

Essay

UNCIVIL RELIGION:
“JUDEO-CHRISTIANITY” AND THE TEN COMMANDMENTS*

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With respect to public acknowledgment of religious belief, it is entirely clear from our Nation's historical practices that the Establishment Clause permits th[e] disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists.

—Justice Antonin Scalia[‡]

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[‡] *McCreary County v. ACLU*, 125 S.Ct. 2722, 2753 (2005) (dissenting opinion joined by Rehnquist, C.J., & Thomas, J.).

In the recent *Decalogue Cases*,¹ Justice Scalia conceded that government cannot invoke the blessings of ““God,”” or even say his name, “without contradicting the beliefs of some people that there are many gods, or that God or the gods pay no attention to human affairs.”² Nevertheless, Justice Scalia declares that this contradiction is of no constitutional moment, because the historical understanding of the Establishment Clause permits government wholly to ignore those who do not subscribe to monotheism.³ Noting that more than 97% of American believers are either Christians, Jews, or Muslims, Justice Scalia concludes that the government invocation or endorsement of belief in a monotheistic God does not violate the Establishment Clause.⁴

Justice Scalia’s opinion represents the latest attempt to insulate American civil religion from Establishment Clause attack. A “civil religion” is a set of nondenominational values, symbols, rituals, and assumptions by means of which a country interprets its secular history.⁵

¹ *Van Orden v. Perry*, 125 S.Ct. 2854 (2005); *McCreary County v. ACLU*, 125 S.Ct. 2722 (2005). *Van Orden* and *McCreary County* were handed down less than two years after the Court denied review in a divisive, high-profile case involving placement of a decalogue monument in the Alabama state courthouse by then-Alabama Chief Justice Roy Moore. *See Glassroth v. Moore*, 540 U.S. 1000 (2003) (denying cert. in 335 F.3d 1282 (11th Cir. 2003)).

² *McCreary County*, 125 S.Ct. at 2752-53 (Scalia J., joined by Rhenquist, C.J. & Thomas, J., dissenting).

³ *McCreary County*, 125 S.Ct. at 2753 (Scalia J., joined by Rhenquist, C.J. & Thomas, J., dissenting). Surely one of the most remarkable judicial declarations in contemporary Establishment Clause jurisprudence, this statement confirms, as Professor Gey has put it, that Justice Scalia is willing to say out loud what most judges dare only to think.

⁴ *McCreary County*, 125 S.Ct. at 2753 (Scalia J., joined by Rhenquist, C.J. & Thomas, J., dissenting).

⁵ ROBERT BELLAH, *THE BROKEN COVENANT: AMERICAN CIVIL RELIGION IN TIME OF TRIAL* 3 (New York: Seabury, 1975).

Civil religion aims to bind citizens to their nation and government with religious belief, hoping both to inspire reverence of national history and to form a communal national bond.⁶

Since the founding era, successive versions of civil religion have framed loyalty to the United States as a religious as well as a secular or purely civic commitment.⁷ American civil religion thus filled the role played by the Anglican establishment in England, ascribing theological or spiritual meaning to the secular historical events of America's founding and subsequent history, and thereby encouraging development and maintenance of the social and political cohesion necessary for the effective functioning of liberal democratic government.⁸

The most recent incarnation of American civil religion is the "Judeo-Christian tradition," which emerged in the 1950s as a set of "spiritual values" that was thought to be held by virtually all Americans.⁹ The content of Judeo-Christian civil religion was captured by President Eisenhower's famously awkward observation that American government "makes no sense, unless it is founded in a deeply felt religious faith—and I don't care what it is."¹⁰

President Eisenhower and Justice Scalia to the contrary notwithstanding, Judeo-Christianity no longer reflects the religious beliefs of all or nearly all Americans, if it ever did.

⁶ Michael Walzer, *Drawing the Line: Religion and Politics*, 1999 UTAH L. REV. 619, 621.

⁷ See text accompanying notes ##-## *infra* [Part 1 ¶¶ 2-4].

⁸ See text accompanying notes ##-## *infra* [Part 1 ¶1].

⁹ See text accompanying notes ##-## *infra* [Part 1 ¶¶ 5-7].

¹⁰ Quoted in WIL HERBERG, *PROTESTANT - CATHOLIC - JEW* 97 (New York: Doubleday, 1955); accord NOAH FELDMAN, *DIVIDED BY GOD* 165 (New York: Farrar, Straus & Giroux, 2005) ("Americans of the 1950s developed a public language for speaking about religion in which they emphasized the importance of belonging to a church without specifying the beliefs that membership might entail.").

Dramatic increases in unbelievers, practitioners of nonWestern religions, and adherents to postmodern spirituality now leave large numbers of Americans outside the boundaries of Judeo-Christianity, a situation only marginally improved by adding in American Muslims to Christians and Jews to re-constitute an “Abrahamic” civil religion. Demographic changes have simply placed too many Americans outside of Judeo-Christianity for it to perform the politically and socially unifying function of civil religion.¹¹

At the same time that religious demographic trends have expanded American religious diversity beyond the bounds of Judeo-Christianity, political forces are contracting these same boundaries. Religious conservatives do not defend Judeo-Christianity as a theologically inclusive manifestation of the beliefs of nearly all contemporary Americans, but rather as the historic and theologically exclusive faith of the American founders, to which such conservatives are the legitimate heirs. Consequently, the symbols and observances of Judeo-Christianity now signify the thicker sectarian meaning of this narrower religious interpretation of American history, and not the thin religiosity of civil religion.¹² Ironically, however, though conservative Christians defend appropriation of the symbols and practices Judeo-Christianity precisely because of their sectarian meaning, they rely on the thin religiosity of civil religion to circumvent Establishment Clause limitations on government use of such symbols and practices. Should this tactic succeed, the contemporary ethic of religious equality that now informs Establishment Clause jurisprudence would regress into one of classic tolerance, under which the government

¹¹ See Part 2.

¹² Throughout this Essay, we use “sectarian” to signify theological narrowness, exclusion, and self-absorption, and “nonsectarian” to signify the opposite—theological inclusion, ecumenicism, and openness. See, e.g. Steven D. Smith, *Nonestablishment “under God”?* *The Nonsectarian Principle*, 50 VILL. L. REV. 1, 7-8 (2005).

would be constitutionally free to use the symbols and practices of a purportedly inclusive Judeo-Christian civil religion to promote observance of a conservative and sectarian Christianity, so long as it refrained from affirmatively persecuting unbelievers and adherents to other religious faiths.¹³

The tensions of American civil religion are reflected in Europe.¹⁴ Indeed, the insistence on retaining Judeo Christianity as the American civil religion sets the United States against the contemporary current of Western democracy. That current emphasizes procedural democracy and value-neutrality over value-laden government and religio-nationalist exceptionalism. The separation of governmental machinery from thick conceptions of the good permits liberal democracy to function despite the radically different religious beliefs that may exist among its citizens. Insistence on an American democracy informed by Judeo-Christianity or, indeed, by any civil religion, is precisely the wrong answer to increasing religious pluralism and difference in the United States and elsewhere.¹⁵

1.

In eighteenth century Britain, the king's dual status as leader of the Church of England and head of the British state was thought essential to the cultivation and maintenance of loyalty to crown and Parliament among British subjects.¹⁶ This understanding informed American

¹³ See Part 3.

¹⁴ See Part 4.

¹⁵ See Part 5.

¹⁶ See Michael McConnell, *Establishment and Disestablishment at the Founding—Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2113 (2003) [hereinafter McConnell, *Establishment and Disestablishment I*] (noting that the purpose of the Test, Corporation, and Conventicles Acts (among others) was in part to "retain the Queen's subjects in their due

government prior to the Revolution, as most of the colonies formally established the Church of England or otherwise provided for the legal predominance of Protestant faith,¹⁷ with the same goal of developing and preserving popular loyalty to colonial law and government.¹⁸

obedience," by targeting Catholics and Puritans who were thought to threaten the political legitimacy of the state); *see also* FELDMAN, *supra* note #, at 22 ("In England and on the European continent, in Catholic and Protestant countries alike, it had long been assumed that a close relationship between established religion and government was necessary to maintain social order and national cohesion.").

¹⁷ Prior to the Revolution, a specific Protestant denomination was established by law in eight of the original thirteen colonies. The Church of England was officially established in Maryland, North Carolina, South Carolina, Georgia, and Virginia, as well as in portions of metropolitan New York. Additionally, each city or town in Connecticut, New Hampshire, and Massachusetts was authorized by law to select a locally established religion by majority vote; the overwhelming choice was Congregationalism. There was no established religion in Pennsylvania, Delaware, New Jersey, Rhode Island, and rural New York. Vermont also followed the New England model, though it was not recognized as a state until well after the Revolution. *See* McConnell, *Establishment and Disestablishment*, *supra* note #, at 2110-11.

¹⁸ While Professor (now Judge) McConnell finds this to have been true of the Anglican establishments in America, he argues that it was less true of the Puritan or Congregationalist establishments in New England, which "were based on the intense religious convictions of the people" more than any pragmatic about political stability. McConnell, *Establishment and Disestablishment*, *supra* note #, at 2115-16. Nevertheless, the importance of religion to good government was acknowledged by all who favored religious establishment, *see, e.g.*, FELDMAN, *supra* note #, at 35 (relating that in the view of supporters of the Virginia Bill for Religious Establishment, nonpreferential support of Christianity "was necessary to avoid the rapid decline of religion that would in turn be 'fatal to the Strength and Stability of civil government.' [O]bedience to the law depended on men's belief in divine punishment. Weakening religion would threaten the stability of the state."); WILLIAM WARBURTON, *THE ALLIANCE BETWEEN CHURCH AND STATE* (London, 1736) (making the common argument that an alliance between civil government (prohibiting "open mischief") and religion (prohibiting "secret mischief") prevented Hobbesian anarchy); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 427-28 (Chapel Hill: University of North Carolina Press, 2nd ed. 1998) (describing the unwillingness of most of the newly independent states to abandon state religious establishments, owing to the widespread belief that religion was necessary to cultivate republican virtue), as well as by most of those who argued against it, *see* PHILLIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* 107 (2002) (concluding that the vast majority of the early opponents of establishment in America acknowledged the importance of religion to government and never intended to create a constitutional doctrine that completely separated government from religion).

In the aftermath of the Revolution, the Establishment Clause forbade the creation of a national church,¹⁹ which the substantial and growing religious diversity of the colonists would have precluded in any event.²⁰ This same diversity also undermined state religious establishments, the last of which had disappeared by the 1830s.²¹ In their place arose a “civil religion,”²² which linked American citizenship and loyalty to a “nonsectarian” Protestant understanding of the United States as having a divine origin and destiny.²³ The tenets of this civil religion consisted of beliefs purportedly shared by all Christian religions,²⁴ such as the

¹⁹ U.S. CONST. Amend I, cl.1 (“Congress shall pass no law respecting an establishment of religion”); *see also id.*, art.I, cl.3 (“[N]o religious Test shall ever be required as a Qualification to any Office of public Trust under the United States.”).

²⁰ In addition to the general split between Congregationalist and Puritan establishments in New England, nonestablishment in the middle Atlantic, and Anglican establishment in the South at the time of the Revolution, *see* note 13 *supra*, Rhode Island and certain communities in other of the newly independent states had been founded as havens for religious dissenters, and Catholic, Presbyterian, Baptist, and Jewish presences were evident throughout the country. George Dargo, *Religious Toleration and its Limits in Early America*, 16 N. ILL. U. L. REV. 341, 352-53 (1996); *see also* ANSON PHELPS STOKES, CHURCH AND STATE IN THE UNITED STATES 21-23 (1950) (noting the substantial religious diversity in colonial America); THOMAS CURRY, THE FIRST FREEDOMS: CHURCH AND STATE TO THE PASSAGE OF THE FIRST AMENDMENT (New York: Oxford, 1986) (documenting the same).

²¹ *See* FRANKLYN S. HAIMAN, RELIGIOUS EXPRESSION AND THE AMERICAN CONSTITUTION 6 (2003).

²² *See* text accompanying note ## [¶2, 2nd sentence] *supra*.

The term “civil religion” was used by Rousseau to refer to a set of purportedly universal religious beliefs that government was obligated to encourage to ensure social stability. *See* JEAN JACQUES ROUSSEAU, THE SOCIAL CONTRACT bk.4, ch.8, at *** (****).

²³ *See* BELLAH, *supra* note #, at 4 (observing that the “sacredness of the Constitution . . . is closely bound up with the existence of the American people”); *id.* at 27, 44 (arguing that Jefferson’s invocation of the “laws of nature” in the Declaration and his use of biblical imagery captured the feelings of religious Americans about the United States and its destiny).

²⁴ *See* FELDMAN, *supra* note #, at 61.

existence of God, the literal truth of the Bible, the efficacy of prayer, and the expectation of an afterlife in which virtue is rewarded and vice is punished.²⁵ This civil religion allowed the states to continue to countenance relationships between government and religion while rejecting the idea of formal denominational establishments.²⁶ Public schoolchildren were led in prayer and Bible-reading by government-paid teachers,²⁷ public prayer became common in the state legislatures,²⁸ important days of Christian worship were recognized as civic holidays,²⁹ biblical and other expressions of devotion to God appeared on government seals, documents, and buildings,³⁰ and blasphemy and Sunday-closing laws reinforced respect for the Christian Sabbath and the Christian God.³¹

²⁵ ROBERT N. BELLAH, *BEYOND BELIEF: ESSAYS ON RELIGION IN A POST-TRADITIONAL WORLD* 171-72 (1970); John C. Jeffries, Jr., & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 297-98 (2001).

²⁶ FELDMAN, *supra* note #, at 63, 81; HAMBURGER, *supra* note #, at 275-83.

²⁷ *See* FELDMAN, *supra* note #, at 81; Jeffries & Ryan, *supra* note #, at 297-98.

²⁸ *See* JOHN WITTE, JR., *RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT* 118 (Boulder, Colo.: Westview, 2nd ed. 2005); Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2104 (1996).

²⁹ *See* WITTE, *supra* note #, at 118.

³⁰ *E.g.*, WITTE, *supra* note #, at 119 (noting the appearance of “In God We Trust” on “government seals and stationary,” the inscription of the Ten Commandments and biblical verses “on the walls of courthouses, public schools, and other public buildings, and erection of crucifixes in “state parks and on statehouse grounds”); Epstein, *supra* note #, at 2112-13 (noting the use of “in the year of our Lord” and “*Anno Dominus*” to date official government documents).

³¹ *See* WITTE, *supra* note #, at 118; Andrew J. King, *Sunday Laws in the Nineteenth Century*, 64 ALB. L. REV. 675, 684-85 (2000).

Waves of European immigrants in the nineteenth and early twentieth centuries exposed this “nonsectarianism” as essentially Protestant.³² This period is accordingly marked by periodic Catholic and Jewish resistance to assimilation under the umbrella of “nonsectarian” civil religion.³³ By the 1950s, however, these conflicts had largely abated. Succeeding generations of Catholic and Jewish immigrants had absorbed some of the Protestant individualism implicit in “nonsectarianism,”³⁴ while nonsectarianism itself loosened its ties to Protestant beliefs and observances.³⁵ This permitted a reformulation of the American civil religion from a

³² See FELDMAN, *supra* note #, at 12, 63-64. See generally HAMBURGER, *supra* note #, chs. 8 & 10 (arguing that the “separation” of church and state emerged in the 19th century, largely as the consequence of Protestant fear of Catholic influence over American government, and was never thought or intended to sever Protestant relationships with government); Calvin Massey, *The Political Marketplace of Religion*, 57 HASTINGS L.J. 1, 11-12 (2005) (observing that in the late 19th century, “Protestant hegemony was preserved by using the political process to bar government aid to religious institutions regarded as mostly Catholic entities,” and noting the “complacent acceptance of Protestant practices in public life” based on the assumption that “the only acceptable form of Christianity was some version of Protestantism”).

³³ See FELDMAN, *supra* note #, at 77 (describing Protestant “paranoia toward the Catholic church,” and a “corresponding elevation of the Bible to the foundational text of American republicanism,” based on the purported “connection among Bible reading, morality, and successful participation in republican government”); HAMBURGER, *supra* note #, at 209-221 (relating intensification of tensions between Protestants and Catholics during the nineteenth century as the latter resisted the “nonsectarian” religion in the common schools and accused Protestants of religious intolerance); see also Thomas C. Berg, *Minority Religions and the Religion Clauses*, 82 Wash. U. L. Q. 919, 927 (200*) (describing Protestant discrimination against religious minorities, including Catholics and Jews, during the nineteenth century).

³⁴ See FELDMAN, *supra* note #, at 90-91 (suggesting that “the phenomenon of Catholics sending their children in large numbers to public schools” resulted in Catholic identification with “nonsectarian religion” and its “shared vision of what it meant to be Christian and American”); HAMBURGER, *supra* note #, at ** (“Catholics in America increasingly felt individualistic expectations” and “adopted a liberalized, American understanding of their Church,” which conceptualized papal authority as “merely of a spiritual nature” without power to “interfere with the temporal authority of our government.”) (internal quotation marks omitted).

³⁵ See Michael McConnell, *Why is Religious Liberty the “First Freedom”?*, 21 CARDOZO L. REV. 1243, 1263-64 (2000) [hereinafter McConnell, *First Freedom*] (arguing that while

“nonsectarian” Protestantism to a more plausible transdenominational “Judeo-Christianity.”³⁶

Thus, Justice Douglas declared in the early 1950s that Americans are a “religious” rather than a “Christian” people, and that American institutions presuppose belief in a “Supreme Being,” which presumably signified the Jewish as well as the Christian God.³⁷

It was also in the 1950s that Wil Herberg published his classic of American civil religion, *Protestant - Catholic - Jew*.³⁸ Herberg argued that unlike other immigrant characteristics, such as language or national origin, religious identity did not disappear into the “melting pot” of American assimilation.³⁹ To the contrary, an immigrant could enter the mainstream of American society without sacrificing religious identity—indeed, could only enter that mainstream by retaining religious identity—so long as he or she was a Protestant, a Catholic, or a Jew.⁴⁰ Noting

nineteenth century “nonsectarianism” was essentially Protestant, contemporary civil religion lacks an “overt connection” to Protestantism); *see also* FELDMAN, *supra* note #, at 91 (“As Catholics entered the public schools, . . . those schools were faced with the challenge of expanding Christian nonsectarianism to include the Catholic difference, and this they gradually began to do.”).

³⁶ *See* Gerard v. Bradley, *The Enduring Revolution: Law and Theology in the Secular State*, 39 EMORY L.J. 217, 218 (****); Barbara L. Kramer, *Reconciling Religious Rights and Responsibilities*, 30 LOY. U. CHI. L.J. 439, 440 n. 10 (1999).

³⁷ *Compare* *Zorach v. Clawson*, 343 U.S. 306, 313-14 (1952) (“We are a religious people whose institutions presuppose a Supreme Being.”) *with* *Holy Trinity Ch. v. United States*, 143 U.S. 457, *** (1892) (“We are a Christian people, and the morality of the country is deeply ingrafted upon Christianity.”) (quoting *People v. Ruggles*, 8 Johns. 290, 295 (N.Y. 1811)).

³⁸ *See* HERBERG, *supra* note #.

³⁹ HERBERG, *supra* note #, at 40.

⁴⁰ HERBERG, *supra* note #, at 40 (observing that while immigrants to the United States were expected to abandon almost everything they brought with them from “the old country,” “becoming an American did not involve abandoning the old religion in favor of some native American substitute.” To the contrary, “it was largely through his religion that he, or rather his children and grandchildren, found an identifiable place in American life”); *id.* at 53-54 (“Unless

that virtually all Americans identified themselves with one of these religious groups,⁴¹ Herberg concluded that Protestantism, Catholicism, and Judaism were each a quintessentially American religion, and that “Judeo-Christianity” was the American civil religion.⁴²

In contrast to the ironic sectarianism of “nonsectarian” Christianity, 1950s Judeo-Christianity had greater potential to perform the socially unifying function of civil religion. Judeo-Christianity built and maintained loyalty to the United States, its governments, and its laws, by linking the transdenominational religious beliefs and observances of Protestants, Catholics, and Jews with patriotic fervor and national obligation. As Herberg himself admitted, however, it was not so much theological common ground which suggested that Judeo-Christianity could function as a civil religion in the 1950s, but a narrow confluence of broader “spiritual values” that Protestants, Catholics, and Jews each placed at the foundation of American society, such as belief in a transcendent morality shared by all Americans, faith in American democracy as the last, best safeguard of individual liberty, and recognition of a monotheistic God who gives America his special care and attention.⁴³

one is either a Protestant, or a Catholic, or a Jew, one is a ‘nothing’; to be a ‘something,’ to have a name, one must identify oneself to oneself, and be identified by others, as belonging to one or another of the three great religious communities in which the American people are divided.”).

⁴¹ HERBERG, *supra* note #, at 59.

⁴² See HERBERG, *supra* note #, at 101 (“Protestantism, Catholicism, and Judaism [are] three diverse, but equally legitimate, equally American, expressions of an overall American religion, standing for essentially the same ‘moral ideals’ and ‘spiritual values.’”).

⁴³ See, e.g., HERBERG, *supra* note #, at 52 (observing that the American civil religion of the 1950s did not so much presuppose that Protestantism, Catholicism, and Judaism shared an “underlying theological unity,” as that they were “three diverse representation of the same ‘spiritual values,’ the ‘spiritual values’ American democracy is presumed to stand for (the fatherhood of God and brotherhood of man, the dignity of the individual human being, etc.).”); *id.* at 98 (arguing that American religion is not devoted to “God,” but to “religion”: “The faith is

Its inclusive potential notwithstanding, Judeo-Christianity did not function for very long as a socially unifying force in American society. The relative quiescence of the 1950s was followed by the political and social upheavals of the 1960s and 1970s, which included constitutional invalidation of government use of many symbols and observances of Judeo-Christianity, particularly in the public schools.⁴⁴ In reaction, numerous religious activist groups emerged, primarily culturally and politically conservative Christians, with a goal of defending the constitutionality of government appropriation of the symbols and practices of Judeo-Christianity.⁴⁵ This coalition of conservative Christians grew and strengthened throughout the

not in God, but in faith; we worship not God but our own worshipping”) (footnote omitted); Yudah Mirsky, Note, *Civil Religion and the Establishment Clause*, 95 YALE L.J. 1237, 1252 (1986) (identifying the five themes of American civil religion as “a sense that there is some sort of transcendent principle of morality to which this polity is, or ought to be, responsible”; “a faith in democracy as a way of life for all people and a concomitant belief in an American mission to spread it the world over”; “a sense of civic piety, that exercising the responsibilities of citizenship is somehow a good end in itself”; “a reverence for American religious folkways”; and “a belief that Destiny has great things in store for the American people.”).

⁴⁴ See, e.g., *Stone v. Graham*, 449 U.S. 39 (1980) (holding that public school display of decalogue violated Establishment Clause); *Epperson v. State of Arkansas*, 393 U.S. 97 (1968) (same with respect to ban on teaching any theory of human origin in public schools); *Abingdon School Dist. v. Schempp* 374 U.S. 203 (1963) (same with respect to public school-sponsored prayer and Bible-reading, even though nonconsenting students were exempted from attendance and participation); *Engel v. Vitale* 370 U.S. 421 (1962) (same with respect to nondenominational government-composed prayer offered at the start of each school day); *Torcaso v. Watkins*, 367 U.S. 488 (1961) (same with respect to state requirement that notaries affirm belief in God).

⁴⁵ See, e.g., FELDMAN, *supra* note #, at 192-93 (describing the political influence and values agenda of Rev. Jerry Falwell’s “Moral Majority” and Rev. Pat Robertson’s Christian Coalition in the late 1970s and 1980s); [add Robertson presidential campaign & American Center for Law & Justice, James Dobson and Focus on the Family].

1980s and 1990s, and entered the twenty-first century with considerable social and political power.⁴⁶

2.

Judging solely from Justice Scalia's rhetoric, one would think that the current number and devotion of American Protestants, Catholics, and Jews is virtually unchanged since the 1950s, save only for the addition of a few Muslims. It is true, of course, that adherents to Buddhism, Hinduism, and other nonWestern or non-monotheistic religions still constitute only about 2% of all adult Americans.⁴⁷ Emphasis on the small absolute number of such adherents, however,

⁴⁶ See, e.g., Bruce Ledewitz, *Up Against the Wall of Separation: The Question of American Religious Democracy*, 14 WM. & MARY BILL RIGHTS J. 555 (2005) (arguing that conservative Christian influence on American politics has transformed the United States into a "religious democracy"). See generally MICHELLE GOLDBERG, *KINGDOM COMING: THE RISE OF CHRISTIAN NATIONALISM* (New York: W.W. Norton, 2006); KEVIN PHILLIPS, *AMERICAN THEOCRACY: THE PERIL AND POLITICS OF RADICAL RELIGION, OIL, AND BORROWED MONEY IN THE 21ST CENTURY* (New York: Viking, 2006).

Some commentators have suggested that Christian conservatives themselves are divided over many of these initiatives. See Russell Cobb, *Cracks in the Christian Ascendancy* (June 27, 2006), available at <<http://www.slate.com/id/2144522>> (last visited June 27, 2006); see also E.J. Dionne, *A Shift Among the Evangelicals*, WASH. POST, June 16, 2006, at A25, available at <<http://www.washingtonpost.com/wp-dyn/content/article/2006/06/15/AR2006061501790>> (last visited June 20, 2006).

⁴⁷ See, e.g., CUNY, GRADUATE CENTER, *AMERICAN RELIGIOUS IDENTIFICATION SURVEY* (Barry A. Kosmin, Egon Mayer & Ariela Keysar, eds. 2001) (reporting adult Muslim, Buddhist, Hindu, Baha'I, Taoist, and Sikh affiliation in 2001 at slightly over 3 million, or nearly 2% of the population), reprinted in *STATISTICAL ABSTRACT OF THE UNITED STATES 2004-2005*, Table 67, at 55; CIA FACT BOOK, <<http://www.cia.gov/cia/publications/factbook/fields/2122.html>> (reporting American Muslim population at 2.9 million, or over 1% of the adult population); see also CIA FACT BOOK, *supra* note # (reporting that 10% of the American population in 2002 reported themselves as affiliated with a religious denomination or sect that was neither Protestant, Roman Catholic, Mormon, Jewish, or Muslim); Harris Interactive Election 2000 Poll, *supra* note # (reporting that 12.7% of a random sample of 5.6 million American registered voters identified through the Internet described themselves as affiliated with a religious denomination or sect that was neither Christian nor Jewish).

ignores their dramatic growth over the last half century.⁴⁸ Moreover, Justice Scalia's decision to focus on monotheists as a percentage of the population of *believers*, obscures the equally dramatic increase of unbelievers in the United States, now between 10% and 15% of the population,⁴⁹ compared to 3% or less during the heyday of Judeo-Christianity.⁵⁰ Given that the

⁴⁸ See LEO ROSTEN, *RELIGIONS OF AMERICA 196-97* (New York: Simon & Schuster, 1955) (reporting that in 1953 Buddhists numbered only 63,000 or 0.04% of a population of about 95 million, and noting that Muslims were present in the United States but no statistical reports of their numbers were available); see also Walter Russell Meade, *God's Country?*, 85 *FOREIGN AFF.* 24, 42 (Sept./Oct. 2006) (noting the "growing presence and influence of non-Christian communities in the [United States]—of Jews, Muslims, Buddhists, [and] Hindus").

This increase is attributable to a variety of causes. Beginning in the 1970s, the United States began to loosen immigration restrictions on nonEuropeans that had been in place for nearly half a century, and a large number of southeast Asian refugees entered the country in the aftermath of the American withdrawal from Vietnam and the subsequent fall of South Vietnam to the North. Indian and Asian immigration also increased during the telecommunications expansion of the 1990s, as technology companies dealt with a shortage of computer skilled American engineers and other professionals by seeking them overseas. Both of these coincided with the growth in adherents to such religions by longtime citizens and residents of the United States.

⁴⁹ See, e.g., CUNY, *supra* note # (reporting that 14.1% of all adult Americans in 2001 described themselves as being atheist, agnostic, humanist, or secular, or as having no religion at all, and that an additional 5.4% refused to specify a religious identification); GLENN H. UTTER & JAMES L. TRUE, *CONSERVATIVE CHRISTIANS AND POLITICAL PARTICIPATION* 26 (Santa Barbara, CA: ABC-CLIO, 2004) (concluding that "the largest percentage gain" reported in survey data between 1965 and 1996 "was in the secular category, which includes those stating no religious preference as well as respondents stating that they are atheists or agnostics," and which increased from 9.7% of survey respondents in 1965 to 16.3% of respondents in 1996); Harris Interactive Election 2000 Poll, <http://www.adherents.com/rel_USA.html> (reporting that 7.1% of a random sample of 5.6 million American registered voters identified through the Internet described themselves as "agnostic" or "atheist," and that an additional 10% described themselves as "nonreligious" or refused to answer); see also *STATISTICAL ABSTRACT*, *supra* note #, Table 67, at 55 (reporting that the number of self-identified unbelievers in 2001 had more than doubled since 1990); CIA *FACT BOOK*, *supra* note # (reporting that in July 2002, 10% of Americans declined to identify themselves as members of any religious denomination).

The recent study conducted by the Baylor Institute for Studies of Religion suggests that only 4% of Americans are nonbelievers. See BAYLOR INSTITUTE FOR STUDIES OF RELIGION, *AMERICAN PIETY IN THE 21ST CENTURY* 8, 12 (September 2006) [hereinafter BAYLOR INSTITUTE]

rate of unbelief is three times as great among the young as the old,⁵¹ one can expect the proportion of unbelievers in the United States to increase steadily for the foreseeable future.

Additionally, a postmodern “spirituality” has arisen among American believers within the last 20 years. This is a new attitude of belief that cannot properly be characterized as either predominantly secular or traditionally religious. Spirituality is characterized by personal choice—by adherence to religion based on the individual needs it satisfies, rather than the truth-claims it makes or the conversion experience it may generate.⁵² Spirituality incorporates the consumer mentality of a marketplace in which believers shop for beliefs and practices, picking and

(reporting that 10.8% of Americans are not affiliated with a “congregation, denomination, or religious group,” but that 62.9% of these nevertheless believe in “God or a higher power”), available at <<http://www.baylor.edu/content/services/document.php/33304.pdf>>; see also NEWSWEEK, Aug.29/Sept.5, 2005, at 48 (reporting that only 6% of Americans describe themselves as “atheist,” “agnostic,” or having “no religion,” and that only an additional 4% declined to answer). It is not clear, however, that the “belief” of this group extends significantly beyond agnosticism. See BAYLOR INSTITUTE, *supra* note #, at 14 (reporting that overwhelming majorities of religiously unaffiliated Americans “never” attend weekly services, pray, or read scripture, and reject the Bible as the word of God); cf. notes ##-## and accompanying text *infra* [Part 2, ¶4] (arguing that the object of faith for many who are routinely classified as monotheistic “believers” is not recognizable as the traditional God of American monotheism).

⁵⁰ George Gallup, American Institute of Public Opinion (Jan. 9, 1948) (reporting that only 3% of Americans disclaimed belief in God, and only 3% expressed uncertainty about such belief), reprinted in ROSTEN, *supra* note #, at 247; George Gallup, American Institute of Public Opinion (Dec. 9, 1944) (reporting that only 1% of Americans identified themselves as not believing in God, and only 5% as undecided), reprinted in ROSTEN, *supra* note #, at 237.

⁵¹ See, e.g., NEWSWEEK, *supra* note #, at 48 (reporting in 2005 that 9% of those age 18 to 39 describe their religion as “atheist,” compared to 3% of those age 60 or older); cf. BAYLOR INSTITUTE, *supra* note #, at 9 (reporting in 2006 that 18.6% of those age 18 to 30 declared no religious affiliation, compared to 5.4% of those age 65 or older).

⁵² For a detailed discussion of postmodern spirituality, see Frederick Mark Gedicks, *Spirituality, Fundamentalism, Liberty: Religion at the End of Modernity*, 54 DEPAUL L. REV. 1215-19 (2005).

choosing from among diverse and even incompatible denominations and traditions.⁵³ Whereas the principal focus of traditional denominational religion is its revelation of a reality beyond the temporal self, the emphasis of spirituality is on revelation of the reality of that very self.⁵⁴

Between 20% and 25% of Americans identify themselves as “spiritual, *but not religious*.”⁵⁵

There is undoubtedly some overlap among the categories of unbelief, nonWestern and non-monotheistic religion, and spirituality, so one cannot simply add the percentages representing these categories together to calculate the percentage of Americans who find themselves outside of the Judeo-Christian mainstream. The number of adherents to spirituality, for example, almost certainly includes some who would describe themselves as either nonbelievers or followers of eastern religions.⁵⁶ Nevertheless, the overlap is not total—that is, a

⁵³ See, e.g., Rebecca French, *Shopping for Religion: The Change in Everyday Religious Practice and Its Importance to the Law*, 51 BUFF. L. REV. 127 (2003); Calvin Massey, *The Political Marketplace of Religion*, 57 HASTINGS L.J. 1 (2005).

⁵⁴ Gedicks, *supra* note #, at 1519; see, e.g., ALAN WOLFE, *THE TRANSFORMATION OF AMERICAN RELIGION* 182-84 (2003); see also Ira C. Lupu & Robert Tuttle, *The Distinctive Place of Religion in Our Constitutional Order*, 47 VILL. L. REV. 37, 67 (2002).

At the time of the Framing, religion, for many Americans, was a source of comprehensive understanding about Divine Providence and the order of the universe. The rise of science, technology, psychoanalysis, and other profoundly secularizing influences, however, has altered perceptions about the role of religion. For many Americans, religion is now affective, psychological, and interior.

Id.

⁵⁵ See, e.g., NEWSWEEK, *supra* note #, at 48 (emphasis added).

⁵⁶ See Massey, *supra* note #, at 17 (noting “considerable overlap” between spirituality and psychology, and observing that practitioners of spirituality often combine the metaphysics of eastern religions with psychology).

significant number of the “spiritual but not religious” would not classify themselves as either unbelievers or followers of a nonWestern or non-monotheistic religion.

Finally, even setting aside those who clearly fall outside the Judeo-Christian mainstream, many of those who presumed to be clearly within that mainstream do not have traditional understandings of “God.” A substantial minority of American believers describe their object of faith as a “distant” God who “sets the laws of nature in motion,” is unconcerned about human activities, and does not intervene in earthly events.⁵⁷ Some members of the Protestant mainline—American Baptists, Congregationalists, Episcopalians, Lutherans, Methodists, and Presbyterians—are skeptical about both the Trinity and the divinity of Jesus, oppose literal-historical understandings of the Bible, and reject Jesus’s miracles, including the resurrection.⁵⁸ Such believers are no closer to traditional Christian belief than they are to agnosticism; at the least, the “God” of such believers is barely recognizable as the traditional “Heavenly Father” of the Judeo-Christian tradition.

⁵⁷ BAYLOR INSTITUTE, *supra* note #, at 27, 29 (reporting that 24.4% of Americans believe in such a God).

⁵⁸ Meade, *supra* note #, at 30; *see also id.* at 31 (describing the Protestant mainline as having a “lower estimate of the difference between Christians and nonChristians that do the other forms of American Protestantism,” and attaching little importance to the “idea of the church as a supernatural society whose members enjoy special grace”); Dale Buss, *Houses of Worship: Christian Teens? Not Very*, WALL ST. J., Jul. 9, 2004, at W13 (reporting findings of evangelical youth minister Josh McDowell that 91% of born-again teenage evangelicals do not believe in absolute truth, that a “slight majority” reject the resurrection, and that nearly 60% believe that “all religious faiths teach equally valid truths”).

Such findings suggest the extent to which postmodern sensibilities have influenced traditional denominational religion. Gedicks, *Religions, Fragmentations, and Doctrinal Limits*, WM. & MARY BILL OF RIGHTS L.J. [6–Pt. 2, 1st sentence] (forthcoming Fall 2006).

Similarly, one effect of the postmodern spirituality movement has been a shift away from denominational Christianity and the truth of the doctrines it teaches, towards satisfaction of individual needs and preferences, even among members of some traditionally conservative denominations.⁵⁹ Thus, even among the American majority touted by Justice Scalia as “monotheistic believers,” traditional faith in a traditional God is often absent.

In sum, one can reliably estimate that between one-quarter and one-third of Americans no longer fall within the orthodox denominational definitions of Protestant, Catholic, or Jew. Even if one expands Judeo-Christianity by adding Islam to create a marginally larger “Abrahamic” monotheism,⁶⁰ it remains that at least a quarter of Americans adhere to religions or religious beliefs that place them outside the orthodox boundaries of this reformulation, or do not believe in a god at all. Demographically, the United States is now well beyond the point where the symbols of either a “Judeo-Christian” or an “Abrahamic” civil religion can authentically represent the religious commitments of all or nearly all Americans.

3.

During the night of July 31, 2001, Roy Moore, then the Chief Justice of the Alabama Supreme Court, arranged for the installation of a 2-1/2 ton granite representation of the Ten

⁵⁹ Gedicks, *supra* note #, at 1216-18; e.g., Charles Trueheart, *Welcome to the Next Church*, THE ATLANTIC MONTHLY, Aug. 1996, at 37 (describing the evangelical megachurch movement). Regrettably, the Baylor Institute study did not ask questions about postmodern spirituality. See BAYLOR INSTITUTE, *supra* note #, App. B (listing survey questions used in the study).

⁶⁰ See, e.g., *McCreary*, 125 S.Ct. at 2753 (arguing that government acknowledgment of the nondenominational monotheistic God of Christianity, Islam, and Judaism does not constitute an establishment of religion) (Scalia, J., dissenting); see also *Van Orden*, 125 S.Ct. at 2861, 2863 (same with respect to government invocation of “God” and the “Judeo-Christian God”) (plurality opinion of Rehnquist, C.J.).

Commandments in a prominent location in the Alabama state courthouse.⁶¹ The installation was filmed by the Coral Ridge Baptist Church, but no members of the print or electronic media were present or, apparently, invited.⁶² In a speech delivered at the unveiling of the monument the next day, Chief Justice Moore emphasized that the Commandments uniquely and preeminently symbolize the “moral foundation of law” and the “sovereignty of God” over church and state.⁶³ Elsewhere in this speech, and in his trial testimony during subsequent litigation, Moore made clear that the “God” to which he referred was the Christian God of the founding fathers and the Judeo-Christian God of 1950s civil religion.⁶⁴

⁶¹ See *Glassroth v. Moore*, 229 F.Supp.2d 1290, 1294 (M.D.Ala. 2002), *aff’d*, 335 F.3d 1282 (11th Cir.), *cert. denied*, 540 U.S. 1000 (2003).

⁶² *Glassroth*, 229 F.Supp. at 1294.

⁶³ Referring to quotations from secular historical sources carved on the sides of the monument below the focal representation of the Commandments, Chief Justice Moore declared that the monument displayed

every ounce of support for the acknowledgment of the sovereignty of . . . God and those absolute standards upon which our laws are based. Oh, this isn’t surrounding the plaque with history, historical documents. All history supports the acknowledgment of God. You’ll find no documents surrounding the Ten Commandments because they stand alone as an acknowledgment of that God that’s contained in our pledge, contained in our motto, and contained in our oath.

Glassroth, 229 F.Supp.2d at 1321, 1324 (App. C).

⁶⁴ See *Glassroth*, 229 F.Supp.2d at 1300 (summarizing Chief Justice Moore’s trial testimony that “the Judeo-Christian God reigned over both the church and the state in [the United States], and that both owed allegiance to that God”); *e.g.*, *id.* at 1323 (App. C) (copy of Moore’s unveiling speech) (“Today a cry has gone out across our land for the acknowledgment of that God upon whom this nation and our laws were founded and for those simple truths which our forefathers found to be self-evident; but once again, we find that those cries have fallen upon eyes that have seen not, ears that hear not our prayers, and hearts much like that nether millstone.”) (quoting Moore’s unveiling speech); *see also id.* at 1322- 24 (App. C) (copy of Moore’s unveiling speech) (quoting and summarizing references to “God” in or by the preamble to the Alabama Constitution, *McGowan v. Maryland* (1961), the Declaration of Independence,

Chief Justice Moore's placement of a conspicuous religious monument in the state courthouse, and his unapologetically Judeo-Christian defense of that placement, triggered more than two years of hard-fought litigation,⁶⁵ together with intense media coverage and public demonstrations.⁶⁶ The controversy ended in removal of the monument from the courthouse as a violation of the Establishment Clause, and (not incidentally) removal of Moore as Alabama Chief Justice for defying a federal court order to remove the monument.

Moore's effort to defend government sponsorship of a sectarian display of the Ten Commandments was not an isolated incident. In the last few years, other lower court decisions have examined other decalogue monuments apparently erected with comparable sectarian

the 1954 revision of the Pledge of Allegiance, Samuel Adams, James Madison, William Blackstone, George Washington, the "Star-Spangled Banner," the national motto, executive, judicial, and legislative oaths of office, John Jay, and Thomas Jefferson)

⁶⁵ See *Glassroth v. Moore*, 229 F.Supp.2d 1290 (M.D.Ala. 2002), *aff'd*, 335 F.2d 1282 (11th Cir.), *cert. denied*, 540 U.S. 1000 (2003); see also *Glassroth v. Moore*, 229 F.Supp.2d 1283 (M.D.Ala. 2002) (denying Moore's motion that district judge recuse himself for bias against Moore); 242 F.Supp.2d 1067 (granting motion that court enter permanent injunction and order removal of monument after Moore failed to do so voluntarily following court's prior decision that monument violated Establishment Clause); *Glassroth v. Moore*, 275 F.Supp.2d 1347 (M.D.Ala. 2003) (entering final judgment and permanent injunction against Moore on remand from Court of Appeals); *Glassroth v. Moore*, 278 F.Supp.2d 1272 (M.D.Ala. 2003) (denying Moore's motion for stay of final judgment and entrance of injunction pending action on petition for review by Supreme Court); *Glassroth v. Houston*, 299 F.Supp. 1244 (M.D.Ala. 2004) (granting substitution of Senior Associate Justice of Alabama Supreme Court as defendant in Moore's place following Moore's removal as Chief Justice, and denying Moore's motion that such Justice recuse himself from participation in the litigation); *Moore v. Judicial Inquiry Comm'n*, 891 So.2d 848 (Ala. Sup. Ct. 2004) (affirming Commission order removing Moore as Alabama Chief Justice for failure to obey federal court orders).

⁶⁶ See, e.g., Jeffrey Gettleman, *Supporters of Ten Commandments Rally On*, NY TIMES, Aug. 24, 2003, at A20.

motivations,⁶⁷ and the United States Supreme Court in *McCreary County* reviewed two other courthouse displays whose origin and history bore more than passing resemblance to those of Moore’s Alabama monument.⁶⁸

The displays reviewed by the Supreme Court both involved the hanging of “large, gold-framed copies” of an abridgment of the King James version of the Commandments, complete with the full biblical citation to Exodus, in a prominent place in a county courthouse.⁶⁹ In one county, the Commandments appeared after the county council ordered that they be displayed in “‘a very high traffic area’ of the courthouse.”⁷⁰ In the other county, the Commandments were hung in a ceremony at which the county judge endorsed the statement of an American astronaut who had declared that his belief in the necessary existence of a “divine God” was confirmed by the awe-inspiring view of the earth from space.⁷¹ In addition, the judge’s pastor spoke of the ethical value of the Commandments, and commented afterward that “displaying the Commandments was ‘one of the greatest things the judge could have done to close out the millennium.’”⁷²

⁶⁷ See, e.g., *Adland v. Russ*, 307 F.3d 471 (6th Cir. 2002), *cert. denied*, 538 U.S. 999 (2003); *Turner v. Habersham, Cty.*, 290 F.Supp.2d 1362 (N.D.Ga. 2003); *Mercier v. City of La Crosse*, 276 F.Supp.2d 961 (W.D.Wis. 2003), *rev’d in part & remanded sub nom. Mercier v. Fraternal Order of Eagles*, 395 F.3d 693 (7th Cir. 2005); *ACLU v. v. Rutherford Cty.*, 209 F.Supp.2d 799 (M.D.Tenn.); *ACLU v. Hamilton Cty.*, 202 F.Supp.2d 757 (E.D.Tenn. 2002).

⁶⁸ *McCreary County v. ACLU*, 125 S.Ct. 2722 (2005).

⁶⁹ *McCreary County*, 125 S.Ct. at 2728.

⁷⁰ *McCreary County*, 125 S.Ct. at 2728 (quoting 96 F.Supp.2d 679, 684 (E.D.Ky. 2000)).

⁷¹ *McCreary County*, 125 S.Ct. at 2728.

⁷² *McCreary County*, 125 S.Ct. at 2728.

In response to legal challenges under the Establishment Clause, both counties added smaller displays of excerpts from secular documents that referred to God or religious symbols or observances, including the Declaration of Independence, the Preamble to the Kentucky Constitution, the national motto, congressional and executive proclamations declaring 1983 as the “Year of the Bible,” a proclamation by President Lincoln declaring a “National Day of Prayer and Humiliation,” a quotation by President Lincoln identifying the Bible as “the best gift God has ever given to man,” and the Mayflower Compact.⁷³ These additions were ordered by county resolutions which expressly invoked Moore’s arguments in defense of his decalogue monument, additionally called Jesus the “Prince of Ethics,” and appealed to a purported belief of the founders that government officials were obligated to “publicly acknowledge God as the source of America’s strength and direction.”⁷⁴ The Court ultimately declared these displays unconstitutional under the Establishment Clause for lack of a secular purpose.⁷⁵

One of the standard rhetorical moves of those who defend government appropriation of Judeo-Christian symbols and practices against Establishment Clause challenges is deemphasis of the religious content and contemporary relevance of the disputed symbols and practices.⁷⁶

⁷³ *McCreary County*, 125 S.Ct. at 2729.

⁷⁴ *McCreary County*, 125 S.Ct. at 2729. These displays were altered yet a third time in the course of this litigation, by removing the other document displays and adding for display along with the Commandments equal-sized representations of Magna Carta, the Declaration of Independence, the Bill of Rights, the lyrics to the “Star Spangled Banner,” the Mayflower Compact, the national motto, the Preamble to the Kentucky Constitution, and a picture of Lady Justice, together with a statement of the historical and legal significance of each such document. *McCreary County*, 125 S.Ct. at 2730-31.

⁷⁵ *McCreary County*, 125 S.Ct. at 2738-39.

⁷⁶ Professor Gedicks has elaborated this point in FREDERICK MARK GEDICKS, *THE RHETORIC OF CHURCH AND STATE* 74-80 (Durham, N.C.: Duke University Press, 1995). *See also*

Supreme Court opinions defending government deployment of Judeo-Christian symbols and observances consistently characterize them as historical, passive, generic, and innocuous.⁷⁷ The recent *Decalogue Cases* are no exception. The *Van Orden* plurality, for example, minimizes the religious significance of the monument at issue in that case, repeatedly characterizing it as a “mere acknowledgment” of the religious history and heritage of the United States.⁷⁸ Individual opinions in both *McCreary County* and *Van Orden* follow the same pattern.⁷⁹

Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2164-65 (1996) (“Another popular argument used to justify the constitutional permissibility of ceremonial deism is that through rote repetition, transformations which have occurred over time, and the emergence of secular and patriotic traditions associated with religious holidays, these practices have lost whatever religious significance they may once have had.”); Steven G. Gey, “*Under God,*” *the Pledge of Allegiance, and other Constitutional Trivia*, 81 N.C. L. REV. 1865, 1905 (2003) (noting the common argument that “‘God’ in the context of the Pledge is not a sufficiently religious concept to implicate the protections of the Establishment Clause”).

⁷⁷ See, e.g., *Allegheny County v. ACLU*, 492 U.S. 573 (1989) (conceding religious significance of Jewish menorah, but arguing that it also signifies a secular cultural tradition akin to Christmas, and that both Christmas and Chanukah are secular symbols of the same “winter-holiday” season); *Lynch v. Donnelly*, 465 U.S. 668 (1984) (characterizing Christmas nativity scene as commemorating the historical origins of an (unnamed) national holiday, and promoting friendship and community unity in keeping with the spirit of the (unnamed) season); *McGowan v. Maryland*, 366 U.S. 420 (1961) (characterizing Sunday closing laws as promoting rest, relaxation, recreation, community, and family togetherness, rather than church attendance or Sabbath observance); see also *Elk Grove Indep. Sch. Dist. v. Newdow*, 124 S.Ct. 2301, 2317, 2319-20 (2004) (Rhenquist, C.J., concurring in the judgment) (arguing that “under God” in the Pledge of Allegiance is neither an expression nor an endorsement of religious belief, but merely acknowledges that the United States was founded on belief in God); *Santa Fe Indep. Sch. Dist. v. Doe*, 120 S.Ct. 2266, 2286, 2287 (2000) (Rhenquist, C.J., dissenting) (arguing that prayer by a peer-selected student before high school football games solemnized the game, promoted sportsmanship and safety, and created a proper competitive environment, and speculating that students might choose those giving prayers on the basis of public speaking ability or social standing rather than religion).

⁷⁸ See, e.g., *Van Orden*, 125 S.Ct. at 2862 (plurality opinion of Rehnquist, J., joined by Scalia, Kennedy & Thomas, JJ.) (Monuments and other official government “acknowledgments of the role played by the Ten Commandments in our Nation’s heritage are common throughout America.”); accord *id.* at 2859.

The theme of these opinions is that decalogue monuments constitute only the barest recognition of a nonsectarian God. Decalogue monuments, in other words, purportedly symbolize nothing more than ecumenical, transdenominational belief. The implication is that objections to such a benign and innocuous symbolic meaning betray an unreasonable hostility to

Our cases, Januslike, point in two directions in applying the Establishment Clause. One face looks toward the strong role played by religion and religious traditions throughout our Nation's history. [] The other face looks toward the principle that governmental intervention in religious matters can itself endanger religious freedom. [] One face looks to the past in acknowledgment of our Nation's heritage, while the other looks to the present in demanding a separation between church and state.

Id.; *Van Orden*, 125 S.Ct. at 2861 (characterizing the *Lemon* test as “not useful in dealing with the sort of passive monument that Texas has erected”); *id.* at 2863 (“Our opinions, like our [Supreme Court] building have recognized the role the Decalogue plays in America’s heritage.”); *id.* at 2864 (“The placement of the Ten Commandments monument on the Texas State Capitol grounds is a far more passive use of those texts than was the case in *Stone* [*v. Graham*], where the text confronted elementary school students every day.”).

⁷⁹ See *Van Orden*, 125 S.Ct. at 2864 (Scalia, J., concurring) (“[T]here is nothing unconstitutional in a State’s favoring religion generally, honoring God through public prayer and acknowledgment, or, in a nonproselytizing manner, venerating the Ten Commandments.”); *id.* at 2864-65 (Thomas, J., concurring) (The plurality “rightly recognizes the role of religion in this Nation’s history and the permissibility of government displays acknowledging that history.”); *id.* at 2865 (Thomas, J., concurring) (“The mere presence of the monument [on the capitol grounds] involves no coercion and thus does not violate the Establishment Clause.”); *id.* at 2865 (Thomas, J., concurring) (characterizing the Judeo-Christian symbols reviewed by the Court “benign signs and postings”); *McCreary County*, 125 S.Ct. at 2752 (Scalia, J., dissenting) (“Why, one wonders, is not respect for the Ten Commandments a tolerable acknowledgment of beliefs widely held among the people of this country?”); *id.* at 2753 (Scalia, J., dissenting) (“Historical practices thus demonstrate that there is a distance between the acknowledgment of a single Creator and the establishment of religion.”); *id.* at 2759 (Scalia, J., dissenting) (“The acknowledgment of the contribution that religion in general, and the Ten Commandments in particular, have made to our Nation’s legal and governmental heritage is surely no more of a step towards the establishment of religion than was the practice of legislative prayer”).

religion.⁸⁰ In this view, official government recognition of the Ten Commandments is like the polite nod one gives to an acquaintance passing on the street.

This rhetoric of “mere acknowledgment” ignores that the symbols and practices of Judeo-Christian civil religion are still widely recognized as religious.⁸¹ Indeed, it is precisely the sacred, even sectarian meaning associated with these symbols that triggers such strong reactions

⁸⁰ See, e.g., Gey, *supra* note #, at 1914 (noting and criticizing the common observation that the only people upset by “trivial” government establishments like “In God We Trust” on coins or “under God” in the Pledge are “hypersensitive religious spoilsports”) (discussing *Newdow v. United States Congress*, 292 F.3d 597, 613 (9th Cir. 2002) (Fernandez, J., concurring in part and dissenting in part), *rev’d on other grounds sub. nom. Elkgrove Indep. Sch. Dist. v. Newdow*, 124 S.Ct. 2301 (2004)).

[S]uch phrases as “In God We Trust” or “under God” have no tendency to establish a religion in this country or to suppress anyone’s exercise, or non-exercise, of religion, except in the fevered eye of persons who most fervently would like to drive all tincture of religion out of the public life of our polity.

Id.; cf. Timothy Hall, *Sacred Solemnity: Civic Prayer, Civil Communion, and the Establishment Clause*, 79 IOWA L. REV. 35, 86 (1993) (“Justice Scalia implicitly assumes that anyone who cannot endure an innocent civic prayer is simply a bigot.”) (discussing the graduation prayer at issue in *Lee v. Weisman*, 112 S.Ct. 2649, 2678 (1992) (Scalia, J., dissenting)).

⁸¹ See Epstein, *supra* note #, at 2165 (“[U]nder any honest appraisal of modern American society, the practices constituting ceremonial deism have *not* lost their religious significance.”); e.g., Arnold H. Lowey, *Morals Legislation and the Establishment Clause*, 55 ALA. L. REV. 159, 162-63 (2003) (arguing that government enforcement of decalogue prohibitions on unbelief in the monotheistic God, making graven images of God, blasphemy, and coveting would clearly violate the Establishment Clause, and that such enforcement of decalogue prohibitions on Sabbath-breaking, parental disrespect, and adultery would avoid violating the Clause only in particular circumstances, leaving the decalogue prohibitions on murder, theft, and perjury as the only Commandments government could fully enforce without violating the Establishment Clause); Timothy Zick, *Cross Burning, Cockfighting, and Symbolic Meaning: Toward a First Amendment Ethnography*, 45 WM. & MARY L. REV. 2261, 2297 (2004) (arguing that in the creche cases the Court was “indifferent” to the “constitutive meaning sacred symbols have for those who truly believe in them”) (discussing *Allegheny Cty. v. ACLU*, 492 U.S. 573 (1989); *Lynch v. Donnelly*, 465 U.S. 668 (1984)).

to their removal from public life.⁸² During recent decades, conservative Christians have successfully projected potent theological meaning onto these symbols and practices, meaning that has long since overflowed the bounds of the generic thinness of Judeo-Christian civil religion.⁸³ Judeo-Christianity has been, in a word, “sectarianized.”

We think it significant that both Jewish members of the Court voted to invalidate the overtly Christian display in *McCreary County* that Justice Scalia and other conservative Justices would have upheld,⁸⁴ and that one of these Justices dissented even from the Court’s validation of the relatively uncontroversial decalogue display in *Van Orden*.⁸⁵ As a Christians ourselves, we obviously cannot speak for Jews, Muslims, or any other nonChristian minority. But as Christians, we can express our sense that many Christians would find it deeply problematic if “Jehovah” or “Allah” were substituted in place of the ubiquitous and purportedly inclusive

⁸² See Erwin Chemerinsky, *Why Justice Breyer Was Wrong in Van Orden v. Perry*, 14 WM. & MARY BILL OF RIGHTS J. 1, 7 (observing that “those who favor the Ten Commandments on government property . . . do so precisely because of the religious content of the Ten Commandments and the importance of the Decalogue as a religious symbol,” although constitutional doctrine forces them to defend the Commandments in secular terms); Steven H. Shiffrin, *The Pluralistic Foundations of the Religion Clauses*, 90 CORNELL L. REV. 9, 70 (2004) (observing that the “firestorm” of criticism following constitutional invalidation of “under God” in the Pledge “itself demonstrated the religious character of the message and the tenacity with which it is held”); Zick, *supra* note #, at 2310, 2371-72 (arguing that it was the sacred character of Moore’s decalogue monument in the eyes of some believers that accounted for their reacting “as if their very faith was under attack” when its removal from the courthouse was threatened).

⁸³ See Massey, *supra* note #, at 37-38 (arguing that sectarianization of public religious symbols by conservative Christian majorities was a predictable outcome of the Court’s deference to legislative deployment of such symbols).

⁸⁴ See *McCreary County*, 125 S.Ct. at 2727 (noting that Ginsburg & Breyer, JJ., joined the majority opinion of Souter, J.).

⁸⁵ *Van Orden*, 125 S.Ct. at 2873, 2892 (noting that Ginsburg, J., joined the dissenting opinions of Stevens & Souter, JJ., respectively).

“God” of Judeo-Christianity.⁸⁶ Whether one pledges allegiance to the United States as nation under “Jehovah,” “Allah,” or “God,” for example, is not a matter of indifference to American Christians, just as we expect that it is not a matter of indifference to Jews, Muslims, or adherents to other theistic faiths.⁸⁷ The “God” of Judeo-Christianity is not a nondenominational term,⁸⁸ any more than the Ten Commandments constitute a nondenominational symbol that is meaningful to

⁸⁶ Cf. Epstein, *supra* note #, at 2084-85, 2086 (imagining a predominantly Muslim United States pervaded by official references and appeals to “Allah,” in which most Christians and Jews would feel like outsiders); George Cardinal Pell, *Islam and Us*, FIRST THINGS (June/July 2006), at 33, 34.

It is true that Christianity, Judaism, and Islam claim Abraham as their father and the God of Abraham as their God. I accept, with reservations, the claim that Jews, Christians, and Muslims worship the same God, but this has been disputed, not only by Christians but by Muslims as well. It is difficult to recognize the God of the New Testament in the God of the Qur’an, and two very different concepts of the human person have emerged from the Christian and Muslim understandings of God. This has had significant consequences for the different cultures that Christianity and Islam have given rise to and for the scope of what is possible within them.

Id.

⁸⁷ Cf. FELDMAN, *supra* note #, at 230 (observing that Muslims consider the Bible “a preliminary, imperfect revelation, unlike God’s definitive teachings, found on in the Qur’an”); see also Shiffrin, *supra* note #, at 69 (suggesting that it is difficult to imagine that Buddhists, along with atheists and agnostics, have been pleased to send their children to public schools that recite a patriotic pledge to a nation under God). But see Smith, *supra* note #, at 8, 21 (suggesting that the proper inquiry should not be whether the words “under God” are “religious,” but whether they are *unnecessarily* and *gratuitously* religious).

⁸⁸ See, e.g., Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes, but Missing the Liberty*, 118 HARV. L. REV. 155, 255, 226 (2004) (arguing that the Pledge is a profession of faith that implies a set of particular religious beliefs, including that God exists, that there is only one God, and that this God exercises controlling authority over the United States); *id.* at 226-27 & n.458 (noting others who believe that the Pledge implies that the United States is under God’s judgment, that government is limited by God, and that God is transcendent).

all or nearly all Americans.⁸⁹ Insistence on the inclusive nature of either echoes the insistence of 19th century Protestants that “nonsectarian” Christianity was not essentially Protestant, and the parallel assumption of the 1950s that virtually all Americans could fit under the religious umbrella held up by Protestants, Catholics, and Jews.⁹⁰

The sectarianization of Judeo-Christianity by conservative Christians makes it difficult even for other monotheistic believers to see their beliefs reflected in its symbols and practices. For example, many conservative Christian leaders have publically savaged Islam since 9/11.⁹¹ Rev. Jerry Falwell has stated that Muhammad, the founder of Islam, was a terrorist,⁹² Rev. Pat Robertson has referred to Muhammad as a “robber and a brigand,”⁹³ and Rev. Franklin Graham, son of well-known evangelist Rev. Billy Graham and successor to his ministry, has accused American Muslims of endorsing the 9/11 attacks and characterized Islam as an “evil and wicked religion.”⁹⁴ More recently, Pope Benedict, in an otherwise sensitive call for rational dialogue on

⁸⁹ See Paul Finkelman, *The Ten Commandments on the Courthouse Lawn and Elsewhere*, 73 FORD. L. REV. 1477, 1498 (2005) (“For an increasing number of Americans, the Ten Commandments have no religious significance. [W]hile the Ten Commandments speak directly to Jews, and indirectly to Christians, they have no relevance to the religious life of people who are not of those faiths.”). Professor Finkelman persuasively argues that even the choice of a version of the Commandments is sectarian. *See id.* at 1480-98.

⁹⁰ See text accompanying notes [Part 1, ¶1, 1st & 2nd sentences].

⁹¹ See UTTER & TRUE, *supra* note #, at 29 (observing that since 9/11, “many Christian groups and publications continued to emphasize the differences between Islam and Christianity and to proclaim the superiority of the Christian faith” despite widespread media criticism that this approach was “indicative of a hate-filled campaign of intolerance”).

⁹² Reported in UTTER & TRUE, *supra* note #, at 29.

⁹³ Reported in UTTER & TRUE, *supra* note #, at 29.

⁹⁴ Reported in KAPLAN, *supra* note #, at 82; UTTER & TRUE, *supra* note #, at 29.

religiously motivated violence, implied that Islam is “evil and inhuman” because its Qu’ranic command to spread Mohammed’s teachings “by the sword” violated God’s nature.⁹⁵

Nor are such attacks aimed only at Islam. Falwell, for example, has announced that the “Anti-Christ” of the New Testament is Jewish,⁹⁶ and comparably vicious attacks by conservative Christians on Catholics, Mormons, and theological liberals are well-known.⁹⁷ Thus, while it is true that Catholics, Jews, Mormons, and Muslims are all monotheists who accept the divine origin of the Commandments, the close association of the Commandments with hostile sectarian condemnations of their faiths may make it difficult for the members of those faiths to see themselves and their beliefs reflected in the symbolic meaning of the decalogue monuments.

During the years he lived in a small city in the deep South, Professor Gedicks was present for many public prayers offered at community events by conservative Christian ministers and lay believers. The sentiments expressed in these prayers, offered up to “God” or “our Father,” in the name of Jesus, were nearly always consistent with his personal religious beliefs. Yet it was also

⁹⁵ Pope Benedict XVI, “Lecture of the Holy Father,” Aula Magna, University of Regensburg, Germany (Sept. 12, 2006) (quoting 13th century Byzantine emperor); *see also* Ian Fisher, *Benedict XVI and the Church That May Shrink. Or May Not.*, NY TIMES, May 29, 2005, at WK4 (noting that Benedict, as Cardinal Ratzinger, oversaw the issuance of a Vatican document which characterized nonChristian faiths as “deficient”).

Whether or not one considers Benedict’s use of this quotation ill-advised, the violent Muslim over-reaction to it seems to have confirmed its assessment of Islam.

⁹⁶ Reported in UTTER & TRUE, *supra* note #, at 68.

⁹⁷ *See, e.g.*, KAPLAN, *supra* note #, at 74 (reporting conservative Christian characterizations of the Roman Catholic church as the “church of the Anti-Christ,” and The Church of Jesus Christ of Latter-day Saints, or “Mormon” church, as a “cult”) (quoting Rev. Bob Jones, Jr. & the Southern Baptist Convention, respectively); UTTER & TRUE, *supra* note #, at 71 (reporting that Falwell and Robertson both laid the blame for the 9/11 attacks on the World Trade Center to abandonment of traditional moral values by feminists, gays and lesbians, and other cultural liberals who reside in New York City).

true that clergy of the conservative Christian churches in the community regularly warned their members against the dangerous “cult” of the Mormons, to which Professor Gedicks belongs. Shorn of their context, this prayer language appeared open, benign, and ecumenically inclusive. For a person outside the conservative Christian majority like Professor Gedicks, however, it was impossible to ignore that this language was usually intended by its speaker and understood by most of its audience to have a sectarian meaning that did not include him.

Perhaps the best example of how conservative Christians have sectarianized the purportedly nondenominational symbols and observances of Judeo-Christianity is their reaction to former Chief Justice Moore’s defiance of a federal court order to remove his ostentatious decalogue monument from the state courthouse. Broad and deep conservative Christian support for Moore’s insistence on maintaining the display even in the face of adverse federal and state judicial decisions “clearly demonstrate[d] the belief of conservative Christian groups that the American legal system depends on God-given law and that the nation must publicly recognize that dependence.”⁹⁸ In the wake of the Moore controversy and the *Decalogue Cases*, political

⁹⁸ UTTER & TRUE, *supra* note #, at 74-75; accord FELDMAN, *supra* note #, at 232.

[Some] values evangelicals will not be especially disturbed to discover that some Americans might disagree with the prayers they offer in the workplace or the inspirational message Christian messages that some teachers in the South hang in their classrooms. [T]hey may even argue that they are going to promote their beliefs because those beliefs are God’s truth, worth fighting for even if the Constitution limits their public promotion. This tone of civil disobedience was heard among the supporters of Alabama Chief Justice Roy Moore, who were prepared to be arrested rather than to allow removal of the tow-and-a-half ton granite Ten Commandments monument he had erected in the state courthouse in Montgomery.

Id.; KAPLAN., *supra* note #, at 247 (observing that members of Focus on the Family “ranked Moore’s fight [to install the Ten Commandments in the Alabama State Courthouse] as second in importance only to the signing of the partial-birth abortion ban”).

conservatives in Congress introduced a jurisdiction-stripping measure that would prevent federal courts from reviewing state court decisions upholding governmental acknowledgments of God, irrespective of whether these are tied to America's religious history or heritage.⁹⁹ In introducing this proposed act, one of its co-sponsors criticized the separation of church and state and declared that the moral condition of the contemporary United States required the reintroduction of God into government and public society.¹⁰⁰

Many Americans whose religious beliefs would seem to fall comfortably within the boundaries of Judeo-Christian civil religion are alienated from it because of the increasingly close association of its symbols and practices with conservative Christianity.¹⁰¹ The conservative Christian understanding of the meaning symbolized by Moore's decalogue monument is based on a narrow and particular interpretation of Christianity to which Jews, Mormons, Muslims, and many Christians cannot authentically subscribe. This, of course, is not even to mention nonbelievers and adherents to nonWestern religions and postmodern spirituality. Conservative Christians have appropriated the symbols and practices of Judeo-Christianity with sufficient success that these symbols and observances no longer communicate breadth and inclusiveness, if

⁹⁹ See proposed Religious Liberties Restoration Act of 2005.

¹⁰⁰ UTTER & TRUE, *supra* note #, at 76.

¹⁰¹ Cf. Robert J. Bein, *Stained Flags: Public Symbols and Equal Protection*, 28 SETON HALL L. REV. 897, 921 (1998) (arguing that the Confederate battle flag cannot act as a unifying symbol of the South because it excludes southern blacks who have equal claim with whites to the heritage of the South); Sanford Levinson, *They Whisper: Reflections on Flags, Monuments, and State Holidays, and the Construction of Meaning in a Multicultural Society*, 70 CHI-KENT L. REV. 1081, 1100-04 (1995) (arguing that the legitimate Southern honor and pride signified by the Confederate battle flag cannot be disentangled from the racism it also signifies as a symbol of Southern resistance to abolition, desegregation, and African American civil rights) (discussing James Forman, Jr., *Driving Dixie Down: Removing the Confederate Flag from Southern State Capitols*, 101 YALE L.J. 505 (1991)).

they ever did. Judeo-Christian symbols and observances now combine sectarian and patriotic meanings. Government deployment of such symbols and observances, therefore, communicates that conservative Christians are properly in charge of American culture and politics.

Sectarianization of Judeo-Christianity has clear doctrinal import. Establishment Clause doctrine is now largely informed by a principle of religious equality.¹⁰² This principle generally prevents federal and state governments in the United States from acting as if a particular religion, or even belief generally, were metaphysically true or morally correct.¹⁰³ Government use of sectarianized symbols and observances of conservative Judeo-Christianity would undermine and could eventually eliminate this ethic of equality. In that event, government would be re-empowered to define religious truth in accordance with the sectarian preferences of the majority, and religious minorities would have to endure the social marginalization that accompanies adherence to a tradition of belief or unbelief that falls outside the boundaries of the majority's version of Christianity.¹⁰⁴

¹⁰² Dan Conkle, *The Path of American Liberty: From the Original Theology to Formal Neutrality and an Uncertain Future*, 75 IND. L.J. 1 (2000); Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CAL. L. REV. 673 (2002).

¹⁰³ Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. 87, 108, 109 (2002) (“The Establishment Clause forbids the state from declaring religious truth. [] It means that the state may not declare articles of faith. The state may not express an opinion about religious matters. It may not encourage citizens to hold certain religious beliefs.”).

¹⁰⁴ See FELDMAN, *supra* note #, at 222 (“[E]ven in the face of diversity, allowing citizens to use the government to express or give effect to religious belief enables some to exclude or disadvantage those who believe differently. [] If the state is functionally Christian, how can Jews or Muslims be equal to Christians as citizens?”); Hall, *supra* note #, at 80-81 (arguing that civil or “civic” religion “may force religious minorities to sever civil communion to avoid spiritual pollution,” may cause separationists to forego “participation in civic occasions such as school graduation ceremonies to avoid contamination with prayers that create in their minds an unholy communion,” and “will coerce citizens to deny their citizenship rather than submit to an unholy spiritual fellowship”); Massey, *supra* note #, at 48 (arguing that the Court’s Religion Clause

In sum, at the same time that religious demographics in the United States have placed large numbers of Americans outside the boundaries of Judeo-Christian civil religion, the sectarianization of Judeo-Christianity has shrunk the theological landscape marked by these boundaries, making it doubly unlikely that Judeo-Christianity can function as the social and political unifier that civil religion is supposed to be.

doctrine of legislative deference may encourage government coercion by majorities “who seek to push the judicial boundaries of establishment further to the margins, particularly when the issue involves the degree to which religious ceremony should play a part in public culture”); Shiffren, *supra* note #, at 39 (“If a state is permitted to endorse a particular religion, formally creating insiders and outsiders on the basis of religion, there is good reason to fear that this formal marginalization will carry over to the social and economic spheres. Discriminating on the basis of religion would be subtly encouraged.”).

4. The problem of civil religion is not confined to the United States. Though Judeo-Christianity is “massively present” through Europe, in Grace Davie’s words,¹⁰⁵ recent events have placed its viability as civil religion in question. Both Germany and Italy face continuing controversies over whether the crucifix displayed in public schools and government buildings is a Roman Catholic symbol of the crucified Christ, an historical remnant of Europe’s Christian patrimony, or an ubiquitous cultural emblem whose religious significance has long since evaporated.¹⁰⁶ Spain has already crossed this bridge, having largely abandoned implicit as well as explicit Catholic influence on public policy and public life.¹⁰⁷ From the other direction,

¹⁰⁵ GRACE DAVIES, *EUROPE, THE EXCEPTIONAL CASE 4* (London: Darton, Longman & Todd, 2002).

¹⁰⁶ Compare Alenka Kuhelj, *Religious Freedom in European Democracies*, 20 *TULANE EUROP. & CIV. L. FORUM* 1, 27-29 (2005) (describing rulings of German state courts that banned displays for crosses and crucifixes in government schools, on the ground that these are both religious symbols whose meaning exceeds the merely cultural or historical) *with id.* at 6 (reporting 2003 Italian parliamentary defeat of legislation that would have required display of crucifix in all public school classrooms, and 2003 appellate decision overturning lower court order requiring removal of crucifix from such classrooms); *see also id.* at 6 (quoting Italian President Ciampi arguing that “the crucifix is a symbol of the national identity and not only a religious emblem”) (emphasis deleted); Alessandro Ferrari, *State and Churches in Italy: from Liberal Separation to Democratic Laicità*, 14 *JAHRBUCH FÜR EUROPÄISCHE VERWALTUNGSGESCHICHTE* [YEARBOOK OF EUROPEAN ADMINISTRATIVE HISTORY] 41, 77 (Baden-Baden, Ger.: Nomos Verlagsgesellschaft, 2002) (observing that the 1984 Concordat between the Italy and the Vatican marking the beginning of equal state recognition of religions has had little effect in public schools, where “crucifixes remain hanging on the walls”).

¹⁰⁷ See Ian Fisher, *Pope's Defense of Traditional Family Draws Crowds in Spain*, N.Y. TIMES, Jul. 10, 2006, at A4 (noting the “paradox” that “modern, secular Spain, once ruled by Catholic kings,” is a country where “religious people now consider themselves part of th[e] minority”); Samuel Loewenberg, *As Spaniards Lose Their Religion, Church Leaders Struggle to Holed On*, N.Y. TIMES, June 26, 2005, §4 (“Week in Review”), at 4 (“Religion is rapidly losing strength and influence” in Spain.); e.g. Fiona Govan, *Younger Set in Spain Spurn the Old Values*, DAILY TEL., Aug. 7, 2006, at 13 (reporting on government survey showing that more than three-fourths of Spaniards age 15 to 29 support gay marriage and euthanasia, more than two-thirds support liberal abortion rights, and one-third described themselves as nonbelievers, with the majority of the remainder declaring that religion was “of little relevance in their lives”); Loewneberg, *supra*, at 4 (reporting government surveys showing that although 80% of Spaniards

France and Turkey are struggling to balance *laïcité*—a tradition of secularity in government, politics, and public life—with human rights to freedom of religious dress and expression.¹⁰⁸

These problems are emblematic of the controversies and tensions that have accumulated throughout Europe as the result of the immigration of large numbers of as-yet unassimilated Muslims,¹⁰⁹ and in Turkey as the result of the rise to power of the Islamic Justice and Development Party, or “AKP.”¹¹⁰

describe themselves as Catholic, two-thirds support gay marriage, 50% never attend church, except for weddings and funerals, and only 20% attend regularly; upon Benedict's election as Pope, 60% of Spaniards hoped that he would help the poor, 45% hoped that he would liberalize the church, but only 5% hoped that he would defend strict moral values); WNET-TV, *Religion and Ethics Newsweekly: Pope Visits Spain at Time When Spain Is Torn Between Secularism and Faith-based Living* (July 7, 2006) (observing that the “spiritual and social influence” of the Catholic church in Spain is declining, and that of those who regularly attend Mass, most are elderly).

¹⁰⁸ Kuhelj, *supra* note #, at 3 (summarizing France's defense of head scarf ban in public schools on ground that it symbolizes female inequality and thus undermines the French republican values, and Islamic response that it is merely a sign of modesty whose ban threatens the religious freedom of French Muslims); *id.* at 19 (noting that Muslim males often threaten both Muslim women who do not wear the head scarf and others with different religious or political convictions); *id.* at 22-24 (summarizing arguments in support of Leyla Şahun v. Turkey, App. No. 44774/98 (Europ. Ct. Hum. Rts. June 29, 2004) (upholding Turkey's ban on wearing of Islamic head scarf at universities and by civil service employees in government buildings, on grounds that it is a symbol of anti-democratic Islamic fundamentalism and female oppression)); *see also id.* at 11, 21 (recounting German state bans of head scarves).

One commentator has recently argued that the reported alienation of French Muslims from mainstream French society is exaggerated. *See* Stéphanie Giry, *France and Its Muslims*, 85 FOREIGN AFFAIRS 87, 93-98, 102 (Sept./Oct. 2006) (noting that French Muslims are generally modern and assimilated, do not exhibit voting patterns different from other French citizens, have made no specialized sectarian demands on French society and considered the head scarf issue of little importance, and have not generally supported Islamist or Muslim fundamentalist movements within France).

¹⁰⁹ *See* Kuhelj, *supra* note #, at 24, 33 (arguing that “Islamic extremism poses a threat . . . to Europe as a whole,” and that the “[w]earing of religious symbols and clothing may only be a symbol of an individual's religious convictions, but can also be an expression of political

Central and Eastern Europe may soon be grappling with similar problems. There was a spike in public religious observance and expression in central and eastern Europe following the fall of Communism in the early 1990s.¹¹¹ Nearly two decades later, however, many

ambitions and desires” that conflict with European democratic values); PBS, *News Hour: A Test of Tolerance* (Nov. 4, 2004) (interviewing various commentators who declared, *inter alia*, that “too many Muslims living in Europe are unwilling to accept European cultural values, such as equality for women and gays,” that “Europe is increasingly threatened by Islamic fundamentalist beliefs imported from the Middle East” which “are appealing to many poor and alienated Muslim young people,” and that Christians and moderate Muslims “have been labeled by the radical Muslims as unbelievers or working with the unbelievers”), *transcript available at* <http://www.pbs.org/newshour/bb/religion/july-dec04/dutchmuslims_11-4.htm> (last visited September 19, 2006); Quentin Peel, *Editorial, Europe's Healthy Religious Tension*, FINANCIAL TIMES, Apr. 21, 2005, at 19 (declaring that “religious fundamentalism of all sorts, including Islamic fundamentalism” is now the most serious challenge to Western Europe's traditional public secularity, particularly in France and the Netherlands); Tracy Wilkinson, *Pontiff Admonishes Catholics Not to Lose Their Souls to Science*, L.A. TIMES, Sept. 11, 2006, at A4 (reporting that Catholicism is “flagging in Europe, where Catholics have wandered from the church and Muslims immigrants have diluted Christian demographics”). *But see* Giri, *supra* note #, at 87, 102 (asserting that the “vast majority of Europe’s 15-20 million Muslims have nothing to do with radical Islam and are struggling hard to fit in, not opt out”).

Existing tensions between Islam and the western European nations were of course exacerbated by the 9/11 attacks in New York and Washington DC, and the subsequent London subway and Madrid train bombings. *See* Kuhelj, *supra* note #, at 4 (“The current trend towards banning Islamic symbols in the West stems primarily from a fear of increasing terrorism linked to Islam and the Muslim world.”).

¹¹⁰ *See* Mary Fitzgerald, *Guessing at PM's True Intentions*, IRISH TIMES, Sept. 8, 2006, at 14 (reporting the fears of secular Turkish elites that AKP is a front for Islamism despite its generally secular political initiatives, its support of Turkey’s bid for EU membership, and its general defense of the Turkish secular tradition since coming to power); Soner Cagaptay, *Where Goes the U.S.-Turkish Relationship?*, MIDDLE EAST Q., Sept. 22, 2004, at 43 (pointing out that AKP is the successor to the Islamist opposition Welfare Party, outlawed since 1997 for undermining the traditional Turkish secular order); *see also* Kuhelj, *supra* note #, at 33 (suggesting that AKP prime minister is “attempting to combine personal Islamic religious views with Western principles of secular democracy. [] The desire to join the European Union on one side is matched by the emphasis on Islamic privacy on the other”).

¹¹¹ *See, e.g.*, Kuhelj, *supra* note #, at 16 (observing that “the relationship between church and state [in the postcommunist democracies of eastern Europe] is very much an expression or reaction to the socialist-atheist position forced on the individual by the state.” and that “[a]fter

postcommunist countries are starting to exhibit the public secularity that has long been a staple of western Europe.¹¹²

the change from a communist system, in most of these countries the church attained the same or even greater importance than it had had before the socialist period”); *id.* at 32 (“The breakdown of the socialist and communist regimes in Eastern Europe has seen a religious ‘revival’ in its new democracies, with churches there becoming far stronger than the[y] were before communism.”); *see also* Stephen White & Ian McAllister, *The Politics of Religion in Postcommunist Russia*, 25 RELIG., STATE & SOC'Y 232, 239 (****) (noting an “‘explosion’ in religiosity” in postcommunist Europe).

¹¹² *See* White & McAllister, *supra* note #, at 241-42 (noting that both religious identification, and the perception of religion as a socially unifying force, began to fall in postcommunist Europe during the mid- to late 1990s); *e.g.*, James P. Gannon, *Is God dead in Europe?*, USA TODAY, Jan 8, 2006 (noting that only 19% of Czechs believe in God), *available at* <http://www.usatoday.com/news/opinion/editorials/2006-01-08-faith-edit_x.htm> (last visited Jan. 9, 2006). *But see* GEORGE WEIGEL, *THE CUBE AND THE CATHEDRAL* 149-50 (New York: Basic, 2005) (noting that Poland remains “arguably the world’s most intensely Catholic country,” where the most residents still attend mass on Sunday morning).

The problem of civil religion is not confined to Europe and the United States. For example, China, attempting to liberalize economically without liberalizing politically, is rightly criticized for its repression of religious belief and expression. Nevertheless, it has a legitimate and complex problem with fundamentalist Islam in its western province of Xinjiang. Xinjiang shares a long boarder with multiple Islamic states from the former Soviet Union, as well as Pakistan and Kashmiri India--two concentrations of Islamic fundamentalism which support separatist movements in China. While the Chinese government is combatting violent Muslim separatist movement in Xinjiang which are partially funded and supported from abroad, violence and tensions in the province, which is 50% Muslim, are also attributable to political and religious repression of Islam by the Chinese government, a dramatic in-migration of Han Chinese which has reduced the indigenous Muslim Uighur population from 90% in 1949 to about 50% today, and an informal system of ethnic segregation which reserves the best education, housing, and employment opportunities for Han Chinese at the expense of the Uigurs. The situation has been further complicated by the Chinese government’s attempt to characterize its actions in Xinjiang as part of the international “war on terror” following the 9/11 attacks in the United States. *See generally* MICHAEL DILLON, *XINJIANG—CHINA’S MUSLIM FAR NORTHWEST* 135-41, 166,67 (New York: Routledge, 2004); Peter S Goodman, *Natives Feel Left Out of China's New West*, WASH. POST, June 5, 2006, at A1; *Religious Freedom in China: Hearing Before the Congressional-Executive Commission on China*, 108th Cong. 2-10 (2002) (Statement of Preeta D Bansal, Chair, U.S. Commission on International Religious Freedom).

Likewise India, the world’s most populous democracy, has for decades contended with conflicts among extremist Muslims, Hindus, and Sikhs, all of which wish to control government

The cultural, political, and legal contexts of conflicts over religious symbols in European differ considerably from those in the United States. These differences include the absence of a politicized Christian right,¹¹³ a different understanding of religious pluralism,¹¹⁴ and a different conception of the public role of religious denominations.¹¹⁵ politicized Christian right. Moreover,. Nevertheless, the European lesson is consistent with the American one: As the decline of Christianity and the increase in immigration have diversified religious belief and practice in the countries of Europe, their “civil religions” have been exposed as insufficiently broad to function as social and political unifiers.¹¹⁶

and public life in various parts of India, and none of which is broad enough to include most Indian believers. *See generally* Sunit Ganguly, *Will Kashmir Stop India’s Rise?*, 85 FOREIGN AFFAIRS 45 (July/Aug. 2006); Mark Sappenfield, *Bombs Fail To Incite as Indian Imams Urge Calm*, CHRISTIAN SCI. MONITOR, Sept. 14, 2006, at World-1; Ramesh Thakur, Editorial, *Getting Tough on Terrorism*, JAPAN TIMES, July 29, 2006.

¹¹³ DAVIE, *supra* note #, at 30.

¹¹⁴ DAVIE, *supra* note #, at 38-39 (noting that religious “pluralism” in Europe refers more to the presence of Islam in a societies that used to be relatively homogeneous, rather than to the religious fragmentation that exists in the United States).

¹¹⁵ *Compare* DAVIES, *supra* note #, at 43-44 (observing that Europeans regard their churches “as public utilities rather than competing firms”) *with* Massey, *supra* note #, at 31-41 (describing the “marketplace for religion” in the United States).

¹¹⁶ *See* A. Ferrari, *supra* note #, at 41, 51, 78-82 (observing that historically Italy was not be subject to “religious fragmentation” and owed its national unity “more to a certain, natural, cultural/religious homogeneity than to a patriotism founded on the conscious participation of its members in a common bond of citizenship rallied around its public institutions,” and concluding that this religious homogeneity prevented development of an Italian “civil religion able to encourage a republican patriotism in harmony with a constitutional text,” leaving Italy ill-prepared to deal with the religious pluralism and legal secularization that has fractured contemporary Italian politics and society); Kuhelj, *supra* note #, at 18 & n.42 (decrying the exclusion of Muslims from the social mainstream of many European countries, and observing that since “Muslims are the second largest religious group in France . . . , it is only a question of time before one can no longer consider Muslims as adherents of a ‘non-European’ religion”); PBS, *supra* note # (“As Islam’s influence in Europe continues to grow Europeans face a

challenge familiar to many Americans: Welcoming the beliefs and traditions of newcomers while protecting freedom and equality for all”); Peel, *supra* note #, at 19 (reporting the view of French politicians that references to God or Christianity in the EU Constitution would have guaranteed its defeat).

There is a definite nostalgia attached to conservative Christian efforts to reclaim the symbols of Judeo-Christian civil religion. These symbols are being used to recall American society to the 1950s, when Judeo-Christianity formed the foundation for the “religious people” of the United States,¹¹⁷ if not to the 1890s, when a *de facto* Protestant establishment formed the foundation of a “Christian nation.”¹¹⁸ The sectarianization of Judeo-Christianity exhibits one of the signal attributes of religious fundamentalism: Recourse to the past in reaction to uncertainties and upheavals triggered by contemporary life.¹¹⁹ Fundamentalism looks back to an idyllic time when traditional religious values promoted a social order and stability that economic, political, and cultural liberalization have undermined and surpassed.¹²⁰

But this older order cannot be restored. Liberal democracy seeking to establish or to maintain itself in a social condition of religious pluralism does not flourish when infused with thick religious values.¹²¹ In such conditions, liberal democracy depends on the development of

¹¹⁷ *Zorach v. Clawson*, 343 U.S. 306, 313-14 (1952) (“We are a religious people whose institutions presuppose a Supreme Being.”).

¹¹⁸ *Holy Trinity Ch. v. United States*, 143 U.S. 457, *** (1892) (“We are a Christian people, and the morality of the country is deeply ingrafted upon Christianity.”) (quoting *People v. Ruggles*, 8 Johns. 290, 295 (N.Y. 1811))

¹¹⁹ Gedicks, *supra* note #, at 1222; see Martin E. Marty, *The Widening Gyres of Religion and Law*, 45 DEPAUL L. REV. 651, 660 (1996) (“It is often presumed, at least by the more nostalgic souls, that at certain moments—e.g., for the West, in medieval Christendom or, for America, in certain colonial situations of religious establishment, there was coherence because the legal sphere was coextensive with the religious.”); e.g. KAREN ARMSTRONG, *THE BATTLE FOR GOD* 273 (2000) (describing contemporary American fundamentalist admiration for the theocratic governments established by early Puritan colonists).

¹²⁰ See RICHARD D. BROWN, *MODERNIZATION: THE TRANSFORMATION OF AMERICAN LIFE 1600-1865*, at 59, 98 (***: Waveland, 1976).

¹²¹ See JOHN RAWLS, *POLITICAL LIBERALISM* 448 (New York: Columbia University Press, 1993) [hereinafter RAWLS, *LIBERALISM*] (“In a well-ordered society, then, the plans of life of individuals are different in the sense that these plans give prominence to different aims, and persons are left

thin, procedural democratic values which permit individuals to pursue their own conceptions of the good, so long as they do not interfere with that pursuit by others.¹²² No set of values is sufficiently broad, no civil religion sufficiently inclusive, to shelter all or nearly all of the citizens of a religiously plural country.¹²³ To the contrary, linking patriotism and citizenship to civil religion in circumstances of religious pluralism will inevitably result in alienation of those portions of the population who cannot see themselves in the model citizen presupposed by the civil religion.¹²⁴

free to determine their good, the views of others being counted as merely advisory.”); *accord* Walzer, *supra* note #, at 622 (“[I]t is very important that people whose views have had a religious formation learn to politicize them. They don’t need to leave them behind when they enter the political arena, but they do need to surrender their absolutism.”); *see also* Frederick Mark Gedicks & Roger Hendrix, *Religious Experience in the Age of Digital Reproduction*, 79 ST. JOHN’S L. REV. 127 (2005) (arguing that the twin effects of postmodernism and digitization are likely to deprive fundamentalist religions of mass contemporary appeal and consign them to the role of niche products in the religious marketplace of ideas).

122 *See* JOHN RAWLS, A THEORY OF JUSTICE 94, 396 (Cambridge, Mass.: Harvard University Press, 1971) (arguing for the general priority of rights over the good in a well-ordered society, and for a “thin theory of the good” which assures each member of society “equal liberty to pursue whatever plan of life he pleases as long as it does not violate what justice demands”); *see also* Walzer, *supra* note #, at 633 (arguing that liberal democratic societies can actively seek to realize “this or that idea of the good society. What follows is simply that, so long as there are different ideas, no realization can be definitive. On the religious or ideological side of the line, the good society can have an absolute form; on the political side, it is always provisional”).

123 *See* RAWLS, LIBERALISM, *supra* note #, at 38.

Since there is no reasonable religious, philosophical, or moral doctrine affirmed by all citizens, the conception of justice affirmed by all citizens in a well-ordered democratic society must be a conception limited to what I shall call ‘the domain of the political’ and its values. [C]itizens individually decide for themselves in what way the public political conception all affirm is related to their own more comprehensive views.

Id.

124 *Cf.* Bein, *supra* note #, at 913 (arguing that for public symbols to function as a means of uniting citizens with their country, they “must advance a message that speaks inclusively to the

To insist on Judeo-Christianity's continued linkage to American politics and government is to insist on a world that has already passed away. The irony of civil religion is that it was supposed to provide a substitute for the established church, a means of morally instructing and spiritually unifying the people so as to bind them to republican government, but its invocation in contemporary Western society triggers the very disunity it was supposed to remedy. At the very time that religious pluralism has strained the ability of Judeo-Christianity to function as a plausibly national civil religion, conservative Christians have sectarianized the public meaning of Judeo-Christianity, thereby shrinking its inclusive possibilities even further. Even in its most latitudinarian mode, Judeo-Christianity alienates from ever larger minorities of unbelief, nonWestern religion, and postmodern spirituality from their country. At the same time, the efforts of conservative Christians to recall the sectarian meaning of Judeo-Christianity ensure that it will become increasingly sectarian, not latitudinarian. This seems an odd and unlikely means of pursuing patriotic loyalty and national unity.

citizenry. If a symbol represents a message of exclusion, rather than inclusion, it will deny those excluded full participation in public life," leaving them with a "sense of physical vulnerability, alienation, and displacement").