

## ARTICLES

### THOU SHALT USE THE EQUAL PROTECTION CLAUSE FOR RELIGION CASES (NOT JUST THE ESTABLISHMENT CLAUSE)

*Susan Gellman & Susan Looper-Friedman\**

#### INTRODUCTION

If you have to drive in a Phillips head screw, you can use a flathead screwdriver, if that's the only tool you've got. It may do the job fine. But if you have a perfectly good Phillips head screwdriver in your toolbox, why not use that instead?

Establishment Clause law is in flux—indeed, it may well be up for grabs—as we move into the Roberts Court era. When one looks at the recent (and even not so recent) religion cases and the votes and opinions they produced, no other jurisprudence seems as susceptible to drastic change as Establishment Clause cases. Any doubts that both the familiar *Lemon* test<sup>1</sup> and the “endorsement” test<sup>2</sup> for the Establishment Clause are vulnerable were erased after the Court's 2005 “Ten Commandments” cases, *McCreary County v. ACLU of Kentucky*<sup>3</sup> and *Van Orden v. Perry*,<sup>4</sup> even before the change in the Court's composition.

Even if no change comes at all, the authors propose another approach to be used in a common subset of Establishment Clause cases: those in which the government is engaging in religious expression. Familiar examples include government Christmas displays, prayers at

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\* Susan Gellman is an attorney in Columbus, Ohio. Susan Looper-Friedman is a professor at Capital University School of Law. The authors are grateful to Sarah M. Schregardus for her research assistance, to Erwin Chemerinsky, Steven Gey, and James Beattie for their consultation and insights, and to Benson A. Wolman (1936–2007), civil libertarian, partner, and friend, for twenty-five years of inspiration and encouragement.

1 *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (“First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion.” (citations and internal quotation marks omitted)).

2 *See Lynch v. Donnelly*, 465 U.S. 668, 691 (1984) (O'Connor, J., concurring) (“The proper inquiry under the purpose prong of *Lemon*, I submit, is whether the government intends to convey a message of endorsement or disapproval of religion.”).

3 545 U.S. 844 (2005).

4 545 U.S. 677 (2005).

government-sponsored events, government adoption of religious mottoes, giant crosses on public property, and, most recently in the public consciousness, Ten Commandments displays at government buildings. In these cases, the problem is not so much that people feel religiously coerced or proselytized by the government, but that non-Christians are made to feel that they are outsiders, almost second-class citizens, and not equally American. The problem is an equality problem; shouldn't the solution be an equality solution? Fortunately, there is such a solution, and we have had it all along: the Fourteenth Amendment Equal Protection Clause.

Challenges to discrimination based on religion are hardly ever brought under the Equal Protection Clause. Where government action interferes with or coerces religious practice, challenges are almost always analyzed under the Free Exercise and Establishment Clauses, respectively, which require a compelling state interest for any interference with religion or coercion.<sup>5</sup> But the First Amendment clauses are less effective when the problem is neither interference nor true coercion, but unequal treatment.

We believe that there are several good reasons for employing the Equal Protection Clause for these "government religious expression" cases, in addition to (or, in an appropriate case, even instead of) the First Amendment Establishment Clause. Certainly, there is the pragmatic concern that the Roberts Court may abandon the current Establishment Clause analysis in favor of a far more permissive standard, so challengers in government religious expression cases will want to have another tool in their belts. But even if the Establishment Clause analysis remains the same, the Equal Protection Clause has much to recommend it for government religious expression cases. The interest at issue falls naturally within the purpose and scope of the Equal Protection Clause; the injury of government religious expression is much less a question of proselytization than of treating some Americans differently from (or as if they are different from) others. It therefore is not surprising that the tests used in Equal Protection Clause cases are also more to the point for government religious expressions than Establishment Clause tests, even those used prior to the change in the Court. Also unsurprisingly, the histories of the Establishment and Equal Protection Clauses support the principle that government religious expressions are properly ana-

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<sup>5</sup> See JAMES A. KUSHNER, *GOVERNMENT DISCRIMINATION: EQUAL PROTECTION LAW AND LITIGATION* § 5:21 (2007).

lyzed under the Equal Protection Clause. Moreover, even if the Supreme Court does not jettison *Lemon*, results under *Lemon* are very unpredictable.

What is surprising is that the Equal Protection Clause has virtually never been invoked by challengers in government religious expression cases, or for that matter in any cases brought under the Establishment Clause. When it has been used, the Equal Protection Clause has usually been used in a tortured manner that guaranteed either its failure or its being ignored by the courts deciding the cases. Similarly, few scholars or judges have considered using the Equal Protection Clause in these cases—although several have come awfully close, arguing for a reading of the Establishment Clause that addresses the equality issue head on.

Why? Many courts and scholars have acknowledged the equality issue inherent in these cases and have argued eloquently and persuasively for judicial recognition of marginalization—but only as a test for an Establishment Clause violation. They come tantalizingly close to equal protection: several Supreme Court opinions have recognized that “[e]ndorsement sends a message to nonadherents that they are outsiders.”<sup>6</sup> Scholars have argued that the Free Exercise and Establishment Clauses are “impossible of effectuation unless they are read together as creating a doctrine more akin to the reading of the equal protection clause.”<sup>7</sup> Yet no one seems to have taken the obvious next step: if the problem is one of unequal treatment, not religious coercion, then use the Fourteenth Amendment Equal Protection Clause, the same as for any other kind of discrimination by the government. These courts’ and scholars’ recognition of the equality interest as worthy of constitutional protection is a good first step, but they may be using the wrong constitutional provision, or at least the second-best one. Now there is more disagreement than ever about the goals and limits of the Establishment Clause, even within each of the many different schools of thought of constitutional interpretation. Some observers will continue to see the equality interest as be-

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6 *Lynch*, 465 U.S. at 688 (O’Connor, J., concurring); see also, e.g., *McCullum v. Bd. of Educ.*, 333 U.S. 203, 227–28 (1948) (plurality opinion) (noting that weekly religious training at public school, which violated First Amendment Establishment Clause, “sharpens the consciousness of religious differences at least among some of the children committed to its care. These . . . are precisely the consequences against which the Constitution was directed . . .”). See *infra* Part III.A.1.

7 Philip B. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 5 (1961). Professor Kurland’s ideas seem to be revisited every twenty years or so in legal journals, without any notice taken by the courts. See *infra* Part III.

ing central to the Establishment Clause, and some will not consider it addressed at all by the Establishment Clause.

The authors stress that we do not believe that the Establishment Clause permits the government expressions of religion at issue in this group of cases (at least certainly not always). The Establishment Clause *ought* to be an adequate basis for challenges, in our opinion, because we agree that marginalization of non-members of the dominant religion constitutes an Establishment Clause violation. But Establishment Clause challenges have not always been successful (and may be less likely to succeed in the Roberts Court era), and even when they are, they are sort of the long way around. So we suggest that in this subset of religion cases, practitioners and courts should *also*, and in appropriate cases *primarily*, analyze the government action at issue under the Fourteenth Amendment Equal Protection Clause.

It is simply a matter of using the right tool for the job. Like a Phillips head screwdriver for a Phillips head screw, the Equal Protection Clause, designed from the ground up to address disparate treatment by government, is a better tool for the job of analyzing a government religious expression case than an Establishment Clause “retrofitted” to reach these religious equality issues.

Part I of this Article explains the equality issue we see in government religious expressions, and why the Establishment Clause has limitations in redressing that issue. Part II looks at current Establishment Clause theory, including the *Van Orden* and *McCreary County* opinions. Part III reviews case law, scholarship, and recent government religious expression cases that acknowledged the equality issue, but always within the First Amendment context. Part IV sets forth some advantages to using the Equal Protection Clause in addition to the Establishment Clause in government religious expression cases, and Part V acknowledges some obstacles (with suggested approaches to address them). Finally, Part VI tells what we learned when we wondered why no one has used the Equal Protection Clause in this way.

## I. “GOVERNMENT RELIGIOUS EXPRESSION”: WHAT IT IS, AND HOW IT CAN CONSTITUTE UNCONSTITUTIONAL DISCRIMINATION

What’s the big deal, really?

Why do Christmas displays, Ten Commandments monuments, God-based government mottoes, opening prayers, and “under God” upset some people so much? It’s pretty hard to understand how any

of those innocuous, actually rather pleasant little gestures could amount to “an establishment of religion”—not just in the narrow sense of the establishment of a state church, but even in the sense of coercing anyone to believe in the majority religion, some sort of non- or interdenominational “civic religion,” or for that matter religiosity generally. Is anyone really so impressionable that walking past a little display is going to make him feel compelled to believe something different about God?

Probably not. There is very little—negligible, really—proselytization effect in these instances, especially where only adults are involved. What’s more, it is very unlikely that the intent of the government is to try to coerce any type of religious belief or action.<sup>8</sup> Rather, the Christmas display, the graduation prayer, or the motto probably was simply and genuinely an attempt to spread some sort of general or happy-holiday goodwill and inspiration.<sup>9</sup> Certainly, the idea was not to try to convert the atheists and non-Christians.

Given the low proselytization effect in these cases, it is easy to understand why those who would like to see more religion in public life feel that they are being limited unreasonably, and why even some people who agree that things like Ten Commandments displays or “under God” probably do violate the First Amendment think that those who push the issue are being foolishly absolutist, if not a little hysterical, about it. If there is no religious coercion going on, why not let government engage in inspirational or enjoyable religious or holiday-related expression?

These critics are halfway right. The proselytization effect is *not* a big deal. But that is not the problem. In fact, even much more overt religious compulsion has not been very effective at converting the “unchurched.” Plenty of people (most now over fifty years old) who recited the Lord’s Prayer every morning of their public school education—right along with the Pledge of Allegiance—grew up to be rab-

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8 At least, so far. With some of the recent noise about “returning America to its Christian roots,” who knows what real proselytization programs might be proposed? See, e.g., D. JAMES KENNEDY & JERRY NEWCOMBE, *WHAT IF AMERICA WERE A CHRISTIAN NATION AGAIN?* (2005). A Supreme Court opinion stating that “this is a Christian nation,” *Church of Holy Trinity v. United States*, 143 U.S. 457, 471 (1892), does not sound as quaintly unthinkable as it did ten or twenty years ago. For now, though, we begin with the premise that the government’s purpose is *not* to try to coerce anyone to practice any religion or religion in general.

9 In the case of religious mottoes and the addition of “under God” to the Pledge of Allegiance, the motive had more to do with distinguishing our godly society from the godless Soviet Union than to spread general goodwill, see *infra* Part IV.B, but it still was not about proselytization.

bis, imams, and atheists. Even that daily indoctrination of young children, which has long been held to violate the First Amendment Establishment Clause,<sup>10</sup> did not seem to have a powerful theological coercive effect.

But it *did* have a different kind of effect: having to recite the Lord's Prayer—particularly in juxtaposition with the Pledge—told every non-Christian student that she was “different” from the others; that being a “real American” meant subscribing to the Lord's Prayer just as to the Pledge of Allegiance. Sure, if you were Jewish, or atheist, or Buddhist, you were still an American citizen with equal rights. But, let's face it, you were still sort of a variation on the theme—in fact, your very entitlement to those equal rights was because of, and dependent upon, your *similarity* to Christian Americans, not your equality to them regardless of similarity or difference.<sup>11</sup>

It is the same problem faced by African-Americans and women, who report feeling like variations on the white male norm, and whose equality under the law depended on them proving their similarity to white men. White men never had to prove that they were entitled to full citizenship—that they ought to be entitled to vote, own property, and so forth. It was simply assumed because it had always been so.<sup>12</sup> In like manner, Christians in the United States, unlike Jews, Muslims, atheists, and others, never had to make a case that they were legitimate, “real” Americans who ought to be entitled to full rights—it was just assumed. Now, that assumption is not the result of bias or bad will—it is just that Christians constitute such a large majority of Americans that everyone, Christian and non-Christian, is familiar and comfortable with the notion of Christians as “real,” mainstream Americans.

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10 Engel v. Vitale, 370 U.S. 421 (1962); Sch. Dist. v. Schempp, 374 U.S. 203 (1963).

11 In the context of sex discrimination, Catharine A. MacKinnon has described the problem of the “jurisprudence of sameness,” which, with its emphasis on identical treatment, conceals “the substantive way in which man has become the measure of all things. Under the sameness standard, women are measured according to our correspondence with man. . . . Gender neutrality is simply the male standard,” CATHERINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 34 (1987), in other words, not really “neutral” at all. Kenji Yoshino discusses a related issue, “covering,” minorities not quite hiding their differences from the majority in order to “pass,” but minimizing them in order to fit in and to prevent the majority from feeling threatened. KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* (2006).

12 The same problem faces same-sex couples wishing to marry and adopt. Opposite-sex couples have never had to prove that heterosexual marriage is not bad for society or for raising children.

This feeling of marginalization, of “once-removedness,” of the need to translate oneself to be understood, can be difficult for members of the Christian majority to understand or see as significant, just as it can be hard for men, whites, and heterosexuals to understand similar feelings of women, nonwhites, and homosexuals. Majority members need not and should not feel guilty or to blame for that difficulty—after all, just about all of us are members of *some* majority, as well as of some minority, so we can understand both points of view. But just as most of us therefore have learned to take others’ word for the marginalization or invisibility they feel as, for example, racial minorities, we can also appreciate that there may be a similar effect upon non-Christians in our Christian-dominant society. Indeed, looking at both of these observations—that compulsory recitation of the Lord’s Prayer did not have much effect on non-Christian students’ beliefs, and that many Christians have difficulty understanding the marginalization felt by members of religious minorities—maybe the marginalization effect was created less by the experience of the minority students and more by the unspoken message to the majority Christian students that they were the “real” Americans, no translation required, and that reciting their kind of prayer was as American as saluting the flag.

Even government religious expressions carefully designed to be “nonsectarian” or “universal”—such as a “nonsectarian” prayer at a graduation—do not have the inclusive effect intended, certainly for atheists, but also for non-Christians.<sup>13</sup> Christians in America often have little exposure to others’ religious practices, so it is unsurprising that they may feel that simply removing all references to Jesus makes a prayer or display “universal” to all religions. They may be surprised to learn that it does not, especially to those whose prayers are conducted in another language, or chanted, or only under circumstances such as separation of sexes or in seclusion. To non-Christians, these intended neutral expressions still sound like the religion of the dominant Christian culture. The content may be generalized to the point

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13 Well-intentioned efforts to be inclusive can go seriously awry. A frieze on the wall of the courtroom of the United States Supreme Court depicts eighteen great lawgivers from the ages, including Muhammad. In 1997, the Council on American-Islamic Relations demanded removal of the image of Muhammad. As images of the Prophet are prohibited by Islam, the “well-intentioned attempt by the sculptor to honor Muhammad” (in the words of the Supreme Court’s visitors’ information pamphlet) was actually offensive to Muslims. The Court’s refusal to modify the display sparked international protests. Tony Mauro, *The Supreme Court’s Own Commandments*, LEGAL TIMES, Mar. 2, 2005, available at <http://www.law.com/jsp/article.jsp?id=1109597692160>.

that it is not inconsistent with minority religions' theologies—but the point here is not the content, but how the exercise or display makes people *feel*, and sometimes the warm intentions themselves only serve to underscore minority status.<sup>14</sup>

In short, the problem created by these government religious expressions is not one of coercion, but of *equality*. Specifically, it is that religious expression by the government makes many people who are members of minority religions or of no religion feel like second-class citizens, tolerated outsiders. Sometimes this is because the religious “marker” is in effect one’s ethnic identity, for example, Jewish, Amish, Sikh, but it also happens when people feel marginalized for not holding the majority religion’s beliefs (particularly in eras like ours, in which religion figures prominently in political divisions). In such cases, there can be little or no religious coercion at issue, but a substantial discriminatory effect.

That is why litigants’ (and courts’) virtually exclusive reliance on the First Amendment Establishment Clause is a mistake. The Establishment Clause is poorly suited to address the equality issue, primarily because its various tests focus on proselytization, coercion, religious purpose, or entanglement of government and religion—not on equality. Some judges simply do not believe that the Establishment Clause protects this equality interest; others might, but have trouble grasping the problem. So plaintiffs lose cases they might have won under the more apt Equal Protection Clause tests, and the equality issues never even get addressed.

Experts and laypeople; pundits, scholars, and politicians—everyone has an opinion (usually unshakable) about what the limits on government expressions of religion are and should be under the Establishment Clause. Although sometimes they discuss the equality (as opposed to the endorsement or coercion) issues, their arguments always take place within the Establishment Clause context, never the Equal Protection Clause context. Any equal protection violation is virtually never even addressed, let alone resolved.

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<sup>14</sup> Did you ever see a public service announcement on your local television station saying something like “We wish a happy Passover to our Jewish friends”? Probably you’ve never seen one that wished “Happy Easter to our Christian friends.” Which of course begs the question: who are “We”? And who isn’t?



## II. CURRENT ESTABLISHMENT CLAUSE ANALYSIS

The Supreme Court's 2005 decisions in *McCreary County v. ACLU of Kentucky*<sup>15</sup> and *Van Orden v. Perry*<sup>16</sup> provide a good summary of the current status of Establishment Clause jurisprudence. *McCreary County* and *Van Orden*, companion cases, both dealt with the familiar terrain of Ten Commandments displays on government property. In both, the Court continued its practice of case-by-case analysis of such displays under the Establishment Clause, rather than adopting any one-size-fits-all rule. In fact, the various *McCreary County* and *Van Orden* opinions give so little guidance that if one would read them without peeking at the endings, it would still be anyone's guess as to what the result would be in either of the cases. Between them, *McCreary County* and *Van Orden* clarified only that the Establishment Clause prohibits something more than just government preference for one religion over another (although that may not be a AAA-rated rule either, depending upon the influence of the new Justices).

Going into—and, probably, coming out of—*McCreary County* and *Van Orden*, the dominant test for constitutionality under the Establishment Clause was the famous (and famously frustrating) test set forth in *Lemon v. Kurtzman*.<sup>17</sup> In *Lemon*, the Court held that use of government funds for instructional uses in nonpublic schools, including parochial schools, violated the Establishment Clause. (Note that *Lemon* was *not* a government religious expression case.) The Court set forth the following test in *Lemon*: “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, finally, the statute must not foster ‘an excessive government entanglement with religion.’”<sup>18</sup> Already, just from the language of the *Lemon* test, it is

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15 545 U.S. 844 (2005).

16 545 U.S. 677 (2005).

17 403 U.S. 602 (1970). The Court has not always applied the *Lemon* test. In some cases, for example, the Court has applied the “endorsement” test suggested by Justice O’Connor in her concurring opinion in *Lynch v. Donnelly*, 465 U.S. 668 (1984), the “coercion” test suggested by Justice Kennedy in *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989); and (especially in funding cases) the “neutrality” test described in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). The *Lemon* test has never been rejected, however, and indeed the other tests are often seen less as independent analyses than as approaches to one or another of the three *Lemon*-test prongs.

18 403 U.S. at 612–13 (citing *Bd. of Educ. v. Allen*, 392 U.S. 236, 243 (1968) and quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 674 (1970)). Professor Steven G. Gey has observed, “The Court has recently ‘folded the entanglement inquiry into the primary effect inquiry. This [has] made sense because both inquiries rely on the same evidence, and the degree of entanglement has implications for whether a statute advances or inhibits religion.’”

easy to see how the test is both more appropriate and easier to apply outside the government religious expression context.

Many cases have applied, construed, and in some cases, at least arguably modified the *Lemon* test.<sup>19</sup> At least one federal judge felt that the Court's opinion in *Agostini v. Felton*<sup>20</sup> firmly established that *Lemon*'s entanglement prong is best understood and treated only "as an aspect of the inquiry into a statute's effect."<sup>21</sup> As a practical matter, it may not make much difference in most or even all cases whether the entanglement inquiry is seen as a separate prong or as part of the "effects" prong, especially as the Court's subsequent opinions in *McCreary County* and *Van Orden* assume that the *Lemon* test, in its three-pronged incarnation, is still in effect. But there's a reason to bear that point of view in mind when looking ahead: this language from *Agostini* was used approvingly by the majority opinion in *ACLU ex rel. Lander v. Schundler*,<sup>22</sup> authored by then-Third Circuit Judge Samuel Alito.

The Ten Commandments display at issue in *Van Orden* was a six-foot monolith placed by the State in front of the Texas State Capitol building.<sup>23</sup> In *McCreary County*, two separate Ten Commandments

Steven G. Gey, "Under God," *The Pledge of Allegiance, and Other Constitutional Trivia*, 81 N.C. L. REV. 1865, 1885 n.74 (quoting *Zelman*, 536 U.S. at 668–69 (O'Connor, J., concurring)).

19 Nevertheless, the Court has gone out of its way to reemphasize the test's continued validity. See *Zelman*, 536 U.S. at 648–49 ("The Establishment Clause of the First Amendment, applied to the States through the Fourteenth Amendment, prevents a State from enacting laws that have the 'purpose' or 'effect' of advancing or inhibiting religion."); *id.* at 668–69 (O'Connor, J., concurring) ("Nor does today's decision signal a major departure from this Court's prior Establishment Clause jurisprudence. A central tool in our analysis of cases in this area has been the *Lemon* test. . . . The test today is basically the same as that set forth in *School Dist. of Abington Township v. Schempp* over 40 years ago." (citing *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947); *McGowan v. Maryland*, 366 U.S. 420 (1961))); see also *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 314 (2000) ("[A]s in previous cases involving facial challenges on Establishment Clause grounds, we assess the constitutionality of an enactment by reference to the three factors first articulated in *Lemon* . . . ." (alteration in original) (citations omitted) (quoting *Bowen v. Kendrick*, 487 U.S. 589, 602 (1988))).

20 521 U.S. 203 (1997) (holding that the Establishment Clause does not bar a public board of education from sending public school teachers into parochial schools to provide remedial education to disadvantaged children pursuant to federally mandated program), *overruling Aguilar v. Felton*, 473 U.S. 402 (1985).

21 *Id.* at 233.

22 168 F.3d 92, 97 (3d Cir. 1999).

23 *Van Orden v. Perry*, 545 U.S. 677, 681–82 (2005). The monument was donated by the Fraternal Order of Eagles as part of a joint effort with Cecil B. DeMille (who was at that time filming *The Ten Commandments*) to erect similar Ten Commandments displays at courthouse squares, city halls, and parks nationwide. There were twenty-one other historical markers and sixteen other monuments surrounding the Texas capitol building.

displays were at issue, both large copies of the Ten Commandments, framed in gold, in two Kentucky county courthouses. After a federal court ordered the displays removed and enjoined their replacement, the counties installed new versions along with displays of the Magna Carta, the Declaration of Independence, the Bill of Rights, and so forth, and labeled the whole collection "The Foundations of American Law and Government Display."<sup>24</sup>

These cases made First Amendment watchers nervous as they worked their way up. The pessimists feared that the Supreme Court would take the opportunity to reject the *Lemon* test entirely in favor of a much more deferential "coercion" test or to abandon *Lemon*'s "secular legislative purpose" prong. The optimists hoped that the Court would clarify that government could not hide behind ex post facto secular reasons for religious expression and that courts could consider the history behind such things as Ten Commandments displays, not only what a reasonable observer might conclude.

The optimists won—but it was a squeaker. Justices Rehnquist, Scalia, Kennedy, and Thomas felt that both displays were constitutional, and Justices Stevens, O'Connor, Souter, and Ginsberg felt they were both unconstitutional. Justice Breyer alone accounted for the different results in the two cases, voting that the display in *McCreary County* violated the Establishment Clause, but that the display in *Van Orden* did not: he agreed with the *McCreary County* majority's view of the law, but felt that the facts of *Van Orden* permitted the Texas monument even under that view.

The five Justices in the *McCreary County* majority specifically retained the *Lemon* test, including the "secular purpose" prong particularly challenged by the government defendants; the four dissenters would have abandoned it.<sup>25</sup> Justice Breyer voted to retain the *Lemon* test, but felt that in very close cases—including, in his opinion, *Van Orden*—tests are not very helpful, and courts in the end must look carefully at the facts in light of the "basic purposes"<sup>26</sup> of the First Amendment Religion Clauses, particularly avoidance of "divisiveness based upon religion that promotes social conflict."<sup>27</sup>

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<sup>24</sup> *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 856 (2005). The other items in the display were the lyrics of *The Star Spangled Banner*, the Mayflower Compact, the National Motto, the Preamble to the Kentucky Constitution, and a picture of "Lady Justice," each with an explanation of its historical significance.

<sup>25</sup> *Id.* at 901 (Scalia, J., dissenting).

<sup>26</sup> *Van Orden*, 545 U.S. at 698 (Breyer, J., concurring in the judgment).

<sup>27</sup> *Id.* This view is of particular interest to Justice Breyer. See also *Zelman v. Simmons-Harris*, 536 U.S. 639, 717–29 (2002) (Breyer, J., dissenting). See generally STEPHEN BREYER, ACTIVE

Justice Souter's opinion for the five-member majority—including Justice O'Connor—in *McCreary County* explicitly rejected the government's urging to replace the *Lemon* test or to eliminate the "secular legislative purpose" prong. Moreover, the secular purpose must be real and not secondary to a religious purpose; the government cannot meet its burden with a "transparent claim to secularity."<sup>28</sup> Finally, the constitutionality of a religious display is not to be judged in a vacuum, but in light of its context and history, including, in the *McCreary County* situation, not only the final displays, but also the earlier ones: "reasonable observers have reasonable memories."<sup>29</sup>

Justices Thomas and Scalia stated that they would abandon the *Lemon* test in favor of a much more deferential test. In their view, the Establishment Clause is violated only where there is either establishment of a state church or religion (a nonexistent threat) or where there is actual coercion of nonadherents to practice or to profess belief in a particular religion. Justice Thomas, concurring (alone) in *Van Orden*, went as far as to say:

[G]overnment practices that have nothing to do with creating or maintaining . . . coercive state establishments simply do not implicate the possible liberty interest of being free from coercive state establishments. . . . The only injury to him [Van Orden] is that he takes offense at seeing the monument as he passes it on his way to the Texas Supreme Court Library. He need not stop to read it or even to look at it, let alone to express support for it or adopt the Commandments as guides for his life. The mere presence of the monument along his path involves no coercion and thus does not violate the Establishment Clause.<sup>30</sup>

Justice Scalia, joined by Justices Rehnquist and Thomas, and in parts by Justice Kennedy, wrote in dissent in *McCreary County* that "the Court's oft repeated assertion that the government cannot favor religious practice is false."<sup>31</sup> Only outright coercion would be an Establishment Clause violation in his view:

The Court has in the past prohibited government actions that "proselytize or advance any one, or . . . disparage any other, faith or belief," or

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LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005).

28 *McCreary County*, 545 U.S. at 863.

29 *Id.* at 866.

30 *Van Orden*, 545 U.S. at 693–94 (Thomas, J., concurring) (internal quotation marks omitted). Justice Thomas has even taken the position that the Court should overrule *Everson v. Board of Education*, 330 U.S. 1 (1947), and hold that the Establishment Clause does not even apply to state and local governments. See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 45 (2004) (Thomas, J., concurring in the judgment); *Zelman*, 536 U.S. at 676 (Thomas, J., concurring).

31 *McCreary County*, 545 U.S. at 885 (Scalia, J., dissenting).

that apply some level of coercion (though I and others have disagreed about the form that coercion must take). The passive display of the Ten Commandments, even standing alone, does not begin to do either.<sup>32</sup>

Indeed, in language that seems to beg the equal protection issue, he wrote:

With respect to public acknowledgment of religious belief, it is entirely clear from our Nation's historical practices that the Establishment Clause permits this disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists. . . . Invocation of God despite their [polytheists'] beliefs is permitted . . . because governmental invocation of God is not an establishment. . . . [I]n the context of public acknowledgments of God there are legitimate competing interests: On the one hand, the interest of that minority in not feeling "excluded"; but on the other, the interest of the overwhelming majority of religious

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<sup>32</sup> *Id.* at 908–09 (citations omitted). Professor Erwin Chemerinsky believes that Justice Kennedy, too, thinks that coercion should be the benchmark. Erwin Chemerinsky, John Roberts and the Establishment Clause and the Role of the Religious Test Clause in the Confirmation Process 2 (Aug. 17, 2005), [http://www.acslaw.org/files/2005%20programs\\_Chemerinsky\\_white%20paper.pdf](http://www.acslaw.org/files/2005%20programs_Chemerinsky_white%20paper.pdf). It is certainly true that Justice Kennedy's dissent in *Allegheny County v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989), vividly expressed his hostility toward the "endorsement" test:

The notion that cases arising under the Establishment Clause should be decided by an inquiry into whether a 'reasonable observer' may 'fairly understand' government action to 'sen[d] a message to nonadherents that they are outsiders, not full members of the political community,' is a recent, and in my view most unwelcome, addition to our tangled Establishment Clause jurisprudence.

*Id.* at 668 (quoting majority opinion); see also *infra* notes 55–56 and accompanying text. But we feel it is significant that Justice Kennedy declined to join exactly that part of Justice Scalia's *McCreary County* dissent arguing for a coercion test.

Several observers predict that Chief Justice Roberts shares Chief Justice Rehnquist's dim view of the separation of church and state, although not necessarily the "coercion" view of the Establishment Clause. See, e.g., Erwin Chemerinsky, *supra*; Charles C. Haynes, *Church, State and Judge Roberts: Will the Wall Come Tumbling Down?*, FIRST AMENDMENT CENTER, Sept. 18, 2005, <http://www.firstamendmentcenter.org/commentary.aspx?id=15801>.

Justice Alito's view must be gleaned from his lower court opinions and other writings; most observers would be surprised to find him a vigorous defender of expansive First Amendment protections. See, e.g., David D. Kirkpatrick, *Nominee Is Said To Question Church-State Rulings*, N.Y. TIMES, Nov. 4, 2005, at A22; *Religion Clauses Protect Nonbelief, Alito Testifies*, ASSOCIATED PRESS, Jan. 13, 2006; David G. Savage, *Alito May Quickly Affect Laws*, L.A. TIMES, Jan. 15, 2006, at A23; *Online Symposium: Samuel Alito & the First Amendment First Reports/Online Symposium on Nominee's First Amendment Record*, FIRST AMENDMENT CENTER, Nov. 13, 2005, <http://www.firstamendmentcenter.org/collection.aspx?id=16013>. However, even if he would overrule *Lemon*, his opinions do not seem to reflect a commitment to the adoption of a "coercion" model, and there may even be hope that he would be receptive to, or at least understand, the equality value at issue. In one of his Third Circuit Establishment Clause opinions, even as he upheld, under *Lynch v. Donnelly*, 465 U.S. 668 (1984), a Christmas-Chanukah display at City Hall in Jersey City, then-Judge Alito acknowledged the force of Justice O'Connor's opinions in *Lynch* and *Allegheny County*. *ACLU ex rel. Lander v. Schundler*, 168 F.3d 92, 106 n.13 (3d Cir. 1999).

believers in being able to give God thanks and supplication as a people . . . .<sup>33</sup>

Justice O'Connor joined the majority in *McCreary County* and added a concurring opinion echoing an important (certainly for our purposes) theme in her opinions in earlier Establishment Clause cases:

And government may not, by "endorsing religion or a religious practice," "mak[e] adherence to religion relevant to a person's standing in the political community." . . . When the government associates one set of religious beliefs with the state and identifies nonadherents as outsiders, it encroaches upon the individual's decision about whether and how to worship.<sup>34</sup>

From their *Van Orden* and *McCreary County* opinions, as well as earlier opinions, it seems that Justices Stevens, Souter, Breyer, and Ginsburg all agree with Justice O'Connor's view that the Establishment Clause protects an equality interest, and Justices Scalia, Thomas, and probably Roberts, Kennedy, and Alito<sup>35</sup> do not.

"Justice counting" is an inexact and risky enterprise in any context, and this one is no exception. But the exercise illuminates how the change in the Supreme Court composition throws into question whether the current Establishment Clause jurisprudence—such as it is—will continue. Accordingly, future challengers to government religious expressions had better add another tool to their belt besides the Establishment Clause. That tool is the Equal Protection Clause.

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33 *McCreary County*, 545 U.S. at 893, 899–900. Justice Scalia did not explain what he meant by "the interest of the overwhelming majority of religious believers in being able to give God thanks and supplication as a people," or why, even if there is such an interest, its expression by government could not anyway constitute a constitutional violation: by that logic, if the white majority had an interest in being able to express themselves "as a people," government could exclude non-whites without violating the Constitution. *But see infra* Part V.C. Justice Scalia's position was no surprise; he had already compared *Lemon* to "some ghoul in a late-night horror movie" which "stalks our Establishment Clause jurisprudence." *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring). Justice White, writing for the majority, responded: "While we are somewhat diverted by Justice Scalia's evening at the cinema, we return to the reality that there is a proper way to inter an established decision and *Lemon*, however frightening it might be to some, has not been overruled." *Id.* at 395 n.7 (citation omitted).

34 *McCreary County*, 545 U.S. at 883 (O'Connor, J., concurring) (quoting *Wallace v. Jaffree*, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring)).

35 *See supra* note 32.

### III. THE "EQUALITY INTEREST" IN ESTABLISHMENT CLAUSE JURISPRUDENCE

Once one entertains the idea of using the Equal Protection Clause for government religious expression cases, it seems obvious. But very surprisingly, no one tries it. A review of the lead (and more obscure) government religious expression cases and literature reveals that although sometimes people raise equality-based arguments against government religious expressions, those arguments are always part of First Amendment Establishment Clause (and occasionally Free Exercise or Speech Clause) claims; the Equal Protection Clause is rarely even mentioned. Ten Commandments and Christmas displays, portraits of Jesus in public schools, Christian mottoes, school religious exercises, and related government actions like religious qualifications for public office and Sunday closing laws all raise the equality issue, but no one seems to have tried using the Equal Protection Clause to challenge them. Many court decisions and scholarly writings have recognized an equality interest inherent in the First Amendment Establishment Clause. Yet rather than rely upon the Equal Protection Clause, judges, litigants, and scholars have instead focused on the view that the Establishment Clause protects that equality interest.

#### A. Case Law

##### 1. Courts Recognizing an Equality Interest in Establishment Clause Cases

As noted above, Justice O'Connor often showed a special interest in the idea that the First Amendment Establishment Clause protects an equality interest, even when she did not find that particular government religious expressions violated the First Amendment. She was not writing on a clean slate; there was plenty of authority for her view, not limited to those cases she cited, in cases somewhat outside the government religious expression context. In *McCullum v. Board of Education*,<sup>36</sup> for example, the Court struck down a public school program releasing students from classes once a week for religious instruction, conducted in the regular classrooms, with students opting out required to move to other rooms to continue their regular secular studies. The majority opinion easily disposed of the case on the ground that public schools maintained with tax dollars were being used by religious groups to spread their faiths, and the schools' com-

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36 333 U.S. 203 (1948).

pulsory attendance policy was providing students for the churches' religious classes.<sup>37</sup> Justice Frankfurter, joined by three other Justices, saw another problem, which he expressed in language that seems to anticipate both the social science arguments relied upon a few years later in *Brown v. Board of Education*<sup>38</sup> and Justice Breyer's focus on avoidance of "religiously based social conflict"<sup>39</sup>:

That a child is offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and non-conformity is not an outstanding characteristic of children. The result is an obvious pressure upon children to attend. . . . The children belonging to these non-participating sects will thus have inculcated in them a feeling of separatism when the school should be the training ground for habits of community. . . . As a result, the public school system of Champaign actively furthers inculcation in the religious tenets of some faiths, and in the process sharpens the consciousness of religious differences at least among some of the children committed to its care. These are consequences not amenable to statistics. But they are precisely the consequences against which the Constitution was directed. . . .<sup>40</sup>

*Niemotko v. Maryland*<sup>41</sup> was not a government religious expression case, but it presented an excellent opportunity for an equal protection challenge. Some Jehovah's Witnesses were convicted of disorderly conduct for holding Bible talks in a public park after their application for a permit was denied. The Court struck down the convictions as violating both the First Amendment and the Equal Protection Clause, but the equal protection violation was based upon the defendants' exercise of fundamental First Amendment rights to free speech and free exercise of religion.<sup>42</sup>

The Court relied on the same equality-based First Amendment analysis as in *Niemotko* to reach the same result in a similar Witnesses-in-the-park case, *Fowler v. Rhode Island*.<sup>43</sup> The state had admitted that

<sup>37</sup> *Id.* at 212.

<sup>38</sup> 347 U.S. 483 (1954).

<sup>39</sup> See *supra* notes 26–27 and accompanying text.

<sup>40</sup> *McCollum*, 333 U.S. at 227–28 (emphasis added). Although Justice Frankfurter began by saying that the program "has not been used to discriminate," *id.* at 227, the remainder of his discussion describes exactly the psychological effects of separate treatment that was held to be discrimination just a few years later in *Brown*.

<sup>41</sup> 340 U.S. 268 (1951).

<sup>42</sup> *Id.* at 272. The defendants had only raised the Equal Protection Clause in that context, not on the basis of "suspect classification" discrimination. See Brief for Appellants at 9–10, *Neimotko v. Maryland*, 340 U.S. 268 (1951) (Nos. 595-17, 595-18), 1950 WL 78465.

<sup>43</sup> 345 U.S. 67 (1953).



other religious groups were permitted to hold religious events in the park. The Court again used the language of the Equal Protection Clause in striking down the convictions—under the First Amendment: “a religious service of Jehovah’s Witnesses is treated differently than a religious service of other sects. That amounts to the state preferring some religious groups over this one.”<sup>44</sup> Justice Frankfurter concurred, with no opinion, only this tantalizing notation indicating that he completely got the point:

Mr. Justice Frankfurter concurs in the opinion of the Court, except insofar as it may derive support from the First Amendment. For him it is the Equal-Protection-of-the-Laws Clause of the Fourteenth Amendment that condemns the Pawtucket ordinance as applied in this case.<sup>45</sup>

Justice Harlan, concurring in *Walz v. Tax Commission*,<sup>46</sup> agreed that property tax exemptions to religious organizations for properties used solely for religious worship did not violate the Establishment Clause, because the exemption was very broadly worded to apply to both religious and secular organizations “whose common denominator is their nonprofit pursuit of activities devoted to cultural and moral improvement and the doing of ‘good works’ by performing certain social services in the community that might otherwise have to be assumed by government.”<sup>47</sup> In order not to violate “the requirement of neutrality” of the Establishment Clause, the exemption could not discriminate against religious “cultural and moral improvement.”<sup>48</sup> His discussion of “neutrality” comes close enough to the Equal Protection Clause to touch it: “Neutrality in its application requires an equal protection mode of analysis. The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders.”<sup>49</sup>

Justice White got even closer than that a few years later. In *McDaniel v. Paty*,<sup>50</sup> the Court struck down a state constitutional provision barring “Ministers of the Gospel, or priests of any denomination whatever”<sup>51</sup> from serving as delegates to a state constitutional convention on Free Exercise grounds, because it conditioned delegates’

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44 *Id.* at 69.

45 *Id.* at 70.

46 397 U.S. 664 (1970). A Free Exercise Clause challenge to the exemptions was also unsuccessful.

47 *Id.* at 696 (Harlan, J., concurring).

48 *Id.*

49 *Id.*

50 435 U.S. 618 (1978).

51 *Id.* at 620 (brackets omitted).

right to free exercise upon the surrender of their right to seek office. Justice White, concurring in the judgment, disagreed that there was a Free Exercise Clause violation, but, like Justice Frankfurter in *Fowler*, stated that,

I would hold [the provision] unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. . . . Because I am not persuaded that the Tennessee statute in any way interferes with McDaniel's ability to exercise his religion as he desires, I would not rest the decision on the Free Exercise Clause, but instead would turn to McDaniel's argument that the statute denies him equal protection of the laws.<sup>52</sup>

Mr. McDaniel, a Baptist minister, had raised an equal protection claim, but *not* for religion-based "suspect classification" discrimination. Rather, he raised a "fundamental right" claim: that the constitutional provision interfered with his fundamental right to seek public office. Justice White agreed: "Although the State's interest [in maintaining church-state separation] is a legitimate one, close scrutiny reveals that the challenged law is not 'reasonably necessary to the accomplishment of . . .' that objective."<sup>53</sup> That language suggests that Justice White would have approved of a "suspect classification" equal protection challenge as well.

And this brings us to Justice O'Connor. More than any other Justice, she focused on the equality interest she found protected by the First Amendment Establishment Clause: "School sponsorship of a religious message is impermissible because it sends the . . . 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 . . .'"<sup>54</sup>

<sup>52</sup> *Id.* at 643–44 (White, J., concurring in judgment).

<sup>53</sup> *Id.* at 645 (quoting *Bullock v. Carter*, 405 U.S. 134, 144 (1972)).

<sup>54</sup> *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309–10 (2000) (O'Connor, J., concurring) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984)). In *Lynch v. Donnelly*, Justice O'Connor wrote, "In this case, as in *Engel v. Vitale*, '[w]hen the power, prestige and financial 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,'" 465 U.S. at 701–02 (quoting *Engel v. Vitale*, 370 U.S. 421, 431 (1962)), and in *Elk Grove Unified School District v. Newdow*, she wrote:

When a court confronts a challenge to government-sponsored speech or displays, I continue to believe that the endorsement test captures the essential command of the Establishment Clause, namely, that government must not make a person's religious beliefs relevant to his or her standing in the political community by conveying a message that religion or a particular religious belief is favored or preferred. In that context, I repeatedly have applied the endorsement test, and I would do so again here.

542 U.S. 1, 33–34 (2004) (citations and internal quotation marks omitted).

In *Allegheny County v. ACLU, Greater Pittsburgh Chapter*,<sup>55</sup> a case involving a Christmas display, Justice O'Connor pointed out:

Precisely because of the religious diversity that is our national heritage, the Founders added to the Constitution a Bill of Rights, the very first words of which declare: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." 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.

. . . [T]his Court has come to understand the Establishment Clause to mean that government may not . . . discriminate among persons on the basis of their religious beliefs and practices . . .<sup>56</sup>

Justice O'Connor went into greater depth, and came even closer to simply applying the Equal Protection Clause, in *Board of Education v. Grumet*,<sup>57</sup> a 1994 case regarding preferential treatment of a religious school district:

We have time and again held that the government generally may not treat people differently based on the God or gods they worship, or do not worship. . . . "[T]he Establishment Clause prohibits government from abandoning secular purposes . . . to favor the adherents of any sect or religious organization." . . .

This emphasis on equal treatment is, I think, an eminently sound approach. In my view, the Religion Clauses—the Free Exercise Clause, the Establishment Clause, the Religious Test Clause, Art. VI, cl. 3, and the Equal Protection Clause as applied to religion—all speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits. As I have previously noted, "the Establishment Clause is infringed when the government makes adherence to religion relevant to a person's standing in the political community."<sup>58</sup>

Although Justice O'Connor is no longer on the Court, her recognition of an equality interest compromised by government religious expression has left its mark, as evidenced by frequent quotation of that language from her opinions by the other Justices, including in their *Van Orden* and *McCreary County* opinions. Justice Souter, for example, observed:

There is something significant in the common term "statehouse" to refer to a state capitol building: it is the civic home of every one of the State's citizens. If neutrality in religion means something, any citizen should be

55 492 U.S. 573 (1989).

56 *Id.* at 589–90 (emphasis added) (internal quotation marks omitted).

57 512 U.S. 687 (1994).

58 *Id.* at 714–15 (O'Connor, J., concurring) (citation omitted).

able to visit that civic home without having to confront religious expressions clearly meant to convey an official religious position that may be at odds with his own religion, or with rejection of religion.<sup>59</sup>

And, in a footnote:

That the monument also surrounds the text of the Commandments with various American symbols (notably the U.S. flag and a bald eagle) only underscores the impermissibility of Texas's actions: by juxtaposing these patriotic symbols with the Commandments and other religious signs, the monument sends the message that being American means being religious (and not just being religious but also subscribing to the Commandments, i.e., practicing a monotheistic religion).<sup>60</sup>

Justice O'Connor laid special emphasis on *Larson v. Valente*,<sup>61</sup> an interesting case for our purposes. In *Larson*, the Court struck down a state registration and reporting requirement that exempted religious organizations that solicited less than 50% of their funding from nonmembers. As usual, the case was argued and decided under the Establishment Clause, even though the reasoning focused on equality and discrimination (against religious organizations such as the plaintiff Unification Church), as in the other cases we have seen. As we have also seen before, the plaintiffs did include, if not argue, an equal protection claim, although the Court did not even discuss, let alone decide, it.<sup>62</sup> Notable for our purposes, *Larson* went a step farther toward the Equal Protection Clause; the Court applied the "strict scrutiny" analysis used for Equal Protection Clause cases, tracing the history of strict scrutiny of religious discrimination under the Establishment Clause:

The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another. . . .

Since *Everson v. Board of Education*, this Court has adhered to the principle, clearly manifested in the history and logic of the Establishment

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59 *Van Orden v. Perry*, 545 U.S. 677, 745–46 (2005) (Souter, J., dissenting); *see also* *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 859–61 (2005).

60 *Van Orden*, 545 U.S. at 739 n.2 (Souter, J., dissenting).

61 456 U.S. 228 (1982).

62 Typically, the Equal Protection claim was barely mentioned, appearing only in the list of claims:

Appellees sought a declaration that the Act, on its face and as applied to them . . . constituted an abridgment of their First Amendment rights of expression and free exercise of religion, as well as a denial of their right to equal protection of the laws, guaranteed by the Fourteenth Amendment . . . .

*Id.* at 233. A footnote to the mention of the Fourteenth Amendment indicates that the Equal Protection issue was a narrow one: "Appellees' complaint stated in pertinent part that the 'application of the statutes to itinerant missionaries whose Churches are not established in Minnesota, but not to Churches with substantial local membership, constitutes an unequal application of the law.'" *Id.* at 233 n.5.

Clause, that no State can “pass laws which aid one religion” or that “prefer one religion over another.” This principle of denominational neutrality has been restated on many occasions. . . . [T]he fullest realization of true religious liberty requires that government . . . effect no favoritism among sects . . . and that it work deterrence of no religious belief. In short, when we are presented with a state law granting a denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its constitutionality.<sup>63</sup>

Even as anti-*Lemon* sentiment has grown, federal and state courts have continued to recognize an equality interest in the Establishment Clause from time to time in government religious expression and similar cases, often coming whisker-close to the Equal Protection Clause itself. In a case challenging the inclusion of the words “under God” in the Pledge of Allegiance in public schools, *Newdow v. United States Congress*,<sup>64</sup> for example, Judge Fernandez, dissenting, argued specifically that both the Establishment Clause and the Free Exercise Clause “were not designed to drive religious expression out of public thought; they were written to avoid discrimination.”<sup>65</sup> Professor Steven Gey cogently observes that “[i]n Judge Fernandez’s view, the Religion Clauses are nothing more than ‘an early kind of equal protection provision [intended to] assure that government will neither discriminate for nor discriminate against a religion or religions.’”<sup>66</sup> Indeed, Judge Fernandez wanted to *uphold* the inclusion of “under God” in the pledge on the ground that the First Amendment religion clauses were *only* about “equal protection,” not secularity.

## 2. Litigants Who Might Have Used Equal Protection Challenges

A recent government religious expression case brought in federal district court in West Virginia, *Sklar v. Board of Education*,<sup>67</sup> ought to have easily been won on Establishment Clause grounds,<sup>68</sup> but it also seemed to beg for an equal protection claim. *Sklar* provides an excellent opportunity to explain how this type of government religious expression, which makes students and others feel marginalized by re-

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63 *Id.* at 244, 246 (emphasis added) (citations and internal quotation marks omitted).

64 292 F.3d 597 (9th Cir. 2002), *rev'd sub nom.* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004).

65 *Id.* at 613 (Fernandez, J., dissenting).

66 Gey, *supra* note 18, at 1923 (first brackets added).

67 Complaint, No. 1:2006cv00103 (N.D. W. Va. filed June 28, 2006).

68 In *Washegesic v. Bloomingdale Public School*, 33 F.3d 679 (6th Cir. 1994), a case with almost identical facts, display of a copy of the same portrait in a public high school hallway was declared unconstitutional under the Establishment Clause.

minding them who the “real” citizens are, also violates the Equal Protection Clause. A large copy of Warner Sallman’s familiar painting, *Head of Christ*, hung for many years in the hall outside the principal’s office at a public high school, where it was readily visible to students, staff, and visitors (and unavoidable for anyone going to or past the administrative offices). The portrait was not part of any larger display. School District officials refused to remove the portrait despite repeated complaints for at least ten years.<sup>69</sup> The ACLU and Americans United for Separation of Church and State sued the Harrison County Board of Education in federal court, seeking removal of the portrait—but only on Establishment Clause grounds, not equal protection grounds.<sup>70</sup>

The plaintiffs’ use of only the Establishment Clause in *Sklar* is typical. Several cases in recent years challenging government religious expressions seem particularly suited to an equal protection claim: challenges to city or county seals that include explicitly Christian religious images (usually crosses),<sup>71</sup> giant Latin crosses atop public buildings,<sup>72</sup> Ten Commandments displays in public school classrooms,<sup>73</sup> and “disclaimer” stickers on science textbooks warning public school students that evolution is just a theory.<sup>74</sup> In case after case, the plaintiffs and the courts acknowledge the equality interest;

69 Complaint at ¶ 2, *Sklar v. Bd. of Educ.*, No. 1:2006cv00103 (N.D. W. Va. filed June 28, 2006).

70 The complaint also alleged that the portrait violates the Due Process Clause, but that claim is simply derivative of the Establishment Clause claim. For more on *Sklar*, see *infra*, Part V.

71 *E.g.*, *Murray v. City of Austin*, 744 F. Supp. 771 (W.D. Tex. 1990), *aff’d in part, vacated in part*, 947 F.2d 147 (5th Cir. 1991) (upholding city seal including family crest with cross), *cert. denied*, 505 U.S. 1219 (1992); *Foremaster v. City of St. George*, 882 F.2d 1485 (10th Cir. 1989) (holding that there was a question of material fact whether the image of Mormon Temple was advancing the Mormon religion), *cert. denied*, 495 U.S. 910 (1990); *Friedman v. Bd. of County Comm’rs*, 781 F.2d 777 (10th Cir. 1985) (holding that the county seal that depicted a Latin cross and Spanish motto, “CON ESTA VENCEMOS” (“With This We Conquer”), did not violate the Establishment or Free Exercise Clause), *cert. denied*, 476 U.S. 1169 (1986); *ACLU of Ohio, Inc. v. City of Stow*, 29 F. Supp. 2d 845 (N.D. Ohio 1998) (holding that the City’s display of a cross on its seal violates the Establishment Clause).

72 *E.g.*, *ACLU of Ill. v. City of St. Charles*, 794 F.2d 265 (7th Cir. 1986) (upholding the prohibition on the City’s display of a lighted Latin cross), *cert. denied*, 479 U.S. 961 (1986).

73 *E.g.*, *Stone v. Graham*, 449 U.S. 39 (1980) (*per curiam*) (prohibiting the State of Kentucky from requiring public classrooms to post the Ten Commandments).

74 *E.g.*, *Selman v. Cobb County Sch. Dist.*, 390 F. Supp. 2d 1286 (N.D. Ga. 2005), *vacated and remanded*, 449 F.3d 1320 (11th Cir. 2006) (requiring more facts to decide the constitutionality of a sticker on biology books that claims that evolution is a theory); *Freiler v. Tangipahoa Parish Bd. of Educ.*, 185 F.3d 337 (5th Cir. 1999) (holding that requiring a disclaimer to be read before teaching evolutionary theories was unconstitutional), *cert. denied*, 530 U.S. 1251 (2000).

indeed, the courts often hold the expressions unconstitutional specifically on the ground that the religious expression, in Justice O'Connor's signal words in *Lynch*, "sends a message to nonadherents that they are outsiders."<sup>75</sup> Sometimes the language sounds so squarely in equal protection that it is hard to believe that *no one* thought about using the Equal Protection Clause—take for example these excerpts from *ACLU of Ohio, Inc. v. City of Stow*, in which a federal court struck down, under the Establishment Clause, a city seal that featured a cross:

[F]ederal courts across the country are struggling on a daily basis to balance the right of each American, both as an individual and as part of a community, to engage in religious expression with the companion *right of each American not to feel excluded or ostracized by a community's expression of religious sentiment* which conflicts with his or her own personal beliefs.

... [T]he heavy local publicity that has surrounded this litigation and the tension it has created in the community could only have exacerbated *the effect of causing non-Christians in Stow to feel like outsiders.*

... [I]t is much less likely that a non-Christian resident of Austin would have any "*second-class citizen*" sense than would a non-Christian resident of Stow.

... [T]here are numerous nonsectarian ways that the City of Stow could readily accomplish [its] purpose, without having the effect of *making non-Christians feel like outsiders.*

... An objective and reasonably informed observer would conclude from the seal that *adherence to Christianity is somehow relevant to a citizen's standing in the political community.*<sup>76</sup>

Yet in this and the other contemporary government religious expression cases, neither the challengers nor the courts ever use the Equal Protection Clause itself.<sup>77</sup>

<sup>75</sup> *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

<sup>76</sup> 29 F. Supp. 2d at 847, 852–53 (emphasis added); *see also id.* at 850 (distinguishing *Murray v. City of Austin*, 947 F.2d 147 (5th Cir. 1991), which upheld a city seal containing a cross, because it was the Austin family seal).

<sup>77</sup> Although it is conspicuously absent in Establishment Clause cases, the Equal Protection Clause *has* been used, along with the First Amendment, in cases brought under the Free Exercise Clause. These are not the government religious expression cases considered in this Article, and therefore are not really precedent for the use we suggest, but it is important to bear them in mind if only for the purpose of responding to the occasionally heard objection that *any* kind of "religion case" must be brought only under the First Amendment, not the Fourteenth. A series of decisions in the early 1950s struck down convic-

In *ACLU of Georgia v. Rabun County Chamber of Commerce, Inc.*,<sup>78</sup> a challenge to a large lighted cross in a government-owned park, the Eleventh Circuit came close to deciding the case under the Equal Protection Clause:

[W]here the challenged action involves alleged discriminatory treatment of various religions by a government, the court has applied a "strict scrutiny/compelling governmental interest" standard similar to that which prevails under equal protection analysis. In the instant case, no evidence has been presented concerning the state's refusal to approve construction of symbolic expressions of religions other than Christianity in state parklands. In the absence of any evidence of an "express design [to] burden or favor selected religious denominations" we conclude that the *Lemon* test remains the controlling legal standard in this case.<sup>79</sup>

The court's language suggests that had the plaintiffs presented evidence of some other group's having been denied permission to erect a religious display, it would have been willing to decide the case on equality principles. Several other courts have considered displays of giant or lighted crosses and crèches on public property. Sometimes

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tions for the use of public property for religious worship or proselytizing. See, e.g., *Fowler v. Rhode Island*, 345 U.S. 67 (1953) (reversing the conviction of Jehovah's Witnesses who delivered an address in a park); *Niemotko v. Maryland*, 340 U.S. 268 (1951) (reversing the convictions of Jehovah's Witnesses who used a public park for Bible talks). In many of these cases, the Supreme Court based its decision, at least in part, on the government having treated the defendants (usually Jehovah's Witnesses) differently from other religious groups. "The conclusion is inescapable that the use of the park was denied because of the City Council's dislike for or disagreement with the Witnesses or their views." *Niemotko*, 340 U.S. at 272. "[A] religious service of Jehovah's Witnesses is treated differently than a religious service of other sects. That amounts to the state preferring some religious groups over this one." *Fowler*, 345 U.S. at 69. It seems no coincidence to us that these opinions recognizing an equality interest in the Establishment Clause context were written at the dawn of the civil rights movement and only shortly before *Brown v. Board of Education*. In *Sherbert v. Verner*, 374 U.S. 398 (1963), the Supreme Court held that denial of unemployment benefits to a Seventh-Day Adventist, because she declined employment that would have required her to work on Saturdays, violated the Free Exercise Clause. *Sherbert* had included, seemingly as an afterthought, a single reference to the Equal Protection Clause. Brief for Respondents at 31, *Sherbert*, 374 U.S. 398 (No. 526), 1963 WL 105528. Briefs of two amici curiae elaborated on the argument slightly, but even these arguments used Establishment Clause precedents. Brief of American Jewish Committee et al. as Amici Curiae at 20, *Sherbert*, 374 U.S. 398 (No. 526), 1963 WL 105530; Brief of Synagogue Council of America et al. as Amici Curiae at 15, 17, *Sherbert*, 374 U.S. 398 (No. 526), 1963 WL 105529. The Court did not even discuss Equal Protection beyond stating that "[i]n view of the result we have reached under the First and Fourteenth Amendments' guarantee of free exercise of religion, we have no occasion to consider appellant's claim that the denial of benefits also deprived her of the equal protection of the laws in violation of the Fourteenth Amendment." *Sherbert*, 374 U.S. at 410.

<sup>78</sup> 698 F.2d 1098 (11th Cir. 1983).

<sup>79</sup> *Id.* at 1109 n.20 (second alteration in original) (citations omitted).



they are upheld;<sup>80</sup> sometimes they are held unconstitutional.<sup>81</sup> But always, the case is decided under the Establishment Clause, usually turning on the question of whether there was a secular or sacred purpose.

In *ACLU of Ohio v. Capitol Square Review & Advisory Board*,<sup>82</sup> the Sixth Circuit rejected an Establishment Clause challenge to Ohio's plan to engrave a twelve-foot-wide copy of the state motto, "With God All Things Are Possible," a quotation from the New Testament, in the plaza in front of the statehouse. The plaintiffs included equality arguments similar to those in *Allegheny County*,<sup>83</sup> but the majority ignored them entirely, adopting almost a coercion approach, at most acknowledging that the motto could be mildly annoying to non-Christians.<sup>84</sup> The dissenting judges were furious, and although they never mentioned the Equal Protection Clause, those judges seemed to understand the injury that would underlie such a claim, using language that explains that they "got it" better than perhaps any court before them:

[T]he motto. . . does more than "irritate" people. It has the capacity to alienate citizens of Ohio, to create in-groups and out-groups on the basis of their identification with and knowledge of the words of Jesus as contained in the New Testament. . . . [I]t is an exclusion all non-Christians will come to share whenever they walk past the inscription on Capitol Square and wherever else it will now appear.

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80 See, e.g., *Paul v. Dade County*, 202 So. 2d 833 (Fla. Dist. Ct. App. 1967) (holding that a lighted cross on the courthouse during the Christmas season did not constitute an establishment of religion), *cert. denied*, 390 U.S. 1041 (1968); *Meyer v. Oklahoma*, 496 P.2d 789 (Okla. 1972) (upholding cross on fairground under state constitution); *Eugene Sand & Gravel, Inc. v. City of Eugene*, 558 P.2d 338 (Or. 1976) (upholding cross built as war memorial), *cert. denied*, 434 U.S. 876 (1977).

81 See, e.g., *Gillfillan v. City of Philadelphia*, 637 F.2d 924 (3d Cir. 1980) (holding that expenditures to erect a platform for papal ceremonies were unconstitutional), *cert. denied*, 451 U.S. 987 (1981); *Citizens Concerned for Separation of Church & State v. City & County of Denver*, 481 F. Supp. 522 (D. Colo. 1979) (rejecting as unconstitutional a nativity scene on state property), *rev'd on other grounds*, 628 F.2d 1289 (10th Cir. 1981); *Fox v. City of Los Angeles*, 587 P.2d 663 (Cal. 1978) (holding that lighted cross on city hall violated the California constitution); see also discussion *infra* Part V.A.

82 243 F.3d 289 (6th Cir. 2001) (en banc). Disclosure: one of the authors participated on behalf of the plaintiffs in this litigation—to a very limited extent and, unfortunately, after the case had proceeded too far to add an Equal Protection claim.

83 492 U.S. 573 (1989). See *supra* notes 55–56 and accompanying text.

84 243 F.3d at 293, 299 ("This motto involves no coercion. It does not purport to compel belief or acquiescence. It does not command participation in any form of religious exercise.").

... Turning Christ's unique message of salvation through grace into a public bumper sticker is not only deeply offensive to many devout Christians. It says to others that their beliefs are inferior and hence turns Christian doctrine into an official state advertising label that discriminates against nonbelievers and other religions that do not accept Christ as their savior.<sup>85</sup>

Had the plaintiffs raised a separate equal protection challenge, the court would have been forced to address these points, and perhaps the result would have been different.<sup>86</sup>

And of course, *McCreary County*<sup>87</sup> and *Van Orden*<sup>88</sup> both concerned Ten Commandments displays outside government buildings—an excellent context for an equal protection argument—but the plaintiffs did not raise one. In the *McCreary County* and *Van Orden* opinions, the Court referred to several other government religious expression cases, including *Buono v. Norton*<sup>89</sup> and *Separation of Church & State Committee v. City of Eugene*,<sup>90</sup> both of which held maintenance of giant crosses in government parks unconstitutional, *Santa Fe Independent School District v. Doe*,<sup>91</sup> which held student-led, student-initiated prayers before high school football games unconstitutional, and *Granzzeier v. Middleton*,<sup>92</sup> which held that including a crucifix on signs announcing that government offices would be closed for Good Friday was unconstitutional. In each case, the constitutional provision raised by the challengers and relied upon by the courts was the First Amendment Establishment Clause—never the Equal Protection Clause.<sup>93</sup>

Two groups of Establishment Clause cases seem, like government religious expression cases, to be tailor-made for equal protection challenges: qualifying oaths and Sunday closing laws. But the Equal Protection Clause has not been used in these cases, either. In *Torcaso v. Watkins*,<sup>94</sup> the Supreme Court invalidated a provision of the Maryland Constitution that barred from public office anyone who refused

85 *Id.* at 316, 318–19 (Merritt, J., dissenting).

86 We may yet find out. Ohio recently enacted a statute requiring public schools to post privately-donated copies of either “In God We Trust” or “With God, All Things Are Possible.” OHIO REV. CODE ANN. § 3313.801 (West 2008). In the school setting, a challenge should be, if anything, easier. See *infra* Part IV.

87 *McCreary County v. ACLU of Ky.*, 545 U.S. 844 (2005).

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

89 212 F. Supp. 2d 1202 (C.D. Cal. 2002), *aff'd*, 371 F.3d 543 (9th Cir. 2004).

90 93 F.3d 617 (9th Cir. 1996).

91 530 U.S. 290 (2000).

92 955 F.Supp. 741 (E.D. Ky. 1997).

93 The First Amendment Free Exercise Clause was at issue, too, in some cases.

94 367 U.S. 488 (1961).

to make “a declaration of belief in the existence of God.”<sup>95</sup> The Supreme Court, in unanimously holding the provision unconstitutional under the First Amendment, used language that seems to support an equal protection claim at least as well:

There is, and can be, no dispute about the purpose or effect of the Maryland Declaration of Rights requirement before us—it sets up a religious test which was designed to and, if valid, does bar every person who refuses to declare a belief in God from holding a public “office of profit or trust” in Maryland. The power and authority of the State of Maryland thus is put on the side of one particular sort of believers—those who are willing to say they believe in “the existence of God.”<sup>96</sup>

....

Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others.<sup>97</sup>

It is true that the requirement of declaring a belief in the existence of a deity is a clear First Amendment violation. But it is equally obvious that denying public office to nonbelievers or to nonmonotheists is a clear equal protection violation. The Court (and, apparently, the plaintiffs), though, never even mentioned equal protection.

In *Silverman v. Campbell*,<sup>98</sup> an atheist, applying to become a notary public, crossed out the words “So help me God” in the oath on the application.<sup>99</sup> The application was denied on the express ground that the application “did not comply with the South Carolina Constitution and statutes applicable to Notaries.”<sup>100</sup> South Carolina’s state constitution had a provision barring “persons who deny the existence of a Supreme Being” from holding public office.<sup>101</sup> The state supreme court held that that provision violated both First Amendment religion clauses and the Religious Test Clause of the Federal Constitution.<sup>102</sup> This was almost as blatant a case of government discrimination be-

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95 *Id.* at 489.

96 *Id.* at 489–90.

97 *Id.* at 495 n.11.

98 486 S.E.2d 1 (S.C. 1997).

99 *Id.* at 1.

100 *Id.* (internal quotations omitted).

101 *Id.* at 2.

102 *Id.* The Religious Test Clause of the Constitution states:

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

U.S. CONST. art. VI, cl. 3.

tween people based upon religion as there could be, yet here again, there was not even any mention of the Equal Protection Clause by either the court or the litigants.

Sunday closing laws, or “blue laws,” similarly seem an especially obvious context for an equal protection challenge. Laws prohibiting commercial activity on Sundays are similar to many government religious expressions in that they have no theological content; they do not require people to go to church instead of working. There is no proselytization or coercion at all. But they certainly discriminate against observant Muslim, Seventh-Day Adventist, and Jewish business owners who close on Fridays or Saturdays for their own sabbaths and are forced to close on Sundays as well. Whatever “establishment” of Sunday-sabbath religions is present in those laws is small potatoes compared to the unequal treatment of observers of different sabbath days. As the Equal Protection Clause therefore seems like the obvious basis for a challenge, cases challenging Sunday closing laws seem like the most likely place to find the Equal Protection Clause used in a religion case. Sure enough, there *have* been equal protection challenges to Sunday closing laws—but they are so surprising, you’re going to think we’re making them up.

In 1961, the Supreme Court decided four Sunday closing laws cases.<sup>103</sup> In one, *McGowan v. Maryland*, the challenged statute prohibited Sunday sales of “all merchandise except the retail sale of tobacco products, confectioneries, milk, bread, fruits, gasoline, oils, greases, drugs and medicines, and newspapers and periodicals . . . all food-stuffs, automobile and boating accessories, flowers, toilet goods, hospital supplies and souvenirs,” by any retail business that employed more than one person other than the owner.<sup>104</sup> The defendants, employees of a discount store, had sold floor wax, some office supplies, and a toy submarine.<sup>105</sup> They did indeed raise an equal protection challenge (in addition to Establishment Clause and Due Process Clause challenges)—but *not* on the basis of religious discrimination. Rather, they complained that the exceptions to the Sunday laws violated the Equal Protection Clause—not disparate treatment of Christians and Jews, just disparate treatment of flowers and floor wax. As

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103 *McGowan v. Maryland*, 366 U.S. 420 (1961); *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582 (1961); *Braunfeld v. Brown*, 366 U.S. 599 (1961) (plurality opinion) (discussing same Pennsylvania statute as in *Two Guys*); *Gallagher v. Crown Koshier Super Mkt. of Mass, Inc.*, 366 U.S. 617 (1961).

104 366 U.S. at 422–23.

105 *Id.* at 422.

that claim asserted neither a suspect classification nor infringement of a fundamental right, only the lower constitutional threshold applied. The State had only to argue that the laws were rationally related to the asserted government objective of promoting the health of the population, and the Supreme Court agreed that they were.

The same losing argument was raised, and rejected, in *Two Guys from Harrison-Allentown, Inc. v. McGinley*.<sup>106</sup> In both *McGowan* and *Two Guys*, the plaintiffs were not observers of a non-Sunday Sabbath, which could explain their choice of only the low-scrutiny equal protection challenge.<sup>107</sup> That does not explain why the plaintiffs, Orthodox Jews who closed on Saturdays, in the other two cases, *Gallagher v. Crown Kosher Super Market of Massachusetts, Inc.* and *Braunfeld v. Brown*, also limited themselves to exactly the same commodities-exception argument for their equal protection challenges.<sup>108</sup> Indeed, in *Braunfeld*, Chief Justice Warren's plurality opinion suggests tantalizingly that an equal protection challenge would have succeeded:

If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect. But if the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden.<sup>109</sup>

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106 366 U.S. 582 (1961).

107 See also *Petit v. Minnesota*, 177 U.S. 164, 167 (1900) (raising the same challenge and receiving the same result).

108 *Gallagher*, 366 U.S. at 622 (plurality opinion) ("The equal protection arguments advanced by appellees are much the same as those made by appellants in *McGowan v. Maryland*. They contend that the exceptions to the statute are so numerous and arbitrary as to be found to have no rational basis . . . . The three-judge District Court described the present statutory system as an 'unbelievable hodgepodge . . . .' (citation and footnote omitted)); *Braunfeld*, 366 U.S. at 600-01 ("Among the questions presented are whether the statute is a law respecting an establishment of religion and whether the statute violates equal protection. Since both of these questions, in reference to this very statute, have already been answered in the negative, *Two Guys from Harrison-Allentown, Inc. v. McGinley*, and since appellants present nothing new regarding them, they need not be considered here. Thus, the only question for consideration is whether the statute interferes with the free exercise of appellants' religion." (citation omitted)). The same exceptions basis, as opposed to religious classification basis, has been the subject of subsequent challenges to Sunday closing laws. See generally KUSHNER, *supra* note 5, § 4:13; cases cited *supra* note 6.

109 366 U.S. at 607 (emphasis added). Note that his approval of an "impact" test for Equal Protection analysis predates its rejection in *Washington v. Davis*, 426 U.S. 229 (1976), a challenge for the equal protection approach advocated here. See *infra* Part V.A. Had the Court had the equal protection issue properly before it in *Braunfeld* and established the impact analysis as precedent, perhaps the result in *Davis* might have been different.

Justice Warren went on to consider whether any of the alternatives suggested by the challengers would serve the State's purpose in maintaining a general day of rest and quiet adequately, and although he concluded that in that case they would not, his application of that analysis is exactly what one would be going for by raising an equal protection challenge.<sup>110</sup>

### B. Scholarship

Some notable scholars, too, have recognized an equality interest at issue in government religious expression cases. Every time, though, their recommendation is some variation on the theme that Establishment Clause jurisprudence ought to include, or even be based on, the equality principle.

Philip B. Kurland's famous 1961 article, *Of Church and State and the Supreme Court*,<sup>111</sup> advocated a "neutrality" focus for the First Amendment religion clauses. His main premise was that the Free Exercise and Establishment Clauses are

impossible of effectuation unless they are read together as creating a doctrine more akin to the reading of the equal protection clause than to the due process clause, *i.e.*, they must be read to mean that religion may not be used as a basis for classification for purposes of governmental action . . . .

. . . [T]he thesis proposed here as the proper construction of the religion clauses of the first amendment is that the freedom and separation clauses should be read as a single precept that government cannot utilize religion as a standard for action or inaction because these clauses pro-

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<sup>110</sup> See also *Fine v. Comm'r of Dep't of Consumer Affairs*, 562 N.Y.S.2d 511, 511 (N.Y. App. Div. 1990) (mem.) (holding that a law that prohibits service of process on Sundays was neither a violation of the Establishment Clause nor the Equal Protection Clause because it "serves a legitimate state objective in providing a day of rest for its citizens and neither forces plaintiff to observe Sunday Sabbath nor hinders him from observing his own Sabbath"); *Kittery Motorcycle, Inc. v. Rowe*, 201 F. Supp. 2d 189 (D. Me. 2002) (upholding Sunday closing law that prohibited the sale of motor vehicles, including motorcycles, but not of other recreational equipment, such as boats, on Sunday over Equal Protection challenge); *Ex parte Robbins*, 661 S.W.2d 740 (Tex. App. 1983) (holding that there was no equal protection violation when Sunday law treated smaller and larger merchants differently); *Caldor's, Inc. v. Bedding Barn, Inc.*, 417 A.2d 343 (Conn. 1979) (holding that Sunday laws were unconstitutional in the absence of a rational connection between items whose availability was deemed appropriate to a day of rest and establishments permitted to offer such items for sale under Sunday closing law); *Hertz Washmobile Sys. v. Village of South Orange*, 124 A.2d 68 (N.J. Sup. Ct. 1956), *aff'd* 135 A.2d 524 (1957) (holding that village could not establish a policy by ordinance that specifically prohibited only certain activities on Sundays and not all activities that were prohibited by state law).

<sup>111</sup> Kurland, *supra* note 7.

hibit classification in terms of religion either to confer a benefit or to impose a burden.<sup>112</sup>

Noting that the principle “that religion may not be used as a classification for purposes of governmental action” has long since been established in the equal protection context,<sup>113</sup> Professor Kurland found evidence that the Supreme Court, long before *Larson, Lynch, Allegheny County*, et al., in fact had been applying his suggested “neutrality” principle in First Amendment cases such as *Cantwell v. Connecticut*,<sup>114</sup> *Cox v. New Hampshire*,<sup>115</sup> *Chaplinsky v. New Hampshire*,<sup>116</sup> and *Jones v. Opelika*,<sup>117</sup> albeit not explicitly.<sup>118</sup> In *Jones v. Opelika*, for example, Professor Kurland noted language in the majority opinion suggesting that the Court seemed to be using a “non-discrimination test”:

There is to be noted, too, a distinction between nondiscriminatory regulation of operations which are incidental to the exercise of religion . . . and those which are imposed upon the religious rite itself . . . . Nothing more is asked from one group than from another which uses similar methods of propagation.<sup>119</sup>

Not only did Professor Kurland not recommend using the Equal Protection Clause in First Amendment cases, he suggested using the First Amendment for what had been brought (and won) as equal protection cases. He looked at a set of free exercise cases in which the Equal Protection Clause itself, not just an equality-based First Amendment, was used to strike down convictions, and made an observation almost directly opposite to the thesis of this Article. He noted that *Niemotko v. Maryland*,<sup>120</sup> in which a conviction of Jehovah’s Witnesses for making religious speeches in a public park without permission was held unconstitutional under the Equal Protection Clause, “could as appropriately have been based on the religion clauses of the first amendment properly construed to prohibit classification in

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112 *Id.* at 5–6.

113 *See supra* note 77.

114 310 U.S. 296 (1940).

115 312 U.S. 569 (1941).

116 315 U.S. 568 (1942).

117 316 U.S. 584 (1943).

118 Kurland, *supra* note 7, at 37–42. People usually think of many of these as “speech” cases, not “religion” cases, but they all involved religious expressive activity, frequently by Jehovah’s Witnesses. This is true even in *Chaplinsky* in which the famous “fighting words” were spoken by the defendant after he had been arrested when passing out religious leaflets. 315 U.S. at 569. The Court got into and out of any religious issues quickly, though, *id.* at 571, so perhaps Professor Kurland was stretching it just a bit in using *Chaplinsky* to prove his thesis. He was certainly correct, however, that religion was at issue in the other cases.

119 *Jones*, 316 U.S. at 596, 598.

120 340 U.S. 268 (1951).

terms of religion."<sup>121</sup> With regard to such "public park" cases, Professor Kurland observed:

It should be noted that the notion of the utility of the equal protection clause in this area is akin to the suggested thesis of this paper, except that in its application to this case [*Fowler v. Rhode Island*]<sup>122</sup> it involved discrimination among religions rather than the problem of classification in terms of religion.<sup>123</sup>

Professor Kurland gave no clue why he did not simply suggest using the Equal Protection Clause, instead of or in addition to, the Establishment Clause, for government religious expression cases or any others. He did not reject the idea; he just never addressed it.

Professor Kurland's thesis, impressive and persuasive though it is, pretty much laid unused for a decade and a half until Kenneth Karst picked up the theme in *Equality as a Central Principle in the First Amendment*.<sup>124</sup> As the title reveals, Professor Karst, too, argued forcefully for maximization of the equality interest in the First Amendment, although in his article the focus was on the Speech Clause, not either of the religion clauses. He noted as well that in the 1960s and early 1970s—coincidentally or not, the time between Professor Kurland's article and his own—the Supreme Court had used not only the equality principle, but also the Equal Protection Clause itself, in speech cases, and both judges and commentators objected that "[f]raming the problem of free expression in equal protection terms . . . misses the basic purpose of the first amendment, which is not equality but liberty."<sup>125</sup> Although this seems like an obvious invitation to just use the Equal Protection Clause, whose basic purpose is equality, Professor Karst argued instead that "[t]he principle of equality, when understood to mean equal liberty, is not just a peripheral support for the freedom of expression, but rather part of the 'central meaning of the First Amendment.'"<sup>126</sup> Like Professor Kur-

121 Kurland, *supra* note 7, at 60; *see also id.* at 60–62, 69 (invalidating conviction where "a religious service of Jehovah's Witnesses is treated differently than a religious service of other sects[, which] amounts to the state preferring some religious groups over [Jehovah's Witnesses]").

122 *See supra* notes 43–44.

123 Kurland, *supra* note 7, at 62.

124 Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975) [hereinafter Karst, *Equality as a Central Principle*]. *See also* Kenneth L. Karst, *The First Amendment, the Politics of Religion and the Symbols of Government*, 27 HARV. C.R.-C.L. L. REV. 503 (1992) [hereinafter Karst, *First Amendment*].

125 Karst, *Equality as a Central Principle*, *supra* note 124, at 21.

126 *Id.* (quoting *New York Times v. Sullivan*, 376 U.S. 254, 273 (1964)).



land, his point was to use the First Amendment *instead* of the Equal Protection Clause where the interest at issue was equality.

Mark Tushnet returned to Professor Kurland's idea in 1989. In "*Of Church and State and the Supreme Court*": *Kurland Revisited*,<sup>127</sup> Professor Tushnet, noting that "no one has yet devised a better solution than Kurland's,"<sup>128</sup> looked at contemporary Supreme Court cases to understand why the neutrality/equality approach had not been adopted. One reason was that the approach "does not always yield normatively attractive results."<sup>129</sup> That is, where "legislators have simply overlooked the impact of a neutral rule on some religious believers,"<sup>130</sup> such as denial of unemployment benefits to those who would not work on Saturdays,<sup>131</sup> "the doctrine of mandatory accommodation plainly produces 'better' outcomes."<sup>132</sup> Second, Professor Kurland had analogized to equal protection theory, but the equal protection landscape had changed since Professor Kurland wrote his 1961 article, specifically to exclude "disparate impact" claims. The Supreme Court, Professor Tushnet wrote, "has developed doctrines that reduce the congruence between equal protection doctrine and Kurland's proposed religion clause doctrine,"<sup>133</sup> specifically that "the Court has refused to invalidate neutral rules with disproportionate racial impact unless the impact was intended in a strong sense, but it has invalidated neutral rules with disproportionate religious impact without regard to intent."<sup>134</sup> Finally, at the time of Professor Kurland's article, the issue at the forefront of the debate was public aid to religious schools. Professor Tushnet felt that Professor Kurland would have been surprised to see that

the people of the United States, in the midst of one of their periodic upsurges in public religiosity, have begun to seek direct government support of clearly sectarian activities such as organized prayer in the public

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127 Mark V. Tushnet, "*Of Church and State and the Supreme Court*": *Kurland Revisited*, 1989 SUP. CT. REV. 373.

128 *Id.* at 373.

129 *Id.* at 400.

130 *Id.*

131 *See, e.g.,* *Frazee v. Ill. Dep't of Emp. Sec.*, 489 U.S. 829, 834 (1989) (holding that the denial of state unemployment benefits due to a refusal of employment violating religious beliefs is unconstitutional); *Sherbert v. Verner*, 374 U.S. 398, 410 (1963) (holding that state unemployment benefits cannot be denied to one who refuses employment because of religious beliefs).

132 Tushnet, *supra* note 127, at 400.

133 *Id.* at 401.

134 *Id.* (footnote omitted).

schools. Kurland found such support simply unthinkable, and perhaps when he wrote it was.<sup>135</sup>

The Supreme Court is sensitive to the political atmosphere, and in the sort of climate he saw developing, Professor Tushnet correctly predicted, the Court would be unlikely to adopt the Kurland approach.

James A. Kushner observes, as have we, that “[r]eligion-based discrimination is rarely challenged under the equal protection clause. Typically, government action interfering with religious practices had been reviewed under the free exercise clause of the First Amendment and historically accorded strict scrutiny requiring a compelling state interest for any coercion as to or interference with religion . . . .”<sup>136</sup> Tracing the path from *Sherbert v. Verner*<sup>137</sup> through a series of Congressional enactments intended to require strict scrutiny of any law that burdens religious practice,<sup>138</sup> Professor Kushner observes that “[t]he Court’s attempted devaluation of the free exercise clause to challenge religious discrimination, at least in cases not presenting outrageous facts of religious intolerance, may signal the need to focus on the equality principle of the equal protection clause as an additional source to protect religious liberty.”<sup>139</sup>

That sure sounds like an invitation to use the Equal Protection Clause. And Professor Kushner then goes on to state that “[r]eligion . . . appears to deserve strict scrutiny under the equal protection clause.” But the analysis that follows refers only to cases brought under the First Amendment with emphasis on the equality interest it protects, or focuses on affirmative action, on the frequent tension between accommodation of religion under the Free Exercise Clause and the Establishment Clause, and on cases in which employees assert discrimination claims against religious employers.<sup>140</sup> The closest he gets to suggesting a direct Equal Protection Clause challenge is to note that

[t]he obligation to accommodate religion under the free exercise clause, however, arguably requires religion-based classifications resulting in

135 *Id.* at 402.

136 KUSHNER, *supra* note 5, § 5:21, 846–55 (footnotes omitted).

137 374 U.S. 398 (1963); *see supra* note 109.

138 The Religious Freedom Restoration Act (RFRA) of 1993, 42 U.S.C. § 2000bb, *et seq.*, was invalidated by *City of Boerne v. Flores*, 521 U.S. 507 (1997). The Religious Land Use and Institutionalized Persons Act (RLUIPA) of 2000, 42 U.S.C. § 2000cc, *et seq.*, applies to land use regulations and prisoners’ religious rights.

139 KUSHNER, *supra* note 5, § 5:21, 896.

140 *Id.*

some First Amendment-equal protection tension, as in the case of religious accommodation required by federal employment discrimination law, in programs designed to accommodate the religious practices of participants, or in state regulation of religious entities.<sup>141</sup>

His discussion of Sunday closing laws does not address the idea of a religion-based equal protection challenge, or the dearth of such challenges in reported cases.<sup>142</sup>

Steven G. Gey has examined the Cold War era federal legislation adding “under God” to the Pledge of Allegiance.<sup>143</sup> He argues persuasively that the government’s motive was not secular, but religious, and thus violated the Establishment Clause:

The message conveyed by the Senate when it passed the “under God” legislation, like that of the House, was overtly and nontrivially sectarian: Americans believe in God, Communists do not. Ergo, atheists are not real Americans.

....

... [T]he general atmosphere surrounding the President’s signing ceremony drove the sectarian point home forcefully.

....

This is the image that encapsulates the government’s intent in adding the words “under God” to the Pledge: the President, surrounded by many of the most important political actors of the time, standing together and reciting the newly sanctified Pledge, bolstered with repeated verbal diatribes against demonic atheists, and serenaded by the “familiar strains of ‘Onward Christian Soldiers!’” The intent is unambiguous and undeniable: Every single political actor who had a hand in the decision to add the words “under God” to the Pledge specifically intended (to borrow Justice O’Connor’s phrasing) to send “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.”<sup>144</sup>

Professor Gey is surely correct that the motive behind the legislation was to separate “us” from “them,” to make it plain that the godless are not “Real Americans.” But his point is that the discrimination proves religious intent; ours is that the religious intent proves discrimination.

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141 *Id.* at 896–901 (footnotes omitted).

142 *Id.* § 4:13.

143 Gey, *supra* note 18.

144 *Id.* at 1868, 1878–80 (citing *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring)).

Mark A. Paulsen's 1986 article, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*<sup>145</sup> comes the closest of all. The title itself sounds like an invitation to use the Equal Protection Clause in the way that we are suggesting here. But Professor Paulsen, while pressing the equality issue, kept his theory grounded in the First Amendment, referring to the Equal Protection Clause only by way of analogy:

The central thesis of this article is that the establishment clause protects *religious liberty*; it safeguards much the same interests as the free exercise clause, but in a slightly different way. . . . Stated narrowly, government can neither keep persons from exercising certain religious beliefs nor may it make them exercise any religion.

But each clause is entitled to a somewhat broader reading: Not only may the state not prohibit free exercise, it may not penalize or unduly burden it either. Not only must the state refrain from mandating any exercise of religion, it also may not place the exercise of any religion or group of religions in a preferred position. Thus, a broad free exercise right bars government inhibition, deterrence, or *discrimination*; a broad establishment clause right bars religious coercion, inducement, or, once again, *discrimination*—in one direction or the other.<sup>146</sup>

Accordingly, he proposed "a new model for establishment clause adjudication: *The equal protection of the free exercise of religion.*"<sup>147</sup> Equal protection, that is, of free exercise of religion itself, not of *people* who are in some minority on the basis of religion or non-religion. It makes a big difference, because in government religious expression cases, the plaintiff's exercise of religion is typically not an issue. Professor Paulsen urged an analysis for both Free Exercise and Establishment Clause cases that would mirror the Equal Protection Clause analysis. He did not explain why plaintiffs could not simply use the Equal Protection Clause itself. The same year, Arnold H. Loewy used reasoning similar to Professor Paulsen's in urging the courts to embrace Justice O'Connor's "neutrality" analysis.<sup>148</sup> He, too, stayed entirely in the First Amendment ballpark.<sup>149</sup>

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145 Mark A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311 (1986).

146 *Id.* at 313–14.

147 *Id.* at 315.

148 Arnold H. Loewy, Essay, *Rethinking Government Neutrality Towards Religion Under the Establishment Clause: The Untapped Potential of Justice O'Connor's Insight*, 64 N.C. L. REV. 1049 (1986) (arguing that Justice O'Connor's endorsement test prevents the government from favoring or disfavoring particular religious beliefs).

149 See also JESSE H. CHOPER, *SECURING RELIGIOUS LIBERTY: PRINCIPLES FOR JUDICIAL INTERPRETATION OF THE RELIGION CLAUSES* 142 (1995) (proposing a set of guidelines for the consistent application of the religion clauses of the First Amendment); Steven B. Ep-

#### IV. ADVANTAGES TO THE EQUAL PROTECTION CLAUSE FOR GOVERNMENT RELIGIOUS EXPRESSION CASES

The Equal Protection Clause has several advantages over the Establishment Clause for government religious expression cases. It avoids the riskiness and unpredictability of the *Lemon* test; it is better suited to marginalization (as opposed to proselytization) claims; it provides an almost guaranteed strict scrutiny standard of review; it provides ready analogies to familiar precedents; and it protects against “de minimis” arguments.

##### A. *Exclusive Reliance on the Establishment Clause Is More Dangerous than Ever*

The first advantage of the Equal Protection Clause over the Establishment Clause is purely pragmatic. For the foreseeable future, reliance on the Establishment Clause, under even the most sympathetic analysis, is risky.

It is unlikely that the addition of Justices Roberts and Alito will shore up the chances for the survival of *Lemon* at all, let alone its liberal application à la Justice O’Connor to marginalization theories. Indeed, there is reason to fear not only for *Lemon*, but possibly any Establishment Clause analysis beyond the strict “coercion” view.

Even if *Lemon* survives unscathed, it offers little security to challengers to government religious expressions. The majorities in successful Establishment Clause cases under *Lemon* were often alarmingly slender even before the change in the Supreme Court’s composition. One need look no farther than *McCreary County* and *Van Orden* to see that the same court, the same day, applying the same test, can uphold one display and strike down another. The “endorsement” test, although it has commanded a majority a few times,<sup>150</sup> is even less likely

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stein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083 (1996) (questioning how the First Amendment religion clauses can be reconciled with the use of ceremonial deism); Karst, *First Amendment*, *supra* note 124 (discussing the Supreme Court’s new approach to the religion clauses); Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1990) (expounding on the concept of neutrality); 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 (2003) (discussing the Ninth Circuit decision that “under God” in the Pledge of Allegiance is unconstitutional); Alexandra D. Furth, Comment, *Secular Idolatry and Sacred Traditions: A Critique of the Supreme Court’s Secularization Analysis*, 146 U. PA. L. REV. 579 (1998) (critiquing the Court’s secularization of religious symbols).

150 See Gey, *supra* note 18, at 1883 n.67, 1891–92.

to become the standard. Even Justice O'Connor, applying the endorsement test, sometimes voted to uphold government religious expressions—including in *Lynch* itself.<sup>151</sup> And of course, if a court is applying the coercion test, there is almost no hope of successfully challenging any but the most blatantly proselytizing government religious expression—something like legislation declaring the United States a Christian country—and even then, who knows?<sup>152</sup>

*B. Equal Protection Is a Better Fit Where the Problem Is Marginalization, Not Proselytization*

The Equal Protection Clause speaks to the harm that is actually suffered. Unlike other Establishment Clause violations, government religious expressions usually have very low proselytization effect. Ten Commandments or Christmas displays and religious mottoes do not force anyone to worship or believe anything. The injury is instead marginalization, a form of discrimination when practiced by government. In *McCreary County*, the Court acknowledged that point: “While posting the Commandments may not have the effect of causing greater adherence to them, an ostensible indication of a purpose

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<sup>151</sup> *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring). Indeed, she observed that the endorsement test is best understood as the proper analysis of “[t]he purpose and effect prongs of the *Lemon* test.” *Id.* at 690.

<sup>152</sup> *See Church of the Holy Trinity v. United States*, 143 U.S. 457, 471 (1892) (“[T]his is a Christian nation.”). From time to time, proposals for theocratic constitutional amendments surface, including (unsuccessful) S. Res. 87, 83rd Cong. (1954):

This Nation devoutly recognizes the authority and law of Jesus Christ, Saviour and Ruler of nations, through whom are bestowed the blessings of Almighty God.

This amendment should not be interpreted so as to result in the establishment of any particular ecclesiastical organization, or in the abridgement of the rights of religious freedom, or freedom of speech and press, or of peaceful assemblage. Congress shall have power, in such cases as it may deem proper, to provide a suitable oath or affirmation for citizens whose religious scruples prevent them from giving unqualified allegiance to the Constitution as herein amended.

*See Hunting Time*, TIME, May 24, 1954, available at <http://www.time.com/time/magazine/article/0,9171,823381,00.html>. Think that sort of initiative died out with the McCarthy era? Check out the “Constitution Restoration Act of 2004,” which included a provision that

the Supreme Court shall not have jurisdiction to review, by appeal, writ of certiorari, or otherwise, any matter to the extent that relief is sought against an element of Federal, State, or local government, or against an officer of Federal, State, or local government (whether or not acting in official personal capacity), by reason of that element’s or officer’s acknowledgement of God as the sovereign source of law, liberty, or government.

H.R. 3799, 108th Cong. § 1260 (2004).

to promote a particular faith certainly will have the effect of causing viewers to understand the government is taking sides.”<sup>153</sup>

When a non-Christian with business to conduct in a courthouse or other government building must begin by walking through an entrance bearing a New Testament quotation of Jesus,<sup>154</sup> he may well feel that he has a strike against him even as he walks up to the plate. He is reminded of his minority status—not a “regular” citizen, but a “tolerated” outsider—before he even gets through the door. Will the decision maker who got the same reminder on his or her way into the building be able to see his point of view? Will he have to “translate” himself somehow to be understood in a way that his opponent will not? Imagine the feelings of a Muslim defendant in a criminal trial, passing a Ten Commandments monument on the way into the courthouse, reminding both her and the members of the jury who will decide her fate that she is The Other. The most secular Christmas display would have the same effect; eliminate every reference of Jesus, and you still remind non-Christians of their minority status. But an Establishment Clause challenge before any court, let alone a court committed to or even inclined toward a coercion test, is far from guaranteed success.

A challenger certainly could try emphasizing the equality interest Justice O’Connor and others have recognized in the Establishment Clause. But even if that viewpoint has enough support to carry the day, the natural “home” of this argument is in the Equal Protection Clause—no one can disagree that the Equal Protection Clause protects an equality interest, after all. Justice O’Connor remarked in *Lynch* that “The central issue in this case is whether [the government] has endorsed Christianity by its [actions.]”<sup>155</sup> The small but crucial step from the Establishment Clause to the Equal Protection Clause changes the question to whether the government is “endorsing” not Christianity, but *Christians*.

Challengers definitely should take advantage of *McCreary County’s* acknowledgement of the importance of the history of a challenged government religious expression. Many government religious expressions actually have their roots not in the “inspirational” or “moti-

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153 545 U.S. 844, 867 n.14 (2005).

154 E.g., Ohio’s motto, “With God All Things Are Possible,” (*Matthew* 19:26), embedded in bronze and granite in the approach to the entrance of the State House. *ACLU of Ohio v. Capitol Square Review & Advisory Bd.*, 20 F. Supp. 2d 1176, 1178 (S.D. Ohio 1998), *rev’d*, 210 F.3d 703 (6th Cir. 2000), *rev’d en banc*, 243 F.3d 289 (6th Cir. 2001).

155 *Lynch*, 465 U.S. at 690 (O’Connor, J., concurring).

vational” purposes asserted by government defendants, but in separatism. The inclusion of “under God” in the Pledge of Allegiance and the official adoption of “In God We Trust” as the national motto and “With God All Things Are Possible” as the Ohio motto all took place in the 1950s, as a part of the Cold War zeitgeist. The purpose was not proselytization, but it was not a response to any perceived public malaise, either—it was to distinguish “Us” from “Those Godless Communists” in the atheist Soviet Union.<sup>156</sup> Legislatures were not shy about stating that purpose, so there is ample evidence. This is a one-step argument for atheist challengers, but non-monotheists, Muslims, and Jews can extend the principle by explaining that an original purpose to proclaim “this is what We the People—unlike other people—believe” applies to them, too.

In even the most sympathetic, equality-focused Establishment Clause analysis, challengers must show that the government’s purpose was not secular.<sup>157</sup> Under the Equal Protection Clause, where the focus is not people’s religious beliefs but their status as members of a minority that happens to be defined by religion, secularity of intent is barely even an issue—even if the government’s purpose were secular, it can still be discriminatory.

This inquiry often arises in the context of government Christmas displays. Depending on the circumstances, an entirely secular Christmas display can create the marginalizing effect (and a religious one might not). As Rabbi Lawrence A. Hoffman explains, “[t]he problem is that even in its secularized form, Christmas is not religiously neutral. It is still Christian. . . . There may be two Christmases here, the age-old religious celebration and the modern secular one. But they are not easily separated.”<sup>158</sup> The message that it is “normal” and “American” to celebrate at least the secular Santa-and-tree aspects of

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156 See Gey, *supra* note 18, at 1875. This is not to deny, however, the overwhelming use of religious, in addition to anti-Communist, language by legislatures in adopting these mottoes; for example, the House Report regarding the addition of “under God” to the Pledge stresses that the change was intended

to communicate the idea that the country’s political structure derives its authority from God and indeed that the “nation was founded on a fundamental belief in God.” . . . The House Report refers to a specifically religious concept, which the Report places in direct contrast to contrary notions of “atheis[m] and materialis[m].”

*Id.* at 1876 (quoting H.R. Rep. No. 83-1693, at 1–2 (1954), *reprinted in* 1954 U.S.C.C.A.N. 2339, 2340–41).

157 “Predominantly” or otherwise. See *supra* Part II.

158 Lawrence A. Hoffman, *Being a Jew at Christmas Time*, CROSS CURRENTS, Fall 1992, at 363.



Christmas creates strong pressure on minorities to conform.<sup>159</sup> If their objection to being pushed to celebrate Christmas is based on identity, not theological grounds, it does not make a difference whether the practice or symbol in question is secular or sacred; indeed, non-Christian parents have an easier time explaining to their children why they do not have a crèche than why they do not have a Christmas tree and why they are not bad children even though everyone knows that Santa brings toys to all good children.<sup>160</sup> Using the Equal Protection Clause eliminates the need to engage in absurd and demeaning exercises like calculating how many plastic reindeer it takes to “secularize” a Christmas display containing a crèche. The focus is off the amount of religiosity and onto where it belongs: Does the government impermissibly treat members of some groups differently than others?

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159 See, e.g., Carol Britt, Letter to the Editor, COLUMBUS DISPATCH, Jan. 5, 2004, at A7 (“This is America, and as a melting pot, some Americans need to accept that for the majority of us, Christmas is a holiday. . . . Why are people so threatened by Christmas?”). Could Ms. Britt understand the point of view of Tracey R. Rich, author of the blog *Jewish in a Gentile World*, who compared being Jewish at Christmastime to being the lone non-basketball fan in an office during “March Madness”?

You can’t get away from it: it’s on TV and radio, newspapers and magazines. Everyone is talking about it, and expects you to express an opinion on it. You aren’t interested and just wish everyone would leave you alone.

Now magnify that feeling a hundredfold, because there is nothing that permeates our culture as thoroughly as Christmas does. . . .

And that is the worst part of it: no one will respect your desire to skip the holiday. Yeab, sure, you’re Jewish, but Christmas isn’t a Christian holiday, they will tell you. It’s everybody’s holiday, they say, it’s a secular holiday, which means you’re not allowed to “just say no.”

Jewish in a Gentile World, Being Jewish at Christmas, <http://jewfaq.blogspot.com/2004/12/being-jewish-at-christmas.html> (Dec. 15, 2004, 13:00 EST); see also Hoffman, *supra* note 149, at 358–63:

As welcome as I was in my country, there were certain times when I suspected that as a Jew I didn’t quite fully belong. Heading up the list of such times was the annual Christmas fever that swept through almost everyone I knew, but passed me by. . . .

. . . .

. . . American mores expect me, even as a non-Christian, to welcome Christmas as a positive good in my life. Not to appreciate the Christmas spirit is considered a cultural sin. . . .

. . . .

. . . As the public pomp and ceremony become somewhat overwhelming, I slip into the role of a visitor to a foreign culture.

160 This of course necessitates explaining the truth about Santa to non-Christian children and teaching them not to blab it to their Christian friends—an ironic situation in which it is the minority who is being sensitive to the feelings of the majority. See Julie M. Brown, *There’s No Santa, but Keep It Quiet*, JEWISH J., Dec. 17, 2004, <http://www.jewishjournal.com/home/preview.php?id=13405>.

On a more abstract level, the equal protection approach, more than the Establishment Clause approach, reflects another large issue lurking below the surface. One reason government religious expressions evoke such strong emotional responses is that they reflect not so much a religious divide in contemporary American society as a social and political one. There is today a strong association of many far-right Christian organizations with conservative political parties, politicians, and policies. Those organizations' success in promoting government religious expressions is seen as threatening to others not so much for the religious impact or perhaps even the discriminatory impact, but as a demonstration of political power that will play out in other areas, from abortion and school funding to foreign policy.<sup>161</sup> Conversely, conservative Christians may see opposition to government religious expressions as a salvo in the battle for "secularization" and demoralization of American society.<sup>162</sup> We are not recommending raising that whole issue explicitly in a legal challenge to a particular government religious expression, but it is the "elephant in the room" (no pun intended) in any such case, and challengers should be aware of this subtext.

### C. *Straight Path to Strict Scrutiny*

Even the most enthusiastic fan of the *Lemon* test must admit that it is perhaps well-named: it is cumbersome, confusing, and unpredictable. Under the First Amendment Establishment Clause, challengers must fight their way through the thicket of *Lemon* (or whatever other test—coercion, neutrality, etc.—the court decides to use) to establish on the facts presented that there *is* an infringement of the First Amendment, and *then* argue that the government's action is insufficiently tailored to be constitutional. *Lemon* and all its variants are fact-dependent at the threshold level in this way, so the challengers'

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161 See PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, 69% SAY LIBERALS TOO SECULAR, 49% SAY CONSERVATIVES TOO ASSERTIVE: MANY AMERICANS UNEASY WITH MIX OF RELIGION AND POLITICS (2006), <http://pewforum.org/docs/index.php?DocID=153>.

162 See, e.g., JOHN GIBSON, THE WAR ON CHRISTMAS: HOW THE LIBERAL PLOT TO BAN THE SACRED CHRISTIAN HOLIDAY IS WORSE THAN YOU THOUGHT (2005); Posting of Russel Johnson, To Forum of Church and State in Ohio's Electoral Politics (Oct. 8, 2006, 21:47 EST), available at <http://realreligiousleft.blogspot.com/2006/10/forum-on-church-and-state-in-ohios.html> ("From our country's classrooms to our court houses, from Christmas carols to graduation celebrations, from the pledge of allegiance to our state motto . . . the forces of darkness I think have opposed every public expression of allegiance to God. . . . [T]he arteries of our culture, I think have been infected with the toxin of dogmatic secularism which have sought to deny America's Godly heritage.").

work is greater, and the outcome is less predictable (remember *McCreary County* and *Van Orden*?).

By happy contrast, the path to the challenger-friendly strict scrutiny standard<sup>163</sup> is much easier under the Fourteenth Amendment Equal Protection Clause, sometimes even a matter of bright line. In the equal protection context, strict scrutiny is applied to government action that either intentionally discriminates against a “suspect class” or interferes with a “fundamental right.”<sup>164</sup> Show either one of those, and strict scrutiny applies—no case-specific inquiry required.

The fundamental right prong is available in many cases brought under the Free Exercise Clause, because the right to free exercise of religion, like all First Amendment rights, is a fundamental right for Equal Protection Clause purposes.<sup>165</sup> Government religious expression cases, though, are less likely to raise Free Exercise Clause issues than Establishment Clause issues. Freedom from government establishment of religion is also a fundamental right, but the marginalizing problem at issue really is more a matter of the suspect classification prong of the Equal Protection Clause than the fundamental right prong, so suspect classification is the better choice.

Establishing that religion is a “suspect classification” for equal protection purposes is easy. There is no landmark case establishing this principle, but that is not an indication that the point is debatable; to the contrary, it is because it has always been *assumed* that classification based on religion is suspect. Indeed, religion is used as a paradigm, like race, for the concept. In *City of New Orleans v. Dukes*, for example, the Supreme Court referred to “inherently suspect distinctions such as race, religion, or alienage” in explaining when strict scrutiny is applied.<sup>166</sup>

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163 Under strict scrutiny analysis, the government action must be *necessary* to serve a *compelling state interest*, or it will be struck down as unconstitutional. The threshold for strict scrutiny is so high and the threshold for the rational relationship test you are stuck with if you do not get it is so low, that the winner of the level-of-scrutiny battle is usually the winner of the ultimate question of constitutionality.

164 *Plyler v. Doe*, 457 U.S. 202, 216–17 (1982); *see, e.g., City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493–94 (1989) (applying strict scrutiny to program that discriminated on basis of race, the classic suspect classification); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541–42 (1942) (invalidating sterilization law because it impinged on the fundamental right to marriage and procreation of some criminals, but not others). For discussion of potential problems with the intentional discrimination and suspect class requirements, *see infra* Parts IV.C & V.A.

165 *Johnson v. Robison*, 415 U.S. 361, 375 n.14 (1974) (“Unquestionably, the free exercise of religion is a fundamental constitutional right.”).

166 427 U.S. 297, 303 (1976); *see also Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (“[T]he conscious exercise of some selectivity in enforcement is not in itself a federal

Once strict scrutiny is established, the challenger has a much easier job, but there is still work to do. The key to success is to help the court to understand that the government must show why the *particular* expression it chose—not just *some* expression—is necessary to a compelling (and legitimate, secular, and non-discriminatory) purpose. For example, the government's declared purpose for the Ten Commandments display in *Van Orden* was "recognizing and commending the Eagles for their efforts to reduce juvenile delinquency."<sup>167</sup> Under an equal protection strict scrutiny analysis, the government should have to demonstrate that it could not serve that purpose through some other display (or otherwise) that did not marginalize minorities.

*D. Ability To Analogize to Familiar, Accepted Precedents, Such as Mosley and Brown*

Courts, not improperly, prefer to decide cases on well-developed lines of authority. Is the fact that the Equal Protection Clause, for whatever reason, has not been used in government religious expression cases, going to seem so novel to courts that they will not take plaintiffs who make that argument seriously?

Plaintiffs can avoid creating that impression by pointing out that the Equal Protection Clause has been used in a very similar manner in other areas of constitutional law. In *Police Department v. Mosley*,<sup>168</sup> for example, the Supreme Court used the Equal Protection Clause along with the Free Speech Clause in striking down an ordinance prohibiting picketing near schools, but with an exception for labor picketing. The Court held that the distinction between picketing about labor issues and picketing about any other issues was a content-based distinction that violated the Free Speech Clause. But that was not all: the Court also held that the disparate treatment of picketers who wanted to demonstrate about issues other than labor violated the Equal Protection Clause.<sup>169</sup> The *Mosley* Court pointed out that this was nothing new: it had similarly employed the Equal Protection

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constitutional violation' so long as 'the selection was [not] deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.'" (second alteration in original) (quoting *Oyler v. Boles*, 368 U.S. 448, 456 (1962)); *Ball v. Massanari*, 254 F.3d 817, 823 (9th Cir. 2001) ("If the statute employs a suspect class (such as race, religion, or national origin) . . . then courts must apply strict scrutiny . . .").

<sup>167</sup> *Van Orden v. Perry*, 545 U.S. 677, 682 (2005).

<sup>168</sup> 408 U.S. 92 (1972).

<sup>169</sup> *Id.* at 96–98.

Clause in both *Niemotko v. Maryland*<sup>170</sup> and *Fowler v. Rhode Island*,<sup>171</sup> holding unconstitutional denials of Jehovah's Witnesses' requests to use a city park for Bible talks and religious services.<sup>172</sup>

The injury argument is no more novel than the legal one.<sup>173</sup> Indeed, it is quite similar to that used by the Supreme Court in *Brown v. Board of Education*, regarding the effects of official reinforcement of outsider status.

And you can always remind them that the Supreme Court has shown great enthusiasm for the Equal Protection Clause in recent important decisions.<sup>174</sup>

#### *E. Political/Public Relations Advantage*

An equal protection challenge makes the equality issue easier for the public to understand, which makes it easier for courts to act. It can also avoid a very difficult problem that arises in the Establishment Clause context: the demonization (no pun intended) of religion.

Anyone arguing that government should not engage in religious expression must walk a very narrow and delicate line. It is very easy for challengers to sound as if they are arguing that the reason government should stay away from religion is that religion itself is bad—a toxic influence being foisted upon a helpless public—and it is even easier for their opponents to make them sound like they are saying that. Whatever one's feelings about religion are, it is easy to see that this is a tactical disaster. Challengers need to avoid creating a climate in which many judges would personally take offense and in which a ruling in their favor would force courts to open themselves to public outrage. Like any litigant, challengers to government religious expression must make it as easy as possible for courts to rule in their favor.

It is true that some opponents of government religious expression do not like religion. They may be atheists, they may feel that religion does people more harm than good, or they may feel that government should not involve itself in any supernatural (and therefore irrational) realm. That anti-religious feeling may indeed be the reason they are uncomfortable with government religious expression. But

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170 340 U.S. 268 (1951).

171 345 U.S. 67 (1953).

172 *Mosley*, 408 U.S. at 97.

173 See *infra* Part V.B.

174 See, e.g., *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam).

whether they are right or wrong, it is a losing argument, legally as well as emotionally: there is nothing in the Constitution that commands government *hostility* to religion. Nor is “irrationality” off limits to government support; the government supports art, music, fiction, poetry, philosophy, and plain fun. No one wants to have to reply to the accusation that they are calling Martin Luther King, Jr., the Dalai Lama, and Mother Teresa—never mind Jesus or Muhammad—“irrational,” harmful, or foolish.

One need not hate religion in order to believe that government ought not to be involved in it. Indeed, many deeply religious people believe exactly that. And strict separationists may be absolutely delighted to attend, as a guest of a friend, a religious ritual of a faith to which they do not subscribe. But it can be very hard to avoid getting trapped into defending oneself against the accusation that one is hostile to religion—and allowing opponents to characterize *themselves* as the beleaguered minority—in the Establishment Clause context, where even under *Lemon* the argument by necessity is about whether the government’s purpose is “too religious.” In the equal protection analysis, by contrast, the focus is not on sacred versus secular, but about equal treatment of minorities—the minority happening to be defined by religious identity. Analogies are very useful in helping members of the majority understand minority viewpoints, and moving to the equal protection context enlarges and simplifies the universe of comparisons, allowing more things to be “apples,” as it were. One can argue forever whether “With God All Things Are Possible”<sup>175</sup> is analogous to “With Allah All Things Are Possible” under the Establishment Clause. Using the Equal Protection Clause, a challenger instead could analogize to “For White People All Things Are Possible.” Even those most firmly opposed to security “profiling” would admit that a focus on Muslims is not about disparagement of the principles of Islam; the problem there, too, is not religious coercion or limitation, but discrimination along lines that happen to be drawn by religion.

Suppose that a school board defended the display of a portrait of Jesus, such as that in *Sklar*,<sup>176</sup> by arguing that there could be a portrait of George Washington, so why not one of Jesus, who is also a historical figure? Using only the Establishment Clause, a challenger would have to argue that Jesus’ image is specifically sacred, and the court

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175 See *supra* notes 82–86 and accompanying text.

176 See Complaint, *Sklar v. Bd. of Educ.*, No. 1:2006cv00103 (N.D. W. Va. filed June 28, 2006); see *supra* notes 67–70 and accompanying text.

would have to sort out what secular messages were also conveyed by the painting. The challenger would also have to be very careful not to appear to be arguing that there is something inherently harmful or offensive in Jesus' message. Using an equal protection argument, though, the challenger could avoid the whole sacred/secular mess and any coercion analysis and point out—without casting any aspersions on Jesus or Christianity—that unlike Washington, who was President of *all* Americans, Jesus is specifically associated with only *some* Americans, and thus the portrait makes others feel not offended, but marginalized, even if they do not feel coerced at all. A judge who is uncomfortable with even a subliminal suggestion of Jesus' message being “offensive” could much more easily accept an invitation to imagine, by analogy, how students in different communities would feel marginalized if the portrait were of the Louis Farrakhan or the Pope—or Jefferson Davis.

An equal protection argument may even appeal to those firmly convinced that the Establishment Clause does *not* protect any equality interest, and even that it should be limited to some sort of coercion test. Justice Kennedy, in his *Allegheny County* dissent, even as he forcefully disagreed with Justice O'Connor's equality-centered “endorsement” view, acknowledged that the Establishment Clause

forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall. This is not because government speech about religion is *per se* suspect, as the majority would have it, but because such an obtrusive year-round religious display would place the government's weight behind an obvious effort to proselytize on behalf of a particular religion.<sup>177</sup>

Justice Kennedy believed that *the Establishment Clause* did not protect an equality interest<sup>178</sup>—but he did not say that he did not believe that there was *any* such interest. There is always the chance that he, and others who share his view, would be receptive to an equality argument under the more appropriate Equal Protection Clause.<sup>179</sup> More-

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177 *Allegheny County v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 661 (Kennedy, J., concurring in the judgment in part and dissenting in part). See *supra* note 32.

178 See Chemerinsky, *supra* note 32, at 4–5.

179 Nothing in Justice Kennedy's *Allegheny County* opinion gives much cause for optimism that he would be sensitive to the marginalizing effect of government religious expression, though. See, e.g., 492 U.S. at 664 (“Passersby who disagree with the message conveyed by these displays are free to ignore them, or even to turn their backs, just as they are free to do when they disagree with any other form of government speech.”). Would he feel that way about a swastika on a government building? A Confederate flag? A burning flag? See *infra* Part V.C. Still, the ability to ignore the message is of lesser weight if the point is not proselytization, but marginalization, because it is not only that the minority member her-

over, an equal protection approach is certainly not only for atheists and religious minorities: religious Christian groups, too, can successfully challenge discrimination against them not only on Free Exercise and Free Speech Clause grounds, but on equal protection as well.<sup>180</sup>

#### F. Avoidance of a De Minimis Problem

Even where courts do not insist on a very narrow “coercion” or “state church” standard for Establishment Clause challenges, they still may see government religious expressions as only very minor infringements of the First Amendment—but that is because they are still focusing upon religious impact, not discrimination. In the equal protection context, religion is significant not with regard to belief or theology, but as a marker of ethnic or quasi-ethnic identity that, for at least some groups, amounts to a suspect classification,<sup>181</sup> and what may not be enough to constitute proselytization in the eyes of a coercion-focused court may be enough to establish discrimination.

Arnold H. Loewy, staying in the Establishment Clause context, pointed out that this was also an advantage to Justice O’Connor’s

self sees the message that creates the marginalization; arguably, that effect is caused even more by majority members’ seeing it.

180 See, e.g., *Widmar v. Vincent*, 454 U.S. 263 (1981). The students in *Widmar*, challenging a university policy that did not permit their religious Christian group to use facilities, cited both Professor Karst, *supra* Part III.B, and Justice Harlan’s concurring opinion in *Walz*, *supra* Part III.A, in their brief. Brief of Respondents at 13 n.49, 45, *Widmar*, 454 U.S. at 263 (No. 80-689), 1981 WL 390013.

181 Several cases have held that “Jewish” is a “race” for the purposes of federal discrimination law. See, e.g., *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 617–18 (1987) (“The question before us is not whether Jews are considered to be a separate race by today’s standards, but whether, at the time § 1982 was adopted, Jews constituted a group of people that Congress intended to protect. It is evident . . . that Jews and Arabs were among the peoples then considered to be distinct races and hence within the protection of the statute. Jews are not foreclosed from stating a cause of action against other members of what today is considered to be part of the Caucasian race.”); *Bachman v. St. Monica’s Congregation* 902 F.2d 1259, 1260–61 (7th Cir. 1990) (making a very interesting comparison of racial and religious anti-Semitism); *Malhotra v. Cotter & Co.*, 885 F.2d 1305 (7th Cir. 1989); *Abrams v. Baylor Coll. of Med.*, 805 F.2d 528 (5th Cir. 1986) (holding that discrimination against Jewish employees by the University violated Title VII as religious or racial discrimination); *Kirshner v. First Data Corp.*, No. Civ.A. 3:98-CV-0222-L, 2000 WL 1772759 (N.D. Tex. 2000) (finding that religious discrimination against Jews, but not Catholics, implicates 42 U.S.C. § 1981); *Singer v. Denver Sch. Dist. No. 1*, 959 F. Supp. 1325, 1331 (D. Colo. 1997) (finding Jews “a distinct racial group for the purposes of § 1981”); *Joseph v. State*, 636 So.2d 777, 779–81 (Fla. Dist. Ct. App. 1994) (discussing thoroughly the status of Jews as a protected ethnic group for jury selection purposes under a two-pronged test).



neutrality analysis. Discussing the “God Save the Supreme Court” invocation, he observed:

It can be argued that the invocation should be sustained because its religiosity is de minimis. So long as establishment clause analysis was focused on the abstract impropriety of governmental involvement with religion, it is understandable that one could have viewed the Supreme Court’s invocation as a trifling matter, perhaps innocuously characterized as mere “ceremonial Deism.” Once focus is directed towards the endorsement/disapproval principle, however, the matter is anything but trifling. We would not consider trifling a law that requires blacks to ride in a separate railroad car or sit in a separate section of a courtroom from whites. I doubt that many Moslems or Jews would consider it de minimis were the Supreme Court to begin its session with the invocation: “Christ save the United States and this Honorable Court.” Why then should we expect nontheists who are entitled to equal dignity under the establishment clause to react differently?<sup>182</sup>

Professor Loewy’s argument makes sense for the Establishment Clause used as an equality-enforcing tool; how much more so for the Equal Protection Clause itself?

## V. SOME POTENTIAL OBSTACLES TO AN EQUAL PROTECTION CLAUSE CHALLENGE (AND SOME SUGGESTED SOLUTIONS)

### A. *Intentional Discrimination Requirement*

An equal protection claimant must show that the governmental discrimination is intentional, not the unintended result of a decision made for proper government purposes. This is different from a claim under the Civil Rights statutes, such as Title VII, which permit recovery on a “disparate impact” theory.<sup>183</sup> In the government religious expression context, the government, already arguing that its purpose was not religious, will surely also claim that its purposes in engaging in the expression were not to discriminate against anyone but to celebrate “the holiday season,” to inspire and encourage, to honor veterans, and so forth. While it is presumably true that the government does have those motives, it is also true that that is not the end of the analysis, and it need not doom an equal protection challenge to government religious expressions. A quick review of the cases developing the discriminatory purpose rule shows why.

The Supreme Court held that discriminatory impact alone, without discriminatory intent, would not suffice for a constitutional chal-

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182 Loewy, *supra* note 148, at 1057 (footnotes and internal quotation marks omitted).

183 See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

lenge in *Washington v. Davis*.<sup>184</sup> *Davis* was an action by African-Americans who had applied unsuccessfully to become police officers, contending that the department's recruitment procedures, including a written verbal skills test, were racially discriminatory because a disproportionate number of African-American applicants failed the test and the test was not really related to occupational competency. The Court rejected the Circuit Court's decision, which had followed the Title VII analysis and held that the disparate impact sufficed for the constitutional challenge, stating the rule no less definitively for stating it in the negative: "we have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another."<sup>185</sup> Shortly after *Davis*, which had been decided under the Fifth Amendment,<sup>186</sup> the Court made the same rule for the Fourteenth Amendment Equal Protection Clause in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,<sup>187</sup> rejecting the appellate court's finding that denial of a rezoning plan that would have allowed multi-family housing was racially discriminatory based upon its disparate "ultimate effect."<sup>188</sup> Then, in *Personnel Administrator v. Feeney*,<sup>189</sup> the Court relied upon *Davis* and *Arlington Heights* to uphold a veterans' hiring preference that had a greatly disproportionate impact upon women, firmly establishing the rule that "a neutral law does not violate the Equal Protection Clause solely because it results in a racially disproportionate impact; instead the disproportionate impact must be traced to a purpose to discriminate on the basis of race."<sup>190</sup> Moreover, the Court set a high standard for a showing of purpose:

"Discriminatory purpose," . . . implies more than intent as volition or intent as awareness of consequences. . . . It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course

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184 426 U.S. 229, 248 (1976).

185 *Id.* at 242.

186 Because the District of Columbia is a federal jurisdiction, the challenge was brought and decided not under the Fourteenth Amendment Equal Protection Clause (which does not apply to the federal government), but under the Fifth Amendment Due Process guarantee, which the Supreme Court has held contains an equal protection guarantee for which the analysis is identical. See *Bolling v. Sharpe*, 347 U.S. 497 (1954).

187 429 U.S. 252, 270 (1977).

188 *Id.* at 254-55.

189 442 U.S. 256 (1979).

190 *Id.* at 260.

of action at least in part “because of,” not merely “in spite of,” its adverse effects upon an identifiable group.<sup>191</sup>

However, the Court also recognized that although disparate impact was not dispositive of a constitutional claim, it was not irrelevant, either, stating in *Davis*:

This is not to say that the necessary discriminatory racial purpose must be express or appear on the face of the statute, or that a law’s disproportionate impact is irrelevant in cases involving Constitution-based claims of racial discrimination. . . .

Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another.<sup>192</sup>

And in *Arlington Heights*:

Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. The impact of the official action—whether it “bears more heavily on one race than another”—may provide an important starting point. . . .

The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes. The specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker’s purposes.<sup>193</sup>

So a challenge to a government religious expression on equal protection grounds will surely face a strenuous argument that the government did not have the requisite discriminatory intent. There are several responses.

The most obvious is to argue that the true purpose is indeed discriminatory. Before even reaching that point, though, a challenger should argue that the rule of *Davis*, *Arlington Heights*, and *Feeney* does not even apply. Look again at that rule: “a neutral law does not violate the Equal Protection Clause solely because it results in a racially disproportionate impact.”<sup>194</sup> If the government action is *not* neutral, then the rule does not apply, and those cases are therefore not controlling.

Government religious expressions are not neutral. Verbal skills tests (*Davis*) and single-family zoning plans (*Arlington Heights*) are not directly related to race, and a hiring preference for veterans (*Feeney*) is not directly related to sex; they had disparate impacts (and possibly

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191 *Id.* at 279 (citation and footnotes omitted).

192 *Washington v. Davis*, 426 U.S. 229, 241–42 (1976).

193 *Arlington Heights*, 429 U.S. at 266–67 (citations omitted) (quoting *Davis*, 426 U.S. at 242).

194 *Feeney*, 442 U.S. at 260 (emphasis added). *Davis* and *Arlington Heights* also specify that the discriminatory purpose requirement applies to challenges to neutral laws.

unproved discriminatory purposes), but they were all facially neutral. In the religion context, a full-face driver's license photo requirement and an airport security ban on knives, although they would have disparate impacts on Muslim women and Sikh men, respectively, are neutral. But a cross, a Ten Commandments display, a scriptural quotation, and a Christmas display are certainly not "neutral" with respect to religion or to distinctions between people based upon their religious identity.<sup>195</sup> Neutrality of government action might be an answer to a complaint asserting that an intersection in the shape of a cross or that a city named "St. Paul" somehow marginalizes non-Christians, but not to one claiming that a cross on a courthouse does. Therefore, challengers to government religious expressions should not concede that the discriminatory intent requirement even applies; rather, the government has the burden to show that the expression at issue is truly "neutral" to avoid strict scrutiny. In most government religious-expression cases, that will be a very difficult burden to meet.

It is very hard to imagine a court declaring that a crèche is neutral as to religion; perhaps a Christmas tree would stand a better chance. But the point is neutrality between groups, not neutrality as to religious content; that is, not that the display is not neutral as between Christianity and other religions (or atheism), but that it is not neutral as between Christians and non-Christians. Even though some non-Christians may not feel marginalized or pressured to conform to "secular" Christmas symbols, others do, and that effect upon them is no less real than, say, the effect of a remark that one woman may not mind but that another experiences as a sexist slur. A plaintiff complaining of sexual harassment or of a racially discriminatory environment need not prove that *every* other woman or minority member would be equally upset; neither should a plaintiff in a religious discrimination case.

Even if a court would find that the government religious expression is neutral as to religion (or perhaps we should say as to religious classification), a challenger should argue that the government does not have a proper purpose for the display, or that any proper purpose is outweighed by the improper purposes. At the maximal level, the

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<sup>195</sup> Note that the name of a religious group need not be on the face of a statute for there to be an improper classification; the Supreme Court once gave the example that "[a] tax on wearing yarmulkes is a tax on Jews." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993); *cf. Larson v. Valente*, 456 U.S. 228, 246-47 & n.23 (1982) (holding that the "fifty per cent rule," despite naming no religions or denominations, "is not simply a facially neutral statute"; rather, it "makes explicit and deliberate distinctions between different religious organizations"); *see also supra* notes 61-63 and accompanying text.

argument is that the government's proffered purpose is a pretext for a discriminatory purpose.<sup>196</sup> It is certainly unlikely that there will be evidence of legislative debates stating a purpose to make minorities feel marginalized, but that is not the only kind of evidence available. Take, for example, the facts of *Sklar*<sup>197</sup>: the school board had received complaints about the portrait of Jesus in the hallway for many years. Although the Supreme Court has stressed that "[d]iscriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences,"<sup>198</sup> it has more recently been equally explicit in acknowledging that disparate impact and the history of the government's actions are relevant in determining that purpose.

The Court's emphatic declaration in *McCreary County*, that mere statement of purpose will not suffice, and that courts may indeed look to the history of a challenged religious expression,<sup>199</sup> bolster this point; there is no reason to believe that pretextual, in-a-vacuum defenses will be any more acceptable under the Equal Protection Clause than under the Establishment Clause. Indeed, in First Amendment cases, the Court itself has done exactly the converse, as in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*:

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. As Justice Harlan noted in the related context of the Establishment Clause, "[n]eutrality in its application requires an equal protection mode of analysis." Here, as in equal protection cases, we may determine the city council's object from both direct and circumstantial evidence. Relevant evidence includes, among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administra-

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196 See Kurland, *supra* note 7, at 5:

It must be recognized, however, that this statement of the 'neutral' principle of equality, that religion cannot supply a basis for classification of governmental action, still leaves many problems unanswered. Not the least of them flows from the fact that the actions of the state must be carefully scrutinized to assure that classifications that purport to relate to other matters are not really classifications in terms of religion.

*Id.*

197 Complaint, *passim*, *Sklar v. Bd. of Educ.*, No. 1:2006cv00103 (N.D. W. Va. filed June 28, 2006); *supra* notes 67–70 and accompanying text.

198 *Feeney*, 442 U.S. at 279.

199 See *McCreary County v. ACLU of Ky.*, 545 U.S. 844 (2005); *supra* note 29 and accompanying text; see also *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) ("When a governmental entity professes a secular purpose for an arguably religious policy, the government's characterization is, of course, entitled to some deference. But it is nonetheless the duty of the courts to 'distinguis[h] a sham secular purpose from a sincere one.'" (alteration in original) (quoting *Wallace v. Jaffree*, 472 U.S. 38, 75 (1985) (O'Connor, J., concurring in judgment))).

tive history, including contemporaneous statements made by members of the decisionmaking body.<sup>200</sup> These objective factors bear on the question of discriminatory object.

Moreover, and more to the point, in the context of religious symbolism or other government religious expression, the issue of "intent" is much murkier than it is in employment and other contexts. No American government body today could seriously claim that it never occurred to it that government religious expression could make some people feel marginalized or excluded. There is little if any difference between knowledge that the marginalization effect will occur and the intent that it should—not just functionally, but in terms of actual government purpose. For the government to contend that it had no "intent" to discriminate against non-Christians, polytheists, or atheists by using symbols that it knows are associated only with part of the citizenry, would, and should, be harder to argue than that a facially neutral qualifying exam was not intended to discriminate.

In the case of the portrait in *Sklar*, for example, the school board insisted upon maintaining the portrait, despite its years-long awareness of the impact this had on some of the students, parents, and other community members. At some point, awareness shades into intent, just as failure to repair the only elevator or women's restroom in a building for ten years can reasonably be argued as evidence of intent to discriminate against the disabled or women, respectively.

That analogy suggests an argument based on levels of intent, familiar in tort and criminal law. Is "intent" all or nothing in the equal protection context? Or should courts recognize various levels of volition, as it does in other contexts? A property owner may have less civil liability for failing to clear an icy sidewalk of which she had knowledge than if she had intentionally iced it down to booby-trap an enemy, but she is liable nonetheless. A defendant who recklessly smacks someone in the face with a stick he was swinging around in a crowded room while pretending to be Barry Bonds is subject to a lower criminal penalty than if he had hauled off and done it on purpose, but he is not innocent. The same recognition of purposefulness, intent, recklessness, and negligence (or some similar continuum) should apply in the equal protection context, not just the "specific intent" of unalloyed discriminatory intent. Even if the "strict

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200 508 U.S. 520, 540 (1993) (opinion of Kennedy, J.) (alteration in original) (quoting *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring), and citing *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977); *Feeney*, 442 U.S. at 279 n.24).

liability” of disparate impact analysis is inapplicable, the government’s negligence, and certainly its recklessness, as to the discriminatory effect of its actions ought to be cognizable.<sup>201</sup>

Challengers should not ignore the Court’s repeated reminders in *Davis*, *Arlington Heights*, and *Feeney* that, although impact is not a substitute for showing discriminatory intent, it is definitely relevant evidence thereof.<sup>202</sup> Similarly, challengers should point out that mixed purposes can still constitute “intent” for equal protection purposes. In *Gilfillan v. City of Philadelphia*,<sup>203</sup> the Third Circuit used that approach to hold unconstitutional several costly preparations by the City for the 1979 visit of Pope John Paul II, including an enormous cylindrical stage with pyramids, a throne, and a 36-foot cross. The court rejected the City’s “imaginative” argument that the secular purposes it advanced, protecting the Pope and capitalizing upon a “public relations bonanza” for the City, were sufficient to defeat the Establishment Clause challenge. This is both because they could have been (and in other cities had been) accomplished in other ways that did not appear to endorse Catholicism, and also because there was no secular purpose for some of the expenditures, including construction of a 36-foot cross and a platform for a Mass.<sup>204</sup>

Most important, government defendants must be required to demonstrate that even when they have sufficient secular purposes for government religious expressions, those purposes could not be served adequately through other means that do not marginalize mi-

201 The lesser “culpabilities” might lead to different remedies. E.g., government action that is negligently or recklessly discriminatory might result only in an injunction, whereas purposeful discrimination could also give rise to damages.

202 Professor Kushner draws analogies here, too, to other areas of law in explaining that, Under *Washington v. Davis* and *Arlington Heights*, disproportionate impact is relevant evidence and a starting place in the search for purposefulness. Exactly how much disparity is “extreme,” allowing proof of effect to be sufficient to meet the prima facie case requirement—a question often arising in cases challenging jury composition, criminal prosecution sentencing, education, employment, housing, municipal services, prisons, voting, and school patterns—is unclear.

KUSHNER, *supra* note 5, § 3:9, at 200–12 (footnotes omitted).

203 637 F.2d 924 (3d Cir. 1980), *cert. denied*, 451 U.S. 987 (1981).

204 *Id.* at 929–30. Judge Rosenn’s majority opinion indicates that he shared the view that the Establishment Clause includes an equality interest: “An auspicious aspect of our pluralistic society is its rich religious diversity. The essential purpose of the *Establishment Clause* reflects this pluralism.” *Id.* at 930. Citing *Lemon*, he also noted that “[a]n alternative basis for the district court’s conclusion that the City’s activity caused entanglement was a finding that the assistance tended to promote divisiveness among and between religious groups. . . . [T]he City’s assistance and the extensive cooperation during the preparations for the Pope’s visit, also fail the entanglement test, because of the potential for divisiveness.” *Id.* at 932.

norities. In *Sklar*,<sup>205</sup> the school board at one point argued that the portrait covered a crack in the wall.<sup>206</sup> That is clearly a neutral purpose, but it would not be enough to defeat a challenge (even if it were accepted as a genuine interest, not a ridiculous pretext). There are lots of other ways to hide a crack in a wall than with a portrait of Jesus Christ, and the school board's insistence upon that approach as the only effective choice would be so absurd as to constitute proof that the proffered neutral purpose was a pretext. The same is true of an insistence that only the use of religious symbols for displays, mottoes, logos, and so forth, especially those identified with specific groups and not others, will suffice to "recognize the winter season" or "generally inspire and encourage."<sup>207</sup>

If the government's purposes for, say, a religious motto are to "inculcate hope" and to "solemnize occasions," surely there is some way to achieve those purposes other than through a motto that is identified with only one group of citizens and that the state is aware makes others feel marginalized. The facial neutrality of the proffered reasons, even if they are genuine, does not relieve the government of the burden of explaining why only the religious (let alone specifically Christian) choice will do. If a non-divisive alternative is available, and the government insists upon the religious motto, it must show a neutral purpose *for that insistence*.

Some Justices have been receptive to this kind of "least religious means" argument. Justice Brennan made this observation in a case holding unconstitutional, under the First Amendment, daily prayers and Bible readings in public schools:

Such devotional exercises may well serve legitimate nonreligious purposes. To the extent, however, that such purposes are really without religious significance, it has never been demonstrated that secular means would not suffice. Indeed, I would suggest that patriotic or other nonreligious materials might provide adequate substitutes—inadequate only to the extent that the purposes now served are indeed directly or indirectly religious. Under such circumstances, the States may not employ religious

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205 See *supra* notes 67–70 and accompanying text.

206 Complaint at ¶ 17, *Sklar v. Bd. of Educ.*, No. 1:2006cv00103 (N.D. W. Va. filed June 28, 2006).

207 Mark Tushnet has pointed out that this approach would have worked in *Sherbert v. Verner*, which invalidated, on First Amendment grounds, a rule denying unemployment benefits to people who refused, for religious reasons, Saturday employment: "That is, at least once the burden on the religious observers was pointed out, and after it became clear that no substantial governmental purpose was served by denying them benefits, the state's adherence to its general rule began to look like intentional discrimination." Tushnet, *supra* note 127, at 378.



means to reach a secular goal unless secular means are wholly unavailing.<sup>208</sup>

The full Court later echoed this principle in striking down a school policy permitting student-led prayers before high school football games:

According to the District, the secular purposes of the policy are to “foste[r] free expression of private persons . . . as well [as to] solemniz[e] sporting events, promot[e] good sportsmanship and student safety, and establis[h] an appropriate environment for competition.” We note, however, that the District’s approval of only one specific kind of message, an “invocation,” is not necessary to further any of these purposes.<sup>209</sup>

It is important to remember that “intentional” discrimination does not necessarily mean having intent to harm. Sometimes there is an intent to treat people differently, but in a way seen as benign. If, for example, a legislator thinks that a New Testament motto or a Ten Commandments display will help rescue the eternal souls of non-Christian citizens from everlasting torment in Hell, or that a Christmas tableau will help share holiday joy with non-Christians, she arguably has the best intent in the world toward them. Still, the intent to spread a Christian (or theist or whatever) message to non-Christians is certainly different from the intent to spread a Christian message to Christians. That is sufficient to establish intent to discriminate—i.e., to treat similarly situated people differently even if in both cases benignly (as in “separate but equal”). In the most cynical view, if the true government purpose is simply to pander to private individuals and groups who want to see “God put back in the public square,” that may actually not be a “discriminatory” purpose—but it certainly is not a proper purpose either.

After all, these cases are not about *punishing* government—just about stopping it from doing something that hurts people by making them feel like outsiders. So even if the only way government knows that it is marginalizing people is because people are telling it so by

208 Sch. Dist. v. Schempp, 374 U.S. 203, 293–94 (1963) (Brennan, J., concurring); see also ACLU of Ga. v. Rabun County Chamber of Commerce, Inc., 698 F.2d 1098, 1111 (11th Cir. 1983) (“Although the promotion of tourism is a secular goal commonly pursued by states, cities and counties alike, a government may not ‘employ religious means to reach a secular goal unless secular means are wholly unavailing.’” (quoting *Schempp*)); Gilfillan v. City of Philadelphia, 637 F.2d 924, 930 (3d Cir. 1980) (“[I]f some peripheral public relations benefit can constitute a sufficient secular purpose, then the purpose test is destroyed, for it is hard to imagine a city expenditure that will not look good in someone’s eyes.”), cert. denied, 451 U.S. 987 (1981).

209 Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 309 (2000) (alterations in original) (quoting Brief for Petitioner at 14).

bringing a lawsuit (or, one hopes, a request for change without legal action), that should be considered in the “intent” analysis. If it were about punishment (criminal or civil), then what the defendant learns *after* the conduct has already begun should not be relevant, or at least be less so. But it’s not about punishment: it’s about correcting a practice.

### B. *Standing and Injury in Fact*

The Establishment Clause has one big advantage over the Equal Protection Clause when it comes to standing: the relaxed rules for standing. Still, government religious-expression cases brought under the Equal Protection Clause should survive standing challenges—good thing, too, because they are likely to face them.

The Supreme Court has developed a test for standing in federal court that appears to be so specific and detailed that results would be fairly easily predictable:

- (1) The plaintiff must have suffered a concrete and personal “injury in fact.”
- (2) There must be a causal connection between the injury and the defendant’s action.
- (3) It must be “likely, as opposed to merely ‘speculative’” that the injury will be redressed by the requested relief.<sup>210</sup>

The “injury in fact” inquiry is the heart of the standing analysis for government religious-expression cases. Simply taking offense or suffering other “psychic injury,” such as the “psychological consequence presumably produced by observation of conduct with which one disagrees,”<sup>211</sup> is not considered sufficient to constitute an injury in fact.<sup>212</sup> However, an economic or other objectively quantifiable injury is not required either,<sup>213</sup> and courts, including the Supreme Court, have been lenient, specifically in Establishment Clause challenges to government religious expressions, with regard to the nature of the injury, so long as the injury was sustained by one or more specific plaintiffs and not by the community in general. The required personal connection between the plaintiff and the challenged government religious expression is satisfied as long as the plaintiff is a member of

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210 *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

211 *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 485 (1982).

212 *Id.*; *Freedom from Religion Found., Inc. v. Zielke*, 845 F.2d 1463, 1467–68 (7th Cir. 1988) (applying *Valley Forge* to deny standing to challenge Ten Commandments display in park).

213 See *Valley Forge*, 454 U.S. at 486 & n.22; *Rabun County*, 698 F.2d at 1108.

the community in which a religious display is exhibited, for example, or frequents the public property on which it is erected.<sup>214</sup> Indeed, in *McCreary County* and *Van Orden* themselves, the Supreme Court did not even bother to discuss standing, which was based on the plaintiffs' use of the public buildings in question.<sup>215</sup>

Government defendants often rely upon a 1982 Supreme Court decision, *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*,<sup>216</sup> to challenge standing when there is no economic injury.<sup>217</sup> The plaintiffs had challenged, under the Establish-

214 See, e.g., *Adland v. Russ*, 307 F.3d 471, 478 (6th Cir. 2002) (holding that political activist plaintiffs who regularly visited the state capitol had standing to challenge a Ten Commandments monument on capitol grounds); *Books v. City of Elkhart*, 235 F.3d 292, 299–301 (7th Cir. 2000) (holding that citizens who used a municipal building had standing to challenge a Ten Commandments monument situated in front of the building); *Washegesic v. Bloomington Pub. Schs.*, 33 F.3d 679, 681–83 (6th Cir. 1994) (recognizing standing where a former student challenged a portrait of Jesus hung in public school); *Church of Scientology Flag Serv. Org., Inc. v. City of Clearwater*, 2 F.3d 1514 (11th Cir. 1993) (recognizing standing where the Church of Scientology challenged a charity ordinance); *Gonzales v. N. Twp.*, 4 F.3d 1412, 1417 (7th Cir. 1993) (holding that the plaintiffs' having discontinued their use of a city park conferred standing to challenge presence of a crucifix in park); *Foremaster v. City of St. George*, 882 F.2d 1485 (10th Cir. 1989) (holding that a citizen had standing to challenge a public utility's free provision of electricity to a religious temple even though citizen did not have an electric utility account when filing suit), *cert. denied*, 495 U.S. 910 (1990); *Saladin v. City of Milledgeville*, 812 F.2d 687 (11th Cir. 1987) (recognizing standing for residents and non-residents of city that had inscribed "Christianity" on its seal); *Ariz. Civil Liberties Union v. Dunham*, 112 F. Supp. 2d 927 (D. Ariz. 2000) (recognizing standing where town residents challenged town proclamation of Bible Week); *ACLU of Ky. v. McCreary County*, 96 F. Supp. 2d 679, 682–83 (E.D. Ky. 2000) (recognizing standing where plaintiffs had to enter courthouse to conduct business), *aff'd*, 545 U.S. 844 (2005); *Granzeier v. Middleton*, 955 F. Supp. 741, 743 n.2 (E.D. Ky. 1997) (recognizing standing for plaintiffs who regularly conducted business at a courthouse that was closed on Good Friday).

215 *Van Orden v. Perry*, 545 U.S. 677, 681 (2005) (assuming, without discussion, that a resident of the capitol city who frequently visited the Capitol building had standing to challenge Ten Commandments monument located on Capitol grounds); *ACLU of Ky. v. McCreary County*, 96 F. Supp. 2d 679, 682–83 (E.D. Ky. 2000) (holding that the plaintiffs had suffered an injury in fact because they must come into contact with the display of the Ten Commandments every time they enter the courthouse). See *supra* note 214.

216 454 U.S. 464 (1982).

217 In an earlier case involving federal aid to schools, *Flast v. Cohen*, 392 U.S. 83, 102–04 (1968), the Court had created an exception to the rule against taxpayer standing—i.e., that one otherwise unaffected except as a taxpayer cannot challenge government action simply because it uses tax dollars—for Establishment Clause cases, reasoning that the Establishment Clause is a "specific" limitation on Congress's spending power. If taxpayers could not challenge a violation of that limitation, no one could, because there may not always be a concrete individual injury. The *Flast* exception was later extended to apply to state and local expenditures alleged to violate the Establishment Clause, and also to Executive Branch expenditures in *Bowen v. Kendrick*, 487 U.S. 589 (1988), but a plurality of

ment Clause, a transfer, without payment, of government property in Pennsylvania to a religious organization. The plaintiffs lived in other states and only learned of the transfer through news releases; they relied on their status as federal taxpayers for standing. The Third Circuit held that the plaintiffs had standing, not as taxpayers, but because the Establishment Clause abridgement constituted an injury in fact.<sup>218</sup> The Supreme Court reversed, holding that these plaintiffs lacked standing because they had shown no particularized injury, only a generalized grievance about the transfer violating the Establishment Clause. Although *Valley Forge* is sometimes misconstrued as requiring a tangible injury, it does not actually say that at all, and subsequent cases, particularly religion cases, have demonstrated that although injury must be real and particular, it need not be tangible or quantifiable.

In *ACLU of Georgia v. Rabun County Chamber of Commerce, Inc.*,<sup>219</sup> decided a year after *Valley Forge*, for example, the Eleventh Circuit granted standing in an Establishment Clause challenge to a large cross located in a state park, which was lit up such that light flooded two campgrounds at night. The individual plaintiffs testified that they would not use the park so long as the cross remained displayed.<sup>220</sup> The court distinguished *Valley Forge* in holding for the plaintiffs, finding that their position was less like that of the plaintiffs in *Valley Forge*—otherwise unaffected taxpayers who objected to an Establishment Clause violation—than like that of the plaintiffs in *School District v. Schempp*<sup>221</sup>—public school students and their parents, who

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the Court declined to extend taxpayer status to challengers to purely executive expenditures in *Hein v. Freedom from Religion Foundation, Inc.*, 127 S. Ct. 2553 (2007).

218 *Ams. United for Separation of Church & State, Inc. v. U.S. Dep't of Health, Educ. & Welfare*, 619 F.2d 252 (3d Cir. 1980), *rev'd sub nom. Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982). See especially Judge Rosenn's concurring opinion, noting the necessity of allowing organizational plaintiffs where, otherwise, constitutional violations could never be addressed:

Although it is possible to conceive of economic interests that might give rise to a plaintiff who meets traditional standing requirements, that will be relatively rare and is certainly not the case here. Americans United is likely to be the best available plaintiff. If they do not have standing, it is probable that the transfer of property at issue here, and other similar transfers (of which there are apparently a substantial number) would be placed beyond judicial review. In respect to such actions, the Establishment Clause would be rendered virtually unenforceable.

*Id.* at 268 (Rosenn, J., concurring) (citation and footnote omitted).

219 698 F.2d 1098 (11th Cir. 1983).

220 *Id.* at 1103.

221 374 U.S. 203 (1963).

were affected, albeit not economically, by required Bible reading<sup>222</sup>—and was also like that of the plaintiffs in a series of environmental cases in which standing had been liberally construed.<sup>223</sup>

More recently, in *Buono v. Norton*,<sup>224</sup> the Ninth Circuit held that the presence of a Latin cross on federally owned land managed by the National Park Service violated the Establishment Clause. Interestingly, the government claimed that because the plaintiff did not allege “that the presence of the cross at Sunrise Rock made him feel like an outsider” (referencing Justice O’Connor’s famous “‘message to nonadherents that they are outsiders, not full members of the political community’” language),<sup>225</sup> he did not allege the injury necessary for an Establishment Clause claim under *Valley Forge*. The Ninth Circuit disagreed, pointing out that *Valley Forge* made no such distinction between “ideological” and “religious” offense; the *Valley Forge* “problem was not the nature of ‘the psychological consequence’ plaintiffs experienced in observing ‘conduct with which [they] disagree[d],’ but the absence of any personal injury at all, economic or non-economic, accompanying it.”<sup>226</sup> The court held that the plaintiff’s intention to avoid the public property in question because of his discomfort (occasioned by the cross) amounted to an infringement upon his right to “freely use” the property, and accordingly granted

222 Noting that in *Valley Forge* the Supreme Court had specifically reaffirmed its holding in *Schempp*, the Eleventh Circuit observed that

the Court, in finding that the plaintiffs in *Valley Forge* had not alleged an injury of any kind, reaffirmed its prior holdings that noneconomic injury could serve as a basis for standing. Moreover . . . the Court provided us with specific examples of the type of noneconomic injury which would overcome the deficiencies of *Valley Forge*. . . . Unlike the plaintiffs in *Valley Forge*, the plaintiffs in *Abington* had demonstrated an injury in fact because they “were forced to assume special burdens” to avoid “unwelcome religious exercises.”

*Rabun County*, 698 F.2d at 1106–07.

223 Several of the Supreme Court’s decisions on noneconomic injury involve factual situations similar to that presented in the instant case. Indeed, the underpinnings of plaintiffs’ claim of noneconomic injury based on deprivation of their right to the use of public land may be found in the Supreme Court’s implicit holding in *Sierra Club v. Morton*. In that case, the Sierra Club, a nonprofit organization committed to conservation of national parks, challenged the federal government’s approval of a skiing development in Sequoia National Forest. Although rejecting plaintiff’s theory of standing based on its status as a “‘representative of the public,’ the Supreme Court indicated that if the plaintiff had alleged that individual members’ use of the park would be affected by this action, the requirements for standing would have been satisfied.” *Rabun County*, 698 F.2d at 1104 & n.11 (citing *Sierra Club v. Morton*, 405 U.S. 727 (1972)).

224 371 F.3d 543 (9th Cir. 2004).

225 *Id.* at 547.

226 *Id.* (alterations in original).

standing: “We have repeatedly held that inability to unreservedly use public land suffices as injury-in-fact.”<sup>227</sup>

Other courts have agreed with *Rabun County* and *Buono* that *Valley Forge* did not eliminate the liberal standing rules in Establishment Clause cases.<sup>228</sup> But when government religious-expression cases are brought under the Equal Protection Clause, will they be afforded a similarly lenient standing analysis? They should be, because the same logic applies. The more prudent approach, though, is to avoid reliance upon taxpayer status altogether and make sure that there is at least one individual plaintiff who can demonstrate an individualized marginalization injury beyond simply being offended by the government’s engagement in religious expression.

### C. Closest Analogue Has Bad Precedent: Confederate Flag Cases

Recall that the injury to minorities created by such things as government Christmas displays or religious mottoes is not due to some pernicious effect of the Christian message itself, but to the reminder that members of minority groups are different from “real” citizens. That is why the sacred versus secular analysis is meaningless in the equal protection context; religion is significant only as the marker of minority or ethnic groups, the same way that race is. Thus, the effect upon African-Americans of the display of the Confederate flag on government buildings seems like a good analogy to draw to help courts and others understand the marginalizing effect of government religious expressions.

<sup>227</sup> *Id.*

<sup>228</sup> *See, e.g.*, *DaimlerChrysler Corp. v. Cuno*, 126 S. Ct. 1854, 1864–65 (2006) (denying taxpayers standing to allege constitutional violations generally, but reaffirming the narrow exception that taxpayers can raise Establishment Clause violations); *Separation of Church & State Comm. v. City of Eugene*, 93 F.3d 617, 619 n.2 (9th Cir. 1996) (“Separation is composed of local citizens who have standing to bring this challenge because they alleged that the cross prevented them from freely using the area on and around [it].”); *see also Ellis v. City of La Mesa*, 990 F.2d 1518, 1523 (9th Cir. 1993) (citing *Rabun County* approvingly); *Hewitt v. Joyner*, 940 F.2d 1561, 1564–65 (9th Cir. 1991) (same). *But see Heiu v. Freedom from Religion Found., Inc.*, 127 S. Ct. 2553 (2007) (concluding that the President’s speeches in support of faith-based initiatives did not give taxpayers standing to bring Establishment Clause challenges).

Note also that the courts recognize “associational standing” for an organization, such as the ACLU and Americans United for Separation of Church and State, to sue “when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 343 (1977). The ACLU’s associational standing was not even an issue in *McCreary County*.

But every solution has a problem. As helpful as the Confederate flag analogy can be in helping explain the marginalization effect of government religious expressions, it creates another obstacle: government displays of Confederate flags have been *upheld* over equal protection challenges.

There are four reported cases of equal protection challenges to displays of these flags,<sup>229</sup> and a challenger to a government religious expression on equal protection grounds must be prepared to deal with them. Two of these lawsuits, one from Georgia and one from Alabama, were brought in federal court (both in the Eleventh Circuit), and two were brought in Mississippi state court; all failed.

Why? It seems obvious that African-Americans would feel marginalized and unwelcome, to say the least, at government buildings flying the Confederate flag, which, whatever else it symbolizes, certainly also is well known as an emblem of white supremacy. That message is so strongly conveyed by the Confederate flag that its display on public buildings where citizens must conduct government business would seem to be as clearly a *prima facie* violation of the Equal Protection Clause as a sign reading "this building and the government it represents are for whites; blacks permitted only because we have to." The short answer given by the courts is that although they agreed with the conclusion that the flag is a symbol of racism and fervently wished that the states would abandon these flags, they concluded that the choice of a flag is a political decision in which the courts should not interfere. This passage from *NAACP v. Hunt* is illustrative:

It is unfortunate that the State of Alabama chooses to utilize its property in a manner that offends a large proportion of its population, but that is a political matter which is not within our province to decide. The remedy for such a grievance lies within the democratic processes of the State of Alabama and the voting rights of all its citizens, "the restraints on which the people must often rely solely, in all representative governments."<sup>230</sup>

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229 *Coleman v. Miller*, 117 F.3d 527 (11th Cir. 1997), *cert. denied*, 523 U.S. 1011 (1998); *NAACP v. Hunt*, 891 F.2d 1555 (11th Cir. 1990); *Miss. Div. of United Sons of Confederate Veterans v. Miss. State Conference of NAACP Branches*, 774 So. 2d 388 (Miss. 2000); *Daniels v. Harrison County Bd. of Supervisors*, 722 So. 2d 136 (Miss. 1998); *see also* *Quantrell v. Warren*, 998 P.2d 644 (Okla. Civ. App. 1999) (denying a petition for writ of mandamus requiring display of Confederate flag at state capitol on the ground that a statute requiring the display of any flag over the official flag of the territory was ineffective); *cf.* *Briggs v. Mississippi*, 331 F.3d 499 (5th Cir. 2003) (rejecting Establishment Clause challenge to state flag, the Confederate flag section of which contains St. Andrew's Cross), *cert. denied*, 540 U.S. 1108 (2004).

230 891 F.2d at 1566 (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 197 (1824)).

This reasoning seems to us to stand equal protection on its head. The whole point of the Equal Protection Clause, like most of the Bill of Rights, is to protect the minority from the will of the majority in the political process.

One problem may have been the plaintiffs' not having produced sufficient evidence of marginalization, à la *Brown v. Board of Education*, to survive the government's summary judgment motion. The Eleventh Circuit's conclusion might make legal sense if the plaintiffs in *Hunt* had alleged only that the flag "offended" them; its decision suggests that the NAACP did little more than, in a conclusory fashion, "apparently argue[] that the flying of the flag was 'tantamount to holding public property for racially discriminatory purposes' and that it denied its members their rights to equal education, equal economic opportunity, and equal protection."<sup>231</sup> Perhaps the plaintiffs felt—understandably—that the injury was too obvious to require something like statistical evidence, at least at the pretrial stage; they were not anticipating a court that could reason that "there is no unequal application of the state policy; all citizens are exposed to the flag. Citizens of all races are offended by its position."<sup>232</sup>

The Eleventh Circuit gave the same answer in *Coleman v. Miller*:

We recognize that the Georgia flag conveys mixed meanings; to some it honors those who fought in the Civil War and to others it flies as a symbol of oppression. . . . We regret that the Georgia legislature has chosen, and continues to display, as an official state symbol a battle flag emblem that divides rather than unifies the citizens of Georgia. As judges, however, we are entrusted only to examine the controversies and facts put before us. Based on the record presented to us in this case, we hold that appellant has failed to produce sufficient facts to allow a reasonable trier of fact to conclude that the state has violated his equal protection rights.<sup>233</sup>

The appellant's brief referred to some testimonial evidence, but mostly relied upon references to legal scholarship and generalizations in discussing the injury created by the flag, as in the following passage:

Mr. Coleman's injury is that he is treated as an "outsider." Or, as Professor Bollinger explains, the injury is

231 *Id.* at 1562.

232 *Id.* Yes, you read that right: the Confederate flag on the Alabama Capitol did not violate the Equal Protection Clause because it is *too* offensive; it offends everyone, not just African-Americans. Take three deep breaths and go back to reading this Article.

233 117 F.3d at 530–31.



“the thought and message of inferiority, of hatred and contempt, that is communicated by the discriminatory act and that [afflicts] the human spirit of the victim.”

In other words, any time the State imposes a burden on an entire group of people, the Equal Protection Clause is involved, because its goal of guaranteeing “a full measure of human dignity” is being subverted. That is the injury.<sup>234</sup>

The arguments were compelling, but the plaintiffs evidently did not proffer enough evidence to satisfy the court that the district court’s grant of summary judgment was erroneous: “Like the plaintiffs in *Hunt*, Coleman has presented ‘no specific factual proof’ in support of his claim that flying the Confederate symbol causes disproportionate racial impact.”<sup>235</sup> The Mississippi state court cases followed *Hunt* and *Coleman* with the same reasoning. As right and as persuasive as counsel for the plaintiffs were about the *nature* of the injury, the courts felt that they did not demonstrate specifically how *these* plaintiffs had sustained that injury. It is difficult, though, to distinguish the type of evidence in these cases—e.g., Mr. Coleman’s testimony “that the flying of the flag has caused him real psychological ‘fear of violence’ and that the flag has caused him to devalue himself as a person”<sup>236</sup>—from that offered by the plaintiffs in *Rabun County* and *Buono*.<sup>237</sup> The difference is not accounted for by the fact that those cases were brought under the Establishment Clause and *Coleman* and *Hunt* were brought under the Equal Protection Clause; the various opinions give no support for that conclusion, and there is no difference between “injury” under the Fourteenth and First Amendments. The sad and predictable difference was the element of race.

So what is a challenger to a government religious expression to do about these cases? Of course, one possibility is to ignore them and hope that the government either will not think to use them or will be too embarrassed to do so. But that would be a waste of a very useful tool to help courts understand the equal protection injury created by government religious expressions, an understanding that is not easy to instill. We believe that challengers would be better served by drawing the analogy to a Confederate flag on a government building that an African-American citizen must enter, and be prepared to deal with

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234 Brief of Appellant at 11, *Coleman*, 117 F.3d at 527 (No. 96-8149), 1996 WL 33574375 (citations omitted) (brackets added to correct quotation) (quoting Lee C. Bollinger, Commentaries, *The Tolerant Society: A Response to Critics*, 90 COLUM. L. REV. 979, 980 (1990)); see also *id.* at 9–10, 14.

235 117 F.3d at 530.

236 Brief of Appellant, *supra* note 234, at 9.

237 See *supra* Part V.B.

the government's possible response of pointing out the fate of the flag cases. The government may very well choose not to do so, because it would mean comparing its religious display to the Confederate flag.<sup>238</sup>

Outside of the Eleventh Circuit and Mississippi, these cases are not binding precedent, and so a challenger can and should urge the court to reject them as based on faulty reasoning, with particular attention to the illogic of deference to the political process for an equal protection question. Other courts may well be all too eager to distance themselves from the rationalizations of *Coleman* and *Hunt*, and indeed several already have managed to distinguish or ignore them. In *Griffin v. Department of Veterans Affairs*,<sup>239</sup> for example, the Fourth Circuit rejected a challenge to a Veteran's Administration rule permitting display of the Confederate flag at a cemetery of Confederate soldiers only two days a year, reversing the district court, which had relied in part upon *Coleman*.<sup>240</sup> Most important, the *Coleman* and *Hunt* courts held only that the plaintiffs in those cases failed to carry their evidentiary burden; they did not hold that as a matter of law no one ever can succeed. Thus, even where *Coleman* and *Hunt* are precedent, challengers can give courts room to decide differently, reminding the court that those cases were decided on a fact-specific basis. Challengers should be careful to present plenty of evidence of the marginalization injury, perhaps following *Brown* as closely as possible, not just scholarly discussion of the nature of the problem generally,<sup>241</sup> and with careful attention to evidence of that injury *as specifically experienced by the individual plaintiffs*. In most jurisdictions, the results should be like *Buono* and *Rabun County*, not *Hunt* and *Coleman*.

#### D. Landmines of Confusion

An equal protection approach, because it is novel, risks misunderstanding and misdirection in a few areas. All these potential detours into confusion can be avoided with foresight and planning by plaintiffs.

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238 Of course, the plaintiffs' drawing the analogy can similarly risk the same emotional boomerang, but it is easier for them than for the government defendant to avoid it, by stressing that it is the *impact* upon a minority citizen that is analogous, not the display itself.

239 274 F.3d 818 (4th Cir. 2001), *cert. denied*, 537 U.S. 947 (2002).

240 129 F. Supp. 2d 832 (D. Md. 2001).

241 Including this Article!

1. *Injury and Remedy Are Not About Including Other Religions, Too*

Courts and the public may assume that a plaintiff challenging government religious expression, particularly in the case of a Christmas display or event, on equal protection grounds is complaining about exclusion of his or her religion from the display or event. While that is the case for some plaintiffs, it is not the type of challenge recommended here, which speaks to the marginalization effect upon minorities of government identification with one, usually the dominant, religious group. Inclusion of symbols from another religion's holidays in a winter holiday display, pageant, or whatever, does not necessarily redress that problem (and their absence was not the injury in the first place).

Take a display such as the one held unconstitutional on Establishment Clause grounds in *Allegheny County*.<sup>242</sup> The County had placed a crèche on the "Grand Staircase" of its courthouse. The display was topped by an angel with a banner reading "Gloria in Excelsis Deo!" and was surrounded by poinsettias and evergreen trees with red bows. Choirs stood at the crèche and sang Christmas carols at lunch time.<sup>243</sup> The Grand Staircase is the most public part of the building, where both criminal and civil trials are held, and where the offices of the county commissioners, controller, treasurer, sheriff, and clerk of court are located. The problem with non-Christians having to conduct business in the courthouse while that display dominated the entry was not that they could not find in it some salute to their own religions or to atheism; it was that they were reminded of their minority status, their "deviation from the mean," at precisely the moment that they would be most concerned about equal treatment by government. Even worse, the government officials they were coming to talk to—people who might have been making life-altering decisions about them—had also just gotten the same message. For many people, it would not make much difference if the display had been of Santa instead of a crèche.

Inclusion of, say, a Hanukkah menorah would do little if anything to ameliorate the problem; indeed, for many Jews, it could make it worse. Hanukkah is actually a rather minor holiday on the Jewish cal-

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242 *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989). See *supra* notes 55–56, 177, 179, and accompanying text.

243 *Id.* at 579–81.

endar,<sup>244</sup> so it is clear that inclusion of Hanukkah menorahs, songs, and so forth in “winter holiday” festivities is at best a clumsy attempt to be inclusive, like wishing Jewish colleagues a “Happy Hanukkah” at Christmas (even when Hanukkah happens to be over). A truly pluralistic form of inclusion would take the form of recognizing major holidays, not the one that happens to fall nearest Christmas. More cynically, it can seem like an attempt to insulate government Christmas observance from Establishment Clause challenges. In addition, some non-Christians, particularly in the current era of “War on Christmas” complaints, may feel worried that some of their colleagues resent them when they see either a Christmas display containing non-Christian images or a completely secular “holiday” display. Under any of these views, such “inclusion” does not do anything to counteract the marginalization effect, and for some people, it can even make it worse.

There certainly may be plaintiffs who do want inclusion of their religion’s symbols, but they are not making the same argument advocated here, and it is important to make that distinction from the start—and probably several times after that—to avoid confusion. The reaction can be fierce: in 2006, a rabbi asked the Seattle airport, which had a display of nine Christmas trees, to allow display of a Hanukkah menorah, too. Not wanting to have to consider similar requests from numerous groups or to defend a lawsuit, the airport authority decided to remove the Christmas trees. Although neither the rabbi nor anyone else had asked for the trees to be removed, the backlash was breathtaking.<sup>245</sup>

There may be times when the appropriate remedy for a marginalizing government religious expression is to add to the display or program, but usually it will not be. The remedy for a large lighted cross in a public park is not to add a large lighted crescent. The remedy for a portrait of Jesus outside a public school principal’s office is not to add a portrait of Krishna. Sometimes the expression should be removed entirely; sometimes it can be placed in a more appropriate

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244 Besides the Sabbath, arguably the most important Jewish “holiday,” Rosh Hashanah and Yom Kippur, the high holy days, come in the fall, usually September and early October. The next biggest holidays are the three pilgrimage festivals, Succot (fall), Passover (spring), and Shavuot (late spring/early summer). Hanukkah, as much fun as it is, is in the next group down from that—roughly parallel to, say, Halloween or Memorial Day on the American calendar.

245 See Jonathan Martin, *Airport Puts Away Holiday Trees Rather than Risk Being “Exclusive,”* SEATTLE TIMES, Dec. 10, 2006, at A1, available at [http://seattletimes.nwsourc.com/html/localnews/2003470331\\_trees10m.html](http://seattletimes.nwsourc.com/html/localnews/2003470331_trees10m.html). The airport later restored the trees.

context. The remedy will depend upon the circumstances of each case. For our purposes, the important thing to remember is to make it very clear to the decision maker, and perhaps to the public, that the problem is not simply that the plaintiff's own religion is being snubbed.

2. *The Equal Protection Argument Is Not Simply a Restatement of the Establishment or Free Exercise Argument that Will Stand or Fall Along with Any First Amendment Challenge*

Probably most government religious expression cases that can support an equal protection claim can also support a First Amendment claim—usually an Establishment Clause, but sometimes a Free Exercise Clause claim—and it will usually make sense to argue both theories. The danger of confusion in that situation is that if the court finds that there is no First Amendment violation, it may think that a fortiori there can be no equal protection violation based upon religion arising out of the same facts.

But that is not necessarily the case. Even if there is no Establishment or free exercise violation, there can still be an equal protection violation. It is not even true that if strict scrutiny is inappropriate under a First Amendment theory (either free exercise or establishment of religion), then a fortiori it is not triggered under an equal protection challenge on the same facts, as if the two analyses were congruent. For example, an Establishment Clause claim might have failed because the court, depending upon the analysis it employed, found that there was not enough religious content in the government religious expression to make it not primarily secular, under a *Lemon* analysis, or that it was not quite “coercive,” under that narrower approach. But that does not end the analysis under equal protection. If a symbol, motto, or display communicates the message, “non-Christians not welcome” or “atheists are immoral,” it may not be primarily sacred, coercive, or interfering, but it is certainly discriminatory.

Although a few cases have included language that might suggest to the incautious reader that any equal protection claim must stand or fall along with an Establishment Clause claim, in fact they do not establish any such rule. In *Locke v. Davey*,<sup>246</sup> the plaintiff challenged a statute denying state financial aid to theology students. Although the

case was decided (against Mr. Davey) on Free Exercise grounds, the Court included this brief aside on equal protection:

Davey also argues that the Equal Protection Clause protects against discrimination on the basis of religion. Because we hold, *infra*, at 725, that the program is not a violation of the Free Exercise Clause, however, we apply rational-basis scrutiny to his equal protection claims. *Johnson v. Robison*, 415 U.S. 361, 375, n.14 (1974); see also *McDaniel v. Paty*, 435 U.S. 618 (1978) (reviewing religious discrimination claim under the Free Exercise Clause). For the reasons stated herein, the program passes such review.<sup>247</sup>

It is easy to misconstrue this language (which is dicta anyway) as implying that anything that does not constitute a free exercise violation a fortiori cannot trigger strict scrutiny under the Equal Protection Clause. However, the cases cited by the Court, *Johnson v. Robison*<sup>248</sup> and *McDaniel v. Paty*,<sup>249</sup> offer no support for any such rule. In *Robison*, the plaintiff was a conscientious objector who argued that the statutory system of veterans' educational benefits violated both the Free Exercise and Equal Protection Clauses. The language cited by the *Locke* Court is the following:

Appellee argues that the statutory classification should be subject to strict scrutiny and upheld only if a compelling governmental justification is demonstrated because (1) the challenged classification interferes with the fundamental constitutional right to the free exercise of religion, and (2) 1-O conscientious objectors are a suspect class deserving special judicial protection. We find no merit in either contention. Unquestionably, the free exercise of religion is a fundamental constitutional right. However, since we hold . . . that the Act does not violate appellee's right of free exercise of religion, we have no occasion to apply to the challenged classification a standard of scrutiny stricter than the traditional rational-basis test. With respect to appellee's second contention, we find the traditional indicia of suspectedness lacking in this case.<sup>250</sup>

Mr. Robison had brought a First Amendment free exercise challenge, and both kinds of equal protection challenges: "fundamental right" and "suspect classification." The fundamental right at issue was the right to free exercise of religion. As the Court had already decided that there was no Free Exercise Clause violation, it made sense that the same argument under the fundamental right prong of the Equal Protection Clause failed, as the analysis would be the same: was there or was there not an infringement of the right to free exer-

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<sup>247</sup> *Id.* at 720 n.3.

<sup>248</sup> 415 U.S. 361 (1974).

<sup>249</sup> 435 U.S. 618 (1978).

<sup>250</sup> *Robison*, 415 U.S. at 375 n.14.

cise of religion, and if so, did it survive strict scrutiny? But the *suspect classification* equal protection challenge was *not* based on religion. The class Mr. Robison claimed as “suspect” was the class of conscientious objectors, not a religion-based class, and the Court simply declined to recognize conscientious objectors as a suspect class. In sum, the most *Johnson v. Robison* can be said to stand for is the fairly obvious principle that if state action does not trigger strict scrutiny under the Free Exercise Clause, it will not trigger strict scrutiny under the *fundamental right* prong of the Equal Protection Clause, either—but the opinion says nothing at all with regard to a challenge under the *suspect classification* prong.

The other case mentioned in *Locke, McDaniel v. Paty*,<sup>251</sup> invalidated on free exercise grounds a state constitutional provision barring “Minister[s] of the Gospel, or priest[s] of any denomination whatever”<sup>252</sup> from serving as delegates to a state constitutional convention. The sole reference to the Equal Protection Clause appears in Justice White’s concurring opinion, stating that he would have struck down the constitutional provision on equal protection, not free exercise, grounds. Justice White disagreed that the state constitutional provision interfered with Mr. McDaniel’s right to practice his religion, but he felt that the right to seek office was a fundamental right, and that the provision did not survive strict scrutiny. There was no discussion of religion, or anything else, as a suspect classification.<sup>253</sup>

Even a case that came as close as any to saying that religion does not even constitute a suspect classification, *Wirzburger v. Galvin*,<sup>254</sup> explicitly cautioned that *Locke* should not be read to mean that a failed free exercise claim automatically dooms an equal protection claim on the same facts:

It bears clarifying that we do not read [*Locke*] to be a blanket rule that where a Free Exercise Claim fails, all equal protection claims based on the same facts must also fail. . . . [W]e interpret this line of Supreme Court cases to apply only to the extent that the related equal protection claims are based on a theory that the law or governmental action in question “interferes with the fundamental constitutional right to the free ex-

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251 435 U.S. 618 (1978); see also discussion *supra* Part III.A.

252 *McDaniel*, 435 U.S. at 621 n.1.

253 Mr. McDaniel did not raise any suspect class claim. The two Equal Protection questions raised in his brief were based upon deprivation of his rights to vote and to hold office. Brief for Appellant at 2, *McDaniel*, 435 U.S. at 618 (No. 76-1427), 1977 WL 189701. There was some language about discrimination against a “class” of clergy, but that question was not raised before the Court. *Id.* at 40.

254 412 F.3d 271 (1st Cir. 2005).

ercise of religion.” Other types of equal protection claims may have independent force, and must be considered accordingly.<sup>255</sup>

The court ultimately acknowledged that “[c]ertainly any form of invidious discrimination because of religion is forbidden” under the Equal Protection Clause as well as the Free Exercise Clause.<sup>256</sup>

*Wirzburger’s* logic is sound: while a Free Exercise claim and a fundamental-right-to-Free-Exercise equal protection claim resting on the same facts will likely stand or fall together, there is no reason that a suspect-classification equal protection claim should automatically be denied strict-scrutiny review whenever a Free Exercise claim on the same facts failed, or even a more analogous Establishment Clause challenge. It is easy to conceive of government action that violates the Equal Protection Clause that does not necessarily constitute a violation of the Establishment Clause—that is the whole problem addressed by this Article. Such government actions include not only blatant discrimination—such as a rule that Hindu employees of a government agency may not paint their offices green (but everyone else can)—but also those that narrowly survived Establishment Clause challenges, such as Christian state motto or the Ten Commandments display upheld in *Van Orden*, particularly in which the decision turned on an acceptable sacred/secular balance, a *de minimis* theory, or a coercion test.

### 3. Courts May Simply Be Resistant to Striking Down Government Religious Expressions

Equal protection is a good basis for challenging government religious expressions, but it is not a foolproof one. Courts may acknowledge the disparate treatment of—not just impact upon—minority religious groups, yet be unwilling to forbid the government action, particularly if it were popular and well-intentioned.

*Washegesic v. Bloomingdale Public Schools*<sup>257</sup> had facts almost identical to those of *Sklar*<sup>258</sup>: the court held that the same *Head of Christ* portrait hung in a high school corridor outside the principal’s office violated the Establishment Clause, and ordered the picture removed. A concurring judge reluctantly agreed that *Lemon* required this result, in an

<sup>255</sup> *Id.* at 282 n.5 (citations omitted).

<sup>256</sup> *Id.* at 284.

<sup>257</sup> 33 F.3d 679 (6th Cir. 1994).

<sup>258</sup> Complaint, *Sklar v. Bd. of Educ.*, No. 1:2006cv00103 (N.D. W. Va. filed June 28, 2006); see *supra* notes 67–70 and accompanying text.



opinion that showed the need to educate courts on the nature of the equality problem:

I can well understand that someone . . . could be offended by this portrait, but “injured” is another matter. . . .

. . . If the Supreme Court ever gets around to abandoning *Lemon*, and there is certainly significant impetus within the Court to do so, I would hope the new test would have a “de minimis” prong to it.

I do not mean to suggest that the “appropriateness” of this picture in the school is not a legitimate issue for discussion . . . but, if I am permitted to use the expression, for heaven’s sake, stay out of the courthouse and quit trivializing the Constitution!<sup>259</sup>

In *Lynch v. Donnelly*, the Court showed about as much receptivity as in any case to the equality-as-a-First-Amendment-value theory:

The Court of Appeals viewed *Larson v. Valente* as commanding a “strict scrutiny” due to the city’s ownership of the \$200 crèche which it considers as a discrimination between Christian and other religions. It is correct that we require strict scrutiny of a statute or practice patently discriminatory on its face.<sup>260</sup>

The Court’s next sentence, though, suggests that even if a court would be receptive to an equal protection challenge, it would not necessarily be quick to find a violation: “But we are unable to see this display, or any part of it, as explicitly discriminatory in the sense contemplated in *Larson*.”<sup>261</sup>

Of course there is no guarantee that an equal protection claim will succeed. But that is true of just about any legal theory, and it is no excuse not to try it. The lesson seems to be that challengers really have to help a court understand the nature and effect of marginalization. Perhaps this will be especially true when the judges are all majority members; note that the *Lynch* Court that felt a crèche did not “discriminate” was 100 percent Christian.

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259 *Washagesic*, 33 F.3d at 684–85 (Guy, J., concurring).

260 465 U.S. 668, 687 n.13 (1984) (citation omitted).

261 *Id.* Even Justice O’Connor’s opinion in *Lynch*, displaying her understanding of the marginalization effect created by government religious expressions, was, it must be remembered, a *concurring* opinion; she voted that the crèche was constitutional.

## VI. IF IT'S OBVIOUS, WHY HASN'T ANYONE DONE IT?

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262

It is pretty daunting that so many experts in religion law—all those scholars who argue so persuasively for recognition of an equality interest protected by the Establishment Clause,<sup>263</sup> the judges (notably Justice O'Connor) who agree with them,<sup>264</sup> and the litigators in all these government religious expression cases,<sup>265</sup> who so often include powerful equality arguments in their First Amendment challenges—all trot right up to the border of the Equal Protection Clause, but never quite step across it. If the Equal Protection Clause is such an obvious tool for government religious expression cases,

262 © Ted Goff 2004. Used by permission.

263 See *supra* Part III.B.

264 See *supra* Part III.A.1.

265 See *supra* Part III.A.2.

then there must be some good reason that it has not been used. Right?

Maybe not. Recall *Sklar*<sup>266</sup>: the plaintiffs raised only an Establishment Clause challenge to the *Head of Christ* painting outside the school principal's office. Yet the complaint itself sounds at least as much in equal protection as in Establishment of Religion—indeed, it fairly begs to include an equal protection claim:

[T]he Board is communicating the message that [non-Christian] children are outsiders with respect to the school community. . . .

. . . .

. . . [T]he school district has sent a powerful visual message to all who enter the school that Christian students are more valued than others and that students who wish to curry favor with the administration should adhere to the school district's preferred religious views and refrain from questioning or challenging the district's favoritism toward a particular faith.<sup>267</sup>

Doesn't it sound like the very next line would be, "Thus, the district's actions violate *the Equal Protection Clause*"? But it's not—it's, "The district's actions thus violate the Establishment Clause of the First Amendment to the United States Constitution."<sup>268</sup>

Why? We asked counsel for the plaintiffs in *Sklar*. Attorneys at both the ACLU and AUSCS told us that they simply had not thought of this argument.<sup>269</sup> Counsel in other recent and pending government religious expression cases brought under the First Amendment all told us the same thing: they just never thought of using the Equal

266 Complaint, *Sklar v. Bd. of Educ.*, No. 1:2006cv00103 (N.D. W. Va. filed June 28, 2006); see *supra* notes 67–70 and accompanying text.

267 Complaint at ¶¶ 3, 7, *Sklar v. Bd. of Educ.*, No. 1:2006cv00103 (N.D. W. Va. filed June 28, 2006).

268 *Id.*

269 Telephone Interviews with Heather Weaver & Richard B. Katskee, Attorneys, AUSCS (Aug. 22, 2006) & Terri Baur, Attorney, ACLU of West Virginia (Aug. 22, 2006 & Sept. 6, 2006). The attorneys said that they might move to amend the complaint to add the type of Equal Protection claim advocated in this Article, but the case settled on October 6, 2006, with the school district barred from displaying the picture.

There is some question whether the case would have gotten that far anyway, though. Truth is stranger than fiction: the portrait vanished from the school on August 17, 2006, and the defendants moved immediately for dismissal on mootness grounds. The plaintiffs offered to withdraw the lawsuit if the Board of Education, which had already agreed not to hang the portrait *in the same place* if it were recovered, agreed to post no similar artwork anywhere. Meanwhile, a group of "pro-portrait" students donated a framed mirror, to hang in the same spot, with an inscription reading "To know the will of God is the highest of all wisdom. The love of Jesus Christ lives within each of us." Cindi Lash, *Christ Art Gone, but Controversy Remains—W. Va. Town Takes on Constitutional Debate*, PITTSBURGH POST-GAZETTE, Sept. 4, 2006, at B-1.

Protection Clause.<sup>270</sup> Yet the complaints in those actions typically include allegations that, like those in *Sklar*, vividly raise the equal protection issue.<sup>271</sup>

270 Telephone Interviews with Susan M. Fall, Counsel for Plaintiff in *Washegesic v. Bloomingdale Pub. Schs.*, 33 F.3d 679 (6th Cir. 1994) (Aug. 22, 2006); Timothy Nelson, Counsel for Plaintiff in *Ariz. Civil Liberties Union v. Dunham*, 112 F. Supp. 2d 927 (D. Ariz. 2000) (Aug. 22, 2006); Kenneth J. Falk, Counsel for Plaintiffs in *Hinrichs v. Bosma*, 400 F. Supp. 2d 1103 (S.D. Ind. 2005), *appeal docketed*, No. 05-4604 (7th Cir. Dec. 14, 2005) (Sept. 19, 2006); Gerald Weber, Counsel for Plaintiffs in *Pelphrey v. Cobb County*, 410 F. Supp. 2d 1324 (N.D. Ga. 2006) (Sept. 19, 2006); Edmund H. Robinson & Armand Derfner, Co-Counsel for Plaintiff in *Silverman v. Campbell*, 486 S.E.2d 1 (S.C. 1997) (Oct. 12, 2006 & Oct. 14, 2006); Ronald A. Krauss, Counsel for Plaintiffs in *Smith v. Bd. of Educ., N. Babylon Union Free Sch. Dist.*, 844 F.2d 90 (2d Cir. 1988) (Oct. 23, 2006); Thomas J. Allingham II, Counsel for Plaintiffs in *Dobrich v. Indian River Sch. Dist.*, Complaint at ¶ 29, *Dobrich v. Indian River Sch. Dist.*, No. Civ.A. 05-120-JJF, 2006 WL 2460740 (D. Del. Aug. 23, 2006), 2006 WL 2304529 (Feb. 23, 2008); Craig A. Cowie & Dan Mach, Counsel for Plaintiffs in *Moreno v. Ector County Indep. Sch. Dist.*, Complaint, *Moreno v. Ector County Indep. Sch. Dist.*, No. MO-07-CV 039, 2007 WL 1995302 (W.D. Texas filed May 16, 2007) (Mar. 6, 2008); *see also* Interview with Erwin Chemerinsky, Counsel for Plaintiffs in *Van Orden v. Perry*, 545 U.S. 677 (2005) at Capital University Law Review's 2005–2006 John E. Sullivan Lecture, in Columbus, Ohio (Oct. 14, 2005).

271 *See, e.g.*, Complaint at ¶¶ 4, 16, *Pelphrey v. Cobb County*, 410 F. Supp. 2d 1324 (N.D. Ga. 2006) (No. 1:05-CV-2075-RWS) (“[Plaintiff] is offended that his religion has been presented with a governmental imprimatur, as if it, and he, as a Christian, were somehow more American, or more Cobb Countian than other religions and non-Christians. . . . The prayers cause the other Plaintiffs to feel like outsiders in their own community and unwelcome at government meetings.”); Complaint at 8–9, ¶¶ 42, 45, 50, *Hinrichs v. Bosma*, 440 F.3d 393 (7th Cir. 2006) (“[A]n affront to many citizens of the State of Indiana, raising implicit and explicit questions about the State’s respect of the religious beliefs of *all* its citizens. . . [the practice] sends a strong message which discourages diversity. . . [and] discourages diverse persons from wanting to live in Indiana. . . [I]t sends a message of exclusion and intolerance to many persons whose daily lives are affected by the workings of the General Assembly.”).

Timothy Nelson, counsel for the plaintiffs in *Arizona Civil Liberties Union v. Dunham*, 112 F. Supp. 2d 927 (D. Ariz. 2000), a § 1983 action alleging that a town violated the Establishment Clause “by issuing a Proclamation declaring the week of November 23–30, 1997 as ‘Bible Week in Gilbert, Arizona’ and urging fellow citizens to read the Bible,” *id.* at 927, reports that he and his colleagues had considered adding an Equal Protection claim, but based on the mayor’s refusal to let other religions have similar proclamations, not on the marginalization effect of that proclamation. In *Jocham v. Tuscola County*, 289 F. Supp. 2d 887 (E.D. Mich. 2003), the plaintiffs, who were atheists and witches, complained about a crèche on government property at a county commissioners’ meeting, at which they were shouted down and subjected to religious harassment. The court dismissed or granted summary judgment on all the plaintiffs’ claims under various federal and state constitutional and statutory provisions, *except* an Equal Protection claim. It appears more likely that that claim was raised and treated as a “fundamental right” claim (i.e., that the denial of their right to speak at the meeting was viewpoint-based, and therefore an infringement of their First Amendment speech rights) than as a “suspect classification” claim (i.e., that they were discriminated against because of their religion (or lack thereof)); in any event, the Equal Protection claim was raised only with regard to the meeting, not against the crèche—the government religious expression—*itself*.

Maybe it is because of the history of the two constitutional provisions; the First Amendment was almost a collection of Equal Protection guarantees, necessary because there was no Equal Protection Clause. Maybe it is because these challenges are often brought by organizations such as the ACLU and AUSCS, which focus heavily on the First Amendment. Maybe it is even because the equality interest seemed to be “covered” by those arguing for its protection under the Establishment Clause. Or maybe not.

Sometimes there just is not any reason, other than habit, for the absence of the obvious. Did you know that the first successful patent on wheeled suitcases was not filed until 1972? Bernard David Sadow was on vacation, hauling heavy luggage around an airport, when he saw a porter wheeling a large load on a wheeled skid. It was obvious: Why not just put the wheels right on the suitcases themselves? Mr. Sadow was not in the business of luggage design or ergonomics—he never even went to college. “If I were a physicist or an engineer,” he later said, “I might never have thought of this stuff.”<sup>272</sup> Yet Mr. Sadow met with resistance to his invention from buyers at department stores—not because it was not a good idea, but because they thought no one would buy it.<sup>273</sup>

The wheel was not a new or rare device, and for that matter, neither was the suitcase. But as obvious as it now seems, no one had put wheels on luggage. They just had never done it that way.<sup>274</sup>

And no one has used the Equal Protection Clause to challenge government religious expressions. Until now.

## CONCLUSION

Even before the changes in the Supreme Court, First Amendment practitioners were searching for an alternative to *Lemon*. It was not such a great test to begin with, anyway. There is no way to know exactly what makes something “secular” or “sacred,” or how much of a mix there could be before government had gone too far. Challengers have to walk on eggshells to avoid appearing to insult religion, re-

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272 Aaron Nicodemus, *City Native on a Roll*, STANDARD-TIMES (New Bedford, Mass.), June 1, 2000 (internal quotation marks omitted), available at <http://www.southcoasttoday.com/daily/06-00/06-01-00/a011o007.htm>; see also Corey Kilgannon, *From Suitcases on Wheels to Tear-Free Onion Slicers*, N.Y. TIMES, Aug. 6, 2000, at WE1; J. Robert Parkinson, *Focus on Creative Problem Solving Can Let Good Ideas Roll*, MILWAUKEE J. SENTINEL, Sept. 8, 2003, at 2D.

273 ROBERT J. SHILLER, *THE NEW FINANCIAL ORDER: RISK IN THE 21ST CENTURY* (2003).

274 The authors apologize for the repeated analogies to hardware. See *supra* Introduction (comparing the Equal Protection Clause to a Phillips head screwdriver).

ligious people, and even God. There isn't even agreement on how many prongs the test has or what it requires; some Justices think it requires neutrality, others only that it forbids coercion or establishment of a state church. Even where there is agreement on how to apply *Lemon*, results are unpredictable, as evidenced by the different results in *Van Orden* and *McCreary County*. With the replacement of Justices Rehnquist and O'Connor with Justices Roberts and Alito, as well as changes in the other federal and state courts, the uncertainty both of what the test will be held to mean and what the result will be in any given case are even greater—if such a thing is possible. A new tool is needed.

The Equal Protection Clause is that tool. Whatever the reason that it hasn't been used in the way recommended here so far, it seems that the time is ripe for its use now. An equal protection approach—under the Equal Protection Clause itself, not just via an equality-based reading of the Establishment Clause—not only provides a backup to a risky Establishment Clause challenge, it has several advantages that recommend its use, at least for government religious expression cases, even if *Lemon* were thriving.

Because the problem with a government religious expression is not coercion or even any effect at all of the religious content of the message, but rather the marginalization effect the message has upon people who are not members of the religious majority with whom the religious symbol or message is associated, an equal protection challenge speaks more directly to the nature of the injury. It also avoids the entire mess of measuring the quantum of “sacredness” in the government's action, because even entirely secular expressions can be discriminatory in this way.

Equal protection provides a straight path to strict scrutiny that the Establishment Clause does not. There is no need to prove either that the government religious expression is “sacred enough” in its purpose and primary effect to trigger strict scrutiny or that it will entangle government with religion. As long as care is taken in choosing plaintiffs, strict scrutiny based upon “suspect classification” will be almost automatic.

Avoiding the need to focus so closely on the religious content of the expression will help challengers to help majority members (especially judges) understand the nature of the injury. They can analogize to other equal protection contexts, particularly race discrimination, with which they are familiar, and in which *de minimis* arguments are not typically raised (as they are in the Establishment Clause context), even by judges sympathetic to the equality-neutrality

approach. Challengers will also find it easier to avoid the public relations trap of appearing to argue against the theological merits of that message itself. Even more important, it will provide courts the space to rule in the challengers' favor without feeling like they are committing a religious or political "sin."

We hope we have explained this Equal Protection argument clearly and persuasively. Now it's your job to do the same for a legislature or for a court, on behalf of your next client in a government religious expression case. Maybe you will be the one to make legal history.