

Nonbelievers and Government Speech

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ABSTRACT: In the past few years, nonbelievers have become much more prominent in the United States. But while their visibility has increased, they are still a small minority, and they remain disliked, distrusted, and not truly American in the eyes of many. As a result, many nonbelievers are hesitant about disclosing their views, and those who do often face hostility and discrimination.

This Article argues that government religious speech such as “In God We Trust” or a Latin cross war memorial violates the Establishment Clause in part because it exacerbates the precarious position of nonbelievers in this country. One of the main goals of the Establishment Clause is to protect religious minorities like nonbelievers. Contrary to claims that government religious speech is essentially harmless and that any offense it causes should not be considered of constitutional dimension, government religious speech harms both the equality and liberty of nonbelievers. It undermines the equality of nonbelievers by sending the message that they are not worthy of equal regard and by reinforcing stereotypes—in particular, that atheists are immoral and unpatriotic—which leads to discrimination against them. The 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. In short, the claim that government religious speech does not violate the Establishment Clause because it only offends nonbelievers misunderstands exactly what is at stake.

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I. INTRODUCTION

“Don’t Believe in God? You Are Not Alone.” This was only one of dozens of atheist slogans on buses, trains, and billboards this past year.¹ Atheism’s visibility in the United States is on the rise. Books by atheists whose goal is to debunk religion have become bestsellers.² Organizations for nonbelievers are growing by leaps and bounds. Recent surveys show that the number of Americans who identify themselves as not belonging to any religion has doubled in the past twenty years.³ President Obama even acknowledged nonbelievers in his inaugural address.⁴

At the same time, 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 and attack. After all, the United States continues to be a deeply religious nation, and much of American culture is steeped in religion, from our pledge declaring that we are one nation “under God,” to our national motto proclaiming “In God We Trust,” to our war memorials in the form of Latin crosses.⁵

Where does the Establishment Clause, which reads “Congress shall make no law respecting an establishment of religion,”⁶ fit into this picture? On the most general level, the Establishment Clause has been interpreted to bar the state from favoring one or some religions over others and from favoring religion over nonreligion. But what does this mean for nonbelievers? What protection in particular should the Establishment Clause provide for them?

The Establishment Clause was adopted to prevent several problematic consequences that often followed state establishment of religion. First, because civil strife, and even religious wars, tend to ensue whenever the state favors one religion over others, the Establishment Clause protects the stability of the civil society.⁷ Second, the Establishment Clause protects the established religion from the corruption and degradation that so often accompany alliance or involvement with the state.⁸ Finally, the Establishment Clause protects those who do not share the established religion’s beliefs, as persecution or discrimination may, and historically usually did, follow when the state prefers one religion over others.⁹

1. See *infra* notes 53–66 and accompanying text.

2. See *infra* notes 34–42 and accompanying text.

3. See *infra* text accompanying notes 27–33.

4. See *infra* note 51.

5. See *Salazar v. Buono*, 130 S. Ct. 1803 (2010); *Trunk v. City of San Diego*, 629 F.3d 1099 (9th Cir. 2011).

6. U.S. CONST. amend. I.

7. See *infra* notes 207–09 and accompanying text.

8. See *infra* notes 210–12 and accompanying text.

9. See *infra* notes 213–15 and accompanying text.

This Article focuses on the last goal—protecting those who do not belong to the favored religion. It does not argue that this is the Establishment Clause’s most important goal, though it is the one most in keeping with the countermajoritarian spirit of the Bill of Rights. Rather, it provides theoretical justifications for why and how the Establishment Clause protects religious minorities and, in particular, nonbelievers. Nonbelievers include all those who do not profess belief in a religion. Thus, the term encompasses those who describe themselves as atheist, humanist, secular, or ethical culture.¹⁰

Although few would deny that the Establishment Clause protects those without religious beliefs, there is great disagreement about the scope of that protection. This Article argues that the Establishment Clause should be understood as protecting both the equality and religious liberty of nonbelievers. While some argue that the goal of the religion clauses is first and foremost to protect religious liberty¹¹ and others maintain that the Establishment Clause is primarily meant to protect the political equality of those outside the religious mainstream,¹² this Article assumes that both religious liberty and equality are major concerns of the Establishment Clause.

In particular, the Article focuses on the harm to nonbelievers caused by government religious speech—an issue not yet addressed in the literature.¹³ Many courts and commentators have argued that the national motto and Pledge or governmentally displayed Ten Commandments and Latin crosses are essentially harmless, and that any offense they cause should not be considered of constitutional dimension.¹⁴ This Article argues that

10. See *infra* Part II.A.1 (defining these terms). Not included are those who do not believe in God but still subscribe to nonmonotheistic religious beliefs. Nonbelievers are atheists in that they do not believe in God. Yet for various reasons, many prefer not to use the term to describe themselves. See *infra* notes 24–25 and accompanying text. Nonetheless, both terms are used interchangeably in this Article.

11. See, e.g., Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 677 (1980) (“[A] central purpose of the Establishment Clause (as well as of the Free Exercise Clause) was to protect religious liberty . . .”); Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 1 (“[R]eligious liberty is the central value and animating purpose of the Religion Clauses . . .”).

12. See, e.g., CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, *RELIGIOUS FREEDOM AND THE CONSTITUTION* (2007); MARTHA C. NUSSBAUM, *LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA’S TRADITION OF RELIGIOUS EQUALITY* (2008); Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975).

13. Atheists are mostly absent in the legal scholarship and underexamined in other fields as well. See Will Martin Gervais, *Do You Believe in Atheists? Trust and Anti-Atheist Prejudice* 1 (Aug. 2008) (unpublished M.A. thesis, University of British Columbia), available at https://circle.ubc.ca/bitstream/handle/2429/1549/ubc_2008_fall_gervais_will.pdf;jsessionid=FD0EgoDCoE23B2BA22C378B3DD3231A6?sequence=1 (“Despite the attention that atheism is receiving in culture at large, the scientific literature on the topic is scant at best.”).

14. See *infra* notes 273–75 and accompanying text.

government religious speech of this sort does in fact harm nonbelievers.¹⁵ Atheists—for nonbelievers are atheists—occupy a unique position in our society, and government religious speech affects them in a manner that is distinct from other religious minorities. For example, many Americans believe that, unlike believers of any stripe, atheists are immoral and unpatriotic.¹⁶ Government religious speech perpetuates these stereotypes, thereby undermining the equality and liberty of nonbelievers.¹⁷

Part II traces the rise of nonbelievers in the United States and notes that though the visibility and, perhaps, numbers of nonbelievers in the United States have been increasing, distrust of and discrimination against them remains strong. Part II also examines the Establishment Clause's longstanding protection of religious nonbelievers and argues that protection of religious minorities such as atheists should be one of the Establishment Clause's main purposes.

Part III argues that one way the Establishment Clause protects nonbelievers is essentially to serve as an Equal Protection Clause for religious minorities. As many scholars have noted, the Equal Protection Clause has an expressive component; so too does the Establishment Clause. Indeed, the Establishment Clause's endorsement test attempts to capture the insight from *Brown v. Board of Education* that government action can send unacceptable messages of inequality. While these messages are wrong in and of themselves, they cause tangible harms as well, including the perpetuation of stereotypes that lead to discrimination and exclusion from the social and political community.

Part IV examines the liberty component of the Establishment Clause, arguing that the Establishment Clause should also be understood as protecting the freedom of religious conscience. By putting its power and prestige behind religion, the government not only pressures nonbelievers into conforming to mainstream religious beliefs but also reinforces existing prejudice against nonbelievers, which can keep nonbelievers in the closet and hinder them from acting in accordance with their beliefs.

15. In this Article, "government religious speech" refers to government speech that amounts to a religious practice or endorsement of religion, rather than government speech that merely discusses religion.

16. See *infra* Part II.A.4.

17. See *infra* Part III.B.3 (describing how government religious speech reinforces stereotypes of atheists as immoral and unpatriotic).

II. NONBELIEVERS AND THE ESTABLISHMENT CLAUSE

A. *THE RISE OF NONBELIEVERS*

1. Different Types of Nonbelievers

When Americans are asked what religion they belong to, many name a specific one, such as Catholicism, Judaism, Islam, or Hinduism. But others answer that they are secular, or have no religion, or are humanists, agnostics, or atheists. An agnostic is someone “who holds the view that any ultimate reality (as God) is unknown and probably unknowable.”¹⁸ An atheist, on the other hand, does not believe in God.¹⁹ There are at least two types of atheists. There are “hard” atheists, who affirmatively deny the existence of God and will assert as much.²⁰ This is usually the popular understanding of atheism.²¹ There are also “soft” atheists, who are simply without a belief in God.²² The category of nonbelievers might also include agnostics or atheists who describe themselves as humanist,²³ secular, or Ethical Culture.²⁴ These nonbelievers may eschew the term agnostic or atheist as a description because it is one that centers around the concept of God and their focus is not on the existence or nonexistence of God or gods. They may also avoid those terms because of the stigma associated with them.²⁵

18. *Agnostic Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/agnostic> (last visited Oct. 30, 2011). In other words, an agnostic is someone “who is not committed to believing in either the existence or the nonexistence of God or a god.” *Id.*

19. Merriam-Webster defines atheist as “one who believes that there is no deity.” *Atheist Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/atheist> (last visited Oct. 30, 2011).

20. Michael Martin, *Introduction* to THE CAMBRIDGE COMPANION TO ATHEISM 1, 1 (Michael Martin ed., 2007).

21. *Id.*

22. *Id.*

23. Humanism is defined as a philosophy “centering on humans and their values, capacities, and worth and deemphasizing religious beliefs.” AMERICAN HERITAGE COLLEGE DICTIONARY 675 (4th ed. 2002).

24. The American Ethical Union, whose motto is “deed before creed,” defines Ethical Culture as a humanistic “movement inspired by the ideal that the supreme aim of human life is working to create a more humane society.” AM. ETHICAL UNION, <http://aeu.org/> (last visited Oct. 30, 2011).

25. See *infra* Part II.A.4 (discussing Americans’ unfavorable view of atheists); see also Babak Alidoosti, *The Process and Experience of Deciding To Live Openly Atheist in a Christian Family: A Qualitative Study* 1 (Dec. 11, 2009) (unpublished M.S. thesis, Virginia Polytechnic Institute and State University), available at http://scholar.lib.vt.edu/thesis/available/etd-12222009-140247/unrestricted/Alidoosti_B_T_2009.pdf (suggesting that atheists in America may avoid the label for fear of discrimination).

2. Growth of Nonbelievers

The number of nonbelievers in the United States may well be increasing.²⁶ According to the American Religious Identification Survey (“ARIS”) 2008, the number of Americans who describe themselves as having no religious affiliation has almost doubled in less than twenty years.²⁷ In 1990, 8.2% of Americans stated they had no religious affiliation; by 2008, that number had increased to 15.0%.²⁸ Another large-scale religious survey found similar results, with 16.1% of American adults responding that they are not currently affiliated with any particular religion.²⁹ Not all of these “nones,” as they have been dubbed, are atheists.³⁰ ARIS found that 2.3% of all Americans are atheist and another 10% are agnostic.³¹ Nevertheless, these “nones” are growing in all fifty states,³² and their percentages are even higher among young Americans.³³

26. The percentage of atheists in other countries is much higher. In one study, 41% of Norwegians, 48% of the French, and 54% of Czechs said they did not believe in God, although the same study found that only 10%, 19%, and 20%, respectively, self-identified as atheist. Phil Zuckerman, *Atheism: Contemporary Numbers and Patterns*, in THE CAMBRIDGE COMPANION TO ATHEISM, *supra* note 20, at 47, 47, 49–51.

27. BARRY A. KOSMIN & ARIELA KEYSAR, AMERICAN RELIGIOUS IDENTIFICATION SURVEY [ARIS 2008] SUMMARY REPORT 3 & tbl.3 (2009), *available at* http://commons.trincoll.edu/aris/files/2011/08/ARIS_Report_2008.pdf (surveying a nationally representative sample of 54,461 adults).

28. *Id.* The unaffiliated includes those Americans who answered “none,” “atheist” “agnostic,” “secular,” or “humanistic,” *id.* app. A at 23, when asked, “What is your religion, if any?,” *id.* at 2 (internal quotation marks omitted); *see also* BARRY A. KOSMIN ET AL., AMERICAN NONES: THE PROFILE OF THE NO RELIGION POPULATION, at i (2009), *available at* http://commons.trincoll.edu/aris/files/2011/08/NONES_08.pdf.

29. PEW FORUM ON RELIGION & PUB. LIFE, U.S. RELIGIOUS LANDSCAPE SURVEY 5 (2008) [hereinafter PEW SURVEY], *available at* <http://religions.pewforum.org/pdf/report-religious-landscape-study-full.pdf> (summarizing findings based on interviews with more than 35,000 adult Americans).

30. *Id.* (reporting the breakdown of subgroups within “Major Religious Traditions”). Similarly, not all of the “unaffiliateds” are atheists. Instead, out of the 16.1%, 1.6% self-identify as atheist, 2.4% self-identify as agnostic, and 6.3% have a secular orientation. *Id.* at 6. Thus, in the ARIS survey, “based on their stated belief rather than their religious identification,” 12% are atheist or agnostic, KOSMIN & KEYSAR, *supra* note 27, at Highlights, while in the Pew survey, 10.3% are atheist, agnostic, or secular, PEW SURVEY, *supra* note 29, at 6.

31. KOSMIN & KEYSAR, *supra* note 27, at 8 & tbl.4 (describing people’s various beliefs with respect to the existence of God). Plus, another 12% are Deists who believe “[t]here is a higher power but no personal God.” *Id.* Thus, close to a quarter of Americans do not believe in a personal God.

32. *Id.* at 17.

33. According to an ARIS survey, while 15% of the total U.S. population falls into the “None” category, 22% of the adults aged 18–29 do. KOSMIN ET AL., *supra* note 28, at 17 fig. 2.1. According to the Pew survey, 25% of adults 18–29 are not affiliated with a religion, with 16% categorized as atheist (3%), agnostic (4%), or secular (9%). PEW SURVEY, *supra* note 29, at 37 & tbl.

The visibility of atheists has definitely increased over the last five or six years. Starting with Sam Harris's *The End of Faith: Religion, Terror, and the Future of Reason*³⁴ and continuing with Richard Dawkins's *The God Delusion*³⁵ and Christopher Hitchens's *God Is Not Great: How Religion Poisons Everything*,³⁶ a string of books by New Atheists³⁷ have become bestsellers.³⁸ While these pioneers of New Atheism wrote polemics savaging religion as false, ridiculous, and deeply harmful, a second wave of New Atheist books, such as *Good Without God: What a Billion Nonreligious People Do Believe* by Greg Epstein³⁹ and *Living Without God* by Ronald Aronson,⁴⁰ focus less on attacking religion and more on examining a life without God. These books have also become bestsellers.⁴¹ Meanwhile, an atheist iPhone application found its way to the top ten book-apps list on iTunes.⁴²

Atheist organizations have also proliferated in the past ten years. In 2003, there were forty-two atheist student groups on college campuses.⁴³ By 2010, the number had increased fivefold.⁴⁴ The growth is not limited to college campuses. According to one tally, six times more atheist groups exist

34. SAM HARRIS, *THE END OF FAITH: RELIGION, TERROR, AND THE FUTURE OF REASON* (2004).

35. RICHARD DAWKINS, *THE GOD DELUSION* (2006).

36. CHRISTOPHER HITCHENS, *GOD IS NOT GREAT: HOW RELIGION POISONS EVERYTHING* (2007).

37. Other books by leaders of the New Atheism movement include: SAM HARRIS, *LETTER TO A CHRISTIAN NATION* (2006); VICTOR J. STENGER, *GOD: THE FAILED HYPOTHESIS: HOW SCIENCE SHOWS THAT GOD DOES NOT EXIST* (2007); VICTOR J. STENGER, *THE NEW ATHEISM: TAKING A STAND FOR SCIENCE AND REASON* (2009).

38. "'The End of Faith' won the 2005 PEN/Martha Albrand Award for First Nonfiction and sold more than 270,000 copies . . ." David Segal, *Atheist Evangelist*, WASH. POST (Oct. 26, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/10/25/AR2006102501998.html>; see also Jacqueline L. Salmon, *In America, Nonbelievers Find Strength in Numbers*, WASH. POST (Sept. 15, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/09/14/AR2007091402199.html> ("In the past two years, five books touting atheism have hit the bestseller lists . . .").

39. GREG M. EPSTEIN, *GOOD WITHOUT GOD: WHAT A BILLION NONRELIGIOUS PEOPLE DO BELIEVE* (2009).

40. RONALD ARONSON, *LIVING WITHOUT GOD* (2008).

41. See *Best Sellers: Hardcover Nonfiction*, N.Y. TIMES (Jan. 17, 2010), <http://www.nytimes.com/2010/01/17/books/bestseller/besthardnonfiction.html> (ranking Epstein's *Good Without God* at number thirty-one).

42. Press Release, Jay-Roc Invs., Inc., *The Atheist Pocket Debater iPhone App Remains on Top Ten Best Selling Apps List in Book Category on iTunes* (July 16, 2010), available at http://www.prweb.com/releases/iPhone_app/atheist_book_app/prweb3954134.htm.

43. According to the Student Secular Alliance, there were 42 secular student groups in 2003 and 195 in late 2009. Nara Schoenberg, *Young and Atheist*, CHI. TRIB. (Apr. 11, 2010), http://articles.chicagotribune.com/2010-04-11/features/ct-sun-atheists-20100407_1_atheist-god-delusion-secular-student-alliance.

44. By 2010, the number had grown to 225. Susan Kim, *Atheist Student Groups on Rise Nationally*, DAILY ORANGE (Nov. 2, 2010), <http://www.dailyorange.com/news/atheist-student-groups-on-rise-nationally-1.1739857>.

now than in 2005.⁴⁵ Parenting groups for nonbelievers have exploded from one or two in 2005 to at least thirty-three in 2009.⁴⁶ These groups have not been confined to large cities; on the contrary, they have sprung up across the country, including the Bible Belt.⁴⁷ The first lobbying group for nonbelievers, the Secular Coalition for America, was formed in 2002⁴⁸ and met with White House officials in 2010.⁴⁹ The first African Americans for Humanism Conference was held in 2010.⁵⁰ President Obama's acknowledgment in his inaugural address that "[w]e are a nation of Christians and Muslims, Jews and Hindus and nonbelievers"⁵¹ confirms the growing significance of American nonbelievers.

One of the more public faces of the growing atheist movement has been its recent advertising campaigns. The Freedom From Religion Foundation has installed over fifty billboards in thirty states in the past four years,⁵² ranging from "Imagine No Religion," to its Christmastime "Yes, Virginia . . . there is no God."⁵³ The less confrontational United Coalition of Reason has also been actively campaigning since its 2009 incorporation, proclaiming on buses and billboards in twenty-six cities, "Don't believe in

45. One estimate found 59 atheist groups in 2005 compared to 372 in 2009. G. Jeffrey MacDonald, *Ranks of Atheists Grow, Get Organized*, CHRISTIAN SCI. MONITOR (July 16, 2009), <http://www.csmonitor.com/USA/Society/2009/0716/p22s01-ussc.html> (citing statistics from American Atheists, a networking and advocacy organization).

46. *Id.*

47. Radio Interview by Michel Martin with Blair Scott, Founder, N. Ala. Free Thought Ass'n (Aug. 14, 2009), available at <http://www.npr.org/templates/story/story.php?storyId=111885128>.

48. *History*, SECULAR COAL. FOR AM., <http://www.secular.org/history> (last visited Nov. 1, 2011). According to its website, the ten-member "Secular Coalition for America is a 501(c)4 advocacy organization whose purpose is to amplify the diverse and growing voice of the nontheistic community in the United States." *About the Secular Coalition for America*, SECULAR COAL. FOR AM., <http://www.secular.org/about/main> (last visited Nov. 1, 2011).

49. Margaret Talev, *Obama Aides To Meet with Atheists at White House*, DESERET NEWS (Feb. 27, 2010), <http://www.deseretnews.com/article/700012473/Obama-aides-to-meet-with-atheists-at-White-House.html>.

50. Chika Oduah & Lauren E. Bohn, *Blacks, Mirroring Larger U.S. Trend, 'Come Out' as Nonbelievers*, HUFFINGTON POST (May 24, 2010), http://www.huffingtonpost.com/2010/05/24/blacks-mirroring-larger-u_n_587854.html.

51. Barack H. Obama, President of the U.S., Inaugural Address, 3 (Jan. 20, 2009), available at <http://www.gpo.gov/fdsys/pkg/DCPD-200900001/pdf/DCPD-200900001.pdf>. President Obama said: "For we know that our patchwork heritage is a strength, not a weakness. We are a nation of Christians and Muslims, Jews and Hindus and nonbelievers. We are shaped by every language and culture, drawn from every end of this Earth." *Id.* President Obama's address was the first time a President publicly acknowledged nonbelievers.

52. *Bus Sign/Billboard Campaign*, FREEDOM FROM RELIGION FOUND., <http://www.ffrf.org/get-involved/bus-billboard-campaign> (last visited Oct. 30, 2011).

53. *Billboards in Action!*, FREEDOM FROM RELIGION FOUND., <http://www.ffrf.org/get-involved/bus-billboard-campaign/billboards-in-action/> (last visited Sept. 22, 2011).

God? You are not alone”⁵⁴ and “Are you good without God? Millions are.”⁵⁵ A variety of other groups have sponsored signs that run the gamut from “You don’t have to believe in God to be a moral or ethical person”⁵⁶ to “In the Beginning, Man Created God.”⁵⁷

These campaigns have not been welcomed with open arms. Billboard and bus advertisements in Massachusetts,⁵⁸ North Carolina,⁵⁹ Idaho,⁶⁰ Colorado,⁶¹ Michigan⁶² and California have been vandalized.⁶³ A “Don’t believe in God? You are not alone” billboard was removed in Cincinnati after the landowner, who leased the land on which the billboard stood, received multiple death threats.⁶⁴ Transit authorities in Des Moines pulled “Don’t believe in God? You are not alone” advertisements from public buses after people complained.⁶⁵ Bloomington Transit rejected as too controversial “You can be good without God” advertisements, despite having

54. *About Us*, UNITED COAL. OF REASON, <http://unitedcor.org/national/page/about-us> (last updated Dec. 8, 2010).

55. *Godless Ads Now on Fayetteville Buses*, UNITED COAL. OF REASON (Apr. 13, 2010), <http://unitedcor.org/national/news/godless-ads-now-fayetteville-buses>.

56. Clyde Haberman, *Their Belief Is in the Power of Persuasion*, N.Y. TIMES (July 23, 2009), <http://www.nytimes.com/2009/07/24/nyregion/24nyc.html> (internal quotation marks omitted).

57. Manya A. Brachear, *Atheist Group Brings Mobile Message to CTA*, CHI. TRIB. (May 24, 2009), http://articles.chicagotribune.com/2009-05-24/news/0905220468_1_advertising-crusade-religion-god (internal quotation marks omitted).

58. Jacqueline Lavache, *Boston Coalition of Reason Poster Is Vandalized*, EXAMINER.COM (Nov. 12, 2009) (on file with author) (reproducing vandalized “Good without God? 40 Million Americans are” poster altered to “Are you Good with God? Over 40 Million Americans are in Need of Salvation!”).

59. Tim Funk, *Atheist Group’s Billboard Vandalized*, CHARLOTTE OBSERVER (June 29, 2010), available at <http://pluralism.org/news/view/24538> (reporting that vandals spray painted “Under God” onto billboard reading “One Nation Indivisible” in Charlotte, N.C.).

60. *Death Threats Force Removal of Atheist Billboard*, CURRENT (Nov. 13, 2009), http://current.com/community/91446453_death-threats-force-removal-of-atheist-billboard.htm (noting vandalism to billboards in Idaho); Duke Helfand, *Humanists Launch a Godless Holiday Campaign*, L.A. TIMES (Dec. 7, 2009), <http://articles.latimes.com/2009/dec/07/local/la-me-beliefs7-2009deco7> (noting that vandals painted over “out” in a “Millions are good without God” billboard in Idaho).

61. *Death Threats Force Removal of Atheist Billboard*, *supra* note 60 (noting vandalism to billboards in Colorado).

62. Niraj Warikoo, *Atheist Bus Ads Are Desecrated*, DETROIT FREE PRESS, March 16, 2010, at A4 (noting that “Don’t” was torn off or scratched off in “Don’t believe in God? You are not alone” bus advertisements in Detroit).

63. *Id.*

64. *Death Threats Force Removal of Atheist Billboard*, *supra* note 60 (internal quotation marks omitted).

65. Cynthia Reynaud & Jason Clayworth, *ACLU Questions Removal of Atheists’ Bus Ads*, DES MOINES REG., Aug. 7, 2009, at 1B (noting that some people had refused to ride buses with the ad on them). The ads were reinstated after the ACLU of Iowa got involved. Cynthia Reynaud, *Atheist Ads Will Go Back on Buses, DART Decides*, DES MOINES REG., Aug. 8, 2009, at 1B.

accepted advertisements from religious organizations in the past.⁶⁶ Discomfort with those who do not believe in God is hardly a new development, as discrimination against atheists is longstanding and deeply rooted.

3. Discrimination Against Nonbelievers

Discrimination against atheists was officially sanctioned in the United States well into the twentieth century.⁶⁷ In many states, atheists were not allowed to serve in public office, on a jury, or as a witness in court—even long after these same disadvantages were lifted for other historically subordinated groups.⁶⁸ Atheists lost jobs and custody of their children because of their beliefs.⁶⁹ Finally, atheists were social pariahs, unwelcome in private clubs and associations, and the victims of harassment and violence.⁷⁰

Despite the Religious Test Clause in the U.S. Constitution, which reads “no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States,”⁷¹ many states barred atheists from holding office. For example, Maryland’s constitutional provision, providing that “no religious test ought ever to be required as a qualification for any office of profit or trust in this State, other than a declaration of belief in the existence of God,”⁷² was not invalidated until the 1961 Supreme Court case of *Torcaso v. Watkins*.⁷³ Still today, several state constitutions exclude those

66. Reynaud & Clayworth, *supra* note 65. The ACLU sued, and the agency eventually settled and agreed to run the ads. *Id.*; see Brady Gillihan, *Atheist Group Wins Battle To Place Ads on City Buses*, BLOOMINGTON HERALD-TIMES, July 28, 2009, <http://www.heraldtimesonline.com/stories/2009/07/28/news.qp-8620169.sto>.

67. Eugene R. Milhizer, *So Help Me Allah: An 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.110 (2009) (stating the sentiment that atheists should not be allowed as witnesses “was not put to rest in America until well into the twentieth century”).

68. Paul W. Kaufman, Note, *Disbelieving Nonbelievers: Atheism, Competence, and Credibility in the Turn of the Century American Courtroom*, 15 YALE J.L. & HUMAN. 395, 397 (2003).

69. See *infra* notes 89–103, 317 and accompanying text.

70. See *infra* Part III.B.

71. U.S. CONST. art. VI, cl. 3. Although there was room for debate that the Religious Test Clause applied only to federal office, see, e.g., 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), the point was essentially mooted after the Supreme Court decided *Torcaso v. Watkins*. See *infra* note 73.

72. MD. CONST. Declaration of Rights, art. 37; see also MD. CONST. Declaration of Rights, art. 36 (“[N]or shall any person, otherwise competent, be deemed incompetent as a witness, or juror, on account of his religious belief; provided, he believes in the existence of God . . .”).

73. *Torcaso v. Watkins*, 367 U.S. 488, 496 (1961) (holding that Maryland could not require Torcaso to declare his belief in God in order to assume his commission as notary public because the “Maryland religious test for public office unconstitutionally invades the appellant’s freedom of belief and religion and therefore cannot be enforced against him”).

who do not believe in God from state positions.⁷⁴ Even after *Torcaso* held that these provisions are unenforceable, South Carolina cited its provision—“No person who denies the existence of the Supreme Being shall hold any office under this Constitution”⁷⁵—against an atheist seeking to become a notary public in 1992.⁷⁶ It wasn’t until 1997 that the South Carolina Supreme Court finally declared the provision unconstitutional.⁷⁷ Meanwhile, when enacting its new state constitution in 1970, North Carolina retained the provision disqualifying from office “all persons who shall deny the being of Almighty God.”⁷⁸ Similarly, when in 2009 a state representative proposed an amendment to repeal the anti-atheist provision in Arkansas’s constitution,⁷⁹ it died in committee.⁸⁰

Atheists were also disqualified from serving as witnesses in court because they could not swear to God that their testimony was true.⁸¹ While believers could be counted on to give truthful testimony under threat of

74. ARK. CONST. art. 19, § 1 (“No person who denies the being of a God shall hold any office in the civil departments of this State, nor be competent to testify as a witness in any Court.”); MISS. CONST. art. 14, § 265 (“No person who denies the existence of a Supreme Being shall hold any office in this State.”); N.C. CONST. art. VI, § 8 (“The following persons shall be disqualified for office: First, any person who shall deny the being of Almighty God.”); PA. CONST. art. I, § 4 (“No person who acknowledges the being of a God and a future state of rewards and punishments shall, on account of his religious sentiments, be disqualified to hold any office or place of trust or profit under this Commonwealth.”); S.C. CONST. art. VI, § 2 (“No person who denies the existence of the Supreme Being shall hold any office under this Constitution.”); TENN. CONST. art. IX, § 2 (“No person who denies the being of God, or a future state of rewards and punishments, shall hold any office in the civil department of this State.”); TEX. CONST. art. I, § 4 (“No religious test shall ever be required as a qualification to any office, or public trust, in this State; nor shall any one be excluded from holding office on account of his religious sentiments, provided he acknowledge the existence of a Supreme Being.”).

75. S.C. CONST. art. VI, § 2.

76. In his application to become a notary public, atheist Herb Silverman crossed off the “So help me God” part of the oath. His application was rejected. *Silverman v. Campbell*, 486 S.E.2d 1, 1 (S.C. 1997).

77. *Id.* at 2 (holding that the provision violated the First Amendment and the Religion Test Clause of the U.S. Constitution).

78. Gary R. Govert, Essay, *Something There Is That Doesn’t Love a Wall: Reflections on the History of North Carolina’s Religious Test for Public Office*, 64 N.C. L. REV. 1071, 1086–87 (1986) (quoting N.C. CONST. of 1868, art. VI, § 5) (internal quotation marks omitted).

79. David Waters, *Atheist Revival in Arkansas*, WASH. POST UNDER GOD BLOG (Feb. 13, 2009, 1:53 PM), http://newsweek.washingtonpost.com/onfaith/undergod/2009/02/an_advocate_for_atheists_in_ar.html; see also H.R.J. Res. 1009, 87th Gen. Assemb., Reg. Sess. (Ark. 2009).

80. ARK. H.R. JOURNAL, 87th Gen. Assemb. 5848, 5850, available at <http://www.arkleg.state.ar.us/assembly/2009/R/House%20Journal/ADDENDUM%2087TH%20GENERAL%20ASSEMBLY.pdf>.

81. Kaufman, *supra* note 68, at 416–18 & nn.129–42 (stating that among the states that excluded atheists as witnesses were Arkansas, Maryland (in its constitution), Alabama, North Carolina, Delaware, New Hampshire, New Jersey, and South Carolina (by common law)).

eternal damnation, no such fear compelled nonbelievers.⁸² This bar persisted until the latter half of the twentieth century.⁸³ For example, Maryland's highest court, the Court of Appeals of Maryland, held in 1960 that "it seems clear that under our Constitution disbelief in a Supreme Being, and the denial of any moral accountability for conduct, not only renders a person incompetent to hold public office but to give testimony, or serve as a juror."⁸⁴ The court concluded, "The historical record makes it clear that religious toleration, in which this State has taken pride, was never thought to encompass the ungodly."⁸⁵ In the states that did permit atheists to testify, many allowed their testimony to be impeached because of their beliefs.⁸⁶ As late as 1963, the Supreme Court of Georgia held that while it was not "essential" for a witness to believe in a Supreme Being, it was "desirable," and that a lack of faith is "merely a matter to be considered in passing upon his credibility."⁸⁷

Historically, at common law, parents could lose custody of their children for professing disbelief in God. In England, the famous poet Percy Bysshe Shelley was not only expelled from Oxford⁸⁸ but also lost custody of his children on account of his "immoral and vicious" atheism.⁸⁹ In fact, his case marked one of the first times that a father lost a custody dispute in England.⁹⁰ As summarized in Story's Commentaries, atheism rendered parents unfit to rear their children:

82. *Id.* at 403 (disqualifying atheists on the theory that "since they did not fear the retribution of any god at all, they could not be trusted to tell the truth"); *see also* Milhizer, *supra* note 67, at 4 ("[T]he oath acts as a guarantor of truth; it guards against testimony that is either false or wavers from the truth by juxtaposing the individual's dishonest motive against his sense of moral culpability and fear of divine punishment."); *id.* at 29 n.118 (referencing John Locke, who declared that "[p]romises, covenants, and oaths, which are the bonds of human society, can have no hold upon an atheist." (quoting A LETTER CONCERNING TOLERATION 32 (William Popple trans., 2004) (1689))).

83. Kaufman, *supra* note 68, at 407 (noting that a minority of states—approximately nineteen of the forty-eight that joined the Union by 1950—"neither rendered atheists incompetent nor allowed questioning to affect their credibility").

84. *Torcaso v. Watkins*, 162 A.2d 438, 443 (Md. 1960), *rev'd*, 367 U.S. 488 (1961).

85. *Id.*

86. Kaufman, *supra* note 68, at 412.

87. *Jones v. State*, 132 S.E.2d 648, 649 (Ga. 1963). The Federal Rules of Evidence put an end to these practices in federal court after they were formally adopted in 1975. Milhizer, *supra* note 67, at 32–33; *see also* FED. R. EVID. 601 ("Every person is competent to be a witness except as otherwise provided in these rules."); FED. R. EVID. 610 ("Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced.").

88. He was sent down from Oxford after the publication of his *Necessity of Atheism*. RICHARD HOLMES, *SHELLEY: THE PURSUIT* 54–55 (1974).

89. Shelley v. Westbrook, (1817) 37 Eng. Rep. 850 (Ch.) 851.

90. *Montgomery Cnty. Dep't of Soc. Servs. v. Sanders*, 381 A.2d 1154, 1160 n.8 (Md. Ct. Spec. App. 1977) ("It was not until the Victorian era that a father lost a custody dispute in

Although, in general, parents are intrusted with the custody . . . of their children, . . . whenever (for example) it is found, that a father is guilty of gross ill treatment or cruelty towards his infant children; or that he is in constant habits of drunkenness and blasphemy, or low and gross debauchery; or that he professes atheistical or irreligious principles; . . . in every such case the Court of Chancery will interfere and deprive him of the custody of his children⁹¹

The tradition of denying atheist parents custody continued into the twentieth century in the United States. In one case from the 1930s, a New Jersey woman lost custody of her two children because of her “atheistic and communistic beliefs.”⁹² The court stated that the woman was free to believe what she wished, but that she was not “privileged to instill into the minds of these young children . . . doctrines . . . which are looked upon with abhorrence by the vast majority of people living under the protection of our Lord.”⁹³

Still today, parents’ lack of belief can count against them in custody disputes.⁹⁴ In a 1998 South Carolina case, for example, a mother with a history of writing fraudulent checks and failing to take her child to doctor’s appointments to check on the child’s broken arm won custody over an agnostic father, who had been recommended by the guardian ad litem.⁹⁵ In rejecting the father’s claim that the family court focused too much on the parties’ religious beliefs, the appeals court stated that “[a]lthough the religious beliefs of parents are not dispositive in a child custody dispute, they are a factor relevant to determining the best interest of a child.”⁹⁶ A

England. The dubious award for ‘first loser’ was presented to the famous poet, Percy Bysshe Shelley. . . .”).

91. *Id.* at 1161 (quoting 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE 702 (7th ed. 1857)).

92. *Woman’s Red Creed Costs Her Children*, N.Y. TIMES, Jan. 30, 1936, at 1 (internal quotation marks omitted).

93. *Id.* (internal quotation marks omitted).

94. Eugene Volokh, *Parent-Child Speech and Child Custody Speech Restrictions*, 81 N.Y.U. L. REV. 631, 633–35 (2006) (compiling over seventy child-custody cases where the party recognized by the court as more likely to provide a religious upbringing has prevailed). It can also count against them in adoption. One New Jersey court would not let a couple adopt solely because it thought their lack of belief in a Supreme Being rendered them unfit to be adoptive parents. *In re Adoption of “E,”* 271 A.2d 27, 30 (Essex County Ct. 1970). The Supreme Court of New Jersey reversed. *In re Adoption of “E,”* 279 A.2d 785, 796 (N.J. 1971).

95. *Pountain v. Pountain*, 503 S.E.2d 757, 759–61 (S.C. Ct. App. 1998). The guardian ad litem called the decision a “really tough call.” *Id.* at 759 (internal quotation marks omitted). His main concern with the father was that the father was an agnostic. *Id.* In the end, the guardian recommended the father because he “had a better value system.” *Id.*

96. *Id.* at 761; see also, e.g., *Staggs v. Staggs*, 919 So. 2d 112, 119 (Miss. Ct. App. 2005) (ruling in mother’s favor and noting that “[w]hile [father] is an agnostic and testified that religion is not important to him, [mother] testified that religion is very important to her”); *Gancas v. Schultz*, 683 A.2d 1207, 1213–14 (Pa. Super. Ct. 1996) (returning custody to mother based on best interests of child, in part because mother testified that she takes daughter to

Pennsylvania court similarly observed that “[a] proper religious atmosphere is an attribute of a good home and it contributes significantly to the ultimate welfare of a child.’ Where it appears that the religious training of the children will cease upon placement in a given custodial setting, courts lean in favor of the religious-minded contestant.”⁹⁷

Given this official state discrimination, it should not be surprising that private discrimination and prejudice against atheists have also been commonplace. In the 1960s, 59% of Americans thought that people who did not believe in God should not be allowed to teach in public schools,⁹⁸ and 24% still believed that in the 1980s.⁹⁹ News stories about employers terminating atheist employees—a chiropractor firing his receptionist on discovering her atheism because “[t]here is no place for your thoughts, opinions and beliefs on God in my office,”¹⁰⁰ a financial-service company terminating a worker when she complained that a picture of Christ appeared on her computer days after two coworkers requested and received a desk change on discovering her atheism,¹⁰¹ a housepainter harassing his

church while “[f]ather, an admitted agnostic, does not attend church” and agreeing that “[r]eligion, while not determinative, ‘is an important matter and should be given some consideration in child custody matters”’ (quoting *Boylan v. Boylan*, 577 A.2d 218, 219 (Pa. Super. Ct. 1990)).

97. *Myers v. Myers*, 14 Phila. Co. Rptr. 224, 257 (C.P. 1986) (citation omitted) (quoting *Commonwealth ex rel. Bendrick v. White*, 169 A.2d 69, 73 (Pa. 1961)), *aff’d mem.*, 520 A.2d 68 (Pa. Super. Ct. 1986).

98. Anti-Defamation League of B’nai B’rith & Nat’l Op. Research Ctr., Univ. of Chi., *Anti-Semitism in the United States Survey*, 1964 (Oct. 1964), *available at iPoll Databank*, Roper Ctr. for Pub. Op. Research, Univ. of Conn., http://www.ropercenter.uconn.edu/data_access/ipoll/ipoll.html.

99. Am. Jewish Comm. & Yankelovich, Skelly & White, *Anti-Semitism in the United States Survey*, 1981 (Jan. 1981), *available at iPoll Databank*, *supra* note 98.

100. Kacey Cornell, *Religion in the Workplace: An Atheist’s Battle Against Discrimination*, EXAMINER.COM (May 14, 2009), <http://www.examiner.com/atheism-in-dallas/religion-the-workplace-an-atheist-s-battle-against-discrimination-pt-1> (internal quotation marks omitted). A receptionist at a chiropractor’s office told a reporter that though she never discussed religion at work, she was fired when her boss discovered her atheism via her husband’s website. *Id.* When interviewed, the doctor stated that he treats people regardless of their beliefs, but that he is a person of faith, and “I do not want to hire anyone with a different world view.” Kacey Cornell, *Religion in the Workplace: The Christian’s Side of the Discrimination Story*, EXAMINER.COM (May 17, 2009), <http://www.examiner.com/atheism-in-dallas/religion-the-workplace-the-christian-s-side-of-the-discrimination-story> (internal quotation marks omitted).

101. Matthew Lane, *Judge Reinstates Religious Discrimination Lawsuit Against ACS, CitiGroup*, SULLIVAN-COUNTY.COM (July 24, 2003), http://www.sullivan-county.com/news/pat_quotes/atheist_fired.htm. Two women requested and were granted a request to move away from Carletta Sims after learning that she was an official with American Atheists. *Id.* Two day later, Sims found a picture of Jesus on her computer. *Id.* When Sims complained to her supervisor, her supervisor fired her on the ground that she was a disturbance. *Id.*

underling to repent and join his church until the employee quit¹⁰²—demonstrate that nonbelievers still face employment discrimination.¹⁰³

Prominent private organizations, like the Boy Scouts of America, have always excluded atheists from their ranks, and continue to do so. The Boy Scouts' refusal to allow gay scoutmasters is now well known.¹⁰⁴ Less widely known is the Boy Scouts' policy of excluding nonbelievers as leaders or as scouts. The Scouts' Declaration of Religious Principles states that "no boy can grow into the best kind of citizenship without recognizing his obligation to God."¹⁰⁵ Accordingly, only those willing to swear an oath of duty to God may join,¹⁰⁶ and the Scouts have expelled longtime scoutmasters discovered to be atheists on the ground that they cannot serve as a proper role model for boys.¹⁰⁷ This message about the incompatibility of atheism and trustworthiness, loyalty, and morality¹⁰⁸ comes not from just any organization but from one that embodies all-American values; indeed, in modern society, "Boy Scout" is essentially synonymous with wholesomeness. Moreover, the Boy Scouts and its messages have received tremendous state sanction and support.¹⁰⁹ The Boy Scouts have been chartered by Congress since 1916 and,

102. *Meltebeke v. Bureau of Labor & Indus.*, 903 P.2d 351, 353–54 (Or. 1995).

103. *See, e.g.*, Peter Wollheim, *Atheists in Idaho; Non-believers on the Fringe*, BOISE WEEKLY (Mar. 23, 2005), <http://www.boiseweekly.com/boise/atheists-in-idaho/content?oid=921480> (reporting that a member of the Idaho Atheist Alliance noted that "we have had members who have been fired for being public about their atheism" (internal quotation marks omitted)).

104. It became widely known after the organization successfully challenged a public-accommodation law outlawing discrimination on the basis of sexual orientation. *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (holding that the Boy Scouts had a free-association right to exclude Dale as scoutmaster because his homosexuality would undermine their expressive messages).

105. *Welsh v. Boy Scouts of Am.*, 742 F. Supp. 1413, 1423 (N.D. Ill. 1990) (quoting Reaffirmation of the Position of the Boy Scouts of America on "Duty to God") (internal quotation marks omitted).

106. *See, e.g., id.* at 1417–18 (denying the defendant's motion to dismiss a lawsuit filed by a seven-year-old boy who was denied admission to Tiger Cubs because he could not acknowledge a duty to God); *Randall v. Orange Cnty. Council, Boy Scouts of Am.*, 952 P.2d 261, 262–63 (Cal. 1998) (ruling in favor of Scouts who revoked membership of two nine-year-old atheist boys trying to advance from "Wolf" to "Bear" because they could not comply with religious component of program).

107. *Seabourn v. Coronado Area Council, Boy Scouts of Am.*, 891 P.2d 385, 390–91 (Kan. 1995) (ruling against plaintiff who had been involved with Boy Scouts for over twenty years, the last as an assistant scoutmaster, and who was expelled from Boy Scouts two days after sending a letter explaining that he did not believe in God).

108. The Scout Oath or Promise reads: "On my honor I will do my best / To do my duty to God and my country / and to obey the Scout Law; / To help other people at all times; / To keep myself physically strong, / mentally awake, and morally straight." *Welsh*, 742 F. Supp. at 1440. The Scout law is as follows: "A Scout is trustworthy . . . loyal . . . helpful . . . friendly . . . courteous . . . kind . . . obedient . . . cheerful . . . thrifty . . . brave . . . clean . . . reverent." *Id.*

109. According to the official Boy Scout website, "204 members of the 112th Congress participated in Scouting as a youth and/or adult leader." *Facts About Scouting*, BOY SCOUTS OF AM., <http://www.scouting.org/about/factsheets/scoutingfacts.aspx> (last visited Oct. 30, 2011).

under federal law, fall into the category of “Patriotic and National Organizations.”¹¹⁰ An attempt to rescind their congressional charter on account of their discriminatory policies overwhelmingly failed.¹¹¹ Likewise, no U.S. President has declined the honorary title of President of the Boy Scouts,¹¹² despite requests not to endorse an organization known for blatantly discriminating against homosexuals and atheists.¹¹³ Such actions have generated little public outcry.¹¹⁴

4. Persistent Distrust of Nonbelievers

Given this legacy, it is easier to understand why Americans today still express enormous distrust of those who do not profess some religious belief. One study noted that Americans are less accepting of atheists than any other minority group—“and by a wide margin.”¹¹⁵ Social scientists have found a consistently negative attitude towards atheists.¹¹⁶ In particular, Americans equate atheism with a lack of both morality and patriotism.¹¹⁷ Consequently,

110. 36 U.S.C. §§ 30901–30908 (2006). Other groups meriting a charter include veterans, arts, and civic groups like American War Mothers, National Academy of Sciences, Congressional Medal of Honor Society of the United States of America, and Big Brothers–Big Sisters of America. *See generally* 36 U.S.C. §§ 10101–240112 (“Patriotic and National Organizations”).

111. The vote was 362 to 12. Jim Abrams, *House Gives Boy Scouts Solid Vote on Charter*, SUN HERALD (Biloxi, Miss.), Sept. 14, 2000, at C1. Instead, Congress supported the Boy Scouts with the Support Our Scouts Act of 2005, which guaranteed access to state facilities even if in conflict with local antidiscrimination law, Pub. L. No. 109-148, 119 Stat. 2728 (2005) (repealed 2006), and the Boy Scouts of America Centennial Commemorative Coin Act, Pub. L. No. 110-363, 122 Stat. 4015 (2008).

112. *Preparing for the Next Century: The Legacy of the Boy Scouts Includes Patriotism and Outdoorsmanship, but Also Excluding Gays and Atheists*, WIS. ST. J., Dec. 21, 2009, at A1, available at 2009 WLNR 25712351.

113. Press Release, Am. Humanist Ass’n, President-Elect Obama Asked To Turn Down Boy Scouts of America (Jan. 13, 2009), available at <http://www.americanhumanist.org/news/details/2009-01-president-elect-obama-asked-to-turn-down-boy-scouts-of-america> (including text of open letter to Obama signed by nineteen atheist, agnostic, and nontheistic organizations).

114. To the extent people disapprove, it is usually based on the Boy Scouts’ discrimination against gays. *See, e.g., Members of Congress Call on BSA To End Its Discrimination Against Gays and Lesbians*, SCOUTING NEWS (Feb. 6, 2010), <http://www.scoutingnews.org/2010/02/06/congress-end-discrimination-policy/>.

115. Penny Edgell, Joseph Gerteis & Douglas Hartmann, *Atheists as “Other”: Moral Boundaries and Cultural Membership in American Society*, 71 AM. SOC. REV. 211, 217 (2006); *see also id.* at 230 (“Atheists are at the top of the list of groups that Americans find problematic in both public and private life, and the gap between acceptance of atheists and acceptance of other racial and religious minorities is large and persistent. It is striking that the rejection of atheists is so much more common than rejection of other stigmatized groups.”).

116. *See, e.g., STEVE FARKAS ET AL., PUB. AGENDA, FOR GOODNESS’ SAKE: WHY SO MANY WANT RELIGION TO PLAY A GREATER ROLE IN AMERICAN LIFE passim* (2001), available at http://www.publicagenda.org/files/pdf/for_goodness_sake.pdf; Edgell, Gerteis & Hartmann, *supra* note 115, at 217.

117. *See* Edgell, Gerteis & Hartmann, *supra* note 115, at 228.

as the polls and personal stories of atheists demonstrate, atheists are viewed with suspicion and hostility and suffer discrimination and social ostracism.

Public opinion polls are very revealing.¹¹⁸ When people are asked whether their overall opinion of atheists is favorable or unfavorable, roughly half of Americans regularly answer that they view atheists unfavorably.¹¹⁹ Framing the question slightly differently as to whether their view of atheists is positive, negative, or neutral, 45% of Americans still responded that their view was negative.¹²⁰ While Americans also rate other religious minority groups negatively, none of them, not Muslims, not Hindus, not Mormons, rank as poorly as atheists.¹²¹

In fact, anywhere from one-quarter to one-half of twenty-first century Americans believe morality and atheism are mutually exclusive.¹²² To these people, religion is the foundation of morality,¹²³ and those who have none

118. Of course, certain caveats apply when looking at polls. There is a margin of error. The wording of a question may affect results. National polls do not capture regional differences, nor do they isolate variables such as income, education, and race. Data needs to be contextualized and interpreted. Still, polls provide a snapshot of Americans' views.

119. PEW FORUM ON RELIGION & PUB. LIFE & PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, VIEWS OF RELIGIOUS SIMILARITIES AND DIFFERENCES 22 (2009) [hereinafter PEW 2009 SURVEY], available at http://pewforum.org/uploadedfiles/Topics/Religious_Affiliation/Muslim/survey0909.pdf. Here is the exact question and the responses from the August 2009 survey: "Now thinking about some specific religious groups . . . Is your overall opinion of [Atheists, that is people who don't believe in God,] very favorable [6%], mostly favorable [23%], mostly UNfavorable [23%], or very unfavorable [26%]?" *Id.* at 21–22 (first alteration in original). Twenty-one percent refused to answer. *Id.* at 22. When the same question was asked in August 2007, the responses were: 7% very favorable; 28% mostly favorable; 23% mostly unfavorable; 30% very unfavorable; and 12% can't rate/refused. *Id.*

120. Gallup Org., Poll (Mar. 2008), available at *iPoll Databank*, *supra* note 98 (finding that people's view of atheists were 5% very positive; 8% somewhat positive; 41% neutral; 16% somewhat negative; 29% very negative; and 1% no opinion).

121. While 49% of people rated atheists unfavorably, the number that rated other religious groups unfavorably was significantly lower: Muslims (32%), Mormons (26%), Hindus (21%), Buddhists (20%), Evangelical Christians (17%), Jews (11%), Catholics (13%). PEW 2009 SURVEY, *supra* note 119, at 21–23.

122. This stereotype of the immoral atheist is unfounded. See Benjamin Beit-Hallahmi, *Morality and Immorality Among the Irreligious*, in ATHEISM & SECULARITY 113, 134 (Phil Zuckerman ed., 2010) ("The claim that atheists are somehow likely to be immoral or dishonest has long been disproved."); Federico Varese & Meir Yaish, *The Importance of Being Asked: The Rescue of Jews in Nazi Europe*, 12 RATIONALITY & SOC'Y 307, 320 (2000) (finding that "the less religious the respondents, the more likely they were to help" persecuted Jews); Phil Zuckerman, *Atheism, Secularity, and Well-Being: How the Findings of Social Science Counter Negative Stereotypes and Assumptions*, 3/6 SOC. COMPASS 949, 953 (2009) (noting that studies show that atheists and secular people are "markedly less nationalistic; less prejudiced, less anti-Semitic, less racist, less dogmatic, less ethnocentric, less close-minded, and less authoritarian").

123. See, e.g., FARKAS ET AL., *supra* note 116, at 10–11 (concluding that for many Americans, "[t]o be religious . . . means to be a moral human being"); Edgell, Gerteis & Hartmann, *supra* note 115, at 214 (describing the American assumption that religious people of whatever faith are understood to be worthy of trust and to be good Americans).

are immoral.¹²⁴ When asked “Do you think someone can be a moral person and be an atheist, or not?,” over a quarter said “no.”¹²⁵ When asked whether “[i]t is necessary to believe in God in order to be moral and have good values,” over half of Americans regularly answer “yes.”¹²⁶

While Americans accept that their particular religious beliefs are not a precondition to morality, they deem some kind of religious foundation necessary.¹²⁷ Thus, many Americans have a particular antipathy for nonbelievers, who in their eyes lack this moral foundation. One atheist described how people have physically backed away from him upon discovering his beliefs.¹²⁸ Another in the Bible Belt wrote: “Many times I’ve been told, ‘What stops you from going out and killing people?’”¹²⁹ The stereotype of the immoral atheist helps explain why so many of the atheist billboards and bus advertisements are focused on spreading the message that nonbelievers do not sport “horns and a long tail” and that people can be good, moral, and ethical without believing in God.¹³⁰

124. Edgell, Gerteis & Hartmann, *supra* note 115, at 228 (describing how people may associate atheists with, for example, criminality or excessive individualism, but that generally atheists represent a general lack of morality, albeit not always in the same way); *see also Psalms* 14:1 (Revised Standard Version) (“The fool says in his heart, ‘There is no God.’ They are corrupt, they do abominable deeds, there is none that does good.”).

125. Princeton Survey Research Assocs. Int’l & Newsweek, Poll (Mar. 2007), *available at iPoll Databank, supra* note 98 (68% yes; 26% no; 6% don’t know); Princeton Survey Research Assocs. Int’l & Newsweek, Poll (Aug. 2006), *available at iPoll Databank, supra* note 98 (68% yes; 26% no; 6% don’t know). The numbers were not so different twenty years ago: 59% yes; 32% no; 9% don’t know. CBS News/N.Y. Times, Poll (Sept. 1984), *available at iPoll Databank, supra* note 98.

126. Pew Global Attitudes Project & Princeton Survey Research Assocs. Int’l, Poll (Apr. 2007), *available at iPoll Databank, supra* note 98 (finding that 57% believed it is “[n]ecessary to believe in God to be moral/have good values”; 41% thought it is “[n]ot necessary to believe in God to be moral/have good values”; and 2% don’t know/refused); Pew Research Ctr. for the People & the Press, Political Typology Poll (Dec. 2004), *available at iPoll Databank, supra* note 98 (finding that 51% of Americans believed “[i]t is necessary to believe in God to be moral and have good values”; 46% thought “[i]t is not necessary to believe in God to be moral and have good values”; and 3% neither/don’t know).

127. Press Release, Univ. of Minn., Atheists Identified as America’s Most Distrusted Minority, According to New U of M Study (Mar. 28, 2006), *available at* http://www1.umn.edu/news/news-releases/2006/UR_RELEASE_MIG_2816.html (providing a statement from the lead researcher noting that “[i]t seems most Americans believe that diversity is fine, as long as every one [sic] shares a common ‘core’ of values that make [sic] them trustworthy—and in America, that ‘core’ has historically been religious” (internal quotation marks omitted)).

128. Tom Arcaro, *The Stigma of Being an Atheist: An Empirical Study on the New Atheist Movement and Its Consequences*, 15 SKEPTIC MAG., no. 4, 2010 at 50, 55 (reporting one man’s experience: “I’ve had people literally, physically BACK away from me upon hearing I am atheist. My children were told to run away from our evil home.”).

129. *Id.* A Kentucky billboard, depicting a boy pointing a gun at the viewer, provides a visual representation of this assumption, where the tag line is: “If God doesn’t matter to him, do you?” *Billboard Wars*, DANGEROUS TALK, <http://www.dangeroustalk.net/billboard-wars.html> (last visited Nov. 1, 2011).

130. Holly Yan, *Dallas-Area Atheists Discuss Their Outlook, Relationships*, DALL. MORNING NEWS, Apr. 3, 2009 (on file with author). In explaining why his atheist group sponsored a “Don’t

Atheism is linked not only with a lack of values but also with a lack of patriotism.¹³¹ “In public life, many Americans believe now . . . that affirming a religious identity is an important way of ‘being American’”¹³² When asked whether atheism was patriotic, unpatriotic, or neither, 39% of Americans in 2008 told pollsters that not believing in God was “very unpatriotic.”¹³³ Americans also rated atheists below Muslims, homosexuals, recent immigrants, and other groups as “shar[ing] their vision of American society.”¹³⁴ “Simply put, many Americans would likely agree with the sentiment that ‘to be irreligious . . . [is] to be unAmerican.’”¹³⁵

These assumptions—that atheists are immoral and un-American—have ramifications in the private and public sphere. A “standard measure of . . . prejudice” against a group is asking people how they would feel if their child married someone from that group.¹³⁶ In the United States, Americans express great reluctance about their children marrying atheists. People were more upset about a possible family tie with an atheist than with any other religious or racial minority group.¹³⁷

believe in God? You are not alone” billboard, Terry McDonald explained that “[w]e’d like to show Christians we don’t have horns and a tail We’re just normal people.” *Id.* (internal quotation marks omitted).

131. Edgell, Gerteis & Hartmann, *supra* note 115, at 212 (noting religion’s “association with morality and citizenship”); *id.* at 214 (noting religion’s association with “being a good American”).

132. *Id.* at 216.

133. Another 4% stated it was somewhat unpatriotic. Greenberg Quinlan Rosner Research, True Patriot Survey (Aug. 2004), *available at iPoll Databank, supra* note 98; *see also* CBS News & N.Y. Times, Poll (Sept. 1984), *available at iPoll Databank, supra* note 98 (reporting that 22% of people answered “no” to “Do you think someone can be patriotic if they don’t believe in God?”); N.Y. Times, Poll (June 1983), *available at iPoll Databank, supra* note 98 (providing that 24% of people answered “no” to “Can someone be patriotic if they do not believe in God?”).

134. Edgell, Gerteis & Hartmann, *supra* note 115, at 212 (“From a list of groups that also includes Muslims, recent immigrants, and homosexuals, Americans name atheists as those least likely to share their vision of American society.”).

135. Alidoosti, *supra* note 25, at 10 (alteration in original) (quoting R. Hart, *An Unquiet Desperation: Rhetorical Aspects of “Popular” Atheism in the United States*, Q. J. SPEECH 64(1), 35 (1978)).

136. Edgell, Gerteis & Hartmann, *supra* note 113, at 217; *see also* Pew Research Ctr. & NPR, Social Trends Racial Attitudes in America Survey (Oct. 2009), *available at iPoll Databank, supra* note 98 (reporting that when asked how they would react to a member of their close family marrying an atheist, 34% said they would be fine; 38% said they “[w]ould be bothered but would come to accept it”; and 24% said they “[w]ould not be able to accept it”); Wash. Post & Kaiser & Harvard Univ., Racial Attitudes Survey (Mar. 2001), *available at iPoll Databank, supra* note 98 (reporting that, in response to the same question, “31% would be fine with it . . . ; 39% would be bothered but would come to accept it; 30% would not be able to accept it”).

137. Edgell, Gerteis & Hartmann, *supra* note 115, at 217–18. Asked if they would disapprove of their child marrying an atheist, 47.6% of those interviewed said “yes.” *Id.* at 218. Asked the same question about Muslims, the “yes” responses fell to 33.5%. *Id.* The “yes” responses for African-Americans, Asian-Americans, Hispanics, and Jews were 27.2%, 18.5%, 18.5%, and 11.8%, respectively. *Id.*

Americans also readily admit that they do not want atheists in positions of power. Poll after poll shows that Americans are less willing to elect an atheist as President than a member of any other group, establishing once again that atheists are the most negatively rated minority in the United States.¹³⁸ Roughly half of Americans told pollsters that they would not vote for an otherwise qualified atheist nominated by their own party.¹³⁹ The numbers are even higher if the atheist is not described as party nominated or well qualified.¹⁴⁰ In comparison to the 53% who would not vote for an atheist President, far fewer said they would not vote for someone who was homosexual (43%), Hispanic (12%), a woman (11%), Jewish (7%), or black (4%).¹⁴¹ In another poll, 87% of Americans agreed that a strong belief in God was an important leadership trait for the next President.¹⁴² This distrust is not limited to the Presidency. In 2010, 58% of Americans told pollsters that they would not be comfortable with a Supreme Court Justice who is an atheist.¹⁴³ In short, “atheists represent a symbolic ‘other’ against which some Americans define themselves as good people and worthy citizens.”¹⁴⁴

138. *Id.* at 215 (noting that the gap in willingness to vote for atheists versus other religious minorities is “large and persistent” (citing FARKAS ET AL., *supra* note 116)); *see also id.* (concluding “that [the] widespread political rejection of [nonbelievers] provides a ‘glaring exception’ to the general rule of increasing social tolerance” (citing FARKAS ET AL., *supra* note 116, at 37)).

139. Princeton Survey Research Assocs. Int’l & Newsweek, Poll (July 2008), *available at iPoll Databank, supra* note 98 (finding that 51% would not vote for an atheist presidential candidate who was nominated by their party and qualified for the job); Gallup & USA Today, Poll (June 2011), *available at iPoll Databank, supra* note 98 (49% would not vote for party-nominated, generally well-qualified presidential candidate who happens to be an atheist); Gallup & USA Today, Poll (Mar. 2007), *available at iPoll Databank, supra* note 98 (48%); Gallup & USA Today, Poll (Feb. 2007), *available at iPoll Databank, supra* note 98 (53%); *see also* Pew Research Ctr. for the People & the Press & Princeton Survey Research Assocs. Int’l, Pew Forum on Religion and Public Life Survey (May 2011), *available at iPoll Databank, supra* note 98 (61% said that they would be less likely to support a Presidential candidate who does not believe in God).

140. Princeton Survey Research Assocs. Int’l & Newsweek, Poll (Mar. 2007), *available at iPoll Databank, supra* note 98 (62% answered “no” to the question “Would you vote for a political candidate who says he or she is an atheist, or not?”); Princeton Survey Research Assoc. Int’l/Newsweek Poll (Aug. 2006), *available at iPoll Databank, supra* note 98 (56% answered “no” to the same question).

141. Gallup/USA Today Poll (Feb. 2007), *available at iPoll Databank, supra* note 98 (reporting responses of individuals who, when asked if their party nominated a generally well-qualified person for president who happened to be . . . , would vote for that person).

142. Ctr. for Pub. Leadership of the John F. Kennedy Sch. of Gov’t, Harvard Univ. & U.S. News & World Report & Yankelovich, Poll (Sept. 2007), *available at iPoll Databank, supra* note 98.

143. FOX NEWS, OPINION DYNAMICS POLL (2010), *available at* http://www.foxnews.com/projects/pdf/042810_SCOTUS.pdf.

144. Edgell, Gerteis, & Hartmann, *supra* note 115, at 214.

The negative associations are so strong¹⁴⁵ that they have found their way into the very definition of atheism. Thus, according to the *American Heritage College Dictionary*, “atheism” means “1.a. Disbelief in or denial of the existence of God or gods. b. The doctrine that there is no God or gods,” but it also means “2. Godlessness; immorality.”¹⁴⁶ The second definition of “atheism” in the *Webster’s Third New International Dictionary of the English Language Unabridged* is “godlessness esp. in conduct.”¹⁴⁷ At least the Merriam-Webster Online Dictionary notes that the “ungodliness, wickedness” definition of “atheism” is archaic.¹⁴⁸

This discrimination against atheists is often first-generation discrimination. That is, the prejudice is conscious, deliberate, and unashamed.¹⁴⁹ Unlike discrimination against someone because of race, sex, or religion, there is little social stigma attached to disliking or denigrating someone because he or she does not believe in God.¹⁵⁰ In addition, first-generation discrimination can erupt into violence; atheists who have come out of the closet have been threatened¹⁵¹ and assaulted.¹⁵² Assuming atheists

145. See, e.g., Kenny A. *ex rel.* Winn v. Perdue, 532 F.3d 1209, 1234 (11th Cir. 2008) (comparing atheists in the Bible Belt to pedophiles in terms of the loathing they could provoke), *rev’d*, 130 S. Ct. 1662 (2010).

146. AMERICAN HERITAGE COLLEGE DICTIONARY 89 (4th ed. 2002).

147. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 137 (1993).

148. *Atheism Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/atheism> (last visited Nov. 1, 2011).

149. See, e.g., Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 460, 466 (2001) (describing first-generation discrimination as deliberate exclusion based on conscious stereotypes and second-generation discrimination as unconscious and based on cognitive bias, structures of decisionmaking, and patterns of interaction).

150. See, e.g., Welsh v. Boy Scouts of Am., 742 F. Supp. 1413, 1416 n.1 (N.D. Ill. 1990) (“Cases involving allegations of racial and gender-based discrimination, while now commonplace, rarely provoke the expressed defense that such discrimination is justified. In contrast, religious discrimination—including discrimination against those who do not believe in God—remains openly defended by some in a way that most of our society no longer tolerates with respect to other forms of discrimination.”); Gervais, *supra* note 13, at 27 (“In contrast to many other kinds of prejudice, anti-atheist prejudice is not widely stigmatized.”).

151. Outspoken atheists regularly receive death threats. E-mail from Shawn Joset to Fred Edwards, Nat’l Dir., United Coal. of Reason (Feb. 14, 2010, 2:26 PM) (on file with author) (describing threats); E-mail from Mike Newdow to author (Jan. 13, 2011, 10:17 AM) (on file with author) (describing receipt of what appeared to be a pipe bomb in the mail, which necessitated closing down the entire post office and the block around it); see also *Death Threats: Just Another Risk of Atheist Blogging*, ATHEIST REVOLUTION (Oct. 2, 2009), <http://www.atheistrev.com/2009/10/death-threats-just-another-risk-of.html>. But so do ordinary people whose beliefs have become known. An atheist in the U.S. military “was sent home early from Iraq because of threats from fellow soldiers.” Neela Banerjee, *Soldier Sues Army, Saying His Atheism Led to Threats*, N.Y. TIMES, April 26, 2008, <http://www.nytimes.com/2008/04/26/us/26atheist.html>.

152. One atheist was killed by his housemate who explained that “I did it because he was evil; he was not a believer.” Joel Thurtell, *Man Is Not Competent To Stand Trial*, DETROIT FREE PRESS, Dec. 30, 2004. A ten-year-old girl who refused to recite “under God” in the Pledge was

are unpatriotic and immoral, people see them as less worthy and their mistreatment justified.¹⁵³ A few stories of atheists in America may serve to demonstrate the potential repercussions of nonbelief in a religious nation.

B. *PERSONAL STORIES OF NONBELIEVERS*

1. A Story of Political Exclusion

David Habecker moved to Estes Park, Colorado in the 1970s. He was the owner and operator of the Appenzell Inn in Estes Park and joined the Chamber of Commerce and the Estes Area Lodging Association.¹⁵⁴ He has been President and Lion of the Year of the Estes Park Lions Club and volunteered for other civic groups as well, including the Wildflower Music Festival Committee and the Aspenfest Committee.¹⁵⁵ He has participated in several choirs and in a barbershop quartet.¹⁵⁶ He also served intermittently as an Estes Park Town Trustee over a twenty-year period.¹⁵⁷ Most recently, he was reelected to a four-year term in 2002.¹⁵⁸ As a Town Trustee, “Habecker voted on routine matters such as budgets, appropriations, and hiring and firing of the Town Manager and Town Attorney.”¹⁵⁹

Then the Mayor announced in May 2004 that henceforth Trustee Board meetings, which are open to the public, would begin with the Pledge of Allegiance.¹⁶⁰ At first Habecker stood up and joined, albeit without saying “under God.”¹⁶¹ Soon, however, “Habecker felt hypocritical reciting even this redacted version of the Pledge.”¹⁶² Consequently, starting in September, Habecker sat silently during the Pledge.¹⁶³ According to Habecker, “My protest has nothing to do with respect for the flag, for my fellow board

pushed up against a building by a classmate who also made the sign of the cross over her and said, “[e]veryone has to believe in God.” Exhibit C (Affidavit of Bailey Wood Frei) to Plaintiffs’ Motion for Protective Order, *Freedom from Religion Found. v. Hanover Sch. Dist.*, No. 1:07-cv-356-JM (D.N.H. Jan. 22, 2008) (internal quotation marks omitted).

153. These same stereotypes no doubt also operate unconsciously, leading to the more subtle, second-generation cognitive bias type of discrimination. Cf. Sturm, *supra* note 149, at 468 (noting that first-generation discrimination often coexists with second-generation discrimination).

154. *Candidates for Town Trustee*, TOWN OF ESTES PARK COLO., <http://www.estesnet.com/TownClerk/Election/CandidateBio2010.aspx> (last visited Oct. 30, 2011) (follow Candidate Bio Link for David Habecker).

155. *Id.*

156. *Id.*

157. *Id.*

158. *Habecker v. Town of Estes Park*, 518 F.3d 1217, 1220 (10th Cir. 2008).

159. *Id.*

160. *Id.* at 1221.

161. *Id.*

162. *Id.*

163. *Id.*

members, for any member of the community, or for any religion.”¹⁶⁴ Instead, “My protest concerns the unconstitutional religious test that the pledge of allegiance becomes with the addition of the words ‘under God.’ . . . [Adding under God] was meant as a religious test, pure and simple, and to this day, few elected officials will stay elected if they object.”¹⁶⁵ In short, “It was a conscientious objection on my part. To take a loyalty oath before the meeting starts—that’s not American This country was founded on religious tolerance. This wasn’t religious tolerance.”¹⁶⁶

When Habecker’s actions became known, three Estes Park residents formed a committee to recall him from office.¹⁶⁷ Their recall platform emphasized Habecker’s unwillingness to recite the Pledge, stating that as a result, “[e]lectors suffer a loss of confidence in Mr. Habecker’s ability to represent citizen’s [sic] pride, patriotism, and common decency. . . . His defiant behavior occurs because the phrase ‘. . . under God . . .’ offends him.”¹⁶⁸ Habecker lost his seat by a vote of 903 to 605.¹⁶⁹ It was the first recall in the town’s eighty-seven-year history.¹⁷⁰ When he ran for town trustee again in 2010, he came in dead last.¹⁷¹

2. A Story of Social Ostracism

Thirteen-year-old Nicole Smalkowski was originally very excited when her family moved to an eighty-acre ranch in Hardesty, Oklahoma.¹⁷² A first-rate athlete, she was the only girl on the public school’s football team, and when basketball season arrived, she also joined the girls’ basketball team.¹⁷³ At the end of the first basketball game, everyone—all the players from her team and the opposing team, all the teachers and school officials, all the spectators in the stands—bowed their heads for the Lord’s Prayer.¹⁷⁴ She did not join in because she thought it would be disrespectful to them and to

164. Lisa Pogue, *A Town Divided: Trustee’s Protest Fuels Animosity*, ESTES PARK TRAIL-GAZETTE (Sept. 12, 2008), http://www.eptail.com/news/ci_12799967 (internal quotation marks omitted).

165. *Id.*

166. *Voters Recall Pledge Objector*, WASH. TIMES (Mar. 23, 2005), <http://www.washingtontimes.com/news/2005/mar/23/20050323-110303-17111/> (quoting David Habecker) (internal quotation marks omitted).

167. *Habecker*, 518 F.3d at 1221.

168. *Id.* (alterations in original) (internal quotation marks omitted).

169. *Voters Recall Pledge Objector*, *supra* note 166.

170. *Pledge Protester Faces Recall Vote*, WASH. TIMES (Dec. 21, 2004), <http://www.washingtontimes.com/news/2004/dec/21/20041221-122302-9022/>.

171. John Cordsen, *New Trustees, Incumbent Are Sworn In*, ESTES PARK TRAIL-GAZETTE (Apr. 29, 2010), http://www.eptail.com/estes-park-news/ci_14985654.

172. 20/20: *Seeing and Believing: The Power of Faith* (ABC television broadcast May 11, 2007), transcript available at 2007 WLNR 9008625.

173. *Id.*

174. *Id.*

herself.¹⁷⁵ When she explained to the coach that she didn't believe in God, the coach responded, "Go to the locker room then."¹⁷⁶

School officials kicked Nicole off the team the next day on the grounds that she had stolen someone's sneakers.¹⁷⁷ They did not inform Nicole, who only found out when she showed up for the next scheduled game.¹⁷⁸ Subsequently, Nicole became the target of derision and intimidation.¹⁷⁹ Some students called her a devil worshiper.¹⁸⁰ One student announced when he saw her that he was going to get a gun.¹⁸¹ The school did nothing to stop the harassment; on the contrary, teachers told Nicole that "this is a Christian country and if you don[']t like it you can get out."¹⁸²

A year later, Nicole was allowed back on the team; this time when everyone huddled together to pray, Nicole stepped aside and recited the Pledge of Allegiance without the "under God."¹⁸³ The following Monday, the school suspended her, claiming that she had threatened a team member; no notice or due process was provided.¹⁸⁴

In the end, Nicole's parents decided to homeschool all three of their children rather than risk their safety at school.¹⁸⁵ So now instead of sports, Nicole focuses on music.¹⁸⁶ She says that she is disappointed about leaving

175. *Id.*

176. *Id.* (internal quotation marks omitted).

177. *Id.*; Complaint at 5–6, *Smalkowski v. Hardesty Pub. Sch. Dist.*, No. 06CV00845 (W.D. Okla.), 2006 WL 2919119.

178. Complaint, *supra* note 177, at 6.

179. *Id.*

180. 20/20, *supra* note 172.

181. Charleyski, Reply to *Its Even Worse if You Are a Liberal and Have No Gods*, DEMOCRATIC UNDERGROUND (Dec. 09, 2005, 5:56 AM), http://www.democraticunderground.com/discuss/duboard.php?az=show_mesg&forum=173&topic_id=1263&mesg_id=1510.

182. *Id.* According to Nicole's father, when he went to talk to the principal, the principal assaulted him and then the county filed charges against the father. Nicole's father said, "The D.A. was willing to drop the charges if I left the county. The charges were switched from a misdemeanor to a felony when I refused." *Id.* The father was subsequently acquitted by a jury of all charges. Austin Cline, *Atheist Acquitted on Assault Charges After Being Harassed by Local Christians*, ABOUT.COM (June 30, 2006), <http://atheism.about.com/b/2006/06/30/atheist-acquitted-on-assault-charges-after-being-harassed-by-local-christians.htm>.

183. 20/20, *supra* note 165. On Nicole's website, you can see a video of a circle of girls from both teams, arms around each other, heads bent, reciting the Lord's Prayer, and one lone girl standing several feet apart reciting the Pledge. Nicole Smalkowski, *Against the Law To Pray*, MYSFACE (Mar. 31, 2006), <http://www.myspace.com/nicoletheproudatheist/videos/against-the-law-to-pray-in-school/257673>.

184. Complaint, *supra* note 177, at 8.

185. 20/20, *supra* note 172.

186. *Id.*

school, particularly because she can no longer pursue a college athletic scholarship.¹⁸⁷

3. Stories of Hiding

Rather than risk the consequences, many atheists keep their views to themselves.¹⁸⁸ While this secrecy may avoid external conflict, it often creates internal turmoil. The letter below, seeking advice on the “Friendly Atheist” website reflects the dilemma many nonbelievers have in deciding whether to come out or not.¹⁸⁹

Dear Richard,

I’ve been an atheist for several years now, and the only person in my family who knows is my sister, and she shares my doubts, though perhaps not quite as strongly as I do.

Every year around Christmastime I get anxious over how in the world I am going to escape Mass on Christmas. My parents are not fanatically religious, but my grandparents are, and I’m always hard pressed to find a way to not attend. My personal thoughts on the holiday are that a couple of days eating and spending time with

187. *Id.* The sudden hostility that greets revelation of their beliefs is a recurring theme in atheist narratives. After a nursing student disclosed her religious beliefs, classmates shunned her:

The next day, a classmate whom I had personally tutored that normally sat by me now refused. She sat on the complete other end of the classroom and refused to make eye contact. . . . Lately it has been harder and harder to get any of my classmates (except for the only other atheist in the class) to work with me.

Richard Wade, *Ask Richard: Atheist Nursing Students Treated as Pariahs by Fellow Students*, FRIENDLY ATHEIST (Jan. 22, 2010), <http://www.patheos.com/blogs/friendlyatheist.com/2010/01/22/ask-richard-atheist-nursing-students-treated-as-pariahs-by-fellow-students>. Another nonbeliever writes about how socially alone he and his family are:

I have been an atheist for several years now. I have three younger children, all under the age of ten. . . . I live in a small town My family and I are dying socially with little to no one who believes like we do or even accepts us for our beliefs. Our kids cannot play with the neighbors because they hate us and tell my kids they will burn in hell. . . . My kids need other kids to play with I would cry if my anger at the situation wasn’t overcoming the emotion.

Richard Wade, *Ask Richard: An Atheist Hesitates to Visit a Unitarian Universalist Congregation*, FRIENDLY ATHEIST (Apr. 13, 2010), <http://www.patheos.com/blogs/friendlyatheist.com/2010/04/13/ask-richard-an-atheist-hesitates-to-visit-a-unitarian-universalist-congregation>.

188. See Peter Wollheim, *Atheists in Idaho: Non-believers on the Fringe*, BOISE WEEKLY (Mar. 23, 2005), <http://www.boiseweekly.com/boise/atheists-in-idaho/content?oid=g21480> (noting that atheists “liv[e] a double life”).

189. The terminology of “coming out of the closet” is taken from the gay rights movement. See generally, e.g., Whitney Anspach et al., *The Other Closet?: Atheists, Homosexuals, and the Lateral Appropriation of Discursive Capital*, 4 CRITICAL DISCOURSE STUD. 95 (2007).

family is a good thing, but I can't be honest with myself and still attend church.

I've been toying with the idea of telling my parents Telling them would help with the struggle I have around the holidays "Coming out of the closet" as an atheist has been something I have gone back and forth about for so long, and I wonder if finally saying it out loud would actually help or not. Would it just be better to keep my mouth shut and tolerate the religious services around Christmastime? After all, I don't encounter them any other time of year. I just feel like I'm being dishonest with myself, and that my parents don't know who I really am.

Thanks so much,

Janice¹⁹⁰

Some nonbelievers feel that dissembling is their only viable option. One participant at the first African Americans for Humanism Conference who gave his first but not last name emphasized that "[i]f I want a second date or a job in the community, I won't say I'm an atheist."¹⁹¹ Another conference participant agreed that it is "almost impossible to admit that you're a black atheist"; she explained, "[w]e have to hide our non-belief, otherwise we are excluded. And if we give voice to any objection or doubt, we're ostracized and isolated So any time religion comes up, it's simpler to just change the subject or say nothing if you can't bring yourself to fake an 'amen.'"¹⁹² True to her statement, she requested anonymity: "[D]on't use my name 'cause my mother told me when she saw me reading *God is Not Great* that if any of her children actually believed 'that mess,' she'd have one less child."¹⁹³

190. Richard Wade, *Ask Richard: Critical Mass: Atheists Facing the Unwelcome Christmas Ritual*, FRIENDLY ATHEIST (Dec. 1, 2009), <http://www.patheos.com/blogs/friendlyatheist/2009/12/01/ask-richard-critical-mass-atheists-facing-the-unwelcome-christmas-ritual>.

191. Oduah & Bohn, *supra* note 50 (internal quotation marks omitted).

192. Jamila Bey, *Black Women Who Use the "A" Word*, ROOT (May 19, 2010), <http://www.theroot.com/views/black-women-who-use-word>; see also Sikivu Hutchinson, "Out of the Closet": *Black Atheists*, BLACK AGENDA REP. (May 12, 2009), [http://www.blackagendareport.com/content/"out-closet"-black-atheists](http://www.blackagendareport.com/content/) ("For black atheists, actively breaking with religious tradition is an even graver rejection than that of white intellectuals This is partly due to the fact that the history of African American civil and human rights resistance is heavily steeped in Judeo-Christian religious dogma. . . . If being black and being Christian are synonymous, then being black, female and religious (whatever the denomination) is practically compulsory. Black women with children who don't fall in line, who raise their children as atheists, may find their race credentials revoked."); Your Pal Satan, Comment to *The Invisibility of the Black Atheist*, WORDS WRATH (May 28, 2008, 8:54 PM), <http://wordsofwrath.blogspot.com/2008/05/invisibility-of-black-atheist.html/showComment=123225444000#c8436544351337092301> ("I am a black, lesbian agnostic. . . . My family accepts the homosexuality, but the agnosticism is the dirty, little secret.")

193. Bey, *supra* note 192.

Because people often have been stunned by the malice directed at them when they tell family members, Richard Wade, the retired psychologist to whom the Dear Richard letter was addressed, recommends that atheists proceed with caution.¹⁹⁴ One study found that of those who came out as atheist, half in San Francisco and two thirds in Alabama and Idaho reported difficulties with friends and families as a result.¹⁹⁵ A focus group of atheists who had come out reported a range of negative repercussions from their disclosure,¹⁹⁶ from family members not trusting them around the younger members of the family,¹⁹⁷ to one being shunned by a classmate on the same dormitory floor,¹⁹⁸ to another having to resign from his lodge and losing a close friend,¹⁹⁹ to one's wife deciding to separate from him.²⁰⁰ As one atheist noted, "It's the A-word. . . . You commit social suicide as a black person when you say you're an atheist."²⁰¹

If family and friends may "suddenly change[] from loving and supportive, to cold, rejecting, hostile, and even vicious,"²⁰² and classmates,

194. Richard Wade, *Ask Richard: Young Atheist Considers Coming Out to His Grandparents*, FRIENDLY ATHEIST (Jan. 26, 2010), <http://www.patheos.com/blogs/friendlyatheist/2010/01/26/ask-richard-young-atheist-considers-coming-out-to-his-grandparents/> ("Over and over, so many of the stories relate how when the atheists came out, their families suddenly changed from loving and supportive, to cold, rejecting, hostile, and even vicious. The years that the atheist has spent being loving, supportive and loyal to the family apparently count for absolutely nothing, as if that never took place. They are instantly regarded as vile monsters simply because of their membership in a belief category. Their actual behavior or conduct has nothing to do with it. While the atheists may have expected some upset from the family, they are often stunned by the intensity of the reaction."). In his blog, *Words of Wrath*, Wrath James White complained, "In [most African American] communities you find more tolerance towards gangbusters, drug addicts, and prostitutes, who pray to God for forgiveness than for honest productive citizens who deny the existence of God." *The Invisibility of the Black Atheist*, WORDS OF WRATH (May 28, 2008, 10:37 PM), <http://wordsofwrath.blogspot.com/2008/05/invisibility-of-black-atheist.html>.

195. BRUCE E. HUNSBERGER & BOB ALTEMEYER, ATHEISTS: A GROUNDBREAKING STUDY OF AMERICA'S NONBELIEVERS 55 (2006).

196. Alidoosti, *supra* note 25, at 71. One participant shared the coming out story of a friend, whose very upset mother reacted by saying "Why couldn't you just be gay? That would have been better." *Id.* (internal quotation marks omitted).

197. *Id.* at 67 (noting that after disclosing their atheism, family members were "apprehensive about leaving children alone with the participants").

198. *Id.* at 72.

199. *Id.* at 58 ("I've lost, for instance, the fraternity here with the [organization] . . . there was one guy, that we were very good friends and brothers in the lodge, who after - I was in charge of the lodge and he was second in command - and so when I left he was in charge and he basically, over a period of about two months, stopped talking to me for, for no reason except that, you know, he doesn't like that I'm not a, not a believer.").

200. *Id.* ("The greatest cost is, just recently, the wife and I just separated and she states that, you know, that my atheism is a big, you know, is a big, is a big decision for the separation and, you know, the way that it affects her and her family. Her family is very religious and, you know, she thinks it's going to - my atheism's going to impinge on her inheritance.").

201. Oduah & Bohn, *supra* note 50 (internal quotation marks omitted).

202. Wade, *supra* note 194.

colleagues, and neighbors can likewise turn on them,²⁰³ it becomes understandable why nonbelievers may decide to hide their beliefs. Many leaders in the nonbelieving community have commented on how people usually prefer to just keep silent, even at the expense of their religious conscience.²⁰⁴ As the stories of Habecker, Nicole, and others illustrate, they fear not hurt feelings, but political powerlessness, lost opportunities, social ostracism, and the threat of physical assault.

C. PURPOSES OF THE ESTABLISHMENT CLAUSE

Clearly then, atheists in America are a stigmatized group, and stereotypes about them affect their standing in the community and their ability to fully comply with their beliefs. Should the Establishment Clause play any role in ameliorating this situation? The answer is yes because among the multiple goals of the Establishment Clause is protecting those whose beliefs do not conform to the dominant religion. Accordingly, regardless of whether atheism is a religion or not,²⁰⁵ the Supreme Court has long held that the Establishment Clause's protection for religious minorities extends to nonbelievers.

There is not one single purpose of the Establishment Clause any more than there is one single purpose of the Free Speech Clause.²⁰⁶ At a minimum, however, the Establishment Clause can be seen as offering at least three kinds of protection.²⁰⁷ First, it protects civil society from the turmoil that follows when the government establishes religion. As James Madison argued in his *Memorial and Remonstrance*, disestablishment brings "moderation and harmony," while establishment results in "torrents of blood."²⁰⁸ The Supreme Court describes this interest as "guard[ing] against

203. See *supra* notes 172–87.

204. Dave Silverman, *Coming Out: The Other Closet*, AM. ATHEISTS, http://www.atheists.org/atheism/coming_out (last visited Oct. 30, 2011) ("Many of us . . . hide in the shadows due to fear of hostility and aversion to confrontations."). On his website, Richard Dawkins urges atheists to "COME OUT" of the closet: "You'll feel liberated." OUT CAMPAIGN, <http://outcampaign.org/> (last visited Oct. 30, 2011).

205. See *infra* notes 221–24. Some have argued that atheism should be considered a religion. See *infra* notes 370–73. While a fascinating question, it is not one that is necessary to resolve for purposes of this paper since the Establishment Clause extends to nonbelievers regardless.

206. See, e.g., Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 125–30 (1989) (arguing that any attempt to articulate a single, unifying theory of free speech risks oversimplification).

207. Among other goals, the Establishment Clause may also be understood to prevent the government from interfering with the religious development of its citizens. See *infra* note 395.

208. JAMES MADISON, *Memorial and Remonstrance* (1785), reprinted in 8 THE PAPERS OF JAMES MADISON 295, ¶ 11, at 302 (Robert A. Rutland et al. eds., 1973) (stating that the bill establishing a provision for teachers of the Christian religion "will destroy that moderation and harmony which the forbearance of our laws to intermeddle with Religion has produced among its several sects. Torrents of blood have been spilt in the old world, by vain attempts of the

the civic divisiveness that follows when the Government weighs in on one side of religious debate.”²⁰⁹

Second, the Establishment Clause protects the religion that is established from corruption and degradation.²¹⁰ According to Madison, “[E]cclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation.”²¹¹ Daniel O. Conkle observed that “government ‘support’ for religion is illusory because it tends to degrade and cheapen religion.”²¹²

Finally, the Establishment Clause protects those who do not belong to the state-favored religion. As the Supreme Court has noted more than once, “Another purpose of the Establishment Clause rested upon an awareness of the historical fact that governmentally established religions and religious persecutions go hand in hand.”²¹³ While establishment of mainstream religions may reflect indifference rather than hostility toward religious minorities, that indifference all too easily escalates into intolerance,²¹⁴ and what starts merely as preference for some religions invariably bodes ill for

secular arm, to extinguish Religious discord, by proscribing all difference in Religious opinion.”).

209. *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 876 (2005); *see also* *Capital Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 812 (1995) (Stevens, J., dissenting) (“Our Constitution wisely seeks to minimize such strife by forbidding state-endorsed religious activity.”).

210. *See, e.g., Lee v. Weisman*, 505 U.S. 577, 589–90 (1992) (“It must not be forgotten . . . that while concern must be given to define the protection granted to an objector or a dissenting nonbeliever, these same Clauses exist to protect religion from government interference.”). *See generally* Andrew Koppelman, *Corruption of Religion and the Establishment Clause*, 50 WM. & MARY L. REV. 1831 (2009).

211. MADISON, *supra* note 208, ¶ 7, at 301. Madison continued, “During almost fifteen centuries has the legal establishment of Christianity been on trial. What have been its fruits? More or less in all places, pride and indolence in the Clergy, ignorance and servility in the laity, in both, superstition, bigotry and persecution.” *Id.*

212. Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1113, 1181 (1988). The Supreme Court has observed, “[R]eligion is too personal, too sacred, too holy, to permit its ‘unhallowed perversion’ by a civil magistrate.” *Engel v. Vitale*, 370 U.S. 421, 432 (1962) (quoting MADISON, *supra* note 208, ¶ 5, at 301); *see also id.* at 431 (“[A] union of government and religion tends to destroy government and to degrade religion.”).

213. *Engel*, 370 U.S. at 432, *cited in* *Cnty. of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 648 n.3 (1989) (Stevens, J., concurring in part and dissenting in part).

214. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 856 (1995) (Thomas, J., concurring) (“Madison’s seventh, ninth, eleventh, and twelfth arguments all speak, in some way, to the same intolerance, bigotry, unenlightenment, and persecution that had generally resulted from previous exclusive religious establishments.” (quoting ROBERT L. CORD, *SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION* 21 (1982)) (internal quotation marks omitted)); *cf.* MADISON, *supra* note 208, ¶ 9, at 302 (“Distant as it may be in its present form from the Inquisition, it differs from it only in degree. The one is the first step, the other the last in the career of intolerance.”).

those who do not conform.²¹⁵ Even if the inevitable harm does not rise to the level of persecution, religious minorities do not escape unscathed.

Protection of religious minorities comports with the Bill of Rights's general protection of minorities against the tyranny of the majority. As Justice Jackson famously wrote in striking down mandatory recitation of the Pledge of Allegiance:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's . . . fundamental rights may not be submitted to vote; they depend on the outcome of no elections.²¹⁶

Whatever its original intent, the Bill of Rights today is understood as (and revered for) guaranteeing certain rights to everyone, including unpopular minorities, even when the majority would rather deprive them of those rights.²¹⁷ Furthermore, the unelected judiciary is charged with ensuring that these rights extend to everyone, even if it means counter-majoritarian decisions.²¹⁸ After all, if the majority's law violates a guaranteed right, it should be declared unconstitutional.

Consequently, the Establishment Clause ought to protect atheists and agnostics in addition to members of minority religions. Nonbelievers are a minority in their beliefs about religion. The Establishment Clause is meant to protect those who do not conform to majority religious beliefs—and not believing in or being uncertain about God clearly fits that description. Since the goal of the Establishment Clause is to avoid making people's beliefs about religion a source of harm, it does not matter whether atheism or agnosticism is itself a religion. In short, "the Establishment Clause requires the same respect for the atheist as it does for the adherent of a Christian faith."²¹⁹

215. See, e.g., Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 321 (1996) (noting people's fears that "what starts with mere preference . . . will escalate to discrimination, suppression, or coerced participation in observances of the dominant religion" and contending that "[t]hese fears gain substance from history").

216. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

217. Lynn A. Baker, *Constitutional Ambiguities and Originalism: Lessons from the Spending Power*, 103 NW. U. L. REV. 495, 510 (2009) ("In addition, the very purpose of many provisions of the original Constitution, as well as of the Bill of Rights, is to protect minorities from the majority—to protect the individual from the (majoritarian) government.")

218. See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980) (arguing for a robust view of the judiciary's role, including the protection of minority rights); THE FEDERALIST NO. 78, at 528 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) ("[T]he independence of the judges may be an essential safeguard against the effects of occasional ill humours in the society.")

219. *Van Orden v. Perry*, 545 U.S. 677, 711 (2005) (Stevens, J., dissenting).

In fact, even in its early Establishment Clause decisions the Supreme Court indicated that the Establishment Clause covered nonbelievers.²²⁰ In the case that incorporated the Establishment Clause, the Supreme Court wrote: “No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance.”²²¹ Similarly, “the 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.”²²² Recent cases have repeated the Court’s commitment to protecting nonbelievers, and at least in theory, the Court has not wavered from this promise.²²³ In practice, however, its Establishment Clause jurisprudence has fallen short.²²⁴ The next two parts will explain more specifically how the Establishment Clause should be understood so that it can fulfill this promise of protection for nonbelievers, with Part III focusing on the Establishment Clause’s equality component, and Part IV focusing on the Establishment Clause’s liberty component.

III. THE EQUALITY COMPONENT OF THE ESTABLISHMENT CLAUSE

The debate about equality and the Establishment Clause centers not on whether it protects the equality of nonbelievers; most courts and commentators would agree that it should.²²⁵ Where opinions differ is in what way and to what degree the Establishment Clause protects the equality of

220. The Supreme Court, however, has never explicitly held that the Free Exercise Clause protects nonbelievers to the same extent as believers or that atheism qualifies as a religion. *E.g.*, *Kaufman v. McCaughtry*, 422 F. Supp. 2d 1016, 1022 (W.D. Wis. 2006) (“The United States Supreme Court has never determined whether atheism qualifies as a religion.”). *Compare* *Kaufman v. McCaughtry*, 419 F.3d 678, 682 (7th Cir. 2005) (noting that under the Wisconsin administrative code regulating prisons, atheism is a religion for purposes of an inmate’s request for an atheist study group), *with* *Kaufman v. Schneider*, 474 F. Supp. 2d 1014, 1027 (W.D. Wis. 2007) (describing an atheist study group as more akin to a secular debate society than to a group religious practice for purposes of an inmate’s request for a study group).

221. *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1, 15–16 (1947); *see also* *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961) (“We repeat and again affirm that neither a State nor the Federal Government can constitutionally force a person ‘to profess a belief or disbelief in any religion.’”).

222. *Wallace v. Jaffree*, 472 U.S. 38, 52–53 (1985).

223. *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 884 (2005) (O’Connor, J., concurring) (“The Religion Clauses . . . protect adherents of all religions, as well as those who believe in no religion at all.”); *Cnty. of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 590 (1989) (“Perhaps in the early days of the Republic these words were understood to protect only the diversity within Christianity, but today they are recognized as guaranteeing religious liberty and equality to ‘the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism.’” (quoting *Wallace*, 472 U.S. at 52)).

224. In its religious-speech cases, for example, the Supreme Court has approved a state-sponsored Ten Commandments monument, *Van Orden*, 545 U.S. at 681, and prayers before legislative sessions, *Marsh v. Chambers*, 463 U.S. 783, 786 (1983).

225. In other words, few would argue that the government can refuse to hire atheists or ban atheists from testifying in court without violating the Establishment Clause.

atheists. Thus, there is great disagreement about what kinds of government action unconstitutionally compromise the equality of nonbelievers.²²⁶ In resolving this debate, the Establishment Clause can be viewed as essentially functioning as an Equal Protection Clause for nonbelievers.²²⁷ In protecting the equality of nonbelievers, the Establishment Clause should be understood as making unconstitutional both expressive harms²²⁸ and material harms.²²⁹

The Supreme Court has stated on more than one occasion that government discrimination based on religion triggers heightened scrutiny under the Equal Protection Clause.²³⁰ Despite this, the Court almost never relies on the Equal Protection Clause when faced with a religious-discrimination claim.²³¹ Instead, the issue is decided under the religion clauses.²³² Thus, it falls to the religion clauses to guarantee equal protection based on religious belief. For example, when the city of Hialeah essentially outlawed the Santeria religious practice of sacrificing animals but not other ways of killing animals, the Court turned to the Free Exercise Clause.²³³ In a sense, the Free Exercise Clause now operates as an antidiscrimination provision for state action that targets or hinders a religious practice. In fact, *Hialeah* expressly compared the free exercise and equal protection

226. Compare, e.g., Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 126–27 (1992) (arguing, for example, that the Establishment Clause should not bar the state from sponsoring religious symbols such as a menorah or a crèche), with Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2124 (1996) (arguing that most kinds of ceremonial deism should violate the Establishment Clause).

227. Alan E. Brownstein, *Harmonizing the Heavenly and Earthly Spheres: The Fragmentation and Synthesis of Religion, Equality, and Speech in the Constitution*, 51 OHIO ST. L.J. 89, 103 (1990) (“[T]he establishment clause has become a *de facto* substitute for an independent equal protection analysis of the treatment of religious minorities by the state . . .”).

228. See *infra* Part III.A (discussing expressivist harms).

229. See *infra* Part III.B (discussing material harms).

230. See, e.g., *Burlington N. R.R. Co. v. Ford*, 504 U.S. 648, 651 (1992) (noting that classifications based on race or religion are suspect classifications); *City of New Orleans v. Duke*, 427 U.S. 297, 303 (1976) (noting that a regulation does not trigger strict scrutiny under the Equal Protection Clause unless it “trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage”).

231. Perhaps the courts should rely on the Equal Protection Clause. 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 (2008). Because the case law has traditionally relied on the religion clauses and the equal protection concern with minorities overlaps with the traditional Establishment Clause concern for religious minorities, I will frame the issue as an Establishment Clause question. My arguments about the scope of equal protection apply with equal force regardless of which clause is applied.

232. Brownstein, *supra* note 227, at 102–03 (noting that there are few, if any, Supreme Court cases that explicitly treat religion as a suspect classification under the Equal Protection Clause).

233. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993); see also *Locke v. Davey*, 540 U.S. 712 (2004) (deciding under religion clauses a challenge to a state ban on theology scholarships when the state allowed all other scholarships).

analyses.²³⁴ When confronting state religious speech like “under God” in the Pledge or a religious monument, however, it is the Establishment Clause that comes into play. To start, government religious speech does not directly impede the free exercise of religion, the province of the Free Exercise Clause.²³⁵ In addition, government religious speech’s deleterious effects stem from the state favoring religion or favoring one religion over others, which is the concern of the Establishment Clause.²³⁶

A. EXPRESSIVIST HARM TO EQUALITY

How might government religious speech undermine the equality of nonbelievers? Expressivist theory, which emphasizes “that laws frequently express certain attitudes, values, or beliefs,” has one answer.²³⁷ Under expressivist theory, the harm to equality is caused by the expressive content of the law or policy at issue.²³⁸ The focus is on the message conveyed by the state action rather than its intent²³⁹ or its practical effect.²⁴⁰ State action violates the Constitution’s guarantee of equality if its social meaning clashes with the government’s duty to treat each person with equal concern. That is,

234. *Church of the Lukumi Babalu Aye*, 508 U.S. at 540 (“In determining if the object of a law is a neutral one under the Free Exercise Clause, we can also find guidance in our equal protection cases.”).

235. As argued in Part IV.B–C, government religious speech does indirectly affect religious practice by making those outside the favored religion uncomfortable or even afraid to follow the dictates of their conscience. Therefore, one might argue that government religious speech does implicate the Free Exercise Clause. However, given the current narrow scope of free exercise protection, analysis of the Free Exercise Clause would have to change significantly to encompass this indirect effect. While perhaps it should, the reformulation of Free Exercise Clause analysis is beyond the scope of this Article.

236. In addition, whether the Free Exercise Clause protections extend to nonbelievers is subject to debate. See, e.g., Kent Greenawalt, *Diverse Perspectives and the Religion Clauses: An Examination of Justifications and Qualifying Beliefs*, 74 NOTRE DAME L. REV. 1433, 1473 (1999) (arguing that claims of conscience will rarely arise directly from atheist or agnostic convictions); see also *supra* note 220 (discussing free exercise claims of atheists in prison).

237. Mark D. Rosen, *Establishment, Expressivism, and Federalism*, 78 CHI.-KENT L. REV. 669, 682 (2003).

238. Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1533–45 (2000); Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 MINN. L. REV. 1, 2 (2000).

239. Steven D. Smith, *Expressivist Jurisprudence and the Depletion of Meaning*, 60 MD. L. REV. 506, 510–11 (2001) (arguing that expressivist scholars emphasize social or public meaning over legislative intent or speaker meaning).

240. Richard H. Pildes & Richard G. Niemi, *Expressive Harms, “Bizarre Districts,” and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 506–07 (1993) (“An expressive harm . . . results from the ideas or attitudes expressed through a governmental action, rather than from the more tangible or material consequences the action brings about.”); Hellman, *supra* note 238, at 2. The next part, which addresses how the law conveys messages that create norms and socialize citizens, could be considered a strand of expressivism that does consider consequences. Rosen, *supra* note 237, at 683. For simplicity’s sake, I use the term “expressivism” for the more deontological approach that stresses the rightness or wrongness of the message rather than the consequences of the message.

“the government may not express, in words or deeds, that it values some of us more than others.”²⁴¹ Thus, the constitutional validity of a law depends on its social or public meaning.²⁴²

De jure segregation is the paradigmatic example of an expressive injury. The many harms of segregation are well established. Segregation denies black schoolchildren equal access to education because racially separate schools are unlikely to be equal in this country. It also sabotages the black schoolchildren’s sense of their own potential and thus undermines their ability to learn.²⁴³ But the expressive harm is the *social meaning* of segregation, which is, as we all know, to mark the black race as inferior and unworthy.²⁴⁴ The crucial point under expressivist theory is that this message alone violates the Constitution, even apart from any concrete injuries to identifiable people.²⁴⁵ Thus, as Deborah Hellman argues, legally segregated daycare centers for infants would violate the Equal Protection Clause, even if the centers were of equal quality, and even if the babies suffered no psychological injury, because segregation carries the message of racial inequality.²⁴⁶

Under an expressivist approach, the government violates the Establishment Clause’s equality component if its religious speech fails to treat believers and nonbelievers with equal concern.²⁴⁷ Again, the injury turns not on intent or on material harms, but on the state’s message of unequal worth.²⁴⁸ Consequently, the expressive harm of direct financial support to a church is not in the payment but in what the payment symbolizes.²⁴⁹

241. Hellman, *supra* note 238, at 13.

242. Smith, *supra* note 239, at 519.

243. Hellman, *supra* note 238, at 9.

244. See, e.g., *Plessy v. Ferguson*, 163 U.S. 537, 560 (1896) (Harlan, J., dissenting) (explaining that “the real meaning of such legislation” is “that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens”), *overruled by Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 427 (1960) (arguing that the meaning of segregation is to put “the Negro in a position of walled-off inferiority”).

245. Anderson & Pildes, *supra* note 238, at 1531; Hellman, *supra* note 238, at 10.

246. Hellman, *supra* note 238, at 10. Similarly, allowing gay couples to enter into civil unions with all of the benefits of marriage but still excluding them from marriage itself carries a message of inequality. See, e.g., Michael C. Dorf, *Same-Sex Marriage, Second-Class Citizenship, and Law’s Social Meanings*, 97 VA. L. REV. 1267 (2011).

247. The expressivist approach to the equality component dovetails well with a structural approach to the Establishment Clause, as its primary focus is on what the state is empowered to do, as opposed to how state action affects individuals. See, e.g., Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1 (1998). At the same time, because messages of inequality may perpetuate discrimination, an expressivist approach also comports with a rights-based approach to the Establishment Clause.

248. See Smith, *supra* note 239, at 519.

249. David Cole, *Faith and Funding: Toward an Expressivist Model of the Establishment Clause*, 75 S. CAL. L. REV. 559, 563 (2002).

The Establishment Clause actually has a longstanding expressivist tradition. The endorsement test—where the state violates the Establishment Clause if it endorses religion and “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”²⁵⁰—embodies the idea that a message of unequal value is itself a constitutional harm.²⁵¹

1. Social Meaning as a Constitutional Injury

Many commentators have questioned whether an act that conveys a state message of unequal regard, without proof of concrete harm, should run afoul of the Constitution.²⁵² They argue that the state’s action should be judged based on its consequences: If it has no negative consequences, why should it be unconstitutional? This is a “no harm, no foul” constitutional argument. Or, as E. Gregory Wallace puts it, “The endorsement test errs by leaping from real disabilities to felt disabilities. When government speaks religiously, ‘no one loses the right to vote, the freedom to speak, or any other state or federal right.’”²⁵³ Should a message without more really suffice to violate the Constitution?

First, it is important to clarify what the expressivist claim is not. It is not an argument that “offending” someone is unconstitutional.²⁵⁴ Rather, it is an argument that the state cannot, consistent with the Equal Protection Clause or the equal protection component of the Establishment Clause, convey the message that some people are less equal than others or less worthy of regard because of their race, sex, or religious beliefs. Expressivism argues that it is of constitutional moment “whether the *message* sent by a government action

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

251. Kenneth L. Karst, *Justice O’Connor and the Substance of Equal Citizenship*, 2003 SUP. CT. REV. 357, 368 (noting that Justice O’Connor’s endorsement test, with its “concern for dignitary harms bears a strong family resemblance to the concerns of modern equal protection doctrine as applied to discrimination against ‘outsiders’ in other categories of self-identity, such as race or sex or sexual orientation”).

252. E.g., Smith, *supra* note 239, at 519–20 (describing as counterintuitive a theory that determines constitutionality based on message and not consequences); cf. Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363, 1444–47 (2000).

253. E. Gregory Wallace, *When Government Speaks Religiously*, 21 FLA. ST. U. L. REV. 1183, 1222 (1994) (quoting Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the ‘No Endorsement’ Test*, 86 MICH. L. REV. 266, 307 (1987)).

254. Jesse H. Choper, *The Endorsement Test: Its Status and Desirability*, 18 J.L. & POL. 499, 521 (2002) (“[A]bsent any meaningful threat to religious liberty, distressed sensibilities should not rise to the level of a judicially cognizable harm under the Establishment Clause”); cf., e.g., William P. Marshall, *The Concept of Offensiveness in Establishment and Free Exercise Jurisprudence*, 66 IND. L.J. 351, 364 (1991).

comports with the underlying values embodied in the constitutional provision at issue.”²⁵⁵

Some scholars argue that current equal protection jurisprudence has rejected (correctly, in their view) an expressivist approach for discrimination based on race, and therefore, it would be inappropriate to adopt it for discrimination based on religion.²⁵⁶ In support they cite *Palmer v. Thompson*, where the town of Jackson, Mississippi, closed all its public pools immediately after a desegregation order.²⁵⁷ The Supreme Court rejected an Equal Protection Clause claim on the ground that blacks and whites were equally deprived of public swimming pools.²⁵⁸ Many have interpreted this case to stand for the proposition that there can be no equal protection violation without some sort of material or tangible harm to the affected group (and to them alone).²⁵⁹

A closer reading, however, reveals that the Court’s argument was that a discriminatory motivation without more could not suffice²⁶⁰ for the usual reasons why intent-based determinations are considered problematic, such as the fact that the motive of a group of legislators is impossible to ascertain,²⁶¹ or that the same law could be passed without the improper motive.²⁶² This holding arguably does not exclude an expressivist approach because under expressivism what matters is not the motivation behind legislation, but the social meaning of the legislation.²⁶³

Furthermore, other cases do support an expressivist understanding of equal protection. *Brown* itself is the most famous example.²⁶⁴ In addition, in *Strauder v. West Virginia*, the Court struck down a law excluding blacks from the jury pool, writing that the exclusion of otherwise qualified citizens

255. Rachel D. Godsil, *Expressivism, Empathy and Equality*, 36 U. MICH. J.L. REFORM 247, 249 (2003).

256. See, e.g., Marshall, *supra* note 254, at 364 (arguing that there are two necessary components for an equal protection violation: (1) “the classification . . . must be pejorative of the group claiming stigmatic injury,” and (2) “there must be a harm in addition to the . . . stigma”).

257. *Palmer v. Thompson*, 403 U.S. 217, 219 (1971); see also *Allen v. Wright*, 468 U.S. 737, 755 (1984) (denying standing to African-American parents who claimed that the state’s failure to enforce antidiscrimination laws against private schools stigmatized them).

258. *Palmer*, 403 U.S. at 220 (“[T]his is not a case where whites are permitted to use public facilities while blacks are denied access.”).

259. See, e.g., Godsil, *supra* note 255, at 261–62 (noting that *Palmer* represents an abandonment of a stigmatic- or expressive-harm test in favor of one that focused on intent).

260. *Palmer*, 403 U.S. at 224 (“[N]o case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it.”).

261. *Id.*

262. *Id.* at 225.

263. Moreover, social meaning does not depend on discerning the thoughts of individual legislators, nor is repassing a law likely to change it. Granted, motive can inform the social meaning, but it is not determinative.

264. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

because of their race “is practically a brand upon them, affixed by the law, an assertion of their inferiority.”²⁶⁵ Of course, these cases preceded *Palmer* and also involved material harms. Nonetheless, following *Palmer*, the Court has on more than one occasion decided equal protection cases based upon the message sent by the state. For example, in *Shaw v. Reno*,²⁶⁶ the Supreme Court held that North Carolina’s redistricting violated equal protection because a bizarrely shaped district, the result of racial gerrymandering, sent pernicious messages about race: “Classifications of citizens solely on the basis of race . . . threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility.”²⁶⁷ Similarly, in *Mississippi University for Women v. Hogan*, the Court held that a women-only state nursing school violated equal protection in large part because it communicated a message fraught with “archaic and stereotypic[al] notions”²⁶⁸ and “traditional, often inaccurate, assumptions about the proper roles of men and women.”²⁶⁹

Setting aside the descriptive question of whether controlling, equal protection decisions support an expressivist approach to equality, the normative question remains as to whether such an approach should be adopted. In other words, even assuming *Palmer* rejected an expressivist approach, perhaps it ought to be considered wrongly decided. Perhaps there should have been an Equal Protection Clause violation for the state to close the pools, because, as the dissent pointed out, “The fact is that closing the pools is an expression of official policy that Negroes are unfit to associate with whites. . . . The Equal Protection Clause is a hollow promise if it does not forbid such official denigrations of the race the Fourteenth Amendment was designed to protect.”²⁷⁰ To the extent that the

265. *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879), *abrogated by Taylor v. Louisiana*, 419 U.S. 522 (1975).

266. Both Hellman, *supra* note 238, at 26–27, and Pildes & Niemi, *supra* note 240, at 508–09, point to *Shaw* as an example of an equal protection decision based on the social message of state action.

267. *Shaw v. Reno*, 509 U.S. 630, 643 (1993). In addition, “[i]t reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls.” *Id.* at 647. Whether perpetuating this perception is equivalent to perpetuating other destructive stereotypes about blacks, as Justice O’Connor concluded, is a separate question.

268. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982).

269. *Id.* at 726; *see also id.* at 729–30 (“MUW’s policy of excluding males from admission to the School of Nursing tends to perpetuate the stereotyped view of nursing as an exclusively woman’s job. . . . MUW’s admissions policy lends credibility to the old view that women, not men, should become nurses, and makes the assumption that nursing is a field for women a self-fulfilling prophecy.” (citations omitted)).

270. *Palmer v. Thompson*, 403 U.S. 217, 240–41 (1971) (White, J., dissenting). The dissent went on to say, “[B]y closing the pools solely because of the order to desegregate, the

Establishment Clause might provide greater protection than the Equal Protection Clause, it is equal protection that should be expanded, not the Establishment Clause that should be retracted.

2. Determination of Social Meaning

Another critique of the expressivist approach is that social meaning is elusive. Steven Smith argues that as difficult as it is to determine the intent behind a law, it is even harder to determine its social meaning.²⁷¹ Although intent depends on the motives of a body of legislators, social meaning depends on the interpretation of everyone else.²⁷² Yet the alternatives to using social meaning as a constitutional yardstick—intent or consequences—are not necessarily more definite. Motive may depend on the internal psychology of individual lawmakers, which is not publicly available. Social meaning, by definition, does not depend on any such inside knowledge. Instead it depends on understanding what message a law or other state action conveys given “its text, history, and implementation in the context of American culture.”²⁷³ And unless one adopts the narrowest definition of consequences, a court usually will not have all the empirical evidence it needs to fully determine the consequences of a law. In fact, of the three, it may well be that determining social meaning is more within the court’s institutional competence than uncovering motive or calculating effects.²⁷⁴

Nonetheless, pinpointing social meaning can be a challenge, especially if people cannot agree on a shared social meaning, as can happen with government religious speech.²⁷⁵ In particular, people disagree about whether government speech favorable to religion communicates any

city is expressing its official view that Negroes are so inferior that they are unfit to share with whites this particular type of public facility” *Id.* at 266.

271. See Smith, *supra* note 239, at 542.

272. See *id.*

273. Jerry Kang, *Negative Action Against Asian Americans: The Internal Instability of Dworkin’s Defense of Affirmative Action*, 31 HARV. C.R.-C.L. L. REV. 1, 25 (1996).

274. Smith, *supra* note 239, at 547. My claim is not that courts are incapable of doing either of these analyses; rather, my claim is that a social-meaning analysis is not necessarily more difficult.

275. Split decisions on religious displays result in part from the different social meanings attributed to the display. For example, the majority in *Van Orden v. Perry* held that the Ten Commandments monument merely acknowledged the role of religion in our Nation’s heritage. *Van Orden v. Perry*, 545 U.S. 677, 688–89 (2005). The dissent found that they represented a sacred religious text declaring God’s divinity. *Id.* at 707–08, 717 (Stevens, J., dissenting). The majority in *Newdow v. Rio Linda Union School District* held that the Pledge of Allegiance was a patriotic exercise designed to foster love of country. *Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1018 (9th Cir. 2010). However, the dissent argued that Congress added “under God” in order to indoctrinate children with a belief in God. *Id.* at 1042–44 (Reinhardt, J., dissenting).

message of inequality or whether government speech with religious content even conveys any message about religion at all.

a. Messages of Inequality?

Unlike segregation, whose message of inferiority and superiority is unmistakable, the social meaning of much government religious speech is less obvious, rendering conclusions that the government is marking nonbelievers as unequal members of society more contestable. Of course, sometimes the social meaning may be easy to discern: a government advertisement campaign about the impossibility of teaching morality without religion clearly conveys a message of disparate value between faith and no faith.

However, most government religious speech does not so obviously denigrate nonbelief. Instead, government religious speech usually takes the form of support for religion with no explicit statement about nonbelief, such as the state sponsoring a Latin cross war memorial or including God in the national Pledge and motto. In fact, virtually all Establishment Clause challenges to government religious speech in the United States involve the government favoring the Judeo-Christian religious tradition. Does this speech create a hierarchy between religion and nonreligion?²⁷⁶ Does it, like segregation, send a message of inequality?

Supporting one thing does not necessarily mean disparaging something else. Making the piano the state's official musical instrument does not cast cello fans as outsiders or less valuable members of the community. At the same time, supporting something can implicitly convey a message of denigration or at least inequality.²⁷⁷ Imagine, for example, that a state declared that the official state race was the white race. The question, then, is whether making Judeo-Christianity the favorite state religious tradition is more like picking a favorite musical instrument or more like picking a favorite race.²⁷⁸

276. Notably, the state's message about religious minorities need not be denigrating to be problematic under the Establishment Clause. There are several different ways a state may express a preference for one religion over others. It may show active hostility toward the nonfavored religions. However, its message may also be that the state prefers this religion, and by implication, all other religions are less worthy. Alternately, it might convey the message that other beliefs are acceptable or even good, but that the favored one is nonetheless superior. All would be unconstitutional under the equality component of the Establishment Clause, which bars any favoritism.

277. See, e.g., Marshall, *supra* note 254, at 365 ("A favorable statement about one class is not necessarily a correlative pejorative remark about another.")

278. Cf. EISGRUBER & SAGER, *supra* note 12, at 124-25 (comparing, hypothetically, a "Fineville—A Christian Community" sign to a "Fineville—A Nuclear-Free Community" sign).

An official state religion is more akin to an official state race.²⁷⁹ One of the reasons why religious beliefs, even if not truly immutable,²⁸⁰ are considered a protected characteristic under the Equal Protection Clause is that they are deeply constitutive of identity, like race or sex.²⁸¹ Consequently, a state proclaiming that it favors this race or this religion is essentially stating that people of this race, or people of this religion, are favored. Even if the state is not denigrating anyone, it is announcing its preference for one group over others.²⁸² Such a message clearly clashes with the State's obligation to "not express, in words or deeds, that it values some of us more than others."²⁸³

Furthermore, in determining the social meaning of government religious speech, the government's statement cannot be isolated from its historical and cultural context. To the contrary, social meaning is dependent on context.²⁸⁴ Another reason race, sex, and religion are protected is that people have been subordinated and discriminated against based on those characteristics.²⁸⁵ Given the United States' long history of oppressing blacks

279. *Id.* at 124–28 (arguing that the social meaning of government support for religion is disparagement of those who do not belong to that religion).

280. Religion is not immutable in the way that race and sex are (although these too are not entirely immutable). On the other hand, nor is religion mutable in the way that political beliefs are either; for many they are deeply rooted and extremely difficult to alter. Timothy L. Hall, *Religion, Equality, and Difference*, 65 TEMP. L. REV. 1, 62 (1992) (arguing that religion works as a suspect classification in part because "[r]eligious convictions frequently appear to their possessors as immutable: something they did not choose, but which chose them"). Studies show that the majority of people identify with the religion they learned as a child. *See, e.g.*, PEW FORUM ON RELIGION & PUB. LIFE, FAITH IN FLUX 2–3 (2009), available at http://pewforum.org/uploadedfiles/Topics/Religious_Affiliation/fullreport.pdf (finding that nearly three-quarters of adults belong to the religion of their childhood, with over half of adults belonging to the same denomination).

281. *See, e.g.*, John E. Thompson, *What's the Big Deal? The Unconstitutionality of God in the Pledge of Allegiance*, 38 HARV. C.R.-C.L. L. REV. 563, 597 (2003) (arguing that "religion [is] often crucial to self-identity, for believers and non-believers alike"); Tseming Yang, *Race, Religion, and Cultural Identity: Reconciling the Jurisprudence of Race and Religion*, 73 IND. L.J. 119, 121 (1997) (arguing that race and religion play similar roles in self-identity).

282. Notably, state endorsements of Christianity particularly lend themselves to the negative inference that favoring religion includes disfavoring other belief systems. If the favored religion were pluralistic and did not view other religions as wrong, it might pose less of an issue for the state to prefer it. However, certain teachings within Christian traditions repudiate other faiths and condemn those who do not accept their beliefs. Thus while the government itself may not directly denigrate those outside these traditions, it does so indirectly by approving and sponsoring those who do. *See, e.g.*, Brownstein, *supra* note 227, at 148–49 (celebrating various ethnicities is possible because "[e]thnic self-esteem is not a zero sum game, religious truth is").

283. Hellman, *supra* note 238, at 13.

284. Pildes & Niemi, *supra* note 240, at 507–08 (stating that when courts recognize expressive harms, they are interpreting "the expressive significance or social meaning that a particular governmental action has in the specific historical, political, and social context in which it takes place").

285. *See, e.g.*, Jesse H. Choper, *Religion and Race Under the Constitution: Similarities and Differences*, 79 CORNELL L. REV. 491, 491–93 (1994) (arguing that a history of hostility and hate

and the continuing discrimination they still confront, it cannot be credibly argued that no negative inference about blacks should be drawn from a declaration that whites are the official state race. Similarly, the social meaning of a pro-religion statement must take into account the prejudice that nonbelievers have in the past and still today face.²⁸⁶ I do not mean to say that discrimination against atheists in the United States has taken the same form as discrimination against blacks in the United States. It obviously has not. But they need not be equivalent in order to understand that the backdrop of prejudice and hostility against nonbelievers complicates statements made in favor of religion.

b. Religious Messages at All?

Of course, government religious speech generally does not take the form of declaring an official state religion; indeed, in many cases, whether the government is sending any message about religion is the central dispute.²⁸⁷ The cross designated as a national war memorial in Mojave National Preserve provides a recent example.²⁸⁸ That cross is the only national monument honoring World War I veterans.²⁸⁹ As is often the case with government religious speech, the competing visions of social meaning come down to a clash between those whose religion is favored—who focus on the nonreligious import—and those whose religion or nonreligion is not—who focus on the religious implications of government religious speech. Thus, Christians and Christian groups tended to argue that the message of the war memorial was simply to honor veterans of World War I.²⁹⁰ Non-Christian groups, on the other hand, argued for a social meaning that involved the government favoring and honoring Christianity.²⁹¹

toward religious beliefs and race provides a strong justification for strict scrutiny of government discrimination based upon either).

286. Atheists are also uniquely ill-positioned to protect themselves in the political process, given how strong anti-atheist bias is in the political arena. *See supra* notes 138–44 and accompanying text. Atheists, therefore, do not get elected, and few non-atheist politicians stand up for them.

287. *See infra* note 293; *see also* Pildes & Neimi, *supra* note 240, at 507–08.

288. *Salazar v. Buono*, 130 S. Ct. 1803, 1811–13 (2010).

289. In other words, it is the only monument honoring WWI veterans that has been designated a national landmark. Brief for Jewish War Veterans of the United States of America, Inc. as Amicus Curiae Supporting Respondent at 4, *Salazar*, 130 S. Ct. 1803 (No. 08-472), 2009 WL 2406367.

290. *See, e.g.*, Brief of the Thomas More Law Center et al. as Amici Curiae Supporting Petitioners at 16, *Salazar*, 130 S. Ct. 1803 (No. 08-472), 2009 WL 1629704 (“[A] reasonable observer would know that while the cross is a religious symbol, it is also a universal symbol of self-sacrifice—and in the context of a war veterans’ memorial, the cross is a symbol of the ultimate sacrifice made for one’s country.”).

291. *See, e.g.*, Brief Amicus Curiae of the Freedom from Religion Foundation in Support of Respondent at 9, *Salazar*, 130 S. Ct. 1803 (No. 08-472), 2009 WL 2406366 (“No secular

When faced with competing understandings, there are two possible ways to resolve the question. One is to decide which is more plausible. Social meaning is determined by the text, implementation, history, and specific social context.²⁹² Not every claimed interpretation is consistent with these.²⁹³ It was not really credible to argue that segregation in the 1950s carried no message of subordination, no matter how many white people insisted otherwise. In resolving its government religious speech cases, the Supreme Court too often adopts the perspective of the privileged majority.²⁹⁴ Yet, in most Establishment Clause challenges, the more persuasive social meaning is the plausible meaning as understood by the nonfavored group,²⁹⁵ as this is usually the meaning that better accounts for the historical and social context. Privileged groups tend to be blind to the way their privilege operates.²⁹⁶ Consequently, privileged groups often do not understand that their experience is not the universal experience and they miss the power dynamics that inform the social meaning of the state's action.²⁹⁷ How else to explain how whites could conclude that segregation only maligned blacks if blacks chose to put that construction on it,²⁹⁸ or that segregation presented an unsolvable clash between the freedom of association of whites and the freedom of association of blacks?²⁹⁹

The same blindness underlies the claim that a state cross does not favor Christianity because it is a universal marker for death. To be clear, choosing a Latin cross to serve as a war memorial is not the same as declaring Christianity the official state religion. Yet it still conveys a preference for Christianity and a message of unequal value.³⁰⁰ A cross may seem like a

purpose, no matter how sincere, will detract from the overall message that the Latin cross stands for Christianity and the overall display promotes Christianity.”).

292. It may also be informed by intent.

293. This may be because the claim is a sham. Or it may be, as discussed below, because privilege distorts the analysis.

294. Thus, while the endorsement test could be a vehicle for a successful expressivist approach to the Establishment Clause, in application it usually falls short.

295. See generally Caroline Mala Corbin, *Ceremonial Deism and the Reasonable Religious Outsider*, 57 UCLA L. REV. 1545 (2010). Of course, the nonfavored group's understanding must be plausible. It is reasonable for an American nonbeliever to view a cross or a crèche as a preference for Christianity. On the other hand, a reasonable nonbeliever would not view Earth Day in the United States as an endorsement of Gaia/Earth Goddess worship.

296. *Id.* at 1592–97.

297. *Id.* at 1585–92.

298. *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896) (“We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.”), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

299. See generally Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

300. The recent Supreme Court case *Salazar v. Buono*, which involved a Latin cross monument in the Mojave National Preserve, never actually reached this question. Instead, it

universal symbol of death to American Christians because (a) it represents death to them; (b) as members of the dominant religion, they may have never learned the symbols that other religions do or do not use;³⁰¹ and (c) members of dominant groups tend to universalize their subjective experience.³⁰² Nonetheless, the Latin cross is a uniquely Christian symbol. It “represents with relative clarity and simplicity the Christian message of the crucifixion and resurrection of Jesus Christ.”³⁰³ The Supreme Court itself has acknowledged the religiosity of the symbol.³⁰⁴ The claim that the Latin cross is a universal marker of the dead is simply inaccurate. “If the cross signifies death, it is because for Christians (but only for Christians), the cross evokes Christ’s death, resurrection, and promise of everlasting life.”³⁰⁵ Consequently, Christians alone use it to mark graves.³⁰⁶ The U.S. armed forces have not made this error. They permit family members of veterans to choose one of thirty-nine “emblems of belief” for their headstones.³⁰⁷ And

held that a transfer of state-park land to private parties did not violate the lower court’s injunction barring the state from displaying a Latin cross on public property. *Salazar v. Buono*, 130 S. Ct. 1803, 1816–17 (2010). In finding unconstitutional a Latin cross war memorial atop Mount Soledad, however, the Ninth Circuit held that “[t]he use of such a distinctively Christian symbol to honor all veterans . . . suggests that the government is so connected to a particular religion that it treats that religion’s symbolism as its own, as universal.” *Trunk v. City of San Diego*, 629 F.3d 1099, 1124–25 (9th Cir. 2011).

301. *Cf.* PEW FORUM ON RELIGION & PUB. LIFE, U.S. RELIGIOUS KNOWLEDGE SURVEY 6–7 (2010) (noting that a questionnaire on religious knowledge showed that Jews, atheists, and agnostics had the most knowledge of world religions). A Jew in the United States for example, aware of majority traditions, is not likely to claim that the Star of David is a universal symbol of death.

302. In other words, the dominant group will present its subjective view and experience as the objective universal one, and if the judges belong to the same dominant group, they may well validate this claim.

303. *Ellis v. City of La Mesa*, 990 F.2d 1518, 1525 (9th Cir. 1993) (quoting *Okrand v. City of Los Angeles*, 254 Cal. Rptr. 913, 922 (Ct. App. 1989)).

304. *See, e.g., Cnty. of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 661 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part) (“[T]he [Establishment] Clause forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall.”).

305. Brief for Jewish War Veterans of the United States of America, Inc. as Amicus Curiae Supporting Respondent, *supra* note 289, at 7; *see also id.* (“If honoring sacrifice is a meaning of the cross, it is because for Christians (but only for Christians), the cross symbolizes Christ’s sacrifice for humankind’s sins.”).

306. *See, e.g., Am. Atheists, Inc. v. Duncan*, 616 F.3d 1145, 1162 (10th Cir. 2010) (finding that state roadside crosses commemorating the deaths of highway patrol members were predominately religious symbols in part because “there is no evidence in this case that the cross has been widely embraced by non-Christians as a secular symbol of death”), *amended and superseded sub nom.* *Am. Atheist, Inc. v. Davenport*, 637 F.3d 1095 (10th Cir. 2010).

307. Options include the Buddhist Wheel of Righteousness, the Jewish Star of David, the Bahai Nine Pointed Star, the Muslim Crescent and Star, the Sikh Khanda, and the Wicca Pentacle. *Available Emblems of Belief for Placement on Government Headstones and Markers*, U.S. DEP’T OF VETERANS AFFAIRS, <http://www.cem.va.gov/hm/hmemb.asp> (last visited Nov. 1, 2011).

indeed, “the vast majority of war memorials in the United States do not include crosses.”³⁰⁸

It is conceivable that some government displays or symbols may be susceptible of two equally plausible interpretations, though the ones in Establishment Clause challenges rarely are. In such instances, the one with religious import should control the Establishment Clause analysis. The same approach would apply for determining social meaning in equal protection cases. Imagine, for example, an equal protection challenge to a state flying a confederate flag. Some might argue that the confederate flag represents pride in Southern heritage; others that it embodies nostalgia for the subordination of blacks. The first question would be whether these are really equally persuasive readings of the use of the confederate flag in Southern states. Assuming that they are,³⁰⁹ then the plausible meaning inflected by race—i.e., that the flag represents white supremacy—is the one that should control for the equal protection analysis. Some might protest that this means a state could not celebrate its history with a historical flag. This is true. However, one of the consequences of having the enslavement of a people in your history is that you cannot celebrate that history any way you wish. Likewise, one of the consequences of having a history where one religion is privileged over all others is that you cannot celebrate it any way you wish.³¹⁰ Importantly, this approach does not preclude celebrating America’s religious history with a museum exhibit, a history class, a clearly worded proclamation, or some other way where the historical or secular import unquestionably dominates.³¹¹

However, the Latin cross is not a symbol open to equally plausible interpretations. Consequently, to demand that a Christian symbol be

Nonbelievers also have options, including the Humanist Emblem of Spirit and the Atheist Atom Symbol. *Id.*

308. *Trunk v. City of San Diego*, 629 F.3d 1099, 1112 (9th Cir. 2011). While American soldiers who died during World War I and World War II are memorialized with crosses in Europe and the Pacific, these crosses mark the individual graves of Christian soldiers. *Id.* at 1113. Jewish soldiers, on the other hand, are honored with Stars of David. *Id.* Meanwhile, American military graves use rectangular tombstones engraved with one of the emblems of belief described above. *Id.*

309. This assumption can be rebutted, as states adopted the confederate flag in reaction to desegregation. For example, Georgia changed its state flag to incorporate the confederate flag in 1956, Georgia Military Forces Reorganization Act of 1955, No. 29, sec. 1, § 90, 1956 Ga. Laws 38, 39, and South Carolina starting flying the confederate flag instead of its state flag on its state capitol dome in 1962, David Firestone, *South Carolina Votes to Remove Confederate Flag from Dome*, N.Y. TIMES (May 19, 2000), <http://www.nytimes.com/2000/05/19/us/south-carolina-votes-to-remove-confederate-flag-from-dome.html>.

310. Again, I do not mean to equate these histories. See *supra* note 276 and accompanying text. Rather, the point is that a state must exercise care when celebrating a history whose practices would today be condemned.

311. See *infra* notes 415–18 and accompanying text (describing some permissible government speech about religion).

accepted as a universal symbol of respect for the dead is akin to expecting that a United Nations delegation accept the American flag as a universal symbol of patriotism. In short, for the government to insist on a Latin cross as a war memorial, especially over the protests of people from many different faiths, not only fails to treat nonbelievers with equal regard but also fails to treat members of all other religious traditions with equal regard.

B. MATERIAL HARM TO EQUALITY

In addition to expressive harm, government religious speech causes material harm. Indeed, it is unrealistic to think that government messages about one group's inferiority or lesser value have no concrete effects.³¹² It may not cause the obvious harms described by Wallace,³¹³ but at the very least, government religious speech reinforces the stereotypes about atheists that drive harmful discrimination in the first place.

1. Perpetuating Discrimination

The expressive harm is not the only harm to equality caused by government religious speech. As far back as *Strauder* the Supreme Court recognized that the state's message of inferiority is not just wrong in itself but has the negative consequence of reinforcing stereotypes that deprive the stigmatized group of equality. There, the Court noted:

The very fact that colored people are singled out and expressly denied by a statute . . . is practically a brand upon them, . . . an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.³¹⁴

When the government speaks, it simultaneously reflects and "helps shape social power and norms by prefiguring preferences, prejudices, and interests."³¹⁵ Instead of refuting stereotypes about nonbelievers, the government's religious speech reaffirms them.³¹⁶ Stereotypes can operate at

312. See Kenneth L. Karst, *The First Amendment, the Politics of Religion and the Symbols of Government*, 27 HARV. C.R.-C.L. L. REV. 503, 511 (1992) (suggesting that government endorsement of religion reinforces dominant and subordinate positions of religious groups); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2024-25 (1996) (describing how legal statements help shape social norms).

313. See *supra* note 253 and accompanying text.

314. *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879), *abrogated by* *Taylor v. Louisiana*, 419 U.S. 522 (1975).

315. William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U. L. REV. 1327, 1333 (2000); see also Danielle Keats Citron, *Law's Expressive Value in Combating Cyber Gender Harassment*, 108 MICH. L. REV. 373, 407 (2009) ("Because law creates and shapes social mores, it has an important cultural impact . . ."); Sunstein, *supra* note 312, at 2026 ("[B]eliefs[] are not a presocial given but a product of a complex set of social forces, possibly including law." (footnotes omitted)).

316. See Thomas Healy, *Stigmatic Harm and Standing*, 92 IOWA L. REV. 417, 451-52 (2007).

both the conscious and unconscious level. If a person in charge of hiring kindergarten teachers believes the stereotype that atheists are immoral, she may consciously decide against hiring a nonbeliever.³¹⁷ Stereotypes also influence people's cognitive processes on an unconscious level.³¹⁸ Thus, social science has found that stereotypes can distort decisionmaking by, for example, leading people to assess,³¹⁹ value,³²⁰ notice, and recall information³²¹ in a way that conforms to pre-existing notions.³²²

As discussed above, atheists are often viewed as immoral and unpatriotic. These stereotypes mean atheists risk discrimination in every facet of life.³²³ An open atheist in the United States likely cannot get elected to political office.³²⁴ Though public opinion polls focus on the Presidency

317. Gervais, *supra* note 13, at 22, 28 (quoting a study that showed that participants rating high belief in God were less likely to hire an atheist for a job requiring a trustworthy candidate, such as daycare workers or kindergarten teachers); *see also supra* notes 98–99 and accompanying text (summarizing public-opinion polls showing that many Americans thought atheists should not be schoolteachers).

318. Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1214 (1995); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997, 1032–33 (2006).

319. Behavior is interpreted differently if performed by a white person rather than a black person or a man rather than a woman. Thus, for example, “[r]ésumés are evaluated more favorably when they carry male rather than female names.” Deborah L. Rhode, *The Subtle Side of Sexism*, 16 COLUM. J. GENDER & L. 613, 618 (2007) (citing Rhea E. Steinpreis et al., *The Impact of Gender on the Review of Curricula Vitae of Job Applicants and Tenure Candidates: A National Empirical Study*, 41 SEX ROLES 509 (1999)).

320. The criteria deemed the most important for a job can shift depending on the gender of the person possessing them. Thus, in one study, education was considered a more important qualification than job experience when the male candidates had stronger educational backgrounds and female candidates had stronger employment histories; in contrast, job experience was considered more important when the reverse was true. Krieger & Fiske, *supra* note 318, at 1037.

321. People are more likely to notice and recall information that confirms their existing stereotypes. Rhode, *supra* note 319, at 624 (“[W]hen employers assume that a working mother is unlikely to be fully committed to her career, they more easily remember the times when she left early than the times when she stayed late. Similarly, attorneys who assume that women of color are beneficiaries of preferential treatment, not merit-based selection, will recall their errors more readily than their merits.”).

322. Krieger & Fiske, *supra* note 318, at 1032–33 (“[S]tereotypes can function as implicit, associative networks that subconsciously predispose the stereotype holder to perceive, characterize, and behave toward a stereotyped target in stereotype-consistent ways.”).

323. Healy, *supra* note 316, at 453–54 (noting that members of stigmatized groups always face the possibility of discrimination in employment, education, housing, and relationships).

324. Steven G. Gey, *Rewriting the Establishment Clause for One Nation Under (a) God*, 41 TULSA L. REV. 737, 757 (2006) (“In most parts of the country, an avowed atheist or agnostic who has the bad judgment to announce that fact will have no chance of winning a political contest.”). As with all rules, however, there may be exceptions. For example, Congressman Fortney Hillman “Pete” Stark, Jr., who had served since 1973 as a Democrat from California, was re-elected in 2008 despite having confirmed in 2007 that he was a Unitarian who did not believe in a supreme being. Carla Marinucci, *Stark’s Atheist Views Break Political Taboo*, SFGATE.COM (Mar.

and other national offices, atheists may find themselves shut out of countless local positions, as people are also elected to school boards, zoning committees, town councils, district attorney's offices, judgeships, and sheriff's departments. Nonbelievers may also find their educational opportunities and employment prospects impeded if they are open about their religious beliefs.³²⁵ The personal lives of atheists are also affected by prejudice, whether in custody battles for their children or relations with the in-laws. Government religious speech that equates religious adherence with morality and patriotism exacerbates these harms by reinforcing negative stereotypes of atheists.³²⁶

The government's religious speech not only perpetuates these stereotypes but also makes it more difficult for nonbelievers to overcome them.³²⁷ Social science has shown that one of the best ways to break down stereotypes is for people to interact with members of the stigmatized group³²⁸: "Stereotypes weaken as people observe nonstereotypical behavior in minorities they come to know, and prejudices weaken as people cooperate with minorities in win-win projects."³²⁹ The government's religious speech, however, makes it more likely that atheists stay in the closet.³³⁰ As a result, instead of stereotype-busting interaction, the stereotypes and discrimination persist.

2. Attributing Discrimination to the State

One might counter that, aside from custody decisions, the harms in government religious speech cases are perpetuated by private individuals, not the State. In *Habecker*, for example, the Tenth Circuit held that the former Town Trustee lacked standing to challenge the town's pledge policy because his injury—being recalled from office—was caused by private

14, 2007), http://articles.sfgate.com/2007-03-14/news/17235967_1_atheist-secular-coalition-political-suicide.

325. See *supra* note 317. People seem especially uncomfortable with atheists in positions of trust. Gey, *supra* note 324.

326. See *infra* Part III.B.3 (describing how government religious speech reinforces stereotypes of atheists as immoral and unpatriotic).

327. See *infra* Part III.B.3.

328. This method is known as the social-contact hypothesis. Gervais, *supra* note 13, at 34. See generally GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* (25th anniv. ed. 1979) (explaining the benefits of increased social contact between groups as a means to assuage the negative effects of discrimination).

329. Eskridge, *supra* note 315, at 1410; see also Gervais, *supra* note 13. In his study, Gervais found that while believers were less likely to hire atheists for positions of trust, merely reading information about the large number of nonbelievers reduced the amount of bias. Gervais, *supra* note 13, at 33–34. The study hypothesized that the excerpt may have forced a sort of retrospective contact with atheists: "We did not actually bring religious participants into cooperative contact with atheists; we simply reminded them that they do this all the time by themselves." *Id.* at 34.

330. See *infra* Part IV.C.

individuals, not the State.³³¹ Although the recall may have been precipitated by the town's pledge policy, the electorate's actions broke the chain of causation.³³²

Yet the state should not automatically be off the constitutional hook just because it was not the immediate direct cause. Establishment Clause claims are often brought pursuant to 42 U.S.C. § 1983,³³³ and the Supreme Court has directed courts to look to tort law in determining state responsibility for constitutional violations in § 1983 actions.³³⁴ Under tort law, a tortfeasor is responsible for an injury if its conduct was the actual and proximate cause of that harm.³³⁵ Both are satisfied in *Habecker*. The State actually caused Habecker's harm because, but for the pledge policy, Habecker's religious views would not have been disclosed and Habecker would not have been recalled.³³⁶ The State's policy was also the proximate cause because the electorate's reaction to Habecker's disclosure was foreseeable,³³⁷ and intervening acts of third parties do not relieve a defendant of liability for its own conduct if the intervening cause itself was foreseeable.³³⁸ So, for example, the state can be liable for an inmate's beating even if other prisoners were the ones who actually administered it, so long as the beating

331. *Habecker v. Town of Estes Park*, 518 F.3d 1217, 1224–25 (10th Cir. 2008).

332. *Id.* at 1224–26.

333. Congress enacted § 1983 to “create[] a right of action in Federal court against local government officials who deprive citizens of their constitutional rights by failing to enforce the law, or by unfair and unequal enforcement.” H.R. REP. NO. 96-548, at 1 (1979), *reprinted in* 1979 U.S.C.C.A.N. 2609, 2609. Recent Establishment Clause cases brought pursuant to § 1983 include: *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844 (2005); *Van Orden v. Perry*, 545 U.S. 677 (2005); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).

334. *See, e.g., Malley v. Briggs*, 475 U.S. 335, 345 n.7 (1986) (“[Section] 1983 ‘should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.’” (quoting *Monroe v. Pape*, 365 U.S. 167, 187 (1961))).

335. Actual harm is generally understood as addressing the empirical question of whether the defendant caused the harm, while proximate cause is understood as addressing “the normative issue of the proper extent of legal responsibility.” *See, e.g., Richard W. Wright, Once More into the Bramble Bush: Duty, Causal Contribution, and the Extent of Legal Responsibility*, 54 VAND. L. REV. 1071, 1073 (2001) (criticizing the Restatement's treatment of legal cause).

336. *Habecker* had served as a town trustee intermittently over a twenty-year period before the pledge policy outed him as a nonbeliever. *Habecker v. Town of Estes Park*, 452 F. Supp. 2d 1113, 1116 (D. Colo. 2006), *aff'd*, 518 F.3d 1217 (10th Cir. 2008).

337. *See Limone v. United States*, 579 F.3d 79, 100 (1st Cir. 2009) (holding that the FBI may be liable under § 1983 for failing to turn over exculpatory evidence even though the state's decision to prosecute and the jury's decision to convict were intervening acts because those intervening acts were foreseeable consequences); *Kerman v. City of New York*, 374 F.3d 93, 127 (2d Cir. 2004) (“The fact that the intervening third party may exercise independent judgment . . . does not . . . relieve the defendant of responsibility.”).

338. *Sanchez v. Pereira-Castillo*, 590 F.3d 31, 51 (1st Cir. 2009); *see also Powers v. Hamilton Cnty. Pub. Defender Comm'n*, 501 F.3d 592, 609 (6th Cir. 2007) (“Even if an intervening third party is the immediate trigger for the plaintiff's injury, the defendant may still be proximately liable [under § 1983], provided that the third party's actions were foreseeable.”).

was a foreseeable consequence of the state's conduct.³³⁹ Consequently, Habecker's unseating should be attributable to the State for Establishment Clause purposes.³⁴⁰

In *Habecker*, the government's pledge policy both outed an atheist and reinforced negative stereotypes about atheists. What if the harm is just the latter? What if an openly atheist candidate running for office wants the state to take down its "don't-vote-for-atheists-because-they-are-immoral" sign on the grounds that it will hurt her chances?³⁴¹ In that scenario, the problem may not be satisfying proximate cause, since it is foreseeable that stereotypes will lead to discrimination,³⁴² but rather satisfying cause in fact. In other words, if the atheist politician loses because of stereotypes, is it possible to measure the extent of the government's contribution to dissemination of those stereotypes? Or, alternatively, given an electorate already hostile to atheists, is the state's contribution to the plaintiff's loss too minimal to be considered an actual cause of the resulting harm?

The easier question to answer is whether one of many contributors to a harm should be considered responsible for it, even if its exact contribution cannot be determined. Again, tort law provides helpful analogies. If a factory is one of ten factories that dumps toxins in a river, should it be considered a cause of the river's polluting? The answer surely is yes,³⁴³ insofar as the plaintiff seeks injunctive relief. While the inability to measure the state's precise contribution may preclude plaintiffs from seeking damages, most Establishment Clause plaintiffs are more concerned with stopping the religious speech.³⁴⁴

339. *Palay v. United States*, 349 F.3d 418 (7th Cir. 2003) (reversing a dismissal in a § 1983 suit for damages from gang violence that was considered a foreseeable consequence of transferring prisoner).

340. *Cf. Abner S. Greene, The Pledge of Allegiance Problem*, 64 *FORDHAM L. REV.* 451, 472 (1995) (arguing that the school's policy of requiring the Pledge should be considered a proximate cause of pressuring students to participate, even if peer pressure is the immediate direct cause).

341. In this hypothetical, I am assuming people did not vote for her because she was an atheist.

342. Since this is so well known, it is obviously foreseeable that advancing these stereotypes would lead to discrimination. Notably, under tort law it is the general type of harm, not the actual injury suffered, that must be foreseeable. *Palay*, 349 F.3d at 434 ("[S]o long as the defendant could have foreseen that his negligence would result in some type of injury, the precise nature or method of injury need not have been foreseeable.").

343. *Cf. Massachusetts v. EPA*, 549 U.S. 497, 523-25 (2007) (stating that to have standing to sue the EPA to regulate vehicle emissions, it was enough for Massachusetts to show that the EPA's failure to regulate contributed to the Commonwealth's global-warming injuries); Frank H. Easterbrook, Foreword, *The Court and the Economic System*, 98 *HARV. L. REV.* 4, 40 (1984) ("Someone who feeds me a poison that increases my chances of dying next year has injured me, even if I am neither dead nor sure to die . . .").

344. Patrick M. Garry, *A Congressional Attempt To Alleviate the Uncertainty of the Court's Establishment Clause Jurisprudence: The Public Expression of Religion Act*, 37 *CUMB. L. REV.* 1, 5 (2006) ("[T]he remedies [in Establishment Clause challenges] are most often injunctions

The more difficult task is assessing whether the government contributed at all or enough to matter. Again, tort law recognizes that for certain toxic torts, it is impossible to definitely pinpoint whose toxin caused the harm.³⁴⁵ In the face of this uncertainty, the inquiry is usually broken down into two questions, one focusing on general harm, the other on specific harm.³⁴⁶ The first question asks whether the defendant's action or product causes the type of harm that the plaintiff suffered.³⁴⁷ There is no doubt that perpetuating stereotypes exacerbates discrimination: countless studies have shown how stereotypes lead to equal protection violations.³⁴⁸ Indeed, our very understanding of discriminatory decisions includes decisions based on inaccurate stereotypes.

The second question asks to what degree the defendant's action or product, if at all, caused this particular plaintiff's harm.³⁴⁹ In tort law, one among many causes must usually still be a "substantial factor" for liability to attach.³⁵⁰ Toxic-tort jurisprudence relies on scientific studies and sophisticated statistics to approximate the degree of responsibility and to apportion the damages accordingly.³⁵¹ No such techniques exist in equal

against the offending governmental practice or an overturning of a particular law or ordinance."); *see also, e.g.*, *Salazar v. Buono*, 130 S. Ct. 1803, (2010) (involving a plaintiff that sought an injunction requiring the state to remove a large Latin cross in the Mojave National Preserve).

345. For example, it is usually not possible to pinpoint whose asbestos caused asbestosis or increased the plaintiff's risk of contracting the condition. Joseph Sanders, Michael D. Green & William C. Powers, Jr., *The Insubstantiality of the "Substantial Factor" Test for Causation*, 73 MO. L. REV. 399, 415–16 (2008). Victims often could not determine with any precision how much any particular defendant's product contributed to their injury. *Id.* at 415. Presented with this irreducible uncertainty, courts found liability when plaintiffs were exposed to defendant's asbestos product, and that exposure increased the risk of plaintiff developing the disease. *Id.* at 415–16.

346. Joseph Sanders, *From Science to Evidence: The Testimony on Causation in the Bendectin Cases*, 46 STAN. L. REV. 1, 14 (1993) ("In mass tort cases, proof of causation comes in two parts: general causation and specific causation."); *see also* *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 714–15 (Tex. 1997) (noting that in toxic-tort cases, plaintiff must show both general causation and specific causation).

347. Sanders, *supra* note 346, at 14 ("General causation asks whether exposure to a substance causes harm to anyone.")

348. *See* Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 955–56 (2006); *see also* Krieger, *supra* note 318, at 1186–1211 (explaining how stereotypes lead to discrimination and citing numerous studies).

349. Sanders, *supra* note 346, at 14 ("Specific causation asks whether exposure to a substance caused a particular plaintiff's injury.")

350. *See, e.g.*, *Ricketts v. City of Columbia*, 36 F.3d 775, 779 (8th Cir. 1994) ("[I]t is enough that the defendant's fault was a 'substantial factor' in producing the plaintiff's injuries, and the defendant's fault need not have been the *sole* proximate cause in order to allow recovery." (quoting *Trudeav v. Wyrick*, 713 F.2d 1360, 1367 (8th Cir. 1983)); *FDIC v. Bierman*, 2 F.3d 1424, 1434 (7th Cir. 1993) (noting that proximate cause "need only be a substantial factor" leading to the injury, not the sole factor).

351. *See, e.g.*, *Sindell v. Abbott Labs.*, 607 P.2d 924, 928–30 (Cal. 1980) (apportioning damages in DES mass tort case based on market share).

protection analyses. Does this mean that the state's unmeasurable contribution to discrimination should be considered too attenuated to be attributable to the state?

While the answer is not clear cut, there are several reasons to resist such a conclusion. First, "substantial cause" is not the only approach when dealing with multiple indeterminate causes.³⁵² Second, "substantial" has been interpreted leniently: "The substantial factor standard is a relatively broad one, requiring only that the contribution of the individual cause be more than negligible or theoretical."³⁵³ According to a standard jury instruction for these cases, "each of several actors or forces acting concurrently to cause an injury is a legal cause of the injury 'regardless of the extent to which each contributes to the injury.'"³⁵⁴ Thus, while the state's contribution might be judged negligible if almost no one saw the anti-atheist sign, the sign's influence need not be quantified in order to hold the state accountable. Finally, as mentioned above, precise measurements may be unnecessary where the plaintiff seeks only injunctive relief. So long as it has been shown that perpetuating stereotypes exacerbates discrimination—and it has—the resulting discrimination should be attributed to the state for injunctive relief. In sum, it is enough that the state is helping to perpetuate and exacerbate stereotypes that clash with the goals of equal protection. The state should not be creating conditions that impede nonbelievers from participating fully in the political and social life of their community and country,³⁵⁵ especially, as Part IV.D argues, without a persuasive government interest for doing so.

3. How Government Religious Speech Perpetuates Stereotypes

This brings us back to an earlier question: How exactly does government religious speech perpetuate negative stereotypes about atheists? As we saw above, one of the most widespread stereotypes about atheists is that they are unpatriotic. Logically, the depth of one's religious beliefs seems unrelated to the depth of one's devotion to the United States. Indeed,

352. In some jurisdictions, once it has been established in toxic-tort suits that the challenged conduct or product could cause the type of injury that plaintiff suffered, the burden of proof shifts to defendants to show that their particular conduct or product was not a cause-in-fact. *In re* "Agent Orange" Prod. Liab. Litig., 597 F. Supp. 740, 832 (E.D.N.Y. 1984) (using burden-shifting to solve the indeterminate-defendant problem), *aff'd*, 818 F.2d 145 (2d Cir. 1987); *Abel v. Eli Lilly & Co.*, 343 N.W.2d 164, 170 (Mich. 1984) (explaining that the burden of proof in DES cases may be shifted to defendants on the element of causation in fact); *Collins v. Eli Lilly Co.*, 342 N.W.2d 37, 52 (Wis. 1984) (same).

353. *Rutherford v. Owens-Illinois, Inc.*, 941 P.2d 1203, 1220 (Cal. 1997).

354. *Id.* (citing standard jury instructions).

355. Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CALIF. L. REV. 673, 708–09 (2002) ("To say that the Establishment Clause prohibits this harm is to say that the Clause aims to stop the state from creating conditions that would impede the equal ability of religious dissenters to realize their political lives.").

one could argue that atheists are more likely to be patriotic as they do not have conflicting obligations.

Nonetheless, the state creates and reaffirms the stereotype by linking patriotism and God in much of its religious speech. Two of the most widespread expressions of American patriotism, our national motto (“In God We Trust”) and our national Pledge of Allegiance (“I pledge allegiance to the flag of the United States of America, and to the republic for which it stands, one nation under God, indivisible, with liberty and justice for all”), invoke God. The motto and the addition of God to the Pledge were both adopted during the Cold War, when the United States was trying to contrast its godly citizens with the atheist comrades of the Soviet Union.³⁵⁶ But the equation works both ways: not only was America superior because its citizens believed in God while the Soviets did not, but also the Soviet Union was our enemy in part because the Soviets did not believe in God.³⁵⁷ The bottom line is that the national Pledge of Allegiance and the national motto embody and perpetuate the equation that Godly equals patriotic citizen and atheist equals enemy of the United States, or at the very least, not a loyal citizen.³⁵⁸

The Latin cross war memorial presents a more difficult example. Although there is no explicit statement about the morality of nonbelievers, the government’s choice of that one symbol and no other to pay homage still conveys, if more subtly, messages about morality. According to the plurality in the recent *Salazar v. Buono* decision, “a Latin cross is not merely a reaffirmation of Christian beliefs.”³⁵⁹ Rather, “[i]t is a symbol often used to honor and respect those whose heroic acts, noble contributions, and patient striving help secure an honored place in history for this Nation and its people.”³⁶⁰ But this is exactly the kind of nexus the government should not be promoting. The state should not equate a Christian symbol with moral traits such as heroism, nobility, striving, and honor. First, the symbol of American bravery and sacrifice should be an American flag, an American

356. Epstein, *supra* note 225, at 2118–23. Before the Cold War, our national motto was “E pluribus unum,” or “Out of many, one.” See *id.* at 2123–24 (quoting H.R. REP. NO. 84-1959, at 1 (1956)).

357. In a 1984 public opinion poll, 36% of Americans said that a very important reason why the Soviet Union is considered our enemy is because its people were atheists. Pub. Agenda Found., Nuclear Arms and National Security Poll (May 1984), available at *iPoll Databank*, *supra* note 98. Respondents were asked to rank on a scale of one to ten the importance of that reason, where ten means “a very important reason” and one means “not at all important.” Thirty-six percent chose ten. *Id.* Another 18% chose between seven and nine. *Id.* So, over half the population thought that a country’s atheism was a reason why it was our enemy.

358. A number of private billboards make plain this link. A West Virginia billboard reads “Anti-God is Anti-American.” *Billboard Wars*, DANGEROUS TALK, <http://www.dangeroustalk.net/billboard-wars.html> (last visited Nov. 1, 2011). A Pennsylvania billboard, referring to the attempts to remove “under God” from the Pledge, depicts a little girl pledging allegiance to the American flag with the tag line “Why Do Atheists Hate America?” *Id.*

359. *Salazar v. Buono*, 130 S. Ct. 1803, 1820 (2010).

360. *Id.*

eagle, or some other secular image, not a symbol whose use automatically excludes a large swath of the U.S. population. Christians may use crosses to commemorate their dead, but no one else does, and atheists certainly do not.³⁶¹

Second, if the cross is imbued with all these positive qualities, inevitably, so too is Christianity. Obviously, the cross had positive connotations before it was used by the government.³⁶² Yet for the government to choose the Latin cross over the many secular alternatives does send a message. At best, it suggests that Christianity and Christians are more associated with these valued traits than everyone else; at worst the message conveyed is that only Christianity and Christians are associated with these virtues. Either way, valorizing one religious group and its symbols diminishes the worth of all those outside that religion. This message is clearly at odds with treating everyone with equal concern. It also reinforces the longstanding stereotype that non-Christians, and especially the irreligious, are less heroic, noble, self-sacrificing, honorable, and indeed, moral, than Christians. Furthermore, this government message does not appear in a social or historical vacuum. It is made by a government that has a long history of denigrating the morality of nonbelievers and in a culture where people equate irreligion with immorality. In short, a national war memorial in the form of a Latin cross ought to violate the equal protection component of the Establishment Clause.³⁶³

In sum, government religious speech does not have solely an expressive dimension but also leads to material harms. Government religious speech—which so often privileges the Judeo-Christian tradition, and always favors belief over unbelief—clashes with the state’s obligation to treat people with equal respect regardless of their religious belief or unbelief. In doing so, the state perpetuates the stereotypes that result in discrimination—discrimination that deprives atheists of equality in politics, employment, education, and custody decisions, and makes them outcasts in their own community and country.

IV. THE LIBERTY COMPONENT OF THE ESTABLISHMENT CLAUSE

The Establishment Clause has a liberty component as well as an equality component: the Establishment Clause bar on the state favoring religion also protects the freedom of conscience of religious minorities, including nonbelievers.³⁶⁴ As with the equality component, the debate with the liberty

361. See *supra* notes 300–08 and accompanying text.

362. Or at least obviously for Christians.

363. Note that the Supreme Court in *Salazar v. Buono* did not actually address whether a Latin cross war memorial violated the Establishment Clause. See *supra* note 300.

364. *Wallace v. Jaffree*, 472 U.S. 38, 52 (1985) (stating that freedom of religion requires “equal respect for the conscience of the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism”).

component is less about the general proposition that the Establishment Clause protects the freedom of conscience of nonbelievers than about when government religious speech actually compromises it.

A. HARM TO CONSCIENCE

Compared to the harm to equality, the harm to liberty is perhaps the more obvious injury of government establishments. If the state establishes the Church of Athena as the official state church, and requires everyone to attend its services and no other, this requirement impinges on the religious freedom of those of a different faith in two complementary ways.³⁶⁵ First, it forces them to worship in a manner that conflicts with their true beliefs. Second, it prevents them from worshipping as their religion teaches them. Thus, for Christians, mandatory and exclusive attendance at the Church of Athena both forces them to worship a false god, Athena, in contravention of the commandment that “[y]ou shall have no other gods before me”³⁶⁶ and denies them the chance to worship God as their conscience dictates.

There is no question that for atheists, the first harm to conscience is at stake. The right to religious liberty includes the right to worship and the right not to worship.³⁶⁷ For anyone who does not belong to the Church of Athena, being forced to participate in a religious practice that is not their own tramples on their religious liberty. Whether it is not their own because they belong to a minority religion and worship another way, or because they are atheists and do not worship at all, mandatory prayers to Athena—or to bring the hypothetical back to the United States, mandatory prayers to God— infringe on their religious conscience.³⁶⁸

Indeed, state establishment of religion may hit with greater force for atheists than for other religious minorities. An agnostic ambivalent about a Supreme Being might not mind praying to God. For those whose belief system does not insist on a single path to God, religious truth, enlightenment, or spirituality, a prayer to God is not necessarily inconsistent with their own beliefs and practices. Perhaps for indifferent atheists too, who

^{365.} See, e.g., Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 313 (1986) (explaining that under the Establishment Clause, “government can neither keep persons from exercising certain religious beliefs nor may it make them exercise any religion”).

^{366.} *Exodus* 20:3 (internal quotation marks omitted).

^{367.} *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 319–20 (1963) (Stewart, J., dissenting) (“What our Constitution indispensably protects is the freedom of each of us, be he Jew or Agnostic, Christian or Atheist, Buddhist or Freethinker, to believe or disbelieve, to worship or not worship, to pray or keep silent, according to his own conscience, uncoerced and unrestrained by government.”).

^{368.} Note for this intrusion on atheist conscience to count as an Establishment Clause violation, the Establishment Clause can still be understood to protect religious freedom of conscience rather than freedom of conscience more broadly since the focus is on conscience with regard to religious beliefs.

do not believe in God but are disinterested in religion, participating in what to them is an empty ritual causes no dissonance. For other atheists, however, and especially those who affirmatively do not believe in God, being forced to pray to a nonexistent God is a serious incursion on their conscience.³⁶⁹

Less certain is whether the harm of being denied the right to practice one's religion affects atheists. Unless atheism counts as a religion, and debate swirls about whether it does,³⁷⁰ atheists have no affirmative religious practices.³⁷¹ Yet there are a couple of reasons why it might make sense for Establishment Clause purposes to consider atheism a religion and denying God a religious practice. To the extent that atheists have any tenets that might manifest in practice, it is that they do not believe in God and to make clear that they do not believe in God. Again, this may not be the case for all nonbelievers: some might just be completely unconcerned about religion one way or another.³⁷² Yet for some, their disbelief in God is central, and proclaiming this view is a crucial component of their belief system. It is the atheist version of testifying or witnessing. In addition, if atheism were not a religion for Establishment Clause purposes, then the state could establish atheism as its official stance on religion.³⁷³ Even if atheism is not a religion, government establishments still impede atheists' religious practice as long as "religious practice" is understood to encompass both religious rituals (like praying) and practices regarding religion (like denying the existence of God). If so, then state actions that prevent atheists from denying God clearly compromise atheists' ability to fulfill their religious practices.

In short, a state establishment that prevents atheists from proclaiming their beliefs infringes their religious freedom of conscience. Likewise, a state establishment that forces atheists to participate in religious worship infringes upon their religious freedom of conscience, just as it infringes upon the

369. An online poll of 8200 atheists found that 79% were made at least uncomfortable by religion invoked in intimate social situations, such as prayers said at family meals, and 82% were made at least uncomfortable by religion invoked at public gatherings, such as when a speaker refers to God or says a prayer. Arcaro, *supra* note 128, at 54-55.

370. See generally Derek H. Davis, Editorial, *Is Atheism a Religion? Recent Judicial Perspectives on the Constitutional Meaning of "Religion,"* 47 J. CHURCH & ST. 707, 708 (2005).

371. Atheists do not pray, attend services, read from a holy book, take sacraments, or otherwise participate in religious rituals.

372. Secular humanists, for example, may be more focused on "express[ing] [their] commitment to improv[ing] human welfare in this world." *What Are Secular Humanist Values?*, COUNCIL FOR SECULAR HUMANISM, <http://www.secularhumanism.org/index.php?section=main&page=values> (last visited Nov. 1, 2011).

373. See, e.g., Kent Greenawalt, *Diverse Perspectives and the Religion Clauses: An Examination of Justifications and Qualifying Beliefs*, 74 NOTRE DAME L. REV. 1433, 1459-61 (1999) (observing that the state can establish atheism if it is not considered a religion); Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1002 (1990) ("Th[e] constitutional conception of religious belief as any belief about religion explains why atheists are protected from persecution, and why the government cannot establish atheism." (footnote omitted)).

religious conscience of all those who belong to other religions that do not subscribe to the mandated practices. This claim is rarely disputed. What is disputed is whether the state actions that are challenged under the Establishment Clause in fact coerce in this way.

B. *HARM FROM COERCIVE GOVERNMENT RELIGIOUS SPEECH*

A major rebuttal to the claim that state religious speech violates the religious liberty of atheists is that when the state speaks, it does not act coercively. In the Church of Athena hypothetical, the state required attendance at the official state religious service and banned attendance at all others. However, in twenty-first-century America, the state will generally neither mandate nor forbid attendance at any religious services.³⁷⁴ No one is required by law to participate in prayers before legislative sessions or to recite the Pledge of Allegiance.³⁷⁵ In fact, statutes implementing recitation of the Pledge in school must include an opt-out provision for students who do not wish to join in.³⁷⁶

The persuasiveness of this critique turns on the type of coercion the Establishment Clause is deemed to prohibit.³⁷⁷ No one will quibble that the state cannot force participation in a state-sponsored religious exercise by penalty of fine or imprisonment.³⁷⁸ But that is not the only way the state can wield its power. Current Establishment Clause jurisprudence recognizes that social pressure can be a potent force as well. At least in the public-school context, courts have recognized that peer pressure in school and additional social pressure during school events may exert as much coercive influence on students as the threat of direct state punishment.³⁷⁹ For this reason,

374. *But cf., e.g.,* Inouye v. Kemna, 504 F.3d 705, 713 (9th Cir. 2007) (noting that a parole officer had recommended revoking parole because he refused to participate in Alcoholics Anonymous—a program rooted in religious faith).

375. *But cf., e.g.,* Debra Cassens Weiss, *Miss. Judge Sends Lawyer to Jail for Refusing To Recite the Pledge*, A.B.A. J. (Oct. 7, 2010), http://www.abajournal.com/news/article/miss._judge_sends_lawyer_to_jail_for_refusing_to_recite_the_pledge/ (noting that after the attorney silently stood during the Pledge but refused to recite the words, the judge held him in contempt of court and sent him to jail). The judge was later reprimanded for misusing the powers of contempt. *Miss. Comm'n on Judicial Performance v. Littlejohn*, 2010-JP-01954-SCT (¶¶4–10, 20) (Miss. 2010).

376. The opt-out provision became constitutionally required after Jehovah's Witnesses successfully claimed that mandatory recitation of the Pledge in school violated their freedom of conscience. *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). At the time of the challenge, “under God” had not yet been added.

377. *Compare* *Lee v. Weisman*, 505 U.S. 577, 593 (1992) (defining coercion more broadly to include peer pressure), *with id.* at 642 (Scalia, J., dissenting) (“I see no warrant for expanding the concept of coercion beyond acts backed by threat of penalty . . .”).

378. *See, e.g., id.* at 642 (Scalia, J., dissenting) (agreeing that the Establishment Clause bars coercion by threat of penalty).

379. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 312 (2000) (“[T]he delivery of a pregame prayer has the improper effect of coercing those present to participate in an act of religious worship.”); *Lee*, 505 U.S. at 593 (“[A] high school graduation ceremony places public

arguments that school recitation of the Pledge is constitutional usually depend on claims about the secular nature of the Pledge rather than the lack of coercion.³⁸⁰ However, the Supreme Court has not recognized that peer and social pressure may change a nominally voluntary religious exercise into coerced participation for adults as well, presumably on the theory that adults' greater maturity allows them to better withstand that type of pressure.³⁸¹

While adults may have greater psychological wherewithal to withstand peer pressure, some social science calls into question that proposition. For example, studies like the famous Asch conformity experiments suggest that adults too may be highly susceptible.³⁸² However, even if it were true that adults were impervious, adults face other pressures that children do not. Atheist children may fear losing the good opinion of their teachers or friends.³⁸³ Atheist adults, on the other hand, may worry about sacrificing their ability to raise their children, earn a living or participate in civic affairs: atheist parents may be scared of losing a custody battle for their children;³⁸⁴ atheist employees may be afraid of losing their jobs, while atheist business owners may worry about losing customers;³⁸⁵ and atheist politicians may worry about election, re-election, or, as we saw above, recall.³⁸⁶ To argue

pressure, as well as peer pressure, on attending students This pressure, though subtle and indirect, can be as real as any overt compulsion.”).

380. *E.g.*, *Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007 (9th Cir. 2010) (holding that the Pledge was a patriotic rather than religious exercise).

381. *Marsh v. Chambers*, 463 U.S. 783, 792 (1983) (noting that as an adult, Marsh was “presumably not readily susceptible to ‘religious indoctrination’ or peer pressure” (citations omitted)); *cf.* *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 291 n.69 (1963) (Brennan, J., concurring) (“It is also apparent that . . . social influence within the school environment varies inversely with the age, grade level, and consequent degree of sophistication of the child.”).

382. In Asch’s classic experiment on conformity, subjects were shown three lines and asked which best matched a fourth line. When asked with no one present, 99% answered correctly. When asked after several people gave the wrong answer, 70% of the subjects went along with the group at least once and also gave the wrong answer. SOLOMON E. ASCH, *SOCIAL PSYCHOLOGY* 450–59 (1952); *see* Solomon E. Asch, *Studies of Independence and Conformity*, 70 *PSYCHOL. MONOGRAPHS: GEN. & APPLIED* 1, 1, 9–24 (1956); *see also* LEE ROSS & RICHARD E. NISBETT, *THE PERSON AND THE SITUATION* 33 (1991) (“[S]tudies [have] demonstrated again and again that arbitrarily constructed groups, even ones that hold no long-term power to reward conformity or punish dissent, can exert potent conformity pressures.”).

383. *Sherman v. Cmty. Consol. Sch. Dist. 21 of Wheeling Twp.*, 714 F. Supp. 932, 937 (N.D. Ill. 1989) (finding that a first-grader with freethinking background may have felt compelled to recite the Pledge because of “fears of embarrassment [and] potential loss of . . . friends” (internal quotation marks omitted)).

384. *See supra* notes 88–97 and accompanying text (discussing how courts use religion as a factor in deciding custody disputes).

385. *See supra* Part II.A–B (discussing discrimination against atheists).

386. *See supra* notes 138–42 and accompanying text (discussing public opinion polls regarding unwillingness to vote for an atheist); *supra* Part II.B.1 (discussing recall of a Town Trustee who could not in good conscience recite the Pledge with “under God”); *see also* *Marsh*,

politicians feel no pressure to conform when faced with the choice between following their conscience or exposing themselves as an atheist is to deny the reality of being atheist in America.³⁸⁷ Nor does it suffice to respond that politicians should be accountable to the electorate. Of course, politicians should be accountable to the people who vote for them, and should lose their seats if they disappoint their constituents—but surely not for irrelevant personal characteristics. While morality may be a relevant characteristic, lack of belief in God is not correlated with it.³⁸⁸ In sum, given that the loss of children, work, or political power may do more damage to someone's life than a fine, it is unconvincing to argue that a state custom of praying or pledging to God exerts no coercive pressure on adult atheists to violate their conscience.

C. HARM FROM PASSIVE GOVERNMENT DISPLAYS

Still, even with a broad definition of coercion, it is not immediately obvious how what have been termed “passive displays” of religiosity violate anyone's freedom of conscience.³⁸⁹ A state-erected cross seems to force no one, even indirectly, through the threat of social ostracism or the risk of personal, financial, or political ruin, to participate in any kind of religious exercise for the simple reason that there is no religious exercise. Granted, it is somewhat odd to describe a display as “passive,” as not many displays are “active.” Compared to religious exercises, however, these religious displays are “passive.” Consequently, displays like the Latin cross or a crèche, or government statements like “In God We Trust” on our money, raise the question as to whether they even trigger the liberty component of the Establishment Clause.

One response is that even these “passive displays” exert some coercive influence on viewers. The Supreme Court suggested as much when, after stating that coercion is not a necessary element for an Establishment Clause violation,³⁹⁰ it went on to observe, “When the power, prestige and financial

463 U.S. at 808 (Brennan, J., dissenting) (“Legislative prayer . . . intrudes on the right to conscience by forcing some legislators either to participate in a ‘prayer opportunity’ with which they are in basic disagreement, or to make their disagreement a matter of public comment by declining to participate.” (internal citation omitted)).

387. Or at least, it is to deny the reality of being atheist in most parts of America. There may be a few regions where admitting a lack of belief in God is not political suicide. Likewise, perhaps in certain fields atheism may not equate with career or business suicide.

388. See *supra* notes 122–26 (discussing social science regarding the morality of nonbelievers).

389. See *Cnty. of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 662 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part) (“[T]he risk of infringement of religious liberty by passive or symbolic accommodation is minimal.”); Douglas Laycock, *Religious Liberty in America*, HUM. RTS., Summer 2006, at 3, 6 (“[I]t is hard to find coercion in a passive display.”).

390. *Engel v. Vitale*, 370 U.S. 421, 430 (1962).

support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.”³⁹¹ Whether this is empirically true has not been definitively proven. One might argue that this assumption gives too much credit to the government’s ability to influence. On the other hand, studies of government advertising campaigns suggest that government speech can influence behavior.³⁹² Plus, it is hardly unreasonable to believe that government religious speech, if only by virtue of its sheer ubiquity,³⁹³ will exert some kind of influence on people’s thinking about religion.

Notably, this influence can take place at different stages of people’s religious development. So far, this Article has focused on how government religious speech might affect those who have already arrived at their atheism. However, government religious speech also operates on those whose religious convictions might be unformed or in flux.³⁹⁴ This fact raises the issue of whether the government should be putting its imprimatur on certain beliefs as opposed to others. A state whose activities and mottos are religiously inflected may influence people into one channel of belief rather than another. Under the Establishment Clause, however, the government should refrain from influencing people’s religious development.³⁹⁵ In this case, the government religious speech might more accurately be described

391. *Id.* at 431.

392. *See, e.g.*, PUBLIC COMMUNICATION CAMPAIGNS 277 (RONALD E. RICE & CHARLES K. ATKIN eds., 3d ed. 2001) (arguing that there is suggestive evidence that the Smoky the Bear campaign has reduced forest fires); D. Hammond et al., *Effectiveness of Cigarette Warning Labels in Informing Smokers About the Risk of Smoking: Findings from the International Tobacco Control (ITC) Four Country Survey*, 15 TOBACCO CONTROL iii19, iii19 (2006) (noting that recent research “indicates that graphic warning labels on cigarette packages can increase cessation behaviour among smokers”); Jennifer K. Ibrahim & Stanton A. Glantz, *The Rise and Fall of Tobacco Control Media Campaigns, 1967–2006*, 97 AM. J. PUB. HEALTH 1383, 1394 (2007) (“[T]here is strong empirical evidence that . . . media campaigns can substantially contribute to a reduction in smoking rates.”).

393. For example, “In God We Trust” appears on the U.S. currency, and the Pledge is recited daily in most public schools.

394. The Supreme Court’s greater concern about proselytizing to schoolchildren is presumably based on the idea that children’s religious beliefs may be less defined and that children are more vulnerable to proselytizing. *Tilton v. Richardson*, 403 U.S. 672, 685–86 (1971) (noting that college students were “less impressionable and less susceptible to religious indoctrination” than those in primary or secondary school).

395. *See* Carl H. Esbeck, *A Constitutional Case for Governmental Cooperation with Faith-Based Social Service Providers*, 46 EMORY L.J. 1, 26 (1997) (noting that an “integrating principle” of the religion clauses is to “neutraliz[e] the impact of governmental action on personal religious choices”); Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43, 43–44 (1997) (arguing that an underlying purpose of religious liberty is to minimize government influence on religious choices).

as influential rather than coercive, but under the Establishment Clause it ought not rise to even that level.³⁹⁶

There is yet another way that so-called passive displays and speech negatively impact the freedom of conscience of nonbelievers. By reinforcing the negative stereotypes about atheists,³⁹⁷ government religious speech helps create a climate in which atheists do not feel comfortable following the dictates of their conscience. As a result, they choose to stay in the closet and pass as believers. The personal costs of pretending to be something you are not should not be underestimated. Kenji Yoshino has detailed some of the harms of passing, which include isolation,³⁹⁸ exhaustion,³⁹⁹ and the fact that “the individual who passes always simultaneously takes on the identity of a liar.”⁴⁰⁰ Atheists report feeling dishonest about hiding their beliefs and the hope of living authentically is a major impetus for disclosing their atheism.⁴⁰¹

Government religious speech that reinforces stereotypes that atheists are immoral and unpatriotic contributes to the public’s negative, if not hostile, views about atheists. It is this distrust and hostility that makes atheists think twice about disclosing their beliefs. One need only listen to the participants at the first African Americans for Humanism Conference or read the Dear Richard letters seeking advice about “coming out as an atheist” to realize how the atmosphere in this country makes it exceedingly difficult for nonbelievers to live an honest true-to-their-conscience life. While violence may be rare, it is not unheard of.⁴⁰² At the very least, who

396. See *supra* note 395 (citing scholars that view the Establishment Clause as barring the State from influencing people’s religious beliefs).

397. See *supra* Part III.B.3 (describing how government religious speech reinforces stereotypes of atheists as immoral and unpatriotic).

398. Hiding one’s true self means sacrificing potential support from those who share the same stigmatized trait. Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of “Don’t Ask, Don’t Tell,”* 108 YALE L.J. 485, 527–28 (1998).

399. *Id.* at 528 (summarizing studies of lesbians, gay men, and bisexuals that describe how passing requires “constantly decid[ing] whether to tell, whom to tell, and when to tell,” and “constantly monitor[ing] emotional responses in order not to reveal . . . true feelings” (alteration in original) (quoting Joanne DiPlacido, *Minority Stress Among Lesbians, Gay Men, and Bisexuals*, in STIGMA AND SEXUAL ORIENTATION, 138, 148–49 (Gregory M. Harek ed., 1998)) (internal quotation marks omitted)).

400. *Id.*

401. Alidoosti, *supra* note 25, at 44 (explaining that one of the main reasons study participants disclosed their atheism to family members was because they wished to be “truthful about who they were, both for their own peace of mind, as well as being sincere with those they loved and cared about the most”).

402. As one atheist remarked, “One of the things that rules your life when you’re an atheist is fear. You never know when you’re going to be attacked.” Richard Cimino & Christopher Smith, *Secular Humanism and Atheism Beyond Progressive Secularism*, 68 SOC. RELIGION 407, 421 (2007) (quoting Paul, a “fifty-six-year-old businessman in Washington, D.C. [sic] area during the Goddess March on Washington”) (internal quotation marks omitted); see *supra* notes 151–52 and accompanying text (describing violence against atheists).

wants to publicly reveal themselves as a member of a disliked, distrusted minority and open themselves up to ostracism and discrimination? It is not surprising, then, that so many people choose to stay in the closet, despite the high costs to their conscience.

D. BALANCING GOVERNMENT INTERESTS AND HARMS TO NONBELIEVERS

As discussed, discrimination is one of the harms of government religious speech under the equality component of the Establishment Clause. Under its liberty component, however, discrimination is not the ultimate harm, but rather a cause of the harm of staying in the closet—raising the question of whether the link between government religious speech and this harm to conscience is too attenuated to amount to a violation of the Establishment Clause.⁴⁰³ Nevertheless, if the state interest in government religious speech is weak, especially compared to Establishment Clause interests in government not speaking in this way, then perhaps the Establishment Clause should reach this state speech. So what is the government interest at stake in government religious speech? In Free Exercise Clause cases, there is often a genuine clash between the government's regulatory interest in the health and safety of the nation and the individual's interest in his or her religious practice. Consequently, Free Exercise cases have addressed whether child-welfare laws should trump the religious command to proselytize⁴⁰⁴ and whether drug laws should trump a religious sacrament involving peyote.⁴⁰⁵ It is less clear, however, what state interest is advanced by government religious speech when having a war memorial in the form of a cross or a national motto that invokes God does not safeguard either health or safety.

Both secular and religious justifications have been offered for government religious speech. The secular reasons are many. For example, our national motto is meant to unify us as a people,⁴⁰⁶ while our pledge is meant to unify us and inculcate love of country.⁴⁰⁷ The Latin cross war

403. In fact, claims involving government religious speech that might rely on these arguments have been rejected for lack of standing. But it is not so much that there is no harm, for clearly feeling pressure to act against one's conscience is a harm. Rather, the question is whether the harm ought to be attributed to the state given the intervening factors.

404. *Prince v. Massachusetts*, 321 U.S. 158 (1944) (holding that a Jehovah's Witness child may not sell religious magazines in contravention of state child labor laws).

405. *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990) (holding that the Free Exercise Clause does not require an exemption from neutral and generally applicable drug laws).

406. *ACLU of Ohio v. Capitol Square Review & Advisory Bd.*, 243 F.3d 289, 307 (6th Cir. 2001) (noting that "the national motto, and the national anthem, and the pledge of allegiance . . . [are] symbol[s] of a common identity" and that "[s]uch symbols unquestionably serve an important secular purpose—reenforcing the citizen's sense of membership in an identifiable state or nation").

407. *See Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 6 (2004).

memorial is meant to commemorate and honor the sacrifice of World War I veterans.⁴⁰⁸ All of these are legitimate and important goals.

Yet these ends can be achieved by wholly secular means. Indeed, a purely secular approach would more successfully accomplish these goals. A national motto that did not exclude millions on its face—such as our pre-Cold War motto “E pluribus unum,” translated “Out of Many, One”—is likely to be more unifying than one that does.⁴⁰⁹ Restoring the Pledge to its pre-Cold War formulation (i.e., without “under God”) would not only be more unifying for the same reason but would more successfully epitomize “liberty and justice for all.”⁴¹⁰ Similarly, erecting a more inclusive symbol would better show respect for all war veterans, Christian believers, non-Christian believers, and nonbelievers alike, who gave up their lives for the American ideals of liberty and equality for everyone. One of the nation’s most moving and visited memorials is the Vietnam War Memorial—a black granite wall engraved with the names of over 58,000 Americans killed in that war.⁴¹¹ Given this, the secular justifications for government religious speech are weak at best.

Courts and commentators have also suggested a religious reason for government religious speech. Such speech is necessary, the argument goes, because the lack of government religious speech shows hostility toward religion,⁴¹² which is directly counter to the goals of the religion clauses.⁴¹³ A typical argument is that, while atheists and other religious minorities might

408. *Salazar v. Buono*, 130 S. Ct. 1803, 1811 (2010). Along these lines, crèches are meant to celebrate the holiday season, *Lynch v. Donnelly*, 465 U.S. 668, 681 (1984), and the Ten Commandments are meant to recognize our history, *Van Orden v. Perry*, 545 U.S. 677, 686–88 (2005).

409. See Epstein, *supra* note 226, at 2122–24 (discussing the motto change from “E pluribus unum” to “In God We Trust”).

410. See *id.* at 2118–22 (discussing the addition of “under God” to the Pledge of Allegiance).

411. *FAQS, VIET. VETERANS MEMORIAL FUND*, <http://www.vvmf.org/141.cfm> (last visited Nov. 1, 2011). The World War II Memorial in Washington, D.C. is comprised of 56 columns in two half circles with arches at either end. *World War II Memorial*, NPS.GOV, <http://www.nps.gov/nwwm/historyculture/index.htm> (last visited Sept. 22, 2011). The Korean War Veterans Memorial in Washington, D.C. consists of nineteen stainless steel statues representing ground troops on patrol. *Korean War Veterans Memorial*, NPS.GOV, <http://www.nps.gov/kowa/index.htm> (last visited Nov. 1, 2011). Countless other memorials have used flames, fountains, flags, eagles, architectural elements, or other nonreligious elements.

412. See, e.g., *Cnty. of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 657 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part) (arguing that barring all government religious speech “would border on latent hostility toward religion”); Wallace, *supra* note 253, at 1200 (arguing that requiring government silence regarding religious matters “would marginalize or trivialize religious views by making them seem irrelevant, outdated, or even strange”).

413. See, e.g., Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 120 (1992) (describing that the court interpreted the religion clauses to protect individual religious life and to foster a regime of religious pluralism).

be offended by state acknowledgement of God, those belonging to the religious mainstream can be offended by the State's eradication of religion from the public square.⁴¹⁴

The first response is that interpreting the Establishment Clause to bar government religious speech does not eliminate religion from the public square. To start, the Establishment Clause does not require the government to be completely silent on the topic of religion.⁴¹⁵ For example, as long as religion is taught as part of a secular curriculum, public schools may teach about religious traditions in a comparative religion class, study the language of the Bible in literature class, and discuss the importance of religious movements in a social studies class.⁴¹⁶ In addition, the Establishment Clause does not constrain private religious speech.⁴¹⁷ On the contrary, Free Speech Clause protection for private religious speech has been ratcheted up ever since the Supreme Court interpreted restrictions on religious speech as a viewpoint rather than a subject-matter limit.⁴¹⁸ As a result, any attempt to regulate private religious speech in any forum—traditional, designated, limited, or nonpublic—will be subject to strict scrutiny.⁴¹⁹ Consequently, the First Amendment encourages robust private religious speech in the public square, and there is no danger of it vanishing.

414. Choper, *supra* note 254, at 529 (“[F]inding an Establishment Clause violation on feelings of alienation or offense alone usually makes a decision to protect the distressed sensibilities of the religious minority (or nonbelievers) and to ignore those of the religious majority . . .”); Richard M. Esenberg, *Must God Be Dead or Irrelevant: Drawing a Circle That Lets Me In*, 18 WM. & MARY BILL. RTS. J. 1, 8 (2009) (stating that the government’s attempt to remain religiously neutral in its public speech results in a “public secularity that makes religious dissenters just as uncomfortable as public religiosity would make nonadherents.”).

415. A recent study has shown that many Americans misunderstand exactly what is forbidden by the Establishment Clause. Just over a third (36%) understood that comparative religion classes may be taught in public school, while even fewer (23%) understood that public school teachers could read from the Bible as an example of literature. PEW FORUM ON RELIGION & PUB. LIFE, U.S. RELIGIOUS KNOWLEDGE SURVEY 9 (2010), *available at* http://pewforum.org/uploadedFiles/Topics/Belief_and_Practices/religious-knowledge-full-report.pdf.

416. *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 225 (1963) (“Nothing we have said here indicates that [the] study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment.”).

417. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000) (“[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.” (quoting *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 250 (1990) (internal quotation marks omitted))).

418. *See, e.g., Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981).

419. Under forum-analysis doctrine, viewpoint restrictions are always subject to strict scrutiny. *See, e.g., Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1132 (2009). Subject-matter limits, however, need only be rational in nonpublic forums. *See, e.g., Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 54 (1983).

The second response is that this critique misunderstands the nature of the harms. The harm to atheists and other religious minorities is not offense, but loss of equality and liberty. These are real harms that cannot be summarily dismissed. Since these are significant concerns under the Establishment Clause, it is only fair to query whether eliminating government religious speech intrudes on the equality or liberty of religious believers.

As a preliminary matter, the answer may depend on whether the focus is on believers within the Judeo-Christian, or really Christian, tradition or believers outside of it. Removing God from the Pledge of Allegiance or removing Ten Commandment monuments from state grounds is probably not an issue for Buddhists and Wiccan believers in the way it may be for Christian believers.⁴²⁰ Accordingly, the complaint about hostility toward religion is really about hostility toward Christianity.

As discussed above, government religious speech undermines the equality of nonbelievers by failing to show them equal regard and by facilitating discrimination against them. Does the absence of government religious speech work the same kind of equality harms to Christians? As far as perpetuating stereotypes go, the answer is no. Studies do not show that Christians are stereotyped as less patriotic or moral or less able, motivated, or reliable; on the contrary, assumptions made about believers are generally positive.⁴²¹ Furthermore, the absence of speech does not perpetuate any stereotypes about them. In short, that particular harm to equality is not present for Christians.

Perhaps then, the failure to speak religiously, especially in the face of opposition to that silence, fails to show equal regard in the same way as mounting a religious display in the face of opposition fails to show equal regard for nonbelievers. Or maybe it is the removal of existing religious speech or symbols that shows hostility toward religion: whatever might be said about a decision not to erect a new Ten Commandments monument, dismantling a long-established one requires the government to actively eliminate religion. For many Americans, such concrete actions against religion amount to affirmative hostility.⁴²² Some have argued that with regard to government religious speech, the government is in a no-win position: if the state speaks religiously, it will be seen as favoring believers,

420. I do not mean to imply that all Christians feel the same way about government religious speech. Rather, it is mostly Christians, not members of minority religions, who complain about how eliminating government religious speech would demonstrate government hostility toward religion.

421. See *supra* note 119 and accompanying text.

422. See, e.g., *Salazar v. Buono*, 130 S. Ct. 1803, 1823 (2010) (Alito, J., concurring) (“The demolition of this venerable if unsophisticated, [Latin cross war] monument would also have been interpreted by some as an arresting symbol of a Government that is not neutral but hostile on matters of religion and is bent on eliminating from all public places and symbols any trace of our country’s religious heritage.”).

and if it fails to speak religiously, it will be seen as favoring nonbelievers, if not establishing atheism.⁴²³

Notably, for the argument that government silence on religion reflects hostility toward religion to have any traction, one would have to accept an expressivist approach, as there are no material consequences to believers from removing “under God” from the Pledge or replacing the Latin cross with a bald eagle as a war memorial. Accepting this, the answer is once again, no.

To start, government religious speech and government silence on religion are not equivalent. Adopting the symbols and language of one faith comes much closer to endorsement than silence comes to endorsing lack of faith. Endorsement of atheism would be changing the Pledge of Allegiance from “one nation under God” to “one nation without God.” The affirmative denial of God evinces hostility toward religion (or at least religions that center on God). Silence does not. Indeed, for decades the Pledge did not mention God. Few would argue, however, that the Pledge was hostile to religion before its amendment. Silence is simply far more ambiguous than affirmative statements. As the Supreme Court has noted: “A secular state, it must be remembered, is not the same as an atheistic or antireligious state. A secular state establishes neither atheism nor religion as its official creed.”⁴²⁴

The antireligion argument also assumes a baseline of no rules about religion. However, that is not the baseline in the United States. In this country, the constitutionally mandated baseline is no establishment. And it is no establishment in order to encourage all religions, many of which do not center on God. In other words, failure to mention God one way or another is how the state displays an equal regard for all belief systems.⁴²⁵ The motivation is not animosity toward belief or preference for nonbelief; rather

423. Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the “No Endorsement” Test*, 86 MICH. L. REV. 266, 310–11 (1987) (stating that if the state speaks religiously, “persons who do not adhere to the predominant religion may feel like ‘outsiders,’” and if it does not, “some religious people will feel that their most central values and concerns . . . have been excluded from a public culture devoted purely to secular concerns”). An alternative approach might be to speak favorably of both; for example, perhaps the Pledge of Allegiance could include “without God” and the national motto could include “God,” but that seems like a much less effective way of withholding judgment or favor than simply not endorsing any belief system. Besides the oddness, it still reflects a worldview that assumes only two positions on religion: belief in God, or disbelief in God. It ignores all the believers whose faith does not center on God.

424. *Cnty. of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 610 (1989).

425. Rex J. Ahdar, *A Christian State?*, 13 J.L. & RELIGION 453, 458 (1999) (observing James Wood’s view that “the concept of a secular state was not born out of a hostility toward religion (for the secular state is neither hostile nor friendly but is simply uncommitted in matters religious) but rather out of a respect for freedom of conscience and a recognition of the incompetence of the state in purely spiritual matters”).

it is an attempt to treat all religious belief systems equally.⁴²⁶ Indeed, driving the Establishment Clause's prohibitions is the idea that they provide the best way for all religions to flourish, including the dominant one.⁴²⁷ Nor is there a more effective alternative. Thus, the claim that government's removal of God or a cross is hostile to religion conflates Christianity with religion and ignores the existence of all other believers.⁴²⁸

Finally, while removing the symbols of Christianity may work a change in Christians' status,⁴²⁹ it is not a change from equal citizen to second-class citizen. Rather, it is a change from privileged citizen to equal citizen. Today, Christians and Christianity are favored and endorsed by the state.⁴³⁰

426. *Cnty. of Allegheny*, 492 U.S. at 612–13 (“[T]he Court’s decision today, [requiring removal of a nativity scene], does not represent a hostility or indifference to religion but, instead, the respect for religious diversity that the Constitution requires.”).

427. The Establishment Clause prohibitions are, after all, also meant to protect the favored religion from corruption and degradation. Some Christians, for example, believe that allowing government to speak religiously actually undermines Christianity. See, e.g., Kathleen A. Brady, *Fostering Harmony Among the Justices: How Contemporary Debates in Theology Can Help To Reconcile the Divisions on the Court Regarding Religious Expression by the State*, 75 NOTRE DAME L. REV. 433, 553 (1999) (“[R]eligious expression by the government may distort and demean the sacred meaning that religious language and symbols carry for many individuals.”); see also Thomas C. Berg, *The Pledge of Allegiance and the Limited State*, 8 TEX. REV. L. & POL. 41, 71 (2003) (“[S]ilence about God is . . . the way in which the state in America acknowledges its limits. If the state makes any explicit religious affirmation, it ends up defining and limiting the transcendent reality rather than deferring to it. Therefore, the only way for the state to acknowledge its limits is by remaining silent . . .”).

428. Those whose faith permeates their life, so that its absence in any facet is contrary to their religious worldview, might protest that removing government religious speech is hostile to their religious beliefs. For those whose belief system requires government religious speech, its cessation conflicts with their beliefs. However, that is not the same thing as concluding that the social meaning of ending government religious belief is hostility toward religion. Just as the social meaning of government practices that happen to coincide with religious beliefs such as laws against murder (thou shall not kill) or perjury (thou shall not bear false witness) is not endorsement of religion, the social meaning of government practices that happen to clash with particular religious beliefs is not hostility toward religion. This is especially true when the practice is motivated by an attempt to show equal respect for all beliefs, and there is no better way to achieve that goal. The impossibility of guaranteeing equal treatment of all religions given the case of the religion that demands state endorsement is parallel to the impossibility of tolerating all beliefs in a liberal state, given that some beliefs demand intolerance.

429. There is no denying that some Christians genuinely feel under attack. The substitution of “happy holidays” for “merry Christmas” by private retailers has been described as evidence of a “War on Christmas.” The American Family Association urges its members to boycott stores who attempt to be nonsectarian during the holiday season. Natalie Zmuda, *In “The War on Christmas,” Christmas is Winning*, MSNBC.COM (Nov. 22, 2010), http://www.msnbc.msn.com/id/40260889/ns/business-holiday_retail/t/war-christmas-christmas-winning/#.TIW52oLWTfB (reporting that, according to the American Family Association, the percentage of retailers whose advertisements include Christmas has increased from 20% to 80% in the past five years).

430. See Corbin, *supra* note 295, at 1578–79 (“Applying Catharine MacKinnon’s observations to Christian privilege, it becomes evident that their Sabbath defines the workweek, their sacred days define state and national holidays, their morality defines the family and

Removing these symbols would mean that they, like everyone else, would receive no special state endorsement of their particular beliefs. Nonetheless, even assuming that there was a draw with respect to the expressivist analysis, the overall effect on equality—where one choice would result in discrimination against nonbelievers while the alternate would have no such effect on Christian believers—clearly differs.

What about the liberty component: Does cleansing religion from government speech hurt the liberty of believers? Government religious speech impedes the liberty of nonbelievers by coercing them into participating in religious practices or at least influencing them to conform to mainstream religious beliefs. In addition, the perpetuation of stereotypes may also make nonbelievers less likely to obey their conscience and openly acknowledge their nonbelief. Here too, the harms of government religious speech to nonbelievers' liberty far outweigh any harm to (some) believers when the government declines to speak religiously. Reciting a pledge without mentioning God will not violate anyone's religious conscience in the same way reciting a pledge with "under God" does.⁴³¹ Nor will the government's silence about God make those who believe in a Supreme Being feel uncomfortable about, never mind afraid of, attending church or praying or otherwise observing their beliefs. They simply are not subjected to the kind of discrimination and hostility that nonbelievers face.

The main threat to the religious liberty of believers is the possibility that the government's silence on religion may influence those whose belief systems are undecided to choose a path without religion.⁴³² While the government may not endorse religion, however, plenty of private individuals do, so that in the marketplace of religious ideas, believers far, far outnumber nonbelievers. In any case, government silence on religion is not comparable to government religious speech. Government religious speech in the United States, which invariably draws on the Judeo-Christian tradition, definitely does take a position on religion. Government silence on religion, on the other hand, although it may be construed as government endorsement of nonreligion, is better understood as a government attempt to refrain from

determines when life begins, belief in their God characterizes patriotism, and invocation of their God solemnizes, dignifies, and authenticates." (footnotes omitted)).

431. In other words, while pledges in general may violate some people's religious beliefs, see, e.g., *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943), a pledge is not likely to violate a person's belief because it does not include God. To argue otherwise would mean that the pledge recited by millions through two world wars violated people's religious beliefs for lacking any mention of God. Cf. Steven G. Gey, "Under God," *the Pledge of Allegiance, and Other Constitutional Trivia*, 81 N.C. L. REV. 1865, 1907 (2003).

432. Esenberg, *supra* note 414, at 39 ("[O]stensibly secular messages . . . interfere with religious formation.").

favoring some religious beliefs over others.⁴³³ In short, asserting that the harms are the same for believers and nonbelievers whichever choice the government makes is simply false. Indeed, the fact that religious believers do not risk the kind of hostility and discrimination that nonbelievers do belies any claim that they are.

V. CONCLUSION

One of the main goals of the Establishment Clause is to ensure that the state does not compromise the equality or liberty of anyone based on their religious beliefs. The Establishment Clause bars the state from favoring religion not only to prevent the state from treating religious minorities as less than equal citizens but also to prevent the state from intruding on their religious freedom of conscience. Yet government religious speech, which usually takes the form of some kind of affirmation of God, has just such an effect on nonbelievers. Government religious speech sends a message that nonbelievers are not worthy of equal regard. It also undermines nonbelievers' equality by reinforcing stereotypes that lay at the root of so much discrimination against them. The perpetuation of these stereotypes also compromises atheists' liberty by making them less willing, even frightened, to openly follow the dictates of their nonbelieving conscience. And of course, coercive government speech may compromise religious liberty by forcing nonbelievers to participate in religious practices that conflict with their true beliefs. Thus, the claim that government religious speech does not violate the Establishment Clause because all it does is offend nonbelievers misunderstands exactly what is at stake.

⁴³³ This is especially true since most government religious speech does not favor religion generally, but some religions over others. Thus, government silence on religion benefits not only nonbelievers but also believers outside the dominant Judeo-Christian mainstream.