

## Atmospheric Harms in Constitutional Law

Frederick Mark Gedicks

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/mlr>



Part of the [First Amendment Commons](#)

---

### Recommended Citation

Frederick M. Gedicks, *Atmospheric Harms in Constitutional Law*, 69 Md. L. Rev. 149 (2009)

Available at: <http://digitalcommons.law.umaryland.edu/mlr/vol69/iss1/13>

This Conference is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Law Review by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact [smccarty@law.umaryland.edu](mailto:smccarty@law.umaryland.edu).

# 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,<sup>1</sup> it is easy to forget that less was at stake than may have appeared. Because same-sex couples may formalize their relationships as “domestic partners” to whom state law provides all of the rights and privileges of legally married spouses,<sup>2</sup> 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 eventually made clear.<sup>3</sup> For the same reason, Proposition 8 did not

---

Copyright © 2009 by Frederick Mark Gedicks.

\* Guy Anderson Chair & Professor of Law, Brigham Young University Law School. 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, e.g., Laurie Goldstein, *A Line in the Sand for Same-Sex Marriage Foes*, N.Y. TIMES, Oct. 26, 2008, at A (“This vote on whether we stop the gay-marriage juggernaut in California is Armageddon . . . . We lose this, we are going to lose in a lot of other ways, including freedom of religion.” (quoting Charles W. Coulson, founder of Prison Fellowship Ministries)); Duke Heif, *Clergy Vocalize Stance on Prop. 8*, L.A. TIMES, Oct. 26, 2008, at B4 (“The traditional moral values of our nation are at stake by allowing gay marriage to continue.” (quoting California Pastor Dan Nelson)).

2. See CAL. FAM. CODE § 297.5(a) (West 2004). The statute states the following: 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.

*Id.*

3. See *Strauss v. Horton*, 207 P.3d 48, 102 (Cal. 2009). *Strauss* explained the following: 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 . . . with the sole, albeit significant, exception that the designation of “marriage” is, by virtue of the new state 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.

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,<sup>4</sup> so that train, too, had 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 formalize their intimate relationships legally, if they so choose, in the way that intimate heterosexual 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 the day when 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 significant.<sup>5</sup> 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,<sup>6</sup> even though—heated pro-8 rhetoric aside—they will not be required to endorse, accept, or perform same-sex marriages in their churches, sanctuaries, and private social groups.<sup>7</sup>

Nevertheless, I want to suggest that the harm suffered by gays and lesbians, whom Proposition 8 implicitly label “abnormal,” just like the harm of “normalizing” same-sex orientation and conduct, from which the proposition has (for now) saved religious conservatives, 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.

---

*Id.* (internal citation omitted).

4. See *supra* notes 2–3 and accompanying text.

5. Cf. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493–94 (1954) (recognizing the stigma of racially segregated public schools even when segregated schools provide a genuinely equal education).

6. Cf. *Wisconsin v. Yoder*, 406 U.S. 205, 234–36 (1972) (permitting Amish parents to withdraw their children from high school attendance so as to avoid its corrosive effect on the intergenerational preservation of their distinctive religious community).

7. See *infra* text accompanying notes 9–10.

## 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 of the knowledge that one’s essential identity or core beliefs or practices are not approved by the majority, even though they are not prohibited or penalized or even regulated by it. Atmospheric harms are 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 or abnormal, “the community” implicitly communicates its view of right or wrong, even when it tolerates dissenters from that view.<sup>8</sup> But this rhetoric betrays that atmospheric harms are really individual, though frequently voiced as communal. The weight of contrary community norms on individual dissenters constitutes harm, even though it is unaccompanied by legal consequences.

Atmospheric harms are distinct from aesthetic offenses. A harm stemming from behavior that one believes is wrong is atmospheric, not because one finds the behavior disgusting or unattractive, but because the apparent acceptance of the behavior implied by the absence of sanctions alters the social or cultural environment in which one lives. Plenty of folks believe that same-sex relationships or heterosexual condemnation of them are distasteful, but normalization or condemnation of such relationships would constitute an atmospheric harm to such persons only if the normalization or condemnation also negatively affects the social or cultural environment in which they live. 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 marriages, 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. This would make traditional marriage more difficult to perpetuate or to promote as a social and cultural practice.

For example, opposition to same-sex marriage by many religious conservatives seems motivated by the purported threat that such marriage poses to the traditional conceptualization of marriage that lies at

---

8. 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.

the theological core of many conservative religions.<sup>9</sup> (Again, this seemed especially the case in the Proposition 8 campaign because of the apparent equation of domestic partner rights and privileges with those stemming from civil marriage.) 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 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 perform or permit such marriages in their places of worship.<sup>10</sup>

More credibly, pro-8 supporters argued that its failure would alter the atmospherics of public education.<sup>11</sup> 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: Although 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, neither they nor their parents would have been required to endorse, to act out, or otherwise to approve this norm, nor would parents have been prevented from teaching their children a morality at home or at church that departs from it,<sup>12</sup> or from enrolling their children in private schools that do

---

9. See *supra* note 1.

10. See Frank D. Russo, *Constitutional Law Professors Reject Arguments Made by California Proposition 8 Proponents*, CAL. PROGRESS REP., Oct. 29, 2008, [http://californiaprogressreport.com/2008/10/constitutional\\_1.html](http://californiaprogressreport.com/2008/10/constitutional_1.html) (providing the original statement of fifty-nine professors at California law schools concluding, *inter alia*, 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 in order to protect their tax exemptions (citing *In re Marriage Cases*, 183 P.3d 384, 451–52 (Cal. 2008))).

11. See Dan Morain & Jessica Garrison, *Focused Beyond Marriage: Prop. 8 Supporters Shrewdly Warned of Implications for Schools, Churches, and Children, Analysts Say*, L.A. TIMES, Nov. 6, 2008, at A1 (noting the powerful effect of this argument on otherwise uninterested voters).

12. Cf. *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (recognizing the substantive due process right of a parochial school instructor to teach, and of parents to provide for their children to be taught, a foreign language).

not teach to this norm.<sup>13</sup> Of course, in the long run, harms that initially are purely atmospheric may become more tangible. As the underlying value that an atmospheric harm reflects becomes widely and deeply embedded in the culture, a decreased inclination to tolerate dissenting views is likely to follow, thereby converting the atmospheric harm into a more tangible one.

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.<sup>14</sup> 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.<sup>15</sup>

---

13. See *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 531–35 (1925) (recognizing the substantive due process right of parents to satisfy compulsory school attendance laws by choosing private religious education for their children).

14. Compare Patricia Wen, *Catholic Charities Stuns State, Ends Adoptions*, BOSTON GLOBE, Mar. 11, 2006, at A1 (reporting that the Catholic Charities affiliate of the Boston Diocese would withdraw from adoption work because of state law prohibiting discrimination against same-sex adoptive parents), with An Act Implementing the Guarantee of Equal Protection Under the Constitution of the State for Same Sex Couples, 2009 Conn. Legis. Serv. P.A. 09-13 (West) (exempting religious 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), and An Act to End Discrimination in Civil Marriage and Affirm Religious Freedom, 2009 Me. Legis. Serv. Ch. 82 (West) (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 of the United States Constitution).

The application of anti-discrimination laws to religious social service agencies might entail more than a purely atmospheric harm, in that it would likely require religious social service agencies affirmatively to *act* in a way that implies approval of same-sex marriages. For example, such laws could 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.

15. Cf. *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 334–40 (1987) (holding that as applied to nonprofit activities of religious organizations, statutory exemption of religious organizations from antidiscrimination laws does not violate the Equal Protection or Establishment Clause); *id.* at 342–44 (Brennan, J., concurring in the judgment) (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); see also Ira Lupu & Robert W. Tuttle, *Question & Answer: A Clash of Rights? Gay Marriage and the Free Exercise of Religion*, PEW FORUM ON RELIGION & PUBLIC LIFE, May 21, 2009, <http://pewforum.org/events/?EventID=216> (observing that “when individuals enter

### 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.”<sup>16</sup> This conclusion is controversial because the Court supported it with citations to now-discredited social science research.<sup>17</sup> This suggested that the harm of segregation to African-American schoolchildren stemmed not only from their confinement to state facilities and services that were not truly equal to those afforded whites, “separate but equal” notwithstanding, but also from 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.<sup>18</sup>

*Wisconsin v. Yoder*<sup>19</sup> also sounds in atmospheric harm. *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.<sup>20</sup> The Court accepted the parents’ argument

the commercial market as employers or sellers, their federal constitutional right of freedom of religion is significantly limited”).

16. 347 U.S. 483, 494 (1954); *cf.* *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003) (holding that maintenance of a diverse learning environment is a compelling state interest justifying racial preferences in higher education admissions).

17. *Brown*, 347 U.S. at 494–95 & n.11. For a brief summary of the controversy surrounding *Brown*’s reliance on psychological research, see Michael Heise, *Brown v. Board of Education*, Footnote 11, and *Multidisciplinarity*, 90 CORNELL L. REV. 279, 292–96 (2005).

18. 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” do not simply deny valuable opportunities to racial minorities, but also “inflict psychological injury by stigmatizing their victims as inferior”).

19. 406 U.S. 205 (1972).

20. *Id.* 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”).

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.<sup>21</sup>

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 “tone of commerce in the great city centers . . . .”<sup>22</sup> 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.”<sup>23</sup>

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 at least be tangible, if not actually physical.<sup>24</sup> For example, a discrimination case from the early 1970s 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.<sup>25</sup> More recently, the Court has

---

21. *Id.* at 235.

22. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 58 (1973). The Court further explained its position:

[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.* at 59 (quoting Alexander Bickel, *On Pornography: Dissenting and Concurring Opinions*, 22 PUB. INT. 25, 25–26 (Winter 1971) (internal quotation marks omitted)).

23. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 54 (1986).

24. *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 or hypothetical”) (citations, internal quotation marks, and parenthetical numbering omitted).

25. *See Palmer v. Thompson*, 403 U.S. 217, 218–19, 226–27 (1971) (holding that a Mississippi city that closed its previously whites-only swimming pools allegedly to avoid integration did not violate the Equal Protection Clause); *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

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.<sup>26</sup> Likewise, 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,<sup>27</sup> and even within the workplace it 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 like "overt, physical deprivation of access to school resources."<sup>28</sup> Neither the atmospheric harm to racial minorities stemming from the expression of government animus toward 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 integration techniques. Rather, post-*Brown* racial equal protection doctrine has evolved into a means of ensuring equal racial access, not a racially integrated society.<sup>29</sup> *Yoder* has not appreciably strengthened parental rights to shield their children from purportedly im-

---

the men who voted for it."); see also Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1007 (1986) (contrasting the now-dominant "anti-differentiation" 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 th[em]").

26. See *Lawrence v. Texas*, 539 U.S. 558, 571–72, 578–79 (2003); compare *id.* at 599 (Scalia, J., dissenting) ("The Texas [anti-sodomy] statute undeniably seeks to further the belief of its citizens that certain forms of sexual behavior are 'immoral and unacceptable' . . . ." (quoting *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986))).

27. See, e.g., *Virginia v. Black*, 538 U.S. 343, 359 (2003) (declaring that the First Amendment does not prohibit the criminalization of "fighting words" and "true threat[s]").

28. See, e.g., *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 650 (1999); see also *id.* at 651 (finding that to prevail on an implied private action under Title IX of the Education Amendments of 1972, "a plaintiff must establish sexual harassment of students that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' education experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities").

29. See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2768 (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 a history of *de jure* segregation); *Gratz v. Bollinger*, 539 U.S. 244, 273–75

moral or anti-religious atmospheres in the public schools,<sup>30</sup> and regulation of sexually explicit speech continues to be primarily based on traditional notions of protecting children and nonconsenting adults, rather than on the tone of society that such speech might be said to undermine.<sup>31</sup>

### 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 of Establishment Clause validity,<sup>32</sup> terminally ill but still hanging on, 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.<sup>33</sup> By contrast, the Court’s abortive attempt to narrow the reach of the Clause by introduction of a decidedly non-atmos-

---

(2003) (invalidating nonremedial use of mechanical racial preference to achieve racial diversity in a public university).

30. 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 rights), *cert. denied*, 516 U.S. 1159 (1996); *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058, 1063–64, 1066 (6th Cir. 1987) (same with respect to school district’s refusal to excuse students from reading texts that contradicted religious beliefs of students and their parents), *cert. denied*, 484 U.S. 1066 (1988).

31. See, e.g., *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244–58 (2002) (holding that virtual child pornography is protected by the Free Speech Clause because its production and dissemination does not involve, and thus does not directly harm, actual children).

32. See *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (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).

33. See *Edwards v. Aguillard*, 482 U.S. 578, 585–86, 596–97 (1987) (invalidating for lack of a secular purpose a statutory mandate that creationism be taught in public schools whenever evolution is taught); *Wallace v. Jaffree*, 472 U.S. 38, 55–61 (1985) (same regarding mandatory moment of silence in public schools); *Stone v. Graham*, 449 U.S. 39, 40–41 (1980) (same regarding passive display of Ten Commandments in public school hallway); see also *Epperson v. Arkansas*, 393 U.S. 97, 109 (1968) (pre-dating *Lemon*, but reaching

pheric “coercion” element into anti-establishment claims was a short-lived failure.<sup>34</sup>

The currently dominant “endorsement test” positively constitutionalizes atmospheric harm under the Establishment Clause.<sup>35</sup> Among other things, the endorsement test prohibits state action taken with the specific intent to aid religion,<sup>36</sup> as well as action lacking such an intent that nevertheless reasonably appears to aid religion,<sup>37</sup> both constitute constitutional violations even though these actions frequently do not aid religion beyond creating a 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 or belief that the government prefers certain kinds of believers over others, or believers over unbelievers, that constitutes the constitutional violation, even if the government never acts on that preference.<sup>38</sup> So the climate of evangelical favoritism created by a program of high school football invocations,<sup>39</sup> or the possibility that a graduation prayer might have nudged unbelieving or nonpracticing students to stand up while it was delivered,<sup>40</sup> or the possible message of Christian preference sent by a passive monument of the Ten Com-

---

same conclusion regarding a state initiative that prohibited teaching of any theory of human origin in public schools).

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

35. The endorsement test was first proposed by Justice O’Connor in her *Lynch v. Donnelly* concurrence. 465 U.S. 668, 687–94 (1984) (O’Connor, J., concurring); see *id.* at 690 (“The purpose prong . . . asks whether government’s actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government’s actual purpose, the practice under review in fact conveys a message of endorsement or disapproval.”). The Court essentially adopted the endorsement test, if not Justice O’Connor’s precise formulation of it, five years later in *Allegheny*. See 492 U.S. at 592–94 (majority opinion).

36. *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 860 (2005).

37. *Allegheny*, 492 U.S. at 593–94.

38. See *Lynch*, 465 U.S. at 688 (“Endorsement sends a message to nonadherents that they are outsiders . . . .”) (emphasis added).

39. See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 294–301, 317 (2000) (holding that a school district’s policy permitting a student-led prayer before each home varsity football game violates the Establishment Clause).

40. See *Lee v. Weisman*, 505 U.S. 577, 586–87, 599 (1992) (holding that the Establishment Clause forbids including clergy who offer prayers as part of a public school graduation ceremony).

mandments in a county courthouse,<sup>41</sup> all constituted 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 public schools involved an atmosphere of support for a theologically conservative cosmology hostile to unbelief and theologically liberal Christianity, against a secular atmosphere dismissive of this cosmology.<sup>42</sup>

#### IV. CONCLUSION: THE PERSISTING CONSTITUTIONAL UNIQUENESS OF RELIGION?

It is 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 was subject to special constitutional constraints under the Establishment Clause.<sup>43</sup> 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,<sup>44</sup> and financial and other tangible aid directed to religion by participants in social welfare programs using secular eligibility criteria no longer violates the Establishment Clause.<sup>45</sup> In both these circumstances, atmospheric harm no longer counts as a constitutional harm.

---

41. See *McCreary*, 545 U.S. at 851–56, 864–74, 881 (affirming a preliminary injunction barring display of the Ten Commandments in two county courthouses).

42. 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, the one that explicitly mentions an intelligent designer, and that the ‘other science,’ evolution, takes no position on religion”).

43. 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.

44. See *Employment Div., Dep’t of Human Res. v. Smith*, 494 U.S. 872, 878–79, 890 (1990) (holding that the Free Exercise Clause does not compel relief from incidental burdens on religious exercise imposed by religiously neutral, generally applicable laws).

45. See *Zelman v. Simmons-Harris*, 536 U.S. 639, 644–47, 662–63 (2002) (plurality opinion) (upholding a voucher program that resulted in assistance to private religious schools,

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.<sup>46</sup> As *Pleasant Grove City v. Summum* illustrates,<sup>47</sup> these cases are almost never about 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 stated when 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 insiders, favored members of the political community. Disapproval sends the opposite message.”<sup>48</sup> To date, the Court has generally held that government appropriation of such symbols violates the Establishment Clause if they have a nontrivial religious content that is not neutralized or balanced by secular symbols.<sup>49</sup> So even though other areas of Religion Clause doctrine have shifted to an understanding of religion that simply folds it into the general set of (less-protected) conscientious human activities, the Court’s willingness to take note of atmospheric

---

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, 801–03, 815–36 (2000) (declining to strike down in-kind aid to parochial schools based upon the mere possibility that it might be diverted to religious uses, where aid was received as part of a general program of assistance to elementary and secondary schools).

46. For detailed discussions of the persisting special doctrinal treatment of religion in this area of Establishment Clause doctrine, see Frederick Mark Gedicks, *Neutrality in Establishment Clause Interpretation: Its Past and Future*, in CHURCH-STATE RELATIONS IN CRISIS 191, 201–04 (Stephen V. Monsma ed., 2002); Frederick Mark Gedicks, *A Two-Track Theory of the Establishment Clause*, 43 B.C. L. REV. 1071, 1087–1108 (2002).

47. 129 S. Ct. 1125, 1129–30, 1138 (2009) (holding that a city’s installation of the Ten Commandments in a city park despite refusal to allow a minority religion’s monument in the park was government speech as to which the city could constitutionally discriminate on the basis of content).

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

49. See, e.g., *Van Orden v. Perry*, 545 U.S. 677, 681, 691–92 (2005) (holding that a Ten Commandments monument installed on state capitol grounds among numerous secular monuments did not violate the Establishment Clause); *County of Allegheny v. ACLU*, 492 U.S. 573, 578–79 (1989) (finding that a free-standing Christmas nativity scene in a county courthouse violated the Establishment Clause, but a Jewish menorah displayed outside of a city-county building next to a giant Christmas tree did not); *Lynch*, 465 U.S. at 671, 681, 687 (1984) (majority opinion) (holding that a Christmas nativity scene surrounded by a Christmas tree, candy canes, a Santa Claus house, and reindeer erected by the city did not violate the Establishment Clause).

harm in religious symbol and practice cases suggests that there still remains something constitutionally distinct about religious belief and practice.