

THE SUPREME COURT’S FACILITATION OF WHITE CHRISTIAN NATIONALISM

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INTRODUCTION.....	835
I. <i>JAGER V. DOUGLAS COUNTY SCHOOL DISTRICT</i>	837
II. THE PROMOTION OF CHRISTIAN NATIONALISM	840
<i>A. Christian Nationalism Explained</i>	841
<i>B. Government-Sponsored Christianity and Christian Nationalism</i>	846
III. END GOVERNMENT-SPONSORED CHRISTIANITY.....	858
CONCLUSION	865

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Doug Jager, a band student of Native-American ancestry, complained about the Christian prayers at his Georgia public school's football games. Rather than address his concerns, the school lectured him on Christianity and proposed an alternative that appeared neutral yet would result in the continuation of the Christian prayers. In striking down the school's proposal, Judge Frank M. Johnson Jr. understood some of the ramifications of state-sponsored Christianity.

Despite Supreme Court rulings limiting Christian invocations at public-school events, government-sponsored Christian prayers and Christian symbols remain plentiful in the United States. This proliferation of government-sponsored Christianity around the country both reflects and strengthens Christian nationalism.

Christian nationalism maintains that the United States is and should be a Christian nation, and Christian nationalism's defining characteristic is the belief that religious identity and national identity overlap completely. Christian nationalism necessarily implies a hierarchy based on religion, with Christian insiders who are true Americans and non-Christian outsiders who are not. Moreover, studies show that those with strong identification with Christian nationalism have more hostile attitudes towards out-groups, religious and otherwise. That hostility paves the way for hostile public policy. Consequently, Christian nationalism does not simply lead to symbolic exclusion from the community and nation; it may lead to actual exclusion.

Thus, as the sociological evidence establishes, the potential harms of government-sponsored Christianity are not just offense but also discriminatory attitudes and discriminatory policies. The insight embedded in Establishment Clause doctrine that the government should not favor one religion over others is validated by contemporary social science. As a result, instead of eviscerating separation of church and state, the Establishment Clause ought to be recognized as more important than ever.

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INTRODUCTION

In 1985, student and marching-band member Doug Jager challenged his public high school's practice of starting its football games with an invocation.¹ Historically, the Georgia public school had invited a Christian minister,² and the prayers were often explicitly Christian.³ Jager, a Native-American who did not practice Christianity,⁴ complained that the Christian invocations violated his religious beliefs.⁵ He also "had had enough of being ridiculed for not bowing his head as Jesus was invoked on the public address system."⁶ In response, the school proposed allowing school clubs to select a student, parent, or school staff member to give an invocation instead.⁷ Under this "equal access" plan, the school would not monitor the content.⁸ In Georgia's Douglas County School District, where most inhabitants were Protestant Christians, such a solution would have resulted in overwhelmingly Christian invocations.⁹ It was this proposal that Judge Johnson of the Eleventh Circuit Court of Appeals held violated the Establishment Clause in *Jager v. Douglas County School District*.¹⁰

My contribution to the Judge Frank M. Johnson Jr. Centennial Symposium makes three points. First, Judge Johnson's analysis in *Jager* was spot-on. He was right to apply the *Lemon* test rather than the *Marsb* test, and he was right to find that both the primary purpose and primary effect of the school district's plan was to continue Christian invocations in violation of the Establishment Clause.

Second, I argue that government-sponsored Christianity,¹¹ while always troubling under the Establishment Clause, becomes even more so when viewed through the lens of this country's growing Christian nationalism. Christian nationalism is the belief that the United States "has been and should always be distinctively Christian in its identity, values, sacred symbols and policies."¹² It

1. *Jager v. Douglas Cty. Sch. Dist.*, 862 F.2d 824, 826 (11th Cir. 1989).

2. *Id.* at 826 n.2 (finding that, with a few exceptions, "Protestant Christian clergymen gave every invocation delivered at Douglas County High School games from 1974 to 1986").

3. *Id.* at 826 (noting that prayers often invoked Jesus Christ or closed with "in Jesus' name we pray").

4. *Id.* at 826 & n.3.

5. *Id.* at 826.

6. Nat Hentoff, *Should God Be Barred from High School Football?*, WASH. POST (Feb. 25, 1989), https://www.washingtonpost.com/archive/opinions/1989/02/25/should-god-be-barred-from-high-school-football/1974919a7-96e8-4146-b6af-22cfcac4a029/?utm_term=.e717ccb043a5.

7. *Jager*, 862 F.2d at 827.

8. *Id.*

9. *Id.* at 831.

10. *Id.* at 829–33.

11. As used here, government-sponsored Christianity is when the government sponsors Christian prayers, monuments, or practices that are exclusively, or at least almost exclusively, Christian. Whatever the outer limits, government-sponsored Christianity includes at least the Christian prayers of *Town of Greece v. Galloway* and the Christian Latin cross of *American Legion v. American Humanist Ass'n*.

12. Samuel L. Perry & Andrew L. Whitehead, *Christian Nationalism and White Racial Boundaries: Examining Whites' Opposition to Interracial Marriage*, 38 ETHNIC & RACIAL STUD. 1671, 1672 (2015).

conceives of religion and government as wholly overlapping rather than separate spheres.¹³ Government-sponsored Christianity both reflects and furthers Christian nationalism.

Growing Christian nationalism is a problem because recent social science has found that Christian nationalism is strongly linked to hostility towards out-groups, and this hostility paves the way for hostile public policy. Consequently, Christian nationalism does not simply symbolically exclude some from their community and country; it may lead to actual exclusion.¹⁴

The Establishment Clause, as the Supreme Court has long held, bans the government from favoring some religions over others.¹⁵ This commitment to separation of church and state, however, is fading, as the Supreme Court moves towards an approach that allows government-sponsored Christianity. Nowhere is this more apparent than the Supreme Court's two most recent Establishment Clause decisions. First, in *Town of Greece v. Galloway*, the Supreme Court rejected an Establishment Clause challenge to the town's explicitly Christian legislative prayers.¹⁶ Second, in *American Legion v. American Humanist Ass'n*, the Court held that a forty-foot Latin cross, located adjacent to a busy highway intersection in Bladensburg, Maryland, and designated as a war memorial to World War I veterans,¹⁷ did not violate the Establishment Clause.¹⁸

Yet emerging social science confirms that there was good reason for the Establishment Clause ban on preferring one religion over others. Such government favoritism does not merely cause offense but embodies and encourages Christian nationalism, with its discriminatory attitudes and policies. In other words, as James Madison warned in his *Memorial and Remonstrance*, government-

13. See Joshua Davis, *Enforcing Christian Nationalism: Examining the Link Between Group Identity and Punitive Attitudes in the United States*, 57 J. FOR SCI. STUDY RELIGION 300, 301 (2018) ("This desire for a government that reflects not only the American interest, but the Christian interest as well, leads many to form an ideology of what may be called 'Christian nationalism.'").

14. See *infra* Part II.B.

15. See, e.g., *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 703 (1994) ("[A] principle at the heart of the Establishment Clause [is] that government should not prefer one religion to another, or religion to irreligion."); *County of Allegheny v. ACLU*, 492 U.S. 573, 605 (1989) ("Whatever else the Establishment Clause may mean . . . it certainly means at the very least that government may not demonstrate a preference for one particular sect or creed . . ."); *Larson v. Valente*, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.")

16. 572 U.S. 565, 628 (2014) (Kagan, J., dissenting) ("Many prayers contained elaborations of Christian doctrine or recitations of scripture. ('And in the life and death, resurrection and ascension of the Savior Jesus Christ, the full extent of your kindness shown to the unworthy is forever demonstrated'); ('For unto us a child is born; unto us a son is given. And the government shall be upon his shoulder . . .')" (citations omitted)).

17. 139 S. Ct. 2067, 2077 (2019) (plurality opinion).

18. *Id.* at 2089 ("[W]e conclude that the Bladensburg Cross does not violate the Establishment Clause.")

avored religion helps create second-class citizens.¹⁹ Accordingly, my third point is that the best way to advance Establishment Clause values and the equality of all Americans, regardless of religious belief, is to eliminate government-sponsored Christianity, whether it be Christian prayers or Christian symbols.

Part I examines Judge Johnson's decision in *Jager v. Douglas County School District*, along with some Establishment Clause basics. Part II explains Christian nationalism and argues that government-sponsored Christianity reflects and exacerbates Christian nationalism. In particular, it summarizes the social science that finds alignment between Christian nationalism and discriminatory attitudes and policies. Part III contends that to help curb Christian nationalism and its negative effects, the Court's move towards allowing government-sponsored Christianity ought to be reversed. Such a result is more in keeping with the Establishment Clause goal of avoiding a caste system based on religious belief.

I. *JAGER V. DOUGLAS COUNTY SCHOOL DISTRICT*

Judge Johnson decided *Jager v. Douglas County School District* in 1989, before the Supreme Court had issued either of its two decisions addressing religious invocations at public schools.²⁰ Consequently, he was in somewhat uncharted territory. The first question Judge Johnson faced was whether to rely on the standard *Lemon* test or the special *Marsh* test. Second, he then had to apply his selected doctrinal test with limited Supreme Court guidance. He made the right call at both steps.

Lemon v. Kurtzman holds that state action that has either the primary purpose or the primary effect of promoting religion, especially one religion over all others, violates the Establishment Clause.²¹ Although the *Lemon* test has fallen out of favor with the current Supreme Court,²² it was the controlling Establishment

19. James Madison, Memorial and Remonstrance Against Religious Assessment, in 8 THE PAPERS OF JAMES MADISON 295, 302 (Robert A. Rutland et al. eds., 1973) (“It degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority.”).

20. They include *Lee v. Weisman*, 505 U.S. 577 (1992), and *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000).

21. 403 U.S. 602, 612–13 (1971); see also *Zelman v. Simmons-Harris*, 536 U.S. 639, 668 (2002) (O’Connor, J., concurring) (“A central tool in our [Establishment Clause] analysis of cases in this area has been the *Lemon* test. As originally formulated, a statute passed this test only if it had ‘a secular legislative purpose,’ if its ‘principal or primary effect’ was one that ‘neither advance[d] nor inhibit[ed] religion,’ and if it did ‘not foster an excessive government entanglement with religion.’ In *Agostini v. Felton*, we folded the entanglement inquiry into the primary effect inquiry.” (alterations in original) (citations omitted) (quoting *Lemon*, 403 U.S. at 612–13)).

22. *Am. Legion*, 139 S. Ct. at 2080 (“If the *Lemon* Court thought that its test would provide a framework for all future Establishment Clause decisions, its expectation has not been met. . . . This pattern is a testament to the *Lemon* test’s shortcomings.”); *id.* at 2092 (Kavanaugh, J., concurring) (“[T]his Court no longer applies the old test articulated in *Lemon v. Kurtzman*.”); *id.* at 2097 (Thomas, J., concurring) (“I would take the logical next step and overrule the *Lemon* test in all contexts.”); *id.* at 2101 (Gorsuch, J., concurring) (“*Lemon* was a misadventure.”).

Clause doctrine of the day.²³ The one exception to it was carved out in *Marsh v. Chambers*.²⁴ In *Marsh*, the Supreme Court upheld nondenominational prayers before legislative sessions largely based upon the originalist argument that since the Founders prayed before legislative sessions, they must have thought them constitutional, and if they found them constitutional, so should we.²⁵

First, Judge Johnson correctly rejected applying *Marsh* to the case before him and instead relied on *Lemon*.²⁶ He found *Marsh* inappropriate because, unlike the nondenominational prayers before legislative sessions in *Marsh*, Christian prayers before public-school football games do not date to the founding era.²⁷

His decision is consistent with the Supreme Court establishment decisions made soon after, where the Court was especially mindful of young people's vulnerability to coercion. Students at school are more susceptible to coercion in part because they are more likely to be a captive audience.²⁸ For example, as a saxophone player in the school band,²⁹ Doug Jager had no choice but to attend football games. In addition, compared to adults, schoolchildren are more impressionable and therefore more easily pressured into participating in religious exercises.³⁰

Second, Judge Johnson correctly concluded that the school's "equal access" proposal failed both prongs of the *Lemon* test. He found that its primary purpose was to continue the practice of Christian prayers.³¹ The school articulated four goals for its proposed "equal access" invocations: continuing a tradition; solemnizing the football game; reminding everyone of the "importance of sportsmanship"; and "satisfy[ing] the genuine, good faith wishes [of the] majority of the citizens of Douglas County to publicly express support for

23. *Jager v. Douglas Cty. Sch. Dist.*, 862 F.2d 824, 828 (11th Cir. 1989) ("[T]he *Lemon* test has been applied in all cases since its adoption in 1971, except in *Marsh v. Chambers* . . ." (quoting *Edwards v. Aguillard*, 482 U.S. 578, 583 n.4 (1987))).

24. 463 U.S. 783 (1983).

25. *Id.* at 790–91 ("It can hardly be thought that in the same week Members of the First Congress voted to appoint and to pay a chaplain for each House and also voted to approve the draft of the First Amendment for submission to the states, they intended the Establishment Clause of the Amendment to forbid what they had just declared acceptable. . . . [I]t would be incongruous to interpret that Clause as imposing more stringent First Amendment limits on the states than the draftsmen imposed on the Federal Government.").

26. *Jager*, 862 F.2d at 829 ("[T]he *Lemon* test guides this Court's analysis in the case at bar."). I leave aside the question of whether *Marsh* was correct in the first place, which it wasn't. Backward-looking originalism is generally the wrong approach when dealing with forward-looking equality issues.

27. *Id.* ("[T]he present case does not lend itself to *Marsh*'s historical approach because invocations at school-sponsored football games were nonexistent when the Constitution was adopted.").

28. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 311 (2000) (noting that school band members may be required to attend football games); *Lee v. Weisman*, 505 U.S. 577, 595–96 (1992).

29. Hentoff, *supra* note 6.

30. *Santa Fe*, 530 U.S. at 311–12; *Lee*, 505 U.S. at 593–94.

31. *Jager*, 862 F.2d at 830.

Protestant Christianity.”³² As Judge Johnson pointed out, the first three goals could have been accomplished by Jager’s proposed secular invocation.³³ Given that the school rejected this option, it was clearly the last goal—promoting Protestant Christianity—that drove the school’s proposal. Accordingly, Judge Johnson held that the primary purpose of the “equal access plan” was to promote Christianity.³⁴

Judge Johnson also concluded that the primary effect of the school’s proposal would be to promote Christianity.³⁵ To be sure, on its face, the equal access plan was neutral. Its language did not mention Christianity, and in theory, any religious beliefs, or even secular beliefs, could benefit from the school’s platform and stamp of approval. Indeed, the current Supreme Court might well find it constitutional.³⁶ In many ways, Douglas County’s equal access plan parallels the prayer policy in *Town of Greece v. Galloway*³⁷, another case involving almost exclusively Christian prayers. Like the school’s plan, the town’s plan provided for facially neutral “equal access”: clergy from every congregation in town were welcome (and invited) to preside over the legislative prayers.³⁸ Like the school plan, the town said it would not direct the content.³⁹ Like the school district, the town was mostly Christian, as were most of the prayers.⁴⁰ Despite this sectarian result, the Supreme Court held the town of Greece’s prayer program did not violate the Constitution because it did not explicitly or intentionally exclude non-Christians.⁴¹ The Court further argued that though the exclusively Christian, government-sponsored prayers might offend some, they did no actual harm.⁴²

Rather than emphasizing the formal equality of the school’s plan (anyone could be chosen), Judge Johnson emphasized the lack of substantive equality

32. *Id.* at 829.

33. *Id.* at 830 (“Since the School District rejected [the Jagers’ proposed secular] compromise even though it would have fulfilled the three secular purposes of pregame invocations, it is clear that the School District was most interested in the fourth purpose served by the invocations.”).

34. *Id.*

35. *Id.* at 830–31.

36. However, it might not for two reasons. First, the school context might lead the Court to apply a different standard. Second, the Court might find that, unlike the town of Greece, the school district did intend to exclude non-Christians. The former would be much more likely than the latter, as the Court minimized evidence that the town of Greece had intended to exclude non-Christians. For example, even after residents complained about years of Christian prayers, the town of Greece did not change its policy.

37. 572 U.S. 565 (2014).

38. *Id.* at 571–72. Strictly speaking, it did not favor some religions over others on its face. However, if the invitations were limited to congregations, then even on its face it favored religious speakers over nonreligious ones.

39. *Id.* at 571.

40. *Id.*

41. *Id.* at 591–92.

42. *Id.* at 589 (“Adults often encounter speech they find disagreeable; and an Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views in a legislative forum . . .”).

(Protestant Christians will be chosen). That is, his analysis focused not on what in theory might happen but what in reality would likely happen. And in reality, almost all school-sponsored prayers in a district where most people were Protestant Christians would be Protestant Christian.⁴³ As Judge Johnson noted, the invocations had been Protestant since 1947.⁴⁴ Thus, allowing the school's plan to proceed would have resulted in school-sponsored Protestant Christian prayers. Judge Johnson never questioned whether this was sufficient to violate the Establishment Clause.⁴⁵ It was. State-sponsored prayers that were primarily Christian favored Christianity in violation of the Establishment Clause.

Although he did not elaborate on the consequences for Doug Jager of attending a school that welcomed predominantly Christian prayers, Judge Johnson hinted that they would be more than mere offense. In the opinion's opening paragraph, Judge Johnson noted that after Jager told his high school principal that the Christian prayers conflicted with his religious beliefs, the principal gratuitously passed along the complaint to Jager's band director, who then "proceeded to lecture Doug on Christianity."⁴⁶ It was not just that the principal failed to keep young Jager's complaint private but that his band director felt comfortable enough to lecture Jager about the superiority of Christianity (over, presumably, whatever Jager believed in).

A profile published in the *Washington Post* detailed further repercussions for the Jagers, none of which can be chalked up to "feeling offended." The family became targets of harassment, suffering slashed car tires and receiving such an inundation of threatening phone calls that they installed an answering machine.⁴⁷ As studies detailed in the next Part bear out, state-sponsored Christianity results in more than just "offense" to non-Christians. Thus, Judge Johnson was right to find the plan unconstitutional.

II. THE PROMOTION OF CHRISTIAN NATIONALISM

My second point is that this desire for the government to sponsor Christian prayers—or display Christian symbols—reflects Christian nationalism and helps perpetuate Christian nationalism. And Christian nationalism is not a good development.

43. *Jager*, 862 F.2d at 831 ("In addition, Protestant Christianity is the majority religious preference in Douglas County.").

44. *Id.*

45. *See id.* ("[T]he likely result of the equal access plan will be the continuation of Protestant Christian invocations, which have been delivered since 1947. Moreover, the equal access plan places those attending football games in the position of participating in a group prayer. Consequently, the plan violates the primary effect prong of the *Lemon* test.")

46. *Id.* at 826.

47. Hentoff, *supra* note 6. Asked whether he was worried about his son's safety, with "[h]is lip trembling," Jager's father responded, "How could he be in danger? He's among Christians." *Id.*

A. *Christian Nationalism Explained*

What is Christian nationalism? Christian nationalism is the belief that the United States has always been, and should always remain, a Christian nation in both its culture and government. It envisions a perfect overlap between religious identity and national identity.⁴⁸

Christian nationalists believe that the United States has a special relationship with God⁴⁹: “[T]he United States is God’s chosen country, a ‘city on a hill’”⁵⁰ Because it is a core belief, one of the questions sociologists use to measure Christian nationalism is whether the respondent believes that “the success of the United States is part of God’s plan.”⁵¹

In order to stay in God’s favor, “the United States must uphold God’s commands and not break the covenant.”⁵² A failure to obey God’s laws—and by that Christian nationalists mean God’s laws as they understand them—will lead to great national harm.⁵³ Consequently, Christian nationalism requires a Christian government to ensure that the United States abides by Christian principles. This belief is reflected in the other questions used to measure Christian nationalism, namely, asking whether: “the federal government should declare the United States a Christian nation”; “the federal government should advocate Christian values”; “the federal government should allow the display of religious symbols in public spaces”; and—especially pertinent for *Jager*—whether “the federal government should allow prayer in public schools.”⁵⁴ The more strongly people agree (or disagree with the statement “the federal government should

48. See Andrew L. Whitehead, Samuel L. Perry & Joseph O. Baker, *Make America Christian Again: Christian Nationalism and Voting for Donald Trump in the 2016 Presidential Election*, 79 SOC. RELIGION 147, 165 (2018) (“Christian nationalism is a pervasive set of beliefs and ideals that merge American and Christian group memberships”).

49. Eric Leon McDaniel, Irfan Nooruddin & Allyson Faith Shortle, *Divine Boundaries: How Religion Shapes Citizens’ Attitudes Toward Immigrants*, 39 AM. POL. RES. 205, 212 (2011) (“[T]he American nation holds a special connection with God and has a central role in the divine plan.”).

50. Andrew L. Whitehead & Samuel L. Perry, *A More Perfect Union? Christian Nationalism and Support for Same-Sex Unions*, 58 SOC. PERSP. 422, 425 (2015).

51. *Id.* at 427; see also Davis, *supra* note 13, at 305; Whitehead, Perry & Baker, *supra* note 48, at 155.

52. Whitehead & Perry, *supra* note 50, at 425.

53. See *id.* at 423 (defining Christian nationalism as “the belief that (1) God chose the United States and (2) the United States must follow God’s commands to flourish”).

54. *Id.* at 427; see also Davis, *supra* note 13, at 305; Whitehead, Perry & Baker, *supra* note 48, at 155. The last two questions do not mention Christianity in particular. Nonetheless, as we saw in *Jager*, the introduction of facially neutral prayers (or facially neutral religious symbols) is very often equivalent to the introduction of Christian prayers. Governments are displaying Latin crosses, not Stars of David (Judaism), or star-and-crescents (Islam), or nine-pointed stars (Bahai), or wheels of dharma (Buddhist), or oms (Hindu), or yin and yang (Taoist), etc. See Andrew L. Whitehead, Landon Schnabel & Samuel L. Perry, *Gun Control in the Crosshairs: Christian Nationalism and Opposition to Stricter Gun Control Law*, SOCIUS, July 23, 2018, at 1, 4 n.6 (“[W]e believe it would be a stretch to argue that the vast majority of American adults have anything else but Christianity in mind when they are asked about whether the federal government should allow the display of religious symbols in public spaces, or prayer in public schools, or whether the success of the United States is God’s plan.”).

enforce strict separation of church and state”),⁵⁵ the stronger their alignment with Christian nationalism.

If America is a Christian nation, it follows that true Americans are Christian.⁵⁶ “A person who views the United States as a Christian nation will likely believe (explicitly or implicitly) that to be a ‘true’ American, one must be Christian.”⁵⁷ The corollary is that non-Christians are not real Americans. “[B]y conditioning recognition as an authentic American on adherence to Christian faith, the idea of a Christian America tacitly reinforces the moral prestige of the religious majority, even as it presents Americans of other faiths, or with no formal religion, with invisible barriers to symbolic inclusion.”⁵⁸ In short, Christian nationalism necessarily implies a hierarchy based upon religion, with Christian insiders who truly belong and non-Christian outsiders who do not.⁵⁹

Notably, this hierarchy is not solely a religious one. Christian nationalism has a racial dimension to it,⁶⁰ so that the mythical Christian America pictured is actually a white Christian America.⁶¹ In other words, “Christian nation” is usually understood to mean “white Christian nation.”⁶²

55. Whitehead & Perry, *supra* note 50, at 427.

56. Jeremy Brooke Straughn & Scott L. Feld, *America as a “Christian Nation”? Understanding Religious Boundaries of National Identity in the United States*, 71 SOC. RELIGION 280, 283 (2010) (“[T]he statement that ‘America is a Christian nation’ not only posits an intersection between religious and national boundaries; it also implies that the boundary between Christians and non-Christians helps regulate the threshold between more and less ‘prototypical’ Americans.”).

57. Whitehead & Perry, *supra* note 50, at 424.

58. Straughn & Feld, *supra* note 56, at 281.

59. Whitehead, Perry & Baker, *supra* note 48, at 150 (noting that Christian nationalism is not only explicitly Christian but is also “often quite explicitly evangelical, and consequently, impl[ies] the exclusion of other religious faiths or cultures”).

60. See John Tehranian, Note, *Performing Whiteness: Naturalization Litigation and the Construction of Racial Identity in America*, 109 YALE L.J. 817, 835 (2000).

61. Rhys H. Williams, *Civil Religion and the Cultural Politics of National Identity in Obama’s America*, 52 J. FOR SCI. STUDY RELIGION 239, 243 (2013) (“There has long been a *sub rosa* association that made ‘white Christian American’ the baseline, default cultural understanding of this nation.”). The original racial delineation was actually a religious one:

The Africans brought to the American colonies in those years were distinguished from Europeans principally on the basis of religion, not color. Instead of a bifurcation between white and black to define the Self and the Other, the English called themselves “Christians” while referring to the Others—the Africans—as “heathens.”

Tehranian, *supra* note 60, at 829–30 (footnote omitted). It switched from religion to race when black slaves started converting to Christianity. *Id.* at 831. “The principal criteria for distinguishing the English from the Africans transformed from mutable religious affiliations to immutable differences in skin color. A number of states even passed statutes preventing blacks from escaping slavery through conversion to Christianity.” *Id.*

62. As one historian noted, “Christian nationalism has always been connected with whiteness. It has always been about [the idea of] America’s founding by white Christians.” Tara Isabella Burton, *What One Pastor’s Anti-Nike Protest Says About Religion and Nationalism in America*, VOX (Sept. 14, 2018, 12:50 PM) (alteration in original) (quoting historian John Fea), <https://www.vox.com/identities/2018/9/14/17855804/alabama-pastor-nike-protest-nfl-kaepernick-christian-nationalism>; see also *infra* notes 61–74 and accompanying text.

This association has a long history.⁶³ “[T]he use of religion as a prime mover in the creation of racial divisions is a critical, but frequently overlooked, tradition in American history.”⁶⁴ When American citizenship by naturalization was limited to white people,⁶⁵ the courts⁶⁶ would use religion to help establish race.⁶⁷ Christians were white;⁶⁸ non-Christians were not.⁶⁹ As Nagwa Ibrahim notes, “the racial and religious systems of domination defined by Whiteness and Christianity overlapped and became intertwined such that a group’s designation as an ‘inferior race’ was in part informed by its affiliation to an ‘inferior religion.’”⁷⁰

Sociological studies show that this association continues to this day. One empirical study concluded that “for whites, religious heritage is infused with racial meaning.”⁷¹ The study asked white people about their desire to pass on their religious beliefs and practices. It found that “the more whites desire their descendants to share the same religious creeds, values, and rituals, the more they would prefer that these descendants be themselves white, and thus, religious heritage is to a large degree equated with whiteness.”⁷² Consequently, the Christian nationalist goal of “‘protect[ing]’ or ‘restor[ing]’ America’s ‘Christian heritage’ is laced with an implicit desire to maintain white supremacy and white

63. Nagwa Ibrahim, Comment, *The Origins of Muslim Racialization in U.S. Law*, 7 UCLA J. ISLAMIC & NEAR EASTERN L. 121, 124 (2008) (“[F]rom the beginning, the American national community was racially constructed as white, whereby a group’s religious affiliation to Christianity was a factor in determining its inclusion into Whiteness and the national community.”).

64. Tehranian, *supra* note 60, at 835.

65. When Congress passed the first federal law on citizenship, it limited naturalization to white people. Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 UCLA L. REV. 405, 412 (2005) (“The first federal citizenship statute, passed by Congress in 1790, limited naturalization to ‘free white’ aliens.”). The Fourteenth Amendment changed that, but “[u]ntil 1952, only whites and blacks could qualify for naturalization.” Tehranian, *supra* note 60, at 819 (footnote omitted).

66. Tehranian, *supra* note 60, at 819 (“Fifty-two cases were reported between 1878 and 1952. In all of these cases, an individual sued to be declared white by law after being denied citizenship rights by immigration authorities on the grounds of racial ineligibility.”).

67. *See id.* at 823 (“[A] petitioner could point to the assimilation of his ethnic group into the core Western European, Christian tradition as evidence of his whiteness.”).

68. *Id.* at 831 (“Nevertheless, practicing Christianity remained a viable means of performing whiteness, with a long history of recognition in American culture and courts.”); *see also* Khaled A. Beydoun, *Faith in Whiteness: Free Exercise of Religion as Racial Expression*, 105 IOWA L. REV. (forthcoming 2020) (“Whiteness stood as the optimal pathway toward naturalized citizenship until 1952. And Christianity . . . often served as the most compelling demonstration of whiteness.” (footnote omitted)).

69. *Cf. id.* at 822 (“It may be true that the blond Scandinavian and the brown Hindu have a common ancestor in the dim reaches of antiquity, but the average man knows perfectly well that there are unmistakable and profound differences between them” (quoting *United States v. Thind*, 261 U.S. 204, 209 (1923))); *see also* Ibrahim, *supra* note 63, at 133 (“One determining factor that courts relied on to classify people as non-white was an applicant’s espousal of and relationship to Islam.”).

70. Ibrahim, *supra* note 63, at 126. Groups that fell on the wrong side of the line at various times include Native-Americans, Jews, Irish Catholics, and currently Muslims. *Id.* at 127, 129, 136; *see also* Beydoun, *supra* note 68 (“[R]eligion remains a potent catalyst in shaping race and racial classifications today.”).

71. Samuel L. Perry, *Hoping for a Godly (White) Family: How Desire for Religious Heritage Affects Whites’ Attitudes Toward Interracial Marriage*, 53 J. FOR SCI. STUDY RELIGION 202, 216 (2014).

72. *Id.* at 203.

racial purity.”⁷³ Not surprisingly, an overwhelming percentage of Christian nationalists are white.⁷⁴

Christian nationalism should not be confused with civil religion, which also imagines a special relationship between the United States and God. But civil religion envisions America’s responsibilities as promoting liberty and justice rather than Christianity.⁷⁵ Thus, American “civil religion views the religious and political spheres as ‘independent but interconnected’, while Christian nationalists ‘advocate a total fusion’ between the two spheres.”⁷⁶ Crucially, too, civil religion is not explicitly Christian.⁷⁷

Nor should Christian nationalism be confused with personal religiosity, which is about “the commitment with which one practices one’s faith,”⁷⁸ as measured by criteria such as church attendance, private prayer, and reading of sacred text.⁷⁹ As opposed to personal religious commitments,⁸⁰ Christian nationalism focuses on public religious expression⁸¹ and intertwined religious and national identity.⁸²

73. Perry & Whitehead, *supra* note 12, at 1685 (“Christian nationalism contains a distinct ethno-racial component . . .”); *see also id.* at 1672 (“Scholars point out that Christian nationalist ideology has historically [been] highly racialized . . . and some theorize that a resurgence of Christian nationalism in the public sphere will likely serve to buttress notions of white purity and systemic non-white exclusion in American social life.”). In Penny Edgell & Eric Tranby, *Shared Visions? Diversity and Cultural Membership in American Life*, 57 SOC. PROBS. 175, 177 (2010), Edgell and Tranby found that about a quarter of Americans surveyed qualified as “cultural preservationists,” a category that more or less overlaps with Christian nationalists as their “vision is distinguished by a commitment to the white Christian cultural heritage that is imagined as still being central to American identity.” *Id.* at 194. In this group, “98 percent [say that the United States] is a Christian nation and that it is a good thing, and that the United States is [a] white nation and that is a good thing.” *Id.* at 190.

74. Perry & Whitehead, *supra* note 12, at 1685 (“The vast majority of Christian nationalists are white and likely envision America’s religious heritage through an Anglo-European, Protestant lens.”).

75. Whitehead, Perry & Baker, *supra* note 48, at 150 (describing civil religion as including “a divine Creator who promises blessings for the nation for fulfilling its responsibility to defend liberty and justice”).

76. Perry & Whitehead, *supra* note 12, at 1672.

77. Whitehead, Perry & Baker, *supra* note 48, at 150 (“While vaguely connected to Christianity, appeals to civil religion rarely refer to Jesus Christ or other explicitly Christian symbols.”); *see also* Samuel L. Perry, Andrew L. Whitehead & Joshua T. Davis, *God’s Country in Black and Blue: How Christian Nationalism Shapes Americans’ View About Police (Mis)treatment of Blacks*, 5 SOC. RACE & ETHNICITY 130, 131–32 (2019) (“American civil religion has often prioritized ‘inclusiveness’ and ‘unity’ as core ideals, and thus can be reimagined to transcend ethnoracial boundaries . . . Christian nationalism, from its inception, has been inextricably linked with white supremacy.”).

78. McDaniel, Nooruddin & Shortle, *supra* note 49, at 210.

79. *Id.* at 218; Perry, Whitehead & Davis, *supra* note 77, at 135–36 (describing the measure of religious commitments as including the “frequency of religious service attendance, scripture reading, and prayer”).

80. *See* Evan Stewart, Penny Edgell & Jack Delehanty, *The Politics of Religious Prejudice and Tolerance for Cultural Others*, 59 SOC. Q. 17, 18 (2018).

81. *Id.* (explaining that public religiosity includes the expectation that “religious beliefs [will] be an integral part of public life”).

82. *Id.*

Christian nationalism is not new.⁸³ Historians disagree about its origins, but the current era does not mark its first appearance.⁸⁴ The idea that the United States is a white, Christian nation blessed by God has motivated doctrines like manifest destiny⁸⁵ and policies like the Chinese Exclusion Act.⁸⁶

The current version of Christian nationalism arguably has its roots in the growth of the Christian right, which prioritizes the enactment of Christian principles as opposed to the salvation of Christian souls.⁸⁷ As Jerry Falwell preached, “If a nation or a society lives by divine principles, even though the people personally don’t know the One who taught and lived those principles, that society will be blessed.”⁸⁸

83. Mark Edwards, *Ebook Introduction to CHRISTIAN NATIONALISM IN THE UNITED STATES* 1 (Mark T. Edwards ed., 2017) (ebook) (“[W]e should avoid ‘decline and revival’ narratives and understand Christian nationalism as a construction . . . that has arisen at various times in various places to accomplish a myriad of work.”); Gene Zubovich, *The Christian Nationalism of Donald Trump*, RELIGION & POL. (July 17, 2018), <https://religionandpolitics.org/2018/07/17/the-christian-nationalism-of-donald-trump/> (“Christian Nationalism has taken many forms over the years . . .”).

84. See, e.g., Daniel K. Williams, *Baptizing Uncle Sam: Tracing the Origins of Christian Nationalism*, 44 REV. AM. HIST. 391 (2016). In *Baptizing Uncle Sam*, Williams reviews two books. *Id.* at 391. Steven K. Green’s *Inventing a Christian America: The Myth of the Religious Founding* suggests Christian Nationalism originated with evangelical Christians in the early nineteenth century. *Id.* In contrast, Kevin M. Kruse’s *One Nation Under God: How Corporate America Invented Christian America* argues it dates back to the New Deal era in the mid-twentieth century. *Id.* at 391–92. Williams himself writes, “Perhaps instead of looking for a single moment when the myth of the Christian nation emerged, we should accept the possibility that this mythology has always been part of the American fabric.” *Id.* at 395.

85. Jason Wilson, *We’re at the End of White Christian America. What Will That Mean?*, GUARDIAN (Sept. 20, 2017, 6:00 AM), <https://www.theguardian.com/us-news/2017/sep/20/end-of-white-christian-america> (“This faith informed the 19th-century doctrine of manifest destiny, which held that the spread of white settlement over the entire continent was not only inevitable, but just. The dispossession of native peoples . . . was carried out under an imprimatur with Christian roots.”); see also Matthew N. Lyons, *Fragmented Nationalism: Right-Wing Responses to September 11 in Historical Context*, 127 PA. MAG. HIST. & BIOGRAPHY 377, 381 (2003) (“Racial nationalism . . . often portrayed the United States as a Christian nation sanctioned by God. These themes came together in the nineteenth-century doctrine of Manifest Destiny.”).

86. See John A. Scanlan, *Aliens in the Marketplace of Ideas: The Government, the Academy, and the McCarran-Walter Act*, 66 TEX. L. REV. 1481, 1504 n.106 (1988) (“Although never explicitly acknowledged by the Supreme Court, two of the factors that contributed to the enactment of the Chinese exclusion laws of the late nineteenth century were concerns about polygamy attributed to the Chinese and the fact that the Chinese were not Christians. Both factors were discussed during the Senate debates on the Naturalization Act of 1870.” (citing CONG. GLOBE, 41st Cong., 2d Sess. 5155-62 (1870))); John Hayakawa Torok, *Reconstruction and Racial Nativism: Chinese Immigrants and the Debates on the Thirteenth, Fourteenth, and Fifteenth Amendments and Civil Rights Laws*, 3 ASIAN L.J. 55, 57 (1996) (“[I]here was a deep fear of granting [Chinese immigrants] political power as they were seen as threatening white Christian hegemony.”); Stephanie Howell, Note, *In the Shadow of Korematsu: Precedent & Policy Considerations for Trump’s Muslim Registry*, 27 S. CAL. INTERDISC. L.J. 593, 598–99 (2018) (“Congress passed the Chinese Exclusion Act of 1882 and later implemented a total ban on immigrants from Asia under the Immigration Act of 1924 to ease the growing panic associated with ‘yellow peril’—a term used to describe the sense of fear that Asian immigrants were out to overtake Christian civilization in the United States.” (footnotes omitted)).

87. Daniel Hummel, *Revivalist Nationalism Since World War II: From “Wake Up, America!” to “Make America Great Again,”* 7 RELIGIONS 128 (2016), reprinted in CHRISTIAN NATIONALISM IN THE UNITED STATES 115, 116 (Mark T. Edwards ed., 2017) (ebook) (“[I]o win divine blessing God cared less about individual souls and more about the principles that society was based upon.”). This view contrasts with early evangelicals such as Billy Graham who “prioritized individual spiritual regeneration over political actions to bring about social reform.” *Id.* at 118.

88. *Id.* at 125.

White Christian nationalism seems ascendant again. Perhaps its resurgence was sparked by the election of President Barack Obama, the first African-American President of the United States.⁸⁹ Perhaps it is a reaction to the demographic shift that made white Christians a numerical minority for the first time⁹⁰ or the impending minority status of white Americans. White people, who were 85% of the U.S. population in 1965, are predicted to be 46% of the population in 2065.⁹¹ Perhaps it is all of the above and several additional reasons. Whatever its cause, many people now openly proclaim their support for Christian nationalism.⁹²

B. *Government-Sponsored Christianity and Christian Nationalism*

Government-sponsored Christianity both reflects and exacerbates Christian nationalism. Christian nationalism maintains that the United States is a Christian nation and that the United States government must further Christian values.⁹³ It is easy to read the Christian invocations at a public high school event as Christian nationalism in practice (never mind a public high school teacher lecturing a student on the merits of Christianity).⁹⁴ Not only do *Jager's* predominantly Christian prayers typify the Christian nationalist agenda, but the racial dynamics do, as well. *Jager* was neither Christian nor white. Indeed, that a white Christian representative of the state had no qualms about trying to convert to Christianity a Native-American under his authority is in some ways a reenactment of America's history of white Christian supremacy vis-à-vis native peoples.⁹⁵

89. Williams, *supra* note 61, at 253 (“As Barack Obama has literally embodied a disruption of the triangle of associations among religion, race, and national identity, these [Christian nationalist] understandings of who we are and our special character in the world are at risk.”).

90. Wilson, *supra* note 85.

91. *Id.*

92. Certainly, Donald Trump has not been shy about “play[ing] to Christian nationalist sentiments.” Whitehead, Perry & Baker, *supra* note 48, at 151. For example, during a campaign stop at Liberty University, Trump told the crowd, “[W]e are going to protect Christianity. . . . Other religions, frankly, they’re banding together. . . . We have to band together. . . . Our country has to do that around Christianity.” *Id.* At a rally at Oral Roberts University, Trump claimed, “There is an assault on Christianity. . . . There is an assault on everything we stand for, and we’re going to stop the assault.” *Id.* Another time, “Trump said, ‘Now, in these hard times for our country, let us turn again to our Christian heritage to lift up the soul of our nation.’” *Id.* at 152. During his campaign, his catchphrase “Make America Great Again” was even set to a Christian hymn. *Id.* at n.2.

93. Perry & Whitehead, *supra* note 12, at 1672 (“Christian nationalism . . . represent[s] a convergence of national and religious identities . . .”).

94. *Jager v. Douglas Cty. Sch. Dist.*, 862 F.2d 824, 826 (11th Cir. 1989). Strictly speaking, the court describes *Jager* getting lectured on Christianity, but it is probably safe to assume that it was not a lecture about its shortcomings. *See id.*

95. After dispossessing Native-Americans of their land on the ground that they were not Christian, the United States attempted to convert Native-Americans to Christianity. Anastasia P. Winslow, *Sacred Standards: Honoring the Establishment Clause in Protecting Native American Sacred Sites*, 38 ARIZ. L. REV. 1291, 1309 (1996) (“*Johnson v. McIntosh*”) authorized the removal of Native Americans from their homelands, with its

Christian prayers at public-school football games are merely one manifestation of Christian nationalism. While official religious invocations at public schools were curtailed by the Supreme Court's decisions in *Lee v. Weisman*⁹⁶ and *Santa Fe Independent School District v. Doe*,⁹⁷ Christian prayers at school-board meetings and other local political meetings have proliferated,⁹⁸ as well as other attempts to reintroduce government-sponsored Christianity into public schools and the wider community.⁹⁹ Some states have sought to require that a Bible study class be made available in all public high schools.¹⁰⁰ Kentucky, for example, now offers classes that "explore the Bible's relevance to contemporary society and culture."¹⁰¹ Other states have passed laws mandating that "In God We

underlying premise being the subjugation of so-called heathen peoples for the sake of civilization and Christianity."); *id.* at 1308 ("Historically, the government explicitly endorsed and attempted to impose Christianity upon Native Americans . . ."); see also Allison M. Dussias, *Ghost Dance and Holy Ghost: The Echoes of Nineteenth-Century Christianization Policy in Twentieth-Century Native American Free Exercise Cases*, 49 STAN. L. REV. 773, 773 (1997) ("In the late nineteenth century, Native Americans were the subject of a United States government Christianization policy that attempted, with the help of Christian churches, to convert Native Americans to Christianity by assigning reservations to Christian groups for proselytization purposes and by suppressing Native American religious beliefs and practices.").

96. 505 U.S. 577 (1992).

97. 530 U.S. 290 (2000).

98. See, e.g., *Freedom From Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ.*, 896 F.3d 1132, 1137 (9th Cir. 2018) (Christian prayers at school-board meetings); *Bormuth v. County of Jackson*, 870 F.3d 494, 497–98 (6th Cir. 2017) (Christian prayers at meetings of the County Board of Commissioners); *Am. Humanist Ass'n v. McCarty*, 851 F.3d 521, 523 (5th Cir. 2017) (Christian prayers at school-board meetings); *Freedom From Religion Found., Inc. v. Mack*, No. H-17-881, 2018 WL 6981152, at *1 (S.D. Tex. Jan. 19, 2018) (Christian prayers in the courtroom); *Nickell v. Franklin Twp. Cmty. Sch. Corp.*, No. 1:16-cv-03193-TWP-MPB, 2017 WL 5952899, at *1 (S.D. Ind. Aug. 17, 2017) (Christian prayers at school-board meetings).

99. Indeed, Christianity still appears at public high school football games in the form of coach-led prayers after games on the field. See *Kennedy v. Bremerton Sch. Dist.*, 869 F.3d 813, 816 (9th Cir. 2017). Christianity also appears in the form of Bible verses on football-game banners. See Lauren McGaughy, *Court Hands Victory to Christian Cheerleaders Who Want Bible Verses on Football Game Banners*, DALL. MORNING NEWS (Aug. 31, 2018, 12:41 PM), <https://www.dallasnews.com/news/courts/2018/08/31/texas-court-hands-christian-cheerleaders-big-victory-fight-display-bible-verses-football-games>; see also, e.g., *Freedom From Religion Found., Inc. v. Concord Cmty. Sch.*, 885 F.3d 1038, 1041 (7th Cir. 2018) (allowing a nativity scene in a school's "Christmas Spectacular"); *Am. Humanist Ass'n v. Douglas Cty. Sch. Dist.* RE-1, 328 F. Supp. 3d 1203, 1214–15 (D. Colo. 2018) (finding that a school-sponsored Christian mission trip violated the Establishment Clause).

100. Erin Richards, *Bible Classes in Public Schools? Why Christian Lawmakers Are Pushing a Wave of New Bills*, USA TODAY (Jan. 23, 2019, 5:45 PM), <https://www.usatoday.com/story/news/education/2019/01/23/in-god-we-trust-bible-public-school-christian-lawmakers/2614567002/> (noting that six states including Florida, Indiana, Missouri, North Dakota, Virginia, and West Virginia introduced so-called "Bible Literacy" bills).

101. Supriya Sridhar, *State Ed Board Approves Bible Literacy Standards for Public Schools*, LOUISVILLE COURIER J. (June 7, 2018, 8:05 AM), <https://www.courier-journal.com/story/news/2018/06/06/kentucky-bible-literacy-class-standards-public-schools/677137002/>. While the Establishment Clause does not bar studying the Bible as part of a literature or world-religions class, these classes will likely be more akin to Sunday-school studies. When the ACLU obtained course materials, it "found some classes were being taught as devotional study, rather than literature." *Id.* For example, students were required "to memorize Bible verses [and] were asked 'What are some promises in the Bible that God gives to everyone who believes in him?'" *Id.*

Trust” be prominently displayed in their public schools.¹⁰² In fact, multiple states now require that the police, the ultimate incarnation of state power, bear the slogan “In God We Trust” on their vehicles.¹⁰³ Mississippi has even changed its official state license plate to a design that prominently features “In God We Trust.”¹⁰⁴ Some might argue that our national motto, “In God We Trust,” does not promote Christianity, as Jews and Muslims also trust in God, and that at the very least the motto should be deemed Judeo-Christian.¹⁰⁵ But liberal Jews usually support separation of church and state, and more conservative Jews often avoid spelling out God’s name lest it become destroyed or defaced.¹⁰⁶ Meanwhile, many Muslims prefer the word *Allah*, which is Arabic for God.¹⁰⁷

Government-sponsored Christian symbols also flourish in the United States.¹⁰⁸ Every year at Christmastime,¹⁰⁹ municipalities across the country erect a nativity scene, the sacred depiction of the birth of Jesus Christ.¹¹⁰ Texas went

102. See, e.g., Stephanie Byrne, *Florida Law Requires ‘In God We Trust’ to Be Displayed in Public Schools Statewide*, NBC7 (Aug. 1, 2018, 8:28 PM), <https://www.wjhg.com/content/news/Florida-law-requires-In-God-We-Trust-to-be-displayed-in-public-school-489807851.html>; Richards, *supra* note 100 (noting that in 2018, six states passed laws requiring schools to post “In God We Trust” and at least nine more introduced similar bills in 2019).

103. Cf. *In God We Trust National Motto*, CONG. PRAYER CAUCUS FOUND., <https://cpcfoundation.com/religious/in-god-we-trust/> (last visited Feb. 14, 2020) (noting that “over 600 cities and counties nationwide display the National Motto in their offices, chambers, official seals, and even on the outside of police and sheriff’s cruisers”).

104. Justin Wise, *New Mississippi State License Plate Features Phrase ‘In God We Trust,’* HILL (Jan. 3, 2019, 10:54 AM), <https://thehill.com/blogs/blog-briefing-room/news/423669-new-mississippi-state-license-plate-features-phrase-in-god-we>.

105. *But cf.* ANDREW L. SEIDEL, *THE FOUNDING MYTH: WHY CHRISTIAN NATIONALISM IS UN-AMERICAN* 4 (2019) (“‘Judeo-’ is a sop, a fig leaf, tossed about to avoid controversy and complaint. It is simply a morsel of inclusion offered to soften the edge of an exclusionary, Christian movement.”).

106. See, e.g., Tracey R. Rich, *The Name of G-d*, JUDAISM 101, <http://www.jewfaq.org/name.htm> (last visited Jan. 19, 2020) (“That is why observant Jews avoid writing a Name of God online: because there is a risk that someone else will print it out and deface it.”); see also Ariela Pelaia, *The Jewish Spelling of “God” as “G-d,”* LEARN RELIGIONS (June 11, 2018), <https://www.learnreligions.com/jewish-spelling-of-god-2076772>.

107. Jamal Badawi, *Who Is Allah?*, WHY ISLAM, <https://www.whylam.org/on-faith/who-is-allah/> (last visited May 17, 2019) (“The proper terminology used, in Islam, for God is ‘Allah.’”); see also Asma Af-saruddin, *Allah*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/Allah> (last visited Feb. 14, 2020) (“Allah is the standard Arabic word for God and is used by . . . Muslims, regardless of their native tongue . . .”).

108. *But see, e.g.,* *Davies v. L.A. Cty. Bd. of Supervisors*, 177 F. Supp. 3d 1194, 1215 (C.D. Cal. 2016) (holding that adding a Latin cross to the county seal violated the Establishment Clause).

109. Only Christianity has one of its holy days recognized as an official federal holiday.

110. Rebecca S. Markert, *Religious Holiday Displays on Public Property*, FREEDOM FROM RELIGION FOUND. (2008), <https://ffrf.org/outreach/item/14019-religious-holiday-displays-on-public-property> (“The most frequent complaint that FFRF receives during November and December concerns religious displays on public property. The majority involve a crèche, or nativity scene, being displayed at a public park, or outside or inside a government building.”). Although sometimes local governments will also erect Jewish menorahs and even the Kwanzaa Kinara, sometimes they do not. And most include the menorah or secular items to ensure the constitutionality of the nativity scene, as suggested by *Lynch v. Donnelly*, 465 U.S. 668 (1984).

further and enacted a law—the “Merry Christmas” bill—to allow nativity scenes in public schools.¹¹¹

Meanwhile, in *American Legion v. American Humanist Ass’n*,¹¹² the Supreme Court upheld the placement on government property of a forty-foot Latin cross, a symbol that has been described as “the principal symbol of Christianity around the world;”¹¹³ “an inspirational symbol of the crucifixion and resurrection of Jesus Christ;”¹¹⁴ and “the principal symbol of the Christian religion, recalling the crucifixion of Jesus Christ and the redeeming benefits of his passion and death.”¹¹⁵ Even the *American Legion* Court acknowledged the Latin cross as “a preeminent Christian symbol.”¹¹⁶ As Justice Ginsburg noted in oral argument, “People wear crosses . . . to show their devotion to the Christian faith.”¹¹⁷ In short, as the Fourth Circuit ruled when finding that the Bladensburg cross violated the Establishment Clause, “One simply cannot ignore the fact that for thousands of years the Latin cross has represented Christianity. Even in the memorial context, a Latin cross serves not simply as a generic symbol of death, but rather a Christian symbol of the death of Jesus Christ.”¹¹⁸

Despite this, the Supreme Court held that the Bladensburg Latin cross did not violate the Establishment Clause because of its “special significance” as a

111. Associated Press, *Texas Gov. Perry Signs ‘Merry Christmas’ Bill into Law*, FOX NEWS (Dec. 21, 2015), <https://www.foxnews.com/politics/texas-gov-perry-signs-merry-christmas-bill-into-law>. The act provides that:

[A] school district may display on school property scenes or symbols associated with traditional winter celebrations, including a menorah or a Christmas image such as a nativity scene or Christmas tree, if the display includes a scene or symbol of:

- (1) more than one religion; or
- (2) one religion and at least one secular scene or symbol.

TEX. EDUC. CODE ANN. § 29.920(b) (West 2018). Other states have attempted to follow in Texas’s footsteps. David Walls, *States Following Texas’ Lead in Protecting Christmas*, TEX. VALUES (Dec. 3, 2013), <https://txvalues.org/2013/12/03/states-following-texas-lead-in-protecting-christmas/> (listing similar proposals in Louisiana, South Carolina, Tennessee, Oklahoma, Georgia, and New Jersey).

112. 139 S. Ct. 2067, 2089 (2019) (plurality opinion).

113. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 792 (1995) (Souter, J., concurring).

114. *Id.* at 797 (Stevens, J., dissenting).

115. *Am. Humanist Ass’n v. Md–Nat’l Capital Park & Planning Comm’n*, 874 F.3d 195, 207 (4th Cir. 2017) (quoting *ACLU v. City of St. Charles*, 794 F.2d 265, 273 (7th Cir. 1996)), *rev’d and remanded sub nom. Am. Legion*, 139 S. Ct. at 2067; *see also id.* (recognizing that the Latin cross “represents with relative clarity and simplicity the Christian message of the crucifixion and resurrection of Jesus Christ, a doctrine at the heart of Christianity” (quoting *Carpenter v. City & Cty. of San Francisco*, 93 F.3d 627, 630 (9th Cir. 1996))). In response to the claim that the Latin cross is a symbol of death, the Fourth Circuit noted, “While the Latin cross may generally serve as a symbol of death and memorialization, it only holds value as a symbol of death and resurrection *because* of its affiliation with the crucifixion of Jesus Christ.” *Id.*; *cf. Gonzales v. N. Twp. of Lake Cty.*, 4 F.3d 1412, 1418 (7th Cir. 1993) (“[W]e are masters of the obvious, and we know that the crucifix is a Christian symbol.”).

116. *Am. Legion*, 139 S. Ct. at 2074.

117. Transcript of Oral Argument at 88–89, *Am. Legion*, 139 S. Ct. 2067 (No. 17-1717); *see also Am. Legion*, 139 S. Ct. at 2107 (Ginsburg, J., dissenting) (“Christians wear crosses, not as an ecumenical symbol, but to proclaim their adherence to Christianity.”).

118. *Am. Humanist Ass’n*, 874 F.3d at 207.

historic monument linked to World War I¹¹⁹ and commemorating the World War I dead.¹²⁰ Even accepting the Court's justification, there is no escaping the fact that a monumental Christian symbol on public land perfectly embodies the Christian nationalism ideal of state-supported Christianity. Indeed, the argument that the Latin cross should be viewed as no more than the government's memorial honoring patriotic sacrifice accomplishes exactly what Christian nationalism intends: the equivalence of a Christian symbol with patriotic values.¹²¹ Consequently, as the Fourth Circuit found, "any reasonable observer" of the Latin-cross monument could easily conclude that the government "either places Christianity above other faiths, views being American and Christian as one in the same, or both."¹²²

Explicitly Christian practices and symbols do not only reflect Christian nationalism, they help perpetuate it as well. In other words, the causation is not all one-way—it rarely is. The government, after all, plays a major role in shaping social and political norms.¹²³ (Indeed, this role is well recognized in public education, where one of the goals of the public-school system is to inculcate values in young men and women.)¹²⁴ Although causation is harder to prove than correlation, social scientists have begun to demonstrate that government policy

119. More than once, the Court characterized the cross as a symbol of WWI and the sacrifices made during that war. *See, e.g., Am. Legion*, 139 S. Ct. at 2085 ("[T]he cross had become a symbol closely linked to the war."); *id.* at 2076 ("Although we do not know precisely why the committee chose the cross, it is unsurprising that the committee—and many others commemorating World War I—adopted a symbol so widely associated with that wrenching event." (footnote omitted)); *id.* (noting "the cross's widespread resonance as a symbol of sacrifice in the war," i.e., WWI).

120. *Id.* at 2074. The Court added that "there is no evidence of discriminatory intent [against non-Christians] in the selection of the design of the memorial or the decision of a Maryland commission to maintain it." *Id.*

121. In some ways, this argument is even more strongly aligned with Christian nationalism. The Latin cross is no longer one religion's special symbol; it is the state's official symbol of honor, respect, and acknowledgment that is to be applied to everyone.

122. *Am. Humanist Ass'n*, 874 F.3d at 212.

123. Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1380 (2001) ("Government inculcates values, defines justice, fairness, and liberty, and shapes behavior.").

124. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 278 (1988) (Brennan, J., dissenting) ("The public school conveys to our young the information and tools required not merely to survive in, but to contribute to, civilized society. It also inculcates in tomorrow's leaders the 'fundamental values necessary to the maintenance of a democratic political system . . .'. All the while, the public educator nurtures students' social and moral development by transmitting to them an official dogma of 'community values.'" (citation omitted) (first quoting *Ambach v. Norwick*, 441 U.S. 68, 77 (1979); then quoting *Bd. of Educ. v. Pico*, 457 U.S. 853, 864 (1982)); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) ("[T]he objectives of public education [is] the 'inculcat[ion] of fundamental values necessary to the maintenance of a democratic political system.'" (quoting *Ambach*, 441 U.S. at 77) (third alteration in original)).

does cause changes in attitudes¹²⁵ and behavior.¹²⁶ “[P]olicy changes can strongly affect how people perceive groups, [and] who is considered to be part of an in- and out-group”¹²⁷

Consequently, while those already drawn to Christian nationalism may push government-sponsored Christianity, because causation is not one-way, government-sponsored Christianity may also promote Christian nationalism.¹²⁸ When the government supports Christian prayers and Christian symbols, it is also—whether explicitly or not, and intentionally or not—supporting Christian nationalism, which, at its core, is about a union of the state with Christianity.

Many, including the Supreme Court, have argued that government-sponsored Christianity usually causes no harm, only offense to those easily offended. In *Jager*, dissenting Chief Judge Roney invoked the Supreme Court’s view of government prayers as merely “a tolerable acknowledgement of beliefs widely held among the people of this country.”¹²⁹

In *Town of Greece*, the Supreme Court essentially held that without proof that someone had been coerced into joining the state-sponsored Christian prayers, they were not a problem—and certainly not a constitutional one.¹³⁰ In fact, the Court insinuated that the non-Christian respondents were thin-skinned whin-

125. See, e.g., Tarik Abou-Chadi & Ryan Finnigan, *Rights for Same-Sex Couples and Public Attitudes Towards Gays and Lesbians in Europe*, 52 COMP. POL. STUD. 868, 870 (2019) (“We find that the introduction of same-sex marriage leads to significantly more positive attitudes toward homosexuality, whereas passing a constitutional ban on same-sex marriage leads to significantly more negative attitudes.”); Katerina Linos & Kimberly Twist, *The Supreme Court, the Media, and Public Opinion: Comparing Experimental and Observational Methods*, 45 J. LEGAL STUD. 223, 247 (2016) (“We find that the American public takes cues from the Supreme Court, which can result in increased support for controversial laws that have been upheld by the Court.”).

126. See, e.g., René D. Flores, *Do Anti-Immigrant Laws Shape Public Sentiment? A Study of Arizona’s SB 1070 Using Twitter Data*, 123 AM. J. SOC. 333, 335 (2017) (finding that the passage of an anti-immigrant law in Arizona led to more anti-immigrant tweets from Arizonans on Twitter); Margaret E. Tankard & Elizabeth Levy Paluck, *The Effect of a Supreme Court Decision Regarding Gay Marriage on Social Norms and Personal Attitudes*, 28 PSYCHOL. SCI. 1334, 1341–42 (2017) (finding that Supreme Court decisions changed people’s perception of social norms and noting that “individuals often use their perceptions of what is common or accepted in a collective as a guide for their own behavior”).

127. Abou-Chadi & Finnigan, *supra* note 125, at 873; see also *id.* at 888 (“[C]hanges in policies can indeed lead to changes in attitudes”).

128. Note that I am not arguing that everyone who supports public religiosity self-identifies as a Christian nationalist. They may subscribe to the beliefs but not use the term. Or they may not agree with all Christian-nationalist beliefs, though supporting government-sponsored prayers and symbols is a core one.

129. See *Jager v. Douglas Cty. Sch. Dist.*, 862 F.2d 824, 836 (11th Cir. 1989) (Roney, C.J., dissenting) (quoting *Marsh v. Chambers*, 463 U.S. 783, 792 (1983)).

130. *Town of Greece v. Galloway*, 572 U.S. 565, 589 (2014) (“Offense, however, does not equate to coercion.”). The Supreme Court also required that state-sponsored prayers neither proselytize nor denigrate other religions. *Id.* at 585 (“Absent a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose, a challenge based solely on the content of a prayer will not likely establish a constitutional violation.”). However, these limits are mostly empty given the Court’s decision to allow Christian prayers. When the government-sponsored prayers are only Christian, they inevitably proselytize Christianity, and the Christian view that Jesus is the only path to salvation inherently denigrates other faiths.

ers, writing, “Adults often encounter speech they find disagreeable; and an Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views”¹³¹

These sentiments are echoed in *American Legion*. The Court assumed that the Latin cross hurts no one and repeatedly mischaracterized the harm as giving “offense.”¹³² Justice Gorsuch’s impatience with people “offended” by this innocuous display is palpable in the opening to his concurrence: “The American Humanist Association wants a federal court to order the destruction of a 94[-]year-old war memorial because its members are offended.”¹³³ Later, he further minimized the harm by reducing it to a “dislike” that does not even confer standing.¹³⁴

The Supreme Court is wrong. If nothing else, government-sponsored Christianity creates a caste system based on religion. For the government to align itself with one and only one religion is to send a message that (a) there is one true religion and (b) adherence to that religion is the approved way to be a true citizen of the polity.¹³⁵ Those who do not bow their heads with the government do not belong in the same way (or at all). In short, government-approved Christian symbols and Christian prayers create an in-group (Christians) and an out-group (non-Christians).¹³⁶ “Those who aren’t Christian—or who aren’t the right kind of Christian—can never be full citizens of the country the Christian nationalists want to create.”¹³⁷

A recent poll reveals how this religion-based hierarchy is not a hypothetical but a real problem in the United States: 32%—that is, almost a third—of Americans said that being a Christian is “very important” to being a true American,

131. *Id.* at 589.

132. See *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2074 (2019) (plurality opinion) (“Eighty-nine years after the dedication of the Cross, respondents filed this lawsuit, claiming that they are offended by the sight of the memorial on public land”). But the respondents did not use the word “offended.” In fact, at one point, the Court states, “[t]he AHA is not offended by the sight of the Argonne Cross or the Canadian Cross of Sacrifice,” citing respondents’ brief, where the word does not appear. *Id.* at 2086.

133. *Id.* at 2098 (Gorsuch, J., concurring).

134. *Id.* at 2099–100. Justice Gorsuch also refers to the lower court as “indulg[ing]” the plaintiffs, as though the lower court were a bad parent spoiling a child who, after all, suffers no harm other than disliking a patriotic monument. See *id.* at 2101.

135. Cf. *Lund v. Rowan County*, 863 F.3d 268, 284 (4th Cir. 2017) (“When the state’s representatives so emphatically evoke a single religion in nearly every prayer over a period of many years, that faith comes to be perceived as the one true faith, not merely of individual prayer-givers, but of government itself.” (quoting *Lund v. Rowan County*, 837 F.3d 407, 434 (4th Cir. 2016) (Wilkinson, C.J., dissenting), as amended (Sept. 21, 2016), *on reb’g en banc*, 863 F.3d 268 (4th Cir. 2017))).

136. Cf. Sanford Levinson, *They Whisper: Reflections on Flags, Monuments, and State Holidays, and the Construction of Social Meaning in a Multicultural Society*, 70 CHI.-KENT L. REV. 1079, 1107 (1995) (“Symbols are an important part of the cultural exchange system that, among other things, establishes relationships of hierarchy and domination.”).

137. MICHELLE GOLDBERG, KINGDOM COMING: THE RISE OF CHRISTIAN NATIONALISM 31 (2006).

and another 19% said it was “somewhat important.”¹³⁸ That over half of Americans think Christianity is a prerequisite to true citizenship is a rather startling conviction for those of us in the United States who are not Christian.¹³⁹ While the government’s expansive sponsorship of Christian prayers and Christian symbols cannot be completely blamed for this pinched and exclusionary view of American citizenship, neither can government-sponsored Christianity be completely absolved. Many factors inform people’s beliefs, and the government’s laws, policies, and practices are unquestionably among them.¹⁴⁰

Moreover, this in-group/out-group dichotomy of who truly belongs to the polity has concrete consequences.¹⁴¹ “Symbolic boundaries are regularly translated into social boundaries, and social boundaries influence which groups have access to resources and certain civil rights and to which groups these are denied.”¹⁴² In plainer terms, these symbolic exclusions lead to actual exclusions.

People think differently about out-groups.¹⁴³ In fact, a growing body of social-science literature has found that those with strong identification with Christian nationalism have more hostile attitudes towards out-groups, religious and otherwise.¹⁴⁴ “Christian nationalism is also a powerful predictor of intolerance toward various out-groups”¹⁴⁵ In one study, those who supported public religiosity¹⁴⁶—a hallmark of Christian nationalism—were more prejudiced, even controlling for a range of demographic and ideological factors.¹⁴⁷

138. BRUCE STOKES, PEW RESEARCH CTR., WHAT IT TAKES TO TRULY BE ‘ONE OF US’ 33 (2017), <https://www.pewresearch.org/global/2017/02/01/what-it-takes-to-truly-be-one-of-us/>; see also PUB. RELIGION RESEARCH INST., PRRI/RNS JUNE 2015 SURVEY 3–4 (2015), <https://www.pri.org/wp-content/uploads/2015/06/June-PRRI-RNS-Religion-News-Survey-Topline.pdf> (responding to the same question, 33% answered being Christian was “very important” to being “truly American” and 20% answered it was “somewhat important”).

139. In addition, 55% of people surveyed by the American Mosaic Project also responded either that “America is a Christian nation and that is a good thing or that [America] is not a Christian nation and that is a bad thing.” Penny Edgell, *An Agenda for Research on American Religion in Light of the 2016 Election*, 78 SOC. RELIGION 1, 6 (2017).

140. See Martha Minow, *Religious Exemptions, Stating Culture: Foreword to Religious Accommodation in the Age of Civil Rights*, 88 S. CAL. L. REV. 453, 456 (2015) (“[T]he government inevitably shapes cultural values . . .”).

141. See Straughn & Feld, *supra* note 56, at 283 (“Even if their immediate effects are largely ‘imagined,’ symbolic boundaries can also have material consequences, serving as ‘an essential medium through which people acquire status and monopolize resources.’” (quoting Michèle Lamont & Virág Molnár, *The Study of Boundaries in the Social Sciences*, 28 AM. REV. SOC. 167, 168 (2002))).

142. Andrew L. Whitehead & Christopher P. Scheitle, *We the (Christian) People: Christianity and American Identity from 1996 to 2014*, 5 SOC. CURRENTS 157, 169 (2018).

143. Cf. Edgell & Tranby, *supra* note 73, at 177 (“Cultural membership is not formal membership. The boundary that marks cultural membership defines insiders and outsiders not in legal or technical terms, but rather in terms of authenticity or legitimacy. It separates ‘true’ or ‘good’ or ‘worthy’ members of the community from ‘false’ or ‘bad’ or ‘unworthy’ ones.”).

144. See e.g., Stewart, Edgell & Delehanty, *supra* note 80, at 17–18.

145. Whitehead, Schnabel & Perry, *supra* note 54, at 3.

146. Stewart, Edgell & Delehanty, *supra* note 80, at 18 (stating that public religiosity means that people “expect religious beliefs to be an integral part of public life and political deliberation”).

147. *Id.* at 18 (“First, preferences for PRE [(public religious expression)] have a significant and unique association with prejudicial attitudes toward religious out-groups. Second, preferences for PRE also have a

Other studies confirm that Christian nationalists are not only more antagonistic to non-Christians, such as Muslims,¹⁴⁸ but also more antagonistic to other out-groups, such as LGBT individuals,¹⁴⁹ immigrants,¹⁵⁰ and racial minorities.¹⁵¹ For example, Christian nationalism is correlated with unwillingness to have one's daughter marry someone who is nonwhite¹⁵² and with the belief that blacks are more violent than whites.¹⁵³ This racial hostility dovetails with the white-supremacist facet of Christian nationalism discussed earlier.¹⁵⁴ "Thus, . . . findings suggest that, for many white Americans, the idealized image of a Christian nation implies a nation where racial boundaries are fortified and white-racial heritage is protected."¹⁵⁵

None of this is to say that religiosity drives intolerance. Notably, people who rated high on *private* religiosity, as opposed to the *public* religiosity favored

significant association with intolerant attitudes toward out-groups *in general*, even after we control for a range of factors . . ."); *see also id.* at 26 (listing demographic (e.g., age, gender, race, ethnicity, political conservatism, income, education, and region) and ideological controls). In the study, they found that the stronger the support for public religiosity, the less likely individuals were to agree that religious outsiders such as Muslims, Buddhists, or atheists shared their vision of society, and the more unhappy they would be if their children married someone belonging to one of these outsider groups. *Id.* at 26–27.

148. Allyson F. Shortle & Ronald Keith Gaddie, *Religious Nationalism and Perceptions of Muslims and Islam*, 8 POL. & RELIGION 435, 451 (2015) ("Christian nationalism positively related to intolerant attitudes [toward Muslims] more than any other variable in the model, regardless of the population examined."); *see also id.* ("[W]e can conclude that prejudice against Muslims is largely the result of Christian nationalism.").

149. Whitehead & Perry, *supra* note 50, at 423 ("Using the concept of Christian nationalism, this study highlights how a particular religiopolitical social identity influences attitudes *above and beyond* the standard religion and politics measures. . . . [T]his research clearly shows that Christian nationalism is strongly associated with intolerance toward same-sex unions, despite some claims that beliefs about the Christian heritage of the United States is merely an attempt at creating and maintaining a collective identity." (emphasis in original)).

150. McDaniel, Nooruddin & Shortle, *supra* note 49, at 205 ("Christian nationalism is a robust determinant of immigrant animus, whereas religious affiliation only affects immigrant animus when Christian nationalism is excluded."); *see also id.* at 224 ("[I]ncreases in adherence to Christian nationalism increase one's negative attitudes toward immigrants . . .").

151. Perry & Whitehead, *supra* note 12, at 1683 ("[G]reater adherence to Christian nationalism . . . is strongly associated with whites' discomfort at the thought of their daughters marrying non-whites, and especially African Americans."); *cf.* GOLDBERG, *supra* note 137, at 70 ("A 2004 survey by the American Mosaic Project at the University of Minnesota found that 48.3 percent of white conservative Christians said they would disapprove if their child wanted to marry a black person, compared with 21.8 percent of white Americans as a whole.").

152. Perry & Whitehead, *supra* note 12, at 1683.

153. Perry, Whitehead & Davis, *supra* note 77, at 140 ("Americans who hold more strongly to Christian nationalist ideology were more likely to believe that the police treat white and black Americans equally, and they are more likely to believe that the police shoot blacks more often than whites because they are more violent than whites . . . Moreover, the effects of Christian nationalism hold even when we control for a variety of measures for religious and political conservatism . . .").

154. *See supra* notes 60–74 and accompanying text; *see also* Perry, Whitehead & Davis, *supra* note 77, at 3 ("[W]hite dominance remains at the core of Christian nationalist ideology, and thus, for white Americans, adhering to Christian nationalist beliefs still implies the same desire for white racial purity and supremacy.").

155. Perry & Whitehead, *supra* note 12, at 1684; *id.* at 1685 ("[O]ur findings demonstrate a clear and near-linear association between adherence to Christian nationalism and whites' disapproval of white/non-white racial exogamy, even after controlling for political ideology, whites' desire for religious heritage, their friendships with non-white racial groups and other socio-demographic factors.").

by Christian nationalists, did not share these prejudicial attitudes towards out-groups.¹⁵⁶ In other words, “the extent to which Americans expect religion to play a role in public life is a key determinant of prejudice toward various out-groups even while individual religiosity can, under certain circumstances, promote tolerance.”¹⁵⁷

This antipathy to out-groups was reflected by the community’s treatment of Doug Jager and his family. And this hostile reception was not unusual: those who challenge government-sponsored Christianity are regularly subjected to vitriol and violence.¹⁵⁸ It is for this reason that Establishment Clause plaintiffs often litigate under fictitious names.¹⁵⁹ For Christian nationalists, non-Christians who oppose a Christian nation are not just outsiders, they are dangerous

156. Perry, Whitehead & Davis, *supra* note 77, at 12 (“Americans who were more religious (measured in terms of worship attendance, prayer, and sacred text reading) were actually less likely to affirm our race and policing measures once we controlled for Christian nationalism.”); Stewart, Edgell & Delchanty, *supra* note 80, at 31 (“Much of the field conceptualizes religiosity by the ‘3 Bs’—belief, belonging, and behavior We find that this conceptualization of private religiosity is not significantly associated with prejudicial views toward religious out-groups, net of controls.” (citation omitted)); Whitehead & Perry, *supra* note 50, at 434 (“Those who do not perceive a large degree of overlap between their ‘American’ and ‘Christian’ identities are much less likely to discriminate toward others, in this case gays and lesbians.”).

157. Whitehead, Schnabel & Perry, *supra* note 54, at 2–3.

158. See generally Benjamin P. Edwards, *When Fear Rules in Law's Place: Pseudonymous Litigation as a Response to Systemic Intimidation*, 20 VA. J. SOC. POL'Y & L. 437, 455–67 (2013) (detailing violence towards Establishment Clause plaintiffs, including arson, death threats, physical assaults, vandalization, and torture of pets). One example is Joann Bell. After Bell complained about Christian prayers at her children’s school, she was threatened and assaulted, and her home was burned to the ground. *Id.* at 457–58; see also *Bell v. Little Axe Indep. Sch. Dist.*, No. 70, 766 F.2d 1391, 1397 (10th Cir. 1985) (“After initiating this lawsuit, both plaintiffs received numerous threatening telephone calls and letters. Their children were called ‘devil-worshippers’ by other students and, in one instance, an upside-down cross was hung on Robert McCord’s locker. . . . Joann Bell was the victim of a hair pulling incident committed by a school employee and, in September 1981, the Bells’ home was destroyed by a fire of suspicious origin.”). Another example is Jessica Ahlquist, a student who, after complaining about a Christian prayer mural in her school auditorium, received threats along the lines of “your home address posted online i [sic] cant [sic] wait to hear about you getting curb stomped you fucking worthless cunt” and “[g]et the fuck out of R.I. you bitch whore. You are nothing more than a sex-toy of a slut. Maybe you will gang-banged [sic] before we throw you out of one of our cars. WE WILL GET YOU—LOOK OUT!” Edwards, *supra*, at 459–60 (first alteration in original); see also *Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1114 (9th Cir. 2010) (Reinhardt, J., dissenting) (“It is no accident that today’s plaintiffs are known only by aliases; in the United States, in the twenty-first century, members of a religious minority suing for their constitutional rights still face genuine danger of harassment or physical abuse.”); cf. *Ahlquist v. City of Cranston ex rel. Strom*, 840 F. Supp. 2d 507, 513, 516 (D.R.I. 2012) (“At the end of the meeting, Plaintiff and her companion, who had also spoken out against the Prayer Mural, were escorted from the meeting by the police because of concerns for their safety. . . . Plaintiff was subject to frequent taunting and threats at school, as well as a virtual on-line hate campaign via Facebook.”).

159. In fact, one lawmaker hoped to discourage establishment suits by making it illegal to bring them anonymously. Austin Huguélet, *‘An Embarrassment to the State’: Lawmaker Wants Ban on Anonymous Church-and-State Lawsuits*, SPRINGFIELD NEWS-LEADER (Feb. 28, 2019, 11:32 PM), <https://www.news-leader.com/story/news/politics/2019/02/28/lawmaker-wants-ban-anonymous-church-state-lawsuits-christians/3017237002/>. Cases involving anonymous challenges to prayers and religion at school events include: *Santa Fe Indep. Sch. Dist. v. Doe ex rel. Doe*, 530 U.S. 290 (2000) (challenging student-led prayers before football games); *Doe ex rel. Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840 (7th Cir. 2012) (challenging graduation ceremonies held in a church); *Doe v. Indian River Sch. Dist.*, 653 F.3d 256 (3d Cir. 2011) (challenging prayer before school-board meetings); *Doe v. S. Iron R-1 Sch. Dist.*, 498 F.3d 878 (8th Cir. 2007) (challenging distribution of Bibles to elementary students on school grounds); *Doe ex rel. Doe v. Tangipahoa Par. Sch. Bd.*, 473 F.3d 188 (5th Cir. 2006) (challenging prayer before school-board meetings), *on reh’g en banc*, 494 F.3d

outsiders.¹⁶⁰ Christian nationalists “will want to make sure that those who are part of the nation will not threaten its values or take it off its intended path.”¹⁶¹

Once people think differently about members of an out-group, they are liable to treat them differently. In addition to being less tolerant of out-groups, one study found that people who subscribe to Christian nationalist beliefs were more accepting of policies that treated those groups unequally.¹⁶² In the sociologists’ words, “we find real stakes to these symbolic boundary styles.”¹⁶³ Those decreed “outsiders” are more likely to be denied access to material benefits¹⁶⁴ and to be deprived of civil rights.¹⁶⁵ For example, take racial minorities. Complementing the studies that find white, Christian nationalists are more hostile to people of color,¹⁶⁶ a recent study found that Christian nationalists are more likely to oppose policies perceived as benefiting minorities (like spending on welfare) and to support policies perceived as punishing minorities (like spending on law enforcement).¹⁶⁷

494 (5th Cir. 2007); *Doe ex rel. Doe v. Sch. Dist. of City of Norfolk*, 340 F.3d 605 (8th Cir. 2003) (challenging recitation of the Lord’s Prayer at a graduation ceremony); *Doe ex rel. Doe v. Sch. Bd. of Ouachita Par.*, 274 F.3d 289 (5th Cir. 2001) (challenging statute allowing prayer in schools); *Doe ex rel. Doe v. Beaumont Indep. Sch. Dist.*, 240 F.3d 462 (5th Cir. 2001) (challenging the district’s “Clergy in the Schools” counseling program); *Does v. Enfield Pub. Sch.*, 716 F. Supp. 2d 172 (D. Conn. 2010) (challenging graduation ceremonies held at church); *Doe ex rel. Doe v. Wilson Cty. Sch. Sys.*, 564 F. Supp. 2d 766 (M.D. Tenn. 2008) (challenging repeated official endorsement of religion); *Doe v. Porter*, 188 F. Supp. 2d 904 (E.D. Tenn. 2002) (challenging Bible instruction to kindergarten through fifth-grade students); *Doe v. Aldine Indep. Sch. Dist.*, 563 F. Supp. 883 (S.D. Tex. 1982) (challenging the reciting and singing of prayers at school); *Doe v. Acton-Boxborough Reg’l Sch. Dist.*, 8 N.E.3d 737 (Mass. 2014) (challenging daily recitation of the pledge of allegiance).

160. According to Christian nationalists, the United States, founded as a Christian nation, “ha[s] since lost its way, but through political means, the United States could once again hold up its end of the covenant by returning to its biblical ideals and bring God’s blessing back on the country.” Whitehead & Perry, *supra* note 50, at 425.

161. McDaniel, Nooruddin & Shortle, *supra* note 49, at 212 (“Individuals seek to protect their most salient identities by policing their boundaries against those who might undermine them.”).

162. Penny Edgell et al., *The Stakes of Symbolic Boundaries*, SOC. Q. (forthcoming 2020) (manuscript at 25) (“The cultural preservationist package of symbolic boundaries not only defines specific insider and outsider groups, it also associates with willingness to tolerate material and political inequality.”); *see also id.* at 26–27 (“We . . . show that the content of the symbolic boundaries that Americans draw is linked not only to differential tolerance of specific racial, religious, and other minority groups, but it is also connected to more general preferences for policies that redistribute material resources to address inequality, and to willingness to grant civil liberties to unpopular groups.”).

163. *Id.* at 25.

164. Kristen P. Williams, Book Review, 32 POL. PSYCHOL. 1089, 1095 (2011) (“How individuals conceive of who belongs determines whether members of the perceived community should receive benefits, and thus these conceptions of community and who is considered a ‘true American’ have policy implications.”).

165. Stewart, Edgell & Delehanty, *supra* note 80, at 32 (finding that those who support public religiosity “also express a stronger willingness to revoke civil liberties for groups with which they disagree”).

166. Joshua T. Davis, *Funding God’s Policies, Defending Whiteness: Christian Nationalism and Whites’ Attitudes Towards Racially-Coded Government Spending*, 42 ETHNIC & RACIAL STUD. 2123, 2137 (2019) (“Numerous studies show that white Christian nationalism is linked with overt indicators of white supremacy, including explicit xenophobia and racism.”).

167. *Id.* (“[T]he current study unequivocally affirms that white Americans who more strongly adhere to Christian nationalist ideology are more likely to oppose spending for policies that are racially-coded to benefit minorities (like welfare) and favour spending for policies that are racially-coded to punish minorities (law enforcement, border patrol).”).

Similarly, the Christian-nationalist hostility towards immigrants¹⁶⁸—who are often non-Christian, nonwhite, or both¹⁶⁹—likewise translates into hostile policies. One study found that individuals more aligned with Christian nationalism were also more inimical to Muslims and more willing to deny them civil rights.¹⁷⁰ Consequently, hostility towards immigrants paves the way for hostile public policy, like drastically reduced refugee caps¹⁷¹ and the Muslim ban.¹⁷² “The Trump administration’s repeated attempts at instituting various travel bans, largely regarded as singling out Muslims, are one example of the symbolic being translated to reality.”¹⁷³

In fact, numerous studies have shown that “if taken to extremes, symbolic boundaries can have [dire] implications, as when restrictive definitions of nationhood serve as a pretext for depriving marginalized citizens of their civil

168. See McDaniel, Nooruddin & Shortle, *supra* note 49, at 213 (“Because of the intertwining of religion and nationalism, immigration threatens their entire Christian national identity by permitting others to alter their exclusive conceptions of what it means to be an American.”); Perry & Whitehead, *supra* note 12, at 1673 (“Because Christian nationalists believe that America’s ‘Christian heritage’ should be defended, they tend to oppose the immigration of non-Christians (e.g. Muslims), who also tend to be non-white.”).

169. According to the Pew Research Center, 76.8% of U.S.-born residents identify as white as opposed to 46.1% of foreign-born U.S. residents. Jynnah Radford & Abby Budiman, 2016, *Foreign-Born Population in the United States Statistical Portrait*, PEW RES. CTR. (Sept. 14, 2018), <http://www.pewhispanic.org/2018/09/14/facts-on-u-s-immigrants-current-data/>.

170. Shortle & Gaddie, *supra* note 148, at 452 (“It is clear from Table 5 that higher agreement with Christian nationalism is associated with greater probability of holding unfavorable views of Muslims, and with supporting limits to Muslims’ religious freedom.”).

171. Zachary Cohen & Elise Labott, *Refugee Levels Are Surging Worldwide. Trump Is Slashing the Number the US Will Let In*, CNN (Sept. 18, 2018, 11:48 AM), <https://www.cnn.com/2018/09/17/politics/pompeo-trump-refugee-asylum-levels/index.html> (explaining that the Trump Administration has capped the number of refugees at 30,000 for 2019, down from the 110,000 that Obama set in 2017).

172. Rick Gladstone & Satoshi Sugiyama, *Trump’s Travel Ban: How It Works and Who Is Affected*, N.Y. TIMES (July 1, 2018), <https://www.nytimes.com/2018/07/01/world/americas/travel-ban-trump-how-it-works.html> (explaining that the ban “indefinitely suspends the issuance of immigrant and nonimmigrant visas to applicants from the Muslim-majority countries Libya, Iran, Somalia, Syria and Yemen—plus North Korea,” which does not let many citizens travel, and also affects a few officials from Venezuela); Todd Green, *By Any Other Name: Why the ‘Travel Ban’ Really Is a Muslim Ban*, RELIGION NEWS SERV. (July 3, 2018), <https://religionnews.com/2018/07/03/by-any-other-name-why-the-travel-ban-really-is-a-muslim-ban/>; see also *Trump v. Hawaii*, 138 S. Ct. 2392, 2417 (2018) (“At the heart of plaintiffs’ case is a series of statements by the President and his advisers casting doubt on the official objective of the Proclamation. For example, while a candidate on the campaign trail, the President published a ‘Statement on Preventing Muslim Immigration’ that called for a ‘total and complete shutdown of Muslims entering the United States until our country’s representatives can figure out what is going on.’ That statement remained on his campaign website until May 2017. Then-candidate Trump also stated that ‘Islam hates us’ and asserted that the United States was ‘having problems with Muslims coming into the country.’ . . . More recently, on November 29, 2017, the President retweeted links to three anti-Muslim propaganda videos.” (citations omitted)).

173. Whitehead & Scheitle, *supra* note 142, at 169; see also Ramsey Dahab & Marisa Omori, *Homegrown Foreigners: How Christian Nationalism and Nativist Attitudes Impact Muslim Civil Liberties*, 42 ETHNIC & RACIAL STUD. 1727, 1739 (2019) (“Our findings suggest that Christian nationalism has a significant and negative impact on the civil liberties of Muslims, which has also been supported by past sociological research.”); Paul Brandeis Raushenbush, *New Religious Landscape Survey Explains a Lot About the Politics of White Christian Nationalism*, AUBURN, <https://auburnseminary.org/voices/new-religious-landscape-survey-explains-lot-politics-white-christian-nationalism/> (last visited Feb. 9, 2020) (“As many have noted, Trump’s ‘Make America Great Again’ slogan, is being translated policy wise into: Make America White (and Christian) Again.”).

rights or denying citizenship to outsiders on the basis of race, religion, or national origin.”¹⁷⁴ A European study particularly on point found that the more robust the government’s sponsorship of Christianity, the more hostile citizens were to Muslim immigrants, and the more willing they were to limit the civil rights of Muslim immigrants in their communities.¹⁷⁵

In sum, government-sponsored Christianity divides the entire community into insiders and outsiders, with all the negative consequences that result.¹⁷⁶ That is, it does not simply lead to symbolic exclusion from the community and nation; it may lead to actual exclusion.¹⁷⁷ By embracing the overlap between Christianity and government and the equivalence of Christianity and citizenship, government-sponsored Christianity bolsters and empowers Christian nationalism.

III. END GOVERNMENT-SPONSORED CHRISTIANITY

The Establishment Clause prohibits (or used to prohibit) the government from favoring one religion over others for very specific reasons. A principal one is to ensure that the government does not create religious outsiders who are denied equal citizenship or equal access to benefits, services, and power. Put another way, the Establishment Clause operates as an Equal Protection Clause for religious minorities¹⁷⁸ and is meant to ensure that no one is treated as a second-class citizen because of their religious beliefs.¹⁷⁹

174. Straughn & Feld, *supra* note 56, at 284; *see also* Dahab & Omori, *supra* note 173, at 1736–37 (“Respondents who identified Christianity as a crucial aspect of being ‘truly’ American are more significantly likely to support the free-speech infringements of Muslims, atheists, communists . . . than those who eschewed Christianity as a crucial aspect of national identity.”).

175. *See generally* Marc Helbling & Richard Traunmüller, *How State Support of Religion Shapes Attitudes Toward Muslim Immigrants: New Evidence from a Sub-National Comparison*, 49 COMP. POL. STUD. 391 (2016).

176. *See* Whitehead & Scheitle, *supra* note 142, at 158 (“Social boundaries are ‘objectified forms of social differences’ that limit certain groups from obtaining access to resources and other social opportunities. Symbolic boundaries precede social boundaries People are creative in their construction of symbolic boundaries, drawing on any multitude of characteristics to designate who is ‘in’ and who is ‘out.’” (quoting Michèle Lamont & Virág Molnár, *The Study of Boundaries in the Social Sciences*, 28 AM. REV. SOC. 167, 168 (2002))).

177. Dahab & Omori, *supra* note 173, at 1731 (“[T]he conflation between White, Christian, and American identities suggests a boundary-making praxis that delineates between those provided access to power centres and those rebuffed.”); Straughn & Feld, *supra* note 56, at 283 (“By attributing contrasting degrees of social prestige to insiders and outsiders, symbolic boundaries can confer differential access to material benefits and other advantages.”).

178. Alan E. Brownstein, *Harmonizing the Heavenly and Earthly Spheres: The Fragmentation and Synthesis of Religion, Equality, and Speech in the Constitution*, 51 OHIO ST. L.J. 89, 103 (1990) (“[T]he [E]stablishment [C]lause has become a *de facto* substitute for an independent equal protection analysis of the treatment of religious minorities by the state”); Caroline Mala Corbin, *Nonbelievers and Government Speech*, 97 IOWA L. REV. 347, 379 (2012) (“[T]he Establishment Clause can be viewed as essentially functioning as an Equal Protection Clause for nonbelievers.”).

179. *See* Thomas B. Colby, *A Constitutional Hierarchy of Religions? Justice Scalia, the Ten Commandments, and the Future of the Establishment Clause*, 100 NW. U. L. REV. 1097, 1132–33 (2006) (“The historical evidence is overwhelming that one of the primary purposes of the First Amendment was the protection of minority

Yet by fostering Christian nationalism, government-sponsored Christianity undermines religious equality. In fact, government-sponsored Christianity helps create precisely the religious hierarchy envisioned by Christian nationalists, with devout (white) Christians as the true citizen insiders and non-Christians cast as the suspicious—if not dangerous—outsiders. Accordingly, government-sponsored Christianity should violate the Establishment Clause. Granted, barring government-sponsored Christianity may curtail some American traditions, but some traditions are not worth saving, especially if they clash with core constitutional values.

Unfortunately, Establishment Clause doctrine has become increasingly open to government-sponsored Christianity. The Supreme Court permitted some government-sponsored Christianity in cases from the 1980s, but it at least ensured Christianity was not exclusively promoted. *Marsh* allowed legislative prayers in part because they were not Christian but nondenominational.¹⁸⁰ *Lynch v. Donnelly* allowed government nativity scenes when they were surrounded by secular items.¹⁸¹ Actually, this decision, too, is consistent with Christian nationalism, so the Court's tolerance for favoring Christianity is hardly new. Nonetheless, the current Supreme Court has gone even further in allowing government Christianity. *Town of Greece* allowed explicitly Christian legislative prayers.¹⁸² *American Legion* allowed the State to erect and maintain explicitly Christian monuments.¹⁸³ The Supreme Court's evisceration of the Establishment Clause has made possible the Christian-nationalism vision of a pro-Christian state. Thus, the current Court is moving in the wrong direction, with its new doctrine facilitating Christian nationalism more than ever.

This encouragement of Christian nationalism is completely avoidable. There is no need for government-sponsored Christianity; Christian invocations are not necessary, and any secular goal can be accomplished by solemn secular invocations.¹⁸⁴ Nor is there any need for the government to erect tributes highlighting the birth (nativity) or death (Latin cross) of Jesus Christ. If the state wants to celebrate the secular aspects of Christmas,¹⁸⁵ then it can celebrate with

religions through the guarantee that the government would treat all religions alike."); Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2171 (1996) ("The purpose of the Constitution generally, and the Establishment Clause specifically, is to protect minorities from raw majoritarian impulses."); cf. Lynn A. Baker, *Constitutional Ambiguities and Originalism: Lessons from the Spending Power*, 103 NW. U. L. REV. 495, 510 (2009) ("[T]he very purpose of . . . the Bill of Rights, is to protect minorities from the majority . . .").

180. *Marsh v. Chambers*, 463 U.S. 783, 793 n.14 (1983).

181. *Lynch v. Donnelly*, 465 U.S. 668, 671, 680 (1984).

182. *Town of Greece v. Galloway*, 572 U.S. 565, 582 (2014).

183. *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2090 (2019) (plurality opinion).

184. As local governments around the country demonstrate, solemnity can be induced by reciting the pledge of allegiance, observing a moment of silence, or even reading part of the U.S. Constitution.

185. Given that Christmas is a Christian holiday and Santa Claus is derived from the Christian St. Nicholas, the state might want to reconsider celebrating the holiday at all.

a secular Santa and reindeer. If the state wants to honor those who died defending the United States and its ideals of liberty and equality for all, then it can honor them with an actual American symbol, such as the American flag or the American eagle.¹⁸⁶ Unlike symbols of single-faith tradition, which do not speak to other religious observers,¹⁸⁷ never mind those who live without religion,¹⁸⁸ these symbols would represent American values shared by everyone.

What about honoring the role of religion in the United States, past and present? According to the Supreme Court, government-sponsored Christianity is “a recognition of the important role that religion plays in the lives of many Americans”¹⁸⁹ or “simply a tolerable acknowledgment of beliefs widely held among the people of this country.”¹⁹⁰ Moreover, the Court has argued there is a long tradition of this type of acknowledgment. Indeed, the Supreme Court upheld legislative prayers in large part because they date to the founding of the country,¹⁹¹ and it affirmed Christian monuments because they are (somehow) linked to this tradition.¹⁹²

186. An American flag or eagle is certainly a better way to honor the American values of equality and liberty than a symbol that has deep significance to only some Americans.

187. According to Gallup, in 2017, “6% of the population identif[ie]d with a non-Christian faith, including Judaism, Islam and others, while 21% of Americans [d]id not have a formal religious identity.” Frank Newport, *2017 Update on Americans and Religion*, GALLUP (Dec. 22, 2017), <https://news.gallup.com/poll/224642/2017-update-americans-religion.aspx>.

188. According to Gallup, in May 2017, 12% of Americans who were asked, “Do you believe in God?” answered, “No.” *Religion*, GALLUP, <https://news.gallup.com/poll/1690/religion.aspx> (last visited Feb. 9, 2020). According to the Pew Research Center on Religion and Public Life, 10% of Americans do not believe in God or a higher power of any kind, and another 23% believe in God but not the God of the Bible. *When Americans Say They Believe in God, What Do They Mean?*, PEW RES. CTR. (Apr. 25, 2018), <http://www.pewforum.org/2018/04/25/when-americans-say-they-believe-in-god-what-do-they-mean/>; see also Daniel Cox, *Way More Americans May Be Atheists Than We Thought*, FIFTYTHIRTYEIGHT (May 18, 2017, 11:55 AM), <https://fiftythirtyeight.com/features/way-more-americans-may-be-atheists-than-we-thought/> (finding that 26% of individuals studied “likely do not believe in God”). The numbers are even higher for young adults: among millennials born between 1990 and 1996, 16% do not believe in God or a higher power of any kind. *When Americans Say They Believe in God, What Do They Mean?*, *supra*. Indeed, only 43% of these eighteen- to twenty-nine-year-olds believe in God as described in the Bible. *Id.*

189. *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2089 (2019) (plurality opinion) (discussing the presence and maintenance of a Latin cross on public land).

190. *Marsh v. Chambers*, 463 U.S. 783, 792 (1983) (denying a claim that legislative prayers violate the Establishment Clause).

191. *Id.* at 788 (“Clearly the men who wrote the First Amendment Religion Clauses did not view paid legislative chaplains and opening prayers as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress.”).

192. *Am. Legion*, 139 S. Ct. at 2089 (“The [legislative prayer] practice begun by the First Congress stands out as an example of respect and tolerance for differing views, an honest endeavor to achieve inclusivity and nondiscrimination, and a recognition of the important role that religion plays in the lives of many Americans. Where categories of monuments, symbols, and practices with a longstanding history follow in that tradition, they are likewise constitutional.”). Missing from this analysis is how a WWI monument that does not date to the country’s founding can be justified on the same grounds as a practice that was upheld largely because it *did* date to the founding. Also missing is any principled way of deciding whether a Christian monument, symbol, or practice belongs to this “tradition” or not.

Of course, prayers are not an acknowledgement of religion's importance; instead, prayers are religious worship.¹⁹³ And a Latin cross is more accurately viewed as a foundational symbol exclusive to Christianity than an acknowledgment of the role of "beliefs widely held"¹⁹⁴ in a country where at least a quarter of Americans either identify with a non-Christian faith or no particular faith at all.¹⁹⁵

In any event, the acknowledgment justification has an air of pretext, as do other proffered secular justifications. (For example, the Court has simultaneously asserted that the Bladensburg cross acknowledges the role of religion, symbolizes WWI sacrifice,¹⁹⁶ and simply is historically important.)¹⁹⁷ It is not clear why the beginning of high school football games is an appropriate time to impart a social-studies lesson about religion in the United States and to do it in such an oblique way. Nor is it clear why memorials in a country with such diverse religious beliefs should draw from only one faith.¹⁹⁸

If Christianity were not the most significant feature of government-sponsored Christian practices and monuments, they probably would not provoke so much emotion in the people defending them.¹⁹⁹ After all, if the religious component was not so important—indeed, overriding—then it would matter less (or not at all) if the legislative prayers were replaced or the Latin cross was modified or moved. Such actions certainly would not amount to hostility to

193. That prayers are an inherently religious act should not need a footnote. See generally *Marsh*, 463 U.S. at 797 (Brennan, J., dissenting) ("To invoke Divine guidance on a public body entrusted with making the laws, is nothing but a religious act." (citation omitted) (quoting *id.* at 792 (majority opinion))).

194. *Id.* at 792 (majority opinion).

195. According to Gallup, in 2017, "6% of the population identifie[d] with a non-Christian faith, including Judaism, Islam and others, while 21% of Americans d[id] not have a formal religious identity." Newport, *supra* note 187.

196. *Am. Legion*, 139 S. Ct. at 2076; see also *id.* at 2089 ("That the cross originated as a Christian symbol and retains that meaning in many contexts does not change the fact that the symbol took on an added secular meaning when used in World War I memorials.").

197. *Id.* at 2085 ("And no matter what the original purposes for the erection of a monument, a community may wish to preserve it for very different reasons, such as . . . historic preservation . . .").

198. The cross is an especially inapt representation of all religion because "on one widely known understanding of Christianity, the cross symbolizes the threat that non-Christians are damned." Brief of Baptist Joint Committee for Religious Liberty et al. as Amici Curiae in Support of Respondents at 10, *Am. Legion*, 139 S. Ct. 2067 (No. 17-1717). In fact, "[t]he cross divides the world between the saved and the damned." *Id.* at 12; see also *Am. Legion*, 139 S. Ct. at 2104 (Ginsburg, J., dissenting) ("Soldiers of all faiths 'are united by their love of country, but they are not united by the cross.'" (quoting Brief for Jewish War Veterans of the United States of America, Inc. as Amicus Curiae in Support of Respondents at 3, *Am. Legion*, 139 S. Ct. 2067 (No. 17-1717))).

199. One could argue that the Supreme Court has failed to properly enforce the Establishment Clause for fear that full enforcement would lead to a popular revolt. *American Legion's* compromise position—allow existing Christian monuments but disallow new ones—seems more pragmatic than principled. See *Am. Legion*, 139 S. Ct. at 2085 ("[R]etaining established, religiously expressive monuments, symbols, and practices is quite different from erecting or adopting new ones. The passage of time gives rise to a strong presumption of constitutionality.").

religion as the Court has claimed.²⁰⁰ In response to this precise point,²⁰¹ the *American Legion* Court did a little dance: the government’s Latin cross was not so religious that it violated the Establishment Clause, but it was sufficiently religious that any action other than leaving it exactly as it is would demonstrate hostility to religion.²⁰² Besides the having-the-Christian-cake-and-eating-it-too quality of this claim, it reveals the inescapably religious nature of much government-sponsored Christianity.

The more honest argument is that because these religious exercises are a tradition and have lasted for centuries (or almost a century), how bad could they be? Put differently, if a Christian practice or monument exists for long enough, it is a perfectly fine tradition; it has become part of the culture. That is essentially the argument the *Town of Greece* Court made when it insisted that the Christian prayers “must be evaluated against the backdrop of historical practice. As a practice that has long endured, legislative prayer has become part of our heritage and tradition, part of our expressive idiom”²⁰³ Similarly, in *American Legion*, the Supreme Court argued that “[t]he passage of time gives rise to a strong presumption of constitutionality,”²⁰⁴ in part because “[w]ith sufficient time, religiously expressive monuments, symbols, and practices can become embedded features of a community’s landscape and identity.”²⁰⁵

Of course, powerful in-groups have enjoyed all kinds of traditions at the expense of out-groups.²⁰⁶ The reason some traditions persist is not because everyone in the community welcomes them but because the powerless are not able to end them.²⁰⁷ Those marginalized may have simply failed to convince—or calculated that it was pointless to try to convince—the powers that be to stop.²⁰⁸

200. See *infra* notes 215–16 and accompanying text (describing how the Court characterizes any attempt to remove, move, or modify the Bladensburg cross as hostility to religion); see also *id.* at 2086 (“[A]n alteration like the one entertained by the Fourth Circuit—amputating the arms of the Cross—would be seen by many as profoundly disrespectful.” (citation omitted)).

201. *Am. Legion*, 139 S. Ct. at 2086 (“One member of the majority below viewed this objection [that modifying the cross is hostile and disrespectful] as inconsistent with the claim that the Bladensburg Cross serves secular purposes”).

202. See *id.* at 2087 (“[A] campaign to obliterate items with religious associations may evidence hostility to religion even if those religious associations are no longer in the forefront.”).

203. *Town of Greece v. Galloway*, 572 U.S. 565, 587 (2014).

204. *Am. Legion*, 139 S. Ct. at 2085.

205. *Id.* at 2084; see also *id.* at 2083 (“[A] community may preserve such monuments, symbols, and practices for the sake of their historical significance or their place in a common cultural heritage.”).

206. For example, sexual harassment long prevailed in the workplace not because women did not mind it but because they were unable to stop it.

207. Cf. Williams, *supra* note 61, at 254 (“[W]hite Christians . . . have unproblematically worn the mantle of American identity and have been the gatekeepers of which other groups could aspire to do likewise.”).

208. The #MeToo movement provides a powerful example. To this day, many women do not report sexual harassment or assaults because of the risks that come along with speaking out. See, e.g., Cate Luzio, *MeToo’s Next Frontier: Addressing Backlash After Speaking Up*, FORBES (Apr. 28, 2019, 6:23 PM), <https://www.forbes.com/sites/cateluzio/2019/04/28/metoos-next-frontier-addressing-backlash-after-speaking-up/#7d21f09a7529> (“Once you report bad behavior of any kind, women are often shunned and

“[T]he quiescence of those opposed . . . may have reflected nothing more than their sense of futility in opposing the majority.”²⁰⁹ But surely “what the powerless must tolerate [should not become] what the law defines as acceptable conduct.”²¹⁰ In other words, the fact that the government has always prayed at the beginning of its sessions or that the government has always relied on Christian symbols should not excuse a tradition if it undermines core Establishment Clause values. And it does: as the social science suggests, government-sponsored Christianity is incompatible with religious equality.²¹¹ The tradition should be jettisoned, no matter how long-standing or embedded in the culture. The courts should be remedying an unequal status quo, not cementing it.

Although the Supreme Court has argued that experiencing state-sponsored religion in public inspires understanding and tolerance,²¹² the evidence is not on its side. In fact, one team of sociologists who study public religiosity ultimately concluded that government “endorsements of religion in general may not lead to general religious tolerance, but may . . . be exclusionary for specific religious and nonreligious minorities.”²¹³ Accordingly, claims about the unifying tendencies of even civic religion are questionable. Rather than fostering tolerance, civic religion may merely placate those who are intolerant.²¹⁴

Moreover, despite the Supreme Court’s claims,²¹⁵ eliminating government-sponsored Christianity does not evidence hostility to religion. First, this argument conflates Christianity with religion.²¹⁶ There are dozens of religions that

blackballed. . . . We have a long way to go for people to feel safe raising issues around sexual harassment and gender discrimination.”)

209. Lynch v. Donnelly, 465 U.S. 668, 703 (1984) (Brennan, J., dissenting).

210. Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 847 (1991).

211. See *supra* Part II.B; cf. Larson v. Valente, 456 U.S. 228, 244 (1982) (“The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.”).

212. Cf. Lee v. Weisman, 505 U.S. 577, 646 (1992) (Scalia, J., dissenting) (“The Founders of our Republic knew the fearsome potential of sectarian religious belief to generate civil dissension and civil strife. And they also knew that nothing, absolutely nothing, is so inclined to foster among religious believers of various faiths a toleration—no, an affection—for one another than voluntarily joining in prayer together, to the God whom they all worship and seek.”).

213. Stewart, Edgell & Delehanty, *supra* note 80, at 32 (emphasis omitted). In fact, “[c]ontrary to expectations from the literature on civil religion, we find that support for public religious expression is strongly and consistently associated with a distinct and relatively narrow vision of religious belonging in American society.” *Id.* at 16.

214. See Whitehead & Perry, *supra* note 50, at 436 (concluding civic religion’s claim to be “merely an attempt at creating and maintaining collective identity and . . . not overtly related to intolerance [is belied by] findings [that] suggest that single convergent social identities such as Christian nationalism strongly promote intolerance toward same-sex unions” (citation omitted)).

215. E.g., *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2074 (2019) (plurality opinion) (“[The] removal or radical alteration [of the Bladensburg Cross] at this date would be seen by many not as a neutral act but as the manifestation of ‘a hostility toward religion that has no place in our Establishment Clause traditions.’” (quoting *Van Orden v. Perry*, 545 U.S. 677, 704 (2005) (Breyer, J., concurring in judgment))); *id.* at 2084–85 (“A government that roams the land, tearing down monuments with religious symbolism and scrubbing away any reference to the divine will strike many as aggressively hostile to religion.”).

216. To use one’s own religion (or race or sex) as the unstated norm for all religion is a hallmark of privilege. See Caroline Mala Corbin, *Justice Scalia, the Establishment Clause, and Christian Privilege*, 15 FIRST AMEND. L. REV. 185, 202–06 (2017).

are not Christian, and their members are not likely to view the end of government-sponsored Christianity as antagonistic to their faith. Second, if it is not hostility to Buddhists, Muslims, and Sikhs for the government to have no Buddhist, Muslim, or Sikh prayers or symbols, then it is not hostility to Christians for the government to refrain from Christian prayers and symbols. Third, Christianity, as well as all other religions, are fully protected in forums that are open to private speakers.²¹⁷ This Essay addresses only the *government's* prayers and displays.

Finally, the Establishment Clause is meant to protect not only the equality of disfavored religions but also the integrity of favored ones.²¹⁸ In other words, another reason to keep church and state separate is to protect religion from the harm that inevitably follows their union. This union—one that the Establishment Clause bans (or should ban) and that occurs when the government sponsors Christianity—“tends to destroy government and to degrade religion.”²¹⁹ For example, characterizing a prayer to God as nothing more than a social-studies lesson or a reminder to play fair during a football game is insulting to religion.²²⁰ Likewise, characterizing the Latin cross as primarily a war memorial “desacralize[s] the most sacred symbol of Christianity.”²²¹

As predicted, government-sponsored Christianity and the Christian nationalism it embodies may be souring people on Christianity.²²² Many Americans,

217. Thus, the argument that a strict application of the Establishment Clause eliminates religion from the public square is unfounded. There is a long line of free-speech cases where the Supreme Court insists that any time the government opens a forum for private speech, religious speech is entitled to the fullest free-speech protection. *See, e.g.*, *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 119–20 (2001) (holding that school facilities must be made available after school hours for a Christian children’s club); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 845–46 (1995) (holding that a printing reimbursement for student groups must be made available to a Christian student newspaper); *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 295–96 (1993) (holding that school facilities must be made available to a church to screen a religiously oriented film series on family values and child-rearing); *Widmar v. Vincent*, 454 U.S. 263, 277 (1981) (holding that university facilities must be made available to a student religious group).

218. *See Marsh v. Chambers*, 463 U.S. 783, 804 (1983) (Brennan, J., dissenting) (“The third purpose of separation and neutrality is to prevent the trivialization and degradation of religion by too close an attachment to the organs of government.”).

219. *Engel v. Vitale*, 370 U.S. 421, 431 (1962).

220. *See Marsh*, 463 U.S. at 811 (Brennan, J., dissenting) (“If upholding the practice requires denial of this fact [that prayers are an act of religious worship], I suspect that many supporters of legislative prayer would feel that they had been handed a pyrrhic victory.”).

221. Brief of Baptist Joint Committee for Religious Liberty, *supra* note 198, at 2.

222. *See* E.J. Dionne Jr., *No Wonder There’s an Exodus from Religion*, WASH. POST (May 6, 2018, 6:07 PM), https://www.washingtonpost.com/opinions/no-wonder-theres-an-exodus-from-religion/2018/05/06/4ad8c33a-4feb-11e8-84a0-458a1aa9ac0a_story.html?utm_term=.a19535e785d3 (“In their landmark 2010 book, ‘American Grace,’ the scholars Robert Putnam and David Campbell found that the rise of the nones was driven by the increasing association of organized religion with conservative politics and a lean toward the right in the culture wars. . . . And when will those who advertise themselves as religion’s friends realize they can do far more damage to faith than all the atheists and agnostics put together?”); Charles Mathewes, *White Christianity Is in Big Trouble. And It’s Its Own Biggest Threat.*, WASH. POST (Dec. 19, 2017, 5:00 AM), https://www.washingtonpost.com/news/posteverything/wp/2017/12/19/white-christianity-is-in-big-trouble-and-its-its-own-biggest-threat/?utm_term=.ad9b444f32e6 (“[T]he alliance of white Christians with

especially young ones, are abandoning religion, including Christianity²²³: recent surveys find that roughly four in ten young adults are religiously unaffiliated.²²⁴ Among the reasons they turn away is the mix of religion with politics and government.²²⁵ In other words, the attempt to unite Christianity with the state and that union's potentially corrupting influence on religion may well drive people away.²²⁶ As one Christian commentator wrote about young religious people, many "reject the label 'evangelical' or 'Christian' altogether today . . . because we don't want our faith identified with this weird Christian nationalism that's swept the nation."²²⁷ For those who care about Christianity, as opposed to Christian nationalism, government-sponsored Christianity is the wrong approach to take.

CONCLUSION

Government-sponsored Christianity is one manifestation of Christian nationalism. As the sociological evidence establishes, the harm of Christian nationalism is not just offense but also discriminatory attitudes and discriminatory

right-wing politics from the 1980s forward . . . has repelled many younger people from religion out of a distaste at seeing religion so eagerly bend the knee to short-term political gain.”).

223. See Jack Jenkins, *'None' Now as Big as Evangelicals, Catholics in the US*, NAT'L CATH. REP. (Mar. 22, 2019), <https://www.ncronline.org/news/people/nones-now-big-evangelicals-catholics-us> (reporting that, according to the General Social Survey, about 23% of Americans respond “no religion” when asked about their religious tradition); Jana Riess, *Religion Declining in Importance for Many Americans, Especially for Millennials*, RELIGION NEWS SERV. (Dec. 10, 2018), <https://religionnews.com/2018/12/10/religion-declining-in-importance-for-many-americans-especially-for-millennials/> (reporting that in 2018, 35% of all Americans were “nones” who identify as atheist, agnostic, or nothing in particular); cf. Jeffrey M. Jones, *U.S. Church Membership Down Sharply in Past Two Decades*, GALLUP (Apr. 18, 2019), <https://news.gallup.com/poll/248837/church-membership-down-sharply-past-two-decades.aspx> (finding that only 52% of Americans belong to a church, synagogue, or mosque).

224. ROBERT P. JONES ET AL., EXODUS: WHY AMERICANS ARE LEAVING RELIGION—AND WHY THEY'RE UNLIKELY TO COME BACK 3 (Sept. 22, 2016), <https://www.prii.org/wp-content/uploads/2016/09/PRRI-RNS-Unaffiliated-Report.pdf> (finding that 39% of millennials were religiously unaffiliated); Riess, *supra* note 223 (finding that 43% of Americans aged thirty to forty-four were “nones” in 2018).

225. “Nones” on the Rise, PEW RES. CTR. (Oct. 9, 2012), <http://www.pewforum.org/2012/10/09/nones-on-the-rise/#what-is-behind-the-growth-of-the-religiously-unaffiliated> (“Several leading scholars contend that young adults, in particular, have turned away from organized religion because they perceive it as deeply entangled with conservative politics and do not want to have any association with it. . . . [T]wo-thirds or more of the unaffiliated say that churches and other religious institutions are too concerned with money and power (70%) and too involved in politics (67%)” (footnotes omitted)); see also JONES ET AL., *supra* note 224, at 10 (finding that among Americans who are unaffiliated, 66% agree that “religion causes more problems in society than it solves”).

226. Cf. Paul A. Djupe, Jacob R. Neiheisel & Kimberly H. Conger, *Are the Politics of the Christian Right Linked to State Rates of the Nonreligious? The Importance of Salient Controversy*, 71 POL. RES. Q. 910, 910 (2018) (finding that the rate of religious “nones” climbed more in states where the Christian right was active); Michael Hout & Claude S. Fischer, *Why More Americans Have No Religious Preference: Politics and Generations*, 67 AM. SOC. REV. 165, 165–66 (2002) (suggesting that the Christian right's foray into politics was driving people away from religion).

227. Benjamin Sledge, *Christian Nationalism Is on the Rise and a Growing Cancer*, MEDIUM (Dec. 18, 2017), <https://medium.com/@benjaminsledge/christian-nationalism-is-on-the-rise-and-a-growing-cancer-9a19b7f85dfb>.

policies. Even if not specifically motivated by Christian nationalism, government-sponsored Christianity nonetheless advances the Christian-nationalist belief that true Americans are Christian-Americans. Everyone else simply is not accorded the same respect, benefits, or rights. This result is exactly what the Establishment Clause aims to prevent. The insight embedded in Establishment Clause doctrine that the government should not favor one religion over others is borne out by contemporary social science.²²⁸ Consequently, instead of eviscerating the separation of church and state, the principle ought to be recognized as more important than ever. In sum, government-sponsored Christianity like the predominantly Christian prayers in *Town of Greece* or *Jager* or predominantly Christian displays like the Bladensburg Latin cross should violate the Constitution.

228. Or at least this insight *was* a bedrock Establishment Clause rule until recently.