“In God We Trust:”

Is It Time to Decide?

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“Simply put, most Atheists don’t like the ‘In God We Trust’ slogan staring at us every time we pull out our wallets or purses.”[1]

[1] “In God We Trust” – Stamping Out Religion on National Currency, **American Atheist**, (posted March 15, 1999) <http://www.atheists.org/flash.line/igwt1.htm> (providing the general feeling of atheists toward the motto “In God We Trust” on coins and currency).

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Introduction

"In God We Trust" is the national motto and is required to appear on all currency. In recent months, there have been pronouncements by the United States House of Representatives placing pressure on government institutions to increase the use of the motto. Additionally, the House has condemned a recent Sixth Circuit panel decision that held the Ohio state motto "With God All Things Are Possible" to be a violation of the Establishment Clause. That case is currently awaiting en banc consideration.

The national motto (and similar mottoes such as Ohio's) causes concern to supporters of the separation of church and state and is an affront to groups and individuals who do not believe in the term "God" as used in the motto. Agnostics, atheists, and various religions do not believe in a monotheistic "God"[2] and many members of these groups are offended by the national motto and its uses. These groups have in some cases been afforded protection by the Establishment Clause, where a government may "favor[] neither one religion over others nor religious adherents collectively over nonadherents."[3] However, in other situations, such as the national motto, these groups believe that their rights have not been protected. With the recent House pronouncements and the possibility that the loser of the Ohio case might want to request certiorari by the Supreme Court, this would seem to be an opportune time to reconsider the constitutionality of the national motto. Part I of this paper will explore the governmental uses of the national motto and other official symbols using the word "God." Part II will look at recent legislative pronouncements. Part III will look at seven Supreme Court cases that have explicitly referred to "In God We Trust," and will also look at other relevant Supreme Court and Circuit Court cases. Part IV will look at the relevant endorsement clause tests, standards, and doctrines that have been used for and against practices such as the national motto. Part V will conclude that the use of "In God We Trust" is a violation of the Establishment Clause and will present arguments that can be used in future litigation.

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[2] "Monotheism" is "the doctrine or belief that there is only one God." See **Random House Webster's College Dictionary** 857 (1999). ("God" is "1. the creator and ruler of the universe; Supreme Being. 2. one of several immortal powers, esp. one with male attributes, presiding over some portion of worldly affairs; deity.") See id at 560. "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." See Torcaso v. Watkins, 367 U.S. 488, n.11 (1961).

[3] Board of Educ. of Kiryas Joel Village Sch. Dist. V. Grumet, 114 S.Ct. 2481, 2487 (1994) (stating that government may "favor[] neither one religion over others nor religious adherents collectively over nonadherents"). See also Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 8 (1989) (stating that government "is forbidden from endorsing 'religion generally' or from placing imprimatur on 'religion as such'"); School Dist. Of Grand Rapids v. Ball, 473 U.S. 373, 382 (1985) (stating that "government must 'maintain a course of neutrality among religions, and between religion and nonreligion"); Epperson v. Arkansas, 393 U.S. 97, 104 (1968) ("The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion"); Torcaso v. Watkins, 367 U.S. 488, 495 (1961) (stating that government "[cannot] constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs"); Steven B. Epstein, Rethinking the Constitutionality of Ceremonial Deism, 96 **Colum. L. Rev.** 2083, 2129, n.270 (1996).

I. Uses of "In God We Trust" and Other References to "God"

The federal government makes official use of "In God We Trust." The Congress of the United States adopted "In God we trust" as the national motto in 1956,[4] replacing the previous national motto of "E Pluribus Unum."[5] "In God We Trust" has also been on various coins starting in 1864; in 1955 Congress mandated that it appear on all coins and paper currency.[6] The phrase is prominently engraved in the wall above the Speaker's dais of the Chamber of the House of Representatives[7] and over the entrance to the Senate Chamber.[8]

Additionally, there are many official federal references to "God." For example, in 1931, the Star Spangled Banner was designated as the national anthem[9] and included the line: "And this be our motto—"In God is our trust."[10] In 1954, the Pledge of Allegiance was modified to change the phrase "one Nation" to "one Nation under God."[11] By statute, the President is directed to proclaim a National Day of Prayer each year "on which [day] the people of the United States may turn to God in prayer . . . ."[12] Some court sessions are opened with "God save the United States and this honorable court."[13]

Many state and city governments also use the word "God." For example, the Ohio state motto is "With God All Things Are Possible;" Florida's state seal displays "In God We Trust;" Arizona's state seal displays in Latin "God Enriches"; and Boston's city seal displays in Latin "God be with us, as He was with our fathers." Forty-five of the state Constitutions have explicit references and appeals to God.[14]

II. Recent Legislative Events

On June 27, 2000, the United States House of Representatives passed a "sense of Congress" resolution[15] that officially endorsed the Ohio state motto "With God All Things Are Possible." The resolution was in response to a Sixth Circuit ruling that had declared the motto unconstitutional.[16] The resolution gave arguments for why Congress felt the ruling was wrong

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[4] See 36 U.S.C. 302, 70 Stat. 732, Pub. L. 851 (1956) ("'In God we trust' is the national motto").
[5] See **Random House Webster's College Dictionary** 444 (1999) ("[O]ut of many, one").
[6] See Pub. L. 140 (July 11, 1955). The bill was signed into law by President Eisenhower in the years of the Communist scare. The statutes requiring "In God We Trust" to be on coins and currency are 31 U.S.C. 5112(d)(1) and 31 U.S.C. 5114(b).
[7] County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter, 492, 673 U.S. 573 (1989).
[8] See Engle v. Vitale, 370 U.S. 421, 441 n.5 (1962) (Douglas, J. concurring).
[9] See 46 Stat. 1508; 36 U.S.C. 170 (1931).
[10] See American Civil Liberties Union of Ohio v. Capitol Square Review and Advisory Bd., 210 F.3d 703, 721 n.14 (6th Cir. 2000).
[11] See Engle, 370 U.S. at 449, citing 36 U.S.C. 172, Pub. L. 396, 68 Stat. 249 (1954).
[12] See id., citing 36 U.S.C. 185 (1952).
[13] Lynch v. Donnelly, 465 U.S. 668, 693 (1984).
[14] See A Report from Congressman Ernest Istook, (May 20, 1996) <http://www.house.gov/istook/watsnext.htm> (reporting on his introduction of "The Religious Liberties Amendment" in the House of Representatives (104 H.J.Res. 127)).
[15] See H.Res. 494 (2000).
[16] See discussion infra section I.4; American Civil Liberties Union of Ohio v. Capitol Square Review and Advisory Bd., 210 F.3d 703 (2000).

and included Congress' beliefs that "the Ohio State motto and other long-standing mottoes which make reference to God or Providence do so as long-accepted expressions consistent with American tradition and rooted in the sentiments of the American people." Congress also took on the role of the judicial system by stating: "[T]he decision of a three-judge panel of the United States Court of Appeals for the Sixth Circuit striking down the Ohio State motto is a misinterpretation and misapplication of the United States Constitution," and that Congress "finds repugnant all misinterpretations and misapplications of the Constitution by Federal courts which disregard those references to God which are well within the American tradition and within the Constitution.' The resolution concluded by "affirm[ing Congress'] support for the Ohio State motto and other State mottoes making reference to a divine power." Congress also added that it supported Ohio's decision to appeal the ruling.

On July 6, 2000, the Colorado State Board of Education recommended that its public schools post the motto "In God We Trust" in their facilities.[17] The five Republicans on the board voted in favor and the lone Democrat dissented. The board chairperson stated: "Our nation has lost its way on the road to virtue and moral character. We have a moral obligation to educate our children in the truth." An ACLU representative who attended the board meeting characterized the discussion in a different manner: "Each argument they made was a religious argument that reflected a strong religious bias."[18]

On July 13, 2000, the United States House of Representatives introduced a bill[19] to support the national motto "In God We Trust." The bill still sits in subcommittee. This bill included the resolutions that the House of Representatives "finds repugnant all misinterpretations and misapplications of the Constitution that disregard those references to God that are well within the American tradition and outside constitutional proscription;" and that Congress "rejects the notion that the laws and Constitution of this Nation require the exclusion of God from matters of government and public life." Congress concluded that it "supports and encourages the public display of the national motto in all public buildings, public schools, and other government institutions established or maintained at taxpayer expense."

On July 24, 2000, in response to the Colorado State Board of Education action, the United States House of Representatives passed a sense of Congress resolution[20] that "encourages the display of the national motto of the United States in public buildings throughout the Nation."[21] The title of the bill was "Expressing the sense of Congress regarding the national motto for the government of a religious people." The bill was passed with no hearings and with a suspension of the rules. This resolution included language that was clearly meant to persuade the courts that the history of the United States and the United States' judicial system permitted the display of the motto. The language was essentially a mini-brief and referred to many Supreme Court cases that have addressed the First Amendment Establishment Clause. In

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[17] See, e.g., Colorado Endorses 'In God We Trust' for Its Schools, **The Internet Home of the American Family Association**, (July 7, 2000) <http://www.afa.net/news_issues/news070700a.shtml>.
[18] See, e.g., "In God We Trust" remains in Colorado schools, **The New York Times News Service**, (July 6, 2000) <http://www.bakersfield.com/cal/I--1249201863.asp>.
[19] See H. Res. 5551 (2000). The sponsor of the bill indicated that he wrote it with the direct assistance of Reverend Donald Wildmon of the American Family Association. See 106 Cong. Rec. 6747 (2000) (statement of Rep. Shows) (speaking in support of H. Res. 548 and implying that H. Res. 548 was being passed in lieu of H. Res. 551).
[20] See H. Res. 548 (2000).
[21] H. Res. 548 (2000).

speaking on the House floor in support of the resolution, Representative Barr of Georgia considered the motto to be "one that all Americans embrace, one that we enjoy and celebrate routinely"[22] and stated that the American people are "a religious people who earnestly pray that the Supreme Lawgiver guide them in every measure which may be worthy of His blessing."[23]

III. Cases

Statutes establishing "In God We Trust" as the national motto and requiring its reproduction on currency have been declared constitutional by circuit courts.[24] The U.S. Supreme Court has indicated in dicta that they are constitutional[25] but has denied certiorari for the only case to raise the explicit issue.[26]

A. Supreme Court Cases that Explicitly Refer to "In God We Trust"

While "In God We Trust" can generally be argued better in the context of a broader category (e.g., ceremonial deism, symbolic speech, civil religion, and others),[27] it is also helpful to look at the seven Supreme Court cases that have explicitly referred to the phrase."[28]

1. Engel v. Vitale[29] (1962)

The Court held that official prayer in public schools was unconstitutional under the Establishment Clause. However, the Court pointed out that

> there is of course nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which include the composer's professions of faith in Supreme Being, or with the fact that there are many manifestations in our public life of belief in God.[30]

In Engle, both Justice Stewart (in his dissent) and Justice Douglas (in his concurrence) discussed the "countless practices of the institutions and officials of our government" that

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[22] 106 Cong. Rec. 6747 (2000) (statement of Rep. Barr).
[23] Id.
[24] See, e.g., Gaylor v. United States, 74 F.3d 214 (10th Cir. 1996), cert. denied 517 U.S. 1211 (1996); Aronow v. United States, 432 F.2d 242 (9th Cir. 1970); O'Hair v. Blumenthal, 462 F.Supp. 19 (W.D. Tex. 1978), aff'd 588 F.2d 1144, cert. denied 442 U.S. 930.
[25] For the entire set of eight Supreme Court cases that refer to the phrase "In God We Trust," see supra Part III.A.
[26] See Gaylor, 74 F.3d, cert. denied 517 U.S. 1211 (1996).
[27] See the remainder of this paper for a discussion of those categories.
[28] In addition to the cases discussed in this section, one additional case referred to "In God We Trust." That case concerned the publication and reproduction of illustrations of federal currency and is not relevant to this paper. See Regan v. Time, Inc., 468 U.S. 641 (1984).
[29] Engel v. Vitale, 370 U.S. 421 (1962).
[30] Id. at n.21.

referred to God. They provided examples including: the use of "In God We Trust" on coins;[31] the beginning of each day's Supreme Court session with the proclamation "God save the United States and this Honorable Court;"[32] the beginning of each day of the House and Senate with prayer; and the fact that "each of our Presidents, from George Washington to John F. Kennedy, has upon assuming his Office asked the protection and help of God."[33] Both justices summarized by citing a statement from Zorach v. Clauson: "We are a religious people whose institutions presuppose a Supreme Being."[34] Justice Stewart then ended his dissent by referring to the "deeply entrenched and highly cherished spiritual traditions of our Nation" and cited those traditions as coming from the Declaration of Independence.[35]

2. School District of Abington v. Schempp[36] (1963)

In his concurrence, Justice Brennan categorized the "permissible and impermissible forms of involvement between government and religion." One of his categories was "Activities Which, Though Religious in Origin, Have Ceased to Have Religious Meaning." Under this category, he noted that the Court's "Sunday Law" decisions showed that "nearly every criminal law on the books can be traced to some religious principle or inspiration"[37] and quoted from McGowan v. Maryland that "the Establishment Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions."[38] He then went on to conjecture that

> [t]his rationale suggests that the use of the motto "In God We Trust" on currency, on documents and public buildings and the like may not offend the clause. It is not that the use of those four words can be dismissed as '*de minimis*'—for I suspect there would be intense opposition to the abandonment of that motto. The truth is that we have simply interwoven the motto so deeply into the fabric of our civil policy that its present use may well not present that type of involvement which the First Amendment prohibits.[39]

Justice Brennan then noted that the general category of activities that no longer have religious purpose or meaning might insulate the patriotic exercises and activities used in the public schools and elsewhere. He surmised that the reference to "God" in the revised Pledge of Allegiance might merely recognize the historical fact that the United States was believed to have

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[31] Id. at 449 (1962) (Stewart, J. dissenting).
[32] Id. at 446, 446 n.1 (Stewart, J. dissenting).
[33] Id. at 448, 448 n.3 (Stewart, J. dissenting) (providing examples from Washington, Jefferson, Madison, Franklin D. Roosevelt, Kennedy, and others).
[34] See Engle, 370 U.S. at 450 (Douglas, J. concurring; Stewart, J. dissenting), citing Zorach v. Clauson, 343 U.S. 306, 313 (1952). This statement from Zorach was also cited in Justice Douglas' concurrence. See Engel, 370 U.S. at 437, 437 n.1 (Douglas, J., concurring).
[35] Id. at 450, 450 n.10 (Stewart, J. dissenting) (citing the words of the Declaration of Independence: "And for the support of this Declaration, with a firm reliance on the protection of divine Providence, we mutually pledge to each other our Lives, our Fortunes and our sacred Honor.").
[36] School Dist. Of Abington Tp., Pa. v. Schempp, 374 U.S. 203 (1963).
[37] Id. at 304 (Brennan, J., concurring).
[38] Id., citing McGowan v. Maryland, 366 U.S. 420, 442 (1961).
[39] Schempp, 374 U.S. at 304 (Brennan, J., concurring).

been founded under "God" and, thus, that reciting the Pledge "may be no more of a religious exercise than the reading aloud of Lincoln's Gettysburg Address, which contains an allusion to the same historical fact."[40]

3. Wooley v. Maynard[41] (1977)

This is not a religion case. The Supreme Court held that the State of New Hampshire could not force a citizen to display the motto "Live Free or Die" on vehicle license plates. The Court believed that this coercive action was an attempt to force the citizen to participate in the dissemination—on the citizen's private property—of an ideological message for the express purpose of the motto being read by the public. The Court was concerned about the ramifications of its holding on other mottos and pointed out that the ruling was distinguishable from the display of "In God We Trust" on coins and currency. The Court stated that currency is passed hand-to-hand and, because it is generally carried in a purse or pocket, need not be displayed to the public. The summary of the comparison was that an automobile driver is required to publicly advertise the motto but a holder of coin of currency is not.[42]

4. Stone v. Graham[43] (1980)

The Supreme Court held that a Kentucky statute requiring the display of The Ten Commandments[44] in every public school classroom had a preeminent religious purpose and was thus an unconstitutional violation of the Establishment Clause. Justice Rehnquist, in his dissent, argued that even though the majority believed the Ten Commandments to be "undeniably a sacred text," he believed that "it was equally undeniable . . . that the Ten Commandments have had a significant impact on the development of secular legal codes of the Western World." He based this part of his dissent on the part the Ten Commandments played in the foundation of law and cited a New Hampshire case that upheld the placement of plaques with "In God We Trust" in public schools.[45] Justice Rehnquist believed that even though there were clearly religious

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[40] Id. at 304-05.
[41] Wooley v. Maynard, 430 U.S. 705 (1977).
[42] See id. at n.15 (1977).
[43] Stone v. Graham, 449 U.S. 39 (1980).
[44] Another Ten Commandments issue has recently been in the news. On Nov. 7, 2000, Judge Roy Moore of the Etowah County circuit court in Alabama won election as chief justice of the Alabama Supreme Court. Judge Moore gained notoriety during the 1990s by fighting to display a plaque of the Ten Commandments in his courtroom. A county judge ordered the plaque removed but the Alabama Supreme Court vacated the ruling on a technicality without deciding the constitutionality of the display. Judge Moore has continued to display the plaque and has stated "There is an absolute truth, and the truth is in the Bible." Prior to the election, Judge Moore promised, if he were elected chief justice of the Alabama Supreme Court, to display the plaque in the state judicial building. See 'Ten Commandments Judge' seeking chief justice job in Alabama, **CNN.com Law Center**, (visited Nov. 3, 2000) <http://www.cnn.com/2000/law/a0/23/religion.judge.ap/>. See also Moore Wins, Credits God, **The Birmingham News**, (Nov. 8, 2000) <http://www.al.com/news/birmingham/Nov2000/8-e353437b.html> (providing the election result and quoting Judge Moore's reaction to the victory: "Remember the one responsible for it all, and that's God.").
[45] Stone v. Graham, 449 U.S. 39, 45 (1980) (Rehnquist, J., dissenting), citing Opinion of the Justices, 228 A.2d 161 (1967) (advising that Bible readings and recitation of prayers would be unconstitutional but that

parts of The Ten Commandments, there were also parts that had a strong secular influence. Hence, he believed that it should be permissible to display the entire document—not just the purely secular parts—to the students.[46]

5. **Marsh v. Chambers**[47] **(1983)**

The Supreme Court held that it was constitutional for the Nebraska legislature to have a chaplain—paid with public funds—open each legislative session with a prayer. Judge Brennan, in his dissent, compared legislative prayer with the "formulaic recitation of 'God save the United States and this Honorable Court'" and surmised that the majority considered the legislative prayer as

> at most a *de minimis* violation, somehow unworthy of our attention. I frankly do not know what should be the proper disposition of features of our public life such as 'God save the United States and this Honorable Court,' 'In God We Trust,' 'One Nation Under God,' and the like. I might well adhere to the view expressed in Schempp that such mottoes are consistent with the Establishment Clause, not because their import is *de minimis*, but because they have lost any true religious significance.[48]

6. **Lynch v. Donnelly**[49] **(1984)**

The Supreme Court held that a city did not violate the Establishment Clause by displaying a nativity scene. The Court discussed the "official acknowledgment by all three branches of government of the role of religion in American life" and the history of "official references [by the Founding Fathers and contemporary leaders] to the value and invocation of Divine guidance."[50] The Court cited examples such as "In God We Trust" and its use on coin and currency; the amendment to the Pledge of Allegiance; the opening of court sessions with "God save the United States and this honorable court;" and the proclamations for the National Day of Prayer,[51] Jewish Heritage Week,[52] and the Jewish High Holy Days.[53] It also used the examples of the Thanksgiving[54] and Christmas holidays and specifically acknowledged the religious significance of those holidays.[55] The Court believed these official actions to be

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requiring a period of silent meditation and requiring the display of "In God We Trust" would be permissible).

[46] Id. at 45 n.2.

[47] Marsh v. Chambers, 463 U.S. 783 (1983).

[48] Id. at 818 (Brennan, J., dissenting).

[49] Lynch v. Donnelly, 465 U.S. 668 (1984).

[50] Ch. 167, 16 Stat. 168 (1870).

[51] See Lynch v. Donnelly, 465 U.S. 668, 674-75 (1984) (stating that the National Day of Prayer is a day "on which [day] the people of the United States may turn to God in prayer and meditation at churches, in groups, and as individuals.").

[52] Proclamation No. 4844, 46 Fed.Reg. 25,077 (1981).

[53] 17 Weekly Comp. Pres. Doc. 1058 (Sept. 29, 1981).

[54] See Ch. 167, 16 Stat. 168 (1870) (making Thanksgiving a national holiday).

[55] See Lynch, 465 U.S. at 674-75 (acknowledging that Thanksgiving "express[es] thanks for Divine aid" and that Christmas has not lost its religious significance).

examples of accommodation and that they "'follow[ed] the best of our traditions' and 'respect [ed] the religious nature of our people.'"[56]

The Court stated:

> "Those government acknowledgments of religion serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society. For that reason, and because of their history and ubiquity, those practices are not understood as conveying government approval of particular religious beliefs.[57]

Justice Brennan, in his dissent, was troubled by the "relaxed application of the Lemon test" but thought it was understandable for the facts of the case. However, he was more troubled by the broader implications of the holding.[58] He noted that the Court had previously stated: "[G]overnment cannot be completely prohibited from recognizing in its public actions the religious beliefs and practices of the American people as an aspect of our national history and culture." He also noted that although he was still uncertain of how to best deal with the broader set of practices given as examples in the case, he did consider them all to a form of "ceremonial deism."[59] He considered the practices to have secular meaning and serve secular purposes.[60]

7. County of Allegheny v. ACLU[61] (1989)

The Supreme Court held that the display of a crèche violated the Establishment Clause but the display of a menorah next to a Christmas tree did not. The Court stated that it did not want to analyze the case using "ceremonial deism" analysis because there is "an obvious distinction between crèche displays and references to God in the motto and the pledge."[62] However, the Court rejected Justice Kennedy's minority view that under Marsh, any practice that has "no greater potential for an establishment of religion [than those] accepted practices dating back to the Founding," must be constitutional. Kennedy took that approach, he said, because otherwise practices such as the national motto and the Pledge of Allegiance would be in danger of invalidity.[63] In rejecting Kennedy's view, the Court reiterated that its previous opinions had

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[56] Id. at 675-76.
[57] Id. at 692-93 (O'Connor, J., concurring).
[58] Id. at 713-14 (Brennan, J., dissenting).
[59] See Lynch, 465 U.S. at 716-17 (1984) (Brennan, J., dissenting). ("While I remain uncertain about these questions, I would suggest that such practices as the designation of 'In God We Trust' as our national motto, or the references to God contained in the Pledge of Allegiance can best be understood, in Dean Rostow's apt phrase, as a form a 'ceremonial deism.'"), citing Sutherland, Book Review, 40 **Ind. L.J.** 83, 86 (1964) (quoting Dean Rostow's 1962 Meikeljohn Lecture delivered at Brown University).
[60] See Lynch, 465 U.S. at 716-17 (Brennan, J., dissenting).
[61] County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573 (1989).
[62] Id. at 603.
[63] Id. at 672-73 (Kennedy, J. concurring in part and dissenting in part). Justice Kennedy's minority opinion additionally referred to other examples of practices such as the opening of the Supreme Court sessions with "God save the United States and this honorable Court," legislative chaplains, the National Day of Prayer, and a special prayer room in the Capitol including a stained glass panel of George

always considered the motto and the pledge to be "consistent with the proposition that government may not communicate an endorsement of religious belief"[64] and that "[although] history may affect the constitutionality of nonsectarian references to religion by the government, history cannot legitimate practices that demonstrate the government's allegiance to a particular sect or creed."[65]

In her concurrence, Justice O'Connor restated her opinion that legislative prayers and having "In God We Trust" on coins and currency serve the secular purposes of "solemnizing public occasions, expressing confidence in the future and encouraging the recognition of what is worthy of appreciation in society."[66] She then stated that because of those secular purposes, those practices are not understood to be an endorsement of particular religious beliefs; however, "'[g]overnment practices that purport to celebrate or acknowledge events with religious significance must be subjected to careful judicial scrutiny."[67]

Justice Kennedy's minority opinion conceded that these practices were harmful for certain groups: "[I]t borders on sophistry to suggest that the 'reasonable' atheist would not feel less than a 'full membe[r] of the political community' every time his fellow Americans recited, as part of their expression of patriotism and love for country, a phrase he believed to be false."[68] However, he did not think it was a problem that certain minority groups or individuals were harmed because, in his view, the purpose of the Establishment Clause is not to protect individuals from mere feelings of exclusion.[69]

B. Other Supreme Court Cases

1. West Virginia State Board of Education v. Barnette[70] (1943)

This is considered a free exercise case but it has similarities to Establishment Clause cases. The Supreme Court held that compelling school children to salute the flag and recite the Pledge of Allegiance was unconstitutional. The Court considered those activities to be symbols of political thought and hence analyzed the activities as symbolic speech.[71] It stated that a

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Washington with the first verse of the 16th Psalm "Preserve me, O God, for in Thee do I put my trust." See id.

[64] Id. at 602-03, citing Lynch, 465 U.S. at 693 (O'Connor, J., concurring); id. at 716-17 (Brennan, J. dissenting) .

[65] Allegheny, 492 U.S. at 602-03.

[66] Id. at 625 (O'Connor, J., concurring), citing Lynch, 465 U.S. at 693.

[67] Allegheny, 492 U.S. at 625 (O'Connor, J., concurring).

[68] Id. at 672-73 (Kennedy, J. concurring in part and dissenting in part). See also "In God We Trust" – Stamping Out Religion on National Currency, **American Atheist**, (posted Mar. 15, 1999) <http://www.atheists.org/flash.line/igwt1.htm> ("Simply put, most Atheists don't like the 'In God We Trust' slogan staring at us every time we pull out our wallets or purses.")

[69] See Allegheny, 492 U.S. at 672-73 (Kennedy, J. concurring in part and dissenting in part) ("If the intent of the Establishment Clause is to protect individuals from mere feelings of exclusion, then legislative prayer cannot escape invalidation.").

[70] West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943).

[71] Id. at 632-33 ("Symbols of State often convey political ideas just as religious symbols come to convey theological ones.")

"person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn."[72]

2. Torcaso v. United States[73] (1961)

The Supreme Court held that it was unconstitutional to require a person, as a test for office, to declare a belief in the existence of God.

> "We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person 'to profess a belief or disbelief in any religion.' Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs."[74]

This case clearly established that two groups might object to the use of the word "God." One group is composed of persons who are not members of any religion and who do not believe in "God." The other group is composed of persons who are members of a religion but whose religion is based on principles other than "God." This second group could be considered to be members of any religion who do not believe in a monotheistic "God." Judaism, Christianity, and Islam are the three major monotheistic religions[75] and among the religions in the United States "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."[76]

C. Other Federal Cases

1. Aronow v. United States[77] (1970)

Plaintiffs challenged the two federal statutes that declared "In God We Trust" to be the national motto[78] and required "In God We Trust" to appear on all United States currency and coins.[79] The Ninth Circuit stated:

> "It is quite obvious that the national motto and the slogan on coinage and currency 'In God We Trust' has *nothing whatsoever to do with the establishment of religion*. Its use is of a patriotic or ceremonial character and bears no true resemblance to a governmental sponsorship of a religious exercise."[80] (emphasis added).

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[72] Id.
[73] 367 U.S. 488 (1961).
[74] Torcaso v. United States, 367 U.S. 488, 495 (1961).
[75] See American Civil Liberties Union of Ohio v. Capitol Square Review and Advisory Bd., 210 F.3d 703, 706 (2000)
[76] See Torcaso v. Watkins, 367 U.S. 488, n.11 (1961).
[77] Aronow v. United States, 432 F.2d 242 (9th Cir. 1970).
[78] 36 U.S.C 186 (1956).
[79] 36 U.S.C. 324a (1955).
[80] Aronow, 432 F.2d at 243.

The court, referring to Engle v. Vitale, said its ruling that official prayer in public schools was unconstitutional was not inconsistent with allowing official governmental encouragement of recitation of historical documents or singing of anthems which contain "references to the Deity [or] professions of faith in a Supreme Being."[81] The court believed that the national motto fit into the categories of "ceremonial" and "patriotic" and also that the motto is allowable because it does not have the "theological or ritualistic impact" that would be prohibited by the Establishment Clause. Instead of that, the court believed that the practices have the allowable "spiritual and psychological value" and "inspirational quality."[82] The court also relied on the holding in McGowan v. Maryland that Sunday blue laws are not violative of the Establishment Clause because they are not a use of "the State's coercive power to aid religion."[83] The court took the view of "benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference"[84] and stated that the general principle is that "we will not tolerate either governmentally established religion or governmental interference with religion."[85]

2. O'Hair v. Blumenthal[86] (1979)

A The plaintiff alleged that the national motto and its appearance on currency violate both the Free Exercise and Establishment Clause.[87] The District Court relied on the Ninth Circuit's holding in Aronow and held that there was no constitutional violation—dismissing the case for failure to state a claim on which relief could be granted. In particular, it relied on Aronow's analysis that the motto had a patriotic or ceremonial character and that there was "no true resemblance to a governmental sponsorship of a religious exercise."[88] The court applied the Lemon[89] test, and concluded that, according to Aronow, the "primary purpose of the motto was secular; it served a secular ceremonial purpose in the obviously secular function of providing a medium of exchange."[90] The court believed it was "equally clear" that there was no primary effect of advancing religion; and it would be "ludicrous" to argue that there was an entanglement of government and religion.

The court also referred to Schempp's statement that there are "many manifestations of a belief in a Supreme Being which do not violate the First Amendment" and to Justice Brennan's concurrence that "[t]he truth is that we have simply interwoven the motto so deeply into the fabric of our civil polity that its present use may well not present that type of involvement which

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[81] Id., citing Engle v. Vitale, 370 U.S. 421, n.21 (1962).
[82] Aronow, 432 F.2d at 243-44.
[83] Id. at 244.
[84] Id.
[85] Id.
[86] 462 F.Supp. 19 (W.D. Tex. 1978), aff'd 588 F.2d 1144, cert. denied 442 U.S. 930 (1979).
[87] The plaintiff also alleged that two federal statutes (18 U.S.C. 331 & 333) that attach criminal penalties to the defacement of coin and currency are unconstitutional insofar as removal of "In God We Trust" is concerned. See id. at 19.
[88] O'Hair, 462 F.Supp. at 20, citing Aronow v. United States, 432 F.2d 242, 243 (9th Cir. 1970).
[89] See Lemon v. Kurtzman, 403 U.S. 602 (1971) (providing that to withstand scrutiny under the test, a challenged government action must have a secular purpose, have a primary effect which neither advances nor inhibits religion, and must not foster excessive entanglement with religion).
[90] O'Hair, 462 F.Supp. at 20.

the First Amendment prohibits."[91] The court also referred to Wooley v. Maynard's statement that the holding against compelling a citizen to bear New Hampshire's state motto on an automobile license plate is distinguishable from having the national motto on coins and currency. It also referred to Justice Rehnquist's dissent in Wooley that "[t]he fact that an atheist carries and uses U.S. currency does not, in any meaningful sense, convey any affirmation of belief on his part in the motto "In God We Trust."[92]

The ruling was affirmed by the appellate court and then denied certiorari by the Supreme Court. This was the first of two cases explicitly addressing "In God We Trust" that was denied certiorari by the Supreme Court.[93]

3. Gaylor v. United States[94] (1996)

The plaintiffs alleged that the national motto and its appearance on currency violate the Establishment Clause. The district court dismissed the claim for failure to state a claim on which relief could be granted. The appellate court affirmed the dismissal and stated that the claim failed both the Lemon test and the "endorsement test."[95] The court looked at the dicta from the Supreme Court cases and considered itself "bound [by the dicta of the Supreme Court] almost as firmly as by the Court's outright holdings . . . ."[96] Gaylor used the "reasonable observer" standard, stating that "[t]he reasonable observer, much like the reasonable person of tort law, is the embodiment of a collective standard and is thus 'deemed aware of the history and context of the community and forum in which the religious display appears.'" It then used that standard to find that "a reasonable observer, aware of the purpose, context, and history of the phrase 'In God We Trust,' would not consider its use or its reproduction on U.S. currency to be an endorsement of religion."[97] The Supreme Court denied certiorari. This was the second of two cases explicitly addressing "In God We Trust" that was denied certiorari by the Supreme Court.[98]

4. American Civil Liberties Union of Ohio v. Capitol Square Review and Advisory Bd.[99] (2000)

A three-judge panel[100] of the Sixth Circuit held that the Ohio state motto "With God All Things are Possible" is unconstitutional under the Establishment Clause.[101] However, the full

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[91] Id. citing Schempp, supra at note 39.
[92] O'Hair, 462 F.Supp. at 20, citing Wooley v. Maynard, 430 U.S. 705, 722 (1977).
[93] The second case denying certiorari was Gaylor v. United States. See infra section I.3.
[94] 74 F.3d 214 (10th Cir. 1996), cert. denied 517 U.S. 1211 (1996).
[95] See discussion infra section IV.A.
[96] Gaylor, 74 F.3d at 217.
[97] Id.
[98] The first case denying certiorari was O'Hair v. Blumenthal. See infra section I.2.
[99] American Civil Liberties Union of Ohio v. Capitol Square Review and Advisory Bd., 210 F.3d 703 (6th Cir. 2000), rehearing en banc granted, opinion vacated by 222 F.3d 268 (6th Cir. 2000) (restoring the case to the docket as a pending appeal).
[100] There was a majority opinion, one concurrence, and one dissent.
[101] Specifically, the case was in response to an intention of the government to install an engraved state seal and the Ohio motto on a plaza outside of the state house. However, the court addressed the case in broader terms by stating that "the clear thrust of the complaint is at the use of the words of the motto in all forms by the State of Ohio." Capitol Square, 210 F.3d at 705 n.2.

Court then voted for rehearing the case en banc. The effect of that vote was to vacate the judgment and to restore the case as a pending appeal. The case is now pending appeal and arguments are scheduled for December 2000.[102]

The holding of the three-judge panel was mainly grounded in the fact that the phrase was taken directly from a dialogue of Jesus in the New Testament of the Christian Bible[103] and thus "[is] an endorsement of the Christian religion by the State of Ohio. No other interpretation in the context of [the presence of the words] in the New Testament is possible."[104] The majority rejected the argument of the defendants that the motto merely "inculcates hope, makes Ohio unique, solemnizes occasions, and acknowledges the humility that government leaders frequently feel in grappling with difficult public policy issues."[105] The majority believed that the secular meaning given to the words by the defendants could only be justified "by decontextualizing and blotting out their origins," and should not be done.

The one dissenting judge, on the other hand, thought that a reasonable observer would sense that the Ohio motto had the same meaning as the United States motto ("In God We Trust"); and hence, because various circuit courts had declared the United States motto to be constitutional, the Ohio motto should also be declared constitutional.[106]

The concurrence focused on the meaning of the words "With God, All Things Are Possible" and thought that, while "many Christian believers accept these verses as true, others do not believe that a powerful, all-knowing personal God intervenes in daily affairs." It quoted from a Scientific American survey of 1,800 members of the National Academy of Sciences that over ninety percent of the Academy members "do not believe in a personal God who intervenes in the affairs of human beings.[107] The implication was that the meaning of the phrase is closely tied to a Christian belief.

The court referred to the Marsh statements that the opening of official public sessions with prayer "is deeply embedded in the history and tradition of this country [and that] it has become part of the fabric of our society [and that] it is simply a tolerable acknowledgment of beliefs widely held among the people of this country."[108] The court also thought that Allegheny was particularly helpful because of the emphasis on the location of the crèche where "[n]o

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[102] The tentative date was obtained via a phone conversation with a clerk of the Sixth Circuit on Nov. 1, 2000.

[103] Capitol Square, 210 F.3d at 705 (stating that the phrase was a direct quotation from Chapter 19, Verse 26 of the Gospel According to Matthew, and was from a dialogue between Jesus and Jesus' disciples). The district court had seemed to sense the significance of the Biblical source as well because, even though it held that the motto was constitutional, without explanation it had enjoined Ohio from attributing the source of the motto to the text of the New Testament.

[104] Id. at 725.

[105] Id. at 707.

[106] Id. at 730-31 (Nelson, J., dissenting). The majority also noted that while there were many states that have mottoes using the word "God," Ohio has the only motto that quotes directly from either the Old or New Testaments of the Christian Bible. See American Civil Liberties Union of Ohio v. Capitol Square Review and Advisory Bd., 210 F.3d 703, 730-31 (2000) at 711.

[107] See Capitol Square at 729 (Merritt, J., concurring). Interestingly, an additional survey provided insight into the public's knowledge of mottoes. The survey showed that only ten percent of those surveyed (presumably Ohio citizens) knew what the state motto was. See id. at 711.

[108] Marsh v. Chambers, 463 U.S. 783, 792 (1983).

viewer could reasonably think that it occupies this location without the support and approval of the government."[109]

The court looked at the Sixth Circuit precedent, including a case that held the placing of a portrait of Jesus in the hallway of a public school to be unconstitutional.[110] The reasoning of the case included:

> "Though the portrait, like school prayers and other sectarian religious rituals and symbols, may seem '*de minimis*' to the great majority, particularly those raised in the Christian faith and those who do not care about religion, a few see it as a governmental statement favoring one religious group and downplaying others. It is the rights of these few that the Establishment Clause protects in this case."[111]

The court considered the analysis in Aronow v. United States, Gaylor v. United States, and Wooley v. Maynard. It saw parallels with the stand-alone crèche in Allegheny. It also looked at the holding in West Virginia State Board of Education v. Barnette where the Supreme Court held that it is unconstitutional to compel a student to salute the flag or to recite the Pledge of Allegiance. The court stated: "It is equally so with a state motto. The words of a motto are a form of symbolic speech whether vocalized or read and, therefore, take their meaning from the text in which they are located . . . ."[112] The court, applying the reasonable observer standard to the second prong of the Lemon test, believed that there was an implicit endorsement of Christianity, which was prohibited by Lynch.

The court, however, distinguished the Ohio motto from "the various forms of ceremonial deism as described in Marsh . . . and in the 'In God We Trust' and Pledge of Allegiance cases." The majority did not explicitly describe why it considered the Ohio motto to be different than the United States motto, but the concurrence discussed the distinguishing features. It stated that

> "In God We Trust" did not have a meaning of "a personal, all-powerful, all-knowing God which makes 'all things possible' by intervening in daily affairs. It does not necessarily run contrary to the religious beliefs of any particular Christina denomination or group or any other religion. It may not be entirely consistent with the views of the National Academy of Sciences and nonbelievers, but it is not particularly offensive. The god in whom we 'trust' could be the god of Jefferson's deism or even perhaps the laws of science or the cosmology of Newton or Einstein. The phrase is sufficiently vague that it does not define the particular god of any religion."[113]

The court quoted from hypothetical questions asked of the Assistant Attorney General during oral argument and stated that the exchange reinforced the court's view that the motto was unconstitutional. The court first hypothesized that a court open each session by quoting the motto and specifying that the motto is the view of the court. It then hypothesized that a court open each session by stating "We want to advise you of our view that with God all things are

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[109] County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter, 673 U.S. 573, 599-600 (1989).
[110] See Washegesic v. Bloomingdale Public Schools, 33 F.3d 679 (6th Cir. 1994).
[111] Id. at 684.
[112] See Capitol Square at 723-24.
[113] Id. at 729 (Merritt, J., concurring).

possible." It then hypothesized that a court open each session by with "As Jesus Christ said in Matthew 19, we believe 'with God all things are possible'." It then summed up its questioning by stating "But if we're quoting from Jesus Christ and we don't just tell you we're quoting—what's the difference?"[114] The point of the exchange was that if the meaning of the motto—rather than the motto itself—were uttered by the court, it would be far clearer that it was unconstitutional. Therefore the motto itself must be unconstitutional.

IV. Establishment Clause Tests, Standards, and Doctrines

A. Endorsement Test

Since 1971, the Supreme Court had been applying the Lemon test[115] to Establishment Clause cases. However, "[w]hile Lemon is still good law, the Supreme Court has declined to apply the Lemon test in several recent Establishment Clause cases. Instead, the Court has focused on whether the challenged government action endorses religion, suggesting that the Lemon test is being supplanted by an 'endorsement test'".[116] The endorsement test now seems to be the appropriate test for analyzing Establish Clause cases.[117]

In her concurrence in Lynch v. Donnelly, Justice O'Connor began the formulation of the endorsement test when she said that government can violate the Establishment Clause prohibition against making religion relevant to a person's standing in the political community in two main ways. The first is excessive entanglement with religious institutions and "the second . . . is government endorsement or disapproval of religion. 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."[118]

A plurality of the Supreme Court approved Justice O'Connor's endorsement test in Wallace v. Jaffree when it stated that when applying the Lemon purpose prong, "it is appropriate to ask 'Whether government's actual purpose is to endorse or disapprove religion.'"[119] Justice

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[114] See id. at 726-27 (implying that for Establishment Clause purposes a Biblical quote does not require a statement as to the source of the quote).

[115] See Lemon v. Kurtzman, 403 U.S. 602 (1971) (providing that to withstand scrutiny under the test, a challenged government action must have a secular purpose, have a primary effect which neither advances nor inhibits religion, and must not foster excessive entanglement with religion).

[116] Gaylor v. United States, 74 F.3d 214, 217 (10th Cir. 1996), cert. denied 517 U.S. 1211 (1996) (adding that "This shift of focus is particularly relevant to the case at hand because the Supreme Court has expressly prescribed the endorsement test for cases involving challenges to religious expression by the government itself"), citing Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753 (1995); Lamb's Chapel v. Center Moriches Union Free Sch. Dist. (508 U.S. 384 (1993); County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573, 625 (1989).

[117] See, e.g., Epstein, supra note 3, at 2126-28 (providing examples of court opinions and scholarly articles that believe the endorsement test is now the appropriate test for Establishment Clause cases); **Stephen M. Feldman**, **Please Don't Wish Me a Merry Christmas: A Critical History of the Separation of Church and State** 241 (1997) (stating that even when the Supreme Court was continuing to apply the Lemon test, simultaneously the endorsement test "gathered enough support to appear likely to emerge eventually as the predominant standard.").

[118] Lynch v. Donnelly, 465 U.S. 668, 687-88 (1984) (O'Connor, J., concurring).

[119] Wallace v. Jaffree, 472 U.S. 38, 56 (1985).

O'Connor herself provided more refinement of the endorsement test by stating that the purpose of the endorsement test is not to "sav[e] isolated nonadherents from the discomfort of viewing symbols of a faith to which they do not subscribe."[120] And that "the endorsement test does not preclude government from acknowledging religion or from taking religion into account in making law and policy."[121] However, she stated that it is an infringement upon the religious liberty of the nonadherent—and an Establishment Clause violation—"[w]hen the power, prestige and financial support of government is placed behind a particular religious belief [and] the indirect coercive pressure upon religious minorities [force them] to conform to the prevailing officially approved religion."[122]

The Court again addressed the issue in School District of Grand Rapids v. Ball by stating that one important factor is whether the "governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices."[123]

B. Reasonable Observer Standard

The reasonable observer standard is used by the endorsement test. It was first articulated by Justice O'Connor in Wallace v. Jaffree: "The relevant issue is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement . . . ."[124] She refined the standard in Capitol Square Review & Advisory Bd. v. Pinette[125] by stating that the endorsement test should not focus on the actual perceptions of individual observers. She believed that if the focus was on the actual perceptions, then at least one person could always be found to perceive a government endorsement and that would lead to a necessary preclusion of all religious displays. Rather, she thought the proper standard should be a "more collective standard" that is objective. She believed the reasonable observer standard to be similar to the "'reasonable person' in tort law, who 'is not to be identified with any ordinary individual, who might occasionally do unreasonable things,' but is 'rather a personification of a community ideal of reasonable behavior, determined by the [collective] social judgment."[126]

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[120] Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 779 (1995) (O'Connor, J., concurring).
[121] Wallace v. Jaffree, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring).
[122] Id.
[123] School District of Grand Rapids v. Ball, 473 U.S. 373, 390 (1985).
[124] Wallace, 472 U.S. at 76 (O'Connor, J., concurring).
[125] Pinette, 515 U.S. (O'Connor, J., concurring).
[126] Id. at 779-80.

C. Ceremonial Deism[127]

This term was first used in a reference to a 1962 lecture given by Dean Eugene Rostow of Yale University Law School.[128] The reference was to prayers in Congress and was meant to signify that some public activity that otherwise might be considered religious could be so conventional and uncontroversial that it would be constitutional. The term was first used by the Supreme Court in Justice Brennan's dissent in Lynch that suggested "In God We Trust" and the references to God in the Pledge of Allegiance could best be understood as a form of "ceremonial deism," meaning that the practices "have lost through rote repetition any significant content."[129] The opinion also gave a list of government practices that fell into the category of "official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders,"[130] and implied that they all were constitutionally permissible. In addition to "In God We Trust" and the Pledge of Allegiance, the list included the Thanksgiving and Christmas holidays, chaplains, congressional prayer room, and the National Day of Prayer.[131]

Then, in Allegheny, a footnote explained that the practices that are included in ceremonial deism do not indicate government approval of particular religious beliefs.[132] Additionally, in the same case, Justice O'Connor gave an explanation of ceremonial deism. She said that examples include legislative prayers and opening Court sessions with "God save the United States and this honorable Court," and that ceremonial deism "serve[s] the secular purposes of 'solemnizing public occasions' and 'expressing confidence in the future.'" However, she also said that "[h]istorical acceptance of a practice does not in itself validate that practice under the Establishment Clause if the practice violates the values protected by that Clause, just as historical acceptance of racial or gender based discrimination does not immunize such practices from scrutiny under the Fourteenth Amendment."[133]

The author Steven B. Epstein[134] has stated that ceremonial deism is often used in syllogistic reasoning. Parties trying to justify a use of a practice will compare it to ceremonial

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[127] For an excellent discussion of ceremonial deism, see Epstein, supra note 3 (providing the history, examples, significance, and arguments (for and against) of ceremonial deism). The court in ACLU v. Capitol Square Review and Advisory Board cited Professor Epstein's article as a general source in its analysis of ceremonial deism. See American Civil Liberties Union of Ohio v. Capitol Square Review and Advisory Bd., 210 F.3d 703, n.11 (2000). Note that "Civil Religion" is another body of scholarship that is closely connected to ceremonial deism, and has, in fact, been written about more frequently than ceremonial deism. However, Professor Epstein only briefly mentions it because he does not think it is useful for determining whether a practice is consistent with the Establishment Clause. For that reason, and because ACLU v. Capitol Square Review and Advisory Board considers ceremonial deism but not civil religion, this paper only focuses on ceremonial deism. For a complete discussion of civil religion, see **Robert N. Bellah**, **Beyond Belief: Essays on Religion in a Post-Traditional World** (1970).

[128] See American Civil Liberties Union of Ohio v. Capitol Square Review and Advisory Bd., 210 F.3d 703, 719-20 (2000).

[129] See infra note 143 and accompanying text.

[130] Lynch v. Donnelly, 465 U.S. 668, 675 (1984).

[131] See Epstein, supra note 3, at 2094, citing Lynch, 465 U.S. at 674-79 & nn. 2-5.

[132] County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573, 595-96 n.46 (1989).

[133] Id. at 630.

[134] See Epstein, supra note 3.

deism practices (e.g., "In God We Trust") that have already been declared constitutionally permissible. The argument is that 1) there are traditional practices that are constitutionally permissible, 2) the practice at hand does not advance religion any more than the constitutionally permissible practices, and 3) therefore the practice at hand must be constitutionally permissible. The author argues that this approach (the "any more than" syllogism) has of course resulted in an ever-expanding set of practices that have been found to be constitutionally permissible. He believes that as long as the basic premise (that certain practices are so innocuous and inconsequential that they should not be ruled unconstitutional) of ceremonial deism is allowed to remain unchallenged, the syllogism will continue to allow the sphere of constitutionally permissible practices to grow.

D. Arguments For and Against Ceremonial Deism[135]

Professor Steven B. Epstein analyzed ceremonial deism and concluded that almost all of its practices would be constitutionally impermissible if analyzed under normal Establishment Clause reasoning. He then looked at the major arguments for ceremonial deism to determine whether the arguments were valid.

1. Original Intent

Professor Epstein first looked at the argument that the "original intent [of the Framers]" would permit ceremonial deism practices and concluded that original intent by itself is not sufficient, and, thus, "an originalist analysis [should not] end the inquiry."[136] Professor Epstein ended his analysis of this argument by quoting from Justice Oliver Wendell Holmes:

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.[137]

2. Solemnization/Acknowledgement

Professor Epstein considers this argument to be the one most often used by the Supreme Court and gives examples from Justice O'Connor,[138] Chief Justice Burger,[139] and Justice

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[135] Much of this section comes from Professor Epstein's article on Ceremonial Deism. See id. at 2154-73.
[136] Id. at 2155 (contrasting his view to the analysis of Chief Justice Burger in Marsh).
[137] Epstein, supra note 3, at 2155, citing Oliver Wendell Holmes, The Path of the Law, 10 **Harv. L. Rev.** 457, 469 (1897).
[138] See Epstein, supra note 3, at 2160, citing Lynch v. Donnelly, 465 U.S. 668, 693 (1984) (O'Connor, J., concurring) (stating that ceremonial deism "serve[s], in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society. For that reason, and because of their history and ubiquity, those practices are not understood as conveying government approval of particular religious beliefs.")
[139] See Epstein, supra note 3, at 2160, citing Marsh v. Chambers, 463 U.S. 783, 792 (1983) ("In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society. To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an

Brennan.[140] He suggests that the argument is used to permit certain practices either 1) because they are deemed to be "truly important, serious of special (solemnization)," or 2) "so ingrained in our history and traditions that the public has come to expect government to embrace religion where it has customarily done so (acknowledgment)."[141]

Professor Epstein believes there are arguments to be used against solemnization/acknowledgement. There are nonreligious means available that are at least as effective for solemnizing public occasions. Further, drawing the line here (as ceremonial deism does) to separate those practices that are given an exception from the normal Establishment Clause tests is not as logical as drawing the line at the point at which the endorsement test itself fails.

He does not like the acknowledgment argument for reasons similar to the historical intent argument. Just because a practice has endured for a long time should not immunize it from constitutional scrutiny. And "even the seemingly innocuous practices that constitute ceremonial deism cannot be justified by history and tradition, for doing so would validate the very historical discrimination that the Court has stated should play no part in Establishment Clause jurisprudence." He also argues that the longevity itself of the practices harms religious minorities even more than would otherwise be the case. "Not only must religious outsiders tolerate these practices now, but they must also do so with the awareness that those who share their religious beliefs have endured these practices for generations."[142]

3. Loss of Religious Significance

This argument is that "through rote repetition, transformations which have occurred over time, and the emergence of secular and patriotic traditions associated with religious holidays, these practices have lost whatever religious significance they may once have had."[143] Professor Epstein believes that this argument is flawed because it is in conflict with two other arguments for ceremonial deism: the solemnization argument[144] and the "any more than" syllogism.[145] He

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'establishment' of religion . . . [but] simply a tolerable acknowledgment of beliefs held among the people of this country.")

[140] See Epstein, supra note 3, at 2160, citing Lynch v. Donnelly, 465 U.S. 668, 716-17 (1984) (Brennan, J., dissenting) (characterizing ceremonial deism as "uniquely suited to serve such wholly secular purposes as solemnizing public occasions, or inspiring commitment to meet some national challenge in a manner that simply could not be fully server in our culture if government were limited to purely nonreligious phrases. The practices by which the government has long acknowledged religion are therefore probably necessary to serve certain secular functions, and that necessity, coupled with their long history, gives those practices an essentially secular meaning.").

[141] See Epstein, supra note 3, at 2160-61.

[142] See id. at 2160-64.

[143] Id. at 2164-65, citing Lynch, 465 U.S. at 716 (Brennan, J., dissenting) (stating that the national motto and the amendment to the Pledge of Allegiance have "lost through rote repetition any significant religious content"); Allegheny, 492 U.S. at 631 (O'Connor, J., concurring) (stating that certain practices "have largely lost their religious significance over time"); Lynch, 465 U.S. at 710 (Brennan, J., dissenting) (stating that even though the celebration of Christmas has both secular and sectarian elements, it may well be that the government is simply seeking wholly secular goals such as promoting goodwill and a common day of rest).

[144] See supra notes 138-142 and accompanying text.

[145] See supra note 134 and accompanying text.

also believes, however, that the strongest argument against the loss of religious significance theory is simply that the practices have not lost their religious significance. He argues that these practices "pack a powerful punch to both the most and the least devout members of the American population" and imagines the national reaction (particularly by the most religious segment) if the Supreme Court were ever to declare that "under God" or "In God We Trust" were unconstitutional.[146]

4. *De Minimis* Endorsement and Societal Acceptance

This *de minimis* argument is that the practices "are so innocuous even to religious minorities, agnostics, and atheists that they cause too little harm to be a real threat to religious liberty."[147] Professor Epstein argues that this thinking is contrary to the statement of the Supreme Court that "it is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment."[148] He believes that the thinking comes from the perspective of the religious mainstream. The practices may be innocuous to the religious mainstream, but are certainly not *de minimis* for religious minorities, agnostics, or atheists. For those groups, the practices can even be considered coercive. He imagines the outcry if the word "Allah" were substituted for "God" in the national motto and other practices considered to be ceremonial deism.[149]

The societal acceptance argument is very similar to the *de minimis* argument. The argument is that American citizens overwhelmingly accept ceremonial deism practices. Professor Epstein believes that the argument is flawed because, in fact, there is considerable non-acceptance. The problem is that non-believers and religious minorities face considerable challenges in protesting these ceremonial deism practices and hence their voice is not often heard. "Often these victims of religious liberty violations do not want even to file a claim in court . . . because of the hostility, enmity, persecution, and attacks they would face."[150] Professor Epstein states that "the ostracism that befalls plaintiffs who challenge cherished governmental endorsements of religion is so extreme that most who are offended by these practices bite their tongues and go about their lives."[151] Further, he argues that the societal acceptance premise of "majority acceptance equates with constitutional validity" is disturbing because the general purpose of the Constitution is to "protect minorities from raw majoritarian impulses" and therefore "[u]sing majority acceptance of ceremonial deism to justify its constitutionality stands the Constitution on its head."[152]

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[146] See Epstein, supra note 3, at 2166.
[147] Id.
[148] Id. at 2167, citing Schempp, 374 U.S. at 225.
[149] See Epstein, supra note 3, at 2168-69.
[150] Id. at 2169, citing Nadine Strossen, How Much God in the Schoold? A Discussion of Religion's Role in the Classroom, 4 **Wm. & Mary Bill of Rts. J.** 607, 610 (1995) (providing the view of the president of the ACLU).
[151] Epstein, supra note 3, at 2171.
[152] See id.

V. Going Forward

A. Recommendation

Because of the arguments already discussed, this paper believes that "In God We Trust" is unconstitutional. However, as stated in the section about ceremonial deism, "In God We Trust" is often held up as an example of a constitutional practice when other ceremonial deism practices are litigated. Because of that frequent use as an example, the phrase becomes even more important, since its own constitutionality promotes an ever-expanding group of other constitutionally permissible practices.[153] Thus, if any of the ceremonial deism practices should be litigated, "In God We Trust" is the most important.

The time seems to be right for the Supreme Court to make a definitive decision on the constitutionality of the phrase. With its recent strident pronouncements, the United States House of Representatives is putting pressure on the courts to make such a decision. The House is trying to act like the Supreme Court and tell other courts what is constitutional. Additionally, the Ohio case (of a very similar motto) will soon be addressed by the Sixth Circuit en banc. There is a good chance that the losing party will request certiorari from the Supreme Court. This paper will now look at some of the strategy and arguments that could be used by plaintiffs when litigating "In God We Trust."

B. Religious Underpinnings

The phrase "In God We Trust" does not appear explicitly in the Christian Bible but there are passages that indicate a similar meaning.[154] The statutes that made it the national motto and required its presence on coins and currency clearly came from a religious perspective and atmosphere.

In 1861, the Reverend M.R. Watkinson wrote to the Secretary of the Treasury and suggested that a motto signifying the United States' trust in God be stamped on coins. This letter was written at the beginning of the Civil War and was concerned that, should the United States be broken up, future groups would consider the United States to be a "heathen nation." The Secretary of the Treasury then wrote to the Director of the Mint, stating: "No nation can be strong except in the strength of God, or safe except in His defense. The trust of our people in God should be declared on our national coins."[155] These actions ultimately led to the Congressional bill in 1956 that required the motto to be on all United States currency and coin. Representative Bennett, the sponsor of the legislation, stated on the floor of the House of Representatives:

> In these days when imperialistic and materialistic communism seeks to attack and to destroy freedom, it is proper for us to seek continuously for ways to strengthen the foundation of our freedom. At the base of our freedom is our faith in God and the desire of Americans to live by His will and by His guidance. As long as this country trusts in God, it will prevail.

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[153] See supra note 134 and accompanying text.

[154] See, e.g., 1 Timothy: 4-10 ("Trust in the living God, who is the savior of all men . . . ."); 2 Corinthians 1:9 ("But we had the sentence of death in ourselves, that we should not trust in ourselves, but in God which raiseth the dead . . . .").

[155] See Epstein, supra note 3, at 2122-23.

> To remind all of us of this self-evident truth, it is proper that our currency should carry these inspiring words, coming down to us through our history: 'In God We Trust.'[156]

During the "Communist Scare" years of the late 1940s and early to mid 1950s, there was a fear that the United States was going to be undermined by communist ideology. Because communism was considered to be godless, government and private groups looked for ways to combat godless communism with a showing of Christian America. "Godliness thus became a test of national loyalty."[157] Among the actions of the era, Congress conducted a "witch-hunt of persons with un-Christian ideas" and passed a law requiring every federal judge to take an oath ending with "So help me God." President Eisenhower instituted prayer breakfasts and "seldom missed an opportunity to contrast the 'atheistic' foe with the freedom-loving people of America under God."[158] Congress approved special mailing rates for all religious magazines; these rates were lower than for all other types of organizations.

In the atmosphere of the "Communist Scare," Congress passed statutes for the amendment to the Pledge of Allegiance (1954), the change to the currency and coin (1955), and the national motto (1956).[159] These changes were "intended to contrast America's embrace of Almighty God with Communist Russia's embrace of Atheism."[160]

This embrace of godliness continued even after the "Communist Scare" years. For instance, in 1964, an amendment was attached to the Civil Rights Bill that would allow anyone discovered to be an atheist to be discharged from public office for that reason alone, without any right of appeal. The amendment passed the House but was narrowly defeated in the Senate. In 1966, Congress passed a law requiring any person elected or appointed to an office in the civil service or uniformed services to take an oath ending with "So help me God."[161]

Because of the clear religious underpinnings of both the phrase and the period in which legislation was enacted, any future arguments should strongly argue this aspect.

C. The Supreme Court Dicta

On the surface, there appears to be very little promise for successful litigation in the seven Supreme Court cases that explicitly refer to "In God We Trust." However, there is some hope in Allegheny. The Court seemed to somewhat reject the "any more than" view that as long as a practice has no greater potential for an establishment of religion that other long-standing practices, the practice must be constitutional. The Court stated that the practice still must be

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[156] Id., citing 101 Cong. Rec. 4384 (1955) (statement of Rep Bennett).
[157] **Madalyn Murray O'Hair**, **Freedom Under Seige** 51 (1974)
[158] See id. (providing an example of President Eisenhower speaking to the Israelis about the Soviet Union: "We are entitled to respect . . . a contribution to world order which unhappily we cannot expect from a nation controlled by atheistic despots.").
[159] See also, id. at 51-52.
[160] Epstein, supra note 3, at 2151-52, citing 100 Cong. Rec. 1700 (1954) (statement of Rep. Rabaut).
[161] See **O'Hair**, supra note 157 at 52-53. The President of the United States was the one exception to this law since Article II, Section 1, of the Constitution prescribes what the Presidential oath must be. President Nixon, however, on his own accord added "So help me God" to his oath and subsequent Presidents have done the same. See id. at 53 (1974).

judged independently as to whether it endorses a religious belief.[162] Allegheny also reiterated that such practices must be subjected to "careful judicial scrutiny."[163]

And even though a minority opinion in Allegheny stated that "the purpose of the Establishment Clause is not to protect individuals from mere feelings of exclusion," the same opinion at least acknowledged that an atheist can suffer real harm whenever someone else recites a phrase he doesn't believe in.[164] The same issue of harm to nonadherents was earlier brought up in Lynch when Justice O'Connor began her construction of the endorsement test.[165] Since the trend is to use the endorsement test, these cases suggest that future litigation may want to concentrate on the harm suffered by nonadherents—atheists, agnostics, and non-monotheistic religions.

In general, since the endorsement test is still evolving, any novel arguments might be worthwhile. This certainly applies to the reasonable observer standard of the endorsement test.[166] Why is an objective ("collective") standard used? Why should the standard not be a subjective one? If there is resistance to making the standard subjective to individuals, then why not make it subjective to minority groups? After all, since endorsement test cases talked of harm to individuals, why not set the standard the same way? This argument should be grounded in the increasing number of non-monotheistic religions.

Torcaso established that it is not just atheists and agnostics who might object to the word "God." It established that there are many religions that have the same objection.[167] Since the number of non-monotheistic religions is increasing, and the number of members of those religions is increasing, future litigation should emphasize minority religions. Similarly, if the Scientific American survey is valid when extrapolated, there are a large number of people who "do not believe in a personal God who intervenes in the affairs of human beings."[168]

The two cases of Wooley and Barnette may have more promise than any of the other Supreme Court cases. They suggest bringing in a new argument of compelled (symbolic) speech that may be able to work together with the Establishment Clause arguments. The argument would have to overcome the Court's statement in Wooley that a license plate motto is distinguishable from a motto on coin and currency. There seems to be an opening since Wooley only discussed the situation when coin or currency is not being displayed; it did not address the situations when the coin or currency is actually being transferred between people.[169]

D. Ceremonial Deism

The arguments against ceremonial deism, as discussed in Section IV.D, should of course be used; all of the arguments for ceremonial deism can be countered. If a line is to be drawn, it is just as logical to draw it at the point at which the endorsement test fails. Original intent is not sufficient; just because a practice has endured for a long time should not immunize it from constitutional scrutiny. There are nonreligious means that are at least as effective for

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[162] See supra notes 63-65 and accompanying text.
[163] See supra note 67 and accompanying text.
[164] See supra note 68-69 and accompanying text.
[165] See supra note 118 and accompanying text.
[166] See supra notes 124-126 and accompanying text.
[167] See supra notes 74-76 and accompanying text.
[168] See supra note 107 and accompanying text.
[169] See supra note 42 and accompanying text.

solemnizing public occasions. The practices have not lost their religious significance; they still bring out strong feelings from both the least and most devout members of the United States. The practices are only innocuous to the religious mainstream. The practices are not accepted by society; nonbelievers and religious minorities are mostly silent because of the hostility they face when bringing a challenge.

A general argument that runs through all of this is that the acceptance of ceremonial deism according to the viewpoint of the religious mainstream runs counter to the belief that the Constitution protects minorities from majorities.

E. What About the Ohio Case?

The case that is awaiting appeal in the Sixth Circuit, ACLU v. Capitol Square Review and Advisory Bd., has good arguments for why the Ohio state motto is unconstitutional. It even uses the symbolic speech argument from Barnette. Unfortunately, it is probably not a good case to take to the Supreme Court. There is too much grounding of the Ohio state motto in explicit words from the Bible; it would be very easy for the Supreme Court to distinguish it from "In God We Trust," which does not have the same explicit grounding in the Bible. It would have no impact on "In God We Trust" and might even set back the effort.

Conclusion

Would the Supreme Court ever rule that "In God We Trust" was unconstitutional? After all, Justice Brennan believed that "there would be intense opposition to the abandonment of that motto."[170] That is surely true. But with the Congressional resolutions to expand the use of the motto, with a potential test case in the Sixth Circuit, and with the increase in the number of non-monotheistic religion members, the Supreme Court may be willing to consider the constitutionality of "In God We Trust." It is time to decide.

[170] School Dist. Of Abington Tp., Pa. v. Schempp, 374 U.S. 203, 304 (1963) (Brennan, J., concurring).