

PUTTING YOUR FAITH IN GOD AT THE BMV:

INDIANA'S LICENSE PLATE CONTROVERSY

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I. INTRODUCTION

Indiana has long boasted the honor of being the “Crossroads of America.”¹ But if one finds themselves traveling the roads of Indiana recently, they are likely to notice another slogan. In 2006, the Indiana Legislature passed a resolution regarding the issuance of new license plates in the state. These new plates proudly proclaim, “In God We Trust.”² The new license plates and their religious slogan have ignited a controversy within the state. It is not only the message that has come under fire, but also the way that a driver in Indiana acquires such plates. This Note will attempt to add some clarity to this ongoing debate. Specifically, it asks if the state of Indiana’s practice of selling license plates with the motto “In God We Trust” without an additional fee for specialty plates violates Constitutional protections.

II. BACKGROUND ON THE LEGISLATION

In order to analyze the legal issues implicated by the ongoing controversy regarding Indiana’s new license plates, it is imperative to have an understanding of both the background of the specific phrase that is used and the recent legislation that provides for these new license plates.

The phrase “In God We Trust” is the national motto of the United States of America and should be familiar to anyone that has looked at any piece of American currency. As such, the phrase itself has had a long history in this country.³ The motto first appeared on U.S. currency in 1862 as a sign that the country was unwavering as the Civil War raged on.⁴ Since then, it has enjoyed widespread use with minimal exception.⁵ In 1956, Congress adopted the

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1. Indiana Historical Bureau, <http://www.in.gov/history/2621.htm> (last visited March 10, 2008).

2. Indiana Bureau of Motor Vehicles, <http://www.in.gov/bmv/3999.htm> (last visited March 10, 2008).

3. Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2122 (1996) (suggesting that the history of the phrase’s beginnings are tied to that of the National Anthem, written in 1814, during the War of 1812. A line in the final stanza states, “and this be our motto - In God is our Trust.”)

4. *Id.* at 2123. The motto first appeared on the half dollar as “God our Trust.” In 1864, “In God We Trust” was inscribed on two-cent coins and Congressional legislation authorized its use on other such currency in 1865. See Act of March 3, 1865, ch.100, s 5, 13 Stat. 517, 518.

5. *Id.* In 1907, President Roosevelt ordered the removal of the phrase. His objection to its use

phrase officially as the national motto and from this point its use has been mandated on all forms of currency.⁶

The question then becomes, how did this phrase make its way onto license plates in the state of Indiana within the last year?⁷ The Indiana State Legislature created the plates through the passing of IC 9-18-24.5.⁸ This statute specifically calls for the Bureau of Motor Vehicles to design an “In God We Trust” license plate.⁹ Furthermore, it lays out the procedures by which an Indiana driver obtains such a license plate. Section 4 of the statute states:

A person who is a resident of Indiana and who is eligible to register and display a license plate on a vehicle under this title may apply for and receive an In God We Trust license plate for one (1) or more vehicles after December 31, 2006, after doing the following:

- (1) Completing an application for an In God We Trust license plate.
- (2) Paying the fee under section 5 of this chapter.¹⁰

Section 5 of the same statute states that the license plate fee for this specific plate is the same fee charged to those that choose the previous conventional plate.¹¹ Motorists may still choose the conventional plate. It is important to note that this fee is different than the one charged by the state for other specialty plates.¹² Specifically, specialty plates in Indiana cost an additional \$40

was not based on Constitutional grounds, but rather that it boarded on sacrilege. Congress rejected this mandate a year later.

6. *Id.* Congress mandated its use on all currency in 1955. *See also* 36 U.S.C. § 302 (2000) (stating “In God We Trust” is the national motto).

7. The use of specialty plates has become widespread among states over the past decade. Indiana is not alone in facing legal challenges based on the availability and messages that they display. *See Planned Parenthood of South Carolina, Inc. v. Rose*, 361 F.3d 786 (4th Cir. 2004) (upholding South Carolina’s “Choose Life” license plates).

8. IND. CODE § 9-18-24.5 (2006). The bill passed the House of Representatives by a count of 94 to 2. H.B. 1013, 114th Gen. Assem., Reg. Sess. (Ind. 2006).

9. Within eight months of release, the Indiana House Republican Caucus stated in a press release that the number of “In God we Trust” license plates distributed have reached over one million in number. *Rep. Woody Burton: “One Million Hoosiers Can’t be Wrong!”*, Indiana House Republicans, Aug. 1, 2007, available at http://www.in.gov/legislative/house_republicans/homepages/r58/press.html (last visited March 10, 2008).

10. IND. CODE § 9-18-24.5-4 (2006).

11. IND. CODE § 9-18-24.5-5 (2006).

12. Indiana’s Bureau of Motor Vehicles Official Website, concerning specialty plates available, states, “You’ll be able to select a plate with a background from a diverse group of subjects that includes universities, military organizations, breast cancer awareness, firefighting, nursing, diabetes, Native Americans, arts, sports, engineering, Boy Scouts, and even Lewis and Clark.” <http://www.in.gov/bmv/3722.htm#> (last visited Jan. 20, 2008). According to IC § 9-18-17 to 9-18-48, the various specialty plates available to drivers in Indiana include distinguishing prisoner of war, disabled veteran, Purple Heart, Indiana National Guard, Indiana Guard Reserve, license plates for persons with disability, amateur radio operator, civic event license plates, and special group recognition. In addition, the state also permits specialty plates for the following groups and issues: protecting the environment, kids first trust, education license plates, drug free Indiana trust, FFA trust license plates, Indiana firefighter, food bank trust, girl scouts, boy scouts, retired armed forces member, Indiana antique car museum trust, D.A.R.E. Indiana trust, Indiana arts trust, Indiana health trust, Indiana mental health trust, Native American, Pearl Harbor survivor, Indiana state educational institution trust, Lewis and Clark bicentennial, and Riley Children’s Foundation license plates. IND. CODE § 9-18-17-48 (2006).

in fees. According to a BMV spokesman, \$25 of this fee goes to support the specific cause for which the plate is designed. The remaining \$15 of the initial fee is diverted into a pool earmarked for administrative costs.¹³ Of this administrative fee, \$9 goes towards the BMV Commission while the remaining \$6 is put towards a road maintenance fund.¹⁴

The legislation in question in effect waives these fees for those who choose the "In God We Trust" plates.¹⁵ Since the plate does not support any particular group, the state does not collect the \$25 fee as it does with other specialty plates for their fundraising efforts. But the issue lies in the state waving the additional fees that support administrative costs. Thus, the "In God We Trust" specialty plates are only subject to the fees that apply to the default standard plates.

The purpose behind this legislation is not clear. The intent was not to increase state revenues because, as stated explained above, the state actually takes a financial loss in reducing the fees for the "In God We Trust" plates. While legislative history on the statute is scant, comments made by the bill's

13. *Lawsuit Claims "In God We Trust" Indiana License Plates Are Unconstitutional*, FOXNEWS.COM, April 24, 2007, <http://www.foxnews.com/story/0,2933,268058,00.html>.

14. *Id.* Additionally, BMV spokesman Greg Cook has stated that the "In God we Trust" plates cost his agency \$3.69 to produce while the standard plates cost the agency \$3.19.

15. Indiana is not the only state that has implemented the "In God we Trust" license plate option. North Carolina offers such plates, where the additional fees support the National Guard Soldiers in the state. The North Carolina National Guard, <http://www.nc.ngb.army.mil/NCSAAF> (last visited March 10, 2008); South Carolina offers an in "In God We Trust Plate" as well as a secular humanist plate stating "In Reason We Trust," South Carolina Department of Motor Vehicles, <http://www.scdmvonline.com/DMVNew/plategallery.aspx?q=All> (last visited March 10, 2008); Other states offering the plates include *Tennessee*, Tennessee Department of Revenue, <http://www.tennessee.gov/revenue/vehicle/licenseplates/misc/miscdesc.htm#automobile> (last visited March 10, 2008); *Arkansas*, Department of Motor Vehicles, http://www.arkansas.gov/dfa/motor_vehicle/mv_plates_detail.php?pl_id=87 (last visited March 10, 2008); and *Louisiana*, Department of Public Safety, http://omv.dps.state.la.us/Special%20Plates/SpecialPlates_display.asp (last visited March 10, 2008). Several states offer "God Bless America" plates as well, including *Alabama*, Alabama Department of Revenue, <http://www.revenue.alabama.gov/motorvehicle/specialty.html> (last visited March 10, 2008), *Iowa*, Iowa Department of Transportation, <http://www.dot.state.ia.us/mvd/ovs/plates/bless.htm> (last visited March 10, 2008); *Mississippi*, State Tax Commission, http://www.mstc.state.ms.us/mvl/tag_img/Godbles.jpg (last visited March 10, 2008); *Missouri*, Missouri Department of Revenue, <http://dor.mo.gov/mvdl/motorv/plates/> (last visited March 10, 2008); *Texas* offers both "God Bless America" and "God Bless Texas" plates, Vehicle Title and Registration Services, <http://rts.texasonline.state.tx.us/NASApp/txdotrts/SpecialPlateOrderServlet?grpid=60&pltid=84> (last visited March 10, 2008); *Ohio* offers a plate stating "One Nation under God", Bureau of Motor Vehicles, <https://www.oplates.com/NameLookup/PlateLookupWizard1.asp?ID=WPBLHIUPVPSYOTOUQOVWNMEGNCHZZXQIFQAPBPIKSAYWICPOXG> (last visited March 10, 2008). Furthermore, several legislators have proposed an "In God we Trust" option for license plates in their state, see Jack Brammer, *Panel OKs "In God We Trust" License Plate*, KENTUCKY.COM, Feb.13, 2008, <http://www.kentucky.com/454/story/316687.html> (Kentucky); see also David Klepper, *"In God We Trust" and "Gold Star" License Plates Advance in Kansas Legislature*, KANSASCITY.COM, Feb.22, 2008, <http://www.kansascity.com/115/story/501731.html> (Kansas); see also Kartikay Mehrotra, *"In God We Trust" Coming to Illinois License Plates?*, QUAD-CITY TIMES.COM, Jan. 25, 2008, <http://www.qctimes.com/articles/2008/01/25/news/local/doc47997be7c1e9a437763037.txt?sPos=2> (Illinois); see also *"In God We Trust"*, WKRG.COM NEWS, Dec. 25, 2007, http://www.wkrg.com/news/article/in_god_we_trust/8418/ (Florida); see also Oklahoma State Senate, http://www.oksenate.gov/news/press_releases/press_releases_2007/pr20071206a.html (last visited March 10, 2008) (Oklahoma). It appears that none of the fee structures employed within these states create the same constitutional questions as the Indiana statute.

author, State Representative Woody Burton, a republican from Greenwood, may prove to be the most illuminating source for determining what the state legislature was thinking when it passed this statute. In published comments, Burton has stated that, "In this country there's a severe attack on faith. This [the license plates] gives the public their opportunity to express their faith and the motto of the USA, which is 'In God We Trust.'"¹⁶ Specifically regarding the legal challenges that have been made towards IC 9-18-24.5, Burton has stated, "It's not a special interest plate. It's a stock item. It's the motto of the country. Its on the dollar bill."¹⁷

As far as Representative Burton's broader views on separation of church and state, he has written that "the constitution clearly states that we have a freedom to worship. Separation of church and state is not even found in the constitution. It states that the state cannot regulate religion and religion cannot dominate government."¹⁸ With this background in mind, the next step in our analysis is to address the potential legal concerns that surround IC 9-18-24.5.

III. CONSTITUTIONAL CHALLENGES

Indiana's statute establishing the option for "In God We Trust" license plates raises a number of constitutional questions. First of all, does the enacting of this bill violate the Establishment Clause contained within the First Amendment of the United States Constitution? Furthermore, does this legislation raise constitutional issues regarding the state of Indiana's privileges and immunities clause?

In looking at this issue, it is also important to understand the legal framework involved. This statute in question must adhere to two constitutions. First, the statute must not violate the Federal Constitution of the United States. While the First Amendment originally applied to only the federal government, the Supreme Court has held that the Fourteenth Amendment mandates the states adhere to the protections contained within the Bill of Rights of the Federal Constitution.¹⁹ In terms of Indiana's constitution, there are a couple of provisions that are relevant to the issues presented in this case. Specifically, article I, sections 2-7 all concern religion.²⁰ Section 4 states that "No preference shall be given, by law, to any creed, religious society, or mode of worship; and no person shall be compelled to attend, erect, or support, any place of worship,

16. Jennie Runevitch, *State Unveils 'In God We Trust' License Plate*, WTHR.COM, Aug. 10, 2006, www.wthr.com/global/story.asp?s=5266841.

17. *Supra* note 13. Later in the article, Burton adds "It seems unfortunate that someone that doesn't like it would keep others from having it." In a press release, Burton stated "I am proud that the people of Indiana are standing up for our nation's motto and choosing the 'In God We Trust' license plate. Even though some people are challenging the word 'special' surrounding the alternative license plate, the only thing that is truly special about this plate is that want to display it." *Supra* note 9.

18. *Burton Reacts to Dismissal of Prayer Lawsuit*, Indiana House Republicans, Oct 31, 2007, available at http://www.in.gov/legislative/house_republicans/homepages/r58/press.html (last visited March 10, 2008).

19. *Stomberg v. California*, 283 U.S. 359 (1931) (freedom of speech); *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947) (Establishment Clause specifically).

20. IND. CONST. art I §§ 2-7.

or to maintain any ministry, against his consent.”²¹ Furthermore, section 6 states that “No money shall be drawn from the treasury, for the benefit of any religious or theological institution.”²² With the emphasis on not establishing a preference by law nor contributing financially to a religious organization, these provisions seem to address concerns similar to those covered by the Establishment Clause of the United States Constitution. Finally, this legislation raises concerns regarding Indiana’s privileges and immunities clause.²³

A. Does the Statute Violate the Establishment Clause?

The starting place for addressing a constitutional challenge in this case involves an analysis of the Establishment Clause and how the courts have interpreted its meaning. The text of the First Amendment states:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the people peaceably to assemble, and to petition the Government for a redress of grievances.²⁴

The First Amendment thus contains two clauses that deal with religion: the Establishment clause and the Free Exercise Clause. In cases such as this one, where the government seems to actively be putting forth a message, the Court is most likely to see this case as an Establishment Clause case. In interpreting the application of this clause, the Supreme Court has struggled over time to devise a precise standard which lower courts can apply. As a result, three different tests have been put forth by the Court to try to shed light on the meaning of the clause and its application to separation of church and state issues over the past five decades.²⁵

The first test that the Court employed in cases concerning the Establishment Clause has been deemed the *Lemon* Test, resulting from its inception in the case of *Lemon v Kurtzman*.²⁶ This test has evolved into the Endorsement Test, which the Court first put forth in *Lynch v. Donnelly*.²⁷

The *Lemon* Test was first developed in a case concerning public subsidization of private school teachers. The Court created a three-pronged test to determine whether the actions of the government violated the Establishment Clause. It held that in order to withstand a constitutional challenge, the governmental action must: 1) have a secular purpose, 2) have the primary effect of not advancing religion, and finally 3) the action must not foster excessive

21. IND. CONST. art I § 4.

22. IND. CONST. art I § 6.

23. IND. CONST. art I § 23.

24. U.S. CONST. amend. I.

25. Richard F. Suhrheinrich & T. Melindah Bush, *The Ohio Motto Survives the Establishment Clause*, 64 OHIO ST. L.J. 585, 587 (2003).

26. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

27. *Lynch v. Donnelly*, 465 U.S. 668, 686 (1984) (O'Connor, J., concurring).

entanglement with religion.²⁸ After thirteen years of consistent use by the Court, Justice O'Connor put a spin on the test that has transformed the *Lemon* Test into its present version, the Endorsement test.²⁹ In her concurring opinion in *Lynch*, Justice O'Connor suggested that the first two elements of the *Lemon* test be viewed in the light of government endorsement.³⁰ In her view, the essence of the Establishment Clause is whether the government sends a message of endorsement so that believers of the message believe that they are favored members of the community.³¹ Therefore, she asserts that government action is unconstitutional if it is either excessively entangled itself with religion or takes on a more direct infringement by participating in endorsement.³² This view in interpreting the Establishment Clause ultimately gained acceptance by the Court.³³ But much like its predecessor the *Lemon* Test, many scholars have criticized the test's subjective standard.³⁴

The most recent test the Court has employed in Establishment Clause cases has been the "Coercion" Test as stated in *Lee v. Weisman*.³⁵ Justice Kennedy first suggested the use the Coercion Test for Establishment Clause violations in his concurring opinion in *County of Allegheny v. ACLU*.³⁶ In *Weisman*, Kennedy stated that "at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise."³⁷ Coercion consists of three elements: a forced choice, the threat of sanction, and the presence of coercive intent.³⁸ Furthermore, it appears that the Court does not deem coercion mandatory for a violation of the Establishment Clause, but it has found it to be sufficient for finding that such a violation exists.³⁹

Finally, the Court has also intermittently used the "Ceremonial Deism" Test. This test is the most relevant in the instant case. This phrase was coined by Professor Eugene Rostow⁴⁰ and adopted by the Court in the case of *Marsh v.*

28. *Lemon*, 403 U.S. at 612-613; see also Epstein, *supra* note 3 at 2125.

29. Epstein, *supra* note 3 at 2125.

30. *Lynch v. Donnelly*, 465 U.S. 668 (1984) (O'Connor, J., concurring); see also Suhrheinrich, *supra* note 25 at 588.

31. Suhrheinrich, *supra* note 25 at 588; see also Epstein *supra* note 3 at 2126.

32. *Lynch v. Donnelly*, 465 U.S. 668 (1984). See also *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

33. See *Wallace v. Jaffree*, 472 U.S. 38 (1985); see also *Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985).

34. See Cynthia V. Ward, *Coercion and Choice under the Establishment Clause*, 39 U.C. DAVIS L. REV. 1621, 1630 (2006) ("The basic problem with the endorsement test is that it is no test at all, but merely a label for the judge's largely subjective impressions"). This has also been debate in the federal court system as to how the "observer" of the alleged endorsement should be viewed. In *Capital Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753 (1995), Justice Stephens expresses his belief that the reasonable observer should be viewed as the average American. Justice O'Connor's view attributes more knowledge to the reasonable observer, including being "acquainted with the text, legislative history, and implementation of the statute." Suhrheinrich, *supra* note 25 at 589.

35. *Weisman v. Lee*, 505 U.S. 577 (1992).

36. *County of Allegheny v. ACLU*, 492 U.S. 601 (1989). See also Ward, *supra* note 34 at 1630.

37. *Weisman*, 505 U.S. at 587.

38. Ward, *supra* note 34 at 1639-43.

39. William J. Dobash, *Coercion in the Ranks: The Establishment Clause Implications of Chaplain-Led Prayers at Mandatory Army Events*, 2006 WIS. L. REV. 1493, 1506 (2006) (Dobash adds that this test is mostly used when the court reviews cases which involve situations such as school prayer in public schools).

40. Suhrheinrich, *supra* note 25 at n.7; see also Epstein, *supra* note 3 at 2091 ("Rostow reconciled

Chambers.⁴¹ The concept behind ceremonial deism stems from tradition. The argument is that the use of religion, in nondenominational terms, is needed to be used by the government in some very limited situations where solemnity needs to be created and only invoking God in those specific situations will suffice in creating this necessary mood.⁴² Included in this doctrine is the idea that such invocations of God in these limited situations over time has prompted a ceremonial deism – that meaning once contained within these invocations has lost its religious nature.⁴³ As such, there is no real religious issue at stake. Justice Brennan in his concurrence in *Abington Township v. Schempp*, addressing the phrase at issue in this case, stated that he believed that the national motto has reached this level of ceremonial deism – that it has been so entrenched into the country's traditions that it has lost its specific religious meaning.⁴⁴ Specifically, in *Marsh* the Court stated that “to invoke divine guidance on a public body entrusted with making the laws is not, in these circumstances, a violation of the Establishment Clause; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country.”⁴⁵

Given the previous tests that the Court has used in its Establishment Clause jurisprudence, it is unlikely that any court will find Indiana's license plate statute unconstitutional on the grounds that it establishes a religious belief. Its use, as described by Justice Brennan, seems to fall directly under the ceremonial deism as previously described. Under *Marsh's* test for ceremonial deism, the phrase “In God We Trust” has reached the point that it has become common place and is not viewed by the majority of the populace as an affirmation of belief in a higher religious being. Therefore, its mere presence on state-issued license plates would not violate the Establishment Clause if the Court adopts the Ceremonial Deism Test in this case.

Furthermore, it does not appear as though a challenge would be successful

the Establishment Clause with a class of public activity, which ... could be accepted as so conventional and uncontroversial as to be constitutional.”). See also Arthur E. Sutherland, Book Review, 40 IND. L.J. 83, 86 (1964) (reviewing Wilber G. Katz, *Religion and American Constitutions* (1963)).

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

42. Epstein, *supra* note 3 at 2092; see also *County of Allegheny*, 492 U.S. at 596 n.46 (Brennan, J., dissenting).

43. *Id.*

44. *School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 303 (1963) (Brennan, J., concurring). The phrase “In God We Trust” was not specifically at issue in the case, so his statements concerning the national motto are to be considered dicta, however influential. Other Supreme Court opinions have also stated in dicta a likelihood of upholding the use of the national motto at least in certain contexts, see *County of Allegheny*, 492 U.S. at 602-3 (“Our previous opinions have considered in dicta the motto ... characterizing [it] as consistent with the proposition that government may not communicate an endorsement of religious belief.”); see also *Lynch*, 465 U.S. at 693 (O'Connor, J., concurring) (“Government's display of the crèche in this particular physical setting [is] no more an endorsement of religion than such governmental ‘acknowledgments’ of religion as ... [the] printing of ‘In God We Trust’ on coins....”). See also, Epstein *supra* note 3 at 2093 (examples of ceremonial deism prevalent in the United States include legislative prayers and prayer rooms, prayers and the invocation of God at presidential inaugurations, invocation of “God save the United States and this Honorable Court” prior to judicial proceedings, administration of oaths, use of A.D. and “in the year of Our Lord” in public documents, the National Day of Prayer, Thanksgiving and Christmas as public holidays, and the use of “under God” in the pledge of allegiance.)

45. *Marsh*, 463 U.S. at 792.

under the other tests that the Court has pronounced either. In terms of a Coercion Test analysis, the state specifically allows for another message-neutral plate to be selected at the option of the car owner. Therefore, there is no mandate by the state that each individual driver must display the phrase at issue. While the intent of the legislature in passing this legislation is questionable, no forced choice or threat of sanction is present which would lead the Court to invalidate this statute under the Coercion Test.

Shifting to a Lemon/Endorsement Test analysis, a more difficult case has to be made for this legislation to withstand a constitutional challenge. But, because of the jurisprudence of the Court has been infused with the ideal of ceremonial deism, the use of this test in the instant case does not ultimately change the result. Under the first element of the traditional *Lemon* Test,⁴⁶ the state could claim that it has a secular purpose in giving the "In God We Trust" option to motorists. Much like a ceremonial deism argument,⁴⁷ the state can claim that the message works to create solemnity on the roadways and promotes responsible driving by its citizenry as a result. Surely the state has an interest in promoting highway safety. Moving to the second element, it can be argued that the option for these new license plates does not promote any religion. Once again, citing back to the all important ceremonial deism that the Court has pronounced, a religious message is not being primarily promoted because the phrase has lost all of its religious meaning over time. Finally, because the message does not promote any specific religious doctrine or faith (except that perhaps a God does in fact exist) this does not reach the level of entanglement. There is no evidence that church leaders were officially consulted as to the specifics of the message, nor do the plates create any lasting ties between religion and the government once the motorist leaves the BMV. While still on the road, at this point the relationship between the government and the specific message has ended.⁴⁸ Incorporating the Endorsement Test into this analysis, a reasonable observer (informed with the history the phrase has in American and the Court's previous statements concerning ceremonial deism in the past) would conclude that the state was not endorsing any religion by the use of the phrase. Even the reasonable observer who has not reached the level of knowledge that O'Connor believes that standard entails,⁴⁹ will be likely to conclude that the message is so broad and watered down that it does not reach the level of religious endorsement by the state.

Due to the movement and alternating standards that the Supreme Court

46. *Lemon*, 403 U.S. at 612-13.

47. Epstein, *supra* note 3 at 2092.

48. Alternatively, the argument could be made that the continued use of the plates by the motorists in the state in fact maintains a relationship. For example, motorists from other states will have occasion to see these official plates. One can argue that the motorists might receive this as an outward display that the state of Indiana endorses a belief in God. But ultimately, the phrase at issue does not create this problem. While this might be the case with other religious messages, "In God We Trust" is the national motto, familiar with many from all states. They would not see this as endorsement under O'Connor's test. Furthermore, the relationship ends for entanglement purposes since the state no longer makes decisions as to what the plate will say after the motorist leaves the BMV.

49. See *supra* note 34.

has taken in Establishment Clause cases over the past three decades, numerous circuit courts have been forced to clarify the law in this area as well. In regards to the specific phrase pertinent in this case, lower courts have had the opportunity to weigh in and have found the phrase itself to pass constitutional standards.⁵⁰ This attention has not only focused on the national motto, but rather has taken on similar phrases and uses throughout the country as well. For example, the Sixth Circuit has recently upheld the phrase “With God All Things Are Possible” as Ohio’s state motto.⁵¹ On the other hand, the Ninth Circuit declared that the phrase “under God” as recited in the Pledge of Allegiance in public schools was unconstitutional.⁵² There are countless other examples of similar uses that may be the subject of litigation in the future.⁵³ This trend could even spill over to challenges against license plates from other states as well, for many states allow for religious-type messages to be displayed, albeit not on a no-fee basis that ultimately dooms the Indiana statute in question.⁵⁴

Having addressed the federal questions, the analysis then shifts to whether this legislation has violated the Indiana Constitution’s provisions on religion. First of all, in regards to section 4, the state cannot give preference to any religion. While the bounds of Indiana’s Establishment Clause are not clear, it

50. See *Lambeth v. Bd. Of Comm’rs*, 407 F.3d 266, 272 (4th Cir. 2005) (the court, in upholding motion to dismiss, states, “the Complaint alleges no circumstances-such as an inappropriate context or character-to negate the legitimate secular connotations arising from the long-standing patriotic uses in this country of the phrase ‘In God We Trust.’ A reasonable observer contemplating the inscription of the phrase on the Government Center would recognize it as recently installed, but also as incorporating familiar words-a phrase with religious overtones, to be sure, but also one long-used, with all its accompanying secular and patriotic connotations as our national motto and currency inscription.”; see also *Books v. Elkhart County*, 401 F.3d 857 (7th Cir. 2005) (court upheld display of ten commandments at county administration building, finding it did not give the appearance of endorsing religion since it was surrounded by other secular texts, such as the Declaration of Independence. The court found that the purpose was educational. Important for the purposes of this Note is the fact that the national motto “In God We Trust” was part of this display, its use was not challenged, and that the court characterized it with the other secular texts); see also *O’Hair v. Murray*, 588 F.2d 1144 (5th Cir. 1979) (affirming dismissal of challenge to “In God We Trust” as national motto and its use on currency).

51. *Suhrheinrich*, *supra* note 25 at 586; *American Civil Liberties Union of Ohio v. Capitol Square Review & Advisory Bd.*, 243 F.3d 289 (6th Cir. 2001) (en banc) (finding the motto appropriate under ceremonial deism and Endorsement Test); see also 20 F.Supp.2d 1176 (S.D. Ohio 1998); cf. 210 F.3d 703 (6th Cir. 2002) (disagreeing with the en banc opinion). Even the dissent by Judge Merritt in the en banc opinion distinguishes Ohio’s phrase from the national motto stating, “While the phrase In God We Trust refers broadly to a shared human yearning for the spiritual, the Ohio motto conveys a sectarian view of God as interventionist, active and omnipotent. The national motto does not specify a personal, all-knowing, God who makes all things possible by intervening in daily affairs. The God in whom we trust could be the god of Jefferson’s deism or even the laws of science or the cosmology of Newton or Einstein. It does not define the god of any religion. The god of the silver coin and the dollar bill – In Whom We Trust – may be drawn from any of the gods of the world’s vast pantheon of divinity that has accumulated from Greek times to the present.” *Capitol Square*, 243 F.3d at 315 (Merritt dissenting); see also *Suhrheinrich*, *supra* note 25 at 600.

52. *Newdow v. U.S. Congress*, 292 F.3d 597 (9th Cir. 2002). The merits of this decision were criticized by Congress, see H.R.Res.459, 107th Cong., 148 CONG. REC. H4130 (daily ed. June 28, 2002). Congress also responded by proposing a Constitutional Amendment to protect both the Pledge of Allegiance and the National Motto, H.R.J. Res. 108, 107th Cong., 148 CONG. REC. H5790 (daily ed. July 25, 2002 pt. II). The Supreme Court later reversed the 9th Circuit’s decision on a standing issue. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004).

53. For examples, see *supra* note 44.

54. For examples, see *supra* note 15.

appears that the analysis that governs the federal religion clauses is appropriate here as well. The Indiana Supreme Court has paid lip service to the unique nature of Indiana's Establishment Clauses in comparison to its federal counterpart, but in practice has yet to adopt any test for such claims.⁵⁵ Even if the court relies solely on a historical and textual analysis of the state's constitutional religion clauses, as it seemed to do in *City Chapel v. South Bend*, the phrase at issue in this case will be upheld.⁵⁶ Given the history of general acceptance that the phrase has enjoyed and the fact that section 2 of the state's own constitution proclaims "All people shall be secured in the natural right to worship ALMIGHTY GOD, according to the dictates of their own consciences," it would be difficult to prohibit the use of the phrase "In God We Trust" in this case.⁵⁷ Thus the court, by applying either the federal test or a historical analysis, is likely to determine that the use of the national motto in this case does not give preference to any specific religion and therefore this legislation does not violate the state constitutional provision prohibiting the establishment of religion. Furthermore, in terms of Section 6's restriction on the state's financial contributions to religious organizations, IC 9-18-24.5 does not call for any funds from the state's treasury to actually go to any organization outside of government. As stated above, the state does not collect the \$25 fee for these plates earmarked for the charitable organization as it does for the other specialty plates. Therefore this statute does not violate the Indiana's Constitution version of the establishment clause and its provision banning financial support to be given by the government towards any religious organization.

B. Does the Indiana Statute Violate Privileges and Immunities Clause?

While it appears unlikely that the courts will find statute IC 9-18-24.5 unconstitutional on Establishment Clause grounds, the statute does raise additional constitutional concerns. Specially, there have been claims that the practice violates article 1, section 23 of the Indiana Constitution. This section of the state's constitution states, "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens."⁵⁸ Indiana's privileges and

55. See *City Chapel Evangelical Free, Inc. v. City of South Bend ex rel. Dept. of Redevelopment*, 744 N.E.2d 443, 446 (Ind. 2001) ("the religious liberty provisions of the Indiana Constitution were not intended merely to mirror the federal First Amendment. We reject the contention that the Indiana Constitution's guarantees of religious protection should be equated with those of its federal counterpart and that federal jurisprudence therefore governs the interpretation of our state guarantees."); But see *Myers v. State*, 714 N.E.2d 276, 280-81 (Ind. Ct. App. 1999) (Court does not confront state constitutional issues and employs *Lemon* Test to federal Establishment Clause question). The lack of case law on Indiana's religion clauses seems to imply that both the parties to such cases and the courts that have heard them did not think the state clauses were at issue in light of the scrutiny applied to the federal question. A possible explanation to this phenomenon is that the analysis of the federal question is more exacting – thus if a state practice is found to pass federal constitutional muster, it would implicitly be valid under state constitutional law as well.

56. *City Chapel*, 744 N.E.2d at 447.

57. IND. CONST. art. I, § 2 (emphasis in original).

58. IND. CONST. art. I, § 23.

immunities clause differs from the Federal Constitution's clause of the same name.⁵⁹ The purpose of the state's clause is "to prevent the distribution of extraordinary benefits or burdens to any group."⁶⁰ As such, the legal analysis under Indiana's clause is to be done independently of what the U.S. Supreme Court has said on the Federal Constitution's version of the clause.⁶¹ Indiana's courts, when presented with a privileges and immunities clause challenges, undertake a two part test to determine the claim's validity. The first step of the analysis mandates that the "disparate treatment accorded by the legislation must be reasonably related to inherent characteristics which distinguish unequally treated classes."⁶² Furthermore, courts have held that this "preferential treatment must be uniformly applicable and equally available to all persons similarly situated."⁶³ As the court summed up in *Horn*:

Under the privileges and immunities clause, the statutory distinctions must improve something more than mere characteristics which will serve to divide or identify a class; there must be inherent differences in situation related to the subject matter of the legislation which require, necessitate, or make expedient different or exclusive legislation with respect to the members of the class.⁶⁴

Article 1, section 23 is the basis for a lawsuit filed in Indiana State Court earlier this year. In the pending case, *Studler v. Indiana Bureau of Motor Vehicles*,⁶⁵ the ACLU's main argument for the plaintiff is "those who obtain the 'In God We Trust' plate are afforded the opportunity to make an affirmative statement at no cost,"⁶⁶ while the plaintiff incurred additional cost to make his statement regarding his support for the environment by opting for the "environment" plates.⁶⁷ This argument, unlike a challenge under the

59. Article IV, Section 2, Clause 1 of the United States Constitution states that "the Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV, §2. Indiana's clause also differs from the Privileges and Immunities Clause contained within the 14th amendment of the Constitution, U.S. CONST. amend. XIV.

60. *Smith v. Indiana Dept. of Corr.*, 821 N.E.2d 975, 985 (Ind. Ct. App. 2007); *see also W.C.B. v. State*, 855 N.E.2d 1057 (Ind. Ct. App. 2006); *see generally* 5A Ind. Law Encycl. Constitutional Law § 147 (2008).

61. *Collins v. Day*, 644 N.E.2d 72, 75 (Ind. 1994); *see generally* 5A Ind. Law Encycl. Constitutional Law § 147.

62. *Collins*, 644 N.E.2d at 80.

63. *Id.*; *see also Rondon v. State*, 711 N.E.2d 506, 513 (Ind. 1999). The baseline for a challenge under the state's privileges and immunities clause is unequal treatment. *Hosler ex rel. Hosler v. Catepillar, Inc.*, 710 N.E.2d 193, 198 (Ind. Ct. App. 1999). This analysis differs from the standards that the Supreme Court has established for the Privileges and Immunities Clause under the Federal Constitution. The purpose of the federal clause is to prevent discrimination on the basis of state residency, which is not at issue in this case. *See generally* KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 316 (15th ed. 2004). Furthermore, Indiana courts do not employ different levels of scrutiny as federal courts do. John Laramore, *Indiana Constitutional Developments*, 37 IND. L. REV. 929, 945 (2004).

64. *Horn v. Hendrickson*, 824 N.E. 2d 690, 702 (Ind. App. 2005).

65. *Studler v. Indiana Bureau of Motor Vehicles*, Complaint, available at <http://www.aclu-ind.org/upload/newsletters/LicensePlateComplaint.pdf>

66. *Id.*

67. *Id.*

Establishment Clause, is not centered on the religious message contained on the license plates. In all likelihood, the argument would be the same no matter what the message on the plate stated. But even so, the fact that the Establishment Clause looms makes it even more difficult for this statute to pass constitutional muster.

There are several reasons that support Studler's argument that Indiana's practices under IC 9-18-24.5 violate the state's privileges and immunities clause. Specifically on this point, Studler argues that the statute in question "represents disparate treatment that is not reasonably related to the inherent characteristics which distinguish the unequally treated class and preferred treatment is not uniformly applicable and equally available to all persons similarly situated."⁶⁸

This claim strikes at the heart of the clause. First of all, this case deals with the actions of the state legislature in enacting the legislation at issue, in addition to the actions of the Bureau of Motor Vehicles in its execution of the statute amounts to state action. The claim then falls under the mandate of *Lutz*, which requires that a state action be involved in order for a plaintiff to bring a claim under the privileges and immunities clause.⁶⁹ Further, the burden is on Studler to negate "every reasonable basis" for the classification between the favored group (those who want the statement "In God We Trust" on their license plates) and the disadvantaged group (those who wish to make other statements on their license plates).⁷⁰ Studler also has to overcome the deference that courts give to the legislature in making such class determinations.⁷¹

Therefore the main question that needs to be addressed is whether there is any reasonable basis for the legislation's classification between the two groups. But this "reasonable basis" standard cannot be looked at in a vacuum. For example, when looking at the plain language of the phrase, the most obvious basis for this classification would be to promote a trust in God within the state. The legislation can be said to achieve this by giving an incentive to those drivers who choose to display the "In God We Trust" license plate over other specialty plates. This incentive of paying less in fees then at least makes the

68. *Id.*

69. *Lutz v. Fortune*, 758 N.E.2d 77, 84 (Ind. Ct. App. 2001); *see generally* 5A Ind. Law Encycl. Constitutional Law § 147 (2008); state action includes actions by governmental agencies, *see Palin v. Indiana State Personnel Dept.*, 698 N.E.2d 347, 354 (Ind. Ct. App. 1998).

70. *Leadbetter v. Hunter*, 842 N.E.2d 810, 813 (Ind. 2006); *see also Johnson v. St. Vincent Hosp., Inc.*, 404 N.E.2d 585, 597 (1980) (holding that the plaintiff's burden is "to negate every conceivable basis which might have supported the classification").

71. *W.C.B.*, 855 N.E.2d at 1060. Discretion of the courts to overturn a statute is limited to laws deemed arbitrary and "manifestly unreasonable." *Ziegler v. Indiana Dept. of State Revenue*, 797 N.E.2d 881 (Ind. Tax 2003); *Flemming v. Int'l Pizza Supply Corp.*, 707 N.E.2d 1033, (Ind. App. 1999); *Chamberlain v. Parks*, 692 N.E.2d 1380, 1382 (Ind. App. 1998). Case law has shown that this deference has been difficult to overcome. *See generally* 5A Ind. Law Encycl. Constitutional Law § 157 (2008); *see also Indiana High Sch. Athletic Ass'n, Inc. v. Carlberg by Carlberg*, 694 N.E. 2d 222 (Ind. 1997) (transfer students versus other students in determining athletic eligibility); *American Legion Post No. 113 v. State*, 656 N.E.2d 1190 (Ind. Ct. App. 1995) (drawing distinction between riverboat/lottery gambling and other forms); *Carr v. State*, 93 N.E. 1071 (Ind. 1911) (taking into account police powers of the state in upholding excepted classes to Sunday laws); *see also Palin*, 698 N.E.2d at 354 (upholding different classification between professional personnel and executive personnel in state pay scales for the purpose of recruiting and retaining those with technical knowledge to the job).

plate in question equal to the default, standard-issue license plate. Thus, the legislation has shown a reasonable basis for the classification within the statute. But we simply cannot look at this statute without factoring in the Establishment Clause. When looking at this “reasonable basis” standard, coupled with the U.S. Supreme Court’s jurisprudence regarding the Establishment clause, the mandate then becomes in order for IC 9-18-24.5 to be constitutional under both clauses, the “reasonable basis” for the legislation cannot be the promotion of religion. If the purpose of the classification is to promote a trust in God, then the legislation is doomed. Its basis, no matter how reasonable, is forbidden under the Establishment Clause. A statute cannot have a reasonable basis under the law if that underlying basis is unconstitutional; and it is unreasonable to create a law in direct violation of a constitutional provision.⁷² This then transforms the analysis. The question then becomes, is there any reasonable basis for this classification besides the promotion of religion by the state?⁷³

The state legislature has put this legislation in a bind. What is the reasonable basis for distinguishing those like Studler who want to promote causes like the environmental protection and those who want to promote a trust in God? Unfortunately, legislative history does not provide any guidance on this question. By reading Representative Burton’s comments in the previous section,⁷⁴ the ability to express one’s faith is the purpose behind the statute. Once again, this does not help the state’s case. The state cannot even argue that they have a revenue raising purpose in enacting the legislation – as stated earlier, the state actually takes a financial hit on the “In God We Trust” plates in that it is not maximizing profits from the sale of specialty plates.⁷⁵ Thus, there does not seem to be a reasonable basis to differentiate the ability to express one’s faith “In God We Trust” over one’s faith in (or concern for) the environment.

The state’s only realistic argument to withstand the pitfalls of the privileges and immunities clause in light of the restrictions brought to bear by the Establishment Clause would be to combine an argument of ceremonial deism while using the differences in fee structure to its advantage. First of all the state could try to save this legislation by arguing that the phrase “In God We Trust” no longer has any religious significance, but rather is used to create solemnity in a way that only ceremonial deism can provide. This is reasonable because, the state could argue, it has an interest in maintaining safe roadways and that drivers are less likely to drive recklessly with this type of solemnity in mind.⁷⁶ Therefore the promotion of safe driving is inherently different than the messages that the other various specialty plates promote. Thus, the state is not

72. *Marbury v. Madison*, 1 Cranch 137, 178 (1803) (“The Constitution is superior to any ordinary act of the legislature, the Constitution and not such ordinary act, must govern the case to which they both must apply”).

73. In order to determine whether the government action is “promoting religion,” refer back to the discussion concerning the Endorsement Test, Coercion Test and ceremonial deism, *supra* pp. 7-10.

74. See *supra* note 13.

75. See *supra* note 14.

76. See *supra* note 44.

promoting religion, while at the same time providing a reasonable basis for making this class determination. Additionally, the state should argue that the fact that there are no special proceeds going to any one group (i.e. the \$25 of the fees for other specialty plates) makes the "In God We Trust" plates inherently different from other specialty plates. Thus this rationale provides the needed "reasonable basis" for the differing classifications by the legislature. If the court accepts this argument, then the purpose is separate from the promotion of religion. This, coupled with the Supreme Court's trend to tolerate the national motto for Establishment Clause purposes, would mean that the statute would likely be upheld. Both of these arguments are also uniformly applicable because whoever wants to select the plate is afforded the same specialty plate fee waiver. Therefore, the second prong of Indiana's privileges and immunities clause analysis is not at issue.

But ultimately, these arguments try too hard. Despite judicial deference to the decisions of legislators in such class distinctions, this particular legislation is just too flawed. The clear purpose of the legislation in question is to promote a trust in a religious being. To say that the fees are collected differently does not account for the entire issue. Even if the \$25 dollars is no longer an issue, there still is the matter of the additional \$15 discrepancy. To waive it only for the "In God We Trust" plates and not for the other group of specialty plate holders solely on the basis of the \$25 fundraising fee cannot be thought of as a "reasonable basis." This is a created, not an inherent characteristic. In the end, the legislation in question raises too many issues to withstand this challenge.⁷⁷ Indiana's "In God We Trust" license plate legislation is unconstitutional due to its lack of reasonable basis for its fees classification. As such, it violates the state's privileges and immunities clause. Even if this statute passes the privileges and immunities clause challenge, its rationale for doing so would put it in danger of an Establishment Clause challenge.

IV. CONCLUSION

Despite no constitutional problems with the government's use of the phrase "In God we Trust" in of itself, the fact that Indiana's IC 9-18-24.5 promotes these license plates over other specialty plates violates Indiana's Constitution article 1, section 23. As this Note has explained, the Supreme Court has hinted that the national motto would survive a challenge under the Establishment Clause of the First Amendment of the Constitution. Even an independent analysis of the phrase's use on license plates based on the various tests that the Court has employed in addressing these types of issues lends itself to

77. Another effect of this legislation concerns the potential for abuse regarding the police powers of the state. The question in this specific case, and in many ways all cases where specialty plates are promoting a message, is whether this will make those displaying the plates a target for discrimination? Or conversely, will the displaying of the message lead to undue favoritism? This is particularly relevant question to ask in light of recent debate on racial profiling by police and security personnel across the country. The question must then be asked, does the option for "In God We Trust" plates create a possibility of discrimination that outweighs any potential benefits that this legislation might have?

upholding the constitutionality of the plates. But while not unconstitutional under the Endorsement Clause, Indiana's statute allowing for "In God We Trust" license plates does violate Indiana's constitutional protection against granting unequal privileges and immunities to its citizens. This conclusion stems not from the actual content of the message that the state has decided to promote, but rather that it promoted any message at all to the detriment of others without a reasonable basis for doing so. Any reasonable basis that the state can conjure up will likely result in the state admitting that it violated the Establishment Clause in doing so. As a result, the legislation is unlikely to withstand the challenge being waged against it in court on this basis.

Of course, this is not to say by any means that the promotion of religion or the ability to show your support of religion on your license plates is an inherently bad concept. It is completely reasonable to believe that the promotion of faith, as Representative Burton believes that this law does,⁷⁸ promotes the common good of society to its benefit. This legislation just fails to do it the proper, constitutional way. By creating a discrepancy between the fees paid for the "In God We Trust" license plate and other specialty plates, IC 9-18-24.5 violates the state's privileges and immunities clause. As such, the legislature would be justified in amending the statute to eliminate the different classifications of specialty plates and the fees that accompany them. The drivers of Indiana should still be able to show their faith by proudly displaying their "In God We Trust" plates — they just should have to cough up the extra fifteen dollars like everyone else.

78. See *supra* note 13.