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Redefining "Atheism" in America: What the United States Could Learn From Europe's Protection of Atheists

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REDEFINING “ATHEISM” IN AMERICA: WHAT THE UNITED STATES COULD LEARN FROM EUROPE’S PROTECTION OF ATHEISTS

ABSTRACT

There continues to be a pervasive and persistent stigma against atheists in the United States. The current legal protection of atheists is largely defined by the use of the Establishment Clause to strike down laws that reinforce this stigma or that attempt to deprive atheists of their rights. However, the growing atheist population, a religious pushback against secularism, and a neo-Federalist approach to the religion clauses in the Supreme Court could lead to the rights of atheists being restricted. This Comment suggests that the United States could look to the legal protections of atheists in Europe. Particularly, it notes the expansive protection of belief, thought, and conscience and some forms of establishment.

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INTRODUCTION

Atheism, the belief in no god or gods,¹ has for the vast majority of recorded history been despised, stigmatized, and oppressed.² It was not until the 1960s that atheism began to spread.³ The post-World War II era also saw an international shift in focus from the protection of group rights to the protection of fundamental individual rights, such as freedom of religion.⁴ The respective legal systems of the United States and the emerging European Community responded to this new human rights paradigm and the growth of atheism in different ways. The United States, which already had nearly two centuries of religious liberty jurisprudence, attempted to craft a new interpretation of the religion clauses of the Constitution to protect both religion and non-religion equally.⁵ Europe was attempting to create a new supranational identity, and looked to principles being developed by the greater international community.⁶ In the United States today, however, a growing, more unified, and more vocal atheist population, religious pushback against secularism, and a neo-federalist approach in the Supreme Court could threaten to make the American model untenable in the future.⁷ Instead, the continued legal protection of atheists' rights in the United States would be best accomplished by looking to the guiding principles from the international framework on religious liberty as adopted by Europe.⁸

¹ A more thorough definition will be developed in Part I.A.

² See Jan N. Bremmer, *Atheism in Antiquity*, in THE CAMBRIDGE COMPANION TO ATHEISM 11, 11 (Michael Martin ed., 2007) (explaining that, throughout history, atheists have been dissenters, and critics have accused others of atheism to discredit them).

³ Gavin Hyman, *Atheism in Modern History*, in THE CAMBRIDGE COMPANION TO ATHEISM, *supra* note 2, at 27, 32.

⁴ W. COLE DURHAM, JR. & BRETT G. SCHARFFS, LAW AND RELIGION 79 (2010); Steven G. Gey, *Atheism and the Freedom of Religion*, in THE CAMBRIDGE COMPANION TO ATHEISM, *supra* note 2, at 250, 250.

⁵ See, e.g., *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961) (“We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person ‘to profess a belief or disbelief in any religion.’ Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers.”).

⁶ MARK WESTON JANIS & JOHN E. NOYES, INTERNATIONAL LAW CASES AND COMMENTARY 428 (4th ed. 2011).

⁷ These changing circumstances will be detailed more thoroughly in Part II.

⁸ While this Comment will often refer to Europe, it is limited primarily to the member states of the European Union (“EU”) and nations party to the European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”). Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, E.T.S. No. 5 (entered into force Sept. 3, 1953) [hereinafter ECHR].

The current legal protection of atheists in the United States is largely defined by the use of the Establishment Clause⁹ to strike down laws that indirectly reinforce a pervasive and persistent stigma against atheists.¹⁰ The United States has long been hailed as a land of religious freedom and tolerance,¹¹ a proposition borne out by the broad legal protections offered by the Constitution¹² and the growing acceptance of people of various faiths by American society.¹³ However, despite this broad protection of religious belief and the general religious tolerance of American society, atheists remain among the most despised minorities in the United States.¹⁴ While this stigma has not resulted in many forms of direct government oppression in recent times,¹⁵ the stigma is reinforced by overt or implicit religious endorsements¹⁶ that serve to both ostracize atheists and convey to the religious majority that atheists are disfavored.¹⁷ The Establishment Clause currently provides the best legal mechanism for combating this discrimination by striking down laws that do not pass muster under the prevailing *Lemon* test.¹⁸ However, the use of the Establishment Clause will increasingly become inadequate as the Supreme

⁹ U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion . . .”).

¹⁰ Gey, *supra* note 4, at 262.

¹¹ See JOHN WITTE, JR. & JOEL A. NICHOLS, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT xx (3d ed. 2011).

¹² U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .”). These two clauses are referred to as the Establishment Clause (or the Non-Establishment Clause) and the Free Exercise Clause. JEROEN TEMPERMAN, STATE-RELIGION RELATIONSHIPS AND HUMAN RIGHTS LAW 116 (2010).

¹³ See Penny Edgell et al., *Atheists as “Other”*: Moral Boundaries and Cultural Membership in American Society, 71 AM. SOC. REV. 211, 212–14 (2006).

¹⁴ *Id.* at 230 (“Atheists are at the top of the list of groups that Americans find problematic in both public and private life, and the gap between acceptance of atheists and acceptance of other racial and religious minorities is large and persistent.”).

¹⁵ Gey, *supra* note 4, at 259 (“Legal protection of atheism and atheists is now the norm in modern Western constitutional democracies.”). *But see* Eugene Volokh, *Discrimination Against Atheists*, VOLOKH CONSPIRACY (Aug. 29, 2005, 3:16 PM), <http://volokh.com/posts/1125342962.shtml> (arguing that legal discrimination occurs in U.S. child custody cases based on the religiosity of the parent).

¹⁶ One of the most contentious examples is the phrase “under God” that was inserted into the pledge of allegiance in 1954. 4 U.S.C. § 4 (2006). A challenge to the phrase made it to the Supreme Court, but failed on standing grounds. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 17–18 (2004). In response to the Ninth Circuit ruling that prompted the Supreme Court to grant certiorari, Congress passed a bill reaffirming the use of the phrase and encouraging schools and public buildings to display the pledge. H.R. REP. NO. 107-659, at 5 (2002), *reprinted in* 2003 U.S.C.C.A.N. 1304, 1305.

¹⁷ *Wallace v. Jaffree*, 472 U.S. 38, 69 (1985) (O’Connor, J., concurring in the judgment); Gey, *supra* note 4, at 262.

¹⁸ *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971); DURHAM & SCHARFFS, *supra* note 4, at 141 (stating that, although widely criticized, this three-pronged test is still often used by the lower federal courts to evaluate Establishment Clause cases).

Court continues to shy away from aggressively applying the religion clauses to the states¹⁹ and as the American atheist population grows.²⁰

The model employed in Europe offers a different approach to the legal protection of atheists, and can provide some guiding principles to aid the United States in ensuring continued legal protection for atheists in America. Following World War II, the birth of the United Nations and the focus on individual human rights were accompanied by the formation of the Council of Europe in 1949.²¹ The Council of Europe produced the European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”) in 1950.²² The ECHR, acting as a European Bill of Rights, drew many of its provisions from international sources²³ and Article 9, which protects freedom of religion or belief,²⁴ “is almost identical to Article 18 of the Universal Declaration of Human Rights.”²⁵ In contrast to the United Nations, however, the European human rights system established more robust enforcement mechanisms.²⁶ This human rights system now covers more 900 million people in forty-seven countries,²⁷ and is widely recognized as one of the most, if not the most, effective human rights organizations in the world.²⁸

¹⁹ This movement is largely referred to as “deincorporation,” because the Court would be in effect or reality reversing the selective incorporation of the religion clauses via the Fourteenth Amendment. WITTE & NICHOLS, *supra* note 11, at xxi, 95, 126; James J. Knically, “First Principles” and the Misplacement of the “Wall of Separation”: Too Late in the Day for a Cure?, 52 DRAKE L. REV. 171, 174 n.15 (2004) (listing a thorough collection of the academic calls for deincorporation); John Witte, Jr., Facts and Fictions of Separation of Church and State 5–6 (Mar. 2, 2005), available at http://cslr.law.emory.edu/fileadmin/media/PDFs/Lectures/Witte_-_Facts_and_Fiction_Lecture.pdf. Deincorporation will be discussed more thoroughly in Part II.E.

²⁰ Special Rapporteur on the Question of Religious Intolerance, *Civil and Political Rights, Including: Freedom of Expression: Addendum: Visit to the United States of America*, Comm’n on Human Rights, 11, U.N. Doc. E/CN.4/1999/58/Add.1 (Dec. 9, 1998) [hereinafter Special Rapporteur] (by Abdelfattah Amor) (“In terms of personal religious identification, the most rapidly growing group in the United States is atheists/agnostics (currently about 8 million).”); see THE PEW FORUM ON RELIGION & PUB. LIFE, U.S. RELIGIOUS LANDSCAPE SURVEY: RELIGIOUS AFFILIATION 5 (2008) [hereinafter U.S. RELIGIOUS LANDSCAPE SURVEY], available at <http://religions.pewforum.org/pdf/report-religious-landscape-study-full.pdf>.

²¹ Statute of the Council of Europe, May 5, 1949, 87 U.N.T.S. 103, E.T.S. No. 1.

²² ECHR, *supra* note 8.

²³ See JANIS & NOYES, *supra* note 6, at 428.

²⁴ ECHR, *supra* note 8, art. 9.

²⁵ DURHAM & SCHARFFS, *supra* note 4, at 36.

²⁶ See *id.* at 92; JANIS & NOYES, *supra* note 6, at 428. The most important enforcement mechanism today is Protocol No. 11, which requires member states to recognize the right of individuals to petition and makes judgments binding on the member states. Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms arts. 34, 46, opened for signature May 11, 1994, 2061 U.N.T.S. 7, E.T.S. No. 155 (entered into force Nov. 1, 1998) [hereinafter Protocol No. 11].

²⁷ DURHAM & SCHARFFS, *supra* note 4, at xxxii.

²⁸ *Id.* at 91; JANIS & NOYES, *supra* note 6, at 428.

Europe also provides an excellent source of inspiration because its human rights framework is applied to a population with a high percentage of atheists.²⁹ European atheists are generally considered to be in a much more favorable position than their American counterparts.³⁰ With the American atheist population growing, and its primary means of protection being restricted, the United States should look to the example of Europe for guiding principles on how to craft a religious liberty regime that effectively protects atheists against discrimination and stigma.

This Comment seeks to show why it is time to reevaluate the United States' protection of atheism and suggests adopting some guiding principles from the European approach. Part I lays out the basic framework for the analysis by providing a definition of atheism, briefly describing the American anti-atheist stigma, and examining the history of legal protection for atheists in the United States. Part II details the changing circumstances that necessitate a new approach. Part III describes the development of the framework used to protect religious liberty in Europe, and the guiding principles that can be gleaned from it. Finally, Part IV illustrates how the guiding principles are likely to be received and how they might be implemented.

²⁹ Of the forty-seven member states to the ECHR, twenty-nine are in the top fifty countries by percentage of atheists, agnostic, or nonbelievers in God, and seven in the top ten. Phil Zuckerman, *Atheism: Contemporary Numbers and Patterns*, in THE CAMBRIDGE COMPANION TO ATHEISM, *supra* note 2, at 47, 56–57.

³⁰ One study used data from the World Values Study to measure anti-atheist bias. After applying regression models, the study was left with residual scores for each country with available data. “Higher scores indicate more anti-atheist prejudice. Consistent with extant research, mean residualized anti-atheist prejudice values were higher in the United States (0.18) and Canada (-0.23) than in Sweden (-0.73) and Denmark (-1.11).” Will M. Gervais, *Finding the Faithless: Perceived Atheist Prevalence Reduces Anti-Atheist Prejudice*, 37 PERSONALITY & SOC. PSYCHOL. BULL. 543, 546 (2011). Using the same data Gervais relied upon (but without some of his regressions) we can get a simple view of the stigma in Europe. Using the fourth-wave data from the twenty-six EU countries with available data (Cyprus is missing), we can measure the percentage of respondents in each country who either strongly agreed or agreed with the statement that “politicians who don’t believe in God are unfit for public office.” In the United States, 17.8% of respondents strongly agreed, while 20.5% agreed (total 38.3%). In the EU, the Netherlands was the least likely to agree with 0.6% and 1.2% for 1.8% total, and Romania was the most likely to agree with 25.2% and 26.8% for 52% total. Even with the high total percentages from Romania (52%), Malta (40.7%), and Greece (37.3%), the average total score of the twenty-six nations was 15.98%, well below the United States’ score of 38.3%. The total drops to 14.22% factoring in the relative populations of the member states (except for Cyprus). Question data was drawn from the World Values Survey. WORLD VALUES SURVEY, http://www.worldvaluessurvey.org/index_html (last visited Feb. 26, 2012). Population data was drawn from the European Union site. *Living in the EU*, EUROPEAN UNION, http://europa.eu/about-eu/facts-figures/living/index_en.htm (last visited Feb. 26, 2012).

I. ATHEISM IN AMERICA

Atheists in America today face a deeply religious populace that holds a powerful and resilient anti-atheist prejudice, outstripping its distaste for other stigmatized groups, such as Muslims and homosexuals.³¹ As the American atheist population grows and the Court continues to move towards deincorporation, this stigma is more likely to be expressed in state legislation that discriminates against or harms atheists. This Comment suggests some legal principles that could be adopted from the European system to protect atheists from such legislation, but it is important to start with a brief description of atheism and the anti-atheist stigma that is prevalent in America.

A. *What Is Atheism?*

Atheism can be difficult to define,³² not only literally, but also in the connotations that are attached to the term. For instance, it is not unusual to see survey respondents directly claim not to believe in God while still refusing to self-identify with the term.³³ There are two main goals of this Subpart: to briefly define “atheism” for readers who are unfamiliar with some of the contours of the term,³⁴ and to explain why this Comment will use a slightly broader definition that encompasses not only atheists, but agnostics and other nonbelievers³⁵ as well.

A common dictionary definition of atheism defines it as a “disbelief in the existence of a supreme being or beings.”³⁶ It is usually framed in contrast to the prevailing monotheistic religions but is technically broader as a rejection of belief in supernatural beings, supreme or otherwise, and therefore also rejects

³¹ Edgell et al., *supra* note 13, at 217–18.

³² The Supreme Court has considered the negative connotations associated with atheism. Sch. Dist. of Abington v. Schempp, 374 U.S. 203, 208 n.3 (1963) (citation omitted).

³³ Edgell et al., *supra* note 13, at 214; Zuckerman, *supra* note 29, at 47 (noting a 2003 study in which more than forty percent of Norwegian, French, and Czech respondents claimed not to believe in God, but fewer than twenty percent self-identified as “atheist”).

³⁴ For a more comprehensive understanding of various atheistic schools of thought and the arguments behind them, see DOUGLAS E. KRUEGER, WHAT IS ATHEISM? A SHORT INTRODUCTION (1998); THE CAMBRIDGE COMPANION TO ATHEISM, *supra* note 2.

³⁵ This Comment uses the terms “nonbelievers” or “the non-religious” to refer to those who do not identify as atheist or agnostic, but who would be similarly affected by legislation expressing the anti-atheist stigma.

³⁶ RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY (2d ed. 2001).

non-theistic religions.³⁷ The distinction, while interesting, is outside the scope of this Comment because these non-theistic beliefs are generally grouped with the monotheistic religions in First Amendment doctrine.³⁸ This definition of atheism is usually seen as covering two versions of atheism: positive atheism and negative atheism.³⁹ Positive atheism, which is usually considered the more popular meaning, is a belief that no God or gods exist.⁴⁰ Negative atheism, which is more in line with the word's Greek roots, is simply a lack of belief in God or gods.⁴¹ These categories should not be viewed rigidly or as limiting an individual atheist's views, especially when attempting to find a suitable definition of atheism in contrast to different concepts of God or gods.⁴²

Two groups that are not generally considered atheists, but that should be included in this working definition, are agnostics⁴³ and the non-religious.⁴⁴ There are at least two reasons to include these two groups in the working definition: First, they are already often grouped with atheists in statistical reports and commentaries, as opposed to with the religious;⁴⁵ second, many

³⁷ Most books discussing atheism frame the arguments against the God of the Christian faith because it is the dominant religious philosophy in their markets and the one they are best equipped to analyze. *See, e.g.*, RICHARD DAWKINS, *THE GOD DELUSION* 36 (2006) ("I am aware that critics of religion can be attacked for failing to credit the fertile diversity of traditions and world-views that have been called religious. . . . I decry supernaturalism in all its forms, and the most effective way to proceed will be to concentrate on the form most likely to be familiar to my readers. . . ."); SAM HARRIS, *LETTER TO A CHRISTIAN NATION* (2008); *THE CAMBRIDGE COMPANION TO ATHEISM*, *supra* note 2.

³⁸ *Torcaso v. Watkins*, 367 U.S. 488, 495 n.11 (1961) (noting that the government cannot aid religions based on a belief in a supreme being against those that are founded on non-theistic beliefs, including "Buddhism, Taoism, Ethical Culture, Secular Humanism and others").

³⁹ Michael Martin, *General Introduction*, in *THE CAMBRIDGE COMPANION TO ATHEISM*, *supra* note 2, at 1, 1. These are also sometimes referred to as the narrow and broad versions of atheism. KRUEGER, *supra* note 34, at 17–18.

⁴⁰ Martin, *supra* note 39, at 1.

⁴¹ *Id.* at 1–2.

⁴² *See id.* at 2 ("These categories should not be allowed to mask the complexity and variety of positions that atheists can hold, for a given individual can take different atheistic positions with respect to different concepts of God."). Another way of viewing this distinction is by plotting human judgments on the probability of the existence of a God or gods on a line between a strong theist who thinks there is a one hundred percent probability of God existing (point 1), and a strong atheist who thinks there is a one hundred percent probability that there is no God (point 7). DAWKINS, *supra* note 37, at 50–51. A positive atheist is likely to be a 7, while a negative atheist is likely to be a 5 or 6. Dawkins states that someone scoring a 5 or 6 would agree with the following statement: "I don't know whether God exists but I'm inclined to be skeptical." *Id.*

⁴³ "Agnosticism [is] the position of neither believing nor disbelieving that God exists." Martin, *supra* note 39, at 2.

⁴⁴ *See supra* note 35 and accompanying text.

⁴⁵ *See, e.g.*, Edgell et al., *supra* note 13, at 214; Zuckerman, *supra* note 29, at 55.

among them are also likely to be subjected to discrimination and stigma for their lack of religious belief.⁴⁶

B. *The Stigma*

A widespread and pervasive stigma against atheists persists in America today.⁴⁷ Polling data suggest that atheists are the least accepted group by Americans, even outstripping “lightning-rod” groups such as homosexuals and Muslims.⁴⁸ This social rejection is both public and private.⁴⁹ For example, a 2011 Gallup Poll found that in response to the question, “[i]f your party nominated a generally well-qualified person for president who happened to be ATHEIST would you vote for that person,” only 49% of Americans responded “yes.”⁵⁰ This stands in stark contrast to responses for hypothetical nominees who were: black (94%), women (93%), Catholic (92%), Jewish (89%), and Mormon (76%).⁵¹ When a 2003 survey asked whether members of particular minorities shared the respondent’s vision of American society, 39.6% responded that atheists do not at all agree with their vision of American society (the next closest was Muslim at 26.3%).⁵² When asked about their approval if their child wanted to marry an atheist, 47.6% said they would disapprove (the

⁴⁶ However, there are also several problems with their inclusion. Just because individuals claim no religion does not mean that they reject a belief in God or gods. Edgell et al., *supra* note 13, at 214 (noting that while fourteen percent of Americans claimed no religious preference, most of them still believed in God and prayed regularly). Their movement along the spectrum closer to religious belief may also remove or reduce the discrimination they face, and in turn make them less uncomfortable and less willing to protest discriminatory practices.

⁴⁷ See Edgell et al., *supra* note 13, at 214, 230. Unfortunately, “[a]lthough discussions of atheism have become increasingly common in popular culture, researchers have only recently turned their empirical attention to atheism and attitudes toward atheists.” Gervais, *supra* note 30, at 544. Therefore, there are only a handful of studies on the topic, Edgell’s being the most prominent.

⁴⁸ Edgell et al., *supra* note 13, at 217 (“Americans are less accepting of atheists than of any of the other groups we asked about, and by a wide margin. The next-closest category [measured by the polls] is Muslims. We expected Muslims to be a lightning-rod group, and they clearly were. This makes the response to atheists all the more striking.”).

⁴⁹ *Id.* at 214.

⁵⁰ Frank Newport, *Americans Still Hold Certain Biases in Choosing President*, GALLUP (June 20, 2011), <http://www.gallup.com/video/148106/Americans-Hold-Certain-Biases-Choosing-President.aspx>.

⁵¹ *Id.*

⁵² Edgell et al., *supra* note 13, at 218. Surveyors asked about the following groups and whether they did not agree with the participants’ vision of American society: Atheist (39.6%), Muslim (26.3%), homosexual (22.6%), conservative Christian (13.5%), recent immigrant (12.5%), Hispanic (7.6%), Jew (7.4%), Asian American (7.0%), African American (4.6%), and White American (2.2%). *Id.*

next closest was Muslim at 33.5%).⁵³ The latter two questions were specifically chosen to gauge Americans' rejection of atheists in public and private spheres, respectively.⁵⁴ These surveys show not only that there exists a strong stigma against atheists, but also that it is especially strong when compared with other stigmatized groups.

This stigma has also proved remarkably persistent, offering a “‘glaring exception’ to the general rule of increasing social tolerance over the last thirty years of the twentieth century.”⁵⁵ Notably, other out-groups such as racial and religious minorities have seen a “marked increase in acceptance . . . over the past forty years.”⁵⁶ The only group to rate lower than atheists on the “Willingness to Vote for Presidential Candidates” scale was homosexuals during the 1978 iteration of the Gallup poll.⁵⁷ However, by 1999 they had received greater than a thirty percent jump to leapfrog atheists.⁵⁸ This is not to suggest that acceptance of atheism hasn't improved over the years (forty-nine percent is a large increase from the mere eighteen percent who said yes to the presidential question in 1958),⁵⁹ but atheists have clearly not achieved the acceptance and tolerance gained by other stigmatized minorities. Perhaps even

⁵³ *Id.* The following groups were asked about and received the following percentages: Atheist (47.6%), Muslim (33.5%), African American (27.2%), Asian American (18.5%), Hispanic (18.5%), Jew (11.8%), conservative Christian (6.9%), white (2.3%). *Id.*

⁵⁴ *Id.* at 217.

⁵⁵ *Id.* at 215–16. Edgell and others have attempted to explain this difference by looking to the reasons behind the stigma. *Id.* Although the reasons behind the stigma are beyond the scope of this Comment, four explanations are usually offered. The first is that it is a holdover from an era when governments rested their claims of legitimacy on divine right. Gey, *supra* note 4, at 252 (“The legitimacy of premodern governments rested on claims of divine right, which were directly threatened by atheistic beliefs that denied the existence of the divinity.”). The second is that atheism has suffered from association with Communism and the USSR, where fifty years of Cold War rhetoric linked atheism with the Soviet empire and everything that is bad, while religion was linked with the United States and everything that is good. DAWKINS, *supra* note 37, at 272–78 (discussing of the evidence linking atheism to both Stalin and Hitler and why connection should not be mistaken for causation); SUSAN JACOBY, FREETHINKERS: A HISTORY OF AMERICAN SECULARISM 227–67 (2004) (discussing in a chapter, aptly titled “Unholy Trinity: Atheists, Reds, Darwinists,” how this connection was already being made in the 1920s); see Hyman, *supra* note 3, at 31 (explaining the association between atheism and left-wing revolutionary thought in the late nineteenth century). The third explanation for the stigma is the widespread belief that a foundation for morality can only be provided by religion, and therefore that atheists are incapable of having morals. KRUEGER, *supra* note 34, at 25; Edgell et al., *supra* note 14, at 214, 228 (“For all these respondents, atheists represent a general lack of morality.”). The fourth explanation is that religious individuals inherently distrust those without religion, because they believe that they will be more likely to engage in anti-social behavior. Will M. Gervais et al., *Do You Believe in Atheists? Distrust Is Central to Anti-Atheist Prejudice*, 101 J. PERSONALITY & SOC. PSYCHOL. 1189, 1200–01 (2011).

⁵⁶ Edgell et al., *supra* note 13, at 212.

⁵⁷ *Id.* at 215.

⁵⁸ 1978 was the first time that the question was asked using homosexual as a descriptor. *Id.*

⁵⁹ Newport, *supra* note 50.

more concerning, acceptance of atheists has stagnated in the polls since 1987 and may even be seeing a decline.⁶⁰ This high degree of stigma and its persistence has led some to claim that atheists are the last oppressed minority in America and are in need of a civil rights movement.⁶¹

This stigma is manifested in a number of ways. While there is some sign of direct harassment and discrimination against atheists,⁶² such overt discrimination is still rare, due to the small number of atheists and the fact that they are not easily identified.⁶³ Instead, atheists face cultural and political isolation and ostracism.⁶⁴ As the presidential candidate polls indicate, “atheists are culturally and politically isolated because of the common assumption that political actors must demonstrate religious devotion as part of their public duties.”⁶⁵ This holds true despite the existence of a constitutional provision banning religious oath tests,⁶⁶ and a series of cases since 1961 that have invalidated state provisions requiring office holders to profess a belief in God.⁶⁷ Today, there is only one openly atheist member of Congress, and he has said that he only felt comfortable revealing his beliefs due to his long tenure and solid incumbency.⁶⁸

⁶⁰ See Edgell et al., *supra* note 13, at 215.

⁶¹ Margaret Downey, *Discrimination Against Atheists: The Facts*, FREE INQUIRY, June/July 2004, at 41. However, this is contested even within the atheist community. See DJ Grothe & Austin Dacey, *Atheism Is Not a Civil Rights Issue*, FREE INQUIRY, Feb./Mar. 2004, at 50.

⁶² Margaret Downey and many atheist groups have begun collecting accounts of such discrimination. See Downey, *supra* note 61, at 41–42. A particularly egregious example is found in custody cases where non-religious parents are being denied custody at least in part due to their lack of religion. Volokh, *supra* note 15.

⁶³ Edgell et al., *supra* note 13, at 214; *accord id.* at 230 (“Unlike members of some other marginalized groups, atheists can ‘pass’: people are unlikely to ask about a person’s religious beliefs in most circumstances, and even outward behavioral signs of religiosity (like going to church) do not correlate perfectly with belief in God.”). Of course, this inability to readily identify atheists also contributes to atheists’ feelings of isolation and inability to coordinate. Author Christopher Hitchens went on a tour to promote his book *God Is Not Great* and noted after an event in Little Rock that “I discover something that I am going to keep on discovering: Half the people attending had thought that they were the only atheists in town.” CHRISTOPHER HITCHENS, *GOD IS NOT GREAT: HOW RELIGION POISONS EVERYTHING* 286 (1st trade ed. 2009).

⁶⁴ Gey, *supra* note 4, at 251.

⁶⁵ *Id.*; see also Mary J. Loftus, *Running on Faith*, EMORY MAG., http://www.emory.edu/EMORY_MAGAZINE/issues/2012/winter/features/faith.html?utm_source=newsletter&utm_medium=email&utm_campaign=winter12-campus (last visited Feb. 18, 2012).

⁶⁶ U.S. CONST. art. VI, cl. 3 (“[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.”).

⁶⁷ *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961). Despite this ruling, states such as South Carolina were still enforcing such provisions as late as 1992, and only stopped after a five-year court battle. *Silverman v. Campbell*, 486 S.E.2d 1, 1–2 (S.C. 1997).

⁶⁸ Carla Marinucci, *Stark’s Atheist Views Break Political Taboo*, SFGATE (Mar. 14, 2007), <http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2007/03/14/MNG7BOKV111.DTL>.

This political isolation also provides a nexus by which the statements of government officials⁶⁹ and laws giving preference to religion or faith provide positive feedback to this stigma.⁷⁰ As Justice Sandra Day O'Connor stated in her concurrence in *Wallace v. Jaffree*: "Direct government action endorsing religion . . . 'sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.'"⁷¹ Put another way: "The incorporation of religious principles into government policies or the use of religious overtures or symbolism in official pronouncements or insignia inevitably distorts the intellectual marketplace in a way that subtly undercuts the equality between religion and atheism that is the sine qua non of religious liberty."⁷² This positive feedback remains true even if the statutes are unenforceable. For example, although state constitutional provisions requiring officeholders to profess a belief in God have been ruled unconstitutional,⁷³ nine states still have such provisions on the books.⁷⁴ They are still sometimes used as justifications for political attacks on atheists and calls to bar them from public office.⁷⁵ This positive reinforcement of the stigma against atheists remains the one of the largest concerns for

⁶⁹ Peter Beinart, *Bad Faith*, NEW REPUBLIC, Mar. 25, 2002, at 6 ("Civilized individuals, Christians, Jews, and Muslims, all understand that the source of freedom and human dignity is the Creator. Governments may guard freedom. Governments don't grant freedom. All people are called to the defense of the Grantor of freedom, and the framework of freedom He created." (quoting Attorney General John Ashcroft)); DAWKINS, *supra* note 37, at 43 n.22 (George H.W. Bush reportedly said the following in response to a question about whether he recognized the equal citizenship of American atheists: "No, I don't know that atheists should be considered as citizens, nor should they be considered patriots. This is one nation under God." However, there is no tape recording of the exchange and none of the other journalists at the press conference reported it. (quoting Robert I. Sherman, FREE INQUIRY, Fall 1988, at 16)).

⁷⁰ Gey, *supra* note 4, at 264 ("[T]he government has responded to the religious views of the population by overtly endorsing religious values. The government has gone so far as to insert the words 'under God' in the official Pledge of Allegiance and place 'in God we trust' on its currency.").

⁷¹ *Wallace v. Jaffree*, 472 U.S. 38, 68 (1985) (O'Connor, J., concurring in the judgment) (quoting Lynch v. Donnelly, 465 U.S. 668, 688 (1984)). Mr. Newdow's "spell-binding" oral argument also highlights this idea. *Recap of Oral Arguments—Newdow v. U.S.*, PROCON.ORG, <http://undergod.procon.org/view.additional-resource.php?resourceID=000109> (last updated July 1, 2008) (citation omitted).

⁷² Gey, *supra* note 4, at 262–63.

⁷³ In *Torcaso v. Watkins*, the Supreme Court held that a provision of the Maryland constitution requiring public officials to profess a belief in God violated the First Amendment as applied to the states. *Torcaso*, 367 U.S. at 496; see also *supra* note 67 and accompanying text.

⁷⁴ *State Constitutions that Discriminate Against Atheists*, ATHEISTS SILICON VALLEY, <http://www.godlessgeeks.com/LINKS/StateConstitutions.htm> (last visited Oct. 9, 2011). These provisions have remained, even if their constitutions have been amended since *Torcaso v. Watkins*. See *id.*

⁷⁵ *Critics Say Atheist N.C. City Councilman Unworthy of Seat*, FOX NEWS (Dec. 14, 2009), <http://www.foxnews.com/politics/2009/12/14/critics-say-atheist-nc-city-councilman-unworthy-seat>.

American atheists today, and elevates the Establishment Clause as the more important religion clause given the current situation.⁷⁶

As the Supreme Court continues to extend greater leeway for states and legislatures to deal with religious liberty through legislation,⁷⁷ and the tension between a growing atheist population⁷⁸ and a resurgent religious majority⁷⁹ grows, there is a greater chance that this stigma will be expressed in legislation that adversely impacts or even overtly discriminates against atheists.⁸⁰ In part, the states' tendency to ignore the rights of minorities prompted the Court to selectively incorporate the religion clauses in the first place.⁸¹ To forestall this potential persecution, the United States needs to reevaluate its protection of religious liberty as applied to atheists.

C. *Legal Protection of Atheists in the United States*

The legal protection for American atheists stems from the religion clauses of the First Amendment.⁸² Although not originally intended to protect atheists, or even non-theistic religions,⁸³ broadening views of human rights developed

⁷⁶ Gey, *supra* note 4, at 262 (“In many respects, these structural constraints [preventing governments from incorporating religion into their policies and laws] are even more important than direct protections from religious coercion.”).

⁷⁷ See *infra* Part II.E.

⁷⁸ See *infra* Part II.A.

⁷⁹ See *infra* Part II.D.

⁸⁰ After all, legislators will generally bow to the will of the majority of their constituents. WITTE & NICHOLS, *supra* note 11, at 163 (“It is an elementary but essential political reality that statutes generally privilege the views of the majority, not the minority. They are passed by elected officials who must be as vigilant in reflecting popular opinion as protecting constitutional imperatives.”).

⁸¹ *Id.* at 126 (“The need for firm and common laws on religious liberty, in the face of grim local bigotry at home and abroad, was also among the compelling reasons that led the Supreme Court in the 1940s to apply the religion clauses against the states.”).

⁸² U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .”). This Comment only briefly outlines a few of the major cases and approaches. For a more thorough understanding of the religion clause jurisprudence, see WITTE & NICHOLS, *supra* note 11.

⁸³ See DURHAM & SCHARFFS, *supra* note 4, at 79; WITTE & NICHOLS, *supra* note 11, at 51 (“These rare passages from the eighteenth century that flirt with the idea of extending equal religious rights to atheists, polytheists, and nontheists alike should not be overread, though. The principal concern of most founders, unlike that of the modern Supreme Court, was directed to equality among theistic religions before the law, not equality between religion and nonreligion.”); 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1874, at 593 (photo. reprint 2005) (2d ed. 1851) (footnote omitted) (“Probably at the time of the adoption of the constitution, and of the amendment to it, now under consideration [First Amendment], the general, if not the universal sentiment in America was, that christianity ought to receive encouragement from the state, so far as was not incompatible with the private rights of conscience, and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter

around World War II, including religious liberty, led to the Supreme Court taking a more expansive view of the protection afforded by the religion clauses.

Everson v. Board of Education, the first case to selectively incorporate the Establishment Clause via the Fourteenth Amendment, also produced a different reading of the Establishment Clause.⁸⁴ Writing for the majority, Justice Hugo Black⁸⁵ offered a formulation of the Establishment Clause that recognized equality between religion and non-religion. “The ‘establishment of religion’ clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.”⁸⁶ He continues that the First Amendment “requires the state to be a neutral in its relations with groups of religious believers and non-believers.”⁸⁷ Justice Black’s novel reading has been taken as an authoritative rejection of the notion that the Establishment Clause only forbids giving preference to one religion over another.⁸⁸

Justice Black’s expounded upon his reading of the Establishment Clause in *Torcaso v. Watkins*.⁸⁹ Roy Torcaso had been appointed to the office of Notary Public by the Governor of Maryland, but was refused a commission to serve because he would not declare his belief in God.⁹⁰ His refusal violated Article 37 of the Maryland Constitution that stated: “[N]o religious test ought ever to be required as a qualification for any office of profit or trust in this State, other

indifference, would have created universal disapprobation, if not universal indignation.”); Gey, *supra* note 4, at 250.

⁸⁴ See *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947).

⁸⁵ There has been some interesting recent insight into Justice Black that is beyond the scope of this Comment. See Witte *supra* note 19, at 1 (“We know more about the odious manipulation of separationist rhetoric by the Ku Klux Klan and other nativist groups against Catholics, Jews, and other minority faiths and immigrant groups in the later nineteenth century. And we now see more clearly than before that Justice Black drew some of his inspiration from these nativist teachings, particularly those of the KKK of which he was a member . . . in crafting his famous *Everson* opinion. For peculiar souls like me who labor on the history of law, religion, and the First Amendment, this has all been a sobering, but edifying corrective to the traditional story.”).

⁸⁶ *Everson*, 330 U.S. at 15.

⁸⁷ *Id.* at 18.

⁸⁸ *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 216 (1963) (“[T]his Court has rejected unequivocally the contention that the Establishment Clause forbids only governmental preference of one religion over another.”).

⁸⁹ *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961).

⁹⁰ *Id.* at 489.

than a declaration of belief in the existence of God.”⁹¹ In holding for *Torcaso*, the Court stated that “[w]e repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person ‘to profess a belief or disbelief in any religion.’ Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers.”⁹² The Court also listed a number of non-theistic beliefs that were considered “religions,” at least for the purposes of the Constitution.⁹³ The list included “Buddhism, Taoism, Ethical Culture, Secular Humanism and others.”⁹⁴ While this expansive reading has sometimes been criticized,⁹⁵ it has allowed for the extension of guarantees of religious freedom to atheists and nonbelievers.⁹⁶

Atheists have also received varying degrees of protection under the Establishment Clause, especially during Justice O’Connor’s tenure when she championed a reading of the clause that prohibited government action that made “adherence to religion relevant to a person’s standing in the political community.”⁹⁷ As previously noted,⁹⁸ many atheists consider government actions that endorse religion among the greatest threats to their religious liberty, as they encourage and reinforce the stigma.⁹⁹ Justice O’Connor’s

⁹¹ *Id.* Interestingly, nine states still have similar provisions in their constitutions, even if they have been amended and revised since the decision in *Torcaso*. See *supra* note 74 and accompanying text. One such provision was still being enforced as late as 1992, and was only held unconstitutional after a five-year court battle. See *supra* note 67 and accompanying text.

⁹² *Torcaso*, 367 U.S. at 495.

⁹³ *Id.* at 495 n.11.

⁹⁴ *Id.*

⁹⁵ See, e.g., *McCreary Cnty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 889 (2005) (Scalia, J., dissenting) (“With all of this reality (and much more) staring it in the face, how can the Court *possibly* assert that the ‘First Amendment mandates governmental neutrality between . . . religion and nonreligion,’ and that ‘[m]anifesting a purpose to favor . . . adherence to religion generally,’ is unconstitutional? Who says so? Surely not the words of the Constitution. Surely not the history and traditions that reflect our society’s constant understanding of those words. Surely not even the current sense of our society, recently reflected in an Act of Congress adopted *unanimously* by the Senate and with only five nays in the House of Representatives criticizing a Court of Appeals opinion that had held ‘under God’ in the Pledge of Allegiance unconstitutional. Nothing stands behind the Court’s assertion that governmental affirmation of the society’s belief in God is unconstitutional except the Court’s own say-so, citing as support only the unsubstantiated say-so of earlier Courts going back no further than the mid-20th century.” (internal citations omitted)).

⁹⁶ See, e.g., *Kaufman v. McCaughtry*, 419 F.3d 678 (2005) (holding that an inmate’s atheism is his religion for the purposes of his First Amendment protections).

⁹⁷ *Wallace v. Jaffree*, 472 U.S. 38, 69 (1985) (O’Connor, J., concurring in the judgment).

⁹⁸ See *supra* note 76 and accompanying text.

⁹⁹ Gey, *supra* note 4, at 262 (“In many ways, the insulation of the political process from religion is the single most important legal mechanism for the protection of religious liberty.”).

approach was applied in more than a dozen opinions between 1984 and 2005, but it may have been abandoned by the Court with her retirement in 2005.¹⁰⁰

Since 1947, atheists in America have enjoyed fairly strong protection under the Court's expansive definition of religion, and the Court's adherence to Justice Black's formulation providing equality between religion and non-religion. However, the more stringent standing requirements for bringing a case under the religion clauses,¹⁰¹ the increased role of the states and the legislatures in deciding the role of religion, and the continued government endorsement of religion, have left American atheists in a state of "quasi-legal cultural ostracism."¹⁰² The situation seems likely to grow worse in the future, based on a number of factors discussed in the next Part.

II. CHANGING CIRCUMSTANCES

There are a number of factors that are currently altering the situation for atheists in the United States. As these factors continue to change the proverbial landscape, the current legal framework for protecting atheists will need to adapt. In particular, a growing, more outspoken, and more unified atheistic minority may provide a target for the transformation of a vague stigma into outright discrimination and may cause the tension between religious persons and atheists to grow more severe, possibly resulting in the use of the political and legal systems against atheists.

A. *Growth of Atheism in America*

The United States is home to a large and growing population of atheists.¹⁰³ Although the stigma surrounding the word "atheist"¹⁰⁴ makes it hard to conduct accurate surveys, it is thought that atheists, agnostics, and nonbelievers in God make up between three and nine percent of the American population.¹⁰⁵ A 2007 U.S. Religious Landscape Survey found that 16.1% of Americans are "unaffiliated," with 1.6% being atheist and 2.4% being agnostic.¹⁰⁶ However, because the survey relied wholly upon self-reporting,¹⁰⁷

¹⁰⁰ WITTE & NICHOLS, *supra* note 11, at 181.

¹⁰¹ *See, e.g.*, *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 17–18 (2004) (rejecting an atheist's challenge to the words "Under God" in the pledge of allegiance due to standing).

¹⁰² Gey, *supra* note 4, at 251.

¹⁰³ U.S. RELIGIOUS LANDSCAPE SURVEY, *supra* note 20, at 5; Special Rapporteur, *supra* note 20, at 11.

¹⁰⁴ *See supra* note 31 and accompanying text.

¹⁰⁵ Zuckerman, *supra* note 29, at 48.

¹⁰⁶ U.S. RELIGIOUS LANDSCAPE SURVEY, *supra* note 20, at 5.

the number for atheists is likely to be lower than the actual percentage of American atheists.¹⁰⁸ Even adding a .1% bump to account for the stigma (a conservative amount considering some surveys suggest that the number of respondents self-identifying as atheist should be doubled or even tripled to correspond to the number of respondents saying that they do not believe in God or gods),¹⁰⁹ that puts American atheists on par with far more politically powerful religious factions,¹¹⁰ such as adherents of Judaism and Mormonism (both 1.7%).¹¹¹ To put these numbers in a global context, the United States ranks forty-fourth on a list of the countries containing the largest percentage of atheists, agnostics, or nonbelievers in God.¹¹²

It appears that this number is also likely to grow in coming decades. The Religious Landscape Survey noted that its unaffiliated group is growing at a faster rate than the “Other Religions” group (new entrants into this group outnumber those leaving it nearly three to one) despite having what the survey describes as “one of the lowest retention rates.”¹¹³ Atheistic and agnostic beliefs in particular have also been noted as the fastest growing category.¹¹⁴ These trends are also likely to persist due to a higher percentage of Americans aged eighteen to twenty-nine (known as the “millennials”) self-identifying as unaffiliated (their twenty-six percent is also higher than the preceding generation’s twenty percent, and more than double the Baby Boomers’ thirteen percent), and self-identifying as atheist or agnostic at higher rates than other age groups (three and four percent, respectively).¹¹⁵ There are perhaps too many theories that attempt to explain this trend, mainly springing from an argument that there is a link between atheism and modernity¹¹⁶ created by the

¹⁰⁷ *Id.* at 6.

¹⁰⁸ See *supra* note 33 and accompanying text.

¹⁰⁹ See U.S. RELIGIOUS LANDSCAPE SURVEY, *supra* note 20, at 6.

¹¹⁰ Atheists also tend to be more educated than the average person. Benjamin Beit-Hallahmi, *Atheists: A Psychological Profile*, in THE CAMBRIDGE COMPANION TO ATHEISM, *supra* note 2, at 300, 313 (“What we are able to conclude about the modal atheist in Western society today is that that person is much more likely to be a man, married, with higher education.”). This suggests that as a group they may be more likely to vote. However, their lack of unification may make the concept of an “atheist vote” illusory. KRUEGER, *supra* note 34, at 22–24 (describing atheism’s inability to provide a unifying philosophy).

¹¹¹ U.S. RELIGIOUS LANDSCAPE SURVEY, *supra* note 20, at 5.

¹¹² Zuckerman, *supra* note 29, at 56–57 (using three to nine percent).

¹¹³ U.S. RELIGIOUS LANDSCAPE SURVEY, *supra* note 20, at 5, 7.

¹¹⁴ Special Rapporteur, *supra* note 20, at 11.

¹¹⁵ THE PEW FORUM ON RELIGION & PUB. LIFE, RELIGION AMONG THE MILLENNIALS 1–3 (2010), available at <http://pewforum.org/newassets/images/reports/millennials/millennials-report.pdf>.

¹¹⁶ Hyman, *supra* note 3, at 43 (“[A]theism and modernity are so linked that modernity seems almost necessarily to culminate in atheism.”).

removal of scientific gaps as science advances,¹¹⁷ or rising rates of individual and societal security/well-being,¹¹⁸ to be adequately covered here. However atheists make up a larger portion of Americans than previously assumed, that it is and has been the fastest growing “religious” group, and that this trend is likely to continue. As this population increases, more individuals will be likely to submit legal challenges to what they perceive to be discriminatory regulations and government endorsements of religion. The result could be an increase in the tension between the atheist population and the religious majority, thereby further exacerbating the already considerable stigma associated with atheism.

B. *Unification of Atheists*

As their numbers grow, American atheists will have incentives to unify. However, this unification is likely to have the counterproductive result of increasing the stigma. Despite their numbers, American atheists are for the most part unorganized.¹¹⁹ This may be due to reluctance on the part of atheists to self-identify due to the stigma,¹²⁰ a predisposition toward independent thought and nonconformity,¹²¹ or atheism’s inability to serve as a unifying philosophy.¹²² Yet the potential exists for atheism to become a powerful movement.¹²³ Not only does atheism have comparable or greater numbers than other effective religious political lobbies,¹²⁴ but atheists also tend to be better

¹¹⁷ See RICHARD DAWKINS, *supra* note 37, at 125–34. “God of the Gaps” is the name given by atheists and others to a strategy whereby individuals look for holes in scientific knowledge and presume to fill it with God by default. The argument goes that this strategy was more effective when people did not know why it rained or how the sun moved, but that as science advances to fill in these gaps, it leaves less plausible areas for divine influence. *See id.*

¹¹⁸ Gervais et al., *supra* note 55, at 1203; Zuckerman, *supra* note 29, at 55–57.

¹¹⁹ Edgell et al., *supra* note 13, at 214. Atheists’ ability to “pass” may also work against them. *See supra* note 63 and accompanying text.

¹²⁰ DAWKINS, *supra* note 37, at 4. This has led some atheists to encourage others to “come out,” using terminology that is analogous to the gay-rights movement. *Id.* at 4–5.

¹²¹ *Id.* at 4–5. This may also be a problem confronting secular movements more generally. *See* JACOBY, *supra* note 55, at 103 (“Values are handed down more easily and thoroughly by permanent institutions than by marginalized radicals who, even if they change minds in their own generation—as the abolitionists did—are often subject to remarginalization in the next. Every brand of religion maintains and *is* a permanent mechanism for transmitting ideas and values—whether one regards those values as admirable or repugnant. Secularist movements, with their generally loose, nonhierarchical organization, lack the power to hand down and disseminate their heritage in a systematic way.”).

¹²² KRUEGER, *supra* note 34, at 22–23.

¹²³ DAWKINS, *supra* note 37, at 4–5.

¹²⁴ *Id.* at 4; *see supra* note 110 and accompanying text.

educated, more upwardly mobile, and overrepresented among scientists.¹²⁵ As their numbers grow, atheists become increasingly visible in society,¹²⁶ more atheists challenge laws they view as discriminatory or as endorsing religion, and the religious majority will feel increasingly that “religion is under attack,”¹²⁷ thus contributing to a greater stigma.

C. “New Atheism”

This movement toward unification may also be hastened by the emergence of new atheistic voices and movements. These movements have caused atheists to be more visible in the United States.¹²⁸ The increasing number and prominence of atheistic voices likely contribute to the stigma because some conservative religious leaders view these voices as attempting to establish a secular or atheistic viewpoint on America.¹²⁹ The most prominent of these new movements, and the one most likely to be viewed as threatening by the religious majority, is the “New Atheism” movement.¹³⁰ This movement has largely been attributed to atheist scholars such as Richard Dawkins, Daniel C. Dennett, Sam Harris, and Christopher Hitchens, many of whom have had best-selling books in the past decade.¹³¹ Their arguments largely reject the “non-overlapping magisterial” argument embraced by eminent scientists such as Stephen Jay Gould, which makes the case that science and religion answer separate and non-overlapping questions.¹³² Instead, they view many of the

¹²⁵ Edward J. Larson & Larry Witham, *Leading Scientists Still Reject God*, 394 NATURE 313 (1998) (finding that American scientists are less religious than the average American and members of the National Academy of Sciences even less so, with only seven percent professing a belief in a personal god, and 72.2% professing not doubt, but a personal disbelief in a personal god); see also Beit-Hallahmi, *supra* note 110, at 306–13 (discussing atheists in academia, particularly in the sciences).

¹²⁶ This visibility can be individual or collective, with supporting groups such as the Freedom from Religion Foundation. See FREEDOM FROM RELIGION FOUND., <http://ffrf.org> (last visited Feb. 21, 2012).

¹²⁷ Press Release, Anti-Defamation League, Poll: Americans Believe Religion Is ‘Under Attack’—Majority Says Religion Is ‘Losing Influence’ in American Life (Nov. 21, 2005) [hereinafter Americans Believe Religion Is Under Attack], available at http://www.adl.org/PresRele/RelChStSep_90/4830_90.htm; Sixty-four percent of respondents agree with the statement that “religion is under attack.” The number jumps to eighty percent among Christians identifying as fundamentalist/evangelical/charismatic. *Id.*

¹²⁸ Simon Hooper, *The Rise of the ‘New Atheists,’* CNN (Nov. 8, 2006), http://articles.cnn.com/2006-11-08/world/atheism.feature_1_new-atheists-new-atheism-religion.

¹²⁹ R. Albert Mohler, Jr., *My Take: Are Evangelicals Dangerous?*, CNN (Oct. 15, 2011, 10:00 PM), <http://religion.blogs.cnn.com/2011/10/15/my-take-are-evangelicals-dangerous>.

¹³⁰ See Gary Wolf, *The Church of the Non-Believers*, WIRED (Nov. 2006), <http://www.wired.com/wired/archive/14.11/atheism.html>.

¹³¹ Hooper, *supra* note 128.

¹³² STEPHEN JAY GOULD, ROCK OF AGES: SCIENCE AND RELIGION IN THE FULLNESS OF LIFE 6 (1999) (“[T]he net, or magisterium, of science covers the empirical realm: what is the universe made of (fact) and

supernatural concepts that are central to religions—including the existence of God or gods—as scientific hypotheses that can be tested.¹³³ Furthermore, they argue that not only is the existence of God or gods highly improbable,¹³⁴ but that religion receives a disproportionate amount of respect in society,¹³⁵ and most controversially, that religion is pernicious and dangerous.¹³⁶ In addition to their often provocative approaches,¹³⁷ this “new,”¹³⁸ strand of atheism also has the effect of alienating liberal and moderate members of religious faiths, in effect both provoking conservative fundamentalists and alienating potential allies of atheists.¹³⁹ As the religious majority has increasingly felt attacked by atheists and the New Atheists in particular,¹⁴⁰ they have begun to push back, and could introduce discriminatory legislation that could strip away the rights of atheists.

why does it work this way (theory). The magisterium of religion extends over questions of ultimate meaning and moral value. These two magisteria do not overlap, nor do they encompass all inquiry (consider, for example, the magisterium of art and the meaning of beauty). To cite the old clichés, science gets the age of rocks, and religion the rock of ages; science studies how the heavens go, religion how to go to heaven.”)

¹³³ See generally DAWKINS, *supra* note 37, at 54–61.

¹³⁴ Wolf, *supra* note 130 (“Science, after all, is an empirical endeavor that traffics in probabilities. The probability of God, Dawkins says, while not zero, is vanishingly small. He is confident that no Flying Spaghetti Monster exists. Why should the notion of some deity that we inherited from the Bronze Age get more respectful treatment?”).

¹³⁵ DAWKINS, *supra* note 37, at 27 (“I am intrigued and mystified by the disproportionate privileging of religion in our otherwise secular societies. . . . What is so special about religion that we grant it such uniquely privileged respect?”).

¹³⁶ Wolf, *supra* note 130 (“The New Atheists will not let us off the hook simply because we are not doctrinaire believers. They condemn not just belief in God but respect for belief in God. Religion is not only wrong; it’s evil.”); DAWKINS, *supra* note 37, at 279–308. In particular, New Atheists argue that viewing faith as a virtue is dangerous. *Id.* at 307–08 (“[W]hat is really pernicious is the practice of teaching children that faith itself is a virtue. Faith is an evil precisely because it requires no justification and brooks no argument. Teaching children that unquestioned faith is a virtue primes them—given certain other ingredients that are not hard to come by—to grow up into potentially lethal weapons for future jihads or crusades.”).

¹³⁷ See, e.g., HARRIS, *supra* note 37; Hooper, *supra* note 128.

¹³⁸ But see Tom Flynn, *Why I Don’t Believe in New Atheism*, COUNCIL FOR SECULAR HUMANISM, http://www.secularhumanism.org/index.php?section=library&page=flynn_30_3 (arguing that New Atheism’s accomplishments are not in generating new ideas, but in being able to have them printed by major publishers) (last visited Nov. 11, 2011).

¹³⁹ Wolf, *supra* note 130 (“While frontline warriors against creationism are busy reassuring parents and legislators that teaching Darwin’s theory does not undermine the possibility of religious devotion, Dawkins is openly agreeing with the most stubborn fundamentalists that evolution must lead to atheism. I tell Dawkins what he already knows: He is making life harder for his friends. He barely shrugs. ‘Well, it’s a cogent point, and I have to face that. My answer is that the big war is not between evolution and creationism, but between naturalism and supernaturalism. The sensible’—and here he pauses to indicate that *sensible* should be in quotes—the ‘sensible’ religious people are really on the side of the fundamentalists, because they believe in supernaturalism. That puts me on the other side.”).

¹⁴⁰ See Americans Believe Religion Is Under Attack, *supra* note 127.

D. Religious Pushback

Some have argued that the New Atheism movement is both a response to, and a driving force behind, the resurgence of religious influence in American politics.¹⁴¹ Sixty-four percent of Americans agree with the statement that “religion is under attack,”¹⁴² and leading evangelicals, such as the Reverend Rick Scarborough, have said that “Christians are going to have to take a stand for the right to be Christian,” framing it as a civil rights struggle.¹⁴³

As a result, evangelicals have launched court battles to roll back tolerance policies protecting minorities, including homosexuals, from harassment, with religious plaintiffs arguing that the policies inhibit their free exercise because their faith compels them to speak out against certain groups.¹⁴⁴ Some religious advocates see these policies and a broader framework of legislative principles as an attempt by “secular elites” to establish a “virtual monopoly in public life.”¹⁴⁵ Others argue that the Supreme Court jurisprudence erecting the wall of separation between church and state is flawed, and that regardless, the modern administrative state is too pervasive to adhere to strict separation.¹⁴⁶

This resurgence is also seen in the “explosion of religious lobbying.”¹⁴⁷ The number of organizations engaged in religious lobbying in Washington, D.C., has increased nearly fivefold since 1970, and such organizations are spending at least \$390 million a year.¹⁴⁸ While atheistic and secular groups have also been a part of this explosion, they are heavily underrepresented,

¹⁴¹ Hooper, *supra* note 128 (“[T]he vehemence of their arguments can largely be understood as a frustrated backlash against a religious revival that is still gathering pace, especially in the U.S. . . . ‘The reason these books are proving popular is that religion is becoming center stage,’ said Keith Porteous Wood, director of the National Secular Society. ‘In the last five years, in terms of the influence of religion, the gas has been turned up breathtakingly. People are starting to react against this.’ In recent years religious ideas have increasingly impinged on public life in ways unacceptable to New Atheist rationalism, from arguments over the teaching of ‘intelligent design’ in schools to gay marriage and restrictions on embryonic stem cell research.”).

¹⁴² See Americans Believe Religion Is Under Attack, *supra* note 127.

¹⁴³ Stephanie Simon, *Christians Sue for Right Not To Tolerate Policies*, L.A. TIMES, Apr. 10, 2006, at A1.

¹⁴⁴ *Id.*

¹⁴⁵ Mohler, *supra* note 129.

¹⁴⁶ Witte, *supra* note 19, at 10–12.

¹⁴⁷ Dan Gilgoff, *Report Tracks Explosion of Religious Lobbying in Washington*, CNN (Nov. 22, 2011, 12:29 PM), <http://religion.blogs.cnn.com/2011/11/22/report-tracks-explosion-of-religious-lobbying-in-washington>.

¹⁴⁸ THE PEW FORUM ON RELIGION & PUB. LIFE, LOBBYING FOR THE FAITHFUL: RELIGIOUS ADVOCACY GROUPS IN WASHINGTON, D.C. 9 (2011), available at http://www.pewforum.org/uploadedFiles/Topics/Issues/Government/ReligiousAdvocacy_web.pdf. This rate is on par or greater than that of other common advocacy groups. *Id.*

making up only one percent of the organizations engaged in religious lobbying.¹⁴⁹ This demonstrates not only an intention to reassert religious influence on politics and legislation, but an increasingly well-organized and well-founded capacity to do so. This mounting political will could lead to the simmering tension between religion and atheism becoming manifest in law, especially if atheists remain politically isolated and the protection of religious liberty shifts from the courts to the legislatures.

E. Neo-Federalist Movement To Unincorporate Religion Clauses

This mounting political pressure will see greater opportunities to affect legislation if the Supreme Court continues to move towards “unincorporation.” Some scholars regard recent Supreme Court holdings and dicta as heralding support within the Court to unincorporate the religion clauses.¹⁵⁰ Such a movement would seek to return the American system of religious freedom to its pre-1940 state, before the Court held the religion clauses applicable to the states through the Fourteenth Amendment’s guarantee of due process.¹⁵¹ The implications could prove disastrous for atheists’ rights in the states, as the anti-atheist stigma becomes expressed through legislation.¹⁵²

Direct evidence of this support for unincorporation among the Justices is sparse. Justice Clarence Thomas appears to be the only vocal and repeated critic of incorporation,¹⁵³ although some of Justice O’Connor’s holdings had likewise been seen as supporting a similar view.¹⁵⁴ However, the Court’s firmer standing requirements and more permissive tests have sparked a

¹⁴⁹ *Id.* at 28. The study notes that this is far below the proportion of non-religious Americans, which the study cites as making up 10.3% of the population. *Id.* at 28. However, because the study only measures absolute numbers of groups, it cannot make definitive statements on the relative influence of the different groups. *Id.* at 29.

¹⁵⁰ WITTE & NICHOLS, *supra* note 11, at xxi, 95, 126; Knicey, *supra* note 19, at 174 n.15; Witte, *supra* note 19, at 5–6.

¹⁵¹ *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

¹⁵² WITTE, JR. & NICHOLS, *supra* note 11, at 163.

¹⁵³ He is at least a vocal critic of the incorporation of the Establishment Clause. *E.g.*, *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 50 (2004) (Thomas, J., concurring in the judgment) (“Quite simply, the Establishment Clause is best understood as a federalism provision—it protects state establishments from federal interference but does not protect any individual right. These two features independently make incorporation of the Clause difficult to understand.”); *Zelman v. Simmons-Harris*, 536 U.S. 639, 678 (2002) (Thomas, J., concurring); *see also* WITTE & NICHOLS, *supra* note 11, at 186 (“Five times since 1994, Justice Thomas has repeated his call for the Court to selectively deincorporate the establishment clause by restricting its application to the federal government . . .”).

¹⁵⁴ *See* WITTE & NICHOLS, *supra* note 11, at xxi.

movement from the Court to the state legislatures,¹⁵⁵ which are likely to continue to explore the edges of this new federalist freedom. Even if the Court does not explicitly abandon *Everson* as some have predicted and encouraged,¹⁵⁶ a reluctance to apply the religion clauses, at least regarding the action of the states, and a neutering of the tests are likely to produce the same results as explicit unincorporation.

If the United States were to return to the “two-track constitutional system”¹⁵⁷ of the pre-1940 period, the religion clauses would apply only to the federal government. The states would be free to develop their own protections of religious freedom, and such experimentation would likely occur more in the legislatures than in the courts.¹⁵⁸ This could lead to a situation where the legal protections for atheists are stripped away or degraded as legislators attempt to curry favor with constituencies¹⁵⁹ that are still predominantly religious and experiencing a semblance of a religious resurgence.¹⁶⁰ After all, it was in part because of the states legislatures’ tendency to enact legislation that discriminated against religious minorities that the Court first selectively incorporated the religion clauses.¹⁶¹

F. Implications

The stigma against atheists in the United States is likely to grow in the future due to an expanding, more unified, and more visible atheist population, especially if atheist groups continue to bring legal actions that are perceived as attacks on religion. This could have dramatic effects as a more visible atheist population provides targets for the stigma to manifest into outright

¹⁵⁵ *Id.* (“In the past two decades, the testing ground has partly shifted away from the federal government to the states and away from the courts to the legislature—a trend encouraged by the Supreme Court’s generous nods toward federalism and separation of powers as well as by the Court’s firmer standing requirements and weakened First Amendment tests. Accordingly, state legislatures and courts have become bolder in conducting their own experiments in religious liberty, which seem calculated to revisit, if not rechallenge, prevailing Supreme Court interpretations of the establishment and free exercise clauses.”).

¹⁵⁶ Knicely, *supra* note 19, at 177; Christopher N. Elliot, Comment, *Federalism and Religious Liberty: Were Church and State Meant To Be Separate?*, 2 RUTGERS J.L. & RELIGION, no. 5, at 1, 49, 50, 53; Note, *Rethinking the Incorporation of the Establishment Clause: A Federalist View*, 105 HARV. L. REV. 1700, 1702 (1992).

¹⁵⁷ WITTE & NICHOLS, *supra* note 11, at xxi.

¹⁵⁸ *Id.*

¹⁵⁹ See *supra* note 80 and accompanying text.

¹⁶⁰ See *supra* Part II.D.

¹⁶¹ See *supra* note 81 and accompanying text.

discrimination and legislation negatively impacting atheists.¹⁶² This fear is especially salient in light of a developing trend to move the issues of religious protection away from the federal judiciary to the states, and from the courts to the legislatures.¹⁶³ Due to the continued political isolation of atheists and the growing religious pushback in politics, there is reason to believe that the state legislatures will be far more likely to reinforce the stigma and to pass legislation that will further degrade the status of atheists in the United States.

However, there may be some countervailing factors that would work to lessen the stigma. In particular, the relatively low number of atheists, and their ability to “pass,”¹⁶⁴ means that many Americans who hold a very negative opinion of atheists are unlikely to know any atheists personally (or at least not ones who will openly admit their atheistic beliefs).¹⁶⁵ It is therefore possible that as atheists become more visible to the average American, this visibility will provide an opportunity for people to reevaluate their prejudices and engage in dialogue.¹⁶⁶ This could provide the impetus for atheists to enjoy the same increase in social acceptance experienced by other minorities over the last fifty years.¹⁶⁷

However, two factors suggest that increased visibility will not be able to overcome the stigma: First, social acceptance of atheists has not improved, even though stigmas toward other groups have lessened; and second, it has been argued that the reason behind the growing social acceptance of other minorities was a weakening of internal religious boundaries as Americans redefined themselves from having a Christian center to simply having a religious center.¹⁶⁸ Essentially, Americans became more tolerant of

¹⁶² This type of legislation can take on many forms. Some legislation could contain outright discriminatory provisions, such as the religious oaths for political officials or denying custody of children to atheists. Volokh, *supra* note 15; *see supra* note 91 and accompanying text. These are examples of custody being denied under existing law. As the Supreme Court moves away from applying the religion clauses to the states, state courts and legislatures could uphold these rulings under state law or enact similar measures through legislation. Another more subtle example would be the rollback of Supreme Court establishment clause jurisprudence. *See Bill Would Mandate Bible Study*, CONCORD MONITOR (Feb. 3, 2012), <http://www.concordmonitor.com/news/4436629-95/jerrybergevin-thebible>.

¹⁶³ Witte, *supra* note 19, at 5–6; *see supra* note 158 and accompanying text.

¹⁶⁴ Edgell et al., *supra* note 13, at 230.

¹⁶⁵ *Id.* at 228 (“It is important to note that our respondents did not refer to particular atheists whom they had encountered. Rather they used the atheist as a symbolic figure to represent their fears about those trends in American life—increasing criminality, rampant self-interest, an unaccountable elite—that they believe undermine trust and a common sense of purpose.”).

¹⁶⁶ Gervais, *supra* note 30, at 546.

¹⁶⁷ Edgell et al., *supra* note 13, at 230–31.

¹⁶⁸ *Id.* at 212.

minorities¹⁶⁹ by recognizing and focusing on their common ground of religious faith.¹⁷⁰ This internal process of tearing down boundaries between faiths may have the added impact of augmenting the boundaries Americans perceive between those with faith and those without.¹⁷¹ Even if the growing visibility of individual atheists does help to lessen the stigma in some Americans' minds, it is unlikely to be enough to counter the predominant trends lending themselves to an increased tension and stigma.

Given these facts, there appears to be a distinct possibility that the legal protections for atheists in the United States, already widely claimed to be inadequate,¹⁷² will deteriorate in the future, which could lead to overt and widespread oppression and discrimination. If the United States is to avoid this scenario, it will need to reevaluate its models for religious liberty and protection, with an eye towards ensuring freedom of thought and belief. It must also find a way to do so without unnecessarily exacerbating the situation by further increasing the tension. It would be prudent to look to models that provide these protections and more effectively incorporate a large number of atheists into political and cultural society.

III. LEGAL PROTECTION OF ATHEISTS IN EUROPE

Since World War II, Europe has developed one of the most effective human rights regimes in the world,¹⁷³ and its protection of religious liberty rights extends to a population with a high percentage of atheists.¹⁷⁴ Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms protects “the right to freedom of thought, conscience, and religion” and the “[f]reedom to manifest one’s religion or beliefs,” subject only to certain limitations.¹⁷⁵ The ECHR draws so heavily on international norms in regard to religious liberty that the wording of Article 9 “is almost identical to Article 18 of the Universal Declaration of Human Rights.”¹⁷⁶ For this reason, it

¹⁶⁹ This includes groups that are not defined by religious affiliation (*e.g.*, race, gender, sexual orientation, etc.).

¹⁷⁰ Which religion a particular minority followed is less important than the fact that each particular minority had some religion. Edgell et al., *supra* note 13, at 231 (suggesting that “religion itself” serves “as a basis for solidarity in American life”).

¹⁷¹ *Id.*

¹⁷² See Downey, *supra* note 61, at 41–42.

¹⁷³ DURHAM & SCHARFFS, *supra* note 4, at 91; JANIS & NOYES, *supra* note 6, at 428.

¹⁷⁴ See *supra* note 29 and accompanying text.

¹⁷⁵ ECHR, *supra* note 8, art. 9.

¹⁷⁶ DURHAM & SCHARFFS, *supra* note 4, at 36.

is best to start with an exploration of the documents that form the basis of the international norms, as they both serve as the foundation for, and a contributing influence on, the European model. The following are the most important documents, and will be discussed in turn: the Universal Declaration of Human Rights;¹⁷⁷ the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights;¹⁷⁸ the Declaration on the Elimination of all Forms of Intolerance Based on Religion or Belief;¹⁷⁹ and General Comment 22, which took the bold step of putting non-religious belief systems such as atheism on par with religions.¹⁸⁰

A. *The Universal Declaration of Human Rights*

The first act of the United Nations was to declare new international norms of human rights.¹⁸¹ A panel of intellectuals and advocates led by Eleanor Roosevelt drafted what would become the Universal Declaration of Human Rights (“UDHR”).¹⁸² The UDHR was adopted by the General Assembly on December 10, 1948, with no dissents and only eight members abstaining.¹⁸³ Included in the UDHR is Article 18, which protects the “right to freedom of thought, conscience and religion.”¹⁸⁴

The consensual nature of the adoption of the UDHR has largely been attributed to the fact that it was understood to be non-binding when adopted.¹⁸⁵ The United States even went so far as to issue a statement confirming that the UDHR “is not a treaty; it is not an international agreement. It does not purport

¹⁷⁷ Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR].

¹⁷⁸ International Covenant on Civil and Political Rights, Dec. 16, 1966, S. TREATY DOC. No. 95-20, 999 U.N.T.S. 171 [hereinafter ICCPR]; International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

¹⁷⁹ Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 36/55, U.N. GAOR, 36th Sess., Supp. No. 51, U.N. Doc. A/RES/36/684, at 171 (Nov. 25, 1981) [hereinafter Declaration].

¹⁸⁰ Human Rights Comm., General Comment No. 22 (48) (art. 18), U.N. Doc. CCPR/C/21/Rev.1/Add.4 (Sept. 27, 1993) [hereinafter General Comment 22].

¹⁸¹ DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 99 (3d ed. 2010).

¹⁸² *Id.*

¹⁸³ *History of the Document*, UNITED NATIONS, <http://www.un.org/en/documents/udhr/history.shtml> (last visited Oct. 2, 2011). *But see* DURHAM & SCHARFFS, *supra* note 4, at 36 (noting that Article 18 was opposed by many Muslims because it contained a provision affirming the right to change one’s religion, and that Saudi Arabia abstained largely due to this issue).

¹⁸⁴ UDHR, *supra* note 177, art. 18.

¹⁸⁵ BEDERMAN, *supra* note 181, at 100; DURHAM & SCHARFFS, *supra* note 4, at 79.

to be a statement of law or legal obligation.”¹⁸⁶ Although it is still not seen as imposing legal obligations,¹⁸⁷ it is now “often interpreted to have the force of customary international law.”¹⁸⁸ Since 1948 there have been several attempts to codify the principles laid out in the UDHR in binding legal instruments.¹⁸⁹

B. *The International Covenants*

What was intended to be the second major document outlining an international norm for the protection of religious liberty became the International Covenant on Civil and Political Rights (“ICCPR”¹⁹⁰ and the International Covenant on Economic, Social, and Cultural Rights (“ICESCR”).¹⁹¹ These were adopted unanimously in 1966 along with the first Optional Protocol.¹⁹² The first Optional Protocol allows individuals subject to the jurisdiction of a member state to petition the Human Rights Committee regarding a violation by the state party of the ICCPR.¹⁹³ The Committee requires that a petition meet certain requirements, including that it not be anonymous and that the individual exhaust all domestic remedies, before the Committee asks the state to respond.¹⁹⁴ Some of the rights set out in these covenants, including some of the Article 18 rights governing the “right to freedom of thought, conscience and religion,” are non-derogable and are viewed as having “the nature of peremptory norms of international law.”¹⁹⁵ Article 18 specifically states that the “[f]reedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental

¹⁸⁶ *General Assembly Adopts Declaration of Human Rights: Statement of Mrs. Franklin D. Roosevelt*, 19 DEP’T ST. BULL. 751, 751 (1948).

¹⁸⁷ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 734 (2004) (“But the Declaration does not of its own force impose obligations as a matter of international law.”).

¹⁸⁸ DURHAM & SCHARFFS, *supra* note 4, at 82.

¹⁸⁹ BEDERMAN, *supra* note 181, at 100.

¹⁹⁰ ICCPR, *supra* note 178.

¹⁹¹ ICESCR, *supra* note 178.

¹⁹² DURHAM & SCHARFFS, *supra* note 4, at 82.

¹⁹³ Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 302.

¹⁹⁴ *First Optional Protocol to the International Covenant on Civil and Political Rights: Overview of Procedure*, OFF. U.N. HIGH COMMISSIONER FOR HUM. RTS., <http://www2.ohchr.org/english/bodies/hrc/procedure.htm> (last visited Mar. 29, 2013).

¹⁹⁵ Human Rights Comm., General Comment No. 29: States of Emergency (Art. 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001). Peremptory norms, also called “*jus cogens* norms,” are rules of custom deemed so significant that they cannot be avoided by treaty, reservation, objection, or declarations. BEDERMAN, *supra* note 181, at 25.

rights and freedoms of others.”¹⁹⁶ The adoption of the ICCPR marked a major step forward in international protection of religious freedom by establishing enforcement mechanisms including the Human Rights Committee.¹⁹⁷

As of 2011, 167 states are party to the ICCPR, including the United States.¹⁹⁸ Ratification was intensely debated in the United States, and was not finalized until 1992.¹⁹⁹ Even then, the United States made a number of reservations, although notably none as to Article 18.²⁰⁰ Furthermore, it declared that the rights provided by the ICCPR were not “self-executing.”²⁰¹ It has also neither signed nor ratified the first Optional Protocol.²⁰² This essentially left the ICCPR with no impact on rights in America, as the reservations “made the international human rights exactly congruous to constitutional protections; to the extent that international rights actually exceeded domestic standards, they were repudiated.”²⁰³

C. *The Declaration on the Elimination of All Forms of Intolerance Based on Religion or Belief*

The third document outlining the evolution of the international norm for the protection of religious liberty is the Declaration on the Elimination of All Forms of Intolerance Based on Religion or Belief (“Declaration”).²⁰⁴ After the ICCPR and ICESCR were passed, further attempts were made to adopt more focused treaties relating to specific issues encapsulated within the ICCPR and ICESCR.²⁰⁵ Although several treaties were adopted, sufficient backing was never reached for one protecting religious freedom.²⁰⁶ The General Assembly

¹⁹⁶ ICCPR, *supra* note 189, art. 18.

¹⁹⁷ DURHAM & SCHARFFS, *supra* note 4, at 83.

¹⁹⁸ *Status of the International Covenant on Civil and Political Rights*, U.N. TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (last visited Mar. 29, 2013).

¹⁹⁹ BEDERMAN, *supra* note 181, at 101.

²⁰⁰ I U.N., MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL: STATUS AS AT 1 APRIL 2009, at 216–17, U.N. Doc ST/LEG/SER.E/26, U.N. Sales No. E.09.V.3 (2009) The U.S. reservations do note that articles 1–27 are not self-executing. *Id.* at 217; *see also* DURHAM & SCHARFFS, *supra* note 4, at 83.

²⁰¹ BEDERMAN, *supra* note 181, at 101.

²⁰² *Status of the First Optional Protocol to the International Covenant on Civil and Political Rights*, U.N. TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&lang=en (last visited Mar. 29, 2013).

²⁰³ BEDERMAN, *supra* note 181, at 102.

²⁰⁴ Declaration, *supra* note 179.

²⁰⁵ Carolyn Evans, *Time for a Treaty? The Legal Sufficiency of the Declaration on the Elimination of All Forms of Intolerance and Discrimination*, 2007 BYU L. REV. 617, 624.

²⁰⁶ *Id.*

finally decided to issue the Declaration instead. This represents the last attempt at an international treaty protecting freedom of religion, and although only a declaration, represents the most recent and thorough enunciation of international norms on the subject.²⁰⁷ The Declaration is notable for providing a definition of discrimination based on religion or belief²⁰⁸ and for two articles calling for affirmative action on the part of nations to ensure that the Declaration is being complied with.²⁰⁹ However, Romania, Bulgaria, Poland, Czechoslovakia, and the USSR entered reservations claiming that the Declaration did not sufficiently protect atheistic beliefs.²¹⁰

D. General Comment 22

The final document is General Comment 22, which was adopted by the United Nations High Commissioner on Human Rights in 1993 and expands upon Article 18 of the ICCPR.²¹¹ General Comments are not legally binding, but are very influential, as they reflect the Committee's understanding of the ICCPR.²¹² General Comment 22 represents a large step forward for atheistic beliefs, as it makes clear that "Article 18 protects theistic, non-theistic and atheistic beliefs."²¹³ Thus, the same protections that extended to religions under Article 18, including the strict standard that must be met before any restrictions on the freedom to manifest religion or belief can be permitted, also apply to atheism.²¹⁴

²⁰⁷ *Id.* at 625.

²⁰⁸ Declaration, *supra* note 179, art. 2 ("For the purposes of the present Declaration, the expression 'intolerance and discrimination based on religion or belief' means any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis.").

²⁰⁹ *Id.* arts. 4, 7.

²¹⁰ *Reflections—Human Rights & Freedom of Religion or Belief—History, Education, Religion, Science*, TANDEM PROJECT, http://www.tandemproject.com/issue_statements/statements/2010/060110_issue.htm (last visited Mar. 29, 2013) [hereinafter TANDEM PROJECT] (quoting BAHIYYIH G. TAHZIB, FREEDOM OF RELIGION OR BELIEF 186 (1996)). Interestingly, Iraq, speaking for the Organization of the Islamic Conference, entered a reservation saying that it did not favor religion enough. *Id.*

²¹¹ General Comment 22, *supra* note 180.

²¹² Richard D. Glick, *Environmental Justice in the United States: Implications of the International Covenant on Civil and Political Rights*, 19 HARV. ENVTL. L. REV. 69, 96 (1995) ("While the Human Rights Committee's interpretations of the Political Covenant in the form of 'General Comments' are not definitive interpretations of the Political Covenant, they are the operative definitions that the Committee uses to carry out its functions as Political Covenant control organ and are therefore influential with regard to the behavior of states.").

²¹³ General Comment 22, *supra* note 180, para. 2.

²¹⁴ *Id.* para. 8. General Comment 22 also makes clear that the listed reasons for limits on expression are exhaustive. *Id.*

General Comment 22 also touches on the issue of religious establishment.²¹⁵ General Comment 22 highlights that, while establishment of a state religion does not violate Article 18, “[t]he fact that a religion is recognized as a state religion or that it is established as official or traditional or that its followers comprise the majority of the population, shall not result in any impairment of the enjoyment of any of the rights under the Covenant . . . nor in any discrimination against adherents to other religions or non-believers.”²¹⁶ Some establishment is thus permissible, so long as the rights of non-adherents are not compromised.

General Comment 22 marks a bold step for international religious freedom instruments. It explicitly puts non-religious belief systems such as atheism on par with religions.²¹⁷ This marks a vast improvement over the Declaration, which was criticized for giving greater freedom to religions than to atheism.²¹⁸ In conjunction with its provisions on state establishment of religion or belief, the General Comment also makes clear that states cannot discriminate against or deny services to adherents of religions other than the established one, or those who hold no religion at all.

E. How These Principles Are Applied in Europe

When the newly formed Council of Europe began drafting what would become the ECHR in 1950, it drew heavily on the principles of religious freedom expounded in international instruments including the UDHR, which had been drafted two years earlier.²¹⁹ In fact, the ECHR drew so heavily on international norms in regard to religious liberty that the wording of Article 9 “is almost identical to Article 18 of the Universal Declaration of Human

²¹⁵ *Id.* para. 9. Paragraph 10 also states that:

If a set of beliefs is treated as official ideology in constitutions, statutes, proclamations of ruling parties, etc., or in actual practice, this shall not result in any impairment of the freedoms under article 18 or any other rights recognized under the Covenant nor in any discrimination against persons who do not accept the official ideology or who oppose it.

Id. para. 10.

²¹⁶ *Id.* para. 9.

²¹⁷ *Id.* para. 2.

²¹⁸ See TANDEM PROJECT, *supra* note 210.

²¹⁹ See BEDERMAN, *supra* note 181, at 111 (discussing the ECHR’s structure); see also DURHAM & SCHARFFS, *supra* note 4, at 91–92.

Rights.”²²⁰ The ECHR has also been used to protect a wide variety of thoughts and beliefs in keeping with the UDHR and its progeny.²²¹

Religious freedom cases brought under Article 9 were first presented to the European Commission of Human Rights,²²² and then to the European Court of Human Rights (“ECtHR”), both of which were established pursuant to the ECHR (the first in 1954, and the latter in 1959).²²³ Since 1993 when the first Article 9 case reached the ECtHR,²²⁴ there has been a “rapid growth in Article 9 case law.”²²⁵ It is in part due to the binding nature of these judgments²²⁶ that the ECHR has been heralded as the most potent and advanced human rights regime in the world.²²⁷

In contrast to their expansive free exercise provisions, international and European religious freedom instruments allow for the establishment of religion.²²⁸ Even the nations with the largest populations of atheists have

²²⁰ DURHAM & SCHARFFS, *supra* note 4, at 36.

²²¹ *E.g.*, *Arrowsmith v. United Kingdom*, App. No. 7050/75, 19 Eur. Comm’n H.R. Dec. & Rep. 5, 19 (1978) (“The Commission is of the opinion that pacifism as a philosophy and, in particular, as defined above, falls within the ambit of the right to freedom of thought and conscience. The attitude of pacifism may therefore be seen as a belief (‘conviction’) protected by Article 9.1.”). Even if pacifism had not been stated as a belief, it still would have been protected, as General Comment 22 makes clear. General Comment 22, *supra* note 180, para. 9 (“The Committee draws the attention of State parties to the fact that the freedom of thought and the freedom of conscience are protected equally with the freedom of religion and belief.”). However, the ECtHR has made clear that for a view to be protected, it must “attain a certain level of cogency, seriousness, cohesion and importance.” *Campbell & Cosans v. United Kingdom*, 48 Eur. Ct. H.R. (ser. A) at 13 (1982).

²²² DURHAM & SCHARFFS, *supra* note 4, at 92.

²²³ *Id.* at 92–93.

²²⁴ *Kokkinakis v. Greece*, 260 Eur. Ct. H.R. (ser. A) at 6 (1993).

²²⁵ DURHAM & SCHARFFS, *supra* note 4, at 30.

²²⁶ Claimants under Article 9 also received a boon in 1998 with the entering into force of Protocol No. 11, which requires member states to recognize the right for individuals to petition the ECHR, and makes the judgments of the court binding on member states. Protocol No. 11, *supra* note 26, art. 46. This appears to be a stronger version of the Optional Protocol to the ICCPR.

²²⁷ BEDERMAN, *supra* note 181, at 111; DURHAM & SCHARFFS, *supra* note 4, at 91. It also appears that this commitment to protection of a broad range of thoughts and beliefs is likely to continue in Europe’s future, as the draft treaty establishing a constitution in the European Union, which has been submitted but not ratified, includes an article on freedom of thought, conscience, and religion meant to continue the work of Article 9. Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) 1. It should be noted that the Constitution’s drafters rejected the Catholic Church’s efforts to have language inserted recognizing Europe’s Christian roots. Gey, *supra* note 4, at 263.

²²⁸ General Comment 22, *supra* note 180, para. 9. *But see* TEMPERMAN, *supra* note 12, at 4 (“Whilst short of a condemnation in absolute terms [General Comment 22’s paragraph 10 makes] clear that a state of non-secularity does raise concerns with respect to questions of human rights compliance in the eyes of the UN Human Rights Committee.”). European countries exhibit a range of activities constituting establishment, including establishments in constitutions and religious taxes. *Darby v. Sweden*, 187 Eur. Ct. H.R. (ser. A) at 10 (1990) (“This system [of a Church tax] has a long tradition and is based on the fact that the Lutheran Church of

maintained established state religions.²²⁹ Such establishment is in keeping with the international instruments dealing with religious establishment, which state that establishment is permissible, so long as it does not interfere with the rights of non-adherents.²³⁰ EU member states have followed this principle by building opt-outs into many of their programs establishing religion, particularly in cases of church taxes.²³¹ The fact that Europe, with its large atheist population, permits some establishment suggests that, although many American atheists view the Establishment Clause as their greatest source of protection,²³² some establishment can coexist in nations with even large atheist populations without engendering a large anti-atheist bias.

IV. THE ADOPTION OF THE EUROPEAN MODEL

The example of Europe provides some guideposts as to how American protection of religious freedom could be molded in such a way as to appease a restless religious majority and yet still protect a significant and growing population of atheists and nonbelievers. First, a more expansive protection of not just religious belief, but thought, conscience, and belief affords the same protections of free exercise to both believers and nonbelievers. Such an expansive protection could permit more claims to be brought under the Free Exercise Clause, allowing atheists to opt-out of laws they feel impermissibly infringe on their freedom of conscience,²³³ without these laws being struck

Sweden is the established church.”). Of the twenty-seven nations in the European Union, five maintain official state religions: Bulgaria, Denmark, Greece, Malta, and England. Robert J. Barro & Rachel M. McCleary, *Which Countries Have State Religions?*, 120 Q.J. ECON. 1331, 1336–39 (2005). Italy, Portugal, and Spain have also sometimes been labeled as having state religions, despite the lack of constitutional provisions saying so, because they “favor a designated religion through subsidies and tax collections or through the mandatory teaching of religion in public schools.” *Id.* at 1333. Sweden had Lutheranism as its official state religion until 2000 and Bulgaria only adopted a state religion in 2001. *Id.* at 1333 n.1.

²²⁹ For example, most of the nations cited in the previous cite rank on the list of top fifty nations ranked according to their percentage atheist/agnostic/nonbeliever: Sweden (1st), Denmark (3rd), Britain (15th), Bulgaria (17th), Spain (27th), Greece (32nd), and Italy (34th). Zuckerman, *supra* note 29, at 56–57. Note that these all rank above the United States (44th). *Id.*

²³⁰ General Comment 22, *supra* note 180, para. 9.

²³¹ JIM MURDOCH, FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION: A GUIDE TO THE IMPLEMENTATION OF ARTICLE 9 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 14 (2007) (“[D]omestic law may not impose an obligation to support a religious organisation by means of taxation without recognising the right of an individual to leave the church and thus obtain an exemption from the requirement.”). *See generally Darby*, 187 Eur. Ct. H.R. (ser. A).

²³² *See supra* note 76 and accompanying text.

²³³ Although atheists generally do not have religious practices in the vein of true religions, this right will become more important to them as laws touching on religion become more prevalent due to possible unincorporation and increasing establishment. Their claims could be better described as asserting a right to

down as would happen under a successful Establishment Clause challenge.²³⁴ Second, the example of Europe shows that some establishment can occur without necessarily resulting in a severe anti-atheist backlash.²³⁵ This Part shows why the United States should look to international law, how these principles would be received by atheists and the religious majority, and how these principles might be implemented. It also provides a short discussion of other possible solutions.

A. *Why Look to International Law?*

It is always hazardous to argue that the United States should look beyond a belief in American exceptionalism to wisdom and experience developed in foreign nations, especially in the area of religious liberty.²³⁶ However, the difficulties in applying an eighteenth-century, sixteen-word constitutional clause written to govern a predominantly Christian population²³⁷ to today's modern and increasing religiously diverse America have led to a situation where "the American experiment often inspires more criticism than praise."²³⁸

In contrast, the international instruments on religious freedom have been praised for drawing on the lessons and ideas of the First Amendment²³⁹ and crafting something that in many ways is more coherent and protective than the American constitutional experiment.²⁴⁰ This may be because the international instruments are a more contemporary invention,²⁴¹ were drawn to cover a more

freedom from religion, rather than as a right to freedom to practice religion. It is perhaps in this vein that one of the largest and most prominent advocates for atheists' rights in America is the Freedom from Religion Foundation. *See* FREEDOM FROM RELIGION FOUND., *supra* note 126.

²³⁴ WITTE & NICHOLS, *supra* note 11, at 172 ("Critics countered that such permissive standing rules [for bringing claims under the Establishment Clause] effectively empowered a single secular party to 'veto' popular laws touching religion that caused him or her only tangential injury.").

²³⁵ *See supra* notes 29–30 and accompanying text. Sweden and Denmark, both of which boast more establishment than the United States, scored significantly lower.

²³⁶ WITTE & NICHOLS, *supra* note 11, at 265 ("[T]here remains political resistance to departing from American exceptionalism.").

²³⁷ However, the U.S. Constitution does cover a wide range of divergent denominations within Christendom. *See id.* at xx.

²³⁸ *Id.*

²³⁹ *Id.* at 269 ("[T]he international norms on religious liberty are—in many ways—the very norms of the American experiment itself. Most of what appears in modern international human rights instruments captures the best of American and other Western constitutional learning on religious liberty . . .").

²⁴⁰ *Id.* at xxii ("Somewhat ironically, the first principles of religious liberty seen in the American experiment have been exported, reified, and reformulated in international legal instruments where they now enjoy greater coherence than they do in First Amendment law.").

²⁴¹ DURHAM & SCHARFFS, *supra* note 4, at 79; Gey, *supra* note 4, at 250.

diverse range of religious and non-religious beliefs,²⁴² and saw input from state champions of new and diverse religious and non-religious belief systems.²⁴³ Regardless, it offers a chance to learn and evaluate other approaches but still hold on to the common principles underlying both approaches. As the Court has noted, “It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.”²⁴⁴

Furthermore, looking to international law has some recent precedent, and would not be out of step with some of the Court’s recent cases. Although the Supreme Court has looked to international law at various times, three cases since 2002 have explicitly noted its influence: *Atkins v. Virginia*,²⁴⁵ *Lawrence v. Texas*,²⁴⁶ and *Roper v. Simmons*.²⁴⁷ In each case, the majority not only looked to international law, but also looked explicitly to the opinions of the European Union,²⁴⁸ perhaps recognizing our shared backgrounds and wellsprings of principles, and Europe’s rise as a preeminent protector of human rights.²⁴⁹ Although these moves have not been met with universal acclaim,²⁵⁰ they do show a growing willingness among the Justices to look abroad, especially when dealing with fundamental human rights.²⁵¹

²⁴² This is true both on the international level and on the European level. Zuckerman, *supra* note 29, at 56–57.

²⁴³ For examples, look to Saudi Arabia’s abstention from the UDHR, and the USSR and other Communist nations’ reservations to the Declaration for a perceived failure to adequately protect atheistic viewpoints. *See supra* notes 183, 210 and accompanying text.

²⁴⁴ *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

²⁴⁵ 536 U.S. 304 (2002).

²⁴⁶ 539 U.S. 558 (2003).

²⁴⁷ 543 U.S. 551.

²⁴⁸ *Id.* at 575–76; *Lawrence*, 539 U.S. at 573 (citing a case from the European Court of Human Rights); *Atkins*, 536 U.S. at 316 n.21.

²⁴⁹ DURHAM & SCHARFFS, *supra* note 4, at 91; JANIS & NOYES, *supra* note 6, at 428.

²⁵⁰ One need look no further than Justice Scalia’s scathing dissents in each of those cases. *E.g.*, *Roper*, 543 U.S. at 622 (Scalia, J. dissenting) (“Though the views of our own citizens are essentially irrelevant to the Court’s decision today, the views of other countries and the so-called international community take center stage.”).

²⁵¹ *Roper* and *Atkins* dealt with the application of the death penalty to juveniles and mentally retarded criminals, respectively, and *Lawrence* dealt with sodomy laws. *Roper*, 543 U.S. at 564; *Lawrence*, 539 U.S. at 564; *Atkins*, 536 U.S. at 307. Religious liberty has been viewed as a fundamental liberty since at least 1923. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (“While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual . . . to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.”); *see*

Looking to some European developments in protecting religious freedom would allow the United States to gain a new perspective on many of the same principles that underlie the U.S. religion clauses. Furthermore, their application to a population with a sizeable percentage of atheists and the non-religious could provide an informative roadmap for dealing with a growing American atheist population. If nothing else, the experiences and trials of Europe can provide strong guiding principles as religious liberty experiments continue to be conducted at both the federal and state level.

B. How These Guideposts Would Be Received

Moving beyond the American reluctance to look outside of the United States for wisdom, it is important to gauge the potential reaction of the American public to the principles gleaned from the European approach. These principles are likely to be enthusiastically received by the religious majority; they are also likely to give rise to protest by American atheists due to a perceived rollback of the principle that atheists view as the most important for their protection: non-establishment.²⁵² Ironically, this counter-intuitive approach could prove useful, as the stricter scrutiny for free exercise²⁵³ and the relaxed stance on establishment would be welcome concessions to the religious majority while still providing a proven approach to protecting the rights of atheists and other religious minorities. This win-win scenario makes it more likely that these principles would be welcomed by the American public, and thus incorporated into legislation. Even legislators sympathetic to the plight of atheists and non-believers would find these principles an easy sell because of

also Cantwell v. Connecticut, 310 U.S. 296, 304 (1940) (“The fundamental concept of liberty embodied in [the Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment. The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.”); WITTE & NICHOLS, *supra* note 11, at 122–27.

²⁵² See *supra* note 76.

²⁵³ The strict scrutiny test for free exercise claims provides:

[T]hat when the state imposes a substantial burden on the free exercise of a claimant’s religion, the state must show that it is pursuing a compelling or overriding purpose, has used the least restrictive alternative for achieving that purpose, and has engaged in no religious discrimination in drafting or applying the law in question.

WITTE & NICHOLS, *supra* note 11, at 278. It was regularly used from 1963 in *Sherbert v. Verner* until 1990 when it was replaced by a type of heightened rational basis review in *Employment Division v. Smith*. Compare *Emp’t Div. v. Smith*, 494 U.S. 872 (1990), with *Sherbert v. Verner*, 374 U.S. 398 (1963). The decision in *Smith* was met with heated criticism and led Congress to attempt a restoration of the *Sherbert* test by enacting the Religious Freedom Restoration Act, the constitutionality of which was dealt with by the Court in *City of Boerne v. Flores*. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

their religious concessions, and would not have to face the difficult task of overcoming the prevalent anti-atheist stigma to explain themselves to the voters.

C. How the European Guideposts Would Be Implemented

The guideposts from Europe would have to be adopted through a combination of judicial direction and legislation. The courts could adopt these principles as dicta when they outline the contours of the legislatures' and states' new freedom in the area of religious freedom, or the states could proactively adopt the principles in new legislation with the courts acquiescing by upholding the laws. Once adopted, the two guiding principles would be applied in different ways.

The more consistent and most likely approach would be for the courts to provide the guideposts as a signal to the legislatures and the states. The federal judiciary, especially the Supreme Court, could provide a clear and unified message to the legislatures and the states that, as they take a more active role in shaping religious liberty jurisprudence, they should consider this principles and act in accordance with them. The legislatures would then have a clear idea about how they could legislate in this area without risking judicial review.²⁵⁴ The Court has already shown a willingness to signal to the states that they can experiment more freely with religious liberty legislation;²⁵⁵ an adoption of these principles in dicta would simply go a step further by providing more specific indicators of where the Court thinks the states can permissibly go.

The other, less consistent approach would be for the state legislatures to adopt these principles on their own initiative, with the federal courts either openly welcoming the move or silently acquiescing by upholding the laws if the laws are challenged. While this approach would be more in line with the neo-federalist approach to the religion clauses, it would be less consistent as fifty state legislatures independently struggle to anticipate what actions they could take without reawakening the Court's heavy hand. Furthermore, although the guiding principles do have concessions to the religious majority, thus making it easier for legislators to sell them on the adoption of the

²⁵⁴ This assumes a more gradual movement towards deincorporation where the Court could always step in, but is choosing to grant the legislatures more latitude. Obviously if the Court takes a more dramatic step by explicitly overturning *Everson* and *Cantwell* and thus reversing the incorporation of the religion clauses, then the Court would be less likely to scrutinize state legislation, having removed much of its grounds to do so.

²⁵⁵ See *supra* Part II.E.

principles,²⁵⁶ the legislators²⁵⁷ are far more likely to be motivated by the anti-atheist stigma of the religious majority than by the protection of a small, albeit growing, population of American atheists.²⁵⁸

The first guiding principle, the “right to freedom of thought, conscience and religion,”²⁵⁹ would be applied to ensure an expansive definition of religious protection that includes protection for atheists. Specifically, the Supreme Court could explicitly and forcefully adopt the right to freedom of thought, conscience, and belief into its Free Exercise jurisprudence. The Court could accomplish this adoption either by directly citing the right as a term of art²⁶⁰ or by modeling it as a more forceful extension of Justice Black’s reformulation to Free Exercise jurisprudence.²⁶¹ An explicit adoption would send a strong message to the states that, as they legislate more regularly in areas implicating religious liberty, they must extend equal protection to believer and nonbeliever alike, including the right to opt out of burdensome laws.²⁶² Furthermore, because the European right can only be abridged in several enumerated instances,²⁶³ its application in the United States could be seen as a return to the pre-*Smith* strict scrutiny for Free Exercise claims.²⁶⁴ This would provide a barrier to new state legislation intruding on atheists’ rights, and would allow more atheists to claim exemptions from offending laws.

The adoption of the first guiding principle—the right to freedom of thought, conscience, and belief—would also remove some of the confusion

²⁵⁶ See *supra* Part IV.B.

²⁵⁷ Many of these legislators are likely to be very religious themselves due to the heavy infusion of religion into the American political process. See *supra* notes 64–68 and accompanying text.

²⁵⁸ See *supra* note 80 and accompanying text.

²⁵⁹ UDHR, *supra* note 177, art. 18.

²⁶⁰ And thus the legal traditions would accompany that term. *Morissette v. United States*, 342 U.S. 246, 263 (1952) (“[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.”).

²⁶¹ See *supra* Part 1.C.

²⁶² Where these laws aid religion, the Free Exercise right could be more aptly characterized as a freedom from religion right. See *supra* note 233. The international and European instruments already recognize this right. See *supra* notes 230–31 and accompanying text.

²⁶³ ECHR, *supra* note 8, art. 9 (“Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”).

²⁶⁴ See *supra* note 253 and accompanying text.

engendered by extending the protections of the religion clauses to atheism. While religion clause jurisprudence has been interpreted to extend roughly equal protection to both religion and non-religion since Justice Black,²⁶⁵ this reformulation has not been without some cognitive dissonance. After all, the original intent of the religion clauses “was directed to equality among theistic religions before the law, not equality between religion and non-religion,”²⁶⁶ and many people still find it nonsensical to label atheism a religion.²⁶⁷ Adopting the language of the European right would clear up much of this confusion by extending protection to atheism and other beliefs that many would not consider religious without resorting to counterintuitive but practical reformulations.²⁶⁸

The second guiding principle—allowing for some establishment of religion—would be more difficult and more controversial to apply. After all, American atheists view the Establishment Clause as their greatest source of protection.²⁶⁹ One of the primary examples of such establishment in Europe, religious taxes,²⁷⁰ also began to go out of favor in the United States before the First Amendment was even drafted.²⁷¹ However, some states have already begun efforts to remove constitutional barriers to state aid for churches and religion.²⁷² The states could also use this principle to experiment more widely

²⁶⁵ See *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961); *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947).

²⁶⁶ WITTE & NICHOLS, *supra* note 11, at 51.

²⁶⁷ *Court Rules Atheism a Religion*, WND (Aug. 20, 2005), <http://www.wnd.com/2005/08/31895>. Atheism has been labeled a religion under religion clause jurisprudence as a practical matter so that it can enjoy protection under the religion clauses. See, e.g., *Torcaso*, 367 U.S. at 495 n.11 (including atheism and secular humanism as religions).

²⁶⁸ The expansive definition of a “right to freedom of thought, conscience and religion” would also make it easier for new and unusual beliefs and religions to seek protection. Under the ECHR, a novel view only has to “attain a certain level of cogency, seriousness, cohesion and importance.” *Campbell & Cosans v. United Kingdom*, 48 Eur. Ct. H.R. (ser. A) at 13 (1982).

²⁶⁹ Gey, *supra* note 4, at 262.

²⁷⁰ See, e.g., *Darby v. Sweden*, 187 Eur. Ct. H.R. (ser. A) at 5, 10 (1990) (“This system [of a Church tax] has a long tradition and is based on the fact that the Lutheran Church of Sweden is the established church.”).

²⁷¹ WITTE & NICHOLS, *supra* note 11, at 58 (“To be sure, these formal state establishments of religion, particularly the controversial practice of state funding for religion, were losing support by 1789 when the First Amendment was being forged. Such state establishments of religion ended formally in 1833, when Massachusetts became the last state to abandon its state tithing system.”).

²⁷² For instance, a proposed ballot initiative in Oklahoma would ask voters to remove the provision of their state constitution that states, “No public money or property shall ever be appropriated, applied, donated, or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, or system of religion, or for the use, benefit, or support of any priest, preacher, minister, or other religious teacher or dignitary, or sectarian institution as such.” Rob Boston, *Constitutional Assaults: The Right’s Attack on State Constitutions*, AMERICANS UNITED (Feb. 23, 2012), <http://www.au.org/blogs/wall-of-separation/constitutional-assaults-the-right%E2%80%99s-attack-on-state-constitutions>.

with state action that has in the past been struck down under a theory of strict neutrality or Justice O'Connor's endorsement theory.²⁷³ While this principle might not provide persuasive justification for the reintroduction of all forms of establishment previously found unconstitutional,²⁷⁴ it could aid states in their attempts to roll back some of the Court's "ambitious disestablishment agenda of the 1960s to 1980s."²⁷⁵

D. Other Possible Solutions

Adopting these principles is also the best approach when compared with other possible solutions. Two of the most obvious would be either to do nothing or to recognize atheists as having unique standing to bring Establishment Clause cases. However, both of these alternatives present significant problems that would be avoided by adopting the guiding principles from Europe.

The first alternative—to do nothing—leaves a significant number of Americans in a disadvantaged situation that has been described as a "quasi-legal cultural ostracism."²⁷⁶ In addition, their primary method for obtaining protection, the Establishment Clause, has had its use restricted by a tightening of the standing requirements over the last decade.²⁷⁷ This problem will be exacerbated as the number of atheists in the United States continues to grow and the religious majority continues to push back against the perceived secularization of America.²⁷⁸ Furthermore, if the Supreme Court moves further towards unincorporation of the religion clauses,²⁷⁹ religious freedom will revert to the two-track system that led in the past to persecution and discrimination against religious minorities.²⁸⁰ Considering the prevalence and

²⁷³ See *supra* note 70 and accompanying text.

²⁷⁴ For instance, the amplified effect on children of such an endorsement may still justify a ban on school prayer. See *Lee v. Weisman*, 505 U.S. 577, 590, 593 (1992); *Wallace v. Jaffree*, 472 U.S. 38, 81 (1985).

²⁷⁵ WITTE & NICHOLS, *supra* note 11, at 186.

²⁷⁶ Gey, *supra* note 4, at 251.

²⁷⁷ WITTE & NICHOLS, *supra* note 11, at 172; see *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 609 (2007); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 17–18 (2004); *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 486–87 (1982).

²⁷⁸ See *supra* Parts II.A, II.D.

²⁷⁹ See *supra* Part II.E.

²⁸⁰ WITTE & NICHOLS, *supra* note 11, at 80, 109 ("It was only after local state practices became increasingly discordant, and after state legislatures and courts began systematically abridging these essential rights and liberties of religion, especially for religious minorities, that the Supreme Court stepped in to create a more uniform national law of religious liberty.").

power of the anti-atheist stigma,²⁸¹ atheists would likely be the first minority to have their rights threatened. If this large and growing number of Americans is to enjoy equality under the law, something will have to be done.

The second alternative—to recognize unique standing²⁸² for atheists to bring Establishment Clause cases—not only seems unlikely given the current trends in the religious clauses jurisprudence, but would in itself be an unconstitutional preference of non-religion over religion. Atheists might welcome the move given the increased standing hurdles²⁸³ and the impact of even the most broadly phrased endorsement of religion,²⁸⁴ but just as the Supreme Court has stated that the First Amendment prohibits the government from aiding all religions against non-believers,²⁸⁵ it also prohibits it from aiding atheism and non-religion over religion.²⁸⁶ Such an unconstitutional promotion would also result in an increased stigma as atheists would possess a legal weapon unavailable to the religious,²⁸⁷ and as the increased standing would potentially lead to a number of laws being struck down, furthering the perception that religion is under attack in America.²⁸⁸ Not only would this be

²⁸¹ See *supra* Part I.B.

²⁸² This recognition of standing would be “unique” in that it would hinge on a novel recognition that government endorsement of religion is a “direct injury” to atheists not shared in “common with people generally.” *Frothingham v. Mellon*, 262 U.S. 447, 88 (1923). The Court has made clear that a litigant cannot bring a claim alleging a violation of the Establishment Clause without some alleged injury. *Valley Forge Christian Coll.*, 454 U.S. at 486–87 (1982) (“We simply cannot see that respondents have alleged an injury of any kind, economic or otherwise, sufficient to confer standing. . . . Their claim that the Government has violated the Establishment Clause does not provide a special license to roam the country in search of governmental wrongdoing and to reveal their discoveries in federal court.”). For a more thorough explanation of how standing requirements have been applied in Establishment Clause cases, see WITTE & NICHOLS, *supra* note 11, at 170–73.

²⁸³ See *supra* note 277.

²⁸⁴ Gey, *supra* note 4, at 262, 264.

²⁸⁵ See *supra* Part I.C.

²⁸⁶ *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963) (“We agree of course that the State may not establish a ‘religion of secularism’ in the sense of affirmatively opposing or showing hostility to religion, thus ‘preferring those who believe in no religion over those who do believe.’” (quoting *Zorach v. Clauson*, 343 U.S. 306, 214 (1952))).

²⁸⁷ These claims already arose during a period of more relaxed standing requirements. WITTE & NICHOLS, *supra* note 11, at 172 (“Critics countered that such permissive standing rules effectively empowered a single secular party to ‘veto’ popular laws touching religion that caused him or her only tangential injury. . . . It was no small irony that a secular claimant could use the establishment clause to overturn a carefully calibrated local law that happened to touch religion too favorably, but a religious claimant could not use the free exercise clause to claim an individual exemption from a discretionary regulatory decision that happened to ‘virtually destroy’ its religion.”).

²⁸⁸ See *supra* note 127 and accompanying text.

an unconstitutional move that flies in the face of religious equality, but it would ultimately prove counterproductive.

Adopting the guiding principles from Europe would avoid the pitfalls of these alternatives. The principles would place atheism on par with religion rather than elevate it, would be welcomed by the religious majority rather than resisted, and would effectively protect atheists' freedom of conscience.

CONCLUSION

Atheists in the United States face a widespread and persistent stigma. Currently, the religion clauses of the Constitution provide protection more or less on par with religious individuals. However, as conditions in the United States change due to a growing, more unified, and more outspoken atheist community, a push by religious Americans to reinsert their faith into the nation's laws, and a neo-federalist movement to shift the development of religious protection from the federal government to the states and from the courts to the legislatures, there is a growing risk that this stigma will result in discrimination and oppression of atheists being enacted as law.

As the United States struggles to develop a new framework for handling religious liberty, it would be prudent to look to other examples developed on the international scene. In particular, the European system provides useful insights due to Europe's demographic similarities with the United States' future population—namely a large and growing atheist and non-religious population. The European framework for protecting religious liberty has drawn heavily on the principles developed by the international community since 1940, but has applied them to a population more equally divided between the religious and non-religious.²⁸⁹

While the European system can be selectively mined for years to come, two principles stand out. The first is a more expansive definition of religious protection that protects not only religious beliefs, but also the "right to freedom of thought, conscience and religion."²⁹⁰ As interpreted by later instruments, this protection extends equally to atheism and both theistic and non-theistic religions, and could be used in the United States to allow atheists to bring Free Exercise claims without first going through the often counterintuitive process of proving that a religious exercise of the atheist is being hampered. This could

²⁸⁹ See *supra* note 29 and accompanying text.

²⁹⁰ UDHR, *supra* note 177, art. 18.

allow more atheists to bring claims under the Free Exercise Clause and ask for exemptions based on conscience, rather than resorting to Establishment claims to strike down offending laws in their entirety. This would prove beneficial to religious Americans as well, because laws that had only a tangential effect on religion or freedom of conscience would be less likely to be overturned, and legislatures could feel freer to toe the line, guarded by the knowledge that any nonbelievers who felt unduly burdened could seek exemptions. Furthermore, the international definition allows for limitations on this right in only a few enumerated circumstances. Religious Americans would likely welcome this as a return to the pre-*Smith* strict-scrutiny test for Free Exercise.²⁹¹

The second principle permits some establishment of religion. Although only a few European nations still maintain established state religions,²⁹² many provide levels of accommodation and support, particularly in regards to levied taxes,²⁹³ which would be impermissible under the current American system. These methods of establishment are permitted under the international instruments, so long as nonadherents and nonbelievers are free to fully exercise their right to freedom of conscience and claim an exemption. While perhaps counterintuitive given the heavy emphasis American atheists give to prohibiting government endorsement of religion, it could prove a powerful concession to religious demands, particularly at a state and local level, so long as it is coupled with the expansive right to freedom of thought, conscience, and belief to enable exemptions for those consciously opposed.

The stigma against atheists is unlikely to disappear in the near future and cannot be solved by legal means alone, but as the framework for protecting religious freedom and the freedom of conscience adapts to a changing America, it is important that the rights and liberties of atheists and nonbelievers receive the necessary protection. Europe can offer a new perspective on dealing with the liberty interests of atheists, and the United States must take heed of these important lessons. The failure to do so could

²⁹¹ See *supra* note 264 and accompanying text.

²⁹² See *supra* note 228 and accompanying text.

²⁹³ See MURDOCH, *supra* note 231, at 34–36.

result in a situation where millions of Americans lose their rights to freely follow the dictates of their own conscience and become victim to the trampling of a religious majority motivated by a persistent stigma.

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