Atheism and the Courts

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I. INTRODUCTION

The vast majority of judicial opinions on the subject of church and state, and consequently the majority of scholarship on this subject, involve the rights of religious groups to be free of, or supported by, the government. Hardly any attention has been paid to the legal concerns of atheists, those people who profess a lack of belief in God. The number of legal opinions involving the rights of atheists is relatively small, and I am aware of little scholarship on this issue.[1] Atheism is a topic worthy of discussion, however, as an underappreciated variety of religious belief—or non-belief, as the case may be. Moreover, because atheism entails the deliberate rejection of religion, the subject serves as an important test of the scope of the First Amendment's protection of religious liberty.[2] This paper addresses this scholarly shortcoming by examining a range of judicial opinions concerning atheists and atheism in light of the First Amendment.

Atheism is defined as "disbelief in, or denial of, the existence of a God."[3] Atheism is distinct from agnosticism, which is "belief that there can be no proof either that God exists or that God does *not* exist."[4] Older, more pejorative definitions of atheism equated this

[1] The one article which provides an overview of atheism-related judicial opinions is Derek H. Davis, Editorial, *Is Atheism a Religion? Recent Judicial Perspectives on the Meaning of 'Religion'*, 47 J. CHURCH & ST. 707, 708 (2005). Other articles offer more specialized discussions of this topic. *See, e.g.*, Edward P. Abbott, *Atheism and the Religious Liberty Protection Act: A Place for Everyone or Everyone in their Place*, 2 RUTGERS J. LAW & RELIG. 4 (2002); Kyle Cohen, *One Nation Under Atheism, With Liberty and Justice for All*, 12 DIGEST 3 (2004) (discussing the atheist challenge to the Pledge of Allegiance in *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004)).
[2] The First Amendment states, in part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I. These clauses are known as the Establishment Clause and the Free Exercise Clause, respectively.
[3] THE OXFORD ENGLISH DICTIONARY.
[4] *Id*. An agnostic is "one who is skeptical about the existence of God but does not profess true atheism." *Id.*

philosophical outlook with "godlessness" or "wickedness."[5] This movement has been largely a philosophic one, highlighted by famous thinkers such as Bertrand Russell and Friedrich Nietzsche,[6] but it has also included a populist component as well. This everyday variety of anti-religion is described by the author Paul Vitz as "superficial atheism,"[7] in light of the fact that many people are insincere, unprincipled, or unsophisticated in their claimed atheism, as many cases in this paper illustrate.

This paper focuses on the everyday atheists in modern America, examining their place in American society through the lens of judicial opinions. Atheists commonly portray themselves—and are portrayed—as victimized outsiders, as social outcasts and pariahs.[8] Atheists often celebrate that status as an indication of philosophic and psychological liberation from the confines of religion, while critics find serious spiritual flaws in their abdication of faith. Atheists also argue that they are discriminated against based on their views; in the constitutional context, they allege that they are victims of unconstitutional violations of their right to free exercise of religion and freedom from the establishment of religion, given the arguably ubiquitous undertone of Christianity in American life.

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[5] *Id.*; MERRIAM-WEBSTER COLLEGIATE DICTIONARY 72 (10th ed. 1993) (citing older versions).

[6] The scholarship on atheism is also overwhelmingly philosophical in focus, rather than sociological or cultural. For examples of philosophical tracts on atheism and intellectual histories of this movement, *see, e.g.*, MICHAEL S. BUCKLEY, DENYING AND DISCLOSING GOD: THE AMBIGUOUS PROGRESS OF MODERN ATHEISM (2004); MICHAEL MARTIN, ATHEISM: A PHILOSOPHICAL JUSTIFICATION (1990); VINCENT P. MICELI, THE GODS OF ATHEISM (1971); J.J.C. SMART & J.J. HALDANE, ATHEISM & THEISM (2nd ed. 2003); S. PAUL SCHILLING, GOD IN AN AGE OF ATHEISM (1969).

[7] PAUL VITZ, FAITH OF THE FATHERLESS: THE PSYCHOLOGY OF ATHEISM 130 (1999). Most of Vitz's book is devoted to discussing the philosophical atheism of Friedrich Nietzsche, Bertrand Russell, and others, but he adds this chapter on superficial atheism because "No psychological critique of atheism would be complete without an examination of its more shallow and much more common forms." Using his own personal history to illustrate "superficial atheism," he writes: "On reflection, I have seen that my reasons for becoming, and remaining, an atheist-skeptic . . . were, on the whole, superficial and lacking in serious intellectual and moral foundation. Furthermore, I am convinced that these reasons are common among Americans, especially in intellectual, academic, and artistic communities and in the media." *Id.*

[8] *See* Jennifer Gresock, *No Freedom from Religion: The Marginalization of Atheists in American Society, Politics, and Law*, 1 MARGINS 569 (2001); *infra* Part II.

If atheists are indeed discriminated against on an everyday basis, however, we would expect to see factual support in the evidence presented by atheists in court. We would also expect to see atheists winning their constitutional claims. Additionally, if discrimination against atheists is indeed pervasive in American society, we might expect judicial opinions on this subject to reveal indications of bias, or at least lack of sympathy. Upon studying the case law on this issue, however, these easy assumptions prove woefully off the mark. In fact, there have not been very many lawsuits brought by atheists, and most that have been brought have been lost. Many of these lawsuits prove entirely without merit, as well, at least based on the facts of the case, due to serious factual shortcomings. Even where courts reach the constitutional merits of a claim, many cases fail because although the separation between church and state is vigorously upheld by our courts, the First Amendment does not provide such sweeping separation as to protect against every trapping of religion in everyday life. Instead, the constitutional claims brought by atheists that are unrealistically ambitious in their requested relief or woefully lacking in evidence of harm to the plaintiff may be better left to the legislature. Other claims, such as unsubstantiated and frivolous allegations of employment discrimination based on plaintiffs' atheism, are better off not considered at all.

This paper provides an overview of legal opinions involving atheists' rights under the First Amendment. Part II describes the conventional wisdom about atheists as a persecuted minority, and in the process suggests why this assumption may overstate the scope of atheism in American society as well as the scope of discrimination. Part III looks at atheists and the Supreme Court, describing the few Court opinions involving atheistic plaintiffs and tracing the historical expansion of religious liberty in Supreme Court caselaw to show that atheists now fall within the scope of First Amendment protections. Part IV examines lower-court opinions

involving atheists with meritorious claims, those that engage the courts in substantial constitutional questions, whether or not the plaintiffs win their case. Part V presents a variety of cases in which atheists and alleged atheists have failed to win lawsuits, and indeed have often failed badly by their inability to present facts or law to support their claims. Part VI concludes with further observations on what this case law tells us about the place of atheists in American courts and society, as well as suggestions for future atheist lawsuits.

II. ATHEISTS AS A PERSECUTED MINORITY

Atheists are often perceived as a misunderstood and persecuted minority in American society. This view—and its weaknesses—are best illustrated by a recent law student's note entitled *No Freedom from Religion: The Marginalization of Atheists in American, Society, and Law.*[9] The author, Jennifer Gresock, equates the perceived mistreatment of atheists with other forms of "oppression" and "cultural imperialism" in American society, including racism, classism, and sex discrimination.[10] Her comparison between discrimination against atheists and discrimination against other social minorities ignores a serious difference, however. Race, ethnicity, gender, and arguably sexual orientation are innate characteristics, and social class is at least difficult to transcend. Atheism, however, is a philosophic worldview which can be adopted or rejected at will, and the differentiation between atheists and the social majority is based on beliefs rather than inviolate characteristics.

Whether or not one accepts Gresock's characterization of atheists as a discriminated-against minority, her analysis also calls into question the scope of the population at issue. She implies, as does the organization American Atheists, that everyone who does not believe in God

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[9] Gresock, *supra* note 8.
[10] *Id.* at 569, 573: "Because believers constitute the majority of the population, they easily dominate nonbelievers, suffocating their voices with a powerful exertion of cultural imperialism."

is by definition an atheist.[11] In fact, not everyone who disbelieves in God defines himself as an atheist; many people would describe themselves as agnostic, or "spiritual" but neither religious nor atheistic, or would simply choose not to label themselves at all. The term "atheist" suggests the affirmative acceptance of a defined atheist worldview, along with the contrarian philosophic outlook that is associated with that view, beyond the mere denial of religion. Many people who disbelieve in God likely choose not to self-identify as atheists exactly because of the cultural stigma associated with atheism, of the sort Gresock describes;[12] others may not think about the issue much one way or another. The plaintiffs in the lawsuits described below are deliberately, consciously atheistic, but they are only a vocal and self-defined subset of those who would say they disbelieve in God. In other words, there is a cultural, philosophical, and numerical gap between denial of God and acceptance of atheism. If we accept this proposed definition of atheists as the subset of self-affirming atheists among all disbelievers in religion, the population in question—and thus the scope of potential "oppression"—is much smaller.

Despite these statistical and definitional questions at the outset of her essay, Gresock does point out some phenomena in everyday American life which can be construed as challenging or offensive to the fundamental beliefs of atheists. We pledge allegiance to the flag, "One nation under God." Our coins proclaim "In God we Trust," the national motto. Christian holidays such as Easter and Christmas are national holidays. These facts seem to implicate atheistic belief indirectly, by implied exclusion, while in other circumstances atheists are explicitly excluded.[13] For example, atheists cannot join the Boy Scouts, a practice which has been upheld by the

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[11] *Id*. at 569-72 (contrasting atheists with "believers" and citing American Atheists for the suggestion that there are 26 million atheists in the United States).
[12] *See generally id*.
[13] *See generally* Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2096 (1996).

courts.[14] Despite the Supreme Court's holding that religious oaths as a condition of public office are unconstitutional,[15] state constitutions still require that people believe in God to hold office, though these provisions are rarely enforced.[16]

However, despite Gresock's emphatic language and extensive discussion of atheists' persecution and marginalization, it is striking to note how little evidence there is of actual targeting of atheists or atheist belief. Much of the harm which Gresock describes is a matter of perception rather than tangible persecution, of disfavor rather than disenfranchisement, of dislike rather than discrimination. While perhaps psychologically cognizable, this is the sort of abstract, intangible harm that fails as a legal basis of harm, as atheistic plaintiffs have already discovered.[17] That is, a personal sense of disapproval among others, or a sense of outsider status, does not rise to the level of constitutionally-protectible harm. Gresock's analysis falls short of providing evidence of tangible bias in the same way that many atheists' lawsuits fail for lack of evidence of discrimination. To the extent that cultural prejudice and philosophic disagreement against atheists does exist—for example, when President George H.W. Bush said that atheists "should [not] be considered as citizens, nor should they be considered patriots"[18]—this is entirely unremarkable given the profound philosophical challenge posed by atheists' beliefs. So while it is unfortunate that atheists are slighted by others' criticism of their philosophic beliefs, they cannot say it is unexpected. Such disagreement and disapproval is also acceptable in a

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[14] Welsh v. Boy Scouts of America, 993 F.2d 1267 (7th Cir. 1993); Seabourn v. Coronado Area Council, 257 Kan. 178 (1995). *See infra* pp. 19-21.
[15] Torcaso v. Watkins, 367 U.S. 488 (1961); *see infra* p. 42.
[16] *See infra* pp. 42-47 (discussing unsuccessful challenges to requirements of this kind in state constitutions).
[17] In *Flora v. White*, 692 F.2d 53 (1982), two atheists argued in part that they suffered "adverse psychological consequences" due to the Arkansas Constitution's requirement that public officials believe in God, but this sort of general psychological impact is insufficient to show injury as a matter of law, according to the Supreme Court. *See* Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 486 (1982); *see also infra* p. 45.
[18] *See* http://www.positiveatheism.org/writ/ghwbush.htm (last visited May 8, 2006). *See also* http://members.aol.com/nogodperiod/propaganda.htm (last visited May 8, 2006) for further examples of criticism of atheists.

democratic society; the debate about atheism and religion in this country is a healthy sign of democracy at work.

Despite the courts' expanding definition of religion, which now includes atheism within the scope of First Amendment protections, constitutional law is not currently very receptive to the claims of atheists and others who seek to enforce the separation of church and state. Although many Americans undeniably feel uncomfortable about "ceremonial deism," the incidental religious elements in everyday public life, as a legal matter these practices have generally been found constitutional because of an overriding interest in national heritage.[19] It is unfortunate that our courts in such cases have adopted a majoritarian approach to religious debate, ceding to heritage when the Pledge of Allegiance or other institutions are challenged, in spite of their undeniably negative impact on atheists and religious minorities. Regardless, courts' approval of ceremonial deism indicates that they are only willing to go so far toward recognizing marginal religious beliefs, and conversely suggests they are willing to uphold majoritarian cultural norms in the religious realm. This deference should arguably be changed; there is more that could be done by the courts to extend the constitutional separation between church and state. However, as shown below, in the meantime courts *are* willing to give protection to individual atheists when they can show evidentiary and legal merit for their claims, such as the plaintiffs who successfully argued for conscientious-objector status during Vietnam.[20]

III. ATHEISTS AND THE SUPREME COURT

[19] *See generally* Epstein, *supra* note 13 (describing "ceremonial deism" and questioning the courts' acceptance of it).
[20] United States v. Foran, 305 F. Supp. 1322 (E.D. Wis. 1969); United States v. Shacter, 293 F. Supp. 1057, 1062 (D. Md. 1968). *See infra* p. 16.

The concept of "religion" was left undefined by the Framers in the First Amendment,[21] likely intentionally so, in order to protect "a diversity of beliefs, not merely the traditional ones, from undue advancement or prohibition of expression by government."[22] The judicial branch has thus been left the responsibility of defining "religion," the rights associated with religious belief, and the relationship between religion and governmental authority. Over time, the courts have adopted increasingly expansive and inclusive definitions of the term, although the courts' protection of religious liberty has fluctuated. The American courts began with a traditional view that religion depended on faith in God but now accept a currently much broader and amorphous definition.[23] One scholar, writing in the *Journal of Church and State* last year, suggested that this expanding definition of religion in the courts mirrors a broader change in cultural norms: "[A]s religious pluralism in America has expanded, the constitutional meaning of religion has expanded as well."[24] The definition of religion is now broad enough to explicitly include atheists within the constitutional protection of the First Amendment, and this judicial acceptance arguably mirrors a broader contemporary tolerance of atheism in American society.

The Supreme Court first addressed the scope and definition of "religion" in the nineteenth century, in cases involving laws which burdened Mormon polygamy.[25] The Court initially formulated a view of religion in light of conventional Christianity, referring to "one's

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[21] The First Amendment states merely that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I.

[22] Davis, *supra* note 1, at 708. Indeed, although the Framers themselves generally held theistic beliefs in God, Thomas Jefferson addressed his Statute of Religious Freedom to protecting "the Jew and Gentile, the Christian and Mahometan, the Hindoo [sic], and infidel[s] of every denomination." *Id.* at 709.

[23] For an example of the Supreme Court's traditional view, consider *Davis v. Beason*, 133 U.S. 333, 342 (1890): "The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will."

[24] *Id*.

[25] Reynolds v. United States, 98 U.S. 145 (1878); *Davis*, 133 U.S. 333 (1890). In *Reynolds*, as an observer has noted, "the defendant's polygamous practices were too unconventional to be protected by the First Amendment [so] the Court found it unnecessary to formulate a definition of religion." Davis, *supra* note 1, at 709. The Court in *Davis* defined religion but reached the same result as *Reynolds*, finding that polygamy fell outside the permissible scope of the First Amendment: "However free the exercise of religion may be, it must be subordinate to the criminal laws of the country . . . ." *Davis*, 133 U.S. at 343.

views of his relation to his Creator"[26] and "belief in a relation to God."[27] The early definition presumed religious freedom *among* theists, excluding other types of religious belief as well as atheism from its scope of protection:

> The first amendment to the Constitution . . . was intended to allow every one under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship as he may think proper, not injurious to the equal rights of others . . . .[28]

This narrow, traditional standard was understandable given the overwhelmingly Christian population in America at the time. This narrow standard led the Supreme Court and lower courts to uphold many laws which burdened or punished nontraditional religious beliefs and practices,[29] including a case from 1943 upholding the conviction of an atheist who refused to register for the draft.[30]

Beginning in the 1940s, however, the Court adopted a broader definition of religion. In *United States v. Ballard*,[31] the Court held that courts could not question the truth or falsity of religious belief, only its sincerity: "Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs."[32] Moreover, the court emphasized the subjectivity and individualism of religious belief: "Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of

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[26] *Davis*, 133 U.S. at 342. Undoubtedly intending to define religion broadly, in the context of the times, the Court in *Davis* defined "religious liberty" as "a right embracing more than mere opinion, sentiment, faith, or belief. It includes all 'human conduct' that gives expression to the relation between man and God." Not that this definition was still limited to belief in God.
[27] United States v. MacIntosh, 283 U.S. 605, 633-34 (1931).
[28] *Davis*, 133 U.S. at 342.
[29] Davis, *supra* note 1, at 709-10.
[30] United States v. Kauten, 133 F.2d 703 (2d Cir. 1943), *infra* p. 17.
[31] United States v. Ballard, 322 U.S. 78 (1944).
[32] *Id*. at 86.

mortals does not mean that they can be made suspect before the law."[33] The court also retrospectively read the Framers' open-ended definition of religion as an inclusive mandate:

> The Fathers of the Constitution . . . fashioned a charter of government which envisaged the widest possible toleration of conflicting views. Man's relation to his God was made no concern of the state. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views.[34]

Ballard deprived courts of the ability to judge the correctness of religious belief, while emphasizing its individualistic nature, thus loosening and broadening the definition of religion.

The Supreme Court took another large step toward incorporating atheists within the scope of First Amendment protection—albeit indirectly—in two cases involving conscientious objection during the Vietnam War. These conscientious-objection cases were decided on statutory rather than constitutional grounds, and thus do not directly speak to atheists' relationship with the First Amendment. However, the opinions nonetheless showed the Court's willingness to expand the legal definition of religion, and subsequent First Amendment cases have in turn relied on that broadened definition.[35] In *United States v. Seeger*,[36] the court found that three men should be excused from military service even though they did not believe in a "Supreme Being," as required of conscientious objectors by the Universal Military Training and Service Act.[37] Instead, the Court relied on Congressional intent in concluding that "the test of

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[33] *Id*. at 86-87.
[34] *Id*. at 87.
[35] Davis, *supra* note 1, at 713: The conscientious-objector cases "are important in tracking the evolution of the constitutional meaning of religion because none [were] decided on constitutional grounds. Instead, the courts merely interpreted congressional statutes in a way that extended the privilege of conscientious objection to those of nontraditional beliefs. Nonetheless, because the conscription cases dealt specifically with the meaning of religion, cases arising outside the conscription context that have been decided on constitutional grounds . . . have often resorted to the language of the conscription cases as useful precedents." For examples of reliance on *United States v. Seeger*, 380 U.S. 163 (1965) and *Welsh v. United States*, 398 U.S. 333 (1970), discussed in this paragraph, see *Cutter v. Wilkinson*, 125 S. Ct. 2113, 2124 (2005), and *Wisconsin v. Yoder*, 406 U.S. 205, 248 (1972) (Douglas, J., dissenting).
[36] United States v. Seeger, 380 U.S. 163 (1965).
[37] "Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religions training and belief in this connection means an individual's belief in relation to a Supreme Being . . . but does not include essentially political, sociological, or philosophical views or a

belief 'in a relation to a Supreme Being'" under the Act "is whether a given belief that is sincere and meaningful occupies a place in the life of the possessor parallel to that filled by the orthodox belief in God . . . ."[38] The appellants in this case were not atheists, as the Court noted,[39] but rather were motivated by sincere and powerful disapproval of war.

Seeger found that "merely personal moral codes" were ineligible as grounds for conscientious objection,[40] but five years later, in *Welsh v. United States*,[41] the Court found that even someone who claimed purely intellectual opposition to war could properly object to it, since the alternative "places undue emphasis on the registrant's interpretation of his own beliefs."[42] In effect, the Court suggested that Welsh made a mistake on his application.[43] By downplaying the factual distinctions between *Seeger* and *Welsh*, the Court further opened the door to a broader definition of conscientious objection and, indirectly, a more permissive view of religious belief under the law. Between these opinions, two lower courts found that self-declared atheists, in particular, should also be considered conscientious objectors.[44]

In other opinions before and since *Seeger* and *Welsh*, the Supreme Court has implicitly found that atheism deserves the same constitutional protection as conventional religious belief, though the Court has never explicitly held that atheism qualifies as a religion.[45] In *Epperson v.*

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merely personal moral code." Universal Military Training and Service Act, 50 U.S.C. App. § 456(j) (1958), *cited by* Welsh v. United States, 398 U.S. 333, 336 (1970).

[38] *Seeger*, 380 U.S. at 165-66. The Court found that "Congress deliberately broadened [the scope of conscientious objection] by substituting the phrase 'Supreme Being' for 'God'" in the military-conscription statutes. *Id.* at 175.

[39] *Id*. at 173-74: "No party claims to be an atheist or attacks the statute on this ground. The question is not, therefore, one between theistic and atheistic belief."

[40] *Id*. at 185-86.

[41] Welsh v. United States, 398 U.S. 333 (1970).

[42] *Id*. at 341.

[43] "[V]ery few registrants are fully aware of the broad scope of the word 'religious' as used in [the Act], and accordingly a registrant's statement that his beliefs are nonreligious is a highly unreliable guide for those charged with administering the exemption." *Id.*

[44] United States v. Foran, 305 F. Supp. 1322 (E.D. Wis. 1969); United States v. Shacter, 293 F. Supp. 1057, 1062 (D. Md. 1968). *See infra* p.16.

[45] Kaufman v. McCaughtry, 2006 U.S. Dist. LEXIS 13278, at 16 (D. Wis. 2006) (noting this fact).

Arkansas,[46] the Court wrote, "The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion."[47] In *Everson v. Board of Education*,[48] they held that "No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance."[49] In *Torcaso v. Watkins*,[50] they wrote, "We repeat and again affirm that neither a State nor the Federal Government can constitutionally force a person to profess a belief or disbelief in any religion."[51] And in *Wallace v. Jaffree*:[52] "the individual freedom of conscience protected by the First Amendment embodies the right to select any religious faith or none at all."[53] *Wallace* explicitly recognized that freedom of religion required "equal respect for the conscience of the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism."[54] This view has been affirmed as recently as last year, in summarizing the government's obligation to "not exercise a preference for one religious faith over another."[55] In *Rosenberger v. Rector & Visitors of the University of Virginia*,[56] a 1995 case regarding freedom of speech and press, the court found atheism equally deserving of free-speech protection, noting that "It is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint."[57] The protection of atheism falls within the Court's

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[46] Epperson v. Arkansas, 393 U.S. 97 (1968).
[47] *Id*. at 104.
[48] Everson v. Bd. of Ed., 330 U.S. 1 (1947).
[49] *Id.* at 16.
[50] Torcaso v. Watkins, 367 U.S. 488 (1961).
[51] *Id*. at 495.
[52] Wallace v. Jaffree, 472 U.S. 38 (1985).
[53] *Id*. at 52-53.
[54] *Id.*
[55] Van Orden v. Perry, 125 S. Ct. 2854, 2875 (2005) (Stevens, J. dissenting). *See also* County of Allegheny v. Am. Civ. Liberties Union, 492 U.S. 573, 590 (1989) (citing *Wallace*).
[56] Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 832 (1995).
[57] *Id.* at 831.

often-repeated observation that the government must remain neutral with regard to religion, including when judging the merits of religiously-related beliefs such as atheism.[58]

The Supreme Court has only heard two cases involving atheistic plaintiffs. The first was *School District of Abington Township v. Schempp*,[59] a 1963 opinion which struck down prayer in public schools. The case consolidated two cases in the lower courts. In one case, a Unitarian family had challenged a Pennsylvania law which required Bible readings before each school day; although the law allowed children to be excused from class, the parents feared the children would be "labeled as 'oddballs'" and labeled pejoratively as atheists.[60] In the second case, a woman and her son, both avowed atheists, challenged a Baltimore law which also mandated Bible readings in school.[61] While conceding that "religion has been closely identified with our history and government,"[62] the Court applied its case law on governmental neutrality toward religion in striking down the school-prayer laws. In both Pennsylvania and Baltimore, the Court concluded that the schools' Bible readings were religious ceremonies, and intended to be so, which therefore violated the Establishment Clause's neutrality requirement and petitioners' rights.[63] The Court did not refer to the atheistic plaintiffs or the subject of atheism in its holding, but *Schempp* arguably remains the largest judicial victory for atheists to date because of its broad advancement of atheists' rights and the separation of church and state.

Besides *Schempp*, the only other Supreme Court opinion involving an atheistic plaintiff and concerned with atheists' rights is *Elk Grove Unified School District v. Newdow*,[64] a highly-

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[58] *See* Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 214-23 (1963) (summarizing the Supreme Court's caselaw on the neutrality requirement).
[59] *Id.*
[60] *Id*. at 205-208.
[61] *Id*. at 211-12. The plaintiffs argued that the Baltimore law "threatens their religious liberty by placing a premium on belief as against non-belief and subjects their freedom of conscience to the rule of the majority." *Id*. at 212.
[62] *Id*. at 212-13.
[63] *Id*. at 223-25.
[64] Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004). *See also* Cohen, *supra* note 1 (discussing this case).

publicized 2004 decision in which a *pro se* atheistic plaintiff challenged the constitutionality of the words "under God" in the Pledge of Allegiance. Like the plaintiffs in *Schempp*, Newdow's daughter recited the Pledge of Allegiance in school, and he challenged the Pledge as her father and "next friend."[65] However, in this case he lacked standing to sue on her behalf because a state family court had recently granted her mother greater custody of their child.[66] The Court was also sympathetic to the mother's wishes to shield her daughter from the national spotlight and to disassociate her from her father's atheism. As the Court explained, "In our view, it is improper for the federal courts to entertain a claim by a plaintiff whose standing to sue is founded on family law rights that are in dispute when prosecution of the lawsuit may have an adverse effect on the person who is the source of the plaintiff's claimed standing."[67]

By focusing on Newdow's lack of standing, the Supreme Court ducked the constitutional questions involving the Pledge of Allegiance and atheists' rights, although the introduction to the opinion hinted that the court would have found against him on the merits. As in many other situations where the Court has upheld instances of "ceremonial deism" found in everyday American life, in *Newdow* the Court seemed inclined to uphold the Pledge due to its important historic and patriotic place in American life.[68] Moreover, the Court suggested that the possible religious imposition of the Pledge was mitigated by students' right not to participate in reciting it, as held in *West Virginia State Bd. of Ed. v. Barnette*.[69] In turn, *Newdow*'s sympathy toward

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[65] *Id*. at 8.
[66] *Id*. at 14: "At a hearing on September 11, 2003, the Superior Court announced that the parents have 'joint legal custody,' but that [her mother] 'makes the final decisions if the two . . . disagree."
[67] *Id*. at 17.
[68] *See, e.g., id*. at 6: "As its history illustrates, the Pledge of Allegiance evolved as a common public acknowledgement of the ideals that our flag symbolizes. Its recitation is a patriotic exercise designed to foster national unity and pride in those principles."
[69] *Id*. at 8: "Consistent with our case law, the School District permits students who object on religious grounds to abstain from the recitation. See West Virginia State Bd. of Ed. v. Barnette, 319 U.S. 624." *But see* Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 224-25 (1963) ("Nor are these required exercises mitigated by the fact

supposedly trivial signs of religion in everyday life reflects a larger theme in atheism-related cases in American courts: although our judicial system willingly redresses individuals' legal wrongs, as merited, the courts are often reluctant—at least on the subject of church and state—to make radical pronouncements that fundamentally upset cultural traditions or historical norms.[70]

IV. MERITORIOUS ATHEIST CLAIMS

Meritorious atheist claims are those lawsuits that require courts to give serious consideration to atheists' constitutional arguments. These claims are frequently unsuccessful, however, but even the failed claims at least present serious issues and contribute to the jurisprudence surrounding atheists' rights under the First Amendment. In this section, the meritorious cases are subdivided into successful and unsuccessful claims for organizational convenience. These cases contrast with the following section of this paper, which describes the many cases that are both unsuccessful and meritless, often because the plaintiffs' claims of discrimination lack evidentiary support and fail to raise important constitutional issues.

a) Successful Claims

Very few lawsuits brought by atheists have been successful. Atheistic plaintiffs have won their lawsuits only when they could show a clear violation of the government's obligation to treat religious faiths neutrally, resulting in—and often presumptively because of[71]—unconstitutional discrimination against their atheistic beliefs. The majority of atheism-related

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that individual students may absent themselves upon parental request, for that fact furnishes no defense to a claim of unconstitutionality under the Establishment Clause.").

[70] *See generally* Epstein, *supra* note 13 (discussing the courts' willingness to uphold "ceremonial deism"). Prayer in public schools may be the largest exception to this rule, where courts have gone beyond public opinion in invalidating a practice which perhaps a majority of Americans support. *See, e.g.*, Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 203-04 (and accompanying footnotes): "In 1962, and again in 1963 [in *Engel v. Vitale*, 370 U.S. 421 (1962) and *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963)], the Supreme Court rendered extremely unpopular decisions regarding prayer in schools . . . . Both polls and news coverage make clear that a majority of the population opposed the decisions. Engel, particularly, created quite a stir, and numerous proposals were introduced in Congress to amend the Constitution to permit school prayer."

[71] For example, in *United States v. Foran*, 305 F. Supp. 1322, 1327 (E.D. Wis. 1969), discussed below, the court suggested that military draft boards targeted the atheistic plaintiff for prosecution because of his atheism.

lawsuits, as we have seen, fail because of factual shortcomings or inability to reach the legal standard required to show violations of the First Amendment. Moreover, the real scope of successful atheist lawsuits is further limited by the fact that two prominent examples, described next, are conscientious-objector cases that were based on the courts' interpretation of the Selective Service Act of 1967, not the First Amendment. Although the cases broadened the definition of religion and thus promoted atheists' rights, they did not directly speak to or expand atheists' constitutional rights under the First Amendment's protection of religious liberty.

In the late 1960s, between the Supreme Court's conscientious-objector opinions in *Seeger* and *Welsh*, two lower courts found that self-declared atheists—distinguished per my distinction from those who merely disbelieve in God—should also be considered conscientious objectors. In *United States v. Foran*,[72] the court held that an avowed atheist's objection to the Vietnam War was based on "religious training and belief," as required by the Selective Service Act's exception for those morally opposed to war.[73] *Foran* relied on the language of *Seeger*, finding that the plaintiff's atheism was "a sincere and meaningful belief which occupied in the life of its possessor a place parallel to that filled by God."[74] His atheism played a central role in his life and he developed these beliefs in reaction to a lifetime of training in Catholicism, meaning that his ideas were not merely the product of sociological or philosophical training.[75] The other case similarly found that an atheist's beliefs were strongly influenced by his childhood instruction in Judaism.[76]

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[72] United States v. Foran, 305 F. Supp. 1322 (E.D. Wis. 1969).
[73] "Nothing contained in this title . . . shall be construed to require any person" to serve in the military "who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form." Selective Service Act of 1967, 50 U.S.C. App. § 456(j), *cited by Foran*, 305 F. Supp. at 1324.
[74] *Foran*, 305 F. Supp. at 1325, citing United States v. Seeger, 380 U.S. 163, 176 (1965).
[75] 305 F. Supp. at 1325-27.
[76] United States v. Shacter, 293 F. Supp. 1057, 1062 (D. Md. 1968): The government urges "that his beliefs stem essentially from philosophical origins. A careful review of the record gives no indication whatsoever that defendant was influenced by a particular philosopher or that he was even a student of philosophy. On the other hand, the

These cases contrast with *United States v. Kauten*,[77] a Second Circuit case from 1943 which upheld the conviction of an atheistic conscientious objector who refused to join the Army during World War II. In this case, the court held that the plaintiff's atheistic objection to war was based on "philosophical and political considerations," not conscience.[78] Although *Kauten* noted that the Selective Service Act no longer required that conscientious objectors belong to groups that held avowedly antiwar views, such as the Quakers, twenty years before *Seeger* the courts were evidently not prepared to recognize philosophically-based objections to war. Nor did the court consider the possibility that the plaintiff's atheism, by itself, could be *prima facie* grounds for conscientious objection.

I could find only case in which an atheist won a constitutional claim against the government. In *Griffin v. Coughlin*,[79] the New York Court of Appeals held that an atheistic prisoner could not be deprived of expanded family visitation rights for refusing to participate in a rehabilitation program that relied on the religion-based teachings of Alcoholics Anonymous (AA). The prison program relied heavily upon AA's "Twelve Steps," a succession of steps toward overcoming drug and alcohol addiction which espoused recovery through religious awakening.[80] The defendants, lower court, and dissenting judge all argued that AA's characterization of God, as adopted by the prison, survived establishment-clause scrutiny because the language emphasized individual spirituality instead of referring to "God as an

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record clearly shows that he was instructed in Judaism, and his statements submitted in support of his claimed exemption are replete with indications that he has been strongly influenced by such religious teachings."

[77] United States v. Kauten, 133 F.2d 703 (2d Cir. 1943).

[78] *Id*. at 707-08.

[79] Griffin v. Coughlin, 88 N.Y.2d 674, 677 (1996).

[80] The Twelve Steps include the following: "3) [W]e made a decision to turn our will and our lives over to the care of God as we understood him . . . . 5) Admitted to God, and ourselves, and to another human being the exact nature of our wrongs . . . . 11) Sought through prayer and meditation to improve our conscious contact with God as we understood him, praying only for knowledge of His will for us and the power to carry that out." *Id*. at 678 (emphasis removed from original).

institutional religion would."[81] The Court of Appeals found that this accommodating viewpoint erred by "applying too narrow a concept of religion or religious activity for Establishment Clause analysis and disregarding the compulsion used to induce petitioner to attend and participate in A.A. meetings heavily laced with at least general religious content."[82] Although AA was superficially inclusive as an organization, "their dominant theme is unequivocally religious" and the references to God and prayer in the twelve steps "were intended in their 'conventional sense'" of religiosity.[83] Moreover, AA is hostile to atheists in particular; as the court noted, a chapter in AA's basic text favorably describes the transformation from incorrect agnosticism and atheism to spiritual awareness.[84] The Court of Appeals relied on Supreme Court opinions requiring governmental neutrality with respect to religion[85] and prohibiting governmental endorsement of religion[86] in concluding that visitation rights could not be conditioned on participating in the AA-styled program.

b) Unsuccessful but Meritorious Claims

A handful of lawsuits brought by atheists have failed in court but nevertheless presented serious issues for discussion and required serious consideration. In these opinions courts were able to look beyond the evidence and consider the constitutional merits of their claims under the First Amendment, though these plaintiffs nevertheless lost on the merits. Such cases contrast

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[81] *Id*. at 679-80, citing a prison official's affidavit.
[82] *Id*. at 680.
[83] *Id*. at 681, 684 (citing Welsh v. United States, 398 U.S. 333, 352 (1970)). In sum, AA's twelve-step program was religious, and hence the prison's rehabilitation program constituted religious exercise for establishment-clause purposes: "Followers are urged to accept the existence of God as a Supreme Being, Creator, Father of Light and Spirit of the Universe. In 'working' the 12 steps, participants become actively involved in seeking such a God through prayer, confessing wrongs and asking for removal of shortcomings." *Id*. at 683.
[84] Chapter 4 of AA's Big Book, entitled "We Agnostics," includes the following: "Instead of regarding ourselves as intelligent agents, spearheads of God's ever advancing creation, we agnostics and atheists chose to believe that our human intelligence was the last word . . . . Rather vain of us, wasn't it?" *Cited by id*. at 682.
[85] Griffin v. Coughlin, 88 N.Y.2d 674, 680 (1996), citing Bd. of Educ. of Kiryas Joel Vil. Sch. Dist. v. Grumet, 512 U.S. 687 (1994); Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203 (1963).
[86] 88 N.Y.2d at 680, citing *Kiryas Joel*, Allegheny County v. Greater Pittsburg Am. Civ. Liberties Union, 492 U.S. 573 (year), and Lemon v. Kurtzman, 403 U.S. 602 (1971).

with those in the following section, where plaintiffs generally lost on summary judgment due to factual shortcomings.

Besides *Newdow*, the most well-known unsuccessful atheist lawsuit may be *Welsh v. Boy Scouts of America*.[87] This Seventh Circuit opinion from 1993 famously found that the Boy Scouts could not be forced to accept a prospective member who refused to affirm his belief in God. The plaintiffs, a father and son who were denied membership as leader and Scout, alleged that the Boy Scouts' exclusion of atheists violated Title II of the Civil Rights Act of 1964, which bars discrimination in public accommodations.[88] The plaintiffs did not in fact label themselves as atheists,[89] though the case has been understood as a test of atheists' rights.[90] Like *Newdow*, this case was significant and achieved notoriety because it challenged the alleged discrimination imbedded in an institution—there the Pledge of Allegiance, here the Boy Scouts—regarded as central to the American way of life.[91]

In its opinion, the Seventh Circuit rejected plaintiffs' challenge to the Boy Scouts' admissions criteria because the Civil Rights Act of 1964, which prohibits discrimination in

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[87] Welsh v. Boy Scouts of America, 993 F.2d 1267 (7th Cir. 1993).

[88] *Id*. at 1268, citing Civil Rights Act of 1964, 42 U.S.C. § 2000(a)-(b) (1988) ("All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin."). The plaintiffs implied, and the court apparently assumed—but did not say explicitly—that atheists could be covered under this statute on the basis of "religion."

[89] Welsh v. Boy Scouts of America, 742 F. Supp. 1413, 1417 n.3 (D. Ill. 1990): "Defendants refer to plaintiffs as atheists, but that label does not appear in plaintiffs' complaint and may not be accurate. An 'atheist' is 'one who denies the existence of God,' while an 'agnostic' is 'one who holds the view that any ultimate reality (as God) is unknown and probably unknowable'. . . . Plaintiffs' complaint does not specifically characterize plaintiffs as adherents to either of these positions" (citations omitted).

[90] 993 F.2d at 1278-79 (Cummings, J., dissenting) ("The question in this case, then, involves a membership organization's power to draw a circle around itself that excludes atheists and agnostics."). *See also, e.g.,* Edward Bigham, *Recent Decision: Civil Rights - Seventh Circuit Permits Boy Scouts of America To Exclude Atheist - Welsh v. Boy Scouts of America, 993 F.2d 1267 (7th Cir.), cert. denied, 114 S. Ct. 602 (1993)*, 67 TEMP. L. REV. 1333 (1994); William Grady, *Scout Ban on Atheists is Upheld*, CHI. TRIB., May 18, 1993, Du Page 1; David Savage, *Decision Goes Against Atheists, Agnostics*, L.A. TIMES, December 7, 1993, at A20.

[91] The court hinted at the perceived importance of the Boy Scouts as a social institution by concluding its opinion with a comparison of the Boy Scout Oath to the Declaration of Independence: "It is interesting to note that the challenged Boy Scout Oath is strikingly similar to the one expressed by out Founding Fathers on July 4, 1776 . . . . Certainly this Court must not upset such enduring principles . . . ." 993 F.2d at 1278.

places of public accommodation,[92] could not be applied to voluntary membership organizations such as the Boy Scouts. The court relied on the plain meaning of the Civil Rights Act's text, which is limited to facilities such as restaurants and hotels that "serve the public" and may be classified as an "establishment," "place," or "facility."[93] The Boy Scouts organization fell outside the plain meaning of these terms. The organization could also not be incorporated within the statute's scope as an "other place of exhibition or entertainment," either, because the statute is narrowly focused on businesses located in physical structures that are open to the entire public, not selective membership groups.[94] The court noted that "The dissent has failed to point us to a single word in the statute that supports its theory that Congress intended to cover membership organizations lacking a close connection to a particular facility."[95] On the contrary, "Congress focused exclusively on prohibiting discrimination in *places of public accommodation* and not every conceivable social relationship."[96] Barring any statutory allowances, the court properly regarded this case as one whose policy questions were better left to the legislature.[97] The dissenting judge admitted upfront that "the majority opinion arguably reaches the correct result," but he nonetheless felt the court did so "in a most unfortunate fashion: by imparting a stingy and narrow reading to the remedial statute at issue."[98] The dissent would have read the statutory

[92] Civil Rights Act of 1964, § 2000a (1988).
[93] Welsh v. Boy Scouts of America, 993 F.2d 1267, 1269 (7th Cir. 1993).
[94] *Id*. at 1269-71.
[95] *Id*. at 1271.
[96] *Id*. at 1275 (emphasis in original).
[97] "If the plaintiffs wish to change the law, the proper forum is the Congress of the United States . . . . Only after Congress has had the opportunity for deliberation and reflection should a radical change of the nature the plaintiffs propose be enacted." *Id.*
[98] *Id*. at 1279 (Cummings, J., dissenting). *See also* Bigham, *supra* note 90, at 1334: "By narrowly interpreting Section 2000a, the Welsh court ignored the Supreme Court's declaration that the statutory language in Title II must be read broadly to give the statute its fullest reach in light of its important remedial purposes."

language more broadly and viewed the Boy Scouts as a public organization, in practice, given their enormous membership.[99]

Although this challenge to the Boy Scouts was unsuccessful, as with *Newdow* it was effective in drawing national attention to the issue of atheists' rights. Then again, while *Welsh* was important to national debate and policy, the plaintiffs' legal grounding in this case was arguably as tenuous as some of the meritless claims described in the following section. As the Seventh Circuit noted, this opinion was easily decided by reference to the clear language of the applicable statutes, without having to address the underlying constitutional questions.[100] Not surprisingly, two years after *Welsh* the Supreme Court of Kansas similarly concluded that the Boy Scouts could prevent an atheist from becoming a Scout leader because the organization is not a place of "public accommodations" under the Kansas Act Against Discrimination.[101]

The next unsuccessful lawsuit, involving prisoners' rights, achieved partial victory on appeal to the Seventh Circuit but was dismissed on remand, in a decision rendered only a month ago. *Kaufman v. McCaughtry*[102] involved an inmate who claimed that prison administrators violated his First Amendment rights by opening his mail and denying his requests to form an atheist prisoners' group.[103] The plaintiff was consistently unsuccessful on the first claim but found support in the Seventh Circuit regarding the atheist study group, although that claim was

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[99] *Id*. at 1282 (Cummings, J., dissenting) ("the majority is clearly swimming upstream in suggesting that an organization of five million people in the United States alone may qualify as a private club"); *but see id*. at 1277 (majority opinion) ("The dissent concludes that because the Boy Scouts have five million members . . . it is neither selective nor private. This conclusion not only exaggerates the facts, it ignores the purpose of the Scouts' existence and punishes the Boy Scouts for its success in recruiting future quality leaders of society.").

[100] *Id*. at 1277.

[101] Seabourn v. Coronado Area Council, 257 Kan. 178 (1995).

[102] Kaufman v. McCaughtry, 2004 U.S. Dist. LEXIS 1904 (W.D. Wis. 2004), *vacated*, 419 F.3d 678 (7th Cir. 2004), *rehearing denied by* 2005 U.S. App. LEXIS 21384 (7th Cir. 2005), *motion denied by* 2006 U.S. Dist. LEXIS 6140 (W.D. Wis. 2006), *dismissed on remand by* 2006 U.S. Dist. LEXIS 13278 (W.D. Wis. 2006).

[103] Kaufman originally described himself as "Wiccan" in correspondence with Jaymi Witch, the improbably-named prison chaplain, which led to this amusing line in the court's opinion: "On March 12, 2002, plaintiff signed a religious preference form, designating his religious preference as Wiccan, because defendant Witch had told him that was necessary in order to attend the pagan study group." *Id.*

recently barred by the prison administrators' qualified immunity. Earlier this year, Kaufman also tried to add claims under the Religious Land Use and Institutionalized Persons Act (RLUIPA) and the equal-protection clause of the Fourteenth Amendment,[104] but the court found that his claims were untimely and should have been brought earlier.[105] RLUIPA, which was passed in 2000 and recently affirmed by the Supreme Court, could have helped him because it requires a "compelling governmental interest" to justify a substantial burden on a prisoner's religious practices.[106]

Mailroom staff at the prison had opened eight pieces of correspondence addressed to Kaufman outside his presence, which in several cases violated a confidentiality rule protecting inmates' legal mail.[107] Law-related correspondence presents an exception to the rule that prisoners' mail can be read without them being present, but in this case some of the letters were not correctly marked as coming from attorneys. Moreover, the plaintiff failed to show an

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[104] Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc *et seq* (2000).

[105] After Kaufman submitted a "Motion for Clarification" to add his RLUIPA and equal-protection claims, which had not been addressed previously, the district court wrote that "To say that plaintiff's request is untimely would be an understatement. Because plaintiff has waived these alleged claims by not pursuing them earlier in the life of the case, his motion will be denied." Kaufman v. McCaughtry, 2006 U.S. Dist. LEXIS 6140, at 1-2 (W.D. Wis. 2006). The Seventh Circuit noted this omission the year before, perhaps inspiring the plaintiff to later seek to add that claim: "Kaufman relies only on the First Amendment and at this stage of the litigation has not tried to take advantage of the added protections of [RLUIPA]." Kaufman v. McCaughtry, 419 F.3d 678, 681 (7th Cir. 2005).

[106] RLUIPA protects the religious use of land as well as the religious rights of prisoners, and holds the government to a highly deferential standard toward religious practices. The section pertinent to prisoners stipulates, "No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc-1 (2000). This high standard, requiring a "compelling governmental interest," was in response to the weakening of free-exercise rights in *Employment Div. v. Smith*, 494 U.S. 872, 895 (1990). The constitutionality of RLUIPA was recently affirmed by the Supreme Court in *Cutter v. Wilkinson*, 125 S. Ct. 2113 (2005). *See also* Anne Chiu, *When Prisoners Are Weary and their Religious Exercise Burdened, RLUIPA*, 79 WASH. L. REV. 999 (2004) (describing the application of RLUIPA to prisoners).

[107] The opened mail included a letter from the U.S. Department of Justice containing information on how to file a civil-rights lawsuit, which was "inadvertently" opened even though the prison had stamped the letter "exempt correspondence, must be opened in the presence of staff." Letters from the ACLU and an attorney were also opened. Kaufman v. McCaughtry, 2004 U.S. Dist. LEXIS 1904, at 5-8 (W.D. Wis. 2004).

ongoing interference with his legal mail, versus "simply a few instances of negligence."[108] The fact that his mail was opened eight times, however, suggests to me that the actions may have been more deliberate than the court concluded, which may in turn indicate lack of judicial sympathy toward the plaintiff as a prisoner or an atheist.[109] Regardless, the circuit court was even more dismissive of this claim, concluding that the opened letters were not eligible for exception because, although they were sent to him by attorneys, they were not "legal" mail because they did not involve his representation.[110]

Kaufman also alleged that the prison improperly kept him from forming an atheist study group. As the district court described, prison guidelines "permit the formation of umbrella religious groups that are designed to appeal to a wide range of religious beliefs within a given religious group or faith."[111] Such religious groups were required to have a chaplain or approved spiritual leader to direct them, not an inmate. Requests for religious groups were evaluated based upon "whether the request is motivated by religious beliefs"[112] and whether there was sufficient interest among the inmates. Kaufman's request to form a religious group for atheists was denied, probably because he was the only prisoner who expressed an interest in forming such a group. However, the prison chaplain recommended he apply under a different prison rule allowing for secular activity groups.[113] Kaufman followed her advice but was again denied,

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[108] *Id*. at 18. *See also id*. at 20 ("From the evidence he has provided, a reasonable jury could not conclude that defendants opened plaintiff's 'legal mail' frequently.").
[109] 2004 U.S. Dist. LEXIS 1904, at 2. Although Kaufman may have believed he was targeted by prison administrators because of his atheism, the court opinions do not indicate such an allegation.
[110] 419 F.3d at 686.
[111] 2004 U.S. Dist. LEXIS 1904, at 9.
[112] This criterion seems to require the prison to judge the sincerity of prisoners' beliefs, in conflict with the Supreme Court's declaration that courts should not be in the business of judging the sincerity of religious belief, but the court found that this criterion was facially neutral in application because the elaborated selection criteria created neutrality. *Id.* at 25-26; see *supra* note 58 and accompanying text.
[113] 2004 U.S. Dist. LEXIS 1904, at 12.

initially because the prison "was not forming new inmate activity groups at the time" and later again because of insufficient interest.[114]

Kaufman alleged that the prison violated his free-exercise rights by denying him the same opportunities, as an atheist, that religious prisoners enjoyed in forming religious groups. He also claimed the prison's policies violated the Establishment Clause by providing easier approval for religious groups than non-religious ones.[115] As an initial matter, the district court and court of appeals both agreed that atheism is considered a "religion," according to the Supreme Court's holdings in *Torcaso*, *Seeger*, and *Welsh*,[116] showing that those opinions' inclusive definition of religion still applies forty years later. The courts also noted that the Seventh Circuit recently held that atheism is a form of religion for purposes of the Civil Rights Act, which Kaufman sued under: "If we think of religion as taking a position on divinity, then atheism is indeed a form of religion."[117]

The district court held that Kaufman's free-exercise rights were not violated, in light of the Supreme Court's holding in *Employment Division v. Smith*,[118] because the prison regulation was "neutral and generally applicable."[119] Even though the regulations allowed administrators to consider an inmate's religious motivation in approving a request for a religious study group, the regulations were restrictive enough to make that decision value-neutral.[120] It was also reasonable for the administrators to consider the level of interest among inmates as well as security

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[114] Kaufman v. McCaughtry, 2004 U.S. Dist. LEXIS 1904, at 13-14 (W.D. Wis. 2004).
[115] *Id*. at 22-23.
[116] Torcaso v. Watkins, 367 U.S. 488, 495 (1961); United States v. Seeger, 380 U.S. 163, 184-88 (1965); Welsh v. United States, 398 U.S. 333, 340 (1970), *cited by* Kaufman v. McCaughtry, 419 F.3d 678, 681-682 (7th Cir. 2004); Kaufman v. McCaughtry, 2004 U.S. Dist. LEXIS 1904, at 24 (W.D. Wis. 2004).
[117] 2004 U.S. Dist. LEXIS 1904, at 23.
[118] Employment Div. v. Smith, 494 U.S. 872, 880-82 (1990).
[119] 2004 U.S. Dist. LEXIS 1904, at 24-25.
[120] "The prison could not consider "1) the number of persons who participate in the practice; 2) the newness of the beliefs or practices; 3) the absence from the beliefs of a concept of a supreme being; or 4) the fact that the beliefs are unpopular." Kaufman v. McCaughtry, 2004 U.S. Dist. LEXIS 1904, at 26 (W.D. Wis. 2004).

concerns, making their criteria facially neutral.[121] The facts also did not support Kaufman's free-exercise claim, since he could not show that other inmates were interested in the group or that a qualified religious leader would have been available to lead it.[122] The Seventh Circuit agreed with the lower court that Kaufman did not show a "substantial burden" on his practice of atheism, as required by the Supreme Court,[123] because even without an atheist group he could still study atheism on his own, meet informally with other atheistic prisoners, and correspond with atheist organizations.[124] The appeals court also deferred to the prison's legitimate security concerns.[125]

The district and appellate courts did not agree, however, on Kaufman's charge that the prison's selection criteria favored inmate religious groups over activity groups and thereby established religion, in violation of the First Amendment. The issue here was "whether a prison that permits some association can treat religious inmates' opportunities to associate differently from those of nonreligious inmates."[126] Relying on the Supreme Court's *Lemon* test, the lower court found that the prison had a legitimate purpose in treating religious groups deferentially, and also concluded that the prison did not advance religion because they did not show preference among religious groups.[127] However, the district court incorrectly analyzed the prison's selection criteria by only focusing on the nondiscriminatory effect on religious groups, failing to

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[121] *Id*. The court contrasted this case with *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993), where the Supreme Court found that a municipal law against animal sacrifices was indeed discriminatory on its face because it obviously targeted a Santeria church.
[122] 2004 U.S. Dist. LEXIS 1904, at 27.
[123] Kaufman v. McCaughtry, 419 F.3d 678, 683 (7th Cir. 2004), citing Hernandez v. Comm'r, 490 U.S. 680, 699 (1989) (plaintiff must show a "substantial burden" on a "central religious belief or practice" to prevail under the Free Exercise Clause).
[124] 419 F.3d at 683; *see also* 2004 U.S. Dist. LEXIS 1904, at 27-29 (arguing that his beliefs were not substantially burdened).
[125] 419 F.3d at 683.
[126] Kaufman v. McCaughtry, 2004 U.S. Dist. LEXIS 1904, at 33 (W.D. Wis. 2004).
[127] *Id*. at 29-45.

examine the criteria for religious groups *in relation to* the less favorable criteria for secular groups.

The comparison between religious and secular group criteria was particularly relevant to Kaufman's case, as the Seventh Circuit pointed out, because the inmate *tried* to start a religious group but was rejected, thus forcing him to seek approval under the prison's less-favorable secular-group standard.[128] His request should have been considered only as a religious group, the Seventh Circuit held, because "Atheism is Kaufman's religion, and the group that he wanted to start was religious in nature even though it expressly rejects a belief in a supreme being."[129] The appeals court was also not persuaded by the prison's security rationale for denying Kaufman's request, since they "failed even to articulate—much less support with evidence—a secular reason why a meeting of atheist inmates would pose a greater security risk than meetings of inmates of other faiths . . . ."[130] Because the prison lacked a secular purpose in rejecting Kaufman's request to form a religious group, their action violated the first prong of *Lemon*'s establishment test, and the Seventh Circuit remanded the case.[131]

On March 23 of this year, after rejecting Kaufman's motion to add RLUIPA and equal-protection claims to his complaint,[132] the district court found on remand that the prison's administrators were entitled to qualified immunity.[133] Kaufman's rights were not settled under established law when they rejected his application for an atheist study group, therefore they could not be held accountable retrospectively for violating his rights.[134] Although the prison officials conceded afterwards that they had violated Kaufman's rights pursuant to the

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[128] "The problem with the district court's analysis is that the court failed to recognize that Kaufman was trying to start a 'religious' group . . . ." 419 F.3d 678 at 684.
[129] *Id*.
[130] *Id*.
[131] *Id.*, relying on Lemon v. Kurtzman, 403 U.S. 602 (1971).
[132] Kaufman v. McCaughtry, 2006 U.S. Dist. LEXIS 6140 (W.D. Wis. 2006).
[133] Kaufman v. McCaughtry, 2006 U.S. Dist. LEXIS 13278 (W.D. Wis. 2006).
[134] *Id*. at 2.

Establishment Clause,[135] when Kaufman's requests were denied "they were not on notice that their decision would violate plaintiff's First Amendment rights" and therefore they deserved the benefit of the doubt.[136] The defendants won for the same reason that atheistic defendants have lost in the past: "No law in existence at the time of defendants' decision, in this circuit or any other, stated explicitly that atheism was to be treated as a religion."[137] In rejecting Kaufman's request to have his atheist study group approved as a religious group, the defendants acted reasonably at the time, given their understanding of the undefined law on this topic. Kaufman himself was partly to blame for his failure, too, because on his application to create an atheist group he described his interest in atheism in intellectual rather than religious terms, thus failing to clearly bring his beliefs within the constitutional protection of the First Amendment.[138]

The next unsuccessful-yet-meritorious opinion to consider is *Otero v. State Election Board of Oklahoma* (1992),[139] in which the Tenth Circuit heard a challenge to the use of churches as polling places in statewide elections. The *pro se* plaintiff, Frank Otero, was a candidate for mayor of a small town in Oklahoma. He claimed that the use of churches violated his First, Fourteenth, and Fifteenth Amendment rights, and he sought a statewide injunction against all voting in churches.[140] Otero suggested that locating polling places in church buildings only perpetuated the intermingling of religion and politics in the Bible Belt, disadvantaging him

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[135] *Id*. at 2.
[136] *Id*. at 2, 9.
[137] *Id*. at 20.
[138] Id. at 18: "In plaintiff's request for religious programming, he described his proposed group as one that would (1) meet for the 'purpose of study and education;' (2) 'educate others interested in atheism;' and (3) 'promote a more thorough understanding of all religions, their origins, and their histories.' He did not indicate how his proposed group was connected to 'religious' principles, however broadly defined, in which he had a sincere belief. Nothing in his proposal indicated how his group could be distinguished from a history club or debate society, or indicated that his group was dedicated to 'moral, ethical, or religious beliefs about what is right and wrong' or to other 'ultimate issues.' *Welsh*, 398 U.S. at 342-43."
[139] Otero v. State Election Bd. of Ok., 975 F.2d 738 (10th Cir. 1992).
[140] *Id.* at 739.

as an atheistic candidate and burdening his own atheistic beliefs.[141] On the latter issue, the court explained that "he likens his position to Christian voters asked to vote in a house of demonic worship containing pervasive symbols of Satan,"[142] which certainly seems constitutionally problematic on its face. Indeed, Otero's complaint evokes Steven Epstein's compelling depiction of life in of a hypothetical future America dominated by Muslims, once again calling attention to the "invisible" pervasiveness of Christian imagery in contemporary American life.[143] The Supreme Court has accepted such "ceremonial deism" as constitutional, however, as a constitutionally permissible reflection of our culture and heritage, but for Otero and other atheists who are radically opposed to Christianity, the imposition could be considerable.[144]

The court rejected all of Otero's claims. First, while accepting his self-identified status as an atheist, the court nonetheless said, "[W]e find frivolous plaintiff's argument that his atheistic beliefs do not permit him to enter a church and that, therefore, he is denied his right to vote when his precinct polling place is an Episcopal church."[145] The court noted that the Supreme Court's holding in *Wisconsin v. Yoder*[146] requires that plaintiffs show that their claims are "rooted in

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[141] *Id.*
[142] *Id.*
[143] *See* Epstein, *supra* note 13, at 2084-2085: "The year is 2096. Due to radically altered immigration and birth patterns over the past century, Muslims now comprise seventy percent of the American population, while Christians and Jews comprise only twenty-five percent collectively. Elementary school students 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—both coins and paper—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. Surely this scenario could not be squared with the First Amendment to the United States Constitution. Surely any court addressing these practices would conclude that the federal and state governments behind them have impermissibly sought to 'establish' the religion of Islam. Right? Not necessarily."
[144] *See generally id.*
[145] Otero v. State Election Bd. of Ok., 975 F.2d 738, 740 (10th Cir. 1992).
[146] Wisconsin v. Yoder, 406 U.S. 205 (1972).

religious belief;"[147] in this case, Otero "makes no showing that a tenet of atheism is a refusal to enter a church building."[148] As for his constitutional complaints against the practice of locating polling stations in churches, the court first found Otero's Fifteenth Amendment claim inapplicable because "it only guarantees the right of citizens to vote and states that the right shall not be denied" because of race; religion is not covered by this Amendment.[149] Also, regarding Otero's First Amendment claim that the church-polling interfered with the free exercise of his atheist beliefs, the court found the burden on his beliefs insignificant, because "by voting in a church building plaintiff is not required to attest to the nature of his religious beliefs . . . ."[150]

The court in *Otero* spent more time considering the plaintiff's argument that the practice of voting in churches was "an establishment of religion" by the state. The court followed the Supreme Court's *Lemon* test[151] to judge the purported establishment at issue here. The practice satisfied *Lemon*'s requirement that laws impacting religious belief have a secular purpose, since churches provide a place to vote.[152] Voting in churches did not foster an "excessive government entanglement with religion," either, for the same reason.[153] Although the court conceded that voting in a church might influence voters by reminding them of candidates' religious beliefs,

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[147] *Id*. at 215-16: "A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief. Although a determination of what is a 'religious' belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests."

[148] 975 F.2d at 740. The court continued: "Atheists purportedly do not believe in any god; such a nonbeliever necessarily, it would seem, would have no fear of psychic or other punishment for entering a church to vote in a secular election." *Id.*

[149] *Id*. The Fifteenth Amendment to the Constitution provides, "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV.

[150] 975 F.2d at 741.

[151] Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

[152] Otero v. State Election Bd. of Ok., 975 F.2d 738, 740 (10th Cir. 1992). The court also concluded, albeit without elaboration, that the "principal or primary effect" of the church-polling law is one that "neither advances nor inhibits religion," as required by the second prong of the *Lemon* test. *Id.*

[153] 975 F.2d at 740, citing *Lemon*, 403 U.S. at 613.

there was no "excessive" entanglement when weighed against the government's valid interest in having convenient voting stations.[154] However, this element of the *Lemon* test, regarding "excessive government entanglement with religion," is certainly debatable under these facts, because one could argue that the standard for entanglement should be much stricter in the voting context, given the pivotal place of voting among our democratic rights.[155] Broadly speaking, this is one case where the court surely could have found a way, doctrinally, to be more sensitive to the atheist's seemingly valid arguments. The difficulty with these constitutional claims, which are argued on the legal merits—rather than being dismissed on the facts for lack of standing, as the meritless cases often are—is that courts' legal conclusions are more open to interpretation, since First Amendment jurisprudence is somewhat malleable.

One other unsuccessful yet meritorious atheist opinion deserves mention. Like other cases discussed in this section, this plaintiff lost his case, but in the process he raised substantive questions that tested the scope of atheists' rights under the First Amendment. In *Murray v. City of Austin*,[156] an atheist claimed that the city insignia of Austin, Texas, violated the First Amendment because the symbol included a Christian cross, which was derived from the coat of arms of the city's founder.[157] The district court rejected Murray's challenge and imposed Rule 11 sanctions against him for bringing a frivolous claim,[158] but the Fifth Circuit vacated the sanctions and considered his claims in detail before finally rejecting them. First, Murray's free-

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[154] *Otero* directly cited the government's brief for explanation: "'Church buildings are located throughout a city, including in the residential areas of which many precincts consist; they have parking lots; and they typically have a common area, parish hall, foyer, nursery or some other such nonconsecrated portion of the church building which can be used as the polling place.'" 975 F.2d at 741.
[155] *Otero* did not offer any case law expressing either position on entanglement, instead relying solely on the facts. *Id.* at 740-41.
[156] Murray v. City of Austin, 947 F.2d 147 (5th Cir. 1991).
[157] *Id.* at 149. Surprisingly, Austin's insignia is nowhere to be found on the city's official website, at http://www.ci.austin.tx.us/ (last accessed May 9, 2006). It may be that the city has chosen to downplay it, or else they do not regard it as significant to the city's identity to include in their comprehensive, official website.
[158] Murray v. City of Austin, 744 F. Sup. 771 (W.D. Tex. 1990).

exercise claim was quickly dismissed by the appeals court; although he suggested there was "subtle coercion" in having a cross on the city seal, this argument fell far short of the legal standard for showing compulsion or interference with one's religious belief.[159]

Murray also argued, pursuant to the establishment test in *Lemon*, that the "principal or primary effect" of Austin's insignia was to both advance and inhibit religion.[160] He did not meet this standard, either, because the government already allowed "much more direct, as well as permanent, government use of religion acknowledgement," the trappings of ceremonial deism such as the Pledge of Allegiance, legislative prayers, and the motto "In God We Trust."[161] The Supreme Court had upheld the constitutionality of much more prominent public religious imagery, as well as legislative prayer, so the unobtrusive cross on Austin's seal was not a problem either:

> The crèche (a Christian symbol) in *Lynch*, the menorah (a Jewish symbol) in *County of Allegheny*, the legislative prayer in *Marsh*, and the above-discussed references by government to God have been held not to transgress the Establishment Clause. We view any perceived preference by use of the insignia to be even more remote than in the above-referenced cases."[162]

The Fifth Circuit also distinguished Austin's cross from the more prominent and pervasive religious imagery which led two other circuit courts to find Establishment-Clause violations in municipal seals.[163] In one case a city's seal "contained only sectarian symbols and was adopted

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[159] 947 F.2d at 152.
[160] *Id*. at 153.
[161] *Id*. at 154-55.
[162] Murray v. City of Austin, 947 F.2d 147, 155 (5th Cir. 1991) (citing Lynch v. Donnelly, 465 U.S. 668 (1984); Allegheny Co. v. Greater Pittsburg Am. Civ. Liberties Union, 492 U.S. 573 (1989); Marsh v. Chambers, 463 U.S. 783 (1983)).
[163] *Murray*, 947 F.2d at 156-57. "In holding that Austin's insignia does not violate the First Amendment, we recognize that two of our sister circuits have found [E]stablishment [C]lause violations when municipal seals include religious symbolism. We do not view this as a split with our circuit. Instead, it is further evidence, as discussed in *Lynch*, that such cases must be decided on the facts."

for an express religious purpose,"[164] while in another case a cross was "the only visual element of the seal [and was] surrounded by rays of light."[165] As a practical matter, too, the principal effect of Austin's insignia was not to encourage religion but more simply in "identifying city activity and property and promoting Austin's unique role and history."[166] As in many church-state cases, the Seventh Circuit also deferred to "our nation's religious and cultural heritage" in upholding the city seal.[167] The court concluded that the constitutional conflict of interest between church and state posed by Austin's insignia was incidental, and thus struck down the atheist's challenge.

V. MERITLESS ATHEIST CLAIMS

Whether successful or not, the atheists' cases described above were meritorious because they involved serious claims of unconstitutional discrimination against atheists' beliefs. However, a large number of published and unpublished opinions involve much more frivolous and unsuccessful claims related to atheism. These often fail on summary judgment for lack of evidentiary support, often in claims of personal discrimination that do not rise above the level of unsubstantiated allegations. Whereas the cases above involved serious constitutional questions, and often seemed designed to challenge and shaping First Amendment jurisprudence, many of

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[164] *Id*. at 157, distinguishing Harris v. City of Zion, 927 F.2d 1401 (7th Cir. 1991). Moreover, in *Zion*, "the size and placement of the cross in the [city's] seal arguably conveys a message of its being a 'Christian community' . . . . The cross is as tall as the water tower and taller than the building behind it." 947 F.2d at 157.

[165] *Murray*, 947 F.2d at 157, distinguishing Friedman v. Bd. of County Comm'rs of Bernalillo, 781 F.2d 777 (10th Cir. 1985). *Murray* continued: "Several distinguishing factors in the *Friedman* seal are readily apparent, most importantly: the lack of undisputed secular symbols within the seal; the accompanying phrase which translates 'With This We Conquer[, and other factors.]" 947 F.2d at 157. With Austin's seal, in contrast, "we must recognize the reason for the cross originally being in the coat of arms; that Austin did not have an improper purpose in adopting the insignia; its long and unchallenged use; its non-proselytizing effect; that in its context, it does not endorse religion in any true or meaningful sense of the word 'endorsement;' and that requiring the City to remove all displays of the insignia, arguably evinces not neutrality, but instead hostility, to religion." *Id*. at 158. Several years after *Murray, Zion,* and *Bernalillo,* the Tenth Circuit also found a city seal unconstitutional because its Latin cross was "a prominent feature of the [city] seal" and "[t]he religious significance and meaning of the Latin or Christian cross are unmistakable." Robinson v. City of Edmond, 68 F.3d 1226, 1232 (10th Cir. 1995).

[166] 947 F.2d 147 at 155.

[167] *Id*. at 156.

these meritless cases are individual complaints where plaintiffs invoke their alleged atheism in cases meant to redress their personal alleged wrongs. The cases in this section where activist atheists did attempt to challenge church-state law failed because the facts or law supporting their position were clearly deficient.

There may be a number of reasons for the significant number of meritless atheist lawsuits. Most generally, it is possible that courts hear many frivolous claims; I may simply be unaware of their frequency because such easily-dismissed cases are rarely studied.[168] It may also be that other legal topics would reveal a similar frequency of frivolous claims, if examined closely. Regardless of the comparison with other subjects, this topic shows a high incidence of meritless claims. There may be subject-specific reasons why atheism inspires a higher-than-average incidence of unsuccessful and baseless lawsuits, beginning with the apparent frequency of *pro bono* representation among atheistic litigants. Many of these cases are brought *pro se*, whether for economic reasons or because litigants were unable to find a lawyer to take their case, if indeed they sought help. Some litigants may prefer to represent themselves, manifesting the same independent or contrarian streak that led them to embrace atheism—it requires a certain "outsider" personality or worldview to adopt a belief system that is so religiously and culturally marginalized. That same contrarian attitude may lead atheistic litigants to challenge the legal system, albeit without the help of lawyers.[169] In other words, litigious atheists may be trying to "fight the system," in the broadest sense of the term, both religiously and legally, as outsiders.

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[168] We also rarely if ever consider unpublished opinions, as several of these are. I consider them despite their lack of precedential value because they are topically useful and because precedence is not important in this academic format.

[169] Legal scholars agree that at least traditionally, legal self-representation was confined to "political dissidents and lawyer-haters." Drew Swank, Article: *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*, 54 AM. U.L. REV. 1537, 1540 (2005). *See also* Drew Swank, Note and Comment, *The Pro Se Phenomenon*, 19 BYU J. PUB. L. 373, 378-384 (2005) (offering perceived and actual reasons why litigants represent themselves in court).

Whatever the reason for the apparent frequency of *pro se* representation among these litigants, this phenomenon may substantially explain their lack of success because *pro se* plaintiffs presumably frequently lose in court. Without professional representation, such litigants have less legal expertise to present their case and less professional grounding to temper the emotion and personal bias which enter into every litigant's view of their legal claims. *Pro se* litigants may be more inclined to argue for the righteousness of their position at the expense of solid legal grounding and professional demeanor. It may be that in the hands of a capable lawyer, such claims would have fared much better. Then again, courts are more patient and permissive with *pro se* litigants,[170] so a degree of lower expectations are already built into the system, and yet these litigants still often fail.

Many atheists with unsuccessful or baseless claims were represented by counsel, too, so self-representation does not fully explain why the subject of atheism seems prone to failed lawsuits. A second reason may be that plaintiffs and their counsel alike may believe that courts will be sympathetic to accusations of religious persecution toward this misunderstood minority. Conversely, judges might be swayed by cultural prejudice against atheists; if so, perhaps atheists lose their lawsuits partly out of judicial bias. In reality, of course, judges are reasonable adjudicators of the law, and the law itself requires that claims be legally and factually supported, so claims based substantially on emotion or hot-button issues properly fail. Moreover, when

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[170] In the atheist case *Sobel v. Eastman Kodak Co*., 1987 U.S. Dist. LESIX 6505, at 2 n.2 (E.D. Pa. 1987), *infra* p.40, the court noted, "Pro se complaints are to be construed liberally, and not dismissed, if given their most favorable reading the complaint states a potentially viable cause of action." *Sobel* cited the Supreme Court's opinion in Haines v. Kerner, 404 U.S. 519, 520 (1972), in which the Court held that "we hold [*pro se* complaints] to less stringent standards than formal pleadings drafted by lawyers." *Haines* has been followed frequently in years since, *see, e.g.,* Boag v. MacDougall, 454 U.S. 364, 365 (1982), and other courts adopt the same permissive standard for *pro se* litigants without specifically citing *Haines*. In *McIntyre-Handy v. West Telemarketing Corp*., 97 F.Supp. 2d 718, 724 (E.D. Va. 2000), infra pp. 36-38, the court wrote, "*Even liberally construing plaintiff's pro se complaint,* she has failed to allege any cause of action . . ." (emphasis added). And later in the opinion: "Even though she proceeds *pro se* in the instant matter, plaintiff cannot create a genuine issue of material fact sufficient to survive a motion for summary judgment on the strength of unverified, unsubstantiated allegations in the pleadings." *Id*. at 732, n.16.

litigants bring claims that lack evidentiary or legal support, such possible discrimination is difficult to discern and certainly irrelevant to the outcome of these easy cases. For example, a trier of fact does not need to exercise much discretion in holding that a plaintiff is barred by lapsed statutes of limitation. In practice, such meritless cases make litigants seem unreasonable and the courts seem fair, upending the inferable assumption from Gresock's oppression thesis that courts, like American society, treats atheists badly.

Of course, some of the following cases could just have easily been lost by a theistic plaintiff, since some plaintiffs lose because of facts unrelated to their religious beliefs. In such cases the courts reject plaintiff's claims based on weak evidence, not based on judicial evaluation of the legal rights of atheists. However, such cases nevertheless suggest a possible correlation between frivolous lawsuits and frivolous atheism, seeming to provide evidence of the "superficial atheism" that Paul Vitz describes.[171] These baseless claims also call into question exactly how much discrimination atheists really experience in American society—if the only lawsuits that allege personal discrimination based on one's atheism are meritless, this may undermine the claim by Gresock and others that atheists are a persecuted minority.[172]

A number of failed and frivolous atheist lawsuits will illustrate these general observations, beginning with an employment-discrimination suit that was dismissed on summary judgment. *McIntyre-Handy v. West Telemarketing Corp.*[173] involved a *pro se* plaintiff who alleged that her employer discriminated against her because of her atheism and also failed to accommodate those beliefs.[174] McIntyre-Handy was a telemarketer at West Telemarketing's call center. At least two of the company's clients were religious organizations, and McIntyre-Handy

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[171] VITZ, *supra* note 7, at 130.
[172] Of course, lawsuits do not necessarily reflect the full range of social phenomena, so the lack of credible discrimination claims does not mean that such discrimination does not exist.
[173] McIntyre-Handy v. West Telemktg. Corp., 97 F.Supp. 2d 718 (E.D. Va. 2000).
[174] *Id.* at 724.

objected to advocating on their behalf—as an alleged atheist—because doing so "subjected her" to the clients' religious principles. Her employer promptly responded by transferring her to another telemarketing team.[175] While working in her second position, McIntyre-Handy was recorded being rude to callers, failing to read her assigned scripts, criticizing the company's clients, and giving her own advice to callers.[176] These infractions violated the company's policy manual, and she was summarily dismissed, at which time she filed a complaint with the Equal Employment Opportunity Commission (EEOC) alleging religious and racial discrimination under the Civil Rights Act of 1964.[177]

McIntyre-Handy lost all her claims because her evidence "fail[ed] to raise a genuine issue of material fact of religion-based discrimination" based on disparate treatment or failure to accommodate her beliefs.[178] She could not show evidence of satisfactory job performance or discriminatory discharge, though the court generously assumed for the sake of argument that she could.[179] McIntyre-Handy nonetheless lost because her employer showed non-discriminatory reasons for her termination, namely her flagrant violations of the company's policies.[180] She also could not show that the reasons for firing her were pretext for underlying discrimination due to her atheist beliefs, since that claim was based solely on personal opinion.[181] Similarly, her

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[175] *Id.* at 722-723.
[176] *Id.* at 723.
[177] 42 U.S.C. § 2000e-2 (2000); *McIntyre-Handy*, 97 F.Supp. 2d at 724, 726-727. The plaintiff neglected to file her complaint with the Virginia Council on Human Rights (VCHR) before filing in court, as required by law, but the court found that she was not procedurally barred for failing to exhaust her administrative remedies because "[T]he EEOC and the VCHR have established a practice of regularly communicating the fact that charges have been made and of considering the charges to have been 'dual filed' . . . ." *Id.* at 725-26.
[178] 97 F.Supp. 2d at 729. The Federal Rules of Civil Procedure, applied here, specify that summary judgment shall be granted if the evidence shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. Proc. R. 56(c).
[179] McIntyre-Handy v. West Telemktg. Corp., 97 F.Supp. 2d 718, 730 (E.D. Va. 2000).
[180] *Id.* at 730-32.
[181] "[A] plaintiff's 'own naked opinion, without more,' is not enough to create a genuine issue of material fact sufficient to defeat summary judgment" (citation omitted). *Id.* at 732.

evidence that non-atheist employees were treated differently than her was mere hearsay.[182] The court concluded that "she has presented no evidence other than her own conclusion, speculation, and supposition" to show that she was terminated due to her atheism.[183]

After rejecting McIntrye-Handy's claims of outright discrimination or pretextual firing, the court also rejected her argument that West Telemarketing failed to accommodate her atheistic beliefs. The evidence showed that the company acted quickly and diligently by transferring her to another position in the company within days of her complaint about endorsing religious clients.[184] Finally, the plaintiff argued that her employer failed to accommodate her in her second position because she was required to say the words "God-gifted gifts" and "spiritual" in certain scripts used with callers. However, she had failed to notify the employer of her alleged discomfort, and furthermore, the company manual allowed employees to substitute "gifted" for "God-gifted" if they were uncomfortable with the word "God."[185] McIntyre-Handy therefore lost on all counts. After exhausting every possible claim that the plaintiff could raise regarding her alleged religious discrimination, the judge concluded her opinion by advising the *pro se* litigant how she could appeal the decision to the appeals court,[186] again indicating her apparent sympathy toward this unrepresented plaintiff.

Another employment-discrimination case involving alleged mistreatment of an atheist also recently failed, although here the evidence presented a closer issue. In *Ricci v. Ralls*,[187] Carl Ricci, a maintenance worker at the University of California at Davis, alleged that a group of

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[182] *Id.* at 732-33.
[183] *Id.* at 734.
[184] *Id*. at 735-36.
[185] McIntyre-Handy v. West Telemktg. Corp., 97 F.Supp. 2d 718, 736, 736 n.22 (E.D. Va. 2000).
[186] *Id*. at 737: "Plaintiff is advised that she may appeal from this Opinion and Final Order by forwarding a written notice of appeal to the Clerk of the United States District Court, United States Courthouse, 600 Granby Street, Norfolk, Virginia 23510. Said written notice must be received by the Clerk within thirty (30) days from the date of this Opinion and Final Order." This is the first opinion I have read in which a judge told a plaintiff how to appeal his or her decision.
[187] Ricci v. Ralls, 2004 Cal. App. Unpub. LEXIS 4905 (2004) (unpublished opinion).

managerial employees discriminated against him because he resisted their Christian proselytizing, and because he cohabitated with an unmarried coworker. Leslie Nopp, his paramour and co-plaintiff, claimed the managers also retaliated against her because she helped Ricci file grievances against them. Ricci had submitted five internal grievance notices against his supervisors, alleging that he had been wrongly passed over for promotion, disciplined for his atheism, and retaliated against for filing complaints.[188] He felt the managers' devout and public religiosity explained his unsuccessful promotion and overall mistreatment, although the court noted that only one Christian manager was involved in the personnel decisions that affected him.[189]

The appellate court upheld the summary judgment in defendants' favor, for several reasons. Most obviously, both the plaintiffs were still working at the University, although in different positions, and therefore they suffered no adverse employment consequences as a result of their conflicts with supervisors.[190] Also, the University had nondiscriminatory reasons for the personnel choices which prompted the grievances and this lawsuit. In particular, Ricci was less qualified than his co-applicants for the managerial position he sought, plus his short temper and confrontational personality made him ill-suited for the leadership role.[191] Moreover, the defendants decided not to promote Ricci before he filed his grievances, and therefore could not have denied him promotion in retaliation for his complaints.[192]

The plaintiffs also argued that they were demoted due to discrimination against his atheism and retaliation for their complaints. Both Ricci and Nopp were indeed transferred into different positions within the maintenance organization, but the court did not believe their new

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[188] *Id.* at 7-11.
[189] *Id.* at 3-5, 26-30.
[190] *Id.* at 1-2.
[191] *Id.* at 13.
[192] *Id.* at 12-15; 33-41.

positions were inferior in responsibility.[193] The court also concluded that transferring the plaintiffs was reasonable, given their acrimonious relationships with their supervisors.[194] As the court pointed out, "Mere friction between a supervisor and his subordinate does not create, in and of itself, a triable issue of discrimination," nor do job transfers intended to relieve employees and managers of an adverse work environment.[195] In sum, Ricci failed to show any evidence that his conflict with supervisors constituted discrimination, much less discrimination *because* he was an atheist. He could not link his supervisors' personnel decisions with their alleged religious bias,[196] and his relationship with managers and coworkers was certainly stormy but fell far short of religious discrimination.

In a third case of alleged employment discrimination, a chemist who had been fired by Eastman Kodak represented himself in a claim of alleged mistreatment on the basis of age, religion—because of his atheism—and disability.[197] The plaintiff, Peter Sobel, also alleged wrongful discharge and libel, for a cumulative requested relief of twenty-five million dollars.[198] The court did not even reach the factual basis of his claims, since every cause of action was time-barred by applicable statutes of limitations. The plaintiff had filed a discrimination charge with the EEOC two years after being fired, then withdrew the complaint, but then two years after that—more than four and a half years after being fired—he attempted to bring suit. The law requires that plaintiffs file charges with the EEOC first, within 180 days of the alleged discrimination; a plaintiff can only file suit if the EEOC declines to investigate the claim, and only within thirty days of that decision.[199] Sobel therefore failed to exhaust his administrative

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[193] Ricci v. Ralls, 2004 Cal. App. Unpub. LEXIS 4905, at 11-12 (2004) (unpublished opinion).
[194] *Id*. at 36.
[195] *Id.* at 36.
[196] *Id.* at 32-33.
[197] Sobel v. Eastman Kodak Co., 1987 U.S. Dist. LEXIS 6505 (E.D. Pa. 1987) (unpublished opinion).
[198] *Id.* at 2.
[199] *Id.*

remedies and also complained too late. He argued that the applicable statutes of limitation should be waived because he had suffered recurring insanity, but the court noted that he was only hospitalized for short periods of time, beyond which he failed to account for his legal inaction.[200]

The court's holding in this case does not directly implicate atheism, since the plaintiff instead lost due to tardiness, but it provides another example where atheism is correlated with meritless claims. We do not know whether Sobel's allegations of religious discrimination were legitimate, since the court did not reach the merits of his claims, though the court's unflattering impression of him, and his alleged insanity, imply that he lacked a claim. This opinion is interesting in part because it presents an example of apparent overlap between atheism and insanity. I do not wish to suggest that atheists are more likely to be insane, but conversely, it may be that mentally unstable people, as a subset of the "outsiders" discussed at the beginning of this section, are attracted to the *idea* of atheism as a manifestation of their unconventional thinking.

Despite the apparent groundlessness of the claims made by the telemarketer, the maintenance worker, and the chemist, the respective courts considered their claims in surprisingly thorough and thoughtful opinions. In the case of the telemarketer, for example, the court went so far as to consider—but reject—possible arguments not raised by the plaintiff.[201] These judges' repeated reference to the plaintiffs' *pro* se status suggests that their tolerance was due in part to that status. Courts are not always so patient in cases of claimed discrimination against atheists, however, even with *pro se* litigants. In *Salaa v. INS*,[202] the Tenth Circuit

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[200] "[A] statute of limitation cannot be tolled simply because of 'personal problems.'" *Id*. at 12; *see generally id*. at 11-14.

[201] *See, e.g.,* McIntyre-Handy v. West Telemktg. Corp., 97 F.Supp. 2d 718, 733 (E.D. Va. 2000): "[T]he best case plaintiff could hope to present is one of mixed-motive—she could attempt to show that religion was a motivating factor in the decision to terminate her employment, even though other, legitimate factors also motivated the decision."

[202] Salaa v. INS, 1993 U.S. App. LEXIS 956 (10th Cir. 1993) (unpublished opinion).

summarily disposed of an appeal by an asylum-seeker who challenged the Board of Immigration Appeals' denial of his application for asylum. Madjid Salaa claimed that he had a well-founded fear of persecution in his home country, Algeria, due to his political beliefs and his atheism.[203] On appeal, as before the Board, Salaa was unable to meet his burden of proof because "he presented no evidence that his beliefs as an atheist could lead to his persecution."[204] This case may exemplify a situation where the plaintiff hoped that judicial sympathy would outweigh a lack of evidence, particularly when combined with his sympathetic asylum-seeking status.

Another atheist lawsuit also failed for lack of evidentiary support, in this case despite legal representation, despite an undeniably atheistic plaintiff, and despite the superficial appearance of a constitutional issue. In *Via v. City of Richmond*,[205] the director of the Virginia chapter of American Atheists sued the Richmond's library for declining to add an atheist publication to their collection and thereby violating his right to free exercise of religion. American Atheists published a monthly magazine, *The American Atheist*, which Via twice offered to the city library, free of charge. Both times the library rejected his gift subscription.[206] The plaintiff presented only one witness to support his claim that the library should have accepted the magazine, and the court rejected this testimony because the "expert" was not qualified to judge library periodicals, nor did he adequately investigate the facts of this case.[207] Instead, the court was persuaded by the librarians' explanation for rejecting the magazine: "[T]he publication was of low quality, there was little or no indication of interest by the reading

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[203] *Id.* at 2. To be eligible for asylum as a refugee, one must show an inability or unwillingness to return to one's country of nationality "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion . . . ." *Id.* at 3, citing 8 U.S.C. § 1158(a) (1988); 8 U.S.C. § 1101(a)(42) (1988).
[204] 1993 U.S. App. LEXIS 956, at 4.
[205] Via v. City of Richmond, 543 F.Supp. 382 (E.D. Va. 1982).
[206] *Id*. at 383.
[207] *Id*. at 384.

public, and the subject matter was dealt with by better-quality publications and books."[208] Reproductions of *The American Atheist* corroborate the library's opinion that the magazine was of low quality; the "magazine" was a black-and-white newsletter with a simplistic layout which included hand-drawn illustrations.[209]

The court also found no evidence that the Richmond library rejected Via's subscription because it did not want to display a magazine espousing atheism,[210] although it would have been difficult for him to prove such discriminatory intent, even if that were the case. The court did not say so, but it may also have been implicitly deferring to the library's expertise and discretion, as the Supreme Court has recently mandated.[211] As a final rebuke, the court noted that it regarded the lawsuit as "harassment" and "frivolous."[212] However, the court may have been unfairly harsh toward the atheistic plaintiff, in particular because it is unclear where the library could have found better sources of information about atheism, as they argued, if not from a magazine published by a prominent national atheist group. Perhaps the court should have questioned the library's rationale more closely.

At least three other meritless lawsuits were brought by atheists who hoped to invalidate provisions in state constitutions that required public officials to believe in God. The Supreme Court previously affirmed in *Torcaso v. Watkins*[213] that such "test oaths" are unconstitutional. However, the plaintiff in *Torcaso* was actually injured, because he was refused a notary public

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[208] *Id*.
[209] A reproduction of the March 1964 issue of *The American Atheist* is included among a collection of other similar periodicals in ATHEIST MAGAZINES: A SAMPLING, 1927-1970 (unnumbered pages) (1972). It may be that the magazine became more professional in appearance between 1964 and 1982, when *Via v. City of Richmond* was decided, but even if it looked professional in 1982, that would still not address the likely lack of public interest in this publication and possible better sources of information on atheism.
[210] 543 F.Supp. at 384.
[211] United States v. Am. Library Ass'n, 539 U.S. 194, 205 (2003) ("Public library staffs necessarily consider content in making collection decisions and enjoy broad discretion in making them.").
[212] Via v. City of Richmond, 543 F.Supp. 382, 385, 385 n.2 (E.D. Va. 1982).
[213] Torcaso v. Watkins, 367 U.S. 488 (1961).

position based on his refusal to declare his belief in God, whereas in the cases that follow the plaintiffs failed to show any injury.[214] On the contrary, in these unsuccessful test-oath lawsuits brought by avowed atheists, the plaintiffs lost due to lack of standing because they were not injured by the oaths.[215] Nevertheless, it is surprising that the states' constitutional provisions in the cases below were not automatically found unconstitutional, given the precedent in *Torcaso*.[216] In practice, the courts were not required to consider the constitutional merits of these claims because the plaintiffs did not have standing. Moreover, the courts did not feel compelled to strike down the constitutional provisions because they were unlikely to be enforced, and thus posed no real threat of constitutional violation. These cases remind us that lawsuits must be firmly grounded in favorable facts and law to be won—personal conviction will not win cases, and claims such as these that lack cognizable injury and are instead purely political efforts are perhaps better left to the legislature.

The first case involved a would-be candidate for governor of South Carolina who claimed the state constitution was unconstitutional because it required public officials to believe in a Supreme Being.[217] Herb Silverman, the plaintiff, was an atheist. Prior to the gubernatorial election, a newspaper reported that the state voting commission might challenge his qualifications to run for office due to his lack of religious belief.[218] However, the commission

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[214] *See, e.g.*, O'Hair v. Hill, 641 F.2d 307, 311 (5th Cir. 1981): "This case does not present the situation of an individual being denied the right to serve as a judge because of a refusal to express a belief in a supreme being. *See* Torcaso v. Watkins, 367 U.S. 488 (1961) . . . . Rather, here we have a litigant claiming that a judicial selection procedure has denied her the due process right to a fair trial. In the absence of a colorable demonstration of an instance of unfairness in the conduct of her trials, however, we find it inappropriate to discern a cognizable injury."
[215] To be fair, in the third case, *O'Hair v. White*, 675 F.2d 680 (5th Cir. 1982) (en banc), the district court and Fifth Circuit both found the plaintiff had no claim, but a divided *en banc* Fifth Circuit found in her favor.
[216] *O'Hair v. White*, 675 F.2d at 696 n.34, noted this incongruity in the majority opinion without explaining it: "Although we do not now decide that section 4 is unconstitutional, it is difficult to distinguish this case from Torcaso v. Watkins, 367 U.S. 488 (1961)."
[217] Silverman v. Ellisor, 1991 U.S. App. LEXIS 18506, at 3-4 (1991) (unpublished opinion).
[218] *Id*. at 4-5.

had already decided that Silverman's beliefs would not disqualify him as a candidate.[219] The Fourth Circuit affirmed the lower court's finding that Silverman's claim was not ripe, since "the record reveals no indication by the Commission that it would enforce the provisions against Mr. Silverman—indeed, the only indication is that the Commission would not enforce them."[220] The court also rejected the plaintiff's claim because he was not yet governor, nor likely to be.[221] Because Silverman's claim failed on the facts, the court did not reach the constitutionality of the requirement that public officials believe in "the Supreme Being," language which still exists in the South Carolina Constitution.[222]

Similarly, the Eighth Circuit heard a case in 1982, *Flora v. White*,[223] which involved a challenge to the Arkansas Constitution. The state constitution then held—and still holds—that "No person who denies the being of a God shall hold any office in the civil department of this state, nor be competent to testify as a witness in any court."[224] The atheistic plaintiffs in this case argued that the state constitution violated the Establishment Clause of the First Amendment. One plaintiff worried that the constitution would prevent her from testifying on her own behalf in a lawsuit and would keep her from a career in government.[225] However, like in the previous case, this plaintiff could not show "that she has been or in all likelihood will be barred either from appearing as a witness or from serving as a prosecuting attorney."[226] Less controversially, the plaintiffs in *Flora* also argued that they suffered "adverse psychological consequences" as a result of the Arkansas Constitution's provision, but the Eighth Circuit noted that the Supreme

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[219] *Id.*
[220] *Id.* at 10.
[221] *Id*. at 5.
[222] The state constitution still holds—in two places, no less, using identical language—that "No person who denies the existence of the Supreme Being shall hold any office under this Constitution." *See* S.C. Const. Ann. Art. VI, § 2; Art. XVII, § 4 (2005).
[223] Flora v. White, 692 F.2d 53 (1982).
[224] *Id.* at 54, citing Ark. Const. Art. 19, § 1 (2006).
[225] 692 F.2d at 54.
[226] *Id.*

Court had ruled the same year that "general psychological impact does not constitute the requisite injury in fact."[227]

These Fourth and Eighth Circuit judges evidently believed—though they did not specify this or give evidence—that such constitutional requirements regarding a belief in God are rarely enforced, and therefore they do not create an "actual or threatened injury" to give plaintiffs standing to sue.[228] The courts may have been seeking to sidestep the thornier question of the state constitutions' conformity with the First Amendment. While the term "a God" in the Arkansas Constitution is both broader and more specific than South Carolina's reference to "the Supreme Being"—which could include other "supreme beings" besides God—both constitutions seems to raise serious constitutional claims. According to their language, atheists and agnostics would be barred from their presumptive right to participate in public office and testify in court.

The final group of unsuccessful and meritless atheist lawsuits to discuss involves Madalyn Murray O'Hair, founder of American Atheists and its president from 1963 to 1995. Among other pursuits, the outspoken atheist was a radio commentator[229] and editor-in-chief of *American Atheist* magazine, the publication at issue in *Via v. City of Richmond*,[230] the library-censorship case discussed above. O'Hair was also the plaintiff in the Maryland lawsuit which

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[227] *Id.*, citing Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 486 (1982): "Although respondents claim that the Constitution has been violated, they claim nothing else. They fail to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms. It is evident that respondents are firmly committed to the constitutional principle of separation of church and State, but standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy."

[228] Flora v. White, 692 F.2d at 54, citing Gladstone, Realtors v. City of Bellwood, 441 U.S. 91, 99 (1979).

[229] MADALYN MURRAY O'HAIR, WHAT ON EARTH IS AN ATHEIST! (1972) (collection of transcribed radio broadcasts by O'Hair from the years 1968 and 1969).

[230] Via v. City of Richmond, 543 F.Supp. 382 (E.D. Va. 1982). *See supra* p. 41. *See also* ALISTER MCGRATH, THE TWILIGHT OF ATHEISM: THE RISE AND FALL OF DISBELIEF IN THE MODERN WORLD 242-56 (2004) (discussing O'Hair's role in the atheism movement).

was consolidated with *School District of Abington Township v. Schempp*[231] and heard by the Supreme Court in 1963.[232] Following the plaintiffs' successful argument in that case that public prayer in schools was unconstitutional, *Life* magazine labeled her "the most hated woman in America."[233] Unfortunately for O'Hair, subsequent court pleadings by her and her daughter were much less successful than *Abington*.

One of O'Hair's lawsuits presented yet another challenge to a state constitution's requirement that officials believe in God. In 1981, the Fifth Circuit heard her *pro se* complaint, joined by the Society of Separationists, that the Texas Constitution established religion in violation of the First Amendment.[234] The state Constitution specified that "No religious test shall ever be required as a qualification to any office, or public trust, in this State; nor shall any one be excluded from holding office on account of his religious sentiments, provided he acknowledge the existence of a Supreme Being."[235] Like in previous cases on this issue, the court held that O'Hair lacked standing because she did not allege any way in which the alleged establishment of religion affected her, since she apparently was not a public official and did not plan to run for office.[236] She also could not show that she was excluded from jury service because of her atheism, since "We cannot anticipate with the requisite certainty whether Texas courts understand [the constitution] to require the exclusion of atheists from jury duty."[237]

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[231] Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203 (1963). Madalyn Murray O'Hair (then Madalyn Murray) petitioned on her son's behalf in Murray v. Curlett, 228 Md. 239 (Ct. App. 1962).
[232] Wikipedia, Madalyn Murray O'Hair, http://en.wikipedia.org/wiki/Madalyn_Murray_O%27Hair (last accessed May 9, 2006).
[233] *Id.* *See also* BRYAN F. LE BEAU, THE ATHEIST: MADALYN MURRAY O'HAIR (2003) (biography); ANN ROWE SEAMAN, AMERICA'S MOST HATED WOMAN: THE LIFE AND GRUESOME DEATH OF MADALYN MURRAY O'HAIR (2005) (same).
[234] O'Hair v. Hill, 641 F.2d 307 (5th Cir. 1981).
[235] *Id.* at 309.
[236] *Id.* at 309-310.
[237] *Id.* at 310.

Despite her "blanket allegation" that she had been denied due-process rights because the selection of Texan judges excludes atheists, O'Hair also presented no evidence to show that she had received unfair treatment in state court due to her atheism.[238] The dissenting judge was sympathetic to her argument that a judicial pool which excluded atheists violated her due-process rights,[239] but the majority forcefully criticized the dissent for indulging O'Hair's claim "in the absence of a showing of injury."[240] The Fifth Circuit's opinion was reheard *en banc*, and that court found in her favor on the narrow issue of standing, without reaching the merits of her claim,[241] based on a broader interpretation of the harm needed to establish standing.[242] However, a strongly-worded dissent in the *en banc* decision reiterated O'Hair's lack of standing and lack of appropriate remedy for her unspecified injuries. That opinion began: "In its zeal to provide a forum for the vindication of first amendment values, the majority rides roughshod over established standing requirements, endows O'Hair with claims she does not allege . . . and ignores O'Hair's failure to demonstrate that she has adequate remedy at law for the claims she advances as a litigant in Texas courts."[243] Among other failings, the dissent noted—as the majority admitted—that the plaintiff did not intend to run for office, calling into question her ability to challenge a statute directed only at current public officials.[244]

More recently, O'Hair's daughter Robin Murray-O'Hair and the Society of Separationists sued a local Texas judge because he allegedly excluded O'Hair from jury duty on religious

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[238] *Id*. at 311.
[239] *Id*. at 313-14 (Clark, J., dissenting): "[D]ue process and equal protection mandate her entitlement to have [judges] chosen from a group which has no ordained religious bias."
[240] O'Hair v. Hill, 641 F.2d 307, 311 (5th Cir. 1981): "Apparently the dissent has concluded, by reference to unarticulated empirical understandings, both that there is a substantial probability that judges selected from a candidate pool which excludes atheists will provide an atheist with a fundamentally unfair trial, and that this probability is incapable of factual demonstration."
[241] O'Hair v. White, 675 F.2d 680, 695 (5th Cir. 1982) (en banc).
[242] *See, e.g.*, *id*. at 687 ("actual harm to individual values of an abstract or esoteric nature can provide the basis for standing").
[243] *Id*. at 696 (Tjoflat, J., dissenting); *see generally id.* at 696-703 (Tjoflat, J., dissenting).
[244] *Id*. at 697. The majority opinion characterized her failure to allege an intention to run for office as mere "inartfulness." *Id*. at 690 (the.

grounds.[245] The plaintiffs sought five million dollars in damages.[246] In contrast with prior cases regarding public office and jury duty, where the plaintiffs complained only of potential injury from restrictive constitutional provisions, this case seemed to present actual evidence of harm. However, a closer look at the facts shows that again the plaintiff lacked evidence of any harm, and in fact the plaintiff compounded the problem. O'Hair objected to taking an oath before voir dire questioning during jury duty because she was an atheist.[247] However, she also refused to affirm, in lieu of an oath, that she would answer the questions truthfully. In what seems like a reasonable solution to the dilemma presented by mandatory oaths for jury duty, the judge had offered her an "oath of affirmation" that could be taken "without . . . any reference to God or anything of that nature."[248] The judge was able to offer this alternative because Texas courts had previously relaxed the oath requirement, such that no particular form of words were required to take an oath.[249] O'Hair refused to take even the religion-free oath, however, and was held in contempt, leading her to sue the judge and the court system for the unconstitutional oath requirement.

Like many other atheistic plaintiffs with meritless claims, O'Hair lacked standing and thus lost her case because she failed to meet her evidentiary burden.[250] Her claim relied on one alleged past instance of injury—the conflict with her beliefs posed by the requirement that she take an oath—but requests for injunctive relief must be based on ongoing injuries. In this case, she suffered no continuing harm from the judge's actions, and it was very unlikely that she

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[245] Society of Separationists, Inc. v. Herman, 959 F.2d 1283 (5th Cir. 1992).
[246] *Id.* at 1285.
[247] *Id.* at 1284.
[248] *Id.*
[249] *Id.* at 1286 n.2.
[250] *Id.* at 1285: "Standing defies precise definition," the court noted, "but at the least insists that the complained of injury be real and immediate rather than conjectural, that the injury be traceable to the defendant's allegedly unlawful conduct, and that relief from the injury must be likely to follow from a favorable ruling."

would appear before the same judge, and experience the same problem with him, ever again.[251] Furthermore, the court held, "There is nothing to indicate, and we decline to presume, that Judge Herman will fail to take cognizance of applicable constitutional principles in future proceedings."[252] Rather, this case was based on a singular experience and did not challenge any particular Texas law or policy,[253] in contrast to her mother's challenge to the Texas Constitution in *O'Hair v. White*.[254] The baselessness of O'Hair's claim, and particularly her willingness to bring suit against an authority figure as sacrosanct as a judge, illustrates the contrarian attitude which may be a common characteristic of atheists.

With all of these unsuccessful atheist lawsuits, the shortcomings of the litigants' claims are striking. The allegedly atheistic claimants are unable to prove their case—and often lose at summary judgment—because of indisputable evidentiary shortcomings or uncontroversial legal faults. Indeed, the plaintiffs may appear unrealistic or unreasonable for even bringing their suits, while the courts seem fair because the cases are so easily decided. In fact, in some cases courts seem exceptionally permissive and patient toward the litigants, as with the telemarketer in *McIntyre-Handy*. Overall, these opinions support the conclusion that courts are not unreasonable in their consideration of atheists' claims, but rather are quite fair. The lack of real harm at issue in these cases also counteracts Gresock's argument that atheists are a principled and persecuted religious minority; if there are so few serious cases, perhaps discrimination against atheists is not as serious a legal and social dilemma as Gresock implies. On the contrary, these cases suggest that some atheists may not be sincere about their atheism—they may ascribe to only "superficial"

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[251] Society of Separationists, Inc. v. Herman, 959 F.2d 1283, 1285 (5th Cir. 1992). *See also id.* at 1287: "[S]he objects to the specific events which led to her incarceration by a single judge whom she is unlikely to encounter again and whose administration of the oath or affirmation requirement is likely to vary in different circumstances."
[252] *Id*. at 1287.
[253] 959 F.2d at 1287.
[254] O'Hair v. White, 675 F.2d 680 (5th Cir. 1982) (en banc), *supra* p. 43.

atheism, in the words of Paul Vitz[255]—or they may even been insincere and opportunistic in invoking atheism.

[255] VITZ, *supra* note 7.

VI. CONCLUSION: ATHEISM IN THE COURTS AND SOCIETY

Atheists are often viewed as a persecuted minority, and atheistic plaintiffs have brought dozens of lawsuits over the years seeking redress for alleged constitutional violations resulting from such discrimination. This paper challenged that assumption by revealing the surprising shortage of meritorious, successful lawsuits in this field, which in turn may suggest that atheists' marginalization is overstated and their constitutional complaints are exaggerated, to the extent that judicial opinions can be extrapolated to more general sociological observations. In a surprising number of cases, atheists were unable to show any evidence whatsoever of discrimination against them, calling into question the seriousness of their complaints. Many other times, atheists were unable to show that their alleged harms rose to the level of constitutionally cognizable complaints. That failure does not necessary mean that discrimination did not exist in those cases, but at least that the respective courts felt that the discrimination was not legally significant.

Of course, some of these lawsuits, those categorized as meritorious yet unsuccessful, do present serious legal issues even though the courts ultimately reject their claims. The failure of these borderline cases reminds us that the constitutional standards which courts use to judge these issues, the legal thresholds of analysis, are contestable and flexible. That malleability, in turn, reminds us that those legal standards could change. A strong case may be made, as Stephen Epstein does in his article on ceremonial deism, that the Supreme Court and lower courts have been improperly permissive toward the entanglement of religion and government in our society.[256] If so, ongoing lawsuits brought by atheists are helpful in continuing to challenge the courts' standards in First Amendment jurisprudence as it pertains to atheists, with the hope of continuing to push the courts toward greater protection of atheists' rights. Losses in individual

[256] *See generally* Epstein, *supra* note 13.

lawsuits may nonetheless pave the way toward future victories by gradually introducing courts to new legal arguments. Viewed in this light, there is still plenty that can be done litigiously to further remove the trappings of religion from everyday life and thus relieve atheists of the unwelcome burden of state-sanctioned religiosity.

On the other hand, it is also important to note that some plaintiffs invoke atheism for entirely selfish reasons and on entirely frivolous grounds, though frivolous lawsuits are perhaps inevitable and understandable with such a controversial issue, which will tend to attract strong feelings on all sides. We should encourage legitimate atheist complaints and discourage frivolous ones, as the courts already do by applying their sound and fair judgment to adjudicating these claims.

In order to bring a successful First Amendment claim based on discrimination against atheism, as with any First Amendment claim, plaintiffs must have compelling evidence on their side and must be able to overcome the relatively high burden of proof in Free Exercise Clause and Establishment Clause jurisprudence. In particular, they must be able to show that a challenged law or policy substantially interferes with their practice of religion or that it clearly violates government's obligation to remain neutral with regard to religion. With regard to evidence, plaintiffs must show evidence of discrimination and make clear that the bad treatment was related to their atheism, which is difficult to prove. Alternately, in order to strike down a constitutional provision, a statute, or a governmental policy, a plaintiff must show that there is a real constitutional violation at hand and a real threat of harm, not just a hypothetical injury.