

## Disestablishing Deism: Advocating Free Exercise Challenges to State-Induced Invocations of God

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One is often told that it is a very wrong thing to attack religion, because it makes men virtuous. So I am told; I have not noticed it.

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You find as you look around the world that every single bit of progress in humane feeling . . . every moral progress that there has been in the world has been consistently opposed by the organized churches of the world.<sup>1</sup>

My own view on religion is that of Lucretius. I regard it as a disease born of fear and as a source of untold misery to the human race.<sup>2</sup>

—Bertrand Russell

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1. BERTRAND RUSSELL, WHY I AM NOT A CHRISTIAN, AND OTHER ESSAYS ON RELIGION AND RELATED SUBJECTS 19–21, 24 (Paul Edwards ed., 1st ed. 1957).

2. *Id.* at 24.

In recent years, Atheism<sup>3</sup> has risen to a new level of visibility in American public life.<sup>4</sup> This public awareness arose largely from an influx of what has been termed neo-Atheist, or new Atheist, literature,<sup>5</sup> a phenomenon exemplified by authors like Sam Harris,<sup>6</sup> Richard Dawkins,<sup>7</sup> and Christopher Hitchens.<sup>8</sup> These Atheist authors

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3. "Atheism" generally refers to a philosophical belief in the non-existence of any god or gods. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY UNABRIDGED 137 (Philip Babcock Gove ed., Merriam-Webster 1993) (defining Atheism as "disbelief in the existence of God or any other deity"). It must be distinguished from agnosticism, which is the belief that the existence of god is unknown or unknowable. *Id.* at 42 (defining agnosticism as "the doctrine that the existence or nature of any ultimate reality is unknown and probably unknowable or that any knowledge about matters of ultimate concern is impossible or improbable," specifically knowledge of god). Many Atheists subscribe to "religious" schemas such as Secular Humanism, which provide a discrete statement of beliefs and values. Secular Humanism has been described as an "ethical, scientific, and philosophical outlook that has changed the world." PAUL KURTZ, HUMANIST MANIFESTO 2000: A CALL FOR A NEW PLANETARY HUMANISM (2000), available at <http://www.secularhumanism.org/index.php?section=main&page=manifesto>. Its tenets include a disbelief in god, a rejection of organized religion, a reliance on scientific naturalism, and a commitment to provide all people on Earth with basic human rights. Its goals and dogma are found in the Humanist Manifesto 2000. See *id.* In this Note, Atheism refers to the affirmative belief that there is no god, and that ultimate questions of morality and purpose can be answered using the scientific method. See RICHARD DAWKINS, THE GOD DELUSION 209-33 (2006); David van Biema, *God vs. Science*, TIME, Nov. 5, 2006, at 48, 53. Van Biema's article contains a debate between a prominent Atheist evolutionary biologist and a religious scientist who supports creationism. Van Biema, at 48-55. He quotes Dawkins as saying that the problem with religious scientists is that they claim god as an answer, whereas an Atheist scientist admits a lack of knowledge but vows to pursue scientific research. *Id.* at 53.

4. See, e.g., E.J. Dionne Jr., Op-Ed., *Answers to the Atheists*, WASH. POST, Apr. 6, 2007, at A21; Peter Steinfels, *Books on Atheism Are Raising Hackles in Unlikely Places*, N.Y. TIMES, Mar. 3, 2007, at B5.

5. New Atheism or neo-Atheism refers to the recent surge in Atheist literature, not necessarily to the novelty of any ideology espoused by that literature. See Michael Novak, *Lonely Atheists of the Global Village*, NAT'L REV., Mar. 19, 2007, at 43 (critiquing three recent books by Atheists from the perspective of a religious apologist); James Wood, *The Celestial Teapot*, THE NEW REPUBLIC, Dec. 18, 2006, at 27 (criticizing the new Atheist genre from the perspective of an Atheist); van Biema, *supra* note 3, at 49.

6. See SAM HARRIS, LETTER TO A CHRISTIAN NATION (2006); see also SAM HARRIS, THE END OF FAITH (2004). Harris is completing a doctorate in neuroscience and holds a degree in philosophy from Stanford University. Sam Harris, About Sam Harris, <http://www.samharris.org/site/about> (last visited July 15, 2009).

7. See Dawkins, *supra* note 3; see also van Biema, *supra* note 3, at 49. Dawkins is an evolutionary biologist well known for his vocal opposition both to religion in general and, more specifically, creationism. Van Biema, *supra* note 3, at 49.

8. See CHRISTOPHER HITCHENS, GOD IS NOT GREAT (2007). Hitchens primarily is a political columnist and foreign correspondent, and makes regular submissions to *The Atlantic Monthly*, *Slate*, and *Vanity Fair*. The Christopher Hitchens Web, <http://www.hitchensweb.com> (last visited Aug. 20, 2009).

have experienced popular success<sup>9</sup> in the face of an American society where religion continues to play an important role.<sup>10</sup> Despite the visibility of Atheist literature, however, Atheists trying to rid the public sphere of reference to god have met with much resistance.<sup>11</sup>

The popularity of Atheist literature contrasts sharply with the prevalence of god and religion in American public life. For example, candidates for political office frequently invoke god in their rhetoric and actively seek the so-called religious vote.<sup>12</sup> Congress wrote god

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9. Hitchens's, Dawkins's, and Harris's books all have appeared multiple weeks on *The New York Times* Best Sellers list. Hitchens's book sold in the top sixteen in hardcover nonfiction for twenty weeks. *Best Sellers: The New York Times Book Review*, N.Y. TIMES MAG., Sept. 30, 2009, at 26, available at <http://www.nytimes.com/2007/09/30/books/bestseller/0930besthardnonfiction.html>. Dawkins's book spent thirty-two weeks in the top sixteen in hardcover nonfiction. *Best Sellers: The New York Times Book Review*, N.Y. TIMES MAG., May 13, 2007, at 30, available at <http://www.nytimes.com/2007/05/13/books/bestseller/0513besthardnonfiction.html>. Harris's first book, *THE END OF FAITH*, *supra* note 6, gained popularity as a paperback and spent fourteen weeks in the top sixteen on that list. *Paperback Best Sellers: The New York Times Book Review*, N.Y. TIMES MAG., Mar. 19, 2006, at 28, available at <http://www.nytimes.com/2006/03/19/books/bestseller/0319bestpaperonfiction.html>. His second book, *LETTER TO A CHRISTIAN NATION*, *supra* note 6, spent six weeks in the top sixteen of the hardcover nonfiction category. *Best Sellers: The New York Times Book Review*, N.Y. TIMES MAG., Nov. 19, 2006, at 26, available at <http://www.nytimes.com/2006/11/19/books/bestseller/1119besthardnonfiction.html>.

10. A recent survey by the Pew Forum on Religion and Public Life found that Americans are more supportive of religion in public life now than they were in the 1960s, and that religious institutions are more involved with politics today than they used to be. The survey also noted the increasing involvement of evangelical Christians with conservative political attitudes. See PEW FORUM ON RELIGION & PUBLIC LIFE, MANY AMERICANS UNEASY WITH MIX OF RELIGION AND POLITICS 2–3 (2006), <http://pewforum.org/publications/surveys/religion-politics-06.pdf>.

11. For instance, following the Ninth Circuit's initial decision in *Newdow v. U.S. Congress*, 292 F.3d 597 (9th Cir. 2002), amended by 328 F.3d 466 (9th Cir. 2003), *rev'd Sub nom. Elk Grove Unified School District v. Newdow*, 542 U.S. 1 (2004), members of both houses of Congress from both parties objected vociferously to the ruling, which declared the words "under god" in the Pledge of Allegiance to be unconstitutional. Many of them protested by gathering on the steps of the Capitol building to recite the Pledge, while the Senate voted unanimously to allow Senate legal counsel to intervene in the lawsuit. See CNN.com, *Lawmakers blast Pledge ruling*, June 27, 2002, <http://archives.cnn.com/2002/LAW/06/26/pledge.allegiance/>.

12. See, e.g., CHRIS HEDGES, *AMERICAN FASCISTS: THE CHRISTIAN RIGHT AND THE WAR ON AMERICA* (2006) (comparing the religious right to twentieth-century totalitarian movements and decrying democratic society's tolerance for intolerant movements); Jason Carter, *Toward a Genuine Debate About Morals, Religion, Politics, and Law: Why America Needs a Christian Response to the "Christian" Right*, 41 GA. L. REV. 69 (2007) (arguing that the religious right and the secular left provide a false choice about the place of religion in American politics and advocating for a third, more moderate religious option); L. Scott Smith, *Religion, Politics, and the Establishment Clause: Does God Belong in American Public Life?*, 10 CHAP. L. REV. 299 (2006) (reviewing the history of religion in American culture and arguing that historical

into the Internal Revenue Code, giving tax breaks to individuals who donate money to religious charities<sup>13</sup> and exempting “ministers of the gospel” from some taxes on income from their property.<sup>14</sup> Indeed, god can be found on every dollar bill and every coin that comes out of the United States Mint.<sup>15</sup> The Supreme Court even declared that the United States is a “Christian nation,”<sup>16</sup> and more recently held that churches can use Schedule I narcotics<sup>17</sup> for their religious ceremonies, while terminally ill cancer patients cannot use drugs from the same schedule to alleviate their symptoms without fear of federal prosecution.<sup>18</sup> Several states have carved out exceptions to their criminal codes for parents who deny medical treatment to their

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evidence provides no answer as to whether the Establishment Clause is meant to impose a secular state). Former Senator Elizabeth Dole of North Carolina attempted to attack her opponent, Senator Kay Hagan, for taking money from a political action committee funded by Atheists during the 2008 election. Dole’s attack ad, which featured Hagan’s picture along with another woman’s voice saying “there is no god,” was widely considered to be a crucial element of her defeat in the 2008 election. See Gail Collins, Op-Ed, *Thinking of Good Vibrations*, N.Y. TIMES, Nov. 6, 2008, at A33.

13. 26 U.S.C. §§ 170(c)(2)(B), 501(c)(3) (2006).

14. 26 U.S.C. § 107 (2006).

15. The motto has been in continuous use on all United States currency since 1938. See U.S. Treasury, Fact Sheet on The History of “In God We Trust,” <http://www.treas.gov/education/fact-sheets/currency/in-god-we-trust.shtml> (last visited Aug. 20, 2009). Famous Atheist Madalyn Murray O’Hair once challenged the motto on Establishment Clause grounds, but the suit was dismissed in Texas District Court. See O’Hair v. Blumenthal, 462 F. Supp. 19 (W.D. Tex. 1978) (holding that use of “In God We Trust” as national model has secular purpose, has a primary effect that does not advance nor inhibit religion, and avoids excessive government entanglement with religion, and therefore does not violate the Establishment Clause).

16. *Holy Trinity Church v. United States*, 143 U.S. 457, 471 (1892) (holding that a law preventing corporations from contracting with foreign workers did not apply to a church contracting to bring a British pastor over to the United States). The Court lists a variety of state-supported invocations of god as evidence of the United States being a Christian nation, including the traditional form of witnesses’ oaths and oaths of office, legislative prayer, and the plentitude of churches in America. *Id.*

17. Drugs are classified into schedules according to the Controlled Substances Act, 21 U.S.C. § 812 (2006). Schedule I substances have high potential for abuse and no medically accepted use. *Id.*

18. See Dawkins, *supra* note 3, at 22. Compare *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 439 (2006) (holding that the government failed to carry its burden in showing a compelling interest to bar the use of hoasca tea, which contains a schedule I substance, in religious ceremonies), with *Gonzales v. Raich*, 545 U.S. 1 (2005) (holding that the application of provisions of the Controlled Substances Act criminalizing manufacture, distribution, or possession of marijuana to intrastate growers and users of medical marijuana approved by state law did not violate Commerce Clause).

children on religious grounds, leaving behind a generation of martyrs to the religious cause.<sup>19</sup>

This privileged status of religion in America leads to some frustration amongst Atheists who have tried and failed to prevent the state from invoking god. In March 2000, Atheist Michael Newdow filed a lawsuit claiming that the words “under God” in the Pledge of Allegiance violated the Establishment Clause.<sup>20</sup> In June 2004, the Supreme Court dismissed his case for lack of standing.<sup>21</sup> While Newdow’s suit was pending, North Carolina District Court Judge James M. Honeycutt informed state officials that he no longer would allow the words “so help me God” to be included in witnesses’ oaths,<sup>22</sup> nor would he allow the court clerk to open the court’s day with the normal proclamation invoking god.<sup>23</sup> In a perfunctory opinion, the North Carolina Supreme Court ordered Honeycutt to permit the invocation of god.<sup>24</sup>

In both of these cases, citizens argued that a government-mandated invocation of god violated the Establishment Clause.<sup>25</sup> This Note will suggest that Atheists should challenge state-induced invocations of god under the Free Exercise Clause.<sup>26</sup> Because of the

19. MARCI A. HAMILTON, *GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW* 31–39 (2007). As Hamilton notes, states were required to enact exemptions permitting the medical neglect of children for religious reasons in order to qualify for federal funding related to children from 1974 to 1983. *Id.* at 31. “[R]oughly 30 states plus the District of Columbia now have exemptions for religious parents from the medical neglect laws.” *Id.*

20. *Newdow v. U.S. Congress*, 292 F.3d 597 (9th Cir. 2002), *amended by* 328 F.3d 466 (9th Cir. 2003), *rev’d sub nom.* *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004). *See also* U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion . . .”).

21. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004) (holding that a non-custodial parent deprived by state law of the right to sue as next friend lacks prudential standing to bring an Establishment Clause challenge on behalf of his daughter).

22. Associated Press, *N.C. Judge Requests Religion-Neutral Oaths, Courtrooms*, FIRST AMENDMENT CENTER, Mar. 5, 2004, <http://www.firstamendmentcenter.org/news.aspx?id=12871>. The statute provides for an oath in the form of a “most solemn appeal [] to Almighty God.” N.C. GEN. STAT. § 11-1 (2007). The state’s evidence code, however, allows for either an oath or an affirmation of no specified form. N.C. GEN. STAT. § 8C-1, Rule 603 (2007).

23. *In re Honeycutt*, 600 S.E.2d 470 (N.C. 2004) (ordering Judge James M. Honeycutt “to permit court to be opened with a proclamation which shall include the customary phrase, ‘God save the state and this honorable court.’”).

24. *Id.*

25. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion . . .”).

26. *Id.* (“Congress shall make no law . . . prohibiting the Free Exercise [of religion]”).

difference in doctrine, Free Exercise challenges may succeed where Establishment Clause challenges have failed. More specifically, this Note will examine four instances of so-called ceremonial deism:<sup>27</sup> the Pledge of Allegiance, legislative prayer, oaths of office, and oaths of witnesses.

Section A of Part I examines the evolution of the definition of religion and asserts that Atheism is a religion for First Amendment purposes. Section B of Part I discusses Establishment Clause jurisprudence, while Section C details how that doctrine has failed or would fail in challenges to state-induced invocations of god, highlighting the four examples of ceremonial deism aforementioned. Section D of Part I reviews Free Exercise Clause jurisprudence, and Part II outlines how Free Exercise challenges stand to succeed where Establishment Clause challenges to the Pledge of Allegiance, legislative prayer, oaths of office, and oaths of witnesses, have failed or would fail if attempted. This Note concludes by proposing that Atheists pursue Free Exercise challenges to state-induced invocations of god.

## I. HISTORY

### *A. Evolution of a Definition of Religion*

The definition of religion for purposes of First Amendment protection evolved over time through the legal system.<sup>28</sup> Surprisingly, the Supreme Court did not address the definition of religion until *Reynolds v. United States* in 1878.<sup>29</sup> The Court stated that “[t]he word

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27. Justice Brennan attributed this term to former Dean of Yale Law School Eugene Rostow, who first used it in a lecture on Alexander Meiklejohn. *Lynch v. Donnelly*, 465 U.S. 668, 716 n.24 (1983) (Brennan, J., dissenting). Justice Brennan appropriated it to describe the national motto of “In God We Trust” and the Pledge of Allegiance. *Id.* at 716–17. Justice O’Connor used the term to describe similar instances of state-induced invocations of god for ceremonial purposes, like the Pledge. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 44 (2004) (O’Connor, J., concurring).

28. See generally Derek H. Davis, *Is Atheism a Religion? Recent Judicial Perspectives on the Constitutional Meaning of “Religion,”* 47 J. CHURCH & ST. 707 (2005) (describing the major cases establishing Atheism as a religion for purposes of First Amendment protection); Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056 (1978) (arguing for a broad functional definition of religion focusing on the “ultimate concern” test).

29. *Reynolds v. United States*, 98 U.S. 145 (1878), in which the Court held that the

‘religion’ is not defined in the Constitution. We must go elsewhere, therefore, to ascertain its meaning. . . .”<sup>30</sup> The Court looked to history<sup>31</sup> to discern the framers’ vision of the beliefs to be protected under the religion clauses, and concluded that a traditional belief in god and morality must be involved.<sup>32</sup>

The Court clarified its stance twelve years later in *Davis v. Beason*, when it stated that “[t]he term ‘religion’ has reference to one’s views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will.”<sup>33</sup> This substantive definition involving a traditional belief in god and the duties imposed by him lasted through the 1930s.<sup>34</sup>

In the 1940s, a significant shift occurred wherein courts began looking for a functional definition of religion.<sup>35</sup> In *United States v. Ballard*, the Supreme Court distinguished between the objective truth or verity of belief, which the Court deemed irrelevant to the belief’s classification as a religion, and the good faith with which one holds belief, which the Court regarded as a relevant consideration.<sup>36</sup> The Court made no attempt to define religion, but its holding illustrated that religion must encompass a broad range of beliefs.<sup>37</sup>

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conviction of a Mormon for bigamy did not violate the Free Exercise Clause. *See id.* at 168.

30. *Id.* at 162.

31. The Court relies mainly on public comments by James Madison and Thomas Jefferson regarding a Virginia law that Jefferson wrote mandating religious freedom, as well as their letters during the Constitutional Convention. *Id.* at 163.

32. *See id.* at 162–64. The Court saw polygamy as inconsistent with the European tradition from which the founders’ beliefs originated. *Id.* at 164.

33. *Davis v. Beason*, 133 U.S. 333, 342 (1890), *abrogated by* *Romer v. Evans*, 517 U.S. 620 (1996) (holding that a law forbidding bigamists from voting did not violate the Free Exercise Clause, abrogated on equal protection grounds).

34. *See* *United States v. Macintosh*, 283 U.S. 605, 633 (1931), *overruled by* *Girouard v. United States*, 328 U.S. 61 (1946) (holding that a candidate for naturalization who refuses to take an oath of allegiance because his Christian beliefs prevent him from agreeing to take part in war properly was denied citizenship). In dissent, Chief Justice Hughes wrote that “[t]he essence of religion is belief in a relation to God involving duties superior to those arising from any human relation.” *Macintosh*, 283 U.S. at 633–34 (Hughes, C.J., dissenting).

35. *Davis*, *supra* note 28, at 710.

36. *United States v. Ballard*, 322 U.S. 78, 86 (1944) (holding that a court may not submit the truth or verity of the defendant’s beliefs to a jury).

37. *But see* *Lafferty v. Cook*, 949 F.2d 1546 (10th Cir. 1991) (holding that a defendant’s sincerely held religious beliefs that included a personal revelation from god instructing him to kill two people, characterized by the majority as a paranoid delusion, rendered him incompetent to stand trial). Dissenting from *Lafferty*, Judge Brorby indicated that, by declaring the defendant incompetent because of his direct communications with god, the majority was imposing its own

The Second Circuit formulated a more functional definition of religion in *United States v. Kauten*.<sup>38</sup> *Kauten* focused on religion as a relationship between man and his fellow men, rather than a relationship solely between man and god.<sup>39</sup> However, other federal circuit courts maintained the old substantive definition.<sup>40</sup>

In several tax-related decisions from the 1950s, lower courts applied the functional definition from *Kauten* to embrace Secular Humanism as a religion.<sup>41</sup> In 1961, the Supreme Court followed suit, stating in *Torcaso v. Watkins* that First Amendment protection extended both to believers and non-believers in god.<sup>42</sup> The Court rejected the older substantive definition of religion in two selective service cases later in the same decade.<sup>43</sup> It modified the functional

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judgment about what is “realistic” in terms of religious beliefs. *Id.* at 1566 (Brorby, J., dissenting). For a more in depth discussion of *Lafferty*, see JOHN KRAKAUER, UNDER THE BANNER OF HEAVEN: A STORY OF VIOLENT FAITH 291–311 (Anchor Books 2004).

38. *United States v. Kauten*, 133 F.2d 703 (2d Cir. 1943) (holding that an Atheist’s convictions against a war did not rise to the level of religious objection, and therefore he could not invoke religious protection from appearing for selective service).

39. *Id.* at 708. Judge Hand distinguished between objection to a specific war and conscientious objection to all war:

The former is usually a political objection, while the latter, we think, may justly be regarded as a response of the individual to an inward mentor, call it conscience or God, that is for many persons at the present time the equivalent of what has always been thought a religious impulse.

*Id.*

40. *Berman v. United States*, 156 F.2d 377 (9th Cir. 1946) (holding that an Atheist’s convictions against the war do not exclude him from selective service because the Selective Service Act excuses only those with religious beliefs that prevent them from serving). The Court held that the term “religion” required a belief in a deity. *Id.* at 380–82.

41. *Wash. Ethical Soc’y v. District of Columbia*, 249 F.2d 127 (D.C. Cir. 1957) (holding that a Humanist society is entitled to a District of Columbia tax exemption for religious institutions even though it does not profess a belief in god); *Fellowship of Humanity v. County of Alameda*, 315 P.2d 394 (Cal. Ct. App. 1957) (holding that a Secular Humanist organization was immune from state taxation because of a state law excluding property used for exclusively “religious” purposes).

42. *Torcaso v. Watkins*, 367 U.S. 488 (1961) (holding that the requirement of a declaration of a belief in the existence of god, as a test for office, invaded the freedom of belief and religion of the petitioner in violation of the First and Fourteenth Amendments). The Court listed several religions that do not profess a belief in god: “Buddhism, Taoism, Ethical Culture, Secular Humanism and others.” *Id.* at 495 n.11.

43. *United States v. Seeger*, 380 U.S. 163 (1965) (holding that a person could be given conscientious objector status even if he did not have a belief in a supreme being as required by statute as long as he has a sincere and meaningful belief that occupies a parallel place in his life to that filled by orthodox belief in god by someone who clearly qualifies for the exemption);



definition by holding that, to qualify as a religion, a belief system must deal with matters of ultimate concern.<sup>44</sup> The Court adopted an approach that compared nontraditional beliefs with traditional ones, and identified religion by its common role in people's lives.<sup>45</sup>

In *Wisconsin v. Yoder*, the Supreme Court retreated somewhat from its expansive functional definition of religion.<sup>46</sup> The Court stated that the mere fact that one holds a belief in good faith is not sufficient to extend to the belief protection as a religion.<sup>47</sup> The majority distinguished between philosophical and personal choices, on the one hand, and religious compulsions, on the other.<sup>48</sup> The Court accepted that the Amish lifestyle was a religious compulsion that triggered First Amendment protection,<sup>49</sup> but it emphasized that beliefs must meet distinct criteria in order to qualify as a religion.<sup>50</sup>

Since *Yoder*, some courts have retreated further from the Supreme Court's once expansive definition of religion. The Third Circuit, for

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*Welsh v. United States*, 398 U.S. 333 (1970) (holding that if an individual deeply and sincerely holds beliefs which are purely ethical or moral in source and content, but which nevertheless impose upon him duty of conscience to refrain from participating in all wars, such individual is entitled to conscientious objector exemption even if he does not profess a belief in god).

44. *Seeger*, 380 U.S. at 187. The Court relied on a quote from Christian philosopher Paul Tillich, who argues that belief in god is universal because one can replace the word god with any word that describes "the depths of your life, . . . the source of your being, or your ultimate concern." *Id.*

45. *Welsh*, 398 U.S. at 340 ("If an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience . . . those beliefs certainly occupy in the life of that individual 'a place parallel to that filled by . . . God' in traditionally religious persons.").

46. *Wisconsin v. Yoder*, 406 U.S. 205, 215–16 (1972) (holding that the First and Fourteenth Amendments prevent states from compelling Amish parents to cause their children, who have graduated from eighth grade, to attend formal high school to age sixteen).

47. *Id.* at 215–16 ("Although a determination of what is a 'religious' belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests.").

48. *Id.* at 216.

[I]f the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses.

*Id.*

49. *Id.*

50. *See id.* at 215–17; *see also* Davis, *supra* note 28, at 715–16.

instance, developed three strict criteria for identifying a religion that restrict the Court's prior functional definition.<sup>51</sup> To qualify for First Amendment protection according to the Third Circuit's test, a purported religion must deal with fundamental and ultimate questions regarding deep and imponderable matters,<sup>52</sup> must be comprehensive in nature,<sup>53</sup> and must have a formal set of exterior signs and practices analogous to traditional religions.<sup>54</sup> Although many courts followed in adopting a definition of religion based on the fulfillment of required elements,<sup>55</sup> this approach does not enjoy universal support among the circuits,<sup>56</sup> some of which continue to apply the malleable definition articulated in the selective service cases from the late 1960s and early 1970s.<sup>57</sup>

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51. See *Malnak v. Yogi*, 592 F.2d 197, 207–10 (3d Cir. 1979) (Adams, J., concurring) (agreeing that a public school course teaching the “science” of creationism and involving transcendental meditation violated the Establishment Clause); *Africa v. Pennsylvania*, 662 F.2d 1025, 1032 (3d Cir. 1981) (utilizing the tripartite test from *Malnak's* concurrence and holding that a prisoner's “revolutionary” beliefs did not qualify as a religion for purposes of First Amendment protection because they did not address fundamental and ultimate questions). In both cases, the court relied on the functional definition of religion provided by the Supreme Court as a basis for its more rigid three-part test. *Malnak*, 592 F.2d at 207; *Africa*, 662 F.2d at 1031–32.

52. *Malnak*, 592 F.2d at 208; *Africa*, 662 F.2d at 1032–33.

53. *Malnak*, 592 F.2d at 209 (“A religion is not generally confined to one question or one moral teaching; it has a broader scope. It lays claim to an ultimate and comprehensive ‘truth.’”); *Africa*, 662 F.2d at 1032, 1035.

54. *Malnak*, 592 F.2d at 209–10; *Africa*, 662 F.2d at 1032, 1035–36. “Such signs might include formal services, ceremonial functions, the existence of clergy, structure and organization, efforts at propagation, observance of holidays and other similar manifestations associated with the traditional religions.” *Malnak*, 592 F.2d at 209.

55. Several courts applying such a test use the Third Circuit's three-part test verbatim. See, e.g., *Carpenter v. Wilkinson*, 946 F. Supp. 522, 526–28 (N.D. Ohio 1996) (utilizing the three part test to analyze Satanism); *Johnson v. Pa. Bureau of Corr.*, 661 F. Supp. 425, 436 (W.D. Pa. 1987). Other courts, however, modify the Third Circuit's test slightly. See *Jacques v. Hilton*, 569 F. Supp. 730, 733–36 (D.N.J. 1983) (holding that prisoners' religious beliefs did not qualify for First Amendment protection as a religion because they: (1) did not adequately address the question of human mortality or the purpose of life; (2) lacked the cohesiveness and commonality of beliefs typical of accepted religions; and (3) lacked the defining structural characteristics of traditional religious institutions).

56. For example, the Seventh Circuit relies explicitly on the broad functional definition laid out in *Torcaso*. See *Kaufman v. McCaughtry*, 419 F.3d 678, 681–82 (7th Cir. 2005) (holding that, where prison officials allow prisoners to form religious groups, the denial of the right to form an Atheist group violates the Establishment Clause because Atheism qualifies as a religion for the purpose of First Amendment protection). *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961).

57. *Seeger*, 380 U.S. at 187; *Welsh*, 398 U.S. at 340. See also *Torcaso*, 367 U.S. at 495.

Applying either the Supreme Court's functional definition or the Third Circuit's three-part test,<sup>58</sup> Atheists should prevail in arguing that Atheism qualifies as a religion for First Amendment purposes. Atheism occupies the same place in an Atheist's life as religion does for a religious person.<sup>59</sup> It deals with the very nature of god,<sup>60</sup> and informs all those aspects of life normally informed by religion like morality,<sup>61</sup> theodicy,<sup>62</sup> and the origin of life.<sup>63</sup> While there is no one church or institution of Atheism,<sup>64</sup> an Atheist's adherence to scientific method in all areas of life<sup>65</sup> and rejection of the existence of any deity are distinguishable characteristics analogous to those of adherents to traditional religions. Surprising as this conclusion may seem, many courts, including the Supreme Court, have indicated their agreement.<sup>66</sup>

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58. *Supra* notes 49–52 and accompanying text.

59. Among recent Atheist authors, Sam Harris is the most explicit about carving out a place for Atheist spirituality analogous to traditional religions. Specifically, he advocates a type of spiritual meditation that will emphasize happiness, consciousness, introspection, and the development of the self. *See* HARRIS, *THE END OF FAITH*, *supra* note 6, at 204–27.

60. *See, e.g.*, DAWKINS, *supra* note 3, at 113–51. Dawkins also addresses traditional religious proofs for god's existence, illustrating a rational person's path toward Atheist beliefs. *Id.* at 77–105.

61. *Id.* at 209–26; *see also* HARRIS, *THE END OF FAITH*, *supra* note 6, at 170–203. Many religious people argue that there can be no morality without god, and Atheists must counter such arguments in order to solidify their Atheist beliefs.

62. Theodicy is the question of why bad things happen to good people. Atheism deals with this problem directly because the absence of god allows for nature's neutrality. Theodicy mainly is a question for religious philosophers who must deal with god's seeming indifference and unwillingness to act for the benefit of goodness. *See* DAWKINS, *supra* note 3, at 108.

63. Atheists generally are proponents of evolution, while many traditional religions promote creationism, or the idea that god created the world as it exists today over a given period of time. *See generally* van Biema, *supra* note 3.

64. Some Atheists have formed organizations more analogous to traditional religions in that there is a church or other place of worship and stated dogma. Most prominent among these is Secular Humanism. *See* discussion *supra* note 3. There also are other Atheist organizations that identify as "churches," like the Church of the Flying Spaghetti Monster, and the Temple of the Invisible Pink Unicorn. *See* Bobby Henderson, Church of the Flying Spaghetti Monster, <http://www.venganza.org> (last visited May 6, 2009); The Virtual-Temple of the Invisible Pink Unicorn, <http://www.theinvisiblepinkunicorn.com> (last visited Nov. 18, 2007). However, no one Atheist "church" can claim universal approval or membership by Atheists.

65. Dawkins in particular equates Atheism with the use of scientific method to reveal the answer to any question one has about the world. *See* Dawkins, *supra* note 3, at 209–33.

66. *Kaufman v. McCaughty*, 419 F.3d 678, 682 (7th Cir. 2005). In describing the constitutional freedom of religion, the court said:

### *B. Establishment Clause Jurisprudence*

Atheists in recent years have relied on the Establishment Clause of the First Amendment to challenge state-sponsored religiosity.<sup>67</sup> The beginnings of Establishment Clause jurisprudence relied on Thomas Jefferson's characterization of a "wall of separation" between church and state.<sup>68</sup> The deference shown to state actions in

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At one time it was thought that this right merely proscribed the preference of one Christian sect over another, but would not require equal respect for the conscience of the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism. But when the underlying principle has been examined in the crucible of litigation, the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith, or none at all.

Wallace v. Jaffree, 472 U.S. 38, 52–53 (1985).

67. See, e.g., Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004); O'Hair v. Blumenthal, 462 F. Supp. 19 (W.D. Tex. 1978); Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963). This likely is due to the differing standing requirements for Free Exercise jurisprudence and Establishment Clause jurisprudence. Standing is a requirement stemming from the interpretation of the case or controversy requirement of Article III of The United States Constitution. U.S. CONST. art. III, § 2, cl. 1. The Supreme Court has interpreted that clause to require that any litigant bringing suit in federal court must show that he or she has suffered a concrete and particularized injury, that the injury is fairly traceable to the wrongful conduct complained of, and that it is likely that a favorable decision will redress that injury. Massachusetts v. E.P.A., 549 U.S. 497, 517 (2007) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992)). The Court has carved out a narrow exception, however, for certain congressional actions that can be challenged by any taxpayer. Taxpayer standing is allowed in any case challenging a congressional action taken pursuant to the taxing or spending power that allegedly violates a discrete constitutional right. Flast v. Cohen, 392 U.S. 83, 103–06 (1968). The *Flast* exception appears to be limited to congressional actions (as opposed to executive actions) that violate the Establishment Clause (as opposed to other constitutional limitations, like the Commerce Clause). See Hein v. Freedom From Religion Found., 551 U.S. 587, 608 (2007) (holding that *Flast* is limited to challenges to legislative enactments and therefore does not encompass taxpayer standing to challenge general appropriations by the Executive Branch); DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 347–48 (2006) (noting "that 'only the Establishment Clause' has supported federal taxpayer suits since *Flast*"). But despite any limitations on *Flast*, these cases make clear that standing for Establishment Clause challenges is much broader than standing for Free Exercise challenges. In the context of Free Exercise, only those members of a religion targeted by or unduly affected by a state action would experience the necessary injury to bring their claim. See *Newdow*, 542 U.S. at 11–12; *Lujan*, 504 U.S. at 560–61.

68. See *Everson v. Bd. of Educ.*, 330 U.S. 1, 15–17 (1947) (holding that the use of public buses for transporting students to and from private parochial schools does not violate the Establishment Clause). In *Everson*, The Court stated:

The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws

early cases, however, indicated that the Supreme Court would not be as strict as the “wall of separation” standard implied.<sup>69</sup>

In the mid-twentieth century, the Court identified two pillars of Establishment Clause jurisprudence: the neutrality principle and the coerciveness principle.<sup>70</sup> The neutrality principle holds that the government need not be hostile toward religion, but it cannot show a preference for any one religion in particular.<sup>71</sup> The coerciveness principle dictates that neither the purpose nor the effect of the government’s action can be to coerce citizens into religious observances or rituals.<sup>72</sup>

The Court added to the coerciveness and neutrality principles in *Abington Township School District v. Schempp*.<sup>73</sup> There, the Court

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which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect ‘a wall of separation’ between Church and State.

*Id.* at 15–16 (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1878)).

69. Despite the harshness of its language, the Court in *Everson* upheld the New Jersey statute allowing for use of public buses to transport children to and from parochial schools. The Court suggested that if this statute were not allowed, then no public services could be provided to private parochial schools including police and fire protection, connections to the sewage system, or access to public highways. *Id.* at 17–18.

70. See *Zorach v. Clauson*, 343 U.S. 306, 311–312 (1952) (holding that a state statute providing for a release time program for the release of public school children from school attendance to attend religious classes was constitutional); *Engel v. Vitale*, 370 U.S. 421, 430–32 (1962) (holding that the New York Board of Regents program of daily classroom invocation of god’s blessings in public schools was a “religious activity,” and violated the Establishment Clause, though pupils were not required to participate).

71. *Engel*, 370 U.S. at 430–32 (discussing colonial experiences with the union of church and state); *Everson*, 330 U.S. at 15.

72. See *Engel*, 370 U.S. at 431 (“When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.”); *Zorach*, 343 U.S. at 311; *Everson*, 330 U.S. at 15.

73. *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963) (holding that a state’s requirement that the school day be opened with a reading from the Bible violates the Establishment Clause).

identified two additional tests that a government action must meet to withstand an Establishment Clause challenge. The government's purpose in acting must be secular, and the primary effect of its action cannot be the advancement or inhibition of religion.<sup>74</sup> Eight years later, in *Lemon v. Kurtzman*, the Court streamlined the requirements for government action under the Establishment Clause into a three-part test, commonly referred to as the *Lemon* test.<sup>75</sup> In addition to the secular purpose and primary effects requirements, the government's actions cannot result in the state's excessive entanglement with religion.<sup>76</sup> Since *Lemon*, the Court has applied some mixture of the *Lemon* test and the coerciveness principle.<sup>77</sup>

The role of *Lemon* in Establishment Clause jurisprudence was somewhat obscured by two cases from 2005 addressing displays of the Ten Commandments on public buildings in Texas and Kentucky.<sup>78</sup> In the Texas case, Chief Justice Rehnquist stated that the criteria in the *Lemon* test provided nothing more than "helpful signposts,"<sup>79</sup> though he focused on the secular purpose of the Texas

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74. *Id.* at 222.

75. *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (holding that a Rhode Island program providing for state funding of teachers in private parochial schools teaching secular subjects violates the Establishment Clause despite its secular purpose because it results in excessive entanglement of government and religion).

76. *Id.*

77. *See Lee v. Weisman*, 505 U.S. 577, 587 (1992) (holding that the inclusion of invocations and benedictions in the form of prayer at public school graduation ceremonies violates the Establishment Clause even when the prayer is non-sectarian); *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985) (holding that a state statute authorizing a daily period of silence in public schools for meditation or prayer violated the Establishment Clause). Justice O'Connor in particular thought that the secular purpose prong of the *Lemon* test was conflatable with the coerciveness principle. *See Lynch v. Donnelly*, 465 U.S. 668, 687–89 (1984) (O'Connor, J., concurring) (maintaining that a city's inclusion of a nativity scene in its Christmas display did not violate the Establishment Clause).

78. *See Van Orden v. Perry*, 545 U.S. 677 (2005) (holding that, where historical evidence showed that the County's purpose was to acknowledge the historical role of religion in American life, the public display of the ten commandments in a courthouse did not violate the Establishment Clause); *McCreary County, Ky. v. ACLU of Ky.*, 545 U.S. 844 (2005) (holding that, where historical evidence showed that the County's purpose was to promote a religious message, the public display of the ten commandments in a courthouse violated the Establishment Clause).

79. *Van Orden*, 545 U.S. at 686 (citing *Hunt v. McNair*, 413 U.S. 734, 741 (1973), in which the Court held that a South Carolina statute authorizing revenue bonds for aiding colleges but explicitly excepting religious institutions did not violate the Establishment Clause because it satisfied the *Lemon* test).

legislature in upholding the display.<sup>80</sup> In contrast, Justice Souter relied explicitly on the secular purpose prong of the *Lemon* test to invalidate the Kentucky display.<sup>81</sup>

*C. Applying Establishment Clause Jurisprudence to Real and Potential Challenges to State Induced Invocations of God*

The most prominent subject of an Establishment Clause challenge to state-induced invocations of god is the Pledge of Allegiance. The Pledge was initially published in 1892, but has undergone many changes since then.<sup>82</sup> Prior to the inclusion of any reference to god, the Supreme Court addressed objections to state-compelled recitation of the Pledge. After first holding that states could require students to recite the Pledge as part of compulsory flag salute in public schools,<sup>83</sup> the Supreme Court reversed itself only three years later.<sup>84</sup> In *West Virginia v. Barnette*, the Court held that the state cannot compel public school students to recite the Pledge, basing its decision not on the religion clauses, but on the broader underpinnings of freedom of conscience enshrined in the First Amendment.<sup>85</sup> It was not until 1954 that Congress added the words “under God” to the Pledge, resulting in the wording that persists today.<sup>86</sup>

Despite the holding in *Barnette*, many states have patriotic exercise statutes mandating daily recitation of the Pledge by public school students.<sup>87</sup> Often, these statutes allow for objecting students to

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80. *Id.* at 688.

81. *McCreary*, 545 U.S. at 864–65.

82. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 6–7 (2004).

83. *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940), *overruled by* *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). *Minersville* upheld a state requirement that students attending public school take part in flag salute ceremonies. *Id.*

84. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (holding that a state statute mandating flag salute by students in public school is unconstitutional).

85. *Id.* at 634–42.

86. *Newdow*, 542 U.S. at 7; *see also* 4 U.S.C. § 4 (2000).

87. *See, e.g.*, ALA. CODE § 16-43-5 (2001); ARIZ. REV. STAT. ANN. § 15-506 (2002); CAL. EDUC. CODE § 52720 (West 2006) (allowing recitation of Pledge to satisfy mandatory “patriotic exercise” requirement); DEL. CODE ANN. tit. 14 § 4105 (2007); GA. CODE ANN. § 20-2-310 (2005) (requiring that students be afforded an opportunity to recite the Pledge); 105 ILL. COMP. STAT. 5/27-3 (2006); KAN. STAT. ANN. § 72-5308 (2002); LA. REV. STAT. ANN. § 17:2115 (2001 & Supp. 2009) (mandating that school boards allow opportunities for recitation of Pledge); MASS. GEN. LAWS ch. 71, § 69 (2006); NEV. REV. STAT. ANN § 389.040 (West 2006)

opt out of saying the Pledge.<sup>88</sup> The combination of the reference to god and the proliferation of patriotic exercise statutes made an Establishment Clause challenge to the Pledge of Allegiance almost inevitable.

In *Elk Grove Unified School District v. Newdow*,<sup>89</sup> Atheist Michael Newdow challenged the constitutionality of California's patriotic exercise statute.<sup>90</sup> While the majority dismissed the suit for lack of standing,<sup>91</sup> Chief Justice Rehnquist's concurring opinion

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(requiring that time be set aside to recite Pledge); N.M. STAT. ANN. § 22-5-4.5 (West 2003); N.Y. EDUC. LAW § 802 (McKinney 2000); S.D. CODIFIED LAWS § 13-24-17.2 (2004) (requiring that right to recite the Pledge not be infringed upon).

88. See, e.g., ALASKA STAT. § 14.03.130 (2006); ARK. CODE ANN. § 6-16-108 (2007); COLO. REV. STAT. § 22-1-106 (2008); IDAHO CODE ANN. § 33-1602 (2008); IND. CODE ANN. § 20-30-5-0.5 (West 2008); MD. CODE ANN., Educ. § 7-105 (LexisNexis 2008); MINN. STAT. ANN. § 121A.11 (West 2008); MISS. CODE ANN. § 37-13-6 (2007); MO. REV. STAT. § 171.021 (2000 & Supp. 2006); MONT. CODE ANN. § 20-7-133 (2008); N.H. REV. STAT. ANN. § 194:15-c (2008) (allowing students who choose not to recite the Pledge to stand or remain seated silently, but mandating respect for the rights of students who elect to participate); N.J. STAT. ANN. § 18A:36-3 (1999) (requiring excepted students to show full respect to the flag while the Pledge is recited by standing at attention, boys removing all head coverings); N.C. GEN. STAT. § 115C-47(29a) (2007); N.D. CENT. CODE § 15.1-19-03.1 (2003) (noting that students may not be required to recite the Pledge, to stand during the recitation of the Pledge, or to salute the American flag); OHIO REV. CODE ANN. § 3313.602 (West 2005) (authorizing daily recitation but prohibiting the intimidation of students by other students or staff aimed at coercing recitation of the Pledge); OKLA. STAT. ANN. tit. 70, § 24-106 (West 2005); OR. REV. STAT. ANN. § 339.875 (West 2003) (requiring students who choose not to participate to maintain a respectful silence); R.I. GEN. LAWS § 16-22-11 (2001); S.C. CODE ANN. § 59-1-455 (2004) (allowing any form of non-participation that does not materially infringe on the rights of others); TENN. CODE ANN. § 49-6-1001 (2004); TEX. EDUC. CODE ANN. § 25.082 (Vernon 2006) (requiring written parental permission to be excused from recitation of the Pledge); UTAH CODE ANN. § 53A-13-101.6 (2006 & Supp. 2008) (same); VA. CODE ANN. § 22.1-202 (2006) (requiring non-participating students to stand or sit quietly and make no displays that disrupts or distracts others reciting the Pledge); WASH. REV. CODE ANN. § 28A.230.140 (2006) (requiring non-participating students to maintain a respectful silence); W. VA. CODE ANN. § 18-5-15b (LexisNexis 2008); WIS. STAT. ANN. § 118.06 (West 2004). Florida has a similar statute, which the Eleventh Circuit declared unconstitutional to the extent it required students to stand at attention during the Pledge. See Fla. Stat. Ann. § 1003.44(1) (West 2004); *Frazier ex. rel. Frazier v. Winn*, 535 F.3d 1279 (11th Cir. 2008). Conn. Gen. Stat. Ann. § 10-230 (2002); KY. REV. STAT. ANN. § 158.175 (LexisNexis 2006) (including a provision authorizing local school districts to allow recitation of the Lord's Prayer to help students learn about the importance of freedom of religion). Pennsylvania has a similar law, which was declared unconstitutional by the Third Circuit because it required written parental permission to be excused from Pledge recitation. See 24 Pa. Cons. Stat. Ann. § 7-771 (c)(1) (West Supp. 2009); *Circle Schools v. Pappert*, 381 F.3d 172 (3d Cir. 2004).

89. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 8 (2004).

90. CAL. EDUC. CODE § 52720 (West 2006).

91. *Newdow*, 542 U.S. at 17-18. As a non-custodial parent, Newdow was precluded by



concluded that the Establishment Clause challenge would fail on the merits.<sup>92</sup> After detailing the many references to god in the public sphere,<sup>93</sup> the Chief Justice asserted that the words “under God” are not a prayer, but merely a descriptive phrase recognizing the history of the nation.<sup>94</sup> Justice O’Connor, concurring separately, agreed that the Establishment Clause challenge should fail.<sup>95</sup> Only Justice Thomas concluded that the Establishment Clause challenge would have succeeded, and he suggested overruling precedent to avoid such an outcome.<sup>96</sup>

In addition to *Newdow*’s high profile challenge to the Pledge, citizens have targeted other state-induced invocations of god as subjects of failed Establishment Clause challenges—or would have done so if the political climate were different. In *Marsh v. Chambers*, a state legislator challenged the practice of opening Nebraska legislative sessions with a prayer offered by a chaplain paid with public funds.<sup>97</sup> The Supreme Court held that the practice did not violate the Establishment Clause,<sup>98</sup> relying primarily on the long and uninterrupted history of opening federal legislative sessions with a

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state law from suing on behalf of his daughter as next friend. The Court thus concluded that he also lacked prudential standing to sue on her behalf in federal court. *Id.*

92. *Id.* at 31–32 (Rehnquist, C.J., concurring).

93. The opinion lists several statements by presidents at their inaugurations or at appearances before Congress in which god is invoked, as well as the words “In God We Trust” on currency and the Court Marshal’s opening declaration before the Supreme Court. *Id.* at 26–29.

94. *Id.* at 31. “The phrase ‘under God’ is in no sense a prayer . . . . Reciting the Pledge . . . is a patriotic exercise, not a religious one; participants promise fidelity to our flag and our Nation, not to any particular God, faith, or church.” *Id.*

95. *Id.* at 33–45 (O’Connor, J., concurring). Justice O’Connor noted that certain ceremonial invocations of god have always been allowed, and asserted that the Establishment Clause challenge should fail because of the absence of compulsory worship or prayer, the absence of any reference to a particular religion, and the de minimis character of the religious reference involved. *Id.*

96. *Id.* at 49 (Thomas, J., concurring). Justice Thomas noted that the Pledge involves an affirmation of god’s existence, and violates the coercion principle as laid out in *Lee v. Weisman*, 505 U.S. 577 (1992). *Lee* held that a Providence, Rhode Island, custom of allowing public high school and middle school principals to invite clergy to give non-denominational prayers at graduation ceremonies violated the Establishment Clause because it failed the *Lemon* test and violated the coerciveness principle. However, Justice Thomas argued that *Lee* was decided wrongly because, in his view, coercion should be limited to coercion by the government, not coercion by one’s peers. *Newdow*, 542 U.S. at 49.

97. *Marsh v. Chambers*, 463 U.S. 783, 784–85 (1983).

98. *Id.* at 793–95.

prayer.<sup>99</sup> Chief Justice Burger proclaimed for the majority that “[t]o invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an ‘establishment’ of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country.”<sup>100</sup> Notably, the Court did not apply the *Lemon* test.<sup>101</sup>

Federal officers have not challenged the oath of office on Establishment Clause grounds, likely because of the anticipated political repercussions.<sup>102</sup> The official oath of the President, as set forth in the Constitution, does not include a reference to a deity,<sup>103</sup> though all presidents have appended one and have sworn the oath on a Bible.<sup>104</sup> This practice has even made its way into our pop culture.<sup>105</sup> The oath for other federal officers, including congressmen and judges, formally includes the phrase “so help me God.”<sup>106</sup> Justice

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99. *Id.* at 786–90.

Standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees, but there is far more here than simply historical patterns. In this context, historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress—their actions reveal their intent.

*Id.* at 790.

100. *Id.* at 792. The majority notes that a Presbyterian has been the clergyman offering the prayer for sixteen years and that his prayer is Judeo-Christian, but nonetheless concludes that the longstanding history of legislative prayer, dating back to the First Congress, shows that there is no real danger of an establishment of religion “while this Court sits.” *Id.* at 795.

101. *Id.* at 783–95; see also *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

102. See PEW FORUM, *supra* note 10. While federal officers have not challenged the oath, a few Atheist citizens have challenged the inclusion of the words “under God.” For instance, Michael Newdow, the same person who challenged the Pledge, also challenged the religious invocations at the 2005 inauguration of President George W. Bush. *Newdow v. Bush*, 355 F. Supp. 2d 265 (D.D.C. 2005). The district court’s rejection of Newdow’s request for an injunction against President Bush’s inauguration ceremony did not deter Newdow from again challenging the religious rites at President Obama’s 2009 inauguration. That challenge also expressly sought an injunction against Chief Justice Roberts to prevent him from prompting the President to say the words “under God” in the oath. Newdow’s request for an injunction was again denied, this time without an opinion. See Associated Press, *US Judge Lets Obama Include ‘God’ In Oath*, THE LEGAL INTELLIGENCER, Jan. 16, 2009, <http://www.law.com/jsp/pa/PubArticlePA.jsp?id=1202427515840>.

103. U.S. CONST. art. II, § 1.

104. See *Lee v. Weisman*, 505 U.S. 577, 633–35 (1992) (Scalia, J., dissenting); THE LEGAL INTELLIGENCER, *supra* note 102.

105. See, e.g., *The West Wing: Inauguration Part I* (NBC television broadcast Feb. 5, 2003).

106. 5 U.S.C. § 3331 (2006).

Scalia, dissenting in *Lee v. Weisman*, indicated that he would uphold this practice under the *Lemon* test.<sup>107</sup>

Challenges to the oaths of witnesses also are uncommon. Federal courts do not have a specific form of the witness oath; instead, the Federal Rules of Evidence and the Federal Rules of Civil Procedure allow each court to tailor the witness oath to the needs and beliefs of individual witnesses, and explicitly allow for affirmations where a witness is uncomfortable taking an oath.<sup>108</sup> Most state rules track the language of the Federal Rules and allow for discretion in the formation of the oath.<sup>109</sup> Many states have held that forcing a witness to take the traditional form of the oath instead of accepting an affirmation is reversible error.<sup>110</sup> Yet, some states have specific forms for their oaths or utilize oaths with a religious connotation, and those instances may be problematic.<sup>111</sup>

In 2004, North Carolina District Judge James M. Honeycutt notified state officials and his court officers that he would no longer allow reference to god in the Court's opening invocation or in the

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107. See *Lee*, 505 U.S. at 633–35 (Scalia, J., dissenting).

108. See FED. R. CIV. P. 43(d); FED. R. CIV. P. 30(c) FED. R. EVID. 603.

109. See, e.g., ARIZ. REV. STAT. ANN. § 12-2221(2003); IND. CODE ANN. § 34-45-1-2 (West 1999); MO. REV. STAT. § 492.040 (2000); WASH. REV. CODE ANN. § 5.28.030-060 (West 1995); IDAHO R. EVID. 603.

110. See *United States v. Ward*, 989 F.2d 1015 (9th Cir. 1992) (holding that the district court's refusal to allow the defendant to swear a sufficient oath of his own creation prevented him from testifying on his own behalf and violated his Free Exercise rights); *Ferguson v. Comm'r*, 921 F.2d 588 (5th Cir. 1991) (reinstating a tax court claim previously dismissed for failure to prosecute after the petitioner refused to swear an oath because of religious beliefs); *Gordon v. Idaho*, 778 F.2d 1397, 1398–99 (9th Cir. 1985) (holding that it was an abuse of discretion for a court to dismiss a civil rights claim for noncompliance with discovery orders after the petitioner refused to use the words "swear" or "affirm" in his oath); *United States v. Looper*, 419 F.2d 1405, 1407 (4th Cir. 1969) (holding it reversible error to refuse the testimony of a witness who would not take an oath "to God"); *Wright v. State*, 135 So. 636 (Ala. Ct. App. 1931) (holding an otherwise valid dying declaration may not be excluded from evidence solely because the declarant was an Atheist).

111. See ALA. CODE § 12-21-136 (LexisNexis 2005) (allowing oath to be tailored to the "religious faith of the witness"); FLA. STAT. ANN. § 90.605 (West 1999) (giving specific wording for the oath without reference to god); MASS. GEN. LAWS ch. 233 § 19 (2006) (allowing oath to be tailored to the declarant's faith if witness is not Christian); OR. REV. STAT. ANN. § 40.320 (West 2003) (providing alternate phrasings, including one that invokes god and another without reference to a deity); 42 PA. CONS. STAT. ANN. § 5901 (West 2000) (providing a specific phrasing invoking god and requiring that oath to be taken with a hand on "the Holy Bible"). *But cf.* 225 PA. CODE § 603 (2009) (tracking language of FED. R. EVID. 603).

administration of oaths to witnesses.<sup>112</sup> He threatened to have court officers arrested for contempt if they violated his order because of his belief that the practices violated the Establishment Clause.<sup>113</sup> In response to a lawsuit instituted by the Judge's court officers, the North Carolina Supreme Court issued a perfunctory order compelling Judge Honeycutt to use the "traditional oath" and to allow the bailiff to open court sessions with the phrase "God save the state and this honorable court."<sup>114</sup>

Three years after the Honeycutt controversy, a witness in another North Carolina case sued the state after a court refused to allow her to take the witness oath on a Quran in lieu of a Bible.<sup>115</sup> Although no court addressed the merits of that suit,<sup>116</sup> a decision allowing the challenge to proceed led to a reversal of the State's practice of mandating oaths on Bibles<sup>117</sup> and to a proposed change in the State's law on oaths of witnesses.<sup>118</sup>

#### *D. Free Exercise Jurisprudence*

A Free Exercise approach to state-induced invocations of god would differ in many respects from the failed Establishment Clause challenges. Historically, Free Exercise jurisprudence focused on a

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112. See *Court Orders 'God' Into Oath*, WASH. POST, June 30, 2004, at A22. The state's Supreme Court ordered compliance. *In re Honeycutt*, 600 S.E.2d 470, 470 (N.C. 2004).

113. See *court orders 'God' Into Oath*, *supra* note 112. News reports indicate that Judge Honeycutt's actions were prompted by the increasing number of non-Christians and people of diverse beliefs served by the court system. *Id.*; Associated Press, *supra* note 22. However, the Judge has since indicated that the news reports about his case misconstrued his intentions and the severity of his actions. E-mail from James Honeycutt, Special Judge of the North Carolina Superior Court, to author (Jan. 23, 2008, 07:43 CST) (on file with author).

114. *Honeycutt*, 600 S.E.2d at 470.

115. *ACLU of N.C. v. North Carolina*, 639 S.E.2d 136, 137–38 (N.C. Ct. App. 2007) (holding that a challenge to the state's practice of mandating oaths on a bible was unavoidable litigation and therefore justifiable under the Declaratory Judgment Act).

116. *Id.* The Court held that the petitioner was entitled to an interpretation of the statute, but it did not offer that interpretation nor did any court after it. *Id.*

117. *Id.*; see also e-mail from James Honeycutt, *supra* note 113.

118. Compare N.C. GEN. STAT. §11-2 (2007) with S.B. 88, 2007 Gen. Assemb. (N.C. 2007), available at <http://www.ncleg.net/Sessions/2007/Bills/Senate/HTML/S88v1.html>. The proposed legislation still requires witnesses to swear on a holy book, either the Bible or any other text sacred to the person's religious faith. The legislation further provides that only Bibles need to be kept on hand and provided by the court, and that any other sacred text must either be donated or brought to court by the witness. *Id.*

distinction between belief and conduct: the government could enact religion-neutral statutes that burdened the conduct of religious people, but it could not regulate beliefs.<sup>119</sup> In the 1960s, the Supreme Court took a new approach and applied strict scrutiny to government actions that burdened or classified based on religion.<sup>120</sup> Accordingly, the government needed to prove that a statute was narrowly tailored to serve a compelling government interest.<sup>121</sup> Strict scrutiny also applied to facially neutral statutes that in effect burdened religion.<sup>122</sup>

In *Employment Division v. Smith*, the Court retreated from the strict scrutiny approach.<sup>123</sup> Justice Scalia wrote that the Court's previous cases involved hybrid rights: situations in which a Free Exercise challenge was paired with some other constitutionally protected interest.<sup>124</sup> Thus, the Court concluded that a Free Exercise

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119. See *Braunfield v. Brown*, 366 U.S. 599 (1961) (holding a statute proscribing the sale of certain goods on Sundays did not violate the Free Exercise clause as applied to Orthodox Jews); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (holding that a statute prohibiting the solicitation of money or services for religious or philanthropic causes was unconstitutional as applied to a group of Jehovah's Witnesses selling books door-to-door); *Reynolds v. United States*, 98 U.S. 145, 162 (1878). *Braunfield* also suggested a distinction between direct burdens on religion, which would be unconstitutional, and indirect burdens on religion, which would be constitutional. *Braunfield*, 366 U.S. at 606–08.

120. *Sherbert v. Verner*, 374 U.S. 398, 403–04, 410 (1963) (holding a South Carolina law denying unemployment benefits to people who refused to work on Saturday because of religious convictions violated the Free Exercise clause and the Equal Protection clause of the Fourteenth Amendment).

121. *Id.* at 403–04.

122. See *Wisconsin v. Yoder*, 406 U.S. 205, 220–21 (1972).

123. *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872 (1990) (upholding constitutionality of statute prohibiting use of peyote even though use of peyote was an integral part of Respondent's religious practice).

124. *Id.* at 881. Soon after *Smith*, Justice Souter criticized the hybrid rights approach to the application of strict scrutiny, writing that:

[T]he distinction *Smith* draws strikes me as ultimately untenable. If a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the *Smith* rule, and, indeed, the hybrid exception would certainly cover the situation exemplified by *Smith*, since free speech and associational rights are certainly implicated in the peyote ritual.

*Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 567 (Souter, J., concurring). The hybrid rights distinction also has been criticized by several constitutional scholars. See HAMILTON, *supra* note 19, at 223. The Federal Circuit Courts of Appeal have split over whether the hybrid rights exception is part of *Smith*'s holding or merely unworkable dicta. At least two circuits have rejected the hybrid rights distinction outright. See *Leebaert v. Harrington*, 332 F.3d 134, 143–44 (2d Cir. 2003) (stating that the court “can think of no good reason for the standard of review to vary simply with the number of constitutional rights that

challenge alone would not trigger strict scrutiny.<sup>125</sup> Justice Scalia distinguished laws that discriminated against religion from “neutral, generally applicable laws” incidentally burdening religion.<sup>126</sup> The former may merit strict scrutiny, while Justice Scalia emphasized that the latter did not unless paired with a hybrid right.<sup>127</sup>

Congress responded to *Smith* by passing the Religious Freedom Restoration Act (“RFRA”), attempting to force the Court to apply strict scrutiny in all religious freedom cases.<sup>128</sup> In the first Free Exercise Clause case following the passage of RFRA, the Court indeed applied strict scrutiny,<sup>129</sup> but did not do so out of obedience to the Act. Rather, the Court applied strict scrutiny only after concluding that the law was neither neutral nor generally applicable.<sup>130</sup>

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the plaintiff asserts have been violated”); *Kissinger v. Bd. of Trs.*, 5 F.3d 177, 180 (6th Cir. 1993) (deeming the hybrid rights exception “completely illogical”). Other circuits have required the hybrid claim to be independently viable. *See Henderson v. Kennedy*, 253 F.3d 12, 19 (D.C. Cir. 2001) (rejecting the application of strict scrutiny because the plaintiff’s free speech claim was not viable); *Brown v. Hot, Sexy, & Safer Prods., Inc.*, 68 F.3d 525, 539 (1st Cir. 1995) (same). Other circuits require merely that the hybrid claim be colorable. *See Axson-Flynn v. Johnson*, 356 F.3d 1277, 1297 (10th Cir. 2004) (defining colorable as having “a fair probability or likelihood, but not a certitude, of success on the merits” (quoting *Miller v. Reed*, 176 F.3d 1202, 1207 (9th Cir. 1999)); *San Jose Christian Coll. v. Morgan Hill*, 360 F.3d 1024, 1032 (9th Cir. 2004) (same). Still other circuits have recognized the hybrid rights distinction but have not yet definitively articulated their approach. *See Civil Liberties for Urban Believers v. Chicago*, 342 F.3d 752, 765 (7th Cir. 2003) (citing the First, Sixth, Ninth, and Tenth Circuits with approval); *Cornerstone Bible Church v. Hastings*, 948 F.2d 464, 473–74 (8th Cir. 1991) (ordering district court to consider the hybrid rights claim on remand without further instruction); *Combs v. Homer-Center Sch. Dist.*, 540 F.3d 231, 247 (3d Cir. 2008) (rejecting a hybrid rights claim because it failed both the “independently viable claim” and “colorable” approaches without choosing between the two). Thus, the continued viability of the hybrid rights distinction is somewhat in question.

125. *Employment Div.*, 494 U.S. at 881. Interestingly, the majority also refused to require a compelling state interest for the law, reasoning that *Sherbert v. Verner* could not be read to require an exception from universally applied state criminal law. *Id.* at 882–89.

126. *Id.* at 879–81.

127. *Id.*

128. Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (2006).

129. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993) (invalidating a local ordinance banning the ritual slaughter of animals because the ordinance was not neutral or of general applicability, and the asserted government interest did not justify the targeting of religious activity).

130. *Id.* at 531. Justice Kennedy stated that “if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral . . . and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest.” *Id.* at 533. In a separate opinion, Justice Kennedy relied on neutrality as defined in the equal

In 1997, the Court held that RFRA was unconstitutional as applied to state and local statutes.<sup>131</sup> In *Boerne v. Flores*, Justice Kennedy reasoned that RFRA exceeded Congress's authority under section five of the Fourteenth Amendment.<sup>132</sup> The Court did not indicate, however, what standard would apply to state legislation that burdened religious practice or classified based on religious affiliation. In 2006, however, the Court held that RFRA was constitutional as applied to actions by the federal government.<sup>133</sup> When a federal statute is implicated, therefore, strict scrutiny still applies.<sup>134</sup>

In response to *Boerne*, advocates for several religious organizations sought another avenue to impose strict scrutiny in state Free Exercise cases.<sup>135</sup> On the federal level, these groups urged passage of the Religious Liberty Protection Act ("RLPA").<sup>136</sup> However, RLPA failed in Congress amid objections by secular groups contending that the Act suffered from the same overbreadth that rendered RFRA problematic.<sup>137</sup> In response, Congress passed the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), which applied the terms of RFRA to the discrete areas of land use and prisons.<sup>138</sup> Shortly thereafter, several state legislatures

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protection context, discerning the lawmaking body's intent through direct and circumstantial evidence such as "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history." *Id.* at 540 (citing *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266–68 (1977)). In his separate opinion, Justice Kennedy concluded that the ordinances were enacted for the purpose of suppressing the practice of the Santeria religion. *Id.*

131. *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (involving the denial of a permit for expansion to a church because of an ordinance regarding preservation of historical sites).

132. *Id.* at 532.

133. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006).

134. *Id.* at 430–31; *see also* 42 U.S.C. § 2000bb (2006) (codifying a strict scrutiny test).

135. HAMILTON, *supra* note 19, at 181. Hamilton credits specifically "groups like the Rutherford Institute, which is run and funded by attorney John W. Whitehead." *Id.*

136. Religious Liberty Protection Act of 1999, H.R. 1691, 106th Cong. (1999); Religious Liberty Protection Act of 2000, S. 2081, 106th Cong. (2000); *see also* HAMILTON, *supra* note 19, at 181.

137. HAMILTON, *supra* note 19, at 181. Groups that objected included "children's advocates, corrections officials, city planners, historical preservationists, and cities, among others." *Id.*

138. Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc – 2000cc-5 (2006). RLUIPA also has been the subject of widespread criticism. *See generally* HAMILTON, *supra* note 19, at 79–110, 150–69 (arguing that RLUIPA unfairly benefits religious

passed statutes of broader applicability that mirrored RFRA.<sup>139</sup> In these states, therefore, strict scrutiny applies even to neutral, generally applicable statutes that burden the free exercise of religion. The appropriate standard to apply in states without their own RFRA is less clear.

## II. ANALYSIS AND PROPOSAL: COMPARING THE ESTABLISHMENT CLAUSE APPROACH WITH THE FREE EXERCISE CLAUSE APPROACH

Since Atheism is a religion for purposes of First Amendment protection, it follows that Atheists may assert Free Exercise rights when challenging state-induced invocations of god.<sup>140</sup> Although Establishment Clause jurisprudence has failed to address certain instances of state-sponsored religiosity, Atheists could challenge these same actions on Free Exercise Clause grounds. Applying a Free Exercise analysis instead of Establishment Clause doctrine, Atheists could succeed where they have not previously.

Establishment Clause doctrine currently consists of a combination of the *Lemon* test and the coerciveness principle.<sup>141</sup> National and local legislative enactments “must have a secular purpose,”<sup>142</sup> their primary effect must not be the advancement or inhibition of

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landowners to the detriment of their neighbors and prisoners to the detriment of the rehabilitative process).

139. See, e.g., ARIZ. REV. STAT. ANN. § 41-1493.01 (2008); CONN. GEN. STAT. ANN. § 52-571b (2005); FLA. STAT. ANN. § 761.03 (West 2005); IDAHO CODE ANN. § 73-402 (2006); 775 ILL. COMP. STAT. ANN. 35/1 – 99 (2006); MO. REV. STAT. § 1.302 (2008); N.M. STAT. ANN. § 28-22-3 (2008); OKLA. STAT. ANN. tit. 51, §§ 251–58 (2008); 71 PA. STAT. ANN. §§ 2401–06 (West 2008 & Supp. 2009); R.I. GEN. LAWS § 42-80.1-3 (2001); S.C. CODE ANN. § 1-32-40 (2005); TEX. CIV. PRAC. & REM. CODE ANN. §§ 110.001 – 110.012 (Vernon 2005); VA. CODE ANN. § 57-2.02(B) (2007). Many other states considered similar legislation. See Marci Hamilton, *How Existing State Religious Freedom Restoration Acts May Be Used To Help Cover Up Clergy Child Abuse, And Why States Considering RFRA's Should Think Again*, FINDLAW, Nov. 7, 2002, <http://writ.news.findlaw.com/hamilton/20021107.html>.

140. State-induced invocations of god force Atheists to violate their religious beliefs. See *supra* note 3. This concrete and particularized injury may create standing to challenge the state action under a Free Exercise Clause theory. Cf. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11–12 (2004); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992); *supra* note 67 and accompanying text.

141. See *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). See also *Lee v. Weisman*, 505 U.S. 577, 584 (1992).

142. *Lemon*, 403 U.S. at 612.



religion,<sup>143</sup> they must not result in “excessive government entanglement with religion,”<sup>144</sup> and they must not coerce citizens into choosing one religious practice over any other.<sup>145</sup>

Free Exercise doctrine, on the other hand, is in a state of flux. While federal actions that burden religion or classify on the basis of religious affiliation are subject to strict scrutiny under the RFRA,<sup>146</sup> the Supreme Court has not indicated the appropriate standard for state and local enactments.<sup>147</sup> If the Free Exercise challenge implicates an additional protected right, then the Court’s hybrid rights analysis indicates strict scrutiny is the appropriate standard.<sup>148</sup> Strict scrutiny also is appropriate if the challenged government action is not neutral or generally applicable.<sup>149</sup> Additionally, strict scrutiny may be applied in states with their own RFRAs.<sup>150</sup> If the challenged action is neutral and generally applicable, does not involve a hybrid right, and does not arise in a state that mandates strict scrutiny for burdens on the free exercise of religion, then it would seem likely that the government would only have to prove a legitimate interest<sup>151</sup> and satisfy the belief/conduct distinction from the Court’s early Free Exercise Clause jurisprudence.<sup>152</sup>

A closer look at Establishment Clause and Free Exercise Clause doctrine as applied to four instances of ceremonial deism<sup>153</sup> illustrates

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143. *Id.*

144. *Id.* at 613.

145. *Lee*, 505 U.S. at 587.

146. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006); *see also* 42 U.S.C. § 2000bb (2006).

147. *See Boerne v. Flores*, 521 U.S. 507 (1997).

148. *Employment Div., Dep’t of Human Res. v. Smith*, 494 U.S. 872, 881 (1990). However, the hybrid rights distinction has not been universally accepted. *See supra* note 124 and accompanying text.

149. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531 (1993) (finding that a law not neutral or generally applicable “must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest”).

150. *See discussion supra* note 139; *see also* HAMILTON, *supra* note 139.

151. All legislative enactments must satisfy rational basis scrutiny—they must be rationally related to the achievement of a legitimate government interest. *See Sherbert v. Verner*, 374 U.S. 398, 406 (1963). If the Court were unwilling to apply strict scrutiny, at the very least the challenged law would have to meet this test. *Id.*

152. *See cases cited supra* note 119.

153. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 37 (2004) (O’Connor, J., concurring); *see also supra* note 27 and accompanying text.

how Atheists can succeed in Free Exercise challenges where an Establishment Clause challenge is likely to fail.

### A. *The Pledge of Allegiance*

While Justice Thomas's argument in *Newdow* that California's Pledge policy violates the coerciveness principle has merit,<sup>154</sup> the majority of the Court appears unwilling to overturn patriotic exercise statutes on Establishment Clause grounds.<sup>155</sup> Justice O'Connor's concurrence in *Newdow* provided the doctrinal Establishment Clause analysis of a challenge to the Pledge of Allegiance.<sup>156</sup> Justice O'Connor argued that the phrase "under God" served the dual secular purpose of recognizing the historical role of religion in the United States and solemnizing public occasions.<sup>157</sup> Justice O'Connor also noted that the primary purpose of the wording could not be advancement of religion,<sup>158</sup> nor could the phrase be considered

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154. *Newdow*, 542 U.S. at 46–47 (Thomas, J., concurring). In *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943), the Court held that states cannot constitutionally compel students to salute the American flag. Many states have opted for patriotic exercise statutes that require public schools to give students the opportunity to say the Pledge, while allowing objecting students to abstain. See statutes cited *supra* note 88. School prayer cases, however, uniformly have held that even moments of silence qualify as coercive and are unconstitutional under the Establishment Clause. See *Engel v. Vitale*, 370 U.S. 421, 430–33 (1962); *Wallace v. Jaffree*, 472 U.S. 38, 58–62 (1985). Thus, even an optional recitation of the Pledge should amount to coercion under existing precedent, because objecting students are forced to observe moments of silence while their peers invoke god on behalf of their country.

155. While the majority opinion did not reach the merits, all three concurring opinions in *Newdow* concluded that an Establishment Clause challenge to California's Pledge policy should fail. *Newdow*, 542 U.S. at 1.

156. *Newdow*, 542 U.S. at 33–45. Chief Justice Rehnquist concurred, arguing that the Establishment Clause challenge would fail on the merits. His argument is historical rather than doctrinal, however, and therefore is unhelpful in determining how the Pledge policy fits with Establishment Clause doctrine. *Id.* at 18, 25 (Rehnquist, C.J., concurring).

157. *Id.* at 35–36. "I believe that although these references speak in the language of religious belief, they are more properly understood as employing the idiom for essentially secular purposes. One such purpose is to commemorate the role of religion in our history." *Id.* Justice O'Connor also argued that ceremonial references to god serve the secular purposes of "solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society." *Id.* at 36. (quoting *Lynch v. Donnelly*, 465 U.S. 668, 692–93 (1984) (O'Connor, J., concurring)).

158. *Id.* at 42.

The phrase "under God," conceived and added at a time when our national religious diversity was neither as robust nor as well recognized as it is now, represents a

excessive entanglement given the de minimis character of the religious reference.<sup>159</sup> Finally, the absence of worship, prayer, or reference to any specific religion led Justice O'Connor to conclude that recitation of the Pledge was not coercive.<sup>160</sup> Justice Thomas, also concurring, disagreed with this portion of O'Connor's argument.<sup>161</sup> He noted that the coerciveness principle could be read to encompass coercion by one's peers, not just coercion by the government.<sup>162</sup> Thomas agreed, however, with the conclusion that the Pledge is constitutional under the Establishment Clause.<sup>163</sup>

A Free Exercise Clause challenge to the Pledge policy should begin by noting that mandating the invocation of god forces Atheists to violate their religious beliefs.<sup>164</sup> The argument should then highlight the connection between religious objection to the Pledge and the right to free speech that is concurrently implicated.<sup>165</sup> Under the hybrid rights analysis, patriotic exercise statutes would need to be supported by a compelling government interest, and be narrowly

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tolerable attempt to acknowledge religion and to invoke its solemnizing power without favoring any individual religious sect or belief system.

159. *Id.* at 42–43. The de minimis character of the religious reference was important to Justice O'Connor for three reasons: it affirms that the reference is meant to acknowledge religion rather than endorse it, it makes it easier for participants to “opt out” of language they find offensive without totally rejecting the ceremony, and it limits the government's ability to prefer one sect over another. *Id.* at 43.

160. *Id.* at 44. “Any coercion that persuades an onlooker to participate in an act of ceremonial deism is inconsequential, as an Establishment Clause matter, because such acts are simply not religious in character . . . [T]he Constitution does not guarantee citizens a right entirely to avoid ideas with which they disagree.” *Id.*

161. *Id.* at 45–47 (Thomas, J., concurring) (“Adherence to *Lee* would require us to strike down the Pledge policy.”).

162. *Id.* at 47 (identifying two types of coercion: the State's coercive power in forcing students to attend school, and the peer pressure created through the Pledge policy).

163. *Id.* at 54. Justice Thomas took a more radical approach, suggesting that traditional Establishment Clause doctrine misconstrues the purpose of the First Amendment. He would read the Establishment Clause as a federalism provision, protecting state religious establishments from national interference. Consequently, he would reject the notion that the Establishment Clause protects any kind of individual right. *Id.* at 50–51.

164. *See supra* note 3 and accompanying text.

165. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 634–35 (1943). The majority reasoned that compelling flag salute was the equivalent of compelling agreement with a political ideology. The Court explicitly rejected the notion that the challenge to the flag salute depended in any way on the religious views of the petitioners, saying that religion may have been the impetus for litigation but that the question posed was one of the State's power to mandate ideology. *Id.*

tailored to achieve that interest.<sup>166</sup> Alternatively, one could argue that the Pledge is not neutral, since it favors religions that believe in god over religions that do not.<sup>167</sup> Since the patriotic exercise statutes are not neutral and implicate hybrid rights, strict scrutiny is triggered.<sup>168</sup>

In *Barnette*, the Court established that states could not compel school children to salute the flag, in part because the state's interest in fostering patriotism did not outweigh the children's right to free speech.<sup>169</sup> Given that the same interest underlies states' current patriotic exercise legislation, the balancing approach taken in *Barnette* indicates that the state's interest is not compelling enough to outweigh the Free Exercise rights of Atheist children who otherwise would be compelled to recite the Pledge.<sup>170</sup> Since the Pledge fails to satisfy the "compelling interest" prong of strict scrutiny analysis,<sup>171</sup> Atheists might succeed in a Free Exercise challenge to state patriotic exercise statutes that mandate recitation of the Pledge.<sup>172</sup>

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166. *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 881 (1990).

167. Indeed, despite Justice O'Connor's assertion that the Pledge does not favor any one belief system over any other, the history of the Pledge appears to illustrate the opposite. *Newdow*, 542 U.S. at 42 (O'Connor, J., concurring). The phrase "under God" was inserted in 1954, at the height of the Cold War, in direct opposition to the type of state-imposed Atheism espoused by the USSR. *Id.* at 6-7. Given Justice Kennedy's admonition (albeit in a separate opinion not part of the majority holding) in *Church of the Lukumi Babalu Aye v. City of Hialeah* to look at a statute's neutrality by examining the historical context in which it was enacted, it seems clear that the Pledge was meant to declare the superiority of a belief in god over a non-belief in god. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 540 (1993) (writing separately). The Pledge is not neutral because it was enacted "because of, not in spite of," Atheist beliefs, making it subject to strict scrutiny. *Id.* at 540-41 (quoting *Personnel Admin'r of Mass. v. Feeny*, 442 U.S. 256, 279 (1979)); see also *supra* note 130 and accompanying text.

168. *Employment Division*, 494 U.S. at 881; *City of Hialeah*, 508 U.S. at 533, 540.

169. *Barnette*, 319 U.S. at 638, 641-42. The Court noted that patriotism is an important state interest, but argued that compelling patriotism will only lead to more vigorous dissent and disunity. *Id.* at 641-42.

170. One aspect of a Free Exercise approach, somewhat illustrated by *Newdow*, is that in order to have standing, the challenger would have to be an Atheist student who is affected by the patriotic exercise statute. This is due to the injury prong of standing analysis. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Newdow*, 542 U.S. at 11-12; see also *supra* note 67 and accompanying text. A parent's ability to sue on behalf of his or her child may be more limited by state law. See *Newdow*, 542 U.S. at 11-12.

171. Strict scrutiny requires both that a government action be supported by a compelling government interest and that it be narrowly tailored to achieve that interest. *City of Hialeah*, 508 U.S. at 546.

172. See *State Patriotic Exercise Statutes*, cited *supra* notes 87 and 88.

### *B. Legislative Prayer*

While the Court has never fully addressed how legislative prayer would be considered under the Establishment Clause, its precedent indicates that such a challenge would fail. Application of the *Lemon* test and coerciveness principle to legislative prayer is difficult, largely because of the historical rather than doctrinal approach taken by the Court in *Marsh v. Chambers*.<sup>173</sup> The majority suggested that the purpose of opening legislative sessions with prayer is to invoke divine guidance—hardly a secular goal.<sup>174</sup> However, the Court's emphasis on the history of legislative prayer indicates that a secular purpose might be the recognition of the role religion played in the ideology of those who founded the United States.<sup>175</sup> While legislative prayer should fail the primary effect and excessive entanglement prongs of the *Lemon* test, *Marsh* indicates that the Court would not invalidate the practice on either basis.<sup>176</sup> The Court also rejected the idea that legislative prayer was coercive, reasoning that the Establishment Clause does not bar a state from acting simply because the action is in harmony with religious canons.<sup>177</sup> Since legislative prayer seems to satisfy the *Lemon* test as well as the coerciveness principle, it likely would survive a challenge under the Establishment Clause.

Like the Pledge policy, legislative prayer burdens the Free Exercise rights of Atheists by forcing an Atheist legislator to violate his religious beliefs.<sup>178</sup> Legislative prayer also fits into a hybrid rights analysis, raising issues of free speech and procedural due process relating to the legislative process.<sup>179</sup> Alternatively, legislative prayer

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173. *Marsh v. Chambers*, 463 U.S. 783 (1983). Neither the *Lemon* test nor the coerciveness principle are mentioned in the majority opinion, which relies solely on the history of legislative prayer to show that it is consistent with the Founder's view of the First Amendment. *Id.*

174. *Id.* at 790–92.

175. The Court emphasized that the Framers knew of and often participated in state run churches, and that many of them were legislators at the First Congress, which opened sessions with a prayer. Given the Framers' knowledge, the Court concluded that the Framers could not have thought legislative prayer would be barred under the First Amendment. *Id.*

176. Again, however, application of the *Lemon* test is difficult because of the historical analysis used by the Court in *Marsh*. *Marsh*, 463 U.S. 783; see also *supra* note 173.

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

178. See *supra* note 3 and accompanying text.

179. Legislative prayer might affect the objecting legislator's Fourteenth Amendment

might not be neutral because it favors religions that believe in god over religions that do not.<sup>180</sup> Thus, in a Free Exercise context, the state's actions must pass strict scrutiny.<sup>181</sup>

While the invocation of god at the opening of legislative sessions is well rooted in history, replication of that tradition for its own sake cannot be a compelling state interest.<sup>182</sup> As for the state's other asserted purpose, the Court has characterized the recognition of religion's role in history as "tolerable."<sup>183</sup> This statement seems to indicate that, while such a goal may be legitimate, it hardly qualifies as compelling. Thus, an Atheist legislator wishing to challenge the practice of legislative prayer likely would have more success using a Free Exercise challenge than he or she would using Establishment Clause jurisprudence.<sup>184</sup>

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procedural due process rights. The affected legislator could voice concern that a legislative process that proceeds under the guise of religious empowerment does not comport with a republican form of government, and that laws passed by a legislature under the influence of legislative prayer might be invalid because of improper legislative intent. *See* U.S. CONST. amend. XIV; *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 540–41 (1993) (indicating a willingness to inquire into legislative intent to decide whether an enactment is valid under the Fourteenth Amendment). Additionally, if the challenge is to legislative prayer on the federal level, strict scrutiny applies without the need to establish hybrid rights or non-neutrality. *See* *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430–31 (2006); *see also* 42 U.S.C. § 2000bb (2006).

180. Legislative prayer is meant to invoke "Divine guidance" on behalf of the democratic leaders. *Marsh*, 463 U.S. at 792. The Court's own language in *Marsh* describing how the institutions of the United States presuppose a "Supreme Being" indicates a preference for believers over non-believers in legislative positions. *Id.* Legislative prayer attempts to buttress believers at the expense of non-believers because of (not just in spite of) their belief or lack thereof, and therefore it violates basic principles of neutrality. *See City of Hialeah*, 508 U.S. at 533, 540 (1993) ("a law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible"); *see also supra* note 130 and accompanying text.

181. Because a challenge would implicate hybrid rights, strict scrutiny applies. *See* *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 881 (1990). Strict scrutiny also is appropriate because legislative prayer is not neutral. *See supra* note 180 and accompanying text; *City of Hialeah*, 508 U.S. at 533, 540.

182. *Marsh*, 463 U.S. at 790 ("Standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees.")

183. *Id.* at 792 ("[Legislative prayer] is simply a tolerable acknowledgement of beliefs widely held among people of this country.")

184. Standing to challenge legislative prayer on Free Exercise grounds would be limited to legislators whose religious beliefs were inconsistent with the prayer offered due to the "injury in fact" prong of standing analysis. *See* *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11–12 (2004); *see also supra* note 67 and accompanying text. This test would be satisfied by any Atheist legislator, but the political climate is such that self-proclaimed Atheists rarely are elected to political office. *See*

### C. Oaths of Office

Oaths of Office have not been tested through Establishment Clause challenges, but application of Establishment Clause doctrine under the *Lemon* test and coerciveness principle likely would yield a result similar to that of *Newdow* or *Marsh*.<sup>185</sup> Justice O'Connor's concurrence in *Newdow* notes the secular purpose of solemnizing public ceremonies that can be achieved through the invocation of god.<sup>186</sup> The primary effect of the oath is to have officers swear to uphold their duties; they are not swearing an allegiance to god or any particular religion.<sup>187</sup> Finally, the singular invocation of god at the end of the oath can hardly be described as excessive entanglement.<sup>188</sup>

A Free Exercise challenge by an Atheist officer would have some chance of success. Strict scrutiny is applicable because of the special importance of the free speech rights of legislators.<sup>189</sup> Additionally, the oath is arguably not neutral because it favors believers in a god over non-believers.<sup>190</sup> While requiring officers to swear to uphold their duties is surely a compelling government interest,<sup>191</sup> its application to Atheists taking office would fail to achieve that purpose. Officers who do not believe in god cannot possibly see the invocation of god as binding upon themselves in such a way that it

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PEW FORUM, *supra* note 10; HEDGES, *supra* note 12; Carter, *supra* note 12; Smith, *supra* note 12.

185. *Newdow*, 542 U.S. at 1; *Marsh*, 463 U.S. at 783. Justice O'Connor described oaths of office as being included in the same category of ceremonial deism as legislative prayer and the Pledge of Allegiance. *See Newdow*, 542 U.S. at 35–36 (O'Connor, J., concurring); *see also* 5 U.S.C. § 3331 (2006) (including in the oath for officers the phrase “so help me God”).

186. *Newdow*, 542 U.S. at 36 (O'Connor, J., concurring).

187. *Id.* at 42.

188. *Id.* at 42–43. Just as the reference to god in the Pledge is considered to be de minimis, so too would the reference in the oath of office.

189. Beyond the ordinary protection of free speech found in the First Amendment, abridging both state and national legislators generally are vested with immunity for speech and debate in the course of their legislative duties. *See* U.S. CONST. amend. I; U.S. CONST. art. I, § 6, cl. 1; *see generally* Steven F. Huefner, *The Neglected Value of the Legislative Privilege in State Legislatures*, 45 WM. & MARY L. REV. 221, 221 (2003) (arguing for a “broad constitutional privilege for state legislators to protect the integrity of the deliberative process”).

190. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 532–33 (1993) (writing separately). The oath of officers favors believers in god over non-believers in god because of that belief or lack thereof. *See id.* at 540; *see also supra* notes 130 and 180 and accompanying text.

191. *See Lee v. Weisman*, 505 U.S. 577, 633 (1992) (Scalia, J., dissenting).

would cause them to be more diligent in fulfilling their responsibilities. Given the availability of religion-neutral alternatives, as is the case with the oaths for witnesses,<sup>192</sup> a court should find that the state's action in mandating a religious form of the oath is not narrowly tailored to achieve its interest.<sup>193</sup>

#### *D. Oaths of Witnesses*

The permissive language of the Federal Rules of Evidence and Civil Procedure, and that of most state rules, likely mitigates any challenge to the oaths of witnesses on Establishment Clause grounds.<sup>194</sup> Moreover, some courts have held that forcing a witness to take a traditional form of the oath over religious objection is reversible error.<sup>195</sup> Nonetheless, a Free Exercise challenge might be successful when a court is confronted with a statute or state practice that demands a certain form of the oath, as is the case in North Carolina.<sup>196</sup>

In both federal and state courts, a Free Exercise challenge to a witness oath would invoke strict scrutiny because of the due process rights implicated by witness testimony,<sup>197</sup> and because an oath that

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192. See FED. R. CIV. P. 43(d); FED. R. CIV. P. 30(c) 26; FED. R. EVID. 603; see also state statutes tracking this language *supra* note 109.

193. The consideration of religion-neutral alternatives is necessary to survive the narrow tailoring prong of strict scrutiny. While an exhaustion of neutral alternatives is not required, a complete lack of consideration, as has been the case in the context of oaths of office, will trigger a failure of strict scrutiny. See *Grutter v. Bollinger*, 539 U.S. 306, 339–40 (2003) (citing *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509–10 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 n.6 (1986)) (upholding University of Michigan Law School's use of race in admissions policy).

194. See *supra* notes 109 and 192.

195. See, e.g., *United States v. Ward*, 989 F.2d 1015 (9th Cir. 1992); *Ferguson v. Comm'r*, 921 F.2d 588 (5th Cir. 1991); *Gordon v. Idaho*, 778 F.2d 1397 (9th Cir. 1985); *United States v. Looper*, 419 F.2d 1405, 1407 (4th Cir. 1969); *Wright v. State*, 135 So. 636 (Ala. Ct. App. 1931).

196. See N.C. GEN. STAT. §§ 11-1 to -2 (2007); see also *In re Honeycutt*, 600 S.E.2d 470 (N.C. 2004); *ACLU of North Carolina v. North Carolina*, 639 S.E.2d 136 (N.C. Ct. App. 2007). More religiously intensive forms of the oath are required in several other states. See *supra* note 109 and accompanying text.

197. See *Ward*, 989 F.2d at 1019 (noting that one's Fifth Amendment right to testify on one's own behalf is implicated when a criminal defendant is prevented from testifying because of his refusal to take a traditional oath); see also U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.



mandates invocation of god is inherently non-neutral.<sup>198</sup> While the government has a compelling interest in ensuring the truthfulness of witness testimony, both the availability of religion-neutral alternatives and the fact that such a goal would not be achieved in the case of an Atheist witness indicate that a court likely would look favorably on a Free Exercise challenge to witness oaths that mandate invocation of god.<sup>199</sup> In North Carolina particularly, the statute dealing with witness oaths, even under the proposed revision, requires the oath to be sworn on a holy text.<sup>200</sup> Many religions, including Atheism, have no such text, leaving the door open for future Free Exercise challenges.<sup>201</sup>

#### CONCLUSION

The Pledge of Allegiance, legislative prayer, oaths of office, and oaths of witnesses all represent instances in which states sponsor or require the invocation of god. Past and recent decisions by the Supreme Court indicate that challenges to these state actions under the Establishment Clause will fail.<sup>202</sup> Without a current successful strategy, Atheists wishing to challenge the presence of god in the public sphere must look toward a different avenue. Confronted with a

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198. Free Exercise challenges to federal statutes always implicate strict scrutiny. *See* *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430–31 (2006); *see also* 42 U.S.C. § 2000bb (2006). In state systems, challenges to witness oaths implicate the procedural rights of criminal defendants and civil parties, which in turn triggers hybrid rights analysis. *See* *Employment Div. Dep't of Human Res. v. Smith*, 494 U.S. 872, 881 (1990) (discussing hybrid rights). Strict scrutiny is triggered because religiously involved witness oaths are not neutral. Requiring invocation of god in the oath of a witness favors believers over non-believers in god because of that belief or lack thereof. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 533, 540 (1993); *see also supra* notes 130 and 180 and accompanying text.

199. An Atheist would not look upon the invocation of god or the swearing of an oath upon a bible as a way of solemnizing the occasion, and it would do nothing to invoke his or her conscience. Therefore, the rationale for the traditional oath fails when applied to an Atheist and could not be considered compelling. The availability of religion-neutral alternatives, moreover, indicates that the oath is not narrowly tailored to achieve the state's interest. *See* *Grutter v. Bollinger*, 539 U.S. 306, 339–40 (2003); *see also supra* note 193 and accompanying text.

200. *See* N.C. GEN. STAT. § 11-2 (2007); S. 88, 2007 Gen. Assemb. (N.C. 2007), available at <http://www.ncleg.net/Sessions/2007/Bills/Senate/HTML/S88v1.html>.

201. *See supra* note 3.

202. *See, e.g.,* *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004); *Marsh v. Chambers*, 463 U.S. 783 (1983); *In re Honeycutt*, 600 S.E.2d 470 (N.C. 2004).

system that favors religious interests, Atheists should find a way to turn that bias in their favor. By identifying Atheism as a religion, Atheists open the door to the use of the favorable strict scrutiny approach mandated by modern Free Exercise jurisprudence.<sup>203</sup> Because in each instance of ceremonial deism the state lacks either a compelling interest or a narrowly tailored approach, Free Exercise challenges should succeed where Establishment Clause jurisprudence has failed.<sup>204</sup>

By its nature, Free Exercise jurisprudence demands that Atheists be more proactive in challenging state induced invocations of god.<sup>205</sup> Only those Atheists affected by the state's action will have standing to bring a challenge, meaning that Atheists participating in the political process must transcend societal pressures and advocate for their own cause.<sup>206</sup> Though popular interest in Atheism is rising,<sup>207</sup> the political community remains hostile toward Atheists generally.<sup>208</sup> In a culture in which god and religion increasingly influence societal

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203. In all federal cases, strict scrutiny applies to statutes challenged under the Free Exercise Clause. *See Gonzales*, 546 U.S. at 430–31; *see also* 42 U.S.C. § 2000bb. In most contexts, including the Pledge of Allegiance, oaths of office and of witnesses, and legislative prayer, a Free Exercise challenge implicates hybrid rights. *See Smith*, 494 U.S. at 881. Moreover, these instances of ceremonial deism favor belief in god over non-belief because of that belief or lack thereof, and their lack of neutrality triggers strict scrutiny, because of their non-neutrality. *City of Hialeah*, 508 U.S. at 533, 540 (1993); *see also supra* notes 130 and 180 and accompanying text. Thus, strict scrutiny applies even to challenges of state law.

204. In the context of the Pledge of Allegiance, the state's interest in fostering patriotism is not compelling according to the language of *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641–42 (1943). With legislative prayer, oaths of office, and oaths of witnesses, the proffered state objective is not compelling when applied to Atheists, since invocation of god would not implicate the conscience or duty of an Atheist in the same way it would a religious person. *See supra* note 199 and accompanying text.

205. Because of standing requirements, the plaintiff in each of the challenges suggested by this Note must be a self-identified Atheist affected by the law. Therefore, only an Atheist legislator could challenge the practice of legislative prayer, and only an Atheist taking an oath of office could challenge that provision. This is because of the injury prong of standing analysis. *See Newdow*, 542 U.S. at 11–12; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992); *see also supra* note 67 and accompanying text.

206. Because of the preferred status of religion in political life, Atheists taking the kind of actions suggested by this note would likely be subject to immense political and social pressure not to disturb the status quo. *See generally* HEDGES, *supra* note 12; Carter, *supra* note 12; Smith *supra* note 12.

207. *See generally supra* note 4.

208. *See generally* HEDGES, *supra* note 12; Carter, *supra* note 12; Smith *supra* note 12. *See also* PEW FORUM, *supra* note 10. The advertisement run by Elizabeth Dole in the 2008 North Carolina senatorial race illustrates this hostility quite clearly. *See* Collins, *supra* note 12.

conduct and norms,<sup>209</sup> Atheists must act to shore up the wall of separation between church and state<sup>210</sup> by pursuing Free Exercise challenges to state-induced invocations of god.

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209. See PEW FORUM, *supra* note 10.

210. Again, standing requirements mandate that Atheists take an active role in advocating for their own cause. See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. at 11–12; *Lujan*, 504 U.S. at 560–61; see also *supra* note 67 and accompanying text. The “wall of separation” language is taken from Thomas Jefferson and is identified as one of the purposes of the Establishment Clause in *Everson v. Bd. of Educ. of Ewing TP*, 330 U.S. 1, 15–16 (1947) (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1878)).