The Future of Religious Pluralism: Justice O'Connor and the Establishment Clause

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In the last opinion she authored before announcing her retirement from the Supreme Court, Justice Sandra Day O’Connor eloquently summarized the importance of our Constitution’s Establishment Clause: “At a time when we see around the world the violent consequences of the assumption of religious authority by government, Americans may count themselves fortunate: Our regard for constitutional boundaries has protected us from similar travails, while allowing private religious exercise to flourish.”

The First Amendment, O’Connor observed, shields both religious freedom and our religiously “pluralistic society.” Given the apparent success of that approach, she concluded: “Those who would renegotiate the boundaries between church and state must therefore answer a difficult question: Why would we trade a system that has served us so well for one that has served others so poorly?”

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2. Id. Justice O’Connor frequently referred to “pluralism” in her discussions of the Religion Clauses. Although other members of the Court have also used that term, it is particularly distinctive of O’Connor’s approach. See, e.g., City of Boerne v. Flores, 521 U.S. 507, 544, 564 (1997) (O’Connor, J., dissenting) (noting “a society characterized by religious pluralism”); Employment Div., Dep’t of Human Res. v. Smith, 494 U.S. 872, 903 (1990) (O’Connor, J., concurring in the judgment) (“The compelling interest test [of the Free Exercise Clause] reflects the First Amendment’s mandate of preserving religious liberty to the fullest extent possible in a pluralistic society.”); County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 628 (1989) (O’Connor, J., concurring in part and concurring in the judgment) (stating that the Establishment Clause must “respect the religious diversity of the members of our pluralistic political community”). As we discuss further below, the notion of “pluralism” differs in important ways from diversity, tolerance, and other concepts frequently associated with religious freedom. See infra notes 6–8 and accompanying text.
3. McCready, 545 U.S. at 882 (O’Connor, J., concurring).
Justice O'Connor's quarter century of Supreme Court jurisprudence illuminated almost every nook of constitutional law. Yet this final plea, to appreciate the Framers' vision of religious pluralism and to defend that design, may prove her most critical appeal. Although America's religious diversity and tolerance have grown during the last quarter century, pluralism today is under siege. Substantial percentages of the American public disapprove of key Establishment Clause decisions, including restrictions on school prayer and courthouse displays of the Ten Commandments. Proposals to formally declare the United States a "Christian Nation" are drawing enthusiastic support, just as they did during earlier eras of social unrest. The United States stands at a crucial turning point, where it can continue the struggle to create a genuinely pluralist nation or retreat to a more hostile treatment of religious differences.

Pluralism implies more than simple diversity. A pluralist nation is one that welcomes, encourages, defends, and celebrates difference. Religious pluralism, therefore, demands more than bare tolerance. A religious majority can tolerate minority religions without respecting them; the majority may allow free exercise of other religions while still relegating


Some advocates of the Christian nation concept affirm the freedom of citizens to practice other religions, e.g., id., but others do not. The amendment featured on the website ChristianAmerica.net, for example, explicitly replaces the First Amendment's Religion Clauses with language guaranteeing free exercise only to members of Christian religions and barring state preferences only for one Christian sect over another. Christian America, http://www.christianamerica.net (last visited Sept. 16, 2007).

those believers to “the back of the bus.” Genuine pluralism requires the
state to treat all religious beliefs, including nonbelief, evenhandedly. This
evenhandedness, an essential component of the Establishment Clause, spells
the difference between tolerance and pluralism.

As Justice O’Connor’s reference to other nations indicates, neither
religious tolerance nor pluralism is easily achieved. The United States has
toiled slowly toward both goals for more than two centuries. Understanding
that history, as well as some of the psychological and social forces that
resist religious pluralism, illuminates the tensions that surround
contemporary enforcement of the Establishment Clause.

In this Article, we briefly review the gradual evolution of religious
diversity, tolerance, and church/state separation in the United States. The
growth of religious pluralism has been difficult even here, in a nation
widely admired for its religious freedom. We then examine the individual
and social dynamics that impede pluralism and encourage religious
polarization. Against this background, we explore Justice O’Connor’s
vision of the Establishment Clause, demonstrating that her principle offers a
particularly promising path for maintaining our course toward a more
religiously tolerant, accepting, and diverse America.

I. PROGRESS TOWARD PLURALISM

Justice O’Connor often turned to history, not rigidly to control the
present, but to clarify the contours of an issue. In the same spirit, we briefly
review the history of America’s religions, focusing on the growth of
religious diversity, the expansion of tolerance, and the gradual separation of
church and state. These three ingredients—diversity, tolerance, and
separation—are essential for religious pluralism. Understanding their slow
evolution, together with the forces that resisted them, is critical to
comprehending the challenges of Establishment Clause jurisprudence.

7. Hutchison, supra note 6, at 6; cf. Flores, 521 U.S. at 555–57 (O’Connor, J.,
dissenting) (discussing James Madison’s recognition of the critical difference between religious
“toleration” and deeper protections for individual liberty).

8. We address the issue of nonbelievers and religious nonadherents (those who identify
with no organized religious group) more fully below. See infra Part III.A. The question of how
to define “religion” is a related problem that has challenged judges and scholars from many
disciplines. We do not address that issue in this Article; the history and psychology we discuss
center on beliefs and organizations that all observers would consider religions.
A. The Colonial Period: Diversity or Conformity?

A popular eighteenth-century book, *Letters from an American Farmer*, depicted the new United States as an idyllically diverse nation.9 “Here,” Hector St. John de Crevecoeur claimed, “individuals of all nations are melted into a new race of men.”10 Along a single country lane, he claimed, one could find Roman Catholic, German Lutheran, English Puritan, and Dutch Calvinist farmers pursuing their faiths in peaceful coexistence.11 This vision of America as a haven for religious diversity is a powerful component of our national identity. The American colonists, we tell ourselves, escaped the religious persecutions of Europe and founded a nation of unparalleled religious tolerance. Freedom of religion became their constitutional cornerstone.12

There is truth to this tale. The ideal of religious freedom is central to American democracy and, for most of its history, the United States has been more religiously tolerant than any other nation on earth. But the truth is also more complicated, and more fascinating, than the popular fables of multicultural colonists worshiping peacefully side-by-side. The American colonies, paradoxically, were both more and less diverse than folklore suggests.

Most of the colonists who attended church adhered to a small number of Calvinist sects. A handful of Jews and a small number of Catholics lived in the colonies, but almost all of the white settlers were Protestant, and more than 90% of them traced their religious roots to Calvinism.13 These

9. Hutchison, supra note 6, at 11–12.
10. Id.
11. Id. at 12–13.
12. Id. at 20–23.
13. Id. at 20–21. Catholics comprised only 1.8% of church adherents in 1776 and accounted for just 56 of 3,200 religious congregations in 1780. Roger Finke & Rodney Stark, *How the Upstart Sects Won America: 1776–1850*, 28 J. FOR SCI. STUDY RELIGION 27, 31 (1989); Hutchison, supra note 6, at 21–22. Jews were even scarcer; only five of those 1780 congregations were Jewish, and none of them hosted a rabbi. Id.
Calvinists, moreover, shared a common language and culture. At the time of the Revolution, at least 85% were “English-speaking Calvinist Protestants” who “had spent two centuries constructing a culture to their own specifications.”\textsuperscript{14} The colonists who dominated the towns, attended churches, and led the Revolution represented a small range of Calvinist beliefs.\textsuperscript{15} The peaceful country lane of mixed religions and nationalities was a rarity.

The colonies did boast religious diversity, but it was one that folklore rarely mentions. Careful analyses of colonial records suggest that only 17% of the white colonists belonged to any church.\textsuperscript{16} Early America was a frontier, characterized by rugged land, vast distances, few ministers, and large numbers of single young men seeking their fortunes.\textsuperscript{17} “Like other frontier areas throughout history, this resulted in high levels of social deviance (crime, prostitution, and alcohol abuse) and low levels of church involvement.”\textsuperscript{18} We do not know which faiths, if any, these unchurched colonists practiced privately. Social scientists did not roam the frontier, asking them whether they considered themselves religious, what religion they identified with, and whether they would have attended church if they could. These colonists probably had Christian ties, but we have no good measure of their religious attitudes. Their lack of formal church association, combined with the conditions in which they lived, suggests that their

not formally belong to a congregation or participate in religious activities. Some scholars believe that surveys, our primary source of contemporary data on religious participation, produce “[h]opelessly inflated statistics” about religious affiliation. CHURCHING, supra, at 13. Data supplied by religious organizations may also inflate membership totals; conversely, they may underestimate religiosity by overlooking individuals who participate informally in denominational activities. See id. Faiths, finally, may define membership differently, making these totals difficult to compare. Id. at 16.

Despite these obstacles, scholars have made considerable progress in measuring religious attitudes and participation among the American public. We draw upon this scholarship, noting where applicable the type of underlying data.

\textsuperscript{14} Hutchison, supra note 6, at 21 (emphasis omitted).

\textsuperscript{15} The members of the First Continental Congress, for example, included only Episcopalians, Presbyterians, Congregationalists, and a lone former Quaker who had been disowned by his religion for owning a slave. Id. at 23–24. Delegates to the 1787 Constitutional Convention were only slightly more diverse. Eighty-five percent of these delegates were Episcopalian, Congregationalist, or Presbyterian, but there were two Quakers, two Catholics, one Dutch Reformed member, and one Methodist among the delegates. Ralph E. Pyle & James D. Davidson, The Origins of Religious Stratification in Colonial America, 42 J. FOR SCI. STUDY RELIGION 57, 70 (2003).

\textsuperscript{16} Finke & Stark, supra note 13, at 30.

\textsuperscript{17} See Roger Finke, Church Membership in America: Trends and Explanations, in HANDBOOK OF RELIGION AND SOCIAL INSTITUTIONS 335, 336 (Helen Rose Ebaugh ed., 2005); CHURCHING, supra note 13, at 35–40.

\textsuperscript{18} Finke, supra note 17, at 336.
religion was a more informal, individualistic set of beliefs and practices than we usually associate with the colonial period.\textsuperscript{19} The sheer number of these religiously unaffiliated colonists (83\%) implies that the colonies were more religiously freewheeling than formal church records convey.\textsuperscript{20}

The people living in the colonies, moreover, included a substantial number of Native Americans and African slaves.\textsuperscript{21} The European colonists sporadically attempted to convert members of these groups to Christianity, but most slaves and Native Americans retained their own religious traditions throughout the colonial period.\textsuperscript{22} Colonial leaders and writers did not acknowledge these practices as "religion," but everyday colonists interacted with slaves and Native Americans at home and on the frontier. It is quite possible that the presence of these faiths added to the aura of religious diversity in the American colonies. The question of how many

\begin{itemize}
  \item \textsuperscript{19} See CHURCHING, supra note 13, at 34.
  \item \textsuperscript{20} Even on the Mayflower, only a minority of passengers (35 of 102) were members of the iconic Pilgrim separatist congregation, accompanied by some dozen servants. See Pilgrims, THE COLUMBIA ENCYCLOPEDIA (6th ed. 2005), available at http://www.bartleby.com/65/pi/Pilgrims.html; Caleb Johnson, Complete Mayflower Passenger List, http://www.mayflowerhistory.com/Passengers/passengers.php (last visited Sept. 16, 2007) (linking to biographical information for each passenger). The other Mayflower passengers—not necessarily religious separatists at all—were added to the manifest by the colony's commercial investors. See Pilgrims, supra. It was the need to forestall conflict between the two groups, termed the "saints" and the "strangers" by later writers, that prompted the Mayflower Compact. \textit{Id}.
  \item \textsuperscript{21} Slaves constituted 42\% of the Southern Colonies in 1776. CHURCHING, supra note 13, at 30. With church affiliation rates of 20\% among white settlers in those colonies, the number of slaves would have been almost quadruple the number of white colonists attending church. \textit{Id} at 31. For every 42 slaves, only 11.6 white colonists (20\% of 58) would have adhered to a religious denomination.

  It is very difficult to estimate the number of Native Americans living in the colonies or early republic. The 1790 census counted Native Americans "only if they lived in settled areas," paid taxes, and disavowed any tribal affiliation. The State Historical Society of Missouri, Native American Genealogy (Apr. 30, 2007), http://www.umsystem.edu/shs/nativeam.html (last visited Sept. 16, 2007). It recorded Native Americans fitting those characteristics, moreover, as "white" if they lived among whites and "black" if they lived among blacks. \textit{Id}. Attempts to count Native Americans during the colonial period appear even more lacking.
  \item \textsuperscript{22} See, e.g., CHURCHING, supra note 13, at 30–31. Some churches and colonies actively opposed conversion of slaves. The Anglican Church, for example, believed that slaves were not sufficiently human to merit baptism. \textit{Id} at 31.

  Although colonial leaders did not acknowledge the religious practices of slaves or Native Americans, scholars have started to tell the story of these religions. See generally ALBERT J. RABOTEAU, SLAVE RELIGION: THE "INVISIBLE INSTITUTION" IN THE ANTEBELLUM SOUTH (paperback ed. 1980) (examining the religious traditions of slaves); Douglas L. Winia, Native American Popular Religion in New England's Old Colony, 1670–1770, 15 RELIGION & AM. CULTURE 147 (2005) (discussing Native American religion in the colonies). \end{itemize}
religions existed differs from that of how many were encouraged, tolerated, or formally recognized. 23

Colonial America, in other words, displayed two types of religious diversity. Officially, among those who attended church, that diversity comprised little more than a handful of contentious Calvinist sects. Bitter disputes separated some of these denominations, but by contemporary standards their diversity was slight. Unofficially, religious diversity in the colonies was much greater—perhaps broader than it has been at any other time in American history. The number of white colonists unaffiliated with any church, together with Native Americans and slaves following a mix of non-Christian faiths, vastly exceeded the number of Calvinists in their pews. 24

Despite, or perhaps because of, the colonies' religious diversity, Protestants remained firmly in control of both church and state. At least eight of the thirteen colonies maintained established churches at the time of the Revolution. 25 All thirteen colonies barred Catholics from holding office, twelve barred atheists, and eleven prohibited Jews and other non-Christians from office. 26 Similarly, most restricted the franchise to Protestants or Christians. 27 Eleven excluded Catholics from legal residence within the colony; eight denied formal tolerance to Jews; and seven denied tolerance to

23. From the perspective of the twenty-first century, it is particularly challenging to decide how to treat slave and Native American religions. Should we ignore them, on the ground that they did not count in the eyes of the colonial leaders? Or should we acknowledge them, as our ancestors should have, as valid religions? The latter course seems to make more sense. It also allows us to distinguish diversity from tolerance. The colonies were quite diverse religiously, if one includes the Native American and slave religions, but tolerance was narrow.

24. See supra text accompanying note 16 (noting that only 17% of white colonists had a church affiliation); The State Historical Society of Missouri, supra note 21 (discussing number of Native Americans with church affiliations).

25. The five southern colonies (Virginia, Maryland, North Carolina, South Carolina, and Georgia) recognized the Anglican Church, while four of the New England ones (Massachusetts, New Hampshire, Vermont, and Connecticut) were Congregationalist (Puritan). Michael W. McConnell, Establishment and Disestablishment at the Founding, Part I: Establishment of Religion, 44 WM. & MARY L. REV. 2105, 2110 (2003). Following Congregational precepts, the latter authorized each town to choose its own religion, but most elected Congregationalism. Id. Four colonies (Rhode Island, New Jersey, Pennsylvania, and Delaware) clearly did not have established churches in 1776. Id. at 2111. Scholars disagree on classification of the final colony, New York. Some include New York among those recognizing the Anglican Church, see, e.g., Pyle & Davidson, supra note 15, at 67, while others note that at the time of the Revolution, New York formally established this religion only in the four counties of metropolitan New York. McConnell, supra, at 2110–11, 2130.


27. Id.
atheists. Only Rhode Island officially opened its doors to all immigrants regardless of religious belief.

The text of these enactments, as well as individual declarations, expresses the rather dramatic religious prejudices of the era. Virginia banned the “unreasonable and turbulent sort of people, commonly called Quakers,” while a Massachusetts statute labeled Jesuits, priests, and missionaries “enemies to the true Christian religion.” The Director General of New Amsterdam announced that Jews were a “deceitful race” that should “not be allowed to further infect and trouble this new colony.” And even the patriot Sam Adams exclaimed that “much more is to be dreaded from the growth of Popery in America than from the Stamp Act.”

Religious toleration, in other words, took hold slowly in the new world. As the colonial laws reflect, many Protestant settlers feared or despised Catholics. Adherence to Christianity, almost always meaning Protestantism, was virtually assumed as a prerequisite to voting or office holding. And even the Protestant sects warred with one another. Virginians horsewhipped Baptist ministers and jailed them for attempting to preach their faith, while Massachusetts tolerated no disagreements with its established Puritanism. The flights of Roger Williams, Anne Hutchinson, and other Puritan dissidents from Massachusetts to Rhode Island are as much a part of our nation’s history as the Puritans’ own quest for religious liberty.

Some colonies did display a religious tolerance that was remarkable for the era. Williams’s Rhode Island guaranteed religious freedom to all, and Pennsylvania was similar in its broadmindedness. Maryland, founded as a

28. *Id.* Virginia enforced its exclusion of non-Anglicans so rigorously that it refused to allow Lord Baltimore, the Catholic founder of Maryland, to stop even briefly in the colony en route to Maryland. McConnell, supra note 25, at 2163.
29. Pyle & Davidson, supra note 15, at 68.
30. McConnell, supra note 25, at 2163.
31. Pyle & Davidson, supra note 15, at 60.
32. *Id.*
33. *Id.* These examples span more than a century of colonial history, illustrating the persistent religious bias of the time.
34. See supra notes 26–29 and accompanying text.
35. See McConnell, supra note 25, at 2119.
36. *Id.* at 2162.
37. *Id.* Dissidents who remained in Massachusetts did so at their peril; the colony hanged four Quakers who resisted banishment. *Id.* It is worth noting that the original Pilgrims who settled at Plymouth were somewhat more tolerant than their Puritan peers in Massachusetts. See *id.* at 2121–22. By the late seventeenth century, however, the Massachusetts Bay Colony had absorbed Plymouth. *Id.* at 2122.
38. MARK A. NOLL, THE OLD RELIGION IN A NEW WORLD: THE HISTORY OF NORTH AMERICAN CHRISTIANITY 44, 76–77 (2002) (Pennsylvania and Rhode Island); Timothy L. Hall,
haven for Catholics and other dissenters, briefly established itself as "the most tolerant jurisdiction in the world," although Anglicans seized control during the late seventeenth century and established their church with a vengeance.

Religious liberty thus remained precious and precarious in the colonies. Many of the European settlers, like the Puritans who founded the Massachusetts Bay Colony, sought freedom for themselves but denied it to others. For the Puritans, moreover, exclusivity and intolerance were part of their religious creed. These settlers "believed that God had entered into a special covenant relationship with them" as "His newly chosen people." Under this sacred covenant, the Puritans thought that they served as "a model of Christ's kingdom among the heathens." Adherents of other faiths tainted that model and simply were not welcome in Massachusetts. These colonists, moreover, had abandoned their homelands, crossed the ocean in a wooden sailing ship, and settled a wilderness to pursue their chosen faith; they did not take religion lightly. In the colonies, religious fervor wrestled with tolerance.

Against this background, the principal engine of colonial liberty became geographic separation. The American continent was large enough to accommodate many denominations; settlers who were unwelcome in one colony could move to another. As John Hughes, the Archbishop of New York, commented somewhat cheekily in 1852, the colonists extended adherents of other religious faiths the liberty to "find themselves a Plymouth Rock in some other bay." Geographic tolerance also served other purposes: even colonies with strict religious establishments tolerated dissenters on their western frontiers, where they provided a convenient buffer between the religious majority and the sometimes unfriendly Native Americans.

This, then, was America at the time of the founding: a sprawling, freewheeling nation of open spaces, characterized as much by do-it-yourself


40. Id. at 2128–29.


42. Id. (citation omitted).

43. NOLL, supra note 38, at 39–40.

44. HUTCHISON, supra note 6, at 51.

religion, slave faiths, and Native American traditions as by formal Calvinist churchgoers. All of the states imposed religious qualifications for residence, voting, or office holding; most had a long legacy of establishment. Religious prejudice was rampant, even among Calvinist sects. The pioneer spirit and unsettled frontier, however, helped preserve the ideal of religious freedom that the new nation symbolized.

B. The Constitution

The American Constitution includes remarkable safeguards for religious liberty. Article VI prohibits religious tests for any national office, and the document omits any mention of God, Christianity, or the Creator—all facts that eighteenth-century critics quickly noted. The First Amendment added to these protections by directing Congress to “make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” These protections rather dramatically insulated the new national government from the nation’s religious life.

Some of the Constitution’s drafters endorsed this separation as a matter of principle. For others, a religiously neutral national government was the only practical solution to unite states that recognized competing religious traditions. One of the leading colonial denominations, moreover, was in disarray at the time of the Constitutional Convention. Many of the Anglican clergy had supported England in the war, and a church that recognized the English monarch as its earthly leader required major overhaul in a nation that had just won its independence from that king. The Anglicans, renamed Episcopalians, sent the largest number of delegates to the Constitutional Convention, but they were in no position to demand national recognition of their religion.

Although the national separation of church and state was partly pragmatic, the principle quickly took hold in the states. Most states abandoned their established churches, religious tests, and religious restrictions before the end of the eighteenth century. Massachusetts, the last

46. U.S. CONST. art. VI, § 3 (“No religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.”).
47. See, e.g., McConnell, supra note 25, at 2178–79. See generally U.S. CONST.
49. James Madison and Thomas Jefferson, for example, fully embraced separation as a governing principle. See, e.g., McConnell, supra note 25, at 2120, 2156; Witte, supra note 45, at 501.
50. McConnell, supra note 25, at 2125–26, 2155.
51. Pyle & Davidson, supra note 15, at 70.
to renounce its established church, did so in 1833.52 These rapid changes in the states suggest that the Constitution’s commitment to religious freedom was more than a federalist compromise; a spirit of tolerance, combined with recognition that church and state should separate, had caught hold in America.53

C. The Expanding Republic

America’s population increased exponentially between 1790 and 1860; in just seventy years, the population doubled, doubled again, and doubled a third time.54 Those newcomers significantly changed the nation’s religious profile. Lutherans arrived from Germany and Scandinavia,55 while Catholics immigrated from Ireland and Germany.56 The Louisiana Purchase incorporated French-speaking Catholics into the nation, while California contributed Hispanic Catholics.57 All of these groups differed theologically, culturally, and linguistically from the English Calvinists who dominated the colonies.

At mid-century, Chinese immigrants joined the mix. In the sparsely populated West, these Asian immigrants quickly achieved critical mass. In California, the Chinese constituted 8.6% of the population by 1870;58 in Idaho, they represented almost a third of the settlers.59 The Chinese established temples and smaller prayer houses, supporting their Buddhist

52. McConnell, supra note 25, at 2126.
53. As Roger Finke and Rodney Stark point out, principles of separation and tolerance also drew support from rapidly growing Evangelical sects, which lacked the political power of the older Protestant denominations. Finke & Stark, supra note 13, at 28. The best course for these “upstart” religious groups was to support an “unregulated, free market, religious economy.” Id. Separation of church and state stemmed in part from “a most unlikely alliance” between “the rationalists and freethinkers . . . who resented their taxes going to any religion, and the upstart, aggressive, Evangelical, Protestant sects, who resented their taxes going to false religions.” Id.
54. See Hutchison, supra note 6, at 24.
55. The number of Lutheran congregations in the United States grew from 240 in 1780 to more than 2000 in 1860. Id. at 21, 26. More than half of those churches conducted services in a language other than English. Id. at 26.
56. See Noll, supra note 38, at 237, 295–96.
57. See Churching, supra note 13, at 120. Preoccupation with European immigration, both among nineteenth-century Americans and historians, has obscured acquisition of formerly French and Spanish territories as a source of Catholic citizens. In 1860, Rhode Island led the states with the highest percentage of Catholics among its citizens (21.4%), but California ranked second (19%), and Louisiana third (16.6%). Id.
59. Hutchison, supra note 6, at 25.
and Taoist faiths, both in the California cities and on the frontier.  
Missionaries attempted to convert the Chinese to Christianity, but these efforts realized little success.  

Equally radical changes were underway among non-immigrants. Joseph Smith published the Book of Mormon in 1830, and began attracting followers to the new sect. Although Mormonism had Christian ties, it was a distinctively “new religious movement, based . . . on Smith’s account of a new revelation.” Methodism, meanwhile, grew from a minor denomination (claiming just 2.5% of church adherents in 1776) to a major force. By 1850, over one-third of church members in the United States were Methodist. The Baptists likewise enjoyed significant gains, increasing from 16.9% of the churchgoing population in 1776 to 20.5% in 1850. Although both of these sects were Protestant, they differed from the more established groups of Episcopalians, Congregationalists, and Presbyterians.  

The Methodists and Baptists appealed, not only to large groups of white Americans, but to the African American slaves. Some African Americans worshipped in white churches or with their plantation masters, but others formed independent black churches within the Methodist and Baptist traditions. Although these churches shared much of their theology with white Protestants, they differed sharply on slavery and other social issues. The black churches also served distinctive institutional needs among both slaves and the freed African American community. These churches added yet another set of denominations to America’s proliferating religions.

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61. Id. at 162–68.
63. Id.
64. Finke, supra note 17, at 340.
65. Id.
66. Id.
67. The latter groups significantly declined among the churchgoing public. Episcopalians (formerly Anglicans) and Congregationalists (formerly Puritans) together accounted for 36.1% of church adherents in 1776. Id. By 1850, that share had plummeted to 7.5%. Id. Presbyterians maintained their presence somewhat more successfully, but saw their share of church adherents drop from 19.0% to 11.6%. Id.
69. Id. at 26, 52–53, 65.
70. The African Methodist Episcopal Church, for example, was organized after a group of black worshippers at a Philadelphia Methodist Episcopal Church were “pulled from their knees during worship in a gallery that they did not know was closed to black Christians.” Id. at 51; see
All of these changes coincided with an overall rise in the nation’s religiosity. The percentage of Americans formally affiliated with a church more than doubled between 1776 and 1860, reaching 37% in the latter year. This boom benefited all sects, but did not obscure growing tensions among the diversifying denominations. America had changed from a nation that was “almost unanimously Protestant” in 1790 to one in which one out of every five worshippers in 1860 was Catholic, a momentous change by any measure.

The change prompted both individual and official acts of intolerance. As soon as Joseph Smith began preaching his revelations, the New York courts convicted him of “being a disorderly person and an imposter” because of his “pretensions to supernatural powers.” When Smith and his followers moved to Missouri, the governor of that state issued an “extermination order,” declaring that “Mormons must be treated as enemies, and must be exterminated or driven from the State if necessary for the public good.” The Missouri government looked the other way as local mobs destroyed a succession of Mormon settlements and killed seventeen Mormons. An Illinois mob murdered Smith a few years later, and the Mormons fled to Utah.

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Also Churching, supra note 13, at 103–05 (discussing distinctive aspects of African American Christianity).
71. Finke, supra note 17, at 337.
72. See id. at 338–42.
73. Churching, supra note 13, at 122; Hutchison, supra note 6, at 26. Other writers have estimated the number of Catholics in mid-nineteenth century America as even higher. Churching, supra note 13, at 117–20. Finke and Stark explain, however, that those estimates are flawed in several respects. Id.

Throughout this period, of course, Native Americans and many slaves continued to follow religious traditions quite different from the dominant Christianity. And almost two-thirds of white Americans remained unaffiliated with any church. Id. at 22–23. It is paradoxical to talk of a nation that was “almost unanimously Protestant,” or even four-fifths Protestant, when so many people within the borders of that nation pursued other faiths or eschewed other religions.

74. Orma Linford, Mormons, the Law, and the Territory of Utah, 23 AM. J. LEGAL HIST. 213, 216 (1979). Prosecutions for disturbing the peace continued; town governments claimed Smith “had thrown the countryside into an uproar with his preachings and claims about the heavenly origin of the Book of Mormon.” Id.


76. Hutchison, supra note 6, at 53. Indeed, the government “seemed to place the stamp of official approval on the lawless actions of the mob” by indicting Smith and his followers, rather than the mob, for a series of felonies including treason, murder, and arson. Linford, supra note 74, at 216–17.

77. Hutchison, supra note 6, at 17, 53; Linford, supra note 74, at 218–19.
American Catholics faced similar acts of violence. A Boston mob burned a Catholic convent in 1834. The following decade, anti-Catholic riots erupted in Philadelphia; two churches were destroyed and a dozen people were killed. An angry mob likewise destroyed Bishop Hughes’ residence in New York, retaliating against his demands for support of Catholic schools.

Anti-Catholic sentiment achieved more formal status through the prominent American Party, colloquially called the “Know Nothings.” This party declared that “Americans must rule America,” proposed a series of draconian changes in voting and naturalization laws, and frequently inveighed against the immoral, drunken, and debauched behavior of Catholics. The party achieved surprising success during the middle of the nineteenth century, securing seventy-five seats in the U.S. House of Representatives in 1854, controlling several state legislatures during the 1850s, and receiving 21% of the popular vote in the 1856 Presidential election. Fortunately for Catholics and other non-Protestants, the Know Nothings proved better at winning elections than implementing their agenda, although the party did manage temporarily to halt construction of the Washington Monument when they discovered that Pope Pius IX had donated some of the marble.

African American slaves, finally, suffered sharp restrictions on their freedom of worship. As Methodist and Baptist conversion spread among the slaves, these faiths affirmed their personal dignity and nourished abolitionist talk. Whites feared that worship meetings, often held clandestinely on plantations, offered the opportunity to plan insurrections. After a series of slave rebellions, culminating with Nat Turner’s 1831 uprising, the southern states clamped down on religious worship by slaves.

78. NOLL, supra note 38, at 123. Local fire departments refused to respond to the fire, effectively collaborating with the mob. CHURCHING, supra note 13, at 151. The violence followed a series of provocative sermons delivered by Lyman Beecher, a prominent Congregationalist minister. Id. at 150–51. Beecher warned that the Pope and other leaders of the Catholic Church were conspiring to take over the American West. Id.

79. HUTCHISON, supra note 6, at 17.


81. NOLL, supra note 38, at 123.

82. HUTCHISON, supra note 6, at 48–50 (emphasis omitted).

83. NOLL, supra note 38, at 123.

84. HUTCHISON, supra note 6, at 48–50.

85. Id. at 49.

86. NOLL, supra note 38, at 123.

87. LINCOLN & MAMIYA, supra note 68, at 200–03.

88. Id.

89. Id. at 25; NOLL, supra note 38, at 107.
Official codes silenced black preachers and authorized slaves to attend only white churches.\textsuperscript{90}

Despite legal guarantees of religious liberty, in other words, official acts of religious intolerance persisted into the nineteenth century. Members of the Protestant majority supported political parties that railed against Catholics, prosecuted new religions like Mormonism, and outlawed independent worship by slaves. Religious toleration did not come easily, especially in the face of rapid population growth and shifting religious affiliations.

Separation of church and state also faltered, as state and local governments attempted to strengthen mainstream Protestantism. Public schools, which emerged during the first half of the nineteenth century as a way to assimilate increasingly diverse immigrants, aggressively promoted Protestant views.\textsuperscript{91} The schools featured Protestant hymns and prayers, as well as readings from the King James Version of the Bible.\textsuperscript{92} As Catholic leaders pointed out, the very reading of Biblical verses, unaccompanied by commentary or instruction, was a distinctively Protestant practice.\textsuperscript{93} Catholics read a translation of the Bible that included official commentary and annotations; they rejected the “direct and unmeditated approach to God” that most Protestant sects embraced.\textsuperscript{94} For Jews and other faiths, of course, these public school practices were even more foreign.\textsuperscript{95}

Government further promoted Protestantism by subsidizing missionaries in frontier regions, granting land and tax subsidies to religious schools and charities, underwriting “the costs of Bibles and liturgical books for poorer churches,” and donating land and services to those churches.\textsuperscript{96} Most of these efforts ostensibly included all “Christian” churches, but Catholics and members of the newer Protestant denominations often found themselves

\textsuperscript{90} LINCOLN & MAMIYA, supra note 68, at 24; CHURCHING, supra note 13, at 105–06.


\textsuperscript{92} See, e.g., Jeffries & Ryan, supra note 91, at 297, 300; Laycock, supra note 91, at 509.

\textsuperscript{93} Jeffries & Ryan, supra note 91, at 300.

\textsuperscript{94} Id. Personal interpretation of the Bible, in fact, was an essential point on which the Protestant sects split from Catholicism. Jeffries and Ryan quote one nineteenth-century Catholic cleric who explained, “The Catholic Church tells her children that they must be taught their religion by AUTHORITY—the Sects say, read the Bible, judge for yourselves.” Id.

\textsuperscript{95} See Virginia Lineson Brereton, Education and Minority Religions, in MINORITY FAITHS AND THE AMERICAN PROTESTANT MAINSTREAM 279, 293–96 (Jonathan D. Sarna ed., 1998).

\textsuperscript{96} Witte, supra note 45, at 507.
excluded. In the New England states, for example, government officials routinely stalled delivery of corporate charters, tax exemptions, and educational licenses to Catholics, Baptists, and Methodists who qualified for these benefits. 97

Governments, finally, adopted a web of symbols and practices vigorously proclaiming Christianity's favored status in the United States:

The Ten Commandments and favorite Bible verses were inscribed on the walls of courthouses, public schools, and other public buildings. Crucifixes were erected in state parks and on state house grounds. Flags flew at half-mast on Good Friday . . . . Many of the first public schools and state universities had . . . compulsory attendance in daily chapel and Sunday worship services. Employees in state prisons, reformatories, orphanages, and asylums were required to know and to teach basic Christian beliefs and values. 98

Although most of these symbols were Christian, rather than Protestant, the prevailing anti-Catholicism made clear which Christian sects these symbols represented. 99 The message was even more exclusionary for practitioners of Judaism, Native American faiths, and other non-Christian religions.

The United States, in sum, greeted the first shocks of religious diversity with a mixed record. Toleration was greater than in other nations, but far from perfect. And, despite official separation of church and state, Protestantism enjoyed semi-official status. That influence was particularly strong in the public schools, which overtly attempted to assimilate mixed groups of immigrants to Protestant attitudes.

97. Id. at 506.
98. Id. at 507.
99. Even today, a significant number of Catholics resist Christian symbols and terminology connected with government, perceiving the implicit message of those actions as favoring Protestantism. Only 24% of Catholics, for example, support a constitutional amendment declaring the United States a "Christian nation," while 43% of Protestants support such an amendment. The Barna Group, supra note 5. And Catholics are two to four times more likely than Protestants to favor removing "under God" from the pledge of allegiance, "In God We Trust" from currency, and Ten Commandment displays from courthouses. Id. A long history of anti-Catholicism has made many Catholics wary that a "Christian nation" would be more Protestant than Catholic. Cf. Witte, supra note 45, at 507 (providing examples of the preference for Protestantism in government programs); supra notes 91–97 and accompanying text.
D. Emancipation, Immigration, and Industrialization

Between 1860 and 1920, three upheavals rocked the United States social structure: The emancipation of America’s slaves, increased immigration from central and southern Europe, and the rapid advance of industrialization. All three of these trends significantly changed the nation’s religious profile, as well as its responses to religious diversity.

American Protestantism emerged from the Civil War more fractured than ever. The war had split many sects into northern and southern divisions, and many of those divides persisted after hostilities ended.100 More importantly, emancipation triggered a dramatic upsurge in African American churches. Membership in the African Methodist Episcopal Church soared from just 20,000 members before the Civil War to over 450,000 in 1896.101 Similarly, the number of black Baptist ministers tripled, from 5,500 to more than 17,000, in just sixteen years.102 These churches played a particularly important role in the African American community, offering community ties and social support that white Americans failed to extend.103 Partly because of their centrality in the new black communities, and partly because of continued white racism, these denominations remained distinct from their white counterparts.104

Continued immigration altered the United States in equally dramatic ways. The post-war arrivals increasingly represented southern and central Europe, regions that housed large numbers of Catholics and Jews.105 Between 1850 and 1920, the number of Catholics in the United States grew three times faster than the overall population.106 The number of Jewish

100. Witte, supra note 45, at 509.
101. LINCOLN & MAMIYA, supra note 68, at 54. The African Methodist Episcopal Zion church experienced similar expansion, growing from 4,600 in 1860 to 350,000 in 1896. Id. at 58.
102. Id. at 28 (comparing 1890 and 1906).
103. CHURCHING, supra note 13, at 190. Perhaps because of this role, African American church affiliation was much higher than that of white Americans. In 1890, 59% of African Americans belonged to a church, while only 45% of the U.S. population as a whole did so. Id. at 191. And in 1906, when African Americans constituted less than 11% of the U.S. population, black congregations accounted for 17% of the country’s local churches. NOLL, supra note 38, at 121.
104. See CHURCHING, supra note 13, at 190 (noting that “when it became clear that blacks wanted greater autonomy and whites wanted the status quo [of white dominance in congregations], both sides agreed that dividing churches along racial lines was desirable”).
105. See HUTCHISON, supra note 6, at 84, 114.
106. Id. at 114. The percentage of Catholics among all church adherents, as a result, increased from 21% in 1860 to 30% in 1916. CHURCHING, supra note 13, at 122.
Americans, meanwhile, leaped from just fifty thousand in 1850 to more than three million in 1920.\textsuperscript{107} These Catholic and Jewish newcomers were poorer and more insular than their predecessors. They spoke languages other than English and were more likely to retain those languages in their churches, synagogues, and communities.\textsuperscript{108} Some of their religious practices were more orthodox than those of earlier immigrants, further enhancing their differences from the mainstream.\textsuperscript{109}

Industrialization and urbanization, finally, generated still more Protestant innovations as churches adapted to novel communities. New approaches included the urban evangelicalism of Dwight Moody, emergence of the Salvation Army, and development of the “Social Gospel” that included both a liberalized theology and explicit reform agendas.\textsuperscript{110} These shifts increasingly separated the urban Protestant churches from their more rural colleagues.\textsuperscript{111} Energetic new sects also continued to emerge; these included the Church of the Nazarene, Seventh-day Adventists, Christian Scientists, Jehovah’s Witnesses, and several Pentecostal sects.\textsuperscript{112}

This multiplication of religious faiths, both within and outside Protestantism, encouraged the first stirrings of interfaith respect. Americans previously had tolerated some diversity of religious beliefs, but stopped short of celebrating this diversity.\textsuperscript{113} The 1893 World’s Parliament of Religions, organized as part of the Columbian Exposition, initiated a long process of replacing grudging tolerance with equal respect.\textsuperscript{114} The Parliament included Catholics, Jews, and representatives of the black Protestant Churches; Shintoists, Hindus, and representatives of other nonwestern religions also participated.\textsuperscript{115} Many educated Americans greeted

\textsuperscript{107} HUTCHISON, supra note 6, at 114.
\textsuperscript{108} Finke, supra note 17, at 342–48.
\textsuperscript{109} Id. at 343–44; HUTCHISON, supra note 6, at 114.
\textsuperscript{110} NOLL, supra note 38, at 130–33.
\textsuperscript{111} See HUTCHISON, supra note 6, at 84–110.
\textsuperscript{112} Id. at 114–15; NOLL, supra note 38, at 149–53.
\textsuperscript{113} On the contrary, most sects condemned the views of others. William Hutchison cites an 1815 sermon by the Reverend Samuel Worcester as representative of this earlier view. Worcester warned that individuals who failed to embrace Christianity “have no good hope. . . . Their gods cannot save them; . . . their religion does not satisfy the heart or the life . . . . [It] does not dissipate the darkness which heavily broods over them, thickening into the blackness of eternal night.” HUTCHISON, supra note 6, at 133.
\textsuperscript{114} Id. at 132.
\textsuperscript{115} Id. at 132–33, 135; E. ALLEN RICHARDSON, STRANGERS IN THIS LAND: PLURALISM AND THE RESPONSE TO DIVERSITY IN THE UNITED STATES 91 (1988). See generally Donald H. Bishop, Religious Confrontation, A Case Study: The 1893 Parliament of Religions, 16 NUMEN 63 (1969) (describing speeches by participants from a variety of religions).
the Parliament as a remarkable symbol of a new breed of religious tolerance.\footnote{Hutchison, supra note 6, at 111–12. During the same era, some interdenominational organizations also increased their inclusiveness. The Federal Council of Churches, for example, included the African American churches in its Christian coalition, a step that previous organizations had overlooked. Id. at 137.}

The small seeds of tolerance, however, sprouted among continued bigotry. Even during the World’s Parliament of Religions, several speakers affirmed the inherent superiority of Christianity.\footnote{Bishop, supra note 115, at 63.} Professor Wilkinson of the University of Chicago, for example, showered disapproval on all the “erring religions of mankind” that refused to recognize Christ.\footnote{Id.} Members of those religions, Wilkinson proclaimed, are “groping downward, not groping upward. . . . Their adherents’ hold on them is like the blind grasping of drowning men on roots or rocks, that only tend to keep them to the bottom of the river.”\footnote{Id.} And, in a particularly ironic act of religious divisiveness, the white Pentecostal churches excluded black congregations from their alliances\footnote{Lincoln & Mamiya, supra note 68, at 79.}—even though Pentecostalism stemmed from the dynamic teachings of William J. Seymour, an African American minister who preached to a mixed congregation of blacks, whites, and Hispanics at the Azusa Street Mission in Los Angeles.\footnote{Id.; Noll, supra note 38, at 151–52.}

More ominously, the end of the Civil War birthed violent nativist groups like the Ku Klux Klan. White Protestantism was an essential element of the Klan’s self concept, symbolized by its signature burning cross.\footnote{Id.} Some of the group’s earliest actions were to break up black prayer meetings;\footnote{Cf. id. at 287, 294–96 (stating that the Klan tried to “intimidate” and control religious blacks).} when the Klan reorganized in 1915, Jews and Catholics joined blacks as targets of Klan violence.\footnote{Id. at 286–87, 294. The Klan’s first incarnation, during the years immediately following the Civil War, focused primarily on terrorizing newly freed slaves and impeding Reconstruction. See Ku Klux Klan, THE COLUMBIA ENCYCLOPEDIA (6th ed. 2001–05), available at http://www.bartleby.com/65/ku/KuKluxKl.html. The federal government suppressed the Klan during the 1870s, but it reemerged in 1915 as a national organization. Id.} In its less violent activities, the Klan joined other nativist Americans in vigorously supporting Bible reading in the public schools and
other public expressions of Protestantism.\textsuperscript{125} It played a substantial role in securing enactment of an Oregon law requiring all children to attend public schools, and won representation in both state legislatures and Congress.\textsuperscript{126}

While Catholics, Jews, and blacks endured bigotry in the East and Midwest, Chinese and other Asian immigrants suffered in the West. As with many other immigrant groups, opposition to ethnic groups and their culture blended with religious prejudice.\textsuperscript{127} Nativist Americans perceived Chinese religions as particularly pagan and superstitious.\textsuperscript{128} Several of the Protestant denominations officially denounced the Chinese as an imminent threat to the morals of Christian America.\textsuperscript{129} As Japanese and Indian immigrants began to arrive, they elicited similar fears. Mobs destroyed Chinese homes, temples, and property, while more peaceful citizens formed civic organizations dedicated to the exclusion of Asian immigrants.\textsuperscript{130}

This tide of anti-Asian feeling infected both state and federal law. California and other states enacted statutes taxing Asian immigrants, restricting their land ownership, and limiting their occupations.\textsuperscript{131} Congress acted even more definitively; in 1882, it passed the Chinese Exclusion Act, barring Chinese immigration for ten years.\textsuperscript{132} Between then and 1917, the federal government adopted a series of laws and international agreements banning immigrants from almost every part of the “Asiatic barred zone,” which stretched “from the Kirghiz (Russian) Steppes and the Arabian Peninsula to what is now Indonesia.”\textsuperscript{133} Congress and the courts also excluded Asian-born immigrants already in the United States from

\textsuperscript{125} Higham, supra note 122, at 294.
\textsuperscript{126} See generally Tyack et al., supra note 91, at 177–92 (discussing the Klan’s success in passing an Oregon law that required children to attend public rather than private schools); Ku Klux Klan, supra note 124.
\textsuperscript{127} Cf. Jeffries & Ryan, supra note 91, at 303 (citing a best selling book of the 1880s that identified the “seven perils” facing the United States as “immigration, Catholicism, Mormonism, intemperance, socialism, wealth, and the city”).
\textsuperscript{128} See, e.g., Richardson, supra note 115, at 80–81.
\textsuperscript{129} ld. at 84. The General Assembly of the Presbyterian Church in the United States of America, for example, determined in 1876 that it should increase attempts to convert Chinese immigrants in California “to prevent harm to ‘American society, morals, and civil institutions.’” ld. (citation omitted).
\textsuperscript{130} ld.; see Hyung-chan Kim, A Legal History of Asian Americans, 1790–1990, at 47 (1994) (describing the first mob action against Chinese workers, which forced sixty Chinese miners to leave their jobs).
\textsuperscript{131} Kim, supra note 130, at 47–49, 54–56; Richardson, supra note 115, at 95–97.
\textsuperscript{132} Richardson, supra note 115, at 82.
becoming naturalized citizens.\textsuperscript{134} Although none of these state or federal laws targeted religious beliefs explicitly, they sought to exclude Asians from every facet of American life. In practice, they shut down the spread of most non-Christian faiths within the United States.

During the same period, the national government launched an explicitly religious initiative to subdue the remaining Native American tribes and convert them to Christianity.\textsuperscript{135} President Grant’s “Peace Policy,” announced in 1869, allocated the tribes among competing Christian sects, assigning different denominations to supervise improvement of different tribes.\textsuperscript{136} As Columbus Delano, Secretary of the Interior explained, this policy “through the instrumentality of the Christian organizations, acting in harmony with the Government,” would teach the Indians “the comforts and benefits of a Christian civilization.”\textsuperscript{137} Most of the government funds supported proselytizing and explicitly religious work.\textsuperscript{138} As with many of the “Christian” efforts during this era, moreover, the Peace Policy was predominantly Protestant. Catholics achieved no seats on the first Board of Indian Commissioners and a much smaller share of tribal assignments than their previous missionary work justified.\textsuperscript{139}

The decades after the Civil War, in sum, both expanded America’s religious diversity and provoked desperate efforts to repress those differences. From the terrorist acts of the Ku Klux Klan to government-supported conversion of Native Americans and official exclusion of Asians, nativist Americans struggled to preserve the nation’s Protestant character. A few citizens welcomed the new religions, as symbolized by the World’s

\textsuperscript{134} The Naturalization Act of 1870 had restricted naturalization to whites and people of African descent; the Supreme Court and lower federal courts upheld application of these laws to bar naturalization of Chinese, Japanese, and other Asian immigrants. \textit{Hull, supra} note 133, at 12–13. The Act likewise deprived many Native Americans of the ability to claim U.S. citizenship. \textit{Id.} at 12.


\textsuperscript{136} Hamilton, \textit{supra} note 135, at 54.

\textsuperscript{137} Dussias, \textit{supra} note 135, at 779.

\textsuperscript{138} Hamilton, \textit{supra} note 135, at 55.

\textsuperscript{139} Dussias, \textit{supra} note 135, at 779, 781–82; Hamilton, \textit{supra} note 135, at 54. Other religious groups suffered less visible forms of government mistreatment. John Witte, for example, notes: “At the turn of the twentieth century and increasingly thereafter, local officials began routinely to deny Roman Catholics their school charters, Jehovah’s Witnesses their preaching permits, Eastern Orthodox their canonical freedoms, Jews and Adventists their Sabbath-day accommodations, and non-Christian pacifists their conscientious objection status.” Witte, \textit{supra} note 45, at 510.
Parliament of Religions, but religious pluralism remained an elusive goal for much of the country.

E. Retrenchment

In 1924, Congress and the American public embraced an immigration statute that froze the nation’s religious, ethnic, and racial composition for more than fifty years. The National Origins Act extended previous restrictions on Asian immigrants by excluding them entirely from the United States. It also reduced immigration from southern and central Europe to a bare trickle, tying immigration quotas for all Eastern Hemisphere nations to their share of the U.S. population in 1890. And it slashed even immigration from northern Europe to a bare minimum, as German Jews seeking to escape Hitler learned: The 1924 Act capped immigration from the entire Eastern Hemisphere at just 165,000 people per year, a total that was less than one-fifth of the annual average before World War I.

America’s rejection of immigrant populations dramatically halted the growth of non-Christian religions. The 1924 Act allowed very little immigration from non-Christian countries; as a result, non-Christian faiths showed little growth between 1924 and 1965, when Congress modified the immigration laws. Even the American Jewish community, the largest group of non-Christians in the United States, stopped growing after the 1930s. The percentage of Americans practicing Judaism rose marginally from 3.2% in 1925 to 3.3% in 1950, but has declined since then.

The only two religious groups that grew significantly between 1925 and 1975 were Catholics and white Evangelical Protestants. The 1924 National Origins Act did not attempt to limit immigration from Latin America, partly because of the difficulties of policing the Mexican border and partly due to the ongoing need for cheap Mexican labor. Immigration

140. HULL, supra note 133, at 18.
142. History Matters, supra note 141. For a discussion of the United States’s failure to facilitate immigration of Jewish refugees, see ROGER DANIELS, COMING TO AMERICA: A HISTORY OF IMMIGRATION AND ETHNICITY IN AMERICAN LIFE 297–301 (2d ed. 2002) and infra note 154.
143. See Finke, supra note 17, at 345–47.
144. Id. at 346.
145. Id.
146. HULL, supra note 133, at 18.
from Latin America, domestic conversion, and high fertility rates likely combined to increase the percentage of practicing Catholics in the United States from 13.9% in 1925 to at least 22.7% in 1975.\textsuperscript{147}

Growth in white Evangelical Protestant churches is harder to track, partly due to disagreements over which churches are Evangelical,\textsuperscript{148} but those denominations seem to have doubled their share of the U.S. population between 1925 and 1975, from 3.7% to 8.0%.\textsuperscript{149} The percentage of the population belonging to a white mainline Protestant church, conversely, declined from 13.9% to 11.5%.\textsuperscript{150}

The decades before and after World War II were a time of uniformity in the United States; popular culture stressed Americans' similarities rather than their differences. The restrictive immigration laws, together with the common enemies of the Depression, Axis powers, and Communism, supported that spirit.\textsuperscript{151} For the first time since its founding, the United States did not have to absorb large numbers of diverse immigrants. Instead, it focused on economic and foreign foes that threatened all Americans.

This surface harmony, however, masked ongoing prejudice against Jews, Catholics, Asians, and any others who differed from the congenial white Protestant mold. The Japanese internment camps of World War II are the most visible example of a culture that rejected diversity in both legally sanctioned and informal ways.\textsuperscript{152} The era of retrenchment also featured virulently anti-Catholic best-sellers,\textsuperscript{153} rejection of Jewish refugees attempting to obtain shelter from Hitler,\textsuperscript{154} and mob violence against Jewish

\begin{footnotesize}
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\item[147.] Finke, supra note 17, at 346. These percentages, contrary to those cited for previous historical periods, estimate the percentage of practicing Catholics among the full population, not their percentage of church adherents. Other methods peg the percentage of Catholics as slightly higher in 1975. The General Social Survey, for example, calculated that 25.3% of the population was Catholic during that year. Tom W. Smith & Seokho Kim, The Vanishing Protestant Majority, 44 J. FOR SCI. STUDY RELIGION 211, 215 (2005).
\item[148.] See NOLL, supra note 38, at 153–55.
\item[149.] Finke, supra note 17, at 346. Membership in African-American Protestant churches increased more modestly, from 6.7% to 7.6% of the overall population. Id. All of the percentages in this footnote and the accompanying textual paragraph represent the number of individuals adhering to a particular population as a fraction of the total population. Since only 56% of the American population adhered to any church in 1926, and that figure had increased to just 62% in 1980, percentages given relative to the full population may appear low. Id. at 337.
\item[150.] Id. at 346.
\item[152.] See DANIELS, supra note 142, at 302–04; KIM, supra note 130, at 132–38.
\item[153.] See ELLWOOD, supra note 151, at 130.
\item[154.] DANIELS, supra note 142, at 297–300. Two of the most tragic cases involved Congress's failure to enact the Rogers-Wagner bill, which would have admitted twenty thousand refugee children, and the refusal to admit "nearly a thousand refugees whose Cuban visas [had been] cancelled" and who "sailed close enough to Miami Beach for its passengers to
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families who purchased homes in Christian neighborhoods.\textsuperscript{155} During this period of American retrenchment, diversity and tolerance both suffered.

\textbf{F. Opening Doors: The 1960s to the Present}

The 1960s brought four momentous changes to America's religious life. In 1960, the nation elected its first non-Protestant President. John F. Kennedy's election signaled the end of Protestant domination in national politics, and his popular presidency further reduced anti-Catholic sentiments. In 1962, the United States Supreme Court declared officially sponsored prayers in the public schools an establishment of religion.\textsuperscript{156} Two years later, Congress enacted the Civil Rights Act of 1964, which barred religious discrimination in a variety of settings.\textsuperscript{157} And in 1965, Congress modified the immigration laws, eliminating quotas for individual countries.\textsuperscript{158} Laws still restricted the number of individuals who could enter the United States, but they no longer targeted immigrants from non-Christian countries so disproportionately.

These changes set the stage for rapid shifts in the country's religious profile. In 1975, nine of ten Americans declared adherence to a Christian faith, with the remaining 10\% split among followers of Judaism (1.5\%), members of non Judeo-Christian religions (1.1\%), and those associating themselves with no religion (7.3\%).\textsuperscript{159} Demographically, the United States

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hear the music being played at the beachfront hotels," but who returned to Europe, where many of them died in the Holocaust. \textit{Id.} at 299–300.
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\textsuperscript{155} \textsc{Elliwood}, \textit{supra} note 151, at 207.


\textsuperscript{158} Daniels, \textit{supra} note 142, at 338–44; Hull, \textit{supra} note 133, at 22–25; \textsc{cf.} \textsc{John H. Berthrong}, \textsc{The Divine Deli: Religious Identity in the North American Cultural Mosaic} 16 (1999) ("[Nineteen sixty-five] may be one of the most important years for religion in North America. . . . This was the year when American immigration laws that had excluded Asians for decades were revised and relaxed . . . .").

\textsuperscript{159} Smith & Kim, \textit{supra} note 147, at 215. These percentages, like many of the estimates in this section, derive from the General Social Survey ("GSS"). The National Opinion Research Center ("NORC"), affiliated with the University of Chicago, has conducted that survey every one or two years since 1972. Social scientists rely upon the GSS more than any other data source except for the U.S. Census. \textit{See} NORC, GSS Study Description, http://www.norc.org/GSS/GSS+Study+Description.htm (last visited Nov. 2, 2007). Since its inception, the GSS has included questions about respondents' religious identification and other religious attitudes or practices. \textit{See generally} Smith & Kim, \textit{supra} note 147, at 212 (discussing GSS research methodology).
was overwhelmingly a Christian nation, in large part due to its suppression of twentieth century immigration. Protestants, moreover, still outnumbered Catholics by a margin of more than two to one: 65.5% of the nation identified as Protestant and 24.4% identified as Catholic.\footnote{University of California, Berkeley, SDA Archive: GSS Cumulative Datafile 1972–2004, \texttt{http://sda.berkeley.edu/archive.htm} (last visited Nov. 2, 2007) (follow “GSS Cumulative Datafile 1972–2004”; then enter variables “RELIG” and “YEAR”; then select “Run the Table”) [hereinafter GSS Religion by Year]. The University of California, Berkeley, maintains this website to allow researchers to analyze data from the GSS and several other databases. For background information on the GSS, see \textit{supra} note 159.}

In less than thirty years, immigration and other social forces markedly altered that allocation of religious affiliations. By 2004, the percentage of the population identifying as Protestant had declined from 65.5% to no more than 54.1%.\footnote{See GSS Religion by Year, \textit{supra} note 160. The authors of the GSS classify only 50.6% of the 2004 respondents as Protestants. \textit{Id.} Several scholars have criticized the GSS definition, however, as underinclusive. Respondents identifying themselves as generic “Christians,” for example, may belong in the Protestant category, as do at least some of those identifying themselves as members of nondenominational or interdenominational congregations. See, e.g., Darren E. Sherkat, \textit{Tracking the “Other”: Dynamics and Composition of “Other” Religions in the General Social Survey, 1973–1996}, 38 J. FOR SCI. STUDY RELIGION 551, 555 (1999). Reclassifying all of the latter groups as Protestant raises the GSS estimate of Protestants to 54.1% in the year 2004. GSS Religion by Year, \textit{supra} note 160. Among the youngest cohorts of adult Americans, the percentage affiliated with Protestantism has already slipped below 50%. Smith & Kim, \textit{supra} note 147, at 219 tbl.5. Only 48.0% of adults born during the 1960s, and 43.2% of those born during the 1970s, describe themselves as Protestants. \textit{Id.}} Catholics and Jews had maintained relatively stable percentages of adult believers (25.2% and 2.2% respectively), but Americans identifying with other religions had grown to at least 4.2%.\footnote{GSS Religion by Year, \textit{supra} note 160. This percentage includes respondents identifying their religions as Buddhist, Hindu, Other Eastern, Muslim, Orthodox Christian, Native American, or “other.” Adding respondents who identified themselves as generic “Christian” (2.6%) or interdenominational (0.9%) would raise the percentage of Americans identifying with religions other than Protestant sects, Catholicism, or Judaism to 7.7%. \textit{Id.} As noted \textit{supra} note 161, however, members of the “Christian” and interdenominational categories may consider themselves Protestants.}

Those other religions were much more diverse than in previous years, including healthy numbers of Muslims,\footnote{Estimates of the number of Muslims in the United States vary widely. At a minimum, Muslims accounted for 1.9 million Americans by 2001, with other conservative estimates ranging to over 2.8 million. Tom W. Smith, \textit{Religious Diversity in America: The Emergence of Muslims, Buddhists, Hindus, and Others}, 41 J. FOR SCI. STUDY RELIGION 577, 578 (2002) [hereinafter Smith, \textit{Religious Diversity}]; Tom W. Smith, \textit{The Muslim Population of the United States: The Methodology of Estimates}, 66 PUB. OPINION Q. 404, 414 (2002) [hereinafter Smith, \textit{Muslim Population}]. Other observers have placed the total closer to four, or even six, million, Hutchison, \textit{supra} note 6, at 224, but scholars challenge those numbers. E.g., Smith, \textit{Muslim Population}.} Buddhists,\footnote{\textit{Id.}} and Hindus.\footnote{\textit{Id.}}
representatives of other Eastern religions, Wiccans, and followers of Native American faiths. In all, about 2.4% of the American population now adheres to religions that are not Judeo-Christian.

Some of the fastest growing Protestant denominations, moreover, are those near the boundaries of Protestantism. The percentage of Mormons in the United States almost doubled between 1975 and 2000, from 1.1% to 1.9%. The Vineyard, an interdenominational Christian sect, opened its first church in 1974 and grew to more than 500 congregations and over 150,000 adherents by 2000. These trends suggest that established Protestant sects are ceding adherents both to new forms of Protestantism and to non-Christian denominations.

The most striking change in religious beliefs, however, has been a sudden increase in the percentage of Americans identifying with no religion. That proportion of the population almost doubled between 1975 and 2004, from 7.6% to 14.3%. As two sociologists of religion recently

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Population, supra at 404–05, 414. The 2004 GSS estimated Muslims at 0.7% of the adult American population. GSS Religion by Year, supra note 160.

164. Estimates of the number of Buddhists in 2000 range between 1.4 and 2.8 million. Smith, Religious Diversity, supra note 163, at 580; Robert Wuthnow & Wendy Cadge, Buddhists and Buddhism in the United States: The Scope of Influence, 43 J. FOR SCI. STUDY RELIGION 363, 364 (2004). The GSS reported 0.5% of Americans as Buddhists in 2004. GSS Religion by Year, supra note 160.

165. Between 1970 and 2000, the number of practicing Hindus in the United States swelled from a few thousand to more than a million. Hutchison, supra note 6, at 224; Smith, Religious Diversity, supra note 163, at 581. In 2004, the General Social Survey identified 0.5% of the adult population as Hindu. GSS Religion by Year, supra note 160.

166. Although followers of these latter faiths each comprise relatively small percentages of the population, in combination they account for about as many Americans as the number practicing Hinduism, Buddhism, and Islam combined. Smith, Religious Diversity, supra note 163, at 578.

167. Id.

168. Finke, supra note 17, at 346 tbl.17.2.

169. Id. at 346.

170. Within the more established Protestant denominations, yet another shift has occurred: Members of the “conservative” denominations (e.g., Baptist, Pentecostal, Church of Christ, and Assembly of God) now outnumber those belonging to the “mainline” groups (e.g., Episcopal, Presbyterian, Methodist, and most Lutheran). Michael Hout et al., The Demographic Imperative in Religious Change in the United States, 107 AM. J. SOC. 468, 468–70, 475, 480–81 (2001). Hout and his colleagues demonstrate that this shift has occurred because of increased retention rates in the conservative sects, some tendency of mainline adherents to abandon religion or convert to Catholicism, and higher birthrates among the conservative sects. Id. at 470. Relatively little of the shift is due to mainline adherents converting to the conservative sects. Id.; see also Churching, supra note 13, at 235–83 (discussing the inevitable decline of mainline sects).

171. GSS Religion by Year, supra note 160.
observed, this is "a startlingly rapid social change," representing "one of the most dramatic proportional changes in any of the variables measured by the [General Social Survey]." The shift, moreover, seems likely to continue; among young adults surveyed in August 2005, a full third indicated that their religion was "none."

As a result of these trends, the percentage of Christians in the United States shrank from 89.9% in 1975 to 80.0% in 2004. Although Christians still represent a comfortable majority, the doubling of the non-Christian population in less than thirty years is noteworthy. A nation in which one of five people does not identify with Christianity is considerably more diverse than a country in which just one out of ten individuals espouses a different belief. An increasing number of non-Christians, moreover, differ from the majority of Americans in race, ethnicity, dress, or cultural customs. These differences make their religious differences more salient.

Interest in, and respect for, other religions has blossomed along with this diversity. Holiday displays, both in stores and on public land, routinely combine Christian and Jewish symbols. Some even incorporate Islam and other traditions. Officials speak increasingly of our "Judeo-Christian" nation and traditions, rather than our "Christian" one. Public celebrations have started to include representatives of Muslim, Hindu, and other faiths along with Protestant, Catholic, and Jewish speakers. And Americans increasingly report informal connections with diverse religious faiths. Although Buddhists account for only 0.5% of the population, for example, from fourteen to eighteen percent of Americans indicate that they have been influenced by Buddhism.

173. Id. at 166.
175. GSS Religion by Year, supra note 160. These estimates for "Christians" err on the high side by including all members of interdenominational and nondenominational churches. See id.
177. Id.
178. For further examples of the increased mixing of religious traditions in public and private life, see BERTHRONG, supra note 158, at 54–55.
179. Wuthnow & Cadge, supra note 164, at 364–66. The number of Americans who have participated in other quasi-religious Eastern practices, such as meditation and yoga, undoubtedly is even higher. The fact that these practices have entered everyday American culture, despite their religious origins, is itself strikingly different from the attitudes of earlier eras.
Tolerance for other religions, of course, has not been perfect. In a 2005 national survey, one quarter of adult Americans expressed “mostly” or “very” unfavorable views of Muslim Americans.180 A similar percentage disapproved of Buddhists.181 Mormons remain distinctively unpopular; in February 2007, a CBS News poll found that 30% of Americans expressed “somewhat” or “very” unfavorable views of Mormons.182 And atheists elicit particular ire, with half of all Americans holding a “mostly” or “very” unfavorable view of this group.183 Indeed, one quarter of survey respondents believe that an atheist cannot be a moral person,184 and almost half insist that atheists constitute a threat to America’s moral character.185


These percentages are virtually identical to those obtained in a similar poll conducted in March 2001. See PEW RESEARCH CENTER FOR THE PEOPLE AND THE PRESS, 2001 RELIGION AND PUBLIC LIFE SURVEY (Apr. 10, 2001), http://people-press.org/reports/print.php3?pageid=118 (registering an 8% “very unfavorable” view of Muslim Americans and a 16% “mostly unfavorable” view in question 12j) [hereinafter PEW 2001 SURVEY]. Nor did the percentages shift much in polls conducted between those two dates. See PEW 2005 SURVEY, supra (reporting comparable responses from surveys conducted in November 2001, March 2002, and July 2003). At least as measured by responses to public opinion polls, therefore, the September 11 attacks did not substantially affect attitudes toward Muslim Americans.

Higher percentages of Americans, both before and after September 11, express disapproval of Muslims or Islam in general, but those views include religious observers in other nations. Id. The most relevant question for implementation of the Establishment Clause involves views toward Muslims living in the United States.

181. PEW 2001 SURVEY, supra note 180 (reporting that 25% held mostly or very unfavorable views toward Buddhists, in question 12k). The 2001 figures are the most recent ones available for attitudes toward Buddhists.

182. CBS News Poll, Mitt Romney’s Race for the Nomination (Feb. 13, 2007), http://www.cbsnews.com/htdocs/pdf/021307_romney.pdf (reporting results of poll conducted February 8–11, 2007, of 1142 adult Americans). Only one quarter of the respondents expressed favorable views, with the remainder unsure. Id. These percentages are consistent with repeated surveys conducted by Pew and other polling organizations.

183. PEW 2005 SURVEY, supra note 180 (reporting that 22% expressed “mostly” unfavorable views toward atheists, while 28% expressed “very” unfavorable ones, in question 9e). This percentage is quite consistent with those obtained by Pew researchers in other polls conducted between 2000 and 2003. Id. For additional perspectives on American attitudes toward atheists, see generally Penny Edgell et al., Atheists as “Other”: Moral Boundaries and Cultural Membership in American Society, 71 AM. SOC. REV. 211 (2006).

184. Newsweek Poll (Mar. 31, 2007), http://www.msnbc.msn.com/id/17875540 (showing that 26% of registered voters think that an atheist cannot be a moral person, and 6% do not know).

185. Institute for Jewish and Community Research, Religion Survey (May 2002), http://poll.orspub.com/document.php?id=quest3.out_619&type=list&num=8 (reporting that 17% of respondents believed that atheists presented a “large threat,” and another 28% perceived a “small threat” from that group). Similarly, 62% of survey respondents say that they would not
Surprising percentages of the population express distaste even for America’s most established religions. Almost 10% of Americans hold "mostly" or "largely" unfavorable views of Episcopalians,\textsuperscript{186} with similar percentages expressing dislike of Methodists, Presbyterians, Lutherans, and Jews.\textsuperscript{187} Catholics draw unfavorable views from 13% of the population, while 16% express negative feelings toward Evangelical Christians.\textsuperscript{188} Survey respondents tend to mask socially unacceptable biases, including those against disfavored religious groups, so these percentages probably understate actual prejudice.\textsuperscript{189}

Nor is religiously motivated violence a relic of the past. In 2005, the Federal Bureau of Investigation reported 1,405 victims of religiously motivated hate crimes.\textsuperscript{190} The crimes ranged from destruction of property and vandalism to arson, intimidation, and aggravated assault.\textsuperscript{191} Jewish citizens bear the brunt of these crimes; in 2005, 977 of the victims (69.5%) were Jewish.\textsuperscript{192} Another 151 victims that year were Muslim, 61 were Catholic, 58 were Protestant, 5 were atheists or agnostics, and 153 were members of other religions or part of a targeted group that included diverse religions.\textsuperscript{193}

\begin{footnotesize}
\begin{itemize}
\item "vote for a political candidate who says he or she is an atheist." Newsweek Poll, \textit{supra} note 184, at Question 18. Only 29\% affirmatively state that they would vote for an avowed atheist; another 9\% are unsure. \textit{Id}.
\item \textsuperscript{186} \textsc{Pew 2001 Survey}, \textit{supra} note 180 (reporting that 9\% of respondents registered unfavorable views toward Episcopalians in question 12).
\item \textsuperscript{187} \textit{Id}. The percentages are as follows: Methodists (8\%), Presbyterians (9\%), Lutherans (11\%), Jews (10\%). Only 7\% of respondents expressed unfavorable views toward Jews in Pew’s 2005 version of the poll, but that poll did not explore attitudes toward the Protestant sects. \textsc{Pew 2005 Survey}, \textit{supra} note 180.
\item \textsuperscript{188} \textsc{Pew 2001 Survey}, \textit{supra} note 180 (reporting that 13\% disapproved of Catholics and 16\% disapproved of Evangelical Christians). Disapproval of Catholics fluctuated between 9\% and 13\% in Pew surveys conducted between 2000 and 2005. Pew 2005 Survey, \textit{supra} note 180 (reporting all recent figures). Disapproval of Evangelical Christians has been rising gradually during the same years, from 16\% in 2000 to 19\% in 2005. \textit{Id}. We use the 2001 percentages for these groups because they are the only ones available for the mainline Protestant denominations.
\item \textsuperscript{189} See, e.g., Bob Altemeyer, \textit{Why Do Religious Fundamentalists Tend to Be Prejudiced?}, 13 \textsc{Int'l J. For Psychol. Religion} 17, 24 (2003).
\item \textsuperscript{190} Federal Bureau of Investigation, Table 1—Hate Crime Statistics 2005, http://www.fbi.gov/ucr/hc2005/table1.htm (last visited Nov. 2, 2007).
\item \textsuperscript{192} \textit{Id}.
\item \textsuperscript{193} \textit{Id}. The number of religiously motivated hate crimes exceeds the number of those based on sexual orientation or ethnicity, although it still pales compared to the number of racially motivated hate crimes. In 2005, 4,895 victims suffered from a racially motivated hate crime; 1,213 experienced one based on sexual orientation; and 1,228 suffered a hate crime based on ethnicity or national origin. \textit{Id}.
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Continued separation of church and state, finally, has proceeded fitfully, often over intense public opposition. Throughout the last quarter century, some public schools, courthouses, and statehouse lawns have continued to display the Ten Commandments and other Christian symbols. A large number of Americans approve these practices; almost 75%, for example, support exhibiting the Ten Commandments in government buildings. This position, moreover, reflects a clear preference for Judeo-Christian traditions; only one-third of respondents would approve a monument of the Quran in a public school or government building.

The courts have struck down some of these public displays and upheld others. Overall, the public disagrees with decisions ending public religious practices, believing that judges have been too harsh in separating church and state. In December 2005, more than three quarters of registered voters responding to a national survey agreed “that the courts have gone too far in taking religion out of public life.” Similarly, in 2006, 69% of Americans told pollsters that “liberals have gone too far in trying to keep religion out of the schools and the government.”

Contemporary America, in sum, is groping its way toward religious pluralism. Most Americans support the broad outlines of religious liberty, staunchly defending the right of individuals to worship as they please. Separation of church and state, however, remains more contested. Many Americans, particularly Protestants, believe that it is possible to affirm the nation’s Christian character without infringing religious freedom. The 2006


Texas Republican Party Platform, for example, both declared that "America is a Christian nation, founded on Judeo-Christian principles," and "affirm[ed] the constitutional right of all individuals to worship in the religion of their choice."\textsuperscript{199} Catholics and other non-Protestants are more skeptical that these principles can be reconciled.\textsuperscript{200} With religious diversity and tolerance growing, disputes over the proper relationship between church and state have become central to the future of pluralism.

II. FORCES OF DIVISIVENESS

As the previous section demonstrates, religious diversity, tolerance, and separation of church and state all emerged gradually in the United States. For much of its history, the United States has declared its commitment to religious liberty and led the world in achieving those ends. Yet, even with clearly articulated ideals and constitutional protections, the struggle has not been an easy one. Why is religious tolerance so difficult to maintain? And why is genuine pluralism, one that manifests equal respect for all religions, so elusive? This section outlines some of the psychological and sociological forces that impede religious pluralism in the United States and elsewhere.

A. Religion, Prejudice, and Pluralism

When social scientists first examined the relationship between religion and prejudice, they expected to find that religious people showed less bias than others. Religion, after all, teaches brotherhood and compassion for all. In the United States, moreover, Christian churches championed both the anti-slavery and the civil rights movements.

Instead, researchers consistently identified a positive link between religiosity and prejudice; that is, more religious people tend to display more bias than less religious people do.\textsuperscript{201} Studies have confirmed a correlation between religiosity and biases based on race, ethnicity, sexual orientation, and several other characteristics.\textsuperscript{202} Conversely, studies have suggested a negative relationship between religiosity and universalism, a cluster of values that supports the "[u]nderstanding, appreciation, tolerance, and

\textsuperscript{199} TEXAS REPUBLICAN PARTY, \textit{supra} note 5, at P-21.
\textsuperscript{200} See \textit{supra} note 99 and accompanying text; The Barna Group, \textit{supra} note 5.
\textsuperscript{202} See Hunsberger & Jackson, \textit{supra} note 201, at 811 tbl.1.
protection for the welfare of all people and for nature."203 Deeply religious people, in other words, may be less likely to appreciate or tolerate those who are different than themselves.

This correlation between religiosity and prejudice, however, does not hold for all religious individuals. Instead, the link appears strongest for believers who are "fundamentalists."204 In this context, fundamentalism does not refer to any particular religious tradition. Instead, it denotes a type of religious orientation that cuts across faiths. Social scientists identify fundamentalists, whatever their creed, as those who believe "that one religion uniquely represents the fundamental truth, that this truth is opposed by evil, and that only followers of this religion have the desired relationship with God."205 Individuals who hold this relationship to their faith tend to exhibit more prejudice against others.206

Believers with a "quest" religious orientation, on the other hand, show significantly less bias. Indeed, research suggests that these individuals may be particularly tolerant and accepting of others.207 The quest orientation exhibits a "questioning, doubting, open, and flexible approach to religious


204. See Bob Altemeyer & Bruce Hunsberger, Authoritarianism, Religious Fundamentalism, Quest, and Prejudice, 2 INT'L J. FOR PSYCHOL. RELIGION 113, 116 (1992); Hunsberger & Jackson, supra note 201, at 811 tbl.1.

205. Lynne M. Jackson & Bruce Hunsberger, An Intergroup Perspective on Religion and Prejudice, 38 J. FOR SCI. STUDY RELIGION 509, 512 (1999). See generally Bob Altemeyer & Bruce Hunsberger, A Revised Religious Fundamentalism Scale: The Short and Sweet of It, 14 INT'L J. FOR PSYCHOL. RELIGION 47 (2004) (discussing development of a scale to measure fundamentalism). The fundamentalism scale has been used to identify fundamentalist religious orientation among Christians, Hindus, Muslims, and Jews, suggesting its applicability to a broad range of religions. Id. at 49.

206. See Vyacheslav Karpov, Religiosity and Tolerance in the United States and Poland, 41 J. FOR SCI. STUDY RELIGION 267, 274 (2002) (analyzing national survey data showing that Evangelicals, who display high degrees of fundamentalist religiosity, are significantly more likely than others to express political intolerance toward a variety of groups).

Conversely, underscoring the fact that religious doctrine differs from religious orientation, individuals who display a high degree of "Christian Orthodoxy" do not display more prejudice than others. Altemeyer & Hunsberger, supra note 204, at 116. The Christian Orthodoxy scale measures the degree to which an individual accepts Christian beliefs. Id.; see Brian Laythe et al., Religious Fundamentalism as a Predictor of Prejudice: A Two-Component Model, 41 J. FOR SCI. STUDY RELIGION 623, 624–25 (2002) (finding that Christian Orthodoxy shows a negative correlation with racial prejudice, while right-wing authoritarianism displays a positive one, suggesting that the relationship between fundamentalism and prejudice among Christians results from an offset of these two trends).

issues." People with this orientation also tend to prefer idiosyncratic approaches to religion rather than group-based ones.

This research suggests that religious believers with a quest perspective are likely to feel comfortable with religious pluralism. These individuals approach their own religion in a flexible, doubting manner; they are likely to acknowledge the validity of multiple religious truths and to value the insights members of other faiths might offer. Individuals with a quest orientation are also comfortable with highly individualized, idiosyncratic resolutions to religious issues because they do not seek uniform answers.

Fundamentalists, conversely, are likely to find religious pluralism deeply troubling. By recognizing a single religious truth, and one approved way of relating to God, fundamentalists do not acknowledge the validity of alternative religious perspectives. By conceptualizing life as an eternal struggle between one religious truth (good) and all else (evil), moreover, the fundamentalist relegates both nonbelievers and adherents of other religious faiths to the "evil" category. At its core, a fundamentalist religious orientation incorporates the belief that "if you are not with me, you are against me."210

A recent study of more than 800 Christian adults, drawn from a variety of denominations, bears out this prediction. The researcher gauged the fundamentalism of the subjects, as defined above, and then asked each subject to respond to statements measuring his or her attitudes toward other religions. The more fundamentalist respondents were in their religious orientation, the more enthusiastically they endorsed statements such as:

Our country should always be a Christian country, and other beliefs should be ignored in our public institutions.

Nonchristian religions have a lot of weird beliefs and pagan ways that Christians should avoid having any contact with.

208. Hunsberger & Jackson, supra note 201, at 809. In the context of religion, it is particularly important to note that overall correlations do not account for the actions of all individuals. Some individuals with a fundamentalist religiosity are quite tolerant, while some with a questing religiosity are "quite bigoted." Altemeyer & Hunsberger, supra note 204, at 126.


211. Altemeyer, supra note 189, at 22–23. Although the author studied Christians, the predominant religion in his nation (Canada), he notes that both theory and preliminary results suggest that the same effects occur in other religious traditions. Id. at 19 n.2.
All people may be entitled to their own religious beliefs, but I don’t want to associate with people whose views are quite different from my own. 212

Fundamentalist respondents tended to disagree with statements such as:

If there is a heaven, good people will go to it no matter what religion they belong to, if any.

You can trust members of all religions equally; no one religion produces better people than any other does.

I would like my church to hold joint services with a wide variety of other religions. 213

The fundamentalist respondents, in other words, expressed attitudes very similar to those held by the Puritans who founded the Massachusetts Bay Colony. 214 These individuals believe deeply in their own faith, want to live in a society that endorses that faith, think members of other religions are mistaken (or worse), and prefer not to associate with people holding those divergent beliefs. As a psychological attitude, twenty-first century fundamentalism has much in common with seventeenth century fundamentalism.

This point is worth stressing because contemporary culture often assumes that pluralism has become a universal ideal. Many observers assume that all Americans genuinely value religious pluralism and want to work towards that ideal. Religious orientations, however, differ just as religious doctrines do. Studies of religiosity demonstrate that pluralism suits some religious orientations but not others.

Some contemporary, law-abiding, and thoughtful Americans, in sum, are likely to resist pluralism. Their resistance stems, not from a particular religious tradition or doctrine, but from their psychological orientation toward religion. Individuals with a fundamentalist orientation, whatever their faith, may acknowledge the right of others to hold diverse religious beliefs, but they do not want to associate too closely with those others. These individuals also push strongly for the government to demonstrate publicly its support for their denomination. Government neutrality does not satisfy this religious orientation; these believers seek government alignment with “truth” and against evil.

212. Id. at 21, 23.
213. Id.
214. See NOLL, supra note 38, at 39–40; Witte, supra note 41, at 46.
B. Polarization

The variations in religious orientation described above generate tension among both religious adherents and nonadherents. Individuals with a quest orientation find religious pluralism palatable, while those with a fundamentalist perspective do not. Other social forces, unfortunately, push these groups further apart. This dynamic creates polarization rather than compromise, making enforcement of the Establishment Clause particularly contentious.

Detailed analyses of the 2000 presidential election reveal that Evangelical Christians (who, as a group, express high degrees of fundamentalist religiosity) were more likely to vote for President Bush if they lived in counties with a larger percentage of adults claiming no religious affiliation than if they lived among more religious adults. At first, the finding seems counterintuitive. Would not Evangelicals living in the latter counties, with more religious people, be more likely to have discussions reinforcing their initial inclination toward a sympathetic candidate? Conversely, Evangelicals living in less religious counties would have encountered more adults with beliefs different from their own and should have been more likely to modify their initial inclinations. What created the contrary effect?

David Campbell, the social scientist who analyzed these data, suggests that the Evangelicals living in less religious counties felt a higher degree of “religious threat.” They perceived a less religious, more secular society that challenged their beliefs. They reacted to that threat by turning out in high numbers to support a religiously sympathetic candidate, while their peers in more solidly religious neighborhoods felt less threatened and less compelled to vote for Bush. This hypothesis draws considerable support from earlier research showing a similar dynamic among white voters.

215. Altemeyer & Hunsberger, supra note 205, at 49. Scholars and lay people use the words “evangelical” and “fundamentalist” to describe an overlapping group of Christian denominations. In this section, we use “fundamentalist” to describe people of any faith who display a particular type of religious orientation. We use “Evangelical Christian” or “Evangelical” to denote members of U.S. sects identified in that manner. See also Altemeyer & Hunsberger, supra note 204, at 118 (distinguishing between fundamentalism as a general concept and specific Christian fundamentalist sects).

216. David E. Campbell, Religious “Threat” in Contemporary Presidential Elections, 68 J. Pol. 104, 109 (2006). The study controlled for party membership, demographics, and a number of other factors that commonly affect political preferences. Id. at 109. Bush adopted views “sympathetic to Evangelicals” and was widely perceived as holding Evangelical views himself. Id. at 106.

217. Id. at 109.

218. See id. at 111–13.
supporting racially conservative candidates: support for those candidates tends to be higher among white voters who live in districts with greater proportions of minority residents.\textsuperscript{219}

Increasing secularization, therefore, may intensify fundamentalist religious beliefs. Individuals with a fundamentalist religiosity respond to increased numbers of nonadherents, not by compromising with that group, but by more vigorously endorsing candidates and political approaches that they hope will return the society to their preferred religious principles.

Combating secular forces in this way also seems to strengthen the appeal of religious denominations with a large number of fundamentalist adherents. Christian Smith, a scholar of American Evangelical Christianity, explains that these sects define themselves by their battle against secularism; Evangelical Christianity “flourishes on difference, engagement, tension, conflict, and threat.”\textsuperscript{220} Contemporary pluralism, in Smith’s view, offers an ideal environment for evangelicalism to thrive: “On the one hand, pluralism does not exterminate evangelicalism; on the other, pluralism does not allow evangelicalism’s complete success. . . . It is precisely evangelicalism’s heavy . . . engagement with modern pluralism . . . which reinforces evangelical boundaries, identity, solidarity, mobilization, and membership retention.”\textsuperscript{221}

Increased religious diversity, secularization, and group identity, therefore, tend to polarize individuals with a fundamentalist religiosity. Polarization, however, is not a one-way street. There is also evidence that the increased visibility of fundamentalists pushes individuals with other religious orientations toward a more secular stance. A recent demographic analysis convincingly argues that the sudden rise of American adults claiming no religious affiliation reflects in part a reaction to the prominence of the Religious Right during the 1990s.\textsuperscript{222} The converts to “no religion,” these researchers contend, disapproved “the growing connection . . . between Republicans and Christian evangelicals” and “express[ed] their distance from the Religious Right by saying they prefer no religion.”\textsuperscript{223} No other explanation accounts so well for the rapid increase in “no religion” adults during the 1990s.\textsuperscript{224}

\textsuperscript{219} Id. at 105.

\textsuperscript{220} SMITH, supra note 210, at 153.

\textsuperscript{221} Id. at 150–51; see also James K. Wellman, Jr. & Kyoko Tokuno, Is Religious Violence Inevitable?, 43 J. FOR SCI. STUDY RELIGION 291, 292 (2004) (arguing more generally “that it is a part of the nature of religious communities to gain their identity through conflict and tension with out-group cultures”).

\textsuperscript{222} Hout & Fischer, supra note 172, at 168, 188.

\textsuperscript{223} Id. at 168.

\textsuperscript{224} Id. at 188.
The increasing visibility of conservative religious groups, therefore, pushes some religious moderates to distance themselves from religion. That movement intensifies the secular nature of society, prompting a further reaction from fundamentalists. Religious diversity, in sum, establishes a dynamic that seems to lead inevitably to polarization: diversity, especially in a highly integrated modern society, requires pluralism and government neutrality to accommodate competing religious denominations.\textsuperscript{225} The increased secularization, as well as the underlying diversity, threatens the beliefs of individuals holding fundamentalist religious worldviews. They react by intensifying their religious perspectives and seeking greater government affirmation for their religion; the battle itself further invigorates their sects. Individuals with less fundamentalist perspectives respond to both the increased vibrancy of these sects and their anti-pluralist positions by distancing themselves from religion. That distancing creates still more secularization, perpetuating the cycle.\textsuperscript{226}

Religious nonadherents, meanwhile, contribute their own biases to the mix, further deepening conflict among religious groups. The prejudices of individuals claiming no religious affiliation are weaker than those displayed by the highly religious, but empirical studies confirm that nonadherents perceive religious individuals less favorably than they rate those who share their lack of religious affiliation.\textsuperscript{227} A common example of bias among nonadherents is “the stereotype that religious individuals are conforming, or in need of ‘a crutch’ in order to cope.”\textsuperscript{228} These attitudes, just like those of religious adherents can “foster . . . condescension and self-congratulation.”\textsuperscript{229}

A final element stoking the fires of religious tension is the tendency of any interest group to perceive more hostility from its opponents as it becomes more polarized. Individuals who hold strongly partisan political views, for example, are more likely than others to perceive media bias against their position.\textsuperscript{230} Paul Perl and Mary Bendyna recently demonstrated

\textsuperscript{225} For a discussion of the relationship among diversity, pluralism, and secularization, see J. Milton Yinger, \textit{Pluralism, Religion, and Secularism}, 6 J. FOR SCI. STUDY RELIGION 17, 27 (1967).

\textsuperscript{226} Other scholars have noted various aspects of this cycle. See, e.g., Smith, supra note 210, at 150–51 (noting the importance of pluralism in sustaining evangelicalism); Immanuel Wallerstein, \textit{Render unto Caesar?: The Dilemmas of a Multicultural World}, 66 SOC. RELIGION 121, 132–33 (2005) (suggesting that multiculturalism of the modern world may have reduced tolerance).

\textsuperscript{227} Jackson & Hunsberger, supra note 205, at 519.

\textsuperscript{228} Id. at 511.

\textsuperscript{229} Id.

the same effect within a religious community. A national survey of American Catholics revealed that 68% of them perceived some hostility toward Catholics, either from society as a whole or from a subgroup. Individuals who attended mass more frequently, however, were significantly more likely to perceive bias—especially from liberals and cultural elites—than were other Catholics. People who identify strongly with a position, whether religious or otherwise, are more likely to perceive hostility from others toward their position.

Two recent surveys of the American public suggest the manner in which individuals are becoming increasingly polarized over Establishment Clause issues. In the first, the Washington Post asked respondents which of two statements came closer to their personal view: “The government should take steps to protect America’s religious heritage” or “there should be a high degree of separation between church and state.” Respondents split almost evenly in their choices; 48% chose the former goal, while 47% chose the latter. This poll may have created a false dichotomy by offering respondents just two choices, but the even split is intriguing. Half the public wants the government to act affirmatively to protect America’s religious—and primarily Protestant—heritage, while half supports a “high degree of separation between church and state.” These divergent approaches to church/state relations are difficult, if not impossible, to reconcile.

The second poll centered on the specific, and highly provocative, issue of prayer in the public schools. The survey asked respondents to indicate which of three approaches to this issue “comes closest to your feelings about prayer in the public schools.” Twenty-two percent of the respondents chose “[t]he Lord’s Prayer or some Bible verse should be read daily,” 55% selected “a moment for silent prayer or meditation,” and 21% indicated that “[n]o prayer or other religious observances should be held in the public schools.” This division, unhappily, suggests about half the public will criticize any approach adopted by the schools. Although a slight majority favors a moment of silence, both extremes reject that approach. Endorsing either of those extremes, conversely, would alienate the opposite pole and, most likely, a significant portion of the middle segment as well.

231. Id. at 658–59.
232. Id. at 660.
234. Id. Five percent did not know or had no answer.
235. Id.
236. Id. at 617. In addition to choosing one of the three primary responses, the survey allowed respondents to select “other” or “don’t know.”
237. Id.
The American public, in sum, appears highly polarized on issues of church/state relations. Psychological and social forces suggest that this polarization is likely to continue. Enforcing the Establishment Clause today, given rapidly increasing religious diversity and these forces of divisiveness, may be more difficult than ever. Can the courts and society find a way out of this dilemma?

III. JUSTICE O’CONNOR AND THE ESTABLISHMENT CLAUSE

When Justice O’Connor joined the Supreme Court in 1981, most observers agreed that the Court’s Establishment Clause jurisprudence was muddled at best. Justice O’Connor attempted to make sense of the Court’s rulings by proposing, in her first opinion addressing the clause, a “clarification” of the Court’s previous doctrine. As the centerpiece of her formulation, Justice O’Connor proposed that the Establishment Clause “prohibits government from making adherence to a religion relevant in any way to a person’s standing in the political community.” The essence of nonestablishment, Justice O’Connor suggested, is this distinction between political standing and religious belief. Rather than stressing an institutional “wall of separation between Church and State,” as earlier precedents sometimes suggested, Justice O’Connor focused on the state’s relationship to individual citizens. That connection, she concluded, should not “in any way” depend upon the citizen’s religious identity.

Building on this core principle, Justice O’Connor then consolidated the Court’s three-pronged test for Establishment Clause violations into two key

238. See, e.g., Patrick M. Garry, Religious Freedom Deserves More Than Neutrality: The Constitutional Argument for Nonpreferential Favoritism of Religion, 57 Fla. L. Rev. 1, 5–6 (2005); Thomas R. Hensley & G.R. Jarrod Tudor, An Analysis of the Rehnquist Court’s Establishment Clause Jurisprudence: A New Marriage of Legal and Social Science Approaches, 1999 Rev. Mich. St. U. Detroit C.L. 869, 886 (“It is not too harsh to state that the Court’s Establishment Clause jurisprudence during the Burger years was ‘tumultuous.’ Easily, we can be sure that at least the Establishment Clause cases were inconsistent.”).


241. Id.


inquiries.\textsuperscript{244} First, a court must ask whether the state has created “excessive entanglement with religious institutions.”\textsuperscript{245} Entanglement risks tying political standing to religious affiliation in two ways: it can “give the [religious] institutions access to government or governmental powers not fully shared by nonadherents of the religion” and it can “foster the creation of political constituencies defined along religious lines.”\textsuperscript{246} Both of these evils, notably, relate directly to Justice O’Connor’s concern for the individual citizen’s status. If some religious institutions enjoy special access to government, then nonadherents of those religions enjoy comparatively less access; their religious faith affects their political status. Similarly, if government action “foster[s] the creation of political constituencies defined along religious lines,” then the individual’s political fortunes depend upon the religious group to which he or she belongs.\textsuperscript{247}

The second inquiry, according to Justice O’Connor, is whether government has endorsed or disapproved religion. Again, her query focuses on the effects of government action on individual citizens: “Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.”\textsuperscript{248} By approving or disapproving religion, the government elevates or diminishes a citizen’s political worth based on adherence to that religion.\textsuperscript{249}

The key element of Justice O’Connor’s approach is her focus on the relationship between the individual citizen and the state. Other Establishment Clause inquiries concentrate on the connection between

\textsuperscript{244} The Court’s classic three-pronged test, dating from \textit{Lemon v. Kurtzman}, provides: “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster ‘an excessive government entanglement with religion.’” \textit{Lemon v. Kurtzman}, 403 U.S. 602, 612–13 (1971) (citation omitted).

\textsuperscript{245} \textit{Lynch}, 465 U.S. at 687–88 (O’Connor, J., concurring).

\textsuperscript{246} \textit{Id.} at 688. Justice O’Connor mentioned a third evil of entanglement, that it may “interfere with the independence of the [religious] institutions” themselves, but this concern plays a less central role in her jurisprudence. \textit{Id.}

\textsuperscript{247} \textit{Id.}

\textsuperscript{248} \textit{Id.}

\textsuperscript{249} Consistent with her close attention to context, see \textit{infra} Part III.B, Justice O’Connor has eschewed any attempt to apply these standards rigidly in every Establishment Clause dispute. As she recognized in \textit{Board of Education of Kiryas Joel Village School District v. Grumet}, “the same constitutional principle may operate very differently in different contexts.” \textit{512 U.S. 687, 718} (1994) (O’Connor, J., concurring in part and concurring in the judgment). For that reason, the search for a “Grand Unified Theory . . . may sometimes do more harm than good.” \textit{Id.} Justice O’Connor’s core principle, however, has proved remarkably resilient in resolving a wide range of Establishment Clause cases.
government programs and religious organizations; the very notion of a "wall of separation" suggests that courts can simplistically sort government actions into two categories, one for each side of the wall. Justice O'Connor's standard acknowledges more nuance. The relationship between an individual and the government is inherently complex, and may shift over time. Justice O'Connor's Establishment Clause principle is particularly well suited to supporting the evolution of pluralism in a society that is experiencing rapid religious change.

Justice O'Connor's endorsement test has been widely discussed and generally praised. We focus here on four facets of the test that are essential to its operation and that, taken together, offer particular hope for promoting religious pluralism. First, Justice O'Connor's principle protects religious nonadherents as well as those who belong to organized faiths. Second, the test assesses government action within its social context and as applied to particular cases. Third, the endorsement principle offers governments and religious organizations an incentive to develop programs in a way that promotes pluralism; if they consider and respect all beliefs (including those who affiliate with no organized religion), the courts are more likely to uphold their programs. Finally, Justice O'Connor's endorsement approach fits within a broader principle requiring government to accommodate religious freedom "to the fullest extent possible in a pluralistic society." This formula properly acknowledges the centrality of both religious freedom and pluralism within American constitutional law.


A. Protection of Nonadherents

An increasing number of scholars and jurists have argued that the Establishment Clause prevents official recognition of any one religious sect but allows preferences for religious adherents over nonadherents. Justice O'Connor's jurisprudence firmly rejects that notion. Responding to Justice Rehnquist's suggestion in Wallace v. Jaffree that the Court "limit the reach of the Establishment Clause to state discrimination between sects," Justice O'Connor stressed that the clause "preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred." She returned to this point in several subsequent opinions, noting in one case that "[j]ust as government may not favor particular religious beliefs over others, 'government may not favor religious belief over disbelief,'" and in another that "[w]e have time and again held that the government generally may not treat people differently based on the God or gods they worship, or do not worship." In her final Establishment Clause opinion, Justice O'Connor succinctly summarized: "[Government] may not prefer one religion over another or promote religion over nonbelief."

253. See, e.g., id. at 893–94 (Scalia, J., dissenting); Wallace v. Jaffree, 472 U.S. 38, 95–99 (1985) (Rehnquist, J., dissenting); Garry, supra note 238, at 37–41. Proponents of this view often fail to clarify whether they draw the line between members of organized religion and all other individuals (i.e., adherents and nonadherents); between those who believe in God (whatever their affiliational status) and atheists; or on some other basis. Justice Scalia recently suggested that under some circumstances the line falls between those who endorse a monotheism similar to Judeo-Christian beliefs and all others. McCreary, 545 U.S. at 893 ("With respect to public acknowledgement of religious belief . . . the Establishment Clause permits this disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists.").

The most common distinction, however, is one that distinguishes those who identify with organized religion and those who do not. The types of government action challenged in the courts, moreover, most often reflects this type of distinction. We focus here on that divide, labeling it one between "adherents" and "nonadherents."


255. Id. at 68 (O'Connor, J., concurring in the judgment).

256. Id. at 70 (emphasis added).

257. Allegheny, 492 U.S. at 635 (O'Connor, J., concurring in part and concurring in the judgment) (citation omitted).


259. McCreary County v. ACLU of Ky., 545 U.S. 844, 883 (2005) (O'Connor, J., concurring); see id. at 884 ("The Religion Clauses . . . protect adherents of all religions, as well as those who believe in no religion at all.").
Both our nation’s history and the complexity of its religious beliefs support Justice O’Connor’s interpretation of the Establishment Clause. It is true, as some proponents of the “nonsectarian” Establishment Clause have noted, that history records many statements proclaiming America’s religiosity and Christian nature. Eighteenth and nineteenth century Americans also adopted many practices tying the state closely to religion. Those pronouncements and practices, however, usually accompanied preferences for Protestant sects, avowals of anti-Catholicism, and persecution of other religions. We can not separate these two historical strands, retaining early expressions of piety to define the Establishment Clause, while rejecting the sectarianism that accompanied those expressions as quaint mistakes.

A more candid reading of our history reflects a complex mix of ideals, advances toward those goals, and retreats from them. The United States embraced the principles of religious tolerance and church/state separation at its birth, but actual religious diversity, recognition of minority religions, tolerance, and separation of church and state have all progressed slowly over the years. Our ancestors moved haltingly toward their ideals, just as we do today. America’s history reveals free exercise and establishment principles that too often yielded to prejudice and nativist fears, but our mistakes do not define our ideals. Historical support for an Establishment Clause that favors religious adherents over nonadherents does not exist separate from attitudes and actions that conveyed a sectarian bias we now would reject.

Citizens who identify with no organized religion, moreover, are as varied and complex as those who affiliate with a particular denomination. The majority of contemporary Americans who claim no religious affiliation nonetheless express some belief in God. Almost one-third (29.2%), in fact, declare that they “know God really exists, and . . . have no doubts about it.”260 Another 41.7% express a qualified belief in God,261 while 15.0% articulate the agnostic position that “I don’t know whether there is a God, and I don’t believe there is any way to find out.”262 Just 14.2% of these

261. Id. Qualified beliefs included those who had some doubts but believed in God, those who believed in God some of the time, and those who believed in a “Higher Power of some kind” rather than a “personal God.”
262. Id.
nonadherent adults completely reject a belief in God, a position that adherents of some recognized religions share.

Nor does a lack of formal religious affiliation prevent most Americans from praying. Ninety-three percent of adults who identify with no religion report that they pray at least some of the time; 20% pray at least once a day, and another 18% pray at least once a week. Surprisingly high percentages of these adults, moreover, express a belief in life after death (57%), heaven (42%), and hell (36%).

The majority of contemporary Americans who embrace no religious denomination, in other words, have quite conventional—and theistic—beliefs. As sociologists Michael Hout and Claude Fisher observe, "[t]he key fact . . . about people who express no religious preference is that most are believers of some sort, and many are quite conventional." "No religion" adults differ primarily from their church- or temple-going neighbors on just three characteristics: they do not attend formal services, they express little confidence in religious leaders, and they sharply criticize organized religion. "Their quarrel," Hout and Fisher conclude, "[is] not with God but with people running organized religion."

Religious nonadherents, moreover, view this status as central to their identity. On surveys, individuals who identify with no religion assign their non-belief status an importance rating as high as the one that religious adherents attribute to their denominational affiliations. Nonadherents, therefore, have not simply forgotten about religion; they have consciously chosen a status that expresses their beliefs.

These contemporary nonadherents fit a surprisingly longstanding tradition of rugged individualism in American religion. In 1776, the overwhelming majority of American citizens (83%) adhered to no church. Like current nonadherents, many of those unchurched Americans probably believed in God, prayed, and endorsed other conventional religious beliefs.

263. Id.
264. See generally RAY BILLINGTON, RELIGION WITHOUT GOD (2002) (arguing that removing God from the idea of religious experience, and religion from the idea of morality, would serve to enlighten all members of society).
265. Hout & Fischer, supra note 172, at 176 tbl.3.
266. Id. at 175 tbl.2.
267. Id.
268. Id. at 175–78.
269. Id. at 178.
But they chose, either due to the exigencies of frontier life or personal preference, to maintain a more personal set of religious practices.

This tradition is so strongly rooted in American life that sociologist of religion R. Stephen Warner identifies the "tradition of religious individualism" as one of five characteristics distinguishing American religiosity. In addition to colonial precedents, Warner notes that today's spirit of individual religious choice draws directly on early nineteenth century evangelicalism. Since the nation's origins, Warner concludes, "Americans have been free to choose whether and where to be committed to a religious community..." This tradition spurred development of many Evangelical sects and continues to nourish religious practices today. In the United States, it is has never sufficed simply to accept the family religion; Americans individually affirm their religious faiths—including the choice to disassociate from organized religion.

Given this tradition, it would be artificial to separate adherents of organized religion from nonadherents under the Establishment Clause. Many of the latter believe in God or hold other deeply religious attitudes. Their beliefs, in fact, often closely resemble those of individuals worshipping within established sects. Our American tradition of religious individualism has encouraged these idiosyncratic approaches to faith. The formally unaffiliated are as much a part of American religiosity as are Baptists and Buddhists. Indeed, the unaffiliated have a longer history in America than do many contemporary sects.

Construing the Establishment Clause to favor members of organized religions over religious independents, moreover, disregards a critical point separating the two groups. Most Americans who identify with no religion reject organized religion and its leaders—not religiosity. Allowing the state to favor organized religion under these circumstances denies a genuine religious preference, one that views organized religion as inconsistent with personal religiosity.

Justice O'Connor's recognition that the Establishment Clause protects those who claim no religious affiliation, therefore, is an essential facet of pluralism. The state cannot approve members of organized sects over religious independents, just as it cannot favor Episcopalians over Presbyterians. Religious pluralism requires respect for all traditions,

273. Id. at 21.
274. Id. at 20.
including those who choose to answer fundamental questions of life and meaning without organized religion.

B. Context

Justice O'Connor's Establishment Clause test, like much of her jurisprudence, is highly contextual. Determining whether government action has made a citizen's religious beliefs relevant to his or her political standing is a fact-specific inquiry. In *Lynch*, the opinion in which Justice O'Connor proposed her Establishment Clause principle, she recognized: "Every government practice must be judged in its unique circumstances . . ." 276 After examining the specific components of a city’s contested holiday display, Justice O'Connor concluded that the display was sufficiently secular to avoid sending a message of religious approval or disapproval. 277 Her analysis, however, suggested that a different combination of symbols, displayed under other circumstances, might well violate the Establishment Clause. 278

The contextual nature of Justice O'Connor's inquiry emerged even more clearly in *Wallace v. Jaffree*, 279 where she joined a majority of the Court in striking down an Alabama law that specifically endorsed prayer during moments of silence in the public schools. Justice O'Connor noted that although many moment-of-silence laws might survive Establishment Clause scrutiny, such a "statute, either as drafted or as actually implemented, could effectively favor the child who prays over the child who does not." 280 The question, she concluded, was "whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools." 281 After "examin[ing] the history, language, and administration" of the Alabama statute, Justice O'Connor concluded that the legislature indeed intended to specially endorse prayer during the mandated moment of silence. 282 This conclusion invalidated Alabama's statute, although a similar inquiry in another case might yield the opposite result.

The context-driven nature of Justice O'Connor's endorsement test proved particularly useful in assessing one of the holiday displays

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277. *Id.*
278. *Id.* at 691–94.
279. *Id.* at 73 (O'Connor, J., concurring in the judgment).
280. *Id.* at 73 (O'Connor, J., concurring in the judgment).
281. *Id.* at 76.
282. *Id.* at 74, 78.
challenged in *County of Allegheny v. ACLU Greater Pittsburgh Chapter.*

During December, the City of Pittsburgh exhibited outside its main government offices: a Christmas tree, Chanukah menorah, and sign titled “Salute to Liberty.”

A majority of Justices found no religious message in the Christmas tree or sign; the menorah was more troubling because of its more explicit religious significance. While Justice Blackmun struggled to identify the menorah as a secular object, Justice O’Connor’s contextual focus allowed her to acknowledge that “the menorah is the central religious symbol and ritual object of [the] religious holiday” of Chanukah. Despite the religious meaning of the menorah as an object considered on its own, Justice O’Connor readily concluded that “Pittsburgh’s display of the menorah . . . next to a Christmas tree and a sign saluting liberty . . . sends a message of pluralism and freedom to choose one’s own beliefs.”

Justice O’Connor’s focus on context is essential in a culture that is both emerging from a long history of Protestant dominance and experimenting with new forms of pluralism. An ordinance requiring public school students to observe a moment of silence in a town with a dominant religious sect and a long history of school prayer may implicitly endorse sectarian prayer, while the same ordinance in a town with more tolerant religious traditions could signal genuine support for quiet reflection of any type. Similarly, public display of a menorah in a predominantly Jewish community sends a different message than one that mounts the same menorah as part of a broader display, in a town where Jews represent a minority. These lines seem painstaking to draw, but they are essential to upholding pluralism. Acknowledging all religious traditions, including that of nonadherence, without preferring any, is a task our communities are just learning.

### C. Incentives for Pluralism

Justice O’Connor’s focus on the signals that the state sends to individual citizens offers intriguing incentives for government and religious organizations to establish relationships honoring all religious traditions. If religious majorities consider the perspectives of all citizens, and respect

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284. *Id.* at 581–87. The full text of the sign read: “During this holiday season, the city of Pittsburgh salutes liberty. Let these festive lights remind us that we are the keepers of the flame of liberty and our legacy of freedom.” *Id.* at 582.
285. *Id.* at 614–19.
286. See, e.g., *Id.* at 587 n.34.
287. *Id.* at 633 (O’Connor, J., concurring in part and concurring in the judgment).
288. *Id.* at 634.
those views equally, religion can more easily maintain a role in the public sphere. If the majority is indifferent to the beliefs of some citizens, or overlooks their concerns, then a court is more likely to find messages of approval and disapproval.

Justice O'Connor hints at this dynamic in her concurring opinion in *Bowen v. Kendrick*. In that case, the Court upheld the facial validity of the Adolescent Family Life Act, which allowed religious organizations to receive federal funds for counseling adolescents on issues of sexuality and pregnancy. The majority remanded, however, for determination of whether the Secretary of Health and Human Services had violated the Establishment Clause in applying the statute. Justice O'Connor concurred, stressing that the record clearly showed "evidence of specific incidents of impermissible behavior by . . . grantees." Although she agreed that the district judge would have to determine the extent of violations on remand, she noted that "any use of public funds to promote religious doctrines violates the Establishment Clause" and that "extensive violations—if they can be proved in this case—will be highly relevant in shaping an appropriate remedy that ends such abuses."

Justice O'Connor's *Bowen* concurrence sent a strong "shape up or else" message to the federal agency administering the grant program. If the agency wanted to experiment with faith-based approaches to social problems, it had to do so responsibly. Running the program in a way that used government funds for doctrinal proselytizing would plainly violate the Establishment Clause and lead to judicial termination. Justice O'Connor's approach invites innovative partnerships between government and religion; older notions of the "wall of separation" were more restrictive. But Justice O'Connor's principle limits this invitation, by holding government and religious organizations accountable for implementing their programs in ways that respect the nation's religious diversity. If government or religious groups neglect that responsibility, the Establishment Clause empowers the courts to intervene.

A similar spirit animated Justice O'Connor's opinion for the Court in *Agostini v. Felton*. In that case, she and a majority of the Court overturned a prior decision and allowed New York to resume sending government-paid teachers into parochial schools, where they provided remedial education to

290. Id. at 618.
291. Id. at 622.
292. Id. at 623 (O'Connor, J., concurring).
293. Id. (emphasis in original).
disadvantaged children.\textsuperscript{295} Previous rulings had stressed both the possibility that the publicly paid teachers might adopt sectarian messages and the entanglement that policing the teachers would entail.\textsuperscript{296} Justice O'Connor, however, refused to "presume that public employees will inculcate religion simply because they happen to be in a sectarian environment."\textsuperscript{297} If the state-supported teachers did promote religious ends, then the courts would strike down the program as applied. Without proof of such wrongdoing, there was no reason to invalidate a statute designed to benefit all disadvantaged schoolchildren.\textsuperscript{298}

Justice O'Connor's approach to the Establishment Clause thus allows church and state to experiment with novel approaches, giving both actors an incentive to "get it right," while still allowing courts to intervene when avowedly neutral programs become sectarian or promote religion over nonreligion. This flexibility offers significant advantages at a time when religious diversity, structures within organized religion, social problems, and government programs are all shifting. We cannot overlook our nation's long history of promoting Protestantism, often in the guise of religious neutrality; the courts must continue to approach church/state partnerships with care. At the same time, a presumption that professional, publicly paid teachers will subversively promote sectarian doctrines seems to reflect outdated fears of "Popery" rather than a realistic assessment of the relationship between modern school boards and sectarian schools. An openness to church/state cooperation, bounded by the prerequisites of pluralism, offers government and religious organizations incentives to develop their partnerships in ways that advance pluralism while addressing other social problems.

\textsuperscript{295} Id. at 234–35.
\textsuperscript{296} Id. at 233–34.
\textsuperscript{297} Id. at 234.
\textsuperscript{298} Similarly, in \textit{Mitchell v. Helms}, Justice O'Connor agreed that the Establishment Clause does not bar the government from lending educational materials and equipment to religious schools simply because the schools might use the materials for religious instruction. 530 U.S. 793, 867 (2000). "[P]resumptions of religious indoctrination," she concluded, "are normally inappropriate when evaluating neutral school aid programs under the Establishment Clause." \textit{Id.} at 858 (O'Connor, J., concurring in the judgment). Unfounded suspicion of religious organizations should not invalidate programs providing aid on nonsectarian grounds. On the other hand, religious schools can retain the benefits of government aid only so long as they abide by Establishment Clause constraints. Proof that the schools have diverted more than \textit{de minimis} aid to religious purposes would demonstrate an Establishment Clause violation. \textit{See id.} at 861.
D. Religious Liberty and Pluralism

In her final Establishment Clause opinion, Justice O'Connor placed the clause within the broader context of religious liberty and the Constitution's two Religion Clauses.\textsuperscript{299} The goal of those clauses, she explained, "is clear: to carry out the Founders' plan of preserving religious liberty to the fullest extent possible in a pluralistic society."\textsuperscript{300} This formula elegantly conveys both the joint purpose of the Religion Clauses and the weight to accord the values they embody. Courts interpreting these clauses should emphasize religious liberty; the Constitution attempts to preserve that freedom "to the fullest extent possible."\textsuperscript{301} The indispensable companion and limit to liberty, however, is pluralism. Because pluralism itself is essential to religious freedom in a diverse society, government cannot promote religious liberty in a way that compromises pluralism. If the two values conflict, then liberty cedes to pluralism.

This statement captures the essence of Justice O'Connor's Establishment Clause jurisprudence. Her touchstone, under both this clause and its companion Free Exercise Clause, is "religious liberty." The Constitution bars establishment of any church because that action would unacceptably compromise individual rights to pursue other religions or no religion. As Justice O'Connor explained in \textit{McCreary}, "[v]oluntary religious belief and expression may be as threatened when government takes the mantle of religion upon itself as when government directly interferes with private religious practices."\textsuperscript{302}

In a society hosting diverse religions, however, avoidance of a formally established church is not sufficient to guarantee the full extent of religious freedom. Instead, Justice O'Connor tellingly refers to a "pluralistic society" as the counterweight to raw religious liberty.\textsuperscript{303} A pluralistic society, one that encourages all beliefs equally, cannot accede to some religious demands. The United States, for example, cannot declare itself a "Christian nation," even if some Christian sects hold that affirmation central to their beliefs. Nor can it post the Ten Commandments in courthouses or on

\textsuperscript{299} McCreary County v. ACLU of Ky., 545 U.S. 844, 881 (2005) (O'Connor, J., concurring).
\textsuperscript{300} Id. at 882. Justice O'Connor first introduced this language in \textit{Employment Division, Department of Human Resources v. Smith}, where she criticized the Court's dilution of its Free Exercise standard. 494 U.S. 872, 903 (1990) (O'Connor, J., concurring in the judgment).
\textsuperscript{301} McCreary, 545 U.S. at 882; Smith, 494 U.S. at 903.
\textsuperscript{302} McCreary, 545 U.S. at 883.
\textsuperscript{303} Id. at 882.
statehouse lawns, no matter how much the majority wishes to see them displayed there. These actions, which some might view as an acknowledgement of religious spirit and encouragement of its free expression, violate pluralism by linking religious belief to membership in the political community.

IV. CLOSING REFLECTIONS

Justice O’Connor’s Establishment Clause jurisprudence was generous in its vision and careful in its application. She set sweeping goals, to preserve religious liberty and honor pluralism, then found their expression through painstaking examination of the facts of each case. Critics may differ with some of her applications, but her approach holds great promise for a society attempting to embrace religious pluralism.

Despite more than two centuries of religious freedoms secured by state and federal law, religious pluralism remains uncharted territory. Our nation is still learning to welcome immigrants with diverse religious beliefs, and we are still deciphering the complex riddle of respecting different religious traditions without endorsing them. There are no easy blueprints for genuine religious pluralism; we are still crafting them.

Judicial decisions will play only one part in delimiting a new culture of pluralism. The actions of legislators, school board members, zoning commissioners, and individual Americans will serve as great, if not a greater role in fashioning those bounds. These individuals can consider, not just what the Establishment Clause mandates, but which policies best promote religious pluralism. Continuing our advance toward pluralism, moreover, will require concessions from all segments of the currently polarized church/state debate.

Citizens who occupy the middle ground of that spectrum can expand pluralism by acknowledging the Protestant preferences that mark much of American history, as well as the presence of a significant minority of the

304. A majority of the Supreme Court agreed with Justice O’Connor that posting the Ten Commandments in a courthouse violates the Establishment Clause. Id. at 883–84. She parted from the majority in finding the same violation when the Ten Commandments were displayed on a statehouse lawn. Compare Van Orden v. Perry, 545 U.S. 677 (2005) (plurality opinion), and id. at 698 (Breyer, J., concurring in the judgment), with id. at 737 (O’Connor, J., dissenting).

305. Some observers have pointed out that pluralism is new to white North Americans, but not to the descendants of African Americans transported to this hemisphere. “The African American theological community has always recognized that they live in at least two worlds. There is the world they were torn from in West Africa, and there is the new world... .” BERTHRONG, supra note 158, at xix–xx.
population who clamor to maintain that dominance today. Against that background, legislative prayers, government-sponsored nativity scenes, public pledges to “one nation under God,” and official proclamations that “In God We Trust” are not as neutral or secular as supporters claim them to be. Instead, many of these practices continue to convey distinctively Protestant messages; that is why they arouse such passionate loyalty and opposition among some citizens. Forging a consensus to modify these practices would allow America’s religious diversity to flourish more readily.

At the same time, individuals who champion a strict separation of church and state should recognize that expressions of religiosity in public spaces do not invariably link the state with sectarian messages. Especially if the government abandons official pronouncements invoking Protestantism, a neutral public forum can foster robust religious expressions that embody inclusion and diversity. A moment of silence need not endorse either particular religions or religion in general. Student-organized prayer groups at public schools and universities, religious publications, and other privately generated expressions of religious belief likewise advance pluralism rather than retard it. Strict separationists should also reconsider some programs funding nonsectarian activities at private religious schools. During our nineteenth and twentieth century struggles to “Americanize” immigrants, states first established distinctly Protestant public schools and then rigidly denied aid to largely Catholic private ones. Just as we have learned to remove overt religious practices from the public schools, we can seek ways to broaden educational choice in private schools without directly supporting sectarian practices. We need not perpetuate either of our historical errors.

Citizens who hold a fundamentalist orientation toward their religious beliefs may find it hardest to adapt to pluralism. They will have to reconcile themselves to a society that officially rejects their core belief, that only one religion holds the true path to God. A pluralistic society likewise denies a worldview that sees one chosen religion locked in an eternal struggle against all other religions and the secular society. There is still room under pluralism for these religious believers to express their views and practice their religion freely, but legal norms will not support these facets of their beliefs. As Justice Blackmun wrote for a majority of the Court, including Justice O’Connor, in County of Allegheny, “some would-be theocrats, who wish that their religion were an established creed, . . . may be . . . audacious enough to claim that the lack of established religion discriminates against
their preferences. But this claim gets no relief, for it contradicts the fundamental premise of the Establishment Clause itself.\textsuperscript{306}

One way for all Americans to advance pluralism is to seek expressions of our national unity and uniqueness that avoid religious polarization. Our nation’s first motto, “E Pluribus Unum” or “One from Many” is more eloquent and distinctively American than generic references to our trust in God. Offering citizens the option to pledge allegiance to “one nation, under God” or “one nation, under law” would allow them to choose either the current affirmation or an expression of our nation’s singular commitment to the rule of law.\textsuperscript{307} Our dedication to pluralism, equality, and diversity in all areas are themselves worthy of official celebration.

As citizens, we can also rethink government’s role in religious expression, just as we have redesigned government in other areas. We have embraced privatization for many tasks previously performed by government. Why, then, do our public agencies still mount displays celebrating religious holidays? The resources for private religious expression in the United States are vast; if government pulled back from religious displays, the private sector surely would fill the gap. Religious organizations and commercial enterprises, moreover, are likely to prove much more adept than government at adapting their decorations to the evolving mixture of congregational and neighborhood beliefs. Government need not proclaim America’s religiosity; Americans can do it themselves.

Thoughtful compromises by citizens and leaders, of course, will not solve all Establishment Clause disputes. The courts will continue to define the boundaries of pluralism, protecting religious liberty on the one hand while assuring that the state honors all beliefs on the other. Justice O’Connor’s Establishment Clause jurisprudence offers a flexible, pragmatic approach to that challenge. Her primary principle, that the clause “prohibits government from making adherence to a religion relevant in any way to a person’s standing in the political community,”\textsuperscript{308} focuses judicial attention on the primary impediment to pluralism addressed by the clause. And the four facets of her principle—respect for religious independents, contextual evaluation of government action, incentives for both government and religious organizations to create pluralistic connections, and

\textsuperscript{306} County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 611 (1989) (Blackmun, J., delivering the opinion of the Court with respect to section V-C).

\textsuperscript{307} See CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 152 (2007) (proposing “under law” as an approved option for “under God”) (emphasis omitted).

acknowledgement of the need to encourage religious liberty "to the fullest extent possible in a pluralistic society"—complement that pluralistic goal.

The United States has led the world in fostering two essential elements of freedom: religious liberty and judicial enforcement of constitutional rights. The Establishment Clause stands at the intersection of those two principles. Enforcing that clause is one of the most contentious tasks that the courts perform, but it is also one of the most critical. We have not always achieved the ideals embedded in the Establishment Clause, but we have always strived toward them. As Justice O'Connor stressed at the close of her quarter century of outstanding service on the Supreme Court, separation of church and state is essential for both individual liberty and religious pluralism. "Those who would renegotiate the boundaries between church and state must therefore answer a difficult question: Why would we trade a system that has served us so well for one that has served others so poorly?"


310. McCreary, 545 U.S. at 882 (O'Connor, J., concurring).