Please Don't Wish Me a Merry Christmas

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CHAPTER 9

The Fruits of the Framing

Church and State in Late-Twentieth-Century America

THE SUPREME COURT INTERVENES

The dominant story of the first amendment religion clauses suggests that the separation of church and state is a constitutional principle that equally protects the religious freedom of all, including religious outgroups. Most evidently, this dominant story did not fit the social reality of America through at least the end of World War II. At that time, America remained a de facto Christian nation, albeit with a small Jewish population and some other religious outgroups. American Jews often experienced Christian domination through the prism of antisemitism, sometimes expressed through governmental and sometimes through non-governmental actors. Thus, from an American Jewish perspective, the assertion that the separation of church and state preserved religious equality and freedom seems a cruel joke at best.

Despite the severe restrictions on immigration first implemented in the 1920s, the extensive migrations of the nineteenth and early twentieth centuries did, in fact, change America. Many historians argue that the long era of Protestant hegemony in America ended by the 1930s.1 With that said, though, two qualifications bear emphasis. First, whereas the hegemonic hold of Protestantism on America very well may have ended, Protestant domination was not (and is not) over. In other words, Protestantism might not have maintained its total and pervasive control over American culture, yet it still remained (and remains) a predominant religious and cultural force in American society. Hence, emblematic of their continuing position
of power, Protestant churches seeking to expand during the mid-twentieth century often agreed among themselves to divide and allocate new territories (such as a suburban development). These self-conscious divisions of territory were not arbitrary, but rather were based on strategic decisions flowing from "the use of census data, real estate and demographic projections, as well as survey data gathered by the research department of the denominational bureaucracies." The avowed purpose of this Protestant church comity was to create "a dynamic program of positive church cooperation to provide an efficient and inclusive pattern of religious service in every community." Furthermore, in some areas of the country, particularly the South, Protestant hegemony barely wavered.

Second, while Protestant hegemony did in fact wane in many areas, Christian hegemony did not. As Protestant power declined, Roman Catholic power increased: despite the restrictions on immigration imposed during the 1920s, a large Roman Catholic population developed in America. As early as 1920, one in six Americans and one in three church members were Catholic. The political ramifications of this large Catholic population were evident immediately. In the 1920s, Catholics did not need to seek judicial intervention to protect their sacramental use of wine during Prohibition because Congress readily created a legislative exception for such use. And significantly, the relative proportion of Protestant and Catholic church members would hold close to steady throughout the century. In 1958, 66.2 percent of the population considered themselves Protestant, while 25.7 percent regarded themselves as Roman Catholic. Of those individuals, though, a higher proportion of Catholics were actually church members: 56 percent of church members were Protestant, and 36 percent were Catholic. Protestants at that time still far outnumbered Roman Catholics, but Catholics had become the largest Christian group in America, outnumbering the largest Protestant denomination (the Baptists) by almost two to one. These proportions have gone roughly unchanged. In the 1990s, nine out of ten Americans claimed a specific religious affiliation, with 86.5 of them being Christians. Of those Christians, Protestants outnumbered Catholics approximately two to one, but Catholics were the largest Christian group, at 26 percent of the population (with Baptists second). Less than 2 percent of the American population is Jewish, and only 0.5 percent is Muslim.

Quite clearly, then, throughout the twentieth century, Christians have remained the overwhelming religious majority in America. Protestants, taken together, are still the majority, though their numerical superiority has diminished to the point where Roman Catholics are the largest Christian
group. And regardless of the proportional relations between Protestants and Catholics, because Protestantism and Catholicism both are Christ-centered religions that accept the New Testament as Scripture, they obviously have far more in common with each other than with Judaism. Most simply, Protestants and Catholics are Christians; Jews are not. Moreover, tensions between Protestants and Catholics diminished significantly after the meeting of the Second Vatican Council from 1962 to 1965. I do not mean to suggest that the differences between Protestantism and Catholicism are trivial; they are not. Indeed, for a brief period in mid-century (starting at around the 1950s), Protestants sought to help maintain their dominant position vis-à-vis the burgeoning Catholic population by courting American Jews as political allies. Many Protestants thus began to invoke the so-called Judeo-Christian tradition in an effort to persuade American Jews that true Christians (that is, Protestants) and Jews were natural allies. According to this argument, then, American Jews should align politically with Protestants rather than with Catholics. In fact, Jews occasionally joined with Protestants to form political coalitions—helping, for instance, to defeat Senator Joseph McCarthy and the House Un-American Activities Committee during the Red Scare. Nonetheless, from a Jewish standpoint, the Protestant assertion of a shared Judeo-Christian tradition was self-evidently problematic: in light of the persistent antisemitism running throughout European and American history, the Judeo-Christian tradition appeared quite clearly as an invention, a myth. The recent vintage of this supposed tradition was underscored by the fact that the Supreme Court mentioned it for the first time only in 1961. Indeed, as already discussed in chapter 2, the concept of a Judeo-Christian tradition is not merely a harmless or even misleading myth; rather, it is an antisemitic lie that suggests that Christianity necessarily reforms and replaces Judaism.

Regardless of the invidious antisemitism manifested in the assertion of a Judeo-Christian tradition, the nature of American antisemitism changed after World War II. And the single event that perhaps most changed the character of American antisemitism was the Holocaust. As discussed in chapter 8, overt antisemitism was socially respectable and quite common in America before the Holocaust. After World War II, however, overt antisemitism and racism resounded too closely with the violence of the Holocaust and thus became socially embarrassing; for their own well-being, (Christian) Americans needed to differentiate themselves sharply from the Germans. In the words of Jerome A. Chanes, "Adolf Hitler gave antisemitism a bad name." The Germans thus were racist monsters, but Americans
were different: Americans were exceptional. Americans were committed to equality and liberty for all—or so, at least, they wanted to believe.10

This need for Americans to distance themselves from the Nazis—the anti-Semitic murderers—combined with at least two other factors to help significantly reduce overt antisemitism. First, the restrictive immigration laws implemented during the 1920s severely curtailed the number of immigrant Jews coming to America. Consequently, the 1940 census for the first time marked a population with more native-born than foreign-born American Jews. Then, as these Jews increasingly assimilated into the Christian culture during the 1950s, they provoked less of the open hostility characteristic of earlier eras. Put bluntly, many Jews learned to “pass” in Christian America.11 Second, as Derrick Bell and Mary Dudziak have argued, several factors contributed to a postwar reduction in racism against African Americans. Most important, overt racism hindered the nation’s efforts to woo Third World countries during the Cold War and also interfered with national economic development, especially in the South.12 Insofar as antisemitism had become a form of racism, the reduction in racism against African Americans implicitly undermined antisemitism; if overt racism had become socially problematic, then so apparently did overt antisemitism.

Thus, by the late 1950s, overt antisemitism became a social faux pas: antisemitism went underground and became secretive, tacit, and unconscious.13 Two points require clarification. First, overt antisemitism remained strong in the years immediately after the war. Antisemitism was deeply engrained in American culture, so the ameliorative effects of the various factors—the Holocaust reaction, Jewish assimilation, and the reduction in racism—were gradual, not sudden. Second, overt antisemitism never disappeared completely, but it certainly became far less common.14 Antisemitism became less of the normal and natural experience of daily American life. An Anti-Defamation League survey immediately after World War II revealed that 56 percent of Americans believed that Jews had too much power in the United States. By 1964 this figure had dropped to 13 percent, and in 1981 10 percent.15 During the 1950s, Jews entered realms of the economy previously closed to them. Jews secured numerous positions at colleges and universities, including the most prestigious institutions, and successfully entered other semiacademic areas, such as publishing. Religious discrimination diminished at law firms and law schools so that, by the 1970s, it was practically eliminated. Jews also made strides in retail businesses, though major corporations continued to discriminate. In particular, with regard to the major corporations, business often was done at elite country clubs, and
these clubs continued to exclude or limit Jews. In 1966, an Anti-Defamation League survey reported that of 1152 clubs, 665 discriminated against Jews: 513 barred Jews, and 152 had quotas. Yet, in 1964, the federal government enacted the Civil Rights Act, which prohibited discrimination in employment and in places of public accommodation (such as hotels and restaurants) based on religion (as well as race, color, and national origin).

Despite these advances, America remained a de facto Christian nation, and implicit and unconscious antisemitism always remained a prominent part of American Jewish life. Postwar America experienced waves of religiosity: a period of religious fervor, followed by a declension, followed by a time of fervor, and so forth. The 1950s was a time of Christian fervor. Hence, for example, efforts to add a Christian amendment to the Constitution were renewed at around this time. The Christian Amendment Movement, closely resembling the National Reform Association of the late nineteenth century, spearheaded this drive, annually seeking members of Congress to submit an amendment for debate. And more than once, Congress did consider proposing a constitutional amendment; in 1959, seven congressional members, more than ever before, sponsored such an action. Although no suggested amendment ever received sufficiently broad-based support to make it out of Congress, this failure revealed more about Protestant disagreement concerning the proper relation between church and state than about the degree of Christian religiosity prevalent during the 1950s.

Winthrop S. Hudson and John Corrigan write of this period:

Seldom had religion been held in greater public esteem. The pledge of allegiance was amended to include the phrase “under God,” prayer breakfasts were attended by the president and members of his cabinet, a prayer room was installed in the national Capitol, and both the American Legion and the National Advertising Council launched “Back to God” and “Go to Church” campaigns.

Both old and novel practices that intermingled religion and government were the norm. The Supreme Court opened its daily sessions with the invocation “God save the United States and this honorable Court,” legislatures at the federal and state levels began daily proceedings with prayers from publicly paid chaplains, and currency was stamped with the national motto, “In God We Trust.” After World War II, the practice of granting released time from the public schools for religious (Christian) education became firmly established. Under these released-time programs, which were adopted in forty-six states, children were allowed to leave their public school classes early if (and only if) they were to attend a religious class
Instead. The symbolic effect of these programs was to provide a governmental stamp of approval for Christian religious education. The religious classes were conducted in the public schools themselves, and the programs provided a means for proselytizing. Teachers would approach Jewish school children and ask, "Why don't you want to listen to these pretty Bible stories? We just talked today about King David; you know he was a Jew." Classmates would occasionally taunt Jewish children, calling them "Christ killer" and "dirty Jew" because they refused to participate.

Throughout the 1950s, Bible reading, prayers, and Christmas and Easter celebrations continued as typical activities in the public schools. In fact, during this time, many of these religious and quasi-religious (Christian) practices were recast as part of the "American civil religion." Some Christian Americans now claimed that matters such as Sunday laws and Christmas celebrations in the public schools were part of a distinctly American civil life. These practices, in other words, were no longer characterized purely as Christian concerns, but rather were supposedly justified in secular terms. Moreover, in the late 1950s, Christian efforts to display their religious symbols publicly seemingly intensified. These displays—including crucifixes, crèches, Easter pageants, and so forth—were funded sometimes publicly and sometimes privately, and were presented sometimes on governmental and sometimes on non-governmental property.

In this post-World War II context, the Supreme Court began to enforce seriously the religion clauses of the first amendment against the state and federal governments. The Holocaust and the reduction in overt anti-Semitism undoubtedly influenced the Court to move in this direction, but at least four other factors contributed to the transition. First, as already discussed, by the 1950s, Roman Catholicism had become the largest Christian group in America: while Protestants still far outnumbered Catholics, Catholics outnumbered the largest Protestant denomination by almost two to one. As Roman Catholics thus had become a potent political force in American democracy, the Supreme Court's judicial enforcement of the separation of church and state can be understood as another Protestant reaction to a perceived Catholic threat. Significantly, the Supreme Court always remained overwhelmingly Protestant; from the 1940s through the 1970s, no more than one Catholic and one Jew ever sat on the Court at any time. Hence, insofar as Roman Catholic and Protestant values and practices diverged to some extent, the separation of church and state became in part a mechanism that could prevent Catholics from imposing their views on their Protestant rivals. Many Protestants were especially opposed to the public subsidization of the Roman Catholic
educational mission; Protestants frequently favored religious practices in
the public schools but opposed governmental aid to Catholic schools. I do
not wish, however, to overstate the significance of the Protestant–Catholic
division for understanding the judicial enforcement of the separation of
church and state. Positions on issues of church and state did not (and still
do not) neatly divide, with Protestants on one side of the line and Cath-
olics on the other. Indeed, during the 1950s, many Roman Catholics joined
Protestants in strongly supporting practices such as the Sunday laws and
religion in the public schools. Nonetheless, the fact remains: the Supreme
Court began to question the constitutionality of some of these activities
only when Roman Catholics, with their burgeoning political power, began
to strongly support such practices. Even more telling, in cases challenging
governmental aid to nonpublic schools (overwhelmingly Roman Catholic),
the Court has struck down the governmental action as unconstitutional
nearly twice as often as it has upheld the action. In light of the strong
Protestant sentiments against Catholicism expressed often throughout
American history, the concurrence of these judicial and social develop-
ments does not appear to be a matter of mere chance.

The second additional factor contributing to the Court’s increasing
solicitude for religious freedom during the postwar era was that Jews and
Jewish organizations—especially the American Jewish Committee, the Anti-
Defamation League, and the American Jewish Congress—stepped forward
to press for the separation of church and state in the courts. In particular,
the American Jewish Congress (with its general counsel, Leo Pfeffer)
strongly advocated the strict separation of church and state. These organi-
zations were buoyed by the reduction of overt antisemitism in America and
spurred by a post-Holocaust sense of urgency; many Jews (though cer-
tainly not all) were determined to no longer readily allow overt antisemit-
ism and Christianizing to go unchallenged. Consequently, in a significant
number of the most important religion-clause cases, these organizations
either instituted the action or participated as amicus curiae.

The third factor was the Court’s tendency during this period to become
more protective of many civil rights: the Court’s movement in religion-
clause cases, that is, paralleled its movement in other cases involving indi-
vidual rights. While the Court no longer was willing to grant constitutional
protection to economic interests, as it had before 1937, the Court began
during the 1940s and 1950s to reason that certain civil liberties stood in a
“preferred position.” The Court increasingly granted protection to these
so-called preferred freedoms, which included freedom of speech, freedom
of the press, and equal protection, as well as religious liberty. Hence, the
Court’s growing concern with the separation of church and state was part of a larger judicial trend to safeguard individual rights.

The fourth factor was an ever-increasing emphasis on the importance of democracy, especially in American intellectual circles. America’s ideology of democracy and its tendency toward populism (in government and religion)—combining with other causes—influenced America to gradually grow more democratic through its history. At least as a formal matter (but not necessarily as a social reality), the fifteenth amendment, ratified in 1870, extended the right to vote to African Americans, and the nineteenth amendment, ratified in 1920, extended suffrage to women. But it was only in the 1930s that democracy, as a theory of government, became a predominant intellectual concern (with the possible exception of the constitutional framing period). The earlier part of the twentieth century had seen the rise of scientific empiricism and its apparent corollary, ethical relativism. The appeal of scientific empiricism became most evident in the increasingly important social sciences. In particular, by the 1920s and 1930s, social scientists had rejected formal reasoning and abstract theorizing as means to knowledge and instead turned insistently to the empirical study of individual human actions and social functions. But from this perspective, the discovery of ethical values became problematic because experience and empirical studies provided the only means to knowledge. More precisely, since a knowledge of ethical values could not be grounded clearly on empirical evidence, such values seemed to be merely relative. By the 1930s, intellectuals found it difficult to justify any set of moral values or cultural tenets over any others: all values and cultures had equal claims to validity (and invalidity).30

International events during the 1930s transformed this seemingly inevitable acceptance of ethical relativism into an unexpected intellectual crisis. Specifically, for many American intellectuals, the international ascent of totalitarianism (including Nazism) rendered a firm belief in American democracy and the rule of law a necessity. Yet the rise of ethical relativism forced intellectuals to contemplate a disconcerting question: if all values are relative, then why is American democracy better than totalitarianism? In sum, the conjunction of intellectual currents and international events thrust the theoretical justification of democracy to the forefront of American thought.31

John Dewey was one of the first to respond to this challenge. In Freedom and Culture, published in 1939, Dewey asked what type of culture promotes the political freedoms of democracy. To Dewey, democracy had flourished in America because the culture had produced “a basic consensus and community of beliefs”—that is, a commitment to democracy.
Yet, Dewey queried, how can we ensure that democracy will not degenerate into totalitarianism, as it had in other parts of the world? He concluded that the political methods of democracy—such as consultation, persuasion, negotiation, and communication—need to be extended to the cultural realm in order to ensure the development and preservation of a culture that would, in turn, promote political democracy. In short, for Dewey, the key to democracy lay in democratic procedures: "democratic ends demand democratic methods for their realization."32

The need to justify democracy remained prominent after World War II as America became enmeshed in the Cold War. Two of Dewey’s themes—the commitment to procedures or processes and the belief in an American social consensus—became central components in the development of a relativist theory of democracy. While only a few years earlier the relativity of values threatened to disarm democracy, the same relativism now became the theoretical foundation for free government. According to relativist democratic theory, a society must constantly choose what substantive values to endorse and thus what ends to pursue, but since values are relative, the only legitimate means for choosing among disparate values is the democratic process. Each individual supposedly brings preexisting values to the political arena; then, through the democratic process, the community chooses to promote and pursue particular values and goals. At the communal level, the democratic process itself provides the only criterion for validating normative choices; there is no standard of validity higher than acceptance by the people in the political arena. Democracy thus resembles capitalism: the marketplace (democracy) provides a forum for the expression of individual preferences and values, and production (the government) responds accordingly.33 Moreover, many political theorists believed that American culture produced a needed consensus regarding democratic processes. Although various individuals and interest groups might clash in political struggles, they shared certain elementary cultural norms that prevented the society from splintering into embittered fragments. Thus, these theorists saw an American society fundamentally and harmoniously joined in a cultural consensus celebrating the processes of democracy: individuals freely express diverse viewpoints, they negotiate, they disagree, and they compromise.34

During this postwar era, democracy not only was a predominant concern for American intellectuals, but it also became a central judicial and political issue. Before the 1940s, the Supreme Court rarely even mentioned democracy, but from that time on, the Court gave increasing attention to it.35 Besides continually referring to democracy, the Court decided a
number of cases that were explicitly intended to promote it—striking down, for example, some of the mechanisms that different states had designed to impede African American participation in the democratic process (despite the fifteenth amendment). To illustrate, the Court held in two of the cases that poll taxes in state elections and racially discriminatory gerrymandering were unconstitutional. More broadly, the Court held that no person's vote should be worth more or less than another's: one person, one vote. Meanwhile, Congress enacted legislation—the Voting Rights Act of 1965 and parts of the Civil Rights Act of 1964—designed to guarantee the right to vote by eradicating literacy, educational, and character tests that had been used to discourage minority participation. Also in 1964, the twenty-fourth amendment was ratified, prohibiting poll taxes in federal elections, and in 1971, the twenty-sixth amendment guaranteed the right to vote for anyone eighteen years of age or older.

This postwar emphasis on democracy and the related rise of ethical relativism combined to help push the Court toward its more active enforcement of the separation of church and state. As value relativism had become intellectually acceptable and even in vogue, the governmental imposition of religious values and practices (or any other particular values, for that matter) seemed less justifiable than it had been in previous eras. Indeed, the Court's solicitude for all of the preferred freedoms, discussed above, can be better understood in this context. In an age of value relativism, what mattered most was protecting the ability of each individual both to formulate his or her own values and to participate in the democratic process. Hence, the Court tended to safeguard those constitutional rights that appeared integral to the formation of values—such as freedom of speech and religion—and crucial to the proper functioning of democracy—such as free speech, voting, and equal protection.

In addition, this relation between religion and value relativism helps further to explain the diminution of overt antisemitism, as well as the increasingly common references to the Judeo-Christian tradition during this postwar period. Basically, the prevalence of ethical relativism rendered Judaism somewhat more acceptable to many Americans. In the words of Daniel Silver: "How could anyone claim title to The Truth in an age which had learned the truth of relativity? Whatever Heaven was, if there was a Heaven, entrance was not restricted to one set of believers." Thus, to many Christian Americans (especially Protestants), Judaism came to be understood as a type of quirky Christian sect: why quibble about the details of sectarian differences when "we" all belong to the same Judeo-Christian tradition anyway? To become legitimate in America, then,
Judaism had to be transformed (at least apparently) into a *mere* religion, a matter of individual choice (in the American Protestant tradition); Judaism could no longer (appear to) be an ethnic identity or a way of life. In fact, as already mentioned, many Jews had become deeply assimilated into Christian American culture: these Jews were effectively forced to trade their distinctiveness, their religious and cultural identities, for the opportunity to succeed as Americans. Jews to a great extent had moved from a period (in the early twentieth century) when their differences from Christians were accentuated and objectified and when overt antisemitism was respectable to a period (during the 1950s and later) when their differences from Christians were largely denied or ignored and when overt antisemitism became socially unacceptable.

In sum, the Supreme Court tended to become more receptive to arguments concerning the separation of church and state because of the temporary alignment of a variety of factors: Protestant reaction to Roman Catholic political strength, the advocacy of Jewish organizations, the emergence of a preferred freedoms doctrine, an increased concern for democracy, and post-Holocaust sentiments including opposition to overt antisemitism. In a sense, because of the conjunction of these factors, Jews briefly and partially solved the puzzle of American democracy. During the New Deal, American Jews had “embraced the state” by gaining positions in the Roosevelt administration, but this tie between Jews and the federal government was exceedingly brief and due largely to the unique convergence of interests between Roosevelt and unemployed and underemployed Jewish professionals. Jews thus remained in a structured predicament in American society. On the one hand, Jews occasionally needed protection from Christian overreaching, and throughout (European) history Jews had turned to governmental officials for such refuge in times of crisis. For this reason, the sharp separation of religion and government would be detrimental to Jewish interests, as Jews (qua Jews) would be unable to align with governmental officials. On the other hand, because America was a democracy and overwhelmingly Christian, any governmental support for religion inevitably reinforced Christian values and interests. For this reason, the sharp separation of church and state might, in fact, provide some protection for American Jews.

Postwar American Jews discovered a partial solution to this predicament: the Supreme Court’s power of judicial review. So long as the Court remained open to Jewish arguments for the separation of church and state, Jews could (paradoxically) look to the state—that is, the Court—for protection from the state itself—that is, from the Christian masses acting through
the instrumentality of the state. More precisely, Jews sought the protection of the state through the institution of the judiciary, with the courts protecting Jews from the reach of the more political branches of government (which were largely controlled by the Christian majority). And the means used by the courts to protect Jews from political overreaching was, of course, the constitutional principle of separation of church and state. So, in other words, Jews embraced the state—as embodied in the courts, especially the Supreme Court—to enforce the principle of separation of church and state in order to be protected from the Christian masses who democratically controlled the state—as embodied in the legislative and executive branches of the national, state, and local governments.

The role of American Jews in the postwar judicial evolution of the separation of church and state is highly complex. Without doubt, the major Jewish organizations played important roles in the litigated cases. Indeed, my critical narrative suggests that many Jews overestimated the benefit of a strict separation of church and state, partly because they oversimplified the relation between religion and government. Nonetheless, as I mentioned when discussing the nineteenth century, American Jews as a small numerical minority were forced to accept certain parameters of the Christian American world. Namely, when seeking religious liberty and equality in America, Jews needed to argue for freedom of conscience and the separation of church and state, even though those concepts were Christian (especially Protestant) and thus foreign to any previous Jewish world view. It was the burden of the prototypical religious outgroup—Jews—to re-articulate the Christian-Protestant theology and interests, as expressed in the religion clauses, to represent some type of principle of religious freedom and equality that might accord at least minimal protection to Jews and not just to Christians. As mentioned, a variety of factors led the Supreme Court to accept at least briefly some of the Jewish arguments concerning church and state, but insofar as any principle of religious freedom and equality developed in the courts, it never strayed far from the Christian-Protestant interests that lay at its foundation.

Before the post–World War II era, the Supreme Court infrequently decided cases under the free exercise and establishment clauses. Furthermore, even in those rare cases, the Court had interpreted the religion clauses as having little bite. Indeed, in *Permolt v. City of New Orleans*, decided in 1845, the Court held that the religion clauses did not apply against the *state* governments at all.⁴² And in those cases challenging *federal* activities—typically brought under the free exercise clause—the governmental actions inevitably were upheld as constitutional. For example, in *Reynolds v.*
In 1878, Reynolds challenged his criminal conviction for committing polygamy in a federal territory. Reynolds, a Mormon, contended that he was religiously obligated to follow polygamy, and thus he claimed that the conviction violated the free exercise clause. The Court rejected the free exercise claim and upheld Reynolds's conviction. In reaching this conclusion, the Court emphasized a distinction between beliefs and actions: Congress could not constitutionally pass laws that would infringe on religious beliefs and opinions, but Congress could restrict actions for the good of society, even if those actions were supposedly related to religious beliefs. Furthermore, the Court for the first time quoted Thomas Jefferson's gloss on the religion clauses: in an 1802 letter to the Danbury Baptist Association, Jefferson had declared that the first amendment had built "a wall of separation between church and State."

The first key step in the transition of the Supreme Court's approach to the separation of church and state was the application of the free exercise and establishment clauses against the states. The mechanism for this change was the incorporation doctrine: starting in the early twentieth century, the Court held that the due process clause of the fourteenth amendment, adopted during Reconstruction in 1868, incorporated or implicitly included various provisions of the Bill of Rights. These provisions then applied against the state governments, just as they applied against the federal government. In 1940, in *Cantwell v. Connecticut*, the Court held that the free exercise clause was incorporated and applied against the states, and in 1947, in *Everson v. Board of Education*, the Court held that the establishment clause was incorporated. As was somewhat common during the 1940s, *Cantwell* involved a free exercise claim combined with a free speech claim. The Court held that a state violated the first amendment when it demanded that a member of the Jehovah's Witnesses obtain a permit before soliciting money on the street. Beyond the incorporation of the free exercise clause, the case had little precedential value because the Court relied on the free exercise clause only in conjunction with the free speech clause. Meanwhile, in *Everson*, as in *Reynolds*, the Court again drew upon Jefferson's metaphorical wall of separation between church and state to explicate the meaning of the religion clauses, particularly the establishment clause. The Court wrote:

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or
disbelief in any religion. No person can be punished for entertaining or pro-
professing religious beliefs or disbeliefs, for church attendance or non-atten-
dance. No tax in any amount, large or small, can be levied to support any
religious activities or institutions, whatever they may be called, or whatever
form they may adopt to teach or practice religion. Neither a state nor the
Federal Government can, openly or secretly, participate in the affairs of any
religious organizations or groups and vice versa. In the words of Jefferson,
the clause against establishment of religion by law was intended to erect "a
wall of separation between Church and State."47

Despite then insisting that the wall between church and state "must be
kept high and impregnable," the Court nonetheless rejected the establish-
ment clause challenge, holding that the public reimbursement of trans-
portation costs for children attending either public or Catholic schools was
constitutional.48

Everson, though, merely inaugurated a series of cases involving the con-
junction of religion and education. In the next one, McCollum v. Board of
Education, decided in 1948, the Court for the first time struck down a gov-
ernmental action as unconstitutional under the establishment clause.
McCollum involved a challenge to a released-time program. In this particu-
lar program, children were released early from their public school classes
once each week so that they could attend religious classes, which were
held in the public school buildings. Other children, not seeking religious
instruction, were not similarly released from their regular classes. The
Court, again emphasizing the wall of separation between church and state,
held that this type of released-time program was unconstitutional: "This is
beyond all question a utilization of the tax-established and tax-supported
public school system to aid religious groups to spread their faith. And it
falls squarely under the ban of the First Amendment."49

Although McCollum was a significant decision, it was not a harbinger of
radical change: the Court did not embark on a purge of religion (Christian-
ity) from public life, whether in the schools or elsewhere. Zorach v.
Clauson, decided in 1952, involved another establishment clause challenge
to a released-time program. In this program, unlike the one in McCollum,
the religious instruction occurred off the public school grounds. Emphasizing this fact, the Court upheld this program as constitutional. In
so doing, the Court declared:

We are a religious people whose institutions presuppose a Supreme
Being.... When the state encourages religious instruction or cooperates
with religious authorities by adjusting the schedule of public events to sec-
tarian needs, it follows the best of our traditions. For it then respects the
This declaration strongly resonated with the assertion that America is a Christian nation, which the Court had reiterated numerous times in the past. Moreover, despite evidence showing that Jewish children and other nonparticipants in the released-time program were taunted, ostracized, and proselytized, the Court concluded that the state did not coerce students to participate.

The next important cases arose from several different challenges to a long-standing Protestant tradition in America, the Sunday laws. In a set of four cases, the Court held that these laws violated neither the free exercise nor the establishment clause. The Court downplayed the fact that the Sunday laws undisputedly were historically rooted in Christianity. According to the Court, the Sunday laws now were justified by purely secular reasons, such as ensuring a day of rest. Even Orthodox Jews, whose religious convictions demand that they observe the Sabbath on Saturday, were not exempted from the Sunday laws. One case was most remarkable because the Sunday law included an incredible list of exemptions:

[The Massachusetts Sunday law forbids] under penalty of a fine of up to fifty dollars, the keeping open of shops and the doing of any labor, business or work on Sunday. Works of necessity and charity are excepted as is the operation of certain public utilities. There are also exemptions for the retail sale of drugs, the retail sale of tobacco by certain vendors, the retail sale and making of bread at given hours by certain dealers, and the retail sale of frozen desserts, confectioneries and fruits by various listed sellers. The statutes under attack further permit the Sunday sale of live bait for noncommercial fishing; the sale of meals to be consumed off the premises; the operation and letting of motor vehicles and the sale of items and emergency services necessary thereto; the letting of horses, carriages, boats and bicycles; unpaid work on pleasure boats and about private gardens and grounds if it does not cause unreasonable noise; the running of trains and boats; the printing, sale and delivery of newspapers; the operation of bootblacks before 11 a.m., unless locally prohibited; the wholesale and retail sale of milk, ice and fuel; the wholesale handling and delivery of fish and perishable foodstuffs; the sale at wholesale of dressed poultry; the making of butter and cheese; general interstate truck transportation before 8 a.m. and after 8 p.m. and at all times in cases of emergency; intrastate truck transportation of petroleum products before 6 a.m. and after 10 p.m.; the transportation of livestock and farm items for participation in fairs and sporting events; the sale of fruits and vegetables on the grower's premises; the keeping open of public bathhouses; the digging of clams; the icing and dressing of fish; the sale of works of art at exhibitions; the conducting of private trade expositions between 1 p.m. and
And the list goes on (and on). Despite this seemingly endless litany of exemptions, the Court upheld the state’s astounding refusal to grant an exemption to Orthodox Jews (would granting an exemption have undermined the purpose of the law?). In fact, many states continued to enforce Sunday laws until economic considerations forced a change: as more and more stores opened along suburban highways or in shopping malls instead of in downtown districts, Sunday became increasingly commercialized. These new stores sought to attract shoppers on the weekends, including Sundays, because urban workers could not walk (or run) conveniently into suburban stores while on workday lunch breaks or immediately after work.56

The next major decision, Engel v. Vitale, probably did more than any other to reinforce the dominant story of the separation of church and state. In 1951, the Board of Regents of the state of New York had recommended that local school boards have children recite a prayer each day in school in order to promote religious commitment and moral and spiritual values. The Regents recommended the use of a supposedly “nondenominational” prayer: “Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country.”57 In 1958, when the school board in the town of New Hyde Park, Long Island, adopted this prayer for use in the classrooms, several parents decided to challenge its constitutionality. Early reactions to this litigation were foreboding, as the plaintiffs received numerous hate letters. One letter, for example, stated: “This looks like Jews trying to grab America as Jews grab everything they want in any nation. America is a Christian nation.” Another letter declared: “If you don’t like our God, then go behind the Iron Curtain where you belong, Kike, Hebe, Filth.”58 When the Supreme Court decided the case in 1962, Engel v. Vitale held that the daily recitation of the Regents’ prayer in the public schools violated the establishment clause. The Court drew upon Protestant history to interpret the establishment clause: the Puritans, the Court recalled, had fled England for America in the seventeenth century to avoid following the governmentally imposed Book of Common Prayer for the Church of England. Daily recitation of the Regents’ prayer, according to the Court, resounded too closely with the official imposition of a Prayer Book. The Court reasoned further that the first amendment prohibited any law that established an “official religion,” even if the law did not coerce religious practices. Regardless, the
Court recognized that coercion existed in this particular context, although the students were allowed to remain silent or to leave the room when their classmates recited the prayer. The Court used language that buoyed the hopes of advocates of a strong separation of church and state:

When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain. But the purposes underlying the Establishment Clause go much further than that. Its first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion.59

Court observers either hoped or feared—depending on their perspective—that Engel was a watershed decision. To many, Engel demonstrated the fulfillment of the dominant story of church and state: surely, the argument went, the religion clauses protected the religious freedom and equality of outgroups if even nondenominational prayers could not be recited in public school classrooms.60 Consequently, as then described in The New Republic, Engel provoked “the most savage controversy” since 1954, when the Court held in Brown v. Board of Education that racially segregated public schools were unconstitutional.61 For the most part, Engel unleashed a torrent of ridicule on the Court, which, according to many, “had betrayed the American way of life.”62 For example, a Wall Street Journal editorial lamented the likely implications of the decision: “Poor kids, if they can’t even sing Christmas carols.”63 Unsurprisingly, Engel led to yet another spurt of proposals to add a Christian amendment to the Constitution; indeed, the 1964 platform of the Republican Party called for such an amendment. And in a particularly insidious argument, some Christians ominously observed that such judicial decisions might soon spark a wave of antisemitism. These Christians suggested, in other words, that Jews (litigating before the Court) caused antisemitism: Jews could generate a renewal of overt antisemitism if they (and other non-Christians) did not allow Christian Americans to retain those practices that stamped this nation as Christian.64

The Supreme Court cases decided in 1963, the year after Engel, supported the notion that Engel had been a landmark. The first case, Abington School District v. Schempp, also involved prayer in the public schools. A state statute required that, at the outset of each day, every public school was to read to its students ten verses from the Bible, recite the Lord’s Prayer, and then recite the Pledge of Allegiance. Children could participate
“voluntarily” by joining in the Bible reading and prayer recitation; during
the prayer and the Pledge, students were asked to stand and speak in uni-
son. Although the statute did not specify what Bible was to be used, the
only Bible supplied by the schools was the (Protestant) King James version,
which was distributed to each teacher. The Court held that voluntary Bible
reading and recitation of the Lord’s Prayer violate the establishment clause.
In so holding, the Court acknowledged that expert evidence suggested that
significant portions of the New Testament were contrary to Judaism.\(^{65}\)
Although the Court reiterates that “[w]e are a religious people,” it contin-
ued by emphasizing that the establishment and free exercise clauses
together require governmental neutrality in matters of religion.\(^{66}\) Because
of this demand for neutrality, the Court explicitly rejected the so-called
nonpreferentialist position. According to this position, the establishment
clause merely forbids the government from favoring or preferring one reli-
gion over another; it does not prohibit the government from favoring reli-
gion over non-religion. The Court reasoned that it had repudiated the
nonpreferentialist position almost twenty years earlier in Everson:
“[N]either a state nor the Federal Government can set up a church.
Neither can pass laws which aid one religion, aid all religions, or prefer one
religion over another.”\(^{67}\) Based on this conception of neutrality, the Court
articulated a two-pronged test—focusing on the purposes and effects of the
state action—to determine whether a governmental action violated the
establishment clause:

The test may be stated as follows: what are the purpose and the primary
effect of the enactment? If either is the advancement or inhibition of religion
then the enactment exceeds the scope of legislative power as circumscribed
by the Constitution. That is to say that to withstand the strictures of the
Establishment Clause there must be a secular legislative purpose and a pri-
mary effect that neither advances nor inhibits religion.\(^{68}\)

The second key religion case from 1963 was Sherbert v. Verner.\(^{69}\) Signif-
icantly, Sherbert appeared to energize the free exercise clause, just as
McCollum, Engel, and Schempp had done (or at least appeared to have
done) with the establishment clause.\(^{70}\) Sherbert had been discharged from
her job because she refused to work on Saturday, the Sabbath of her
religion, Seventh-day Adventism. When she was unable to obtain alterna-
tive employment because of her religious convictions, she applied for
unemployment benefits from the state of South Carolina. The state denied
Sherbert’s claim for benefits, reasoning that she had refused to accept
suitable work “without good cause.” The Court held this state action
unconstitutional under the free exercise clause. In reaching this conclusion, the Court articulated a test for adjudicating free exercise claims: a state can justify a burden on an individual’s free exercise of religion only by showing that the state action is necessary to achieve a compelling state interest. Under the facts in Sherbert, the Court reasoned that the state’s asserted interest in preventing spurious and unscrupulous unemployment claims was insufficient to justify the state action in light of this strict judicial scrutiny.71 Most important, the compelling state interest (or strict scrutiny) test would remain as the predominant standard in free exercise actions for over two decades.

Similarly, in deciding Lemon v. Kurtzman in 1971, the Court articulated a test that would remain for nearly two decades as the predominant standard in establishment clause cases. The so-called Lemon test had three prongs: “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster ‘an excessive government entanglement with religion.’”72 This test further developed the Schempp standard by adding the third prong—the focus on governmental entanglement—to the previously articulated two prongs—focusing on the purposes and effects of the state action. In applying this three-pronged test, the Lemon Court held unconstitutional two state programs that provided financial aid to church-related schools by supplementing teachers’ salaries and paying for books and other instructional materials in secular subjects.

The further development of free exercise doctrine after Sherbert is rather easy to summarize. In Wisconsin v. Yoder, decided in 1972, the Court struck down another state action as violating the free exercise clause. Members of the Old Order Amish—who are Christians—were convicted for violating a state compulsory education law because they had refused to send their children to school after the eighth grade. The Court applied the compelling state interest test and held the convictions to be unconstitutional; compulsory education did not amount to a compelling interest. In reaching this conclusion, the Court returned to the distinction between belief (or opinion) and action (or conduct) that the Reynolds Court had stressed in the late nineteenth century. The Yoder Court maintained that unlike religious beliefs, “religiously grounded conduct” can be regulated. But such conduct, the Court emphasized, is still within the ambit of the free exercise clause; therefore, contrary to the state’s argument, the Amish’s actions were not automatically unprotected under the first amendment.73

For many years after Yoder, the Court continued to claim that the compelling state interest test was presumptively the proper standard in free
exercise cases. The Court would (at least nominally) apply the compelling state interest test unless the factual circumstances suggested that a lower level of scrutiny was appropriate. In fact, regardless of the level of judicial scrutiny, between 1972 (when Yoder was decided) and 1990 (when the free exercise doctrine was expressly and significantly changed), the Court held that a governmental action contravened the free exercise clause in only three cases. And each of those cases closely resembled Sherbert: the free exercise claims were brought by Christians (belonging either to a minority sect or to no sect at all) who had been denied unemployment benefits.

In all other cases, the Court upheld the governmental actions. For example, in United States v. Lee, the Court applied strict scrutiny but nonetheless concluded that the free exercise clause did not require the federal government to exempt an Old Order Amish employer from collecting and paying Social Security taxes. In Bob Jones University v. United States, the Internal Revenue Service (IRS) denied tax-exempt status to private schools that, for religious reasons, discriminated on the basis of race. The Court held that the IRS action survived strict scrutiny under the free exercise clause; the eradication of racial discrimination in education was deemed a compelling state interest. In Goldman v. Weinberger, the Court rejected the free exercise claim of an Orthodox Jewish rabbi, Goldman, who was an officer in the Air Force. Air Force regulations prohibited wearing any headgear indoors, but as an Orthodox Jew, Goldman needed to wear a yarmulke (skullcap) at all times. In evaluating Goldman's request for a free exercise exemption from the Air Force regulations, the Court reasoned that the special needs of the military for obedience and unity rendered strict scrutiny inappropriate. The Court then concluded that the regulations were reasonable, and as such, they did not violate the free exercise clause. In Bowen v. Roy and Lyng v. Northwest Indian Cemetery Protective Association, the Court upheld governmental actions that were inconsistent with the religious practices of Native Americans. In both cases, strict scrutiny was deemed inappropriate: the burdens on religion supposedly were insufficient to require that the government justify its actions with compelling interests. In O'Lone v. Estate of Shabazz, the Court held that prison regulations preventing Muslim prisoners from attending certain religious services did not violate the free exercise clause. Because of a perceived need to defer to prison officials, the Court reasoned that a level of judicial scrutiny lower than the compelling state interest test was appropriate for evaluating the free exercise claims of prisoners. The Court thus concluded that the prison regulations were constitutional because they were rationally related to a legitimate governmental interest.
Finally, in *Employment Division, Department of Human Resources v. Smith*, decided in 1990, the Court expressly changed the standard for evaluating free exercise claims. Smith belonged to the Native American Church, whose members participate in religious rituals that include the supervised consumption of peyote. Smith was discharged from his job at a private drug rehabilitation clinic because his use of peyote violated the state criminal laws. The Court held that the state criminal law prohibiting the use of peyote even for religious purposes did not violate the free exercise clause. In reaching this conclusion, the Court once again emphasized a distinction between religious beliefs and conduct (or actions). The first amendment precluded all governmental regulations of religious beliefs, but it did not similarly preclude governmental restrictions on conduct—such as the use of peyote—even if the conduct arose from religious convictions. A governmental prohibition on particular religiously motivated conduct would be unconstitutional only if the government restricted that conduct exactly because of its religious foundation. Consequently, and most important, the Court abandoned the strict scrutiny test for free exercise challenges to laws of general applicability. For such laws, the Court claimed that the compelling state interest test was appropriate only in cases involving the denial of unemployment compensation, such as *Sherbert*. In other situations, the Court suggested that the “political process” would effectively determine the scope of free exercise rights. Remarkably, then, the *Smith* Court moved from the previous doctrine of presumptively applying strict scrutiny in free exercise cases—supposedly showing almost no deference to the political process—to a doctrine without meaningful judicial scrutiny of challenged governmental actions—a standard showing extraordinary deference to the legislative process. Soon after *Smith*, though, Congress attempted to reinstate the compelling state interest test by enacting the *Religious Freedom Restoration Act of 1993*, but the effects and even the constitutionality of that legislation remain in serious doubt. In any event, based on the *Smith* Court’s constitutional doctrine, a free exercise challenge to a governmental action has little chance of success: in all likelihood, the Court would hold a state action unconstitutional under the free exercise clause only if the government intentionally and egregiously discriminated on the basis of religion.

Meanwhile, the further development of establishment clause doctrine is complex. From 1971 until the mid-1980s, the three-pronged *Lemon* test remained unequivocally the dominant standard. For example, in *Stone v. Graham*, decided in 1980, the Court considered the constitutionality of a state statute that required the biblical Ten Commandments to be posted on
public classroom walls. Reasoning that the statute violated the first prong of the Lemon test because it had no secular purpose, the Court held that it contravened the establishment clause. In Mueller v. Allen, decided in 1983, the Court reviewed a state statute that allowed “taxpayers to claim a deduction from gross income for certain expenses incurred in educating their children.” Although the statute allowed all parents to claim this deduction—whether their children attended public or private schools—the primary beneficiaries of this statute were parents with children in private schools, which were overwhemingly parochial (Christian). Nonetheless, the Court held that the statute was constitutional because it satisfied all three prongs of the Lemon test, although a strong four-justice dissent argued that the statute violated the second or “primary effects” prong. Significantly, the majority characterized the Lemon test as only a “helpful signpost,” thus revealing that the justices’ commitment to this standard was wavering.

The weakening hold of the Lemon test on the Court emerged unmistakably in an opinion handed down only days after Mueller. In Marsh v. Chambers, the Court held that the practice of having a publicly paid chaplain open state legislative sessions with a prayer did not violate the establishment clause. In so holding, the Court ignored the Lemon test and instead reasoned that the opening of legislative sessions “with prayer is deeply embedded in the history and tradition of this country.” Unsurprisingly, in light of the Court’s reliance on American tradition, the opinion concluded by reiterating that “[w]e are a religious people.” Moreover, and also unsurprisingly, the specific state involved in the dispute, Nebraska, had selected the same chaplain for sixteen straight years: he was Protestant (Presbyterian). Although the chaplain characterized his prayers as “nonsectarian,” some of the prayers were distinctly Christian, such as the following:

Father in heaven, the suffering and death of your son brought life to the whole world moving our hearts to praise your glory. The power of the cross reveals your concern for the world and the wonder of Christ crucified.

The days of his life-giving death and glorious resurrection are approaching. This is the hour when he triumphed over Satan’s pride; the time when we celebrate the great event of our redemption.

Lynch v. Donnelly, decided in 1984, revealed that establishment clause doctrine had plunged into disarray. The city of Pawtucket, Rhode Island, erected a Christmas display in a park in the heart of the shopping district. The Court described the display as follows:
The display is essentially like those to be found in hundreds of towns or cities across the Nation—often on public grounds—during the Christmas season. The Pawtucket display comprises many of the figures and decorations traditionally associated with Christmas, including, among other things, a Santa Claus house, reindeer pulling Santa’s sleigh, candy-striped poles, a Christmas tree, carolers, cutout figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, a large banner that reads “SEASONS GREETINGS,” and the crèche at issue here. All components of this display are owned by the City.92

The sole issue was whether the governmental display of the crèche violated the establishment clause.

The Court ultimately upheld the constitutionality of the governmental action, but the Court’s opinion revealed the deep ambivalence (or confusion) of the justices regarding the appropriate doctrine for adjudicating an establishment clause issue. After stating the facts, the Court began with a review of American history—echoing the Marsh Court’s approach—to show that government and religion have often been entwined despite the establishment clause: “There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789.” Unlike the Marsh Court, however, the Lynch Court did not rely solely on history or tradition to uphold the governmental action. Instead, the Court noted that there is no mechanical or fixed rule for resolving establishment clause issues. Yet, the Court continued, the Lemon test has often been “useful” in such cases. Consequently, the Court presented the Lemon test, only to immediately add a caveat: “But we have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area.”93

Finally, the Court proceeded to apply the Lemon test to the facts, but even when applying Lemon, particularly the first two prongs (the purpose and effect prongs), the Court again stressed American history in reasoning that the governmental action here satisfied the Lemon requirements. In determining that the display of the crèche (supposedly) had a secular purpose, the Court cast Christmas as a historical event rather than a Christian holiday: “The city, like the Congresses and Presidents, however, has principally taken note of a significant historical religious event long celebrated in the Western World. The crèche in the display depicts the historical origins of this traditional event long recognized as a National Holiday.”94 Then, in analyzing the second prong—whether the primary effect of the crèche was to advance religion—the Court again adverted to history. Specifically, the Court reasoned that if the governmental display of the crèche were to fail
the primary effects prong of Lemon, then many other traditional forms of governmental support for religion—forms that the Court already had upheld—would have to be deemed unconstitutional. Finally, the Court concluded that the display of the crèche did not amount to excessive governmental entanglement with religion—the third prong of Lemon. According to the majority, administrative entanglement did not exist because governmental officials were not involved in religious affairs. Furthermore, the crèche display did not generate any political divisiveness. Consequently, the Court held that the governmental display of the crèche satisfied the Lemon test and therefore was constitutional.

Because of dissatisfaction with the Lemon test, Justice Sandra Day O'Connor wrote a concurrence in Lynch that advocated the adoption of an alternative approach. O'Connor's so-called endorsement test had two prongs. First, does the state action create excessive governmental entanglement with religion? Second, does the state action amount to governmental endorsement or disapproval of religion? The endorsement test can be read in at least two different ways. Under one reading, the endorsement test, for the most part, merely reformulated the Lemon test. The first prong of the endorsement test was the same as the third prong of the Lemon test, and the second prong of the endorsement test amounted in practice to a combination of the purpose and effects prongs (the first two prongs) of the Lemon test. Under a second reading, the endorsement test stressed, more so than the Lemon test, that the establishment clause should protect an individual's connection to or standing within the political community.

Over the next several years, the Court continued to apply the Lemon test to resolve most establishment clause issues, but simultaneously, the endorsement test gathered enough support to appear likely to emerge eventually as the predominant standard. In County of Allegheny v. American Civil Liberties Union, decided in 1989, the constitutional question of governmental displays of religious symbols once again was raised. Two different displays were challenged: "The first is a crèche placed on the Grand Staircase of the Allegheny County Courthouse [in downtown Pittsburgh]. The second is a Chanukah menorah placed just outside the City-County Building, next to a Christmas tree and a sign saluting liberty." Apparently, a majority of justices could not agree on any one test or standard for determining the constitutionality of these displays, so the majority opinion articulated both the Lemon and the endorsement tests, suggesting that the latter refined the former. Meanwhile, a plurality opinion in the same case not only fully accepted the endorsement test but also argued that a
majority of justices previously had accepted the test, though never in one majority opinion.\(^{102}\) Finally, Justice Anthony Kennedy, concurring and dissenting, advocated that the Court adopt yet a different approach to establishment clause issues. Kennedy’s so-called coercion test had two parts: “government may not coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact ‘establishes a [state] religion or religious faith, or tends to do so.’”\(^{103}\)

Regardless of which test a majority of justices truly applied in *Allegheny County*, the case underscored that the constitutionality of governmental displays of religious symbols would be determined in an ad hoc fashion, with the result depending upon the specific facts of each case. The Court held that the display of the crèche was unconstitutional because it stood alone, unlike the crèche in *Lynch*, which had been part of a larger “Christmas display.”\(^{104}\) Since the *Allegheny County* crèche stood apart, “nothing in the context of the display detracts from the crèche’s religious message.”\(^{105}\) Using similar reasoning, the Court then held that the display of the menorah was constitutional largely because it was accompanied by a Christmas tree and a sign saluting liberty. Any religious message of the menorah supposedly was dissipated since the menorah stood within the larger holiday display.\(^{106}\)

In *Lee v. Weisman*, decided in 1992, the Court held that public schools violate the establishment clause by having clergy deliver invocation and benediction prayers at graduation ceremonies.\(^{107}\) Daniel Weisman had challenged the constitutionality of this governmental activity after a rabbi offered prayers at his daughter’s middle school graduation in Providence, Rhode Island. The series of events that led the school to have a rabbi deliver the prayers is illuminating.\(^{108}\) The Providence school district had a policy of permitting the middle and high schools to invite clergy to give invocation and benediction prayers at graduations. When Weisman’s older daughter graduated from middle school in 1986, the speakers at the ceremony included a Baptist minister who asked the audience to stand, bow their heads, and say a prayer that explicitly referred to Jesus Christ. Weisman, who was Jewish, felt “violated” and “appalled,” and consequently he complained to school officials.\(^{109}\) He requested that future graduation ceremonies not include prayers, but the school district refused to change its policy. Thus, when Weisman’s younger daughter, Deborah, approached her graduation from middle school in 1989, Weisman twice inquired whether the principal, Robert E. Lee, planned to have prayers at the forthcoming graduation ceremony. After initially not responding to Weisman’s inquiries,
Lee finally revealed that he had invited a rabbi to say the prayers. Lee and other school officials assumed that if a rabbi delivered the prayers, then Weisman would not and indeed could not complain. Weisman nonetheless was dissatisfied: he did not want any prayers and did not wish to have his religious beliefs imposed on others. Regardless of Weisman's wishes, Lee refused to revoke the invitation to the rabbi. Then, before the graduation, Lee advised the rabbi to say nonsectarian prayers and also gave the rabbi a pamphlet prepared by the National Conference of Christians and Jews that contained guidelines for public prayers at civic ceremonies. Deborah Weisman and her family attended her graduation ceremony, and the rabbi did in fact deliver the invocation and benediction prayers. Subsequently, Daniel Weisman sought a permanent injunction barring Lee and other Providence public school officials from inviting clergy to say prayers at future graduations.

With a clever gambit, the Court declared that it would resolve this case without clearing the morass of establishment clause doctrine. Specifically, the Court stated that in this case it would not reconsider the vitality of the Lemon test, but the Court did not then apply or otherwise rely upon Lemon. Instead, the Court wrote:

> It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which "establishes a [state] religion or religious faith, or tends to do so." The State's involvement in the school prayers challenged today violates these central principles.

The majority opinion, written by Justice Kennedy, thus accepted the coercion test, first introduced in Kennedy's Allegheny County dissent, as a permissible method for adjudicating establishment clause claims. The Weisman Court seemed to suggest that of the three major establishment clause tests—the Lemon, coercion, and endorsement tests—the coercion test provides the least protection for religious liberty. Hence, if a governmental action contravenes the coercion test, then the action surely would violate the Lemon and endorsement standards and should be held unconstitutional. The Court, according to this reasoning, could decide the Weisman case without determining the fate of the beleaguered Lemon test. The implication, apparently, is that Lemon, at least for the time being, remains good law—an adequate if not the predominant method for adjudicating establishment clause issues.

In any event, the Court focused its analysis on the issue of coercion: would the public school practice of having clergy deliver prayers at gradua-
tion coerce a student such as Deborah Weisman into participating in a religious exercise? In concluding that coercion was present in this context, the Court emphasized that the graduates were adolescents, who might be coerced more easily than adults. Thus, contrary to the argument of Justice Antonin Scalia in dissent, coercion might exist even though the government was not "by force of law and threat of penalty" imposing a religious orthodoxy or demanding financial support for religion. Rather, coercion can be indirect and can arise from psychological pressure to conform to certain religious practices. The majority wrote:

The undeniable fact is that the school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the Invocation and Benediction. This pressure, though subtle and indirect, can be as real as any overt compulsion.

Having accepted a conception of coercion that included indirect and psychological pressure, the Court still needed to respond to two more governmental arguments: first, that Deborah voluntarily chose to attend the graduation, and second, that she was free to attend the graduation without participating in the prayers. If either of these arguments were accepted, then Deborah and other students seemingly would not be coerced to participate in a religious exercise. With regard to the first point, the Court reasoned that while Deborah chose or consented to attend the graduation, she did not do so voluntarily. That is, her only choices were to attend or not to attend, but a graduation ceremony is such an important event to many students and their families that Deborah's choice to attend should not have been deemed voluntary. Absence from the graduation "would require forfeiture of those intangible benefits which have motivated the student through youth and all her high school years." With regard to the second point, the Court maintained that Deborah could not have attended the graduation without feeling coerced to participate in the prayers. According to the majority opinion, a "reasonable dissenter" in the position of Deborah Weisman would have believed that her attendance at graduation "signified her own participation or approval of [the prayers]."

Cases after Weisman have not clarified the doctrinal confusion swirling around the establishment clause. For the most part, the justices in these recent cases have avoided confronting the problematic status of the doctrine. The Court has eschewed articulating any definitive standard for adjudicating the establishment clause issues, and instead usually has emphasized a need for governmental neutrality in religious affairs. For example,
in Zobrest v. Catalina Foothills School District, the Court held that a public school district can provide a sign-language interpreter for a student in a Roman Catholic high school without contravening the establishment clause. The Court reasoned, in typical language, that "government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit."117 In Rosenberger v. Rectors and Visitors of the University of Virginia, the Court came close to articulating some type of test for resolving establishment clause issues: "[W]e must in each case inquire first into the purpose and object of the governmental action in question and then into the practical details of the program's operation."118 Nonetheless, in holding that the University of Virginia had violated the establishment clause by withholding university financial support for a student-run Christian publication, the Court emphasized that the government must act neutrally, not treating religious organizations less favorably than secular ones.119

In one case, Capitol Square Review and Advisory Board v. Pinette, decided in 1995, the intense disagreement among the justices became manifest. In Pinette, the Court held that a private actor, the Ku Klux Klan, could constitutionally display a large Latin (Christian) cross on public property. In a plurality opinion, four justices explicitly rejected the endorsement test: "[T]he endorsement test does not supply an appropriate standard for the inquiry before us. It supplies no standard whatsoever."120 In particular, the plurality emphasized that the endorsement test itself raises a difficult problem: if, following the endorsement test, any governmental action that endorses religion is to be held unconstitutional, then from whose perspective should endorsement be determined? Despite this difficulty, four other justices expressly accepted and applied the endorsement test, but they disagreed about the ultimate result. Justice O'Connor's concurrence, joined by Justices David Souter and Stephen Breyer, insisted that "the endorsement test necessarily focuses upon the perception of a reasonable, informed observer."121 To O'Connor, this reasonable observer should be "a personification of a community ideal of reasonable behavior, determined by the [collective] social judgment."122 Justice John Paul Stevens, who dissented, agreed that the endorsement test is the appropriate standard and that it should be applied from the perspective of a reasonable observer. But Stevens criticized O'Connor's conception of the reasonable observer as being an "ideal human [who] comes off as a well-schooled jurist." To Stevens, the reasonable observer should be a person "who may not share the particular religious belief" symbolized in the disputed public
display. Hence, *Pinette* did not clarify the doctrine for adjudicating establishment clause issues: to the contrary, *Pinette* disclosed the depth of disagreement that exists among the justices in this field.

**A Brief Assessment of the Supreme Court Cases**

In one popular formulation of the dominant story of the separation of church and state, constitutional scholars and historians maintain that the Supreme Court decisions in the latter half of the twentieth century fulfilled the American principle of religious liberty. In this section and in the next chapter, I contest this viewpoint. To be sure, during some of the period after World War II, the Court articulated doctrine—such as the strict scrutiny test in free exercise cases—that seemed especially protective of religious minorities. Nevertheless, a study of the holdings in religion clause cases reveals far fewer victories for religious outgroups than the dominant story would lead one to expect. In this section, then, I challenge the dominant story in two ways: first, by reviewing the case holdings, and second, by discussing how the Court conceptualizes religion in distinctly Christian terms. In the next chapter, I delve deeper into the relation between the cases, the separation of church and state, and the Christian domination of American society. In the end, the dominant story seems not only false but even duplicitous.

As Mark Tushnet has trenchantly noted, only Christians ever win free exercise cases. Members of small Christian sects sometimes win and sometimes lose free exercise claims, but non-Christians never win. The significance of Christianity to a successful free exercise claim emerged most clearly in *Wisconsin v. Yoder*. The Court there emphasized that Old Order Amish communities were devoted “to a life in harmony with nature and the soil, as exemplified by the simple life of the early Christian era that continued in America during much of our early national life.” Thus, the Court seemed especially receptive to the Amish’s claim for a free exercise exemption from a state compulsory-education law because they were able to appeal to the justices’ romantic nostalgia for a mythological past—a simple Christian America. This national past—however mythological it might be—was one that most of the justices (as Protestants) could readily understand; its meaning resonated with the religious and cultural horizons of the justices themselves. Thus, whereas members of non-Christian religious minorities have difficulty convincing the Court of the sincerity and meaningfulness of their religious convictions, the *Yoder* Court quoted the New Testament in reasoning that “the traditional way of life of the Amish
is not merely a matter of personal preference, but one of deep religious conviction.” Because the Amish were Christians, the Court could easily relate their way of life to Christian society and Christian history:

Whatever their idiosyncrasies as seen by the majority, this record strongly shows that the Amish community has been a highly successful social unit within our society, even if apart from the conventional “mainstream.” Its members are productive and very law-abiding members of society; they reject public welfare in any of its usual modern forms. . . . We must not forget that in the Middle Ages important values of the civilization of the Western World were preserved by members of religious orders who isolated themselves from all worldly influences against great obstacles. There can be no assumption that today’s majority is “right” and the Amish and others like them are “wrong.”

The Court consequently sympathized with the Amish’s contentsions in Yoder far more than it ever seemed to do with those of non-Christians, whether Jews, Moslems, or others. The Yoder Court’s receptive attitude contrasts sharply with the Court’s approach to the free exercise claim of the Orthodox Jewish Air Force officer in Goldman v. Weinberger. In rejecting Goldman’s request for a free exercise exemption to allow him to wear his yarmulke despite Air Force regulations, the Court wrote: “The considered professional judgment of the Air Force is that the traditional outfitting of personnel in standardized uniforms encourages the subordination of personal preferences and identities in favor of the overall group mission.”

Two points in this passage bear emphasis. First, the Court’s stress upon “standardized uniforms” disregards the fact that the standard will almost always mirror the values and practices of the dominant majority—namely Christians. Put bluntly, the U.S. military is unlikely to require everyone to wear a yarmulke as part of the standard uniform. Second, and most clearly opposed to the Yoder Court’s receptiveness, the Goldman Court characterized the wearing of a yarmulke as a matter of mere personal preference. Evidently, the majority of the justices (all of the justices at this time were Christian) were unable to comprehend the significance of the yarmulke. In Orthodox Judaism, the wearing of a yarmulke or other head covering is far from a personal preference; it is a custom going back so many centuries that it has attained the status of a religious law. For many Orthodox Jews, wearing a yarmulke is not a choice but a necessary part of being Jewish; to fail to wear one would amount to a sin. Moreover, Justice Harry Blackmun’s dissent revealed that the Court was informed about the significance of the yarmulke to Orthodox Jews. Apparently, the majority nevertheless could not grasp the meaning of this non-Christian religious practice.
Finally, in Employment Division, Department of Human Resources v. Smith, the Court repudiated the strict scrutiny test for free exercise challenges to laws of general applicability and upheld a state law prohibiting the use of peyote even for religious purposes. In so doing, the Court brushed away any semblance of doctrine that had suggested that the free exercise clause equally protects the religious freedom of all, including outgroups. If Smith has a virtue, it lies in the forthright manner in which the majority declared that religious outgroups will not receive judicial protection from most instances of majoritarian overreaching and insensitivity. Quite simply, when the government enacts a law of general applicability, the protection of religious liberty and equality will depend upon the political process. The Court will not attempt to enforce any particular principle of religious freedom and instead will defer to the legislative decision, so long as it is not infected by discriminatory intent. Moreover, the Smith Court expressly acknowledged that this judicial approach to free exercise favors the religious majority: “It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that [is an] unavoidable consequence of democratic government.”

While the Smith Court candidly admitted that it would no longer pretend to judicially protect religious outgroups under the free exercise clause, the Court was either less forthright or less aware that its very conception of religion was distinctly Christian. This Christian concept of religion was evident in at least two related ways (both of which have appeared in other cases). First, the Court emphasized a distinction between belief and conduct: the first amendment fully protects religious beliefs but does not similarly protect religiously motivated conduct. This constitutional doctrine mirrors basic Christian dogma: that salvation depends largely on faith or belief in the truth of Jesus Christ and not on works or conduct in this world. And this Christian dogma, stressed particularly in Protestantism, is grounded on the antisemitic imagery of the New Testament: the opposition between a world of Christian spirituality and a world of Jewish carnality, and the injunction against forcing Jewish conversion because true Christian faith cannot be compelled. Hence, from a Christian standpoint, the potential for uncoerced belief in Christ must be protected in order for salvation to be possible, but the protection of this-worldly conduct is unnecessary because such conduct is largely unrelated to salvation. Indeed, the Smith Court closely echoed Luther and Calvin by emphasizing that while the government cannot be allowed to coerce beliefs, the government
must be able to regulate conduct to prevent social chaos or, in the Court's words, to avoid "courting anarchy."\textsuperscript{133}

Second, the Court's Christian conception of religion was evident in the justices' assumption that only \textit{individual choices} have religious significance sufficient to require constitutional protection. The Court wrote: "The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.'"\textsuperscript{134} From the Court's Christian standpoint, so long as the government does not coerce religious belief, governmental activity is unlikely to seriously affect an individual's religious well-being. An individual's religious development or salvation—in the Christian world view—depends upon freedom of conscience: the individual must be able to follow the dictates of conscience to the truth of Christ. Moreover, as the concept of freedom of conscience evolved in nineteenth-century American Protestantism, the individual must remain free to choose Christian salvation, that is, free to choose to accept Christ. Governmental activities that impede the use of peyote, as in \textit{Smith}, or that damage lands sacred to Native Americans, as in \textit{Lyng v. Northwest Indian Cemetery Protective Association}, or that prevent an Orthodox Jew from wearing a yarmulke, as in \textit{Goldman v. Weinberger}, do not interfere (supposedly) with the individual's freedom to make religiously significant choices. Consequently, from the Court's Christian-biased perspective, these types of governmental activities are constitutionally permissible under the free exercise clause.\textsuperscript{135}

In establishment clause cases, too, the centrality of the Christian conception of freedom of conscience stands paramount. \textit{Lee v. Weisman} might be considered a good case from the perspective of religious minorities: Weisman, a Jew, won the case, as the Court held that public schools violate the establishment clause by having clergy deliver invocation and benediction prayers at graduation ceremonies. Indeed, since the \textit{Weisman} Court displayed unusual sensitivity to and empathy for the experiences of religious outgroups, the decision unquestionably stands as one of the best of the good cases, enforcing a strong wall of separation between church and state.\textsuperscript{136} Yet, even in \textit{Weisman}, the Court's Christian conception of religion was unmistakable, as the majority opinion emphasized the importance of freedom of conscience under both the free exercise and establishment clauses: "A state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed."\textsuperscript{137} Similarly, in another apparently good case, \textit{Wallace v.}
Jaffree, holding unconstitutional a statute authorizing a period of silence for “meditation or voluntary prayer,” the Court underscored the significance of freedom of conscience to both religion clauses by identifying “the individual’s freedom of conscience as the central liberty that unifies the various Clauses in the First Amendment.” Then, in a passage dripping with unintended irony, the Court appeared to stress that first amendment protections extend equally to all religions, but in making this argument, the Court unwittingly used Christian and Protestant imagery, focusing on individual faith and voluntary choice in religious matters.

Just as the right to speak and the right to refrain from speaking are complementary components of a broader concept of individual freedom of mind, so also the individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority. At one time it was thought that this right merely proscribed the preference of one Christian sect over another, but would not require equal respect for the conscience of the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism. But when the underlying principle has been examined in the crucible of litigation, the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all. This conclusion derives support not only from the interest in respecting the individual's freedom of conscience, but also from the conviction that religious beliefs worthy of respect are the product of free and voluntary choice by the faithful, and from recognition of the fact that the political interest in forestalling intolerance extends beyond intolerance among Christian sects—or even intolerance among “religions”—to encompass intolerance of the disbeliever and the uncertain. 138

Hence, the holdings in cases such as Wallace and Weisman reveal that religious outgroups, including American Jews, occasionally emerge from litigation with a victory—a decision that prohibits the Christian majority from using the instrumentality of the government to impose Christian practices or values. These victories, though, are often less pronounced than they at first appear, as suggested by the foregoing discussion. Even when upholding the rights of religious minorities, the Court conceptualizes the very notion of religion in distinctively Christian terms. While judicial victories for religious outgroups are not necessarily Pyrrhic, such victories nonetheless often come with great costs. To be clear, I am not suggesting that religious outgroups, including American Jews, would be better off without the judicial decisions striking down various governmental actions in support of Christianity. But I am arguing that the story is far more complex than the dominant story of church and state suggests.
In fact, regardless of the Christian bias embedded in many of the Court’s opinions, a simple review of the establishment clause holdings reveals fewer victories than suggested by the dominant story of church and state. Most of the victories have come in cases that challenged either, on the one hand, egregious impositions of religious (usually Christian) practices and values in public schools or, on the other hand, governmental aid to religious schools (overwhelmingly Roman Catholic). In some notable victories, the Court struck down the following governmental actions as violating the establishment clause (this list is not exhaustive): voluntary Bible reading and reciting the Lord’s Prayer in the public schools; the daily recitation of a state-created “nondenominational” prayer in the public schools; a released-time program with instruction on public school grounds; a statute that prohibited public schools from teaching the theory of evolution; state programs providing financial aid to church-related schools by, for instance, supplementing teachers’ salaries and paying for instructional materials; a tuition tax scheme providing tax credits and deductions for parents with children in nonpublic schools; a statute that required the posting of the Ten Commandments on public classroom walls; a state law regulating charitable solicitations that favored certain religions over others; a state program providing remedial education to children in parochial schools; a statute authorizing a period of silence for meditation or voluntary prayer in the public schools; a statute that required public school teachers to teach creation science whenever they taught the theory of evolution; the governmental display of a crèche standing alone; and a public school policy to have clergy deliver invocation and benediction prayers at graduation ceremonies.

These decisions are significant, but they do not justify the pervasive belief in the dominant story of church and state. Even if these cases represented genuine victories for religious outgroups seeking the strict separation of church and state, a similar number of cases represented equally significant losses. During the post–World War II era, the Court upheld the following governmental actions as not violating the establishment clause (again, this list is not exhaustive): the governmental reimbursement of transportation costs for children attending either public or Catholic schools; a released-time program when religious instruction was not on public school grounds; Sunday closing laws without exemptions for Jews or others with non-Sunday sabbaths; a statute lending books to parochial school students; the granting of property tax exemptions to churches; a state university opening its facilities to registered student groups, including an evangelical Christian student group that focused on
religion worship and discussion; a statute providing all parents with a tax deduction for certain educational expenses, regardless of whether their children attended public or nonpublic schools; having a publicly paid chaplain open state legislative sessions with a prayer; the governmental exhibit of a crèche as part of a larger Christmas display; a statutory exemption of religious organizations for employment discrimination on the basis of religion in connection with secular nonprofit activities; governmental provision of a sign-language interpreter for a student at a Roman Catholic high school; the display on public property by a private actor of a large Latin (Christian) cross; and governmental financial support of an explicitly Christian student publication.

One of the most remarkable losses for religious outgroups was *Thornton v. Caldor, Inc.* decided in 1985. In *Thornton*, the Court considered the constitutionality of a Connecticut statute that allowed employees to not work on their religious sabbath, whatever day of the week that might be. The statute, without doubt, manifested an unusual degree of legislative sensitivity to religious outgroups: the state legislature recognized that not everybody is a Christian celebrating a Sunday sabbath, so the state provided non-Sunday sabbath observers (such as Jews) with benefits similar to those enjoyed for two centuries by most Christians in states with Sunday closing laws. The Court, it should be recalled, previously had upheld the constitutionality of Sunday laws in the face of free exercise and establishment clause challenges. If the dominant story of church and state were accurate—that is, if the separation of church and state truly were a constitutional principle that equally protects the religious freedom of all, including outgroups—then one would expect the Court to uphold this Connecticut statute. After all, the Court already had upheld Sunday laws, and this statute appeared merely to accommodate the religious practices of outgroups. Nonetheless, the Court held that the statute violated the establishment clause. To reach this conclusion, the Court relied on the second prong of the *Lemon* test, reasoning that the primary effect of the statute was to advance religion. Consequently, despite the professions (or pretensions?) of the dominant story, the Court not only upheld (in previous cases) the constitutionality of Sunday closing laws, thus approving the legal imposition of the traditional Christian sabbath, but then the *Thornton* Court also struck down a statute designed to accommodate the sabbaths of religious outgroups, thus denying equal treatment and full religious liberty to certain minorities.

Moreover, in reaching this conclusion, the *Thornton* Court's reasoning (once again) displayed a distinctly Christian conception of religion. In
particular, the Court characterized an individual's observance of the sabbath as a matter of mere choice. In fact, the Court suggested that if it upheld the statute, then an individual might designate whatever day of the week he or she chooses as the sabbath. In so reasoning, the Court echoed the Christian and particularly Protestant notions that religious beliefs matter more than conduct and that religiously significant actions are a matter of individual choice. Specifically, from the Court's perspective, a person's conduct in observing the sabbath seemed relatively unimportant because (from the Christian standpoint) it could not affect salvation (which is solely a matter of belief or faith). Furthermore, according to the Court, the religious individual remains free to choose whether or not to observe the sabbath in the first place. The Court ignored (or was unaware) that for some outgroup religions, such as Judaism, conduct may be as important as or even more important than belief. Moreover, for many Jews, especially the Orthodox, following the sabbath is far from being a matter of individual choice: it is a central component of the religion. Morris N. Kertzer writes: "The Sabbath is more than an institution in Judaism. It is the institution of the Jewish religion." Considering that the disputed statute was expressly intended to accommodate members of outgroup religions, the justices' failure to seriously heed the views of minorities revealed the incredible tenacity of the Court's Christian bias.

Moreover, the Court does not always show such indifference toward sabbath observance. Indeed, if Thornton is compared with another case from the 1980s, Frazee v. Illinois Department of Employment Security, the Court's indifference (or hostility?) toward religious outgroups (and their sabbaths) and not toward sabbath observance in general is underscored. In Frazee, the Court held that the state had violated the free exercise clause by denying Frazee unemployment benefits when he refused to work on Sunday because he was Christian. Most telling, in comparison with Thornton, the Frazee Court reasoned that the claimant's desire to observe Sunday as the sabbath was not a "purely personal preference," even though he was not a member of any particular Christian church or sect. Appar-ently, for the Frazee Court, a bald assertion of Christianity was sufficient to establish the importance of the sabbath and the legitimacy of the resultant free exercise claim.

To be clear, I do not mean to suggest with this discussion that the Supreme Court justices never have been motivated, even in part, by a desire to follow their conception of the separation of church and state as a constitutional principle. Undoubtedly, some justices were so motivated (at least sometimes). Nonetheless, the justices' very conceptions of separation
of church and state most often arose from their Christian backgrounds. Indeed, as I have discussed, totally apart from the justices’ conceptions or understandings, the concept of the separation of church and state itself is rooted in Christianity. The dominant story of church and state therefore is just too simple and misleading. A constitutional principle of separation of church and state does not equally protect the religious liberty of all, including outgroups, and does not determine judicial outcomes in religion clause cases. The true story is much more complex.