RELIGIOUS MINORITIES AND THE FIRST AMENDMENT: THE HISTORY, THE DOCTRINE, AND THE FUTURE

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INTRODUCTION

Progressive or liberal constitutional scholars who focus on religious freedom have not been pleased with the Rehnquist Court.[1] For more than a decade, it seems, the Court has been handing down decisions that have twisted the Free Exercise and Establishment Clauses in an unduly conservative direction. Most notably, *Employment Division v. Smith*[2] radically transformed free exercise doctrine, while *Zelman v. Simmons-Harris*,[3] the voucher case, consolidated the Court's recent Establishment Clause cases into a modified doctrinal approach. As a consequence, First Amendment protections have apparently shrunken to their smallest since World War II, especially for religious minorities.[4]

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[1] *See* Jesse H. Choper, *The Rise and Decline of the Constitutional Protection of Religious Liberty*, 70 NEB. L. REV. 651, 687 (1991) (arguing against the Court's rejection of a compelling interest analysis for Free Exercise Clause challenges to general statutory prohibitions of certain conduct); Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CAL. L. REV. 673, 678–79 (2002) (arguing that the Court has changed its Establishment Clause jurisprudence in adopting an equality, rather than liberty, rationale); Richard K. Sherwin, *Rhetorical Pluralism and the Discourse Ideal: Countering* Division of Employment v. Smith, *A Parable of Pagans, Politics, and Majoritarian Rule*, 85 NW. U. L. REV. 388, 393 (1991) (criticizing the Court's decision in *Smith* as ignoring its interpretive obligations by deferring to "legislative/majoritarian interest accommodation and mangement efficiency"). For an attack on the Court's free exercise jurisprudence from a more conservative political perspective, see Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1153 (1990) (arguing against the *Smith* Court's "bare requirement of formal neutrality").

[2] 494 U.S. 872 (1990).

[3] 536 U.S. 639 (2002).

[4] Justice Breyer writes: "The Court, in effect, turns the clock back. It adopts, under the name of 'neutrality,' an interpretation of the Establishment Clause that this Court rejected more than half a century ago." *Id.* at 728 (Breyer, J., dissenting).

Justice Souter writes:

> [T]he reality is that in the matter of educational aid the Establishment Clause has largely been read away. True, the majority has not approved vouchers for religious schools alone, or aid earmarked for religious instruction. But no scheme so clumsy will ever get before us, and in the cases that we may see, like these, the Establishment Clause is largely silenced.

This pessimistic assessment of Religion Clause jurisprudence is based on two hypotheses: first, that the Court for several decades, starting in the 1940s, was particularly receptive to the Religion Clause claims of minorities; second, that the Rehnquist Court's doctrinal innovations will turn subsequent Religion Clause cases against minorities in an unprecedented fashion. This Article challenges both these hypotheses. If the postwar cases are examined from a political, cultural, and social perspective, rather than from a doctrinal one, they reveal a surprising level of judicial hostility toward religious outsiders. To a great extent, then, the Rehnquist Court merely has maintained this antagonism and, in all likelihood, will continue to do so in the future. To be sure, the Rehnquist Court has transformed First Amendment doctrine, but these changes are unlikely to produce results substantially different from prior decisions.[5]

In making this argument, this Article contributes to an emerging strand of Religion Clause revisionism in legal scholarship. During the post-World War II era, most scholars have subscribed to a conventional account of the First Amendment. This standard story maintains, first, that the Framers laid down a foundational principle of religious freedom, and second, that the post-World War II Supreme Court—at least before the Rehnquist Court arrived—formulated doctrine to help fulfill that principle, thus affording great protection to religious outsiders. Numerous writers would agree with William Lee Miller's declaration of religious liberty: "We 'secured' it—our forefathers did . . . and on the whole it has stayed secured."[6] The Court itself has pronounced that the First Amendment guarantees "religious liberty and equality to 'the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism.'"[7]

Id. at 717 (Souter, J., dissenting).

[5] I do not mean to suggest that the Rehnquist Court is not worse than previous Courts for religious minorities. This Court is worse, but the change is not nearly as pronounced as many assume or argue. The transition, for religious minorities, is more a matter of degree than of kind.

[6] WILLIAM LEE MILLER, THE FIRST LIBERTY: RELIGION AND THE AMERICAN REPUBLIC, at vii (1985). John Noonan wrote that the First Amendment guaranteed "to all a freedom from religious oppression. . . . Never before 1791 such a public, almost unalterable commitment to this ideal." JOHN T. NOONAN, JR., THE LUSTRE OF OUR COUNTRY: THE AMERICAN EXPERIENCE OF RELIGIOUS FREEDOM 2 (1998). Stephen L. Carter applauded the separation of church and state as "one of the great gifts that American political philosophy has presented to the world." STEPHEN L. CARTER, THE CULTURE OF DISBELIEF 107 (1993). Thomas Curry declared that the First Amendment—"the great American experiment"—should be understood "as a proclamation of principle." Indeed, the ability of immigrants "to achieve religious liberty," Curry wrote, illustrates "how deeply the principle of religious freedom was embedded in American culture and government." THOMAS J. CURRY, FAREWELL TO CHRISTENDOM 4–5, 58 (2001).

[7] County of Allegheny v. ACLU, 492 U.S. 573, 590 (1989) (quoting Wallace v. Jaffree, 472 U.S. 38, 52 (1985)).

Nonetheless, a revisionist understanding of religious freedom has recently begun to emerge.[8] According to one strand of this revisionist work, history reveals that, contrary to the Whiggish conventional account of the Religion Clauses, the First Amendment often has failed to provide equal liberty to religious minorities.[9] A second, though related, strand of revisionist work has begun to detail how the meaning and degree of religious freedom has varied through American history according to contingent political, cultural, and social interests.[10] Along these lines, two important recent articles, one by John C. Jeffries, Jr., and James E. Ryan, and one by Thomas C. Berg, explicitly tied the post-World War II development of religious freedom in America to the evolving political relations between Protestants and Roman Catholics rather than to the fulfillment of a predetermined constitutional principle.[11] Philip Hamburger's even more recent book, *Separation of Church and State*, while focused on the importance of Protestant-Catholic relations for the nineteenth-century development of religious liberty, largely agrees with the views of Jeffries and Ryan, and Berg, on the post-World War II period.[12]

Revisionist and conventional scholars agree, though, on at least one important point. Before the post-World War II era, the religion clauses were almost toothless in the United States Supreme Court.[13]

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[8] *Cf.* G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL 1–5 (2000) (contrasting conventional and revisionist accounts of the New Deal-era constitutional revolution).

[9] *See, e.g.*, Stephen M. Feldman, *A Christian America and the Separation of Church and State, in* LAW AND RELIGION: A CRITICAL ANTHOLOGY 261, 262–66 (Stephen M. Feldman ed., 2000) (discussing how the Supreme Court's determination of what is religious favors Christianity); Frank S. Ravitch, *A Crack in the Wall: Pluralism, Prayer, and Pain in the Public Schools, in* LAW AND RELIGION, *supra*, 296, 296–303 (detailing the discrimination and harassment of religious minorities who object to mainstream religious practices in the public schools); Samuel J. Levine, *Toward a Religious Minority Voice: A Look at Free Exercise Law Through a Religious Minority Perspective*, 5 WM. & MARY BILL RTS. J. 153, 160–62 (1996) (arguing that Supreme Court majorities have failed to accord respect to religious minorities).

[10] *See, e.g.*, STEPHEN M. FELDMAN, PLEASE DON'T WISH ME A MERRY CHRISTMAS: A CRITICAL HISTORY OF THE SEPARATION OF CHURCH AND STATE 175–203 (1997) [hereinafter FELDMAN, PLEASE DON'T] (discussing the politically driven development of a concept of separation of church and state after the framing of the Constitution); PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 14–17 (2002) (focusing on Protestant-Catholic relations in the nineteenth century to trace the transformation of religious liberty into a separation principle); Thomas C. Berg, *Anti-Catholicism and Modern Church-State Relations*, 33 Loy. U. Chi. L.J. 121, 123–51 (2001) (discussing the importance of Protestant-Catholic relations to the separation of church and state during the 1940s to the early 1960s); John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 Mich. L. Rev. 279, 297–305 (2001) (attributing nineteenth-century state efforts to ban funding to sectarian schools to Protestant-Catholic disputes); *see also* FREDERICK MARK GEDICKS, THE RHETORIC OF CHURCH AND STATE 4–7 (1995) (arguing that different communities generate different discourses that describe the relationship between church and state in distinctive and sometimes incompatible ways).

[11] Berg, *supra* note 10, at 123–51; Jeffries & Ryan, *supra* note 10, at 312–27.

[12] HAMBURGER, *supra* note 10, at 450–63.

[13] For example, Jesse H. Choper writes:

Few cases made their way to the Court, and in those few cases, the Court typically upheld the governmental actions, whether challenged under either the Establishment or Free Exercise Clause.[14] During and after the war, however, the Court transformed its Religion Clause jurisprudence. In the 1940s, the Court incorporated both religion clauses to apply against state and local actions through the Due Process Clause of the Fourteenth Amendment.[15] Consequently, many more governmental actions were subject to constitutional attack and an increasing number of cases reached the Court. Equally important, the Court became more receptive to these new Religion Clause claims, occasionally striking down the challenged governmental actions.[16]

From a revisionist standpoint, this jurisprudential transformation presents an interesting twofold problem: how precisely did the Court's approach to these Religion Clause cases change, and what factors contributed to those changes? The Jeffries and Ryan article, in conjunction with the Berg article, uncovers a significant part of this story. If one adds together all the sundry Protestant denominations and sects, Protestants always have constituted the largest proportion of the American population. During the first 150 years of the nation's history, America was, to a great extent, "de facto" Protestant.[17] Freedom of conscience, or the free exercise of religion, was based directly on Protestant doctrine, while official disestablishment arose primarily because of competition among a multitude of Protestant groups.[18] Put in different words, religious freedom under the

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> [B]efore the middle of this century, these provisions of the Bill of Rights applied only to the federal government; since the states enacted most legislation, and Congress was quite inactive in regulating domestic affairs, there simply was not much occasion for the Supreme Court to interpret the Free Exercise and Establishment Clauses. Where they *were* in issue, the Court afforded them a relatively restricted meaning.

Jesse H. Choper, *A Century of Religious Freedom*, 88 CAL. L. REV. 1709, 1712 (2000).

[14] *See, e.g.*, Reynolds v. United States, 98 U.S. 145, 165–67 (1878) (upholding governmental proscription of the Mormon practice of polygamy); *see also* Carl H. Esbeck, *Table of United States Supreme Court Decisions Relating to Religious Liberty 1789–1994*, 10 J.L. & RELIGION 573 (1993–1994) (summarizing cases).

[15] Everson v. Bd. of Educ., 330 U.S. 1, 5 (1947) (incorporating the Establishment Clause); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (incorporating the Free Exercise Clause).

[16] For a brief summary of the cases, see Esbeck, *supra* note 14, at 575–78 (tracing this de facto establishment of religion to the evangelical principle of separation).

[17] *See* MARK DEWOLFE HOWE, THE GARDEN AND THE WILDERNESS 11 (1965) (arguing that there is de facto separation). Some commentators argue that, due to demographic changes, there was a second disestablishment—a disestablishment of the nation's unofficial or de facto Protestantism that was complete by the end of the 1930s. *See, e.g.*, Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 15 (1996).

[18] *See* FELDMAN, PLEASE DON'T, *supra* note 10, at 145–58. The connection between freedom of conscience and Protestant doctrine (and experience) was suggested in the 1824 decision, *Updegraph v. Commonwealth*, in which the court approved a blasphemy statute: "This act, was not passed, as the counsel supposed, when religious and civil tyranny were at their height; but on

First Amendment emerged initially from, and was largely understood as consistent with, the mainstream Protestant values and interests.

Yet, starting in the mid-nineteenth century, immigration helped produce an ever-expanding American Catholic community.[19] From 1850 to 1900, the Catholic population grew from 1.7 million to 12 million, and by 1930, that number had doubled.[20] As early as 1920, one in six Americans and one in three church members were Catholic.[21] If measured against the respective Protestant denominations and sects, Catholics had become by the 1950s the largest Christian group in America: while the total number of Protestants still far outnumbered Catholics, Catholics nonetheless exceeded the largest

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the breaking forth of the sun of religious liberty, by those who had suffered much for conscience' sake, and fled from ecclesiastical oppression." Updegraph v. Commonwealth, 11 Serg. & Rawle 394, 407 (Pa. 1824), *reprinted in* 5 THE FOUNDERS' CONSTITUTION 170, 174 (Philip B. Kurland & Ralph Lerner eds., 1987). Noah Feldman, however, has recently argued that *both* free exercise and disestablishment in the First Amendment were intellectually grounded on a principled commitment to liberty of conscience. Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346 (2002).

Helpful historical discussions, related to the development of religious freedom, include the following: SYDNEY E. AHLSTROM, A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE (1972); MORTON BORDEN, JEWS, TURKS, AND INFIDELS (1984); JON BUTLER, AWASH IN A SEA OF FAITH: CHRISTIANIZING THE AMERICAN PEOPLE (1990); CHURCH AND STATE IN AMERICAN HISTORY (Donald L. Drakeman & John F. Wilson eds., 2d ed. Beacon Press 1987) (1965); NAOMI W. COHEN, JEWS IN CHRISTIAN AMERICA: THE PURSUIT OF RELIGIOUS EQUALITY (1992); THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT (1986); FELDMAN, PLEASE DON'T, *supra* note 10, ROBERT T. HANDY, A CHRISTIAN AMERICA (2d ed. rev. 1984); NATHAN O. HATCH, THE DEMOCRATIZATION OF AMERICAN CHRISTIANITY (1989); WINTHROP S. HUDSON & JOHN CORRIGAN, RELIGION IN AMERICA (5th ed. 1992); GREGG IVERS, TO BUILD A WALL: AMERICAN JEWS AND THE SEPARATION OF CHURCH AND STATE (1995); FREDERIC COPLE JAHER, A SCAPEGOAT IN THE NEW WILDERNESS: THE ORIGINS AND RISE OF ANTI-SEMITISM IN AMERICA (1994); LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT (1986); MARTIN E. MARTY, PROTESTANTISM IN THE UNITED STATES: RIGHTEOUS EMPIRE (Scribener Book Cos. 1986) (1970); ERIC MICHAEL MAZUR, THE AMERICANIZATION OF RELIGIOUS MINORITIES: CONFRONTING THE CONSTITUTIONAL ORDER (1999); RICHARD E. MORGAN, THE SUPREME COURT AND RELIGION (1972); PETER NOVICK, THE HOLOCAUST IN AMERICAN LIFE (1999); LEO PFEFFER, CHURCH, STATE, AND FREEDOM (1953); THE SUPREME COURT IN CONFERENCE (1940–1985): THE PRIVATE DISCUSSIONS BEHIND NEARLY 300 SUPREME COURT DECISIONS (Del Dickson ed., 2001) [hereinafter IN CONFERENCE]; ANSON PHELPS STOKES, 1 CHURCH AND STATE IN THE UNITED STATES (1950); ROBERT WUTHNOW, THE RESTRUCTURING OF AMERICAN RELIGION (1988); Harold J. Berman, *Religion and Law: The First Amendment in Historical Perspective*, 35 EMORY L.J. 777 (1986); Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085 (1995); Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 NW. U. L. REV. 1106 (1994).

[19] Hamburger stresses the degree to which a significant aspect of the nineteenth-century Protestant values and interests was wound up with anti-Catholicism. Furthermore, he argues that this factor helped transform religious liberty into the separation of church and state. HAMBURGER, *supra* note 10, at 191–251.

[20] Klarman, *supra* note 17, at 49; *see also* Jeffries & Ryan, *supra* note 10, at 306 (describing Catholics' rise in population and political power in the first half of the twentieth century).

[21] HUDSON & CORRIGAN, *supra* note 18, at 241.

Protestant denomination, the Baptists, by almost two to one. Throughout the rest of the century, the relative proportion of Protestants and Catholics would remain roughly unchanged.[22] The presence of such a large Catholic community in America had serious repercussions, generally increasing Catholic political power and, at different times, generating Protestant backlashes. Jeffries, Ryan, and Berg specifically explore how these factors influenced the development of the concept of religious freedom during the postwar era.[23]

Despite the importance of their work, Jeffries, Ryan, and Berg overlook a crucial point. The true measure of a nation's commitment to religious freedom, it would seem, lies in its treatment of religious minorities or outgroups. Given the superior size of the American Catholic population vis-à-vis even the largest Protestant denominations and sects—as of 1999, Catholics constituted twenty-eight percent of the total population and outnumbered Southern Baptists by a whopping forty-six million[24]—a history of religious freedom in America that focuses solely on Catholic-Protestant relations is likely to miss an important part of the story. For that reason, while this Article discusses Catholic-Protestant connections, it primarily explores cases involving American Jews, who have always remained a numerically small religious minority, regardless of their various social and political successes (and failures) in this country. In the words of William Lee Miller, "the prime test would be, how was it for the Jews?"[25]

Part I examines two factors that contributed to the Court's changing approach to religious freedom during and after World War II:

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[22] *See* AHLSTROM, *supra* note 18, at 1002; MARTY, *supra* note 18, at 208. In the 1990s, nine out of ten Americans claimed a specific religious affiliation, with 86.5% of them being Christians. HUDSON & CORRIGAN, *supra* note 18, at 425. Of those Christians, Protestants outnumbered Catholics approximately two to one. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES, 61 tbl.74, 62 tbl.75 (2000); MARTY, *supra* note 18, at 3. Yet Catholics were the largest Christian group, at 26% of the population, with Baptists second. Less than 2% of the American population is Jewish and only 0.5% is Muslim.

[23] Jeffries & Ryan, *supra* note 10; Berg, *supra* note 10; *see also* HAMBURGER, *supra* note 10, at 450–63 (discussing post-World War II anti-Catholicism). Douglas Laycock previously had mentioned a link between anti-Catholicism and the Justices' attitudes toward religious freedom. Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43, 57–58 (1997). Laycock, in turn, had relied on John T. McGreevy, *Thinking on One's Own: Catholicism in the American Intellectual Imagination, 1928–1960*, 84 J. AM. HIST. 97 (1997).

[24] U.S. Census Bureau, Statistical Abstract of the United States, 61 tbl.74, 62 tbl.75 (2000).

[25] MILLER, *supra* note 6, at 195. Berg barely mentions the role of American Jews, Berg, *supra* note 10, at 149, while Jeffries and Ryan accord the topic only slightly more attention. Jeffries & Ryan, *supra* note 10, at 305–08. Hamburger does devote some minimal attention to Jews, but given his near-500 page text, his devotion of part of one section, amounting to six pages, together with a few additional brief references, has to be considered scant and insufficient. HAMBURGER, *supra* note 10, at 391–96. To be fair to Berg, Jeffries, Ryan, and Hamburger, their focus was on Protestant-Catholic relations rather than on Christian-Jewish relations. But again, that disregard of Jews and antisemitism is one important reason for writing this Article.

first, the increasingly powerful American Catholic community, and second, a transformation within the American Jewish community.[26] Part II focuses on how religious outsiders, chiefly American Jews, argued Religion Clause claims before the Supreme Court during the postwar era, and how the Court responded to the different types of arguments in its decisions.[27] When, on the one hand, Jews and other non-Christians asked the Court to create an apparent exception to the mainstream understanding of religion and religious freedom by invoking the Free Exercise Clause, the Court denied their claims. When, on the other hand, Jews instead urged the Court to stretch the shield of the Establishment Clause so that they too might have refuge, they occasionally were successful. Religious freedom thus has developed from its initial Protestant origins and understanding so that it now extends at least some meaningful protection to Jews and other religious outsiders.[28]

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[26] *See infra* text accompanying notes 34–69.

[27] *See infra* text accompanying notes 70–170.

[28] *Cf.* Derrick A. Bell, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980) (arguing that African Americans historically have gained social justice only when their interests happened to converge with the interests of the white majority). The question of who constitutes a religious outsider is, of course, subject to sharp dispute. For purposes of this Article, I do not need to give one precise and static definition of religious outsiders. In the course of the discussion, I identify which specific religious groups I am discussing when it is relevant. Most often, I intend the term, religious outsiders, to denote non-Christians. Generally, I follow the political scientist James C. Brent who distinguishes mainstream from nonmainstream religions. To Brent, any non-Christian religion is nonmainstream in America. Most Christian religions are mainstream, though some of the minority Christian groups, such as the Seventh-day Adventists and the Jehovah's Witnesses, are deemed nonmainstream. *See* James C. Brent, *An Agent and Two Principals: U.S. Court of Appeals Responses to* Employment Division, Department of Human Resources v. Smith *and the Religious Freedom Restoration Act*, 27 AM. POL. Q. 236, 259 (1999); *cf.* Frank Way & Barbara J. Burt, *Religious Marginality and the Free Exercise Clause*, 77 AM. POL. SCI. REV. 652, 654 & n.7 (1983) (distinguishing mainline from marginal religions).

Although I emphasize constitutional *development* (or judicial *transformation*) in this Article, I do not mean to preclude the possibility that America can experience constitutional *revolutions*, as suggested by Bruce Ackerman. 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991). In the realm of the history of American jurisprudence, I have suggested that neither evolution nor revolution precisely captures the nature of change:

> [A] broad idea, X, might tend to develop into another idea, Y, but this development might not emerge unless and until particular social, political, and cultural circumstances arise that facilitate or trigger it. As a general matter, the elements for a major intellectual change—say, from X to Y—often seem to gather over an extended time period, like clouds on the horizon, but the transition remains latent, as a mere potential, until a large social disturbance such as a Civil or World War occurs. This social upheaval then precipitates the intellectual transformation, like a sudden burst of rain. Of course, as described, the intellectual transformation is neither exactly sudden nor exactly gradual—neither revolutionary nor evolutionary. Despite final appearances, the intellectual transition should not be understood as an unexpected or unpredictable cloudburst because it has been building for years and sometimes even decades. Yet, even so, it is not truly gradual, steady, and slow because the transition does not emerge in a clearly recognizable form until the requisite social event finally triggers the ultimate transformation.

Part III of the Article looks to the future. It begins by tracing the Rehnquist Court's recent doctrinal changes in establishment and free exercise cases and explains how those changes appear to favor mainstream religions while harming religious outsiders.[29] Part III then recommends several possible doctrinal innovations that might bolster First Amendment protections for religious outsiders.[30] Part III next discusses the probability that these recommended changes would prove fruitful.[31] Drawing from history, as detailed in Parts I and II, the unfortunate reality is that the Court is unlikely to adopt these recommendations, regardless of their virtues. Part III concludes, however, by explaining that the Court's own recent doctrinal changes, when understood in light of the history of Religion Clause cases, will not turn future First Amendment cases in a drastically more conservative direction.[32]

STEPHEN M. FELDMAN, AMERICAN LEGAL THOUGHT FROM PREMODERNISM TO POSTMODERNISM: AN INTELLECTUAL VOYAGE 5–6 (2000) (footnote omitted).

[29] *See infra* text accompanying notes 171–95.

[30] *See infra* text accompanying notes 197–209.

[31] *See infra* text accompanying notes 210–23.

[32] Apart from the revisionist scholarship specifically focusing on religious freedom, my argument builds on three emerging and interrelated lines of thought from political science and constitutional scholarship. First, in his landmark 1997 book, *Civic Ideals*, Rogers M. Smith articulated a "multiple traditions thesis [which] holds that American political actors have always promoted civic ideologies that blend liberal, democratic republican, and inegalitarian ascriptive elements in various combinations." ROGERS M. SMITH, CIVIC IDEALS 6 (1997). In this Article, I elaborate the inegalitarian ascriptive element of the American understanding of religious freedom—an element of our constitutionalism that most often is obscured, denied, or ignored. Second, I follow scholars such as Robert A. Dahl and Michael J. Klarman who have argued that, as a general matter, the Supreme Court does not heroically protect outsiders from majoritarian overreaching. *See* Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 293–94 (1957) ("As an element in the political leadership of the dominant alliance, the Court of course supports the major policies of the alliance. By itself the Court is almost powerless to affect the course of national policy."); Klarman, *supra* note 17, at 1–7 (arguing that contrary to popular belief, the Court does not play a strong countermajoritarian role in defense of individual liberties); *see also* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333 (1998) (questioning the existence of a countermajoritarian difficulty). Rather, the Court tends to be a part of and support, in Dahl's words, "the dominant national alliance." Dahl, *supra*, at 293. While the Court, to a degree, might be politically *insulated*, it certainly is not politically *isolated*. Finally, I follow scholars such as Michael J. Klarman, Stephen M. Griffin, Barry Friedman, and Scott B. Smith in seeking to understand American constitutionalism from a historical perspective that accounts for all of American history, not just the framing; this approach resonates with the historical new institutionalism that is blossoming in political science. *See* Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 5–6 (1998) ("[R]eplac[ing] the apparent choice between anachronistic originalism or non-historical living constitutionalism with an approach that takes *all* of our constitutional history into account."); Stephen M. Griffin, *Constitutional Theory Transformed*, 108 YALE L.J. 2115, 2116 (1999) (defining historical institutionalism as a "state-centered" approach because it takes the concept of the state seriously and focuses on its halting evolution through American history); Klarman, *supra* note 17, at 1–7 (arguing that the Court does not play a strong countermajoritarian role in defense of individual liberties); Friedman and Smith write: "[H]istory is essential to interpretation of the Constitution,

The Article ends with a brief Conclusion. To clarify at the outset, I use the term *religious freedom* in this Article in a conventional sense: as referring to the relationship between religion and government, or to what is commonly called the separation of church and state. Religious freedom, in other words, is a constitutional guarantee that encompasses issues that fall ordinarily under either the Free Exercise Clause, the Establishment Clause, or both.[33]

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but the relevant history is not just that of the Founding, it is that of *all* American constitutional history." Friedman & Smith, *supra*, at 5–6. Griffin writes:

> [A]ll the theories of constitutional interpretation normally discussed by scholars accept an ahistorical view about the role that the constitutional principles of the early republic can and should play in the complex democracy of the present. The emphasis in these theories—characteristic of American constitutionalism from the beginning—is on how the fundamental principles adopted by the Founding generation can solve contemporary constitutional problems. This approach is completely implausible from an historicist perspective.

Griffin, *supra*, at 2120. Elsewhere, Griffin explains that "[c]onstitutionalism should be appreciated as a dynamic political and historical process rather than as a static body of thought laid down in the eighteenth century." STEPHEN M. GRIFFIN, AMERICAN CONSTITUTIONALISM: FROM THEORY TO POLITICS 5 (1996).

In political science, new institutionalists explain how Supreme Court Justices are influenced by both their political preferences and the structural or institutional mechanisms in which they operate (as Justices). For a helpful explanation of the new institutionalism, see Keith E. Whittington, *Once More unto the Breach: Postbehavioralist Approaches to Judicial Politics*, 25 LAW & SOC. INQUIRY 601 (2000) (reviewing SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES (Cornell W. Clayton & Howard Gillman eds., 1999)). *See also* THE SUPREME COURT IN AMERICAN POLITICS: NEW INSTITUTIONALIST INTERPRETATIONS (Howard Gillman & Cornell W. Clayton eds., 1999). Rogers M. Smith is an example of a historical new institutionalist. SMITH, *supra*, at 6, 509–10.

Thus, I agree with G. Edward White's and Barry Cushman's view that Supreme Court decision making is not pure politics. Instead, Supreme Court Justices find legal consciousness to be a real constraint on their decisions. *See* WHITE, *supra* note 8, at 1–32; Barry Cushman, *Rethinking the New Deal Court*, 80 VA. L. REV. 201, 207–08 (1994) (rejecting the idea that the Supreme Court's acceptance of the New Deal was based on President Roosevelt's attempt to pack the Court and emphasizing instead the role of lawyering). Indeed, part of what I write about in this Article is the shaping or construction of legal consciousness, specifically the law related to the Establishment and Free Exercise Clauses. Needless to say, though, I believe that cultural, societal, and political interests strongly influence such legal developments.

[33] For instance, Erwin Chemerinsky writes: "To a large extent, the establishment and free exercise clauses are complementary. Both protect freedom of religious belief and actions." ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1140 (2d ed. 2002) (citations omitted). Laurence H. Tribe writes similarly: "The constitutional concepts of religious autonomy were first articulated in the religion clauses of the first amendment, assuring both free exercise and nonestablishment." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1154 (2d ed. 1988) (footnote omitted). Many commentators have noted that, while the Free Exercise and Establishment Clauses are interrelated, there also is a tension between the two. CHEMERINSKY, *supra*, at 1140–41; TRIBE, *supra*, at 1154.

I. CAUSES OF CHANGE

A. *Catholic-Protestant Relations*

The enhanced American Catholic population strongly contributed to the Court's increased receptiveness toward religious freedom cases during and after World War II. In some parts of the country, the political ramifications of the growing Catholic community became apparent as early as the nineteenth century. By the 1880s, Catholic mayors had been elected in several Northeastern cities, including New York and Boston.[34] During Prohibition in the 1920s, Catholics did not need to seek judicial intervention to protect their sacramental use of wine because Congress had readily created a legislative exception for such use.[35] The expanding Catholic political power, furthermore, affected attitudes toward the separation of church and state. Specifically, Catholic and Protestant attitudes had traditionally diverged on church-state issues: Protestants tended to favor religious (predominantly Protestant) practices in the public schools but opposed governmental aid to nonpublic (predominantly Catholic) schools, while Catholics tended to hold the opposite viewpoints. Protestant political power long had allowed them to impose their preferences, but during the 1920s and 1930s, Catholic political power in a number of states had grown sufficient "to secure enactment of laws subsidizing parochial schools with publicly funded textbooks and bus transportation."[36] Moreover, at least some state courts in heavily Catholic states, such as Wisconsin and Illinois, became receptive to Catholic challenges to Bible reading and religious displays in the public schools.[37]

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[34] Klarman, *supra* note 17, at 52.

[35] Volstead Act of Oct. 28, 1919, 41 Stat. 305, *codified at* 27 U.S.C. § 16, *repealed by* Act of Aug. 27, 1935, 49 Stat. 872; *see also* Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 216 (1992) (noting that mainstream Christian groups, such as the Roman Catholics during Prohibition, generally do not need to seek free exercise exemptions in the courts).

[36] Klarman, *supra* note 17, at 53.

[37] *Id.* at 49–50. Jeffries and Ryan write:

> As early as 1869, the school board in Cincinnati, then one of the most religiously heterogeneous of American cities, voted to ban Bible reading, hymns, and religious instruction in the public schools. The resulting firestorm of protest prompted litigation all the way to the Ohio Supreme Court, which eventually ruled that the school board was *permitted* to omit religious instruction if it wished. Some urban centers with large Catholic populations followed suit. In the 1870s, New York City, Chicago, Buffalo, and Rochester banned Bible reading in the public schools. Indeed, by the early twentieth century, a few state courts had outlawed Bible reading and other religious observances in public school as violative of state constitutions, though most courts continued to approve these practices.

Jeffries & Ryan, *supra* note 10, at 304 (footnotes omitted).

Needless to say, though, many Protestants did not meekly accept enhanced Catholic political power and assertiveness.[38] In the late 1940s, for instance, several mainstream Protestant denominations joined to form Protestants and Other Americans United ("POAU") for the Separation of Church and State, which was vociferously anti-Catholic and strongly opposed public aid for parochial schools.[39] Indeed, most important, the Supreme Court's judicial enforcement of religious freedom after World War II can be understood, in part, as a Protestant reaction to the perceived Catholic threat within the American democracy.[40] 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.[41] Insofar as Catholic and Protestant values and practices diverged, the separation of church and state became partly a mechanism that Protestants could invoke to prevent or retard the imposition of Catholic views. Unsurprisingly, then, in cases challenging governmental aid to nonpublic schools, which are overwhelmingly Catholic, the Supreme Court struck down the governmental action as unconstitutional nearly twice as often as it upheld the action.[42] According to Jeffries and Ryan:

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[38] *See* Jeffries & Ryan, *supra* note 10, at 313 (discussing postwar Protestant opposition to Catholics).

[39] IVERS, *supra* note 18, at 26 (discussing the evolution of POAU and its anti-Catholic agenda).

[40] *Cf.* Wuthnow, *supra* note 18, at 72–74 (discussing Protestant perceptions of a Roman Catholic threat). Berg writes that during the post-World War II years, "the alleged political power and danger of the Catholic Church was the most prominent issue in America concerning religion and public life." Berg, *supra* note 10, at 124; *see also id.* at 129 (detailing documented anti-Catholic sentiments of Supreme Court Justices).

[41] Through 1990, 91 of 104 Supreme Court Justices came from Protestant backgrounds. Eight Justices were Roman Catholic: Roger Taney (appointed in 1835), Edward D. White (1894), Joseph McKenna (1897), Pierce Butler (1922), Frank Murphy (1939), William Brennan (1956), Antonin Scalia (1986), and Anthony Kennedy (1987). Five Justices were Jewish: Louis Brandeis (1916), Benjamin Cardozo (1932), Felix Frankfurter (1939), Arthur Goldberg (1962), and Abe Fortas (1965). *See* CONG. Q., GUIDE TO THE U.S. SUPREME COURT 794 (2d ed. 1990). James F. Byrnes, who served as an Associate Justice for only the 1941–1942 term, was born into a Roman Catholic family, but converted to Episcopalianism when he married in 1906. More recently, two more Jewish Justices have been appointed: Ruth Bader Ginsburg and Stephen G. Breyer. Clarence Thomas was born a Baptist, raised a Catholic, began attending an Episcopal Church, and most recently, returned to Catholicism. In fact, if Thomas is categorized as Catholic, then 1996 marked the first time that a majority of the Justices were not Protestant. *See* MAZUR, *supra* note 18, at 12, 179 n.3; THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES, 1789–1993, at 530 (Clare Cushman ed., 1993) (detailing Thomas's religious background through 1993).

[42] *See* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 1494–1503 (2d ed. 1991) (listing cases); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 134 (1992) (characterizing the Warren Court as deeply suspicious of Catholicism). Laurence Tribe argues that this pattern is based on a consistent application of coherent constitutional considerations. TRIBE, *supra* note 33, at 1219–21. Jeffries and Ryan write:

> [A] ban against aid to religious schools was supported by the great bulk of the Protestant faithful. With few exceptions, Protestant denominations, churches, and believers vigorously opposed aid to religious schools. For many Protestant denominations, this position followed naturally from the circumstances of their founding. It was strongly reinforced, however, by hostility to Roman Catholics and the challenge they posed to the Protestant hegemony, which prevailed throughout the nineteenth and early twentieth centuries. In its political origins and constituencies, the ban against aid to religious schools aimed not only to prevent an establishment of religion but also to maintain one.[43]

The Supreme Court's protection, whether conscious or unconscious, of Protestant interests and values vis-à-vis Catholics can also help explain First Amendment cases involving religious displays and practices in the public schools. As Catholic political power grew during the twentieth century, Catholics tended to become more confident of their strength and position in America and thus, particularly after World War II, began to increase their support for public school religious displays. Put simply, as Catholics gained more political control over the public schools, they were more willing to have religion in the schools.[44] One does not have to be overly cynical to recognize

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> The Supreme Court's first concern during this period (1947–1996) was to inhibit aid to parochial schools. In thirteen cases, the Court considered various programs that would have eased the financial burden on parents who sent their children to church schools. The Court allowed reimbursement of transportation expenses, loan of approved textbooks, reimbursement for the costs of state-mandated testing and record-keeping, state income tax deductions for private-school expenses, and provision of a sign-language interpreter for a disabled child in parochial school. None of these programs offered much more than incidental support to church schools. Perhaps for that reason, they survived Supreme Court scrutiny, but just barely. Only the textbook loan program had a vote to spare; the others, like *Everson*, divided five-four. More often, the Court struck down attempts to help church schools. Specifically, the Court prohibited state supplements for the salaries of nonpublic school teachers, tuition reimbursement, maintenance and repair of schools serving low-income students, reimbursement for expenses of state-mandated and nonmandated testing, provision of school services and educational equipment, aid for instructional materials and field trips, and loan of public-school teachers to teach secular subjects in parochial schools (twice).

Jeffries & Ryan, *supra* note 10, at 288–89 (footnotes omitted).

[43] Jeffries & Ryan, *supra* note 10, at 282.

[44] *See* Berg, *supra* note 10, at 126–27 (explaining shifting Catholic and Protestant attitudes toward religion in the public schools); Klarman, *supra* note 17, at 57, 60 (discussing Catholic support for public school religious displays); Morgan, *supra* note 18, at 81–90, 124–25 (discussing the emergence of Catholic community after World War II and growing Catholic support for religious displays). Jeffries and Ryan write:

> Historically, religious observances in public schools had been distinctly Protestant, and Catholics objected to them on that ground. In the 1940s, the church changed its mind and began to call for religious content in public education. The switch sprang in part from the elimination of Protestant specificity in religious exercises and in part from growing confidence that Catholic students would not be "lost to the fold" if they said ecumenical prayer. Partly, however, the change in position was strategic. Catholic leaders began highlighting the secularization of public education in order to bolster the case for church schools. If public schools could be portrayed as hostile to the devout, the argument for funding religious education would be strengthened. This strategic

that the Supreme Court began to question the constitutionality of these public school religious displays and practices only in this post-war political context. In response to the changing Catholic attitudes concerning religion in the public schools, many Protestants—not only Supreme Court Justices—became more wary of public school religious practices and displays for at least two reasons. First, anti-Catholic Protestants would resist any Catholic exertion of power in the public schools, and second, Protestants were increasingly attracted to the idea of a principled strict separation of church and state to be used as a bulwark against Catholic power, particularly in the face of Catholic efforts to gain public support for parochial schools.[45]

Unsurprisingly, some Justices occasionally revealed their Protestant biases in private communications. For instance, at a November 1946 oral argument, Justice William O. Douglas passed a note to Justice Hugo Black stating that "[i]f the Catholics get public money to finance their religious schools, we better insist on getting some good prayers in public schools or we Protestants are out of business."[46] After that same oral argument, Justice Wiley B. Rutledge fretted that the case was "really a fight by the Catholic schools to secure this money from the public treasury. It is aggressive and on a wide scale. There is probably no other group which is either persistent in efforts to secure this type of legislation or insistent upon it."[47] In a case argued the following term, Justice Robert Jackson asserted at the post-oral argument conference that "[t]his cuts the Protestants out of the

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motivation was not lost on commentators at the time: an editorial in the *New York Post*, for example, suggested that Cardinal Spellman's denunciation of *Engel* was prompted "not by the prohibition of a prayer which many churchmen would agree has little religious value, but by the potential impact of the decision on the aid-to-education battle." That Catholic leaders actually cared more about funding Catholic schools than they did about keeping religion in the public schools became even more apparent when Catholic leaders either remained neutral or testified against constitutional amendments to validate school prayer.

Jeffries & Ryan, *supra* note 10, at 323–24.

[45] For a discussion of the Protestant leaders' strong support in favor of the Supreme Court's decisions banning Bible reading in the public schools, see Jeffries & Ryan, *supra* note 10, at 320.

Professor Berg also notes the trend toward support of separation:

[T]he school aid debate often seemed to drive people's attitudes on other church-state matters. For example, *The Christian Century*, the leading mainline Protestant magazine, reasoned that the Catholic Church would use any method "to blur the principle of separation of church and state," and therefore it was necessary for Americans to "reinforce" the principle, even to the point of doing away with government-paid chaplains for military servicemen and the inclusion of churches among tax-exempt organizations. The magazine acknowledged that such programs were sympathetic in themselves, but argued that they set dangerous precedents for parochial school aid.

Berg, *supra* note 10, at 126 (footnotes omitted).

[46] IN CONFERENCE, *supra* note 18, at 401 n.26 (discussing Everson v. Bd. of Educ., 330 U.S. 1 (1947)).

[47] McGreevy, *supra* note 23, at 123–24 (quoting Rutledge's Memo after Conference).

schools at the same time that we are paying for Catholic schools' buses. Protestants don't have a good means of standing out."[48] To be sure, the Justices generally avoided in their public statements such obvious expressions of pro-Protestant and anti-Catholic attitudes, though occasionally they would reveal a similar, albeit less overt, bias.[49] In their judicial opinions, however, the Justices most often explained their Religion Clause decisions with ringing declarations of principle.

Undoubtedly, the significance of the Protestant-Catholic division for understanding the judicial enforcement of religious freedom should not be overstated. Positions on issues of church and state did not (and still do not) neatly divide with Protestants on one side of the line and Catholics on the other.[50] Nonetheless, the fact remains: the Supreme Court began to enforce the Religion Clauses with vigor only when Catholics became more politically potent. Given the strong Protestant sentiments against Catholicism expressed so often throughout American history, the concurrence of these judicial and social developments does not seem merely coincidental. Indeed, as mentioned earlier, the causal connection between the shifting Protestant-Catholic relations and the Court's interpretation of religious freedom after World War II is the central unifying theme of both the Jeffries and Ryan article and the Berg article. "The widespread distrust of Catholicism was almost certainly a factor," Berg writes, "in how the Justices of the Supreme Court decided the first modern Establishment Clause cases."[51]

B. The American Jewish Community

A second factor contributing to the Court's increasing solicitude for First Amendment claims during the postwar era was a change in American Jewish attitudes and conduct. Throughout most of the nineteenth century, Jews were an exceedingly small minority in this country: numbering approximately 4,500 in 1830; 40,000 in 1845; and still only 150,000 by the Civil War.[52] Starting in the 1880s, though, Eastern European Jews began streaming into the United

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[48] IN CONFERENCE, *supra* note 18, at 404 (discussing Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203 (1948)).

[49] *See* Berg, *supra* note 10, at 129 (detailing documented anti-Catholic sentiments of Supreme Court Justices); *see also* McGreevy, *supra* note 23, at 122–26 (same).

[50] *See* COHEN, *supra* note 18, at 139, 222; Ira C. Lupu, *The Lingering Death of Separationism*, 62 GEO. WASH. L. REV. 230, 231 (1994); *cf.* WUTHNOW, *supra* note 18, at 73 (noting that many court cases found Protestants and Catholics on different sides of the fence).

[51] Berg, *supra* note 10, at 127; *see also* Jeffries & Ryan, *supra* note 10, at 280 (emphasizing the usefulness of a political view of Establishment Clause cases).

[52] LEONARD DINNERSTEIN, ANTISEMITISM IN AMERICA 24 (1994).

States. Between 1887 and 1927, the total number of American Jews increased from 229,000 to over 4,228,000. Nonetheless, the American Jewish community never amounted overall to more than a small numerical minority, even at its peak constituting only about three percent of the total American population.[53]

Furthermore, overt antisemitism was common and socially accepted in most quarters of American society, at least through World War II.[54] A few brief examples will suffice. Throughout the 1920s, Henry Ford published a newspaper, *The Dearborn Independent*, that incessantly attacked Jews with traditional antisemitic diatribes, claiming Jews controlled American banking, American agriculture, American journalism, and so on. Many Americans must have agreed with Ford, since *The Dearborn Independent* increased circulation almost tenfold within four years to 700,000 copies per week, only 50,000 less than the best-selling paper in the country.[55] The Secretary of the Chamber of Commerce in St. Petersburg, Florida, apparently was one who shared Ford's sentiments, as he "advocated expelling all Jews and foreigners" from the city in 1924.[56] In the spring of 1936, eight *Harvard Law Review* editors had not been offered a job for the following year; all were Jewish.[57] Throughout the 1930s, Jews who fled Germany believed that antisemitism was worse in the United States than in pre-Nazi Germany.[58] In a 1944 poll, twenty-four percent of Americans identified Jews as the single national, religious, or racial group that presented the greatest menace or threat to Americans (as a comparison, nine percent identified Japanese, and six percent chose Germans—even though the poll was conducted well before the end of the war).[59] Given such widespread antisemitic sentiments, Jews tended to avoid asserting their rights and interests either in litigation or even in political electioneering. Up through the early decades of the twentieth century, "[a]ssimilation, not ethnocentric demands for equal rights, [was] the operative norm among the American Jewish leadership."[60] Jews hoped that the nonconfrontational education of

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[53] Klarman, *supra* note 17, at 49.

[54] DINNERSTEIN, *supra* note 52, at 58–149 (explaining the acceptance and evolution of antisemitism in America from the beginning of the twentieth century until the end of World War II).

[55] *Id.* at 80–82.

[56] *Id.* at 78.

[57] JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 186 (1976).

[58] *See* GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 1186 n.4 (H & R 1962). *See generally* MARTIN JAY, THE DIALECTICAL IMAGINATION: A HISTORY OF THE FRANKFURT SCHOOL AND THE INSTITUTE OF SOCIAL RESEARCH 1923–1950, at 34 (1973) (discussing the wave of antisemitism in Germany).

[59] DINNERSTEIN, *supra* note 52, at 131.

[60] IVERS, *supra* note 18, at 32.

non-Jews might eventually diminish antisemitic behavior and attitudes.[61] To assert legal rights more directly and energetically, it was feared, would likely have been counterproductive, engendering reactionary reprisals.[62]

After World War II, Jews and Jewish organizations—especially the American Jewish Committee ("AJCommittee"), the Anti-Defamation League ("ADL"), and the American Jewish Congress ("AJCongress")—stepped forward to press for religious freedom and equality in the courts. These organizations were buoyed by a reduction of overt antisemitism in America and spurred by a post-Holocaust sense of urgency.[63] The Holocaust painfully demonstrated to American Jews "the consequences that communal silence had wrought for European Jewry."[64] I do not mean to suggest that American Jews dwelled on the Holocaust and its meaning for them. Instead, they tended to downplay the Nazis' obsessive destruction of European Jews partly because of the lingering fear of antisemitism in this country. An emphasis on the German murder of Jews rather than on wider Axis wartime atrocities and totalitarianism in general seemed ill-advised when West Germany had so quickly become an American ally in the Cold War battle against the Soviet bloc.[65] To harp on the Holocaust during the Cold War era might have been viewed as unpatriotic and rekindled traditional antisemitic accusations of Jewish vengefulness. Nonetheless, partly because of their awareness of the Holocaust, many American Jews (though certainly not all) became determined after the war to confront overt antisemitism and Christian proselytizing. Within the leading Jewish organizations, a more "active, rather than reactive, domestic program of law and social action" was thus called for.[66] Consequently, in a substantial number of the most important postwar Religion Clause cases, the leading Jewish organizations either instituted the action or participated as amicus curiae.[67]

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[61] *Id.* at 40 (explaining that the American Jewish Committee leadership determined that American antisemitism could best be eradicated by educational work with non-Jewish organizations, stressing that Jews differ from other Americans in religion only).

[62] *See generally* DINNERSTEIN, *supra* note 52, at 13–57 (discussing antisemitism in nineteenth-century America); JAHER, *supra* note 18, at 129–77, 184–241 (same).

[63] For a discussion of the reduction in antisemitism after World War II, see DINNERSTEIN, *supra* note 52, at 150–74; NOVICK, *supra* note 18, at 113.

[64] IVERS, *supra* note 18, at 49.

[65] NOVICK, *supra* note 18, at 85–102.

[66] IVERS, *supra* note 18, at 49; *see also id.* at 61 ("The Holocaust brought home . . . that American Jews could neither achieve equal civil rights nor ensure the protection of those rights through polite appeals to public opinion.").

[67] For general discussions, *see* COHEN, *supra* note 18, at 123–246; IVERS, *supra* note 18, at 34–188; *cf.* Robert F. Drinan, *Mending the Wall*, 38 STAN. L. REV. 615 (1986) (discussing the litigation career of former AJCongress general counsel Leo Pfeffer).

With regard to specific cases, however, unanimity over such tactics rarely existed within the Jewish community. Disagreements among the various Jewish organizations and among Jews from different national regions were common. In the words of one AJCommittee and ADL attorney, Jews in the South could aim for little more than being "accepted as honorary Protestants."[68] Even so, for the most part, American Jews became more assertive of their rights to equality and religious freedom during the postwar period. In particular, the AJCongress, with its General Counsel, Leo Pfeffer, most strongly advocated for the strict separation of church and state. "[T]he greatest danger," according to Pfeffer, "[came] from those who . . . plead compromise for the sake of good interfaith relations and the avoidance of anti-Semitism."[69]

II. SUPREME COURT CASES AND RELIGIOUS OUTSIDERS

The Supreme Court took its first major step toward an increasingly vigorous enforcement of religious freedom when the Court incorporated the Free Exercise and Establishment Clauses against the states. Earlier in the twentieth century, the Court had begun to hold 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. Pursuant to this so-called "incorporation doctrine," these constitutional provisions then applied against the state governments just as they applied against the federal government.[70] The Court did not incorporate the Religion Clauses, however, until the 1940s. Specifically, under the Court's decisions, the Free Exercise Clause was incorporated in 1940, and the Establishment Clause was incorporated in 1947.[71]

A. Establishment Clause Cases

The first case to incorporate and apply the Establishment Clause against a state or local government was *Everson v. Board of Education.* The case challenged an instance of public aid to Catholic schools, and as such, it presented the Court with an opportunity to confront the shifting constellation of Catholic-Protestant relations. Signifi-

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[68] IVERS, *supra* note 18, at 124.

[69] *Id.* at 56 (quoting Leo Pfeffer).

[70] On the incorporation doctrine in general, see ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 478–86 (2d ed. 2002).

[71] *See* Everson v. Bd. of Educ., 330 U.S. 1 (1947); Cantwell v. Connecticut, 310 U.S. 296 (1940). In *Cantwell,* the Court wrote: "The fundamental concept of liberty embodied in [the Fourteenth Amendment] embraces the liberties guaranteed by the First Amendment." *Id.* at 303.

cantly, then, the Court's opinion reveals the Protestant tilt of the Court in the face of enhanced Catholic power. Although a bare five-to-four majority upheld the challenged governmental action, Justice Black's majority opinion unequivocally declared a robust antiestablishment principle that could thwart other attempts to aid parochial schools. In particular, the Court explained the meaning of the Religion Clauses, especially the Establishment Clause, by drawing upon Jefferson's metaphorical wall of separation between church and state:

> 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 professing religious beliefs or disbeliefs, for church attendance or non-attendance. 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."[72]

Despite then upholding the public reimbursement of transportation costs for children attending either public or Catholic schools, the Court emphasized that the wall between church and state "must be kept high and impregnable."[73] As Justice Black said afterward, he had purposefully tailored the opinion: "I made it as tight and gave them as little room to maneuver as I could."[74] He considered the decision no more than a "pyrrhic victory" for those who favored aid to parochial schools (read: Catholics).[75] Plus, as Black wrote to one of his former clerks, he believed the opinion gave "weight to the basically religious nature of Catholic education."[76]

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[72] *Everson*, 330 U.S. at 15–16.

[73] *Id.* at 18.

[74] ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 363 (2d ed. 1997) (quoting Hugo Black); *see also* Berg, *supra* note 10, at 127–28 (discussing Black's motivations in crafting the *Everson* opinion).

[75] NEWMAN, *supra* note 74, at 364.

[76] *Id.* at 682 n.2 (quoting Hugo Black's letter to Charles Luce, Apr. 2, 1947). Black's son later commented that the Justice "suspected the Catholic Church." McGreevy, *supra* note 23, at 124 (quoting HUGO T. BLACK, MY FATHER: A REMEMBRANCE 104 (1975)). For a discussion of other evidence suggesting that Black retained certain anti-Catholic sentiments, see Berg, *supra* note 10, at 129. At the *Everson* post-oral argument conference, Rutledge said: "Once this is done, the field is wide open and there is no telling where this ends. First it was textbooks, now buses and transportation, and next it will be lunches and teachers. . . . If you can justify this law, then you can go much further. . . . Every religious institution in the country will be reaching

The Court for the first time struck down a governmental action as violating the Establishment Clause in 1948.[77] The case, *McCollum v. Board of Education*, involved a challenge to a released time program in Champaign, Illinois. In this particular 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. All of the major Jewish organizations, spurred in part by the *Everson* Court's strong language concerning a wall of separation, joined together in a show of unity to file an amicus brief in the name of the Synagogue Council of America ("SCA") and the National Community Relations Advisory Council ("NCRAC").[78] To underscore the widespread Jewish support for the brief, the SCA and NCRAC's *Motion for Leave to File Brief as Amici Curiae* claimed that they included "in their membership more than eighty percent of Americans affiliated with Jewish organizations."[79] They, therefore, professed to "speak for American Jewry."[80]

The SCA and NCRAC amicus brief presented a multifaceted argument, but the main thrust was straightforward.[81] The released time classes facilitated sectarian religious instruction. The state participated in such religious instruction in a variety of ways, such as by allowing the religious instructors to conduct classes in the public school buildings during regular class hours. This state participation violated the Establishment Clause.

More important than the details of this argument, the amicus brief revealed two interrelated themes or a two-pronged strategy, so

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into the hopper for help if you sustain this. It forces people to pay for the religious education of others. We must stop this thing right at the threshold of the public schools." IN CONFERENCE, *supra* note 18, at 401–02. Given Rutledge's other comments, there is little doubt that the "thing" he wanted to stop was *Catholic* use of public funds for parochial schools. McGreevy, *supra* note 23, at 123–24.

[77] Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 210 (1948) (holding that the use of a "tax-established and tax-supported school system to aid religious groups to spread their faith" violates the Establishment Clause) .

[78] COHEN, *supra* note 18 at 140–43. For discussions of the increasing use of amicus briefs during the postwar era, see Lee Epstein & Jack Knight, *Mapping Out the Strategic Terrain: The Informational Role of Amici Curiae, in* SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES 215, 221–22 (Cornell W. Clayton & Howard Gillman eds., 1999); Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L.J. 694 (1963). According to the historian Naomi Cohen, the *McCollum* amicus brief "signaled a new assertiveness and confidence on the part of postwar Jews and, simultaneously, a newly found unity among organized American Jews." COHEN, *supra* note 18, at 143.

[79] Motion for Leave to File Brief as Amicus Curiae, *McCollum* (No. 90) (no page number in original).

[80] *Id.*

[81] Brief of Amici Curiae Synagogue Council of America and National Community Relations Advisory Council, *McCollum* (No. 90) at 36–41 [hereinafter *McCollum* Brief]; *see* IVERS, *supra* note 18, at 78–80 (discussing the amicus brief's argument).

to speak, that would persist through many of the Jewish organizations' briefs in subsequent post-World War II cases, particularly under the Establishment Clause. First, the brief framed its arguments to stress principles, especially principles of American democracy. By invoking principles rather than specific Jewish interests, Jews appeared to be joined with rather than separated from other Americans. In fact, still during the war, Jewish leaders had recognized the importance of stressing the similarities, not the differences, between Jews and others. In a report on antisemitism, the Executive Vice-President of the AJCommittee had declared that Jewish organizations "should avoid representing the Jew as weak, victimized, and suffering. . . . There needs to be an elimination or at least a reduction of horror stories of victimized Jewry. . . . We must normalize the image of the Jew. . . . The Jew should be represented as *like* others, rather than unlike others."[82] Unsurprisingly, then, before the Jewish organizations even decided to file the *McCollum* amicus brief, David Petegorsky of the AJCongress had argued that "Jews have always been, and will always be, far better advised to take their position on the basis of fundamental principle rather than of temporary or immediate considerations of expediency."[83]

The brief itself began by emphasizing this theme:

> We regard the principle of separation of church and state as one of the foundations of American democracy. Both political liberty and freedom of religious worship and belief, we are firmly convinced, can remain inviolate only when there exists no intrusion of secular authority in religious affairs or of religious authority in secular affairs. As Americans and as spokesmen for religious bodies, lay and clerical, we therefore deem any breach in the wall separating church and state as jeopardizing the political and religious freedoms that wall was intended to protect.[84]

Given the Jewish organizations' desire to invoke principles, the Protestant-tinged protectionism that had emerged in the *Everson* opinion proved fortuitous. When Justice Black had articulated the wall-of-separation principle, he aimed in part to fortify Protestant prerogatives against potential Catholic incursions. The plight and interests of Jews and other non-Christian outsiders probably did not sway his reasoning.[85] Yet, in *McCollum* and subsequent cases, the Jew-

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[82] NOVICK, *supra* note 18, at 121 (quoting John Slawson, Scientific Research on Anti-Semitism, Paper delivered by Executive Vice-President of AJCommittee, at NCRAC (Sept. 11, 1944)).

[83] IVERS, *supra* note 18, at 73 (quoting David Petegorsky); *see also id.* ("'In opposing any impairment of the separation of church and state, we stand firmly on sound and tested democratic principle.'").

[84] *McCollum* Brief, *supra* note 81, at 1–2.

[85] Black had been a member of the Ku Klux Klan during the 1920s, apparently to help his political ambitions. In one incident, though, he defended a Jewish friend from Klan attempts to oust him from his job as a school principal. NEWMAN, *supra* note 74, at 92–94. On occasion,

ish organizations seized upon Black's language and invoked it to their advantage. Indeed, the very beginning of the argument section of the *McCollum* amicus brief quoted from *Everson* on the principled wall of separation.[86]

Moreover, to accentuate the focus on principle rather than on Jewish interests, the brief took two additional tacks. It invoked traditional icons of American—and thus Protestant—religious freedom, particularly James Madison and Thomas Jefferson,[87] and it emphasized that Christian interests also were at stake in the case. "Jewish groups," the brief argued, "base their opposition to the released time program on many grounds, but no consideration bulks larger in that opposition than the divisive effects of the program. Thoughtful Christians are no less concerned with this harmful aspect of released time."[88] An "eminent Protestant observer" was quoted to this effect.[89] Moreover, the brief specifically cited to "ample evidence that the teachings in religious courses foster antagonisms between Christians and Jews, between Protestants and Catholics and even among various Protestant sects."[90]

The second theme evident in the *McCollum* amicus brief was that the strict separation of church and state protects and fosters religion. "Our opposition to religious instruction within the public school must in no way be interpreted as hostility to religious instruction as such."[91] The brief then stressed the religiosity within the American Jewish community, including the community's emphasis on the religious education of Jewish children.[92] Indeed, the brief concluded by expressly linking together the two themes or strategies. Religiosity and its protection are part and parcel of American democratic principles: "by protecting religion against the intrusion of civil authority

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other Justices openly revealed their indifference toward non-Christians during Court conferences. For instance, during the conference for *Zorach v. Clauson*, 343 U.S. 306 (1952), Chief Justice Vinson said, "Hence we do not have to pass on all the horribles posed by the appellant—i.e., atheists, Jews, Jehovah's Witnesses, etc." IN CONFERENCE, *supra* note 18, at 405. In the conference involving Sunday closing laws, for example, *Braunfeld v. Brown*, 366 U.S. 599 (1961), Chief Justice Warren said that "somebody is always going to be 'hurt.' Orthodox Jews might lose two days." IN CONFERENCE, *supra* note 18, at 393.

[86] *McCollum* Brief, *supra* note 81, at 13.

[87] *Id.* at 15–16, 29.

[88] *Id.* at 2–3.

[89] *Id.* at 3 n.3.

[90] *Id.* at 4. The brief added that Protestant and Catholic children were not treated equally: "Protestant religious instruction is conducted in the same classroom in which the regular classes are held, whereas the Catholic children are required to leave the room and go to a basement room, operates as an obvious preference." *Id.* at 16.

[91] *Id.* at 5. This theme, that the strict separation of church and state is good for religion, had previously been pronounced not only by James Madison but also by Roger Williams. FELDMAN, PLEASE DON'T, *supra* note 10, at 128–29, 152–53.

[92] *McCollum* Brief, *supra* note 81, at 5–6.

and by making it impossible for the state to become a battleground for sectarian preference and favor, [the separation of church and state] has preserved both our political freedom and our religious freedom."[93]

One of the difficulties in the case was that the actual Establishment Clause claimant, Vashti McCollum, was an avowed atheist. This fact particularly troubled the AJCommittee and the ADL, which led to the following language in the brief:

> We wish to make clear our regret that the appellant chose to use this case as a medium for the dissemination of her atheistic beliefs and injected into the record the irreligious statements it contains. We wish not only to disassociate ourselves completely from the anti-religious views of the appellant, but wish also to deplore the fact that the sponsors of the original petition chose this case as a means of inscribing such anti-religious matter on the public record and for confusing the basic issue in this case by dragging into it the unrelated issues of atheism versus religion.[94]

Once again, thus, the amicus brief unequivocally declared that the Jewish organizations themselves were not atheistic but instead supported religion, and that the separation of church and state, as a constitutional principle, would foster rather than inhibit religion.

The Supreme Court held that the Champaign, Illinois, released time program was unconstitutional, with the SCA and NCRAC amicus brief apparently playing a significant role. While the brief's influence was most discernible in Justice Felix Frankfurter's concurrence,[95] the majority opinion, written again by Justice Black, also echoed the brief in multiple ways. The Court's own language resonated with the main thrust of the brief's argument. "This [released time program] is beyond all question," the Court wrote, "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 . . . ."[96] Furthermore, the Court stressed that there is an American tradition or principle of religiosity and that the strict enforcement of the principle of religious freedom protects and even bolsters such religiosity:

> To hold that a state cannot consistently with the First and Fourteenth Amendments utilize its public school system to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals does not, as counsel urge, manifest a governmental hostility to religion or religious

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[93] *Id.* at 41.

[94] *Id.* at 6; *see* IVERS, *supra* note 18, at 79 (discussing the dispute leading to this language).

[95] Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 212–28 (1948) (Frankfurter, J., concurring); *see* COHEN, *supra* note 18, at 143 (discussing Frankfurter's reliance on the amicus brief).

[96] *McCollum*, 333 U.S. at 210.

> teachings. A manifestation of such hostility would be at war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion. For the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere. Or, as we said in the *Everson* case, the First Amendment has erected a wall between Church and State which must be kept high and impregnable.[97]

Perhaps the Court's strongest statement regarding the ostensible wall of separation between church and state came more than a decade after *McCollum* in the context of an Establishment Clause case, *Engel v. Vitale*,[98] which challenged prayer in the public schools. The reading of the Protestant Bible and the recitation of prayers long had been common practices in public schools across the country.[99] In 1951, the Board of Regents of New York State 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.[100] When a town school board adopted this prayer for use in its classrooms in 1958, several parents decided to challenge the constitutionality of the practice. The plaintiffs, not yet supported by any of the Jewish organizations, lost in the state trial court. But by the time the case reached the United States Supreme Court, the AJCommittee and the ADL already had joined the fray; they together filed an amicus brief with the Court. The AJCongress's Leo Pfeffer, who had strong reservations about the case, eventually also filed an amicus brief with the Court on behalf of the SCA and the NCRAC.[101]

The Jewish organizations' amicus briefs reiterated the two interrelated themes that were central to the *McCollum* amicus brief. While the AJCommittee and ADL brief in *Engel* focused on stare decisis, relying heavily on the Supreme Court's *McCollum* opinion, the brief also carefully explained that the strict separation of church and state benefits religion: "Freedom of religious belief, observance and worship can remain inviolate only so long as there is no intrusion of religious authority in secular affairs or secular authority in religious affairs."[102] Meanwhile, the SCA and NCRAC brief declared that it

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[97] *Id.* at 211–12.

[98] 370 U.S. 421 (1962).

[99] FELDMAN, PLEASE DON'T, *supra* note 10, at 191, 208, 223.

[100] *Engel*, 370 U.S. at 430. The prayer was as follows: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." *Id.* at 422.

[101] COHEN, *supra* note 18, at 168–70.

[102] Brief of American Jewish Committee and Anti-Defamation League of B'nai B'rith as Amici Curiae at 3, *Engel* (No. 468); *see id.* at 9–14 (basing the argument on stare decisis).

sought the application of the principle of the "absolute separation of church and state."[103] As the brief explained, enforcement of that principle by the "[e]xclusion of communal prayer from the public school curriculum does not manifest a hostility towards religion."[104] To the contrary, the SCA and NCRAC argued that banning prayer in the public schools would promote religiosity.[105] Moreover, this viewpoint did not merely reflect Jewish interests and values; many Christians agreed with them:

> This brief is submitted on behalf of the coordinating bodies of 70 Jewish organizations, including the national bodies representing congregations and rabbis of Orthodox, Conservative and Reform Judaism. The thousands of rabbis and congregations who have authorized the submission of this brief can hardly be characterized as being "on the side of those who oppose religion." Many Christian groups and publications have similarly expressed opposition to the Regents' Prayer.[106]

The Court decided the *Engel* case in 1962 by holding that the daily recitation of the Regents' prayer in the public schools violated the Establishment Clause.[107] The Court articulated religious freedom, or the separation of church and state, as a principled protection of democracy and religion rather than as protection of Jewish or other minority interests:

> 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.[108]

Most tellingly, the *Engel* Court drew upon Protestant history to help interpret the Establishment Clause. The Puritans, the Court elucidated, had fled England for America in the seventeenth century to avoid following the governmentally imposed Book of Common Prayer of the Church of England.[109] It was found that the daily recitation of the New York Regents' prayer too closely resembled the official imposition of the English Prayer Book. Finally, the Court ex-

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[103] Brief of Synagogue Council of America and National Community Relations Advisory Council as Amici Curiae at 3, *Engel* (No. 468).

[104] *Id.* at 7.

[105] The brief stated that it was "committed to the belief that the absolute separation of church and state is the surest guaranty of religious liberty and has proved of inestimable value both to religion and to the community generally." *Id.* at 3.

[106] *Id.* at 26.

[107] Engel v. Vitale, 370 U.S. 421, 424 (1962) (finding recitation "wholly inconsistent with the Establishment Clause").

[108] *Id.* at 431.

[109] *Id.* at 425–26.

plained at length that banning public school prayers did not "indicate a hostility toward religion or toward prayer."[110]

Undoubtedly, American Jews—a prototypical religious outgroup—have, to some degree, litigated successfully under the Establishment Clause. By carefully choosing and arguing cases, the Jewish organizations fruitfully urged the Court to stretch the scope of the Establishment Clause so as to encompass the Jewish positions. The organizations argued that enforcing the strict separation of church and state was a matter of principle, not merely a matter of Jewish interests, and that the Jewish organizations favored religiosity. By imposing strict separationism, the organizations maintained, the First Amendment fostered religion.

Putting this in different words, the Jewish organizations' basic strategy was to assert their Establishment Clause claims without asking for any special treatment. "We're just like other Americans," they seemed to be saying. "We rely on principles, not on our distinctive interests or values." "And don't forget," they added, "we are just as religious as other Americans." Understood in this way, success in the Establishment Clause cases was due in part to the Jewish organizations' ability to advocate for positions that remained reasonably consistent with mainstream Protestant interests and values. Studies in the art of rhetoric support using this sensible strategy. As a general matter, an effective advocate "must choose a characterization that ac-

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[110] *Id.* at 434. The Court wrote:

> It has been argued that to apply the Constitution in such a way as to prohibit state laws respecting an establishment of religious services in public schools is to indicate a hostility toward religion or toward prayer. Nothing, or course, could be more wrong. The history of man is inseparable from the history of religion. And perhaps it is not too much to say that since the beginning of that history many people have devoutly believed that "More things are wrought by prayer than this world dreams of." It was doubtless largely due to men who believed this that there grew up a sentiment that caused men to leave the cross-currents of officially established state religions and religious persecution in Europe and come to this country filled with the hope that they could find a place in which they could pray when they pleased to the God of their faith in the language they chose. And there were men of this same faith in the power of prayer who led the fight for adoption of our Constitution and also for our Bill of Rights with the very guarantees of religious freedom that forbid the sort of governmental activity which New York has attempted here. These men knew that the First Amendment, which tried to put an end to governmental control of religion and of prayer, was not written to destroy either. They knew rather that it was written to quiet well-justified fears which nearly all of them felt arising out of an awareness that governments of the past had shackled men's tongues to make them speak only the religious thoughts that government wanted them to speak and to pray only to the God that government wanted them to pray to. It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance.

Id. at 433–35 (footnotes omitted).

tually resonates with her audience."[111] When addressing an overwhelmingly Protestant Supreme Court, then, Jewish advocates wisely characterized their positions as consistent with Protestant views. Moreover, it is worth reiterating, insofar as Jewish advocates appealed to Protestant interests and values, those interests and values were, at the time, partly shaped by Protestant defensive reactions against perceived Catholic political overreaching.

Despite the wisdom of the two-pronged litigation strategy, it did not lead to unmitigated success. The Jewish organizations lost cases such as *Zorach v. Clauson*, a 1952 Establishment Clause case that upheld a released time program where the religious instruction occurred off the public school grounds.[112] In another 1952 decision, *Doremus v. Board of Education*, the Court rejected a challenge to Bible reading in the public schools by finding that the plaintiffs lacked standing to sue.[113] And more recently, the infamous *Lynch v. Donnelly* upheld the public exhibition of a crèche as part of an extensive Christmas display.[114]

Furthermore, the Jewish organizations sometimes failed not only in the courtroom but also in the realm of public opinion. The decision in *Engel* provoked outrage in both the Protestant and Catholic communities. Local school districts defied the ruling, members of Congress called for a constitutional amendment overturning the decision, and newspapers published editorials and letters condemning the Court.[115] Indeed, this backlash at least calls into question my conclusion that the Jewish organizations' success in Establishment Clause cases was partly due to their arguments remaining consistent with Protestant interests and values.

Nonetheless, this conclusion remains relatively easy to sustain with regard to a case like *McCollum*, which struck down a released time

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[111] Laura E. Little, *Characterization and Legal Discourse*, 46 J. LEGAL EDUC. 372, 394 (1996); *cf.* Samuel J. Levine, *Toward a Religious Minority Voice: A Look at Free Exercise Law Through a Religious Minority Perspective*, 5 WM. & MARY BILL RTS. J. 153, 164–65 (1996) (arguing that in cases won by the Jehovah's Witnesses, the Court tended to emphasize similarities to the mainstream).

[112] 343 U.S. 306 (1952).

[113] 342 U.S. 429 (1952).

[114] 465 U.S. 668 (1984).

[115] *See, e.g.*, COHEN, *supra* note 18, at 171–73; FELDMAN, PLEASE DON'T, *supra* note 10, at 234; IVERS, *supra* note 18, at 137. Neal Devins writes:

> That there are instances where court opinions seem inconsequential cannot be denied. Supreme Court decisions limiting religious observance in the public schools . . . are often disregarded. The public school cases demand that objecting students bear the fiscal and emotional toll of challenging school systems that would prefer to heed religious belief ahead of Supreme Court decisions. This price is quite high and consequently many religious practices remain unchallenged.

Neal Devins, *Judicial Matters*, 80 CAL. L. REV. 1027, 1065 (1992) (reviewing GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991)) (footnote omitted).

program. Most importantly, Catholics participated far more than Protestants in released time programs.[116] Thus, unsurprisingly, Catholic groups most vehemently criticized the Court's decision, while Protestant groups were divided in their reactions.[117] In fact, during the post-World War II era, Protestants often divided on religious freedom issues, with some favoring a more secular civil society and others favoring a more religious (read: Protestant) society.[118] Regardless, and more broadly, any judicial enforcement of the wall of separation between church and state would, at least in part, temporarily bolster the Protestant defense against Catholic power. From an admittedly cynical viewpoint, then, the Court's *McCollum* decision can be understood, in part, as an expression of indifference or even hostility by the Protestant-controlled Court toward the burgeoning Catholic population.

A similar argument can be made with regard to *Engel*. First, while visible and vocal Protestant leaders such as Billy Graham openly attacked the Court's decision, reaction throughout the Protestant community was actually mixed, with many Protestants strongly supporting the Court.[119] For instance, the executive director of the Baptist Joint Committee on Public Affairs admitted that "'he was not disturbed by the elimination of 'required prayers' from schools.'"[120] Second, while some public school districts, especially in the South, continued their prayers, such resistance to the Court's ruling was nowhere near as prolonged or intense as in reaction against *Brown v. Board of Education*.[121] Third, and related to the previous point, was the Court's significant reliance on Protestant history. Even if many Protestants contemporaneously opposed the *Engel* decision, the Court's opinion underscored that governmentally imposed public school prayer resonated closely with the Church of England's mandated Prayer Book, which the early Puritans had so strongly detested.[122] Put

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[116] *See* IVERS, *supra* note 18, at 72 (discussing Leo Pfeffer's study of released time programs).

[117] COHEN, *supra* note 18, at 145–46 (describing Protestant and Catholic reactions).

[118] *See* HAMBURGER, *supra* note 10, at 476–78 (discussing Protestant divisions, especially after the *McCollum* decision).

[119] COHEN, *supra* note 18, at 172 (noting that the overall Protestant reaction was mixed despite these leaders' influence); *see also* IVERS, *supra* note 18, at 141–42 ("[M]any Christians will welcome the decision [because] it protects the rights of minorities and guards against the development of public school religion which is neither Christianity nor Judaism but something less than either."); Jeffries & Ryan, *supra* note 10, at 320–21 (explaining that "the vast majority of Protestant leaders and organizations" supported decisions excluding prayer and Bible reading in public schools).

[120] IVERS, *supra* note 18, at 141 (quoting C. Emanuel Carlson).

[121] 347 U.S. 483 (1954). The less intense resistance to the prayer decision may have been partly due to the ambivalence of Protestants. *See* Klarman, *supra* note 17, at 15–16 (discussing the minimal resistance to the Court's prohibition on prayer and Bible reading).

[122] *See* FELDMAN, PLEASE DON'T, *supra* note 10, at 81–83, 119–24 (discussing the *Book of Common Prayer*, Puritanism, and motivations for American settlement).

differently, while the Court's decision may have departed from some contemporary Protestant opinion, the decision harmonized with Protestant values and interests, when understood from a broader historical perspective. Finally, the Jewish organizations may have once again benefited from the shifting forces of the Protestant and Catholic political constellations. In particular, during the postwar era, Catholic support for public school religious practices, including prayer, increased dramatically.[123] One reason for this increased Catholic support was that the enhanced Catholic political power ensured that public school prayers would be less overtly Protestant. Prayers, in other words, would supposedly be nondenominational. Because of this increased Catholic support for public school prayers, there is a reasonable likelihood that the Protestant-controlled Supreme Court would be less protective of the practice than it would have been in earlier decades.[124]

Hence, the importance for the Jewish organizations to articulate their Establishment Clause claims consistently with Protestant interests and values should not be gainsaid. In fact, in *School District of Abington Township v. Schempp*,[125] a case decided only one year after *Engel*, the organizations used the same two-pronged strategy to successfully challenge Bible reading as well as the recitation of the Lord's prayer in public schools. The amicus brief of the AJCommittee and ADL emphasized "the principle of separation of church and state as expressed in the First Amendment."[126] Moreover, the brief argued that the Jewish organizations' constituencies not only were religious people but that their views regarding religious freedom echoed Christian views. The brief quoted Paul Hutchinson, onetime editor of the *Christian Century*, in stating that "'the American adoption of the principle of church and state separation has been a godsend for the churches, Protestant, Roman Catholic and of every sort.'"[127] The amicus brief for the SCA and NCRAC, in relying heavily on stare de-

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[123] *See* MILLER, *supra* note 6, at 277–78 (noting the strong Catholic support for New York public school prayer).

[124] Michael Klarman writes that while the Court's prohibition of public school prayers and Bible reading "plainly were contrary to the preferences of a national majority, they were not dramatically countermajoritarian, which is what they would have been had the Court rendered them a generation earlier." Klarman, *supra* note 17, at 16.

[125] 374 U.S. 203 (1963) (holding in-school Lord's Prayer recitation unconstitutional under the Establishment Clause).

[126] Brief of American Jewish Committee and Anti-Defamation League of B'nai B'rith as Amici Curiae at 3, *Schempp* (No. 142).

[127] *Id.* at 4 (quoting Paul Hutchinson, *The Onward March of Christian Faith*, LIFE, Dec. 26, 1955, at 43).

cisis, argued similarly.[128] Enforcement of strict separationism, the brief stated, "is the surest guaranty of religious liberty and has proved of inestimable value both to religion and to the community generally."[129] Banning Bible reading and the Lord's Prayer would "not manifest hostility to religion."[130] Moreover, "many Christian groups and publications . . . have similarly expressed opposition" to these practices in the public schools.[131]

Apparently in response to the widespread criticisms of the *Engel* decision from the previous term, the *Schempp* amicus briefs tried, if anything, to augment their willingness to reconcile their positions with the mainstream Protestant views. They struck an even more accommodationist chord by explicitly acknowledging that religion could be studied as a secular subject in the public schools. The SCA and NCRAC brief stated:

> The complaints in these actions do not demand, nor do the plaintiffs assert, any right to the complete exclusion of religion or reference to God from the public schools. Nothing in the Constitution of the United States requires the school authorities to remove all matter relating to religion from the school curriculum. It is not contended that, for example, the Bible may not be studied in the public schools as a work of literature. . . . Nor is it contended that the influence of religion and religious institutions upon history may not be studied in the public schools.[132]

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[128] For example, the brief emphasized the *Everson* wall-of-separation language and the *McCollum* holding. Brief of Synagogue Council of America and National Community Relations Advisory Council as Amici Curiae at 8–11, *Schempp* (No. 142).

[129] *Id.* at 4.

[130] *Id.* at 35. The brief adds:

> [Striking down the state actions here] would not in any way infringe upon the religious liberty of children or their parents. It would not prevent any child from reading the Bible or reciting any prayer he wished during public school hours, provided of course he did not thereby intefere with the regular course and discipline of instruction. Rather than restrict religious liberty, such a determination would further it, since it would substitute freedom of individual choice for State-imposed conduct. In American tradition, religion is a matter of individual choice; the First Amendment was written because the people did not want their religious beliefs and practices to be established by law or imposed by government. Invalidation of the regulations here challenged would place the responsibility for religious exercises where it properly belongs—in the home, the church, the synagogue and on the individual conscience.

Id. at 37.

[131] *Id.* at 36.

[132] *Id.* at 19–20. The SCA and NCRAC brief added:

> It is constitutional to study the Bible as a work of literature; it is, we contend, unconstitutional to read it as an act of devotion. If the approach to the Bible or religious music or art is as an intellectual study, it is proper in the public schools; if the approach is worship or faith, it belongs in the home, church and synagogue.

Id. at 20. The AJCommittee and ADL brief likewise took the position that the Bible could be used in "the context of instruction of such subjects as literature, art, history and social studies." Brief of American Jewish Committee and Anti-Defamation League of B'nai B'rith as Amici Curiae at 18, *Schempp* (No. 142).

The Jewish organizations, in other words, stressed that they sought to eradicate sectarian religious practices, but not religion per se, from the public schools.

B. Free Exercise Clause Cases

While the Jewish organizations developed and used a moderately effective strategy in the Establishment Clause cases, they were not as successful in articulating or implementing a similar approach in free exercise cases. The most common type of free exercise case is probably the exemption claim: a member of a religious group—almost always a minority or outgroup—seeks an exemption (or exception) from a generally applicable law that burdens the exercise of her religion.

Who wins such free exercise cases? As a general matter, most free exercise claimants lose.[133] More specifically, in an empirical study of free exercise cases in the United States courts of appeals, James C. Brent reports that "claimants who belonged to mainstream Catholic and Protestant sects were more likely to win than were claimants who belonged to other religions (38.9% versus 24.5%)."[134] In free exercise exemption cases at the Supreme Court level, the numbers are even more striking: while members of small Christian sects sometimes win and sometimes lose such free exercise claims, non-Christian religious outsiders never win.[135] Brent speculates:

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[133] Brent, *supra* note 28, at 249–50 (reporting from a study of the courts of appeals); Way & Burt, *supra* note 28, at 661–62 (reporting from a study of state and federal decisions between 1970 and 1980). According to Jesse H. Choper, "[t]he bedrock test of a government's commitment to protecting the free exercise of religion arises when general government regulations, enacted for secular purposes, conflict with an individual's religious beliefs." Choper, *supra* note 13, at 1713 (footnote omitted).

[134] Brent, *supra* note 28, at 250–51. For an interesting analysis of free exercise cases involving Jehovah's Witnesses, see MAZUR, *supra* note 18, at 28–61. Mazur explains that between 1938 and 1960, the Jehovah's Witnesses won a majority of the more than fifty cases that their members brought before the United States Supreme Court. Yet, their success arose from those cases where they focused on free speech claims or they combined free speech with free exercise claims. *Id.* at 30, 45, 47, 50–51. Mazur concludes that the Jehovah's Witnesses were "singularly unsuccessful" in cases involving only free exercise claims. *Id.* at 54.

[135] As I have written elsewhere:

> I refrain from categorically asserting that non-Christians never win any free exercise cases because a few cases are ambiguous enough to render such a bald assertion at least questionable. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993); Bowen v. Roy, 476 U.S. 693 (1986); Cruz v. Beto, 405 U.S. 319 (1972); Torcaso v. Watkins, 367 U.S. 488 (1961); United States v. Ballard, 322 U.S. 78 (1944). Some of these cases involve religions that may or may not be categorized as Christian, depending on the definition of Christianity. None of the cases, though, can be reasonably categorized as involving the enforcement of a free exercise exemption on an otherwise generally applicable law. For example, in *Cruz v. Beto*, 405 U.S. 319 (1972), a non-Christian seemed to win a free exercise case where the government explicitly and overtly discriminated against the exercise of Buddhism. The Court held that the lower court should not

> America is a predominantly Christian nation. It therefore is not unreasonable to suppose that Christians should receive preferential treatment at the hands of the Court. Christians probably are less likely to find that the exercise of their religion is burdened by laws in the first place. Because of the majoritarian process, lawmakers are less likely to adopt laws that place burdens on adherents of Christianity, the majority religion. If, however, Christians do find themselves in court defending the exercise of their religion, the judiciary is likely to be receptive to their claims. Primarily, this is because Christian judges should be more likely to be sympathetic to the plight of fellow Christians. The religious burden may appear more "substantial," or the governmental interests may seem less "compelling" when they burden Christians than when they burden non-Christians. Therefore, mainstream Christians should prevail more often than non-Christians in free exercise cases.[136]

The majority opinion in *Wisconsin v. Yoder*,[137] which involved the Old Order Amish, illustrates the importance of Christianity for a successful free exercise exemption claim. The Amish impressed the *Yoder* Court with their "devotion 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."[138] 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—for a simple Christian America. This national and Christian past was one that most of the Justices (as Protestants) could readily understand; its meaning corresponded with the religious and cultural backgrounds of the Justices themselves. At the post-oral argument conference, Chief Justice Warren Burger commented: "This is an ancient religion, not a new cult. . . . Being raised on an Amish farm is equal to or better than vocational school train-

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have dismissed Cruz's complaint for failure to state a claim when allegations asserted that Cruz was a Buddhist and "denied a reasonable opportunity of pursuing his faith comparable to the opportunity afforded fellow prisoners who adhere to conventional religious precepts." *Id.* at 322. Even in that case, I refrain from asserting that Cruz, as a non-Christian, outright won the case because of its procedural posture. Since the lower court had dismissed for failure to state a claim without benefit of a trial, the case presented the free exercise violation as a conditional or hypothetical, the validity of which would therefore depend on the further development of facts at trial. Cruz thus might have an opportunity to present evidence at a trial, but after such a trial, he might then win or lose. Moreover, in dissent, Justice Rehnquist even suggested that Cruz, proceeding in forma pauperis, might still have the complaint dismissed as frivolous under 28 U.S.C. § 1915(d). *Id.* at 328 (Rehnquist, J., dissenting). On the importance of Christianity to free exercise claims, see Mark Tushnet, *"Of Church and State and the Supreme Court":* Kurland *Revisited*, 1989 SUP. CT. REV. 373, 381.

Feldman, *supra* note 9, 261, 273–74 n.5.

[136] Brent, *supra* note 28, at 248.

[137] 406 U.S. 205 (1972).

[138] *Id.* at 210.

ing."[139] Thus, whereas non-Christian religious outsiders have difficulty convincing the Court that their religious convictions are sincere and meaningful, the *Yoder* majority opinion, written by Burger, 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."[140] 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. . . ."[141]

The Court consequently sympathized with the free exercise exemption claim of the Amish in *Yoder* far more than the Court has ever done with the claims of non-Christian outsiders, whether Jews, Muslims, or otherwise. For example, in *O'Lone v. Estate of Shabazz*, the Court held that prison officials did not need to grant a free exercise exemption from regulations that prevented Muslim prisoners from attending certain religious services.[142] Likewise, in *Employment Division v. Smith*, the Native American respondents sought to consume peyote as part of the supervised rituals of the Native American Church, but the Court held that the state did not need to grant an exception from a criminal law prohibiting peyote use.[143]

The *Smith* Court also stressed a constitutional distinction between religious beliefs and conduct (or actions)—a distinction that parallels Protestant doctrine. The Free Exercise Clause, according to the *Smith* Court, precludes all governmental regulations of religious beliefs but does not similarly preclude governmental restrictions on conduct—such as the use of peyote—even if the conduct arises from religious convictions. A governmental prohibition on particular re-

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[139] IN CONFERENCE, *supra* note 18, at 437.

[140] 406 U.S. at 216.

[141] *Id.* at 222. The Court explicitly stressed the long history and traditional culture of the Amish (as Christians) as significant to the decision: "It cannot be overemphasized that we are not dealing with a way of life and mode of education by a group claiming to have recently discovered some 'progressive' or more enlightened process for rearing children for modern life." *Id.* at 235.

[142] O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987). For a discussion (including analyses of lower court cases) of the rights of Jewish prisoners to wear beards, yarmulkes, and eat kosher food, see Abraham Abramovsky, *First Amendment Rights of Jewish Prisoners: Kosher Food, Skullcaps, and Beards*, 21 AM. J. CRIM. L. 241 (1994).

[143] Employment Div. v. Smith, 494 U.S. 872 (1990). In rejecting another First Amendment claim, the Court in *Bowen v. Roy* held that the government did not need to grant a free exercise exemption to a Native American who sought to prevent the government from using his daughter's social security number as a precondition for granting welfare benefits. 476 U.S. 693 (1986).

ligiously motivated conduct would be unconstitutional only if the government restricted that conduct exactly because of its religious foundation.[144]

The difficulty for Jews and other non-Christian outsiders in free exercise cases can be understood best if one recalls the Jewish organizations' strategy in Establishment Clause cases. Their basic approach was to advocate for positions that remained reasonably consistent with mainstream Protestant interests and values. They argued, in effect, that they were asking for nothing special. This strategy, though, is practically impossible to articulate in the free exercise exemption scenario. In fact, the nature of a free exercise exemption claim forces the claimant to do the exact opposite: to explain to the Court how her religious beliefs or practices differ from the mainstream. It is, after all, this difference that creates a free exercise problem in the first place, since laws of general applicability rarely interfere with mainstream Protestant or Catholic practices or beliefs. The claimant, then, must ask the Court for special treatment to accommodate her religious difference.

Unsurprisingly, the Court on multiple occasions has rejected the free exercise claims of Jewish litigants—litigants who needed to describe their unusual religious practices (unusual, that is, from a Christian perspective). For example, in *Goldman v. Weinberger*, an Orthodox Jewish Air Force officer, Simcha Goldman, sought a free exercise exemption so that he could wear his yarmulke (skull-cap) in spite of Air Force regulations.[145] Jewish organizations submitted two amicus briefs, one filed by the ADL and one filed by the AJCongress.[146] As was true in Goldman's petitioner's brief, both amicus briefs explained the practice and importance within Judaism of wearing a yarmulke. The ADL brief stated that "[a]s an Orthodox Jew, [Goldman] wore at all times, as he has done throughout his life, a diminutive head-covering known as a 'yarmulke' in fulfillment of a Jewish re-

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[144] The *Smith* Court wrote:

> [A] State would be "prohibiting the free exercise [of religion]" if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display. It would doubtless be unconstitutional, for example, to ban the casting of "statues that are to be used for worship purposes," or to prohibit bowing down before a golden calf.

494 U.S. at 877–78; *accord* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) (holding that a city violated the Free Exercise Clause when the city prohibited animal sacrifices for the very purpose of discriminating against the Santeria religion); Reynolds v. United States, 98 U.S. 145, 166–67 (1878) (relying on a belief/conduct dichotomy to uphold polygamy conviction against a Mormon despite free exercise challenge); *see also* Marci A. Hamilton, *The Belief/Conduct Paradigm in the Supreme Court's Free Exercise Jurisprudence: A Theological Account of the Failure to Protect Religious Conduct*, 54 OHIO ST. L.J. 713 (1993) (emphasizing the importance of the distinction between belief and conduct in the Court's free exercise cases).

[145] 475 U.S. 503 (1986).

[146] *See infra* notes 147–48.

ligious requirement that he keep his head covered at all times."[147] The brief elaborated:

> The religious practice of wearing a yarmulke, a head covering worn by observant Jews, is of ancient origin. References to the practice appear in the Talmud, an authoritative compendium of Jewish law completed by approximately 500 C.E. The practice has been firmly established since the Middle Ages. For example, Maimonides wrote in his classic 12th century philosophical treatise, *The Guide to the Perplexed*, that "The great men among our Sages would not uncover their heads because they believed that God's glory was round them and over them . . . ." And Rabbi S. R. Hirsch wrote in his 19th century commentary on the Jewish Siddur (prayer book), that "[t]he Jew symbolically expresses [submission to God] by keeping his head covered, and in this subordination to God he finds his own honor."[148]

Because Air Force regulations sometimes prohibited the wearing of a head covering, the briefs argued that Goldman's Jewish, and therefore unusual, practice of wearing a yarmulke required the granting of a free exercise exemption. Significantly, in struggling to make its argument, the petitioner's brief stressed that the case was not a matter of broad principle, or in the brief's words, "a broad constitutional declaration of right."[149] Rather, Goldman's claim "rests on a careful and particularized appraisal of the personal and nonintrusive nature of the religious observance at issue."[150] The brief, that is, practically begs the Court to focus on Goldman's unique situation, due to his Jewish practices. Finally, the AJCongress brief underscored Goldman's dilemma, one faced by most free exercise claimants: "Because petitioner sincerely holds the religious belief that he must keep his head covered at all times, strict enforcement of [the Air Force regulations] forces petitioner—or any other Orthodox Jew—to choose between adhering to his religious beliefs or serving his country in the Air Force. It is 'a cruel choice.'"[151]

The Supreme Court rejected Goldman's claim. Strikingly, whereas the *Yoder* Court had sympathized readily with the Christian religious tenets of the Amish, the *Goldman* Court mistakenly charac-

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[147] Brief of Anti-Defamation League of B'nai B'rith as *Amicus Curiae* at 3, *Goldman* (No. 84-1097).

[148] *Id.* at 3 n.2 (citations omitted); *see also* Brief for Petitioner at 11–12, *Goldman* (No. 84-1097) (explaining the practice of wearing a yarmulke); Brief of American Jewish Congress on Behalf of Itself, the Synagogue Council of America, and the American Civil Liberties Union as Amici Curiae at 4–5, *Goldman* (No. 84-1097) (describing Goldman's practice of wearing a yarmulke).

[149] Brief for Petitioner at 7, *Goldman* (No. 84-1097).

[150] *Id.*

[151] Brief of American Jewish Congress on Behalf of Itself, the Synagogue Council of America, and the American Civil Liberties Union as Amici Curiae at 9, *Goldman* (No. 84-1097) (quoting Braunfeld v. Brown, 366 U.S. 599, 616 (1961) (Stewart, J., dissenting)).

terized the wearing of a yarmulke as a matter of mere "personal preference[]."[152] But as the amicus briefs had detailed, wearing a yarmulke is not a personal preference or choice for an Orthodox Jew. It is a centuries-old custom that has attained the status of religious law. Apparently, the majority of the *Goldman* Justices—and all of the Justices at this time were Christian—were unable (or unwilling) to comprehend the religious significance of this non-Christian practice.[153]

Two cases decided in 1961 arose from Jewish religious challenges to Sunday closing laws, from Massachusetts and Pennsylvania respectively. Among other assertions, these cases involved claims for free exercise exemptions that would have allowed Jewish-owned businesses to remain open on Sundays.[154] The Massachusetts Sunday law included an impressively long list of exceptions:

> [The 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 non-commercial 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; in-

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[152] *Goldman*, 475 U.S. at 508. 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." *Id.* The Amish, it is worth noting, do not always win. *See, e.g.*, United States v. Lee, 455 U.S. 252 (1982) (holding that the Amish are not constitutionally exempt on religious grounds from paying social security taxes).

[153] *See Goldman*, 475 U.S. at 508 (1986); *But see id.* at 525 (Blackmun, J., dissenting) (discussing the importance of the yarmulke in Orthodox Judaism); ROY A. ROSENBERG, THE CONCISE GUIDE TO JUDAISM 124–25 (1990) (discussing the importance of a yarmulke).

[154] *See* Gallagher v. Crown Kosher Super Mkt. of Mass., Inc., 366 U.S. 617, 622, 630–31 (1961); Braunfeld v. Brown, 366 U.S. 599, 608–09 (1961) (discussing the potential problems involved in creating an exception to Sunday labor laws). The Court actually decided four cases involving Sunday laws, though only two involved Jewish religious challenges. The other cases were brought for commercial reasons. *See* Two Guys from Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582 (1961); McGowan v. Maryland, 366 U.S. 420 (1961). For a discussion of the cases, see COHEN, *supra* note 18, at 226–32.

> trastate 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 10 p.m.
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> . . . Permission is granted by local option for the Sunday operation after 1 p.m. of amusement parks and beach resorts, including participation in bowling and games of amusement for which prizes are awarded.[155]

Incredibly, the list of exceptions continued on (and on) even further, but there was no exemption for Orthodox Jews or others whose religious convictions demanded that they observe the Sabbath on Saturday.

Jewish organizations were pessimistic about challenging even this Massachusetts statute. Somewhat to their surprise, then, the district court struck down the law as violating both religion clauses. "What Massachusetts has done," the judge wrote, "is to furnish special protection to the dominant Christian sects which celebrate Sunday as the Lord's Day, without furnishing such protection in their religious observances to those Christian sects and to Orthodox and Conservative Jews who observe Saturday as the Sabbath, and to the prejudice of the latter group."[156] Such a sensitive statement sparked optimism among the Jewish organizations.

In arguing the free exercise claims before the Supreme Court, the Jewish claimants' briefs as well as an amicus brief for the SCA and NCRAC explained, by necessity, the specific religious practices of the Orthodox Jewish claimants. For instance, the appellants' brief in the Pennsylvania case quoted extensively from the Hebrew Bible and Jewish scholars as it devoted several pages to its explanation of "the cardinal importance of the Sabbath institution to Orthodox Judaism."[157] Interestingly, the amicus brief first stated, in a similar vein, that "the appellees in the *Crown Kosher* case and the appellants in *Braunfeld v. Gibbons* are Orthodox Jews who observe the seventh day of the week as their Sabbath and refrain from all secular business and labor on that day."[158] In the very next paragraph, however, the amicus brief attempted to invoke the same strategy that had worked effectively in Establishment Clause cases. The brief declared that the claimants re-

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[155] *Gallagher*, 366 U.S. at 619–20.

[156] COHEN, *supra* note 18, at 227 (quoting Judge Calvert Magruder).

[157] Appellants' Brief at 10, Braunfeld v. Gibbons, *aff'd sub nom.* Braunfeld v. Brown, 366 U.S. 599 (1961) (No. 67); *see* Appellees' Brief at 2–3, *Gallagher* (No. 11).

[158] Brief of Synagogue Council of America and National Community Relations Advisory Council as Amici Curiae at 4, *Braunfeld* (No. 67).

lied on the principle of religious freedom and that they were not concerned solely with Jewish interests and values:

> [O]ur concern extends beyond the interests of the particular parties to this litigation. We would be concerned even if Braunfeld and the proprietors of Crown Kosher were not Jews or observers of the seventh day of the week as the Sabbath. We believe that the principle of religious liberty is impaired if any person is penalized for adhering to his religious beliefs, or for not adhering to any religious belief, so long as he neither interferes with the rights of others nor endangers the public peace or security.[159]

Regardless of this strategic effort to render the free exercise claim more ecumenical, the gist of the claimants' arguments was one of religious difference. As the Pennsylvania appellants' brief specified, "there is no real relationship between the Jews' Sabbath and the Christians' Sunday. While the latter arose out of the former, they are not the same either in conception or in manner of observance."[160] For that reason, the claimants requested exemptions from the Sunday laws so that Orthodox Jews could observe their Sabbath without being penalized.[161] As the amicus brief wryly suggested, however, granting an exemption to Orthodox Jews could not interfere any more with the religious character of Sundays than did professional sporting events, which the Massachusetts statute expressly allowed.[162]

The Jewish organizations' optimism, spurred by the lower court's decision in the Massachusetts case, went unrequited. During the post-oral argument conference, Chief Justice Warren indifferently brushed aside potential injuries to religious outsiders: "[S]omebody is always going to be 'hurt.' Orthodox Jews might lose two days."[163] Given such an attitude, the Court unsurprisingly upheld the Sunday laws in both cases and refused to mandate exemptions for the Orthodox Jewish claimants.[164] A plurality opinion in the Massachusetts case reasoned that Sunday laws merely regulate secular activities. As such,

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[159] *Id.*

[160] Appellant's Brief at 13, *Braunfeld* (No. 67); *see also* Appellees' Brief at 13, *Gallagher* (No. 11) (explaining that the Lord's Day is no longer adopted to make everyone rest on the same day). The Appellants' Brief then emphasized the dilemma that most free exercise claimants face: choosing between following one's religion or following the law.

> The special vice of the statute now before the Court is the choice it puts to the Sabbatarian businessman: To give up his Sabbath observance and thus his faith or to go out of business or, at least, suffer serious economic loss. And it is the statute, not appellants' religion, which is the cause of this dilemma.

Appellant's Brief at 14, *Braunfeld* (No. 67).

[161] Brief of Synagogue Council of America and National Community Relations Advisory Council as Amici Curiae at 31, *Braunfeld* (No. 67).

[162] *Id.* at 31–32.

[163] IN CONFERENCE, *supra* note 18, at 393.

[164] Gallagher v. Crown Kosher Super Mkt., 366 U.S. 617 (1961); Braunfeld v. Brown, 366 U.S. 599 (1961).

they do not force a "choice [on] the individual of either abandoning his religious principle or facing criminal prosecution .... [T]he statute at bar does not make unlawful any religious practices."[165]

In sum, these free exercise cases reveal that Jews and other non-Christian religious outsiders have not fared well when seeking free exercise exemptions from generally applicable laws. Even when the Jewish organizations attempted to advocate consistently with the mainstream Christian interests and values, they were rebuked. Unfortunately, the crux of the claimant's free exercise argument is precisely that her religion diverges from the mainstream Christian views. That divergence, then, compels the claimant to request special recognition or treatment, in the form of a free exercise exemption.[166] In effect, the free exercise claimant asks the Court to create an exception from the mainstream or normal understanding of religion and religious freedom, as manifested in the generally applicable laws as well as in previous Supreme Court decisions. In all such cases involving non-Christian outsiders, the Court implicitly concluded that the claimants' religious freedom already was protected adequately. These outsiders, according to the Court, neither required nor were entitled to any further constitutional shelter.

C. Lessons From History

In light of the history of the postwar establishment and free exercise cases, Religion Clause litigants obviously would be wise to frame their claims, whenever possible, as establishment rather than free exercise issues.[167] Indeed, further analysis suggests a deeper point. Regardless of what Religion Clause provision is invoked, one should avoid constructing arguments that accentuate differences from the mainstream. The more that a First Amendment claimant stresses her divergence from mainstream religious views, the less the Supreme Court is likely to rule in her favor. This point, however troubling, is

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[165] *Braunfeld*, 366 U.S. at 605.

[166] A statement from the petitioner's brief in *Goldman* underscores that the crux of a free exercise claim is religious difference:

> According to many respected rabbinical authorities, Jewish law requires observant men to keep their heads covered at all times. The religious obligation may be satisfied by wearing a yarmulke—a skull-cap that is universally recognizable as a form of religious observance. This case concerns the constitutional power of government to forbid an individual from observing this religious duty while he serves as a psychologist at an Air Force hospital.

Brief for the Petitioner at 5, Goldman v. Weinberger, 475 U.S. 503 (1986) (No. 84-1097).

[167] Phillip E. Johnson has recognized that "many significant problems can be categorized so as to fall under the rule of *either* the establishment clause or the free exercise clause." Phillip E. Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 CAL. L. REV. 817, 821–22 (1984) (discussing the Supreme Court's treatment of several Religion Clause cases).

reinforced by a perhaps intuitive social psychology insight: one's membership in significant social groups greatly determines values and perceptions. "[I]ngroup favoritism and outgroup hostility are seen as consequences of the unit formation between self and other ingroup members and the linking of one's identity to them."[168] As soon as a non-Christian Religion Clause claimant stresses her differences from Christianity, she apparently diminishes her likelihood for success before a Christian-dominated Supreme Court.

Of course, in a free exercise case, a claimant would be hard-pressed not to emphasize religious difference, since that difference is precisely the crux of the claim. But in an Establishment Clause case, there might be considerable leeway for strategically presenting one's position. *Lynch v. Donnelly*, which involved the public display of a crèche,[169] illustrates the dire consequences that can follow when religious differences are amplified rather than diminished, even in an Establishment Clause context. The amicus brief of the ADL and AJCongress provided the following information regarding the nativity scene vis-à-vis Christians and Jews:

> This religiously based depiction of the birth of the Christian Messiah is one of the most fundamental religious symbols to Christians and Jews. For Christians it provides basic religious definition—Christians accept the birth of Jesus as the birth of the Messiah. "The Christian faith . . . is based on the mystery of the Incarnation . . . . The Christian Incarnation means that God was incarnate in the human person of . . . Jesus of Nazareth . . . ." "The most fundamental affirmation of Christian faith is the belief that Jesus is the Christ . . . . On this affirmation everything else in Christian theology is built. To ask about this affirmation is to ask about the keystone of Christian faith."
>
> Just as fundamental to Jewish thought is the "non-incarnation of God." "The God in whom [Jews] believe, to whom [Jews] are pledged, does not unite with human substance on earth." Further, Jews believe in the inseparability of the coming of the Messiah with the coming of the

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[168] Norman Miller & Marilynn B. Brewer, *Categorization Effects on Ingroup and Outgroup Perception*, *in* PREJUDICE, DISCRIMINATION, AND RACISM 209, 213 (John F. Dovidio & Samuel L. Gaertner eds., 1986); *see also* DAVID G. MYERS, SOCIAL PSYCHOLOGY 502–04 (2d ed. 1987) (discussing ingroup-outgroup relations); GENEVIÈVE PAICHELER, THE PSYCHOLOGY OF SOCIAL INFLUENCE 151 (Angela St. James-Emler & Nicholas Emler trans., 1988) ("What is perceived to be most salient about a minority is its difference and not the content of its arguments. Its arguments are accorded meaning first in terms of the minority position they occupy, not in terms of what they express.").

Other psychologists argue that a person is more likely to empathize with another who seems similar. *See* EZRA STOTLAND ET AL., EMPATHY AND BIRTH ORDER 125 (1971) (discussing the correlation between empathy for, and perceived similarity of, another). Still other psychologists argue that people who argue against their own self-interest are generally deemed more credible. *See* MYERS, *supra* note 168, at 279–80. It would follow, then, that when Religion Clause claimants overtly specify their own unique religious interests, the Supreme Court Justices would be less likely to pay heed.

[169] 465 U.S. 668 (1984).

> Messianic Age and, thus, cannot accept the Christian conception of Jesus as the Messiah.
>
> Emerging from these fundamentally disparate Christian and Jewish beliefs is a basic difference between these two religions concerning the messianic nature of Jesus. It has been described by theologians as part of the "ultimate division between Judaism and Christianity." This would have remained merely a theological difference if it were not for the reaction, throughout history, to the Jewish non-acceptance of the Christian belief in the Messiah. Discreditation of Jewish beliefs by linking the non-acceptance of Jesus as the Messiah to the punishment of the wandering of Jews, together with forced conversion of Jews, were the historic responses to the Judaic non-acceptance of Jesus as the Messiah.[170]

This information is interesting, accurate, and important, at least for someone interested in Jewish-Christian relations. It also manifested a monumental strategic miscalculation. The amici apparently intended to stress to the Court how the symbolism of the crèche crystallized the *religious* division between Christianity and Judaism. The idea that Jesus was born as the Messiah, as God incarnate, is central to Christianity and denied by Judaism. But this information did not impress the Court. Despite the amici's argument, the Court found that the crèche, as publicly displayed, was secular and therefore constitutional. The implication is disturbingly clear: emphasizing religious divergence from the mainstream in a Religion Clause case, whether under the Establishment or Free Exercise Clause, is unlikely to engender the Court's empathy. To the contrary, divergence seems to induce judicial indifference or even hostility.

III. THE FUTURE OF RELIGION CLAUSE CASES

This Part has three Sections. The first examines current Supreme Court doctrine under, in turn, the Establishment Clause and the Free Exercise Clause. The second recommends certain doctrinal innovations designed to benefit religious outsiders. The final Section then relates both the current doctrine and my doctrinal recommendations to the history detailed in Parts I and II.

A. Current Supreme Court Doctrine

In *Lemon v. Kurtzman*, a 1971 decision, the Court synthesized previous Establishment Clause cases into a three-part test: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits relig-

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[170] Brief of Anti-Defamation League of B'nai B'rith and American Jewish Congress as Amici Curiae at 9–10, *Lynch* (No. 82-1256) (citations omitted) (quoting JULES ISAAC, THE TEACHING OF CONTEMPT 118 (1962) and ROSEMARY REDFORD REUTHER, FAITH AND FRATRICIDE 246 (1974)).

ion; . . . finally, the statute must not foster 'an excessive government entanglement with religion.'"[171] The Court has since applied the *Lemon* test many times and, despite criticisms, has never expressly and fully repudiated it.

Different Justices, though, have introduced and applied alternative doctrines. In *Lynch v. Donnelly*, decided in 1984, a majority of Justices applied the *Lemon* test to uphold the public display of a crèche as part of a larger Christmas exhibition. Yet, because of dissatisfaction with the *Lemon* test, Justice O'Connor wrote a persuasive concurrence that advocated the adoption of an endorsement test, consisting of two prongs: first, does the state action create excessive governmental entanglement with religion, and second, does the state action amount to governmental endorsement or disapproval of religion.[172]

Over the next several years, the Court continued to apply the *Lemon* test, even as additional Justices expressed support for the endorsement test. In *County of Allegheny v. ACLU*, decided in 1989, the Court faced constitutional challenges to two different governmental displays of religious symbols, one including a crèche and one including a Chanukah menorah.[173] A majority of Justices could not agree on any one test or standard for determining the constitutionality of these displays. The Court's majority opinion articulated both the *Lemon* and the endorsement tests, suggesting that the latter refined the former.[174] Yet, a plurality opinion in the same case fully accepted the endorsement test and argued further that a majority of Justices previously had accepted the test, though never in one majority opinion.[175] Finally, Justice Anthony Kennedy, concurring in part and dissenting in part, advocated that the Court adopt yet a different approach to Establishment Clause issues. Kennedy's coercion test had two parts: first, the "government may not coerce anyone to support or participate in any religion or its exercise,"[176] and second, the government "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.'"[177]

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[171] 403 U.S. 602, 612–13 (1971) (quoting Bd. of Educ. v. Allen, 392 U.S. 236, 243 (1968) and Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).

[172] 465 U.S. 668, 687–89 (O'Connor, J., concurring).

[173] 492 U.S. 573 (1989)

[174] *Id.* at 592–94.

[175] The plurality argued that the four dissenters in *Lynch* actually had accepted the endorsement test, as articulated in O'Connor's *Lynch* concurrence. *See id.* at 596–97 (plurality opinion).

[176] *Id.* at 659 (Kennedy, J., concurring in the judgment in part and dissenting in part).

[177] *Id.* (quoting *Lynch*, 465 U.S. at 678).

In subsequent cases, the Court has occasionally applied Kennedy's coercion test without rejecting either of the other tests.[178]

In *Zelman v. Simmons-Harris*,[179] decided in 2002, the Court appeared to consolidate these various Establishment Clause tests with a conservative twist, thus effectively diminishing First Amendment protections for religious outsiders. The *Zelman* Court upheld a school voucher program from Cleveland, Ohio, that allowed parents to use public money to help pay for private school education, including at religious or sectarian schools. The majority opinion recited only the first two prongs of the *Lemon* test, the purpose and effects prongs.[180] Justice Breyer's dissent stressed the third prong, governmental entanglement with religion, by arguing that the voucher program would generate "religiously based social conflict" or divisiveness.[181] The majority, in a footnote, dismissed this concern as irrelevant: "We quite rightly have rejected the claim that some speculative potential for divisiveness bears on the constitutionality of educational aid programs."[182] In fact, Justice O'Connor's concurrence in *Zelman* maintained that the Court had previously "folded the entanglement inquiry into the primary effect inquiry."[183]

Zelman thus seems to shift the judicial focus to a modified *Lemon* test, consisting of only two prongs, purpose and effects. Notably, the two leading proponents of alternative doctrines, Justices O'Connor and Kennedy, both joined the *Zelman* majority opinion, which briefly mentioned endorsement and coercion as if they were mere consid-

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[178] *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) (applying *Allegheny*'s coercion test to a school district's policy of allowing student-led pre-football game prayers); Lee v. Weisman, 505 U.S. 577 (1992) (applying *Allegheny*'s coercion test to a policy of allowing nondenominational prayer at high school graduation ceremonies).

[179] 536 U.S. 639 (2002).

[180] *Id.* at 648–49 (citing Agostini v. Felton, 521 U.S. 203, 222–23 (1997)).

[181] *Id.* at 717, 723–35 (Breyer, J., dissenting).

[182] *Id.* at 662 n.7.

[183] *Id.* at 668 (O'Connor, J., concurring). O'Connor was following an interpretation of *Agostini v. Felton*, set forth in Justice Thomas's plurality opinion in *Mitchell v. Helms*, 530 U.S. 793 (2000). Thomas wrote:

> In *Agostini* . . . we brought some clarity to our case law, by overruling two anomalous precedents (one in whole, the other in part) and by consolidating some of our previously disparate considerations under a revised test. Whereas in *Lemon* we had considered whether a statute (1) has a secular purpose, (2) has a primary effect of advancing or inhibiting religion, or (3) creates an excessive entanglement between government and religion, in *Agostini* we modified *Lemon* for purposes of evaluating aid to schools and examined only the first and second factors. We acknowledged that our cases discussing excessive entanglement had applied many of the same considerations as had our cases discussing primary effect, and we therefore recast *Lemon*'s entanglement inquiry as simply one criterion relevant to determining a statute's effect. We also acknowledged that our cases had pared somewhat the factors that could justify a finding of excessive entanglement.

Mitchell v. Helms, 530 U.S. 793, 807–08 (2000) (citations omitted).

erations under the effects prong.[184] Furthermore, and perhaps even more important, the *Zelman* Court disemboweled the *Lemon* effects prong. The very point of an effects prong, it would seem, is to inquire into the consequences of governmental action, regardless of the government's intentions or purposes. In other words, for the effects prong to be meaningful, the Court should ask the following question: does the governmental action advance or inhibit religion within the actual social and cultural context of the dispute? Given this focus, a crucial method for proving that the primary effect of a governmental action is to benefit religion would be through statistical evidence. For instance, the complainants in *Zelman* argued that although the voucher program appeared neutral on its face, ninety-six percent of the beneficiaries sent their children to religious schools.[185] Tellingly, the *Zelman* Court discounted such statistical evidence as inconsequential.[186] "Our focus," the Court wrote, "was on neutrality and the principle of private choice, not on the number of program beneficiaries attending religious schools."[187]

This transformation of the Establishment Clause doctrine seems designed to favor the religious mainstream to the detriment of religious outsiders. In future cases, the sole genuine judicial inquiry will be into governmental purpose; the effects prong has been rendered nominal. Thus, so long as the government does not appear to purposefully or intentionally favor specific religions or religion in general, the governmental action will be upheld. The fact that the government's action might grossly favor mainstream religions is immaterial under *Zelman*. And of course, any supposedly neutral governmental program that allows benefits to flow to religious institu-

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[184] *Zelman*, 536 U.S. at 655–56. O'Connor herself refers to endorsement as no more than an alternative phrasing of the effects prong.

> The Court's opinion in these cases focuses on a narrow question related to the *Lemon* test: how to apply the primary effects prong in indirect aid cases? Specifically, it clarifies the basic inquiry when trying to determine whether a program that distributes aid to beneficiaries, rather than directly to service providers, has the primary effect of advancing or inhibiting religion, or, as I have put it, of "endors[ing] or disapprov[ing] . . . religion."

Id. at 669 (O'Connor, J., concurring) (quoting Lynch v. Donnelly, 465 U.S. 668, 691–92 (1984) (O'Connor, J., concurring)) (citation omitted).

[185] *Id.* at 658–59.

[186] The Court wrote:

> The constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are run by religious organizations, or most recipients choose to use the aid at a religious school. . . . "[S]uch an approach would scarcely provide the certainty that this field stands in need of, nor can we perceive principled standards by which such statistical evidence might be evaluated."

Id. at 658 (quoting Mueller v. Allen, 463 U.S. 388, 401 (1983)). The *Zelman* Court also disputed the accuracy of the statistical evidence in that case. *Id.* at 658–59.

[187] *Id.* at 652.

tions is likely, in reality, to disproportionately favor mainstream religions since the overwhelming majority of people belong to those religions (which is largely why they are called the mainstream). Meanwhile, any governmental action that appears to disproportionately favor an outsider religion will immediately be judicially suspect as purposefully benefiting that religion[188]—because, after all, how else could a legislature funnel benefits to an outsider religion unless it did so intentionally? Thus, quite rightly, Justice Souter's *Zelman* dissent denounced the majority's approach as a "verbal formalism,"[189] a judicial inquiry lacking in any real substance; the *Zelman* doctrine allows the religious mainstream to direct benefits to itself under the guise of governmental neutrality.

In the area of free exercise, the Court in *Sherbert v. Verner*,[190] a 1963 decision, articulated a strict scrutiny test that would remain, at least nominally, the presumptive standard in free exercise cases for over twenty-five years. According to this test, a state could justify a burden on an individual's free exercise of religion only by showing that the state action was necessary to achieve a compelling state interest. While this judicial standard seemed rigorous and favorable to free exercise claimants, including religious outsiders, it proved otherwise in application. The Court repeatedly upheld challenged governmental actions by reasoning either that the government had compelling purposes for its conduct or that strict scrutiny was inappropriate under the specific circumstances.[191] In fact, from 1973 until 1990, the Court concluded that a governmental action contravened the Free Exercise Clause only three times.[192]

Nonetheless, in *Employment Division v. Smith*, decided in 1990, the Court expressly changed the doctrine for evaluating free exercise

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[188] *See* Bd. of Educ. v. Grumet, 512 U.S. 687 (1994) (striking down the creation of a school district that benefited Hasidic Jews).

[189] Zelman v. Simmons-Harris, 536 U.S. 639, 688–89 (2000) (Souter, J., dissenting).

[190] 374 U.S. 398 (1963).

[191] *See, e.g.*, O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) (reasoning that strict scrutiny was inappropriate because of need to defer to prison officials); Goldman v. Weinberger, 475 U.S. 503 (1986) (reasoning that strict scrutiny was inappropriate because of the special needs of the military); United States v. Lee, 455 U.S. 252 (1982) (applying strict scrutiny but concluding 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).

[192] All three cases involved unemployment compensation. Frazee v. Ill. Dep't of Employment Sec., 489 U.S. 829 (1989) (holding unconstitutional the denial of unemployment benefits to a Christian who refused to work on Sundays but did not belong to established church or sect); Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136 (1987) (holding unconstitutional the denial of unemployment benefits to a convert to Seventh-day Adventism); Thomas v. Review Bd. of the Ind. Employment Sec. Div., 450 U.S. 707 (1981) (holding unconstitutional the denial of unemployment benefits to a Jehovah's Witness who refused to continue to work in a munitions factory because of his religious objections to war).

claims.[193] The Court abandoned the strict scrutiny test for free exercise challenges to laws of general applicability, except for cases, like *Sherbert*, that involved the denial of unemployment compensation.[194] Apart from that narrow situation, the Court suggested that the "political process" should effectively determine the scope of free exercise rights.[195]

The *Smith* Court, in other words, moved from the previous free exercise doctrine of presumptively applying strict scrutiny—at least supposedly showing almost no deference to the political process—to a doctrine without any meaningful judicial scrutiny of challenged governmental actions—a standard showing remarkable deference to the legislative process. Thus, as with the *Zelman* doctrine under the Establishment Clause, the *Smith* doctrine under the Free Exercise Clause appears to blatantly favor the religious mainstream at the expense of outsiders. Because of the nature of our majoritarian legislative processes, laws of general applicability are unlikely to burden mainstream religions. Legislators are likely either to belong to the mainstream religions or to be fully aware of their practices and beliefs. Out of ignorance or indifference, though, legislators are likely sometimes to enact general laws that incidentally or accidentally burden the exercise of outsider religions. Yet, members of such religions will be unable to get judicial relief under *Smith*. Instead, they will be left to beseech legislatures in the hope of procuring statutory exemptions. To be sure, such legislative exemptions will sometimes be forthcoming,[196] but they will be due to majoritarian tolerance or whim. From the outsiders' viewpoint, there is a huge difference between tolerance and constitutional right.

B. Recommended Doctrinal Changes

Doctrine can change, as the recent spate of Rehnquist Court innovations in First Amendment jurisprudence illustrates. With the possibility of further change in mind, this section recommends a

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[193] 494 U.S. 872 (1990).

[194] *See, e.g.*, Frazee v. Ill. Dep't of Employment Sec., 489 U.S. 829 (1989) (holding unconstitutional the denial of unemployment benefits to a Christian who refused to work on Sundays but did not belong to established church or sect).

[195] *See* Employment Div. v. Smith, 494 U.S. at 890.

[196] In fact, after the Court decided *Smith*, Congress attempted to reinstate the strict scrutiny test by enacting the Religious Freedom Restoration Act of 1993 ("RFRA"), which the Court in *City of Boerne v. Flores* promptly struck down as beyond congressional power. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, Nov. 16, 1993, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb to 2000bb-4 (1994)) (reinstating the compelling state interest test for laws of general applicability infringing free exercise rights); City of Boerne v. Flores, 521 U.S. 507 (1997) (striking down RFRA).

number of doctrinal modifications in the establishment and free exercise areas that presumably would benefit religious outsiders.

Under the Establishment Clause, religious minorities would welcome a stronger focus on the effects of governmental actions, whether under the guise of a reinvigorated *Lemon* effects prong or under some other appellation. Legislatures today rarely discriminate purposefully against religious outsiders,[197] yet those same legislatures might unwittingly enact laws that bestow disproportionate benefits on mainstream religions. Such disproportionate benefits are not diminished even if such a law is neutral on its face. And of course, some clever legislators can intentionally design laws that are facially neutral but that will have disproportionate effects. In theory, these duplicitous laws should be struck down under the still-remaining purpose prong from *Lemon*, but in reality, proving discriminatory legislative purpose or intent is notoriously difficult.[198]

Ideally, from the standpoint of religious outsiders, when an Establishment Clause claimant presents statistical evidence showing that a governmental action confers disproportionate benefits either on members of one particular religion, mainstream religions as a whole, or religious believers in general, then the Court should hold the action unconstitutional. Short of this ideal, the Court at a minimum should create a presumption of unconstitutionality if such evidence is presented. The government could then overcome this presumption with a showing of a sufficiently compelling interest. In other words, the Court could resurrect the *Lemon* effects prong under the Establishment Clause as a type of strict scrutiny test: a showing of disproportionate effects, possibly through statistical evidence, would shift the burden to the government to justify its action with a compelling reason.

Another possible way to bolster Establishment Clause protections could be developed either through the coercion test or the endorse-

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[197] For one example of such purposeful discrimination, albeit from the free exercise context, see Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993), which voided Florida's animal cruelty laws that had been interpreted to punish killings for religious reasons.

[198] *See generally* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266–68 (1977) (discussing proof of discriminatory purpose in context of equal protection case). It is the rare case, indeed, where a legislator openly admits to having discriminatory intent. One such Establishment Clause case was *Wallace v. Jaffree*, 472 U.S. 38 (1985). The Court there noted:

> The sponsor of the bill that became § 16-1-20.1, Senator Donald Holmes, inserted into the legislative record—apparently without dissent—a statement indicating that the legislation was an "effort to return voluntary prayer" to the public schools. Later Senator Holmes confirmed this purpose before the District Court. In response to the question whether he had any purpose for the legislation other than returning voluntary prayer to public schools, he stated: "No, I did not have no [sic] other purpose in mind."

Wallace, 472 U.S. at 56–57 (footnotes omitted).

ment test (or a reinvigorated *Lemon* entanglements prong). Each of these tests requires the Court to evaluate whether a governmental action produces a certain state of affairs—either coercion or endorsement of (or entanglement with) religion—and thus the application of these doctrines depends partly on the perspective that the Court adopts. For instance, the coercion test requires the Court to strike down any law that coerces anyone to support or participate in any religion, but from whose perspective should the presence or absence of coercion be judged? Should coercion be judged from the perspective of the reasonable person or observer—a standard that would incorporate the values and interests of the dominant or mainstream religions—or should coercion be judged from the perspective of the reasonable religious dissenter or outsider? If the Court were to adopt the view of the reasonable dissenter or outsider, the Court would be more likely to conclude that coercion was present. After all, as a matter of definition, the reasonable outsider will not share all the interests and values of the mainstream; otherwise, she would be an insider rather than an outsider (or dissenter).

Although several Justices have expressed a preference for the reasonable observer perspective in the endorsement test context,[199] the current case law provides at least some support for adopting the reasonable dissenter or outsider perspective. In *Lee v. Weisman*, decided in 1992, the Court focused on the issue of coercion: did a public school practice of having clergy deliver prayers at graduation coerce a student such as Deborah Weisman, who was Jewish, into participating in a religious exercise?[200] In concluding that coercion was present, the Court emphasized that the graduates were adolescents who might be coerced more easily than adults. Thus, contrary to Justice Scalia's dissent, the *Lee* majority reasoned that coercion might exist even

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[199] *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 653–56 (2002); Good News Club v. Milford Cent. Sch., 533 U.S. 98, 119 (2001). In *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753 (1995), Justices O'Connor and Stevens debated the content of a reasonable observer standard. Justice O'Connor's concurrence, joined by Justices Souter and Breyer, stated that "the endorsement test necessarily focuses upon the perception of a reasonable, informed observer." *Id.* at 773 (O'Connor, J., concurring). This reasonable observer, O'Connor explained, should be "a personification of a community ideal of reasonable behavior, determined by the [collective] social judgment." *Id.* at 780 (quoting W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 175 (5th ed. 1984)). Justice Stevens, dissenting, agreed that the endorsement test was the appropriate standard and that it should be applied from the perspective of a reasonable observer. According to Stevens, though, O'Connor's conception of the reasonable observer resembled an "ideal human [who] comes off as a well-schooled jurist." *Id.* at 800 n.5 (Stevens, J., dissenting). The reasonable observer, Stevens argued, should be a person "who may not share the particular religious belief" symbolized in the disputed public display. *Id.* at 799. Thus, Stevens's reasonable observer might be construed to resemble a reasonable dissenter or outsider.

[200] 505 U.S. 577, 587 (1992) (holding that the coercive thrust of a public school's practice of graduation prayer violated the Establishment Clause).

though the government was not "by force of law and threat of penalty" imposing a religious orthodoxy or demanding financial support for religion.[201] Coercion could be indirect and could arise from psychological pressure to conform to certain religious practices.[202] Moreover, in the Court's words, 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]."[203]

Turning to free exercise doctrine, the introduction of a series of presumptions favoring the claimant would possibly benefit religious outsiders. These presumptions would be designed to encourage the Justices (and other judges), who are typically political and religious insiders, to sympathize more closely with the plight of outsiders. The need for such presumptions is paramount. As already discussed, legislatures today rarely discriminate purposefully against religious outsiders, yet legislatures might occasionally burden the practices or beliefs of religious outsiders because of ignorance or indifference. If a legislator is unaware of the practices of a particular minority religion, she might support the enactment of a general law that could have disastrous consequences for members of that religion. The fact that the legislator might have harbored no malice at all toward the religion would be little solace to its practitioners. So, for instance, probably few members of Congress who supported the Aid to Families with Dependent Children program or the Food Stamp program even contemplated how a statutory requirement for recipients to supply Social Security numbers might affect or burden religious practices and beliefs.[204] Yet eventually, a Native American complained that the assignment of a social security number would rob his daughter of spiritual power.[205]

Three different presumptions could help account for the likelihood that outsiders will occasionally confront generally applicable laws that burden their religious practices and beliefs. First, any claim of religious conviction should be presumed to be sincere, genuine,

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[201] *Id.* at 640 (Scalia, J., dissenting) (emphasis omitted).

[202] 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.

Id. at 593; *see also id.* at 593–94 (discussing peer pressure among adolescents).

[203] *Id.* at 593.

[204] 42 U.S.C. § 602(a)(5) (certifying that states will provide Native Americans with equitable access to assistance); 7 U.S.C. § 2025(e) (requiring citizens in the food stamps program to furnish a social security number to the state agency as a requirement of participation).

[205] This was the claim made in a free exercise case. Bowen v. Roy, 476 U.S. 693 (1986).

and most important, truly religious in nature. This presumption would possibly discourage the Court from finding, as it did in *Goldman v. Weinberger*, the Air Force yarmulke case, that outsider religious practices are mere personal preferences rather than sincerely religious acts.[206]

Second, though closely related to the first presumption, any free exercise claim based on nonvolitional religious practices should be presumed to be as important, from a religious standpoint, as a claim based on individual choice related to faith or belief. The Court, in the past, has accepted the religious importance of faith- or belief-based claims (which are central to Christianity, especially Protestantism), but has failed to recognize the significance of religious rituals or sacred objects or events.[207] Thus, if implemented, this presumption of religious importance might help the Court recognize the religious significance of claims arising from outsider religions that differ widely from the mainstream, such as in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, where the Court refused to uphold a free exercise claim even though the governmental actions, building a road and permitting timber harvesting, would desecrate sacred Indian burial grounds.[208]

A third presumption would relate to the weighing of religious interests against governmental interests. A free exercise claimant's religious interests should be presumed to outweigh all countervailing governmental interests unless the government shows that its interests are of overriding (or compelling) importance and cannot be satisfied in any other manner. Quite evidently, this presumption would reinstitute the strict scrutiny or compelling state interest test that the Court at least claimed to apply for many years in free exercise cases. The reason for reintroducing this presumption is powerful: the Court might all too easily permit the sacrifice of outsiders' sincere religious interests for the mere convenience of the government or democratic majorities (the religious mainstream). Certainly, one can understand *Gallagher v. Crown Kosher Super Market*, the Massachusetts Sunday closing law case, in this vein: the Court refused to order a free exercise exemption for the Orthodox Jewish claimants even though the state had already statutorily granted a seemingly endless

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[206] 475 U.S. 503, 508 (1986) (suggesting that the wearing of a yarmulke by an Orthodox Jew was merely for personal preference and identity reasons).

[207] *See* Hamilton, *supra* note 144, at 713 (arguing that the Court has protected religious beliefs but not conduct); David C. Williams & Susan H. Williams, *Volitionalism and Religious Liberty*, 76 CORNELL L. REV. 769, 811–13, 828–34, 846–47 (1991) (emphasizing the Court's protection of volitionalist religions).

[208] 485 U.S. 439, 441–42 (1988).

list of exceptions from its closing law.[209] If the Court were to adopt this recommended presumption—and truly implement a strict scrutiny test—then the Justices would be doctrinally directed to give outsiders' religious interests their due weight and would be less likely to hand down decisions like *Gallagher*.

C. *The Likelihood and Significance of Doctrinal Change*

Doctrine matters. Religious outsiders, for instance, unquestionably benefited when the Supreme Court incorporated the Establishment and Free Exercise Clauses to apply against state and local governments in the 1940s.[210] Before that time, outsiders could not possibly bring First Amendment challenges, with any hope of success, against state or local governments, no matter how egregious the governmental action (though outsiders could nonetheless invoke state constitutional provisions in state court actions). Without the doctrine of incorporation, then, *Engel v. Vitale*,[211] *Lee v. Weisman*,[212] and other cases that extended some degree of protection to outsiders could not have been decided.

Recognizing the potential for meaningful change, the previous Section offered recommendations for doctrinal improvements in a sanguine spirit. Yet, given Parts I and II of this Article, one must ask the following question: in reality, will these suggestions for doctrinal changes be likely to help religious outsiders? The discouraging answer: probably not. Two reasons lead to this conclusion. First, the Court is unlikely to change Religion Clause doctrine in the recommended manner. Second, even if the Court were to do so, the modified doctrine might not significantly alter the outcomes of future Religion Clause cases.

Why is the Court unlikely to change Religion Clause doctrine in the recommended manner? As a general matter, a yawning abyss stretches today between the Supreme Court and legal scholars. The Court shows little interest in legal scholarship and, in fact, has occa-

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[209] 366 U.S. 617, 627 (1961) (upholding Massachusetts's Sunday closing laws). The *Smith* case can be understood similarly. That is, as the *Smith* dissenters argued, the state's interest in prohibiting the religious use of peyote as part of its war against drugs did not outweigh the free exercise claimant's interest in using peyote as part of the religious rituals of the Native American Church. Employment Div. v. Smith, 494 U.S. 872, 911 (1990) (Blackmun, J., dissenting). Put in different words, the state did not have a compelling enough interest to justify its interference with the claimant's free exercise of religion. *Id.* at 907.

[210] Everson v. Bd. of Educ., 330 U.S. 1 (1947) (incorporating the Establishment Clause); Cantwell v. Connecticut, 310 U.S. 296 (1940) (incorporating the Free Exercise Clause).

[211] 370 U.S. 421 (1962).

[212] 505 U.S. 577 (1992).

sionally expressed disdain for legal academics.[213] More specific to Religion Clause jurisprudence, though, the historical discussions in Parts I and II of this Article illustrate, if nothing else, that the Justices' religious orientations influence their decisions in First Amendment cases. The successes and failures of American Jews who litigated before the Court starkly illustrate the impact that religion has on First Amendment cases. So long as the Court remains predominantly Christian, its decisions and doctrines are likely to favor Christian (if not Protestant) interests and values. In short, the Rehnquist Court, as constituted, is unlikely to reverse itself in order to structure Religion Clause doctrine to be more favorable to religious outsiders.

To be sure, the Court is more religiously diverse now than it has ever been before. That diversity might, in theory, prompt the Court to be more receptive to the claims of religious outsiders. But still, such a liberal turn seems improbable given that seven of the Justices' backgrounds are from mainstream Christian religions, while only two of the Justices, Breyer and Ginsberg, are non-Christian.[214] Moreover, to some extent, the religious divisions between Protestant and Catholic Justices, like Rehnquist and Scalia, seem to pale in the glow of their conservative political bonds. It is commonplace now to acknowledge that conservative Catholics and fundamentalist Protestants share more in common on certain political and moral issues than do liberal and conservative Protestants.[215] Thus, the majority-block of politically conservative Justices will likely repress any religiously induced

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[213] *See, e.g.*, Romer v. Evans, 517 U.S. 620, 652–53 (1996) (Scalia, J., dissenting) (questioning the validity of the Association of American Law Schools' "view of what prejudices must be stamped out"); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 68–69 (1996) (Rehnquist, C.J., majority opinion) (criticizing the dissent's disregard of prior case law "in favor of a theory cobbled together from law review articles" and its "undocumented and highly speculative extralegal explanation"); Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 228 (1995) (Scalia, J., majority opinion) (showing disdain for doctrine even where it is supported by "all the law professors in the land"). Judge Harry T. Edwards wrote "that judges, administrators, legislators, and practitioners have little use for much of the scholarship that is now produced by members of the academy." Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 35 (1992).

[214] If Clarence Thomas—who was born a Baptist, raised a Catholic, began attending an Episcopal Church, and then returned to Catholicism—is categorized as Catholic, then 1996 marked the first time that a majority of the Justices were not Protestant. MAZUR, *supra* note 18, at 12, 179 n.3; *see* THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES, 1789–1993, at 530 (Clare Cushman ed., 1993) (detailing Thomas's religious background).

[215] *See, e.g.*, Jeffries & Ryan, *supra* note 10, at 358–60 (discussing shifting alliances on church and state issues and the shared concerns of conservative Protestants and Catholics); Suzanna Sherry, *Religion and the Public Square: Making Democracy Safe for Religious Minorities*, 47 DEPAUL L. REV. 499, 516–17 (1998) (discussing a conservative Catholic and evangelical Protestant "alliance"); John Quist, Book Review, 20 L. & HIST. REV. 431, 433 (2002) (noting "the common moral ground between contemporary conservative Catholics and Protestants").

inclinations toward the protection of individual rights, whether under the First Amendment or otherwise.[216]

Indeed, the Court's recent Free Exercise and Establishment Clause landmarks suggest the strength of these political forces working in conjunction with the Justices' mainstream religious orientations. If anything, the Court currently leans strongly toward favoring the mainstream to the detriment of religious outsiders. Thus, in *Zelman*, the Court wrote: "The constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are run by religious organizations, or most recipients choose to use the aid at a religious school."[217] The Court, in other words, is not troubled if a facially neutral law effectively funnels public money to schools owned and operated by mainstream religions. Even more starkly, the *Smith* Court reasoned that the religious diversity of the American people actually threatened potential "anarchy."[218] As such, according to the Court, American diversity not only justified but even necessitated the transition from a strict scrutiny to a deferential test under free exercise:

> [I]f "compelling interest" really means what it says (and watering it down here would subvert its rigor in the other fields where it is applied), many laws will not meet the test. Any society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them. Precisely because "we are a cosmopolitan nation made up of people of almost every conceivable religious preference," and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order.[219]

In sum, then, the Court is unlikely to alter Religion Clause doctrine in the recommended ways. Moreover, even if the Court surprisingly were to follow the recommended changes, the modified establishment and free exercise doctrines might not substantially alter the outcomes of future Religion Clause cases. Doctrine matters, but in a sense that is less than most lawyers, judges, and law professors care to admit. To be precise, doctrine matters, but doctrine must always be interpreted. Significantly, then, one's political, cultural (religious), and social perspectives necessarily orient the interpretive process.[220]

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[216] My list of political conservatives on the Court is not quirky at all. I would include Rehnquist, Scalia, and Thomas as die-hard political conservatives, with O'Connor and Kennedy close behind.

[217] Zelman v. Simmons-Harris, 536 U.S. 639, 658 (2002).

[218] Employment Div. v. Smith, 494 U.S. 872, 888 (1990).

[219] *Id.* (citations omitted).

[220] *See* Stephen M. Feldman, *An Arrow to the Heart: The Love and Death of Postmodern Legal Scholarship*, 54 VAND. L. REV. 2351, 2361 (2001) ("We are always already situated in some cultural

No more so than any other interpreter, a Supreme Court Justice cannot read First Amendment doctrine without being situated in a particular political, cultural (religious), and social context that affects his or her interpretive conclusions. This interpretive necessity is, once again, one of the lessons from the history laid out in Parts I and II.

The Court's doctrinal statements in Religion Clause cases often do not reflect the reality of the decisions. Thus, as Parts I and II demonstrate, the Warren and Burger Courts were not as liberal in establishment and free exercise areas as is commonly believed—and as is suggested by those Courts' doctrinal statements. The strict scrutiny test that was theoretically propitious for religious minorities and that the Warren and Burger Courts supposedly applied in free exercise exemption cases for more than twenty-five years did little to help non-Christian outsiders—after all, as discussed, they lost every case at the Supreme Court level. Meanwhile, in Establishment Clause cases, the outcomes turned less on the doctrine that supposedly was being applied than on the ability of the religious outsiders to articulate their positions as consistent with the religious mainstream.

Hence, even if the Rehnquist Court were to adopt my recommended doctrines for establishment and free exercise cases—doctrinal approaches that appear favorable to religious outsiders—the Court's decisions still would be strongly influenced by the religious (as well as political) orientations of the Justices and by the religious slant of the claimants' arguments. In short, when the claimants present their arguments so that their religious beliefs and practices appear largely consistent with the American mainstream, they have some reasonable chance of success. If they instead argue so that their religious beliefs and practices appear exceptional or contrary to the mainstream, then the probability of success diminishes, practically to nil.

This section of the Article, so far, has argued as follows: first, the Rehnquist Court is unlikely to adopt my recommended doctrines under the Establishment and Free Exercise Clauses, despite the merits of the recommendations; and second, even if the Court were to accept these innovations, the results in subsequent cases would change little. One final and important point must be added, though.

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context, and that context is therefore necessarily the starting point for all communication . . . ."); Stephen M. Feldman, *Made For Each Other: The Interdependence of Deconstruction and Philosophical Hermeneutics*, 26 PHIL. & SOC. CRITICISM 51, 54–57 (2000) (discussing Hans-Georg Gadamer's assertion that "an interpreter is always situated in a communal 'tradition' that inculcates the individual with prejudices and interests, which then constrain and direct the understanding of any text . . . ."); Stephen M. Feldman, *The Politics of Postmodern Jurisprudence*, 95 MICH. L. REV. 166, 173–84 (1996) (discussing Gadamer's view that "communal tradition and individual prejudices and interests constrain what one can possibly understand or see in a text.").

Namely, the Rehnquist Court, despite its purported conservative doctrinal changes in Religion Clause cases, is unlikely to be as conservative—as hostile to Religion Clause claimants—as many progressive scholars and commentators fear.

In fact, the Rehnquist Court's establishment and free exercise decisions are likely, in the end, to closely resemble those of its predecessor Courts. Without doubt, non-Christian outsiders cannot fare any worse before the Supreme Court under the *Smith* free exercise doctrine than they did under the strict scrutiny test. In addition, under the Establishment Clause, the *Zelman* doctrine is unlikely to produce outcomes far different from those that would otherwise be reached by the same set of Justices if they were instead applying the traditional *Lemon* test, the endorsement test, or the coercion test. The *Zelman* approach obviously shares much in common with *Lemon*, since *Zelman*, at least nominally, reiterates the first two *Lemon* prongs. More importantly, the differences among the various Establishment Clause doctrines are neither momentous nor forceful enough to consistently overcome the Justices' religious and political orientations. In short, the doctrinal modifications are unlikely to produce different case outcomes.

To illustrate the point, some constitutional scholars have celebrated O'Connor's endorsement test in comparison to the *Lemon* test, suggesting that the endorsement test could transform Establishment Clause jurisprudence.[221] Yet, O'Connor herself has interpreted the endorsement test to echo *Lemon*.[222] More significantly, when O'Connor has applied the endorsement test in specific cases, she has typically agreed with the conclusions of her colleagues who had applied the traditional *Lemon* prongs.[223] Thus, regardless of the rhetori-

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[221] Arnold H. Loewy, Rethinking Government Neutrality Towards Religion Under the Establishment Clause: The Untapped Potential of Justice O'Connor's Insight, 64 N.C. L. REV. 1049 (1986) (analyzing past and potential Establishment Clause cases in light of Justice O'Connor's endorsement test); see also Suzanna Sherry, Civic Virtue and the Feminine Voice in Constitutional Adjudication, 72 VA. L. REV. 543, 593–95, 613–16 (1986) (describing Justice O'Connor's feminist perspective in Establishment Clause cases and recognizing the "potential for development of a feminist jurisprudence").

[222] *See Zelman*, 536 U.S. at 668–70 (2002) (O'Connor, J., concurring) ("Nor does today's decision signal a major departure from this Court's prior Establishment Clause jurisprudence."); Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring) (discussing the *Lemon* test as it bears on endorsement).

[223] For instance, in *Lynch*, the majority applied the *Lemon* test, while Justice O'Connor articulated and applied the endorsement test in a concurrence. O'Connor, though, reached the same conclusion as the majority: constitutionally approving the public display of a crèche as part of a larger Christmas exhibition. *Lynch*, 465 U.S. at 694 (O'Connor, J., concurring). In *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995), the Court held that a private actor, the Ku Klux Klan, could constitutionally display a large Latin (Christian) cross on public property. A four-Justice plurality, with an opinion written by Justice Scalia, outright rejected the endorsement test. *Id.* at 763–67. Yet O'Connor, writing for Justices Souter and

cal distinctions between the endorsement test and the traditional *Lemon* test, the doctrinal differences were insufficient to compel the Justices to divergent outcomes. The same will be true under *Zelman.*

CONCLUSION

Partly because of enhanced Catholic political power, as explained in Parts I and II of this Article, the postwar Protestant-dominated Supreme Court articulated First Amendment principles that could be used as a bulwark against perceived Catholic overreaching. Jews and other non-Christian outsiders became the incidental beneficiaries of these judicial pronouncements. By invoking these supposedly broad principles rather than idiosyncratic Jewish interests and values—as well as by emphasizing the importance of the strict separation of church and state for promoting religiosity—Jewish organizations sometimes successfully urged the Court to stretch the protections of the Establishment Clause.[224] The Jewish organizations, in other words, found they needed to present Establishment Clause arguments that largely corresponded with the already-in-place mainstream understandings of religion and religious freedom. Unsurprisingly, then, Jews and other religious outsiders consistently lost before the Supreme Court when, under the Free Exercise Clause, they sought exceptions to this same mainstream understanding, as manifested in generally applicable laws and in prior Court decisions.

When the postwar cases are examined from a political, cultural, and social perspective rather than from a doctrinal one, they reveal a significant judicial succor for the religious mainstream and a concomitant aversion toward non-Christian outsiders. The Rehnquist Court, to a great extent, has maintained these sentiments, and in all likelihood, this Supreme Court pattern will continue in the future. To be sure, the Rehnquist Court has turned First Amendment doctrine in a seemingly conservative direction, but these changes are unlikely to produce results substantially different from prior decisions, at least at the level of the Supreme Court.

Ultimately, the Court will continue to vindicate the occasional First Amendment claim that remains consistent with mainstream religious, cultural, and political outlooks. The Court, likewise, will continue to repudiate the more radical claims that would require a judicial departure from mainstream understandings of religion and

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Breyer, applied the endorsement test and reached the same result as the Scalia plurality, upholding the display of the cross. *Id.* at 776–78 (O'Connor, J., concurring).

[224] This conclusion is consistent with Dahl's observation that "[i]t follows that within the somewhat narrow limits set by the basic policy goals of the dominant alliance, the Court *can* make national policy." Dahl, *supra* note 32, at 293–94.

religious freedom. These are the lessons from history, and the Court's tinkerings with the establishment and free exercise doctrines are unlikely to change that reality.