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Recommended Citation

Jennifer Gresock, *No Freedom From Religion: The Marginalization of Atheists in American Society, Politics, and Law*, 1 U. Md. L.J. Race Relig. Gender & Class 569 (2001).

Available at: <http://digitalcommons.law.umaryland.edu/rrgc/vol1/iss2/9>

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NO FREEDOM FROM RELIGION: THE MARGINALIZATION OF ATHEISTS IN AMERICAN SOCIETY, POLITICS, AND LAW

JENNIFER GRESOCK*

On August 27, 1988, reporter Robert I. Sherman of the American Atheist Press approached Republican presidential nominee George Bush with a simple question: what would he do to win the votes of atheists?¹ When Bush skirted the question and Sherman pressed him, the nominee offered an astounding response. Bush said that he did not “know that atheists should be considered as citizens, nor should they be considered patriots. This is one nation under God.”² While such a comment may seem quite extraordinary in a country that purports to value religious freedom and diversity, it probably surprised few atheists. Most atheists are accustomed to being misunderstood or treated with hostility and disdain. In an article on “coming out” as an atheist, Dave Silverman notes, “[A]theists are vilified as anarchistic and evil anti-religionists.”³

In a society that obsesses about class, gender, and racial categorizations, it is easy to forget that other, less visible groups suffer the painful effects of oppression. Because the damaging effects of racism, classism, and sex discrimination are so extreme, society tends to dismiss other forms of oppression that appear to be less severe. But if, as a society, we truly hope to achieve “liberty, and justice for all,”⁴ we must acknowledge and combat all forms of oppression. This includes not only the most egregious kinds of oppression, but also oppression that touches only a relative few. Atheists, who suffer from that of the latter category, make up only four to ten percent of the American population.⁵

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1. FREE INQUIRY, Fall 1988, at 16 available at <http://www.amicron.com/users/dhaas/misc/george-bush.htm>.

2. *Id.*

3. Dave Silverman, *Coming Out—Atheism: The Other Closet*, at <http://www.atheists.org/comingout/othercloset.html>.

4. These words are, of course, taken from the U.S. “Pledge of Allegiance.” It may seem to be a curious reference to use here because of its overt reference to God; however, the original pledge did not contain the words “under God.” Professor Steven Epstein notes that it was “not until June 1954, at the height of the Cold War with the Soviet Union, that this reference to God was added.” Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2118 (1996).

5. Statistics on the number of atheists conflict. Some estimate that 94% of people believe in God. Michael M. Maddigan, *The Establishment Clause, Civil Religion, and the*

This paper will examine the social, political, and legal ramifications of being an atheist in modern American society. Section I offers a definition of atheism and an argument that atheists suffer a form of cultural imperialism that constitutes oppression. Section II illustrates how this cultural imperialism is reflected in our social and political institutions. Section III presents an analysis of the legal tradition that embodies and reinforces cultural imperialism, with a particular emphasis on ceremonial deism. By casting certain religious practices as mere ceremonial deism, courts have avoided subjecting these practices to appropriately rigorous legal analysis under the Establishment Clause. Ceremonial deism thus perpetuates the alienation and marginalization of nonbelievers.

I. DEFINING ATHEISM AND THE CULTURAL IMPERIALISM OF BELIEVERS

Defining atheism is perhaps not quite as straightforward as it may seem. Indeed, in *The Apology of Socrates*, Plato notes that Socrates was charged not only with teaching the youth to worship the wrong gods, but also—paradoxically—with being an atheist.⁶ Atheism literally means “without theism,” or “without belief in a god or gods.”⁷ The Merriam-Webster Collegiate Dictionary’s first definition of atheism, which it acknowledges as archaic, is “ungodliness; wickedness.”⁸ The Microsoft Reference Dictionary⁹ defines atheism first as a disbelief in or denial of the existence of God or gods or the doctrine that there is no God or gods. The second definition is particularly telling, if predictable: “Godlessness; immorality.”¹⁰

Public Church, 81 CALIF. L. REV., 293, 294 (1993). Others argue that the percentage is higher. The American Atheists place the number of atheists much higher, at 10% of the nation’s population, or 26 million people. See the testimony of Ellen Johnson, President of American Atheists, given to U.S. Civil Rights Commission on August 21, 1998, at <http://www.atheists.org/schoolhouse/seattle.html>. Silverman writes that because only a few atheists are willing to be open about their nonbelief, atheists are viewed as a much smaller percentage of the population than they really are. Silverman, *supra* note 3.

6. Plato, *The Apology of Socrates*, in NORTON ANTHOLOGY OF WORLD MASTERPIECES, 807, 813 (Maynard Mack et al. eds., 1992).

7. See The Atheism Web: Definitions of Atheism, at <http://www.infidels.org/news/atheism/sn-definitions.html> (last modified June 30, 1997).

8. MERRIAM-WEBSTER COLLEGIATE DICTIONARY 72 (10th ed. 1993).

9. MICROSOFT REFERENCE DICTIONARY CD-ROM (Microsoft, 1995).

10. *Id.*

The pejorative bias in these dictionary definitions is clear when they are compared with atheists' own definition of themselves. Self-definitions are without the negative connotations of definitions shaped by the cultural dominance of believers.¹¹ In a landmark case challenging the constitutionality of prayer in public schools, the court heard the following self-definition:

Your petitioners are Atheists, and they define their lifestyle as follows. An atheist loves himself and his fellow man instead of a god. An Atheist accepts that heaven is something for which we should work now—here on earth—for all men together to enjoy. An Atheist accepts that he can get no help through prayer, but that he must find in himself the inner conviction and strength to meet life, to grapple with it, to subdue it and to enjoy it. An Atheist accepts that only in a knowledge of himself and a knowledge of his fellow man can he find the understanding that will help to a life of fulfillment.¹²

Many atheists take great pride in their atheism. Silverman writes, "one of the best components of atheism is the freedom of thought and mind."¹³ Silverman notes that among atheists, "prejudice against people of other sexes, races, or sexual preferences is rare, because most of such prejudice is religion-based."¹⁴ Bertrand Russell—author, professor, and atheist—muses that while the "freethinker's universe" may seem "bleak and cold" to others, to those who have "grown accustomed to it, it has its own sublimity, and confers its own joys."¹⁵ Russell asserts that in "learning to think freely, [freethinkers] have learnt to thrust fear out of our thoughts,"

11. The irony of terming oneself an atheist—"without theism"—is not lost on most atheists. There is surely something paradoxical about defining yourself primarily by describing what you are not. However, in a culture heavily dominated by believers, I find that other terms fail to effectively counter the assumption that I am a believer. Thus, while I privately define myself as an existential absurdist, I will almost always describe myself as an atheist when communicating with others.

12. This quote appears on the American Atheists web site at <http://www.atheists.org>. The site notes that this is the quotation that "began" the case. The case is *Murray v. Curlett*, 232 Md. 368 (1963).

13. Silverman, *supra* note 3.

14. *Id.*

15. BERTRAND RUSSELL, *The Value of Free Thought: How to Become a Truth-Seeker and Break the Chains of Mental Slavery*, in *THE ATHEIST VIEWPOINT* 24 (1944).

bringing "a kind of peace which is impossible to the slave of hesitant and uncertain credulity."¹⁶

Estimating the number of atheists in the United States is difficult. American Atheists estimate that there may be 25 to 26 million atheists in this country.¹⁷ However, many atheists hide their nonbelief from others due to "fear of hostility and aversion to confrontation."¹⁸ While determining the precise number of atheists may be difficult, it is clear that the United States is dominated by believers, including Jews, Muslims, and Christians, among others. Atheist author Wendy Kaminer notes, "almost all Americans (95 percent) profess a belief in God or some universal spirit, according to a 1994 survey by *U.S. News and World Report*. Seventy-six percent imagine God as a heavenly father who actually pays attention to their prayers."¹⁹

Because believers are the majority, they wield tremendous social, political, and legal power. It is easy for believers to ignore the voices of the small minority of atheists. Indeed, some believers seem entirely unaware that atheists even exist.²⁰ Other believers explicitly assert that because atheists are such a small minority, their rights somehow count less than those of the majority.²¹ Through cultural

16. *Id.*

17. Silverman, *supra* note 3.

18. *Id.*

19. Wendy Kaminer, *The Last Taboo: Why America Needs Atheism*, THE NEW REPUBLIC, October 14, 1996, at 24, available at <http://www.positiveatheism.org/writ/kaminer.htm>.

20. Consider the following remark from a man interviewed about the current state of the United States in a BALTIMORE SUN series called "Listening to the New America": "We need to turn this country around," said Eddie Daigle, bathed in a soft glow from the track lighting above, easy jazz floating into his ears, 'back to a Christian country. We need to put God back in this country.'" The comment indicates a complete disregard for or lack of awareness of all non-Christians. Jonathan Weisman, *Rising Tides in the Old South*, BALT. SUN, July 17, 2000, at A1.

21. An example of this reasoning can be found on the web site for Concerned Women for America in an article on school prayer. Concerned Women for America claims to be the nation's largest public policy women's organization, with over 500,000 members. The article, by Laurel MacLeod, is entitled "School Prayer and Religious Liberty: A Constitutional Perspective." MacLeod notes that the "most prevalent argument of such individuals is that the government has a responsibility to be neutral, so that no child is offended by the religious speech of another. This is erroneous because the issue *cannot* be neutral. Elimination of religious expression for the atheist will offend the child who believes in God. So, the schools must choose. Since 1962, they have sided with the small, nonreligious minority of atheists which, as recent *Newsweek* poll shows, consists of only 4 percent of the population. By contrast, 94 percent of respondents to that same survey professed a religious faith, and 61 percent said that they agreed with the statement that 'religion is very important' in their lives."

imperialism, these believers impose a distinct form of oppression upon atheists.²²

Iris Marion Young defines cultural imperialism as “the experience of existing in a society whose dominant meanings render the particular perspectives and point of view of one’s own group invisible at the same time as they stereotype one’s group and mark it out as ‘other.’”²³ Young asserts that cultural imperialism is the “universalization of one group’s experience and culture and its establishment as the norm.... [T]he dominant groups project their own experience as representative of humanity....”²⁴ Because believers constitute the majority of the population, they easily dominate nonbelievers, suffocating their voices with a powerful exertion of cultural imperialism.

II. THE SOCIAL AND POLITICAL MANIFESTATION OF CULTURAL IMPERIALISM

As the above quotation illustrates, Young notes that an oppressed group is made invisible through the mechanism of cultural imperialism. Atheists are rendered invisible in part by the assumptions and the expectations that believers impose upon them. Believers tend to assume that other people must also be believers. This assumption is usually correct because the majority of the population is indeed comprised of believers. But for an atheist, the believers’ assumption can lead to discomfort, embarrassment, and a sense that the atheist is living in a community that is defined by the expectations of others, with little room for divergent viewpoints.

The atheists’ situation is perhaps best compared to that of gays and lesbians. Unlike racial minorities and women, the atheist does not fear that discrimination or hostile treatment is the direct result of physically apparent characteristics. But like members of the gay community, the atheist may be careful not to reveal too much about his

Laurel MacLeod, *School Prayer and Religious Liberty: A Constitutional Perspective*, at http://cwfa.org/library/freedom/2000-09_pp_school-prayer.shtml.

22. Atheism is distinct from agnosticism, which asserts that the existence or non-existence of a god or gods is beyond human knowledge, and is thus unknowable. While agnostics must deal with many of the same acts of cultural imperialism by the dominant believers, this paper’s focus is on atheists, for whom the oppression is a greater affront because it is in conflict with atheism.

23. Iris Marion Young, *Five Faces of Oppression*, in *POWER, PRIVILEGE AND LAW: A CIVIL RIGHTS READER* 66, 77 (Leslie Bender & Daan Braveman, eds., 1995).

24. *Id.*

or her “true self” for fear of condemnation or alienation. Silverman acknowledges that “for some people, coming out as an atheist can be as difficult as anything they’ve ever done.”²⁵ Kaminer notes some of the dangers about being openly atheist:

... I’d violate the norms of civility and religious correctness. I’d be excoriated as an example of the cynical, liberal elite responsible for America’s moral decline. I’d be pitied for my spiritual blindness; some people would try to enlighten and convert me. I’d receive hate mail. Atheists generate about as much sympathy as pedophiles.²⁶

Consistent with Young’s description of cultural imperialism, believers also universalize their own experiences, effectively marginalizing nonbelievers. Those holidays most important to Christian believers are national holidays. Our currency and coins proclaim “In God We Trust”—our national motto.²⁷ Our Pledge of Allegiance was amended in the 1950s to include a reference to God as the nation was gripped by an anti-communist fervor.²⁸

Among the most vivid and ongoing examples of this marginalization is the relentless push for prayer in public schools. Thus far, the Supreme Court has consistently ruled that explicit prayer has no place in public schools, whether led by teachers or student volunteers.²⁹ But social conservatives continue to insist that school prayer is fundamental to the proper moral upbringing of children.³⁰

25. Silverman, *supra* note 3.

26. Kaminer, *supra* note 19.

27. Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2096 (1996).

28. *Id.* at 2118.

29. The Court’s most recent affirmation of this was in *Santa Fe v. Doe*, 530 U.S. 290 (2000) (the “football game prayer case”). See also *Engel v. Vitale*, 370 U.S. 421 (1962) (holding that non-denominational prayer to be recited by each class in a New York public school district was inconsistent with the Establishment Clause); *Abington School District v. Schempp*, 374 U.S. 203 (1963) (holding that the establishment clause prohibits state laws and practices requiring the recitation of Bible verses and the Lord’s Prayer); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (holding that an Alabama law authorizing schools to set aside one minute at the start of each day for meditation or voluntary prayer violated the Establishment Clause).

30. On his official campaign web site Reform Party candidate Pat Buchanan promises to “take back our public schools by passing a constitutional amendment to allow voluntary prayer and to “reject ‘multicultural’ curricula that denigrate our history and teach our children to identify themselves as hyphenated Americans rather than as citizens of one nation under God.” See <http://www.buchananreform.com/library/default.asp?id=118> (last visited Oct. 30, 2000). Concerned Women for America, which claims to be the nation’s largest public policy

The official 2000 platform of the Republican National Committee proclaims: "We will continue to work for the return of voluntary school prayer to our schools . . . We strongly support voluntary student-initiated prayer in school without governmental interference. We strongly disagree with the Supreme Court's recent ruling [*Santa Fe v. Doe*], backed by the [Clinton] administration, against student-initiated prayer."³¹

But the Republican National Committee is really referring to student-led prayer, not independent, private, student-initiated prayer. No Supreme Court decision has threatened the right of individual students to engage in independent, non-disruptive prayer in school, silently or aloud, by themselves or in groups.³² In *Santa Fe v. Doe*, the Court determined only that *student-led* prayer violated the Establishment Clause.³³ For atheists, the on-going battle for school prayer represents a continuous assault on their right to a public school education free of religious proselytizing. Ellen Johnson, president of American Atheists, testified before the U.S. Civil Rights Commission that "[o]ur public schools are considered not educational centers, but a locus for 'culture war' battles waged by certain sectarian groups who seek to introduce prayer, religious proselytizing or inappropriate religious content into public school curricula ... and other extra-curricular activities...."³⁴

In recent years, the tactics of those fighting to "put God back in schools" have become a bit more subtle but remain just as threatening to nonbelievers. Curriculum-based character education programs have become one back-door way of slipping the endorsement of religion into public school classrooms. A good example is the character education program law passed by Georgia legislators in 1999.³⁵ Under § 20-2-145 of the Official Code of Georgia, the Georgia State Board of Education must develop a character education program for all grade levels.³⁶ The "character curriculum" must focus on certain specified

women's organization, advocates school prayer in response to the moral decline of the United States. See generally <http://www.cwfa.org>.

31. See Republican Platform 2000, available at <http://www.mnc.org/gopinfor/platform>.

32. See Rob Osberg, *School Prayer*, in RELIGION AND AMERICAN LAW: AN ENCYCLOPEDIA, 447-453 (Paul Finkelman, ed., 2000) (discussing practices and policies related to school prayer that have been struck down).

33. 530 U.S. 290 (2000).

34. Ellen Johnson, *Unconstitutional Religious Expression in the Public Schools*, at <http://www.atheists.org/schoolhouse/seattle.html> (testimony of Ellen Johnson, President of American Atheists, before the U.S. Civil Rights Commission on August 21, 1998).

35. GA. CODE ANN. § 20-2-145 (2000).

36. *Id.*

traits, including courage, tolerance, generosity, punctuality, cleanliness, and other such non-religious virtues.³⁷ However, buried in the lengthy list of traits is a requirement that public schools teach “respect for the creator.”³⁸

Under the Georgia law, each school district is to develop its own plan for implementing the character education curriculum.³⁹ Lumpkin County Public Schools planned to display posters proclaiming, “In God We Trust” and noting “the duty we owe to our creator.”⁴⁰ However, the liberal advocacy group People for the American Way Foundation contacted school officials and warned them that the program was unconstitutional. The Department of Education then requested a formal legal opinion from the Georgia Attorney General Thurbert E. Baker.⁴¹

On December 28, 2000, Attorney General Baker released an opinion concluding that the inclusion of “respect for the creator” and “In God We Trust” in the state’s character education program was not a violation of the First Amendment.⁴² Baker relied on the Lemon test to determine that “neither state lawmakers nor education officials intended to advance religion.”⁴³ Amanda Seals, spokesperson for State School Superintendent Linda Schrenko, advocated a particular curriculum poster that included the motto “In God We Trust” pictured with an American flag. In praising the poster, she noted that it did not “say anything about taking kids to church or which creator, Christian, Muslim, Buddhist or whatever.”⁴⁴

Despite the opinion of the Georgia Attorney General, it seems clear that the Georgia character education program constitutes an endorsement of a religious belief in a deity. As attorneys at People for the American Way Foundation stated in their letter to Attorney

37. *Id.*

38. *Id.*

39. *Id.*

40. ‘*Respect for Creator*’ Law Raises Legal Questions, CHATTANOOGA NEWS FREE PRESS, July 24, 2000, available at <http://www.cyi-stars.org/articles/RespectForCreator.htm>.

41. See Press Release, People for the American Way, Georgia Attorney General Urged to Find that Teaching Students to Have ‘Respect for The Creator’ Is Unconstitutional (August 22, 2000), available at <http://www.pfaw.org/news/press/2000-08-22.206.phtml>. I was a summer intern at People for the American Way Foundation during the time that the organization began working on this case. I provided research assistance and support to the staff attorneys working on this case.

42. Phillip Taylor, *Georgia Attorney General Approves ‘Respect for Creator’ Curriculum*, January 22, 2001, at <http://www.freedomforum.org/templates/document.asp?documentID=12910>.

43. *Id.*

44. *Id.*

General Baker, teaching “respect for the creator” “assumes and promotes the existence of a single ‘creator,’ an inherently religious belief.... The Constitution prohibits the government from endorsing such beliefs and teaching students that they should have them. It would be difficult to imagine a greater violation of freedom of conscience than the government’s instructing children that they should hold particular religious beliefs as a matter of good character.”⁴⁵

And yet not all observers see such a blatant violation of freedom of conscience in the Georgia character education program. The tendency for believers to universalize their own beliefs, rendering nonbelievers invisible, is all too evident in the comments of one Georgia school principal, John Newman: “As far as my community, I don’t think I’ll have a problem. I think the consensus is that all [religions] have a creator. We plan to fully implement all these character traits....”⁴⁶ Newman’s comments reveal a total disregard for those students who do not believe in a creator. Clearly, Newman is either unaware that such students exist or is oblivious to the threat to these students’ freedom of conscience that the character education program represents.

The terrorist attack on September 11, 2001, has fueled the relentless efforts of some conservatives to marginalize atheists. In the shock and grief that followed the murder of thousands of innocent American civilians, many turned to worship and prayer, and the drumbeat for school prayer has grown ever louder. American Atheists note that in the aftermath of the attack,

there have been denunciations against those who profess no religion, juxtaposed with calls to bring the nation “back to god,” even if it means reviving unconstitutional practices like school prayer.... Clergy are leading assemblies of students in prayer, and in some communities, there is a renewed effort to post the Ten Commandments, or open government meetings with religious devotionals.⁴⁷

45. Letter from People for the American Way Foundation and law firm of Bondurant, Mixson & Elmore to Georgia Attorney General Thurbert E. Baker (August 22, 2000), available at <http://www.pfaw.org/news/press/letter.pdf>.

46. *‘Respect for Creator’ Law Raises Legal Questions*, *supra* note 40.

47. American Atheists, Inc., *Attacks on Atheists, More “Crisis” Violations of First Amendment*, October 4, 2001, at <http://www.atheists.org/flash.line/atheist2.htm>.

Indeed, the *Washington Times* claims that “God has made a comeback,” and notes that “[d]espite Supreme Court guidelines that say mandatory prayer cannot be conducted at public schools, some students, teachers and administrators around the nation have momentarily bypassed constitutional concerns, praying openly at assemblies, in classrooms and at sporting events, asking God for support and protection.”⁴⁸ Barry Lynn of the Americans United for Separation of Church and State expressed concern about the trend, saying that “some schools are considering patriotism and religion the same thing, acting as if you cannot be patriotic unless you are also conventionally religious.... That is a major fallacy.”⁴⁹ But the desire to impose conventional religion persists; former California Representative William F. Dannemeyer, head of Americans for Voluntary School Prayer, supports a constitutional amendment to establish prayer in schools. He argues that the issue is not really school prayer, but rather “whether we as a people believe that God exists.”⁵⁰

In addition to suffering marginalization from those who fail to recognize that they exist, atheists are further marginalized by their explicit exclusion from popular organizations like the Boy Scouts of America (BSA). Many American men point to their experience in Cub Scouts and Boy Scouts as playing a powerful role in shaping them both as citizens and as leaders. More than half of the members of the 106th Congress were Boy Scouts.⁵¹ And yet while the organization proudly proclaims that it welcomes boys of all religions, it excludes atheists from participation.⁵² Well before James Dale challenged the Boy Scouts for excluding him because he was openly gay, several atheists took legal action against the Boy Scouts when they were refused membership in the organization.⁵³

In September 1989, eight-year-old Mark Welsh received a flyer in school that stated, “Join Tiger Cubs, BSA and Have Lots of Fun!

48. Andrea Billups, *Students Pray at School Events*, WASH. TIMES, October 8, 2001, at A13.

49. *Id.*

50. *Id.*

51. See the official web site of the Boy Scouts of America at <http://www.bsa.scouting.org>.

52. It may be that some organizations enforce the exclusion of nonbelievers while others do not. Because the Boy Scouts of America is made up of many small local chapters, or “troops,” the application requirements may be more stringent for some groups than for others.

53. In 1992, Mark Welsh and his son Elliot filed suit against the BSA. *Welsh v. Boy Scouts of America*, 787 F.Supp. 1511 (N.D. Ill., 1992). And in 1993, Robert Sherman and his son Robert Jr. filed suit against the BSA. 1993 U.S. Dist. LEXIS 2617, (N.D.Ill, 1993).

You Can Join Tiger Cubs, BSA, If You Are In the First Grade.” The flyer also contained an invitation to an informational meeting.⁵⁴ Mark and his father, Elliott, attended that meeting and learned that “applications to join BSA required the applicants to agree and recognize an obligation to God.”⁵⁵ Child applicants were (and are) required to subscribe to the Cub Scout Promise, while adult partners were required to sign the Declaration of Religious Principle.⁵⁶ Both Elliott and Mark are atheists. But Elliott still wanted Mark to participate in the organization because of the non-religious values associated with scouting, as well as the fun Mark would have.⁵⁷ After the meeting, Elliott mailed applications for his son and for himself.⁵⁸ On the applications, he noted that he and Mark subscribed to all but the duty to God.⁵⁹ Their applications were rejected.⁶⁰

The Welshes challenged their exclusion from the Boy Scouts under Title II of the Civil Rights Act of 1964, which bars discrimination in places of public accommodation.⁶¹ The trial court determined that because the Boy Scouts were a private organization rather than a place of public accommodation, they were not subject to Title II’s prohibition against discrimination.⁶² Upon appeal, the 7th Circuit affirmed.⁶³ What is remarkable about the opinions of both the trial court and the Court of Appeals is the bland, sterile way that they went about analyzing the issue. Both courts seemed entirely unmoved by the exclusion of Mr. Welsh and his young son from the Boy Scouts.

It is not the Boy Scouts’ legal victory in excluding atheists that makes the Welsh case evidence of the marginalization of nonbelievers; rather, it is the fact that such an exclusionary Boy Scout policy exists in the first place. Nonbelievers are completely shut out of the organization, though most people do not perceive it as primarily a religious organization. Despite the Boy Scouts’ public image as an inclusive social organization that welcomes boys of all “ethnic, religious, and economic backgrounds,”⁶⁴ the Boy Scouts categorically

54. *Welsh v. BSA*, 787 F.Supp., 1511, 1517 (N.D.Ill., 1992).

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 1511.

62. *Id.* at 1538.

63. *Welsh v. BSA*, 993 F.2d 1267, 1268 (7th Cir. 1993).

64. *See generally* <http://www.bsa.scouting.org>.

refuse to admit those who refuse to profess belief in a god.⁶⁵ For a young boy whose friends are enthusiastic members of the organization, such discrimination is surely a source of confusion and alienation.

If Mark Welsh was a member of a racial minority and was refused admission because of the color of his skin, it is difficult to imagine that the courts would have offered such a tepid response.⁶⁶ One might argue that such a scenario could be distinguished since religious belief is a basic tenet of the organization, while white supremacy is not. Indeed, the dissenting Supreme Court justices in *BSA v. Dale* made an analogous argument.⁶⁷ Noting that it was never the official BSA policy to exclude gays before James Dale's membership was revoked, the dissenters argued that the termination of his membership constituted discrimination that violated the state's anti-discrimination statute.⁶⁸

But what if white supremacy *were* the official policy of the Boy Scouts, just as the majority in *Dale* concluded that the organization had an official policy of excluding gays and lesbians? The courts probably would not have limited the reach of Title II in the face of blatantly racist policies. In fact, courts have held that Young Men's Christian Associations that discriminated against blacks were within the reach of Title II of the Civil Rights Act.⁶⁹ YMCA did not

65. *Id.*

66. Many atheists bristle at efforts to characterize atheism as a religion, and accordingly, resist classifying themselves as a religious minority. This is primarily because atheists don't perceive the absence of belief as being doctrinal, but merely logical and materialistic. As an illustration, consider that most people do not believe in the existence of pink unicorns, and yet they would hardly perceive this lack of belief to be part of their religion. Indeed, defining atheism as a religion smacks of cultural imperialism, for it makes a religion of a rejection of the beliefs of the majority.

67. *BSA v. Dale*, 120 S. Ct. 2446 (2000).

68. *Id.*

69. See *Smith v. Young Men's Christian Association of Montgomery, Inc.*, 462 F.2d 634, 636 (5th Cir. 1972) and *Nesmith v. Young Men's Christian Association of Raleigh, N.C.*, 397 F.2d 96, 99-100 (4th Cir. 1968). In *Welsh v. BSA*, the 7th Circuit makes much of the fact that the YMCA decisions were based in part on the organization's ownership of recreational facilities, while the Boy Scouts are not associated with any particular place. However, as 7th Circuit Court Judge Cummings explained in his dissenting opinion, there is no "principled distinction between membership organizations such as the Boy Scouts that meet in varying locales and other organizations that use or own one facility....That Title II should turn on the definition of 'place' is irrational because places do not discriminate; people who own and operate places do. And there is no basis to believe that those who operate facilities at fixed locales, as opposed to those who operate membership organizations from various locales, are more deserving of civil rights regulation....The more logical and contextual reading of Title II is that 'place' is a mere 'term of convenience, not of limitation,' because the word as it is commonly used does encompass most of what is open to the public." *Welsh v. BSA*, 993 F.2d 1267, 1283 (7th Cir. 1993) (Cummings, J., dissenting).

allow blacks to become members.⁷⁰ No special circumstances exist to explain why the 4th and 5th Circuits were willing to extend the reach of Title II to the YMCA and why the 7th Circuit refused to apply it to the Boy Scouts. The probable explanation is that racial discrimination is deemed morally unacceptable by the majority, while discrimination against atheists is somehow not as egregious. Hence, the 7th Circuit completely failed to recognize the injustice of excluding Mark and Elliott Welsh from the Boy Scouts.

In fact, the final paragraph of the majority opinion in *Welsh* reinforces that the court was completely unsympathetic to the atheist plaintiffs and also indignant about the legal challenge they initiated to “enduring principles.” The court commented that it is

interesting to note that the challenged Boy Scout Oath is strikingly similar to the one expressed by our Founding Fathers on July 4, 1776 in the Declaration of Independence which reads in part “And for the support of this Declaration, with a firm reliance on the protection of Divine Providence, we mutually pledge to each other our Lives, our Fortunes and our sacred Honor.” Certainly this Court must not upset such enduring principles by stretching beyond recognition a statute drafted to guarantee equal access to public facilities.⁷¹

The Court’s apparent bias against the atheist plaintiffs is clear in this passage, and thus the result is hardly surprising.

Atheists who speak out against cultural imperialism can pay a high price; professor Steven Epstein argues that “the ostracism that befalls plaintiffs who challenge cherished governmental endorsements of religion is so extreme that most who are offended by the practices bite their tongues and go about their lives.”⁷² Epstein notes that the president of the ACLU, Nadine Strossen, “recently wrote that ‘often these victims of religious liberty violations do not want to even file a claim in court, even when we assure them they would win, because of the hostility, enmity, persecution, and attacks they would face.’”⁷³ According to Epstein, Strossen then recounts the harassment suffered

70. *Welsh v. BSA*, 787 F.Supp., 1511, 1532 (N.D.Ill., 1992).

71. *Welsh v. BSA*, 993 F.2d 1267, 1278 (7th Cir. 1993).

72. Epstein, *supra* note 27, at 2169-70.

73. *Id.*

by children who refused to attend school-sponsored organized prayer meetings in Oklahoma: the children were both harassed and insulted by teachers and students; “upside-down crosses were taped to their school lockers and the prize-winning goat of one of the children had its throat slit; their mother was attacked by a school employee, who repeatedly bashed her head against a car door and threatened to kill her, and eventually the family’s home was burned to the ground....”⁷⁴

The experience of the Oklahoma family lends credibility to Wendy Kaminer’s assertion that apparent “public support for different belief systems is matched by intolerance of disbelief.”⁷⁵ Indeed, Kaminer cites an early 1980s study in which “intolerance for atheism was stronger even than intolerance of homosexuality.”⁷⁶ Hostility towards atheists is perhaps due to society’s tendency to blame atheists (and other nonbelievers) for the moral decline of western civilization. As Kaminer notes, “[v]irtuecrats from Hillary Clinton to William Bennett to Patrick Buchanan blame America’s moral decay on our lack of religious belief.”⁷⁷

An article by Douglas W. Kmiec, a professor of Constitutional Law at the University of Notre Dame and former legal counsel to Ronald Reagan, illustrates that Kaminer is not exaggerating. Kmiec’s article, entitled “America’s ‘Culture War’: The Sinister Denial of Virtue and the Decline of Natural Law,” explicitly blames nonbelievers for tearing apart the country in a war of culture, with the battlegrounds in gay rights, abortion, the arts, women’s rights, political correctness, multiculturalism, and separation of church and state.⁷⁸ Asserting that the culture war is a “contest between religion and no religion,” Kmiec argues that the war is “over the source of moral authority that governs the life of the individual and the community.”⁷⁹ According to Kmiec, “[o]n the one side are those who acknowledge the transcendent authority of God, and on the other are those who don’t.”⁸⁰

74. *Id.*

75. Kaminer, *supra* note 19.

76. Kaminer notes that “only 26 percent” of those surveyed “agreed that the freedom of atheists to make fun of God and religion ‘should be legally protected no matter who might be offended,’” and “seventy-one percent held that atheists ‘who preach against God and religion’ should not be permitted to use civic auditoriums.” *Id.*

77. *Id.*

78. Douglas W. Kmiec, *America’s “Culture War”—The Sinister Denial of Virtue and the Decline of Natural Law*, 13 ST. LOUIS U. PUB. L. REV. 183, 183 (1993).

79. *Id.*

80. *Id.*

Kmiec argues that the “camp that denies God’s sovereign authority styles themselves as progressives in pursuit of justice or fairness,” but with “numbing subtlety, hides the fact that their normative conceptions of the just are anchored in skepticism or materialism or worse.”⁸¹ Kmiec’s willingness to blame nonbelievers for the moral decline of society is certainly not a new phenomenon. Paul Edwards, editor of a collection of Russell’s essays entitled *Why I Am Not a Christian*, writes the following in his 1957 foreword to the book: “At present ... we are witnessing a campaign for the revival of religion which is carried on with all the slickness of modern advertising techniques.... From every corner and on every level ... we have for several years been bombarded with theological propaganda.”⁸²

Because religion and morality are inextricably intertwined for believers, it is difficult for believers to imagine that one can have a strong moral and ethical framework without a supreme being. This is an example of the powerful effect of cultural imperialism imposed by the dominant believers. For atheists, this persistent tendency to equate religion and sound ethics can be extraordinarily frustrating. It means that atheists are constantly forced to defend their ethics. Silverman writes of himself and fellow atheists: “[w]e are moral, we are ethical, and we’re tired of being defamed and maligned for our disbelief.”⁸³

In the wake of the September 11 terrorist attack on the World Trade Center and the Pentagon, atheists have repeatedly been maligned for their lack of belief. American Atheists note that “humorist and E! Magazine pundit Ben Stein was apparently misinformed on the philosophical and theological beliefs of [the terrorists]—he described the events of September 11 as an “atheistic evil.”⁸⁴ And ABC talk show host Star Jones apparently told viewers that “she was grateful George W. Bush was a ‘man of faith,’ and added that under no circumstances would she ever vote for an Atheist, since nonbelievers presumably have no foundation for morality.”⁸⁵ Such comments clearly reflect the mistaken belief that those who do not believe in a god are evil and unethical.

Russell addresses this assumption that atheists are morally inadequate in several of his essays. Russell notes that “[o]f all the

81. *Id.*

82. Paul Edwards, *Editor’s Introduction to WHY I AM NOT A CHRISTIAN AND OTHER ESSAYS ON RELIGION AND RELATED SUBJECTS*, xi, xii (Paul Edwards ed., 1957).

83. Silverman, *supra* note 3.

84. *Attacks on Atheists, More “Crisis” Violations of First Amendment*, *supra* note 47.

85. *Id.*

arguments designed to show that free thought is wicked, the one most often used is that without religion people would not be virtuous.”⁸⁶ After discussing the core of his ethical beliefs—admiration for “kindly feeling and veracity”⁸⁷—Russell acknowledges that many people “fear that, without the theoretical beliefs that I find myself to reject, the ethical beliefs which I accept could not survive.”⁸⁸ This assumption that atheists are morally deficient is more than a nuisance for atheists. Kaminer discusses how a tendency to consider “faith in immaterial realities” essential to individual morality influences public behavior and perceptions:

When politicians proclaim their belief in God, regardless of their religion, they are signaling their trustworthiness and adherence to traditional moral codes of behavior, as well as their humility. Belief in God levels human hierarchies while offering infallible systems of right and wrong. By declaring your belief, you imply that an omnipotent, omniscient (and benign) force is the source of your values and ideas. You appropriate the rightness of divinity.⁸⁹

Because atheists are not able to claim that their sense of ethics is derived from a belief in a god, it is difficult for them to gain the moral trust and respect of believers. This vividly illustrates Young’s point about the universalization of one’s own experience, and how the dominant group’s universalization is essentially an act of cultural imperialism. It is as if believers simply cannot imagine or accept that atheists may have their own sound foundation for their moral and ethical beliefs, or that a life without god might be fulfilling nonetheless. In a 1998 speech, then Vice President Al Gore blamed a host of social problems, including “gang violence and deteriorating social conditions among inner-city youth” on those who have a “spiritual vacuum in their lives, because they feel disconnected from the love of their Father in Heaven.”⁹⁰

86. RUSSELL, *supra* note 15, at 5.

87. BERTRAND RUSSELL, *The Faith of a Rationalist: No Supernatural Reasons are Needed to Make Men Kind*, in *THE ATHEIST VIEWPOINT* 3 (1947).

88. *Id.* at 5.

89. Kaminer, *supra* note 19.

90. American Atheists, Inc., *Lieberman Blames National Woes on “Freedom From Religion,”* August 29, 2000, at <http://www.atheists.org/flash.line/elec16.htm>.

In response to Gore's comments, American Atheists president Ellen Johnson told the press that "[w]hether he intended to or not, Mr. Gore is unfairly connecting a lack of belief in a god with antisocial, criminal behavior. He ... marginalized and insulted the ten percent of Americans—over 26 million people—who have no religious belief, and describe themselves as atheists, nonbelievers, freethinkers, or skeptics...."⁹¹ The impact of this mistrust of atheists is tremendous; as Kaminer wryly comments, "[t]ry to imagine an avowed atheist running successfully for public office; it's hard enough for politicians to oppose prayer in schools."⁹²

Indeed, political figures often go to great lengths to call attention to their religious faith. Democratic presidential nominee Al Gore's unprecedented choice of Orthodox Jew Joe Lieberman as running mate caused quite a stir among journalists and political pundits, as well as in the Jewish community.⁹³ The strategic choice of Lieberman itself had moral and religious overtones; some political commentators speculated that Gore's choice of a man known as a "moralist" in the Senate was intended to counter those voters who had been unhappy with the perceived "moral failings" of President Clinton and, by extension, his administration.⁹⁴ And Lieberman was not shy about making an issue not only of his own religious beliefs, but also his apparent ambivalence about the separation of church and state.⁹⁵

According to American Atheists, Lieberman said that "John Adams, second president of the United States, wrote that our Constitution was made only for a moral and religious people" and that "George Washington warned us never to indulge in the supposition that morality can be maintained without religion."⁹⁶ Lieberman also stated, "the Constitution guarantees freedom of religion, not freedom from religion."⁹⁷ Lieberman's comments not only made American

91. *Id.*

92. Kaminer, *supra* note 19.

93. See Melanie Brubaker Mazur, *Lieberman Embraced by Jewish Community*, THE DURANGO HERALD, August 12, 2000 at, available at <http://www.durangoherald.com/rel046.htm> (last visited October 29, 2000).

94. See Matthew Vita, *Impeachment: 2000's Stealth Issue*, WASH. POST, Nov. 1, 2000, at A1.

95. Lieberman has said that while the line between church and state is "an important one,...in recent years we have gone far beyond what the Framers ever imagined in separating the two...." American Atheists, Inc., *Lieberman Again Claims "No Freedom From Religion" In Notre Dame Address: Cites Judeo-Christian Roots of America*, October 26, 2000, at <http://www.atheists.org/flash.line/elec21.htm>.

96. *Lieberman Blames National Woes on "Freedom From Religion," supra* note 81.

97. *Lieberman Again Claims "No Freedom from Religion" In Notre Dame Address: Cites Judeo-Christian Roots of America, supra* note 95.

Atheists nervous, but also the Anti-Defamation League. The ADL warned that “emphasizing personal religious faith might be ‘inappropriate and even unsettling in a religiously diverse society such as ours.’”⁹⁸

And yet perhaps the American Atheists overstate the effect that Lieberman’s comments might have on atheists. After all, atheists have become accustomed to living under state and national leaders who make repeated public proclamations of their religious faith. In fact, Maryland and Tennessee actually required those holding public office to profess a belief in God until the Supreme Court declared such a requirement unconstitutional in 1961.⁹⁹ “Every President has mentioned God in his inaugural address,” and it is a “tradition that has continued unbroken to this day. President John F. Kennedy made three references to God in his famous inaugural speech. Similarly, President Reagan referred continually to the deity while he was in office. Most recently, evangelist Billy Graham led a prayer at George Bush’s and Bill Clinton’s inaugurations.”¹⁰⁰ Such comments surely make atheists feel marginalized; Epstein argues that “presidents should refrain from wrapping their speeches in religious imagery, for in doing so they certainly can make Americans feel like outsiders in their own political community.”¹⁰¹

98. *Id.*

99. Epstein, *supra* note 27, at 2101.

100. Michael M. Maddigan, *The Establishment Clause, Civil Religion, and the Public Church*, 81 CALIF. L. REV., 293, 322 (1993). Epstein provides the text of the prayer itself: “Our God and Father, we thank you for this historic occasion when we inaugurate our new President and Vice President. We thank You for the moral and spiritual foundations which our forefathers gave us, and which are rooted deeply in Holy Scripture. Those principles have nourished and guided us as a nation in the past. But we cannot say that we are a righteous people, for we are not. We have sinned against You. We have sown to the wind and are now reaping the whirlwind of crime, drug abuse, racism, immorality, and social justice. We need to repent of our sins and to turn by faith to You.... We commit this inaugural ceremony to You and ask that the memory of this event may always remind us to pray for our leaders. I pray this in the name of the One who was called Wonderful Counselor, the mighty God, the everlasting Father, and the Prince of Peace. Amen.” Epstein, *supra* note 27, at 2108.

101. Epstein, *supra* note 27, at 2143.

III. THE MARGINALIZATION OF ATHEISTS IN THE LEGAL REALM

A. *The United States as a Christian Nation?*

While American social and political institutions marginalize atheists, the legal culture has been even more oblivious to the existence and rights of nonbelievers. Law professor Daniel O. Conkle notes, “from the colonial period forward, Christianity has played a prominent and leading role, both socially and politically. Indeed, throughout most of our country’s history, there has been an overt Christian, and primarily Protestant, dominance in American law and public life.”¹⁰² To support his assertion, Conkle cites a famous 1892 Supreme Court case, *Rector, Holy Trinity Church v. United States*.¹⁰³ For contemporary readers, the case represents a startling example of religious single-mindedness.

Writing for the Court, Justice Brewer stated that “this is a religious people.... Every constitution of every one of the forty-four states contains language which either directly or by clear implication recognizes a profound reverence for religion and an assumption that its influence in all human affairs is essential to the well being of the community.”¹⁰⁴ Justice Brewer then concluded that “this is a Christian nation,” based on such practices as the “form of oath universally prevailing, concluding with an appeal to the Almighty; the custom of opening sessions of all deliberative bodies and most conventions with prayer ... the laws respecting the observance of the Sabbath, with the general cessation of all secular business, and the closing of courts ... [and] legislatures ... on that day....”¹⁰⁵

The language of an 1882 child custody decision of the Supreme Court of Arkansas makes the atheists’ legal disadvantage evident. In that case, the state was seeking to remove the son of James Grisby and his wife (the child’s stepmother) from their custody based on their egregious abuse and neglect of the child.¹⁰⁶ The opinion of Judge English, quoting Justice Story, acknowledged that there is a presumption that children belong in the custody of their parents, but that

102. Daniel O. Conkle, *The Path of American Religious Liberty: From the Original Theology to Formal Neutrality and an Uncertain Future*, 75 IND. L.J. 1 (2000).

103. *Id.*

104. 143 U.S. 457, 471 (1892).

105. *Id.*

106. *State v. Grisby*, 38 Ark. 406, 409 (1882).

whenever ... it is found that a father is guilty of gross ill-treatment or cruelty towards his infant children, or that he is in constant habits of drunkenness or blasphemy, or low and gross debauchery, or *that he possesses atheistical or irreligious principles*, or that his domestic associations are such as tend to the corruption and contamination of his children, or that he otherwise acts in a manner injurious to the morals or interests of his children ... the Court of Chancery will interfere, and deprive him of the custody of his children (emphasis added)....¹⁰⁷

Indeed, the Court of Special Appeals of Maryland noted in *Montgomery County Department of Social Services v. Sanders* that the longstanding English common law tradition of favoring fathers in child custody disputes remained unbroken until early in the 19th century.¹⁰⁸ The father's atheism was the decisive factor in this case. The Maryland court noted that it was "not until the Victorian Era that a father lost a custody dispute in England. The dubious award for 'first loser' was presented to the famous poet, Percy Bysshe Shelley by Lord Eldin."¹⁰⁹ According to the Maryland court, Lord Eldin "described Shelley's atheistic beliefs as vicious and immoral and refused to give him custody of his children."¹¹⁰

Conkle notes that forty years after *Church of the Holy Trinity*, the United States Supreme Court "officially reaffirmed that 'we are a Christian people'" in *United States v. MacIntosh*.¹¹¹ Conkle argues that while "this sort of language was soon to disappear from judicial opinions ... the legal favoritism of Christianity continued for some time. In public schools, for example, Christian prayers and Bible readings remained common for another 30 years—until the Supreme Court banned them in its 1962 and 1963 decisions."¹¹² Now,

107. *Id.* A 1978 decision of the Maryland Court of Appeals cites Grisby but notes that "Mr. Justice Story's pronouncement that atheists or person's with 'irreligious principles' are unfit parents is without the ambit of the First Amendment. The Constitutional right to Freedom of Religion carries with it the concomitant right to 'freedom from religion.'" *Montgomery County Department of Social Services v. Sanders*, 38 Md. App. 406 (1978).

108. 38 Md. App. 406, 381 A.2d 1154 (1978).

109. *Id.* at 415.

110. *Id.*

111. Conkle, *supra* note 102, at 5 (quoting *United States v. MacIntosh*, 283 U.S. 605, 625 (1931)).

112. *Id.* (citing *Engel v. Vitale*, 370 U.S. 421 (1962); *School Dist. v. Schempp*, 374 U.S. 203 (1963)).

according to Conkle, “the Court has renounced the Christian dominance that prevailed ‘at one time,’ and it has interpreted the religion clauses to reflect a strong constitutional commitment to equal treatment for all religions, Christian and non-Christian alike.”¹¹³

However, there is ample evidence to suggest that Conkle’s conclusions about equal treatment cannot be extended to atheists. For instance, in a 1987 modification of child custody hearing, the Court of Appeals of Texas made the following observations about the child’s father, Ronald Griffin:

[Vicki Griffin] contends that [Ronald Griffin] has engaged in immoral, unethical acts that have set a bad example for the children. [She] and several of her co-workers testified that [Ronald Griffin] hounded [Vicki Griffin] to file a fraudulent health insurance claim for him.... [Vicki Griffin] also testified that [Ronald Griffin] had kept and spent \$900 that he knew had been mistakenly paid to him by his employer, Texas A&M University. [Ronald Griffin] is an atheist. He has never taken the children to church by himself.¹¹⁴

The court never indicated why Ronald Griffin’s atheism is listed in this paragraph, which otherwise involves explicit allegations of wrongdoing. In doing so, the judge appears to have categorized Mr. Griffin’s atheism as a moral failing analogous to fraud or theft. Quantifying just how the judge’s view of atheists may have shaped his decision in this custody battle is difficult. But—based on this paragraph—it seems possible that Mr. Griffin’s atheism was a significant strike against him in the mind of the judge.

B. Ceremonial Deism

The categorization of certain practices as “ceremonial deism” may explain why the equal treatment Conkle refers to has not yet been extended to atheists. According to Epstein, the term “ceremonial deism” was coined by former Yale Law School Dean Walter Rostow. The term refers to a “class of public activity” that could be accepted as “so conventional and uncontroversial as to be constitutional.”¹¹⁵

113. Conkle, *supra* note 102, at 6.

114. Griffin v. Griffin, 1987 LEXIS 8948, 38-39 (Tex. App. 1987).

115. Epstein, *supra* note 27, at 2091.

Courts have used the phrase to justify the constitutionality of a wide range of practices, from the recognition of certain religious holidays as national holidays to the inscribing of “In God We Trust” on our coins and paper currency.

Epstein incorporates these examples and others in an imagined scenario to illustrate how saturated our lives are with religious observances that many barely notice because the practices are congruent with the religious views of the majority:

The year is 2096.... Muslims now comprise seventy-percent of the American population, while Christians and Jews comprise only 25-percent collectively.... [S]tudents in most public school systems begin each day with the Pledge of Allegiance in which they dutifully recite that America is one nation “under Allah;” our national currency...contains the inscription codified as our national motto, “In Allah We Trust;” witnesses in court proceedings and public officials are sworn in by government officials asking them to place one hand on the Koran and to conclude “so help me Allah;” presidential addresses are laced with appeals to Allah; federal and state legislative proceedings begin with a formal prayer typically delivered by a Muslim chaplain in which supplications to Allah are unabashed; state and federal judicial proceedings—including proceedings before the United States Supreme Court—begin with the invocation “Allah save this honorable court;” and, pursuant to federal and state law, only Muslim holy days are officially celebrated as national holidays.... Would the average Christian or Jew seriously contend that this America of 2096 would not make them feel like outsiders in their own country?¹¹⁶

The world described by Epstein is one in which atheists live each and every day, treated as though their views somehow can be disregarded. Because almost everyone believes in a god, theists cannot imagine why a small minority might object to these “innocent” expressions of religious faith.

116. Epstein, *supra* note 27, at 2084-2085.

Indeed, American legal culture is steeped in religious traditions that leave atheists feeling like outsiders but that have been upheld by courts based on their classification as mere “ceremonial deism.” The courts appear to cast a particular practice as ceremonial deism to avoid striking down longstanding religious traditions or practices that seem particularly innocuous and inconsequential in a nation dominated by believers. Michael Maddigan notes that ceremonial deism is a “vague concept” that the Supreme Court has used to “justify some of the practices with which it has been confronted,” but that the Court has “never really defined ceremonial deism.”¹¹⁷ Maddigan argues that the term “seems to be shorthand for the Court’s judgment that a practice ought to be permissible because it is not really religious...”¹¹⁸

Ceremonial deism plays a significant role in the legal marginalization of atheists for two reasons. First, it is used to justify practices that constitute a government endorsement of theism. These same practices would clearly be held unconstitutional if they were subjected to the usual tests for determining whether there is an Establishment Clause violation. By casting the practice as mere “ceremonial deism,” the Court simply bypasses the application of the Lemon test—the traditional test for evaluating possible Establishment Clause violations. One scholar, Professor Steven G. Gey, asserts that “[a]ppplied rigorously, the operative terms of Lemon—secular purpose, secular effect, and entanglement—could be effective tools in separating government from religion An honest application of the Lemon test would require a far more rigorous separation of church and state than a majority of the Supreme Court is willing to enforce.”¹¹⁹

Second, the characterization of certain practices as “ceremonial deism” can be used as a springboard to validate other religious practices. Epstein explains the argument as follows:

[I]f practices such as the Pledge of Allegiance to a nation “under God,” legislative prayer, the invocation of God prior to court proceedings, and the Christmas holiday are permissible notwithstanding the Establishment Clause, then surely the practice at hand (be it a nativity scene, commencement invocation, or some other governmental practice)—which does not

117. Maddigan, *supra* note 100, at 337.

118. *Id.*

119. Steven G. Gey, *Religious Coercion and the Establishment Clause*, 1994 U. ILL. L. REV. 463 (1994).

advance religion “any more than” these accepted practices—must also pass muster under the Establishment Clause.¹²⁰

Thus, ceremonial deism creates a slippery slope that can lead courts to uphold religious practices based on this “any more than” test, rather than the *Lemon* test the Court crafted to address possible Establishment Clause violations.

C. Using Ceremonial Deism to Validate Practices that Would Probably Fail the Lemon Test

In the landmark 1971 case of *Lemon v. Kurtzman*, the Supreme Court established a framework for evaluating challenges under the Establishment Clause.¹²¹ The Court held that to pass constitutional muster, a federal, state, or municipal act must (1) have a secular legislative purpose;¹²² (2) have a principal or primary effect that neither advances nor inhibits religion; and (3) not foster excessive government entanglement with religion.¹²³ Since *Lemon*, the Court has wavered in its application of the *Lemon* test.¹²⁴ Steven Gey argues that “the Court’s application of *Lemon* has been erratic, contradictory, and arguably irrational.”¹²⁵ But while “the continued vitality of the

120. Epstein, *supra* note 27, at 2086.

121. 403 U.S. 602 (1971).

122. The Supreme Court has suggested a variety of legitimate “purposes” that might be served by a governmental acknowledgement of religion. See *Lynch v. Donnelly*, 465 U.S. 668 (1984). In *Lynch*, O’Connor justifies “such governmental ‘acknowledgments’ of religion as legislative prayers, . . . government declaration of Thanksgiving as a public holiday, printing of ‘In God We Trust’ on coins, and opening court sessions with ‘God save the United States and this honorable court’” as serving, “in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in our society. For that reason, and because of their history and ubiquity, those practices are not understood as conveying governmental approval of particular religious beliefs.” *Id.* at 693 (O’Connor, J., concurring). The intriguing thing about the justifications offered by Justice O’Connor is that references to God only serve these purposes for theists; for atheists, these practices have quite the opposite effect. Referring to an entity one does not believe to exist seems silly, rather than solemn; it is entirely unrelated to any confidence one might have in the future (indeed, many atheists argue that belief in God stems from a fear of what the future holds); and it represents the very worst of society (irrationality and a lack of confidence in the capacities of human kind). Thus, the justifications offered by Justice O’Connor reflect her universalization of her own view of what these religious practices are meant to do, and are an excellent example of the cultural imperialism theists impose on the rest of society.

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

124. See generally Gey, *supra* note 119.

125. Gey, *supra* note 119.

Lemon test is still much in doubt,”¹²⁶ the test has not yet been overruled. The Court has splintered on several recent Establishment Clause cases, and several Justices have offered alternative tests,¹²⁷ but *Lemon* appears to exert a powerful influence on the Court’s legal analysis.

Justice O’Connor has added an additional element to the *Lemon* test that she deems to be a “clarification.”¹²⁸ In *Lynch v. Donnelly*, Justice O’Connor stated that the Establishment Clause “prohibits government from making adherence to a religion relevant in any way to a person’s standing in the political community.”¹²⁹ Justice O’Connor argued that the government could violate this prohibition in two ways: (1) excessive governmental entanglement with religious institutions and (2) government endorsement that “sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.”¹³⁰

If the “clarified” *Lemon* test was both consistently and carefully applied by the courts, practices permitted as “ceremonial deism” would probably be ruled unconstitutional. Because the courts have created an exception for these practices, atheists continue to suffer marginalization perpetuated by flawed legal analysis and an unwillingness to apply the *Lemon* test consistently.¹³¹ Epstein suggests that “[i]f ... the Court means what it says when it espouses the principle that government may not, consistent with the Establishment Clause, endorse religion and send messages to citizens that cause them to feel like outsiders in the political community, the Court should have the intellectual honesty and fortitude to recognize that ceremonial deism violates a core purpose of the Establishment Clause.”¹³² Indeed, a close look at the practices the Court refers to as

126. Norman Dorsen & Thomas Viles, *The Lynch and Allegheny Religious Symbols Cases and the Decline of the Lemon Test*, in *RELIGION AND AMERICAN LAW: AN ENCYCLOPEDIA* 283, 290 (Paul Finkelman, ed., 2000).

127. Justice Kennedy has advocated the coercion test, which would invalidate practices under the Establishment Clause only if they coerce someone to assent to a religious belief or to participate in a religious activity. See Justice Kennedy’s dissenting opinion in *Allegheny v. ACLU*, 492 U.S. 573 (1989).

128. *Lynch v. Donnelly* 465 U.S. 668, 687 (1984) (O’Connor, J., concurring).

129. *Id.*

130. *Id.* at 688.

131. See generally Gey, *supra* note 119.

132. Epstein, *supra* note 27, at 2174.

“ceremonial deism” reveals that they fail the modified Lemon test and thus violate the Establishment Clause.¹³³

1. Religious Oaths

One prominent example of ceremonial deism is the oaths required of public officers, court witnesses, and jurors. Under English common law, “no one but a believer in God and in a future state of rewards and punishments could serve on a jury or testify as a witness. The oath was taken on a Christian Bible, in effect disqualifying non-Christians.”¹³⁴ Further, “as late as 1939, five states and the District of Columbia excluded the testimony of those professing a disbelief in God, and, in a dozen or so additional states, the testimony of nonbelievers was subject to attack on the ground that one’s credibility was impaired by irreligion or lack of belief in a deity.”¹³⁵ According to Epstein, “oaths on the bible are still standard fare in American courtrooms today; witnesses, grand jurors, prospective petit jurors, and interpreters are all asked to swear to tell the truth, ‘so help me God.’”¹³⁶

Requiring a religious oath in court creates an uncomfortable experience for nonbelievers. The oath requires a witness or juror who does not believe in a god to participate in a ritual that conflicts with her own view of the world, or, alternatively, “publicly declare her disbelief in front of (and with the likely disapproval of) a judge and her fellow citizens.”¹³⁷ Thus, the courtroom oath fails the second and third prongs of the Lemon test. The oath has the effect of advancing religion in the sense meant by Justice O’Connor—by requiring a religious oath, the judicial system endorses a belief in God. Further, it represents excessive entanglement. Epstein notes that “[i]ndispensable to that oath and to the administration of justice is the Christian Bible, which is typically left in open view in American trial courtrooms.”¹³⁸

Indeed, even when a court does not use an explicitly religious oath to assure truth-telling, atheists may find the alternative affirmation equally offensive. However, the 5th Circuit was entirely

133. The categories of ceremonial deism set out in this section are drawn from Steven Epstein’s article. He classifies a group of practices as “core ceremonial deism,” which he defines as “practices which have been noncontroversial, have resulted in very little litigation, and have never been held unconstitutional by any court.” *Id.* at 2095.

134. *Id.* at 2111.

135. *Id.* at 2111-12.

136. *Id.* at 2112.

137. *Id.* at 2146-47.

138. *Id.* at 2146.

unsympathetic to an atheist making such an argument. In *Society of Separationists v. Herman*, Robin Murray-O'Hair challenged both her exclusion from venire that resulted from her refusal to give an oath or affirmation and the judge's decision to hold her in contempt for that refusal. O'Hair was jailed for several hours before she was released on bond. O'Hair argued that she considered both an oath and an affirmation to be religious in nature, and she asked the court both to "declare the juror oath practice as engaged in by the defendants (a judicial coercion of a religious exercise) to be unconstitutional under the First Amendment" and to 'grant injunctive relief, both temporary and permanent, against the continuation of such unconstitutional jury oath practices by judges and other public officials.'"¹³⁹

The district court granted the defendants' motion for summary judgment, concluding that the named defendants other than Judge Herman were either immune, nonexistent entities, or improperly named.¹⁴⁰ On appeal, a divided panel of the 5th Circuit determined that Herman "erred in debating the correctness of O'Hair's religious beliefs rather than asking her what sort of pledge she could make to commit herself to tell the truth." The 5th Circuit issued a "declaratory judgment requiring judges to ask prospective jurors who object to the oath or affirmation requirement what form of serious public commitment would accord with their constitutionally protected beliefs."¹⁴¹ After a rehearing en banc, the 5th Circuit concluded that O'Hair and the Society of Separationists lacked "standing to obtain declaratory relief against Judge Herman."¹⁴² The court noted that O'Hair suffered "no continuing harm" and was not able to show a "real and immediate threat that she will again appear before Judge Herman as a prospective juror and that Judge Herman will again exclude her from jury service and jail her for contempt."¹⁴³

Judge Weiner dissented, stating that the most disturbing aspect of the court's decision was that "neither O'Hair nor the Society has any way to pursue redress of the First Amendment violations perpetrated by the state trial judge.... If there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought we hate."¹⁴⁴ Judge Goldberg also

139. *Society of Separationists v. Herman*, 959 F.2d 1283, 1284-85 (5th Cir. 1992).

140. *Id.* at 1285.

141. *Id.*

142. *Id.* at 1284.

143. *Id.* at 1285-86.

144. *Id.* at 1290 (Wiener, J., dissenting).

dissented, arguing that O'Hair and the Society have standing because they are "susceptible to injury precisely because they are not like the average Joe: they are not willing to conform to the popular view that an affirmation is not a religious exercise."¹⁴⁵ Judge Goldberg noted that the plaintiffs "merely seek a declaration that Judge Herman may not exclude or incarcerate a prospective juror for refusing to affirm until he has proposed that the prospective juror make a nonreligious, conscience-binding declaration of a commitment to tell the truth."¹⁴⁶

Unlike the majority, Judge Goldberg recognized that O'Hair was being punished merely for subscribing to an unconventional view about the religious nature of affirmations. Thus, Judge Goldberg's opinion seemed to acknowledge that the majority effectively marginalized O'Hair by refusing to provide a forum for redress for a violation of her First Amendment rights.

2. Religious Invocations Prior to Judicial Proceedings

Courts themselves have a religious atmosphere that can marginalize atheists. "The invocation 'God Save the United States and this Honorable Court' has been used to convene Supreme Court sessions since the time John Marshall was Chief Justice and continues today as a standard practice in federal courts."¹⁴⁷ Maddigan argues that such invocations are not truly religious, but rather examples of civil religion. According to Maddigan, the "God" of civil religion is "mythic, patriotic, and secular."¹⁴⁸ To an atheist, the notion that God is a secular concept is truly absurd. As Epstein points out, those who are "required to be in court to conduct official business must listen to the government's endorsement of a transcendent, monotheistic, Judeo-Christian God."¹⁴⁹

Because the use of religious invocations to open judicial proceedings indicates the government's clear approval of and adherence to a theistic religious perspective, it violates the endorsement prong of the Lemon test. In *Lynch*, Justice O'Connor asserted in her concurrence that "the effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval.... An affirmative answer to [the] question should render the challenged

145. *Id.* at 1292 (Goldberg, J., dissenting).

146. *Id.*

147. Epstein, *supra* note 27, at 2111.

148. Maddigan, *supra* note 100, at 326.

149. Epstein, *supra* note 27, at 2143.

practice invalid.”¹⁵⁰ With this test in mind, it is difficult to imagine how religious invocations prior to judicial proceedings would pass constitutional muster. Justice Douglas once noted that a “fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: ‘God save the United States and this Honorable Court,’”¹⁵¹ in an effort to support his argument that separation of church and state need not be absolute. Indeed, an atheist could object, and if the practice were properly evaluated under the Lemon test, it would be declared unconstitutional.

By classifying the practice as ceremonial deism, the courts have avoided subjecting religious judicial invocations to critical analysis. The Supreme Court, and other courts, frequently refer to judicial invocations without any suggestion that they might violate the Constitution. The practice is simply understood to be acceptable because courts have done it for so long. For instance, in *Marsh v. Chambers*, which involved a challenge to legislative prayer, the Court noted that in “the very courtrooms in which the United States District Judge and later three Circuit Judges heard and decided this case, the proceedings opened with an announcement that concluded, ‘God save the United States and this Honorable Court.’”¹⁵² The same invocation occurs in all sessions of this Court.”¹⁵² No further support was offered for the constitutional validity of the practice; the fact that the practice takes place seemed to be enough for the Court to assume its validity.

3. Legislative Prayer

Legislative prayer is common in state legislatures.¹⁵³ The United States Congress also opens each day with a prayer led by “an ordained, appropriately attired Christian minister delivering a formal prayer to God (and often, to Jesus Christ).”¹⁵⁴ Further, “[e]very Chaplain selected by Congress in more than 200 years of its existence has been Christian.”¹⁵⁵ Epstein explains the marginalizing effect this practice has for nonbelievers: “Americans who regularly observe congressional proceedings quickly ascertain that these prayers embrace them only if they happen to be Christian. How else could a non-Christian interpret a prayer that our civilization ‘can only be saved

150. *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984).

151. *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

152. *Marsh v. Chambers*, 463 U.S. 783, 786 (1983).

153. Epstein, *supra* note 27, at 2104.

154. *Id.* at 2137.

155. *Id.* at 2138.

by becoming permeated with the spirit of Christ' and prayers of similar substance?"¹⁵⁶

Incredibly, the Supreme Court has held that legislative prayer is not in fact a violation of the Establishment Clause. In *Marsh v. Chambers*, the Supreme Court upheld Nebraska's practice of employing a state-appointed chaplain to open each session of its legislature with a prayer. The Supreme Court stated that the "opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country."¹⁵⁷ The Court used that premise to declare the practice constitutional:

In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society. To 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 people of this country.¹⁵⁸

What is astonishing about *Marsh* is that the Supreme Court "ma[de] no pretense of subjecting Nebraska's practice of legislative prayer to any of the formal 'tests' that have traditionally structured [the Court's] inquiry under the Establishment Clause."¹⁵⁹ Scholars Peter Schotten and Dennis Stevens assert that "a straightforward application of *Lemon* would have dictated outlawing ... chaplain-led public prayers."¹⁶⁰ Justice Brennan, in his dissent in *Marsh*, clearly agreed, stating that "if the Court were to judge legislative prayer through the unsentimental eye of our settled doctrine, it would have to strike it down as a clear violation of the Establishment Clause."¹⁶¹ Justice Brennan noted that the *Lemon* test should have been applied, and further stated that he had "no doubt that, if any group of law students were asked to apply the principles of *Lemon* to the question

156. *Id.*

157. *Marsh v. Chambers*, 463 U.S. 783, 786 (1983).

158. *Id.* at 792.

159. *Id.* at 796 (Brennan, J. dissenting).

160. PETER SCHOTTEN & DENNIS STEVENS, *RELIGION, POLITICS, AND THE LAW: COMMENTARIES AND CONTROVERSIES* 151 (1996).

161. *Marsh v. Chambers*, 463 U.S. 783, 796 (Brennan, J., dissenting).

of legislative prayer, they would nearly unanimously find the practice to be unconstitutional.”¹⁶²

Justice Brennan’s own analysis in his *Marsh* dissent makes it clear that legislative prayer does violate the Establishment Clause when properly analyzed in accordance with the Lemon test. Indeed, legislative prayer violates all three prongs of the test. First, Justice Brennan asserted that it is “self-evident” that the “‘purpose’ of legislative prayer is pre-eminently religious.”¹⁶³ Second, Justice Brennan argued that the “‘primary effect’ of legislative prayer is also clearly religious ... invocations in Nebraska’s legislative halls explicitly link religious belief and observance to the power and prestige of the state.”¹⁶⁴

In an amicus brief filed in the *Marsh* case, Jon Garth Murray, Madalyn Murray O’Hair, and the Society of Separationists echoed the argument that legislative prayer violates the second prong of the Lemon test. They also indicated in the amicus brief the marginalizing effect these prayers have on nonbelievers:

These prayers offered by Congress’ chaplains have the undeniable purpose and effect of advancing a particular religious viewpoint. These prayers not only implicitly endorse belief in God by the mere fact that they are being offered, but are also used as vehicles for expressly urging the legislators to believe in God, since, according to the chaplains, disbelief will lead to a situation in which there is “no morality, no justice,” and in which “we will be ruled by tyrants” who are less than fully human. Amici are, to say the least, offended by these remarks, which are subsidized by their tax dollars, as any Christian, Jew, Buddhist or Moslem would understandably be offended were they forced to subsidize sermons to our nation’s legislators which branded them as immoral and less than fully human

162. *Id.* at 800-801.

163. *Id.* at 797. Brennan cited the chaplain’s own explanation of his role as evidence of this purpose. The chaplain, Reverend Palmer, made the following statement:

I would say that I strive to relate the Senators and their helpers to the divine.... [My] purpose is to provide an opportunity for Senators to be drawn closer to their understanding of God as they understand God. In order that the divine wisdom might be theirs as they conduct their business for the day. *Id.* at 798.

164. *Id.* at 798.

simply because of what they believed. But whether the chaplains are correct in saying atheists are immoral or less than fully human is beside the point. What is important is that through their prayers the chaplains advance a particular religious viewpoint, and, therefore, they have no right to expect this nation's taxpayers to provide them with the funds for doing so.¹⁶⁵

The legislative prayers also violate the third prong of the Lemon test, according to Justice Brennan, because the "process of choosing a 'suitable' chaplain ... and insuring that the chaplain limits himself or herself to 'suitable' prayers, involves precisely the sort of supervision that agencies of government should if at all possible avoid."¹⁶⁶ This selection process involves an inappropriate—and unconstitutional—level of governmental entanglement in religious matters.

Perhaps most satisfying for atheists is Justice Brennan's recognition that the legislative prayers effectively marginalize those Americans who profess no religious belief, or whose religious beliefs do not coincide with those expressed in the prayer. Justice Brennan noted that "no American should at any point feel alienated from his government because the government has declared or acted upon some 'official' or 'authorized' point of view on a matter of religion." Justice Brennan argued that:

legislative prayer clearly violates the principles of neutrality and separation that are embedded within the Establishment Clause.... It intrudes on the right to conscience by forcing some legislators either to participate in a "prayer opportunity" ... with which they are in basic disagreement or to make their disagreement a matter of public comment by declining to participate. It forces all residents of the state to support a religious exercise that may be contrary to their own beliefs. It requires the state to commit itself on fundamental theological issues...¹⁶⁷

165. Brief of Amici Curiae for Jon Garth Murray, Madalyn Murray O'Hair, and the Society of Separationists, *Marsh v. Chambers*, 463 U.S. 783 (1983) (No. 82-23).

166. *Marsh v. Chambers*, 463 U.S. 783, 799 (1983) (Brennan, J., dissenting).

167. *Id.* at 808.

However, any satisfaction atheists feel because of Justice Brennan's awareness of how legislative prayer can alienate nonbelievers is tempered by the disappointing recognition that the Court chose to uphold the practice without even subjecting it to appropriate critical constitutional analysis. Even conservative Justice Kennedy has admitted that "it seems incredible to suggest that the average observer of legislative prayer who either believes in no religion or whose faith rejects the concept of God would not receive a clear message that his faith is out of step with the political norm."¹⁶⁸ However, legislative prayer continues at the federal level and the state level, thus perpetuating feelings of invisibility and exclusion among nonbelievers.

4. *National Day of Prayer*

In 1952, the House of Representatives and the Senate passed a joint resolution establishing the National Day of Prayer.¹⁶⁹ The resolution requires that the President proclaim a day as the National Day of Prayer on which "people 'may turn to God in prayer and meditation at churches, in groups, and as individuals.'"¹⁷⁰ Reverend Billy Graham suggested the resolution.¹⁷¹ And, "[s]ince 1952, every President has issued such a proclamation."¹⁷² Epstein notes that in 1995, "President Clinton's proclamation urged Americans to 'continue to seek the guidance of God in all the affairs of our Nation.'"¹⁷³

The National Day of Prayer has never been challenged in court; indeed, it seems unlikely that anyone would have standing to bring such a challenge.¹⁷⁴ Further, the Court has frequently referred to the National Day of Prayer in dicta in ways that indicate that the Court

168. *Allegheny v. ACLU*, 492 U.S. 573, 673-674 (1989) (Kennedy, J., dissenting). Significantly, Justice Kennedy was not offering this comment to support a finding that legislative prayer ought to be struck down as a violation of the Establishment Clause. Rather, he was attempting to use this argument to illustrate that the endorsement test proposed by Justice O'Connor is deeply flawed. He goes on to comment that "[e]ither the endorsement test must invalidate scores of traditional practices recognizing the place religion holds in our culture, or it must be twisted and stretched to avoid inconsistency with practices we know have been permitted in the past, while condemning similar practices with no greater endorsement effect simply by reason of their lack of historical antecedent. Neither result is acceptable." *Id.*

169. William Funk, *National Day of Prayer*, in *RELIGION AND AMERICAN LAW: AN ENCYCLOPEDIA* 329 (Paul Finkelman ed., 2000).

170. *Id.*

171. Epstein, *supra* note 27, at 2116.

172. *Id.* at 2117.

173. *Id.* at 2118.

174. Funk, *supra* note 169, at 329, 329-30.

believes it to be constitutional. In *Lynch*, “the Court used the National Day of Prayer as one of several examples in which government officially acknowledged religion in order to demonstrate that not all such acknowledgments violate the Establishment Clause.”¹⁷⁵ The National Day of Prayer has been categorized with practices the Court deems ceremonial deism.¹⁷⁶ However, if the National Day of Prayer could be subjected to the Lemon test it would probably be found unconstitutional.

First, the explicit purpose of the National Day of Prayer—to set aside a day for Americans to turn to God—is clearly religious.¹⁷⁷ One Senate sponsor of the resolution “stressed a need for divine guidance at this particular time due to threats ‘at home and abroad by the corrosive forces of communism which seek simultaneously to destroy our democratic way of life and the faith in an Almighty God on which it is based.’”¹⁷⁸ Second, the National Day of Prayer clearly advances religion under Justice O’Connor’s endorsement test. Justice Kennedy has referred to the statute as “a straightforward endorsement of the concept of ‘turn[ing] to God in prayer.’”¹⁷⁹

In short, the National Day of Prayer clearly seems to involve government endorsement of “the religious practices and beliefs of some citizens.” Thus, the National Day of Prayer sends a “clear message to nonadherents that they are outsiders or less than full members of the political community” while sending a “corresponding message to Christians that they are favored members of the political community.”¹⁸⁰ The fact that a mostly Christian Congress chose to impose the National Day of Prayer on a country dominated by believers constitutes an appalling act of cultural imperialism. It is as if nonbelievers either do not exist or are so unimportant that they can be ignored. The National Day of Prayer thus both reflects and contributes to the marginalization of nonbelievers.

5. *The National Motto: “In God We Trust”*

Many Americans may not be aware of the National Day of Prayer or the practice of opening legislative sessions with a prayer. However, anyone who has examined a coin or paper bill is aware that

175. *Id.* at 330.

176. *See Lynch v. Donnelly*, 465 U.S. 668, 677 (1984).

177. Epstein, *supra* note 27, at 2151.

178. *Id.* at 2117.

179. *Allegheny v. ACLU*, 492 U.S. 573, 672 (1989) (Kennedy, J., dissenting).

180. This is the endorsement test set out by Justice O’Connor in *Allegheny v. ACLU* at 626-627.

the phrase “In God We Trust” appears on both. Indeed, by law, the phrase is the national motto of the United States.¹⁸¹ The phrase was adopted as the national motto in 1956.¹⁸² Several atheists challenged the inscription of the phrase on coins and paper currency unsuccessfully. In the earliest legal challenges, the phrase was not termed “ceremonial deism.” Later, in numerous court decisions—including Supreme Court decisions—the courts referred to the phrase as an example of ceremonial deism “not rising to the level of an Establishment Clause violation.”¹⁸³

In 1970, the Court of Appeals for the 9th Circuit considered a challenge to the national motto in *Aronow v. United States*. The court ruled that the motto is “excluded from First Amendment significance because [it] has no theological or ritualistic impact. As stated in the Congressional Report, it has ‘spiritual and psychological value’ and ‘inspirational quality.’”¹⁸⁴ Perhaps because the court decided that the motto had no “religious significance,”¹⁸⁵ it did not even bother to apply the Lemon test.

However, in 1996, the Court of Appeals for the 10th Circuit considered a similar challenge to the national motto in *Gaylor v. Smith*.¹⁸⁶ Although the court ultimately decided that the national motto is an example of ceremonial deism, it did attempt to apply the Lemon test.¹⁸⁷ However, the court’s analysis under the Lemon test clearly indicates that it approached the issue with little understanding of the perspective of nonbelievers. Thus, the court perpetuates the cultural and legal dominance of believers because of its inability—and perhaps its unwillingness—to perceive and understand the objections of nonbelievers.

The statute establishing “In God We Trust” should have been held to violate the first prong of the Lemon test since its legislative purpose was clearly religious. The sponsor of the legislation made the following statement on the floor of the House:

In these days when imperialistic and materialistic communism seeks to attack and to destroy freedom, it is

181. 36 USC § 186 (1956) *reincorporated at* 36 USC § 302 (1998).

182. William Funk, “*In God We Trust*,” in *RELIGION AND AMERICAN LAW: AN ENCYCLOPEDIA* 239 (Paul Finkelman ed., 2000).

183. *Id.*

184. *Aronow v. U.S.*, 432 F.2d 242, 244 (9th Cir. 1970).

185. *Id.* at 243.

186. 74 F. 3d 214 (10th Cir. 1996).

187. *Gaylor v. Smith*, 74 F. 3d 214, 216 (10th Cir. 1996).

proper for us to seek continuously for ways to strengthen the foundation of our freedom. At the base of our freedom is our faith in God and the desire of Americans to live by His will and by His Guidance. As long as this country trusts in God, it will prevail. To remind of us this self-evident truth, it is proper that our currency should carry these inspiring words, coming down to us through our history: "In God We Trust."¹⁸⁸

In *Gaylor*, the 10th Circuit ignored the legislative purpose of the statute entirely.

The court did attempt to evaluate the "In God We Trust" statute under the "effect" prong of the Lemon test. The court determined that the "motto symbolizes the historical role of religion in our society, formalizes our medium of exchange, fosters patriotism, and expresses confidence in the future."¹⁸⁹ According to the court, the "motto's primary effect is not to advance religion; instead, it is a form of 'ceremonial deism' which through historical usage and ubiquity cannot be reasonably understood to convey government approval of religious belief."¹⁹⁰

The court then turned to the endorsement prong of the Lemon test, and stated that the standard is whether a "reasonable observer would view the practice as endorsement."¹⁹¹ Noting that Justice O'Connor has said that "the endorsement inquiry is not about the perceptions of particular individuals or saving isolated nonadherents from the discomfort of viewing symbols of faith to which they do not subscribe,"¹⁹² the court concluded that a "reasonable observer," "aware of the purpose, context, and history of the phrase, would not consider its reproduction on U.S. currency to be an endorsement of religion."¹⁹³ By using the "reasonable observer," the court was able to evaluate the phrase from the perspective of a believer, rather than the "isolated nonadherent."¹⁹⁴

That the court could view "In God We Trust" as anything but a blatant endorsement of monotheism is truly astonishing. An atheist reading the phrase on a coin is surely aware that the "we" in the phrase

188. Epstein, *supra* note 27, at 2123.

189. See *Gaylor*, 74 F. 3d at 216.

190. *Id.*

191. *Id.* at 217.

192. *Id.*

193. *Id.*

194. *Id.*

printed by the government on U.S. currency cannot possibly include those who do not believe in a god. American Atheists, in a written statement to Congress, argued that the phrase is “a religious phrase showing that the government has selected and established a particular monotheistic type of religion.”¹⁹⁵ Indeed, by printing the phrase and establishing it as a national motto, the government has clearly indicated its support of the notion expressed in the phrase.

6. “*One Nation Under God*”: *The Pledge of Allegiance*

In 1954, Congress added “under God” to the text of the Pledge of Allegiance.¹⁹⁶ Although the added text has rarely been challenged in court, this has “not stopped numerous courts from mentioning the provision ... always in the context of a list of situations in which the federal government by statute or practice acknowledges God. In each circumstance the reference suggests that the Supreme Court believes the provision constitutional.”¹⁹⁷ For instance, in *Lynch*, Justice Brennan wrote: “I would suggest that such practices as ... the references to God contained in the Pledge of Allegiance to the flag can best be understood...as a form of ‘ceremonial deism,’ protected from Establishment Clause scrutiny chiefly because they have lost through rote repetition any significant religious content.”¹⁹⁸ However, if the addition of “under God” to the Pledge of Allegiance were evaluated under the Lemon test, it seems likely that it would fail.

First, the explicit purpose of the addition of “under God” to the pledge was religious. Epstein offers the following description of the political atmosphere of the time:

[T]here was the conclusion that something was needed to distinguish America from its atheistic Cold War rival. Representatives and Senators making this distinction referred to atheism as being amoral, evil, and certainly un-American.... The symbolism of placing the words “‘under God’ on millions of lips” was likened to “running up a believer’s flag as the witness of a great nation’s faith” to forcefully remind

195. *God on Our Coins: Hearings on H.R. 3314 Before the Subcommittee on Consumer Affairs and Coinage of the Committee on Banking, Finance, and Urban Affairs*, 100th Congress (1988) (written statement of Jon G. Murray, President, American Atheists, Inc.).

196. William Funk, *Pledge of Allegiance*, in RELIGION AND AMERICAN LAW: AN ENCYCLOPEDIA 364, 367 (Paul Finkelman ed., 2000).

197. *Id.* at 367-68.

198. *Lynch v. Donnelly*, 465 U.S. 668, 716 (1984).

“those who deny the sacred sanctities which it symbolizes” that, like it or not, theirs is a nation that believes devoutly in God.¹⁹⁹

The House Judiciary Committee concluded that adding the phrase to the pledge would “serve to deny the atheistic and materialistic concepts of communism.”²⁰⁰ This history clearly indicates that the phrase “under God” was intended to endorse a belief in God.

Second, the effect of the addition amounts to endorsement. The daily recitation of the phrase in public schools throughout the country “sends a message to students who do not believe in a monotheistic god ‘that they are outsiders, not full members of the political community’ and instills in them a perception of ‘disapproval of their individual religious choices.’”²⁰¹ Even conservative Justice Kennedy has admitted that “it borders on sophistry to suggest that the ‘reasonable’ atheist would not feel less than a ‘full membe[r] of the political community’ every time his fellow Americans recited, as part of their expression of patriotism and love for country, a phrase he believed to be false.”²⁰² The phrase clearly has—and was intended to have—a religious effect. Thus, the phrase represents the imposition of the religious beliefs of the majority on all, an act of cultural imperialism that renders atheists and other nonbelievers invisible or irrelevant.

D. Using Ceremonial Deism to Justify Other Religious Practices

Some may think that quibbling about such seemingly innocuous practices as courtroom oaths and national mottoes is silly. For those who fail to see the way that these practices isolate and ostracize nonbelievers, it may be hard to imagine why anyone would

199. Epstein, *supra* note 27, at 2119.

200. Funk, *supra* note 196, at 364, 367.

201. Epstein, *supra* note 27, at 2152.

202. *Allegheny v. ACLU*, 492 U.S. 573, 673 (1989) (Kennedy, J., dissenting). Justice Kennedy is not advocating that the Pledge of Allegiance be struck down as a violation of the Establishment Clause; on the contrary, he uses this example to illustrate why the endorsement test suggested by Justice O'Connor is objectionable. He argues that “[i]f the endorsement test, applied without artificial exceptions for historical practice, reached results consistent with history, my objections to it would have less force. But, as I understand that test, the touchstone of an Establishment Clause violation is whether nonadherents would be made to feel like ‘outsiders’ by government recognition or accommodation of religion. Few of our traditional practices recognizing the part religion plays in our society can withstand scrutiny under a faithful application of this formula.” *Id.* at 672-73.

waste time, effort, and money challenging them in court. But in addition to creating a social, political, and legal atmosphere that is hostile to nonbelievers, these practices often serve to justify other violations of separation of church and state. Thus, the courts' refusal to subject certain longstanding, traditional religious practices to constitutional scrutiny opens the door for other intrusions from the religion of the majority in public life. This reasoning process has been termed the "any more than" approach.²⁰³ Epstein argues that this approach has "yielded an ever expanding sphere of activities courts have found to be permissible."²⁰⁴ The "any more than" approach has been used to validate government-sponsored nativity displays and prayers at graduation ceremonies.

In *Lynch v. Donnelly*, the Supreme Court upheld the city of Pawtucket's holiday display, which included a creche, in its downtown shopping area. The Court noted that the Constitution does not "require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility towards any."²⁰⁵ The Court then detailed the many ways that the government has recognized religion, citing the national motto, the Pledge of Allegiance, and the National Day of Prayer.²⁰⁶ The Court then concluded that "whatever benefit [the creche provides] to one faith or religion or to all religions is indirect, remote, and incidental; display of the creche is no more an advancement or endorsement of religion than the Congressional and Executive recognition of the origins of the holiday itself as 'Christ's Mass,' or the exhibition of literally hundreds of religious paintings in governmentally supported museums."²⁰⁷

203. Epstein, *supra* note 27, at 2087.

204. *Id.* at 2088.

205. *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984).

206. *Id.* at 674-78.

207. *Id.* at 683. This argument about religious paintings in museums struck me as extraordinarily strange, and yet I was surprised to find no scholarly commentary addressing it. The analogy simply does not work; it seems bizarre to contend that by displaying works of art in a museum, the government is accommodating any particular religious view. Museums typically display art from a wide variety of religious perspectives. For instance, the National Gallery of Art in Washington, D.C., displays Raphael's *Alba Madonna*, a portrait of the Biblical Mary, infant Jesus, and a young John the Baptist; Giovanni Bellini's *The Feast of the Gods*, which depicts the gods Jupiter, Neptune, and Apollo eating and drinking in the woods, attended by nymphs and satyrs; and Benjamin West's *The Expulsion of Adam and Eve From Paradise*, which shows a grief-stricken Adam and Eve being forced out of the Garden of Paradise by an angry-looking archangel. Thus, there seems to be no particular religious view endorsed by the government display of these paintings. Indeed, it seems quite clear that the works are displayed *for their artistic merit*, rather than for the religious perspective they represent. This is quite different from a city government setting up and maintaining a

Clearly, the creche is not an example of ceremonial deism. But by using examples of ceremonial deism to paint a picture of a government that “accommodates” religion, coupled with a few other examples of accommodation (such as museum paintings), the Court justified what the four dissenting Justices in *Lynch* call an “impermissible governmental endorsement of a particular faith.”²⁰⁸ Writing for the dissent, Justice Brennan noted that the effect of the creche “on minority groups, as well as on those who may reject all religion, is to convey the message that their views are not similarly worthy of public recognition nor entitled to public support.”²⁰⁹

Another example of when the “any more test” was used by the Court is *Jones v. Clear Creek Independent School District*.²¹⁰ In *Jones*, graduating seniors and parents challenged “Clear Creek’s policy and actions permitting invocations consisting of traditional Christian prayer at high school graduation ceremonies” as violating the Establishment Clause.²¹¹ The court used the Lemon test to evaluate the school’s policy, but it succumbed to the “any more than” approach when it reached the “effect” prong of the Lemon test:

Constitutional examples of governmental religious accommodation abound. Nebraska may pay a Protestant chaplain to open its legislature’s daily sessions with an invocation. Our statutorily prescribed national motto is “In God We Trust.” The Pledge of Allegiance, recited daily by thousands of public school children, describes us as “One nation under God.” We even begin each public hearing in federal court with the invocation “God save the United States and this Honorable Court.” ... All of the students will have seen United States currency, and many will have witnessed judicial or legislative proceedings.... The Resolution no more advances or endorses religion than

Christian holiday display on government property, where only a single religious perspective is represented and the primary function of the display is depicting the religious view, rather than an artistic effort.

208. *Lynch v. Donnelly*, 465 U.S. 668, 695 (1984).

209. *Id.* at 701.

210. *Jones v. Clear Creek Independent School District*, 930 F.2d 416, 417 (5th Cir. 1991).

211. *Id.*

the myriad of constitutional public religious accommodations cited above...²¹²

The 5th Circuit used practices that have never been properly scrutinized under the Lemon test by the Supreme Court—because the practices are mere “ceremonial deism”—to assert that the practice at hand passes the second prong of the Lemon test. Thus the court concluded that prayer at graduation does not violate the Establishment Clause.

These examples show that because practices deemed ceremonial deism by the Supreme Court can be used to justify other government accommodations of religion, nonbelievers and other members of religious minorities must continue to challenge all violations of the Establishment Clause, no matter how trivial they may seem to be.

IV. CONCLUSION

American atheists are undoubtedly accustomed to living in a society saturated with theistic religious practices. After all, a tremendous majority of Americans believe in God. Because theists are clearly the dominant group in American society, they wield significant cultural power. The theist perspective thus runs through our social, political, and legal institutions, and is presumed to be universal by the dominant majority. For nonbelievers, this constant imposition of the theist perspective is both alienating and marginalizing. The universalization of the theist perspective alienates atheists by making them feel uncomfortable and unwelcome in their own country. It also marginalizes atheists by denying them the opportunity to participate fully in their social, political, and legal communities.

The alienation and marginalization of nonbelievers in the United States is the result of this universalization of theism, a form of cultural imperialism, which theists impose upon nonbelievers. Theists utilize a wide variety of mechanisms to impose theism on nonbelievers. These mechanisms include advocating school prayer and religious character education programs, excluding atheists from popular social organizations that purport to be inclusive, equating morality with theistic belief, punishing atheists who speak out, and

212. *Id.* at 421-22.

allowing unconstitutional governmental endorsement of theism by casting it as “ceremonial deism.” Until theists recognize that the imposition of their own religious perspective on American society oppresses the small minority of nonbelievers, atheists will likely continue to experience alienation and marginalization.