

June 2012

# The Future of the Establishment Clause in Context: A Response to Ledewitz

Christopher C. Lund

Follow this and additional works at: <https://scholarship.kentlaw.iit.edu/cklawreview>

 Part of the [Constitutional Law Commons](#), [First Amendment Commons](#), and the [Religion Law Commons](#)

---

### Recommended Citation

Christopher C. Lund, *The Future of the Establishment Clause in Context: A Response to Ledewitz*, 87 Chi.-Kent L. Rev. 767 (2012).  
Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol87/iss3/4>

This Article is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact [dginsberg@kentlaw.iit.edu](mailto:dginsberg@kentlaw.iit.edu).

## THE FUTURE OF THE ESTABLISHMENT CLAUSE IN CONTEXT: A RESPONSE TO LEDEWITZ

BY CHRISTOPHER C. LUND\*

Five days before we met in Pittsburgh last year, the Kentucky Court of Appeals decided *Kentucky Office of Homeland Security v. Christerson*.<sup>1</sup> Perhaps some in Kentucky noticed the decision, but it did not receive much widespread attention. Following the September 11th attacks, Kentucky created its own Department of Homeland Security. The implementing legislation included a number of factual findings—one of them being that “[t]he safety and security of the Commonwealth cannot be achieved apart from reliance upon Almighty God . . . For as was written long ago: ‘Except the Lord keep the city, the watchman waketh but in vain.’”<sup>2</sup> Kentucky also required its Department of Homeland Security to publicize this finding in its training materials and on a commemorative plaque.<sup>3</sup> As you might expect, this drew complaints and eventually a lawsuit.

If you are familiar with the Establishment Clause, you will see the constitutional issue: Kentucky’s actions here seem to violate the well-known constitutional rule that the government cannot endorse or promote religion. But if you know how the Establishment Clause really works, you will not be terribly surprised to learn that the Kentucky Court of Appeals upheld this statute.

And knowing the outcome, you can probably now guess the general gist of the court’s opinion. The court might apply the *Lemon* test and conclude that the statute has a secular purpose and effect.<sup>4</sup> The court might apply the endorsement test and say that there is no endorsement of religion.<sup>5</sup> The court might apply several tests at once and declare them all sat-

\* Assistant Professor of Law, Wayne State University Law School. I am pleased to have been at the Duquesne University School of Law last fall for its symposium, “The Future of the Establishment Clause in Context.” I am particularly grateful to Bruce Ledewitz, its organizer. It is hard to find anyone as charitable, as thoughtful, and as kind as Bruce is. I am also grateful to Duquesne’s Associate Dean, Jane Moriarty, for her gracious hospitality and helpful advice. For their valuable comments on this piece, I thank Chad Flanders and Kerry Kornblatt.

1. 2011 WL 5105253 (Ky. Ct. App. Oct. 28, 2011).
2. KY. REV. STAT. ANN. § 39A.285(3) (West 2002) (quoting *Psalms* 127:1).
3. KY. REV. STAT. ANN. § 39G.010(2)(a) (West 2006).
4. See *Lemon v. Kurtzman*, 403 U.S. 602, 612–613 (1971) (articulating the *Lemon* test).
5. See *County of Allegheny v. ACLU*, 492 U.S. 573, 593–94 (1989) (articulating the endorsement test).

isfied. But formal tests aside, the essence of the court's decision will be the same: although the statute sounds religious, it really isn't—or, at least, it isn't exclusively or predominantly religious.<sup>6</sup> The statute might refer to God, but those references can be interpreted in a secular fashion. The Kentucky legislature may have used religious language, but context suggests that it did not really mean to take sides in a theological dispute.

Yet in *Christerson*, this logic hit a bump in the road. Understanding how this game is played, the Kentucky legislature wrote in to the court to make one thing crystal clear: they *had* meant to take sides in a theological dispute. Thirty-five out of the thirty-eight state senators and ninety-six out of the one-hundred state representatives—95 percent of Kentucky's legislature—joined in two amicus briefs defending the statute. They did not defend it as religiously neutral; they instead attacked the principle of religious neutrality. The subtext was this. We believe in God. We intended these religious references seriously. Uphold them on that ground. Don't you dare call them secular. Don't you dare imply that they are meaningless.<sup>7</sup>

So what happened? Well, utterly unmoved by all this, the Kentucky Court of Appeals did what it was going to do. It upheld the statute.<sup>8</sup> It said that the statute was mostly secular.<sup>9</sup> It implied that the religious references were indeed meaningless.<sup>10</sup> You know how it goes.

Douglas Laycock calls this “the lie”—it is simply a lie, he says, for courts to label this kind of thing as secular in order to uphold it but still maintain lip service to the constitutional principle of religious neutrality.<sup>11</sup> And one sees the lie at work quite vividly in *Christerson*. Lawyers sometimes speak of two different types of meaning—the subjective and the ob-

6. *Cf.* Van Orden v. Perry, 545 U.S. 677, 701 (2005) (Breyer, J., concurring, and providing the fifth vote) (upholding the government's display of the Ten Commandments, on the grounds that the display “communicates not simply a religious message, but a secular message as well” and that the “nonreligious aspects of the tablets' message . . . predominate”).

7. Though they had much in common, the two briefs advanced somewhat different legal arguments. One brief argued for a complete overhaul of Establishment Clause jurisprudence. *See* Brief of Amicus Curiae Thirty-Five Kentucky State Senators, Ky. Office of Homeland Sec. v. *Christerson*, 2011 WL 5105253 (Ky. Ct. App. Oct. 28, 2011) (08-CI-1950). The other argued within governing Supreme Court precedents. *See* Brief of Amicus Curiae Ninety-Six Kentucky State Representatives, Ky. Office of Homeland Sec. v. *Christerson*, 2011 WL 5105253 (Ky. Ct. App. Oct. 28, 2011) (08-CI-1950).

8. *Christerson*, 2011 WL 5105253, at \*3, \*4.

9. *Id.* at \*4 (“The legislation complained of here does not seek to advance religion, nor does it have the effect of advancing religion, but instead seeks to recognize the historical reliance on God for protection.”).

10. *Id.* at \*4 (“The legislation merely pays lip service to a commonly held belief in the puissance of God.”).

11. *See* Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 225 (2004); Douglas Laycock, *Church and State in the United States: Competing Conceptions and Historic Changes*, 13 IND. J. OF GLOBAL LEG. STUDIES 503, 529 (2006).

jective. Here they converged. On the subjective level, the Kentucky legislature intended a religious message; its amici briefs made that clear. On the objective level, the text of the statute—"[t]he safety and security of the Commonwealth cannot be achieved apart from reliance upon Almighty God"—plainly suggests the existence of God. No other interpretation is possible, let alone plausible. God cannot protect Kentucky unless God exists. But the statute actually makes a much stronger claim. Kentucky cannot be safe unless its citizens place their trust in God. Nonbelievers are not merely wrong; they are wrong in a way that endangers their fellow citizens. Atheists are a threat to the security of the state.

Faced with all this, the Kentucky Court of Appeals chose to stick with the lie. Of course, the lie is not a lie in the strict sense. Legal meanings do not have to match idiomatic meanings. And that is what the lie boils down to, in the end. We now have things that are factually religious but legally nonreligious—government actions that we deem nonreligious as a matter of law, no matter how religious they might be as a matter of fact. But this legal fiction is just a fiction, and cases like *Christerson* reveal how the fig leaf is always at risk of being stripped away.

Of course, no one blames either the *Christerson* court or the parties to the case. The Supreme Court started us down this path long ago. The Court accepted the crèche in *Lynch* as having historical value.<sup>12</sup> It approved of the Christmas tree and menorah in *Allegheny County* as cultural rather than religious.<sup>13</sup> It upheld the Ten Commandments in *Van Orden* as a combination of the moral, cultural, and historical.<sup>14</sup> Those on the left see this as the lie in action, and want these things struck down. Those on the right agree that this is a lie, but want them upheld. There are few people that actually believe the lie.

Bruce Ledewitz does not believe the lie exactly. But he would probably not call it a lie. A nonbeliever himself, Ledewitz encourages his fellow nonbelievers to be more accepting of government-sponsored religion. It is not that atheists and agnostics need to put up with religious language they find offensive. Rather there is no reason for them to be offended at all. Atheism is not incompatible with religious language and religious symbols.

12. See *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984) (arguing that Christmas is a "significant historical religious event long celebrated in the Western World" and that "[t]he crèche in the display depicts the historical origins of this traditional event").

13. See *County of Allegheny v. ACLU*, 492 U.S. 573, 619 (1989) (claiming that the display was "not an endorsement of religious faith but simply a recognition of cultural diversity").

14. See *Van Orden v. Perry*, 545 U.S. 677, 703 (2005) (Breyer, J., concurring, and providing the fifth vote) (calling "the religious aspect of the tablets' message [simply] part of what is a broader moral and historical message reflective of a cultural heritage").

“[T]he symbol ‘God’ has many meanings,” Ledewitz says, “some of which have nothing to do with a supernatural creator of the universe.”<sup>15</sup> Were nonbelievers to “reinterpret” religious language and imagery so as to be consistent with their own nonreligious worldviews, then everyone would win. Religious people would get governmental approval of their prayers and religious symbols. Atheists would not feel excluded. All the litigation could end. And our society would enjoy increased religious understanding and a greater sense of connection among our citizenry.

Ledewitz will not tolerate all governmental uses of religious language and imagery. There has to be a “plausible” nonreligious meaning—a plausible case that a nonreligious person could interpret the government’s action in some secular fashion.<sup>16</sup> But apart from that, religious imagery is acceptable, no matter the government’s intentions and whatever the ordinary religious connotations of the words used.

I have mixed feelings about Ledewitz’s proposal. I suppose my biggest hesitation is that it seems unlikely to succeed. Ledewitz wants to change the social meaning of religious language and religious symbols in a way that I do not think possible. Atheists will not embrace God, even as a concept. The rejection of God—the rejection of theism—is what it literally means to be an atheist. Most atheists will not accept the word “God” as a placeholder for their deepest values, just as most Jews will not accept Jews for Jesus as a mere reinterpretation of their faith.

And if Ledewitz’s proposal somehow began to work—if atheists began to embrace the word God as a secular concept—that would upset the other side. Those who want government support for religion want their government to reject atheism. If atheists begin to co-opt the word God, then these religious believers will insist on more particularized religious endorsements that say more and more about God. Intense atheists and intense religious believers can work together on a lot of issues, but asking them to agree on religious matters seems silly to me. If we were all really able to

15. Bruce Ledewitz, *Toward a Meaning-Full Establishment Clause Neutrality*, 87 CHI.-KENT L. REV. 725, 751 (2012); see also BRUCE LEDEWITZ, CHURCH, STATE, AND THE CRISIS IN AMERICAN SECULARISM 132 (2011) [hereinafter LEDEWITZ, CHURCH, STATE, AND THE CRISIS IN AMERICAN SECULARISM] (“Even for a nonbeliever, a word like ‘God’ can serve as a stand-in for the concept of the Absolute.”).

16. Ledewitz, *supra* note 15, at 756 (“The plausibility test is the key to my proposal about the permissible use of religious imagery.”); *id.* at 754 (“the government’s proffered secular justification is plausible, this kind of subjective untruthfulness is irrelevant to either law or politics. The meaning of government expression in the public square is social, not subjective.”); see also LEDEWITZ, CHURCH, STATE, AND THE CRISIS IN AMERICAN SECULARISM, *supra* note 15, at 134–35 (elaborating on the plausibility standard).

agree on religious matters, we would not need to talk about religious toleration in the first place.

My second concern is that Ledewitz's approach seems somewhat undefined. His approach depends upon his views of social meaning. But, as I explained above, his views on that are atypical. Ledewitz thinks that the word "God" can be made consistent with atheism; I think very few atheists would agree with that. Ledewitz says that government-sponsored religion should be permissible as long as there is a "plausible" nonreligious meaning.<sup>17</sup> But because I have little idea how Ledewitz gets nonreligious meaning out of religious symbols and words, I have little idea when Ledewitz would find such a thing plausible. Ledewitz accepts government-sponsored prayer, at least nondenominational prayer, arguing that atheists can reinterpret the word "God." That reinterpretation is plausible to him. But he rejects government-sponsored Christmas displays—or at least nativity scenes. Apparently no such reinterpretation is plausible there.<sup>18</sup> Maybe Ledewitz has this right. Or maybe he has it backwards. I know of atheists who celebrate Christmas—who have Christmas trees, put up Christmas lights, and exchange Christmas gifts. I know of no atheists who pray to God.

Having said all this, I should make clear that I think very much of Ledewitz's work. He admirably tries to bridge the cultural gap between atheists and religious believers. As an atheist, he speaks directly to his own side, trying to help his fellow nonbelievers find some common ground with those on the other side. That is very important work, even if it has nothing to do with law. In fact, having nearly finished this review, I now realize that Ledewitz is probably more interested in increasing religious understanding than in coming up with workable Establishment Clause doctrine.

Though I agree with that goal, I do not think this is the way to go about it. The conflict between intense believers and intense nonbelievers will not go away. Both sides see themselves as too different; both sides define themselves by reference to the other. And rather than trying to prevent that conflict, or deny that there is a conflict, I think the way forward is to set terms for that conflict—to ensure that it stays nonviolent, to ensure that neither side uses the organs of government to repress the other, to ensure that both sides get to choose the lives they want as much as possible. The best approach, I think, is for the government to stay out of the conflict as much as possible. That is why I believe in religious neutrality.

17. See *supra* note 16 and accompanying text.

18. Ledewitz, *supra* note 15, at 749 (agreeing with the Court's conclusion in *Allegheny County* that the crèche there violated the Establishment Clause).

Ledewitz worries that a strict kind of religious neutrality will lead to an impoverished state of public discourse. He worries that neutrality, applied to the limits of its logic, will bar the government from taking positions on moral issues.<sup>19</sup> He fears that it may further corrode public discourse—that it will work to inhibit “[c]ommunal expression in a democratic community.”<sup>20</sup>

I do not share these fears, because I do not think this is where religious neutrality leads. The government can take positions on moral issues. It can teach that racial discrimination is wrong. It can say that peoples’ bad actions will come back around to them.<sup>21</sup> It can generally make any sort of moral claim, subject only to the familiar political reality that our society disagrees deeply on some issues of right and wrong. The one thing—the only thing, in this context—that the Establishment Clause bars is the government taking religious positions.

I admit there is some potential for awkwardness here. A student asks why racial discrimination is wrong. The teacher says that it violates human equality and human dignity. The student might persist—where do human equality and human dignity come from? At that point, the teacher has to stay agnostic—“Some people believe that they come from God; others believe that human equality and human dignity are simply important human values.” Few high school students will be perceptive enough to ask that sort of question, but the constitutional concerns there can be handled in any event.

As for Ledewitz’s concern about communal expression and the sense of community that it fosters, I see his worry as misplaced. The government can (and does) act to foster a sense of community. This sense of community comes from a variety of things, from parades to sporting events, from inspiring public speeches to sobering public eulogies. Religion too has an important role to play, through churches and other voluntary religious groups. But that role should not be played by the state. Of course, that does require the sacrifice of one particular liberty: people will not be able to get the state to adopt their religious views. They might feel that loss keenly. But that is precisely the loss that the Establishment Clause imposes, in exchange for the confidence that the religious tables will never be turned on them later.

19. *Id.* at 117–19.

20. *Id.* at 136.

21. *Id.* at 131 (discussing this point).