

Essay

ATMOSPHERIC HARMS IN CONSTITUTIONAL LAW

Frederick Mark Gedicks*

I. THE ATMOSPHERICS OF PROPOSITION 8

Given the rhetoric that surrounded the Proposition 8 initiative campaign to ban recognition of same-sex marriages in California, it is easy to forget that less was at stake than may have appeared. Because same-sex couples may formalize their relationship as “domestic partners” to whom state law provides all of the rights and privileges of legally married spouses,¹ the issues raised by Proposition 8 did not include whether same-sex couples in California do or should have all of the rights and privileges of married heterosexual spouses—that train had already left the station, as the California Supreme Court made abundantly clear.² For the same reason,

* Guy Anderson Chair & Professor of Law, Brigham Young University Law School; gedicksf@law.byu.edu. I am grateful for comments and criticisms on earlier drafts of this essay by other participants in the Schmooze and by my BYU colleagues during a faculty colloquium. Allison Shiozawa Miles provided excellent research assistance.

¹ See CAL. FAM. CODE § 297.5(a) (“Registered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses.”).

² See *Strauss v. Horton*, Nos. S168047, S168066 & S168-78, slip op. at 92-93, 2009 WL 1444594, at *46 (Cal. May 26, 2009).

Proposition 8 does not eliminate the substantial substantive protections afforded to same-sex couples by the state constitutional rights of privacy and due process as interpreted in the majority opinion in the *Marriage Cases*. Rather, same-sex couples continue to enjoy the same substantive core benefits afforded by those state constitutional rights as those enjoyed by opposite-sex couples—including the constitutional right to enter into an officially recognized and protected family relationship with the person of one's choice and to raise children in that family if the couple so chooses—with the sole, albeit significant, exception that the designation of “marriage” is, by virtue of the new state

Proposition 8 did not implicate the question whether extending the rights and privileges of marriage beyond heterosexual couples will undermine or otherwise change the importance and function of marriage—those rights had already been extended, and so that train had also already departed.

What *was* at stake in Proposition 8 was the definition of normality, and thus the question of social acceptability. Are same-sex relationships sufficiently “normal” that same-sex couples should be able to legally formalize their relationships, if they so choose, in the way that heterosexual intimate relationships have been formalized for millennia? Or are such relationships sufficiently outside the norm to justify reserving the term “marriage” solely for heterosexual couples, even if the rights and privileges held by heterosexual “spouses” and homosexual “partners” are identical?

These are not trivial questions. There will always be a social asterisk attached to same-sex couples until those who wish to can call themselves “spouses” rather than “partners”; that this difference is legally inconsequential does not obscure that it is socially and culturally

constitutional provision, now reserved for opposite-sex couples. Similarly, Proposition 8 does not by any means “repeal” or “strip” gay individuals or same-sex couples of the very significant substantive protections afforded by the state equal protection clause either with regard to the fundamental rights of privacy and due process or in any other area, again with the sole exception of access to the designation of “marriage” to describe their relationship. Thus, except with respect to the designation of “marriage,” any measure that treats individuals or couples differently on the basis of their sexual orientation continues to be constitutionally “suspect” under the state equal protection clause and may be upheld only if the measure satisfies the very stringent strict-scrutiny standard of review that also applies to measures that discriminate on the basis of race, gender, or religion.

Id.

significant.³ And if (or when) that day comes, religious conservatives will have a more difficult time teaching distinctive principles of moral right and wrong and otherwise holding themselves apart from the world, even though—heated pro-8 rhetoric aside—they will not be required to endorse or to accept, let alone to perform, same-sex marriages in their churches, sanctuaries, and private social groups.⁴

Nevertheless, I want to suggest that the harm suffered by gays and lesbians whom Proposition 8 implicitly labels “abnormal,” like the harm of “normalizing” same-sex orientation and conduct from which the Proposition has (for now) saved religious conservatives in California, is different in kind than harm stemming from state denial of legal rights and privileges. I call this harm “atmospheric,” suggesting that the harm stems from the social or cultural environment in which one lives, but does not block his or her exercise of constitutional, civil, or other legal rights, or otherwise deprive him or her of life, liberty, or property, as these have been traditionally understood.

II. WHAT IS AN “ATMOSPHERIC” HARM?

Atmospheric harms are social or cultural abstractions rather than violations of legal rights. An atmospheric harm is a kind of emotional weight that one carries, consisting in the knowledge that one’s essential identity or core beliefs or practices are not approved by the majority, but also not prohibited or penalized or even regulated by it. Atmospheric harms are

³ *Cf.* *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (recognizing the stigma of racially segregated public schools even when segregated schools provide a genuinely equal education).

⁴ *Cf.* *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (permitting Amish parents to withdraw their children from high school attendance so as to facilitate the intergenerational preservation of their distinctive religious community).

frequently verbalized as harms to “society” or “the community” or “the country,” in that the relevant society or community or country is, to use a common expression, “sending the wrong message.” By accepting or rejecting certain persons or behavior as normal, “the community” implicitly communicates its view of right or wrong, even when it tolerates dissenters from that view.⁵ But this rhetoric betrays that atmospheric harms are really individual, though frequently voiced as communal: It is the weight of contrary community norms on individual dissenters from those norms, though unaccompanied by legal consequences, that constitutes the harm, rhetoric to the contrary notwithstanding.

Atmospheric harms are distinct from aesthetic offenses. A harm stemming from behavior that one believes is wrong is atmospheric because the apparent acceptance of the behavior implied by the absence of sanctions alters the social or cultural environment in which such persons live, not because one finds the behavior disgusting or unattractive. Plenty of folks believe that same-sex relationships or heterosexual condemnation of them are distasteful, but normalization of such relationships or condemnations would constitute an atmospheric harm to such persons only if the normalization or condemnation also negatively affected the social or cultural environment in which they live.

For example, opposition to same-sex marriage by many religious conservatives seems motivated by the purported threat that such marriage poses to a traditional contrary conceptualization of marriage which lies at the theological core of many conservative religions. (Again, this seemed especially the case in the Proposition 8 campaign because of the apparent

⁵ By “toleration” I intend its classic sense of the government’s permitting the practice of minority religions that it believes are wrong, rather than its more contemporary sense of the government’s granting equal respect and protection to all religions, majority and minority alike.

equation of domestic partner rights and privileges with those stemming from civil marriage.)

The purported harm, in other words, is not that same-sex marriage will interfere with whether or how religious conservatives themselves enter into or act within traditional such marriages,⁶ but rather that permitting gays and lesbians to marry will change the social meaning of marriage in ways that religious conservatives would not find congenial, which would make traditional

⁶ Not that such arguments weren't made. Perhaps the least credible argument offered in support of Proposition 8 was the suggestion that in its absence, religions that oppose same-sex marriage on theological grounds would nevertheless have been required to solemnize same-sex marriages in their sanctuaries, temples, and other places of worship. There is no credible constitutional argument that would support such a result, and even the most currently aggressive interpretations of state public accommodation statutes do not end in a legal requirement that religions opposed to same-sex marriage must perform or permit such marriages in their places of worship. *See* Joint Statement of California Constitutional Law Professors (n.d.) (statement of 60 constitutional law professors at California law schools concluding that there is no basis for the claim that legalization of same-sex marriage would require churches to perform or to permit the performance of same-sex marriages in buildings reserved for worship), *available at* Frank D Russo, *Constitutional Law Professors Reject Arguments Made by California Proposition 8 Proponents*, <http://www.californiaprogressreport.com/2008/10/constitutional_1.html> (last visited Mar. 4, 2009).

Marginally more credible was the argument that without Proposition 8, churches opposed to same-sex marriage would lose their California state tax exemptions. While this is conceivable in theory, *cf.* *Bob Jones Univ. v. United States* (1983) (upholding revocation of federal tax exempt status of religious university unaffiliated with a church on ground that university's theological opposition to interracial marriage and dating violated public policy), it is very unlikely in practice, *see* Joint Statement, *supra* (statement of 60 constitutional law professors at California law schools concluding that "no church's tax-exempt status will be affected by its decision whether to solemnize marriages between same-sex couples"). For example, no church with an all-male priesthood has been threatened with loss of its tax exempt status for gender discrimination, notwithstanding well-established state and federal public policies condemning such discrimination. It seems unlikely that the policies on which exempt status rests would dictate revocation of exempt status in case of sexual-orientation discrimination, but not gender discrimination.

In any event, neither of these purported consequences of Proposition 8 would have constituted a merely atmospheric harm, because each of them would have required an affirmative action (solemnizing a marriage) or imposed a tangible penalty (loss of tax exempt status).

marriage more difficult to perpetuate or to promote as a social and cultural practice.⁷

⁷ One of the most credible pro-8 arguments concerned the atmospherics of public education. Public education teaches to the norm, and it would have been inevitable, had Proposition 8 been defeated, that same-sex marriage would have been normalized in all educational contexts to which sexuality and marriage are now relevant. Religious conservatives viewed this as a serious potential harm, but it would have been an atmospheric one: The children of religious conservatives may well have been expressly taught, or the public school curriculum may have implicitly assumed, that same-sex marriage is part of the California social norm, but neither they nor their parents would have been required to endorse, to act out, or otherwise to approve of this norm, nor would parents have been prevented from teaching their children a morality at home or at church that departs from it, *cf.* *Meyer v. Nebraska* 262 U.S. 390 (1923) (recognizing substantive due process right of parochial school instructor to teach, and of parents to provide for their children to be taught, a foreign language), or from enrolling their children in private schools that do not teach to this norm, *see* *Pierce v. Soc. of Sisters* 268 U.S. 510 (1926) (recognizing substantive due process right of Roman Catholic order to provide, and of parents to satisfy compulsory school attendance laws by choosing for their children, private religious education). Of course, in the long run harms that initially are purely atmospheric may become more tangible, as the underlying value they reflect becomes widely and deeply embedded in the culture, which then displays a decreased inclination to tolerate dissenting views.

Another credible pro-8 argument concerned the fear that adoption and other social welfare agencies operated by religions opposed to same-sex marriage would not have been able to adhere to beliefs and practices opposing same-sex marriage in placing children or otherwise providing services. *Compare* Patricia Wen, *Catholic Charities stuns state, ends adoptions; gay issue stirred move by agency*, BOSTON GLOBE, Mar. 11, 2006 (reporting decision of Boston diocese to withdraw its Catholic Charities affiliate from adoption work because of state law prohibiting discrimination against same-sex adoptive parents), <http://www.boston.com/news/local/articles/2006/03/11/catholic_charities_stuns_state_ends_adoptions/> (last visited June 9, 2009) *with* An Act Implementing the Guarantee of Equal Protection under the Constitution of the State for Same-Sex Couples, Conn. Pub. Act No. 09-13 §§ 17-19 (Apr. 23, 2009) (exempting religious individuals, clergy, and organizations from obligation to perform, recognize, or provide goods, services or accommodations in connection with the solemnization or celebration of a same-sex marriage where doing so would violate their religious beliefs), <<http://www.cga.ct.gov/2009/ACT/PA/2009PA-00013-R00SB-00899-PA.htm>> (last visited June 10, 2009) *and* An Act to End Discrimination in Civil Marriage and Affirm Religious Freedom, Maine Pub. L., ch. 82, LD 1020, item 1 § 3 (124th Legislature, 1st session, May 6, 2009) (providing that the same-sex marriage statute “does not authorize any court or other state or local governmental body, entity, agency, or commission to compel, prevent, or interfere in any way with any religious institution’s religious doctrine, policy, teaching or solemnization of marriage within that particular religious faith’s tradition,” as guaranteed by the free exercise provisions of the Maine Constitution and the First Amendment),

III. ATMOSPHERIC HARMS IN CONSTITUTIONAL LAW

A. *In General*

There are hints at the legitimacy of atmospheric harms in constitutional doctrine. One of the most famous (and controversial) passages of *Brown v. Board of Education* is its conclusion that separating racial minorities from other children in the public schools solely on the basis of their race “generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”⁸ This suggested that the harm of

<http://www.mainelegislature.org/legis/bills/bills_124th/chapters/PUBLIC82.asp> (last visited June 10, 2009).

A possible compromise would exempt the *nonprofit* activities of religions and their members from laws that prohibit sexual orientation discrimination, while leaving *for-profit* activities subject to such laws. *Cf.* *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987) (holding that as applied to nonprofit activities of religious organizations, statutory exemption of religious organizations from antidiscrimination laws does not violate Equal Protection or Establishment Clause); *id.* at 342-44 (recognizing that religiously restrictive employment practices are part of a religious organization’s free exercise right of self-definition, and that use of the nonprofit character of an activity as a bright-line rule to determine whether it is deserving of free exercise protection avoids entangling the Court in theological questions) (Brennan, J., concurring in the judgment); *see also* Ira Lupu & Robert W. Tuttle, *Question & Answer: A Clash of Rights? Gay Marriage and the Free Exercise of Religion*, The Pew Forum on Religion and Public Life (May 21, 2009) (observing that “when individuals enter the commercial market as employers or sellers, their federal constitutional right of freedom of religion is significantly limited”), <<http://pewforum.org/events/?EventID=216>> (last visited June 9, 2009).

The application of anti-discrimination laws to religious social service agencies might entail more than purely atmospheric harm, in that it would likely require religious social service agencies to act in a way that implies approval of same-sex marriages—for example, when such laws compel a religious adoption agency to place a child with a same-sex married couple despite the belief of its affiliated or sponsoring religion that such marriages are morally wrong.

⁸ 347 U.S. 483, 494 (1954); *cf.* *Grutter v. Bollinger*, 539 U.S. 306 (2003) (holding that maintenance of a diverse learning environment is a compelling state interest justifying racial preferences in higher education admissions).

segregation to African American schoolchildren was not only their confinement to state facilities and services that were not truly equal to those afforded whites, “separate but equal” notwithstanding, but also the condescending or hostile racial atmosphere created and perpetuated by state segregation, which would have persisted even if segregated public schools had provided genuinely equal educational facilities.⁹

Wisconsin v. Yoder also sounds in atmospheric harm.¹⁰ *Yoder* upheld the free exercise rights of Amish parents to withdraw their children from public high school in violation of state compulsory attendance laws, in part because attendance would have made it significantly more difficult for these parents to teach Amish religious values to their children.¹¹ The Court accepted the parents’ argument that transmission of their way of life to the next generation depended upon the ability to insulate their children from the worldly influences of a public high school.¹²

This conclusion is controversial because the Court supported it with citations to now-discredited social science research.

⁹ See Paul Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 8 (1976) (arguing that “[d]ecisions based on assumptions of intrinsic worth and selective indifference” don’t simply deny valuable opportunities to racial minorities, but also “inflict psychological injury by stigmatizing their victims as inferior”).

¹⁰ 406 U.S. 205 (1972).

¹¹ 406 U.S. at 211 (“Formal high school education beyond the eighth grade is contrary to Amish beliefs, not only because it places Amish children in an environment hostile to Amish beliefs . . . , but also because it takes them away from their community, physically and emotionally, during the crucial and formative adolescent period of life.”); *accord id.* at 218; *see also id.* at 212 (quoting expert testimony that forcing Amish children to attend a public high school would “ultimately result in the destruction of the Old Order Amish church community as it exists in the United States today”).

¹² *See* 406 U.S. at 235.

The notion of atmospheric harm has also been invoked in cases involving regulation of sexually explicit speech. The Court has held, for example, that in addition to protecting minors and nonconsenting adults, such regulation advances legitimate state interests in protecting “the quality of life and the total community environment,” as well as the “the tone of commerce in the great city centers.”¹³ Similarly, the Court has relied on the atmospheric harm of sexually explicit speech in upholding a city’s confinement of adult movie theaters to a single zone, as a legitimate means of protecting “the quality of life in the community at large.”¹⁴

These isolated examples aside, however, atmospheric harms generally have not fared well in constitutional litigation. With few exceptions, the interests protected by constitutional law must be tangible, if not physical.¹⁵ For example, a discrimination claim from the early 1970s

¹³ *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973); *accord id.* (quoting Alexander Bickel, 22 PUB. INT. 25-26 (Winter 1971) (internal quotation marks omitted)).

[The dissemination of pornography] concerns the tone of the society, the mode, or to use terms that have perhaps greater currency, the style and quality of life, now and in the future. A man may be entitled to read an obscene book in his room, or expose himself indecently there We should protect his privacy. But if he demands a right to obtain the books and pictures he wants in the market, and to foregather in public places-discreet, if you will, but accessible to all-with others who share his tastes, then to grant him his right is to affect the world about the rest of us, and to impinge on other privacies. Even supposing that each of us can, if he wishes, effectively avert the eye and stop the ear (which, in truth, we cannot), what is commonly read and seen and heard and done intrudes upon us all, want it or not.

Id.

¹⁴ *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 55 (1986).

¹⁵ *Cf. Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (holding that the “irreducible constitutional minimum” for Article III standing includes plaintiff’s pleading and proof of defendant’s “invasion of a legally protected interest which is concrete and particularized, and actual or imminent,” rather than merely “conjectural”) (internal quotation marks, citations, and parenthetical numbering omitted)

established that an illicit government purpose to discriminate on the basis of race, unaccompanied by a discriminatory racial effect, does not constitute an actionable constitutional harm under the Equal Protection Clause.¹⁶ More recently, the Court has held that expression of a community’s moral disapproval of same-sex intimacy is insufficient to justify criminalization of such intimacy between consenting adults in the privacy of their home.¹⁷ Hate speech outside of the workplace is protected by the Speech Clause unless it is likely to provoke immediate violence or constitutes a genuine threat of violence,¹⁸ and even within the workplace is protected so long as it does not rise (or rather sink) to the level at which it is “so severe, pervasive, and objectively offensive” that it creates a discriminatory effect, such as “overt, physical deprivation of access to school resources.”¹⁹ Neither the atmospheric harm to racial minorities stemming from the

¹⁶ See *Palmer v. Thompson*, 403 U.S. 217 (1971) (holding that Mississippi city that closed all of its previously whites-only swimming pools, and reclassified its previously blacks-only swimming pool as open to all city residents, did not violate the Equal Protection Clause); see also *id.* at 224 (“[N]o case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it.”) (plurality opinion of Black, J.); see also Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 NYU L. REV. 1003, 1007 (1986) (contrasting the now-dominant “equal opportunity” conception of equal protection with the “anti-subordination” conception, which “seeks to eliminate the power disparities between men and women, and between whites and non-whites, through the development of laws and policies that directly redress them”).

¹⁷ See *Lawrence v. Texas*, 539 U.S. 558, 571-72 (2003); compare *id.* at 599 (“The Texas [anti-sodomy] statute seeks to further the belief of its citizens that certain forms of sexual behavior are ‘immoral and unacceptable’”) (Scalia, J., dissenting) (quoting *Bowers v. Hardwick*).

¹⁸ See, e.g., *Virginia v. Black*, 538 U.S. 343, 359-60 (2003) (declaring that Speech Clause permits the criminalization of “fighting words” and “true threats”).

¹⁹ See, e.g. *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 650 (1999); accord 526 U.S. at 651 (To prevail on an implied private action under Title IX, “a plaintiff must establish sexual harassment of students that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victim’s education experience, that the victim-students are

expression of government animus towards them, nor that to moral conservatives created by decriminalization of what they consider to be immoral acts, nor the humiliation and insult suffered by the objects of hate speech, suffices to support a constitutional claim in the absence of direct harm to traditional conceptions of individual life, liberty, or property.

Even the apparently exceptional decisions that seem to recognize atmospheric harms mean less than one might think. The atmospheric holding of *Brown* has not generally taken hold in equal protection doctrine; as attested by the abandonment of busing and other aggressive techniques of integration, post-*Brown* racial equal protection doctrine has been primarily aimed at ensuring the opportunities afforded by equal racial access, not at the result of a racially integrated social environment.²⁰ *Wisconsin v. Yoder* has not appreciably strengthened parental rights to shield their children from purportedly immoral or anti-religious atmospheres in the public schools,²¹ and regulation of sexually explicit speech continues to be primarily based on traditional harms to children and nonconsenting adults, rather than on the tenor or tone of society

effectively denied equal access to an institution's resources and opportunities.”).

²⁰ See, e.g., *Parents Involved in Comm. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (invalidating nonremedial use of race-conscious measures to achieve integration by school districts that had never been *de jure* segregated or that had achieved racially unitary status after history of *de jure* segregation); *Gratz v. Bollinger*, 539 U.S. 244 (2003) (invalidating nonremedial use of mechanical racial preference to achieve racial diversity in public university that had never been *de jure* segregated).

²¹ See, e.g., *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 538-39 (10th Cir. 1995) (rejecting parental claim that compulsory student attendance at a high school AIDS awareness assembly involving sexually explicit language and demonstrations violated parental free exercise and education rights), *cert. denied*, 516 U.S. 1159 (1996); *Mozert v. Hawkins Cty. Bd. Educ.*, 827 F.2d 1058 (6th Cir. 1987) (same with respect to school district's refusal to excuse students from reading texts which contradicted religious beliefs of students and their parents), *cert. denied*, 484 U.S. 1066 (1988).

that such speech may be said to undermine.²²

B. *The Establishment Clause*

In contrast to the rest of constitutional rights law, the Establishment Clause is sympathetic to atmospheric claims. Valid Establishment Clause claims are not confined to state action that prevents people from acting in a particular way, or that threatens religiously discriminatory government action or private ownership or control of persons or property. To the contrary, successful Establishment Clause claims frequently turn on whether state interactions with religion make religious minorities feel excluded, on whether such interactions imply that such minorities do not truly belong to some relevant “community” or “society,” even if there is no exclusion in physical fact.

For example, the *Lemon* test,²³ terminally ill but still formally alive, has long held that state action lacking a plausible secular purpose violates the Establishment Clause, even when such legislation does not appear to constrain or coerce individual actions.²⁴ By contrast, the

²² See, e.g., *Ashcroft v. Free Speech Coalition*, 535 U.S. 534 (2002) (holding that virtual child pornography is fully protected by the Speech Clause because its production and dissemination does not involve, and thus does not directly harm, actual children).

²³ 403 U.S. 602, 613 (1971) (holding that for a statute to conform to the Establishment Clause, it must have “a secular legislative purpose,” and a “principal or primary effect . . . that neither advances nor inhibits religion, and must avoid fostering “an excessive government entanglement with religion”) (internal quotation marks omitted).

²⁴ *Aguillard v. Edwards*, 482 U.S. 578 (1987) (invalidating for lack of a secular purpose statutory mandate that creationism be taught in public schools whenever evolution is taught); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (same regarding mandatory moment of silence in public schools); *Stone v. Graham*, 449 U.S. 39 (1980) (same regarding passive display of Ten Commandments in public school hallway); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (same regarding state initiative that prohibited teaching of any theory of human origin in public schools).

Court's abortive attempt to narrow the reach of the Clause by introduction of a decidedly nonatmospheric "coercion" element into anti-establishment claims was a short-lived failure.²⁵

The currently dominant "endorsement test" positively constitutionalizes atmospheric harm under the Establishment Clause. Among other things, the endorsement test prohibits state action taken with the specific intent to aid religion, as well as action lacking such an intent that nevertheless reasonably appears to aid religion; both constitute constitutional violations even though these actions frequently do not constitute tangible aid to religion beyond creation of a certain community atmosphere that favors some religions over others, or belief over unbelief. Actual or apparent endorsements of religion are often unaccompanied by any government action that violates individual rights or otherwise constrains constitutionally protected personal interests; rather, it is the mere knowledge that the government prefers certain kinds of believers over others, or believers over nonbelievers, that constitutes the constitutional violation, even if the government does not act on that preference. So the climate of evangelical favoritism created by a program of high school football invocations,²⁶ or the possibility that a graduation prayer

²⁵ See, e.g., *City & Cty. of Allegheny v. ACLU*, 492 U.S. 573, 659-61 (1989) (Kennedy, J., joined by Rhenquist, C.J., and White & Scalia, JJ., concurring in the result in part and dissenting in part) (arguing that coercion is a necessary element of an Establishment Clause claim).

One might argue that coercion still remains a formal element of every Establishment Clause claim, but the Court's determination that even the faintest whiff of endorsement constitutes psychological coercion means that the element doesn't do any meaningful doctrinal work. See, e.g., *Lee v. Weisman*, 505 U.S. 577 (1992) (striking down graduation prayer based in part on the psychological pressure that group devotional prayer exerts on middle- and high-school students). As Professor Siegel pointed out at the workshops, however, a more robust and meaningful coercion test may make a comeback now that its principal proponent, Justice Kennedy, has replaced Justice O'Connor as the deciding vote on most Religion Clause cases.

²⁶ See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).

might have nudged nonbelieving or nonpracticing students to stand up while it was delivered,²⁷ or the possible message of Christian preference sent by a passive monument of the Ten Commandments in a county courthouse,²⁸ all constitute serious violations of the Establishment Clause despite being purely atmospheric harms.

Atmospheric harms can even appear on both sides of an Establishment Clause controversy. Recent controversies over the proposed teaching of “scientific creationism” or “intelligent design” along with neo-Darwinism in the public schools involved an atmosphere of support for a theologically conservative cosmology hostile to unbelief and theologically liberal Christianity (when creationism is taught as an alternative to neo-Darwinism), against a secular atmosphere dismissive of this cosmology (when it is not).²⁹

IV. CONCLUSION: THE PERSISTING CONSTITUTIONAL UNIQUENESS OF RELIGION?

It’s hard to know what to make of the embrace of atmospheric harm by Establishment Clause doctrine, when most of the rest of constitutional law discounts it as constitutionally inactionable. One possibility is that religious belief is special—especially worthy of protection, yet especially prone to generate discrimination, persecution, and other antisocial consequences. This indeed seemed to be the constitutional trade-off in Establishment Clause doctrine for several decades: Religion received special constitutional protection under the Free Exercise Clause, but

²⁷ See *Lee v. Weisman*, 505 U.S. 577 (1992).

²⁸ See *McCreary Cty. v. ACLU*, 545 U.S. 844 (2005).

²⁹ See *Kitzmiller v. Dover Area Sch. Dist.*, 400 F.Supp.2d 707, 728-29 (M.D.Pa. 2005) (finding that the introduction of “intelligent design” into the public school classroom “sets up what will be perceived by students as a ‘God-friendly’ science, one that explicitly mentions an intelligent designer, and that the ‘other science,’ evolution, takes no position on religion”).

was subject to special constitutional constraints under the Establishment Clause.³⁰ but that apparent compromise has been almost completely dismantled in recent years. Religiously motivated actions are no longer entitled to special protection under the Free Exercise Clause,³¹ and financial and other tangible aid directed to religion by participants in social welfare programs using with secular eligibility criteria no longer violates the Establishment Clause.³² In both these circumstances, atmospheric harm no longer counts as a constitutional harm.

There is, however, one major remaining area of Establishment Clause doctrine in which atmospheric harms still seem relevant—namely, state appropriation of religious symbols and practices.³³ As *Pleasant Grove City v. Summum* illustrates,³⁴ these cases are almost never about

³⁰ See, e.g., Abner S. Green, *The Political Balance of the Religion Clauses*, 102 Yale L.J. 1611 (1993); Michael E. Smith, *The Special Place of Religion in the Constitution*, 1984 SUP. CT. REV. 83.

³¹ See *Employment Div. v. Smith*, 494 U.S. 872 (1990).

Much religious exercise still receives special protection as a statutory constitutional right. See, e.g., Religious Freedom Restoration Act of 1993 § 3(b), 42 U.S.C. § 2000bb-1(b) (providing that government action that burdens the free exercise of religion must satisfy strict scrutiny), *invalidated as to state government action by City of Boerne v. Flores*, 521 U.S. 507 (1997); Religious Land Use and Institutionalized Persons Act of 2000 §§ 2(a)(1), 3(a), 42 U.S.C. §§ 2000cc(a)(1), 2000cc-1(a) (same with respect to state government action relating to land use or persons in government custody); Religious Freedom Act, ARIZ. REV. STAT. § 41-1493.01 (same with respect to Arizona government action).

³² See *Zelman v. Harris-Simmons*, 536 U.S. 639 (2002) (upholding voucher program that resulted in assistance to private religious schools, where criteria for participation were secularly defined and vouchers were directed to private schools by the choices of individual students or their parents); *Mitchell v. Helms*, 530 U.S. 793 (2000) (declining to strike down in-kind aid to parochial schools based upon the mere possibility that it might be diverted to sectarian uses, where aid was received as part of general program of assistance to K-12 education) (plurality opinion).

³³ For detailed discussions of the persisting special doctrinal treatment of religion in this area of Establishment Clause doctrine, see Frederick Mark Gedicks, *A Two-Track Theory of*

state action that harms “concrete” individual interests or interferes with the actual exercise of individual autonomy. Rather, the endorsement test makes the constitutionality of state deployment of religious symbols or practices turn on whether the state is sending a message of metaphysical inclusion or exclusion when it appropriates a symbol or practice. As Justice O’Connor put it in originally articulating the test, “Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insider, favored members of the political community. Disapproval sends the opposite message.”³⁵ To date, the Court has generally held that government appropriation of such symbols violate the Establishment Clause if they have a nontrivial religious content that is not neutralized or balanced by secular symbols.³⁶ So even though other areas of Religion Clause doctrine have shifted to an understanding of religion that

Establishment Clause Doctrine, 43 B.C. L. REV. 1071 (2002); Frederick Mark Gedicks, *Neutrality in Establishment Clause Jurisprudence: Its Past and Future*, in CHURCH-STATE RELATIONS IN CRISIS: DEBATING NEUTRALITY 191 (Stephen V. Monsma ed. 2002).

³⁴ 483 F.3d 1044 (10th Cir.) (holding that city’s refusal to allow minority religion’s monument in city park that contained display of the Ten Commandments together with secular monuments constituted unconstitutional viewpoint- or content-based discrimination under the Speech Clause), *rev’d*, 129 S.Ct. 1125 (2009) (holding that city’s installation of the Ten Commandments in the park was government speech as to which the city could constitutionally discriminate on the basis of content).

³⁵ *Lynch v. Donnelley*, 465 U.S. 665, 688 (1984) (O’Connor, J., concurring).

³⁶ *See, e.g.*, *Van Orden v. Perry*, 545 U.S. 677 (2005) (Ten Commandments monument installed on state capitol grounds among numerous secular monuments did not violate Establishment Clause); *City & Cty. of Allegheny v. ACLU*, 492 U.S. 573 (1989) (free-standing Christmas nativity scene in city-county building violated Establishment Clause, but Jewish menorah displayed next to giant Christmas tree did not); *Lynch v. Donnelly*, 465 U.S. 668 (1984) (Christmas nativity scene surrounded by clowns, candy canes, Santa Claus, and reindeer did not violate Establishment Clause).

simply folds it into the general set of (less-protected) conscientious human activities, the Court's willingness to take note of atmospheric harm in religious symbol and practice cases suggests that there still remains something constitutionally distinct about religious belief and practice.