counties’ purpose in displaying the ten commandments at courthouses was a sound basis for ruling on the complaint).

56. KY. REV. STAT. ANN. § 118A.040 (West 2012); §118A.050.

federal judges within the federal courts having jurisdiction covering the Commonwealth, causing great divisiveness within the U.S. Court of Appeals for the Sixth Circuit. One might even go so far to say that the movement has generated a constitutional crisis by calling into question the legitimacy of the Court in the religious arena. Such a crisis warrants a response by the Court, although that response may not be the one desired by the non-believing minority and others opposed to the fundamentalist movement.<sup>57</sup>

### 1. Supreme Court Religious Displays Decisions

At issue in the Supreme Court's 1984 decision in *Lynch v. Donnelly*<sup>58</sup> was a government-sponsored Christmas display that potentially constituted the endorsement of the Christian religious holiday. Each year, the City of Pawtucket, Rhode Island, set up a Christmas display at a park owned by a nonprofit organization.<sup>59</sup> The display contained a variety of figures and decorations, including a "SEASONS GREETINGS" banner, a Christmas tree, a Santa Clause house, and candy cane-striped poles.<sup>60</sup> The display also contained a crèche, which included animals, shepherds, kings, a baby Jesus, Mary, and Joseph.<sup>61</sup> Considering the display as a whole, the Court found that the inclusion of the crèche did not violate the Establishment Clause.<sup>62</sup> The Court concluded there was a lack of evidence that the crèche's inclusion was driven by religious motives.<sup>63</sup> Thus, the Court held that the inclusion of the crèche had a secular purpose in the context of a generalized holiday display and therefore did not violate the Establishment Clause.<sup>64</sup>

Justice O'Connor filed a concurring opinion setting forth what is commonly referred to as the "Non-Endorsement Test."<sup>65</sup> Under the Non-

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57. Cf. Jack M. Balkin, *What Brown Teaches Us about Constitutional Theory*, 90 VA. L. REV. 1537, 1538 (2004) ("Lesson One: The Supreme Court Is not Countermajoritarian; It Is Nationalist"); see *id.* at 1551 ("Lesson Three: Courts Tend to Protect Minorities Just About as Much as Majorities Want Them To"); *id.* at 1558 ("Lesson Four: Social Movements Change Constitutional Law, But Not as They Intend").

58. *Lynch v. Donnelly*, 465 U.S. 668, 671 (1984) (holding that notwithstanding the significance of the nativity scene, the city did not violate the Establishment Clause).

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 687.

63. *Id.* at 680.

64. *Id.* at 671.

65. See, e.g., Anderson, *supra* note 46, at 764.

Endorsement Test, a court would examine whether the practice that touches upon religion conveys a message of endorsement or disapproval, notwithstanding the government's actual intention.<sup>66</sup> If there is either a positive or negative message conveyed, the court should conclude that the practice violates the Establishment Clause.<sup>67</sup>

Next, in 1989, the majority opinion authored by Justice Blackmun in *County of Allegheny v. American Civil Liberties Union* (Parts III-A, IV, and V) applied the Non-Endorsement Test, stating that “[t]he Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from making adherence to a religion relevant in any way to a person’s standing in the political community.”<sup>68</sup> The case involved two holiday displays on public property in downtown Pittsburgh. The first holiday display was a crèche, depicting a Christian Nativity scene on the staircase of the Allegheny County Courthouse. The second was an 18-foot Chanukah menorah, which was immediately adjacent to a 45-foot Christmas tree located outside the government building. The Court held that the crèche but not the menorah or the Christmas tree had an unconstitutional effect. The Court applied the Non-Endorsement Test to evaluate whether the displays conveyed a message “that religion or a particular religious belief is favored or preferred.”<sup>69</sup> The Court stated that “[w]hen viewed in its overall context, the crèche angel’s words endorse a patently Christian message: Glory to God for the birth of Jesus Christ.”<sup>70</sup>

Two further cases help delineate the Supreme Court’s Non-Endorsement Test.<sup>71</sup> Next, seemingly in response to criticism<sup>72</sup> of the confusing nature of its Establishment Clause, the Court granted certiorari in two Ten Commandments cases, *Van Orden* and *McCreary County*, both of which were decided June 27, 2005.<sup>73</sup> The Court came to polar opposite conclusions in each case, with the *Van Orden* majority opinion authored by Justice Antonin Scalia and the *McCreary County* majority opinion authored by Justice Souter. The different outcomes turned on whether the Ten

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66. *Lynch*, 465 U.S. at 688 (O’Connor J., concurring)

67. *Id.*

68. *Cty. of Allegheny v. Am. Civil Liberties Union*, 492 U.S. 573, 593 (1989).

69. *Id.* at 574.

70. *Id.*

71. *See generally* *McCreary Cnty. v. Am. Civil Liberties Union*, 545 U.S. 844 (2005) (striking *McCreary* and *Pulaski Counties Foundations Displays*); *Van Orden v. Perry*, 545 U.S. 677 (finding constitutional display of Fraternal Order of Eagles monument).

72. *See, e.g., supra* note 39.

73. Tomlinson, *supra* note 30, at 272.

Commandments were displayed in a historic manner or whether the government actors displaying the Ten Commandments intended to convey a religious message.

In *Van Orden v. Perry*, an Austin, Texas, resident had filed suit claiming that a 6-foot-high monolith engraved with the Ten Commandments on State Capitol grounds violated the Establishment Clause.<sup>74</sup> The monolith was among the 17 monuments and 21 historical markers on the grounds.<sup>75</sup> Declining to apply the *Lemon* Test, the Supreme Court held that the Ten Commandments display did not violate the Establishment Clause.<sup>76</sup> In so doing, the Court recognized that the Ten Commandments played a role in our Nation's heritage.<sup>77</sup> Then the Court reasoned that the Ten Commandments, while in the presence of the other monuments, had historical—as opposed to religious—significance.<sup>78</sup>

In contrast, in *McCreary County, Ky. v. Am. Civil Liberties Union*, similarly to *Lynch*, the Court focused more on the intent of the county officials displaying the Ten Commandments. The Court held that two counties hanging a version of the Ten Commandments, known as the “Foundations Displays,” on the walls of their respective courthouses violated the Establishment Clause because the county politicians involved intended to display a religious message and not a historical one.<sup>79</sup> Unfortunately, as relayed in Sub-Parts I(B)(2)-(3) below, the Court's attempt to draw a flexible line in the sand has backfired by emboldening elected state legislators and judges—and even federal judges—to defy the Court starting immediately upon remand of *McCreary County* in 2005.

## 2. Supreme Court “Ignored” and “Flouted” Six Months After *McCreary County*

The extraordinary litigation surrounding the Foundations Displays at issue in *McCreary County* demonstrates the problem, and its after-story is not well known despite the fact that its beginnings were reported in the *New York Times* in connection with another case arising out of the injection of

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74. *Van Orden* 545 U.S. at 682.

75. *Id.* at 681.

76. *Id.*

77. *Id.* at 688.

78. *Id.* at 691.

79. *McCreary Cnty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 881 (2005); see also *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam) (holding that Ten Commandments displays in public classrooms violated the Establishment Clause).

God into Kentucky legislation. The New York Times reported about Kentucky Representative Tom Riner's mission to proselytize via legislation in Kentucky as follows:

Tom Riner looks for God everywhere, and in places he does not find him, he tries to put him there.

For more than 30 years, Mr. Riner's singular devotion has been to inject God into the public arena. . . .

"The church-state divide is not a line I see," Mr. Riner, a Baptist minister, said of [a] lawsuit [brought by American Atheists, Inc.]. "What I do see is an attempt to separate America from its history of perceiving itself as a nation under God."<sup>80</sup>

Representative Riner has led the General Assembly to pass wildly unconstitutional religious bills and inject religious resolutions into various bills' histories, as relayed above.<sup>81</sup> This sets the stage to tell the rest of the story of the aftermath of *McCreary County* in the Commonwealth of Kentucky and the U.S. Court of Appeals for the Sixth Circuit.

First, just six months after *McCreary* was remanded in 2005, a Sixth Circuit panel (The Honorable Richard F. Suhrheinrich, The Honorable Alice M. Batchelder, and The Honorable Walter Herbert Rice, a U.S. District Court Judge sitting by designation who concurred in the result only) seemed to defy the Court's evaluation of the identical Foundations Display in *McCreary County*: "[W]hat five justices of the Supreme Court would include in a display commemorating Kentucky and American legal history has no bearing on the constitutionality of the display as erected."<sup>82</sup> When the American Civil Liberties Union ("ACLU") petitioned for rehearing *en banc*, five judges filed a dissenting opinion from the denial of the petition:

In order to [uphold the constitutionality of the Foundations Display], the panel was willing to deviate from the precedent of this Court . . . . In

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80. Urbina, *supra* note 52, at A12 (also reporting that as of 2009, the Commonwealth had spent \$160,000 on this litigation and \$400,000 as of 2005 on the *McCreary County* litigation).

81. See *supra* notes 48-52 and accompanying text.

82. See *Am. Civil Liberties Union of Ky. v. Mercer Cnty*, 432 F.3d 624, 634 n.7 (6<sup>th</sup> Cir. 2005) (holding that the predominant purpose of the display was secular, and that the display would not have principal or primary effect of endorsing religion).

essence, the panel announced a new rule: that an overt sectarian legislative history is *necessary*, as a matter of law, before a display will be invalidated. The panel premised this novel principle on a recent Supreme Court holding that an avowed sectarian purpose is *sufficient* to invalidate a display. Because the most charitable characterization of the panel's decision is that it makes an illogical inference, I respectfully dissent from the order denying en banc rehearing by this Court.<sup>83</sup>

The dissenters continued, emphasizing that the panel “flouted” the Supreme Court’s charge:

In short, the panel essentially **ignored the Supreme Court’s characterization** of the content of the Mercer County display. **The panel flouted the Supreme Court’s charge** that the reasonable observer not be “absentminded,” and the panel viewed context as coterminous with legislative history. *Compare Mercer County*, 432 F.3d at 632 (“The objective observer has no recent history of religiously motivated governmental acts or resolutions to incorporate into the display.”) *with McCreary County*, 125 S.Ct. at 2737 (“The Counties’ position just bucks common sense; reasonable observers have reasonable memories, and our precedents sensibly forbid an observer ‘to turn a blind eye to the context in which [the] policy arose.’”). The panel read Mercer County’s action of quickly and exactly copying its fellow counties’ embattled and religiously motivated display out of the record.<sup>84</sup>

Notwithstanding the emphatic dissent to the request for an *en banc* hearing, the “flouting” of the Supreme Court’s *McCreary County* decision continued. In 2007, a federal district judge, also allowing the Foundations Display in the Rowan County, Kentucky courthouse to remain on the wall, reiterated the panel’s opinion that the Supreme Court’s *McCreary County* decision “has no bearing on the constitutionality of the display as erected.”<sup>85</sup> And, in 2010, another Sixth Circuit judge openly exhibited hostility towards the Supreme Court’s Establishment Clause jurisprudence based on “the Supreme Court majority’s [purported] persistent hostility to religion”.<sup>86</sup>

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83. *Am. Civil Liberties Union of Ky. v. Mercer Cnty.*, 446 F.3d 651, 651-52 (five judge dissent) (additional internal citations omitted).

84. *Id.* at 655-56 (emphasis added).

85. *Am. Civil Liberties Union v. Rowan Cnty.*, 513 F.Supp.2d 889, 898-99 (E.D. Ky. 2007) (citing *Mercer Cty.*, 432 F.3d at 634 n.7).

86. *Am. Civil Liberties Union v. McCreary Cnty.*, 607 F.3d 439, 452 (6th Cir. 2010) (Ryan, J., dissenting).

I cannot be too critical of my . . . colleagues who feel *stare decisis* bound by the **Supreme Court majority's persistent hostility to religion** and its refusal to acknowledge the historical evidence that religion, religious symbols, and the support of religious devotion were of the very essence of the values the Constitution's authors and the ratifying legislators thought they were preserving in the language of the First Amendment.

The result, I fear, is that federal courts will continue to close the Public Square to the display of religious symbols as fundamental as the Ten Commandments, at least until the Supreme Court rediscovers the history and meaning of the words of the religion clauses of the First Amendment and jettisons the flawed reasoning of *Lemon v. Kurtzman*. . . .<sup>87</sup>

### 3. Seeing the "Big Picture" from Kentucky

At some point, one seeing all of the "baffling" displays "oddly" containing the Ten Commandments and religious texts, "given [their] content and context, understandably throws up his hands in frustration" or at least "would probably suspect that the Counties were simply reaching for any way to keep a religious document on the walls of the courthouse constitutionally required to embody religious neutrality."<sup>88</sup> This is particularly true in Kentucky, after the Supreme Court remanded the *McCreary* case, which arose out of a prominent, vibrant movement to post the Ten Commandments throughout the courthouses of Kentucky, the home of the nation's very popular Creation Museum.<sup>89</sup>

Although stated solely in the context of the *McCreary County* case, one Sixth Circuit judge seems to understand what has been happening:

[T]he fact that more time has passed since the Supreme Court decision is meaningless in this case, because Defendants have spent the time since the Supreme Court decision continuously seeking to accomplish their initial purpose of posting the Ten Commandments as a religious document. Unlike a case in which the passage of time might have some significance, there has been no dormant period here; Defendants have

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87. *Id.* (emphasis added).

88. *Mercer Cnty.*, 446 F.3d at 653, 654-55 (Cole, J., dissenting); *McCreary*, 545 U.S. at 873.

89. *See McCreary Cnty.*, 607 F.3d at 446-47; CREATION MUSEUM, *About the Museum*, <http://creationmuseum.org/about/> (last visited May 23, 2013).

continuously sought to defend their actions and accomplish what they initially set out to do.<sup>90</sup>

It is “naïve to assume that the reasonable observer would not be aware of Mercer County’s related activity of copying the disputed display,” even more so in light of the fact that the Supreme Court struck down the McCreary and Pulaski County displays under the Establishment Clause.<sup>91</sup> The Sixth Circuit judges who dissented from the denial of the rehearing en banc in the *Mercer County* case certainly seemed to think that the counties were aware of each other’s activities:

Somehow I doubt that the Mercer County officials were surprised to find out that they had coincidentally erected the same display as their sister counties, at almost the exact same time. Nor do I believe it a coincidence that the panel relegated what was by far the ACLU’s most powerful argument to a footnote.<sup>92</sup>

In a number of counties, a legislative record exists to show that the sole governmental intent in displaying the Ten Commandments was to construct the display in a manner to defeat a lawsuit, that the sponsorship of the proposal to hang the display originated from religious leaders, and even that religious ceremonies occurred to commemorate the posting of the Foundations Display.<sup>93</sup>

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90. *McCreary Cnty.*, 607 F.3d at 448.

91. *Id.*

92. *Mercer Cnty.*, 446 F.3d at 654 (Cole, J., dissenting); *accord* Am. Civil Liberties Union v. Grayson Cnty., 4:01CV-202-JHM, 2008 WL 859279, at 9 (W.D. Ky. Mar. 28, 2008) (“An objective observer would understand that the Foundations Display’s sponsor desired to post the Ten Commandments in the Courthouse for purely religious reasons and counseled the Grayson Cnty. Fiscal Court on how to accomplish this and avoid objection by the ACLU.”).

93. *See* Am. Civil Liberties Union v. Grayson Cnty., 591 F.3d 837, 850-61 (6th Cir. 2010) (Moore, J., dissenting) (documenting the role of Reverend Shartzter and stating that the government’s stated purpose was a “sham”); *Grayson Cnty.*, 2008 WL 859279, at 10 (discussing the record of government officials seeking to display Ten Commandments without judges having even viewed the “historical documents” in manner to defeat any lawsuit by the ACLU); *Grayson Cnty.*, 605 F.3d at 430-32 (Moore, J., dissenting from opinion assessing costs against ACLU) (describing Reverend Shartzter and Fiscal Court Judge Executive Logdsdon conduct of a religious ceremony after being forced to remove the Foundations Display wherein Shartzter promised to “safeguard” it “until the County was permitted to rehang it” and Logdsdon’s demand that those in attendance “state their religious affiliation”); *accord* *McCreary Cnty.*, 545 U.S. at 851 (describing the ceremony to install Foundations Display overseen by county judge’s executive accompanied by his pastor). For example, in the *Grayson County* case, Judge Logdsdon, during the ceremony to begrudgingly remove the display, “also specifically demanded that those individuals in attendance state their religious affiliation or whether they agreed with [his] clear preference that the Ten

The ACLU has lost most of these types of suits despite the Court's intervention in 2005. In *Grayson County*, for example, the Sixth Circuit panel stated that the burden of proof in religious display suits lies with the challenger:

Indeed, there may be good reason to believe that religious purpose underlies many of the attempts in recent years to place copies of the Ten Commandments in public buildings. Nonetheless, while “the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective,” *McCreary County*, 545 U.S. at 871 . . . , it is those objecting to a display of the Ten Commandments who bear the burden of producing evidence sufficient to *prove* that the governmental entity's secular purpose is a sham, and that an objective observer would understand the display to be motivated predominately by religion.<sup>94</sup>

Predictably and unfortunately, the court once again ruled against the ACLU. The Sixth Circuit panel's overemphasis on the burden of proof allowed to stand what everyone in Kentucky knows to be true – the primary reasons for erecting the Foundations Display is to cross the Supreme Court's line in the sand concerning the Establishment Clause and to demonstrate the political majority's belief in the superiority of Christian faith. As stated by Judge Moore in her dissent calling the governmental purpose a “sham,” “when it is a religious leader who proposes [the Ten Commandments] be hung . . . the desire to post the religious document establishes the predominant purpose, even if the government entity never bluntly states that purpose as its rationale.”<sup>95</sup> An incredible video of the installation ceremony currently still is available on-line.<sup>96</sup>

Those trying to force the Ten Commandments upon nonbelievers via the falsely historical Foundations Display have learned to leave a sanitized record to help them overcome court challenges to their “choreographed” identical displays in at least four other Kentucky counties, and they have

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Commandments remain in place.” *Grayson Cnty.*, 605 F.3d at 431-32 (Moore, J., dissenting). He “then chastised an individual who desired to remain unaffiliated for not supporting the Ten Commandments and deemed that individual to be against the religious text.” *Id.* at 432. This is a clear example of a Kentucky government official “making religion relevant, in reality or public perception, to status in the political community.” *Lynch v. Donnelly*, 465 U.S. at 692 (O'Connor, J., concurring).

94. *Am. Civil Liberties Union v. Grayson Cnty.*, 591 F.3d 837, 856 (6th Cir. 2010).

95. *Id.* at 859 n.3 (Moore, J., dissenting).

96. A video showing hundreds singing *Amazing Grace* during the ceremony is available here: <http://www.kentucky.com/2010/01/19/1100913/crowd-praises-the-return-of-10.html>.

become emboldened to violate the Establishment Clause in other ways that some might describe as “more subtle.”<sup>97</sup> Unfortunately, some Kentucky courts seem to go along pretending that knowledge about the Foundations Display cannot penetrate county lines. As stated by the five Sixth Circuit judges who dissented from the denial of the rehearing en banc in *Mercer County*: “The panel pointed to no changes of constitutional significance since *McCreary County*, unless the panel would constitutionalize the fifty miles of Kentucky between the courthouses.”<sup>98</sup> Furthermore, “[a]s the panel acknowledged, the stories of the Ten Commandment displays erected in the State of Kentucky are intertwined. In the summer of 1999, two bordering counties (McCreary and Pulaski) erected identical Ten Commandments displays. Both displays were successfully challenged by the ACLU . . . .”<sup>99</sup> Meanwhile, *within four months* of the district court order enjoining the final McCreary and Pulaski county displays, four other counties (Mercer, Rowan, Garrard, and Grayson) *exactly copied* those displays; all were identical. In fact, on appeal from the resulting ACLU challenge, the panel in *Mercer County* held the case in abeyance, precisely “[b]ecause the challenged display [was] identical in all material respects to the third and final display in *McCreary County*.”<sup>100</sup>

The Supreme Court denied the most recent petition for certiorari filed in *McCreary County*, which emphasized the seeming meaninglessness of the Establishment Clause within the Commonwealth, and the Court has been uninterested in granting certiorari in other religious display litigation seeking to clarify the *Lemon* Test.<sup>101</sup> As a result, even within the federal

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97. *Am. Civil Liberties Union v. Mercer Cnty.*, 446 F.3d 651, 654 (6th Cir. 2006); *Cnty. of Allegheny v. Am. Civil Liberties Union*, 492 U.S. 573, 627-28 (1989) (O’Connor, J., concurring) (describing how improper religious favoritism may be exercised in “more subtle” ways than “overt efforts at government proselytization”). The Honorable Karen Nelson Moore of the United States Court of Appeals for the Sixth Circuit wisely relied on widely disseminated media reports, which some might argue is in tension with Justice O’Connor’s focus on “traditional external signs that show up in the ‘text, legislative history, and implementation of the statute.’” *Am. Civil Liberties Union v. McCreary Cnty.*, 545 U.S. 844, 862 (2005) (O’Connor, J., concurring). Justice O’Connor also stated of *Stone* and other cases: “In each case, the government’s action was held unconstitutional only because openly available data supported a commonsense conclusion that a religious objective permeated the government’s action.” *Id.*

98. *Am. Civil Liberties Union v. Mercer Cnty.*, 446 F.3d 651, 654 (6th Cir. 2006) (five judge dissent from denial of rehearing *en banc*) (internal citation omitted).

99. *Id.* at 652.

100. *Id.* at 652 (quoting *Mercer Cnty.*, 432 F.3d at 626).

101. See *Davenport v. Am. Atheists*, 132 S.Ct. 12 (Oct. 31, 2011) (No. 08-4061) (denying certiorari); *Utah Highway Patrol Ass’n v. American Atheists*, 132 S.Ct. 12 (Oct. 31, 2011) (Nos. 10-1276, 10-1297) (same); *McCreary*, 131 S.Ct. 1474 (Feb 22, 2011) (No.

courts that have jurisdiction within the borders of the Commonwealth of Kentucky, judges have “flouted” the Supreme Court’s directive to evaluate in good faith facially suspicious<sup>102</sup> governmental words or deeds explainable by nothing other than religious motivation, thereby crossing the Establishment Clause line. Thus, both the legislature and many courts in the very religious Commonwealth remain impervious to the plight of those seeking to preserve the church-state divide.

### C. Ceremonial Deism

Ceremonial Deism cases concern longstanding ritualistic references to God in various governmental contexts.<sup>103</sup> “Courts have generally stated in holdings and dicta that ceremonial deism is constitutional because these phrases have lost their religious meaning through the passage of time or rote repetition.”<sup>104</sup> For instance, the national motto, “In God We Trust,” has been mandatorily printed on coins since 1955 and is now considered constitutional ceremonial deism due to its longstanding history and purported secular, ritualistic goal, which trump its religious content.<sup>105</sup>

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10-566) (same). The petitions for certiorari in each of these cases emphasized the need for clarification of the *Lemon* test: Petition for Writ of Certiorari, *Davenport v. American Atheists*, 2011 WL 1540434 (No. 10-1297); Petition for Writ of Certiorari, *Utah Highway Patrol Ass’n v. American Atheists*, 2011 WL 1495152 (No. 10-1276); Petition for Writ of Certiorari, *McCreary Cnty.*, 2010 WL 4314343 (No. 10-566). *But see*, *Salazar v. Buono*, 559 U.S. 700 (2010) (remanding the case concerning transfer of land in Mojave National Preserve holding Latin Cross erected in 1934 by members of the Veterans of Foreign Wars).

102. The five judge dissent employed the term “facially suspicious,” which should justify fully shifting the burden of proof in Establishment Clause cases to the government to show the absence of religious motivation and effect. *Cf.* *Van Orden v. Perry*, 545 U.S. 677 (2005) 708 (Stevens, J. and Ginsburg, J., dissenting) (citations omitted) (“In my judgment, at the very least, the Establishment Clause has created a strong presumption against the display of religious symbols on public property.”); *Cnty. of Allegheny v. Am. Civil Liberties Union*, 492 U.S. 573, 650 (1989) (partial concurrence and dissent of Brennan, J., Marshall, J., and Stevens, J.) (“In my opinion the Establishment Clause should be construed to create a strong presumption against the display of religious symbols on public property.”). Otherwise, now that those manipulating government as personal pulpits know simply to leave no written religious fingerprints to the record to defeat almost any challenge, even if everyone knows the true intent is religious favoritism. *See* *Am. Civil Liberties Union v. Mercer Cnty.*, 446 F.3d 651, 653 (6th Cir. 2005) (using “facially suspicious” language).

103. For resources on ceremonial deism, see Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. REV. 1 (2011); Christopher C. Lund, *Legislative Prayer and the Secret Costs of Religious Endorsements*, 94 MINN. L. REV. 972 (2010); Christopher C. Lund, *The Congressional Chaplaincies*, 17 WM. & MARY BILL RTS. J. 1171 (2009).

104. Jessie Hill, *Of Christmas Trees and Corpus Christi: Ceremonial Deism and Change In Meaning*, 59 Duke L.J. 705, 707 (2010).

105. Corbin I, *supra* note 25, at 1546.

These cases best illustrate how history and longstanding practices can be construed to protect what would otherwise likely be an unconstitutional establishment of religion. In 2004, in the case of *Elk Grove Unified School District v. Newdow*, the Supreme Court dismissed on standing grounds a challenge to students' recitation of the phrase "under God" within the Pledge of Allegiance, which had been added to the Pledge in 1954.<sup>106</sup> In dicta, the Court clearly stated that it would not have found a violation of the Establishment Clause in the case.<sup>107</sup> Similarly, in *Marsh v. Chambers*, the Supreme Court looked to 18<sup>th</sup> century practices of Congress when it held that the Nebraska legislature's practice of opening every session with a prayer by a chaplain (paid for by public funds) did not violate the Establishment Clause.<sup>108</sup>

A three-judge panel of the Second Circuit very recently utilized the Endorsement Test in a seeming ceremonial deism case arising out of Greece, New York.<sup>109</sup> The Supreme Court also granted a writ of certiorari to decide whether the town board's practice of opening session with a prayer from the "chaplain of the month" —usually someone invoking a Christian faith—violates the Establishment Clause.<sup>110</sup> The stakes are high, but this Article will leave it to other experts to make predictions about the outcome or how the Court might utilize the platform of the case to improve or further mar its jumbled Establishment Clause jurisprudence.<sup>111</sup> While

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106. *Elk Grove Unified Sch. Dist. V. Newdow*, 542 U.S. 1, 5 (2004) (holding that a father lacked standing to bring action in federal court challenging the constitutionality of school districts' policy requiring teacher-led recitation of the Pledge of Allegiance).

107. *Id.*

108. *Marsh v. Chambers*, 463 U.S. 783 (1983) (holding that the challenged practice did not violate the establishment clause); *see also Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1042-44 (9th Cir. 2010) (Reinhardt, J., dissenting) (suggesting that Congress added "under God" to the Pledge of Allegiance to indoctrinate children with belief in God, not just country).

109. *See Galloway v. Town of Greece*, 681 F.3d 20 (2d Cir. 2012), *cert. granted*, 2013 WL 2149803 (May 20, 2013) (No. 12-696) (finding an Establishment Clause violation because prayer practice impermissibly endorsed a Christian viewpoint).

110. *Id.*

111. *See* Rick Garnett, *More on the Town of Greece*, PRAWFSBLAWG, (May 20, 2013, 12:51 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2013/05/more-on-the-town-of-greece.html>; Paul Horwitz, *Beware of Town of Greece Bearing Gifts*, PRAWFSBLAWG, (May 20, 2013, 10:18 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2013/05/beware-of-town-of-greece-bearing-gifts.html>; Eugene Volokh, *New Establishment Clause Case for the Supreme Court*, THE VOLOKH CONSPIRACY (May 20, 2013, 9:45 AM), <http://www.volokh.com/2013/05/20/new-establishment-clause-case-for-the-supreme-court/>; *see generally* Andrew Koppelman, *Defending American Religious Neutrality* (2013); Andrew Koppelman, *Phony Originalism and the Establishment Clause*, 103 NW. U. L. REV.

much more could be written about the ceremonial deism doctrine, for purposes of this Article the point is simple: time is an obstacle in religious liberty litigation, because over time, courts tend to justify what would otherwise be unconstitutional practices by pointing to their longstanding, and thus historical, nature.

#### D. Governmental Speech Doctrine

It is this author's—perhaps minority—opinion, like that of Professor Corbin, that “government religious speech harms both the equality and liberty of nonbelievers.”<sup>112</sup> This author believes that the main purpose of the Establishment Clause is to protect religious minorities, including the nonbelievers.<sup>113</sup> However, government religious speech is common and has often gained the Court's blessing, as in the creation of the government speech doctrine in *Pleasant Grove City, Utah v. Summum* in 2009.<sup>114</sup>

In *Pleasant Grove v. Summum*, the issue was whether a city's denial of permission to a private organization seeking to place a religious monument in a park violated the Establishment Clause. Pioneer Park was a public park located in the Historic District of Pleasant Grove City, Utah. The park contained fifteen permanent displays, including an historic granary, a September 11 monument, a wishing well, the Ten Commandments, and the City's first fire station.<sup>115</sup> Eleven of the fifteen existing displays were donated to the park by private sources. A minority religious organization then sought permission to display a stone monument containing the Seven Aphorisms of Summum,<sup>116</sup> but the government denied the requisite permit.<sup>117</sup>

The Supreme Court's majority opinion, authored by Justice Alito, set forth the framework under which the parties' Establishment Clause

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727 (2009); PAUL HORWITZ, *THE AGNOSTIC AGE: LAW, RELIGION AND THE CONSTITUTION* (2011); Steven D. Smith, *Symbols, Perception, and Doctrinal Illusions: Establishment Neutrality and the “No Endorsement” Test*, 86 MICH. L. REV. 266 (1987).

112. Corbin II, *supra* note 27, at 349.

113. *Id.*

114. *Pleasant Grove City v. Summum*, 555 U.S. 460, 464 (2009) (holding that by allowing placement of donated permanent monuments in a public park, the city was exercising a form of government speech not subject to scrutiny under the Free Speech Clause).

115. *Id.*

116. *See generally* PRINCIPLES OF CREATION, SEVEN SUMMUM PRINCIPLES, <http://www.summum.us/philosophy/principles.shtml>.

117. *Pleasant Grove City v. Summum*, 555 U.S. at 466.

arguments would be evaluated.<sup>118</sup> The Court first determined whether the displays were considered government speech, as opposed to governmental regulation of private speech (which would be subject to strict scrutiny).<sup>119</sup> The Court held that the private displays donated for erection on public property amounted to governmental speech.<sup>120</sup> The Court then found that the city choosing not to display the stone monument was constitutional, because it could not be forced to engage in any particular speech.<sup>121</sup> The Court reasoned that, while the challengers to the display saw the monuments as an expression by the government, each individual has the ability to develop his or her own interpretation of it.<sup>122</sup> Justice Alito then distinguished private speech such as temporary displays (Christmas trees and Menorah) from permanent monuments on public property, which would be considered government speech.<sup>123</sup> In light of the *Sumnum* case, which “has truly frightening implications for free speech law,”<sup>124</sup> it may prove difficult to force via judicial fiat inclusion of non-majority viewpoints as a means of remedying one-sided displays. This is but one of many strategic difficulties nonbelievers face in mounting constitutional challenges to government-sponsored religious expression.

### *III. Nonbelievers Need New Litigation Strategies*

Nonbelievers and others seeking to use the courts to enforce the constitutionally required church-state divide need new litigation strategies for two primary reasons: (1) the above-discussed case law and turnover on the Court has made litigation under the Establishment Clause risky, and (2) discrimination against non-believers in the nation’s conservative heartland is on the rise, leading to further ostracization of non-believers from the democratic process. Both of these issues, as well as suggestions for new strategies, will be discussed in sub-parts A, B, and C, below.

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118. *Id.* at 462.

119. *Id.* at 470.

120. *Id.* at 471.

121. *Id.* at 479.

122. *Id.* at 478.

123. *Id.* at 480.

124. Erwin Chemerinsky, *A Dangerous Free Speech Ruling*, 45 TRIAL 60 (July 2009).

*A. Inconsistent Case Law and Heightened Litigation Risk*

The Supreme Court has yet to find any single principle that consistently drives a majority in Establishment Clause cases.<sup>125</sup> There is unpredictability. For example, in *Van Orden*, the Court stated that the *Lemon* Test was not useful in the case,<sup>126</sup> while it employed the *Lemon* Test in *McCreary County* which was decided on the same day.<sup>127</sup> The difference between the outcomes was due to Justice Breyer voting differently in each case.<sup>128</sup> Justice Breyer did not seem to use any specific Establishment Clause test, but said that Justices should just use their “legal judgment” in cases like this.<sup>129</sup> “At some point during the last ten years, one or more of the nine Justices have articulated ten different Establishment Clause standards.”<sup>130</sup>

Further, “Justice O’Connor’s Non-Endorsement approach may seem more focused, but uncertainties about what behavior constitutes endorsement greatly reduces its apparent simplicity.”<sup>131</sup> Nor has the Non-Endorsement Test commanded a Court majority.<sup>132</sup> Justice Kennedy has rejected the Non-Endorsement Test completely and suggested the constitutionality of actions challenged under the Establishment Clause should turn on whether there is some kind of coercion.<sup>133</sup> *Lee v. Weisman*, authored by Justice Kennedy, crystallized the issue of the case as “whether the exposure to the government’s religious expression is voluntary, and whether the governmental practice coerces religious belief.”<sup>134</sup> As Justice Kennedy noted, coercion “may not be limited to the context of public schools . . . .”<sup>135</sup> Although *Lee* did not indicate who beyond high school children should not have to endure being put “in the dilemma of participating, with all that implies, or protesting,”<sup>136</sup> the reality in many

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125. Anderson, *supra* note 46, at 762.

126. Tomlinson, *supra* note 30, at 273.

127. *McCreary Cnty. v. Am. Civil Liberties Union*, 545 U.S. 844, 850 (2005).

128. Tomlinson, *supra* note 30, at 288.

129. *Id.*

130. Gey, *supra* note 31, at 725.

131. Greenawalt, *supra* note 39, at 1138.

132. Anderson, *supra* note 46, at 764.

133. Holland, *supra* note 43, at 1627.

134. *Lee v. Weisman*, 505 U.S. 580, 580 (1992).

135. *Id.* at 592 (citing *Cnty. of Allegheny v. Am. Civil Liberties Union*, 492 U.S. 573, 661) (1989) (Kennedy, J., concurring in part and dissenting in part).

136. *Id.*

parts of the country is that nearly everyone is subject to enormous pressure to conform.

Litigation under the Establishment Clause today poses risks to nonbelievers seeking to challenge improper injection of religion into government. As previously noted, the current analysis under the Establishment Clause is highly criticized for being inconsistent, unpredictable, and confusing.<sup>137</sup> The Court applies different tests, or interprets the same test differently, or Justices switch votes depending on the facts, which all equals to uncertainty for the nonbelievers seeking justice in the court systems.

Moreover, many would posit that the composition of the conservative Roberts Court renders challenges by nonbelievers under the Establishment less likely to succeed.<sup>138</sup> Indeed, there is real concern that the Roberts Court might abandon the current analysis under Establishment Clause for a more pro-religion standard.<sup>139</sup> Chief Justice Roberts and Justice Alito replaced Chief Justice Rehnquist and Justice O'Connor, respectively, leaving uncertainty surrounding the prospects that the Establishment Clause will continue to find majority support to protect nonbelievers.<sup>140</sup> A five-justice consensus could emerge to all but obliterate standing for organizations or individuals to bring this type of litigation under the Establishment Clause.<sup>141</sup>

In light of the opinions in *Van Orden* and *McCreary County*, it appears that Justices Scalia, Thomas, and probably Roberts, Kennedy, and Alito do not agree with Justice O'Connor's view that the Establishment Clause protects an equality interest.<sup>142</sup> Justice-counting is never certain, however.<sup>143</sup> Inconsistencies result when justices switch sides, and the

137. See E.g., Gey, *supra* note 31, at 725.

138. Cf. Erwin Chemerinsky, *Not a Free Speech Court*, 53 ARIZ. L. REV. 723 (2011) (hereinafter "Chemerinsky I"); Erwin Chemerinsky, *Moving to the Right, Perhaps Sharply to the Right*, 12 THE GREEN BAG 2d 413 (2009) (hereinafter "Chemerinsky II").

139. Erwin Chemerinsky, *The Roberts Court and Freedom of Speech*, 63 FED. COMM. L.J. 579, 666 (2011) (hereinafter "Chemerinsky III").

140. Chemerinsky I, *supra* note 138, at 742.

141. Cf. *Hein v. Freedom From Religion Found.*, 551 U.S. 587 (2007) (finding organization's challenge to "faith-based initiatives" did not fall within narrow exception on taxpayer standing set forth in *Flast v. Cohen*, 32 U.S. 83 (1968)).

142. Chemerinsky III, *supra* note 139, at 678.

143. E.g., Mark Sherman, *John Roberts' Health Care Decision Draws More Nuanced Look at Chief Justice's Tenure*, HUFFINGTON POST (July 2, 2012), [http://www.huffingtonpost.com/2012/07/02/john-roberts-health-care-decision\\_n\\_1642739.html](http://www.huffingtonpost.com/2012/07/02/john-roberts-health-care-decision_n_1642739.html).

majority changes its analysis. Justice O'Connor and Justice Kennedy were predominantly considered the swing votes.<sup>144</sup> Further, even the articulation of the applicable tests can vary, causing inconsistent results. Justice Kennedy, predicted by Professor Erwin Chemerinsky to be the most important swing vote in the Establishment Clause arena on the current court,<sup>145</sup> seems to adhere to the case-by-case coercion test.<sup>146</sup> Thus, personnel changes on the Court make it difficult to predict future outcomes in Establishment Clause cases.

The Court has not yet decided enough cases using the coercion theory to predict authoritatively what would amount to coercion in a close case.<sup>147</sup> But the *City of Greece*<sup>148</sup> case provides the Court a platform to how to rectify the *Marsh* ceremonial deism doctrine with the *Lemon* Endorsement Test.<sup>149</sup> How it will do so – or whether it will attempt to adopt one controlling principle, such as the coercion principle – is anyone's guess. As of right now, the outcome of any Establishment Clause analysis remains highly case-specific and impossible to predict in all but the most obvious of cases.<sup>150</sup>

In any event, as observed by one scholar, “the First Amendment clauses are less effective when the problem is neither interference nor true coercion, but unequal treatment.”<sup>151</sup> Therefore, nonbelievers should seek new avenues to challenge religious discrimination.

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144. Steven G. Gey, *Reconciling the Supreme Court's Four Establishment Clauses*, 8 U. PA. J. CONST. L. 725, 764 (2006) (“The best way to assess the current status of any Establishment Clause issue... is to focus on how the Justices respond to particular fact contexts...”).

145. Chemerinsky III, *supra* note 139.

146. Gey, *supra* note 144, at 740.

147. Holland, *supra* note 43, at 1601.

148. *Town of Greece, New York v. Galloway*, 133, S.Ct 2388 (May 20, 2013) (granting a petition for writ of certiorari for the United States Court of Appeals for the Second Circuit).

149. *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (defining the Lemon Test as: (1) the government's action must have a secular legislative purpose, (2) the government's action must not have the primary effect of advancing or inhibiting religion, and (3) the government's action must not result in an “excessive government entanglement” with religion).

150. Greenawalt, *supra* note 39, at 1133.

151. Gellman, *supra* note 19, at 666.

*B. Risking Discrimination and Alienation*

The problem of present-day discrimination and alienation of non-believers is quite real. Supported by surveys and a litany of sources, Professor Corbin recently made the following well-supported succinct observation: “Nonbelievers still make up a small minority in the United States, and they remain disliked, distrusted, and not truly American in the eyes of many. As a result, many atheists are hesitant to reveal their religious views, and those who do risk discrimination or attack.”<sup>152</sup> Nonbelievers are victims of stereotypes, prejudices, and hatred. For example, just across from its Kentucky suburbs in Cincinnati, Ohio, a landowner received death threats after the leased billboard on his land displayed the message: “Don’t believe in God? You’re not alone.”<sup>153</sup> He reneged on the lease.<sup>154</sup> In Kentucky, a billboard was erected that depicted a boy pointing a gun at the viewer with the following quote: “If God doesn’t matter to him, do you?”<sup>155</sup> Even in the wake of the devastating Oklahoma City tornado, an atheist survivor shared an awkward moment with a CNN reporter asking her if she thanked God she was alive.<sup>156</sup> Notwithstanding the cultural ostracism often faced by nonbelievers, if the Supreme Court stays true to a core purpose of the Establishment Clause and protects minorities, it can send a message to citizens to accept nonbelievers in our society.

According to a University of Minnesota study, atheists are the most despised minority in the United States.<sup>157</sup> In 1999, a Gallup Poll

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152. Corbin II, *supra* note 27, at 349; accord Gervais W. M., et al., *Do You Believe in Atheists? Distrust Is Central to Anti-atheist Prejudice*, J. OF PERSONALITY AND SOC. PSYCHOL., 101, 1189 (2011). One survey of 54,461 adults found that as many as 25 percent of Americans do not believe in a “personal God” although 12 percent of them believe “[t]here is a higher power.” See Barry A. Kosmin & Ariela Keysar, *Am. Religious Identification Survey [ARIS 2008] Summary Report 3, 5* (Mar. 2009), [http://commons.trincoll.edu/aris/files/2011/08/ARIS\\_Report\\_2008.pdf](http://commons.trincoll.edu/aris/files/2011/08/ARIS_Report_2008.pdf).

153. Hugh Kramer, *Death Threats Force Removal of Atheist Billboard*, EXAMINER.COM (Nov. 12, 2009), <http://www.examiner.com/article/death-threats-force-removal-of-atheist-billboard>.

154. *Id.*

155. See generally BILLBOARD WARS, DANGEROUS TALK, <http://www.dangeroustalk.net/billboard-wars.html> (last visited Oct. 11, 2012).

156. See Brayden Goyette, *Wolf Blitzer Asks Atheist Tornado Survivor if She ‘Thanks the Lord,’* HUFFINGTONPOST.COM (May 21, 2013), [http://www.huffingtonpost.com/2013/05/21/wolf-blitzer-atheist-tornado-survivor\\_n\\_3316312.html](http://www.huffingtonpost.com/2013/05/21/wolf-blitzer-atheist-tornado-survivor_n_3316312.html).

157. Austin Cline, *Gallup Polls & Other Surveys on American Attitudes Towards Atheists*, ABOUT.COM, <http://atheism.about.com/od/atheistbigotryprejudice/a/Atheist-Surveys.htm> (last visited July 28, 2012).

demonstrated that even if an atheist were qualified as President, 45 percent of Americans would not vote for that candidate.<sup>158</sup> “Americans rated atheists as the group that least agrees with their vision of America and the group that they would most disapprove of their children marrying.”<sup>159</sup> Recent polls found that in parts of the country with religious majorities, atheists were the least liked people.<sup>160</sup> This prejudice against atheists is predominantly due to a feeling of distrust, which “generalized even to participants from more liberal, secular populations.”<sup>161</sup> “A description of a criminally untrustworthy individual was seen as comparably representative of atheists and rapists but not representative of Christians, Muslims, Jewish people, feminists or homosexuals.”<sup>162</sup> Further, studies showed that this belief is premised upon the assumption that most people believe that those who have a relationship with God and believe God is watching them will behave better than those who don’t believe.<sup>163</sup> “[A]theists were systematically socially excluded only in high-trust domains; belief in God, but not authoritarianism, predicted this discriminatory decision-making against atheists in high trust domains.”<sup>164</sup> Thus, distrust and political ostracism of atheists in America is a true problem needing a remedy.

### C. Seeking New Strategies

Just as there is a movement to inject God into American politics, there is a countermovement among non-believers to use the courts to uphold the constitutional church-state divide. Among those who have filed litigation recently are the ACLU;<sup>165</sup> American Atheists, Inc.;<sup>166</sup> Freedom From Religion Foundation;<sup>167</sup> Michael Newdow, an individual attorney in

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158. *Id.*

159. Gervais, *supra* note 152, at 1189.

160. *Id.*

161. *Id.*

162. *Id.* at 1189.

163. Gervais, *supra* note 152, at 1189.

164. Phil Zuckerman, *Atheism, Secularity and Well-Being: How the Findings of Social Science Counter Negative Stereotypes*, 3/6 SOCIOLOGY COMPASS 949, 953 (2009).

165. *See supra* Part I(C).

166. American Atheists, *American Atheists Legal Center*, ATHIESTS.ORG, <http://atheists.org/legal> (last visited July 28, 2013) (defining themselves as “committed to the full and absolute separation of religion from government”).

167. Freedom From Religion Foundation, *Our Legal Work*, FFRF.ORG, <http://ffrf.org/legal> (last visited May 28, 2013) (“The Freedom From Religion Foundation, an educational watchdog organization working to keep church and state separate, has had

California,<sup>168</sup> and other groups and individuals. Any civil rights movement involving a diverse array of uncoordinated actors runs the risk of individuals pulling in opposite directions. My thinking in putting this Article into the public domain is to generate conversation among the various groups and individuals to maximize the movement's chances of success. The remainder of this sub-part will attempt to do this by discussing American Atheists' newest litigation against the IRS and how it might lead to new strategies for those seeking to uphold the church-state divide, including by drawing some lessons from the landmark litigation from the civil rights era, *Brown v. Bd. of Ed. of Topeka*.<sup>169</sup>

American Atheists, Inc. is an advocacy organization that often brings litigation to challenge Establishment Clause violations. Its most recent litigation challenging the Internal Revenue Service's preferential treatment of churches and religious organizations under I.R.C. § 501(c)(3) seeks to open this new path. The basis of American Atheists' complaint is rooted in the Internal Revenue Code's treatment of "non-profit" status:

I.R.C. § 501(c)(3) distinguishes between entities that are religious in nature, on the one hand, and those that are charitable, scientific, testing for the public safety, literary, educational, or dedicated to amateur athletics or the prevention of cruelty to children or animals, on the other. "Religious organizations" and "churches" are treated differently from all other organizations entitled to tax exemptions under I.R.C. § 501(c)(3). Additionally, under the IRS's application of I.R.C. § 501(c)(3), churches receive certain preferences that even religious organizations do not.<sup>170</sup>

American Atheists argues that such treatment violates Equal Protection principles inherent in the Due Process Clause of the Fifth Amendment, the Religious Test Clause of Article VI, § 3 of the Constitution, and the Establishment Clause of the First Amendment. Sub-part 1 below will flesh out very briefly the Equal Protection argument, including some lessons from *Brown*, while Sub-part 2 will briefly introduce the Religion Test Clause argument. As the purpose of this Article is to develop new legal

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many significant legal accomplishments nationwide.").

168. Michael Newdow— Biography, WIKIPEDIA: THE FREE ENCYCLOPEDIA, [http://en.wikipedia.org/wiki/Michael\\_Newdow](http://en.wikipedia.org/wiki/Michael_Newdow) (last visited May 28, 2013) ("He is best known for his efforts to have recitations of the current version of the Pledge of Allegiance in public schools declared unconstitutional.").

169. *Brown v. Bd. of Ed. of Topeka*, 347 U.S. 483, 488 (1954) (holding that segregation denied plaintiffs equal protection of the laws as guaranteed by the Fourteenth Amendment).

170. *E.g.*, Complaint for Injunctive & Declaratory Relief, Am. Atheists, Inc., v. Shulman, No. 12-264 (Dec. 20, 2012) (on file with author).

theories, the Establishment Clause arguments are not discussed herein. The litigation is at the incipient stages and would benefit from strategic brainstorming from the broader community seeking to preserve the church-state divide.

### *1. Equal Protection and Lessons from Brown*

American Atheists, in its complaint, claims that I.R.C. § 501(c)(3) violates the Equal Protection principles inherent in the Fifth Amendment in that it discriminates between entities solely on the basis of whether they profess deistic beliefs.<sup>171</sup> Courts commonly have used the Equal Protection Clause of the Fourteenth Amendment to protect minorities from discriminatory laws.<sup>172</sup> The Court has extended this protection to prevent discrimination based on gender, alienage, illegitimacy and burdens on fundamental rights, such as voting and free speech.<sup>173</sup> So it seems that Equal Protection principles could apply to bar religious discrimination against atheists.

In *Brown v. Bd. of Ed. of Topeka*, the Court held that separate schools for African Americans violated the Equal Protection Clause of the Fourteenth Amendment.<sup>174</sup> In *Brown*, the Court famously held that separate was not equal, overruling *Plessy v. Ferguson*.<sup>175</sup> The Court relied upon the poignant – yet scientifically weak – doll study as evidence of this inequality.<sup>176</sup> The Court stated, “to separate [Black students] from others of

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171. *Id.*

172. E.g., *Shelley v. Kraemer*, 68 S.Ct. 836 (1948) (holding that courts cannot enforce racial covenants in real estate); *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding that intimate sexual conduct is part of the liberty covered by due process).

173. E.g., *id.*

174. *Brown v. Bd. of Ed.*, 347 U.S. 483, 488 (1954) (“[T]hey have been denied admission to schools attended by white children under laws requiring or permitting segregation according to race. This segregation was alleged to deprive the plaintiffs of the equal protection of the laws under the Fourteenth Amendment.”); *Missouri v. Jenkins*, 515 U.S. 70, 120-21 (1995) (Thomas, J. concurring) (citing *Brown v. Bd. of Ed.*, 370 U.S. 483 (1954) (“At the heart of this interpretation of the Equal Protection Clause lies the principle that the government must treat citizens as individuals and not as members of racial, ethnic, or religious groups.”)).

175. *Id.*

176. *See generally* JACK M. BALKIN, *REWRITING BROWN, IN WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID* (Jack M. Balkin ed., 2001) (critiquing the Court’s use of the doll study in footnote 11); Michael Heise, *Judicial Decision-Making, Social Science Evidence, and Equal Educational Opportunity: Uneasy Relations and Uncertain Futures*, 31 SEATTLE U. L. REV. 863, 866-69 (2008) (“Most leading constitutional scholars today (granted, with the considerable benefit of hindsight) eschew the particular evidentiary path

similar age and qualifications solely because of their race *generates a feeling of inferiority* as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”<sup>177</sup> The Court went even further by stating that this feeling of inferiority, undergirded by law, would affect the children’s ability and desire to learn.

Social science demonstrating the effects of a particular law could be of relevance in religious cases as well. On the other hand, moving the Court to accept such evidence outside the context of school litigation might be difficult, because the Supreme Court “has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools.”<sup>178</sup>

So, what can the movement to uphold the church-state divide learn from *Brown* to shift its focus more toward Equal Protection principles, rather than the Establishment Clause? To at least two other scholars, it is surprising that Equal Protection principles have never been a cornerstone for religious cases.<sup>179</sup> I do not mean in this Article, however, to overemphasize or imply exactly how social science data might be used. In fact, I am hoping this Article will lead to new ideas and voices heard on the subject. As explained by Justice Thomas in *Missouri v. Jenkins*:<sup>180</sup>

*Brown I* itself did not need to rely upon any psychological or social-science research in order to announce the simple, yet fundamental, truth that the government cannot discriminate among its citizens on the basis of race. . . . At the heart of this interpretation of the Equal Protection Clause lies the principle that the government must treat citizens as individuals, and not as members of racial, ethnic, or religious groups. It is for this reason that we must subject all racial classifications to the strictest of scrutiny . . . .<sup>181</sup>

Strategies are necessary to try to avoid similar shortcomings experienced since *Brown*. Extraordinarily insightful commentators have

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taken by the Court in *Brown*.”); accord Sanjay Mody, Note, *Brown Footnote 11 in Historical Context: Social Science and the Supreme Court’s Quest for Legitimacy*, 54 STAN. L. REV. 793, 803-14 (2002); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

177. *Brown v. Bd. of Ed.*, 347 U.S. 483, 494 (1954) (emphasis added).

178. *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987).

179. Gellman & Looper-Feldman, *supra* note 12, at 667.

180. *Missouri v. Jenkins*, 515 U.S. 70 (1995) (overturning District Court ruling that required the state of Missouri to correct *de facto* racial inequality in schools by funding salary increases and remedial education programs).

181. *See id.* at 120-121 (1995) (Thomas, J., concurring) (“The mere fact that a school is black does not mean that it is the product of a constitutional violation.”).

documented that the Court is moving away from fulfilling the promises of *Brown*.<sup>182</sup> Some originalists might even maintain that *Brown* itself was an unconstitutional decision—or at least deeply flawed constitutionally even if generally socially desirable.<sup>183</sup> At least one scholar has come close to predicting the demise of social statistics as being useful in modern educational opportunity litigation.<sup>184</sup> Some commentators are particularly critical of “the Court turning to such evidence in constitutional cases, especially those involving the equal protection clause.”<sup>185</sup> Nonetheless, despite such obstacles, one lesson to derive from the epic *Brown* litigation is that relying too narrowly on a single remedial theory for too long can eventually backfire.<sup>186</sup>

In sum, one of my intents in writing this Article is to generate a dialogue among those interested in developing the Equal Protection angle to the First Amendment. This is in the spirit of what Professor Charles J. Ogletree, Jr., constitutional law scholar, did on the fiftieth anniversary of *Brown*, when he wrote in an excellent essay trying to preserve some of *Brown*'s lessons:

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182. See generally Joel K. Goldstein, *Not Hearing History: A Critique of Justice Roberts's Reinterpretation of Brown*, 69 OHIO ST. L.J. 791 (2008); Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1473 n.10 (2004); Neal Devins, *School Desegregation Law in the 1980's: The Court's Abandonment of Brown v. Board of Education*, 26 WM. & MARY L. REV. 7 (1984).

183. See Michael J. Klarman, *Brown, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1883 (1995) (criticizing an argument in favor of *Brown* being constitutional on the grounds the argument “fails to show either that *Brown* is correct on originalist grounds, or even, as he more modestly claims, that *Brown* is within the legitimate range of interpretations’ of the Fourteenth Amendment”); Ronald Turner, *Was “Separate But Equal” Constitutional?: Borkian Originalism and Brown*, 4 TEMP. POL. & CIV. RTS. L. REV. 229 (1995) (exploring the originalism arguments counter to Judge Bork’s theorizing that *Brown* could be squared with the original understanding of the Fourteenth Amendment).

184. Michael Heise, *Judicial Decision-Making, Social Science Evidence, and Equal Educational Opportunity: Uneasy Relations and Uncertain Futures*, 31 SEATTLE U. L. REV. 863, 883 (2008) (“Reliance on social science evidence in judicial decisions, especially in constitutional cases, continues to make scholars and courts uneasy.”). But see generally Gordon J. Beggs, *Novel Expert Evidence in Federal Civil Rights Litigation*, 45 AM. U. L. REV. 1 (1995).

185. Heise, *supra* note 184, at 885.

186. E.g., Lia B. Epperson, *True Integration: Advancing Brown's Goal of Educational Equity in the Wake of Grutter*, 67 U. PITT. L. REV. 175, 204 (2005) (noting limits of a one directional strategy in desegregation litigation); see also Martha Minnow, *Surprising Legacies of Brown v. Board*, 16 WASH. U. J.L. & POL'Y 11 (2004) (discussing various aspects of law and society beyond race relations impacted by *Brown*).

As we reflect on fifty years of *Brown* in the context of where we are today as a country of diverse people, we have a clearer sense of its successes and failures and the challenge for the future. In the pages that follow, my goal is to share my assessment of *Brown* and its progeny, in the hope that others will seek solutions to these problems and meet the laudable goals of *Brown*, which have, regrettably, thus far not been achieved.<sup>187</sup>

In contrast to the doll study used in *Brown*, recently gathered statistics demonstrating large numbers of fellow Americans' attitudes towards atheists are far more scientifically reliable given the large sample sizes.<sup>188</sup> In many of the cases that fall within the four broad areas of the Establishment Clause discussed above, the problem is not that people necessarily feel, at least not strictly, that strong-willed nonbelievers are being coerced; they feel that they are being ostracized by government actors for being non-Christian, that they are being rendered outsiders, second-class citizens, and less "American" than the Christian majority.<sup>189</sup> This ostracism discourages participation in the political process, which serves to encourage political insiders to cater further to the majority at the expense of nonbelievers.<sup>190</sup> For example, in recent litigation, almost 35 of the 38 members of the Kentucky Senate signed an amicus brief authored by Roy Moore<sup>191</sup> encouraging the elected appellate court judges not to follow the Supreme Court's jurisprudence on the grounds that it purportedly contravenes the First Amendment.<sup>192</sup> Ninety-six Kentucky House of Representative members – out of a total of only one hundred – signed a corresponding brief seeking to revive Justice David Josiah Brewer's

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187. Charles J. Ogletree, *The Significance of Brown*, 20 HARV. BLACKLETTER L.J. 1, 12 (2004).

188. See *supra* notes 134 - 136 and accompanying text.

189. Gellman, *supra* note 19, at 666.

190. See *supra* notes 129-131 and accompanying text; see also, *Doe v. Harlan Cnty. Sch. Dist.*, 96 F. Supp. 2d 667 (2000) (striking down clearly unconstitutional Kentucky law requiring the posting of the Ten Commandments in every public classroom in Kentucky); *Roark v. South Iron R-1 Sch. Dist.*, 540 F. Supp. 2d 1047 (E.D. Mo. 2008) (striking school district's practice of allowing Bibles to be distributed in fifth grade classrooms by evangelical Christians).

191. See *supra* notes 4-9 and accompanying text.

192. Brief for Thirty-Five Kentucky State Senators as Amicus Curiae, Kentucky Office of Homeland Security v. Christerson, 371 S.W.2d 754 (Ky. Ct. App. 2011) (No. 2009-CA-001676), at 7, available at [http://www.morallaw.org/PDF/KYSENATORS\\_FM\\_LAMICUS%20BRIEF\\_5\\_10\\_10.pdf](http://www.morallaw.org/PDF/KYSENATORS_FM_LAMICUS%20BRIEF_5_10_10.pdf).

widely-discredited statement in *Church of The Holy Trinity v. United States*<sup>193</sup> that the United States is a “Christian nation.”<sup>194</sup>

While there is always risk of backlash, such as is apparent in the “billboard wars,”<sup>195</sup> the Court’s protection of atheists’ individual liberties could lead to more widespread acceptance of them by more Americans. If the law continues to be used as a tool to ostracize nonbelievers, their status as second-class citizens in most of the country will become further entrenched. Take the following examples, which while focused on atheists, are relevant to all those interested in preserving the church-state divide. The idea that atheists should be deemed incompetent to serve as witnesses “was not put to rest in America until well into the twentieth century” and still lingers unchallenged in multiple state constitutions.<sup>196</sup> Atheism can even impact one’s likelihood of being awarded custody or adoption of children.<sup>197</sup> People also have been forced out of non-religious jobs for being atheist.<sup>198</sup>

Various Supreme Court opinions have acknowledged the alienation of nonbelievers:

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193. *Church of the Holy Trinity v. U.S.*, 143 U.S. 457 (1892) (holding that a minister is not a foreign laborer under the statute even though he was a foreigner).

194. Brief for Thirty-Five Kentucky State Senators, *supra* note 191, at 18, available at [http://kysecurity.files.wordpress.com/2010/05/motion-2\\_0001.pdf](http://kysecurity.files.wordpress.com/2010/05/motion-2_0001.pdf); see also Steven K. Green, *Justice David Josiah Brewer and the “Christian Nation” Maxim*, 63 ALA. L. REV. 427, 427-28 (1999) (“Judges and commentators have panned the Christian nation pronouncement as ‘arrogant’ and ‘anachronistic,’ an ‘aberration,’ or at best, as stating a mere ‘truism.’”). Even Justice Brewer himself did not seem to truly believe the mantra had legal significance. See DAVID J. BREWER, *THE UNITED STATES A CHRISTIAN NATION* 12 (1905).

195. See *supra* notes 153-54 and accompanying text.

196. Eugene R. Milhizer, *So Help Me Allah: A Historical and Prudential Analysis of Oaths As Applied to the Current Controversy of the Bible and Quran in Oath Practices in America*, 70 OHIO ST. L.J. 1, 26 n.10 (2009); see generally *Torasco v. Watkins*, 367 U.S. 488 (1961) (striking Maryland constitution religious test required of notary public applicant); Paul W. Kaufman, Note, *Disbelieving Nonbelievers: Atheism, Competence, and Credibility in the Turn of the Century American Courtroom*, 15 YALE J.L. & HUMAN. 395 (2003) (describing ineligibility to serve as witnesses, jurors, notaries public and other public offices).

197. See Eugene Volokh, *Parent-Child Speech and Child Custody Speech Restrictions*, 81 N.Y.U. L. REV. 631, 633-35 (2006).

198. E.g., Robert F. Worth, *From Bible-Belt Pastor to Atheist Leader*, N.Y. TIMES MAG., (Aug. 22, 2012), [http://www.nytimes.com/2012/08/26/magazine/from-bible-belt-pastor-to-atheist-leader.html?\\_r=1](http://www.nytimes.com/2012/08/26/magazine/from-bible-belt-pastor-to-atheist-leader.html?_r=1) (describing frequency of even preachers losing faith and level of discrimination against atheists including loss of employment in non-religious sectors).

“Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.”<sup>199</sup>

“When the government puts its *imprimatur* on a particular religion, it conveys a message of exclusion to all those who do not adhere to the favored beliefs.”<sup>200</sup>

“The issue before us today is not the abstract philosophical question whether the alternative of frustrating this desire of a religious majority is to be preferred over the alternative of imposing “psychological coercion,” or a feeling of exclusion, upon nonbelievers. Rather, the question is whether the United States Constitution has imposed a mandatory choice in favor of the former. As the age-old practices of our people show, “the answer to that question is not at all in doubt.”<sup>201</sup>

In looking to the view of this unusually informed observer, this Court inquires whether the sign or display “sends the ancillary message to . . . nonadherents ‘that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.’”<sup>202</sup>

I conclude this sub-part with the proposal that despite the shortcomings of *Brown* and its progeny,<sup>203</sup> the Equal Protection theory should be developed to try to stem the political ostracism of nonbelievers. Establishment Clause theories seem to be losing traction. This risk could come to a head in *City of Greece*,<sup>204</sup> if the Roberts Court undermines the Court’s prior progression toward solidifying the Establishment Clause’s protection of nonbelievers, perhaps by raising the bar as to standing.<sup>205</sup>

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199. *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring).

200. *Lee v. Weisman*, 505 U.S. 577, 606 (1992) (emphasis added)

201. *Id.* at 646 (1992).

202. *Van Orden v. Perry*, 545 U.S. 677, 696 (2005) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring)).

203. *E.g.*, Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 111 (1997) (stating that by condoning neutral actions the Court legitimizes practices that perpetuate racial disparities).

204. *See supra* note 148 and accompanying text.

205. *See, e.g.*, *Hein v. Freedom From Religion Found*, 551 U.S. 587 (2007) (finding organization’s challenge to “faith-based initiatives” did not fall within narrow exception on taxpayer standing set forth in *Flast v. Cohen*, 392 U.S. 83 (1968)).

## 2. Religious Test Clause

American Atheists also seeks to develop the theory that provisions of I.R.C. § 501(c)(3) violate the Religious Test Clause of Article 6 § 3 of the Constitution. The Religion Test Clause states: “no religious test shall ever be required as a qualification to any Office or public Trust.”<sup>206</sup> American Atheists argues that the Office of Commissioner of the IRS is impermissibly denying a benefit to nonbelievers solely because of their failure to fulfill an IRS test of qualifying as a religious organization or church. I will briefly summarize the modern theoretical grounds below.<sup>207</sup>

There is precious, little evidence of what the Founders contemplated by “public Trust,”<sup>208</sup> but standard rules of statutory construction dictate that it must mean something other than an “Office” because of the two terms’ separation by the word “or.”<sup>209</sup> There is some contemporary authority to support the theory that a modern 501(c)(3) entity, which fills charitable voids that otherwise would be likely to burden the government, does, indeed, qualify as a “public Trust.” For example, Professor Robert A. Destro squarely theorizes that non-profit entities receiving public funds are “public Trusts,” although he comes to the conclusion that prohibiting religious entities from being eligible to receive public funds on an equal footing with non-religious entities effectively applies a religious test against the religiously-oriented entities.<sup>210</sup> He basically argues for a shift to presume that all entities seeking federal funds can fulfill the non-religious

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206. U.S. CONST. art. VI, cl. 3; *see also*, *Girouard v. U.S.*, 328 U.S. 61 (1965) (holding that an alien who wishes to enter into the U.S. could not be barred from entering the country due to religious beliefs, reasoning that there could be no religious test for citizenship with no similar test for holding office); *Torcaso v. Watkins*, 367 U.S. 488 (1961) (holding a provision in the Maryland Constitution that required a religious test, a declaration of belief in God, in order to hold office as unconstitutional); Luke Beck, *The Constitutional Prohibition on Religious Tests*, 35 MELB. U. L. REV. 323, 330 (2011) (“Perhaps surprisingly, the current constitutions of Arkansas, Maryland, Massachusetts, North Carolina, Pennsylvania, South Carolina, Tennessee, and Texas all contain religious tests.”).

207. For more historical discussion, *see generally* Response in Opposition to The United States’ Motion to Dismiss, *Am. Atheists v. Werfel*, No. 2:12-cv-00265 (E.D. Ky. Aug. 6, 2013), ECF No. 22.

208. Gerard V. Bradley, *The No Religious Test Clause and the Constitution of Religious Liberty: A Machine That Has Gone of Itself*, 37 CASE W. RES. L. REV. 674, 714 (1987).

209. SUTHERLAND ON STATUTORY CONSTRUCTION § 24.14 (5th ed. 1990) (“Generally, courts presume that “or” is used in a statute disjunctively unless there is clear legislative intent to the contrary.”).

210. *See generally* Robert A. Destro, *Equal Treatment: Implications for Nonprofit Organizations*, in EQUAL TREATMENT OF RELIGION IN A PLURALISTIC SOCIETY (Stephen V. Mansma & J. Christopher Soper, eds., 1998).

objective to be funded, rather than the other way around.<sup>211</sup> Nonetheless, we are in agreement that the First and Fourteenth Amendments supplement the Religious Test Clauses of Article VI and rest on entirely separate theoretical ground.<sup>212</sup>

Other scholars have theorized in a related manner. Two scholars pondering the manner in which American society provides care to child abuse victims pondered the “public Trust” concept in the context of relying on religiously affiliated entities to provide so much of this service.<sup>213</sup> They noted, “[i]t is unclear what standards a private, religious organization must meet in fulfilling a public trust.”<sup>214</sup> They also noted, as is a common issue in sovereign and governmental immunity in the outsourcing age,<sup>215</sup> “[i]t is unclear as to when the activity of a private actor becomes state action.”<sup>216</sup> A leading dictionary dating back to the time of the Founding supports the argument.<sup>217</sup>

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211. See generally *Bowen v. Kendrick*, 487 U.S. 589 (1988) (holding that an Act authorizing federal grants to public or nonprofit private organizations or agencies for services and research in the area of premarital adolescent sexual relations and pregnancy does not violate the Establishment Clause). I would maintain that the Court’s requirement of written proof of tax misconduct by a religiously affiliated organization is overly deferential, which is another point to be explored in American Atheists’ suit against the I.R.S. I also would maintain that the dissenters were correct in the fractured opinion of *Agostini v. Felton*, 521 U.S. 203 (1997) (holding that a federally funded program providing supplemental, remedial instruction to disadvantaged children on a neutral basis is not invalid under the Establishment Clause when such instruction is given on the premises of sectarian schools by government employees under a program containing safeguards such as those present in New York City’s Title I program).

212. See also Robert A. Destro, *Structure of the Religious Liberty Guarantee*, 11 J.L. & RELIGION 355, 369 (1995) (“The significance of the Test Clause is thus both structural and normative.”).

213. Brian K. Gran & Laurel Gaddie, *Changing Boundaries: Child Abuse, Public Health, and Separation of Church and State*, 21 BUFF. PUB. INT. L.J. 1, 29-30 (2003).

214. *Id.* at 30.

215. See *Brentwood Academy v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288 (2001) (determining whether private entity has taken on the role of a state actor); *Lebron v. Nat’l Rail. Passenger Corp.*, 513 U.S. 374 (1995) (determining whether a private entity has taken on the role of a state actor).

216. Gran & Gaddie, *supra* note 203, at 30.

217. SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE, Vol. I-II. (J.F. & C. Rivington, et. al., eds., 6th ed. 1785); see also HENRY HITCHINGS, DR JOHNSON’S DICTIONARY: THE EXTRAORDINARY STORY OF THE BOOK THAT DEFINED THE WORLD 225 (2005) (noting the importance of Samuel Johnson’s A DICTIONARY OF THE ENGLISH LANGUAGE, and stating, “The American adoption of the Dictionary was a momentous event not just in its history, but in the history of lexicography. For Americans in the second half of the eighteenth century, Johnson was the seminal authority on language, and the subsequent development of American lexicography was coloured by his fame”). The dictionary defines

This novel theory offers potential for nonbelievers and others seeking new means to challenge differing treatment of believers and nonbelievers in certain contexts.<sup>218</sup> Although it remains to be seen how courts will respond to these novel challenges by atheists, existing Establishment Clause principles seem to be transforming into an increasingly ineffective mechanism for attacking government-sponsored religious expression. As a result, nonbelievers are charged with the task of pursuing new legal theories – like the Sixth Amendment’s Religious Test Clauses – to achieve balance and fairness in religious messaging.

#### *IV. Conclusion*

In conclusion, significant Supreme Court Establishment Clause jurisprudence supports the conclusion that ostracism of nonbelievers in parts of the nation, strongly and politically influenced by religious fundamentalism, is, in fact, an unconstitutional violation of their rights as American citizens. While there is risk in pushing for the Supreme Court to solidify the promises within that jurisprudence, there is daily harm and risk for the future if the Court does not remedy the second-class citizen status of many American nonbelievers. This Article is proffered in the hope that those seeking to litigate such issues may contribute to the development of novel theories so as to minimize the risk to the most progressive aspects of

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“Pu’blich. adj. [public, publique, Fr. Publicus, Latin.]” as:

1. “Belonging to the state or nation; not private. Open; notorious; generally known”;
2. “General; done by many Regarding not private interest, but the good of the community”; and
3. “Open for general entertainment.”

The Dictionary defines “trust” as:

1. “Confidence; reliance on another”;
2. “Charge received in confidence”;
3. “Confident opinion of any event”;
4. “Credit given without examination”;
5. “Credit on the promise of payment”;
6. “Something committed to one’s faith”;
7. “Deposit something committed to charge of which an account must be given.”;
8. “Confidence in supposed honesty”; and
9. “State of him to whom something is entrusted.”

218. Of course, it is possible that the course of the litigation will come to emphasize the more traditional Establishment Clause arguments. American Atheists also claims that the I.R.C. 501(c)(3) violates the Establishment Clause. It likely will need to distinguish *Walz v. Tax Comm’n. of City of N.Y.*, 397 U.S. 664 (1970) (holding that a New York statute exempting from real property tax realty owned by association organized exclusively for religious purposes and used exclusively for carrying out such purposes is not unconstitutional as an attempt to establish, sponsor or support religion or as an interference with free exercise of religion), to successfully challenge differing treatment for believers and non-believers.

the Court's Establishment Clause jurisprudence in light of what some people fear are the leanings of the conservative core of the Roberts Court.