**Non-sectarianism and Atheism in the Courts: The Fractured Separationist Response to the Religious Right**

Much of the scholarship on American legal advocacy groups written in the past decade has focused on the rise of the Religious Right and its impact on American constitutional development. Notable works by scholars such as Steven Teles (2008), Ann Southworth (2008), Steven Brown (2002) have traced the institutional development of the Right’s litigation infrastructure as well as the resulting doctrinal effect these groups have had on American jurisprudence. The creation of litigation advocacy groups such as the American Center for Law and Justice and the Christian Legal Society have been instrumental in crafting Christian challenges to older conceptions of the appropriate relationship between religion and government that emerged from several decades of anti-sectarian litigation advanced primarily by American Civil Liberties Union, Americans United for the Separation of Church and State (AU),[[1]](#footnote-1) and various minority religious organizations. Although much of this work on the rise of the Religious Right and other conservative legal organizations has deepened our understanding of constitutional development and the judiciary, it has also led to a neglect of the particulars and nuances of groups with more liberal and “high wall” of separation approaches to these constitutional issues. In assessing these responses to the rise of these conservative coalitions, the binary between religious and secular groups breaks down, providing a clearer look into the diverse—and often conflicting—strategies and goals among secular advocacy organizations.

In differentiating within the broader secular distinction here, I identify the first of these organizations as the “old coalition” of separationist groups[[2]](#footnote-2), which has been led predominately by the ACLU, AU, and the American Jewish Committee. These organizations came to prominence during the early to mid-twentieth century in their challenges to government aid to particular denominations, especially Catholic ones, as well as the championing of minority religious rights, most notably the rights of Jehovah’s Witnesses.[[3]](#footnote-3) As a result, these groups have principally articulated their responses to what they perceive to be violations of the Constitution perpetrated by Christians.[[4]](#footnote-4) Although groups like the ACLU have a long history of being accused as predominately atheist-oriented by its opponents, the path dependent, historical nature of its position in these disputes has constrained the ACLU from opposing every and all instances of church-state relations (Pierson, 2004).

In contrast to this older alliance, challenges to the Religious Right have also been led by self-proclaimed secular organizations such as the Freedom From Religion Foundation (FFRF), the American Atheists (AA), and the conglomerate Secular Coalition for America (SCA).[[5]](#footnote-5) This “new coalition” of groups has been much more actively anti-religion in its pursuit of litigation without sensitivity to or support for any religious faith whether or not it has been the subject of discrimination. While several of these groups were founded before the rise of the Religious Right, many scholars and commentators have attributed the exponential growth of some of these organizations in the last decade as a response to the recent legal and policy achievements of conservative Christians.[[6]](#footnote-6) Others have emphasized the significance of the terrorist attacks on September 11, 2001 as a driving cause of this mobilization as many members of these groups and their celebrity leaders in the academy such as Richard Dawkins have called for a new era of science and rationalism to combat what they perceive to be religious extremism.[[7]](#footnote-7)

Assessing the response to the litigation of the Religious Right involves tracing and evaluating the similarities and differences in the historical development of these litigation coalitions and their legal strategies and doctrinal approaches to what they perceive to be violations of the separation of church and state. By examining several areas of advocacy pursued by both coalitions, I demonstrate that one of the key differences between these coalitions lies in the conceptualization of principles such as neutrality and pluralism. Whereas the ACLU has historically aligned itself with religious minorities as well as secularists in an attempt to create a neutral state that accommodates various forms of religious expression without allowing one particular sect to dominate, the new coalition has repeatedly emphasized that nearly *any* accommodation of religion violates the government’s duty to be neutral toward religion and rigidly secular in all of its conduct. These disparate approaches to neutrality and pluralism can be seen in many religious clause cases over the last few decades, most significantly in the old coalition’s overwhelming support for the Religious Freedom and Restoration Act (RFRA) and the new coalition’s attempts to resurrect the much less accommodating interpretation of religious freedom found in Justice Scalia’s majority opinion for *Employment Division, Department of Human Resources of Oregon vs. Smith* (1990).[[8]](#footnote-8)

In addition to these often conflicting interpretations of principles, the new coalition’s concerns with building and strengthening an atheist political identity has led to different legal strategies and political projects as well. For example groups such as the Secular Coalition for America, the Freedom From Religion Foundation, and others have initiated “coming out” movements for secularists, sobriety programs for the nonreligious, and congressional campaign funds for openly atheist candidates (Cimino & Smith, 2014). In this identitarian-style of politics, new coalition members have begun to establish an entirely secular culture and identity that has informed both their own movement building as well as their constitutional tactics and strategies. While the ACLU especially has been encouraging of these sorts of projects when championing the recognition of atheist and secular identities *in addition* to religious identities and voices, the new coalition’s other identity project goes a step further: in arguing for a high wall of separation between church and state, many atheist and humanist groups have claimed that the United States was founded on a secular national identity and that even mild accommodations of religion in the public sphere are suspect at best. This has led to differences among the two coalitions concerning constitutional issues such as the ministerial exception to the ADA as well as views on legislative prayer.[[9]](#footnote-9) In this rest of this paper, I hope to substantiate these arguments by tracing the historical developments of these secular factions and observing how these differences in foundation and principles have affected constitutional development and what they mean for the future of American separationist political movements.

**Origins of the Old and New Separationist Coalitions**

Although the separationist litigation orchestrated by the ACLU is often associated with a hostile attitude toward religion, the organization’s history and partnerships with a diverse array of religious groups tells a different story (Walker, 1999). As Sarah Barringer Gordon (2010) documents, the ACLU has consistently aligned itself with religious organizations, most notably Protestants and Other Americans United for the Separation of Church and State (POAU) as well as the American Jewish Committee. Beginning in the 1930s, this alliance was forged by combining the ACLU’s secular mission with the POAU’s desire to defend religious liberty by restraining the government from interfering with or endorsing any particular sect. The old coalition’s concerns with sectarianism developed as the organizations waged legal battles with Catholics who they accused of holding many public schools “captive” by employing faculty comprised of priests and nuns who taught dogma and Catholic prayer to their students (Kersch, 2005). General uneasiness with the relationship between Catholicism and the public education system was so prevalent that the coalition was able to push the Court to incorporate the establishment clause in the Catholic school and public busing case *Everson v. Board of Education*, 330 U.S. 1 (1947).[[10]](#footnote-10) Even as anti-Catholicism began to wane in the 1960s, this alliance has remained focused on what the POAU coined as “pervasive sectarianism,” i.e. public institutions run as de facto religious enterprises (Gordon, 2010, p.93). This focus has given the old coalition targets for litigation as well as a foundational principle from which to base its legal arguments in a variety of cases.

In addition to sectarian concerns, the old coalition has a long history of supporting the rights of religious minorities that has continued to inform its modern legal strategies. The ACLU in particular has been instrumental in litigating on behalf of marginalized and unpopular religious faiths since it took on several cases defending Jehovah’s Witnesses in the 1940s. In landmark Supreme Court cases such as *Cantwell v. Connecticut*,310 U.S. 296 (1940), *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), and *West Virginia State Board of Education v. Barnette,* 319 U.S. 624 (1943), the ACLU argued for Jehovah’s Witnesses’ rights to freely exercise their religion through proselytization as well as the right to refrain from saluting the U.S. flag. The ACLU also partnered with groups such as the Unitarian Universalists to protect minority Christians from being subjected to majority Christian religion interpretations of scripture. For example in the case *Abington School District v. Schempp*, 374 U.S. 203 (1963), the ACLU represented Unitarian schoolboy Edward Schempp in his challenge to the daily school reading of the Lord’s Prayer. It is clear from these cases that rather than the anti-religious perception of organizations such as the ACLU, the old coalition of separationists can be conceived of more accurately as a nonsectarian alliance of advocacy groups fundamentally concerned with the protection of minority rights.

In the last decade, a new coalition of separationists has emerged in the form of alliances among more purely secular-oriented advocacy groups. Organizations such as the Freedom From Religion Foundation, the Secular Coalition of America, and the American Atheists have seen a surge in membership and funding as they have seized on the political opportunity to represent a more purely secular challenge to instances of government and church intermingling. Although the alliance consists of a variety of humanist and secular Jewish organizations, the atheist members of the new coalition have provided the leadership generally in terms of seeking out litigation and drafting amicus briefs to which many of the lesser active groups have tended to join. In order to delineate this coalition’s material and ideological contributions to the separationist constitutional tradition, it is necessary to first trace its origins and determine how their arguments and tactics have been shaped by the relevant historical context and their situation in political time (Orren & Skowronek, 2004). In doing so, three explanatory factors for the origins of this new coalition can be identified as: a dialectical response to the Religious Right, a consequence of a political moment conducive to secular and atheist politics, and an elite-driven secular agenda.

Scholars such as Gavin Hyman (2007) have posited that the recent rise in secular advocacy groups is the result of a dialectical response to the preceding rise of the Religious Right. As the Republican Party under President Ronald Reagan came to embrace Christian political leaders such as Jerry Falwell and Pat Robertson and their organizations, secular-minded Americans began to organize in opposition.[[11]](#footnote-11) As early as the 1960s, these secularists started to establish advocacy groups, beginning with Madalyn Murray O’Hair’s American Atheists slightly ahead of its time in 1963; following were the 1978 establishment of the FFRF and the 1981 founding of the People for the American Way (PAW). In the past twenty years there has been another era of secular political organizing which has brought about the formation of the Secular Coalition for America, the Secular Student Alliance, and the Center for Inquiry among others. These groups have offered a secular andd often antireligious discourse as a rejoinder to the fundamentalist rhetoric of many evangelical Christian organizations such as Falwell’s Moral Majority. Especially interesting are the constant rhetorical battles over whether the country’s founding was more secular or more Christian (Hamburger, 2004; Sehat, 2011; Lambert, 2006). These developments provide evidence for the claim that as religion became more “public” in the 1980s (Casanova, 1994), there became a prospect for the establishment of a political challenge to the New Right’s politics.

In addition to dialectical explanations, secular groups have also benefited from the end of the Cold War and the waning fear of communism among Americans. Especially in the 1960s and 1970s, American secularists and atheists were tied problematically to notions of communism and general un-Americanism. Atheists suffered an additional liability in the form of Madalyn Murray O’Hair and her notoriety in the press. Having become infamous for her pugnacious personality throughout the *Schempp* case in which her son’s challenge to a Lord’s Prayer school provision was combined with the Schempp’s challenge at the Supreme Court, O’Hair used her airtime and interviews to mock all forms of religion as primitive as well as espouse the great deeds done by the rational and atheistic Soviet Union. At the height of her visibility, *Life* magazine featured her on a cover with the headline “The Most Hated Woman in America” (Le Beau, 2005). After O’Hair was removed from the spotlight and anti-communist sentiments began to taper, an effective secular political project could more feasibly be undertaken. By determining that the political moment for an atheist politics was now more possible, a less reactionary element of the new coalition of separationists becomes clearer. After all, American secularists did not suddenly emerge from nothingness over the past several decades. Susan Jacoby (2013) offers evidence for this in her book on the popular orator Robert Ingersoll, the nineteenth century “Great Agnostic” who embodied the American Golden Age of Freethought. It has undoubtedly behooved New Atheist figures such as Christopher Hitchens and Sam Harris to root their secularism in the tradition of patriotism, a characteristic that draws sharp contrast between Ingersoll the Civil War veteran and O’Hair the would-be defector to the Soviet Union (Bullivant 2010).[[12]](#footnote-12) The contemporary American political scene can thus be viewed as the first moment in over a century that secularists have been able to organize and pursue their interests with some efficacy.

While it is true that the present political climate is one that has been conducive for the rise of secular politics, this does not fully explain how such a reportedly minuscule percentage of the population has organized into such a widespread and growing alliance of advocacy groups.[[13]](#footnote-13) The highly-visible and politically active leaders of what has been termed the “New Atheism” aid in explaining how an elite-driven agenda has been principal in organizing secularists and attracting funding and membership to already established atheist, secular, and humanist groups. The most famous of these new atheist leaders have been dubbed the “Four Horsemen of New Atheism,” these atheists such as Richard Dawkins and Sam Harris have been instrumental in organizing their efforts via bestselling books, frequent media appearances, and national and international conferences.[[14]](#footnote-14) The Four Horsemen in addition to dozens of other lesser figures currently hold an assortment of presidential positions and seats on the boards of directors of organizations such as the Secular Coalition for America and the FFRF (Secular Coalition for America, 2013: Freedom From Religion Foundation, 2013a). Commentators have linked these formal and informal ties among leaders and organizations with a recent massive growth of funding and membership in these organizations (Williamson & Yancey, 2012). For example, the FFRF has seen a 130% growth in membership and millions of dollars in donations, bringing the group up to almost 20,000 dues-paying members (Wing, 2013). In many ways, these institutions have parallels to Religious Right elite-driven organizations such as Pat Robertson’s Christian Coalition and Jerry Falwell’s Moral Majority. As a consequence, they have had much more latitude to pursue not only nonsectarian goals but also more radically separationist ones than the organizations of the old coalition.

**Similarities and Differences between the New and Old Coalitions’ Political and Legal Approaches**

The following section considers various court cases and amicus briefs in order to delineate the principles and strategies by which the new and old coalitions approach religious establishment, free exercise, and free speech issues. As the previous section has demonstrated, the separationist response to the Religious Right has been a fractured one due to the differences not only in founding and constitutive principles and identities but also the historical context during which each coalition formed. Although both alliances seek to oppose government endorsements of Christianity in particular, the old coalition’s preference for nonsectarian aims has in certain instances met competition from the new coalition’s more diverse desires including the political recognition and rights of atheists as well as an acknowledgement of secularism—and antireligious sentiment—as a key founding principle of American constitutionalism. The analysis of cases exemplifies these diverse and sometimes conflicting commitments among separationists and explains where and why there has been a fractured response to the rise of the Religious Right’s brand of constitutionalism.

*Nationalizing Efforts and Atheist Movement Building*

The two separationist coalitions are perhaps most similar in their use of local and state courts to concentrate “nationalize” separationist Supreme Court rulings in noncompliant communities (Balkin, 2012). In contrast to more negative views concerning the efficacy of the courts (Dahl, 1957), Emily Zackin (2008) explains that the ACLU and related groups have had to resort to the courts after their politics became too distasteful to majority interests represented in elected institutions. Following in the old coalition’s footsteps, many atheist groups have been founded primarily as litigation-oriented organizations, providing both the funding and human capital to produce change in areas of the country that openly defy separationist constitutional doctrine. Even though the recitation of school prayer and the teaching of creationism or intelligent design in public classrooms have been broadly understood as unconstitutional for decades, these nonsectarian and atheist groups continually address local practices that flout these precedents. For example some of the FFRF’s recent legal victories—achieved either by litigation of the threat thereof—have included the ending of religious endorsements such as a 51-year policy of bible instruction in Dayton, TN schools, various sectarian religious displays, and the revoking of federal funding of a faith-based agency involved in proselytizing (Freedom From Religion Foundation, 2013b). Although the ACLU, the AU, and the more recently established Secular Coalition for America all retain lobbyists in Washington, D.C., the vast majority of these organizations’ efforts have involved litigation.

While much of the shaping of constitutional development can be seen in Supreme Court opinions, it is also necessary to examine the important discursive and material influencing factors that these separationist advocates form far from the Court. In recent years, the new coalition has grown its presence in secondary schools, high schools, universities, and law schools throughout the country in their efforts to establish resources and training for future separationist proponents. Groups like the Secular Student Alliance are committed primarily to inculcating a secular, scientific, and “human-based” ethos by providing things such as literature, speaking events, supplies to start SSA chapters, as well as resources for litigation if necessary (Secular Student Alliance, 2013). In a strategy similar to that of the conservative’s creation of the Federalist Society, atheist and humanist organizations have been especially active in creating the institutional infrastructure and spreading their ideological sentiments and rhetoric across various sites of influence in order to build their movement from the ground upward (Avery & McLaughlin, 2013). An increased organizational presence in local schools and communities in addition to the use of litigation to nationalize precedent has been a hallmark of the separationist strategy to influence and wield judicial power.

In addition to these educational and community-building projects, the new coalition has begun to promote national atheist and secular humanist candidates as well as lobby Congress from a distinctively atheist perspective. Over the last several years, various atheist organizations have begun to mount challenges to the remaining seven states that have constitutional bans on atheists from holding public office (Goodstein, 2014). Even though the Supreme Court ruled in *Torcaso v. Watkins*, 367 U.S. 488 (1961) that the Constitution’s prohibition against religious tests for public office made these a moot issue, the desire to raise awareness for the need of more “openly secular” and atheist representatives has fueled campaigns to remove these bans.

Regarding the latter, groups like the American Humanist Association’s Center for Humanist Activity and the American Atheists have developed political action committees (PACs) to help fund candidates with explicitly secular humanist and atheist identities and platforms (Freethought Equality Fund, 2015).[[15]](#footnote-15) Due to the nature of the ACLU and AU, there has been less emphasis on identity-building among the old coalition; instead, the focus has remained on promoting the rights of religious (and areligious) minorities writ large. As the new coalition continues to grow in terms of membership and resources, it will be interesting to see if the identity-based claims come to be more central to secular politics in the United States or if they remain peripheral.

*Claims to Equal Access to Public Resources and Funds*

Both the old and new coalitions’ litigation to ensure secular and atheist organizations equal access to public funds has been the most cohesive and collaborative project between the two alliances; however, the new coalition has taken this even further by developing their own secular and atheist communities that are very similar to religious ones. This pursuit was ironically based on the Religious Right’s litigation and lobbying efforts from decades earlier. Rogers Smith (2011) identifies this precedent as beginning in the 1981 case *Widmar v. Vincent* 454 U.S. 263, in which the National Evangelical Association wrote a brief supporting Christian student groups’ claims to organizational funds distributed through the University of Missouri at Kansas. Several years after the Court decided in favor of the student groups, the Religious Right lobbied Congress to pass the 1984 Equal Access Act (20 U.S.C. § 4071) in order to secure similar rights to Christian groups in federally-funded secondary schools. Using this precedent and statute, the ACLU of Michigan represented a thirteen-year-old plaintiff arguing for the right to start an atheist Bible study group to complement the traditional Bible-reading group formed by Christian students (Associated Press 1999). Since this initial litigation, groups such as Americans United, the national arm of the ACLU, and the SCA among others have provided legal resources and advice for secularist and atheist students who feel their constitutional rights have been violated.

Although member groups of both coalitions have supported this cause in principle, the new coalition has been dedicated to not only protecting already established atheist and secular student groups, but they have also made available resources and additional funds in order to generate new ones nationwide. The Secular Student Alliance in particular was founded with this purpose in mind. While the old coalition’s concern with equal access is grounded in a fidelity to free speech and the desire to create a level-playing field, the SSA and other atheist organizations explicitly state that their aim is to create a future “in which nontheistic students are respected voices in public discourse and vital partners in the secular movement's charge against irrationality and dogma” (Secular Student Alliance, 2013). This goal explains why the FFRF, SSA, and the SCA have been so active in identifying regions of the country where plaintiffs require either the resources to go to court or secularists need instruction in founding secular student organizations in secondary schools and universities. In this way, the new coalition has expanded the voice of secularists who fundamentally oppose religion while also planting the seeds of influence in schools with the aim of both increasing and deepening their legal power. More generally, both coalitions’ equal access litigation highlights an area where elected politicians have deferred to the judiciary’s reading of the Equal Access Act and the *Widmar* precedent as mandating this politically unpopular accommodation of secularist and atheist interests.

Both the old and new coalitions have worked together to challenge the rise of voucher school programs that often divert education funds to parochial schools as well as faith-based organization programs that channel federal welfare responsibilities to private religious organizations. It is unsurprising that in these cases groups like the ACLU and the FFRF have been allies as both have decades-long commitments to challenging religious organizations’ appropriation of public education and welfare funds. In cases such as *Zelma v. Simmon-Harris, 536 U.S. 639 (2002)*, *Freedom From Religion Foundation v.McCallum*, 324 F.3d 880, and Hein v. Freedom From Religion Foundation, 551 U.S. 587 (2007), the ACLU and the Freedom From Religion Foundation in particular have brought suits against or supported lawsuits where they perceived there to be an improper use of public funds by religious entities (Henriques and Lehren, 2006). Although many of these cases have resulted in losses for separationists, these issues tend to engender the most collaboration among the two coalitions. Although pluralistic in some senses, the ACLU has traditionally been suspect of these kinds of supposedly neutral allocations of funds on the basis that there tends to be a *de facto* favoring of mainstream Christian religions (this generally signifies evangelical, Catholic, and Protestant sects).[[16]](#footnote-16)

*Approaches to Public Displays of Religion*

Cases concerning public displays of religion have brought the two coalitions collaborative opportunities as well as instances of fundamental divergences in approach. It is no stretch to state that both nonsectarian and atheist groups have consistently opposed the presence of Christian icons—ranging from nativity scenes to the Ten Commandments—on public grounds. For example, there was a significant amount of crosscutting support among the coalitions for the 2005 challenges to two different Ten Commandments displays on public grounds in the cases *Van Orden v. Perry*, 545 U.S. 677 (2005) and *McCreary County v. ACLU*, 545 U.S. 844 (2005). In fact, the cases were so mutually supported by the two coalitions that the American Jewish Congress and the Freedom From Religion Foundation (Friedman & Peterson, 2005) filed briefs in support of Van Orden while the American Humanist Association and the Anti-Defamation League filed in support of the ACLU’s litigation (Legal Information Institute, 2005). Possibly even more significant, the FFRF advanced an argument in favor of the Lemon test from *Lemon v. Kurtzman,* 411 U.S. 192 (1973), a standard that the ACLU had been litigating in favor for since the 1980s.[[17]](#footnote-17) Similarly, the Atheist Law Center (Sumners & Darby, 2004) championed the Lemon test against the reasonable observer test found in Justice O’Connor’s concurrence in *Lynch v. Donnelly*, 465 U.S. 668 (1984). Together, groups from both coalitions petitioned the Court to apply the Lemon test as well as for the use of a strong presumption against the constitutionality of religious displays, an alternative to O’Connor’s reasonable observer articulated by Justice Stevens in his dissent and concurrence in *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989). This collaboration represents a unified support for arguments that had been advanced by the ACLU and AU (Americans United, 2011) for over two decades.

A more subtle instance of discord between the two coalition’s strategies can be seen in the ACLU and the American Atheists’ selection of litigants for recent lawsuits against memorial crosses on public lands. It is well established that the ACLU—like many other successful advocacy groups—is careful to vet candidates for litigation, choosing individuals who are hopefully able to evoke popular sentiment or at least prevent others from branding their litigation as extreme. The ACLU has been especially careful regarding religion clause cases, oftentimes denying representation of self-identifying atheists for religious litigants.[[18]](#footnote-18) In accordance with this approach, the organization represented a Catholic former Mojave National Preserve employee in his claim that the display of a wooden cross on the park’s grounds was unconstitutional in *Salazar v. Buono*, 559 U.S. 700 (2010). Knowing that the issue was a sensitive one, the ACLU and its coalition partners concentrated their resources on a legal battle that could be framed positively for at least some of the country’s religiously-inclined.

Conversely, the American Atheists were much less strategic in their challenge to memorial crosses on public land during the same time as the ACLU litigation. Rather than seek out an attractive litigant, the American Atheists promoted its brand of secularism in the local and national press by highlighting their organization’s opposition to religion in their challenge to privately-funded memorial crosses erected on Utah public roads in honor of fallen state troopers. Not only was this a controversial and less than strategic move, the AA avoided a potentially catastrophic decision for separationists when the Supreme Court refused to hear an appeal in 2011. Just months prior in the *Salazar* case, Justice Kennedy opined that it was unlikely the Court would rule that a “cross on the side of a public highway marking, for instance, the place where a state trooper perished need not be taken as a statement of government support for sectarian beliefs” (*Salazar v. Buono*, 14-15). Justice Thomas, a supporter of the accomodationalist faction, seemed to agree with this position in his 19-page dissent where he bemoaned the lost opportunity for the Court to hear the Utah cross cases (Thomas dissenting, *Utah Highway Patrol Association v. American Atheists, Inc.* 566 U.S. 10-1276, and *Lance Davenport et. al v. American Atheists, Inc.* 566 U.S. 10-1297). Rather than advancing separationalism in a strategic manner, the AA’s challenge actually posed a threat to decades of the old coalition’s more cautious litigation. This approach—rather than being an outlier situation—has actually been advocated by several organizations in the new coalition; the FFRF in particular coordinates a campaign of purposefully offensive billboards under the rationale that mocking theists and exposing their irrationality is an important organizing and secularizing endeavor. These tactical decisions are part of a broader strategy of solidifying an identity for “rational secularists” that is based in reason and science and in many ways openly hostile to religious sentiments generally.

Most hazardous to the separationist cause, however, has been the American Atheists’ challenge to a Ten Commandments monument displayed on a Bradford County, Florida courthouse lawn. In 2013, the AA chose to accept District Judge Timothy Corrigan’s referral of their case to mediation where the atheist organization and the county agreed that the display of a secular monument beside the religious one would be a suitable compromise (American Atheists, 2013). Rather than be concerned with the sectarian nature of the biblical monument, the AA represented one of its own interests: to be recognized as a fundamental ideology in the founding of the nation, very similar to the claim of the Christians supporting their display. Only four years earlier, however, the AA along with organizations of both coalitions argued that the display of a minority religion’s monument beside a Christian one on public property would not constitute an appropriate remedy to what they perceived to be an establishment clause violation (*Pleasant Grove City v. Summun*, 555 U.S. 460 (2009).[[19]](#footnote-19) The arguments in *Pleasant Grove City* showed awareness that a proper remedy similar to the result of the Bradford County decision would involve an impractical number of religious displays (not to mention displays of “conscience” that the Court considers equivalent to more traditional religious faiths).[[20]](#footnote-20) This inconsistency and the quickness at which the AA abandoned decades of a grounded nonsectarian approach to public displays of religion demonstrates the liabilities that accompany the new coalition’s foundational principles and interests.

When the issue is less about religious establishment and more about equal access to a similar public space such as a park or square, the old and new coalitions are much more likely to work together. Just as in other equal access claims, the ACLU, AU, and FFRF worked together in filing a lawsuit against the city of Warren, Michigan for allowing some religious organizations to set up a prayer booth and distribute pamphlets in a public square (Americans United, 2014). The ACLU and the AU argued that the proper move was not to remove the booth but instead to allow equal access to all groups, in this instance a secularist trying to establish a “reason booth” to counter the religious one. Past constitutional decisions such as *Widmar* as well as a pluralistic notion of neutrality account for this stance. The FFRF, however, most likely supported this argument not because the group desired pluralism as much as it wanted the opportunity to promote its own philosophy and identity in a formerly theistic-dominated context. Even though the new coalition often allies with the old coalition’s pluralistic approach to equal access and a strict separationist approach to publically-endorsed religious displays and monuments, the identity focus sometimes steers new coalition groups—such as the AA—to support “balanced” endorsements that promote atheist identities as well as a secular national identity yet contradictorily encourage a pluralistic display of religious and secular symbols.

*Approaches to Legislative Prayer*

Differences in approach to the constitutionality of legislative prayer illustrate yet another split between the strategies and goals of the two separationist coalitions. In November 2013, the Supreme Court heard oral arguments for *Town of Greece v. Galloway*, a case in which two community members challenged the town of Greece’s policy of inviting local clergy to lead prayer at the beginning of the monthly town meetings. Although petitioners for Greece argued that the invitation to prayer has been extended to members of diverse and untraditional faiths and, therefore, is constitutional under the precedent of *Marsh v. Chambers*, 463 U.S. 783 (1983), respondents have argued that because the vast majority of prayers have been given by Christian clergy there has been the effect of an establishment of a particular religion. This case has divided the two coalitions once again, the older faction supporting a nonsectarian reading of *Marsh* and the new coalition, along with organizations from several minority faiths, advocating an overturning of the *Marsh* precedent and for the elimination of legislative prayer entirely. By examining the various briefs filed in this case, it is evident that the issue of legislative prayer presents a severe obstacle to a united separationist approach to the establishment clause.

Looking first to the old coalition, the AU has represented the respondents at the Second Circuit Court of Appeals as well as the Supreme Court where the organization argued for a nonsectarian application of the precedent in *Marsh* (Laycock et al., 2013). In that case, the Burger Court abandoned the Lemon test for a more historical approach that acknowledged the preeminent place of religion in United States history. Advancing a novel approach to this precedent, the AU has said that there is no flaw with the *Marsh* decision fundamentally, however, when combined with the Court’s opinion banning coercive or sectarian prayers in *Lee v. Weisman*, 505 U.S. 577 (1992), the town of Greece’s specific mode of legislative prayer is unconstitutional.[[21]](#footnote-21) Filing in support of the AU, the ACLU’s amicus brief—joined by other groups such as the Anti-Defamation League and the Inter-Faith Alliance—presented a similar argument (Eisenberg, Karpatkin, Mach, & Shapiro, 2013). These organizations claimed that key to the establishment clause is denominational neutrality and that, although Greece has insufficiently represented diverse faiths in its prayers, there exist forms of constitutional legislative prayers that the town could adopt. The brief went on to cite various examples of legislatures across the county that had reconciled their desire to offer public prayers without making them coercive or sectarian in nature. Organizations like the AU and the ACLU have been dedicated to treading lightly by not demanding the repeal of *Marsh*, a three-decade-year-old precedent with its roots in customs extending back to the colonial period. In this way, the old coalition has sought to appease its religious members while still advocating a high wall of separation.

Rather than attempting a compromise, new coalition member organizations have confronted both the appropriateness of legislative prayer in its totality as well as the validity of the history the Burger Court used to justify it. The Freedom From Religion Foundation filed a brief that addressed *Marsh* as an inappropriate outlier that was based on a faulty interpretation of the place of religion in the nation’s founding era (Bolton, 2013). Regarding the first claim, the FFRF framed its argument against the counsel for the petitioner as well as Religious Right amicus briefs that the Court should apply a historical test to Greece’s prayer policy. In a review of the Court’s record on religious establishment, the FFRF concluded that *Marsh* deviated from a long trajectory of doctrine that forbids both the use of history as dispositive and demographics—i.e. a majority Christian population—as a trump (p.4-14). Attacking the *Marsh* precedent even further, the FFRF stated that Chief Justice Burger erred in basing much of his opinion on practices from the Continental Congress and conveniently referring to the lack of prayer at the Constitutional Convention as an “oversight” (463 U.S. at 824 n.6.). A more accurate depiction of U.S. history, the FFRF argued, would require acknowledgement of the secular principles found in the Constitution. The FFRF’s divergence from the old coalition’s arguments here can once again be traced back to the organization’s desire to highlight what it perceives to be the secular founding of the United States.

The Center for Inquiry also filed a brief joined by several other humanist and atheist groups that argued for the overturning of *Marsh* based on the idea that legislative prayer tends to result in the ridicule of minority faiths and those without a religious affiliation (Blatt, 2013). Joined in this argument by a brief filed by the Unitarian Universalist Association of Congregations and various minority faith advocacy groups, these organizations referenced the growing numbers that minority faiths and atheist groups have experienced in the last few decades (Maynard & Hearron, 2013). The Center for Inquiry brief in particular cited statistics that reveal even if the Court could use demographics as a rule of measure in deciding these issues, the United States has increasingly become more heterogeneous in regards to religious affiliation anyways. In addition to these claims, both briefs expressed a discomfort with legislative prayer even when it is nonsectarian in practice. The Center for Inquiry’s brief provided examples of atheist invocations and Islamic prayers that have been met with harassment, ridicule, and charges of treason (p.5-7). For this reason, many members of the new coalition as well as members of minority religious faiths have organized together to oppose the continuation of legislative prayer throughout the country.

It is no overstatement to say that legislative prayer litigation has presented separationist organizations one of their most severe challenges to organizing as a unified front. Whereas New Right groups such as the ACLJ, the Beckett Fund for Religious Liberty, and the American Civil Rights Union among others have presented a coherent and unified argument in favor of the *Marsh* precedent, the two coalitions have been sharply divided over what the establishment clause requires. It is true that the AU and the ACLU have been careful to articulate a strictly nonsectarian position that seeks to offend their own members as well as the Christian majority in the United States as little as possible. In taking this approach, the old coalition has expressed its commitment to a pluralism and neutrality that will allow religious and areligious minorities a seat at the table of legislative prayer.

At the same time, the new coalition is less interested in finding an accommodating solution and more invested in shaping doctrine in a more pluralistic manner. Groups like the FFRF and the SCA expressed outrage with the opinion in *Town of Greece* and immediately began working on campaigns against the decision. In the days following the decision, the FFRF established the new annual “Nothing Fails Like Prayer Award” to be bestowed upon the best secular invocation at a legislative session captured on film (Freedom From Religion Foundation, 2014c). The Secular Coalition for America also responded to the decision, citing its previous statements that any form of prayer recited during the proceedings of a democratic institution served to undermine civic participation (Youngblood, 2015). Unfortunately for these groups, asking the Court to overturn *Marsh* appears to be far from the most efficient or strategic position any organization has taken regarding *Town of Greece* and clashes like these over legislative prayer promise to continue into the future.

*Differing Views Concerning the Ministerial Exception*

In a 2012 case which the ACLU described as one of the most important religious liberty cases of the era, the Supreme Court decided in *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 565 U.S.\_\_\_ (2012) to expand its ministerial exception doctrine (American Civil Liberties Union, 2012). Citing the need to protect churches from excessive entanglement with the government, the Court held that the Establishment and Free Exercise Clauses of the First Amendment prohibited employment discrimination suits brought on behalf of ministers against their churches, specifically in this case a suit brought by a parochial school teacher claiming that her termination was a violation of the Americans with Disabilities Act. The AU and the ACLU—joined by the National Council of Jewish Women, the Sikh Council on Religion and Education, and the Unitarian Universalist Association—filed an *amicus* brief that simultaneously supported the plaintiff Cheryl Perich’s suit for unlawful termination (she claimed to have been fired due to her narcolepsy) while also arguing for the necessity of the ministerial exception in principle. While these groups believed that Perich had been fired for reasons not required by the Evangelical Lutheran Church, they stated that the ministerial exception is a “reasonable accommodation to ease burdens on the practice of religion” and “preserves the independence of American religious communities” (Shapiro et al., 2011, p.3).

Due to the AU and the ACLU’s long tradition of arguing against the ability of the courts or other political bodies to judge what a particular religious belief demands of a person, this brief contained an extended discussion on what kinds of pretextual discretion courts have in applying the ministerial exception. They argued that while pretextual considerations would involve determining whether or not an action taken by a religious institution was related to their beliefs or merely an improper justification for discrimination, courts were equipped to make these kinds of judgments—except in cases where such consideration would be “improper” and too intertwined with the interpretation of particular church doctrine (p.4).[[22]](#footnote-22) Once again, these arguments serve as an example of the old coalition’s desire to protect both the integrity of the government and religious organizations by ensuring that neither corrupt nor interfere with one another. In this pluralistic vision, diverse religious institutions are able to hire and fire employees based on their adherence to fundamental religious doctrines without the state unduly regulating the staffing of their clergy and religious instructors.

Whereas the old coalition supported a narrow version of the ministerial exception, the new coalition vehemently opposed it in principle. A brief filed by the American Humanist Association, the American Atheists, the American Ethical Union, the Atheist Alliance of American, the Military Association of Atheists and Freethinkers, the Secular Student Alliance, and the Society for Humanistic Judaism stated that the exception was based in discrimination and was, therefore, antithetical to the 14th Amendment’s protections regarding citizenship and equality for secular, and—because this case concerned the ADA in particular—disabled Americans alike (Burgess & Hileman, 2011). The new coalition here argued that the ministerial exception “slamm[ed] the courthouse door in the face of victims of illegal discrimination in employment” (p.7). Challenging the “judicial creation” of the ministerial exception, this brief referenced the legacy of the Civil War, slavery, and the equal protection clause to claim that any doctrine allowing a particular group to engage in discrimination must be inherently discriminatory (p.27-8).

Regarding past judicial precedent, these groups argued against lower court opinions that interpreted the *Lemon* test from *Lemon v. Kurtzman*, 403 U.S. 602 (1971) as requiring the creation of the ministerial exception as wholly inconsistent with the Court’s approach to the Establishment clause (p.17). In interpreting the third-prong of the test that prohibits an “excessive entanglement” between church and state, the brief states that:

“[T[his Court has made clear that “excessive entanglement” is something more than a single, discrete instance of state involvement in the affairs of a religious organization. It is instead a “comprehensive, discriminating, and continuing state surveillance” amounting to an “enduring entanglement.” Lynch v. Donnelly, 465 US 668, 684 (1984) (quoting Lemon)” (p.18-9).

Instead of protecting against this sort of excessive entanglement, the new coalition argued here that the *Lemon* test’s third-prong was violated in this constant interaction between the church and the state. To avoid this problem, the brief suggested that the Court adhere to its interpretation of the Free Exercise from *Employment Division, Department of Human Resources of Oregon vs. Smith*, 494 U.S. 872 (1990) (p. 9-10, 19-20). In *Smith*, the Court said that the free exercise of religion was not interfered with by “neutral laws of general applicability.” In *Hosanna-Tabor* then, it is presumable that the ADA would have prevented Perich from losing her job as the ADA’s provisions against unlawful employment discrimination are neutral regarding religious free exercise (p. 7-9). Although the new coalition was ostensibly a champion of state neutrality towards religious institutions in this case, neutrality was interpreted in an extremely non-pluralistic sense that barred *any* accommodations to churches and religious schools in their hiring and firing procedures. Rather, this brief argued for all forms of race, gender, and disability considerations to apply equally to religious institutions as they did to secular ones, thereby eliminating the ministerial exception and any notion that churches could hire clergy and religious instructors with any sort of religious bias to ensure that their beliefs would be championed and upheld by their employees. Just as in the legislative prayer issue, this case represents another deep divide in principles and commitments between the two coalitions.

*Smith vs. RFRA: Conflicting Constitutional Visions*

The issues discussed above have generated varying degrees of conflict and incoherent responses to religious liberty disputes among the two coalitions, but none of them reaches the degree of disagreement between the two than their stances on the Religious Freedom and Restoration Act of 1993 (RFRA). This law was passed in response to the Supreme Court’s decision in *Employment Division, Department of Human Resources of Oregon vs. Smith* (1990), in which Justice Scalia writing for the majority ruled that the Free Exercise clause could not be used to challenge neutral laws of general applicability. Plaintiffs in the case had argued that an Oregon state law prohibiting the consumption of peyote even for religious purposes interfered with their desire to engage in the rituals of the Native American Church. Scalia responded to this claim by saying that there was no precedent for such exemptions and that such a broad interpretation of the Free Exercise clause could open up the door to exemptions from things like mandated vaccines and payment of taxes. The *Smith* decision caused controversy almost immediately as religious groups and the ACLU alike argued that the Court had unduly overturned its decisions in cases such as *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), which held that the state and federal governments required a “compelling interest” to violate religious exercise rights. A bipartisan coalition in Congress heeded this argument and passed RFRA, overriding the Court in *Smith* and effectively reinstituting the compelling interest test.

To the dismay of RFRA supporters such as the ACLU and the AU, the Court declared that Congress had overstepped its constitutional boundaries with RFRA in *City of Boerne v. Flores*, 521 U.S. 507 (1997). The Court ruled that Congress could not expand the scope of rights under the §5 enforcement clause of 14th Amendment, the constitutional basis for RFRA. The opinion stated that Congress is limited to laws that prevent or remedy violations of rights recognized by the Supreme Court and these must be narrowly tailored – “proportionate” and “congruent” – to the constitutional violation under consideration. To bypass this ruling, twenty states have since passed their own versions of RFRA, which the Court has not challenged (Hamilton, 2015). In 2006, the Supreme Court held that RFRA remained constitutionally permissible as applied to the federal government in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006). Although these cases solicited much involvement from members of the old coalition, it was not until 2014 in *Burwell v. Hobby Lobby*, 573 U.S. \_\_\_ (2014) that the most extreme divides between the old and new coalition over RFRA became evident.

In *Burwell v. Hobby Lobby*, 573 U.S. \_\_\_ (2014), Hobby Lobby Stores, Inc. sued the federal government over the Patient Protection and Affordable Care Act’s requirement that employment-based healthcare plans provide FDA-approved contraceptives to employees as part of their preventative care benefits. Although there are exceptions in the law for religious organizations such as churches as well as religiously-affiliated nonprofit institutions, Hobby Lobby’s Christian owner’s free exercise rights regarding their belief against certain forms of contraception were violated by this mandate. Despite the fundamental rights issue at play here, the case was argued and decided upon statutory considerations—the extent of RFRA’s protections—rather than the Free Exercise clause directly. Old coalition groups filed briefs in this case in attempts to both support for the government’s position and salvage RFRA from those groups that might use the law as a justification for discrimination—by gender in this particular case. Americans United and the Anti-Defamation League were joined by various majority and minority religious organizations including Catholics for Choice and the Hindu American Foundation as well as reproductive rights and pro-LGBT groups (Kahn & O’Connell, 2014). These organizations argued that RFRA was necessary for protecting diverse religious belief and free exercise but Hobby Lobby was actually infringing on its employees’ rights, forcing them to essentially adopt their employer’s religious beliefs on contraception as their own by not providing them this medical coverage.

The ACLU, joined by the NAACP, filed a separate brief in this case that in many ways reflected the AU brief (March et al., 2014). Both briefs emphasized that the fact that RFRA did not protect against Hobby Lobby’s attempt to impose its own religious beliefs on its employees. Additionally, the ACLU was sure to mention that RFRA properly applied did indeed protect important free exercise rights in other contexts. The majority of the brief did not mention religious clause doctrine much at all; instead, the counsel for these organizations spent nearly the entire document describing instances in United States history in which religious belief was used as a justification to discriminate against minorities. To demonstrate the progress the United States has made, the brief provided examples such as religious justifications for slavery, segregated schools, objections to the Civil Rights Act of 1964, and unequal pay and employment restrictions for women. Although at the national level the ACLU has remained a staunch proponent of RFRA, the emergence of state laws that mimic RFRA have caused concern for state chapters. For example, as of March 16, 2015 the Indiana General Assembly is debating its own RFRA yet both opponents and proponents have framed the law as one that would allow businesses to discriminate against LGBT persons on the basis of religious belief (Davies, 2015). The ACLU’s chapter in Indiana testified before the General Assembly, citing the need for the 1993 version of RFRA in its own context and the comparative lack of a need for a state RFRA in Indiana in the political climate of 2015 (Henegar, 2015). In detailing the changing uses of the federal and state versions of the law**, Executive Director of the American Civil Liberties Union of Indiana Jane Henegar argued that this proposed law would likely hurt more minorities than it would benefit them.**

**The new coalition briefs for *Hobby Lobby* demonstrate one of the deepest divide between the two coalitions. Whereas groups like the ACLU and the AU have longstanding and foundational commitments to protecting minority rights, and in particular the religious rights of minorities, the new coalition has much less of an interest in this project.**[[23]](#footnote-23) **The Center of Inquiry—joined by the American Humanist Association, the American Atheists, the Military Association of Atheists and Freethinkers, and the Institute for Science and Human Values—filed a brief arguing that Hobby Lobby not only lacked a free exercise claim here but that a government exemption from the contraceptive mandate would result in a violation of the Establishment Clause (Lindsay, Little, & Tabash, 2014) Although the brief did not state that RFRA was unconstitutional explicitly, these groups were clear that any exemption given under RFRA was legislative and, therefore, would be subject to constitutional scrutiny as applied, which would presumably be unconstitutional according to their interpretation of the *Smith* decision. In addition to this argument, the brief hinted that because exemptions *de facto* favor one religion over another, it is possible that any exemption to a neutrally applicable laws could be judged as an unconstitutional endorsement of one religion over another. In contrast to the old coalitions’ briefs which attempted to save parts of RFRA for future use, the Center for Inquiry brief was concerned with making the scope of RFRA as narrow as possible.**

**The brief filed by the Freedom From Religion Foundation, which a number of groups fighting child abuse by clergy joined, eschewed discussing arguments concerning *Hobby Lobby* in particular and instead argued that RFRA in its entirety was unconstitutional (Hamilton, 2014). Marci Hamilton, an anti-RFRA legal scholar and clergy abuse victims advocate, wrote the argument for these organizations, claiming that RFRA violated the principle of separation of powers, Article V’s amendment procedures, the Establishment clause, and Congress’s powers under Article I. In response to the Court’s decision to interpret RFRA broadly in favor of *Hobby Lobby*, the FFRF continued to pursue these claims by issuing an action alert to lobby for the congressional repeal of RFRA (Freedom From Religion Foundation, 2014a). The organization also took out a full-page ad in *The New York Times* protesting RFRA and the Court’s decision, which they argued was antithetical to both gender and religious equality (Freedom From Religion Foundation, 2014b). It is in these briefs and actions that the new coalition’s idea of neutrality conflicts with the old coalition’s interpretation: rather than allowing for exemptions as long as they do not hurt another party, both new coalition briefs make the claim that RFRA has been used to protect extreme forms of religious liberty that intrude on the secular principles of the country as well as afford religious Americans additional rights that secularists do not possess.**

**Conclusion: The Damaging Potential of Fracture**

By examining these diverse cases concerning religious liberty and religious establishment, it is possible understand where the separationist response to the Religious Right has been successful, where it has failed, and where it might have produced liabilities for its proponents’ future litigation. Just as Thomas Keck (2002) and Rogers Smith (2011) have identified the Right’s victories as coming from well-established precedents and constitutional discourse, these separationist organizations have been most successful when they have used their resources to advance equal access claims, challenge the sectarian nature of public religious displays, and balance their high wall of separation goals with the religious preferences of most Americans. Unfortunately for members of the old coalition, the new coalition organizations hold principles that are often at odds with the kind of separationist legal arguments that have enjoyed success before the Court. Although it may be politically inefficacious at times, the approach taken by atheist and humanist groups comes from a foundational ethos that perceives the Constitution to require hyper-secularism and most—if not all—government relations with religious institutions as constitutionally suspect. Ultimately, this fracture in the separationist response to the rise of the Religious Right has the potential to damage the coalitions’ joint aim to combat the encroachment of religion into the public sphere.

Is it possible for these strands of separationalism to come together around a common moral approach that is simultaneously politically efficacious? After all, members of both coalitions have collaborated in significant cases including challenges to the funding of faith-based organizations (*Hein v. Freedom From Religion Foundation*, 551 U.S. 587 (2007) as well as the recitation of the phrase “under God” in the Pledge of Allegiance (*Elk Grove Unified School District v. Newdow*, 542 U.S. 1 (2004). For the moment, however, this seems to be the extent of cooperation that can be expected of these diverse groups. Even though a myriad of scholars agree that a denominational neutrality approach—one that appears more similar to the old coalition’s ideology of nonsectarianism—will likely produce the most effective response to the Religious Right, it is doubtful that the new coalition groups will sacrifice their principled anti-religious stand and their identity-and movement-building projects, especially as their members, funding, and institutional resources continue to grow (Koppelman, 2013; Shiffrin, 2009). Unfortunately for the more radically-minded separationists, constitutional development is constrained by a path-dependent nature that prizes precedent and often forces litigants to carefully craft their arguments according to established case law. At least for now and into the foreseeable future, proponents of separationalism will have to bear with a less than united—and potentially self-destabilizing—response to the Religious Right.

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1. Americans United was originally founded in 1947 under the name Protestants and Other Americans United for Separation of Church and State (POAU). [↑](#footnote-ref-1)
2. I use the term separationist here to highlight the difference between these groups and the more accomodationist ones that compromise the Religious Right organizations. While the ACLU and the old coalition in particular have advanced some arguments—especially free exercise ones—that are more accomodationist, the term separationist draws from texts such as John Locke’s *A Letter Concerning Toleration* and Thomas Jefferson’s “Letter to the Danbury Baptists,” which emphasizes the distinct and separate domains of church and state. [↑](#footnote-ref-2)
3. See cases such as *Engel v. Vitale*, 370 U.S. 421 (1962), *Abington School District v. Schempp*, 374 U.S. 203 (1963), and *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), among others. [↑](#footnote-ref-3)
4. The term “Christians” here refers to members of well-represented Christian sects such as evangelicals and Catholics. Mainline Protestants and Baptists have been traditionally more in favor of separationist policies. [↑](#footnote-ref-4)
5. The Secular Coalition for America is the home of member groups such as American Atheists, the American Ethical Union, the American Humanist Association, the Atheist Alliance of America, Camp Quest, the Council for Secular Humanism, HUUmanists, the Institute for Humanist Studies, the Military Association of Atheists and Freethinkers, the Secular Student Alliance, and the Society for Humanistic Judaism. (Retrieved from http://secular.org/member\_orgs). [↑](#footnote-ref-5)
6. See the 2010 volume *Religion and the New Atheism*, a series of essays reflecting on the rise of New Atheism, for various scholars’ perspectives. [↑](#footnote-ref-6)
7. Ibid. [↑](#footnote-ref-7)
8. *Employment Division, Department of Human Resources of Oregon vs. Smith*, 494 U.S. 872 (1990). [↑](#footnote-ref-8)
9. *Hosanna-Tabor* (2012); *Town of Greece v. Galloway*, 572 U.S. ­­­\_\_\_ (2014). [↑](#footnote-ref-9)
10. It is important to note that the Court actually upheld public funding for parochial school busing in this case. I only mean to suggest that anti-Catholicism was a strong organizing principle employed by groups like the ACLU and the POAU. [↑](#footnote-ref-10)
11. See Lisa McGirr. 2002. *Suburban Warriors: The Origins of the New American Right* (Princeton, NJ: Princeton University Press) for a historical analysis of the build-up to this moment in the 1980s. [↑](#footnote-ref-11)
12. Hitchens (2009) opted for historical revisionism such as a pro-secular reading of Thomas Jefferson’s writings whereas Harris has made a large part of his career around secular critiques of radical Islam. [↑](#footnote-ref-12)
13. The Pew Research Center’s Religion & Public Life Project reports that less than 6% of Americans identify as atheists or agnostics. Interestingly, however, almost 14% choose to identify as “Nothing in particular.” While this identification has been interpreted in a variety of ways—Putnam and Campbell (2012) explain the “nones” as those respondents who link institutionalized religion to the Republican Party and other conservative political entities—there has yet to be a broad consensus on what this category is actually measuring (Retrieved from http://www.pewresearch.org/fact-tank/2013/10/23/5-facts-about-atheists/). [↑](#footnote-ref-13)
14. The most notable of these leaders and their books include Richard Dawkins’s *The God Delusion* (2006), Christopher Hitchens’s *god is Not Great* (2007), Sam Harris’s *End of Faith* (2005), and Daniel Dennett’s *Breaking the Spell: Religion as a Natural Phenomenon* (2007). [↑](#footnote-ref-14)
15. The American Atheists run the Godless Americans Political Action Committee. The Secular Coalition for America has announced plans to start a PAC in 2015. [↑](#footnote-ref-15)
16. This opposition goes back to the 1943 *Barnette* case and has been a guiding light for the ACLU as well as the AU since (see https://www.aclu.org/religion-belief/aclu-calls-supreme-court-ruling-vouchers-bad-education-bad-religious-freedom and https://www.au.org/our-work/legal/lawsuits/freedom-from-religion-foundation-v-mccallum for more contemporary examples of this rationale). [↑](#footnote-ref-16)
17. See *Lynch v. Donnelly*, 465 U.S. 668 (1984), *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989). [↑](#footnote-ref-17)
18. For this reason, the ACLU chose to represent Elliot Schempp and turned down the O’Hair family’s request for representation in *Abington School District v. Schempp*, 374 U.S. 203 (1963). The Supreme Court combined these cases upon cert. [↑](#footnote-ref-18)
19. This case was actually litigated and decided as a government speech issue, therefore falling under free speech jurisprudence. [↑](#footnote-ref-19)
20. United States v. Ballard, 322 U.S. 78 (1944), although a free exercise decision, nonetheless established the precedent that the Court must look beyond more traditional ideas of religious faiths when deciding what constitutes a religious belief. [↑](#footnote-ref-20)
21. The AU’s brief cited nonsectarian cases such as *Schempp*, *Zorach v. Clauso*n, 343 U.S. 306 (1952), and *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290 (2000) among others. [↑](#footnote-ref-21)
22. *Presbyterian Church in United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969); *Ohio Civil Rights Comm’n v. Dayton Christian Sch., Inc.*, 477 U.S. 619, 628 (1986). [↑](#footnote-ref-22)
23. It is true that in *Town of Greece* new coalition organizations argued on behalf of minority religious rights but importantly that was in a moment in which the rights of atheists and other secularists were at issue as well. When juxtaposed to *Hobby Lobby*, *Town of Greece* then seems to support the identity claim I have been trying to make: new coalition groups are most interested in allying with religious minority rights when the arguments overall buttress their own claims to identity. [↑](#footnote-ref-23)