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Ceremonial Deism and the Reasonable Religious Outsider

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CEREMONIAL DEISM AND THE REASONABLE RELIGIOUS OUTSIDER

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State invocations of God are common in the United States; indeed, the national motto is "In God We Trust." Yet the Establishment Clause forbids the state from favoring some religions over others. Nonetheless, courts have found the national motto and other examples of what is termed ceremonial deism constitutional on the ground that the practices are longstanding, have de minimis and nonsectarian religious content, and achieve a secular goal. Therefore, they conclude, a reasonable person would not think that the state was endorsing religion.

But would all reasonable people reach this conclusion? This Article examines the "reasonable person" at the heart of the Establishment Clause's endorsement analysis. The starting point is the feminist critique of early sexual harassment decisions, which often held that a reasonable person would not find that the alleged harassment created a hostile work environment. Feminists argued that the supposedly objective reasonable person was actually a reasonable man, that because of structural inequalities, men and women often have different perspectives on what amounts to sexual harassment, and that reliance on this unstated norm perpetuates male privilege rather than remedies it.

This Article argues that the same insights apply to the reasonable person used to evaluate ceremonial deism. The supposedly objective reasonable person too often equates to a reasonable Christian. Furthermore, just as men might find harmless comments that women would find offensive, Christians may find acceptable certain invocations of God that non-Christians would find alienating because of their status as religious outsiders. Finally, reliance on this norm perpetuates Christian privilege rather than ensures religious liberty and equality for all. Consequently, the constitutionality of ceremonial deism should be evaluated from the perspective of a reasonable religious outsider.

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INTRODUCTION

The national motto of the United States is "In God We Trust." Congress opens its sessions with a prayer by a taxpayer-funded chaplain. The Supreme Court begins its sessions with the cry, "God save the United States and this honorable Court." The president annually declares a National Day of Prayer, and presidential inaugurations invariably include prayers.

At the same time, it is unconstitutional under the Establishment Clause for the government to endorse religion.[1] Although debates swirl about how separate church and state must be under the Establishment Clause, almost no one disputes that the state cannot favor one or some religions over others.[2] To conclude otherwise would mean that the government could proclaim that Christianity or Judaism or Islam is the one true religion.

How can the religious practices described in the opening paragraph be reconciled with the Establishment Clause? Many courts and scholars argue that they should be considered examples of constitutional ceremonial deism. Ceremonial deism is defined as a longstanding religious practice—sometimes extending back to the nation's founding—with de minimis and nonsectarian religious content.[3] Any reasonable person, the argument continues, would recognize that the state is not endorsing one version of religious truth or favoring one religion over others.[4] Instead, opening invocations or "In God

1. *See infra* notes 69–79 and accompanying text.
2. *See infra* notes 25–31 and accompanying text.
3. *See infra* notes 14–19 and accompanying text.
4. *See infra* notes 74–83 and accompanying text.

We Trust" serve merely to solemnize important occasions or allow the state to recognize the role of religion in our past history and our present lives.[5]

But would all reasonable people necessarily arrive at this conclusion? In discussing whether a reasonable person would find that a state-sponsored religious display or religious statement endorses religion, commentators have debated how much knowledge the reasonable person should possess: Is the reasonable person a typical passerby, or someone aware of the history and context of the religious practice?[6] Less consideration has been given to the personal characteristics of the reasonable person in Establishment Clause challenges, and almost none to issues of power, privilege, and inequality.[7] In particular, to what, if any, religion does the reasonable person belong? What kind of status and power do members of that religion possess? Does it matter?

In contrast, there has been extensive analysis of the personal characteristics and status of the reasonable person in sexual harassment law.[8] Feminist scholars have long argued that reliance on a reasonable person standard without elaboration fails to further the equal opportunity goals of Title VII. Men and women can have different perspectives on sexual harassment, and too often the reasonable person standard has equated to what is reasonable to men. Such unreflective use of the reasonable person standard also overlooks the asymmetry in power between the sexes, and as a result reinforces rather than eliminates existing sexual inequalities. Consequently, many feminists have argued, the reasonable person in sexual harassment cases

5. *See infra* notes 41–47 and accompanying text.

6. *See infra* note 102 and accompanying text.

7. Some commentators have argued that Establishment Clause challenges should be evaluated from the point of view of religious outsiders. *See, e.g.*, Stephen M. Feldman, *Religious Minorities and the First Amendment: The History, the Doctrine, and the Future*, 6 U. PA. J. CONST. L. 222, 268 (2003); Steven G. Gey, *"Under God," the Pledge of Allegiance, and Other Constitutional Trivia*, 81 N.C. L. REV. 1865, 1918 (2003); Susan Hanley Kosse, *A Missed Opportunity to Abandon the Reasonable Observer Framework in Sacred Text Cases:* McCreary County v. ACLU of Kentucky *and* Van Orden v. Perry, 4 FIRST AMEND. L. REV. 139, 168 (2006); *cf.* Samuel J. Levine, *Toward a Religious Minority Voice: A Look at Free Exercise Law Through a Religious Minority Perspective*, 5 WM. & MARY BILL RTS. J. 153, 160–61 (1996). They generally have not, however, examined the question of Christian privilege and ceremonial deism's perpetuation of Christian privilege. *But cf.* Kenneth Karst, *The First Amendment, the Politics of Religion and the Symbols of Government*, 27 HARV. C.R.-C.L. L. REV. 503 (1992) (arguing that government endorsement of religion reinforces the dominant and subordinate position of religious groups).

8. *See, e.g.*, Naomi R. Cahn, *The Looseness of Legal Language: The Reasonable Woman Standard in Theory and in Practice*, 77 CORNELL L. REV. 1398, 1404 (1992); Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177 (1990); Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813 (1991); Caroline Forell, *Essentialism, Empathy, and the Reasonable Woman*, 1994 U. ILL. L. REV. 769, 803–14; Toni Lester, *The Reasonable Woman in Sexual Harassment—Will It Really Make a Difference?*, 26 IND. L. REV. 227 (1994); *cf.* Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1204–05 (1989); Lucinda M. Finley, *A Break in the Silence: Including Women's Issues in a Torts Course*, 1 YALE J.L. & FEMINISM 41, 56 (1989).

ought to be a reasonable person of the victim's sex—who is, in most cases, a woman.

I argue that the Establishment Clause analysis of ceremonial deism has much to learn from the feminist analysis of sexual harassment.[9] As with the reasonable person in sexual harassment law, application of the reasonable person standard in ceremonial deism cases often rests upon an unstated norm that favors the dominant group, ignores power asymmetries, and reinforces existing structural inequalities. Thus, an unconsidered use of the reasonable person in Establishment Clause analysis too often equates to the perspective of a reasonable Christian, and compared to a reasonable Christian, a reasonable Buddhist or a reasonable atheist may well have a different perspective on state invocations of God. Just as men may find harmless comments and behavior that women would find offensive in the sexual harassment context, Christians may find acceptable certain invocations of God that religious outsiders would find alienating.[10] In addition, in the same way that application of the reasonable person standard in Title VII cases without attention to power dynamics reflects and reinscribes male privilege, unconsidered application of a reasonable person standard in endorsement challenges reflects and reinforces what can be termed "Christian privilege."

This is not to say that harassment in the employment setting is equivalent to religious speech by the government. The former has little to no speech value, while the latter does.[11] Nevertheless, both can have detrimental effects. Sexual harassment tends to keep women out of traditionally male-dominated workplaces, while government endorsement of religion makes outsiders of those who do not share the preferred religion. Whether it be prayers before city council meetings,[12] or a state motto proclaiming "With God All Things Are Possible,"[13] government religious speech may inhibit the religious practices of religious outsiders or deter them from participating fully in government affairs,

9. While this Article focuses on ceremonial deism, the arguments apply equally to other state-sponsored religious exercises and displays.

10. Note, however, I do not mean to argue that all women or all men, or for that matter, all Christians and all religious outsiders, share the same perspective. *See infra* notes 145–148, 203–206 and accompanying text.

11. *But see infra* text accompanying note 202.

12. *See, e.g.*, Pelphrey v. Cobb County, 547 F.3d 1263, 1267, 1274 (11th Cir. 2008) (allowing sectarian prayers at county commission meetings); Simpson v. Chesterfield County Bd. of Supervisors, 404 F.3d 276, 278, 280, 284 (4th Cir. 2005) (allowing the town to limit prayers before board of supervisors meetings to Judeo-Christian clergy).

13. *See, e.g.*, ACLU of Ohio v. Capitol Square Review & Advisory Bd., 243 F.3d 289, 291 (6th Cir. 2001) (en banc) (holding that the state motto "With God All Things Are Possible" did not violate the Establishment Clause).

thus undermining the Establishment Clause's promise of equal freedom of conscience for all.

Part I describes ceremonial deism and the Supreme Court's reliance on a reasonable person standard in evaluating its constitutionality. Part II summarizes the feminist critique of the reasonable person standard as used in early sexual harassment cases. Part III applies the insights of the feminist critique to ceremonial deism. It concludes that just as the reasonable person in sexual harassment law must be considered from the perspective of the subordinate rather than dominant group, so too should the reasonable person in ceremonial deism be applied from the point of view of a religious outsider, namely, someone outside the Judeo-Christian religious mainstream.

I. CEREMONIAL DEISM

Ceremonial deism is a government invocation of God that the courts have found constitutional on the grounds that the practice is longstanding and its religious impact is minimal and nonsectarian.[14] Well-known examples[15] include prayers before the start of a legislative session,[16] opening invocations

14. Steven B. Epstein defines ceremonial deism as containing the following elements: prayer, appeal, or reverent reference to a general or particular deity that is sponsored by government officials, deeply rooted in the nation's history or traditions, and in and of itself neither likely to indoctrinate nor designed to lift a religious burden. Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2095 (1996). Cass Sunstein defines ceremonial deism as a noncoercive public display that refers generally to God and that involves an activity that is specifically honored by tradition. Cass R. Sunstein, *Celebrating God, Constitutionally*, 83 U. DET. MERCY L. REV. 567, 567 (2006). Note that "ceremonial deism" is a term of art and distinct from the theological definition of Deism as "the belief, claiming foundation solely upon the evidence of reason, in the existence of God as the creator of the universe who after setting it in motion abandoned it, assumed no control over life, exerted no influence on natural phenomena, and gave no supernatural revelation." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 348 (1978).

15. Epstein lists core examples as including: legislative prayers; prayer at presidential inaugurations; presidential addresses invoking God; oaths of office and use of the Bible to administer such oaths; "God save the United States and this honorable Court" ; the national motto "In God We Trust": Thanksgiving and Christmas holidays; the National Day of Prayer; the use of "In the Year of Our Lord" to date public documents; and the addition of "under God" to the Pledge of Allegiance. Epstein, *supra* note 14, at 2095. References at presidential inaugurations or in presidential addresses might not belong on the list since the speech could be considered private speech as opposed to government speech. *See, e.g.*, Van Orden v. Perry, 545 U.S. 677, 723 (2005) (Stevens, J., dissenting) ("[W]hen public officials deliver public speeches, we recognize that their words are not exclusively a transmission from the government because those oratories have embedded within them the inherently personal views of the speaker as an individual member of the polity.").

16. In Congress, a federally funded, ordained chaplain opens each legislative day. Epstein, *supra* note 14, at 2137. So far, every chaplain has been Christian. Office of the Chaplain, United States House of Representatives, History of the Chaplaincy, http://chaplain.house.gov/chaplaincy/history.html (last visited June 12, 2010); United States Senate, Senate Chaplain, http://www.senate.gov/artandhistory/

such as "God save the United States and this honorable Court,"[17] the national motto "In God We Trust,"[18] and the addition of "under God" to the Pledge of Allegiance.[19] Though the Supreme Court has ruled only on legislative prayers,[20] high court decisions have indicated the presumed constitutionality of other practices.[21]

A. The Origins of Ceremonial Deism

The Establishment Clause states that "Congress shall make no law respecting an establishment of religion."[22] It bars the state from favoring religion over nonreligion[23]—though a few justices dispute that limitation.[24]

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history/common/briefing/Senate_Chaplain.htm (last visited June 12, 2010). In fact, all but one House chaplain and one Senate chaplain have been Protestant. *Id.* In 2007, the House chaplain earned $163,800 per year and the Senate chaplain $146,600. *See* MILDRED AMER, CONG. RESEARCH SERV., HOUSE AND SENATE CHAPLAINS (2008), *available at* http://chaplain.house.gov/chaplaincy/ChaplainHistoryCRS.pdf.

17. The Supreme Court marshal's opening proclamation concludes with this phrase. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 29 (2004) (Rehnquist, C.J., concurring).

18. "In God We Trust" first appeared on certain coins during the Civil War and was on all coins by 1938. *Elk Grove*, 542 U.S. at 28 (Rehnquist, C.J., concurring). Congress adopted it as the national motto at the height of the Cold War. Act of July 30, 1956, ch. 795, 70 Stat. 732; *Elk Grove*, 542 U.S. at 28 (Rehnquist, C.J., concurring). Several state mottos also mention God, including Arizona ("God Enriches"); Colorado ("Nothing without Providence"); Connecticut ("He Who Transplanted Still Sustains"); Florida ("In God We Trust"); Ohio ("With God All Things Are Possible"); and South Dakota ("Under God the People Rule"). *Id.* at 36 n.* (O'Connor, J, concurring).

19. The Pledge of Allegiance reads: "I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all." 4 U.S.C. § 4 (2006). Congress enacted the Pledge in 1942 and added the phrase "under God" during the Cold War. Act of June 14, 1954, ch. 297, 68 Stat. 249. The explicit mention of God was meant to contrast the godly citizens of the USA with the godless communists of the USSR. *See* Epstein, *supra* note 14, at 2151–52. "As the Cold War era progressed, patriotism and religiosity often merged to form a common front against the perceived threat of atheistic Communism . . . ." Gey, *supra* note 7, at 1875.

20. Marsh v. Chambers, 463 U.S. 783 (1983).

21. *See, e.g.*, Van Orden v. Perry, 545 U.S. 677, 716 (2005) (Brennan, J., dissenting) (presuming constitutionality of "In God We Trust" and "God save the United States and this honorable Court"); Sch. Dist. of Abington Twp. v. Schemmp, 374 U.S. 203, 303–04 (1963) (suggesting that "In God We Trust" may not offend the Establishment Clause because it is so deeply woven into the fabric of our civil society, and the "reference to divinity in the revised pledge of allegiance . . . may merely recognize the historical fact that our Nation was believed to have been founded 'under God' . . . .").

22. U.S. CONST. amend. I. The Establishment Clause applies to the states through the Fourteenth Amendment. Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947).

23. *See, e.g.*, McCreary County v. ACLU of Ky., 545 U.S. 844, 860 (2005) (quoting Epperson v. Arkansas, 393 U.S. 97, 104 (1968)) ("[T]he 'First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.'").

24. Several justices believe favoring religion over nonreligion is compatible with the First Amendment. Chief Justice Rehnquist argued that the founders never expressed concern about whether the federal government might aid all religions evenhandedly. Wallace v. Jaffree, 472 U.S. 38, 99 (1985) (Rehnquist, J., dissenting). Justice Scalia has repeatedly argued that the Establishment Clause does

However, there is near unanimity among courts and commentators that the Establishment Clause forbids the government from preferring one or some religions over others.[25] Indeed, the Supreme Court has held that statutes that intentionally discriminate in favor of some religions should be subject to strict scrutiny:[26] "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."[27] To find otherwise risks the civil peace[28] and jeopardizes the religious freedom of all.[29] It especially endangers religious minorities, and one of the Establishment Clause's main goals is to protect the freedom of conscience and equality of religious outsiders,[30] including nonbelievers.[31] As Steven Epstein has observed,

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not bar the state from preferring religion over nonreligion. *See, e.g.*, *Van Orden*, 545 U.S. at 692 (Scalia, J., concurring) ("[T]here is nothing unconstitutional in a State's favoring religion generally . . . ."); *see also McCreary County*, 545 U.S. at 885 (Scalia, J., dissenting) ("[T]he Court's oft repeated assertion that the government cannot favor religious practice is false . . . .").

25. *See, e.g.*, County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 615 (1989) (Blackmun, J., dissenting) ("The simultaneous endorsement of Judaism and Christianity is no less constitutionally infirm than the endorsement of Christianity alone."); Torcaso v. Watkins, 367 U.S. 488, 495 (1961) (The state cannot "aid those religions based on a belief in an existence of God as against those religions founded on different beliefs.").

26. Larson v. Valente, 456 U.S. 228, 246 (1982) (applying strict scrutiny to a law that granted preference to some religious denominations over others).

27. *Id.* at 244; *Allegheny*, 492 U.S. at 605 ("Whatever else the Establishment Clause may mean . . . it certainly means at the very least that government may not demonstrate a preference for one particular sect or creed . . . .").

28. *McCreary County*, 545 U.S. at 876 ("The Framers and the citizens of their time intended not only to protect the integrity of individual conscience in religious matters, but to guard against the civic divisiveness that follows when the government weighs in on one side of religious debate . . . ."); Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 773 (1995) (Stevens, J., dissenting) ("Our Constitution wisely seeks to minimize such strife by forbidding state-endorsed religious activity.").

29. Lee v. Weisman, 505 U.S. 577, 589–90 (1992) ("It must not be forgotten . . . that while concern must be given to define the protection granted to an objector or dissenting nonbeliever, these same Clauses exist to protect religion from government interference."); Engel v. Vitale, 370 U.S. 421, 431 (1962) (Establishment Clause meant to prevent degradation of religion).

30. *See, e.g.*, Thomas C. Berg, *Minority Religions and the Religion Clauses*, 82 WASH. U. L.Q. 919, 923 (2004) ("[T]he protection and equal status of minority faiths and adherents is a significant purpose of religious freedom, even if not the sole or conclusive one."); Thomas B. Colby, *A Constitutional Hierarchy of Religions? Justice Scalia, the Ten Commandments, and the Future of the Establishment Clause*, 100 NW. U. L. REV. 1097, 1132–33 (2006) ("The historical evidence is overwhelming that one of the primary purposes of the First Amendment was the protection of minority religions through the guarantee that the government would treat all religions alike."); Douglas Laycock, Comment, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 243 (2004) ("Modern violations of the Establishment Clause . . . impose majoritarian religious observances on individual dissenters, and some of those dissenters experience these impositions as acute violations of their own religious liberty."); Michael W. McConnell, *Governments, Families, and Power: A Defense of Educational Choice*, 31 CONN. L. REV. 847, 851 (1999) (noting that the "Establishment Clause . . . was designed to protect religious minorities from being forced to conform to the opinions of the majority").

31. *McCreary County*, 545 U.S. at 883 (O'Connor, J., concurring) ("The Religion Clauses . . . protect adherents of all religions, as well as those who believe in no religion at all."); Van Orden v. Perry,

"The purpose of the Constitution generally, and the Establishment Clause specifically, is to protect minorities from raw majoritarian impulses."[32]

The phrase "ceremonial deism" was first coined in a 1962 lecture by Yale Law School Dean Eugene Rostow, who defined it as "a class of public activity which . . . c[ould] be accepted as so conventional and uncontroversial as to be constitutional."[33] Though the Supreme Court has relied on the concept of ceremonial deism in a number of decisions, usually as a contrast to the issue before the Court,[34] the Court has used the specific phrase in only three cases, none of which actually decided a case of ceremonial deism. In two, a challenged nativity scene was distinguished from examples of ceremonial deism.[35] The third and most recent case, *Elk Grove Unified School District v. Newdow*,[36] challenged the inclusion of "under God" in the Pledge of Allegiance. While the Court dismissed the challenge on standing grounds, several justices addressed the substantive issue and concluded that the Pledge's

545 U.S. 677, 696 (2005) (Stevens, J., dissenting) ("[T]he Establishment Clause requires the same respect for the atheist as it does for the adherent of a Christian faith. As we wrote, 'the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all.'" (quoting Wallace v. Jaffree, 472 U.S. 38, 52–53 (1985)); *Allegheny*, 492 U.S. at 590 ("Perhaps in the early days of the Republic these words were understood to protect only the diversity within Christianity, but today they are recognized as guaranteeing religious liberty and equality to 'the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism.'" (quoting *Wallace*, 472 U.S. at 52)).

32. Epstein, *supra* note 14, at 2171; *see also* Alan Brownstein, *How Rights Are Infringed: The Role of Undue Burden Analysis in Constitutional Doctrine*, 45 HASTINGS L.J. 867, 903 (1994) ("[T]he Establishment Clause protects . . . the interest of a member of a minority religion in not suffering the stigmatic consequences or implicit coercion that result from the state's endorsement of the majority faith."); Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1113, 1178–79 (1988).

33. Epstein, *supra* note 14, at 2091 (quoting Arthur E. Sutherland, Book Review, 40 IND. L.J. 83, 86 (1964)). Rostow probably meant to contrast ceremonial deism with theological deism. *Id.*

34. *Allegheny*, 492 U.S. at 602 (noting that "there is an obvious distinction between crèche displays and references to God in the motto and the pledge"); *see also* Sch. Dist. of Abington Twp. v. Schemmp, 374 U.S. 203, 303–04 (1963) (Brennan, J., concurring) (distinguishing school prayer from the national motto and Pledge of Allegiance); *cf. Van Orden*, 545 U.S. at 716 (Stevens, J., dissenting) (distinguishing "a common article of commerce ('In God we Trust') [and] an incidental part of a familiar recital ('God save the United States and this honorable Court')" from the "venerable religious text" of the Ten Commandments).

35. The first case allowed the display of a nativity scene. Lynch v. Donnelly, 465 U.S. 668, 671, 687 (1984) (finding constitutional a Christmas display that included a crèche, a Christmas tree, reindeer, Santa's sleigh, candy striped poles, cutout figures of a clown, an elephant, and a teddy bear, hundreds of colored lights, and a large banner reading "Seasons Greetings"). In dissent, Justice Brennan contrasted the crèche with ceremonial deism, which he listed as including the national motto and the Pledge of Allegiance. *Id.* at 716. In the second crèche case, the majority argued that it need not address the constitutionality of ceremonial deism because there was an obvious distinction between the crèche display and references to God in the national motto and the Pledge of Allegiance. *Allegheny*, 492 U.S. at 579, 603 (enjoining the display of a solitary crèche in a courthouse).

36. 542 U.S. 1 (2004).

reference to God was an example of constitutional ceremonial deism.[37] The one case in which the entire Court addressed an arguable instance of ceremonial deism on the merits, *Marsh v. Chambers*[38]—a decision upholding the constitutionality of legislative prayers by taxpayer-funded chaplains—never used that particular term.

B. Justifications for the Constitutionality of Ceremonial Deism

The justifications for why ceremonial deism does not violate the Establishment Clause vary. Justice Brennan suggested that religious government speech may count as ceremonial deism if it has lost through rote repetition any significant religious content.[39] "'God Save the United States and this honorable Court,' 'In God We Trust,' [and] 'One Nation Under God' . . . are consistent with the Establishment Clause not because their import is *de minimis*, but because they have lost any true religious significance."[40]

Other explanations do not deny the religious content, but argue that the reference to God does not serve as a statement of religious belief. Instead, God may be mentioned to acknowledge the importance of religion in our nation's past and present.[41] The Supreme Court has noted more than once that all three branches of government have officially acknowledged the role of religion in American life.[42] For example, many view "under God" in the Pledge of Allegiance as a reference to the religious roots of our nation rather than an affirmation of belief in God.[43] Likewise, in rejecting a challenge to the national

37. *Id.* at 18 (Rehnquist, C.J., concurring); *id.* at 37 (O'Connor, J., concurring).

38. 463 U.S. 783 (1983).

39. *Lynch*, 465 U.S. at 716 (Brennan, J., dissenting) ("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 to the flag can best be understood, in Dean Rostow's apt phrase, as a form of 'ceremonial deism' protected from Establishment Clause scrutiny chiefly because they have lost through rote repetition any significant religious content.").

40. *Marsh*, 463 U.S. at 818 (Brennan, J., dissenting).

41. *Elk Grove*, 542 U.S. at 35 (O'Connor, J., concurring) ("One such purpose is to commemorate the role of religion in our history. In my view, some references to religion in public life and government are the inevitable consequence of our Nation's origins."); *see* Epstein, *supra* note 14, at 2160 (noting that one justification for ceremonial deism is that it merely recognizes the role religion plays and has played in our history).

42. *Lynch*, 465 U.S. at 674 ("There is an unbroken history of official acknowledgement by all three branches of government of the role of religion in American life from at least 1789."); *see also* Van Orden v. Perry, 545 U.S. 677, 711 (2005) (same); Edwards v. Aguillard, 482 U.S. 578, 606 (1987) (Powell, J., concurring) (same).

43. McCreary County v. ACLU of Ky., 545 U.S. 844, 906 (2005) (Scalia, J., dissenting) ("Acknowledgment of the contribution that religion has made to our Nation's legal and governmental heritage partakes of a centuries-old tradition."). The Ninth Circuit made a slightly different claim recently, arguing that "under God" in the Pledge "is a recognition of our Founders' political philosophy

motto "In God We Trust," the Tenth Circuit held that the "motto symbolizes the historical role of religion in our society."[44]

Alternatively, God may be invoked for the secular purpose of "solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society."[45] Thus, praying at the start of a legislative session or proclaiming "God save the United States and this honorable Court" before judicial proceedings is meant to solemnize the coming proceedings, not worship God. By the same token, the mention of God in the Pledge of Allegiance is meant to intensify the patriotic exercise. "Reciting the Pledge, or listening to others recite it, is a patriotic exercise, not a religious one; participants promise fidelity to our flag and our Nation, not to any particular God, faith, or church."[46] As Justice O'Connor put it, "although these references speak in the language of religious belief, they are more properly understood as employing the idiom for essentially secular purposes."[47]

Others argue that practices qualify as ceremonial deism when they have been around for so long—often since the nation's founding—and are so widespread that they have become an acceptable part of the fabric of our society.[48] "Our history is replete with official references to the value and

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that a power greater than the government gives the people their inalienable rights. Thus the Pledge is an endorsement of our form of government, not of religion or any particular sect." Newdow v. Rio Linda Union Sch. Dist., 597 F.3d 1007, 1037 (9th Cir. 2010).

44. Gaylor v. United States, 74 F.3d 214, 216 (10th Cir. 1996).

45. *Lynch*, 465 U.S. at 693 (O'Connor, J., concurring); *see also id.* at 717 (Brennan, J., dissenting) ("[T]hese references are uniquely suited to serve such wholly secular purposes as solemnizing public occasions, or inspiring commitment to meet some national challenge . . . ."); ACLU of Ohio v. Capitol Square Review & Advisory Bd., 243 F.3d 289, 291, 307 (6th Cir. 2001) (explaining that the Ohio state motto, "With God All Things Are Possible," "serves a secular purpose in boosting morale, instilling confidence and optimism, and exhorting the listener or reader not to give up and to continue to strive").

46. *Elk Grove*, 542 U.S. at 31 (Rehnquist, C.J., concurring); *Newdow v. Rio Linda*, 597 F.3d at 1018–19 (recitation of the Pledge is a patriotic exercise "designed to evoke feelings of patriotism, pride, and love of country, not of divine fulfillment or spiritual enlightenment"); *see also* Myers v. Loudoun County Pub. Schs., 418 F.3d 395, 407 (4th Cir. 2005). Similarly, use of the national motto "In God We Trust" has been described as of a "ceremonial or patriotic character." Aronow v. United States, 432 F.2d 242, 243 (9th Cir. 1970) ("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 government sponsorship of a religious exercise."); Newdow v. Lefevre, 598 F.3d 638, 644 (9th Cir. 2010) (same); N.C. Civil Liberties Union Legal Found. v. Constangy, 947 F.2d 1145, 1151 (4th Cir. 1991) (holding that "In God We Trust" used as national motto or on coins is a patriotic and ceremonial motto).

47. *Elk Grove*, 542 U.S. at 35 (O'Connnor, J., concurring).

48. County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 595 n.46 (1989) (noting that in *Marsh v. Chambers*, 463 U.S. 783 (1983), "the Court sustained the practice of legislative prayer based on its unique history"); *see also* Epstein, *supra* note 14, at 2169 (explaining that another justification for ceremonial deism is that Americans overwhelmingly accept the practices).

invocation of Divine guidance."[49] Originalists[50] also insist that if the framers thought the practice was constitutional, so should we:[51] "[I]t would be incongruous to interpret [the Establishment Clause] as imposing more stringent First Amendment limits . . . than the drafters imposed . . . ."[52]

A final ground that has been cited to support the constitutionality of ceremonial deism is the lack of complaints. In discussing the inclusion of "God" in the Pledge of Allegiance, Justice O'Connor emphasized that the practice has been pervasive for years without engendering significant controversy.[53] The assumption is that because Americans have never been "timid nor unimaginative"[54] in raising Establishment Clause challenges, the practice must not have bothered anyone to remain unchallenged for so long.[55]

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49. Van Orden v. Perry, 545 U.S. 677, 688 n.7 (2005) (plurality opinion) (quoting *Lynch*, 465 U.S. at 675).

50. Originalists believe that constitutional interpretation should be based on how the original framers or polity interpreted a clause. Thus, if the Establishment Clause was originally understood to allow a particular practice, then that is what the Establishment Clause allows today. *See, e.g.*, Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 662 (2009) (noting that the term originalism applies to both original intent theory and original understanding theory); *see generally* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997). A comprehensive critique of originalism is beyond the scope of this Article. One relevant flaw, however, is that the indeterminacy of history makes it difficult to discern what the original understanding really was. In *District of Columbia v. Heller*, 128 S. Ct. 2783, 2789–2804, 2824–38 (2008), for example, both the majority and the dissent apply an originalist analysis yet come to opposite conclusions; *see also* DANIEL A. FARBER & SUZANNA SHERRY, DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS *passim* (2002); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 *passim* (1980); Suzanna Sherry, *The Indeterminacy of Historical Evidence*, 19 HARV. J.L. & PUB. POL'Y 437 *passim* (1996).

51. *See, e.g.*, *Marsh*, 463 U.S. at 790 (noting that "historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized"); *cf.* Michael W. McConnell, *On Reading the Constitution*, 73 CORNELL L. REV. 359, 362 (1988) (stating that *Marsh* "is based squarely and exclusively on the historical fact that the framers of the first amendment did not believe legislative chaplains to violate the establishment clause").

52. *Van Orden*, 545 U.S. at 688 (plurality opinion) (quoting *Marsh*, 463 U.S. at 790–91).

53. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 38 (2004) (O'Connor, J., concurring). The lack of complaints was also mentioned in *Lynch v. Donnelly* and was the deciding factor in Justice Breyer's controlling concurrence in *Van Orden v. Perry*. *Lynch*, 465 U.S. at 684 ("[A]part from this litigation, there is no evidence of political friction or divisiveness over the crèche in the 40-year history of Pawtucket's Christmas celebration."); *Van Orden*, 545 U.S. at 702 (Breyer, J., concurring) (describing as "determinative" the fact that no one had complained about the challenged Ten Commandments monument for forty years). The *Van Orden* plurality also noted that "Van Orden, the petitioner here, apparently walked by the monument for a number of years before bringing this lawsuit." *Id.* at 691.

54. *Elk Grove*, 542 U.S. at 39 (O'Connor, J., concurring).

55. *Id.* ("Given the vigor and creativity of such challenges, I find it telling that so little ire has been directed at the Pledge."); *see also Van Orden*, 545 U.S. at 702 (2005) (Breyer, J., concurring) (noting that for forty years no one complained about the challenged Decalogue monument and that there was no "evidence suggesting that this was due to a climate of intimidation").

Usually, these often overlapping justifications appear in some combination. Shades of several can be found in *Marsh v. Chambers*,[56] which upheld legislative prayers.[57] Using taxpayer dollars, the state of Nebraska hired a chaplain to open each session of the Nebraska legislature with a prayer.[58] The lower courts found that this practice violated the Establishment Clause,[59] a finding that the Supreme Court reversed. The majority downplayed the religious component of the legislative prayers by characterizing them as "simply a tolerable acknowledgement of beliefs widely held among the people of this country."[60] Pivotal for the Court was the fact that the practice of opening a legislative session with prayer has existed since the nation's founding: "The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country."[61] In particular, the Court emphasized that three days after Congress authorized the appointment of paid chaplains, it approved the Bill of Rights.[62] Based upon this history, the *Marsh* Court concluded that "[c]learly the men who wrote the First Amendment Religion Clauses did not view paid legislative chaplains and opening prayers as a violation of that amendment."[63]

C. The Reasonable Person Query in Establishment Clause Jurisprudence

Recent Supreme Court jurisprudence has relied on a bewildering selection of standards in Establishment Clause cases,[64] including the *Lemon* test,[65]

56. 463 U.S. 783 (1983).

57. *Id.* at 786.

58. *Id.* at 784–85. The same Presbyterian minister had served as chaplain for sixteen years. *Id.* at 785.

59. The district court held that paying for the chaplain from public funds violated the Establishment Clause, while the Eighth Circuit Court of Appeals held that the chaplaincy practice itself was unconstitutional. *Id.* at 785–86.

60. *Id.* at 792.

61. *Id.* at 786; *see also id.* at 788 ("[T]he practice of opening sessions with prayer has continued without interruption ever since that early session of Congress.").

62. *Id.* at 788.

63. *Id.*; *see also id.* at 790 ("It can hardly be thought that in the same week Members of the First Congress voted to appoint and pay a chaplain for each House and also voted to approve the draft of the First Amendment for submission to the States, they intended the Establishment Clause of the Amendment to forbid what they had just declared acceptable.").

64. The list is not necessarily exhaustive. Steven Gey, for example, lists six possible tests without even including the *Marsh* analysis. *See* Gey, *supra* note 7, at 1883, 1883 n.67. Further, the Supreme Court at times appears to use no discernable test. For example, in his controlling concurrence in *Van Orden v. Perry*, Justice Breyer rejected the existing tests and instead wrote he was relying on his legal judgment. 545 U.S. 677, 700 (2005) ("I see no test-related substitute for the exercise of legal judgment."). However, the three primary Establishment Clause tests are the *Lemon* test, the coercion test, and the endorsement test. In *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 302, 304, 314 (2000), for example, the Supreme Court applied all three.

the coercion test,[66] the endorsement test,[67] and the historical analysis of *Marsh*.[68] Other than the *Marsh* historical approach, the primary test for Establishment Clause challenges to the government's use of religious practices, symbols, or language is the endorsement query.[69] This asks whether a reasonable person would believe that the government is, through its conduct or expression, endorsing religion.[70] The test debuted in a concurrence by Justice O'Connor in 1984.[71] Justice O'Connor argued that the essential command of the Establishment Clause is that "government must not make a person's religious beliefs relevant to his or her standing in the political community by conveying a message that religion or a particular religious belief is favored or preferred."[72] Such state endorsement of religion "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."[73]

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65. The *Lemon* inquiry asks three questions: Was the government's purpose to advance religion; was the primary or principal effect to advance religion; and does the practice foster an excessive entanglement between church and state? Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).

66. The coercion test asks whether the government forced someone to participate in a religious activity. *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 587 (1992). The coercion test has never been approved by a majority of the Court. *See* County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 597 n.47 (1989) (explicitly rejecting coercion as a necessary rather than sufficient factor for an Establishment Clause violation).

67. The endorsement test is arguably a reformulation of *Lemon* and analyzes *Lemon*'s purpose and effects prongs in terms of endorsement. *See* Agostini v. Felton, 521 U.S. 203, 233 (1997).

68. *See supra* notes 61–63 and accompanying text (discussing *Marsh v. Chambers*).

69. Note that the endorsement approach is the primary approach for evaluating all religious practices and displays, including those that would never qualify as ceremonial deism, such as sectarian prayers or displays. Consequently, the argument of this Article is not limited to ceremonial deism.

70. Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 773 (1995) (O'Connor, J., concurring) ("[T]he endorsement test necessarily focuses upon the perception of a reasonable, informed observer."); *Allegheny*, 492 U.S. at 620 ("[T]he constitutionality of its effect must . . . be judged according to the standard of a 'reasonable observer.'").

71. Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring).

72. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 34 (2004) (quoting *Allegheny*, 492 U.S. at 627) (O'Connor, J., concurring in part and concurring in judgment); *see also Allegheny*, 492 U.S. at 594 ("[T]he Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from making adherence to a religion relevant in any way to a person's standing in the political community.") (quotations omitted); *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring).

73. *Elk Grove*, 542 U.S. at 34 (quoting *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring)) (O'Connor, J., concurring); *see also* McCreary County v. ACLU of Ky., 545 U.S. 844, 860 (2005); Santa Fe Indep. Sch. Dist v. Doe, 530 U.S. 290, 309–10 (2000); *Allegheny*, 492 U.S. at 595; JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (William T. Hutchinson ed., Univ. of Chicago Press 1962–77) (1785) ("[Establishment] degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority.").

The "endorsement test . . . assumes the viewpoint of a reasonable observer."[74] In its original formulation, the endorsement test asked whether a reasonable person would conclude that the government was endorsing religion.[75] Justice O'Connor later refined the test, adding that the reasonable person was an informed observer, specifically, one aware of the text, legislative history, context, and implementation of the challenged statute or activity.[76] In defining the reasonable person, Justice O'Connor explicitly drew from tort law, stating that "the applicable observer is similar to the 'reasonable person' in tort law, who is not to be identified with any ordinary individual . . . but is rather a personification of a community ideal of reasonable behavior, determined by the collective social judgment."[77] Justice O'Connor rejected a subjective approach to the query, arguing that "[g]iven the dizzying religious heterogeneity of our Nation, adopting a subjective approach would reduce the test to an absurdity."[78] Instead, the reasonable observer "must embody a community ideal of social judgment, as well as rational judgment."[79]

In her *Elk Grove* concurrence, Justice O'Connor attempted to formulate an endorsement test specifically applicable to ceremonial deism. A religious reference or practice would qualify as ceremonial deism if a reasonable person found that it possessed the following four factors: a long history and ubiquity;[80] the absence of worship or prayer;[81] the absence of reference to a particular religion;[82] and minimal religious content.[83]

According to Justice O'Connor, there exists a discrete category of cases where the government may refer to the divine without offending the

74. *Elk Grove*, 542 U.S. at 34 (O'Connor, J., concurring); *see also Pinette*, 515 U.S. at 773 (O'Connor, J, concurring) ("[T]he endorsement test necessarily focuses upon the perception of a reasonable, informed observer.").

75. *Allegheny*, 492 U.S. at 630 (O'Connor, J., concurring).

76. *McCreary County*, 545 U.S. at 866 (internal quotations omitted); *see also Elk Grove*, 542 U.S. at 35 (O'Connor, J., concurring) ("[T]he reasonable observer must be deemed aware of the history of the conduct in question and must understand its place in our Nation's cultural landscape"); *Pinette*, 515 U.S. at 780 (O'Connor, J, concurring) ("[T]he reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious display appears.").

77. *Pinette*, 515 U.S. at 779–80 (O'Connor, J, concurring) (quoting from W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, PROSSER AND KEETON ON LAW OF TORTS 175 (5th ed. 1984)).

78. *Elk Grove*, 542 U.S. at 34–35 (O'Connor, J., concurring). Justice O'Connor argues that to hold otherwise risks creating a heckler's veto. *Id.* at 35.

79. *Id.* at 35 (O'Connor, J., concurring).

80. *Id.* at 37. The first factor requires that the challenged practice have been in place "for a significant portion of the Nation's history" and have been "observed by enough persons that it can fairly be called ubiquitous." *Id.*

81. *Id.* at 39.

82. *Id.* at 42.

83. *Id.*

Constitution, including the national motto and the Supreme Court marshal's opening words.[84] A reasonable observer, fully aware of our national history and the origins of such practices, "would not perceive these acknowledgments as signifying a government endorsement of any specific religion, or even of religion over nonreligion."[85] Applying this reasoning to "under God" in the Pledge, Justice O'Connor argued that the phrase does not run afoul of the Establishment Clause because there is "a shared understanding of its legitimate nonreligious purposes."[86]

Chief Justice Rehnquist's *Elk Grove* concurrence upholding the Pledge did not adopt Justice O'Connor's test and instead relied heavily on history,[87] much as *Marsh* did.[88] Nonetheless, many of his conclusions mirrored hers:[89] He reasoned that the Pledge is not a religious exercise;[90] "[e]xamples of patriotic invocations of God and official acknowledgments of religion's role in our Nation's history abound";[91] and "our national culture allows public recognition of our Nation's religious history and character."[92] Moreover, Justice Rehnquist in *Elk Grove* used the language of endorsement, insisting that "under God" is "in no sense . . . an endorsement of any religion."[93]

While the *Marsh* history and tradition–focused approach does not explicitly invoke the reasonable person as the endorsement analysis does,[94] it too can be seen as ultimately assuming a reasonable person. To start, as revealed in Justice Rehnquist's *Elk Grove* language, the concept of endorsement has penetrated even this approach. In addition, Justice Rehnquist's conclusion that the Pledge is a constitutional patriotic exercise depends on choosing one particular

84. *Id.* at 37.
85. *Id.* at 36.
86. *Id.* at 37.
87. The bulk of Justice Rehnquist's argument on the merits describes invocations of God from our nation's history. *See Elk Grove*, 542 U.S. at 26–30 (Rehnquist, C.J., concurring) (detailing mentions of God in inaugural prayers, Thanksgiving proclamations, the national motto, the Supreme Court marshal's opening proclamation, and the national anthem).
88. *Marsh* is notable for upholding legislative prayers based on history and tradition rather than satisfaction of any of the existing Establishment Clause tests. Justice Brennan complained that any law student applying the *Lemon* test would find that legislative prayers were unconstitutional. Marsh v. Chambers, 463 U.S. 783, 800–01 (1983) (Brennan, J., dissenting).
89. In fact, Justice O'Connor joined his concurrence. *See Elk Grove*, 542 U.S. at 18 (Rehnquist, C.J., concurring). Justice Scalia had recused himself. *See id.* at 1.
90. *Elk Grove*, 542 U.S. at 31 (Rehnquist, C.J., concurring) (finding that reciting the Pledge, or listening to others recite it, is a patriotic exercise, not a religious one).
91. *Id.* at 26 (Rehnquist, C.J., concurring).
92. *Id.* at 30.
93. *Id.* at 31.
94. *See id.* at 37–38, 40, 42, 43 (O'Connor, J., concurring) (invoking the reasonable person in discussing her proposed four-factor test).

understanding of "under God" over others.[95] According to Justice Rehnquist, "under God" is merely a descriptive phrase[96] that acknowledges religion's role in our history and culture.[97] But that is an interpretive choice, since the words "under God," as Justice Rehnquist himself recognizes, could easily be understood as religious and meaning that God has guided the destiny of the United States, or that the United States exists under God's authority.[98] Which interpretation should control? Justice Rehnquist essentially argues that someone aware of our nation's history, which is replete with state invocations to God (and Justice Rehnquist spends most of his opinion listing them), would choose the interpretation that "allows public recognition of our Nation's religious history and character."[99] In other words, a reasonable, informed person would find the Pledge constitutional.[100]

Courts and commentators have debated the extent of knowledge the reasonable person should possess in Establishment Clause challenges. In *Capitol Square Review and Advisory Board v. Pinette*,[101] for example, Justice O'Connor argued that the reasonable person is an observer who is aware of the history and context of the display, while Justice Stevens argued that this hypothetical person is merely a reasonable passerby.[102] Fewer, however, have discussed the

95. *See generally* Timothy Zick, *Cross Burning, Cockfighting, and Symbolic Meaning: Towards a First Amendment Ethnography*, 45 WM. & MARY L. REV. 2261 (2004).

96. *Elk Grove*, 542 U.S. at 32 (Rehnquist, C.J., concurring) (The recital . . . of the descriptive phrase 'under God' cannot possibly lead to the establishment of a religion."); *see also id.* at 33 ("[T]he Pledge of Allegiance contains the descriptive phrase 'under God.'").

97. *Id.* at 26, 30, 31, 32.

98. *See id.* at 26.

99. *Id.* at 30.

100. Even if the constitutional question is framed differently, government religious displays and practices are still going to involve a text with multiple possible meanings, and courts are still going to have to decide which interpretation will control the constitutional analysis. In short, even if the Supreme Court abandons the endorsement test and its reasonable person standard, courts will still have to pick among competing interpretations.

101. 515 U.S. 753 (1995).

102. *See id.* at 779 (O'Connor, J, concurring) ("In my view, proper application of the endorsement test requires that the reasonable person be deemed more informed than the casual passerby postulated by Justice Stevens."); *see also id.* at 780 (O'Connor, J., concurring) (stating that "the reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious display appears" and that "the knowledge attributed to the reasonable observer [cannot] be limited to the information gleaned simply from viewing the challenged display"); *id.* at 808 n.14 (Stevens, J., dissenting); Kristi Bowman, *Seeing Government Purpose Through the Objective Observer's Eyes*, 29 HARV. J.L. & PUB. POL'Y 417, 476 (2006) (noting that "after *McCreary County* . . . what the reasonable observer is presumed to know becomes even more important in an Establishment Clause case"); Kent Greenawalt, *Quo Vadis: The Status and Prospects of "Tests" Under the Religion Clauses*, 1995 SUP. CT. REV. 323, 372–74 (noting that most actual reasonable people will not know the history of the community and forum to the degree Justice O'Connor assumes for the reasonable person, and that the reasonable person should have only an ordinary amount of knowledge of the law and history of symbols in public

importance of who the reasonable person is, and how her status within existing power structures might influence her perception of endorsement.[103] In fact, courts regularly make several unstated assumptions about the identity and status of the reasonable person in the Establishment Clause context.[104] Because similar problems in sex discrimination jurisprudence have been extensively dissected, it is to that topic that I now turn.

II. THE REASONABLE PERSON IN HOSTILE WORK ENVIRONMENT CLAIMS

When sexual harassment was first recognized as a form of sex discrimination, courts often rejected claims that the harassment created a hostile work environment on the ground that no reasonable person would find it so. According to these early decisions, the plaintiff was simply difficult or oversensitive. Feminist critics quickly observed that the courts were relying upon a reasonable person standard that was actually a reasonable man standard, and that because of power asymmetries, men and women may have very different perspectives on what amounts to a hostile work environment. Courts that applied this view were therefore entrenching longstanding inequalities rather than achieving the Civil Rights Act's[105] goal of equal opportunity in the workplace. To ameliorate this problem, critics argued that claims should be evaluated from the perspective of those the law was trying to help.

A. Early Sexual Harassment Law

While Title VII of the Civil Rights Act of 1964 had always forbidden sex discrimination in the workplace, the Supreme Court did not recognize that sexual harassment was a form of sex discrimination until 1986.[106] In *Meritor Savings Bank v. Vinson*,[107] the Court held that when harassment creates a hostile and abusive work environment, Title VII has been violated.[108] A few years after *Vinson*, the Court adopted a reasonable person standard to determine

places); Kirsten K. Wendela, *Context Is in the Eye of the Beholder: Establishment Clause Violations and the More-Than-Reasonable Person*, 80 CHI.-KENT L. REV. 981, 996 (2005) (same).

103. Scholars have argued that the reasonable person should belong to a religious minority, but few have delved deeper to discuss unstated norms and Christian privilege. *See supra* note 7.

104. *See infra* Part III.B.

105. Pub. L. 88-352, 78 Stat. 241 (Title VII codified as amended at 42 U.S.C. § 2000e to 2000e-17 (2006)).

106. Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986).

107. *Id.*

108. *Id.* at 66 ("[A] plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment.").

whether the harassment rose to a level necessary to create a hostile work environment.[109] In *Harris v. Forklift Systems, Inc.*,[110] the Court held that the plaintiff must show that the alleged conduct is "severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive."[111]

In early sexual harassment cases, lower courts routinely held that a reasonable person would not find that the harassment was severe or pervasive enough to violate Title VII. The Sixth Circuit's decision in *Rabidue v. Osceola Refining Co.*[112] provides a typical example. Vivienne Rabidue, a credit manager at a petrochemical company, alleged that sexually explicit images, sexually harassing language, and antagonistic treatment collectively created a hostile work environment. The Sixth Circuit rejected her claim, asserting that while humor can be "rough hewn and vulgar"[113] in some workplaces, and that "sexual jokes, sexual conversations, and girlie magazines may abound,"[114] that does not mean they are illegal or that Title VII was meant to change those facts of life at some workplaces.[115] The court insisted that Title VII was not "designed to bring about a magical transformation in the social mores of American workers."[116] As for the specific incidents, the majority found that one coworker's use of obscenities was "annoying,"[117] and that the sexually oriented posters "had a de minimis effect on the plaintiff's workplace environment"[118] given that "society . . . condones and publicly features and commercially exploits open displays of written and pictorial erotica."[119]

The dissent painted a more complete picture. The "vulgar" coworker routinely referred to women as "whores," "cunts," "pussies," and "tits."[120] This same coworker called plaintiff a "fat ass" and remarked, "all that bitch needs is a good

109. There is not one single kind of sexual harassment. It can be sexualized, such as unwanted sexual advances or sexually explicit pornography in the workspace. But sexual harassment can be hostile as well, much like the harassment in racial harassment or religious harassment. *See* Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1687 (1998) (explaining that examples of harassment include disparaging women's abilities, withholding training or information, deliberate work sabotage, assigning women sex-stereotyped tasks outside their job description, and nonsexual taunts and "pranks").

110. 510 U.S. 17 (1993).

111. *Id.* at 21.

112. *See* 805 F.2d 611 (6th Cir. 1986).

113. *Id.* at 620.

114. *Id.* at 620–21.

115. *Id.*

116. *Id.* at 621.

117. *Id.* at 622.

118. *Id.*

119. *Id.*

120. *Id.* at 624 (Keith, J., concurring in part and dissenting in part).

lay." Despite repeated complaints, he was not fired or reprimanded.[121] The "sexually oriented" poster depicted a naked woman with a golf ball on her breasts lying underneath a man swinging a golf club.[122] Furthermore, second-class treatment was the order of the day for Rabidue, the sole woman in management. For example, unlike her male colleagues, she did not receive free lunches, free gasoline, a telephone credit card, or entertainment privileges.[123] Nonetheless, the majority held that a reasonable person would not find that this created an abusive working environment.[124]

B. Different Perspectives

It was not long before feminist scholars began deconstructing sexual harassment decisions. Their first insight was that men and women frequently have different perceptions of what constitutes harassment. Anita Hill's claims of sexual harassment during Clarence Thomas's confirmation hearing brought this difference to the fore.[125] Polls revealed a definite gender divide in judging her allegations.[126] Studies confirm that men are regularly less likely to perceive sexual harassment[127] and more likely to feel that the problem of sexual harassment is greatly exaggerated.[128]

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121. *Id.* Instead, he was "given a little fatherly advice" about his prospects if he learned to become "an executive type person." *Id.*

122. *Id.*

123. *Id.*

124. *See id.* at 620 (majority opinion). The Sixth Circuit actually required that actionable sexual harassment must create a hostile environment that "affected seriously the psychological well-being of the plaintiff." *Id.* at 619. This standard was overruled by *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 22 (1993), which held that an environment need not cause psychological injury in order to be illegal.

125. *See* Cahn, *supra* note 8, at 1401 n.50 (arguing that Anita Hill's case demonstrated that many men just did not "get it"); Forell, *supra* note 8, at 780–81 (noting that many senators who heard Hill's allegation thought that even assuming she were telling the truth, what happened to her did not amount to illegal harassment).

126. *See, e.g.*, Eloise Salholz, *Did America 'Get It'?*, NEWSWEEK, Dec. 28, 1992, *available at* http://www.newsweek.com/1992/12/27/did-america-get-it.html (finding that 27 percent of men and 51 percent of women think Clarence Thomas harassed Anita Hill); *Polls Show Support for Thomas*, TIMES DAILY, Oct. 15, 1991, at 8A, *available at* http://news.google.com/newspapers?nid=1842&dat=19911015&id=Wk8eAAAAIBAJ&sjid=WccEAAAAIBAJ&pg=2748,2071360 (citing an ABC-Washington Post Poll that found that 33 percent of men and 41 percent of women believe Anita Hill more than Clarence Thomas).

127. Debbie S. Dougherty, *Gendered Constructions of Power During Discourse About Sexual Harassment: Negotiating Competing Meanings*, 54 SEX ROLES 495, 505 (2006) ("[T]here is a consistent discrepancy between the amount and types of behaviors that men and women label sexual harassment."); Brenda L. Russell & Kristin Y. Trigg, *Tolerance of Sexual Harassment: An Examination of Gender Differences, Ambivalent Sexism, Social Dominance, and Gender Roles*, 50 SEX ROLES 565, 571–72 (2004) (finding women less tolerant than men of sexual harassment). The gap is greatest when the ambiguity is greatest, that is, when the observations are vague or unclear or where the parties' stories differ. Eleanor H. Blakely et al., *The Relationship Between Gender, Personal Experience, and Perceptions*

What explains the difference in perspective? It is not because men and women are inherently different. Rather, it is because they are differently situated, with men generally in the more favorable position. The asymmetry in power between men and women tends to lead to very different life experiences.[129] For example, women are much more at risk of sexual assault than men,[130] and sex-related violence is an ever-present menace.[131] As a result, sexual conduct that may seem like harmless fun or even flattering to men can seem like a threat of violence to women.[132]

The power asymmetry extends into the workplace, especially in workplaces that have traditionally been male-dominated.[133] Having to overcome stereotypes about their abilities, women must constantly prove themselves.[134]

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of Sexual Harassment in the Workplace, 8 EMP. RTS. & EMP. POL'Y J. 263, 272 (1995) (During "situations that were . . . ambiguous, females tended to rate them as more sexually harassing than did males."); Maria Rotundo, Dung-Hanh Nguyen, & Paul R. Sackett, *A Meta-Analytic Review of Gender Differences in Perceptions of Sexual Harassment*, 86 J. APPLIED PSYCHOL. 914, 919–20 (2001) (finding that "women are more likely than men to define a broader range of behaviors as harassing" and "the gender difference was larger for the less extreme and more ambiguous behaviors").

128. Lester, *supra* note 8, at 227 n.2 (citing OFFICE OF MERIT SYS. REVIEW AND STUDIES, U.S. MERIT SYS. PROT. BD., SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: IS IT A PROBLEM? 31 (1981) (finding that 44 percent of men and 23 percent of women thought that the problem of sexual harassment was greatly exaggerated)).

129. Nicole Newman, *The Reasonable Woman: Has She Made a Difference?*, 27 B.C. THIRD WORLD L.J. 529, 541–42 (2007).

130. One out of every six American women has been the victim of an attempted or completed rape in her lifetime (14.8 percent completed rape; 2.8 percent attempted rape). PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN 14 (2000), *available at* http://www.ncjrs.gov/pdffiles1/nij/183781.pdf. Another government study estimated that between one-fifth and one-fourth of women are victims of a completed or attempted rape over the course of their college career. *See* BONNIE S. FISHER, FRANCIS T. CULLEN & MICHAEL G. TURNER, U.S. DEP'T OF JUSTICE, THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN 10 (2000), *available at* http://www.ncjrs.gov/pdffiles1/nij/182369.pdf.

131. Leslie M. Kerns, *A Feminist Perspective: Why Feminists Should Give the Reasonable Woman Standard Another Chance*, 10 COLUM. J. GENDER & L. 195, 215 (2001).

132. *Id.* at 216–17.

133. *See* Abrams, *supra* note 8, at 1204.

134. *See* Madeline E. Heilman, *Description and Prescription: How Gender Stereotypes Prevent Women's Ascent Up the Organization Ladder*, 57 J. SOC. ISSUES 657, 662 (2001) (explaining that even when men and women produce identical work product, the women's work is often regarded as inferior and that identical behavior is also interpreted differently depending on the sex of the actor); JoAnn Miller & Marilyn Chamberlin, *Women Are Teachers, Men Are Professors: A Study of Student Perceptions*, 28 TEACHING SOC. 283, 283 (2000) ("[S]tudents misattribute in an upward direction the level of education actually attained by male graduate student instructors, while they misattribute in a downward direction the level of formal education attained by women."); Cecilia L. Ridgeway, *Gender, Status, and Leadership*, 57 J. SOC. ISSUES 637 (2001) (finding that men but not women benefit from an assumption of competence); Ryan A. Smith, *Do the Determinants of Promotion Differ for White Men Versus Women and Minorities?: An Exploration of Intersectionalism Through Sponsored and Contest Mobility Processes*, 48 AM. BEHAV. SCIENTIST 1157, 1157 (2005) ("[R]elative to white men, black women and Latinas must have more prior job-specific experience and more overall work experience before receiving a promotion.").

Consequently, remarks and acts that challenge or undermine their competency leave more of an impact.[135] Likewise, comments and conduct that reduce women to sex objects make establishing their professional credentials that much more difficult.[136]

There is also a relationship between sexual harassment and the degree to which a workplace is male-dominated. One of the most striking features about employment in the United States is the extent to which it is segregated by sex, with men in the higher-status and higher-paying jobs.[137] On average, women in traditionally male-dominated fields experience more sexual harassment than women in other fields.[138] As Vicki Schultz argues, relentless hostility discourages women from coming into,[139] or chases women out of, traditionally male occupations.[140] In addition, sexualized harassment serves as a means of undercutting women's competency[141] by making their sexuality—rather than their professional abilities—their most salient characteristic.[142] In short, sexual

135. Martha Chamallas, Essay, *Writing About Sexual Harassment: A Guide to the Literature*, 4 UCLA WOMEN'S L.J. 37, 49–50 (1993) (explaining that women have a different perspective than men because of their outsider status in the workplace); Abrams, *supra* note 8, at 1204–05 ("[M]any women view their position in the workplace as marginal or precarious. They are likely to construe disturbing personal interactions, stereotypical views of women, or other affronts to their competence as workers as serious judgments about their ability to succeed in the work environment.").

136. Abrams, *supra* note 8, at 1208 ("A woman struggling to establish her credibility in a setting in which she may not be . . . welcome[ ] can be swept off balance by a reminder that she can be raped, fondled, or subjected to repeated sexual demands."); *see also infra* notes 141–142 and accompanying text.

137. Schultz, *supra* note 109, at 1756–57; *see also* Judith A. Levine, *It's a Man's Job, or so They Say: The Maintenance of Sex Segregation in a Manufacturing Plant*, 50 SOC. Q. 257, 257 (2009); Barbara Reskin, *Sex Segregation in the Workplace*, 19 ANN. REV. SOC. 241, 241 (1993) (noting that "most workers remain in sex segregated jobs"). For example, most secretaries (96.1 percent), childcare workers (95.6 percent), receptionists (93.6 percent), registered nurses (91.7 percent), and grade school teachers (81.2 percent) are women. U.S. Dept of Labor, Bureau of Labor Statistics, Twenty Leading Occupations of Employed Women (2008), http://www.dol.gov/wb/factsheets/20lead2008.htm. In contrast, very few electricians (1.0 percent), plumbers (1.4 percent), aircraft pilots (4 percent), firefighters (4.8 percent), carpenters (6.5 percent), mechanical engineers (6.7 percent), or chefs (17 percent) are women. U.S. Dep't of Labor, Women's Bureau, Nontraditional Occupations for Women in 2008 (April 2009), http://www.dol.gov/wb/factsheets/nontra2008.htm.

138. Stacy De Coster, Sara Beth Estes & Charles W. Mueller, *Routine Activities and Sexual Harassment in the Workplace*, 26 WORK & OCCUPATIONS 21, 29, 38, 39 (1999) (concluding that women who are most threatening to male privilege are more likely to be harassed, i.e., women in male-dominated occupations and women with greater tenure and education are more likely to be harassed than women in female-dominated occupations or women with less tenure or less education); Schultz, *supra* note 109, at 1759; *see also* Barbara A. Gutek & Maureen O'Connor, *The Empirical Basis for the Reasonable Woman Standard*, 51 J. SOC. ISSUES 151 (1995).

139. Schultz, *supra* note 109, at 1760.

140. *Id.* at 1768.

141. *Id.* at 1687, 1758, 1762.

142. Abrams, *supra* note 8, at 1208 ("Sexual inquiries, jokes, remarks, or innuendoes sometimes can raise the spectre of coercion, but they more predictably have the effect of reminding a woman that she is viewed as an object of sexual derision rather than as a credible coworker."); Finley, *supra* note

harassment "provides male workers with a mechanism for achieving exclusion and protection of privilege in connection with work."[143] And by keeping the most desirable jobs for themselves, "men [benefit] in and outside the workplace," which perpetuates existing inequalities.[144] Because of the different significance harassment in fact carries for women, it is not surprising that their perception of it differs.

Despite these very different perceptions, early sexual harassment decisions failed to take into account women's perspectives. Though I refer to "women's perspectives," I do not mean to claim that all women think the same way[145] or share the same experience.[146] Rather, the point is that "the formidable differences in the material conditions and socialization processes that women and men face will tend to produce broad commonalities of perspective within each sex."[147] And while there are no doubt significant differences in viewpoints among women, "there is greater variance between the attitudes held by women and those held by men."[148]

C. The Reasonable Man as the Unstated Norm

The second crucial insight of the feminist critiques is that the supposedly objective reasonable person standard in sexual harassment cases was not, in fact, neutral at all. Feminists explained that the "reasonable person" invoked by the *Rabidue* court and others actually embodied a male perspective.[149] In other words, the reasonable person was gendered male, and this male viewpoint was presented as the objective, universal norm.[150]

How is it that an ostensibly neutral analysis actually contained a hidden male perspective?[151] The reasonable person standard can be traced to the

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8, at 56 (arguing that sexual harassment "is part of a widespread practice men employ in the workplace to disempower women or to safely define them as sex objects rather than as potential colleagues").

143. Schultz, *supra* note 109, at 1760 (internal quotation marks omitted).

144. *Id.* at 1690.

145. Ehrenreich, *supra* note 8, at 1194. The same observation applies to men.

146. *Cf.* Forell, *supra* note 8, at 807 (quoting Audre Lorde: "Some problems we share as women, some we do not. You fear your children will grow up to join patriarchy and testify against you, we fear our children will be dragged from a car and shot down in the street and you will turn your backs upon the reasons they are dying."). Forell concludes that "sexual harassment is one of the problems that *all* women share, even though they often experience [it] differently." *Id.*

147. Ehrenreich, *supra* note 8, at 1194. Furthermore, "differences of class, race, and sexual orientation, and the like . . . [will also] dilute sex-based similarities." *Id.*

148. Abrams, *supra* note 8, at 1205.

149. Finley, *supra* note 8, at 57–62.

150. Ehrenreich, *supra* note 8, at 1208.

151. *Id.* at 1215.

"reasonable man" standard of torts.[152] He first appeared in an 1837 English case, and was described as "the man of ordinary prudence."[153] At that time, women were generally portrayed as incapable of reason.[154] Thus, when the law said reasonable man, it did in fact have a man in mind.[155] The early prototypes of the reasonable man make this point even clearer: In the United States, the reasonable man was described as "the man who takes the magazines at home and in the evening pushes the lawn mower in his shirtsleeves."[156] "The male bias inherent in a standard that explicitly excludes consideration of women as reasonable actors is obvious."[157] Only with the advent of the women's movement did the law finally abandon formal reference to the "reasonable man" and begin referring to the "reasonable person."[158]

But while the name of the standard changed to "reasonable person," the substance of it did not.[159] The claimed objective, reasonable point of view was still a distinctively male point of view.[160] This unstated male norm was, and some would argue, still is, pervasive in law and society. As Catharine MacKinnon famously summed up male privilege:

> Men's physiology defines most sports, their health needs largely define insurance coverage, their socially designed biographies define workplace expectations and successful career patterns, their perspectives and concerns define quality in scholarship, their experiences and obsessions define merit, their military service defines citizenship, their presence defines family, their inability to get along with each other—their wars

152. Leslie Bender, *An Overview of Feminist Torts Scholarship*, 78 CORNELL L. REV. 575, 579 (1993); Finley, *supra* note 8, at 57 (explaining that the reasonable person was originally "referred to as the reasonable man.").

153. Forell, *supra* note 8, at 772.

154. Bender, *supra* note 152, at 579 (noting that the reasonable man/reasonable person standard "has historical roots in a legal system and intellectual culture that did not recognize woman as capable of reason").

155. Finley, *supra* note 8, at 57–58.

156. *Id.* at 58 (internal quotation marks omitted). "In civil law countries the reasonable man was described as 'the good father of the family.' In England, . . . [he was] the man who rides the Clapham Omnibus." *Id.* In all cases, the reasonable man was middle-class and worked outside the home. *Id.*

157. Cahn, *supra* note 8, at 1404.

158. Forell, *supra* note 8, at 770 (noting that, for example, the American Law Institute's 1965 Restatement (Second) of Torts "refers to the negligence standard of care as that of 'the reasonable man'").

159. Bender, *supra* note 152, at 579 (doubting that merely changing the name of the standard will "adequately represent" women's interests); Forell, *supra* note 8, at 770–71 ("While . . . 'the reasonable person' has . . . replaced the reasonable man, the reasonableness standard continues to be male.").

160. *See* Cahn, *supra* note 8, at 1398 (noting that "[u]se of the reasonable person construct has not meant sudden equality for women, it has meant applying a male standard under a different name").

> and rulerships—define history, their image defines god and their genitals define sex.[161]

In sexual harassment law, feminist scholars flagged *Rabidue* as the perfect example of deploying a reasonable person standard that is really a reasonable man standard.[162] Perspective is essential in evaluating a potential hostile work environment,[163] and *Rabidue* exemplifies a male perspective that sexual harassment is just harmless kidding around and that women who complain are either overly sensitive or unable to get along with people.[164] Misogynist comments are described as merely vulgar,[165] and clear examples of sex-based hostility are overlooked.[166] In contrast to the indulgent attitude taken towards the perpetrators,[167] the *Rabidue* court calls the victim hostile, rude,[168] aggressive, intractable, opinionated, abrasive, antagonistic, willful, uncooperative, irascible, and troublesome.[169] The Sixth Circuit essentially trivialized Rabidue's complaint,[170] reducing it from a serious charge of sex discrimination to the "peevish protests of an unreasonably oversensitive [and difficult] woman."[171] In short, *Rabidue* represents a classic example where men's and women's experiences differ, and the women's perspective is not regarded as legitimate.[172]

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161. Stephanie M. Wildman, *Ending Male Privilege: Beyond the Reasonable Woman*, 98 MICH. L. REV. 1797, 1805 (2000).

162. Chamallas, *supra* note 135, at 49 n.47.

163. Finley, *supra* note 8, at 60.

164. *See id.*; Ehrenreich, *supra* note 8, at 1207 (describing how men "tend to view 'milder' forms of harassment" like sexist jokes as "harmless social interactions" that only oversensitive women would object to).

165. The court described as "vulgar" the coworker who called women "cunts." Rabidue v. Osceola Refining Co., 805 F.2d 611, 615 (6th Cir. 1986).

166. The majority did not mention that Rabidue was denied countless benefits granted to her male colleagues. *See id.* at 624 (Keith, J., concurring in part and dissenting in part).

167. Abrams, *supra* note 8, at 1203. Abrams also states that the characteristically male point of view is evident in courts' reluctance to credit the plaintiff's account. *Id.*

168. *Rabidue*, 805 F.2d at 614.

169. *Id.* at 615; *see also, e.g.*, Spencer v. Gen. Elec. Co., 697 F. Supp. 204, 211 (E.D. Va. 1988) (finding that although the defendant—who had had sexual affairs with two other subordinates—had created a hostile work environment by repeatedly propositioning and groping the plaintiff, diagnosis by the defendant's psychiatrist of the plaintiff as someone with histrionic personality disorder "ring[s] true" and explaining that "[a] histrionic personality disorder . . . is characterized by immaturity, shallowness, self-centeredness, obsession with one's personal appearance, and exaggerated emotionality"); Muench v. Township of Haddon, 605 A.2d 242, 248–49 (N.J. Super. Ct. App. Div. 1992) (rejecting the trial court's conclusion that the plaintiff's reaction to disparaging remarks about the plaintiff, refusing to train the plaintiff, kissing the plaintiff's dispatcher window, and bragging of sexual powers was "the eccentric response of a hypersensitive woman").

170. Finley, *supra* note 8, at 60 (saying that judging from the male perspective "trivializes sexual harassment").

171. Ehrenreich, *supra* note 8, at 1199.

172. Wildman, *supra* note 161, at 1799–1803 (noting a number of legal areas where men's and women's experiences differ).

Use of a male-centered viewpoint is also apparent when courts question the severity of the harassment and the credibility of the plaintiff based upon her delay in complaining about it. For example, one plaintiff's failure to report certain incidents, according to a district court, "reflect[ed that] they had little effect on her emotional well being."[173] Similarly, in the Clarence Thomas confirmation hearings, Anita Hill's detractors argued that had she really been harassed, or had the harassment really been serious, Hill would have complained immediately.[174]

This thinking ignores the structural inequality that helps explain why a reasonable woman might not complain immediately. To start, women may fail to complain because being harassed is humiliating, and they are reluctant to admit their powerlessness to the world, their colleagues, or even themselves.[175] More fundamentally, the expectation that a harassed woman would complain about her harasser(s) right away assumes a conflict between two entities of similar power. Of course, the employer-employee relationship is not between two equals, especially when the employee is a woman in a male-dominated field. Given a victim's often tenuous foothold, the fear of retaliation may be too great to risk complaining.[176] Yet, courts do not seem to realize that the extent to which women complain about harassment may have less to do with its severity and more to do with the need to keep their jobs.[177] Even if a woman is not fired or demoted, a complaint may fall upon deaf ears and exacerbate the harassment.[178] In sum, women who have been harassed may reasonably conclude that the best way to advance professionally, or simply to remain employed, is to stay silent.[179]

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173. Lipsett v. Rive-Mora, 669 F. Supp. 1188, 1203 (D.P.R. 1987), *rev'd* Lipsett v. Univ. of Puerto Rico, 864 F.2d 881 (1st Cir. 1988). According to the plaintiff, a surgery resident, her senior resident regularly declared, among other things, that women were not fit to be surgeons and that they could not be relied on when they were "in heat" (i.e., menstruating). *Id.* at 887; *see also* Highlander v. KFC Nat'l Mgmt. Co., 805 F.2d 644, 646, 650 (6th Cir. 1986) (finding that plaintiff "failed to demonstrate that she was offended in any significant way" when, after asking "to discuss her promotion possibilities," her manager put his arm around her and said "that if she was interested in becoming co-manager, 'there is a motel across the street,'" because she did not complain about it until three months later).

174. Estrich, *supra* note 8, at 845 (noting that if women "suffer in silence," courts presume that the harassment could not have been that bad; otherwise they would have complained).

175. *Id.* at 829–30 (arguing that silence may signal shame, humiliation, and fear, and noting that empirical studies from the 1980s found that women "do not talk about sexual harassment even to friends").

176. Studies back this up: Workers report that they do not complain to management because they fear that nothing will change or that they would be ignored, reprimanded, or suffer retaliation. Lester, *supra* note 8, at 250–51 (citing a study of federal employees).

177. Estrich, *supra* note 8, at 846.

178. *Id.* at 833.

179. As Carol Sanger concluded about Anita Hill: "There is simply nothing mysterious (or delusional) about the course of professional prudence and self-preservation that Hill and many other

Why had this distinctly male perspective and norm of reasonableness persisted for so long? First, men created the norms and judged their reasonableness. In fact, those who make the laws, both legislatively and judicially, continue to be predominately men.[180] When most judges are male and have "experienced the traditional forms of male socialization, their instinctive reaction" is to adopt a male perspective.[181] Not surprisingly, recent studies suggest that male and female judges rule quite differently on sex discrimination and sex harassment cases.[182]

Second, the male norm of reasonableness is unstated and, for many, unseen. As Stephanie Wildman noted, "[s]ystems of privilege are elusive and

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women have chosen to follow." Carol Sanger, *The Reasonable Woman and the Ordinary Man*, 65 S. CAL. L. REV. 1411, 1416 (1992).

180. Forell, *supra* note 8, at 774. Despite advances, men still made up 83.2 percent of the U.S. House of Representatives and 83 percent of the Senate in 2010. CTR. FOR AM. WOMEN & POLITICS, WOMEN IN ELECTIVE OFFICE 2010, at 2 (2010), *available at* http://www.cawp.rutgers.edu/fast_facts/levels_of_office/documents/elective.pdf. In addition, 75.6 percent of state legislators are men, 88 percent of state governors are men, and among the one hundered largest cities in the United States, 93 percent have male mayors. *Id.* The courts do not fare much better: As of 2008, 71 percent of federal court of appeals judges are male, as are approximately 75 percent of federal district court judges. NAT'L WOMEN'S LAW CTR., WOMEN IN THE FEDERAL JUDICIARY: STILL A LONG WAY TO GO (2010), *available at* http://www.nwlc.org/pdf/factsheetnumberofwomeninjudiciary.pdf. Among state court judges, 74 percent are men. National Association of Women Judges, 2009 Representation of United States State Court Women Judges, http://www.nawj.org/us_state_court_statistics_2009.asp (last visited June 13, 2010).

181. Abrams, *supra* note 8, at 1203; *see also* Cahn, *supra* note 8, at 1433 ("When we leave the interpretation of substantive norms to the sole discretion of judges, most of whom are upper- or middle-class white men, they will naturally perpetuate their traditional white male viewpoint."); Finley, *supra* note 8, at 55 (noting that male decisionmakers "assumed that persons of ordinary sensibilities," that is, persons very much like the men deciding the cases, "would not be offended by conduct common in the workplace").

182. *See, e.g.*, Sue Davis, Susan Haire, & Donal R. Songer, *Voting Behavior and Gender on the U.S. Courts of Appeals*, 77 JUDICATURE 129, 131 (1993) (finding that even when controlling for political affiliation and region, female judges are more likely than male judges to support the claimant in employment discrimination cases); Theresa M. Beiner, *Diversity on the Bench and the Quest for Justice for All*, 33 OHIO N.U. L. REV. 481, 485 (2007) (summarizing the work of political scientist Nancy Crowe, who studied split sex discrimination decisions at the circuit court level between 1981–1996 and found that in those decisions, white Democratic women supported the claimant 90 percent of the time compared to 76 percent of the time for white Democratic men, and that white Republican women voted for the claimant 53 percent of the time compared to 28 percent of the time for white Republican men); Gregory S. Sisk, *The Quantitative Moment and the Qualitative Opportunity: Legal Studies of Judicial Decisionmaking*, 93 CORNELL L. REV. 873, 888 (2008) (book review) (noting that empirical studies of federal appellate judges show that sex usually has little effect on judicial decisionmaking "with notable exceptions in certain types of cases" such as sex discrimination); Jennifer L. Peresie, Note, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759, 1776–79 (2005) (finding that empirical analysis of 556 Title VII sex discrimination and sexual harassment cases between 1999–2001 revealed that plaintiffs were twice as likely to prevail when a female judge was on the bench).

fugitive, deriving their power from their very invisibility."[183] The biased nature of the reasonable person standard is often not even evident to those applying it: After all, it is reasonable to them. Indeed, "those with privilege rarely recognize it as such."[184] Feminists like Kathryn Abrams commented in the late 1980s that "the men who constitute the workplace, like most proponents of societally dominant standards, do not recognize the partiality of their norms."[185]

Third, judging discrimination cases from the victim's perspective requires bucking the status quo.[186] Judges believed that, by adhering to community standards in evaluating reasonableness, they "[were] able to render neutral and unbiased decisions."[187] As the Sixth Circuit argued in *Rabidue*, how unreasonable can it be to have sexualized images in the workplace when sexualized images of women are widely tolerated in society?[188] However, "equating 'reasonableness' with societal consensus . . . necessarily assumes that the status quo itself is egalitarian, pluralistic, and nondiscriminatory."[189] But this assumption is false. Women did not have an equal role in shaping the status quo, inside or outside the workplace.[190] Unfortunately, questioning the status quo and dismantling the existing power structure is daunting in a way that condoning it is not.

Because of its many shortcomings, feminists argued that courts should not rely on the reasonable person standard as it was then formulated.[191] Many recommended a reasonable woman standard[192] as a replacement for the supposedly neutral but actually highly partial standard that "fail[ed] to consider the viewpoints, experiences, and needs of groups who have largely been excluded from positions powerful enough to set the legal agenda."[193] The Ninth Circuit was the first court of appeals to officially adopt a reasonable woman standard

183. Wildman, *supra* note 161, at 1805 (internal quotations omitted); *see also* Forell, *supra* note 8, at 806 ("[T]he unstated reference point . . . can remain unstated because those who do not fit have less power to select the norm than those who fit comfortably within the one that prevails.").

184. Wildman, *supra* note 161, at 1806.

185. Abrams, *supra* note 8, at 1189.

186. Forell, *supra* note 8, at 772 ("Because it applies existing community norms, the reasonable [person] standard is deeply conservative and supports the status quo.").

187. Lester, *supra* note 8, at 232–33.

188. Forell, *supra* note 8, at 795; *see also* Katz v. Dole, 709 F.2d 251, 256 (4th Cir. 1983) ("Title VII is not a clean language act and it does not require employers to extirpate all signs of centuries-old prejudice.").

189. Ehrenreich, *supra* note 8, at 1205.

190. Abrams, *supra* note 8, at 1189 ("[M]ale control of the workplace has permitted male norms to prevail.").

191. *Id.* at 1206.

192. Abrams, *supra* note 8, at 1202; Forell, *supra* note 8, at 804; Lester, *supra* note 8, at 258–62.

193. Finley, *supra* note 8, at 41–42.

for sexual harassment cases,[194] though others have explicitly rejected it.[195] The reasonable woman standard has not been without feminist controversy, both about its risks[196] and its effectiveness,[197] but no one disputes that a standard that perpetuates the status quo rather than captures the experiences and perspectives of women is unacceptable.[198] In short, the reasonableness standard should be based on the viewpoint of the nonprivileged group, rather than the privileged one.[199]

Indeed, if the ostensibly neutral but actually partial reasonable person standard is not eliminated, legitimate claims of hostile work environment will be trivialized and dismissed, and Title VII will fail to achieve its equal opportunity goals. Left unchallenged, sexual harassment in the workplace

194. Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991). The First and Third Circuits have also adopted a reasonable woman standard. *See* Gray v. Genlyte Group, Inc., 289 F.3d 128 (1st Cir. 2002); Andrews v. City of Philadelphia, 895 F.2d 1469, 1484 (3d Cir. 1990).

195. The Fifth Circuit has explicitly declined to adopt a reasonable woman standard, while the Sixth, Eighth, and Eleventh tend to use the reasonable person over the reasonable woman standard. Newman, *supra* note 129, at 552. While the plaintiff in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993), argued for the reasonable woman standard, the Supreme Court neither accepted nor rejected it. Instead, it simply continued to apply the standard of the reasonable person in the position of the plaintiff. At the same time, the Court also wrote that the severity of sexual harassment must be judged by considering all the circumstances, including how it is "experienced by its target." Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998).

196. Feminists have identified two main risks of relying on a reasonable woman standard: stereotyping and essentializing. Cahn, *supra* note 8, at 1402–03; Forell, *supra* note 8, at 804; Wildman, *supra* note 161, at 1809–10. Some commentators fear that relying on a reasonable woman standard will increase the risk of stereotyping by "openly acknowledging that sex matters." Forell, *supra* note 8, at 804; *see also* Cahn, *supra* note 8, at 1402. This fear taps into the longstanding sameness-difference debate. Forell, *supra* note 8, at 804. For example, Lucinda M. Finley argues that a reasonable woman standard "implies that women's experiences and reactions are something for women only, rather than normal human responses." Finley, *supra* note 8, at 64; *see also* Cahn, *supra* note 8, at 1398 (arguing that the reasonable woman standard "perpetuates distinctions between men and women rather than developing a standard applicable to both sexes"). Essentialism refers to the "difficulty in speaking accurately about 'women' as if women fit some universal definition." Wildman, *supra* note 161, at 1810–11. Many worry that a new unstated norm that privileges middle-class, heterosexual white women will emerge. *See* Cahn, *supra* note 8, at 1403; *see also* Ehrenreich, *supra* note 8, at 1218 ("[T]o the extent that a reasonable woman standard fails to draw the court's attention to issues of race and class, it may perpetuate existing inequalities based on those factors the same way that the reasonable person standard does when it fails to consider women's point of view."); Wildman, *supra* note 161, at 1811.

197. A reasonable woman standard will not help if only the name but not the substance changes from the current reasonable person standard. *See, e.g.*, Ehrenreich, *supra* note 8, at 1231 ("To the extent that [the reasonable woman standard] can be infused with new meaning, [it] can be [a] valuable tool[ ] for reform. To the extent [it] resist[s] such redefinition, [it] will continue to legitimate inequality."); Cahn, *supra* note 8, at 1432 ("[C]ourts that use a reasonable woman standard can apply it in a manner that subordinates women just as easily as one that supports women.").

198. Abrams, *supra* note 8, at 1206 (stating that if employment discrimination is to end, "then courts must employ a standard that reflects women's perceptions of sexual harassment").

199. Ehrenreich, *supra* note 8, at 1216.

enhances men's preexisting power, while it reinforces women's subordination.[200] "[T]he very point of Title VII—indeed the only point—should be to ensure that . . . 'tolerance' [of harassment] by the powerless should not define the prerogatives of the powerful."[201]

The same insights apply to the reasonable person in ceremonial deism and other Establishment Clause challenges. First, like the reasonable man compared to the reasonable woman under Title VII, the reasonable Christian compared to the reasonable Buddhist or atheist will not share the same perspective, and the perspective of the non-Christian will be shaped by her minority group status. Second, the unstated norm for the reasonable person is a reasonable member of the dominant group—here, a reasonable Christian—and Christian privilege, like male privilege, renders this norm invisible. Third, like Title VII's equity-driven goals, the Establishment Clause will not achieve its goals of religious equality and freedom for all unless ceremonial deism is analyzed from the perspective of those traditionally without power.

I do not mean to suggest an exact equivalence between the reasonable person in Establishment Clause and early sexual harassment cases. Obviously there are major differences. (One key difference is that harassment generally has little or no social value, while invocations of God generally do. But I am not arguing that these types of speech are equivalent—although in fact they are less diametrically opposed than they seem at first: Some free speech proponents have argued that employee comments that amount to harassment can have free speech value and are constitutionally protected.[202] Meanwhile, although invocations of God may generally be positive, *government* invocations of God may cause harm, which is why they trigger the Establishment Clause.) Rather, I argue that the reasonable person test that each area relies on to determine legality share some of the same flaws and that the reasonable person issues identified by feminists in the sexual harassment context can help illuminate the problems of its use under the Establishment Clause.

III. APPLYING FEMINIST INSIGHTS TO CEREMONIAL DEISM

There are strong parallels between the use of the reasonable person standard in Title VII and Establishment Clause jurisprudence. Just as the "reasonable person" in early Title VII sexual harassment cases was actually a "reasonable man," the "reasonable person" in ceremonial deism cases is actually

200. Sanger, *supra* note 179, at 1415.
201. Estrich, *supra* note 8, at 847.
202. *See infra* note 322 (listing articles arguing that Title VII violates the Free Speech Clause).

a "reasonable Christian." For both, the norm is unstated, unrecognized, and favors the privileged group. But evaluating a legal issue from the perspective of those at the top may mean reinscribing privilege rather than providing relief for those at the bottom. In short, just as it was essential to understand the reasonable woman's perspective and the role of male privilege in order to achieve sex equality under Title VII, so too is it necessary to understand the reasonable religious outsider's perspective and the role of Christian privilege to achieve the goals of the Establishment Clause—religious liberty and equality for all.

A. Different Perspectives

Point of view matters, as we saw with sexual harassment.[203] This insight holds true for ceremonial deism. As certain comments that would not perturb men might alienate and harass women, so too certain government invocations of God that would not offend Christians (and perhaps Jews) might alienate those who do not share the Judeo-Christian belief in God.[204] This is not to say that Christians and non-Christians are two monolithic groups who will automatically arrive at opposite conclusions when presented with alleged ceremonial deism. Plainly, as with men and women, there is a significant amount of diversity within each group. But as with sexual harassment, the impact on the out-group is likely to be different than it is on the in-group. Indeed, while the effect of an observer's religious affiliation on evaluating Establishment Clause claims has not been studied to the same degree as the effect of an observer's sex in evaluating sexual harassment claims, there is empirical evidence suggesting that it does make a difference. According to one study of federal court decisions, Jewish judges were significantly more likely to find an Establishment Clause violation than Christian judges.[205] Given the different reactions of Christians and Jews, one might expect an even greater divergence between Christians and those outside the Judeo-Christian tradition.[206]

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203. Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the 'No Endorsement' Test*, 86 MICH. L. REV. 266, 291 (1987) (explaining that a critical question in the endorsement test is "[w]hose perceptions count?").

204. Kosse, *supra* note 7, at 168 ("An observer's perception of what is reasonable changes depending on whether that observer is an atheist, Buddhist, or a Christian.").

205. *See* Gregory C. Sisk, Michael Heise, & Andrew P. Morriss, *Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions*, 65 OHIO ST. L.J. 491, 572 (2004); *see also id.* at 502 ("Jewish judges were significantly more likely to conclude that governmental interaction with religion breached the figurative wall of separation between church and state.").

206. *See, e.g.*, Jay D. Wexler, *The Endorsement Court*, 21 WASH. U. J.L. & POL'Y 263, 285 (2006) ("It is very difficult for judges who are themselves not, for the most part, members of minority traditions to understand those perceptions and to empathize with them.").

To understand why differences might exist, it is first necessary to understand that not everyone's religion centers around God. References to God in ceremonial deism cases may seem nonsectarian and inclusive to members of religions like Judaism and Christianity, which worship a Supreme Being known as God. But this is not true for all religions. Many Hindus, for example, envision three main manifestations of the Divine—Brahma, Vishnu, and Shiva.[207] Many Buddhists, on the other hand, do not worship any deities.[208] Even Muslims, who do worship a Supreme Being, generally refer to their Supreme Being as Allah, and not God.[209] Thus, unless all citizens of a country are Jewish or Christian, a government invocation of God is sectarian. The United States is not that country, as it is home to adherents of countless other religions.[210] According to the latest surveys, approximately 1.35 million

207. *See* Vasudha Narayanan, *The Hindu Tradition*, *in* WORLD RELIGIONS: EASTERN TRADITIONS 12, 48 (William G. Oxtoby ed., 1996) ("In the symbolism of *trimurti*, the gods Brahma, Visnu, and Siva coalesce into one form with three faces."). For this reason, Hinduism is often described as a Trinitarian religion. *See* BRITANNICA ENCYCLOPEDIA OF WORLD RELIGIONS 437, 472 (Wendy Doniger ed., 2006). However, it has also been called polytheistic, pantheistic, henotheistic, and sometimes even a monotheistic religion. A.S. Woodburne, *The Idea of God in Hinduism*, 5 J. RELIGION 52, 52 (1925). Hinduism is one of the world's oldest religions, and is currently the third largest. NEW RELIGIONS: A GUIDE 158 (Christopher Partridge ed., 2004) [hereinafter NEW RELIGIONS] (estimating roughly 800 million adherents worldwide).

208. There are two main branches of Buddhism: Theravada Buddhism and Mahayana Buddhism. Theravada Buddhism is explicitly nontheistic. NEW RELIGIONS, *supra* note 207, at 164–66. Buddhism is the world's fourth largest religion. *Id.* at 162 (estimating roughly 357 million adherents worldwide).

209. *See, e.g.*, Chibli Mallat, *From Islamic to Middle Eastern Law, A Restatement of the Field (Part II)*, 52 AM. J. COMP. L. 209, 285 (2004) (noting that "Allah" is used to "set apart the Muslims' God from 'God' in any [other] great religious tradition"). Islam is the world's second largest religion, with well over a billion adherents. NEW RELIGIONS, *supra* note 207, at 124.

210. There are Americans who follow Asatru, Confucianism, Nature Religions (including some Native American religions), Neopaganism, the Raelian Movement, Scientology, Shinto, Taoism, and Wicca—none of which are monotheistic. *See, e.g.*, Cutter v. Wilkinson, 544 U.S. 709, 712 (2005) (describing that petitioners were members of "nonmainstream" religious groups including, "the Satanist, Wiccan, and Asatru religions . . . ."); Torcaso v. Watkins, 367 U.S. 488, 495 n.11 (1961) ("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."); Simpson v. Chesterfield County Bd. of Supervisors, 292 F. Supp. 2d 805, 808 (E.D. Va. 2003), *aff'd in part, rev'd in part*, Simpson v. Chesterfield County Bd. of Supervisors, 404 F.3d 276 (4th Cir. 2005) ("There are recognized religions in America other than Wicca that are not considered to be 'monotheistic' or of the 'Judeo-Christian' tradition, including, for example, Afro-Caribbean religions (*e.g.*, Santeria, Vodou, and Rastafarianism), Buddhism, Hinduism, the various Native American traditions, Bah'i, Jainism, Sikhism, Shinto, Taoism, and Zoroastrianism."). Americans also belong to Islam (Allah), Rastafaria (Jah), Zoroastrianism (Ahura Mazda), Sikhism (Waheguru), and Hare Krishna (Krishna), which are monotheistic but do not refer to their Supreme Being as God. BRITANNICA ENCYCLOPEDIA OF WORLD RELIGIONS, *supra* note 207, at 1165 ("Zoroaster's teachings centered on Ahura Mazde, who is the highest god and alone is worthy of worship."); NEW RELIGIONS, *supra* note 207, at 64, 66, 68 (describing how Rastafarians seek the guidance of Jah and how God is considered the true Guru, Sat-Guru, or Waheguru); E. Burke Rochford Jr., *The Hare Krishna Movement: Beginnings, Change, and Transformation*, *in* 4 INTRODUCTION TO NEW AND ALTERNATIVE RELIGIONS IN AMERICA 21, 22

American adults are Muslim, 1.96 million belong to Eastern Religions (in other words, they are Baha'i, Buddhist, Hindu, Shinto, Sikh, Taoist, or Zoroastrian), 2.80 million belong to other nonmainstream religions, such as Druidism, Native American religions, New Age, Paganism, Rastafaria, Santeria, and Wicca,[211] and 34.17 million identify themselves as having no religion.[212]

In all, well over 40 million people in the United States are neither Christian nor Jewish.[213] This fundamental divide between those who believe in God and those who do not undermines any notion of inclusiveness.[214] For those who do not worship God, the government's invocation of God is a government invocation of someone else's beliefs. Thus, for an American Hindu, Buddhist, or atheist, the national motto "In God We Trust," with its

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(Eugene V. Gallagher & W. Michael Ashcraft eds., 2006) (recognizing Krishna as the supreme deity of Hare Krishna followers).

211. *See* BARRY A. KOSMIN & ARIELA KEYSAR, AMERICAN RELIGIOUS IDENTIFICATION SURVEY SUMMARY REPORT [ARIS 2008] 5, 23 (2009), *available at* http://livinginliminality.files.wordpress.com/2009/03/aris_report_2008.pdf [hereinafter ARIS 2008]. The ARIS 2008 survey interviewed 54,461 people from February to November 2008. *Id.* at 2; *see also* PEW FORUM ON RELIGION AND PUBLIC LIFE, U.S. RELIGIOUS LANDSCAPE SURVEY 5 (2008) (interviewing more than 35,000 Americans eighteen and older), *available at* http://religions.pewforum.org/pdf/report-religious-landscape-study-full.pdf [hereinafter PEW SURVEY]. According to this Pew survey, less than 0.3 percent of the population self-identify as other World Religions, less than 0.3 as Native American religions, 0.4 percent as New Age, 0.4 percent as Hindi, 0.6 percent as Muslim, 0.7 percent as Buddhist, and 1.6 percent as atheist, 2.4 percent as agnostic, and 6.3 percent as unaffiliated and secular (as opposed to unaffiliated and religious); *see also* Khyati T. Joshi, *Buddhism, Hinduism, Islam, and Sikhism in America: The Impact of World Religions*, *in* FAITH IN AMERICA: CHANGES, CHALLENGES, NEW DIRECTIONS 109 (Charles H. Lippy ed., 2006) ("In 2005, the United States was home to approximately 1.5 million Buddhists and between 5.5 and 6 million Muslims of all races. It is believed there were between 1 million and 1.3 million Hindus in the United States, and 250,000 to 500,000 Sikhs. All four religious populations continue to grow . . . .").

212. When asked their religion, those categorized as no religion answered atheist (1.62 million), agnostic (1.98 million), humanistic, ethical culture, secular, none, or no religion. ARIS 2008, *supra* note 211, at 5, 23. This category does not include the 11.81 million people who refused to answer. *Id.* at 5. When a sample of this population was asked whether they believed in God, 7 percent were atheist, answering "There is no such thing," 35 percent were agnostic and answered "There is no way to know" or "I'm not sure," 24 percent were deist, answering "There is a higher power but no personal God," and 27 percent were theists who said "There definitely is a personal God." BARRY A. KOSMIN ET AL., AMERICAN NONES: THE PROFILE OF THE NO RELIGION POPULATION, A REPORT BASED ON THE AMERICAN RELIGIOUS IDENTIFICATION SURVEY 2008, at 11 (2009), *available at* http://www.americanreligionsurvey-aris.org/reports/NONES_08.pdf. Overall, roughly 2 percent of the American adult population is atheist, 10 percent is agnostic, 12 percent are deists, and 70 percent believe in a personal God (6 percent did not answer the question.) *Id.*

213. In other words, while 76 percent of adults surveyed consider themselves Christian and 1.2 percent considered themselves Jewish, 17.7 percent are neither Christian nor Jewish (around 5.2 percent did not answer). ARIS 2008, *supra* note 211, at 5.

214. *See* Robert J. Delahunty, *"Varied Carols": Legislative Prayer in a Pluralist Polity*, 40 CREIGHTON L. REV. 517, 540 (2007).

implications that all true Americans believe in God, may be alienating in a way that it is not for those who do in fact trust in God.[215]

Furthermore, many scholars have pointed out that even among Judeo-Christian religions, or Abrahamic religions if Islam is included, certain uses of "God" align much more with some traditions than others. Because these religions have very different ways of understanding God and their relationship to the divine, state invocations of God may be sectarian even among them.[216] Geoffrey Stone noted more than twenty-five years ago that "the very concept of a 'nondenominational prayer' is self-contradictory."[217] Even something as simple as "God Bless America" reflects certain assumptions about God that are not universally shared: "It presupposes a deity who alone is divine, who is personal, who is willing to hear and respond to human petitions, who intervenes in human history and indeed controls its course, who grants or withholds blessing, and who sits in judgment on the nations."[218]

Christians and religious outsiders have distinct perspectives on state invocations of God not only because they hold different belief systems, but also because they are differently situated. Just as men have controlled public life during most of the nation's history, and still disproportionately occupy positions of power compared to woman, so too have Christians, and to a much lesser extent Jews, dominated public life. Every single president has been Christian. Every single Supreme Court justice has been Christian or Jewish.[219] Every single United States senator has been Christian or Jewish.[220] Until the 110th Congress in 2007, there had never been a Muslim or Buddhist representative, and a Hindu representative has yet to be elected.[221] Moreover, while

215. It is important to understand that the offense is not that people believe in God, but that the government is uniting its power and prestige with some religious traditions.

216. Delahunty, *supra* note 214, at 539–41.

217. Geoffrey R. Stone, *In Opposition to the School Prayer Amendment*, 50 U. CHI. L. REV. 823, 829 (1983). Another commentator wrote recently that, "The search for a universally acceptable "nonsectarian" prayer has been and remains, the futile quest for a non-existent Holy Grail." Delahunty, *supra* note 214, at 526.

218. Delahunty, *supra* note 214, at 540.

219. Though note that of all the U.S. Supreme Court justices, only seven have been Jewish, with two on the bench now—Ruth Bader Ginsburg and Stephen Breyer. Jewish Supreme Court Justices, http://www.jewishvirtuallibrary.org/jsource/US-Israel/justices.html (last visited June 13, 2010).

220. Though note that until the 1970s, only ten senators were Jewish, or less than one every fifteen years. Jewish Members of the U.S. Senate, http://www.jewishvirtuallibrary.org/jsource/US-Israel/jewsens.html (last visited June 13, 2010).

221. DAVID MASCI & TRACY MILLER, PEW FORUM ON RELIGION AND PUBLIC LIFE, FAITH ON THE HILL: THE RELIGIOUS AFFILIATIONS OF MEMBERS OF CONGRESS (2008), http://pewforum.org/docs/?DocID=379. The 110th Congress saw its first Buddhist and its first Muslim. *Id.* Representative Dalip Singh Saund, who served three terms starting in 1957, has been the only Sikh member of Congress so far. *Id.* The Pew report makes no mention of any Hindus in Congress, noting that one member of

10.3 percent of Americans describe themselves as secular and unaffiliated with any religion, with 4 percent explicitly self-identifying as atheist or agnostic,[222] only one United States representative has ever publicly stated that he did not believe in the existence of a Supreme Being.[223]

The privileged status of Christians and the outsider status of non-Christians are apparent in many ways.[224] To start, Christians' dominant position leads to Christian privilege much as men's domination resulted in male privilege. Applying Catharine MacKinnon's observations to Christian privilege, it becomes evident that their Sabbath defines the workweek,[225] their sacred days define state[226] and national holidays,[227] their morality defines the family[228]

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a "world religion" served in the 87th Congress (1961–62), and that no Hindus have served in the 110th (2007–08) or 111th (2009–10) Congress. *Id.*

222. According to the Pew survey, 2.4 percent of Americans would describe themselves as agnostic, 1.6 percent as atheist, and 6.3 percent as unaffiliated with any religion and secular. PEW SURVEY, *supra* note 211, at 5.

223. Representative Pete Stark, a Unitarian who joined Congress in 1973, stated in 2007 that he did not believe in a Supreme Being. MASCI & MILLER, *supra* note 221; Press Release, Secular Coalition for America, Rep. Pete Stark (D-Calif.) is First Congress Member in History to Acknowledge His Nontheism (Mar. 12, 2007), *available at* http://atheism.about.com/b/2007/03/14/pete-stark-nontheist-member-of-congress.htm.

224. While Jews also believe in God, they comprise such a small percentage—1.7 percent of Americans identify as Jewish compared to 78.4 percent who identify as Christian—and are so rarely responsible for ceremonial deism practices, that it makes more sense to talk about Christian privilege rather than Judeo-Christian privilege. PEW SURVEY, *supra* note 211, at 5. That said, Jews do believe in God, so their perspective about state invocations of God is not the same as someone whose religious beliefs do not include God.

225. The Christian Sabbath or Lord's Day is usually Sunday and occasionally Saturday; the Jewish Sabbath is Saturday. Daniel L. Dreisbach, *In Search of a Christian Commonwealth: An Examination of Selected Nineteenth-Century Commentaries on References to God and the Christian Religion in the United States Constitution*, 48 BAYLOR L. REV. 927, 975 (1996).

226. For example, Good Friday is a legal holiday in several states, including Delaware, DEL. CODE ANN. tit. 1, § 501 (2001); Indiana, IND. CODE ANN. § 1-1-9-1 (LexisNexis 2002); Louisiana, LA. REV. STAT. ANN. 1:55 (2003); New Jersey, N.J. STAT. ANN. § 36:1-1 (West 2002); North Carolina, N.C. GEN. STAT. § 103-4 (2009); North Dakota, N.D. CENT. CODE § 15.1-06-02 (2009); and Tennessee, TENN. CODE ANN. § 15-1-101 (1999). *See also, e.g.*, Cammack v. Waihee, 932 F.2d 765, 766–67 (9th Cir. 1991) (upholding Good Friday as a state holiday in Hawaii).

227. Christmas, which celebrates the birth of Jesus Christ, is a federal holiday. Does this mean it is unconstitutional? If Congress were deciding today whether to make a major religious holiday like Easter or Christmas a national holiday, the answer may well be yes, it is unconstitutional. But it is probably not politically feasible to rescind the federal holiday status of Christmas. Some might argue that Christmas has become secularized enough, so that even if it were newly recognized, it should not offend the Establishment Clause. If that is true, then can't one say that other examples of ceremonial deism have become secularized and accepted over time? Even granting that possibility, I would maintain that reference to God cannot be characterized as secular, and its religious import does not diminish over time. *See, e.g.*, Van Orden v. Perry, 545 U.S. 677, 696 (2005) (Thomas, J., concurring) ("[R]epetition does not deprive religious words or symbols of their traditional meaning. Words like 'God' are not vulgarities for which the shock value diminishes with each successive utterance."); Thomas Berg, *The Pledge of Allegiance and the Limited State*, 8 TEX. REV. L. & POL. 41, 48 (2003) (arguing that "under God" has not lost its religious meaning); Epstein, *supra* note 14, at 2165 ("[U]nder any honest

and determines when life begins,[229] belief in their God characterizes patriotism,[230] and invocation of their God solemnizes, dignifies, and authenticates.[231]

In addition, non-Christians are unpopular. While one might be tempted to conclude that religious outsiders' lack of participation in government is a function of their historically small populations, public opinion polls make

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appraisal of modern American society, the practices constituting ceremonial deism have *not* lost their religious significance."); *see* B. Jessie Hill, *Of Christmas Trees and Corpus Christi: Ceremonial Deism and Change in Meaning Over Time*, 59 DUKE L.J. 705, 755–59 (2010) (arguing that the meaning of religious phrases can change over time but that courts should be skeptical of claims that it has, instead advocating for a rebuttable presumption of "enduring religious meaning").

228. In most states, marriage is limited to a man and a woman mostly because of Christian opposition to same-sex marriage. *See, e.g.*, Joshua K. Baker, *Status, Benefits, and Recognition: Current Controversies in the Marriage Debate*, 18 BYU J. PUB. L. 569, 574 (2004) ("[Thirty-eight] states have adopted marriage recognition statutes defining marriage as a male-female union and declining to recognize same-sex unions as marriages."); Justin T. Wilson, Note, *Preservationism, or the Elephant in the Room: How Opponents of Same-Sex Marriage Deceive Us Into Establishing Religion*, 14 DUKE J. GENDER L. & POL'Y 561, 563–64 (2007) ("According to the Pew Research Center, the two most common demographic indicators for opposition to same-sex civil marriage are age and religiosity. . . . The most commonly-cited reason for opposing same-sex civil marriage is that it goes against one's own religious beliefs. These statistics are consistent with the Pew Research Center's conclusion that opposition to homosexuality and gay rights is derived primarily from religious beliefs.").

229. Many states have defined or attempted to define life as starting when the sperm fertilizes the egg, *see, e.g.*, Webster v. Reproductive Health Servs., 492 U.S. 490, 504–07 (1989) (refusing to strike the Missouri preamble stating that life begins at conception), a position for the most part based on religious doctrine. Indeed, laws touching on reproductive rights are often influenced by religious belief rather than scientific fact. *See* Elizabeth Spahn & Barbara Andrade, *Mis-Conceptions: The Moment of Conception in Religion, Science, and Law*, 32 U.S.F. L. REV. 261, 327 n.390 (1998) (noting that nine states define life as starting at the moment of conception or fertilization); *see also* Claire A. Smearman, *Drawing the Line: The Legal, Ethical and Public Policy Implications of Refusal Clauses for Pharmacists*, 48 ARIZ. L. REV. 469, 490–91 (2006) ("In contrast to the medical community, the Catholic Church and other conservative Christian denominations hold as a matter of religious belief that life begins at conception, which they define as the moment of fertilization and the beginning of pregnancy."); Sacred Congregation for the Doctrine of Faith, The Declaration on Procured Abortion (1974), http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19741118_declaration-abortion_en.html (stating that at fertilization, "the life of a new human being [begins] with his own growth" separate from the life of the mother).

230. The Pledge of Allegiance specifically links belief in God to patriotism. Gey, *supra* note 7, at 1875–78 (remarking that adding "under God" to the Pledge and adopting "In God We Trust" as the national motto are examples of how patriotism and religiosity merged during the Cold War); *see also* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 36 (2004) (Rehnquist, C.J., concurring) ("Examples of patriotic invocations of God . . . abound."); Frederick Mark Gedicks & Roger Hendrix, *Uncivil Religion: Judeo-Christianity and the Ten Commandments*, 110 W. VA. L. REV. 275, 305 (2007) (criticizing the linkage of patriotism and citizenship to religion).

231. As we saw in Part I, courts and commentators sometimes justify ceremonial deism as a means to solemnize occasions. The phrase "so help me God" is added to the end of oaths to emphasize their seriousness. *Cf.* Lynch v. Donnelly, 465 U.S. 668, 693 (1984) (O'Connor, J., concurring) (arguing that some "government acknowledgements of religion serve . . . 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"); Doe v. La. Supreme Court, Civ. A. No. 91-1635, 1992 WL 373566, at *7 (E.D. La. Dec. 8, 1992) (holding that the phrase, "In the year of our Lord" is an example of ceremonial deism that serves to solemnize the date of the certification of the attorney and the notary public).

clear that those belonging to a minority religion—or more perilous yet, those without religion—are subject to the electorate's conscious bias. Sixty-two percent of Americans surveyed stated that they would not vote for a political candidate who said he or she was an atheist.[232] Even when asked whether they would vote for a generally well-qualified person nominated by their party who happened to be an atheist, over half the people surveyed still said they would withhold their vote.[233] Asked about their general opinion of religious groups, 31 percent stated they had an overall unfavorable impression of Hinduism,[234] 35 percent had an unfavorable opinion of Muslims, and 53 percent had an unfavorable opinion of atheists.[235] Along those lines, 33.5 percent of adults polled stated that they would disapprove if their child wanted to marry a Muslim, and 47.6 percent stated that they would disapprove if their child wanted to marry an atheist.[236] Already outsiders to the cultural and political

232. Brian Braiker, *Newsweek Poll: 90% Believe in* God, NEWSWEEK, Mar. 31, 2007, *available at* http://www.msnbc.msn.com/id/17879317/site/newsweek/print/1/displaymode/1098/. In another poll, 62 percent of Americans surveyed admitted that they would be less willing to support a political candidate who did not believe in God. In the same poll, 45 percent said they would be less likely to vote for a Muslim. In comparison, only 11 percent said they would be less likely to support someone Jewish, and 7 percent for someone Catholic. PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, RELIGION IN CAMPAIGN '08, at 9 (2007), *available at* http://pewforum.org/assets/files/religion-campaign08.pdf. In yet another poll, 76 percent of those polled answered "No" to the question, "Do you think most Americans would be comfortable with a president who was an atheist?" *Fox News/Opinion Dynamics Poll*, FOXNEWS.COM, Oct. 11, 2007, http://www.foxnews.com/projects/pdf/101107_rls_2008_web.pdf. In answer to the question "Do you think someone can be a moral person and be an atheist?," 26 percent said "No." Braiker, *supra*.

233. The exact question was, "Between now and the 2008 political conventions, there will be discussion about the qualifications of presidential candidates—their education, age, religion, race, and so on. If your party nominated a generally well-qualified person for president who happened to be . . . , would you vote for that person?" Four percent said they would not vote for a Catholic, 7 percent said they would not vote for a Jew. The poll also asked about race, sex, and sexual orientation, finding that 5 percent would not vote for someone black, 11 percent would not vote for someone Hispanic, 7 percent would not vote for a woman, and 43 percent would not vote for a homosexual. Jeffrey M. Jones, *Some Americans Reluctant to Vote for Mormons, 72-Year-Old Presidential Candidates*, GALLUP NEWS SERVICE, Feb. 20, 2007, http://www.gallup.com/poll/26611/some-americans-reluctant-vote-mormon-72yearold-presidential-candidates.aspx.

234. AM. MUSLIM COUNCIL, AMERICAN ATTITUDES TOWARDS ISLAM (1993) (polling respondents about attitudes towards various religious groups). In this poll, 36 percent had an overall unfavorable impression of Muslims. Fewer had an unfavorable impression of Jews (20 percent) and Presbyterians (12 percent). *Id.*

235. PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, BENEDICT XVI VIEWED FAVORABLE BUT FAULTED ON RELIGIOUS OUTREACH 1 (2007), *available at* http://pewforum.org/uploadedfiles/Topics/Religious_Affiliation/religionviews07.pdf. In contrast, the unfavorable rating was 9 percent for Jews, 14 percent for Catholics, and 19 percent for Evangelical Christians. *Id.*

236. Penny Edgell, Joseph Gerteis & Douglas Hartmann, *Atheists as "Other": Moral Boundaries and Cultural Membership in American Society*, 71 AM. SOC. REV. 211, 217–18 (2006) (citing American Mosaic Project Survey 2003, which asked: "People can feel differently about their children marrying people from various backgrounds. Suppose your son or daughter wanted to marry [a person in a given

community, state endorsement of Judeo-Christianity confirms and reinforces the outsider status of those who do not share Judeo-Christian beliefs.[237]

The outsider status of people holding non-Christian beliefs is further underscored by the hostility directed at those who bring Establishment Clause challenges. Tellingly, many Establishment Clause cases, including challenges to prayers at school events [238] and challenges to religious displays[239] or mottos like "The World Needs God,"[240] are litigated under a pseudonym. Just as women who dare challenge male privilege have been harassed, non-Christians challenging Christian privilege have been intimidated and attacked. Hate mail, vandalism,[241] death threats,[242] and the like plague those who complain.[243] The reason the family challenging prayers before school football games sued anonymously was that their son had received death threats.

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category]. Would you approve of this choice, disapprove of it, or wouldn't it make any difference at all one way or the other?").

237. *See, e.g.*, Pephrey v. Cobb County, Ga., 410 F. Supp. 2d 1324, 1327 (N.D. Ga. 2006) (discussing plaintiffs' complaint that prayers before Cobb County Commission meetings made them feel like outsiders in their own community and unwelcome at government meetings).

238. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000); *see also* Doe v. Tangipahoa Parish Sch. Bd., 473 F.3d 188 (5th Cir. 2006) (challenging prayer before school board meetings); Doe v. Sch. Dist. of Norfolk, 340 F.3d 605, 610 (8th Cir. 2003) (challenging recitation of the Lord's Prayer at a graduation ceremony); Doe v. Beaumont Indep. Sch. Dist., 240 F.3d 462, 464 (5th Cir. 2001) (challenging the district's "Clergy in the Schools" counseling program); Doe v. Aldine Indep. Sch. Dist., 563 F. Supp. 883, 884 (S.D. Tex. 1982) (challenging a prayer posted in the gymnasium and sung at school events).

239. Doe v. Small, 934 F. 2d 743 (7th Cir. 1991) (challenging sixteen eight-foot paintings depicting the life of Jesus Christ in a city park), *rev'd en banc*, 964 F.2d 611 (7th Cir. 1991).

240. Doe v. County of Montgomery, Ill., 915 F. Supp. 32 (C.D. Ill. 1996) (holding that the motto placed over the entrance to the county courthouse was unconstitutional).

241. In addition to death threats, the man who challenged a huge Latin cross atop the town water tower had his car covered in excrement. Charles Fishman, *Gladly, the Cross They Bear: A Four-Act Play Starring the Citizens of St. Cloud, Who Lost Their Symbol of Christianity, and Their Innocence*, ORLANDO SENTINEL, Dec. 10, 1989, at 4, 12, *available at* http://articles.orlandosentinel.com/1989-12-10/news/8912093992_1_cloud-water-tower-cross. He was not even the first plaintiff—that person dropped out after receiving threats that he would lose his job if he pressed the suit. *Id.* at 10.

242. Newdow, who asked that "under God" be removed from the Pledge of Allegiance, received stacks of hate mail and death threats. Gey, *supra* note 7, at 1915. The mail was directed at Newdow and his daughter. *Id.*; *see also* Chandler v. James, 985 F. Supp. 1068, 1078 (M.D. Ala. 1997) (describing harassment of a student who complained about prayers at school—"Virtually every day between October 1996 and April 1997, approximately 175 out of 200 students in the lunchroom stood up and prayed aloud when Jesse entered the lunchroom"—and failure of school officials to stop it).

243. As Judge Reinhardt observed in a recent ceremonial deism case, "It is no accident that today's plaintiffs are known only by aliases; in the United States, in the twenty-first century, members of a religious minority suing for their constitutional rights still face genuine danger of harassment or physical abuse." Newdow v. Rio Linda Union Sch. Dist., 597 F.3d 1007, 1114 (9th Cir. 2010) (Reinhardt, J., dissenting).

Unfortunately, hostile reactions to Establishment Clause plaintiffs are not uncommon.[244]

Given that Americans who do not worship God are already distrusted, disliked, or simply deemed outsiders because of their beliefs—reminiscent of the way women entering male-dominated professions were viewed—government speech that highlights their outsider status will only solidify their alienation. The power of government expression to reinforce the outsider status of certain groups should not be underestimated.[245] While many factors determine a group's status, symbols of government are one of them, and government's religious speech signals who belongs and who does not, who is preferred and who is second-class.[246] Certainly ceremonial deism can be seen as perpetuating this hierarchy. For example, by having "In God We Trust" as the official national motto and by including "under God" in the official expression of patriotism, ceremonial deism links belief in God with loyalty to the country.[247] Likewise, when the legislative and judicial branches open their sessions with invocations to God, and the president starts his term of office with an inaugural prayer to God, it is logical to conclude that political participation and belief in God are intertwined. Members of a majority religion might be disinclined to notice these messages, but members of a minority religion do not have that luxury.

Consequently, the practice of ceremonial deism compromises the religious liberty of religious outsiders. To start, by reinforcing the link between

244. *See, e.g.*, Tina Kelley, *Talk in Class Turns to God, Setting Off Public Debate on Rights*, N.Y. TIMES, Dec. 18, 2006, at B1 (reporting that a student who belongs to the Ethical Culture Society received death threats and calls for his suspension after taping his history teacher telling his high school class that they would go to hell if they rejected Jesus's gift of salvation). Members of the legal community are not immune either. *See, e.g.*, Dan Margolis, *Consider Lessons, Complexity of Intelligent-Design Case*, KANSAS CITY STAR, Dec. 9, 2007, at 3 (recounting how a district court judge and his family received death threats after he held that intelligent design was religion not science and could not be taught in a public school's biology class); Philip Paulson, *Crossing Mount Soledad*, HUMANIST, Nov.–Dec. 2006, at 22, 22, 26 (describing how an attorney received numerous death threats due to his role in challenging a forty-three foot Latin cross in a public park in San Diego).

245. Karst, *supra* note 7, at 504 ("When the government displays the symbols of the majority religion, the members of religious minorities suffer a painful status harm.").

246. *Id.* at 508, 519 (noting that government alignment with certain religions is "not only a statement about what the town or school stands for, but also . . . . a recognition of who is in charge" and "a slap-in-the-face reminder that [nonbelievers are] not full members of the community"); *see also* Steven H. Shiffrin, *The Pluralistic Foundations of the Religion Clauses*, 90 CORNELL L. REV. 9, 75 (2004) (suggesting that keeping "under God" in the Pledge represents "a desire on the part of many to marginalize those who do not agree, to show who the insiders are, and to send a loud, clear message as to who the outsiders are"); Sanford Levinson, *They Whisper: Reflections on Flags, Monuments, and State Holidays, and the Construction of Social Meaning in a Multicultural Society*, 70 CHI.-KENT L. REV. 1079, 1107 (1995) ("Symbols are an important part of the cultural exchange system that, among other things, establishes relationships of hierarchy and domination.").

247. *See supra* note 230.

patriotism and Judeo-Christianity, the state exacerbates the religious insiders' bias against those whose moral and ethical beliefs do not include worship of God. Nor does it require a great leap of imagination to believe that widespread hostility and government-reinforced alienation will make a religious outsider think twice about openly practicing her nonmainstream beliefs. In an early challenge to school prayer, although the parents had the option of abiding by their religious beliefs and pulling their children out of the classroom during the official school prayer, they choose not to for fear that their children would be branded as "un-American" and "atheistic communis[ts]."[248]

Government-reinforced distrust and hostility to religious outsiders may also compromise their equality, including their ability to participate on an equal basis in the democratic process. A case in point is that of Darla Kaye Wynne, a Wiccan, who had asked at town council meetings that references to Christ be removed from the council's opening prayers.[249] Though Wynne's request was twice denied,[250] she continued to attend council meetings.[251] When she refused to stand during the Christian invocation, she heard someone, possibly a council member, declare, "Well, I guess some people aren't going to participate."[252] Her fellow citizens told her that she "wasn't wanted" and that she "should leave town."[253] They also accused her of being a Satanist.[254] Wynne testified that "she felt very, very, uncomfortable" and "a little scared."[255] Further, as the district court found, "Wynne's efforts to participate in Town Council's meetings as a member of the public were adversely affected by her refusal to accept the Christian prayer tradition."[256] For example, "the Council would not permit Wynne to participate after arriving a few minutes late to avoid the prayer, even though she had signed up to speak at the meeting and was listed on the agenda."[257]

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248. Bruce J. Dierenfield, *"The Most Hated Woman in America": Madalyn Murray and the Crusade Against School Prayer*, J. SUP. CT. HIST. 62, 68 (2007) (describing the Schempp family of *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963)). Even so, the principal of the school found out where the older child had applied to college and wrote unsolicited letters calling him a troublemaker and possibly a communist and urging the schools to reject his application. *Id.* at 67.

249. Wynne v. Town of Great Fall, S.C., 376 F.3d 292, 295 (4th Cir. 2004).

250. The mayor explained that there was nothing wrong with the Council's invocation of "Jesus Christ," "Christ Our Lord," or "Christ the Savior," because "Christ *is* God." *Id.* at 296 n.2.

251. *Id.* at 295.

252. *Id.* (internal quotations removed).

253. *Id.* (internal quotations removed).

254. *Id.*

255. *Id.* (internal quotations removed).

256. *Id.* (internal quotations removed).

257. *Id.* (internal quotations removed). In addition, the Fourth Circuit found that the Council limited her allotted speaking time, ostracized her, and treated her differently than other members of the community. *Id.* at 295–96.

Nor is her story unique. In *Habecker v. Town of Estes Park*,[258] one elected official was recalled after he refused to recite the Pledge of Allegiance.[259] For twenty years, David Habecker had served intermittently as a town trustee.[260] In 2004, the mayor announced that henceforth Board of Trustees meetings would open with a recitation of the Pledge of Allegiance.[261] At first, Habecker recited the Pledge, omitting the phrase "under God," but then he decided to remain seated and refrain from reciting the Pledge at all.[262] A recall vote followed, and Habecker lost his seat.[263] According to the recall platform: "Electors suffer loss of confidence in Habecker's ability to represent citizen's national pride, patriotism, and common decency. . . . His defiant behavior occurs because the phrase 'under God' offends him."[264]

Had legislative prayers and "under God" in the Pledge not been condoned as a form of ceremonial deism, Wynne and Habecker would not have had to choose between following their conscience and full participation in the political process.[265] This is "precisely the choice that the establishment clause forbids Government to impose on citizens."[266] In both cases, the government made their religion relevant to their standing in the political community and hindered their equal access to the democratic process. In sum, the possibility that these practices were permissible ceremonial deism set in motion a chain of events that led to one woman's inability to fully participate in town council meetings as an interested citizen and one man's inability to participate as an elected town official. For these reasons, the reasonable religious outsider may view alleged ceremonial deism very differently than the reasonable religious insider.

The Supreme Court has occasionally recognized the different perspectives that religious outsiders might have. Justice Kennedy has observed, "[I]t seems

258. 452 F. Supp. 2d 1113 (D. Colo. 2006).

259. The district court held that Habecker did not have standing to challenge the Pledge of Allegiance or the town board's alleged policy requiring recitation of the Pledge. *Id.* at 1113.

260. *Id.* at 1116.

261. *Id.* at 1117.

262. *Id.*

263. *Id.*

264. *Id.*

265. While citizens have the right to recall an unsatisfactory official, the fact is that Habecker seemed to have represented his constituents satisfactorily over a twenty-year period, and was recalled solely because of his religious convictions. Thus, the state's practice of allowing ceremonial deism made religion relevant to his ability to participate in the political community in exactly the way the Establishment Clause hoped to avoid.

266. Arnold H. Loewy, *The Positive Reality and Normative Virtues of a "Neutral" Establishment Clause*, 41 BRANDEIS L.J. 533, 545 (2003) ("Compelling the atheistic patriot to either appear unpatriotic or to betray his religious convictions is precisely the choice that the establishment clause forbids Government to impose on citizens.").

incredible to suggest that the average observer of legislative prayer who either believes in no religion or whose faith rejects the concept of God would not receive the clear message that his faith is out of step with the political norm."[267] Nonetheless, the conclusion is still that a reasonable person would not find that the ceremonial use of God amounts to endorsement of religion over nonreligion or some religions over others.[268] Furthermore, this tolerance for ceremonial deism is widespread, regularly leading to observations like "the use of the words 'under God' might offend some people, but it hardly establishes an official religion."[269]

B. The Reasonable Christian as the Unstated Norm

The second parallel to the reasonable person standard in sexual harassment cases is that there is an unstated norm that favors the dominant group. The hidden norm for the reasonable person in sex discrimination claims was a male perspective,[270] while the hidden norm in ceremonial deism cases is a Christian perspective, or perhaps a Judeo-Christian perspective. Thus, the conclusion that a reasonable person would not see any endorsement of religion in ceremonial deism or in other challenged religious practices usually embodies a Christian perspective masquerading as a universal, objective one. In short, courts and commentators regularly fail to take into account the perspective of those who belong to a minority religion or have no religion at all.[271]

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267. County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 673–74 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part).

268. *See, e.g.*, Lambeth v. Bd. of Comm'rs, 407 F.3d 266, 272 (4th Cir. 2005) (concluding that a reasonable person would not find that the state "impermissibly" endorses religion by carving "In God We Trust" on the facade of a county government building); Gaylor v. United States, 74 F.3d 214, 217 (10th Cir. 1996) ("[W]e 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."); Cammack v. Waihee, 932 F.2d 765, 780 (9th Cir. 1991) ("[I]t is unlikely that an observer would regard Good Friday's inclusion [as an official state holiday] as an endorsement of religion.").

269. Sunstein, *supra* note 14, at 577. *See also* Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CAL. L. REV. 673 (2002) (arguing that endorsement's harm to the political self-realization of religious minorities is not unconstitutional); Michael J. Perry, *Freedom of Religion in the United States: Fin de Siècle Sketches*, 75 IND. L.J. 295, 317–18 n.71 (2000) ("One may plausibly conclude that whatever religious dimension routine public recital of the Pledge retains is so slight, so marginal, as to be legally de minimis); Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 207–08 n.59 (1992) ("But we need not melt down the national currency to get rid of 'In God We Trust.' Rote recitation of God's name is easily distinguished as a de minimis endorsement in comparison with prayer or the seasonal invocation of sacred symbols. The pledge of allegiance is a closer question.").

270. And white, and heterosexual, and able bodied, etc.

271. One court even explicitly stated that it would discount the plaintiffs' perceptions because the analysis was supposed to be from a reasonable person's point of view. In that case, the plaintiffs,

The unstated norm manifests itself in several ways. First, it appears in the assumption that "God" is nonsectarian.[272] But because not all religions center around God,[273] references to God cannot be nonsectarian. Nonetheless, the Sixth Circuit insists that a reasonable, well-informed observer would not "discern an endorsement of Christianity in the words of Ohio's [New Testament] motto ['With God All Things Are Possible']. There is, after all, nothing uniquely Christian about the thought that all things are possible with God."[274] Similarly, in rejecting a Wiccan's challenge to a policy allowing only clergy of monotheistic faiths to pray before legislative sessions,[275] the Fourth Circuit held that the monotheistic prayers were nonsectarian and highly diverse: "Chesterfield has had a wide variety of prayers . . . . Clerics from multiple faiths and traditions have described divinity in wide and embracive terms—'Lord God, our creator,' 'giver and sustainer of life,' . . . 'the God of Abraham, of Moses, Jesus, and Mohammad,' 'Heavenly Father,' 'Lord our Governor,' 'mighty God,' 'Lord of Lords, King of Kings, creator of planet Earth and the universe and our own creator.'"[276] These courts overlook all the other religions that do not worship God. A reasonable Buddhist or atheist, neither of whose belief systems include God, is unlikely to draw the same conclusion.

Second, as courts characterized women who complained about harassment as difficult, so too do they treat non-Christians. Like Title VII plaintiffs,

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a Jewish football player and his family, objected to the Christian prayers before his football games. Berlin v. Okaloosa County Sch. Dist., No. PCA 87-30450-RV, 1988 WL 85937, at *1–2 (N.D. Fla. Mar. 1, 1988). The mother testified that she felt animosity from the crowd when she refused to stand for the Christian invocations, and the sister testified she got "weird looks." *Id.* at *2. Nonetheless, the district judge found no Establishment Clause violation, in part because "my evaluation of the invocation's effect must be from the perspective of an objective observer. The nature of my inquiry thus minimizes the significance of the Berlins' characterization." *Id.* at *14 (citation omitted). *See also* Am. Atheists, Inc. v. Duncan, 528 F. Supp. 2d 1245, 1257 (D. Utah 2007) (holding that "because this is an objective inquiry, the court need not ask whether a particular individual or group might be offended" by the government erecting twelve foot crosses bearing a state logo).

272. *See, e.g.*, Croft v. Perry, 604 F. Supp. 2d 932, 940 (N.D. Tex. 2009) (rejecting the claim that "under God" prefers some religions over others).

273. *See supra* notes 207–212 and accompanying text.

274. ACLU of Ohio v. Capitol Square Review & Advisory Bd., 243 F.3d 289, 303 (6th Cir. 2001) (en banc). This is the court's conclusion despite the fact that, as noted in the governor's press release, the motto is from a verse in the New Testament, *Matthew* 19:26. *Id.* at 311.

275. Simpson v. Chesterfield County Bd. of Supervisors, 404 F.3d 276, 284–85 (4th Cir. 2005) (rejecting a Wiccan's request to be added to the list of religious leaders able to give invocations).

276. *Id.* at 284; *see also id.* at 279 (arguing that the diversity of clergy who have given invocations, which included Muslim, Jewish, and Christian religious leaders, "reflects the Board's requirement that prayers be 'non-sectarian'"); Doe v. Indian River Sch. Dist., 685 F. Supp. 2d 524, 542 (D. Del. 2010) (upholding a prayer policy expressly permitting denominational prayers and questioning "whether the mere reference to a deity or religious figure—whether it be 'Jesus Christ,' 'God,' 'Allah,' 'Mohammed,' or 'Yahweh'—necessarily renders a prayer 'sectarian'").

Establishment Clause plaintiffs are depicted as troublesome and oversensitive.[277] The Supreme Court characterized their objections to a nativity scene, which represents the birth of Jesus, as "overreact[ing]": "To forbid the use of this one passive symbol—the crèche— . . . would be a *stilted over-reaction* contrary to our history and to our holdings."[278] Similarly, a judge wrote that "phrases [such] as 'In God We Trust' or 'under God' have no tendency to establish religion in this country . . . except in the *fevered eye* of the persons who most *fervently* would like to drive all tincture of religion out of the public life of our polity."[279] In short, the reasonable person is not upset by ceremonial deism,[280] only, as one critic of ceremonial deism put it, "hypersensitive religious spoilsports."[281] Even Justice O'Connor, who articulated alienation as a prime concern of the Establishment Clause, nevertheless seems to envision only two reactions to ceremonial deism: the reasonable person who is not bothered by it and someone who is essentially trying to exercise a heckler's veto.[282]

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277. Mark Strasser argues that current application of the endorsement test merely serves to "validate practices that seem to violate the express terms of the test and to reject the reasonableness of those individuals feeling offended when their religious views or practices are ignored or undermined." Mark Strasser, *The Protection and Alienation of Religious Minorities: On the Evolution of the Endorsement Test*, 2008 MICH. ST. L. REV. 667, 668; *cf.* ACLU of Ky. v. Mercer County, 432 F.3d 624, 638, 639 (6th Cir. 2005) (noting, in upholding display of the Ten Commandments, that "[f]ortunately the reasonable person is not a hyper-sensitive plaintiff" and that the ACLU "does not embody the reasonable person").

278. Lynch v. Donnelly, 465 U.S. 668, 686 (1984) (emphasis added); *see also* Pelphrey v. Cobb County, 547 F.3d 1263, 1286 n.3 (11th Cir. 2008) (emphasis added).

279. Newdow v. U.S. Cong., 292 F.3d 597, 614 (9th Cir. 2002) (Fernandez, J., concurring in part and dissenting in part) (emphasis added). Another judge wrote that while a Latin Cross and the motto "With This We Conquer" might have religious significance to the plaintiff, an ethically Jewish atheist, or "some other sensitive perceiver," the seal had "only a benign reference to religion" and that it "would require a singular subtlety of mind to ideate a divisive potential." Johnson v. Bd. of County Comm'rs, 528 F. Supp. 919, 921, 924–245 (D.N.M. 1981); *see also* Am. Atheists v. Duncan, 528 F. Supp. 2d 1245, 1257 (D. Utah 2007) (upholding the state's twelve-foot crosses bearing the State Highway Patrol logo because the endorsement question is "not posed to the most sensitive in society").

280. *See, e.g.*, Elewski v. City of Syracuse, 123 F.3d 51, 52, 55 (2d Cir. 1997) (holding that the reasonable observer would not perceive a stand-alone, state-owned crèche with a banner reading "Gloria in Excelsis Deo" as a message of endorsement of Christianity); Strasser, *supra* note 277, at 723 ("In too many of the cases, the nonadherent who is sincerely offended is implicitly or explicitly being told that she would not be offended were she either better informed or more reasonable.").

281. Gey, *supra* note 7, at 1914. Of course, as Stephen Gey has pointed out, the irony is the incredibly fevered response to the Ninth Circuit's decision that adding 'under God' was unconstitutional: "Politicians at every level of government rushed to the podium (or television studio) to express their revulsion . . . ." *Id.* at 1866–67. As Gey explains, President Bush dismissed the Ninth Circuit decision as "ridiculous"; the Senate immediately voted 99–0 in favor of a resolution denouncing the Ninth Circuit; the House passed a similar resolution 416–3, and the public was in an uproar. *See id.* at 1866–68. On remand from the Supreme Court, the Ninth Circuit upheld the Pledge. Newdow v. Rio Linda Union Sch. Dist., 597 F.3d 1007, 1042 (9th Cir. 2010).

282. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 34–35 (2004) (O'Connor, J., concurring) ("First, because the endorsement test seeks 'to identify those situations in which government makes adherence to a religion relevant . . . to a person's standing in the political community,' it assumes the

Hand in hand with this belittling of plaintiffs is the trivialization of their complaints. Courts used to argue that women were perhaps "offended" by certain language or behavior in the workplace, but that it hardly amounted to a hostile or abusive work environment, and a reasonable person would not find that it violated Title VII. Likewise, courts regularly downplay the harm in ceremonial deism and other Establishment Clause claims. Plaintiffs are routinely described as merely "offended," "irritated," or "discomforted" by the challenged practice, rather than actually suffering a serious injury. In her concurrence upholding the display of a large cross on government property,[283] Justice O'Connor wrote that "the endorsement inquiry is not about . . . saving isolated nonadherents from the *discomfort* of viewing symbols of a faith to which they do not subscribe."[284] In upholding the Ohio motto, "With God All Things Are Possible," the Sixth Circuit repeatedly characterized the plaintiff's harm as an "irritation."[285] A Texas district judge had so little empathy for a ceremonial deism plaintiff that he *sua sponte* imposed Rule 11 sanctions, declaring that the suit was frivolous and a waste of time.[286]

In addition to characterizing the harm as mere "irritation" or "discomfort," courts downplay the injury by arguing that the government's religious speech clearly did not establish a state church or amount to some other real violation. For example, when the Fifth Circuit reversed the aforementioned Texas judge's imposition of sanctions, it nonetheless wrote that "[a]ny notion that [this religious] symbol[ ] pose[s] a real danger of establishment of a state church is far-fetched indeed."[287] Similarly, in upholding the 2007

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viewpoint of a reasonable observer. Given the dizzying religious heterogeneity of our Nation, adopting a subjective approach would reduce the test to an absurdity. Nearly any government action could be overturned as a violation of the Establishment Clause if a 'heckler's veto' sufficed to show that its message was one of endorsement.") (citation omitted).

283. The cross was a private display, but there were concerns that passersby would not realize that it was private rather than government speech because the cross was erected on public property—the county courthouse to be exact. Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 763 (1995) (O'Connor, J., concurring).

284. *Id.* at 779 (O'Connor, J., concurring) (emphasis added).

285. ACLU of Ohio v. Capitol Square Review & Advisory Bd., 243 F.3d 289, 309 (6th Cir. 2001) (arguing that "[m]uch of what government does is irritating to someone," like requiring people to pay taxes, but that irritation does not equate to unconstitutionality, and that "[o]ur level of irritation with a given governmental action is simply not a reliable gauge of the action's constitutionality").

286. Murray v. City of Austin, 744 F. Supp. 771, 775–76 (W.D. Tex. 1990) (rejecting a challenge to the city's use of a Latin cross in its official insignia). The Fifth Circuit, after noting that the city insignia appeared on police cars, police and fire uniforms, letterhead, monthly utility bills, and many city-owned buildings, parks, and recreation centers, vacated the imposition of sanctions. Murray v. City of Austin, Texas, 947 F.2d 147, 149–50, 158 (5th Cir. 1991).

287. *Murray*, 947 F.2d at 150, 155 (citing Lynch v. Donnelly, 465 U.S. 668, 686 (1984)) ("Any notion that these symbols pose a real danger of establishment of a state church is far-fetched indeed.").

addition of "under God" to the Texas State Pledge of Allegiance, a judge wrote,

> [W]hen all is said and done, the danger that 'under God' in our Pledge of Allegiance will tend to bring about a theocracy . . . is so miniscule . . . as to be *de minimis*. The danger that phrase presents to our First Amendment freedoms is picayune at most.[288]

Of course, the Establishment Clause does more than merely prevent the government from formally establishing an official state church, just as Title VII bars more than sexual assault or harassment that causes a nervous breakdown. As Stephen Gey has observed, "the very concept of constitutional triviality [is] one of the most effective mechanisms for maintaining majoritarian control over public discourse."[289]

Third, someone identifying with the Judeo-Christian tradition is much more likely to find reasonable the explanations often given as to why references to God accomplish a secular rather than religious end. The claim that "God" solemnizes an occasion or pledge is more convincing if God actually means something to the audience, especially since whatever solemnity is needed can be accomplished without reference to a God that not everyone worships.[290] For example, why not make the national motto, "With Liberty and Justice For All,"[291] or open the Supreme Court with, "Long live the United States and the honorable Court."[292] Someone outside as opposed to inside the Judeo-Christian tradition is also more likely to agree that "it is implausible that the addition of the words 'under God' in 1954 added any solemnity to a Pledge that had seen the country through two world wars without those words."[293]

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288. Croft v. Perry, 604 F. Supp. 2d 932, 940 (N.D. Tex. 2009) (internal quotation marks omitted) (quoting Newdow v. U.S. Cong., 292 F.3d 597, 613 (9th Cir. 2002) (Fernandez, J., dissenting in part and concurring in part)).

289. *See* Gey, *supra* note 7, at 1872, 1897 (questioning whether "triviality analysis is merely a mechanism for legitimating violations of the Establishment Clause" and later answering this question affirmatively).

290. Justice Brennan has argued that, "States may not employ a religious means to reach a secular goal unless secular means are wholly unavailing." Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 294 (1963) (Brennan, J., concurring).

291. The current motto is "In God We Trust." Alternatively, the previous national motto—"E Pluribus, Unum," or "Out of Many, One"—can better serve a unifying function as it does not exclude anyone from its ambit and indeed recognizes the great diversity of this country.

292. Epstein, *supra* note 14, at 2144 (noting that one district court in Texas does this). Similarly, there is no need for witnesses to swear to tell the truth "so help me God"; reciting "upon penalty of perjury charges" can convey the seriousness of a courtroom oath. *See id.* at 2161.

293. Gey points out that "under God" adds nothing to the nonreligious patriotic aspects of the Pledge. Gey, *supra* note 7, at 1907. Indeed, he argues that the Pledge's long existence without God shows how specious the solemnity argument is. *Id.* at 1872, 1907. Similarly, Judge Reinhardt has argued that "a pledge of allegiance to a national flag is, by definition, supremely patriotic. Except in theocracies,

Similarly, the argument that ceremonial deism merely recognizes the important role that God plays for the nation's people[294] reveals the unstated norm in assuming that God is significant to all Americans. In upholding Ohio's state motto, "With God All Things Are Possible," the Sixth Circuit held that "[l]ike the national motto, and the national anthem, and the pledge of allegiance, the Ohio motto is a symbol of a common identity. Such symbols . . . reenforc[e] the citizen's sense of membership in an identifiable state or nation."[295] But government endorsement of some people's religions at the expense of others cannot unify. On the contrary, instead of reinforcing a sense of belonging for non-Christians, it reaffirms their outsider status. Perhaps at one time, when all citizens belonged to the Judeo-Christian faith, phrases such as these could function as a kind of civil religion.[296] But that time has passed.[297] When over 10 percent of Americans are atheist or agnostic, and an additional 12 percent do not believe in a personal God,[298] it is difficult to see how words that focus on recognizing God will unite the populace. "Trends in religious demographics . . . suggest that Judeo-Christianity can no longer plausibly claim

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such a pledge does not become *more* patriotic by amending it to include a personal affirmation of belief in God." Newdow v. Rio Linda Union Sch. Dist., 597 F.3d 1007, 1080 (9th Cir. 2010).

294. *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668, 692–93 (1984) (O'Connor, J., concurring) (describing a crèche in a holiday display, as well as legislative prayers, "In God We Trust," and "God save the United States and this honorable Court" as constitutional acknowledgements of religion); Marsh v. Chambers, 463 U.S. 783, 792 (1983) (holding that opening a legislative session with prayer is "simply a tolerable acknowledgment of beliefs widely held among the people of this country"); ACLU Neb. Found. v. City of Plattsmouth, 419 F.3d 772, 777 (8th Cir. 2005) (en banc) (noting that the Supreme Court has approved state actions that recognize the role of religion in our national life such as displaying a crèche).

295. ACLU of Ohio v. Capitol Square Review & Advisory Bd., 243 F.3d 289, 307 (6th Cir. 2001) (en banc); *see also Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d at 1012 (arguing that the "Pledge of Allegiance serves to unite our vast nation").

296. Frederick Mark Gedicks and Roger Hendrix describe civil religion as an attempt "to bind citizens to their nation and government with widely shared religious beliefs, thereby supplying a spiritual interpretation of national history that suffuses it with transcendent meaning and purpose." Gedicks & Hendrix, *supra* note 230, at 276–77.

297. *See supra* notes 210–213 and accompanying text (detailing the current religious composition of the United States). *See also* Gedicks & Hendrix, *supra* note 230, at 277–78 (noting that "dramatic" demographic changes "leave large numbers of Americans outside the" walls of traditional Judeo-Christianity); *id.* at 289 ("[T]he United States is now well beyond the point where the symbols and practices of either a 'Judeo-Christian' or 'Abrahamic' civil religion can authentically represent the religious commitments of all or nearly all Americans.").

298. *See supra* note 212 (according to ARIS 2008, while 70 percent of Americans believe in a personal God, 2 percent are atheist, 10 percent are agnostic, and 12 percent are deists); *see also* PEW FORUM ON RELIGION & THE PUBLIC LIFE, U.S. RELIGIOUS LANDSCAPE SURVEY 5 (2008) (noting that 10.3 percent of Americans describe themselves as atheist, agnostic, or unaffiliated and secular); Gedicks & Hendrix, *supra* note 230, at 288 (noting that it is reliable to "estimate that between one-quarter and one-third of Americans no longer fall within the traditional denominational definitions of Protestant, Catholic, or Jew").

to capture the beliefs of nearly all Americans, and, correspondingly, that it can no longer plausibly claim to function as a socially and politically unifying civil religion."[299] Nonetheless, many courts refuse to see that we are no longer a homogeneous Christian or even a Judeo-Christian nation.

One rejoinder might be that government references to God are not statements of belief in God, but merely acknowledgements of the role of God in our history, and we should be able to celebrate our heritage. A reasonable person who is aware of the history of this nation, even someone who does not believe in God, it is argued, would not take exception to this acknowledgement of our past.[300] A close reading of these cases, however, reveals that courts' analysis of religious significance is not confined to the past.[301] Instead, courts explicitly acknowledge the continued vitality of religion. As a result, this "acknowledgement of history" justification seems more like a cover to allow expression of present religious convictions.[302] The Christian-centered norm becomes apparent when a court, after claiming that the reference to God reflects the historical role that religion played for many Americans, makes statements that presume the existence of God.[303] While courts no longer

299. Gedicks & Hendrix, *supra* note 230, at 284. *See also* Marsh v. Chambers, 463 U.S. 783, 817 (1983) (Brennan, J., dissenting) ("[O]ur religious composition makes us a vastly more diverse people than were our forefathers. . . . In the face of such profound changes, practices which may have been objectionable to no one in the time of Jefferson and Madison may today be highly offensive to many persons, the deeply devout and the nonbelievers alike.") (quoting Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 240–41 (1963) (Brennan, J., concurring)).

300. *See, e.g.*, Van Orden v. Perry, 545 U.S. 677, 687 (2005) ("Recognition of the role of God in our Nation's heritage has also been reflected in our decisions."); Croft v. Perry, 604 F. Supp. 2d 932, 938 (N.D. Tex. 2009) (accepting the argument that "under God" was added to the Texas state pledge of allegiance in order "to acknowledge that a belief in a Supreme Being was historically important to the founders of our nation and of the State of Texas").

301. There are other rebuttals to the history argument. One is that the role played by religion in our history is much more complicated than advocates make it out to be. For example, more than one scholar contests the often-made claim that the Ten Commandments significantly influenced the development of American law and government. *See, e.g.*, David A. Friedman, *Why Governmental Decalogue Displays Endorse Religion*, 23 T.M. COOLEY L. REV. 109, 110 (2006) (noting that the Ten Commandments "lack[ ] the historical pedigree" often claimed for them); Kosse, *supra* note 7, at 166 (noting the "raging debate . . . as to the extent the Ten Commandments influenced American law").

302. Some might argue that the Court knows that its justifications for ceremonial deism are a sham, but that the country is not yet prepared to fully comply with the Constitution, and the Court dare not eliminate state invocations of God in the face of such opposition. *See, e.g.*, McCreary County v. ACLU of Ky., 545 U.S. 844, 892 (2005) (Scalia, J., dissenting) (suggesting that the Supreme Court "occasionally ignor[es] the [Establishment Clause's] neutrality principle" out of "an instinct for self-preservation"). Such a possibility raises interesting questions—beyond the scope of this Article—about the legitimacy and institutional power of the courts, and what is more likely to undermine their legitimacy: unpersuasive decisions or unpopular and potentially unenforceable ones.

303. *See* Croft v. Perry, 604 F. Supp. 2d 932, 938, 940 (N.D. Tex. 2009) (claiming that "under God" in the Texas pledge merely "acknowledge[s] that a belief in a Supreme Being was historically important to the founders of our nation and of the State of Texas," but then describing the phrase as a "broad

repeat Justice Brewer's 1892 comment that the United States "is a Christian nation,"[304] the Supreme Court and others still quote Justice Douglas's 1952 observation that "[w]e are a religious people whose institutions presuppose a Supreme Being."[305] In these cases, God is mentioned not as a historical or sociological observation about the role of religion but as an assertion about the divinity and omniscience of God. Comments like these abound.[306] They reveal that the judge believes in God—and, as a result, probably envisions that that the reasonable person does too. Given this context, it becomes questionable whether a reasonable non-Christian would conclude that "under God" in the Pledge of Allegiance refers to the historical role of religion rather than affirms that God exists, or reads the national motto, "In God We Trust," as an historical fact rather than an assertion of faith.

C. Blindness to and Perpetuation of Christian Privilege

The third parallel between the use of the reasonable person standard in sexual harassment and ceremonial deism is that blindness to the unstated norm perpetuates existing hierarchies. The ubiquity of Judeo-Christian dominance in our culture, from our national motto to our national holidays, is apparent.[307] Yet failure to recognize asymmetries in power leads judges to underestimate ceremonial deism's impact, allowing them to sanction its continuance and perpetuate Christian privilege.

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acknowledgement of a divine being"); ACLU of Ky. v. Mercer County, 432 F.3d 624, 633 (6th Cir. 2005) (stating that the County display was an attempt to recognize American legal history but then writing that "several of the documents refer to the Deity").

304. Church of the Holy Trinity v. United States, 143 U.S. 457, 471 (1892).

305. Zorach v. Clauson, 343 U.S. 306, 313 (1952); *see also* Van Orden v. Perry, 545 U.S. 677, 683 n.2 (2005) (upholding a Ten Commandments monument); Lynch v. Donnelly, 465 U.S. 668, 672 (1984) (upholding the display of a crèche); Marsh v. Chambers, 463 U.S. 783, 792 (1983) (upholding legislative prayers); Simpson v. Chesterfield County Bd. of Supervisors, 404 F.3d 276, 282 (4th Cir. 2005) (upholding a policy of limiting clergy giving legislative prayers to members of Judeo-Christian religions); Myers v. Loudoun County Pub. Schs., 418 F.3d 395, 397 (4th Cir. 2005) (upholding recitation of the Pledge of Allegiance in Virginia public schools); ACLU of Ohio v. Capitol Square Review & Advisory Bd., 243 F.3d 289, 293 (6th Cir. 2001) (en banc) (upholding "With God All Things Are Possible" as the Ohio state motto); Cammack v. Waihee, 932 F.2d 765, 776 (9th Cir. 1991) (upholding Good Friday as a state holiday).

306. *See, e.g.*, *ACLU of Ohio*, 243 F.3d at 308 (finding that the state motto merely "pays lip service to the puissance of God"). The congressional report accompanying the law adding "under God" to the Pledge states that "[t]he phrase 'under God' recognizes only the guidance of God in our national affairs." H.R. REP. NO. 83-1693, at 3 (1954), *reprinted in* 1954 U.S.C.C.A.N. 2339, 2341–42.

307. *See also supra* notes 225–231 and accompanying text (describing Christian privilege).

A recent example of this type of blindness is Justice Scalia's comments regarding a large Latin cross standing alone on government property.[308] In explaining the Establishment Clause issue with the monument, the ACLU attorney stated that the Latin cross was "the predominant symbol of Christianity."[309] Justice Scalia disagreed, arguing that the monument was a war memorial, and that furthermore the cross was "the most common symbol of . . . the resting place of the dead."[310] The ACLU attorney disagreed, pointing out that "[t]he cross is the most common symbol of the resting place of Christians. I have been in Jewish cemeteries. There is never a cross on a tombstone of a Jew."[311] Despite the laughter that followed, Justice Scalia remained adamant, insisting that "I don't think you can leap from that to the conclusion that the only war dead that the cross honors are the Christian war dead. I think that's an outrageous conclusion."[312]

Courts and commentators' reliance on the history and ubiquity of government invocations of God to justify ceremonial deism also exemplifies this blindness to privilege. The argument is as follows: How can ceremonial deism be viewed as government endorsement of God-centered religions when government speech regularly and throughout history has had this religious component? Indeed, *Marsh*'s main argument in upholding legislative prayers,

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308. Transcript of Oral Argument at *38–39, Salazar v. Buono, 130 S. Ct. 1803 (2010) (No. 08-472), 2009 WL 3197881.

309. *Id.* at *38.

310. *Id.* at *38–39.

311. *Id.* at *39.

312. The full exchange is as follows:

> MR. ELIASBERG: It doesn't say that, but a cross is the predominant symbol of Christianity and it signifies that Jesus is the son of God and died to redeem mankind for our sins, and I believe that's why the Jewish war veterans—
>
> JUSTICE SCALIA: It's erected as a war memorial. I assume it is erected in honor of all of the war dead. It's the-the cross is the-is the most common symbol of-of-of the resting place of the dead, and it doesn't seem to me—what would you have them erect? A cross—some conglomerate of a cross, a Star of David, and you know, a Moslem half moon and star?
>
> MR. ELIASBERG: Well, Justice Scalia, if I may go to your first point. The cross is the most common symbol of the resting place of Christians. I have been in Jewish cemeteries. There is never a cross on a tombstone of a Jew.
>
> (Laughter.)
>
> MR. ELIASBERG: So it is the most common symbol to honor Christians.
>
> JUSTICE SCALIA: I don't think you can leap from that to the conclusion that the only war dead that that cross honors are the Christian war dead. I think that's an outrageous conclusion.

Id. at *38–39. *See also* Am. Atheists v. Duncan, 528 F. Supp. 2d 1245, 1257 (D. Utah 2007) (holding that twelve-foot crosses on the side of the highway bearing the State Highway Patrol logo "[do] not have the effect of conveying the message that religion . . . is favored because the cross here serves as a secular symbol of death or burial, not as a religious symbol").

apart from original understanding, is that congressional sessions have always opened with prayer.

Courts in early Title VII decisions operated on similar assumptions when they expressed astonishment that the new law might change the status quo. As far as these courts were concerned, boys will be boys, certain workplaces were rough and vulgar, and that's just the way things are; that shouldn't mean that they are illegal or that "Title VII was meant to . . . change [that fact]."[313] To complain was deemed unreasonable. Indeed, how harassing and objectionable could "girlie magazines" in the workplace be when objectification of women was widespread? Likewise, the American government has always invoked God, and that is just the way things are. And given how widespread and widely accepted government references to God are, how alienating could they be?[314] The Seventh Circuit relied upon this reasoning when upholding a city seal with a Latin cross: "What *is* endorsement in a world pervaded by [government] religious imagery, from the eye in the Great Seal of the United States (the eye of God in a pyramid representing the Christian trinity) to 'In God We Trust' on the coinage . . . ?"[315] To see endorsement of Judeo-Christianity is simply unreasonable.

Yet, this argument should have as little traction as it would now in the sexual harassment context. The response in both cases is that "what the powerless must tolerate" should not "become[ ] what the law defines as acceptable conduct."[316] "[E]quating 'reasonableness' with societal consensus . . . necessarily assumes that the status quo itself is egalitarian, pluralistic, and nondiscriminatory."[317] And just as that is not true for women, so is it not true for religious outsiders. Like women, non-Christians have not enjoyed equal power or an equal role in shaping the status quo. In short, neither a historical pedigree nor ubiquity inoculates harassment or endorsement. On the contrary, the length and breadth of the behavior merely underscores the severity of the problem.

This inability to see Christian privilege also colors courts' and commentators' understanding of why religious outsiders do not immediately challenge

313. Rabidue v. Osceola Refining Co., 805 F.2d 611, 620–21 (6th Cir. 1986).

314. A starker, more familiar, symbolic example might help drive this point home. Imagine that states had always been responsible for minting pennies. Imagine that in several Southern states, pennies for at least the past hundred and fifty years have had a confederate flag on the back. For some, the confederate flag represents Southern pride. For others, especially African Americans, it is a racist symbol of oppression and nostalgia for the days of slavery. *See, e.g.*, Sons of Confederate Veterans, Inc. v. Comm'r of the Va. Dep't of Motor Vehicles, 288 F.3d 610, 624 (4th Cir. 2002) (describing views of the confederate flag). Does it then become unreasonable to take offense given that the practice of putting confederate flags on pennies is ubiquitous and longstanding? Should the states continue the practice?

315. Harris v. City of Zion, 927 F.2d 1401, 1423 (7th Cir. 1991) (Easterbrook, J., dissenting).

316. Estrich, *supra* note 8, at 847.

317. Ehrenreich, *supra* note 8, at 1205.

ceremonial deism.[318] Perhaps a reasonable person in a position of power might complain as soon as something displeased him, but that is not necessarily the reasonable reaction for someone without power. In other words, just as women do not necessarily complain immediately about sexual harassment that they find abusive, members of minority religions may not necessarily challenge state religious practices that they find alienating. While litigation may be treacherous for everyone, it is especially so for those already on the margins. Religious minorities, often outsiders in their communities, may hesitate for fear of being completely ostracized.[319] As described above, plaintiffs who challenge government religiosity have been intimidated and attacked. Furthermore, given the Supreme Court's tolerance for ceremonial deism, why bring a lawsuit and be branded an overreacting crank?[320] Consequently, judges' conclusion that the harm of ceremonial deism could not have been severe because no one complained right away[321] reflects and perpetuates Christian privilege.

Finally, failure to see power asymmetries allows courts and commentators to characterize Establishment Clause challenges as between two equal interests in much the same way that blindness to male privilege allowed men to complain about conflicting interests in sexual harassment law.[322] Justice Scalia describes the two competing interests as, "[o]n the one hand, the interest of that minority in not feeling 'excluded'; but on the other, the interest of the overwhelming majority of religious believers in being able to give God thanks and supplication *as a people*, and with respect to our national endeavors."[323]

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318. *See* Freethought Soc'y v. Chester County, 334 F.3d 247, 250 (3rd Cir. 2003) (remarking that plaintiff "noticed the [Ten Commandments] plaque as early as 1960 but was apparently not bothered enough by it to complain until 2001").

319. Van Orden v. Perry, 545 U.S. 677, 747 (2005) (Souter, J., dissenting) ("Suing a State over religion puts nothing in a plaintiff's pocket and can take a great deal out, and even with volunteer litigators to supply time and energy, the risk of social ostracism can be powerfully deterrent."); *see also supra* notes 238–249 and accompanying text (describing how plaintiffs often sue anonymously).

320. *See* Lynch v. Donnelly, 465 U.S. 668, 703 (1984) (Brennan, J., dissenting) ("[T]he quiescence of those opposed . . . may have reflected nothing more than their sense of futility in opposing the majority."); Epstein, *supra* note 14, at 2171.

321. *See supra* notes 53–55 and accompanying text.

322. *See* Caroline Mala Corbin, *The First Amendment Right Against Compelled Listening*, 89 B.U. L. REV. 939, 958, 958 n.133 (2009) (citing Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481 (1991) (arguing that hostile work environment claims based on expression cannot withstand First Amendment scrutiny)); Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791 (1992) (arguing that Title VII harassment law violates the First Amendment).

323. McCreary County v. ACLU of Ky., 545 U.S. 844, 900 (2005) (Scalia, J., dissenting). In a similar vein, Steven Smith has argued that the endorsement test is bound to alienate some: If ceremonial deism is allowed, "persons who do not adhere to the predominant religion may feel like outsiders"; if ceremonial deism is banned, "some religious people will feel that their most central values and con-

Justice Scalia's conclusion is to favor the latter: "With respect to public acknowledgment of religious belief, it is entirely clear from our Nation's historical practices that the Establishment Clause permits the disregard of polytheists and believers in unconcerned deities, just as it permits this disregard of devout atheists."[324]

However, eliminating questions of privilege and power from the calculus distorts it.[325] Scalia frames the issue as a clash between the religious rights of the majority versus the religious rights of the minority, and concludes that the majority should prevail.[326] But the conflict is not between two groups of equal status, any more than Title VII's tension between women and men in traditionally male-dominated workplaces is between two groups of equal status.[327] Because of asymmetries in power, making men restrict their sexually hostile comments and pornography in the workplace does not have the same effect on men's rights as making women work in environments filled with hostility and pornography has on women's rights.[328] Likewise, because of asymmetries of power, ending government endorsement of Judeo-Christianity does not have the same effect on Christians' religious rights as its continuation does on non-Christians' religious rights. Christians retain their status as equal citizens and

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cerns . . . have been excluded from a public culture devoted to purely secular concerns." Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Clause Neutrality and the 'No Endorsement' Test*, 86 MICH. L. REV. 266, 310–11 (1987). Therefore, Smith concludes, the endorsement test should not find alienation unconstitutional because, "a degree of alienation must be acknowledged as an inevitable cost of maintaining a government in a pluralistic culture." *Id.* at 313. *See also* Jesse H. Choper, *The Endorsement Test: Its Status and Desirability*, 18 J.L. & POL. 499, 529 (2002) ("finding an Establishment Clause violation on feelings of alienation or offense alone usually makes a decision to protect the distressed sensibilities of the religious minority (or nonbelievers) and to ignore those of the religious majority").

324. *McCreary County*, 545 U.S. at 893 (Scalia, J., dissenting). *See also* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 42 (2004) (O'Connor J., concurring) (admitting that "one would be hard pressed to imagine a brief solemnizing reference to religion that would adequately encompass every religious belief expressed by any citizen of this Nation" and concluding nonetheless that invocation to God in the Pledge was constitutional).

325. Also missing from the calculus is acknowledgment of the Constitution's and the judiciary's countermajoritarian function. *See, e.g.*, Stephen G. Gey, *Religious Coercion and the Establishment Clause*, 1994 U. ILL. L. REV. 463, 506.

326. Actually, he frames it as a clash between the hurt feelings of a minority and the religious rights of the overwhelming majority. *McCreary County*, 545 U.S. at 900 (Scalia, J., dissenting). *See supra* note 323 and accompanying quotation.

327. This blindness to structural inequality also brings to mind the claim that segregation was a question of whose freedom of association should be respected, blacks' right to associate, or whites' right not to associate. *See, e.g.*, Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 32–35 (1959); *cf.* Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 *passim* (1960) (critiquing Wechsler's blindness to the social meaning of segregation).

328. Though Title VII may curtail men's free speech rights in the workplace, men are still generally free to say and read what they like outside of the workplace. However, as elaborated *supra* notes 139–144, allowing harassing speech in the workplace seriously compromises women's equal opportunity.

can still freely practice their religion even if the government no longer endorses their beliefs. The same cannot be said for religious outsiders if the government continues to endorse Judeo-Christianity.[329] As one feminist noted, "while the elimination of inequality in society inevitably makes some people feel wronged—entailing, as it does, a reduction in the social status and privilege of those on the top of the hierarchy . . . that fact does not justify its perpetuation."[330] The same response is applicable here. While cessation of ceremonial deism will deprive Christians of a privilege they have long enjoyed—the privilege of the state endorsing their religion—this does not justify ignoring the constitutional rights of the minority, especially since the Establishment Clause was designed to protect religious minorities.

In order to end this blind perpetuation of Christian privilege, just as the judgment of whether a reasonable person would find a workplace environment sexually harassing should be evaluated from the viewpoint of a reasonable woman, ceremonial deism should be evaluated from the perspective of a reasonable religious outsider.[331] "The perspective of the reasonable man who has not experienced the plaintiff's harassment is no more objective, it simply reflects a different kind of subjectivity." Likewise, the perspective of the reasonable Christian who has not experienced the alienation of a religious minority is no more objective, it simply reflects a different kind of subjectivity. Given the goals of Title VII and the Establishment Clause, the point of view adopted should be the point of view of the less powerful group, not the currently and historically dominant group.

CONCLUSION

The use of a reasonable person standard in sexual harassment and ceremonial deism cases can, if it embodies the viewpoint of the dominant group, undermine the goals of Title VII and the Establishment Clause. Applying an unstated reasonable man standard in a Title VII case may, as past cases have made abundantly clear, condone conduct that a reasonable woman would find harassing. Likewise, applying an unstated reasonable Christian standard in a ceremonial deism case may condone government speech that a reasonable religious outsider would find alienating. In each case, the goal of protecting

329. See *supra* notes 245–265 and accompanying text for discussion of endorsement's deleterious effects on the freedom of conscience and equal status of religious outsiders.

330. Ehrenreich, *supra* note 8, at 1195.

331. *See, e.g.*, Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 799 (1995) (1995) (Stevens, J., dissenting) ("It is especially important to take account of the perspective of a reasonable observer who may not share the particular religious belief it expresses.").

the nonprivileged group is given short shrift. Sexual harassment not only causes victims great distress, but it perpetuates structural inequality and undermines our ideal of equal opportunity for all. By a similar token, state endorsement of some religions over others not only marks and alienates religious outsiders, it also perpetuates Christian privilege and compromises the Establishment Clause's goal of religious liberty and equality for all. Consequently, in deciding on the constitutionality of ceremonial deism, courts should take to heart the feminist lessons on reasonableness in harassment cases: Be aware of different perspectives and unstated norms in the reasonable person test, and consider the viewpoint of the nonprivileged group the law seeks to protect.

This is not to say that implementing such a change would be without challenges. For one thing, there is no single reasonable religious outsider. But difficulties in administering a reasonable person standard should not mean defaulting to a reasonable person of a privileged group. Another challenge is the religious majority's resistance to forsaking its centuries-old privileged position.[332] This opposition raises not only pragmatic questions,[333] but also the risk that even if the name of the standard changes—from reasonable person to reasonable religious outsider—the content will remain the same because our predominantly Judeo-Christian judiciary may resist, consciously or unconsciously, altering their perspective.[334] Of course, it is by no means impossible for a Christian to imagine how a reasonable Buddhist or atheist might feel: The Ninth Circuit, after all, held the Pledge of Allegiance unconstitutional.[335] Nonetheless, life experiences do matter.[336] The differences of perspective argue

332. In a public opinion poll, 87 percent of people polled said that the Pledge should contain the phrase "under God" while only 9 percent said that it should not. *Vast Majority in U.S. Support "Under God"*, CNN.COM, June 30, 2002, http://archives.cnn.com/2002/US/06/29/poll.pledge (summarizing Newsweek poll results); *see also supra* note 281 (describing outrage when the Ninth Circuit held that the Pledge of Allegiance violated the Establishment Clause); Loewy, *supra* note 266, at 542 ("[S]adly, the majority likes the endorsement so much, that there would be hell to pay if we were to remove it.").

333. A few scholars concede the unconstitutionality of ceremonial deism but believe it must be accepted for pragmatic reasons, as they fear a backlash and constitutional amendment if disallowed. *See, e.g.*, Colby, *supra* note 30, at 1123–24; Shiffrin, *supra* note 246, at 73–74 (suggesting that to declare "In God We Trust" unconstitutional would be futile and dangerous because "it would trigger a quick constitutional amendment to the contrary"). Whether this fear is justified is debatable, as is whether pragmatism should trump just law; both are beyond the scope of this Article.

334. *See supra* note 159 (describing feminists' concern that simply changing the standard from reasonable person to reasonable woman does not address male bias).

335. Courts could also seek testimony from plaintiffs and experts to help them better understand, as they do with sexual harassment cases.

336. *See* Sonia Sotomayor, A Latina Judge's Voice, Address Before the University of California, Berkeley, School of Law (2001), *in* 13 BERKELEY LA RAZA L.J. 87, 92 (2002) ("[O]ur gender and national origins may and will make a difference in our judging. Justice O'Connor has often been cited as saying that a wise old man and wise old woman will reach the same conclusion in deciding cases. . . . I am also not so sure that I agree with the statement. . . . I would hope that a wise Latina woman with the

for diversity among decisionmakers, both those in government deciding whether to adopt a particular religious symbol, and those on the bench ruling on whether that particular symbol is constitutional. Although the Ninth Circuit decision striking down daily recital of "under God" may be an outlier now,[337] as the religious composition of our nation, and perhaps our legislatures and bench shift, so too may the legal understanding of what counts as unconstitutional endorsement of religion.

richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life. . . . [W]e should not be so myopic as to believe that others of different experiences or backgrounds are incapable of understanding the values and needs of people from a different group. Many are so capable. . . . However, to understand takes time and effort, something that not all people are willing to give. For others, their experiences limit their ability to understand the experiences of others. Other simply do not care.").

337. Notably, a few other courts have also struck down examples that could fall under the rubric of constitutional ceremonial deism, including: ACLU of Ohio v. Capitol Square Review & Advisory Bd., 243 F.3d 289 (6th Cir. 2001) (finding the state motto "With God All Things Are Possible" unconstitutional); Doe v. County of Montgomery, 915 F. Supp. 32 (C.D. Ill. 1996) (holding unconstitutional "The World Needs God" inscription on the county courthouse); Freedom From Religion Found., Inc. v. Obama, No. 08-cv-588-bbc, 2010 WL 1499451, at *30 (W.D. Wis. Apr. 15, 2010) (holding that the National Day of Prayer statute violates the Establishment Clause).